

MAR 29 2016

SUSAN M. SPRAUL, CLERK
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NOT FOR PUBLICATION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. SC-15-1222-FJuKi
)
 JAMES BERTRAM MORRIS, JR.,) Bk. No. 14-02962-CL7
)
 Debtor.)
 _____)
)
 JAMES BERTRAM MORRIS, JR.;)
 MARK NISHI,)
)
 Appellants,)
)
 v.) **MEMORANDUM***
)
 GERALD DAVIS, Chapter 7)
 Trustee; JEANEEN MCGEE,)
)
 Appellees.)
 _____)

Argued and Submitted on March 17, 2016
at Pasadena, California

Filed - March 29, 2016

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

Honorable Christopher B. Latham, Bankruptcy Judge, Presiding

Appearances: Michael A. Gardiner argued for Appellant James
Bertram Morris, Jr.; Kathryn A. Millerick argued
for Appellee Gerald Davis, Chapter 7 Trustee.

Before: FARIS, JURY, and KIRSCHER, Bankruptcy Judges.

* 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 **INTRODUCTION**

2 Appellants James Bertram Morris, Jr. and his friend and
3 business partner Mark Nishi appeal from the bankruptcy court's
4 order granting Appellee and chapter 7¹ trustee Gerald H. Davis'
5 motion to settle claims of Appellee Jeaneen McGee against
6 Mr. Morris' estate. We hold that the bankruptcy court did not
7 abuse its discretion when it approved the settlement.
8 Accordingly, we AFFIRM.

9 **FACTUAL BACKGROUND**

10 **A. The Arizona family court proceedings**

11 Mr. Morris and Ms. McGee were involved in contentious
12 divorce proceedings before the Arizona family court. On
13 March 10, 2009, the family court approved a Consent Decree of
14 Dissolution of a Non-Covenant Marriage, which incorporated by
15 reference the attached Property Settlement Agreement. The
16 Property Settlement Agreement provided for the division of
17 substantial assets, including certain pending lawsuits.
18 Paragraph 29 of the Property Settlement Agreement discussed the
19 disposition of the so-called Cadence lawsuit:

20 29. CADENCE LAWSUIT.

21 The community formerly sued a company that will
22 here be called "Cadence" on theories which need not
23 here be discussed. The community lost that lawsuit in
24 a Federal District Court, and that Court's decision has
25 been appealed to the Ninth Circuit Court of Appeals
26 where it is currently being considered. . . .

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

1 It appears that the attorneys who originally
2 represented the community in the Federal District Court
3 lawsuit against Cadence, which resulted in the
4 dismissal and subsequent appeal to the Ninth Circuit,
5 may have been negligent in their handling of the
6 original case, and consequently caused the community to
7 lose a viable and valid claim against Cadence, and thus
8 to suffer damages. . . .

9 Exhibit A to the agreement provided that Mr. Morris and Ms. McGee
10 would each take "50% of all right and value in the 'Cadence'
11 lawsuits **and related lawsuits** (See paragraph 29)." (Emphasis
12 added.)

13 A few months later, Mr. Morris initiated a malpractice
14 action against his original attorneys in the Cadence lawsuit.
15 About three years later, he settled the malpractice suit for
16 \$1,125,000. Both before and after the settlement of the
17 malpractice litigation, Mr. Morris told Ms. McGee via e-mails
18 that she was the co-owner of the action and that she would
19 receive \$250,000 or more. Mr. Morris also threatened that, if
20 Ms. McGee continued to press him for spousal maintenance, he
21 would keep all funds from her, including any proceeds from the
22 malpractice litigation:

23 I am going to give you a warning. I gave you a
24 warning a couple of years ago that you did not heed,
25 and look where it got you.

26 You had better heed this warning.

27 If you f[--] with me again like you did a couple
28 of years ago, I will make sure you never see another
penny from me in ANYTHING in the future. That
includes, in particular, the malpractice lawsuit. I
will hide that money so f[--] deep that nobody will
ever find it, and I will be long gone from America and
untouchable by you and any American court.

 And you will never get another penny from me for
as long as you live.

1 (Expletives modified.)

2 Thereafter, Mr. Morris took the position that Ms. McGee was
3 not entitled to any part of the settlement proceeds. His counsel
4 communicated to Ms. McGee's counsel that Mr. Morris' "position is
5 that the divorce property settlement agreement does not
6 explicitly reference the malpractice suit and does not make any
7 provision for his ex-wife to share in the recovery." Mr. Morris
8 now contends that the "related lawsuits" (referenced in
9 connection with Ms. McGee's right to share in the proceeds of the
10 "'Cadence' lawsuits and related lawsuits") do not refer to the
11 malpractice litigation, but refer to the so-called RaveSim
12 lawsuit,² which is not mentioned anywhere in the Property
13 Settlement Agreement.

14 In or around January 2013, Ms. McGee filed a garnishment
15 action in the Arizona family court, seeking to recover her share
16 of the malpractice litigation settlement proceeds.³ The family
17 court awarded Ms. McGee \$108,022.89 for unpaid spousal support
18

19 ² According to Mr. Morris, RaveSim had agreed to transfer
20 certain intellectual property rights to him but had failed to do
21 so. He says he lost the Cadence lawsuit because RaveSim had not
22 assigned the intellectual property rights to him, and therefore
23 he lacked standing to prosecute his claims. The attorneys'
24 malpractice consisted of their failure to secure the RaveSim
25 rights before suing Cadence. Mr. Morris said that he sued
26 RaveSim to enforce the RaveSim agreement and that the RaveSim
27 lawsuit is the "related" litigation mentioned in the Property
28 Settlement Agreement.

26 ³ Of the \$1,125,000 settlement proceeds from the malpractice
27 litigation, \$250,000 went to Mr. Morris' attorneys. If the
28 remaining \$875,000 was divided in half, Ms. McGee would be
entitled to \$437,500. At issue in this appeal is Ms. McGee's
half of the net settlement proceeds.

1 from Mr. Morris' share of the settlement proceeds. However, the
2 family court did not adjudicate Ms. McGee's claim that she is
3 entitled to 50% of the malpractice litigation settlement. The
4 family court ordered that Mr. Morris' attorneys freeze the
5 balance of the settlement proceeds in their account.

6 **B. Bankruptcy proceedings**

7 While the Arizona family court was considering Ms. McGee's
8 claims to the settlement proceeds,⁴ Mr. Morris filed a chapter 11
9 petition in the Southern District of California.

10 Mr. Nishi filed a proof of claim for \$959,216.12. Mr. Nishi
11 is a friend and business partner of Mr. Morris in one or more of
12 Mr. Morris' businesses. Anne Marie Groden, Mr. Morris' sister,
13 filed an amended proof of claim for \$1,153,898.99. Ms. McGee
14 filed a priority claim in the amount of \$497,147.19.

15 On October 24, 2014, the United States Trustee moved to
16 convert Mr. Morris' chapter 11 case to chapter 7. The court
17 granted the motion, stating that:

18 Here, Debtor has failed to accurately describe his
19 interest in [a company in which he holds an interest].
20 He has failed to report numerous prepetition and
21 postpetition transfers involving his various entities
22 and made for his benefit. He has failed to disclose
the existence of accounts and assets under his control.
He has expended estate assets without disclosing the
transactions or obtaining court authority. In

23 ⁴ Ms. McGee claims that Mr. Morris delayed the family court
24 proceedings for over a year and a half. He filed an interpleader
25 action in the District Court of Nevada, which resulted in a "bad
26 faith, time-consuming, expensive and ultimately unsuccessful
27 attempt at forum shopping." Ultimately, the district court
28 dismissed the interpleader action, holding that Mr. Morris failed
to demonstrate that he was domiciled in Nevada and that the
claims were not proper claims in an interpleader case. The
parties then resumed litigating in the Arizona family court.

1 particular, he has retained and paid special counsel
2 without court approval. And given Debtor's
3 circumstances, including his Arizona Family Court
proceeding, there does not appear to be a reasonable
likelihood of rehabilitation.

4 Debtor has also not fully complied with the
5 court's directive to disclose postpetition income and
6 support. By failing to disclose the many transfers to
7 and from the entities he holds interests in or
8 otherwise controls, Debtor has failed to satisfy
applicable reporting requirements. Without good
cause, he has failed to attend a scheduled 341(a)
meeting of creditors. And he has failed to timely
provide the UST with information reasonably requested.

9 Mr. Morris' amended schedules list the settlement proceeds
10 as an asset of the estate, valued at \$441,971.11. His amended
11 schedules also include a \$4,138.87 exemption in "Litigation
12 settlement funds - Tiffany & Bosco trust acct" under § 522(d)(5).

13 **C. The Motion to Settle**

14 On May 28, 2015, the Trustee filed a motion to settle
15 Ms. McGee's claims to half of the net malpractice settlement
16 proceeds ("Motion to Settle"). Essentially, the proposed
17 settlement provided that, out of the half of the net proceeds
18 that Ms. McGee claimed, the estate would receive \$41,000 and
19 Ms. McGee would receive the remainder. Ms. McGee also agreed to
20 reduce her proof of claim from \$497,147.19 to \$59,647.19 (a
21 reduction of \$437,500) and dismiss with prejudice her § 523(a)(6)
22 claim in her adversary proceeding. The Trustee examined the
23 compromise under Rule 9019 and the four factors of Martin v. Kane
24 (In re A&C Properties), 784 F.2d 1377, 1381 (9th Cir. 1986), and
25 he argued that the settlement was in the best interest of the
26 estate.

27 Mr. Morris opposed the Motion to Settle by arguing, in
28 summary, that the motion did not satisfy the four factors of

1 A&C Properties and Woodson v. Fireman's Fund Insurance Co.
2 (In re Woodson), 839 F.2d. 610, 620 (9th Cir. 1988), and the
3 settlement was not in the best interests of the estate and
4 creditors. Both Mr. Nishi and Ms. Groden joined in the
5 opposition.

6 At the hearing on the Motion to Settle, counsel for
7 Mr. Nishi said for the first time that Mr. Nishi was proposing to
8 purchase the litigation against Ms. McGee for \$45,000. The oral
9 proposal had only been presented to the Trustee on the morning of
10 the hearing.

11 Counsel for the Trustee argued that the offer was
12 gamesmanship and would not result in any significant, additional
13 benefit to the estate:

14 On the face of it, it just appears to the trustee and
15 myself that this is just a little bit more gamesmanship
16 by the debtor, having Mr. Nishi come in and offer to
buy the estate's interest.

17

18 And that kind of leads to my next point, which is
19 the cost. It's a \$4,400 increase. No, a \$4,000
20 increase. And I'm concerned that the cost of analyzing
21 the assignability of it, the cost of renoticing,
22 repapering, and potentially dealing with objection by
23 Mr. Cunningham's firm on behalf of Ms. McGee, all we're
really doing is inviting more litigation rather than
resolving current litigation. And I'm concerned that
those expenses are going to exceed any benefit of
\$4,000. And the trustee - I'm echoing the trustee's
concerns, your honor.

24 And so rather than resulting in a settlement of
25 the matter, we see it, your honor, as certainly just
creating and augmenting more litigation.

26 The Trustee also argued that Mr. Morris lacked standing to object
27 to the settlement.

28 At the conclusion of the hearing, the court said:

1 As far as the standing issue goes, I'm highly
2 dubious that the debtor has standing. But observe: the
3 court has considered debtor's counsel's papers and his
4 lengthy argument today, the most lengthy argument of
all this day, and credited all of those arguments via
the joinder. So they were given a full airing and
consideration by the court.

5 I think under A and C Properties, because that's
6 where the analytical rubber meets the road in this
7 case, that the point has been made very clear that one
8 side desires strongly to perpetuate the litigation in
9 the family law court. The probability of success is
uncertain, at best. And that litigation is very
complex both within the family law case itself and as
it intersects - as those issues intersect with
bankruptcy principles.

10 The settlement works a massive reduction in
11 Ms. McGee's claim

12 The court issued its order granting the Motion to Settle
13 (the "Order"). Appellants timely appealed the Order.

14 **JURISDICTION**

15 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
16 §§ 1334, and 157(b) (2) (A) and (O). We have jurisdiction under
17 28 U.S.C. § 158.

18 **ISSUE**

19 Whether the bankruptcy court abused its discretion in
20 granting the Motion to Settle.

21 **STANDARD OF REVIEW**

22 We review approval of both a Rule 9019 settlement agreement
23 and a § 363 sale for an abuse of discretion. Fitzgerald v. Ninn
24 Worx Sr, Inc. (In re Fitzgerald), 428 B.R. 872, 880 (9th Cir. BAP
25 2010) (§ 363 sale); Goodwin v. Mickey Thompson Entm't Grp., Inc.
26 (In re Mickey Thompson Entm't Grp., Inc.), 292 B.R. 415, 420 (9th
27 Cir. BAP 2003) ("Mickey Thompson") (Rule 9019 settlement
28 agreement).

1 To determine whether the bankruptcy court has abused its
2 discretion, we conduct a two-step inquiry: (1) we review de novo
3 whether the bankruptcy court "identified the correct legal rule
4 to apply to the relief requested," and (2) if it did, we consider
5 whether the bankruptcy court's application of the legal standard
6 was illogical, implausible, or "without support in inferences
7 that may be drawn from the facts in the record." United States
8 v. Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009)
9 (en banc). "If the bankruptcy court did not identify the correct
10 legal rule, or its application of the correct legal standard to
11 the facts was illogical, implausible, or without support in
12 inferences that may be drawn from the facts in the record, then
13 the bankruptcy court has abused its discretion." USAA Fed. Sav.
14 Bank v. Thacker (In re Taylor), 599 F.3d 880, 887-88 (9th Cir.
15 2010) (citing Hinkson, 585 F.3d at 1261-62).

16 DISCUSSION

17 **A. Mr. Nishi has standing to appeal the Order.**

18 As a preliminary matter, we must determine whether either
19 appellant has standing on appeal. The bankruptcy court
20 determined that while Mr. Morris lacked standing to challenge the
21 Motion to Settle, Mr. Nishi may have standing, and it thus
22 considered the arguments raised by Mr. Morris (and joined in by
23 Mr. Nishi).

24 To have standing to appeal from a bankruptcy court order, a
25 person must show that he is a "person aggrieved." Fondiller v.
26 Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983).
27 A person is aggrieved if he is "directly and adversely affected
28 pecuniarily" by the order appealed. Id. As a result, in a

1 typical case, "a hopelessly insolvent debtor does not have
2 standing to appeal orders affecting the size of the estate" as
3 "[s]uch an order would not diminish the debtor's property,
4 increase his burdens, or detrimentally affect his rights." Id.;
5 see also Duckor Spradling & Metzger v. Baum Trust
6 (In re P.R.T.C., Inc.), 177 F.3d 774, 778 n.2 (9th Cir. 1999).

7 It is well settled, however, that a creditor has "a direct
8 pecuniary interest in a bankruptcy court[']s order transferring
9 assets of the estate." In re P.R.T.C., Inc., 177 F.3d at 778
10 (citing Salomon v. Logan (In re Int'l Envtl. Dynamics, Inc.),
11 718 F.2d 322, 326 (9th Cir. 1983)); see Redwood Trust v. Am.
12 Bldg. Storage, LLC (In re Am. Bldg. Storage, LLC), 285 F. App'x
13 375, 376 (9th Cir. 2008) (An equity interest holder had "standing
14 as an aggrieved party because the settlement [guaranteeing
15 creditors \$600,000] could 'diminish [its] property . . . [and]
16 detrimentally affect its rights.'" (quoting In re P.R.T.C., Inc.,
17 177 F.3d at 777)).

18 We need not decide whether Mr. Morris has standing because
19 we agree with the bankruptcy court that Mr. Nishi joined in
20 Mr. Morris' objections, and Mr. Nishi has standing on appeal. It
21 is undisputed that Mr. Nishi currently holds an allowed claim
22 against Mr. Morris' estate under § 502(a); he filed a proof of
23 claim for \$959,216.12, to which no one has objected. Any
24 increase or decrease in the estate's share of the malpractice
25 settlement funds would directly affect Mr. Nishi's pecuniary
26 interest. As such, he has standing as a creditor to appeal the
27 court's Order.

28 / / /

1 **B. The court's decision was consistent with § 363.**

2 Appellants argue that the court committed an error of law by
3 not analyzing the settlement as a sale of estate assets under
4 § 363. We find no reversible error.

5 Section 363 provides, in relevant part, that "[t]he trustee,
6 after notice and a hearing, may use, sell, or lease, other than
7 in the ordinary course of business, property of the estate
8" § 363(b)(1). In Mickey Thompson, we held that the
9 proposed compromise at issue was actually a sale of assets
10 requiring analysis under both Rule 9019 and § 363. In addition
11 to our Rule 9019 analysis, we stated:

12 this settlement is in essence a sale of potential
13 claims to the Settling Parties. While the Agreement
14 purports to act as a mutual release of claims, no party
15 has identified any claims which the Settling Parties
16 could assert against the estate or Trustee. The record
17 does not contain any evidence that a release of claims
18 by the Settling Parties has value.

19 Thus, the settlement is in reality a purchase by
20 the Settling Parties of a chose in action of the estate
21 and for which another entity has offered a higher price
22 in circumstances that invite a competitive auction that
23 could yield a considerably higher price. Settling
24 Parties were free to bid against the third party
25 overbidder.

26 We agree with the Third Circuit that the
27 disposition by way of "compromise" of a claim that is
28 an asset of the estate is the equivalent of a sale of
the intangible property represented by the claim, which
transaction simultaneously implicates the "sale"
provisions under section 363 as implemented by
Rule 6004 and the "compromise" procedure of
Rule 9019(a).

29 In re Mickey Thompson Entm't Grp., Inc., 292 B.R. at 421
30 (citations omitted).

31 Appellants argue that the bankruptcy court failed to conduct
32 the § 363 analysis that Mickey Thompson requires. We disagree.

1 **1. Appellants failed to raise § 363 before the bankruptcy**
2 **court.**

3 Appellants did not raise this argument before the bankruptcy
4 court. They merely argued that the settlement was inappropriate
5 under the Woodson and A&C Properties analysis and did not mention
6 § 363.

7 We decline to consider this issue on appeal, as it was not
8 properly raised before the bankruptcy court in the first
9 instance. As a general rule,

10 federal appellate courts will not consider issues not
11 properly raised in the trial courts. O'Rourke v.
12 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
13 955, 957 (9th Cir. 1989); see also Moldo v. Matsco,
14 Inc. (In re Cybernetic Servs., Inc.), 252 F.3d 1039,
15 1045 n.3 (9th Cir. 2001) (stating that appellate court
16 would not explore ramifications of argument because it
17 was not raised in the bankruptcy court); Scovis v.
18 Henrichsen (In re Scovis), 249 F.3d 975, 984 (9th Cir.
19 2001) (stating that court would not consider issue
20 raised for first time on appeal absent exceptional
21 circumstances). **An issue only is "properly raised" if**
22 **it is raised sufficiently to permit the trial court to**
23 **rule upon it.** In re E.R. Fegert, Inc., 887 F.2d at
24 957.

18 Notwithstanding this general rule, "[a] reviewing
19 court may consider an issue raised for the first time
20 on appeal if (1) there are exceptional circumstances
21 why the issue was not raised in the trial court,
22 (2) the new issue arises while the appeal is pending
23 because of a change in the law, or (3) the issue
24 presented is purely one of law and the opposing party
25 will suffer no prejudice as a result of the failure to
26 raise the issue in the trial court." Franchise Tax Bd.
27 v. Roberts (In re Roberts), 175 B.R. 339, 345 (9th Cir.
28 BAP 1994) (internal quotations omitted) (citing United
States v. Carlson, 900 F.2d 1346, 1349 (9th Cir.
1990)).

25 Ezra v. Seror (In re Ezra), 537 B.R. 924, 932-33 (9th Cir. BAP
26 2015) (emphasis added).

27 Appellants failed to raise § 363 in response to the proposed
28 settlement. Further, Appellants have failed to provide us with

1 any exceptional circumstances that would cause us to exercise our
2 discretion to consider this issue for the first time on appeal.
3 As such, we need not consider whether the court erroneously
4 failed to apply § 363 to the Motion to Compromise.

5 **2. Even if § 363 was properly before the court, the Mickey
6 Thompson analysis is not applicable because Ms. McGee
7 released valuable claims against the estate.**

8 The § 363 analysis described in Mickey Thompson is not
9 applicable to the proposed compromise. The settlement here was a
10 mutual release between the estate and Ms. McGee, rather than a
11 unilateral compromise contemplated in Mickey Thompson. Cf. Fuchs
12 v. Snyder Tr. Enters. (In re Worldpoint Interactive, Inc.),
13 335 F. App'x 669, 670 (9th Cir. 2009) ("We are not persuaded by
14 [appellant's] contention that the settlement amounted to an asset
15 sale under [Mickey Thompson], because both parties to the
16 settlement here released claims." (citing In re Mickey Thompson
Entm't Grp., Inc., 292 B.R. at 421)).

17 Ms. McGee agreed to reduce her claim by \$437,500 and to
18 dismiss a portion of her adversary proceeding. Ms. McGee's
19 claims had significant value because she claimed a right to a
20 specific fund - the malpractice settlement proceeds. In exchange,
21 the estate agreed to forego its claim of entitlement to \$400,000
22 of the malpractice litigation settlement proceeds. Thus, both
23 parties released claims, rendering the settlement a mutual
24 compromise, rather than a sale. Accordingly, the court did not
25 need to analyze the proposed settlement under § 363.

26 **3. The court had ample basis to reject Mr. Nishi's**
27 **proposed offer.**

28 Even assuming that § 363 was raised before the bankruptcy

1 court and was applicable, we hold that the court did not abuse
2 its discretion in rejecting Mr. Nishi's proposed offer.⁵

3 **a. Mr. Nishi's proposed offer was too late.**

4 The bankruptcy court had ample reason to reject Mr. Nishi's
5 eleventh-hour offer, which was only raised the morning of the
6 hearing. The court has the power to provide for orderly
7 proceedings and had discretion to disregard the late proposal.

8 **b. There was no documentation of a legitimate offer.**

9 Further, unlike the situation in Mickey Thompson, Mr. Nishi
10 did not make a definite, concrete offer of payment, but only
11 **proposed** to purchase the claims. His counsel called the
12 Trustee's counsel the morning of the hearing to discuss the
13 proposal, but the Trustee remained skeptical. The Trustee's
14 counsel informed the court, "I don't think it's \$45,000. I think
15 it was just an offer of \$45,000." Mr. Nishi's failure to
16 document his proposal justified its rejection.

17 **c. There were substantial doubts whether Mr. Nishi's**
18 **offer was made in good faith.**

19 The Trustee also expressed concern that Mr. Nishi's proposed
20 offer was "just a little bit more gamesmanship by the debtor[.]"
21 In addition to being a creditor of Mr. Morris' estate, Mr. Nishi
22 is also Mr. Morris' friend and business partner. The bankruptcy
23 court had already found that Mr. Morris had engaged in serious

24
25 ⁵ The bankruptcy court did not rely on the following points,
26 but "[w]e may affirm the decision of the bankruptcy court on any
27 basis supported by the record." Franklin High Yield Tax-Free
28 Income Fund v. City of Stockton, Cal. (In re City of Stockton,
Cal.), 542 B.R. 261, 272 (9th Cir. BAP 2015) (citing ASARCO, LLC
v. Union Pac. R. Co., 765 F.3d 999, 1004 (9th Cir. 2014); Shanks
v. Dressel, 540 F.3d 1082, 1086 (9th Cir. 2008)).

1 misbehavior in the bankruptcy case by grossly mismanaging the
2 estate, failing to obey court orders, and withholding
3 information. Faced with the fact that Mr. Nishi was an
4 "insider[] - or near insider[] -" of a misbehaving debtor, the
5 court did not abuse its discretion by refusing to entertain
6 Mr. Nishi's proposed offer.

7 **d. Appellants did not take into account Ms. McGee's**
8 **substantial reduction of her claim.**

9 One purpose of the Mickey Thompson rule is to encourage
10 "overbidding," to maximize creditor recovery. But Mr. Nishi's
11 proposal was probably not an overbid, in the sense that it was
12 not more valuable to the estate than Ms. McGee's settlement.
13 Mr. Nishi's proposal exceeded the cash portion of the settlement
14 (\$45,000 versus \$41,000 in cash), but Ms. McGee also agreed to
15 reduce her claim by \$437,500 in exchange for only about \$400,000
16 of the settlement proceeds paid to Ms. McGee. Mr. Nishi's
17 proposal contained nothing comparable to this claim reduction.
18 In other words, Mr. Nishi's proposed offer was not necessarily a
19 better deal for the estate than the settlement with Ms. McGee.

20 **e. Any benefit would be offset by extra costs.**

21 The Trustee pointed out that the modest additional \$4,000
22 received by Mr. Nishi's offer would be negated by the additional
23 costs of litigation and administration. Appellants did not
24 contest this assertion. The court had good reason to reject the
25 proposed offer because the additional administrative expenses
26 associated with the new proposal would likely offset any
27 potential gain.

28 Accordingly, the court did not err under § 363. The record

1 amply supports numerous legitimate reasons for rejecting
2 Mr. Nishi's proposed offer.

3 **C. The court properly analyzed the settlement under Rule 9019.**

4 Appellants argue that the court erred in its application of
5 Rule 9019 to the proposed settlement. We disagree.

6 Rule 9019(a) provides that, "[o]n motion by the trustee and
7 after notice and a hearing, the court may approve a compromise or
8 settlement." Rule 9019(a). "The bankruptcy court has great
9 latitude in approving compromise agreements." In re Woodson,
10 839 F.2d at 620 (citing In re A&C Props., 784 F.2d at 1380-81).

11 It is clear that there must be more than a mere
12 good faith negotiation of a settlement by the trustee
13 in order for the bankruptcy court to affirm a
14 compromise agreement. The court must also find that
15 the compromise is fair and equitable. See, e.g.,
16 Citibank, N.A. v. Baer, 651 F.2d 1341, 1345-46 (10th
17 Cir. 1980).

18 In determining the fairness, reasonableness and
19 adequacy of a proposed settlement agreement, the court
20 must consider:

- 21
- 22 (a) The probability of success in the litigation;
 - 23 (b) the difficulties, if any, to be encountered in
 - 24 the matter of collection; (c) the complexity of
 - 25 the litigation involved, and the expense,
 - 26 inconvenience and delay necessarily attending it;
 - 27 (d) the paramount interest of the creditors and a
 - 28 proper deference to their reasonable views in the
- premises.

22 In re A&C Props., 784 F.2d at 1381 (citation omitted). The Ninth
23 Circuit has also stated that "[t]he trustee, as the party
24 proposing the compromise, has the burden of persuading the
25 bankruptcy court that the compromise is fair and equitable and
26 should be approved." Id. (citing In re Hallet, 33 B.R. 564,
27 565-66 (Bankr. D. Me. 1983)).

28 The law favors compromise, "and as long as the bankruptcy

1 court amply considered the various factors that determined the
2 reasonableness of the compromise, the court's decision must be
3 affirmed. Thus, on review, we must determine whether the
4 settlement entered into by the trustee was reasonable, given the
5 particular circumstances of the case." Id. (internal citations
6 omitted).

7 Moreover, "[w]hen assessing a compromise, courts need not
8 rule upon disputed facts and questions of law, but only canvass
9 the issues.' If the court were required to do more than canvass
10 the issue, 'there would be no point in compromising; the parties
11 might as well go ahead and try the case.'" Suter v. Goedert,
12 396 B.R. 535, 548 (D. Nev. 2008) (citations omitted).

13 **1. Probability of success in the litigation**

14 First, the court considered the parties' respective
15 likelihood of success before the Arizona family court. It held
16 that, "whether Debtor admits it or not, Ms. McGee has more than a
17 colorable claim to the settlement funds[,] and "the probability
18 of the Trustee's success in the Arizona Family Court is low."

19 Appellants argue, in summary, that Ms. McGee's probability
20 of success in the Arizona family court litigation is low, because
21 (1) it was improper for Ms. McGee to have brought the action in
22 family court, rather than civil court; (2) the e-mail evidence
23 offered by the Trustee is inadmissible hearsay and settlement
24 communications; and (3) the Property Settlement Agreement did not
25 give Ms. McGee any rights in the malpractice litigation
26 settlement. We do not find any of these arguments persuasive.

27 We find no error in the court's assessment that Ms. McGee
28 has asserted at least a "colorable claim" to the settlement

1 proceeds with a substantial probability of success. Even
2 assuming, arguendo, that Ms. McGee asserted her claim in the
3 wrong venue, such a defect does not affect the likelihood of her
4 eventual success in civil court. Likewise, Appellants are wrong
5 regarding the admissibility of the e-mail evidence. The e-mails,
6 which clearly evidence Mr. Morris' intent and expectation that
7 Ms. McGee recover half of the net malpractice litigation
8 settlement proceeds, are admissions of a party-opponent that are
9 not hearsay under Federal Rule of Evidence 801(d)(2).
10 Additionally, they were not confidential settlement
11 communications under Federal Rule of Evidence 408. As such, the
12 e-mails support the conclusion that Ms. McGee would likely be
13 successful in prosecuting her claims.

14 Further, Appellants' interpretation of the Property
15 Settlement Agreement is implausible at best. Appellants argue
16 that the reference to "related" litigation points to the RaveSim
17 lawsuit, and not to the malpractice suit. But a plain reading of
18 the Property Settlement Agreement suggests that an action for
19 legal malpractice committed in the Cadence lawsuit is "related"
20 to that lawsuit. Further, the Property Settlement Agreement says
21 that Mr. Morris and Ms. McGee would split "the 'Cadence' lawsuits
22 and related lawsuits (See paragraph 29)." The only lawsuit
23 mentioned in paragraph 29 (apart from the Cadence lawsuit itself)
24 is the potential malpractice lawsuit. In contrast, the Property
25 Settlement Agreement does not even mention the RaveSim lawsuit.
26 Accordingly, we hold that the court did not err in holding that
27 the Trustee's probability of success is low.

28 / / /

1 **2. Difficulties in collection**

2 Second, the court noted that an appeal by either side would
3 delay collection efforts. On appeal, Appellants argue that
4 "there is no danger in collecting once the issues are finally
5 adjudicated[,] " while Appellees argue that "this factor is
6 neutral[,] " because "[a]ppeals delaying collection are likely."

7 Neither party has raised any difficulty in collecting,
8 because the Arizona family court froze the funds in Mr. Morris'
9 attorneys' client account. As such, this factor is neutral.

10 **3. Complexity of the litigation involved and the attendant**
11 **expense, inconvenience, and delay**

12 Third, the court accurately observed that "Debtor's
13 assertion that the Arizona Court has no jurisdiction to
14 adjudicate the matter actually hurts his cause - if that court
15 lacks jurisdiction, then Ms. McGee will bring her action in
16 another court, thus compounding the litigation's complexity,
17 expense, inconvenience, and delay." It held that "the issues the
18 Trustee faces in that court are decidedly complex, and very
19 likely to cause significant expense, inconvenience, and delay."

20 Appellants do not offer any cogent argument contesting the
21 court's ruling. The record amply demonstrates that Mr. Morris
22 would likely do anything in his power to delay and frustrate
23 Ms. McGee's efforts to enforce the Property Settlement Agreement,
24 as he threatened in his e-mails to Ms. McGee. We find no error
25 in the court's assessment of the underlying litigation.

26 **4. Interests of the creditors**

27 Fourth, the court held that "the Trustee's proposed
28 settlement benefits the estate's creditors." It stated that,

1 "given this court's findings that led to conversion of this case,
2 Debtor's ability to argue on behalf of creditors of this estate
3 is dubious. Indeed, that the Trustee proposes to use these
4 settlement funds to investigate Debtor and his insiders only
5 highlights the essentially self-serving nature of Debtor's
6 arguments"

7 The court ultimately held that "[t]he Trustee negotiated his
8 settlement with Ms. McGee in good faith. And the settlement is
9 both fair and equitable." The court did not abuse its
10 discretion. Appellants only argue that the court did not explain
11 its ruling and that Mr. Nishi and Ms. Groden (who both asserted
12 claims against the estate) opposed the settlement. Especially
13 given Mr. Nishi's and Ms. Groden's connections to Mr. Morris, the
14 court did not err in declining to give deference to their views
15 and holding that the proposed settlement was in the best
16 interests of the creditors.

17 **D. The Trustee presented the court with a sufficient record.**

18 Appellants argue that the court could not have properly
19 evaluated the A&C Properties factors, because the Trustee
20 presented the court with a deficient evidentiary record
21 concerning the family court litigation and the malpractice
22 litigation settlement. In essence, Appellants argue that (1) the
23 Trustee failed to offer the declaration of Mr. Morris' Arizona
24 attorney, Kelly Mendoza, regarding his likelihood of success or
25 his positions in the underlying suit; (2) the Trustee failed to
26 present Mr. Morris' positions in the underlying dispute; and
27 (3) the Trustee made factual misstatements before the court. We
28 reject these arguments.

1 First, there is no requirement that the Trustee present the
2 declaration of Mr. Morris' counsel. Appellants offer no
3 authority in support of such a requirement. Under A&C Properties
4 and its progeny, the bankruptcy court must canvass the issues,
5 see Suter, 396 B.R. at 548 (citation omitted), but there is no
6 requirement that the court must always solicit the views of both
7 parties or their counsel. We agree with Appellees that, based on
8 the documents in the record, the Trustee and the court did not
9 need Ms. Mendoza's declaration to understand Mr. Morris'
10 position.

11 Second, the record was sufficient for the court to
12 understand Mr. Morris' position and his assessment of the state
13 court litigation. For example, the court was aware of
14 Mr. Morris' position when it ruled on Ms. McGee's motion for
15 relief from stay and Mr. Morris' motion to dismiss Ms. McGee's
16 adversary complaint, both of which informed the court of the key
17 issues considered in the Motion to Settle. As such, we reject
18 Appellants' false contention that the court could not "make an
19 informed decision because the Court has no idea what it is to
20 make a decision about."

21 Appellants appear to fault the Trustee for essentially
22 failing to argue Mr. Morris' position that he is likely to
23 prevail in the Arizona family court litigation. It was not the
24 Trustee's responsibility to do so. The Trustee, having
25 considered both Mr. Morris' position and Ms. McGee's position,
26 exercised his business judgment in determining that settling with
27 Ms. McGee was in the best interest of the estate. He had no duty
28 to advocate for Mr. Morris; rather, it was Mr. Morris' counsel's

1 job to convince the court of his client's position.

2 Appellants also argue that the Trustee could not have
3 presented the court with a complete record, because he did not
4 discuss the settlement with Mr. Morris, either through counsel or
5 at his § 341 meeting. They conclude that, "because the Trustee
6 did not avail himself of the opportunity to informally discuss
7 the matter with the Debtor[,] the Trustee was unable to present
8 the Bankruptcy Court with a record regarding the Debtor's
9 positions" However, the germane question is not what the
10 Trustee did or knew, but whether the court had a sufficient basis
11 for its ruling. As we noted above, the court had more than an
12 ample understanding of the issues.

13 Finally, regarding the alleged misstatements,⁶ we need not
14 make those factual determinations here. Even if Appellants were
15 correct, there is no indication that the court based its Order on
16 them.

17 Accordingly, we discern no reversible error concerning the
18 record before the court.

19 **E. The Panel denies the parties' motions to supplement.**

20 Both Appellants and Appellees filed motions to supplement

21
22 ⁶ Appellants argue that the Trustee made factual
23 misstatements that (1) Ms. McGee and "the community" were parties
24 to the malpractice lawsuit; and (2) that Mr. Morris' Arizona
25 attorneys were paid \$6,000 and retained without court approval.
26 As to the first point, Appellants fail to explain how this
27 statement affects the Motion to Settle. As to the second point,
28 Appellants concede that both statements are true, but contend
that they are misleading, because Ms. Groden paid the legal fees
(not the estate), and Mr. Morris sought court approval to retain
counsel, but the application was denied. Again, Appellants fail
to explain how these minor differences might have affected the
court's decision.

1 the record. Appellants request leave to augment the record by
2 adding four additional documents filed in the bankruptcy court
3 **after** they filed their notice of appeal. Similarly, Appellees
4 offer two documents filed in the Arizona family court **after**
5 Appellants filed their notice of appeal.

6 We decline to take judicial notice of the documents. Our
7 job is to determine whether the bankruptcy court erred based on
8 the evidence before it, which in turn depends in part on the
9 then-existing circumstances surrounding the Motion to Settle.
10 The bankruptcy court did not have any of the proffered documents
11 before it, and therefore they are irrelevant to this appeal.

12 Additionally, Appellants claim that their documents are
13 "relevant to the issue of whether the appeal is moot." The issue
14 of mootness was not briefed by the parties or otherwise raised on
15 appeal. No one claims that this appeal is moot, and, if
16 anything, the new documents confirm that this appeal is not moot.
17 We thus need not consider the new documents.

18 **CONCLUSION**

19 For the reasons set forth above, we conclude that the
20 bankruptcy court did not abuse its discretion in granting the
21 Motion to Settle as fair and equitable. Accordingly, we AFFIRM.
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