

FEB 01 2018

NOT FOR PUBLICATION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

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5 In re:) BAP No. CC-16-1435-KuFL
6 MARK TECHNOLOGIES CORPORATION,) BAP No. CC-16-1436-KuFL
7 Debtor.) BAP No. CC-17-1069-KuFL
8) BAP No. CC-17-1070-KuFL
9) (Related)*

10)
11)
12 MARK TECHNOLOGIES CORPORATION,) Bk. No. 6:16-bk-12192-WJ
13)
14)

Appellant,

v.

M E M O R A N D U M**

15 HELEN RYAN FRAZER, Chapter 7)
16 Trustee,)
17)

Appellee.

18)
19 TENDERLAND RENEWABLES, LLC;)
20 ALTA MESA FINANCE, LLC,)
21)

Appellants,

v.

22)
23 HELEN RYAN FRAZER, Chapter 7)
24 Trustee; INVESTEK PROPERTIES)
25 CO.; EARTH CONSTRUCTION AND)
26 MINING; EDF RENEWABLE ENERGY,)
27 INC.; ALTA MESA 640 LLC,)
28)

Appellees.

22
23 * While not formally consolidated, these four related
24 appeals were submitted at the same time, and were considered
25 together. This single disposition applies to the four appeals,
and the clerk is directed to file a copy of this disposition in
each appeal.

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

1 Argued and Submitted on January 25, 2018

2 Filed - February 1, 2018

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

5 Honorable Wayne Johnson, Bankruptcy Judge, Presiding

6 Appearances: Robert P. Goe and Donald W. Reid of Goe &
7 Forsythe, LLP on brief for appellants TenderLand
8 Renewables, LLC, Alta Mesa Finance, LLC, and Mark
9 Technologies Corporation; Elissa D. Miller of
10 SulmeyerKupetz, APC argued for appellee,
11 Chapter 7 Trustee, Helen Ryan Frazer; J. Barrett
12 Marum of Sheppard Mullin Richter & Hampton LLP
13 argued for appellee, EDF Renewable Energy, Inc.;
Patrick M. Hartnett of Hartnett Law Group on
brief for appellee, Earth Construction & Mining,
Inc.; Reg J. Lormon of the Law Office of Reg J.
Lormon on brief for appellee, Investek Properties
Co; Thomas R. Phinney, Esq. of Parkinson Phinney
argued for appellee Alta Mesa 640, LLC.

14 Before: KURTZ, FARIS, and LAFFERTY, Bankruptcy Judges.

15 **I. INTRODUCTION**

16 Mark Technologies Corporation (MTC or Debtor) owned real
17 property which was improved with two windfarm projects
18 (Projects). MTC entered into a lease and a series of agreements
19 with EDF Renewable Energy, Inc. (EDF-RE), Alta Mesa Phase III
20 Partners (AMPP), EDF Renewable Windfarm IV, Inc. (EDF-RW IV),
21 and EDF Renewable Services, Inc. (EDF-RS) (collectively, EDF)
22 under which EDF maintained and operated the Projects.

23 A dispute over the early termination of a restated and
24 amended five year lease agreement arose between EDF and MTC
25 resulting in a \$20 million dollar judgment against MTC. Due to
26
27
28

1 EDF's collection efforts, MTC filed a chapter 11¹ petition which
2 was converted to chapter 7. Helen Frazer was appointed the
3 chapter 7 trustee (Trustee).

4 MTC's schedules listed assets including, among others,
5 650 acres of real property upon which the Projects were located
6 (Real Property), 159 wind turbine electricity generators (WTGs),
7 and MTC's asserted right to receive about \$2.8 million in funds
8 generated by the Projects which were deposited into a business
9 trust account (Trust Funds). MTC's appeal of the EDF judgment
10 (EDF Litigation) was pending at the time MTC filed its petition.

11 The Real Property was encumbered by three involuntary liens
12 held by appellees, Investek Properties Company (Investek), Earth
13 Construction and Mining (ECM), and EDF (collectively, the Lien
14 Creditors). MTC disputed the three liens, which totaled over
15 \$22 million and exceeded the value of the Real Property.

16 Trustee moved to sell the Real Property and other personal
17 property in conjunction with a settlement agreement with the
18 Lien Creditors whereby they agreed to reduce their liens against
19 the Real Property, settle all disputes with Trustee related to
20 the liens, and assure the estate a portion of the sale proceeds.
21 In addition, EDF agreed to allocate a portion of the Trust Funds
22 to the estate once ownership of the funds was determined in an
23 adversary proceeding pending before the bankruptcy court.

24 Appellants, affiliates of MTC, TenderLand Renewables, LLC
25 (TR) and Alta Mesa Finance, LLC (AMF) (collectively, the

27 ¹ Unless otherwise indicated, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
Rule references are to the Federal Rules of Bankruptcy Procedure.

1 Affiliates), objected to the settlement agreement and asset
2 sale, alleging that TR owned the WTGs and the Trust Funds and
3 AMF owned other personal property connected to the operation of
4 the windfarms pursuant to an assignment agreement. These
5 assertions were contrary to MTC's representations on its
6 schedules and contrary to representations made in the state
7 court litigation with EDF in connection with MTC's request for a
8 preliminary injunction. The Affiliates argued that Trustee
9 could not sell property which the estate did not own nor could
10 the settling parties apportion the Trust Funds when ownership of
11 those funds were disputed. Finally, the Affiliates asserted
12 that Trustee was improperly selling the overencumbered Real
13 Property and related assets for the benefit of the secured
14 creditors and to ensure payment of Trustee's administrative fees
15 in contravention of the holding in In re KVN Corp., Inc.,
16 514 B.R. 1 (9th Cir. BAP 2014).

17 These contentions, among others, required Trustee to make
18 numerous amendments to the settlement and sale motions and
19 related documents. After several amendments to the settlement
20 agreement and two hearings, the bankruptcy court issued
21 extensive findings of fact and conclusions of law, finding that
22 the legal standards for approving a compromise under Rule 9019
23 were met (Settlement Order). In the end, the settlement
24 agreement was amended so that ownership rights in the Trust
25 Funds would be determined in the pending adversary proceedings
26 rather than through certain settlement terms.

27 One day after approving the settlement agreement, the
28 bankruptcy court approved the sale of the Real Property and

1 other assets under § 363(f), and found that the buyer was a good
2 faith purchaser under § 363(m) (Sale Order). The Affiliates
3 appeal the Settlement and Sale Orders in BAP Nos. CC-17-1069 and
4 CC-17-1070.

5 Prior to the entry of the Settlement and Sale Orders, MTC
6 filed motions to compel Trustee to abandon the EDF Litigation
7 and the Real Property, which the bankruptcy court denied. MTC
8 appeals the bankruptcy court's orders denying its motions for
9 abandonment of the EDF Litigation and Real Property in BAP Nos.
10 CC-16-1435 and CC-16-1436.

11 Following the filing of these appeals, a motions Panel
12 granted the Affiliates a stay pending the appeals of the
13 Settlement and Sale Orders conditioned upon their posting a
14 \$5 million bond. The Affiliates failed to post the bond and the
15 Panel dissolved the stay.

16 Trustee moved to dismiss the appeal of the Sale Order as
17 statutorily moot under § 363(m) and contended that the appeals
18 of the Settlement and Sale Orders were equitably or
19 constitutionally moot. A motions Panel denied the motion,
20 deferring resolution of mootness to the merits Panel.

21 For the reasons that follow, we DISMISS the appeal of the
22 Sale Order on statutory mootness grounds. Even if the appeal of
23 the Sale Order is not statutorily moot, we conclude that it is
24 equitably moot as is the appeal of the Settlement Order, which
25 makes DISMISSAL of the four appeals appropriate. Finally, even
26 if the Settlement and Sale Orders are not equitably moot, we
27 AFFIRM those orders on the merits. Due to our affirmance, we
28 DISMISS the appeals denying abandonment of the EDF Litigation

1 and Real Property on constitutional mootness grounds.

2 **II. FACTS**

3 **A. MTC's Operations**

4 Mark Jones is the president of MTC and the president of
5 TenderLand Power Company, Inc. (TPC), the managing member of TR
6 and the managing member of the current managing member of AMF.

7 MTC is a passive real estate company with no employees or
8 operations of its own. MTC purchased 650 acres of real property
9 in Riverside County, California, which was improved with the
10 Projects. The project operators sold electrical energy
11 generated by the WTGs to Southern California Edison Company
12 (SCE) under an Amended and Restated Power Purchase Contract (SCE
13 PPA). SCE, in turn, made payments to the Alta Mesa Power
14 Purchase Contract Trust (Trust), which was a business trust
15 created to, among other things, allocate and distribute payments
16 received from SCE to the operators of the Projects that
17 generated the electrical energy. The Trust is governed by the
18 Alta Mesa Power Purchase Contract Trust Agreement and
19 Declaration of Trust dated August 4, 1988 (Trust Agreement).

20 The electrical energy generated by the Projects is
21 delivered to SCE through common facilities located on or
22 adjacent to the Real Property, including a substation and
23 overhead high-voltage electrical transmission line
24 (Interconnection Facilities). As it is constructed, all
25 electrical energy generated by the Projects is delivered to SCE
26 through the Interconnection Facilities. SCE makes a single
27 monthly payment for the aggregate electrical energy delivered to
28 it from the Projects. This payment is deposited into a bank

1 account owned by the Trust (Trust Account).

2 MTC leased the Projects to various operators through long-
3 term capital leases, which governed the underlying Real Property
4 as well as the improvements, including the WTGs located on the
5 property. EDF operated the Projects for many years under
6 various agreements and leases, which were restated from time to
7 time (Restated Project Leases).

8 Restated Project Leases between MTC and EDF extended the
9 lease terms for six years beginning January 1, 2012 and ending
10 December 31, 2017. Under these agreements, AMPP became the
11 owner and operator of one project and EDF-RW IV became the owner
12 and operator of another. EDF-RE became the operational trustee
13 under the Trust Agreement.

14 Per agreement, MTC was permitted to terminate one or both
15 of the Restated Project Leases early, but only if MTC proceeded
16 with the construction of a new repower or energy-related project
17 on the Real Property. In turn, the EDF parties, who had prepaid
18 \$8 million for the five year extension of the leases, were
19 entitled to a minimum "Preferred Return" on their investment
20 should MTC terminate the leases early.

21 MTC and its affiliates began to explore repowering a
22 significant portion of the Projects because of potential
23 financing options and attractive governmental incentives. In
24 furtherance of this repower program, TPC and its affiliates
25 formed AMF, which entered into a joint venture with XEMC New
26 Energy Co, LTD, a major state-owned Chinese company that
27 manufactures WTGs and invests in wind power projects. AMF
28 commenced construction on the Real Property in December 2011 and

1 continued with significant grading operations during the first
2 half of 2012.

3 **B. The Litigation With EDF**

4 Disputes arose over the early termination of the Restated
5 Project Leases. In March 2013, EDF gave notice to MTC by letter
6 that, in its view, MTC had terminated the Restated Project
7 Leases as of October 31, 2012. In May 2013, EDF ceased
8 operating the Projects and froze all future revenues deposited
9 into the Trust Account. At the same time, EDF filed a complaint
10 against MTC in the California Superior Court, seeking a
11 declaratory judgment that MTC terminated the Restated Project
12 Leases as of October 31, 2012, and an award of damages,
13 rescission, and return of advance rent (State Court Action).
14 EDF alleged that it was owed more than \$16 million for the
15 "Preferred Return," and more than \$4 million in lost operating
16 income.

17 Unable to keep the Projects going, MTC shut down the
18 operations in November 2013. However, shutting down the
19 Projects posed risks of theft and fire, mechanical stress on the
20 equipment, and potential breaches of agreements with SCE and
21 certain land-use permits. In March 2014, MTC entered into an
22 arrangement with its affiliate, TR, to maintain, repair, and
23 operate the Projects. TR operated and maintained the Projects
24 from March 2014 to September 2016, allegedly expending over
25 \$3 million. Meanwhile, SCE continued to deposit its monthly
26 payments into the Trust Account.

27 During this period, MTC sought a preliminary injunction in
28 the State Court Action barring EDF from interfering with MTC's

1 use of the Trust Funds. MTC also filed a cross-complaint
2 seeking, among other things, specific performance requiring EDF
3 to execute and deliver documentary assignments of certain assets
4 of the Projects, including the WTGs and Trust, as allegedly
5 required by the terms of the Restated Project Leases due to
6 EDF's abandonment of the Projects in May 2013.

7 In August 2014, the state court issued a minute order
8 granting MTC a preliminary injunction on the basis that EDF had
9 no colorable claim to funds generated after June 2013 and held
10 in the Trust Account. The state court later issued an order
11 setting forth procedures under which MTC could seek payment for
12 certain expenses from the Trust Funds, but did not compel the
13 turnover of all revenues generated by TR.

14 In September 2015, a judgment after trial was entered in
15 the State Court Action in favor of EDF and against MTC in the
16 amount of \$20,883,646.74. In the judgment, the state court
17 found that MTC terminated the Restated Project Leases on
18 October 31, 2012, when it purportedly gave notice of its right
19 for early termination by commencing construction of its proposed
20 repower project. The state court also found that MTC was not
21 entitled to specific performance, injunctive relief, or monetary
22 damages arising from EDF's abandonment of the Projects on May
23 31, 2013. Due to the judgment, the preliminary injunction was
24 dissolved. EDF recorded abstracts of judgment, filed a judgment
25 lien on MTC's personal property, and noticed MTC's judgment
26 debtor examination.

27 However, the litigation continued. MTC unsuccessfully
28 moved for a temporary restraining order regarding the Trust

1 Funds. In November 2015, MTC filed an appeal of the EDF
2 judgment. The next month, EDF-RE, in its capacity as the
3 operational trustee of the Trust, filed a petition in the state
4 court seeking an order instructing it regarding allocations and
5 distributions from the Trust Account (Probate Proceeding). In
6 May 2016, EDF removed the Probate Proceeding to the bankruptcy
7 court where it is currently pending.

8 **C. Bankruptcy Events**

9 MTC filed a chapter 11 petition on March 11, 2016.
10 Debtor's schedules listed the Real Property and listed personal
11 property, including 159 WTGs.² In the addendum to Schedule B,
12 Debtor also claimed the right to receive the Trust Funds:

13 Debtor has the right to receive income generated by
14 Alta Mesa Power Purchase Contract dated August 4,
15 1988, of over \$1,000,000 per year, receivable may
16 exceed \$2,000,000.

17 At the time of the filing, the Real Property was encumbered
18 by three involuntary liens: (1) a first priority judgment lien
19 held by Investek in the amount of \$1,238,379, which was on
20 appeal and disputed; (2) a second priority mechanic's lien held
21 by ECM in the amount of \$540,000, which was subject to a pending
22 action in the state court but not yet reduced to judgment; and
23 (3) a third priority judgment lien held by EDF in the amount of
24 \$21,007,225.47. Non-insider general unsecured claims totaled
25 about \$2 million.

26 On May 4, 2016, the case was converted to one under
27 chapter 7 and Trustee was appointed. Subsequently, Trustee

28 ² About 80% of these turbines were no longer operational.

1 filed an application to employ a real estate broker to market
2 and auction the Real Property along with the WTGs and other
3 improvements. The bankruptcy court granted Trustee's request
4 over the objections of Debtor and the Affiliates. Trustee then
5 filed a motion for approval of the sale procedures and sought a
6 hearing date and briefing schedule on Trustee's motion to
7 confirm the sale to the winning bidder. Trustee intended to
8 sell the Real Property, the WTGs, and other personal property
9 listed on Debtor's schedules to the highest bidder.

10 EDF filed a reservation of rights in the property which
11 Trustee sought to sell. EDF claimed the right to credit bid in
12 the sale and also asserted that EDF-RW IV and AMPP were the
13 owners of all the personal property making up the windfarm
14 Projects. Due to EDF's claim that it owned the WTGs and other
15 issues raised, the bankruptcy court continued the matter.

16 At the continued hearing, Trustee represented that she had
17 settlements with the Lien Creditors regarding their disputed
18 liens and that she would be submitting a motion to approve the
19 three compromises. The bankruptcy court approved the sale
20 procedures by order entered on September 22, 2016.

21 The highest and best bid received by Trustee was \$3,180,000
22 from Mohammed F. Koya, who assigned the rights under the sale
23 agreement to Alta Mesa 640, LLC (Buyer). The sale included the
24 Real Property and the improvements, including the WTGs.³

25
26 ³ Exhibit A to the draft Bill of Sale listed additional
27 assets to be sold which included, among other things, permits or
28 governmental approvals which EDF-RW IV and AMPP obtained with
(continued...)

1 In October 2016, Trustee moved to confirm the sale to the
2 Buyer and sought, among other things, authorization to assume
3 and assign the estate's interest in various agreements necessary
4 for the Buyer to operate a windfarm on the Real Property, i.e.:
5 the SCE PPA; the lease agreement for the Interconnection
6 Facilities; and the Trust Agreement (Sale Motion). Trustee also
7 requested a determination that the Buyer was a good faith
8 purchaser under § 363(m).

9 In the Sale Motion, Trustee represented that a settlement
10 agreement had been reached with each of the Lien Creditors as to
11 the amount of their allowed claim and for a payment of an amount
12 to the estate from the sale proceeds. However, because the
13 assets were selling for less than anticipated, and the Lien
14 Creditors' liens exceeded the purchase price, the parties were
15 continuing to discuss a revised division of the sale proceeds.
16 As it stood, the Lien Creditors and the estate would receive a
17 percentage of the proceeds from the sale and the EDF parties
18 would receive 80% of the Trust Funds while the estate would
19 receive 20%.

20 Trustee also argued that the sale was in the best interests
21 of the estate. Besides providing proper notice of the sale to
22 all interested parties, Trustee asserted that the sale was
23 negotiated at arms' length and in good faith. Trustee sought
24 approval of the sale under § 363(f) and contended that the liens
25 against the Property were subject to bona fide disputes.

26
27 ³(...continued)
28 to the Buyer under relevant law. In addition, the sale included
fences and other improvements.

1 Finally, Trustee asserted that the sale would afford her funds
2 to pay allowed secured and administrative claims, and a dividend
3 to unsecured claims of the estate.

4 Mr. Koya submitted a declaration to support confirmation of
5 the sale and a good faith determination. He declared that he
6 had no connections with Debtor or its owners or employees,
7 Trustee or her agents, any creditors of Debtor or other
8 interested party, or the U.S. Trustee. He further declared that
9 he was made aware of the sale through marketing materials sent
10 out by the broker and that the price he agreed to pay for the
11 assets was reached in connection with the auction and as a
12 result of arms-length negotiation with Trustee. The Affiliates
13 did not object to Mr. Koya's declaration or provide any contrary
14 evidence to challenge his statements.

15 They did, however, oppose the Sale Motion, arguing:

16 (1) Trustee was attempting to sell assets that were not property
17 of the estate; namely, the WTGs and Interconnection Facilities
18 located on the Real Property; (2) Trustee was attempting to sell
19 the Real Property and improvements for the sole benefit of
20 secured creditors; (3) Trustee was attempting to assign
21 agreements to the Buyer that were either terminated or assigned
22 away prepetition or, even if the agreements were property of the
23 estate, they were deemed rejected (as the § 365 deadline of
24 sixty days had passed) and were no longer assignable by Trustee;
25 and (4) the sale was patently unreasonable and proposed in bad
26 faith as Trustee failed to file a motion to approve the
27 compromises with the Lien Creditors, file an adversary
28 proceeding to resolve the disputed ownership in the WTGs and

1 Interconnection Facilities, and address the other disputed
2 ownership issues. The Affiliates maintained that until these
3 ownership interests were resolved, Trustee could not sell the
4 assets under the holding in Darby v. Zimmerman (In re Popp),
5 323 B.R. 260 (9th Cir. BAP 2005).

6 Attached to the opposition was the declaration of Mr. Jones
7 stating that TR was entitled to monies in the Trust Account and
8 that AMF owned certain personal property by virtue of an
9 assignment from MTC to AMF. Therefore, Mr. Jones asserted that
10 Trustee could not sell that property.

11 Investek also opposed the Sale Motion. Investek contended
12 that it had a first priority lien on the Real Property and
13 personal property, including the Trust Funds. Investek stated
14 that it would not agree to the sale until a division of the
15 proceeds was fully articulated and everyone agreed to that
16 division.

17 EDF filed a pleading consenting to the sale and addressing
18 the ownership interests raised by the Affiliates. EDF attached
19 the declaration of Bernard C. Barmann, Jr., counsel for EDF in
20 the litigation against MTC. Mr. Barmann pointed out many
21 instances in which Mr. Jones had testified that MTC, rather than
22 AMF or TR, owned the WTGs and other personal property.
23 According to Mr. Barmann, Mr. Jones' testimony in support of the
24 opposition was in direct conflict with his testimony in the
25 State Court Action, as well as the actions MTC took in that
26 proceeding.

27 Meanwhile, Debtor filed a motion to compel Trustee to
28 abandon all claims related to the EDF Litigation. Debtor

1 asserted that (1) Trustee expressed no interest in prosecuting
2 the appeal of the EDF judgment for the benefit of the estate and
3 (2) due to the state court's errors, it was likely to prevail in
4 the appeal. Debtor maintained that if the appeal were
5 successful, the largest lien against the Real Property would be
6 removed, unlocking substantial equity for the unsecured
7 creditors. Debtor also contended that the resolution of the
8 appeal in its favor would clarify numerous disputes over the
9 ownership of personal property and fixtures located upon the
10 Real Property, which were caused by inconsistencies in the
11 judgment itself. Finally, Debtor stated that its principals
12 would fund the litigation at no expense to the estate. In the
13 end, Debtor argued that abandonment of the litigation claims
14 arising from and relating to the appeal would be in the best
15 interests of the estate.

16 Trustee opposed the motion to compel abandonment,
17 contending that she had been in discussions with the Lien
18 Creditors regarding the sale of the real and personal property,
19 the assignment of relevant agreements to the Buyer, and the
20 settlement of the Lien Creditors' claims, including the appeal
21 and continued litigation. Trustee reiterated that the parties
22 were continuing their discussions because the bid for the Real
23 Property and other assets was less than anticipated. In short,
24 although the settlement agreement between the parties remained
25 subject to documentation and approval by the bankruptcy court,
26 the Lien Creditors advised Trustee that they consented to the
27 sale free and clear of their respective liens with the liens
28 attaching to the proceeds.

1 Trustee also contended that Debtor lacked standing to
2 pursue abandonment because there was no possibility of a surplus
3 estate. According to Trustee, Debtor failed to show that the
4 EDF Litigation was burdensome and inconsequential to the estate.
5 Rather, Debtor simply disagreed with Trustee's decision not to
6 pursue the appeal and instead settle with EDF. Trustee
7 emphasized that the appeal of EDF's judgment was one part of the
8 package of rights included in the settlement with EDF. Finally,
9 Trustee pointed out that there was no evidence to support
10 Debtor's conclusion that it would win the appeal of the EDF
11 judgment.

12 The bankruptcy court heard Debtor's motion for abandonment
13 of the EDF Litigation and Trustee's Sale Motion on October 25,
14 2016. Regarding Debtor's request for abandonment of the EDF
15 Litigation, EDF argued that the dismissal of the appeal of the
16 state court litigation was an integral part of its settlement
17 with Trustee. EDF made clear that if Debtor were allowed to
18 proceed with the appeal, its settlement with Trustee would fall
19 apart because EDF would have no incentive to do the deal.
20 Furthermore, Trustee and EDF stated that they had exchanged
21 drafts of a settlement agreement, but it was not finalized
22 because Trustee received less than what was expected for the
23 sale of the assets.

24 The bankruptcy court continued Debtor's motion for
25 abandonment due to the pending settlement as the court perceived
26 there would be a greater chance of settlement if the resolution
27 of the abandonment motion was pending. The court declined to
28 rule on Debtor's standing to bring the motion for abandonment,

1 stating that it did not have a complete evidentiary record
2 before it.

3 The bankruptcy court also continued the Sale Motion,
4 concluding that it would not go forward without a written
5 agreement between the parties regarding the disposition of the
6 sale proceeds. The court further found that Trustee had not
7 established the sale was in the best interests of the creditors
8 without providing the numbers, as the Real Property was
9 overencumbered. The bankruptcy court noted that there had to be
10 something for the administrative creditors and something for the
11 unsecured creditors that was not de minimis. The court also
12 expressed its concern that the Sale Motion was asking the court
13 to expunge instruments that had been recorded against the Real
14 Property without giving notice to the affected parties.
15 Finally, the bankruptcy court asked for a more comprehensive
16 capital gains tax analysis. The court set a briefing schedule
17 for Trustee's supplement to the Sale Motion and motion for court
18 approval of the settlement with the Lien Creditors.

19 On November 7, 2016, one day prior to Trustee's filing of
20 the settlement motion, the Affiliates filed an adversary
21 complaint seeking a judicial determination of, among other
22 things, ownership of the Interconnection Facilities, Trust
23 Agreement, SCE PPA and Trust Funds. TR alleged that it
24 generated the Trust Funds by operating the Projects from
25 March 1, 2014, until shortly after the bankruptcy case was
26 converted. Therefore, TR was entitled to the funds in the Trust
27 Account attributed to that period. TR maintained that EDF had
28 no interest in the Trust Funds following its abandonment of the

1 Projects and adjudged termination of the Restated Project
2 Leases.

3 The Affiliates amended the adversary complaint in January
4 2017 to alter the relief requested and dropped AMF as a
5 plaintiff. In the amended complaint, TR sought declaratory
6 relief with respect to ownership of the Trust Funds and also
7 sought an accounting for all Trust Funds deposited in the Trust
8 Account on or after March 1, 2014. Ownership disputes over the
9 other assets were deleted. TR voluntarily dismissed this
10 adversary proceeding without prejudice in August 2017, months
11 after the bankruptcy court's entry of the Settlement and Sale
12 Orders.

13 In conformance with the briefing schedule set by the
14 bankruptcy court, Trustee filed the supplement to the Sale
15 Motion and her motion for approval of the settlement agreement
16 with the Lien Creditors (Settlement Motion). The supplement to
17 the Sale Motion showed that under the settlement agreement each
18 of the Lien Creditors discounted its lien claim and agreed that
19 the estate would receive a portion of the sale proceeds. The
20 settlement with EDF also resolved issues regarding the ownership
21 of the personal property, including the WTGs and the Trust
22 Funds, and provided that Trustee would dismiss the pending
23 appeal of the state court judgment.

24 Trustee showed that there were approximately \$2 million in
25 non-insider unsecured claims and estimated that the estate would
26 receive \$930,000 from the sale of the assets and the settlement
27 with the Lien Creditors. In the end, after various payments,
28 there would be approximately \$16,000 left for payment on the

1 non-insider unsecured claims. However, to insure a distribution
2 to creditors, Trustee and her counsel, SulmeyerKupetz (SK),
3 agreed to set aside up to an additional \$50,000 from fees
4 otherwise payable to each of them for a total of approximately
5 \$66,000 available for distribution to creditors.

6 Trustee's Settlement Motion essentially reiterated these
7 facts. Trustee asserted that the settlement was fair and
8 equitable under the criteria set forth in Fireman's Fund
9 Insurance Co. v. Woodson (In re Woodson), 839 F.2d 610, 620 (9th
10 Cir. 1988) (citing Martin v. Kane (In re A & C Properties),
11 784 F.2d 1377 (9th Cir. 1986)).

12 The Affiliates objected to the Sale Motion, arguing that
13 the sale of the overencumbered Real Property was not in the best
14 interests of the estate under the holding in In re KVN
15 Corporation. According to the Affiliates, the sale would result
16 in a loss of \$68,650 to the estate because the estate was
17 receiving a carve-out of only \$50,000, while Trustee's statutory
18 fee from the transaction was \$118,650. They again reiterated
19 that Trustee was attempting to sell assets the estate did not
20 own.

21 While Trustee's sale and settlement motions were pending,
22 Debtor filed a motion to compel Trustee to abandon the Real
23 Property. According to Debtor, it was doubtful that Trustee
24 would reach a global settlement agreement with the Lien
25 Creditors that could be approved under applicable law or provide
26 a meaningful distribution to the bankruptcy estate.

27 On November 29, 2016, the bankruptcy court heard Debtor's
28 motion to compel abandonment of the Real Property, the continued

1 motion for abandonment of the EDF Litigation, Trustee's
2 Settlement Motion, and the continued Sale Motion. The court
3 first heard argument on the motion to compel abandonment of the
4 EDF Litigation. Counsel for Debtor argued, among other things,
5 that the only chance the creditors would get anything in this
6 case was if the appeal of the EDF judgment proceeded. Without
7 further discussion, the bankruptcy court denied the motion.

8 Next, the bankruptcy court considered the motion to abandon
9 the Real Property. Debtor's counsel argued that the Real
10 Property was overencumbered and thus the sale could not go
11 forward. Counsel also argued that the property was of
12 inconsequential value to the estate because the sale of the
13 property did not bring any money into the estate. Without
14 further discussion, the bankruptcy court denied the motion.

15 The court then considered the Settlement Motion and Sale
16 Motion. During this phase of the hearing, the bankruptcy court
17 heard argument from TR's counsel and EDF's counsel regarding the
18 disputes over ownership of the Trust Funds. The court expressed
19 its concern over how the settlement agreement between Trustee
20 and the Lien Creditors would resolve the Probate Proceeding and
21 TR's then pending adversary proceeding, both of which involved
22 disputes over ownership of the Trust Funds. The bankruptcy
23 court was not convinced that there was enough evidence to show
24 that EDF was entitled to any portion of the Trust Funds.

25 In addition, the bankruptcy court found that there were
26 insufficient proceeds under the settlement agreement for the
27 estate. The court opined that Trustee needed another \$150,000
28 to \$200,000 in order to make the settlement/sale work

1 economically.⁴

2 The bankruptcy court then discussed the Affiliates'
3 adversary proceeding related to the ownership disputes of
4 personal property and the Trust Funds. The court pointed out
5 numerous problems with the evidentiary support for their
6 asserted rights of ownership in the personal property and Trust
7 Funds.

8 On December 1, 2016, the bankruptcy court entered the
9 orders denying Debtor's motions to compel abandonment of the EDF
10 Litigation and Real Property. Debtor filed a timely appeal from
11 both orders on December 14, 2016.⁵

12 Meanwhile, Trustee filed supplemental pleadings in support
13 of the Settlement Motion. The settlement agreement, as amended,
14 increased cash to the estate from the sale proceeds from \$50,000
15 to \$200,000. In addition, the parties agreed that upon entry of
16 a final order approving the settlement, the Probate Proceeding,
17 which was removed to the bankruptcy court, would be dismissed
18 with prejudice.

19 The Affiliates continued to object to both the settlement
20

21 ⁴ The bankruptcy court also decided to strike TR's
22 opposition brief to the Settlement Motion because it was
23 sanctionable. The court explained to TR's counsel that it did
24 not want to read any more stories in briefs without a declaration
25 by someone with percipient knowledge that could state the story.
That was lacking in the opposition brief. The court gave TR's
counsel an opportunity to file another opposition brief.

26 ⁵ The Panel requested Appellant-Debtor to explain how the
27 abandonment orders on appeal were final and immediately
28 reviewable. After receiving the briefs, the Panel issued an
order granting Appellant-Debtor leave to appeal the orders
denying abandonment to the extent necessary.

1 and sale based on ownership issues and contended that the sale
2 was not in the best interests of the estate. In addition,
3 Debtor filed a motion to reconvert the bankruptcy case to a
4 chapter 11 case. This motion was later withdrawn without
5 prejudice.

6 After several more rounds of pleadings from the parties,
7 the bankruptcy court issued a tentative ruling in advance of the
8 February 23, 2017 hearing on Trustee's Settlement Motion.
9 There, the court stated that it was prepared to enter an order
10 approving the settlement agreement, as amended, in part. The
11 bankruptcy court found that it did not have the power to approve
12 a settlement agreement which terminated the ownership claims
13 asserted by Mr. Jones or the Affiliates in the Trust Funds.
14 Therefore, the court would approve the settlement agreement, as
15 amended, with additional language that essentially stated that
16 the settlement would not impair the ownership claims, title
17 rights, or similar rights asserted by Mr. Jones or the
18 Affiliates to the funds in the Trust Account prior to the
19 petition date, March 11, 2016. The bankruptcy court also stated
20 that the entry of the order approving the settlement should not
21 in any way be construed as validating such claims. Instead, the
22 claims would be adjudicated separately.

23 The court further required that the recitals in the
24 agreement would not be binding on the parties to the agreement
25 or anyone else. Moreover, the bankruptcy court struck the
26 provision that the Probate Proceeding would be dismissed with
27 prejudice and required the parties to litigate the ownership
28 claims in the Trust Funds and obtain a binding judgment. The

1 court also required Trustee to retain her strong arm powers
2 under § 544 and any other avoidance claims necessary to defeat
3 the claims of Mr. Jones, or his Affiliates, regarding
4 entitlement to the Trust Funds or any other assets.

5 Finally, the bankruptcy court required a provision whereby
6 Trustee and her professionals would agree to reduce their
7 compensation in amounts necessary to insure that at least
8 \$250,000 in funds were available for payment of unsecured
9 creditors after paying all chapter 7 administrative costs. The
10 court stated the amount of \$250,000 would be reduced to \$125,000
11 in the unlikely event the Trustee and the estate did not receive
12 20% of the funds in the Trust Account after litigating the
13 ownership disputes. In the end, the court's tentative ruling
14 stated that if Trustee and the parties to the settlement agreed
15 to the amendments stated in the tentative ruling, Trustee could
16 upload an order.

17 On February 23, 2017, the bankruptcy court held the hearing
18 on Trustee's Settlement Motion. After hearing arguments from
19 the parties, and confirming that Trustee and the Lien Creditors
20 agreed with the amendments suggested in the tentative ruling,
21 the bankruptcy court approved the settlement and rendered its
22 findings of fact and conclusions of law on the record. The
23 court recited the evidence in the record which supported the
24 settlements with each of the Lien Creditors under the four A&C
25 factors: (a) probability of success in the litigation, (b) the
26 difficulties, if any, to be encountered in the matter of
27 collection, (c) the complexity of the litigation involved, and
28 the expense, inconvenience and delay necessarily attending it.

1 and (d) the paramount interest of creditors and a proper
2 deference to their reasonable views in the premises.

3 As to the first and third factors, the bankruptcy court was
4 satisfied that Trustee had throughly investigated the disputed
5 liens on the Real Property and concluded that Mr. Jones provided
6 insufficient evidence to contradict her conclusions with respect
7 to each of the Lien Creditors. Concerning the appeal of EDF's
8 judgment, the bankruptcy court set forth eleven factors which
9 supported Trustee's settlement with EDF which included, among
10 other things, a finding that Mr. Jones was not credible as he
11 started to lie after the case was converted with respect to
12 ownership of property that he had listed on MTC's schedules as
13 belonging to MTC. The bankruptcy court found that since
14 conversion of the bankruptcy case, Mr. Jones had been on a
15 "scorched-earth campaign to pull assets out of the bankruptcy
16 estate and into his own affiliate, TR, for the benefit of
17 Mr. Jones." And, in order to do this, Mr. Jones had to perjure
18 himself. The court further noted that Mr. Jones had provided no
19 evidence that there was any more money at the end of the rainbow
20 - he provided no evidence that the Real Property and the WTGs
21 were worth more than \$3.18 million.

22 The bankruptcy court also found that the difficulties, if
23 any, to be encountered in the manner of collection did not apply
24 to the case. Finally, the court found that the fourth factor,
25 the paramount interests of the creditors, and a proper deference
26 to their reasonable views in the premises, weighed in favor of
27 granting the settlement with each of the Lien Creditors.

28 Continuing on, the court found that Trustee had diligently

1 done her job to ensure that \$125,000 at a minimum would be
2 available for creditors other than chapter 7 administrative
3 claims. According to the court, the standards in In re KVN
4 Corporation were met when \$125,000 was guaranteed to the estate
5 even if Trustee did not prevail in defeating the claims of TR to
6 the Trust Funds in the pending adversary proceeding. Finally,
7 the court opined that the evidence that Mr. Jones/TR would
8 prevail in the adversary proceeding was so weak that it was
9 highly likely that Trustee would prevail and therefore the
10 minimum payment to unsecured creditors would be \$250,000.

11 On February 23, 2017, the bankruptcy court entered the
12 Settlement Order. The Affiliates filed a timely appeal from the
13 Settlement Order.

14 On February 24, 2017, the bankruptcy court held the final
15 hearing on the Sale Motion. During the hearing, the bankruptcy
16 court clarified that the assets being sold included the Real
17 Property, the WTGs, and other improvements on the property.
18 Trustee noted that the EDF parties and the estate were
19 transferring whatever rights they had, if any, in the various
20 agreements (such as the SCE PPA and the Trust Agreement)
21 pursuant to the settlement and the terms of the sale.

22 The bankruptcy court also clarified with counsel for MTC
23 and the Affiliates that they did not assert any adverse claims
24 of ownership against any of the property that was identified on
25 the list of property to be sold. Counsel agreed that MTC and
26 the Affiliates did not assert adverse claims to the listed
27 property and also agreed that the listed property constituted
28 property of the estate.

1 In the end, the bankruptcy court approved the sale as being
2 in the best interest of creditors. The court found that there
3 was a meaningful distribution to the creditors when \$125,000
4 would be available for distribution, even if Trustee did not
5 recover any of the funds from the Trust Account. In addition,
6 the bankruptcy court found that the settlement agreement and the
7 supplemental amendment thereto were negotiated by the parties at
8 arms' length and in good faith. Finally, the court found that
9 the chapter 7 estate was not administratively insolvent and that
10 Trustee was not responsible for the fees that arose in the
11 chapter 11 phase of the case. According to the court, Trustee
12 was complying with her fiduciary duty by raising money for
13 creditors that have lower priority than her chapter 7
14 administrative estate claims.

15 On February 28, 2017, the bankruptcy court entered the Sale
16 Order which stated that the Buyer is "deemed to be a good faith
17 purchaser entitled to the protections of 11 U.S.C. § 363(m)."
18 The Affiliates filed a timely appeal from the Sale Order.

19 Under the sale agreement, the Buyer had fourteen days to
20 close the sale, or until April 24, 2017. The Buyer did not
21 close the sale within that time period due to the title
22 company's refusal to insure the sale because of the pending
23 appeal. Trustee and Buyer then worked with a new title company
24 and the sale closed on June 29, 2017. At that time, Trustee
25 filed a report of sale of real property pursuant to
26 Rule 6004(f)(1).

1 **D. Post-Appeal Events**

2 **1. Emergency Motion For Stay Pending Appeal: BAP Nos.**
3 **CC-17-1069 and CC-17-1070**

4 The Affiliates moved for a stay pending appeal in
5 connection with the Settlement and Sale Orders in the bankruptcy
6 court (Stay Motions). In a lengthy and detailed memorandum
7 decision, the bankruptcy court denied the Stay Motions on
8 March 3, 2017.

9 The Affiliates filed emergency motions for a stay pending
10 appeal of the Settlement and Sale Orders before the BAP on
11 March 9, 2017. The Affiliates argued, among other things, that
12 they were likely to prevail on appeal of the Settlement and Sale
13 Orders and that without a stay, Trustee would abandon the appeal
14 relating to the EDF litigation and transfer the Real Property
15 and other assets to the Buyer.

16 On the same day, the Panel entered orders in each appeal,
17 granting a temporary stay and requiring further briefing.
18 Trustee filed an opposition to the motions and EDF filed
19 joinders. In addition, Alta Mesa 640, LLC, filed an opposition
20 to the stay requests, as did ECM. The Affiliates filed a reply
21 on March 17, 2017.

22 A motions Panel found that the Affiliates had not
23 established that they were entitled to a discretionary stay
24 without a bond and that a bond of \$5 million would be sufficient
25 to preserve the status quo. Therefore, the Panel granted the
26 stay of the Settlement Order and the Sale Order conditioned upon
27 the filing of a bond in the amount of \$5 million no later than
28 14 days from the date of the order (April 10, 2017).

1 The Affiliates filed a document entitled Emergency Petition
2 for Writ of Mandate Directing Ninth Circuit Bankruptcy Appellate
3 Panel to Recalculate Amount of Supersedeas Bond in the Ninth
4 Circuit. The Ninth Circuit denied the petition.

5 The Affiliates then filed another motion in the BAP seeking
6 a clarification of the Order Re Motion For Stay Pending Appeal
7 and requesting an extension of the deadline to post the bond.
8 The motions Panel denied the motion and dissolved the stay
9 because the Affiliates failed to post a bond.

10 **2. Trustee's Motion To Dismiss The Appeals As Moot**

11 On July 10, 2017, Trustee filed a motion to dismiss these
12 appeals as statutorily, equitably, and constitutionally moot.
13 Trustee argued that the sale transaction had closed and the sale
14 proceeds distributed in accordance with the settlement. Notices
15 required pursuant to the approved sale agreement were delivered
16 to third parties who are not parties to the bankruptcy case or
17 to the sale or settlement. In addition, in accordance with the
18 order approving the settlement, which became effective upon the
19 closing of the sale, Debtor's appeal of EDF's judgment, which is
20 the subject of the order denying abandonment of the EDF
21 Litigation, was formally abandoned (i.e., dismissed) by Trustee
22 and, according to Trustee, could not be revived. In essence,
23 since the settlement and sale were consummated, neither the Real
24 Property nor the EDF Litigation remained assets of the estate
25 which Trustee could abandon. Trustee also argued that since the
26 sale was to a good faith purchaser and there was no stay pending
27 appeal, the appeal of the Sale Order was statutorily moot under
28 § 363(m) and the holding in Onouli-Kona Land Co. v. Richards

1 (In re Onouli-Kona Land Co.), 846 F.2d 1170, 1172 (9th Cir.
2 1988).

3 In response, the Affiliates challenged the bankruptcy
4 court's determination that the Buyer was a good faith purchaser
5 within the meaning of § 363(m) due to its delay in closing the
6 sale well past the fourteen days set forth in the Sale Order.

7 In ruling on Trustee's motion, a motions Panel observed
8 that findings on good faith are insufficient for a final and
9 complete determination of the buyer's good faith when a good
10 faith challenge is based on post-sale events. Thomas v. Namba
11 (In re Thomas), 287 B.R. 782, 785 (9th Cir. BAP 2002). On this
12 basis, the motions Panel denied Trustee's motion, subject to a
13 final decision by the merits Panel following the conclusion of
14 briefing and oral argument in all four appeals.⁶

15 **3. Requests for Judicial Notice**

16 The parties have filed requests for judicial notice with
17 respect to certain papers regarding the transactions at the
18 heart of these appeals. To the extent the pleadings are
19 relevant to the issues before us, we take judicial notice of
20 these documents and others which were filed in the bankruptcy
21 court. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),

22 _____
23 ⁶ Trustee and EDF also moved to dismiss these appeals since
24 the appellants were no longer represented by counsel. We deny
25 this request. The Panel issued an order directing appellants to
26 obtain counsel by a certain date and if they did not do so, the
27 appeals would be submitted without their oral argument. There
28 was nothing in the order which gave appellants any indication
that their appeals would be dismissed if they failed to obtain
counsel, nor is this a case where appellants failed to defend
their appeals as all briefing was complete prior to the
withdrawal of their counsel.

1 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

2 **III. JURISDICTION**

3 The bankruptcy court had jurisdiction over this proceeding
4 under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (N). Subject to
5 our discussions of mootness below, we have jurisdiction under
6 28 U.S.C. § 158.

7 **IV. ISSUES**

8 Whether these appeals are moot;

9 Whether the bankruptcy court abused its discretion by
10 granting Trustee's Settlement Motion;

11 Whether the bankruptcy court abused its discretion by
12 granting Trustee's Sale Motion; and

13 Whether the bankruptcy court abused its discretion by
14 denying Debtor's motions for abandonment of the EDF Litigation
15 and the Real Property.

16 **V. STANDARDS OF REVIEW**

17 Mootness is a question of law reviewed de novo. Ellis v.
18 Yu (In re Ellis), 523 B.R. 673, 677 (9th Cir. BAP 2014).

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

25 Once a bankruptcy court has determined whether "the factual
26 predicates for abandonment . . . are present, the court's
27 decision to authorize or deny abandonment is reviewed for an
28 abuse of discretion." Viet Vu v. Kendall (In re Viet Vu),

1 245 B.R. 644, 647 (9th Cir. BAP 2000).

2 A bankruptcy court abuses its discretion if it applies the
3 wrong legal standard, misapplies the correct legal standard, or
4 if its factual findings are illogical, implausible or without
5 support in inferences that may be drawn from the facts in the
6 record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d
7 820, 832 (9th Cir. 2011) (citing United States v. Hinkson,
8 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

9 VI. DISCUSSION

10 A. Mootness

11 Trustee continues to assert on appeal these appeals are
12 moot.⁷ “The party moving for dismissal on mootness grounds
13 bears a heavy burden.” Motor Vehicle Cas. Co. v. Thorpe
14 Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 880
15 (9th Cir. 2012) (citation omitted); United States v. Gould
16 (In re Gould), 401 B.R. 415, 421 (9th Cir. BAP 2009).

17 1. Statutory Mootness: The Sale Order

18 Under § 363, a trustee may sell property of the estate,
19 other than in the ordinary course of business, after notice and
20 a hearing. Under § 363(m), the validity of a “sale . . . of
21 property” executed under the terms of § 363 cannot be challenged
22

23 ⁷ Investek filed a notice of joinder with Trustee’s opening
24 brief contending, among other things, that the Settlement and
25 Sale Orders should be sustained or dismissed as moot. EDF also
26 joined in Trustee’s assertion that the Sale Order is statutorily
27 moot and both the Settlement and Sale Orders are equitably moot.
28 ECM also filed a joinder relating to the Settlement and Sale
Orders. Alta Mesa 640 LLC joined in the opening brief of Trustee
and EDF as to all portions of the briefs relating to the Sale
Motion and Sale Order.

1 on appeal unless the sale was stayed pending appeal.⁸ “The
2 requirement to seek a stay pending appeal only applies to
3 purchases of estate property that were made in good faith, and
4 is designed to protect the interests of good faith purchasers by
5 guaranteeing the finality of property sales.” Adeli v. Barclay
6 (In re Berkeley Delaware Court, LLC), 834 F.3d 1036, 1039 (9th
7 Cir. 2016) (citing In re Onouli-Kona Land Co., 846 F.2d at
8 1172); In re Fitzgerald, 428 B.R. at 880 (“While a finding of
9 ‘good faith’ is not an essential element for approval of a sale
10 under [§] 363(b), such a determination becomes important with
11 respect to potential mootness when an appeal is taken from the
12 order authorizing the sale.”).

13 On appeal, the Affiliates argue that the bankruptcy court
14 erred in finding that the Buyer was a good faith purchaser. The
15 Affiliates never raised any objection to the bankruptcy court’s
16 findings of good faith. They did not object to Mr. Koya’s
17 declaration, which was submitted in support of the Sale Motion.
18 Nor can we find any mention of good faith in their written
19 objections to the Sale Motion or in their arguments at the
20

21 ⁸ No comparable provision applies to settlements under
22 Rule 9019. Although a bankruptcy court has discretion to apply
23 § 363 procedures to a sale of claims pursuant to a settlement
24 approved under Rule 9019, that is not what happened here. See
25 In re Berkeley Delaware Court, LLC, 834 F.3d at 1039-49. The
26 record shows that Trustee moved for approval of the compromise
27 separately from the sale of assets, the motion for compromise was
28 not briefed as a sale, and the bankruptcy court did not indicate
that it was considering approval of the compromise under § 363.
Instead, although the settlement and sale were intertwined, the
bankruptcy court separately considered and ruled upon the
settlement and the sale. In sum, § 363(m) does not apply to the
Settlement Order.

1 evidentiary hearing. At this stage in the proceedings, the
2 Affiliates have waived any challenge to the bankruptcy court's
3 findings that the Buyer was a good faith purchaser at the time
4 of the sale and entry of the Sale Order. See Smith v. Marsh,
5 194 F.3d 1045, 1052 (9th Cir. 1999) ("[A]n appellate court will
6 not consider issues not properly raised before the [trial]
7 court."). Even if there were no waiver, we conclude the
8 bankruptcy court's finding of good faith was not clearly
9 erroneous based on the record available to it at the time of its
10 finding.

11 The Affiliates also challenge the Buyer's good faith due to
12 post-sale events. According to the Affiliates, by making an
13 offer with no intention (or, possibly, ability) to timely close,
14 the Buyer effectively chilled Trustee from further marketing the
15 Property and other potential purchasers from submitting offers
16 on comparable terms. The Affiliates contend that this strategy
17 allowed the Buyer to purchase the real and personal property on
18 better terms than it otherwise would have. According to the
19 Affiliates, the Buyer's "intentional" delay in closing the sale
20 is a "new fact" that came to light after the Sale Order was
21 entered and thus § 363(m) does not apply.

22 A bankruptcy court's determination of whether a purchaser
23 of property acted in good faith under § 363(m) is a finding of
24 fact reviewed for clear error. In re Thomas, 287 B.R. at 785.
25 We do not make findings of fact on appeal. Generally, "when new
26 facts come to light after the sale authorization order is
27 entered plausibly calling into question the good faith of the
28 purchaser, and when the issue of whether § 363(m) applies is

1 critical to the disposition of the appeal, the appropriate
2 procedure is a limited remand to permit the bankruptcy court to
3 hear and consider the new facts.” Zuercher Tr. of 1999 v.
4 Schoenmann (In re Zuercher Tr. of 1999), BAP No.
5 NC-14-1440-KuWJu, 2016 WL 721485, at *1 (9th Cir. BAP Feb. 22,
6 2016); see In re Thomas, 287 B.R. at 785.

7 There is no need for a limited remand here. Under our case
8 law, the alleged new facts must “plausibly” call into question
9 the good faith of the purchaser. The plausibility requirement
10 insures that bald conclusory allegations of bad faith based on
11 post-sale events cannot be used to make an end run around the
12 safe harbor of § 363(m). Otherwise, the statutory protection
13 afforded to a good faith purchaser would be utterly useless.

14 The Affiliates’ allegations do not identify a plausible
15 factual basis that gives rise to an inference of the Buyer’s bad
16 faith based on post-sale events. Standing alone, the
17 Affiliates’ unsubstantiated “beliefs” regarding the reason for
18 the Buyer’s delay in the closing are insufficient to establish a
19 minimal plausible inference of the Buyer’s post-closing bad
20 faith. Moreover, the Affiliates argue that Trustee’s “excuse”
21 for the delay in closing due to the title insurance is
22 “questionable.” Trustee provided a status report to the
23 bankruptcy court informing the court about the delay in the
24 closing based on a problem with the original title company and
25 its decision to decline to insure the sale due to the appeal.
26 Under these circumstances, the Affiliates’ conclusory and
27 unsubstantiated allegation that we should “question” Trustee’s
28 statements to the bankruptcy court is also insufficient to

1 establish a minimal plausible inference of the Buyer's post-
2 closing bad faith.

3 In sum, the Affiliates' allegations do not plausibly call
4 into question the Buyer's bad faith. Statutory mootness should
5 thus apply to the Sale Order as the Affiliates failed to post
6 the bond which would have stayed the Sale Order pending appeal.

7 **2. Equitable Mootness**

8 However, even if the Affiliates' appeal of the Sale Order
9 is not statutorily moot under § 363(m), we conclude that it is
10 moot under the doctrine of equitable mootness. See Castaic
11 Partners II, LLC v. Daca-Castaic, LLC (In re Castaic Partners
12 II, LLC), 823 F.3d 966, 968 (9th Cir. 2016) ("[S]tatutory
13 mootness codifies part, but not all, of the doctrine of
14 equitable mootness.") (citing Clear Channel Outdoor, Inc. v.
15 Knupfer (In re PW, LLC), 391 B.R. 25, 35 (9th Cir. BAP 2008));
16 In re Fitzgerald, 428 B.R. at 882 ("Even though Fitzgerald's
17 appeal is not statutorily moot under § 363(m) [due to lack of
18 findings], his appeal may still be moot under the general
19 principles of mootness."); see also Bonnett v. Gillespie
20 (In re Irish Pub Arrowhead Land, LLC), BAP No. 13-1024-PaKuD,
21 2014 WL 486955, at *5 (9th Cir. BAP Feb. 6, 2014) ("To be sure,
22 equitable mootness applies to appeals concerning sales under
23 § 363.").

24 We may dismiss an appeal if we deem it equitably moot.
25 In re PW, LLC, 391 B.R. at 33-35. Equitable mootness is "a
26 judge-made abstention doctrine unrelated to the constitutional
27 prohibition against hearing moot appeals." Rev Op Grp. v. ML
28 Manager LLC (In re Mortgs. Ltd.), 771 F.3d 1211, 1214 (9th Cir.

1 2014). The doctrine holds that even where effective relief is
2 theoretically possible, and the appeal is therefore not
3 constitutionally moot, courts may “dismiss appeals of bankruptcy
4 matters when there has been a ‘comprehensive change of
5 circumstances . . . so as to render it inequitable for [the]
6 court to consider the merits of the appeal.’” Id. (quoting
7 In re Thorpe Insulation Co., 677 F.3d at 880). In other words,
8 “[e]quitable mootness concerns whether changes to the status quo
9 following the order being appealed make it impractical or
10 inequitable to unscramble the eggs.” In re Castaic Partners II,
11 LLC, 823 F.3d at 968.

12 Given the intertwined nature of the Settlement and Sale
13 Orders, it is not necessary to analyze separately whether each
14 appeal is equitably moot. The compromise with the Lien
15 Creditors under Rule 9019 was the cornerstone of the asset sale
16 and integral to the distributions made to the bankruptcy estate
17 from the sale proceeds. Therefore, we consider together whether
18 the Settlement and Sale Orders are equitably moot.

19 The Ninth Circuit follows a four-step process to determine
20 whether an appeal is equitably moot:

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

27 In re Thorpe, 677 F.3d at 881. Applying this four-factor test,
28 we conclude that the appeals of the Settlement and Sale Orders

1 are equitably moot.

2 **The Stay:** The Affiliates sought and obtained a stay from a
3 motions Panel, which was conditioned upon the posting of a bond.
4 The Panel dissolved the stay when the Affiliates failed to post
5 the bond. Although the Affiliates did not sit on their rights
6 and they obtained a temporary stay from the Panel, they also
7 failed to maintain the status quo by posting the bond.
8 Regardless, in this Circuit, “[t]he failure to gain a stay is
9 one factor to be considered in assessing equitable mootness, but
10 is not necessarily controlling.” In re Thorpe, 677 F.3d at 881-
11 82.

12 **Substantial Consummation:** We next consider whether
13 substantial consummation of the settlement and sale has
14 occurred. Although Thorpe focused on plan consummation, the
15 Ninth Circuit has held that the same general principles apply to
16 any equitable mootness analysis. In re Mortgs. Ltd., 771 F.3d
17 at 1271.

18 Here, because there was no stay, the full execution of the
19 settlement and sale agreements has occurred, including the sale
20 of the real and personal property, the transfer of various
21 agreements, the dismissals of litigation pertaining to the Lien
22 Creditors, and the distribution of the sale proceeds. The
23 settlement and sale are more than substantially consummated;
24 they are essentially complete.

25 The settlement agreement was the result of a complex
26 negotiated agreement to resolve the Lien Creditors’ claims and
27 obtain a distribution from the sale proceeds for the estate. In
28 conformance with the settlement agreement, Trustee filed a

1 notice of abandonment of the EDF appeal and the appeal has now
2 been closed. ECM dismissed its complaint on its mechanic's lien
3 claim against Debtor with prejudice, and the California Court of
4 Appeal dismissed the Investek appeal at Investek's request.

5 Furthermore, the sale proceeds have been distributed to the
6 Lien Creditors and other third parties, including payment of
7 defaulted property taxes to the County of Riverside. Various
8 liens and other matters of record have been reconveyed, and
9 letters to SCE and City National Bank where the Trust Account is
10 located have been sent, advising them of the sale and assignment
11 of all rights to the Buyer.

12 Substantial consummation of the settlement and sale is the
13 kind of "comprehensive change of circumstances" which makes
14 granting the relief sought in these appeals inequitable. At
15 this point, reversing the settlement or sale orders requires
16 "unscrambling the eggs." In re Castaic Partners II, LLC,
17 823 F.3d at 968; see also Baker & Drake, Inc. v. Pub. Serv.
18 Comm'n of Nev. (In re Baker & Drake, Inc.), 35 F.3d 1348, 1351
19 (1994).

20 Although this factor weighs in favor of finding the appeals
21 of the Settlement and Sale Orders moot, the law in this Circuit
22 requires that we still look at the third and fourth prongs of
23 the equitable mootness test. In re Mortgs. Ltd., 771 F.3d at
24 629 (recognizing that "[s]ubstantial consummation of a
25 bankruptcy plan often brings with it a comprehensive change in
26 circumstances that renders appellate review of the merits of the
27 plan impractical," but that courts must still consider whether
28 it is possible to "fashion effective relief").

1 **Innocent Third Parties:** The question posed by the third
2 Thorpe factor is "whether modification of the plan of
3 reorganization would bear unduly on the innocent."
4 In re Thorpe, 677 F.3d at 882. Equitable mootness inquires
5 beyond the impossibility of a remedy and considers the
6 consequences of a reversal on third parties who acted in
7 reliance on an order authorizing a sale (or settlement).
8 In re PW, LLC, 391 B.R. at 33. The remedy the Affiliates seek
9 is the outright reversal of the Settlement and Sale Orders. The
10 complete unraveling of the settlement and sale would have a
11 negative effect on parties intended to be protected by the
12 doctrine of equitable mootness, namely innocent third parties
13 not before the court.

14 Trustee has distributed over \$50,000 to the County of
15 Riverside for past-due taxes and over \$180,000 to the brokers
16 involved in the sale. Reversal or alteration of the Settlement
17 and Sale Orders would require these third parties to return
18 distributions from the estate. In addition, although they are
19 before the Panel, we cannot ignore the Buyer or the Lien
20 Creditors. There is no indication that the Buyer had any
21 connection to this case before the sale of the Real Property and
22 personal property was advertised. The sale and settlement have
23 closed, and possession of the Real Property and other assets
24 have been turned over to the Buyer who has commenced operations
25 and negotiations of a new PPA with SCE since the existing PPA
26 expires in 2018. ECM and Investek have dismissed their
27 litigation against Debtor, and EDF has given up a portion of its
28 claim and purported right to the Trust Funds in exchange for

1 Trustee's dismissal of the EDF Litigation. The Lien Creditors
2 have been paid.

3 Under these circumstances, the reliance of the Buyer and
4 the other parties on the finality of the Sale Order is
5 consistent with the public policy in favor of maximizing
6 debtor's estates and facilitating sales. In the end, this
7 factor supports Trustee's contention that these appeals are
8 equitably moot.

9 **Effective And Equitable Relief:** The fourth factor, whether
10 the bankruptcy court can fashion effective and equitable relief,
11 is generally the most important of the four factors.

12 In re Thorpe, 677 F.3d at 883. Here, is not possible to fashion
13 relief that is both effective and equitable.

14 Even if modification or vacation of the Settlement and Sale
15 Orders were theoretically possible, it would be impracticable –
16 “unscrambling the egg” – to bring the parties back to the same
17 positions they had been in before Trustee sold the real and
18 personal property to the Buyer free and clear of the Lien
19 Creditors' liens. Trustee has distributed the sale proceeds to
20 the Lien Creditors, ECM and Investek reduced their liens and
21 dismissed their litigation against Debtor, and EDF reduced its
22 lien in exchange for Trustee's abandonment of the EDF
23 Litigation. Trustee transferred the real and personal property
24 to the Buyer which has had possession of it for months.

25 Returning to the status quo would require imposing
26 significant costs and possibly necessitate time-consuming and
27 costly litigation. Clawing back money from the Lien Creditors,
28 the County of Riverside, and other third parties would be either

1 impossible or inequitable. Indeed, this is not a case where the
2 bankruptcy court can fashion relief by simply ordering
3 additional disbursements of money by one of the parties on
4 appeal. Cf. Focus Media, Inc. v. Nat'l Broad. Co. (In re Focus
5 Media, Inc.), 378 F.3d 916, 922 (9th Cir. 2004) (requiring one
6 party to disgorge money it has received does not require the
7 unraveling of a complicated bankruptcy plan).

8 Moreover, if we were to reverse or modify the Settlement
9 Order on appeal, MTC's bankruptcy estate - and the equitable
10 distribution among creditors that it represents - would be left
11 with neither the \$125,000 guaranteed distribution from the sale
12 proceeds nor the potential \$250,000, if Trustee succeeds in
13 establishing that TR has no ownership to the Trust Funds. If we
14 were to reverse or modify the Sale Order on appeal, Trustee
15 would inherit assets that are wasting and the sale worth
16 \$3.18 million would be lost.

17 Furthermore, as the bankruptcy court succinctly observed,
18 Mr. Jones and his related entities never provided evidence of a
19 better alternative than what Trustee achieved. Mr. Jones,
20 through his Affiliates, also fails to explain how we can provide
21 effective relief that would not disturb the numerous third
22 parties who have been involved and affected by the consummation
23 of the Settlement and Sale Orders. In short, vacating the
24 Settlement and Sale Orders would not only leave the unsecured
25 creditors with nil, but would also frustrate the orderly
26 administration of Debtor's estate. "[T]he principle of
27 dismissal of an appeal for lack of equity . . . is justified to
28 prevent frustration of orderly administration of estates under

1 various provisions of the Bankruptcy Act." Trone v. Roberts
2 Farms, Inc. (In re Roberts Farms), 652 F.2d 793, 798 (9th Cir.
3 1981).

4 In the end, the Affiliates' failure to post the bond after
5 obtaining a stay allowed the parties to substantially consummate
6 the settlement and sale. This is the kind of comprehensive
7 change of circumstances that renders it inequitable for the
8 Panel to consider the merits of these appeals.

9 Since all factors of the Thorpe test point in favor of
10 applying the equitable mootness doctrine, we find the appeals of
11 the Settlement and Sale Orders equitably moot. Due to our
12 conclusion, Debtor's appeals of the orders denying abandonment
13 of the EDF Litigation and Real Property are rendered moot as
14 well.

15 **B. The Merits**

16 **1. The Settlement Order**

17 The settlement agreement has been substantially
18 consummated, and the appeal of the Settlement Order is equitably
19 moot. Nevertheless, to the extent relief could be fashioned at
20 this juncture, no such relief is warranted.

21 Rule 9019(a) provides that, "[o]n motion by the trustee and
22 after notice and a hearing, the court may approve a compromise
23 or settlement."

24 Although the bankruptcy court has "great latitude" in
25 authorizing a compromise, it may only approve a proposal that is
26 "fair and equitable" to the creditors. In re Woodson, 839 F.2d
27 at 620. The settlement should be in the best interests of the
28 estate and "reasonable, given the particular circumstances of

1 the case." A & C Props., 784 F.2d at 1381. And while a court
2 generally gives deference to a trustee's business judgment in
3 deciding whether to settle a matter, the trustee "has the burden
4 of persuading the bankruptcy court that the compromise is fair
5 and equitable and should be approved." Id.

6 In determining the "fairness, reasonableness and adequacy"
7 of a proposed compromise, a bankruptcy court must consider:

- 8 (a) The probability of success in the litigation;
9 (b) the difficulties, if any to be encountered in the
10 matter of collection; (c) the complexity of the
11 litigation involved, and the expense, inconvenience
and delay necessarily attending it; [and] (d) the
paramount interest of the creditors and a proper
deference to their reasonable views in the premises.

12 Id. "When assessing a compromise, the court needs not rule on
13 disputed facts and questions of law, but rather only canvass the
14 issues. A mini trial on the merits is not required." Burton v.
15 Ulrich (In re Schmitt), 215 F.B. 417, 423 (9th Cir. 1997). The
16 reasonableness of a compromise is determined by the particular
17 circumstances of each case Because the bankruptcy judge
18 is uniquely situated to consider the equities and reasonableness
19 of a particular compromise, approval or denial of a compromise
20 will not be disturbed on appeal absent a clear abuse of
21 discretion." In re Walsh Const., Inc., 669 F.2d 1325, 1328 (9th
22 Cir. 1982).

23 Here, the bankruptcy court recited the four A&C factors
24 when it approved the settlement between Trustee and each of the
25 Lien Creditors. The record shows that the court thoroughly
26 reviewed the evidence regarding the disputed claims of the Lien
27 Creditors and considered Trustee's opinions regarding her
28 probability of success and the costs of litigation. The

1 bankruptcy court greatly discounted Mr. Jones' opinion regarding
2 the merits of the litigation with Investek, ECM, and EDF, and
3 further found him not credible. "If two views of the evidence
4 are possible, the trial judge's choice between them cannot be
5 clearly erroneous." Anderson v. Bessemer City, 470 U.S. 564,
6 573-574 (1985); see Hansen v. Moore (In re Hansen), 368 B.R.
7 868, 874-875 (9th Cir. BAP 2007). The record amply supports the
8 court's findings with respect each of the four A&C factors.

9 Moreover, our decision in In re KVN Corporation does not
10 preclude approval of the settlement. There, the Panel noted the
11 general rule prohibiting the sale of fully encumbered property
12 which would yield no benefit to unsecured creditors. In re KVN
13 Corporation, 514 B.R. at 6. Such a sale raises a presumption of
14 impropriety, but the presumption is rebuttable. Id. at 6-7.

15 To rebut the presumption, the case law directs the
16 following inquiry: Has the trustee fulfilled his or
17 her basic duties? Is there a benefit to the estate;
18 i.e., prospects for a meaningful distribution to
19 unsecured creditors? Have the terms of the carve-out
20 agreement been fully disclosed to the bankruptcy
21 court? If the answer to these questions is in the
22 affirmative, then the presumption of impropriety can
23 be overcome.

24 Id. at 8.

25 The bankruptcy court found that Trustee had performed her
26 duties and that there was a benefit to the estate because the
27 unsecured priority and non-priority creditors were guaranteed
28 \$125,000 from the sale proceeds. Although the court observed
that the funds may end up paying allowed chapter 11
administrative fees, there was still the prospect that funds
would flow to the unsecured creditors. Additionally, for
purposes of approving the settlement, the bankruptcy court

1 found, based on the evidence before it, that it was "highly
2 likely" that priority and non-priority creditors would receive
3 \$250,000 because TR would not prevail on its claims to
4 \$2.8 million in the Trust Account. Taken together, these
5 factual findings, which are logical, plausible, and supported by
6 the record, show that Trustee rebutted any presumption of
7 impropriety.

8 Finally, we summarily dispose of the Affiliates' argument
9 that the bankruptcy court overstepped its role in approving the
10 settlement. It is the bankruptcy court's duty to enforce the
11 law under the Bankruptcy Code. The court's tentative decision
12 posted before the final hearing on the Settlement Motion simply
13 pointed to what the judge saw as particular difficulties with
14 the settlement and obstacles to approval. We know of no
15 decision which states that a judge is prohibited from forming
16 preliminary legal conclusions based upon facts already in the
17 record and providing guidance to the moving parties in a
18 tentative ruling which they could choose to follow – or not.
19 In sum, the bankruptcy court properly exercised its discretion
20 in approving the settlement.

21 **2. The Sale Order**

22 We likewise find that the bankruptcy court did not abuse
23 its discretion in granting Trustee's Sale Motion. The record
24 shows there is no dispute that the property sold was property of
25 the bankruptcy estate nor did the sale alter the rights of
26 anyone to the \$2.8 million in the Trust Account – disputes over
27 ownership of the Trust Funds were preserved. Finally, as noted
28 above, at least \$125,000 will flow to creditors beyond chapter 7

1 administrative creditors.

2 **3. The Orders Denying Abandonment**

3 Due to our affirmance of the Settlement and Sale Orders,
4 the appeals of the orders denying abandonment of the EDF
5 Litigation and Real Property are constitutionally moot. We can
6 offer no effective relief regarding abandonment when the EDF
7 Litigation and Real Property are no longer property of MTC's
8 estate.

9 **VII. CONCLUSION**

10 For the reasons outlined above, we DISMISS the appeal of
11 the Sale Order on statutory mootness grounds. Even if the
12 appeal of the Sale Order is not statutorily moot, we conclude
13 that it is equitably moot as is the Settlement Order, which
14 makes DISMISSAL of all the appeals appropriate on mootness
15 grounds.

16 Finally, even if the Settlement and Sale Orders are not
17 equitably moot, we AFFIRM those orders on the merits. Due to
18 our affirmance, we DISMISS the appeals denying abandonment of
19 the EDF Litigation and Real Property on constitutional mootness
20 grounds.