Case No. 23-4220

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re JASON M. LEE,
JANICE CHEN, Debtors

MISSION HEN, LLC

Appellant,

v.

JASON M. LEE and
JANICE CHEN

Appellees.

On Appeal from the United States Bankruptcy
Appellate Panel of the Ninth Circuit
Case No. 22-1250-FLC
Before Hon. FARRIS, LAFFERTY, and CORBIT, Bankruptcy Judges.

APPELLEE'S ANSWER BRIEF

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INTRODUCTION

Appellees Jason M. Lee and Janice Chen ("Appellees") hereby file their answer brief in response to the opening brief filed in this appeal by appellant Mission Hen, LLC ("Appellant")(collectively the "Parties").

There are three issues to be determined by this Court: (1) whether Appellees complied with the requirements as set forth in 11 U.S.C §109(e), (2) whether Appellees complied with the requirements as set forth in 11 U.S.C. §1325(a)(6), and (3) whether the Bankruptcy Court properly interpreted 11 U.S.C. §1322(c)(2), in conjunction with 11 U.S.C §506(a) and 11 U.S.C. §1325(a)(5), as allowing for the modification of the amount of Appellant's secured claim.

STATUTORY AUTHORITIES

11 U.S.C. §105(a) provides:

"The Court may issue an order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

11 U.S.C §109(e) provides:

"Only an individual with regular income that owes, on the date of the filing

of the petition, noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850.000, 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, 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. §506(A) provides:

"An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property…, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest… is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

11 U.S.C.§1322(b) provides:

"Subject to subsections (a) and (c) of this section, the plan may – modify the rights of holders of secured claim, other than a claim secured by a

security interest in real property that is the debtor's principal residence…"

11 U.S.C.§1322(c) provides:

"Notwithstanding subsection (b)(2) and applicable non-bankruptcy law- in a case in which the last payment on the original payment schedule for a claim secured only by an 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.§1325(a)(6) provides:

"Except as provided in subsection (b), the court shall confirm a plan if- the debtor will be able to make all plan payments under the plan and to comply with the plan."

STATEMENT OF THE CASE

On January 26, 2022, Appellees commenced the bankruptcy case underlying this appeal by filing a voluntary petition for relief under chapter 13 of the Bankruptcy Code, their Original Chapter 13 Plan, and Motion for Order Determining Value of Collateral (the "Valuation Motion") in the Central District of California. (2-ER-65-145) Appellees listed Appellant's debt as disputed. (2-ER-83).

On February 9, 2022, Appellant and Appellee entered into a stipulation to

continue the hearing on the Valuation Motion out to April 7, 2022, to allow Appellant additional time to conduct an appraisal.

On March 8, 2022, Appellant filed and objection to Confirmation of Appellees' Chapter 13 Plan. Appellant objected to the valuation of Appellees' residence, the proposed interest on Appellant's secured claim, the feasibility of Appellees' plan and to whether Appellees were making their best effort to repay the unsecured creditors. (2-ER-178-184).

On March 24, 2022, Appellant filed their Opposition to Appellees' Valuation Motion. Appellant's, in their opposition, alleged the fair market value of Appellees' residence to be $1,360,00.00. (2-ER-185-187).

On April 8, 2022, the Bankruptcy Court set an evidentiary hearing to determine the value of Appellee residence. The hearing was set for and heard on June 22, 2022.

On July 8, 2022, Appellees filed amended schedules I and J of their bankruptcy petition and their First Amended Chapter 13 Plan. (2-ER-189-203) Appellees amended their plan to address the arrears listed on PHH Mortgage's proof of claim.

On July 8, 2022, Appellant filed an objection to Confirmation of Appellees' Amended Chapter 13 Plan. Appellees objected to the valuation of Appellees' residence, the proposed interest on Appellant's secured claim, and the feasibility of

Appellees' plan. (2-ER-204-207).

On July 20, 2022, Appellees filed a Declaration Re: Contribution to Plan. (2-ER-208-2012).

On July 29, 2022, the Bankruptcy Court entered an Order Re: Motion for Order Determining the Value of Collateral (the "Valuation Order"). (2-ER-213-214). Per the Valuation Order, Appellees' residence was valued at 1,225,000.00. (2-ER-214). Based on said value, PHH Mortgage, the senior lienholder, was determined to have a secured claim of $959,526.94 and Appellee was determined to have a secured claim of $265,473.06. (*Id.)*

On August 19, 2022, Appellees filed their Second Amended Chapter 13 Plan. (2-ER-215-232). Appellees' amended plan conformed with the Valuation Order.

On September 1, 2022, Appellant filed an objection to Confirmation of Appellees' Second Amended Chapter 13 Plan. Appellant objected to the feasibility of Appellees' plan, the proposed interest on Appellant's secured claim, Appellees' §109(e) eligibility, and to whether Appellees were making their best effort to repay the unsecured creditors. (2-ER-233-240).

On October 5, 2022, Appellee's filed their Third Amended Chapter 13 Plan. (2-ER-241-258). Appellees amended their plan to adjust the interest rate on Appellant's secured claim.

On October 13, 2022, Appellant filed an objection to Confirmation of Appellees' Third Amended Chapter 13 Plan. Appellant objected to the feasibility of Appellees' plan, Appellees' §109(e) eligibility, and the modification of Appellant's claim as proposed. (2-ER-259-267).

On October 21, 2022, Appellees filed their Fourth Amended Chapter 13 Plan and Reply to Appellant's objection to Confirmation of Appellee's Third Amended Plan. (2-ER-268-285). Appellees amended the plan to address typographical errors.

On October 27, 2022, the Bankruptcy Court, after reviewing all filed objections and entertaining oral arguments from both the Appellee and Appellant, overruled Appellant's objections based on feasibility and the anti-modification clause of §1322(b)(2).

On December 1, 2022, after determining Appellees were both current on their post-petition mortgage payments to PHH Mortgage and plan payments, the Bankruptcy Court confirmed Appellee's Fourth Amended Chapter 13 Plan. (2-ER-306-208)

On December 16, 2022, the Bankruptcy Court entered an Order Confirming Chapter 13 Plan, wherein it confirmed the Appellee's Fourth Amended Chapter 13 Plan. (2-ER-286-289)

On December 29, 2022, Appellant appealed the Order Confirming Chapter

13 Plan to the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP"). (2-ER-290-297)

On November 13, 2023, the BAP issued an Option and Judgment affirming the Bankruptcy Court, which Appellant has now appealed to the United States Court of Appeals for the Ninth Circuit. (1-ER-2-29, 1-ER-30)

SUMMARY OF ARGUMENT

Sections A, B and C provide a detailed analysis of how the value of Appellees' residence, a sum necessary to make a §506(a) valuation which in turn was necessary to make a §109(e) eligibility determination, was not readily ascertainable. Therefore, the Bankruptcy Court was forced to look outside the schedules to make a clear determination regarding the amount and classification of Appellant's debt. Based on that determination, the Bankruptcy Court correctly determined the value of Appellees' residence and therefore Appellant's unsecured claim, which clearly demonstrated that Appellees were within the §109(e) debt limits.

Section D provides a detailed analysis of how the Bankruptcy Court considered Appellant's objections, the Trustee's recommendation, and the evidence at hand. Based on those considerations, the Bankruptcy Court correctly determined that Appellees' plan had a reasonable chance of success and thus feasible pursuant to the requirements set forth in §1325(a)(6).

Sections E and F provide a detailed analysis of how the "plain language" of §1325(a)(5), as made applicable by the "plain language" in §1322(c)(2), clearly allows for Appellee to provide for Appellant's claim, as determined by §506(a), as part of the allowed secured claim. This fact is supported by relevant case law and acts of Congress. Therefore, the Bankruptcy Court did not err in allowing Appellant's claim to be bifurcated and crammed down.

ARGUMENT

A. The Bankruptcy Court Did Not Err In Looking Outside of the Schedules When Determining the Unsecured Portion of Appellant's Debt, Because the Unsecured Portion Was Not Readily Determinable Or Ascertainable

It is clear from the language found in 109(e) that the time to determine eligibility is at the time of the filing of the petition. Furthermore, this Circuit has stated "[w]e now simply and explicitly state he rule for determining Chapter 13 eligibility under §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." *In re Scovis, 249 F.3d 975, 982 (9Th Cir. 2001)*. Therefore, at the time of the filing petition, Appellees must have had less than $419,275.00 in noncontingent, liquidated unsecured debt to be chapter 13 debtors.

Here, as clearly indicated in Appellee's schedules, Appellant's claim was

listed as disputed. (2-ER-85). The question of how we determine whether a disputed claim is noncontingent and liquidated for purposes on 109(e) eligibility was addressed in *In re Slack,* 187 F.3d 1070, 1074 (9th Cir. 1999).

In *Slack* this Circuit stated that "if the amount of the creditor's claim is at the time of filing of the petition is ascertainable with certainty, a dispute regarding liability will not necessarily render a debt unliquidated. Whether a debt is subject to 'ready determination' will depend on whether the amount is easily calculable or whether an extensive hearing will be needed to determine the amount of the debt, or the liability of the debtor." *Slack,* 187 F.3d at 1074.

Appellees do not dispute that the debt owed to Appellant is liquidated in the sense that Appellee acknowledges liability for the total sum owed to Appellant. However, Appellees do dispute the secured and unsecured amounts of Appellant's debt.

To determine the secured and unsecured portions of a debt, we look to 11 U.S.C. §506(A), which reads in part:

> "An allowed claim of a creditor secured by a lien on property in which the estate has an interest… is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property… and is an unsecured claim to the extent that the value of such creditor's interest… is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest."

Per 11 U.S.C. §506(A), to determine the disputed values of a secured and

unsecured debt, a hearing is required. However, per the strict interpretation of the holdings in *Socvis* and *Slack* endorsed by Appellant, there would be no time allowed for such a hearing.

The question of how to determine the unsecured and secured status of a debt for purposes of 109(e) eligibility, without a hearing, was addressed in *Scovis.* In *Scovis* this Circuit determined that a court may look to the originally filed schedules to ascertain whether the secured and unsecured status of a debt is "readily determinable" or "readily ascertainable" and based on those findings decide 109(e) eligibility. Specifically, this Circuit held that determining Chapter 13 eligibility under §109(e) "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. No such request was made by Appellant to do so, until after the Bankruptcy Court held an evidentiary hearing, established the value of Appellees' residence and determined the secured and unsecured portions of Appellant's claim. (2-ER-261-262) However, had Appellant made the request, even under the most mechanical reading of the holding in *Scovis,* as advocated by Appellant, there would still have to be a two-step process. First, a court would review the originally filed schedules. Second, a court would determine, based on the facts and review of the schedules, whether the court could make a readily determinable decision, with certainty, regarding the secured and unsecured

portions of Appellant's claim. In most bankruptcy cases, with normal facts, this is a simple process. For example, in *Scovis* the declared homestead in conjunction with a judgment lien disclosed in the schedules was sufficient to determine the unsecured portion of the lien for eligibility purposes. *Scovis, 249 F.3d* at 984. Furthermore, n *Slack* a stipulation amongst the parties regarding damages was sufficient to determine the unsecured debt exceeded the 109(e) limits. *Slack,* 187 F.3d at 1074.

In *Sovis* this Circuit applied the "readily determinable" standard when determining the secured and unsecured status of debt for the purpose of determining 109 (e) eligibility. This Circuit stated that "[t]his principle of certainty carries equal force in the present context, where the homestead exemption's effect on the status of Debtor's debt as secured or unsecured is readily ascertainable." *Scovis, 249 F.3d* at 983.

The question of how to determine whether a debt was readily determinable or readily ascertainable has been addressed by this Circuit. In *In re Fostvedt*, 823 F. 2d 305, 306 (9th Cir. 1987) this circuit held that a debt is liquidated for the purposes of calculating eligibility for relief under 109 (e) if the amount of debt is readily determinable. This Circuit stated that the question of whether a debt is liquidated "turns on whether it is subject to a 'ready determination and precision in computation of the amount due.'" *Fostvedt*, 823 F. 2d at 306 (quoting *In re*

Sylvester, U19 B.R. 671, 673 (B.A.P. 9th Cir. 1982)). In *In re Wenberg,* 94 B.R. 631, 633 (B.A.P. 9th Cir. 1988) the bankruptcy appellate panel stated that "[t]he definition of 'ready determination' turns on the distinction between a simple hearing to determine the amount of a certain debt, and an extensive and contested evidentiary hearing in which substantial evidence may be necessary to establish amounts or liability." *Wenberg,* 94 B.R. 631 at 634 (aff'd 902 F. 2d 768 (9th Cir. 1990)).

Here, the secured and unsecured status of Appellant's debt was in dispute and not readily determinable or ascertainable. This is evidenced by the fact that Appellees' Chapter 13 Plan and Valuation Motion, which were filed contemporaneously with the petition, were vigorously opposed by Appellant. In Appellant's initial Objection to Confirmation of Chapter 13 Plan Appellant stated that "[Appellant] believes the fair market value of the Property to be significantly greater than Debtors' valuation such that its claim is wholly secured." (2-ER-180) Appellant went on to state that "since the value of the Property is an issue that will likely require expert testimony, [Appellant] requests that this matter be continued to obtain a verified appraisal of the Property, and requests the cooperation of Debtors in obtaining the verified appraisal since [Appellant] will require interior access to the Property." (*Id.)* Furthermore, Appellant, in its opposition to the Motion to Value asserted that Appellee's residence was valued at $1,360,000.00 at

the time of filing. (2-ER-186) Ultimately, an evidentiary hearing was required to determine the true secured and unsecured status of Appellant's claim.

Unlike in *Scovis*, Appellees did not pay down their unsecured debts post-petition to become eligible under 109(e). Nor did any creditors waive their unsecured debts post-petition. Furthermore, in *Scovis,* the appellee argued that the appellant's debt, which was only secured by a lien which was wholly avoidable by a declared homestead, was not unsecured for purposes of 109(e) eligibility, because it was not avoided under 522(f) until after his petition was filed. *Scovis,* *249 F.3d* at 983. Here, Appellees acknowledge that the secured and unsecured amounts of Appellant's debt are determined as of the date of the filing of their petition regardless of when the Motion to Value was filed or granted. Appellees' are merely asserting that the secured and unsecured portions of Appellant's debt were not readily determinable and thus the bankruptcy court was required to look beyond the schedules. Furthermore, unlike in *Slack,* where the amount of debt at the time of petition was determined by a stipulation between the parties, there was no such stipulation between Appellant and Appellees. *Slack,* 187 F.3d at 1074.

Thus, absent something as certain as a stipulated sum between the Parties, the Bankruptcy Court was hard pressed to determine, with certainty, the secured and unsecured status of Appellant's debt readily determinable, thus necessitating the need to look outside the schedules.

B. This Circuit Included "Normally" as a Second Modifier to Allow Courts the Discretion to Look Outside the Schedules in Circumstance Where the Debt is Not Readily Ascertainable

This Circuit held in *Scovis* that the §109(e) "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. The inclusion of "normally" as qualifier indicates that this circuit foresaw instances where, irrespective of good faith, the eligibility analysis can sometimes involve more than just the face of the debtor's originally filed schedules.

The facts of this case, as echoed by the Bankruptcy Appellate Panel ("BAP"), are not normal. (1-ER-24-25) Appellee's chapter 13 case was filed on January 26, 2022. A challenge to Appellees' §109(e) eligibility was not made until September 1, 2022, when Appellant filed their Objection to Confirmation of 2nd Amended Chapter 13 Plan. Interestingly, Appellant conceded in its opposition that the unsecured portion of their debt was $204,030.50. (2-ER-236) It was not until October 13, 2022, some nine and half months after the case was filed and two months after the bankruptcy court issued its Valuation Order, that Appellant first asserted its eligibility challenge in its current form. (2-ER-261-262)

As the BAP aptly pointed out, it would be absurd for the Bankruptcy Court to be required to consider only the originally filed schedules and give no

consideration to its own findings of value. This is especially true here where Appellant chose to contest Appellee's 109(e) eligibility only after the Bankruptcy Court determined that Appellant's debt was not fully secured. Appellant, in its opening brief, admits that its decision to not raise an eligibility argument at the outset of the case was strategic. (Appellant's Opening Brief, pp 21-22) Based on the facts found here, it is doubtful that this Circuit intended its holding in *Scovis* to be so inflexibly interpreted as to require the Bankruptcy Court to disregard its own order simply because Appellant's strategic decision did not bear fruit.

To read "normally" as a second modifier to the general rule makes the most sense. As aforementioned, there are scenarios in which a debt is not readily determinable or ascertainable. Under the inflexible interpretation of the *Scovis* holding argued by the Appellant, a Court's inquiry would simply cease in a quagmire if 109(e) eligibility, absent bad faith, could not be readily determined from the original schedules. Under Appellee's interpretation of the *Scovis* holding, should the debt not be readily determinable, a Court could look outside the schedules, as the Bankruptcy Court did here. Where the debts are readily determinable, a Court would make a determination based on the originally filed schedules, only making an inquiry into whether they were made in good faith. Where the debts are not readily determinable, a Court would look outside the schedules to make such a determination. Here, Appellee and Appellant could not

agree to the value of Appellee's residence, which made a §506 determination unascertainable, subsequently making a §109(e) eligibility determination unascertainable. Therefore, the Bankruptcy Court had to look outside the schedules and hold an evidentiary hearing to make that determination. This interpretation would not create a slippery slope, because only determinations that are not readily ascertainable from the filed schedules would be subject to further review using facts found outside of the schedules. Everything else that is readily determinable, based on a review of the schedules, would remain so.

The proposition that a debt must be readily determinable, both in amount and classification, to conduct a determination of eligibility under §109(e) is supported by holdings in *Slack* and *Scovis.* This Circuit, in both *Scovis* and *Slack,* looked at the original schedules, but only came to a determination regarding the debts after analyzing whether the determinations were readily ascertainable with certainty based upon what was listed in the schedules. Conversely, if the debt is not readily determinable, then a Court cannot just rely on the originally filed schedules. Normally the schedules provide sufficient information for a Court to come to a determination with certainty, as the Courts in *Peason, Slack* and *Scovis* did. However, in an abnormal situation such as the one at hand, where a §506 valuation was not readily determinable, Appellant waited nine and half months to challenge 109(e) eligibility and the Bankruptcy Court made a determination of

value, a court would have to look outside the schedules. Here, a look outside of the schedules included holding an evidentiary hearing to determine the value of Appellee's residence and the unsecured portion of Appellant's debt, which under §105(a), the Bankruptcy Court had the right to do. Section 105(a) states that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. §105(a). To determine §109(e) eligibility, the Bankruptcy Court had to determine the secured and unsecured portions of Appellant's debt under §506, which in turn necessitated an evidentiary hearing.

Appellant goes on to raise a hypothetical situation in which the Appellee's original schedules listed the value of the residence as $1,225,000.00 and six months later, presumably after an evidentiary hearing, the bankruptcy court valued the property at $1,045,000.00. Appellant questions what would result from the facts of said hypothetical. The answer is simple. Appellees would be over the unsecured debt limit. This hypothetical does not change the analysis. The determination of debt for purposes of 109(e) is determined at the filing of the petition. Per the holding in *Scovis*, a court is to look at the originally filed schedules to make that determination. That determination, however, must be readily determinable per the schedules. In Appellant's hypothetical, as an evidentiary hearing was required, the unsecured value of Appellees' debt was not

readily determinable, and the court would be forced to look outside the schedules. Just like what happened here, the true secured and unsecured values of Appellant's debt as of the petition date would be established, and 109(e) eligibility would be determined based on those findings. In this hypothetical, Appellees should not be allowed to force the court to disregard its own order.

Lastly, though Appellant attempts to analogize §109(e) to the amount-in-controversy requirement for exercise of diversity jurisdiction, 28 U.S.C. §1332, the analogy does not hold up, because the §109(e) determination has no impact on federal bankruptcy jurisdiction under 28 U.S.C. §1334. Federal jurisdiction is not at stake in an eligibility determination under §109(e). Under 28 U.S.C. §1334, there is federal bankruptcy jurisdiction, regardless of whether a debtor qualifies for chapter 13 relief. If a debtor is not eligible for chapter 13 under §109(e), they are nevertheless eligible under chapter 7 or chapter 11. Exceeding the debt limits set forth in §109(e), does not defeat federal bankruptcy jurisdiction, but merely only limits which chapters and which remedies are available.

C. Appellees Were in Compliance with the Debt Limits as Set Forth in 11 U.S.C. §109(e)

While the debt limitation found in §109(e) have been increased and simplified since the filing of Appellant's chapter 13 case, the operative debt limits when Appellants filed were $419.275.00 in unsecured debt and $1,257,850.00 in

secured debt.

The Total amount of secured claims owed by the Debtors at the time of filing was $1,225,261.00, which includes the secured portion of Mission Hen's Claim of $265,734.06 as well as the amount owed to the senior lienholder, PHH Mortgage Corporation ($959,526.94 as determined by Valuation Order). (2-ER-214). The Appellees' analysis of the secured debts only includes the secured portion of Appellant's claim as determined by the Bankruptcy Court after holding an evidentiary hearing. This reflects the reality of what the secured debt was at the time of filing based on the value of the residence, which at that time was not readily ascertainable as argued above. The claims of the homeowners associations, Stonetree Manor and Woodbury Community Association, which could readily be ascertained as unsecured are not included in the secured debt analysis.

When Appellees filed their Chapter 13 schedules, the total amount of unsecured claims listed under schedules E-F was $83,185.04. (2-ER-92) When the unsecured portion of the claims of Mission Hen's claim ($204,030.50) and the HOA claims ($21,030.39, and 11,060.08) are added to that tally the total unsecured claims per the schedules is $319,306.01. (1-ER-25)

Thus, Appellees were within the bounds of the debt limits found in §109 (e) that were operative at the time Appellee's bankruptcy petition was filed. Appellees do not assert that post-petition events in their bankruptcy case should alter the

analysis under §109 (e). The values stated above clearly reflect the nature and amount of Appellant's claim on the day Appellees' case was filed. The determination of the secured portion of Appellant's claim, determined by the Bankruptcy Court after an evidentiary hearing, should not be construed as post-petition event, because it determined the secured value as of the filing date of Appellees' petition.

D. Appellees Were in Compliance with the Feasibility Requirements as Set Forth in 11 U.S.C. §1325(a)(6) and Therefore the Bankruptcy Court Did Not Err in Confirming Appellees' Fourth Amended Chapter 13 Plan

Pursuant to §1325(a)(6), a Court cannot confirm a chapter 13 plan unless, "after considering all creditors' objections and receiving the advice of the trustee, the judge is persuaded that the debtor will be able to make all payments under the plan." *Till v. SCS Credit Corporation,* 541 U.S. 465, 158 L. Ed. 2d 787, 124 S. Ct. 1951, 1962 (2004). If the lower Court's "account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as trier of fact, it would have weighed the evidence differently. Where there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.,* 338 U.S. 338, 342 (1949). A determination of feasibility "is a finding of fact, which we may not disturb on appeal unless it is clearly

erroneous." *In re Gavia,* 24 B.R. 573, 574 (9th Cir. BAP 1982)

Here, the Bankruptcy Court considered Appellant's objections and the advice of the Trustee and based on said considerations determined the plan to be feasible. Specifically, the Trustee advised the Bankruptcy Court that that he did not have any objection regarding feasibility and in fact determined the plan feasible. The Bankruptcy Court went on to list the reasons why it determined the plan feasible. (1) The Trustee had no issues regarding feasibility. (2) Appellant failed to file an evidentiary objection. (3) The declaration was satisfactory.

Linda Chen, under penalty of perjury, filed a declaration with the Bankruptcy Court, which stated that she (1) was related to Appellees, (2) resided with Appellees, (3) was committed to funding Appellees plan, (4) was willing to do so for the entirety of the plan, and (5) that the sale proceeds of her home provided her with the funds to do so. (2-ER-208-2012). Based on a careful review of the evidence the Bankruptcy Court determined that Appellees' plan was feasible. The Bankruptcy Court's decision was not arbitrary or clearly erroneous.

Furthermore, by time of the final confirmation hearing Appellees were post-petition current with both their plan payments and mortgage payments.

"A debtor does not need to prove that his or her plan is guaranteed to be successful. To demonstrate that a plan is feasible, chapter 13 debtors must show that their plan has a reasonable chance of success." *In re Ewing,* 583 B.R. 252, 259

(Bankr. D. Mont. 2018). Here, the Bankruptcy Court considered Appellant's objections, the Trustee's recommendation, and the evidence at hand. Ultimately, the Bankruptcy Court correctly determined that Appellees' plan was feasible.

Therefore, as detailed in Sections A, B and C above, as of the Petition Date (January 26, 022), Appellees were eligible for Chapter 13, because their aggregate unsecured debt ($319,306.01) exceeded the limitation set forth in 109(e).

Secondly, as set forth here, Appellees submitted evidence, which the Bankruptcy Court determined sufficient, to demonstrate their Chapter 13 Plan was feasible, thus satisfying the requirements found in §1325)(a)(6).

Thirdly, as detailed in Sections E and F below, §1322(c)(2) does not prohibit Appellees from using §506(a) to value and bifurcate Appellee's secured claim.

Thus, the Bankruptcy Court did not err in confirming Appellees Fourth Amended Chapter 13 Plan.

E. The Plain Language Found in §1322(c)(2) and §1325(a)(5) Allow for the Bifurcation and Cram Down of Appellant's Claim

This Court's analysis begins by looking at the language of the statute itself to determine if the statute is plain or ambiguous. *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 649 132 S. Ct. 2065, 182 L. Ed. 2d 967 (2012). "[I]n determining plainness or ambiguity, courts are directed to look 'to the language itself, the specific context in which the language is used, and the broader

context of the statute as a whole.'" *In re Phillips,* 485 B.R. 53, 56 (Bankr. E.D.N.Y. 2012) (quoting *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed. 2d 808 (1997)). "Courts are required to apply the plain meaning of the statute, unless the statute is ambiguous or applying the unambiguous plain meaning would yield an absurd result." *Id.* If the statutory language is clear, a court's analysis must end there. *Hartford Underwriters Inc. Co. v. Union Planters Bank, Nat'l Ass'n*, 530 U.S. 1, 6, 120 S. Ct. 1942, 147 L. Ed. 2d 1 (2000) ("[W]hen the statute's language is plain, the sole function of the courts – at least where the disposition required by text is not absurd – is to enforce it according to its terms."

§1322(b) of the Bankruptcy Code reads in pertinent part:

> Subject to subsections (a) and (c) of this section, the plan may –
> (1) … ;
> (2) modify the rights of holders of secured claim, other than a claim secured by a security interest in real property that is the debtor's principal residence…
> 11 U.S.C. §1322(b)

Here, there is no dispute that the subject property is Appellee's principal residence. Therefore, it would appear that the restrictions set forth in §1322(b)(2), commonly known as the "anti-modification clause", would apply. There are, however, exceptions to the application of the anti-modification clause set forth in §1322(c) that clearly apply here.

§1322(c) of the Bankruptcy Code reads in pertinent part:

> Notwithstanding subsection (b)(2) and applicable non-bankruptcy law-
>
> 1) … ; and
>
> 2) in a case in which the last payment on the original payment schedule for a claim secured only by an 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).

The Parties are asking this Court to resolve whether the phrase "payment of the claim as modified" permits modification of the "claim" or whether it only permits modifying the "payment of claim." Appellee asserts that the text allows for modification of the "claim" and that modification of the allowed claim amount through bifurcation and cram down under §1325(a)(5)(B)(ii) and §506(a)(1) is permitted.

Looking at the plain language of §1322(c)(2), it is clear that the structure of the text supports Appellee's argument that "as modified" refers to "the claim." Such a reading comports with the grammatical rule of the last antecedent, i.e., that a phrase should modify its immediate antecedent. Here, the phrase "as modified" should be read as modifying the word "claim," which is its immediate antecendent. *Am. Gen. Fin., Inc. v. Paschen (In re Paschen),* 296 F.3d 1203, 1208 (11th Cir. 2002)(rejecting the argument that "as modified" relates to "payment of the claim" rather than the "claim" as a "grammatically strained reading of the statute").

§1325(a)(5) of the Bankruptcy Code reads in pertinent part:

"with respect to each allowed secured claim provided for by the plan –
(B)
(i) the plan provides that-
(I) the holder of such claim retain the lien securing such claim until the earlier of –
(aa) the payment of the underlying debt determined under nonbankruptcy law; or
(bb) discharge under §1328; and
(II) if the case under this chapter is dismissed or converted without competition of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
(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 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 monthly amounts…"

11 U.S.C §1325(a)(5).

Looking at the "plain language" of §1325(a)(5), as made applicable by §1322(c)(2), it clearly allows for Appellee to provide for Appellant's claim, which is secured by Appellee's primary residence, by paying Appellant the value of its secured claim, as determined by §506(a), and not any amount in excess of that determination, as part of the allowed secured claim.

F. Case Law and the Acts of Congress Support the Proposition that Appellee is Allowed to Bifurcate and Cram Down Appellant's Claim

In *Paschen*, the Eleventh Circuit concluded that the §1322(c)(2) exception

works through §1325(b)(5) to allow not only payment terms to be modified, but also to allow for a §506(a) valuation of such claim. In *Hurlburt v. Black,* 925 F.3d 154 (4th Cir. 2019), the Fourth Circuit concluded that the §1322(c)(2) exception providing for the §1325(a)(5) treatment of claims that come due in full during the period of the plan to be modified, includes a §506(a) valuation of such claims.

Appellant directs this Court to the Supreme Court decision, *Nobelman v. American Savings Bank (In re Nobelman),* 508 U.S. 324, 113 S. Ct. 2106, 124 L. Ed. 2d 228 (1993), the Fourth Circuit decision in *Witt v. United Cos. Lending Corp. (In re Witt)*, 113 F.3d 508 (4th Cir. 1997) (subsequently overruled in *Hurlburt)* and the dissent in *Hurlburt*, for the proposition that the provisions of §1322(b)(2), when read in conjunction with §506, precludes bifurcation of any and all claims secured by the debtor's primary residence if there is any value to protect such lien.

Appellant's cited authorities are not convincing for two reasons. First, as discussed above, the structure of the text supports a plain reading that unambiguously allows debtors to bifurcate the claims secured by their principal residences if the last payment on the original payment schedule is due before the final payment under the plan.

Second, in 1994, one year after the decision in *Nobelman*, Congress amended the §1322, adding §1322(c) as it now exists (relettering former paragraph

(c) as (d)) to add an exception to §1322(b)(2). When the Supreme Court issued its ruling in *Nobleman*, there was not, and there could not have been, consideration of the then yet to be enacted exception to §1322(b)(2).

Collier on Bankruptcy provides an extended discussion of this statutory exception in §1322(c)(2) to the residence secured claim limitations in §1322(b)(2), which in pertinent part reads:

> P 1322.17 Exceptions to the Rule Against Modification of Home Mortgages; §1322(c)(2)
>
> Section 1322(c)(2) carves out an exception to the rule of section 1322(b)(2), which prohibits the modification of the rights of holders of claims secured solely by a security interest in real estate that is the debtor's principal residence. It provides that if the last payment on the original payment schedule for such a mortgage is due before the final payment under the plan is due the debtor may pay the claim as modified pursuant to section 1325(a)(5).
> Because the plan may not extend beyond five years, this section will encompass short term mortgages, fully matured mortgages, long-term mortgages on which debtor has nearly completed payments, and mortgages with balloon payments. Congress obviously believed that debtors with such mortgages need additional protection. Short term and balloon payment mortgages often have high rates or terms that are particularly unfavorable, which Congress has deemed deserving of scrutiny…
> The legislative history of the provision states that it was intended to overrule the decision of the Court of Appeals of the Third Circuit in *First National Fidelity Corp. v. Perry*, which held that a debtor could not utilize section 1325(a)(5) to provide for a home mortgage protected from modification by section 1322(b)(2)…
> The exception from the modification prohibition also overrules for such mortgages the Supreme Court's decision in *Nobelman v. American Savings Bank.* That decision was based solely on section 1322(b)(2), to which section 1322(c) is an [subsequently enacted] exception. Again, it is not surprising that Congress would create an

> exception for the types of mortgages described above, which are undersecured.

8 Collier on Bankruptcy, P 1332.17 (Sixteenth Edition)

Therefore, based on Congress' amendment of §1332, which occurred after *Nobel,* and the plain and unambiguous langue of that amendment, there is no doubt the Bankruptcy Court had the authority to bifurcate and cramdown Appellant's claim.

CONCLUSION

For the foregoing reasons, Appellees, Jason M. Lee and Janice Chen, respectfully request that this Court affirm the Bankruptcy Court's Confirmation Order.

Dated: 4/27/2024

Respectfully submitted,

By: *__/s/ Christopher J. Langley__*

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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