General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 20-60043 **Docketed:** 09/09/2020
In re: Donald Hugh Nichols, et al v. Marana Stockyard, et al
Appeal From: BAP, Tucson Bankruptcy Court
Fee Status: Paid

Case Type Information:
1) bankruptcy appellate panel
2) other
3) null

Originating Court Information:
District: 0970-4 : 20-1032
Trial Judge BAP: Julia W. Brand
Trial Judge BAP: William J. Lafferty, III, Bankruptcy Judge
Trial Judge BAP: Laura Stuart Taylor, Bankruptcy Judge
Date Filed: 02/12/2020

Date Order/Judgment:	Date Order/Judgment EOD:	Date NOA Filed:	Date Rec'd COA:
08/12/2020	08/12/2020	09/02/2020	09/04/2020

Prior Cases:
None

Current Cases:
None

In re: DONALD HUGH NICHOLS
Debtor,

JANE ANN NICHOLS
Debtor,

DONALD HUGH NICHOLS Appellant,	German Yusufov Direct: 520-745-4429 Email: gy@yusufovlaw.com [COR LD NTC Retained] Yusufov Law Firm PLLC 5151 E. Broadway Boulevard Suite 1600 Tucson, AZ 85711
JANE ANN NICHOLS Appellant,	German Yusufov Direct: 520-745-4429 [COR LD NTC Retained] (see above)
v.	
MARANA STOCKYARD & LIVESTOCK MARKET, INC. Appellee,	Frederick Petersen, Attorney Direct: 520-624-8886 Email: fpetersen@mcrazlaw.com [COR LD NTC Retained] Mesch, Clark & Rothschild, PC Firm: 602/624-8886 259 N. Meyer Ave. Tucson, AZ 85701 D. Alexander Winkelman Direct: 520-624-8886 Email: awinkelman@mcrazlaw.com Fax: 520-798-1037 [COR LD NTC Retained] Mesch, Clark & Rothschild, PC Firm: 602/624-8886

	259 N. Meyer Ave. Tucson, AZ 85701
THE PARSONS COMPANY Appellee,	Frederick Petersen, Attorney Direct: 520-624-8886 [COR LD NTC Retained] (see above) D. Alexander Winkelman Direct: 520-624-8886 [COR LD NTC Retained] (see above)
CLAY PARSONS Appellee,	Frederick Petersen, Attorney Direct: 520-624-8886 [COR LD NTC Retained] (see above) D. Alexander Winkelman Direct: 520-624-8886 [COR LD NTC Retained] (see above)
KAREN PARSONS Appellee,	Frederick Petersen, Attorney Direct: 520-624-8886 [COR LD NTC Retained] (see above) D. Alexander Winkelman Direct: 520-624-8886 [COR LD NTC Retained] (see above)
ARIZONA DEPARTMENT OF REVENUE Appellee,	Christopher J. Dylla, Esquire, Assistant Attorney General Direct: 602-542-8389 Email: Christopher.Dylla@azag.gov Fax: 605-542-4273 [COR LD NTC Retained] Arizona Attorney General's Office 2005 N. Central Avenue Phoenix, AZ 85004
JILL H. FORD, Chapter 7 Trustee Appellee,	Patrick Timothy Derksen, Esquire, Attorney Direct: 602-680-7332 Email: pderksen@wdlawpc.com Fax: 602-357-7476 [COR LD NTC Retained] Witthoft Derksen, PC 3550 N. Central Avenue Suite 1006 Phoenix, AZ 85012

In re: DONALD HUGH NICHOLS; JANE ANN NICHOLS,

Debtors,

DONALD HUGH NICHOLS; JANE ANN NICHOLS,

Appellants,

v.

MARANA STOCKYARD & LIVESTOCK MARKET, INC.; THE PARSONS COMPANY; CLAY PARSONS; KAREN PARSONS; ARIZONA DEPARTMENT OF REVENUE; JILL H. FORD, Chapter 7 Trustee,

Appellees.

09/09/2020	☐ 1 27 pg, 952.41 KB	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. SEND MQ: Yes. Setting schedule as follows: Appellants Donald Hugh Nichols and Jane Ann Nichols Mediation Questionnaire due on 09/16/2020. Appellants Donald Hugh Nichols and Jane Ann Nichols opening brief due 11/02/2020. Appellees Arizona Department of Revenue, Jill H. Ford, Marana Stockyard & Livestock Market, Inc., Clay Parsons, Karen Parsons and The Parsons Company answering brief due 12/02/2020 Appellant's optional reply brief is due 21 days after service of the answering brief. [11818240] (BG) [Entered: 09/09/2020 04:59 PM]
09/10/2020	☐ 2 283 pg, 13.5 MB	Filed (ECF) Appellants Donald Hugh Nichols and Jane Ann Nichols Motion to stay lower court action. Date of service: 09/10/2020. [11818712] [20-60043] (Yusufov, German) [Entered: 09/10/2020 10:07 AM]
09/15/2020	☐ 3 9 pg, 218.55 KB	Filed clerk order (Deputy Clerk: TSP): Order to show cause docket fee due [11825269] (TSP) [Entered: 09/15/2020 04:37 PM]
09/16/2020	☐ 4	BAP Payment of docket fee received. Receipt #4709004637, check #2106. Date paid: 09/16/2020. Amount paid: USD 505.00. Fee status: [Case Number 20-60043: Paid]. [11826685] (JR) [Entered: 09/16/2020 03:39 PM]
09/16/2020	☐ 5 2 pg, 81.39 KB	Filed (ECF) Appellants Donald Hugh Nichols and Jane Ann Nichols Mediation Questionnaire. Date of service: 09/16/2020. [11826704] [20-60043] (Yusufov, German) [Entered: 09/16/2020 03:50 PM]
09/16/2020	☐ 6	The Mediation Questionnaire for this case was filed on 09/16/2020. To submit pertinent **confidential** information directly to the Circuit Mediators, please use the following **link**. Confidential submissions may include any information relevant to mediation of the case and settlement potential, including, but not limited to, settlement history, ongoing or potential settlement discussions, non-litigated party related issues, other pending actions, and timing considerations that may impact mediation efforts.[11826974]. [20-60043] (AD) [Entered: 09/16/2020 06:44 PM]
09/21/2020	☐ 7 509 pg, 9.6 MB	Filed (ECF) Appellees Marana Stockyard & Livestock Market, Inc., Clay Parsons, Karen Parsons and The Parsons Company response to motion ([2] Motion (ECF Filing), [2] Motion (ECF Filing) motion to stay lower court action). Date of service: 09/21/2020. [11831896] [20-60043] (Winkelman, D.) [Entered: 09/21/2020 06:24 PM]
09/25/2020	☐ 8 2 pg, 5.92 KB	Filed (ECF) Appellees Marana Stockyard & Livestock Market, Inc., Clay Parsons, Karen Parsons and The Parsons Company Correspondence: Amended Certificate of Service. Date of service: 09/25/2020 [11836701] [20-60043] (Winkelman, D.) [Entered: 09/25/2020 09:22 AM]
09/28/2020	☐ 9 312 pg, 9.81 MB	Filed (ECF) Appellants Donald Hugh Nichols and Jane Ann Nichols reply to response (). Date of service: 09/28/2020. [11840069] [20-60043] (Yusufov, German) [Entered: 09/28/2020 07:39 PM]
09/28/2020	☐ 10 2 pg, 128.03 KB	Filed (ECF) Appellants Donald Hugh Nichols and Jane Ann Nichols Correspondence: Amended certificate of service re: Motion to Stay. Date of service: 09/28/2020 [11840073] [20-60043] (Yusufov, German) [Entered: 09/28/2020 07:50 PM]
09/28/2020	☐ 11 2 pg, 136.61 KB	Filed (ECF) Appellants Donald Hugh Nichols and Jane Ann Nichols Correspondence: Amended certificate of service re: Reply to Motion to Stay. Date of service: 09/28/2020 [11840075] [20-60043] (Yusufov, German) [Entered: 09/28/2020 07:51 PM]
10/06/2020	☐ 12 5 pg, 171.36 KB	MEDIATION CONFERENCE SCHEDULED - DIAL-IN Assessment Conference, 10/15/2020, 2:00 p.m. PACIFIC Time. The briefing schedule previously set by the court remains in effect. See order for instructions and details. [11849975] (CL) [Entered: 10/06/2020 05:46 PM]
10/15/2020	☐ 13 1 pg, 126.61 KB	Filed order (WILLIAM A. FLETCHER and JAY S. BYBEE) Appellants' opposed motion for a stay pending appeal (Docket Entry No. [2]) is denied. See Nken v. Holder, 556 U.S. 418 (2009). The opening brief and excerpts of record are due November 12, 2020; the answering brief is due December 14, 2020; and the optional reply brief is due within 21 days after service of the answering brief. [11860642] (OC) [Entered: 10/15/2020 04:00 PM]
10/29/2020	☐ 14 1 pg, 92.57 KB	MEDIATION ORDER FILED: This case is RELEASED from the Mediation Program. Counsel are requested to contact the Circuit Mediator should circumstances develop that warrant settlement discussions while the appeal is pending. [11876569] (CL) [Entered: 10/29/2020 05:54 PM]
11/12/2020	☐ 15 88 pg, 677.28 KB	Submitted (ECF) Opening Brief for review. Submitted by Appellants Jane Ann Nichols and Donald Hugh Nichols. Date of service: 11/12/2020. [11890482] [20-60043]--[COURT UPDATE: attached corrected PDF of opening brief. 11/16/2020 by KT] (Yusufov, German) [Entered: 11/12/2020 01:21 PM]
11/12/2020	☐ 16 558 pg, 14.35 MB	Submitted (ECF) excerpts of record. Submitted by Appellants Donald Hugh Nichols and Jane Ann Nichols. Date of service: 11/12/2020. [11890503] [20-60043]--[COURT UPDATE: attached corrected PDFs of excerpts of record. 11/16/2020 by KT] (Yusufov, German) [Entered: 11/12/2020 01:25 PM]
11/16/2020	☐ 17 2 pg, 96.41 KB	Filed clerk order: The opening brief [15] submitted by Donald Hugh Nichols and Jane Ann Nichols is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: blue. The excerpts of record [16] submitted by Donald Hugh Nichols and Jane Ann Nichols are filed. Within 7 days of this order, filer is ordered to file 3 copies of the

		excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [11893970] (KT) [Entered: 11/16/2020 11:38 AM]
11/18/2020	☐ 18	Received 3 paper copies of excerpts of record [16] in 3 volume(s) filed by Appellants Donald Hugh Nichols and Jane Ann Nichols. [11899256] (LA) [Entered: 11/19/2020 11:29 AM]
11/18/2020	☐ 19	Received 6 paper copies of Opening Brief [15] filed by Donald Hugh Nichols and Jane Ann Nichols. [11899475] (SD) [Entered: 11/19/2020 01:10 PM]
11/19/2020	☐ 20	Received 6 additional paper copies of Opening Brief [15] filed by Donald Hugh Nichols and Jane Ann Nichols. [11900210] (SD) [Entered: 11/19/2020 05:13 PM]
12/14/2020	☐ 21 39 pg, 133.3 KB	Submitted (ECF) Answering Brief for review. Submitted by Appellees Marana Stockyard & Livestock Market, Inc., Clay Parsons, Karen Parsons and The Parsons Company. Date of service: 12/14/2020. [11926613] [20-60043] (Winkelman, D.) [Entered: 12/14/2020 02:36 PM]
12/14/2020	☐ 22 399 pg, 18.75 MB	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Marana Stockyard & Livestock Market, Inc., Clay Parsons, Karen Parsons and The Parsons Company. Date of service: 12/14/2020. [11926630] [20-60043] (Winkelman, D.) [Entered: 12/14/2020 02:39 PM]
12/15/2020	☐ 23 2 pg, 97.01 KB	Filed clerk order: The answering brief [21] submitted by Marana Stockyard & Livestock Market, Inc., et al. is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: red. The supplemental excerpts of record [22] submitted by Marana Stockyard & Livestock Market, Inc., et al. are filed. Within 7 days of this order, filer is ordered to file 3 copies of the excerpts in paper format securely bound on the left side, with white covers. The paper copies shall be submitted to the principal office of the Clerk. [11928027] (KT) [Entered: 12/15/2020 11:03 AM]
12/18/2020	☐ 24	Received 3 paper copies of supplemental excerpts of record [22] in 2 volume(s) and index volume filed by Appellees Marana Stockyard & Livestock Market, Inc., et al. [11933082] (LA) [Entered: 12/18/2020 01:34 PM]
12/18/2020	☐ 25	Received 6 paper copies of Answering Brief [21] filed by Marana Stockyard & Livestock Market, Inc., et al. [11933415] (SD) [Entered: 12/18/2020 03:55 PM]
01/04/2021	☑ 26 36 pg, 402 KB	Submitted (ECF) Reply Brief for review. Submitted by Appellants Jane Ann Nichols and Donald Hugh Nichols. Date of service: 01/04/2021. [11951470] [20-60043] (Yusufov, German) [Entered: 01/04/2021 02:59 PM]
01/04/2021	☐ 27 13 pg, 964.73 KB	Filed (ECF) Appellants Donald Hugh Nichols and Jane Ann Nichols Motion to strike portion of APPELLANTS' MOTION TO STRIKE FROM EXCERPTS OF RECORD DOCUMENTS IMPROPERLY SUBMITTED BY APPELLEE MARANA STOCKYARD & LIVESTOCK MARKET. Date of service: 01/04/2021. [11951495] [20-60043] (Yusufov, German) [Entered: 01/04/2021 03:09 PM]
01/05/2021	☐ 28 2 pg, 96.19 KB	Filed clerk order: The reply brief [26] submitted by Donald Hugh Nichols is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [11952766] (KT) [Entered: 01/05/2021 12:03 PM]
01/06/2021	☐ 29	Received 6 paper copies of Reply Brief [26] filed by Donald Hugh Nichols and Jane Ann Nichols. [11954516] (SD) [Entered: 01/06/2021 02:02 PM]
01/19/2021	☐ 30 5 pg, 13.3 KB	Filed (ECF) Appellees Marana Stockyard & Livestock Market, Inc., Clay Parsons, Karen Parsons and The Parsons Company response to motion ([27] Motion (ECF Filing), [27] Motion (ECF Filing)). Date of service: 01/19/2021. [11967740] [20-60043] (Winkelman, D.) [Entered: 01/19/2021 12:06 PM]
01/19/2021	☐ 31 2 pg, 103.9 KB	Filed clerk order (Deputy Clerk: GS): The appellants' motion (Docket Entry No. [27]) to strike portions of the supplemental excerpts of record, appellees' response at Docket Entry No. [30], and any further responses, are referred to the panel that will consider the merits of this case. Any discussion of the disputed materials in the parties' briefs may be stricken or disregarded if the merits panel grants the appellants' motion to strike. [11968772] (AF) [Entered: 01/19/2021 05:10 PM]
01/26/2021	☐ 32 5 pg, 249.92 KB	Filed (ECF) Appellants Donald Hugh Nichols and Jane Ann Nichols reply to response (). Date of service: 01/26/2021. [11982122] [20-60043] (Yusufov, German) [Entered: 01/26/2021 03:01 PM]
02/12/2021	☐ 33	This case is being considered for an upcoming oral argument calendar in Portland Please review the Portland sitting dates for July 2021 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not

		able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[12002673]. [20-60043] (KS) [Entered: 02/12/2021 03:21 PM]
02/16/2021	☐ 34	This case is being considered for an upcoming oral argument calendar in Portland. Please review the Portland sitting dates for June 2021 as well as the July 2021 dates as mentioned in the previous notice in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation). [12004278] (KJC) [Entered: 02/16/2021 12:34 PM]
03/17/2021	☐ 35	This case is being considered for an upcoming oral argument calendar in Portland Please review the Portland sitting dates for July 2021 and the 2 subsequent sitting months in that location at http://www.ca9.uscourts.gov/court_sessions. If you have an unavoidable conflict on any of the dates, please file Form 32 **within 3 business days of this notice** using the CM/ECF filing type **Response to Case Being Considered for Oral Argument**. Please follow the form's instructions carefully. When setting your argument date, the court will try to work around unavoidable conflicts; the court is not able to accommodate mere scheduling preferences. You will receive notice that your case has been assigned to a calendar approximately 10 weeks before the scheduled oral argument date. If the parties wish to discuss settlement before an argument date is set, they should jointly request referral to the mediation unit by filing a letter **within 3 business days of this notice**, using CM/ECF (**Type of Document**: Correspondence to Court; **Subject**: request for mediation).[12044094]. [20-60043] (KS) [Entered: 03/17/2021 10:21 AM]
04/25/2021	☐ 36	Notice of Oral Argument on Friday, July 9, 2021 - 12:00 P.M. - PO 2nd Floor Ctrm - Scheduled Location: Portland OR. The hearing time is the local time zone at the scheduled hearing location. View the Oral Argument Calendar for your case **here**. NOTE: Although your case is currently scheduled for oral argument, the panel may decide to submit the case on the briefs instead. *See* Fed. R. App. P. 34. Absent further order of the court, if the court does determine that oral argument is required in this case, any argument **will** be held with **all** attorneys appearing remotely by video or telephone. The court **strongly prefers** video arguments whenever possible. Travel to a courthouse will not be required. If the panel determines that it will hold oral argument, the Clerk's Office will be in contact with you directly at least two weeks before the set argument date to make any necessary arrangements for remote appearance. Be sure to review the GUIDELINES for important information about your hearing, including when to be available (30 minutes before the hearing time) and when and how to submit additional citations (filing electronically as far in advance of the hearing as possible). If you are the specific attorney or self-represented party who will be arguing, use the **ACKNOWLEDGMENT OF HEARING NOTICE** filing type in CM/ECF no later than 21 days before Friday, July 9, 2021. No form or other attachment is required. If you will not be arguing, do not file an acknowledgment of hearing notice.[12085831]. [20-60043] (KS) [Entered: 04/25/2021 06:09 AM]
04/26/2021	☐ 37	Filed (ECF) Acknowledgment of hearing notice by Attorney German Yusufov for Appellants Donald Hugh Nichols and Jane Ann Nichols. Hearing in Portland on 07/09/2021 at 12:00 P.M. (Courtroom: 2nd Floor Courtroom). Filer sharing argument time: No. Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 04/26/2021. [12086335] [20-60043] (Yusufov, German) [Entered: 04/26/2021 10:34 AM]
04/26/2021	☐ 38	Filed (ECF) Acknowledgment of hearing notice by Attorney D. Alexander Winkelman for Appellees Marana

Stockyard & Livestock Market, Inc., Clay Parsons, Karen Parsons and The Parsons Company. Hearing in Portland on 07/09/2021 at 12:00 P.M. (Courtroom: 2nd Floor Courtroom). Filer sharing argument time: No. (Argument minutes: 15.) Special accommodations: NO. Filer admission status: I certify that I am admitted to practice before this Court. Date of service: 04/26/2021. [12086652] [20-60043] (Winkelman, D.) [Entered: 04/26/2021 12:37 PM]

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- ( ) **Documents Only**

[x] **Include Page Numbers**

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Case No. 20-60043

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: DONALD HUGH NICHOLS and JANE ANN NICHOLS,

Debtors.

DONALD HUGH NICHOLS; JANE ANN NICHOLS,

Appellants,

v.

MARANA STOCKYARD & LIVESTOCK MARKET INC., ET AL.,

Appellees.

On Appeal from the United States Bankruptcy Appellate Panel
of the Ninth Circuit
BAP No. AZ-20-1032-TaLB

BK. Ct. No. 4:18-bk-09638-BMW

APPELLANTS' OPENING BRIEF

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FRAP 26.1 DISCLOSURE STATEMENT

There are no debtors not named in the caption of this appeal. There are no debtors that are corporations.

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STATEMENT OF JURISDICTION

Donald Hugh and Jane Ann Nichols ("Nichols" or "Debtors") appeal from the opinion and judgment of the Bankruptcy Appellate Panel of the Ninth Circuit, entered on August 12, 2020, affirming the Ruling and Order Regarding Motion to Convert and Motion to Dismiss entered by the bankruptcy court on January 30, 2020. The bankruptcy court had subject matter jurisdiction pursuant to 28 U.S.C. §§1334(a) and 157(a), and the general order of reference entered by the United States District Court for the District of Arizona (the "Court"). This Court has jurisdiction pursuant to 28 U.S.C. § 158(d). This appeal is from a final judgment, order, or decree. *See In re Victoria Station, Inc.*, 840 F.2d 682, 683 (9th Cir. 1988). Debtors timely filed their notice of appeal from the Bankruptcy Appellate Panel on September 2, 2020, in accordance with FRAP 4(a)(1) and 6.

ISSUES PRESENTED

1. In *In re Rosson*, 545 F.3d 764 (9th Cir. 2008), the 9th Circuit Court of Appeals held that a debtor's right to dismiss a previously-unconverted Chapter 13 bankruptcy case at any time, pursuant to 11 U.S.C. §1307(b), is qualified by a bankruptcy court's authority under 11 U.S.C. §105(a) to deny dismissal on grounds of bad faith conduct or "to prevent an abuse of process." Has the United States Supreme Court effectively overruled *Rosson* in *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188 (2014), where the

Supreme Court held that §105(a) does not allow a bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code?

2. 11 U.S.C. §1307(b) provides: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter." Does a bankruptcy court have authority to deny a debtor's 1307(b) right to dismiss a Chapter 13 bankruptcy case at any time, based on a finding of failure to file tax returns?
3. Under 11 U.S.C. §1307(b), does a bankruptcy court have authority to deny a debtor's right to dismiss a Chapter 13 bankruptcy case at any time, based on a finding of "abuse of process"?
4. Did the bankruptcy court err in finding "abuse of process," for purposes of denying the debtors' statutory right to dismiss a Chapter 13 bankruptcy case at any time, where the debtors were subjected to criminal charges after the bankruptcy was filed, thereafter acted on advice of criminal counsel throughout the bankruptcy proceedings, and utilized process afforded by judicial and statutory authority, and the bankruptcy court itself, to seek a stay of the bankruptcy proceedings, but were ultimately unsuccessful?

Pursuant to Circuit Rule 28-2.7, the pertinent statutes are reproduced in the Addendum.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

A. Background Of Case

Debtors filed for bankruptcy protection on August 10, 2018. Excerpts of Record (ER) 29, p. 520. Debtors were forced to file for bankruptcy due to financial pressures that had their origin in certain actions of their son Seth while in the employ of one of the Appellees herein, Marana Stockyard and Livestock Market Inc. (collectively with related appellees "Marana Stockyard" or "Creditor"), involving misappropriation of funds. At the time the bankruptcy was filed, a lawsuit was pending against Debtors and various other entities in state court, filed by Creditor, seeking to impose liability on Debtors for the actions of their son. ER 17. Debtors also had a third-party claim pending against Creditor's owners for fraud, related to the transfer of Debtors' home and another property to them. ER 25.

B. The Filing Of The Criminal Charges And Their Impact On The Bankruptcy Proceedings

On August 22, 2018, criminal charges were filed against Hugh Nichols, based on the same operative facts as those involved in the civil litigation. ER 18. The criminal charges have dominated over the bankruptcy proceeding since their filing, and have dictated Debtors' course of action in the bankruptcy. For example, Debtors had conceded to Creditor's request to have the bankruptcy court hear the

issues surrounding the propriety of the lis pendens recorded in conjunction with the state court third-party claim. ER 28, p. 518. Debtors stood to gain nothing from this hearing other than preservation of the status quo. Debtors were then forced to attend a Rule 2004 examination related to the hearing, because the bankruptcy court denied their request for a protective order. ER 27. At the hearing itself, Debtors followed the advice of their criminal counsel in invoking their Fifth Amendment rights, and, given that the criminal case considerations thus prevented them from testifying, had no choice but to abandon their claim. ER 24, pp. 371:12-372:13. Thus, Debtors' participation in the lis pendens hearing and invocation of the Fifth Amendment allowed Creditor to prevail effectively by default. As a consequence, Creditor's owners were able to receive in excess of one million dollars of Debtors' property. ER 26, p. 511.

On January 23, 2019, the criminal charges were amended to include Jane Nichols. ER 8. In addition, the government added a separate count based on the lis pendens issue that was heard in bankruptcy court. ER 7, p. 68; ER 19, p. 275. In other words, the government used Debtors' inability to testify due to the pending criminal charges to turn around and file additional criminal charges against Debtors based on their pursuit of a civil claim in court. This was a highly unusual move by the government, and required that any further actions in the bankruptcy case be squared with the criminal process. ER 7, p. 68.

It is worth noting that throughout these proceedings, Creditor has attempted to paint Debtors as all but guilty of the allegations against them, and as having filed for bankruptcy for an improper purpose. The bankruptcy court did not make such findings. *See Smallfield v. Home Ins. Co. of NY*, 244 F.2d 337, 341 (9th Cir. 1957) (appellate court cannot make new findings of fact). Additionally, as of the time the bankruptcy court issued its ruling (and as of the date of this brief) there has been no finding by any court that Debtors are in any way responsible for their son's conduct.[1] In fact, all criminal charges against Mrs. Nichols have been dismissed. ER 7, p. 69. Needless to say, the criminal allegations made against Mr. Nichols are not evidence of anything. *See U.S. v. Schanerman*, 150 F.2d 941, 945-6 (3rd Cir. 1945) (an indictment is a mere formal accusation and is not evidence of the facts charged therein or of guilt).

Based on the advice of criminal counsel, Debtors were unable to produce the information required to move the bankruptcy case forward, nor were they able to take any other affirmative actions until the ramifications of such actions on the criminal case were evaluated. ER 7; ER 8. Accordingly, consistent with the

[1] The numerous legal issues with Creditor's attempt to impose liability on Debtors for their son's conduct were briefed early on in the bankruptcy case. ER 26, pp. 481-486.

requests of criminal counsel, Debtors requested a stay of the bankruptcy proceedings.

The first request was made in response to a motion to lift the automatic stay filed by Creditor, in which it sought to proceed with litigation against Debtors in state court. ER 22, pp. 337-343. Creditor filed this motion on January 24, 2019, or the day after the new criminal charges were filed. ER 29, p. 525, DE 77. The bankruptcy court scheduled a hearing on this issue for April 2, 2019, or more than two months later. ER 29, p. 526, DE 82 and 86.

Creditor's tactics in the bankruptcy case explain why the case proceeded as it did. Since the filing of the criminal charges against Debtors, Creditor has tried to take advantage of the pending criminal case to recover on its asserted claim against Debtors without having to prove its merits. Creditor knew that if Debtors invoked the Fifth Amendment, that could give rise to an adverse inference, and Creditor could effectively get a default judgment. On the other hand, if Debtors were not to invoke the Fifth Amendment, that would undermine their rights in the criminal case. ER 7, 8. *See also Ohio v. Reiner*, 532 U.S. 17, 21, 121 S. Ct. 1252, 1254 (2001) ("one of the Fifth Amendment's basic functions is to protect *innocent* men who otherwise might be ensnared by ambiguous circumstances") (citations and quotations omitted, emphasis in original).

However, because litigation of the state law claims would necessarily adversely impact Debtors' constitutional rights, the non-debtor entities that were still parties to the state court case also filed a request to stay proceedings in that case. The state court granted the stay, finding that "it would substantially prejudice the rights of Donald and Jane Nichols and the rights of the companies of which they are the sole owners, investors or representatives and that those entities would not be able to legitimately mount a defense to Plaintiff's claims if Donald and/or Jane were not going to testify on behalf of the business entities due to the pending criminal charges against them." ER 15.[2] The practical effect of the stay granted by the state court was that Creditor could not proceed with its claims against Debtors until the criminal case was resolved, or until the state court stay was lifted.

After the state court imposed a stay pending resolution of the criminal case, Creditor orally withdrew its request for relief from the automatic stay during the April 2 hearing, thus preventing the bankruptcy court from ruling on Debtors' request to stay proceedings pending the conclusion of the criminal case. ER 21, pp. 330-331.

Instead, approximately thirty days later, on May 2, 2019, Creditor filed a motion to convert Debtors' bankruptcy case to Chapter 7 and "to deny any

[2] That stay expired in October 2019, and the new judge assigned to the case did not renew it.

subsequent motion to dismiss." ER 29, p. 526. The sequence of events is notable, because it is only after the state court prevented Creditor from obtaining a judgment while the criminal case was pending that Creditor decided to request conversion. Of course, once the case was converted, the trustee would take over Debtors' non-exempt assets, and Debtors would lose the means to defend against Creditor's claim on the merits (which is exactly what happened).

During the intervening time, Debtors' bankruptcy and criminal counsel were in the process of determining the appropriate way to deal with the bankruptcy in light of the still-pending criminal proceeding. ER 7, p. 69. Debtors then again sought a stay, suspension, or abstention (pursuant to 9th Circuit precedent and as permitted by 11 U.S.C. §305 and 28 U.S.C. §1334), seeking to proceed with the bankruptcy once the criminal case was concluded. ER 29, p. 527; ER 16. No party except for Creditor opposed this request. ER 13. Debtors also filed an opposition to the conversion request. ER 29, p. 527; ER 20. The bankruptcy court set the hearing for June 20, 2020. ER 29, p. 527, DE 93 and 95.

At the June 20 hearing, the bankruptcy court denied Debtors' request to stay proceedings, conditionally granted the conversion request, and postponed consideration of the dismissal issue until a later time. ER 13; ER 14, p. 217:11-19. Debtors then exercised their statutory right under 28 U.S.C. §158 to appeal the denial of their request to stay proceedings. ER 29, p. 528, DE 107. Debtors sought

a stay pending appeal from the bankruptcy court, as required to avoid mootness issues, which the court denied. ER 11. However, on its own initiative, and without a request by Debtors, the bankruptcy court granted an administrative stay to allow Debtors to seek a stay pending appeal from the district court. ER 4, pp. 35:26-36:4; ER 11. Debtors utilized this option made available to them by the bankruptcy court. ER 4, p. 36:3-4. Debtors also moved for dismissal under 11 U.S.C. §1307(b) in the event their stay request was denied. ER 10. The district court denied the request for stay pending appeal on October 24, 2019. ER 4, p. 36:5-7. Debtors immediately requested a hearing on the motion to dismiss.[3] The bankruptcy court set the hearing for January 14, 2020, or two and a half months later. ER 29, pp. 530-531, DE 143 and 155.

C. The Hearing On The Motion To Dismiss

The motion to dismiss was opposed by only two parties, Creditor and the Arizona Department of Revenue. At the hearing on the motion to dismiss, the bankruptcy court acknowledged that a debtor's right to dismiss is only limited by the 9th Circuit *Rosson* decision. ER 5, p. 505:13-17. The bankruptcy court noted that there had not been an evidentiary hearing to determine bad faith or abuse of process, and asked Creditor's counsel whether there is sufficient evidence in the

[3] Debtors made their request on the date the district court issued its ruling, but it took about two weeks for the bankruptcy court to provide a hearing date.

record to make findings required under *Rosson*. ER 6, p. 52:17-22. Creditor's counsel replied that the record was sufficient, but then immediately proceeded, for a duration equivalent to four transcript pages, to discuss matters not in the record in an effort to convince the bankruptcy court that Debtors' purpose in filing for and staying in the bankruptcy was "delay." ER 6, pp. 53:22-58:4. In the process, Creditor's counsel violated Fed. R. Evid. 408 by disclosing settlement discussions as evidence of liability, and, at the same time, misrepresented the substance of those settlement discussions. ER 6, pp. 55:6-56:4. Creditor's counsel then proceeded to express an opinion on the federal prosecutor's motivations in filing the superseding indictment. ER 6, p. 56:6-24. Here, Creditor's counsel offered testimony that contradicted the allegations in the superseding indictment and the record in the criminal case, suggested that Debtors' filing of the bankruptcy was one of the bases for the superseding indictment, and potentially implicated the federal prosecutor in a violation of the ethics rules. *Id*.; *see, e.g.* Ariz. R. S. Ct. 42, ER 3.8(a). The bankruptcy court acknowledged that all of these "facts" were not in the record, but, given how the court ultimately ruled, it appears that the court did in fact consider these allegations in making its ruling. ER 6, p. 61:19-21.

D. The Bankruptcy's Court Ruling On The Motion To Dismiss

In its ruling on the motion to dismiss, the bankruptcy court first concluded that the motion to dismiss was timely filed. ER 4, p. 38:1-4. The bankruptcy court then acknowledged that a debtor's right to dismiss under §1307(b) is limited only by the 9th Circuit's holding in *Rosson*. ER 4, p. 38:5-9. The bankruptcy court next correctly recognized that in determining bad faith, for purposes of determining whether dismissal may be denied pursuant to *Rosson* for bad faith conduct, a court is guided by the four factors set out in *In re Leavitt*, 171 F.3d 1219, 1224 (9th Cir. 1999). ER 4, p. 38:10-22. The bankruptcy court also noted, correctly, that there is no requirement that all four *Leavitt* factors must be present in order for the court to make a bad faith finding, or that all four factors must be weighed equally. ER 4, p. 38:25-27. However, the bankruptcy court did not discuss or analyze any of the *Leavitt* factors, and made no further mention of them. And the bankruptcy court did not find bad faith, and in fact made no further mention of bad faith at all. Instead, the bankruptcy court ruled that it must deny the request to dismiss to prevent "an abuse of the bankruptcy process." ER 4, p. 39:8-9. In support of this conclusion, the court stated that Debtors had been in bankruptcy for 17 months, that they should have known no later than February 4, 2019, that they would not be able to file their tax returns and would not be able to proceed in Chapter 13, faulted Debtors for opposing the motion to convert, and asserted that Debtors had used

Chapter 13 to hide from creditors during the pendency of the criminal proceedings. ER 4, p. 39:19-25.

The bankruptcy court then went further, and asserted that "[e]ven if dismissal under §1307(b) were an option, the Court would nevertheless exercise its discretion to convert this case pursuant to §§1307(c) and (e)." ER 4, p. 40:1-4.

E. The BAP Appeal

Debtors appealed to the Bankruptcy Appellate Panel (BAP), arguing that *Rosson* could not authorize denial of a §1307(b) motion to dismiss based solely on "abuse of process"; that *Rosson* was inconsistent with Supreme Court precedent even at the time it was decided, and has been effectively overruled by subsequent Supreme Court precedent; that there can be no abuse of process where a party uses process for its intended purpose, and does nothing more than carry out the process to its authorized conclusion; and that the bankruptcy court did not have discretion to deny the motion to dismiss absent specific authority to do so.

The BAP, while acknowledging the tension in its analysis, concluded that *Rosson* remains good law and authorized denial of the motion to dismiss. The BAP also affirmed on an alternative ground that denial of dismissal was authorized under §1307(e) for failure to file tax returns. Lastly, without addressing the legal authorities cited by Debtors, the BAP concluded that the bankruptcy court properly found abuse of process due to Debtors' "stalling efforts." This appeal followed.

STANDARD OF REVIEW

This Court "review[s] independently the decision of the bankruptcy court, showing no deference to the decision of the BAP." *In re Kadjevich*, 220 F.3d 1016, 1019 (9th Cir. 2000). The bankruptcy court's ruling on the motion to dismiss is reviewed for abuse of discretion. *In re Rosson*, 545 F.3d 764, 771 (9th Cir. 2008). "A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or makes factual findings that are illogical, implausible, or without support in inferences that may be drawn from the facts in the record." *In re Freeman*, 608 B.R. 228, 233 (9th Cir. B.A.P. 2019), *citing TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820, 832 (9th Cir. 2011). In this regard, even under the abuse of discretion standard, the bankruptcy court's legal conclusions are reviewed *de novo*. *See ECMC v. Mason*, 464 F.3d 878, 881 (9th Cir. 2006); *Rosson*, 545 F.3d at 771. Furthermore, mixed questions of law and fact are reviewed de novo, "because they require consideration of legal concepts and the exercise of judgment about the values that animate legal principles." *Graves v. Myrvang*, 232 F.3d 1116, 1120 (9th Cir. 2000). "A mixed question of law and fact occurs when the historical facts are established; the rule of law is undisputed…and the issue is whether the facts satisfy the legal rule." *In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997). Only factual finding are reviewed for clear error. *In re Rains*, 428 F.3d 893, 900 (9th Cir. 2005); *Rosson*, 545 F.3d at

771. Here, there are no facts in dispute, because the bankruptcy court did not hold an evidentiary hearing, and because the only evidence presented in conjunction with the motion at issue was by Debtors in the form of affidavits of their counsel. Accordingly, the bankruptcy court's legal conclusions and their application to this case are subject to de novo review.

SUMMARY OF ARGUMENT

The bankruptcy court erred as a matter of law by denying Debtors' motion to dismiss under 11 U.S.C. §1307(b). First, the authority on which the bankruptcy court relied, *Rosson*, was inconsistent with existing Supreme Court precedent even at the time it was decided, and has been effectively overruled in all relevant respects by subsequent Supreme Court precedent. Second, under the plain language of §1307(b), a debtor's right to dismiss may not be denied for "abuse of process." *Rosson*, even if it were still applicable, could not change this conclusion. Equally, the absolute right to dismiss under §1307(b) may not be denied based on failure to file tax returns, as the BAP ruled in the alternative. Third, the bankruptcy court did not have discretion to deny the motion to dismiss where §1307(b) provides none. And fourth, the bankruptcy court erred in finding "abuse of process" because there can be no abuse of process where, as here, a party uses process for its intended purpose, and does nothing more than carry out the process to its authorized conclusion.

ARGUMENT

A. The Limitations On The 11 U.S.C. §1307(b) Right To Dismiss Recognized In *Rosson* Are Contrary To Supreme Court Precedent

11 U.S.C. §1307(b) states:

> On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable. (Emphasis added).

In *Rosson*, the 9th Circuit held that a debtor's right to dismiss a previously-unconverted Chapter 13 bankruptcy case at any time, pursuant to §1307(b), is qualified by a bankruptcy court's authority under 11 U.S.C. 105(a)[4] to deny dismissal on grounds of bad faith conduct or "to prevent an abuse of process." 545 F.3d at 774. The sole basis for the 9th Circuit's finding of any exception at all to the right to dismiss, in contravention of the plain language of §1307(b), was the Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105 (2007). *See* 545 F.3d at 773. Accordingly, the *Marrama*

[4] §105(a) states: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

decision necessarily both elucidates, and sets the limits on, the scope of the exception to the right to dismiss that the *Rosson* court recognized.

In *Marrama*, a 5-4 decision, the Supreme Court addressed the right of a debtor to convert from Chapter 7 to Chapter 13 under 11 U.S.C. §706. The debtor in that case had concealed assets when filing for Chapter 7 bankruptcy, and when the concealment was discovered, sought to convert to Chapter 13. 549 U.S. at 368-9, 127 S.Ct. at 1108. The bankruptcy court had found that these facts established bad faith, and denied conversion. *Id*. at 370, 127 S.Ct. at 1109. As the Supreme Court stated the issue before it, it had granted certiorari to decide whether the Bankruptcy Code mandates the "procedural anomaly" that "even a bad-faith debtor has an absolute right to convert at least one Chapter 7 proceeding into a Chapter 13 case even though the case will thereafter be dismissed or immediately returned to Chapter 7." *Id*. at 368, 127 S.Ct. at 1107. The Court focused on two provisions: §706(a), which provides that a debtor may convert a previously-unconverted Chapter 7 case at any time, and §706(d), which provides that notwithstanding §706(a), a case may not be converted unless the debtor may be a debtor under the chapter to which she wants to convert. 549 U.S. at 371, 127 S.Ct. at 1109-10. The Court noted that a Chapter 13 case may be dismissed or converted based on a finding of bad faith. *Id*. at 373, 127 S.Ct. at 1110-1. The Court then held that a ruling that a Chapter 13 case should be dismissed or converted because of bad faith

conduct is tantamount to a ruling that the debtor does not qualify as a debtor under Chapter 13. *Id*. at 373-4, 127 S.Ct. at 1111. Accordingly, the Court concluded that where a Chapter 7 debtor has been found to have engaged in bad faith conduct, "[t]he text of §706(d) therefore provides adequate authority for the denial of his motion to convert." *Id*.

In dicta, the *Marrama* court noted that the authority granted to bankruptcy judges under §105(a) "to prevent an abuse of process" is "adequate to authorize an immediate denial of a motion to convert filed under §706 in lieu of a conversion order that merely postpones the allowance of equivalent relief." *Id*. at 375, 127 S.Ct. at 1111-2. This is the only reference to §105(a) or "abuse of process" in the entire opinion.

The court in *Rosson* focused on the dicta in *Marrama*, and treated it as *Marrama*'s primary holding, describing *Marrama* as "holding that the right to convert to Chapter 13 was impliedly limited by the bankruptcy court's power to take any action necessary to prevent bad-faith conduct or abuse of the bankruptcy process." 545 F.3d at 773. In fact, the *Rosson* court made sure to emphasize its view that "the important point established by *Marrama* is that even otherwise unqualified rights in the debtor are subject to limitation by the bankruptcy court's power under §105(a) to police bad faith and abuse of process." *Id*., fn. 12. The court then drew a parallel between the language of §706(a) and §1307(b), and,

given its interpretation of *Marrama*, concluded that a debtor's facially unequivocal right to dismiss a Chapter 13 case under §1307(b) was nevertheless limited by the court's §105(a) power. *Id*. at 773-4.

However, as the above-quoted language of the *Marrama* decision itself makes clear, the *Marrama* court was not stating that a bankruptcy court may deny relief mandated by statute "to prevent bad-faith conduct or abuse of the bankruptcy process." Rather, the *Marrama* court was stating only that §105(a) allows the court to skip a procedural step "that merely postpones the allowance of equivalent relief." 549 U.S. at 375, 127 S.Ct. at 1111-2. In *Marrama*, this extra procedural step was conversion to Chapter 13 where the debtor would not be able to remain in Chapter 13, and the Chapter 13 case could be reconverted or dismissed immediately upon conversion. *Id*.

The Supreme Court has subsequently made expressly clear that a bankruptcy court's §105(a) power "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code." *Law v. Siegel*, 571 U.S. 415, 421, 134 S.Ct. 1188, 1194 (2014). In *Law*, a unanimous decision, the Court held that §105(a) cannot be used to surcharge a statutory exemption based on the debtor's bad faith. *Id*. at 422-3, 134 S.Ct. at 1195. The Court specifically addressed the scope and import of the earlier *Marrama* decision. The Court explained that the *Marrama* ruling was rooted in the language of §706(d) and the

debtor's inability to satisfy the express condition of that provision, and that *Marrama* did not give bankruptcy courts authority to use equitable considerations to contravene express provisions of the Code. 571 U.S. at 425-6, 134 S.Ct. at 1197. The Court stated: "At most, *Marrama*'s dictum [regarding §105(a)] suggests that in some circumstances a bankruptcy court may be authorized to dispense with futile procedural niceties in order to reach more expeditiously an end result required by the Code. *Marrama* certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code." *Id.* U.S. at 426, 134 S.Ct. at 1197.

Simply put, the Supreme Court in *Law* expressly rejected the legal rationale underpinning the 9th Circuit's *Rosson* decision, that "even otherwise unqualified rights in the debtor are subject to limitation by the bankruptcy court's power under §105(a) to police bad faith and abuse of process." Because the legal rationale of *Rosson* has no continued validity after *Law*, *Law* effectively overruled *Rosson*. *See Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (holding that issues decided by the higher court need not be identical in order to be controlling, and where the relevant court of last resort has undercut the theory or reasoning underlying the

prior circuit precedent in such a way that the cases are clearly irreconcilable, the circuit precedent has been effectively overruled).[5]

[5] The BAP asserted that "*Law* reinforced that §105(a) could be used to avoid the 'futile procedural niceties in order to reach more expeditiously an end result required by the Code.'" ER 2, p. 19. Although the BAP did not elaborate on this statement further, it appears the BAP was attempting to draw a parallel between the procedural circumstances in *Marrama* (to which *Law* was referring by what it termed "futile procedural niceties") and the procedural circumstances in the instant case. As an initial matter, given the very equivocal language used by the Court in *Law*, it is doubtful that *Law* reinforced any use of §105(a) to short-circuit the provisions of the Code. *See* 571 U.S. at 426, 134 S.Ct. at 1197 ("At most, *Marrama*'s dictum suggests that in some circumstances a bankruptcy court may be authorized to dispense with futile procedural niceties...") (emphasis added).

More importantly, even if the *Law* Court had approved of such short-circuiting of the Code, it would have no relevance to the issues in the instant case. In *Marrama*, the extra procedural step was granting the debtor's motion to convert to Chapter 13 where the debtor would not be able to remain in Chapter 13, as, at least according to the majority, the case could be immediately reconverted or dismissed based on the finding of bad faith that the bankruptcy court had already made. 549 U.S. at 375, 127 S.Ct. at 1112*; but see id*. at 381, 127 S.Ct. at 1115 (Alito, J., dissenting). On the other hand, when the debtor requests dismissal, as in this case, the granting of the motion results in a complete termination of bankruptcy proceedings. Dismissal is thus not an intermediate procedural step that the bankruptcy court would have the authority to immediately nullify. In other words, the granting of a motion to dismiss can never be a "futile procedural nicety."

Lastly, as discussed in the body of the brief, *infra*, when a motion to dismiss is filed by the debtor under §1307(b), "an end result required by the Code" is dismissal. The plain language of the Code precludes conversion in such instances. Thus, §105(a) cannot be used in such cases to justify denial of the motion to dismiss or grant of a motion to convert. In fact, doing so would run directly afoul of the prohibition against using §105(a) to override explicit mandates of other sections of the Code. *Law*, 571 U.S. at 421, 134 S.Ct. at 1194.

This Court has not analyzed the relevant aspects of *Rosson* since the Supreme Court issued *Law*. The BAP pointed to *In re Clark,* 652 Fed. Appx. 543 (9th Cir. 2016), as evidence of *Rosson's* continued viability post-*Law*. *Clark* cited *Rosson* in support of its conclusion that a court can convert a Chapter 12 case over a debtor's motion to dismiss. However, *Clark* is a one-page memorandum decision with no analysis, and it appears that no one in that case had raised the Supreme Court's decision in *Law*. Moreover, this Court has adopted and followed the principles enunciated in *Law* in its own subsequent decisions. *See, e.g., In re Sisk*, 962 F.3d 1133, 1145 (9th Cir. 2020) (stating "[w]hatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code," and holding that where the Code does not mandate a fixed term requirement for Chapter 13 plans, debtors are not prevented from confirming plans with estimated duration). In light of this, *Clark* cannot be interpreted as reaffirming *Rosson* and thus creating a conflict between this Court's jurisprudence and Supreme Court precedent.

B. The Plain Language of §1307(b) Mandates Dismissal Upon A Debtor's Motion

Nevertheless, since the Supreme Court issued its ruling in *Law,* some lower courts, including the BAP in this case, have attempted to save the holding of *Rosson* that the right to dismiss under §1307(b) is not absolute. To do so, these

courts inevitably must resort to rewriting the analysis in *Rosson*. For example, in this case, the BAP stated: "This analysis [in *Rosson*] primarily centered on a holistic statutory construction of §1307(b) and (c) to conclude that a debtor's §1307(b) dismissal right is fairly limited by alternative 'for cause' grounds of abuse of process or bad faith for conversion under §1307(c)."[6] ER 2, p. 18. Of course, this assertion is belied by *Rosson* itself. The *Rosson* court's decision was not based on its interpretation of §1307(c), or a "holistic" construction of §§1307(b) and (c). In fact, *Rosson* only mentioned §1307(c) in acknowledging the existence of a potential conflict between §§1307(b) and (c), and the split in court decisions on the issue. 545 F.3d at 771. *Rosson* noted that the 9th Circuit BAP had adopted the "absolute right" approach in *In re Beatty*, 162 B.R. 853 (9th Cir. BAP 1994). However, *Rosson* then determined that *Marrama* was dispositive of the issue, and limited its analysis to what it perceived as *Marrama*'s holding that statutory rights are impliedly limited by a bankruptcy court's authority under §105(a). 545 F.3d at 773-4. *Rosson*'s only other reference to §1307(c) was in the context of discussing the issue of proper notice and hearing on a motion to convert.

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[6] §1307(c) provides:
"Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including…"

545 F.3d at 775. In short, *Rosson* did not hold, or even suggest, that §1307(c) limits the unequivocal language of §1307(b). Thus, *Rosson* does not support the attempt by some courts, including the BAP below, to read into §1307(c) a limitation on §1307(b).

Besides straying far from the ruling in *Rosson*, there is a more fundamental problem with the BAP's attempt to use §1307(c) to impose a bad faith/abuse of process limitation on §1307(b)—it violates basic principles of statutory interpretation. "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-4, 112 S.Ct. 1146, 1149 (1992). The plain language of §1307(b) states that the court "shall" dismiss the case on request of the debtor "at any time." This provision, by its plain terms, is not subject to or conditioned on §1307(c). Furthermore, it imposes a mandatory obligation on the court to take specific action—to dismiss—upon a debtor's request. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S.Ct. 956, 962 (1998) (noting that "shall" creates an obligation impervious to judicial discretion). Moreover, §1307(b) includes language expressly limiting its application to

previously-unconverted cases, indicating that Congress knew how to limit its scope if it had desired to do so. *Accord Law*, 571 U.S. at 424, 134 S.Ct. at 1196 (the "enumeration of exemptions and exceptions to those exemptions confirms that courts are not authorized to create additional exceptions"); *see also Toor v. Lynch*, 789 F.3d 1055, 1061 (9th 2015) (When Congress provides exceptions in a statute, the proper inference is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth). [7]

The BAP nevertheless stated that the use of the word "shall" in §1307(b) is not dispositive, citing in support *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 1301 (2000), for the proposition that it is "compelled to read the statute as a whole, to give meaning to all its provisions, and to aim for a coherent construction where facial differences exist." ER 2, p. 25. *Brown & Williamson* dealt with the authority of an administrative agency, the Food and Drug Administration, to regulate tobacco products as "drug delivery devices" under the Food, Drug, and Cosmetics Act. *Id.* at 131, 120 S.Ct. at 1300. Because the "case involve[d] an administrative agency's

[7] The BAP also stated that "Debtors' argument that §1307(b) has preferred status based on its position in the statute is not supported by any rule of statutory construction." ER 2, p. 25. Debtors made no such argument. What Debtors did argue is that the plain and unambiguous language of §1307(b), including its use of "shall" and "at any time," does not allow discretion, and makes clear that it is not subordinate to other subsections of §1307, including §1307(c).

construction of a statute that it administers," the Court, under its precedent, had to first determine "whether Congress has directly spoken to the precise question at issue," or if Congress instead left the question to the administrative agency's discretion. *Id*. at 132, 120 S.Ct. at 1300. It is in the context of making this determination, and in the context of determining the scope and meaning of statutorily-defined terms "drug" and "device," that the Court stated that "words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and that a court must "interpret the statute as a symmetrical and coherent regulatory scheme." *Id*. at 133, 120 S.Ct. at 1301 (internal citations and quotations omitted). The Supreme Court did not say that a court can ignore the plain meaning of simple words and phrases like "shall" and "at any time." In fact, as the Supreme Court has repeatedly stated, "when the statute's language is plain, the sole function of the court—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 1947 (2000) (interpreting § 506(c) of the Bankruptcy Code); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004) (holding that §330(a)(1) of the Bankruptcy Code does not allow compensation to debtors' attorneys). Enforcing §1307(b) according to its plain terms does not lead to an absurd result, as evidenced by the simple fact that multiple courts, including the 9th Circuit BAP in an earlier

decision, have done just that. *See In re Beatty*, 162 B.R. 853 (9th Cir. BAP 1994); *In re Barbieri*, 199 F.3d 616 (2d Cir. 1999); *In re Williams*, 435 B.R. 552, 559 (Bankr. N.D. Ill. 2010); *In re Procel*, 467 B.R. 297 (S.D.N.Y. 2012); *In re Sinischo*, 561 B.R. 176 (Bankr. D. Colo. 2016); *In re Marinari*, 610 B.R. 87 (E.D. Pa. 2019); *In re Fulayter*, 615 B.R. 808 (E.D. Mich. 2020). In the most recent of these cases, *In re Fulayter*, the court put it most plainly:

> As explained, §1307(b) permits a debtor to make a request to dismiss "at any time," and states unequivocally that if the debtor makes the request, the Court "shall dismiss." The statute does not make any exception to "any time" based on whether another motion is pending in the case, even if that motion alleges bad faith conduct by the debtor and requests conversion. "Any time" means any time. Under the plain language of §1307(b), it does not matter that [creditor] filed her Motion to Convert before [debtor] filed his Motion to Dismiss. Nor does it matter even if [debtor] filed the Motion to Dismiss in response to [creditor's] Motion to Convert. Section 1307(b) does not require a reason, does not ask why a debtor filed the motion, and does not limit in any way the time when a debtor may file the motion. The only exception is if the case was previously converted. Section 1307(b) could not be any more plain: the debtor can make the request "at any time" and the bankruptcy court "shall dismiss."

615 B.R. at 822. As the Supreme Court has admonished, it is beyond the province of the courts to redraft clear statutes to provide for what they might think is the preferred result. *Lamie*, 540 U.S. at 542, 124 S.Ct. at 1034; *see also Azar v. Alina Health Services*, 139 S. Ct. 1804, 1815 (2019) ("[C]ourts aren't free to rewrite clear statutes under the banner of [their] own policy concerns"); *In re Sisk*, 962 F.3d at 1145 ("We are not at liberty to alter the balance struck by the statute when

interpreting the [Bankruptcy] Code") (internal quotations and citations omitted); *Bobka v. Toyota Motor Credit Corporation*, 968 F.3d 946, 954 (9th Cir. 2020) ("We cannot depart from the most natural reading of the statutory text in order to advance our understanding of better policy").

Indeed, the BAP below, just like the other courts that have similarly tried to justify denial of a motion to dismiss under §1307(b) by reference to §1307(c), was not willing to follow its own rationale to its logical conclusion—while asserting that it is "compelled to read the statute as a whole," ER 2, p. 25, and that "[s]ection 1307(c) proffers a statutory basis to refuse to honor a §1307(b) dismissal request," ER 2, p. 21, the BAP nevertheless limited such authority to cases involving bad faith or abuse of process. ER 2, p. 25. Such a limitation is not present in §1307(c). If §1307(c) was to be read as imposing a limitation on §1307(b), contrary to the plain language of both provisions, then a debtor's motion to dismiss could be denied and the case converted to Chapter 7 for failure to pay the filing fee (§1307(c)(2)), failure to file a plan (§1307(c)(3)), or failure to make payments under the plan (§1307(c)(4)). Yet, as one court has observed, "courts agree almost unanimously that if a debtor requests dismissal under §1307(b) in response to a §1307(c) motion seeking conversion for any cause other than bad faith, §1307(b) governs and the debtor's request to dismiss must be granted." *In re Williams*, 435 B.R. at 559. This is further evidence that the approach taken by the BAP below

was not based on its interpretation of §1307(b) or (c), but was instead an attempt to impose an extra-statutory limitation on §1307(b), or to issue a policy pronouncement in the guise of interpreting the statute.

1. A circuit split exists on the interpretation of §1307(b), but the rulings by circuits limiting the right to dismiss are contrary to current Supreme Court precedent

Only three other courts of appeals have addressed the specific issue of the right to dismiss under §1307(b). In *In re Molitor*, 76 F.3d 218, 220 (8th Cir. 1996), the 8th Circuit concluded that a motion to dismiss under §1307(b) could be denied, and the case converted under §1307(c), for bad faith. In doing so, the court appealed to the "broad purpose" of the Bankruptcy Code, which the court described as "to afford the honest but unfortunate debtor a fresh start." *Id*. The 8th Circuit also relied on the principle of statutory interpretation it adopted in an earlier decision, under which the words of a statute were to be interpreted in light of the statute's object and policy. *Id*., *citing In re Graven*, 936 F.2d 378, 385 (8th Cir. 1991).

In *In re Barbieri*, the 2nd Circuit Court of Appeals held that the right to dismiss under §1307(b) is absolute. 199 F.3d at 622-3. The 2nd Circuit followed the principles of statutory interpretation discussed in section B above, finding that the language of §1307(b) is unambiguous and requires dismissal if a debtor requests it "at any time." *Id*. at 619. The 2nd Circuit rejected the district court's

reliance on §105(a) to reach a different conclusion, holding, as the Supreme Court subsequently confirmed, that §105(a) is "not a license for a court to disregard the clear language and meaning of the bankruptcy statutes." *Id*. at 620-1. The 2nd Circuit also rejected the *Molitor* court's appeal to the purpose of the Bankruptcy Code and its desire to prevent abuse of the bankruptcy process, stating: "our concerns about abuse of the bankruptcy system do not license us to redraft the statute." *Id*. at 621. The 2nd Circuit also noted that the concern with abuse was unwarranted, explaining that dismissal restores all creditors to the rights they had before bankruptcy and removes all protections from the debtor, and that the court has statutorily-authorized means to address actual abuse without ignoring or rewriting §1307(b). *Id*.

In the third case, *In re Jacobsen*, 609 F.3d 647, 660 (5th Cir. 2010), the 5th Circuit ruled that a bankruptcy court has discretion to convert despite a §1307(b) motion to dismiss where a debtor acted in bad faith or abused the bankruptcy process. The *Jacobsen* court largely followed the reasoning of *Rosson* and adopted the same interpretation of *Marrama* as holding "that an apparently unqualified right is subject to an exception for bad faith and that bad faith justifies a bankruptcy court's exercise of its power under §105." *Id*. at 661.

Notably, both cases holding that §1307(b) is not absolute were decided prior to the Supreme Court's decision in *Law*. As discussed earlier, *Law* expressly

rejected the rationale relied upon by the 5th Circuit in *Jacobsen*. 571 U.S. at 426, 134 S.Ct. at 1197. Moreover, the Supreme Court has repeatedly rejected the approach taken by the 8th Circuit in *Molitor*, of modifying the plain meaning of a statute by reference to the statute's object and policy. *See Connecticut Nat. Bank*, 503 U.S. at 253-4, 112 S.Ct. at 1149; *Hartford Underwriters*, 530 U.S. at 6, 120 S.Ct. at 1947; *Lamie*, 540 U.S. at 542, 124 S.Ct. at 1034; *Azar*, 139 S. Ct. at 1815. Nevertheless, because the BAP in this case also appealed to the broad purpose of the Bankruptcy Code in rejecting the plain reading of §1307(b), this issue is addressed in more detail in the next section.

2. The purpose of the Bankruptcy Code is consistent with the language of §1307(b), but even if it were not, could not override the plain language of the statute

In justifying its ruling, the BAP stated that limiting the right to dismiss based on bad faith or abuse of process is consistent with the objectives of the Bankruptcy Code. ER 2, p. 22. The BAP asserted that "the purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start" and "§1307(b) should not be used 'as an escape hatch' by a dishonest debtor to avoid the repercussions of bad faith conduct or abuse of process once a §1307(c) conversion motion is filed," citing to the 8th Circuit's *Molitor* decision. ER 2, p. 24.

As an initial matter, "[i]t is never [the court's] job to rewrite a constitutionally valid statutory text," and "[i]ndeed it is quite mistaken to

assume…that whatever might appear to further a statute's primary objective must be the law." *Yith v. Nielsen*, 881 F.3d 1155, 1164 (9th Cir. 2018) (internal citations and quotations omitted). Put simply, a court's view of a statute's purpose cannot override the statute's text.

Second, even if, arguendo, the purpose of the Code were relevant to statutory interpretation, interpreting §1307(b) to mean what it says is consistent with that purpose. The purpose identified by the BAP, and similar cases, is to give an honest but unfortunate debtor a fresh start, with the implication that a debtor who is not "honest" should not get that benefit. Yet when a debtor moves to dismiss a case under §1307(b), he is not seeking to get the benefit of a "fresh start." To the contrary, he is withdrawing from the process entirely, and returning to the pre-bankruptcy status quo, with all attendant ramifications. As explained by the 2nd Circuit in *Barbieri*,

> by voluntarily dismissing a Chapter 13 petition, the debtor indicates that he is prepared to limit his rights and remedies to those available in state court. Creditors will be free to pursue any cause of action they might have had under the Bankruptcy Code in state forums immediately upon dismissal of these proceedings for the reason that the automatic stay no longer remains in effect. Moreover, under 11 U.S.C. §108(c), which tolls statutes of limitation during the pendency of a bankruptcy proceeding, there is no danger that a creditor would be barred from bringing a cause of action.

199 F.3d at 621 (internal citations and quotations omitted); *accord In re Fulayter*, 615 B.R. at 819 (that a debtor may not be within the class of debtors entitled to

bankruptcy relief does not preclude him from dealing with his creditors outside of bankruptcy); *In re Marinari*, 610 B.R. at 93 ("Abiding by §1307(b)'s text does not make Chapter 13 a haven for unscrupulous debtors. In dismissing a Chapter 13 proceeding, a court does not discharge the debtor's debts; it restores the pre-bankruptcy status quo, and creditors may use other avenues to collect on the debt").

Third, interpreting §1307(b) as the BAP did would actually conflict with the purpose reflected in the language of the Code. Chapter 13 was intended to be a purely voluntary chapter. *See Barbieri,* 199 F.3d at 620; 11 U.S.C. §303(a) (not allowing Chapter 13 to be commenced involuntarily). Congress specifically provided a procedure for forcing an unwilling debtor into Chapter 7, but that procedure requires creditors to comply with a number of requirements beyond simply showing cause. 199 F.3d at 620; *see also* 11 U.S.C. §303. As aptly explained by the 2nd Circuit, "to allow a creditor to convert a Chapter 13 case to a Chapter 7 liquidation notwithstanding a pending motion to dismiss filed by the debtor would permit the creditor to effectuate an involuntary petition without the need to satisfy the requisites of §303.... Such a result flies in the face of the voluntary nature of Chapter 13 and circumvents the standards for an involuntary liquidation set forth in §303." 199 F.3d at 620 (internal quotations and citations omitted).

Fourth, the facts of this case illuminate the pitfalls of trying to modify the meaning of a statute based on the court's view of its purpose. The BAP asserted that denial of the motion to dismiss here was proper because §1307(b) should not be used by a "dishonest" debtor as an "escape hatch." ER 2, p. 24. The bankruptcy court in this case did not find that Debtors acted in bad faith, committed fraud, or made a false statement. Rather, the bankruptcy court determined that Debtors committed abuse of process by opposing the motion to convert and seeking to stay the bankruptcy. ER 4, p. 39:19-25. However, all of the actions that the bankruptcy court cited as the basis for its finding of abuse of process were taken pursuant to statutory and judicial authority (*see infra*, section F, for a detailed discussion of this issue). Characterizing Debtors as "dishonest" for simply seeking statutorily- and judicially-authorized relief from the court, albeit unsuccessfully, stretches the meaning of the term "dishonest" beyond any reasonable bounds. If a court is allowed to modify the purpose of a statute in such a fashion to fit its preferred interpretation of the statute's language, then a court can effectively substitute its own policy preferences for both the language of the statute and the legislature's intent in promulgating the statute, thus usurping the authority of the legislature to make laws.

Fifth, the legislative history of §1307(b) supports the plain reading of this provision, and the conclusion that it was intended to provide the debtor an absolute

right to dismiss. The Senate Report on this subsection states: "Subsection[] (b) [of §1307] confirm[s], without qualification, the right[] of a Chapter 13 debtor...to have the Chapter 13 case dismissed." *In re Jacobsen*, 609 F.3d at 660, *quoting* S. REP. NO. 95-989, at 141 (1978), U.S.Code Cong. & Admin. News 1978, at p. 5927. Therefore, to the extent that appealing to the purpose of the Bankruptcy Code is intended to be a means of effectuating legislative intent, the legislative intent is effectuated by interpreting §1307(b) according to its plain terms.

In summary, a court's view of the purpose of the Bankruptcy Code cannot override the plain language of §1307(b). In any case, interpreting §1307(b) to mean what it says, and to require dismissal upon a debtor's motion, is consistent with the purpose of the Code and with the legislative intent.

C. The Bankruptcy Court Did Not Have Authority To Deny The Motion To Dismiss For Abuse Of Process

From the preceding discussion it should be clear that the bankruptcy court did not have authority to deny Debtors' motion to dismiss based on its finding of "abuse of process," because §1307(b) is unequivocal and provides an absolute right to dismiss a previously-unconverted case. The BAP pointed to §1307(c) as the source for an "abuse of process" limitation on §1307(b). ER 2, p. 20 fn. 5. However, as discussed in section B, *supra*, §1307(c) is not a limitation on §1307(b). Thus, regardless of whether "abuse of process" can be "cause" under

§1307(c), an issue that does not appear to have been addressed by any court prior to the BAP here, the right to dismiss under §1307(b) is not limited by §1307(c).

Moreover, even if aspects of *Rosson* had continued validity post-*Law*, the bankruptcy court still could not deny Debtors' motion to dismiss based solely on a finding of abuse of process. *Rosson* did not rewrite the statute. Section 1307(b) still says that the court "shall" dismiss the case on the request of the debtor made "at any time." Nor did *Rosson* hold that §1307(c) can override §1307(b). The only basis for the finding of any exception at all to the right to dismiss was the Supreme Court's *Marrama* decision. 545 F.3d at 773. However, as discussed in section A, *supra*, even at the time it was decided, *Marrama* did not recognize an "abuse of process" exception to a debtor's otherwise-unequivocal statutory rights. At most, the "abuse of process" that *Marrama* authorized a court to remedy was an extra procedural step "that merely postpones the allowance of equivalent relief." 549 U.S. at 375, 127 S.Ct. at 1111-2. Dismissal under §1307(b), however, is not an extra procedural step that postpones equivalent relief. *See supra* p. 29 fn. 5. Because *Rosson* is based solely on *Marrama*, even under *Rosson* the bankruptcy court was not authorized to deny dismissal based on its finding of abuse of process.

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D. The Bankruptcy Court Did Not Have Authority To Deny The Motion To Dismiss For Failure To File Tax Returns

The BAP affirmed the bankruptcy court on the alternative ground that the bankruptcy court was authorized to deny Debtors' motion to dismiss and to convert under §1307(e)[8], for failure to file tax returns. In bankruptcy court, the argument that §1307(e) limited the right to dismiss under §1307(b) was raised only by the Arizona Department of Revenue in opposing Debtors' motion to dismiss, and in response Debtors had fully briefed the issue, explaining why §1307(e) is not a limitation on §1307(b). ER 9, pp. 84-88. The bankruptcy court chose not to address or rule on this issue.[9] Nevertheless, in affirming on this alternative ground,

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[8] §1307(e) states:
"Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate."

[9] The bankruptcy court's conclusion that the §1307(b) right to dismiss is not absolute was based solely on *Rosson*. ER 4, p. 39:5-6. In fact, the bankruptcy court specifically stated that the motion to dismiss must be denied to "prevent an abuse of the bankruptcy process." ER 4, p. 39:8-9. The bankruptcy court did not rule that §1307(e) overrides §1307(b). While the bankruptcy court noted that it had previously determined that conversion was proper under §1307(c) and (e), ER 4, p. 39:7-8, Debtors were not challenging the court's findings under those subsections, but were rather arguing that they were entitled to dismissal under §1307(b) irrespective of those findings. The only discussion even remotely relevant to the impact of §1307(e) on Debtors' right to dismiss under §1307(b) was in the following statement: "[e]ven if dismissal under §1307(b) were an option, the Court would nevertheless exercise its discretion to convert this case pursuant to

the BAP asserted that Debtors waived any challenge to the bankruptcy court's conversion under §1307(e) by not addressing it in their opening brief. However, it is a matter of common sense that an appellant is only required to address the ruling that the lower court actually made, not alternative rulings that the lower court could have, but did not, make. Because the bankruptcy court did not rule that §1307(b) is limited by §1307(e), Debtors were not required to address this issue in their opening brief on appeal, and therefore did not waive it.

Turning to the merits, the interrelationship between §§1307(b) and (e) is an issue of first impression for this Court, and does not appear to have been addressed by any other circuit court. However, basic principles of statutory interpretation, as well as existing precedent, dictate that §1307(e) does not alter the plain language of §1307(b).

The primary principle of statutory interpretation is that the plain language of the statute controls. *Connecticut Nat. Bank*, 503 U.S. at 253-4, 112 S.Ct. at 1149; see also *Azar*, 139 S. Ct. at 1815. "Courts are especially bound to pay heed to plain language of statute, where language has been subject of repeated statutory

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§§1307(c) and (e) given the circumstances of this case." ER 4, p. 40:1-4. As is evident from this passage, the bankruptcy court did not interpret §1307(e), did not limit its claimed discretion to §1307(e), and did not distinguish between §1307(c) and (e) in claiming discretion. The bankruptcy court's asserted discretion to deny a motion to dismiss is discussed in the next section. It was also addressed in the opening brief in the BAP appeal.

amendments." *I.N.S. v. Hector*, 479 U.S. 85, 90, 107 S.Ct. 379, 382 (1986). Similarly, "the purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone" and "[t]he best evidence of that purpose is the statutory text." *W. Virginia Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 98, 111 S.Ct. 1138, 1147 (1991), *superseded by statute as stated in Landgraf v. USI Film Products*, 511 U.S. 244, 251, 114 S.Ct. 1483, 1490 (1994); *see also Pedden v. United States*, 145 Fed. Cl. 785, 798 (2019) (same); *World Fuel Services Trading, DMCC v. M/V Hebei Shijiazhuang*, 12 F. Supp. 3d 792, 806 (E.D. Va. 2014) (same).

Furthermore, "it is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Bobka*, 968 F.3d at 951. If two statutory provisions can otherwise be reconciled, a court should not read a later amendment as an exception to an established general statute. *Strawser v. Atkins*, 290 F.3d 720, 734 (4th Cir. 2002), *citing Tennessee Valley Authority v. Hill*, 437 U.S. 153, 98 S. Ct. 2279 (1978). *See also Steffler v. Johnson*, 121 F.2d 447, 448 (9th Cir. 1941) (an amended statute is to be understood in the same sense exactly as if it had read from the beginning as it does amended).

Section 1307(b) has remained unchanged since at least 1984[10]. The plain language of that section states that upon the request of a debtor "at any time," the court "shall dismiss" the Chapter 13 case. As discussed in section B, *supra*, the language of this provision is plain and unambiguous, and it must therefore be interpreted according to its terms. Section 1307(e) was added in 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). While adding §1307(e), and extensively amending the Bankruptcy Code in other respects, Congress chose not to modify §1307(b), and in particular did not remove or modify the provision requiring the case to be dismissed on request by the debtor made at "any time." If it was Congress's intent to create a new limitation on the debtor's right to dismiss, it could have easily done so by removing the clause "at any time," or by otherwise expressly providing that the right to dismiss terminates once a motion under §1307(e) is filed. Congress did not do so. *Accord W. Virginia Univ. Hosps.*, 499 U.S. at 99, 111 S.Ct. at 1147 (stating, in rejecting the argument that a statute shifting "attorney's fees" covered expert witness fees, that Congress could have easily provided for "attorney's fees and expert witness fees," or "reasonable litigation expenses," if that is what it wanted to do). The fact that Congress left §1307(b) unchanged is clear indication

[10] A comma was added in 1984 after "time." Otherwise the provision has remained unchanged since the Bankruptcy Code was enacted in 1978.

that Congress did not intend §1307(e) to be a restriction on the debtor's right to dismiss under §1307(b)—where the statute is clear, the court must presume that Congress means what it says, especially where the statue has been the subject of repeated amendment. *Connecticut Nat. Bank*, 503 U.S. at 253-4, 112 S.Ct. at 1149; *Hector*, 479 U.S. at 90, 107 S.Ct. at 382. To read §1307(e) as a limitation on the right to dismiss under §1307(b), a court would have to entirely ignore the "at any time" clause in §1307(b), or to rewrite that clause to say something akin to "unless a motion is filed under §1307(e)." Neither approach is permissible, or consistent with the principles of statutory interpretation. *See Bobka*, 968 F.3d at 951; *Azar*, 139 S. Ct. at 1815.

The above interpretation is consistent with existing precedent interpreting §1307. Of note, prior to 2005, §1307 already contained subsection (c), which authorizes a court to dismiss or convert, whichever it determines to be in the best interests of creditors and the estate, on a motion of a party in interest, for cause. Prior to *Rosson*, courts in the 9th Circuit held that the right to dismiss under §1307(b) did not terminate by the filing of a motion to convert under §1307(c), and further held that the right to dismiss was absolute. *See Beatty*, 162 B.R. at 857. As discussed earlier, in *Rosson*, the 9th Circuit overruled *Beatty*'s holding that the right to dismiss was absolute, based on its interpretation of the Supreme Court's *Marrama* decision. 545 F.3d at 773. Notably, the *Rosson* court did not hold that a

case can be converted over the debtor's request to dismiss for any reason absent a finding of bad faith or abuse of process. In fact, courts agree almost unanimously that a motion to dismiss under §1307(b) supersedes a §1307(c) motion to convert for any cause other than bad faith. *Williams*, 435 B.R. at 559.

Section 1307(e) is parallel to §1307(c), on its face operates the same way (grants a right to a party other than the debtor to request dismissal or conversion), and contains largely identical language. The only difference between subsections (c) and (e) is that the former states that the court "may" dismiss or convert, while the latter states that the court "shall." However, on its face, this difference does not create a limitation on §1307(b), but rather addresses the scope of the court's discretion. Thus, when a motion is filed under subsection (c), the court "may" dismiss or convert, that is the court is not obligated to do so, and can instead allow the case to proceed. *See Lopez v. Davis*, 531 U.S. 230, 241, 121 S.Ct. 714, 722 (2001) (explaining that "may" denotes permission, but not duty, to act in accordance with the statute). On the other hand, when a motion is filed under subsection (e), the court must either dismiss or convert, and cannot allow the case to proceed. Both of these provisions are subject to the debtor's right under subsection (b) to dismiss "at any time." This reading gives meaning to every part of the statute, including, critically, the provision that the debtor may dismiss "at

any time." *See Bobka*, 968 F.3d at 951 (statute ought to be interpreted so that no words are rendered insignificant).

In fact, if §1307(e) were interpreted as superseding or creating a conflict with §1307(b), it would necessarily have to be interpreted as superseding or creating a conflict with §1307(a), which provides the debtor the right to convert to Chapter 7 at any time. *See In re DeFrantz*, 454 B.R. 108, 113 (9th Cir. BAP 2011) (right to convert under §1307(a) is absolute); *In re Rivera*, 517 B.R. 140, 144 (9th Cir. BAP 2014) (same). Thus, such an interpretation would have the effect of nullifying the words of not one, but two separate subsections of §1307.

While the principles of statutory interpretation are dispositive of the matter, the reading of §1307(e) as limiting the court's discretion, rather than creating a conflict with §1307(b), is also supported by the structure of the law that added §1307(e) to the Code, and by its legislative history. Section 1307(e) was added as part of Section 716 of BAPCPA, titled "Requirement to File Tax Returns to Confirm Chapter 13 Plans." *See* Bankruptcy Abuse and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23. As indicated in the title, the purpose of that section was to ensure that a chapter 13 plan not be confirmed unless the debtor files the required tax returns. To accomplish this, Section 716 added a new §1308 to the Code, setting out the deadlines for the filing of required tax returns. Section 716 also added a new subsection, §1325(a)(9), requiring compliance with §1308

for plan confirmation. Section 1307(e) also references the new §1308, and mandates conversion or dismissal where the debtor fails to comply with the requirements of §1308. The combination of these provisions, and their addition at the same time, make clear that §1307(e) was added to effectuate §1308, to work in tandem with §1325(a)(9), and to ensure that a debtor does not remain in Chapter 13 when he can no longer confirm a Chapter 13 plan. When a Chapter 13 plan cannot be confirmed, the case cannot move forward, and the only outcome is for the bankruptcy to be terminated, because otherwise it will remain in limbo indefinitely. Section 1307(e) ensures that the court terminates the bankruptcy in such situations, where the debtor has not done so voluntarily under §§1307(a) or (b).

The legislative history supports this conclusion. The House Report on the BAPCPA states, in relevant part:

> "Sec. 716. Requirement to File Tax Returns to Confirm Chapter 13 Plans. Under current law, a debtor may enjoy the benefits of chapter 13 even if delinquent in the filing of tax returns. Section 716 of the Act responds to this problem."

H.R. REP. 109-31(I), at 104, *reprinted in* 2005 U.S.C.C.A.N. 88, 167. As stated in the above quotation, the purpose of the amendments was to ensure that a debtor not "enjoy the benefits of chapter 13 even if delinquent in the filing of tax returns." Section 1307(e) accomplishes this by requiring termination of the Chapter 13 proceedings. However, nothing in the legislative history suggests that Congress

intended, in adding §1307(e), to override the debtor's right to voluntarily dismiss a Chapter 13 case under §1307(b), or the parallel right to voluntarily convert under §1307(a).

In summary, the BAP erred as a matter of law when it ruled that §1307(e) authorized the bankruptcy court to deny the motion to dismiss under §1307(b).

E. The Bankruptcy Court Did Not Have Discretion In Deciding Whether To Deny A Request To Dismiss Under §1307(b)

The bankruptcy court also asserted that it had discretion to deny the motion to dismiss and to convert the case under §1307(c) and (e) "[e]ven if dismissal under §1307(b) were an option." ER 4, p. 40:1-4. Notably, the court asserted this discretion as an additional basis for denying dismissal, after previously ruling that it could deny dismissal for "abuse of process." ER 4, p. 39:25-26. In other words, the bankruptcy court asserted to have such discretion even absent a finding of abuse of process. The bankruptcy court had no such discretion. This is evident from the unequivocal language of §1307(b), which does not give the court discretion, but mandates dismissal upon the debtor's motion. Moreover, even if *Rosson,* on which the bankruptcy court relied, still controlled, the bankruptcy court would not have had the discretion that it asserted. No matter how expansively one tries to read *Rosson*, under its plain language, the absolute right to dismiss is only

"qualified by the authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or 'to prevent an abuse of process.'" 545 F.3d at 774. *Rosson* did not recognize any other exceptions to the debtor's otherwise-absolute right to dismiss, and it certainly did not grant bankruptcy courts unfettered discretion to deny a motion to dismiss for any reasons they want, or to convert a case notwithstanding a motion to dismiss.

To support its claimed discretion to deny the motion to dismiss, the bankruptcy court cited to *Rosson* for the proposition that decisions to deny a request to dismiss are reviewed for abuse of discretion. ER 4, p. 40 fn. 5. However, this confuses the standard of review applied by an appellate court with the underlying substantive legal standard. The abuse of discretion standard simply means that the bankruptcy court's factual findings are given deference. *Rosson*, 545 F.3d at 771. It does not mean that the court can ignore the law, create its own legal standard, or ascribe to itself discretion to refuse to do something where the statute provides none. *Id*. A bankruptcy court necessarily abuses its discretion when it applies the wrong legal standard. *TrafficSchool.com,* 623 F.3d at 832. Because under § 1307(b), and even under *Rosson*, a bankruptcy court does not have discretion to deny a motion to dismiss, the bankruptcy court erred as a matter of law when it asserted to have such discretion.

F. The Bankruptcy Court Erred In Finding "Abuse Of Process," For Purposes Of Denying Debtors' Request To Dismiss Under §1307(b), Where Debtors Utilized Process Afforded By Judicial And Statutory Authority, And The Bankruptcy Court Itself, For Its Intended Purpose

The Supreme Court's decision in *Law* and the language of §1307(b) are dispositive and require reversal. However, even on the substantive question of whether the bankruptcy court properly found abuse of process, reversal would still be necessary. The Court should also address this issue because it is relevant to whether the bankruptcy court may impose sanctions upon dismissal.

As a preliminary matter, the BAP surprisingly asserted that Debtors waived the argument that evidence in the record was insufficient to find abuse of process because they failed to request an evidentiary hearing when the bankruptcy court questioned whether one was necessary. ER 2, p. 27 fn. 6. First, the bankruptcy court did not question Debtors on the matter, but Creditor's counsel. ER 6, p. 52:17-22. Second, Debtors did in fact argue that there was no evidence to support a finding of abuse of process. ER 9, pp. 78-83. More importantly, the BAP's assertion stands the legal standard on its head, as Debtors cannot "waive" the requirement that a court's findings be supported by evidence in the record. *See TrafficSchool.com,* 653 F.3d at 832.

In affirming the bankruptcy court, the BAP also relied on facts not relied upon by the bankruptcy court. For example, the BAP pointed to the request to stay

state court proceedings as evidence of "stalling," and concluded that this justified the finding of abuse of process. ER 2, pp. 4, 24. An appellate court cannot make new findings of fact. *Smallfield*, 244 F.2d at 341. Moreover, the state court had granted the stay request. It is baffling how a request for relief made in one court, and found warranted by that court, can be used to support a finding of abuse of process in proceedings in another court.

Turning to the merits, there does not appear to be 9th Circuit precedent analyzing what constitutes abuse of process under §105(a)[11] in the absence of bad faith or fraudulent conduct. However, this Court has discussed abuse of process multiple times in the tort context. As this Court explained, the gist of abuse of process is "misusing, or misapplying process justified in itself for an end other than that which it was designed to accomplish." *Lunsford v. American Guarantee & Liability Ins. Co.*, 18 F.3d 653, 655 (9th Cir. 1994) (internal quotations and citations omitted). This requires showing "[f]irst, an ulterior purpose, and second a wilful act in the use of the process not proper in the regular conduct of the proceeding." *Blue Goose Growers, Inc. v. Yuma Groves, Inc.*, 641 F.2d 695, 696 (9th Cir. 1981) (internal citations omitted); *Gowin v. Altmiller*, 663 F.2d 820, 824 (9th Cir. 1981) (same). "Some definite act or threat not authorized by the process, or aimed at an

[11] Section 105(a) is the provision of the Code authorizing a court to address "abuse of process."

objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions." *Blue Goose Growers*, 641 F.2d at 696; *accord In re Sisk*, 962 F.3d at 1150 ("it should also go without saying that debtors are not acting in bad faith merely for doing what the Code permits them to do") (internal quotations and citations omitted). Notably, in its ruling, the BAP entirely ignored this authority and did not address the applicable legal standard.

The bankruptcy court in this case did not find that Debtors abused process by filing the bankruptcy case. Rather, the bankruptcy court stated that Debtors should have known no later than February 4, 2019, that they would not be able to proceed in Chapter 13, and that Debtors abused process by their "stalling efforts in an impermissible attempt to remain in Chapter 13" after that date. ER 4, p. 39:19-25. However, the superseding indictment was filed on January 23, 2019, alleging, among other things, criminal violations based on proceedings in bankruptcy court. ER 19. As stated in the uncontroverted affidavit of Debtors' criminal counsel, this indictment required that any further actions in the bankruptcy case be squared with the criminal process. ER 7, p. 68. In fact, all subsequent steps taken by Debtors in the bankruptcy case were consistent with requests and advice of their criminal counsel. ER 7, pp. 68-69.

Furthermore, Debtors did nothing more than seek relief as authorized by law and by the bankruptcy court itself, and any delays in the resolution of their requests for relief were outside their control, or were specifically approved by the bankruptcy court.

Thus, on January 24, 2019, the day after the superseding indictment was filed, Creditor moved for stay relief in bankruptcy court. ER 29, p. 525, DE 77. Debtors opposed this motion because, among other things, it constituted a violation of the settlement agreement reached during the November 1, 2018, hearing, as part of which Creditor agreed that Debtors will be able to decide whether to resolve Creditor's state court lawsuit in bankruptcy court or state court. ER 22, p. 334:10-18; ER 23, p. 348. In conjunction with the opposition, Debtors requested the bankruptcy court to issue a stay pending the conclusion of the criminal case, pursuant to 9th Circuit authority. ER 22, pp. 337-343. In filing the opposition and requesting a stay, Debtors were not using process for some ulterior purpose, but for an end that the process was specifically designed to accomplish. In other words, the purpose of the opposition was to enforce the earlier settlement agreement, and to request a stay of the bankruptcy proceedings. In fact, the state court granted a similar request for a stay pending the conclusion of the criminal case, which shows that beyond not being an abuse of process, the request for stay by Debtors was substantially justified. ER 15.

The bankruptcy court ultimately did not rule on the issue because Creditor withdrew the motion for stay relief at the last minute as a litigation tactic, to avoid the effect of the state court's issuance of a stay pending conclusion of the criminal case. ER 21, pp. 330-331. This did not happen until April 2, 2019. *Id*. However, Debtors had no control over this delay, as the timing of the hearing was determined by the bankruptcy court.

Creditor then filed a motion to convert, which Debtors opposed, and in conjunction filed a request for a stay pursuant to this Court's precedent, suspension of proceedings under 11 U.S.C. §305, or abstention under 28 U.S.C. §1334, until the resolution of the criminal case. ER 16. In finding abuse of process, the bankruptcy court faulted Debtors for opposing the motion to convert and for seeking the stay and related relief. However, it is not abuse of process to use process for its intended purpose, or "to carry out the process to its authorized conclusion." *Blue Goose Growers*, 641 F.2d at 696. Debtors had an absolute right to oppose the motion to convert both under the procedural rules, *see* Ariz. Bankr. LR 9013-1, and under basic principles of due process. Similarly, Debtors' stay request was filed for the purpose expressly stated therein, to obtain a stay, abstention, or suspension with respect to the bankruptcy proceedings. Moreover,

the request was made pursuant to explicit statutory and judicial authority.[12] *See Federal Sav. And Loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989); 11 U.S.C. §305; 28 U.S.C. §1334. ER 16. The bankruptcy court did not identify any ulterior purpose, or a willful act not proper in the regular conduct of the proceedings. The fact that Debtors' request for a stay and related relief was denied by the bankruptcy court does not make the filing of that motion an abuse of process—carrying out the process to its authorized conclusion is not abuse of process.

In this regard, the BAP missed the point by focusing on whether Debtors could invoke the 5th Amendment in the bankruptcy proceeding, and attempting to justify the finding of abuse of process based on its conclusion that they could not. ER 2, pp. 26-27. Debtors had requested a stay precisely to avoid "the quandary of choosing between waiving [their] Fifth Amendment rights or effectively forfeiting the civil case." *Ruszczyk v. Noor*, 349 F.Supp.3d 754, 761 (D. Minn. 2018); *Doe v. Sipper*, 869 F.Supp.2d 113, 116 (D.D.C. 2012) (same). ER 16. The bankruptcy court had denied the stay request. The question before the bankruptcy court on Debtors' motion to dismiss was not whether Debtors were entitled to invoke the 5th

[12] The BAP asserted that the stay was an "extraordinary request." ER 2, p. 8. Even if that characterization were accurate, low likelihood of success does not make the filing of a motion an abuse of process. *See Blue Goose Growers*, 641 F.2d at 696.

Amendment, and the bankruptcy court did not hold that Debtors abused process by invoking it. Rather, the bankruptcy court ruled that Debtors abused process by simply requesting the stay, as well as opposing the motion to convert. ER 4, p. 39:22-24.[13]

The hearing on the motions to convert and stay proceedings took place on June 20, 2019, and the ruling issued the same day. ER 13. Debtors had no control over the timing of the hearing, as it was determined by the bankruptcy court.

Debtors then exercised their statutory right pursuant to 28 U.S.C. §158 to appeal the bankruptcy court's denial of the stay and related relief. ER 29, p. 528, DE 107. As they were required to do in order to avoid a possible mootness issue, *see In re Thorpe Insulation Co.*, 677 F.3d 869, 881 (9th Cir. 2012), Debtors requested a stay pending appeal. ER 29, p. 528, DE 108. The bankruptcy court denied the request for a stay pending appeal, but, on its own initiative, granted an administrative stay to allow Debtors to seek a stay pending appeal from the district

[13] In addition, the cases cited by the BAP do not support the proposition that invocation of the 5th Amendment, even improperly, constitutes abuse of process. *In re McCormick*, 49 F.3d 1524 (11th Cir. 1995), dealt with whether confirmation of a Chapter 11 plan could be denied for bad faith based on the debtor's invocation of the 5th Amendment in an adversary proceeding, and the court held that it could not, and did not discuss abuse of process. In *In re Vaughan*, 429 B.R. 14 (D.N.M. 2010), the court held that refusal to answer questions at the meeting of creditors was cause to convert a Chapter 11 case, and also did not mention abuse of process.

court, provided that Debtors filed their motion with the district court within seven days. ER 11.

If the bankruptcy court believed that Debtors were engaging in delaying tactics by filing the appeal, then it certainly was not required to grant the administrative stay, especially after already denying Debtors' motion to stay pending appeal. However, the bankruptcy court did grant the administrative stay, and Debtors utilized this option made available to them by the bankruptcy court, and timely filed the motion to stay pending appeal with the district court. The hearing at which the administrative stay was issued took place on July 16, 2019. ER 12. From that point on, the bankruptcy case was stayed until the district court issued its ruling on the motion to stay pending appeal. That happened on October 24, 2019. ER 4, p. 36:8-9. Debtors immediately requested a hearing on their previously-filed motion to dismiss, which the bankruptcy court set for January 14, 2020. ER 29, pp. 530-531, DE 143 and 155. Debtors had no control over this hearing date. In short, any delay in the bankruptcy proceedings from July 16, 2019, until the bankruptcy court's ruling on the motion to dismiss, was brought about by the bankruptcy court's own order and by the bankruptcy court's scheduling priorities.

In short, Debtors used the administrative stay, that the bankruptcy court itself provided, for the express purpose for which the bankruptcy court granted it.

It cannot be an abuse of process to utilize process that the court itself makes available for the purpose for which it is made available.

In summary, the bankruptcy court's finding of abuse of process was wrong as a matter of law because the court applied the wrong legal standard. There can be no abuse of process where process is used for its intended purpose and a party does nothing more than carry out the process to its authorized conclusion. Debtors' used process for the purpose for which the process was expressly intended, the use of process was supported by judicial and statutory authority, there was no ulterior purpose, nor a willful act in the use of the process not proper in the regular conduct of the proceeding, and the bankruptcy court did not and could not find otherwise.

CONCLUSION

The bankruptcy court's ruling denying Debtors' motion to dismiss, filed pursuant to §1307(b), was contrary to both the 9th Circuit authority on which the court relied, and current Supreme Court precedent. The bankruptcy court also erred as a matter of law in finding abuse of process, because there can be no abuse of process where process is used for its intended purpose and Debtors did nothing more than carry out the process to its authorized conclusion. Accordingly, Debtors

respectfully request that this Court reverse the bankruptcy court's ruling, and order that this case be dismissed retroactive to the date of the bankruptcy court's ruling.

RESPECTFULLY SUBMITTED this 12th day of November, 2020.

YUSUFOV LAW FIRM PLLC

__/s/ German Yusufov_____
German Yusufov
Attorney for Appellants

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for Appellants is not presently aware of any related cases pending before this Court.

Date: November 12, 2020

YUSUFOV LAW FIRM PLLC

__/s/ German Yusufov_____
German Yusufov
Attorney for Appellants

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Date: November 12, 2020

YUSUFOV LAW FIRM PLLC

__/s/ German Yusufov_____
German Yusufov
Attorney for Appellants

ADDENDUM

11 U.S.C.A. § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest--

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, may issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that--

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title--

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C.A. § 303

§ 303. Involuntary cases

(a) An involuntary case may be commenced only under chapter 7 or 11 of this title, and only against a person, except a farmer, family farmer, or a corporation that is not a moneyed, business, or commercial corporation, that may be a debtor under the chapter under which such case is commenced.

(b) An involuntary case against a person is commenced by the filing with the bankruptcy court of a petition under chapter 7 or 11 of this title--

(1) by three or more entities, each of which is either a holder of a claim against such person that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount, or an indenture trustee representing such a holder, if such noncontingent, undisputed claims aggregate at least $16,750 [originally "$10,000", adjusted effective April 1, 2019][1] more than the value of any lien on property of the debtor securing such claims held by the holders of such claims;

(2) if there are fewer than 12 such holders, excluding any employee or insider of such person and any transferee of a transfer that is voidable under section 544, 545, 547, 548, 549, or 724(a) of this title, by one or more of such holders that hold in the aggregate at least $16,750 [originally "$10,000", adjusted effective April 1, 2019][1] of such claims;

(3) if such person is a partnership--

(A) by fewer than all of the general partners in such partnership; or

(B) if relief has been ordered under this title with respect to all of the general partners in such partnership, by a general partner in such partnership, the trustee of such a general partner, or a holder of a claim against such partnership; or

(4) by a foreign representative of the estate in a foreign proceeding concerning such person.

(c) After the filing of a petition under this section but before the case is dismissed or relief is ordered, a creditor holding an unsecured claim that is not contingent, other than a creditor filing under subsection (b) of this section, may join in the petition with the same effect as if such joining creditor were a petitioning creditor under subsection (b) of this section.

(d) The debtor, or a general partner in a partnership debtor that did not join in the petition, may file an answer to a petition under this section.

(e) After notice and a hearing, and for cause, the court may require the petitioners under this section to file a bond to indemnify the debtor for such amounts as the court may later allow under subsection (i) of this section.

(f) Notwithstanding section 363 of this title, except to the extent that the court orders otherwise, and until an order for relief in the case, any business of the debtor may continue to operate, and the debtor may continue to use, acquire, or dispose of property as if an involuntary case concerning the debtor had not been commenced.

(g) At any time after the commencement of an involuntary case under chapter 7 of this title but before an order for relief in the case, the court, on request of a party in interest, after notice to the debtor and a hearing, and if necessary to preserve the property of the estate or to prevent loss to the estate, may order the United States trustee to appoint an interim trustee under section 701 of this title to take possession of the property of the estate and to operate any business of the debtor. Before an order for relief, the debtor may regain possession of property in the possession of a trustee ordered appointed under this subsection if the debtor files such bond as the court requires, conditioned on the debtor's accounting for and delivering to the trustee, if there is an order for relief in the case, such property, or the value, as of the date the debtor regains possession, of such property.

(h) If the petition is not timely controverted, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed.

Otherwise, after trial, the court shall order relief against the debtor in an involuntary case under the chapter under which the petition was filed, only if--

(1) the debtor is generally not paying such debtor's debts as such debts become due unless such debts are the subject of a bona fide dispute as to liability or amount; or

(2) within 120 days before the date of the filing of the petition, a custodian, other than a trustee, receiver, or agent appointed or authorized to take charge of less than substantially all of the property of the debtor for the purpose of enforcing a lien against such property, was appointed or took possession.

(i) If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment--

(1) against the petitioners and in favor of the debtor for--

(A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith, for--

(A) any damages proximately caused by such filing; or

(B) punitive damages.

(j) Only after notice to all creditors and a hearing may the court dismiss a petition filed under this section--

(1) on the motion of a petitioner;

(2) on consent of all petitioners and the debtor; or

(3) for want of prosecution.

(k)(1) If--

(A) the petition under this section is false or contains any materially false, fictitious, or fraudulent statement;

(B) the debtor is an individual; and

(C) the court dismisses such petition,

the court, upon the motion of the debtor, shall seal all the records of the court relating to such petition, and all references to such petition.

(2) If the debtor is an individual and the court dismisses a petition under this section, the court may enter an order prohibiting all consumer reporting agencies (as defined in section 603(f) of the Fair Credit Reporting Act (15 U.S.C. 1681a(f))) from making any consumer report (as defined in section 603(d) of that Act) that contains any information relating to such petition or to the case commenced by the filing of such petition.

(3) Upon the expiration of the statute of limitations described in section 3282 of title 18, for a violation of section 152 or 157 of such title, the court, upon the motion of the debtor and for good cause, may expunge any records relating to a petition filed under this section.

11 U.S.C.A. § 305

§ 305. Abstention

(a) The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if--

(1) the interests of creditors and the debtor would be better served by such dismissal or suspension; or

(2)(A) a petition under section 1515 for recognition of a foreign proceeding has been granted; and

(B) the purposes of chapter 15 of this title would be best served by such dismissal or suspension.

(b) A foreign representative may seek dismissal or suspension under subsection (a)(2) of this section.

(c) An order under subsection (a) of this section dismissing a case or suspending all proceedings in a case, or a decision not so to dismiss or suspend, is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of title 28 or by the Supreme Court of the United States under section 1254 of title 28.

11 U.S.C.A. § 706

§ 706. Conversion

(a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

(b) On request of a party in interest and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 of this title at any time.

(c) The court may not convert a case under this chapter to a case under chapter 12 or 13 of this title unless the debtor requests or consents to such conversion.

(d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C.A. § 1307

§ 1307. Conversion or dismissal

(a) The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable.

(b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

(c) Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including--

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

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

(3) failure to file a plan timely under section 1321 of this title;

(4) failure to commence making timely payments under section 1326 of this title;

(5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan;

(6) material default by the debtor with respect to a term of a confirmed plan;

(7) revocation of the order of confirmation under section 1330 of this title, and

denial of confirmation of a modified plan under section 1329 of this title;

(8) termination of a confirmed plan by reason of the occurrence of a condition specified in the plan other than completion of payments under the plan;

(9) only on request of the United States trustee, failure of the debtor 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);

(10) only on request of the United States trustee, failure to timely file the information required by paragraph (2) of section 521(a); or

(11) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

(d) Except as provided in subsection (f) of this section, at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 11 or 12 of this title.

(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.

(f) The court may not convert a case under this chapter to a case under chapter 7, 11, or 12 of this title if the debtor is a farmer, unless the debtor requests such conversion.

(g) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C.A. § 1308

§ 1308. Filing of prepetition tax returns

(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4-year period ending on the date of the filing of the petition.

(b)(1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond--

(A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or

(B) for any return that is not past due as of the date of the filing of the petition, the later of--

(i) the date that is 120 days after the date of that meeting; or

(ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law.

(2) After notice and a hearing, and order entered before the tolling of any applicable filing period determined under paragraph (1), if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under paragraph (1) is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee under paragraph (1) for--

(A) a period of not more than 30 days for returns described in paragraph (1)(A); and

(B) a period not to extend after the applicable extended due date for a return described in paragraph (1)(B).

(c) For purposes of this section, the term "return" includes a return prepared pursuant to subsection (a) or (b) of section 6020 of the Internal Revenue Code of 1986, or a similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal.

11 U.S.C.A. § 1325

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if--

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

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

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that--

(I) the holder of such claim retain the lien securing such claim until the earlier of--

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;

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

(iii) if--

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder;

(6) the debtor will be able to make all payments under the plan and to comply with the plan;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation and that first become payable after the date of the filing of the petition if the debtor is required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.

For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day period preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--

(A) the value 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 plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the coronavirus disease 2019 (COVID-19), child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater 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 $750 [originally "$525", adjusted effective April 1, 2019][1] per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period"--

(A) subject to subparagraph (B), shall be--

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not 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 $750 [originally "$525", adjusted effective April 1, 2019)[1] per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

SEC. 716. REQUIREMENT TO FILE TAX RETURNS TO CONFIRM CHAPTER 13 PLANS.

<< 11 USCA § 1325 >>

(a) FILING OF PREPETITION TAX RETURNS REQUIRED FOR PLAN CONFIRMATION.—Section 1325(a) of title 11, United States Code, as amended by sections 102, 213, and 306, is amended by inserting after paragraph (8) the following:

"(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308.".

(b) ADDITIONAL TIME PERMITTED FOR FILING TAX RETURNS.—

<< 11 USCA § 1308 >>

(1) IN GENERAL.—Subchapter I of chapter 13 of title 11, United States Code, is amended by adding at the end the following:

"§ 1308. Filing of prepetition tax returns

"(a) Not later than the day before the date on which the meeting of the creditors is first scheduled to be held under section 341(a), if the debtor was required to file a tax return under applicable nonbankruptcy law, the debtor shall file with appropriate tax authorities all tax returns for all taxable periods ending during the 4–year period ending on the date of the filing of the petition.

"(b)(1) Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond—

"(A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting; or

"(B) for any return that is not past due as of the date of the filing of the petition, the later of—

"(i) the date that is 120 days after the date of that meeting; or

"(ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law.

"(2) After notice and a hearing, and order entered before the tolling of any applicable filing period determined under this subsection, if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under this subsection is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee

under this subsection for—

"(A) a period of not more than 30 days for returns described in paragraph (1); and

"(B) a period not to extend after the applicable extended due date for a return described in paragraph (2).

"(c) For purposes of this section, the term 'return' includes a return prepared pursuant to subsection (a) or (b) of section 6020 of the Internal Revenue Code of 1986, or a similar State or local law, or a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal.".

<< 11 USCA prec. § 1301 >>

(2) CONFORMING AMENDMENT.—The table of sections for subchapter I of chapter 13 of title 11, United States Code, is amended by adding at the end the following:

"1308. Filing of prepetition tax returns.".

(c) DISMISSAL OR CONVERSION ON FAILURE TO COMPLY.—Section 1307 of title 11, United States Code, is amended—

<< 11 USCA § 1307 >>

(1) by redesignating subsections (e) and (f) as subsections (f) and (g), respectively; and

<< 11 USCA § 1307 >>

(2) by inserting after subsection (d) the following:

"(e) Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court shall dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate.".

<< 11 USCA § 502 >>

(d) TIMELY FILED CLAIMS.—Section 502(b)(9) of title 11, United States Code, is amended by inserting before the period at the end the following: ", and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required".

(e) RULES FOR OBJECTIONS TO CLAIMS AND TO CONFIRMATION.—It is the sense of Congress that the Judicial Conference of the United States should, as soon as practicable after the date of enactment of this Act, propose amended Federal Rules of Bankruptcy Procedure that provide—

(1) notwithstanding the provisions of Rule 3015(f), in cases under chapter 13 of title 11, United States Code, that an objection to the confirmation of a plan filed by a governmental unit on or before the date that is 60 days after the date on which the debtor files all tax returns required under sections 1308 and 1325(a)(7) of title 11, United States Code, shall be treated for all purposes as if such objection had been timely filed before such confirmation; and

(2) in addition to the provisions of Rule 3007, in a case under chapter 13 of title 11, United States Code, that no objection to a claim for a tax with respect to which a return is required to be filed under section 1308 of title 11, United States Code, shall be filed until such return has been filed as required.

Case No. 20-60043

UNITED STATES COURT OF APPEALS
OF THE NINTH CIRCUIT

In re: DONALD HUGH NICHOLS; JANE ANN NICHOLS, Debtors. DONALD HUGH NICHOLS; JANE ANN NICHOLS, Appellants, vs. MARANA STOCKYARD & LIVESTOCK MARKET, INC.; THE PARSONS COMPANY; CLAY PARSONS; KAREN PARSONS; ARIZONA DEPARTMENT OF REVENUE; JILL H. FORD, Chapter 7 Trustee, Appellees.	Appeal from BAP No. 20-1032 Tucson Bankruptcy Court

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ANSWERING BRIEF OF APPELLEES MARANA STOCKYARD & LIVESTOCK MARKET, INC.; THE PARSONS COMPANY; CLAY PARSONS; AND KAREN PARSONS

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CORPORATE DISCLOSURE STATEMENT

Rule 26.1, Federal Rules of Appellate Procedure: (a) Who Must File. Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

The filing parties declare as follows:

Marana Stockyard & Livestock Market, Inc.: There is no parent corporation or publicly held corporation that owns 10% or more of its stock.

The Parsons Company: There is no parent corporation or publicly held corporation that owns 10% or more of its stock.

Date: December 14, 2020

MESCH CLARK ROTHSCHILD

/s/ D. Alexander Winkelman
Frederick J. Petersen
D. Alexander Winkelman
Attorneys for Appellees Marana Stockyard & Livestock Market, Inc.; The Parsons Company; Clay Parsons; and Karen Parsons

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I. INTRODUCTION

Appellants Donald Hugh and Jane Nichols (the "Nichols") appeal a ruling by the bankruptcy court denying their motion to dismiss their own bankruptcy and converting their Chapter 13 bankruptcy to a Chapter 7. This Court should affirm the decision of the bankruptcy court. In affirming, this Court should adopt the opinion of the Bankruptcy Appellate Panel of the Ninth Circuit (BAP), which was correctly reasoned. The BAP correctly recognized *In re Rosson*, 545 F.3d 764, 774 (9th Cir. 2008), has not been overruled by the Supreme Court, and is still the correct legal standard for determining a bankruptcy court's authority to convert in the face of a motion to dismiss. This Court should reaffirm *Rosson*, and affirm the bankruptcy court.

II. JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 158.

III. STATEMENT OF THE ISSUES ON APPEAL

Appellants Donald Hugh and Jane Nichols (the "Nichols") declared bankruptcy after they were sued for fraud by Marana Stockyard & Livestock Market Inc., The Parsons Company, Clay and Karen Parsons (collectively, "Parsons"). Once in bankruptcy, the Nichols did nothing to advance their Chapter 13 bankruptcy for seventeen months, even though they "knew, or should have known, no later than February 4, 2019, that they would not be able to proceed in Chapter 13." (1:SER-072). The bankruptcy court denied the Nichols' Motion to Dismiss their bankruptcy to prevent an abuse of the bankruptcy process, and instead converted the Nichols' bankruptcy to Chapter 7 as required under 11 U.S.C. § 1307(e), which requires conversion or dismissal in the best interest of creditors where a debtor fails to file tax returns. The bankruptcy court denied the Nichols' motion to dismiss relying on *Rosson*, which the Nichols expressly acknowledged was binding appellate precedent.

Given the above, did the bankruptcy court err by relying on *Rosson* as controlling Ninth Circuit precedent? Did *Law v. Seigel*, 571 U.S. 415 (2014) in fact confirm the validity of *Marrama* and *Rosson*? Did the bankruptcy court properly apply Rosson in denying the Nichols' motion to dismiss? Did the bankruptcy court err by asserting it was afforded discretion under § 1307? Did the bankruptcy court err in finding an abuse of process where the Nichols fought to remain in Chapter 13 for 17 months, yet took no material steps to advance their case toward confirmation or to comply with the Bankruptcy Code?

IV. STANDARD OF REVIEW

On appeal from the BAP's affirmance of a bankruptcy court's decision, this Court "independently review[s] the bankruptcy court's decision, without giving deference to the [BAP]." *See In re Rosson*, 545 F.3d 764, 770 (9th Cir. 2008). This Court should review the decisions of the bankruptcy court in denying dismissal for an abuse of discretion.[1] *Id*. at 771. This Court should review the bankruptcy court's finding of bad faith and abuse of process for clear error. *In re Leavitt*, 171 F.3d 1219, 1222-23 (9th Cir. 1999). This Court should review the bankruptcy court's conclusions of law de novo, and its factual findings for clear error. *Id.* at 1222. The Nichols claim there are no facts in dispute and ask this Court to apply a de novo review (OB 23), but the law is clear that findings of bad faith are reviewed for clear error. *Id*. at 1222-23.

[1] On page 53 of the Opening Brief ("OB"), the Nichols advance an argument that, although the Nichols admit that *Rosson* applied an abuse of discretion standard, the bankruptcy court had no discretion related to its decision. Under *Rosson*, the bankruptcy court clearly had discretion to deny a motion to dismiss under the specific facts of this case.

V. STATEMENT OF THE CASE AND PROCEDURAL SUMMARY

The Parsons' claims arise from an approximately $4 million fraud that was perpetrated by the Parsons' long-time friends, the Nichols, and their son, Seth. Seth Nichols grew up with the Parsons' son, and based on this position of trust, Seth was hired as a bookkeeper for the Parsons' business, Marana Stockyard. Seth robbed the Parsons, and when the money ran out, Seth maxed out the business's line of credit, leaving the Parsons not only without assets, but with a multi-million-dollar debt.

After the Parsons discovered Seth's fraud, he was indicted and pled guilty. Seth is currently serving a 60-month felony prison sentence. (2:SER-257).[2] In the process of uncovering Seth's fraud, the Parsons and their forensic accountant uncovered substantial evidence which suggested that Donald Hugh Nichols ("Hugh Nichols") was knowingly involved in the fraud. (2:SER-270). Based on this evidence, Hugh Nichols has been indicted for his conduct related to the Parsons, and has been scheduled for trial.

When the Nichols were initially confronted with their son's crimes, the Nichols quit-claimed roughly $1 million in real property to the Parsons to attempt to undo the devastating damage to the Parsons' finances. Although the Nichols were initially cooperative in undoing the harm caused by their son, they later decided they had no interest in working with the Parsons, and the Parsons were forced to file suit. The Nichols responded with a lis pendens and counterclaims, alleging the Parsons fraudulently induced the Nichols into quitclaiming their property to the Parsons.

[2] Appellees will refer to the Appellants' record on appeal as "ER" and will refer to their supplemental record on appeal as the volume number and "SER."

Arguing that the counterclaims and lis pendens were spurious, the Parsons made demand pursuant to A.R.S. § 33-420 that the Nichols remove the lis pendens. (1:SER-085). On August 6, 2018, the Parsons demanded that the Nichols release the lis pendens by August 9, 2018. (1:SER-085).

The Parsons urge this Court to pay close attention to the timing of the Nichols' actions in bankruptcy. The Nichols filed their bankruptcy on the last day before the Parsons filed an action in state court to remove the Nichols' lis pendens. (2:SER-331). The Nichols' initial petition and schedules facially qualified for Chapter 13 relief. (2-SER-330). The Nichols also submitted a plan at that time, but that Plan was unconfirmable as a matter of law. (2:SER-384). The Nichols amended their schedules only one day later to include more debt, yet during the entirety of the Chapter 13 case, did not amended their unconfirmable plan to propose payments which would even arguably satisfy the best interests of creditors test or the liquidation analysis required under 11 U.S.C. § 1325(a)(4). (2:SER-325). Instead, the Nichols initiated an adversary proceeding against the Parsons to litigate their counterclaims. (2:SER-316).

Nearly two months later, on October 11, 2018, the Nichols appeared for and testified in part at Bankruptcy Rule 2004 examinations. (2:SER-218 and 2:SER-191). Interestingly, the Nichols did not invoke the Fifth Amendment as to the entire proceeding, but instead chose to testify where it suited their case.[3] (2:SER-320; 2:SER-312; 2:SER-316; 2:SER-260[4]; and 2:SER-191[5]).

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[3] *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) ("it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding").

[4] Generally, transcript of 2004 Examination of Jane Nichols (2:SER-218).

[5] Transcript of 2004 Examination of Donald Nichols 2:SER-303-315 (four to a page) (transcript pp. 7:23-8:4, 9:3-6, 12:6-13:14, 25:23-26:4, 26:15-31:7, 32:4-35:13, 35:20-38:11, 40:13-41:3, 43:11-45:20, 47:7-48:7, 51:9-52:2, 52:22-53:22).

On November 1, 2018, the Nichols voluntarily appeared in bankruptcy court for an all-day evidentiary hearing related to the adversary and the lis pendens, and their counsel made arguments regarding the propriety of the lis pendens and counter claims in the adversary. The Nichols took the stand and participated in that hearing, and the Nichols personally invoked the Fifth Amendment on the record as to the vast majority of the Parsons's questions.[6] (ER-417-458). The Nichols did not ask the state court or the bankruptcy court for a stay pending the ongoing criminal proceeding at any point before the November 1, 2018 hearing.

When it became clear that the Nichols would not prevail at the November 1, 2018 evidentiary hearing, the Nichols proposed a settlement to resolve the Parsons' treble damage and attorney fee claims against the Nichols for filing a groundless lis pendens. (ER-459-471). The Nichols also requested that the Parsons resolve their sizeable claims against the Nichols' counsel personally as permitted under the statute. (ER-460-461). After this settlement at the November 1, 2018 hearing, the Nichols did not request a stay.

The Nichols subsequently failed to take *any* actions to advance their Chapter 13 bankruptcy. (ER p. 6, 1:SER-152). Nine months after the Nichols had filed bankruptcy, they had still failed to advance their case toward confirmation. The Nichols had also not taken any steps to stay the bankruptcy, or communicate to the court any basis for the delay. Faced with what was appearing to be an indefinite delay, on May 2, 2019, the Parsons moved the bankruptcy court to convert the case to a Chapter 7. (1:SER-155). The Chapter 13 Trustee joined in that motion, noting a myriad of ways in which the Nichols refused to take any

[6] *Keating*, 45 F.3d at 326.

actions to advance the case (1:SER-149).[7] In that motion, the Parsons also raised a motion to prevent the Nichols from dismissing the bankruptcy, arguing that the bankruptcy had been filed as a Chapter 13 in bad faith and for an improper purpose, specifically to maintain their right to dismiss under § 1307. (1:SER-155).

On May 22, 2019, the Nichols filed their objection to the motion to convert. (ER-543). Concurrently with that response, and for the first time, the Nichols first asked the bankruptcy court for a stay of proceedings pending the criminal trial. (ER-087). Notably, the Nichols did not seek to dismiss the bankruptcy at that time.

The bankruptcy court denied that motion for stay, relying in part on the fact that "[t]here is no constitutional right to obtain a discharge of one's debts in bankruptcy." *United States v. Kras*, 409 U.S. 434, 446 (1973). (ER-482). The bankruptcy court also found that granting the Nichols a stay "would allow the debtor to use the Fifth Amendment as a shield, while impermissibly using the Bankruptcy Code as a sword with which to take unfair advantage of creditors." (ER-483). *Phillips v. First Nat'l Ins. Co. of Am.*, No. H-10-3632, 2011 U.S. Dist. LEXIS 63892, at *6 (S.D. Tex. June 15, 2011).

The bankruptcy court denied the Nichols' request for a stay, and made findings that cause existed justifying conversion of the case. (ER:494-495). The Nichols did not move for dismissal of their case. Instead, during the hearing, the Nichols requested more time from the bankruptcy court to progress their case and avoid conversion. (2:SER-253; ER-490-493). The bankruptcy court granted the Nichols "additional time to present a [Stipulated Order Confirming Plan, including

[7] That is not to say that the Nichols allowed the case to lie dormant; the Nichols' attorney has claimed in excess of $100,000 in fees related to work conducted in a bankruptcy that did not advance one step toward confirmation under chapter 13. (1:SER-175; 1:SER-041).

tax returns]" but noted that if "that is not done on a timely basis [the bankruptcy court would] convert the case immediately." (ER-494-495).

Predictably, the Nichols did not take this opportunity to remain in Chapter 13. The Nichols filed an appeal of the bankruptcy court's order refusing to stay the bankruptcy case, and asked again for a stay pending appeal. The appeal, taken to the district court, ended with a total affirmation of the bankruptcy court's decision and reasoning in denying a stay to the Nichols. (1:SER-002). Finally, the Nichols had run out of options to extend the protections of the automatic stay without complying with the bankruptcy code. After the district court's ruling, the Nichols were faced with either filing tax returns and proceeding through Chapter 13 or with being subjected to the financial scrutiny that comes with a Chapter 7 Trustee. Unwilling to permit scrutiny of their finances, the Nichols finally asked the bankruptcy court to dismiss the bankruptcy. (ER-267).

During the hearing regarding the Motion to Dismiss, the Nichols specifically did not argue that *Rosson* had been overturned, and instead, counsel for the Nichols argued that the motion to dismiss was "filed under 1307(b), which gives the Debtors the right to dismiss the case at any time. The only exception or limitation on that right is as stated in the [*Rosson*] case which is if there's a finding of bad faith." (ER-499, l. 18-22). Later, counsel for the Nichols specifically "acknowledge[d] it's not an absolute right to dismiss" under *Rosson,* and that a right to dismiss was limited by "bad faith[] conduct or abuse of bankruptcy process." (ER-502, l. 15-21).

The argument to the bankruptcy court by the Nichols, the Parsons, the Chapter 13 Trustee, and the Arizona Department of Revenue all centered on whether the Nichols had abused the bankruptcy process or filed the motion to dismiss in bad faith. (ER-497). The Nichols admitted that they filed the motion to dismiss to avoid a for-cause conversion. The Nichols did not dispute that

conversion was warranted, specifically stating "about the finding of cause to convert, I don't dispute that." (ER-502, l. 10-14). Later, the Nichols stated "The only point I'm trying to make is that if the Court had not been inclined to provide additional time for us to see what can be done [about the conversion] then the motion to dismiss would have just been filed sooner and would have needed to be addressed." (ER-516, l. 13-17). The bankruptcy court took the matter under advisement. (ER-518, l. 20-25).

The bankruptcy court denied the Nichols' motion to dismiss to prevent an abuse of the bankruptcy process as authorized under *Rosson*. (1:SER-072). Primarily, the bankruptcy court noted that:

> "Debtors primarily sought bankruptcy protection more than 17 (seventeen) months ago, and, until recently, fought to stay in Chapter 13, and yet have taken no material steps to move their case toward confirmation or to comply with the provisions in the Code. The only affirmative actions the Debtors have taken in this case were taken in an attempt to delay these proceedings, including by requesting that this Court stay the entire case pending the outcome of their criminal case." (1-SER-072).

Accordingly, the bankruptcy court found that the Debtors' attempt to stay in Chapter 13 was "impermissible" and concluded that the Debtors had "abuse[d] the bankruptcy process" by using "Chapter 13 to hide from creditors during the pendency of the criminal proceedings." (1:SER-072). The bankruptcy court further concluded that, because it had found cause to convert prior to the filing of a motion to dismiss (and only forestalled converting to give the Nichols one final chance to advance their case in Chapter 13), the bankruptcy court had discretion under §§ 1307(c) and (e) to convert the case as in the best interests of creditors. (1:SER-072).

The Nichols next appealed to the BAP. The Nichols immediately filed a motion for stay to the BAP. The BAP denied that motion for stay without response from the Parsons, ruling that there was no likelihood of success on the merits. (ER-13). The BAP thereafter affirmed the bankruptcy court in full, holding that *Rosson* was still good law and that the bankruptcy court had correctly applied it. (ER-4). In reaching this holding, the BAP first noted that the Nichols had waived their challenge to *Rosson*. (ER p. 12). The BAP noted that the Debtors failure to raise the *Rosson* issue before the bankruptcy court was "particularly troubling where the bankruptcy court ordered conversion before Debtors sought dismissal." (ER p. 13). Nonetheless, the BAP addressed the merits of the Nichols' arguments, and rejected the Nichols' challenge to *Rosson*. (ER- 12). The BAP also noted that "[d]uring all of [the Nichols'] stalling efforts, creditors have suffered." (ER-27).

This appeal followed, and the Nichols again immediately sought stay relief from this Court. This Court denied that motion.

VI. ARGUMENT

The bankruptcy court and the BAP were correct: *Rosson* is binding appellate precedent in the Ninth Circuit. The BAP correctly concluded that *Rosson* was correctly decided under *Marrama*. And, rather than overturning it, *Rosson* was in fact corroborated by the later authority of *Law v. Siegel*, 571 U.S. 415 (2014), which expressly reaffirmed *Marrama*'s interpretation of absolute rights of conversion and dismissal. The bankruptcy court correctly applied *Rosson*, and the bankruptcy court's determination of bad faith and/or abuse of the bankruptcy process was correct and certainly not clear error.

A. *Rosson* was correctly decided because *Marrama* was binding appellate precedent and because *Marrama* authorized conversion rather than dismissal on two grounds.

Rosson was correctly decided by this Court. The United States Supreme Court specifically interpreted the bankruptcy code to qualify a debtor's right to convert or dismiss in *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). This Court, in *Rosson*, extended the reasoning from *Marrama* to apply specifically to § 1307(b) and the right to dismiss. This analysis was correct.

In *Marrama*, the Supreme Court was faced with the question of whether a Chapter 7 debtor's right to convert under 11 U.S.C. § 706(a)[8] was absolute. The debtor there, filed a Chapter 7, but made significant misrepresentations about his assets in his voluntary petition. When these bad-faith misrepresentations were discovered, the debtor moved to convert to Chapter 13. The bankruptcy court did not allow *Marrama* to convert his case to Chapter 13, and an appeal followed.

The Supreme Court began its analysis by noting that, although the right to convert a Chapter 7 was referenced as "absolute" in the legislative history, that reference was "equivocal" in light of the entirety of the language in § 706. 549 U.S. at 372. The Supreme Court then interpreted the right of conversion under section § 706(a) as being limited to those who can qualify as debtors under Chapter 13. In particular, the Supreme Court interpreted § 1307(c),[9] with its

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[8] Section 706(a) provides:

> The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.

[9] Section 1307(c) provides in part:

provision empowering the bankruptcy court to convert or dismiss a chapter 13 bankruptcy for cause, as a good faith requirement for a debtor to take advantage of the protections of Chapter 13.

Specifically, the Supreme Court held that "[i]n practical effect, a ruling that an individual's Chapter 13 case should be dismissed or converted to Chapter 7 because of . . . bad faith conduct . . . is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13." 549 U.S. at 373-74. After noting that the bankruptcy code was designed to protect a "class of honest but unfortunate debtors," the Supreme Court recognized that "Nothing in the text [or legislative history] of . . . § 1307(c) . . . limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor." 549 U.S. at 374. Writing in dissent, Justice Alito specifically recognized that "Congress included in the statutory scheme several express means to redress a debtor's bad faith. First, if a bankruptcy court finds that there is 'cause,' the court may convert [a Chapter 13] restructuring to a Chapter 7 liquidation." 549 U.S. at 378 (Alito, j., dissenting).

In addition to this reasoning, the Supreme Court also noted that:

> the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate 'to prevent an abuse of process' described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a

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"Except as provided in subsection (f) of this section, on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter [11 USCS §§ 1301 et seq.] to a case under chapter 7 of this title [11 USCS §§ 701 et seq.], or may dismiss a case under this chapter [11 USCS §§ 1301 et seq.], whichever is in the best interests of creditors and the estate, for cause.

> conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.

Effectively, the Supreme Court qualified the "absolute right" to convert under § 706(a) on Congress's intent to allow a bankruptcy court to convert or dismiss for bad faith, as evidenced by the plain language of § 1307(c) and § 105(a).

After *Marrama*, this Court decided *Rosson*. The debtor there filed a voluntary petition under Chapter 13, and predicated the confirmation of his plan on the use of certain funds that the debtor was to receive as part of an arbitration proceeding. 545 F.3d at 768. When the debtor finally received those funds, he refused to deposit them with the Chapter 13 trustee, and after months, only deposited a fraction of the total amount. *Id.* After learning of this fact, the bankruptcy court ordered that if the funds were not deposited with the chapter 13 trustee, the bankruptcy court would convert the debtor's case to chapter 7. The debtor did not deliver the money, and instead, before the formal conversion order was filed or entered, the debtor filed a notice of dismissal under § 1307(b). The bankruptcy court denied the debtor's motion to dismiss, and instead converted to Chapter 7.

On appeal, a panel of this Court held that the reasoning from *Marrama* applies to § 1307(b). Borrowing reasoning from the Ninth Circuit BAP, this Court recognized that the scope of rights provided by both § 706(a) and § 1307(b) were "analytically indistinguishable." 545 F.3d at 772-73; *see also In re Croston*, 313 B.R. 447, 451 (B.A.P. 9th Cir. 2004). Concisely, *Rosson* stands for the proposition that the Supreme Court's "rejection of the 'absolute right' theory as to § 706(a) applies equally to § 1307(b)." 545 F.3d at 773. In light of *Marrama's* twin reasons for qualification of rights, this Court expressly held that "the debtor's right of voluntary dismissal under § 1307(b) is not absolute, but is qualified by [1)] the

authority of a bankruptcy court to deny dismissal on grounds of bad-faith conduct or [2)] 'to prevent an abuse of process.'" *Id*. at 774.

Based on the above, there was no legal error in this Court's reasoning in *Rosson*. Unless and until the Supreme Court overrules or abrogates *Marrama*, this Court is bound to recognize a qualification in § 1307(b) for bad-faith, or cause. As shown below, the Supreme Court did not cast doubt on *Marrama*, or *Rosson*. But even assuming arguendo that this Court was not bound to enforce *Marrama*, the reasoning in *Marrama* and *Rosson* cohere with a legally sound interpretation of § 1307(b).

The Nichols' argument that § 1307(b) provides debtors an unqualified right of dismissal is premised on an interpretive error. Specifically, the Nichols ask this Court to both read words into § 1307 that are not there and simultaneously ignore other subsections of § 1307 and provisions of the Bankruptcy Code. It is a black letter principle of statutory interpretation that a court must read the plain language of a statute while interpreting that statute as a whole. *United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole"); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) ("[A] word is known by the company it keeps"). Further, the Bankruptcy Code must be interpreted as a whole, and this Court "must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy" *Kelly v. Robinson*, 479 U.S. 36, 43 (1986).

Here, reading the entirety of § 1307 in light of the whole Bankruptcy Code suggests a legislative intent to qualify § 1307(b)'s right of dismissal, as recognized in *Marrama*. Starting with § 1307(a), the legislature provides the broadest right to a debtor: "The debtor may convert a case under this chapter to a case under chapter 7 of this title at any time." This provision empowers a debtor to convert to chapter 7 at any time, and does not contemplate any action by the bankruptcy

court. This right is clearly broader than rights under § 1307(b), and suggest qualification.

Section 1307(b) provides that the debtor may "request" dismissal, and then orders the bankruptcy court to dismiss upon request. But the fact that this subsection contemplates a request by the debtor to dismiss indicates an intent that such request be subject to consideration by the bankruptcy court. And, as noted by the BAP, "Section 1307(b) is one of several statutory safeguards Congress enacted to ensure that chapter 13 cases are purely voluntary proceedings." (ER-23). The BAP was correct when it noted that "the mandatory language of § 1307(b) is best understood as providing a chapter 13 debtor with an absolute right to exit chapter 13. But there is no indication in the legislative history that Congress intended to grant debtors who have abused the bankruptcy process an unqualified right to choose the means by which they exit chapter 13." (ER- 23-24). And there is no involuntary servitude concern in Chapter 7 on account of the fact that a Chapter 7 debtor is not compelled to pay future wages to a creditor, and no creditor can receive more than they are due in a Chapter 7. (ER-24).

Section 1307(c) empowers a bankruptcy court to dismiss or convert as the court determines is in the best interest of both creditors and the bankruptcy estate, when it determines there is sufficient cause to do so. This has been interpreted by the Supreme Court to have been expressly included to address bad faith conduct, and to impose on chapter 13 a good faith requirement. *See, generally, Marrama*, 549 U.S. 365. The Nichols' interpretation of § 1307(b) as providing an absolute right to dismiss would render meaningless the language of § 1307(c) which requires the bankruptcy court to decide whether conversion or dismissal would be in the best interests of creditors and the estate. *See Boise Cascade Corp. v. U.S. E.P.A.*, 942 F.2d 1427, 1432 (9th Cir. 1991) ("Under accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and

making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless, or superfluous"). There is no conflict between §§ 1307(b) and 1307(c) unless and until a debtor attempts to file a motion to dismiss where a court has competing cause to convert. In the event of such a conflict between §§ 1307(b) and 1307(c), there is no language in the statute which supports the Nichols' interpretation that § 1307(b) necessarily overrides § 1307(c) and allows a debtor to gut a bankruptcy court's best interests decision under § 1307(c). Principles of statutory interpretation require an interpretation of § 1307 as a whole that renders subsections (b) and (c) coherent. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000).

Considering the Supreme Court's interpretation of § 706(a) and the requirement that the bankruptcy court must exercise its authority to further the best interests of creditors and the estate, the Nichols' interpretation that § 1307(b) provides an absolute right to dismiss is not legally sound. The Nichols would effectively read § 1307(c) as empowering a bankruptcy court to dismiss or convert for cause, whichever is in the best interest of the creditors and the estate, unless the debtor chooses dismissal. This effectively eviscerates the bankruptcy court's power to convert for cause under § 1307(c) – a power Congress specifically reserved to the bankruptcy court, which the Supreme Court unanimously identified as a tool to prevent abuse of the bankruptcy process.[10]

The language "whichever is in the best interests of creditors and the estate" identifies one problem with the reasoning in *In re Barbieri*, 199 F.3d 616, 621 (2d

[10] The majority in *Marrama* clearly identified § 1307(c) as creating a good faith requirement in Chapter 13. The four-justice dissent likewise listed § 1307(c) as a tool in a bankruptcy court's toolbox to address abuse. *Marrama*, 549 U.S. at 376-77.

Cir. 1999).[11] *In re Barbieri* appears to be the only Circuit Court opinion at conflict with *Rosson*. One argument for an absolute reading of § 1307(b) is that the voluntary dismissal of a Chapter 13 merely puts the parties back into the position they would have been in, but-for the debtors filing of the bankruptcy. But this ignores the practical realities of litigation – a 17-month delay in the enforcement of an action could very well render a creditor entirely incapable of collecting on a judgment. Recognizing this fact, Congress empowered the bankruptcy court to make a decision as to conversion or dismissal based on the best interests of the parties involved. The Nichols conceded below that conversion was in the best interests of creditors and the estate. (ER-502, l. 10-14).

Section 1307(d) empowers a bankruptcy court to convert a chapter 13 case to a chapter 11 or 12 where appropriate.

Section 1307(e) requires a bankruptcy court to remove a debtor from chapter 13, either through dismissal or conversion, if the debtor fails to file a tax return in compliance with 11 U.S.C. § 1308. The bankruptcy court's duty to remove a debtor from Chapter 13 is also to be guided by the best interests of the creditors and the estate. This dismissal or conversion is not in the bankruptcy court's discretion—if the debtor fails to comply with § 1308, the bankruptcy court "shall" dismiss or convert. To the extent a conflict arose between § 1307(b) and § 1307(e), this conflict arose only through the Nichols' actions. In this light, the Nichols' argument that § 1307(b) provides an absolute right of dismissal is even more extreme.

[11] *In re Barbieri* is discussed more completely below.

In this case, § 1308 required the Nichols to file their tax returns[12] "the day before the date on which the meeting of the creditors is first scheduled to be held under § 341(a)." In this case, the § 341 meeting was first scheduled to be held on October 5, 2018. (Er-521, DE 7). The bankruptcy court was therefore required to dismiss or convert the case in the best interests of creditors or the estate, no later than October 5, 2018. At the very least, the case should have been converted or dismissed when the Parsons filed their motion to convert, on May 2, 2019. But the Nichols argue that their right of dismissal under § 1307(b) allows them to dismiss their bankruptcy, notwithstanding the bankruptcy court's express duty under § 1307(e). But Congress has made clear that a debtor who has not complied with § 1308 does not qualify as a debtor under Chapter 13, and Congress intended that the court, not the debtor, determine how the debtor exit Chapter 13. *Cf. Marrama*, 549 U.S. at 372.

Turning back to the text of § 1307, § 1307(f) expressly limits the court's conversion powers to require the debtor, in a farm case, to be the individual requesting such a conversion. Subsection (f) is noteworthy only because it shows that Congress carefully considered its options before deciding to limit the bankruptcy court's conversion power.

Finally, § 1307(g) provides that "[n]otwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter."

Reading § 1307 as a whole, the Nichols' interpretation of § 1307(b) as invalidating any contrary language in § 1307 is unavailing. Congress clearly intended to empower the bankruptcy court with the power to convert chapter 13

[12] There is no legal principle which permits the Nichols to avoid filing tax returns. Even the Fifth Amendment does not permit a party to avoid filing a tax return. *United States v. Neff*, 615 F.3d 1235, 1238 (9th Cir. 1980).

cases to chapter 7. This statutory analysis confirms and validates both the Supreme Court's analysis in *Marrama* and this Court's analysis in *Rosson*. And these analyses are only further justified in light of the broader provisions of the bankruptcy code—specifically including § 105(a).

In section 105(a), Congress specifically empowered bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." Bankruptcy courts also possess "inherent power . . . to sanction 'abusive litigation practices.'" *Law v. Siegel*, 571 U.S. 415, 421 (2014), *quoting Marrama*, 549 U.S. at 375-76. The equitable powers reserved to the bankruptcy court are limited, as discussed below, such that they cannot contradict the express provisions of the Code. *Law*, 571 U.S. at 421. But so long as an exercise of equitable powers does not override an explicit mandate, Congress intended the bankruptcy court be empowered to issue orders necessary to provide honest debtors the opportunity to seek a discharge. Where a debtor has engaged in bad-faith, abuse of process and has created a conflict between two provisions where none normally exists, there is substantial evidence that Congress intended § 105(a) to permit the bankruptcy court to exercise its discretion or carry out its duties consistent with the bankruptcy code.

The Nichols next argue that the purpose of the Bankruptcy Code cannot "override" the plain language of § 1307. (Ob p. 39). But again, the Nichols take too narrow a view of § 1307 to elevate § 1307(b) over the other, equally important, provisions of § 1307. As noted by the BAP, "the mandatory language of § 1307(b) is best understood as providing a chapter 13 debtor with an absolute right to exit chapter 13." (ER 23-24). "The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama*, 549 U.S. at 367, *quoting Grogan v. Garner*, 498 U.S. 279, 286 (1991). The Bankruptcy Code provides a legal shield to protect debtors while they work toward their fresh start.

Congress has made clear that the Bankruptcy Code should not be used in bad faith, as a sword, to harm creditors. *See, generally, Marrama*, 549 U.S. 365; *In re Molitor*, 76 F.3d 218, 220 (8th Cir. 1996) ("the purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts").

Here, the limitation on a right of dismissal under § 1307(b), as first elucidated in *Marrama* and then adopted in *Rosson,* furthers the purpose of the Bankruptcy Code. If this Court were to diverge from *Marrama*, and sanction a well-known "procedural anomaly" in Chapter 13, it would damage debtor-creditor relations and undermine the effectiveness and efficiency of many Chapter 13 bankruptcies for the honest but unfortunate debtor. Without Rosson, creditors must be more aggressive in filing motions to dismiss Chapter 13 bankruptcies that do not appear confirmable at the petition date. This will place a higher burden on Chapter 13 debtors. And bankruptcy courts, bereft of a tool to prevent abuse of process, will be forced to take such early motions to dismiss more seriously. Congress specifically ordered bankruptcy courts to protect "the best interests of the creditors and the estate" in considering whether to dismiss or convert. *Rosson* and the BAP decision below both interpret § 1307 to advance this directive.

Finally, the Parsons address *In re Barbieri*, 199 F.3d 616 (2d Cir. 1999), the only Circuit Court decision that conflicts with *Rosson*. In that case, the Second Circuit held that § 1307(b) created an absolute right to dismiss. *Id*. at 619. This case predated *Marrama*, and was overruled by it. As noted by the New York Eastern Bankruptcy Court "after the Supreme Court's decision in *Marrama,* the Second Circuit's decision in *Barbieri* is no longer good law." *In re Armstrong*, 408 B.R. 559, 569 (Bankr. E.D.N.Y. 2009). The bankruptcy court noted five reasons why *Barbieri* was invalid. First and second, in *In re Armstrong* noted the twin bases of the decision in *Marrama,* and noted that an interpretation of the statute as

a whole "belied a finding that the debtor has an 'absolute right' because the right to convert under [one subsection] is necessarily limited by [another subsection]." *Id*. at 570. That court also recognized that, although a party cannot be compelled into chapter 13, or compelled to stay in chapter 13, "there is no indication in the legislative history to support the notion that a chapter 13 debtor can abuse the bankruptcy process and not be held accountable." *Id*. at 571. Third, the *Armstrong* court cited *Marrama* for the proposition that the anti-waiver provision of § 1307(b) did not mean that "a debtor could not, through bad faith conduct, forfeit the right to convert." *Id*. at 571. Fourth, *Armstrong* noted that *Marrama* rejected a broad reading of the phrase "at any time." *Id*. at 572. Fifth, the *Armstrong* court rejected reasoning in *Barbieri* that the "shall" in § 1307(b) "necessarily trumps" the "may" in § 1307(c) because Congress had added § 1307(e). *Id*. Because "Section 1307(b) must now by read in light of new subsection (e)," bankruptcy courts "could no longer rely on the reasoning of *Barbieri* to find that section 1307(b) necessarily trumps a creditor's right to seek conversion of the case." *Id*. Instead, "the use of the word 'shall' in subsection (e) may be read as further indication of Congress's intent for chapter 13 to provide refuse for the 'honest but unfortunate debtor' who abides by the rules of the bankruptcy process." *Id*. There is no subsequent ruling from the Second Circuit itself which reflects that *Barbieri* is still good law after *Marrama*.[13]

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[13] In a 2012 case, the United States District Court for the Southern District of New York, sitting on appeal from a bankruptcy proceeding, noted:

> In the end, regardless of how §§ 1307(b) and 1307(e) interact, or how the grant of authority in § 105(a) should be interpreted post-*Marrama*, to the extent that *Armstrong* and other courts have held that *Marrama* means the end of *Barbieri*, the Second Circuit has not embraced that view and therefore this Court is bound by the holding in *Barbieri* that the right of voluntary dismissal under § 1307(b) is absolute.

In re Procel, 467 B.R. 297, 308 (S.D.N.Y. 2012).

In sum, *Marrama* was correctly decided and *Rosson* correctly applied it to § 1307(b). The Nichols' arguments arguing that one or both of *Marrama* and *Rosson* were incorrectly decided are meritless and must be rejected.

B. *Law* did not overrule *Marrama* or *Rosson*, and in fact expressly reaffirmed *Marrama*.

After *Rosson*, the Supreme Court decided *Law*. In the proceedings below in that case, the bankruptcy court used § 105 to surcharge a debtor's exemption in direct conflict with 11 U.S.C. § 522 and California law. *Law*, U.S. 571 at 422. Put briefly, *Law* stands for the proposition that a bankruptcy court's equitable powers under § 105 do not permit a bankruptcy court to take action directly prohibited by the bankruptcy code. 571 U.S. at 421. Because this proposition was "hornbook law" at the time *Law* was unanimously decided, *Law* should be read as a narrow decision overruling a specific decision. The *Law* court specifically noted that the Supreme Court had "long held that 'whatever equitable powers remain in the bankruptcy courts must and can only be exercised within the confines of' the Bankruptcy Code." *Law*, 571 U.S. at 421, quoting *Norwest Bank Worthington v. Ahlers*, 485 U.S. 197, 206 (1988). It was clearly the case at the time *Marrama* was decided that § 105(a) could not directly contravene the express provisions of the bankruptcy code.

Law expressly reaffirmed the validity of *Marrama*. The Supreme Court noted that "[a]lthough § 706(a) of the Code gave the debtor a right to convert the case, § 706(d) 'expressly conditioned' that right on the debtor's 'ability to qualify as a 'debtor' under Chapter 13." *Id.* at 425. The Court continued "§ 1307(c) provided that a proceeding under Chapter 13 could be dismissed or converted to a Chapter 7 proceeding 'for cause,' which the Court interpreted to authorize dismissal or conversion for bad-faith conduct. In light of § 1307(c), the Court held that the debtor's bad faith could stop him from qualifying as a debtor under

Chapter 13, thus preventing him from satisfying § 706(d)'s express condition on conversion." *Id*. at 426.

The Supreme Court then interpreted *Marrama's* reference to § 105(a). Specifically, the Supreme Court noted that "the Court in *Marrama* also opined that the Bankruptcy Court's refusal to convert the case was authorized under § 105(a) and might have been authorized under the court's inherent powers." *Id. Law* held that this reliance on § 105(a) was dictum, and stated that this dictum "suggests that in some circumstances a bankruptcy court may be authorized to dispense with futile procedural niceties in order to reach more expeditiously an end result required by the Code." *Id*.

And these principles buttress the decision made by the bankruptcy court below. First, in order for the Nichols to be able to take advantage of the absolute right of dismissal under § 1307(b), they had to qualify as debtors under Chapter 13. Because § 1307(c) indicates that "[the Nichols'] bad faith could stop [them] from qualifying as a debtor under Chapter 13," once the bankruptcy court correctly found the Nichols had behaved in bad faith, they were no longer members of the class of debtors who could take advantage of the right provided under § 1307(b). *See Id*. at 426.

Second, no aspect of § 105 was necessary for the bankruptcy court to reach the conclusion it did, and *Rosson* does not depend on a reading of § 105. As noted above, *Rosson* based its limitation of a debtors' rights of dismissal under § 1307(b) on the reasoning in *Marrama*. *Rosson* did place weight on the *Marrama* court's interpretation of § 105, but *Rosson* also clearly adopted *Marrama's* reasoning in full, as the Ninth Circuit is required to do. The court in *Law* has identified the § 105 reference in *Marrama* as dictum, and has reaffirmed the other basis for the decision in *Marrama*. *Law* was a narrow decision applying hornbook law to a specific case – and *Law's* interpretation of *Marrama* is, itself, dictum. But *Law*

expressly reaffirmed *Marrama* as binding precedent. Thus, to the extent *Rosson* identified § 105(a) as the primary basis for its holding, such reasoning does not require overruling *Rosson*. *Rosson* recognized that *Marrama* rejected the "absolute right" position, and Law expressly reaffirmed *Marrama*'s rejection of that position. If this Court saw fit to clarify *Rosson*, this Court should clarify that the limitation on § 1307(b) comes from a holistic interpretation of § 1307, taking into consideration Congress's intent in enacting § 105(a). But *Rosson*, relying as it does on *Marrama*, is still good law. More importantly, the bankruptcy court's decision below complies with sound principles enunciated in *Marrama*, and was correct.

C. The bankruptcy court properly applied *Rosson* in denying the Nichols motion to dismiss.

The Nichols state that "the bankruptcy court did not have authority to deny Debtors' motion to dismiss based on its finding of 'abuse of process.'" (OB p. 43). The Nichols appear to argue that an explicit finding of bad faith is required to deny a motion to dismiss under § 1307(b). This argument is waived. *In re Roberts*, 175 B.R. at 345; *Carlson*, 900 F.2d at1349. Again, the Nichols expressly affirmed the applicability of *Rosson*. And *Rosson* explicitly states that "the debtor's right of voluntary dismissal under § 1307(b) is not absolute, but is qualified by the authority of the bankruptcy court to deny dismissal on grounds of bad-faith conduct or 'to prevent an abuse of process.'" *In re Rosson*, 545 F.2d at 774, *quoting* 11 U.S.C. § 105(a). Thus, *Rosson* clearly allows a dismissal for "abuse of the bankruptcy process."

This finding is supported by the text of § 1307(c) and the reasoning of *Marrama*. Subsection (c) specifically provides that where cause exists, a bankruptcy court has discretion to advance the best interests of the creditors and the estate through either dismissal or conversion. This language demonstrates Congress's intent to empower a bankruptcy court to convert where it would bring

the largest benefit and advance justice and the purposes of the Bankruptcy Code. *Marrama* recognized that "cause" was nonexclusive, but should be applied where there is evidence of bad faith. There is nothing in §1307(c)'s cause requirement which would prevent it from applying where a bankruptcy court has found an abuse of process.

Moreover, there is no case law which suggests that there is a distinction between bad faith and an abuse of the bankruptcy process. In the course of its ruling, the bankruptcy court cited to case law relevant to a bad faith analysis, such as *In re Leavitt*, 171 F.3d 1219, 1224 (9th Cir. 1999). *Rosson* is clear that a bankruptcy court never needs to specifically use the words "bad faith" or "abuse of process" in order to deny a motion to dismiss. *In re Rosson*, 545 F.3d at n.13 ("The bankruptcy court never used the words 'bad faith' or 'abuse of process.' Nevertheless, the court's comments at the August 17 hearing and in its order denying the motion for reconsideration make clear that this was the basis for its decision.") *accord In re Leavitt*, 171 F.3d at 1222-23, 1226 (affirming dismissal of Chapter 13 case, notwithstanding lack of "express findings" of bad faith, where record provided clear and complete understanding of the basis for ruling).

The bankruptcy court has discretion to find bad faith or abuse of process, which would therefore justify conversion. *In re Rosson*, 545 F.3d at 771; *In re Leavitt*, 171 F.3d at 1222-23. The bankruptcy court unquestionably made the necessary finding under *Rosson*, whether that be bad faith, abuse of process, or both – and the bankruptcy court's citation to *In re Leavitt* for the standard of bad faith makes clear that the bankruptcy court intended to make a bad faith finding. Further, as the Nichols acknowledge, the reasoning for the bad-faith limitation on the right to dismiss or convert from *Marrama* "is tantamount to a ruling that the debtor does not qualify as a debtor under Chapter 13." (OB p. 26). Here, that can be no question that the bankruptcy court concluded that the Nichols did not qualify

as debtors under Chapter 13 due to their complete failure to comply with Chapter 13's requirements, such as § 1308(a).

Courts have been wary of clearly defining bad faith, but under Rosson and Leavitt, it is clear that the bankruptcy court intended to make use of the bad faith exception to § 1307(b) under Rosson. This Court should affirm because the Nichols acted to distort the bankruptcy process to their own benefit and to harm creditors. *United States v. State*, 641 F.2d 1368, 1371 (9th Cir. 1981) (appellate court "may uphold correct conclusions of law even though they are reached for the wrong reason or for no reason, and we may affirm a correct decision on any basis supported by the record").

D. Under §§ 1307(c) and (e), the bankruptcy court is given discretion to determine whether conversion or dismissal is in the best interest of creditors and the estate.

The Nichols argue that the bankruptcy court lacked discretion whether to deny a request to dismiss. (OB p. 53) But the Nichols misstate the bankruptcy court's ruling and miss the point. Even if the bankruptcy court was incorrect in asserting it had discretion under § 1307(c), such an error would be harmless because the bankruptcy court converted under § 1307(e), which requires conversion or dismissal, and reserves to the bankruptcy court solely the discretion to determine which would further the best interests of creditors and the estate.

Rosson specifically indicates that the denial of motions to dismiss should be reviewed for an abuse of discretion. *In re Rosson*, 545 F.3d at 771. An abuse of discretion standard necessarily implies that the court under review had discretion to abuse. Therefore, *Rosson* stands for the proposition that a bankruptcy court has discretion to deny a motion to dismiss where such a motion is made in bad faith or to abuse the bankruptcy process.

The bankruptcy court, faced with a mandate that it determine whether dismissal or conversion was in the best interest of creditors and the estate, held that dismissal was not an option because it had already "determined that this case should be converted pursuant to § 1307(c), and must be converted pursuant to § 1307(e)." (1:SER-072). The bankruptcy court also recognized it could deny the motion to dismiss based upon a finding of bad faith abuse of the bankruptcy process. (1:SER-072). Given this legal landscape, the bankruptcy court correctly recognized "its discretion to convert this case pursuant to §§ 1307(c) and (e) given the circumstances of this case, and based upon the findings and conclusions set forth in the Court's June 20 Ruling and in this ruling." (1:SER-073). The bankruptcy court was clear that, due to the Nichols' refusal to file tax returns, § 1307(e) mandated conversion or dismissal, "whichever is in the best interest of the creditors and the estate." This is necessarily a discretionary determination. The bankruptcy court did not err in finding conversion was in the best interest of the creditors and the estate.

E. The bankruptcy court correctly found an abuse of the bankruptcy process where the Nichols attempted to remain in Chapter 13 for seventeen months although they never took any action to qualify under the Code.

The Nichols argue that the bankruptcy court erred in finding an abuse of process. (OB p. 55). This Court should only reverse such a finding only if it finds clear error. *In re Leavitt*, 171 F.3d at 1222-23. The bankruptcy court based its ruling on the four, noninclusive, *Leavitt* factors for bad faith, 171 F.3d at 1224, and noted that "If a bankruptcy proceeding is not consistent with bankruptcy policy and goals or is filed for an improper purpose, it is an abuse of the bankruptcy system and the Bankruptcy Code," relying on *In re Hageney*, 422 B.R. 254, 259 (Bankr. E.D. Wash. 2009)." (1:SER-071).

In finding an abuse of the bankruptcy process, the bankruptcy court made the following factual findings:

a. "Debtors voluntarily sought bankruptcy protection more than 17 (seventeen months ago, and until recently, fought to stay in Chapter 13, and yet have taken no material steps to move their case towards confirmation or to comply with the provisions in the Code." (1:SER-072).

b. "The only affirmative actions the Debtors have taken in this case were taken in an attempt to delay these proceedings, including by requesting that this Court stay the entire case pending the outcome of their criminal case." (1:SER-072).

c. "It is undisputed that the Debtors have failed to file tax returns as required by § 1308(a)." (1:SER-072).

d. "Debtors knew, or should have known . . . that they would not be able to proceed in Chapter 13." (1:SER-072).

e. "Debtors opposed the Motion to Convert and continued their stalling efforts in an impermissible attempt to remain in Chapter 13." (1:SER-072).

f. "Debtors . . . have not met their obligations to creditors or proceeded with any degree of transparency." (1:SER-073).

Prior to these findings, on June 20, 2019, the bankruptcy court found cause to convert already existed. (1:SER-078). During argument on the Motion to Convert, the Nichols admitted that the Nichols would not proceed with confirmation or filing of tax returns because of concerns over a pending criminal case. Nevertheless, the Nichols requested more time to file tax returns and to propose a confirmable plan. (ER-492, l. 3 to 132, l. 12). In granting the Nichols' request for more time, the bankruptcy court ordered that the Nichols "have [until 7/22/19] to submit updated tax returns and a stipulated order of confirmation . . . If

those tasks are not completed by the deadline, *then the motion to convert is granted* and counsel for the Trustee is authorized to upload an order converting this case to Chapter 7." (1:SER-078, emphasis added).

Instead of complying with the bankruptcy court's order that they requested, the Nichols moved to dismiss this case. The Nichols never explained their failure to comply with the order and address their plan or tax returns within the time that they themselves requested. Ten days after the bankruptcy court's conversion order, the Nichols filed a motion to stay the proceedings pending appeal, wherein they stated "In order to comply with the requirements for plan confirmation, Debtors must waive their Fifth Amendment rights."[14] (1:SER-146). The Nichols again made clear in that pleading (consistent with their Counsel's argument regarding the Conversion motion) that the Nichols had no intention of complying with the order that they themselves requested. The Nichols then waited another 18 days to move to dismiss this case. The Nichols never credibly explained their change in position.

The Nichols never made any attempts whatsoever to confirm a Chapter 13 plan. (ER-078; 1:SER-152). Instead, the Nichols litigated to improve their position with creditors and have delayed these proceedings. There is no evidence anywhere in the record that the Nichols could have – or indeed ever attempted – to proceed

[14] The Nichols have persistently repeated this legal falsehood, such as when they argue they were forced to abandon their third-party claim, including the lis pendens, specifically because of the Fifth Amendment concerns and their resulting inability to testify. (OB p. 13). The Nichols had no right to *avoid* invoking the Fifth Amendment. And in fact the Nichols had no right to avoid testifying other than through invoking the Fifth Amendment. The Nichols have legal duties to disclose information. The Nichols may, if they choose, refuse to incriminate themselves. The law is clear that the Fifth Amendment does not provide them a right not to participate in the process of their own claims. *See, e.g.*, *Leidendeker*, 779 F.2d 1417, 1418 (9th Cir. 1986); *In re Gonzales*, 1995 Bankr. LEXIS 65, *5 (Haw. Bankr. 1995); *see also United States v. Sullivan*, 274 U.S. 259 (1927).

under Chapter 13 in good faith. Even the initially proposed payments were predicated on a debt amount that was amended merely one day after filing. (2:SER-331; 2:SER-325). The Nichols took no steps to entitle them to the protections of Chapter 13, and indeed have not suggested any valid reasons why this case should be in Chapter 13. All of this begs the question why the Nichols chose Chapter 13.

Importantly, the Nichols did not move to dismiss their Chapter 13 until they had exhausted all other remedies to stay in Chapter 13 without participating in good faith under the Code. The Nichols' behavior proves that Nichols "used Chapter 13 to hide from creditors during the pendency of the criminal proceedings" rather than to "effectuat[e] a speedy, efficient, and feasible organization." (1:SER-071-072). Entering a Chapter 13 solely to hide assets from creditors is "not consistent with bankruptcy policy and goals [and constitutes] an improper purpose." *In re Hageney*, 422 B.R. at 259.

The Nichols' abuse of the bankruptcy process is demonstrated through their Opening Brief. The Nichols do not identify any legitimate basis for their refusal to advance their case in Chapter 13, and instead argue that they were justified in attempting to stay the Chapter 13 without advancing it in order to:

1) seek a highly discretionary stay pending appeal for which there is no constitutional or statutory right, and which is an "extraordinary remedy." *Crawford & Sons v. Besser*, 298 F.Supp2d 317, 319 (E.D.N.Y. 2004). (OB p. 58)

2) to "enforce [an] earlier settlement agreement" that appears nowhere in the bankruptcy or appellate records and the exact terms of which are entirely absent from the Opening Brief. (OB p. 58)

3) seek a second, highly discretionary stay pending appeal on virtually the same grounds as previously, even though there had been no meaningful change in circumstances. (OB p. 59).

Nowhere in the Opening Brief do the Nichols justify why they filed in Chapter 13 in the first place, why they chose to seek a stay only after their adversary was defeated, why they did not move to dismiss the case sooner, why they made no attempt to advance the case toward confirmation, why they refused to submit tax returns as required under the law, or attempted to explain their motive for seeking to remain in Chapter 13. The Parsons can only assume it was to avoid an examination of their finances and to retain the right to dismiss their bankruptcy. The bankruptcy court exercised its discretion to find that all of these unanswered questions amounted to an abuse of process and cause for conversion.

The Nichols make no attempt to justify their complete and total lack of transparency to creditors and make no attempt to explain why they took no steps to participate in the Chapter 13 bankruptcy process. Instead, the Nichols ask this Court to find clear error because they used a number of procedural vehicles to avoid advancing their own bankruptcy. The Nichols claim that they used process for the purpose for which the process was expressly intended. (OB p. 63). But the Nichols provide no evidence to support these claims. The normal Chapter 13 debtor seeks to move toward confirmation. The normal Chapter 13 debtor makes required disclosures under the code. A normal Chapter 13 debtor does not delay for 17 months and then file a motion to dismiss only when the bankruptcy court has already decided cause exists to convert their case. It is not incumbent on the bankruptcy court, this Court, or the Parsons to invent a motive to explain why the Nichols did nothing that a usual Chapter 13 debtor would do. The Nichols' use of the bankruptcy process to gain the benefit of the automatic stay without complying with any of the requirements under Chapter 13 can constitute nothing but abuse of the process. The bankruptcy code is not intended to allow a party to play games to avoid a liquidation or payments to creditors. There was no error in the bankruptcy court's decision, and certainly not clear error. This Court must affirm.

VII. CONCLUSION

The bankruptcy court's decision to convert instead of dismiss under § 1307 was legally and factually justified under still-controlling Ninth Circuit precedent. This Court should affirm the bankruptcy court's decision.

DATED: December 14, 2020 MESCH CLARK ROTHSCHILD

By: *<u>/s/D. Alexander Winkelman</u>*
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Attorneys for Appellees Marana Stockyard & Livestock Market, Inc.; The Parsons Company; Clay Parsons; and Karen Parsons

Case No. 20-60043

UNITED STATES COURT OF APPEALS
OF THE NINTH CIRCUIT

CERTIFICATE OF SERVICE FOR ELECTRONIC FILING

I hereby certify that I electronically filed the foregoing/attached document(s) on this date with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system.

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Description of Document: Answering Brief Of Appellees Marana Stockyard & Livestock Market, Inc.; The Parsons Company; Clay Parsons; and Karen Parsons.

s/ D. Alexander Winkelman — Signed

December 14, 2020 — Dated

Case No. 20-60043

UNITED STATES COURT OF APPEALS
OF THE NINTH CIRCUIT

CERTIFICATE OF COMPLIANCE

I am the attorney for Appellees Marana Stockyard & Livestock Market, Inc.; The Parsons Company; Clay Parsons; and Karen Parsons. This brief contains 9,787 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6). I certify that this brief complies with the word limit of Cir. R. 32-1.

s/ D. Alexander Winkelman
Signed

December 14, 2020
Dated

Case No. 20-60043

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: DONALD HUGH NICHOLS and JANE ANN NICHOLS,

Debtors.

DONALD HUGH NICHOLS; JANE ANN NICHOLS,

Appellants,

v.

MARANA STOCKYARD & LIVESTOCK MARKET INC., ET AL.,

Appellees.

On Appeal from the United States Bankruptcy Appellate Panel
of the Ninth Circuit
BAP No. AZ-20-1032-TaLB

BK. Ct. No. 4:18-bk-09638-BMW

APPELLANTS' REPLY BRIEF

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ARGUMENT

Debtors respectfully request the Court to reverse the bankruptcy court's ruling denying Debtors' motion to dismiss under 11 U.S.C. § 1307(b) and converting this case to Chapter 7. Reversal is necessary because the bankruptcy court's ruling is contrary to the statute and the relevant judicial authority.

Only one appellee has filed a response, Marana Stockyard ("Creditor"). Creditor's response effectively asks this Court to ignore the applicable Supreme Court precedent, to ignore the plain language of the statute, to make findings of fact that the bankruptcy court did not make, and to essentially rewrite the bankruptcy court's ruling.[1] Needless to say, the Court cannot do this.

A. The Legal Issue Of The Scope And Validity Of *Rosson* Is Properly Before This Court

Before moving on to the substantive issues, it is worth addressing the assertion by Creditor, relying on a statement in the BAP opinion, that the issue of the continued validity of *In re Rosson*, 545 F.3d 764 (9th Cir. 2008), was waived. Of course, the BAP ruled on the issue in a published opinion, precluding waiver

[1] Creditor includes in its excerpts of record several documents that are not part of the record, including court orders issued after the ruling on appeal, and Debtors' counsel's fee application that was filed after the ruling here at issue, and an objection to it (but, interestingly, not the reply). These documents must be stricken. *See Kirshner v. Uniden Corp. of America*, 842 F.2d 1074, 1077 (9th Cir. 1988). A motion to strike is being filed concurrently herewith.

arguments at this stage. Additionally, even if, arguendo, the issue had not been raised in bankruptcy court,[2] an appellate court can review legal issues raised for the first time on appeal where there is no prejudice to the opposing party. *See Columbia Steel Casting Co., Inc. v. Portland General Elec. Co.*, 111 F.3d 1427, 1443 (9th Cir. 1996) ("We will review an issue that has been raised for the first time on appeal…when the issue is purely one of law"). Where "an appellee has a full and fair opportunity to address an issue raised for the first time on appeal in its appellate briefing, there is no prejudice." *Emmert Indus. Corp. v. Artisan Associates, Inc.*, 497 F.3d 982, 985-6 (9th Cir. 2007). The question of the scope and validity of *Rosson* is purely one of law, and the appellees clearly had an opportunity to address it in appellate briefing both here and before the BAP. The issue is thus properly before this Court.

Creditor also asserts that Debtors waived the argument that *Rosson* does not authorize dismissal for abuse of process without a finding of bad faith. Response Brief ("RB"), p. 23. This is a minor issue, as the primary argument in this appeal is that *Rosson* has no continued validity. In any case, there was no reason to address this particular issue below, because no one argued for a contrary interpretation of *Rosson*. In fact, Creditor itself took the position that a finding of

[2] Debtors noted questions regarding the validity of *Rosson* both in the motion to dismiss and in the reply. 2-ER-87, 2-ER-175.

bad faith was required, and did not distinguish bad faith from abuse of process, something that Debtors pointed out in their reply to the motion to dismiss. 1-SER-79; 2-ER-78, fn. 4. In denying the motion to dismiss, the bankruptcy court did not adopt any of Creditor's arguments, or the arguments of the other opposing party, and did not find bad faith. Instead, the court ruled that Debtors committed "abuse of process" by attempting to stay in the bankruptcy after February 4, 2019. 1-ER-39. It was the bankruptcy court's denial of the motion to dismiss without a finding of bad faith that first raised this issue.

In short, the legal issues surrounding the scope and viability of *Rosson* are properly before this Court.

B. *Rosson* Is Irreconcilable With Supreme Court Precedent

Creditor's first approach appears to be to argue that the relevant Supreme Court cases, namely *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 127 S.Ct. 1105 (2007), and *Law v. Siegel*, 571 U.S. 415, 134 S.Ct. 1188 (2014), support the holding of *Rosson*. In furtherance of this argument, Creditor makes a series of perplexing assertions about the holding and analysis of each of these three cases that plainly contradict what these cases actually say. For example, Creditor argues that *Rosson* follows *Marrama* and until the Supreme Court overrules *Marrama*, this Court is bound to recognize the qualification in §1307(b) for bad faith. RB, p. 13. There are several problems with this argument. First, *Marrama*

never recognized a bad faith limitation on §1307(b), for the obvious reason that it did not deal with that provision (in fact, §1307(b) is not mentioned in the opinion even once). Moreover, *Marrama* did not even recognize a bad faith limitation on §706(a), with which it was dealing, but rather held that under the express language of the statute, §706(a) was limited by §706(d). 549 U.S. at 373-4, 127 S.Ct. at 1111. Second, to the extent *Marrama* could have been interpreted as imposing an implicit bad faith limitation on §706(a) at the time *Rosson* was decided, and there are serious questions in this regard[3], the Supreme Court did in fact overrule or abrogate *Marrama* on this point when it held in *Law* that a court is not allowed to contravene express provisions of the Bankruptcy Code based on equitable considerations. 571 U.S. at 426, 134 S.Ct. at 1197. Lastly, whether or not *Marrama* approved of a bad faith limitation is irrelevant to the instant case,

[3] As discussed in the opening brief, in recognizing the general power of the bankruptcy court to prevent bad faith conduct or abuse of process, *Marrama* was at most stating that a court can utilize this power to skip a procedural step "that merely postpones the allowance of equivalent relief." 549 U.S. at 375, 127 S.Ct. at 1111-2. As the Supreme Court subsequently made clear in *Law*, and contrary to what some lower courts have attempted to read into *Marrama*, *Marrama* did not adopt a more expansive view of a bankruptcy court's authority under §105 of the Code, and did not authorize courts to limit express provisions of the Bankruptcy Code based on their general power to prevent bad faith conduct or abuse of process. 571 U.S. at 426, 134 S.Ct. at 1197.

because the bankruptcy court here did not find bad faith, as discussed further in Section D below.[4]

Along the same lines, Creditor argues that the holding of *Rosson* "does not depend on a reading of §105." RB, p. 22. This is belied by *Rosson* itself, which expressly states, in explaining its view that the word "shall" in §1307(b) is not dispositive, that "the important point established by *Marrama* is that even otherwise unqualified rights in the debtor are subject to limitation by the bankruptcy court's power under §105(a) to police bad faith and abuse of process." 545 F.3d at 773, fn. 12. *Marrama* offered the *Rosson* court no other basis to rule as it did with respect to §1307(b). The only other basis for the ruling in *Marrama* was the language of §706(d), which expressly limits the right to convert based on whether the debtor qualifies under the converted-to chapter. 549 U.S. at 373-4, 127 S.Ct. at 1111. Although there is a parallel provision to §706(d) in §1307(g), it has no bearing on the right to dismiss under §1307(b) for the obvious reason that whether a debtor qualifies under the converted-to chapter is irrelevant when the debtor is not requesting conversion, but rather requests dismissal. Interestingly,

[4] It is worth pointing out here that many of Creditor's arguments, although deficient for the reasons discussed in the body of this brief, also turn on the existence of a finding of bad faith. In fact, throughout the response brief, Creditor repeatedly refers to the bankruptcy court as having found that Debtors acted in bad faith to support its arguments. *See, e.g.*, RB, p. 22. This is nothing more than a misrepresentation of the bankruptcy court's ruling.

Creditor effectively acknowledges that the holding of *Rosson* cannot survive without its reliance on §105(a), as it asks this Court to "clarify" *Rosson* as standing for a "holistic" interpretation of §1307, "taking into consideration Congress' intent in enacting §105(a)." RB, p. 23. Not only does this requested clarification run directly afoul of the principle enunciated in *Law*, which prohibits using §105(a) to modify other provisions of the Code, but the request also asks the Court to commit an even worse analytical error by looking at the legislative intent behind one statutory provision to interpret the language of another statutory provision.

Creditor next attempts to limit the scope and import of *Law*. It asserts that *Law* reaffirmed *Marrama*'s rejection of the "'absolute right' position" (presumably, the "position" that a statute providing an unequivocal right to do something must be interpreted as such). In reality *Law* did the exact opposite, as it expressly rejected the idea that a court can ignore or contravene express provisions of the Bankruptcy Code, as noted above. 571 U.S. at 426, 134 S.Ct. at 1197. Creditor then argues that "[i]t was clearly the case at the time *Marrama* was decided that §105(a) could not directly contravene express provisions of the bankruptcy code," that therefore *Law* should be narrowly construed as overruling a specific decision, and that *Law*'s discussion of *Marrama* is dictum. Of course, this argument directly contradicts Creditor's prior assertion that *Marrama* rejected the "absolute right position." In fact, by acknowledging that the law has always been

that §105(a) cannot be used to contravene express provision of the Code, and that *Marrama* did not change the law in this respect, Creditor acknowledges that *Rosson*'s assertion that §105(a) could be used to limit §1307(b) was wrong even when *Rosson* was decided.

The assertion that *Law*'s discussion of *Marrama* is dictum, made without any citation to legal authority, is equally puzzling. "Dictum is 'an unnecessary statement in a published opinion that is not the result of reasoned consideration.'" *U.S. v. Boitano*, 796 F.3d 1160, 1164 (9th Cir. 2015). The Supreme Court's discussion of *Marrama* in *Law* was in direct response to an argument made by the appellee that *Marrama* required a different result than the one the Court reached. 571 U.S. at 425, 134 S.Ct. at 1197. It was thus both necessary to the ruling, and, clearly, the result of reasoned consideration.

In summary, the principle underlying the ruling in *Rosson*, that even otherwise unqualified rights are subject to limitation by the bankruptcy court's power under §105(a) to police bad faith and abuse of process, was expressly rejected by the Supreme Court in *Law*, and therefore *Rosson*'s interpretation of §1307(b) has no continued validity.

C. The Plain Language Of §1307(b) Requires Dismissal On A Debtor's Request

Creditor's statutory interpretation arguments largely rely on ignoring the plain language of the statute in favor of "legislative intent" and furthering the general purposes of the Bankruptcy Code, an approach repeatedly repudiated by the Supreme Court, and by this Court. None of Creditor's contentions warrants ignoring the plain language of §1307(b).

1. Supreme Court and this Court's precedent requires that a statute's plain terms be given effect

Creditor cites three Supreme Court cases to support its statutory interpretation arguments. None supports the arguments it is trying to advance. Two of these cases stand for the unremarkable proposition that a word, in both cases a word fairly subject to interpretation, cannot be interpreted while ignoring the context of the surrounding words within the same clause or sentence.

In *U.S. v. Morton*, 467 U.S. 822, 824, 104 S.Ct. 2769, 2770-1 (1984), dealing with a statute stating that the government is not liable with respect to any payments it makes from federal employee wages "pursuant to legal process regular on its face," the Court held that the phrase "legal process," which the Court determined to be ambiguous, must be read in light of the immediately-following phrase "regular on its face." 467 U.S. at 828-9, 104 S.Ct. at 2773. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 564, 115 S. Ct. 1061, 1064 (1995), dealt with the

meaning of the statutorily-defined term "prospectus" under the Securities Act of 1933. The statute stated that "[t]he term 'prospectus' means any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security." 513 U.S. at 573-4, 115 S. Ct. at 1069. The Court ruled that reading "communication" as covering every communication would make the preceding words superfluous, since, e.g., a notice or a circular would necessarily be subsumed within such a broad definition of "communication." 513 U.S. at 574-5, 115 S. Ct. at 1069. Accordingly, the Court applied the doctrine of *noscitur a sociis*, "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words," and concluded that "communication" referred to public communications. 513 U.S. at 575, 115 S. Ct. at 1070. The interpretive principles applied by these cases have no bearing here, because neither "shall" nor "any time" in §1307(b) is ambiguous, and no other words in §1307(b) qualify or modify those terms as relevant here.

In the third case, *Kelly v. Robinson*, 479 U.S. 36, 50, 107 S. Ct. 353, 361 (1986), the question before the Court was whether a statutory provision excepting from discharge a debt that is "for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss," covered criminal restitution orders. As the Court itself pointed out, the

language was subject to interpretation. *Id*. In addition to the issues of statutory interpretation, the case involved considerations of federalism, created by a potential conflict between state criminal law and federal bankruptcy law. *Id*. at 49, 107 S. Ct. at 361. The Court stated that the text of the statute is the starting point for its construction, but the court should also "look to the provisions of the whole law, and to its object and policy." *Id*. at 43, 107 S. Ct. at 357-8. Nevertheless, the Court focused its analysis on the language of the statute, and on determining whether the nature of criminal restitution satisfied the express requirements of the statutory text, concluding that it does. *Id*. at 52, 107 S. Ct. at 362-3. To the extent *Kelly* is offered for the proposition that a court can ignore the language of the statute in favor of effectuating what it deems the statute's object or policy, *Kelly* does not support such a proposition.[5] Moreover, the Supreme Court has repeatedly repudiated such an approach in numerous subsequent cases. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6, 120 S.Ct. 1942, 1947 (2000); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030

[5] To the extent *Kelly* is offered for the proposition that in interpreting one statute or provision, the court cannot ignore related statutes or provisions, such a proposition is obvious, but does not add anything to the analysis here. For example, when the Court in *Marrama* was analyzing the scope of §706(a), it properly also looked at §706(d), as that section imposes an explicit limitation on §706(a). But recognizing limitations on one statutory provision imposed by the language of another provision is quite different from ignoring unequivocal statutory language based on hypothetical legislative intent underlying another statutory provision.

(2004); *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-4, 112 S.Ct. 1146, 1149 (1992). In *Henson v. Santander Consumer USA Inc.*, the Supreme Court expressly stated that "it is quite mistaken to assume…that whatever might appear to further the statute's primary objective must be the law." 137 S.Ct. 1718, 1725 (2017). As the Court explained, "[l]egislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues the stated purpose at all costs." *Id*. at 1725.

This Court followed *Henson* in *Yith v. Nielsen*, 881 F.3d 1155 (9th Cir. 2018), which has parallels to the present case. At issue in *Yith* was 8 U.S.C. §1447(b), which allows a naturalization applicant to request a court hearing on his application if there is "failure" by the administrative agency to make a determination within 120 days of the naturalization examination. *Id*. at 1164. Another statute, 8 U.S.C. §1429, prevented the administrative agency from considering the naturalization application when removal proceedings were pending, and one of the arguments by the government was that §1447(b) did not authorize a court to hear an appeal where removal proceedings were pending, because there could be no "failure to make a determination" where the agency was prevented by statute from doing so. *Id*. at 1163. This Court rejected this argument, applying instead a common-sense usage of the word "failure." *Id*. at 1164. Moreover, this Court rejected the argument adopted by another circuit court that "it

would seem to work against the framework set forth on §§1447 and 1429 for the district court to undertake [naturalization petition] evaluation where Congress has expressly prohibited the [administrative agency] from doing so." *Id*. The Court explained that the court adopting this position "substituted its own views of Congressional purpose for the actual language of the statute," and further emphasized that "it is never our job to rewrite a constitutionally valid statutory text." *Id*. *See also U.S. ex rel Hartpence v. Kinetic Concepts, Inc.*, 792 F.3d 1121, 1129 (9th Cir. 2015) ("if Congress's plain words…are to have any effect at all, they surely cannot give way to whatever broad goals we, as the judiciary, might prefer").

Here, likewise, the natural and plain reading of §1307(b), in particular of the words "shall" and "at any time," requires dismissal upon a debtor's request. Neither the language of §1307(c) nor of §1307(e) limits §1307(b). The limitations that Congress wanted to impose on §1307(b), it did impose in the language of the statute, and Congress chose not to impose additional limitations when it had the opportunity to do so. Neither the alleged framework of the statue, nor the alleged purpose in promulgating its provisions, in particular provisions other than §1307(b), can serve as a basis for ignoring or judicially rewriting the language of the statute. *Yith*, 881 F.3d at 1164.

2. The language of §1307(b) is unambiguous and not limited by any other provision of the Bankruptcy Code

Turning to Creditor's specific contentions, Creditor first points to the word "request" in §1307(b), and contrasts it with §1307(a), which provides that the debtor "may convert" a Chapter 13 case to Chapter 7 at any time. Creditor then argues that the need for a "request" "indicates an intent that such request be subject to consideration by the bankruptcy court," and that therefore, apparently, the bankruptcy court must have the ability to deny it. Of course, this argument ignores the second clause of the same sentence providing that the court "shall dismiss" the case on the debtor's request. But it is also not a new argument and has been addressed by other courts. In fact, one court characterized it as an outlier. *In re Williams*, 435 B.R. 552, 555 fn. 2 (Bankr. N.D. Ill. 2010). As the *Williams* court explained,

> [t]he argument is not well grounded. Section 1307(a) makes the debtor's right to convert applicable to all Chapter 13 cases, and so presents no reason for a debtor to 'request' conversion from the court; by contrast, the right to dismissal under §1307(b) applies only to previously unconverted Chapter 13 cases, and so requires a request by the debtor to allow the court to distinguish between converted and unconverted cases. For unconverted cases, though, §1307(b) makes dismissal mandatory.

Id. *See also* Fed. R. Bankr. P. 1017(a) (requiring no hearing or notice to creditors in order to dismiss under §1307(b)); *In re Mills*, 539 B.R. 879, 884 (Bankr. Kan.

2015) (stating that Rule 1017 contemplates that dismissal under §1307(b) should be granted out of hand).

Creditor next asserts that interpreting §1307(b) to mean what it says would render §1307(c) superfluous. There are numerous problems with this assertion. First, it is wrong as a factual matter. As one court explained, this contention is based on the assumption that the debtor neither wants nor needs bankruptcy relief. Not every debtor will choose dismissal, especially given its consequences such as loss of the automatic stay and the opportunity for a discharge, and "many—perhaps most—debtors will prefer to stand and fight rather than retreat from the courthouse under cover of section §1307(b)." *In re Polly*, 392 B.R. 236, 244 (Bankr. N.D. Tex. 2008), *declined to follow by In re Jacobsen*, 609 F.3d 647 (5th Cir. 2010).

Second, and more importantly, the fact that §1307(b) limits the ability of the court to decide whether to convert or dismiss is not a basis for ignoring the plain language of §1307(b). *See Hartford Underwriters*, 530 U.S. at 6, 120 S.Ct. at 1947 (plain language of the statute controls); *Lamie*, 540 U.S. at 534, 124 S.Ct. at 1030 (same); *Connecticut Nat. Bank*, 503 U.S. at 253-4, 112 S.Ct. at 1149 (same).

Third, contrary to Creditor's contention, *Marrama* in no way supports the conclusion that §1307(c) can override §1307(b), nor even addresses the matter. At most, *Marrama* supports the proposition that a debtor who meets the cause requirements of §1307(c) can be removed from Chapter 13. 549 U.S. at 373-4,

127 S.Ct. at 1111. This much is not in dispute. But *Marrama* does not address a debtor's right to remove himself from Chapter 13 by virtue of §1307(b), as the issue was not before the Court in *Marrama*.

Fourth, while couching its argument in terms of statutory interpretation, Creditor basically requests this Court to ignore the unambiguous language of §1307(b) in favor of granting the bankruptcy court discretion under §1307(c) to deny a debtor's motion to dismiss, which the statute itself does not provide. Even the BAP below was unwilling to so blatantly ignore the statutory language, opting to limit the authority to deny dismissal to cases of bad faith or abuse of process (an approach that still results in imposition of an extra-statutory limitation on §1307(b), as discussed in the opening brief). In an effort to root the argument in the statutory language, Creditor asserts that "there is no language in the statute which supports [Debtors'] interpretation that §1307(b) necessarily overrides §1307(c)." RB, p. 15. But that is exactly what the words "shall" and "at any time" in §1307(b) do—they require the court to dismiss the case upon the debtor's request, which the debtor can make at any time, regardless of what the court could have otherwise done under other statutory provisions had the debtor not requested dismissal. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35, 118 S.Ct. 956, 962 (1998) ("shall" creates an obligation impervious to judicial discretion). Creditor's parallel argument, that §1307(c) requires the

bankruptcy court to exercise its authority to further the best interests of creditors, suffers from the same flaw of ignoring the actual language of the statute—a requirement that the bankruptcy court exercise its authority based on certain considerations only applies where the court is given such authority. Under §1307(b), the bankruptcy court is not given authority to consider any matters other than the debtor's prior conversions. *See In re Sisk*, 962 F.3d 1133, 1145 (2020) (court not at liberty to alter the balance struck by the statute).

Similarly, Creditor asserts that §1307(e) requires the court, on motion, to remove a debtor from Chapter 13 for failure to file tax returns, and that the court must decide whether to dismiss or convert based on the interests of creditors and the estate. RB, p. 16. This assertion does not contribute to the analysis of the issues, as it states a point not in dispute. The real question when it comes to §1307(e) is whether it supersedes the right of the debtor to dismiss "at any time" under §1307(b). Creditor does not address this question, and in particular does not address any of the authorities cited by Debtors explaining that §1307(e) limits the court's discretion to allow the case to remain in Chapter 13, and cannot be interpreted to nullify the "shall" and "at any time" clauses of §1307(b), especially where, as here, Congress chose not to modify or remove these clauses despite having multiple opportunities to do so.

Creditor also resorts to arguing, incredibly, that Debtors could not utilize §1307(b) because, "once the bankruptcy court correctly found [Debtors] had behaved in bad faith, they were no longer members of the class of debtors who could take advantage of the right provided under §1307(b)." RB, p. 22. This is because, Creditor asserts, §1307(c) indicates that Debtors' bad faith could stop them from qualifying as a debtor under Chapter 13. As noted earlier and discussed below, the bankruptcy court did not find bad faith. That aside, this argument directly violates the Code, which defines "debtor" as a "person or municipality concerning which a case under this title has been commenced." 11 U.S.C. 101(13). Section 1307(b) grants the right to dismiss to the "debtor," without any conditions as to the "class" or type of debtor. At best, Creditor's argument confuses the term "debtor" with the requirements the debtor must satisfy to proceed under a particular bankruptcy chapter, here Chapter 13. Put another way, whether a person is a "debtor" does not turn on what rulings the bankruptcy court makes while the case is pending.

Next, Creditor attempts to avoid the reasoning of the 2nd Circuit in *In re Barbieri*, 199 F.3d 616 (2d Cir. 1999), by claiming that it was overruled by *Marrama*, citing in support a bankruptcy court case, *In re Armstrong*, 408 B.R. 559 (Bankr. E.D.N.Y. 2009). *Marrama* could not overrule *Barbieri* because it did not deal with the same issue, interpretation of §1307(b). Even if *Marrama* could have

been viewed as abrogating *Barbieri*, the only basis for this would have been *Marrama*'s allegedly expansive view of §105(a). *See Armstrong*, 408 B.R. at 569 (adopting *Rosson*'s interpretation of *Marrama*). But the Supreme Court in *Law* expressly rejected the suggestion that *Marrama* ever permitted such an expansive view of §105(a). *Law*, 571 U.S. at 426, 134 S.Ct. at 1197. Therefore, *Marrama* could not have abrogated *Barbieri*, certainly not after *Law* was decided. Additionally, the views of the *Armstrong* court were rejected by a district court in the same circuit even before *Law*. *See In re Procel*, 467 B.R. 297, 306-7 (S.D.N.Y. 2012). The *Procel* court addressed and rejected each of *Armstrong*'s contentions regarding the scope of §1307(b). In summary, *Armstrong* suffers from the same deficiencies as all similar cases, of ignoring the language of the statute in favor of appeal to legislative history and policy. *See Procel*, 467 B.R. at 306-7.

Lastly, Creditor seeks support in §105(a), stating that "where a debtor has engaged in bad-faith, abuse of process and has created a conflict between two provisions where none normally exists, there is substantial evidence that Congress intended §105(a) to permit the bankruptcy court to exercise its discretion or carry out its duties consistent with the bankruptcy code." RB, p. 18. It is not clear what Creditor means by this. Read literally, the second half of this statement is a truism—that a bankruptcy court can act consistent with the Code—and the first half is an unnecessary limitation. But what Creditor appears to intend to argue, as

it did below, is that the bankruptcy court can use §105(a) to alter the balance struck by the statute and to deny a §1307(b) motion to dismiss in order to convert under §1307(c). Needless to say, this is precisely the type of use of §105(a) that was squarely rejected in *Law*. 571 U.S. at 426, 134 S.Ct. at 1197. Moreover, a debtor cannot "create" conflict between provisions of a statute—statutory provisions either conflict or they do not, and where they do, the conflict must be resolved based on principles of statutory interpretation. As discussed above and in the opening brief, however, those principles dictate that §1307(b) is not limited by §1307(c), or, for that matter, by §1307(e).

3. Speculation about legislative intent cannot override the language of §1307(b)

Creditor also appeals to legislative intent and legislative history as supporting a limitation on the §1307(b) right to dismiss. For example, Creditor repeats the BAP's assertion that "the mandatory language of §1307(b) is best understood as providing a chapter 13 debtor with an absolute right to exit chapter 13," but that the debtor does not have an unqualified right to choose how he exits Chapter 13. 1:ER-23-24. This type of specious reinterpretation of clear statutory language is what the Supreme Court, and this Court, time and again have stated that a court must not do. *See Hartford Underwriters*, 530 U.S. at 6, 120 S.Ct. at 1947; *Lamie*, 540 U.S. at 534, 124 S.Ct. at 1030; *Yith*, 881 F.3d at 1164; *Sisk*, 962

F.3d at 1145. As this Court stated in *Sisk*, the assumption is that the ordinary meaning of statutory language accurately expresses the legislative purpose. 962 F.3d at 1145. To reach its conclusion regarding the meaning of §1307(b), the BAP looked at selective legislative history on the general purposes of Chapter 13, and concluded, effectively, that because the legislative history on the general purpose of Chapter 13 is not inconsistent with the court deciding how to terminate a chapter 13, it will ignore the plain language of the statute. 1:ER-23-24. "But legislative history—no matter how clear—can't override statutory text." *Hearn v. Western Conference of Teamsters Pension Trust Fund*, 68 F.3d 301, 304 (9th Cir. 1995); *Powers v. Wells Fargo Bank NA*, 439 F.3d 1043, 1045 (9th Cir. 2006) (same). Moreover, the legislative history on the specific provision at issue, §1307(b), supports its plain reading. The Senate Report expressly states that the right to dismiss is "without qualification." *See Williams*, 435 B.R. at 555, *quoting* S. REP. NO. 95-989, at 141 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5927. Likewise, the House Report states that "[s]ubsection (b) *requires* the court, on request of the debtor, to dismiss the case if the case has not already been converted from chapter 7 or 11." *Id*., *quoting* H.R.Rep. No. 95–595, at 428 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6383–84.

4. Hypothetical policy concerns cannot override the language of §1307(b)

Creditor also puts forth various policy arguments in support of its contention that §1307(b) should not be interpreted to mean what it says. For example, Creditor asserts that eliminating *Rosson*'s limitation on the §1307(b) right to dismiss "would damage debtor-creditor relations," would require creditors to be more aggressive in moving to dismiss cases that do not appear confirmable as of the petition date, and that bankruptcy courts would have to take such motions more seriously because they would be "bereft of a tool to prevent abuse of process." RB, p. 19. The espoused policy concerns have no basis in fact. Until *Rosson* was decided in 2008, courts in this circuit held that the §1307(b) right to dismiss was absolute. *See In re Beatty*, 162 B.R. 853 (9th Cir. BAP 1994). The same interpretation currently applies in the 2nd Circuit, *see In re Barbieri*, 199 F.3d 616 (2d Cir. 1999), and has been followed by courts in several other circuits. *See Williams*, 435 B.R. at 559; *In re Sinischo*, 561 B.R. 176 (Bankr. D. Colo. 2016); *In re Marinari*, 610 B.R. 87 (E.D. Pa. 2019); *In re Fulayter*, 615 B.R. 808 (E.D. Mich. 2020). In none of these circuits, including this one, have Creditor's suggested dire consequences come to pass. Furthermore, as the *Barbieri* court explained, the Code provides several mechanisms for the bankruptcy court to

prevent abuse without violating the express requirements of §1307(b). 199 F.3d at 621.

Creditor also disputes that dismissal under §1307(b) puts the parties in the position they would have been in prior to bankruptcy, claiming, with reference to the facts of this case, that a "17-month delay in the enforcement of an action could…render a creditor entirely incapable of collecting on a judgment." RB, p. 16. Whether a delay due to bankruptcy would make a judgment uncollectible is debatable. For example, in this case, Creditor would not have been able to just "collect" absent a bankruptcy, since it has no judgment, and would not have gotten a judgment without litigating all the way through trial, something that would have likely taken years, with the process itself likely to have depleted Debtors' assets. But these hypotheticals cannot alter the language of the statute, and a court "cannot depart from the most natural reading of the statutory text in order to advance [its] understanding of better policy." *Bobka v. Toyota Motor Credit Corporation*, 968 F.3d 946, 954 (9th Cir. 2020); *see also Hartford Underwriters*, 530 U.S. at 13-4, 120 S. Ct. at 1951. In short, policy concerns, even if they had any legitimacy, are not a basis for ignoring the language of §1307(b).

D. The Bankruptcy Court's Determination Of "Abuse Of Process" Cannot Be Upheld Based On Factual Contentions That The Bankruptcy Court Did Not Accept, And Must Be Reversed Where Debtors Utilized Process For Its Intended Purpose

Creditor's entire argument in support of the bankruptcy court's finding of abuse of process is seemingly based on a disregard of the record or distortion of the same.[6] To start, Creditor attempts to have this Court rewrite the bankruptcy court's ruling on the issue of bad faith. The bankruptcy court did not find bad faith. Moreover, the bankruptcy court did not find bad faith even in ruling on the motion to convert, despite the fact that Creditor explicitly argued for conversion based on bad faith, and the issue was briefed. 2-SER-160, 2-ER-286-289. Creditor contends that the bankruptcy court "intended" to find bad faith. RB, p. 24. That is belied by the court's ruling. The bankruptcy court did not unintentionally omit the label "bad faith" while substantively finding bad faith. To the contrary, the bankruptcy court expressly used the term "bad faith" and identified the legal standard for bad faith, but then proceeded to hold that dismissal should be denied not for bad faith, but for "abuse of process." 1-ER-38-39. The bankruptcy court itself clearly distinguished the two terms. Creditor's contention that there is no

[6] In addition to the factual allegations discussed in the body of the brief, Creditor makes numerous other allegations that are either: without support in the record (e.g. most of the allegations on page 3 of the response brief), or contradict the record (e.g., the asserted reason for the motion to convert, ignoring the fact that in order to file it, Creditor had to withdraw its motion to lift stay). Because these allegations are not directly relevant to this appeal, they are not addressed further.

distinction between bad faith and abuse of process is thus contradicted by the bankruptcy court's ruling.[7] Essentially, in order to support its argument, Creditor asks this Court to make a factual finding that the bankruptcy court declined to make. Such a request is improper. *See Smallfield v. Home Ins. Co. of NY*, 244 F.2d 337, 341 (9th Cir. 1957) ("This court lacks the power to make new findings of fact").

Moreover, in *In re Leavitt,* the Court rejected, as without foundation in law, the suggestion that the proper test for bad faith is whether the debtor used the bankruptcy system to "stubbornly, persistently and wrongfully thwart creditors." 171 F3d 1219, 1224 (9th Cir. 1999). Therefore, the asserted basis for the bankruptcy court's finding of abuse of process, that Debtors impermissibly attempted to stay in Chapter 13 and opposed conversion to "hide" from creditors during the criminal case, 1-ER-39, could not have supported a bad faith finding.

Creditor next contends that the bankruptcy court properly found abuse of process, but does not address, or even mention, the legal authorities cited by Debtors. By failing to address these authorities, Creditor effectively admits that they state the proper legal standard for evaluating "abuse of process." Instead,

[7] Therefore, Creditor's assertion, that a finding of bad faith is reviewed for abuse of discretion, is irrelevant, because there was no finding of bad faith.

Creditor rehashes the arguments it made below, which the bankruptcy court did not accept.

For example, Creditor asserts that Debtors "never credibly explained their change in position" in moving to dismiss the bankruptcy. RB, p. 28. This argument was raised below, and addressed by Debtors, both in briefing and oral argument. 1-ER-62-63, 2-ER-77-78, 2-ER-209, 2-ER-212-213. The bankruptcy court did not accept this argument in its ruling, and did not find "abuse of process" based on the filing of the motion to dismiss.[8] Rather, the court ruled that the motion to dismiss was "not untimely." 1-ER-38. Creditor also claims that Debtors "litigated to improve their position," RB, p. 28, yet another unsubstantiated assertion it made below, and which Debtors addressed. 2-ER-80-81. The bankruptcy court did not make such a finding in its ruling. Creditor next suggests that Debtors entered Chapter 13 solely to hide assets from creditors, and that they did not proceed under Chapter 13 in good faith. RB, pp. 28-29. As noted earlier, the bankruptcy court did not find bad faith. Furthermore, the bankruptcy court did not find that Debtors abused process in filing the bankruptcy or even that the filing

[8] Creditor claims that Debtors sought dismissal to avoid scrutiny by the Chapter 7 trustee. Nothing in the record supports this and the bankruptcy court made no such finding. There were many reasons for Debtors to request dismissal, including retaining the means to pay priority tax claims, 2-ER-209-212, and to avoid being driven into destitute by the Chapter 7 trustee's liquidation of their income-generating assets.

of the bankruptcy was improper in any way.[9] The bankruptcy court's finding of abuse of process was based on what it termed "an impermissible attempt to remain in Chapter 13" after February 4, 2019. 1-ER-39.

Creditor next resorts to mischaracterizing Debtors' opening brief, claiming that Debtors' argument is that they were justified to stay the Chapter 13 in order to "seek a highly discretionary stay pending appeal," to seek a second similar stay, and to enforce a settlement agreement "that appears nowhere in the bankruptcy or appellate records." RB, p. 29. Debtors of course made no such argument. A request to stay pending appeal is effectively a necessity to avoid a waiver of rights, *see In re Thorpe Insulation Co.*, 677 F.3d 869, 881 (9th Cir. 2012), and nowhere in the opening brief do Debtors state that they were seeking to stay the bankruptcy "in order" to seek a stay pending appeal. The bankruptcy court certainly had no obligation to grant a stay pending appeal, and did not, but chose on its own initiative to grant an administrative stay. 1-ER-35-36. What Debtors did argue,

[9] Creditor rehashes the argument it unsuccessfully made below, that the bankruptcy was filed in response to its request that Debtors remove the lis pendens in the state court case. RB, p. 4. Of course, Creditor omits to mention that it was well aware of Debtors' intent to file for bankruptcy long before it was filed, was aware of the lis pendens long before it made its removal request, and was advised of the timing of the bankruptcy. 2-ER-98-104. The matter was addressed below, 2-ER-72-73, and the bankruptcy court did not find the filing of the bankruptcy improper.

and Creditor cannot dispute, is that Debtors could not abuse process by utilizing a stay that the bankruptcy court itself granted.

Creditor's assertion regarding the referenced settlement agreement not being in the record is even more baffling, as the opening brief cites directly to the record. *See* Opening Brief, p. 58; 3-ER-348. Moreover, Debtors did not seek to stay the bankruptcy proceedings to enforce the settlement agreement. Debtors' requests to stay the bankruptcy proceedings were prompted by the criminal case. 2-ER-67-71, 2-ER-222, 2-ER-337-343. In this regard, Creditor at best confuses the issues when it asserts that Debtors had no right to avoid invoking the Fifth Amendment. RB, p. 28 fn. 14. Debtors never claimed that they had such a right, as if they had such a right they would not have needed to request a stay from the bankruptcy court. But Debtors had a right to request a stay, so as not to be put in a position of having to choose between their Fifth Amendment rights or effectively forfeiting the civil case. *See Federal Sav. And Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989).

In its efforts to prove that Debtors acted with some improper motivation, Creditor ignores the fact that all actions on which the bankruptcy court based its finding of abuse of process were taken pursuant to advice of Debtors' criminal counsel. 2-ER-67-71. Criminal counsel were concerned with adverse criminal consequences from actions taken in the bankruptcy, especially in light of the fact

that criminal charges had already been filed against Debtors based on their use of civil proceedings. 2-ER-68-69.

Creditor does not and cannot dispute that the actions on which the bankruptcy court based its conclusion of "abuse of process," namely the request to stay proceedings and opposition to motion to convert, were authorized by, and filed in compliance with, statutory and judicial authority. Nor can Creditor dispute that Debtors had done nothing more than carry out the process to its authorized conclusion. The bankruptcy court could not find that Debtors abused process by seeking relief authorized by law, and by the bankruptcy court itself, simply because their request was unsuccessful. *See Blue Goose Growers, Inc. v. Yuma Groves, Inc.*, 641 F.2d 695, 696 (9th Cir. 1981).

CONCLUSION

For the reasons stated above and in the opening brief, Debtors respectfully request that this Court reverse the bankruptcy court's ruling denying Debtors' motion to dismiss under 11 U.S.C. §1307(b), and order that this case be dismissed retroactive to the date of the bankruptcy court's ruling.

RESPECTFULLY SUBMITTED this 4th day of January, 2021.

YUSUFOV LAW FIRM PLLC

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