No. 23-2491

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

IN RE MACHELE L. GOETZ,
Debtor.

MACHELE L. GOETZ
Debtor-Appellant,

v.

VICTOR F. WEBER, Chapter 7 Trustee
Appellee.

APPEAL FROM THE BANKRUPTCY APPELLATE PANEL FOR THE EIGHTH CIRCUIT, CASE NO. 22-6009

BRIEF OF APPELLEE VICTOR F. WEBER, TRUSTEE

Victor F. Weber, Missouri Bar # 57361
Merrick Baker & Strauss
1044 Main Street, Ste 500
Kansas City, MO 64105
816-221-8855 Telephone
816-221-7886 Facsimile
victor@merrickbakerstrauss.com
ATTORNEY FOR APPELLEE

CORPORATE DISCLOSURE STATEMENT

The only debtor in the underlying bankruptcy case is the appellant Machele Goetz.

/s/ Victor F. Weber

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I. JURISDICTIONAL STATEMENT

This is an appeal from an order entered by the Bankruptcy Court for the Western District of Missouri denying a motion to compel abandonment of property by a bankruptcy estate. The Bankruptcy Court's Order is a final order that disposes of all parties' claims relating to the property.

The Bankruptcy Court had jurisdiction to enter the Order denying the motion to compel abandonment pursuant to Sections 157(a), and (b)(2)(A) and (O) and 1334(a) of Title 28 of the United States Code, and the August 15, 1984 Order Regarding Reference of Bankruptcy Matters to United States Bankruptcy Judges by the United States District Court for the Western District of Missouri *en banc* because the order denying the motion to compel relates to the composition of the bankruptcy estate in the chapter 7 case of the debtor administered in the Bankruptcy Court for the Western District of Missouri under case number 20-41493. The Bankruptcy Court's order was entered on November 10, 2022 and the debtor timely filed a notice of appeal of the order on November 17, 2022

The Bankruptcy Appellate Panel of the Eighth Circuit Court of Appeals had jurisdiction to enter its judgment and mandate pursuant to sections 157(c)(1) and 158(a)(1), and (b) of Title 28 of the United States Code and the April 10, 1996 Resolution of the Eighth Circuit Court of Appeals entitled "Order of the Judicial Council Establishing a Bankruptcy Appellate Panel," because this is an appeal of a

final order of the Bankruptcy Court denying a motion to compel abandonment of property. The judgment was entered on June 1, 2023 and the debtor timely filed a notice of appeal of the judgment of the Bankruptcy Appellate Panel of the Eighth Circuit Court of Appeals on June 20, 2023

This Court has jurisdiction over this case pursuant to sections 158(d) and 1291 of Title 28 of the United States Code.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Bankruptcy Appellate Panel err in finding that the Debtor did not exempt her entire homestead from her chapter 7 bankruptcy estate?

Schwab v. Reilly, 560 U.S. 770, 130 S. Ct. 2652 (2010)

2. Did the Bankruptcy Appellate Panel err when it determined that 11 U.S.C. § 348(f)(1) was without ambiguity and thus did not consider the legislative history, Congressional intent, and policy objectives?

In re Adams, 641 B.R. 147(Bankr. W.D. Mich. 2022)

In re Castleman, 631 B.R. 914 (Bankr. W.D. Wash. 2021)

In re Goins, 539 B.R. 510 (Bankr. E.D. Va. 2015)

3. Did the Bankruptcy Appellate Panel err when it did not find post-petition appreciation of property to be a separate interest in the property from the pre-petition interest in the property?

In re Adams, 641 B.R. 147(Bankr. W.D. Mich. 2022)

In re Castleman, 631 B.R. 914 (Bankr. W.D. Wash. 2021)

In re Goins, 539 B.R. 510 (Bankr. E.D. Va. 2015)

4. Did the Bankruptcy Appellate Panel err when it did not find that property vesting in the debtor upon confirmation of her plan excluded that property from the Debtor's chapter 7 bankruptcy estate after conversion?

In re Cofer, 625 B.R. 194, 198 (Bankr. D. Idaho 2021)

11 U.S.C. § 348(f)(1)

11 U.S.C. § 1327(b)

5. Did the Bankruptcy Appellate Panel err when it did not find a difference between "value" and "valuation" within 11 U.S.C. § 348(f)(1)(B) and did not find 11 U.S.C. § 348(f)(1)(B) is not relevant when interpreting 11 U.S.C. § 348(f)(1)(A)?

In re Adams, 641 B.R. 147(Bankr. W.D. Mich. 2022)

In re Castleman, 631 B.R. 914 (Bankr. W.D. Wash. 2021)

In re Goins, 539 B.R. 510 (Bankr. E.D. Va. 2015)

6. Did the Bankruptcy Appellate Panel err when it did not find that the its interpretation of 11 U.S.C. § 348(f)(1) would treat the debtor's property the same way such property would be treated if the debtor were found to have filed in bad faith, rendering 11 U.S.C. § 348(f)(2) superfluous?

In re Bell, 225 F.3d 203, 217 (2d Cir. 2000)

III. STANDARD OF REVIEW

All of the Appellant's issues presented for review are conclusions of law made by the Bankruptcy Court and are, accordingly, reviewed *de novo*. *Pierce v. Collection Assocs.*, 779 F.3d 814, 817 (8th Cir. 2015)

IV. SUMMARY OF THE ARGUMENT

The Bankruptcy Appellate Panel correctly found that when a debtor's case converts from chapter 13 to chapter 7, the plain meaning of section 348(f)(1) vests all property interests possessed by the debtor on the when she initially filed bankruptcy in the debtor's chapter 7 estate, including any appreciation in the value of property which occurred subsequent to the commencement of her bankruptcy case. The Appellant argues that the increase in her homestead's value which occurred after she filed for bankruptcy, but before her case converted to a case under chapter 7 is not part of her

chapter 7 estate. The debtor contends this increase in value is her property rather than property of her estate because the increase in value did not exist on her petition date.

The right to sell property for whatever the owner chooses and to keep the proceeds is an interest in property. The debtor's bankruptcy estate had the right to sell her homestead for any price it chose on the day the petition was filed and it has that right today. Value is not an interest in property distinct from the thing itself. Rather, value is appurtenant to property interests which vested in the chapter 7 estate when the debtor's case converted.

The statutory history of section 348(f)(1) is of no help to the Appellant's position. First, because 348(f)(1) is clear and there is no need to resort to statutory history. To the extent legislative history of section 348(f)(1) is examined, it weighs against Appellant's position. In 1994, section 348(f)(1)(B) provided that valuations of property in a chapter 13 case converted to chapter 7 would apply in the converted case, clearly indicating that value of property set in a 13 would continue in a 7. In 2005, section 348(f)(1)(B) was amended to provide that valuations of property in a chapter 13 case converted to chapter 7 does not apply in the converted case, plainly indicating that value of property in a 13 would not apply in a chapter 7.

Contrary to the argument of *amicus* National Association of Consumer Bankruptcy Attorneys, the Bankruptcy Appellate Panel's holding does not create inconsistencies in the Bankruptcy Code. Section 348(f)(2), which governs conversions

from chapter 13 to 7 made in bad faith still penalizes bad faith converters, increasing the estate by new property obtained by the debtor post-petition. Section 522's valuation of exemptions on the petition date similarly creates no issue with section 348(f)'s valuation after conversion. Read together, they simply mean that the estate, not the debtor, owns non-exempt property and gets all the appreciation in its value.

V. ARGUMENT

A. The Bankruptcy Appellate Panel was correct in finding that the Debtor did not exempt her entire homestead from her chapter 7 bankruptcy estate

The Appellant's first argument is that because the Debtor exempted the entire value of her homestead in her chapter 13 case, that she withdrew the homestead entirely from the estate. The Appellant argues this withdrawal completely precludes the homestead's inclusion in the estate upon conversion to chapter 7.

First, the debtor did not completely exempt her homestead in chapter 13. The parties stipulated that when the debtor's case commenced, her homestead was worth $130,000 and was encumbered by a mortgage in the amount of $107,460.54. In her 13 case, the Debtor claimed a $15,000 exemption, leaving $7,539.46 of the homestead's equity in the Debtors' estate. *See* App. 1 Stipulations of Fact, para. 3., R. Doc. 115 at pg. 1, para. 3. While this equity would have been difficult for the estate to

realize given the customary transaction costs of a real estate sale, it nevertheless existed and remained property of the estate until the debtor's plan was confirmed.

Second, even if the debtor appeared to exempt all the value in the homestead by claiming a particular monetary exemption – even if that exemption exceeded the value of the property – such exemption would not be sufficient to withdraw her homestead entirely from the bankruptcy estate. The Debtor limited her exemption to $15,000, rather than one which withdrew the entire homestead from the estate. *See* Addendum 1, Stipulations of Fact, para. 3. The only way for a Debtor to completely withdraw exempt property from the bankruptcy estate is to "declare the value of her claimed exemption in a manner that makes the scope of the exemption clear, for example, by listing the exempt value as "full fair market value (FMV)" or "100% of FMV" *Schwab v. Reilly*, 560 U.S. 770, 792-93, 130 S. Ct. 2652, 2668-9 (2010) (Debtor claimed exemption of $10,718 in property she valued at $10,718 "Where, as here, a debtor accurately describes an asset subject to an exempt interest and on Schedule C declares the "value of [the] claimed exemption" as a dollar amount within the range the Code allows, interested parties are entitled to rely upon that value as evidence of the claim's validity. Accordingly, we hold that Schwab was not required to object to Reilly's claimed exemptions in her business equipment in order to preserve the estate's right to retain any value in the equipment beyond the value of the exempt interest.")

B. The Bankruptcy Appellate Panel correctly determined that 11 U.S.C. § 348(f)(1) was without ambiguity, that value is not a property interest, and it did not err in not considering legislative history, and it did not err when it did not find that there is a difference between "value" and "valuation" within 11 U.S.C. § 348(f)(1)(B) and that 11 U.S.C. § 348(f)(1)(B) is not relevant when interpreting 11 U.S.C. § 348(f)(1)(A).

1. The Meaning of Section 348(f)(1) is Plain and Unambiguous

Section 348(f)(1)(A) and (B) of the Bankruptcy Code read as follows:

(A)property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion;

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply only in a case converted to a case under chapter 11 or 12, but not in a case converted to a case under chapter 7, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan

11 USC § 348(f)(1)(A) and (B)

Section 348(f)(1)(A) is clear and its meaning plain. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030, 103 L. Ed. 2d 290 (1989)("where ... the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.") (quoting *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194, 61 L. Ed. 442 (1917)). When the debtor's case commenced,

her estate included the property right to sell her homestead for whatever amount she wanted: $10 or $1,000,000, and it also included the right to keep all the proceeds of any such sale. 11 USC § 541. To further illustrate the estate's property interest, upon commencement of the bankruptcy case, the estate could not only have sold the homestead for whatever it liked, but it could have sold the right to sell the homestead to a third party - an option contract - granting that party the right to buy or to sell the debtor's homestead for any amount in the future. *E.g. Anderson v. Parker,* 351 S.W.3d 827, 829 (Mo. Ct. App. 2011) (discussing conveyance and application of rights of first refusal and option contracts regarding Missouri real estate). If the estate could sell the right to buy or sell the homestead for any amount, then it necessarily possessed the property rights to sell the homestead for any amount itself. All of a debtor's rights in property become property of the estate at the conversion of a chapter 13 case, not just financial rights. *E.g. Peet v. Checkett (In re Peet)*, 819 F.3d 1067, 1070 (8th Cir. 2016) (where debtor filed chapter 13 case owning vehicle as joint tenant with right of survivorship, and converted case to a case under chapter 7 after which her co-owner in the vehicle passed away, chapter 7 estate succeeded to her interests as a joint tenant and became owner of the whole vehicle); *but see Rodriguez v. Barrera (In re Barrera)*, 22 F.4th 1217, 1219 (10th Cir. 2022) (where debtor filed chapter 13 case owning house, including the right to receive the proceeds of sale of the house, ssold house during 13 case and converted case to chapter 7, proceeds of house not property of chapter 7

estate because house was sold during chapter 13 case while it was not property of estate).

Accordingly, when section 348(f)(1)(A) provides that the debtor's chapter 7 estate gets all the debtor's property held at the commencement of her case – those interests in property include the right to sell the debtor's homestead for any amount, and the right to keep the proceeds.

The Bankruptcy Appellate Panel and Bankruptcy Court correctly found that the meaning of section 348(f)(1) is plain and a chapter 7 bankruptcy estate retains the property right to sell its property and retain any increase in value since the commencement of the case. The Bankruptcy Court found that value is not a distinct item of property – that it is, instead, an inseparable characteristic of that property, and noted that courts have frequently found value not to be an interest in property. *E.g. Crane v. Commissioner of Internal Rev.*, 331 U.S. 1, 6 (1947), *Potter v. Drewes (In re Potter),* 228 B.R. 422, 424 (B.A.P. 8th Cir. 1999), *In re Adams*, 641 B.R. 147, 151 (Bankr. W.D. Mich. 2022); *In re Goins*, 539 B.R. 510, 516 (Bankr. E.D. Va. 2015); *In re Larzelere*, 633 B.R. 677, 683 (Bankr. D.N.J. 2021)

The Appellant disagrees with this reading of subsection 348(f)(1)(A) – arguing she has a separate property interest to any proceeds realized over those likely to have

been realized when the debtor's case was filed,[1] but not explaining how her estate lost the property right to sell the homestead for whatever amount it wished and to keep the proceeds. The difficulty with the Debtor's position (and the position of the *amicus*) is that value is not a property interest – the right to sell property and keep the proceeds is – and subsection 348(f)(1)(A) gave the chapter 7 estate this property interest along with all the other interests in property held at the commencement of the case.

The Bankruptcy Appellate Panel Correctly Found that the Legislative History of Section 348(f)(1) Supports the Bankruptcy Court's Holding

The Appellant and the cases she cites rely a great deal on the legislative history of section 348(f)(1), specifically by referring to the House Report from the Judiciary Committee to the full house on the 1994 Bankruptcy Reform Act. *See e.g In re Barrera*, 620 B.R. 644, 648 (Bankr. D. Colorado 2020); *In re Niles*, 342 B.R. 72, 76 (Bankr. D.

[1] Below, the trustee pointed out that even if the Debtor had such a separate property interest in equity in the homestead, it would be subject to the trustee's strong-arm powers under 11 USC § 544: as a judicial lienholder; or to permit marshalling – requiring that the homestead's mortgage be paid with the Debtor's share of the homestead, with her unsecured creditors enjoying the rest of the proceeds. See R. Doc. 114 Objection to Motion to Compel Abandonment, pgs 9-12.

Ariz. 2006); *Warren v. Peterson*, 298 B.R. 322 (N.D. Ill. 2003); *In re Page*, 250 B.R. 465 (Bankr. D. N.H. 2000).

The 1994 Bankruptcy Reform Act amended section 348(f)(1)(B) to read as follows:

(B) valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.

The legislative history of this 1994 version of section 348(f) explains why section 348(f)(1)(B) was added - to provide that a debtor would retain the value of payments they made towards a secured claim in a chapter 13 case which was later converted to chapter 7. The commentary to section 348(f)(1) reads as follows:

This amendment would clarify the Code to resolve a split in the case law about what property is in the bankruptcy estate when a debtor converts from chapter 13 to chapter 7. The problem arises because in chapter 13 . . . , any property acquired after the petition becomes property of the estate, at least until confirmation of the plan. Some courts have held that if the case is converted, all of this after-acquired property becomes part of the estate in the converted chapter 7 case, even though the statutory provisions making it property of the estate do not apply to chapter 7. Other courts have held that the property of the estate in a converted case is the property the debtor had when the original chapter 13 petition was filed.

These latter courts have noted that to hold otherwise would create a serious disincentive to chapter 13 filings. For example, a debtor who had $10,000 equity in a home at the beginning of the case, in a State with a $10,000 homestead exemption, would have to be counseled concerning the risk that after he or she paid off a $10,000 second mortgage in the chapter 13 case, creating $10,000 in equity, there would be a risk that the home could be lost if the case were converted to chapter 7 (which can occur involuntarily). If all of the debtor's property at the time of conversion is

property of the chapter 7 estate, the trustee would sell the home, to realize the $10,000 in equity for the unsecured creditors and the debtor would lose the home. H.R. Rep. No. 103-835 at 57 (1994), as reprinted in 1994 U.S.C.C.A.N. 3340, 3366)

Following this 1994 amendment to section 348(f), and based upon the fixing of valuations after conversion provided for in section 348(f)(1)(B) courts almost universally found that equity in property, created both by the debtor's payments and by appreciation in the value of the property, belonged to the debtor rather than the estate after a chapter 13 case converted to chapter 7 because the estate's financial interest in the property was constrained by the valuations of property made at the commencement of the chapter 13 case or at plan confirmation. *See In re Goins*, 539 B.R. 510, 513 (Bankr. E.D. Va. 2015) (collecting cases).

Then, in 2005, as part of the Bankruptcy Abuse and Consumer Protection Act, section 348(f)(1)(B) was amended to its present form. Subsection 348(f)(1)(B) changed from providing that valuations of property in chapter 13 apply when a case is converted to 7 – to specifically providing that valuations of property in chapter 13 **do not apply** when a case is converted to a case under chapter 7. The 1994 and 2005 versions of section 348(f)(1)(B) are compared below:

348(f)(1)(B)(1994) **valuations of property** and of allowed secured claims **in the chapter 13 case shall apply in the converted case**, with allowed secured claims

reduced to the extent that they have been paid in accordance with the chapter 13 plan. (emphasis added)

348(f)(1)(B)(2005) **valuations of property** and of allowed secured claims in the chapter 13 case **shall apply only** in a case converted to a case under chapter 11 or 12 **but not in a case converted to a case under chapter 7**, with allowed secured claims in cases under chapters 11 and 12 reduced to the extent that they have been paid in accordance with the chapter 13 plan. (emphasis added).

The plain meaning of section 348(f)(1) as amended in 2005 dictates that all of the debtor's interests in property possessed at the commencement of the 13 case become the bankruptcy estate's interests when the case converts to a case under chapter 7 without any constraint as to value.

This 2005 amendment of subsection 348(f)(1)(B) is important because it is not the 1994's Bankruptcy Act's subsection (f)(1)(A) (which remained unchanged) that did the work of limiting the value of the estate's interest in a case converted to chapter 7 to the value set in the chapter 13 case. It was instead subsection (f)(1)(B) which performed that task by specifically providing "valuations of property… in the chapter 13 case shall apply in the converted case."

Accordingly, the Bankruptcy Court did not err when it declined to create a distinction between between "value" and "valuation when interpreting section 348.

The Appellant contends, citing *In re Hodges*, 518 B.R. 445, 450 (Bankr. E.D. Tenn. 2014), *In re Castleman*, 631 B.R. 914, 920 n. 5 (Bankr. W.D. Wash. 2021) and *In re Goins*, 539 B.R. 510, 514 (Bankr. E.D. Virginia 2015), that despite 348(f)(1)(B)'s explicit language indicating it applies to both "valuations of property" and "of allowed secured claims" that it only applies to valuations of allowed secured claims. 11 USC § 348(f)(1)(B). The Appellant's preferred interpretation of subsection 348(f)(1(B) is likely incorrect for the same reason that the debtor's interpretation of 348(f)(1)(A) is incorrect – the meaning of section 348(f)(1)(B) is plain. Subsection 348(f)(1)(B) explicitly states it applies to **both** "valuations of property and of allowed secured claims…" 11 U.S.C. § 348(f)(1)(B). To allege that the statute only applies to secured claims ignores the terms "property" and "and" and renders them superfluous. Where parties offer competing interpretations of a statute, the rule against superfluities "favors that interpretation which avoids surplusage…" *Corley v. United States*, 556 U.S. 303, 314 (2009).

Since section 348(f)(1)(B) was modified in 2005 to provide that valuations of property in the chapter 13 case shall not apply in the converted case, the 1994 legislative history does not speak to the current statute at all. In fact, it affirmatively contradicts the provisions of new section 348(f)(1)(B) which prohibits the use of valuations of property in a chapter 13 case in a converted 7 case. It would be error to

rely upon the 1994 House Report in interpreting section 348(f) as currently enacted 11 years later in 2005.

The National Association of Consumer Bankruptcy Attorneys in its *amicus* brief notes that in the 1994 Bankruptcy Act, Congress expressed a strong policy of encouraging debtors to take advantage of Chapter 13 where possible. While that observation about Congress's intent in 1994 is true – it is incomplete as applied to current law. This stated policy preference has been mooted by later modifications to the Bankruptcy Code. The 1966 Supreme Court case cited by *amicus* supporting this public policy notes that

> large sums of money are annually returned to creditors under [chapter 13] plans . . . As wage earners ordinarily have little or no assets available for distribution in straight bankruptcy, these sums represent settlements which the debtors would otherwise be unable to effect and the creditors unable to obtain

Perry v. Commerce Loan Co., 383 U.S. 392, 396, 86 S. Ct. 852, 855 (1966). This quote reflects an understanding that unsecured creditors receive greater recoveries in chapter 13 cases than chapter 7 cases. The Supreme Court went on to note that having debtors pay creditors rather than simply discharging their debts is "highly desirable." *Id.* Prior to 2005, it was Congress's policy to encourage chapter 13 filings as opposed to chapter 7. But in 2005 Congress evidently tired of encouraging debtors to repay their creditors and modified the Bankruptcy Code to require debtors to repay their creditors if they have disposable income which would permit them to do so by

application of a means test contained in 11 USC § 707(b)(2), a new statutory subsection first enacted in 2005.[2] Since 2005, if a debtor has enough income to repay their unsecured creditors through a chapter 13 case, barring very special circumstances they must file a chapter 13 case and repay their unsecured creditors or dismiss their bankruptcy altogether. 11 USC § 707(b)(2). If the debtor files for chapter 13 or converts to chapter 13, section 707(b)(2) applies

> [t]o determine how much income the debtor is capable of paying, Chapter 13 uses a statutory formula known as the "means test." §§ 707(b)(2) (2006 ed. and Supp. III), 1325(b)(3)(A) (2006 ed.). The means test instructs a debtor to deduct specified expenses from his current monthly income. The result is his "disposable income"--the amount he has available to reimburse creditors. § 1325(b)(2).
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> *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 64, 131 S. Ct. 716, 721 (2011)

Under current law, if a debtor has disposable income that makes him capable of paying creditors through a repayment plan in chapter 13 or 11, the debtor generally[3] has to file a case under those chapters and pay his creditors back or forego

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[2] The section 707(b)(2) means test does not apply to everyone. Debtors whose debts were primarily incurred for a non-consumer purpose (generally proprietors of failed businesses), 11 USC § 707(b)(2), and some disabled veterans and active-duty service members, 11 USC § 707(b)(2)(B) qualify for chapter 7 without regard to how much they can afford to pay their creditors over time.

[3] This brief uses the word "generally" when describing the effect of the means test because a bankruptcy court's decision whether to order the debtor to dismiss or convert a chapter 7 case where the debtor has disposable income is an equitable one which takes account of the totality of the debtor's circumstances. Section 707(b)(2) permits the debtor to rebut the presumption that having disposable income and not paying it to creditors does not constitute an abuse of the Bankruptcy Code because of

bankruptcy altogether. Aside from the small and limited categories of those to whom the means test does not apply – a debtor who filed a chapter 13 case with no disposable income under section 707(b)(2) would not pay a cent more to his unsecured creditors than they would receive in that same debtor's chapter 7 bankruptcy case. Consequently, encouraging debtors without disposable income to file chapter 13 does not advance Congress's underlying goal of encouraging payment to unsecured creditors at all.

C. The vesting of the homestead in the Debtor at plan confirmation, because such vesting had no effect on the property of the estate when the case converted to chapter 7.

Section 348(f)(1)(A) provides that the property of the estate in a case converted by from chapter 13 to chapter 7 consists of the debtor's property "as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." 11 USC § 348(f)(1)(A). The fact that the Debtor's plan vested her homestead in her simply permitted the homestead to be in her possession and control on the date of conversion, thereby making it property of her

special circumstances. However, "the standard to rebut the presumption under section 707(b) is 'extremely high,' requiring circumstances that are 'truly special.'" *In re Behne*, 575 B.R. 893, 902 (Bankr. D. Neb. 2017) (collecting cases).

estate when her case converted to chapter 7. All the property of the Debtor vested in her when her plan was confirmed. This did not prevent it from becoming property of her estate when her case converted to chapter 7. *Harris v. Viegelahn*, 575 U.S. 510, 520, 135 S. Ct. 1829, 1838 (2015) ("When a debtor exercises his statutory right to convert, the case is placed under Chapter 7's governance, and no Chapter 13 provision holds sway. §103(i) ('Chapter 13 . . . applies only in a case under [that] chapter.')")

Since all property of the estate generally vests in a debtor when their chapter 13 plan is confirmed, 11 USC § 1327(b), if the debtor's position were adopted, no estate of a case converted to chapter 7 from chapter 13 would have any assets at all. *In re Cofer*, 625 B.R. 194, 198 (Bankr. D. Idaho 2021) ("In sum, sound statutory interpretation and the relevant authorities support the conclusion that the plain language of § 348(f)(1)(A) revests in the estate of the converted case all property of the estate of the original filing still in the possession or control of Debtor despite the provisions of § 1327.")

Further, the debtor's position is contrary to the plain language of section 348(f)(1) which provides that all of the debtor's property as of the filing of her chapter 13 petition which is still in her possession or control when her case converts to chapter 7 becomes property of her chapter 7 estate. Property which has vested in the debtor and not been transferred by her subsequently is under her control.

D. **The Bankruptcy Appellate Panel correctly found that the its interpretation of 11 U.S.C. § 348(f)(1) would treat the debtor's property differently if the debtor were found to have filed in bad faith, keeping 11 U.S.C. § 348(f)(2) effective.**

Section 348(f)(2) of the Bankruptcy Code provides that when a debtor converts a case from chapter 13 to chapter 7 in bad faith "the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion". 11 U.S.C. § 348(f)(2). This is in contrast to the default provision of section 348(f)(1)(A) which provides that the property of the estate in a converted case consists of property held by the estate when the case commences. 11 U.S.C. § 348(f)(1)(A). The Bankruptcy Court found that its interpretation of section 348(f)(1)(A) did not conflict with Congress's evident intent of creating a penalty for bad faith conversions, explaining that section 348(f)(2) augments the estate created by 11 USC § 348(f)(1)(A), increasing the estate to add new property acquired after the commencement of the 13 case. This is in accord with virtually all authority interpreting section 348(f)(2). *See, e.g.*, *In re Bell*, 225 F.3d 203, 217 (2d Cir. 2000) ("before [the 1994 Bankruptcy Reform Act] most courts of appeals also held that upon conversion from Chapter 13 to Chapter 7 all property of the Chapter 13 estate--including after-acquired property that is part of the Chapter 13 estate pursuant to § 1306(a)--was included in the Chapter 7 estate . . . . Under 11 U.S.C. § 348(f), on

conversion of the Chapter 13 proceeding, after-acquired property does not form part of the converted estate--unless the case was converted in bad faith, see 11 U.S.C. § 348(f)(2). In cases of bad faith conversion, the converted estate includes all Chapter 13 estate property, as defined in 11 U.S.C. § 1306--i.e., the bad faith converter receives pre-Reform Act treatment.")

E. Contrary to the argument of The National Association of Consumer Bankruptcy Attorneys, the Bankruptcy Court's decision is in harmony with the rest of the Bankruptcy Code.

The National Association of Consumer Bankruptcy Attorneys ("NACBA") filed an amicus brief in this case arguing that since section 348(f) is silent as to the effective date of property valuations, it should be interpreted in accordance with section 522 of the Bankruptcy Code, which pertains to exemptions, in order to ensure that the Bankruptcy Code is interpreted as a harmonious whole.

NACBA correctly notes that case law requires determination of the value of property for purposes of avoiding liens under section 522 be made as of the petition date. *See David G. Waltrip, L.L.C. v. Sawyers (In re Sawyers),* 2 F.4th 1133, 1138 (8th Cir. 2021). For those who qualify for federal exemptions, section 522 also requires determination of value of exemptions as of the petition date. *See* 11 USC § 522(a) defining value as ("fair market value as of the date of the filing of the petition . . .")

and 522(d) (permitting debtors to exempt their aggregate interest in various kinds of property up to a certain "value")

The Bankruptcy Appellate Panel found that the value of the estate's interest in property in a converted case is not capped as of the date of the filing of the petition. NACBA asserts that this creates a contradiction, with property valued for purpose of lien avoidance and exemptions being valued at the petition date, and valued for other purposes after the case is converted,

> To include in the bankruptcy estate the post-petition increase in value in a converted chapter 7 case would create a conflict in the Bankruptcy Code—in Section 522 property would be valued as the date of the original petition and in Section 348 it would be determined upon conversion.

NACBA Brief pg. 14.

This difference in valuation dates between sections 522 and 348 does not create any kind of contradiction. Instead, they work harmoniously, pretty clearly demonstrating an intent on the part of Congress that the bankruptcy estate, not the debtor owns property post-petition and just like every owner of property should get the appreciation in value of that property. Section 522's early valuation date and section 348(f)(1)'s late one work in conjunction to maximize the value of the bankruptcy estate and limit the value of the debtor's exemptions, not the estate's interest in property.

It would be a greater contradiction if Congress were to limit a debtor's exemptions in property as of the petition date, but then give the debtor any appreciation in value of that property subsequent to that date. Under NACBA's desired interpretation of section 348(f)(1) there would be no purpose served by limiting the exemption to the value of the property on the petition date, because a debtor would get any increase in value without need of an exemption.

VI. CONCLUSION

For the reasons stated, appellant Victor F. Weber, trustee respectfully requests that this Court affirm the decision of the Bankruptcy Appellate for the Eight Circuit and the United States Bankruptcy Court for the Western District of Missouri.

Respectfully submitted,

MERRICK BAKER & STRAUSS, P.C.

/s/ Victor Weber
Bruce E. Strauss, # 26323
Victor F. Weber, # 57361
Merrick Baker & Strauss
1044 Main Street, Ste 500
Kansas City, MO 64105
816-221-8855 Telephone
816-221-7886 Facsimile
victor@merrickbakerstrauss.com
ATTORNEYS FOR APPELLEE

VII. CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

This brief complies with the type-volume limitation of Rules 32(a)(7)(A) and (B) because this brief does not exceed 30 pages and contains 5,803 words, excluding the parts of the brief exempted by Rule 32(f). This brief was prepared using Microsoft Word in Garamond 14 point font.

/s/ Victor F. Weber

VIII. STATEMENT THAT BRIEF IS VIRUS FREE

This brief has been scanned for viruses and is virus-free

/s/ Victor F. Weber

IX. CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2023, I electronically filed the foregoing by using the CM/ECF system. Service on all participants in the CM/ECF service will be accomplished by the CM/ECF system.

/s/ Victor F. Weber
ATTORNEYS FOR APPELLEE