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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Rev Op Group,

) No. 10-1665-PHX-MHM

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Appellant,

) BK NO. 08-bk-0765

11

vs.

) **ORDER**

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ML Manager, LLC, et al.,

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Appellees.

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In Re: Mortgages Ltd.

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Debtor

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Before the Court is appellee ML Manager LLC's ("ML Manager") Motion to Dismiss
23 the Rev-Op Group's Appeal of the Bankruptcy Court's order approving settlements with
24 Grace Entities, which is joined by appellees the Grace Entities. (Docs. 7 and 9). In addition
25 to the motion, the Court has also reviewed the Rev Op Group's response (doc. 10) and the
26 replies by ML Manager and Grace Entities, as well as ML Manager's Supplement to the
27 motion (doc. 17). In addition, the Court has reviewed the order granting the Motion to
28 Approve Settlements with Grace Entities issued by the Bankruptcy Court, which the Rev Op

1 Group is appealing in this matter. Having heard oral argument on January 25, 2011, the
2 Court issues the following order.

3 **I. Background**

4 **A. The Mortgages Limited Bankruptcy**

5 This case, along with a number of others pending before this Court, arises out of the
6 Chapter 11 bankruptcy proceedings for Mortgages Limited, case number BK NO. 08-07465.
7 The Court notes by way of background that Mortgages Limited ("Mortgages Ltd.") once held
8 a \$900 million portfolio of loans and had over 1800 investors. Investors in Mortgages Ltd.
9 owned fractional interests in promissory notes and deeds of trust. Investors entered
10 agreements with Mortgages Ltd. prior to making these investments. Because investors had
11 fractional interests in the various mortgages, when borrowers defaulted and the properties
12 were foreclosed upon, investors became part owners of properties as tenants in common with
13 other investors who had interests in the same loan.

14 On June 28, 2008, Mortgages Ltd. filed for Chapter 11 bankruptcy. The company was
15 thus reorganized pursuant to a plan that was confirmed by the Bankruptcy Court on March
16 20, 2009 ("the Plan"). As part of the Plan, an entity called ML Manager, LLC ("ML
17 Manager"), the appellee in this case, was created to manage and operate the loans in the
18 portfolio. The original investors for the most part transferred their interests to 49 separate
19 Loan LLC's. A number of investors, referred to as "pass through investors" did not transfer
20 their interests. As part of the Plan, ML Manager took out \$20 million in exit financing (the
21 "Exit Financing") to help keep the company afloat during the reorganization.

22 **B. General Dispute Between the Rev Op Group and ML Manager**

23 After confirmation of the Plan, a dispute arose regarding the agency authority of ML
24 Manager to take action on behalf of "pass through investors." A group of "pass through
25 investors" referred to as the Rev Op Group, the appellants in this case, took the position that
26 ML Manager cannot sell property in which Rev Op Group members have an interest without
27 the Rev Op Group's approval and consent. ML Manager asserted that it had the agency
28 power to sell property in which Rev Op investors have an interest without their consent. This

1 conflict has lead to a number of disputes within the bankruptcy court as well as a number of
2 appeals of Bankruptcy Court orders currently pending before this Court.

3 **C. The Dispute with Grace Entities and Settlements**

4 The Grace Entities, the other appellees in this case, were a group of affiliated
5 borrowers who obtained six loans from Mortgages Ltd. to develop five separate projects.
6 Like other Mortgages Ltd. loans, interests in the Grace Entity loans were sold to various
7 investors, including members of the Rev-Op Group. The Grace Entities alleged that
8 Mortgages Ltd. had caused them to incur substantial damages due to its failure to fully and
9 timely fund those loans and two of the Grace Entities filed the initial involuntary bankruptcy
10 petition against Mortgages Ltd. in June 2008.

11 The Grace Entities participated in the bankruptcy proceedings and initially objected
12 to the reorganization Plan. Their objections, however, were resolved by an agreement that
13 ML Manager would mediate and if necessary arbitrate the claims with the Grace Entities
14 loans. Paragraph V of the Confirmation Order describes the mediation procedure and states
15 in part:

16 The parties required to participate in the Grace ADR shall be the Grace
17 Entities, the Grace Guarantors, ML or its successor ML Manager, LLC and
18 any Loan LLC formed to own an interest in any loan with one or more of the
19 Grace Entities. ML, ML Manager, and any of the Loan LLCs will be deemed
to be acting in their interest and in their capacity, if any as the agent for any
and all Grace Investors who retain an ownership in any note or deed of trust
issued in connection with any loan between ML and the Grace Entities.

20 According to the briefs, the Rev Op Group was represented by counsel present in the
21 courtroom when the settlement with the Grace Entities was described on the record and did
22 not object at that time. The Rev Op Group also did not object when the draft confirmation
23 order describing the mediation procedure was circulated, nor did they object when the
24 Confirmation Order was lodged with the Bankruptcy Court. The Rev Op Group did not
25 appeal from the Confirmation Order.

26 During the mediation process, in which the Rev Op Group did not directly
27 participate, ML Manager and the Grace Entities reached a global settlement on the different
28 disputes concerning the various Mortgages Limited loans. One contingency of the approved

1 settlement agreements was that they all had to be approved and implemented or none of them
2 would be effective, in part, because the principals of the Grace Entities were unwilling to
3 release their claims on some projects without a global settlement on all projects.

4 ML Manager then filed a motion to approve settlements with Grace Entities, asking
5 the Bankruptcy Court to enter an order approving the settlements, which was joined by the
6 Grace Entities. The Rev Op Group filed an objection and reservation. On June 30, 2010,
7 ML Manager, the Grace Entities and the Rev Op Group filed a joint pretrial statement
8 regarding contested matters, which outlined the dispute between the parties. The Bankruptcy
9 Court held an evidentiary hearing on the Motion on July 7, 2010, at which it took evidence
10 in support of the Motion. The Bankruptcy Court also heard oral arguments at a hearing on
11 July 8, 2010 and at the conclusion of the hearing the Court made findings of fact and
12 conclusions of law on the record.

13 On July 12, 2010, the Bankruptcy Court issued an order approving the motion to
14 approve the settlements with Grace Entities. The Order granted ML Manager's motion and
15 approved the settlements and overruled the objection and reservation. The Bankruptcy Court
16 also held that ML Manager was authorized under the Confirmed Plan and the Confirmation
17 Order to enter into the Grace Entities settlements and to implement the terms therein. The
18 Bankruptcy Court also held that ML Manager was authorized to give the releases provided
19 for in the settlements, enter into the notes and deeds of trust and pay the settlement payments
20 to the Grace Entities out of the sales of two of the properties.

21 The Rev Op Group did not seek a stay of the Bankruptcy Court's Order approving the
22 settlements. On July 20, 2010, the Rev Op Group filed a notice of appeal to the Bankruptcy
23 Appellate Panel of the Ninth Circuit. On July 29, 2010, ML Manager requested transfer of
24 the case to the District Court and on August 4, 2010, the matter was transferred to this Court.

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26 **D. ML Manager's Motion to Dismiss**

27 On August 19, 2010, ML Manager filed a Motion to Dismiss the Rev Op Group's
28 Appeal of the Bankruptcy Court's Order approving the settlements with the Grace Entities.

1 The motion argues that the Rev Op Group's appeal is moot because the appellant failed to
2 seek or obtain a stay of the order from the Bankruptcy Court and the settlement has now been
3 substantially consummated; ownership of the subject properties has been transferred to the
4 applicable Loan LLC's, promissory notes and deeds of trust have been delivered to the Grace
5 Entities and their designees to secure payment of new obligations created under the
6 settlements. ML Manager also argues that the issues raised by the Rev Op Group constitute
7 an impermissible collateral attack on the Plan. On August 23, 2010 the Grace Entities filed
8 a joinder to the motion to dismiss.

9 In response, the Rev Op Group argues that the appeal is not moot because the
10 Bankruptcy Court's approval of the settlement agreements and the subsequent transactions
11 pursuant to the settlement agreements are not so complex as to be too difficult to unwind.
12 In addition, the Rev Op Group argues that even if the foreclosures on the properties are
13 irreversible, significant issues relating to the settlements remain live for adjudication by this
14 Court, which it argues can fashion effective relief. The Rev Op Group stresses that none of
15 the properties transferred to ML Manager has been sold to third parties or refinanced as
16 proposed in the settlement agreements and no proceeds of such sales have been distributed,
17 so that to the extent the Court determines that the transfers of the properties cannot be
18 unwound, issues still exist with respect to the subsequent sale or refinancing of the properties
19 by ML Manager and the distribution of proceeds. The Rev Op Group also argues that its
20 appeal seeks only review of the Bankruptcy Court's interpretation of the Plan and
21 Confirmation Order and does not constitute a collateral attack of the plan.

22 ML Manager and the Grace Entities both filed replies in support of the motion to
23 dismiss. In their reply, the Grace Entities argue that because the Bankruptcy Court approved
24 the settlements and the Rev Op Group failed to request or obtain a stay of the order, the
25 Grace Entities, relied upon the finality of the settlements by using the promissory notes they
26 received as a source of "payment" to reach settlements with their own creditors. According
27 to the reply, one of the promissory notes was made payable to the Grace Entities' counsel,
28 two of the other secured promissory notes have been assigned to another of the Grace Entities

1 creditors pursuant to a settlement agreement that resolves four lawsuits with one or more of
2 the Grace Entities. The Grace Entities are also in the process of negotiating settlements with
3 additional creditors in which they contemplate further assignments of the remaining secured
4 promissory notes. The Grace Entities also assert that the Bankruptcy Court's ruling that it
5 had the authority to Approve the Settlements pursuant to Paragraph V of the Plan
6 Confirmation order was proper and that this does not impact any agency authority issues that
7 may be pending in the adversary proceeding between ML Manager and the Rev Op Group.
8 Nevertheless the Grace Entities argue that the Rev Op Group's challenge of the Bankruptcy
9 Court's ruling on this issue is a collateral attack by the Rev Op Group on the Plan and
10 Confirmation Order.

11 In its reply, ML Manager outlines the various events that have occurred since approval
12 of the settlements that allegedly further moot the Rev Op Group's appeal of the Bankruptcy
13 Order. These include trustee sales of properties, vesting of property title, lawsuits being filed
14 against new owners of one parcel, and a number of steps that have been taken to sell two of
15 the properties including broker agreements, the issuance of title insurance, the opening of
16 escrow accounts and other entanglements with third parties.

17 On October 28, 2010, ML Manager also filed a Supplement to its motion to dismiss
18 in which it outlines further events that allegedly moot this appeal. The Rev Op Group did
19 not file any objection to the supplement. In the supplement, ML Manager explains that
20 following the trustee sales, it aggressively marketed and sought buyers for possibly the most
21 valuable of the five projects, referred to as the Osborne III Property. ML Manager ultimately
22 executed a purchase agreement with a third-party buyer for \$19.5 million. ML Manager filed
23 a motion to approve the sale with the Bankruptcy Court. The Rev-Op Group objected to the
24 sale, but not the purchase price. On September 21, 2010, the Bankruptcy Court entered an
25 order approving the sale of the subject property. The Rev-Op Group did not appeal the sale
26 order or seek a stay of the sale. ML Manager used proceeds from the sale to make a number
27 of payments to third parties, including tax and lien payments, payments to the title insurer,
28 escrow agent and a large payment to the Exit Financier.

1 On January 25, 2011 the Court heard oral argument from ML Manager, the Grace
2 Entities and the Rev Op Group.

3 II. Discussion

4 "A case is moot only if interim events have 'completely and irrevocably eradicated the
5 effects of' an improper ruling." In re Pintler Corp., 124 F.3d 1310, 1312 (citing Wong v.
6 Dept. of State, 789 F.2d 1380, 1384 (9th Cir. 1986)) The party asserting mootness has a
7 heavy burden to establish that there is no effective relief remaining for a court to provide.
8 Id. (citing Northwest Environmental Defense Center. v. Gordon, 849 F.2d 1241, 1244-45
9 (9th Cir. 1988). In bankruptcy cases, however, where the Court approves asset sales or
10 complicated property transfers that affect third parties, unwinding transactions can become
11 impractical and rather impossible. As a result, appellants must usually obtain a stay to avoid
12 a ruling that an appeal from a bankruptcy ruling approving a sale or asset disposition is moot:
13 "The Rule that failure to obtain a stay pending appeal renders the issue moot did not originate
14 in the Bankruptcy Rules. Rather, it is a judicial doctrine which developed from the general
15 rule that the occurrence of events which prevent an appellate court from granting effective
16 relief renders an appeal moot, and the particular need for finality in orders regarding stays
17 in bankruptcy." Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1424 (9th Cir. 1985);
18 see also Onouli-Kona Land Co v. Richards, 846 F.2d 1170, 1173 (9th Cir. 1988).

19 In the Ninth Circuit, "[f]inality in bankruptcy has become the dominant rationale for
20 our decisions; the trend is toward an absolute rule that requires appellants to obtain a stay
21 before appealing a sale of assets." Ohouli-Kona, 846 F.2d 1170. Therefore, "[I]t is obligatory
22 upon appellants . . . to pursue with diligence all available remedies to obtain a stay of
23 execution of the objectionable order [] if the failure to do so creates a situation rendering it
24 inequitable to reverse the orders appealed from." In re Roberts Farms, Inc., 652 F.2d at 798
25 (dismissing appeal and noting that "Appellants flunked the first step" by not applying to the
26 bankruptcy judge for a stay of orders including a settlement order and giving no adequate
27 reason for not doing so); see also In re Suchy, 786 F.2d 900, 902 (9th Cir. 1986). Courts have
28 acknowledged that this approach "places a heavy burden on aggrieved party-appellants in

1 bankruptcy cases" and that "[i]f an appellant fails to obtain a stay after exhausting all
2 appropriate remedies that well may be the end of his appeal." Roberts Farms, 652 F.2d at
3 798. However, Courts find that this heavy burden is "is justified to prevent frustration of
4 orderly administration of estates. . ." Id. at 798.

5 Although the failure to obtain a stay will generally moot an appeal from a bankruptcy
6 order approving a property sale, there have been some exceptions in cases where it can be
7 argued that the court can still fashion relief. As one court noted, however, "the exception has
8 operated in only where real property is sold to a creditor who is a party to the appeal' where
9 the foreclosure sale is subject to statutory rights of redemption.'" Onouli-Kona, 846 F.2d at
10 1172-73 (citing In re Sun Valley Ranches, Inc., 823 F.2d 1373, 1375 (9th Cir. 1987)). Such
11 an exception makes sense because in such an instance the sale is not truly final. Id.; see also
12 Suter v. Goedert, 504 F.3d 982 (9th Cir. 2007) (sale of litigation rights which led to dismissal
13 of appeal was not so final because of possibility of filing special writ).

14 In this case, the Rev Op Group did not obtain or even seek a stay of the bankruptcy
15 order approving the settlements, which involved transferring title to various properties in
16 exchange for promissory notes used to release the Grace Entities' creditors – third parties to
17 this transaction. Thus, although the settlement was not technically an asset sale, the complex
18 property transactions have progressed to the point that under the general rule applied to
19 bankruptcy orders approving property transactions, this appeal is now moot. The Rev Op
20 Group has not asserted anything remotely akin to a statutory right of redemption, and
21 contrary to the Rev Op Group's assertions, the transactions that have taken place as a result
22 of the approved settlements are complex, involve third parties and cannot be unwound. The
23 settlements, reached on condition that they all be consummated together, allowed the Rev Op
24 Group to foreclose on properties held by the Grace Entities in exchange for promissory notes.
25 Title to properties was transferred and the promissory notes were used by the Grace Entities
26 to pay third parties. At least some of the properties have been marketed and at least one has
27 now been sold to a third party and the proceeds from that sale distributed to third parties as
28 well. Contrary to the Rev Op Group's assertions, under these circumstances the fact that the

1 Grace Entities, with whom the settlements were reached, are parties to this appeal does not
2 alter the fact that the complex transactions are irreversible and the appeal moot. See Algeran
3 , 759 F.2d at 1424("the fact that the purchaser is a party to this appeal does not change the
4 applicability of the mootness rule"); Onouli-Kona, 846 F.2d at 1173 ("No such justification
5 supports a broader exception for all real property sold to a creditor who is a party to the
6 appeal.")

7 The Rev Op Group argues that its failure to obtain a stay does not render the appeal
8 moot, citing cases that either do not support its position or are importantly distinguishable.

9 One case cited by the Rev Op Group, In re Int'l Envtl. Dynamics, Inc., 718 F.2d 322, 326
10 (9th Cir. 1983) involved only the appeal of an order concerning attorneys' fees, a purely
11 monetary transaction which could more easily be unwound than the complex property
12 transfers that have occurred as the result of the settlements with the Grace Entities. The other
13 case cited by the Rev Op Group, In re PW, LLC, 391 B.R. 25,37 (B.A.P. 9th Cir. 2008)
14 actually held that with regard to a property sale approved by a bankruptcy order appealed by
15 a creditor "complexities that cannot be easily undone arise with respect to the sale. These
16 complexities and the impact on third parties make review of the sale ... equitably moot."

17 Although the court asserted that it could reverse the portion of Bankruptcy Court's order
18 stripping the lien of particular creditors, that portion of the holding is distinguishable in
19 important respects from this case. As an initial matter, the Court in In re PW was applying
20 Section 363 of the Bankruptcy Code, which is not applicable here. More to the point, the
21 Rev Op Group is not a lien holder who merely contests the Bankruptcy Court's "free and
22 clear" transfer of a property to a purchaser seeking to reinstate the lien so that the debtor can
23 repay the lien holder a fixed sum. Rather, the Rev Op Group objects to the entire settlement
24 process with the Grace Entities from the beginning, asserting that the complex resolution that
25 was reached and has now been implemented beyond undoing, required each of its members'
26 individual approval. The fact that the members of Rev Op Group might ultimately be
27 satisfied with payment of some monetary sum from ML Manager does not change the reality
28 that their claims undermine the entire settlement effort with the Grace Entities and that

1 resolution of their claims would require undoing the transactions in order to return the parties
2 to the pre-settlement status quo. Other than to conclusively state that the transactions that
3 have occurred are not so complex as to be too difficult to unwind, the Rev Op Group offers
4 no real suggestion as to how the Court could do so.

5 The Rev Op Group argues that even if the transactions resulting from the settlements
6 cannot be undone, the Court can still address its appeal on the merits since the Rev Op Group
7 challenges the Bankruptcy Court's interpretation of the Confirmation Order and argues it was
8 not authorized to bind the Rev Op Group in reaching the Grace Settlements. As one Court
9 put it, however,

10 Were we to deny the motion to dismiss for mootness and on consideration of the
11 merits reverse the order of the [lower court], what would be the result? Are we not
12 quite patently faced with a situation where the plan of arrangement has been so far
13 implemented that it is impossible to fashion effective relief for all concerned?

14 Roberts Farms, 652 F.2d at 797; see also Algeran, Inc., 759 F.2d at 1423. That excerpt
15 summarizes the situation this Court faces with regard to the Bankruptcy Court's approval of
16 the settlements with the Grace Entities. In light of how far the settlements have been
17 implemented, the Court cannot practicably address the merits of the Rev Op Group's appeal.

18 **III. Conclusion**

19 The Court emphasizes that the ruling that this particular appeal is moot is confined to
20 this case only. The Court does not intend for its ruling on this appeal to serve as a ruling on
21 other pending appeals from the Mortgages Ltd. bankruptcy. Each of those cases will be
22 decided in turn. The Court is merely holding that with regard to the Grace Entities
23 settlements, the appeal is moot because the appellants failed to obtain a stay of the
24 bankruptcy order and because the transactions that have transpired as a result cannot be
25 unraveled.

26 Because the Court dismisses this appeal as moot on the basis of the appellant's failure
27 to seek a stay of the bankruptcy court's order and because the settlements have been
28 irreversibly consummated, the Court does not address appellee's claim that the issues raised by
the Rev-Op Group constitute a collateral attack on the bankruptcy plan.

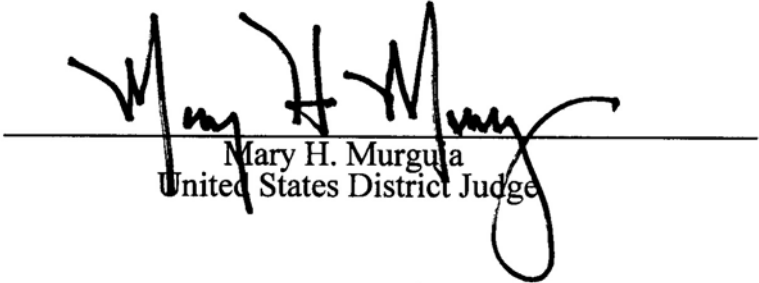
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Accordingly,

IT IS HEREBY ORDERED granting ML Manager's Motion to Dismiss the appeal
(Doc 7).

IT IS FURTHER ORDERED directing the Clerk of Court to close this action.

DATED this 31st day of January, 2011.



Mary H. Murgula
United States District Judge