**Case No. 23-4220**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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MISSION HEN, LLC,

*Creditor-Appellant*,

v.

JASON M. LEE and JANICE CHEN,

*Debtors-Appellees*.

On Appeal from the Bankruptcy Appellate Panel
for the Court of Appeals for the Ninth Circuit
Case No. 22-1250-FLC

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# APPELLANT'S OPENING BRIEF

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

## Corporate Disclosure Statement

**9th Cir. Case Number(s)** 23-4220

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellant Mission Hen, LLC makes the following disclosures:

Mission Hen, LLC is a California limited liability company. No parent corporation or publicly held corporation owns ten percent (10.0%) or more of the membership interest (equity) in Mission Hen, LLC.

**Signature** /s/ BRENT D. MEYER **Date** February 28, 2024

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## INTRODUCTION

There are three discrete issues on appeal in this matter, and adoption of the logic and rationale championed by the Bankruptcy Appellate Panel will radically change the Chapter 13 landscape to unfairly benefit debtors.

First, eligibility for Chapter 13 bankruptcy is based on the same basic test for diversity jurisdiction pursuant to 28 U.S.C. § 1332, in which "[t]he amount in controversy is determined as of the time the action is commenced [and] [s]ubsequent events do not divest the court of jurisdiction [although] when a party for the purpose of obtaining jurisdiction alleges excessive damages beyond any reasonable expectation of recovery, jurisdiction does not attach." Matter of Pearson, 773 F.2d 751, 757 (6th Cir. 1985).

Remarkably, however, the Bankruptcy Appellate Panel disregarded unambiguous binding precedent and significantly expanded the eligibility standard for Chapter 13 debtors by authorizing bankruptcy courts to exercise undefined discretion and consider post-petition circumstances on a case-by-case basis, such as a contested evidentiary hearing on the value of collateral that occurred more than six months *after* the petition date.

Second, although Debtors failed to satisfy their burden and demonstrate feasibility regarding all payments required by the terms of their Chapter 13 plan, the Bankruptcy Appellate Panel also ignored the admissible evidence and

summarily concluded that "[t]he bankruptcy court must have *implicitly found* that [Debtors] parents could and would have increased their contributions as necessary to cover the monthly plan payments." Unfortunately, these implicit findings were not supported by the admissible evidence.

Third, in an issue of first impression, the Bankruptcy Appellate Panel greatly expanded the anti-modification provision of section 1322(b)(2), which prohibits modification of claims secured only by the debtor's principal residence, and pursuant to section 1322(c)(2), now authorize a debtor to modify the principal amount, interest rate, and maturity date for a *Home Equity Line of Credit* (HELOC) that matures during the term of a Chapter 13 plan.

## JURISDICTIONAL STATEMENT

This matter comes before the United States Court of Appeals for the Ninth Circuit on appeal from a *Judgment* entered by United States Bankruptcy Appellate Panel of the Ninth Circuit on November 13, 2023.

The United States Bankruptcy Court had original jurisdiction over these matters pursuant to 28 U.S.C. §§ 1334(b), 157(b)(1), and 157(b)(2)(L). The United States Bankruptcy Appellate Panel of the Ninth Circuit had jurisdiction over the intermediate appeal pursuant to 28 U.S.C. § 158(b).

The *Order Confirming Chapter 13 Plan* entered by the United States Bankruptcy Court on December 16, 2022, which resulted in termination of the

relevant proceeding, is a final and appealable order. See Bullard v. Blue Hills Bank, 575 U.S. 496, 502-03 (2015).

## STATUTORY AUTHORITIES

Section 109(e) of the Bankruptcy Code[1] provides in relevant part that "[o]nly … an individual with regular income and such individual's spouse … that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850 may be a debtor under chapter 13 of this title." 11 U.S.C. § 109(e).

Section 1322(b)(2) of the Bankruptcy Code provides that "[s]ubject to subsections (a) and (c) of this section, the plan may— 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." 11 U.S.C. § 1322(b)(2) (emphasis added to the "anti-modification provision").

Section 1322(c)(2) of the Bankruptcy Code provides that "[n]otwithstanding subsection (b)(2) and applicable nonbankruptcy law—in a case in which the last payment on the original payment schedule for a claim secured only by a security

[1] Unless otherwise specified, all statutory references hereinafter shall refer to 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code").

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." 11 U.S.C. § 1322(c)(2).

Section 1325(a)(1) of the Bankruptcy Code provides that "the court shall confirm a plan if—[t]he plan complies with the provisions of this chapter and with the other applicable provisions of this title." 11 U.S.C. § 1325(a)(1).

Section 1325(a)(6) of the Bankruptcy Code provides that "the court shall confirm a plan if— the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6).

**ISSUES PRESENTED**

There are three discrete legal issues on appeal in this matter, which frame the ultimate legal question of whether Bankruptcy Court erred in confirming the Fourth Amended Plan (defined below).

First, whether pursuant to 11 U.S.C. § 109(e) eligibility for a case filed under Title 11, Chapter 13 of the Unites States Code is determined as of the petition date and based solely on the debtor's bankruptcy schedules when the Bankruptcy Court finds no evidence that the debtor's bankruptcy schedules were filed in bad faith?

Second, whether pursuant to 11 U.S.C. § 1325(a)(6) a debtor can satisfy

their burden and demonstrates an ability to make all payments set forth in a plan of reorganization in a case filed under Title 11, Chapter 13 of the United States Code when *Schedule J: Your Expenses* (Official Form 106J) and supporting declarations for third-party contributions demonstrate that debtor does not have sufficient net income to make the required monthly payments?

Third, whether 11 U.S.C. § 1322(c)(2) authorizes a debtor in a case filed under Title 11, Chapter 13 of the United States Code to modify a claim secured only by a security interest in real property that is the debtor's principal residence?

Fourth, whether the Bankruptcy Court erred in confirming the *Fourth Amended Chapter 13 Plan of Reorganization* filed by Debtors pursuant to the standards set forth in 11 U.S.C. § 1325(a).

## STATEMENT OF THE CASE

On January 26, 2022 (the "Petition Date"), Jason M. Lee and Janice Chen ("Debtors" and "Appellees") filed a voluntary petition for relief under Title 11, Chapter 13 of the United States Code.[2] (2-ER-65-72).

On January 26, 2022, Debtors filed *Schedule A/B: Property*, which in relevant part, listed a fee simple interest in residential real property commonly known as 21 Twin Gables, Irvine, California 92620 (the "Twin Gables Property")

[2] Unless otherwise specified, all statutory references hereinafter shall refer to 11 U.S.C. §§ 101 *et seq*. (the "Bankruptcy Code").

with a current value of $1,045,000. (2-ER-75).

On January 26, 2022, Debtors field *Schedule D: Creditors Who Have Claims Secured by Property*, and listed the following claims:

| Secured Creditor | Collateral | Claim Amount |
|---|---|---|
| Chrysler Capital | 2021 Alfa Romeo Giulia | $ 0.00 |
| Mission Hen, LLC | 21 Twin Gable, Irvine, CA 92620 | $ 465,670.41 |
| PHH Mortgage Services | 21 Twin Gable, Irvine, CA 92620 | $ 952,510.26 |
| Stonetree Manor Community | 21 Twin Gable, Irvine, CA 92620 | $ 21,030.39 |
| Woodbury Community Association | 21 Twin Gable, Irvine, CA 92620 | $ 11,060.08 |
| **TOTAL** | | **$ 1,450,271.14** |

(2-ER-83-85). None of these secured debts were listed as contingent or unliquidated. (2-ER-83-85).

On January 26, 2022, Debtors field *Schedule E/F: Creditors Who Have Unsecured Claims*, and listed the following claims:

| Creditor | Claim Amount |
|---|---|
| Franchise Tax Board | $ 0.00 |
| Internal Revenue Service | $ 0.00 |
| Ally Financial | $ 3,010.00 |
| Capital One | $ 3,301.00 |
| Capital One | $ 462.00 |
| Capital One N.A. by American (1) | $ 8,440.74 |
| Citibank North American | $ 3,541.00 |
| DCFS Trust | $ 15,208.30 |
| Discover Financial | $ 2,234.00 |
| Dsnb Bloomingdales | $ 778.00 |
| SchoolsFirst FCU | $ 15,804.00 |
| SchoolsFirst FCU | $ 12,237.00 |
| SchoolsFirst FCU | $ 11,036.00 |

| | |
|---|---|
| Synchrony Bank/GAP | $ 2,783.00 |
| **TOTAL** | **$ 83,185.04** |

(2-ER-86-92). None of these unsecured debts were listed as contingent or unliquidated. (2-ER-86-92).

On January 26, 2022, Debtors filed a *Chapter 13 Plan* (the "Original Plan"), which in Class 3B, proposed to limit the value of the claim on Mission Hen to $92,489.74 secured by the Twin Gables Property pursuant to 11 U.S.C. § 506(a), with the remainder of the claim ($373,180.67) treated as a general unsecured claim pursuant to Class 5. (2-ER-130-144).

On January 26, 2022, Debtors filed a *Notice of Motion and Motion for Order Determining Value of Collateral* (the "Motion to Value"), which in relevant part, sought a determination that the Twin Gables Property was valued at $1,045,000 as of the Petition Date (January 26, 2022) pursuant to 11 U.S.C. § 506(a), and based on this asserted value, would bifurcate the claim of Mission Hen into a secured claim in the amount of $92,489.80 and an unsecured claim in the amount of $364,180.61[3]. (2-ER-144-177).

The Motion to Value, the Original Plan, and *Schedule A/B: Property* were

[3] In *Schedule D: Creditors Who Have Claims Secured by Property*, Debtors assert that the claim of Mission Hen is $465,670.41, whereas in the Motion to Value, Debtors assert that the claim of Mission Hen is $456,670.41. (Compare 2-ER-52 and 2-ER-117).

all consistent, in that Debtors asserted that the fair market value of the Twin Gables Property was $1,045,000. (2-ER-75, 2-ER-136, 2-ER-148).

On March 8, 2022, Mission Hen filed an *Objection to Confirmation of Chapter 13 Plan*, which in relevant part, raised 4 discrete objections to confirmation of the Original Plan. (2-ER-178-184).

On March 24, 2022, Mission Hen *filed Opposition to Debtors' Motion for Order Determining Value of Collateral*, which in relevant part, disputed Debtors' asserted value of the Twin Gables Property. (2-ER-185-188).

On July 8, 2022, Debtors filed *a Chapter 13 Plan (First Amended)* (the "First Amended Plan"), which in Class 3B, proposed to limit the value of the claim on Mission Hen to $265,473.06 secured by the Twin Gables Property pursuant to 11 U.S.C. § 506(a), with the remainder of the claim ($204,030.50) treated as a general unsecured claim pursuant to Class 5. (2-ER-189-203).

On July 12, 2022, Mission Hen filed a *Supplemental Objection to Confirmation of 1st Amended Chapter 13 Plan*, which in relevant part, raised 3 discrete objections to confirmation of the First Amended Plan. (2-ER-204-207).

On July 29, 2022, and following an evidentiary hearing on value of the Twin Gables Property, the Bankruptcy Court issued an *Order Re: Notice of Motion and Motion for Order Determining Value of Collateral* (the "Order re: Motion to Value"), which in relevant part, determined that the Twin Gables Property was

worth $1,225,000, that the claim of Mission Hen secured by the Twin Gables Property was $265,473.06, and that the general unsecured claim of Mission Hen was $204,030.50. (2-ER-213-214).

Om August 19, 2022, Debtors filed *a Chapter 13 Plan (Second Amended)* (the "Second Amended Plan"), which did not modify the proposed treatment of the claims of Mission Hen as set forth in the First Amended Plan. (2-ER-215-232).

On September 1, 2022, Mission Hen filed an *Objection to Confirmation of 2nd Amended Chapter 13 Plan*, which in relevant part, raised 4 discrete objections to confirmation of the Second Amended Plan, which included an objection to eligibility pursuant to 11 U.S.C. § 109(e). (2-ER-233-240).

On October 5, 2022, Debtors filed *a Chapter 13 Plan (Third Amended)* (the "Third Amended Plan"), which did not modify the proposed treatment of the claims of Mission Hen as set forth in the Second Amended Plan, except that the interest rate for the secured claim increased from 5.00% to 8.50%. (2-ER-241).

On October 13, 2022, Mission Hen filed an *Objection to Confirmation of 3rd Amended Chapter 13 Plan*, which in relevant part, raised 4 discrete objections to confirmation of the Third Amended Plan. (2-ER-259-267).

On October 21, 2022, Debtors filed *a Chapter 13 Plan (Fourth Amended)* (the "Fourth Amended Plan"), which did not modify the proposed treatment of the claims of Mission Hen as set forth in the Third Amended Plan. (2-ER-268-285).

On December 16, 2022, the Bankruptcy Court issued an *Order Confirming Chapter 13 Plan*, which confirmed the Fourth Amended Plan (the "Order Confirming Plan"). (2-ER-286-289).

On December 29, 2022, Mission Hen filed a *Notice of Appeal and Statement of Election*, which appealed the Order Confirming Plan. (2-ER-290-297). Mission Hen elected for the appeal to proceed before the Bankruptcy Appellate Panel for the Ninth Circuit. (2-ER-290-297).

On November 13, 2023, the Bankruptcy Appellate Panel for the Ninth Circuit issued an *Opinion* with a companion *Judgment*, which Mission Hen has now appealed to the United States Court of Appeals for the Ninth Circuit. (1-ER-2-29, 1-ER-30, 3-ER-456-487).

## SUMMARY OF THE ARGUMENT

Section I provides a comprehensive summary of Chapter 13 eligibility pursuant to section 109(e) consistent with the applicable standards set forth in In re Slack, 187 F.3d 1070, 1073 (9th Cir. 1999) and In re Scovis, 249 F.3d 975, 982 (9th Cir. 2001) and demonstrates that the Bankruptcy Court erred when considering post-petition events to find Debtors eligible for Chapter 13.

Section II provides a comprehensive analysis of all admissible evidence regarding Debtors' monthly income and expenses and demonstrates that the Bankruptcy Court erred when finding that Debtors satisfied the feasibility

requirements of section 1325(a)(6) and had sufficient monthly income to make all payments required by the terms of the Fourth Amended Plan.

Section III provides a detailed legal analysis of the anti-modification provision of section 1322(b)(2) and the limitations of Nobelman v. Am. Sav. Bank, 508 U.S. 324 (1993) to demonstrate that amendments to section 1322(c)(2) in the Bankruptcy Reform Act of 1974 did not overturn Supreme Court precedent, squarely on-point, and authorize bifurcation and avoidance of the undersecured portion of a claim that matures during the term of a confirmed Chapter 13 plan.

Section IV concludes that the Bankruptcy Court erred in confirming the Fourth Amended Plan because Debtors failed to satisfy their burden and comply with all elements of confirmation required by section 1325(a).

## STANDARD OF REVIEW

The Ninth Circuit reviews *de novo* the Bankruptcy Appellate Panel's decision on appeal from a bankruptcy court and applies the same standard of review that the Bankruptcy Appellate Panel applied to the bankruptcy court's decision. See In re Vasseli, 5 F.3d 351, 352 (9th Cir. 1993).

"The bankruptcy court's findings of fact are reviewed for clear error, while its conclusions of law are reviewed *de novo.*" Galam v. Carmel (In re Larry's Apt., L.L.C.), 249 F.3d 832, 836 (9th Cir. 2001). "Mixed questions of law and fact are reviewed *de novo*." In re Chang, 163 F.3d 1138, 1140 (9th Cir. 1998).

*De novo* review is independent, with no deference given to the trial court's conclusion, see Barclay v. Mackenzie (In re AFI Holding, Inc.), 525 F.3d 700, 702 (9th Cir. 2008), and requires this Court to "consider a matter anew, as if it has not been heard before, and as if no decision had been rendered previously." In re Smith, 435 B.R. 637, 643 (B.A.P. 9th Cir. 2010).

In contrast, clear error review is "highly deferential" and reversal is proper if this Court has "a definite and firm conviction that a mistake has been committed." In re Sussex, 781 F.3d 1065, 1071 (9th Cir. 2015).

All issues on appeal in this matter shall be reviewed *de novo*, as the first and second issues on appeal are legal issues of statutory construction, and the third and fourth issues on appeal are mixed questions of law and fact. See Galam, 249 F.3d at 836; In re Chang, 163 F.3d at 1140.

## ARGUMENT

### I. Debtors Were Patently Ineligible for Chapter 13 Because Their Liquidated, Non-Contingent Unsecured Debts Exceeded the Limitations Set Forth in 11 U.S.C. § 109(e) on the Petition Date

In disregarding unambiguous binding precedent, the Bankruptcy Appellate Panel significantly expanded the eligibility standard for Chapter 13 debtors by authorizing bankruptcy courts to exercise undefined discretion and consider post-petition circumstances on a case-by-case basis. This novel approach misapplies the eligibility standard set forth in In re Scovis, 249 F.3d 975 (9th Cir. 2001) and In

re Slack, 187 F.3d 1070 (9th Cir. 1999), as amended (Sept. 9, 1999), and should be summarily rejected.

As of the Petition Date (January 26, 2022), section 109(e) of the Bankruptcy Code provided that "[o]nly … an individual with regular income and such individual's spouse … that owe, on the date of the filing of the petition, ***noncontingent, liquidated, unsecured debts that aggregate less than $419,275*** and noncontingent, liquidated, secured debts of less than $1,257,850 may be a debtor under chapter 13 of this title." 11 U.S.C. § 109(e) (emphasis added).[4]

In Slack, the Ninth Circuit implicitly adopted the eligibility standard set forth by the Sixth Circuit in Matter of Pearson, 773 F.2d 751 (6th Cir. 1985), but two years later in Scovis, the Ninth Circuit affirmatively adopted the standard holding that "[w]e now simply and explicitly state the rule for determining Chapter 13 eligibility under [section] 109(e) to be that eligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." Scovis, 249 F.3d at 982.

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[4] Section 109(e) was amended on June 21, 2022, and now provides that "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated debts of less than $2,750,000 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated debts that aggregate less than $2,750,000 may be a debtor under chapter 13 of this title." 11 U.S.C. § 109(e). However, this amendment was not retroactive.

In Pearson, the Sixth Circuit articulated three primary justifications for adoption of the straightforward eligibility standard for Chapter 13.

"First, section 109(e) provides that the eligibility computation is based on the date of filing the petition; it states nothing about computing eligibility *after* a hearing on the merits of the claims." Pearson, 773 F.2d at 756 (emphasis added).

"Second, the fact that evidence must be taken to determine the amount of the claim indicates that, until then, the claim was unliquidated." Id. (emphasis added).

"Third, the Bankruptcy Code contemplates that a Chapter 13 plan be adopted and implemented in a short period of time. Rule 3015 of the Bankruptcy Code provides that a plan 'shall be filed within 15 days [after the filing of the petition] and such time shall not be extended except for cause shown....' 'Unless the court orders otherwise, the debtor shall commence making the payments proposed by a plan within 30 days after the plan is filed.' Thus, within forty-five days of the Chapter 13 bankruptcy petition, the debtor should be making payments under the proposed plan." Id. (emphasis added) *citing* 11 U.S.C. § 1326.

Based on these considerations, the Ninth Circuit recognized that the Pearson rule was grounded "in both the text of [section] 109(e) and Congressional intent, and is similar in nature to the subject matter jurisdiction context for purposes of determining diversity jurisdiction." Scovis, 249 F.3d at 982.

Specifically, in determining eligibility for purposes of diversity jurisdiction

pursuant to 28 U.S.C. § 1332, the Sixth Circuit observed that "[t]he amount in controversy is determined as of the time the action is commenced [and] [s]ubsequent events do not divest the court of jurisdiction [although] when a party for the purpose of obtaining jurisdiction alleges excessive damages beyond any reasonable expectation of recovery, jurisdiction does not attach." Pearson, 773 F.2d at 757 (citations omitted).

By analogy, "[t]he good sense of [the diversity jurisdiction] approach, however, commends itself to our consideration for the same basic problems exist here and, it seems to us, the same basic approach is both workable and fair. Chapter 13 eligibility should normally be determined by the debtor's schedules checking only to see if the schedules were made in good faith." Id.

Further, as the Ninth Circuit has also recognized, "[t]he language of the statute clearly states that the amount of the debt is determined as of '***the date of the filing of the petition***'" and the bankruptcy court cannot look to post-petition events for purposes of determining eligibility. See Slack, 187 F.3d at 1073 (emphasis in original); see also In re Fountain, 612 B.R. 743, 748 (B.A.P. 9th Cir. 2020) (*citing* Scovis holding that "eligibility under [section] 109(e) is determined as of the petition date, and is not based on post-petition events").

Finally, when determining eligibility under section 109(e), and consistent with section 506(a), the undersecured and unsecured amounts of all secured claims

are included in calculation of the aggregate unsecured debt based solely on the value of the collateral set forth in the schedules. Scovis, 249 F.3d at 983 ("It is true that although [section] 506(a) speaks in terms of an 'allowed claim,' applying [section] 506(a) to [section] 109(e) is necessary to prevent 'raising form over substance and manipulation of the debt limits' to achieve Chapter 13 eligibility.").

Here, as of the Petition Date (January 26, 2022), and based on an admission that the Twin Gables Property was valued at $1,045,000, Debtors' noncontingent, liquidated general unsecured claims were as follows:

| Creditor | Claim Amount |
|---|---|
| Mission Hen, LLC | $ 373,180.67 |
| Stonetree Manor Community | $ 21,030.39 |
| Woodbury Community Association | $ 11,060.08 |
| Franchise Tax Board | $ 0.00 |
| Internal Revenue Service | $ 0.00 |
| Ally Financial | $ 3,010.00 |
| Capital One | $ 3,301.00 |
| Capital One | $ 462.00 |
| Capital One N.A. by American (1) | $ 8,440.74 |
| Citibank North American | $ 3,541.00 |
| DCFS Trust | $ 15,208.30 |
| Discover Financial | $ 2,234.00 |
| Dsnb Bloomingdales | $ 778.00 |
| SchoolsFirst FCU | $ 15,804.00 |
| SchoolsFirst FCU | $ 12,237.00 |
| SchoolsFirst FCU | $ 11,036.00 |
| Synchrony Bank/GAP | $ 2,783.00 |
| **TOTAL** | **$ 488,456.18** |

(2-ER-83-92).

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There is no genuine dispute that Debtors' noncontingent, liquidated general unsecured claims ($488,456.18) exceeded the limitation set forth in section 109(e) ($419,275) as of the Petition Date (January 26, 2022). (2-ER-83-92). Further, the Bankruptcy Appellate Panel recognized that was no evidence of bad faith in the filing of Debtors' schedules. (1-ER-21-25).

As such, as of the Petition Date (January 26, 2022) and based on the originally filed schedules, Debtors were not eligible for relief under Chapter 13. See Scovis, 249 F.3d at 981-85; Slack, 187 F.3d at 1073-75.

Although acknowledging that Debtors' noncontingent, liquidated general unsecured claims exceeded the limitation set forth in section 109(e) as of the Petition Date, the Bankruptcy Appellate Panel looked to post-petition events to create a new eligibility standard for purposes of section 109(e) based on a flawed interpretation of the Scovis. (1-ER-21-25).

Specifically, when applying the Pearson rule as adopted in Scovis, the Bankruptcy Appellate Panel found that "[t]he inclusion of '**normally**' as a qualifier indicates that the Ninth Circuit foresaw instances where, irrespective of good faith, the eligibility analysis can sometimes involve more than just the face of the debtors' schedules." (1-ER-23-24) (emphasis added). Regrettably, this strained interpretation is significantly flawed.

First, an examination of the full text of the Pearson rule reveals that

"Chapter 13 eligibility should *normally* be determined by the debtor's schedules checking only to see if the schedules were made in good faith." Pearson, 773 F.2d at 756 (emphasis added). Thereafter, in adopting this rule, the Ninth Circuit in Scovis held that "the rule for determining Chapter 13 eligibility under [section] 109(e) to be that eligibility should *normally* be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." Scovis, 249 F.3d at 982 (emphasis added).

Under the Pearson rule, the general rule that "Chapter 13 eligibility under [section] 109(e) is determined by debtor's originally filed schedules" was modified by the adverb "normally," which provides the sole exception unless "the schedules were made not filed in good faith."

It would strain the English language to accept the interpretation championed by the Bankruptcy Appellate Panel that "normally" acts as a second modifier to the general rule. Specifically, under this interpretation, the Pearson rule would be re-written to provide that "Chapter 13 eligibility under [section] 109(e) is determined by debtor's originally filed schedule unless: (a) the schedules were not filed in good faith; or (b) other equitable post-petition considerations require looking beyond the face of the schedules." This interpretation is patently inconsistent with Pearson, Scovis, and Slack, and more importantly, fails to harmonize the statutory text of section 109(e) with Congressional intent.

Second, as specifically recognized in Slack, "[t]he language of the statute clearly states that the amount of the debt is determined as of '***the date of the filing of the petition.***'" Slack, 187 F.3d at 1073 (emphasis in original). Further, citing Scovis, the Bankruptcy Appellate Panel has previously held that "eligibility under [section] 109(e) is determined as of the petition date, and is not based on post-petition events." In re Fountain, 612 B.R. at 748.

Remarkably, however, the Bankruptcy Appellate Panel disregarded its own precedent and disregarded the express language of Scovis. Specifically, in accepting the value of the Twin Gables Property for proposes of calculating the undersecured portion of Mission Hen's claim pursuant to section 506(a), the Bankruptcy Appellate Panel examined and expressly relied upon the Order re: Motion to Value issued on July 29, 2022, more than six months *after* the Petition Date (January 26, 2022). (2-ER-213-214). However, as recognized in Slack and Scovis, post-petition events have absolutely no relevance or bearing on the determination of eligibility pursuant to section 109(e).

Third, by way of an example, take the inverse situation in which Debtors valued the Twin Gables Property at $1,225,000 on their original schedules, and six months after the Petition Date, the Bankruptcy Court valued the property at $1,045,000 pursuant to section 506(a). Utilizing the rationale and logic adopted by the Bankruptcy Appellate Panel, Debtors would not be eligible for Chapter 13.

As this simple example illustrates, taking into account post-petition events creates an extremely slippery slope, in which any potential event, such as debtor-in-possession (DIP) financing under section 364(c), valuation of collateral under section 506(a), allowance (or disallowance) of claims under section 502(a), and lease rejection claims capped under section 502(b)(6), could render a debtor ineligible for Chapter 13 months (or years) after the petition date. This is preciously why, in Slack, the Ninth Circuit rejected examination of post-petition events to determination eligibility under section 109(e), and the Ninth Circuit should again reject all attempts by the Bankruptcy Appellate Panel to allow an examination of post-petition events to determine eligibility.

Fourth, since the Pearson rule was derived in part by reference to the diversity jurisdiction approach for 28 U.S.C. § 1332, what would be the outcome if the District Court denied a Motion to Dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(1) when a complaint alleged that the amount in controversy was only $50,000? Undoubtedly, the Ninth Circuit would not find that the plaintiff alleged facts sufficient to establish diversity jurisdiction.

Under almost identical circumstances, for purposes of eligibility under section 109(e), Debtors' bankruptcy schedules filed under *penalty of perjury* clearly establish that they had general unsecured claims of $488,456.18 as of the Petition Date (January 22, 2022) and were not eligible for Chapter 13. (2-ER-83-

92). Remarkably, however, instead of admonishing Debtors for significantly undervaluing the Twin Gables Property by $180,000, the Bankruptcy Appellate Panel asserted that "it appears that their counsel simply made a mistake" without any acknowledgment that such a mistake rendered Debtors patently ineligible for Chapter 13. (1-ER-25).

Clearly, this type of professional negligence would not artificially establish diversity jurisdiction pursuant to 28 U.S.C. § 1332, and as such, should not factor into the eligibility analysis pursuant to section 109(e), as Pearson, Scovis, and Slack do not recognize such an exception.

Fifth, although Debtors never previously made the argument, the Bankruptcy Appellate Panel speculated that "the [B]ankruptcy [C]ourt could have held that Mission Hen's inexplicable delay amount to a waiver of its eligibility argument." (1-ER-23, n. 7). This argument should be summarily rejected because Debtors never previously raised this argument and it cannot be raised for the first time on appeal, because the Bankruptcy Court never found that Mission Hen waived any of its rights (2-ER-298, 3-ER-315), because Mission Hen timely raised this argument on September 1, 2022 in its objection to the Second Amended Plan (2-ER-233-240), which was filed merely 32 days after the Bankruptcy Court issued the Order re: Motion to Value on July 29, 2022 (2-ER-213-214), and because Mission Hen

had legitimate and strategic reasons to raise the eligibility argument when it did.[5]

## II. Debtors' Confirmed Fourth Amended Plan Was Not Feasible Because Debtors Lacked Sufficient Monthly Income to Satisfy Plan Payments Due Starting in the Tenth Month of the Plan

Confirmation of a Chapter 13 plan is governed by section 1325(a). See 11 U.S.C. § 1325(a); In re Welsh, 465 B.R. 843, 847 (B.A.P. 9th Cir. 2012). Pursuant to section 1325(a)(6), the bankruptcy court shall not confirm a plan unless "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). This is known as the feasibility requirement. The debtor, as the proponent of the Chapter 13 plan, bears the burden to prove that all elements of section 1325(a) are satisfied. See Welsh, 465 B.R. at 847; Meyer v. Hill (In re Hill), 268 B.R. 548, 552 (B.A.P. 9th Cir. 2001).

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[5] As the Bankruptcy Appellate Panel correctly noted, eligibility under section 109(e) is not jurisdictional, and if not raised prior to confirmation of a Chapter 13 Plan, such argument could be waived. See FDIC v. Wenberg (In re Wenberg), 94 B.R. 631 (B.A.P. 9th Cir. 1988) *aff'd* 902 F.2d 768 (9th Cir. 1990). However, given that the Bankruptcy Court could have determined the Twin Gables Property was valued in excess of $1,418,180.67, the claim of Mission Hen would have been fully secured, which pursuant to section 1325(a)(5), would have required Debtors to pay Mission Hen the full value of its allowed secured claim ($465,670.41) over the 5-year duration of the Chapter 13 Plan. Under this scenario, Mission Hen almost certainly would have elected not to raise eligibility as an objection to confirmation.

As such, it is difficult to comprehend how any court would determine that Mission Hen waived its right to object to confirmation based on eligibility under section 109(e) under these circumstances.

"Most courts have concluded that … [section] 1325(a)(6) can[not] be satisfied by gratuitous or volunteered contributions by nondebtor third parties." In re Welsh, 2003 WL 25273855, at *2 (Bankr. D. Idaho 2003) (citations omitted). "There is, however, some support for the idea that a finding of eligibility or feasibility might be warranted even if a portion of plan funding consists of contributions from friends or family, provided that there is direct evidence of an unconditional commitment or similar affirmative action on the part of the contributing party." Id.

"Although reliance on donations is heavily disfavored [there is no] categorical bars against the use of donations from relatives." In re Schwalb, 347 B.R. 726, 759 (Bankr. D. Nev. 2006). "A debtor's plan can be feasible, even though it relies on contributions, where there is a firm commitment by the family member to make the contributions and a long and undisputed history of providing for the debtor." In re Deutsch, 529 B.R. 308, 312 (Bankr. C.D. Cal. 2015) (citation omitted).

However, when the debtor fails to proffer any evidence in support of the contributions, the Chapter 13 plan is patently unfeasible. See In re Khan, 2015 WL 739854, at *3-4 (Bankr. D. Colo. 2015) (holding that plan was not feasible where business income was speculative and "occasional contributions" from wife's family were not documented or otherwise supported by evidence); In re Crowder,

179 B.R. 571, 574 (Bankr. E.D. Ark. 1995) (dismissing chapter 13 case where debtor's father did not affirm any specific amount or other assistance that would continue for duration of the plan); In re Norwood, 178 B.R. 683, 691 (Bankr. E.D. Penn. 1995) (denying confirmation where debtor did not provide any evidence of the amount of mother or sister's income or of their other expenses and liabilities).

The question of feasibility pursuant to section 1325(a)(6) is fact-specific and is directly dependent upon evidence submitted by the debtor. See Welsh, 2003 WL 25273855, at *3. "Evidence that would support the feasibility of nondebtor contributions includes evidence as to the ability, motivation, and unqualified commitment of the nondebtor to make the contributions." Deutsch, 529 B.R. at 312 (citation omitted).

Here, the confirmed Fourth Amended Plan required Debtors to make the following payments to the Chapter 13 Trustee: $2,115.99 for 3 months; $2,240.41 for 3 months; $5,813.03 for 3 months; and $6,293.10 for 51 months. (2-ER-69-270). However, pursuant to *Schedule I: Your Income*, Debtors identify combined monthly income of $10,010.95, of which, $1,200.00 was based on monthly income described as "co-debtors' parents moved in and paying rent." (2-ER-95-96). On *Schedule J: Your Expenses*, Debtors identify monthly expenses of $7,813.21 (2-ER-97-98).

As such, Debtors had monthly net income of only $2,197.74 available to

make all required payment under the confirmed Fourth Amended Plan, as follows:

| | | | |
|---|---|---|---|
| 23. | **Calculate your monthly net income.** | | |
| 23a. | Copy line 12 *(your combined monthly income)* from Schedule I. | 23a. $ | 10,010.95 |
| 23b. | Copy your monthly expenses from line 22c above. | 23b. -$ | 7,813.21 |
| 23c. | Subtract your monthly expenses from your monthly income. The result is your *monthly net income*. | 23c. $ | 2,197.74 |

(2-ER-98).

Further, in an attempt to demonstrate feasibility, Linda Chen (mother of debtor Janice Chen) filed a *Declaration of Linda Chen*, which in relevant part, provided that "we were contributing $1,200 from our social security as payment of rent [and] [n]ow that we have sold our residence, we are able and willing to increase our contribution/rent payment to $4,900 per month." (2-ER-208, ¶ 3). However, except for increasing monthly rent obligations from $1,200 to $4,900, Linda Chen did not otherwise declare that she had the ability or willingness to make any additional payments to Debtors. (2-ER-208-209).

Based on all admissible evidence before the Bankruptcy Court, Debtors identified the following sources of income and expenses:

| **INCOME** | **Amount** | **Evidence** |
|---|---|---|
| Net Employment Income | $ 2,010.95 | Schedule I, Line 7 |
| Interest and Dividends | $ 6,800.00 | Schedule I, Line 8b |
| Rental Income | $ 4,900.00 | Schedule I, Line 8h; Chen Decl. ¶¶ 3-4 |
| **TOTAL INCOME** | **$ 13,710.95** | |

| **EXPENSES** | **Amount** | **Evidence** |
|---|---|---|
| Monthly Expenses | $ 7,813.21 | Schedule J, Line 23b |
| **TOTAL EXPENSES** | **$ 7,813.21** | |

**NET INCOME** **$ 5,897.74** ($13,710.95 – $7,813.21)

(2-ER-95-98, 2-ER-208-209).

As set forth in the confirmed Fourth Amended Plan, Debtors were required to make payments to the Chapter 13 Trustee in the aggregate amount of $6,293.10 commencing in month 10 for 51 consecutive months. However, as set forth above, based on all evidence submitted to Bankruptcy Court, Debtors were only able to substantiate monthly net income of $5,897.74, which is woefully insufficient for Debtors to make all required payments under the confirmed Fourth Amended Plan.

Remarkably, notwithstanding that Debtors failed to satisfy their burden under section 1325(a)(6) and demonstrate feasibility with making all required plan payments starting in month 10, the Bankruptcy Appellate Panel asserted that "[t]he bankruptcy court must have *implicitly found* that Ms. Chen's parents could and would have increased their contributions as necessary to cover the monthly plan payments." (1-ER-28) (emphasis added).

Given that Linda Chen was never called as a witness at the confirmation hearing (2-ER-298, 3-ER-315), given that the *Declaration of Linda Chen* solely provided for a commitment of rental income in the monthly amount of $4,900 (2-ER-208-209), and given that there was no other admissible evidence before the Bankruptcy Court regarding feasibility, it was clear error for the Bankruptcy Court to determine that Debtors satisfied their burden pursuant to section 1325(a)(6). Further, the Ninth Circuit should summarily reject any "implicit findings" made by

the Bankruptcy Court as recommended by the Bankruptcy Appellate Panel, as there is simply no admissible evidence to make such a finding.

### III. Debtors Cannot Modify the Allowed Secured Claim of Mission Hen Pursuant to 11 U.S.C. § 1322(c)(2)

A bedrock principal of Chapter 13 is that debtors cannot modify the contractual rights of claims secured only by their principal residence.

Specifically, section 1322(b)(2) provides that a chapter 13 plan may "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." 11 U.S.C. § 1322(b)(2) (emphasis added.) The emphasized portion is known as the "anti-modification provision."

This anti-modification provision of section 1322(b)(2) was included in the Bankruptcy Code "to encourage the flow of capital into the home lending market." Nobelman v. Am. Sav. Bank, 508 U.S. 324, 332 (1993). There was a legitimate concern by Congress that in the absence of protections set forth in section 1322(b)(2), residential mortgage lenders would "be extraordinarily conservative in making loans in cases where the general financial resources of the individual borrower are not particularly strong." See Hearings Before the Subcomm. on Improvements of the Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 707 (1977) (statement of Edward J. Kulik, Senior Vice

President, Real Estate Div., Mass. Mut. Life Ins. Co.); see also Lomas Mortg., Inc. v. Louis, 82 F.3d 1, 5 (1st Cir. 1996).

In Nobelman, the Supreme Court unequivocally rejected use of section 506(a) as a mechanism to value and bifurcate claims partially secured only by the debtor's principal residence. See 508 U.S. at 332. Thereafter, the Ninth Circuit created an exception to Nobelman finding that section 1332(b)(2) did not prohibit avoidance of claims wholly unsecured by the debtor's principal residence based on a valuation of the collateral pursuant to section 506(a), which adopted the minority position on the issue. See In re Zimmer, 313 F.3d 1220, 1227 (9th Cir. 2002).

However, this is a matter of first impression, as the Ninth Circuit has not squarely addressed whether section 1322(c)(2) provides a second exception to the anti-modification provision of section 1322(b)(2), and authorizes a debtor to utilize section 506(a) to bifurcate and avoid the undersecured portion of a claim that matures during the term of a confirmed Chapter 13 plan.

Initially, the Fourth Circuit held that "[section] 1322(c)(2) does not trump [section] 1322(b)(2) (and Nobelman) to allow bifurcation of an undersecured home mortgage note." Witt v. United Comp. Lending Corp. (In re Witt), 113 F.3d 508, 514 (4th Cir. 1997). The Eleventh Circuit disagreed and rejected the reasoning of Witt. See In re Paschen, 296 F.3d 1203, 1209 (11th Cir. 2002).

Over twenty years later, the Fourth Circuit overturned Witt in an *en banc*

decision, which included a strong and well-reasoned dissent by three judges. See Hurlburt v. Black, 925 F.3d 154 (4th Cir. 2019) (*en banc*). The Fourth Circuit and the Eleventh Circuit are the only circuit courts that have addressed this issue.

As set forth in detail in the dissent in Hurlburt, there are three primary reasons why the amendments to section 1322(c) did not overrule Nobelman and authorize a debtor to bifurcate and avoid the undersecured portion of a claim that matures during the term of a confirmed Chapter 13 plan.

First, "[i]t is clear that, by enacting 11 U.S.C. § 1322(c)(2) *after* Nobelman, Congress limited the scope of that decision." Hurlburt, 925 F.3d at 167 (dissent). However, notwithstanding feigned denial, it is abundantly clear that the Hurlburt majority unequivocally overturned Nobelman with respect to an entire class of mortgages. Id. at 169 ("The fact that the majority chooses to pretend that it is not overruling Nobelman need not lead anyone else to subscribe to its denial of the obvious.").

Congress often responds to decisions interpreting federal statutes, and in doing so, Congress is often explicit, noting specific decisions in the statutory text or, by its terms, confronting a prior holding head on. See Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 174 (2009). This sort of inter-branch interaction supports the longstanding presumption that Congress enacts new law with an eye towards existing interpretive decisions. See United States v. Langley, 62 F.3d 602, 605

(4th Cir. 1995) (*en banc*) ("Congress is presumed to enact legislation ... with the knowledge of the interpretation that courts have given to an existing statute.").

This presumption has even greater force in contexts, like bankruptcy law, where Congress actively polices judicial interpretations of substantive statutes. See Zuber v. Allen, 396 U.S. 168, 185 n.21 (1969) ("[The] significance [of congressional silence] is greatest when the area is one of traditional year-by-year supervision ... where watchdog committees are considering and revising the statutory scheme."); see also Matthew R. Christiansen & William N. Eskridge, Jr., CONGRESSIONAL OVERRIDES OF SUPREME COURT STATUTORY INTERPRETATION DECISIONS, 1967-2011, 92 Tex. L. Rev. 1317, 1361-62 (2014) (describing active congressional supervision over the bankruptcy code and related interpretive decisions). For that reason, the Supreme Court has made clear that courts "will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." Hamilton v. Lanning, 560 U.S. 505, 517 (2010) (internal quotation marks omitted).

Given these considerations, "Congress must exhibit some modest degree of clarity before lower courts can adopt a reading of a statute that would undermine a significant, on-point Supreme Court precedent." Hurlburt, 925 F.3d at 170 (dissent).

Unfortunately, however, this modest degree of clarity is completely lacking

from the Bankruptcy Reform Act of 1974, and as such, it is difficult to comprehend that Congress would overturn Nobelman without *any reference* to the opinion, which the Supreme Court decided the prior year.

Second, "[i]t is clear that Congress meant for [section] 1322(c)(2) to create an exception to Nobelman's prohibition against modifying the timing of loan repayments." Hurlburt, 925 F.3d at 170 (dissent).

"The text of [section] 1322(c)(2) mentions "payments" four times, along with extended discussions of payment timing." Id. *citing* 11 U.S.C. § 1322(c)(2) (emphasis in original) ("[I]n 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.").

Clearly, "[t]hese words have significance [as] [t]hey serve as an indication that [section 1322(c)(2)] is about payment timing and scheduling, not about amounts." Hurlburt, 925 F.3d at 170 (dissent).

The relationship between section 1322(c)(2) and section 1325(a)(5), which it references, confirms the emphasis on the timing of payments. Specifically, "the text of [section] 1322(c)(2) focuses on payments and timing, so too does [section] 1325(a)(5), which is a procedural section that outlines the conditions under which a

court 'shall confirm a plan.'" Hurlburt, 925 F.3d at 171 (dissent).

"Subsection (5)(B) … allows a court to confirm a plan where the plan distributes 'not less than the allowed amount' of the claim 'in the form of periodic payments ... in equal monthly amounts.'" Hurlburt, 925 F.3d at 171 (dissent). "[Section] 1322(c)(2) allows debtors to modify payment schedules [and section] 1325(a)(5) describes how exactly to do it." Id.

"In other words, [section] 1322(c)(2) would allow a mortgage on which the final payment would be due in one year to be repaid over the full five years of the plan, even though such a schedule modification would formerly have run afoul of Nobelman. Id. This interpretation harmonizes the text of section 1322(c)(2) in the larger context of the Bankruptcy Code, while preserving Nobelman, which Congress never sought to overturn.

Further, the heading for Section 301 of the Bankruptcy Reform Act of 1994 is entitled "*Period for Curing Default Relating to Principal Residence*." See 108 Stat. 4106. "What the text of [section] 1322(c)(2) makes clear, its section heading, which is equally part of the law, leaves no doubt: the provision empowers debtors to repay their mortgages over the length of the plan." Hurlburt, 925 F.3d at 171 (dissent).

"Taken together, the text [section] 1322(c)(2) and the structure of the [Bankruptcy] Code [indicate] that Congress clearly intended to overturn

Nobelman's holding on modifying payment timing." Hurlburt, 925 F.3d at 171 (dissent). However, Congress did not have any intent to overturn Nobelman with respect to modifying the claim amount.

Third, in overturing Witt, Hurlburt relies heavily on the rule of the last antecedent asserting that the phrase "as modified pursuant to section 1325(a)(5)" only modifies the word "claim" rather than the complete phrase "payment of the claim." See Hurlburt, 925 F.3d at 160-61. This is a misapplication of the rule.

Specifically, the rule of the last antecedent normally applies to lists, and without a list, section 1322(c)(2) falls outside the normal scope of the rule. See Hurlburt, 925 F.3d at 172 (dissent). "And under any circumstances, the rule does not require the mechanical reading of only the single word before the modifying provision." Id.

Further, the rule of the last antecedent provides that "a limiting clause or phrase ... should ordinarily be read as modifying only the noun or *phrase* that it immediately follows." Lockhart v. United States, 577 U.S. 347, 351 (2016) (emphasis added). However, the majority "attempts to isolate one word—'claim'—which would be fine, of course, if that word were not integrally part of the phrase—'payment of the claim.'" Hurlburt, 925 F.3d at 172 (dissent).

Here, "as modified pursuant to section 1325(a)(5)" immediately follows the phrase "payment of the claim," the rule of the last antecedent clearly supports the

reading that only payments (of the claim) can be modified, and not the claim itself. See 11 U.S.C. § 1322(c)(2); see also Hurlburt, 925 F.3d at 172 (dissent).

There is no material different between a traditional 30-year mortgage and a *Home Equity Line of Credit* (HELOC), when both are secured only by a debtor's principal residence. Further, pursuant to Hurlburt and Paschen, if a HELOC coincidentally happens to mature during the term of a Chapter 13 plan, then Nobelman is automatically inapplicable and section 1322(c)(2) authorizes a debtor to utilize section 506(a) to bifurcate and avoid the undersecured portion of a claim.

This serendipitous (or more aptly manufactured) result is exactly what happened in this matter. Debtors initially filed a petition for relief under Title 11, Chapter 13 of the United States Code on October 5, 2021. (2-ER-34). Since Mission Hen's loan matured on January 15, 2017 (3-E-354), more than 60 months after the original petition date (October 5, 2021), which is the maximum term for a Chapter 13 plan (see 11 U.S.C. § 1322(d)), Debtors were unable to utilize section 1322(c)(2) to modify the secured claim of Mission Hen.

However, on January 26, 2022, Debtors elected to voluntarily dismiss their original Chapter 13 case, and without any legitimate explanation, *on the exact same day*, Debtors filed the current Bankruptcy Case. (2-ER-34, 65-72). This was not a coincidence, as the Petition Date (January 26, 2022) was less than 60 months from the maturity date (January 17, 2027) of Mission Hen's loan, and section

1322(c)(2) now became a viable option for Debtors to seek modification of the secured claim of Mission Hen pursuant to section 1322(c)(2).

As this actual hypothetical demonstrates, there is no legitimate reason or logic under the Bankruptcy Code for this inconsistent treatment of secured claims, based simply on an arbitrary maturity date for a loan, and the Ninth Circuit should reject Hurlburt and Paschen, which implicitly overturn Nobelman and create distinctions for different types of mortgages without any merit.

The Bankruptcy Code provides the honest, but unfortunate, debtor with a fresh start, not a head start. However, under these circumstances, allowing Debtors to utilize section 1322(c)(2) to avoid paying Mission Hen in excess of $204,030.50 on account of its allowed claim provides Debtors with a significant head start through bad-faith manipulation of the Bankruptcy Code.

## IV. The Bankruptcy Court Erred in Confirming Debtor's Fourth Amended Chapter Plan Pursuant to 11 U.S.C. § 1325(a)

Confirmation of a Chapter 13 plan is governed by section 1325 and the bankruptcy court shall not confirm a Chapter 13 plan unless all requirements of section 1325(a) are satisfied. See 11 U.S.C. §§ 1325(a)(1)-(9). As set forth in Section II above, the debtor, as the proponent of the Chapter 13 plan, bears the burden to prove that all elements of section 1325(a) are satisfied. See Welsh, 465 B.R. at 847; Hill, 268 B.R. at 552.

Here, the Bankruptcy Court erred in confirming the Fourth Amended Plan

because Debtors failed to satisfy their burden of proof and establish that the plan satisfied three separate and distinct requirements of section 1325(a).

First, as set forth in detail in Section I above, as of the Petition Date (January 26, 2022), Debtors were patently ineligible for Chapter 13 because their aggregate unsecured debt ($488,456.18) (2-ER-83-92) exceeded the limitation set forth in section 109(e). See 11 U.S.C. § 109(e). As such, Debtors failed to satisfy their burden to establish that the Fourth Amended Plan satisfied section 1325(a)(1). See 11 U.S.C. § 1325(a)(1) ("[t]he plan complies with the provisions of this chapter and with the other applicable provisions of this title").

Second, as forth in detail in Section II above, Debtors submitted evidence demonstrating that they earned monthly net income of $13,710.95 and had monthly expenses of $7,813.21, which resulted in monthly disposable income of $5,897.74. (2-ER-95-98, 208-209). However, the Fourth Amended Plan required Debtors to remit monthly plan payments to the Chapter 13 Trustee in the aggregate amount of $6,293.10 for 51 consecutive months commencing in the tenth month. (2-ER-270). As such, Debtors failed to satisfy their burden and establish the Fourth Amended Plan satisfied section 1325(a)(6). See 11 U.S.C. § 1325(a)(6) ("the debtor will be able to make all payments under the plan and to comply with the plan").

Third, as set forth in detail in Section III above, section 1322(c)(2) prohibits Debtors from using section 506(a) to value and bifurcate the secured claim of

Mission Hen. See 11 U.S.C. §§ 1322(b)(2), 1322(c)(2). However, in Class 3B of the confirmed Fourth Amended Plan, Debtors only provide for the secured claim of Mission Hen in the aggregate amount of $265,473.06, while the remainder of the allowed claim ($204,030.50) is treated as a general unsecured claim in Class 5. (2-ER-274). As such, Debtors failed to satisfy their burden to establish that the Fourth Amended Plan satisfied section 1325(a)(1). See 11 U.S.C. § 1325(a)(1) ("[t]he plan complies with the provisions of this chapter and with the other applicable provisions of this title").

Based on the foregoing, the Bankruptcy Court erred in confirming the Fourth Amended Chapter 13 Plan because Debtors failed to satisfy their burden that the plan satisfied each element of section 1325(a).

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## CONCLUSION

Based on the foregoing, Mission Hen respectfully requests that this Court enter an order reversing and vacating the *Order Confirming Chapter 13 Plan* issued by the United States Bankruptcy Court on December 16, 2022, and remanding this matter for further proceedings consistent therewith.

Date: February 28, 2024

Respectfully submitted.

**MEYER LAW GROUP, LLP**

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

**Form 17. Statement of Related Cases Pursuant to Circuit Rule 28-2.6**

**9th Cir. Case Number(s)** 23-4220

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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I am the attorney or self-represented party.

**This brief contains 9,741 words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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**APPELLANT'S OPENING BRIEF**

**APPELLANT'S EXCERPTS OF THE RECORD INDEX VOLUME**

**APPELLANT'S EXCERPTS OF THE RECORD (VOLUME 1 OF 3)**

**APPELLANT'S EXCERPTS OF THE RECORD (VOLUME 2 OF 3)**

**APPELLANT'S EXCERPTS OF THE RECORD (VOLUME 3 OF 3)**

**Signature** /s/ BRENT D. MEYER **Date** February 28, 2024