CASE NO. 06-31611

IN THE
UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA

IN RE JASON E. WHITE and ANGLEA B. WHITE, *Debtors*

AMICUS BRIEF ON 910 CLAIM ISSUE

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY

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TABLE OF CONTENTS

STATEMENT OF INTEREST OF NACBA AS AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,100 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 600,000 bankruptcy cases filed each year. NACBA members in the Eastern District of Tennessee file thousands of bankruptcy cases per year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000); *Capital Comm. Fed. Credit Union v. Boodrow (In re Boodrow),* 126 F.3d 43 (2d Cir. 1997); *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom own motor vehicles. The 2005 amendments to section 1325(a) added an unenumerated, hanging paragraph at the end of the section that deals with certain claims secured by motor vehicles. The effect of this paragraph has been widely debated by creditors, debtors, counsel and commentators. This case affords the court an opportunity to address this debate as it pertains to the surrender of these vehicles. The impact of the court's determination surely will be felt by NACBA's members across the country.

SUMMARY OF ARGUMENT

Before considering whether property securing a claim covered by the hanging paragraph may full surrendered in full satisfaction of that claim, the Court should first consider whether section 1325(a)(5) has any applicability to such claim. The hanging paragraph added to the end of section 1325(a)(5) plainly makes section 506 inapplicable to certain claims. Without the application of section 506, Creditor's claim cannot be an "allowed secured claim" entitled to the protections provided under section 1325(a)(5). For those secured claims falling outside the scope of 1325(a)(5), debtors may modify those claims subject to section 1322(b)(2) and the dictates of good faith. Such a result is logical and consistent with longstanding bankruptcy decisions and policy.

By contrast, most court decisions to date have either assumed that the hanging paragraph prevents bifurcation or have completely ignored the longstanding majority position under which, in chapter 13, the term "allowed secured claim" refers to a claim whose status has been determined pursuant to section 506(a). In limiting bifurcation of claims covered by the hanging paragraph, several courts have simply overreached in attempting to extend the very narrow and limited holding in *In re Dewsnup v. Timm*, 502 U.S. 410 (1992). The conclusion of these courts leads to the nonsensical result that the words "allowed secured claim" in section 1325(a)(5) carries two different definitions. One definition is determined with reference to section 506(a) and the other is not.

In the alternative, if Creditor is found to have an "allowed secured claim" in the full amount of the debt and entitled to treatment under section 1325(a)(5), it cannot also have an allowed unsecured claim. The 2005 amendments to section 1325(a) in no way altered the applicability of section 1325(a)(5)(C) to "allowed secured claims" provided

for by the plan. Prior the 2005 amendments debtors were permitted to surrender collateral in full satisfaction of the Creditor's "allowed secured claim." Such a result has not been modified by the addition of the hanging paragraph.

ARGUMENT

I. The plain language of the "hanging paragraph" following section 1325(a)(9) renders section 506 inapplicable for the purposes of 1325(a)(5).

The starting point for the court's inquiry should be the statutory language itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004); *Toibb v. Radloff*, 501 U.S. 157, 160, 111 S.Ct. 2197, 2199 (1991); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030-31 (1989); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (*en banc*) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself."). In interpreting the statutory language, the court must assume that Congress said in the statute what it meant and meant in the statute what it said. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Thus, it has been well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwirters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)(internal quotations omitted). A result will only be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999), *citing Public Citizen v. Dept of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989). A plain reading of the statutory language in results in an outcome that is neither absurd nor demonstrably at odds with the intentions of Congress.

The new paragraph added to the end of section 1325(a)(9) (hereinafter the "hanging paragraph") states in relevant part:

> For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debtor that is the subject of the claim, the debt was incurred within the 910-day preceding the date of filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor…

This paragraph plainly and clearly makes section 506 inapplicable for purposes of section 1325(a)(5) to a claim based on a purchase money security interest in a motor vehicle obtained within 910 days of the filing of the petition. While most courts have agreed that the statute is unambiguous on this point,[1] courts have differed dramatically on what it means to say that section 506 does not apply. *See, e.g., In re Carver*, 338 B.R. 521 (Bankr. S.D. Ga. 2006)(910 car claims not "allowed secured claims"); *In re Brooks*, 2006 WL 168478 (Bankr. E.D.N.C. 2006)(910 car claims are allowed secured claims in the full amount of the debt); *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006)(910-car creditor does not have an "allowed secured claim" but has an allowed claim for the entire prepetition debt without post-petition interest); *In re Taranto*, 344 B.R. 857 (Bankr. N.D. Ohio 2006)(910-claim is not an "allowed secured claim" and therefore present value protection not applicable).

Before considering whether property securing a claim covered by the hanging paragraph may full surrendered in full satisfaction of that claim, the Court should first consider whether section 1325(a)(5) has any applicability to such claim. Based on the plain language of the statute *amicus curiae* believe that it does not.

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[1] *See, e.g., In re Turkowitch*, -- B.R. --, 2006 WL 3346156 (Bankr. E.D. Wis. Nov. 16, 2006); *In re Patricka*, -- B.R. --, 2006 WL 33350198 (Nov. 17, 2006); *In re Payne*, 347 B.R. 278 (Bankr. S.D. Ohio)(finding the language of the hanging paragraph "unambiguous and clear"); *In re Osborn*, 348 B.R. 500 (Bankr. W.D. Mo. 2006), *In re Brown*, 346 B.R. 868 (Bankr. N.D. Fla. 2006); *but see In re Duke*, 345 B.R. 806 (Bankr. W.D. Ky. 2006)(finding language of hanging paragraph ambiguous).

II. If section 506 does not apply to Creditor's claim, then Creditor cannot have an "allowed secured claim" subject to treatment in accordance with 1325(a)(5).

A. A claim becomes an allowed secured claim only after it has been "allowed" under section 502 and its secured status determined under section 506.

The "allowance," "status" and "treatment" of claims require three distinct inquiries under the Bankruptcy Code. Holders of "allowed secured claims" provided for in a chapter 13 plan are accorded special "treatment" of their claims under 11 U.S.C. § 1325(a)(5). Specifically, section 1325(a)(5) states that the court shall confirm a proposed chapter 13 plan if,

> (5) with respect to each **allowed secured claim** provided for by the plan—
> (A) the holder of such claim has accepted the plan;
> (B)(i) the plan provides that—
> (I) the holder of such claim retain the lien securing such claim until the earlier of—
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328; and
> (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such a claim; and
> (iii) if—
> (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments, shall be in equal monthly amounts; and
> (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than the amount sufficient to provide to the holder of such claim adequate protection during the period of the plan;
> (C) the debtor surrenders the property securing such claim to such holder.
> (emphasis added)

To achieve the status of a holder of an "allowed secured claim" and obtain the benefits of section 1325(a)(5) requires the operation of state law and sections 502 and 506 of the Bankruptcy Code.

State Law. Whether or not the amount owed to a creditor is secured by a lien on property is determined in accordance with the applicable law of the state in which the debtor resides or where the contract was formed. Similarly, the classification of such a lien as a "purchase money security interest" is also determined by state law. *See, e.g., In re Horn,* 338 B.R. 110 (Bankr. M.D. Ala. 2006).

Bankruptcy Code. The "allowance", "status" and "treatment" of that creditor's claim in the context of a federal bankruptcy proceeding is determined not under state law, but by the provisions of the Bankruptcy Code. Only after the claim has been "allowed" under section 502(a) and its secured "status" determined under section 506, can the claim be afforded the "treatment" specified in section 1325(a)(5). *See Ron Pair*, 489 U.S. 235, 238-39 (1989)(explaining that section 506 "governs the definition and treatment of secured claims."); *In re Fareed*, 262 B.R. 761 (Bankr. N.D. Ill. 2001)(explaining that the "'secured claim', arising from collateral valuation under section 506, if allowed under § 502, authorizes a secured creditor to demand the plan treatment specified in § 1325(a)(5)").

"Claim allowance" is determined by section 502, which establishes the amount of the creditor's allowed claim.[2] Section 502 does not address the status or treatment of a secured claim in a case, but merely creates a threshold for determining whether an

[2] A proof of claim or interest that is filed in accordance with 11 U.S.C. § 501 is deemed allowed unless a party in interest objects. If an objection is made under section 502(b), the bankruptcy court is authorized only to determine if the claim should be allowed or disallowed. If allowed, the court may then determine the amount of such claim.

asserted claim or interest is eligible for distribution from the estate, and if so, in what amount.

Once a claim is allowed its "secured status" is determined in accordance with section 506. *See In re Bailey*, 153 F.3d 718 (4th Cir. 1998)(table, unpublished)("[t]he determination of an allowed claim's **secured status is an independent inquiry governed by 11 U.S.C. § 506**")(emphasis added). Absent the operation of section 506, the creditor does not obtain the status of a holder of an "allowed secured claim" under the federal bankruptcy law. However, the hanging paragraph only makes section 506 inapplicable with respect to section 1325(a)(5). As a result, the creditor with a purchase money security interest securing a debt described in the hanging paragraph has an allowed secured claim for purposes of chapter 13 with one exception. Under that exception the creditor is simply not entitled to the special treatment specified in section 1325(a)(5). *See* 8 Collier on Bankruptcy ¶ 1325.06 (A. Resnick and H. Sommer, eds., 15th ed. Rev. 2005). To hold otherwise, would be to completely disregard the plain language of the statute.

B. Courts applying *Dewsnup* in chapter 13 have failed to recognize the absurd result in which the same words "allowed secured claim" in section 1325(a)(5) would have two different meanings.

Relying heavily on the Supreme Court's decision in *Dewsnup v. Timm*, 502 U.S. 410 (1992), some recent court decisions[3] hold that a claim allowed under section 502 and

[3] Many early case decisions on the effect of the hanging paragraph assumed that covered claims were fully secured without offering much analysis to support the assumption. *See, e.g., In re Wright*, 338 B.R. 917 (Bankr. M.D. Ala.)("Simply put, the claims of these creditors must be treated as fully secured under the plan'); *In re Horn*, 338 B.R. 110 (Bankr. M.D. Ala. 2006); *In re Robinson*, 338 B.R. 70 (Bankr. W.D. Mo. 2006); *In re Johnson*, 337 B.R. 269 (Bankr. M.D.N.C. 2006)("The statute simply provides that debtor

for which the creditor has a valid lien pursuant to state law is sufficient to create a "allowed secured claim." *See, e.g., In re Patricka,* -- B.R. --, 2006 WL 3350198 (Bankr. E.D. Mich. Nov. 17, 2006); *In re Bufford*, 2006 WL 1677160 (Bankr. N.D. Tex. June 13, 2006); *In re Brooks*, 2006 WL 168478 (Bankr. E.D.N.C. 2006); *In re Brown*, 339 B.R. 818 (Bankr. S.D. Ga. 2006). These courts conclude that the special treatment afforded "allowed secured claims" is available even when section 506 does not apply. In essence, these courts seek to extend the very narrow and limited holding in *Dewsnup,*[4] which held that a chapter 7 debtor could not use section 506(d) to strip down an undersecured lien bifurcated by section 506(a). In the process, they overreach in their attempts to apply the *Dewsnup* opinion to chapter 13 where it has long been held that the term "allowed secured claim" in section 1325(a) does have the section 506(a) meaning—a meaning the *Dewsnup* court rejected for purposes of section 506(d) in chapter 7 cases. *See, e.g., Bank One, Chicago, NA v. Flowers*, 183 B.R. 509 (N.D. Ill. 1995)("had the Supreme Court intended *Dewsnup* to apply specifically to chapter 13 proceedings, it most likely would have stated such in *Nobelman*"); *In re Gray*, 285 B.R. 379 (Bankr. N.D. Tex. 2002)(stating that a majority of courts have taken the position that *Dewsnup* is not controlling in chapter 13 cases); *see also In re Zimmer*, 313 F.3d 1220 (9th Cir. 2003)(applying section 506 and determining mortgagee not "holder of secured claim" within the ambit of § 1322(b)(2); *In re Lane*, 280 F.3d 663 (6th Cir. 2002); *In re Pond*, 252 F.3d 122 (2d Cir. 2001); *In re Dickerson*, 222 F.3d 924 (11th Cir. 2000); *In re Bartee*,

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may not bifurcate the claims of lenders with purchase money security interests in vehicles purchased within 910 days of bankruptcy for the debtor's personal use.").

[4] The *Dewsnup* majority opinion is explicitly limited to the facts of that particular case. *See Dewsnup,* 502 U.S. at 417 n. 3 (Accordingly, we express no opinion as to whether the word "allowed secured claim" have different meaning in other provisions of the Bankruptcy Code.")

212 F.3d 277 (5th Cir. 2000); *In re McDonald*, 205 F.3d 606 (3d Cir. 2000). A thorough review of *Dewsnup*, *Nobleman v. American Savings Bank*, 508 U.S. 324 (1993), and the relevant legislative history show that sections 506, 1322(b)(2), and 1325(a)(5), when viewed as a whole, demonstrate that the words "allowed secured claim" are defined by section 506(a) in chapter 13 proceeding. *See Flowers*, 183 B.R. at 517.

The conclusion of the *Bufford*, *Brooks*, and *Brown* courts leads to the nonsensical result that the term "allowed secured claim" contained within section 1325(a)(5) now carries two different meanings. One meaning applies when dealing with claims covered by the hanging paragraph and merely refers to a claim that is allowed under section 502 and for which the creditor has a valid lien pursuant to state law. For claims not covered by the hanging paragraph, the term "allowed secured claim" refers to the amount of the creditors claim entitled to special treatment under section 1325(a)(5) **after** applying section 506. The latter meaning is, of course, dependent on the application of section 506.

That the *Dewsnup* majority disregarded the normal rules of statutory construction by giving identical words used in different parts of the same subsection distinct meanings is well known. *See Dewsnup*, 502 U.S. at 421 (Scalia, J., dissenting); *Sullivan v. Stroop*, 496 U.S. 478 (1990)(internal quotations omitted). However, neither the *Dewsnup* opinion nor any other authority can support the decisions such as *Patricka*, *Bufford*, *Brooks*, and *Brown*, in which the same words "allowed secured claim" in the ***same*** paragraph of the same subsection—1325(a)(5) —have two different meanings.

C. Nothing in the Code suggests that claims covered by the hanging paragraph are transformed into wholly unsecured claims.

Other courts considering the effect of the hanging paragraph have properly concluded that the claim may not be considered an "allowed secured claim" in chapter 13 without the operation of section 506. *See In re Green*, 348 B.R. 1 (Bankr. M.D. Ga. 2006); *In re Wampler*, 345 B.R. 730 (Bankr. D. Kan. 2006); *In re Taranto*, 344 B.R. 857 (Bankr. N.D. Ohio 2006); *In re Carver*, 338 B.R. 521 (Bankr. S.D. Ga. 2006). However, in *Green*, *Carver* and *Wampler* the courts went on to hold that because creditors did not have an "allowed secured claim" that such creditors were unsecured for purposes of chapter 13. *See In re Green*, 348 B.R. at 8 (declining to adopt conclusion a 910 claim is a secured claim); *In re Carver*, 338 B.R. at 526 (claims covered by the hanging paragraph could not be "treated as secured under a chapter 13 plan"); *In re Wampler*, 345 B.R. at 736 (910 creditor entitled to an allowed, unsecured claim). This conclusion goes to far. Nothing in the hanging paragraph transforms covered claim into an unsecured claim for purposes of chapter 13. The restriction on the applicability of section 506 only applies to section 1325(a)(5). Thus, with respect to all other sections in chapter 13 claims covered by the hanging paragraph should be treated as an allowed secured claim. *See, e.g*., 11 U.S.C. § 1322(b)(2)(permitting debtors to modify the rights of holders of secured claims); 11 U.S.C. § 1325 (addressing requirements for plan confirmation). The effect of the hanging paragraph simply makes section 1325(a)(5) inapplicable to covered claims.

D. Limiting the applicability of section 1325(a)(5) for certain claims is not demonstrably at odds with what is at best ambiguous legislative history regarding the new hanging paragraph.

The plain language of the statute should be conclusive, "except in 'rare cases [in which] the literal application will produce a result demonstrably at odds with the intentions of the drafters.'" *Ron Pair*, 489 U.S. at 242; *see also Lamie*, 540 U.S. at 534-36; *In re Eubanks*, 219 B.R. 468 (B.A.P. 6th Cir. 1998)(concluding the provisions of 1322(c) permit modification of short term mortgages); *In re Thomas*, 179 B.R. 523 (Bankr. E.D. Tenn. 1995)(concluding § 362(b)(1) did not create an exception from the stay for actions against the property of the estate). Here, the sparse legislative history with respect to the hanging paragraph simply does not prove that Congress could not have intended the result reached by application of the plain language. *See Demarest v. Manspeaker*, 498 U.S. 184 (1991), *citing Griffin v. Oceanic Contract., Inc.*, 548 U.S. 564, 571 (1982).

Earlier versions of the 2005 bankruptcy legislation contained language that would have eliminated the bifurcation of certain claims pursuant to section 506(a), but would not have eliminated their status as allowed secured claims. *See, e.g.*, H.R. 833, 106th Cong. 1st Sess. § 122 (1999). For example, section 122 of the Bankruptcy Reform Act of 1999 provided that "**subsection (a)** [of § 506] shall not apply to an ***allowed secured claim*** to the extent attributable in whole or in part to the purchase price of personal property acquired by the debtor within 5 years of filing of the petition."(emphasis supplied). *See also* Bankruptcy Reform Act of 1998, H.R. 3150, 105th Cong. § 128 (1998). Similarly, the 1997 version of the bill provided that "**Subsection (a)** [of § 506] shall not apply to an **allowed secured claim** to the extent attributable in whole or in part

to the purchase price of personal property acquired by the debtor during the 90-day period preceding the date of filing of the petition."(emphasis supplied). Consumer Bankruptcy Reform Act of 1997, S. 1301, 105th Cong. § 302(c) (1997). Surely, had Congress intended only to prevent the bifurcation of claims under 506(a) while retaining the protections of section 1325(a)(5), it could have easily done so.

Indeed, Congress is fully aware of the language necessary to create an explicit exception to section 506. For example, under section 1111(b), the holder of a claim secured by a lien on property may elect that, notwithstanding section 506(a), such claim is a secured claim to the extent such claim is allowed. The fact that Congress considered but ultimately rejected similar language that would have simply eliminated bifurcation of certain claims further supports the conclusion that it did not intend such an effect. *See Till v. SCS Credit Corp*. 541 U.S. 465, 480 n.8 (2004).

In amending section 1325(a), "if Congress enacted into law something different from what it intended, then it should amend the statute to conform to its intent." *Lamie*, 540 U.S. at 1034. Until that time, it is beyond the province of this court to refuse to give effect to the plain meaning of the statute where the result produced is neither absurd nor demonstrably at odds with the drafter's intent.

III. Alternatively, under amended section 1325(a), debtors may fully satisfy an "allowed secured claim" by surrendering the property securing the claim.

A. The 2005 amendments to section 1325(a) do not alter the debtor's ability to fully satisfy an allowed secured claim by surrendering the property securing that claim pursuant to section 1325(a)(5)(C).

Section 1325(a)(5) sets forth the criteria for the treatment of allowed secured claims provided for by the plan. Assuming *arguendo*[5] that Creditor's claim is an allowed secured claim in the full amount of the debt because section 506 is inapplicable, the Creditor cannot also be the holder of an allowed unsecured claim in the same chapter 13 case. A plan is entitled to confirmation if, with respect to each allowed secured claim, 1) the creditor accepts the plan; 2) the debtor surrenders the collateral; or 3) the debtor treats the claim as provided for in section 1325(a)(5)(B). The hanging paragraph does not affect the debtor's ability to fully satisfy an allowed secured claim by surrendering the property securing that claim pursuant to 1325(a)(5)(C). *See In re Gentry*, 2006 WL 3392947 (Bankr. E.D. Tenn. Nov. 22, 2006); *In re Turkowitch*, -- B.R. --, 2006 WL 3346156 (Bankr. E.D. Wis. Nov. 16, 2006); *In re Pool*, 351 B.R. 747 (Bankr. D. Or. 2006); *In re Nicely*, 349 B.R. 600 (Bankr. W.D. Mo. 2006); *In re Evans*, 349 B.R. 498 (Bankr. E.D. Mich. 2006); *In re Osborn*, 348 B.R. 500 (Bankr. W.D. Mo. 2006); *In re Brown*, 346 B.R. 868 (Bankr. N.D. Fla. 2006); *In re Sparks*, 346 B.R. 767 (Bankr. S.D. Ohio 2006); *In re Ezell*, 338 B.R. 330 (Bankr. E.D. Tenn. 2006).

There is no question that prior to the enactment of BAPCPA and based on the plain language of the statute, a chapter 13 debtor could surrender property securing a

[5] Section II argues that the effect of the added paragraph at the end of section 1325(a)(9) is to remove certain claims from the ambit of section 1325(a)(5).

claim in full satisfaction of the creditor's allowed secured claim. *See, e.g.*, *In re Eubanks*, 219 B.R. 468, 473 (B.A.P. 6th Cir. 1998)("Section 1325(a)(5)(C) permits a Chapter 13 debtor to satisfy an 'allowed secured claim' by surrendering the property securing the claim."); *In re Fareed*, 262 B.R. 761, 764 (Bankr. N.D. Ill. 2001)(same); *In re Day*, 247 B.R. 898, 901 (Bankr. M.D. Ga. 2000)(same). No amendments were made to the provisions of section 1325(a)(5)(C) as part of BAPCPA and nothing has changed the application of section 1325(a)(5)(C) to allowed secured claims provided for by the plan. *See Johnson v. First Nat. Bank of Montevideo, Minn.*, 719 F.2d 270 (8th Cir. 1983)(and cases cited)("[A]bsent a clear manifestation of contrary intent, a newly enacted or revised statute is presumed to be harmonious with existing law and its judicial construction."). Accordingly, if the Creditor is found to have an allowed secured claim in the full amount of the debt owed to the creditor, then the Debtor may surrender the collateral in full satisfaction of that claim.

B. The small minority of decisions reaching the opposite conclusion are wrongly decided because section 506(a) is applicable regardless of whether the debtor retains or surrenders property securing an allowed secured claim.

While the vast majority of courts have determined that an "allowed secured claim" is fully satisfied by the surrender of the collateral securing the debt, a handful of courts have held otherwise. *In re Zehrung*, 351 B.R. 675 (W.D. Wis. 2006); *In re Hoffman*, -- B.R. --, 2006 WL 3813775 (Bankr. E.D. Mich Dec. 28, 2006); *In re Patricka*, -- B.R. --, 2006 WL 3350198 (Bankr. E.D. Mich. Nov. 17, 2006); *In re Duke*, 345 B.R. 806 (Bankr. W.D. Ky. 2006).[6] Courts holding that full satisfaction of an

[6] In contrast to a majority of courts, the Duke court found the hanging paragraph to be ambiguous and concluded, with little analysis and without reference to the leading case at the time *In re Ezell*, that surrender in full satisfaction was not permitted. None of the

allowed secured claim is not permitted base their decisions primarily on the belief that that section 506 only applies in the retention scenario under 1325(a)(5)(B), and not in the surrender context of 1325(a)(5)(C). The argument continues that since section 506 has no applicability under 1325(a)(5)(C), the hanging paragraph has no effect on creditors claims where the property is being surrendered. Thus, these courts conclude that creditors with claims covered by the hanging paragraph are entitled to 1) an allowed secured claim in the full amount of the debt if the debtor elects to retain the property or 2) an allowed unsecured claim in an amount representing the difference between the full amount of the debt and the liquidation value if the debtor elects to surrender the property.

The argument that section 506(a) has no application to surrender under section 1325(a)(5)(C) ignores the actual statutory language. Congress did not amend the statute to say that section 506 is not applicable only with respect to section 1325(a)(5)(B). If that had been the intent, it could easily have been done. The division of claims into secured and unsecured portions is governed by section 506(a) and is equally applicable in retention and surrender scenarios. *In re Turkowitch*, -- B.R. --, 2006 WL 3346156, at *7, citing *In re Fobian*, 951 F.2d 1149 (9th Cir. 1991). Between these two situations, it is only the mechanism for determining the amount of the creditor's allowed secured claim that is different. For claims not covered by the hanging paragraph and for which the debtor intends to retain the collateral, the amount of the creditor's allowed secured claim is equal to its replacement value. *See Assoc. Commercial Corp. v. Rash*, 520 U.S. 953, 117 S. Ct. 1879 (1997). For claims not covered by the hanging paragraph and for which the debtor intends to retain the collateral, the amount of the creditor's allowed secured

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other courts weighing in against surrender in full satisfaction have relied upon *In re Duke* for precedent.

claim is determined by liquidation value. *See In re Gentry*, 2006 WL 3392947 at *6 (The fact that valuation of the collateral was generally determined by a UCC liquidation sale rather than by the court is irrelevant. Section 506(a) assigned the formula for the split; the sale was simply the process by which the formula was applied."); *In re Nicely*, 349 B.R. at 604; *In re Ezell*, 338 B.R. at 339. Assuming *arguendo* that claims covered by the hanging paragraph can be an allowed secured claim and if bifurcation is no longer possible, the amount of the creditor's allowed secured claim is now the full amount of the debt.

Zehrung, reversing a bankruptcy court decision following the majority, takes the position that section 506 is inapplicable under section 1325(a)(5)(C) because the estate's interest in the collateral disappears with surrender. *Zehrung*, 351 B.R. at 678. After surrender, *Zehrung* maintains that the creditor is entitled to its state law right to liquidate the collateral and retain an unsecured claim for the balance due. *Id.* According to Zehrung, the creditor who takes possession of collateral after the petition "does not depend upon § 506 to determine the value of its unsecured claim." This reasoning is flawed, however, because it fails to recognize that 1) the property securing the claim covered by the hanging paragraph becomes property of the estate at the commencement of the case, 11 U.S.C. § 541, and 2) at the moment the property of the estate is surrendered upon confirmation of the plan, the creditor's allowed secured claim is extinguished by the plain language of section 1325(a)(5)(C). If the allowed secured claim equals the full amount of the claim, there can be no remaining unsecured claim. That the creditor may have had a state law claim for a deficiency is not relevant. The issue is whether the creditor has an allowed unsecured claim under the Bankruptcy Code,

not whether the creditor has a claim under state law. State law determines creditors' rights only to the extent that such rights are not modified by the Bankruptcy Code. Sections 1322(b)(2) and 1325(a)(5) expressly permit modification of secured creditors' rights, including creditors with claims covered by the hanging paragraph.[7] Indeed, the hanging paragraph itself modifies nonbankruptcy rights by treating a creditor as secured to a degree in excess of nonbankruptcy real world values. Consequently, even though such creditors might be entitled to a deficiency claim outside of bankruptcy, they are not entitled to an allowed unsecured claim for any deficiency here. *In re Turkowitch*, -- B.R. --, 2006 WL 3346156, at *8, citing *In re Osborn*, 348 B.R. at 506. In essence, this creditor want to "have its cake and eat it too."

The *Patricka*[8] goes further than *Zehrung* in suggesting that section 506 is inapplicable under section 1325(a)(5)(C) because the estate's interest in the collateral is extinguished upon plan confirmation. *Patricka*'s reasoning fares no better than that of *Zehrung* for the same reason. It simply does not matter how surrender is effectuated—by turnover of the property or confirmation of the plan. In either case, the surrender of the property, physically or by relinquishment of any rights in the collateral, simultaneously results in the satisfaction of the creditor's allowed secured claim.

In summary, the hanging paragraph is not ambiguous nor does it lead to absurd results. If the effect of the hanging paragraph is to give creditors of covered claims

[7] The result reached by the minority position elevates the claims of hanging paragraph creditors to the same status as claims held by creditors with security interest in real property that is the debtor's principal residence. *See* 11 U.S.C. § 1322(b)(2). Had Congress intended such a result, it could simply have added such claims to section 1322(b)(2).

[8] *In re Hoffman*, -- B.R. --, 2006 WL 3813775 (Bankr. E.D. Mich Dec. 28, 2006), follows *Patricka* without providing much additional analysis.

"allowed secured claims" in the full amount of the debt, then surrender in full satisfaction of the debt is permitted. Such creditors are not entitled to a bifurcated claim and are prevented from filing a deficiency claim after the surrender of the collateral. "This rule complies with the meaning of the statue, constitutes the fair treatment of secured creditors as envisioned by Congress (because it will encourage debtors to either pay the claim in full or promptly surrender the collateral) and is in harmony with the majority of the bankruptcy courts that have analyzed this issue." *In re Turkowitch*, -- B.R. --, 2006 WL 3346156, at *8.

CONCLUSION

For all the foregoing reasons, amicus respectfully requests that this Court deny the Creditor's objection to confirmation of Debtor's plan.

Respectfully submitted,

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