No. 22-16253

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTH RIVER CAPITAL, LLC,

Plaintiff-Appellant,

v.

EVANDER FRANK KANE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of California
No. 3:21-cv-03493-WHO
Hon. William H. Orrick

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

South River Capital, LLC, appellant in this action, "South River" makes this statement pursuant to FRAP 26.1.

South River has no parent corporation, and no publicly held corporation owns more than 10% of interests in Appellant.

Date: January 18, 2023

BINDER & MALTER, LLP

/s/ Wendy Watrous Smith
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I. INTRODUCTION

NHL hockey-player Evander F. Kane ("Kane") filed a petition under Chapter 7 of the United Bankruptcy Code in January 2021.[1] He had earned between $6 and $7 million[2] in each of the previous years under his contract with the San Jose Sharks and stood to earn post-petition wages under his contract of as much as $29 million through 2025.[3] By choosing to file under Chapter 7 Kane would not have to pay any of his future hockey wages to his creditors.

One of his creditors, Zions Bancorporation N.A. ("Zions"), moved to convert Kane's case to one under Chapter 11, which would require Kane to pay some portion of his wages to his creditors over five years while still granting him a discharge from his debts (the "Conversion Motion").[4] 11 U.S.C. § 1129(a)(15). The Conversion Motion was brought under Bankruptcy Code Section 706(b).[5] Several creditors joined (collectively the "Moving Parties") including appellant South River Capital, LLC ("South River").[6] The Bankruptcy Court of the Northern District of California (the "Bankruptcy Court") issued an opinion denying the

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[1] Northern District of California (the "Bankruptcy Court"), Case No. 21-50028 SLJ
[2] ER-V3-614.
[3] ER-V3-571, 583.
[4] Unless specified otherwise, all chapter and section references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101- 1532.
[5] ER-V3-549-567.
[6] ER-V3-533-537; ER-V3-511-515; ER-V3-509-510; ER-V3-506-508.

Conversion Motion in April 2021 (the "Opinion").[7] Both Zions and South River appealed to the Northern District of California (the "District Court"), which sustained the Bankruptcy Court's ruling on July 22, 2022 (the "District Court Order").[8] South River appealed.[9]

This appeal highlights the limits of a bankruptcy court's discretion and authority when applying the Bankruptcy Code. Section 706(b) states simply that a court may convert a Chapter 7 case to one under Chapter 11 on a motion at any time. 11 U.S.C. § 706(b). Nothing in the Bankruptcy Code sets out a specific rule for the judge to follow when granting or denying such a motion and there is no controlling law in this Circuit. From this and general comments from opinions from other districts, the Bankruptcy Court concluded that it could consider any interest of a party and that the "analysis is open ended."[10] Thus untethered, the Bankruptcy Court considered interests of Kane's that are contrary to the terms of the Bankruptcy Code and beyond its scope. This included Kane's desire to "receive

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[7] ER-V1-023-049.
[8] ER-V1-003-017.
[9] Zions filed a separate appeal, *Zions Bancorporations, N.A. v. Kane*, No. 21-CV-0375-WHO. South River understands that a notice has been filed in the Bankruptcy Court indicating that Zions and Kane have settled and that Zions appeal will be dismissed.
[10] ER-V1-033 (l. 17).

his future income free from financial encumbrances,"[11] *i.e.,* a discharge his of debts without paying any future wages to creditors, and to use that income to pay for luxury homes not otherwise protected by an exemption.[12]

But the Supreme Court has made it clear that the bankruptcy court's authority is tightly bound to the text of the Bankruptcy Code itself and a judge may not stray beyond it. *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). Nor does statutory silence grant the bankruptcy court any authority to exercise its discretion except to implement the terms of the Code. *Pac. Shores Dev. LLC v. At Home Corp. (At Home Corp.)*, 392 F.3d 1064, 1070 (2004). ["statutory silence alone does not invest a bankruptcy court with equitable powers [or] . . . a roving commission to do equity."] Here, extensive terms throughout the Bankruptcy Code reflect the expectation that an individual seeking a discharge will pay a portion of his or her post-petition disposable income to creditors. It is emphasized in the recent changes made under the 2005 "Bankruptcy Abuse Prevention and Consumer Protection Act" ("BAPCPA")[13]. (*See* discussion at VII.A.2.) That expectation cannot be ignored by a bankruptcy court using its discretion to decide whether a case must be converted from Chapter 7 to Chapter

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[11] ER-V1-041 (ll. 9-10).
[12] ER-V1-038 (ll. 5-11).
[13] Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).

11.[14]

Here, the Bankruptcy Court's failure to stay within the bounds of the Bankruptcy Code for the purpose of granting a debtor rights to which he is not entitled is enough to reverse its refusal to convert Kane's case to one under Chapter 11. But the Bankruptcy Court also made several significant legal errors in assessing Kane's ability to confirm a Chapter 11 plan if the case was converted—errors that the District Court substantively acknowledged. (*See* discussion below at III.B.).

Letting the Bankruptcy Court's decision stand will allow Evander Kane to discharge his debts while keeping all of his considerable wages as a professional hockey player. By reversing it and converting the case to chapter 11, the court will allow Kane and his creditors to negotiate a chapter 11 plan whereby he may contribute some portion of his earnings to a plan of reorganization and preserve the discharge of his debts.

II. JURISDICTION

South River's appeal from the Bankruptcy Court's decision was timely. The Bankruptcy Court entered the decision on April 19, 2021.[15] South River filed its Notice of Appeal with the clerk of the Bankruptcy Court on May 3, 2021, within

[14] ER-V1-040.
[15] ER-V1-023.

the 14-day period set forth in Bankruptcy Rule 8002(a)(1),[16] [17] and elected to have the appeal heard by the District Court under Bankruptcy Rule 8005.[18]

The District Court had jurisdiction to hear the appeal from a final order issued by the Bankruptcy Court pursuant to 28 U.S.C. §158(a)(1). A bankruptcy order is considered to be final and thus appealable "where it 1) resolves and seriously affects substantive rights and 2) finally determines the discrete issue to which it is addressed." *In re Rosson*, 545 F.3d 764, 768 (9th Cir. 2008). An order on a motion to convert a case from one under Chapter 7 to one under Chapter 11 under Section 706(b) is a final order subject to appeal. *See*, *e.g., Schlehuber v. Fremont Nat'l Bank (In re Schlehuber)*, 489 B.R. 570, 571 (8th Cir. B.A.P. 2013).

South River's appeal from the District Court to this court was also timely. The District Court entered the Order on Bankruptcy Appeal on July 22, 2022.[19] Appellant filed its Notice of Appeal with the District Court on August 16, 2022,[20] within the 30 days required by Federal Rule of Appellate Procedure 4(a)(1)(A). This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(d)(1).

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[16] ER-V4-716-746.
[17] ER-V2-289-318.
[18] ER-V2-319.
[19] ER-V1-003-017.
[20] ER-V2-208-227.

III. ISSUES PRESENTED

1. Did the Bankruptcy Court exceed its authority, and thereby abuse its discretion, by holding that an individual who is not barred by statute from being a debtor under Chapter 7 and is not a consumer debtor has a "right to a discharge and a fresh start" without contributing any post-petition disposable income?

2. Did the Bankruptcy Court err by considering Kane's interest in keeping non-exempt assets and millions of dollars in future wages when denying the motion to convert the case to one under Chapter 11?

3. Did the Bankruptcy Court err by considering non-existent secured creditors and collection threats to the debtor as reasons for denying the Conversion Motion?

4. Did the Bankruptcy Court err when applying Section 706(b) by considering uncertainties common to any Chapter 11 case as reasons for denying the Motion to Convert?

5. If the correct legal standard had been applied, did the Moving Parties meet their burden to establish that Kane's case should be converted to one under Chapter 11?

IV. STATEMENT OF THE CASE

A. Kane's debts and his ability to pay his creditors.

Evander Kane is an NHL hockey player and was playing for the San Jose

Sharks (the "Sharks") when he filed bankruptcy in January 2021 and when the Bankruptcy Court denied the Conversion Motion. Kane's Bankruptcy Schedules listed creditors to whom he owes approximately $26.8 million.[21]

Kane also listed approximately $10.2 million of assets, consisting primarily of three homes with stated values totaling approximately $8.2 million, and an expected tax refund of $1.8 million.[22] Kane's primary asset was the salary he expected to earn over the next four years. When he filed bankruptcy, he was in the third year of a seven-year contract with the San Jose Sharks.[23] Under his Standard Players Contract (the "NHL Contract"), Kane stood to earn a post-petition salary of $25 million between 2021 and 2025. Additionally, Kane was to receive two more signing bonuses of $2 million each in July of 2022 and 2024.[24] The NHL Contract also provided certain guarantees of his salary if Kane were injured while working or terminated without cause.[25]

Therefore, according to the NHL Contract, Kane's gross income for the four years remaining on his contract could be as much as $29 million.[26] This amount is

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[21] ER-V4-650.
[22] ER-3-604-610.
[23] ER-V3-571-590.
[24] ER-V3-571, 583.
[25] ER-V3-573, 579.
[26] Kane has asserted that as much as 20% of his base salary is tied to certain revenue targets (ER-V3-493 (ll. 16-21)), though this does not appear in the NHL

consistent with Kane's filed Statement of Financial Affairs, where he stated under the penalty of perjury that his salary for prior years was in the range of $6 to $7 million.[27] At the meeting of creditors under Bankruptcy Code Section 341, Kane, again under oath, testified that, on a given year with a gross salary of $7 million, after taxes and other deductions, his estimated annual take home pay was between $2.3 to $2.6 million.[28] Kane has not denied either of these statements.

Rather, in the opposition to the Conversion Motion, Kane emphasized that the net amount of the first paycheck he received for the 2020-2021 season in late January 2021 was $38,709.[29] Although this check was in the middle of the COVID health emergency, neither Kane, nor the Bankruptcy Court, explained how it reflected Kane's expectation of future income. Kane also did not explain why, once the COVID emergency had abated, his annual gross salary would not be in the $6 to $7 million range as in prior years or that his annual net salary would not be in the previous range of $2.3 to $2.6 million.

B. Kane's extraordinary living expenses.

Although under Chapter 7 debtors do not have to use any future wages to

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Contract, and Kane did not document this statement in his opposition to the Motion to Convert**.** Even if this is true, that would reduce his salary to $23.2 million (80% of $29 million).

[27] ER-V4-689.

[28] ER-V3-349 (l. 22), 350 (l. 7).

[29] ER-V3-494 (ll. 2-4).

pay their creditors, a debtor must still file a schedule showing annual living expenses. Kane's Amended Bankruptcy Schedule J reports annual living expenses totaling approximately $1.1 million ($93,214 per month).[30] The most significant are:

Food and housekeeping supplies for a family of three	$96,000
Child-care for a six-month old daughter	$144,000
Support for his "father, mother, grandmother, and uncles"	$180,000
Mortgage debt and home ownership expenses for his San Jose, California residence and two houses in Canada[31]	$528,000

Based on his stated average annual take-home salary of $2.45 million, even with these annual expenses of $1.1 million for a family of three, Kane could have annual disposable income of almost $1.35 million with which pay his creditors. Over the four years remaining on Kane's contract, that would have yielded $5.4 million for a Chapter 11 plan.

Kane has never tried to justify his extraordinary expenses, nor has he ever asserted that he has reduced them. Other than a single comment that he "works

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[30] ER-V3-612.
[31] ER-V3-612.

hard to support his family, and the expenses are reasonably necessary to do so,"[32] there was no effort to explain how this could be true, *ie.,* how it is reasonable for a debtor to support an extended family, pay for luxury homes, or pay over $10,000 per month for a single child's care. Rather, Kane argues that the amount that he might save if he changed his expenses "pales in comparison" to the amount of the claims.[33] But Kane carefully avoided presenting any calculations. If, for example, Kane's annual expenses of $1.1 million were cut in half to a $550,000 for a family of three, over four years it would bring $2.2 million into the estate to pay Kane's creditors.

C. The Conversion Motion and Appeal.

Zions filed the Conversion Motion on February 26, 2021, [34] which the remaining Moving Parties joined.[35] The Conversion Motion also included a request that, on conversion, the court appoint a Chapter 11 trustee.[36] The Bankruptcy Court heard the Conversion Motion on March 30, 2021 and issued its opinion denying it on April 19, 2021.[37] South River appealed the decision to the

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[32] ER-V3-479 (ll. 19-21).
[33] ER-V3-479 (ll. 19-21).
[34] ER-V3-549.
[35] ER-V3-533-537; ER-V3-511-515; ER-V3-509-510; ER-V3-506-508.
[36] ER-V3-553.
[37] ER-V1-023-049.

extent it denied the motion to convert the case to one under Chapter 11.[38] The principal moving party, Zions, also appealed the Order.[39]

While the appeal was pending before the District Court, Kane moved to dismiss it as moot because he was no longer playing for the San Jose Sharks.[40] South River objected because Kane had signed a new contract with the Edmonton Oilers, another NHL hockey team, and was still making a substantial salary.[41] The District Court denied the motion, finding that Kane could fund a Chapter 11 plan with the reduced salary and thus the appeal was not moot.[42]

The District Court issued its order affirming the Bankruptcy Order in July 2022.[43] Although the District Court acknowledged that the Bankruptcy Court had made several legal errors, it accepted without analysis the broad authority the Bankruptcy Court assumed in making its ruling.

V. SUMMARY OF THE ARGUMENT

The argument is set forth in four parts.

A. The limits of the authority of the bankruptcy court.

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[38] ER-V4-716-746.
[39] ER-V2-289-308.
[40] ER-V2-093-100.
[41] ER-V2-083.
[42] ER-V2-018-022.
[43] ER-V1-003-017.

First, South River explains the scope of a bankruptcy court's authority by describing the controlling cases that expressly limit that authority to implementing the text of the Bankruptcy Code itself. This, in turn, limits the range of any discretionary opinion the bankruptcy court may issue. Even where the Bankruptcy Code is silent regarding a particular provision, the Ninth Circuit has made it clear that the bankruptcy court's discretion is limited to implementing the code itself. (See discussion at VII.A.1.)

The argument explains how the classically-phrased goals of bankruptcy - paying creditors and providing debtors with a "fresh start" - are not independent of the text of the Code, but summarize its specific terms. Thus, a bankruptcy court considering a debtor's fresh start is not an opportunity for a bankruptcy judge to exercise his or her discretion as to what that fresh start means, but only to implement the terms of the statute.

South River then explains that, as a result of changes in the Bankruptcy Code in 2005, it now clearly includes an expectation that an individual debtor seeking to discharge debts will pay a portion of future disposable income to creditors if the debtors income exceeds a certain minimum, and a creditor or trustee requests it. (See discussion at VII.A.2.) South River also explains that the changes in the law did not affect only consumer debtors, but affected wealthy debtors as well, including requiring Chapter 11 debtors to pay future disposable

income, and eliminating the "mansion exception" for certain high value homes. (See discussion at VII.A.2.)

In Sections VII.A.3 and VII.A.4, South River reviews cases confirming that a court must consider a debtor's ability to pay creditors as a central element of its decision whether or not to convert a case under Section 706(b). The argument also sets forth why the Bankruptcy Court's consideration of Kane's interests in obtaining a discharge without paying any future income and keeping exempt assets were not supported by the Bankruptcy Code and exceeded the court's authority.

B. Legal errors made by the Bankruptcy Court in the underlying decision.

South River explains that the Bankruptcy Court erred when it asserted that, if Kane were to have non-dischargeable claims, holders of those claims could interfere with a Chapter 11 plan by attempting to collect a non-discharged debt. As acknowledged by the District Court, this is false, as any chapter 11 plan could be designed to protect the debtor's assets from collection by a non-discharged debtor as long as the plan was pending. The Bankruptcy Court further erred by asserting that a pre-petition-secured creditor could claim a lien on Kane's post-petition wages when the Ninth Circuit has held specifically that they cannot.

C. Risks common to any Chapter 11 should not be considered as reasons for denying a motion to convert a case.

In the section, South River explains that the Bankruptcy Court should not

have considered factors common to any chapter 11 case as particular reasons to refuse to convert this case to chapter 11, as the risks are inherent to the process and always exist. The first was the risk that Evander Kane's wages are uncertain. The argument explains that, under the changes to the law in 2005, Evander Kane would be able to modify his Chapter 11 plan if his wages changed. Second, the Bankruptcy Court observed that a creditor might object to the plan. But that is true in any case and no particular creditor was identified as creating a greater-than-normal risk. Third, the Bankruptcy Court opined that the cost of administering a Chapter 11 plan might create difficulty in the case. Administrative expenses always exist. Here, no specific amounts were identified as creating expenses so large they would exceed the substantial amount that Kane's wages would add to a Chapter 11 plan.

D. The moving parties met their burden under the Conversion Motion

Once the Bankruptcy Court's legal errors are eliminated, the only question remaining is whether, based on the proper lease legal standard, the Moving Parties met their burden. In this section, South River explains that the Bankruptcy Court acknowledged that Kane would likely pay a greater amount to his creditors in a chapter 11 case than in a chapter 7 case. Also, by finding that Kane's prior gambling habits did not justify the Bankruptcy Court appointing a chapter 11 trustee in a converted case, the Court effectively acknowledged that it did not have

reason to re-convert the case back to a chapter 7 either.

The primary focus of the inquiry--whether it is possible for there to be a confirmed plan—was also met. South River explains that a complete investigation of whether a potential plan might be feasible, by meeting all of the requirements of section 1129, is premature as there was no plan before the court and no obligation to present one in order to succeed on a conversion motion. Finally, it is evident that all parties would benefit. The Bankruptcy Court conceded that a converted case would result in some additional funds for the creditors but asserted that Kane would not benefit by conversion. That assertion was incorrect as it as it failed to recognize that Kane could keep his non-discharged creditors at bay by using a Chapter 11 plan to extend the automatic stay and would benefit by an organized payment of those claims.

VI. STANDARD OF REVIEW

In the proceeding before the Bankruptcy Court there was no trial and no live testimony requiring the Bankruptcy Court to gage the credibility of a witness. Rather, the matter proceeded on filed pleadings and the sworn statements of Kane in his filed bankruptcy schedules and at the meeting of creditors. The only questions before this court are legal ones.

The question of whether the Bankruptcy Court exceeded its authority in making its decision is a question of law to be reviewed *de novo*. The Bankruptcy

Court's interpretation of the legal rule to be applied when ruling under Section 706(b) of the Bankruptcy Code is also to be reviewed *de novo*. *In re Federated Group,* 107 F.3d 730, 732 (9th Cir. 1997). Once the legal standard is determined, the review of the Bankruptcy Court's application of the rule to facts is a mixed question of fact and law and is also reviewed *de novo.* *In re Bammer (Murray v. Bammer*), 131 F.3d 788, 792 (9th Cir. 1997) ("mixed questions presumptively are reviewed by us *de novo* because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principals.") *abrogated on other grounds, Kawaahau v. Geiger*, 523 U.S. 57 (1998).

VII. ARGUMENT

A. The Bankruptcy Court exceeded its authority and abused its discretion by considering Kane's interests beyond the scope and purpose of the Bankruptcy Code as reflected in its text.

1. The Bankruptcy Court's authority is limited to acting with the confines of the Bankruptcy Code.

The Supreme Court has made it clear the Bankruptcy Court's powers "must and can only be exercised within the confines of the Bankruptcy Code." *Norwest Bank Worthington v Ahlers*, 485 U.S. at 206. The 9th Circuit explained this limitation in *Pacific Shores Dev., LLC v. At Home Corp (At Home Corp.),* 392

F.3d at 1070. The case examined the bankruptcy court's authority to enter an order that would operate retroactively to the date the petition date was filed.[44] *Id.* The court observed that, though not expressly allowed in the Bankruptcy Code, retroactive orders were often made by bankruptcy courts exercising what they asserted as their equitable powers. But the court rejected that any such general equitable power exists. *Id.* The opinion focuses on the court's equitable power to issue an order that is "necessary or appropriate to carry out a provision of [the Bankruptcy Code]," citing Bankruptcy Code Section 105(a). *Id.* The court found that a retroactive order in the case before it was appropriate to implement Section 365(d), regarding the rejection of leases in bankruptcy, in light of the "chief purpose" of that section. *Id.*

Here, because Section 706(b) is so spare, looking to the language of the subsection itself provides little guidance. Even so, a standard rule of interpretation requires that the court look "not only the specific provision at issue, but also the structure of the statute as a whole, including its object and policy." *Children's Hosp. & Health Ctr. v. Belshe,* 188 F.3d 1091, 1096 (9th Cir. 1999). The court "will also look to similar provisions within the statute as a whole and the language of related or similar statutes to aid in interpretation." *United States v. Lkav*, 712

[44] The section in question was Section 365(d) regarding a debtor-in-possession's ability to assume or reject a contract—here a lease.

F.3d 436, 440 (9th Cir. 2013).

The policies of the Bankruptcy Code are well established as the "maximization of realization on creditors' claims" and to grant an "honest and unfortunate debtor" a "fresh start" free of his debts. *See, e.g., Holsman v. Weinschneider*, 322 F. 3rd 468, 475 (7th Cir. 2003); *Grogan v. Garner,* 498 U.S. 279, 287 (1991). It is also generally recognized that these goals are inherently at odds with each other. "[W]hile creditors seek to maximize their recovery, debtors understandably seek to discharge their debts. . .". *In re Decker*, 535 B.R. 828, 837, 838 (Bankr. D. Alaska 2015), *aff'd* 548 B.R. 813 (D. Alaska 2015).

These goals are not independent of the Bankruptcy Code, but summarize its central elements. The creditor's goal of maximizing recovery on its claim is set forth primarily in Chapter 5 regarding "Creditors and Claims" (§§ 501 to 511); exceptions to discharge (§ 542); and various sections treating priorities of claims to be paid (§ 507), and protection of security interests (*e.g.*, §§ 506, 361, 352(d)). The Bankruptcy Code also assures fair treatment of creditors in a Chapter 11 by providing for a creditors committee to represent and maximize the interests of all unsecured creditors. 11 U.S.C. § 1103.

The debtor's "fresh start" is provided primarily by: protecting the debtor and assets from collection with the automatic stay (§ 362); exempting specific assets from the bankruptcy estate (§ 522); granting a discharge from debts (§§ 727,

1141, 1228 and 1328); imposing a permanent injunction against all action to collect a discharged debt (§ 524); prohibiting discriminatory treatment stemming from bankruptcy (§ 525); and, in reorganizations, allowing a debtor to continue its business, while retaining assets free and clear of liens pursuant to a confirmed plan meeting certain requirements (§§ 1227, 1337 and 1141).

2. As modified in 2005, the Bankruptcy Code's "fresh start" now includes an expectation that a debtor will pay a portion of disposable income to creditors.

The fresh start allowed by the Bankruptcy Code is not unlimited. In 2005, Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (known as "BAPCPA"), which placed greater burdens on debtors seeking to discharge their debts.[45] BAPCPA provides that, if a creditor objects to an individual's proposed plan of reorganization under Chapter 13 (if the debtor is above median income) or Chapter 11, the debtor's discharge is now conditioned on the debtor promising to contribute five years of post-petition disposable income to pay creditors. 11 U.S.C. §§ 1325(b)(1)(B), 1129(a)(15)(B).[46]

Disposable income is calculated differently in Chapter 13 and Chapter 11. In both cases it is the amount of the debtor's income, less the debtor's expenditures that are reasonably necessary to support the debtor and the debtor's dependents,

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[45] Pub. L. No. 109-8, 119 Stat. 23 (April 20, 2005).
[46] This rule is subject to certain exceptions not relevant here.

and to operate a business if there is one. In Chapter 13, reasonably-necessary expenses can be limited to amounts described in the consumer-debtor means test in Section 707(b)(2). 11 U.S.C.§ 1325(b)(3). In Chapter 11, which accommodates debtors with larger debts and larger incomes than those in Chapter 13, reasonably-necessary expenses are determined without reference to the more restrictive limitations on consumer debtors. It still, however, requires a debtor's expenses to be reasonably necessary. 11 U.S.C. § 1129(a)(15)(B); *See also, In re Roedemeier,* 374 B.R. 264, 271-72 (Bankr. D Kan 2007). Here, neither the Bankruptcy Court nor the District Court has suggested that Kane's expenses of $1 million per year for a family of three are reasonable under any measure.[47]

Finally, although BAPCPA focused largely on the ability of debtors with primarily consumer debts (*see* 707(b)), it also made changes that limited the ability of wealthy debtors to take advantage of the Bankruptcy Code's fresh start. In addition to adding a debtor's earned income to the Chapter 11 estate (11 U.S.C. § 1115(a)(2)); and requiring a commitment of future wages to a plan as described above, Congress limited the "mansion-loophole" where debtors in certain states

[47] ER-V3-612.

could shield "virtually all of the equity in their homes".[48] BAPCPA also added a provision that allows a bankruptcy trustee to avoid a debtor's transfer to a self-settled trust of which the debtor is a beneficiary within the prior ten years under certain circumstances. *Id.* Thus, it cannot be argued that either the Bankruptcy Code or the changes made in BAPCPA express a goal of allowing extremely wealthy or high-earning debtors a greater opportunity for a fresh start than is allowed for consumer debtors.

3. When deciding a motion to convert a case under Section 706(b) a Bankruptcy Court's consideration of a debtor's fresh start is limited to the goals reflected in the Bankruptcy Code.

Section 706(b) states simply "[o]n request of a party in interest and after notice and a hearing, the court may convert a case under [Chapter 7] to a case under chapter 11 of this title at any time." 11 U.S.C. § 706(b). The cases generally agree that, because there are "no specific grounds for conversion [under Section 706(b)], a court should consider anything relevant that would further the goals of the Bankruptcy Code." *Schlehuber v. Fremont Nat'l Bank,* 489 B.R. at 573. This standard – focused as it is on "furthering the goals of the Bankruptcy Code" – is consistent with the general rules of statutory interpretation and

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[48] U.S. House, Committee on the Judiciary, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (H. Rpt. Rept. 109-31, pt. 2) at 16 describing changes to exemption rules under 11 U.S.C. § 522.

limitations of a Bankruptcy Court's authority. Cases interpreting Section 706(b) also regularly rely on a phrase in the legislative history that the court should base its decision on "what will most inure to the benefit of all parties in interest." *In re Parvin,* 538 B.R. 96, 101-102 (Bankr. W.D. Wash.). *(Citations omitted).* But neither Section 706(b)'s lack of guidelines, nor this single comment in the legislative history, mean that a bankruptcy court can go beyond the scope of the Bankruptcy Code when making its decision. *Pacific Shores Dev. LLC,* 392 F.3d at 1070.

In considering the application of Section 706(b), the court in *In re Decker*, 535 B.R. 828, provided a detailed analysis of why the rules of BAPCPA should be considered when deciding a motion to convert an individual's case to one under Chapter 11, noting that "an individual debtor's post-petition earnings are now property of the chapter 11 bankruptcy estate," and upon objection of any allowed unsecured creditor, a debtor seeking plan confirmation "must provide his or her projected disposable income over a five year period." 535 B.R. at 836. *Decker* further noted that Bankruptcy Code section 1129(a)(15) now "help[s] ensure that debtors who can pay creditors do pay them." *In re Decker,* 535 B.R. at 836, n. 29. *See also In re Parvin* 549 B.R. 268, 272 ("*BAPCPA* has now unequivocally included post-petition earnings of individual debtors in property of the chapter 11 estate, even though chapter 11 may be involuntary.")

Although Section 706(b) is silent regarding a debtor contributing disposable post-petition income to pay creditors, the extensive detail in the Bankruptcy Code sections referenced above describing what are reasonably necessary expenses for a debtor seeking a discharge, and the expectation that a debtor will be required to contribute five years of disposable post-petition wages, are both part of the "structure of the statute as a whole." *Children's Hosp. & Health Ctr. v. Belshe,* 188 F.3d at 1096. These factors must be considered by a bankruptcy court when determining "what will inure to the benefit of all parties in interest" in "furthering the goals of the Bankruptcy code" when deciding whether to convert a case under Section 706(b). *Schlehuber v. Fremont Natl. Bank*, 489 at 573.

Finally, a bankruptcy court cannot use its discretion to expand a debtor's rights under the guise of fresh start. *U.S. v. Sutton,* 786 F.2d 1305, 1308 (5th Cir. 1986) (court reversed allowance of family-support payments that were not otherwise permitted by Bankruptcy Code, holding the bankruptcy court is not "authorize[d] to create substantive rights that are otherwise unavailable under applicable law or constitute a roving commission to do equity.") *See also In re Perkins,* 11 B.R. 160, 161, Bankr. D. VT 1980) (court refused to use its discretion to find that debtor with excess spending could obtain a discharge from student loans in order to obtain fresh start).

4. The Bankruptcy Court exceeded its authority by expanding Kane's fresh start to include Kane's desire to discharge his debts without paying any future disposable income.

In describing the legal standard to be applied, the Bankruptcy Opinion begins its discussion of the legal standard to be applied with a reference to the phrase that the court should base its decision on "what will most inure to the benefit of all parties in interest," citing H.R.Rep. No. 595, 95th Cong., 1st Sess. at 380 (1977).[49] The Opinion also recites the frequently-used comment that the court may consider what "will most inure to the benefit to all parties in interest" and "would further the goals of the Bankruptcy Code," citing *Decker*, 548 B.R. at 817.[50] The Opinion also describes factors "identified in cases law" to be considered as 1) the debtor's ability to pay creditors; 2) the absence of immediate grounds for reconversion; 3) the likelihood of confirmation of a Chapter 11 plan; and 4) whether the parties would benefit from conversion, citing to *Decker*.[51] As discussed below in Section D, when these factors are considered within the scope of the Bankruptcy Code, it is evident that this case should have been converted to one under Chapter 11.

Notwithstanding the Bankruptcy Opinion's recitations, it focuses on the

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[49] ER-V1-033.
[50] ER-V1-032.
[51] ER-V1-031-032.

statement that "the decision whether to convert under § 706(b) is left in the discretion of the court. . ." and that the analysis is "open ended".[52] Based on its belief that it had an "open ended" scope of inquiry, the Bankruptcy Court did not limit itself to the issues of the Bankruptcy Code, but expanded its consideration to include Kane's interest in keeping his post-petition earnings free from creditors and keeping non-exempt assets. Specifically, when the Bankruptcy Court described Kane's interests under Section 706(b), Kane's interest as a statutory right:

> [Kane's] primary, and most obvious interests, are to see that his post-petition income does not become entangled in his bankruptcy estate and that he obtains timely discharge of his debts. . . [Because the] motion does not challenge [Kane's] statutory eligibility to be a debtor under Chapter 7. . . , [Kane] has a *statutory right* to discharge and fresh start and to receive his future income free from financial encumbrances".[53]

(Emphasis added.)

There are only three situations in which an individual cannot be a debtor under chapter 7 as a matter of statute as referenced by the Court: 1) where a consumer-debtor filing chapter 7 is presumed to be abusing the Bankruptcy Code because they maintain disposable income in excess of strictly described limits (§

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[52] ER-V1-033.
[53] ER-V1-041.

707(b)(2)); 2) under certain circumstances where the individual has been a debtor within the prior 180 days (§ 109(g)); and 3) where the debtor has not obtained pre-petition credit counseling (§ 109(h)). Thus, according to the Bankruptcy Court, unless an individual debtor fails one of these technical requirements, he has a right to a discharge without contributing any post-petition wages and can thereby defeat any motion to convert the case under Section 706(b). *Id.* While the Opinion includes a quote from the Supreme Court case *Harris v. Viegelahn*, 575 U.S. 510, 513-14 (2015) to emphasize the benefits of a chapter 7 case to a debtor, this case does not hold that every debtor is entitled to these benefits, nor does it address the conversion from a chapter 7 to a chapter 11 under Section 706(a).

The Bankruptcy Court's position has been expressly rejected by two appellate courts. In *Schlehuber v. Fremont Nat'l Bank*, the Bankruptcy Appellate Panel for the Eighth Circuit sustained a bankruptcy court's granting a creditor's motion to convert a case under Section 706(b) based on the debtor's ability to pay creditors. 489 B.R. at 570. The debtor there was an individual with primarily non-consumer debts, and thus not subject to the limitations of the means-test in Section 707(b). After the creditor filed the motion to convert the case, the debtor amended his schedules to show he had separated from his wife, thereby decreasing his income so he had no monthly surplus. *Id.* at 571. The court noted that "the debtor's position amounts to an argument that his interests (or desires) should be

paramount to those of his creditors," the court held: "[c]ontrary to the debtor's apparent belief, nothing in §706(b) states that an individual debtor's interest should control whether his case is converted to chapter 11." *Id.* at 575-576.

In *In re Parvin,* 549 B.R. 268, the Western District of Washington reviewed the bankruptcy court's conversion of an individual debtor's Chapter 7 case to Chapter 11. The court accepted the general guide that, "since there are no specific grounds for conversion, a court should consider anything relevant that would further the goals of the Bankruptcy Code," *citing In re Schlehuber*, 489 B.R. at 573. The court further stated that "courts have recognized that the debtor's ability to pay his creditors is typically the first consideration" in a motion to convert a case under Section 706(b), and found that the bankruptcy court's finding that the debtor could pay his debts was adequate reason to convert the case. *In re Parvin,* 271-272.

The District Court here dismissed the Bankruptcy Court's assertion that Kane had a right to a discharge without payment of post-petition income. It observed that if the Bankruptcy Court had recognized such a right, it would not have provided such a long opinion.[54] But the Bankruptcy Court's lengthy decision does not limit the plain statement of what it believes was Kane's right to a

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[54] ER-V1-009.

discharge "and to receive his future income free from financial encumbrances."[55] The District Court implicitly accepts that Kane has no such right under the Bankruptcy Code, and, therefore, that the Bankruptcy Court should not have considered Kane's desire to keep his wages without paying his creditors as a factor in its deciding not to convert the case.

5. The Bankruptcy Court exceeded its authority by expanding Kane's fresh start to include Kane's desire to keep non-exempt assets.

The Bankruptcy Opinion asserts that "the bargain a Chapter 7 debtor strikes is to turn over all of his non-exempt assets to a Chapter 7 trustee for administration and payment of creditors' claims. . . ."[56] But that is not what occurred here. Under Kane's Chapter 7 case, he would walk away owning three large properties: a residence in San Jose, valued at $3,275,000; a residence referenced as the "Isabel Property" in Vancouver, British Columbia, valued at Can.$2.9 million; and a residence referenced as the "35th Ave. property", co-owned with his mother, also in Vancouver, British Columbia valued at Can.$3.3 Million.[57] As noted by the Opinion, the Chapter 7 allows Kane to "keep and continue making payments on

[55] ER-V1-41 (ll. 9-10).
[56] ER-V1-040 (ll. 17-18).
[57] ER-V3-516, 518-520.

several pieces of real property"[58] while using post-petition wages. The Opinion acknowledges that "the Debtor may have non-exempt equity in his properties."[59] And while the trustee has proposed that Kane may purchase his equity for a total of $255,000,[60] that was challenged.[61] From the trustee's perspective, Kane's proposed payment of $255,000 for his current equity gets the chapter 7 estate immediate assets without the cost and uncertainty of litigation.[62] Since the chapter 7 estate does not include Kane's wages, the fact that his schedules show he is making mortgage payments of $37,990.63 a month for the properties is not part of the trustee's assessment of the transaction.

The Bankruptcy Opinion asserts that, in contrast to the chapter 7 case, under a chapter 11 plan Kane would not be able to keep the properties without contributing "new value." The Opinion refers to the rule that, to confirm a plan under chapter 11 to which a class of creditors objects, a debtor can only keep non-exempt assets if all creditors are paid in full or if the debtor purchases the assets out of the bankruptcy estate with money that is not part of the estate, the "new

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[58] ER-V1-038 (ll. 6-7).
[59] ER-V1-038 (fn. 10).
[60] ER-V3-516.
[61] ER-V3-363.
[62] ER-V3-521.

value."[63] 11 U.S.C. § 1129(b)(2)(B). The Bankruptcy Court opines without any evidence that Kane would not be able to obtain a source of new value, in the form of a loan, for example. The Opinion concludes that no plan could be confirmed that allows Kane to keep three multi-million-dollar pieces of real property. *Id.*

The Opinion appears to be assuming that Kane has a right under the Bankruptcy Code to keep the nonexempt properties. Kane could also propose a plan that sells them (or allows the over-encumbered properties to be foreclosed) and then uses the liberated mortgage payments to pay creditors. For the Bankruptcy Court to have considered the benefit to Kane of retaining non-exempt property as part of the denial of the Conversion Motions was beyond the scope of the Bankruptcy Code and was an abuse of discretion.[64]

B. The Bankruptcy Court erred by considering non-existent threats from potential non-discharged creditors and secured creditors as reasons for denying the Conversion Motion.

The Opinion asserts that if some of the claims against Kane are ruled to be nondischargeable, "nothing in the Code will prevent [those creditors] from

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[63] ER-V1-038 (ll. 5-21).

[64] The District Court accepted without discussion the Bankruptcy Court's consideration of Kane's interest in keeping non-exempt assets and using his post-petition wages to pay for them. (ER-V1-014 (ll. 6-7). It did not consider that the funds being used to pay for the assets could be applied to Kane's debt through a plan.

continuing to collect from Debtor outside the plan."[65] This statement is directly contrary to the Bankruptcy Code. The automatic stay of the Bankruptcy Code, which prevents any collection action against a debtor, continues in an individual case until the time a general discharge is granted or denied, or the case is closed or dismissed. 11 U.S.C. § 362(c)(2). Chapter 11, as modified by BAPCPA, provides that where a debtor is an individual, a "confirmation of the Chapter 11 plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan." 11 U.S.C. § 1141(d)(5)(A). This means that, as long as an individual debtor who is in a Chapter 11 is making payments under the plan, the stay continues as to claims that are provided for. Nor is there any requirement that a plan must provide full payment to non-discharged unsecured creditors. "Instead, the debtor need only formulate a plan which pays the nondischargeable debts pro rata with other unsecured creditors during the life of a plan . . .". *Copeland v. Fink (In re Copeland)*, 742 F.3d 811, 814 (8th Cir. 2014). *(internal quotations omitted).*[66]

The Opinion referenced the unpublished opinion of *In re Hamilton*, 803 F. Appx. 123 (9th Cir. 2020) to support the position that a plan could not enjoin non-

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[66] While *Copeland* addresses the treatment of non-dischargeable claims in a Chapter 13 plan, there is no different treatment in a Chapter 11 plan.

discharged creditors from attempting to collect their debt during the plan term. The *Hamilton* opinion, however, addresses whether an injunction can be included in a plan, not whether the automatic stay prevents the described collection. The point is made in the dissent of the opinion. *Id.* at pp. 126-128. Thus, the Code clearly provides that the automatic stay will continue to protect the debtor and estate until the chapter 11 plan is complete. 11 U.S.C. § 1141(5)(A). The District Court acknowledged that the Bankruptcy Court was wrong when it assumed that non-discharged creditors could interfere with a chapter 11 case.[67]

Finally, there is no question that Kane's post-petition salary is free from any pre-petition security interest and can be used to fund a plan. The Opinion set up a false argument that the existence of possible secured claims against Kane's wages "imperils confirmations of a plan."[68] But the Opinion then acknowledged that no such security interests are recognized in the Ninth Circuit, stating: "[t]he Bankruptcy Appellate Panel has held they are not."[69] *See In re Skagit Pac. Corp.*, 316 B.R. 330, 336 (B.A.P. 9th Cir. 2004) ("Revenue generated post-petition solely as a result of a debtor's labor is not subject to a creditor's pre-petition interest."); S*ee* 11 U.S.C. § 552(b). *See also*, *Johnson v. RFF Family P'ship LP (In re*

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[67] ER-V1-015 (ll. 15-24).
[68] ER-V1-037 (ll. 24-25).
[69] ER-V1-037 (fn. 9).

Johnson), 554 B.R. 448 (S.D. Ohio 2016) (providing a detailed analysis of why there was no security interest in post-petition salary earned under an NHL contract.)

The District Court on appeal here also acknowledged that there was no such security interest.[70] The Court opined that, even though the Bankruptcy Court was wrong in assuming the non-existent risks to a chapter 11 by Kane, the errors were harmless because the Bankruptcy Court could consider that such creditors "might thwart confirmation."[71] As discussed below, the possibility of objecting creditors is a risk in any chapter 11. Until a plan is proposed, it is premature to speculate on an as-yet unidentified objecting creditor.

C. The Bankruptcy Court erred by considering the existence of risks common to any Chapter 11 case as reasons for denying the Conversion Motion.

1. Every chapter 11 plan that relies on an individual's earned income risks that such income will be reduced.

Throughout the Opinion, the Bankruptcy Court insists that the Moving Parties provide the Court with certainty that Kane is able to fund a plan and that the plan can be confirmed.[72] The Opinion references the requirements that, "[u]nder § 1129(a)(11) a plan must be feasible, or not likely to be followed by the

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[70] ER-V1-016 (ll. 17-18).
[71] ER-V1-016 (ll. 2-5).
[72] ER-V1-035, 040 (ll. 7-8).

liquidation or the need for further financial reorganization of the debtor."[73] But the question of feasibility was premature. There was no plan proposed, and no one has suggested that a motion to convert a case under Section 706(b) must be accompanied by one, making the Court's consideration of feasibility entirely speculative. The court in *In re Baker*, 503 B.R. 751 (Bankr. M.D. Fla. 2013), held that: "instead of pre-determining the issue of feasibility at a conversion hearing… the Court should defer its findings on feasibility and the other requirements of §1129 until a confirmation hearing is properly noticed and scheduled." *Baker* at 759. Even if the Bankruptcy Court had been reviewing a plan, feasibility requires only that the propenent demonstrate that the plan has a "reasonable probability of success." *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 787 F.2d 1352, 1364 (9th Cir. 1986). "The Code does not require the debtor to prove that success is inevitable or assured, and a relatively low threshold of proof will satisfy § 1129(a)(11) so long as adequate evidence supports a finding of feasibility." *Wells Fargo Bank, N.A. v. Loop 76, LLC (In re Loop 76, LLC)*, 465 B.R. 525, 544 (9th Cir. BAP 2012).

The Bankruptcy Court's concern regarding feasibility of a chapter 11 plan, focuses primarily on its perception of the unreliability of Kane's income. The

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[73] ER-V1-039 (ll. 19-23).

Opinion cites to *In re Beyond.com Corp.*, 289 B.R. 138, 145-46 (Bankr. N.D. Cal 2003), a pre-BAPCPA corporate case, to suggest that the possibility of changed circumstances was sufficient to assume that a plan was not likely to be feasible.[74] *In re Beyond.com* notes that the Bankruptcy Code, as it was written at the time, "did not allow modification after substantial consummation [of a chapter 11 plan], which generally occurs soon after the effective date." *Id.* at 145. But the referenced section provides that the plan must not be likely to be followed by reorganization "unless such liquidation or reorganization is proposed in the plan." 11 U.S.C. § 1129 (a)(10). Thus, any prudently-written plan would provide for adjustment if Kane's playing income changed.

Furthermore, Section 1127, which governs the modifications of a plan, provides that where, as here, the debtor is an individual (unlike the case in *Beyond.Com Corp.,*) the plan "can be modified any time after confirmation of the plan but before the completion of payments under the plan, whether or not the plan has been substantially consummated. . ." to increase or decrease payments or extend or reduce the time of payments. 11 U.S.C. § 1127. Thus, contrary to the assumptions in the Opinion, the Bankruptcy Code accommodates—and even anticipates—the uncertainties of any individual debtor's income. This was

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[74] ER-V1-039 (ll. 19-24).

observed by the District Court in the Mootness Ruling, where it observed that Kane's changed contract would have required modification of a chapter 11 plan "yet would still have offered the creditors relief."[75] Notwithstanding this ruling, the District Court accepted without discussion that the Bankruptcy Court could assume that an individual's chapter 11 plan could not be amended to accommodate a change in circumstances, and that the Bankruptcy Court could speculate on the feasibility of a plan that was not before it.

Finally, even if Kane were to threaten to quit his job if the case were to be converted, that is not a basis to deny conversion under Section 706(b). The court in *Decker* rejected the same argument where the debtors, a husband and wife, argued that Mr. Decker could "simply retire and walk away from his job. They would then live off their considerable retirement income". *Decker*, 535 B.R. at 840. The court held that the debtor's statement that he did not want to pay his creditors did not make conversion to Chapter 11 under Section 706(b) futile. *Id.*

2. Every Chapter 11 plan risks having a creditor object. Here there was no evidence that any would or that it would defeat a plan.

The Opinion states that, because certain creditors intend to seek non-dischargeability of their claims, they "will have an interest in defeating

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[75] ER-V1-021.

confirmation [of a plan] if the plan does not provide for their payment in full, and perhaps even if it does, as they would be submitting to payment over an extended period."[76] This statement ignores that four of the largest creditors moved to convert, which was unlikely if they did not intend to support a Chapter 11 plan.

Furthermore, no claim had been established to be non-dischargeable.[77] Even if a creditor had a non-dischargeable claim, it would still benefit from a Chapter 11 plan that brought some of Kane's substantial wages into the estate for a regular, orderly distribution. The non-discharged creditor would otherwise need to seek a judgment and then wage-garnishment for enforcement.[78] Thus, the Bankruptcy Court's consideration that there *might* be non-dischargeable claims, which *might* be sufficient in number and amount to defeat a plan, and *might* vote to defeat it, was pure speculation. It was certainly not a sufficient basis for concluding that Kane is incapable of presenting a confirmable plan, or that converting the case was futile.

3. Every chapter 11 plan includes administrative costs. Here, there was no evidence that such costs would exceed the millions in additional funds to the estate.

The Bankruptcy Opinion also references the existence of the administrative

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[76] ER-V1-036 (ll. 14-19).
[77] ER-V1-036 (ll. 14-15).
[78] Among other things, a wage garnishment would be limited to a percentage of Kane's disposable earnings for all creditors (C.C.P. § 706.050).

costs of a chapter 11 estate as a reason to deny conversion.[79] But this is a hollow concern. Much of the administrative cost in a chapter 11 will be incurred by chapter 7 trustee in any case. This includes objections to claims, as well as the normal expenses of accounting, tax preparation, and claims administration. While a chapter 11 case would also involve costs for plan development, negotiation and confirmation, and possibly a creditor's committee, there is no serious argument that even these costs would exceed the additional millions brought into the estate by Kane's sole contributions.

Specifically, Kane's stated annual living expenses for a family of three are over $1 million. His average take home salary after taxes and various withholdings was admitted to be over $2 million per year.[80] Notwithstanding the Opinion's musing on the uncertainties of Kane's income, it does not dispute, or even consider, the fact that Kane admitted the amount of his past years' take-home pay. Nor does the Opinion consider that, even if Kane reduced his expenses to only $500,000 per year, it would add $25 million to the bankruptcy estate over five years. Against the admitted evidence of value to be contributed to a Chapter 11 plan, the Opinion speculates that the administrative costs of a Chapter 11 could

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[79] ER-V1-035.
[80] ER-V3-349-350

outweigh the costs to a creditor to determine dischargeability.[81] But that is not the issue. The question is whether the administrative costs would exceed the amount that could be paid to creditors from Kane's post-petition earnings in a Chapter 11 Plan. There is no suggestion that they would.

D. When considered under the correct legal standard, the Moving Parties met their burden under Section 706(b) and the case should be converted.

Each of the factors that the Opinion states that it considered in making its decision go essentially to the question of futility: (1) whether the debtor will pay a greater amount to his creditors than in a Chapter 7; (2) whether there will be an immediate re-conversion back to chapter 7; (3) the likelihood of there being a confirmed plan; and (4) whether the parties would benefit.[82] The record shows that the Moving Parties established each factor by a preponderance of the evidence, and that if the Bankruptcy Court had applied the correct legal standard, it would have granted the motion to convert the case.

1. The Bankruptcy Court conceded that Kane's post-petition salary would add a substantial amount to the bankruptcy estate if the case were converted.

The Bankruptcy Opinion recognized that Kane's gross salary for the 2020-

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[81] ER-V1-040.
[82] ER-V1-032 (ll. 3-9).

2021 season was $3 million[83] and acknowledged that "obviously converting the case will mean additional funds for creditors."[84] Apparently, that assessment did not include that additional funds that would be available in a converted Chapter 11 case and to Kane's creditors should Kane reduce the extraordinary monthly expenses as described in the Amended Schedule J filed with the Court.[85] These admitted facts clearly establish that Kane is more likely than not to be able to fund a Chapter 11 plan.

The District Court did not dispute these facts and acknowledged that the Bankruptcy Court did not mention Kane's expenditures in its evaluation of his ability to fund a plan.[86] Rather, it focused on the Bankruptcy Court's considering how Kane's salary was to be paid and that the Bankruptcy Court determined that the amount of Kane's salary was not 'clear cut.'[87] But certainty of a debtor's income is not required to confirm a chapter 11 plan, as the District Court recognized in its Mootness Decision.[88]

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[83] ER-V1-026 (ll. 8-9).
[84] ER-V1-035.
[85] ER-V3-612.
[86] ER-V1-012 (ll. 11-15).
[87] ER-V1-012 (ll. 11-15).
[88] ER-V1-018-022

2. By holding that the Bankruptcy Court would not appoint a trustee if it converted the case to chapter 11, it conceded that the case would not be immediately re-converted to chapter 7.

The question of whether a case would be immediately re-converted to a Chapter 7 is considered in order to avoid a futile order. *See Proudfoot Consulting Co. v. Gordon (In re Gordon)*, 465 B.R. 683, 692 (Bankr. N.D. GA 2012) ("[I]f cause exists to reconvert [the case] from chapter 11 under § 1112(b), conversion from Chapter 7 under section 706(b) would be a futile and wasted act." [*internal quotations omitted.*]) The only reason put forward in the Bankruptcy Opinion that the case might be immediately re-converted to one under chapter 11 assumed the court would accept the allegations that Kane's pre-petition mis-management and gambling would be a basis for appointing a trustee.[89] But the Bankruptcy Court found that Kane's pre-petition spending and other actions would *not* justify the appointment of a trustee, and that "were this case to be converted to Chapter 11, Debtor has shown he should at least have the opportunity to prosecute it himself."[90] The District Court opined that the Bankruptcy Court's ability to reconvert the case to one under chapter 7 if it "were necessary" was sufficient to support the

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[89] ER-V1-036 (ll. 1-7).
[90] ER-V1-046 (ll. 20-23).

Bankruptcy Court's finding that reconversion was a risk.[91] But a future possibility of reconversion does not establish that converting a case to chapter 11 is futile.

3. The record establishes a strong likelihood that a chapter 11 plan can be confirmed in this case.

The consideration by a court of the possibility that a debtor can confirm a plan upon conversion to a chapter 11 is also essentially a question of avoiding a futile act of converting a case to Chapter 11 only to have to convert it back. This consideration, however, does not mean that a party moving under Section 706(b) must present or prove a confirmable plan in order to have the case converted. When considering this issue the Court in *In Baker*, 503 B.R. at 759 noted:

> In considering conversion to Chapter 11, a Court may be inclined to consider the prospects for reorganization in much the same way that it considers the feasibility at the time of confirmation hearing. Instead of pre-determining the issue of feasibility at a conversion hearing, however, the C*ourt should defer its findings on feasibility and the other requirements of §1129 until a confirmation hearing is properly noticed and scheduled.*

[quotation omitted, emphasis added]; See In Re Gordon, 465 B.R. 693 (court declines to find that the potential objection of a creditor made a potential plan of re-organization not feasible).

As described above, each of the Opinion's described threats for Kane

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[91] ER-V1-012.

confirming a chapter 11 plan are either false or common issues in any chapter 11 case. These are: the threat of a secured creditor's interest on wages, which does not exist (*see* Section VII.B.); the threat of non-discharged creditors interfering with a plan, which also does not exist (*see* Section VII.B.); the threat that Kane would be unable to amend his plan if his wages changed, which is contrary to the Bankruptcy Code (*see* Section VII.C.1.); and the common risks of a possible objecting creditor, variable wages, and administrative chapter 11 costs (Sections VII.C.2-C.4).

The best evidence that Kane may confirm a chapter 11 plan is probably the case of *In re Johnson*, 2016 Bankr. LEXIS 4598, in which Johnson, also an NHL hockey player, confirmed one. While the facts are not identical, they are similar. There was a high-earning debtor in a high-risk career with millions in debt and, as reflected in the decision, at least one very aggressive creditor. Yet, despite these facts, a chapter 11 plan was confirmed. There is no reason to find that Kane cannot confirm a plan as well.

4. All parties will be served by the conversion of the case to chapter 11

When the interests of Kane and the creditors are considered within the scope and purpose of the Bankruptcy Code, the record shows that both Kane and his creditors will be served by a conversion to chapter 11. There is no real dispute that the creditors will be served as a result of the conversion as it is admitted that

millions of dollars will be added to the estate, and it is not seriously stated that administrative costs will absorb that entire amount.

Kane's interests will also be served. To the extent any claims are determined to be non-dischargeable, Kane will have breathing space to make payments to all of his creditors through his chapter 11 plan while the automatic stay remains in place to prevent any collection efforts. (*See* above at Section VII.B.) Kane will have no such protection under chapter 7. Further, if Kane is in chapter 11, the parties now pursuing non-dischargeability claims may be more motivated to negotiate a resolution as Kane's salary will be protected from any collection effort as long as the automatic stay remains in place.

VIII. CONCLUSION

For the reasons set forth above, South River requests that the court reverse the ruling of the Bankruptcy Court and direct the District Court to direct the Bankruptcy Court to enter an order converting Kane's case to a case under chapter 11. In the alternative, South River requests that the court reverse the decision below and remand to the Bankruptcy Court with clear instructions to reconsider the Conversion Motion without the erroneous legal assumptions described above.

Dated: January 18, 2023

BINDER & MALTER, LLP

By: */s/Wendy Watrous Smith*
Wendy Watrous Smith, Attorneys for
South River Capital LLC

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Statement of Related Cases Pursuant to Circuit Rule 28-2.6

9th Cir. Case Number(s) 22-16253

The undersigned attorney or self-represented party states the following:

[ ] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[X] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

In re Evander Kane, et al. v. Centennial Bank, Case No. 22-16282
In re Evander Kane, et al. v. Zions Bancorporation, N.A., Case No. 22-16304
In re Evander Kane, et al. v. Zions Bancorporation, N.A., Case No. 22-16674

Signature /s/Wendy Watrous Smith **Date** January 18, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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