

OCT 27 2010

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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NOT FOR PUBLICATION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

5	In re:	)	BAP No. CC-10-1120-HKiMk
6	IN RE NAMCO CAPITAL GROUP	)	Bk. No. 08-32333-BR
7	INC.,	)	
8	Debtor.	)	
9	ARIZONA TEMPE TOWN LAKE,	)	
10	LLC, aka ATTL; BUSINESS TO	)	
11	BUSINESS MARKETS, INC., aka	)	
12	B2B; THEODORE KOHAN,	)	
13	Appellants,	)	
14	v.	)	<b>M E M O R A N D U M</b> <sup>1</sup>
15	BRADLEY D. SHARP, Chapter 11	)	
16	Trustee; ROYA BOUCHERIAN,	)	
17	Appellees.	)	

Argued and Submitted on September 23, 2010  
at Pasadena, California

Filed - October 27, 2010

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Barry Russell, Bankruptcy Judge, Presiding.

Appearances: Mark T. Young, Donahoe & Young LLP, argued  
for Appellants Arizona Tempe Town Lake, LLC,  
Business to Business Markets, Inc.

<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.

1 David M. Poitras, Jeffer, Mangels, Butler &  
2 Marmaro LLP argued for Appellee Bradley D. Sharp,  
3 Chapter 11 Trustee  
4 Jeffery Ian Golden, Weiland, Golden, Smiley, Wang  
Ekvall & Strok, LLP argued for Appellee Roya  
Boucherian

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5 Before: HOLLOWELL, KIRSCHER and MARKELL, Bankruptcy Judges.  
6

7 This is an appeal from the bankruptcy court's approval of a  
8 settlement between the chapter 11<sup>2</sup> trustee (Trustee) for the  
9 debtor, Namco Capital Group, Inc. (Namco or the Debtor), and  
10 creditor, Roya Boucherian (Boucherian). The centerpiece of the  
11 settlement liquidates a note and deed of trust that the Debtor  
12 collaterally assigned to Boucherian by providing for the eventual  
13 transfer to Boucherian of title to the real property secured by  
14 the deed of trust free and clear of claims and interests.

15 After the settlement was approved by the bankruptcy court,  
16 certain events transpired with respect to the property, including  
17 the transfer of title, sale, subsequent flood and fire damage,  
18 and payment of taxes and escrow fees. Additionally, third  
19 parties in this bankruptcy case and in related bankruptcy cases  
20 were affected by or acted in reliance on the settlement. As a  
21 result, this appeal is now moot.

22 However, in the event we are incorrect in our determination  
23 that the appeal is moot, we have analyzed the merits and would  
24 affirm the bankruptcy court because it applied the appropriate  
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26 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 factors in deciding that the settlement agreement was fair,  
2 reasonable and equitable. Because the Appellants offered no  
3 valid basis as to why the bankruptcy court should have  
4 reconsidered its decision approving the settlement, we would also  
5 affirm the bankruptcy court's order denying the Appellants'  
6 motion to reconsider.

7 **I. FACTS**

8 The Debtor and Boucherian

9 The Debtor is a California company whose president, sole  
10 shareholder, director and CFO is Ezri Namvar (Namvar). The  
11 Debtor's business for the last 20 years has been to raise money  
12 from investors in order to acquire real estate for development in  
13 California, Nevada and Arizona. Investors were paid a fixed rate  
14 of return or provided promissory notes, and in exchange, Namvar-  
15 controlled entities developed, managed and/or sold the  
16 developments.

17 Boucherian lent the Debtor significant sums of money over  
18 several years. In December 2007, the Debtor executed a  
19 promissory note (the Namco Note) in the amount of \$14.5 million  
20 in favor of Boucherian. Namvar personally guaranteed the Namco  
21 Note. In July 2008, the Namco Note was increased to  
22 \$16.5 million. Part of the Namco Note (\$7 million) is secured by  
23 property in Las Vegas (the Las Vegas Collateral). The other  
24 \$9.5 million is secured by notes and security interests  
25 collaterally assigned by the Debtor to Boucherian (the Collateral  
26 Assignments).

1           The Collateral Assignments consist of the following notes  
2 secured by deeds of trust on undeveloped real property in  
3 Arizona--one parcel, the Club Rio Property, owned by Namwest Town  
4 Lakes (NTL) and an adjoining parcel, the Wilde Property owned by  
5 Namwest Town Lakes II (NTL II).

6           The notes secured by deeds of trust on the Club Rio Property  
7 are:

8           A promissory note in the amount of \$2.78 million executed  
9 by NTL on December 20, 2004, in favor of the Debtor  
10 (purportedly the purchase price lent to NTL by the Debtor  
to buy the Club Rio Property); and,

11           A \$27 million all-inclusive<sup>3</sup> promissory note executed by  
12 NTL on December 5, 2007, in favor of the Debtor. The  
13 Debtor collaterally assigned the note to Boucherian on  
December 12, 2007, and the assignment of the deed of  
trust was recorded on March 24, 2008.

14           The notes secured by deeds of trust on the Wilde Property  
15 are:

16           A promissory note in the amount of \$6 million executed by  
17 NTL II on May 26, 2006, in favor of the Debtor. The  
18 Debtor collaterally assigned the note to Boucherian on  
19 August 19, 2008, and Boucherian recorded the assignment  
of the deed of trust on August 25, 2008.

20           An all-inclusive<sup>4</sup> \$13 million promissory note executed by  
21 NTL II on September 20, 2007, in favor of the Debtor.  
22 The Debtor collaterally assigned the note to Boucherian  
23 on November 21, 2007. Boucherian recorded the assignment  
of the deed of trust on March 24, 2008.

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24  
25           <sup>3</sup> The reference to "all-inclusive" means the note included  
the amount of the \$2.78 million note.

26           <sup>4</sup> "All-inclusive" means that the \$13 million note  
27 encompassed the previous \$6 million loan.

1 NTL II, along with a related entity, Namwest LLC,  
2 (Namwest),<sup>5</sup> and 10 other entities filed bankruptcy in Arizona on  
3 October 9, 2008, and have been jointly administered under the  
4 Namwest bankruptcy (the Namwest Bankruptcy).<sup>6</sup> NTL is not in  
5 bankruptcy. Most of the Namwest Bankruptcy entities are owned or  
6 managed by Namvar or his family members and children.

7 In 2008, the Debtor did not make required interest payments  
8 on the Namco Note. Boucherian demanded payment in full but the  
9 Debtor did not repay the loan. In November 2008, Boucherian  
10 commenced an action to sell the Las Vegas Collateral and the  
11 Collateral Assignments at a public sale. Boucherian completed  
12 the sale of the Las Vegas Collateral; however, the sale of the  
13 Collateral Assignments was not completed, in part because Namwest  
14 and NTL II filed bankruptcy and initiated an adversary  
15 proceeding<sup>7</sup> against the Debtor and Boucherian that resulted in an  
16 entry of an order by the Arizona bankruptcy court enjoining  
17 Boucherian from concluding the sale of the Collateral  
18 Assignments.

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20 <sup>5</sup> NTL II is a wholly-owned subsidiary of Namwest.

21 <sup>6</sup> Case No. 08-bk-13935-CGC, pending in the District of  
22 Arizona.

23 <sup>7</sup> Namwest Bankruptcy, Adv. Pro. No. 08-00926. The adversary  
24 proceeding was filed December 10, 2008, by Namwest and NTL II  
25 against Boucherian and the Debtor. In addition to seeking a  
26 temporary injunction of the sale of the Collateral Assignments,  
27 the complaint alleged that the underlying notes and deeds of  
trust between NTL II and the Debtor were unsupported by  
consideration and avoidable as fraudulent transfers.

1           The Appellants

2           The Appellants are Arizona Tempe Town Lake, LLC (ATTL),  
3 Business To Business Markets, Inc. (B2B), and Theodore Kohan  
4 (Kohan), collectively, the Kohan Group. Kohan is the president  
5 of B2B and the managing member of ATTL.

6           The Kohan Group alleges it has a right to a 27% equity  
7 interest in either NTL or NTL II based on its contention that in  
8 2004, it entered into an agreement to assign the right to  
9 purchase the Club Rio Property to a Namvar-created entity. The  
10 Kohan Group claims that it was orally promised by Namvar a  
11 27% membership interest in any entity that would ultimately own  
12 and develop the Club Rio Property and any adjacent properties  
13 (e.g., the Wilde Property).

14           As part of this transaction, NTL was created to exercise the  
15 purchase option for the Club Rio Property. The money to acquire  
16 the Club Rio Property was purportedly provided to NTL by the  
17 Debtor and resulted in the \$2.78 million note and deed of trust  
18 from NTL to the Debtor. According to the Kohan Group, ATTL was  
19 originally a member of NTL but was removed before NTL acquired  
20 the Club Rio Property.

21           In 2005, Namvar created NTL II to acquire the adjacent  
22 property, the Wilde Property. The Kohan Group contends it is  
23 also entitled to a 27% equity interest in NTL II as part of the  
24 transaction that assigned the Club Rio Property purchase option  
25 to NTL. However, no Kohan-related entity became a member of NTL  
26 II. In late 2005-early 2006, NTL II acquired the Wilde Property  
27

1 and as part of that acquisition executed the \$6 million note and  
2 deed of trust in favor of the Debtor.

3 The Kohan Group's claim to an equity interest fuels the  
4 litigation here, as well as litigation in the Arizona state  
5 court<sup>8</sup>, and is the subject of a counterclaim asserted by the  
6 Kohan Group in an adversary proceeding in the Namwest Bankruptcy  
7 (the Counterclaim Litigation).<sup>9</sup> However, neither the Debtor nor  
8 Boucherian are named as defendants in the Counterclaim  
9 Litigation. The Counterclaim Litigation does not challenge the  
10 validity of the Namco Note or challenge Boucherian's standing as  
11 a holder in due course of the Collateral Assignments.

12 The Namwest Bankruptcy

13 Namwest is the managing member of approximately 10 entities  
14 jointly administered in the Namwest Bankruptcy. Namwest is  
15 jointly owned by SWB Enterprises, LLC (SWB) and Beshmada, LLC  
16 (Beshmada). Namvar's children are the members of Beshmada.<sup>10</sup>

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19 <sup>8</sup> A copy of the Kohan Group's state court complaint was not  
20 included in the record.

21 <sup>9</sup> Namwest Bankruptcy, Adv. Pro. No. 08-00086. The adversary  
22 proceeding was filed by Namwest and NTL II on November 19, 2008,  
23 against NTL and the Kohan Group. Namwest sought a declaratory  
24 judgment that Namwest and NTL II had a valid option to purchase  
25 the Club Rio Property (independent of the Kohan Group's purchase  
26 option) and develop it along with the Wilde Property.

27 The Kohan Group filed a counterclaim against Namwest, NTL  
and NTL II. The Kohan Group disputed the existence of Namwest's  
option and asserted several tort claims associated with its claim  
to a 27% equity interest in NTL and/or NTL II.

<sup>10</sup> An involuntary bankruptcy petition was filed against  
Beshmada on December 22, 2009.

1           The major asset of the Namwest Bankruptcy is the Wilde  
2 Property. The value of the Wilde Property is significantly  
3 enhanced by its development in conjunction with the Club Rio  
4 Property, as one parcel has road access and the other has lake  
5 access.

6           There are two settlement agreements approved by the Arizona  
7 bankruptcy court that impact the Collateral Assignments, the Club  
8 Rio Property, the Wilde Property, and the settlement agreement in  
9 this appeal. The first settlement agreement was approved by an  
10 order entered on March 19, 2009, by the Arizona bankruptcy court  
11 and is referred to in the Trustee's and Boucherian's briefs, and  
12 here, as the February 2009 Agreement. One of the issues resolved  
13 by the February 2009 Agreement was a dispute between Namwest and  
14 its manager, Beshmada, regarding the validity of the \$13 million  
15 all-inclusive NTL II note and deed of trust, which was  
16 collaterally assigned to Boucherian. Namwest had argued that  
17 anything over \$4 million was invalid because only \$4 million was  
18 actually advanced by Namco to NTL II.

19           The February 2009 Agreement resolved the issue by providing  
20 that Boucherian could enforce the full amount of the \$13 million  
21 all-inclusive collaterally assigned note if she met certain  
22 conditions, one of which was providing debtor-in-possession  
23 financing to NTL II in order to complete the entitlement and  
24 zoning for the Wilde Property. The February 2009 Agreement was  
25 approved by the Arizona bankruptcy court over the Kohan Group's  
26 objection. It was not appealed and is final.<sup>11</sup>

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<sup>11</sup> We have taken judicial notice of the Namwest Bankruptcy  
(continued...)



1 The second settlement agreement was proposed in November  
2 2009 (the November 2009 Agreement), although the order approving  
3 the settlement was not entered by the Arizona bankruptcy court  
4 until March 29, 2010.

5 The November 2009 Agreement was between Namwest, NTL II and  
6 Boucherian. Pursuant to the November 2009 Agreement, the parties  
7 agreed, based in part on the February 2009 Agreement, that  
8 Boucherian was a holder in due course with respect to the \$13  
9 million (inclusive of the \$6 million) collaterally assigned note  
10 secured by the Wilde Property. Namwest agreed to abandon its  
11 claims in the two adversary proceedings, including the adversary  
12 that alleged the notes and security interests pledged by NTL II  
13 to the Debtor were not based on adequate consideration or were  
14 fraudulent transfers.<sup>12</sup>

15 Namwest also agreed to sell Boucherian its membership  
16 interest in NTL II for \$500,000 and Boucherian's payment of  
17 certain creditors' claims of NTL II. The parties agreed to  
18 thereafter dismiss the NTL II bankruptcy case. The Arizona  
19 bankruptcy court approved the November 2009 Agreement over the  
20 objection of the Kohan Group but subject to the Kohan Group's

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21  
22 <sup>11</sup>(...continued)  
23 electronic docket. See O'Rourke v. Seaboard Sur. Co. (In re E.R.  
24 Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Ehrenberg v.  
Calif. State Univ. (In re Beachport Entm't.), 396 F.3d 1083, 1088  
(9th Cir. 2005).

25 <sup>12</sup> The other adversary proceeding that was dismissed by the  
26 November 2009 Agreement was Adv. Pro. 08-0086. However, the  
27 Counterclaim Litigation does not appear to have been included in  
the dismissal.

1 disputed claim of a 27% membership interest in NTL II. That  
2 order was not appealed and is final.

3       These two settlement agreements are significant because  
4 after the February 2009 Agreement, and certainly after the  
5 November 2009 Agreement, attacks on the validity of the  
6 \$13 million all-inclusive note that was collaterally assigned to  
7 Boucherian were resolved. Thereafter, the allegations by the  
8 Kohan Group regarding fraud with respect to the Collateral  
9 Assignments could only apply to the NTL \$27 million note and deed  
10 of trust. Nevertheless, the Kohan Group repeatedly conflates its  
11 arguments concerning the Debtor's lack of consideration for the  
12 \$13 million all-inclusive note with the \$27 million note, and  
13 then further conflates the validity of those notes with the  
14 validity of the Namco Note. Significantly, however, the Kohan  
15 Group has never denied that Boucherian lent the Debtor  
16 significant sums of money.

#### 17       The Namco Bankruptcy

18       On December 22, 2008, involuntary bankruptcy petitions were  
19 filed against both the Debtor and Namvar. The orders for relief  
20 were entered January 29, 2009.

21       In July 2009, Boucherian filed a motion for relief from stay  
22 against the Debtor in order to complete the sale of the  
23 Collateral Assignments. To resolve the motion, the Trustee  
24 negotiated (for over five months and at the same time as the  
25 November 2009 Agreement was being negotiated) a settlement  
26 agreement with Boucherian (the Settlement Agreement) that  
27 provided for the sale/transfer of the Collateral Assignments and

1 ultimate sale of the Club Rio Property to Boucherian. The  
2 Settlement Agreement proposed:

3 (1) to transfer, assign and convey the Collateral  
4 Assignments free and clear to Boucherian;<sup>13</sup>

5 (2) that Boucherian would foreclose on the \$27 million deed  
6 of trust against the Club Rio Property, or, that the Trustee  
7 would take steps to obtain title to the Club Rio Property by  
8 either accepting a voluntary transfer of a deed from NTL or by  
9 subordinating the Debtor's \$2.78 million deed of trust to  
10 Boucherian's collaterally assigned \$27 million deed of trust and  
11 foreclosing on the \$2.7 million deed of trust. The Trustee would  
12 then convey the Club Rio Property to Boucherian free and clear of  
13 all rights, titles and interests;

14 (3) the payment of \$2.2 million by Boucherian to the estate  
15 if she acquired the Club Rio Property free and clear of all  
16 interests and liens within two years from the date of the  
17 Settlement Agreement and payment of an additional \$4.35 million  
18 to the estate if Boucherian acquired and sold both the Club Rio  
19 Property and the Wilde Property within a specified time;

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22  
23 <sup>13</sup> It may be somewhat incongruous to transfer the Collateral  
24 Assignments when Boucherian already held them. However, there  
25 are other unusual provisions to the Settlement Agreement,  
26 including the provisions that call for the Trustee to foreclose  
27 on the \$2.78 million deed of trust, which is supposed to be  
included in the \$27 million deed or trust, or, that he foreclose  
on the Club Rio Property after taking title from NTL. But we do  
not need to address those incongruities to resolve the appeal.

1 (4) the payment by Boucherian of \$450,000 to NTL II to  
2 obtain development entitlements, consistent with the February  
3 2009 Agreement and November 2009 Agreement;

4 (5) the release of Boucherian's claims against Namvar on  
5 his guaranty obligation; and,

6 (6) the release of Boucherian's claims against the Debtor,  
7 including the right to payment of the Namco Note.

8 On November 3, 2009, the Trustee filed and served its motion  
9 for approval of the Settlement Agreement and set the hearing for  
10 November 24, 2009 (Motion to Approve). Boucherian joined in that  
11 motion.

12 On November 10, 2009, the Kohan Group filed an opposition  
13 (Opposition). The Opposition requested that the Motion to  
14 Approve be continued so that the Kohan Group could complete  
15 discovery in the Namwest Bankruptcy. The Kohan Group asserted  
16 that pending litigation in the Namwest Bankruptcy was "poised to  
17 resolve the disputed validity of the Boucherian deeds of  
18 trust."<sup>14</sup> Furthermore, the Kohan Group alleged that "[n]one of  
19 the deeds of trust assigned by Namco to Boucherian were actually  
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21 <sup>14</sup> Ostensibly, the Kohan Group was referring to Adv. Pro.  
22 08-00926 because Adv. Pro. 08-00086 and the Counterclaim  
23 Litigation only related to Namwest's and the Kohan Group's claim  
24 of a purchase option of the Club Rio Property. Adv. Pro. 08-  
25 00926 alleged that the \$13 million all-inclusive note from NTL II  
26 was invalid for lack of consideration and as a fraudulent  
27 transfer. It did not allege the same for the \$27 million  
collaterally assigned note. As to the \$27 million note, Namwest  
simply sought a declaratory judgment that Boucherian took the  
\$27 million collaterally assigned deed of trust on the Club Rio  
Property subject to Namwest's claim to a purchase option.

1 supported by any consideration." As a result, the Kohan Group  
2 contended that the Settlement Agreement would "legitimize  
3 fraudulent liens and undermine" the resolution of the Namwest  
4 Bankruptcy litigation. Additionally, the Kohan Group alleged  
5 that the Settlement Agreement would have a "disproportionally  
6 devastating impact" on it.<sup>15</sup>

7 The Trustee and Boucherian each filed replies on November  
8 17, 2009. The Kohan Group filed an ex-parte motion for a  
9 continuance of the hearing on November 19, 2009, which the  
10 Trustee and Boucherian opposed. The Kohan Group re-asserted its  
11 position that it needed a continuance in order to conduct  
12 discovery regarding the validity of the notes and deeds of trust  
13 included in the Collateral Assignments.

14 The Trustee and Boucherian each filed extensive evidentiary  
15 objections to the declarations submitted by the Kohan Group with  
16 the Opposition, contending that many statements contained in the  
17 declarations were irrelevant, lacked foundation, or were improper  
18 legal opinions or conclusions.

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20 <sup>15</sup> This contention is based on its position as a disputed  
21 equity member of NTL. If, as the Kohan Group contends, there was  
22 no consideration for the collaterally assigned \$27 million note  
23 and deed of trust, then the only obligation secured by the Club  
24 Rio Property would be the \$2.78 million note. If the Trustee  
25 could avoid the \$27 million Collateral Assignment, he could  
26 foreclose on the \$2.78 million deed of trust, thereby leaving  
27 equity in the Club Rio Property to which the Kohan Group's  
disputed membership interest would attach. However, this  
position is inconsistent with one of a creditor of the Debtor's  
estate. Creditors of the estate would want to monetize, not  
avoid, the \$27 million note and deed of trust.

1 The bankruptcy court held a hearing on the Motion to Approve  
2 on November 24, 2009. At the hearing, the bankruptcy court  
3 denied the motion to continue, sustained the Trustee's and  
4 Boucherian's evidentiary objections and approved the Settlement  
5 Agreement. The bankruptcy court entered its findings of fact and  
6 conclusions of law along with its order approving the Settlement  
7 Agreement on February 21, 2010 (the Settlement Order). The  
8 Settlement Order did not validate any of the Collateral  
9 Assignments or rights of non-parties to the Settlement Agreement.

10 The Kohan Group filed a motion to alter or amend the  
11 Settlement Order on March 8, 2010 (the Motion to Reconsider).  
12 The Kohan Group argued that it had discovered new evidence to  
13 disprove the Trustee's assertion that he had investigated and  
14 determined that there was no basis to avoid the Collateral  
15 Assignments.<sup>16</sup> The Kohan Group contended its evidence  
16 demonstrated that the Collateral Assignments were invalid because

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17  
18 <sup>16</sup> The Trustee could challenge the validity of the  
19 Collateral Assignments if he discovered that Boucherian did not  
20 provide consideration for the Namco Note, if the Collateral  
21 Assignments were preferences, fraudulent transfers, or improperly  
22 perfected. No one has alleged that Boucherian did not loan the  
23 Debtor money. The Trustee determined that given the timing, he  
24 could not avoid the \$27 million collaterally assigned note as a  
25 preference, nor could he avoid the Collateral Assignments as a  
26 fraudulent transfer. Additionally, the Trustee found that  
27 Boucherian was perfected because she was in physical possession  
of all the Collateral Assignments. At oral argument on appeal,  
the Trustee reiterated that he had investigated hundreds of  
transfers by the Debtor and while much of the Debtor's  
documentation was poor, the transactions between the Debtor and  
Boucherian were tracked on ledgers and offered no basis to object  
or avoid the \$16.5 million claim or Namvar guaranty.

1 the Debtor did not provide consideration to NTL or NTL II, and  
2 that Boucherian could not be a holder in due course because she  
3 took the Collateral Assignments with actual knowledge of the  
4 Kohan Group's disputed equity interest.<sup>17</sup>

5 Boucherian filed an opposition to the Motion to Reconsider  
6 on March 15, 2010, which the Trustee joined. The Kohan Group  
7 filed supplemental declarations, a reply, and evidentiary  
8 objections to declarations contained in Boucherian's and the  
9 Trustee's oppositions. On March 30, 2010, the bankruptcy court  
10 entered an order denying the Motion to Reconsider  
11 (Reconsideration Order). The Kohan Group timely appealed.

12 On April 16, 2010, the Kohan Group filed a motion with the  
13 Bankruptcy Appellate Panel (BAP) requesting a stay pending  
14 appeal. On April 19, 2010, the BAP denied the motion. On August  
15 4, 2010, the Trustee and Boucherian filed with the BAP a joint  
16 motion to dismiss the appeal as moot. The Kohan Group opposed  
17 the motion on August 27, 2010. The Panel has elected to address  
18 the motion to dismiss in this Memorandum Decision.

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21 <sup>17</sup> The issue of the validity of the notes between the Debtor  
22 and NTL II were not at issue in the Settlement Agreement.  
23 Furthermore, the title report for the Club Rio Property showed  
24 that the Kohan Group recorded a lis pendens against the Club Rio  
25 Property concurrent with the filing of its state court litigation  
26 in April 2008. However, Boucherian had previously recorded the  
27 collateral assignment of the \$27 million deed of trust secured by  
the Club Rio Property on March 24, 2008. The Kohan Group  
released the lis pendens voluntarily prior to the date of the  
Settlement Agreement.

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## II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(A). We address our jurisdiction under 28 U.S.C. § 158 below.

## III. ISSUES

1. Is the appeal moot?
2. Did the bankruptcy court abuse its discretion in approving the Settlement Agreement?
3. Did the bankruptcy court abuse its discretion in denying the Kohan Group's Motion to Reconsider?

## IV. STANDARDS OF REVIEW

Whether the appeal is moot is a question of law that we address de novo. Menk v. Lapaglia (In re Menk), 241 B.R. 896, 903 (9th Cir. BAP 1999).

The bankruptcy court's approval of a compromise or settlement agreement is reviewed for an abuse of discretion. Debbie Reynolds Hotel & Casino, Inc. v. Calstar Corp., Inc. (In re Debbie Reynolds Hotel & Casino, Inc.), 255 F.3d 1061, 1065 (9th Cir. 2001). A bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. Zimmerman v. City of Oakland, 255 F.3d 734, 737 (9th Cir. 2001).

In determining whether the bankruptcy court abused its discretion, we first "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal rule, we then determine whether its "application of the correct legal standard [to the facts] was (1) illogical, (2) implausible,



1 or (3) without support in inferences that may be drawn from the  
2 facts in the record." Id. (internal quotation marks omitted).  
3 Therefore, if the bankruptcy court did not identify the correct  
4 legal rule, or its application of the correct legal standard to  
5 the facts was illogical, implausible, or without support in  
6 inferences that may be drawn from the facts in the record, then  
7 the bankruptcy court has abused its discretion. Id.

## 8 V. DISCUSSION

### 9 A. Mootness

10 We lack jurisdiction to hear a moot appeal. I.R.S. v.  
11 Pattullo (In re Pattullo), 271 F.3d 898, 900 (9th Cir. 2001). An  
12 appeal is moot if we cannot fashion relief in the event of  
13 reversal. Church of Scientology of Cal. v. United States,  
14 506 U.S. 9, 12 (1992); United States v. Tanoue, 94 F.3d 1342,  
15 1344 (9th Cir. 1996) (appeal is moot when events occur that make  
16 it impossible for the appellate court to grant "any effectual  
17 relief whatever."). This is considered constitutional mootness,  
18 which

19 derives from constitutional limitations on the federal  
20 court to adjudicate only actual cases and live  
21 controversies. A live case or controversy exists . . .  
22 if the parties have an interest in the litigation. But  
23 that interest in the outcome of the case dissolves, and  
24 an appeal is constitutionally moot, . . . if it is  
25 impossible to grant relief.

24 Clear Channel Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R.  
25 25, 33 (9th Cir. BAP 2008) (internal citations omitted).

26 It is difficult to see what relief might be granted if we  
27 were to reverse the Settlement Order since after the Settlement

1 Order was entered, the Trustee (1) subordinated its \$2.78 million  
2 deed of trust to Boucherian's \$27 million deed of trust,  
3 (2) obtained title to the Club Rio Property from NTL,  
4 (3) foreclosed on the \$2.78 million deed of trust, (4) assigned  
5 its interest in the \$27 million deed of trust to Boucherian, and  
6 (5) sold the Club Rio Property to Boucherian.<sup>18</sup> Boucherian and  
7 the Trustee executed and recorded a number of documents necessary  
8 to effectuate the sale and those documents and recordations  
9 required significant expenditures by both the Trustee and  
10 Boucherian.<sup>19</sup>

11 Additionally, Boucherian paid the Trustee \$2.2 million and  
12 entered (with significant expenditures) into agreements with  
13 several third parties to complete entitlements on the Club Rio  
14 Property, change the zoning, and market it for sale.<sup>20</sup>

15 Furthermore, there was a dam failure at the lake adjacent to the  
16 Club Rio Property and a fire, both of which caused damage to the  
17 Club Rio Property and required Boucherian to incur additional  
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19 <sup>18</sup> The Kohan Group has appealed the order approving the  
20 sale. BAP No. CC-10-1257.

21 <sup>19</sup> For example, the Trustee has paid: (1) \$12,400 for escrow  
22 fees; (2) \$7,600 for title insurance; and (3) \$75,000 in  
23 settlement with NTL.

24 <sup>20</sup> These include: (1) payment of an advance of \$68,000 for  
25 completion of entitlements and zoning changes; (2) insurance  
26 premiums; (3) costs associated with clean up and evictions;  
27 (4) \$220,000 for county tax assessments; (5) costs associated  
with marketing, listing and selling the Club Rio Property; and  
(6) unspecified amounts to repair damages from flooding and fire.  
Additionally, Boucherian released her \$9.5 million claim against  
the Debtor and her \$16.5 million guaranty claim against Namvar.

1 costs to repair. If we were to reverse the Settlement Order,  
2 title would return to NTL but the Club Rio Property is no longer  
3 the same property it was before the Settlement Agreement.

4 The Kohan Group argues that any money spent by Boucherian in  
5 connection with the Club Rio Property could be easily recovered  
6 and returned. This argument is disingenuous. Boucherian has  
7 paid a number of third parties for expenses related to the Club  
8 Rio Property including taxes and expenses incurred as a result of  
9 flood and fire damage. The Kohan Group fails to explain what  
10 jurisdiction the bankruptcy court would have to order those  
11 parties to return payments to Boucherian if we were to reverse  
12 the Settlement Agreement.

13 Additionally, consistent with the Settlement Agreement, a  
14 settlement agreement between Boucherian and Namvar was entered in  
15 the Namvar bankruptcy case that released Boucherian's  
16 approximately \$17 million claim on Namvar's guaranty of the  
17 Namvar Note. The order approving that settlement is final and  
18 not appealed and the creditors of the Namvar estate have relied  
19 on that finality.<sup>21</sup>

20 The November 2009 Agreement (negotiated at the same time as  
21 the Settlement Agreement) was entered into by Boucherian, Namwest  
22 and NTL II in conjunction with and in reliance on this Settlement  
23 Agreement so that the issues regarding all the Collateral

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24  
25 <sup>21</sup> The bankruptcy court's Findings of Fact and Conclusions  
26 of Law that support the settlement between Boucherian and Namvar  
27 are identical to those entered in the Debtor's bankruptcy case  
supporting the Settlement Agreement.

1 Assignments would be fully resolved. The order approving that  
2 agreement is final.

3 Thus, the appeal is constitutionally moot and we lack  
4 jurisdiction over the aspects of the bankruptcy court's orders  
5 that affect third parties not parties to this appeal. As to  
6 those aspects of the order that involve only the parties to the  
7 appeal, the appeal is equitably moot. The doctrine of equitable  
8 mootness has been applied when the appellant has failed to obtain  
9 a stay and although relief may be possible, the ensuing  
10 transactions are too complex or difficult to unwind.<sup>22</sup> In re PW,  
11 LLC, 391 B.R. at 33. "Ultimately, the decision whether to  
12 unscramble the eggs turns on what is practical and equitable."  
13 Id. quoting Baker & Drake, Inc. v. Pub. Serv. Comm'n (In re Baker  
14 & Draker, Inc.), 35 F.3d 1348, 1352 (9th Cir. 1994).

15 As discussed, the changes that have taken place since the  
16 Settlement Order was entered are numerous. Third parties,  
17 including escrow and taxing agencies, NTL, Namwest, NTL II,  
18 Namvar and Namvar's creditors have all entered into transactions  
19 in reliance on the Settlement Order.

20 There is no question that the November 2009 Agreement is  
21 final and, therefore, the sale of the Wilde Property and  
22 validation of the Collateral Assignments secured by the Wilde  
23 Property cannot possibly be undone. As to the Club Rio Property,  
24 events have transpired since the Settlement Order and many third  
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26 <sup>22</sup> Equitable mootness is not a question of jurisdiction but  
27 of prudence.

1 parties have either acted in reliance on the Settlement Agreement  
2 or have been affected by the Settlement Agreement. Therefore,  
3 because this case "present[s] transactions that are so complex or  
4 difficult to unwind," the doctrine of equitable mootness applies.  
5 Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d 923, 932  
6 (9th Cir. 1999). The appeal is moot.

7 However, in the event we are mistaken in our conclusion that  
8 the appeal is moot, the appeal nevertheless fails on its merits.

9 **B. The Settlement Order**

10 Rule 9019(a) provides that the bankruptcy court may approve  
11 a compromise or settlement upon a motion of the trustee and after  
12 a hearing on twenty-one days' notice to all creditors and the  
13 U.S. Trustee. Rule 2002(a)(3).<sup>23</sup> Compromises are favored in  
14 bankruptcy because they avoid the expenses and burdens associated  
15 with litigation. Martin v. Kane (In re A&C Props.), 784 F.2d  
16 1377, 1380-81 (9th Cir. 1986). Therefore, the bankruptcy court  
17 has "great latitude" in approving compromises and settlements.  
18 Woodson v. Fireman's Fund Ins. Co. (In re Woodson), 839 F.2d 610,  
19 620 (9th Cir. 1988). Nevertheless, the bankruptcy court may only  
20 approve a compromise if it is satisfied that its terms are "fair,  
21 reasonable and equitable." In re A&C Props., 784 at 1381. To  
22 determine whether a settlement is fair and reasonable, the  
23 bankruptcy court must consider:

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26 <sup>23</sup> At the time the Motion to Approve was filed, Rule 2002  
27 required only 20 days notice. The rule was amended to 21 days,  
effective December 1, 2009.

1 (a) the probability of success in the litigation;  
2 (b) the difficulties, if any, to be encountered in the  
3 matter of collection, (c) the complexity of the  
4 litigation involved, and the expense, inconvenience and  
5 delay necessarily attending it; (d) the paramount  
6 interest of the creditors and a proper deference to  
7 their reasonable views in the premises.

8 Id.

9 The Trustee, as the party proposing the Settlement  
10 Agreement, had the burden of demonstrating that the Settlement  
11 Agreement was fair, reasonable and equitable. Id. The Trustee  
12 asserted that the estate would benefit if it could realize  
13 monetary value from the \$27 million deed of trust against the  
14 Club Rio Property. The Trustee determined that the estate would  
15 be unsuccessful in avoiding Boucherian's \$27 million collaterally  
16 assigned note and trust deed because she was in physical  
17 possession of the Collateral Assignments and asserted she was a  
18 holder in due course who took the Collateral Assignments in good  
19 faith for value.

20 Furthermore, the Trustee determined that the estate would  
21 unlikely be able to enforce the \$27 million note against the Club  
22 Rio Property because NTL had potentially valid defenses, such as  
23 its assertion that the note lacked consideration. Therefore, the  
24 probable payment by Boucherian of \$2.2 million (and possible  
25 payment of \$6.55 million) along with the release of her \$9.5  
26 million claim against the estate under the Settlement Agreement  
27 was a beneficial compromise for the estate and its creditors.

The Kohan Group argued the Settlement Agreement was not fair  
or equitable because it "effectively legitimize[d] fraudulent

1 liens." The Kohan Group claimed that the underlying debt  
2 obligations supporting the Collateral Assignments were obtained  
3 without consideration. The Kohan Group alleged that it was  
4 prejudiced by the Settlement Agreement and contended that it  
5 could offer the estate a better deal by paying \$2.3 million for  
6 the Club Rio Property.

7 "[W]hile creditors' objections to a compromise must be  
8 afforded due deference, such objections are not controlling, and  
9 while the court must preserve the rights of creditors, it must  
10 also weigh certain factors to determine whether the compromise is  
11 in the best interest of the bankrupt estate." Id. at 1382  
12 (internal citations omitted). As part of its decision, the  
13 bankruptcy court may give weight to the opinions of the trustee,  
14 the parties and their attorneys. Id. at 1384.

15 Here, the bankruptcy court considered the probability of  
16 success in litigation, the complexity of the issues involved, the  
17 difficulties the Debtor would have collecting on the underlying  
18 notes and deeds of trust and, ultimately what would be in the  
19 best interests of the creditors.

20 The bankruptcy court found that rather than the Trustee  
21 engaging in potentially unsuccessful costly litigation (1) with  
22 Boucherian over the Collateral Assignments, (2) with NTL  
23 regarding the validity of its \$27 million note in favor of the  
24 Debtor, or (3) over the value of the Club Rio Property, it would  
25 be easier, less expensive, and more beneficial to the estate if  
26 the Trustee entered into the Settlement Agreement because he  
27 would likely net the estate more money than it otherwise could

1 receive - \$2.2 million and possibly \$6.55 million - and the  
2 release of a \$9.5 million claim.

3         The bankruptcy court found that the Debtor would have  
4 difficulty enforcing the \$27 million note and trust deed against  
5 the Club Rio Property because it was unclear if there was  
6 adequate evidence to support the increase of NTL's obligations to  
7 the Debtor from \$2.78 million to \$27 million. It found that  
8 Boucherian had demonstrated her financial ability to perform  
9 under the terms of the Settlement Agreement. Additionally, it  
10 found that any offer presented by the Kohan Group would not  
11 immediately afford the estate the same releases or benefit  
12 because even if the Kohan Group paid the same amount, it could  
13 not provide the estate with a release of Boucherian's  
14 \$9.5 million claim. Thus, the bankruptcy court found that the  
15 transfer of the Collateral Assignments and the ultimate sale of  
16 the Club Rio Property to Boucherian was in the best interest of  
17 the estate and its creditors because it maximized value to the  
18 estate. Additionally, the Settlement Agreement would benefit  
19 creditors of Namvar's bankruptcy estate because Boucherian's  
20 claim on the \$17 million guaranty of the Namvar Note would be  
21 released.

22         At the hearing on the Motion to Approve, the bankruptcy  
23 court correctly determined that the Kohan Group's allegations of  
24 fraud were not relevant to the Settlement Agreement because they  
25 related to the Kohan Group's contention that the \$13 million all-  
26 inclusive note and deed of trust secured by the Wilde Property  
27 was unsupported by consideration; not that Boucherian took the



1 Collateral Assignments without providing any consideration.<sup>24</sup>

2 The Kohan Group's opposition to the Settlement Agreement was  
3 based on the conflation of its position as a disputed equity  
4 member of NTL with its position as creditor of the bankruptcy  
5 estate (which is tenuous at best).<sup>25</sup> The Kohan Group's attack on  
6 the underlying obligations between the Debtor and either NTL or  
7 NTL II does little in the way of making the Settlement Agreement  
8 less attractive to the Debtor's creditors since the Settlement  
9 Agreement would provide the estate the means to convert  
10 potentially worthless notes into a cash payment of \$2.2 - \$6.55  
11 million. If the Trustee were only able to foreclose against the  
12 Club Rio Property on the \$2.78 million deed of trust, there would  
13 likely be equity for the Kohan Group's disputed equity interest.  
14 However, it is difficult to see how it would benefit the other  
15 creditors of the Debtor to have a \$27 million asset reduced to  
16 \$2.78 million.

17 The Kohan Group did not challenge the Debtor's obligation to  
18 Boucherian, except to suggest, in its Motion to Reconsider, that

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20 <sup>24</sup> As noted above, the \$13 million all-inclusive note that  
21 was collaterally assigned to Boucherian became unassailable as a  
22 result of the February 2009 Agreement and the November 2009  
23 Agreement.

24 <sup>25</sup> The Kohan Group has filed a proof of claim in the Namco  
25 case, although it was not included in the record on appeal. The  
26 Debtor denies that the Kohan Group is a creditor, and the Trustee  
27 and Boucherian have challenged its standing to object to the  
Settlement Agreement. However, we decline to mine the bankruptcy  
court docket to determine whether the Debtor has objected to the  
proof of claim, and assume (without deciding) that the Kohan  
Group has standing to object to the Settlement Agreement as an  
unsecured creditor of the Debtor.

1 Boucherian may have been a "straw man" in a fraudulent credit  
2 enhancement scheme led by Namvar. However, the alleged credit  
3 enhancement scheme involved the obligations from NTL and NTL II  
4 to the Debtor, so even if such a scheme existed, it would not  
5 provide a basis for setting aside the Namco Note.

6 The record demonstrates that the bankruptcy court had "spent  
7 a lot of time" on the issue. Hr'g Tr. (November 24, 2009) at  
8 3:17-18. It took an active role at the hearing on the Motion to  
9 Approve to inquire about the Trustee's proposals and the Kohan  
10 Group's objections. The bankruptcy court made an informed and  
11 independent decision to approve the Settlement Agreement  
12 consistent with the analysis required in the Ninth Circuit by A&C  
13 Props. and Woodson. Accordingly, the bankruptcy court did not  
14 abuse its discretion in approving the Settlement Agreement.

15 1. Request For Continuance

16 The Kohan Group requested a continuance of the Motion to  
17 Approve because (1) the Settlement Agreement was lengthy and  
18 complex; (2) it needed time to conduct discovery in the  
19 Counterclaim Litigation to address the Trustee's assertion that  
20 there was no valid basis to avoid the Collateral Assignments.

21 A bankruptcy court's denial of a continuance and its  
22 discovery decisions are reviewed for an abuse of discretion.  
23 Hasso v. Mozsgai (In re La Sierra Fin. Servs., Inc.), 290 B.R.  
24 718, 726 (9th Cir. BAP 2002). Four factors are considered in  
25 reviewing a denial of a motion to continue: (1) diligence of the  
26 requesting party; (2) usefulness of the continuance;  
27 (3) inconvenience to the court and the other side; and

1 (4) prejudice from the denial. Id. at 734. The denial of a  
2 continuance for purposes of discovery is not disturbed unless the  
3 party shows "actual and substantial prejudice." Martel v. County  
4 of Los Angeles, 56 F.3d 993, 995 (9th Cir. 1995) (en banc).

5 The bankruptcy court found that the Settlement Agreement was  
6 straight-forward and not complex. Furthermore, the bankruptcy  
7 court found that there was no assurance that anything would be  
8 accomplished by the end of the Kohan Group's discovery that would  
9 affect whether the Settlement Agreement was beneficial to the  
10 estate and its creditors. We see no error in its findings. As  
11 noted above, the Counterclaim Litigation was about the Kohan  
12 Group's alleged equity interest in NTL II and tangentially about  
13 the validity of the \$13 million note, not about the Namco Note.  
14 Discovery in the Counterclaim Litigation, therefore, would have  
15 been of little use in evaluating the Trustee's assertions that  
16 the Collateral Assignments were valid.

17 Indeed, the Kohan Group did not indicate how additional time  
18 and investigation would yield evidence to challenge the Namco  
19 Note or the Collateral Assignments that secured it. It only  
20 continued to assert that discovery in the Counterclaim Litigation  
21 (to which the Debtor and Boucherian were not parties) would yield  
22 evidence to contest the validity of the debt obligations between  
23 NTL II and the Debtor based on its allegation that the Debtor did  
24 not provide consideration for the notes and trust deeds that it  
25 then collaterally assigned to Boucherian.

26 Even if this were true, as we noted above, there would be no  
27 reasonable probability that the outcome (the approval of the

1 Settlement Agreement) would be different. See Id. First, the  
2 validity of the \$13 million Collateral Assignment was resolved by  
3 the February 2009 Agreement and was not at issue in the  
4 Settlement Agreement. Second, it was more beneficial for the  
5 estate to enter into the Settlement Agreement because the  
6 Settlement Agreement provided the estate with money and a release  
7 of a significant claim for an asset (the \$27 million note and  
8 deed of trust), which the Kohan Group argued was unenforceable.

9 Because the bankruptcy court's findings are supported by the  
10 record and are not illogical or implausible, the bankruptcy court  
11 did not abuse its discretion in denying the Kohan Group's request  
12 to continue the Motion to Approve.

13 2. Evidentiary Objections

14 Evidentiary rulings are reviewed for an abuse of discretion.  
15 Puget Sound Energy, Inc. v. Pac. Gas & Elec. Co. (In re Pac. Gas  
16 & Elec. Co.), 271 B.R. 626, 645 (N.D. Cal. 2002). The Kohan  
17 Group argues that the bankruptcy court abused its discretion in  
18 sustaining the Trustee's and Boucherian's evidentiary objections  
19 "without any analysis or discussion . . . and without allowing  
20 the Kohan Group to respond." Appellants' Opening Br. at 18.  
21 There is no merit in the Kohan Group's claims that it was not  
22 given an opportunity to respond. The bankruptcy court sustained  
23 the evidentiary objections during the hearing on the Motion to  
24 Approve before the Kohan Group began their argument. The Kohan  
25 Group had ample opportunity to address the bankruptcy court's  
26 ruling regarding the evidentiary objections in its oral argument,  
27 but it did not do so.

1           There is no error unless the exclusion of evidence is  
2 prejudicial. See Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773  
3 (9th Cir. 2002); Pau v. Yosemite Park & Curry Co., 928 F.2d 880,  
4 887 (9th Cir. 1991). A substantial right of a party must be  
5 affected before an evidentiary ruling is regarded as error. Fed.  
6 R. Evid. 103(a). The evidence contained in the Kohan Group's  
7 declarations was not material because it did not address the  
8 validity of the Namco Note and the Collateral Assignments. The  
9 evidence that was excluded largely concerned the Kohan Group's  
10 repeated allegations of fraud with respect to the notes and deeds  
11 of trust pledged in the Collateral Assignments, particularly to  
12 the notes and deeds of trust secured by the Wilde Property. That  
13 evidence may arguably be relevant to the Kohan Group's claim to  
14 an equity interest in the makers of the pledged notes to the  
15 Debtor but it has no relevance to the issues being settled by the  
16 Settlement Agreement. The Kohan Group, as a creditor of the  
17 Debtor's estate, was not prejudiced by the omission of the  
18 evidence. Accordingly, the bankruptcy court did not abuse its  
19 discretion in sustaining the Trustee's and Boucherian's  
20 evidentiary objections.

21 **C. The Reconsideration Order**

22           The Kohan Group moved for reconsideration of the bankruptcy  
23 court's order approving the settlement agreement. The Kohan  
24 Group based its motion on Fed. R. Civ. P. 59(e). The bankruptcy  
25 court has wide discretion in deciding whether to reconsider its  
26 own judgment or orders. A motion for reconsideration should not  
27 be granted absent highly unusual circumstances. 389 Orange St.

1 Partners v. Arnold, 179 F.3d 656, 665 (9th Cir. 1999). Amendment  
2 or alteration of a judgment is appropriate under Fed. R. Civ.  
3 P. 59(e) only if the court (1) is presented with newly discovered  
4 evidence that was not available at the time of the original  
5 hearing, (2) committed clear error or made an initial decision  
6 that was manifestly unjust, or (3) there is an intervening change  
7 in controlling law. Id.; Zimmerman v. City of Oakland, 255 F.3d  
8 at 740.

9 If the motion is based on newly discovered evidence, the  
10 movant must show that: (1) the evidence was discovered after the  
11 hearing; (2) the exercise of due diligence would not have  
12 resulted in the evidence being discovered at an earlier stage;  
13 and (3) the newly discovered evidence is of such magnitude that  
14 producing it earlier would likely have changed the outcome of the  
15 case. In re La Sierra Fin. Serv., Inc., 290 B.R. at 733 (citing  
16 Defenders of Wildlife v. Bernal, 204 F.3d 920, 928-29 (9th Cir.  
17 2000)).

18 The Kohan Group asserted that the new evidence it discovered  
19 revealed that "Namvar arranged to place bogus deeds of trust [on  
20 property] for the purpose of 'credit enhancement' or 'collateral  
21 enhancement' . . . to enhance Namvar's balance sheet.  
22 Appellants' Opening Br. at 29. The Kohan Group contended that it  
23 had evidence of Namvar's fraudulent scheme and asserted that it  
24 had evidence to demonstrate Boucherian's signature on some of the  
25 documents related to her \$9.5 million claim against the Debtor  
26 "appeared to be fraudulent." Thus, the Kohan Group suggested  
27 that the Trustee failed to "examine the possibility that . . .

1 Boucherian might only have been used as a straw [sic] to launder  
2 Namvar's ill-gotten gains." Motion to Reconsider at 10. As  
3 discussed above, even if this evidence were more than  
4 speculative, none of it would make the Settlement Agreement any  
5 less attractive to the estate or its creditors.

6 Additionally, the Kohan Group asserted that the bankruptcy  
7 court's approval of the Settlement Agreement was manifestly  
8 unjust because (1) the request for a continuance was denied;  
9 (2) the Settlement Agreement was tantamount to allowing  
10 Boucherian to credit bid her disputed lien; (3) the Settlement  
11 Agreement did not provide the Kohan Group with adequate  
12 protection; (4) the bankruptcy court failed to articulate why the  
13 evidentiary objections were sustained; and (5) the Kohan Group  
14 proposed a better offer for the estate.

15 A motion for reconsideration is not permitted to rehash the  
16 same arguments made the first time or to simply express an  
17 opinion that the bankruptcy court was wrong; or, to assert new  
18 legal theories that could have been raised before the initial  
19 hearing. In re Greco, 113 B.R. 658, 664 (D. Haw. 1990), aff'd  
20 and remanded, Greco v. Troy Corp., 952 F.2d 406 (9th Cir. 1991).  
21 The Kohan Group provided no new argument as to why it was  
22 manifestly unjust for the bankruptcy court to deny the request to  
23 continue the Motion to Approve or to explain why sustaining the  
24 evidentiary objections was manifestly unjust.

25 In its Motion to Reconsider, the Kohan Group simply asserted  
26 that "a blanket ruling is improper and affords no meaningful  
27 basis for review." Motion to Reconsider at 18. However, it did

1 not argue that the ruling prejudiced it in any way.

2       The Kohan Group argued, for the first time in the Motion to  
3 Reconsider, that the bankruptcy court committed clear error  
4 because the Settlement Agreement improperly allowed Boucherian,  
5 as a holder of a purportedly disputed secured claim, to exercise  
6 § 363(k) credit bid rights. To the extent there is any merit in  
7 that assertion, it should have been raised in the Kohan Group's  
8 Opposition. If it had been, it would not have prevailed because  
9 Boucherian does not hold a disputed claim. The Trustee did not  
10 dispute Boucherian's claim or object to it; and, the Kohan  
11 Group's objections to the Collateral Assignments was based on the  
12 validity of the underlying notes and deeds of trust rather than  
13 on objections to the Namco Note. Furthermore, there is no  
14 evidence that Boucherian exercised any credit bid rights.

15       Thus, the assertion that Boucherian exercised credit bid  
16 rights appears to be nothing more than an attempt by the Kohan  
17 Group to assert that its offer to pay the estate slightly more  
18 than the \$2.2 million that Boucherian agreed to pay was a "higher  
19 and better bid" that should have been accepted by the bankruptcy  
20 court in lieu of approving the Settlement Agreement. However,  
21 the Settlement Agreement was not a simple sale of estate assets.  
22 It was an agreement whereby Boucherian agreed to release her  
23 \$9.5 million claim and to pay the estate not less than  
24 \$2.2 million, subject to the occurrence of certain conditions  
25 including a sale/transfer to Boucherian of the Club Rio Property.  
26 As the bankruptcy court noted, the payment by the Kohan Group of  
27 \$2.3 million would not have provided the same benefits as the



1 Settlement Agreement because the Kohan Group could not release  
2 Boucherian's claims against the estate.<sup>26</sup>

3 The bankruptcy court also rejected the Kohan Group's  
4 argument, raised for the first time in its Motion to Reconsider,  
5 that it was entitled to adequate protection. The Kohan Group did  
6 not have an interest in the notes and deeds of trust pledged in  
7 the Collateral Assignments. Therefore, it was not entitled to  
8 adequate protection as a secured creditor under § 363(e). The  
9 Settlement Agreement did not involve the sale of any equity  
10 interests to Boucherian and left the Kohan Group's claims to such  
11 interests, if any, unaffected.<sup>27</sup>

12 The bankruptcy court found that the Kohan Group provided no  
13 cause to reconsider its Settlement Order. That finding was  
14 neither illogical, implausible, nor without support in the  
15 record. Accordingly, the bankruptcy court did not abuse its  
16 discretion in denying the Motion to Reconsider.

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19 <sup>26</sup> The Kohan Group fails to explain how Boucherian's payment  
20 of \$2.2 million and the release of her claims constituted an  
21 exercise of her credit bid rights as the holder of the Collateral  
22 Assignments. If, in fact she had credit bid her claim as the  
23 holder of the Collateral Assignments, then the amount she paid  
24 under the Settlement Agreement would have been not less than  
25 \$11.7 million (Boucherian's \$9.5 million claim secured by the  
26 Collateral Assignments plus the \$2.2 million) and the Kohan  
27 Group's offer did not exceed that amount.

<sup>27</sup> The Kohan Group has not asserted an equity interest in  
Namco.

1 **VI. CONCLUSION**

2 We DISMISS the appeal as moot. However, if we are incorrect  
3 in our determination that the appeal is moot, we would affirm the  
4 bankruptcy court's Settlement Order and Reconsideration Order.  
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