

MAR 23 2016

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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NOT FOR PUBLICATION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.	CC-15-1217-FDKu
)		
PAUL PHILLIP BARDOS,)	Bk. No.	6:10-bk-41455-SY
DBA Cadmus Construction Co.,)		
)		
Debtor.)		
_____)		
)		
MICHAEL D. ROGERS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
LESLIE T. GLADSTONE,)		
Liquidating Agent for the)		
Estate of Paul Phillip Bardos,)		
DBA Cadmus Construction Co.,)		
)		
Appellee.)		
_____)		

Argued and Submitted on February 19, 2016
at Pasadena, California

Filed - March 23, 2016

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

Honorable Scott Ho Yun, Bankruptcy Judge, Presiding

Appearances: Appellant Michael D. Rogers argued pro se;
Appellee Leslie T. Gladstone argued pro se.

* 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 8024-1.

1 Before: FARIS, DUNN,** and KURTZ, Bankruptcy Judges.

2 **INTRODUCTION**

3 Appellant Michael D. Rogers appeals the bankruptcy court's
4 order approving the sale of stock of chapter 11¹ debtor Paul
5 Phillip Bardos' company, Cadmus Construction, Inc. ("Cadmus
6 Inc."). We AFFIRM.

7 **FACTUAL BACKGROUND²**

8 **A. The Construction Contracts and State Court Litigation³**

9 Mr. Bardos was in the construction business. He sometimes
10 did business as a sole proprietor under the name Cadmus
11 Construction Co. ("Cadmus Co."). He owned 100% of the shares of
12 Cadmus Inc., which was also engaged in the construction business.

13 Beginning in or around 2007, Mr. Bardos entered into a
14

15 ** At oral argument held on February 19, 2016, Appellant
16 raised potential grounds for the recusal of Judge Laura S.
17 Taylor. On February 23, Judge Taylor issued an order recusing
18 herself from the Panel assigned to this appeal. Following the
19 recusal, Judge Randall L. Dunn was assigned to the Panel for this
20 appeal in place of Judge Taylor. Judge Dunn has reviewed the
21 briefs and records filed with respect to this appeal as well as
22 the recording of the oral argument.

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

28 ² Mr. Rogers presents us with a deficient record. We have
exercised our discretion to review the bankruptcy court's docket,
as appropriate. See Woods & Erickson, LLP v. Leonard (In re AVI,
Inc.), 389 B.R. 721, 725 n.2 (9th Cir. BAP 2008).

³ The background facts of this section are drawn largely
from an earlier BAP appeal in this case. See Twenty-Nine Palms
Enters. Corp. v. Bardos (In re Bardos), No. CC-13-1316-PaKuBl,
2014 WL 3703923 (9th Cir. BAP July 25, 2014) ("In re Bardos I").

1 number of construction contracts with Twenty-Nine Palms Band of
2 Mission Indians of California (the "Tribe") to oversee
3 development and construction projects undertaken by the Tribe and
4 its corporate entity, Twenty-Nine Palms Enterprises Corporation
5 ("Twenty-Nine Palms"). In re Bardos I, 2014 WL 3703923, at *1.
6 Mr. Bardos served as contractor for some or all of these
7 projects, doing so under various names, including his sole
8 proprietorship, Cadmus Co. Id.

9 In 2009, Twenty-Nine Palms filed a complaint in the
10 San Bernardino superior court against Cadmus Co. Id.
11 Twenty-Nine Palms alleged that, because Cadmus Co. was not a
12 licensed contractor, it was in violation of the relevant state
13 licensing statutes. Id. It asked the court to order that Cadmus
14 Co. disgorge all of the fees Twenty-Nine Palms had paid it. Id.
15 The superior court granted summary judgment in favor of
16 Twenty-Nine Palms and awarded it \$917,043.09 plus pre-judgment
17 interest. Id.

18 **B. The Individual Bankruptcy Case**

19 On September 29, 2010, Mr. Bardos filed his chapter 11
20 bankruptcy petition (the "Individual Case"). He listed
21 Twenty-Nine Palms as his largest creditor with a claim for
22 \$917,043.09. One of the assets of the estate is Mr. Bardos'
23 stock in Cadmus Inc., with its value listed as "unknown."

24 **C. The Corporate Bankruptcy Case**

25 A few months after Mr. Bardos filed his chapter 11 petition,
26 Cadmus Inc. also filed for chapter 11 bankruptcy (the "Corporate
27 Case"). The Corporate Case was ultimately converted to
28 chapter 7, and Steven Speier was appointed as chapter 7 trustee.

1 **D. The Retention of Mr. Rogers' Firm in the Individual Case**

2 On December 29, 2010, the court in the Individual Case
3 approved Mr. Bardos' application for the employment of
4 Mr. Rogers' law firm, Lambert & Rogers, APLC, as special counsel.
5 Lambert & Rogers was retained to represent Mr. Bardos' estate in
6 the state-court litigation between Twenty-Nine Palms and Cadmus
7 Co. The law firm would be compensated based on an hourly rate.

8 Mr. Rogers' firm apparently completed its work in the
9 Individual Case. On October 18, 2012, Mr. Rogers applied for
10 final compensation in the amount of \$58,066 plus expenses. He
11 stated that \$48,169.50 had been paid to date. The court approved
12 and authorized payment of the requested compensation (a net
13 balance of \$9,896.50) by order entered on November 14, 2012.
14 Mr. Rogers now claims that the compensation was never paid in
15 full and that the unpaid balance is \$8,431.12. Nothing in the
16 record corroborates this assertion, and there is no indication
17 that Mr. Rogers ever brought the issue to the court's attention.

18 **E. The Retention of Mr. Rogers' Firm in the Corporate Case**

19 On March 21, 2014, the chapter 7 trustee in the Corporate
20 Case filed an application to employ Mr. Rogers' law firm as
21 special litigation counsel. The retainer agreement, which was
22 attached to Mr. Rogers' declaration, provided for a contingency
23 fee as follows:

24 CONTINGENCY FEE COMPENSATION

25 The CLIENT agrees to employ ATTORNEYS to defend
26 and prosecute a lawsuit and arbitration and assigns to
27 them for their fee TWENTY-FIVE PERCENT (25%) of all
28 amounts actually recovered by way of settlement,
compromise or otherwise prior to the filing of the
Opening Brief with the California Court of Appeal, and
FORTY PERCENT (40%) of all amounts actually recovered

1 by way of settlement, compromise, judgment, order,
2 award or otherwise after the filing of the Opening
3 Brief, subject to the below and any Bankruptcy Court
4 order (the "Compensation Terms").

5 The retainer agreement also provided:

6 OTHER EMPLOYMENT TERMS

7 In addition to the Compensation Terms, the
8 Employment Terms includes all of the following:

9 (1) ATTORNEYS [Lambert & Rogers] and CLIENT [the
10 chapter 7 trustee in the Corporate Case] have
11 conferred and agree that **no ownership interest in
12 the DEBTOR [Cadmus Inc.] should [be] sold,
13 transferred, or otherwise disposed of during the
14 pendency of the CASE** and a prohibition against
15 such a transfer should be included in any order
16 approving the engagement of ATTORNEYS by CLIENT as
17 provided for herein.

18 (2) **In the event any ownership interest in Cadmus
19 Construction, Inc., is sold, transferred, or
20 otherwise disposed of, and such transferral or
21 disposition causes a prejudicial impact on
22 ATTORNEYS' ability to obtain maximum recovery, the
23 above-stated contingency fees shall be applied to
24 the actual cash proceeds of any such sale,
25 transferral, or disposition.** The determination of
26 "prejudicial impact" shall be made by ATTORNEYS in
27 their sole, unfettered discretion, subject to the
28 right of the CLIENT in the reasonable exercise of
its duties to contest such a determination with
the Court in the Case.

(Emphases added.) Although the entire retainer agreement was
filed with the bankruptcy court, neither Mr. Rogers nor the
chapter 7 trustee called these unusual provisions to the
bankruptcy court's attention.

The court granted the application and approved the
"compensation that is to be paid on a contingency fee basis as
set forth in the . . . Application."

F. The Stock Sale in the Individual Case

The bankruptcy court apparently confirmed a plan of

1 reorganization in the Individual Case that provided, among other
2 things, that if Mr. Bardos was convicted in a pending criminal
3 case, the court would immediately appoint a liquidating agent.
4 After Mr. Bardos pleaded guilty to one count in the criminal
5 case, the court appointed accounting firm Squar Milner as
6 liquidating agent on April 4, 2014. On July 23, the court
7 approved the appointment of Appellee Leslie T. Gladstone
8 ("Liquidating Agent") as successor liquidating agent.

9 When the Liquidating Agent took over, the estate in the
10 Individual Case had essentially no cash, making it very difficult
11 for the Liquidating Agent to do her job. The bankruptcy court
12 permitted the Liquidating Agent to borrow \$15,000 from
13 Twenty-Nine Palms to fund an investigation of potential claims.
14 In granting the request for approval of the advance, the
15 bankruptcy court cautioned the Liquidating Agent that, given the
16 doubtfulness of recovery, she "should be mindful that this case
17 should not linger or stay open."

18 One of the assets of the estate in the Individual Case was
19 Mr. Bardos' stock in Cadmus Inc. It initially appeared that the
20 stock was worthless, but the Liquidating Agent negotiated an
21 agreement to sell the stock to Twenty-Nine Palms for \$20,000.

22 On April 28, 2015, she filed a Motion to Approve Stock
23 Purchase Agreement ("Motion to Approve Stock Purchase") under
24 § 363(b). She stated that "[t]here are no liens against the
25 [Cadmus Inc.] Stock and [Cadmus Inc.] is a debtor in [a separate]
26 bankruptcy with no expected distribution to shareholders." She
27 argued that the sale of the stock was in the best interests of
28 the estate, since it had unpaid claims and no other source of

1 funds.

2 Mr. Rogers opposed the Motion to Approve Stock Purchase. He
3 pointed out that he had been employed since May 2014 as special
4 litigation counsel in the Corporate Case. He contended that,
5 based on his retention agreement in that case, he is entitled to
6 a lien on the stock owned by the estate in the Individual Case.
7 Specifically, he argued that the contingency fee employment
8 agreement in the Corporate Case entitles him "to 40% of the
9 purchase money in the event of a transfer in ownership interest
10 of [Cadmus Inc.] [He] will be entitled to \$8,000 of the
11 purchase money." Mr. Rogers argued that: (1) the Liquidating
12 Agent had not properly evaluated the estate's claims;
13 (2) "\$20,000 seems a bit low, especially considering it is a net
14 of \$12,000 after [Mr. Rogers'] cut" and even less after repayment
15 of the Tribe's \$15,000 loan and various fees; (3) he is pursuing
16 Cadmus Inc.'s claims against the Tribe, and the sale would mean
17 the he "will be, on some level, suing [his] own client"; (4) the
18 Liquidating Agent failed to demonstrate the fairness or
19 reasonableness of the purchase price; and (5) the Liquidating
20 Agent "has been bought and paid for" or "is, at the very least,
21 being played." Significantly, Mr. Rogers did not mention that he
22 was owed any unpaid fees for work done in the Individual Case.

23 Mr. Rogers failed to appear at the hearing on the Motion to
24 Approve Stock Purchase. The court rejected his contentions,
25 reasoning that the chapter 7 trustee in the Corporate Case (i.e.,
26 Mr. Rogers' client) had consented to the sale, and Mr. Rogers did
27 not have standing in the Individual Case. It held:

28 I'm prepared to grant the motion and if Mr. Rogers was

1 here I was going to let him know that I really,
2 although I do share some concerns that he has raised in
3 his opposition, I don't really think he has a right to
4 object. I think his client, the Chapter 7 Trustee in
5 the Cadmus case, as I can see from the e-mail exchange
6 attached by Ms. Gladstone that Mr. Rogers' client
7 seemed to have consented to this transaction and too I
8 think Mr. Rogers is mistaken. I think to the extent
9 that he's a professional and a potential admin creditor
10 it's in the Cadmus case, not in this case, so I don't
11 think he has the standing or the right to object to
12 this transaction as a professional with a potential
13 admin claim in this case.

14 The court expressed its incredulity that anyone would want
15 to purchase the stock, when "[t]here is no money in it" and there
16 likely will not "ever be money for equity." Nevertheless, the
17 Liquidating Agent had stated in her briefs that Twenty-Nine Palms
18 had approached her with an offer to buy the potentially worthless
19 stock for \$5,000, which she later negotiated to \$20,000. She
20 represented that there were no negative tax consequences to the
21 estate. The Liquidating Agent stated that the sale "is fair and
22 equitable and in the best interests of creditors."

23 The court made clear that Twenty-Nine Palms' stock purchase
24 would not terminate the litigation between Cadmus Inc. and
25 Twenty-Nine Palms, since Cadmus Inc.'s claims were property of
26 its bankruptcy estate under the control of the chapter 7 trustee
27 in the Corporate Case. The court cautioned Twenty-Nine Palms
28 that it would have no ability to control the litigation against
it or otherwise influence the handling of the lawsuit by the
trustee in the Corporate Case. Counsel for Twenty-Nine Palms
indicated that his client understood.

The bankruptcy court granted the Motion to Approve Stock
Purchase and entered the order to that effect on June 23, 2015.
Mr. Rogers timely appealed.

1 The Liquidating Agent represents that the sale of the stock
2 has closed and the stock has been transferred to Twenty-Nine
3 Palms. Under the stock purchase agreement, the entry of an order
4 approving the sale and the expiry of the appeal period without an
5 appeal being taken were conditions to the closing.⁴ The
6 Liquidating Agent represents that Twenty-Nine Palms waived this
7 condition.

8 JURISDICTION

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334, 157(b)(1), and 157(b)(2)(K). We have jurisdiction under
11 28 U.S.C. § 158.

12 ISSUES

13 (1) Whether this appeal is moot.

14 (2) Whether the bankruptcy court erred in approving the sale
15 of stock.

16 STANDARDS OF REVIEW

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

21
22 ⁴ The Stock Purchase Agreement states:

23 The obligations of each Party to consummate the
24 transactions contemplated by this Agreement shall be
25 subject to the fulfillment, at or prior to the Closing,
26 of each of the following conditions: (a) The Bankruptcy
27 Court having jurisdiction over the Bankruptcy
28 Proceedings shall have approved this Agreement and the
transactions contemplated by this Agreement by entry of
an order that is final for purposes of appeal, as to
which the time for appeal, including any extensions,
has expired, and from which no appeal has been taken[.]

1 Similarly, standing is a legal issue that we review de novo.
2 Wedges/Ledges of Cal., Inc. v. City of Phoenix, 24 F.3d 56, 61
3 (9th Cir. 1994); Kronemyer v. Am. Contractors Indem. Co.
4 (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009).

5 We review for abuse of discretion an order approving a § 363
6 sale. Moldo v. Clark (In re Clark), 266 B.R. 163, 168 (9th Cir.
7 BAP 2001). We apply a two-part test to determine objectively
8 whether the bankruptcy court abused its discretion, first
9 determining de novo whether the court identified the correct
10 legal rule, and second examining the court's factual findings
11 under the clearly erroneous standard. Beal Bank USA v. Windmill
12 Durango Office, LLC (In re Windmill Durango Office, LLC),
13 481 B.R. 51, 64 (9th Cir. BAP 2012) (citing United States v.
14 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en banc)). A
15 bankruptcy court abuses its discretion if it applied the wrong
16 legal standard or its findings were illogical, implausible, or
17 without support in the record. See TrafficSchool.com, Inc. v.
18 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

19 DISCUSSION

20 **A. This appeal is not moot.**

21 We have requested that the parties address the issue of
22 mootness. As we stated in the prior appeal in this case:

23 We cannot exercise jurisdiction over a moot appeal. A
24 moot case is one where the issues presented are no
25 longer live, and no case or controversy exists. The
26 test for mootness is whether an appellate court can
27 still grant effective relief to the prevailing party if
it decides the merits in his or her favor. If a case
becomes moot while the appeal is pending, an appellate
court must dismiss the appeal.

28 In re Bardos I, 2014 WL 3703923, at *6 (internal citations

1 omitted). We recognize two types of mootness: constitutional
2 mootness and equitable mootness.

3 **1. Constitutional Mootness**

4 Constitutional mootness “occurs when an appellate court
5 cannot give the appellant any relief whatsoever in the event that
6 it decides in appellant’s favor.” Id. (citing Felster Publ’g v.
7 Burrell, 415 F.3d 994, 998 (9th Cir. 2005)). Constitutional
8 mootness is inapplicable in the present case, because we have the
9 authority to grant the requested relief and undo the sale of
10 stock.

11 **2. Equitable Mootness**

12 Equitable mootness requires “that practical and equitable
13 factors should be taken into consideration in determining if an
14 appeal is moot.” In re Bardos I, 2014 WL 3703923, at *6; see
15 Onouli-Kona Land Co. v. Richards (In re Onouli-Kona Land Co.),
16 846 F.2d 1170, 1171 (9th Cir. 1988) (“[b]ankruptcy’s mootness
17 rule applies when an appellant has failed to obtain a stay from
18 an order that permits a sale of a debtor’s assets”). Equitable
19 mootness arises when “appellants have failed and neglected
20 diligently to pursue their available remedies to obtain a stay of
21 the objectionable orders of the Bankruptcy Court, thus
22 ‘permitting such a comprehensive change of circumstances to occur
23 as to render it inequitable . . . to consider the merits of the
24 appeal.” In re Bardos I, 2014 WL 3703923, at *6 (quoting Focus
25 Media, Inc. v. NBC (In re Focus Media, Inc.), 378 F.3d 916, 922
26 (9th Cir. 2004)). The party asserting equitable mootness must
27 “demonstrate that the case involves transactions ‘so complex or
28 difficult to unwind’ that equitable mootness applies.” Id. at *7

1 (quoting Lowenschuss v. Selnick (In re Lowenschuss), 170 F.3d
2 923, 933 (9th Cir. 1999)).

3 "Equitable mootness requires the court to look beyond
4 impossibility of a remedy to 'the consequences of the remedy and
5 the number of third parties who have changed their position in
6 reliance on the order that is being appealed.'" Clear Channel
7 Outdoor, Inc. v. Knupfer (In re PW, LLC), 391 B.R. 25, 33 (9th
8 Cir. BAP 2008) (quoting Darby v. Zimmerman (In re Popp), 323 B.R.
9 260, 271 (9th Cir. BAP 2005)). "In other words, equitable
10 principles may require dismissal of the appeal when the appellant
11 neglects to obtain a stay pending appeal and the rights of third
12 parties intervene." Zuercher v. Kravitz (In re Zuercher Trust of
13 1999), BAP No. NC-13-1299, 2014 WL 7191348, at *6 (9th Cir. BAP
14 Dec. 17, 2014) (citing Spirtos v. Moreno (In re Spirtos),
15 992 F.2d 1004, 1006 (9th Cir. 1993); In re Popp, 323 B.R. at
16 271).

17 Although the concept of equitable mootness is not new, the
18 Ninth Circuit recently endorsed standards for evaluating
19 equitable mootness:

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

26 Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe
27 Insulation Co.), 677 F.3d 869, 881 (9th Cir. 2012).

28 Beginning with the first factor, in the present case,

1 Mr. Rogers never sought a stay of the order approving the stock
2 sale. He says that there was no need to seek a stay, since his
3 appeal prevented the satisfaction of a condition to closing. The
4 Liquidating Agent says that Twenty-Nine Palms waived this
5 condition. Both the Stock Purchase Agreement and the bankruptcy
6 court's order approving that agreement contemplate possible
7 waivers of the closing conditions.⁵ Mr. Rogers simply assumed
8 that his notice of appeal would block the sale. His assumption
9 was unwarranted. Therefore, Mr. Rogers did not diligently pursue
10 his rights to stay the sale.

11 However, our inquiry does not stop there. While "failure to
12 seek a stay pending appeal, at least without an adequate excuse,
13 requires dismissal of an appeal[,]" In re Zuercher Trust of 1999,
14 2014 WL 7191348, at *7 (citing Rev Op Grp. v. ML Manager LLC
15 (In re Mortgs. Ltd.), 771 F.3d 1211 (9th Cir. 2014)), we recently
16 held that, even when an objector did not seek a stay, "there must
17 also be some subsequent event that would render consideration of
18 the issues on appeal inequitable, and thereby trigger an
19 equitable mootness analysis." In re Zuercher Trust of 1999,
20 2014 WL 7191348, at *7 (citations omitted). In other words, even
21 where "[the objector] did not seek a stay of the Sale Order
22 pending appeal and has provided no satisfactory explanation for
23 the failure to do so, to complete our equitable mootness analysis

25 ⁵ Paragraph 2.1 of the agreement provides that the closing
26 will take place no later than three business days "after the last
27 of the conditions to Closing set forth in Section 6 have been
28 satisfied **or waived**" (Emphasis added.) Paragraph 3 of
the bankruptcy court's order contains virtually the same
language.

1 we must consider whether [the objector's] failure to seek a stay
2 'creates a situation rendering it inequitable to reverse the
3 orders appealed from.'" Id. (quoting In re Mortgs., Ltd.,
4 771 F.3d at 1216). Thus, we continue with our analysis of the
5 remaining Thorpe factors.

6 The second factor described in Thorpe is whether the plan
7 has been substantially consummated. In re Thorpe Insulation Co.,
8 677 F.3d at 882.⁶ Here, the Liquidating Agent represents that
9 the stock sale has been completed, with the stock transferred to
10 Twenty-Nine Palms. This weighs in favor of mootness.

11 The third Thorpe factor considers the effect of a reversal
12 on third parties who are not "before the court." See
13 In re Zuercher Trust of 1999, 2014 WL 7191348, at *8. While it
14 is true that Twenty-Nine Palms is not a party to this appeal, it
15 is the largest creditor and a participant in both the Individual
16 Case and the Corporate Case. Accordingly, we cannot say that
17 Twenty-Nine Palms is the type of third party that equitable
18 mootness is meant to protect.

19 Further, "the question is not whether it is possible to
20 alter a plan such that no third party interests are affected, but
21 whether it is possible to do so in a way that does not affect
22 third party interests to such an extent that the change is
23 inequitable." In re Thorpe Insulation Co., 677 F.3d at 882. If
24 we conclude that the bankruptcy court erred, it would be
25

26 ⁶ In the context of a chapter 11 plan, § 1101(2) provides a
27 special statutory definition of the phrase "substantial
28 consummation." The phrase does not directly apply to an asset
sale, but a similar concept can be applied by analogy.

1 relatively easy to restore the status quo ante: the Liquidating
2 Agent could return the purchase price to Twenty-Nine Palms, and
3 Twenty-Nine Palms could return the stock to the Liquidating
4 Agent. Thus, there is no evidence that Twenty-Nine Palms has
5 irrevocably changed its position or cannot be made whole.

6 At oral argument, the Liquidating Agent said that she
7 already spent part of the sale proceeds on fees due to the United
8 States Trustee and other administrative expenses, and she is
9 unsure whether she can recall all or part of those funds. But
10 the Liquidating Agent bears the burden of demonstrating that the
11 transaction **cannot** be undone; uncertainty about whether it can be
12 undone is not sufficient. See id. at 880 ("The party moving for
13 dismissal on mootness grounds bears a heavy burden." (citation
14 and quotation marks omitted)).

15 Finally, the inability of the Liquidating Agent to repay the
16 entire purchase price to Twenty-Nine Palms might not lead to an
17 inequitable result; after all, it was Twenty-Nine Palms that
18 chose to waive the closing condition and close the transaction
19 despite Mr. Rogers' pending appeal. It might not be inequitable
20 to require Twenty-Nine Palms to face the consequences of its
21 calculated risk.

22 "Fourth, and most importantly, we look to whether the
23 bankruptcy court on remand may be able to devise an equitable
24 remedy. . . . Where equitable relief, though incomplete, is
25 available, the appeal is not moot." Id. at 883 (citing Paulman
26 v. Gateway Venture Partners III, L.P. (In re Filtercorp, Inc.),
27 163 F.3d 570, 578 (9th Cir. 1998)). Aside from the fact that the
28 stock sale has been consummated, the Liquidating Agent has failed

1 to provide us with any evidence that the transaction is "so
2 complex or difficult to unwind" that equitable mootness would
3 prevent our reversal of the order granting the Motion to Approve
4 Stock Purchase.

5 Therefore, we hold that this appeal is not equitably moot.

6 **B. Mr. Rogers failed to establish his standing in the**
7 **Individual Case to object to the stock sale.**

8 The Liquidating Agent argues that Mr. Rogers lacks standing
9 to object to the stock sale in the Individual Case. We agree
10 with the conclusion, but for slightly different reasons.

11 Mr. Rogers objected to the stock sale in the Individual Case
12 on the basis that it would impair his rights under the contingent
13 fee agreement. But Mr. Rogers' contingent fee agreement was with
14 the chapter 7 trustee in the Corporate Case. The Liquidating
15 Agent in the Individual Case was not bound by that agreement, and
16 the agreement gave Mr. Rogers no rights in the Individual Case.
17 Indeed, the stock transfer restriction in his retention agreement
18 in the Corporate Case was completely ineffective, because Cadmus
19 Inc. did not own or control its own stock and had no power to
20 restrict transfers of that stock.⁷ The chapter 7 trustee in the
21 Corporate Case had no more power over the stock than Cadmus Inc.
22 As the Liquidating Agent correctly pointed out, "Steven Speier -
23 the client named in the Retainer Agreement and representative of
24 [Cadmus Inc.'s] estate - never owned the Stock and never had any

25
26 ⁷ The Liquidating Agent also argues that the creation of a
27 lien on the stock in the Corporate Case would have violated the
28 automatic stay under § 362(a)(4). We decline to address it
because it is unnecessary and because the Liquidating Agent
admittedly failed to raise it in the bankruptcy court.

1 authority whatsoever to encumber the Stock, which is property of
2 the Shareholder bankruptcy estate.” (Emphasis omitted.)

3 Mr. Rogers has failed to provide any facts or authority to the
4 contrary. Therefore, the contingent fee agreement in the
5 Corporate case gave Mr. Rogers no rights in the Individual Case.⁸

6 Mr. Rogers argues for the first time on appeal that he has
7 standing in the Individual Case because his approved final
8 compensation for services rendered in that case was not paid in
9 full. He says that “[t]here wasn’t enough money in the estate to
10 pay [his] last fee bill; [he] is still owed \$8,431.12.” Nothing
11 in the record either corroborates or refutes this assertion.

12 More importantly, Mr. Rogers did not make this argument in
13 the bankruptcy court, and, because he did not attend the hearing
14 on approval of the stock sale, he was not available to address
15 the court’s concerns about his standing. We decline to consider
16 this new argument on appeal. See Ezra v. Seror (In re Ezra),
17 537 B.R. 924, 932 (9th Cir. BAP 2015) (“[F]ederal appellate
18 courts will not consider issues not properly raised in the trial
19 courts. . . . An issue only is ‘properly raised’ if it is raised
20 sufficiently to permit the trial court to rule upon it.”
21 (internal citations omitted)). Accordingly, Mr. Rogers lacks
22 standing to prosecute this appeal.

24
25 ⁸ We are troubled by the fact that neither Mr. Rogers nor
26 counsel for the chapter 7 trustee specifically called the stock
27 transfer restrictions to the bankruptcy court’s attention when
28 they asked the bankruptcy court to approve that agreement in the
Corporate Case. Although the agreement was filed with the court,
most bankruptcy courts expect counsel to point out, explain, and
justify non-standard provisions such as these.

1 **C. The bankruptcy court did not err when it approved the sale.**

2 Even assuming he has standing, Mr. Rogers has failed to show
3 reversible error.

4 **1. Mr. Rogers' briefs do not identify any error.**

5 As a preliminary matter, we note that Mr. Rogers' nebulous
6 arguments, spanning approximately two pages of his opening brief,
7 do not clearly identify any points of error or cite any error in
8 the record.

9 As a general rule, a party's brief "must make specific
10 references to the relevant portions of the record. Opposing
11 parties and the court are not obliged to search the entire
12 record, unaided, for error." Tevis v. Wilke, Fleury, Hoffelt,
13 Gould & Birney, LLP (In re Tevis), 347 B.R. 679, 686 (9th Cir.
14 BAP 2006) (internal citations omitted). Moreover, we "will not
15 consider a matter on appeal that is not specifically and
16 distinctly argued in [an] appellant's opening brief." Id. at 690
17 (citing Affordable Housing Dev. Corp. v. Fresno, 433 F.3d 1182,
18 1193 (9th Cir. 2006); Price v. Lehtinen (In re Lehtinen),
19 332 B.R. 404, 410 (9th Cir. BAP 2005)).

20 Mr. Rogers' failure to "specifically and distinctly" argue
21 the alleged errors and provide "specific references" to the
22 record supports our decision to reject this appeal.

23 **2. The court may approve a sale in the best interest of**
24 **the estate under § 363.**

25 Section 363(b)(1) provides that "[t]he trustee, after notice
26 and a hearing, may use, sell, or lease, other than in the
27 ordinary course of business, property of the estate"
28 § 363(b)(1). "The trustee (and, ultimately, the bankruptcy

1 court) must assure that the estate receives optimal value as to
2 the asset to be sold." DeBilio v. Golden (In re DeBilio),
3 BAP No. CC-13-1441-TaPaKi, 2014 WL 4476585, at *6 (9th Cir. BAP
4 Sept. 11, 2014) (citing § 363(b)(1); Simantob v. Claims
5 Prosecutor, LLC (In re Lahijani), 325 B.R. 282, 288-89 (9th Cir.
6 BAP 2005)). We also stated that, "[i]n the Ninth Circuit, a
7 § 363(b)(1) sale does not require a good faith finding." Id.
8 (citing Thomas v. Namba (In re Thomas), 287 B.R. 782, 785 (9th
9 Cir. BAP 2002) ("While no bankruptcy judge is likely to approve a
10 sale that does not appear to be in 'good faith,' an actual
11 finding of 'good faith' is not an essential element for approval
12 of a sale under § 363(b).")).

13 **3. The sale price was adequate.**

14 Mr. Rogers' basic argument is that the purchase price for
15 the stock was "a bit low." The bankruptcy court did not clearly
16 err when it rejected this factual contention.

17 In her motion for approval of the stock sale, the
18 Liquidating Agent declared that:

19 The Agreement is based on my sound business judgment,
20 as it provides for payment of substantial funds to the
21 estate. I have also been advised that there are no
22 adverse tax consequences to the estate. Thus, the
23 proposed Agreement is fair and equitable and in the
24 best interests of creditors.

25 In his opposition, Mr. Rogers briefly described the claims
26 against Twenty-Nine Palms and declared that "[i]t does not seem
27 that [Liquidating Agent] has evaluated this before agreeing to a
28 sale of the stock for \$20,000." He acknowledged, however, that,
"[o]f course, coming up with a methodology for calculating a sale
price that efficaciously incorporates the risk/return is

1 problematic and open to bias depending on the 'experts' canvassed
2 for their opinion, but \$20,000 seems a bit low, especially
3 considering it is a net of \$12,000 after my cut." He also
4 attacked the Liquidating Agent personally. He claimed that "she
5 also has a conflict of interest in that she is the first one to
6 get paid out of the \$20,000" and "[i]t must be assumed that [the
7 Liquidating Agent] has been bought and paid for."

8 In reply, the Liquidating Agent declared that the stock
9 "does not have any other value to the Debtor's estate" apart from
10 the proposed sale. She emphasized her independence and stated
11 that Mr. Rogers was free to bid for the stock if he thought the
12 purchase price was too low. She also provided e-mail
13 correspondence between herself and the chapter 7 trustee in the
14 Corporate Case, in which the trustee said, "I doubt there will be
15 a surplus in my case, but we will probably make a small
16 distribution to creditors."

17 The bankruptcy court accepted the Liquidating Agent's
18 evidence. The court noted that "this is very unusual why [sic]
19 anybody would want to buy a privately held equity interest of a
20 Chapter 7 debtor. There is no money in it and at least according
21 to [the chapter 7 trustee in the Corporate Case,] he doesn't
22 think there will ever be money for equity." The court went on to
23 say, "I'm still mystified why anybody will want to buy a [sic]
24 out of the money equity privately held in a Chapter 7 case but it
25 generates money for this estate so I am willing to grant the
26 motion."

27 The bankruptcy court did not commit clear error when it
28 rejected Mr. Rogers' contention that the sale price was "a bit

1 low" and instead agreed with the Liquidating Agent's evidence.

2 **4. We decline to take judicial notice of a state court**
3 **decision that postdated the bankruptcy court's order.**

4 Mr. Rogers submits that the Panel should take judicial
5 notice of a recent, unpublished opinion in which the California
6 Court of Appeals held that the arbitration provisions in the
7 various construction contracts were valid.

8 We decline to take judicial notice of the opinion. Our job
9 is to determine whether the bankruptcy court erred based on the
10 evidence before it, which in turn depends in part on whether the
11 Liquidating Agent properly exercised her business judgment based
12 on the facts known at the time. Neither the bankruptcy court nor
13 the Liquidating Agent had the appellate opinion before them, and
14 neither of them is charged with perfect foresight. Therefore,
15 that opinion is not relevant to this appeal.

16 **5. The bankruptcy court properly addressed the effects of**
17 **the stock sale on Mr. Rogers and the Corporate Case.**

18 Mr. Rogers argues that, if Twenty-Nine Palms owns 100% of
19 Cadmus Inc.'s stock, then he "will be, on some level, suing his
20 own client." Mr. Rogers posits that this "could cause problems
21 down the road."

22 In the first place, his premise is wrong. As the bankruptcy
23 court correctly observed, and as Twenty-Nine Palms' counsel
24 confirmed, the chapter 7 trustee of Cadmus Inc., not the
25 shareholder of Cadmus Inc., is Mr. Rogers' client and will
26 control the prosecution of the claims.

27 Further, the conclusion does not follow. The Liquidating
28 Agent's duty in the Individual Case was to take steps which, in

1 her judgment, advanced the interests of Mr. Bardos' estate and
2 creditors. She had no duty to protect Cadmus Inc.'s estate and
3 creditors or to protect Mr. Rogers' contingent fee. Put simply,
4 even if it were true that the sale of the stock put Mr. Rogers in
5 a difficult position in the Corporate Case, that would not be the
6 concern of the Liquidating Agent or the bankruptcy court in the
7 Individual Case.

8 **6. Lahijani and Fitzgerald are inapplicable.**

9 Mr. Rogers argues that "it would seem to be appropriate to
10 use the analysis set forth in In re Fitzgerald, 428 B.R. 872,
11 883-884 (9th Cir. BAP 2010) and In re Lahijani, 325 B.R. 282,
12 289-290 (9th Cir. BAP 2005)." We disagree.

13 Fitzgerald and Lahijani both considered the sale of
14 litigation claims to a person against whom those claims might be
15 asserted. Both decisions rest on the common-sense proposition
16 that a "sale" of claims to a defendant has the same effect as a
17 settlement of those claims, so such "sales" should be evaluated
18 both as sales and as settlements. Lahijani holds that:

19 when a cause of action is being sold to a present or
20 potential defendant over the objection of creditors, a
21 bankruptcy court must, in addition to treating it as a
22 sale, independently evaluate the transaction as a
23 settlement under the prevailing 'fair and equitable'
test, and consider the possibility of authorizing the
objecting creditors to prosecute the cause of action
for the benefit of the estate, as permitted by
§ 503(b)(3)(B).

24 In re Lahijani, 325 B.R. at 284. Fitzgerald expands on Lahijani,
25 holding that "it is not enough for Trustee to have stopped his
26 inquiry when he determined that the sale price was adequate as
27 long as it covered administrative expenses and the claims of
28 non-insider creditors." In re Fitzgerald, 428 B.R. at 884.

