UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION - DETROIT

In re: Anna J. Fletcher,

Debtor.
_____/

Case No. 20-44787
Chapter 7
Hon. Mark A. Randon

Anna J. Fletcher,

Appellant,

v.

Michael J. Stevenson, Trustee,

Appellee.

Case No. 2:23-cv-10586-NGE-EAS
Hon. Nancy G. Edmunds
Magistrate, Hon. E. A. Stafford

(CORRECTED)BRIEF OF APPELLANT - ORAL ARGUMENT REQUESTED

CERTIFICATION OF PAGE/VOLUME LIMIT - FED. R. BANKR. P. 8015

Appellant, by Counsel, certifies that pursuant to Fed. R. Bankr. P. 8015 (4), the paper size, and margins conform; (5) the typeface is serif at exactly 14-point font; and (7)(B) this Brief does not exceed thirty (30) pages (considering Fed. R. Bankr. P. 8015(g) exclusions from page length), with no more than thirteen thousand (13,000) words – as such, it also complies with L.R. (E.D.M) 5.1(a)(1)(3). Moreover, as Debtor is not a corporation, Fed. R. Bankr. P. 8012 is inapplicable.

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APPLICABLE STANDARD OF REVIEW

1. Whether the Bankruptcy Court erred in reliance on a line of cases which was merely persuasive (*Alcantar*), where the court also failed to identify whether distinguishing factors existed.

Resolution of this question requires an interpretation of the United States Code, Federal case law, and interpretation of ***Copper v Copper (In re Copper)*, 426 F3d 810, 815 (CA 6, 2005)**, all of which is resolved by pure legal conclusions, and, as such, are reviewed *de novo*. See ***In re Cook*, 457 F.3d 561, 565 (6th Cir. 2006) ("Issue – A")**.

II. Whether the Bankruptcy Court erred in denying the Motion where the record contained no finding of law as to whether the right to convert under 11 USC § 706(a) was in any way limited by the inability to set aside the discharge

Resolution of this question requires an interpretation of the United States Code, Federal case law, and interpretation of ***Copper v Copper (In re Copper)*, 426 F3d 810, 815 (CA 6, 2005)**, all of which is resolved by pure legal conclusions, and, as such, are reviewed *de novo*. See ***In re Cook*, 457 F.3d 561, 565 (6th Cir. 2006) ("Issue – B")**.

III. Whether the Bankruptcy Court erred in Denying Appellant's Motion to Set Aside/Vacate Discharge And Convert To Ch. 13, given that the record of the

hearing on such Motion contained no finding of facts as to bad faith (or similar restrictions).

Resolution of this question requires an interpretation of the United States Code, Federal case law, and interpretation of ***Copper v Copper (In re Copper)*, 426 F3d 810, 815 (CA 6, 2005)**, all of which is resolved by pure legal conclusions, and, as such, are reviewed *de novo*. See ***In re Cook*, 457 F.3d 561, 565 (6th Cir. 2006) ("Issue – C")**.

JURISDICTIONAL STATEMENT

The bankruptcy court had jurisdiction of the underlying matter, under 28 USC § 1334, coupled with E.D. M.I. L.R.83.50, which refers all bankruptcy matters in the district to the bankruptcy court in the same jurisdiction. The judgment or order appealed from is entered in that matter at ECF No. 5, Page ID.113. The notice of appeal is at ECF No. 7, PageID. 236-241.

(INTENTIONAL PAGE BREAK – STATEMENT OF CASE FOLLOWS)

STATEMENT OF CASE

The instant matter underlying this appeal was filed, voluntarily, by Debtor on June 15, 2022[1] (the "**Filing Date**"). See ECF No. 5, PageID.26. Inherent with any and all bankruptcy matters filed in any bankruptcy case are certain disclosures. Such disclosures are mandated by Fed. R. Bankr. P. 1007. Questions about these disclosures are asked by a Trustee, appointed to diligently investigate the affairs of the estate, and, if applicable, liquidate property for the benefit of creditors.

11 USC § 341 mandates (at least) one meeting of creditors. At such a meeting, the Trustee (in this case, "**Appellee**") asks the Debtor (in this case, "**Appellant**") questions regarding their financial affairs. The meeting of creditors regarding the Appellant occurred on July 14, 2022 (the "**Meeting**"). See *Id*. At the Meeting, questions were asked about a piece of property owned by the Debtor, at 86 Hibbard Ct., Pontiac, MI 48341 (the "**Property**"). See *Id*. The debt in this matter includes non-dischargeable tax debt[2], and an assumed lease[3], each of which are not affected by the chapter 7 discharge in the underlying matter. See ECF No. 5, PageID.212.

One of the questions at the Meeting, concerned the transferring of the Property

[1] All citations to the record on appeal are cited in this format (ECF No. ___, PageID. ___), as required by E.D. MI Rule 6 ("R6") of the Electronic Filing Policies and Procedures.
[2] 11 USC § 523(a)(1) et al, paired with 523(c).
[3] The decision to assume a contract merely allows the contract to continue to operate and does not change the obligations of the parties, except as provided explicitly in the Code. Michael T. Andrew, Executory Contracts in Bankruptcy: Understanding "Rejection", 59 Colo. L. Rev. 845, 847 (1988) ("Assumption permits the estate to obtain the benefits of continued performance by the nondebtor party to the contract, as would assumption by an ordinary contract assignee.").

in the last six years. Appellant disclosed that approximately two years and nine months before the Filing Date, a transfer of the Property occurred which (essentially) made Appellant's daughter a co-owner of the Property. See *Id*. A discharge was entered in the underlying matter on September 13, 2022 (the "**Discharge Order**"). See *Id*. In December of 2022, via a series of emails, it was determined that the Appellant was at least interested in investigating the home of the Debtor for potential transfer issues and sale of the property.

Very shortly thereafter, on January 2, 2023, the Appellant filed a Motion to *both* set-aside/vacate the order of discharge *and* convert the underlying matter to a case under Chapter 13 of Title 11 of the United States Code (the "**Bankruptcy Code**", and the "**Motion**"). See ECF No. 5, PageID.26-31.The Motion alleged, in pertinent part (with respect to this appeal), that: 1) "the substantive limitation on the right to convert is the absence of good faith" (i.e., bad faith); and 2) 706(a) makes no reference of whether the entry of a discharge precludes entry of an order converting." See ECF No. 5, PageID.30.

The Appellee filed a Response to the Motion (the "**Response**"). See ECF No. 5, PageID.34-68. The Response, in pertinent part with respect to this appeal, alleged that: 1) the right to convert is not absolute; and 2) in a case where a discharge is granted, a case from the District of New Mexico and the Northern District of Georgia suggests that a debtor who has received a discharge has "no 'dischargeable' debts

… to be addressed in [Chapter 13].” See ECF No. 5, PageID.63-68.

Thereafter, Appellant filed a reply to the Response (the “Reply”). See ECF No. 5, PageID.78-84. The Reply, in pertinent part with respect to this appeal, alleged: 1) “[the *Oblinger* Court] determined that 706(a) expressed liberal desire for conversion … [and] was so broad and permissive that [706(a)] excluded a ‘time limitation on the right to convert[4]’”; 2) there is no bad faith on the part of the Appellant in her request to convert, as she disclosed all her assets in amending her disclosures; and 3) the cases cited by Appellant are factually distinguished. See ECF No. 5, PageID. 81, 83.

The bankruptcy court set a hearing on the Motion (and, by proxy, the Response and Reply thereto). The hearing on the Motion was set for January 5, 2023 (the “**Hearing**”). See ECF No. 5, PageID.70. At the Hearing, there was oral argument. See ECF No. 5, PageID.93-112. The Court focused itself on the issue of setting aside the discharge. See ECF No 5, PageID.96 (¶2). The Appellant argued that the cases relied upon by the Appellee were “way out of district,” and that a case, *In re Oblinger*, 288 BR 781 (Bankr ND Ohio, 2003) was directly applicable. See ECF No. 5, PageID.98-99.

Moreover, the Appellant argued that “even if we didn’t set aside the discharge, I don’t think there’s anything that means that we couldn’t [pay creditors in Chapter

[4] That “time limit” being the order of discharge.

13].” See *Id*. Moreover, the Appellant argued that “706(a) … [is] clear and unequivocal that the [Appellant] has the right to convert at any time … [and] if 706(a) [had a time limit, it would say so].” See ECF No. 5, PageID.110 (paraphrasing, last sentence for word count). The Appellant further argued that many cases examining bad faith, specifically *Copper v. Copper*[5] examined bad faith in the parlance of conversion and determined that bad faith is typically evinced by attempts to obfuscate or avoid payment of creditors in the converted case. See *Id*. 110-111. The bankruptcy court ended the hearing with the statement, “[t]here is also the issue of bad faith, but I don’t know that it’s necessary [to reach] … because there is no basis … to set forth the order of discharge.” See *Id.*

After the Hearing, an Order regarding the Motion was entered (the “**Order**”). See ECF No. 5, PageID.113. The Order merely/only recited “there is no basis for [the requested relief] under [Rule 60 of Fed. R. Civ. P.].” See *Id*. The Court later fleshed out the Order, with an amended order (the “**Amended Order**”). See ECF No. 5, PageID.114. The Amended Order seemed to clarify that its ruling in the Order was based upon *In re Alcantar,* No. 19 B 24926, 2021 WL 4192680 (Bankr. N.D. Ill. Sept. 10, 2021) (“***Alcantar***”). See *Id.*

After the Order and the Amended Order, the Appellant filed a motion to reconsider both foregoing orders (the “**Motion to Recon**”). See ECF No. 5,

[5] *Copper v Copper (In re Copper)*, 426 F3d 810 (CA 6, 2005)

PageID.115. The court issued a memoranda opinion on the Motion to Reconsider. See *Id*. The bankruptcy court, in pertinent part, held that: 1) the bankruptcy court ruled in line with *Alcantar* (specifically); 2) as such, debtors who have no non-dischargeable debts have nothing to reorganize in Chapter 13; and 3) the right to convert is not absolute (based upon *Marrama v. Citizens Bank of Massachusetts*, 549 US 365, 127 S.Ct. 1105 (2007)).

ARGUMENT

Summary

The arguments of the Appellant are as follows: 1) *Alcantar* is a persuasive case, that is distinguishable from the instant matter, where in-circuit, on-point opinions exist that are much more persuasive; however, if the facts of this case are applied to the *Alcantar* analysis the inescapable conclusion is that the Debtor, having debts that survived the Chapter 7 discharge, must be allowed to convert to Chapter 13) the bankruptcy court never found (or, alternatively, found incorrectly[6]) that the right to convert is conditioned temporally on not having a discharge entered (or, negatively, if you have a discharge in Chapter 7, you cannot convert to Chapter 13); 3) given the foregoing, the bankruptcy court erred in denying the Motion without making a find of, or reaching the matter of, bad faith.

[6] *Taft Broadcasting Co v United States*, 929 F2d 240 (CA 6, 1991) held that matters, if purely legal, were not waived on appeal if first raised therein.

Issue presented - A.

The Motion raised two issues before the bankruptcy court, primarily. The first being the request to set aside the Discharge Order, the second being the request to convert the underlying matter to Chapter 13. The bankruptcy court only ruled on one of those matters. Moreover, it is unclear, but the bankruptcy court seemed to hold that, because the discharge was ordered, the *Alcantar* case persuaded the bankruptcy court that once a discharge was entered and no further debts could be administered in a bankruptcy case, it could not convert the instant matter. The bankruptcy court did not engage in, or address in its order, an analysis over whether there would be debt to adjust in a Chapter 13 case.

It has been argued by Appellee that the Motion was not about, or indeed did not have, a main contention other than the setting aside of a discharge. However, this is utterly without merit, due to the pleading in the Statement of the Case, which makes it clear that: 1) the Appellant specifically plead that the right to convert is not limited by discharge; 2) notwithstanding discharge, the bankruptcy court needed to and should have converted the instant matter; 3) at the Hearing the bankruptcy court otherwise focused on the setting aside of discharge, largely limiting the focus of the Hearing; and, 4) notwithstanding the limitation by the bankruptcy court, Appellant still argued at the Hearing that the court can and should convert the instant matter

(even in the face of discharge).

The bankruptcy court relied upon persuasive case law when it relied upon *Alcantar*. This Court has rejected reliance on persuasive case law wherein the facts are distinguishable from the facts before it. See *Dow Chem Co v Associated Indemnity Corp*, 727 F Supp 1524, 1528 (ED Mich, 1989). In the instant matter, the facts are (summarily): 1) a debtor received a discharge in Chapter 7; 2) she filed a motion to convert that case to Chapter 13; 3) the discharge was intact at the time she filed the motion to convert the case; 4) certain of her debt was/is exempt from the Order of Discharge and could be adjusted in a Chapter 13.

The facts in *Alcantar* are almost the same but differ in one material way: the debtor in *Alcantar* had *no* other debts which survived his Chapter 7 discharge. The holding in *Alcantar* was, merely, that a Chapter 7 debtor who had received a discharge but had not had his estate fully administered was not permitted to convert under 11 U.S.C.S. § 706(a) to a chapter 13 case because the debtor could not qualify for conversion unless the discharge order was vacated because the discharge precluded him from having "debts" that would make him eligible under 11 U.S.C.S. § 109(e); Conversion would also be denied as an abuse of the bankruptcy process as the debtor was apparently attempting to avoid the risk of losing the home his wife purchased with funds he transferred to her from a settlement he failed to disclose

(e.g., bad faith). See *In re Alcantar*, ___BR___; 2021 Bankr LEXIS 2488, at *1 (Bankr ND Ill, Sep. 10, 2021).

The Court should note that the specific holding of *Alcantar* does *not* tie the discharge temporally to the right to convert nor provide a nexus between a Chapter 7 discharge and conversion to Chapter 13 *except* as to good faith and eligibility under Section 109(e). Moreover, the bankruptcy court did not reach the issue of lack of good faith in the instant matter. As such, the second holding (re: abuse of bankruptcy process) cannot possibly be the reason the bankruptcy court cited *Alcantar*. The only discernible reason for the bankruptcy court to cite *Alcantar* was for the proposition that a debtor needs debts to convert to Chapter 13. In *Alcantar* the debtor only had unsecured, non-priority debts that were *all* discharged in the Chapter 7 case. See *Id*. at *3.

The bulkhead of *Alcantar* focused on eligibility under 11 USC § 109(e). The *Alcantar* court, in pertinent part, analyzed Section 109 with respect to what "debt" was under the foregoing subsection. See *Id*. at *7-10. The *Alcantar* court specifically acknowledged that, even considering discharge, a "debtor who still owes non-discharged debts would qualify for chapter 13." See *Id*. at 8. The *Alcantar* court then examined similar cases (*Starling*) with debtors attempting to convert, as in *Alcantar*, with only discharged debt, and hypothesized that in that kind of case,

discharge would need to be set aside as a predicate for conversion. See *Id*. at 9.

The attempt in this case to set aside discharge failed. However, that does not mean the Appellant is precluded from discharge as a matter of law; Appellant has debts that survived the Chapter 7 discharge and can be treated in Chapter 13. Moreover, from the face of the schedules in the instant matter, and from the admission of the Appellee in its pleadings (see, *Supra*), there are two non-dischargeable tax debts of the debtor that are scheduled, and an assumed debt, which can be reorganized in Chapter 13. As such, *Alcantar* is clearly distinguished from the instant matter, and under *Dow* the Court should disregard rulings made on that precedent. Moreover, even if *Alcantar* were binding, it would be inapplicable due to the factual distinguishment and the Court should reverse the decision of the bankruptcy court, because *Alcantar* would be inappropriately applied. Additionally, if one strictly applies *Alcantar*, the instant matter must be converted.

Additionally, when considering the in-jurisdiction case law, Appellant contends that *In re Oblinger*, 288 BR 781 (Bankr ND Ohio, 2003) is far more persuasive, and matches the facts herein. 1) a debtor received a discharge in Chapter 7; 2) s/he filed a motion to convert that case to Chapter 13; 3) the discharge was intact at the time she filed the motion to convert the case; 4) certain of her debt was/is

exempt from the Order of Discharge[7]. The *Oblinger* court did state it was, "troubled by some of the circumstances in this case, not the least of which is the fact that Ms. Oblinger's desire to repay her creditors did not in fact arise until after the Trustee started doing his job." See *Id*. at 786 (Bankr ND Ohio, 2003).

However, the *Oblinger* court, even considering the foregoing observation, ended up holding that "the language of § 706(a) is broad and permissive, allowing conversion by a debtor at any time. There is no time limitation to pre-or post-discharge in the language Congress chose, and its use of the words at any time shows that Congress did *not* intend that there be a time limitation on the right to convert…[t]he Sixth Circuit has not [reached the issue in this appeal] " *Id.* at 784 (internal citation omitted). Notably, the only Supreme Court case determining limitations of 706(a), has determined that "abuse of process," i.e., bad faith, is the limitation (the only one found as of today) on conversion (outside of calculated eligibility). See *Marrama v Citizens Bank*, 549 US 365; 127 S Ct 1105; 166 L Ed 2d 956 (2007).

The Appellant respectfully submits, even outside of the arguments above, this *de novo* review, of a lower court decision, based on inapplicable case law from another circuit, is the perfect situation for this Court to hold that *Oblinger* is not just

[7] Note that the court stated the debtor had a reaffirmed mortgage and unsecured priority debt, see *Id*. at 782-783.

more persuasive than *Alcantar*, but is controlling in this matter.

Issue presented - B.

The issue presented in this section is somewhat subsumed by the previous. *Oblinger* held, quite unequivocally, that conversion to Chapter 13 is not limited by an order of discharge in Chapter 7. Additionally, *Oblinger* saliently noted that the issue of discharge limiting conversion rights has *not* been examined by the Sixth Circuit. As such, this is an issue that the Court can rule on free from constraint.

As *Oblinger* suggested, 706 says nothing with respect to any temporal limitation on the right to convert. Case law only has limited the right to convert in *Marrama* that essentially held that a Debtor lacking good faith cannot convert because good faith is required to be a Debtor under Chapter 13 (i.e., a plan cannot be confirmed absent good faith). As the Court in *Oblinger* observed, the clear language of 706 provides no other limitation than the text in paragraphs (d) and (a) of that section. Indeed, the Supreme Court has noted, "the task of resolving the dispute over the meaning of [a provision of the bankruptcy code] begins where all such inquiries must begin: with the language of the statute itself." See *United States v Ron Pair Enterprises*, 489 US 235, 241; 109 S Ct 1026; 103 L Ed 2d 290, 298 (1989).

Beyond the text, if a statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute,

and the sole function of the courts is to enforce that language according to its terms. As such, the plain meaning of legislation should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters, in which case the intention of the drafters rather than the strict language controls. See *Id*. at 237.

Here, the plain interpretation of 706 does not produce an absurd result. The Appellant is qualified (even under *Alcantar*) as a debtor under Chapter 13. Moreover, the bankruptcy court made no finding regarding lack of good faith or other *Marrama*-esque factors which would otherwise preclude conversion or create an absurd result. The plain text of 706, paired with *Oblinger* and *Ron Pair Enterprises* clearly suggests that the exclusion of a temporal limitation by Congress on conversion was purposeful.

This disparate exclusion of a temporal limitation should strongly inform this Court when applying the code and making its decision. It is quite clear that if Congress wanted to create a limitation by discharge, it would have, and could have, done so. See *United States v. Granderson*, 511 U.S. 39, 63, 127 L. Ed. 2d 611, 114 S. Ct. 1259 (1994). As such, the Appellant implores this court to find that, as a matter of law, and as a *de novo* holding, 706 is not limited by entry of discharge in cases where the debtor otherwise qualifies as a debtor under the eligibility principles above *and* has not received a finding that would otherwise preclude conversion under

Marrama.

Issue presented - C.

Even in light of the foregoing, the only current, binding restriction on conversion is bad faith. *Alcantar* is not technically binding, nor is *Oblinger*. As it stands, the only decision which has the weight of stare decisis is *Marrama*. *Marrama* is a case which exhaustively analyzes limitations on the right to convert. The main issue in that case was whether or not 706(a) conferred an "absolute" right of conversion to Chapter 13. See *Marrama v Citizens Bank*, 549 US at 367.

In *Marrama*, a Debtor filed a standard Chapter 7 bankruptcy. The *Marrama* bankruptcy was filed March 11, 2003. See *Id*. at 368. *Marrama* disclosed that he owned real estate, however, he disclosed the value of the asset as being "$0.00." See *Id*. Additionally, he denied that he transferred any property other than in the course of business for the two years prior to filing. In fact, *Marrama* had transferred his disclosed real estate into a new trust – right before filing his Chapter 7. See *Id*. The trustee of the *Marrama* estate stated his intent to recover the fraudulently transferred property, and *Marrama* filed a notice of conversion to Chapter 13. See *Id*. The bankruptcy judge denied the conversion. See *Id.* at 369.

Marrama appealed to the bankruptcy appellate panel for the First Circuit (the "BAP"). The BAP affirmed the decision of the bankruptcy judge, citing that

"extreme circumstances," limited an otherwise "absolute right" of appeal to Chapter to 13. See *In re Marrama*, 313 BR 525, at 531 (2004). The primary finding of "extreme circumstances" was the failure to disclose his fraudulent transfer to a revocable trust (that he also failed to disclose) and his attempt to exempt rental property under the "homestead exemption" (the property was not used as his homestead). See *Marrama v Citizens Bank*, 549 US at 370. In determining that the right to convert was not absolute, the BAP focused on the language of the statute. In examining section 706, the Court examined the language of 706(a) which uses "may" when addressing how the debtor can convert his case. See *Id*. (see also 11 USC § 706(b)).

The Court then examined whether *Marrama* qualified as a Debtor under 11 USC § 109, and that, whether, presuming the case was converted, whether it would be dismissed under 11 USC § 1307(c) for "cause." See *Id*. at 373. The Court thought it extremely persuasive that 1307(c) typically allowed bankruptcy courts to dismiss Chapter 13 cases for "prepetition bad-faith conduct." See *Id*. The Court thought the aforementioned practice tantamount to a ruling that *Marrama* could not otherwise be a debtor in Chapter 13. See *Id*. at 374. As such, the Court ruled 706(d) applied and barred conversion. See *Id*. As such, the Court ruled that conversion is not absolute, but, specifically held that the salient limit, outside of other qualifications

to be a debtor in Chapter 13 is, in fact, "fraudulent conduct by the atypical litigant who has demonstrated he is not entitled to the relief available to [the honest but unfortunate debtor]." See *Id*. at 374-375.

No other holdings exist which evince any other formulation of any other limitations on the right of conversion. The holding of *Marrama* is exactly in-line with a case called *Copper v Copper (In re Copper)*, 426 F3d 810 (CA 6, 2005). This case holds, relatively in lock-step with *Marrama*, that bad faith limits the right to convert. See *In re Copper*, 426 F3d at 817. Taken together, the case law of the Supreme Court and this Circuit are both in agreement – "bad faith," "fraudulent conduct," etc. are what limits conversion (outside of section 109 and 706). The two things, "bad faith" and "fraudulent conduct," are roughly the same. No matter how it is sliced, some kind of bad act is the only other salient limit outside of qualifying as a debtor, for conversion.

Quite simply, the record is clear, or any arguments to the contrary are waived for failure to raise them below. See *Scottsdale Ins Co v Flowers*, 513 F3d 546, 552 (CA 6, 2008). As such, the only thing which would keep Appellant from conversion would be a finding of bad faith or some kind of fraudulent conduct. Yet, the bankruptcy court failed to reach such a finding. Without that finding, the bankruptcy court, additionally, was bound to convert the instant matter to Chapter 13.

CONCLUSION AND RELIEF REQUESTED

For the reasons stated herein and for those to be stated at oral argument, the Appellant respectfully request(s) that the decision of the bankruptcy court be reversed, and the case remanded to the Bankruptcy Court for action in accord with this Court's opinion and order.

Respectfully submitted,

Maxwell Dunn, PLC

DATED: May 19, 2023

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CERTIFICATE OF SERVICE

I hereby certify on the date below, I served copies as follows:

Document	Corrected APPELLANT'S BRIEF REGARDING APPEAL OF ORDER OF UNITED STATES BANKRUPTCY COURT
Served Upon	Appellee, C/O counsel, 29200 Southfield Road Suite 210, MI 48076
Method of Service	Transmission of NEF by email pursuant to E.D. of Mich. ECF Procedure 12(a)(1)

Respectfully submitted,

Maxwell Dunn, PLC

DATED: May 19, 2023

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