

AUG 09 2012

NOT FOR PUBLICATION

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. MT-11-1574-JuHPa
) BAP No. MT-11-1575-JuHPa*
6 EDRA D. BLIXSETH,) (related appeals)
))
7 Debtor.) Bk. No. 09-60452
))
8 WESTERN CAPITAL PARTNERS, LLC,) Adv. No. 09-00105
))
9 Appellant,)
))
10 v.) M E M O R A N D U M**
))
11 ATIGEO LLC; XPATTERNS, LLC;)
12 RICHARD J. SAMSON, Chapter 7)
13 Trustee; EDRA D. BLIXSETH;)
14 OPSRING, LLC; BLXWARE, LLC;)
15 JOSEPH V. WOMACK, Trustee for)
16 the Chapter 7 Estate of)
17 Matthew Crocker; HMJZ, LLC;)
18 HEATHER SANDOVAL; MICHAEL)
19 SANDOVAL; JULIE BARVE,)
20)
21 Appellees.)
22)
23)

Argued and Submitted on July 20, 2012
at Pasadena, California

Filed - August 9, 2012

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

Honorable John L. Peterson, Bankruptcy Judge, Presiding
Honorable Ralph B. Kirscher, Bankruptcy Judge, Presiding

* While not formally consolidated, these two related appeals were heard at the same time and were considered together. This single disposition applies to the two appeals, and the clerk is directed to file a copy of this disposition in each appeal.

** This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appearances: Robert W. Hatch, II, Esq. of Hatch Ray Olsen LLC
2 argued for appellant, Western Capital Partners,
3 LLC; David Brian Cotner, Esq. of Datsopoulos,
4 MacDonald & Lind, P.C. argued for appellee Richard
5 J. Sampson, Chapter 7 trustee; Brian Chung Park,
6 Esq. of Stoel Rives LLP argued for appellees
Atigeo, LLC and xPatterns, LLC; Roland Karim
Tellis, Esq. of Baron & Budd, P.C. appeared for
appellees Michael Sandoval and Heather Sandoval
and HMJZ, LLC.

7 Before: JURY, HOLLOWELL, and PAPPAS, Bankruptcy Judges.
8

9 In BAP No. 11-1574, secured creditor-appellant, Western
10 Capital Partners, LLC ("WCP"), appeals from the bankruptcy
11 court's order approving a settlement under Rule 9019¹ among
12 appellees, chapter 7 trustee, Richard J. Samson ("Samson" or
13 "Trustee"), and Michael Sandoval ("Sandoval"), xPatterns, LLC
14 ("xPatterns") and Atigeo, LLC ("Atigeo") (collectively, we refer
15 to Sandoval, xPatterns and Atigeo as the "Atigeo Parties").

16 The bankruptcy court's approval of the settlement was
17 contingent on its approval of a stipulated declaratory judgment
18 on Count I in an adversary proceeding brought by Atigeo and
19 xPatterns (collectively, "Plaintiffs") against the Trustee, Edra
20 Blixseth ("Edra" or "Debtor") and others, and to which WCP joined
21 as a party defendant. In BAP No. 11-1575, WCP appeals the
22 bankruptcy court's entry of the stipulated declaratory judgment
23 on Count I.

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26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and "Civil Rule" references are to the Federal Rules
of Civil Procedure.

1 In contrast, repudiation of the agreement paved the way for
2 the Trustee to pursue certain tort claims against the Atigeo
3 Parties which existed in March 2007, but were subject to a broad
4 release provision contained in the Letter Agreement. Those tort
5 claims, which were not yet ripe for adjudication until
6 repudiation of the Letter Agreement was established under
7 Count I, were the subject of the settlement under Rule 9019.

8 The Trustee and Atigeo Parties sought approval of the
9 Stipulation and, without a hearing, the bankruptcy court granted
10 the requested relief and entered judgment. The next day, at
11 WCP's request, the court issued an order holding the judgment in
12 abeyance and set the matter for hearing on September 7, 2011 (the
13 "September 7th Hearing"). The September 7th Hearing on the
14 Stipulation was combined with the hearing on the settlement.

15 The Trustee was the only witness at the September 7th
16 Hearing. After the hearing, the bankruptcy court took the
17 matters under advisement. The parties submitted additional
18 briefs and proposed Findings of Fact and Conclusions of Law. In
19 a Memorandum Decision and Order, the court approved the
20 Stipulation, entered a declaratory judgment on Count I and
21 approved the settlement of the estate's tort claims against the
22 Atigeo Parties for \$1.25 million. WCP moved for reconsideration
23 of the court's decisions. After a hearing, the bankruptcy court
24 denied WCP's reconsideration requests in a Memorandum Decision.

25 WCP's primary challenge on appeal is to the bankruptcy
26 court's entry of the stipulated declaratory judgment on Count I.
27 WCP argues that the bankruptcy court's decision approving the
28 judgment was plagued by numerous procedural errors, including,

1 among others, that the bankruptcy court lacked jurisdiction to
2 enter judgment in the adversary proceeding on WCP's contractual
3 claims against nondebtors, that the court erred by treating the
4 hearing on the approval of the Stipulation as a de facto motion
5 for summary judgment in the adversary proceeding without
6 procedural protections, and that the court deprived WCP of
7 procedural due process by approving the Stipulation through the
8 guise of a Rule 9019 settlement. As a result, WCP seeks reversal
9 of the declaratory judgment on procedural due process grounds.

10 After a review of the extensive record provided, we conclude
11 that the bankruptcy court had jurisdiction to enter judgment on
12 Count I with respect to all parties involved in the adversary
13 proceeding. However, for the reasons discussed below, we agree
14 that WCP was denied procedural due process before the court
15 entered the declaratory judgment. Accordingly, we VACATE the
16 judgment and orders on appeal and REMAND for further proceedings.

17 I. FACTS

18 A. Edra's Relationship With the Atigeo Parties

19 Sometime in 2006, Sandoval, the CEO for Atigeo and
20 xPatterns,² persuaded Edra to invest \$15 million in xPatterns.
21 Edra invested \$10 million and allegedly agreed that xPatterns
22 could loan \$5 million of that amount to Sandoval so that he could
23 purchase a home in Kirkland, Washington. In early 2007, a
24 disagreement developed between Sandoval and Edra about the terms
25
26

27
28 ² Atigeo and xPatterns are affiliated software development
and sales companies. Atigeo was formerly known as Azimyth, LLC.

1 of xPatterns' loan to Sandoval.³ In addition, Edra was unable to
2 make the final \$5 million investment in xPatterns.

3 Edra had also invested \$8 million in Opspring, LLC
4 ("Opspring"), a start-up company formed to develop technology
5 used by governments. Opspring was a subsidiary of Atigeo and
6 owned by Sandoval. Opspring had hired Dennis Montgomery
7 ("Montgomery") to develop certain products. Before working for
8 Opspring, Montgomery had been employed by eTreppid Technologies,
9 LLC ("eTreppid"). eTreppid filed an action against Opspring
10 alleging, among other things, that Montgomery had converted
11 eTreppid property, interfered with and misappropriated eTreppid
12 business relationships, and misappropriated eTreppid trade
13 secrets for Opspring's benefit.

14 While this litigation was pending, Edra demanded the return
15 of her full investment of capital in xPatterns and, in exchange,
16 she offered to relinquish her ownership interest in xPatterns and

17
18 ³ The record shows that there was a dispute as to whether
19 Edra agreed to the loan from xPatterns to Sandoval. According to
20 the Trustee's third-party complaint filed in the adversary (which
21 we discuss below), Sandoval converted the funds and once Edra
22 found out, Sandoval agreed to repay the "loan" in thirty to sixty
23 days. At an October 12, 2010 hearing, the Trustee stated on the
24 record that "at one point in time [Edra] alleged that
25 Mr. Sandoval had wrongfully diverted money to his benefit." Hr'g
26 Tr. 16:15-16, Oct. 12, 2010. Later, the Trustee submitted Edra's
27 and Sandoval's affidavits in support of the Stipulation.
28 Sandoval's affidavit states that Edra agreed to the loan. Edra's
affidavit does not mention the loan. At the September 7th
Hearing on the approval of the Stipulation, the Trustee stated
that it would be difficult to establish the wrongful taking of
money when Edra gave her permission to Sandoval to take the loan
from xPatterns. Further, the advances were classified as loans
on xPatterns financial statements and there was evidence that the
loans owed to xPatterns by Sandoval were later satisfied. Hr'g
Tr. 72-73, Sept. 7, 2011.

1 obtain full ownership of Opspring. To resolve these disputes,
2 the parties negotiated and entered into the Letter Agreement.

3 The parties agreed to convert the \$10 million equity
4 interest that Edra (and her family members) held in xPatterns
5 into a \$10 million debt obligation from xPatterns to the Blixseth
6 family. The agreement also provided that Edra would assume
7 complete ownership of Opspring, including all liabilities. In
8 exchange for the conversion of Edra's equity position in
9 xPatterns into a debt position, and the transfer of all ownership
10 in Opspring to Edra, xPatterns and Atigeo required certain
11 performance from Edra and Opspring, which Edra would control.

12 The terms of the Letter Agreement required Opspring⁴ to
13 indemnify, defend, and hold harmless the Atigeo Parties with
14 respect to all claims, causes of action, liability and damages
15 arising out of or related in any way to the eTreppid litigation
16 or Opspring's relationship with Montgomery. Edra also agreed
17 that Opspring would pay Atigeo quarterly performance fees equal
18 to 5% of Opspring's revenue (up to a maximum of \$15 million).
19 The first \$5 million of this 5% royalty was to be used to off-set
20 the debt obligations imposed upon xPatterns by Edra in the Letter
21 Agreement.

22 Finally, the Letter Agreement required xPatterns to sign a
23 promissory note for \$10 million payable to Edra. xPatterns
24 satisfied the first \$2 million owed through agreed upon set-offs
25 and a payment of \$382,568 on March 10, 2008. The remaining \$8

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27 ⁴ Blxware, LLC ("Blxware") is a company controlled by Edra
28 and is the successor-in-interest to some if not all of Opspring's
rights and obligations under the Letter Agreement.

1 million, \$5 million of which was unconditionally guaranteed by
2 Sandoval, was never paid.

3 Following the execution of the Letter Agreement, Edra
4 allegedly induced third parties to breach confidentiality
5 agreements that they had with Atigeo and provide her and Opspring
6 with its proprietary information. Edra also failed to cause
7 Opspring to pay performance fees or defend the Atigeo Parties in
8 the eTreppid litigation.

9 On September 23, 2008, Atigeo and xPatterns filed an action
10 in the Washington Superior Court against Edra and others that
11 related to the parties' rights and responsibilities under the
12 Letter Agreement (the "Washington Action").⁵

13 **B. Edra's Relationship with WCP**

14 After the execution of the Letter Agreement, Edra guaranteed
15 a \$13,650,000 loan made to her son by WCP and pledged certain
16 personal property as collateral for the loan. WCP held a
17 perfected security interest in virtually all of Edra's lienable
18 personal property pursuant to a security agreement executed by
19 her on June 5, 2007, in favor of WCP. Included in WCP's security
20 agreement were, among other things, all of Edra's contractual
21 rights in the Letter Agreement and the related Note.

22 **C. Bankruptcy Events**

23 On March 26, 2009, Edra filed for chapter 11 relief. In
24

25 ⁵ Prior to this lawsuit, Edra had commenced an action in the
26 Washington Superior Court, Blixseth v. Atigeo, LLC et al. (Case
27 No. 08-2-18054-4) in connection with the Letter Agreement and the
28 balance owed on the Note. Edra's complaint was dismissed with
prejudice because the suit was filed prematurely as no money was
yet due. Hr'g Tr. 102:2-14, Sept. 7, 2011.

1 Schedule B, Edra listed the receivable of \$8 million due from
2 xPatterns/Sandoval. Edra listed eTreppid as her largest
3 unsecured creditor owed \$20 million. On May 29, 2009, Edra's
4 case was converted to chapter 7 and Samson was appointed the
5 trustee.

6 On October 2, 2009, Atigeo and xPatterns filed unliquidated
7 proofs of claim ("POC") in Edra's case. The POCs were identical
8 and primarily based on the allegations in the Washington Action
9 and Edra's breaches of the Letter Agreement.

10 **The Adversary Complaint**

11 On December 7, 2009, Atigeo and xPatterns filed an adversary
12 complaint against Samson, Edra, Opspring, Blxware, and others.⁶
13 The factual allegations and demands set forth in the complaint
14 were virtually identical to those alleged in the POCs. In total,
15 the Plaintiffs alleged sixteen Counts with fifteen of those
16 Counts seeking offsets or damages arising under the Letter
17 Agreement and other relief.⁷ If the Plaintiffs succeeded on
18 Count I, entitled "Declaratory Judgment Regarding Repudiation of
19 Letter Agreement," and repudiated the Letter Agreement, the
20 remaining Counts asserted in the complaint became moot.

21
22 ⁶ The other defendants were Julie Barve ("Barve") and
23 Matthew Crocker ("Crocker"), family members of Edra, and Erik
24 Bergsagel. The bankruptcy court entered default judgments
against Opspring and Blxware on May 27, 2011.

25 ⁷ Other Counts asserted against the Trustee/Edra included:
26 Declaratory Judgment Regarding Blixseth Family Interest; Breach
27 of Contract (Indemnification); Breach of Contract (Performance
28 Fee); Breach of Contract (Confidentiality); Breach of Contract
(Return of Property); Tortious Interference; Trade Secret
Misappropriation; Conversion; Civil Conspiracy; and Injunctive
Relief.

1 Plaintiffs filed a copy of the adversary complaint in the main
2 bankruptcy case.

3 **The Trustee's Answer, Counterclaim and Third-Party Complaint**

4 On February 10, 2010, the Trustee filed an answer, a
5 counterclaim against Plaintiffs, and a third-party complaint
6 against Sandoval, Heather Sandoval, and HMJZ LLC (the "Sandoval
7 Parties"). In his counterclaim and third-party complaint, the
8 Trustee asserted thirteen Counts based on Sandoval's alleged
9 conversion of Edra's \$5 million investment in xPatterns that he
10 used without authority, or Edra's consent, to purchase the real
11 property in Kirkland, Washington and his numerous
12 misrepresentations to Edra regarding the technology owned by
13 Atigeo and xPatterns. In Count I of the counterclaim and third-
14 party complaint, the Trustee alleged that due to the fraudulent
15 representations made by the Atigeo Parties, Debtor was induced to
16 enter into the Letter Agreement. As a result, the Trustee
17 requested a declaratory ruling that the Letter Agreement was
18 void.⁸

19 The Sandoval Parties moved to dismiss the Trustee's third-
20 party complaint on res judicata grounds, contending that the
21 claims and allegations were identical to those Edra previously
22 asserted against them in her state court action, Blixseth v.
23 Atigeo, LLC et al. (Case No. 08-2-18054-4). That action was
24 dismissed with prejudice on the basis that Edra's claims were
25 premature since no money was yet due on the Note. The Sandoval

26
27 ⁸ In essence, then, the Trustee agreed with Plaintiffs that
28 the Letter Agreement should be repudiated and declared
unenforceable, albeit for different reasons.

1 Parties further alleged that the Trustee's fraud claims failed to
2 comply with Civil Rule 9(b) and the non-fraud claims failed to
3 state a claim for relief. Plaintiffs moved to dismiss the
4 counterclaim on essentially the same grounds. The bankruptcy
5 court denied the motions and gave the Trustee until July 6, 2010
6 to amend. On July 6, 2010, the Trustee filed his amended
7 counterclaim and third-party complaint.

8 **The Trustee's Motion For Second-Amended Counterclaim and**
9 **Third-Party Complaint And Motion to Bifurcate the Trial**

10 On August 31, 2010, the Trustee moved to file a second
11 amended counterclaim and third-party complaint because he did not
12 believe he had "active tort claims" against the Atigeo Parties
13 due to the broad releases in the Letter Agreement. The Trustee
14 admitted that these contingent tort claims did not exist unless
15 the Plaintiffs prevailed on their declaratory relief action to
16 repudiate the Letter Agreement under Count I in the adversary
17 complaint. Hr'g Tr. 9:15-19, Oct. 12, 2010.

18 Also on August 31, 2010, the Trustee filed a Motion to
19 Bifurcate the trial in the adversary proceeding pursuant to
20 Rule 7042.⁹ The Trustee sought to have the court first determine
21 whether the Letter Agreement was unenforceable under Count I and,
22 if so, to then try the Trustee's dormant, or "contingent" tort
23 claims.

24 The Sandoval and Atigeo Parties opposed the Trustee's
25

26 ⁹ Rule 7042 authorizes the court to have separate trials of
27 one or more separate issues, claims, crossclaims, counterclaims,
28 or third-party claims for convenience, to avoid prejudice, or to
expedite and economize.

1 motions. They opposed the motion to bifurcate on the grounds,
2 among others, that the facts and issues relevant to the formation
3 of the Letter Agreement and the parties' performance or non-
4 performance thereunder were inextricably intertwined with the
5 facts and legal theories underlying the Trustee's "contingent"
6 tort claims. The Parties maintained that, if anything, the
7 Trustee's motion to bifurcate demonstrated that his tort claims
8 would only "stay alive" in the event the bankruptcy court
9 invalidated the Letter Agreement. This supported, the Parties'
10 argued, dismissal of the Trustee's "contingent" tort claims, but
11 did not justify piecemeal litigation, both of which revolved
12 around materially similar facts.

13 On October 12, 2010, the court heard the Trustee's motions,
14 along with other matters. With counsel for the Trustee, the
15 Atigeo Parties, the Sandoval Parties, and WCP present, the
16 bankruptcy court questioned whether Count I could be "dealt with
17 on summary judgment." Hr'g Tr. 10:7-8, Oct. 12, 2010. Counsel
18 for the Sandoval Parties answered that it "would depend on,
19 obviously, the discovery." Id. at 10:16-17.

20 The bankruptcy court ultimately denied the Trustee's motion
21 to bifurcate without prejudice and denied the Trustee's motion to
22 amend. The court found that the Trustee's tort claims were not
23 "ripe" and, therefore, ruled that the Trustee's original
24 counterclaim and third-party complaint filed February 1, 2010,
25 were the operative pleadings.

26 After the hearing, the Trustee filed a notice of dismissal
27 of his original pleadings without prejudice. The bankruptcy
28 court dismissed the Trustee's counterclaim and third-party

1 complaint by order entered on October 13, 2010.

2 **WCP's UCC Foreclosure Sale**

3 On March 9, 2010, WCP submitted a Notice of UCC Public Sale
4 that certain collateral was to be sold at a public sale on
5 March 22, 2010. WCP's notice included the sale of all accounts
6 receivable and/or contract rights of Edra D. Blixseth in which
7 WCP had a perfected security interest.

8 WCP had the right to foreclose due to the fact that Edra had
9 failed to timely file her Statement of Intention under § 521.
10 Therefore, under § 362(h), all her personal property secured by
11 WCP's debt was released from the automatic stay. See In re
12 Blixseth, 684 F.3d 865.

13 On March 19, 2010, three days prior to the sale, Atigeo and
14 xPatterns filed a Notice of Potential Impact in Debtor's main
15 bankruptcy case, which provided notice of their allegation that
16 Edra had failed to meet her obligations under the Letter
17 Agreement.

18 At the March 22, 2010 sale, WCP purchased, among other
19 personal property assets, the contract claims and accounts
20 receivable arising out of the Letter Agreement for \$250,000.

21 **WCP'S Motion to "Intervene"**

22 On March 29, 2010, WCP filed an Unopposed Motion to
23 Intervene in the adversary proceeding.¹⁰ The bankruptcy court
24

25 ¹⁰ Although WCP titled its pleading "Unopposed Motion to
26 Intervene", WCP relied on Civil Rule 20(a) which allows
27 permissive joinder of parties, and not Civil Rule 24, which sets
28 forth the requirements for intervention. Civil Rule 20(a),
authorizes persons to join an action as a defendant if: (A) any
(continued...)

1 granted the motion by order entered March 30, 2010.

2 WCP later filed a motion to file a third-party complaint.
3 The bankruptcy court heard WCP's motion on October 12, 2010.
4 During that hearing, WCP stated that it had foreclosed on Edra's
5 contract rights under the Letter Agreement and, as owner of the
6 contract rights, sought to file a third-party complaint against
7 the Atigeo Parties to collect on the Note. At that time, WCP's
8 counsel affirmed that "we do not have any tort claims related to
9 this matter, and those would still rest with the trustee." Hr'g
10 Tr. 46:22-23, Oct. 12, 2010.

11 Also at that hearing, the parties and the court discussed
12 whether WCP should file an answer to the complaint given that it
13 had stepped into the shoes of the Trustee on the contract claims
14 after it had foreclosed on Edra's contract rights. WCP
15 maintained that it would make more sense for the Plaintiffs'
16 complaint to actually assert what claims it had against WCP so
17 that WCP could answer the complaint in a clear way. In the end,
18 the bankruptcy court authorized WCP to answer the complaint as a
19 defendant by stating its interest in the litigation and answering
20 whatever Counts it thought appropriate. Plaintiffs never amended
21 their complaint to include reference to WCP.

22 **WCP'S Answer and Third-Party Complaint**

23 On November 3, 2010, WCP filed an answer and third-party

24 ¹⁰(...continued)
25 right to relief is asserted against them jointly, severally, or
26 in the alternative with respect to or arising out of the same
27 transaction, occurrence, or series of transactions or
28 occurrences; and (B) any question of law or fact common to all
defendants will arise in the action. There is no indication in
the record whether these requirements were met.

1 complaint against the Atigeo Parties.

2 WCP's answer included a Preliminary Statement on Procedure
3 in which it stated that it was an interested party due to its
4 status as a secured creditor of the Debtor and as the party which
5 foreclosed on certain interests of Edra which were the subject of
6 the underlying complaint. In its answer, WCP stated that it was
7 unable to respond to the vast majority of allegations set forth
8 in the adversary complaint for lack of sufficient information.¹¹
9 In the third-party complaint, WCP sought to enforce the Letter
10 Agreement and collect the \$8 million due under Note, including
11 \$3 million from Sandoval due on his guarantee. On December 28,
12 2010, WCP filed notice that it was dismissing, without prejudice,
13 all claims against Atigeo.¹²

14 **The Mediation**

15 All parties to the adversary proceeding participated in a
16 private mediation on June 16, 2011. During that mediation, the
17 Trustee and the Atigeo Parties negotiated a framework for a
18

19 ¹¹ Although WCP professed to be nothing more than Edra's
20 creditor, and despite the fact that it had assumed no liabilities
21 under the Letter Agreement, WCP answered all the Counts in the
22 adversary complaint. WCP also asserted as an affirmative defense
23 that the Plaintiffs' complaint failed due to their breach of the
24 Letter Agreement.

25 ¹² It is unclear from the record why WCP dismissed Atigeo
26 from the third-party complaint. However, the docket shows that
27 after dismissing Atigeo, WCP sought to amend its third-party
28 complaint to seek declaratory relief on the issue whether
xPatterns was the alter ego of Atigeo. WCP alleged that such a
determination was necessary to determine Atigeo's obligations
under the Letter Agreement. The bankruptcy court granted WCP's
motion to amend by order entered May 23, 2011. Atigeo answered
the amended third-party complaint on June 10, 2011.

1 possible settlement with respect to Count I in the adversary and
2 the Trustee's contingent tort claims. WCP's participation in the
3 mediation was limited. Hr'g Tr. 28:10-11, Sept. 7, 2011.

4 **The Scheduling Order**

5 Pursuant to the parties' stipulation and proposed amended
6 scheduling order, the bankruptcy court entered an order on
7 June 22, 2011, extending certain pretrial dates in connection
8 with the adversary. The court declined however to reschedule the
9 trial which was set for September 26-30, 2011.

10 **WCP's Discovery in the Adversary**

11 On March 4, 2011, WCP deposed Sandoval for a full day and
12 that deposition was continued. On March 7, 2011, WCP responded
13 to Sandoval's Requests for Admission. In that response, WCP
14 stated that it succeeded to Blixseth's rights under the Letter
15 Agreement and was not involved in any way with the facts leading
16 to the Letter Agreement, the execution, performance or anything
17 related to the Letter Agreement. Therefore, WCP had no personal
18 knowledge of the events surrounding the Letter Agreement.

19 On August 10, 2011, WCP took the deposition of the Trustee.
20 WCP also took the depositions of Alan Annex (Edra's attorney in
21 her negotiations with the Atigeo Parties) and Nick Rhodes (Edra's
22 advisor in technology companies).

23 **The Stipulation For Entry of Declaratory 24 Judgment On Count 1 of Plaintiffs' Complaint**

25 On July 20, 2011, the Trustee filed the Stipulation and
26 proposed order entering declaratory judgment On Count 1 of
27
28

1 Plaintiffs' Complaint in the adversary.¹³ The Stipulation was
2 not accompanied by a motion or served on WCP. However, one day
3 prior, the Trustee's counsel notified WCP's counsel by email that
4 the Trustee had entered into the Stipulation with the Atigeo
5 Parties on Count I.

6 The Stipulation was based on the Trustee's investigation
7 into the parties' performance under the Letter Agreement. The
8 Trustee discovered that Edra and the entities she controlled
9 breached the Letter Agreement in various ways, including: (1) her
10 failure to direct Opspring to pay xPatterns' performance fees
11 owed, despite Opspring earning revenue and despite Sandoval's
12 reliance on anticipated performance fees; (2) her failure to keep
13 the Letter Agreement confidential; (3) her failure to keep trade
14 secrets and intellectual property of Sandoval and Atigeo
15 confidential; and (4) Opspring and Blxware's failure to defend
16 and indemnify the Atigeo Parties in the eTreppid litigation. As
17 a result of the investigation, the Trustee determined that Edra's
18 estate could not prevail in a defense of Count I. Hr'g Tr. 69-
19 71, Sept. 7, 2011. Thus, Plaintiffs and the Trustee stipulated
20 to the entry of a declaratory judgment on Count 1 of the
21 adversary complaint such that the Letter Agreement and all of its
22
23

24
25 ¹³ Although the Stipulation referenced the affidavits of
26 Edra and Sandoval to support the facts stated, those affidavits
27 were not filed with the Stipulation in the adversary proceeding.
28 Rather, the affidavits were filed in connection with the parties'
motion to settle the estate's tort claims against the Atigeo
Parties under Rule 9019 in the main bankruptcy case. The
settlement is discussed below.

1 terms and instruments were repudiated.¹⁴ The bankruptcy court
2 entered the order approving the Stipulation one day later on July
3 21, 2011.

4 **WCP's Emergency Motion to Vacate the July 21, 2011 Order**

5 On the same day that the court entered the order, WCP filed
6 an emergency motion to vacate or in the alternative reconsider
7 the July 21, 2011 order approving the Stipulation. WCP argued
8 that it would be a denial of due process to approve the
9 Stipulation because the Trustee had no right to stipulate away
10 the rights of third parties.

11 On July 22, 2011, the bankruptcy court rescinded its order
12 and provided WCP with notice of a hearing:

13 The Court's Order entered July 21, 2011, shall be held
14 in abeyance and a hearing on approval of the
15 Stipulation [for] Declaratory Judgment on Count I of
16 Plaintiff's Complaint . . . at Dkt 240 and on [WCP]'s
17 Emergency Motion to Vacate or in the alternative
18 Reconsider July 21, 2011 Order [Approving] Stipulation
19 filed July 21, 2011, at dkt. 242 shall be held
20 Wednesday, September 7, 2011, at 9:00 a.m.

18 **The Trustee's Settlement With The Atigeo Parties**

19 Contemporaneous with the negotiation of the Stipulation, the
20 Trustee also negotiated a settlement with the Atigeo Parties
21 relating to the estate's tort claims against them, which would
22 become ripe upon the repudiation of the Letter Agreement. Those
23

24 ¹⁴ As part of the Stipulation the Trustee also obtained
25 contingent assignments from Barve and the trustee of Crocker's
26 bankruptcy estate of all their interests in Atigeo, xPatterns and
27 their interest or claims arising from or related to the Letter
28 Agreement and the related note. In exchange, the Trustee would
pay Barve and the trustee in Crocker's estate \$40,000 each out of
the settlement proceeds. The Trustee also obtained from Edra a
similar assignment.

1 claims consisted of claims for alleged misrepresentations, fraud,
2 conversion, negligence, and others which were pled in the
3 Trustee's original counterclaim filed February 1, 2010, and later
4 dismissed.

5 On July 20, 2011, the Trustee filed a "Motion for an Order
6 Approving the Settlement with [Plaintiffs] and Third Party
7 Defendant Michael Sandoval" (the "9019 Motion"), discussing the
8 four factors set forth in Martin v. Kane (In re A&C Props.),
9 784 F.2d 1377, 1381 (9th Cir. 1986). Attached to the motion were
10 the affidavits of Edra and Sandoval. The next day, the Trustee
11 filed a notice of the motion and notice of opportunity to respond
12 and request a hearing and a proof of service.

13 The Atigeo Parties filed a Joinder Motion to approve the
14 settlement. WCP filed a brief in opposition.

15 On July 28, 2011, the bankruptcy court provided notice to
16 all parties in the main case, including WCP, that "a hearing will
17 be held on [the Atigeo Parties'] Joinder Motion for Approval of
18 Settlement."¹⁵ On August 5, 2011, the Court issued an Order
19 stating that a "hearing on the Trustee's Motion for Order
20 approving Settlement with Plaintiffs Atigeo LLC and xPatterns LLC
21 and Third Party Defendant Michael Sandoval" will be held on
22 "Wednesday, September 7, 2011." The Trustee and WCP each filed
23 Lists of Exhibits and Witnesses prior to the September 7th
24 Hearing in the main bankruptcy case and in the adversary
25

26
27 ¹⁵ The court's notice and order was necessary because WCP
28 failed to notice its objection for hearing in accordance with
Mont. LBR 9013-1.

1 proceeding.¹⁶

2 **The Atigeo Parties' Request for a Pretrial Conference**

3 On July 25, 2011, the Atigeo Parties filed a Request for a
4 Pretrial Conference. The request set forth several reasons why a
5 pretrial conference was necessary, including the proximity of the
6 September 7th Hearing on approval of the settlement to the
7 September 26, 2011 trial date in the adversary. The Atigeo
8 Parties noted that if the settlement was approved by the court,
9 the Letter Agreement, and all its terms and instruments, would be
10 invalid and unenforceable as a matter of law. As a result, they
11 would dismiss their complaint against the estate and WCP's third-
12 party complaint seeking to enforce the terms of the Letter
13 Agreement would be rendered moot.

14 On July 26, 2011, the bankruptcy court entered an order
15 suspending all unexpired pretrial deadlines and the trial date in
16 the adversary proceeding and provided notice to the parties that
17 a pretrial conference would be held Wednesday, September 7, 2011.

20
21 ¹⁶ The Trustee's exhibit list included the Letter Agreement;
22 WCP's notice of UCC sale; Atigeo and xPatterns' notice regarding
23 the possible impact on the adversary proceeding; assignments from
24 Edra, Barve, and the trustee from Crocker's estate; and the
25 affidavits of Michael Sandoval and Edra. WCP's exhibit list
26 included its security agreement, promissory note, pleadings from
27 the Washington Action and Edra's Washington Superior Court Case
28 No. 08-2-18054-4; various emails; and letters. The Trustee's
witness list identified himself and "any witness identified by
any other party" and "[a]nyone presented in the courtroom as may
be necessary for rebuttal, impeachment witnesses, or witnesses
necessary to establish foundation." WCP's witness list mirrored
the Trustee's, i.e., the only witness identified by name to
testify was the Trustee.

1 affidavit testimony of Edra and Sandoval.

2 At the end of the hearing, the bankruptcy court gave the
3 parties fifteen days to file proposed findings of fact and
4 conclusions of law, along with briefs in support of their
5 respective positions. The Atigeo parties, together with the
6 Trustee, and WCP submitted the requested papers.

7 In WCP's closing brief, WCP argued that it was entitled to a
8 full and fair opportunity to complete discovery. WCP also made
9 an offer of proof that Alan Annex, Edra's attorney and the
10 drafter of the Letter Agreement, expressly contradicted the
11 factual conclusions set forth in the Stipulation. WCP further
12 stated that the trial was scheduled for September 26, 2011 and
13 discovery was to be completed by August 31, 2011. WCP argued
14 that it had outstanding document requests and had served
15 subpoenas and there were at least nine depositions to be
16 completed, including Edra's.

17 On September 27, 2011, after considering the evidence
18 presented at the September 7th Hearing, and reviewing the
19 parties' briefs, the bankruptcy court issued Findings of Fact and
20 Conclusions of Law¹⁸ and entered an order approving the
21 settlement and Stipulation in Debtor's main case.

22 On September 28, 2011, the court entered an order approving
23 the Stipulation and entered a separate judgment in favor of
24 Plaintiffs' on Count I in the adversary proceeding. The
25 bankruptcy court concluded that the Letter Agreement and all of

26 _____

27 ¹⁸ The bankruptcy court adopted the Trustee's and Atigeo
28 Parties' proposed Findings of Fact and Conclusions of Law
verbatim.

1 its terms and instruments were repudiated and thus were invalid
2 and unenforceable as a matter of law.

3 **WCP'S Motions For Reconsideration**

4 On September 29, 2011, WCP moved for reconsideration of the
5 bankruptcy court's September 27, 2011 order approving the
6 settlement and Stipulation under Civil Rule 60(b)(1),
7 incorporated by, Rule 9024. WCP contended the order contained
8 fundamental mistakes of law and fact. The order stated that WCP
9 failed to present any evidence at the September 7, 2011 hearing
10 but, WCP argued, there was no rule of procedure that required WCP
11 to present any evidence. Therefore, WCP maintained that the
12 effect of the court's order approving the Stipulation was to deny
13 WCP its fundamental rights of due process because no evidentiary
14 hearing took place. WCP also maintained that the Trustee had no
15 interest in Count I because WCP had foreclosed on Edra's contract
16 rights under the Letter Agreement which divested the estate of
17 any remaining interest that it may have had in the Letter
18 Agreement or Count I. In this regard, WCP asserted that the
19 Trustee was stipulating not to his own legal rights, but legal
20 rights of others.

21 Finally, WCP pointed out that on September 16, 2011, the
22 court ordered Edra to be made available for a deposition prior to
23 September 30, 2011, to address statements made in her affidavit
24 to support the Stipulation and declaratory judgment. WCP
25 contended that the court cut off its ability to depose Edra when
26 it entered the September 27, 2011 order the day before Edra's
27 deposition was scheduled to take place in California.

28 On October 10, 2011, WCP filed a Motion to Reconsider the

1 court's initial July 21, 2011 order approving the Stipulation
2 prior to a hearing and Judge Peterson's September 28, 2011
3 judgment.

4 The Trustee and the Atigeo Parties opposed WCP's motions.
5 In connection with the hearing, the Trustee filed an Exhibit List
6 showing emails back and forth between the parties regarding
7 further discovery and pertaining to Edra's deposition. The
8 Trustee's supplemental Exhibit List showed that WCP was to
9 complete Edra's deposition by September 30, 2011, which it did
10 not do.

11 WCP sought an expedited hearing on the motions to
12 reconsider, which the bankruptcy court granted. While WCP's
13 motions were pending, WCP filed notices of appeal on the
14 Stipulation and settlement on October 10 and 11, 2011,
15 respectively.

16 **The October 26, 2011 Hearing**

17 On October 26, 2011, the bankruptcy court held a hearing on
18 WCP's motions for reconsideration. At the hearing, WCP's counsel
19 stated that he did not know the September 7th Hearing was a
20 trial. Hr'g Tr. 74:8-25, Oct. 26, 2011. He further stated that
21 he understood the September 7th Hearing was an evidentiary
22 hearing on the 9019 Motion in the main bankruptcy case, not a
23 trial in the adversary proceeding. Id. Finally, he stated on
24 the record that "everybody anticipated that this was a pretrial
25 conference on the adversary. We understood, certainly understood
26 that this was a hearing on the, an evidentiary hearing on the
27 9019 order, but we did not prepare for trial, we did not bring
28 our witnesses, we did not subpoena witnesses." Id. at 83:15-19.

1 WCP again made an offer of proof that Alan Annex, Edra's
2 lawyer, would testify, among other things, that it was the intent
3 of the parties for the Atigeo Parties to get Edra's membership
4 interest in xPatterns in exchange for a repayment of \$10 million
5 investment and that repayment was not conditioned upon any other
6 obligations in the Letter Agreement. Id. at 76:17-25; 77:1-17.
7 WCP also argued that the court should hear from Nick Rhodes, an
8 employee of Opspring and Blxware, and Sandoval, who had been
9 deposed. Id.

10 On November 10, 2011, the bankruptcy court entered a
11 Memorandum of Decision and Order denying WCP's motions for
12 reconsideration. The court found that the bankruptcy court's
13 orders made it clear that the September 7th Hearing was an
14 evidentiary hearing on the approval of the Stipulation. The
15 court concluded that WCP's counsel's misunderstanding about the
16 nature of the hearing and failure to present evidence was not
17 grounds for reconsideration. In addition, the bankruptcy court
18 found that WCP was not a stranger to the adversary proceeding and
19 indeed had been an active participant and had ample notice of the
20 September 7th Hearing. The court concluded that by participating
21 in the adversary (filing an answer, filing a counterclaim and a
22 third-party complaint and by being a party to the stipulated
23 scheduling order), WCP waived and forfeited its right to
24 challenge the court's authority to decide all claims asserted in
25 the adversary proceeding, including Plaintiffs' Count I seeking
26 repudiation of the Letter Agreement.

27 With respect to the 9019 Motion, the court found that WCP
28 failed to show the settlement was not fair and equitable as

1 required under A&C Properties.

2 **II. JURISDICTION**

3 WCP contends that the bankruptcy court did not have
4 jurisdiction over its claims against the Atigeo Parties because
5 those claims were state law contract-based claims and between two
6 nondebtor parties. We address WCP's jurisdictional argument
7 below. WCP does not challenge our jurisdiction over this appeal
8 under § 28 U.S.C. § 158.

9 **III. ISSUES**

10 A. Whether the bankruptcy court had jurisdiction to enter
11 the stipulated declaratory judgment on Count I in the adversary
12 with respect to all parties, including WCP;

13 B. Whether the bankruptcy court's proceedings in
14 connection with its approval of the stipulated declaratory
15 judgment on Count I in the adversary denied WCP procedural due
16 process; and

17 C. Whether the bankruptcy court abused its discretion in
18 approving the Trustee's 9019 Motion when the underlying
19 settlement eliminated the causes of action that WCP had asserted
20 against the Atigeo Parties in its third-party complaint in the
21 adversary.

22 **IV. STANDARDS OF REVIEW**

23 We review questions regarding jurisdiction de novo. Durkin
24 v. Bendor Corp. (In re G.I. Indus. Inc.), 204 F.3d 1276, 1279-80
25 (9th Cir. 2000).

26 We also review de novo whether a bankruptcy court's
27 proceedings violated a party's right to procedural due process.
28 Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir.

1 2009).

2 We review for abuse of discretion the bankruptcy court's
3 approval of a settlement. Martin v. Kane (In re A & C Props.),
4 784 F.2d 1377, 1380 (9th Cir. 1986). A bankruptcy court abuses
5 its discretion if it applied the wrong legal standard or its
6 findings were illogical, implausible or without support in the
7 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,
8 832 (9th Cir. 2011).

9 V. DISCUSSION

10 A. Jurisdiction

11 WCP asserts multiple arguments challenging the bankruptcy
12 court's jurisdiction to render a judgment on Count I that
13 affected its rights against the Atigeo Parties. None have merit.

14 The adversary proceeding embodies the demands set forth in
15 the Plaintiffs' POCs filed in Edra's bankruptcy case. Therefore,
16 resolution of Count I in the adversary will also resolve the
17 allowance or disallowance of the Plaintiffs' unliquidated POCs.
18 The allowance or disallowance of claims against the estate are
19 core proceedings under 28 U.S.C. § 157(b)(2)(B) regardless of
20 whether resolution of the matter involves application of state
21 law. In re G.I. Indus. Inc., 204 F.3d at 1279-80.

22 Bankruptcy courts also have jurisdiction over proceedings
23 that are not core, but "related to" a bankruptcy case. The test
24 for determining the scope of "related to" jurisdiction is
25 whether:

26 the outcome of the proceeding could conceivably have
27 any effect on the estate being administered in
28 bankruptcy. Thus, the proceeding need not necessarily
be against the debtor or against the debtor's property.
An action is related to bankruptcy if the outcome could

1 alter the debtor's rights, liabilities, options, or
2 freedom of action (either positively or negatively) and
3 which in any way impacts upon the handling and
4 administration of the bankrupt estate.

5 Fietz v. Great W. Sav. (In re Fietz), 852 F.2d 455, 457 (9th Cir.
6 1988) (quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d
7 Cir.1984)).

8 Whether the Letter Agreement is enforceable or unenforceable
9 under Count I is directly related to Edra's potential liability
10 for breach of contract damages as alleged in other Counts in the
11 complaint. WCP's UCC foreclosure sale did not eliminate the
12 estate's potential liability for Edra's breaches of the Letter
13 Agreement because, as a secured creditor, WCP did not assume any
14 duty or liability on behalf of Edra or her estate. See U.C.C.
15 § 9-402 ("Secured Party Not Obligated on Contract of Debtor or in
16 Tort."). Therefore, Edra's estate would incur liability for
17 breach of contract damages if the adversary went to trial on
18 Count I and the Letter Agreement ultimately found enforceable.
19 Because of the estate's potential liability, the litigation over
20 the enforceability of the Letter Agreement was not, as WCP
21 argues, only between WCP and the Atigeo Parties, two nondebtor
22 parties. In addition, the bankruptcy court's decision on the
23 enforceability of the Letter Agreement was inextricably
24 intertwined with the existence of the estate's tort claims
25 against the Atigeo Parties. If the Letter Agreement was found
26 unenforceable, then the estate could proceed with its tort claims
27 against the Atigeo Parties.

28 For these reasons, resolution of Count I could alter Edra's
rights and liabilities. Accordingly, we conclude that the

1 bankruptcy court had "related to" jurisdiction over Count I.

2 By statute, a "bankruptcy judge may hear a proceeding that
3 is not a core proceeding but otherwise related to a case under
4 title 11." 28 U.S.C. § 157(c)(1). In those cases, a bankruptcy
5 judge may enter a final judgment if the parties consent.¹⁹

6 28 U.S.C. § 157(c)(2). Otherwise, the court must make findings
7 of fact and conclusions of law which are reviewed de novo by the
8 district court. Here, WCP voluntarily joined as a party to the
9 adversary and fully participated in the proceedings. By
10 participating, WCP consented to the bankruptcy court entering
11 judgment on Count I. See Mann v. Alexander Dawson Inc. (In re
12 Mann), 907 F.2d 923, 926 (9th Cir. 1990); Daniels-Head & Assocs.
13 v. William M. Mercer, Inc., 819 F.2d 914, 919 (9th Cir. 1987).²⁰

14 Finally, to the extent WCP contends that its third-party
15 contract-based claims against the Atigeo Parties fall outside the
16 bankruptcy court's original jurisdiction, the bankruptcy court
17 had supplemental jurisdiction under 28 U.S.C. § 1367(a) over
18 those claims. WCP's contract-based claims against the Atigeo
19 Parties were so related to the Plaintiffs' claims against the
20 Trustee and Edra's estate (which were within the bankruptcy
21 court's original jurisdiction) that they formed part of the same

22
23 ¹⁹ Actually, the declaratory judgment was not "final"
24 because it did not dispose of all claims in the adversary. The
25 Panel granted WCP leave to appeal the declaratory judgment by
order entered March 9, 2012.

26 ²⁰ 28 U.S.C. § 157 allocates the authority to enter final
27 judgment between the bankruptcy court and the district court. See
28 §§ 157(b)(1), (c)(1). That allocation does not implicate
questions of subject matter jurisdiction. Stern v. Marshall,
___ U.S. ___, 131 S.Ct. 2594, 2607 (2011).

1 case or controversy. Sasson v. Sokoloff (In re Sasson), 424 F.3d
2 864, 869 (9th Cir. 2005).

3 In the end, we find no basis for reversal of the bankruptcy
4 court's decisions on jurisdictional grounds.

5 **B. Procedural Due Process**

6 WCP was a party defendant to Count I for declaratory relief
7 after the court ordered it to file an answer as such. Therefore,
8 before WCP's interests in the Note and Letter Agreement
9 referenced in Count I were extinguished, it was entitled to
10 receive notice plus an opportunity to be heard.

11 An elementary and fundamental requirement of due
12 process in any proceeding which is to be accorded
13 finality is notice reasonably calculated, under all the
14 circumstances, to apprise interested parties of the
15 pendency of the action and afford them an opportunity
16 to present their objections. The notice [of the
17 proceedings] must be of such nature as reasonably to
18 convey the required information.

19 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314
20 (1950).

21 Under the rules in Part VII of the Federal Rules of
22 Bankruptcy Procedure, applicable to adversary proceedings, a
23 contested judgment can be achieved by a default judgment, a
24 dispositive summary judgment motion under Civil Rule 56,
25 incorporated by Rule 7056, or by trial. Because none of these
26 occurred here,²¹ the filing of the Stipulation and proposed order

27 ²¹ The Trustee and settling parties never filed a motion for
28 summary judgment in connection with their request for approval of
the Stipulation. Thus, Mont. LBR 7056-1, which governs summary
judgment motions, was not followed. At minimum, that rule
requires a motion with service and an opportunity to be heard.

(continued...)

1 for declaratory judgment on Count I was procedurally flawed from
2 the beginning.

3 The Atigeo Parties argue that the filing of a motion for
4 summary judgment was unnecessary because the facts were
5 "undisputed". However, this argument is disingenuous when WCP
6 was a party defendant in the adversary but not a party to the
7 stipulated facts on which declaratory judgment was based. As a
8 party defendant, WCP's interests in the Note and Letter Agreement
9 were directly affected by the settling parties' stipulated facts
10 to which WCP would be bound. Accordingly, the filing of the
11 Stipulation, accompanied only by a proposed order, deprived WCP
12 of fair notice, possible discovery, and the opportunity to
13 participate in motion practice with respect to the stipulated
14 facts. "When third parties are affected, we scrutinize carefully
15 the fairness of the hearing afforded." Feld v. Zale Corp. (In re
16 Zale Corp.), 62 F.3d 746, 764 (5th Cir. 1995).

17 Generally speaking, "procedural errors are cured by holding
18 a new hearing in compliance with due process requirements." See
19 Batanic v. Immigration and Naturalization Serv., 12 F.3d 662, 667
20 (7th Cir. 1993). However, the bankruptcy court's July 22, 2011
21 order and notice regarding the September 7th Hearing did not
22 correct the initial procedural irregularity. Granted, the
23 court's notice set a "hearing," but the notice gave no indication
24 that the purpose of the hearing was to resolve factual issues
25

26 ²¹(...continued)

27 See Mont. LBR 9013-1(d) & (e). If this had been done, WCP would
28 have been able to adequately respond to the motion with a
Statement of Genuine Issues. Mont. LBR 9013(a)(2).

1 regarding Edra's breaches under the Letter Agreement – a motion
2 for summary judgment would have given that type of notice.
3 Further, the notice did not specify September 7th as a trial date
4 nor did it invoke any alternative direct testimony rule that
5 required the parties to submit direct testimony by declaration,
6 and to have all witnesses giving testimony by declaration
7 available at trial for cross-examination. Although the Trustee
8 submitted the affidavits of Edra and Sandoval, neither of them
9 were available for cross-examination.

10 Undoubtedly WCP had an obligation to press forward on its
11 objection to the Stipulation. However, some guidance was
12 necessary here, especially in light of the fact that the
13 Stipulation had been filed without a motion or notice.

14 Adding to the confusion was the combining of the hearings
15 for declaratory relief in the adversary proceeding with the
16 settlement under Rule 9019 in the main case. The settlement was
17 contingent on the approval of the Stipulation. Therefore, as
18 described by the Trustee, there was a two-step process in play –
19 the first of which was to obtain approval of Stipulation, which
20 was for declaratory judgment in the adversary proceeding.
21 However, as already noted, neither the purpose of the hearing nor
22 the procedure for approving of the Stipulation was ever addressed
23 by the court's notice. Thus, it is difficult to discern from the
24 record exactly what procedure was followed for each of the
25 matters before the court.

26 While approval of the settlement was governed under the
27
28

1 rules in Part IX,²² approval of the contested judgment was not.
2 Neither the bankruptcy court's orders nor Memorandum Decisions
3 state which provision of the adversary rules it relied upon to
4 enter the stipulated declaratory judgment over WCP's objection.
5 Even if we were to consider the bankruptcy court's approval of
6 the Stipulation as a sua sponte (or de facto) ruling on summary
7 judgment,²³ the procedural protections of notice are still
8 lacking. To exercise the right to oppose summary judgment, a
9 party must have notice. That notice gives a party a reasonable
10 opportunity to present to the court material relevant to a Civil
11 Rule 56 proceeding. Bradly v. Pittsburgh Bd. of Educ., 913 F.2d
12 1064, 1069-70 (3d Cir. 1990). Here, because notice was
13 inadequate, WCP was not afforded a reasonable opportunity to
14 present evidence disputing the facts on which declaratory
15 judgment was based. Moreover, since there was no "formal" motion
16 for summary judgment, WCP was under "no formal compulsion to
17 marshal all the evidence in support of [its] claims." Id.

18 On September 7th, the bankruptcy court could have continued
19 the matter for summary judgment or for trial because discovery
20 was on-going. WCP's counsel repeatedly made offers of proof with
21 respect to evidence it already had and informed the court
22

23 ²² Mont. LBR 9014-1 which governs contested motions states
24 that "[u]nless requested by a party and allowed by the Court, in
25 its discretion, the Part VII rules identified in [Rule] 9014(c)
shall not apply to any contested matter."

26 ²³ This is truly a stretch since the bankruptcy court
27 characterized the hearing as an "evidentiary hearing" and made
28 findings of fact and conclusions of law. Furthermore, the court
heard testimony and made evidentiary rulings which are
inconsistent with a hearing for summary judgment.

1 regarding its outstanding discovery. By issuing its ruling
2 before WCP finished with discovery, the bankruptcy court
3 effectively barred WCP from impeaching the veracity of Edra and
4 Sandoval when both had "testified" only through hearsay
5 declarations at the hearing.²⁴ Further, courts which allow
6 direct testimony by declaration (the record does not reflect that
7 the district of Montana authorizes this procedure), all require
8 declarants to be present for cross examination or fundamental due
9 process is absent. Edra and Sandoval were not present at the
10 September 7th Hearing.

11 The bankruptcy court's characterization of the September 7th
12 Hearing as an "evidentiary hearing" does not equate to due
13 process nor can we say that conducting the hearing as an
14 "evidentiary" hearing was harmless error under these
15 circumstances. In contested matters, which this was not,
16 Rule 9014(e) requires bankruptcy courts to "provide procedures
17 that enable parties to ascertain at a reasonable time before any
18 scheduled hearing whether the hearing will be an evidentiary
19

20
21 ²⁴ The Atigeo Parties argue that the affidavits of Edra and
22 Sandoval were not inadmissible hearsay. Because Blixseth, her
23 estate and the Trustee faced adverse judgment as defendants to
24 Plaintiffs' Counts I and II-VI, they contend Blixseth's affidavit
25 testimony constitutes a party-opponent's admission and, by
26 definition, is not hearsay. Fed. R. Evid. 801(d)(2)(A). They
27 further argue that Sandoval's affidavit independently
28 corroborated Blixseth's affidavit so it too was not hearsay.
However, on the hearsay issue, the record is unclear. We cannot
tell if the bankruptcy court overruled WCP's hearsay objection
because it considered the affidavits in connection with the
Trustee's business judgment on the settlement or because the
affidavits were being offered for the truth of the matter in
connection with the court's approval of the Stipulation.

1 hearing at which witnesses may testify." There was nothing in
2 the bankruptcy court's July 22, 2011 notice that would enable WCP
3 to determine that the hearing on the approval of the Stipulation
4 and declaratory judgment would be an "evidentiary hearing" at
5 which witnesses may testify and be cross-examined.

6 Finally, although the hearing required by due process is
7 subject to waiver, there was no waiver here. Waiver is the
8 intentional relinquishment or abandonment of a known right.
9 Kontrick v. Ryan, 540 U.S. 443, 458 n. 13 (2004). There is no
10 basis in the record to conclude that WCP "knew or should have
11 known" that the hearing on the approval of the Stipulation was in
12 essence a de facto summary judgment or, alternatively a "trial,"
13 and that by failing to set forth its evidence or bring its
14 witnesses, it would forever waive its rights to present evidence
15 on the disputed facts. Due process is not simply satisfied by
16 serving notice of a hearing. The notice served must contain
17 adequate information and the content must have been reasonably
18 calculated to put WCP on notice that it was required to produce
19 its witnesses and submit all its evidence on September 7th or be
20 forever barred. As discussed above, the initial procedure
21 employed and the subsequent notice of the hearing fall far short
22 of these requirements.

23 For all these reasons, we conclude that WCP did not have an
24 adequate or meaningful opportunity to present contrary evidence
25 at the September 7th Hearing on the approval of the Stipulation.

26 VI. CONCLUSION

27 Our holding on the due process issue obviates the need to
28 resolve any issues concerning the bankruptcy court's approval of

1 the settlement because the settlement was contingent on approval
2 of the stipulated declaratory judgment. Without the stipulated
3 judgment, there is no settlement. Because WCP was not afforded
4 due process in connection with the stipulated judgment, we VACATE
5 the judgment and orders on appeal and REMAND for further
6 proceedings.

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