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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	OR-10-1523-JuClPa
	)		
THE MARSHALL GROUP, LLC,	)	Bk. No.	08-34585
	)		
Debtor.	)		
	)		
<hr/> MARK R. MARSHALL; CATHY JO	)		
MARSHALL,	)		
	)		
Appellants,	)		
	)		
v.	)	M E M O R A N D U M *	
	)		
THE MARSHALL GROUP, LLC;	)		
CONRAD MYERS, Trustee; UNITED	)		
STATES TRUSTEE,	)		
	)		
Appellees.	)		
<hr/>	)		

Argued and Submitted on October 20, 2011  
at Portland, Oregon

Filed - November 8, 2011

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

Honorable Randall L. Dunn, Bankruptcy Judge, Presiding

Appearances: Appellant Mark R. Marshall argued for himself  
and Cathy Jo Marshall pro se;  
Peter C. McKittrick, Esq., of Farleigh, Wada &  
Witt argued for Appellee Conrad Myers, Trustee.

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

1 Before: JURY, CLARKSON,\*\* and PAPPAS Bankruptcy Judges.  
2

3 At issue in this appeal is the revocation of a confirmation  
4 order. The order confirming the second amended plan of  
5 reorganization dated June 21, 2010 (as modified September 7,  
6 2010) (the "Plan") filed by appellee, Conrad Myers, the  
7 chapter 11<sup>1</sup> trustee, was entered on September 30, 2010.  
8 Appellants, Mark R. Marshall and Cathy Jo Marshall (the  
9 "Marshalls"), did not appeal that order or move to stay  
10 implementation of the Plan. They subsequently moved for  
11 revocation of the order confirming the Plan under § 1144, which  
12 the bankruptcy court denied. The Marshalls now appeal that  
13 decision.

14 The effective date of the Plan was October 15, 2010 (the  
15 "Effective Date"). Since then, numerous transactions have been  
16 completed or implemented according to the Plan and distributions  
17 have commenced. As a result, we conclude that the Plan has been  
18 substantially consummated within the meaning of § 1101(2). We  
19 further conclude that we cannot fashion effective relief for the  
20 Marshalls on appeal and, even if we could, it would be  
21 inequitable to do so under these circumstances. Accordingly, we  
22 DISMISS this appeal as moot.  
23

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24 \*\* Hon. Scott C. Clarkson, Bankruptcy Judge for the Central  
25 District of California, sitting by designation.

26 <sup>1</sup> Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.  
28 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure and "Civil Rule" references are to the Federal Rules of  
Civil Procedure.

1           Alternatively, even if this appeal were not moot, we would  
2 AFFIRM the bankruptcy court's decision.

3   **I.   FACTS**

4           The facts leading up to the bankruptcy of The Marshall  
5 Group, LLC are not fully developed in the record, but are  
6 lengthy and complex. The Marshalls were the sole members of the  
7 Marshall Group, LLC. The Marshall Group, LLC was the surviving  
8 entity under a roll up consolidation agreement entered into on  
9 July 31, 2008, in contemplation of the filing of bankruptcy.  
10 The parties to that agreement were: (1) The Marshall Group,  
11 LLC; (2) Marshall Medical, LLC; (3) Lincoln City Immediate  
12 Health Care, LLC; (3) Redmond Immediate Health Care, LLC;  
13 (4) McMinnville Immediate Health Care, LLC; (5) Marshall  
14 McMinnville, LLC; and (6) M&CJ, LLC.

15           Through some of these entities, the Marshalls owned and  
16 developed commercial property, including several parcels which  
17 were located in the business district of McMinnville, Oregon  
18 (the "McMinnville Property"). At some point, the Marshalls  
19 hired Keeton-King Construction, Inc. ("KKC") to perform  
20 demolition and construction work on their various properties.  
21 The record shows that the Marshalls also entered into several  
22 transactions with Arland and Ima Jean Keeton (the "Keetons")  
23 which we describe below.

24           The Marshalls were also engaged in the health care business  
25 through their health care-named limited liability companies.

26 //  
27 //  
28 //

1 They operated urgent care clinics in Lincoln City,<sup>2</sup> McMinnville  
2 and Redmond, Oregon. The Marshalls apparently became involved  
3 in the health care business after they obtained a \$5 million  
4 business and industry conditional commitment from the United  
5 States Department of Agriculture to build two medical buildings  
6 in 2002. Under the terms of the commitment, one of the  
7 buildings had to be located in a rural area. Because the  
8 Marshalls' McMinnville Property did not meet that requirement,  
9 with the assistance of KKC, the Marshalls located property in  
10 Redmond, Oregon. In addition, construction of the buildings had  
11 to be completed within 540 days. Otherwise, the Marshalls would  
12 lose the loan guarantee which was a critical part of the project  
13 plan.

14 KKC was involved with the construction of the health care  
15 buildings on the McMinnville and Redmond properties. Numerous  
16 disputes arose between the Marshalls and KKC in connection with  
17 the development of the McMinnville Property. In late 2007, KKC  
18 filed a \$1.7 million construction lien claim against the  
19 McMinnville Property. Thereafter, KKC commenced an arbitration  
20 proceeding regarding construction related claims between the  
21 parties with respect to the lien. KKC made claims for unpaid  
22 work while the Marshalls alleged that the project took  
23 substantially longer than expected and far exceeded the  
24 contractually agreed upon construction costs. Presumably  
25 because of the extra costs and delays, the McMinnville Property  
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27  
28 <sup>2</sup> The Lincoln City clinic was closed prior to debtor's  
bankruptcy filing.

1 was at risk. The Marshalls' opening brief suggests foreclosure  
2 of the McMinnville Property by the Keetons was imminent.<sup>3</sup>

3 In addition to the arbitration proceeding, the Keetons and  
4 KKC as plaintiffs, and the Marshalls, Marshall McMinnville, LLC,  
5 M&CJ, LLC, Endeavors Inc., Marshall Properties, LLC, The  
6 Marshall Group, LLC, and Lake Plaza, LLC, as defendants, were  
7 parties in a Yamhill County Circuit Court proceeding. The  
8 parties' dispute in the circuit court proceeding involved, among  
9 other things, breach of contract and foreclosure of trust  
10 deeds.<sup>4</sup>

#### 11 **Bankruptcy Events**

12 On September 4, 2008, The Marshall Group, LLC (which  
13 included Marshall McMinnville, LLC, M&CJ, LLC, McMinnville  
14 Immediate Health Care, LLC and Redmond Immediate Health Care,  
15 LLC) filed a chapter 11 petition. Schedule A showed that debtor  
16 owned real property valued at \$8,970,000 which consisted of  
17 commercial office buildings in McMinnville. On Schedule D,  
18 debtor listed secured debt of \$7,405,419, of which \$6,399,162  
19 was unsecured. Debtor listed \$490,528 in priority debt on  
20 Schedule E representing unpaid employment taxes. On Schedule F,

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21  
22 <sup>3</sup> The Marshalls state in their opening brief that they were  
23 in default with PremierWest Bank which had a consensual lien on  
24 the McMinnville Property. They then allege that the bank sold  
25 its interests in the loans collateralized by the McMinnville  
26 Property to the Keetons and then that the Keetons formed a new  
27 company, AJK, LLC to harbor that loan. There is no evidence in  
28 the record that supports these facts.

26 <sup>4</sup> We take judicial notice of the Keetons' motion for relief  
27 from stay at Dkt. No. 105 which contains this information. See  
28 Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R.  
227, 233 n.9 (9th Cir. BAP 2003).

1 debtor listed \$4,738,683 in unsecured debt.<sup>5</sup> At the time of  
2 debtor's filing, it was operating the two urgent care clinics  
3 located in McMinnville and Redmond. The clinics were suffering  
4 from issues with accounts receivable and cash flow. In  
5 addition, debtor was still involved in the arbitration  
6 proceeding with KKC over the construction costs associated with  
7 the McMinnville Property and the state court case was pending.

8 On September 23, 2008, the United States Trustee ("UST")  
9 appointed a committee of unsecured creditors (the "Committee").

10 **A. The KKC Adversary Proceeding**

11 On January 13, 2009, the Keetons, KKC and AJK Properties,  
12 LLC<sup>6</sup> (hereinafter we refer to these parties as "Keeton-King")  
13 filed an adversary proceeding against the Marshalls  
14 individually, debtor and other Marshall related entities. The  
15 complaint, which was over sixty pages long, alleged several  
16 claims for relief, including breach of contract, foreclosure of  
17 trust deeds, and foreclosure of assignment of rents.<sup>7</sup>

18 The background facts alleged in the complaint show that  
19 the Marshalls had personally executed two promissory notes in  
20 favor of Keeton-King for \$980,000 and that Keeton-King was owed  
21 for construction work performed on numerous properties,

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23 <sup>5</sup> A significant number of the unsecured creditors were  
24 patients who were owed refunds in small amounts.

25 <sup>6</sup> AJK Properties, LLC was evidently owned by the Keetons.

26 <sup>7</sup> We take judicial notice of the adversary complaint because  
27 it is relevant to this appeal. In re Atwood, 293 B.R. at 233  
28 n.9. It is unclear whether the Keeton-King adversary complaint  
was identical to the complaint that was filed prepetition in the  
Yamill County Circuit Court.

1 including on the McMinnville project (collectively, these debts  
2 are referred to in the complaint as the "Global Debt").  
3 Further, Keeton-King had loaned another Marshall related entity,  
4 M&CJ, LLC, \$1 million dollars (the "Million Dollar Loan"). When  
5 none of these debts were paid, the Keeton-King parties and the  
6 Marshalls and their related entities entered into an agreement  
7 in April 2007.<sup>8</sup> That agreement extended the due date for the  
8 Global Debt and the Million Dollar Loan to 120 days after the  
9 completion of the McMinnville project. In return, the Marshalls  
10 and their LLCs agreed to be jointly and severally liable to the  
11 Keeton-King parties. Finally, the complaint states that after  
12 the April 2007 agreement, the Keetons loaned the Marshalls and  
13 their LLCs additional sums which included making their interest  
14 payments to PremierWest Bank for the \$3.2 million loan obtained  
15 by debtor that had been increased to \$3.725 million.

16 All together, Keeton-King asserted claims which were  
17 secured by debtor's real property in excess of \$5 million and  
18 claimed to hold unsecured debts in the amount of \$6 million.  
19 Debtor and its co-defendants asserted counterclaims seeking  
20 \$1 million and attorney's fees.

21 //

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23 <sup>8</sup> In the Marshalls' opening brief, they maintain that they  
24 were "forced" into this new agreement which was written by the  
25 Keeton's CPA, Michael W. Holland, who actually had his license  
26 revoked at the time. The Marshalls state that Holland is now a  
27 convicted felon and has been reprimanded by the Oregon State Bar  
28 for generating the April 2 "agreement" and practicing law without  
a license. There is no evidence in the record that supports  
these statements. In any event, whether or not these alleged  
facts are true does not matter for purposes of this appeal.

1 **B. The Arbitration Proceeding Concludes**

2 On February 24, 2009, the bankruptcy court granted KKC  
3 relief from stay to continue with the arbitration proceedings.

4 In September 2009, KKC obtained an arbitration award  
5 against the Marshalls for \$2.7 million plus interest and  
6 attorney's fees. The final award was entered on October 6,  
7 2009. The Marshalls moved to vacate the award, arguing that KKC  
8 procured the award by fraud, corruption, or other undue means.  
9 The factual basis for the Marshalls' allegation was that KKC had  
10 assisted them in locating the property upon which to build their  
11 Redmond clinic. According to the Marshalls, it came to light  
12 that the Keetons were co-owners of other properties in the  
13 Redmond development where the clinic was eventually located.  
14 The Marshalls maintained that KKC had performed the construction  
15 work on the Redmond property first for the benefit of the  
16 Keetons and used construction loan proceeds from the Marshalls  
17 to make capital improvements to their properties.

18 The state court directed the arbitrators to reopen the case  
19 and hear the Marshalls' fraud arguments. After doing so, the  
20 arbitrators dismissed the Marshalls' motion to vacate and the  
21 state court entered a final order confirming the arbitration  
22 award in June 2010.

23 **C. The Appointment Of The Trustee**

24 On March 27, 2009, the UST filed a motion to dismiss or  
25 convert the bankruptcy case to one under chapter 7. The motion  
26 was mostly based on debtor's failure to pay taxes, including  
27 employment tax obligations, and alleged unauthorized payments  
28 going from debtor to Mr. Marshall and vice versa. Prior to the



1 hearing on that motion, the UST filed a motion to appoint a  
2 chapter 11 trustee in the event the court found dismissal or  
3 conversion inappropriate.

4 Numerous parties, including debtor's attorney, appeared at  
5 the April 28, 2009 preliminary hearing on the UST's two motions.  
6 After the preliminary hearing, and before the final hearing, the  
7 parties stipulated that (1) the UST's motion to dismiss would be  
8 denied, (2) the motion to convert was reserved pending the  
9 chapter 11 trustee's report, and (3) the UST's alternative  
10 motion to appoint a chapter 11 trustee was granted. The  
11 stipulation further provided that the chapter 11 trustee would  
12 promptly investigate the financial circumstances of debtor and  
13 file an initial report not later than four weeks after the date  
14 of acceptance of appointment. The court approved the  
15 stipulation and on May 8, 2009, Conrad Myers was appointed the  
16 trustee.

17 The trustee took several months to investigate the  
18 operations and cash flow from the urgent care clinics. In a  
19 July 31, 2009 report, the trustee concluded that the clinics  
20 could be turned around and eventually sold for the benefit of  
21 the creditors.<sup>9</sup> In addition, the trustee elected not to commit  
22 the limited cash flow of the estate to engage in costly  
23 litigation with KKC. Accordingly, the trustee engaged in  
24 negotiations with the Keeton-King parties to settle their  
25 secured and unsecured claims asserted in the adversary  
26

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27  
28 <sup>9</sup> We take judicial notice of the trustee's report which is  
at Dkt. No. 209. In re Atwood, 293 B.R. at 233 n.9.

1 proceeding.

2 In March 2010, the trustee filed a notice of intent to  
3 compromise the Keeton-King claims. At the same time, the  
4 trustee filed a notice of intent to sell the McMinnville  
5 Property to Keeton-King by credit bid, free and clear of liens.  
6 The trustee also filed a motion for an order authorizing debtor  
7 to enter into a lease agreement with Keeton-King so that it  
8 could continue to operate the McMinnville urgent care clinic on  
9 the property. Finally, the trustee filed a motion for a  
10 determination that the Keeton-King parties were good faith  
11 purchasers within the meaning of § 363(m).

12 The basic structure of the proposed settlement was as  
13 follows: Keeton-King would be allowed a \$4.5 million secured  
14 claim; the trustee would convey the McMinnville Property to  
15 Keeton-King free and clear of all liens; the trustee and Keeton-  
16 King would enter into a lease agreement for the McMinnville  
17 Property with Keeton-King as landlord and debtor as tenant;  
18 Keeton-King would be allowed an unsecured claim in an amount  
19 determined by the parties or the court; and the estate and  
20 Keeton-King would enter into a settlement agreement and mutual  
21 release.

22 The Marshalls filed an objection to the trustee's proposed  
23 sale and compromise, asserting that (1) there was a substantial  
24 basis for overturning the arbitration award; (2) the settlement  
25 improperly resolved the claims without adequate information;  
26 (3) the settlement included property that was not part of the  
27 estate; and (4) the value of the McMinnville Property exceeded  
28 the amount of any asserted claims by the Keeton-King parties.

1 Although they filed this objection, the Marshalls did not appear  
2 at the June 14, 2010 hearing, produce any witnesses or offer any  
3 evidence in support of their alleged value of the McMinnville  
4 Property.

5 The bankruptcy court approved the compromise, the lease  
6 arrangement, and the sale free and clear of liens and made a  
7 good faith determination by separate orders entered on June 28,  
8 2010. Those orders were not appealed and became final orders in  
9 the case.

10 **D. The Confirmation Of The Chapter 11 Trustee's Plan**

11 A week before entry of these orders, on June 21, 2010, the  
12 trustee filed the Second Amended Disclosure Statement and Plan  
13 of Reorganization. Generally, the Plan provided for the  
14 continued operation of the urgent care clinics so that they  
15 could eventually be sold for the benefit of the creditors.  
16 Through the Plan, the chapter 11 trustee was appointed as the  
17 Liquidating Trustee and was given the flexibility to exercise  
18 reasonable business judgment to determine when to sell the  
19 clinics.

20 Under the Plan, the Marshalls comprised the interest  
21 holders class (Class 7) - each held a 50% membership interest in  
22 debtor. They received no payment for their membership interests  
23 and, therefore, they were impaired under § 1124 and deemed to  
24 reject the plan under § 1126(g). Consequently, the Marshalls  
25 were not entitled to vote on the Plan.

26 Objections to the Plan were due on August 31, 2010. The  
27 Marshalls did not file an objection to the Plan or appear at the  
28 confirmation hearing. No testimony was taken during the

1 confirmation hearing and the bankruptcy court placed its  
2 findings and conclusions on the record, deciding that all the  
3 statutory requirements for confirmation of the Plan were met.  
4 On September 30, 2010, the court entered the order confirming  
5 the Plan. The Marshalls did not appeal the confirmation order  
6 or request a stay of implementation of the Plan.

7 On the Effective Date of the Plan (October 15, 2010),  
8 debtor became the reorganized debtor and the Marshalls'  
9 membership interests were canceled and reissued to the Marshall  
10 Group, LLC Liquidating Trust (the "Liquidating Trust"). The  
11 membership interests are currently held for the benefit of  
12 priority and unsecured creditors. Meanwhile, the clinics have  
13 been operating and payments have been made to administrative and  
14 priority claimants. In addition, the Plan vested certain  
15 secured and unsecured creditors (or creditor representatives)  
16 with the right to be on an advisory committee (the "Advisory  
17 Committee"). The Advisory Committee's role was to act in the  
18 capacity of a board of directors and oversee the Liquidating  
19 Trustee and manager of the day-to-day operations, Performance  
20 Improvement Resources. At the time of this appeal, the  
21 creditors, Liquidating Trustee, and Advisory Committee have been  
22 following the provisions of the Plan for over a year.

23 **E. The Marshalls' Motion To Deny And Revoke The Confirmation**  
24 **Order**

25 On October 15, 2010, the Marshalls filed their motion to  
26 deny and revoke the confirmation order confirming the trustee's  
27 Plan. In their motion, the Marshalls requested entry of an  
28 order that provided for (1) the immediate stay of the Plan

1 confirmation; (2) a hearing as provided under § 1144; and  
2 (3) restoration of the Marshalls' debtor-in-possession status or  
3 an immediate appointment of a new trustee.

4 The Marshalls alleged that the proper procedures were not  
5 used for their removal as debtors-in-possession;<sup>10</sup> that the  
6 trustee had not carried out his fiduciary responsibilities and  
7 had grossly mismanaged the businesses; and that the Plan had not  
8 been offered in good faith. Finally, the Marshalls alleged that  
9 the arbitration award was obtained by fraud and that there was  
10 an ongoing RICO criminal investigation concerning the actions of  
11 KKC and the Keetons during the arbitration proceedings.

12 The trustee filed an opposition, asserting that the  
13 Marshalls had to show that the trustee procured the confirmation  
14 order by actual fraud to succeed on their motion under § 1144.  
15 The trustee argued that the court should be "very cautious" in  
16 revoking the Plan when the Marshalls did not have a right to  
17 vote and none of the voting creditors who were allegedly  
18 defrauded joined or supported their motion.

19 At the December 1, 2010 hearing on the Marshalls'  
20 attorney's motion to withdraw, the court conducted a  
21 "preliminary hearing" on the Marshalls' motion to deny or revoke  
22 the Plan. The bankruptcy court clarified the issues and the  
23 corresponding evidence that was to be presented at the final  
24 evidentiary hearing scheduled for December 14, 2010. First, the  
25 bankruptcy court made clear that the arbitration award was a

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26  
27 <sup>10</sup> The Marshalls refer to themselves as debtors-in-  
28 possession, however, the Marshalls were not in bankruptcy  
themselves.

1 final judgment and any issues related to that award would not be  
2 considered. Mr. Marshall acknowledged to the court that the  
3 arbitration award was final and that they would not have another  
4 opportunity to present evidence to the bankruptcy court so that  
5 it could be overturned.

6 In addition, the bankruptcy court stated that it was  
7 treating the Marshalls' motion to revoke the plan as a motion  
8 under Civil Rule 60(b) because there was no testimony at the  
9 confirmation hearing.<sup>11</sup> The court further explained that the  
10 Marshalls had to show that the court was wrong in confirming the  
11 Plan under § 1129(a).

12 At the December 14, 2010 final evidentiary hearing,<sup>12</sup> the  
13 court reiterated that it would not take evidence regarding the  
14 Keeton-King transactions, whether related to the settlement of  
15

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16  
17 <sup>11</sup> It is unclear what subsection of Civil Rule 60(b) the  
18 court was referring to.

19 <sup>12</sup> Three days after the Marshalls filed their motion seeking  
20 revocation of the confirmation order, the trustee filed a motion  
21 to settle and compromise Keeton-King's unsecured claims which was  
22 also scheduled for hearing on December 14, 2010. The Marshalls  
23 objected to the trustee's proposed settlement. The bankruptcy  
24 court overruled the Marshalls' objection to the settlement at the  
25 December 14, 2010 hearing. The court advised the Marshalls that  
26 if they ever had specific documentation after the criminal  
27 proceedings were finished, they could move for reconsideration of  
28 the order at that time.

24 In their opening brief, the Marshalls state that an issue on  
25 appeal is whether the bankruptcy court erred in denying their  
26 objection to the trustee's motion to compromise Keeton-King's  
27 unsecured claims. However, they did not designate this order in  
28 their notice of appeal and that order has become a final order in  
the case. Evidently, in an abundance of caution (or oversight),  
the trustee's brief addresses the merits of this order. It is  
unnecessary for us to consider these arguments.

1 the adversary proceeding or in relation to the arbitration  
2 proceeding. The court then focused on whether the confirmation  
3 order was procured by fraud under § 1144.<sup>13</sup> Mr. Marshall was  
4 sworn in and testified, but the record reflects that his  
5 testimony was about the alleged fraud of Keeton-King. The court  
6 denied the Marshalls' motion by order entered December 15, 2010.  
7 The Marshalls timely appealed.

## 8 II. JURISDICTION

9 The bankruptcy court had jurisdiction over this proceeding  
10 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (L). As set forth  
11 below, we conclude that this appeal is moot. Therefore, we do  
12 not have jurisdiction over the moot appeal. I.R.S. v. Pattullo  
13 (In re Pattullo), 271 F.3d 898, 900 (9th Cir. 2001). If this  
14 appeal were not moot, we have jurisdiction under 28 U.S.C.  
15 § 158.

## 16 III. ISSUES

- 17 A. Whether this appeal is moot; and  
18 B. Whether the bankruptcy court erred by denying the  
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20 <sup>13</sup> This focus was inconsistent with the bankruptcy court's  
21 earlier directive to Mr. Marshall that it was treating the  
22 Marshalls' motion for revocation of the confirmation order under  
23 Civil Rule 60(b). In that regard, the court stated that  
24 Mr. Marshall had to demonstrate how the court's ruling was  
25 "wrong" rather than how the confirmation was "procured by fraud"  
26 within the meaning of § 1144. However, reliance on Civil Rule  
27 60(b) or § 1129(a) to revoke a confirmation order is contrary to  
28 Ninth Circuit law. Dale C. Eckert Corp. v. Orange Tree Assocs.,  
Ltd. (In re Orange Tree Assocs., Ltd.), 961 F.2d 1445, 1447  
(9th Cir. 1992). In any event, the court's error was harmless in  
light of our decision to dismiss this appeal as moot. See Rule  
9005 (incorporating Civil Rule 61 which states "At every stage of  
the proceeding, the court must disregard all errors or defects  
that do not affect any party's substantial rights.").

1 Marshalls' motion for revocation of the order confirming the  
2 Plan.

3 **IV. STANDARD OF REVIEW**

4 Mootness is a question of law reviewed de novo. S. Or.  
5 Barter Fair v. Jackson Cnty., Or., 372 F.3d 1128, 1133 (9th Cir.  
6 2004); Arnold & Baker Farms v. United States (In re Arnold &  
7 Baker Farms), 85 F.3d 1415, 1418 (9th Cir. 1996).

8 We review the bankruptcy court's decision to deny a motion  
9 to revoke an order of confirmation for an abuse of discretion.  
10 Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval),  
11 327 B.R. 493, 511 (1st Cir. BAP 2005); Varde Inv. Partners, L.P.  
12 v. Comair, Inc. (In re Delta Air Lines, Inc.), 386 B.R. 518  
13 (Bankr. S.D.N.Y. 2008). We follow a two-part test to determine  
14 objectively whether the bankruptcy court abused its discretion.  
15 United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir.  
16 2009). First, we "determine de novo whether the bankruptcy  
17 court identified the correct legal rule to apply to the relief  
18 requested." Id. Second, we examine the bankruptcy court's  
19 factual findings under the clearly erroneous standard. Id. at  
20 1262 n.20. We affirm the court's factual findings unless those  
21 findings are "(1) 'illogical,' (2) 'implausible,' or (3) without  
22 'support in inferences that may be drawn from the facts in the  
23 record.'" Id. (internal quotation marks omitted). If the  
24 bankruptcy court did not identify the correct legal rule, or its  
25 application of the correct legal standard to the facts was  
26 illogical, implausible, or without support in the record, then  
27 the bankruptcy court abused its discretion. Id.



1 V. DISCUSSION

2 A. Mootness

3 We consider first whether we have jurisdiction to entertain  
4 the Marshalls' appeal. The trustee asserts that this appeal is  
5 both constitutionally and equitably moot. As the party  
6 advocating mootness, the trustee bears the burden of proving  
7 that there is no effective relief for us to provide. Palmdale  
8 Hills Prop., LLC v. Lehman Comm. Paper, Inc. (In re Palmdale  
9 Hills Prop., LLC), 654 F.3d 868, 2011 WL 3320429, at \*4 (9th  
10 Cir. 2011).

11 We have previously described the constitutional and  
12 equitable mootness rules in United States v. Gould (In re  
13 Gould), 401 B.R. 415, 421 (9th Cir. BAP 2009), aff'd, 603 F.3d  
14 1100 (9th Cir. 2010):

15 Constitutional mootness derives from Article III of  
16 the United States Constitution, which provides that  
17 the exercise of judicial power depends on the  
18 existence of a case or controversy. The doctrine of  
19 constitutional mootness is essentially a recognition  
20 of Article III's prohibition against federal courts'  
21 issuing advisory opinions. While the Article III  
22 mootness doctrine has a 'flexible character,' it  
23 applies when events occur during the pendency of the  
24 appeal that make it impossible for the appellate court  
25 to grant effective relief. If no effective relief is  
26 possible, we must dismiss for lack of jurisdiction.

27 A variation of the mootness rule, the equitable  
28 mootness doctrine, applies when appellants 'have  
failed and neglected diligently to pursue their  
available remedies to obtain a stay' and circumstances  
have changed so as to 'render it inequitable to  
consider the merits of the appeal.'

These rules, which affect our jurisdiction, apply in a § 1144  
proceeding. See In re Delta Air Lines, 386 B.R. at 537 n.15  
citing Chang v. Servico, Inc. (In re Servico, Inc.), 161 B.R.  
297, 300-01 (S.D. Fla. 1993); Almeroth v. Innovative Clinical

1 Solutions, Ltd. (In re Innovative Clinical Solutions, Ltd.),  
2 302 B.R. 136, 141 (Bankr. D. Del. 2003) (applying equitable  
3 mootness to dismiss a case brought under § 1144); S.N. Phelps &  
4 Co. v. Circle K Corp. (In re Circle K Corp.), 171 B.R. 666,  
5 669-70 (Bankr. D. Ariz. 1994) (dismissing § 1144 complaint on  
6 grounds of mootness).

7 **1. This Appeal Is Constitutionally Moot**

8 We may dismiss an appeal based on mootness when a  
9 reorganization plan has been so substantially consummated that  
10 effective relief is no longer available. See Arnold & Baker  
11 Farms, 85 F.3d at 1419-20. “[S]ubstantial consummation means –  
12 (A) transfer of all or substantially all of the property  
13 proposed by the plan to be transferred has been transferred;  
14 (B) assumption by the debtor or by the successor to the debtor  
15 under the plan of the business or of the management of all or  
16 substantially all of the property dealt with by the plan; and  
17 (C) commencement of distribution under the plan.” § 1101(2).

18 Here, numerous critical transactions have been completed or  
19 implemented in accordance with the confirmed Plan:

20 • Prior to confirmation, the McMinnville Property was  
21 sold to Keeton-King in satisfaction of its secured claims  
22 pursuant to a court-approved compromise. The order approving  
23 that sale was entered by a separate order which long ago became  
24 a final order in this case. Part and parcel of that sale was  
25 Keeton-King’s agreement to lease the McMinnville Property to  
26 debtor so that it could continue to operate the McMinnville  
27 urgent care clinic on the property. That order also is final  
28 and cannot be undone. The sale and lease are critical to the

1 continued operation of the McMinnville urgent care clinic which  
2 itself is a crucial component of the Plan.

3 • On the Effective Date, the Marshalls' equity interests  
4 in debtor were extinguished and new membership interests were  
5 issued in the name of the Liquidating Trust for the benefit of  
6 the unsecured creditors.

7 • On the Effective Date, all assets of debtor revested  
8 in the reorganized debtor.

9 • On the Effective Date, the Liquidating Trustee  
10 implemented the Plan provisions for the post-confirmation  
11 operation of the clinics to increase their profitability and  
12 enhance their value in preparation for an eventual sale. The  
13 proceeds of the sale will be used to partially satisfy the  
14 claims of unsecured creditors in accordance with the Plan.<sup>14</sup> The  
15 day-to-day operations of the clinics continue to be performed by  
16 Performance Improvement Resources.

17 • On the Effective Date, an Advisory Committee was  
18 appointed. That committee has the authority to act as an  
19 advisory board of directors and has the power of oversight of  
20 the Liquidating Trustee and the manager of the reorganization  
21 debtor.

22 • Distributions have commenced. A distribution has been  
23 made to administrative and priority claims, including that of  
24 the Internal Revenue Service ("IRS"). There is approximately  
25 \$3,666 remaining on the IRS's secured claim.

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26  
27  
28 <sup>14</sup> The trustee had estimated that unsecured creditors would  
receive a return of approximately ten to twenty percent.

1           These transactions and the disbursements to administrative  
2 and priority creditors compel us to conclude that the Plan has  
3 been substantially consummated. However, substantial  
4 consummation by itself does not resolve the issue. We still  
5 must consider whether we could grant effective relief. First  
6 Fed. Bank of Cal. v. Weinstein (In re Weinstein), 227 B.R. 284,  
7 289 (9th Cir. BAP 1998).

8           The Marshalls have requested a myriad of novel forms of  
9 relief given the order on appeal. They "suggest" that (1) the  
10 chapter 11 bankruptcy was improper because the Keetons declared  
11 themselves managing members of debtor; (2) the Keetons had no  
12 standing in the case to join in the UST's motion for the  
13 appointment of a trustee; (3) the Keetons are not good faith  
14 purchasers and any such finding should be "revoked"; (4) the  
15 Keetons should be excluded from having any input into the  
16 chapter 11 case; (5) no payments are due to the Keetons from  
17 debtor; and (6) the trustee should be removed from the status as  
18 a trustee for debtor and another trustee should be appointed to  
19 review his activities.

20           In essence, the Marshalls seek a "do over" of the entire  
21 bankruptcy proceeding which they themselves commenced over three  
22 years ago. The orders appointing the trustee and granting the  
23 Keetons good faith purchaser status are final orders and, as  
24 such, we do not revisit the merits of those orders in this  
25 appeal. In addition, were we to grant the Marshalls' remaining  
26 "suggestions," an unraveling of the underlying bankruptcy case  
27 would occur and innocent third parties would be affected. Even  
28 if there were some merit to the Marshalls' argument – which

1 there is not – an unraveling of the case would produce  
2 unacceptable and inequitable results.

3 Absent the negotiated agreements with Keeton-King, debtor  
4 would once again become enmeshed in costly and protracted  
5 litigation. Further, absent the lease agreement with Keeton-  
6 King for the McMinnville Property, the operations of the  
7 McMinnville clinic would be put at risk. Without the  
8 McMinnville clinic operations, the modest return to unsecured  
9 creditors would further be reduced.

10 In short, under these circumstances, the substantial  
11 consummation of the Plan is the “event” that has occurred during  
12 the pendency of this appeal that makes it impossible for us to  
13 grant effective relief to the Marshalls. If no effective relief  
14 is possible, we must dismiss this appeal for lack of  
15 jurisdiction.

## 16 **2. The Appeal Is Equitably Moot**

17 Even if we could fashion some effective relief, we conclude  
18 that the Marshalls’ appeal is also equitably moot for several  
19 reasons. First, there was only one objection to the Plan –  
20 which was later withdrawn – and the Marshalls themselves never  
21 objected to the Plan or even appeared at the confirmation  
22 hearing. Second, it is undisputed that the Marshalls did not  
23 appeal the confirmation order or seek a stay of the  
24 implementation of the Plan. Next, as discussed above, the Plan  
25 has been substantially consummated and the Marshalls’ requested  
26 relief would affect both the rights of parties not before us in  
27 this appeal and the success of the confirmed Plan. Finally, any  
28 relief at this late date would undermine the strong policy

1 favoring the finality of confirmation orders that is recognized  
2 in this circuit. See Great Lakes Higher Educ. Corp. v. Pardee  
3 (In re Pardee), 193 F.3d 1083, 1087 (9th Cir. 1999). Therefore,  
4 even if we could fashion effective relief, it would be  
5 inequitable to do so under these circumstances.

6 In sum, upon consideration of the principles of both  
7 constitutional and equitable mootness, we conclude that this  
8 appeal is moot and should be dismissed for lack of jurisdiction.

9 **B. The Merits**

10 Even if this appeal were not moot, we affirm the bankruptcy  
11 court's decision on the merits.

12 Absent an appeal, the parameters for revocation of a plan  
13 are circumscribed by § 1144 which provides:

14 On request of a party in interest at any time before  
15 180 days after the date of the entry of the order of  
16 confirmation, and after notice and a hearing, the  
17 court may revoke such order if and only if such order  
18 was procured by fraud. An order under this section  
19 revoking an order of confirmation shall-

20 (1) contain such provisions as are necessary to  
21 protect any entity acquiring rights in good faith  
22 reliance on the order of confirmation; and

23 (2) revoke the discharge of the debtor.

24 Section 1144 makes clear that "[t]he sole permissible basis [for  
25 revocation] is fraud that is complained of within 180 days. If  
26 there is no fraud, the order cannot be revoked."<sup>15</sup> Official  
27 Comm. of Unsecured Creditors v. Michelson (In re Michelson),  
28 141 B.R. 715, 723 (Bankr. E.D. Cal. 1992).

Here, the record does not show that the order confirming

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<sup>15</sup> The Marshalls' motion was filed well within the 180-day period.

1 the plan was "procured by fraud." The Marshalls simply  
2 reiterate the fraud of the Keetons and Keeton-King in their  
3 opening brief, but then ask this Panel to conclude that the  
4 trustee must have participated in the fraud because he turned a  
5 "blind eye" to obvious questions raised by the Marshalls'  
6 unsubstantiated allegations especially when: the trustee  
7 (1) declared the Keetons a "good faith purchaser"; (2) testified  
8 falsely about the Committee's involvement in the settlement of  
9 the Keeton-King unsecured claims; and (3) ignored that KKC was a  
10 partner in ABC Partners, LLC; that ABC Partners, LLC had  
11 collateralized Marshall McMinnville, LLC properties on March 23,  
12 2006 and that the Marshall McMinnville, LLC was "missing"  
13 monies.

14 The record does not support the conclusion the Marshalls'  
15 advocate. It was the bankruptcy court, not the trustee, that  
16 determined that Keeton-King was a good faith purchaser after a  
17 lengthy hearing. The Marshalls did not appear at the hearing  
18 for this determination or appeal the ruling. Further, there is  
19 nothing in the record that supports the Marshalls' allegation  
20 that the trustee testified falsely about the Committee's  
21 involvement in the proposed settlement of the Keetons and  
22 Keeton-Kings unsecured claims. The Committee's counsel  
23 represented at the December 14, 2010 hearing that the Committee  
24 withdrew its letter objection to the settlement. Counsel also  
25 acknowledged that the Committee had gone over the facts and all  
26 of the issues and did not object to the settlement.

27 The Marshalls also provided no support for their assertion  
28 that the trustee knew or should have known about the

1 transactions between Keeton-King and ABC Partners, LLC or the  
2 alleged "missing monies." We found no evidence in the record  
3 that even comes close to suggesting that the trustee somehow  
4 used this information to perpetuate a fraud upon the creditors  
5 or the court when he proposed the Plan.

6 In short, bald assertions and conclusory statements do not  
7 prove that the confirmation order was "procured by fraud."  
8 There is simply no evidence in the record that the trustee  
9 engaged in a fraudulent plan or scheme or that the creditors or  
10 bankruptcy court were actually deceived by any fraudulent  
11 misrepresentations, false statements, or omissions in connection  
12 with the confirmation of the Plan. Accordingly, the bankruptcy  
13 court properly denied the Marshalls' motion to revoke the Plan.

14 Because the Marshalls also seek relief from the Plan in  
15 their opening brief under § 1129(a) and Civil Rule 60(b) and  
16 (d), we reiterate that an order confirming a plan can only be  
17 revoked under § 1144. In re Orange Tree Assocs., Ltd., 961 F.2d  
18 at 1447. Thus, neither § 1129(a) nor Civil Rule 60(b) provides  
19 an alternative basis for revocation of the Plan. In any event,  
20 the Marshalls offered no coherent basis for the reversal of the  
21 confirmation order under § 1129 or Civil Rule 60(b) or (d).

## 22 VI. CONCLUSION

23 For the reasons discussed, we DISMISS this appeal as moot.  
24 Even if this appeal were not moot, we would AFFIRM the  
25 bankruptcy court's decision on the merits.