BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 23-60037

JOHN EARL ERICKSON,
Debtor/Appellant,

v.

JASON WILSON-AGUILAR,
Trustee/Appellee.

BAP Case No. WW-22-1186

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In re the Bankruptcy of
JOHN EARL ERICKSON,
Debtor

Bankr. Court Case No. 22-10784-TWD

APPELLANT'S OPENING BRIEF

Dated at Galveston, Texas this 29th day of March, 2024.

Respectfully submitted,

/s/ Rhonda Hernandez

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STATEMENT ON ORAL ARGUMENT

Due to the complexity of the proceedings in state and federal courts, Appellant believes that oral argument is likely to assist this Court in deciding this appeal.

JURISDICTIONAL STATEMENT

Appellant John Earl Erickson is a seventy-five (75) year old disabled individual who receives income from a pension and social security. See WAWB[1] 1, 7:8e and 7:8g; 3-ER-25, 7:8e and 7:8g[2]. See also WAWB 30; 3-ER-18. Appellant's nondebtor spouse receives social security income (WAWB 1, 7:8e; 3-ER-25). After a number of attempts to reorganize their debts over the period between May 2, 2018 through February 24, 2022[3], Appellant and/or his spouse, jointly or individually, at first represented by counsel and later self-represented, Appellant filed an individual Chapter 13 case on May 12, 2022 on his own behalf and without assistance of counsel.

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[1] Documents from the Bankruptcy Court for the Western District of Washington (WAWB) are identified as WAWB, followed by the document number in the record before the Bankruptcy Court. Documents filed before the BAP are identified as BAP, followed by the document number from the BAP Docket. Judicially noticeable documents are identified as RJN followed by the RJN exhibit number.

[2] Documents in the Excerpts of the Record (ER) are designated by the abbreviation "ER", preceded by the volume number and followed by the number(s) of the document identified in the Excerpts of the Record Index of Volumes.

[3] Appellant's nondebtor spouse summarized the previous bankruptcy filings with explanations for the filings and why they did not result in confirmation WAWB 35, 3-ER-13, pages 5-41.

See Docket Report (3-ER-30). On June 6, 2022 Appellant completed the filing, amended some of his Schedules (WAWB 20; 3-ER-23) and filed, pro se, a Chapter 13 Plan (WAWB 19; 3-ER-24).

On June 9, 2022, an attorney for an entity known as Select Portfolio Servicing, Inc. ("SPS") objected to the confirmation of the June 6, 2002 Chapter 13 Plan (WAWB 21; 3-ER-22) in the name of an entity claiming to be secured in the Appellant's Homestead. On June 28, 2022, the Chapter 13 Trustee objected to confirmation of Appellant's first-filed Chapter 13 Plan (WAWB 26; 3-ER-21) and simultaneously moved to dismiss Appellant's Chapter 13 Petition with a bar against re-filing for four (4) years (WAWB 27; 3-ER-20), supported by the Declaration of Emily Jarvis (WAWB 27-1; 3-ER-19). Appellant responded in opposition to the multiple filings on July 13, 2022 (WAWB 30, 31, 33, 34, 35, 36, 37, and 38; 3-ER-18, 3-ER-17, 3-ER-16, 3-ER-15, 3-ER-14, 3-ER-13, 3-ER-12, 3-ER-11, and 2-ER-10).

The initial hearing on the objections to confirmation of the June 6, 2022 Chapter 13 Plan and Chapter 13 Trustee's Motion to Dismiss was held on July 20, 2022 (Transcript of the July 20, 2022 Hearings[4]; WAWB 59; 3-

[4] Note that the Bankruptcy Court conducted the hearing on the objections to confirmation of the June 6, 2022 Chapter 13 Plan on July 20, 2022 for

ER-26). An Order dismissing Appellant's Chapter 13 Petition with a bar against filing another petition for two (2) years ("Order of Dismissal with Filing Bar") was entered on July 21, 2022 (WAWB 47; 1-ER-5). Appellant moved for reconsideration of the July 21, 2022 Order on August 3, 2022 (WAWB 51–51-7; 2-ER 8), which was amended, in part, on August 4, 2022 (WAWB 54; 2-ER-7). The Bankruptcy Court denied Appellant's Motion for Reconsideration on August 31, 2022 (WAWB 61; 1-ER-4).

The Order of Dismissal with Filing Bar (WAWB 47; 1-ER-5) was a final, appealable Order from which the time for appeal was extended by Appellant's Motion for Reconsideration. Appellant's Motion for Reconsideration was determined by Order Denying Motion for Reconsideration on August 31, 2022 (WAWB 61; 1-ER-4), and was a final Order. Appellant timely filed his Notice of Appeal to the BAP on September 12, 2022 (WAWB 63; 3-ER-29).

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approximately 3 minutes and 42 seconds, in absence of the aged and disabled Debtor (Appellant herein) who was delayed in arriving at the courtroom. He arrived approximately 5 minutes after the time scheduled for the hearing. Appellant was then informed by the Court that confirmation of the Chapter 13 Plan had been denied while he was not present for that part of the hearing. Bankruptcy Court proceeded to "hear" the Motion to Dismiss with Filing Bar, with Appellant being kept in the dark about the filing of Proof of Claim (POC) No. 4, which he, a non-electronic party, had not yet received (WAWB POC 4-1, page 24; 2-ER-9B).

The Bankruptcy Court had jurisdiction over the Chapter 13 case and the contested Motion to Dismiss with Filing Bar under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and 157(b)(2)(O). The Ninth Circuit Bankruptcy Appellate Panel ("BAP") had jurisdiction under 28 U.S.C. § 158 to review the Orders which finally disposed of Appellant's Chapter 13 case.

The BAP affirmed that Bankruptcy Court's dismissal of Appellant's Chapter 13 Petition with a two (2) year bar against re-filing for relief under Title 11 (BAP 36; 1-ER-3) on April 13, 2023. Appellant sought Rehearing (BAP 40; 2-ER-6). On May 9, 2023 the BAP denied rehearing (BAP 1; 1-ER-1).

The Appellant timely filed his Notice of Appeal to this Court on June 8, 2023 (BAP 45; 3-ER-27). This Court has jurisdiction over this appeal under 28 U.S.C. § 1291.

INTRODUCTION

Appellant raises essentially the same issues to this Court as those presented to the BAP because the BAP affirmed the errors of law made by the Bankruptcy Court and misapprehended the issues on appeal. The BAP determined the appeal on the basis of an issue which had not been appealed: whether the June 6, 2022 Chapter 13 Plan (WAWB 19; 3-ER-24) should

have been confirmed. Appellant did not appeal from the denial of confirmation of his June 6, 2022 Chapter 13 Plan. He conceded that the June 6, 2022 Chapter 13 Plan was not confirmable in his response before the hearing was held (WAWB 33; 3-ER-15, ¶5). The BAP validated the violation of Appellant's Due Process Rights who has been prevented from obtaining relief under Title 11 based on the unsupported inference of "bad faith" filing when his Chapter 13 Petition was filed in good faith.

Crucially, there is no evidence in the record to support the Trustee's contention that sale for the price set forth on the listing contract was "speculative". The Trustee is not an expert in real estate sales; the only evidence in the record regarding the feasibility of sale for the list price is the Declaration of Kreg Kendall, listing broker (ECF 37; 3ER-11) It is undisputed that Appellant was using exempt funds from a personal injury settlement to repair and renovate his Homestead in order to prepare it for sale. See also Declaration of Shelley Ann Erickson, WAWB 34, ¶14; 3-ER-14, ¶14. Instead, the Bankruptcy Court used Appellant's substantial investment of exempt funds from a car accident injury settlement (WAWB 20; 3-ER-23, Schedule C, Part 2) and physical efforts of himself and his nondebtor spouse against him when the Bankruptcy Court illogically

concluded, without support in the record, that the approximately six (6) months since the listing contract was executed was evidence that did not Appellant's position that the Chapter 13 Petition should not be dismissed for "bad faith" filing (WAWB 59; 3-ER-26; Tr. 20:12-18). The Bankruptcy Court used the length of time since the signing of the listing contract to support the conclusion that the Chapter 13 Petition was filed in bad faith, contrary to the only evidence in the record: the Declaration of Kreg Kendall, the listing broker (ECF 37; 3-ER-11) supported the feasibility of the proposed sale.

By the denial of confirmation of his Chapter 13 Plan filed on June 6, 2022 (WAWB 19; 3-ER-24), which Appellant conceded could not be confirmed because it had not been served on all interested parties and without providing Appellant with the opportunity to file a First Amended Chapter 13 Plan, followed simultaneously by the dismissal of his Chapter 13 Petition with a filing bar, Appellant was denied the opportunity to sell his Homestead in order to pay his legitimate creditors before the Sheriff's Sale. The default could have been cured under 11 U.S.C. § 1322(b)(3) and in accordance with Washington law. Moreover, Appellant's good faith effort to cure the default prior to any Sheriff's Sale being scheduled, as allowed by

Washington law, was illogically made the basis for the imposition of a two-year filing bar as to any filing under Chapter 11, preventing him from even obtaining relief under Chapter 7, which the Bankruptcy Court did not even consider. The Bankruptcy Court applied the wrong law: 11 U.S.C. § 1322(b)(2), when Appellant was proposing a cure under 11 U.S.C. § 1322(b)(3).

Appellant had exhaustively addressed the Trustee's Objection to the initial Plan filed on June 6, 2022 (WAWB 21; 3-ER-21) in his July 13, 2022 Response to the Trustee's Objection to Confirmation (WAWB 33; 3-ER-15) and set forth exactly how he proposed to satisfy the Trustee's objections in a First Amended Plan at WAWB 33; 3-ER-15, ¶¶ 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14. At WAWB 33, ¶5; 3-ER-15 ¶ 5, Appellant sought leave to file his First Amended Chapter 13 Plan because, in error, he had not served all interested parties. He stated that the preparation of the First Amended Plan would be undertaken promptly after the July 20, 2022 hearing.[5] At WAWB 33, ¶15; 3-ER-15, ¶15, Appellant reiterated that he

[5] The Appellant, who is disabled and was proceeding pro se, was expecting to obtain guidance from the Trustee at the First Meeting of Creditors scheduled to occur after the hearing on the Trustee's Motion to Dismiss but also from the Court and the Trustee at the July 20, 2022 to assure that the

intended to address all of the Trustee's legitimate concerns in his First Amended Chapter 13 Plan.

Appellant's rightful effort to cure any default by selling his Homestead as allowed by 11 U.S.C. § 1322(b)(3), 11 U.S.C. § 1322(c)(1) and Washington law before a Sheriff's Sale. A Sheriff's Sale was conducted after dismissal of the Chapter 13 Petition on October 14, 2022 (Request for Judicial Notice (RJN) Exhibit 8). The Sheriff's Sale might have mooted part of this appeal (except as to Appellant's right to relief under Chapter 7 including his redemption rights, if any time remained, under Washington law as an exempt asset of his Chapter 7 estate if the filing bar is lifted or expires). Fortunately, Appellant's right to proceed to file a First Amended Chapter 13 Plan or, at worst, to proceed under Chapter 7 with his redemption rights, have been thus far preserved because the Washington Court of Appeals, Division I, remanded the Order Confirming Sale to the King County Superior Court (RJN Exhibit 1). The amount of the

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First Amended Plan would be confirmable. Instead, in great haste, the Bankruptcy Court erred as a matter of law and determined the proposed sale violated the "anti-modification provisions" of Chapter 13. The Bankruptcy Court never even considered that the proposed sale was intended as an allowed cure.

credit bid[6] was substantially overstated (the Court of Appeals calculated an an overstatement of $141,712.13[7], based on the admission of the counsel representing the judgment creditor for the first time on appeal). The Court of Appeals agreed with Appellant and his nondebtor spouse that the overstatement impacted the amount required for redemption and the attempt to correct the overstatement for the first time on appeal cut his redemption period short by more than ten (10) months. See Request for Judicial Notice (RJN) Exhibit 1.

Because Appellant has filed a Petition for Review to the Supreme Court of Washington (RJN Exhibit 5 and 6) as to part of the remand Order

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[6] Additionally, the credit bid was made in the name of an entity which is not the judgment creditor and may not even exist as a de jure entity which may ultimately render the credit bid void.

[7] Overstatements of the amount of the claim against the Homestead have been frequently manufactured by SPS. In the June 9, 2022 Objection to Confirmation filed by an attorney for SPS (WAWB 22, at 2:3-4; 3-ER-22), the claim was alleged to be $1,402,213.94, $275,532.50 more than what was actually owed. The overstated claim was the basis for a Trustee's false challenge to Appellant's eligibility to be a Chapter 13 debtor under 11 U.S.C. § 109(e) because the Trustee uncritically accepted the false claim as true. (WAWB 21; 3-ER-21, 1:17-25. The falsity of that claim was easily shown by a document concurrently prepared by SPS and sent to Appellant. See WAWB 32; 3-ER-16, Exhibit A but the Chapter 13 Trustee did not withdraw his position.

from the Court of Appeals in which the Court of Appeals misconstrued RCW 4.56.090 and RCW 6.17.030, the King County Superior Court has not yet taken any action on the remand because the appeal from the Order Confirming Sale has not been finally decided and the mandate has not yet issued.

The BAP re-wrote Appellant's issues on appeal in order to affirm the Bankruptcy Court's error of law by concluding that Appellant's proposed cure of any default by sale of his Homestead. The BAP concluded that certain provisions of the June 6, 2022 Chapter 13 Plan, such as checking the box that he intended to avoid a security interest (WAWB 19; 3-ER-24 at 1.C.) demonstrated that Appellant did not intend to cure any default by the sale of his Homestead. Contrary to the BAP's misapprehension that Appellant was seeking to confirm the June 6, 2022 Chapter 13 Plan, Appellant had agreed in his Response to the Trustee's Objection to Confirmation that the June 6, 2022 Chapter 13 Plan would be amended to remove the check on line 1.C. regarding avoidance of liens. Appellant did not appeal from the denial of confirmation of the June 6, 2022 Chapter 13 Plan. He appealed because he was denied a single opportunity to file an amended plan before the Chapter 13 Petition was dismissed on the

erroneous basis that the filing was in "bad faith."

The BAP affirmed the denial of confirmation of the June 6, 2022 Chapter 13 Plan but that was not an issue in Appellant's appeal. He did not appeal from the denial of confirmation of his June 6, 2022 Chapter 13 Plan which he conceded could not be confirmed in his Response (WAWB 33; 3-ER-15) to the Trustee's Objection to Confirmation (WAWB 26; 3-ER-21). In error and without any support in the record, the BAP concluded in its April 13, 2023, Memorandum Decision (1-ER-3) on page 13, "Debtor does not address the numerous other substantive and procedural deficiencies in his plan which support denial of confirmation. We would affirm on this basis alone." Appellant had responded to each and every "substantive and procedural" deficiency in his June 6, 2022 Chapter 13 Plan.

Appellant did not appeal from the denial of confirmation of the June 6, 2022 Chapter 13 Plan. He appealed from the denial of his opportunity to file a First Amended Chapter 13 Plan in order to address the objections of the Chapter 13 Trustee in the manner he set forth in detail in his July 13, 2022 Response to the Trustee's Objection to Confirmation (WAWB 33; 3-ER-15, ¶¶ 5-14).

The BAP tried to correct the Bankruptcy Court's obvious error of

applying the wrong law to the proposed sale (because Appellant was arguing that the wrong law had been applied and the proposed sale was not intended to be a modification, but a cure) and concluded that the June 6, 2022 Chapter 13 Plan did not propose a cure. The BAP erred as a matter of law by concluding that the June 6, 2022 Chapter 13 Plan did not propose a cure because Appellant was seeking to correct the identified deficiencies. Again, Appellant was not appealing from the denial of his June 6, 2022 Chapter 13 Plan. He was appealing from the denial of his opportunity to file a First Amended Chapter 13 Plan, making the detailed corrections set forth in his July 13, 2022 which would make his intent to cure any default more clear.[8]

In *In re Leavitt*, 171 F.3d 1219, 1222 (9th Cir. 1999), this Court wrote:

> Since the BAP's decision is based on the bankruptcy court's order, we review the conclusions of law of the bankruptcy court de novo and

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[8] The Bankruptcy Court has a mandatory Chapter 13 Plan form. Appellant was proceeding pro se. He was trying to respond to check the box requirements without necessarily knowing the consequences of checking certain boxes. When he learned by the Trustee's Objections that checking certain boxes was being construed in a manner he did not intend, he clearly set forth his intention to file his First Amended Plan making the necessary corrections in response to the Trustee's Objection to Confirmation. WAWB 33; 3-ER-15, ¶¶ 5-15, and specifically at ¶9.

its factual findings for clear error.

Appellant seeks review of the errors of law and abuse of discretion by the Bankruptcy Court except to the extent that, for context, Appellant has addressed the errors which occurred in the BAP proceedings as the result of the misapprehension of Appellant's issues on appeal to the BAP, above.

STATEMENT OF THE ISSUES

I. The Bankruptcy Court erred as a matter of law in holding that a Chapter 13 Plan providing for the sale of the Debtor's Homestead of over 40 years with the proceeds of the sale being paid to the holders of allowed claims could not be confirmed based on the Court's misapplication of 11 U.S.C. § 1322(b)(2) which prohibits modification of the first mortgage on Debtor's Homestead because Appellant was not seeking to modify the August 27, 2015 Foreclosure Judgment but was proposing a cure under 11 U.S.C. § 1322(b)(3).

STANDARD OF REVIEW: De novo

A. Appellant was not proposing to modify the claim contrary to 11 U.S.C. § 1322(b)(2); he proposed to cure under 11 U.S.C. § 1322(b)(3) by selling his Homestead.

STANDARD OF REVIEW: De novo

B. The Bankruptcy Court's conclusions regarding the permissibility and feasibility of the cure by sale are contrary to the only evidence in the record.

STANDARD OF REVIEW: Mixed issue of law and fact where the law predominates–De novo

II. The proceedings for Dismissal of the Chapter 13 Petition with a Two (2)

Year Filing Bar Violated Appellant's Due Process Rights Guaranteed by the Fifth Amendment to the *Constitution of the United States*.

STANDARD OF REVIEW: De novo

III. The findings of fact upon which the Order for Dismissal with Filing Bar are illogical and unsupported by the record.

STANDARD OF REVIEW: Abuse of discretion

V. The Bankruptcy Court lacked authority to dismiss the Petition with a filing bar under 11 U.S.C. § 105(a).

STANDARD OF REVIEW: De novo

V. The Court abused its discretion in imposing the filing bar for a period of two (2) years.

STANDARD OF REVIEW: Abuse of discretion

VI. The Court abused its discretion in failing to reconsider its July 20, 2022 Order.

STANDARD OF REVIEW: Abuse of discretion

STATEMENT OF THE CASE

Appellant acted in good faith in filing his Petition for Title 11 Relief and was entitled to propose a cure of any default by sale of his Homestead, consistent with the laws of the State of Washington in his Chapter 13 proceedings. Appellant seeks to reverse the filing bar of two (2) years because Appellant's May 12, 2022 Petition was filed in a good faith effort

to pay his legitimate creditors through the sale of his Homestead of over 40 years within a reasonable time consistent with the laws of the State of Washington. The Bankruptcy Court misinterpreted his intention as a prohibited modification contrary to 11 U.S.C. §1322(b)(2) when he was seeking to cure any default under 11 U.S.C. §1322(b)(3).

Reversal of the Order of Dismissal with Filing Bar is necessary because the dismissal of Appellant's Chapter 13 Petition and the imposition of the filing bar for two (2) years was entered contrary to law and in violation of his Due Process Rights under the Fifth Amendment to the *Constitution of the United States*. Moreover, the Bankruptcy Court's imposition of the filing bar without even permitting the filing of a Chapter 7 during the two (2) year period is manifestly unjust.

"The decision to vary the § 349(a) effect of dismissal by imposing a condition such as 'with prejudice' is reviewed for abuse of discretion." *In re Leavitt*, 171 F.3d at 1223, 1226 (9th Cir. 1999); *Ellsworth v. Lifescape Med. Assocs., P.C. (In re Ellsworth)*, 455 B.R. 904, 922-23 (9th Cir. BAP 2011)." *Duran v. Gudino (In re Duran)*, 630 B.R. 797 (9th Cir. BAP 2021). Ordinarily, although a finding of bad faith is fact-specific, Appellant contends that legal errors rather than facts predominate in this case. See

USA v. Mateo-Mendez, 215 F.3d 1039, 1042 (9th Cir. 2000). Under *U.S. v. Hinkson*, 585 F.3d 1247 (9th Cir. 2009), whether the lower court applied the correct rule of law is reviewed de novo and findings of fact will be upheld unless they are (1) "illogical," (2) "implausible," or (3) without "support in inferences that may be drawn from the facts in the record."

In this case, the BAP determined that Appellant was not proposing a cure by sale in order to uphold the Bankruptcy Court's holding that Appellant's Chapter 13 Petition was filed in "bad faith" when the Bankruptcy Court never considered the provisions of his proposed First Amended Plan under 11 U.S.C. § 1322(b)(3) which addressed the defects in his effort to cure any default by sale of his Homestead (WAWB 33; 3-ER-15). The Bankruptcy Court erred as a matter of law in dismissing Appellant's Chapter 13 Petition for "bad faith" by not recognizing Appellant's intent to cure under 11 U.S.C. § 1322(b)(3). The BAP affirmed the dismissal of the Chapter 13 Petition by treating deficient provisions in the June 6, 2022 Chapter 13 Plan as being grounds for affirming the dismissal with filing bar by re-writing the issues on appeal. Whether or not the June 6, 2022 Chapter Plan should have been confirmed had not been appealed; it had been conceded that the initial Chapter 13 Plan could not be

confirmed before the confirmation hearing was held.

Appellant was seeking to file his First Amended Plan to clarify his intent to cure. As a pro se litigant, Appellant was entitled to the benefit of the less stringent pleading standard set forth in *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972) ("the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers). A Chapter 13 Plan is essentially a pleading. Appellant intended to file his First Amended Chapter 13 Plan to correct any deficiencies in its articulation.

SUMMARY OF THE ARGUMENT

Appellant proposed to treat the claim secured only by a security interest in his homestead by curing the default under 11 U.S.C. § 1322(b)(3) in accordance with Washington law pursuant to 11 U.S.C. § 1322(e). The Bankruptcy Court erred as a matter of law when it concluded that the proposed sale of Appellant's homestead constituted a modification of the "claim secured only by a security interest in real property that is the debtor's principal residence" under 11 U.S.C. § 1322(b)(2), which Debtor did not propose. Debtor was proposing to cure the default as allowed by 11 U.S.C. § 1322(b)(3), within a reasonable period of time in accordance with the law

of the State of Washington under 11 U.S.C. § 1322(e).

Appellant was not acting in bad faith in filing his May 12, 2022 Chapter 13 Petition. Appellant's intention to sell his homestead of over 40 years as allowed by 11 U.S.C. §1322(b)(3) and to pay the proceeds to any entity secured only by a security interest in the real estate which is his primary residence and entitled to receive payment was proposed as a cure to any default under Washington law in accordance with 11 U.S.C. §1322(b)(3), within a reasonable time within the term of the Chapter 13 Plan[9] determined pursuant to the laws of the State of Washington under 11 U.S.C. §1322(e). See also *Nobelman v. American Savings Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed.2d 228 (1993) discussed within.

Moreover, 11 U.S.C. §1322(b)(8) permits a plan to be funded by property of the debtor's estate. The purported secured creditor and the Chapter 13 Trustee complain that Appellant's income combined with the income of his nondebtor spouse does not permit the payment of regular monthly payments on the secured claim, but Appellant proposed the

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[9] Under the law of the State of Washington, payment in full is required to be made before the Sheriff's Sale (which was temporarily stayed under 11 U.S.C. §362(a)) or before the redemption period has expired (with interest and allowed costs continuing during the redemption period).

alternative form of payment recognized under 11 U.S.C. §1322(b)(8).

Appellant did not have notice that "separate and independent grounds" for dismissal for "unreasonable delay" under 11 U.S.C. § 1307 (c)(1) and was thus denied notice and opportunity to be heard on the alternative grounds for dismissal interposed by the Bankruptcy Court for the first time when making the oral ruling of dismissal with filing bar for two (2) years. Appellant had addressed the grounds for dismissal of which he had notice: the standards which apply to 11 U.S.C. § 105(a). Moreover, and most importantly, Appellant was denied the opportunity to file a First Amended Chapter 13 Plan in which he proposed correct any deficiencies (WAWB 33; 3-ER-15 at ¶¶ 5-15) in the June 6, 2022 Chapter 13 Plan (WAWB 19; 3-ER-24).

In the reasoning set forth for the first time in the August 31, 2022 Order Denying Appellant's August 4, 2023 Amended Motion for Reconsideration (WAWB 61; 2-ER-7) filed under Fed. R. Bankr. P. 9023, adopting Fed. R. Civ. P. 59(e), and his Amended Alternative Motion for Relief under Fed. R. Bankr. P. 9024, adopting Fed. R. Civ. P. 60(b), the Bankruptcy Court generally cited to authority under 11 U.S.C. § 1307(c) as including the principle of "good faith filing", whereas the Trustee had relied

on 11 U.S.C. § 105(a) for authority for the filing bar. Dismissals under 11 U.S.C. § 105(a) require fraudulent or egregious pre-petition misconduct. See *Marrama v. Citizens Bank of Mass*., 549 U.S. 365, 374-375, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007).

In his Response to the Motion to Dismiss with Filing Bar (WAWB 31; 3-ER-17), Appellant requested an evidentiary hearing to establish his good faith unless the Court denied the Motion to Dismiss with Filing Bar. *Id.*, at ¶¶ 10 and 11. Nevertheless, Appellant more than adequately defended the filing of his Chapter 13 Petition as having been made in good faith in paper form consisting of his Responses at WAWB Nos. 31, 32, 33, 34, 35, 36, 37, and 38 (3-ER-18; 3-ER-17; 3-ER-16; 3-ER-15; 3-ER-14; 3-ER-13; 3-ER-12; 3-ER-11; and 2-ER-10). Because Appellant is not an attorney and neither is his nondebtor spouse, who was allowed to assist him at the proceeding on July 20, 2022, he relied on the Bankruptcy Court to apply the correct law to his good faith effort to confirm a First Amended Plan by allowing him to correct a the deficiencies in the plan language and the Schedules, identified by the Trustee, in a continued effort to propose a cure under 11 U.S.C. § 1322(b)(3). The Bankruptcy Court applied the wrong law to determine that the Chapter 13 Petition was filed in "bad faith",

ignoring Appellant's right to cure by sale under 11 U.S.C. § 1322(b)(3) and to satisfy the claim secured by his Homestead using property of the Chapter 13 estate under 11 U.S.C. § 1322(b)(8).

ARGUMENT

I. The Bankruptcy Court erred as a matter of law in holding that a Chapter 13 Plan providing for the sale of the Debtor's Homestead of over 40 years with the proceeds of the sale being paid to the holders of allowed claims could not be confirmed based on the Court's misapplication of 11 U.S.C. § 1322(b)(2) which prohibits modification of the first mortgage on Debtor's Homestead because Appellant was not seeking to modify the August 27, 2015 Foreclosure Judgment but was proposing a cure under 11 U.S.C. § 1322(b)(3).

A. Appellant was not proposing to modify the claim contrary to 11 U.S.C. § 1322(b)(2); he proposed to cure under 11 U.S.C. § 1322(b)(3) by selling his Homestead.

This appeal arises in the context of a claim which has been reduced to judgment in the Superior Court for King County, Washington on August 27, 2015 (RJN Exhibit 7) and appears to raise an issue of first impression in this circuit. No case law has been located which addresses debtors' rights to cure claimed defaults in payments secured by real estate which is the debtor's principal residence after the entry of judgment of foreclosure and before the execution sale under the laws of the State of Washington which are the circumstances presented in Appellant's case. Appellant's

circumstances based on the status of the Washington state court litigation are not addressed in *In re Gavia*, 24 B.R. 573, 575 (9th Cir. BAP 1982)(per curiam) and *In re Proudfoot*, 144 B.R. 876, 877-78 (9th Cir. BAP 1992) because Appellant's proposed cure does not create a default.

Appellant's proposed cure by sale does not change the underlying expectations of the parties under the laws of the State of Washington. His proposed cure is exactly what Washington law allows. At the time of the filing of the Chapter 13 Petition, no Sheriff's Sale had yet occurred, so Appellant was allowed by Washington law to pay the amount owed on the August 27, 2015 Judgment (RJN Exhibit 7), which he proposed to do by selling his Homestead at a time when the market would have provided more than a sufficient recovery to pay the amount of the August 27, 2015 Judgment.

Appellant contends that the Bankruptcy Court should not have applied 11 U.S.C. § 1322(b)(2) to deny Appellant the opportunity to file a First Amended Chapter 13 Plan and that the Bankruptcy Court erred as a matter of law when it concluded that the proposed sale of Appellant's homestead would modify "the claim secured only by a security interest in real property that is the debtor's principal residence". (WAWB 59; 3-ER-26;

Tr. page 20:12-18; and Order Denying Reconsideration, WAWB 61; 1-ER-, 5:3-7).

Appellant was proposing to cure the any default by the proposed sale of the subject real estate[10] before the execution sale which had not taken place under Washington law. It is well established that curing a default under 11 U.S.C. § 1322(b)(3) is not prohibited by the anti-modification provision for claims secured only by a security interest in real estate which is the debtor's personal residence where the proposed cure does not change the expectations of the parties. *Cf. In re Nelson*, 59 B.R. 417, 419-420 (B.A.P. 9th Cir. 1985).

11 U.S.C. § 1322(b) provides, in relevant part:

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[10] Appellant does not waive his position that the corporate entity seeking relief in the Bankruptcy Court lacks standing to proceed because it is not an existing entity, is not the assignee of the Foreclosure Judgment and cannot be the holder of the Ericksons' March 3, 2006 Note secured by the Deed of Trust because the copy of the Note displays a forged endorsement. These positions are not necessary to resolve the issues on appeal or to the confirmation of a First Amended Chapter 13 Plan. Resolution of the issues would seem to require an adversary proceeding or at least proceedings in a contested case such as a motion for relief from the automatic stay. In Chapter 7 proceedings, the issues could not be litigated by Appellant. He would be entitled only to his Homestead exemption upon distribution following sale.

> (b) Subject to subsections (a) and (c) of this section, the plan may—
> . . .
> (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;. . .
> (3) provide for the curing or waiving of any default;
> . . .
> (8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor; . . .

The Bankruptcy Court overlooked the status of the litigation under Washington state law underlying the purported claim applicable to Appellant's right to cure as set forth in 11 U.S.C. § 1322(e), which provides:

> (e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

See also *Nobelman v. American Savings Bank*, 508 U.S. at 329, in which the United States Supreme Court addressed the application of state law to the "rights" of a secured creditor under 11 U.S.C. §1322(b)(2), holding:

> The term "rights" is nowhere defined in the Bankruptcy Code. In the absence of a controlling federal rule, we generally assume that Congress has "left the determination of property rights in the assets of a bankrupt's estate to state law,"since such "[p]roperty interests are created and defined by state law." [Citations omitted] Moreover, we have specifically recognized that "[t]he justifications for application of state law are not limited to ownership interests," but "apply with

> equal force to security interests, including the interest of a mortgagee.". . .

Judgment for foreclosure of the subject real estate was entered on August 27, 2015 in the action styled *Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4 v. Erickson*, King County Superior Court Case No. 14-2-00426-5 KNT ("the Foreclosure Action"). See RJN Exhibit 7. Appellant contends that, as a matter of Washington state law, no current installment payments were due to *any* claimant which may assert the right to enforce the disputed secured claim, , however such claimant might be identified. The secured claim was reduced to judgment in the name of Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4 on August 27, 2015 (RJN Exhibit 7).

Under the law of the State of Washington, the alleged default which resulted in the Judgment of Foreclosure may only be cured by payment of the amount owed to the party entitled to receive the payment before a Sheriff's Sale and confirmation of the sale in accordance with RCW Chapter 6.21. See 11 U.S.C. §1322(c)(1). Thereafter, Appellant is entitled to redeem the subject real estate by making payment of the amount of the

highest bid at the sale, plus allowed costs and expenses, within one year following the sale (RCW 6.23.020).

In *In re Frazer*, 377 B.R. 621, 628 (B.A.P. 9th Cir. 2007), the BAP wrote:

> As a general proposition, § 1322(b)(3) permits a chapter 13 plan to "provide for the curing or waiving of any default." 11 U.S.C. § 1322(b)(3). This provision applies to a default on a debt secured by an interest in a debtor's principal residence. Although the Code forbids modification in chapter 13 of the rights of a creditor whose claim is secured solely by an interest in the debtor's principal residence (i.e. change the length of the contract or amount of the balance), curing a default through a chapter 13 plan does not constitute modification of the creditor's interests. 11 U.S.C. § 1322(b)(2).

The only way that Appellant could "cure" the purported default as allowed by 11 U.S.C. § 1322(b)(3) is to pay the full cure amount before any foreclosure sale, according to 11 U.S. Code § 1322(c)(1), because no foreclosure sale had been conducted at the time of filing of the Petition and while the Petition was pending. After the Sheriff's Sale under Washington law, Appellant would have the right to redeem the subject real estate within one (1) year under RCW 6.23.020(1) because the August 27, 2015 Foreclosure Judgment included a deficiency judgment (RJN Exhibit 7, page 2).

In this case, Appellant would have still retained his redemption rights during the redemption period of 12 months after the October 14, 2022 foreclosure sale, if it is ultimately confirmed, or from the date of re-sale if the October 14, 2022 foreclosure sale is ultimately not confirmed upon remand in the pending appeal. Thereafter, Appellant could redeem the subject real estate by making payment of the lawfully calculated redemption amount to the party entitled to receive the payment as allowed under RCW 6.23.020(1). The proposed cure by sale neither alters nor delays any remedy to which any allowed claimant would be entitled under the laws of the state of Washington.

Appellant filed his initial Chapter 13 Plan on June 6, 2022 (WAWB 19: 2-ER-1). The attorney for an entity known as Select Portfolio Servicing, Inc. (SPS), purporting to appear on behalf of a secured creditor objected to confirmation of Appellant's initial plan on June 9, 2022 (WAWB 21; 3-ER-22) and, in conclusion, stated the reasonable expectation that, if confirmation of the initial plan was denied, Appellant would be allowed to file a First Amended Chapter 13 Plan, writing:

> If the court sustains this objection and denies confirmation, Creditor respectfully requests that the Court set a deadline by which an amended plan is to be filed. Creditor further requests that if the

> Debtor does not file the Amended Plan by the date imposed by the Court, the Trustee be permitted to submit an order dismissing the bankruptcy case for failure to comply with the order of the court.

Id., page 3, lines 3-7

The Trustee objected to Appellant's first-filed Chapter 13 Plan on June 28, 2022 (WAWB 26; 3-ER-21) but also acknowledges at Page 6:20-22:

> THE TRUSTEE REQUESTS:
> That the Court deny confirmation of the debtor's plan and, if appropriate, set deadlines for debtor to file and note a feasible amended plan.

In his Response to the Trustee's Objection to Confirmation of his Chapter 13 Plan (WAWB 33; 3-ER-15), which he understood could not be confirmed in any event because he had failed to effect service of the plan on all interested parties when he filed it, he set forth each provision of his proposed First Amended Plan to meet each of the Trustee's objections. *Id.*, ¶¶5-14. Appellant was unfairly prevented from filing a single, First Amended Plan which he reasonably expected would be allowed. It was an abuse of discretion by the Bankruptcy Court to deny Appellant the opportunity to file his proposed First Amended Plan by the device of dismissing the Petition based on an error of law, to wit, the anti-

modification provisions of 11 U.S.C. § 1322(b)(2). Appellant was entitled the reasonable inference, supported by the record, that his proposed First Amended Plan would satisfy the Trustee's Objections. Neither the Trustee nor the representative of SPS argued otherwise.

If Appellant's Homestead were to be sold under the protection of the Bankruptcy Court as proposed for the First Amended Plan and detailed in WAWB 33; 3-ER-15, Appellant would have had fifteen (15) months from the date of confirmation of the First Amended Plan which would have been promptly filed. Instead, the Bankrupcty Court hastened to dismiss Appellant's Chapter 13 Petition, thereby denying him the opportunity to file a single First Amended Plan with all of the provisions set forth in his Response (WAWB 33: 3-ER-15, ¶¶5-14). So hasty was the Bankruptcy Court's action to preclude consideration of the possibility of a feasible and confirmable Chapter 13 Plan proposing a cure of any default under 11 U.S.C. § 1322(b)(3) that the Bankruptcy Court could not wait approximately 5 minutes for the disabled, partially blind, elderly Debtor to arrive in the courtroom (See WAWB 59; 3-ER-26; Tr. 3:8-10; Tr. 6:5-6).

As Appellant's filings demonstrate, in Appellant's circumstances under the laws of the State of Washington, there were no current installment

payments to be made to any claimant with an interest secured only by a mortgage on his primary residence. He could not "modify" the terms for repayment; he can only "cure" by payment in full.

Appellant proposed to treat the claim secured only by a security interest in his Homestead by curing the default under 11 U.S.C. § 1322(b)(3) in accordance with Washington law. Therefore, the Bankruptcy Court erred as a matter of law when it concluded that the proposed sale of Appellant's homestead constituted a modification of the "claim secured only by a security interest in real property that is the debtor's principal residence". Payments were due to be made in full within a reasonable time in accordance with the law of the State of Washington under 11 U.S.C. § 1322(e) because no payments were due to be made after the three (3) year payment period of Appellant's Chapter 13 case. Even so, Appellant proposed to file his First Amended Plan providing for 15 months from the date of confirmation to accomplish the sale of his Homestead and cure the default by payment in full. Moreover, 11 U.S.C. § 1322(b)(8) allows a Chapter 13 Plan to provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor, which is exactly what Appellant was proposing to do.

The Bankruptcy Court erred as a matter of law when it applied the "anti-modification" provision at 11 U.S.C. § 1322(b)(2) instead of the cure provision at 11 U.S.C. § 1322(b)(3) which Appellant sought as allowed Washington state law as required by 11 U.S.C. § 1322(e). See *Nobelman v. American Savings Bank*, 508 U.S. at 329.

Further, the Bankruptcy Court raised as cause for dismissal under 11 U.S.C. § 1307(c)(1) "unreasonable delay prejudicial to creditors" at the time of making its findings for which Appellant had no notice or opportunity to be heard. See WAWB 59; 3-ER-26, Tr. 20:9-25:

> THE COURT:
> Besides bad faith, **there is also unreasonable delay that is prejudicial to creditors, which is a separate and independent cause under Section 1307(c)(1)**.
> **The debtor indicates in this case that he will sell the home.** But **that alone does not tip the balance in his favor.**[11] **The debtor has already tried to sell the home for about six months without success or even an offer.**[12] **He**

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[11] This remark suggests that the Bankruptcy Court was placing the burden of proof on the Appellant, rather than on the Trustee who was the moving party.

[12] The real estate had been listed since December 17, 2021 but Appellant and his wife were working diligently to repair the real estate to make maximize its value for sale and were not actively marketing the property until the renovations were completed. See Declarations of Shelley Ann Erickson, WAWB 34; 3-ER-14, at ¶ 14 and WAWB 36; 3-ER-12, at ¶ 6.

> **wants another year or more, but cannot confirm a plan that would allow that much time, <u>given the anti-modification provisions of the code with respect to home mortgages.</u>**
>
> The second step is to determine what form of dismissal is appropriate. In considering whether dismissal with prejudice is appropriate, the Court should consider whether something less than dismissal with prejudice would be sufficient. Here I conclude a two-year bar is appropriate and less harsh than either dismissal with prejudice or the four-year bar requested by the Trustee.

(Emphasis added.)

The Bankruptcy Court's Conclusion of Law in its oral ruling applied the wrong legal standard by considering the proposed sale as a modification of the rights of the purported secured claimant rather than as a cure under 11 U.S.C. § 1322(b)(3) consistent with the time allowed by state law under 11 U.S.C. § 1322(e) and *Nobelman*, supra.

The attorney who filed Proof of Claim No. 4-1 ("POC No. 4-1") on July 18, 2022 (2-ER-9), exemplified for ease of review as 2-ER-9A purports to represent a claimant identified as "Deutsche Bank National Trust Company, as Trustee, in Trust for Registered Holders of Long Beach Mortgage Loan Trust 2006-4, Asset-Backed Certificates, Series 2006-4". POC No. 4-1 was electronically filed with the Bankruptcy Court on July 18, 2022 and could not have been served electronically on Appellant who was

not registered for efiling.[13] See 2-ER-9B, exemplified Certificate of Service extracted from POC 4-1, Part 1, page 24. Appellant had not received POC 4-1 at the time of the July 20, 2022 hearing as demonstrated at 3-ER-26, Transcript of the July 20, 2022 Hearing at Tr. 17:6-19, which reads:

> 6 MS. ERICKSON: Has SPS[14] even filed a claim against
> 7 us in the courts yet, for the amount due that we owe them?
> 8 THE COURT: It looks like a claim was filed on
> 9 July 18th, if I'm reading this right. Yeah, July 18, it
> 10 looks like.
> 11 MR. WILSON-AGUILAR: I have the claim amount if
> 12 you wanted it.
> 13 THE COURT: I'm sorry?
> 14 MR. OLSEN: I have the claim amount if you wanted
> 15 it.

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[13] A different attorney for the purported claimant objected to confirmation of Appellant's Chapter 13 Plan on June 8, 2022 and appeared at the July 20, 2022 hearing. The purported claimant knew that Appellant was not registered for electronic filing no later than June 8, 2022.

[14] Ms. Erickson correctly identifies that party who is being represented by the attorney for the purported claimant as SPS (Select Portfolio Serving, Inc.). Informed homeowners who have been subjected to foreclosure defense litigation learn that it is the mortgage servicers who retain attorneys and direct the litigation against them. In this case, POC No. 4-1 (WAWB POC 4-1; 2-ER-9-A) was filed in the name of a party which is not the judgment holder (RJN Exhibit 7) and clearly identifies SPS as the party to which payments should be made.

16 THE COURT: I don't.[15]
17 MR. OLSEN: Okay.
18 THE COURT: All right. I'm going to grant the
19 motion to dismiss, . . .

Appellant was thereby denied the opportunity to review and address POC 4-1 until after the July 20, 2022 hearing concluded and was prevented from addressing the contents of POC 4-1 at the hearing.[16] Had Appellant received POC No. 4-1 prior to the July 20, 2022 hearing, he would have called the Bankruptcy Court's attention to the fact that the Foreclosure Judgment was granted in favor of "Deutsche Bank National Trust Company, as Trustee for Long Beach Mortgage Loan Trust 2006-4" (RJN Exhibit 7)

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15 The Bankruptcy Court may not have needed to be told the amount of the claim, but Appellant did. It was his nondebtor spouse who was assisting him at the hearing who asked if the claim had been filed and its amount at Tr. 17:6-7.

16 In the August 31, 2022 Order Denying Reconsideration (WAWB 61; 1-ER-4), the Bankruptcy Court erred in concluding that the filing of POC 4-1 (RJN Exhibit 1) on July 18, 2022 was not "new evidence" because POC 4-1 was filed before the July 20, 2022 hearing. The assertion that POC 4-1 was new evidence was made because POC 4-1 was served by mail on the Appellant (2-ER-9B) and was not received until after the July 20, 2022 hearing (WAWB 59; 2-ER-26; Tr. 17:6-19). Appellant's Chapter 13 Petition was dismissed before Appellant even POC 4-1 and he was never allowed to address its contents. POC 4-1 was indeed new evidence from Appellant's point of view because he did not have the opportunity to review it before or address it at the July 20, 2022 hearing.

which is not the same identity as the purported claimant identified in POC No. 4-1 as "Deutsche Bank National Trust Company, as Trustee, in Trust for Registered Holders of Long Beach Mortgage Loan Trust 2006-4, Asset-Backed Certificates, Series 2006-4." As a matter of law, only the judgment holder in a judicial foreclosure is eligible to submit a "credit bid" at an execution sale.

The Appellee and the Bankruptcy Court uncritically accepted the false assertions of a false claimant and accused Appellant of "bad faith" for trying to assure that the party claiming the right to receive the benefit of the security interest was the party entitled to enforce the debt obligation represented by the March 3, 2006 Note under Washington state law. ("Where one advances money to an alleged agent of the holder to satisfy a mortgage and the notes which such mortgage secures, it is his duty at his peril to see that the person whom he pays as agent is either (a) in possession of the instruments, or (b) has special authority to receive payment, or (c) has been represented by the owner and holder of the securities to have such authority.") *Koppler v. Bugge*, 168 Wash. 182, 185, 11 P.2d 236 (Wash. 1932).

In their previous filings, Appellant and his nondebtor spouse had

been seeking Bankruptcy Court protection to ascertain the identity of the entity to which payments were due to be made, but they did not cause the greater part of the delay in this years-long dispute over their Homestead. The delay in resolving the dispute is largely the result of the litigation tactics of the mortgage servicers. The attempts to obtain protection from the Bankruptcy Court, believing that the Bankruptcy Court would assure that the entity entitled to receive their payments would, in fact, receive their payments, amounted to less than approximately 14% of the total time that the litigation over the dispute has been ongoing (WAWB 51–51-7 and 54) and it is still not resolved (RJN Exhibits 1, 2, 3, 4, 5, 6 and 9).

The dispute arose when JPMorgan Chase Bank, N.A. (Chase) breached the loan modification agreement into which Appellant and his wife had been timely paying in good faith in October, 2009. Chase claimed to own the their Note and Deed of Trust by purchase from the FDIC based on the closing of Washington Mutual Bank (WAMU) on September 25, 2008. It turns out that Chase only acquired WAMU's servicing rights from the FDIC. SPS has been the subservicer for Chase and has engaged in years of obfuscation since it commenced the judicial Foreclosure Action on January 3, 2014 (RJN Exhibit 9).

B. Proceedings for Dismissal of the Chapter 13 Petition with a Two (2) Year Filing Bar Violated Appellant's Due Process Rights Guaranteed by the Fifth Amendment to the Constitution of the United States.

Notice and opportunity to be heard on the issue of "unreasonable delay" would have allowed Appellant to calculate the actual delay attributable to Appellant and his nondebtor spouse resulting from their filings for the protection of the Bankruptcy Court as opposed to the delay attributable to the litigation tactics of the purported Plaintiff in the Foreclosure Action, the named plaintiff, which is actual judgment creditor and its attorneys. Appellant would have been able to provide further information to the Bankruptcy Court in his effort to establish his good faith in filing the Chapter 13 Petition.

The standard for review of claimed violation of Due Process Rights is "[w]hether a particular procedure satisfies the basic requirements of due process is a question of law which we review de novo. *Garner v. Shier (In re Garner)*, 246 B.R. 617, 619 (9th Cir. BAP 2000).

The Bankruptcy Court erred by violating Appellant's Due Process Rights and erred as a matter of law in drawing inferences without an evidentiary hearing, without adequate support in the record, and is contrary

to the undisputed evidence in the record: the Declaration of Appellant (WAWB 31; 3-ER-17), the Declarations of Shelley Ann Erickson (WAWB Nos. 31, 34, 35, and 36; 3-ER-17, 3-ER-14, 3-ER-13, and 3-ER-12) and the Declaration of Kreg Kendall (WAWB 37; 3-ER-11). When challenged for its reliance on the Declaration of Emily Jarvis which is devoid of documentary support, the Bankruptcy Court disclosed in its Order Denying Reconsideration that it had based its findings on judicial notice taken without complying with Fed. R. Evid. 201(e) which requires courts to provide notice of taking judicial notice and allow parties to respond.

The BAP ignored the procedural fact that even the Bankruptcy Court could not rely on the Declaration of Emily Jarvis, an employee of the Trustee, because her Declaration was unsupported hearsay. Surprisingly, the BAP found "The evidence provided by Trustee amply supports the court's finding of bad faith." (BAP 36; 1-ER-3). Even the Bankruptcy recognized that "the evidence provided by Trustee" did not "amply support the court's finding of bad faith". That is why the Bankruptcy Court wrote that judicial notice was taken of unspecified documents (without notice to Appellant or opportunity to be heard in accordance with Fed. R. Evid. 201(e). Appellant's thorough Responses to the Objections to Confirmation and the

Trustee's Motion to Dismiss with the Filing Bar.

At the July 20, 2022 hearing, the Bankruptcy Court indicated that it had reviewed the dockets in the previous bankruptcy cases which is far less than the hearsay factual allegations in the Jarvis Declaration. In the Order Denying Reconsideration, the Bankruptcy Court did not disclose which other, if any, documents referenced in the Jarvis Declaration (WAWB 27-1; E.R.9) had been judicially noticed. The taking of judicial notice was not mentioned until the Order Denying Reconsideration was entered, without notice to Appellant or any opportunity to be heard as to the tone and tenor of the evidence which was judicially noticed from and which adverse inferences were drawn.[17] The Bankruptcy Court disregarded the

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[17] The documentary evidence for which judicial notice was supposed to have been taken by the Bankruptcy Court was not identified by the Bankruptcy Court in the August 31, 2022 Order Denying Reconsideration, WAWB 61; 1-ER-4 at 6:16-18, "facts such as the dates of the filing and dismissal of the prior bankruptcy cases were all readily determinable from the Court's records and subject to judicial notice". This procedure violates Fed. R. Evid. 201(e) by depriving Appellant of the opportunity to address the intended judicial notice in a "meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. 545. Appellant does not know what records the Bankruptcy Court reviewed and had no opportunity to provide further information. The evidentiary basis for the dismissal based on judicially noticeable documents remains a mystery to this day except that it is clear that the Bankruptcy Court gave no weight to the Declarations, including but not limited to the summary of bankruptcy filings verified by Shelley Ann

Declaration of Kreg Kendall, the Declarations and statements on the record of Appellant (WAWB 59; 3-ER-26, Tr. 12:12-13:6; the Declarations of Shelley Ann Erickson, especially WAWB 36; 3-ER-12 regarding the extensive work being done to ready the real estate for sale.

In *Power v. Union Pac. R. Co.*, 655 F.2d 1380, 1383 (9th Cir. 1981), the Ninth Circuit Court of Appeals wrote:

> The question here, then, is whether the district court's findings and conclusions are based on a proper view of Washington state law and are adequately supported by the record.

There is no record whatsoever of which documents were subject to the Bankruptcy Court taking of judicial notice without notice to Appellant or opportunity for Appellant to be heard as required by Fed. R. Evid. 201(e).

Additionally, Appellee, the movant, did not assert unreasonable delay would result from allowing the sale but contended that the prospects of sale were speculative, contrary to the only factual evidence in the record: the uncontroverted Declaration of Kreg Kendall, the listing real estate broker (WAWB 37; E.R.11).

There were legal errors within the factual determination of bad faith

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Erickson which provides their explanation. WAWB 35; 3-ER-13 and great weight to the Jarvis Declaration in the summary proceedings.

filing of the May 12, 2022 Chapter 13 Petition. The Bankruptcy Court disregarded uncontroverted evidence in the record, drew inferences without adequate support in the record, without notice to the Appellant, and relied on the "separate and independent cause" for dismissal of unreasonable delay that is prejudicial to creditors under 11 U.S.C. § 1307(c)(1) without notice to the Appellant that "unreasonable delay" under 11 U.S.C. § 1307(c)(1) was at issue. Compare WAWB 59; 3-ER-26, Tr. 20:2-25; and WAWB 36, 51–51-7 and 54; 3-ER-12, 3-ER-8, and 3-ER-7.

As thoroughly discussed in Section I.A., Appellant was not proposing to modify the rights of any creditor holding a secured claim in his homestead, but was only proposing a cure consistent with the law of the State of Washington. The violation of Appellant's Due Process Rights occurred when the Bankruptcy Court *sua sponte* raised the "unreasonable delay" cause for dismissal for the first time when ruling on Appellee's Motion to Dismiss for Bad Faith Filing which relied on 11 U.S.C. § 105(a) for authority and did not raise, as cause for dismissal, 11 U.S.C. § 1307(c)(1). Appellant, who is self-represented, cannot constitutionally be required to guess at what other possible causes for dismissal would be invoked by the Bankruptcy Court *sua sponte*, when he had thoroughly

addressed the issues of which he had notice in his multiple filings on July 13, 2022.

The Bankruptcy Court recognized that Appellant's proposed Amended Chapter 13 Plan would provide for the sale of Appellant's Homestead subject to the approval of the Bankruptcy Court. The Bankruptcy Court addressed the proposed sale of Appellant's homestead in its August 31, 2022 Order Denying Reconsideration (WAWB 61, 1-ER-4], writing ". . . any credit for the Debtor's plan to sell the Property in the current case was tempered by the facts that (1) the Property remained unsold after being listed on the market for around six months and (2) the **Debtor sought an additional year to sell the property, which renders his plan unconfirmable given the anti-modification provisions of the Code**." (Emphasis added.) *Id.* at page 5, lines 3-7. The sale was proposed to cure the claimed default (11 U.S.C. § 1322(b)(3)) and did not "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence" contrary to 11 U.S.C. § 1322(b)(2). A proposal to cure is different from a proposal to modify. See *In re Frazer*, 377 B.R. at 628.

The Bankruptcy Court also erred as a matter of law by concluding

"any credit for the Debtor's plan to sell the Property in the current case was tempered by the facts that (1) the Property remained unsold after being listed on the market for around six months and (2) the Debtor sought an additional year to sell the property, which renders his plan unconfirmable given the anti-modification provisions of the Code." The conclusion numbered (1) contradicts the unopposed expert opinion of Kreg Kendall [WAWB 37 at ¶¶ 1-4 and 6; E.R.17 at ¶¶ 1-4 and 6]. The finding or conclusion numbered (2) is in error as a matter of law because the proposed sale is not a modification contrary to 11 U.S.C. § 1322(b)(2) but is proposed as a cure pursuant to 11 U.S.C. § 1322(b)(3) and was reasonable under Washington state law, which is applicable under 11 U.S.C. § 1322(e).

The careful analysis of the Bankruptcy Court in *In re Newton,*161 B.R. 207, 210-212 (Bankr. Minn. 1993) citing multiple courts in multiple jurisdictions has been cited in cases in various jurisdictions involving Chapter 13 plans which provided for sale of debtors' primary residences which are the claimants' only security for repayment. The *Newton* court allowed for the filing of a Second Amended Chapter 13 Plan to propose reasonable terms for the cure by sale. *In re Newton,*161 B.R. at 219-220.

As stated in Section I. A., above, the proposed sale of Appellant's

homestead in the Chapter 13 case does not modify the rights of any entity (however identified) which might claim to be secured by a first lien on the homestead because the Amended Chapter 13 Plan proposed to be filed would provide for payment in full of the fair market value of the subject real estate up to the amount of the Judgment which represents the first mortgage claim. The Bankruptcy Court erred as a matter of law because Appellant did not propose a delay in payment beyond the one year redemption period under RCW 6.23.020(1)[18] because the foreclosure sale had not occurred and Appellant's redemption period had not begun to run[19].

Appellant proposed to pay the party entitled to receive payment under the August 27, 2015 Judgment within the time allowed under the law

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[18] RCW 6.23.020(1) provides for a one year redemption period when the Judgment allows collection of a deficiency between the sales price and the value of the Judgment as does the August 27, 2015 Foreclosure Judgment. RJN Exhibit 7, page 2.

[19] Since the dismissal of Appellant's Chapter 13 Petition, a Sheriff's Sale was conducted on behalf of a nonparty to the Superior Court Judgment in whose name the Foreclosure Judgment was not granted and for an amount in excess of the amount due. See RJN Exhibit 8. The Order Confirming Sale was appealed, remand was ordered (RJN Exhibit 1), rehearing was requested (RJN Exhibit 2) and part of the remand Order is pending on appeal to the Washington Supreme Court (RJN Exhibit 6). The Sheriff's sale has not been confirmed.

of the State of Washington. His proposed cure is payment in full within the expectation of the legitimate secured creditor and Appellant's rights under Washington law. Appellant's proposed Chapter 13 Plan (WAWB 19, Section X. at C. and D; 3-ER-24) provided for the sale of Appellant's homestead with proceeds from the sale to be distributed to *allowed* secured claims setting forth the following provisions contained in the June 6, 2022 Chapter 13 Plan (WAWB 19; 3-ER-24):

> C. Upon the acceptance of an offer to purchase of the subject real estate, subject to court approval, valuation of the purported secured claim may be necessary. If the real estate sells for less than the purported and disputed secured claim amount, the market value of the homestead should be valued at the amount of the purchase price.
>
> D. In the event that the sale of the homestead provides more than the amount of the disputed secured claim which may or may not be allowed, Debtor will pay [up to[20]] 100% of all other allowed claims.

Appellant's proposed First Amended Plan set forth with his Opposition to the Chapter 13 Trustee's Motion to Dismiss [WAWB 33 at ¶ 13; 3-ER-15 at ¶ 13] provided for the sale of Appellant's homestead with proceeds from the sale to be distributed to the allowed claims as set forth

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[20] The proposed First Amended Chapter 13 Plan would have added the words "up to" which were missing from the June 6, 2022 Chapter 13 Plan at Section X.D.

below:

> 13. As to the Chapter 13 Trustee's ¶ 11), Debtor will amend his plan to provide for sale of the Debtor's homestead no later than 15 months from the date of confirmation [of the Amended Chapter 13 Plan], unless the Court orders otherwise on notice and hearing for an extension of time for sale based on the status of the sales prospects at that time.

The Chapter 13 Plan and the proposed Amended Chapter 13 Plan both provided for the sale of Appellant's homestead with proceeds from the sale to be distributed for payment of allowed claims. Appellant stated at the hearing on the Motion to Dismiss with Filing Bar on July 20, 2022 (Transcript of the July 20, 2022 Hearing at Tr. 13:2-3; E.R.19) :

> 2 I am working diligently to pay all allowed
> 3 creditors through the bankruptcy procedure.

As stated in I.A., above, the proposed sale of Appellant's homestead in the Chapter 13 case does not modify the rights of any entity claiming to be secured by a first lien on the homestead because the proposed First Amended Chapter 13 Plan would provide for payment in full of the fair market value of the subject real estate up to the amount of the August 27, 2015 Judgment which represents the first mortgage claim. The Bankruptcy Court erred as a matter of law because Appellant did not propose a delay in payment beyond the cure period allowed under Washington state law

including the one year redemption period required under RCW 6.23.020(1).[21] See also RCW 6.21.120, which provides, in part:

> . . . **The** [sheriffs'] **deeds shall be issued** upon request immediately after the confirmation of sale by the court in those instances where redemption rights have been precluded pursuant to RCW 61.12.093 et seq., or **immediately after the time for redemption from such sale has expired** in those instances in which there are redemption rights, as provided in RCW 6.23.060. . .

As of the date of dismissal of Appellant's Chapter 13 Petition, the Sheriff's Sale (the foreclosure sale as recognized in 11 U.S.C. § 1322(c)(1)) had not occurred, with the result that any default was allowed to be cured by bringing the total amount of payments due current. Moreover, Appellant's redemption period under RCW 6.23.020(1) had not begun to run[22].

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[21] RCW 6.23.020(1) provides for a one year redemption period when the Judgment allows collection of a deficiency between the sales price and the value of the Judgment as is the case with the August 27, 2015 Judgment. RJN Exhibit 13, page 2.

[22] In the Foreclosure Action, Appellant has objected to confirmation of the Sheriff's Sale which purportedly occurred on October 14, 2022 for irregularities in the sale process to the detriment of Appellant and his non-debtor spouse who are subject to a deficiency judgment (RJN Exhibit 7). See RCW 6.21.110(3). A Motion for Confirmation of Sale, filed in the name of a purported entity which is neither the judgment creditor nor has that purported entity been assigned the right to enforce the judgment from the named judgment creditor was not entitled to place a "credit bid" (RJN Exhibit 9). Appellant and his spouse timely objected to confirmation of the sale. The sale was confirmed on December 12, 2022 (RJN Exhibit 9).

Appellant's redemption rights under RCW 6.23.020(1) are an asset which would be included in a Chapter 13 estate post-petition, if a party with standing to seek relief from the automatic stay were to file such a motion and if it were granted.

II. The proceedings for Dismissal of the Chapter 13 Petition with a Two (2) Year Filing Bar Violated Appellant's Due Process Rights Guaranteed by the Fifth Amendment to the *Constitution of the United States*.

In addition to the violations of Appellant's Due Process Rights set forth in Sections I.A. and I.B., above, which deprived the Appellant of his right to be heard at a reasonable time and in a reasonable manner. *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). Appellant had no notice that the Bankruptcy Court would consider "unreasonable delay" under 11 U.S.C. § 1307(c)(1) as grounds for dismissal.

The Bankruptcy Court asked a single ambiguous question, which was inscrutable to Appellant's spouse, who was assisting him due to his hearing disability, because no notice of cause under 11 U.S.C. § 1307(c)(1).

Tr. 13:14-14:16 reads:

Reconsideration under Washington's Superior Court Civil Rules ("CR") 59 was filed on December 22, 2022 (RJN Exhibit 9).

THE COURT:
14 I guess the one question I did want to ask you
15 about the whole history of the bankruptcy cases -- I don't
16 know if you read Ms. Jarvis's declaration that sort of went
17 through the history of all these cases. But I read it
18 carefully, and I checked it against the docket to see if she
19 accurately described all the dates and what happened in
20 those cases. And it appeared, to me, to be accurate.
21 So the question I wanted to ask is did you see
22 anything in there about the prior bankruptcy cases that you
23 thought was inaccurate factually? I understand you have a
24 different take, that it wasn't done in bad faith. And
25 **that's a legal finding**. So what she might have said about
Page 14
1 that doesn't really matter. But I am interested if you
2 dispute any of the actual facts about those prior cases, the
3 fact that you filed them and that they were dismissed on the
4 dates she said they were dismissed and things like that.
5 MS. ERICKSON: I'm not sure how to answer that.
6 I'm not too sure how my husband would know how to answer
7 that either. We've been just diligently trying to make sure
8 that we're paying the right creditor. We haven't been
9 afforded the investigation on the note to know who we're
10 paying the right creditor to. And so we've tried to do this
11 through the court and pay off the proper creditor through
12 the courts. And so far, we've been unsuccessful. It's not
13 that we're not trying to pay the our debts, and it's not
14 that we're trying to avoid a debt that we feel we owe.
15 We're trying to make sure that we pay a debt that we do owe
16 to the right person.[23]

(Emphasis added.)

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[23] Ms. Erickson is correct on the law of the State of Washington under *Koppler v. Bugge*, 168 Wash. 182, 185, 11 P.2d 236 (Wash. 1932) which has not been reversed or otherwise distinguished.

Appellant's August 3, 2022 Motion for Reconsideration[24] (WAWB 51-51-7; 2-ER-8), amended on August 4, 2022 (WAWB 54; 2-ER-7) addresses the litigation events over a period of what was then 12 years and specifically calculates the number of days of delay resulting from efforts of Appellant or his spouse to reorganize their financial affairs in bankruptcy proceedings in which the automatic stay under 11 U.S.C. § 362(a) was in effect. If Appellant had notice that the Bankruptcy Court intended to rely on 11 U.S.C. § 1307(c)(1) as separate and independent cause for dismissal, he would have responded with evidence of the actual allocation of delay as he did in his Motion for Reconsideration. The calculation of delay and allocation to the long-standing litigation between Appellant and his nondebtor spouse and various claimants purporting to seek to the remedy of foreclosure was set forth in the August 4, 2022 Amended Motion for Reconsideration, based on the periods in which the automatic stay was in effect as a result of attempts to reorganize indebtedness under the Bankruptcy Code:

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[24] The Amended Motion for Reconsideration which corrects some errata and clarifies some contentions was filed on August 4, 2022. WAWB 54; 2-ER-7.

> . . .[F]rom not later than September 2, 2010[25] . . .and thereafter until February 28, 2018 when SPS first sought a Sheriff's Sale (Declaration of Emily Jarvis, WAWB 27-1, ¶¶ 6-7; 3-ER-19, ¶¶ 6-7) . . . is a period of more than 7 ½ years or 2,799 days. Other than seeking to reorganize their debts in bankruptcy proceedings in which the automatic stay was imposed for a total period, all-inclusive, of 454 days, it was an additional 1,534 minus 454 days during which the automatic stay was in effect, or 1,080 days, during which one purported secured creditor or another . . . was not delayed in pursuing enforcement of the purported debt obligation by foreclosure or 10.05% of the total days of the period of attempted foreclosures. The total days during which no stay affected any purported unsecured **or secured** creditor from September 2, 2010 until the date of the hearing on the Trustee's Motion to Dismiss with Filing Bar on July 20, 2022 has been 3,879 days or 87.4 percent (87.4%) of the total time during which foreclosure proceedings (nonjudicial and judicial) have been attempted against the Debtor's home . . .

By failing to give notice of that the "separate and independent" cause for dismissal under 11 U.S.C. § 1307(c)(1) to be considered by the Bankruptcy Court, Appellant was able to first be heard on this issue in his August 3, 2022 Motion for Reconsideration. Proceedings for reconsideration have different standards, burdens of proof and persuasion than those applicable to his Responses to the Motion to Dismiss with Filing

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[25] The Ericksons sought an injunction against nonjudicial foreclosure proceedings in King County Circuit Court which was removed to the United States District Court for the Western District of Washington as Case No. 10-cv-01423 on September 2, 2010. September 2, 2010 was used as the start date for computation of the (nonjudicial) foreclosure proceedings.

Bar. This situation is similar to the circumstances in which Manzo found himself in *Armstrong v. Manzo*, 380 U.S. at 552: seeking to vacate an order which had already been entered against him without notice and opportunity to be heard. Post-hearing remedies are more circumscribed than the original opportunity to be heard, which the Supreme Court of the United States held to have violated Manzo's Due Process Rights. "The hearing must be held in a meaningful manner and at a meaningful time." *Armstrong v. Manzo*, 380 U.S. at 552.

It is apparent that the Bankruptcy Court believed that Appellant and his wife had been using the filing of bankruptcy cases to delay foreclosure of their Homestead, but the delay from their bankruptcy filings are minuscule compared to the litigation tactics of the mortgage servicers. Appellant should have been allowed to address the Bankruptcy Court's concerns in that regard before the Chapter 13 Petition was dismissed and a filing bar imposed.

III. The findings of fact upon which the Order for Dismissal with Filing Bar are illogical and unsupported by the record.

This issue has been thoroughly addressed in Sections 1.A. and 1.B. The issues of law, nevertheless, predominate, because the application of 11

U.S.C. § 1322(b)(3) was not recognized by the Bankruptcy Court, so the findings of fact are tainted by the error of law.

IV. The Bankruptcy Court lacked authority to dismiss the Petition with a filing bar under 11 U.S.C. § 105(a).

Courts with jurisdiction over bankruptcy proceedings have generally established in case law that the authority for "dismissal with prejudice" arises under 11 U.S.C. § 349. Appellant has been unable to locate any case law authority for a bankruptcy court to dismiss a bankruptcy petition with a filing bar under 11 U.S.C. § 105(a) without evidence of a debtor's fraudulent conduct such as fraudulent pre-petition conduct by the debtor or an attempt to defraud the court through false representations by the debtor. See *Marrama v. Citizens Bank of Mass*., 549 U.S. 365, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007); in accord, *In re Duran*, 630 B.R. 797 (9th Cir. BAP 2021). The application of 11 U.S.C. §105(a) is rare because most debtors are "honest and unfortunate" (*Marrama*, 549 U.S. at 374-375) like Appellant, a retired, disabled individual who has been entirely forthcoming with the state and federal courts as he sought to identify the entity to which his payments were required to be made as required by Washington law under *Koppler v. Bugge*, supra.

It has long been uncontroversial that 11 U.S.C. § 105(a) cannot give bankruptcy courts powers and authority beyond the provisions of the Bankruptcy Code until *Marrama*. See dissent in *Marrama*, 549 U.S. at 382-383. But even since *Marrama*, the use of 11 U.S.C. §105(a) as the basis for a filing bar requires fraudulent conduct or egregious misuse of the bankruptcy process.

Due process requires that, at a minimum, and especially in a pro se case, sufficient notice of the statutes relied on must be given so that the pro se debtor can ascertain the issue which need to be addressed in a meaningful time and a meaningful manner (*Armstrong v. Manzo*, 380 U.S. at 552). The dismissal of the Chapter 13 Petition was granted without a finding of fraudulent or egregious conduct by the pro se Appellant who was seeking to conform his proposed cure by sale to the objections of the Chapter 13 Trustee.

V. The Court abused its discretion in imposing the filing bar for a period of two (2) years.

Bankruptcy courts generally find the authority to bar refiling for periods of time under 11 U.S.C. § 349, not 11 U.S.C. § 105(a). A filing bar beyond that set forth in 11 U.S.C. § 349 in reliance on 11 U.S.C. § 105(a)

requires a finding of egregious conduct usually involving fraud by the debtor. The finding of "bad faith" filing of the May 12, 2022 Petition is not supported by adequate evidence in the record. *Power v. Union Pac. R. Co.*, 655 F.2d at 1383.

VI. The Bankruptcy Court abused its discretion in failing to reconsider its Order.

Appellant presented the new evidence of POC No. 4-1 which he had not received prior to the July 20, 2022 hearing in an effort to address the falsity of the identity of the claimant and the earlier asserted false amount of the claim, which Appellee had uncritically accepted in a joint effort with the falsely identified claimant to assert that Appellant was ineligible to be a Chapter 13 debtor. Appellant carefully analyzed the new "cause" of "unreasonable delay prejudicial to creditors" which the Bankruptcy Court interposed *sua sponte*, in order to establish that the previous unsuccessful efforts to reorganize in bankruptcy proceedings was a small part of the litigation delay caused by the tactics of a number of different claimants including, but not limited to Long Beach Mortgage Corporation, Chase Financial, LLC, Washington Mutual Bank, the FDIC, JPMorgan Chase Bank, N.A., and SPS. Appellant reminded the Bankruptcy Court that the

Declaration of Jess G. Almanza (ER 31, Exhibit A) was new evidence of forgery discovered since the earlier attempts to reorganize in 2018 and 2019 and explained the recent short-comings in WAWB Case Nos. 21-12169-TWD and 22-10206-MLB) which prevented completed filings.

The denial of the Motion for Reconsideration was based on the wrong legal standard because it resulted from the violation of Appellant's Due Process Rights to be heard on the merits at "a meaningful time and in a meaningful manner". *Armstrong v. Manzo*, 380 U.S. at 552.

CONCLUSION

Appellant implores the Court to reverse the dismissal of his May 12, 2022 Chapter 13 Petition and to remand the case to the Bankruptcy Court with instructions to permit him to file his First Amended Chapter 13 Plan and for full and fair proceeding on proper notice and opportunity to be heard hereafter or at least to reverse the filing bar which prevents the Appellant from obtaining any relief under Title 11 until July 20, 2024.

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Dated at Galveston, Texas this 29th day of March, 2024.

Respectfully submitted,

/s/ Rhonda Hernandez

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ADDENDUM 1

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ADDENDUM 2

11 U.S. Code § 1322 - Contents of plan

(a) The plan—

(1) shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan;

(2) shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 of this title, unless the holder of a particular claim agrees to a different treatment of such claim;

(3) if the plan classifies claims, shall provide the same treatment for each claim within a particular class; and

(4) notwithstanding any other provision of this section, may provide for less than full payment of all amounts owed for a claim entitled to priority under section 507(a)(1)(B) only if the plan provides that all of the debtor's projected disposable income for a 5-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(b) Subject to subsections (a) and (c) of this section, the plan may—

(1) designate a class or classes of unsecured claims, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated; however, such plan may treat claims for a consumer debt of the debtor if an individual is liable on such consumer debt with the debtor differently than other unsecured claims;

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default;

(4) provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim;

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

(6) provide for the payment of all or any part of any claim allowed under section 1305 of this title;

(7) subject to section 365 of this title, provide for the assumption, rejection,

or assignment of any executory contract or unexpired lease of the debtor not previously rejected under such section;
(8) provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor;
(9) provide for the vesting of property of the estate, on confirmation of the plan or at a later time, in the debtor or in any other entity;
(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims; and
(11) include any other appropriate provision not inconsistent with this title.

(c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—
(1) a default with respect to, or that gave rise to, a lien on the debtor's principal residence may be cured under paragraph (3) or (5) of subsection (b) until such residence is sold at a foreclosure sale that is conducted in accordance with applicable nonbankruptcy law; and
(2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

(d)
(1) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—
(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525?[1] per month for each individual in excess of 4, the plan may not provide for payments over a period that is longer than 5 years.
(2) If the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is less than—
(A) in the case of a debtor in a household of 1 person, the median

family income of the applicable State for 1 earner;
(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525[1] per month for each individual in excess of 4, the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years.

(e) Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure a default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

(f) A plan may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute "disposable income" under section 1325.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2648; Pub. L. 98–353, title III, §§316, 528, July 10, 1984, 98 Stat. 356, 389; Pub. L. 103–394, title III, §§301, 305(c), Oct. 22, 1994, 108 Stat. 4131, 4134; Pub. L. 109–8, title II, §§213(8), (9), 224(d), title III, §318(1), Apr. 20, 2005, 119 Stat. 53, 65, 93; Pub. L. 111–327, §2(a)(43), Dec. 22, 2010, 124 Stat. 3562.)

[1] These amounts may be increased by further legislation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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