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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Dexter Distributing Corporation, et al., )

No. CV 09-1099-PHX-JAT

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Debtors, )

BK NO. 2:03-bk-03546-RJH

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Taylor R. Coleman, )

Jointly Administered as Case With:

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Appellant, )

2-03-BK-03548-RJH

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vs. )

2-03-bk-04238-RJH

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ANMP, et al., )

2-03-BK-04695-RJH through

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Appellees. )

2-03-BK-04710-RJH

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2-03-BK-05427-RJH

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2-03-BK-11513-RJH

2-03-BK-11515-RJH

2-03-BK-04238-RJH

2-07-BK-01017-RJH

2-07-BK-01018-RJH

2-07-BK-01019-RJH; and

2-08-BK-05785-RJH

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ADV. NO. 00-0000

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BAP NO. AZ-00-0000

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**ORDER**

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Taylor R. Coleman filed this action under 28 U.S.C. § 158, seeking judicial review

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of the Bankruptcy Court's Modified and Restated Plan of Reorganization of Debtors, Official

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Committee of Unsecured Creditors, ANMP, and Mark A. Franks Filed February 20, 2009

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1 (“2009 Plan”). For the reasons that follow, the Court dismisses Coleman’s appeal on  
2 mootness grounds.<sup>1</sup>

### 3 ANALYSIS

4 “Mootness is a jurisdictional question because the Court is not empowered to decide  
5 moot questions or abstract propositions; our impotence to review moot cases derives from  
6 the requirement of Article III of the Constitution under which the exercise of judicial power  
7 depends upon the existence of a case or controversy.” *North Carolina v. Rice*, 404 U.S. 244,  
8 246 (1971) (internal quotations and citations omitted). “If a case becomes moot while  
9 pending on appeal, it must be dismissed.” *In re Pattullo*, 271 F.3d 898, 900 (9th Cir. 2001).

10 Appellees argue that the “myriad of transfers and transactions that have occurred in  
11 reliance on the Order Confirming Plan have rendered it impossible, impracticable, and  
12 inequitable for this Court to provide Coleman with any relief whatsoever.” (Doc. # 54 at p.  
13 14.) The Court agrees and finds that Coleman’s appeals is both statutorily and  
14 constitutionally moot.

#### 15 *Section 363(m) Mootness*

16 Congress has expressly limited appellate remedies in the event of reversal by  
17 precluding reviewing courts from altering or otherwise affecting the validity of any sales  
18 conducted pursuant to 11 U.S.C. § 363:

19 The reversal or modification on appeal of an authorization under  
20 subsection (b) or (c) of this section of a sale or lease of property does not affect  
21 the validity of a sale or lease under such authorization to an entity that  
22 purchased or leased such property in good faith, whether or not such entity  
knew of the pendency of the appeal, unless such authorization and such sale  
or lease were stayed pending appeal.

23 11 U.S.C. § 363(m). Courts have interpreted this statute to mean that when a sale of assets  
24 is made to a good faith purchaser, the reviewing court may not modify or set aside the sale  
25 unless the sale was stayed pending appeal. *See, e.g., In re Onouli-Kona Land Co. v. Estate*

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27 <sup>1</sup> For a recitation of the pertinent facts and the procedural background, see the Court’s  
28 July 13, 2009, Order (Doc. # 25).

1 of *Richards*, 846 F.2d 1170, 1172 (9th Cir. 1988); *In re Vista Del Mar Associates, Inc.*, 181  
2 B.R. 422, 423-24 (B.A.P. 9th Cir. 1995). “There are two recognized exceptions to this  
3 mootness rule: (1) where the debtor has a statutory right of redemption, and (2) where other  
4 state law would permit the sale to be set aside.” *In re Vista*, 181 B.R. at 425. Coleman does  
5 not argue that either of these two exceptions apply in this case. Moreover, Coleman failed  
6 to obtain a stay pending appeal. (Doc. # 25.) However, Coleman argues that the mandate  
7 of Section 363(m) does not apply because Mark Franks was not a good faith purchaser. *In*  
8 *re Onouli-Kona Land Co.*, 846 F.2d at 1173 (“Bankruptcy’s mootness rule operates only  
9 when a purchaser bought an asset in good faith.”). While the Court agrees that Section  
10 363(m) does not apply if the sale is not to a good faith purchaser, the Court disagrees that  
11 Franks does not constitute such a purchaser.

12         A lack of good faith in this context has been defined as “the misconduct that . . .  
13 involves fraud, collusion between the purchaser and other bidders or the trustee, or an  
14 attempt to take grossly unfair advantage of other bidders.” *In re Suchy*, 786 F.2d 900, 902  
15 (9th Cir. 1985) (quotation omitted). “The bankruptcy judge is in the best position to assess  
16 the good faith of the parties. The finding of good faith will not be overturned unless the  
17 opponent of the plan can show that the finding was clearly erroneous.” *In re Stolrow’s Inc.*,  
18 84 B.R. 167, 172 (B.A.P. 9th Cir. 1988) (citation omitted). After having reviewed the record,  
19 the Court finds that the record amply supports the Bankruptcy Court’s determination that the  
20 sale to Franks was in good faith.

21         The plan was overwhelmingly supported by the undisputed creditors of the estate,  
22 which included both investors in American National Mortgage Partners and other trade  
23 creditors, and who also understood the relationship between Frank and the Debtor. The  
24 board considered other alternatives besides the sale to Franks but none of these alternatives  
25 ever materialized. The record supports a finding that Franks is the only possible buyer and,  
26 indeed, his offer was above the fair market value of the business. Moreover, the record  
27 before the Bankruptcy Court is devoid of any expert testimony suggesting that the sale was  
28 materially unfair or substantially less than the fair market value. Finally, even assuming

1 Franks “was an estate fiduciary subject to significantly more stringent standards,” (Doc. #  
2 62 at p. 4) the testimony before the Bankruptcy Court established that the 2008 Plan was  
3 approved by a committee of independent directors who stood to gain nothing by selling to  
4 Franks. Franks’ involvement in the sale did not involve fraud, collusion, or an attempt to  
5 take grossly unfair advantage of other bidders. The Court finds that Franks was a good faith  
6 purchaser.<sup>2</sup>

7 Bankruptcy’s mootness rule under Section 363(m) applies in this case. Coleman  
8 failed to obtain a stay, the purchase was made in good faith, and neither of the two exceptions  
9 articulated earlier apply. Thus, Section 363(m) precludes this Court from affecting or  
10 otherwise altering the sale approved by the Bankruptcy Court. It is not entirely clear whether  
11 Coleman is seeking relief other than to have the sale reversed or otherwise altered. In any  
12 event, even if Coleman is seeking relief other than that which would affect the sale,  
13 Coleman’s appeals also fails under a constitutional mootness analysis.

#### 14 *Constitutional Mootness*

15 An appeal from the Bankruptcy Court is constitutionally moot if it is impossible for  
16 this Court to fashion effective relief. *In re Focus Media, Inc.*, 378 F.3d 916, 922 (9th Cir.  
17 2004); *In re Gotcha Intern. L.P.*, 311 B.R. 250, 253 (B.A.P. 9th Cir. 2004). “The party  
18 asserting mootness has a heavy burden to establish that there is no effective relief remaining  
19 for a court to provide.” *In re Pintlar Corp.*, 124 F.3d 1310, 1312 (9th Cir. 1997).

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22 <sup>2</sup> Coleman relies upon *Donovan & Schuenke v. Sampsell*, 226 F.2d 804 (9th Cir.  
23 1955) for the proposition that a CEO of a debtor can never purchase the debtor’s assets.  
24 (Doc. # 62 at p. 4.) In *Donovan*, and unlike here, the purchaser was the appointed agent of  
25 the trustee and referee at the time of the sale. In any event, in this case, the sale to Franks  
26 was approved by a committee of independent directors, and only after it was determined that  
27 Franks’ offer was the only feasible alternative. To suggest that the CEO of a debtor could  
28 never purchase the debtor’s assets would work a severe limitation on the bankruptcy  
proceedings, as is evident in this case where the only viable option was selling to Franks.  
The Court has already found that Franks was a good faith purchaser. Coleman’s reliance  
upon *Donovan* is unavailing.

1 Appellees state that in reliance upon the unstayed Confirmation Order, the following  
2 transfers and transactions have taken place:

3 1. The transfer of all of the Acquired Assets to Castle Megastore Group  
4 (“CMG”);

5 2. The payment by CMG of the \$800,000 purchase price to the  
6 Liquidating Trust;

7 3. The transfer of all of the Acquired Litigation Claims to CMG;

8 4. The termination of all of the New Castle’s employees, including the  
9 termination and cancellation of the New Castle’s employee health care Plan  
10 and the termination and cancellation of the New Castle’s 401(k) Plan;

11 5. The modification and restructure of matured loans secured by the  
12 Castle Real Properties;

13 6. The payment of over \$500,000.00 to several administrative  
14 claimants;

15 7. The payment of over \$180,000.00 to the Arizona Department of  
16 Revenue;

17 8. The filing of articles of dissolution for New Castle and Castle Realty  
18 with the Arizona Corporation Commission;

19 9. The creation of the Liquidating Trust;

20 10. The transfer of the Castle Real Properties, as that term is defined in  
21 the Confirmation Order, to the Liquidating Trust;

22 11. The assumption of responsibility by the Liquidating Trust to collect,  
23 administer and distribute (a) the \$800,000 Purchase Price paid by CMG, (b)  
24 the proceeds from the Retained Causes of Actions, and (c) the proceeds related  
25 to the sale or transfer of the Excluded Assets;

26 12. The disbursement of funds to creditors, including persons holding  
27 administrative claims pursuant to terms of the Restated Plan and the  
28 Liquidating Trust Agreement;

13. The closing of store No. 18;

14. CMG has entered into an agreement with a landlord for the  
operation of a CMG store;

15. CMG has hired all, or substantially all, of New Castle’s former  
employees and has acquired health care and 401(k) Plans for its new  
employees.

(Doc. # 54 at p. 15.)

1 Coleman responds to the above transactions in an attempt to demonstrate existent  
2 forms of relief that can be fashioned to preclude the rendering of his appeal moot. First,  
3 Coleman suggests that if the Court finds grounds for reversal, it can simply reverse the sale.  
4 However, as discussed above, this option is precluded by Section 363(m). Indeed, many of  
5 Coleman's proffered forms of relief rely either explicitly or implicitly on reversing the sale  
6 in violation of Section 363(m). To the extent any form of relief is premised upon reversing  
7 the sale, it must be rejected.

8 Next, Coleman asserts that in the event of a reversal, the employees are going to work  
9 at the same stores and perform the same duties and, hence will not experience any change if  
10 the 2008 Plan is abandoned. While practically speaking this may be true, Coleman's  
11 statements concerning the health insurance and 401(k) plans are assumptive at best.  
12 Presumably, CMG has entered into agreements with third parties for the purposes of  
13 providing health insurance and 401(k) plans. Reversing would have an effect on third parties  
14 not involved in this appeal, an end the Court must seek to avoid at this stage of the  
15 proceedings.

16 Coleman next contends that the distributions by the Liquidating Trust should not  
17 render his appeal moot. However, to the extent reversing the distributions made by the  
18 Liquidating Trust requires this Court to reverse the sale, Coleman's contention is unavailing.

19 Coleman next argues that the commencement of dissolution proceedings for New  
20 Castle and Castle Realty should have no bearing on whether or not this Court can fashion  
21 effective relief. The Court agrees with Coleman that to the extent the dissolution proceedings  
22 are not final, they have no such bearing.

23 Coleman asserts that the notion of closing a store as somehow precluding the Court's  
24 ability to effectively fashion relief is "nonsensical, since New Castle could have simply  
25 elected to close the store for business reasons while it was operating the business." (Doc. #  
26 62 at p. 10.) What "could have" happened does not alter the fact that a store was closed in  
27 reliance upon the 2008 Plan and subsequent sale. Reversal of the Bankruptcy Court would  
28 make it impossible to reestablish a store that was closed in reliance upon the 2008 Plan.

1 Coleman next addresses Appellee’s modification and restructuring of loans secured  
2 by Castle Real Properties. Coleman simply asserts that “[t]o the extent the plan in question  
3 effected a modification of any such obligations, a reversal of the order confirming the plan  
4 would merely reinstate the prior terms of the loans.” (*Id.*) The Court disagrees. Even if this  
5 Court reversed the order confirming the 2008 Plan, the prior terms of the loans would not  
6 automatically be reinstated. Negotiations are necessary for the modification and  
7 restructuring of loans, and once such loans are modified, they cannot simply be reinstated  
8 without further negotiations. Further, Coleman provides no support for his assertion that the  
9 previous terms would automatically be reinstated. In any event, because the loans were  
10 modified and restructured, reversing the order confirming the 2008 Plan would affect third  
11 parties who are not participants in this appeal. *See In re Southwest Products, Inc.*, 144 B.R.  
12 100, 105 (B.A.P. 9th Cir. 1992) (“Effective relief could not involve overturning these aspects  
13 of the sale because to do so could affect rights of third parties.”).

14 Lastly, Coleman states that reversing the order confirming the 2008 Plan would have  
15 the effect of extinguishing the Liquidation Trust, including any of its duties and any real  
16 estate transferred to it. The Court agrees with Coleman, that to the extent extinguishing the  
17 Liquidation Trust would not affect the rights of third parties or otherwise make fashioning  
18 relief ineffective, reversal of the 2008 Plan would not be mooted on this point.

19 After reviewing the record, the Court finds that Appellees have carried their heavy  
20 burden of demonstrating that there is no effective relief remaining for this Court to provide.  
21 Much of Coleman’s arguments center around the reversal of the sale, but as discussed earlier,  
22 the Court is precluded from taking such a course of action. In any event, even if the Court  
23 were permitted to reverse the sale, the Court cannot fashion effective relief that would not  
24 either affect the rights of third parties to this appeal or create an unmanageable, piecemeal  
25 situation for the Bankruptcy Court. *See In re Roberts Farms, Inc.*, 652 F.2d 793, 797 (9th  
26 Cir. 1981) (“Certainly, reversal of the order confirming the plan of arrangement, which  
27 would knock the props out from under the authorization for every transaction that has taken  
28 place, would do nothing other than create an unmanageable, uncontrollable situation for the

1 Bankruptcy Court.”). The transfer of all the acquired assets and litigation claims have  
2 already been transferred. Various administrative claimants have been paid over \$500,000  
3 in addition to a payment of \$180,000 to the Arizona Department of Revenue, as well as the  
4 disbursement of funds to creditors. Moreover, it is impossible for the Court to unwind the  
5 store closing, the modifying and restructuring of the loans, and the agreement with a landlord  
6 for the operation of a store. Because Coleman failed to obtain a stay, the 2008 Plan has been  
7 substantially consummated<sup>3</sup>, and the Court cannot fashion effective relief, Coleman’s appeal  
8 is moot. *In re Clarke*, 98 B.R. 979, 980 (B.A.P. 9th Cir. 1989) (“It is now well recognized  
9 that when a stay of an order confirming a reorganization plan has not been obtained and the  
10 plan has been consummated, appeals seeking to attack the confirmed plan may be  
11 precluded.”).

## 12 CONCLUSION

13 The Court finds that Coleman’s appeal is moot under constitutional principles, as well  
14 as under 11 U.S.C. § 363(m). For these reasons, the Court is precluded from addressing the  
15 merits of Coleman’s appeal.

16 Accordingly,

17 **IT IS ORDERED** that decision of the Bankruptcy Court be affirmed and that Taylor  
18 R. Coleman’s Appeal from the Bankruptcy Court be denied as moot.

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22 <sup>3</sup> The Bankruptcy Code defines “substantial consummation” as:

23 (A) transfer of all or substantially all of the property proposed by the  
24 plan to be transferred;

25 (B) assumption by the debtor or by the successor to the debtor under the  
26 plan of the business or of the management of all or substantially all of the  
27 property dealt with by the plan; and

(C) commencement or distribution under the plan.

28 11 U.S.C. § 1101(2).

