**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

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**REPLY BRIEF OF APPELLANT, ROBERT AIKENS, REGARDING APPEAL OF ORDER OF UNITED STATES BANKRUPTCY COURT, R.** 7

**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 a serif font at exactly 14-point font; and (7)(B) this Brief does not exceed fifteen (15) pages (considering Fed. R. Bankr. P. 8015(g) exclusions from page length), with no more than sixty-five hundred (6,500) 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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**A. The only recognized limits that exist on the right to convert are bad faith, and no other ruling was made on the limit to convert**

The Appellee's first argument is that the right to convert is permissive, and, that there are (plausibly) more limitations on the right to convert, *other* than bad faith (and issues tantamount to bad faith). For the reasons that follow, this argument falls on its face. It should also be noted that Appellee has not sufficiently addressed or addressed "[i]ssue presented – A."

Appellee argues that the right to convert is not absolute. However, this is straw man, i.e., the use of a false argument, that is easier to refute. To wit, nowhere in the appellate brief of the Appellant does she argue that the right to convert is *absolute.* Specifically, it seems that Appellee is referring to Appellant's argument in "[i]ssue presented – B." See ECF No. 10, PageID.291-293. The strawman is that Appellant didn't argue the right to convert is absolute, merely that the right to convert a case is not temporally restricted by the order of discharge. See *Id*. at PageID.291.

The entire argument of Appellee is that the Court has permission to *not* convert a case. The Appellee has cited that, "*[t]he policy of the provision is that the debtor should always be given the opportunity to repay his debts*." S.Rep. No. 95-989, at 94 (1987), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5880. This is most certainly the pinnacle of authority for the proposition of, not the Appellee but, the Appellant. Appellee has cited many cases, *In re Copper, In re Brown, In re Eugene Alexander,*

*Inc*, *In re Lesniak*, *Kuntz v Shambam*, *In re Thornton*, and *In re Jeffrey*.

Each of these cases refers to "bad faith," or something "fraught with discrepancies," or "extreme circumstances," to describe the limitations upon conversion. Notably, all of these citations bolster the proposition that, while conversion *is* permissive, the only *known* limitation(s) are either "bad faith," or bad faith *adjacent*. E.g., something so closely related to bad faith that it may as well be called bad faith – nearly synonymous. The issue with these cases, 1) they fail to address the fact that no bad faith was found or other reason to limit conversion, and 2) with the exception of *In re Jeffrey*, none of them address or bolster the proposition that discharge limits conversion.

It is important to discuss *In re Jeffrey*. Admittedly, abuse of process would otherwise be something potent to dissuade a Court from ordering conversion if it were sitting in review of the matter *sub judice*. On its face, the holding of *Jeffrey* seems to help the Trustee. However, a brief reading of said case will show that the principle remains the same as before – bad faith is the sticking point.

In *Jeffrey*, the Appellee would have the Court believe that the holding of the matter was very general, in broad strokes, that any time you convert to chapter 13 out of chapter 7, post-discharge, the *only* reason is to avoid obligations under chapter 7. The Appellee cited page six (6), however, the actual quotation is specific to the

facts of the case, and is merely, "[w]here the Debtors have already received a discharge, it is clear that *their* purpose …is to evade their obligations under Chapter 7." *In re Jeffrey*, 176 B.R. at 6 (emphasis added). The quotation of the Appellant is out of context, and a paraphrasing, that purposefully omits the relevant context.

To wit, the omission of the previous page forecloses the ability of this Court to see that the only reason the *Jeffrey* court reached that opinion is because the Debtor received a discharge, *without* disclosing an asset which otherwise should have been disclosed. See *Id*. at pg. 4-5. The Debtor acted in, once again, "bad faith," and the "bad faith" only came to light when the Trustee of the bankruptcy estate filed a Motion to Reopen the discharged and closed case, and attempted to prosecute and administer the lawsuit which constituted the undisclosed asset. See *Id*. at pg. 4.

So, the holding of the Court was *not*, in all situations where a Debtor converts to Chapter 13 from Chapter 7, post-discharge the only ambition of the Debtor is to avoid their obligations. Specifically, the Court found that, "[i]n this case, the Debtors received the benefit of their Chapter 7 … but *failed* to disclose … their only asset of value to creditors … now that it has been discovered, they want to take it." See *Id*. at pg. 6-7. So, the reason for the holding was not an overwhelming holding that discharge forecloses conversion, but, as the headnotes disclose, "[a] Chapter 7 involves a quid pro quo: debtors receive a discharge and, in exchange, make full

disclosure about their financial affairs." See *Id*. at pg. 4 (HN 3). As such, the court found that the Debtor(s) had engaged in abuse of process.

This is specifically the inverse of the case *sub judice*. The facts clearly are: 1) full disclosure of all assets; 2) attempted conversion, *prior* to attempted administration; 3) an attempt to repay creditors. See ECF No. 5, PageID.26. As such, not only has the Appellant proved Appellee's point, that bad faith is the only known and substantive limitation on conversion; but Appellant also proved that Appellee's case is factually distinguishable from virtually *every* case limiting conversion. Once again, because there was no ruling from the bankruptcy court that otherwise limits conversion, the only real issue is whether *Alcantar* was appropriate authority for limiting conversion, it is not.

**B. Jones is not what the bankruptcy court based it's ruling upon and is not analogous to the situation at bar**

The Appellee next argues that *In re Jones*, 111 B. R. 674 (Bankr. E. D. Tenn. 1990) is more appropriate than *Oblinger*, and peripherally attempts to state that *Alcantar* is based upon *Jones*. First, *Alcantar* is not based upon *Jones*. *Alcantar* is actually based upon *In re Jeffrey*, basing its ruling upon the fact that, "[h]aving failed to disclose pre-petition transfers exceeding $150,000 and then reluctantly cooperating with the Trustee's efforts to investigate his only assets of value, Alcantar proposes to pay his debts as a last resort." See *In re Alcantar*, 2021 Bankr. LEXIS

2488 at *15-16. Immediately before the quote above, the *Alcantar* court cited the ruling of *Jeffrey*. So, once again, *Alcantar* is not appropriate.

However, assuming *arguendo* that *Jones* is what *Alcantar* is based upon, it still does not yield Appellee's desired result. The facts of *Jones* are *not* identical to the facts of Appellant's case. There is only one fact in common between *Jones* and this matter; the fact that, post-discharge, the Debtor had non-dischargeable debts to the Internal Revenue Service and/or a relevant state-taxing authority as well as reaffirmed debts. The most important facts are entirely different.

To wit, the Debtor in *Jones* had reaffirmed a vehicle, the Debtor(s) began anticipating the layoff of one of the co-debtors – making the compliance with the reaffirmation agreement dubious. Because of this fear, the impetus for conversion was to otherwise modify, surrender, or discharge the "reaffirmed obligation" to their car creditor. See *In re Jones*, 111 B. R. at 675-676. In reasoning the *Jones* decision, the court reviewed (with exhaustive detail) the case of *In re Caldwell*, 67 Bankr. 296 (Bankr. E. D. Tenn. 1986).

*In re Caldwell* was a case where the Debtor filed a petition under Chapter 7 of the United States Bankruptcy Code. Pre-filing, Mr. Caldwell was prosecuted, and a judgment was entered against him for $40,000 damages associated with false imprisonment, false arrest, and malicious prosecution. Post filing, the creditors

holding the $40,000.00 judgment petitioned for non-dischargeability of their judgment. Mr. Caldwell obtained a discharge of all debts, excepting the outcome of the dischargeability litigation. See *In re Jones*, 111 B. R. 676-677 (re: *Supra*).

Mr. Caldwell then attempted to convert and revoke his discharge, and the *Caldwell* court created a test to determine if mere revocation of a discharge was appropriate. See *Id*. at pg. 677. The *Caldwell* court determined that three factors should be examined, "the absolute right to convert to Chapter 13 at any time; (2) the lack of harm which would result to any creditor by granting [a debtor's] motion to revoke his discharge; and (3) the meaningless effect of the discharge." See *Id*. at pg. 677-678. The *Jones* court took the test from *Caldwell* and evaluated it.

Ultimately, the *Jones* court denied the motion to convert. However, it was *not* based upon a motion to set aside the order of discharge. The court in *Jones* denied the motion because, instead of seeking relief under Fed. R. Civ. P. 60 ("Rule 60"), the Debtor in *Jones* filed a motion to "revoke" the discharge, under 11 USC § 727(d)/(e). See *Id*. at pg. 679 (the court noted multiple cases examining the standard under Rule 60) . Specifically, 11 USC § 727 does not allow, notably, the relief of vacating or setting aside a discharge. As the *Jones* court noted, "[t]his court is of the opinion that in considering the aspect of the debtors' motion seeking *revocation* of the discharge, deference must be given to Code § 727(d) and (e). See *Id*. at pg. 679.

The court in *Jones*, actually did hold that, "a Chapter 7 discharge may be revoked upon motion of the debtor filed pursuant to Fed. R. Civ. P. 59(e) and/or 60(b), incorporated into Fed. R. Bankr. P. 9023 and 9024." See *Id*. at pg. 680. As the *Jones* case was examining a completely different scenario – motion under § 727 v. 60b, and there is no bad faith involved. Under *Jones*, it is highly likely that Appellant would succeed in conversion. However, this speculation is unnecessary, *Jones* is inapplicable, and *Oblinger*, is much more analogous.

**C. Whether abuse of process was present, was not ruled upon by the bankruptcy court, it is not present**

The final argument of the Appellee is that it is abuse of process to allow conversion to chapter 13, after discharge in chapter 7. Appellee, once again, has cited a litany of cases, without analyzing them. Appellee cites *Jeffrey*, but, as shown above, the abuse of process wasn't converting to chapter 13 after chapter 7 discharge but doing so after having *failing to disclose* their most significant asset and receiving a discharge based upon that representation. See *Supra*. Appellee cites *In re Spencer*, 137 B. R. 506 (Bankr. N.D. Okla. 1992). However, *Spencer*, like *Jeffrey*, involves the failure to disclose assets, and actual bankruptcy fraud allegations. See *In re Spencer*, 137 B.R. 506, 510-511 (Bankr. N. D. Okla., 1992).

Appellee cites *In re Marcakis*, 254 B.R. 77 (Bankr. E.D.N.Y., 2000). However, once again, this matter involves significant issues regarding undisclosed

fraudulent transfers of not only stock, but real property owned by a company that the Debtor fraudulently transferred his real property to. See *Id*. at pg. 78. Moreover, the Debtor was found to have tampered with his tax return documents and had otherwise attempted to both conceal his realty from the court, but also that under *any* chapter 13 plan, the Debtor would have to not only pay back 100% of creditors, but, the fraudulently secreted property was of such great value, they'd receive *interest* upon their claims. See *Id.* at pg. 83-85. The court would not convert, once again, due to the underlying fraud of the Debtor.

The underlying issue with all the arguments, and all the cases cited by the Appellee are simply that they all have an underlying thread of bad faith, abuse of process, or some bad faith adjacent ruling as a reason for holding that conversion is not allowable. Appellee has cited *In re Safley*, 132 B. R. 397 (Bankr. E.D. Ark. 1991) and *In re Hauswirth*, 242 B.R. 95 (Bankr. N.D.Ga., 1999) which have broad holdings that seem to otherwise proscribe conversion after discharge. However, once again, *Safley* also involved non-disclosure of an asset, and acts attempting to circumvent the fraudulent non-disclosure. See *In re Safley*, 132 B. R. at 398. Moreover, *Hauswirth* was actually ruling that you cannot have "two discharges in a single case." See *In re Hauswirth*, 242 B.R. at 97.

In terms of the issue framed, the Sixth Circuit has no on point case regarding

this issue, no precedent. However, the sticking point on all the cases seems to be abuse of process. As no ruling on whether the same case can have two discharges exists, statutory interpretation is key. No statute in the bankruptcy scheme either proscribes filing a consecutive chapter 13 and completing it (without discharge) after a chapter 7 discharge. No case has held, in this circuit, that a chapter 13 discharge is necessary as the requirement to be a debtor in chapter 13 – people file chapter 13's all the time without the ability to get discharge. See

The statute does not explicitly proscribe this matter. *In re Oblinger* has provided an exhaustive, in-circuit analysis of the actual facts and circumstances in the most analogous fact pattern possible. Moreover, as no finding of bad faith was made in the bankruptcy court as to an action of the Debtor, it staggers the mind to think that abuse of process is present. Abuse of process being the "wrongful use of a process of the court." There are no allegations of this, and no reason why this Court should find there are. See *Johnson v Home State Bank*, 501 US 78; 111 S Ct 2150; 115 L Ed 2d 66 (1991).

## 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: June 30, 2023

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## CERTIFICATE OF SERVICE

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

| | |
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| **Document** | Corrected APPELLANT'S REPLY 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: June 30, 2023

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