SO ORDERED.

SIGNED this 6 day of September, 2024.

Austin E. Carter
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
ATHENS DIVISION

In re:	)	
	)	Case No. 23-30610-AEC
David James Farnham,	)	
	)	Chapter 13
Debtor.	)	

OPINION AND ORDER DENYING MOORE CREDITORS' MOTION UNDER BANKRUPTCY RULES 7052 (FRCP 52), 9023 (FRCP 59), 9024 (FRCP 60) & THE JUDICIAL ESTOPPEL DOCTRINE

This matter concerns whether a debtor has an absolute right to dismiss a chapter 13 case, provided the case has not been converted previously, or whether the court may deny a debtor's request to dismiss a chapter 13 case for cause. The Court agrees with the Debtor that a debtor's right to dismiss is absolute so long as the case was not converted previously.

Before the Court is *Moore Creditors' Motion Under Bankruptcy Rules 7052 (FRCP 52), 9023 (FRCP 59), 9024 (FRCP 60) & the Judicial Estoppel Doctrine* (Doc. 63) (the "Motion to Vacate").[1] Francis X. Moore and FXM, P.C., d/b/a Frank X. Moore Law (collectively, the "Moore Creditors") filed the Motion to Vacate after the

[1] Despite its vague title, the Court interprets the motion as a motion to vacate the dismissal of this case.

Court entered its order granting Debtor's request to dismiss the case. The Debtor opposes the Motion to Vacate, as do Linda Creviston, Marissa Creviston, Lori Andre, and Rebecca Hughson (collectively, the "Creviston Creditors").[2]

In attendance at the hearing on the Motion to Vacate were the Debtor; the Debtor's then-counsel, Jason Braswell;[3] movant, Francis X. Moore; and William Ney, counsel for the Creviston Creditors.[4]

The Moore Creditors request the Court set aside its order dismissing this case, arguing that the Debtor did not have the right to dismiss this chapter 13 case without creditors being afforded the opportunity to oppose the dismissal. The Moore Creditors further move to reinstate this case so that they can pursue their motion to convert the case to chapter 7. The Debtor and the Creviston Creditors, on the other hand, argue that the Debtor had the absolute right to dismiss this case under 11 U.S.C. § 1307(b).[5]

After considering the pleadings, arguments of counsel, evidence proffered, and applicable authority, the Court enters the following findings of fact and conclusions of law.

I. Jurisdiction.

The Court has jurisdiction under 28 U.S.C. §§ 1334(a) and 157(a), and the delegation made to this Court by the Amended Standing Order of Reference from the District Court, entered on February 21, 2012. This matter is a core proceeding under 28 U.S.C. § 157(b)(1) and (2). Venue is appropriate in this Court under 28 U.S.C. § 1408.

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[2] The Creviston Creditors filed a response in opposition to the Motion to Vacate (Doc. 67).

[3] The Court subsequently approved Braswell's withdrawal from representation of the Debtor by order entered August 1, 2024. (Doc. 77).

[4] The Chapter 13 Trustee, Camille Hope, appeared telephonically; however, the Court discharged the Trustee of her duties in this case before the hearing, and she took no position on the Motion to Vacate.

[5] Statutory references herein are to Title 11 of the United States Code (the "Bankruptcy Code"), unless otherwise specified.

II. Findings of Fact.

The Debtor filed this case on December 4, 2023. On May 7, 2024, the Moore Creditors filed a motion to convert this case to chapter 7, which was set to be heard on May 29, 2024. (Docs. 52, 53). Before the hearing on that motion, on May 16, 2024, the Debtor filed a *Voluntary Dismissal* (Doc. 59). When filing his Voluntary Dismissal via the Court's ECF system, the Debtor's attorney described his filing on the Court's docket as "Motion to Voluntarily Dismiss Case by Debtor." (*Id.*). In his Voluntary Dismissal, the Debtor "certifie[d] that this case was not previously converted from Chapter 7." (*Id.*). In accordance with its usual procedure, the Court, on May 17, entered an *Order Dismissing Voluntary Petition*. (Doc. 60).[6] A few days later, the Chapter 13 Trustee filed her final report. The Moore Creditors filed the Motion to Vacate on May 31, 2024. (Doc. 63).

In support of the Motion to Vacate, the Moore Creditors argue that the Debtor should not be allowed to dismiss his case because he was ineligible for relief under chapter 13,[7] and because he engaged in a variety of inappropriate conduct, including: failure to file his tax returns; failure to schedule all of his assets and all of his creditors; scheduling illegitimate claims of the Creviston Creditors;[8] inclusion of unnecessary expenses on his Schedules; prepetition collusion with the Creviston Creditors to harm the Moore Creditors; attempting to use dismissal of the case to

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[6] The Debtor's attorney prepared and submitted this order. *See* M.D. Ga. LBR 9013-1(a).

[7] The Moore Creditors argue that the Debtor is ineligible for chapter 13 relief because his Schedules reveal only social security benefits and family contributions available to fund a plan. While these concerns may go toward feasibility of the plan at confirmation, there is no per se disqualification of debtors from using those sources of income to fund a plan. *See In re Robinson*, 535 B.R. 437, 443–44 (Bankr. N.D. Ga. 2015) (recognizing broad and liberal interpretation of "regular income" for chapter 13 debtors, which can come from a variety of sources, including social security and family contributions) (citations omitted).

[8] The Moore Creditors do not explain this significance of this alleged misconduct. In a chapter 13 case, the scheduling of creditors is for notice purposes. In order to participate in plan distributions, it is incumbent upon creditors to file a proof of claim, to which any party in interest could object under § 502(a). *See In re Durham*, 329 B.R. 899, 901–02 (Bankr. M.D. Ga. 2005) ("In a Chapter 13 case, a creditor must file a timely proof of claim for the claim to be allowed. Only a creditor whose claim has been allowed receives a distribution through a Chapter 13 plan.").

avoid the Bankruptcy Rule 2004 exam to which he previously consented; destruction of evidence in a prepetition investigation; proposing his plan in bad faith; and unreasonably delaying matters in this case before seeking dismissal. For purposes of this Order, the Court assumes that the Moore Creditors would have presented evidence supporting these assertions.

After this case was dismissed, on June 28, 2024, the Debtor filed a new chapter 13 case, no. 24-30325, which remains pending before this Court.[9]

III. Conclusions of Law.

A. Burden of Proof.

The Moore Creditors bear the burden of proof with respect to the Motion to Vacate. *See In re RWD Real Est., LLC*, No. 09-41061, 2010 WL 2926141, at *2 (Bankr. M.D. Ga. July 23, 2010) (Laney, J.); *In re Pac. Cargo Servs., LLC*, No. 13-30439-TMB7, 2013 WL 5299545, at *5 (Bankr. D. Or. Sept. 18, 2013), *aff'd*, No. 3:13-CV-01978-AA, 2014 WL 2041821 (D. Or. May 9, 2014) (holding that movant bears burden of proof for motions brought under Civil Rules 59 or 60); *see also Ellison v. Unknown*, No. CV 122-143, 2023 WL 5962098, at *1 (S.D. Ga. Sept. 13, 2023) ("[T]he moving party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision.") (citation omitted).

B. Absolute Right of Dismissal under § 1307(b).

The question presented is whether a debtor has an absolute right to dismiss a chapter 13 case (so long as the statutory conditions of § 1307(b) are met), or whether there is any exception to this right. The Moore Creditors argue that a debtor should not be able to dismiss his chapter 13 case when there exists evidence of the debtor's bad faith, particularly when a creditor has a pending motion to convert the case to chapter 7. The Debtor, on the other hand, argues that a debtor's right to dismiss

[9] The Moore Creditors have entered an appearance in the Debtor's new case.

under § 1307(b) is absolute, so long as the case was not converted previously under §§ 706, 1112, or 1208.[10]

For the reasons that follow, the Court agrees with the Debtor.

"As with any statutory interpretation question, our analysis 'must begin, and usually ends, with the text of the statute.'" *United States v. Stevens*, 997 F.3d 1307, 1314 (11th Cir. 2021) (quoting *Boca Ciega Hotel, Inc., v. Bouchard Transp. Co.*, 51 F.3d 235, 237 (11th Cir. 1995)). Where a statute's text is unambiguous, a court may cease its inquiry. *People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium,* 879 F.3d 1142, 1146 (11th Cir. 2018) (citation omitted).

The text of § 1307(b) is unequivocal: "On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable." 11 U.S.C. § 1307(b). Section 1307(b) is unambiguous—a debtor cannot waive the absolute right to voluntarily dismiss his case. Nor does a court have discretion in whether to grant a dismissal under § 1307(b). *Smith v. Spizzirri*, 601 U.S. 472, 476 (2024) ("[T]he use of the word 'shall' 'creates an obligation impervious to judicial discretion.'") (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach,* 523 U.S. 26, 35 (1998)); *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873, 877 (11th Cir. 2010) ("The word 'shall' is ordinarily the language of command.") (quoting *Ala. v. Bozeman*, 533 U.S. 146, 153 (2001)).[11] Accordingly, the Court may end its inquiry at this juncture; however,

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[10] As noted previously, the Creviston Creditors support the Debtor's position.

[11] Even if there were ambiguity in § 1307(b), the Court would read § 1307(b) *in pari materia* with other sections of the Bankruptcy Code. Statutes "relating to the same subject matter must be read, construed, and applied together, and harmonized wherever possible." *In re Graupner*, 356 B.R. 907, 918 (Bankr. M.D. Ga. 2006) (Laney, J.), *aff'd*, 2007 WL 1858291 (M.D. Ga. June 26, 2007), *aff'd*, 537 F.3d 1295 (11th Cir. 2008). The Court finds additional statutory support for a debtor's broad right to dismiss a chapter 13 case in § 303(a), which governs involuntary bankruptcy petitions. That code section specifically excludes the filing of an involuntary petition under chapter 13. *See* 11 U.S.C. § 303(a) ("An involuntary case may be commenced only under chapter 7 or 11 of this title . . . .").

because there exists a minority approach recognizing an exception to the absolute right to dismissal as "qualified by accusations of bad faith and abuse of the bankruptcy process[,]" and there exists no binding Eleventh Circuit precedent, the Court assesses both the minority and majority approaches. *See In re Spann*, No. 19-61872, 2021 WL 5177371, at *2 (Bankr. N.D. Ga. Nov. 3, 2021).

The Court observes that a majority of decisions recognize a debtor's right to dismiss under § 1307(b) as absolute. *See In re Kemp*, No. 21-40365, 2022 WL 50368, at *4 (Bankr. D. Kan. Jan. 5, 2022) ("Courts which adopt the majority position hold that a debtor's § 1307(b) request for dismissal precludes a bankruptcy court from granting a conflicting motion for dismissal or conversion for cause under § 1307(c) filed either before or after a debtor's § 1307(b) request.") (footnotes omitted).

The Supreme Court in 2014 issued *Law v. Siegel*, which clarified that bankruptcy courts cannot use their equitable powers in a fashion contrary to specific provisions of the Bankruptcy Code. 571 U.S. 415, 421 (2014) (holding that § 105(a) "does not allow the bankruptcy court to override explicit mandates of other sections of the Bankruptcy Code") (citation omitted).[12] Following *Law v. Siegel*, a clear majority has emerged. The majority approach recognizes a debtor's absolute right to dismiss a chapter 13 case under § 1307(b). As noted below, cases evaluating § 1307(b) often include a competing motion to convert and allegations of a debtor's bad faith, a debtor's abuse of the bankruptcy process, or a debtor's ineligibility for chapter 13 relief.[13]

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[12] Prior to *Law v. Siegel*, some bankruptcy courts had interpreted the Supreme Court's previous decision of *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007), to impose a good faith standard on a debtor's § 1307(b) motion to dismiss. *See, e.g., Rosson v. Fitzgerald (In re Rosson)*, 545 F.3d 764 (9th Cir. 2008). The Ninth Circuit, of course, later held that *Rosson* was effectively overruled by *Law v. Siegel*. *Nichols v. Marana Stockyard & Livestock Mkt., Inc.* (*In re Nichols)*, 10 F.4th 956, 962 (9th Cir. 2021).

[13] Courts following the majority rule observe that other remedies exist to a debtor's misconduct. *See, e.g., In re Fulayter*, 615 B.R. 808, 821 (Bankr. E.D. Mich. 2020) ("A bankruptcy court may punish a Chapter 13 debtor's misconduct, and has lots of tools to do so, but there is nothing in the

The Courts of Appeal for the Second, Sixth, and Ninth Circuits have issued decisions adopting the majority approach. In the most recent of these decisions, the Ninth Circuit recognized the impact of *Law v. Siegel* and revisited its earlier decision that a debtor's bad faith may preclude a debtor's right to dismiss under § 1307(b):

> Section 1307(b)'s text plainly requires the bankruptcy court to dismiss the case upon the debtor's request. There is no textual indication that the bankruptcy court has any discretion whatsoever . . . . We conclude that § 1307(b)'s text confers upon the debtor an absolute right to dismiss a Chapter 13 bankruptcy case, subject to the single exception noted expressly in the statute itself [that the case has not been converted].

Nichols v. Marana Stockyard & Livestock Mkt., Inc. (In re Nichols), 10 F.4th 956, 963–64 (9th Cir. 2021) (overturning bankruptcy court's denial of debtors' dismissal motion based on finding debtors abused bankruptcy process).[14]

The Court of Appeals for the Sixth Circuit likewise held that a debtor's right to dismiss under § 1307(b) is absolute, even if the bankruptcy case was filed in bad faith. *Smith v. U.S. Bank N.A. (In re Smith)*, 999 F.3d 452, 456 (6th Cir. 2021) ("The command of § 1307(b) is no mere procedural nicety[.]"). Like the Ninth Circuit in *Nichols*, the Sixth Circuit addressed the development of this issue through the Supreme Court decision *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365 (2007), and, later, in *Law v. Siegel*.

The Court of Appeals for the Second Circuit, in a decision predating *Law v. Siegel*, ruled similarly:

> We hold that a debtor has an absolute right to dismiss a Chapter 13 petition under § 1307(b), subject only to the limitation explicitly

Bankruptcy Code that permits a bankruptcy court to punish a Chapter 13 debtor's misconduct by denying the debtor's motion to dismiss under § 1307(b).").

[14] "That Congress codified an express exception to § 1307(b)'s right to dismiss [that the case has not been converted] demonstrates that Congress considered the issue of exceptions and chose not to prescribe additional ones." *In re Nichols*, 10 F.4th 956, 963–64 (9th Cir. 2021) (citing *United States v. Johnson*, 529 U.S. 53, 58 (2000)).

> stated in that provision . . . . Section 1307(b) unambiguously requires that if a debtor "at any time" moves to dismiss a case that has not previously been converted, the court "shall" dismiss the action. The term "shall," as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court. The only limitation of the right to dismiss is stated in § 1307(b) itself, which provides for dismissal "if the case has not been converted under section 706, 1112, or 1208 of this title."

Barbieri v. RAJ Acquisition Corp. (In re Barbieri), 199 F.3d 616, 619 (2d Cir. 1999) (citations omitted, emphasis in original).

The Court is aware of only one reported decision in this district addressing this issue. In *In re McDaniels*, Judge Walker recognized that "[t]he debtor's right to dismiss a case [under § 1307(b)] is not subject to approval by the court. The section provides that 'on request of the debtor at any time, . . . the court shall dismiss a case under this chapter.'" 213 B.R. 197, 199 (Bankr. M.D. Ga. 1997) (emphasis in original) (quoting 11 U.S.C. §1307(b)).

Other bankruptcy courts in the Eleventh Circuit have followed the majority. *In re Shula*, 280 B.R. 903, 905 (Bankr. S.D. Ala. 2001) ("A chapter 13 debtor may voluntarily dismiss her case at any time so long as the case has not been converted."); *In re Deeble*, 169 B.R. 240, 242 (Bankr. S.D. Ga. 1994) (recognizing debtor's absolute right to voluntarily dismiss case at any time while pending); *In re McFarland*, 17 B.R. 242, 244 (Bankr. N.D. Ga. 1982) (explaining debtors' motions to dismiss are granted "as a matter of right of the debtor without discretion of the Bankruptcy Judge."). Moreover, several such decisions have embraced the majority rule in situations where, like the instant case, a creditor's motion to convert is pending or there exist allegations of ineligibility or bad faith.

For example, the Bankruptcy Court for the Southern District of Florida held that "a chapter 13 debtor's § 1307(b) pre-conversion right to voluntary dismissal is absolute, notwithstanding a pending motion to convert for cause." *In re Neiman*, 257

B.R. 105, 107 (Bankr. S.D. Fla. 2001). Addressing the same argument present in the instant case—that a pending motion to convert should be ruled on before a debtor's dismissal request—the court held that "when a court is presented with competing motions under § 1307(b) and (c), subsection (b) must control." *Id.* at 110. The court issued its ruling despite a creditor's allegations that the debtor was ineligible for relief under chapter 13 and had engaged in gross misconduct, including fraud, bad faith filing, improper delay, and false or incomplete schedules. *Id.* at 106–07, 110. Several courts have followed suit. *See, e.g., In re Winder*, No. 10-07070-TOM13, 2011 WL 2620992, at *2 (Bankr. N.D. Ala. July 1, 2011) (recognizing debtor's § 1307(b) right to dismiss chapter 13 case despite failure to comply with orders requiring production of tax return and remittance of funds to trustee); *In re Davis*, No. 06-1005-GLP, 2007 WL 1468681, at *2 (Bankr. M.D. Fla. May 16, 2007) (denying creditor's motion to reconsider order granting debtor's dismissal under § 1307(b), in which creditor argued dismissal was in bad faith, holding that debtor had "absolute right" to dismiss); *In re Smith*, 257 B.R. 344, 349 (Bankr. N.D. Ala. 2001) (recognizing "absolute right" of debtor to dismiss Chapter 13 case, despite pending motion to convert).

Many courts in other circuits have ruled similarly, as well. *See, e.g., TICO Constr. Co. v. Van Meter (In re Powell)*, 644 B.R. 181 (B.A.P. 9th Cir. 2022) (affirming bankruptcy court's recognition of debtor's right to voluntary dismissal even when assuming debtor's ineligibility for chapter 13, and despite creditor's pending challenges to dischargeability under § 523(a)(4) and (6) due to alleged prepetition transfer to shield assets from creditors); *In re Kemp*, No. 21-40365, 2022 WL 50368, at *5 (Bankr. D. Kan. Jan. 5, 2022) ("The Court finds that a Chapter 13 debtor, whose case has not been converted from another chapter, has a right to voluntary dismissal under § 1307(b), which is not subject to an implied condition of good faith and cannot be denied because of a pending motion to dismiss or convert

for cause under § 1307(c)."); *In re Minogue*, 632 B.R. 287, 293 (Bankr. D.S.C. 2021) ("Given the clear instruction of *Law v. Siegel* and its consideration of *Marrama*, this Court finds no reason to conclude that a Chapter 13 debtor may be precluded from voluntarily dismissing his or her Chapter 13 case in the face of a pending motion to convert or allegations of bad faith conduct." (citing *In re Nichols*, 10 F.4th at 964)); *In re Fulayter*, 615 B.R. 808, 821–22 (Bankr. E.D. Mich. 2020) (finding debtor has absolute right to dismiss despite pending motion to convert and despite allegations of ineligibility, bad faith, fraud, and cause to convert under § 1307(c)); *In re Pennington*, No. 16-22914-GLT, Doc. 106 (Bankr. W.D. Pa. May 14, 2018) (holding that debtor's right to dismiss under § 1307(b) trumps motion to convert under § 1307(c)); *In re Sinischo*, 561 B.R. 176, 193 (Bankr. D. Colo. 2016) ("The Court finds that § 1307(b) of the Bankruptcy Code requires that the Debtor's request to voluntarily dismiss her case must be granted, despite creditor requests under § 1307(c) that the case be converted to a case under chapter 7 for Debtor's bad faith."); *Ross v. AmeriChoice Fed. Credit Union*, 530 B.R. 277 (E.D. Pa. 2015), *vacated sub nom*, *In re Ross*, 858 F.3d 779 (3d Cir. 2017) (recognizing debtor has absolute right to dismiss under § 1307(b) despite creditor's pending motion to dismiss under § 1307(c) alleging bad faith); *In re Thompson*, No. 10-23017, 2015 WL 394361 (Bankr. E.D. Ky. Jan. 28, 2015) (finding debtor has absolute right to dismiss despite pending motion to convert); *In re Fisher*, No. 14-61076, 2015 WL 1263354 (Bankr. W.D. Va. Mar. 19, 2015) (recognizing debtor's right to dismiss despite allegations of bad faith); *In re Williams*, 435 B.R. 552, 560 (Bankr. N.D. Ill. 2010) (holding that debtors have unlimited right to dismiss unconverted chapter 13 cases, despite pending motion to convert and despite debtor's bad faith); *In re Patton*, 209 B.R. 98, 102 (Bankr. E.D. Tenn. 1997) ("[T]he court is satisfied that the plain language of the statute, the legislative history, and the objectives and policies underlying the Bankruptcy Code persuasively establish Congress' intent that a

debtor's right of dismissal trumps a creditor's right to convert" despite conversion motion being filed first.); *In re Harper-Elder*, 184 B.R. 403–04, 408 (Bankr. D.D.C. 1995) (holding debtor has absolute right to dismiss chapter 13 despite pending motion to convert alleging bad faith including misstatements and material omissions from schedules).

The Moore Creditors cite no cases following the minority view. Regardless, the Court evaluated several cases adopting the minority position and finds each unpersuasive.[15] The Circuit-level decisions which adopt the minority position predate *Law v. Siegel*. *See Jacobsen v. Moser (In re Jacobsen)*, 609 F.3d 647 (5th Cir. 2010);[16] *Molitor v. Eidson (In re Molitor)*, 76 F.3d 218 (8th Cir. 1996).

The Court concurs with the Ninth Circuit's view of these minority decisions:

> [T]he Fifth and Eighth Circuits' view—that the debtor's right under § 1307(b) is subject to an implied exception—is grounded, not on an alternative reading of the statutory text, but rather on the same, now-discredited theory of equitable powers that we had previously embraced in *Rosson* . . . . As we have already discussed, the Supreme Court's decision in *Law* clearly rejected such reasoning. And, ever since *Law* was decided, no other Circuit has taken the position that there is an implied equitable exception to § 1307(b)'s right to dismiss. Accordingly, for the same reason that we dispensed with *Rosson*, we must also reject the approach previously adopted by the Fifth and Eighth Circuits, and instead hew to the "absolute right" approach articulated by the Second Circuit in *Barbieri* and followed, most recently, by the Sixth Circuit in *Smith*.

In re Nichols, 10 F.4th 956, 963 (9th Cir. 2021) (citations omitted); *see also In re Kemp*, No. 21-40365, 2022 WL 50368, at *3 (Bankr. D. Kan. Jan. 5, 2022)

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[15] The Moore Creditors cited to no case law on this issue in the Motion to Vacate. Although the Moore Creditors at the hearing cited to *In re Nichols*, 10 F.4th 956 (9th Cir. 2021), as discussed above, that decision offers the Moore Creditors no support but instead bolsters the argument of the Debtor.

[16] The Fifth Circuit, in a post-*Law v. Siegel* decision, referred in dicta to the *Jacobsen* holding. *See Viegelahn v. Lopez (In re Lopez)*, 897 F.3d 663, 669 (5th Cir. 2018). The court stated that a debtor's bad faith conduct or abuse of the bankruptcy process could preclude dismissal, but offered no analysis or recognition of the Supreme Court's *Law v. Siegel* opinion. *Id.*

(“[D]ecisions imposing a good faith qualification ‘contradict the plain language of the statute, as well as its purpose.’”) (citing 8 Collier on Bankruptcy at ¶ 1307.03.).

The Court is aware of a decision from the Bankruptcy Court of the Northern District of Georgia which adopts the minority view. There, when presented with particularly egregious facts, the court denied a debtor’s request to dismiss his case over objection. *In re Spann*, 2021 WL 5177371. The court acknowledged the majority view but refused to allow the debtor to dismiss his chapter 13 bankruptcy case because there existed “clear evidence” that the debtor had, among other things, stolen assets from the bankruptcy estate. *Id.* at *2.

Here, the Moore Creditors’ allegations of the Debtor’s wrongdoing does not rise to the level of theft from the estate. Even if this Court were persuaded to follow *Spann*’s interpretation of § 1307(b), the contentions of the Debtor’s misconduct, if assumed true, are not sufficient to deny the Debtor’s right to dismiss this case.

C. Procedural Issues.

The Moore Creditors argue that the Debtor and the Court failed to follow proper procedure with respect to the Debtor’s request to dismiss the case. The Court disagrees.

The Moore Creditors argue that the Debtor’s Voluntary Dismissal is defective and does not comply with the Bankruptcy Rules because it is not titled “motion,” and because it cites no authority or basis for its request.

Bankruptcy Rule 1017(f)(2) provides that a debtor seeking to exercise his § 1307(b) right to dismiss a chapter 13 case must proceed by motion as set forth under Bankruptcy Rule 9013.[17] Bankruptcy Rule 9013, in turn, provides that a party seeking relief should generally use a written motion which states the

[17] “[D]ismissal under § . . . 1307(b) shall be on motion filed and served as required by Rule 9013.” Fed. R. Bankr. 1017(f)(2).

supporting grounds. *See also* M.D. Ga. LBR 9013-1(b) (motion shall cite to authority supporting relief requested).

Although the Moore Creditors identify a technical failure to comply with applicable rules, the error is inconsequential. First, the fact that the Debtor did not use the term "motion" in his title is meaningless. A "dismissal" of a case is ineffective until the court enters an order. Regardless of whether the Debtor used the term "motion" in the title of his pleading, the result is the same—an order of dismissal. Moreover, although it may not be the best practice, the Court observes that debtors often do not title their dismissal requests "motions" yet still receive their orders of dismissal. *See, e.g., In re McCormick*, No. 24-70766, Docs. 16, 17 (Bankr. M.D. Ga. Aug. 8, 2024); *In re Johnson*, No. 24-30041, Docs. 26, 27 (Bankr. M.D. Ga. Aug. 19, 2024); *In re Andrews*, No. 23-30343, Docs. 25, 26 (Bankr. M.D. Ga. Aug. 12, 2024);[18] *see also In re O'Hara*, No. 24-00151-SWD, 2024 WL 2099351, at *2 (Bankr. W.D. Mich. May 9, 2024) ("The Debtor's counsel filed a 'notice' [of dismissal], not a 'motion.' Given the context and obvious intent of the Notice, however, the court will ignore the form of the request as a harmless error, even for a counseled debtor, especially considering the limited issues at play in a motion under § 1307(b).") (first citing Fed. R. Bankr. P. 9005; and then citing *Smith v. U.S. Bank N.A.* (*In re Smith)*, 999 F.3d 452, 455 (6th Cir. 2021)); *In re Davis*, No. 06-1005-GLP, 2007 WL 1468681, at *1–2 (Bankr. M.D. Fla. May 16, 2007) (granting dismissal based on debtor's "Notice of Voluntary Dismissal."). The Court is unpersuaded by the Moore Creditors attempt to elevate form over substance.

Second, the Debtor in his Voluntary Dismissal states that "this case was not previously converted from Chapter 7." As discussed above, § 1307(b) directs the court to dismiss a case on a debtor's request "if the case has not been converted

[18] The Court's Local Rule 9004-2(b) requires only that a pleading's title designate the relief sought. M.D. Ga. LBR 9004-2(b).

under section 706, 1112, or 1208 of this title." So, while the Voluntary Dismissal lacks citation to authority, it specifically addresses the single condition set forth in § 1307(b). Accordingly, the Court has no difficulty connecting the Debtor's Voluntary Dismissal to § 1307(b) as the controlling authority.

In any event, the Court considers these procedural oversights harmless error under Civil Rule 61, applicable via Bankruptcy Rule 9005. The Moore Creditors' arguments are without merit.

The Moore Creditors further argue that the Court should have set the Debtor's Voluntary Dismissal for a hearing, citing Bankruptcy Rules 9006(d) and 9014. Once again, the Court disagrees. Neither Bankruptcy Rule 9006(d) nor 9014 supports their argument.

Bankruptcy Rule 9006(d) does not mandate a hearing but rather sets forth a timeline for when a hearing has been set. And, as noted above, a debtor's dismissal request under § 1307(b) is governed by Bankruptcy Rule 9013 rather than 9014. Indeed, no provision in either the Bankruptcy Code or the Bankruptcy Rules requires a hearing on a debtor's request for dismissal of his case under § 1307(b). Rather, Bankruptcy Rule 1017(a) requires "a hearing on notice" only for dismissals of a chapter 13 case *other than* under § 1307(b). Fed. R. Bankr. P. 1017(a); *see also In re Neiman*, 257 B.R. at 107 n.4 ("A debtor's 11 U.S.C. § 1307(b) motion to dismiss does not require notice and a hearing") (citing Fed. R. Bankr. P. 1017); 8 Collier on Bankruptcy ¶ 1307.03 (16th 2024) ("The debtor effectuates the dismissal by motion, but because there is no right to contest the dismissal, the procedures of Bankruptcy Rule 9013, rather than Bankruptcy Rule 9014, are followed. No hearing is required.") (citations omitted).[19]

[19] For dismissals of cases under chapters 7, 11, or 12, Bankruptcy Rule 2002(a)(4) requires a 21-day notice period. For a dismissal of a chapter 13 case, however, no such advance notice is required. Rather, notice of dismissal of a chapter 13 case is required only *after* the case is dismissed. *See* Fed. R. Bankr. P. 2002(f)(2).

In any event, by virtue of the Motion to Vacate, the Court has heard and considered the Moore Creditors' position. The Court declines to adopt it.

D. Bankruptcy Rule 7052/Civil Rule 52.

The Moore Creditors cite Bankruptcy Rule 7052 and argue that they should be allowed to introduce evidence and have the Court make additional findings under Civil Rule 52(b). However, Civil Rule 52 does not apply to a debtor's dismissal request under § 1307(b). Rather, Civil Rule 52 applies only in adversary proceedings (via Bankruptcy Rule 7052) and in contested matters (via Bankruptcy Rules 9014(c) and 7052). There is no adversary proceeding here and, as noted above, the Debtor's dismissal request under § 1307(b) is not a contested matter but is instead governed by Bankruptcy Rule 9013. *See* Fed. R. Bankr. P. 1017(f)(2). Therefore, the Moore Creditors' argument under Civil Rule 52(b) is inapposite.

E. Bankruptcy Rules 9023 and 9024.

The Moore Creditors argue that the Court should reconsider and vacate the dismissal of the case under Civil Rules 59 or 60, applicable via Bankruptcy Rules 9023 and 9024, respectively. The Court disagrees.

The Moore Creditors cite to Civil Rule 59 and request a new trial. In particular, the Moore Creditors seek to present evidence opposing the Debtor's voluntary dismissal and supporting their motion to convert. Under Civil Rule 59, "[t]he only grounds for granting . . . a motion are 'newly-discovered evidence or manifest errors of law or fact.'" *In re Castleberry*, 437 B.R. 705, 707 (Bankr. M.D. Ga. 2010) (Walker, J.) (citing *Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116, 1119 (11th Cir. 1999)). A manifest error of law or fact "arises upon the court's 'wholesale disregard, misapplication, or failure to recognize controlling precedent.'" *Id*. (quoting *Oto v. Metro. Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000)).

For the reasons outlined above, the Court is not persuaded that it made a manifest error of law or fact. Because this case was not previously converted, the

Debtor has an absolute right to secure its dismissal, and the Moore Creditors were not entitled to a hearing. *See In re Marinari*, 596 B.R. 809, 820 (Bankr. E.D. Pa.), *aff'd*, 610 B.R. 87 (E.D. Pa. 2019), *aff'd*, 838 F. App'x 709 (3d Cir. 2021) (holding movant failed to meet high burden of showing that Civil Rule 59 entitled movant to relief in light of case law supporting debtor's absolute right to dismiss under § 1307(b)).

As for Civil Rule 60, the Moore Creditors argue that the Debtor procured his dismissal through fraud and that the dismissal should be set aside. Presumably then, the Moore Creditors move under Civil Rule 60(b)(3). The Court disagrees.

As outlined previously, the Court considers the Debtor's dismissal right under § 1307(b) to prevail even if the Moore Creditors had proven the inappropriate conduct they allege. Moreover, the Court is persuaded by the Sixth Circuit Court of Appeals' ruling on a similar argument, where it overturned a bankruptcy court's order vacating under Rule 60 the debtor's voluntary dismissal under § 1307(b):

> [Creditor] also argues that Civil Rule 60(b)(3) authorized the bankruptcy court to vacate its dismissal of [debtor's] bankruptcy case. Rule 60(b)(3) (as incorporated by Bankruptcy Rule 9024) allows a court to "relieve a party" from a final order due to fraud, "misrepresentation, or misconduct by an opposing party." But "any conflict between the Bankruptcy Code and the Bankruptcy Rules must be settled in favor of the Code." Here, as shown above, the Bankruptcy Code directs bankruptcy courts to dismiss a Chapter 13 case on a debtor's request. That command would be meaningless if a bankruptcy court could then vacate its dismissal under Rule 60(b). The district court therefore abused its discretion when it held that the bankruptcy court could reinstate [debtor's] Chapter 13 case under that Rule.

In re Smith, 999 F.3d at 456 (citations omitted).

F. Res Judicata.

The Moore Creditors argue that the Court should apply judicial estoppel and vacate the dismissal of the case. The Moore Creditors contend that the Debtor has

made a mockery of the Court by filing the bankruptcy case, enjoying its benefits in the form of the automatic stay, and then reversing his position by requesting and obtaining a dismissal of his case. The Moore Creditors fail to address the fact that the Debtor has filed a second bankruptcy case, and further fail to cite to any case in which judicial estoppel was applied to a debtor's voluntary dismissal of his bankruptcy case. Rather, they offer a "Cf." cite to *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1176 (11th Cir. 2017).

In *Slater*, the Eleventh Circuit characterized judicial estoppel as an equitable doctrine "intended to protect courts against parties who seek to manipulate the judicial process by changing their legal positions to suit the exigencies of the moment." 871 F.3d at 1176. The court considered whether a debtor who filed a bankruptcy case but did not schedule a cause of action (pending in another court) could pursue that cause of action despite her failure to schedule it in the bankruptcy case. The Circuit remanded the case with instructions to assess whether the debtor intended to make a mockery of the judicial system by failing to schedule the cause of action. The Circuit directed the district court evaluate all the facts and circumstances of the case, noting that "voluntariness alone does not necessarily establish a calculated attempt to undermine the judicial process." *Id*. at 1176–77.

The Moore Creditors do not specify how the Debtor has changed his legal position, other than filing a chapter 13 case and then requesting dismissal of that case. The Court is not persuaded by the Moore Creditors' argument. If debtors were precluded from requesting and obtaining dismissal of their chapter 13 cases due to judicial estoppel stemming from the commencement of the case, § 1307(b) would be rendered a nullity. *See also In re Neiman*, 257 B.R. 105, 110 (Bankr. S.D. Fla. 2001) (recognizing debtor's right to dismiss under § 1307(b) despite creditor allegations of deception and delay, and of debtor's "frivolous legal theories to shield assets").

IV. Conclusion and Order.

For the foregoing reasons, it is ORDERED that the Moore Creditors' Motion to Vacate is DENIED. This case shall remain dismissed.

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