

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

APPELLEE JASON PHILIP POWELL'S ANSWERING BRIEF

By: /s/ Michael G. Millard
Michael G. Millard, Esq.
NSB# 11212
1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Email: michael@millardlaw.com
Attorney for Appellee Jason Powell

FRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons and entities as described in FRAP 26.1(a) that must be disclosed.

Millward Law, LTD is not owned by any parent corporation nor does any publicly held company own 10% or more of an interest in Millward Law, LTD. The undersigned is the only lawyer who have appeared in this matter on behalf of Appellant.

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated this 29th day of June, 2023.

MILLWARD LAW, LTD

By: /s/ Michael G. Millward
Michael G. Millward, Esq.
NSB# 11212
1591 Mono Ave
Minden, NV 89423
(775) 600-2776
Attorney for Appellant Jason Powell

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTRODUCTION	1
JURISDICTIONAL STATEMENT	4
STATUTORY AUTHORITIES	5
ISSUE PRESENTED.....	5
STATEMENT OF THE CASE.....	6
ARGUMENT	18
CONCLUSION.....	35

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Fountain v. Deutsche Bank Nat'l Trust Co. (In re Fountain)</i> , 612 B.R. 743 (B.A.P. 9th Cir. 2020).....	18, 25
<i>In re Guastelle</i> 341 B.R. 908 (9th Cir. BAP 2006)	25
<i>In re Harwood</i> , 519 B.R. 535 (Bankr. N.D. Cal.2014)	25
<i>In re Jones</i> , 129 B.R. 1003 (Bankr. N.D. Ill. 1991)	16
<i>In re Rosson</i> , 656 F.3d 764 (9th Cir.2008)	20
<i>In re Silberkraus</i> , 253 B.R. 890, 903 (Bankr. C.D. Cal. 2000)	27
<i>In re Stairs</i> , 307 B.R. 698, 703 (Bankr. D. Colo. 2004).....	14, 15, 27, 29, 30
<i>In re Tatsis</i> , 72 B.R. 908 (Bankr. W.D.N.C. 1987)	16, 17, 30, 32, 33
<i>In re Wenberg</i> , 94 B.R. 631,636 (B.A.P. 9th Cir. 1988)	29, 30, 31, 32
<i>Jue v. Liu (In re Liu)</i> , 611 B.R. 864 (B.A.P. 9th Cir. 2020).....	34
<i>Kashikar v. Turnstile Capital Mgmt., LLC (In re Kashikar)</i> , 567 B.R. 160 (9th Cir. BAP 2017)	18
<i>Leafy v. Aussie Sonoran Capital, LLC (In re Leafy)</i> , 479 B.R. 545 (B.A.P. 9th Cir. 2012)	34
<i>Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)</i> , 10 F.4th 956, (9th Cir. 2021)	10, 13, 19, 20, 23, 24
<i>Nikoloutsos v. Nikoloutsos</i> , 199 F.3d 233 (5th Cir.2000).....	14, 27, 28, 29, 30
<i>Scovis v. Henrichsen (In re Scovis)</i> , 249 F.3d 975, 982 (9th Cir. 2001)	25
<i>Smith v. U.S. Bank N.A.</i> , 999 F.3d 452 (6th Cir.2021)	34
Statutes	
§ 1307(a)	15, 16, 30, 31
11 U.S.C § 707(a)	26, 29

11 U.S.C. § 104(b)	5
11 U.S.C. § 109(e)	3, 4, 5, 13, 14, 15, 17, 18, 22, 23, 24, 25, 26, 29, 30, 32, 33
11 U.S.C. § 109(g)	33
11 U.S.C. § 706(d)	27
28 U.S.C. § 1334(a)	4
28 U.S.C. § 158(a)(1).....	4

Rules

F.R.A.P. 28(a)(6).....	11
------------------------	----

INTRODUCTION

Appellee Jason Philip Powell (hereinafter “Powell” or “Debtor”) filed his *Motion for Voluntary Dismissal of Chapter 13 Case* on September 2, 2021 after determining to deal with his debts outside of bankruptcy so that he could have a reprieve of TICO Construction Company, Inc.’s (hereinafter “Appellant” or “TICO”), incessant attack upon Powell and his ex-wife via his bankruptcy case.

TICO was relentless in attempting to paint Powell in poor light. It would appear that TICO’s game plan was to simply overwhelm Powell through its filings.¹ However, Powell only recently learned TICO’s actions in the bankruptcy matter and state court were made in bad faith in order for TICO to obtain a double recovery upon its judgment.²

TICO obtained judgment against Powell’s previous employer Genseven Development and Construction, LLC (hereinafter “Genseven”), in January of 2010.³ In April of 2010, TICO filed a Satisfaction of Judgment releasing Genseven.⁴

Then in June of 2010, without informing the arbitrator that Genseven’s judgment for the same injury had been declared satisfied, TICO obtained an

¹ See e.g. 6-ER-1008-1060; 5-ER-0831-0972; 5-ER-0822-0824; 4-ER-0725-0745; 4-ER-0696-0724; 4-ER-0584-0629.

² See 6-ER-1008-1060; 5-ER-0110-118.

³ 6-ER-1008-1060

⁴ *Id.*

Arbitrator's Award against Powell for the same damages as the Genseven Judgment down to the penny.⁵ In July of 2010, TICO obtained its judgment confirming the Arbitrator's Award against Powell.⁶ Thereafter, except for a renewal of judgment in 2016, TICO made no effort to collect or otherwise enforce the judgment until August of 2020.⁷

On March 1, 2021, Powell filed for Chapter 13 relief with the goal of paying off his priority tax debt owed to the IRS.⁸ Between March and September 2, 2021, TICO sought and obtained an order permitting a 2004 Examination of Powell; TICO initiated an adversary proceeding by way of its Complaint objecting to the discharge of its July 2010 judgment; TICO filed a motion to value collateral; and TICO filed an objection to Powell's claim of homestead exemption.

⁵ See 6-ER-1010-101011, ¶ 21 (noting damages of \$215,149.86 awarding damages of \$215,149.86, and making no mention of TICO's Satisfaction of the Genseven Judgment in the same amount); 6-ER-1040-1041 (noting that Jason Powell did not attend Arbitration); 1036-1043 (Judgment confirming arbitration award not referencing the Satisfaction of Judgment; and awarding damages of \$215,149.86, and making no mention of TICO's Satisfaction of the Genseven Judgment in the same amount); 6-ER-1017-1036 (TICO's May 9, 2008 Complaint alleging five claims against both Genseven and Jason Powell).

⁶ 6-ER-1036-1037 (Judgment confirming Arbitrator's Award of \$215,149.86 and providing additional fees and costs of \$480.00).

⁷ See 6-ER-1008-1060.

⁸ 6-ER-1121-1125 (Chapter 13 plan providing in excess of Powell's disposable income to satisfy priority tax debt); see also 1-SER-0131.

Additionally, beyond propounding discovery requests upon Powell, TICO served eighteen separate subpoenas upon financial institutions and various entities with ties to Powell. Finally, on September 2, 2020, Powell determined to end TICO's attacks and settle what he believed at the time to be a legitimate debt with TICO outside of his bankruptcy. Believing that it was in his best interest to dismiss his Chapter 13 case, he filed his Motion to Dismiss pursuant to § 1307(b).⁹

TICO opposed Powell's motion upon allegations of bad faith, fraudulent transfer, sham divorce, and abuse of the bankruptcy process, all of which Powell challenged.¹⁰ TICO also opposed the Powell's motion upon the argument that Powell was not eligible to be a Chapter 13 debtor pursuant to 11 U.S.C. § 109(e), and, therefore, unable to take advantage of the right to voluntarily dismiss the Chapter 13 case pursuant to § 1307(b).¹¹

The bankruptcy court held a hearing on November 2, 2021, and thereafter entered its *Order Granting Motion for Voluntary Dismissal of Chapter 13 Case Pursuant to 11 U.S.C. § 1307(b)*.¹²

⁹ 4-ER-0746-0767.

¹⁰ 4-ER-0725-0745; 3-ER-0428-0582

¹¹ *Id.*

¹² 1-ER-0001-0006.

TICO's appeal of the bankruptcy court's order seeks a determination that the bankruptcy court erred by determining that Powell was entitled to dismissal without first determining whether Powell was eligible for the Chapter 13 relief pursuant to § 109(e).

JURISDICTIONAL STATEMENT

The bankruptcy court's subject matter jurisdiction over the Powell's September 2, 2021 *Motion for Voluntary Dismissal of Chapter 13 Case* was derived from title 28 U.S.C. § 1334(a) which specifically grants bankruptcy court's jurisdiction over all cases under Title 11.¹³

The Ninth Circuit Bankruptcy Appellate Panel ("BAP") had jurisdiction to review and consider the bankruptcy court's January 14, 2022 *Order Granting Motion for Voluntary Dismissal of Chapter 13 Case Pursuant to 11 U.S.C. § 1307(b)* ("Dismissal Order") pursuant to 28 U.S.C. § 158(a)(1).¹⁴

This Court has jurisdiction to consider this appeal pursuant to 28 U.S.C. § 158(d)(1).

¹³ 28 U.S.C. § 1334(a).

¹⁴ The *Order Granting Motion for Voluntary Dismissal of Chapter 13 Case Pursuant to 11 U.S.C. § 1307(b)*, was a final order of the bankruptcy court and Powell did not object to the BAP taking jurisdiction to review of the bankruptcy court's decision.

STATUTORY AUTHORITIES

The following statutes are at issue in this appeal:

11 U.S.C. § 109(e):

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 and noncontingent, liquidated, secured debts of less than \$1,257,850 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, unsecured debts that aggregate less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850 may be a debtor under chapter 13 of this title.¹⁵

11 U.S.C. § 1307(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.

ISSUE PRESENTED

Whether the bankruptcy court erred in determining that, as a matter of law, that the debtor was entitled to the voluntary dismissal, when the bankruptcy court had not considered the debtor's eligibility to proceed under 11 U.S.C. § 109(e).

¹⁵ Dollar amounts stated above reflect the adjusted dollar amounts provided by the Judicial Conference of the United States on February 12, 2019 as required by 11 U.S.C. § 104(b). The amounts reflect the amounts applicable on the date of the petition, and do not reflect the amounts updated in the February 4, 2022, Notice of the Judicial Conference of the United States.

STATEMENT OF THE CASE

TICO filed a Complaint before the Second Judicial District Court of the State of Nevada, Case No. CV08-01202 (“State Court Action”), alleging claims against Appellee Jason Philip Powell (“Powell”) and Genseven Development and Construction, a Nevada limited liability company (“Genseven”).¹⁶

TICO’s claims against Powell and Genseven pertain to the allegation that Genseven obtained a construction contract with Signature Landscaping, by interference with TICO’s business relationship.¹⁷

TICO obtained a default judgment against Genseven for \$215,149.86 plus additional attorney’s fees and costs in January of 2010.¹⁸ TICO resolved its judgment against Genseven on April 27, 2010, and filed its *Satisfaction of Judgment* therein declaring that the filing “represents full satisfaction of Judgment.”¹⁹

Thereafter, on June 21, 2010, even though TICO had released all liability on its claims underlying the action as it pertains to the judgment against Genseven, TICO obtained an Arbitrator’s Award in the sum of \$125,149.86 against Powell,

¹⁶ 5-ER0092-108.

¹⁷ 6-ER-1027-1033.

¹⁸ 4-ER-0727-0728.

¹⁹ 6-ER-1011.

which was thereafter confirmed in the State Court Action on July 23, 2010.²⁰ TICO recorded its Judgment on September 24, 2010.²¹

On July 19, 2016, TICO filed its *Affidavit of Renewal of Judgment* and thereafter recorded the affidavit on July 20, 2016.²²

On October 1, 2016, Powell married Melissa Hooven.²³ Prior to marriage, Ms. Hooven and Powell discussed a prenuptial agreement, and on the day of their marriage they signed a prenuptial agreement prepared by Ms. Hooven's Attorney.²⁴

On or about December 8, 2017, Powell and Ms. Hooven purchased 136 Juanita Drive, #27, Incline Village, Nevada ("Juanita Property").²⁵ On June 20, 2019, as part of the purchase of real property, known as "Mill Race Loop," a Grant, Bargain, Sale Deed was executed in favor of Powell and Ms. Hooven.²⁶ Powell had agreed to be on title to the property for the purposes of approval of financing.²⁷ The funds contributed to the purchase of the property were Ms. Hooven's separate

²⁰ The July 23, 2010 judgment awarded to TICO the sum of \$215,629.86 which is comprised of the award of \$215,149.86 and an additional \$480.00 in costs. The Judgment and Arbitrator's Award include no mention of TICO's *Satisfaction of Judgment* on April 27, 2010, as to its judgment against Genseven, upon the same claims and same injury as awarded against Powell. 6-ER-1036-1042.

²¹ 6-ER-1010-1012.

²² 1-SER-0084-0100.

²³ 4- ER-0728.

²⁴ 1-SER-0119-0121; 1-SER-0121-0132.

²⁵ 1-SER-0172-0175.

²⁶ 1-SER-0185-0188.

²⁷ 1-SER-0127; 1 SER-0148-0150.

property.²⁸ On September 4, 2019, Powell and Ms. Hooven executed a Quitclaim Deed conveying Mill Race Loop to Melissa Powell, a married woman, as her sole and separate property the real property known as Mill Race Loop.²⁹

On August 25, 2020, a *Writ of Execution* was issued in the State Court Action.³⁰ Between July 23, 2010, and August 25, 2020, except for the filing and the recording of the renewal of its judgment, TICO did not pursue collection of its Judgment.³¹

On October 22, 2020, Powell filed his Complaint for Divorce in case number 2020-DI-00264 before the Ninth Judicial District Court of the State of Nevada.³² On November 23, 2020, as part of the sale and transfer of the Mill Race Loop property, Ms. Hooven, as a married woman, and as her sole and separate property, executed a Grant, Bargain, Sale Deed.³³ On December 18, 2020, the District Court entered its Decree of Divorce therein adopting the parties' Marital Settlement Agreement (hereinafter "MSA").³⁴ The MSA provided that Powell would retain the Juanita property.³⁵ Powell has alleged that during their marriage, Powell and Ms. Hooven

²⁸ *See id.*

²⁹ 1-SER-0176-0180.

³⁰ 3-ER-0373 ("Debtor's Action Table" 8/25/2020).

³¹ 5-ER-0832-0834.

³² 5-ER-0914-0937.

³³ 1-SER-0189-0193.

³⁴ 5-ER-0914-0937.

³⁵ 5-ER-0925-0926.

continued to maintain their separate incomes and separate property.³⁶

The MSA also provided that the Mill Race Loop property and proceeds to be set aside to Ms. Hooven.³⁷ On February 24, 2021, Ms. Hooven executed a Quitclaim Deed transferring her interest in the Juanita Property to Powell.³⁸

On March 1, 2021, Powell filed his voluntary Petition for Chapter 13 relief.³⁹ Thereafter on March 15, 2021, Powell filed his initial *Chapter 13 Plan*, his *Statement of Current Monthly Income and Calculation of Commitment Period*, his schedules of assets and liabilities, and his *Statement of Financial Affairs*.⁴⁰

On March 19, 2021, TICO filed its Complaint for Objection to Debtor's Discharge and Dischargeability Under § 523 of the Bankruptcy Code in Adversarial Case No. 21-05058 ("Adversarial Case").⁴¹

On April 19, 2021, TICO filed its *Motion to Value Collateral* pertaining to the Juanita Property.⁴²

On May 13, 2021, Powell filed his *Response to [TICO's] Motion to Value Collateral* and also filed an amendment to his schedules to correct errors and

³⁶ 1-SER-0117-0119.

³⁷ 5-ER-0925-926.

³⁸ 5-ER-0939.

³⁹ 6-ER-1126-1137.

⁴⁰ 6-ER-1061-1106.

⁴¹ 6-ER-1008-1060.

⁴² 1-SER-0004-0064.

omissions.⁴³

On May 13, 2021, TICO filed its *Objection to Debtor's Claimed Homestead Exemption in 136 Juanita Drive, #27, Incline Village, Nevada 89451*.⁴⁴

On May 20, 2021, Powell filed *Debtor's Answer to Complaint for Objection to Discharge and Dischargeability of Claims* in TICO's adversarial case.⁴⁵

On June 11, 2021, Powell filed *Debtor's Response to Tico's Objection to Homestead Exemption*.⁴⁶ On July 28, 2021, Powell filed *Debtor's Amended Response to Tico's Objection to Homestead Exemption*.⁴⁷

On September 2, 2021, Debtor filed his *Motion for Voluntary Dismissal* seeking dismissal pursuant to 11 U.S.C. § 1307(b), citing *In Re Nichols*, Case No. 20-60043, decided by the Ninth Circuit Court of Appeals on September 1, 2021.⁴⁸

On September 24, 2021, TICO filed its *Opposition to Motion for Voluntary Dismissal and Motion to Convert Case to Chapter 7 or Chapter 11 and for Sanctions*.⁴⁹

⁴³ 1-SER-0065-0106.

⁴⁴ 5-ER-0831-0972.

⁴⁵ 1-SER-0219-0225.

⁴⁶ 3-ER-0800-820.

⁴⁷ 4-ER-0768-0788.

⁴⁸ *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, (9th Cir. 2021).

⁴⁹ 4-ER-0725-745.

On October 25, 2021, Powell filed his *Reply to Opposition to Motion for Voluntary Dismissal and Opposition to Motion to Convert Case to Chapter 7 or 11 and for Sanctions*.⁵⁰

On October 26, 2021, Ms. Hooven filed her *Response to Opposition to Motion for Voluntary Dismissal and Motion to Convert Case to Chapter 7 or Chapter 11 and for Sanctions* and her *Declaration of Melissa Hooven in Support of Response to Opposition to Motion for Voluntary Dismissal and Motion to Convert Case to Chapter 7 or 11 and for Sanctions*.⁵¹

On October 29, 2021, TICO filed its *Omnibus Reply in Support of Opposition to Motion for Voluntary Dismissal and Motion to Convert Case to Chapter 7 or 11 and for Sanctions*.⁵²

On October 29, 2021, Powell filed his *Amended Reply to Opposition to Motion for Voluntary Dismissal and Opposition to Motion to Convert Case to Chapter 7 or 11 and for Sanctions*.⁵³

⁵⁰ 4-ER-0630-695; 1-SER-0112-0114.

⁵¹ 4-ER-0584-0629.

⁵² 3-ER-0428-582,

⁵³ 1-SER-0115-0209.

In its papers, TICO alleges that Powell and Ms. Hooven’s divorce is a “sham” and that they have engaged in conduct to “hinder and delay creditors.”⁵⁴ ⁵⁵ In response, Powell asserted that during his marriage with Ms. Hooven, they continued to maintain their separate incomes and separate property.⁵⁶

On November 2, 2021, the bankruptcy court heard argument on Powell’s motion for voluntary dismissal, and 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)*.⁵⁷ The bankruptcy court’s order granted Powell’s motion and denied TICO’s Countermotion for sanctions and to convert the case to Chapter 7 or 11.⁵⁸

⁵⁴ TICO Opening Br., p. 8 (*citing* Ex. 5-ER-0832).

⁵⁵ On pages 7 and 8 of TICO’s Opening Brief, in its “Statement of the Case” it makes unsupported factual allegations taken directly from its *Reply in Support of Opposition To Motion For Voluntary Dismissal and Motion To Convert Case To Chapter 7 or 11 And For Sanctions*, which is refenced in the Opening Brief as 3-ER-0429 (*See* TICO Opening Br., pp.7-8). Nearly all of the assertion made on pages 7 and 8 of the Opening Brief are false or not supported by the documents cited. *See id.* Furthermore, page 8 of TICO’s Opening Brief does not comport with F.R.A.P. 28(a)(6) requiring “a concise statement of the case setting out the facts relevant to the issues submitted for review.” *See* F.R.A.P. 28(a)(6). Powell objects to consideration of allegations on page 8 as “facts” and requests that all unsupported allegations referencing ER0564 be disregarded.

⁵⁶ 1-SER-0112-0114 (Declaration of Melissa Hooven); 1-SER-0148-0150 (Declaration of Jason Powell).

⁵⁷ 1-ER 0001-0006.

⁵⁸ *Id.*

SUMMARY OF THE ARGUMENT

Creditor TICO Construction Company, Inc.’s (hereinafter “Appellant” or “TICO”), appeals the bankruptcy court’s determination that Jason Philip Powell (“Powell”) has an absolute right to dismiss his Chapter 13 case pursuant to 11 U.S.C. § 1307(b).

TICO asserts that the bankruptcy court erred by determining Powell had the right to dismissal even though TICO had alleged that Powell did not qualify as a Chapter 13 debtor pursuant to 11 U.S.C. § 109(e) and was, therefore, not entitled to voluntary dismissal under § 1307(b).⁵⁹

TICO further argues that a determination of ineligibility would have required the bankruptcy court to determine whether dismissal or conversion was in the best interest of the estate.⁶⁰

Powell herein argues that the bankruptcy court did not err in determining that he has the absolute right to dismiss his Chapter 13 case pursuant to 11 U.S.C. § 1307(b). The recent case *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, (9th Cir. 2021) clearly establishes that regardless of the allegations made, Powell is entitled to dismissal as a matter of right.

⁵⁹ TICO Opening Br., pp.9-11, 13, 15-22, 25.

⁶⁰ *Id.* at pp. 2, 11, 24-25.

TICO, however would have this Court believe that Powell has conceded that he was not eligible for Chapter 13 relief pursuant to 11 U.S.C. § 109(e).⁶¹ However, Powell has not conceded the issue as demonstrated by the argument made in the papers and at the November 2, 2021 hearing.

Based upon the record, this Court should easily conclude that Powell secured and unsecured liabilities stated within his filed and amended schedules qualifies him as a Chapter 13 debtor.

TICO's attack of the bankruptcy court's decision centers around the issue of whether a debtor ineligible under § 109(e) is entitled to seek dismissal under 1307(b) even though such debtor is ineligible for Chapter 13 relief.

For support of its argument, TICO is only able to provide cases involving Chapter 7 debtors that were determined post conversion not to qualify for Chapter 13 relief pursuant to § 109(e).⁶² Powell did not convert his case from Chapter 7 to Chapter 13, and none of the cases cited by TICO are on point.

TICO relies on *Nikoloutsos v. Nikoloutsos*, 199 F.3d 233 (5th Cir.2000), however, that case supports the proposition that a Chapter 7 debtor that was

⁶¹ TICO Opening Brief, p.22 (“Debtor never contested that he was qualified . . . conceding TICO’s point”).

⁶² See TICO Opening Br., p. 20 (*citing Nikoloutsos v Nikoloutsos*, 199 F.3d 233, 237 (5th Cir. 2000)); *see also* TICO Opening Br., pp.10, 18 (*citing In re Stairs*, 307 B.R. 698, 703 (Bankr. D. Colo. 2004).

determined post conversion to be ineligible for Chapter 13 relief has no right to proceed under § 1307(b). TICO's reliance upon *Nikoloutsos* is misplaced.

TICO relies upon the case *In re Stairs*, 307 B.R. 698 (Bankr. D. Colo. 2004). However, *Stairs* does not support TICO's argument because, in *Stairs*, following the bankruptcy court's determination that the debtor was not eligible for Chapter 13 relief, the bankruptcy court considered the debtor's motion to dismiss under 11 U.S.C § 707(a), which permits dismissal "only for cause" because the conversion to Chapter 13 was *void ab initio*.⁶³

The debtors in *Nikoloutsos* and in *Stairs* were never entitled to seek relief under § 1307(b), and the conversion orders in those cases were determined to be void.⁶⁴ In other words, the cases cited by TICO pertain to Chapter 7 debtors that were not eligible to be Chapter 13 debtors.

Had those debtors filed for Chapter 13 relief initially, then even if a determination was made that they did not qualify for Chapter 13 relief, they would still be entitled to dismissal as a matter of right pursuant to § 1307(b).

Additionally, TICO argues that upon a determination that a debtor does not qualify under § 109(e), the bankruptcy court should consider the best interest of the

⁶³ *In re Stairs*, 307 B.R. at 702.

⁶⁴ *See id.*

estate in determining whether to dismiss.⁶⁵ In support of this position TICO cites to *In re Wenberg*, 94 B.R. 631 (B.A.P. 9th Cir. 1988). However, in *Wenberg* this Court disagreed with the bankruptcy court's determination to dismiss the case *sue sponte* on the basis that it lacked jurisdiction because the debtors were ineligible to be a Chapter 13 debtors under § 109(e).⁶⁶ Notably, this Court determined that the debtors in *Wenberg* should be given the opportunity "to file a motion to convert pursuant to § 1307(a)."⁶⁷

Accordingly, *Wenberg* supports the position that ineligible debtors that initially filed a voluntary petition under Chapter 13 have the right to dismiss or be given the opportunity to seek to have the case converted pursuant to § 1307(a).⁶⁸

TICO cites *In re Jones*, 129 B.R. 1003, 1009 (Bankr. N.D. Ill. 1991) for the same conclusion. However, like *In re Wenberg*, the bankruptcy court determined that 109(e) cannot establish when a Chapter 13 case is commenced because "when a debtor files a petition for bankruptcy relief, he or she commences a case under title 11, even if the debtor is not entitled to relief under a specific chapter."⁶⁹

⁶⁵ TICO Opening Br., pp.10, 17-18 (citing *In re Wenberg*, 94 B.R. 631 (B.A.P. 9th Cir. 1988) and also citing *In re Tatsis*, 72 B.R. 908 (Bankr. W.D.N.C. 1987)).

⁶⁶ *Wenberg*, 94 B.R. at 637.

⁶⁷ *In re Wenberg*, 94 B.R. at 636.

⁶⁸ *In re Wenberg*, 94 B.R. at 637.

⁶⁹ *In re Jones*, 129 B.R. 1003, 1009 (Bankr. N.D. Ill. 1991).

TICO also relies upon *In re Tatsis*, 72 B.R. 908 (Bankr. W.D. N.C. 1987). However, *Tatsis* the bankruptcy court agreed with the creditor that a debtor “need only give notice of dismissal and the case is deemed dismissed.”⁷⁰ However, the bankruptcy court disagreed that dismissal had already occurred because at the time the debtor filed the motion to dismiss, a motion to convert was already pending before the court.⁷¹

Tatsis stands for the proposition that an ineligible debtor’s right to dismiss may be limited where a motion to convert is already pending. *Tatsis*, however, does not support TICO’s position that a similarly situated debtor does not have the right to dismissal under § 1307(b).⁷²

TICO fails to present any controlling authority, or compelling argument for a determination that voluntary chapter 13 debtors should be restricted from the exercise of their right to dismiss solely upon the grounds that they do not qualify pursuant to § 109(e).

Therefore, this Court should conclude that the bankruptcy court did not err in determining that Powell was entitled to dismissal as a matter of right pursuant to *11 U.S.C.* § 1307(b).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

STANDARD OF REVIEW

This Court reviews interpretation of the Bankruptcy Code de novo.⁷³ De novo review requires that we consider the matter as if no decision had been previously rendered.⁷⁴

ARGUMENT

I. 11 U.S.C. § 1307(b) Provides Chapter 13 Debtors an Absolute Right to Dismiss.

TICO argues in its opening brief that the bankruptcy court erred in determining Powell had the absolute right to dismiss his Chapter 13 case when TICO alleged Powell did not qualify as a Chapter 13 Debtor pursuant to 11 U.S.C. § 109(e).⁷⁵ TICO further argues that had the bankruptcy court found Powell to be ineligible as a Chapter 13 debtor pursuant to § 109(e), then it would have had to determine whether dismissal or conversion was in the best interest of the estate.⁷⁶

Thus, in this appeal the Court is tasked with determining whether, upon a motion to dismiss by a Chapter 13 debtor, a bankruptcy court must first determine

⁷³ *Fountain v. Deutsche Bank Nat'l Trust Co. (In re Fountain)*, 612 B.R. 743 (B.A.P. 9th Cir. 2020)(reviewing a determination of interpretation of 11 U.S.C. § 109(e))(citations omitted).

⁷⁴ *Id.* (citing *Kashikar v. Turnstile Capital Mgmt., LLC (In re Kashikar)*, 567 B.R. 160, 164 (9th Cir. BAP 2017)).

⁷⁵ *See* TICO Opening Br., pp.7-10, 13, 22-23, 27 (repeating misstatements and allegations as if fact as to debtor's qualification under 109(e) as if the same were fact).

⁷⁶ *Id.* at 14-16.

that the debtor is eligible to be a Chapter 13 debtor under § 109(e) before determining whether the debtor is entitled to dismissal under § 1307(b).

Based upon the caselaw cited by TICO, this Court will have to determine whether there is a difference between the rights of a debtor that initially filed a Petition for Chapter 13 Relief, and a debtor that sought to convert to Chapter 13, but after conversion was determined to have not been eligible to proceed under Chapter 13.

A. Chapter 13 Debtors have an Absolute Right to Dismissal

Chapter 13 debtors are entitled to voluntary dismissal pursuant to 11 U.S.C. § 1307(b) which provides that “[o]n 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.”⁷⁷

Section 1307(b) makes it clear that Chapter 13 debtors are entitled to dismissal as a matter of right.⁷⁸

This Court recently clarified the meaning of § 1307(b) in the case *Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols)*, 10 F.4th 956, (9th Cir. 2021). In *Nichols*, this Court reversed a bankruptcy court’s order denying a Chapter

⁷⁷ 11 U.S.C. § 1307(b)

⁷⁸ *See id.*

13 debtor's motion for voluntary dismissal under § 1307(b) where the bankruptcy court determined that dismissal was inappropriate upon grounds of bad faith and abuse.⁷⁹

In this case, TICO has asserted allegations of bad faith, sham divorce, abuse of the bankruptcy process, and relied upon *In re Rosson*, 656 F.3d 764 (9th Cir.2008) for the position that Powell is unable to seek voluntary dismissal based upon the allegations because “*Nichols* is a non-final decision on an issue that has generated a split in authority.”⁸⁰

However, *Nichols* provides that *Rosson* has been overruled and adopts the position that even where allegations of bad faith and abuse may be established, the unambiguous language of 11 U.S.C. § 1307(b) “plainly requires the bankruptcy court to dismiss the case upon the debtor’s request.”⁸¹

TICO attempts to limit the scope and meaning of *Nichols* and asserts that the bankruptcy court and the BAP “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

⁷⁹ *Nichols*, 10 F.4th at 964.

⁸⁰ 4-ER-0740 (Opposition to MTD, lns.16-20).

⁸¹ *In Re Nichols*, 10 F.45h at 963.

unique rights reserved for a Chapter 13 debtor.”⁸²

Powell was qualified as a debtor under NRS 109(e). Furthermore, TICO has failed to establish with the claims actually filed that Powell does not qualify as Chapter 13 debtor under 109(e).

TICO wrongfully asserts that Powell failed to cite “any authority to contravene Sections 301(a) or 109(e) of the Code in allowing Powell to proceed under Chapter 13.

Powell argued in the papers before the Court that every case supports the position that even unqualified Chapter 13 debtors are entitled to voluntary dismissal.⁸³ For example Powell cited to *In Re Kwiatkowski*, 486 B.R. 409 (Bankr. E.D. Mich. 2013) as an example where the bankruptcy court concluded, upon a determination that the debtor did not qualify under 109(e), that the available routes forward were “conversion to Chapter 7 under 11 U.S.C. § 1307(a) or § 1307(c); or dismissal under 11 U.S.C. § 1307(b) or 1307(c).”⁸⁴

⁸² TICO Opening Brief, p.13.

⁸³ 1-SER-0123-0124.

⁸⁴ In *Kwiatkowski*, the bankruptcy court determined that dismissal was unavailable to the debtor on the basis of bad faith alone, even though the court had concluded that the debtor did not qualify to proceed as a chapter 13 debtor under 109(e). *See* 486 B.R. at 420.

TICO argues that the bankruptcy court’s decision “flies in the face of *Law* and *Nichols*” because it permitted Powell to exercise dismissal when TICO had alleged bad faith.⁸⁵ TICO’s argument is factually wrong. The bankruptcy court had not appetite to delve into TICO’s arguments regarding bad faith when it considered TICO’s counter-motion for sanctions.⁸⁶

TICO sought one of the other avenues “alluded to in *Nichols* that provide the ‘ample alternative tools’ that act as gatekeepers” bad faith filing and abuse.⁸⁷ The fact that TICO is unhappy that the bankruptcy court saw through TICO’s bogus and misplaced allegations of abuse, is not a basis for seeking relief from this Court.

In continuing its mantra that Powell did not qualify as a Chapter 13 debtor, and that he must qualify to “commence” a case under Chapter 13. However, Powell filed his case before TICO made its counter-motion. Had TICO moved the Court first, this Court may have a different issue before it. However, TICO did not move to convert prior to Powell’s motion to dismiss. As a result, no consideration of Section 109(e) is relevant to the Court’s analysis in determining if Powell was a

⁸⁵ TICO Opening Brief, pp14-15.

⁸⁶ At the conclusion of the hearing, counsel for TICO inquired “was there any decision on a evidentiary hearing on sanctions?” The court responded simply in stating “No, I’m denying the request for 19 sanctions.” 1-ER-0007-0016.

⁸⁷ TICO Opening Brief, p.25 (*quoting In re Nichols*, 10 F.4th at 964).

entitled to dismissal as a matter of right.⁸⁸

This Court should conclude that § 1307(b) as interpreted in Nichols provides Powell with the absolute right to dismissal.⁸⁹

B. Powell’s Ineligibility as a Chapter 13 Debtor is not a Foregone Conclusion.

TICO attacks the bankruptcy court’s determination that Powell was entitled to dismissal as matter of right under § 1307(b) upon the assertion Powell is ineligible to be a Chapter 13 debtor pursuant to 11 U.S.C. § 109(e), and he is therefore unable to exercise the rights of a Chapter 13 debtor.⁹⁰

TICO falsely alleges in its opening brief that Powell did not dispute its allegation that Powell was not eligible to be a Chapter 13 debtor and that Powell has conceded the point.⁹¹

In fact, TICO goes so far as to state without any citation to the record that:

“Debtor has claimed that . . . he is not now, and was not on the Petition Date, eligible to be a debtor under Chapter 13 . . .”⁹²

⁸⁸ In *In re Tatsis*, 72 B.R. 908, the bankruptcy court concluded that even where the debtor had exceeded the debt limits under section 109(e), the debtor has the right to pre-conversion dismissal under section 1307(b). However, in *Tatsis* the court concluded debtors are not entitled to dismissal as a matter of right where a motion for convert is already pending. *Id.*

⁸⁹ *See id.*

⁹⁰ TICO Opening Br., p.14.

⁹¹ *Id.*

⁹² TICO Opening Br., pp.14-15.

TICO's assertion that Powell has admitted that he is not qualified as a Chapter 13 debtor pursuant to § 109(e) is patently false.⁹³ Powell has at no time conceded the issue.⁹⁴ In fact, at the November 2, 2021 hearing upon Powell's *Motion for Voluntary Dismissal of Chapter 13 Case*, Powell requested that the bankruptcy court provide Powell with the opportunity to present evidence at an evidentiary hearing if the bankruptcy court was inclined to consider Powell's eligibility as a Chapter 13 debtor under § 109(e).⁹⁵

Powell argued to the bankruptcy court in his reply to TICO's opposition to his motion to dismiss that the motion did not require the Court determine his eligibility under § 109(e) prior to determining whether dismissal was appropriate under § 1307(b).⁹⁶ The bankruptcy court agreed stating that "debt limits are irrelevant according to the case law, as argued by the Debtor and cited in his papers, as well as in the *In Re Nichols* matter, 10 F.4th 956 (9th Cir. 2021)."⁹⁷

However, as a factual matter, Powell's Amended Schedule D and E/F filed on May 12, 2021, establish that Appellant was within § 109(e) debt limits on the date

⁹³ See 3-ER-0392.

⁹⁴ See *id.*

⁹⁵ *Id.*

⁹⁶ 1-SER-0130 (*Amended Reply to Opposition to Motion for Voluntary Dismissal and Opposition to Motion to Convert Case to Chapter 7 or 11 and for Sanctions* therein providing an explanation for debts asserted by TICO to be Powell's disqualifying unsecured debts).

⁹⁷ 1-ER-0001-0006.

of his Petition.⁹⁸ Powell’s Schedule D reflects secured debts of \$709,066.51 and unsecured debts of \$219,812.95, and Schedule E\F reflects unsecured debts totaling \$87,000 which brings the total unsecured debt in the schedules to \$306,812.95.^{99 100}

While TICO argues that “[u]nder the Bankruptcy Court’s reasoning, anyone may proceed as a debtor under Chapter 13, despite the unambiguous provisions” of the code regarding qualification, nothing prevents the chapter 13 trustee, creditors, or even the bankruptcy court, *sua sponte*, from addressing the issue of qualification.^{101 102} However, establishing a rule that would require every dismissal to include an evidentiary finding as to qualification of the debtor prior to permitting dismissal under § 1307(b), would be an incredible waste of judicial resources.

This Court has previously held that determinations of § 109(e) eligibility issues are to be made upon the debtor’s originally filed schedules.¹⁰³ However, if a good faith objection to eligibility is filed, the bankruptcy court may inquire outside of the schedules to determine if the debtor estimated debts in good faith.¹⁰⁴

⁹⁸ 7-ER-1076-1087.

⁹⁹ *Id.*

¹⁰⁰ 2-ER-0081-0109.

¹⁰¹ TICO Opening Brief, p.21.

¹⁰² *See In re Harwood*, 519 B.R. 535, 544 (Bankr. N.D. Cal.2014).

¹⁰³ *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001).

¹⁰⁴ *Fountain v. Deutsche Bank Nat’l Tr. Co. (In re Fountain)*, 612 B.R. 743, 748 (9th Cir. BAP 2020)(citing *In re Guastelle* 341 B.R. 908, 918 (9th Cir. BAP 2006).

Here, there is no evidence that Powell's schedules were filed in bad faith. In fact, the debts listed on Powell's schedules are not far off from the actual claims filed in the case; to wit, the secured claims filed totaled \$789,840.28, and the unsecured claims filed totaled \$314,191.28 as noted in the *Chapter 13 Standing Trustee's Final Report and Account* filed on February 11, 2022.¹⁰⁵

Based upon the filed claims, Powell underestimated his unsecured debts by just over \$80,000 and his secured debts by just over \$7,000.¹⁰⁶ Accordingly, Powell is clearly within the debt limits provided under § 109(e), cited herein above, as to scheduled and filed claims.¹⁰⁷ Thus, even if the bankruptcy court had considered Powell's qualification under § 109(e), the record establishes that Powell estimated his liabilities in good faith and was eligible for Chapter 13 relief pursuant to § 109(e).

C. Section 109(e) Eligibility Does Not Affect Voluntary Chapter 13 Filer's Right to Dismiss.

TICO argues that debtors that are ineligible for Chapter 13 relief under § 109(e) are not entitled to dismissal under 1307(b) as a matter of right.¹⁰⁸

¹⁰⁵ *Chapter 13 Standing Trustee's Final Report and Account*, (ECF 153) filed on 2/11/2022.

¹⁰⁶ *Id.*; see also 7-ER-0152-163.

¹⁰⁷ See 11 U.S.C. § 109(e)(quoted in the *Statement of Authorities* above, providing that eligibility of debtors under Chapter 13 is limited to debtors with “noncontingent, liquidated, unsecured debts of less than \$419,275 and noncontingent, liquidated, secured debts of less than \$1,257,850”).

¹⁰⁸ TICO Opening Br., pp.12-19.

TICO supports its argument with citations to cases involving Chapter 7 debtors that were determined post conversion not to qualify for Chapter 13 relief pursuant to § 109(e).¹⁰⁹

Powell did not convert his case from Chapter 7 to Chapter 13, and none of the cases cited by TICO are on point with the circumstances here. In this regard, it is important to note that one significant distinction between a Chapter 13 debtor and a Chapter 7 debtor is that a Chapter 7 debtor is not entitled to unconditional dismissal as a matter of right, but rather must move for dismissal only upon a showing of “cause” pursuant to § 707(a).^{110 111}

Additionally, pursuant to 11 U.S.C. § 706(d), a Chapter 7 debtor is prohibited from conversion to Chapter 13 “unless the debtor may be a debtor under such chapter.”¹¹²

Thus, where an error in determination of qualification results in a Chapter 7 case being converted to a Chapter 13, the respective bankruptcy court must set aside

¹⁰⁹ See TICO Opening Br., p. 20 (citing *Nikoloutsos v Nikoloutsos*, 199 F.3d 233, 237 (5th Cir. 2000)); see also TICO Opening Br., pp.10, 18 (citing *In re Stairs*, 307 B.R. 698, 703 (Bankr. D. Colo. 2004).

¹¹⁰ See 11 U.S.C. § 707(a).

¹¹¹ *In re Silberkraus*, 253 B.R. 890, 903 (Bankr. C.D. Cal. 2000)(noting that “Chapter 13 debtors have the right to dismiss their chapter 13 cases at will, [while Chapter 7] Debtors wanting dismissal of their chapter 7 . . . case must move the Court to dismiss . . . and must show "cause" for dismissal.”)

¹¹² 11 U.S.C. § 706(d).

its orders converting the case and return to administering the Chapter 7 prior to the point where conversion was granted.¹¹³ As such, no ineligible post conversion debtor would ever have the right to dismissal, because once the conversion order is set aside or declared *void ab initio*, the debtor reverts to a Chapter 7 debtor.¹¹⁴

One such example is *Nikoloutsos v. Nikoloutsos*, 199 F.3d 233 (5th Cir.2000), a case relied upon by TICO for the proposition that ineligible Chapter 13 debtors are “precluded from proceeding under Chapter 13, and ineligible for dismissal as a matter of right under § 1307(b).”¹¹⁵

In *Nikoloutsos*, the Fifth Circuit Court of Appeals found that the bankruptcy court erred “when it allowed Mr. Nikoloutsos to convert from Chapter 7 to Chapter 13” upon misrepresentations to the bankruptcy court.¹¹⁶ The Court of Appeals ordered the case be remanded “with instructions to vacate its order confirming the Chapter 13 plan, to vacate its order permitting conversions from Chapter 7 to Chapter 13, to proceed with [the] case as a Chapter 7 case, beginning at the point that the conversion from Chapter 7 to Chapter 13 should have been denied...”¹¹⁷

¹¹³ See e.g. *Nikoloutsos v. Nikoloutsos (In re Nikoloutsos)*, 199 F.3d 233 (5th Cir.2000).

¹¹⁴ See *id.*

¹¹⁵ TICO Opening Br., p.20 (*citing Nikoloutsos*, 199 F.3d at 237).

¹¹⁶ *Id.* at 235-237.

¹¹⁷ *Id.* at 237-239.

While the decision in *Nikoloutsos* supports the proposition that a Chapter 7 debtor that was determined post conversion to be ineligible for Chapter 13 relief has no right to proceed under § 1307(b), the decision has no bearing upon a debtor who initially filed for relief under Chapter 13.¹¹⁸ Accordingly, TICO's reliance upon *Nikoloutsos* is misplaced.

Another example is the case *In re Stairs*, 307 B.R. 698 (Bankr. D. Colo. 2004) that TICO relies upon for the proposition that where an ineligible Chapter 13 debtor seeks dismissal and the same would cause prejudice to creditors, “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.”¹¹⁹ In *Stairs*, following the bankruptcy court's determination that the debtor was not eligible for Chapter 13 relief, the bankruptcy court considered the debtor's motion to dismiss under 11 U.S.C § 707(a), which permits dismissal “only for cause.”¹²⁰

Just as with the debtor in *Nikoloutsos*, the debtor in *Stairs* was determined not eligible for Chapter 13 relief pursuant to 11 U.S.C § 109(e).¹²¹ The bankruptcy court determined that “the Order Converting the Case to Chapter 13 dated June 23, 2003,

¹¹⁸ TICO Opening Br., p.9 (quoting *In re Wenberg*, 94 B.R. 631,636 (B.A.P. 9th Cir. 1988)).

¹¹⁹ TICO Opening Br., pp.10, 18-19 (*citing* *In re Stairs* 307 B.R. at 698, 702-703).

¹²⁰ *In re Stairs*, 307 B.R. at 702.

¹²¹ *Id.* at 700-703.

should be set aside as *void ab initio*.”¹²²

Thus, like the debtor in *Nikoloutsos*, the debtor in *Stairs* was never entitled to seek relief under § 1307(b) when the order converting the case was void.¹²³ TICO does not cite to any binding or persuasive authority holding that a voluntary Chapter 13 debtor is not entitled to exercise the right to dismiss pursuant to § 1307(b) upon § 109(e) disqualification alone.¹²⁴ However, TICO does cite to two cases involving debtors that initially filed for Chapter 13 relief.¹²⁵ TICO cites to this Court’s decision in *In re Wenberg*, 94 B.R. 631 (B.A.P. 9th Cir. 1988) for the position that upon a determination of ineligibility of a Chapter 13 debtor, “the overwhelming weight of authority is thus squarely in favor of allowing conversion by an ineligible Chapter 13 debtor instead of dismissing the case.”¹²⁶

In *Wenberg*, even though this Court affirmed the bankruptcy court’s determination that the debtors were ineligible to be a Chapter 13 debtors under § 109(e), this Court disagreed with the bankruptcy court’s determination to dismiss the case *sue sponte* on the basis that it lacked jurisdiction to consider converting the

¹²² *Id.* at 700.

¹²³ *See id.*

¹²⁴ *Cf.* TICO Opening Br.

¹²⁵ TICO Opening Br., p.10 (citing *In re Wenberg*, 94 B.R. 631 (B.A.P. 9th Cir. 1988) and also citing *In re Tatsis*, 72 B.R. 908 (Bankr. W.D.N.C. 1987)).

¹²⁶ TICO Opening Br., p.9. (quoting *In re Wenberg*, 94 B.R. at 636).

case to another chapter.¹²⁷

In so deciding, this Court held that § 109(e) “is not jurisdictional in nature,” and, because a “debtor” is defined by the code as a “person . . . concerning which a case under this title has been commenced,” the debtors should be given the opportunity “to file a motion to convert pursuant to § 1307(a).”¹²⁸

Thus, *Wenberg* does not stand for the proposition that an ineligible Chapter 13 debtor does not have the right to exercise his rights to move to dismiss or seek to convert under § 1307 as TICO suggests.¹²⁹ Rather, *Wenberg* upholds the position that ineligible debtors that initially filed a voluntary petition under Chapter 13 have the right or be given the opportunity to seek to have the case converted pursuant to § 1307(a).¹³⁰

Under TICO’s position, the debtor in *Wenberg* would not have been given the opportunity to seek to convert under § 1307(a) because the debtors were ineligible for Chapter 13 Relief and, therefore, had no right to “invoke rights exclusively reserved for a qualified debtor under Chapter 13.”¹³¹

¹²⁷ *Wenberg*, 94 B.R. at 637.

¹²⁸ *In re Wenberg*, 94 B.R. at 636.

¹²⁹ See TICO Opening Br., p.9 (implying that *Wenberg* supports the position “that the best interests of the estate” be determinative over a debtor’s right to dismissal under 1307(b)).

¹³⁰ *In re Wenberg*, 94 B.R. at 637.

¹³¹ TICO Opening Br., p.14.

TICO makes no effort to reconcile *Wenberg* with the facts of this case, or provide any insight as to why “ineligible Chapter 13 debtors” in *Wenberg* would have the right to seek to convert their case to another Chapter under 1307(a), but Powell, if determined to be ineligible, would have no such right as it pertains to dismissal under § 1307(b).¹³² No plausible distinction being evident, this Court should conclude that its decision in *Wenberg* supports the bankruptcy court’s decision in this matter.

The other case relied upon by TICO involving a debtor that filed a voluntary Chapter 13 case is *In re Tatsis*, 72 B.R. 908, (Bankr. W.D. N.C. 1987) . TICO cites *Tatsis* for the position that conversion and not dismissal is in “the best interests of the estate and creditors” when a debtor is determined to be ineligible under § 109(e).¹³³ *Tatsis* also does not support TICO’s stated position.¹³⁴

Rather, *Tatsis* supports the position in the instance where a motion to convert is pending prior to the Chapter 13 debtor’s filing of a motion to dismiss under 1307(b), the court must consider the best interest of the estate and creditors in determining whether conversion is appropriate.¹³⁵ This is because the right to

¹³² Cf. TICO Opening Br.

¹³³ TICO Opening Br., pp.9-10 (citing *In re Tatsis*, 72 B.R. 908).

¹³⁴ *In re Tatsis*, 72 B.R. at 910.

¹³⁵ *Id.* at 908-910

automatic dismissal “is limited when a motion to convert is pending.”¹³⁶

In *Tatsis*, the bankruptcy court for the Western District of North Carolina was asked to determine whether § 1307(b) permits a debtor to dismiss a Chapter 13 case when the debtor’s debts exceed the limitations set out in § 109(e) and when a motion to convert was pending.¹³⁷

In *Tatsis* a creditor seeking dismissal of the case argued that the case was automatically dismissed by the debtor’s filing of a motion to dismiss pursuant to § 1307(b).¹³⁸ The bankruptcy court agreed with the creditor that a debtor “need only give notice of dismissal and the case is deemed dismissed.”¹³⁹ However, the bankruptcy court disagreed that dismissal had already occurred.¹⁴⁰

The *Tatsis* court determined that when a debtor “is not qualified,” the “[f]iling of [the] case under Title 11 establishes jurisdiction in this Court . . . [and] gives the Court the right and authority to administer case in accordance with the Bankruptcy Code.”¹⁴¹ Thus, while *Tatsis* does stand for the proposition that an ineligible debtor’s right to dismiss may be limited where a motion to convert is already

¹³⁶ *Id.* at 910.

¹³⁷ *Id.*

¹³⁸ *Id.* at 910.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

pending, the holding in *Tatsis* does not support TICO's position that a similarly situated debtor does not have the right to dismissal under § 1307(b).¹⁴²

This Court, however, has previously determined that a bankruptcy court may suspend eligibility requirements under 11 U.S.C. § 109(g) in those limited situations where the application "would produce an illogical, unjust, or capricious result, or when the benefit of a dismissal would inure to a bad faith creditor."¹⁴³

In this case, application of § 109(e) as argued by TICO would not only inappropriately inure to the benefit of TICO, but would undermine Congress's intention that Chapter 13 be a "wholly voluntary alternative to Chapter 7."¹⁴⁴

Therefore, this Court should conclude that the bankruptcy court did not err in determining that Powell was entitled to dismissal as a matter of right pursuant to 11 U.S.C. § 1307(b).

¹⁴² *Id.*

¹⁴³ *In re Liu*, 611 B.R. 864 (B.A.P. 9th Cir. 2020)(quoting *Leafy v. Aussie Sonoran Capital, LLC (In re Leafy)*, 479 B.R. 545, 551 (B.A.P. 9th Cir. 2012).

¹⁴⁴ *Smith v. U.S. Bank N.A.*, 999 F.3d 452, 456 (6th Cir.2021); *See* fn. 8 *supra* (pertaining to TICO's attempt to recovery twice upon the same injury).

CONCLUSION

Based upon the foregoing argument, this Court should conclude that the bankruptcy court did not err in determining that Powell was entitled to dismissal as a matter of right pursuant to 11 U.S.C. § 1307(b), and affirm the bankruptcy court's order.

Date: June 29, 2023

MILLWARD LAW, LTD.

By: /s/ Michael G. Millward
Michael G. Millward
Attorney for or Appellee

CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the length limits permitted by Fed R. App. P. 32(a)(7). The Brief contains 7,526 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).

Date: June 29, 2023

MILLWARD LAW, LTD.

By: /s/ Michael G. Millward
Michael G. Millward
Attorney for or Appellee

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellant states that he is not aware of any related cases pending in this Court.

Date: June 29, 2023

MILLWARD LAW, LTD.

By: /s/ Michael G. Millward
Michael G. Millward
Attorney for or Appellee

CERTIFICATE OF SERVICE

I hereby certify under t that on June 29, 2022, pursuant to FRCP 5(b) and 5(d), I electronically filed the **Jason Powell's Answering Brief** with the Clerk of the Court for the for the Ninth Circuit Court of Appeals by using the CM/ECF system.

I certify that that the following parties of record to this appeal are registered CM/ECF users, or have registered for electronic notice, or have consented in writing to electronic service, and that service will be accomplished through the CM/ECF system:

Patrick O'Rourke
L. Edward Humphrey
Humphrey O'Rourke Pllc
201 W. Liberty St., Suite 350
Reno, NV 89501

William A. Van Meter
PO Box 6630
Reno, NV 89413-6630

I certify that **Jason Powell's Answering Brief** was served by causing the same to be placed for mailing upon the following parties of record to this appeal by United States Mail, First-Class, Postage fully prepaid:

Melissa Powell
1166 Wisteria Dr.
Minden, NV 89423-5124

/s/ Michael G. Millward
Michael G. Millward