JS-6

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.:	**SA CV 22-cv-00997 WDK** **Bkcy Case No. 8:20-bk-13335-MW/SC** **Adv. Case No. 8:21-ap-01019-SC**	Date:	September 27, 2024

Title:	*In re: Heartwise, Inc.*

Present: The Honorable	**WILLIAM D. KELLER, United States District Judge**

Kevin Reddick	N/A
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Appearing	None Appearing

Proceedings: **[In Chambers] ORDER RE 1) APPELLEE EARNESTY, LLC, ET AL.'S MOTION TO DISMISS BANKRUPTCY APPEAL [68]; 2) APPELLEE EARNESTY, LLC, ET AL.'S MOTION TO DISMISS FOR LACK OF PROSECUTION [72]; 3) APPELLANT OSMAN KHAN'S MOTION TO STRIKE [76]; AND APPELLEE EARNESTY, LLC, ET AL.'S EX PARTE APPLICATION TO CONTINUE [78]**

I. INTRODUCTION

This matter is before the Court on Appellee Earnesty, LLC, Robinson Pharma, Inc., Alpha Health Research, and Tuong Nguyen's ("Appellees" or "Defendants") Motion to Dismiss the Bankruptcy Appeal ("Appeal") of Appellant Osman Khan ("Appellant" or "Plaintiff" or "Khan") as moot ("Mootness Motion" or "MTD"). [Doc. Nos. 68, 1.] Also before the Court are Appellees' Motion to Dismiss for Lack of Prosecution, Appellant Osman Khan's Motion to Strike, and

Appellees' Ex Parte Application to Continue. [Doc. Nos. 72, 76, 78.] The Court has considered the papers filed in support of and in opposition to the matters, and deems them suitable for decision without oral argument. *See* Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15. For the reasons set forth below, the Appellees' Motion to Dismiss the Bankruptcy Appeal as moot and, in the alternative, the Appellees' Motion to Dismiss for Lack of Prosecution are **GRANTED. [68, 72]**

II.
FACTUAL AND PROCEDURAL BACKGROUND

This Appeal arises out of an adversary proceeding in the underlying bankruptcy case filed by DavidPaul Doyle ("Doyle"),[1] the former minority owner of Heartwise, Inc. ("Heartwise" or "Debtor"),[2] against Appellees. MTD citing Bisconti Declaration, Ex 1 (First Amended Complaint), [Doc. No. 68-2]; Adversary Proceeding Case No. 8:21-ap-01019 (the "Adversary Proceeding").

Doyle founded Heartwise in 2012.[3] Bisconti Decl., Ex. 1 at ¶ 26, ex. "B" at 1. Starting in 2014, Heartwise contracted with Robinson Pharma, Inc. ("RPI") to manufacture and package its products.[4] *Id.* at ¶ 27. In 2018, Heartwise experienced financial issues and, as of September 14, 2018, owed RPI over $4.1 million, of which over $1.5 million was past due. *Id.* at ¶ 31. Further, during this time frame Vitamins Online, Inc. ("Vitamins Online" or "VOL"), a market competitor, pursued a lawsuit against Heartwise seeking tens of millions of dollars in damages for acts alleged to have occurred during Doyle's tenure. *See* Bisconti Decl., Ex. 2.

On October 4, 2018, Doyle and Earnesty, LLC ("Earnesty") entered into a shareholder agreement ("Shareholder Agreement"). *Id.* at ¶ 51, ex. "B." The terms of the Shareholder Agreement were as follows: (a) Earnesty assumed payment of all existing open invoices payable by Debtor to RPI in the total amount of $1,574,000; (b) Earnesty paid Doyle $1,400,000; and (c) Earnesty would deposit $3,026,000 into Heartwise "over the course of one year in the amount of $252,166 per month, or in increments as needed by [Heartwise], to be determined by

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[1] On May 30, 2023, the Court granted Doyle and Khan's motion to substitute Khan as Appellant for Doyle. [Doc. Nos. 39, 50.] Accordingly, Doyle is no longer a party to the Appeal.
[2] Heartwise, Inc., was the debtor in the underlying bankruptcy case.
[3] Heartwise is a distributor of dietary supplements and beverages and operates under the brand name "Naturewise®." *See* Bisconti Decl., Ex. 1, ex. "B" at 1.
[4] RPI's CEO is Tuong Nguyen ("Nguyen"). Bisconti Decl., Ex. 1 at ¶ 29.

[Earnesty and Doyle].” *Id.* at ¶ 51, ex. “B” at 1-2. In exchange for Earnesty’s investment, Earnesty owned 51% of Heartwise and Doyle owned the remaining 49%. Bisconti Decl., Ex. 1, ex. “B” at 1. The Shareholder Agreement designated Nguyen as the CEO of Heartwise and Doyle as its “Chief Brand Officer (CBO)” and Founder. Bisconti Decl., Ex. 1 at ex. “B” § 2.02.

Following the execution of the Shareholder Agreement, Heartwise entered into contracts with Alpha and RPI. Bisconti Decl., Ex. 1 at ¶¶ 72, 83, *see also* Exs. 3, 4 (filed under seal). These contracts specified the scope of services to be performed, the rights and obligations of the parties, and the compensation amounts for Alpha and RPI. *See id.* Doyle and Nguyen approved both of the contracts and signed them on Heartwise’s behalf. *See id.*

On November 10, 2020, a judgment was entered in favor of Vitamins Online against Heartwise for $9,551,232 in disgorged profits plus interest, in the Utah District of the United States District Court. Bisconti Decl., Ex. 2 (the “Judgment”).

On December 4, 2020, Heartwise filed a voluntary petition for bankruptcy relief pursuant to Chapter 11 of the United States Bankruptcy Code. MTD at 4 citing Bisconti Decl., Ex. 1 ¶ 90. On March 20, 2021, Heartwise filed a Chapter 11 plan of reorganization (“the Plan”) and initial disclosure statement in the underlying bankruptcy case. MTD at 4 citing Bisconti Decl., Ex. 1 at ¶ 91. On September 22, 2021, Heartwise amended its disclosure statement and plan of reorganization. *Id.* at 4-5 citing Bisconti Decl., Exs. 7, 8. The Plan proposed to pay in full all Class 1 general unsecured claims entitled to distribution as of the Plan’s effective date, and did not include the equitable subordination of any Class 1 general unsecured claims. *Id.* at 5 citing Bisconti Decl., Ex. 8 at 4-6.[5]

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[5] Regarding the interest holders in Heartwise, the Plan stated:

> Currently, [Earnesty] owns a 51% interest in the Debtor, and [Doyle] owns a 49% interest in the Debtor. On the Effective Date, these interests will be cancelled, and new shares in the Reorganized Debtor will be issued in exchange for the new value contribution of $9,425,854.69. Based on current equity interests, Earnesty shall have the right to purchase 51% of the newly issued shares in the Reorganized Debtor for $4,807,185.89, and Doyle shall have the right to purchase 49% of the newly issues shared in the Reorganized Debtor for $4,618,668.79. The new value contributions must be in cash, and funded fourteen (14) days prior to the Effective Date. Should Earnesty fail to fund the full

On June 23, 2021, Doyle filed the complaint (the "Complaint") commencing the adversary proceeding (the "Adversary Proceeding") that is the basis for this appeal. Bisconti Decl., Ex. 1.

On October 15, 2021, Doyle filed his objection to the Plan (the "Doyle Plan Objection"). MTD at 6 citing Bisconti Decl., Ex. 11.

On November 10, 2021, the bankruptcy court commenced a four-day trial on confirmation of the Plan which was completed on November 16, 2021 (the "Confirmation Trial"). MTD at 6 citing Bisconti Decl., Ex. 12. On November 23, 2021, the bankruptcy court overruled all of VOL's objections to Plan confirmation via its Memorandum Decision and Order. *Id.* On December 17, 2021, the bankruptcy court issued its Order Confirming Heartwise, Inc.'s First Amended Chapter 11 Plan of Reorganization (the "Confirmation Order"). *Id.* citing Bisconti Decl., Ex. 14. The Confirmation Order overruled all objections to confirmation of the Plan. *Id.* at 6:27-7:2. On the same date, the bankruptcy court entered its Findings of Fact and Conclusions of Law ("Findings and Conclusions"). *Id.* citing Bisconti Decl., Ex. 15.

On January 4, 2022, the Debtor confirmed that the Plan had been substantially consummated via the filing of its Notice of Effective Date of Heartwise, Inc.'s First Amended Chapter 11 Plan of Reorganization. MTD at 8 citing Bisconti Decl., Ex. 18.

On February 23, 2022, the bankruptcy court dismissed the Adversary Proceeding (the "Dismissal Order"). MTD at 8 citing Bisconti Decl., Ex. 19.

$4,807,185.89 for its 51% interest in the Reorganized Debtor, Doyle shall have the opportunity to purchase the entirety of the newly issued shares in the Reorganized Debtor for $9,425,854.69. Should Doyle fail to fund the full $4,618,668.79 for his 49% interest in the Reorganized Debtor, Earnesty shall have the opportunity to purchase the entirety of the newly issued shared in the Reorganized Debtor for $9,425,854.69. *Id.* citing Bisconti Decl., Ex. 8 at 5:14-25.

On March 9, 2022, Doyle filed a Motion for Reconsideration of the Dismissal Order which was denied by the bankruptcy court on April 29, 2022 (the "Reconsideration Order"). MTD citing Bisconti Decl. at ¶ 27.[6]

The Appellant filed a Notice of Appeal with this Court on May 17, 2022. [Doc. No. 1.] The Appellees filed the Mootness Motion on February 20, 2024, and the Motion to Dismiss for Lack of Prosecution on March 12, 2024. [Doc. Nos. 68, 72.]

III.
JURISDICTION

Appellate jurisdiction is proper here under Federal Rules of Bankruptcy Procedure, Rule 8005(a) and under 28 U.S.C. § 158(c)(1). Pursuant to the Federal Rules of Bankruptcy Procedure, Rule 8005(a), election may be made to have an appeal heard by the district court instead of the bankruptcy appellate panel. *See* Fed. R. Bankr. P. 8005(a). Similarly, pursuant to 28 U.S.C. § 158(c)(1), an appellant may elect to have an appeal from a bankruptcy court order heard by the district court. *See* 28 U.S.C. § 158(c)(1).

IV.
DISCUSSION

A. Introduction.

The subject of this Appeal is the bankruptcy court's order dismissing the underlying Adversary Proceeding (the "Dismissal Order") as well as the order denying the Motion for Reconsideration of the Dismissal Order (the "Reconsideration Order").[7] [Doc. No. 1], Notice of Appeal; *See also* Bisconti Decl. at ¶ 27; Ex. 19. Following the entry of the Confirmation Order and the Findings and Conclusions on December 17, 2021, the bankruptcy court issued the Dismissal Order on February 23, 2022. *Id.* The Reconsideration Motion was issued by the bankruptcy court on April 29, 2022, and the Appeal was filed on May 17, 2022. *Id.*

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[6] This Motion for Reconsideration was heard by a new bankruptcy judge after the original judge had retired.

[7] The Motion for Reconsideration also included a Motion for More Particular Findings Under Bankruptcy Rule 7052. [Doc. No. 1], Notice of Appeal; *see also* Bisconti Decl. ¶ 27.

B. Jurisdiction.

The first determination by the Court is whether it has jurisdiction over the appeal in this matter. *Eden Place, LLC v. Perl ("In re Perl"),* 811 F.3d 1120, 1125 (9th Cir. 2016) (citations omitted). "A federal court lacks jurisdiction to hear a case that is moot." *Bishop Paiute Tribe v. Inyo County,* 863 F.3d 1144, 1155 (9th Cir. 2017). There are two circumstances in which a bankruptcy appeal is rendered moot. *Rev Op Group v. ML Manager LLC ("In re Mortgages Ltd."),* 771 F.3d 1211, 1214 (9th Cir. 2014) citing *Motor Vehicle Casualty Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.),* 677 F.3d 869 (9th Cir. 2012) *("Thorpe").* The first circumstance is constitutional mootness and is derived from Article III of the Constitution, and the second is equitable mootness derived from equity. *Id.*

Here, the Appellees argue that the Appeal must be dismissed because it is both constitutionally and equitably moot. MTD at 10.[8]

i) Constitutional Mootness.

It is well settled that "[t]he jurisdiction of federal courts is limited to actual cases and controversies." *Thorpe,* 677 F.3d at 880 citing U.S. Const. art. III, § 2, cl. 1. "The inability of the federal judiciary 'to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *DeFunis v. Odegaard,* 416 U.S. 312, 316 (1974) (citations omitted). Federal courts do not have jurisdiction to review "moot questions ... or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Forest Guardians v. Johanns,* 450 F.3d 455, 461 (9th Cir. 2006) (citations omitted). A claim is considered moot "if it has lost its character as a present, live controversy." *Id.* quoting *Am. Rivers v. Nat'l Marine Fisheries Serv.,* 126 F.3d 1118, 1123 (9th Cir. 1997). If it is impossible for a Court to "grant 'any effectual relief whatever,'" a case or controversy no longer exists, and an appeal is rendered constitutionally moot. *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 12, 113 S.Ct. 447 (1992) quoting *Mills v. Green,* 159 U.S. 651, 653, 16 S.Ct. (1895).

The Appellees argue that, "[t]he Confirmation Order fully and finally adjudicated the issues underlying the adversary proceeding" and, "[c]onsequently, "the bankruptcy court dismissed the adversary proceeding as moot." MTD at 2.

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[8] The Court will first address the Mootness Motion. [Doc. No. 68.]

The Appellees further argue that the appeal is constitutionally moot because "[a]n order confirming a chapter 11 plan—like the Confirmation Order here—is a final order entitled to preclusive effect." *Id.* at 10 citing *Bullard v. Blue Hills Bank,* 575 U.S. 496, 502-03, 135 S.Ct. 1686 (2015). Because the issues in the Adversary Proceeding were fully resolved in the Confirmation Order, the Appellees assert that the Appellant "is impermissibly using this appeal of the dismissal of the adversary proceeding as a collateral attack on the Confirmation Order, and as a substitute for direct appeal." *Id.*

Pursuant to 28 U.S.C. §158(c)(2), the time frame allowed for appeals to be taken under this section is governed by Rule 8002 of the Bankruptcy Rules. Federal Rules of Bankruptcy Procedure, Rule 8002(a)(1) states that, "a notice of appeal must be filed with the bankruptcy clerk within 14 days after entry of the judgment, order, or decree being appealed." In addition, "[t]he Ninth Circuit has explained that Rule 8002(a)'s requirement is jurisdictional: untimely filing of notice of appeal deprives appellate court of jurisdiction to review an order of the Bankruptcy Court." *In re Camacho,* 495 B.R. 515, 519 (E.D. Cal. 2013) citing *In re Wiersma,* 483 F.3d 933, 938 (9th Cir. 2007), *In re Slimick,* 928 F.2d 304, 306 (9th Cir. 1990). Here, the Confirmation Order was entered on December 17, 2021, and was not appealed by the Appellant or any other party. MTD at 10. Accordingly, the Confirmation Order became final on January 3, 2022. *Id.*

a. Finality.

Pursuant to 28 U.S.C. §158(a), "[t]he district courts of the United States shall have jurisdiction to hear appeals (1) from final judgments, orders, and decrees; . . . and (3) with leave of the court, from other interlocutory orders and decrees." Accordingly, only "'final' orders of a bankruptcy court" are subject to immediate appeal. *Bullard v. Blue Hills Bank,* 575 U.S. 496, 500, 135 S.Ct. 1686 (2015) citing 28 U.S.C. § 158(a)(1). "A final decision is one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Id.* quoting *Catlin,* 324 U.S. at 233, 65 S.Ct. at 633; *see* 9 James W. Moore et al., *Moore's Federal Practice* ¶ 110.08[1] (2nd ed. 1990) (final judgment "disposes of the entire litigation ... or ... disposes of a complete claim for relief or all the claims of a party").

The Supreme Court has addressed the issue of finality in the bankruptcy context and the preclusive effect of confirmation orders. *See Bullard,* 575 U.S. 496. In *Bullard,* the Supreme Court articulated that, "confirmation is appealable

because it resolves the entire plan consideration process." *Id.* at 506. The Supreme Court held:

> The relevant proceeding is the process of attempting to arrive at an approved plan that would allow the bankruptcy to move forward. This is so, first and foremost, because only plan confirmation—or case dismissal—alters the status quo and fixes the rights and obligations of the parties. When the bankruptcy court confirms a plan, its terms become binding on debtor and creditor alike. Confirmation has preclusive effect, foreclosing relitigation of any issue actually litigated by the parties and any issue necessarily determined by the confirmation order. *Id.* at 502 (internal quotations and citations omitted).

The Ninth Circuit has adopted a "pragmatic approach to finality in bankruptcy [which] focuses on whether the decision appealed from effectively determined the outcome of the case." *In re Frontier Properties, Inc.,* 979 F.2d 1358, 1363 (9th Cir. 1992) (internal quotations and citations omitted). An order "is final because it finally determines the rights of the parties." *Id.* According to the Ninth Circuit, "a bankruptcy order is appealable where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *In re Frontier Properties, Inc.,* 979 F.2d at 1363 citing *In re Allen,* 896 F.2d 416, 418-19 (9th Cir. 1990). Moreover, "[t]raditional finality concerns still dictate, however, that '[w]e avoid having a case make two complete trips through the appellate process.'" *Id.* quoting *In re Vylene Enters,* 968 F.2d 887, 895 (9th Cir. 1992).[9]

As the Ninth Circuit explained, "[o]nce a bankruptcy plan is confirmed, it is binding on all parties and all questions that could have been raised pertaining to the plan are entitled to *res judicata* effect." *Trulis v. Barton,* 107 F.3d 685, 691 (9th Cir. 1995) citing 11 U.S.C. § 1141(a)(1); *see also In re Heritage Hotel Partnership*

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[9] The Supreme Court explained the rationale behind the rule of finality as follows:

> Avoiding . . . delays and inefficiencies is precisely the reason for a rule of finality. It does not make much sense to define the pertinent proceeding so narrowly that the requirement of finality would do little work as a meaningful constraint on the availability of appellate review. *Bullard*, 575 U.S. at 504.

I, 160 B.R. 374, 377 (9th Cir. 1993), *aff'd* 59 F.3d 175 (9th Cir. 1995) ("It is now well-settled that a bankruptcy court's confirmation order is a binding, final order, accorded full *res judicata* effect and precludes the raising of issues which could or should have been raised during the pendency of the case.").

i. The Operative Final Order.

The Court must first determine whether the Dismissal Order or the Confirmation Order constitutes the operative final order that is properly subject to appeal. To make this determination, the Court examines the content of each of the pertinent underlying matters, namely, the Adversary Proceeding Complaint which forms the basis for the Dismissal Order and Reconsideration Order, and the Doyle Plan Objection which comprises the Appellant's objections to Plan confirmation.

The Appellees contend that, "Doyle's arguments in the Doyle Plan Objection mirrored those raised in the underlying adversary proceeding," all of which were addressed fully and finally by the Confirmation Order. MTD at 6.

The Adversary Proceeding Complaint, which forms the basis for this appeal, alleged four causes of action which sought: 1) subordination of Earnesty's claims and interests in Heartwise (Bisconti Decl., Ex. 1 at 20-22); 2) equitable subordination of RPI's, Alpha Health Research's ("Alpha"), and Tuong Nguyen's ("Nguyen") claims and interests (*Id.* at 22-23); 3) a declaration that Earnesty is not the majority owner of Heartwise, that "Doyle is the 100% owner of the issued and outstanding stock in Heartwise, or that the transfer of stock to Earnesty . . . is void or voidable, and any such stock shall be held in trust for the benefit of Doyle" (*Id.* at 23-24, 26); and 4) civil conspiracy by Nguyen, RPI, Alpha, and Earnesty. *Id.* at 24-26. Further, the Complaint alleged that the purpose of the Plan was to accomplish a "squeeze out of Doyle as minority shareholder" and that the Plan was "not offered in good faith and proposed by means of unlawful conduct." Bisconti Decl., Ex. 1. at ¶¶ 114, 115.

Like the Complaint, the Doyle Plan Objection also asserted that the Plan attempted to "squeeze Doyle entirely out of any ownership interest" in Heartwise and was "not proposed in good faith . . . and utilize[ed] means forbidden by . . . law." MTD at 6 citing Bisconti Decl., Ex. 11 at 8:11-12, 31:13-15, 34:2-9. Additionally, the Doyle Plan Objection, similar to the Complaint, alleged as follows: 1) Doyle owned the only shares of Heartwise's common stock and was the sole shareholder of Heartwise (Bisconti Decl., Ex. 11 at 11:10-24:23); 2) the Plan was not proposed in good faith and not by any means forbidden by law, therefore

failing to meet the requirements of 11 U.S.C. § 1129(a)(3) (*id.* at 24:8-23); 3) the resolution of Doyle's equitable subordination claims was required prior to Plan confirmation (*id.* at 30:6-33:26); and 4) the Plan was made in bad faith. *Id.* at 34:8-9.

In the Confirmation Order, the bankruptcy court specifically considered the allegations of the Doyle Plan Objection. The court concluded that, "[t]he Plan and each of its provisions . . . are approved and confirmed under Section 1129 of the Bankruptcy Code." MTD at 6-7 quoting Bisconti Decl., Ex. 14 at 6:18-20. The bankruptcy court addressed the issue of pre-petition stock ownership and the majority ownership of Heartwise, and held that prior to Plan confirmation, "Heartwise's capital stock was owned 51 percent by [Earnesty] and 49 percent by [Doyle]," and all pre-petition equity interests were cancelled upon Plan confirmation. *Id.* at 7 quoting Bisconti Decl., Ex. 14 at 4:4-5; *see also* Ex. 8 at 5-7. Further, the bankruptcy court stated that, "all objections to confirmation of the Plan . . . are overruled on the merits and for the reasons set forth on the record at the [Confirmation Trial], and as set forth in the Findings of Fact and Conclusions of Law." *Id.* at 6:27-7:2. On the issue of the Appellant's contention that the Plan was proposed in bad faith and by unlawful means, the bankruptcy court concluded that, "the Plan was proposed in good faith and not by any means forbidden by law." *Id.* at 13 citing Bisconti Decl., Ex. 12 at 16, *see also* Ex. 15 at 16-17:13-15.

Based upon the above, the Confirmation Order comprehensibly addressed the arguments in the Doyle Plan Objection which mirrored the allegations in the Complaint, and "resolv[ed] the entire plan consideration process," indicating that the appropriate final order subject to appeal was the Confirmation Order and not the Dismissal Order. *See Bullard,* 575 U.S. 496, 506.

ii. Judicial Intent.

In considering whether an order is final, courts also look to judicial intent. "An order is final if it constitutes a complete adjudication of the issues at bar and clearly evidence the judge's intention that it be final." *In re Wiersma,* 483 F.3d 933, 938. The Ninth Circuit in *In re Slimick ("Slimick")* discussed "the recurrent problem of which of two documents filed by a court, both arguably pronouncing the court's final order in a matter, constitutes the final, appealable order." *Slimick,* 928 F.2d 304, 306-07. In *Slimick,* the Court explained that, "if, after filing a final disposition, a court files a more formal judgment, the latter does not constitute a second final disposition or extend the appeal period." *Id.* at 307 citing *United States v. F.& M. Schaefer Brewing Co.,* 356 U.S. 227, 233, 78 S.Ct. 674, 678

(1958). The Court held that, "[a] disposition is final if it contains 'a *complete* act of adjudication,' that is, a full adjudication of the issues at bar, and clearly evidences the judge's intention that it be the court's final act in the matter." *Id*. Further, "[e]vidence of intent consists of the Order's content and the judge's and parties conduct." *Id.* at 308.

Here, the bankruptcy court clearly indicated its intent that the Confirmation Order constitute a final order. The bankruptcy court evinced this intent in the language of both the Dismissal Order and the Confirmation Order.

In the Dismissal Order, the bankruptcy court concluded that:

> [t]he Complaint and each of its claims are moot due to the Court's confirmation of the debtor's chapter 11 plan of reorganization in the Bankruptcy Case. Additionally, the Court's order confirming the debtor's chapter 11 plan is *res judicata* as to the claims asserted by Plaintiff in this adversary proceeding. Bisconti Decl., Ex. 19 at 3.

The bankruptcy court also stated in the Dismissal Order that, "[d]isputes regarding pre-bankruptcy ownership of debtor's capital stock are moot because the debtor's capital stock was cancelled in its entirety pursuant to the plan, and that matter is now *res judicata*." *Id.* at 2.

In the Confirmation Order, the Honorable Mark S. Wallace discussed his intent that the Confirmation Order constitute the final order of the bankruptcy court.[10] Judge Wallace explained:

> One of the purposes of the final order rule is to prevent piecemeal appeals that burden appellate courts where there is a possibility that the entire matter may become moot because of subsequent developments in the case. *Bullard v. Blue Hills Bank,* 575 U.S. ___, 135 S. Ct. 1686(2015) (" . . . [p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration . . ."). For example, appellate litigation concerning a defendant's objection to a protective order precluding a deposition becomes useless and pointless if the trial court subsequently awards judgment in favor of

[10] The Court notes that, while these observations were made in the context of the Participation Denial Order, they are also applicable to the instant analysis of the Dismissal Order.

> the defendant . . . Similar circumstances are present here. Mr. Doyle objected to confirmation of the Plan. The Court then entered the Participation Denial Order. The Court followed this up with a hearing on Plan confirmation. Had the Court decided that the Plan should not be confirmed, Mr. Doyle would not be prosecuting this particular appeal. This shows that the "final order" in question here is this Confirmation Order, not the Participation Denial Order . . . Mr. Doyle's ultimate rights are not altered until the Court confirms the Plan – and thus the "final order" is this Confirmation Order, not the earlier Participation Denial Order. Bisconti Decl., Ex. 14 at 15-16.

In light of the above, the intent of the bankruptcy court also demonstrates the finality of the Confirmation Order. *See In re Slimick,* 928 F.2d 307-08.

iii. Complete Adjudication of the Issues.

The Appellees contend that, "because the Confirmation Order fully and finally decided all issues related to relief sought in the adversary proceeding, there is no justiciable dispute remaining and no relief available to Appellant." MTD at 2. An order is final if it "constitutes a complete adjudication of the issues at bar" and "effectively determined the outcome of the case." *See In re Wiersma,* 483 F.3d at 938; *see also In re Frontier Properties, Inc.,* 979 F.2d at 1363; *Bullard,* 575 U.S. 496, 502-03, 506. Pursuant to the Ninth Circuit, "a bankruptcy order is appealable where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *In re Frontier Properties, Inc.,* 979 F.2d at 1363 citing *In re Allen,* 896 F.2d 416, 418-19 (9th Cir. 1990). Further, an appeal is moot if it "has lost its character as a present, live controversy." *See Forest Guardians v. Johanns,* 450 F.3d 455, 461 quoting *Am. Rivers v. Nat'l Marine Fisheries Serv.,* 126 F.3d 1118, 1123.

The Court therefore considers the discrete, individual substantive claims of the Adversary Proceeding to determine whether there has been a complete adjudication of the issues at bar and, consequently, if any justiciable dispute remains. *See In re Frontier Properties, Inc.,* 979 F.2d at 1363.

a) Appellant's Equitable Subordination Claims.

In the first two claims of the Adversary Proceeding, the Appellant argues that he is entitled to subordination of Earnesty's claims and interests in Heartwise as well as equitable subordination of RPI, Alpha, and Nguyen's claims and

interests. MTD at 12 citing Bisconti Decl., Ex. 1 at 20-23. The Appellees argue that, "[b]ecause the confirmed Plan controls and resolved the relative treatment of claims and interests, it has resolved Appellant's equitable subordination claims and therefore there is no live controversy as to which this Court (or in the event of a remand, the bankruptcy court) may grant Appellant effective relief." MTD at 12.

Pursuant to 11 U.S.C. § 510(c)(1), the court may "under principles of equitable subordination, subordinate for purposes of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest." In order for equitable subordination of a claim to be granted, the court must find as follows: (1) the claimant engaged in some form of "inequitable conduct," (2) the misconduct caused an injury to creditors or conferred an "unfair advantage" to the claimant, and (3) subordination is not "inconsistent with the Bankruptcy Code." *In re Lazar,* 83 F.3d 306, 309 (9th Cir. 1996).

In the instant case, there was no provision in the Plan for the equitable subordination of any claims or interests. MTD at11. Further, the Plan was confirmed by the Confirmation Order which is final, non-appealable, and binding on all parties. *Id.* at 11-12. As such, because all claims and interests have been resolved, including any claims for equitable subordination, no live controversy exists as to which relief may be granted. *Id.* at 12; *see also Nitelshpur v. Social Security Administration*, 2008 WL 5262423, *1 (C.D. Cal. Dec. 17, 2008) ("Because there is no relief available to Plaintiff, there is no case or controversy and the action is moot.") Lastly, the Confirmation Order found that "the Plan was proposed in good faith and not by any means forbidden by law," and that the Plan satisfied the "best interests" test as to Heartwise's equity holders, including Doyle. *Id.* at 13 citing Bisconti Decl., Ex. 12 at 16, *see also* Ex. 15 at 16-17:13-15. Therefore, the Appellant's equitable subordination claims are moot.

b) Appellant's Declaratory Relief Claim.

The third cause of action in the Adversary Proceeding sought a declaration that Earnesty is not the majority owner of Heartwise, that "Doyle is the 100% owner of the issued and outstanding stock in Heartwise, or that the transfer of stock to Earnesty . . . is void or voidable, and any such stock shall be held in trust for the benefit of Doyle." MTD at 12 citing Bisconti Decl., Ex. 1 at 23-24, 26.

The Appellees argue that, because the entirety of the capital stock in Heartwise was cancelled upon Plan confirmation via the Confirmation Order,

"[t]here is no live controversy as to which the Court may grant Appellant effective relief with respect to the pre-bankruptcy ownership of the Debtor's capital stock." MTD at 13. The Appellees support their contention with the bankruptcy court's conclusion that, "[d]isputes regarding pre-bankruptcy ownership of debtor's capital stock are moot because debtor's capital stock was cancelled in its entirety pursuant to the plan." *Id.* at 13 quoting Bisconti Decl., Ex. 19 at 2.

The bankruptcy court specifically addressed this issue in the Confirmation Order and its subsequently issued Findings and Conclusions, and decided that prior to the Plan's effective date, "Heartwise's capital stock was owned 51 percent by [Earnesty] and 49 percent by [Doyle]," and all pre-petition equity interests were cancelled upon Plan confirmation. *Id.* at 7 quoting Bisconti Decl., Ex. 14 at 4:4-5; *see also* Ex. 8 at 5-7. The Court therefore finds that the Appellant's third claim has been resolved by the bankruptcy court's findings regarding Plan confirmation as expressed in the Confirmation Order and, as a result, there is no live controversy. Accordingly, the Appellant's third claim for declaratory relief is moot.

c) Appellant's Civil Conspiracy Claim.

The Adversary Proceeding's fourth cause of action alleged civil conspiracy by Nguyen, RPI, Alpha, and Earnesty and sought a damages award. MTD at 13 citing Bisconti Decl., Ex. 1 at 24-26. The Appellant alleged that the Appellees participated in civil conspiracy by "engaging in further inequitable conduct by causing the Debtor to propose a Plan they know will result in the complete loss of Doyle's equity interests without compensation, to Earnesty's advantage," and by using the Plan to unlawfully "tak[e] ownership of a majority or all equity interests in Heartwise." *Id.* citing Bisconti Decl., Ex 1 at 25-26. The Appellant further alleged that, "the Debtor's proposed plan is not submitted in good faith and is accomplished by unlawful means and for purposes not consistent with the Bankruptcy Code." *Id.* at 26.

Again, the bankruptcy court fully addressed this issue in the Confirmation Order and concluded that, "the Plan was proposed in good faith and not by any means forbidden by law." *Id.* at 13 citing Bisconti Decl., Ex. 12 at 16, Ex. 15 at 16-17. Therefore, as the Appellees argue and the Court agrees, the "Appellant's civil conspiracy claim, which was premised upon an alleged conspiracy by Appellees to harm Doyle through a 'squeeze out plan' using . . . a process and plan that Doyle believed was not proposed in good faith and was forbidden by law, is moot." MTD at 13-14. Thus, no live controversy exists and the Appellant's fourth claim alleging civil conspiracy is moot.

iv. Confirmation Order as Controlling Order.

In accordance with the foregoing, the Court concludes that the operative final order properly subject to appeal was the Confirmation Order and not the Dismissal Order and subsequent Reconsideration Order. First, because the claims raised in the Doyle Plan Objection mirrored the allegations of the Adversary Proceeding Complaint, all of the contested issues were resolved by the bankruptcy court in the Confirmation Order. Thus, because the entirety of the issues raised in the Adversary Proceeding were adjudicated via the Confirmation Order, no issues remained to be litigated on the merits. *See Bullard v. Blue Hills Bank,* 575 U.S. at 500.

Further, the bankruptcy court clearly evinced its intent that the Confirmation Order constitute a final order entitled to preclusive effect, and expressed this intention in the Confirmation Order and subsequent Dismissal Order. *See* Bisconti Decl., Exs. 14, 19; *see also In re Slimick,* 928 F.2d at 306-07; *Bullard,* 575 U.S. at 502. In addition, because the Confirmation Order and not the Dismissal Order constituted a "complete adjudication of the issues at bar" and "effectively determined the outcome of the case," the Confirmation Order is the decision that should have properly been appealed. *See In re Wiersma,* 483 F.3d at 938; *see also In re Frontier Properties, Inc.,* 979 F.2d at 1363; *Bullard,* 575 U.S. at 502-03, 506.

Lastly, because the Appellant failed to appeal the Confirmation Order, and the Appeal "has lost its character as a present, live controversy," the Court finds there is no justiciable controversy and the Appeal is constitutionally moot. *See Forest Guardians v. Johanns,* 450 F.3d 455, 461 quoting *Am. Rivers v. Nat'l Marine Fisheries Serv.,* 126 F.3d 1118, 1123.

ii) Equitable Mootness.

The Appellees also argue that the Appeal is equitably moot. MTD at 14. Equitable mootness occurs when the circumstances of a case have been altered so substantially as to render the consideration of the merits of an appeal inequitable. *See Rev Op Group v. ML Manager LLC (In re Mortgages Ltd.),* 771 F.3d 1211, 1214 (9th Cir. 2014). A critical aspect of this doctrine also involves the issue of reliance on the bankruptcy order by "debtors, creditors, and third parties." *Id.* at 1215 citing *Thorpe* at 880. "An appeal is equitably moot if the case presents transactions that are so complex or difficult to unwind that debtors, creditors, and third parties are entitled to rely on [the] final bankruptcy court order." *In re*

Mortgages Ltd., 771 F.3d at 1214-15 (9th Cir. 2014) ("we can dismiss appeals of bankruptcy matters when there has been a comprehensive change of circumstances . . . so as to render it inequitable for this court to consider the merits of the appeal.") (internal quotations and citations omitted).

a) *Thorpe* Factors.

The Appellees argue that, "the *Thorpe* factors confirm that the appeal is equitably moot and must be dismissed for that separate reason." MTD at 14. The *Thorpe* case provides a thorough analysis of the doctrine of equitable mootness and its applicability in the bankruptcy context. In *Thorpe,* the Ninth Circuit provides the following discussion of equitable mootness:

> Equitable mootness occurs when a comprehensive change of circumstances has occurred so as to render it inequitable for this court to consider the merits of the appeal. The question is whether the case present[s] transactions that are so complex or difficult to unwind that the doctrine of equitable mootness would apply. *Thorpe* at 880 (internal quotations and citations omitted).

Pursuant to the Ninth Circuit in *Thorpe*, courts look to the following four factors in determining equitable mootness:

> We will look first at whether a stay was sought, for absent that a party has not fully pursued its rights. If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred. Next, we will look to the effect a remedy may have on third parties not before the court. Finally, we will look at whether the bankruptcy court 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. *In re Thorpe* at 881.

i. Seek of Stay Pending Appeal.

The first *Thorpe* factor for the Court to consider is whether a stay was sought pending appeal and if that stay was granted. *In re Thorpe* at 881. "A party that disagrees with an order of a bankruptcy judge can move to stay the order before that bankruptcy judge, who has the power to suspend the order or offer other appropriate relief during the pendency of an appeal of the order, to protect

the rights of all parties in interest." *In re Mortgages Ltd.,* 771 F.3d at 1215 citing Fed. R. Bankr. P. 8005. If the bankruptcy court denies the stay, the objecting party can move the district court or the bankruptcy appellate panel for a stay. *Id.* The purpose of a stay is to ensure "that the estate and the status quo may be preserved pending resolution of the appeal." *Id.* quoting *In re Chateaugay Corp.,* 988 F.2d 322, 326 (2d Cir. 1993).

In analyzing this initial factor, courts consider a party's due diligence and "failure to seek a stay can render an appeal equitably moot." *Id.* citing *In re Roberts Farms,* 652 F.2d 793, 797-98 (9th Cir. 1981). Here, the Appellant sought a stay pending appeal which was denied by the bankruptcy court on December 17, 2021 in the Confirmation Order. Bisconti Decl., Ex. 14 at 20. Because the Appellant did seek a stay from the Bankruptcy Court, this factor weighs against a finding of equitable mootness. However, as the Ninth Circuit points out in *Thorpe,* "[t]he failure to gain a stay is one factor to be considered in assessing equitable mootness, but is not necessarily controlling." *Thorpe* at 881-82.

ii. Substantial Consummation.

The second factor involves whether the plan at issue has been "substantially consummated." *Id.* at 882. "If a stay was sought and not gained, we then will look to whether substantial consummation of the plan has occurred." *Id.* at 881.

Substantial consummation is defined by the Bankruptcy Code as follows:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred;
> (B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and
> (C) commencement of distribution under the plan.
> 11 U.S.C. §1101(2).

The decision of "[w]hether a plan has been 'substantially consummated' is a question of fact to be determined upon the circumstances of each case." *Antiquities of Nevada, Inc. v. Bala Cynwyd Corp. (In re Antiquities of Nevada, Inc.),* 173 B.R. 926, 928 (9th Cir. BAP 1994) citing *In re Jorgensen,* 66 B.R. 104, 106 (9th Cir. BAP 1986). Courts within the Ninth Circuit have held that substantial consummation has taken place once a debtor begins to make payment pursuant to a confirmed plan. *In re Antiquities of Nevada, Inc.,* 173 B.R. at 930 ("Since

Antiquities has assumed management and control of the property administered under the confirmed plan, and commenced distribution of payments on both short and long term debt on the effective date, we hold that the plan has been 'substantially consummated'"); *see also Little v. Amber Hotel Corp.,* 2014 U.S. Dist. LEXIS 105716, *18-20 (C.D. Cal. 2014) ("*Little*") (The court, estimating that approximately 17% of claims had been paid, found that substantial consummation of the Plan had occurred).

As part of the implementation of the Plan in the instant case, the Debtor was required to make specific payments to creditors that were funded, in part, from investment contributions by equity holders. MTD at 7 citing Bisconti Decl., Ex. 8 at 2-7, 14. Pursuant to the Plan, the pre-confirmation Heartwise shares were cancelled, and new shares were issued. MTD at 7 citing Bisconti Decl., Ex 8 at 5-7. Earnesty and Doyle were able to purchase the new shares in Heartwise and maintain their same proportionate ownership by making a proportionate contribution of the approximately $9.4 million new value contribution necessary for shareholders to retain their interest. *Id.* The Plan further provided that, if one of the shareholders chose not to exercise their right to acquire their portion of the newly issued shares, the other shareholder had the opportunity to acquire all of the new shares in the reorganized debtor. *Id.* While Earnesty chose to acquire the new shares, Doyle elected not to participate. *Id., see also* Bisconti Decl., Ex. 14 at 4-5. Thus, via its approximately $9.4 million investment, Earnesty acquired all of the shares of the reorganized debtor and became its sole shareholder. MTD at 7 citing Bisconti Decl., Ex 14 at 4-5; *see also* Ex. 16 at 3-4.

As required under the Plan and upon expiration of the appeal period for the Confirmation Order, the Debtor then commenced making payments to undisputed third-party claim holders. MTD at 7 citing Bisconti Decl., Ex 16 at 3-4. The Debtor sent payments to all of the creditors with allowed claims as of the date of Plan confirmation. *Id.* These claimants included the Internal Revenue Service, Franchise Tax Board, and the California Department of Tax & Fee Administration, in addition to other third parties. *Id.* at 7-8 citing Bisconti Decl., Ex. 17.

Additionally, pursuant to the Plan, Heartwise deposited approximately $14.5 million into the bankruptcy court's registry for the payment of disputed claims pertaining to the Judgment obtained pre-petition by Vitamins Online. MTD at 8 citing Bisconti Decl., Ex. 16 at 4; *see also* Bisconti Decl., Ex. 2. Further, the Debtor paid all of the required professional fees approved by the bankruptcy court. *Id.* at 3-4. Lastly, on January 4, 2022, Heartwise filed its Notice of Effective Date of Heartwise, Inc.'s First Amended Chapter 11 Plan of Reorganization thereby

confirming that the Plan had been substantially consummated. *Id.* citing Bisconti Decl., Ex. 18.

In light of the above, it is apparent that the Debtor has, at a minimum, initiated "commencement of distribution under the plan." *See* 11 U.S.C. §1101(2)(C); *see also In re Antiquities of Nevada, Inc.,* 173 B.R. at 930. Accordingly, the Court concludes that the Plan has been substantially consummated,[11] a factor that weighs in favor of a finding of equitable mootness.

iii. Effect on Third Parties.

The third factor examines what effect, if any, a remedy may have on third parties who are not before the court. *Thorpe,* 667 at 881. Specifically, the Court considers whether it is feasible to alter the Plan "in a way that does not affect third party interests to such an extent that the change is inequitable." *Id.* at 882; *Little,* 2014 U.S. Dist. LEXIS 105716, *21. The Court must evaluate "whether modification of the plan of reorganization would bear unduly on the innocent." *Thorpe* at 882. Pursuant to *Thorpe,* "[a]n important consideration is whether all the parties affected by the appeal are before the Court." *Id.* (citations omitted); *Little,* 2014 U.S. Dist. LEXIS 105716, *21.

The Appellees argue that "there are numerous third parties not before the Court that would be harmed or otherwise impacted if the Court were to grant Appellant the relief requested." MTD at 15. The third parties identified by the Appellees and their affected interests include the following:

- The reorganized Debtor (Heartwise), which has cancelled all of its pre-petition equity interests, deposited more than $14.5 million with the bankruptcy court's registry, and paid in excess of a million dollars to other creditors and professionals in reliance on the final, non-appealable Confirmation Order;
- Numerous creditors, including various taxing authorities;
- Doyle (who, although was the original appellant here, is no longer a party to this appeal by virtue of the substitution of Khan);

[11] In a prior appeal involving the same underlying bankruptcy case, it was also determined that the Plan had been substantially consummated. *See* Bisconti Decl., Ex. 20 at 26, Case No.: SACV21-cv-01961-AB, December 5, 2022.

- Professionals who have been paid pursuant to compensation orders. MTD at 15-16.[12]

Therefore, the Court finds that multiple non-parties would be harmed if the Court were to grant relief, another factor that weighs in favor of a finding of equitable mootness.

iv. Effective and Equitable Relief.

The last *Thorpe* factor is "whether the bankruptcy court 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." *Thorpe* at 881. "Finally, 'and most importantly, we look to whether the bankruptcy court on remand may be able to devise an equitable remedy.'" *In re Mortgages Ltd.,* 771 F.3d at 1218 quoting *Thorpe* at 883.

To effectuate the relief requested by the Appellant would require the fundamental dismantling of the Plan and the Confirmation Order, including the disposition of pre-petition equity in Heartwise as well as other substantial claims and interests. MTD at 16. For example, the $9.4 million that Earnesty provided to Heartwise to obtain its new shares in the Debtor was the basis for the Debtor's ability to satisfy the claims as required by the Plan and has already been disbursed. MTD at 16-17.

The Appellees assert that, if the Court were to grant the Appellant his requested relief, it would create a "difficult, if not uncontrollable, situation for the bankruptcy court" that would be "tantamount to setting aside the Confirmation Order, which is not the subject of this appeal and cannot be collaterally attacked." MTD at 17 citing *Robi v. Five Platters,* 838 F.2d 318, 321-22 (9th Cir. 1988). The Court agrees and, in light of the above, does not believe this is a situation where "the bankruptcy court on remand may be able to devise an equitable remedy." *See In re Mortgages Ltd.,* 771 F.3d at 1218 quoting *Thorpe* at 883. Thus, the Court concludes that a "comprehensive change of circumstances" has occurred so "as to render it inequitable for this court to consider the merits of the appeal." *Thorpe* at 880 quoting *In re Roberts Farms,* 652 F.2d 793, 798 (9th Cir. 1981).

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[12] The Court also observes that Earnesty, while a party to the appeal, transferred $9.4 million to Heartwise pursuant to the Plan, which has been spent, and the payments of which, along with the cancellation of old shares in the Debtor and the issuance of new shares, cannot equitably be unwound. MTD at 16.

Upon consideration of the *Thorpe* factors, the Court concludes that the majority of factors weigh in favor of a finding of equitable mootness. Therefore, the Court determines that the appeal is equitably moot.

In accordance with the Court's finding of constitutional and equitable mootness, the Court GRANTS the Mootness Motion and DISMISSES the Appellant's Appeal for lack of jurisdiction. *See* Fed. R. Bankr. P. 8002(a)(1); *see also In re Wiersma,* 483 F.3d at 938.

V.
APPELLEES' MOTION TO DISMISS FOR LACK OF PROSECUTION [72]

On March 12, 2024, the Appellees filed a Motion to Dismiss for Lack of Prosecution (the "Motion"). [Doc. No. 72.] In the Motion, the Appellees discuss the numerous failures by the Appellant to prosecute this action and assert that the Court should dismiss the Appeal on this alternative basis. *Id.* For instance, the Appellees point out that the Appellant still has not filed his opening brief, despite numerous extensions granted by the Court. *Id.*

Pursuant to stipulation, the Appellant's original due date for his opening brief was extended from August 1, 2022 to August 14, 2022. [Doc. No. 15.] Next, the Appellant requested a stay pending disposition of a related appeal which was granted by the Court. [Doc. Nos. 18, 24.] Following the lifting of the stay, the Court issued an order for the Appellant to show cause why the appeal should not be dismissed. [Doc. No. 57.] The Court subsequently set a briefing schedule with a due date for the Appellant's opening brief by January 8, 2024. [Doc. No. 62.] The Appellant failed to meet this deadline and instead filed an untimely request for additional time to file his opening brief. [Doc. No. 64.] The Court granted the request and gave the Appellant an extension to file his opening brief by March 11, 2024. [Doc. No. 67.]

The Court observes that it has been over six months since the last extension granted by the Court and, to date, the Appellant still has not filed his opening brief. In addition, on February 20, 2024, the Appellees' filed their Motion to Dismiss the appeal as moot. [Doc. No. 68.] To date, over seven months later, the Appellant has also failed to file an opposition to the Mootness Motion.

Pursuant to the Federal Rules of Bankruptcy Procedure, Rule 8018(a)(4), "If an appellant fails to file a brief on time or within an extended time authorized by the district court or BAP, an appellee may move to dismiss the appeal--or the district court or BAP, after notice, may dismiss the appeal on its own motion." Further, courts have held that the failure to prosecute, including the failure to file an opposition, constitutes grounds for dismissal of the bankruptcy appeal. *See Abrahams v. Hentz,* 2013 WL 3147732 at *10 (S.D. Cal. 2013), *aff'd sub nom. In re Abrahams,* 601 F. App'x 570 (9th Cir. 2015) (bankruptcy appeal dismissed upon failure of appellant to timely oppose motion to dismiss); *see also In re Griffin,* 261 B.R. 467, 470 (N.D. Cal. 2001) (appeal dismissed based on appellant's failure to prosecute the appeal).

Accordingly, and for the reasons stated by the Appellees, the Appellees' Motion to Dismiss for Lack of Prosecution is GRANTED, and the Appellant's Appeal is DISMISSED, on alternative grounds, for failure to prosecute this action.[13] *See* Fed. R. Bankr. P. 8018(a)(4); *see also In re Griffin,* 261 B.R. at 470.

VI.
CONCLUSION

In light of the foregoing, and for the reasons stated by the Appellees, the Court finds that the Appeal is both constitutionally and equitably moot. Accordingly, the Court concludes that it does not have jurisdiction to hear the Appellant's Appeal in this matter. *See* Fed. R. Bankr. P. 8002(a)(1). The Appellees' Mootness Motion is therefore **GRANTED**, and the Appellant's Appeal is **DISMISSED** for lack of jurisdiction rendering the Appellant's Motion to Strike and the Appellees' Ex Parte Application to Continue **MOOT. [Doc. Nos. 68, 76, 78.]** Additionally, the Court **GRANTS** the Appellees' Motion to Dismiss for Lack of Prosecution and **DISMISSES** the Appeal on this alternative basis. **[Doc. No. 72.]**

IT IS SO ORDERED.

cc: Bankruptcy Court

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[13] The Court dismisses the Appeal on this alternative basis.