

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term 2011

4 (Argued: March 26, 2012 Decided: August 31, 2012)

5 Docket Nos. 11-1710-bk, 11-1726-bk

6 -----x  
7 In re CHARTER COMMUNICATIONS, INC.

8 -----x  
9 R<sup>2</sup> INVESTMENTS, LDC,

10 Appellant,

11 -- v. --

12 CHARTER COMMUNICATIONS, INC., CCH I, LLC, CCH I CAPITAL  
13 CORPORATION, CCH II, LLC, CCH II CAPITAL CORPORATION,

14 Debtors-Appellees,

15 PAUL G. ALLEN, OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

16 Appellees.

17 -----x  
18 LAW DEBENTURE TRUST COMPANY OF NEW YORK,

19 Appellant,

20 -- v. --

21 CHARTER COMMUNICATIONS, INC., CCH I, LLC, CCH I CAPITAL  
22 CORPORATION, CCH II, LLC, CCH II CAPITAL CORPORATION,

23 Debtors-Appellees,

24 PAUL G. ALLEN, OFFICIAL COMMITTEE OF UNSECURED CREDITORS,

25 Appellees.\*

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\* The Clerk of the Court is directed to amend the official captions as set forth above, which reflects the true status of the parties.

1 B e f o r e : WALKER, LYNCH and LOHIER, Circuit Judges.

2 Appellants Law Debenture Trust Company of New York ("LDT") and  
3 R<sup>2</sup> Investments, LDC ("R<sup>2</sup>") appeal from an order of the United States  
4 District Court for the Southern District of New York (George B.  
5 Daniels, Judge) dismissing as equitably moot their appeals from the  
6 bankruptcy court order (James M. Peck, Bankruptcy Judge) confirming  
7 the Chapter 11 reorganization plan of Charter Communications, Inc.  
8 and its affiliated debtors. See R<sup>2</sup> Invs., LDC v. Charter Commc'ns,  
9 Inc. (In re Charter Commc'ns, Inc.), 449 B.R. 14 (S.D.N.Y. 2011);  
10 JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re  
11 Charter Commc'ns), 419 B.R. 221 (Bankr. S.D.N.Y. 2009). We agree  
12 with the district court that it would be inequitable to grant LDT  
13 and R<sup>2</sup> the relief they seek now that the reorganization plan has  
14 been substantially consummated. AFFIRMED.

15 LAWRENCE S. ROBBINS (Mark T.  
16 Stancil, Matthew M. Madden, on the  
17 brief), Robbins, Russell, Englert,  
18 Orseck, Untereiner & Sauber LLP,  
19 Washington, D.C., for Appellant R<sup>2</sup>  
20 Investments, LDC.

21  
22 ANDREW W. HAMMOND, White & Case LLP,  
23 New York, N.Y., for Appellant Law  
24 Debenture Trust Company of New York.

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26 JOHN C. O'QUINN, Kirkland & Ellis  
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28 Cieri, Paul M. Basta, Kirkland &  
29 Ellis LLP, New York, N.Y., Jeffrey  
30 S. Powell, Daniel T. Donovan,  
31 Kirkland & Ellis LLP, Washington,  
32 D.C., on the brief), for Debtors-  
33 Appellees Charter Communications,  
34 Inc., CCH I, LLC, CCH I Capital

1 Corporation, CCH II, LLC, CCH II  
2 Capital Corporation.

3  
4 JEREMY A. BERMAN (Robert E. Zimet,  
5 Jay M. Goffman, Sean J. Young, on  
6 the brief), Skadden, Arps, Slate,  
7 Meagher & Flom LLP, New York, N.Y.,  
8 for Appellee Paul G. Allen.

9  
10 DAVID S. ELKIND (Mark R. Somerstein,  
11 Keith H. Wofford, Darren Azman, on  
12 the brief), Ropes & Gray LLP, New  
13 York, N.Y., for Appellee Official  
14 Committee of Unsecured Creditors.  
15

16 JOHN M. WALKER, JR., Circuit Judge:

17 On March 27, 2009, Charter Communications, Inc. ("CCI" and,  
18 together with its affiliated debtors, "Charter") filed what the  
19 Bankruptcy Court for the Southern District of New York (James M.  
20 Peck, Bankruptcy Judge) described as "perhaps the largest and most  
21 complex prearranged bankruptcies ever attempted, and in all  
22 likelihood . . . among the most ambitious and contentious as well."  
23 JPMorgan Chase Bank, N.A. v. Charter Commc'ns Operating, LLC (In re  
24 Charter Commc'ns), 419 B.R. 221, 230 (Bankr. S.D.N.Y. 2009).  
25 Following the bankruptcy court's confirmation of Charter's proposed  
26 plan of reorganization (the "Plan"), the Law Debenture Trust  
27 Company of New York ("LDT"), as indenture trustee for certain notes  
28 issued by CCI, and R<sup>2</sup> Investments, LDC ("R<sup>2</sup>"), a CCI shareholder,  
29 appealed the confirmation order to the District Court for the  
30 Southern District of New York. The district court (George B.  
31 Daniels, Judge) dismissed those appeals under the doctrine of  
32 equitable mootness. R<sup>2</sup> Invs., LDC v. Charter Commc'ns, Inc. (In re

1 Charter Commc'ns, Inc.), 449 B.R. 14 (S.D.N.Y. 2011). LDT and R<sup>2</sup>  
2 now appeal that dismissal. We agree with the district court that  
3 the appeals are equitably moot and affirm.

4 **BACKGROUND**

5 We recite only those facts necessary to this appeal. A full  
6 recitation of the facts may be found in the district court and  
7 bankruptcy court opinions. See In re Charter Commc'ns, 449 B.R.  
8 14; In re Charter Commc'ns, 419 B.R. 221.

9 In 2008, Charter, the nation's fourth-largest cable television  
10 company and a leading provider of cable and a broadband service,  
11 was operationally sound but carried almost \$22 billion in debt at  
12 various levels of its corporate structure.<sup>1</sup> In re Charter Commc'ns,  
13 419 B.R. at 230-31. After the September 2008 collapse of Lehman  
14 Brothers and the financial crisis that ensued, Charter could no  
15 longer service its debt due to the tightening credit markets,  
16 Charter's excessive leverage, and lower valuations of companies in  
17 the cable sector. Id. at 232-33. Charter began negotiating with  
18 Paul G. Allen, a major investor whose ownership stake gave him  
19 control of the company, and a group of junior bondholders (referred  
20 to as the "Crossover Committee"). Id. The negotiations culminated  
21 in a settlement (the "Allen Settlement") that contemplated

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<sup>1</sup> Charter's corporate structure consisted of a publicly traded parent holding company, CCI, sitting atop a chain of subsidiaries. See Br. of Debtors-Appellees at 10. Charter's publicly traded debt was issued by eight holding companies stacked between CCI and Charter Communications Operating, LLC, the primary operating company. Id.

1 Charter's prenegotiated reorganization in bankruptcy. Id. Charter  
2 then filed for Chapter 11 bankruptcy, using the Allen Settlement as  
3 the cornerstone of its prenegotiated Plan. Id.; 449 B.R. at 17.  
4 Left out of the negotiations, however, were LDT, the trustee for  
5 \$479 million in aggregate principal of convertible notes issued by  
6 CCI; R<sup>2</sup>, a CCI shareholder; and J.P. Morgan Chase N.A. ("JPMorgan"),  
7 the holder of Charter's senior debt. These entities had no input  
8 into the Allen Settlement or the prepackaged Plan. Id. at 17; 419  
9 B.R. at 233.

10 To fully appreciate the key role Paul Allen played in  
11 Charter's reorganization requires delving a bit into the weeds of  
12 the negotiations underlying the Allen Settlement. Charter's  
13 reorganization strategy was driven by the goal of reinstating its  
14 senior credit facility with JPMorgan--that is, curing any breaches  
15 in its contracts with JPMorgan so that JPMorgan would be classified  
16 as an unimpaired creditor. See 11 U.S.C. § 1124(2). Charter  
17 wanted to avoid renegotiating its senior debt during the financial  
18 turmoil of late 2008 and early 2009 because it believed such  
19 renegotiation would at best lead to a higher interest rate and at  
20 worst result in Charter being closed off to new financing  
21 altogether. In re Charter Commc'ns, 419 B.R. at 233. Charter thus  
22 needed to structure its reorganization in a way that would avoid  
23 triggering a default under the credit agreement with JPMorgan. One  
24 condition Charter had consented to in the credit agreement was that  
25 Allen would retain thirty-five percent of the ordinary voting power

1 of Charter Communications Operating, LLC ("CCO"), the obligor under  
2 the senior credit agreements. Id. at 230, 237-38. For the  
3 reorganization plan to succeed, Charter thus needed to induce Allen  
4 to retain these voting rights, even though most of his investment  
5 in Charter would be wiped out. Id. at 230-31. In addition, for  
6 Charter to preserve roughly \$2.85 billion of net operating losses,  
7 a valuable tax attribute, it needed Allen to forgo exercising  
8 contractual exchange rights and to maintain a one percent ownership  
9 interest in Charter Communications Holding Company, LLC ("Holdco").  
10 Id. at 253. Because Charter's main goals in restructuring, namely  
11 reinstating its senior debt and obtaining tax savings through  
12 preserving net operating losses, required Allen's cooperation,  
13 Allen alone was in a position to provide "uniquely personal"  
14 benefits to Charter. Id. at 259.

15 Following "a spirited negotiation in which sophisticated  
16 adversaries and their expert advisors bargained with each other  
17 aggressively and in good faith," id. at 241, Charter, the Crossover  
18 Committee, and Allen agreed to the Allen Settlement. As part of  
19 the Settlement, Allen agreed to retain a thirty-five percent voting  
20 interest in CCO and a one percent ownership interest in Holdco, and  
21 to refrain from exercising his contractual exchange rights. Id. at  
22 253-54. In return for these concessions, Allen would receive \$375  
23 million, of which \$180 million was classified as pure settlement  
24 consideration. Id. at 241. The Allen Settlement further provided  
25 for a "\$1.6 billion rights offering, a stepped-up tax basis in a

1 significant portion of [Charter's] assets, and the purchase of  
2 [Allen's]" preferred shares in CC VIII, LLC, a Charter subsidiary.  
3 Id. at 253. Allen also successfully negotiated for a liability  
4 release (other third parties, including the management of Charter,  
5 were released as well). Id. at 257-58 & n.26. Under the  
6 reorganization Plan that resulted from the Allen Settlement, the  
7 CCI noteholders, represented by LDT, would receive approximately  
8 32.7 percent of their claims, id. at 242, and R<sup>2</sup> and other equity  
9 holders of CCI would receive nothing, see Debtor's Disclosure  
10 Statement at 33.

11 On November 17, 2009, after a nineteen-day hearing, the  
12 bankruptcy court overruled all objections and confirmed the Plan as  
13 submitted by Charter. 419 B.R. at 271. The following week, the  
14 bankruptcy court denied R<sup>2</sup> and LDT's motions for an emergency stay  
15 of the confirmation order. The district court (Sidney H. Stein,  
16 Judge, sitting in Part I) denied a stay pending appeal to that  
17 court, and the confirmation order and the Plan took effect on  
18 November 30, 2009. See In re Charter Commc'ns, 449 B.R. at 21.  
19 Charter immediately took actions under the Plan, including  
20 cancelling the equity issued by the prepetition Charter, issuing  
21 shares in the reorganized Charter, converting notes issued by the  
22 prepetition Charter entities into new notes, and issuing warrants  
23 to Charter's prepetition noteholders. Id. at 24 nn.19-20.

24 R<sup>2</sup> and LDT have objected to the Plan at every stage of these  
25 proceedings. Before the district court, they raised several

1 overlapping challenges to the Plan's confirmation. Their  
2 objections, viewed broadly, related to the Allen Settlement, the  
3 bankruptcy court's valuation of Charter, and compliance with the  
4 Bankruptcy Code's cramdown provisions for approving a plan over the  
5 objections of creditors. See id. at 21. Charter, Allen, and the  
6 Committee of Unsecured Creditors argued that, whatever the merit of  
7 R<sup>2</sup>'s and LDT's legal claims, the relief they sought could not be  
8 granted without upsetting the already-consummated Plan and that the  
9 doctrine of equitable mootness barred the appeals. Id. at 17. The  
10 district court agreed and dismissed the appeals as equitably moot.  
11 R<sup>2</sup> and LDT filed separate appeals from that dismissal, which were  
12 argued in tandem.

## 13 DISCUSSION

### 14 I. Legal Standard for Equitable Mootness

15 This appeal concerns equitable mootness, a prudential doctrine  
16 under which the district court may dismiss a bankruptcy appeal  
17 "when, even though effective relief could conceivably be fashioned,  
18 implementation of that relief would be inequitable." Official  
19 Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v.  
20 Official Comm. of Unsecured Creditors of LTV Steel Co. (In re  
21 Chateaugay Corp.), 988 F.2d 322, 325 (2d Cir. 1993) ("Chateaugay  
22 I"). Unlike constitutional mootness, which turns on the threshold  
23 question of whether a justiciable case or controversy exists,  
24 equitable mootness in the context presented here is concerned with  
25 whether a particular remedy can be granted without unjustly

1 upsetting a debtor's plan of reorganization. See Deutsche Bank AG  
2 v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network,  
3 Inc.), 416 F.3d 136, 143-44 (2d Cir. 2005); see also In re UNR  
4 Indus., 20 F.3d 766, 769 (7th Cir. 1994) ("There is a big  
5 difference between inability to alter the outcome (real mootness)  
6 and unwillingness to alter the outcome ('equitable mootness').").  
7 Equitable mootness in the bankruptcy setting thus requires the  
8 district court to carefully balance the importance of finality in  
9 bankruptcy proceedings against the appellant's right to review and  
10 relief. See Chateaugay I, 988 F.2d at 325-26; Bank of N.Y. Trust  
11 Co., NA v. Official Unsecured Creditors' Comm. (In re Pac. Lumber  
12 Co.), 584 F.3d 229, 240 (5th Cir. 2009) (noting that equitable  
13 mootness is "a judicial anomaly" because it creates an exception to  
14 courts' "virtually unflagging obligation to exercise jurisdiction"  
15 (internal quotation marks omitted)). "[E]quitable mootness applies  
16 to specific claims, not entire appeals" and must be applied "with a  
17 scalpel rather than an axe." In re Pac. Lumber, 584 F.3d at 240-  
18 41.

19 In this circuit, an appeal is presumed equitably moot where  
20 the debtor's plan of reorganization has been substantially  
21 consummated. Aetna Cas. & Sur. Co. v. LTV Steel Co. (In re  
22 Chateaugay Corp.), 94 F.3d 772, 776 (2d Cir. 1996) ("Chateaugay  
23 III"); Frito-Lay, Inc. v. LTV Steel Co. (In re Chateaugay Corp.),  
24 10 F.3d 944, 952-53 (2d Cir. 1993) ("Chateaugay II"). "Substantial  
25 consummation" is defined in the Bankruptcy Code to require that all

1 or substantially all of the proposed transfers in a plan are  
2 consummated; that the successor company has assumed the business or  
3 management of the property dealt with by the plan; and that the  
4 distributions called for by the plan have commenced. See 11 U.S.C.  
5 § 1101(2).

6 The presumption of equitable mootness can be overcome,  
7 however, if all five of the "Chateaugay factors" are met:

- 8 (1) "the court can still order some effective relief";
- 9 (2) "such relief will not affect the re-emergence of the  
10 debtor as a revitalized corporate entity";
- 11 (3) "such relief will not unravel intricate transactions so as  
12 to knock the props out from under the authorization for  
13 every transaction that has taken place and create an  
14 unmanageable, uncontrollable situation for the Bankruptcy  
15 Court";
- 16 (4) "the parties who would be adversely affected by the  
17 modification have notice of the appeal and an opportunity  
18 to participate in the proceedings"; and
- 19 (5) "the appellant pursued with diligence all available  
20 remedies to obtain a stay of execution of the  
21 objectionable order if the failure to do so creates a  
22 situation rendering it inequitable to reverse the orders  
23 appealed from."

24 Chateaugay II, 10 F.3d at 952-53 (internal citations, quotations,  
25 and alterations omitted). Substantial consummation thus "does not  
26 necessarily make it impossible or inequitable for an appellate  
27 court to grant effective relief." Id. at 952. Nor is a claim  
28 automatically equitably moot if the relief requested would require  
29 that a confirmed plan be altered. In this regard, we disagree with  
30 the district court's overly broad statement that invalidating a  
31 plan and remanding for renegotiation renders a request "per se

1 equitably moot." In re Charter Commc'ns, 449 B.R. at 24 n.21. The  
2 Chateaugay factors ensure that there is no per se equitable  
3 mootness by requiring a court to examine the actual effects of the  
4 requested relief. Finally, in examining a debtor's contention that  
5 a claim is equitably moot, we cannot rely solely on the debtor's  
6 conclusory predictions or opinions that the requested relief would  
7 doom the reorganized company. Instead, Chateaugay II requires an  
8 analytical inquiry into the likely effects of the relief an  
9 appellant seeks and must be based on facts. Only if all five  
10 Chateaugay factors are met, and if the appellant prevails on the  
11 merits of its legal claims, will relief be granted.

## 12 **II. Standard of Review**

13 We turn first to the standard of review in appeals of  
14 equitable mootness determinations.<sup>2</sup> Generally in bankruptcy  
15 appeals, the district court reviews the bankruptcy court's factual  
16 findings for clear error and its conclusions of law de novo. Fed.  
17 R. Bankr. P. 8013. On appeal to this court, we ordinarily review

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<sup>2</sup> No published Second Circuit decision has addressed this question directly. In a non-precedential summary order we determined that abuse of discretion review was appropriate. See Ad Hoc Comm. of Kenton Cnty. Bondholders v. Delta Air Lines, Inc., 309 F. App'x 455, 457 (2d Cir. 2009). In prior decisions we have described the general standard of review in bankruptcy cases, involving de novo review of legal conclusions, and then proceeded to address equitable mootness without further discussion or application of a particular standard of review. See, e.g., In re Metromedia, 416 F.3d at 139; South St. Seaport Ltd. P'ship v. Burger Boys, Inc. (In re Burger Boys, Inc.), 94 F.3d 755, 759 (2d Cir. 1996); Resolution Trust Corp. v. Best Prods. Co. (In re Best Prods. Co.), 68 F.3d 26, 29 (2d Cir. 1995). To the extent these cases suggested that de novo review may apply to district court determinations regarding equitable mootness, they did so in dicta.

1 the district court's decision de novo. In re Metromedia, 416 F.3d  
2 at 139. Equitable mootness appeals arise in a somewhat different  
3 procedural posture: in an equitable mootness dismissal, the  
4 district court is not reviewing the bankruptcy court at all, but  
5 exercising its own discretion in the first instance. In so doing,  
6 the district court may rely on the bankruptcy court's factual  
7 findings, unless clearly erroneous, and if necessary receive  
8 additional evidence. Perhaps because of the unusual nature of  
9 equitable mootness dismissals, the courts of appeals are split over  
10 whether a de novo or abuse of discretion standard of review should  
11 be applied by a court of appeals. Compare Curreys of Neb., Inc. v.  
12 United Producers, Inc. (In re United Producers, Inc.), 526 F.3d  
13 942, 946-47 (6th Cir. 2008) (reviewing determination of equitable  
14 mootness de novo), Liquidity Solutions, Inc. v. Winn-Dixie Stores,  
15 Inc. (In re Winn-Dixie Store, Inc.), 286 F. App'x 619, 622 & n.2  
16 (11th Cir. 2008) (same), and United States v. Gen. Wireless, Inc.  
17 (In re GWI PCS 1 Inc.), 230 F.3d 788, 799-800 (5th Cir. 2000)  
18 (same), with Search Mkt. Direct, Inc. v. Jubber (In re Paige), 584  
19 F.3d 1327, 1334-1335 (10th Cir. 2009) (reviewing determination of  
20 equitable mootness for abuse of discretion), and Nordhoff Invs.,  
21 Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 182 (3d Cir. 2001)  
22 (same).

23 We join those circuits that apply an abuse-of-discretion  
24 standard, finding it significant that we are reviewing the district  
25 court's own exercise of discretion as to whether it is practicable

1 to grant relief. A somewhat analogous situation arises when  
2 Article III mootness turns on the defendant's voluntary cessation  
3 of allegedly illegal conduct. There, the voluntary cessation  
4 "bear[s] on whether the court should, in the exercise of its  
5 discretion, dismiss the case as moot." Harrison & Burrowes Bridge  
6 Constructors, Inc. v. Cuomo, 981 F.2d 50, 59 (2d Cir. 1992). In  
7 such a case, because dismissal "lies within the sound discretion of  
8 the district court," we review for abuse of discretion. Id.;  
9 Granite State Outdoor Adver., Inc. v. Zoning Bd. of Stamford, 38 F.  
10 App'x 680, 683 (2d Cir. 2002); cf. In re Paige, 584 F.3d at 1334-35  
11 (reviewing equitable mootness for abuse of discretion in part  
12 because of its similarities to prudential mootness, reviewed in the  
13 Tenth Circuit for abuse of discretion). More generally, equitable  
14 mootness determinations involve "a discretionary balancing of  
15 equitable and prudential factors," the type of determination we  
16 usually review for abuse of discretion. In re Cont'l Airlines, 91  
17 F.3d 553, 560 (3d Cir. 1996) (en banc). Accordingly, we will  
18 review the district court's decision for abuse of discretion.

19 **III. Objections to the Allen Settlement and Third-Party Releases**  
20 **are Equitably Moot**

21 R<sup>2</sup> and LDT both challenge the compensation Paul Allen received  
22 under the Allen Settlement as contravening the absolute priority  
23 rule and Delaware's entire fairness standard. They further argue  
24 that the third-party releases, which originated in the Allen  
25 Settlement and were incorporated into the confirmed Plan, do not

1 comply with SEC v. Drexel Burnham Lambert Group, Inc. (In re Drexel  
2 Burnham Lambert Group, Inc.), 960 F.2d 285, 293 (2d Cir. 1992),  
3 limiting third-party releases to unique circumstances. Appellants  
4 claim that these legal errors can be redressed through a  
5 prospective monetary award, without undoing the Allen Settlement or  
6 reopening the bankruptcy proceedings. LDT suggests that Allen be  
7 required to disgorge some or all of his \$180 million in settlement  
8 consideration, or that Charter pay a similar amount directly to  
9 LDT. R<sup>2</sup> presents a different alternative: that the bankruptcy  
10 court determine the lowest payout Allen would have been willing to  
11 accept, and order him to disgorge the excess. And R<sup>2</sup> maintains that  
12 the third-party releases can be surgically excised from the Allen  
13 Settlement and the Plan.

14 We begin by noting that LDT and R<sup>2</sup> have met their burden with  
15 respect to several of the Chateaugay factors. First, it is not  
16 impossible to grant LDT and R<sup>2</sup> relief, in the sense that the appeals  
17 are not constitutionally moot (factor 1). See Dean v. Blumenthal,  
18 577 F.3d 60, 66 (2d Cir. 2009) (claims for monetary relief  
19 automatically avoid constitutional mootness). Next, LDT and R<sup>2</sup> were  
20 diligent in seeking a stay of the confirmation order (factor 5).<sup>3</sup>  
21 That LDT and R<sup>2</sup> were not granted a stay does not affect the analysis

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<sup>3</sup> Although no stay was sought from this court, under the circumstances we do not fault LDT and R<sup>2</sup> for the omission: the district court denied a stay on the evening of Wednesday November 25, 2009, the day before Thanksgiving, and this court was closed until the following Monday when the Plan became effective and was substantially consummated, leaving no time to move this court for a stay.

1 under Chateaugay II, which looks only to diligence in seeking a  
2 stay. Chateaugay II, 10 F.3d at 954; In re Metromedia, 416 F.3d at  
3 144-45.

4 Next, LDT and R<sup>2</sup> are correct that the relief they seek would  
5 not adversely affect parties without an opportunity to participate  
6 in the appeal (factor 4). See Chateaugay II, 10 F.3d at 953. Even  
7 assuming that the relief requested would send Charter back into  
8 bankruptcy, the parties most affected would be Charter itself,  
9 Allen, and Charter's creditors, all of whom are either parties to  
10 this appeal or participated actively in the bankruptcy proceedings.  
11 Cf. Kenton Cnty. Bondholders Comm. v. Delta Air Lines, Inc. (In re  
12 Delta Air Lines, Inc.), 374 B.R. 516, 524 (S.D.N.Y. 2007) (finding  
13 appeal of a settlement equitably moot in part because distributions  
14 under the settlement had been made to innocent third parties that  
15 were not participating in the appeal). In any event, if the Allen  
16 Settlement were unlawful, it would not be inequitable to require  
17 the parties to that agreement to disgorge their ill-gotten gains,  
18 participation in the appeal or not. See Motor Vehicle Cas. Co. v.  
19 Thorpe Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869,  
20 882 (9th Cir. 2012) ("[T]he question is not whether . . . no third  
21 party interests are affected" but whether any effects on third  
22 parties would be inequitable.). Likewise, striking the third-party  
23 releases from the Plan would affect only those third parties that  
24 benefited from the releases. See Hilal v. Williams (In re Hilal),  
25 534 F.3d 498, 500 (5th Cir. 2008); Gillman v. Cont'l Airlines (In

1 re Cont'l Airlines), 203 F.3d 203, 210 (3d Cir. 2000) (finding  
2 appeal of third-party releases not equitably moot where the  
3 defendant presented no arguments that investors or creditors relied  
4 on the presence of releases in supporting the plan). Less direct  
5 effects may be felt by reorganized Charter's shareholders, since  
6 either a limited remand or a payout would affect the value of the  
7 company. However, Charter has regularly and fully disclosed the  
8 existence of this appeal and the possibility of an adverse ruling  
9 as a risk factor in publicly filed annual and quarterly reports.  
10 See, e.g., Charter Communications, Inc., Annual Report (Form 10-K),  
11 at 29 (Mar. 1, 2011). A prudent investor would take this  
12 information into account before purchasing shares in Charter. See  
13 In re Cont'l Airlines, 91 F.3d at 572 (Alito, J., dissenting).

14       However, LDT and R<sup>2</sup> have failed to establish that the relief  
15 they request would not affect Charter's emergence as a revitalized  
16 entity and would not require unraveling complex transactions  
17 undertaken after the Plan was consummated (factors 2 and 3). See  
18 Chateaugay II, 10 F.3d at 953. R<sup>2</sup> and LDT are correct that any  
19 disgorgement by Allen would not impact reorganized Charter's  
20 financial health. And, as Appellants stress, reorganized Charter  
21 has been quite successful, with substantial assets and cash flow,  
22 access to an \$800 million revolving line of credit, and long-term  
23 debt structured on favorable terms. Charter makes no claim that a  
24 payment in the range of \$200 million would send it spiraling back  
25 into bankruptcy. LDT and R<sup>2</sup> ignore, however, that we must also

1 consider the heavy transactional costs associated with the monetary  
2 relief they seek. Modifying the terms of the Allen Settlement,  
3 including striking the releases, would be no ministerial task. The  
4 Allen Settlement was the product of an intense multi-party  
5 negotiation, and removing a critical piece of the Allen Settlement—  
6 such as Allen’s compensation and the third-party releases—would  
7 impact other terms of the agreement and throw into doubt the  
8 viability of the entire Plan. See In re Metromedia, 416 F.3d at  
9 145.

10 LDT and R<sup>2</sup> maintain that in refusing to alter the Allen  
11 Settlement, the district court gave too much weight to the  
12 nonseverability clause contained in the Settlement and the Plan.  
13 See In re Charter Commc’ns, 449 B.R. at 20, 24-25, 25 n.22, 28-29,  
14 30. We agree with LDT and R<sup>2</sup> that normally a nonseverability clause  
15 standing on its own cannot support a finding of equitable mootness.  
16 Allowing a boilerplate nonseverability clause, without more, to  
17 determine the equitable mootness question would give the debtor and  
18 other negotiating parties too much power to constrain Article III  
19 review. See Nordhoff Invs., Inc., 258 F.3d at 192 (Alito, J.,  
20 concurring in the judgment) (expressing concern that the “equitable  
21 mootness doctrine can easily be used as a weapon to prevent any  
22 appellate review of bankruptcy court orders confirming  
23 reorganization plans”). Given the ubiquity of nonseverability  
24 clauses in prenegotiated plans, such a rule could moot virtually  
25 every appeal where a stay had not been granted. See R<sup>2</sup> Br. at 41-42

1 & 42 n.10 (noting that of the top ten prenegotiated bankruptcies  
2 filed in 2010 by value of the debtor's assets, each contained a  
3 nonseverability clause in either the confirmation order or in the  
4 reorganization plan). More importantly, equitable mootness is a  
5 practical doctrine that requires courts to consider the actual  
6 effects of the relief requested on a debtor's emergence from  
7 bankruptcy. While a nonseverability clause may be one indication  
8 that a particular term was important to the bargaining parties, a  
9 district court cannot rely on such a clause to the exclusion of  
10 other evidence.<sup>4</sup> See Trans World Airlines, Inc. v. Texaco, Inc. (In  
11 re Texaco, Inc.), 92 B.R. 38, 47-49 (S.D.N.Y. 1988) (looking to  
12 both nonseverability clause and testimony about the importance of  
13 release provisions to determine that severing the provisions "would  
14 undermine both the Settlement Agreement and the Reorganization  
15 Plan"); see also Behrmann v. Nat'l Heritage Found., 663 F.3d 704,  
16 713-14 (4th Cir. 2011) (finding an appeal of a release provision  
17 not equitably moot where the bankruptcy court concluded that the  
18 releases were "important" to the Plan without adequate factual  
19 support).

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<sup>4</sup> Reliance on the nonseverability clause alone would be particularly inappropriate here with respect to the third-party releases because the "term sheet" incorporated into the Allen Settlement expressly provided that the debtors' failure to secure the releases as part of the approved Plan would not breach the Allen Settlement. These dueling contractual provisions only underscore the need to examine the totality of evidence to determine the importance of a particular provision.

1           In these appeals, however, the district court did not rest its  
2 decision exclusively on the nonseverability clause. The bankruptcy  
3 court found that the compensation to Allen and the third-party  
4 releases were critical to the bargain that allowed Charter to  
5 successfully restructure and that undoing them, as the plaintiffs  
6 urge, would cut the heart out of the reorganization. Crediting  
7 multiple witnesses, it also found that Allen was in a unique  
8 position to create a successful arrangement because only through  
9 his forbearance of exchange rights and agreement to maintain voting  
10 power could Charter reinstate its senior debt and preserve valuable  
11 net operating losses. See Findings of Fact, Conclusions of Law,  
12 and Order Confirming Debtors' Joint Plan of Reorganization ("Conf.  
13 Order") ¶¶ 32, 43; see also JA 462, 589, 605, 611. The releases,  
14 like the compensation, were important in inducing Allen to settle.  
15 See Conf. Order ¶ 32; see also JA 463, 589, 605, 611. In the face  
16 of witnesses representing that the releases and compensation were  
17 important to Allen, LDT and R<sup>2</sup> can point to no evidence that the  
18 settlement consideration paid to Allen or the third-party releases  
19 were simply incidental to the bargain that was struck. Compare In  
20 re Metromedia, 416 F.3d at 145 (request to strike third-party  
21 releases equitably moot because "it [was] as likely as not that the  
22 bargain struck by the debtor and the released parties might have  
23 been different without the releases") with In re Cont'l Airlines,  
24 203 F.3d at 210-11 (appeal of third-party releases not equitably  
25 moot where there was "[n]o evidence or arguments . . . that

1 Plaintiffs' appeal, if successful, would necessitate the reversal  
2 or unraveling of the entire plan of reorganization").

3       Even if LDT and R<sup>2</sup> are correct that the settlement  
4 consideration and releases are legally unsupportable, these  
5 provisions could not be excised without seriously threatening  
6 Charter's ability to re-emerge successfully from bankruptcy.<sup>5</sup> Nor  
7 could the monetary relief requested be achieved by a quick,  
8 surgical change to the confirmation order. Allen may not be  
9 willing to give up the benefit he received from the Allen  
10 Settlement without also reneging on at least part of the benefit he  
11 bestowed on Charter. Thus the parties would have to enter renewed  
12 negotiations, casting uncertainty over Charter's operations until  
13 the issue's resolution. We therefore find no abuse of discretion  
14 in the district court's conclusion that these claims relating to  
15 the Allen Settlement are equitably moot.

16 **IV. R<sup>2</sup>'s Claim for the Revaluation of CCI is Equitably Moot**

17       R<sup>2</sup>'s next claim of error relates to the valuation of Charter.  
18 The bankruptcies of Charter's 131 affiliated entities were  
19 consolidated for procedural, not substantive, purposes. 419 B.R.  
20 at 269-70. The Plan, however, values all Charter entities as one.

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<sup>5</sup> This risk—supported in the record—that the parties might be unable to compromise if the bankruptcy proceedings were reopened, is what we understand the district court to have meant when it wrote that relief would “nullify the plan.” See 449 B.R. at 24, 25, 26, 27 n.29, 28. Technically speaking, any vacatur of a confirmation order, no matter how limited, would “nullify” the plan, at least temporarily and in part, but we understand the district court's use of “nullification” to have referred to a nullification of the ability to reorganize at all.

1 Id. R<sup>2</sup>, an equity holder in CCI, argues that CCI should have been  
2 valued separately, taking into account the value of the net  
3 operating losses, which R<sup>2</sup> argues "belong" to CCI. Here again, R<sup>2</sup>  
4 claims that simple relief is available: remand the case to the  
5 bankruptcy court for a limited valuation of CCI as a stand-alone  
6 entity, and distribute any surplus to CCI's shareholders, R<sup>2</sup> among  
7 them.

8 As with challenges to the Allen Settlement, R<sup>2</sup> has met the  
9 Chateaugay factors relating to ability to grant effective relief,  
10 diligence in seeking a stay, and effect on third parties. However,  
11 we could not grant the relief R<sup>2</sup> seeks without requiring a  
12 significant revision of Charter's reorganization. R<sup>2</sup>'s argument is,  
13 in effect, an attack on the bankruptcy court's determination that  
14 it was appropriate for the Plan to consider all the Charter  
15 entities together, even though the bankruptcies were never  
16 substantively consolidated. In order to grant a separate valuation  
17 of CCI, the district court would have had to overturn the  
18 bankruptcy court's determination that a joint Plan was appropriate.  
19 That legal conclusion would require not just that CCI be separately  
20 valued, but that all the Charter subsidiaries be revalued and the  
21 proceeds of the bankruptcy distributed accordingly. See Compania  
22 Internacional Financiera S.A. v. Calpine Corp. (In re Calpine  
23 Corp.), 390 B.R. 508, 519-20 (S.D.N.Y. 2008) (holding that the  
24 debtor's valuation was a "'key issue'" in a reorganization, and  
25 therefore even if a remand resulted in a higher valuation, the plan

1 would need to be substantially changed), aff'd 354 F. App'x 479 (2d  
2 Cir. 2009). This is not the type of relief that can be undertaken  
3 without knocking the props out from under completed transactions or  
4 affecting the re-emergence of the debtor from bankruptcy.<sup>6</sup> See  
5 Chateaugay II, 10 F.3d at 952-53. Thus, the district court did not  
6 abuse its discretion in dismissing this claim for revaluation of  
7 CCI as equitably moot.

8 **V. LDT's Claim that the Plan Violates 11 U.S.C. § 1129's Cramdown**  
9 **Provisions is Equitably Moot**

10 LDT appeals the bankruptcy court's determination that the Plan  
11 complies with the cramdown provisions of 11 U.S.C. § 1129. First,  
12 LDT argues that, as a creditor of CCI, it had a more senior claim  
13 to the value of the net operating losses than the Crossover  
14 Committee members, who held the debt of other Charter entities.  
15 See § 1129(b)(2)(B)(ii). Second, LDT argues that creditors were  
16 "gerrymandered" into separate classes to satisfy the provisions of  
17 § 1129(a)(10), which requires that at least one class of impaired

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<sup>6</sup> The district court erred, however, when it held that the relief requested could not be granted because the confirmation order rendered R<sup>2</sup>'s claims "cancelled, released, and extinguished" with the holders "receiving no distribution under the Plan." 449 B.R. at 28 (internal quotation marks and alteration omitted). When the confirmation order is on appeal, the legal effects of that order—such as extinguishing equity—cannot themselves preclude review. See Chateaugay II, 10 F.3d at 953-54, (rejecting the argument that because the confirmation order provided that certain assets were to re-vest in the debtor "free and clear of all claims and interests" we could not correct a legal error in their distribution (internal quotation marks omitted)). Nevertheless, the district court's alternative holding that equitable mootness barred the appeal notwithstanding the this provision was independently sufficient to support its judgment.

1 creditors accept a plan. It further argues that the bankruptcy  
2 court erred by holding that § 1129(a)(10) was satisfied if an  
3 impaired class of any of the debtors accepted the Plan. As relief  
4 for all these alleged errors, LDT seeks the payment in full of the  
5 CCI notes, at a cost to Charter of about \$330 million. 449 B.R. at  
6 29 n.38.

7 As with R<sup>2</sup>'s claims regarding valuation, LDT may be correct  
8 that the simple payment of \$330 million would satisfy the  
9 Chateaugay factors. However, as with R<sup>2</sup>'s revaluation claim, the  
10 legal conclusions required to find for LDT would require much more  
11 than simply paying the CCI Noteholders' claims in full. The legal  
12 errors that LDT alleges, if proven, would require unwinding the  
13 Plan and reclassifying creditors. This is the opposite of a  
14 surgical change to the Plan. See In re Pac. Lumber, 584 F.3d at  
15 251 (finding claims of artificial impairment and misclassification  
16 of creditors equitably moot because "no remedy . . . is practicable  
17 other than unwinding the plan"). We therefore affirm the district  
18 court's exercise of its discretion in dismissing the claim that the  
19 cramdown provisions were violated as equitably moot as well.

20 **CONCLUSION**

21 For the foregoing reasons, the district court's order  
22 dismissing LDT and R<sup>2</sup>'s appeals as equitably moot is AFFIRMED.