No. 16-35384

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: PENNY D. GOUDELOCK,
*Debtor*.

PENNY D. GOUDELOCK,
*Appellant*,

– v. –

SIXTY-01 ASSOCIATION OF APARTMENT OWNERS,
*Appellees*.

On Appeal from the United States District Court
For the Western District of Washington
Docket No. 2:15-cv-01413-MJP

# BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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October 21, 2016

# RULE 26.1 CORPORATE DISCLOSURE STATEMENT

*Goudelock v. Sixty-01 Assoc. of Apartment Owners.*, No. 16-35384

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **K. Michael Fitzgerald, Chapter 13 Trustee**

This 21st day of October, 2016.

*/s/ Jon Erik Heath*
J. Erik Heath, Esq.
Attorney for Amicus Curiae

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## STATEMENT OF INTEREST OF AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of approximately 3,000 consumer bankruptcy attorneys nationwide.

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 cases seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Harris v. Viegelahn*, 135 S. Ct. 1829 (2015); *United States Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010); *Am.'s Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard)*, 803 F.3d 1095 (9th Cir. 2015).

NACBA and its membership have a vital interest in the outcome of this case. NACBA member attorneys represent individuals in a large portion of all chapter 13 cases filed, the vast majority of whom are honest but unfortunate debtors who seek nothing more than a fresh start under the Bankruptcy Code. However, that fresh start would be denied to a debtor who surrenders property in a bankruptcy case, only to learn that liability from the surrendered property continued to grow

throughout the bankruptcy case. Debtors deserve to exit bankruptcy free from the burdens of debt, not mired in fresh liabilities they can ill afford.

## CONSENT

The parties have consented to the filing of this *amicus curiae* brief.

## AUTHORSHIP AND FUNDING OF AMICUS BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

Debtors like Ms. Goudelock are textbook examples of the honest but unfortunate debtors the Bankruptcy Code is intended to assist. She surrendered her property as part of her Chapter 13 bankruptcy, and devoted a portion of her income to repayment of her debts for more than four years before receiving a discharge. Yet, instead of receiving a fresh start, she now owes more money to her former homeowners' association (HOA) than when she filed bankruptcy.

This result is backwards. Chapter 13 bankruptcy serves a rehabilitative purpose, but that purpose is thwarted if the debtor emerges from the bankruptcy with lingering, or even growing, debts to HOAs from which the debtor had long extricated herself.

Most importantly, the broad definition of "claim" under the Bankruptcy Code mandates a different result – one more in line with the Supreme Court's *Davenport* decision and the *Rosteck* line of cases. Cases reaching the opposite result, such as *Rosenfeld* and *Foster*, do so by creating a distinction between covenants running with the land and contract claims, which does not exist anywhere in the broad definition of "claim."

This Court should adhere to the text of the Bankruptcy Code, and cases such as *Davenport* and *Rosteck* that properly apply it, and reverse the decision below.

## ARGUMENT

The oft-cited principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. *Harris v. Viegelahn*, — U.S. —, 135 S. Ct. 1829, 1838 (2015); *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974). This purpose can only be achieved by casting a wide net over the debtor's financial affairs, assets and liabilities alike. Once that net is cast, the way those assets and liabilities are administered depends on the bankruptcy chapter, with Chapter 13 being the legislatively preferred route for individuals.

This particular Chapter 13 issue – the dischargeability of HOA assessments payable postpetition – is governed by the plain language of the term "claim," and the lessons drawn from Section 523(a)(16), both of which have been convoluted by the *Rosenfeld* line of cases. *See River Place E. Hous. Corp. v. Rosenfeld (In re Rosenfeld)*, 23 F.3d 833 (4th Cir. 1994). Even the policy concerns raised by those cases could be treated in less extreme fashion by treating HOA obligations as any other secured debts. In order to help effectuate the policy behind Chapter 13 repayment plans, this Court should adhere the plain text of the Code, and follow the *Rosteck* line of authority. *See In re Rosteck*, 899 F.2d 694 (7th Cir. 1990).

### I. The Bankruptcy Code Is Intentionally Broad In Both Its Coverage of "Claims" And The Scope Of The Chapter 13 Discharge.

Because the proper treatment of HOA assessments requires some explanation of how the Bankruptcy Code treats debts more generally – especially

in a Chapter 13 context – it is important first to discuss how some of the relevant process actually works.

### A. Congress Gave "Debt" The Broadest Possible Definition, While Narrowly Limiting The Exceptions Of Such Debt From Discharge.

The end goal in most bankruptcy cases is the discharge order. That order marks the "fresh start" for the debtor by generally discharging all "debts" rooted in his or her pre-bankruptcy past. *See e.g.*, 11 U.S.C. §§ 727(b); 1228(a) & (c); 1328(a) & (c); *Cal. Dep't of Health Servs. v. Jensen (In re Jensen)*, 995 F.2d 925, 929-30 (9th Cir. 1993).

For this discharge, and its resulting fresh start, to have any meaning, Congress mandated that it cover a broad spectrum of "debts." The Code defines "debt" as any "liability on a claim," and in turn, defines "claim" as the "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(4)(A) & (11). By design, this language creates "'the broadest possible definition' of claims so that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'" *In re Christian Life Ctr.*, 821 F.2d 1370, 1375 (9th Cir. 1987) (quoting S. Rep. No. 989, 95th Cong., 2d Sess. 21, 22, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5807, 5808). Thus, this definition, which "makes no reference to purpose" of the obligation even includes debts that

are outside the "traditional creditor-debtor relationship." *Pa. Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 558-9 (1990).[1]

If a debt meets this broad definition, then there are only narrow circumstances when it is to be excepted from the bankruptcy discharge. "[W]here Congress has intended to provide… [such] exceptions to provisions of the Bankruptcy Code, it has done so clearly and expressly." *FCC v. NextWave Pers. Communs. Inc.*, 537 U.S. 293, 302 (2003); *see also Davenport*, 495 U.S. at 563. Those clear exceptions mostly exist within Section 523(a), which enumerates 19 different categories of generally nondischargeable debt – some of which do not apply to every bankruptcy chapter. *See* 11 U.S.C. § 523(a)(1)-(19). Because of the importance of providing honest debtors with a fresh start, these exceptions are construed narrowly, and in favor of the debtor. *Fezler v. Davis (In re Davis)*, 194 F.3d 570, 573 (5th Cir. 1999); *Inst. of Imaginal Studies v. Christoff (In re Christoff)*, 527 B.R. 624, 629 (B.A.P. 9th Cir. 2015).

### B. By Design, Chapter 13 Repayment Offers Greater Relief To Debtors Than Chapter 7 Liquidation.

The Code offers a number of avenues for a consumer debtor to obtain this broad discharge of debt, most commonly by liquidation (Chapter 7) or by

[1] The specific result from *Davenport* was partially superseded when Congress amended Section 1328(a) to exclude some restitution from the Chapter 13 discharge, *see* Criminal Victims Protection Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, but the principles upon which *Davenport* is based are still valid.

repayment plan lasting three to five years (Chapter 13). Because Chapter 13 is the preferred route to discharge, there are a number of incentives to encourage such filings, such as a broader discharge.

"The legislative history behind chapter 13 relief supports and promotes debtor rehabilitation," *Frazer v. Drummond (In re Frazer)*, 377 B.R. 621, 631 (B.A.P. 9th Cir. 2007), and its use over Chapter 7 has always been encouraged. *Bobroff v. Continental Bank (In re Bobroff),* 766 F.2d 797, 803 (3d Cir.1985) (citing H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977), U.S. Code Cong. & Admin. News p. 5904). This is so because "[p]roceedings under Chapter 13 can benefit debtors and creditors alike." *Harris*, 135 S. Ct. at 1835. "Debtors are allowed to retain their assets, [while]… creditors… usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation." *Id*.

In order to steer debtors away from liquidation and towards the preferred Chapter 13 debt adjustment plans, Congress created a number of incentives for filers under the chapter. Most notably, a "discharge under Chapter 13 is broader than the discharge received in any other chapter." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 268 (2010) (quoting 8 Collier on Bankruptcy ¶ 1328.01, p. 1328-5 (rev. 15th ed. 2008)). It is well-established that this "broad discharge was provided by Congress as an incentive for debtors to opt for relief under that chapter rather than under chapter 7." *Ryan v. United States (In re Ryan)*, 389 B.R.

710, 719 (B.A.P. 9th Cir. 2008). Indeed, the breadth of the Chapter 13 discharge under Section 1328(a) is so expansive that, at least prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), it was colloquially known as the "superdischarge." *See id.*

"Although § 1328(a)'s so-called chapter 13 'superdischarge' was eroded by BAPCPA, there are still at least eleven categories of debt that are dischargeable in chapter 13 but not in chapter 7: 11 U.S.C. §§ 523(a)(6) (in part), (7), (10), (11), (12), (14B), and (15)-(19)." *Fridley v. Forsythe (In re Fridley)*, 380 B.R. 538, 544 n.5 (B.A.P. 9th Cir. 2007). These categories of debt that remain dischargeable in Chapter 13 cases include those arising from the willful and malicious injury to property, 11 U.S.C. § 523(a)(6), property divisions from divorce, 11 U.S.C. § 523(a)(15), some securities fraud, 11 U.S.C. § 523(a)(19), and as relevant here, homeowners' association dues payable postpetition, 11 U.S.C. § 523(a)(16).[2]

It is important to keep in mind both the incentive structure supporting the Chapter 13 discharge, and its ultimate power, when analyzing homeowners' association dues that are clearly covered under the Section 523(a)(16) the exception, and thus included in the Chapter 13 discharge.

[2] The provision dealing with homeowners' association dues refers to those fees "becom[ing] due and payable after the order for relief." 11 U.S.C. § 523(a)(16). The phrase "after the order for relief" means postpetition. *See* 11 U.S.C. § 301(b) ("The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.").

## II. The Text And Structure Of The Bankruptcy Code Enable HOA Debts Coming Due Postpetition To Be Discharged In Chapter 13 Cases.

On its face, an HOA obligation existing at the time of bankruptcy falls squarely within the definition of claim. It is an existing right to payment that is contingent on future events. This is especially true for condominiums in Washington, where "a future lien for unpaid condominium assessments is established at the time the condominium declaration is recorded, even though it may not be enforceable until the unit owner defaults on his or her assessments, if ever." *BAC Home Loans Servicing, LP v. Fulbright*, 180 Wash. 2d 754, 763 (2014).

Cases such as *Rosteck* support this straightforward statutory analysis, especially when coupled with the subsequent input from Congress in its enactment of Section 523(a)(16). By contrast, the *Rosenfeld* line of authority, including the B.A.P.'s *Foster* decision, creates a distinction between claims running with the land and contractual claims, which is not referenced anywhere in the Code. Instead, the *Rosenfeld* cases were apparently decided based on, or strongly influenced by, a "you stay, you pay" policy, which can be handled in more equitable ways that better support the fresh start promised by the Code.

### A. The Language And Structure Of The Bankruptcy Code Support The Adoption Of *Rosteck*.

The seminal case on this issue is *Rosteck*. When the Seventh Circuit was confronted with the question almost 30 years ago, it rightly turned to the text of the Bankruptcy Code. Relying on the broad definition of "claim," the court reasoned:

> …the Rostecks had a debt for future condominium assessments when they filed their bankruptcy petition. It is true that the Rostecks did not actually owe money to Old Willow for assessments beyond those Old Willow had assessed before their bankruptcy. But the condominium declaration is a contract, and by entering that contract the Rostecks agreed to pay Old Willow any assessments it might levy. Whether and how much the Rostecks would have to pay in the future were uncertain, depending upon, among other things, whether the Rostecks continued to own the condominium and whether Old Willow actually levied assessments. But, as we have seen, contingent, unmatured, unliquidated, and unfixed debts are still debts.

*Rosteck*, 899 F.2d at 696-7 (internal citations omitted). This straightforward rationale was widely followed in the following years. *See In re Cohen*, 122 B.R. 755, 758 (Bankr. S.D. Cal. 1991); *In re Garcia*, 168 B.R. 320, 324-25 (Bankr. E.D. Mich. 1993); *In re Lamb*, 171 B.R. 52, 55 (Bankr. N.D. Ohio 1994); *In re Wasp*, 137 B.R. 71, 72 (Bankr. M.D. Fla. 1992) ("Any Association fees coming due after Debtors' filing of their bankruptcy petition were no more than unmatured portions of their original liability to the Association."); *In re Affeldt*, 164 B.R. 628, 631 (Bankr. D.Minn. 1994), *aff'd on other grounds* 60 F.3d 1292 (8th Cir. 1995).

As noted by the courts below, in 1994, the Fourth Circuit chimed in on this issue in the leading case going the other direction. *See generally Rosenfeld*, 23 F.3d 833. In the view of the *Rosenfeld* Court, "the obligation to pay assessments is a function of owning the land with which the covenant runs. Thus, Rosenfeld's obligation to pay the assessments arose from his continued post-petition ownership of the property and not from a pre-petition contractual obligation." *Id*. at 837. However, the Court did not explain where it got this distinction between an obligation running with the land and a pre-petition contract for purposes of deciding a claim. In fact, the broad statutory definition of "claim" does not support such a distinction. *See* 11 U.S.C. § 101(4)(A).[3]

Some of *Rosenfeld*'s logic was also divorced from reality – at least present-day reality. The Court found its holding sustainable because it believed that the solution was simple for a debtor who wished to obtain a fresh start: simply "transfer title to the property, if necessary by a deed in lieu of foreclosure." *Rosenfeld*, 23 F.3d at 838. However, for many debtors who seek to surrender their homes in Chapter 13 proceedings, especially in recent years, this advice is unworkable. The process to complete a deed-in-lieu-of-foreclosure transaction is a

[3] Presumably, this was the *Rosenfeld* Court's attempt to distinguish *Rosteck*, where the Court *in dicta* reasoned that "the condominium declaration is a contract, and by entering that contract the Rostecks agreed to pay Old Willow any assessments it might levy." *Rosteck*, 899 F.2d at 696.

wholly voluntary one by the bank, and it can sometimes be lengthy to fully consummate it even if the bank agrees, which it often does not. Further, completing the bank's application process can be difficult, if not impossible, if there are outstanding HOA assessments or any other liens secured to the property, because the bank cannot obtain clear title through a deed in lieu of foreclosure. Instead, debtors such as Ms. Goudelock find themselves in the absurd position of being deprived of a fresh start on account of an asset that they surrendered as part of the bankruptcy.

### B. The History And Effect Of Section 523(a)(16) Guides The Outcome In This Context.

In the months after *Rosenfeld* was decided, Congress sought to resolve the split in authority over the appropriate treatment of postpetition dues. It did so by reinforcing the central holding from *Rosteck*, while carving out some circumstances in which these debts should be excepted from discharge. Specifically, the legislative history notes that Section 523(a)(16) is intended

> … to except from discharge those fees that become due to condominiums, cooperatives, or similar membership associations after the filing of a petition, *but only to the extent* that the fee is payable for time during which the debtor either lived in or received rent for the condominium or cooperative unit. *Except to the extent that the debt is nondischargeable under this section, obligations to pay such fees would be dischargeable*. See Matter of Rosteck, 899 F.2d 694 (7th Cir. 1990).

Bankruptcy Reform Act of 1994, 140 Cong. Rec. H. 10,752 (Oct. 4, 1994) (emphasis added).

The addition of Section 523(a)(16) conclusively answers the question whether these postpetition assessments are "claims" for bankruptcy purposes. First, as the Supreme Court has reasoned with other 523(a) exceptions, "[h]ad Congress believed that [such] obligations were not 'debts' giving rise to 'claims,' it would have had no reason to except such obligations from discharge." *Davenport*, 495 U.S. at 562 (concerning restitution debts). Likewise here, if homeowners' association dues payable postpetition were not claims, then Section 523(a)(16) would be superfluous. Second, by recognizing that condominium fees assessed postpetition remained dischargeable, as long as the homeowner neither "lived in [n]or received rent" from the unit, Congress clearly intended to adopt the general rationale of *Rosteck*, but with some limits on its effect.[4]

Importantly, in enacting this exception, Congress chose not to amend Section 1328(a), thus still allowing such debts to be discharged in a Chapter 13 proceeding. *See* Pub. L. No. 103-394, § 309, 108 Stat. 4129, 4137 (1994). It is highly unlikely that this decision was a "statutory misstep," as questioned by the

[4] This provision was amended again in 2005 to create the current-day exception, which includes all HOA assessments, and applies "for as long as the debtor or the trustee has a legal, equitable, or possessory ownership in such unit." *See* Pub. L. No. 109-8, § 412, 119 Stat. 23, 107 (2005).

*Foster* Court. *See Foster v. Double R Ranch Ass'n (In re Foster)*, 435 B.R. 650, 659 (B.A.P. 9th Cir. 2010). At the time Section 523(a)(16) was enacted, the Chapter 13 superdischarge (described above) still allowed the discharge of debts such as those incurred by fraud. If fraud debts could have been discharged in a Chapter 13, it would have made little sense indeed to except these HOA assessments from the same discharge.

Because Section 1328(a) does not reference the 523(a)(16) exception, many cases continue to adhere to the *Rosteck* rule for Chapter 13 cases as a simple matter of statutory construction. *See In re Ramirez*, 547 B.R. 449, 452-53 (Bankr. S.D. Fla. 2016); *In re Coonfield*, 517 B.R. 239 (Bankr. E.D. Wash. 2014); *In re Khan*, 504 B.R. 409, 412 (Bankr. D. Md. 2014); *In re Colon*, 465 B.R. 657 (Bankr. D. Utah 2011); *In re Kelly*, No. 09-42376 TG, 2010 Bankr. LEXIS 1409, at *3 (Bankr. N.D. Cal. Apr. 28, 2010); *In re Hawk*, 314 B.R. 312, 316 (Bankr. D. N.J. 2004).

**C. *Foster* Should Not Be Followed In This Case.**

This Circuit's B.A.P. revisited the *Rosteck*/*Rosenfeld* split in its *Foster* decision. Characterizing its rule as "you stay, you pay," the *Foster* Court was apparently more concerned with the outcome of the case than the language of the Bankruptcy Code. *Foster*, 435 B.R. at 661. This Court should decline to adopt the *Foster* rule, at least in the context of this case.

First and foremost, the *Foster* debtor was in a very different position than debtors like Ms. Goudelock. In *Foster*, the debtor sought to discharge all prepetition and postpetition HOA assessments, but continue residing in his home. *Foster*, 435 B.R. at 655. The court was concerned with this attempt at a "have your cake and eat it too" approach, and refused to believe that Congress intended to "discharge postpetition HOA dues under § 1328(a) when the debtor uses the cure and maintenance provisions under the chapter 13 to stay in his or her property after the order for relief." *Foster*, 435 B.R. at 655. To drive this concern home, the court explained that the "rule in this case boils down to one of 'you stay, you pay.'" *Id*. at 661. Here, by contrast, Ms. Goudelock did not choose to stay, and like many debtors in her position, apparently sought shelter under the Bankruptcy Code in order to help extricate herself from the property.

In order to reach its result, the *Foster* Court correctly noted that Section 523(a)(16) was "inapplicable" to Chapter 13 cases, but then remarkably extended the exception to Chapter 13 cases anyway. *Compare Foster*, 435 B.R. at 661 ("we hold that, as a matter of law, debtor's personal liability for HOA dues continues postpetition as long as he maintains his legal, equitable or possessory interest in the property and is unaffected by his discharge."), *with* 11 U.S.C. § 523(a)(16) (excepting such dues from discharge "for as long as the debtor or the trustee has a legal, equitable, or possessory ownership interest" in the property). Extrapolating

this provision to Chapter 13 provisions, the court questioned whether it was a statutory misstep to exclude such obligations from the 1328(a) discharge, and disregarded entirely the fact that the mere existence of Section 523(a)(16) was an implicit recognition by Congress that such obligations were, in fact, claims arising prepetition. *See Foster*, 435 B.R. at 659. However, as described above, this logic ignores the plain text of Section 1328(a) and misses the importance of Section 523(a)(16).

Finally, citing *Rosenfeld*, the *Foster* decision also rested on the same misguided distinction between covenants running with the land (as determined by state law) and contracts. As described above, there is no basis for this distinction in the Code. Further, the Washington Supreme Court has subsequently described such assessments in a way showing that they fit squarely within the definition of claim. *See Fulbright*, 180 Wash. 2d at 763 (characterizing the obligation as a "a future lien for unpaid condominium assessments").

In short, *Foster* was not guided by the text of the Bankruptcy Code, but by its concern that debtors would continue to reside in units without paying HOA fees. As shown below, there are other ways to treat that concern.

### D. There Are More Equitable Ways To Effect A Rule Resembling "You Stay, You Pay" While Allowing Debtors Like Ms. Goudelock A Fresh Start.

The authority reaching a different result than *Rosteck,* from *Rosenfeld* through *Foster,* has largely been guided by a concern that debtors will remain in homes without contributing to the HOAs governing their lots. To the extent that concern should be handled judicially, the answer is not to interpret Section 523(a)(16) as applying to Chapter 13 cases, which it clearly does not, but to treat these HOA liens as any other lien in bankruptcy. Fashioning such a rule would implicitly require those debtors who wish to keep the property to pay, while finally releasing those who seek a fresh start away from their property.

"More than a century ago, the Supreme Court held that a bankruptcy discharge of a secured creditor's claim does not affect the status of the creditor's underlying lien on the debtor's property." *Hamlett v. Amsouth Bank (In re Hamlett),* 322 F.3d 342, 347-48 (4th Cir. 2003) (citing *Long v. Bullard,* 117 U.S. 617, 620-21 (1886)). This long-standing principle is codified in the current version of the Bankruptcy Code, which enjoins collection of a discharged debt "as a personal liability of the debtor," 11 U.S.C. § 524(a)(2), but largely preserves a secured creditor's rights to the property itself, 11 U.S.C. § 524(c)(2). Thus, a lien can still be exercised against a debtor's property post-bankruptcy, even if a

debtor's personal liability on that debt was extinguished by the discharge. *See In re Isom*, 901 F.2d 744, 745 (9th Cir. 1990).

This effect of discharge is most commonly apparent with mortgage debts. The discharge injunction protects the mortgage debtor from being sued personally on the debt post-bankruptcy. However, "a creditor's right to foreclose on the mortgage survives or passes through the bankruptcy." *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991). As a practical matter, this long-standing principle creates the result desired by the *Foster* Court: "you stay, you pay." Debtors who wish to remain in their homes must continue paying on the discharged debt, or they risk foreclosure of the property.

This situation could be viewed as analogous. *See Khan*, 504 B.R. at 414. As described above, Washington law views such assessments as a lien on property. In accordance with *Long*, that lien survives bankruptcy, which encourages debtors like Foster who wish to remain in a property to pay the dues or risk losing it. But at the same time, debtors like Ms. Goudelock who surrendered the property in bankruptcy and obtained no benefit from the HOA whatsoever would be protected from a post-discharge lawsuit on an obligation that quietly accrued during the bankruptcy case. That fair result is a truly fresh start.

This fresh start fits well within the Chapter 13 framework that Congress created. First, while narrowing the Chapter 13 superdischarge in 2005, Congress

chose not to incorporate the Section 523(a)(16) exception in the 1328(a) discharge. Otherwise, as described by one court, "the Debtors are not enjoying the benefits of the HOA and to hold Debtors liable for postpetition HOA dues when they no longer live at the Property and indeed have surrendered the Property to the secured lienholder is not only inequitable, but in contrast to the plain language of § 1328(a)." *Colon*, 465 B.R. at 663.

There are other ways that this approach fits within the structure of the Bankruptcy Code. For example, Congress crafted the Means Test to determine a debtor's eligibility to file a Chapter 7, and help calculate a debtor's monthly payment in a Chapter 13 case. Under this test, debtors may deduct HOA fees from their income to the extent they seek to "maintain possession of [their] primary residence." *See* 11 U.S.C. § 707(b)(2)(A)(iii)(II).[5] This deduction illustrates that Congress fully intended debtors to maintain HOA payments on properties they desire to keep, but not on properties whose possession is not to be maintained.

Allowing debtors a fresh start in these circumstances is equitable for their individual cases, but it also produces wider-scale economic benefits. By stripping personal liability from the debtor, HOAs have incentive to exercise a security interest promptly, thus allowing new residents to move in and start paying

[5] This provision is incorporated into Chapter 13 calculations. 11 U.S.C. § 1325(b)(3).

assessments. Further, removing this burden from debtors who have given up their property also helps them get past the effects of the mortgage crisis, and allows them to obtain their fresh start and become more economically productive citizens.

Finally, such a result would avoid conflict with the takings clause of the Fifth Amendment. Because the HOA would retain its property interest, the enforceable lien, there would be no taking that would invoke Fifth Amendment concerns.

## CONCLUSION

For the reasons stated above, *amicus curiae* asks this court to reverse the decision of the district court.

Respectfully submitted,

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## STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, Amicus hereby states that there are no related cases in this Court.

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Ninth Circuit Local Rule 29(d) because this brief contains 4,569 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

*/s/ Jon Erik heath*
J. Erik Heath
Attorney for Amicus Curiae

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 21, 2016. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

*/s/ Jon Erik heath*
J. Erik Heath
Attorney for Amicus Curiae