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OPINIONS AND ORDERS

REHEARING ORDER

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT (AUGUST 26, 2021)

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

WENDY DALE,

Debtor-Appellant,

v.

ALGERNON LEE BUTLER, III,

Trustee-Appellee.

No. 21-1221

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. W. Earl Britt, Senior District Judge. (7:19-cv-00254-BR)

Submitted: August 24, 2021
Decided: August 26, 2021

Before: NIEMEYER and HARRIS, Circuit Judges, and SHEDD, Senior Circuit Judge.

PER CURIAM:

Wendy Dale appeals from the district court's orders: (1) affirming the bankruptcy court's orders denying her motion to convert her Chapter 7 case to one under Chapter 13, allowing the Trustee's motion for

approval of a compromise of her employment discrimination lawsuit, and denying her motion for reconsideration of the order allowing the Trustee's objection to exemptions and prohibiting her from amending her exemptions, and (2) denying her motion for reconsideration. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Dale v. Butler*, No. 7:19-cv-00254-BR (E.D.N.C. Nov. 17, 2020 & Feb. 3, 2021). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA (NOVEMBER 17, 2020)

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA SOUTHERN DIVISION

WENDY DALE,

Appellant,

v.

ALGERNON L. BUTLER, III,

Appellee.

No. 7:19-CV-254-BR

Before: W. Earl BRITT, Senior U.S. District Judge.

ORDER

This matter is before the court on the appeal of debtor Wendy Dale ("appellant") from the bankruptcy court's: (1) 9 December 2019 order denying appellant's motion to convert and allowing Algernon L. Butler, III's (the "trustee") motion for approval of compromise of controversy and (2) 8 January 2020 orders denying appellant's motion to stay pending appeal and motion to reconsider. (Am. Notice of Appeal, DE # 5.)

I. Background

In June 2018, appellant filed *pro se* an employment discrimination lawsuit against her former employer Red Hat, Inc. ("Red Hat").[1] *Dale v. Red Hat, Inc.*, No. 5:18-CV-262-BO, DE # 5 (E.D.N.C.) In her amended complaint, appellant alleges claims under the Americans with Disabilities Act and for wrongful termination in violation of public policy under North Carolina law. *Id.*, DE # 20. Appellant demands $2,000,000 in compensatory damages and $30,000,000 in punitive damages. *Id.* In November 2018, the court denied Red Hat's motion to dismiss.[2] *Id.*, DE # 30.

A few weeks prior to that decision, appellant filed a voluntary petition under Chapter 7 of the Bankruptcy Code. Among her assets, appellant listed her pending employment discrimination lawsuit, which she valued at $32,000,000. (R., DE # 8-1, at 21.) She did not claim an exemption in the lawsuit.[3] (*See id.* at 24-25.)

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[1] Appellant also filed the lawsuit against a Red Hat employee. *See Dale v. Red Hat, Inc.*, No. 5:18-CV-262-BO, DE # 5 (E.D.N.C.). On motion, the court dismissed the employee from the action. *Id.*, DE # 30.

[2] The lawsuit is stayed pending disposition of this appeal. *See Dale v. Red Hat, Inc.*, No. 5:18-CV-262-BO, DE # 52.

[3] When a debtor files a voluntary petition for relief under chapter 7, a bankruptcy estate is created that contains "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Bankruptcy Rule 4003(a) provides that every "debtor shall list the property claimed as exempt under § 522 of the [Bankruptcy] Code on the schedule of assets required to be filed by Rule 1007." Fed. R. Bankr. P. 4003(a); Fed. R. Bankr. P. 1007.

In re Gregory, 487 B.R. 444, 447 (Bankr. E.D.N.C. 2013).

Later, appellant amended her schedules of assets and exemptions, changing the value of the lawsuit to $0 and claiming an exemption in the lawsuit in the amount of "100% of fair market value, up to any applicable statutory limit" based on N.C. Gen. Stat. § 1C-1601(a)(2).[4] (*Id.* at 80, 84.) The trustee filed an objection to this claimed exemption and requested that the bankruptcy court limit the exemption and prohibit appellant from further amending it. (*Id.* at 89-92.) Appellant did not file a response, (Appellant's Br., DE # 18, at 10), and the bankruptcy court allowed the objection and ordered appellant could not further amend this exemption, (R., DE # 8-1, at 93-94). As a result, appellant's exemption in the lawsuit is limited to $4,930. (*See id.*; Appellant's Br., DE # 18, at 10.)

In May 2019, the trustee filed a motion for approval of the settlement he had negotiated with Red Hat of all claims in the employment discrimination lawsuit for $54,450, representing $10,000 to compensate and reimburse the estate for the trustee's time and expense related to the settlement and the remainder as consideration for the dismissal of the claims in the lawsuit and a release. (R., DE # 8-2, at 4-23.) Appellant filed an objection to the motion and requested a hearing. (*Id.* at 24-38.) Later, the trustee supplemented his motion, (*id.* at 79-183), to which appellant responded, (*id.* at 200-03).

In July 2019, appellant filed a motion to convert her bankruptcy case from Chapter 7 to Chapter 13, (*id.* at 63-66), to which the trustee objected, (*id.* at

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[4] Under N.C. Gen. Stat. § 1C1-1601(a)(2), a debtor may claim a "wildcard" exemption in any property in an amount up to $5,000. *See In re Phillips*, 553 B.R. 536, 543 n.14 (Bankr. E.D.N.C. 2016).

184-95). Later, appellant supplemented her motion. (*Id.* at 204-06.)

In the meantime, appellant also filed an objection to the proof of claim of her largest unsecured creditor, Ascendium Education Solutions, Inc. ("Ascendium").[5] (*Id.* at 51-62.) After a hearing, the bankruptcy court denied the objection and allowed the claim. (*Id.* at 196.)

In September 2019, the bankruptcy court held an evidentiary hearing on appellant's motion to convert her case and the trustee's motion for approval of the settlement. (9/18/19 Tr., DE # 10.) On 9 December 2019, the bankruptcy court denied appellant's motion and allowed the trustee's motion. (Notice of Appeal, DE # 1-1.) Thereafter, appellant appealed from that order, (DE # 1), and filed a motion to stay pending appeal, (R., DE # 8-2, at 243-48). She later filed a motion for a new hearing or, alternatively, for reconsideration of the December 2019 order and of the earlier orders regarding her claimed exemptions and her objection to Ascendium's claim. (*Id.* at 254-65). In separate orders,

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[5] A "claim" generally means a right to payment that a debtor owes to a creditor. After a debtor files a bankruptcy petition, creditors may file a proof of claim. Once a creditor files a proof of claim the court may deem it allowed, unless a party in interest objects to such claim.

Breen v. Portfolio Recovery Assocs., LLC, No. 3:18CV759, 2019 WL 2871142, at *6 (E.D. Va. July 3, 2019) (concerning Chapter 13 requirements) (citations omitted), *appeal dismissed*, No. 19-1844, 2019 WL 7834327 (4th Cir. Sept. 23, 2019); *see also Burkhart v. Grigsby*, 886 F.3d 434, 436 (4th Cir. 2018) (recognizing Chapters 7 and 13 "are governed by the same subchapter on creditors and claims" which "details the formal process for filing a proof of claim and claim allowance," among other things).

on 8 January 2020, the bankruptcy court denied appellant's motions, and appellant amended her appeal to include those orders. (DE # 5.)

II. Discussion

When reviewing a decision of the bankruptcy court, this court sits as an appellate court and applies the same standards as would the Court of Appeals. *Paramount Home Ent. Inc. v. Circuit City Stores, Inc.*, 445 B.R. 521, 526-27 (E.D. Va. 2010). Accordingly, the court reviews the factual findings of the bankruptcy court for clear error and its legal conclusions *de novo*. *See Mort Ranta v. Gorman,* 721 F.3d 241, 250 (4th Cir. 2013).

In her opening brief, appellant claims the bankruptcy court erred by: (1) ordering appellant could not amend her claim of exemption in the employment discrimination lawsuit; (2) denying her motion to convert her case; (3) allowing the trustee's motion for approval of the settlement of the employment discrimination lawsuit; and (4) allowing the claim of Ascendium. (Appellant's Br., DE # 18, at 6; *see also id.* at 16-18 (summarizing arguments).) She does not make any argument regarding the bankruptcy court's denial of her motion to stay pending appeal, and, accordingly, she has abandoned this issue. *See Bastman v. Hassell*, No. 5:18-CV486-D, 2019 WL 2366422, at *3 (E.D.N.C. 2019) (holding the appellant had abandoned the issue where the appellant had noted appeal of the bankruptcy court's ruling but did not address it in her opening brief) (collecting cases). The court turns to the merits of the appeal.

A. Denial of Reconsideration of Exemption

In January 2019, the bankruptcy court entered its order prohibiting appellant from further amending her claimed exemption in the employment discrimination lawsuit. Specifically, the bankruptcy court found that appellant "has had adequate time to claim exemptions, and any amendment to [her] claims of exemption in the property that is the subject of this objection after the entry of the Court's order on this objection would be prejudicial to the Trustee and his administration of this estate." (R., DE # 8-1, at 94.) Nearly a year later, appellant sought reconsideration of this order pursuant to Federal Rule of Civil Procedure 60(b) to enable her to amend her exemption in the employment discrimination lawsuit, specifically to claim an exemption under N.C. Gen. Stat. § 1C-1601(a)(12) based on any payments representing lost wages. (*See* R., DE # 8-2, at 256.) After a hearing, the bankruptcy court denied the motion for reconsideration. (Am. Notice of Appeal, DE # 5, at 4.)

Appellant claims the bankruptcy court erred because she is entitled to relief from the January 2019 order under Rule 60(b)(1), (3), (4), (5), and (6). (Appellant's Br., DE # 18, at 26.) These provisions generally permit the court to relieve a party from a final judgment or order for mistake, inadvertence, or misrepresentation or misconduct by an opposing party; where the judgment is void or applying it prospectively is no longer equitable; or for any other reason justifying relief. Fed. R. Civ. P. 60(b)(1), (3)-(6).

Rule 60 applies in bankruptcy cases. Fed. R. Bank. P. 9024. "'In ruling on an appeal from a denial of a Rule 60(b) motion this Court may not review the merits of the underlying order; it may only review the denial

of the motion with respect to the grounds set forth in Rule 60(b).'" *Breen v. Stephenson*, No. C.A. 4:08-804-TLW, 2009 WL 440490, at *4 (D.S.C. Feb. 20, 2009) (quoting *In re Burnley*, 988 F.2d 1, 3 (4th Cir. 1992)). "The Court reviews the denial of a Rule 60 motion for reconsideration under an abuse of discretion standard." *Snyder v. I.R.S.*, No. CIV. L-07-255, 2007 WL 4287529, at *1 (D. Md. Mar. 8, 2007) (footnote omitted), aff'd, 241 F. App'x 984 (4th Cir. 2007); *see also Cook Group Inc. v. Wilson (In re Wilson)*, 248 B.R. 745, 748 (M.D.N.C. 2000). "A court abuses its discretion when its conclusion is guided by erroneous legal principles or rests upon a clearly erroneous factual finding." *Blue Cross Blue Shield of N.C. v. Jemsek Clinic, P.A. (In re Jemsek Clinic, P.A.)*, 850 F.3d 150, 156 (4th Cir. 2017) (citation and internal quotation marks omitted).

The bankruptcy court did not abuse its discretion in denying appellant's motion to reconsider. First, in her motion for reconsideration, appellant gave the bankruptcy court no explanation for why she did not initially claim an exemption in the employment discrimination lawsuit under N.C. Gen. Stat. § 1C-1601 (a)(12). Furthermore, there was no ground for the bankruptcy court to reconsider its order as it would have been futile to allow appellant to claim this exemption. By the statute's plain language, the exemption applies only to "[a]limony, support, separate maintenance, and child support payments or funds." N.C. Gen. Stat. § 1C-1601(a)(12). Any lost wages that might be recovered in the employment discrimination lawsuit are not payments or funds covered by § 1C-1601(a)(12).

Appellant argues other statutory exemptions apply. (*See* Appellant's Br., DE # 18, at 23 25; Appellant's Reply, DE # 21, at 9.) However, she did not raise

that argument with the bankruptcy court, and this court will not consider it now. *See Williams v. Lynch (In re Lewis)*, 611 F. App'x 134, 137 (4th Cir. 2015) (holding the appellant had waived an argument because he failed to raise it in the district court); *Williams v. McDow (In re Williams)*, No. 5:10CV00049, 2010 WL 3292812, at *6 (W.D. Va. Aug. 19, 2000) ("Because a district court functions as an appellate court when reviewing a bankruptcy court's decision, a district court in these circumstances[, i.e., where the appellants failed to raise an argument in the proceedings below,] applies the same legal standards that govern appellate review in a court of appeals." (citations and internal quotation omitted)). For the same reason, the court does not consider appellant's other arguments under Rule 60(b), such as the trustee engaged in misrepresentation. (*See* Appellant's Br., DE # 18, at 26.) Also, the court does not consider appellant's arguments, (*see id.* at 21-22), which go to the merits of the bankruptcy court's underlying order. *See Breen*, 2009 WL 440490, at *4.

Appellant failed to show any ground for relief under Rule 60(b), and therefore, the bankruptcy court properly denied her motion for reconsideration.

B. Denial of Conversion

Appellant next contends the bankruptcy court erred by not allowing the conversion of her case from Chapter 7 to Chapter 13.

> Chapter 7 enables the debtor to discharge prepetition debts subsequent to liquidation of the debtor's assets by a bankruptcy trustee; the trustee then distributes the proceeds to the creditors. [*Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007).]

> Chapter 13 enables an individual with regular income to obtain a discharge following the bankruptcy court's approval of a payment plan. *Id.* Chapter 7 requires the bankruptcy trustee to control the debtor's non-exempt assets, while under Chapter 13, the debtor retains control over his or her property. *Id.* A debtor who initially files his or her bankruptcy petition under Chapter 7 may convert it to Chapter 13. 11 U.S.C. §§ 706(a), 1307(a), (c).

In re Piccoli, No. CIV.A.06-2142, 2007 WL 2822001, at *4 (E.D. Pa. Sept. 27, 2007); *see also Burkhart v. Grigsby*, 886 F.3d 434, 436 (4th Cir. 2018).

Under the Bankruptcy Code, a Chapter 7 debtor may convert her case to a Chapter 13 case "at any time, if the case has not been converted" previously under Chapter 13. 11 U.S.C. § 706(a). Despite this language, the Chapter 7 debtor's right to convert is not absolute; rather, it is subject to another provision of the Code, which "expressly condition[s the debtor's] right to convert on [her] ability to qualify as a 'debtor' under Chapter 13." *Marrama*, 549 U.S. at 372; *see also* 11 U.S.C. § 706(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."). A debtor is so qualified if her debt is within certain limits, *see* 11 U.S.C. § 109(e), and if she has income "sufficiently stable and regular to enable [her] to make payments under a plan under Chapter 13," *id.* § 101(30); *see also id.* § 109(e). "The Debtor bears the burden of proof in establishing the ability to make the payments needed under the plan and must provide a

sufficient factual basis for the court to determine both the regularity and stability of the income." *In re Mullins*, 360 B.R. 493, 499 (Bankr. W.D. Va. 2007) (citation omitted); *see also Culp v. Stanziale (In re Culp)*, 545 B.R. 827, 840 (D. Del. 2016) ("Case law interpreting this provision has held that the burden of establishing the regularity and stability of income is on the debtor." (citations omitted)), *aff'd*, 681 F. App'x 140 (3d Cir. 2017).

Also, a debtor qualifies as a Chapter 13 debtor provided there is not "cause" that would warrant dismissal or conversion of a Chapter 13 case. *Marrama*, 549 U.S. at 372-74. Bad faith constitutes such "cause." *Id.*

> When using the term "bad faith," the Court is not referring to the Debtor's character. The term "bad faith" refers to actions that do not accord with the bankruptcy purpose of maximizing the distribution to creditors while also giving a debtor a fresh start by discharging debts. It is not a negative statement about an individual's character or behavior.

In re Ordonez, No. 10-37596, 2017 WL 4877242, at *6 (Bankr. D. Utah Oct. 27, 2017). The court's "determination of bad faith requires an examination of the totality of the circumstances." *In re Fields*, No. 15-05957-5-DMW, 2016 WL 3462203, at *4 (Bankr. E.D.N.C. June 17, 2006) (citation omitted).

If the debtor has acted in bad faith, the bankruptcy court is justified in denying a motion to convert in the exercise of its "broad" authority under 11 U.S.C. § 105(a) to prevent an abuse of process. *Marrama*, at

375 & n.13. The party objecting to conversion on the ground of bad faith bears the burden of proof. *In re Southern*, No. 10-50713, 2011 WL 1226058, at *2 (Bankr. M.D.N.C. Mar. 29, 2011).

In this case, the bankruptcy court reasoned that appellant did not have regular income to fund a viable Chapter 13 plan and that her motion to convert was not filed in good faith. (Notice of Appeal, DE # 1-1, at 7.) Based on the "unique" facts, the bankruptcy court denied conversion to prevent an abuse of process. (*Id.*) This decision is reviewed for abuse of discretion. *See Arenas v. U.S. Tr. (In re Arenas)*, 535 B.R. 845, 849 (B.A.P. 10th Cir. 2015) ("An order granting or denying a motion to convert under § 1307(c) is reviewed for abuse of discretion . . . ."); *In re Howes*, 563 B.R. 794, 805 (D. Md. 2016) ("[A] bankruptcy court's decision to order relief, pursuant to the authority granted to it under § 105(a), is reviewed for abuse of discretion." (collecting cases)).

First, appellant argues the bankruptcy court erred in its finding that she did not have the income to fund a Chapter 13 plan. (*See* Appellant's Br., DE # 18, at 27-28.) According to appellant, at the hearing, she provided the court with "proof" of three income streams—permanent employment at Arby's, full-time, temporary employment at PPD, and monthly Social Security disability benefits. (*Id.* at 28-29.) At the hearing, she also mentioned potentially using proceeds from the sale of her real property and her lump sum, Social Security disability (retroactive) payment to fund a Chapter 13 plan. (9/18/19 Tr., DE # 10, at 22.) For the following reasons, the court will not disturb the bankruptcy court's conclusion that appellant's representations are insufficient to show she has regular

income sufficient to propose a Chapter 13 plan that would appropriately pay the allowed claims of creditors.

During the hearing before the bankruptcy court, appellant stated that when she filed her motion to convert, she was working at Arby's. (*Id.* at 53.) She gave the court no information about what her earnings were there. She also stated that since July, she had been working a temporary assignment at PPD for $20 per hour. (*Id.*) Although appellant now claims her income from PPD was approximately $500 to $800 per week, (Appellant's Br., DE # 18, at 29), she did not provide that information to the bankruptcy court nor did she provide any indication of how long she expected to be employed there. Without "baseline" salary information, as the bankruptcy court correctly concluded, "[t]here is no way to establish the feasibility of a proposed chapter 13 plan[.]" (Notice of Appeal, DE # 1-1, at 10.)

As for Social Security benefits, at the hearing, appellant informed the bankruptcy court that she was expecting a $1,700 monthly disability payment and that such income was her "fallback" in the event she did not "get a full-time job." (9/18/19 Tr., DE # 10, at 54.)

According to appellant, "the bankruptcy court apparently failed to consider the evidence of social security income that [she] offered at the Hearing, given the conspicuous absence of any mention of such income in either" its order denying her motion to convert or its order denying her motion for reconsideration. (Appellant's Br., DE # 18, at 29.) Although the

court did not discuss that income in its analysis,[6] (*see* Notice of Appeal, DE # 1-1, at 9-10), it did not commit error in this regard.

Appellant is correct that Social Security income may be considered in determining the feasibility of a proposed Chapter 13 plan. *See Mort Ranta*, 721 F.3d at 254. Even so, "a debtor cannot be compelled to contribute Social Security income toward a chapter 13 plan. Note, however, although courts cannot require a debtor to apply his or her Social Security income to fund a plan, a debtor may pledge such income voluntarily, if he or she so chooses." *In re Moriarty*, 530 B.R. 637, 641 n.31 (Bankr. W.D. Va. 2015) (citing *Mort Ranta*, 721 F.3d at 250-51, 253-54).

From a review of the transcript of the hearing before the bankruptcy court and appellant's filings there, it is apparent appellant was primarily relying on her income from full-time employment to qualify as a Chapter 13 debtor. Appellant did not unqualifiedly commit to use all or a portion of her Social Security benefits, including the lump sum (retroactive) payment, to fund a plan. More importantly, even if appellant did rely exclusively on benefits of $1,700 per month, she did not show that those benefits, less her expenses, would be sufficient or would continue long enough to fund a potential Chapter 13 plan of five years with $1,000 monthly payments. (*See* R., DE # 8-1, at 43-45 (listing monthly expenses of $770, not including rent or utilities); 9/18/19 Tr., DE # 10, at 56 (recognizing appellant will need $1,000 per month in disposable

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[6] In providing background information, the bankruptcy court did recognize that appellant anticipated receiving Social Security disability benefits. (Notice of Appeal, DE # 1-1, at 5.)

income to fund a five-year plan); Supp. R., DE # 18-7, at 15, 19 (stating it is expected appellant's health will improve and the Social Security Administration will conduct a disability review in August 2022).)

The bankruptcy court's order did not mention proceeds from the sale of appellant's real property as a potential source to fund a Chapter 13 plan. However, as with the Social Security benefits, the court concludes the bankruptcy court did not commit error. Appellant did not show that the sale of the property was imminent or likely to occur reasonably soon. (*Cf.* 9/18/19 Tr., DE # 10, at 62 (trustee representing that the property had been listed for sale for $45,000, then the price was reduced to $35,000 and there had been no offers).) "Thus, any income premised upon such a hypothetical sale is mere speculation and does not rise to the level of 'regular income' for purposes of Chapter 13 plan funding." *In re Nealen*, 407 B.R. 194, 205 (Bankr. W.D. Pa. 2009) (dismissing Chapter 13 case based on the debtor's failure to have regular income, including proceeds from the potential sale of real property, that would allow him to make plan payments).

Next, appellant argues the bankruptcy court erred in its determination that her bad faith warranted denial of conversion. In reaching its determination, the bankruptcy court relied on the following actions of appellant: filing her Chapter 7 petition five months after receiving a discharge in a previously filed Chapter 13 case; filing the motion to convert only after the trustee filed the motion to approve the settlement of the employment discrimination lawsuit and in an admitted effort to regain control of the lawsuit; and devaluing the lawsuit to $0. (Notice of Appeal, DE # 1-

1, at 10-11.) Appellant does not dispute these facts but rather the conclusions to be drawn therefrom.[7] (*See* Appellant's Br., DE # 18, at 34-37, 39-43.) Taking these facts together as it did, the bankruptcy court acted within its discretion in denying appellant's motion to convert based on her bad faith. *See Ordonez*, 2017 WL 4877242, at *7 (finding the debtor's motivation to convert her case was to retain control of her employment discrimination lawsuit and determining "[r]etaining [that] asset . . . at the expense of creditors is also evidence of bad faith"); *In re Kerivan*, No. 09-14581(AJG), 2010 WL 2472674, at *3-4 (Bankr. S.D. N.Y. June 15, 2010) (finding the debtor's nondisclosure of an interest in real property combined with the timing of the motion to convert suggested the debtor's motivation was to avoid the trustee's pursuit of that interest and indicated the debtor filed in bad faith, warranting denial of the motion).

In summary, the court concludes that the bankruptcy court did not abuse its discretion in denying appellant's motion to convert her case on the ground

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[7] Appellant raises other arguments regarding the bankruptcy court's bad faith determination. Those arguments rely on her ability to amend her claimed exemption in the employment discrimination lawsuit. (*See* Appellant's Br., DE # 18, at 43-46.) Because the court has concluded the bankruptcy court properly denied appellant's motion for reconsideration of its order prohibiting appellant from further amending that exemption, *see supra* Section II.A., these arguments fail.

that she was not qualified to be a Chapter 13 debtor based on her income and bad faith.[8]

C. Approval of Settlement

Appellant next challenges the bankruptcy court's approval of the settlement of the employment discrimination lawsuit.[9] "On motion by the trustee and after notice and a hearing, the [bankruptcy] court may approve a compromise or settlement." Fed. R. Bankr. P. 9019(a). "Objection by the debtor is not fatal to such a settlement if it is found to be in the best interests of the estate as a whole." *St. Paul Fire & Marine Ins. Co. v. Vaughn*, 779 F.2d 1003, 1010 (4th Cir. 1985) (citation, alteration, and internal quotation marks omitted).

> The bankruptcy court must "assess and balance the value of the claim that is being compromised against the value to the estate

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[8] Appellant does not assert any arguments that pertain exclusively to the bankruptcy court's order denying her motion for reconsideration of the order denying conversion. (*See* Appellant's Reply, DE # 21, at 18.)

[9] The lawsuit became property of the bankruptcy estate upon appellant's filing of her bankruptcy petition. *See* 11 U.S.C. § 541(a); *Logan v. JKV Real Estate Servs. (In re Bogdan)*, 414 F.3d 507, 512 (4th Cir. 2005). In her reply brief, appellant now suggests otherwise. She argues the entire value of the lawsuit is exempt, and therefore, the lawsuit was removed from the bankruptcy estate as of the filing of her amended exemption schedule. (*See* Appellant's Reply, DE # 21, at 26-27.) Appellant did not raise this argument in the bankruptcy court, (*see* Notice of Appeal, DE # 1-1, at 13 ("The debtor does not contest the trustee's statutory authority to prosecute or settle the Employment Action in the context of her chapter 7 case[.]")), and she therefore waived it, *see In re Lewis*, 611 F. App'x at 137.

> of the acceptance of the compromise appeal." *In re Martin*, 91 F.3d 389, 393 (3rd Cir. 1996). When making that assessment and striking that balance, the court gives some deference to the business judgment of the trustee and also considers the following four factors: "(1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; and (4) the paramount interest of the creditors." *Id.* (citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)); *In re Buffalo Coal Co., Inc.*, 2006 WL 3359585, *3 (Bankr. N.D.W. Va. Nov. 15, 2006).
>
> "To minimize litigation and expedite the administration of a bankruptcy estate, '[c]ompromises are favored in bankruptcy." *In re Martin*, 91 F.3d at 393 (9 Collier on Bankruptcy ¶ 9019.03[1] (15th ed. 1993)). Based upon this policy to favor settlement, the bankruptcy court can approve a compromise over objections so long as the compromise does not "fall[] below the lowest point of reasonableness." *United States ex rel. Rahman v. Oncology Assocs., P.C.*, 269 B.R. 139, 149-50 (D. Md. 2001) (internal citations omitted), *aff'd*, *United States ex rel. Rahman v. Colkitt*, 61 Fed. Appx. 860 (4th Cir. 2003).

Van Wagner v. Atlas Tri-State SPE, LLC, No. 3:11-CV-75, 2012 WL 1636857, at *6 (N.D.W. Va. May 8,

2012) (footnote omitted). A decision approving a settlement agreement is reviewed for abuse of discretion. *Off. Unsecured Creditors' Comm. v. Pension Benefit Guar. Corp.*, 164 F. App'x 454, 455 (4th Cir. 2006); *Vaughn*, 779 F.2d at 1010.

First, appellant argues that the bankruptcy court erred in allowing the trustee's motion for approval of the settlement because it purportedly "rubber-stamped" his motion and supplement and did not engage in its own independent research. To the contrary, the record confirms that the bankruptcy court independently and thoroughly examined the evidence and law bearing on the settlement of the employment discrimination lawsuit.

The bankruptcy court had before it the settlement agreement, (R., DE # 8-2, at 11-17); declarations of Red Hat's counsel in the employment discrimination lawsuit and of Teri Harrell, a manager within Red Hat's human resources department who provided a summary of events relevant to the lawsuit, (*id.* at 88-183); and an accurate summary of the relevant federal and state substantive law, (*id.* at 80-83). At the hearing on the motion, the bankruptcy court heard the testimony of Harrell. (9/18/19 Tr., DE # 10, at 75-125.) The court allowed appellant much leeway in her cross-examination of Harrell and, more importantly, with her arguments, accepting that appellant disputed much of Red Hat's evidence even though appellant had not come forward with her own evidence. Although the bankruptcy court expressed confidence in the trustee's assessment of the validity and value of the employment discrimination lawsuit, (see *id.* at 25), and although the court did not consult an employment lawyer, the court was qualified to make, and

in fact made, its own independent assessment in concluding that "the settlement as proposed is in the best interest of both the estate and its creditors," (Notice of Appeal, DE # 1-1, at 16).

Next, appellant contends that the settlement of the employment discrimination lawsuit "is neither fair nor equitable, because it is not reasonably comparative to the damages or injuries allegedly suffered by [her]." (Appellant's Br., DE # 18, at 51 (internal quotation marks and citation omitted).) Appellant compares the $54,450 settlement to her $32,000,000 valuation. (*Id.*) On their face, the amounts are not reasonably comparative. However, the bankruptcy court found appellant's valuation is "wildly overvalued," (Notice of Appeal, DE # 1-1, at 11), and that finding is not clearly erroneous, given the facts and considering the applicable employment law. Again, the bankruptcy court could approve the settlement so long as it "does not fall below the lowest point of reasonableness." *Van Wagner*, 2012 WL 1636857, at *6 (alteration, internal quotation marks, and citation omitted). Considering the record, the bankruptcy court's finding that the proposed compromise is within the range of reasonableness is not clearly erroneous, and it did not abuse its discretion in approving the settlement of the employment discrimination lawsuit.[10]

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[10] Appellant's final argument regarding the settlement hinges on her amending her claimed exemption in the employment discrimination lawsuit. (*See* Appellant's Br., DE # 18, at 52.) Because the court has concluded the bankruptcy court properly denied appellant's motion for reconsideration of its order prohibiting appellant from further amending that exemption, *see supra* Section II.A., this argument fails.

D. Denial of Reconsideration of Ascendium's Claim

In March 2019, Ascendium filed a proof of claim in the amount of $61,656.76, representing an unsecured student loan. (R., DE # 8-2, at 71-73.) On the same day she filed her objection to the trustee's motion for approval of the settlement, appellant filed an objection to Ascendium's claim (which she later amended), requesting that the bankruptcy court deny the claim. (*Id.* at 39-62.) The bankruptcy court denied appellant's objection and allowed the proof of claim.[11] (*Id.* at 196.) Appellant sought reconsideration of this order pursuant to Federal Rule of Civil Procedure 60(b). (*Id.* at 255.) She argued, in relevant part:

> the student loans that make up the vast majority of [her] outstanding debt have been sold to a third party that does not have a valid claim pending in these proceedings. To [her] knowledge there has been no transfer of the bankruptcy claim. The elimination of such claim would render unnecessary the Trustee's settlement of [her] claim against her prior employer . . . .

(*Id.* at 256 (citation omitted).) After a hearing, the bankruptcy court denied the motion for reconsideration. (Am. Notice of Appeal, DE # 5, at 4.)

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[11] Later, appellant filed another objection to Ascendium's proof of claim, which the bankruptcy court denied. *Dale v. Butler*, No. 7:20-CV-30-BR (E.D.N.C.), DE # 1, at 3-4. Appellant appealed that decision. *See id.* at 1. After the court denied her motion to consolidate the appeal with the instant appeal, *id.*, DE # 21, appellant voluntarily dismissed her subsequent appeal, *see id.*, DE ## 25, 26.

Appellant argues the bankruptcy court should not have allowed Ascendium's claim because there is a discrepancy as to the amount of the claim. (Appellant's Br., DE # 18, at 53.) This argument goes to the merits of the bankruptcy court's underlying order, which is not the subject of this appeal and this court does not review. *See Breen*, 2009 WL 440490, at *4.

To the extent appellant contends the bankruptcy court should have reconsidered its order based on Ascendium's sale of its claim, the court agrees with the trustee that appellant did not show any ground warranting relief under Rule 60(b). Appellant is correct that Rule 3001(e)(2) of the Federal Rules of Bankruptcy Procedure requires the transferee of a claim to file evidence of the transfer. (*See* Appellant's Br., DE # 18, at 53.) The purpose of this rule is "to ensure that sufficient notice is given when a claim against the debtor is transferred or assigned post-petition." *Wallace Res., Ltd. v. United States (In re Arc Energy Corp.)*, No. 96-1529, 1997 WL 570878, at *5 (4th Cir. Sept. 16, 1997) (per curiam) (citation omitted); *see also In re NutriPlus, LLC*, No. 99-44743 (REG), 2002 WL 31254797, at *8 (Bankr. S.D.N.Y. Sept. 20, 2002) ("Bankruptcy Rule 3001(e) provides a mechanism for notice of the transfer, providing benefits for each of the claim transferor (giving the transferor notice and opportunity to be heard in the event that it disagrees with the assertion that there was an assignment) and transferee (helping ensure that the transferee will receive the distributions on account of the claim)." (footnotes omitted)). The transferee's failure to comply with the rule, without more, does not entitle a debtor to relief. *See In re NutriPlus*, 2002 WL 31254797, at *9 ("[T]he Disbursing Agent has cited

no authority, and the Court is aware of none, that absolves a debtor from the duty to make payment on its allowed claims by reason of the failure of a transferee of a claim to file a Rule 3001(e)(2) notice of transfer."); *cf. Educ. Credit Mgmt. Corp. v. Pulley*, 532 B.R. 12, 28 (E.D. Va. 2015) ("Even if, as [the debtor] contends, [the student loan guarantor] did not provide notice of transfer after proof of claim [] was assigned to it, Federal Rule of Bankruptcy Procedure 3001(e)(2), which provides for such notice, is not a basis for precluding a student loans creditor from collecting a debtor's student loans." (footnote omitted)). Assuming Ascendium sold its claim to a financial institution, (*see* R., DE # 8-2, at 260), and assuming evidence of that transfer was not filed, the claim would not, by virtue of these facts alone, be eliminated as appellant urged before the bankruptcy court. Therefore, the bankruptcy court did not abuse its discretion in denying appellant's motion for reconsideration of its order allowing Ascendium's claim.

III. Conclusion

For the foregoing reasons, the bankruptcy court's orders of 9 December 2019 and 8 January 2020 are AFFIRMED.

This 17 November 2020.

/s/ W. Earl Britt
Senior U.S. District Judge

ORDER OF THE UNITED STATES BANKRUPTCY COURT, EASTERN DISTRICT OF NORTH CAROLINA, DENYING DEBTOR'S MOTION TO CONVERT AND ALLOWING TRUSTEE'S MOTION FOR APPROVAL OF COMPROMISE OF CONTROVERSY (DECEMBER 9, 2019)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

IN RE: WENDY M DALE

Debtor

Case No. 18-05448-5-SWH
Chapter 7

Before: Stephani W. HUMRICKHOUSE,
United States Bankruptcy Judge.

ORDER DENYING DEBTOR'S MOTION TO CONVERT AND ALLOWING TRUSTEE'S MOTION FOR APPROVAL OF COMPROMISE OF CONTROVERSY

Pending before the court are two motions: The chapter 7 trustee's motion for approval of a compromise of controversy, wherein the trustee requests that the court enter an order approving the terms of a proposed compromise between the *pro se* chapter 7 debtor and Red Hat, Inc. ("Red Hat"), and the debtor's motion to

convert her chapter 7 case to a case under chapter 13. The trustee's motion to approve compromise was filed on May 20, 2019 (D.E. 59), and the debtor filed a response in opposition on June 7, 2019. D.E. 66. On July 2, 2019, the debtor filed her motion to convert her chapter 7 case (D.E. 77), to which the trustee objected on July 22, 2019. D.E. 91. The trustee also filed, on July 11, 2019, a supplement to his motion to compromise. D.E. 85. A hearing was held in Wilmington, North Carolina on September 18, 2019, at which time the court took the matter under advisement. For the reasons that follow, the debtor's motion to convert her case will be denied, and the trustee's motion to enter into a compromise of the debtor's claim against Red Hat will be allowed.

BACKGROUND AND PROCEDURAL HISTORY

The debtor filed her chapter 7 bankruptcy petition on November 8, 2018,[1] and the bankruptcy court entered an order appointing Algernon L. Butler, III as the chapter 7 trustee on November 9, 2018. The order granting the debtor's bankruptcy discharge was entered on February 21, 2019.

The controversy that is at the heart of both the motion to convert and the motion to compromise is an employment-related dispute between the debtor and her former employer, Red Hat. The debtor was first employed by Red Hat as a contracts specialist in August of 2014. In this position, she was involved in the negotiation and review of commercial agreements

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[1] Previously, the debtor filed a petition under chapter 13 on May 7, 2015. *In re Dale*, Case No. 15-02589-5-DMW. A discharge in that case was entered on June 18, 2018.

in support of Red Hat's commercial legal group. After a series of workplace personnel-related incidents in the spring and summer of 2017, the debtor filed an EEOC charge against Red Hat on August 9, 2017 ("EEOC Action"), claiming workplace discrimination premised on Red Hat's failure to properly accommodate certain disabilities alleged by the debtor. Red Hat and the debtor attempted to resolve these issues but were unsuccessful, and Red Hat terminated the debtor's employment on September 5, 2017.

The debtor retained an attorney who negotiated with Red Hat on her behalf in connection with the EEOC claims, and secured an offer of settlement in the amount of $54,450.00. The debtor argues that while she may have considered accepting this offer, she ultimately did not do so because she believed the offered sum to be too low. The debtor thereafter dismissed her attorney and informed Red Hat that she was no longer represented by counsel.

On June 6, 2018, the debtor, proceeding *pro se*, filed a civil action in federal district court against Red Hat and Leah Moore (individually and in her official capacity as Red Hat's Senior People Risk Manager), and then amended her complaint on August 14, 2018. The amended complaint alleged that Red Hat violated her rights under the Americans with Disabilities Act ("ADA") by failing to accommodate certain disabilities, by subjecting her to disparate treatment, and by engaging in retaliation; in addition, the debtor alleged wrongful termination under North Carolina state law (collectively, the "Claims Against Red Hat"). *Dale v. Red Hat, Inc.*, Case No. 5:18-CV-262-BO (E.D.N.C. 2018) ("Employment Action"). On motion of defendants Red Hat and Moore, the district

court entered an order dismissing Moore from all of the claims asserted against her, and denying Red Hat's partial motion to dismiss.[2]

The Employment Action was pending at the time the debtor filed her chapter 7 petition and is the property of the bankruptcy estate. In schedules filed with the bankruptcy petition on November 8, 2018, the debtor valued the Employment Action at $32,000,000.00, and claimed no exemption in it. D.E. 1 at 19. The debtor amended her schedules on December 27, 2018, to value the Employment Action at $0.00 and to claim an exemption in that asset pursuant to N.C. Gen. Stat. § 1C-1601(a)(2) of "100% of the fair market value, up to any statutory limit." The debtor likewise claimed the fair market value, up to any statutory limit, of certain cash deposits in the total amount of $70. D.E. 24 at 8, 12. The trustee filed an objection, stating:

As the debtor has claimed exemptions pursuant to N.C. Gen. Stat. § 1C-1601(a)(2) of "100% of the fair market value, up to any statutory limit" in both deposits of money listed with a value of $70, and in the Claims against Red Hat . . . which she has valued at $0, the Trustee requests that the Court enter an order (i) allowing the Debtor's claim of exemptions in the deposits of money pursuant to N.C. Gen. Stat. § 1C-1601(a)(2) in the scheduled value of $70, and (ii) limiting the Debtor's claim of exemption in the Claims Against Red Hat . . . to the statutory limit of N.C.

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[2] The debtor also filed a state court action in Wake County Superior Court against Red Hat and multiple individual defendants, which also was dismissed on motion of defendants. *Dale v. Red Hat, Inc.*, Case No. 17 CvS 14409 (2017).

Gen. Stat. § 1C-1601(a)(2) less $70 representing the claim of exemption in the deposits of money.

D.E. 27 at 2. Under N.C. Gen. Stat. § 1C-1601(a)(2), then, the debtor's exemption in the Employment Action would be limited to $4,930.00. Further, arguing that the debtor already had received adequate time in which to claim exemptions and that any further amendment would be prejudicial to administration of the estate, the trustee sought entry of an order providing that the debtor could not further amend or increase her claims of exemptions. *Id.* The debtor did not respond, and the motion was allowed by order entered on January 24, 2019. D.E. 37.

On February 22, 2019, the trustee filed an amended objection to exemptions in which he sought the same relief the court already had allowed, explaining that his original objection to exemptions had been returned to the trustee's office as "Undeliverable" notwithstanding that it had been correctly addressed. The trustee stated that his office had contacted the debtor via email and had confirmed with her the accuracy of that address, as well as the debtor's actual receipt of court notices and orders, and that the debtor had informed the trustee that she was temporarily living elsewhere. This amended motion was then served on the debtor via email, at her permanent address, and also at the temporary address she provided to the trustee. Again, the debtor did not file a response. The court's order granting this amended objection to the debtor's claim of exemptions was entered on March 4, 2019. D.E. 51.

On May 20, 2019, the trustee filed a motion for approval of a compromise of the controversy between the debtor and Red Hat, seeking approval of a proposed

settlement of the Employment Action and the Claims Against Red Hat for the total sum of $54,450.00. Of this amount, the trustee proposed that Red Hat pay $10,000.00 to the bankruptcy estate to compensate the estate for time and expense expended by the trustee, with the remaining $44,450.00 paid to the estate in full and final resolution of any claims the estate may have had against Red Hat (the "Settlement Agreement"). D.E. 59. On June 7, 2019, the debtor filed a response in opposition to the motion, wherein she argued that the trustee's proposed settlement was unreasonable, reflected a lack of due diligence, and was fundamentally unfair in that the proposed agreement grossly undervalued a claim she estimates to be worth $32 million dollars. In addition, the debtor argued that other assets of the bankruptcy estate, as well as expected disbursements in connection with her claim for social security disability benefits, would be sufficient to pay the valid claims against the estate without resort to the Employment Action. D.E. 66. On July 11, 2019, the trustee filed a supplement to his motion for approval of compromise in order to "summarize the legal framework and burden-shifting analysis relevant to the plaintiff's attempt to establish employment-related claims such as the Claims Against Red Hat, and to provide the court with additional background information and facts in support of the Motion including corrections to certain statements appearing in the Debtor's objection which are believed to be unfounded."[3] D.E. 85 ("Trustee's Supplement") at 1-2.

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[3] Appended to the Trustee's Supplement are exhibits, including emails and similar correspondence between the debtor and personnel at Red Hat, that would be integral to both the debtor's

The debtor filed an amended objection to the student loan claim of Ascendium Education Services, Inc. ("Ascendium") on June 7, 2019, contending that the claim should be denied because she had entered into a loan rehabilitation program with Ascendium pursuant to which she now makes direct payments of $5.00 per month. Ascendium's unsecured claim is in the amount of $61,657.76. A hearing on the objection was held on July 16, 2019, and an order denying the debtor's amended objection to Ascendium's claim was entered on July 24, 2019. D.E. 94.

On July 2, 2019, the debtor filed a motion to convert her chapter 7 case to a case under chapter 13. D.E. 77. The debtor stated that she had obtained employment, was in receipt of regular income sufficient to fund a chapter 13 plan, and could put forward a plan that would pay, in full, the claims of all of her non-secured, non-student loan creditors. The trustee objected, arguing that there was no proper basis upon which to exclude the Ascendium claim from any proposed chapter 13 repayment plan. The trustee contends that in the debtor's chapter 7 case, "a total of $70,014.00 in claims have been filed – $1,094.73 of which are secured claims, and $68,919.27 of which are unsecured claims." Trustee's Objection to Motion to Convert (D.E. 91) at 4 ("Trustee's Objection"). The unsecured claims include Ascendium's $61,656.76 claim. More generally, the trustee objected to the motion to convert on grounds that it was "not in good faith and is based on no plausible claim that she can propose a confirmable chapter 13 plan." *Id.* at 5.

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pursuit of her claims against Red Hat, and Red Hat's defense to such claims.

The debtor responded that it was her "intent to render [the] Trustee's Motion to Approve Settlement moot by converting to Chapter 13 Bankruptcy, under which she is entitled to retain control over her assets." Debtor's Response to Trustee's Supplemental Motion to Approve Compromise of Controversy and Supplemental Motion to Convert to Chapter 13 (D.E. 99) at 1 ("Debtor's Response"). The debtor maintained that she has at all times been fully transparent about her income and assets, and that if she is permitted to convert the case, she would not be "depriving her creditors of anything they are legally entitled to so long as Debtor complies with the applicable bankruptcy law and a Court-approved Chapter 13 Plan." *Id.* at 6. For the reasons set out below, the court concludes that applicable bankruptcy law precludes conversion of this case, and supports the court's approval of the compromise proposed by the trustee.

DISCUSSION

I. Debtor's Motion to Convert

For the reasons that follow, the motion to convert will be denied on grounds that the court agrees with the trustee that the debtor currently is not in receipt of "regular income" sufficient to propose a viable chapter 13 plan, as required by § 109(e). The court concludes further that the motion to convert was not filed in good faith, and thus runs afoul of § 1307(c). In addition, the court finds that the unique facts of this case support denial of the motion to convert pursuant to the broad authority conferred upon the court under 11 U.S.C. § 105(a).

The debtor contends that her "right to convert to Chapter 13 is absolute so long as Debtor has acted in good faith during her Chapter 7 bankruptcy and has not previously converted from a Chapter 7 bankruptcy." Debtor's Response (D.E. 99) at 5. In a nutshell, her position is that she has "acted in good faith, has never converted from a Chapter 7 bankruptcy, and is therefore entitled to convert in order to regain control over her assets, including her employment discrimination lawsuit against Red Hat and to reorganize her debt into a manageable plan based on her present and future income." *Id.* at 6. She contends that she would be willing and able, under a chapter 13 plan of three to five years' duration, to pay her creditors as much they could receive in the chapter 7 bankruptcy. Her candidly expressed intent in seeking to convert is to regain control of the Employment Action, based on her belief that the trustee has failed to develop a reasonable and objective understanding of the facts of that action, underestimates its value (both monetary and non-monetary, with respect to the debtor's personal and professional reputation in her field), has engaged in "clandestine negotiations" with Red Hat and, ultimately, accepted a proposed settlement that is "unabashedly biased in favor of Red Hat's position." Debtor's Objection (D.E. 66) at 3-4.

The trustee points out in response that the debtor's motion to convert affirmatively states that her proposed plan would pay in full the non-student loan creditors, "which amount would represent only about 10% of the unsecured claims and only 13% of the value of the Red Hat settlement alone." D.E. 91 at 5 n.2. Any chapter 13 plan must provide for payment of at least $54,450.00, the trustee argues, because the liquidation

amount of that claim has been established. Moreover, the trustee contends that the debtor has made misleading and inaccurate representations on her statements regarding the Employment Action, which is her principle asset.

Having fully considered the parties' filings as well as the arguments presented during the hearing on September 18, 2019, the court finds that the debtor is not qualified to be a debtor under chapter 13. The right of a debtor in a chapter 13 case to convert to a case under chapter 7 is not, as the debtor argued, an "absolute" right, because the ability of a debtor to convert may be limited or precluded in the presence of bad faith or for other cause, as specified in 11 U.S.C. § 1307(c). The bases on which a chapter 7 debtor may convert to a case under chapter 13, and in particular the statutory limitations on that ability, were discussed at length in *Marrama v. Citizens Bank of Massachusetts*, wherein the Supreme Court made clear that a debtor's right to convert is not absolute. *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 372 (2007).

In *Marrama*, the Court turned first to 11 U.S.C. §§ 706(a) and (d), which provide:

> (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 be converted under section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
>
> . . .

> (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.

Id. at 371, *quoting* 11 U.S.C. §§ 706(a), (d). Discussing those limitations, the Court explained that the "broad description of the right as 'absolute' fails to give full effect to the limitation in subsection (d). The words 'unless the debtor may be a debtor under such chapter' expressly conditioned [the debtor's] right to convert on his ability to qualify as a 'debtor' under Chapter 13." *Id.* at 372. Ultimately, the Court found that there were

> at least two possible reasons why Marrama may not qualify as a debtor, one arising under § 109(e) of the Code, and the other turning on the construction of the word "cause" in § 1307(c). . . . More pertinently, the latter provision, § 1307(c), provides that a Chapter 13 proceeding may be either dismissed or converted to a Chapter 7 proceeding "for cause" and includes a nonexclusive list of 10 causes justifying that relief.

Id. at 372-73. Section 109(e) specifies that only an individual with "regular income" may be a debtor under chapter 13. Section 1307(c) addresses the circumstances that would justify dismissal or conversion of a chapter 13 case, which is relevant now in this chapter 7 context because "courts have also held that acts of bad faith committed prior to filing [a chapter 13 case] constitute 'cause' for the purposes of § 1307(c)." *In re Fields*, 2016 WL 3462203 *3 (Bankr. E.D.N.C. June 17, 2016), construing *Marrama*, 549 U.S. at 367 n.3.

Here, the court agrees with the trustee that the debtor has not shown that she has the regular income stream necessary to fund a chapter 13 plan, or that her proposed chapter 13 plan could provide an appropriate payout to creditors. The debtor represented that she now has regular employment at Arby's, as well as freelance paralegal work, but has provided no indication of her salary.[4] There is no way to establish the feasibility of a proposed chapter 13 plan without that baseline information, and the court agrees with the trustee's conclusion that the debtor has "implicitly conceded that her income is insufficient to make up the value of the Red Hat settlement." D.E. 91 at 8. Moreover, the debtor skips over her school loan obligation and suggests that a $5.00 per month direct payment plan essentially covers it with respect to creditor Ascendium. The court, however, denied the debtor's amended objection to Ascendium's proof of claim and instead allowed Ascendium's unsecured claim in the amount of $61,656.76 by order entered on August 24, 2019. It is clear that without regular income to direct toward the allowed claims in this chapter 7 action, the debtor is unable to propose a plan that would pay each allowed unsecured claim an amount that is "not less than the amount that would be paid on such claim if the estate of the

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[4] At the hearing on September 18, 2019, the debtor provided a letter dated September 17, 2019, which appears to be her acceptance of employment with Smiths Detection, Inc., a company based in Edgewood, Maryland. The letter specifies that accepting the position would require the debtor to relocate to Edgewood, Maryland, in order to report to the Edgewood site on Monday, October 7, 2019. There is no indication in the docket that the debtor has done so.

debtor were liquidated under chapter 7." 11 U.S.C. § 1325(a)(4).

The court turns next to the broader analysis of whether the debtor's motion to convert should be denied on grounds that it is not in good faith, which generally involves an assessment of the totality of the circumstances. *See, e.g., Fields*, 2016 WL 3462203 *4 ("A determination of bad faith requires an examination of the totality of the circumstances."); *see also In re Marino*, 388 B.R. 679, 682 (Bankr. E.D.N.C. 2008). The debtor's chapter 7 case was filed five months after her receipt of a discharge under chapter 13. The motion to convert was filed only after the trustee filed his motion to compromise the Employment Action, and there is no question about the debtor's motivation in filing that motion, which was to regain control of the Employment Action.

The issue here lies not in the debtor's desire to convert, but rather in the steps she has taken to facilitate it: Specifically, the debtor's amendment of her schedules to downgrade the value of the Employment Action from $32,000,000.00, which the court finds to be wildly overvalued, to $0.00 with a claimed exemption in that "fair market value," which the court finds to be a material and intentional misrepresentation.

The court sees the debtor's misrepresentation of the value of the Employment Action, together with her effort to convert the case in order to take control of that asset despite her inability to qualify as a chapter 13 debtor, as being uncomfortably similar to the facts in *Marrama*. In that case, the chapter 7 debtor made misleading or inaccurate statements about a number of things and especially about his

principal asset, which was a house in Maine. The debtor listed its value as zero, and denied that he had transferred any property other than in the ordinary course of business within the previous year. "In fact," the Court wrote, the property "had substantial value, and Marrama had transferred it into the newly created trust for no consideration seven months prior to filing his Chapter 7 petition." *Marrama,* 549 U.S. at 368. Marrama acknowledged that "the purpose of the transfer was to protect the property from his creditors." *Id.*

After the trustee informed Marrama's counsel that he intended to recover the property as an asset of the estate, Marrama sought to convert to a case under chapter 13. The trustee objected on grounds that the "request to convert was made in bad faith and would constitute an abuse of the bankruptcy process." *Id.* at 369. The debtor countered that the misstatements were mere "scrivener's errors," and also that while he initially had filed under chapter 7 because he was unemployed, he recently had obtained employment and thus was newly eligible to proceed in chapter 13. *Id.* The bankruptcy court rejected these arguments; on appeal, so too did the district court, the bankruptcy appellate panel, and Court of Appeals for the First Circuit. *Id.* at 369-71. The bankruptcy appellate panel specifically rejected Marrama's claim of an absolute right to convert, and interpreted § 706(a),

> when read in connection with other provision of the Code and the Bankruptcy Rules, as creating a right to convert a case from Chapter 7 to Chapter 13 that is "absolute only in the absence of extreme circumstances." *In re Marrama,* 313 B.R. 525, 531 (1st Cir.

> B.A.P. 2004). In concluding that the record disclosed such circumstances, the panel relied on Marrama's failure to describe the transfer of the Maine residence into the revocable trust, his attempt to obtain a homestead exemption on rental property in Massachusetts, and his nondisclosure of an anticipated tax refund.

Id. at 370 (emphasis added). The court of appeals agreed, holding that

> [i]n construing subsection 706(a), it is important to bear in mind that the bankruptcy court has unquestioned authority to dismiss a chapter 13 petition—as distinguished from converting the case to chapter 13—based upon a showing of 'bad faith' on the part of the debtor. We can discern neither a theoretical nor a practical reason that Congress would have chosen to treat a first-time motion to convert a chapter 7 case to chapter 13 under subsection 706(a) differently from the filing of a chapter 13 petition in the first instance. (Citations omitted).

Id. at 370-71, quoting *In re Marrama*, 430 F.3d 474, 479 (1st Cir. 2005).

The "extreme circumstances" that constituted bad faith in *Marrama* were the debtor's efforts to conceal his assets and his pursuit of conversion to chapter 13 when that failed. The Court accepted the lower courts' collective reasoning that in this situation, where a bankruptcy court has the authority to dismiss a chapter 13 petition due to a debtor's bad faith, that authority extends to refusing to allow conversion

from chapter 7 to chapter 13 in the first place. In that instance, the chapter 7 debtor has "forfeited his right to proceed under Chapter 13." *Id.* at 371. In this case, as in *Marrama*, the debtor cannot qualify as a debtor under chapter 13 due to the combination of bad faith and the debtor's inability to propose a feasible, confirmable chapter 13 plan.

Finally, the *Marrama* Court observed that "[n]othing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) 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." *Id.* at 374-75. To the contrary, the Court held, 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 conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors." *Id.* at 375 (emphasis added, footnote omitted). This court finds ample grounds on which to exercise its authority, under § 105(a), to deny the motion to convert.

II. Motion to Approve Compromise of Controversy

Pursuant to 11 U.S.C. § 541(a), the Employment Action and the Claims against Red Hat are property of the chapter 7 estate, and the trustee is vested with the authority to prosecute, settle or compromise such a claim, subject to the bankruptcy court's approval.

E.g., Vinal v. Federal Nat. Mortg. Ass'n, 131 F. Supp. 3d 529 (E.D.N.C. 2015). "If a cause of action is part of the estate of the bankrupt then the trustee alone has standing to bring that claim." *Id.* at 537, quoting *National Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999); *see* Fed. R. Bankr. P. 9019 (a) ("On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.").

The debtor does not contest the trustee's statutory authority to prosecute or settle the Employment Action in the context of her chapter 7 case, but rather takes exception to his valuation of it. According to the trustee, the debtor informed him in recent months that she would never settle with Red Hat for less than $5,000,000.00, which the trustee believes to be "orders of magnitude outside any reasonable assessment." D.E. 91 at 5 n.1. For her part, the debtor contends that the trustee "would have to show that there is absolutely no way that Debtor could prevail in her lawsuit in order to claim that $54,450 would be a reasonable settlement." D.E. 99 at 3. The debtor cites no foundation for this suggested standard, nor is the court aware of any.

What is required is that the trustee establish, to the court's satisfaction, that the proposed compromise is within the range of reasonableness. *See, e.g., In re Health Diagnostic Laboratory, Inc.*, 2016 WL 6068812 *3 (Bankr. E.D. Va. Oct. 14, 2016). The court must independently consider a range of factors, which include "(a) the probability of success in litigation; (b) the possible difficulties of collecting on any judgment which might be obtained; (c) the complexity of the litigation involved, and the expense, inconvenience, and likely duration and delay necessarily attending to

it; and (d) the paramount interest of the creditors." Trustee's Motion (D.E. 59) at 4 (discussing Health Diagnostic factors). A bankruptcy court must "employ its 'informed, independent judgment' to determine whether the settlement is both 'fair and equitable." *In re Bond*, 16 F.3d 408 *3 (4th Cir. 1994), quoting *Protective Committee for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968) (setting out the four factors in context of compromises incident to chapter 11 reorganization). In its review, the bankruptcy court is "uniquely positioned to consider the equities and reasonableness of a particular compromise." *Id.*, quoting *In re American Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987).

In the initial motion, and again in the Supplement to Trustee's Motion for Approval of Compromise of Controversy ("Trustee's Supplement") filed on August 11, 2019, 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 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. In addition, the trustee provided sworn declarations from Red Hat's counsel and from the manager of the employee relations team within Red Hat's department of human resources. These declarations form part of the basis for the trustee's assessment of the extent to which it

would be "time-consuming, expensive and risky" to pursue the claims against Red Hat, and the extent to which substantial evidence would support Red Hat's

> position that it terminated the Debtor for legitimate non-discriminatory business reasons, that providing any accommodation for the Debtor would have caused it an undue hardship, that the debtor failed to communicate and cooperate with Red Hat to identify a reasonable accommodation, that even with a reasonable accommodation the Debtor would have been unable to perform the essential duties of her job, and that [the] Debtor was otherwise subject to termination for engaging in misconduct during her employment with Red Hat.

Id. at 6 (citing Exhibits A (Declaration of Randall D. Avram) and B (Declaration of Terri Harrell)). While the debtor does not agree with the content of these declarations, that in no way discounts the extent to which they are relevant to both parties' ability to realistically assess the future litigation landscape, if the Employment Action and the Claims Against Red Hat were to go to trial.

Finally, in assessing the proposed compromise, the court is not required to test the soundness of the trustee's position with a mini-trial, but rather must ensure that the compromise is within the range of reasonableness. *In re Cajun Elec. Power Corp.*, 119 F.3d 349, 356 (5th Cir. 1997) (court need not "conduct a mini-trial to determine the probable outcome of any claims waived in the settlement"). Indeed, the court "does not have to be convinced that the settlement is the

best possible compromise, but only that the settlement falls within a reasonable range of litigation possibilities. Therefore, the settlement need only be above 'the lowest point of reasonableness.'" *Health Diagnostic*, 2016 WL 6068812 at *3 (emphasis added); *see also In re Final Analysis, Inc.*, 417 B.R. 332, 342 (Bankr. D. Md. 2009) (discussing analytical standards applicable in court's exercise of its discretion).

The court's review of the parties' filings indicates that there are substantial risks to the estate in pursuing the cause of action, that the risks and benefits of trial have been fairly and fully assessed by the trustee, and that the proposed compromise is within the range of reasonableness; it is in fact substantially above the "lowest point," the debtor's dissatisfaction notwithstanding. The court concludes that the settlement as proposed is in the best interest of both the estate and its creditors. Accordingly, the court will, contemporaneously with entry of this order, enter the trustee's proposed Order Approving Compromise of Controversy, and will approve the Settlement Agreement.

CONCLUSION

For those reasons, the debtor's motion to convert her chapter 7 case to a case under chapter 13 is DENIED. The trustee's motion seeking approval of the proposed settlement agreement between the trustee, not individually but solely in his capacity as the chapter 7 trustee for the bankruptcy estate of the debtor, and Red Hat, is ALLOWED.

/s/ Stephani W. Humrickhouse
United States Bankruptcy Judge

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA DENYING MOTION FOR REHEARING (FEBRUARY 3, 2021)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA SOUTHERN DIVISION

WENDY DALE,

Appellant,

v.

ALGERNON L. BUTLER, III,

Appellee.

No. 7:19-CV-254-BR

Before: W. Earl BRITT, Senior U.S. District Judge.

ORDER

This matter is before the court on appellant Wendy Dale's motion for rehearing pursuant to Federal Rule of Bankruptcy Procedure 8022. (DE # 24.) Appellant requests that the court rehear her appeal from the bankruptcy court's 9 December 2019 and 8 January 2020 orders, which this court affirmed on 17 November 2020.

A motion for rehearing under Bankruptcy Rule 8022 must state with particularity each point of law or fact that the movant believes the district court has overlooked or misapprehended. Fed. R. Bank. P. 8022(a)(2). Although the Rule does not specify a standard of review, the standard used to evaluate motions to alter or amend a judgment pursuant to Federal Rule of Civil Procedure 59(e) is appropriate. *See Maines v. Wilmington Sav. Fund Soc'y*, No. 3:15CV00056, 2016 WL 6462141, at *1-*2 (W.D. Va. Oct. 31, 2016) ("Petitions for rehearing function to ensure that the court properly considered all relevant information in reaching its decision; they should not be used to simply reargue the plaintiff's case or assert new grounds." (internal quotation marks and citations omitted)); *In re Envtl. Techs. Int'l, Inc.*, No. 8:15-AP-786-KRM, 2017 WL 3124246, at *1 (M.D. Fla. July 21, 2017) (applying Rule 59(e) standard to motion under Bankruptcy Rule 8022); *Am. First Fed., Inc. v. Theodore*, 584 B.R. 627, 632-33 (D. Vt. 2018); *Ocwen Loan Servicing, LLC for Deutsche Bank Nat'l Tr. Co. v. Randolph*, No. BR 15-10886, 2018 WL 2220843, at *2 (W.D. Pa. May 15, 2018) (a Rule 8022 motion functions, essentially, like a traditional motion for reconsideration). Such a motion may be granted on three limited grounds: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not previously available; or (3) to correct a clear error of law or prevent manifest injustice. *See United States ex rel.*

> *Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002) (citing *Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co.*, 148 F.3d 396, 403 (4th Cir. 1998)), *cert. denied*, 538 U.S. 1012 (2003). The motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Pac. Ins. Co.*, 148 F.3d at 403 (quoting 11 Wright *et al.*, Federal Practice and Procedure § 2810.1, at 127-28 (2d ed. 1995)). "In general, 'reconsideration of a judgment after its entry is an extraordinary remedy which should be used sparingly.'" *Id.* (quoting Wright *et al.*, *supra*, § 2810.1, at 124).

Kelly v. Schlossberg, No. CV PX-17-3846, 2018 WL 4357486, at *2 (D. Md. Sept. 12, 2018), *aff'd sub nom. In re Myers*, 773 F. App'x 161 (4th Cir. 2019).

Appellant contends that the court misconstrued the factual and legal issues regarding the conversion of her bankruptcy case from Chapter 7 to Chapter 13 and the reasonableness of the trustee's settlement of her employment discrimination lawsuit. (Mot., DE # 24, at 2.) She is rearguing her appeal on those issues or raising arguments that could have been asserted earlier. The court declines to revisit its ruling on appeal, and appellant's motion is DENIED.

This 3 February 2021.

/s/ W. Earl Britt
Senior U.S. District Judge

ORDER OF THE BANKRUPTCY COURT DENYING MOTION TO RECONSIDER (FEBRUARY 8, 2020)

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

IN RE: WENDY M DALE

Debtor

Case No. 18-05448-5-SWH
Chapter 7

Before: Stephani W. HUMRICKHOUSE,
United States Bankruptcy Judge.

ORDER DENYING MOTION TO RECONSIDER

The matter before the court is the Motion to Reconsider filed by the Debtor on January 3, 2020, Dkt. 123. The Chapter 7 Trustee filed a Response on January 8, 2020, Dkt. 130. A hearing was held in Wilmington, North Carolina on January 8, 2020.

Wendy M. Dale (the "Debtor") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on November 8, 2018. An order was entered on December 9, 2019, Dkt. 101, denying the Debtor's Motion to Convert to Chapter 13 and allowing the Chapter 7 Trustee's Motion for Approval of Compromise (the "Order Denying Motion to Convert"). The Debtor

requests that the court reconsider the Order Denying Motion to Convert.

As stated at the hearing, the court finds that the Debtor has failed to show any proper basis for reconsideration of the Order Denying Motion to Convert.

THEREFORE, the Motion to Reconsider is DENIED. SO ORDERED.

SIGNED this 8 day of January, 2020.

/s/ Stephani W. Humrickhouse
United States Bankruptcy Judge

SUPREME COURT
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