

**No. 22-60052**

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

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In re: JASON PHILIP POWELL,  
Debtor,

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TICO CONSTRUCTION COMPANY INC.,  
Appellant,

v.

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

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

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**APPELLANT’S REPLY BRIEF**

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## INTRODUCTION

Appellant TICO Construction Company, Inc. (“TICO”) appealed the Order of the Bankruptcy Appellate Panel for the Ninth Circuit (“BAP”) affirming the Bankruptcy Court’s dismissal of Appellee Jason Powell (“Powell”)’s bankruptcy case pursuant to 11 U.S.C. 1307(b).<sup>1</sup> TICO objected to Powell proceeding under § 1307(b) because Powell exceeded the unsecured debt limits proscribed by § 109(e) and was thus ineligible to be a debtor and commence a case under Chapter 13.

In his Answering Brief, Powell responds that the requirements of §§ 109(e) and 301 setting forth who may be a debtor under Chapter 13 are irrelevant to his unconditional right to dismissal because he selected Chapter 13 when he filed his bankruptcy petition. TICO replies that it was an abuse of discretion to grant Powell an unconditional dismissal without determining Powell’s Chapter 13 eligibility or considering whether conversion of the case or a conditional dismissal would have been in the best interests of creditors and the estate.

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

## ARGUMENT

**A. The Bankruptcy Court abused its discretion when it failed to consider Debtor Jason Powell’s ineligibility to be a debtor under 11 U.S.C. §§ 109(e) and 301 in granting Powell an unconditional right to dismissal pursuant to 11 U.S.C. § 1307(b).**

In the proceedings before the Bankruptcy Court and in his Answering Brief, Powell has repeatedly asserted that even debtors who do not meet the eligibility requirements of Chapter 13 are entitled to commence cases under Chapter 13 and exercise unique provisions reserved exclusively for Chapter 13 debtors, including voluntary dismissal of their cases under § 1307(b). It is not clear when Powell believes §§ 109(e) and 301 apply or can be considered by the Court. Powell contends that because he moved to dismiss pursuant to § 1307(b), “no consideration of Section 109(e) is relevant to the Court’s analysis in determining if Powell was entitled to dismiss as a matter of right.” *See* Appellee’s Answering Brief at p. 27. Powell goes even further to argue that if bankruptcy courts applied § 109(e) as written it would “undermine Congress’s intention that Chapter 13 be a ‘wholly voluntary alternative to Chapter 7.’” *See* Appellee’s Answering Brief at p. 38.

But Congress only intended that Chapter 13 be a wholly voluntary alternative to Chapter 7 **for those debtors who qualify**. *See e.g. Stearns v. Pratola (In re Pratola)*, 589 B.R. 779, 786 (“As with the other subsections of §

109, this subsection creates a ‘gateway’ into the Chapter 13 bankruptcy process **for those who are eligible**”) (citations omitted) (emphasis added); *see also Glance v. Carroll (In re Glance)*, 487 F.3d 317, 319-320 (The purpose of § 109(e) is “[t]o ensure that only relatively small debtors invoke the protections of Chapter 13”); *see also* 2 Collier on Bankruptcy ¶ 109.06 (Richard Levine & Henry J. Sommer eds., 16th ed.) (“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**”) (emphasis added).

Powell was not qualified to enter the gateway to become a debtor under Chapter 13 on the Petition Date, or any relevant date thereafter. Despite the fact that he was not eligible to commence a case under Chapter 13, or obtain any relief thereunder, Powell sought to benefit from the unique provisions reserved for Chapter 13 debtors because they allowed him to cause the most harm to his creditors without ever requiring that he sincerely attempt to pay any debts or be required to risk liquidation of any of his property.

Powell has cited no authority that supports his contentions that §§ 109(e) and 301 do not apply to him or preclude him from being a debtor under Chapter 13. It was an abuse of discretion to allow Powell to obtain relief under Chapter 13

after TICO objected to Powell's eligibility. Sections 109(e) and 301 do apply to this case and exist to prevent Powell from unjustly prejudicing his creditors in the exact manner he has attempted here.

**1. Jason Powell did not meet the requirements to be a debtor under Chapter 13 as of the Petition Date.**

In his Answering Brief, Powell argues that his amended schedules establish that he was within the debt limits set forth by § 109(e) as of the Petition Date. However, Powell has never responded to TICO's detailed allegations regarding Powell's schedules and the Bankruptcy Court dismissed Powell's case before ever making any determination on Powell's Chapter 13 eligibility. In its *Opposition to Motion for Voluntary Dismissal and Motion to Convert Case to Chapter 7 or 11 and for Sanctions*, filed in the Bankruptcy Case, TICO went into great detail in addressing the manner in which Powell scheduled unsecured and partially unsecured debts as fully secured, and scheduled a substantial amount of known debts as "unknown", despite the fact that several of the "unknown" amounts had already been superseded by filed creditor claims at that point. *See e.g.* ER0734-0738.

The following summary table of debt is excerpted from ER0738-0739, showing, as of the Petition Date, that Powell had unsecured debt in the

approximate amount of \$557,139.06<sup>2</sup>:

POC	Creditor	Total Amount of Claim	Amount Secured \$1,257,850 limit	Amount Unsecured Per POC \$419,275 Limit	Claimed as Secured by Operative POC or Schedules? Notes.	Location: ECF No. 53
1	Ford Motor Credit Company	\$23,614.89		\$23,614.89	No.	D - 2.2
2	Siera Pacific Mortgage Company Inc.	\$343,660.79	\$343,660.79		Yes - 136 Juanita Drive # 27 - Deed of Trust recorded 12/8/2017. Amount of Secured vs. Unsecured Claim depends on value of property and availability of homestead exemption	D -2.3
3	US Bank National Association	\$270,277.54			No - Unclear if Debtor is or remains liable	
4	IRS	\$219,847.51		\$219,847.51	No	E/F - 2.1
5	American Contractors Indemnity Company					E/F - 2.2
6	BBVA USA	\$38,326.52	\$38,326.52		Yes - 2019 GMC Sierra K15	E/F - 4.3

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<sup>2</sup> The unsecured debt limit for chapter 13, adjusted under Section 104 of the Code, as of the Debtor's petition date was \$419,275.



7	State of Nevada Department of Taxation	\$11,017.60		\$11,017.60	No	D - 2.1 and E/F 4.13 and 4.14
8	TICO Construction Co. Inc.	\$364,066.51	\$364,066.51		Yes - 136 Juanita Drive # 27 - Judgment recorded 09/24/2010; Renewal recorded 07/20/2016. Amount of Secured Claim depends on value of security and validity of homestead exemption	D - 2.4
9	Wells Fargo Auto	\$43,730.73	\$43,730.73		Yes 2021 GMC Cierra	D- 2.5
	First Financial Bank, N.A.	\$302,659.06		\$302,659.06	Yes per Question 2.1, but Column C lists whole amount as unsecured.	D- 2.1 (Schedul ed at \$171,431 .55)
<b>TOTAL</b>			<b>\$789,784.55 (secured)</b>	<b>\$557,139.06 (unsecured)</b>		

Powell has relied on conclusory statements alone to rebut TICO's thorough analysis of Powell's schedules. It is implied from the manner in which Powell scheduled his debts on his Amended Schedules that he was aware of his Chapter 13 ineligibility as of the Petition Date, but chose to proceed with a case under that chapter anyway by scheduling large swaths of his unsecured debt as secured or

unknown when it suited his interests. It was an abuse of discretion for the Bankruptcy Court to grant Powell a dismissal as a matter of right under § 1307(b) without considering Powell's Chapter 13 eligibility.

**B. Because Powell 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.**

While there does not appear to be a consistent approach across the circuits in how to deal with an unqualified debtor who has sought protection under Chapter 13, courts have generally considered the best interests of the debtor, creditors, and the estate in determining how to proceed after finding ineligibility. *See e.g. In re Kwiatkowski*, 486 B.R. 409, 421 (holding that an ineligible debtor could convert case to Chapter 7 under §§ 1307(a) or 1307(c), or dismiss pursuant to §§ 1307(b) or 1307(c) with conditions and sanctions imposed on any dismissal); *see also In re Wenberg*, 94 B.R. 631, 637 (holding that an ineligible debtor could move to convert pursuant to §1307(a), with the merits of said motion to be evaluated by the court); *see also Stearns v. Pratola (In re Pratola)*, 589 B.R. 779, 793 (holding debtor's Chapter 13 ineligibility provides 'cause' to dismiss or convert the case under § 1307(c) in the best interests of creditors and the estate).

In its Order granting dismissal, the Bankruptcy Court held that it was "bound by the precedent set by the Ninth Circuit Court of Appeals' decision in *Nichols v.*

*Marana Stockyard & Livestock Mkt., Inc., et al., (In re Nichols)* No. 20-60043, (9th Cir. Sept. 1, 2021), holding that Section 1307(b)'s text confers upon the debtor an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception noted expressly in the statute itself." *See* ER0004 (citations omitted).

However, the *Nichols* court did not deal with a debtor who was ineligible to proceed under Chapter 13 from the petition date, nor did it deal with a similar objection from a creditor to the debtor's eligibility. *Nichols* did not provide any authority for the Bankruptcy Court to allow an ineligible debtor to contravene the explicit language of §§ 109(e) and 301 by proceeding to utilize the unique benefits of Chapter 13 reserved for qualified debtors, nor did it create an exception to § 109(e) for ineligible debtors who move to dismiss.

Even if the Bankruptcy Court had analyzed Powell's eligibility and determined dismissal was the appropriate course, it was a further abuse of discretion to allow Powell to dismiss pursuant to § 1307(b) without the imposition of sanctions or conditions on the dismissal.

TICO suggests that the Northern District Court for Illinois developed the most adroit response when considering an analogous situation when it held that the only way to proceed was to allow conversion or dismissal pursuant to §

1307(c) for cause, after considering what is in the best interest of the debtor, creditors, and the estate. *See Stearns v. Pratola (In re Pratola)*, 589 B.R. 779, 793 (“Debtor is ineligible to proceed under Chapter 13, and Debtor's ineligibility provides ‘cause’ to dismiss or convert the case under § 1307(c)”). The Illinois court held that the debtor’s ineligibility was cause to immediately stop the debtor from proceeding any further in the case, and that the bankruptcy court only had discretion to convert or dismiss based on the best interests of creditors and the estate. *Id.*

A similar ruling here would be also be in the best interests of creditors and the estate because Powell proceeded under a Chapter 13 for nearly twelve months, never completed his 341 meeting, never filed a viable plan, and never sought plan confirmation, all while causing creditors to expend significant time and resources litigating the case and conducting discovery. Imposing sanctions on dismissal, or converting the case of an ineligible debtor to an appropriate chapter is exactly the type of relief the court referred in in *Nichols* when it stated “the Bankruptcy Code provides ample alternative tools for bankruptcy courts to address debtor misconduct.” *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, 964. The Bankruptcy Court should have utilized these tools to properly address Powell’s ineligibility for Chapter 13, and its failure to do

so was an abuse of discretion.

### **CONCLUSION**

Powell asks the Court to disregard the clear requirements of §§ 109(e) and 301 setting forth who may be a debtor and commence a case under Chapter 13. Powell provides no authority supporting his position that an ineligible debtor may proceed under Chapter 13 over the objection of a creditor if that debtor does not meet the requirements provided in § 109(e). The Chapter 13 debt limits exist for a reason. Congress intended for the broad powers available to Chapter 13 debtors to apply only to a very specific, limited group of individuals. Congress certainly did not intend for these powers to be given to the unscrupulous debtor, who exceeds the debt limit on the petition date, and desires to use Chapter 13 proceedings as a risk-free opportunity to work undue prejudice and hardship on his creditors.

RESPECTFULLY SUBMITTED August 21, 2023.

**HUMPHREY O'ROURKE PLLC**

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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 2061 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: August 21, 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 May 10, 2022, I served the documents described below:

### **APPELLANT TICO CONSTRUCTION COMPANY, INC.'s REPLY 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:

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

DATED: August 21, 2023.

**HUMPHREY O'ROURKE PLLC**

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