

No. 22-60052

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re: JASON PHILIP POWELL,
Debtor,

TICO CONSTRUCTION COMPANY INC.,
Appellant,

v.

WILLIAM ALBERT VAN METER, Chapter 13 Trustee; MELISSA
HOOVEN, FKA MELISSA POWELL; JASON PHILIP POWELL,
Appellees,

ON APPEAL FROM THE UNITED STATES BANKRUPTCY
APPELLATE PANEL OF THE NINTH CIRCUIT
Hon. Robert J. Faris, William Lafferty, Julia W. Brand

APPELLANT’S OPENING BRIEF

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FRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed.

There are no parent corporations for Respondent TICO CONSTRUCTION COMPANY, INC. or publicly held companies owning 10% or more of Respondent's stock.

Respondent has been represented throughout this action by L. Edward Humphrey, Esq., and Patrick O'Rourke, Esq., of Humphrey O'Rourke PLLC. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

There are no debtors in this case that are not named in the caption, nor are there any corporate debtors.

April 28, 2023.

HUMPHREY O'ROURKE PLLC

/S/ Patrick O'Rourke
Patrick O'Rourke, SBN 13557
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INTRODUCTION

This case centers around the seemingly novel issue of how the Court should treat a debtor who files a petition under Chapter 13, invoking jurisdiction of the Bankruptcy Court under Title 11, but does not meet the requirements to be a debtor under Chapter 13. The Bankruptcy Court held that despite the explicit language of 11 U.S.C. 301 and 11 U.S.C. 109(e) setting forth who may be a debtor under Chapter 13, and TICO's objection, debtor Jason Powell was entitled to invoke the limited rights available only to a debtor qualified under the aforementioned code sections.

But Chapter 13 debtors are entitled to unique rights not available to debtors under other chapters because of the voluntary nature of proceedings under Chapter 13. TICO asserts that it was error to allow Powell to invoke the rights reserved exclusively for debtors who meet the requirements of 11 U.S.C. 109(e) and seek to voluntarily resolve their debts. By granting Powell's motion to dismiss his bankruptcy case without imposing sanctions or conditions, after Powell caused TICO to incur great cost and delay during the bankruptcy litigation, the Bankruptcy Court misconstrued the applicable sections of the Bankruptcy Code and the recent decision of this Court in *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, 2021 (9th Cir. Sep. 1, 2021).

The holding in *Nichols* was narrow, and limited to eliminating a “bad faith” exception to a qualified Chapter 13 debtor’s right to dismissal under 11 U.S.C. 1307(b). But the Bankruptcy Court interpreted *Nichols* to mean that any debtor who files a petition and selects Chapter 13, even if they are ineligible, is entitled to an unconditional dismissal of their case without consideration of the best interests of the creditors or the bankruptcy estate. Under the Bankruptcy Court’s ruling, which was affirmed by the Bankruptcy Appellate Panel for the Ninth Circuit, any debtor, regardless of the size of the entity or the amount of secured or unsecured debt, may file a petition under Chapter 13 in bad faith, solely for the purpose of delaying and defrauding creditors, and enjoy the full protections afforded exclusively to eligible Chapter 13 debtors for whom these greater rights were intended. The decision of the Bankruptcy Court cannot stand.

JURISDICTIONAL STATEMENT

The Bankruptcy Court entered its *Order Granting Motion for Voluntary Dismissal* (“Dismissal Order”) on January 14, 2022. *See* Appellant’s Excerpts of Record (“ER”) at 1 ER 1-6. The Bankruptcy Court properly exercised jurisdiction under 28 U.S.C. §§ 157(b)(2)(A), 1334. TICO timely appealed to the Bankruptcy Appellate Panel for the Ninth Circuit (“BAP”) on January 24, 2022. The BAP entered its published *Opinion* on October 21, 2022, which is reported as *TICO*

Constr. Co. v. Van Meter (In re Powell), 644 B.R. 181 (B.A.P. 9th Cir. 2022) ; *see also* 1 ER 17-28. The bankruptcy appellate panel had jurisdiction under 28 U.S.C. §158(a). TICO timely appealed to this Court on November 18, 2022. *See* 6 ER 1138; Fed. R. Bankr. P. 8002(a).

The Orders of the Bankruptcy Court and BAP are final and this Court has jurisdiction under 28 U.S.C. 158(d)(1). *See Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1223 (9th Cir. 1999).

STATEMENT OF ISSUES

1. Did the Bankruptcy Court err as a matter of fact or law in entering the Order Granting Motion for Voluntary Dismissal of Chapter 13 Case Pursuant to 11 U.S.C. § 1307(b) without considering the Debtor's Chapter 13 eligibility or the best interest of the estate or creditors?
2. May a debtor proceed under Chapter 13 if they do not meet the statutory requirements under 11 U.S.C. § 109(e)?
3. What is the proper course of action when a debtor files a petition under Chapter 13, invoking jurisdiction of the Bankruptcy Court under Title 11, but is not qualified for the chapter selected?
4. Did the Bankruptcy Court err in declining to hold an evidentiary hearing to investigate whether sanctions or conditions should be imposed on the dismissal of the case?

STATEMENT OF RELEVANT STATUTES

All applicable statutes are contained in the Addendum to Appellants' Opening Brief.

STATEMENT OF THE CASE

On May 9, 2000, TICO filed a civil Complaint in the Second Judicial District Court, Washoe County, Nevada ("State Court") against Jason Philip Powell and Genseven Development and Construction, a Nevada limited liability company ("Genseven"), commencing Case No. CV08-01202 ("State Court Action"). *See (Opposition to Motion to Dismiss and Motion to Convert and for Sanctions)* at 4 ER 726. As alleged in the State Court Action (and the nondischargeability action filed against Powell in the bankruptcy court), TICO is a construction company that employed Powell as a Senior Project Manager. *Id.* at 4 ER 727. While employed with TICO, Powell gained significant knowledge regarding TICO's finances, ongoing contract negotiations, bids, and job proposals. *Id.* Near the end of January 2008, Powell advised TICO he was resigning to become a full partner at Genseven. *Id.* It turned out that Powell had formed Genseven before quitting his position at TICO. *Id.*

Despite the non-disclosure and non-compete obligations in Powell's employment agreement, he misappropriated TICO's trade secrets, and effectively

misappropriated or embezzled work and information belonging to TICO and used it for his own and his company Genseven's benefit. *Id.* Powell's misconduct was specifically related to a construction project to build an office building for Signature Landscaping ("Signature Landscaping Project"). *Id.* In layman's terms, Powell and Genseven stole the job from TICO. *Id.*

In July 2008, TICO's claims against Powell were sent to binding arbitration, with the State Court retaining the claims against Genseven. *Id.* In mid-August 2008, TICO filed a motion for case ending sanctions in the State Court Action based on Genseven's and Powell's discovery abuses—specifically the failure to disclose crucial documentary evidence related to the Signature Landscaping Project—which TICO uncovered by way of third-party subpoena. *Id.*

At the end of September 2009, the State Court granted TICO's sanctions motion and entered a default judgment against Genseven, finding Genseven "employed abusive litigation practices when it withheld correspondence which was specifically requested by Plaintiff during discovery." *Id.* The State Court entered judgment against Genseven for \$215,149.86 in damages, plus \$75,907.82 in attorney's fees and costs ("Genseven Judgment"). *Id.*

In June 2010, the arbitration hearing against Powell came on for hearing ("Arbitration Hearing") before arbitrator Robert Enzenberger ("Arbitrator"). *Id.*

Despite having proper notice, Powell failed to attend the Arbitration. *Id.* After hearing the evidence presented during the Arbitration Hearing, the Arbitrator entered an Arbitrator's Award against Powell finding, "[b]ased on the evidence presented at the arbitration hearing concerning the cause of action for breach of contract, the arbitrator finds in favor of TICO Construction Company, Inc. and against Jason Powell, and awards damages in the amount of \$215,140,86 plus reasonable attorney's fees and costs incurred in connection with this arbitration proceeding, pursuant to the employment contract entered into between the parties." *Id.* at 4 ER 728.

On July 23, 2010, the State Court entered a Judgment on Arbitrator's Award against Powell for \$215,629.86, plus post-judgment interest at the statutory rate ("TICO Judgment"). *See (Objection to Homestead Exemption (with exhibits))* at 5 ER 833. TICO recorded the TICO Judgment on September 24, 2010, creating a judgment lien on all of Powell's real property in Washoe County, Nevada. *Id.* TICO renewed the Powell Judgment on July 19, 2016, recording it the next day. *Id.* TICO has been chasing, and Powell has been evading, payment ever since.

On October 1, 2016, approximately 10 weeks after TICO renewed its Judgment, Powell married Melissa Hooven aka Melissa Powell ("Ms. Powell" and collectively with Powell, the "Powells"). *See* 4 ER 585. The couple had been dating

since December 2014, and according to Powell, they purportedly executed a Prenuptial Agreement on their wedding day, at the wedding. 4 ER 639.

The Powells were married for about four years and two months. Ms. Hooven entered the marriage with significant assets, including real estate and financial accounts, and earned a substantial salary. *See (Omnibus Reply in Support of Opp to MTD and Motion to Convert (w Exhibits))* at 3 ER 429. The Debtor, Jason Philip Powell (“Powell”) owned a lucrative one-half interest in Parisi & Powell, Inc. (dba “PRD Construction”), from which he also drew a substantial salary. *Id.* The Debtor also had several judgments against him and other debts. *Id.* Throughout their marriage, the Powells lived off the Debtor’s salary, using it to pay for many of Ms. Hooven’s expenses. *Id.* The Debtor also transferred his nonexempt interest in the community property proceeds of sale of real properties to Ms. Hooven in exchange for a different property in which he claimed in this bankruptcy as his exempt homestead. *Id.* This was all orchestrated in an attempt to preserve all of the Powells’ assets, while eliminating the Debtor’s creditors. *Id.*

On January 14, 2022, the bankruptcy court entered an *Order Granting Motion for Voluntary Dismissal of Chapter 13 Case Pursuant to 11 U.S.C. § 1307(b)*. *See (Order Granting Motion for Voluntary Dismissal)* at 1 ER 1-6. The Debtor does not deny that he filed a petition under Chapter 13, under which he never

qualified, to forestall the collection efforts of his creditors. *See* 5 ER 832. Nor does he provide any facts or evidence refuting TICO's bad faith allegations. *Id.* The Debtor solely relies on a Chapter 13 debtor's right to a dismissal under Section 1307(b) of the Code to argue that the dismissal of his case was required— notwithstanding the fact that he is not now, and never was, qualified to be a Chapter 13 debtor; the fact that he fraudulently transferred substantially all of his non-exempt assets, immediately prior to and even after filing his bankruptcy petition; and the fact that he has attempted to abuse the legal process of various courts to hinder and delay his creditors, driving up the costs of collection in bad faith. *Id.* The bankruptcy court made an error of law by failing to consider whether conversion to a Chapter 7 or dismissal was in the best interest of the creditors and the estate, and the Bankruptcy Appellate Panel for the Ninth Circuit affirmed.

SUMMARY OF ARGUMENT

In his bankruptcy case, Debtor Jason Philip Powell ("Powell" or "Debtor") asserted that he had an absolute right to dismiss at any time under Section 1307(b), relying on *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, 2021 (9th Cir. Sep. 1, 2021). *See (Motion to Dismiss Case w Exhibit)*, at 4 ER 749. However, *Nichols* actually counsels in favor of the Court strictly adhering to the statutory language of the Bankruptcy Code, under which Powell may not

proceed as a Chapter 13 debtor. It was an error of law for the bankruptcy court to conclude that Powell was entitled to proceed as a Chapter 13 debtor and exercise the right to unconditional dismissal under 11 U.S.C. § 1307(b).¹

Section 109(e) of the Bankruptcy Code contains the Chapter 13 debt limits and refers to Section 104, which adjusts those limits every three years. As of the Petition Date of March 1, 2021, the secured debt limit was \$1,257,850 and the unsecured debt limit was \$419,275. Only a debtor under both these limits qualifies to be a debtor under Chapter 13.

The Ninth Circuit B.A.P. and Court of Appeals have agreed with the conclusion reached in *In re Tatsis*, 72 B.R. 908 (Bankr. W.D.N.C. 1987), considering the best interest of the estate and creditors, and “which determined that ‘the overwhelming weight of authority is thus squarely in favor of allowing conversion [by an ineligible Chapter 13 debtor]’ instead of dismissing the case. *In re Wenberg*, 94 B.R. 631, 636 (B.A.P. 9th Cir. 1988), *aff’d* 902 F.2d 768 (9th Cir. 1990). Many other courts have reached the same conclusion, that “[t]he Court, for example, has the power to convert the case of a debtor ineligible for relief under chapter 13 to a case under chapter 7.” *In re Jones*, 129 B.R. 1003, 1009 (Bankr. N.D.

¹ All future references to “Code,” “Section,” and “§” are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated.

Ill. 1991) (collecting cases).

In opposing the Debtor's Motion to Dismiss, TICO echoed the *Wenberg* and *Tatsis* courts, that under the circumstances present here, the explicit language of the Bankruptcy Code establishes the congressional intent that when a debtor files a case under Chapter 13, but is ineligible for relief under said chapter, "the case should be administered in accordance with the Code provisions under the chapter which is in the best interest of the estate, the debtors and creditors." *In re Tatsis*, 72 B.R. 908, 911 (Bankr. W.D.N.C. 1987) (collecting cases).

Courts have also considered the Chapter 13 debtor bar provided by Section 109(e) in the context of conversion from a Chapter 7 case to one under Chapter 13, finding that such a conversion is not possible for debtors who do not meet the debt limits provided by Section 109(e). *See e.g., In re Stairs*, 307 B.R. 698, 703 (Bankr. D. Colo. 2004). In *In re Stairs*, an unqualified debtor attempted to convert a case under Chapter 7 to one under Chapter 13, and actually administered the case under Chapter 13 for fifteen months before the conversion order was declared void ab initio. *Id.* The court saliently enumerated that the period of time that the unqualified debtor administered a case under Chapter 13 had already caused prejudice to creditors, that a dismissal would cause additional prejudice to creditors, that the most equitable and fair outcome would be to administer the case under

Chapter 7 to ensure that all creditors would benefit from any recovery for the estate, and that dismissal should only be allowed under Section 707(a) upon a showing that it would not cause prejudice to creditors. *Id.* at 698, 702-703.

It was an error of law to conclude that the Debtor had the absolute right to dismiss under the circumstances of this case, and that the Court was unable to consider the best interests of the estate, Debtor, and creditors. Many courts have even held that the Court may, sua sponte, consider the 109(e) debtor bar to Chapter 13 eligibility at any time. *See In re Harwood*, 519 B.R. 535, 544 (Bankr. N.D. Cal. 2014) (collecting cases). The bankruptcy court abused its discretion by failing to consider whether Powell was able to proceed as a debtor under Chapter 13 and continue to exercise rights exclusively available to a Chapter 13 debtor after Powell's Chapter 13 eligibility was challenged.

STANDARD OF REVIEW

The bankruptcy court's order dismissing a chapter 13 bankruptcy case is reviewed for abuse of discretion. *Leafty v. Aussie Sonoran Capital, LLC (In re Leafty)*, 479 B.R. 545, 550 (B.A.P. 9th Cir. 2012). "A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are illogical, implausible or without support in inferences that may be drawn from the facts in the record." *See Plyam v. Precision*

Dev., L.L.C. (In re Plyam), 530 B.R. 456, 461-62 (B.A.P. 9th Cir. 2015) (citing *TrafficSchool.com Inc. v. Edriver Inc.*, 653 F.3d 820, 832 (9th Cir. 2011)). The bankruptcy court's findings of fact are binding on the appellate court unless clearly erroneous. *See In re Howell*, 638 F.2d 81, 82 (9th Cir. 1980).

ARGUMENT

A. Debtor Jason Powell is not entitled to dismissal as a matter of right under 11 U.S.C. § 1307(b).

Powell asserted that he had an absolute right to dismiss his bankruptcy case under Section 1307(b), relying on *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, 2021 U.S. App. LEXIS 26366, at *16 (9th Cir. Sep. 1, 2021). *Nichols* addressed a narrow precedential change after the Supreme Court's decision in *Law v. Siegel*, 571 U.S. 415, 134 S. Ct. 1188, 188 L. Ed. 2d 146 (2014), which prohibits a bankruptcy court from invoking equitable considerations to contravene express language of the Code.² *See Nichols* 10 F.4th 956, 959-60. Specifically, the Court did away with the “bad faith exception” to dismissal under § 1307(b) that had been adopted in *In re Rosson*, 545 F.3d 764 (9th Cir. 2008).³ *Id.*

² All future references to “Code,” “Section,” and “§” are to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise indicated.

³ To preserve all rights on appeal, TICO asserted that if a bad faith exception to dismissal under § 1307(b) did exist, then said exception would bar dismissal here due to Powell’s bad faith conduct, but the gravamen of TICO’s objection to

At 956, 962. In *Nichols*, the Court stated “[w]e are confident that the Bankruptcy Code provides ample alternative tools for bankruptcy courts to address debtor misconduct.” *Id.* at 956, 964. However, the Court has never addressed the specific facts present here, where a debtor who cannot possibly be a debtor under Chapter 13 seeks to invoke specific provisions of the Code uniquely designed to preserve the voluntary nature of Chapter 13 proceedings for duly qualified debtors.

In this, TICO never asked the Bankruptcy Court to invoke equitable considerations to deny Powell a right to discharge under §1307(b), but asserted that the express language of the Code unequivocally precludes Powell from being a debtor under Chapter 13. The Bankruptcy Court significantly expanded the ruling in *Nichols* when it held that Powell, who, as of the Petition Date, greatly exceeded the debt limits that would have allowed him to proceed under Chapter 13, somehow enjoyed all of the unique rights reserved for a Chapter 13 debtor. Neither Powell nor the Bankruptcy Court referred to any authority to contravene Sections 301(a) or 109(e) of the Code in allowing Powell to proceed under Chapter 13, and the BAP affirmed.

But despite this Court’s narrow holding, Powell literally moved to assert a

dismissal was that Powell was unable to proceed under 1307(b) because he was not qualified under the explicit language of the Code.

right to unconditional dismissal, a right to which Powell has never been entitled, the day after *Nichols* was decided. Inapposite to *Law* and *Nichols*, the Bankruptcy Court and the BAP allowed Powell to contravene multiple Sections of the Bankruptcy Code alluded to in *Nichols* that provide the “ample alternative tools” that act as gatekeepers to such abuse. The Bankruptcy Court here allowed Powell to exercise an unconditional right to which he was never entitled. In so doing, the Bankruptcy Court’s ruling flies in the face of *Law* and *Nichols* and prescribes a blueprint for any unscrupulous debtor, no matter the extent of their debts, to significantly harm their creditors by taking advantage of Code Sections to which they are not entitled, ironically, contravening the explicit language of the Code.

Section 101(13) of the Code defines a “debtor” as a “person or municipality concerning which a case under this title has been commenced.” Section 101(13) does not mention any “chapter” of the Bankruptcy Code—and TICO does not disagree that that Powell may be a “debtor” under Title 11. But this does not resolve whether Powell may be a debtor entitled to commence a case under Chapter 13 of Title 11, or whether he enjoys the extraordinary rights of a Chapter 13 debtor. To answer these questions, one must start at Section 301(a) of the Bankruptcy Code, which provides:

(a) A voluntary case under a chapter of this title [Title 11, U.S. Code] is commenced by the filing with the

bankruptcy court of a petition under such chapter **by an entity that may be a debtor under such chapter.**

See 11 U.S.C. § 301(a) (emphasis added).⁴ As stated by Collier, “Section 301 sets forth the procedure for commencing a voluntary case under the operative chapters of the Code The petitioner must qualify as a ‘debtor’ under the selected chapter.” 2 Collier on Bankruptcy ¶ 301.01 (16th Ed. 2023).⁵ As Collier further confirms:

Section 301(a) requires the petitioner to qualify as a “debtor” under the chapter of the Code pursuant to which the petition is filed. Filing a petition under any chapter of the Code therefore necessitates reference to the requirements for a “debtor” located in section 109, as well as the related definitions contained in section 101.

See 2 Collier on Bankruptcy at ¶ 301.04 (16th 2023). Simply put, while Powell may be a “debtor” under Title 11 [*see* 11 U.S.C. 101(13)], in order for him to “commence” a case under Chapter 13 of Title 11, he had to be eligible to file his petition under Chapter 13. To assess that, one turns to Section 109 of the Bankruptcy Code, titled “Who may be a debtor”, and Section 109(e) in particular—which sets out the requirements to be “a debtor under chapter 13 of

⁴ The term “entity” includes a “person”, and the term “person” includes an individual. *See* 11 U.S.C. § 101(15); 11 U.S.C. § 101(41).

⁵ Under section 103(a) of the Code, Section 301(a) applies to all cases “under chapter 7, 11, 12, or 13” of Title 11.

[Title 11, U.S. Code].” *See* 11 U.S.C. § 109(e). And under that Section, “[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than \$2,750,000 may be a debtor under chapter 13 of [Title 11].” *Id.*⁶

To answer the question before the Court, the analysis next turns to Section 1307(b), which states that, “[o]n request of a debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case **under this chapter**.” 11 U.S.C. § 1307(b). And here lies the quandary before the Court: Does a debtor have an unfettered right to dismiss a

⁶ The full text of 11 U.S.C. § 109(e) provides:

Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than \$2,750,000 or an individual with regular income and such individual’s spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than \$2,750,000 may be a debtor under chapter 13 of this title.

See also Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 981 (9th Cir. 2001) (a bankruptcy court can look past the debtor’s schedules to other evidence when a good faith objection to the debtor’s Chapter 13 eligibility is brought by a creditor (citations omitted). In addition to being over the debt limit, it is also questionable whether the Debtor orchestrated the “regular income” requirement of Section 109(e), as the Debtor obtained his claimed regular employment (rather than his previous occupation as a business owner of a company in its own Chapter 11 proceeding) very near the Petition Date in this case.

bankruptcy case under Section 1307(b) if a case under Chapter 13 has never actually been commenced because the petition, while stating it was filed under Chapter 13, was not filed “by an entity that may be a debtor under such chapter”, as the plain language of Section 301(a) requires? *See* 11 U.S.C. § 301(a)? TICO asserts the answer to this question is no, a debtor does not have such an unfettered right.

Nichols actually counsels in favor of the Court strictly adhering to the statutory language of the Bankruptcy Code, under which Powell may not proceed as a Chapter 13 debtor entitled to dismissal as a matter of right.

Section 109(e) of the Bankruptcy Code contains the Chapter 13 debt limits and refers to Section 104, which adjusts those limits every three years. As of the Petition Date of March 1, 2021, the secured debt limit was \$1,257,850 and the unsecured debt limit was \$419,275. Only a debtor under both these limits qualifies to be a debtor under Chapter 13.

The Ninth Circuit B.A.P. and Court of Appeals have agreed with the conclusion reached in *In re Tatsis*, 72 B.R. 908 (Bankr. W.D.N.C. 1987), “which determined that ‘the overwhelming weight of authority is thus squarely in favor of allowing conversion [by an ineligible Chapter 13 debtor]’ instead of dismissing the case. *In re Wenberg*, 94 B.R. 631, 636 (B.A.P. 9th Cir. 1988), *aff’d* 902 F.2d 768

(9th Cir. 1990). Many other courts have reached the same conclusion, that “[t]he Court, for example, has the power to convert the case of a debtor ineligible for relief under chapter 13 to a case under chapter 7.” *In re Jones*, 129 B.R. 1003, 1009 (Bankr. N.D. Ill. 1991) (collecting cases).

In opposing the Debtor’s Motion to Dismiss, TICO echoed the *Wenberg* and *Tatsis* courts, that under the circumstances present here, the explicit language of the Bankruptcy Code establishes the congressional intent that when a debtor files a case under Chapter 13, but is ineligible for relief under said chapter, “the case should be administered in accordance with the Code provisions under the chapter which is in the best interest of the estate, the debtors and creditors.” *In re Tatsis*, 72 B.R. 908, 911 (Bankr. W.D.N.C. 1987) (collecting cases). The bankruptcy court did not consider Powell’s Chapter 13 eligibility, but instead allowed him to proceed as a Chapter 13 debtor despite TICO’s objection that Powell’s unsecured debts rendered him ineligible as of the Petition Date.

Courts have also considered the Chapter 13 debtor bar provided by Section 109(e) in the context of conversion from a Chapter 7 case to one under Chapter 13, finding that such a conversion is not possible for debtors who do not meet the debt limits provided by Section 109(e). *See e.g., In re Stairs*, 307 B.R. 698, 703 (Bankr. D. Colo. 2004). In *In re Stairs*, an unqualified debtor attempted to convert a case

under Chapter 7 to one under Chapter 13, and actually administered the case under Chapter 13 for fifteen months before the conversion order was declared void ab initio. *Id.* The court saliently enumerated that the period of time that the unqualified debtor administered a case under Chapter 13 had already caused prejudice to creditors, that a dismissal would cause additional prejudice to creditors, that the most equitable and fair outcome would be to administer the case under Chapter 7 to ensure that all creditors would benefit from any recovery for the estate, and that dismissal should only be allowed under Section 707(a) upon a showing that it would not cause prejudice to creditors. *Id.* at 698, 702-703. By filing his Chapter 13 Petition, and proceeding thereunder for nearly one year, Powell has worked a similar prejudice on his creditors here.

It was an error of law to conclude that the Debtor had the absolute right to dismiss under the circumstances of this case, and that the Court was unable to consider the best interests of the estate, Debtor, and creditors, and this Court should remand this case accordingly. Many courts have even held that the Court may, sua sponte, consider the 109(e) debtor bar to Chapter 13 eligibility at any time. *See In re Harwood*, 519 B.R. 535, 544 (Bankr. N.D. Cal. 2014) (collecting cases).

1. The right to unconditional dismissal of a bankruptcy case in § 1307(b) is reserved for a debtor under Chapter 13 of the Code.

Because debtors in Chapter 13 proceedings have voluntarily attempted to resolve their debts, they are imbued with greater statutory entitlements than other debtors, such as the immediate dismissal of their petition upon request as a matter of right. *See Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, No. 20-60043, 2021 U.S. App. LEXIS 26366, at *16 (9th Cir. Sep. 1, 2021).

“The eligibility criteria set forth in section 109(e) are specific and restrictive, with monetary amounts established to govern eligibility so as **to ensure that those persons for whose benefit the chapter is directed are those who employ its provisions.**” *Stearns v. Pratola (In re Pratola)*, 589 B.R. 779, 788 (N.D. Ill. 2018) (quoting 2 Collier On Bankruptcy) (punctuation omitted) (emphasis added).

Once the Bankruptcy Court became aware that Debtor was ineligible to proceed under Chapter 13 due to his debts as of the Petition Date, Debtor should have been precluded from proceeding under Chapter 13, and ineligible for dismissal as a matter of right under Section 1307(b). *See e.g. Nikoloutsos v. Nikoloutsos (In re Nikoloutsos)*, 199 F.3d 233, 237 (5th Cir. 2000) (Finding it was reversible error to allow debtor to invoke provisions of Section 1307 once court was on notice he exceeded unsecured debt limit). The Debtor has not provided any authority that the Code was intended to provide the expanded rights reserved

for a Chapter 13 debtor to one who would misstate the extent of their debts and assets in an attempt to benefit from the resultant delay caused to their creditors. Under the Bankruptcy Court's reasoning, anyone may proceed as a debtor under Chapter 13, despite the unambiguous provisions of §§ 109(e) and 301(a).

2. Jason Powell cannot be a debtor under Chapter 13 of the Code.

TICO's position, based on the plan language and structure of the Bankruptcy Code, is simple: Jason Powell cannot be a "debtor" within the meaning of Section 1307(b) of the Bankruptcy Code if he cannot even be a Chapter 13 debtor under Section 109 of the Code. Section 109 of the Code is titled "Who may be a debtor." And the plain language of Section 109(e) provides, "**only an individual** with regular income that owes, on the date of the filing of the petition noncontingent, liquidated, **unsecured debts of less than [\$419,275]... may be a debtor under chapter 13 of this title.**"⁷ Thus, based on a plain reading of Section 109(e), an individual with noncontingent, liquidated unsecured debts exceeding the prescribed amount cannot "be a debtor under chapter 13" of the Code. (Emphasis added). But only a debtor who is qualified to pass through the 'gateway' enumerated in Section 109(e) may proceed as a debtor under Chapter 13 and invoke the

⁷ The unsecured debt limit for chapter 13, adjusted under Section 104 of the Code, as of the Debtor's petition date was \$419,275.

provisions of the Code that are exclusively available to Chapter 13 debtors. *Puerto Rico v. Franklin Cal. Tax-Free Tr.*, 579 U.S. 115, 133-34, 136 S. Ct. 1938, 1951 (2016) (“Because §109 tells different kinds of debtors which bodies of bankruptcy law apply to them, the Court has described that section as a “gateway” provision... Once an entity meets the eligibility requirements for a specific “gateway” set out in §109 and elects to pass through that gateway, it becomes subject to the relevant chapter of the Code—7, 9, 11, 12, or 13”) (citations omitted).

Throughout the underlying bankruptcy litigation, Debtor never contested that he was, on the Petition Date, qualified to be a debtor under Chapter 13, thus conceding TICO’s point. But notwithstanding TICO’s challenge to Powell’s Chapter 13 eligibility, and Powell’s failure to prove eligibility, the bankruptcy court allowed Powell to proceed and invoke rights exclusively reserved for a qualified debtor under Chapter 13 and the BAP affirmed, holding that “nothing in the text of § 1307(b) limits voluntary dismissal to only “eligible” debtors.” *TICO Constr. Co. v. Van Meter (In re Powell)*, 644 B.R. 181, 186 (B.A.P. 9th Cir. 2022); 1 ER 17-28.

B. Because Debtor has invoked the jurisdiction of the bankruptcy court, the bankruptcy court should have considered whether it was in the best interest of creditors and the estate to convert this case to one under Chapter 7 of the Code.

Debtor has claimed that despite the fact that he is not now, and was not on the Petition Date, eligible to be a debtor under Chapter 13, he may proceed to employ the exclusive provisions reserved for debtors so qualified, because he requested treatment under said chapter in his Petition. Debtor asserts that merely checking the box for Chapter 13 on the first page of his Petition gives him the right to an unconditional dismissal as a matter of right under Section 1307(b) even if he exceeded the unsecured debt limit as of the Petition Date.

However, each case relied upon by Debtor in asserting that his case should be dismissed rather than converted first considered what would be in the best interest of the creditors, the debtor, and the estate, and only then decided to dismiss if that was the collective best interest of the parties. *See e.g. In re McCune*, 2021 Bankr. LEXIS 2836, at *17, 2021 WL 4782957, Case No. 20-12326-j13 (Bankr. D.N.M. Oct. 13, 2021) (“The Court concludes that Debtors' chapter 13 case must be dismissed **or converted to another chapter** because Debtors conceded for purposes of the pending Motions that they are not eligible to be chapter 13 debtors”) (emphasis added); *see also In Re Kwiatkowski*, 486 B.R. 409 (Bankr. E.D. Mich. 2013) (similarly holding that upon determination that the debtor was not qualified under Chapter 13, the case must be converted or dismissed, but imposing sanctions upon debtor if debtor proceeded with

dismissal).

The Debtor had full knowledge of his unsecured debts, and it appears that he intentionally misstated them on his schedules in an attempt to hinder and delay creditors and avoid appearing at a state court judgment debtor's examination. The Debtor utilized bankruptcy counsel to file his bare bones Petition at the eleventh hour, and should have certainly been able to discern that he was not qualified under Chapter 13 well before filing. By filing his Petition under Chapter 13, the Debtor has "establishe[d] jurisdiction in this Court in accordance with 28 U.S.C. §§ 1334 and 157... [and gave] the Court the right and authority to administer the case in accordance with the Bankruptcy Code." *In re Tatsis*, 72 B.R. 908, 910 (Bankr. W.D.N.C. 1987).

In the underlying bankruptcy case, the court did not consider the best interest of creditors or the estate, but instead allowed Debtor to proceed under Chapter 13 despite TICO's objection that Debtor was not eligible.

C. It was an abuse of discretion to not consider whether Powell's conduct warranted the conversion of this case to one under Chapter 7 of the Code or the imposition of sanctions or conditions on the dismissal.

It was an error of law to conclude that the Debtor had the absolute right to dismiss under the circumstances of this case, and that the Court was unable to consider the best interests of the estate, Debtor, and creditors. Many courts have even

held that the Court may, sua sponte, consider the 109(e) debtor bar to Chapter 13 eligibility at any time. *See In re Harwood*, 519 B.R. 535, 544 (Bankr. N.D. Cal. 2014) (collecting cases). Once the Bankruptcy Court was on notice that Debtor exceeded the unsecured debt limit as of the Petition Date, Debtor was unable to proceed under Chapter 13, and unable to invoke dismissal under Section 1307(b) as a matter of right. This unconditional dismissal is a right reserved exclusively for debtors who qualify under Section 109(e) to proceed under Chapter 13.

Instead, the only option for the Bankruptcy Court was to **first** consider the best interests of the estate and the creditors, and only then, proceed to convert or dismiss the case in the best interests of the estate and creditors. The Bankruptcy Court did not consider the best interests of the estate or creditors, but instead allowed the ineligible Debtor to proceed under Chapter 13, which was a reversible error of law.

Both the Bankruptcy Court and the BAP also failed to examine whether it was an abuse of discretion to grant a dismissal without conducting an evidentiary hearing to determine if sanctions should be imposed under §§ 105(a), 349(a), and/or 9011. The Bankruptcy Court declined to impose sanctions without any further explanation, and the BAP similarly stated “*Nichols* also recognizes that the bankruptcy court has other tools to address such abuse. See *In re Nichols*, 10 F.4th at 964. For example, it

could impose a bar on refiling or other conditions under § 105.” *TICO Constr. Co.*, 644 B.R. 181, 187; 1 ER 17-28. The Kansas Bankruptcy Court recently dealt with very similar issues of bad faith and dismissal under §1307(b), and held that even though § 1307(b) provides for an unconditional dismissal, the Court may still hold an evidentiary hearing to determine whether grounds exist to file a motion for imposition of remedies on the dismissal. *See In re Kemp*, No. 21-40365, 2022 Bankr. LEXIS 16, at *11-12 (Bankr. D. Kan. Jan. 5, 2022).

It appears that Powell never had any intention of completing a plan under Chapter 13, and TICO made substantial and detailed allegations of bad faith conduct throughout the bankruptcy proceedings. It was an abuse of discretion for the Bankruptcy Court to dismiss without holding an evidentiary hearing to determine if Powell filed and/or conducted his bankruptcy proceedings in bad faith. By proceeding under a Chapter 13 case to which he was not entitled for nearly one year, Powell caused TICO to incur substantial attorney’s fees and significantly delayed TICO’s judgment collection efforts. The Bankruptcy Court should have considered whether Powell should be required to pay TICO’s fees and costs upon dismissal, and whether additional sanctions, such as a bar to refiling, or to discharge should have been entered as well. *See Miller v. Cardinale (In re DeVille)*, 361 F.3d 539, 553 (9th Cir. 2004) (holding that a debtor who filed a bankruptcy in bad faith to impede state

court action should be liable for creditor's attorney's fees); *see also Klestadt & Winters, LLP v. Cangelosi*, 672 F.3d 809, 813 (9th Cir. 2012).

CONCLUSION

Powell has used the *Nichols* case as a blueprint to commit fraud on his creditors. He evaded judgment collection efforts to the greatest extent he could under state law, and at the last possible moment, filed a petition under Chapter 13. He never filed a viable plan, sought plan confirmation, filed accurate schedules, or completed his 341 meeting. He used the delay to transfer assets to insiders and outside of the reach of creditors, including his entire interest in a lucrative construction business that he co-owned and worked for up until he filed his Petition. When the time came in his bankruptcy case to answer for his conduct, he asserted a right to unconditional dismissal. Powell caused TICO to incur substantial costs and suffer an additional delay of nearly one year in its collection efforts through filing his Chapter 13 case despite never being a qualified debtor. The Bankruptcy Court never held an evidentiary hearing to investigate whether sanctions were appropriate, and the BAP affirmed this decision.

The express provisions of the Code are clear, the unique benefits of Chapter 13 must be reserved for duly qualified debtors, and not used as an additional tool for

malefactors who do not meet the statutory requirements and are only seeking to delay and discourage legitimate collection efforts.

RESPECTFULLY SUBMITTED April 28, 2023.

HUMPHREY O’ROURKE PLLC

By /s/ Patrick O’Rourke
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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by Ninth Circuit Rule 32(a)(7). The Brief contains 6475 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The Brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

By /s/ Patrick O'Rourke

Date: April 28, 2023

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, the Appellant states that it is aware of no related cases pending in this Court.

By /s/ Patrick O'Rourke

Date: April 28, 2023

CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b) and 5(d), I certify under penalty of perjury that I am an attorney at Humphrey O'Rourke PLLC, 201 W. Liberty Street, Suite 350, Reno, Nevada 89501, and that on the April 28, 2023, I served the documents described below:

**APPELLANT TICO CONSTRUCTION COMPANY, INC.'s
OPENING BRIEF**

I served the above-named document(s) by the following means to the persons as listed below:

☒ **ECF System**, to all those persons registered with the Court's CM/ECF system in this case.

☒ **United States mail, First-Class, postage fully prepaid**, upon the following:

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I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 28, 2023.

HUMPHREY O'ROURKE PLLC

By /s/ Patrick O'Rourke
L. Edward Humphrey
*Counsel for Appellant, TICO
Construction Company, Inc.*

No. 22-60052

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

In re: JASON PHILIP POWELL,

Debtor,

TICO CONSTRUCTION COMPANY INC.,

Appellant,

v.

WILLIAM ALBERT VAN METER, Chapter 13 Trustee; MELISSA
HOOVEN, FKA MELISSA POWELL; JASON PHILIP POWELL,

Appellees,

ON APPEAL FROM THE UNITED STATES BANKRUPTCY
APPELLATE PANEL OF THE NINTH CIRCUIT
Hon. Robert J. Faris, William Lafferty, Julia W. Brand

ADDENDUM TO APPELLANT'S OPENING BRIEF

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11 U.S.C. 101(13), (15), and (41)

(13) The term “debtor” means person or municipality concerning which a case under this title has been commenced.

...

(15) The term “entity” includes person, estate, trust, governmental unit, and United States trustee.

...

(41)The term “person” includes individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that—

(A)acquires an asset from a person—

(i)as a result of the operation of a loan guarantee agreement; or

(ii)as receiver or liquidating agent of a person;

(B)is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or

(C)is the legal or beneficial owner of an asset of—

(i)an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or

(ii)an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit.

11 U.S.C. 301(a)

- (a) A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.

11 U.S.C. 707(a)

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

11 U.S.C. 1307(b)

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United State Court of Appeal for the Ninth Circuit by using the appellate CM/ECF system on the 28th day of April, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: April 28, 2023.

HUMPHREY O'ROURKE PLLC

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