

1 Chapter 11² debtor Strata Title, LLC ("Debtor") appeals the
2 order of the bankruptcy court determining that Debtor's
3 membership interest in Tempe Tower, LLC ("Tempe Tower") lapsed by
4 operation of the parties' agreement and is no longer property of
5 the estate. We AFFIRM.

6 **FACTS**

7 Debtor is an Arizona limited liability company; its sole
8 member is John Lupypciw ("Lupypciw"). Pure Country Tower, LLC
9 ("Pure Country") is also an Arizona LLC; its members are Joseph
10 Hindbo and Jordan Hindbo. This appeal arises out of a dispute
11 over the respective membership interests of Debtor and Pure
12 Country in Tempe Tower, another LLC, created by the parties
13 solely to own and operate a commercial office building in Tempe,
14 Arizona (the "Property").

15 When formed in 2012, Debtor and Pure Country each held a
16 50 percent membership interest in Tempe Tower. Under the terms
17 of the parties' Operating Agreement executed February 24, 2012,
18 Lupypciw was designated manager of Tempe Tower. At the center of
19 the dispute is Schedule 1 of the Operating Agreement, which
20 provides:

21 **Schedule 1**

22 **SCHEDULE OF PERCENTAGE INTERESTS**

23 The following shall be the Percentage Interests of the
24 Members of the Company.

25 ² Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 "Rule" references are to the Federal Rules of Bankruptcy
28 Procedure. All "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 Name of Member Percentage Interest

2 Strata Title, LLC 50%
3 Pure Country Tower, LLC 50%

4 The Percentage Interests shall be subject to the following adjustments:

5 (1) Subject to subsection (2) below, at such time as 100% of [Pure Country's] initial Capital Contribution in the amount of \$850,000 is returned to [Pure Country], the Percentage Interest of the Members shall be:

6 Strata Title, LLC 70%
7 Pure Country Tower, LLC 30%

8 (2) Notwithstanding anything to the contrary herein, in the event that [Pure Country] does not received 100% of its initial Capital Contribution of \$850,000 on or before February 23, 2013 ("CC Return Date"), John Lupypciw hereby irrevocably assigns his and the entire right, title and interest of Strata Title, LLC in the Company to [Pure Country] or its nominee, so that following the CC Return Date [Pure Country] or its nominee shall own one hundred percent (100%) of the Percentage Interest of the Company and Strata Title, LLC, shall not be entitled to any return of any Capital Contributions or other amounts advanced or loaned to the company prior to such time. This provision shall be self-operative but John Lupypciw shall within five (5) days of [Pure Country's] request execute any instrument reasonably requested by [Pure Country] to evidence or confirm the same.

9 In February 2012, Tempe Tower purchased the Property using
10 the \$850,000 capital contribution from Pure Country, a \$3,000
11 capital contribution from Debtor, and a one-year loan from
12 Milestone Tempe, LLC ("Milestone") of \$1,365,000 (the "Milestone
13 Loan"). In July 2012, Lupypciw, acting as manager of Debtor,
14 allegedly made a \$140,000 capital contribution to Tempe Tower.
15 In September 2012, Pure Country alleges that Debtor informed it
16 that Tempe Tower had insufficient funds to pay the monthly
17 payments due on the Milestone Loan. Pure Country alleges that it
18 advanced \$20,000 at that time to avoid a default. However, Tempe
19 Tower's financial problems continued.

1 Debtor filed a petition for relief under chapter 11 on
2 November 6, 2012. Debtor initially did not list its membership
3 interest in Tempe Tower on its Schedule B, nor the Operating
4 Agreement as an executory contract on its Schedule G. The
5 membership interest in Tempe Tower was added by amendment to the
6 schedules on December 10, 2012, and the Operating Agreement was
7 disclosed as an executory contract in an amended schedule on
8 February 21, 2013. Pure Country received no formal notice of
9 Debtor's bankruptcy filing. However, it filed a notice of
10 appearance in the bankruptcy case on February 12, 2013.

11 Pure Country contacted Milestone by phone on or about
12 December 18, 2012. Pure Country alleges that it was during this
13 call that, for the first time, Pure Country was informed that
14 Tempe Tower was in default on the Milestone Loan, and that a
15 trustee's foreclosure sale of the Property was scheduled for
16 March 29, 2013.

17 On January 11, 2013, Pure Country sent a letter to Debtor
18 demanding that Debtor take action to cure the Milestone Loan
19 default. At about this time, Debtor had arranged to refinance
20 the Milestone Loan using a new loan from RLS Capital, Inc. for
21 \$1.7 million with an interest rate of 18 percent, secured by the
22 Property. The RLS Loan closed on January 23, 2013. The escrow
23 agent, Security Title, allegedly issued a check to Milestone's
24 agent for \$1,461,191.94 in full payment of the Milestone Loan,
25 recorded a release of Milestone's deed of trust, and recorded a
26 deed of trust in favor of RLS, Inc.

27 On January 28, 2013, Milestone contacted Pure Country to
28 inform it that the Milestone Loan was being refinanced. Pure

1 Country informed Milestone that it was not aware of, and would
2 not consent to, the refinance. Instead, working with Security
3 Title, Pure Country unwound the refinancing. Milestone returned
4 the loan proceeds to RLS, which executed a release of its deed of
5 trust.

6 In the bankruptcy case, on February 12, 2013, Debtor filed a
7 motion for an order deeming the Operating Agreement of Tempe
8 Tower rejected as an executory contract (the "Rejection Motion").
9 Debtor argued that LLC operating agreements are generally
10 considered executory contracts under the Bankruptcy Code. Debtor
11 further suggested that Pure Country was using its powers under
12 the Operating Agreement in bad faith and in an attempt to obtain
13 ownership of Debtor's equity in the Property for itself.

14 On February 14, 2013, Pure Country removed Lupypciw as
15 manager of Tempe Tower and filed papers with the Arizona
16 Corporation Commission designating Pure Country as the new
17 manager of Tempe Tower. Debtor does not contest that Pure
18 Country thereby became the manager of Tempe Tower.

19 Pure Country filed an objection to Debtor's Rejection Motion
20 on February 20, 2013. Pure Country argued that the Operating
21 Agreement was not an executory contract. Alternatively, Pure
22 Country urged that if the Operating Agreement were rejected, then
23 the bankruptcy court should also declare that Debtor would
24 thereby lose all membership rights in Tempe Tower.

25 The bankruptcy court conducted an expedited hearing on the
26 Rejection Motion on February 20, 2013. In an order entered
27 February 22, 2013, the court ruled that the Operating Agreement
28 was an executory contract and granted Debtor's Rejection Motion.

1 However, the court's order also provided that:

2 This order is strictly limited to Debtor's rejection of
3 the Operating Agreement. Nothing contained in this
4 order shall be construed to prejudge any of the
5 following issues: the damages (if any) which arise from
6 rejection; [or] the terms or enforceability of
7 Schedule 1; the future governance of Tempe Tower's
8 business activities[.]

9 The order granting the Rejection Motion was not appealed.

10 The February 23, 2013, deadline in Schedule 1 for repayment
11 of the \$850,000 capital contribution to Pure Country expired
12 without payment. On March 7, 2013, Pure Country filed a motion
13 in the bankruptcy case for an order enforcing the terms of
14 Schedule 1 (the "Enforcement Motion"). In particular, the
15 Enforcement Motion prayed for entry of an order by the bankruptcy
16 court directing Debtor to specifically perform its obligations
17 under the Operating Agreement to execute an assignment of
18 Debtor's membership interest in Tempe Tower to Pure Country.
19 Debtor responded to the Enforcement Motion on March 20, 2013,
20 arguing that specific performance was not a remedy available to
21 Pure Country after rejection of the Operating Agreement as an
22 executory contract.

23 The bankruptcy court held a hearing on the Enforcement
24 Motion on March 21, 2013. On March 28, 2013, the bankruptcy
25 court entered a minute order providing that:

26 At issue is Schedule 1 attached to the Operating
27 Agreement and its effect upon the debtor and others.
28 The Court hereby finds that remedies identified in
Schedule 1 are not stayed as to Mr. Lupypciw by this
bankruptcy proceeding. The court does not presently
make any decision relative to whether there is a stay
in place as to Strata's interest in Tempe Tower LLC nor
does the Court issue any decision relative to whether
specific performance can or cannot be compelled to
require [Debtor] to accomplish certain events or
transactions. . . . By agreement of the parties on the

1 record, counsel for Pure Country shall prepare a form
2 of order acknowledging Strata's consent to the filing
3 of a bankruptcy petition by Tempe Tower LLC. . . .
4 All other issues pertaining to the [Enforcement Motion]
5 have not been decided by this Court and await further
6 decision by the Court.

7 Undeterred, on April 13, 2013, Pure Country filed a Motion
8 for Determination That Debtor Assigned Membership Interest in
9 Tempe Tower, LLC Pre-Petition; and Alternative Request for Stay
10 Relief to Either: (1) Effectuate the Transfer of Membership
11 Interest to Pure Country Tower, LLC, or (2) Allow Pure Country
12 Tower, LLC to Foreclose Its Membership Interest (the "Membership
13 Motion"). Pure Country argued that before bankruptcy, Debtor had
14 absolutely assigned its membership interest in Tempe Tower to
15 Pure Country pursuant to Schedule 1, and that Debtor had no
16 further interest in Tempe Tower. Pure Country sought a
17 declaratory judgment that all Debtor's membership interest in
18 Tempe Tower was assigned to Pure Country, and that the Debtor's
19 interest was not and never has been property of the estate. In
20 the alternative, Pure Country argued that, if the bankruptcy
21 court were to find that the Debtor still held an interest in
22 Tempe Tower, Pure Country should be granted relief from the
23 automatic stay so it could enforce its rights against Debtor as
24 provided in the Operating Agreement.

25 Debtor responded on April 17, 2013, arguing that Pure
26 Country's Membership Motion was procedurally flawed because the
27 relief it requested required an adversary proceeding. Debtor
28 argued that, if the issues raised in the Membership Motion were
adjudicated in a contested matter, not an adversary proceeding,
its due process rights would be violated.

1 The bankruptcy court held its first hearing on the
2 Membership Motion on April 17, 2013. The court directed the
3 parties to provide supplemental briefing and continued the
4 hearing.

5 In its supplemental briefing, in addition to arguing that
6 there was no absolute assignment of Debtor's membership interest
7 effected in Schedule 1, Debtor asserted that Pure Country held,
8 at best, an unperfected security interest in Debtor's membership
9 interest in Tempe Tower.³ Pure Country responded with its
10 supplemental brief on May 3, 2013. It argued that whether it had
11 properly perfected a security interest in Debtor's membership
12 interest was irrelevant, because it never asserted that its
13 interests in Tempe Tower were secured, but had instead been
14 absolutely assigned by Debtor.

15 The bankruptcy court held the continued hearing on the
16 Membership Motion on May 7, 2013. After listening to counsel for
17 Debtor, Pure Country, Milestone, and Tempe Tower, the court took
18 the issues under advisement. On June 6, 2013, the bankruptcy
19 court entered an "Under Advisement Decision Determining:
20 (1) Membership Interests Are No Longer Estate Property; and
21 (2) Order Lifting the Section 362(a) stay." (the "Decision"). In
22 the Decision, the court determined that:

23 - On the petition date, Debtor's membership interest in
24 Tempe Tower became property of the bankruptcy estate. What the
25 Debtor owned at the time of filing the petition was a 50 percent
26

27 ³ The question whether LLC membership interests involve
28 security interests is not on appeal.

1 membership interest in Tempe Tower.

2 - If Schedule 1 created a security interest in either of the
3 parties' membership interests in Tempe Tower, that security
4 interest was not perfected.

5 - Debtor's rejection of the Operating Agreement as an
6 executory contract did not affect the parties' substantive rights
7 under the Operating Agreement, which are governed by Arizona
8 state law.

9 - Pursuant to A.R.S. § 29-682(B), an LLC operating agreement
10 may contain provisions regarding changes in classes of members,
11 and rights to acquire members' interests.

12 - Under terms of the Operating Agreement and Schedule 1,
13 "the Debtor's membership interest in Tempe Tower could only
14 remain property of the Debtor if it paid \$850,000 to Pure Country
15 by February 23, 2013. Having failed to do so, the Debtor
16 ceased to own any membership interests in Tempe Tower as of
17 February 24, 2013."

18 - "Schedule 1 required no action by Pure Country, or any
19 other party, to change the membership interest of the Debtor in
20 Tempe Tower. Instead, the simple passage of time changed the
21 nature of the property the Debtor once owned."

22 - "The nonpayment of \$850,000 by February 23, 2013 results
23 in Pure Country owning 100% of the LLC membership interests with
24 no further action by any party."

25 - "To the extent stay relief is necessary for Pure Country
26 to proceed as it wishes, stay relief is granted to Pure Country."

27 Debtor filed a timely appeal of the Decision on June 20,
28 2013.

1 challenges to the Decision by the bankruptcy court.⁴ Debtor does
2 not contest the bankruptcy court's substantive analysis or its
3 conclusions concerning the continuing vitality of Debtor's
4 membership interest in Tempe Tower. Debtor implicitly
5 acknowledged that Arizona law allows LLC operating agreements to
6 include provisions enforceable in bankruptcy cases modifying the
7 extent of membership interests or of members' rights to acquire
8 other members' interests; that pursuant to Schedule 1, Debtor
9 could only retain its membership interest in Tempe Tower if Pure
10 Country's \$850,000 capital contribution was repaid by
11 February 23, 2013; and that, as the result of nonpayment, Debtor
12 ceased to own any membership interest in Tempe Tower as of
13 February 24, 2013. Instead, Debtor's arguments in this appeal
14 focus solely on the bankruptcy court's acquiescence in what
15 Debtor argues was an inappropriate procedure employed by Pure
16 Country to obtain these rulings by the court. As discussed
17 below, we affirm the bankruptcy court's decision in this case.

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20 ⁴ In Debtor's opening brief, it also asserted that the
21 bankruptcy court erred by ordering the specific performance of a
22 rejected executory contract. Debtor's Op. Br. at 12. However,
23 as Pure Country points out, the bankruptcy court never referred
24 to "specific performance" or in any way ordered the parties to
25 perform under the Operating Agreement. Pure Country's Br. at 28.
26 Indeed, as the bankruptcy court stated, "the simple passage of
27 time changed the nature of the property the Debtor once owned."
28 In reply, Debtor appears to concede that this issue is not on
appeal, but persists in requesting that the Panel instruct the
bankruptcy court on remand that specific performance is not
available as a remedy for Pure Country. Debtor's Reply Br. at
11-12. The Panel declines to address the specific performance
issue.

1 I.

2 **This appeal is not moot.**

3 Before reviewing Debtor's procedural arguments, we first
4 address Pure Country's contention that this appeal is moot. Pure
5 Country notes that, "[g]enerally, an appeal will be dismissed as
6 moot when events occur which prevent the appellate court from
7 granting any effective relief even if the dispute is decided in
8 favor of the appellant." Pure Country's Br. at 15 (quoting
9 Matter of Combined Metals Reduction Co., 557 F.2d 179, 187 (9th
10 Cir. 1977)). Pure Country argues that, in this case, the Panel
11 cannot offer any relief whatsoever because Debtor failed to
12 obtain a stay of the Decision pending resolution of this appeal,
13 and because Tempe Tower sold the Property on August 6, 2013 to
14 JAH Ventures, LLC, an alleged "good faith purchaser," for
15 \$2.2 million. Pure County further contends that since by this
16 appeal Debtor seeks only to retain its membership interest in
17 Tempe Tower, and the sole asset of Tempe Tower was the Property,
18 Debtor has nothing to gain if it prevails on appeal because any
19 resulting membership interest in Tempe Tower would be worthless.

20 The test for mootness is whether an appellate court can
21 fashion any effective relief in the event that it decides in
22 favor of the appellant. Motor Vehicle Cas. Co. v. Thorpe
23 Insulation Co. (In re Thorpe Insulation Co.), 627 F.3d 869,
24 880-81 (9th Cir. 2012) (emphasis added). In particular,
25 equitable mootness arises when "a comprehensive change of
26 circumstances has occurred so as to render it inequitable for a
27 court to consider the merits of the appeal." Id. at 880-81. In
28 cases such as this one, the principal question we must answer is

1 whether the appeal "present[s] transactions that are so complex
2 or difficult to unwind that the doctrine of equitable mootness
3 would apply." Lowenschuss v. Selnick (In re Lowenschuss),
4 170 F.3d 923, 933 (9th Cir. 1999). The party arguing for
5 dismissal based on mootness, "bears the heavy burden of
6 establishing that we cannot provide any effective relief."
7 United States v. Gould (In re Gould), 401 B.R. 415, 421 (9th Cir.
8 BAP 2009).

9 We conclude that the issues are not moot in this case
10 because it might be possible for the Panel to fashion relief were
11 it to hold for Debtor.

12 First, Pure County correctly observes that Debtor, through
13 this appeal, is attempting to retain a membership interest in
14 Tempe Tower, not an ownership interest in the Property, which was
15 sold during the appeal. However, Pure Country's argument that
16 the sale of the Property moots this appeal is incorrect. If
17 Debtor succeeds on appeal, it may, through its membership
18 interest in Tempe Tower, attempt to pursue state law claims
19 against Milestone and Pure Country.

20 Second, even though the Property was sold, it is not
21 accurate to assume that the Panel can provide no effective relief
22 to Debtor. As noted above, the Property was sold by Tempe
23 Tower's manager, Pure Country, to JAH Ventures, LLC. Pure
24 Country acknowledges that the general partner of JAH Ventures,
25 LLC is JAH Management, LLC. The managing members of
26 JAH Management, LLC are Joseph Hindbo and Jordan Hindbo, who are
27 also the only members of Pure Country. In a practical sense,
28 then, Joseph and Jordan Hindbo effectively sold the Property to

1 themselves. As the sole members of Pure Country, Joseph and
2 Jordan Hindbo were the beneficiaries of the Decision by the
3 bankruptcy court, and similarly, control Pure Country's
4 participation in this appeal. Under these circumstances, it
5 would not be impossible for the bankruptcy court or this Panel to
6 fashion some sort of relief for Debtor. See In re Sun Valley
7 Ranches, 823 F.2d 1373, 1375 (9th Cir. 1987); Paulman v. Gateway
8 Venture Partners III (In re Filtercorp), 163 F.3d 570, 577 (9th
9 Cir. 1998) (reaffirming the Sun Valley rule that, where real
10 property is sold to a party before the court, the court may be
11 able to fashion effective relief).

12 Given these realities, Pure Country has not satisfied the
13 "heavy burden of establishing that [the Panel] cannot provide any
14 effective relief." This appeal is not moot.

15 II.

16 **The bankruptcy court's decision to proceed** 17 **in a contested matter rather than to** 18 **require an adversary proceeding was harmless error.**

19 The bankruptcy court considers disputed matters in two
20 contexts. Adversary proceedings are separate lawsuits within the
21 bankruptcy case and have all the attributes of a lawsuit in the
22 district court, including the filing and service of a formal
23 complaint and application of most of the Civil Rules, as
24 incorporated or modified by the Part VII of the Bankruptcy Rules.
25 In a contested matter, there is no summons and complaint,
26 pleading rules are somewhat relaxed, counterclaims and
27 third-party practice do not apply, and much pre-trial procedure
28 is either restricted or dispensed with in the interest of time
and simplicity. Contested matters are governed by other Rules,

1 mostly by Rule 9014. Khachikyan v. Hahn (In re Khachikyan),
2 335 B.R. 121, 125-26 (9th Cir. BAP 2005). Debtor contends in
3 this appeal that the bankruptcy court erred by resolving the
4 issues in a contested matter rather than by adversary proceeding.
5 Even so, we conclude any error by the bankruptcy court does not
6 require reversal.

7 Rule 7001 lists ten categories of proceedings specifically
8 identified as adversary proceedings; Debtor focuses on three of
9 them. Under Rule 7001, "[t]he following are adversary
10 proceedings: (1) a proceeding to recover money or property
11 . . . ; (2) a proceeding to determine the validity, priority or
12 extent of a lien or other interest in property . . . ; (9) a
13 proceeding to obtain a declaratory judgment relating to any of
14 the foregoing"

15 Debtor argues that because Pure Country's Membership Motion
16 sought a declaration by the bankruptcy court concerning the
17 extent of Debtor's and Pure Country's "interest in property," the
18 bankruptcy court could render such a decision only in an
19 adversary proceeding, not in a contested matter. Debtor points
20 out that, through Lupypciw, it obtained the RLS Loan by which
21 Tempe Tower could pay off its secured loans, and qualify for
22 additional loans to repay the \$850,000 capital contribution to
23 Pure Country. According to Debtor, if Pure Country had commenced
24 an adversary proceeding, instead of filing the Membership Motion,
25 Debtor could have used that procedural vehicle to prove that Pure
26 Country and Milestone wrongfully conspired to undo the RLS Loan,
27 which rendered Tempe Tower unable to pay off Pure Country. As a
28 result of this conduct, Debtor urges, Pure Country should not

1 have been allowed to invoke Schedule 1 to deprive Debtor of its
2 interest in Tempe Tower.

3 As a general proposition, Debtor is correct that an
4 adversary proceeding is usually required to determine the extent
5 of a debtor's interest in property. GMAC Mortg. Corp. v.
6 Salisbury (In re Loloee), 241 B.R. 655-60 (9th Cir. BAP 1999).

7 And, in particular, an adversary proceeding is the preferred
8 route when considering the extent of a debtor's ownership
9 interest in a business. In re Cadiz Props., Inc., 278 B.R. 744
10 (Bankr. N.D. Tex. 2002) (extent of stock ownership); In re Corky
11 Foods Corp., 85 B.R. 903, 904 (Bankr. S.D. Fla. 1988) (extent of
12 debtor's interest in limited partnership); In re Colrud, 45 B.R.
13 169 (Bankr. D. Alaska 1984) (debtor's interest in mortgaged
14 property). However, neither the Ninth Circuit nor this Panel
15 have ever held that the requirement for an adversary proceeding
16 under these circumstances is absolute. Instead, where the record
17 shows that the parties proceeded by a contested matter under
18 Rule 9014, there was adequate notice to the parties concerning
19 the nature of the issues raised in a contested motion proceeding,
20 extensive hearings occurred, supplemental briefing was submitted,
21 and the parties were given "ample time to air [their] position[s]
22 . . . for all practical purposes an adversary proceeding was
23 held." Trust Corp. of Mont., Inc. v. Patterson (In re Copper
24 King Inn, Inc.), 918 F.2d 1404, 1407 (9th Cir. 1990).

25 In reviewing the bankruptcy court's decision to allow the
26 contest between Debtor and Pure Country to be litigated in a
27 contested matter rather than in an adversary proceeding, we apply
28 a harmless error analysis. Korneff v. Downey Reg'l Med. Ctr.

1 Hosp., Inc. (In re Downey Reg. Med. Ctr. Hosp., Inc.), 441 B.R.
2 120, 127 (9th Cir. BAP 2010) ("The bankruptcy court's decision
3 not to require an adversary proceeding is subject to a harmless
4 error analysis."); see also Austein v. Schwartz (In re Gerwer),
5 898 F.2d 730, 734 (9th Cir. 1990); USA/Internal Revenue Service
6 v. Valley Nat'l Bank (In re Decker), 199 B.R. 684, 689 (9th Cir.
7 BAP 2006). The harmless error standard is especially apt where
8 the bankruptcy motion in question was the procedural equivalent
9 of a motion for summary judgment, with the issues to be decided
10 by the bankruptcy court dealing with questions of law, not
11 disputed fact. City Equities Anaheim, Ltd. v. Lincoln Plaza
12 Development Co. (In re City Equities Anaheim, Ltd.), 22 F.3d 954,
13 958-59 (9th Cir. 1994).

14 In this case, while the bankruptcy court possibly erred in
15 not requiring that an adversary proceeding be commenced by Pure
16 Country to obtain a declaration that Debtor's interest in Tempe
17 Tower had lapsed under Schedule 1,⁵ we conclude that such error
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19 ⁵ Of course, the Membership Motion requested not only a
20 determination by the bankruptcy court that Debtor's membership
21 interest terminated post-bankruptcy by operation of the Operating
22 Agreement, but also sought relief from the automatic stay "to the
23 extent the Debtor's membership interests were still protected by
24 § 362(a)(3) or if further acts are necessary to obtain possession
25 and control of the Debtor's membership interests." Decision at
26 9. Indeed, the bankruptcy court granted stay relief to Pure
27 Country in the Decision.

28 Clearly, relief from the automatic stay is appropriately
sought via a contested matter, not through an adversary
proceeding under Rule 7001. See Rule 4001(a) (instructing that
"[a] motion for relief from an automatic stay . . . shall be made
in accordance with Rule 9014") (emphasis added); Johnson
(continued...)

1 was harmless. Pure Country's Membership Motion was clear in its
2 factual allegations, its legal theories, and in describing the
3 relief it sought. There were two hearings conducted concerning
4 the Membership Motion. In addition to its original opposition,
5 Debtor was afforded an opportunity to make supplemental
6 submissions contesting the Membership Motion before the second
7 hearing occurred, and the issues were comprehensively briefed by
8 the parties. As it turns out, the bankruptcy court decided that,
9 as a matter of law, Schedule 1 was effective despite Debtor's
10 bankruptcy filing, and that based solely on the undisputed
11 failure to timely repay Pure Country's \$850,000 capital
12 contribution, Debtor lost its interest in Tempe Tower. On this
13 record, it is difficult to understand how Debtor was procedurally
14 disadvantaged by the bankruptcy court's approach.

15 As Pure Country correctly observes, Debtor has not provided
16 any specific examples of how the contested proceedings employed
17 in this case caused it any significant prejudice. See Downey
18 Req. Med. Ctr. Hosp., 441 at 128 (requiring the party claiming
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21 ⁵(...continued)
22 v TRE Holdings, LLC (In re Johnson), 346 B.R. 190, 195 (9th Cir.
23 BAP 2006). Strata conceded before the bankruptcy court that a
24 contested hearing was the proper procedure for a request for
25 relief from stay. Hr'g Tr. 46:19-22, April 17, 2013 ([Counsel
26 for Debtor]: "I admit freely that stay relief motions don't
27 require an adversary."). The Panel has also held that when the
28 relief sought in a declaratory motion is a determination that the
automatic stay does not apply to a particular action, then the
proper procedure is a contested motion. In re Wade, 115 B.R.
222, 225 (9th Cir. BAP 1990); accord 9 COLLIER ON BANKRUPTCY
¶ 4001.02[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed.,
2013).

1 prejudice to identify discoverable facts or witnesses that would
2 "have changed the outcome of the case."). Instead, Debtor's
3 claims of unfairness are vague and overstated: "Pure Country
4 . . . obstinately refused to comply with the adversary rules.
5 Plainly, Pure Country wanted to avoid, at any cost, an
6 evidentiary proceeding where its own conspiracy, bad faith and
7 bre[a]ch of fiduciary [obligations] would be exposed for all to
8 see." Debtor's Op. Br. at 10.⁶

9 In particular, Debtor argued that it was entitled to a trial
10 in this matter. But by this contention, Debtor seemingly fails
11 to understand that contested matters may include evidentiary,
12 trial-like hearings. See Rule 9014(d).⁷ As the Advisory
13 Committee note for Rule 9014(d) explains:

14 If the motion cannot be decided without resolving a

15

⁶ Debtor argues that Pure Country breached its fiduciary
16 duty, the parties' contract, and acted in bad faith by conspiring
17 with Milestone and Security Title to undo Debtor's RLS Loan,
18 which led to Debtor's and Tempe Tower's inability to pay Pure
19 Country the \$850,000. If true, under Arizona law, the preferred
20 remedy for such wrongs is an action for damages. Burkons v.
21 Ticor Title Ins. Co., 813 P.2d 710 (Ariz. 1991). At oral
22 argument, counsel for Debtor was repeatedly questioned by the
23 Panel concerning why Debtor did not initiate its own adversary
24 proceeding, or better yet, simply pursue an action for damages
25 against Pure Country in state court. The bankruptcy court made a
26 similar inquiry. Hr'g Tr. 46:23-47. While apparently conceding
27 that Debtor was not without a remedy under state law, Debtor's
28 counsel's response was that Debtor would prefer to prevent Pure
Country from forfeiting Debtor's interest in Tempe Tower rather
than suing Pure Country for damages. Hr'g Tr. 47:12-15.

⁷ **"Testimony of Witnesses.** Testimony of witnesses with
respect to disputed material factual issues shall be taken in the
same manner as testimony in an adversary proceeding."
Rule 9014(d).

1 disputed material issue of fact, an evidentiary hearing
2 must be held at which testimony of witnesses is taken
3 in the same manner as testimony is taken in an
4 adversary proceeding or at a trial in a district court
5 civil case.

6 2002 Advisory Committee Note to [Rule] 9014(d); see also Caviata
7 Attached Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached
8 Homes, LLC), 481 B.R. 334, 344 (9th Cir. BAP 2012) (disputed
9 material facts in a contested matter ordinarily require an
10 evidentiary hearing). In addition, Debtor has not shown that it
11 at any time formally requested that the bankruptcy court conduct
12 an evidentiary hearing.

13 Debtor also argues that Pure Country was attempting to avoid
14 discovery: "If in fact Milestone and Pure Country were not
15 conspiring together, then they should have nothing to fear from
16 simple depositions and discoveries. The fact that they have gone
17 to such extremes to avoid discovery utterly belies their
18 contention that [they] have nothing to hide." Debtor's Reply Br.
19 at 4. While not articulating what sort of facts it would expect
20 to discover, of course, Debtor's argument ignores that the
21 discovery rules are also applicable in contested matters. See
22 Rule 9014(c) (listing as applicable in contested matters the
23 discovery procedures available in adversary proceedings via
24 Rules 7026, and 7028-7037); In re Downey Med. Ctr.-Hosp, Inc.,
25 441 B.R. at 129 (noting that discovery would be available in a
26 contested proceeding similar to this appeal, i.e., immediately
27 following the filing of an emergency motion or before the
28 continued hearing on the motion). And, again, we lack sympathy
29 for Debtor's argument that it lacked sufficient time to conduct
30 discovery when, in fact, it never formally requested discovery in

1 the bankruptcy court. In short, we conclude, therefore, that
2 there is no merit to Debtor's suggestion that, through use of a
3 contested matter, the bankruptcy court allowed Pure Country to
4 "evade" discovery.

5 The Panel has developed a list of factors that we consider
6 in determining whether prejudice has resulted from a bankruptcy
7 court's decision to proceed by contested matter rather than
8 adversary proceeding: (1) the material facts were few and
9 undisputed, (2) the dispositive issues were pure questions of
10 law, (3) neither party expressed any discontent with the
11 contested matter procedures the bankruptcy court utilized, and
12 (4) this Panel was "satisfied that neither the factual record nor
13 the quality of the presentation of the arguments would have been
14 materially different had there been an adversary proceeding."
15 Ruvacalba v. Munoz (In re Munoz), 287 B.R. 546, 551 (9th Cir. BAP
16 2002). Under this rubric, Debtor has not shown it was
17 prejudiced.

18 First, although Debtor argues that there were disputed facts
19 and law, those disputes do not implicate the facts and law at the
20 heart of the appeal: that there was an Operating Agreement that
21 by operation of law terminated the membership interest of Debtor
22 on February 24, 2013. In other words, the material facts
23 concerning the nature of the parties' agreement and Debtor's
24 failure to pay under the Operating Agreement relied upon by the
25 bankruptcy court were undisputed.

26 Admittedly, under the third criterion, Debtor protested to
27 the bankruptcy court that a contested matter was inappropriate
28 and sought an adversary proceeding. Even so, we are satisfied

1 that neither the factual record, nor the quality of the
2 presentation of the arguments would have been materially
3 different had there been an adversary proceeding. Instead, it
4 appears that Debtor had adequate notice of the issues raised in
5 the Membership Motion, extensive hearings were conducted,
6 supplemental briefing was submitted, the parties had ample time
7 to air their positions, and for all practical purposes, an
8 adversary proceeding was held in this case. In re Copper King
9 Inn, Inc., 918 F.2d at 1407.

10 Although the first hearing was scheduled by the court on
11 shortened notice, Debtor received both a second hearing and an
12 opportunity for supplemental briefing. Debtor's protests that it
13 needed an evidentiary hearing are of no moment, because an
14 evidentiary hearing could have been held in the bankruptcy court
15 had Debtor requested one, which it did not do. And the evidence
16 that Debtor hoped to present to the bankruptcy court, as it
17 turned out, was irrelevant to the central issue, whether Debtor's
18 membership interest terminated by operation of contract and of
19 law on February 24, 2013. In short, the record in the bankruptcy
20 court was developed to a sufficient degree that any arguably
21 enhanced record generated in an adversary proceeding likely would
22 not have been material.

23 Absent a credible argument or specific examples from Debtor
24 showing it suffered some procedural disadvantage as a result of
25 the procedures used in the bankruptcy court, that the court
26 allowed the action to proceed as a contested motion rather than
27 adversary proceeding is not a sufficient reason to disturb the
28 Decision. Even if the bankruptcy court erred in not requiring an

1 adversary proceeding, such error did not affect the substantial
2 rights of the parties, is not inconsistent with substantial
3 justice, and was therefore harmless. 28 U.S.C. § 2111; Civil
4 Rule 61, incorporated by Fed. R. Bankr. P. 9005 (requiring that a
5 court "disregard all errors and defects that do not affect any
6 party's substantial rights"); In re Copper King Inn, Inc.,
7 918 F.2d at 1406-07; Laskin v. First Nat'l Bank (In re Laskin),
8 222 B.R. 872, 874 (9th Cir. BAP 1998); United States v. Valley
9 Nat'l Bank (In re Decker), 199 B.R. 684, 689-90 (9th Cir. BAP
10 1996).

11 III.

12 Debtor was not deprived of due process.

13 The fundamental components of due process are the right to
14 be heard after notice reasonably calculated under the
15 circumstances to apprise a party of the pendency of a matter, and
16 adequate to afford that party of an opportunity to object.
17 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314
18 (1950). Here, in a single page in its opening brief, Debtor
19 claims the bankruptcy court's procedures in this case did not
20 accommodate rights to due process; the principal authority Debtor
21 cites to support this argument is Société Int'l v. Rogers,
22 357 U.S. 197 (1958):

23 The Supreme Court had made it clear that the 5th
24 Amendment Due Process Clause imposes "constitutional
25 limitations upon the power of courts, even in aid of
26 their own valid processes" preventing resolution of an
action without first "affording a party the opportunity
for a hearing on the merits of his cause."

27 Debtor's Op. Br. at 12, quoting Société, 357 U.S. at 209
28 (emphasis added).

1 The due process requirements Debtor invokes are satisfied in
2 both adversary proceedings under Rule 7001 and contested matters
3 under Rule 9014. Fortune & Faal v. Zumbrun (In re Zumbrun),
4 88 B.R. 250, 253 (9th Cir. BAP 1988). There can be no doubt that
5 Debtor was afforded more than adequate notice of the filing of
6 the Membership Motion, and an ample opportunity to object and be
7 heard concerning the merits of its cause. It responded to the
8 Membership Motion, and after an initial hearing on the motion,
9 the bankruptcy court allowed Debtor additional time to file a
10 supplemental response. Société Int'l, 357 U.S. at 209 (observing
11 that only one hearing with notice meets the requirements for due
12 process). The court conducted a continued, second hearing on the
13 Membership Motion, took the issues under advisement, and entered
14 a detailed Decision explaining its findings, conclusions, and
15 reasons for its rulings.

16 As the Panel has previously ruled, due process in bankruptcy
17 proceedings is not violated where property interests are
18 determined in a contested matter where the bankruptcy court had
19 jurisdiction, notice of the motion was provided, the party was
20 represented at all hearings by counsel and had a meaningful
21 opportunity to respond. In re Downey Reg'l Med. Ctr.-Hosp.,
22 441 B.R. at 128. Here, the bankruptcy court had jurisdiction
23 over the issues, Debtor had adequate notice of the Membership
24 Motion and was given ample opportunity to respond, and Debtor was
25 represented by counsel who was heard at both hearings. Simply
26 stated, Debtor was not denied due process in this case.

CONCLUSION

To the extent the bankruptcy court may have erred in not requiring that Pure Country seek relief via an adversary proceeding, that error was harmless. Debtor's right to due process was not violated. We therefore AFFIRM the Decision of the bankruptcy court.

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