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

- -

In re the Bankruptcy of
JOHN EARL ERICKSON,
Debtor

Bankr. Court Case No. 22-10784-TWD

APPELLANT'S REPLY BRIEF

Dated at Galveston, Texas this 20th day of May, 2024.

Respectfully submitted,

/s/ Rhonda Hernandez

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REPLY INTRODUCTION

This Reply Brief is necessary because the Appellee, for the first time in the course of these proceedings in the Bankruptcy Court and on appeal, addresses the issue of prohibited modification under 11 U.S.C. § 1322(b)(2) as opposed to allowed cure under 11 U.S.C. § 1322(b)(3) by re-writing Appellant's first issue on appeal, as the first of Appellee's "Counter Statement of Issues", and Appellee purports to have this Court review an issue from which the Appellant did not appeal.

Appellant's first issue in his Opening Brief on appeal to this Court is identical to the issue he raised in his appeal to the BAP:

> 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).
>
> *Cf.* Appellant's Statement of Issues in his Opening Brief to the BAP (BAP No. 15, page 17 of 70 and page 21 of 70) and Appellant's Statement of Issues in his Opening Brief to this Court (Dkt Entry 17, page 20 of 72 and page 28 of 72)

Appellee writes:

COUNTER STATEMENT OF ISSUES

I. Whether the Bankruptcy Court committed clear error or abused its discretion in Denying Confirmation of the Debtor's Chapter 13 Plan.

. . .

(Appellee's Response Brief, Dkt Entry 25, page 8 of 23)

As Appellant has consistently argued on appeal to the BAP and to this Court, he never appealed from the denial of confirmation of his initial Chapter 13 Plan filed on June 6, 2022 (ER 24; 3-ER-536). In fact, he had already conceded in his Response to the Trustee's Objection to Confirmation (ER 15; 3-ER-433 at ¶5) that the June 6, 2022 Chapter 13 Plan had not been served on all interested parties and could not be confirmed. He plainly requested the opportunity to cure any deficiencies in the initial Chapter 13 Plan in a First Amended Plan to be promptly prepared, filed and served. (ER 15; 3-ER-430 through 435) The dismissal of Appellant's Chapter 13 Petition for "bad faith" filing prevented the filing and service of a First Amended Plan.

Appellant's position before the BAP and, again, before this Court, is that the Bankruptcy Court applied the wrong legal standard in dismissing his Chapter 13 Petition without leave to file a First Amended Chapter 13 Plan by considering Appellant's proposed sale of his Homestead to be a prohibited modification of rights "secured only by a security interest in real

property that is the debtor's principal residence" in his Chapter 13 Plan, contrary to 11 U.S.C. § 1322(b)(2), when the proposed sale was a cure allowed by 11 U.S.C. § 1322(b)(3) in accordance with state law (11 U.S.C. §1322(e)) because he was permitted under 11 U.S.C. § 1322(b)(8) to satisfy the claim against his Homestead using property of the estate (to wit, the Homestead itself).

Although Appellee has never addressed the violations of Appellant's Due Process in the Bankruptcy Court proceedings and through the proceedings before the BAP, this Reply Brief also addresses deprivation of Appellant's rights to Due Process under the Fifth Amendment to the *Constitution of the United States* which are inextricably linked with the foundational error of law by the Bankruptcy Court which preemptively precluded Appellant's efforts to reorganize his debts as allowed under 11 U.S.C. § 1322(b)(3), 11 U.S.C. § 1322(b)(8), and 11 U.S.C. § 1322(e) and the BAP's affirmation of the Bankruptcy Court's violations of Appellant's Due Process Rights.

To accomplish the affirmation of the violations of Appellant's Due Process Rights by the Bankruptcy Court, the BAP re-wrote Appellant's issue on appeal which prevented the filing of the First Amended Chapter 13

Plan by dismissal of the Chapter 13 Petition with a two (2) year bar against re-filing under any Chapter of Title 11 of the United States Code for two (2) years.

The BAP reviewed the non-issue of the denial of confirmation of the initial Chapter 13 Plan which was conceded in Appellant's Response to the Trustee's Objection to Confirmation. The BAP concluded in error that the initial Chapter 13 Plan filed on June 6, 2022 did not propose to cure the default under 11 U.S.C. § 1322(b)(3) but violated the anti-modification provisions of 11 U.S.C. § 1322(b)(2) by refusing to pay the purported secured creditor, which was never Appellant's position. Now Appellee pretends that the issue in this appeal was the denial of confirmation of the June 6, 2022 Chapter 13 Plan in order to embrace the BAP's foundational error while knowing that the issue is the denial of the opportunity to correct the defects in the initial Chapter 13 Plan by filing a single First Amended Plan.

REPLY STATEMENT OF THE CASE

Appellee did not respond to Appellant's Motion for Judicial Notice filed on March 29, 2024 (Dkt Entry 16), so it is assumed that the Court will consider the documents for which Judicial Notice has been requested. A

Supplemental Request for Judicial Notice (Supp. RJN 1) has been concurrently filed to provide the updated status of appellate proceedings in the state court foreclosure action, King County Superior Court No. 14-2-00426-5-KNT. The Petition for Review to the Washington Supreme Court of part of the Court of Appeals' November 13, 2023 Opinion (unpublished), RJN Exhibit 1, was denied on May 8, 2024 and the mandate for remand to King County Superior Court has not yet been entered. When the mandate is entered, the King County Superior Court must proceed to determine whether the October 14, 2022 Sheriff's Sale was lawfully confirmed. Whether or not the Sheriff's Sale was lawfully confirmed will have an impact not just on Appellant's rights in the state court foreclosure action but also on Appellant's right to reorganize in Chapter 13 proceedings.

Appellee's Statement of the Case in his Response blandly asserts procedural facts without providing any context for the events recited. With respect to Appellee's statement that the proceedings on appeal were the "sixth reorganization bankruptcy case" (Response Brief, Dkt Entry 25, page 9) the reasons that each of the preceding five (5) attempts to reorganize were unsuccessful are explained at ER 13, 3-ER-378 through 3-ER-379. The history of the unsuccessful bankruptcy reorganization filings included

Appellant's spouse being confused due to exhaustion in WAWB Case No. 19-12026-TWD (3-ER-378) and this very same Appellee's office refusing to communicate with her in order to obtain a rescheduled Section 341 hearing required by the Bankruptcy Court in WAWB Case No. 21-12169-TWD (3-ER-379). Moreover, in the present case, the Bankruptcy Court took judicial notice of facts which were never identified as being judicially noticeable nor was Appellant allowed to be heard with respect to the judicial notice taken contrary to Fed. R. Evid. 201.

Appellant and his spouse sought bankruptcy protection from the attempt to foreclose on their Homestead for the first time on May 2, 2018, after more than nine (9) years of attempting to establish the identity of the entity to which payments secured by the Deed of Trust on their Homestead (2-ER-262 through 2-ER-269), which was purportedly executed on March 4, 2006, are due to be paid. Bankruptcy Courts are empowered to determine the identity of claimants and the validity of claims.

Except for the bankruptcy cases filed in the Bankruptcy Court for Western District of Washington (WAWB) Case No. 18-11800-CMA (voluntarily dismissed upon bad advice from an attorney who is now disbarred) and, briefly, in WAWB Case No. 19-12026-TWD (for the

purpose of seeking mediation), the Appellant or his spouse were self-represented. In the case pending on appeal herein, Appellant and his spouse, as joint tenants as community property, listed their Homestead for sale with a qualified real estate broker and worked diligently to repair and renovate the property to maximize its value for sale.

The efforts of the Appellant and his spouse to maximize the value of their Homestead (detailed in the Declaration of Appellant's spouse at ER 12 with Exhibits 1-30; 3-ER-339 ¶¶ 3-6), in undisputed cooperation with their real estate broker, were belittled by the Bankruptcy Court. The Bankruptcy Court held their efforts against them because, without any evidence in the record to contradict the feasibility of the sale determined by the real estate broker (ER 11, 11 3-ER-332 through 3-ER-335, specifically at ¶¶ 1-9), the Bankruptcy Court found, at ER 26, 3-ER-614, Tr. 20:12-18:

> 12 The debtor indicates in this case that he will
> 13 sell the home. But that alone does not tip the balance in
> 14 his favor. **The debtor has already tried to sell the home**
> 15 **for about six months without success or even an offer.** He
> 16 wants another year or more, but cannot confirm a plan that
> 17 would allow that much time, given the anti-modification
> 18 provisions of the code with respect to home mortgages.
> (Emphasis added.)

The real estate broker's Declaration stated, under oath, that, under the

current market conditions, the property could be sold within one year after the completion of the repairs and renovation which he observed were being diligently pursued.

This appeal involves the misapplication of the anti-modification principle under 11 U.S.C. § 1322(b)(2) to Appellant's intent to cure under 11 U.S.C. § 1322(b)(3) to support a conclusion that proposed First Amended Plan would not be filed in good faith (11 U.S.C. § 1325(a)(3)) and that the Chapter 13 Petition had been filed in bad faith (11 U.S.C. § 1322(a)(7)) . Neither the Appellee nor the Bankruptcy Court cited 11 U.S.C. § 1325(a)(3) or 11 U.S.C. § 1325(a)(7). Appellant could not have anticipated that his fervent efforts to establish his good faith could be cast aside contrary to the evidence in the record because such an outcome would be contrary to the principles of justice.

Appellant was correct to rely upon the principles of justice. In *U.S. v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009), this Court held that a trial court's resolution of a motion cannot result from a factual finding that is illogical, implausible or without support in inferences which may be drawn from facts in the record. There is no evidence in the record whatsoever from which the inference of "bad faith" filing of the Petition could be

drawn. The proposal to cure a default by sale is allowed under 11 USC § 1322(b)(3) and the only evidence in the record is that Appellant and his spouse were diligently seeking to prepare their Homestead for sale and, according to the real estate broker, the sale could be accomplished within one year after the renovations were completed.

Furthermore, Appellant is entitled to the application of the principles of *Haines v. Kerner*, 404 U.S. 519, 520-521 (1972) as a self-represented party. His self-represented filings should have been construed liberally but instead he (and his spouse whose self-represented filings were also construed against him) were subjected to irrational obstacles to attempts at reorganization. All Appellant wanted to do was to sell his Homestead and pay his legitimate creditors. As his spouse wrote in her Declaration in opposing to the Trustee's Motion to Dismiss at 3-ER-420, at ¶ 14,

> 14. John and I have been working diligently on maintenance and repair projects to maximize the marketability and value of the homestead for sale so that we can pay legitimate allowed claims.

STATEMENT OF ISSUES IN REPLY TO APPELLEE'S COUNTER-STATEMENT OF THE ISSUES

I. Avoiding the actual issue of the denial of the opportunity to file a First Amended Plan deprives Appellant of his Due Process Rights to appellate review.

II. Appellant has the right to appellate review of the actual issues he raised on appeal, not the issues restated by the BAP and ultimately and belatedly adopted by the Appellee.

III. Due Process Rights apply to every stage of bankruptcy proceedings from the Bankruptcy Court and throughout the allowed appellate process.

REPLY SUMMARY OF THE ARGUMENT

Consistent with his Due Process Rights, Appellant is entitled to a determination of his actual issues on appeal which involved the denial of his opportunity to file a single First Amended Plan in order to cure his default by sale by dismissing his Chapter 13 Petition and imposing a filing bar on unsupported findings of "bad faith". The BAP cannot restate his issues for appeal and the Appellee cannot adopt the restated issues in an effort to obscure Appellant's right to cure the default in accordance with 11 U.S.C. §§ 1322(b)(3), 1322(b)(8) and 1322(e) by the misapplication of 11 U.S.C. § 1322(b)(2). Once appellate rights are provided, Due Process Rights apply in the appellate process.

REPLY ARGUMENT

I. Avoiding the actual issue of the denial of the opportunity to file a First Amended Plan deprives Appellant of his Due Process Rights to appellate review.

The result of re-writing the primary issue on appeal is to avoid appellate review of the clear errors of law which Appellant has presented.

Appellee did not attempt to re-write the issue on appeal in his response to the very same issue Appellant raised in the BAP appeal, but he now follows the BAP in an effort to subvert Appellant's right to appellate review of the foundational issue of denial of his opportunity to file a single First Amended Chapter 13 Plan upon being made aware of correctable deficiencies in the initial Chapter 13 Plan.

Being somewhat self-conscious about failing to recognize that Appellant had the right to cure the default resulting in the foreclosure judgment, although remaining remarkably taciturn in the face of the interplay between the actual facts of state court judgment of foreclosure in Appellant's case and the provisions of 11 U.S.C. §§ 1322(b)(3), 1322(b)(8) and 1322(e), Appellee attempts to impose a standard for filing and confirming a Chapter 13 plan upon the elderly, disabled Appellant, based on no legal authority whatsoever, to wit:

> Given the history of bankruptcy case filings for the debtor (and for his spouse) that had failed to result in plan confirmation, **the debtor likely should have anticipated that he would need to propose a feasible and confirmable Chapter 13 Plan from the onset of his bankruptcy case filing, and the debtor failed to do so.** The debtor's Chapter 13 Plan was unconfirmable, and the Bankruptcy Court did not err or abuse its discretion in its decision to deny confirmation of

the plan. SER-39.[1] (Emphasis added.)

(Appellee's April 28, 2024 Brief, Dkt Entry 25, page 16 of 23.)

Appellee creates a standard of performance which has no basis in law. If there were any legal authority for the boldly pronounced proposition that Appellant was allowed only to file a single error-free version of his proposed Chapter 13 Plan, Appellee would have cited such authority. Such authority does not exist. Instead, Appellee cites to the Order Denying Confirmation of the June 6, 2022 Chapter 13 Plan (SER-39) which provides no legal authority whatsoever but simply refers to the record of the proceedings on July 20, 2022 where no such authority is cited or referred to either. See Transcript of the July 20, 2022 Confirmation Hearing, Tr. 3:5-6:25 (3-ER-599 to 3-ER-600).

Both the Appellee in his Response Brief before this Court (for the first time) and the BAP in its Memorandum not only ignore, but entirely recast Appellant's first assignment of error to create a faux issue as if

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1 SER 39 is a single page Order Denying Confirmation entered on July 20, 2022 which nowhere states that Appellant was required to file a confirmable Chapter 13 plan "from the onset of the case filing." That is not the law, Appellee cites to no legal authority for the proposition and no where in the findings and conclusions made on the record of the confirmation hearing on July 20, 2022 (ER 26; 3-ER-597 through 600) is any such conclusion of law made by the Bankruptcy Court.

Appellant was appealing from the denial of confirmation of the initial Chapter 13 Plan filed on June 6, 2022. Appellant never sought review of the denial of confirmation of the initial Chapter 13 Plan which could not be confirmed because, if for no other reason, it was not served on all interested parties as required by the Local Rules of the Bankruptcy Court for the Western District of Washington. (Response to Trustee's Objection to Confirmation ER 15, 3-ER-433, ¶ 15.)

The Bankruptcy Court was well-aware that Appellant was not seeking to have the June 6, 2022 Chapter 13 Plan confirmed but was seeking the opportunity to file a First Amended Plan. The Transcript of the July 20, 2022 Confirmation Hearing and Motion to Dismiss Hearing appears at ER 26 (3-ER-594) and reads at Tr. 5:25-6:4 (3-ER-599 to 3-ER-600):

> 25 . . . Yeah, I'm going to deny confirmation of the plan. It
> 1 isn't even, in any meaningful dispute, actually, that this
> 2 particular plan cannot be confirmed. The debtor's response
> 3 admitted that he did not provide sufficient notice of the
> 4 plan, which alone dooms confirmation.

The Bankruptcy Court also denied confirmation of the initial Chapter 13 Plan for several defects as stated in the Transcript of the July 20, 2022 Confirmation Hearing and Motion to Dismiss Hearing (ER 26; 3-ER-594) and reads at Tr. 6:11-19 (3-ER-600):

. . . They include the improper marking of Sections 1B and C[2], the failure to have the secured car claim in the plan[3], the **violation of the anti-modification provisions of the code with respect to the home mortgage creditor**, an unspecified liquidation value[4], and **the plan payment amount being too low for feasibility.** There were some other problems as well[5], but the ones I

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[2] Section 1B and C are to be marked by checking boxes on the required local Chapter 13 form. 1B asks whether or not the plan limits the amount of a secured claim based on valuation of collateral and 1C asks whether or not the plan involves the avoidance of a lien. Those defects can readily be corrected by moving the check marks from yes to no.

[3] Appellant had already agreed to include the secured car payments in the First Amended Plan, whereas he had been paying the secured creditor on the car directly prior to the Objection to Confirmation. This would have required an Amended Schedule J to remove the car payment from one line and include the amount of the car payment as being available to pay the Trustee.

[4] Liquidation value would be easily provided in the First Amended Chapter 13 Plan because Appellee calculated it in his Objection to Confirmation. See ER 21; 3-ER-517 at ¶ 9. The pro se Appellant was seeking assistance from a bankruptcy preparer with the software capable of making the correct calculation, so he noted liquidation value as TBD (to be determined). Providing liquidation value involves filling in a blank at item IX. of the required local form. See ER 24; 2-ER-541.

[5] Among the other problems would have been the need for a deadline for completion of the proposed sale of the Homestead and the removal of the language involving the newly discovered evidence of forgery involving the endorsement of the Note set forth as a non-standard provision to which the Trustee objected, which the Bankruptcy Court indicated that it would not consider and which the BAP referenced as not being capable of determination in the Bankruptcy Court.

> 18 mentioned are sufficient to deny confirmation. And so I
> 19 will do so. (Emphasis added)

Appellant entirely agreed with the denial of confirmation of the initial Chapter 13 Plan filed on June 6, 2022 (ER 24) and did not appeal from the denial of confirmation of the June 6, 2022 Chapter 13 Plan. Why then, would the BAP and now the Appellee pretend that the Appellant was appealing from the denial of confirmation of the initial Chapter 13 Plan rather than addressing the denial of Appellant's request to file a First Amended Plan?

A reason for obscuring the true issue on the appeal brought by the Appellant may be the long-standing interpretation of 11 U.S.C. § 1322(b)(2) which permeates Chapter 13 cases throughout the Ninth Circuit involving debt claims "secured only by a security interest in real property that is the debtor's principal residence". That interpretation of 11 U.S.C. § 1322(b)(2) requires homeowners to make monthly payments to cover current monthly payments plus the monthly amount of arrears pro-rated over the term of the Chapter 13 plan as the only means for paying a debt claimed to be secured by a security interest in real property that is the debtor's principal residence under a confirmed Chapter13 plan. This pervasive interpretation is

superimposed over alternative means debt reorganization in Chapter 13 cases allowed under 11 U.S.C. § 1322(b)(3) and 11 U.S.C. § 1322(b)(8) and underlies the foundational error of law made by the Bankruptcy Court and the BAP in Appellant's case.

It appears that the Appellee, the Bankruptcy Court and the BAP may have been interpreting 11 U.S.C. § 1322(b)(3) and 11 U.S.C. § 1322(b)(8) through the lens of 11 U.S.C. § 1325(a)(5). 11 U.S.C. § 1325(a)(5) requires that, with respect to secured claims, the creditor must accept the terms of the Plan (11 U.S.C. § 1325(a)(5)(A))[6], the secured property must be surrendered to the creditor (11 U.S.C. § 1325(a)(5)(C))[7] or the provisions of 11 U.S.C. § 1325(a)(5)(B) must be satisfied. 11 U.S.C. § 1325(a)(5)(B) provides, in relevant part:

> (B)
> . . .
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and
> (iii) if—
>
> (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal

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6 The purported secured creditor did not accept the proposed treatment of the secured claim.

7 *Id.*

> monthly amounts; . . .

Appellee argued that Appellant had to make regular monthly payments sufficient to make an ongoing payment to the secured creditor as well as a "cure payment to address the arrears." The Trustee's Objection to Confirmation (ER 21; 3-ER-519 ¶4-6) reads, " . . . it does not appear that he has the means to pay the ongoing payment to the secured creditor, let alone a cure payment to address the arrears."

The BAP rejected the proposition that Appellant was proposing a cure by sale in order to affirm the Bankruptcy Court's denial of confirmation of the initial June 6, 2022 Chapter 13 Plan despite the fact that denial of the confirmation of the initial Chapter 13 Plan was not an issue for appellate review. Appellant had conceded that the initial Chapter 13 Plan required certain amendments as well as service on all interested parties. Having re-written the issue for appeal, the BAP then remarked, in rejecting Appellant's proposition of cure by sale:

> The plan did not provide for regular payments to Deutsche Bank. 1-ER-011.

The BAP ignored the application of 11 U.S.C. § 1322(b)(3) by outright rejecting the proposed cure by sale concluding, in error:

> Debtor's plan proposed to sell the Property without payment of the claim, which is neither a "cure" of the default nor adequate treatment of the claim under § 1325(a)(5). The bankruptcy court correctly determined that **Debtor's plan violated the anti-modification provision of chapter 13 because a sale of the Property without payment of Deutsche Bank's secured claim necessarily affected its rights.** (Emphasis added)
>
> (BAP No. 36, page 014)

The BAP imported 11 U.S.C. § 1322(b)(2) into 11 U.S.C. § 1325(a)(5) which neither the Appellee nor the Bankruptcy Court cited. The pro se Appellant had no notice that he would be required to address the "anti-modification provision of chapter 13" as it applied to the initial Chapter 13 Plan at the July 20, 2022 confirmation hearing because he was not seeking to confirm the initial Plan. Moreover, the Appellee, the Bankruptcy Court and the BAP made no analysis of the requirement of an ongoing payment in Appellant's case where there is equity in the real estate and the plan calls for cure by sale under 11 U.S.C. §1322(b)(3).

As is evident from Appellant's July 13, 2022 Response to the Trustee's Objection to Confirmation (ER 15; 3-ER-430 through 435), Appellant's First Amended Plan would have removed the checks in the boxes at Items 1B and 1C thereby resolving any question as to his intentions as to lien avoidance and valuation (3-ER-433 to 3-ER-434, ¶¶ 8 and 9). His

initial Chapter 13 Plan and his specified amendments in Response to the Trustee's Objection to Confirmation which were to be included in the First Amended Plan made it clear that Appellant was seeking the opportunity to file his First Amended Plan and that he did not propose to sell the Homestead without using the proceeds of the sale to pay the secured creditor entitled to the benefit of the Foreclosure Judgment.

Appellant was simply seeking ordinary proceedings to determine the identity of the entity entitled to enforce the security interest by reserving his right to object to the Proof of Claim, which he had not yet seen as of the date of the confirmation hearing, if the Proof of Claim was not filed on behalf of an entity which was the holder of the Foreclosure Judgment. He never proposed to retain the proceeds of the sale for himself. The issue of payment was to be determined in the Bankruptcy Court which would approve payments to allowed creditors.

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) 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.

II. Appellant has the right to appellate review of the actual issues he raised on appeal, not the issues restated by the BAP and ultimately and belatedly adopted by the Appellee.

Appellant continues to seek review of the Bankruptcy Court's refusal to allow Appellant to file a First Amended Chapter 13 Plan based on the error of law which resulted from the Bankruptcy Court's misapplication of 11 U.S.C. § 1322(b)(2) to the anticipated First Amended Chapter 13 Plan instead of 11 U.S.C. §§ 1322(b)(3), U.S.C. 1322(b)(8) and U.S.C. 1322(e) which were the basis for Appellant's reorganization effort.

Appellant did not appeal from the denial of confirmation of his initial Chapter 13 Plan which he conceded had not been properly served. (ER 15; 3-ER-433 at ¶5). He appealed from the denial of his request to file and serve First Amended Chapter 13 Plan in order to correct certain defects which were readily capable of being addressed as specifically set forth in his Response to the Trustee's Objection to Confirmation (ER 15; 3-ER-430

through 3-ER-435). The BAP affirmed the denial of confirmation of the initial Chapter 13 Plan from which Appellant did not appeal and ignored the issue from which he did appeal, which was his right to file a First Amended Plan, thereby depriving him of his right to appellate review of the issues for which he sought review in violation of his Due Process Rights under the Fifth Amendment to the *Constitution of the United States.*

III. Due Process Rights apply to every stage of bankruptcy proceedings from the Bankruptcy Court and throughout the allowed appellate process.

It is undisputed that 11 U.S.C. 1322(b)(2) prohibits modification of terms of first lien security interests on debtors' primary residences in Chapter 13 proceedings and is it not disputed that Appellant was proposing to cure the default by sale in order to pay the entity entitled to enforce the security interest on his primary residence under 11 U.S.C. 1322(b)(3). The Bankruptcy Court used the device of dismissal with prejudice of the Chapter 13 Petition and imposing a bar against re-filing of a Petition for *any* bankruptcy relief for two (2) years for "bad faith" filing to deny the pro se Appellant the opportunity to file a First Amended Chapter 13 Plan. The "bad faith" determination was based on the clear error of law by which the Bankruptcy Court denied Appellant the opportunity to cure the default

which resulted in the state court judgment of foreclosure by allowing Appellant (and his non-debtor spouse) to sell their Homestead as a cure under 11 U.S.C. § 1322(b)(3). The Bankruptcy Court clearly erred as a matter of fact and law by concluding that Appellant was seeking a prohibited modification under 11 U.S.C. § 1322(b)(2) when Appellant was not seeking a modification; he was seeking to cure the default which resulted in the judgment of foreclosure.

Providing the Appellant with the opportunity to file a First Amended Chapter 13 Plan, which both the Appellee (3-ER-519, lines 20-22[8]) and the purported secured creditor's attorney (3-ER-523, lines 3-7[9]) recognized, is procedurally routine. But the Bankruptcy Court hastened to dismiss Appellant's Chapter 13 Petition by concluding in error, as the Appellee had

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[8] THEREFORE, 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.

[9] 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.

argued in error (at ER 21; 3-ER-519 ¶4-6[10]), that the proposed sale was in " . . . violation of the anti-modification provisions of the code with respect to the home mortgage creditor." Tr. 6:13-15 (3-ER-600).

It is clear from the record that Appellant was not seeking confirmation of the initial June 6, 2022 Chapter 13 Plan. He was merely seeking to file and serve a First Amended Plan correcting defects in the initial filing as noted by the Chapter 13 Trustee. Nevertheless, the BAP affirmed the denial of confirmation of the initial Chapter 13 Plan from which Appellant had not appealed. That the initial Chapter 13 Plan could not be confirmed on the date for the confirmation hearing was already not disputed by the Appellant prior to the confirmation hearing.

The BAP ignored or failed to consider the contents of Appellant's July 13, 2022 Response to the Chapter 13 Trustee's Objection to Confirmation (ER 15; 3-ER-430 through 435) which set forth the terms of the proposed First Amended Plan, including the relatively minor changes to the terms of the proposed First Amended Plan (such as setting a date by which the cure by sale should be completed and including the payments on a

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[10] . . . it does not appear that he has the means to pay the ongoing payment to the secured creditor, let alone a cure payment to address the arrears.

car in the plan payment rather than as a direct payment to the creditor) and minor changes to the format of the related Schedules such as filing an Amended Schedule J to show that the car payments would be made under the Plan (3-ER-434 at ¶ 10).

The BAP erroneously concluded in its April 13, 2023, Memorandum Decision (ER 3; 1-ER-18), "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." Contrary to the conclusion of the BAP, Appellant had responded to each and every "substantive and procedural" deficiency in his June 6, 2022 Chapter 13 Plan in his July 13, 2022 Response to the Appellee's Objection to Confirmation (ER 15; 3-ER-430 through 3-ER-435).

Appellant's proposed the filing of his First Amended Chapter 13 Plan to cure all deficiencies identified by the Appellee Chapter13 Trustee in his Objection to Confirmation of the initial Chapter 13 Plan filed on June 6, 2022 and, due to his pro se status, his disabilities and the fact that he was not registered for electronic filing, Appellant sought at least 14 days to file his First Amended Plan. The terms of the proposed First Amended Chapter 13 Plan were clearly set forth in his July 13, 2022 Response to the Chapter

13 Trustee's Objection to Confirmation (ER 15). The pro se Appellant was not disputing that certain deficiencies in the initial Chapter 13 Plan (ER 24; 3-ER-537 through 3-ER-542) prevented confirmation of the June 6, 2022 initial Chapter 13 Plan and he merely requested leave to promptly file his First Amended Plan to address the deficiencies in accordance with the terms set forth in his July 13, 2022 Response to the Trustee's Objection.

Before the elderly, disabled Appellant even arrived in the court room (no more than 5 minutes after the time scheduled for the hearing), the Bankruptcy Court had denied confirmation of the initial June 6, 2022 Chapter 13 Plan, which Appellant had not opposed in his Responses to Objections to Confirmation by both the Appellee and the purported secured claimant. The Transcript of the July 20, 2022 Confirmation Hearing and Motion to Dismiss Hearing appears at ER 26 (3-ER-594) reads at Tr. 5:25-6:4 (3-ER-599 to 3-ER-600):

> 25 . . . Yeah, I'm going to deny confirmation of the plan. It
> 1 isn't even, in any meaningful dispute, actually, that this
> 2 particular plan cannot be confirmed. The debtor's response
> 3 admitted that he did not provide sufficient notice of the
> 4 plan, which alone dooms confirmation.

Not only did the pro se Appellant admit that he had not provided copies of the initial Chapter 13 Plan to all interested parties as required by the Local

Rules, he specifically addressed each and every valid shortcoming in his June 6, 2022 Chapter 13 Plan which were identified by the Appellee, all of which were readily capable of correction. Appellant simply requested a reasonable time to file and serve his First Amended Chapter 13 Plan and related changes to his Schedules (Schedule J would be amended to include the car payments in his income available for payments under the Chapter 13 Plan rather than scheduling the car payments as being paid directly to the creditor).

That Appellant was seeking the opportunity to promptly file a First Amended Chapter 13 Plan was acknowledged by the Bankruptcy Court at ER 26, Tr. 7:17-8:10:

> 17 What I just did before you walked in is I
> 18 denied confirmation of the plan that you had filed. And I
> 19 understood from your filings that it's your desire to file
> 20 another plan to fix some of the problems that existed with
> 21 the plan that you filed. At the end of that, I indicated I
> 22 was going to hear the second motion, and if I deny that
> 23 motion, then I will give you some deadlines to file your
> 24 next plan. If I grant that motion, then there wouldn't be
> 25 another plan in this case. So I wouldn't set any deadlines
> 1 because it wouldn't make any difference.
> 2 So now I'm going to hear -- oh, the other thing
> 3 that I said at the outset before you walked in -- I'm going
> 4 to give you a chance to argue, of course, but I just wanted
> 5 you to know, I have read all the submissions that you've
> 6 sent in that are on the record, including the declarations

> 7 from various individuals, including a real estate agent and
> 8 a document examiner.
> 9 So now I'll take argument on the motion to
> 10 dismiss.

Each of the defects identified by the Appellee were addressed in Appellant's June 18, 2022 Response to the Trustee's Objection to Confirmation of the June 6, 2022 initial Chapter 13 Plan (ER 15; 3-ER-430 through 435), but it was first and foremost conceded that the June 6, 2022 Chapter 13 Plan (the initial Chapter 13 Plan) could not be confirmed because the pro se Appellant had failed to serve all interested parties with the initial Chapter 13 Plan, which was filed after the May 12, 2022 Petition (3-ER-433 at ¶5). When he was allowed to address the Court after confirmation of the June 6, 2022 Chapter 13 Plan had been denied because he did not oppose the Objection, Mr. Erickson said at Tr. 12:12-18 (3-ER-606):

> 12 MR. ERICKSON: Okay. I am John Erickson, and I am
> 13 here to answer your questions as best I am able. I am
> 14 asking for leave to amend my plan and to set a date by which
> 15 my amended plan may be filed and served on all interested
> 16 parties, as well as a reasonable time to make some
> 17 corrections to the schedules. I request at least 14 days to
> 18 file and serve my amended plan.

It is clear from the record that Appellant was not seeking

confirmation of the initial June 6, 2022 Chapter 13 Plan, but he was merely seeking to file and serve a First Amended Plan. Nevertheless, the BAP affirmed the denial of confirmation of the initial Chapter 13 Plan, which was not in dispute, and ignored or failed to consider the contents of the Response to the Chapter 13 Trustee's Objection to Confirmation which set forth the terms of the proposed First Amended Plan, including the related minor changes to the format of the related Schedules. The BAP concluded in its April 13, 2023, Memorandum Decision (BAP No. 36; 1-ER-18), "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." Contrary to the conclusion of the BAP, Appellant had responded to each and every "substantive and procedural" deficiency in his June 6, 2022 Chapter 13 Plan in his Response to the Appellee's Objection to Confirmation (ER 15).

Moreover, the BAP held, "Debtor's plan proposed to sell the Property without payment of the claim, which is neither a "cure" of the default nor adequate treatment of the claim under § 1325(a)(5). The bankruptcy court correctly determined that Debtor's plan violated the anti-modification provision of chapter 13 because a sale of the Property without payment of

Deutsche Bank's secured claim necessarily affected its rights." BAP No. 36; 1-ER-19. As discussed above, Appellant made it clear that he intended to pay the allowed secured claim and requested the opportunity to file his First Amended Plan to conform to his intention (ER 15; 3-ER-434 to 3-ER-435 at ¶¶ 8 and 9).

Now the Appellee seeks to have this Court review the denial of the initial Chapter 13 Plan which is not before the Court because it has never been contested by the Appellant and has never been an issue on this appeal. The purpose of this belated restatement of the issues on appeal (which Appellee did not address this issue before the BAP because Appellee knew that Appellant was not appealing from the denial of confirmation of the initial Chapter 13 Plan) may be to rely on the clearly erroneous conclusions of the BAP, but Appellee knows better; this Court reviews the issues on appeal based on the record of proceedings before the Bankruptcy Court which was completely misconstrued by the BAP.

The main issue on this appeal is whether a self-represented debtor is entitled to file a First Amended Chapter 13 Plan after review of deficiencies reported by the Chapter 13 Trustee. A Chapter 13 Plan is equivalent to a pleading. Appellant's Due Process Rights require that he be allowed to be

understood before he is subjected to the potential loss of his property without the opportunity to pay his legitimate creditors. See *In re Fernandez*, 227 B.R. 174 (B.A.P. 9th Cir. 1998) (citing *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972): "court should use common sense in interpreting pleadings in pro se complaints".

REPLY CONCLUSION

The denial of Appellant's request to file a First Amended Chapter 13 Plan by misconstruing his good faith intent to pay his legitimate creditors should be reversed and the case should be remanded with instructions to allow the Appellant to file a First Amended Chapter 13 Plan. In addition, the finding of "bad faith" filing must be reversed as unsupported so that Appellant's future rights to relief in bankruptcy proceedings are not affected by the unsupported conclusion that he was acting in bad faith in filing his May 12, 2022 Chapter 13 Petition.

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Dated at Galveston, Texas this 20th day of May, 2024.

Respectfully submitted,

/s/ Rhonda Hernandez

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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