

APR 07 2015

NOT FOR PUBLICATION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. NV-14-1246-DJuKu
)
 WORLD BOTANICAL GARDENS, INC.,) Bk. No. 13-50833
)
 Debtor.)
)
 CALVIN ANDRUS; DOUGLAS LEE,)
)
 Appellants,)
)
 v.) **MEMORANDUM¹**
)
 UNITED STATES TRUSTEE; WORLD)
 BOTANICAL GARDENS, INC.,)
)
 Appellees.)

Submitted without Oral Argument
on March 19, 2015

Filed - April 7, 2015

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

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: Appellants Calvin Andrus and Douglas Lee, pro se,
 on brief; Kevin A. Darby on brief for Appellee
 World Botanical Gardens, Inc.; Ramona D. Elliott,
 P. Matthew Sutko, Noah M. Schottenstein, Tracy
 Hope Davis, Nicholas Strozza and William B.
 Cossitt on brief for Appellee United States
 Trustee.

Before: DUNN, JURY and KURTZ, Bankruptcy Judges.

¹ 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 8024-1.

1 Appellants, Douglas Lee and Calvin Andrus,² shareholders of
2 the debtor, World Botanical Gardens, Inc. ("WBGI"), appeal the
3 bankruptcy court's order converting WBGI's chapter 11 case to
4 chapter 7 ("Conversion Order").³ On appeal, Lee and Andrus seek
5 to overturn the Conversion Order on the ground that the majority
6 of WBGI's shareholders did not receive notice of the hearing on
7 the conversion. For the reasons set forth below, we AFFIRM the
8 bankruptcy court's Conversion Order.

9 **FACTS**⁴

10 A. Procedural background

11 WBGI operated a tourist attraction near Hilo, Hawaii; it
12 consisted of a botanical garden, a visitor center/gift shop, a
13 zip line operation and a Segway tour. With the exception of one
14 year, WBGI never generated a profit.

15
16
17 ² Walter Wagner ("Wagner") was an appellant to this appeal
18 initially, but he was dismissed as an appellant. We describe in
19 more detail below his connection to and participation in the
20 underlying bankruptcy case and this appeal.

21 ³ Unless otherwise indicated, all chapter and section
22 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
23 1532, and all "Rule" references are to the Federal Rules of
24 Bankruptcy Procedure, Rules 1001-9037. All "Local Rule"
25 references are to the Local Bankruptcy Rules, U.S. Bankruptcy
26 Court, District of Nevada, Local Rules 1001-9037.

27 ⁴ Because we lack many of the relevant documents in the
28 excerpts of record submitted by the parties, we have exercised
our discretion to reach the merits of the appeal by independently
reviewing the bankruptcy court's electronic docket and the imaged
documents therein. See O'Rourke v. Seaboard Sur. Co. (In re E.R.
Fegert, Inc.), 887 F.2d 955, 957-58 (9th Cir. 1988); Atwood v.
Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9
(9th Cir. BAP 2003).

1 Wagner was one of the founders of the botanical garden. He
2 also is a shareholder of WBGI.

3 WBGI filed its chapter 11 petition on April 30, 2013.
4 Wagner filed a proof of claim in the amount of eleven million
5 dollars arising from two lawsuits, one in Hawaii state court
6 involving claims for back pay based on quantum meruit, and the
7 other in the U.S. District Court for the District of Utah
8 involving a defamation claim against former and current WBGI
9 officers and directors. Notably, WBGI obtained judgments against
10 Wagner in these lawsuits totaling more than two million dollars.

11 Wagner filed a notice of appeal and an opening brief in this
12 appeal with Lee and Andrus. On appeal, they challenged the
13 Conversion Order, among other "incidental matters."

14 In an order entered on October 3, 2014, the motions panel
15 noted that the only issue on appeal as to the Conversion Order
16 was whether proper notice of the hearing on the Conversion Order
17 was provided. The motions panel pointed out that Wagner clearly
18 did receive notice of the hearing. It thus questioned why Wagner
19 should not be dismissed as an appellant to this appeal. The
20 motions panel required Wagner to respond to its Order re:
21 Response by October 27, 2014.

22 Wagner did not respond to the Order re: Response. He
23 therefore was dismissed as an appellant to this appeal pursuant
24 to an order entered on November 14, 2014.

25 B. WBGI's bankruptcy case

26 1. Sale of substantially all of WBGI's assets

27 Among its assets, WBGI had a 26-acre parcel of real
28 property, associated land grants and improvements, several

1 vehicles, garden tools and equipment, office equipment and gift
2 shop inventory.

3 Two days after filing its chapter 11 petition, WBGI filed
4 several first-day motions, including a motion to sell
5 substantially all of its assets to BWA, LLC under § 363(b), (f)
6 and (m) ("May Sale Motion").⁵ BWA, LLC also agreed to assume
7 substantially all of WBGI's debts, except for Wagner's claims and
8 certain executory contracts.

9 On May 17, 2013, WBGI filed a notice concerning the first-
10 day motions, including the May Sale Motion. In the notice, WBGI
11 stated that a hearing was set for May 21, 2013.⁶ It further
12 stated that any oppositions to the first-day motions had to be
13 filed by May 21, 2013. No proof of service accompanied the
14 notice.

15 The bankruptcy court held a hearing on the May Sale Motion,
16 but continued it to June 6, 2013.⁷ As far as we can tell from the
17 record and the bankruptcy court's docket, no action ever was
18 taken on the May Sale Motion.

19 On July 22, 2013, Andrus filed a motion seeking to have
20

21 ⁵ Steve Bryant was WBGI's CEO. Mark Robinson was WBGI's
22 CFO. Bryant and Robinson expressed interest in purchasing WBGI's
23 assets. To that end, they formed BWA, LLC.

24 ⁶ WBGI simultaneously moved to shorten time for the sale
25 hearing. However, no order appears to have been entered on the
26 motion.

27 ⁷ We are unable to determine definitively whether any of
28 Wagner, Andrus or Lee appeared at the May 21, 2013 hearing. A
record of proceedings for the hearing was not filed on the
bankruptcy court's docket nor included in the record before us.

1 himself appointed as trustee for WBGI. He claimed that he had
2 formulated a chapter 11 plan that would allow WBGI to continue
3 operations profitably. Andrus also proposed that WBGI cease
4 prosecuting its claims against Wagner and instead enter into
5 mediation with Wagner. As far as we can tell from the record and
6 the bankruptcy court's docket, no action ever was taken on this
7 motion.

8 On August 18, 2013, WBGI renewed its motion to sell
9 substantially all of its assets to BWA, LLC ("August Sale
10 Motion"). As in the May Sale Motion, WBGI proposed to sell
11 substantially all of its assets to BWA, LLC for cash and other
12 consideration under § 363(b), (f) and (m). BWA, LLC again agreed
13 to assume substantially all of WBGI's debts, except for Wagner's
14 claims and certain executory contracts.

15 WBGI sought and obtained an order from the bankruptcy court
16 shortening time for hearing on the August Sale Motion as follows:
17 1) setting a hearing on the August Sale Motion for August 28,
18 2013; and 2) setting August 26, 2013, as the deadline to oppose
19 the August Sale Motion. On the same day it obtained the order
20 shortening time, WBGI filed a notice of the order. It attached
21 to the notice a list of parties served with the order; Wagner was
22 among those served.⁸

23 On August 26, 2013, Andrus filed a document titled, "Points
24 and Authorities in Support of Opposition to Motion for Sale of
25 WBGI Assets," supported by affidavits from him and Wagner.

26

27 ⁸ The Service List indicated that Andrus may have been
28 bypassed because he had an undeliverable address.

1 Andrus alleged that the proposed sale to BWA, LLC was designed to
2 "fleece" the shareholders and "line the pockets" of Robinson and
3 Bryant, who were purchasing WBGI's assets for less than their
4 actual value. Andrus also contested BWA, LLC's rejection of
5 Wagner's claims. He again detailed his proposal to continue
6 WBGI's operations, which included obtaining outside funding and
7 ceasing prosecution of WBGI's claims against Wagner.

8 At the start of the August sale hearing, counsel for WBGI
9 pointed out that the May Sale Motion and the August Sale Motion
10 were "very similar." As such, he claimed, "all parties in
11 interest that have been participating have known since at least
12 May 2nd that [WBGI was] moving towards proposing to sell all
13 [its] assets, how [WBGI] valued those assets, and a general
14 structure of the consideration that was being proposed to sell or
15 proposed for the sale of the assets." Tr. of August 28, 2013
16 hr'g, 4:5-10.

17 Both Wagner and Andrus appeared at the August sale hearing.
18 Wagner claimed that, contrary to WBGI's assertions, WBGI was
19 operating at a profit. He then alleged that he had a secured
20 claim against WBGI arising from his Hawaii state court action.
21 However, upon questioning by the bankruptcy court, Wagner
22 admitted that he had not obtained a judgment in the Hawaii state
23 court action.

24 Andrus claimed that he had not been provided notice of the
25 August sale hearing. Upon questioning by the bankruptcy court,
26 Andrus explained that he had received notice of the hearing the
27 week prior. But Andrus claimed that had he received notice
28 earlier, he would have provided more details in his proposed

1 chapter 11 plan.

2 Andrus additionally argued that he had a right to propose a
3 chapter 11 plan. However, the bankruptcy court pointed out that
4 the exclusivity period for WGBI to file a plan had not yet
5 expired.

6 The bankruptcy court ultimately approved the August Sale
7 Motion. It acknowledged that "this may not be the best
8 proposition, but it's certainly the one that provides cash and
9 preserves the entity going forward." Tr. of August 28, 2013
10 hr'g, 21:16-18. The bankruptcy court added that "under the
11 circumstances, this [was] probably the best result"
12 Tr. of August 28, 2013 hr'g, 22:2-3.

13 On September 16, 2013, Wagner filed a document titled,
14 "Objection to Form of Order." He mentioned that he and Andrus
15 had appeared at the August sale hearing by phone. Wagner argued
16 that he objected to the form of the proposed sale order because:
17 1) he had discharged WGBI's state court judgments in his personal
18 bankruptcy case;⁹ 2) WGBI had obtained its judgments against him
19 by fraud; and 3) he held secured and unsecured claims against

21 ⁹ Wagner filed his chapter 7 bankruptcy petition in Salt
22 Lake City, Utah, on December 12, 2012 (12-35494). It was closed
23 as a no asset case on March 20, 2013, and Wagner received his
discharge.

24 However, before he received his discharge, on March 14,
25 2013, WGBI initiated an adversary proceeding (13-2099) against
26 Wagner to except its judgments from discharge under
27 § 523(a)(2), (4) and (6). Ultimately, the Utah bankruptcy court
28 granted WGBI's motion for summary judgment, determining that the
judgments were excepted from discharge. It entered a judgment in
the amount of \$2,257,050.96 in favor of WGBI against Wagner on
December 2, 2013 ("Section 523(a) Judgment").

1 WBGI in amounts exceeding the amounts of the judgments against
2 him. Wagner argued that the proposed sale order did not account
3 for any of his claims against WBGI. He sought entry of a
4 modified order that provided for payment of his alleged claims
5 against WBGI.

6 The bankruptcy court entered a sale order ("Sale Order") on
7 September 25, 2013. In the Sale Order, the bankruptcy court
8 reiterated the terms of the sale as set forth in the August Sale
9 Motion. It determined that entry of the Sale Order was in the
10 best interests of WBGI, its estate, its creditors and other
11 parties in interest. It further made findings and determined
12 that the purchaser, BWA, LLC, was a good faith purchaser of the
13 WBGI assets for purposes of § 363(m).

14 Unsurprisingly, immediately following its entry, Andrus and
15 Wagner filed objections to the Sale Order. In his objection,
16 Andrus admitted that he appeared at the August sale hearing by
17 phone. However, he contended that he and others had not been
18 notified of WBGI's intent to sell substantially all of its
19 assets. Specifically, Andrus claimed that he had not been
20 "legally notified" of WBGI's intent to liquidate its assets by
21 its board of directors or its counsel. He did not become aware
22 of WBGI's intent to sell substantially all of its assets until
23 mid-August 2013 when Wagner informed him of it. He argued that
24 "federal rules of procedure" required that he receive "formal
25 notice." Andrus moreover claimed that none of the other
26 shareholders of WBGI received notice of the sale, except Bryant,
27 Robinson and a few other current board members.

28 Andrus then went on to repeat his earlier arguments: that he

1 be appointed as trustee, that litigation against Wagner cease,
2 that the sale to BWA, LLC favored current board members to the
3 detriment of WBGI's shareholders, and that the sale price was
4 less than the actual value of WBGI's assets.

5 In his objection, Wagner stated that neither he nor Andrus
6 received a copy of the Sale Order for their review. He also
7 stated that he and Andrus disapproved of the Sale Order.

8 Notably, neither he nor Andrus appealed the Sale Order, and
9 no stay of the Sale Order was sought or obtained.¹⁰ Instead,
10 Wagner, Andrus and Lee filed a chapter 11 plan in which they
11 proposed to reorganize WBGI. To that end, they proposed:
12 1) appointing a bankruptcy trustee; 2) forming a new board of
13 directors, which included themselves and others; and
14 3) continuing WBGI's operations. They also sought rescission of
15 the Sale Order.

16 2. Conversion of WBGI's chapter 11 case to chapter 7

17 On February 19, 2014, the United States Trustee ("UST")
18 filed a motion to dismiss WBGI's chapter 11 case for WBGI's
19 failure to file monthly operating reports timely and to pay
20 quarterly fees timely ("UST Motion to Dismiss"). At the
21 April 23, 2014 hearing on the UST Motion to Dismiss ("Conversion
22 Hearing"), counsel for WBGI stated that WBGI was no longer
23 operating a business. But he noted that WBGI had obtained the
24 Section 523(a) Judgment against Wagner when it prevailed in its
25 adversary proceeding against him in his personal chapter 7

26
27 ¹⁰ Based on our most recent review of the bankruptcy case
28 docket, we note that no shareholders or other parties in interest
appealed the Sale Order.

1 bankruptcy case. Counsel for WBGI therefore proposed that WBGI's
2 chapter 11 case be converted to chapter 7 so that a chapter 7
3 trustee could determine whether to pursue collection of the
4 Section 523(a) Judgment or sell it to another party.¹¹

5 Both Wagner and Andrus appeared at the Conversion Hearing,
6 and Lee filed an affidavit in opposition to the UST Motion to
7 Dismiss well in advance of the Conversion Hearing. Andrus
8 requested that the bankruptcy court rescind the Sale Order on the
9 ground that the majority of WBGI's shareholders had not been
10 notified of the sale. When the bankruptcy court asked if he had
11 appealed the Sale Order, Andrus responded that he had not.

12 Andrus then contested the conversion of WBGI's chapter 11
13 case to chapter 7. Andrus argued that WBGI should continue in
14 chapter 11 "to address this problem with due process." Tr. of
15 April 23, 2014 hr'g, 9:19.

16 Wagner echoed Andrus' argument that none of WBGI's
17 shareholders had been notified of the sale. He claimed that he
18 had been the only shareholder to receive notice of the sale - and
19 only "by happenstance."

20 Wagner then urged the bankruptcy court to keep WBGI in
21 chapter 11. He offered to pay personally the delinquent UST
22 quarterly fees. Wagner also requested that the bankruptcy court
23 replace WBGI's board of directors and appoint a chapter 11
24 trustee. He claimed that all of the shareholders wanted WBGI to
25 continue its operations as a reorganizing debtor.

26

27 ¹¹ The chapter 7 trustee ultimately filed a no asset report
28 on July 23, 2014.

1 Counsel for WBGI pointed out that Wagner could not claim
2 that he did not receive notice of the sale because he appeared at
3 the August sale hearing. When the bankruptcy court asked Wagner
4 if he received notice of the August Sale, he answered in the
5 affirmative.

6 Wagner explained that though he received notice of the sale,
7 the other shareholders had not. In response, the bankruptcy
8 court pointed out that he could not "speak on behalf of the other
9 [shareholders]." Tr. of April 23, 2014 hr'g, 19:22-23.

10 It then asked Wagner if he received notice of the sale and
11 if he appeared at the August Sale Hearing by phone. Wagner
12 answered both questions in the affirmative.

13 The bankruptcy court then turned to Andrus, asking him,
14 under oath, if he had received notice of the August sale hearing
15 and if he had filed an opposition to the August Sale Motion.
16 Like Wagner, Andrus answered both questions in the affirmative.
17 He also admitted that he had filed an opposition to the entry of
18 the Sale Order. When the bankruptcy court asked Andrus if he had
19 been notified of the August Sale Hearing "through another source"
20 and had participated in the August Sale Hearing, Andrus again
21 answered both questions in the affirmative.

22 The bankruptcy court ultimately decided to convert WBGI's
23 chapter 11 case to chapter 7. It entered the Conversion Order on
24 May 1, 2014. The bankruptcy court took care to note in the
25 Conversion Order that both Andrus and Wagner appeared at the
26 Conversion Hearing.

27 Lee, Andrus and Wagner appealed the Conversion Order, as
28 well as "all incidental matters including the failure to notice

1 Creditors, etc.”

2 **JURISDICTION**

3 The bankruptcy court had jurisdiction under 28 U.S.C.
4 §§ 1334 and 157(b) (2) (A) and (N). We discuss our jurisdiction
5 below, but generally, we have jurisdiction to review the
6 Conversion Order under 28 U.S.C. § 158.

7 **ISSUE**

8 Lee and Andrus essentially raise one relevant issue on
9 appeal: Did the bankruptcy court have authority to convert WBGI’s
10 chapter 11 case to chapter 7, given that most of WBGI’s
11 shareholders did not receive notice of the Conversion Hearing as
12 required under Rule 2002(d) (4) and Local Rule 2002(a) (1)?

13 **STANDARDS OF REVIEW**

14 We have a duty to consider sua sponte a justiciability issue
15 like standing. Am. Civil Liberties Union of Nev. v. Lomax,
16 471 F.3d 1010, 1015 (9th Cir. 2006). See also Palmdale Hills
17 Prop., LLC v. Lehman Comm. Paper, Inc. (In re Palmdale Hills
18 Prop., LLC), 654 F.3d 868, 873 (9th Cir. 2011) (“standing is a
19 necessary component of subject matter jurisdiction.”). “Standing
20 is an issue of law which we review de novo.” Id. De novo means
21 that we review a matter anew, as if no decision previously had
22 been rendered. Dawson v. Marshall, 561 F.3d 930, 933 (9th Cir.
23 2009).

24 We review a bankruptcy court’s order converting a case from
25 chapter 11 to chapter 7 for abuse of discretion. See, e.g.,
26 Pioneer Liquidating Corp. v. U.S. Trustee (In re Consol. Pioneer
27 Mortg. Entities), 264 F.3d 803, 807 (8th Cir. 2001); Johnston v.
28 JEM Dev’t Co. (In re Johnston), 149 B.R. 158, 160 (9th Cir. BAP

1 1992). Abuse of discretion review involves a two element test:
2 First, we determine de novo whether the bankruptcy court
3 identified the correct legal rule for application. See United
4 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en
5 banc). Second, we review whether the bankruptcy court erred in
6 applying the correct legal rule. We will affirm unless the
7 bankruptcy court's fact findings were illogical, implausible or
8 without support from inferences that may be drawn from the
9 record. Id.

10 We may affirm a bankruptcy court's decision on any basis
11 supported by the record. See ASARCO, LLC v. Union Pac. R. Co.,
12 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d
13 1082, 1086 (9th Cir. 2008).

14 **DISCUSSION**

15 A. Sale Order

16 We begin our analysis by noting what we will not consider in
17 this appeal. At the time this appeal was filed, Rule 8001 set
18 forth the procedure for appealing bankruptcy court orders and
19 judgments. Rule 8001(a), which was adapted from Rule 3(a) of the
20 Federal Rules of Appellate Procedure ("FRAP"), provided that:

21 An appeal from a judgment, order, or decree of a
22 bankruptcy judge to a district court or bankruptcy
23 appellate panel as permitted by 28 U.S.C. § 158(a) (1)
24 or (a)(2) shall be taken by filing a notice of appeal
with the clerk within the time allowed by Rule 8002
. . . . The notice of appeal shall (1) conform
substantially to the appropriate Official Form,

25 The appropriate Official form was Form 17, which provided in its
26 initial paragraph as follows:

27 _____, the plaintiff [or defendant or other
28 party] appeals under 28 U.S.C. § 158(a) or (b) from the
judgment, order, or decree of the bankruptcy judge

1 (describe) entered in this adversary proceeding [or
2 other proceeding, describe type] on the ____ day of
(month), (year). (Emphasis added.)

3 Accordingly, the Appellants were required to designate in the
4 Notice of Appeal the specific judgment or order appealed from in
5 this case. (Effective December 1, 2014, the appellate Rules and
6 official forms were revised to make this requirement even
7 clearer.)

8 The only order attached to the Notice of Appeal is the
9 Conversion Order. The Notice of Appeal does not identify any
10 other order being appealed. Notably absent from the text or
11 attachment to the Notice of Appeal in light of the arguments
12 raised in Appellants' briefs is the Sale Order, which cannot
13 credibly be characterized as "an incidental matter" to the
14 Conversion Order.

15 Consideration of the scope of an appeal is fairly forgiving
16 so long as it is clear what acts or orders the appeal
17 encompasses. See Torres v. Oakland Scavenger Co., 487 U.S. 312,
18 316-17 (1988); Foman v. Davis, 371 U.S. 178 (1962); United States
19 v. Arkison (In re Cascade Roads, Inc.), 34 F.3d 756, 761-61 and
20 particularly, n.5 (9th Cir. 1994), citing Foman v. Davis,
21 371 U.S. at 181. However, that flexibility is not unlimited.
22 See Smith v. Barry, 502 U.S. 244, 248 (1992). "[A]lthough a
23 court may construe [FRAP] liberally in determining whether they
24 have been complied with, it may not waive the jurisdictional
25 requirements of Rules 3 and 4, even for 'good cause shown' under
26 Rule 2, if it finds that they have not been met." Torres v.
27 Oakland Scavenger Co., 487 U.S. at 317.

28 Nothing in the Notice of Appeal gives any indication that

1 We note that the deadline to seek relief from the Sale Order in
2 bankruptcy court on grounds of mistake, inadvertence, surprise or
3 excusable neglect; newly discovered evidence; and/or fraud,
4 misrepresentation or misconduct by an opposing party under Civil
5 Rule 60(b) (1), (2) or (3) is now long past.

6 Generally, and particularly in situations where § 363(m)
7 applies, where a sale of bankruptcy estate property has been
8 approved by order of the bankruptcy court, if no stay of the sale
9 is obtained, an appeal of the sale order is moot. See, e.g., Rev
10 Op Group v. ML Manager LLC (In re Mortgs. Ltd.), 2014 WL 5859300
11 (9th Cir. Nov. 12, 2014) (“[A]ppeals of unstayed sales orders to
12 good faith purchasers are moot under the broader ‘bankruptcy
13 mootness rule’ that complements bankruptcy law regardless of
14 whether the sales should have been made.”); Onouli-Kona Land Co.
15 v. Estate of Richards (In re Onouli-Kona Land Co.), 846 F.2d 1170
16 (9th Cir. 1988).

17 In this appeal, there is no reference in the Notice of
18 Appeal to the Sale Order, and a copy of the Sale Order was not
19 attached to the Notice of Appeal. Accordingly, this appeal does
20 not encompass the Sale Order, and we do not consider any issues
21 or arguments raised by the Appellants in their briefs with
22 respect to the Sale Order. See, e.g., Spookyworld, Inc. v. Town
23 of Berlin (In re Spookyworld, Inc.), 346 F.3d 1, 6 (1st Cir.
24 2003).

25

26

27

28 ¹²(...continued)
Wagner’s litigation adventures.

1 B. Appellants' Lack of Standing to Raise Claims of Other
2 Shareholders

3 "In every federal case, the party bringing the suit must
4 establish standing to prosecute the action." Elk Grove Unified
5 School Dist. v. Newdow, 542 U.S. 1, 11 (2004) ("Elk Grove").

6 "This inquiry involves both constitutional limitations on federal
7 court jurisdiction and prudential limitations on its exercise."
8 Warth v. Seldin, 422 U.S. 490, 498 (1975).

9 A litigant must have both constitutional standing and
10 prudential standing for a federal court to exercise jurisdiction
11 over the case. Elk Grove, 542 U.S. at 11-12. Constitutional
12 standing requires the litigant to demonstrate "that the conduct
13 of which he complains has caused him to suffer an 'injury in
14 fact' that a favorable judgment will redress." Id. at 12.
15 Prudential standing "encompasses the general prohibition on a
16 litigant's raising another person's legal rights." Elk Grove,
17 542 U.S. at 12 (citation and quotation signals omitted). To
18 establish prudential standing, the litigant must: 1) assert his
19 own rights, rather than rely on the rights or interests of third
20 parties; 2) allege an injury that is more than a generalized
21 grievance; and 3) allege an interest that is within the zone of
22 interests protected by the statute or constitutional guarantee in
23 question. Hong Kong Supermarket v. Kizer, 830 F.2d 1078, 1081
24 (9th Cir. 1987). "Failure to satisfy any of these constitutional
25 or prudential requirements defeats standing." Id. (citation
26 omitted).

27 Additionally, with respect to appeals involving bankruptcy
28 matters, the appellant must be "a person aggrieved" by the

1 bankruptcy court's order. Motor Veh. Cas. Co. v. Thorpe
2 Insulation Co. (In re Thorpe Insulation Co.), 677 F.3d 869, 884
3 (9th Cir. 2012). That is, the appellant must be directly and
4 adversely affected by the bankruptcy court's order - it must
5 diminish the appellant's property, increase his burdens, or
6 detrimentally affect his rights. Id.

7 On appeal, Lee and Andrus challenge the Conversion Order on
8 a single ground: the bankruptcy court lacked jurisdiction to
9 convert WBGI's chapter 11 case to chapter 7 because most of
10 WBGI's shareholders did not receive notice of the Conversion
11 Hearing as required under Rule 2002(d)(4) and Local Rule
12 2002(a)(1).¹³

13 Lee and Andrus acknowledge that they obtained notice of the
14 Conversion Hearing. Appellants' Opening Brief at 3, 6;
15 Appellant's Reply Brief at 2, 4. However, they want to make
16 arguments on behalf of the "600+ shareholders" of WBGI who
17 allegedly did not receive notice of the Conversion Hearing. In
18 short, we conclude that they have no standing to do so.

19 As the bankruptcy court pointed out at the Conversion
20 Hearing, Andrus (who was present) could not make any

21
22 ¹³ Rule 2002(d) provides, in relevant part: "In a chapter 11
23 reorganization case, unless otherwise ordered by the court, the
24 clerk, or some other person as the court may direct, shall in the
25 manner and form directed by the court give notice to all equity
security holders of . . . (4) the hearing on the dismissal or
conversion of a case to another chapter"

26 Local Rule 2002(a) provides, in relevant part: "(1) Any
27 person who files a pleading, written motion or other document
28 that requires notice to another party is responsible for serving
all parties who must be served. Unless the court directs
otherwise, the clerk will not serve those notices."

1 representations on behalf of other, absent shareholders. Neither
2 Lee nor Andrus are licensed attorneys, employed by other
3 shareholders to represent them in WBGI's bankruptcy case. Nor
4 have either of them demonstrated before the bankruptcy court or
5 before this Panel that they have any authorization from any other
6 shareholders to act on their behalf. Therefore, Lee and Andrus
7 cannot raise arguments that otherwise might have been available
8 to other shareholders based on an alleged lack of notice as they
9 lack prudential standing to do so.

10 C. Waiver of Arguments

11 Lee had notice of the UST Motion to Dismiss and, in fact,
12 filed an affidavit opposing the motion on March 28, 2014, well in
13 advance of the Conversion Hearing. Lee, however, did not attend
14 the Conversion Hearing personally. Andrus did attend the
15 Conversion Hearing and testified and argued against dismissal or
16 conversion to the bankruptcy court.

17 Lee and Andrus personally do have standing to appeal the
18 Conversion Order in their own rights. However, other than
19 arguing the alleged lack of notice to other shareholders, they do
20 not present any arguments in their briefs as to how the
21 bankruptcy court abused its discretion in granting the UST Motion
22 to Dismiss and entering the Conversion Order. Accordingly, any
23 such arguments are deemed waived. "We review only issues which
24 are argued specifically and distinctly in a party's opening
25 brief." Greenwood v. F.A.A., 28 F.3d 971, 977 (9th Cir. 1994),
26 citing Miller v. Fairchild Indus., Inc., 797 F.2d 727, 738 (9th
27 Cir. 1986).

28 Even if we were to proceed to review the bankruptcy court's

1 decision to convert WBGI's chapter 11 case to chapter 7 on the
2 merits, the record amply supports the bankruptcy court's decision
3 on at least the following grounds: 1) WBGI was not filing its
4 required monthly operating reports; 2) WBGI was delinquent in
5 paying the UST quarterly fees; 3) WBGI was not an operating
6 entity, as its only operating assets had been sold months before
7 pursuant to the Sale Order that never was appealed; and 4) WBGI's
8 sole remaining assets included limited cash and its
9 nondischargeable judgment against Wagner, that could be evaluated
10 for collectibility by a chapter 7 trustee.

11 **CONCLUSION**

12 Based on the foregoing analysis, we AFFIRM the Conversion
13 Order.

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