FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
December 30, 2009
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE C.W. MINING COMPANY, doing business as Co-Op Mining Company, Debtor.	BAP No. UT-09-017
A-FAB ENGINEERING, INC., Appellant, v. C.W. MINING COMPANY, AQUILA, INC., KENNETH A. RUSHTON, Trustee, and STANDARD INDUSTRIES, INC., Appellees.	Bankr. No. 08-20105 Chapter 7 OPINION*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before MICHAEL, BROWN, and ROMERO, Bankruptcy Judges.

BROWN, Bankruptcy Judge.

The issue before this Court is whether Appellee Aquila, Inc. ("Aquila") provided sufficient notice to the Appellant of its motion to appoint a Chapter 11 trustee or convert the case to Chapter 7. Aquila requested and was granted an expedited hearing based on its allegations that the Debtor was engaging in unauthorized post-petition transfers of assets following the filing of an

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

involuntary Chapter 11 petition. At the time Aquila filed the motion, the Debtor had not filed its creditors' matrix or schedules, and most of the creditors did not receive notice of the motion or hearing. The bankruptcy court granted the motion, converting the case to Chapter 7. Appellant A-Fab Engineering, Inc. ("A-Fab"), an unsecured creditor with sizeable claim against the Debtor, filed a motion to vacate the conversion order claiming that it did not receive notice of the motion and had been deprived of its due process right to object and be heard on the issue of conversion. The bankruptcy court denied the motion to vacate, which resulted in this appeal. Under the particular facts and circumstances of this case, we hold that notice of the motion was adequate and we AFFIRM the decision of the bankruptcy court.

I. Background

A. General

C.O.P. Coal Development Co. ("COP") is the owner of the Bear Canyon Mine located in Utah. Prior to this bankruptcy proceeding, C.W. Mining ("Debtor") leased and operated the Bear Canyon Mine pursuant to a lease agreement with COP, the terms of which granted the Debtor the exclusive right to remove coal from the Bear Canyon Mine. In an effort to increase production and generate additional revenue, the Debtor invested in changing its mining method from continuous mining to longwall mining. At some point, a dispute arose between the Debtor and one of its customers, Aquila, Inc. ("Aquila"), which resulted in a $24.8 million judgment in favor of Aquila through federal court proceedings in Utah.

Eventually, the Debtor defaulted on the terms of its lease agreement with COP. Aquila considered Debtor's lease agreement with COP to be a valuable asset from which it could collect its judgment and was concerned that the Debtor might attempt to transfer its assets or terminate the lease to prevent Aquila from

executing and recovering its judgment.[1] In fact, both COP and the Debtor had entered into a proposed agreement to terminate the lease on January 8, 2008, if Debtor did not cure the default prior to that time.[2]

Aquila and two other creditors initiated an involuntary Chapter 11 proceeding against the Debtor on January 8, 2008 and, after protracted proceedings, the bankruptcy court issued the order for relief on September 25, 2008, making the Debtor's list of the 20 largest unsecured creditors due on September 29, 2008,[3] and its list of scheduled creditors due on October 10, 2008.[4] The Debtor failed to timely file either of these lists, uploading its creditors' matrix on October 15, 2008, and filing its schedules and list of the 20 largest creditors on October 31, 2008.[5]

After the filing of the involuntary petition, but prior to the order for relief, the Debtor continued to operate the mine in the "gap period" created by 11 U.S.C. § 303(f).[6] During the gap period, the Debtor attempted to sell its operating assets to Hiawatha Coal Company, Inc. ("the Hiawatha Transfer"). It also attempted to surrender its rights in its lease agreement with COP so that COP could enter into

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[1] The court takes judicial notice of the bankruptcy court's April 23, 2009, *Amended Memorandum Decision Denying COP Coal Development Company's Motion to Require the Trustee to Assume or Reject Lease, and Granting Trustee's Motion to Extend Time for Trustee to Assume or Reject Executory Contracts or Unexpired Leases of the Debtor*, Docket No. 588 at 4 ("*Amended Memorandum Decision*"). *See In re Telluride Income Growth LP*, 364 B.R. 407, 414-15 (10th Cir. BAP 2007) (taking judicial notice of relevant bankruptcy court records filed after the appeal).

[2] *Amended Memorandum Decision* at 5.

[3] Fed. R. Bankr. P. 1007(d) and 9006(a).

[4] Fed. R. Bankr. P. 1007(a)(2).

[5] *20 Largest Unsecured Creditors* filed by Debtor, Docket No. 250 and *Statement of Financial Affairs and Schedules* filed by Debtor, Docket No. 252.

[6] Unless otherwise indicated, all future statutory references are to the Bankruptcy Code, Title 11 of the United States Code.

a new lease with Hiawatha.[7] There has been much controversy regarding the propriety and validity of both the Hiawatha Transfer and Debtor's attempted lease termination, with the Hiawatha Transfer being the subject of a pending adversary proceeding in Debtor's bankruptcy case, and the purported lease termination being the subject of a separate appeal.

Shortly after the entry of the order for relief, on October 13, 2008, Aquila filed a Motion For Appointment of Chapter 11 Trustee or, Alternatively, To Convert Case to Chapter 7 ("Motion to Convert"). Aquila urged the bankruptcy court to appoint a Chapter 11 trustee, arguing that pre-petition and post-petition bad acts by the Debtor demonstrated that the Debtor was either unable or unwilling to act as an independent fiduciary on behalf of its creditors. In support, Aquila pointed to the Debtor's failure to make timely and complete filings of its Statement of Financial Affairs, schedules, list of creditors, monthly operating reports, and disclosure documents, as well as the Debtor's involvement in the Hiawatha Transfer and attempted lease termination during the gap period. In the alternative, Aquila requested the court convert the case to a Chapter 7.

On October 16, 2008, just three days after filing the Motion to Convert, Aquila filed an *Ex Parte* Motion to Expedite Hearing ("Motion to Expedite Hearing") on its Motion to Convert. Aquila was concerned with the potential dissipation of estate assets after reviewing public documents on file with the State of Utah's Department of Oil, Gas & Mining that showed an attempted transfer of a permit from the Debtor to Hiawatha. Neither Aquila nor the bankruptcy court, in its order granting Aquila's Motion to Expedite Hearing, served the creditors identified in the creditors' matrix which had been uploaded by the Debtor on October 15, 2008.

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[7] *November 10, 2008, Hearing Transcript* ("*Tr.*") at 18, *ll.* 20-25, *in* Appellant's Appx. at 117.

Debtor and a company closely related to it, Standard Industries, Inc. ("Standard"), opposed the appointment of a Chapter 11 trustee, arguing that as between the two forms of relief sought by Aquila, conversion would be preferable. Specifically, they argued that the Debtor could not rehabilitate as it had permanently ceased operations and disposed of all of its assets in the Hiawatha Transfer, making it impossible for the Debtor to propose a plan of reorganization under Chapter 11. The President of Debtor, Mr. Charles Reynolds, testified that other than the pending bankruptcy court issues, the Debtor had no "business activities going on."[8] Standard made the following, unqualified representations in its brief:

> In June of 2008, [the Debtor] permanently ceased operations and disposed of its assets. . . . [The Debtor] cannot be rehabilitated under Chapter 11. With the help of Standard Industries, [the Debtor] has paid over 250 unsecured employees and trade creditors in full, and now has fewer than 20 creditors, of whom four have perfected security interests in all property of [the Debtor], all but one of which do not want this case in bankruptcy.
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> . . . .
>
> The purpose of Chapter 11 is to reorganize and thereby rehabilitate the debtor. But [the Debtor] is out of business and will never be back in business. [The Debtor] lacks the employees, equipment, insurance, bonds, lease(s) and tangible assets it would need to produce coal, and lacks the financial ability to acquire those things. It has no income, and has no means of obtaining income.
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> There is no reasonable prospect for a confirmable Chapter 11 reorganization plan. Neither [the Debtor] nor a Chapter 11 trustee if appointed, nor any interested party, could submit a confirmable Chapter 11 reorganization plan that would have any reasonable prospect of rehabilitating [the Debtor].[9]

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[8] *Tr.* at 24-25, *ll.* 25, 1, *in* Appellant's Appx. at 123-124. Standard's *Memorandum in Opposition to the Motion to Convert*, filed October 31, 2008, identifies the secured creditors and the remaining unsecured creditors, including A-Fab. It represents that with the sole exception of Aquila, none of these creditors support the Debtor being in bankruptcy. *Memorandum in Opposition to the Motion to Convert* at 18-19, ¶ 12-14, *in* Appellant's Appx. at 62-63.

[9] *Memorandum in Opposition to the Motion to Convert* at 1, 29, *in* Appellant's Appx. at 45, 73.

Standard and the Debtor also advised that Standard had satisfied much of Debtor's obligations owed to unsecured creditors and trade vendors.[10] There is no indication in our record, however, as to whether it satisfied any of the debt owed to Aquila.

The bankruptcy court conducted an evidentiary hearing on the Motion to Convert on November 10, 2008, and entered an order converting the case to Chapter 7 on November 13, 2008. On November 19, 2008, an interim Chapter 7 Trustee was appointed.[11] The Rule 341 meeting of creditors convened on December 18, 2008, at which time the creditors, including A-Fab, voted in a disputed trustee election. On December 30, 2008, the Chapter 7 Trustee filed an adversary proceeding against Hiawatha to avoid the postpetition transfer of assets in the attempted sale from Debtor to Hiawatha pursuant to §§ 549 and 550.[12] Almost two months later, on February 20, 2009, A-Fab filed a Motion to Vacate the Order of Conversion ("Motion to Vacate"), claiming that it did not receive notice of the Motion to Convert or hearing. Despite having appeared at the hearing on the Motion to Convert, and having argued in favor of conversion, Standard joined A-Fab's Motion to Vacate.

At this juncture, it is necessary take note of the many interrelationships among the Debtor, COP, Hiawatha, and the Kingston family members.[13] Although Standard maintains that there is no legal relationship between the

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[10] *Tr.* at 15-16, *in* Appellant's Appx. at 114-15.

[11] *Notice of Appointment of Interim Trustee*, Docket No. 274.

[12] *Complaint*, Docket No. 341.

[13] The relationships among Debtor, COP, Hiawatha, their employees, and the Kingston family members are not highlighted in either party's appendix. *But see Amended Memorandum Decision*, Docket No. 588 at 3-9, 15. *See also Tr.* at 24-27, *in* Appellant's Appx. at 123-126, and *Debtor's Statement of Financial Affairs*, Docket No. 252.

Debtor and COP,[14] both entities are owned and operated, at least in part, by various members of the Kingston family and some of the members of the Davis County Cooperative. Carl Kingston was the Debtor's attorney in the federal district court action resulting in the judgment for Aquila. He is also the registered agent for the Debtor and COP. Carl Kingston's son, David Kingston, represents A-Fab in the bankruptcy proceeding and this appeal. Carl, David, COP and A-Fab share an identical mailing address on South State Street, Salt Lake City, Utah ("the South State Street address"). Carl Kingston's cousin, Joe Kingston, is the president of COP. Paul Kingston is a shareholder of the Debtor, COP, and Hiawatha, as well as a trustee of the Davis County Cooperative, but his relationship to Carl, Joe, and David is not clear. Charles Reynolds, in addition to acting as the president of Debtor since 2004 and the current mine manager for Hiawatha, is a member of the Davis County Cooperative, along with the current president of Hiawatha, Elliot Finley, and J.A. Gustafson (who owned 9% of Debtor). It appears to be undisputed that Standard is a related entity to Debtor, although neither party defined the precise relationship between them.

B. Notice

At the time that Aquila filed its Motion to Convert, the Debtor had not yet filed a list of its scheduled creditors nor a list of its 20 largest unsecured creditors, despite the fact that both lists were past due. Neither had Debtor filed its schedules, although by an extension granted by the bankruptcy court, those were not due until October 30, 2008. Although Aquila had received an accounts payable "open voucher report" in discovery that made reference to many of the Debtor's vendors, the report did not contain the addresses or locations for these

[14] *Memorandum in Opposition to Motion to Convert* at 3, *in* Appellant's Appx. at 47.

creditors.[15]

Without the benefit of schedules or a creditors' matrix, Aquila served notice of the Motion to Convert on all parties who had entered appearances in the bankruptcy case and on all creditors who had filed proofs of claim.[16] As A-Fab had not filed a proof of claim, had not entered an appearance, and had not requested notice in the case, Aquila did not serve notice of the Motion to Convert or hearing directly on A-Fab.

Two days after Aquila filed its Motion to Convert, on October 15, 2008, the Debtor uploaded its creditor matrix listing 142 creditors, including A-Fab. The next day, on October 16, 2008, Aquila filed its Motion to Expedite Hearing alleging unauthorized post-petition transfers of assets. Aquila did not serve the motion to expedite hearing upon all creditors and other parties of interest reflected on the creditors' matrix uploaded the previous day. Likewise, the bankruptcy court's order granting the expedited hearing was not served on all creditors reflected on the matrix. However, on October 17, 2008, the bankruptcy court issued its Notice of Meeting of Creditors pursuant to Rule 341, and served it on all creditors listed on the matrix, including A-Fab.

Among those served with a copy of the Motion to Convert and a copy of the Motion to Expedite Hearing was Carl Kingston, the registered agent for A-Fab. Aquila served the Motion to Convert and Notice of Hearing on Carl Kingston in his capacity as attorney for COP, rather than in his capacity as A-Fab's agent.

It is undisputed that A-Fab received both a copy of Aquila's proposed order, as well as the written order issued by the bankruptcy court converting the

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[15] Appellant's Appx. at 197-98.

[16] Appellant's Appx. at 19, 22.

case.[17] A-Fab attended the meeting of creditors on December 18, 2008, and voted in a disputed trustee election.[18] Despite receiving notice of the conversion in mid-November, A-Fab took no action to remedy its alleged due process violation for almost three months. Then, on February 20, 2009, A-Fab filed its Motion to Vacate.[19]

C. The Nonevidentiary Hearing on the Motion to Vacate

The bankruptcy court conducted a nonevidentiary hearing on the Motion to Vacate at which A-Fab, Standard and the Debtor argued that the bankruptcy court's original ruling converting the case should be vacated. A-Fab argued that Aquila's failure to serve it with notice of the Motion to Convert and hearing violated the notice requirements of Federal Rule of Bankruptcy Procedure 2002[20] and §1112(b)(1), denying it of its constitutional due process right to be heard on the conversion issue.

At the hearing on the Motion to Vacate, A-Fab did not clearly articulate the grounds upon which it would have opposed the conversion on November 10, 2008, the date of the conversion hearing. Rather, it made arguments for re-converting the case to a Chapter 11 as the date of the hearing on the Motion to Vacate stating:

> "[T]here's a chance that that sale could be undone. And if it is undone, and the assets are transferred back to . . . the estate, then A-Fab's position is that those assets should be used as part of a Chapter 11 reorganization rather than a liquidation.[21]

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[17] Appellant's Appx. at 84-90 and 249; *Certificate of Service on Order on Motion to Convert*, Docket No. 281.

[18] Appellant's Appx. at 190.

[19] Appellant's Appx. at 154.

[20] All future references to "Rule" shall refer to the Federal Rules of Bankruptcy Procedure, unless otherwise noted.

[21] *April 9, 2009, Transcript* at 10-11, *ll.* 22-25, 1, *in* Appellant's Appx. at (continued...)

Later in the hearing, when asked if he had anything further to add, counsel for A-Fab stated:

> On the point that Aquila makes on the fact that Standard testified that there could never be a Chapter 11 reorganization, again, that was under the assumption that the sale– that the sale would stand.
>
> And, of course, now there's been testimony in recent hearings that that could be a possibility that it will not.
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> And so if there are assets that come back into the debtor's possession, or into the estate, there, of course, is a possibility that those assets could be used to form an acceptable Chapter 11 plan among all of the creditors.[22]

Both the Debtor and Standard agreed that A-Fab might be able to propose a feasible Chapter 11 plan if the Chapter 7 Trustee were successful in recovering assets. Contrary to its position at the November 10, 2008 hearing on the Motion to Convert, where it represented to the court in a brief that "[t]here [was] no reasonable prospect for a confirmable Chapter 11 reorganization plan,"[23] Standard argued at the hearing on the Motion to Vacate that "there is a reasonable likelihood that a plan could be confirmed within a reasonable period of time in Chapter 11."[24]

Aquila opposed the Motion to Vacate on several grounds. First, it argued that A-Fab had actual notice of the Motion to Convert and hearing because its registered agent, Carl Kingston, received notice.[25] Second, it argued that A-Fab

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[21] (...continued)
208-09.

[22] *Id.* at 38-39, *ll.* 24-25, 1-11, *in* Appellant's Appx. at 236-237.

[23] *Memorandum in Opposition to the Motion to Convert* at 29, *in* Appellant's Appx. at 73.

[24] *April 9, 2009, Transcript* at 17, *ll.* 18-20, *in* Appellant's Appx. at 215.

[25] The bankruptcy court took no evidence and made no findings as to whether the notice to Carl Kingston could be imputed to A-Fab, but presumed for purposes of its ruling that A-Fab had no actual knowledge of the Motion to Convert. Our duty is not to make findings, but to review the bankruptcy court's findings for

(continued...)

received notice of the proposed order and signed order converting the case, but that it failed to seek post-judgment relief from these orders in a timely fashion. Third, it argued that because the Debtor had not yet uploaded its creditors' matrix or filed its schedules, it had no ability to serve the Debtor's creditors and had no obligation to go beyond the Debtor's open voucher report in an effort to identify and locate the creditors, especially since Standard had assumed virtually all of the unsecured debt and Aquila had no way to readily ascertain the identity and location of the remaining creditors.

The bankruptcy court found that Aquila provided sufficient notice under the circumstances of this case– an adjudicated, involuntary case for which there was no matrix on file and no list of creditors from which Aquila could obtain addresses. It further found that Aquila was not required to search the Debtor's records in order to find the addresses of creditors, especially in light of the confusion in this case as to which entities constituted actual creditors of the estate at the time Aquila filed its Motion to Convert.

II. Appellate Jurisdiction

This court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.[26] The Appellant's notice of appeal in this case was timely. Neither party elected to have this appeal heard by the United States District Court for the District of Utah. The parties have therefore consented to appellate review by this Court.

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[25] (...continued)
clear error. *Taylor v. IRS*, 69 F.3d 411, 417 (10th Cir. 1995). Without evidence as to whether Carl Kingston was aware that A-Fab was a creditor in this bankruptcy case, the record does not contain sufficient findings to permit review of the court's presumption that A-Fab had no actual notice of the Motion to Convert or hearing thereon.

[26] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-1.

A decision is considered final "if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"[27] In this case, the bankruptcy court denied A-Fab's motion to vacate the court's previous order of conversion. Nothing remains for the bankruptcy court's consideration. Thus, the decision of the bankruptcy court is final for purposes of review.

III. Standard of Review

We conduct a *de novo* review of whether the bankruptcy court proceedings violated a party's due process rights.[28] When conducting a *de novo* review, the appellate court is not constrained by the trial court's conclusions, and may affirm the trial court on any legal ground supported by the record.[29]

IV. Discussion

The Bankruptcy Code requires notice and an opportunity to be heard before converting or dismissing a Chapter 11 petition. "[O]n request of a party in interest, and after notice and a hearing . . . the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate[.]"[30] Section 102(1)(A) further provides that "after notice and hearing" means "after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances."[31] In determining what

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[27] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[28] *State Bank v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1083 (10th Cir. 1996); *U.S. v. Clark*, 84 F.3d 378, 381 (10th Cir. 1996) ("Due process issues, which call for legal conclusions, are subject to *de novo* review."); *In re Karbel*, 220 B.R. 108, 110 (10th Cir. BAP 1998).

[29] *See Wolfgang v. Mid-Am. Motorsports, Inc.*, 111 F.3d 1515, 1524 (10th Cir. 1997).

[30] 11 U.S.C. § 1112(b).

[31] 11 U.S.C. § 102(1)(A).

constitutes "appropriate" notice under § 102(1)(A), a court is guided by "fundamental notions of procedural due process."[32]

"The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending hearing."[33] "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[34] The Chapter 11 reorganization process in particular "depends upon all creditors and interested parties being properly notified of all vital steps in the proceeding so they may have the opportunity to protect their interests."[35] "[A] fundamental purpose of the Federal Rules of Bankruptcy Procedure is to set forth what process is due in various categories of bankruptcy matters."[36] When a notice provider complies with the rules, there is a presumption that satisfies the due process requirement that notice be "reasonably calculated" to apprise parties of their rights.[37]

In the instant case, Bankruptcy Rules 2002(a)(4) and (g) set forth the applicable notice requirements. Bankruptcy Rule 2002(a)(4) requires that twenty-days notice by mail be given to "all creditors" of "the hearing on the

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[32] *W. Auto Supply Co. v. Savage Arms, Inc., (In re Savage Indus., Inc.)*, 43 F.3d 714, 721 (1st Cir. 1994).

[33] *In re Gledhill*, 76 F.3d at 1083 (quoting *Memphis Light, Gas & Water Div. v Craft*, 436 U.S. 1, 14 (1978)).

[34] *Id.* (quoting *Memphis Light, Gas & Water Div. v Craft*, 436 U.S. at 13).

[35] *Reliable Elec. Co. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984).

[36] *In re Stacy*, 405 B.R. 872, 878 (Bankr. N.D. Ohio 2009).

[37] *Id.*; *In re Boykin*, 246 B.R. 825, 828 (Bankr. E.D. Va. 2000) ("The Federal Rules of Bankruptcy Procedure and the Bankruptcy Code were designed to satisfy the due process requirement of adequate notice to parties whose interests may be affected.").

dismissal of the case or the conversion of the case to another chapter[.]" Rule 2002(g) prescribes rules to be implemented by a notice provider in mailing and addressing the notices. It provides that notice to creditors under the rule must be addressed as the creditor has directed in its last request filed in the particular case, including a proof of claim designating a specific mailing address.[38] It further states that if the creditor does not have an address on file, "the notices shall be mailed to the address shown on the list of creditors or schedule of liabilities, whichever is filed later."[39]

The provisions in Rule 2002(g) are predicated on the assumption that the names and addresses of creditors are already on file with the court either because the debtor has filed its creditor lists and schedules, or because the creditor has filed a proof of claim or statement of interest, none of which happened in this case. A-Fab takes the position that because Aquila did not serve it or the other unsecured creditors with notice of the Motion to Convert or hearing, notice was deficient under the plain language of Rule 2002(a)(4) which requires that "all creditors" be served. Aquila, on the other hand, maintains that Rules 2002(a)(4) and (g), when read together, require service only on creditors who have filed a request for notice, a proof of claim, a proof of interest, or alternatively, are shown on the list of creditors or schedule of liabilities. As A-Fab did not meet this criteria, Aquila asserts that it provided adequate notice pursuant to the literal language of the rule.

Whether Aquila served notice in literal compliance with the Rules is not a helpful analytical tool in this instance, as none of the creditors' names or addresses were on file with the bankruptcy court. We must look beyond the concept of rule compliance in order to determine whether due process was

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[38] Fed. R. Bankr. P. 2002(g)(1).

[39] Fed. R. Bankr. P. 2002(g)(2).

afforded to A-Fab. In considering whether notice was reasonably given, "[t]he proper inquiry is whether the [noticing party] acted reasonably in selecting means likely to inform persons affected, not whether each property owner actually received notice."[40] Due process is a flexible concept calling for "such procedural protections as the particular situation demands."[41] Adequacy of notice is evaluated by reference to the surrounding context, and is dependent on the particular facts and circumstances of each case.[42]

The instant facts and circumstances do not suggest an obvious outcome of the due process issue. Prior to filing the Motion to Convert, Aquila had access to an open voucher report that referenced by name some of the Debtor's creditors, including A-Fab. After Aquila filed its Motion to Convert, but prior to the evidentiary hearing, the Debtor uploaded its creditors' matrix and filed its schedules and list of 20 largest creditors. Had Aquila independently researched the information on the open voucher report or monitored the bankruptcy court docket, it could have provided formal notice of the Motion to Convert to A-Fab prior to the hearing. These facts suggest that, under all the circumstances, Aquila did not provide notice reasonably calculated to apprise A-Fab of the hearing.

Other facts suggest a contrary result. At the time Aquila filed the Motion to Convert, it had no information from which it could readily ascertain the identity and location of the Debtor's creditors. The difficulty of serving creditors without the benefit of the Debtor's schedules or list of creditors was compounded by

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[40] *Weigner v. City of New York*, 852 F.2d 646, 649 (2d Cir.1988), *cited in Smith v. Toronto-Dominion Bank*, 166 F.3d 1222 at *3 (10th Cir. 1999) (unpublished); *DePippo v. Kmart Corp.*, 335 B.R. 290, 295 (S.D.N.Y. 2005).

[41] *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *In re Parcel Consultants, Inc.*, 58 F. App'x 946, 950 (3rd Cir. 2003).

[42] *Pearl-Phil GMT v. Caldor Corp.*, 266 B.R. 575 (Bankr. S.D.N.Y. 2001); *In re Standard Metals Corp.*, 48 B.R. 778 (Bankr. D. Colo. 1985), *aff'd* on other grounds, 817 F.2d 625 (10th Cir. 1987).

confusion over the identity of creditors given that Standard, an entity closely related to the Debtor, had satisfied many of the unsecured claims against the Debtor.

It was the Debtor's burden to accurately complete its schedules, not Aquila's. Debtors are expected to use reasonable diligence in completing their schedules and lists under Rule 1007.[43] "Reasonable diligence does not require impractical and extended searches . . . in the name of due process."[44] Generally, ambiguities regarding information contained in a debtor's schedules are construed against the debtor as the drafter and as the party most familiar with the information.[45] In this case, the notice provider was a creditor, not the Debtor. As a creditor, Aquila was not responsible for providing the information upon which proper notice relies. Nor did it have familiarity with or access to books and records which would have allowed it to serve all creditors. There is no indication from the record that, apart from the open voucher report, Aquila had any information about the identity and location of the Debtor's creditors. Under these facts, it would not be fair to penalize Aquila for the Debtor's failure to meet its obligations.

With little or no access to the Debtor's books and records, Aquila cannot be expected to conduct what would have been a tedious and exhaustive investigation into the identity and location of the Debtor's creditors. While it may have been possible for Aquila to monitor the court's docket in anticipation of the Debtor

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[43] *In re Stacy*, 405 B.R. 872, 879 (Bankr. N.D. Ohio 2009).

[44] *Selman v. Delta Airlines*, No. CIV 07-1059, 2008 WL 6022017 at *14 (D.N.M. 2008) (internal quotation marks omitted); *In re J.A. Jones, Inc.*, 492 F.3d 242, 250 (4th Cir. 2007) ("[W]hat is required is not a vast, open-ended investigation. Instead, '[t]he requisite search . . . focuses on the debtor's own books and records. Efforts beyond a careful examination of these documents are generally not required.'") (quoting *Chemetron Corp. v. Jones*, 72 F.3d 341, 347 (3rd Cir. 1995)) (footnote omitted).

[45] *In re Stacy*, 405 B.R. at 879.

filing its schedules, and while it may have been possible for Aquila to extract the names of potential creditors from the open voucher report and to then verify each entity's status as a creditor and research the appropriate mailing addresses, it was not obligated to do so. Aquila is a creditor in an involuntary proceeding that, at the time it filed its Motion to Convert, had no access to information from which it could readily identify and locate the Debtor's creditors.

Moreover, the emergency nature of Aquila's Motion weighs heavily in this Court's analysis. Concerned with the Debtor's willingness to act as an independent fiduciary and the potential dissipation of estate assets, Aquila could not wait indefinitely for the Debtor to comply with its obligations. We decline to impose such a burden on this creditor and conclude that, under the particular facts of this case, Aquila provided sufficient notice of the Motion to Convert.

In addition, we observe that the bankruptcy court provided A-Fab with an opportunity to present its objections to the Motion to Convert in the hearing on A-Fab's Motion to Vacate. A-Fab's Motion to Vacate, as a motion for post-judgment relief, could have been considered by the bankruptcy court under the more stringent standards for relief under Rule 60(b). The bankruptcy court did not limit the substance of the hearing on the Motion to Vacate to the Rule 60(b) criteria, and instead permitted A-Fab to raise any ground upon which it would have opposed the merits of the underlying Motion to Convert, thereby affording A-Fab due process.[46]

Given this opportunity, A-Fab argued it was possible to propose a

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[46] *See In re Bartle*, 560 F.3d 724, 730 (7th Cir. 2009) (where court ruled on motion to dismiss prior to either a hearing or an opportunity to respond, the post-judgment motion for relief provided movant with opportunity to be heard satisfying due process concerns). This Court is not suggesting that complete denial of notice is harmless, rather we conclude that the briefing and hearing the bankruptcy court permitted in connection with the Motion to Vacate afforded A-Fab an opportunity to be heard. *Id.*; *Turney v. FDIC*, 18 F.3d 865, 868 (10th Cir. 1994).

"carefully crafted" plan of reorganization using any assets recovered by the Chapter 7 Trustee. A-Fab was unable to articulate any basis for a confirmable plan apart from any potential recovery of assets that might occur in the Chapter 7 proceeding. Obviously, this argument would not have been available to A-Fab at the time of the conversion hearing as there was no Chapter 7 Trustee in place,[47] a point considered by the bankruptcy court in denying the Motion to Vacate.[48] It was incumbent on A-Fab to proffer evidence necessary to support the relief it requested in its Motion to Vacate. It failed to do so.

The decision to convert a Chapter 11 proceeding pursuant to § 1112(b) is one within the court's discretion. Conversion is appropriate if it is unreasonable to expect that a plan of reorganization can be confirmed. The Debtor's and Standard's representations that the Debtor had no assets, no income, no business, and no prospects of obtaining any of these, support the notion that reorganization was unlikely. As a general matter, the "existence of an ongoing business is an inherent requirement for relief under chapter 11."[49] A-Fab provided the bankruptcy court with no reason to believe that it had a potentially meritorious basis upon which to oppose the Motion to Convert and that any deprivation of notice prejudiced it.

Finally, A-Fab's due process argument is perplexing in light of the fact that A-Fab knew of the conversion for over three months before seeking post-judgment relief in the Motion to Vacate. On November 11, 2008, Aquila served A-Fab with a proposed order converting the case to Chapter 7, and approximately

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[47] This Court is not aware of any efforts by the Debtor to recover the assets transferred to Hiawatha.

[48] *April 9, 2009, Transcript* at 15-17, 38-40, *in* Appellant's Appx. at 213-215, 237-238.

[49] *In re Blue Mountain Invs., Inc.*, No. 90-4175S, 1991 WL 49710 at *3 (D. Kan. 1991).

one month later, A-Fab attended the meeting of creditors and participated in a trustee election. Nonetheless, A-Fab sat by for three months while the Chapter 7 Trustee worked diligently to recover assets for the estate. By all appearances, A-Fab waited until the prospect of recovering assets became promising and then decided it would be more advantageous to participate as a creditor in a Chapter 11 reorganization. It would undermine the orderly disposition of assets essential to bankruptcy proceedings if creditors were allowed to adopt a "wait and see" approach before raising due process concerns.

V. Conclusion

For the foregoing reasons, the bankruptcy court's order denying A-Fab's Motion to Vacate is AFFIRMED.