No. 23-4220

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN RE: JASON M. LEE AND
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.

AMICI CURIAE BRIEF OF THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLEES

Jenny L. Doling, Esq. #207033
J. DOLING LAW, PC
36915 Cook Street, Suite 101
Palm Desert, CA 92211
(760) 884-4444
jd@jdl.law
Attorney for the
National Consumer Bankruptcy Rights Center and
National Association of Consumer Bankruptcy
Attorneys.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Mission Hen v. Lee, No. 23-4220.

Pursuant to Fed. R. App. P. 26.1, Amici Curiae, the National Consumer Bankruptcy Rights Center and the National Association of Consumer Bankruptcy Attorneys, makes the following disclosure:

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

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

This day of May 3, 2024.

s/ Jenny L. Doling

Jenny L. Doling

Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2500 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors.

The National Consumer Bankruptcy Rights Center (NCBRC) is a non-profit organization dedicated to protecting the integrity of the bankruptcy system and preserving the rights of consumer bankruptcy debtors. To those ends, it provides assistance to consumer debtors and their counsel in cases likely to impact consumer bankruptcy law importantly. Among other things, it submits amicus curiae briefs when in its view resolution of a particular case may affect consumer debtors throughout the country, so that the larger legal effects of courts' decisions will not depend solely on the parties directly involved in the case.

NCBRC and NACBA have filed amicus curiae briefs in numerous cases seeking to protect the rights of consumer bankruptcy debtors. See, e.g., *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin*, 143 S. Ct. 1689

(2023); *Evans v. McCallister (In re Evans)*, 69 F.4th 1101 (9th Cir. 2023); *Numa Corp. v. Diven*, 2022 U.S. App. LEXIS 32224, 2022 WL 17102361 (9th Cir. 2022).

NCBRC, NACBA and NACBA's members have a vital interest in the outcome of this case. A ruling in the case at bar will affect the administration of many consumer cases in this Circuit. If this court were to render a ruling that debtors may not bifurcate eligible mortgage loans under 11 U.S.C. § 1322(c)(2), it would dramatically affect thousands of debtors with short-term mortgages, fully matured mortgages, long-term mortgages on which debtors have nearly completed payment, and mortgages with balloon payments. Such a ruling would severely limit these debtors' ability to reorganize and address these loans which often have high rates or terms that are particularly unfavorable and would weaken the ability of good faith debtors to receive a fresh start in bankruptcy.

Amici believe that, in their roles as a national advocates for consumer debtors, they bring a unique perspective to this case that will be helpful to the court in deciding this matter.

SUMMARY OF ARGUMENT

The Bankruptcy Appellate Panel (BAP) and other circuits correctly applied 11 U.S.C. § 1322(c)(2) to allow debtors to modify the claim of a creditor whose secured claim will be fully due and payable on its own terms before the last payment is due under a debtor's chapter 13 plan. The arguments posed by Appellant are non-meritorious. The plain language of this section allows the debtors to bifurcate a secured claim into a secured portion and an unsecured portion if the value of the residence so dictates.

Amici support the standard found in in *Scovis v. Henrichsen* (*In re Scovis*), 249 F.3d 975 (9th Cir. 2001) for determining eligibility but argue that the bankruptcy court's slight deviation is merited on the facts of this case. This case was not a "normal" one, where a creditor looks at the schedules and raises eligibility at the initial confirmation hearing. Instead, here Appellant strategically delayed that challenge, seeking to better its own outcome, depending on the outcome of the valuation hearing. Its strategy allowed the bankruptcy court to consider that valuation in determining eligibility. The BAP recognized that these specific facts warranted deviation from the strict *Scovis* rule.

Amici respectfully request this Court to affirm the BAP.

ARGUMENT

A. THE BAP AND THE OTHER CIRCUITS CORRECTLY APPLIED 11 U.S.C. § 1322(c)(2)

Although the Ninth Circuit Bankruptcy Appellate Panel (the BAP) was walking on untrodden ground in this circuit, its field of inquiry has been well plowed by two circuit courts and multiple bankruptcy courts, all of which have reached the same conclusion: 11 U.S.C. § 1322(c)(2) allows a debtor to modify the claim of a creditor whose secured claim will be fully due and payable on its own terms before the last payment is due under a debtor's chapter 13 plan. The arguments posed by Appellant are non-meritorious, at best, and a poorly disguised attempt to mislead the Ninth Circuit, particularly when they rely on *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993) which predated the amendment to the Bankruptcy Code that added Section 1322(c)(2). As the BAP, the Fourth Circuit in *Hurlburt v. Black*, 925 F.3d 154 (4th Cir. 2019) (sitting *en banc* to overrule its precedent, *Witt v. United Cos. Lending Corp.* (*In re Witt*), 113 F.3d 508 (4th Cir. 1997)), and the Eleventh Circuit in *Am. Gen. Fin., Inc. v. Paschen* (*In re Paschen*), 296 F.3d 1203 (11th Cir. 2002) all concluded, this holding is compelled by the words of the statute itself.

The words of the section begin by specifying that 11 U.S.C. § 1322(b)(5) (the anti-modification provision) does not apply to (c): "Notwithstanding subsection (b)(2) …." Then the following language in (c)(2) leaves no ambiguity:

> In a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the Debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

In the words of the BAP, "[t]he plain language states that the limitation under 11 U.S.C. § 1322(c)(2) does not protect the allowed claim coming due before the end of the plan from plan treatment as provided under 11 U.S.C. § 1325(a)(5)." *In re Lee*, 655 B.R. 340, 348 (B.A.P. 9th Cir. 2023). The rule of the last antecedent dictates that the phrase "as modified" modifies the word "claim." This simple language allows a debtor such as Mr. Lee to bifurcate a secured claim into a secured portion and an unsecured portion if the value of the residence so dictates. Under 11 U.S.C. § 1322(a)(5), the debtor must then pay the entirety of the secured portion of the claim over the plan term and treat the unsecured part in the same manner the plan treats other similarly situated unsecured creditors. If this court rules otherwise, such ruling would go against the plain language of the statute, two other circuits (notably more than 20 years ago), and the vast number of bankruptcy court decisions that have all ruled the same way. There is no reason to create a circuit split on this well-established principle.

The leading treatise on bankruptcy, Collier on Bankruptcy, supports this holding and notes the policy reasons for Congress's decision to add subsection 1322(c)(2):

> Section 1322(c)(2) carves out an exception to the rule in section 1322(b)(2)….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).
>
> The legislative history of the provision states that it was intended to overrule the decision of the Court of Appeals for 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) ...
>
> Because the plan may not extend beyond five years, this section will encompass short-term mortgages, fully matured mortgages, long-term mortgages on which the debtor has nearly completed payment, and mortgages with balloon payments. Congress obviously believed that debtors with such mortgages needed additional protection. Short-term and balloon payment mortgages often have high rates or terms that are particularly unfavorable, which Congress has deemed deserving of close scrutiny.
>
> 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 often undersecured.

8 Collier on Bankruptcy ¶ 1322.17 (Richard Levin & Henry J. Sommer eds., 16th ed.)(footnotes omitted).

It is these "types of mortgages" – short-term or ballooning which frequently carry onerous interest rates – that often burden the debtors whom NACBA desires to protect in this circuit, as they are protected in others. It is not surprising that it has taken more than twenty years after the other circuits settled this issue for it to be

ripe for review at the Ninth Circuit. The conditions created by a section 1322(c)(2) bifurcation are not easily satisfied by a chapter 13 debtor. If the bifurcated claim is a second mortgage, not only must such debtor with a confirmed plan keep a first mortgage current and cure any arrearages, but the debtor must also pay the entire allowed secured balance over a maximum five-year term. Many more debtors attempt this herculean task than succeed. Such default usually leads to dismissal or conversion of the chapter 13 case before an appeal can wend its way to the Circuit, resulting in mootness of the appeal.

B. *AMICI* SUPPORT THE SCOVIS STANDARD FOR DETERMINING ELIGIBILITY BUT SUBMITS THAT THE BANKRUPTCY COURT'S SLIGHT DEVIATION IS MERITED ON THE FACTS OF THIS CASE

This court's decision in *Scovis*, 249 F.3d 975, that chapter 13 eligibility should normally be determined by debtor's originally filed schedules, checking only to see if the schedules were made in good faith, has provided a general rule which well serves all parties in a chapter 13 proceeding. It allows for an early determination of the eligibility of the debtor, in keeping with the generally accelerated pace to confirmation that makes chapter 13's attractive to both debtors and creditors. It also provides a bright-line standard that works in all "normal" cases, allowing debtors' attorneys to advise their potential clients with relative certainty whether they will be allowed to proceed in a chapter 13. But it is also presumes that a challenge to eligibility will be made early in the case.

This is not that "normal" case, nor did the Appellant promptly object to the debtor's eligibility. As admitted in Appellant's brief, it "had legitimate and strategic reasons to raise the eligibility argument when it did," which was after the debtor filed the third amended plan. Appellant's Opening Brief, p. 22. Footnote 5 to the Brief states Appellant's reasons for delaying its challenge to eligibility, which turned in large part on the outcome of the valuation hearing.[1] The bankruptcy court took this postpetition valuation into account in determining eligibility because Appellant's challenge was predicated on the result of that ruling. This case was not "normal," where a creditor looks at the schedules and raises eligibility at the initial confirmation hearing. Instead, here Appellant strategically delayed that challenge, seeking to better its own outcome, depending on the outcome of the valuation hearing. Its strategy allowed the bankruptcy court to consider that valuation in determining eligibility. The BAP recognized that these specific facts warranted deviation from the strict *Scovis* rule. More generally, it makes no sense to dismiss a case on eligibility grounds based on the schedules at a point in the case where later decisions of the court have shown that the debtor is, in fact, eligible for chapter 13.

[1] Footnote 5 says in relevant part: "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.

To do so would deny relief for which a debtor is eligible. Affirming the BAP's ruling will not damage the viability of the *Scovis* standard in the normal case.

CONCLUSION

The question whether mortgage loans may be bifurcated pursuant to 11 U.S.C. § 1322(c)(2) will affect thousands of chapter 13 debtors in this Circuit. The plain language of this section allows debtors to modify specific mortgage loans in their chapter 13 plans. The decisions in the BAP and other sister circuits should be affirmed. *Amici* respectfully request the Court to affirm the BAP.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

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

I am the attorney or self-represented party.

This brief contains 1996 words, including zero (0) words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

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Signature /s/ Jenny L. Doling **Date May 3, 2024**

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 3, 2024. All participants that are registered as CM/ECF users will receive service via appellate CM/ECF system.

s/ Jenny L. Doling
Jenny L. Doling
Attorney for Amici Curiae

STATEMENT UNDER FED. R. APP. P. 29(a)(4)(E)

No party's counsel authored this amicus curiae brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person, other than the amici curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief.

s/ Jenny L. Doling
Jenny L. Doling
Attorney for Amici Curiae