

JUL 16 2013

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No. AZ-12-1626-JuTaAh
		)	
6	RCS CAPITAL DEVELOPMENT, LLC;	)	Bk. No. 11-28746-RJH
7	AMERICAN CHILDCARE PROPERTIES,	)	(jointly administered with
	LLC; ACCP I, LLC,	)	11-29741-RJH, 11-29742-RJH)
		)	
8	Debtors.	)	
		)	
9	A.B.C. LEARNING CENTRES LTD.;	)	
10	ABC DEVELOPMENTAL LEARNING	)	
	CENTERS (USA), INC.,	)	
		)	
11	Appellants,	)	
		)	
12	v.	)	M E M O R A N D U M *
		)	
13	RCS CAPITAL DEVELOPMENT, LLC;	)	
14	AMERICAN CHILDCARE PROPERTIES,	)	
	LLC; ACCP I, LLC,	)	
		)	
15	Appellees.	)	
		)	

Argued and Submitted on June 21, 2013  
at Phoenix, Arizona

Filed - July 16, 2013

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

Honorable Randolph J. Haines, Chief Bankruptcy Judge, Presiding

Appearances: Carson T.H. Emmons Esq., of Baird, Williams &  
Greer, LLP, argued for Appellees RCS Capital  
Development, LLC, American Childcare Properties,

\* 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 asserted legal and equitable defenses to the setoff. Since we  
2 stated the facts leading up to the bankruptcy court's decisions  
3 on the setoff issue in our memorandum in the related appeal, we  
4 will not repeat them here other than to amplify them as may be  
5 appropriate to this appeal.

6 **A. RCS's Request for Relief From Stay in ABC's Chapter 15**

7 After the bankruptcy court entered the order granting RCS's  
8 MSJ on the setoff issue and quashing all lis pendens which ABC  
9 recorded against RCS properties, RCS filed a motion in the  
10 Delaware bankruptcy court seeking to vacate the orders:

- 11 (1) imposing the automatic stay in ABC's chapter 15 case; and  
12 (2) finding that RCS had willfully violated the automatic stay.

13 On September 20, 2012, the Delaware bankruptcy court denied  
14 RCS's motion as premature because the order granting RCS's MSJ  
15 remained subject to reconsideration and appeal.

16 **B. Confirmation of Debtors' Chapter 11 Plan**

17 Debtors then proceeded toward confirmation of their plan,<sup>2</sup>  
18 which proposed, as allowed by the MSJ order, to pay ABC's claim  
19 in full through setoff and to pay other unsecured creditors in  
20 full through cash on hand and post-confirmation collections. In  
21 particular, the funding for the plan would come from: (1) cash  
22 on hand (\$56,000); (2) proceeds from the Ann Road Property (as  
23 described below); (3) proceeds from the distributions to RCS  
24 from its participation in the development of the Russell Road  
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26  
27 <sup>2</sup> The plan was a "joint" plan proposed by RCS, ACCP, and  
28 ACCP I, LLC. The bankruptcy court approved the Disclosure  
Statement by order dated June 21, 2012.

1 Property;<sup>3</sup> and (4) pursuing collection of the USD\$28,486,206.64,  
2 plus interest, owed by ABC to RCS as a result of the setoff.

3 The plan designated five classes of claims:

4 Class 1 - City of North Las Vegas Secured Claim: The  
5 City of North Las Vegas had a lien for unpaid property  
6 taxes and development fees against the property known  
7 as the Ann Road Property. RCS proposed to sell this  
8 property under § 363 and use the proceeds to pay the  
9 City with the remainder used to pay other allowed  
10 unsecured claims (other than ABC) under the plan.<sup>4</sup>

11 Class 2 - Hill Crest Bank Secured Claim: RCS owned  
12 two parcels known as the Valley View and Simmons  
13 properties which were encumbered by liens in favor of  
14 Hill Crest Bank. Because the loans were nonrecourse  
15 and the value of the properties was less than the  
16 liens, RCS would surrender those properties to Hill  
17 Crest Bank.

18 Class 3(A) - General Unsecured Claims (other than ABC  
19 and Ken Krynski): These claims would be paid in full  
20 with (1) excess proceeds from the Ann Road Property;  
21 (2) through RCS' 50% profit participation in the  
22 Russell Road Property; and (3) any monies RCS  
23 collected from ABC. RCS anticipated that the claims

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24 <sup>3</sup> RCS owned a 50% profit interest in property located at  
25 2488 East Russell Road. Once the Russell Road Property was sold,  
26 Debtors would use RCS's share of the proceeds (approximately  
27 \$800,000-\$1,000,000) to pay off general unsecured claims, except  
28 the debt owed to ABC. The Russell Road Property was in escrow  
prior to confirmation of Debtors' plan with a scheduled closing  
in December 2012.

29 <sup>4</sup> On July 9, 2012, RCS moved for authorization to sell the  
30 Ann Road Property for \$500,000. On July 27, 2012, RCS filed an  
31 amended motion to sell the property. ABC objected to the motion  
32 due to the automatic stay imposed in its chapter 15 proceeding.  
33 However, ABC consented to the sale if the proceeds were held in a  
34 segregated account and not distributed until ABC's interest in  
35 the Ann Road Property was determined by a final and non-  
36 appealable order. On August 20, 2012, the bankruptcy overruled  
37 ABC's objection and allowed the property to be sold by order  
38 entered on August 24, 2012 without the conditions consented to by  
ABC. The proceeds were used to pay off the City of North Las  
Vegas, and the remaining proceeds were designated for unsecured  
creditors other than ABC.

1 in this class would be no greater than \$925,000.

2 Class 3(B) - ABC Claims: RCS proposed to pay ABC the  
3 full amount of its claim with its setoff, which  
4 allowed for 100% payment.

4 Class 3(C) - Ken Krynski Claim: RCS disputed  
5 Krynski's claim filed in the amount of \$2 million.  
6 RCS believed that the claim was no more than \$500,000.  
7 RCS would make payments to Krynski on the Effective  
8 Date in an amount determined by the court necessary to  
9 cure any default(s) on the payment plan due Krynski  
10 pursuant to the settlement agreement dated August 15,  
11 2011. Any payments made after the Effective Date  
12 would be made in accordance with the settlement  
13 agreement.

9 Administrative Claims: All amounts would be paid in  
10 full within thirty (30) days of confirmation subject  
11 to allowance by the bankruptcy court.

11 Class 5 - Interests of Members: No distributions  
12 would be made to members until after payments to all  
13 other creditors.

14 Finally, the plan provided for mutual releases in  
15 connection with ABC's claim and for substantive consolidation of  
16 Debtors' estates.

17 On August 14, 2012, ABC objected to the confirmation of  
18 Debtors' plan on several grounds.<sup>5</sup> First, citing Sherman v.  
19 Harbin (In re Harbin), 486 F.3d 510, 517 (9th Cir. 2007), ABC  
20 argued that the plan did not meet the feasibility requirement  
21 under § 1129(a)(11) because it made no provision for the  
22 possibility that ABC would prevail on appeal of the RCS MSJ  
23 order and, thereafter, obtain a judgment against Debtors that  
24 was not subject to setoff. Second, ABC asserted that the plan  
25 provided for property sales that were "forbidden by law" in

26 \_\_\_\_\_  
27 <sup>5</sup> The Official Committee of Unsecured Creditors and Krynski  
28 also objected to the plan. However, those objections were either  
resolved or withdrawn.

1 violation of § 1129(a)(3). ABC maintained that the automatic  
2 stay in its chapter 15 case, coupled with the Delaware  
3 bankruptcy court's enforcement of the stay against RCS through  
4 various orders, prohibited the property sales called for by the  
5 plan.<sup>6</sup>

6 The bankruptcy court heard the matter on October 10, 2012  
7 and overruled ABC's objections, except for those related to the  
8 purported violations of § 1129(a)(3) (forbidden by law) and  
9 § 1129(a)(11) (feasibility). These objections were continued  
10 for an evidentiary hearing on November 13, 2012.

11 On October 22, 2012, Debtors submitted the Fifth Amendment  
12 to Plan of Reorganization. The plan was amended as result of  
13 the hearing on October 10, 2012.

14 At the November 13, 2012, evidentiary hearing, Debtors'  
15 sole witness was Rick Sodja, a member of RCS. ABC produced no  
16 witnesses. After hearing Sodja's testimony and the parties'  
17 arguments, the bankruptcy court overruled ABC's remaining  
18 objections and confirmed the plan. The bankruptcy court found  
19 that the sale of the properties did not run afoul of the  
20 automatic stay imposed in ABC's chapter 15 case nor violate the  
21 Delaware bankruptcy court's orders which enforced the stay  
22 against RCS with respect to the properties. The court reasoned

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24 <sup>6</sup> ABC made numerous other objections that are not relevant  
25 for purposes of this appeal. For example, ABC objected to the  
26 plan provision which made its claims against Debtors subject to a  
27 mutual release; asserted that the plan falsely classified its  
28 claim as unimpaired; accused Debtors of gerrymandering because  
the plan classified ABC separately from other unsecured claims;  
and argued that the plan improperly called for the substantive  
consolidation of Debtors' estates.

1 that neither of the orders made any determination with respect  
2 to ABC's rights or interests in the properties. Since the RCS  
3 bankruptcy court had determined ABC had no rights or interests  
4 in the properties, the court found that the plan complied with  
5 § 1129(a)(3).

6 Next, the bankruptcy court addressed ABC's feasibility  
7 objection based on the holding in Harbin. The court explained  
8 that the holding in Harbin simply required the court, rather  
9 than the plan, to consider what might happen on appeal and that  
10 requirement was among all the facts and circumstances the court  
11 needs to consider in determining feasibility. The court  
12 concluded that based on the evidence presented, the plan was not  
13 likely to need any further liquidation or financial  
14 reorganization for two reasons: First, the court did not think  
15 that ABC was going to prevail on appeal. Second, even if ABC  
16 did prevail, the court found no evidence that suggested after a  
17 trial on the merits that ABC's claim would not be subject to  
18 setoff or that it was likely ABC would wind up with a net claim  
19 so large that Debtors would have to liquidate or engage in  
20 further financial reorganization. The bankruptcy court  
21 concluded that Debtors presented a "good case" that further  
22 liquidation or financial reorganization was not likely. For  
23 these reasons, the court found that Debtors met their burden of  
24 proof on feasibility under § 1129(a)(11).<sup>7</sup> The bankruptcy court  
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26 <sup>7</sup> At this hearing, the bankruptcy court also ruled that the  
27 mutual release provision should be deleted, substantive  
28 consolidation was inappropriate, and that the plan was proposed  
in good faith.

1 entered the order confirming the plan on November 29, 2012.

2 On December 4, 2012, ABC filed a timely notice of appeal  
3 from the confirmation order. On the same day, ABC filed an  
4 emergency motion for a stay pending appeal and an emergency  
5 motion for an expedited hearing on the motion. At the  
6 December 11, 2012 expedited hearing on the matter, the  
7 bankruptcy court denied ABC's motion for stay pending appeal.

8 On December 17, 2012, Debtors filed a Notice of Effective  
9 Date which stated that the Effective Date of the confirmed plan  
10 was December 14, 2012. In the notice, Debtors represented that  
11 payments were made to Krynski in the amount of \$535,000 and that  
12 other payments were being made pursuant to the confirmed plan of  
13 reorganization.

14 After the bankruptcy court denied ABC's motion for a stay  
15 pending appeal, ABC filed a motion for a stay of the  
16 confirmation order with the Panel. On December 21, 2012, the  
17 Panel entered an order staying distributions under the plan  
18 pending resolution of this appeal. RCS moved for  
19 reconsideration. After reviewing the bankruptcy court's reasons  
20 for denying a stay, the Panel concluded that the lack of  
21 likelihood of success on the merits justified revisiting its  
22 original order granting the requested stay. The Panel granted  
23 RCS's motion for reconsideration and vacated the stay by order  
24 entered on February 2, 2013.

## 25 **II. JURISDICTION**

26 Because the plan has been confirmed, distributions  
27 commenced, properties sold, and there is no stay pending appeal  
28 of the confirmation order, the question arises whether this

1 appeal is moot and subject to dismissal. If an appeal is moot,  
2 we must dismiss if constitutionally moot, Drummond v. Urban  
3 (In re Urban), 375 B.R. 882, 887 (9th Cir. BAP 2007), and we may  
4 dismiss if equitably moot. Clear Channel Outdoor, Inc. v.  
5 Knupfer (In re PW, LLC), 391 B.R. 25, 33-35 (9th Cir. BAP 2008).  
6 We consider the mootness question below and conclude that the  
7 appeal is not constitutionally or equitably moot.

8 The bankruptcy court had jurisdiction over this proceeding  
9 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction  
10 under 28 U.S.C. § 158.

### 11 III. ISSUES

12 A. Whether ABC's appeal from the bankruptcy court's order  
13 confirming Debtors' chapter 11 plan is moot;

14 B. Whether the bankruptcy court erred in finding that  
15 Debtors' plan was not forbidden by law and complied with  
16 § 1129(a)(3); and

17 C. Whether the bankruptcy court erred in finding that  
18 Debtors' plan satisfied the feasibility requirements under  
19 § 1129(a)(11).

### 20 IV. STANDARDS OF REVIEW

21 "Mootness is a question of law reviewed de novo." Nelson  
22 v. George Wong Pension Trust (In re Nelson), 391 B.R. 437, 442  
23 (9th Cir. BAP 2008).

24 The issue of whether the plan was proposed "by any means  
25 forbidden by law" is a question of law which we also review de  
26 novo. Settling States v. Carolina Tobacco Co. (In re Carolina  
27 Tobacco Co.), 360 B.R. 702, 711 (D. Or. 2007). In connection  
28 with our inquiry into whether Debtors' plan was proposed "by any

1 means forbidden by law," we are called upon to interpret the  
2 stay enforcement orders issued by the Delaware bankruptcy court.  
3 The interpretation of a court order is a legal conclusion to be  
4 reviewed de novo. See U.S. v. Spallone, 399 F.3d 415, 423 (2d  
5 Cir. 2005) ("The interpretation of the text of [another court's]  
6 order or judgment is considered a conclusion of law subject to  
7 de novo review.").

8 "The issue whether a plan is feasible-is not likely to be  
9 followed by liquidation or further reorganization-is one of  
10 fact, which we review under the clearly erroneous standard."  
11 In re Harbin, 486 F.3d at 517. We affirm the bankruptcy court's  
12 factual findings unless those findings are "(1) 'illogical,'  
13 (2) 'implausible,' or (3) without 'support in inferences that  
14 may be drawn from the facts in the record.'" United States v.  
15 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc).  
16 Where there are two plausible views of the evidence, "the  
17 factfinder's choice between them cannot be clearly erroneous."  
18 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574  
19 (1985).

## 20 V. DISCUSSION

### 21 A. Mootness

22 Both RCS and ABC address the mootness issue in their  
23 briefs, albeit in an abbreviated manner. On the one hand, ABC  
24 contends that this appeal is not moot because the Panel granted  
25 ABC's request for a stay pending appeal. However that order has  
26 since been vacated. On the other hand, without legal analysis  
27 or support, RCS suggests that this appeal would become moot once  
28 we affirmed the bankruptcy court's summary judgment order in the

1 related appeal, BAP No. AZ-12-1381-JuTaAh. Although we have  
2 affirmed the bankruptcy court's orders on the cross motions for  
3 summary judgment on the setoff issue, we disagree that our  
4 decision rendered this appeal moot.<sup>8</sup>

5 We have an independent obligation to consider mootness sua  
6 sponte, Felton Pilate v. Burrell (In re Burrell), 415 F.3d 994,  
7 997 (9th Cir. 2005), because we lack jurisdiction, Urban, 375  
8 B.R. at 887, or it may be the case that any remedy may be unjust  
9 given the change in position of third parties, Clear Channel,  
10 391 B.R. at 33-35. "The test for mootness of an appeal is  
11 whether the appellate court can give the appellant any effective  
12 relief in the event that it decide the matter on the merits in  
13 his favor. If it can grant such relief, the matter is not  
14 moot." In re Burrell, 415 F.3d at 998. We conclude that this  
15 appeal is not constitutionally moot because we could reverse  
16 plan confirmation or require modification of the plan, thereby  
17 giving relief to ABC.

18 The equitable mootness question requires more analysis due  
19 to the Ninth Circuit's "comprehensive test" for determining  
20 whether an appeal is equitably moot:

21 We will look first at whether a stay was sought, for  
22 absent that a party has not fully pursued its rights.  
23 If a stay was sought and not gained, we then will look  
24 to whether substantial consummation of the plan has  
25 occurred. Next, we will look to the effect a remedy  
26 may have on third parties not before the court.  
27 Finally, we will look at whether the bankruptcy court  
28 can fashion effective and equitable relief without  
completely knocking the props out from under the plan  
and thereby creating an uncontrollable situation for

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<sup>8</sup> We also must acknowledge that our ruling may not be the final order on that issue, as ABC has further appeal rights.

1 the bankruptcy court.

2 Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe  
3 Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012). In applying  
4 these factors to this case, we ultimately decline to dismiss  
5 this appeal on equitable mootness grounds.

6 First, ABC was diligent in seeking a stay from the  
7 bankruptcy court and this Panel, which both refused. “[F]ailure  
8 to obtain a stay is one factor to be considered in assessing  
9 equitable mootness, but is not necessarily controlling.” Id. at  
10 881-82. Second, because a stay was sought and not gained, we  
11 next determine whether substantial consummation of the plan has  
12 occurred. “The Bankruptcy Code defines substantial consummation  
13 as: (a) transfer of all or substantially all of the property  
14 proposed by the plan to be transferred; (b) assumption by the  
15 debtor or by the successor to the debtor under the plan of the  
16 business or of the management of all or substantially all of the  
17 property dealt with by the plan; and (c) commencement of  
18 distribution under the plan.” Id. (citing § 1101(2)).

19 RCS states that it no longer has any property that was  
20 subject to the lis pendens as the properties have all been sold  
21 and most of the proceeds have been used to pay RCS’s creditors.  
22 Sodja’s testimony at the evidentiary hearing on plan  
23 confirmation corroborates RCS’s statement. As noted above, the  
24 Ann Road Property was sold over ABC’s objection pursuant to a  
25 court order prior to the confirmation of Debtors’ plan. Sodja  
26 testified that two of the properties RCS owned would be returned  
27 to Hill Crest Bank because the debt exceeded the potential value  
28 of the properties. Finally, Sodja testified that the closing

1 for the Russell Road Property was to occur prior to the end of  
2 the year [2012]. Hence, the first requirement for substantial  
3 consummation has been met because there has been a transfer of  
4 all the real property dealt with by the plan.

5 Paragraph 7.1 of the plan provides that, as of the  
6 Effective Date, the management, control, and operation of the  
7 Reorganized Debtor[s] became the general responsibility of the  
8 Managing Member of the Reorganized Debtor[s], "which shall,  
9 thereafter have the responsibility for the management, control  
10 and operation of the Reorganized Debtor[s]." Therefore, the  
11 second requirement for substantial consummation of the plan has  
12 been met.

13 Finally, distributions under the plan have commenced. The  
14 Notice of Effective Date filed by Debtors plainly states that  
15 Krynski was paid \$525,000 and other distributions had commenced.  
16 Accordingly, the plan has been substantially consummated.

17 Even though the plan has been substantially consummated,  
18 that is not the "end of the story." In re Thorpe Insulation  
19 Co., 677 F.3d at 882 n.7. We can "still assess whether  
20 effective relief might be given without fully impairing the  
21 prior plan and other pertinent circumstances." Id. We, thus,  
22 consider "whether modification of the plan of reorganization  
23 would bear unduly on the innocent." Id. at 882.

24 There is no doubt that the plan has proceeded and third  
25 party rights have intervened. Properties were sold to third  
26 parties who are not presently before the court. Under these  
27 circumstances, it would be inequitable to alter the plan so far  
28 as the sale of the properties is concerned because parties who

1 relied on the plan are not before us.

2 We last consider whether the bankruptcy court on remand may  
3 be able to devise an equitable remedy. "Where equitable relief,  
4 though incomplete, is available, the appeal is not moot." Id.  
5 at 883. Here, RCS's remaining asset is its judgment against  
6 ABC. Therefore, complete reversal of the plan will not likely  
7 provide a remedy for ABC. However, RCS admits that some  
8 residual amount remains in its estate. Moreover, if ABC's  
9 claims are determined to be valid, then it may be entitled to  
10 recover monies RCS paid to Krynski, who was the sole member of  
11 ACCP, which had obtained the loans from ABC. While  
12 theoretically Krynski may not have the money, we conclude this  
13 possibility does not make this appeal equitably moot. We  
14 therefore consider the merits.

15 **B. The Merits**

16 Debtors had the burden of proving all the elements  
17 governing plan confirmation. Leavitt v. Soto (In re Leavitt),  
18 209 B.R. 935, 940 (9th Cir. BAP 1997), aff'd, 171 F.3d 1219 (9th  
19 Cir. 1999). The requirements for plan confirmation are listed  
20 in § 1129(a) (stating that the court shall confirm a plan only  
21 if all the following requirements have been met). Sections  
22 1129(a)(3) and (11) are at issue in this appeal.

23 **Section 1129(a)(3): Forbidden by Law**

24 Section 1129(a)(3) requires the bankruptcy court to decide  
25 whether the "plan has been proposed in good faith and not by any  
26 means forbidden by law." ABC contends that Debtors' plan runs  
27 afoul of this section because properties will be sold that are  
28 subject to stay enforcement orders issued by the Delaware

1 bankruptcy court. ABC argues that these orders, which enforced  
2 the automatic stay in ABC's chapter 15 case against RCS,  
3 demonstrate that ABC has a protectable interest in the  
4 properties. Thus, according to ABC, the confirmation order  
5 authorizing the sale of the properties constitutes an  
6 impermissible collateral attack on the Delaware bankruptcy  
7 court's orders.

8 In the first order ABC relies upon, the Delaware bankruptcy  
9 court found that RCS's sale of properties subject to ABC's lis  
10 pendens was a willful violation of the automatic stay.<sup>9</sup> ABC's  
11 argument that this order somehow prohibited the sale of the  
12 properties through the confirmed plan stems from a faulty  
13 premise; i.e., that the Delaware bankruptcy court's enforcement  
14 of the stay against RCS means that the court found ABC had a  
15 constructive trust over the properties, creating a right to the  
16 protection of the stay. The order does not say that.

17 "Court orders are construed like other written instruments,  
18 except that the determining factor is not the intent of parties,  
19

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20  
21 <sup>9</sup> Recall that ABC recorded the lis pendens against the ACCP  
22 properties concurrent with the commencement of the Nevada lawsuit  
23 against Debtors and others. RCS filed a motion to expunge the  
24 lis pendens which the Nevada court denied in an order dated  
25 September 10, 2009, finding: (1) the constructive trust claim  
26 affected the title or possession of the properties; (2) ABC  
27 Learning would be injured by a transfer of an interest in the  
28 properties before the Nevada Action was concluded; and (3) ABC  
Learning established that it was likely to prevail on the merits  
of the constructive trust claim. See In re ABC Learning Centres  
Ltd., 2011 WL 4899789, at \*2 (setting forth what happened in the  
Nevada court). After the Nevada district court denied RCS's  
motion to expunge, RCS sold three properties that were subject to  
the lis pendens. Id.

1 but that of the issuing court." Spallone, 399 F.3d at 424.  
2 "[A]n order will not be construed as going beyond the motion in  
3 pursuance of which the order was made, for a court is presumed  
4 not to intend to grant relief which was not demanded." Id.  
5 The plain language of the order shows that the Delaware  
6 bankruptcy court found RCS violated the stay based on its  
7 inquiry into whether ABC had "arguable claims of right to the  
8 properties, or a colorable basis for asserting an interest in  
9 the properties." In re ABC Learning Centres Ltd., 2011 WL  
10 4899789, at \*2. The court's order further shows that ABC's  
11 filing of the lis pendens established the colorable claim:  
12 "Filing the Lis Pendens and the Nevada Court's Lis Pendens Order  
13 established a colorable claim of title." Id. Finally, the  
14 Delaware bankruptcy court did not find that ABC had rights to  
15 the properties by virtue of its constructive trust claim. "It  
16 is not necessary at this stage that [ABC] establish an ownership  
17 interest in or title to the property and the bankruptcy court  
18 need not make that determination at the outset for the automatic  
19 stay to apply. The Nevada Court will make that determination  
20 . . . If the Nevada court finds that [ABC] had a constructive  
21 trust, that will vest title of rights in [ABC]." Id. at \*3.

22 We do not construe the Arizona bankruptcy court's  
23 confirmation order as a collateral attack on this order. "The  
24 collateral attack doctrine precludes litigants from collaterally  
25 attacking the judgments of other courts." Rein v. Providian  
26 Fin. Corp., 270 F.3d 895, 902 (9th Cir. 2001). In order to be  
27 an impermissible collateral attack of an earlier judgment, the  
28 relevant claims must have been directly ruled on in the prior

1 proceeding. See Skokomish Indian Tribe v. United States,  
2 332 F.3d 551, 560 (9th Cir. 2003). Here, although the Delaware  
3 bankruptcy court enforced the automatic stay against RCS, the  
4 basis for its doing so was the filing of the lis pendens. The  
5 order does not establish that ABC had any other colorable basis  
6 for asserting an interest in the properties. As noted by the  
7 bankruptcy court, no court has ever ruled on ABC's constructive  
8 trust claim. Accordingly, the collateral attack doctrine does  
9 not apply.

10 It follows that once the Arizona bankruptcy court quashed  
11 the lis pendens due to its findings that there was a de facto  
12 merger between RCS and ACCP, the sale of the properties through  
13 a confirmed plan could not run afoul of the Delaware bankruptcy  
14 court's order, or for that matter, the imposition of the stay in  
15 ABC's chapter 15.

16 The second order ABC relies upon is the Delaware bankruptcy  
17 court's denial of RCS's motion to vacate the order imposing the  
18 stay in ABC's chapter 15 and the order finding RCS had committed  
19 a willful violation of the stay even though the Delaware court  
20 knew that the Arizona bankruptcy court had granted RCS's MSJ and  
21 quashed the lis pendens on the properties. The plan also does  
22 not violate the law because of this denial order. Again, the  
23 plain language of the order only refers to the now-dissolved lis  
24 pendens as the colorable basis for ABC's alleged interest in the  
25 properties. In sum, we conclude that the bankruptcy court did  
26 not err by finding that Debtors' plan complied with  
27 § 1129(a)(3).

1           **Section 1129(a)(11): Feasibility**

2           Section 1129(a)(11) requires the court to confirm a plan  
3 when “[c]onfirmation of the plan is not likely to be followed by  
4 liquidation, or the need for further financial reorganization,  
5 of the debtor or any successor to the debtor under the plan,  
6 unless such liquidation or reorganization is proposed in the  
7 plan.”

8           ABC argues that the bankruptcy court erred in its finding  
9 of feasibility because it did not follow a bright-line rule set  
10 forth in Harbin, which ABC recites as follows: a plan is not  
11 feasible if it does not provide a mechanism for addressing the  
12 claims of creditors who may subsequently recover large judgments  
13 against the debtor. However, this is neither a rule nor the  
14 holding set forth in Harbin. The opinion begins: “[W]e hold  
15 that a bankruptcy court considering the feasibility of a plan of  
16 reorganization under 11 U.S.C. § 1129(a)(11) must evaluate the  
17 possible effect of a debtor’s ongoing civil case with a  
18 potential creditor, whether that litigation is pending at the  
19 trial level or on appeal.” In re Harbin, 486 F.3d at 514.  
20 Nowhere do we find in the opinion a “bright-line” rule that  
21 requires a plan to provide a mechanism for addressing the claims  
22 of creditors who may subsequently recover large judgments  
23 against the debtor.

24           Moreover, in Harbin the bankruptcy court erroneously  
25 concluded that it could not consider the effect of the  
26 creditor’s pending appeal for several reasons, including the  
27 Rooker-Feldman doctrine. All these reasons were rejected by the  
28 Ninth Circuit. This case differs. The bankruptcy court

1 properly noted, "what might happen on appeal is among the facts  
2 and circumstances the court needs to consider in determining  
3 feasibility." The court then considered the effect of ABC's  
4 appeal on the feasibility of Debtors' plan by taking evidence on  
5 whether ABC would prevail in the appeal of the RCS MSJ order,  
6 but "it heard no evidence to that effect."

7 Because feasibility is a finding of fact, ABC has the  
8 burden to demonstrate that the bankruptcy court's findings of  
9 fact are clearly erroneous. Wells Fargo Bank, N.A. v. Loop 76,  
10 LLC (In re Loop 76, LLC), 465 B.R. 525, 545 (9th Cir. BAP 2012).  
11 To show clear error, ABC must demonstrate how the findings were  
12 not supported by the record (i.e., the testimony and evidence  
13 upon which the court relied in issuing its ruling). ABC  
14 contends that it does not need to show clear error because the  
15 bankruptcy court misapplied the law when it found ABC was  
16 unlikely to prevail in the summary judgment appeal. In  
17 addition, ABC argues that the RCS MSJ will be reviewed de novo  
18 on appeal. Therefore, ABC maintains that the bankruptcy court's  
19 decision that it was "unlikely to prevail on appeal" should be  
20 governed under a de novo review standard. We now have affirmed  
21 the bankruptcy court's orders on the parties' cross motions for  
22 summary judgment. Therefore, even under a de novo review, ABC  
23 has not shown that it was likely to prevail on appeal.

24 In short, ABC failed to show a reasonable possibility that  
25 its claim could affect the plan's feasibility in the future;  
26 i.e., that the plan was likely to be followed by liquidation, or  
27 the need for further financial reorganization. Accordingly, we  
28 discern no error with the bankruptcy court's conclusion that the

1 plan met the requirements for feasibility under § 1129(a)(11).<sup>10</sup>

2 **VI. CONCLUSION**

3 For the reasons stated, we AFFIRM.

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26 <sup>10</sup> ABC devotes a significant portion of its brief to  
27 arguments raised and briefed in the related appeal on the cross  
28 summary judgment motions. We do not revisit these arguments in  
the context of this appeal.