No. 21-803

In the Supreme Court of the United States

WENDY M. DALE,

Petitioner,

v.

ALGERNON BUTLER, III,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a bankruptcy court deny a Motion to Convert to Chapter 13 Bankruptcy on the basis of bad faith and inability to qualify as a Chapter 13 debtor where the bankruptcy court found that the pro se Chapter 7 debtor did not have means to propose a feasible Chapter 13 plan, but the bankruptcy court failed to request specific salary information or to consider evidence of social security disability income in making such determination

2. May a bankruptcy court deny a Motion to Convert to Chapter 13 Bankruptcy on the basis of bad faith and inability to qualify as a Chapter 13 debtor where the pro se Chapter 7 debtor valued a pending lawsuit at $0.00, *as of the date of petition,* for which no discovery had been obtained and no settlement had been negotiated or offered and where the pro se debtor did not conceal any material information about the pending lawsuit from the Chapter 7 trustee?

3. What is the applicable standard under Bankruptcy Rule 9019 under which a bankruptcy court may approve a compromise settlement of a pending lawsuit between a Chapter 7 trustee and a non-party to the bankruptcy, over the objection of the debtor who initiated the lawsuit against the non-party, without violating the debtor's constitutional property rights?

LIST OF PROCEEDINGS

United States Court of Appeals for the Fourth Circuit

No. 21-1221

Wendy M. Dale *Debtor-Appellant* v. *Algernon Lee Butler, III, Trustee-Appellee*

Date of Final Opinion: August 26, 2021

United States District Court for the Eastern District of North Carolina

No. 7:19-CV-254-BR

Wendy M. Dale *Appellant* v. *Algernon Lee Butler, III, Appellee*

Date of Final Order: November 17, 2020

Rehearing Denial: February 3, 2021

United States Bankruptcy Court Eastern District of North Carolina Southern Division

No. 18-05448-5-SWH Chapter 7

In re: Wendy M. Dale *Debtor*

Date of Final Order: December 9, 2019

Rehearing Denial: February 8, 2020

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PETITION FOR A WRIT OF CERTIORARI

I, Wendy M. Dale, a pro se debtor (hereinafter, "Debtor") under Chapter 7 of the Bankruptcy Code, respectfully petition this Court for a Writ of Certiorari to review the judgment of the Fourth Circuit Court of Appeals.

OPINIONS BELOW

In re Dale, No. 18-05448-5-SWH, U.S. Bankruptcy Court for the Eastern District of North Carolina. Judgment entered December 9, 2019. (App.25a). Order Denying Motion to Reconsider entered January 8, 2020. (App.48a).

Dale v. Butler, No. 7:19-cv-00254-BR, U.S. District Court for the Eastern District of North Carolina. Judgment entered November 17, 2020. (App.3a) Order Denying Motion for Rehearing entered February 3, 2021. (App.45a).

Dale v. Butler, No. 21-1221, U.S. Court of Appeals for the Fourth Circuit. Judgment entered August 26, 2021. (App.1a).

JURISDICTION

The final Order of the Fourth Circuit Court of Appeals was entered August 26, 2021. (App.1a). This Court has jurisdiction under 28 U.S.C. § 1254(1), having timely filed this Petition for a Writ of Certiorari within ninety days of the judgment of the Fourth Circuit Court of Appeals.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. XIV:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges

or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On November 8, 2018, I filed a voluntary petition under Chapter 7 of the Bankruptcy Code with the U.S. Bankruptcy Court for the Eastern District of North Carolina, and on November 9, 2018, the bankruptcy court entered an order appointing the Respondent, Algernon L. Butler, III, as Chapter 7 Trustee in this case (hereinafter, "Trustee"). I had only two significant assets: a small parcel of land worth $45,000 and a pending, employment disability discrimination lawsuit, which claims $32 Million in damages, (hereinafter, "Lawsuit") against my prior employer, Red Hat, Inc. (hereinafter, "Red Hat"). The meeting of creditors was held on December 18, 2018. On February 21, 2019, the bankruptcy court entered an order granting my bankruptcy discharge. The claims of creditors totaled approximately $70,000; however, approximately $62,000 of that amount is student loans, which are non-dischargeable. On May 20, 2019, the Trustee filed a Motion for Approval of Compromise of Controversy seeking approval of a settlement he had negotiated with Red Hat, whereby the Lawsuit and all claims against Red Hat would be released in exchange for the amount of $44,450 (hereinafter, "Proposed Settlement"). On June 7, 2019, I filed an objection to the Motion for Approval of Com-

promise of Controversy on the grounds that the Proposed Settlement was unreasonable, unfair, contrary to public policy, and unnecessary to the administration of the bankruptcy estate. On July 2, 2019, I filed a Motion to Convert to Chapter 13. I did not propose a formal Chapter 13 plan at the time I filed my Motion to Convert to Chapter 13 because I was unaware of any requirement to do so. I thought that once I was granted leave to convert to Chapter 13, I would then hire an attorney to take care of proposing a Chapter 13 plan.

The Trustee filed an Objection to Motion to Convert on July 22, 2019, on the grounds that I had allegedly filed the Motion to Convert to Chapter 13 in bad faith. A hearing was held on September 18, 2019, (hereinafter, "Hearing") on the Trustee's Motion for Approval of Compromise of Controversy and my Motion to Convert to Chapter 13. With regards to my income, at the time of the Hearing I was employed and making $20 per hour; however, my job was temporary. I also had a contingent offer in hand for a job that paid $70,000 a year plus generous benefits and relocation expenses. Such job offer was later withdrawn, but I had reasonable expectations at the time of the Hearing that it would work out. Additionally, I had been approved for social security disability benefits in an approximate amount of $1,700 per month. I had also received a lump sum distribution of past due social security benefits of approximately $18,000 and still had the total sum thereof in my bank account. I provided this financial information to the bankruptcy court and the Trustee. The Trustee provided the bankruptcy court with the official paper-

work from the Social Security Administration at the Hearing.

On December 9, 2019, the bankruptcy court entered an Order Denying Debtor's Motion to Convert and Allowing Trustee's Motion for Approval of Compromise of Controversy. The bankruptcy court found specifically that my amended valuation of the Lawsuit in the amount of $0 was an intentional misrepresentation and constituted "bad faith", that I had not shown that I had the ability to complete a Chapter 13 plan, and that the Trustee's Proposed Settlement was reasonable. I filed my Notice of Appeal of the Order Denying Debtor's Motion to Convert and Allowing the Trustee's Motion for Approval of Compromise of Controversy on December 20, 2019, in the Eastern District of North Carolina. On January 3, 2020, I filed, in the bankruptcy court, a Motion for Reconsideration of the bankruptcy court's Order of December 9, 2019 (Denying Debtor's Motion to Convert and Allowing the Trustee's Motion for Approval of Compromise of Controversy). Said Motion for Reconsideration was denied by the bankruptcy court on January 8, 2020, and I amended my Notice of Appeal to include an appeal of said denial. The district court affirmed the bankruptcy court's rulings in its Order of November 17, 2020. I appealed to the Fourth Circuit Court of Appeals, and the court of appeals affirmed the district court's Order on August 26, 2021.

REASONS FOR GRANTING THE PETITION

This Court in *Marrama v. Citizens Bank of Mass,* 549 U.S. 365 (2007) established that a bankruptcy court may deny a motion to convert from Chapter 7 to Chapter 13 bankruptcy on the basis of bad faith but emphasized that denial of a motion to convert should only be undertaken in "extraordinary cases".

> We have no occasion here to articulate with precision what conduct qualifies as "bad faith" sufficient to permit a bankruptcy judge to dismiss a Chapter 13 case or to deny conversion from Chapter 7. It suffices to emphasize that the debtor's conduct must, in fact, be atypical. Limiting dismissal or denial of conversion to extraordinary cases is particularly appropriate in light of the fact that lack of good faith in proposing a Chapter 13 Plan is an express statutory ground for denying plan confirmation. 11 U.S.C. § 1325(a)(3); *See In re Love,* 957 F.2d, at 1356 (Because dismissal is harsh . . . the bankruptcy court should be more reluctant to dismiss a petition for lack of good faith than to reject a plan for lack of good faith under section 1325(a)").

Marrama v. Citizens Bank of Mass, 549 U.S. 365, 375 (2007).

Further, the dissent in *Marrama* stated,

> The Court notes that the Bankruptcy Code is intended to give a "'fresh start' to the 'honest but unfortunate debtor.'" *Ante,* at 367, 374

> (quoting *Grogan v. Gamer,* 498 U.S. 279, 286, 287 (1991)). But compliance with the statutory scheme-conversion to Chapter 13 followed by notice and a hearing on the question of reconversion would at least provide some structure to the process of identifying those debtors whose "bad faith" meets the Court's standard for consignment to liquidation, *i.e.*, "bad faith" conduct that is "atypical" and "extraordinary." *Ante,* at 375, n. 11.

Marrama v. Citizens Bank of Mass, 549 U.S. 365, 382 (2007)

This case presents the question of what standard of bad faith would apply to a Chapter 7 pro se debtor attempting to convert to Chapter 13, particularly where the alleged bad faith consists entirely of actions that the pro se debtor has maintained are a result of her lack of knowledge of bankruptcy procedure and not of an intent to avoid her obligations under the law and where the bankruptcy court simply refused to acknowledge income and assets of the debtor that could have been used to complete a Chapter 13 plan.

Additionally, this Court has repeatedly stressed that a pro se filing must be liberally construed.

> A document filed pro se is "to be liberally construed," *Estelle*, 429 U. S., at 106, and "a pro se complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers," ibid. (internal quotation marks omitted). *Cf.* Fed. Rule Civ. Proc. 8(f) ("All pleadings shall be so construed as to do substantial justice").

Erickson v. Pardus, 551 U. S. 89, 94 (2007).

This case is replete with instances of narrow constructions of pro se pleadings and disregard of the pro se Debtor's legal arguments. Despite the voluminous record, this case is one in which the lower courts have summarily dismissed the claims of a pro se litigant rather than taking those claims seriously and analyzing them thoroughly.

Further, this case provides the opportunity for the Court to define the standard under which a court may approve a settlement in bankruptcy under Bankruptcy Rule 9019 specifically for a Chapter 7 debtor. The standard applied by the lower courts in this case is based on case law related to Chapter 11 bankruptcy rather than Chapter 7, and it is my contention that said standard is unconstitutional in that it deprives me of my property without due process of law and just compensation in that it allows the Trustee to settle my Lawsuit in an amount that is less than .2% than the actual total damages demanded in the complaint and a mere 2.23% of the actual compensatory damages claimed in said Lawsuit.

I. TO AVOID ERRONEOUS DEPRIVATIONS OF PROPERTY, THIS COURT SHOULD CLARIFY THE STANDARD UNDER *MARRAMA V. CITIZENS BANK OF MASSACHUSETTS*, 549 U.S. 365 (2007), THAT APPLIES WHEN A BANKRUPTCY COURT DENIES A PRO SE CHAPTER 7 DEBTOR THE RIGHT TO CONVERT TO CHAPTER 13 ON THE BASIS OF "BAD FAITH".

The district court affirmed the bankruptcy court's denial of my Motion to Convert to Chapter 13 on two separate grounds: 1) that I could not show I had sufficient regular income to fund a Chapter 13 plan and 2) that I could not show that I had filed my Motion to

Convert to Chapter 13 in good faith. The 2nd finding of bad faith incorporates the first finding that I did not have sufficient regular income to fund a Chapter 13 plan as part of its "bad faith" analysis.

The district court conceded in its ruling that the bankruptcy court did not consider my social security disability income in making its determination that I did not have enough regular income to qualify as a Chapter 13 debtor but found that the bankruptcy court did not err, because, in the district court's view, I did not "unqualifiedly commit" to using my social security disability income to fund a Chapter 13 plan.

As a pro se Debtor, I am entitled to a liberal construction of my pleadings, and a court may not dismiss my pleading unless it appears that there is no way I can prevail.

> It is now established doctrine that pleadings should not be scrutinized with such technical nicety that a meritorious claim should be defeated, and even if the claim is insufficient in substance, it may be amended to achieve justice. *Rice v. Olson*, 324 U.S. 786, 791-92, 65 S.Ct. 989, 89 L.Ed. 1367 (1945); *Holiday v. Johnston*, 313 U.S. 342, 350, 61 S.Ct. 1015, 85 L.Ed. 1392 (1941). In one of the latest expressions on the subject, *Haines v. Kerner*, 404 U.S. 519, 521,92 S.Ct. 594, 30 L.Ed.2d 652 (1972), it was said that a complaint, especially a pro se complaint, should not be dismissed summarily unless "it appears `beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,'" quoting from *Conley v. Gibson*,

355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957).

Gordon v. Leeke, 574 F.2d 1147 (4th Cir. 1978).

Additionally, some courts have placed an obligation on judges to ask appropriate questions of and even to advise pro se litigants on the specifics of what they need to show in order to prevail. At no time before or during the Hearing on my Motion to Convert to Chapter 13 did the bankruptcy court inform me that I needed to "unqualifiedly commit" my social security income in order for the bankruptcy court to consider it in connection with a Motion to Convert to Chapter 13. I assumed that by bringing the existence of such income to the bankruptcy court's attention, I was ensuring that the bankruptcy court would consider it in making a determination of whether I had regular income for the purpose of qualifying as a Chapter 13 debtor.

I believe, that as a pro se Debtor, I was entitled to have my social security disability income considered as part of the bankruptcy court's obligation to refrain from dismissing my Motion unless it appeared there was no way I could prevail. To be clear, I made no indication at the Hearing or at any other time that I was unwilling to commit such social security income. My thinking at the time was that my contingent job offer would provide enough income to fund a Chapter 13 plan and that continued, uninterrupted employment at a substantially gainful job would eventually result in the loss of the social security disability benefits, which is why, at the Hearing, I referred to my social security disability benefits as a "back-up," but I never said I was unwilling to commit them in the event that

I needed to use them as my primary source for funding a Chapter 13 plan.

Further, the Fourth Circuit has ruled that social security income may be utilized in proposing a Chapter 13 plan despite the fact that it is not considered part of a debtor's disposable income. *Mort Ranta v. Gorman*, 721 F.3d 241, 253-54 (4th Cir. 2013).

Also, there is no requirement, to my knowledge, that a debtor "unqualifiedly commit" any funds in connection with a motion to convert to Chapter 13 bankruptcy. At the stage of conversion, the bankruptcy court's determination is based on whether a debtor is qualified to be a Chapter 13 debtor, not whether she has actually proposed a feasible Chapter 13 Plan. The qualifications to be a Chapter 13 debtor are set forth at 11 U.S.C. § 109(e):

> Only an individual with regular income that owes, on the date of the filing of the petition noncontingent, liquidated, unsecured debts of less than $250,000 and noncontingent, liquidated, secured debts of less than $750, 000, or an individual with regular income and such individual's spouse, except a stock-broker or a commodity broker, that owe, on the date of the filing of the petition, Non-contingent, liquidated, unsecured debts that aggregate less than $250,000 and noncontin-gent, liquidated, secured debts of less than $750,000 may be a debtor under chapter 13 of this title.

Further, "The term "individual with regular income" means individual whose income is sufficiently stable and regular to enable such individual to make

payments under a plan under chapter 13 of this title . . . " 11 U.S.C. § 101(30). The statute providing for qualifying as a Chapter 13 debtor says nothing about an obligation to "unqualifiedly commit" any amount or type of income to a Chapter 13 plan.

The District Court also erred by finding that in order to propose a feasible Chapter 13 plan, I would have to be able to afford a $1,000 monthly payment. As I argued in my appeal, the amount claimed by the Trustee and the bankruptcy court to be the amount that I would have to pay into a Chapter 13 plan is factually inaccurate. I would have to pay no more than approximately $30,951 into a Chapter 13 plan, pursuant to the Chapter 7 liquidation test. $30,951 is far less than the $54,450 claimed by the Trustee and the bankruptcy court and, over the period of a five-year plan amounts to approximately $516 a month. Adding in a 10% buffer for the commission for the Chapter 13 Trustee raises the amount to no more than $575 a month. The reasons for the lower amount had been objectively established by the time of the Hearing. I had only one asset that the Trustee was interested in liquidating at the time of the Hearing –the Lawsuit. The Trustee had reached a contingent settlement with Red Hat for $54,450; thus the Trustee and the bankruptcy court repeatedly made the inaccurate claim that I would have to put $54,450 into a Chapter 13 plan in order to satisfy the Chapter 7 liquidation test ensuring that creditors under a Chapter 13 plan will receive at least what they would have received under Chapter 7; however, under the Chapter 7 liquidation test, administrative expenses are deducted from the amount distributed to creditors. To be clear, 1) $10,000 of the proposed $54,450 settlement with Red

Hat was earmarked for administrative expenses, had already been paid to the Trustee, and was non-refundable even if the settlement had not been approved. Pursuant to the settlement agreement, it is not part of the consideration for the release of claims against Red Hat. Administrative expenses incurred as part of the process of liquidation are subtracted from the net proceeds of liquidated funds that are considered available to creditors under the Chapter 7 liquidation test; therefore, any payments for the Trustee's administrative expenses cannot be included in the Chapter 7 liquidation test. 2) At the time of the Hearing I had scheduled an exemption in the Lawsuit in the amount of $4,930, which would have further reduced the amount of the proceeds to the estate to $39,520. 3) The amount of the proceeds would be further reduced by the Trustee's commission, which is also an administrative expense. The maximum commission would be 25% of the first $5,000 and 10% of the rest of the net proceeds, which would be a total commission amount of $4,702. The remaining net proceeds of $34,818 would be taxable income of the estate and income taxes on it would have to be paid by the estate; therefore, such amount of taxes owed to the federal government and the state of North Carolina would also be an administrative expense and would not be available to creditors. Assuming a standard deduction of $12,400, a federal tax rate of 12% and a North Carolina tax rate of 5.25%, such amount of taxes would be $3,867 leaving only $30,951 available to creditors. Such amount divided over 60 payments pursuant to a five-year plan is approximately $516 a month. This calculation does not even take into account other administrative expenses of the Trustee that have not been brought forward,

which would undoubtedly reduce the amount available to creditors even further.

> "For purposes of the hypothetical liquidation in § 1325(a)(4), after valuing all assets that would be available in a Chapter 7 case, it is appropriate to deduct the costs of liquidation, including trustee's fees and other administrative expenses." Keith M. Lundin, CHAPTER 13 BANKRUPTCY § 160.1, p. 160-18 (3rd ed. 2004). Appropriate deductions used in making the calculation required by § 1325 (a)(4) include: Chapter 7 trustee's fees, the costs of sale, exemptions, and capital gain taxes. *E.g.*, *In re Ruggles*, 210 B.R. 57, 59-60 (Bankr. D. Vt. 1997) (deducting the value of the debtor's claimed exemptions); *In re Young*, 153 B.R. 886, 888 (Bankr. D. Neb. 1993) (deducting capital gains tax); *In re Dixon*, 140 B.R. 945, 947 (Bankr. W.D.N.Y. 1992) (using a 10% cost of sale figure based on the well found experience of the court, considering the amount of real estate commissions and trustee's fees incurred as part of a normal sale).

In re Delbrugge, 347 B.R. 536, 539 (Bankr. N.D.W.Va. 2006).

This factual inaccuracy in both the bankruptcy court's and the district court's rulings should have provided sufficient grounds for remanding the matter back to the bankruptcy court, especially given that my alleged inability to fund a Chapter 13 plan was used by the bankruptcy court to make the determination of bad faith.

The district court also affirmed the bankruptcy court's conclusion that I had filed my Motion to Convert to Chapter 13 in bad faith on three different grounds: 1) that I had completed a previous Chapter 13 bankruptcy (filed in May of 2015) just five months prior to filing the current case under Chapter 7, 2) that I had filed the Motion to Convert to Chapter 13 in order to retain the Lawsuit, thereby preventing the Trustee from settling it, and 3) that I had allegedly misrepresented the value of such Lawsuit as $0.00 on my schedules. The district court's conclusions are wrong for the following reasons.

First, pursuant to statute, there is nothing inappropriate about filing a Chapter 7 bankruptcy immediately after a Chapter 13 bankruptcy, so long as the Chapter 13 bankruptcy allowed all creditors to receive the full amount of their claims, which my Chapter 13 plan did. 11 U.S.C. § 727(a)(9)(A). I did not fail to complete my prior "100%" Chapter 13 plan. In fact, I completed it early. Every creditor that filed a claim received the full amount of their claim. Such facts should speak to my credibility and good faith intentions in filing bankruptcy, rather than as the district court concluded, evidence of bad faith. My subsequent Chapter 7 filing was necessary because I was fired from my job with Red Hat in September of 2017 and was not able to obtain substantially similar employment in a timely manner in order to keep making payments on my real property and other debts that had not been paid as part of the Chapter 13 bankruptcy. My schedules are indicative of my precarious financial situation at the time I filed my Chapter 7 petition in November of 2018, so there should be no

great mystery as to why I needed to file bankruptcy in the instant case.

Second, the district court's noting that bad faith is not an indication of bad character, nevertheless fails to distinguish between actions that are taken in good faith that may have unintended or unforeseen consequences and actions actually taken in bad faith, which by definition require an actual intent to misrepresent, deceive, or circumvent said party's legal obligations.

Black's defines "bad faith" as

> 'The opposite of "good faith," generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive. Term "bad faith" is not simply bad judgment or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will. *Stath v. Williams*, Ind. App., [174 Ind. App. 369] 367 N.E.2d 1120, 1124.' BLACK'S LAW DICTIONARY (6th ed. 1990).

In re Siegfried, 219 B.R. 581, 584 (Bankr. D. Colo. 1998).

Bad faith is not something that one can engage in accidentally or unintentionally. Indeed, by the implications of the district court's ruling in this case,

how can any bankruptcy filer ever be said to not be acting in bad faith to the extent that the bankruptcy rules and laws plainly allow them, to varying degrees, to not pay their creditors what they are otherwise duly owed?

The district court upheld the bankruptcy court's conclusions regarding my alleged bad faith actions in attempting to retain the Lawsuit against Red Hat by citing *In Re Ordonez*, Bankruptcy Number: 10-37596 (Bankr. D. Utah Oct. 27, 2017); however, this case is distinguishable from the instant case in very pertinent ways. *In re Ordonez* concerned a debtor whose stated ability to make payments under a Chapter 13 plan would not have even come close to providing for the creditors what a settlement of her lawsuit would provide under Chapter 7. In the instant case, I have shown that the bankruptcy court erred, factually, by finding that I did not have sufficient regular income to propose a Chapter 13 plan, and that in fact, I could and have always had every intent to propose and enter into a plan that will fully provide to my creditors what they would have received under a Chapter 7 bankruptcy; therefore, I am most certainly not seeking to retain an asset "at the expense of creditors" as suggested by the district court's citation of *In re Ordonez.*

Third, the district court cites *In re Kerivan*, No. 09-14581 (AJG) (Bankr. S.D.N.Y. June 15, 2010), to show that my valuation of the Lawsuit was in bad faith. *In re Kerivan* is also distinguishable. The debtor in *Kerivan* did not disclose certain assets on his petition. In the instant case, I have not been accused of non-disclosure of assets; rather, the Trustee claimed, for the first time in his Trustee's Objection to Motion

to Convert, filed July 22, 2019 (seven months after I filed my amended schedule listing the value of the Lawsuit as $0.00), that I had misrepresented the value of the Lawsuit, in that Red Hat had previously offered me a severance payment in exchange for withdrawing my original pre-Lawsuit Equal Employment Opportunity Commission ("EEOC") charges, as well as, among other things, waiving my right to sue. Such severance offer was made long before I filed for bankruptcy and even before I filed the Lawsuit itself. Such severance offer was disclosed to Trustee in the Lawsuit case documents, which he admittedly read prior to negotiating a settlement of the Lawsuit. I had rejected such severance offer long before filing bankruptcy. Red Hat had made no further offers of severance or settlement nor had they given me any reason to believe that any other offer was likely or imminent as of the date I filed for bankruptcy. I have represented that I believed $0.00 was the appropriate value for a Lawsuit that was still in its early stages and for which discovery had not yet been obtained. I still believe that this value is accurate for the effective date of the bankruptcy petition or at least that it should have reasonably been understood to be a nominal placeholder value for an asset whose final value was then undeterminable, but I did not at any time misrepresent or withhold any material fact about the Lawsuit from the Trustee. To be sure, even the court in *Kerivan* noted that "Because motions for conversion should only be denied in exceptional circumstances, innocent . . . misrepresentations, such as where the value of the asset is not obvious . . . may be insufficient, absent other conduct, to warrant a finding of bad faith."

Further, the court in *Kerivan* found that the debtor had acted in bad faith by considering the totality of circumstances, which included the debtor's admitted non-disclosure of an interest in real property because he didn't think it held any value for the estate. In the instant case, I listed all of my known property, as required by the Bankruptcy Code, regardless of its perceived value to the estate. The bankruptcy court's finding that I engaged in bad faith through my valuation of the lawsuit, when the bankruptcy court knew I was not a lawyer and had no experience in valuating lawsuits in bankruptcy, is just one example of how my pleadings have been narrowly construed, in violation of Supreme Court precedent, in order to deny me my rights under the Bankruptcy Code.

Nothing in *Kerivan* or *Ordonez* indicates that the mere fact that a Chapter 7 debtor wants to convert to Chapter 13 in order to retain an asset constitutes bad faith. The bankruptcy court's bad faith conclusion hinges essentially on the $0.00 Lawsuit valuation and the clearly erroneous finding that I cannot complete a Chapter 13 plan. In fact, I can complete a Chapter 13 plan and I have only done what I have the right to do under the Bankruptcy Code by filing a Motion to Convert to Chapter 13; therefore, I have not acted in bad faith, and I am qualified to be Chapter 13 debtor.

II. TO AVOID ERRONEOUS DEPRIVATIONS OF PROPERTY, THIS COURT SHOULD CLARIFY THE STANDARD THAT APPLIES UNDER BANKRUPTCY RULE 9019 WHEN A BANKRUPTCY COURT APPROVES A SETTLEMENT OF A PENDING LAWSUIT BY A CHAPTER 7 TRUSTEE OVER THE OBJECTION OF THE DEBTOR.

Although this Court has clarified standards regarding settlements under a bankruptcy reorganization plan, I am unaware of any Supreme Court precedent related to a bankruptcy court's right to approve a settlement of a Chapter 7 debtor's claims against a non-party to the bankruptcy. Even utilizing the standard articulated under *Protective Committee v. Anderson*, 390 U.S. 414 (1968), the bankruptcy court did not engage in an appropriate analysis to find that the Trustee's proposed settlement was "fair and equitable". First, the bankruptcy court's approval of the Trustee's Motion for Approval of Compromise of Controversy is a rubber-stamping of the Trustee's Motion.

> A court's acceptance or rejection of a settlement must be based on an "informed and independent judgment as to whether a proposed compromise is fair and equitable." *Protective Comm.*, 390 U.S. at 424. The court's "overriding concern . . . is to determine . . . whether the [s]ettlement is proper under law and whether it is fair and equitable and in the best interest of all interested parties." *Maloy*, 2009 Bankr. LEXIS at *11 (emphasis added). Also, any settlement must be reasonable and a "bankruptcy court's decision to approve [a proposed] settlement . . . must

> be an informed one based upon an objective evaluation of developed facts." *Reiss v. Hagmann*, 881 F.2d 890, 892 (10th Cir. 1989). "[A] bankruptcy judge may not simply accept [the proponent's] word that the settlement is reasonable, nor may [the judge] merely 'rubber stamp'" a proposed settlement without an individual determination that the settlement is reasonable. *In re Ionosphere Clubs*, 156 B.R. 414, 426 (S.D.N.Y. 1993).

Brantley v. Citifinancial, Inc. (In re Brantley), No. 13-00483-8-DMW, at *5 (Bankr. E.D.N.C. Jan. 15, 2015).

The bankruptcy court's Order does not provide any indication that the bankruptcy court engaged in its own independent research of the law, issues, and complete facts of the Lawsuit. Rather, the bankruptcy court begins it legal opinion by asserting that, "the trustee specifically and accurately summarized the 'legal framework and burden-shifting analysis relevant to a plaintiff's attempt to establish employment-related claims such as the Claims against Red Hat,' as well as his review of the available evidence in connection with those claims. D.E. 85."

The bankruptcy court also asserted its confidence in the Trustee at the Hearing; however, the Trustee did not seek the services of an employment lawyer or any other professional with experience in mediating a discrimination employment lawsuit. *In re Health Diagnostic Lab., Inc.,* cited by the bankruptcy court, is distinguished from the instant case in that the trustee in said case undertook significant due diligence in negotiating a reasonable settlement.

> The Court finds that the foregoing factors favor approval of the Settlement Agreement. The uncontroverted evidence presented at the Hearing established that the Settlement Agreement was the hard-fought product of an intense, arms-length mediation process that lasted nearly nine months. The parties utilized the skills of an independent mediator who had experience in legal malpractice, healthcare regulation, fraud, and complex commercial disputes. The Liquidating Trustee relied heavily upon the advice of financial advisors, tax counsel, bankruptcy counsel, and legal malpractice counsel in evaluating the terms of the Settlement Agreement. The Court finds the Settlement Agreement represents a fair and equitable deal for all parties, and is far above the lowest point of reasonableness. *In re Health Diagnostic Lab., Inc.* Case No. 15-32919 (Bankr. E.D. Va. Oct. 14, 2016).

I clearly stated my preference at the Hearing that an employment lawyer should provide a valuation of the Lawsuit. The evidence indicates that the Trustee and the bankruptcy court made their determinations of fairness and reasonableness without consulting an experienced employment lawyer (except for the employment lawyers representing Red Hat).

Also, I take exception to the bankruptcy court's assertion that, "The trustee reviewed the many factors that together create a full and accurate picture of the issues raised in the Employment Action, including the comparative strengths and weaknesses of both parties' positions based upon the facts (both disputed

and non-disputed) and the applicable statutory and case law."

There is no evidence in the record that the Trustee ever considered the facts or law that were supportive of my position on the issues in the Lawsuit. In fact, the Trustee did not even consult with me to let me know that he was negotiating with Red Hat prior to filing his Motion for Approval of Compromise of Controversy, which Motion came as a complete surprise to me. The Trustee did not even reference in said Motion any specific facts that were included in the Amended Complaint in the Lawsuit in support of my claims.

I was also at a disadvantage at the Hearing in producing documentary evidence of my claims in the Lawsuit because no discovery had been produced by Red Hat. Red Hat was in actual possession of almost every email and documented communication that I had produced or received in connection with my employment at Red Hat because my access to my emails and other work documents was terminated at the time I was suspended from work at Red Hat in August of 2017. I had expected to locate such evidence via the discovery process. I knew and informed the Trustee and the bankruptcy court at the Hearing that there were emails in existence that supported my claims, but that they had yet to be produced by Red Hat pursuant to my discovery requests. I summarily denied the affidavit evidence provided by Red Hat and objected at the Hearing to the introduction of further evidence from Red Hat.

All of the evidence of my alleged misconduct presented by the Trustee was either hearsay or entirely too vague to constitute "developed facts." Such

evidence consisted almost entirely of hearsay or conclusory and sometimes outright false statements about alleged misconduct during my employment at Red Hat. The Red Hat witness was evasive under cross examination, and the bankruptcy court failed to require said witness to provide complete details regarding the allegations she made against me, citing Red Hat's confidentiality concerns, but the bankruptcy court allowed testimony about conversations that I had with my employer about my disability and health, which I had presumed were confidential. According to the bankruptcy court, my own concerns of confidentiality were moot because I had initiated the Lawsuit. The effect of allowing such evidence was more to cast doubt on my credibility than to actually apprise the bankruptcy court of how likely it was that I could win the Lawsuit, and even the bankruptcy court conceded that the evidence from Red Hat was not for the purpose of proving the facts of the Lawsuit.

The bankruptcy court allowed evidence and testimony from Red Hat without allowing a balanced opportunity to cross-examine and respond. Not only did the bankruptcy court allow hearsay and incomplete answers from the Red Hat witness, but the bankruptcy court also routinely interrupted my arguments and cross examination of the Red Hat witness. The Trustee's evidence and arguments at the Hearing were explicitly biased in favor of Red Hat's position.

Further, the settlement is unreasonable because it does not adequately compensate me for the time and effort of filing it (and litigating against Red Hat's motion to dismiss), much less provide reasonable consideration for the release of claims. "The Settlement in this case is neither fair nor equitable, because it is

not reasonably comparative to the damages or injuries allegedly suffered by the Plaintiffs." *Brantley v. Citifinancial, Inc. (In re Brantley)*, No. 13-00483-8-DMW, at *5 (Bankr. E.D.N.C. Jan. 15, 2015).

$44,450 is not reasonably comparative to $32 Million. The bankruptcy court's declaration that I "wildly overvalued" my Lawsuit is not backed up by any evidence or case law. Red Hat is a $34 Billion company and received annual revenues in excess of $2.9 Billion for fiscal year 2018, and I alleged punitive damages in addition to my actual compensatory damages. Amended Complaint at 4, *Dale v. Red Hat, Inc.*, Case No. 5:18-CV-00262-BO, (E.D.N.C.). Further, I provided the breakdown of my claim for damages to the bankruptcy court. I clearly provided to the bankruptcy court uncontested evidence that I had at least $2 million in compensatory damages based just on the salary and benefits I was receiving at the time I was wrongfully terminated, not including other financial loss that I experienced and claimed damages for in the Lawsuit. These are damages I would almost certainly be entitled to were Red Hat found liable for discrimination under the Americans with Disabilities Act because they represent back and front pay and benefits that I lost as a direct result of Red Hat's wrongful actions. Even if the Court narrows its consideration of my claimed damages to my actual demonstrable lost past and future wages and benefits of $2 million, the Trustee's Proposed Settlement of $44,450 is still a mere 2.23% of my damages.

Finally, the settlement is unreasonable because the bankruptcy court did not consider whether or not the Lawsuit was subject to exemption. I raised the issue of potential exemption in my Motion to Reconsider

filed January 3, 2020, which was summarily denied by the bankruptcy court on January 8, 2020.

The Constitution of the United States provides that I may not be deprived of my property without "due process of law" and that I am entitled to "just compensation" for the taking of my property for the public good. I understand that by filing bankruptcy I essentially consented to the use of my non-exempt assets for payment of creditors; however, I could not have foreseen that a Trustee would devalue my Lawsuit to the point where I would have been better off to not even have filed it. It seems logical to me that due process of law in this situation requires that a settlement ordered by a bankruptcy court must take into account the rights I have to any excess value in the Lawsuit and therefore, a settlement that only seeks to benefit the creditors, but ignores the potential multi-million dollar loss to the debtor is not consistent with the constitutional mandate. The Trustee has argued vigorously that my claims aren't valid to begin with, all the while he has contracted with Red Hat to cover his administrative fees in litigating this matter. To date, the Trustee has filed multiple disclosures showing that he is subject to compensation from Red Hat for his administrative fees in amounts totaling more than $100,000, while the actual consideration for release of claims is only $44,450. Clearly, Red Hat is able and willing to spend more than $44,450 to put the matter to rest, yet the Trustee continues to argue that $44,450 is an appropriate amount for settling the Lawsuit. This is a matter of grave importance for any Chapter 7 debtor with pending legal claims, and there should be a clear standard for determining when a bankruptcy

court may approve a settlement of a debtor's discrimination lawsuit over the objections of the debtor under Rule 9019, without violating a debtor's constitutional rights to not be deprived of property without due process of law and to be justly compensated for property taken for the public good.

CONCLUSION

For the foregoing reasons, I respectfully request that this Court issue a writ of certiorari to review the judgment of the Fourth Circuit Court of Appeals.

Respectfully submitted,

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