

JUL 25 2014

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-13-1316-PaKuBl
)
) Bankr. No. 10-41455-DS
 PAUL PHILLIP BARDOS,)
 dba CADMUS CONSTRUCTION CO.,)
 Debtor.)
 _____)
 TWENTY-NINE PALMS ENTERPRISES)
 CORPORATION,)
 Appellant,)
 v.) **MEMORANDUM**¹
 PAUL PHILLIP BARDOS,)
 Appellee.)
 _____)

Argued and Submitted on June 26, 2014
at Pasadena, California

Filed - July 25, 2014

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

Honorable Deborah J. Saltzman, Bankruptcy Judge, Presiding

Appearances: _____
 Richard M. Freeman of Sheppard, Mullin, Richter &
 Hampton, LLP, argued for appellant Twenty-Nine
 Palms Enterprises Corporation; Martha A. Warriner
 argued for appellee Paul Phillip Bardos; Maria J.
 Nunez argued for Leslie T. Gladstone, Proposed
 Successor Liquidating Agent.

¹ 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: PAPPAS, KURTZ and BLUMENSTIEL,² Bankruptcy Judges.
2

3 Appellant Twenty-Nine Palms Enterprises Corporation
4 ("29 Palms") appeals the bankruptcy court's order approving a
5 modification of debtor Paul Phillip Bardos' ("Bardos") confirmed
6 chapter 11³ plan, and authorizing the sale of Bardos' residence
7 for \$625,000. We DISMISS this appeal as MOOT.

8 **FACTS**

9 Bardos was a contractor. In February 2007, Bardos entered
10 into an agreement with the Twenty-Nine Palms Band of Mission
11 Indians of California (the "Band") to oversee a number of
12 development and construction projects undertaken by the Band and
13 its corporate entity, 29 Palms,⁴ related to the Spotlight 29
14 Casino and associated grounds in Riverside County. Bardos
15 apparently functioned both as an owner's representative on behalf
16 of 29 Palms for all these projects, as well as served as the
17 contractor on one or more of them, doing so under various names,
18 including his wholly owned proprietorship, Cadmus Construction
19 Co. ("Cadmus").

20
21 ² Hon. Hannah L. Blumenstiel, United States Bankruptcy
22 Judge for the Northern District of California, sitting by
23 designation.

24 ³ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, all
26 Rule references are to the Federal Rules of Bankruptcy Procedure,
27 Rules 1001-9037, and all Civil Rule references are to the Federal
28 Rules of Civil Procedure 1-86.

⁴ Unless necessary to distinguish them, we will refer to
either the Band or 29 Palms as 29 Palms.

1 **The Cadmus State Court Action and Judgment**

2 On July 23, 2009, 29 Palms filed a complaint in California
3 state court against Cadmus and, indirectly, Bardos. Twenty-Nine
4 Palms v. Cadmus Construction Co., et al., CIVRS908132 (San
5 Bernardino Superior Court). In it, because Cadmus was not a
6 licensed contractor in California, 29 Palms alleged two counts
7 for violation of Cal. Bus. & Prof. Code §§ 7031 and 17200, and
8 asked the court to order that Cadmus disgorge all of the fees
9 29 Palms had paid it, amounting to approximately \$750,000, plus
10 interest. The California court entered a summary judgment
11 awarding 29 Palms a judgment against Cadmus for \$917,043.09 plus
12 post-judgment interest (the "Judgment"). Bardos appealed the
13 Judgment to the California Court of Appeals. In a published
14 opinion, the court ruled against Bardos and affirmed the
15 Judgment, noting that Bardos was fully responsible for the acts
16 of his proprietorship, Cadmus. Twenty-Nine Palms Enters. Corp.
17 v. Bardos, 210 Cal. App. 4th 1435, 1454 (2012).

18 Bardos filed a petition asking the Supreme Court of
19 California to review the Court of Appeals decision. The petition
20 was denied on February 20, 2013. Bardos then filed a petition
21 for certiorari (the "Cert. Petition") with the United States
22 Supreme Court. As discussed below, Bardos voluntarily withdrew
23 the Cert. Petition on June 25, 2013. Bardos v. Twenty-Nine Palms
24 Enters. Corp., 133 S.Ct. 2884 (2013). We refer to these three
25 appeals collectively as the "Cadmus Appeals."

26 **The Bankruptcy Case and Chapter 11 Plans**

27 Bardos filed a petition seeking relief under chapter 11 of
28 the Bankruptcy Code on September 29, 2010, about three weeks

1 after filing the appeal with the California Court of Appeals.
2 Based upon the stipulation of the parties, the bankruptcy court
3 granted relief from the automatic stay in the bankruptcy case so
4 that the appeal could proceed.

5 Bardos filed his initial proposed Plan of Reorganization and
6 Disclosure Statement (the "First Disclosure Statement") on
7 March 29, 2012. In the plan, Bardos offered alternative
8 approaches he called "Plan A" and "Plan B" to dealing with his
9 financial challenges. Plan A proposed a fairly unremarkable
10 reorganization of Bardos' financial affairs, with Bardos
11 proposing to pay his creditors' claims out of the business income
12 generated by his construction businesses. However, if Bardos was
13 unsuccessful in the Cadmus Appeals, Plan B provided for
14 liquidation of his assets. 29 Palms objected to the First
15 Disclosure Statement arguing that it failed to provide sufficient
16 information about Bardos' and his companies' incomes, any
17 information about a pending grand jury investigation of Bardos,
18 or a liquidation analysis to show the results of Bardos' proposed
19 asset liquidation under Plan B.

20 In response, Bardos filed a First Amended Plan of
21 Reorganization (the First Amended Plan) and First Amended
22 Disclosure Statement. The First Amended Plan contained minor
23 changes to address 29 Palms' objections but, importantly, added a
24 provision stating that if Bardos were convicted in any criminal
25 proceedings, any criminal conviction would act as a second
26 "trigger" requiring him to liquidate under Plan B. The
27 bankruptcy court allowed Bardos to submit a slightly modified
28 Disclosure Statement (the "Second Amended Disclosure Statement"),

1 providing additional information about Bardos' recent federal
2 criminal indictment. The bankruptcy court approved Bardos'
3 Second Amended Disclosure Statement on May 29, 2012, and it
4 remained the operative disclosure statement at the time of plan
5 confirmation.

6 One of the focal points of the bankruptcy case and this
7 appeal concerns Bardos' residence in Rancho Cucamonga, California
8 (the "Property"). The Second Amended Disclosure Statement listed
9 the Property as a Bardos asset, and represented that it had a
10 value of \$750,000, subject to a first mortgage in favor of Wells
11 Fargo with a balance due of \$328,000.

12 Bardos filed Second and Third Amended Plans of
13 Reorganization. The amended plans contained only minor changes.
14 Shortly thereafter, Bardos and 29 Palms resolved their remaining
15 differences in the bankruptcy case in a stipulated agreement
16 allowing Bardos to confirm the Third Amended Plan according to
17 the terms of the stipulation. There were no objections to
18 confirmation, and the bankruptcy court approved the parties'
19 stipulation, and entered an order confirming the Third Amended
20 Plan on October 28, 2012 (the "Confirmed Plan" and "Confirmation
21 Order"). Like his prior plans, the Confirmed Plan provided two
22 means for Bardos to pay creditors: Plan A, the reorganization
23 option, provided that all creditors would be paid in full from
24 income generated over time by Bardos' wholly owned corporation,
25 Bardos Construction, Inc., together with the proceeds from a
26 successful outcome to the Cadmus Appeals; and Plan B, the
27 liquidation option, required that Bardos' assets be sold and the
28 sale proceeds distributed to creditors if any one of three events

1 occurred: (1) if he lost or withdrew the Cadmus Appeals; (2) if
2 he were convicted in the pending federal criminal case;⁵ or
3 (3) if Bardos were to otherwise default under Plan A. In
4 addition, the Confirmation Order provided that, if Bardos were
5 convicted, a liquidating agent would be appointed to oversee the
6 liquidation of the assets.

7 **Bardos' Motion to Modify the Confirmed Plan**

8 By early May 2013, none of the events that would trigger
9 Plan B had occurred. Bardos decided to implement Plan B
10 immediately, rather than to await the events which would "force
11 his hand." Since the Confirmed Plan did not allow him to
12 implement Plan B without a triggering event, Bardos filed a
13 motion to modify the Confirmed Plan (the "Modification Motion").
14 The Modification Motion provided for the immediate implementation
15 of Plan B under the Confirmed Plan, including termination of
16 Bardos' business operations that had supported plan payments
17 under Plan A. Of particular interest in this appeal are the
18

19 ⁵ In an opposition to Bardos' motion to dismiss this
20 appeal, 29 Palms asks the Panel to take judicial notice of a
21 "First Superseding Indictment" entered against Bardos and his
22 alleged co-conspirators in the criminal case, which alleges that
23 Bardos engaged in conspiracy, bribery, money laundering and tax
24 evasion in dealings with 29 Palms. Since none of these
25 allegations are relevant to the issues on appeal, 29 Palms'
26 request for judicial notice is DENIED.

27 Of course, under the Confirmed Plan, were Bardos convicted
28 in the federal case, that conviction would trigger implementation
of Plan B, including the appointment of a liquidating agent. The
parties have informed the Panel that Bardos eventually entered a
guilty plea to one count of the indictment (income tax evasion).
Therefore, because he stands convicted in the federal case,
Plan B was triggered under the Confirmed Plan.

1 Modification Motion's provisions relating to liquidation of the
2 Property:

3 Plan B provides for, among other things, the listing
4 and sale of the [Property], which is Debtor's
5 residence. That [P]roperty has been listed for sale
6 for the sum of \$625,000; the Plan requires that escrow
be closed within 6 months. It is also Debtor's desire
that this [P]roperty be sold as quickly as is
reasonable in the present real estate market.

7 Modification Motion at ¶ II(5).

8 The [Property] shall be sold at a market price within
9 6 months pursuant to Plan B, listed by the Debtor at
10 \$625,000 in consultation with a qualified local real
estate broker[.]

11 Modification Motion at ¶ VI(C).

12 29 Palms objected to the Modification Motion, raising two
13 arguments:

14 29 Palms is not opposed to the Debtor implementing
15 Plan B[;] however, [Debtor] should be required to
16 abandon his appeal to the [U.S.] Supreme Court as
17 indicated in the motion. Additionally, 29 Palms is
18 opposed to the Debtor's proposal to sell his primary
19 residence at a discount to the detriment of his
unsecured creditors. The Debtor is proposing to list
and sell the [Property] for \$625,000, which may be
substantially below fair market value and well below
the value he stated in the Plan (\$750,000).

20 Attached to the 29 Palms opposition was the Declaration of
21 Bram Hanono, one of its attorneys. The Hanono Declaration in
22 turn attached two screenprints from internet sites Hanono
23 attested he had recently visited. One printout was from
24 zillow.com, ostensibly containing information about the value of
25 the Property. The second attachment was from dqnews.com, a
26 website operated by the Los Angeles Times, with information
27 regarding the average year-to-year sale price of homes located in
28 the same zip code as the Property.

1 Bardos responded to 29 Palms' opposition to the Modification
2 Motion. Bardos disagreed with 29 Palms that he should be
3 compelled to abandon his appeal to the Supreme Court, suggesting
4 that it was only an option that he might take. Bardos also
5 argued in favor of the \$625,000 listing price for the Property
6 and submitted documentary evidence, including a local broker's
7 assessment of the value of the Property based upon comparable
8 sales of similarly situated houses. Bardos argued that the
9 Zillow estimate and other website printout were not admissible
10 evidence.

11 The bankruptcy court conducted a hearing on the Modification
12 Motion on June 6, 2013. Early on, the court sustained Bardos'
13 objection to 29 Palms' attempt to submit the zillow.com and other
14 website printout, noting that "[t]he Zillow and other website
15 printouts are not evidence." Hr'g Tr. 5:13-15, June 6, 2013.

16 The court also agreed with Bardos concerning his proposal to
17 list and sell the Property for \$625,000:

18 The evidence that is here suggests that the value that
19 the [P]roperty was listed for and appears to be about
20 to be sold for is an appropriate value, notwithstanding
the older appraisal and the amount set forth in the
disclosure statement.

21 Hr'g Tr. 5:17-21. However, the bankruptcy court also advised the
22 parties:

23 I don't have as much of an issue with the sale price of
24 the house as I do with the appeal. It seems to me that
25 the stipulation and the plan were very clear on the
26 conditions that would trigger the implementation of
27 Plan B, and now what the Debtor's asking for is what I
view as a material modification of the plan. . . . I
don't see how I can grant the motion. The []
conditions [of the Confirmed Plan] haven't been
satisfied.

28 Hr'g Tr. 10:22-11:6.

1 During a recess, the parties apparently reached a compromise
2 concerning Bardos' pending Cert. Petition and some other issues
3 not involved in this appeal. After the bankruptcy court
4 reconvened, the following colloquy ensued:

5 WARRINER [Bardos' Counsel]: And we would also assume
6 that in granting the motion, obviously you are letting
7 the sale [of the Property to] proceed without a
8 liquidating agent.

9 THE COURT: Uh-huh.

10 WARRINER: - and sustaining our evidentiary objection
11 and approving the values for the other assets. If all
12 of those are approved by the Court, Mr. Bardos will
13 withdraw the petition for cert.

14 THE COURT: Okay. Mr. Warum:

15 WARUM [29 Palms' Counsel]: That is satisfactory, Your
16 Honor. . . .

17 WARRINER: And the only other thing that I've added to
18 the [proposed order granting the Modification Motion]
19 is an abstract of judgment that showed up on the title
20 report in favor of [29 Palms], and [Mr. Warum] has
21 agreed that his client will withdraw that. I'd like to
22 include that in the order.

23 THE COURT: Okay. . . . Mr. Warum, does that work for
24 you?

25 WARUM: That's fine, Your Honor. No objections.

26 Hr'g Tr. 13:24-15:7.

27 The bankruptcy court concluded the hearing by instructing
28 Bardos' counsel to prepare an agreed order that "will be entered
right away." Hr'g Tr. 16:1. Bardos submitted an order bearing
the endorsement of counsel for 29 Palms as "approved as to form
and content." The bankruptcy court entered the order granting
the Modification Motion on June 19, 2013 (the Modification
Order"). It provided, in relevant part:

The [Modification] Motion is granted, subject to the

1 following:

2 A. The Debtor shall dismiss his appeal to the United
3 States Supreme Court in the matter of Paul Bardos,
4 Petitioner v. Twenty-Nine Palms Enters. Corp,
5 Respondent. . . .

6 B. The Debtor may proceed with the sale of the
7 [Property], as proposed in the Motion, on behalf of the
8 Bankruptcy Estate, free and clear of the abstract of
9 judgment in favor of 29 Palms, which abstract shall be
10 released by 29 Palms prior to the close of escrow[.]

11 Modification Order at 2.

12 Consistent with the Modification Order, the Supreme Court
13 appeal was dismissed upon stipulation of the parties on June 25,
14 2013. However, on July 3, 2013, 29 Palms filed a timely appeal
15 of the Modification Order. 29 Palms did not seek a stay of the
16 Modification Order in the bankruptcy court or from this Panel.

17 **Events Occurring During This Appeal**

18 Bardos filed a motion to dismiss this appeal on August 15,
19 2013, arguing that, because 29 Palms had benefitted from the
20 Modification Order, it was estopped from appealing it (the "First
21 Dismissal Motion"). 29 Palms opposed the First Dismissal Motion.
22 A BAP motions panel denied the First Dismissal Motion in an order
23 entered October 15, 2013.

24 Bardos filed a second dismissal motion (the Second Dismissal
25 Motion"), representing that, on December 4, 2013, the Property
26 had been sold as allowed in the Modification Order to unrelated
27 third parties, and that the sale proceeds had been distributed to
28 creditors as provided in the Confirmed Plan shortly thereafter.
29 Thus, Bardos argued, the 29 Palms appeal of the Modification
30 Order was now moot. 29 Palms opposed the Second Dismissal
31 Motion, arguing that, even if the sale of the Property could not

1 be undone (which it challenges), the Panel could still grant
2 29 Palms effective relief. The BAP motions panel referred the
3 resolution of the Second Dismissal Motion to this merits Panel.

4 **JURISDICTION**

5 The bankruptcy court had jurisdiction under 28 U.S.C.
6 §§ 1334 and 157(b) (2) (L). The Panel has jurisdiction over
7 appeals from the bankruptcy court's final orders under 28 U.S.C.
8 § 158, and the Modification Order was a final order. Everett v.
9 Perez (In re Perez), 30 F.3d 17, 20 (9th Cir. 1994). However, we
10 lack jurisdiction to decide moot appeals. United States v.
11 Patullo (In re Patullo), 271 F.3d 898, 900 (9th Cir. 2001). If
12 an appeal becomes moot while it is pending before the Panel, we
13 must dismiss it. Id. Even so, the Panel always has jurisdiction
14 to determine its own jurisdiction, including a determination of
15 mootness. Hupp v. Educ. Credit. Mgmt. Corp. (In re Hupp),
16 383 B.R. 476, 478 (9th Cir. BAP 2008).

17 **ISSUE**

18 Whether this appeal is moot.

19 **STANDARD OF REVIEW**

20 We review our own jurisdiction, including questions of
21 mootness, de novo. Silver Sage Partners, Ltd. v. City of Desert
22 Hot Springs (In re City of Desert Hot Springs), 339 F.3d 782, 787
23 (9th Cir. 2003).

24 **DISCUSSION**

25 **Status of the Parties to the Appeal**

26 As a preliminary matter, we address a procedural anomaly
27 about which the Panel was first informed at the oral argument in
28 this appeal. Apparently, on April 9, 2014, after briefing was

1 completed in this appeal, a liquidating agent had been appointed
2 by the bankruptcy court because Bardos had entered a guilty plea
3 in the federal criminal case.

4 Counsel for Bardos informed the Panel that the parties had
5 stipulated to the appointment of a successor liquidating agent in
6 the bankruptcy case and that an order had been submitted to the
7 bankruptcy court for its entry. Thus, Bardos' counsel conceded
8 that the successor liquidating agent should likely be substituted
9 as the real party in interest in the place of Bardos in this
10 appeal.⁶

11 Counsel for the proposed successor liquidating agent, who
12 also appeared at the argument, informed the Panel that the
13 successor liquidating agent intended to join 29 Palms in
14 requesting that the bankruptcy court's Modification Order be
15 reversed. Counsel for Bardos indicated that while Bardos did not
16 dispute the successor liquidating agent's standing to participate
17 in the appeal, Bardos did not agree with the successor

18
19 ⁶ The Confirmation Order required that a liquidating agent
20 be appointed if Bardos was convicted in the federal criminal
21 case. Bardos was convicted, and the bankruptcy court approved
22 the appointment of Squar Milner, LLP, as liquidating agent on
23 April 9, 2014 (the "Liquidating Agent Order"). The Liquidating
24 Agent Order directed Debtor to turn over all assets of the estate
25 to the liquidating agent "to liquidate and administer in
26 accordance with the provisions of the Plan and the Bankruptcy
27 Code." Liquidating Agent Order at 1, April 9, 2014.

28 On June 23, 2014, Bardos, 29 Palms and Squar Milner
submitted a stipulation to the bankruptcy court informing the
court that Squar Milner desired to be replaced as liquidating
agent. The parties requested appointment of Leslie Gladstone as
successor liquidating agent.

The bankruptcy court approved the stipulation appointing
Leslie Gladstone as successor liquidating agent on July 23, 2014.

1 liquidating agent's position regarding the merits of this appeal.

2 Despite these somewhat perplexing and surprising
3 developments about the status of the parties to this appeal, the
4 Panel directed that oral argument proceed, hearing from counsel
5 for Bardos, the proposed successor liquidating agent, and
6 29 Palms. We conclude that questions concerning the parties are,
7 under the circumstances, not an impediment to the Panel's
8 disposition of this appeal. Because we decide below that this
9 appeal is equitably moot, the Panel lacks jurisdiction to
10 consider the merits of this appeal, including whether or not to
11 reverse the decision of the bankruptcy court. In re Patullo,
12 271 F.3d at 900 (a federal court cannot exercise jurisdiction
13 over a moot appeal). Thus, even assuming the proposed successor
14 liquidating agent is a proper party to the appeal, we do not
15 address the implications of the joint request of the liquidating
16 agent and 29 Palms for reversal.

17 **Mootness**

18 We cannot exercise jurisdiction over a moot appeal.
19 In re Pattullo, 271 F.3d at 900; GTE Cal., Inc. v. FCC, 39 F.3d
20 940, 945 (9th Cir. 1994) ("The jurisdiction of federal courts
21 depends on the existence of a 'case or controversy' under Article
22 III of the Constitution."). A moot case is one where the issues
23 presented are no longer live, and no case or controversy exists.
24 Pilate v. Burrell (In re Burrell), 415 F.3d 994, 998 (9th Cir.
25 2005). The test for mootness is whether an appellate court can
26 still grant effective relief to the prevailing party if it
27 decides the merits in his or her favor. Id. If a case becomes
28 moot while the appeal is pending, an appellate court must dismiss

1 the appeal. In re Pattullo, 271 F.3d at 900.

2 Constitutional mootness, in the strict sense, occurs when an
3 appellate court cannot give the appellant any relief whatsoever
4 in the event that it decides in appellant's favor. Felster
5 Publ'g v. Burrell, 415 F.3d 994, 998 (9th Cir. 2005). This
6 appeal is not moot in the Constitutional sense because the Panel
7 has the authority to grant the relief requested, that is, we
8 could reverse the bankruptcy court's decision approving the plan
9 modification and sale of the Property.

10 However, the case law recognizes that practical and
11 equitable factors should be taken into consideration in
12 determining if an appeal is moot. This is the doctrine of
13 equitable mootness. An appeal becomes equitably moot when:

14 appellants have failed and neglected diligently to
15 pursue their available remedies to obtain a stay of the
16 objectionable orders of the Bankruptcy Court, thus
17 "permitting such a comprehensive change of
18 circumstances to occur as to render it inequitable
19 . . . to consider the merits of the appeal." Trone v.
20 Roberts Farms, Inc. (In re Roberts Farms, Inc.),
21 652 F.2d 793, 798 (9th Cir. 1981).

22 Focus Media, Inc. v. NBC (In re Focus Media, Inc.), 378 F.3d 916,
23 922 (9th Cir. 2004). In other words, equitable principles may
24 require dismissal of the appeal when the appellant neglects to
25 obtain a stay pending appeal and the rights of third parties
26 intervene. Spirtos v. Moreno (In re Spirtos), 992 F.2d 1004,
27 1006 (9th Cir. 1993); Darby v. Zimmerman (In re Popp), 323 B.R.
28 260, 271 (9th Cir. BAP 2005).

29 The party asserting equitable mootness must demonstrate that
30 the case involves transactions "so complex or difficult to
31 unwind" that equitable mootness applies. Lowenschuss v. Selnick

1 (In re Lowenschuss), 170 F.3d 923, 933 (9th Cir. 1999). In
2 deciding whether an appeal is equitably moot, the Ninth Circuit
3 instructs that we must consider the consequences of the remedy on
4 appeal, and the number of third parties who have changed their
5 position, in reliance on the validity of the order on appeal.
6 Kaonohi Ohana, Ltd. v. Sutherland (In re Kaonohi Ohana, Ltd.),
7 873 F.2d 1302, 1306 (9th Cir. 1989). The Ninth Circuit recently
8 provided guidelines for our inquiry into equitable mootness:

9 We endorse a test similar to those framed by the
10 circuits that have expressed a standard: We will look
11 first at whether a stay was sought, for absent that a
12 party has not fully pursued its rights. If a stay was
13 sought and not gained, we then will look to whether
14 substantial consummation of the plan has occurred.
15 Next, we will look to the effect a remedy may have on
16 third parties not before the court. Finally, we will
17 look at whether the bankruptcy court can fashion
18 effective and equitable relief without completely
19 knocking the props out from under the plan and thereby
20 creating an uncontrollable situation for the bankruptcy
21 court.

22 Motor Vehicle Cas. Co. v. Thorpe Insulation Ins. Co.

23 (In re Thorpe Insulation Ins. Co.), 677 F.3d 869, 881 (9th Cir.
24 2012).

25 In Thorpe Insulation, and the other circuit opinions it
26 cites, the first and most important consideration is if the party
27 seeking to appeal failed to seek a stay. Id. at 881 (appellant
28 may not "sit on its rights"); Nordhoff Invs. v. Zenith Elecs.
Corp., 258 F.3d 180, 186 (3d Cir. 2001) ("It is obligatory upon
appellant . . . to pursue with diligence all available remedies
to obtain a stay of execution of the objectionable order (even to
the extent of applying to the Circuit Justice for relief)[.]");
Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.),
10 F.3d 944 (2d Cir. 1993) (appellant must "pursue[] with

1 diligence all available remedies to obtain a stay of execution of
2 the objectionable order"). Here, 29 Palms did not seek a stay of
3 the bankruptcy court's order pending appeal either in the
4 bankruptcy court or with this Panel; instead, it "sat on its
5 rights."

6 In its opening brief, 29 Palms attempted to excuse its
7 failure to request any stay pending appeal concerning a sale of
8 the Property by explaining that:

9 29 Palms has been informed by Bardos that the Property
10 has not been sold and that it cannot be sold until this
11 appeal is resolved because the title company will not
issue a clean title report; therefore there are no
issues of mootness or need for stay pending appeal.

12 29 Palms Op. Br. at 2, n.1. Apparently, 29 Palms elected not to
13 seek a stay of the Modification Order believing that, as a
14 practical matter, the Property could not be sold because this
15 appeal prevented Bardos from providing insurable title to a
16 buyer. Even assuming there may have been some communication
17 between 29 Palms and Bardos concerning difficulties obtaining a
18 title policy, 29 Palms has not argued that Bardos agreed not to
19 sell the Property during the pendency of the appeal. To the
20 contrary, the Modification Order expressly empowered Bardos to
21 sell the Property, and so he did. 29 Palms, on the other hand,
22 had the right to seek a stay of that sale; it did not. Simply
23 put, while Bardos exercised his rights, 29 Palms did not
24 "diligently" pursue its rights to stay a sale of the Property.

25 The other relevant inquiries⁷ in Thorpe focus on the rights
26

27 ⁷ Because 29 Palms never requested a stay pending appeal,
28 we do not consider the second Thorpe element, substantial
consummation.

1 of third parties, and whether intervening transactions have taken
2 place that are "so complex or difficult to unwind" as to create
3 an uncontrollable situation for the bankruptcy court. In this
4 case, 29 Palms asserts that the purchasers of the Property would
5 not be prejudiced by an order voiding the sale because they would
6 have recourse to reimbursement from the title insurance company
7 that insured their good title in the sales transaction.

8 29 Palms' Opposition to Motion for Mootness at 1-2. We disagree.

9 Of course, neither the Property purchasers nor their title
10 insurer are parties to this appeal, nor did they participate in
11 the proceedings before the bankruptcy court. Under these facts,
12 we simply cannot be certain as to the impact of our possible
13 decision reversing the bankruptcy court's order approving the
14 sale. Presumably, both the purchasers and title company relied
15 upon 29 Palms' failure to seek a stay of that order in proceeding
16 to close the sale.

17 In addition, 29 Palms must remember that the title insurer's
18 contract is with the purchasers, not Bardos. We therefore cannot
19 know whether the title company would be obliged to compensate the
20 purchasers for any damages or expenses they might incur if the
21 sale of the Property by Bardos to them is rescinded. As can be
22 seen, then, 29 Palms takes a cavalier approach to evaluating the
23 relative equities and potential consequences to third parties of
24 any decision to undo the sale.

25 Moreover, the impact and efficacy of an order in this appeal
26 requiring that the distributions from the sale proceeds be
27 disgorged would be, at best, uncertain. Indeed, proceedings by
28 the bankruptcy court to compel the several creditors who have

1 received full payment of their claims to return approximately
2 \$620,000 to the estate may be problematic, lengthy and expensive.
3 And although the mortgage creditor and bankruptcy case
4 administrative creditors would continue to hold claims senior to
5 29 Palms if the sale is undone, there is no guarantee that any
6 future sale of the Property would generate as much for them as
7 they have already received.

8 Finally, we are concerned that if the Property is put back
9 onto the market, the prospects for another sale are unclear and
10 additional holding costs will be incurred until another sale can
11 be arranged.

12 All things considered, we conclude that undoing the sale of
13 the Property and recovery of the sale proceeds at this late stage
14 of the proceedings could adversely impact the rights of third
15 parties and could require potentially extensive, expensive, and
16 lengthy proceedings in the bankruptcy court. Since 29 Palms did
17 not diligently seek a stay pending appeal, and the relief
18 requested by 29 Palms would be complex and difficult for the
19 Panel to provide, we conclude this appeal is equitably moot.

20 In response to Bardos' mootness contention, 29 Palms argues
21 that since the bankruptcy court did not enter an order that the
22 buyers of the property were good faith purchasers for purposes of
23 § 363(m), any protections against reversal or modification of a
24 sale order on appeal are not available to the buyers, relying on
25 the Ninth Circuit's decision in Algeran, Inc. v. Advance Ross
26 Corp., 759 F.2d 1421, 1423-24 (9th Cir. 1985). 29 Palms'
27 argument lacks merit.

28 While, admittedly, no § 363(m) finding was made by the

1 bankruptcy court in connection with the sale of the Property in
2 this case, it is of no consequence to determining whether this
3 appeal is equitably moot. Vista del Mar Assocs., Inc. v. W.
4 Coast Land Fund (In re Vista del Mar Assocs, Inc.), 181 B.R. 422,
5 424 (9th Cir. BAP 1995). 29 Palms offers us no case law clearly
6 holding that § 363(b) or (m) applies to a sale of property made
7 pursuant to a confirmed chapter 11 plan. Such sales are not
8 subject to § 363, but are authorized by another Code provision
9 which requires that "[n]otwithstanding any otherwise applicable
10 nonbankruptcy law, a plan shall . . . provide adequate means for
11 the plan's implementation, such as . . . transfer of all or any
12 part of the property of the estate to one or more entities,
13 whether organized before or after the confirmation of such plan."
14 § 1123(a) (5) (B); see also In re Smurfit-Stone Container Corp.,
15 2010 Bankr. LEXIS 1971, at *26 (Bankr. D. Del. 2010) (a sale
16 pursuant to a plan may be approved by a bankruptcy court without
17 reference to the requirements of § 363).

18 In sum, when it elected not to seek a stay of the bankruptcy
19 court's order authorizing Bardos to sell the Property and
20 distribute the sale proceeds, 29 Palms assumed the risk that this
21 appeal would become equitably moot. At this point, even if
22 possible, unwinding the sale and distribution of the sale
23 proceeds would be complex, impractical, and would potentially
24 prejudice the rights of third parties. Therefore, the appeal is
25 equitably moot.

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1 **CONCLUSION**

2 This appeal is DISMISSED.⁸

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25 ⁸ Because our decision is founded upon mootness, we do not
26 reach the merits. We also express no opinion concerning whether
27 the successor liquidating agent could seek some form of relief
28 from the Modification Order in the bankruptcy court via motion
under Rule 9024 (incorporating Civil Rule 60(b)).