SO ORDERED.

SIGNED this 13th day of September, 2022.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:	)	
	)	
Lindsay Johnston Agnew,	)	Case No. 21-50309
	)	
Debtor.	)	Chapter 7
	)	
	)	
	)	

ORDER
GRANTING DEBTOR'S MOTION TO CONVERT CASE AND DENYING JOINT MOTION TO VACATE DISCHARGE

THIS MATTER came before the Court on the Motion to Convert Case to Chapter 13 (Docket No. 17, the "Motion to Convert") filed by Lindsay Johnston Agnew (the "Debtor") and the Joint Motion to Vacate Discharge (Docket No. 25, the "Motion to Vacate") filed by the Debtor and the United States Bankruptcy Administrator (the "BA"). This case presents an atypical situation in which a debtor who files initially under chapter 7 of the Bankruptcy Code and received a discharge seeks to convert the case to one under chapter 13. The BA filed the lone objection to the Motion to Convert, not opposing the ultimate conversion of the case, but arguing that conversion should not be effectuated until the previously entered discharge order is vacated. To that end, the BA and the Debtor jointly filed the Motion to Vacate, requesting the Court enter an order vacating or revoking the discharge

under Federal Rule of Bankruptcy Procedure 9024, 11 U.S.C. § 105, or 11 U.S.C. § 727.

For the reasons discussed below, the Court finds no allegations or evidence of bad faith posing a barrier to the Debtor's right to convert her case to chapter 13, and no provision in the Bankruptcy Code or Federal Rules of Bankruptcy Procedure requires a previously entered discharge to be vacated or revoked to effectuate such a conversion. The Court also finds no cause under Rule 9024, 11 U.S.C. §§ 105 or 727 to vacate or revoke the previously entered chapter 7 discharge in this case.

BACKGROUND

The Debtor filed a voluntary petition for relief under chapter 7 on May 11, 2021. The debts listed on her schedules include an estimated $1,051.00 in Federal and state priority taxes and $51,855.69 in general unsecured claims. Among her listed assets are two vehicles with some non-exempt equity as well as real property at 1150 Browns Run Drive, Kernersville, North Carolina (the "Property"). The schedules show the Property's value as $230,000.00 based on an appraisal from August 21, 2019.[1] The Property is also subject to a deed of trust held by Mr. Cooper in the scheduled amount of $209,635.00. The Debtor, who is listed as unemployed but noted that she expected to start a new job by May 2021, scheduled monthly net income of $4,069.95 and monthly expenses of $4,051.00. After adjourning the initial meeting of creditors under 11 U.S.C. § 341, the BA and chapter 7 trustee held and concluded the meeting on July 9, 2021. On August 23, 2021, the Debtor was granted a discharge (Docket No. 12, the "Discharge Order").

Approximately nine months later, on June 7, 2022, the Debtor filed the Motion to Convert. Citing a higher-than-expected valuation of her residence, which could result in substantial non-exempt equity to be administered by the chapter 7 trustee, the Debtor seeks to convert her case to one under chapter 13 to retain her

[1] In the Motion to Convert and at the initial hearing on the matter, as well as in the Motion to Vacate, the Debtor's counsel misstated that the $230,000.00 valuation of the Property was based upon the county tax value. Counsel subsequently corrected the record at the continued hearing to represent that the valuation, as stated in the Debtor's schedules, was based upon an appraisal conducted in August 2019.

residence and pay any non-exempt equity over time through a confirmed plan. The BA objected to the Motion to Convert (Docket No. 21), asserting that a number of courts, including this one, *see In re Godwin*, No. 06-50150, 2007 WL 4191729, at *2 (Bankr. M.D.N.C. Nov. 21, 2007), have refused to allow post-discharge conversion absent the Debtor seeking to vacate the prior discharge order.[2] The BA asserted that conversion without vacating the Discharge Order would be meaningless because the Debtor has already discharged any debts to be addressed through a repayment plan.

Accordingly, the Debtor and the BA jointly filed the Motion to Vacate (Docket No. 25). In this motion, the parties proffered three legal rationales for vacating or revoking the Discharge Order. First, the Debtor requested the Court enter an order vacating the discharge under 11 U.S.C. § 105(a), which provides that the Court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." The Debtor asserted that vacating the discharge would aid in the administration of the chapter 13 plan and any potential chapter 13 discharge order. Second, the Debtor requested that the Court vacate the Discharge Order under Rule 60(b) of the Federal Rules of Civil Procedure, as made applicable through Federal Rule of Bankruptcy Procedure 9024. The Debtor argued that her scheduled value for the Property was based on "mistake" or "inadvertence" and that the chapter 7 trustee's updated valuation constituted "new evidence" for purposes of Rule 60(b)(2). As a third alternative, the BA requested that an order be entered revoking the Discharge Order under 11 U.S.C. § 727(d), which states that the Court shall revoke a granted discharge for certain bad acts committed by a debtor, including fraud and failure to explain a material misstatement. The BA, however, did not point to any specific acts or information supporting revocation of the discharge under § 727(d).

[2] While *Godwin* directed the debtors to file a motion to vacate the discharge as a condition to granting conversion, the same court denied the debtors' motion and the converted case continued on in chapter 13 with the discharge still intact.

The Court held a hearing on August 18, 2022 at which Tommy Blalock, appeared on behalf of the Debtor, James Lanik appeared in his capacity as chapter 7 trustee, and Robert E. Price, Jr., appeared on behalf of the BA. After the parties presented their positions on the motions, and upon the Court's questioning of the bases offered to vacate the Discharge Order, the Debtor conceded that she had no preference as to whether she received a chapter 7 or chapter 13 discharge and that she filed the Motion to Vacate due to the perceived precedent set forth in *Godwin*. The BA warned that if the Court did not vacate the Discharge Order there "are essentially no debts in the [chapter] 13 to be paid" because "all the debts are discharged." Based on this belief, the BA asked that the Court grant the Motion to Vacate and only then allow for conversion of the Debtor's case to chapter 13.

DISCUSSION

1. Motion to Vacate

The parties provided three legal rationales for vacating or revoking the discharge, two of which may be quickly discarded. First, the Court must decline the Debtor's request to use 11 U.S.C. § 105(a) to vacate the Discharge Order because, in exercising its statutory powers under § 105(a), "a bankruptcy court may not contravene specific statutory provisions." *Law v. Siegel*, 571 U.S. 415, 421 (2014); *see also* 2 COLLIER ON BANKRUPTCY ¶ 105.01(2) (16th ed. 2022). The Bankruptcy Code expressly provides the bases and time limits for seeking to revoke a debtor's discharge in § 727(d) and (e), and the Court may not use the equity provisions under § 105(a) to bypass or override those mandates. *See Lugo Alejandro v. Betancourt (In re Betancourt)*, No. 17-07289, 2020 WL 4728083, at *2 (Bankr. D.P.R. May 22, 2020) (holding that the statutory time limitations for the revocation of a discharge order are dispositive and may not be altered under § 105(a)); *Ballard v. Thoennes (In re Thoennes)*, 536 B.R. 680, 688–89 (Bankr. D.S.C. 2015) (holding that invocation of § 105 was outside the court's authority given *Siegel* and the "comprehensive statutory framework under §§ 523 and 727 and express provisions of the Code that provide methods to challenge or revoke the debtor's discharge and to except certain debts from discharge").

The second avenue offered by the parties is § 727(d), which directs the Court to revoke a discharge in certain narrowly defined circumstances such as fraud or failure to explain material misstatements 11 U.S.C. § 727(d). While the BA, unlike the Debtor, has standing to seek revocation of the Discharge Order through § 727(d), *see Markovich v. Samson (In re Markovich)*, 207 B.R. 909, 911–12 (9th Cir. B.A.P. 1997), the BA offers no factual support for this request, which is confined to a single line in the Motion to Vacate. Therefore, the BA's request to vacate under § 727(d) must be denied.

The third and final rationale cited to vacate the Discharge Order is Federal Rule of Bankruptcy Procedure 9024, which incorporates Federal Rule of Civil Procedure 60 regarding relief from a judgment or order. The grounds for relief under Rule 60(b) are as follows:

1. mistake, inadvertence, surprise, or excusable neglect;
2. newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
3. fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
4. the judgment is void;
5. the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
6. any other reason that justifies relief.

Fed. R. Civ. P. 60(b).

The Debtor cites three grounds for vacating the Discharge Order — mistake or inadvertence, newly discovered evidence, and the general equities of the case. Specifically, the Debtor asserts that her scheduled value for the Property was based on "mistake" or "inadvertence" and that the chapter 7 trustee's updated valuation constituted "new evidence" for purposes of Rule 60(b).

The Debtor asserts that she valued the Property below market value due to "mistake and inadvertence," but counsel's deliberate choice to rely upon an appraisal from 2019 — nearly 2 years before the petition date — is not the type of mistake or inadvertence that would afford relief under Rule 60(b)(1). Counsel decided to rely upon a stale appraisal in the face of a booming housing market that

was, at the time of the petition, driving residential real estate prices up.[3] While the Debtor's reliance upon this outdated appraisal may have yielded an unintended result in the form of an undervalued asset, "inadvertent conduct is not automatically a mistake or excusable neglect sufficient to justify relief from judgment under Rule 60(b)(1)" and "a claim of mistake or excusable neglect will always fail if the facts demonstrate a lack of diligence." 12 MOORE'S FEDERAL PRACTICE - CIVIL § 60.41 (2022). With more diligence, the Debtor could have obtained an updated appraisal that more accurately reflected the Property's value in the present housing market.

Similarly, the chapter 7 trustee's current valuation does not constitute "newly discovered evidence" for purposes of Rule 60(b)(2). The standard governing relief on the basis of newly discovered evidence requires that a party demonstrate:

> (1) the evidence is newly discovered since the judgment was entered; (2) due diligence on the part of the movant to discover the new evidence has been exercised; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; and (5) the evidence is such that is likely to produce a new outcome if the case were retried, or is such that would require the judgment to be amended.

Boryan v. United States, 884 F.2d 767, 771 (4th Cir. 1989). Critically, the Debtor must not only show that the current market value was newly discovered since the petition date, but that she "could not with reasonable diligence have discovered and produced such evidence" by that date. *Id.* "Reasonable diligence requires that the movant acted with some promptness where the facts and circumstances would put a person of common knowledge and experience on notice that some evidence might exist." *SEC v. Wojeski*, 752 F. Supp. 2d 220, 228 (N.D.N.Y. 2010). Based on the record before it, the Court concludes that the Debtor, with reasonable diligence, could have produced an updated, and more accurate valuation of the Property at the petition date rather than relying upon the 2019 appraisal. Therefore, the chapter 7

[3] *See* Ann Carns, "How to Navigate a Hot Housing Market," THE NEW YORK TIMES (May 29, 2021), available at https://www.nytimes.com/2021/05/14/your-money/buying-home-market.html ("A lack of construction over the past decade, plus pent-up demand from pandemic shutdowns, has unleashed a national seller's market.").

trustee's updated valuation of the Property does not constitute newly discovered evidence under Rule 60(b)(2).

The Debtor also asks that the Court vacate the Discharge Order based on "the general equities of the case," which the Court interprets as a request for relief under the catch-all provision of Rule 60(b)(6). "In order to obtain relief under Rule 60(b)(6) there must be a showing of extraordinary circumstances justifying relief and the movant must not have contributed to the situation from which relief is sought." *In re Foster*, No. 18-80466, 2019 WL 7841547, at *6 (Bankr. M.D.N.C. Feb. 8, 2019); *see also Aikens v. Ingram*, 652 F.3d 496, 500 (4th Cir. 2011) (finding the context of Rule 60(b)(6) "requires that it be invoked in only 'extraordinary circumstances'"). Before even considering whether the Debtor contributed to the situation by neglecting to obtain an updated value for the Property, the Court finds that the difference between a debtor's scheduled property value, based on an outdated appraisal, and a trustee's valuation based on current market conditions is not an extraordinary circumstance that meets the very high standard required for relief under Rule 60(b)(6).

After reviewing the record of the case and the arguments of the parties, the Court finds no basis to vacate or revoke the Discharge Order under Rule 60(b) or 11 U.S.C. §§ 727(d) or 105(a). Accordingly, the Court must deny the Motion to Vacate.

2. Motion to Convert

Given that there is no basis to vacate or revoke the Discharge Order, the Court will consider the BA's assertions that converting the case while leaving the chapter 7 discharge intact could violate the spirit of the Bankruptcy Code and preclude the Debtor from proceeding in chapter 13 because she would essentially have no debts to be repaid through a plan.

A debtor's right to convert from chapter 7 to chapter 13 is governed by 11 U.S.C § 706, which provides, in relevant part:

> (a) The debtor may convert a case under this chapter to a case under chapter 11, 12, or 13 of this title at any time, if the case has not been converted under

> section 1112, 1208, or 1307 of this title. Any waiver of the right to convert a case under this subsection is unenforceable.
> …
> (d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

11 U.S.C. §§ 706(a), (d). As indicated by the plain language of § 706, a debtor may convert the case "at any time" provided (1) the case was not previously converted to a case under chapter 11, 12, or 13 and (2) the debtor is eligible to be a debtor under such chapter. *See* 6 COLLIER ON BANKRUPTCY ¶ 706.02 (16th ed. 2022). A debtor may be rendered ineligible by the income and debt-limit eligibility benchmarks detailed in § 109(e) or by a finding of bad faith conduct. *See Marrama v. Citizens Bank*, 549 U.S. 365 (2007). In *Marrama*, the United States Supreme Court found that § 1307(c), which provides for dismissal or conversion of a chapter 13 case "for cause," implicitly includes prepetition bad faith conduct and reasoned that a finding of prepetition bad faith conduct "is tantamount to a ruling that the individual does not qualify as a debtor under Chapter 13." *Id.* at 374. Neither § 109 nor § 1307(c) render a debtor who has received a chapter 7 discharge ineligible to be a debtor under chapter 13.

The Court finds there is no blanket prohibition on a debtor who has received a chapter 7 discharge from exercising the right to convert contained in § 706(a). *See* 6 COLLIER ON BANKRUPTCY ¶ 706.02 (16th 2022) ("Indeed, a debtor may request conversion even after a chapter 7 discharge has been entered. Since the Code makes no provision for revocation of the discharge in that event, the discharge remains operative and the converted case may proceed on that basis."). Where, as is the case here, a debtor is otherwise eligible for conversion and in the absence of bad faith conduct, the existence of an unvacated chapter 7 discharge does not, on its own, bar the debtor from converting a chapter 7 case under § 706(a). *See In re Young*, 237 F.3d 1168 (10th Cir. 2001); *In re Carter*, 285 B.R. 61, 66 (Bankr. N.D. Ga. 2002); *In re Mosby*, 244 B.R. 79, 81 (Bankr. E.D. Va. 2000); *In re Pakuris*, 262 B.R. 330, 332 n.1 (Bankr. E.D. Pa. 2001); *In re Stern*, 266 B.R. 322, 327 (Bankr. D. Md. 2001).

The Court is not persuaded by the BA's argument that leaving the discharge intact leaves the Debtor with no debts to be repaid. While the discharge prohibits collection of the discharged debt as a "personal liability of the debtor," 11 U.S.C. § 524(a), "[i]t does not, however, affect the liability of any other person or entity for the debt" and "nothing in the [Bankruptcy] Code suggests that a discharge eliminates the creditor's claim against the bankruptcy estate." *In re Mosby*, 244 B.R. at 87; *see also In re Carter*, 285 B.R. 61, 68 (N.D. Ga. 2002). Conversion "does not constitute the commencement of a new case … but merely represents a change in the statutory chapter pursuant to which the case would proceed." *Confederated Tribes of Colville Reservation Tribal Credit v. White (In re White)*, 139 F.3d 1268, 1273 (9th Cir. 1998); *see also In re Ferguson*, No. 10-81401, 2014 WL 2761149, at *4 (Bankr. C.D. Ill. June 18, 2014) ("Conversion does not commence a new case; rather, it is a continuation of the same case under a new chapter."). Conversion to chapter 13 and the retention of the discharge will have no impact on creditors' ability to file claims against the estate because the case — and the estate — remain the same despite conversion.[4] *In re Mosby*, 244 B.R. at 87 ("Thus, creditors with valid claims against the bankruptcy estate on the date the bankruptcy petition is filed do not lose them simply because the debtor is granted a discharge or the case is converted to another chapter.").

The Court is also unpersuaded that leaving the Debtor's chapter 7 discharge in place will undermine the spirit of the Bankruptcy Code. There are numerous protections in place to prevent any attempts at manipulation or potential prejudice to creditors. Conversion of the case is hardly a consequence-free escape valve for the Debtor. Unlike a debtor who initially files a case under chapter 13, the Debtor here will not have an absolute right to dismiss the converted case. *See* 11 U.S.C. § 1307(b) ("On request of the debtor at any time, *if the case has not been converted under section 706*, 1112, or 1208 of this title, the court shall dismiss a case under

[4] For the same reasons, the entry of discharge is not a barrier to a trustee, upon discovering previously undisclosed estate assets, from moving to reopen a case, noticing creditors to file proofs of claim, and distributing a dividend to unsecured creditors. *See* Fed. R. Bankr. P. 3002(c)(5).

this chapter." (emphasis added)). Therefore, if the Debtor fails to confirm a plan or complete plan payments, the case could be reconverted to chapter 7 to allow for the liquidation of the Property. And, any chapter 13 plan must provide creditors with at least as much as they would receive in a chapter 7 liquidation. 11 U.S.C. § 1325(a)(4).

Here, the Debtor is eligible to be a debtor under chapter 13 as she meets the criteria set forth in 11 U.S.C. § 109(e), and there are no allegations that the Debtor has engaged in any conduct of the type that would constitute cause under § 1307. This case was not previously converted to a case under chapter 11, 12, or 13. Accordingly, the Court will grant the Debtor's Motion to Convert.

CONCLUSION

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that the Debtor's Motion to Convert Case is GRANTED and this chapter 7 case is hereby converted to a case under chapter 13 of the Bankruptcy Code.

IT IS FURTHER ORDERED that the Joint Motion to Vacate Discharge is DENIED.

END OF DOCUMENT

PARTIES TO BE SERVED

Lindsay Johnston Agnew (Ch.7)

21-50309

Tommy S. Blalock, III
via cm/ecf

James C. Lanik, Trustee
via cm/ecf

William P. Miller, BA
via cm/ecf

Lindsay Johnston Agnew
1150 Browns Run Drive
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And any/all additional Creditors and Parties of Record as of the Date of the Order Shall be Served by the Bankruptcy Noticing Center