No. 18-2116

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

In re: Willie West,
Debtor.

UNITED STATES OF AMERICA,
Defendant/Appellant,

– v. –

WILLIE WEST,
Plaintiff/Appellee.

On Appeal from the Bankruptcy Court for the
Western District of Tennessee, No. 17-00078)

BRIEF OF *AMICI CURIAE* NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEE AND SEEKING DISMISSAL FOR LACK OF JURISDICTION

TARA TWOMEY
EMILY JOSEF
NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER
1501 The Alameda, Suite 200
San Jose, CA 95126
(831) 229-0256

BO LUXMAN (TN BPR #21580)
LUXMAN LAW FIRM
44 N. 2nd St., Suite 1004
Memphis, TN 38103
Phone: 901-526-7770
Fax: 901-526-7957

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

U.S.A. v. West, No. 18-2116

Pursuant to Fed. R. Bankr. P. 8012, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center, makes the following disclosure:

1) Is party/amicus a subsidiary or affiliate of a publicly owned corporation? If yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party. **NO**

2) Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list below the identity of the corporation and the nature of the financial interest. **NO**

This 16th day of July, 2018.

s/ Tara Twomey
Tara Twomey

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STATEMENT OF INTEREST OF *AMICI CURIAE*

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization of approximately 2,000 consumer bankruptcy attorneys nationwide. 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.

NCBRC, NACBA and its membership have an interest in this case because pro se debtors, such as Mr. West, are often unable to protect their interests in the appellate process. The bankruptcy court determined that more findings of fact were necessary to determine the dischargeability of Mr. West's student loans. The Department of Eduction seeks to deny Mr. West the opportunity to present those facts by appealing the bankruptcy court's denial of summary judgment. *Amici* believe that Mr. West should have his day in court to present evidence of his undue hardship.

AUTHORSHIP AND FUNDING OF *AMICI* BRIEF

Pursuant to Fed. R. Bankr. P. 8017(c)(4), *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than NACBA and NCBRC, their members, and their counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Mr. West, a 62-year old, pro se debtor, sought a determination that his student loans were dischargeable under section 523(a)(8) of the Bankruptcy Code because the payments on those loans would constitute an undue hardship. The Department of Education filed a motion for summary judgment on the grounds that the debtor failed to meet the standard for undue hardship under the three-prong *Brunner* test.[1] At the same time, Mr. West made a cross motion for summary judgment. The bankruptcy court granted "summary judgment" in favor of Mr. West on one of three parts of the legal test. ***The bankruptcy court made no final determination as to the dischargeability of the student loan debt.*** Instead the bankruptcy court determined that a trial would be necessary to determine whether Mr. West's student loans were dischargeable. The Department of Education ("DOE") nevertheless appealed the judgment, and later "amended" its notice of appeal to include a motion for leave to proceed on an interlocutory basis. In

[1]*Brunner v. New York Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987); *see also Oyler v. Educ. Credit Mgmt. Corp.*, 397 F.3d 382, 385 (6th Cir. 2005) (adopting the *Brunner* test for determining undue hardship under section 523(a)(8)).

this motion, the DOE asserted that this Court had jurisdiction over the appeal under 28 U.S.C. § 158(a)(2).

Section 158(a) provides three circumstances under which the district court will have jurisdiction over an appeal of a judgment from the bankruptcy court.[2] Specifically, this Court has authority to hear appeals (1) from final judgments, orders, and decrees; (2) from interlocutory orders and decrees involving in section 1121(d) of the Bankruptcy Code, and (3) with leave of the court, from other interlocutory orders and decrees. *Amici* submit that neither of the first two grounds apply here, and to the extent the Court considers the government's untimely motion for leave to appeal under section 158(a)(3), this Court should decline to grant leave.

I. The Denial of a Motion for Summary Judgment is Not a Final Judgment or Order Subject to Appeal Under 28 U.S.C. § 158(a)(1).

The denial of a motion for summary judgment is not a final judgment or order subject to appeal under 28 U.S.C. § 158(a)(1). A final order is one that leaves nothing for the court to do but execute judgment.[3] Courts have repeatedly held that a denial of a motion for summary judgment is not a final order subject to immediate appeal.[4] In *Bullard v. Blue Hills Bank*,[5] the Supreme Court noted that final orders alter the status quo or fix the rights of the parties. Here, the bankruptcy court

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[2] 28 U.S.C. § 158(a).

[3] *Spradlin v. Khouri (In re Bruner)*, 561 B.R. 397, 400 (B.A.P. 6th Cir. 2017), *citing Midland Asphalt Corp. v. U.S.*, 489 U.S. 794, 798 (1989).

[4] *See Harrison v. Ash,* 539 F.3d 510, 521 (6th Cir. 2008), *citing Johnson v. Jones*, 515 U.S. 304, 313 (1995); *Smith v. First Nat. Bank of Albany* (*In re Smith*), 735 F.2d 459, 461 (11th Cir. 1984) ("denial of summary judgment is interlocutory in nature and is thus not appealable."); *see also Church Joint Venture, L.P. v. Blasingame (In re Blasingame)*, 651 F. App'x 386, 388 (6th Cir. 2016).

[5] 135 S. Ct. 1686, 1692 (2015).

decision did not fix the rights of the parties. Indeed, DOE concedes that the bankruptcy court's order is not final. [6]

Therefore, there is no jurisdiction for the appeal under 28 U.S.C. § 158(a)(1).

II. The Basis for Jurisdiction Stated by the Government, 28 U.S.C. § 158(a)(2), is Not Applicable Here.

This Court does not have jurisdiction to hear this matter under 28 U.S.C. § 158(a)(2) as DOE claims.[7] In its brief, DOE states that this Court has jurisdiction pursuant to subsection (a)(2), which gives courts the authority to hear appeals from interlocutory orders issued under 11 U.S.C. § 1121(d). That is, the plain text of section 158(a)(2) only applies to orders under 11 U.S.C. § 1121(d).[8] Section 1121(d), in turn, is titled "Who may file a plan" and pertains to the period of time in a chapter 11 case when the debtor is the only party who can propose a plan—the debtor's "exclusivity period."[9] An order under section 1121(d) would be one where the court decides to either increase or decrease the length of this time period. Mr. West's case and this appeal have nothing to do with the filing of a chapter 11 plan; section 1121(d), and therefore, section 158(a)(2), simply do not apply. The authority cited by DOE for jurisdiction is incorrect and irrelevant.

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[6] DOE Brief pg. 7. Partial summary judgment on an element of a claim is also not a final order. Fed. R. Bankr. P 7054; Fed. R. Civ. P. 54(b). *See In re Frederick Petroleum*, 912 F.2d 850, 853-54 (6th Cir. 1990) (partial disposition in bankruptcy case not final without certified order under Rule 54(b)).

[7] 28 U.S.C. § 158(a)(2); DOE brief at 7.

[8] 28 U.S.C. § 158(a)(2) ("The district courts of the United States shall have jurisdiction to hear appeals from interlocutory orders and decrees issued under section 1121(d) of title 11 increasing or reducing the time periods referred to in section 1121 of such title."

[9] 11 U.S.C. § 1121(d).

III. The Court Does Not Have Jurisdiction Under 28 U.S.C. 158(a)(3) Because the Motion for Leave to Appeal Was Not Timely, but if Court Considers the Motion It Should be Denied.

Section 158(a)(3) grants the district court jurisdiction over interlocutory orders of the bankruptcy court with leave of the court.[10] The procedures for how to file for leave of the court are laid out in the Federal Rules of Bankruptcy Procedure Rule 8004. The order denying summary judgment was entered on the docket on February 6, 2018. DOE filed its notice of appeal on February 13, 2018, but did not file a motion for leave with it. It later "amended" its notice of appeal to include a motion for leave on March 2, 2018. The motion for leave to appeal was untimely.[11] While the court may deny the motion based on its untimeliness, Rule 8004(d) allows this Court to excuse the late filing (or lack of filing in the first instance) and address the motion for interlocutory appeal on the merits. On the merits the motion should be denied.

A. If the Court Does Consider the Motion for Interlocutory Appeal, It Should Be Denied on Its Merits.

Federal courts should be reluctant to hear interlocutory appeals and leave should be reserved for cases of exceptional circumstances.[12] When determining whether or not to grant a motion for leave in a bankruptcy appeal, courts use the standards set out in 28 U.S.C. § 1292(b).[13] Section 1292(b) provides that motion for

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[10] 28 U.S.C. § 158(a)(3).
[11] *See* Fed. R. Bankr. P. 8002(a)(1).
[12] *WCI Steel, Inc., v. Wilmington Trust Co.*, 338 B.R. 1 (N.D. Ohio 2005) (denying leave for an interlocutory appeal under section 158(a)(3)).
[13] *See id.* (denying leave to appeal after application section 1292(b) standard), *citing U.S. Trustee v. Eggleston Works Loudspeaker Co.,* 253 B.R. 519, 521 (B.A.P. 6th Cir. 2000); *In re Sandenhill, Inc.*, 304 B.R. 692 (E.D. Pa. 2004).

leave to appeal an interlocutory order should be granted only in extraordinary circumstances—where there is a controlling question of law with substantial disagreement and where the resolution of that question would materially advance the conclusion of the case.[14] The controlling question must be one that materially affects the outcome of the case.[15] This standard promotes efficiency and ensures that appeals are not used to unnecessarily prolong cases.

DOE has not identified any extraordinary circumstances that would justify granting leave. Instead, it focused on the substantive issues that were presented and discussed in the bankruptcy court's opinion.[16] It is not enough for DOE to state their disagreements with the ruling of the bankruptcy court at the summary judgment stage.[17] Should the bankruptcy court ultimately determine that Mr. West's student loans are dischargeable after trial, then DOE may appeal that final order and this Court will be in a better position to address the issues on appeal after a full factual record is developed.

The motion for leave should be denied on the grounds that DOE has not satisfied the standards in 28 U.S.C. § 1292(b).

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[14] 28 U.S.C. § 1292(b); *Rafoth v. National Union Fire Insurance Co. (In re Baker & Getty Financial Services Inc.),* 954 F.2d 1169, 1172 (6th Cir. 1992)
[15] *Rafoth,* 954 F.2d at 1172.
[16] *See* Supplement Motion for Leave to Appeal at 3, March 2, 2018.
[17] *Rafoth,* 954 F. 2d at 1172.

CONCLUSION

For the reasons stated above, the appeal of the Department of Education should be dismissed for lack of jurisdiction, or in the alternative leave to appeal should be denied. The case should be remanded to the bankruptcy court for further factual findings necessary to determine the dischargeability of Mr. West's student loans.

Respectfully submitted,

s/ Bo Luxman

BO LUXMAN (TN BPR #21580)
LUXMAN LAW FIRM
44 N. 2nd St., Suite 1004
Memphis, TN 38103
Phone: 901-526-7770
Fax: 901-526-7957

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. Bankr. P. 8017(d) because this brief contains 1,767 words, excluding parts exempted by Fed. R. Bankr. P. 8015(a)(7)(B)(iii).

2. This filing complies with L.R. 8015-1(b) and the type style requirements of Fed. R. Bank. P. 8015(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Century Schoolbook 14-point type.

s/ Bo Luxman
Bo Luxman

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Western Tennessee by using the appellate CM/ECF system on July 16, 2018. All participants that are registered as CM/ECF users will receive service via appellate CM/ECF system. Further, a true copy of the brief was also served by first class mail, postage prepaid, to:

Willie West, pro se Appellee
3612 Buffalo Road
Memphis, TN 38109

s/ Bo Luxman
Bo Luxman
Attorney for *Amici Curiae*