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 REPLY BRIEF

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I. INTRODUCTION

South River Capital, LLC ("South River") appealed the order of the Bankruptcy Court that allowed NHL-hockey player Evander Frank Kane ("Kane") to discharge his millions of dollars in debt without committing any of his future wages to pay creditors (The "Order").[1] Based on Kane's sworn statement made during the middle of the COVID health emergency, he expected that his future income would be $2.3 to $2.6 million per year.[2] This would have yielded over $10 million in take-home pay over the 4 years through the end of his contract. Kane does not dispute this.[3]

The Bankruptcy Order denied a motion under Bankruptcy Code § 706(b)[4] to convert Kane's bankruptcy case from one under Chapter 7 of the Bankruptcy Code, which does not affect a debtor's future wages, to a case under Chapter 11 (the "Motion"). That chapter requires that, in order to confirm a plan of reorganization and discharge debts, a debtor must confirm a plan that is either

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[1] All capitalized terms that are not specifically defined here have the meanings set forth in the Appellant's Opening Brief (DktEntry: 11).

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

[3] Kane (and the Bankruptcy Court) instead assert that the exact amount of Kane's income was uncertain, Appellee's Responsive Brief ("Response"), p. 31 (DktEntry: 23). But Kane has never presented any alternative projection of his expected take-home pay over the life of the contract that was different from his original statements. Nor has he ever presented any calculation of what his disposable income would be if he incurred only reasonable living expenses.

[4] Unless specified otherwise, all chapters and § references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101- 1532.

accepted by creditors or that distributes property equal in value to the debtor's 5-year projected disposal income. 11 U.S.C. §1129 (a)(15).[5]

The Bankruptcy Court made three reversible legal errors in denying the Motion. First, it considered Kane's desire to keep his post-petition disposable income without paying creditors as a legitimate reason for denying the Motion. (See discussion below at II.C.2.) In light of the recent changes to the Bankruptcy Code, which expects an individual to contribute future disposable income to pay creditors, a debtor's desire to keep it is not relevant, and the Bankruptcy Court's consideration of Kane's desire to keep his wages exceeded the Bankruptcy Court's authority.[6] Second, the Bankruptcy Court considered non-existent threats to a Chapter 11 plan—specifically arguing that there could be security interests in Kane's wages, when that has been expressly rejected by this Court[7] and assuming that creditors with non-discharged debts could interfere with a Chapter 11 plan by attempting to collect from Kane's income when a Chapter 11 plan can be structured to prevent that.[8] Finally, the Bankruptcy Court considered unremarkable elements of any Chapter 11 plan, which do not create a basis for denying

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5 A copy of this statute is attached for the court's convenience.
6 Appellant's Opening Brief ("Appellant's Brief") at Section VII. A. (DktEntry: 11).
7 ER-V1-037 (l. 15), 038 (l. 14).
8 ER-V1-038 (l. 22), 039 (l. 14), *See also*, Appellant's Brief at Section VII. B.

conversion.[9]

Kane admits in the Response that the recent changes to the Bankruptcy Code under BAPCPA[10] were enacted in part to "restor[e] personal responsibility" to the bankruptcy system, but does not suggest that keeping millions in wages reflects such "personal responsibility".[11] Kane also does not deny that by limiting his expenses, he could have liberated millions of dollars to pay creditors over five years. Kane does not now, nor has he ever, attempted to justify those expenses. Nor does Kane deny that the only reason he was not forced by the "means test" in § 707(b) to file a Chapter 11 in the first instance is because his debts are not primarily consumer debts.[12]

Kane presents no legal or policy reason to justify his position that an individual in every other Chapter must contribute future disposable income to pay creditors, but that a professional hockey-player with primarily non-consumer debt is free to keep wages unencumbered. Instead, Kane sets up a false comparison, suggesting that the liquidation of a debtor's non-exempt assets by a Chapter 7 trustee is an equivalent alternative to a debtor paying wages over time, as is

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9 Appellant's Brief at Section VII. C.
10 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 119 (April 20, 2005).
11 Response at 26.
12 Response at 16-17.

required under Chapter 11.[13] 11 U.S.C. § 1129(a)(15). But this is not accurate. Chapter 7 liquidation provides the minimum amount that can be paid to creditors. Chapter 11 also requires that, unless a creditor agrees to receive less, the plan must distribute property valued at no less than 5-years of the debtor's projected disposable income. *Id*. This is an *additional* requirement of a Chapter 11 case, not an alternative one, and was added as part of BAPCPA. (See discussion below at Section C.II.3.) Kane does not assert that the Chapter 7 creditors in this case are receiving as much as would be paid from his wages in Chapter 11.

As to the Bankruptcy Court's legal errors regarding the non-existent secured claims and the purported inability for a Chapter 11 plan to shield assets from non-discharged creditors, the Response simply restates the positions set forth in the Order and addressed in the Appellant's Brief. Because the Bankruptcy Court's legal errors formed such a significant part of its reasoning, the Order must be reversed, or at a minimum remand for reconsideration in light of a correct assessment of the law.

Finally, the Response reiterates an earlier argument that conversion to Chapter 11 would violate the 13th amendment.[14] It does not address the well-established law that an individual may be subject to an involuntary Chapter 11

[13] Response at 16-18.
[14] Response at 18-19.

bankruptcy under § 303 and that § 706(b) does not distinguish corporate and individual debtors. (See discussion below at Section II. E.)

The Response also includes a claim that the appeal is equitably moot because of the liquidation activities of the Chapter 7 Trustee.[15] Even if the Court is inclined to consider the claim, Kane does not meet the basic test of mootness as he does not assert that this court is unable to provide relief, nor does he assert that the Trustee's efforts have affected Kane's ability to fund a plan. (See discussion below at Section II.F.)

II. DISCUSSION

A. The Response gives no reason why this court would not review issues of law *de novo.*

Kane's Response asserts that this court is to review the Order entirely for clear error.[16] But the first questions are ones of law: what is the legal standard when a Bankruptcy Court rules on a motion to convert an individual's Chapter 7 case under § 706(b) and did the Bankruptcy Court apply it in this case? Later in the Response, Kane concedes that this is the core issue with an entire section asserting that the Bankruptcy Court applied the correct standard. Yet Kane declines to acknowledge that the review of such choice is one of *de novo*. It is well

[15] Response at 46-48.
[16] Response at 3-4.

established that the Circuit Court will "review the bankruptcy court's interpretation of the Bankruptcy Code *de novo*". *In re Federated Group,* 107 F.3d 730, 732 (9th Cir. 1997).

Kane relies on *U.S. Bank N.A. v. The Village at Lakeridge, LLC*, 138 S. Ct., 960 (2018). In that case the court reviewed a lower court's determination that a party who offered to purchase certain corporate debtor assets was a "non-statutory insider" such that the proposed transaction could be conducted at arm's length. *Id.* at 964. The appellant there argued that the romantic relationship of the proposed buyer with a member of the board of the corporate debtor made the buyer an insider. *Id.* at 964. The Supreme Court examined the nature of the question as a "mixed question of fact and law." *Id.* at 966-967. This type of question requires reviewing: 1) whether the lower court applied the correct rule of law, which is reviewed *de novo*; 2) whether it determined the "relevant historical facts" correctly, which requires a review for clear error; and 3) whether the "historical facts found satisfy the legal test chosen". *Id.* at 965-966.

The Supreme Court notes that "[w]hen an issue falls somewhere between a pristine legal standard and a simple historical fact, the standard of review often reflects which judicial actor is better positioned to make the decision." *Id.* at 967 (citation omitted). It goes on:

> [s]ome require courts to expound on the law, particularly by amplifying or elaborating on a broad legal standard.

> When that is so – when applying law involves developing auxiliary legal principles of use in other cases - appellate courts should typically review the decision *de novo*.

Id. at 967 (internal citation omitted).

The Response, however, does not acknowledge the need for this court to review the critical legal errors that are the mainstays of the Order and does not address whether the facts considered were relevant to the legal question being decided, which is required by the Supreme Court's decision in *U.S. Bank*.

B. Kane's effort to re-state the issues on appeal and the narrative of his cooperation with the Chapter 7 Trustee add nothing to the discussion.

The section in the Response titled "Issues Presented," asserts that the issues "boil down" to two "fundamental" questions: whether the Bankruptcy Court applied an incorrect legal standard, and whether it erred in analyzing the "relevant factors" that resulted in the court's denial of the motion.[17] This "boiling down" operates to deflect the initial, and critical, legal question of what exactly that legal standard is, particularly in light of the recent developments in the Bankruptcy Code under the BAPCPA. This then leads the Response to assert a standard of review for clear error—whether the factual conclusions of the Bankruptcy Court were "logical, plausible, and adequately supported."[18] As is evident, this court's review

[17] Response at 3.
[18] Response at 3-4.

of the Bankruptcy Court's interpretation of the law and the related questions of policy are to be reviewed *de novo.*

Kane's "Statement of the Case"[19] begins with describing some of Kane's creditors and the transactions with the party "Sure Sports."[20] It goes on to describe Kane's efforts to negotiate payment of his debts, and his cooperation with the Chapter 7 Trustee.[21] There is no indication what this narrative has to do with either the Motion or the issues on appeal, except as an effort to cast Kane in a positive light personally. It should be noted, however, that Kane, as a debtor, has extensive duties to cooperate with the Chapter 7 Trustee under the Code and the Bankruptcy Rules. *See, e.g.* 11 U.S.C. § 521, Bankruptcy Rule 4002.[22] The fact that Kane has complied with the rules required for him to get his discharge is hardly an indication of personal merit.

C. Kane's Response essentially concedes that the Bankruptcy Court applied the wrong rule of law.

1. Kane concedes that the Bankruptcy Code should not give high-earning, non-consumer debtors a greater right to keep post-petition wages than it gives consumer debtors.

As a preliminary matter, the Response does not dispute that the Bankruptcy Court's authority is limited to the confines of the Bankruptcy Code, and that, when

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[19] *Id.* at 6-14.
[20] *Id*. at 6.
[21] *Id*. at 8.
[22] Copies of the statute and the rule are attached for the court's convenience.

interpreting any provision of a statute, the court will 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 F.3d 436, 440 (9th Cir. 2013).[23]

The Response also acknowledges that BAPCPA was enacted by Congress for a general purpose of "improv[ing] bankruptcy law and practice by restoring personal responsibility…" (internal quotations and citation omitted).[24] It accepts that the amendments to the Bankruptcy Code impose additional duties on certain individual debtors facing objecting creditors, including requiring them to contribute post-petition disposable income to a plan of reorganization. (*Id.* at 26-27.) Finally, the Response does not dispute that a Bankruptcy Court cannot use its discretion to expand a debtor's rights under the guise of a "fresh start," and accepts that BAPCPA did not have a goal of allowing high-earning debtors a greater opportunity for a fresh start than that allowed consumer debtors. (*Id.* at 27.)

2. The Bankruptcy Court's assertion that Kane's interest in keeping his post-petition wages could be considered when deciding the Motion was not a comment made in passing but was the core of the opinion.

In the face of these concessions, the Response must address the Bankruptcy Court's statement that an individual non-consumer Chapter 7 debtor has a "statutory right to a discharge and fresh start and to receive his future income free

[23] Appellant's Brief at 17.
[24] Response at 26.

from financial encumbrances."[25] The Response does so by asserting that the Bankruptcy Court made this comment simply as a statement of Kane's initial ability to file a Chapter 7.[26] But the Bankruptcy Court's belief that it could consider Kane's interest in keeping his disposable post-petition income in the face of the creditors' objections underlies the entire Order.

The Order's discussion of the debtor's interests under § 706(b) begins with a discussion of the benefits of a Chapter 7, stating "a [Chapter 7] debtor's post-petition income is not subject to creditors' claims and animates a debtor's discharge following the conclusion of the case."[27] It goes on to state: "[c]rucially... a Chapter 7 estate does not include the wages a debtor earns or the assets he acquires *after* the bankruptcy filing," and that the debtor "is able to make a 'fresh start' by shielding from creditors his post-petition earnings". (Emphasis in original.)[28]

In the same vein, the Order states the "[d]ebtor'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 a timely discharge of his debts".[29] The Order then asserts that "as it now stands, Debtor is entitled to a discharge if he meets

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[25] ER-V1-041 (ll. 8-10).
[26] Response at 22.
[27] ER-V1-040 (ll. 19-20).
[28] ER-V1-040 (ll. 25-28) [internal quotations and citation omitted.]
[29] ER-V1-041 (ll. 1-2).

applicable statutory requirements. Conversion to Chapter 11 would imperil this possibility."[30] It then notes that a Chapter 11 would require Kane to make payments over time, and that a conversion to Chapter 11 "impairs Debtor's interest in a relatively quick and final resolution to his current financial troubles, the reason people file chapter 7 cases."[31] The Order revisits its theme at the end of its discussion where it states "[w]hatever challenges Chapter 7 presents for Debtor would be mitigated by not having to comply with a years-long payment plan. . .."[32]

Nothing in the Bankruptcy Code post-BAPCPA sets out that an individual debtor, in the face of a creditors objection, is entitled to avoid applying post-petition disposable income to pay his debts. Creditors in this case have objected to Kane's continuation in Chapter 7, thereby eliminating whatever valid interest Kane may have had in keeping his disposable income when he filed his Chapter 7. Nowhere in the Order, the District Court Opinion, or the Response is there any effort to justify why Kane, as a non-consumer individual debtor, is entitled to keep his post-petition wages when a high-earning consumer-debtor is not.[33]

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[30] ER-V1-042 (ll. 13–14).
[31] ER-V1-042 (ll. 18-19).
[32] ER-V1-045 (ll. 17-19).
[33] Under 707(b), a high-earning debtor with primarily consumer debts is presumed to be abusing the provisions of Chapter 7 where his expenses exceed an extremely lean measure of what would be reasonable. A copy of § 707(b) is attached for the court's convenience. *See also*: *David R. Hague, Loopholes for the Affluent Bankrupt*, 94 St. John's L. Rev. 107 (2020).

3. Contrary to the Response's suggestion, an individual debtor with primarily non-consumer debts and a high-income fares far better under Chapter 7 than under Chapter 11.

The Response struggles with the disparity between the treatment of a consumer-debtor under Chapter 7 who must pass the "means test" under § 707(b), and a high-earning individual with non-consumer debt. The Response acknowledges that, if Kane had primarily consumer debts he would not be allowed to proceed in Chapter 7 as a result of the changes made by BAPCPA.[34] To justify the different treatment Kane seeks to receive, the Response implies that the liquidation by a trustee of a debtor's assets in Chapter 7 is equivalent to the payment by a debtor in a Chapter 11 plan over time.[35] The Response describes that, in a Chapter 7 case, in exchange for giving up pre-petition assets the debtor receives a discharge of his debts.[36] It then describes a Chapter 11 for an individual as one where a plan "cannot be confirmed over a creditor's objection unless it (1) commits all the debtor's disposable income over five years or (2) pays the objecting creditor in full, with interest, over a shorter period."[37] [38]

While the Response refers to various other Chapter 11 plan requirements, it

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[34] Response at 16.
[35] *Id.* at 16-18.
[36] *Id.* at 16.
[37] Response at 17.
[38] The description is not precise. It is presumably referencing Bankruptcy Code § 1129(a)(15). A copy of this section is attached for the court's convenience.

does not mention the requirement that the property to be distributed to any objecting creditor under a Chapter 11 plan must be not less than what that creditor would receive if the case were in a Chapter 7. 11 U.S.C. § 1129(a)(7). This is known as the "best-interest-of-creditors test." This is distinct from the requirement of § 1129(a)(15). This section provides that a Chapter 11 plan of an individual debtor with an objecting a creditor must distribute property equal to 5-years of the debtor's projected disposable income (called here for convenience the "Income-Contribution Requirement").[39]

The two requirements serve different purposes. The best-interests-of-the-creditors test assures that a Chapter 11 plan will distribute, *at a minimum*, assets equivalent to the distribution of a Chapter 7 case and, is thus measured against the liquidation value of the assets of the bankruptcy estate. In contrast, the Income Contribution Requirement is measured against the debtor's projected disposable income. A Chapter 11 plan must meet both requirements, with the Chapter 11 debtor required to contribute future income to the extent needed to assure that creditors receive the full value of the five-years of disposable income.

The Response illustrates precisely why the Income Contribution Requirement was added by BAPCPA. It describes how the Chapter 7 trustee in

[39] "Disposable income" is defined by reference to § 1325(b)(2), which describes it generally as current monthly income less amounts reasonably necessary for the debtor and his dependents.

Kane's case determined that "investment properties valued at millions of dollars" were abandoned by the trustee as having no value to a Chapter 7 bankruptcy estate.[40] The lack of value, according to Kane, was the result of encumbrances on the property.[41] The Income Contribution Requirement operates to assure that in a Chapter 11, Kane will not use post-petition disposable income to pay for valuable property where, if the property were surrendered to the lien holder or sold, that income could be used to pay general unsecured creditors.[42]

Put another way, in Chapter 7 the bankruptcy estate is limited (with certain exceptions) to the value of assets held by the bankruptcy estate when the petition is filed, while the debtor is free to receive post-petition wages free from discharged debt. 11 U.S.C. § 541. Under Chapter 11, the bankruptcy estate *includes* the debtor's post-petition earnings under § 1115, and the debtor's plan must pay at least 5-years' worth of projected disposable income as part of a plan. It is no surprise that any high-earning individual debtor would choose Chapter 7 relief.[43]

4. This court has an opportunity to clarify that high-earning non-consumer individual debtors are not entitled to more favorable

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[40] Response at 25.

[41] *Id.*

[42] Here, according to Kane's schedules, he was paying $20,000 per month of his income to mortgage holders of property that was not his residence—money that could be applied instead to pay pre-petition debt. ER-V3-611 (l. 2).

[43] There is theoretically a situation where a debtor's income is actually smaller than the amount of what would be distributed in a Chapter 7 liquidation, but no one has suggested that is the case here. See discussion below at Section II. F.

treatment than consumer debtors.

The Bankruptcy Court was correct when it observed that Kane was not prohibited from filing a petition in Chapter 7 as a matter of statute. Its error occurred when it considered that Kane's desire to keep post-petition wages, and not contribute them to paying his creditors, was a legitimate interest to be protected by the Bankruptcy Court when ruling on a conversion motion under § 706(b).

It is simple enough for this court to clarify that wealthy debtors are not entitled to special treatment under the Code. The case of *Decker v. U.S. Trustee*, 548 B.R. 813, 817 (D.Alaska 2015) *("Decker II")* describes the factors a court might consider on a motion to convert as: "(a) the debtor's ability to repay debt; (2) the absence of immediate grounds for reconversion [from Chapter 11 back to Chapter 7]; (3) the likelihood of confirmation of a Chapter 11 plan; and (4) whether the parties would benefit from conversion. *Id.* Assuming that this court accepts this list of factors, it can clarify that the "debtor's ability to repay debt" refers to whether the Income Contribution Requirement of § 1129(a)(15) would increase payment to creditors. Here, the Bankruptcy Court acknowledged that it would, stating "obviously, converting the case would mean additional funds for Creditors".[44] The court can further clarify that the factor of "whether parties would

[44] ER-V1-035 (ll. 12-13); ER-V1-037 (ll. 24-25) - 038 (ll. 102).

benefit from conversion" does *not* include any consideration of the debtor's desire to keep his post-petition income and to not pay his creditors.

D. The Response does not cure the remaining errors of the Order.

Of the remaining issues—the risk of immediate re-conversion of the case from Chapter 11 back to Chapter 7, and the ability to confirm a plan - the Response addresses only the latter. When considering Kane's ability to confirm or implement a plan, the Bankruptcy Court made the two additional legal errors described above--that hypothetical holders of non-discharged claims could collect such debts "outside the plan," which would "generate uncertainty," and the claim of a security interest in the debtor's post-petition wages.[45] The District Court acknowledges that these were errors but found they were harmless, pointing to possible interference or lack of cooperation by other creditors.[46] Kane makes a similar argument in its Response.[47] But the lack of cooperation by creditors is always a possibility. Here, the fact that four of the largest creditors moved to convert the case suggests that

[45] ER-V1-039 (ll. 12-14).
[46] ER-V1-015 (l. 15)-016 (l. 9).
[47] The Response also argues that a hypothetical non-discharged creditor could collect against "property of the debtor which is not property of the estate" (Response at 41.) But in a Chapter 11, the debtor's post-petition income *is* property of the estate, so would be protected—a protection that is not available under Chapter 7. 11 U.S.C. §1115(a)(2). This fact is not acknowledged in the Response.

there would be significant cooperation.[48]

When ruling on a § 706(b) motion, the court's consideration of whether a debtor may confirm a plan is simply to establish that conversion is not a futile effort. It does not require a determination that an as-yet proposed plan is feasible under § 1129. The court in *In re Baker*, 503 B.R. 751 (Bankr. M.D. Fla. 2013), explained in a well-reasoned opinion that considering feasibility at a conversion hearing is premature: "[i]nstead 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." *Id.* at 759. The Response attempts in a footnote to distinguish the facts in *Baker* by claiming that, because the debtor's income there was "steady" "confirmation was all but certain."[49] First, "certainty" is not a requirement, only a showing that the confirmation is not futile—which has been done. Second, the Response does not explain how any court can pre-determine the confirmability of a plan that is not before it or suggest that a party moving for conversion must propose a plan.

Even if this court is inclined to consider the Bankruptcy Court's factual

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[48] The remaining large creditor, Centennial Bank, is holdings out for a ruling that Kane's debts were primarily consumer debts making him subject to the means test under §707(b). *Centennial Bank* Case No. 22-16282.

[49] Response at 36, fn. 10.

conclusions regarding Kane's ability to confirm a plan, it will find that they were clearly erroneous. The Bankruptcy Court focused on its finding that Kane's wages were uncertain. This was based on three elements: a single page check identified by Kane as payment in the middle of the COVID shutdown; the terms of his NHL contract; and the physical risks of Kane's career.[50] Yet Kane never controverted his original estimation of his projected annual wages at $2.3 to $2.6 million.[51] And there was no evidence that the terms of the contract and the physical challenges of Kane's career would create any greater uncertainty to a plan confirmation than would any high-risk career. Indeed, it is common knowledge that most people do not have employment contracts at all, but work on an at-will basis. Furthermore, at least one NHL player has, in fact, confirmed a plan. *In re Johnson*, 2016 Bakr. Lexis 4598. Kane's Response dismisses the *Johnson* plan confirmation stating "the similarities do not extend past the debtors' shared profession and whether a Chapter 11 plan proposed by the debtor could be confirmed."[52] But those are exactly the questions the Bankruptcy Court here was assessing.

E. Kane's claim that the Thirteenth Amendment would prohibit an involuntary conversion to Chapter 11 has been soundly rejected.

The Response asserts that "significant Thirteenth Amendment issues [are]

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[50] ER-V1-035 (ll. 4-8), 034 (ll. 23-27), 037 (ll. 6-12)
[51] Appellant's Brief at 8; ER-V3-349 (l. 22); 350 (l. 17)
[52] Response at 38.

implicated by involuntary conversion of an individual case."[53] The issue is not before the Court on appeal but must be addressed here in light of Kane's comments. Several courts have fully considered and rejected the claim that converting an individual debtor's case from Chapter 7 to Chapter 11 under § 706(b) is a violation of the Thirteenth Amendment. The court *In re Gordon*, 464 B.R. 683 (Bankr. N.D.Ga. 2012) provides a detailed explanation of the issue, observing that a party has no Constitutional right to discharge its debts, citing *United States v. Kras,* 409 U.S. 434, 446 (1973) and noting that an individual can be put into an involuntary bankruptcy under § 303. *In re Gordon, Id.* at 694-702. Put simply, there is nothing that might require Kane to work—unless he wants to discharge his debts. If he decides to abandon his career instead of paying his creditors, he can do so. Kane's suggestion that there may be a Constitutional question is meritless.

F. The appeal is not equitably moot.

Procedurally, this argument should have been brought in a separate motion. By putting this into the Response, Kane avoids providing a declaration or supporting evidence and prevents South River from doing so. Instead, he references a range of events that occurred after the Order and adds documents to the "supplemental excerpts to the record," which are not part of the record on

[53] Response at 18.

appeal.

Substantively, the argument fails. In the 9th Circuit, "the test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the merits in his favor. If it can grant such relief, the matter is not moot." *In re Burrell*, 415 F.3d 994, 998 (9th Cir. 2005); *See also In re Pattullo*, 271 F.3d 898, 901 (9th Cir. 2001) ("If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal is moot and must be dismissed.") (citations omitted).

Here, Kane simply lists actions by the Chapter 7 trustee taken as part of the liquidation process: the court's approval of fees for the trustee and counsel, and Kane's settlement agreement.[54] Based on this, Kane asserts that "conversion would disadvantage innocent parties and result in an inequitable outcome."[55] But Kane does not identify who (besides himself) would be disadvantaged by conversion, or even describe how conversion would affect anything that has occurred in the case.

The Motion seeks to convert the case to one under Chapter 11 so that Kane will contribute a portion of his ongoing wages to a plan to pay creditors. Kane

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[54] Response at 47.
[55] *Id.*

does not suggest that such relief is no longer available. He pointedly does not describe what his wages are now or what they are projected to be, which he could have done in a separate motion with a declaration. This only suggests that, indeed, he continues to earn substantial wages that could be used to fund a Chapter 11 plan.[56]

III. CONCLUSION

Because of the extensive legal errors made by the Bankruptcy Court in denying the Motion to convert Kane's case, the Order should be reversed and the District Court directed to enter an order converting the case to one under Chapter 11.

Dated: May 10, 2023

BINDER & MALTER, LLP

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

[56] South River notes that when Kane brought the motion in the District Court to dismiss that appeal based on the fact that his Sharks contract had been terminated, he did not tell the court that he had signed a new contract with the Edmonton Oilers. [ER-V1-019, fn. 3.] Here again claiming mootness, Kane did not disclose to this court that apparently he has signed new four-year contract with the Oilers in the Summer of 2022 reported to be worth $20.5 million. *See* https://www.spotrac.com/nhl/edmonton-oilers/evander-kane-6346/. Had this claim been brought as a motion, the facts could have been determined.

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

Signature /s/Wendy Watrous Smith **Date** May 10, 2023

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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Signature /s/Wendy Watrous Smith **Date** May 10, 2023

ATTACHMENT
SELECTED STATUTES AND RULES

1. 11 U.S. Code § 521 – Debtor's Duties
2. 11 U.S. Code § 707 – Dismissal of a case or conversion to a case under chapter 11 or 13
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4. Rule 4002. Duties of Debtor

11 U.S. Code § 521 - Debtor's duties

U.S. Code Notes

(a) The debtor shall—

(1) file—

(A) a list of creditors; and

(B) unless the court orders otherwise—

(i) a schedule of assets and liabilities;

(ii) a schedule of current income and current expenditures;

(iii) a statement of the debtor's financial affairs and, if section 342(b) applies, a certificate—

(I) of an attorney whose name is indicated on the petition as the attorney for the debtor, or a bankruptcy petition preparer signing the petition under section 110(b)(1), indicating that such attorney or the bankruptcy petition preparer delivered to the debtor the notice required by section 342(b); or

(II) if no attorney is so indicated, and no bankruptcy petition preparer signed the petition, of the debtor that such notice was received and read by the debtor;

(iv) copies of all payment advices or other evidence of payment received within 60 days before the date of the filing of the petition, by the debtor from any employer of the debtor;

(v) a statement of the amount of monthly net income, itemized to show how the amount is calculated; and

(vi) a statement disclosing any reasonably anticipated increase in income or expenditures over the 12-month period following the date of the filing of the petition;

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);

(3) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;

(4) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

(5) appear at the hearing required under section 524(d) of this title;

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722; and

(7) unless a trustee is serving in the case, continue to perform the obligations required of the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan if at the time of the commencement of the case the debtor (or any entity designated by the debtor) served as such administrator.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

(b) In addition to the requirements under subsection (a), a debtor who is an individual shall file with the court—

(1) a certificate from the approved nonprofit budget and credit counseling agency that provided the debtor services under section 109(h) describing the services provided to the debtor; and

(2) a copy of the debt repayment plan, if any, developed under section 109(h) through the approved nonprofit budget and credit counseling agency referred to in paragraph (1).

(c) In addition to meeting the requirements under subsection (a), a debtor shall file with the court a record of any interest that a debtor has in an education individual retirement account (as defined in section 530(b)(1) of the Internal Revenue Code of 1986), an interest in an account in a qualified ABLE program (as defined in section 529A(b) of such Code,[1] or under a qualified State tuition program (as defined in section 529(b)(1) of such Code).

(d) If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

(e)

(1) If the debtor in a case under chapter 7 or 13 is an individual and if a creditor files with the court at any time a request to receive a copy of the petition, schedules, and statement of financial affairs filed by the debtor, then the court shall make such petition, such schedules, and such statement available to such creditor.

(2)

(A) The debtor shall provide—

(i) not later than 7 days before the date first set for the first meeting of creditors, to the trustee a copy of the Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such return) for the most recent tax year ending

immediately before the commencement of the case and for which a Federal income tax return was filed; and

(ii) at the same time the debtor complies with clause (i), a copy of such return (or if elected under clause (i), such transcript) to any creditor that timely requests such copy.

(B) If the debtor fails to comply with clause (i) or (ii) of subparagraph (A), the court shall dismiss the case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor.

(C) If a creditor requests a copy of such tax return or such transcript and if the debtor fails to provide a copy of such tax return or such transcript to such creditor at the time the debtor provides such tax return or such transcript to the trustee, then the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return or such transcript is due to circumstances beyond the control of the debtor.

(3) If a creditor in a case under chapter 13 files with the court at any time a request to receive a copy of the plan filed by the debtor, then the court shall make available to such creditor a copy of the plan—

(A) at a reasonable cost; and

(B) not later than 7 days after such request is filed.

(f) At the request of the court, the United States trustee, or any party in interest in a case under chapter 7, 11, or 13, a debtor who is an individual shall file with the court—

(1) at the same time filed with the taxing authority, a copy of each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) with respect to each tax year of the debtor ending while the case is pending under such chapter;

(2) at the same time filed with the taxing authority, each Federal income tax return required under applicable law (or at the election of the debtor, a transcript of such tax return) that had not been filed with such authority as of the date of the commencement of the case and that was subsequently filed for

any tax year of the debtor ending in the 3-year period ending on the date of the commencement of the case;

(3) a copy of each amendment to any Federal income tax return or transcript filed with the court under paragraph (1) or (2); and

(4) in a case under chapter 13—

(A) on the date that is either 90 days after the end of such tax year or 1 year after the date of the commencement of the case, whichever is later, if a plan is not confirmed before such later date; and

(B) annually after the plan is confirmed and until the case is closed, not later than the date that is 45 days before the anniversary of the confirmation of the plan;

a statement, under penalty of perjury, of the income and expenditures of the debtor during the tax year of the debtor most recently concluded before such statement is filed under this paragraph, and of the monthly income of the debtor, that shows how income, expenditures, and monthly income are calculated.

(g)

(1) A statement referred to in subsection (f)(4) shall disclose—

(A) the amount and sources of the income of the debtor;

(B) the identity of any person responsible with the debtor for the support of any dependent of the debtor; and

(C) the identity of any person who contributed, and the amount contributed, to the household in which the debtor resides.

(2) The tax returns, amendments, and statement of income and expenditures described in subsections (e)(2)(A) and (f) shall be available to the United States trustee (or the bankruptcy administrator, if any), the trustee, and any party in interest for inspection and copying, subject to the requirements of section 315(c) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

(h) If requested by the United States trustee or by the trustee, the debtor shall provide—

(1) a document that establishes the identity of the debtor, including a driver's license, passport, or other document that contains a photograph of the debtor; or

(2) such other personal identifying information relating to the debtor that establishes the identity of the debtor.

(i)

(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

(2) Subject to paragraph (4) and with respect to a case described in paragraph (1), any party in interest may request the court to enter an order dismissing the case. If requested, the court shall enter an order of dismissal not later than 7 days after such request.

(3) Subject to paragraph (4) and upon request of the debtor made within 45 days after the date of the filing of the petition described in paragraph (1), the court may allow the debtor an additional period of not to exceed 45 days to file the information required under subsection (a)(1) if the court finds justification for extending the period for the filing.

(4) Notwithstanding any other provision of this subsection, on the motion of the trustee filed before the expiration of the applicable period of time specified in paragraph (1), (2), or (3), and after notice and a hearing, the court may decline to dismiss the case if the court finds that the debtor attempted in good faith to file all the information required by subsection (a)(1)(B)(iv) and that the best interests of creditors would be served by administration of the case.

(j)

(1) Notwithstanding any other provision of this title, if the debtor fails to file a tax return that becomes due after the commencement of the case or to properly obtain an extension of the due date for filing such return, the taxing authority may request that the court enter an order converting or dismissing the case.

(2) If the debtor does not file the required return or obtain the extension referred to in paragraph (1) within 90 days after a request is filed by the taxing

authority under that paragraph, the court shall convert or dismiss the case, whichever is in the best interests of creditors and the estate.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2586; Pub. L. 98–353, title III, §§ 305, 452, July 10, 1984, 98 Stat. 352, 375; Pub. L. 99–554, title II, § 283(h), Oct. 27, 1986, 100 Stat. 3117; Pub. L. 109–8, title I, § 106(d), title II, § 225(b), title III, §§ 304(1), 305(2), 315(b), 316, title IV, § 446(a), title VI, § 603(c), title VII, § 720, Apr. 20, 2005, 119 Stat. 38, 66, 78, 80, 89, 92, 118, 123, 133; Pub. L. 111–16, § 2(5), (6), May 7, 2009, 123 Stat. 1607; Pub. L. 111–327, § 2(a)(16), Dec. 22, 2010, 124 Stat. 3559; Pub. L. 113–295, div. B, title I, § 104(c), Dec. 19, 2014, 128 Stat. 4064.)

11 U.S. Code § 707 - Dismissal of a case or conversion to a case under chapter 11 or 13

U.S. Code Notes

(a) The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

(1) unreasonable delay by the debtor that is prejudicial to creditors;

(2) nonpayment of any fees or charges required under chapter 123 of title 28; and

(3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521(a), but only on a motion by the United States trustee.

(b)

(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

(2)

(A)

(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000,[1] whichever is greater; or

(II) $10,000.[1]

(ii)

(I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts. In

addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 302 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses. Such monthly expenses may include, if applicable, contributions to an account of a qualified ABLE program to the extent such contributions are not excess contributions (as described in section 4973(h) of the Internal Revenue Code of 1986) and if the designated beneficiary of such account is a child, stepchild, grandchild, or stepgrandchild of the debtor.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,500[1] per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National Standards,

Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of—

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)

(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide—

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of—

(I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000,[1] whichever is greater; or

(II) $10,000.[1]

(C) As part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor's current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each such amount is calculated.

(D) Subparagraphs (A) through (C) shall not apply, and the court may not dismiss or convert a case based on any form of means testing—

(i) if the debtor is a disabled veteran (as defined in section 3741(1) of title 38), and the indebtedness occurred primarily during a period during which he or she was—

(I) on active duty (as defined in section 101(d)(1) of title 10); or

(II) performing a homeland defense activity (as defined in section 901(1) of title 32); or

(ii) with respect to the debtor, while the debtor is—

(I) on, and during the 540-day period beginning immediately after the debtor is released from, a period of active duty (as defined in section 101(d)(1) of title 10) of not less than 90 days; or

(II) performing, and during the 540-day period beginning immediately after the debtor is no longer performing, a homeland defense activity (as defined in section 901(1) of title 32) performed for a period of not less than 90 days;

if after September 11, 2001, the debtor while a member of a reserve component of the Armed Forces or a member of the National Guard, was called to such active duty or performed such homeland defense activity.

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

(4)

(A) The court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may order the attorney for the debtor to reimburse the trustee for all reasonable costs in prosecuting a motion filed under section 707(b), including reasonable attorneys' fees, if—

(i) a trustee files a motion for dismissal or conversion under this subsection; and

(ii) the court—

(I) grants such motion; and

(II) finds that the action of the attorney for the debtor in filing a case under this chapter violated rule 9011 of the Federal Rules of Bankruptcy Procedure.

(B) If the court finds that the attorney for the debtor violated rule 9011 of the Federal Rules of Bankruptcy Procedure, the court, on its own initiative

or on the motion of a party in interest, in accordance with such procedures, may order—

(i) the assessment of an appropriate civil penalty against the attorney for the debtor; and

(ii) the payment of such civil penalty to the trustee, the United States trustee (or the bankruptcy administrator, if any).

(C) The signature of an attorney on a petition, pleading, or written motion shall constitute a certification that the attorney has—

(i) performed a reasonable investigation into the circumstances that gave rise to the petition, pleading, or written motion; and

(ii) determined that the petition, pleading, or written motion—

(I) is well grounded in fact; and

(II) is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and does not constitute an abuse under paragraph (1).

(D) The signature of an attorney on the petition shall constitute a certification that the attorney has no knowledge after an inquiry that the information in the schedules filed with such petition is incorrect.

(5)

(A) Except as provided in subparagraph (B) and subject to paragraph (6), the court, on its own initiative or on the motion of a party in interest, in accordance with the procedures described in rule 9011 of the Federal Rules of Bankruptcy Procedure, may award a debtor all reasonable costs (including reasonable attorneys' fees) in contesting a motion filed by a party in interest (other than a trustee or United States trustee (or bankruptcy administrator, if any)) under this subsection if—

(i) the court does not grant the motion; and

(ii) the court finds that—

(I) the position of the party that filed the motion violated rule 9011 of the Federal Rules of Bankruptcy Procedure; or

(II) the attorney (if any) who filed the motion did not comply with the requirements of clauses (i) and (ii) of paragraph (4)(C), and the motion was made solely for the purpose of coercing a debtor into waiving a right guaranteed to the debtor under this title.

(B) A small business that has a claim of an aggregate amount less than $1,000[1] shall not be subject to subparagraph (A)(ii)(I).

(C) For purposes of this paragraph—

(i) the term "small business" means an unincorporated business, partnership, corporation, association, or organization that—

(I) has fewer than 25 full-time employees as determined on the date on which the motion is filed; and

(II) is engaged in commercial or business activity; and

(ii) the number of employees of a wholly owned subsidiary of a corporation includes the employees of—

(I) a parent corporation; and

(II) any other subsidiary corporation of the parent corporation.

(6) Only the judge or United States trustee (or bankruptcy administrator, if any) may file a motion under section 707(b), if the current monthly income of the debtor, or in a joint case, the debtor and the debtor's spouse, as of the date of the order for relief, when multiplied by 12, is equal to or less than—

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525[1] per month for each individual in excess of 4.

(7)

(A) No judge, United States trustee (or bankruptcy administrator, if any), trustee, or other party in interest may file a motion under paragraph (2) if the current monthly income of the debtor, including a veteran (as that term is defined in section 101 of title 38), and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than—

(i) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(ii) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(iii) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 [1] per month for each individual in excess of 4.

(B) In a case that is not a joint case, current monthly income of the debtor's spouse shall not be considered for purposes of subparagraph (A) if—

(i)

(I) the debtor and the debtor's spouse are separated under applicable nonbankruptcy law; or

(II) the debtor and the debtor's spouse are living separate and apart, other than for the purpose of evading subparagraph (A); and

(ii) the debtor files a statement under penalty of perjury—

(I) specifying that the debtor meets the requirement of subclause (I) or (II) of clause (i); and

(II) disclosing the aggregate, or best estimate of the aggregate, amount of any cash or money payments received from the debtor's spouse attributed to the debtor's current monthly income.

(c)

(1) In this subsection—

(A) the term "crime of violence" has the meaning given such term in section 16 of title 18; and

(B) the term "drug trafficking crime" has the meaning given such term in section 924(c)(2) of title 18.

(2) Except as provided in paragraph (3), after notice and a hearing, the court, on a motion by the victim of a crime of violence or a drug trafficking crime, may when it is in the best interest of the victim dismiss a voluntary case filed under this chapter by a debtor who is an individual if such individual was convicted of such crime.

(3) The court may not dismiss a case under paragraph (2) if the debtor establishes by a preponderance of the evidence that the filing of a case under this chapter is necessary to satisfy a claim for a domestic support obligation.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2606; Pub. L. 98–353, title III, §§ 312, 475, July 10, 1984, 98 Stat. 355, 381; Pub. L. 99–554, title II, § 219, Oct. 27, 1986, 100 Stat. 3100; Pub. L. 105–183, § 4(b), June 19, 1998, 112 Stat. 518; Pub. L. 109–8, title I, § 102(a), (f), Apr. 20, 2005, 119 Stat. 27, 33; Pub. L. 110–438, § 2, Oct. 20, 2008, 122 Stat. 5000; Pub. L. 111–320, title II, § 202(a), Dec. 20, 2010, 124 Stat. 3509; Pub. L. 111–327, § 2(a)(25), Dec. 22, 2010, 124 Stat. 3560; Pub. L. 113–295, div. B, title I, § 104(b), Dec. 19, 2014, 128 Stat. 4064.)

11 U.S. Code § 1129 - Confirmation of plan

U.S. Code Notes

(a) The court shall confirm a plan only if all of the following requirements are met:

(1) The plan complies with the applicable provisions of this title.

(2) The proponent of the plan complies with the applicable provisions of this title.

(3) The plan has been proposed in good faith and not by any means forbidden by law.

(4) Any payment made or to be made by the proponent, by the debtor, or by a person issuing securities or acquiring property under the plan, for services or for costs and expenses in or in connection with the case, or in connection with

the plan and incident to the case, has been approved by, or is subject to the approval of, the court as reasonable.

(5)

(A)

(i) The proponent of the plan has disclosed the identity and affiliations of any individual proposed to serve, after confirmation of the plan, as a director, officer, or voting trustee of the debtor, an affiliate of the debtor participating in a joint plan with the debtor, or a successor to the debtor under the plan; and

(ii) the appointment to, or continuance in, such office of such individual, is consistent with the interests of creditors and equity security holders and with public policy; and

(B) the proponent of the plan has disclosed the identity of any insider that will be employed or retained by the reorganized debtor, and the nature of any compensation for such insider.

(6) Any governmental regulatory commission with jurisdiction, after confirmation of the plan, over the rates of the debtor has approved any rate change provided for in the plan, or such rate change is expressly conditioned on such approval.

(7) With respect to each impaired class of claims or interests—

(A) each holder of a claim or interest of such class—

(i) has accepted the plan; or

(ii) will receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date; or

(B) if section 1111(b)(2) of this title applies to the claims of such class, each holder of a claim of such class will receive or retain under the plan on account of such claim property of a value, as of the effective date of the plan, that is not less than the value of such holder's interest in the estate's interest in the property that secures such claims.

(8) With respect to each class of claims or interests—

(A) such class has accepted the plan; or

(B) such class is not impaired under the plan.

(9) Except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that—

(A) with respect to a claim of a kind specified in section 507(a)(2) or 507(a)(3) of this title, on the effective date of the plan, the holder of such claim will receive on account of such claim cash equal to the allowed amount of such claim;

(B) with respect to a class of claims of a kind specified in section 507(a)(1), 507(a)(4), 507(a)(5), 507(a)(6), or 507(a)(7) of this title, each holder of a claim of such class will receive—

(i) if such class has accepted the plan, deferred cash payments of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) if such class has not accepted the plan, cash on the effective date of the plan equal to the allowed amount of such claim;

(C) with respect to a claim of a kind specified in section 507(a)(8) of this title, the holder of such claim will receive on account of such claim regular installment payments in cash—

(i) of a total value, as of the effective date of the plan, equal to the allowed amount of such claim;

(ii) over a period ending not later than 5 years after the date of the order for relief under section 301, 302, or 303; and

(iii) in a manner not less favorable than the most favored nonpriority unsecured claim provided for by the plan (other than cash payments made to a class of creditors under section 1122(b)); and

(D) with respect to a secured claim which would otherwise meet the description of an unsecured claim of a governmental unit under section 507(a)(8), but for the secured status of that claim, the holder of that claim will receive on account of that claim, cash payments, in the same manner and over the same period, as prescribed in subparagraph (C).

(10) If a class of claims is impaired under the plan, at least one class of claims that is impaired under the plan has accepted the plan, determined without including any acceptance of the plan by any insider.

(11) Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.

(12) All fees payable under section 1930 of title 28, as determined by the court at the hearing on confirmation of the plan, have been paid or the plan provides for the payment of all such fees on the effective date of the plan.

(13) The plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

(14) If the debtor is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, the debtor has paid all amounts payable under such order or such statute for such obligation that first become payable after the date of the filing of the petition.

(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objects to the confirmation of the plan—

(A) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor (as defined in section 1325(b)(2)) to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer.

(16) All transfers of property under the plan shall be made in accordance with any applicable provisions of nonbankruptcy law that govern the transfer of property by a corporation or trust that is not a moneyed, business, or commercial corporation or trust.

(b)

(1) Notwithstanding section 510(a) of this title, if all of the applicable requirements of subsection (a) of this section other than paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

(2) For the purpose of this subsection, the condition that a plan be fair and equitable with respect to a class includes the following requirements:

(A) With respect to a class of secured claims, the plan provides—

(i)

(I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

(B) With respect to a class of unsecured claims—

(i) the plan provides that each holder of a claim of such class receive or retain on account of such claim property of a value, as of the effective date of the plan, equal to the allowed amount of such claim; or

(ii) the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property, except that in a case in which the debtor

is an individual, the debtor may retain property included in the estate under section 1115, subject to the requirements of subsection (a)(14) of this section.

(C) With respect to a class of interests—

(i) the plan provides that each holder of an interest of such class receive or retain on account of such interest property of a value, as of the effective date of the plan, equal to the greatest of the allowed amount of any fixed liquidation preference to which such holder is entitled, any fixed redemption price to which such holder is entitled, or the value of such interest; or

(ii) the holder of any interest that is junior to the interests of such class will not receive or retain under the plan on account of such junior interest any property.

(c) Notwithstanding subsections (a) and (b) of this section and except as provided in section 1127(b) of this title, the court may confirm only one plan, unless the order of confirmation in the case has been revoked under section 1144 of this title. If the requirements of subsections (a) and (b) of this section are met with respect to more than one plan, the court shall consider the preferences of creditors and equity security holders in determining which plan to confirm.

(d) Notwithstanding any other provision of this section, on request of a party in interest that is a governmental unit, the court may not confirm a plan if the principal purpose of the plan is the avoidance of taxes or the avoidance of the application of section 5 of the Securities Act of 1933. In any hearing under this subsection, the governmental unit has the burden of proof on the issue of avoidance.

(e) In a small business case, the court shall confirm a plan that complies with the applicable provisions of this title and that is filed in accordance with section 1121(e) not later than 45 days after the plan is filed unless the time for confirmation is extended in accordance with section 1121(e)(3).

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2635; Pub. L. 98–353, title III, § 512, July 10, 1984, 98 Stat. 386; Pub. L. 99–554, title II, §§ 225, 283(v), Oct. 27, 1986, 100 Stat. 3102, 3118; Pub. L. 100–334, § 2(b), June 16, 1988, 102 Stat. 613; Pub. L. 103–394, title III, § 304(h)(7), title V, § 501(d)(32), Oct. 22, 1994, 108 Stat. 4134, 4146; Pub. L. 109–8, title II, § 213(1), title III, § 321(c), title IV, § 438, title VII, § 710, title XII, § 1221(b), title XV, § 1502(a)(8), Apr.

Rule 4002. Duties of Debtor

(a) In General. In addition to performing other duties prescribed by the Code and rules, the debtor shall:

(1) attend and submit to an examination at the times ordered by the court;

(2) attend the hearing on a complaint objecting to discharge and testify, if called as a witness;

(3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007;

(4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate; and

(5) file a statement of any change of the debtor's address.

(b) Individual Debtor's Duty To Provide Documentation.

(1) *Personal Identification*. Every individual debtor shall bring to the meeting of creditors under §341:

(A) a picture identification issued by a governmental unit, or other personal identifying information that establishes the debtor's identity; and

(B) evidence of social-security number(s), or a written statement that such documentation does not exist.

(2) *Financial Information*. Every individual debtor shall bring to the meeting of creditors under §341, and make available to the trustee, the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:

(A) evidence of current income such as the most recent payment advice;

(B) unless the trustee or the United States trustee instructs otherwise, statements for each of the debtor's depository and investment accounts, including checking, savings, and money market accounts, mutual funds and brokerage accounts for the time period that includes the date of the filing of the petition; and

(C) documentation of monthly expenses claimed by the debtor if required by §707(b)(2)(A) or (B).

(3) *Tax Return*. At least 7 days before the first date set for the meeting of creditors under §341, the debtor shall provide to the trustee a copy of the debtor's federal income tax return for the most recent tax year ending immediately before the commencement of the case and for which a return was filed, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.

(4) *Tax Returns Provided to Creditors*. If a creditor, at least 14 days before the first date set for the meeting of creditors under §341, requests a copy of the debtor's tax return that is to be provided to the trustee under subdivision (b)(3), the debtor, at least 7 days before the first date set for the meeting of creditors under §341, shall provide to the requesting creditor a copy of the return, including any attachments, or a transcript of the tax return, or provide a written statement that the documentation does not exist.

(5) *Confidentiality of Tax Information*. The debtor's obligation to provide tax returns under Rule 4002(b)(3) and (b)(4) is subject to procedures for safeguarding the confidentiality of tax information established by the Director of the Administrative Office of the United States Courts.

Notes

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 23, 2008, eff. Dec. 1 2008; Mar. 26, 2009, eff. Dec. 1, 2009.)

Notes of Advisory Committee on Rules—1983

This rule should be read together with §§343 and 521 of the Code and Rule 1007, all of which impose duties on the debtor. Clause (3) of this rule implements the provisions of Rule 2015(a).

Notes of Advisory Committee on Rules—1987 Amendment

New clause (5) of the rule imposes on the debtor the duty to advise the clerk of any change of the debtor's address.

Committee Notes on Rules—2008 Amendment