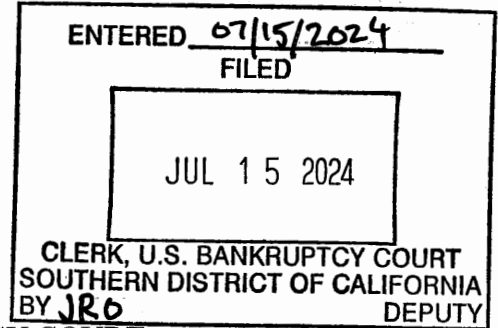


WRITTEN DECISION – FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

<p>12 In re:</p> <p>13</p> <p>14 RODRIGO AGUIRRE,</p> <p>15 Debtor,</p> <p>16</p> <p>17</p> <p>18 _____</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p>Bankruptcy Case No. 23-03639-CL7</p> <p>Chapter 7</p> <p>MEMORANDUM DECISION AND ORDER DENYING CONVERSION TO CHAPTER 13</p> <p>Judge: Christopher B. Latham</p>
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**MEMORANDUM DECISION AND ORDER DENYING CONVERSION TO CHAPTER 13**

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4 Before the court is Debtor's motion to convert his petition from Chapter 7 to Chapter 13  
5 (ECF No. 42). This motion follows omissions and inconsistencies in his schedules, and comes on the  
6 heels of the Chapter 7 Trustee's initial steps to liquidate Debtor's interest in real property. Both the  
7 Trustee and Creditor Mario Mora oppose (ECF Nos. 47 & 48). The court heard oral argument and took  
8 the matter under submission (ECF No. 50). It now finds that conversion is futile under 11 U.S.C. §§ 105,  
9 1307(c), and 1325(a). Thus it will **deny** the motion without prejudice as follows.

**I. JURISDICTION AND VENUE**

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12 The court has jurisdiction over this matter under 28 U.S.C. §§ 1334(b) and 157(b)(2)(A) and (L).  
13 Venue is proper under 28 U.S.C. § 1409(a).

**II. BACKGROUND**

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16 Debtor filed his Chapter 7 petition on November 21, 2023 (ECF No. 1). His schedules show  
17 three dependents—his estranged wife and two sons. *Id.* It is unclear if Debtor is still married; he  
18 provided no non-filing spouse's financial information. *Id.* And he listed \$1,317 in monthly support  
19 expenses on his Schedule J. *Id.* But he did not include any underlying legal actions in his statement of  
20 financial affairs. *Id.* Debtor later admitted there is a prepetition child support judgment against him  
21 (ECF No. 42). He also scheduled \$356,589.55 in unsecured debt and \$2,688 of negative net monthly  
22 income. *Id.*

23 In Schedule D, Debtor claimed a \$288,816.72 homestead exemption in 1939-41 Ensenada St.  
24 Lemon Grove, California ("Ensenada Property") under California Civil Procedure Code § 704.730. *Id.*  
25 But at the February 8, 2024 meeting of creditors he admitted he does not reside there (ECF No. 47). He  
26 then amended his homestead exemption under California Civil Procedure Code § 703.140(b)(1) and  
27 (b)(5) to \$31,950 and \$1,700, respectively, leaving \$197,478 non-exempt equity in the Ensenada  
28 Property (ECF Nos. 26, 28 & 47).

1 In response, the Trustee informed Debtor he intended to liquidate the estate's interest in the  
2 Ensenada Property, employed counsel to aid in that on April 4, 2024, and demanded turnover from the  
3 two non-debtor joint owners (ECF Nos. 35, 40 & 47).

4 Debtor responded with the present motion to convert his case from Chapter 7 to one under  
5 Chapter 13 (ECF No. 42). In support, he attached an amended Schedule I and a proposed Chapter 13  
6 plan. *Id.* He claims he has obtained the permit necessary to revive his flagging business in addition to  
7 securing W-2 employment. *Id.* Debtor's amended Schedule I indicates his income increased by  
8 \$3,740—including \$800 more in business income—for a \$6,740 monthly total. *Id.* Coupled with his  
9 original Schedule J, that leaves \$1,052 in monthly net income (*see* ECF Nos. 1 & 42). Debtor's plan  
10 proposes sixty \$934 monthly payments and \$45,836 to nonpriority unsecured claims (ECF No. 42). By  
11 his own calculation, nonpriority unsecured claims would be paid approximately \$194,535.93 in a  
12 Chapter 7 liquidation. *Id.*

13 The Trustee opposes conversion based on bad faith, lack of sufficient income, and inability to  
14 meet the liquidation test (ECF No. 47). Creditor Mario Mora joins the Trustee's opposition, adding that  
15 he was not scheduled as a secured creditor and asserting that Debtor omitted the child support judgment  
16 in his initial schedules (ECF No. 48).

### 17 18 III. LEGAL STANDARDS

19 Chapter 7 debtors may convert to Chapter 11, 12, or 13 "at any time . . . ." 11 U.S.C. § 706(a).<sup>1</sup>  
20 In general, conversion is broadly favored. But a "case may not be converted to a case under another  
21 chapter of this title unless the debtor may be a debtor under such chapter." § 706(d). And the Code  
22 limits who may be a Chapter 13 debtor. § 109(e). Under the statute in effect at filing, an individual  
23 cannot owe more than \$2,750,000 in noncontingent, liquidated debts and must have regular income.<sup>2</sup> *Id.*

24  
25 <sup>1</sup> Unless otherwise noted, all statutory references are to the United States Code, Title 11.

26 <sup>2</sup> On June 21, 2024, the Chapter 13 threshold reverted to the two-part test that limits eligibility to a maximum of  
27 \$465,275 for unsecured debt and \$1,395,875 for secured debt. *See* § 109(e). Debtor filed his motion to convert  
28 on April 15, 2024 (ECF No. 42). For the purposes of this motion, the court accords Debtor the benefit of the  
\$2,750,000 limit. And in any event, his scheduled debts are within the statutory thresholds (*see* ECF Nos. 1 &  
21).

1 The Code defines an “individual with regular income” as someone “whose income is sufficiently stable  
2 and regular to enable such individual to make payments under a plan under chapter 13.” § 101(30).

3 But this does not necessarily mean payments under a *specific* Chapter 13 plan. *See* § 101(30); *In*  
4 *re Santiago-Monteverde*, 512 B.R. 432, 443 (S.D.N.Y. 2014). Instead, a debtor seeking conversion only  
5 needs income regular and stable enough to make payments “under some hypothetical Chapter 13 plan.”  
6 *See id.* at 443 (Reasoning that “[b]ecause a Chapter 13 plan need not be filed until 14 days after the  
7 petition for relief, it is premature to consider the feasibility of such a plan prior to conversion.” *See* FED.  
8 R. BANKR. P. 3015(b)).

9 Regardless of § 109(e) eligibility, a debtor may forfeit the right to proceed under Chapter 13 in  
10 certain circumstances. *See Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 371 (2007)  
11 (holding that § 706(d) permits the bankruptcy court to consider § 1307(c) when denying a motion to  
12 convert); *see also In re Lopez*, No. CC-14-1427-TaKuPe, 2015 WL 5175471, at \*2 (B.A.P. 9th Cir. Sept.  
13 3, 2015).

14 Courts may consider § 1307(c) when evaluating a motion to convert because it “is tantamount to  
15 a ruling that the individual does not qualify as a debtor under Chapter 13.” *Marrama*, 549 U.S. at 371–  
16 74. Section 1307(c) provides a “non-exclusive list of factors which constitute ‘cause’ for conversion or  
17 dismissal” of a Chapter 13 case. *See* § 1307(c)(1)–(11). *In re de la Salle*, 461 B.R. 593, 605 (B.A.P.  
18 9th Cir. 2011). And the Supreme Court has interpreted “cause” to include bad faith. *See Marrama*, 549  
19 U.S. at 371.

20 If a Chapter 13 petition (or motion to convert) was filed in bad faith, the court may dismiss or  
21 deny it for cause under § 1307(c). *See HSBC Bank USA, N.A. v. Blendheim (In re Blendheim)*, 803 F.3d  
22 477, 499 (9th Cir. 2015). To determine whether a debtor acted in bad faith, the court must review the  
23 “totality of the circumstances,” considering:

24 (1) whether the debtor misrepresented facts in his petition or plan, unfairly manipulated  
25 the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable  
26 manner; (2) the debtor’s history of filings and dismissals; (3) whether the debtor only  
intended to defeat state court litigation; and (4) whether egregious behavior is present.

27 *Id.* (quoting *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224 (9th Cir. 1999)). This is a “case-by-  
28 case” inquiry. *Blendheim*, 803 F.3d at 499 (quoting *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386, 1390

1 (9th Cir. 1982)). A “finding of bad faith does not require fraudulent intent by the debtor.” *Leavitt*, 171  
2 F.3d at 1224. And conversion can be abusive or in bad faith when the debtor files to preempt the trustee’s  
3 administration of the estate. *In re Barnes*, 275 B.R. 889, 895 (Bankr. E.D. Cal. 2002).

4 Further, a court need not convert a case where conversion is “an exercise in futility.” See *In re*  
5 *Lilley*, 29 B.R. 442, 443 (B.A.P. 1st Cir. 1983); see also *In re Glenn*, 408 B.R. 800, 803 (Bankr. E.D.  
6 Mo. 2009); *In re Pakuris*, 262 B.R. 330, 335–36 (Bankr. E.D. Pa. 2001).

7 To confirm a Chapter 13 plan, the court must ensure that the debtor “will be able to make all  
8 payments under the plan and to comply with the plan . . . .” § 1325(a)(6). This is more commonly  
9 known as the feasibility requirement. Further, the best interests of creditors analysis mandates:

10 “[T]he value, as of the effective date of the plan, of property to be distributed under the  
11 plan on account of each allowed unsecured claim is not less than the amount that would  
12 be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this  
title on such date . . . .”

13 *Id.* at § 1325(a)(4).

14 Finally, bankruptcy courts have broad authority to take any action necessary or appropriate “to  
15 prevent an abuse of process.” § 105(a). And that is “adequate to authorize an immediate denial of a  
16 motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of  
17 equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.”  
18 *Marrama*, 549 U.S. at 375.

## 20 IV. ANALYSIS AND DISCUSSION

### 21 A. Section 109(e) Eligibility

22 Debtor’s schedules show \$478,448.55 in debts, well within the applicable § 109(e) eligibility  
23 threshold. Further, Debtor’s amended Schedule I provides monthly income of \$6,740, yielding a  
24 monthly net income of \$1,052 (see ECF Nos. 1 & 42). While the sudden \$3,740 increase in income is  
25 dubious, Debtor claims under oath that it resulted from recent W-2 employment and obtaining the permit  
26 necessary to revive his business (ECF No. 42).<sup>3</sup>

27  
28 <sup>3</sup> In his amended Schedule I, Debtor represents that he has been gainfully employed for the past six months (ECF  
No. 42).

1 Taken as true, \$1,052 monthly net income is sufficiently regular and stable to make payments  
2 “under some hypothetical Chapter 13 plan.” See *In re Santiago-Monteverde*, 512 B.R. at 443. Thus,  
3 while Debtor’s proposed plan may lack feasibility at that income, that is not at issue insofar as § 109(e)  
4 eligibility is concerned. See *id.*

5 **B. Conversion Would Be Futile**

6 Independent of bad faith,<sup>4</sup> the court finds ground to deny conversion based on futility. See  
7 §§ 105(a); 1307(c); 1325(a); *In re Lilley*, 29 B.R. at 443 (“Finding that conversion to Chapter 13 would  
8 be an exercise in futility on the facts of the case, the bankruptcy judge denied the relief sought by the  
9 debtors.”); *In re Glenn*, 408 B.R. at 803 (“It is within this Court’s power to deny conversion from  
10 Chapter 7 to Chapter 13 when a debtor’s finances obviate a confirmable plan and render the conversion  
11 “an exercise in futility.”) (cleaned up). Even with Debtor’s increased income, his proposed plan does  
12 not meet § 1325’s confirmation requirements. See § 1325 (mandating that general unsecured creditors  
13 receive at least what they would have in a hypothetical Chapter 7 liquidation). By his own calculations,  
14 nonpriority unsecured creditors would receive \$148,699.93 more in a hypothetical liquidation than under  
15 the current proposed plan (ECF No. 42). The Trustee notes that the best interest of creditors test would  
16 require a minimum \$2,975.22 monthly payment (ECF No. 47). And since that grossly exceeds Debtor’s  
17 proposed monthly amount, he cannot satisfy the test without vitiating plan feasibility. See § 1325(a)(6).

18 Indeed, it appears Debtor can only satisfy both sections 1325(a)(4) and (a)(6) by liquidating his  
19 interest in the Ensenada Property. But since his conversion motion is ostensibly a strategy to avoid  
20 precisely that, it appears Debtor is incapable of proposing a confirmable Chapter 13 plan. And his  
21 proposed plan is certainly unconfirmable. See §§ 1325(a)(4), (a)(6). Accordingly, the court finds that  
22 conversion here would “merely postpone the allowance of equivalent relief and may provide a debtor  
23 with an opportunity to take action prejudicial to creditors.” *Marrama*, 549 U.S. at 375.

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25  
26 <sup>4</sup> A motion to convert may be denied for cause under § 1307(c) if it is filed in bad faith. See *In re Blendheim*, 803  
27 F.3d at 499. The court does not decide this motion on bad faith grounds. But in the totality of the circumstances,  
28 Debtor filed for conversion in bad faith. His timing is suspect, and the infeasible plan leaves no cognizable motive  
as to his motion other than to frustrate the Trustee’s sale of the Ensenada Property. See *In re Leavitt*, 171 F.3d at  
1224; *In re Barnes*, 275 B.R. at 895; *In re Richards*, BAP No. CC-21-1178-LTF, 2022 WL 884593, at \*6–7.

V. CONCLUSION

Although Debtor meets the facial eligibility requirements, conversion would be an exercise in futility because he cannot propose a feasible plan. Accordingly, and good cause appearing, the court **denies** the motion without prejudice.

IT IS SO ORDERED.

Dated: July 15, 2024

  
CHRISTOPHER B. LATHAM, JUDGE  
United States Bankruptcy Court

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