Case No. 22-16253

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: EVANDER FRANK KANE,

Debtor.

SOUTH RIVER CAPITAL, LLC,

Appellant,

v.

EVANDER FRANK KANE,

Appellee.

On Appeal from the United States District Court
for the Northern District of California
D.C. No. 3:21-cv-03493-WHO
Bankr. No. 21-50028-SLJ

APPELLEE'S RESPONSIVE BRIEF

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INTRODUCTION

This appeal arises out of the bankruptcy court's denial of a motion to convert Evander Kane's ("Kane") Chapter 7 bankruptcy to a Chapter 11 case. Zions Bancorporation, N.A. ("Zions") brought the motion to convert (the "Motion") along with a request that the bankruptcy court immediately appoint a Chapter 11 trustee upon conversion of the case. The court denied the Motion. Zions and the current appellant, South River Capital, LLC ("South River"), separately appealed the bankruptcy court's decision to the district court. The district court issued decisions in both appeals affirming the bankruptcy court's order. Both Zions and South River appealed to this Court, though Zions has since dismissed its appeal. South River, however, which filed a short joinder to the Motion but did not submit any evidence or argue at the hearing, maintains its appeal.

Section 706(b)[1] allows a court to convert a debtor's Chapter 7 bankruptcy case to a Chapter 11 case on the request of a party in interest. In deciding a motion to convert, the court's decision is based on what will most inure to the benefit of *all* parties in interest. This inquiry requires the court to consider myriad case-

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[1] Unless specified otherwise, all chapter and code references are to the Bankruptcy Code, §§ 101–1532. "AOB" references are to South River's opening brief, ECF 11; "ER" references are to South River's excerpts of record, ECF 12; and "SER" references are to Kane's concurrently filed supplemental excerpts of record.

specific factors, some of which necessitate a level of prognostication about what might happen in a prospective Chapter 11 case. Due to the fact-intensive nature of this analysis, the decision whether to convert is left in the sound discretion of the bankruptcy court. South River attempts to overcome the high burden to demonstrate that the bankruptcy court abused its discretion by arguing that the court applied the wrong legal standard, ventured outside of the Bankruptcy Code in considering Kane's interests, and provided Kane with rights he did not have.

The district court diplomatically described South River's arguments as "overreading" the bankruptcy court's opinion. As discussed below, the bankruptcy court appropriately considered the various case-specific factors, the burden of proof (which is on the moving creditors), and the potential events in a hypothetical Chapter 11 case. The court rejected the creditors' approach to the issues in question and noted that the limited factual evidence provided by the movants in support of the Motion was insufficient to meet the burden of proof.

Kane respectfully requests that this Court affirm the bankruptcy court decision.

ISSUES PRESENTED AND STANDARD OF REVIEW

I. Issues Presented

South River presents five numbered issues on appeal. AOB at 6. The stated issues boil down to two fundamental questions:

1. Did the bankruptcy court apply an incorrect legal test?
2. Did the bankruptcy court err in analyzing the relevant factors that resulted in its denial of the Motion?

As set forth below, both questions should be answered in the negative. The bankruptcy court applied the correct legal standard. It carefully weighed the available evidence. Its factual conclusions are logical, plausible, and adequately supported by the record. This Court should uphold the bankruptcy court's well-reasoned conclusion that the movants failed to meet their burden of proof to justify conversion of Kane's bankruptcy case to Chapter 11.

II. Standard of Appellate Review

South River asserts, incorrectly, that the bankruptcy court's order is reviewed de novo. The bankruptcy court has broad discretion to decide a motion to convert under § 706(b). *In re Parvin*, 549 B.R. 268, 271 (W.D. Wash. 2016) ("*Parvin II*"). As such, its decision is reviewed for abuse of discretion. *Id.*; *Lafountaine v. Grobstein (In re Lafountaine)*, No. CC-15-1426-LKiTa, 2016 Bankr. LEXIS 2218, at *5, 2016 WL 3344003 (B.A.P. 9th Cir. 2016). "A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or if its factual findings are illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *In re Plyam*, 530 B.R. 456, 461–62 (B.A.P. 9th Cir. 2015).

South River also argues that, because "there was no trial and no live testimony," this appeal presents questions of law that are subject to de novo review. AOB at 15–16. However, South River's argument drastically understates the factual record below and the factual disputes central to this appeal, as well as the considerations of the bankruptcy court in arriving at its decision. Here, the bankruptcy court's task was to determine whether a multitude of case-specific facts satisfied the statutory standard for conversion. The Supreme Court has described such questions as mixed questions of law and fact. *U.S. Bank N.A. v. The Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). South River cites the wrong standard for review of mixed questions and ignores *Village at Lakeridge*.

In *Village at Lakeridge*, the Court cautioned that "[m]ixed questions are not all alike," and the applicable standard of review—de novo or clear error—depends on the nature of the question and "whether answering it entails primarily legal or factual work." *Id.* at 966–67. Some questions require courts to "expound on the law, particularly by amplifying or elaborating on a broad legal standard," which appellate courts should review de novo. *Id.* at 967. But others

> immerse courts in case-specific factual issues—compelling them to marshal and weigh evidence, make credibility judgments, and otherwise address what we have (emphatically if a tad redundantly) called multifarious, fleeting, special, narrow facts that utterly resist generalization.

Id. (internal marks removed). When that is so, appellate courts should review only for clear error. *Id.*

To the extent that this appeal presents mixed questions of law and fact, they fall squarely into the latter category. To determine whether conversion was warranted under § 706(b), the bankruptcy court marshaled and weighed evidence submitted by the parties, made credibility judgments, and addressed narrow facts to determine what would most inure to the benefits of all parties in interest. Accordingly, the bankruptcy court's findings are reviewed for clear error and can only be overturned if they were "illogical, implausible, or without support in the record." *Retz v. Samson (In re Retz)*, 606 F.3d 1189, 1196 (9th Cir. 2010). Put another way, for a finding to be clearly erroneous, it must strike the appellate court as "wrong with the force of a five-week old, unrefrigerated dead fish." *Nagy v. Grp. Long Term Disability Plan for Emples. of Oracle Am., Inc.*, 739 F. App'x 366, 368 (9th Cir. 2018) (quoting *Ocean Garden, Inc. v. Marktrade Co.*, 953 F.2d 500, 502 (9th Cir. 1991)).

The bankruptcy court's findings are not clearly erroneous. To the contrary, they are well-considered and supported by the available evidence (or lack of evidence, as the case may be). As such, the bankruptcy court's order should be affirmed.

STATEMENT OF THE CASE

I. Background to Kane's Bankruptcy Case

Kane is a professional hockey player. ER-V3-470. He started playing hockey professionally at the age of eighteen. *Id.* At the time he filed for bankruptcy, he was 29 years old, playing hockey for the San Jose Sharks (the "Sharks"), and living in San Jose, California, with his wife and their infant daughter. *Id.*

Beginning in 2014, under the "guidance" of an agent/broker, Sure Sports LLC ("Sure Sports"), and its principal, Leon McKenzie, Kane entered into a series of loans. *Id.* The loans central to this appeal were:

1. $8 million from Centennial Bank ("Centennial")
2. $4.25 million from Zions
3. $1.5 million from Professional Bank
4. $750,000 from Lone Shark Holdings, LLC ("Lone Shark")
5. $600,000 from South River

Id. These creditors will be referred to collectively as the "Lenders."

Kane paid sizeable fees to Sure Sports to arrange these loans. *Id.* For example, Kane paid Sure Sports fees of approximately $67,000 in connection with the Zions loan. *Id.* Unbeknownst to Kane at the time, the Lenders were also paying Sure Sports fees for directing Kane to them for loans. *Id.* Kane also learned that after he went into default on the loans, Sure Sports was providing the Lenders with

recommendations on attorneys to use in California and litigation strategy, including the garnishing of Kane's salary. *Id.* Sure Sports' conduct forms the basis of Kane's crossclaim against Sure Sports in litigation pending in Miami, Florida, at the time of the bankruptcy filing. *Id.* The Trustee (defined below) has also filed suit against Sure Sports based on this conduct as well as violations of the Miller-Ayala Athlete Agents Act. *See* Adv. Proc. No. 22-05033.

The terms of the Lenders' loans were similar to one another. *Id.* Generally, the loans were used to pay down prior high interest loans and the Lenders each required Kane to sign additional documents (such as UCC-1 financing statements) to ostensibly secure their loans against his future salary. *Id.* at 470–71.

Kane eventually defaulted on his loans with the Lenders, and in October 2019 he retained John Fiero of Pachulski Stang Ziehl & Jones LLP to restructure his debt. *Id.* at 471. Mr. Fiero brought in Ben Cary, a Certified Insolvency and Restructuring Advisor, to support the restructuring efforts. *Id.* Mr. Fiero concluded that the Lenders' asserted security interests in Kane's future salary were ineffective and contrary to the Uniform Commercial Code, and he advised the Lenders as such. *Id.* Mr. Fiero spent many months and more than one hundred hours of attorney time seeking to reach a consensual resolution with the Lenders. *Id.* The efforts were for naught, and the Lenders filed lawsuits against Kane in state and federal court. *Id.* Faced with multifront litigation, a cut in pay due to the COVID-

19 pandemic, and far more debt than he could conceivably manage, Kane filed for Chapter 7 bankruptcy. *Id.*

II. Post-Filing Events

Fred Hjelmeset (the "Trustee") was appointed as Chapter 7 trustee, and he retained legal counsel and an accountant. *Id.* Kane cooperated fully in responding to numerous requests for information from the Trustee as well as the United States Trustee. *Id.* Among other things, Kane provided (1) statements for all bank accounts going back to January 2020, (2) credit card statements, (3) prior years' federal and state tax returns, (4) mortgage statements, (5) insurance information, (6) information regarding various business entities and business ventures, (7) a breakdown of the use of loan proceeds, (8) an explanation of transactions reflected in bank statements and credit card statements, (9) lease agreements, (10) loan agreements, and (11) various other miscellaneous documents reflecting his debts and financial history. *Id.*

Kane also provided access to his home in San Jose and real property in Vancouver, British Columbia, to realtors selected by the Trustee to opine as to the current value of the real property assets. *Id.* Kane accepted the valuations provided by the Trustee's realtors in reaching a settlement with the Trustee regarding the real estate and funds on account. *Id.* at 471–72. The Trustee filed a motion seeking

approval of that settlement and Kane made the first installment payment of $55,000 to the Trustee prior to the hearing on the Motion. *Id.* at 472.

Kane appeared for an initial meeting of creditors that lasted about two and a half hours and appeared for a continued meeting lasting less than an hour, after which time the Trustee concluded the meeting. *Id.* Kane continued providing documentation to the Trustee and the United States Trustee as requested after the meetings. *Id.* Kane also amended his Schedules and Statement of Financial Affairs to provide additional or more detailed information to the Trustee, the United States Trustee, and creditors. *Id.* Kane also stipulated with the Trustee, the United States Trustee, and various creditors to extend the deadlines for filing complaints to determine dischargeability or object to discharge. *Id.* In short, Kane acted as a responsible Chapter 7 debtor and fulfilled his duties under the Bankruptcy Code in what is, without question, a complicated and unusual case.

III. Zions' Motion

Zions filed its Motion, seeking to convert Kane's case to Chapter 11 and to appoint a Chapter 11 trustee to take control of Kane's assets and future salary.[2] *Id.* at 549. Zions' provided limited factual support for the Motion, consisting of (1) a

[2] The Motion acknowledged that Kane's debts were business debts (*i.e.*, that his debts were primarily non-consumer in nature, rather than primarily consumer in nature). ER-V3-555.

declaration attaching Kane's contract with the Sharks, *id.* at 568; (2) a declaration of Zions' counsel summarizing Kane's testimony at the meetings of creditors, which attached the deeds to Kane's home, *id.* at 590; and (3) in reply to Kane's opposition to the Motion, a declaration of Zions' counsel attaching portions of the transcript of Kane's meetings of creditors, *id.* at 394.

Zions filed its Motion early in the case seeking to convert Kane's postpetition salary into an estate asset. *See id.* at 549. The Motion also sought to highlight perceived bad acts by Kane to prejudice the bankruptcy court against his case. *Id.* The Motion offered scant justification for conversion, arguing that Kane's case should be converted because: (1) Kane's postpetition income could be used to pay his creditors over the next five years in a Chapter 11 case, and therefore conversion was in the best interests of creditors; (2) conversion might ultimately lead to a resolution between Kane and his creditors, and potentially minimize or avoid litigation with creditors over his prepetition conduct (which Zions and other creditors were threatening), and therefore conversion was in Kane's best interests. *Id.* The Motion then focused on the reasons why a Chapter 11 trustee should be appointed to take over Kane's assets. *Id.* at 565 (stating without support that "Kane simply cannot be trusted to handle large sums of money, or to make good decisions, or to put the interests of the estate and his creditors first. He is just not that guy.").

Creditors Professional Bank, Lone Shark, Sure Sports, and South River filed joinders. ER-V1-023.

IV. Kane's Opposition to the Motion

Kane opposed the Motion, pointing out his prepetition efforts to resolve matters with the Lenders, and correcting the numerous factual misstatements in the Motion. ER-V3-465, -470–75. Kane discussed the potential effects of the COVID-19 pandemic on the upcoming season and provided details regarding his income. *Id.* This detail included an explanation of the large amounts deducted and withheld from his salary which resulted in a dramatic difference between his gross salary and his take home pay—factors that were not discussed or considered by Zions, which counted on presenting Kane's high salary as sufficient to carry the day. *Id.*

Kane also pointed out factors glossed over or completely ignored by the Motion. For example, the Lenders, which held millions of dollars of claims, asserted security interests in Kane's future salary. If Kane's salary became a part of the estate (as it would in a Chapter 11 case), there would be disputes as to the validity and priority of the claimed security interests. *Id.* at 480–81.[3] As another example, Kane pointed out that the creditors were threatening to bring complaints

[3] South River's joinder in the Motion included a statement that it held a security interest in Kane's contract with the Sharks and his assets. ER-V3-512.

challenging the dischargeability of their debts or Kane's ability to discharge any of his debts. *Id.* In a Chapter 11 case, Kane's postpetition income would belong to the bankruptcy estate and he would be unable to use it to fund a defense of those actions and would be at the mercy of the Lenders. *Id.* Finally, Kane pointed out the practical impossibility of his confirming a plan of reorganization if he were in Chapter 11 and how the requested conversion could trap him in Chapter 11. *Id.* at 481. Finally, Kane addressed the significant Thirteenth Amendment issues underlying a conversion to Chapter 11 and the appointment of a trustee. *Id.* at 485–89.

V. The Hearing on the Motion

The bankruptcy court held a hearing on the Motion and provided the opportunity for any party to present its argument. SER-158 (hearing transcript). Zions presented the issue as one of three options: (1) allowing Kane to remain in Chapter 7 would result in a "pittance" to creditors and a "windfall" to Kane, *id.* at 171; (2) dismissal of Kane's bankruptcy would result in a "piecemeal dismemberment of the debtor, *id.*; and (3) conversion to Chapter 11 and appointment of a Chapter 11 trustee, which Zions hoped would lead the parties to an eventual resolution and the divvying up of Kane's future income, *id.* at 169–81. South River did not argue at the hearing. *See id.* at 158.

Notably, Centennial, the Lender that held the largest claim in the case at approximately $8.4 million, appeared at the hearing and announced its opposition to the Motion. *Id.* at 179–83. Specifically, Centennial argued that "conversion to 11 is not a practical result" because of the increased costs of administration that the estate (and therefore all creditors) would bear, the "uncertainty and contentiousness" resulting from a "free-for-all" battle between creditors, the increased efficiency of a Chapter 7 case, and the overall lack of a benefit to creditors if the case were to be converted to Chapter 11. *Id.*

VI. The Bankruptcy Court's Order Denying Conversion

Following the hearing, the bankruptcy court issued a thorough decision denying the Motion. ER-V1-023 (the "Order"). The Order carefully analyzed the factors relevant to conversion, identifying that the burden was on Zions to establish the grounds for conversion by a preponderance of the evidence. *Id.* The Order noted that Kane's future salary would be part of a Chapter 11 bankruptcy estate but observed that there had been no showing of what the result of its inclusion would be. *Id.* It noted the likely disputes over the validity and priority between the Lenders as to an alleged security interest in Kane's future salary (which had not been waived, and which would require adversary proceedings to resolve). *Id.* The Order noted that creditors were likely to bring nondischargeability actions (as two had already done, and as five, including South River ultimately did bring), and the

problems such actions created in terms of a plan of reorganization and Kane's ability to defend himself. *Id.* It noted the numerous potential hurdles to confirmation of a plan of reorganization and the future physical risks to Kane and his ability to earn his salary, which would factor into plan feasibility. *Id.* The Order remarked that even on the basic factor of "benefit to creditors," Zions failed to meet its burden to show that conversion would result in such a benefit. *Id.* The Order then discussed the dramatic (and negative) effects that conversion would have on Kane. *Id.* Finally, the Order rejected the arguments for appointing a Chapter 11 trustee, and having decided that conversion was not warranted, the bankruptcy court determined that it need not decide the Thirteenth Amendment issues that would otherwise arise. *Id.* Zions and South River separately appealed.

VII. The District Court's Affirmance

The district court affirmed the bankruptcy court's Order. ER-V1-003. It found that the bankruptcy court applied the correct legal standard and did not exceed the scope of the Bankruptcy Code, *id.* at 8–9; that it imposed the proper burden of proof, *id.* at 9–11; and that the bankruptcy court's analysis of the factors relevant to conversion was correct, *id.* at 11–17. It also held that South River's strained arguments relied on multiple "overread[ings]" of the bankruptcy court's Order. *Id.* at 8, 10.

Zions and South River filed further appeals. Zions subsequently dismissed its appeal before the Ninth Circuit. *See* Case No. 22-16304.

SUMMARY OF THE ARGUMENT

First, a framework is provided for understanding the differences between Chapter 7 and 11 bankruptcy. Notably, the bankruptcy estate includes a Chapter 7 debtor's prepetition assets, and in Chapter 11 the estate is expanded to also include the debtor's postpetition income for up to five years.

Second, the bankruptcy court applied the correct legal test, which required it to consider what will most inure to the benefit of all parties in interest. The bankruptcy court's consideration of Kane's interests was proper, and South River's arguments concerning the amendments to the Bankruptcy Code made by the BAPCPA (defined below) do not change the outcome on appeal.

Third, the bankruptcy court properly considered and weighed the relevant factors. It found that the factors of Kane's ability to pay, the possibility of immediate reconversion, the chances of confirming a Chapter 11 plan, and the benefit to creditors all weighed at least somewhat against conversion. It also found that Kane's interests weighed against conversion. These factual findings were logical, plausible, and supported by the record.

Fourth, this appeal is equitably moot. The case, which was filed over two years ago, has progressed significantly following the bankruptcy court's denial of

the Motion. At this point, conversion would disadvantage innocent parties and produce an impractical and inequitable outcome.

ARGUMENT

I. Framework for Understanding Chapter 7 and Chapter 11 Cases

A. Chapter 7 Bankruptcy

In a Chapter 7 bankruptcy, a debtor's prepetition assets are collected by a Chapter 7 trustee (except for a baseline set of "exempt" assets described by state and/or federal law that are excluded from the process and retained by the debtor). The Chapter 7 trustee then liquidates the collected assets and distributes the proceeds to the debtor's creditors on a proportional basis. In exchange for giving up prepetition assets, and in the normal course of events, the debtor receives a discharge of his prepetition debts. Creditors are free to pursue § 523 actions seeking a determination that Debtor cannot discharge his debt to that creditor (*e.g.*, debts obtained by fraud). Creditors can also file § 727 actions, seeking to deny the debtor a discharge of any of his debts (*e.g.*, if the debtor is concealing assets). A debtor with "primarily consumer debts" and a high income will generally be prevented from proceeding in Chapter 7 pursuant to amendments made by the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). However, as conceded by the Motion, these provisions did not apply to Kane's

case because his debts were "business debts" (*i.e.*, not primarily consumer debts). ER-V3-555.

B. Chapter 11 Bankruptcy

In a Chapter 11 bankruptcy, by contrast, a debtor's postpetition income belongs to the bankruptcy estate. § 1115(a)(2). The debtor's payments to creditors are defined by a Chapter 11 plan. A plan may be proposed by the debtor or other parties in interest, and must be voted on and accepted by the creditor body subject to the provisions of §§ 1123 and 1129. 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. *Id.* Other intricacies of plan requirements, such as feasibility, the treatment of secured claims, nondischargeable claims, and the absolute priority rule, are discussed below. Because the debtor's postpetition income is property of the estate in a Chapter 11 case and used in a plan to pay creditors, it cannot fund the debtor's defense to §§ 523 and 727 actions.

While a debtor is normally in charge of his Chapter 11 case, a Chapter 11 trustee may be appointed when a creditor, as was the case here, requests such an appointment and the bankruptcy court grants such request. § 1104(a). A Chapter 11 trustee controls the assets in a Chapter 11 case. §§ 1106, 1107. Here, those assets would notably include Kane's postpetition salary. § 1115(a)(2). The trustee then

determines what should be done with assets and can propose a plan of reorganization. §§ 1106, 1107. The Chapter 11 trustee, as well as counsel and other professionals such as accountants selected by the trustee, are paid from the assets of the bankruptcy estate. *Id.*; § 327.

C. Constitutional Issues

At this juncture, it is important to note the significant Thirteenth Amendment issues implicated by involuntary conversion of an individual case from Chapter 7 to Chapter 11, which the bankruptcy court did not reach because it found that the movants failed to satisfy the standard for conversion. ER-V1-047–48 (bankruptcy court discussion); ER-V3-485–89 (Kane's discussion). Although there is no absolute prohibition on the involuntary conversion of an individual's case, courts are sensitive to the issue of involuntary servitude. 6 Collier on Bankruptcy, ¶ 706.03 (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.). Even though individuals are eligible to be Chapter 11 debtors, courts have refused to grant motions to convert when the movant's intent was to compel the debtor to submit to an involuntary payment plan. *In re Snyder*, 509 B.R. 945 (Bankr. D.N.M. 2014); *In re Graham*, 21 B.R. 235 (Bankr. N.D. Iowa 1982) ("individual debtors should not be forced into a repayment plan against their will"); *In re Brophy*, 49 B.R. 483 (Bankr. D. Haw. 1985) (following *Graham* and finding "that Section

706(b) was not intended to be a vehicle by which individual debtors would be forced to submit to a plan of repayment against their wills.").

As noted above, the debt extended by the Lenders was purportedly secured by Kane's future income. The Motion sought conversion to Chapter 11 to ensure that Kane's future income became property of the bankruptcy estate, to be controlled by a Chapter 11 trustee. This concept would violate the Thirteenth Amendment's prohibition against involuntary servitude and should not be tolerated by the Court.

II. The Bankruptcy Court Applied the Correct Legal Test

South River argues that the bankruptcy court applied the wrong legal standard and exceeded the scope of the Bankruptcy Code when it considered Kane's interests in conversion. This is incorrect. As pointed out by the district court, South River "overreads the bankruptcy court's opinion as establishing certain rights where it does not." ER-V1-008. Instead, the bankruptcy court properly considered what would most inure to the benefit of all parties in interest, including the creditors and Kane. These considerations exist squarely within the confines of the Bankruptcy Code, and the bankruptcy court did not exceed the scope of its authority in denying the Motion. *See Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988).

A. Legal Test for Conversion Under § 706(b)

Pursuant to § 706(b), "On 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." Unlike dismissal or conversion under § 707(a)–(b), conversion under § 706(b) is not conditioned on any specific statutory factors or limited to any subset of debtors. *In re Decker*, 535 B.R. 828, 834–35 (Bankr. D. Alaska 2015) ("*Decker I*"). Rather, the decision whether to convert is left in the sound discretion of the court and should be based on what "will most inure to the benefit of all parties in interest." *Id.* at 837; *Parvin II*, 549 B.R. at 271; H.R. Rep. No. 595, 95th Cong., 1st Sess. at 380 (1977). *See also Takano v. Takano (In re Takano)*, 771 F. App'x 805, 806 (9th Cir. 2019) (unpublished) (affirming bankruptcy court's denial of conversion motion after weighing the interests of the parties, including the debtor).

"Since there are no specific grounds for conversion, a court should consider anything relevant that would further the goals of the Bankruptcy Code." *Parvin II*, 549 B.R. at 271. Courts have applied a variety of factors in determining whether § 706(b) conversion would be appropriate, including: "(1) 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 in interest would benefit from conversion." *Decker v. U.S.*

Trustee, 548 B.R. 813, 817 (D. Alaska 2015) ("*Decker II*"). *See also Parvin II*, 549 B.R. at 271–72 ("the debtor's ability to pay his creditors is typically the first consideration"). "The burden is on the movant to show that the case should be converted." *In re Parvin*, 538 B.R. 96, 101 (Bankr. W.D. Wash.) ("*Parvin I*").

Under this guidance, the bankruptcy court properly considered what would most inure to the benefit of all parties in interest, including both the interest of creditors and Kane. ER-V1-032. It considered Kane's ability to pay, the possibility of an immediate reconversion to Chapter 7, the likelihood of plan confirmation, the benefits to creditors, and Kane's interests. *Id.* at 34–45. These are all proper considerations under § 706(b).

B. The Bankruptcy Court Did Not Exceed Its Authority or Stray from the Bankruptcy Code by Creating a New "Statutory Right" to a Discharge

South River argues that the bankruptcy court strayed outside the bounds of the Bankruptcy Code when it stated that Kane had a "statutory right" to a discharge without contributing his post-petition income. AOB at 24–28. In context, the bankruptcy court wrote:

> Debtor'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. Debtor's choice of filing Chapter 7 is not improper from a statutory standpoint. Chapter 7 is designed to allow every debtor quote a quick discharge of his debts and a fresh start." *In re Takano*, 771 Fed. App'x. 805, 806 (9th Cir. 2019). It is often said that a Chapter 7 debtor quote has no constitutional right to discharge of his debts." *In re Gordon*, 464 B.R. 683, 700 (Bankr.

> N.D. Ga. 2012) (citing *United States v. Kras*, 409 U.S. 434, 436 (1973)). The motion does not challenge Debtor's statutory eligibility to be a debtor under Chapter 7. This being so**, debtor has a statutory right to discharge** and fresh start and to receive his future income free from financial encumbrances.

ER-V1-041 (emphasis added). South River reads this as the bankruptcy court creating substantive rights from thin air and elevating Kane's interests above the interests of creditors. *See* AOB at 24–28.

As correctly pointed out by the district court, South River's argument "not only ignores the context of the [bankruptcy] court's statement (which came at the end of a discussion over whether Kane improperly filed Chapter 7 'from a statutory standpoint') but ignores the entirety of the order." ER-V1-009. In other words, the bankruptcy court was merely acknowledging that the Motion did not challenge Kane's eligibility to proceed under Chapter 7 (though the movants preferred for him to proceed in Chapter 11). *Id.* at 40. If the bankruptcy court truly considered such a "right" to exist, that right would trump all other considerations regarding conversion and result in a short order stating so. However, the bankruptcy court carefully analyzed what would inure most to the benefit of all parties in interest under the four factors enunciated above—Kane's ability to pay, the possibility of immediate reconversion, the likelihood of confirmation, and the benefit to creditors. Furthermore, the bankruptcy court's analysis (1) found that "each factor

weighs at least somewhat against converting this case," *id.*; and (2) did not elevate Kane's interests above those of creditors.[4]

South River's citations to case law do not help its argument. South River cites *Schlehuber v. Fremont Nat'l Bank (In re Schlehuber)*, 489 B.R. 570, 575–76 (B.A.P. 8th Cir. 2013), for the proposition that a debtor's interests should not be held paramount to those of creditors. In *Schlehuber*, the bankruptcy court converted a debtor's case to Chapter 11 after considering a multitude of factors, including (1) the debtor's assertion that conversion was not in his best interests, (2) competing arguments why conversion actually *advanced* the debtor's interests, and (3) multiple other factors that indicated conversion would most inure to the benefit of all parties. The Eight Circuit declined to reverse the bankruptcy court's decision, which was based on its sound discretion and the balancing of several factors. *Schlehuber* does not advance South River's argument because, here, the bankruptcy court did not elevate Kane's interests above those of creditors. Instead, it considered all available evidence and found that each factor weighed at least somewhat against converting Kane's case to Chapter 11.

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[4] Even if the bankruptcy court did consider discharge to be a "right" (which it did not), such error was harmless. The bankruptcy court found that all factors weighed against conversion, so the Motion would have been denied even if Kane's interests had been disregarded.

South River then cites *Parvin II*, 549 B.R. at 268, for the unremarkable proposition that "courts have recognized that that the debtor's ability to pay his creditors is typically the first consideration" in a motion under § 706(b). In that case, the bankruptcy court converted a debtor's case after finding, among other things, that (1) the debtor had an ability to pay off all his creditors in full within three years; (2) the debtor would benefit in Chapter 11 by being able to enter into a managed payment plan for certain domestic support obligations which are not dischargeable under Chapter 7; and (3) the burdens of Chapter 11 were outweighed by its benefits. *Id.* at 271–72. This case does not advance South River's argument because (1) indeed, the first factor considered by the bankruptcy court was Kane's ability to pay, ER-V1-034–35; and (2) the bankruptcy court found that all factors, including Kane's ability to pay, weighed against conversion.

C. The Bankruptcy Court Did Not Exceed Its Authority or Stray from the Bankruptcy Code by Considering Kane's Non-Exempt Property

South River contends that the bankruptcy court exceeded its authority by "assuming that Kane has a right under the Bankruptcy Code to keep the nonexempt properties" (referring to his home in San Jose and two investment properties in Canada). AOB at 30. Again, as pointed out by the district court, South River "overreads the bankruptcy court's opinion as establishing certain rights where it does not." ER-V1-008. Nowhere does the bankruptcy court state, or even suggest,

that Kane has a right to keep non-exempt assets. Rather, the bankruptcy court merely considered Kane's interest in keeping the properties and whether any non-exempt equity could hinder confirmation of a Chapter 11 plan. *Id.* at 38. These considerations fall squarely within the factors for consideration on a motion to convert under § 706(b).

Furthermore, South River's argument is factually incongruous. The Trustee has sold Kane's home and the non-exempt proceeds have become a part of the bankruptcy estate. SER-090, 93, 102. And while South River complains that Kane has kept investment properties valued at millions of dollars, it conveniently ignores that they are significantly encumbered—so much so, in fact, that the Trustee determined, in an exercise of his valid business judgment, that selling them on the open market would result in a net *negative* to the bankruptcy estate of over $400,000. *Id.* at 127. For that reason, among others, the Trustee found the investment properties to be "burdensome" and "of inconsequential value and benefit to the estate." *Id.* The Trustee's settlement with Kane, in which the properties were transferred back to Kane, actually resulted in benefit to the estate that it would not have otherwise received. *See* SER-098, 99, 126, 130.

D. The Bankruptcy Abuse Prevention and Consumer Protection Act Does Not Suggest a Different Result

After complaining without any valid basis that the bankruptcy court strayed outside the scope of the Bankruptcy Code, South River then spends considerable effort to suggest that irrelevant sections of the Bankruptcy Code should be applied here. AOB at 16–23. Specifically, South River argues that the 2005 BAPCPA amendments require conversion of Kane's case. South River is mistaken, at best.

As a preliminary matter, these issues were not briefed or argued before the bankruptcy court. South River has waived its arguments by failing to address any of the narrow exceptions to the general rule that an argument raised for the first time on appeal is waived. *El Paso v. Am. W. Airlines, Inc. (In re Am. W. Airlines, Inc.)*, 217 F.3d 1161, 1165 (9th Cir. 2000); *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990).

BAPCPA's congressionally stated purpose was "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensur[ing] that the system is fair for both debtors and creditors." H.R. Rep. No. 109-31, pt. 1, at 2 (2005). It included the following amendments, among others:

1. It introduced a screening mechanism known as the "means test." This test applies only to debtors with "primarily consumer debts" and precludes them from filing for Chapter 7 if they have a high income. § 707(b)(2). However, as conceded by the Motion, Kane is

not affected by this provision because his debts are not primarily consumer debts. ER-V3-555.

2. If a creditor in a Chapter 11 or Chapter 13 case objects to a debtor's plan, the debtor must contribute five years of their postpetition disposable income to pay creditors. §§ 1129(a)(15)(B), 1325(b)(1)(B). This concept does not apply to Chapter 7 debtors and does not suggest that Chapter 7 debtors should be in a case under Chapter 11 or 13.

3. It made a Chapter 11 debtor's postpetition income property of the estate. § 1115(a)(2). Again, this concept does not apply to Chapter 7 debtors and does not suggest that Chapter 7 debtors should be in a Chapter 11 case.

4. It closed a loophole which allowed debtors to move to a new state on the eve of bankruptcy to obtain a favorable homestead exemption. § 522(p).

5. It added a provision to allow a trustee to avoid a debtor's transfer to a self-settled trust in certain circumstances. § 548(e).

South River states, based on the above, that "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." But nobody is making this argument. The stated purpose of the BAPCPA is, among other things, to ensure the bankruptcy system is "fair for both debtors and creditors." H.R. Rep. No. 109-31, pt. 1, at 2 (2005). South River cannot cherry-pick irrelevant provisions from the BAPCPA and argue that they require this Court to depart from the text and purpose of the Bankruptcy Code to convert Kane's case to Chapter 11.

South River then cites *Decker I*, 535 B.R. 828, to suggest that the BAPCPA "should be considered" when deciding a motion to convert. AOB at 22. *Decker I* states:

> BAPCPA's amendments to the Bankruptcy Code limited access to chapter 7 by requiring consumer debtors with incomes above the applicable mean income to reorganize, rather than liquidate, to obtain a discharge of their debts. Chapter 7 consumer debtors who run afoul of this "means test" may either dismiss their case, or convert it to chapter 13 or chapter 11. However, consumer debtors are no longer entitled to a discharge within chapter 7 if it would result in an abuse of the bankruptcy process.
>
> Under BAPCPA, Congress also amended the Bankruptcy Code to revise the treatment of individuals in chapter 11. An individual debtor's postpetition earnings are now property of the chapter 11 bankruptcy estate. Upon objection of any allowed unsecured creditor, an individual chapter 11 debtor seeking confirmation of his or her plan must provide his or her projected disposable income over a five year period.

Id. at 836. The *Decker I* court concluded that "the plain language of § 706(b) permits the involuntary conversion of any chapter 7 debtor to chapter 11 in the exercise of the court's discretion." *Id.* at 837.

Following the suggestion of South River, the bankruptcy court did "consider" the BAPCPA when it analyzed and denied the Motion. The Motion did not argue that Kane's debts were "consumer" or seek to impose the means test.[5] It

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[5] Rather, the Motion conceded that Kane was not a consumer debtor. ER-V3-555. The bankruptcy court addressed the consumer/non-consumer nature of Kane's debts, and the applicability of the means test, when it denied Centennial's subsequent motion to dismiss Kane's bankruptcy case. SER-143.

recognized that, in Chapter 11, Kane's postpetition income would become part of the bankruptcy estate and a portion paid to creditors over the life of a hypothetical plan. The bankruptcy court properly denied the Motion as a valid exercise of its discretion after carefully analyzing all relevant factors and finding that they all weighed against conversion.

Finally, South River provides no support for its proposition that the provisions found in Chapter 11 and 13 that describe "reasonably necessary expenses" and require contribution of the debtor's postpetition income, necessitate conversion of Kane's case from Chapter 7 to Chapter 11. AOB at 23. South River's citation to *Children's Hosp. & Health Ctr. v. Belshe*, 188 F.3d 1090, 1096 (9th Cir. 1999), is off-point—that case does not concern bankruptcy matters and instead discusses reimbursements for out-of-state hospitals under the Social Security Act. South River's citation to *Schlehuber*, 489 B.R at 573, merely states that the bankruptcy court must consider what will most inure to the benefit of all parties in interest and further the goals of the Bankruptcy Code, which is precisely what occurred here.

III. The Bankruptcy Court Properly Analyzed the Relevant Factors

A. The Movants Bore the Burden of Proof

South River acknowledges that the movants bore the burden of proof to establish, by a preponderance of the evidence, that conversion was justified

pursuant to § 706(b). AOB at 39. Kane agrees. The bankruptcy court applied precisely this standard and found that, "Because Zions and the joining parties fail to show by a preponderance of the evidence that it is appropriate here to convert the case to Chapter 11 or appoint a trustee, Zions' motion must be denied."

B. The Bankruptcy Court's Analysis of the Factors Relevant to Conversion Was Logical, Plausible, and Supported by the Record

Turning now to the bankruptcy court's analysis of the factors set forth above, it considered (1) Kane's ability to pay, (2) the possibility for immediate reconversion back to Chapter 7, (3) the likelihood that a Chapter 11 plan could be confirmed, and (4) whether the parties in interest would benefit from conversion.

First, the bankruptcy court found that, while Kane had "substantial income," it was not obvious "and so far unproved" that Kane's income would be sufficient to justify conversion. ER-V1-034. The bankruptcy court pointed to Kane's January 2021 paycheck showing gross earnings of $213,905 but net income of only $38,709. *Id.* It discussed the substantial withholdings and deductions from his pay, including 10% withholding that is paid over three years and another 20% withholding that is only paid if the NHL meets its yearly revenue target (which was very unlikely to be paid out due to the ongoing COVID-19 pandemic). *Id.* at 35. Furthermore, Kane is only paid for games he plays, and the COVID-19 pandemic had resulted in cancellation of many games, decreasing the previous

year's schedule from 82 to 56 games and introducing further doubts as to Kane's future income stream. *Id.* at 26, 35. The bankruptcy court then considered the additional costs of Chapter 11. It remarked that Chapter 11 cases carry significantly increased costs compared to Chapter 7. *Id.* at 35. If a Chapter 11 trustee was appointed (something that was part and parcel of the Motion), that trustee would be entitled to hire attorneys and professionals that would be paid from the estate. *Id.* Even without appointment of a Chapter 11 trustee, additional costs would include plan development, negotiation, and confirmation, as well as those of a creditors committee. The bankruptcy court found that movants did not "address the likelihood that administrative costs could consume a material portion of a Chapter 11 estate," which "seriously undercuts [their] arguments regarding Debtor's ability to pay." *Id.*

South River argues that the bankruptcy court erred by not considering Kane's expenses. AOB at 38–40. Although the court did not mention Kane's expenses, that was not the question—it was Kane's ability to pay that was the issue at hand. On that note, the bankruptcy court discussed his contract in depth. It considered how his salary was paid out, including the percentages withheld and the timing and chances of the withholdings being paid out. ER-V1-026–28, 34–35. It conceded that conversion would result in additional funds for the estate, but found that the amount of those additional funds was unclear, as the evidence submitted

was imprecise and inconclusive. South River also argues that the bankruptcy court erred because it acknowledged that conversion would mean "additional funds for creditors," but did not grant the Motion. *Id.* at 35; AOB at 40. However, South River fails to realize that it is not simply the additional funds coming into the estate—which were unproven and far from certain—but also the additional costs to be incurred in a Chapter 11 influenced the bankruptcy court's decision. It was the movants' burden to convince the court that the benefits would outweigh the costs, and they failed to do so.[6]

Second, the bankruptcy court considered the possibility of immediate reconversion to Chapter 7. ER-V1-035–36. The Motion repeatedly argued that Kane could not be trusted to manage a Chapter 11 case due to his history of gambling and spending. The bankruptcy court pointed out that, if it were to accept the movants' assertions, "those same arguments would apply with equal force towards reconverting the case" back to Chapter 7 under § 1112(b)(4)(A).[7]

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[6] South River attempts to flip the burden, stating that there is no suggestion that administrative costs would outweigh the income flowing into the estate. However, it was the movants' burden to show an ability to pay, not Kane's burden to show his lack of ability to pay.

[7] The law directs courts to convert Chapter 11 cases to Chapter 7 for "cause," including when there is "substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation" and "gross mismanagement of the estate." § 1112(b)(4)(A)–(B).

South River argues that, because the bankruptcy court said that it would not appoint a Chapter 11 trustee if it converted the case (despite Zions' coupling of the request as part of its Motion), the bankruptcy court implicitly accepted that there was no cause for reconversion. AOB at 41–42. However, the bankruptcy court did not state that it would *never* appoint a trustee. It acknowledged Kane's previous "ill-considered" financial decisions, but noted that he realized his disarray, hired outside experts to help, filed bankruptcy once those efforts proved unsuccessful, and complied with the Bankruptcy Code. ER-V1-046 (portion of the Order not on appeal, but relevant to the instant discussion). As such, the bankruptcy court stated that Kane should have the opportunity to manage his own bankruptcy, and that a trustee could be appointed if he squandered that opportunity. The bankruptcy court's statements regarding whether a Chapter 11 trustee was needed and the possibility of reconversion are not mutually exclusive—one does not preclude the other.

Third, the bankruptcy court found that there were practical and legal issues that would seriously impede the confirmation and consummation of a Chapter 11 plan. *Id.* at 36. In doing so, it was required to draw on its experience and expertise to predict the issues that might arise in a Chapter 11 case. It noted that some of the Lenders asserted nondischargeable claims, meaning that they would "have an interest in defeating confirmation 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." *Id.* It also took Kane's career into account, noting Kane's age, the length of time he has been playing hockey, the physically demanding nature of his sport, and the fact that he may not be compensated if he is unable to play. *Id.* at 37. It considered the legal issues that would complicate plan confirmation, including more than $23.5 million in purportedly secured claims (and the diverging interests of secured and unsecured creditors), the absolute priority rule's impact on Kane's ability to keep non-exempt property,[8] the ability of creditors to collect non-dischargeable claims outside of a plan, and feasibility concerns given the uncertain nature of Kane's career. *Id.* at 37–39.

South River asserts that the bankruptcy court erred when it considered the uncertainty of Kane's income because "[e]very chapter 11 plan that relies on an

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[8] The absolute priority rule provides that a debtor can only retain non-exempt property if the plan either pays unsecured creditors in full or contributes "new value" to the estate. § 1129(b)(2)(B)(i)–(ii); *Zachary v. Cal. Bank & Tr.*, 811 F.3d 1191, 1994 (9th Cir. 2016). New value must be "present contribution[s], taking place on the effective date of the Plan rather than a future contribution," meaning that Kane's future income would not count. *In re Ambanc La Mesa Ltd. P'ship*, 115 F.3d 650, 655 (9th Cir. 1997). Given Kane's financial situation, in which his future income and non-exempt assets would be part of the estate, the bankruptcy court expressed skepticism that he could obtain and provide new value. ER-V1-038. South River speculates that Kane could have borrowed money to make a new value contribution to satisfy the absolute priority rule. There was no evidence to support this argument and it is an unlikely possibility in the extreme.

individual's earned income risks that such income will be reduced." AOB at 33. The bankruptcy court considered the legal effect of Kane's uncertain income after recognizing that, to be confirmed, a plan must be feasible and "not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor." § 1129(1)(11). The bankruptcy court found that the Motion made much of Kane's high income, but ignored the attendant uncertainty and risk that his career entails. ER-V1-039. If, as the court noted, Kane's ability to play hockey diminished—because of injury, the COVID-19 pandemic, or any other reason—it would threaten a plan's reasonable chances of success. *Id.* Given the ongoing uncertainty around the pandemic's impact on the number of games that would be played, along with the inherent unpredictability of a professional sports career, this was not an illogical, implausible, or unsupported finding. In other words, on the sparse factual record presented by the movants, the bankruptcy court was not convinced that there would be any reasonable probability of success.[9]

[9] In fact, the bankruptcy court's concern was borne out. As discussed below, Kane's contract was terminated by his employer within a year from his filing bankruptcy.

South River states that the bankruptcy court's consideration of plan feasibility was premature, as no plan had been proposed.[10] However, South River cites no Ninth Circuit authority preventing the bankruptcy court from considering plan feasibility (which is a requirement for confirmation), and Kane is aware of none. South River also states that a debtor can modify a Chapter 11 plan to reduce such risk. AOB at 33–36. However, modification can only come *after* a Chapter 11 plan is confirmed, and the bankruptcy court was not convinced that a plan could be confirmed in the first place.[11]

South River argues that the bankruptcy court erred in considering the possibility of creditors' objections because "[e]very Chapter 11 plan risks having a creditor object." AOB at 36. It points out that "four of the largest creditors moved to convert" and that no claims had yet been found nondischargeable. *Id.* at 37. This

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[10] South River cites a non-controlling case from Florida to support its point. *In re Baker*, 503 B.R. 751 (Bankr. M.D. Fla. 2013). Besides not being binding in the Ninth Circuit, *Baker* is distinguishable because the debtor had steady income of $19,000 per month with expenses of $7,615, and feasibility was all but certain. This is quite different from Kane's situation, in which his income and career is subject to significant uncertainty.

[11] The bankruptcy court did not, as South River argues, give special treatment to Kane as being part of an inherently dangerous profession. Instead, the court simply questioned Kane's long-term ability to play professional hockey given his age, the number of years he had already played, and the "physically demanding" nature of hockey.ER-V1-037. The court found that this, along with the possibility of an injury disrupting Kane's career, raised concerns about the feasibility of a Chapter 11 plan. *Id.* at 39.

argument is made for the first time on appeal, and it is waived because South River fails to address any of the narrow exceptions to the general rule that an argument raised for the first time on appeal is waived. *Am. W. Airlines*, 217 F.3d at 1165; *Carlson*, 900 F.2d at 1349.

Furthermore, this argument ignores the obvious inter-creditor conflicts. For example, Centennial, the Lender that holds the largest claim in the case at approximately $8.4 million, appeared at the hearing on the Motion and announced its opposition to conversion to Chapter 11. SER-179–83. South River also ignores the clear conflicts between ordinary unsecured creditors, those that assert nondischargeable claims, and those (such as South River) that assert secured claims. These conflicts and competing interests exist even when nondischargeability and/or the validity of the security interests has not yet been finally decided, and heavily incentivizes creditors to pursue diametrically opposed objectives.

South River also asserts that the bankruptcy court committed legal error in its consideration of secured claims and nondischargeable claims. These arguments are discussed in part III.C, below. Suffice it to say, the bankruptcy court properly found that secured and nondischargeable claims introduced significant competing incentives and uncertainty that would likely hinder plan confirmation.

South River brushes aside the concerns regarding plan confirmation as "false" or "common." AOB at 43. However, it did not provide any evidence in support of the Motion or at the hearing to meaningfully engage with the bankruptcy court's concerns, and on appeal it does not demonstrate any fatal flaws in the bankruptcy court's reasoning.

Oddly, South River's self-described "best evidence that Kane may confirm a chapter 11 plan" is not actually evidence, but rather a bankruptcy case from Ohio: *In re Johnson*, No. 14-57104, 2016 Bankr. LEXIS 4598 (Bankr. S.D. Ohio Nov. 10, 2016). AOB at 43. South River asserts that the facts of *Johnson* are similar to Kane's situation because Johnson was also a hockey player. It asserts that, because Johnson proposed and confirmed a Chapter 11 plan, Kane can too. South River makes no attempt to analyze the facts of *Johnson* or to explain its significance to Kane's case. A review of *Johnson* reveals that the similarities do not extend past the debtors' shared profession. *Johnson* was a decision that determined whether a Chapter 11 plan proposed by the debtor could be confirmed, and did not consider involuntary conversion from Chapter 7 to Chapter 11. As such, its discussion is not relevant to the issues on appeal here.

Fourth, the bankruptcy court considered what would most benefit the parties in interest. Concerning the creditors, it found that while conversion would bring Kane's postpetition salary into the estate, significant uncertainty existed as to the

amount of that income and that the movants would not, in the near term, receive the return about which they argued. ER-V1-040. It also found that the Motion overlooked the significant challenges and expenses that awaited in Chapter 11 and it was not convinced that the benefits of conversion would outweigh the costs. *Id.* At this point, before considering Kane's interests, the bankruptcy court found that "each factor weighs at least somewhat against converting this case." *Id.*[12]

Next, the bankruptcy court considered Kane's interests. *Id.* at 40–42. In short, it found that Chapter 7 would allow Kane to keep his postpetition income and obtain a timely discharge of his debts in exchange for relinquishing his prepetition assets. *Id.* It also found that remaining in Chapter 7 would allow Kane to access funds needed to defend himself from nondischargeability litigation. *Id.* at 45. If, on the other hand, Kane's case were converted to Chapter 11, he would be cut off from those funds because his income would belong to the bankruptcy estate and professionals could not be compensated by the estate for any defense of Kane against nondischargeability litigation. § 1115(a)(2); *In re Waxman*, 148 B.R. 178 (E.D.N.Y. 1992) (denying request for payment of postpetition legal fees where the services benefited the debtor personally and not the bankruptcy estate).

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[12] That conversion was necessarily in the creditors' best interest is belied by Centennial's opposition to the Motion, as it held a claim that dwarfed all other creditor claims.

South River briefly argues against the bankruptcy court's findings as to the various benefits. It asserts that creditors would benefit from conversion, though in doing so it continues to ignore the significant costs and risks of Chapter 11 that have been repeatedly pointed out to it. It also speculates that Chapter 11 will help Kane deal with nondischargeable claims and bring those creditors to the negotiating table. However, this unsupported speculation ignores the simple fact that conversion would leave Kane "trapped in a chapter 11 proceeding [he does] not need, [does] not want, and cannot manage," and would run contrary to Kane's "interest in a quick discharge of [his] debts and a fresh start." *Takano*, 771 F. App'x at 806.

C. The Bankruptcy Court Did Not Make Any Legal Errors, and Even If It Did, They Were Harmless

South River asserts that the bankruptcy court made two legal errors. Its first argument concerns nondischargeable claims. The bankruptcy court cited *In re Hamilton*, 803 F. App'x 123 (9th Cir. 2020), for the concept that, "even if a plan is confirmed, if Creditors are successful in having their claims declared non-dischargeable, nothing in the Code will prevent them from continuing to collect from Debtor outside the plan." The district court disagreed. It pointed to § 362(c)(2) and stated that it provides that the bankruptcy automatic stay bars creditors from collecting nondischargeable claims until a debtor's discharge is

granted or denied, or the case is closed or dismissed. ER-V1-016. This, the district court stated, would keep creditors with nondischargeable claims at bay during the life of a Chapter 11 plan. *Id.*

However, the district court was mistaken and the bankruptcy court's reliance on *Hamilton* was correct. The Bankruptcy Appellate Panel for the Ninth Circuit has held that the "the automatic stay provisions of Section 362 do not preclude the execution of a judgment, which has been held by the bankruptcy court to be non-dischargeable, upon property of the debtor which is not property of the estate." *In re Watson*, 78 B.R. 232, 235 (B.A.P. 9th Cir. 1987). *See also Arneson v. Farmers Ins. Exch. (In re Arneson)*, 282 B.R. 883, 892 (B.A.P. 9th Cir. 2002). In other words, the holders of nondischargeable claims would be free to immediately collect against Kane personally. This would present enormous problems for plan confirmation and consummation. It would set up a fight between creditors—the holders of nondischargeable claims would likely seek to maximize their recovery by garnishing Kane's wages, while creditors bound by a Chapter 11 plan would likely oppose garnishment and seek to maximize the amount of Kane's income that would be paid out under the plan. This would also be severely detrimental to Kane, as his disposable income would be consumed by the bankruptcy estate and everything else would be subject to execution by nondischargeable claimholders.

This outcome would also exacerbate the issue of Kane being left without funds to defend himself in pending nondischargeability litigation.

Turning back to *Hamilton*, that case involved a plan provision that enjoined creditors from collecting nondischargeable debt during the plan period, even if that collection was against the debtor personally. 803 F. App'x at 124–25. The bankruptcy court confirmed the plan even though that provision ran afoul of Ninth Circuit law holding that creditors with nondischargeable claims *were* permitted to immediately collect against the debtor. *Id.* For that reason, the bankruptcy court's confirmation of the plan containing the offending provision was reversed by the Bankruptcy Appellate Panel for the Ninth Circuit (and the reversal was affirmed by the Ninth Circuit). Presumably, any similar plan in Kane's case would run into the same problem.

But even if the bankruptcy court erred in asserting that nothing in the Bankruptcy Code would keep creditors with nondischargeable claims at bay, any such error was harmless. The thrust of the bankruptcy court's statement was that the interests of creditors with nondischargeable claims would conflict with the interests of other creditors. Holders of nondischargeable claims would, at minimum, be incentivized to thwart confirmation of any plan that would reduce or delay their recoveries. Regardless of whether creditors could collect from Kane during the life of a plan, the bankruptcy court's concern was valid. To the extent

the statement about the Bankruptcy Code was inaccurate (Kane does not believe it was), any error was harmless considering the context in which it was made.[13]

South River's second argument regards the purported security interests the Lenders asserted against Kane's future income. The bankruptcy court noted that, if the security interests are valid, they would imperil plan confirmation. ER-V1-037. This is so, because a plan needs to provide secured creditors with deferred 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." § 1129(b)(2)(A)(i)(II). As such, Kane's income—the source for funding any plan—would be devoted to paying the purportedly secured creditors, and the interests of unsecured creditors and secured creditors would diverge and create plan confirmation problems. ER-V1-038.

South River assigns error to this consideration, arguing that the bankruptcy court's own Order acknowledged that security interests in future income are not recognized in the Ninth Circuit. *Id.* at 37; AOB at 32–33. *See In re Skagit Pac. Corp.*, 316 B.R. 330, 336 (B.A.P. 9th Cir. 2004) ("Revenue generated post-petition

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[13] Moreover, South River's argument as to what the outcome would be in a dispute with creditors holding nondischargeable claims over the terms of a potential plan of reorganization, is just conjecture and would undoubtedly be another hotly contested matter if the case had been converted into Chapter 11.

solely as a result of a debtor's labor is not subject to a creditor's pre-petition interest.") The district court seemed to agree with South River, stating that it "is not clear why the court weighed the potential impact of security interests in Kane's post-petition income when it acknowledged that the Ninth Circuit had held that such interests were invalid." ER-V1-016. Nevertheless, the district court held that the error was harmless because the divergent interests of creditors with dischargeable claims and the particulars of Kane's career weighed against the likelihood of plan conversion. *Id.*

However, the issue is not as simple as South River suggests. As of the hearing on the Motion, the Lenders had not waived their asserted security interests in Kane's future income. South River's own joinder to the Motion claims that it has a perfected security interest in Kane's future income. ER-V3-512. Even if South River and the other Lenders' security interests were eventually found to be invalid, absent consent (which the creditors did not give), determination of the issue required an adversary proceeding. Fed. R. Bankr. P. 7001(2) (requiring an adversary proceeding to "determine the validity, priority, or extent of a lien or other interest in property"). No adversary proceedings had been filed to resolve this potential dispute over the validity of the asserted security interests. As such, the bankruptcy court had to consider the potential for future arguments on the issue. The bankruptcy court's discussion demonstrates that (1) it was mindful of the lack

of a decision terminating the asserted security interests, (2) it briefly discussed, but did not decide, the validity of those interests, and (3) it recognized that the Lenders' asserted security interests cut against their arguments that Kane's case should be converted. When viewed in this light, the bankruptcy court's Order does not contain any legal error, and certainly not any reversible error.

D. The Bankruptcy Court Properly Found That the Movants Failed to Meet Their Burden of Proof

As set forth above, the bankruptcy court carefully weighed the factors relevant to the Motion. It found that the factors of Kane's ability to pay, the possibility of immediate reconversion, the chances of confirming a Chapter 11 plan, and the benefit to creditors all weighed at least somewhat against conversion. ER-V1-040. It also found that Kane's interests weighed against conversion. *Id.* at 40–42. It discussed in depth and distinguished *Gordon*, 464 B.R. 683, a case relied heavily on by the moving parties. *Id.* at 43–45. South River has seemingly dropped the arguments related to *Gordon* on appeal.

Having weighed the applicable factors and analyzed the relevant case law, the bankruptcy court determined that Zions did not meet its burden to show, by a preponderance of the evidence, that conversion was warranted. In doing so, the bankruptcy court applied the correct legal standard, the proper burden of proof, and

its factual findings were logical, plausible, and supported by the record. As such, it did not abuse its discretion in denying the Motion.

IV. This Appeal Is Equitably Moot[14]

Equitable mootness is a judge-made doctrine that, even where effective relief is theoretically possible, courts may dismiss an appeal of a bankruptcy matter when there has been a comprehensive change of circumstances so as to render it inequitable for the court to consider the merits of the appeal. *First Intercontinental Bank v. Ahn (In re Ahn)*, 705 F. App'x 581, 582-83 (9th Cir. 2017). In other words, equitable mootness concerns whether changes to the status quo following the order being appealed make it "impractical or inequitable to unscramble the eggs." *Castaic Partners II, LLC v. DACA-Castaic, LLC (In re Castaic Partners II, LLC)*, 823 F.3d 966, 968 (9th Cir. 2016) (internal marks removed).

Following the bankruptcy court's denial of the Motion, the following events (among others) have come to pass in Kane's bankruptcy case, which was filed in January 2021:

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[14] This is a separate issue than that raised by Kane before the district court, in which he argued that Zions' appeal should be dismissed because he was terminated from the Sharks. ER-V1-020. The district court denied Kane's motion to dismiss the appeal under the high bar for dismissal because "[a]t most, [Kane] has shown that there is less post-petition income that would be available to creditors in a Chapter 11 plan." *Id.* at 22. The district court ultimately affirmed the bankruptcy court's Order denying the Motion on the merits. *Id.* at 3.

1. The Trustee sold Kane's home in San Jose, California. SER-090, 93, 102.

2. Kane entered into a settlement with the Trustee regarding the disposition of various assets including bank accounts and the estate's interest in Kane's two Canadian investment properties. SER-098, 99, 126, 130.

3. The Trustee retained special counsel to sue Sure Sports (the agent/broker that arranged the Lenders' loans) for violations of the Miller-Ayala Athlete Agents Act. SER-069, 72. *See* Adv. Proc. No. 22-05033.

4. Kane's contract with the Sharks was terminated. *See* ER-V1-018–022. He found employment with the Edmonton Oilers, albeit at a much reduced salary and on a shorter-term contract. *Id.*

5. The bankruptcy court approved, on an interim basis, the fees and expenses of the Trustee's bankruptcy counsel. SER-027, 30.

6. Kane and Zions entered into a global settlement including dismissal of prepetition litigation. SER-004, 7. *See* Adv. Proc. No. 21-05056.

These events unfolded after the bankruptcy court denied the Motion, so they could not have been raised below. Since then, the Trustee has diligently marshaled, liquidated, and administered the assets of Kane's bankruptcy estate (and Kane has thoroughly cooperated with those efforts); the Trustee has initiated litigation on behalf of the estate; professional fees have been awarded on an interim basis; and Kane has entered into various settlements and compromises. Conversion would disadvantage innocent parties and result in an inequitable outcome. *See Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 881–83 (9th Cir. 2012). In other words, the metaphorical eggs are so

scrambled that it would be impractical and inequitable to convert Kane's bankruptcy case now.[15] *See Castaic Partners II*, 823 F.3d at 968. Finally, Zions' Motion relied on Kane's then-existing contract, which had four years remaining. The contract was terminated and over two of the four years have passed since Kane filed his case.

CONCLUSION

For the reasons set forth above, Kane requests that this Court affirm the bankruptcy court's Order denying the Motion. The bankruptcy court properly applied the correct legal standard and carefully weighed the evidence, and its factual findings are logical, plausible, and adequately supported by the record. This Court should uphold the bankruptcy court's well-reasoned conclusions that the movants did not meet their burden to justify conversion of Kane's bankruptcy case to Chapter 11.

As an alternative, Kane also requests that the Court dismiss South River's appeal as equitably moot.

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[15] As such, these is one of the "exceptional circumstances" that merits consideration of an argument raised for the first time on appeal. *See Carlson*, 900 F.2d at 1349.

Date: April 19, 2023

FINESTONE HAYES LLP

s/Ryan A. Witthans
Ryan A. Witthans

Attorneys for Appellee,
EVANDER FRANK KANE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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

I am the attorney or self-represented party.

This brief contains 11,546 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6

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The following appeals arise from the debtor's bankruptcy case:

No. 22-16282, Centennial Bank v. Kane: Appeal of bankruptcy court's denial of motion to dismiss bankruptcy case (pending)

No. 22-16304, Zions Bancorporation v. Kane: Appeal of bankruptcy court's denial of motion to convert case to Chapter 11 (voluntarily dismissed)

No. 22-16674, Kane v. Zions Bancorporation: Appeal of bankruptcy court's decision re debtor's homestead exemption (voluntarily dismissed)

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