No. 16-16584

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re JOHN JEFFERSON VITALICH,

Debtor.

JOHN JEFFERSON VITALICH,

Appellants,

– v. –

BANK OF NEW YORK MELLON,

Appellee.

On Appeal from the United States District Court for the Northern District of California No. 16-420

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Vitalich v. Bank of New York Mellon, No. 16-16584

Pursuant to Fed. R. App. P. 26.1, Amicus Curiae, the National Association of Consumer Bankruptcy Attorneys, and the National Association of Consumer Bankruptcy Attorneys make the following disclosure:

1) Is party/amicus a publicly held corporation or other publicly held entity? **NO**

2) Does party/amicus have any parent corporations? **NO**

3) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

4) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

5) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **N/A**

This 24th day of August, 2017.

/s/ Tara Twomey

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STATEMENT OF INTEREST OF AMICUS CURIAE

NCBRC is a nonprofit organization dedicated to preserving the bankruptcy rights of consumer debtors and protecting the bankruptcy system's integrity. The Bankruptcy Code grants financially distressed debtors rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are ill-equipped to protect their rights in the appellate process. NCBRC files *amicus curiae* briefs in systemically-important cases to ensure that courts have a full understanding of the applicable bankruptcy law, the case, and its implications for consumer debtors.

NACBA is also a nonprofit organization of approximately 3,000 consumer bankruptcy attorneys nationwide. 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.

NCBRC, NACBA and its membership have a vital interest in the outcome of this case. The automatic stay is one of the fundamental benefits of bankruptcy, giving the debtor some breathing room before addressing debts, and ensuring equitable distribution of estate assets among creditors. Where, as here, Congress has spoken plainly in favor of retaining the protections of the automatic stay even upon a bankruptcy filing that follows within one year of a previous bankruptcy

termination, it is not up to the courts to rewrite the automatic stay provision to further a presumed goal of punishing such successive filings.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person or entity other than NCBRC or NACBA, its members, and its counsel made any monetary contribution toward the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Section 362(c)(3)'s language that, in the event of a second petition filed with one year of the termination of the prior petition, the automatic stay shall terminate "with respect to the debtor" thirty days after the filing of the later case, plainly applies to actions against the debtor personally, or the debtor's property, but leaves the stay in effect as to property of the bankruptcy estate.

In *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362 (B.A.P. 9th Cir. 2010), the Bankruptcy Appellate Panel incorrectly adopted the minority view that the phrase "with respect to the debtor" serves only to preserve the automatic stay as to a spouse who is the joint debtor in the current case, but was not a debtor in the prior case that was dismissed.

The justifications for departing from the plain language are illusory. Contrary to the reasoning of courts adhering to the minority view, the language "with respect to the debtor" is not needed to differentiate between spouses who are joint debtors where only one spouse has a prior filing. When a joint petition is filed two cases are jointly administered and the rights of the two debtors, and their creditors, are treated as if two separate cases had been simultaneously filed. In addition, there is substantial deterrent effect against abusive, successive filings, even if the automatic stay continues to apply to estate property under section

362(c)(3). It is not the province of the courts to increase the sanction effect of the provision to further presumed legislative intent.

Finally, the protection of the automatic stay extends beyond the debtor and serves to ensure equitable distribution of estate assets among all creditors. If Congress meant to terminate the stay in its entirety, it would have done so in plain language.

STATUTORY FRAMEWORK

The Bankruptcy Estate. Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The importance of this regime to the national welfare, and the delicacy of the task, are suggested by the Framers' assignment to Congress of the power to "establish . . . uniform Laws on the subject . . ." U.S. CONST., art. I, § 8, cl. 4. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913). To achieve these dual goals, the Bankruptcy Code first creates a bankruptcy estate upon commencement of a case. 11 U.S.C. § 541(a). Section 541(a) defines the bankruptcy estate and contains a definition of property that includes all debtors' legal or equitable interests in property whether tangible or intangible, real or personal. Some property, however, is specifically

excluded from becoming property of the estate. 11 U.S.C. § 541(b). Other property initially considered part of the bankruptcy estate may be removed from the estate and reverted to the debtor through the exemption process. *See Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 642 (1992) (Bankruptcy Code "allows the debtor to prevent the distribution of certain property by claiming it as exempt").

The bankruptcy estate is a separate entity from the debtor. *See, e.g*, 28 U.S.C. § 1334(e) (conferring jurisdiction on the district court over property of the debtor and property of the estate).

The Automatic Stay. The automatic stay is a fundamental cornerstone of the bankruptcy system established under the Bankruptcy Code. It is triggered instantly upon the filing of a bankruptcy petition. It is intended to prevent a chaotic and uncontrolled scramble for the assets of the debtor and the property of the estate. It prevents the commencement or continuation of proceedings against the debtor and prevents creditors from creating, perfecting, or enforcing any lien against property of the debtor. See 11 U.S.C. § 362(a)(1), (2). The automatic stay also protects property of the estate by preventing the enforcement of a judgment against property of the estate or creating, perfecting, or enforcing any lien against property of the estate. 11 U.S.C. § 362(a)(2), (4). Of the seven subsections describing the reach of the automatic stay in consumer cases, five apply to the debtor or to property of the debtor and three apply to the property of the estate. *See* 11 U.S.C.

§ 362(a)(1) (debtor), (a)(2) (debtor and estate), (a)(3) (estate), (a)(4) (estate); (a)(5) (debtor); (a)(6) (debtor); (a)(7) (debtor).

ARGUMENT

I. The Plain Meaning of Section 362(c)(3) is That the Automatic Stay of Actions Directed at Property of the Estate Remains in Effect Even if No Order Extending the Stay is Entered Within 30 Days

As the debtor has observed in his brief, there are two different views about what happens if the automatic stay is not extended within 30 days after a potentially disqualifying second case is filed. The majority view, exemplified by cases such as *Holcomb v. Hardeman (In re Holcomb),* 380 B.R. 813 (B.A.P. 10th Cir. 2008), and *Jumpp v. Chase Home Finance, LLC (In re Jumpp),* 356 B.R. 789 (B.A.P. 1st Cir. 2006), holds that because section 362(c)(3)(A) states that the stay "shall terminate *with respect to the debtor* on the 30th day after the filing of the later case" (emphasis added), the termination of the stay applies to actions against the debtor personally, or the debtor's property, but leaves the stay in effect as to property of the bankruptcy estate. 3 Collier on Bankruptcy ¶ 362.06[3][a]. The minority view, which has been adopted by this circuit's Bankruptcy Appellate Panel, is that the phrase "with respect to the debtor" does not refer to the scope of the stay, but only serves to preserve the automatic stay as to a spouse who is the joint debtor in the current case, but was not a joint debtor in the prior case that was

dismissed. *Reswick v. Reswick (In re Reswick)*, 446 B.R. 362, 367-73 (B.A.P. 9th Cir. 2010).

The majority view is correct because it follows the plain meaning of the words "with respect to the debtor" used in section 362(c)(3). Construing the plain meaning of the statute results in a straightforward though brief analysis.

Under section 362(c)(3)(A), if a debtor has had a case pending within the preceding one year period that was dismissed,

> … the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate *with respect to the debtor* on the 30th day after the filing of the later case[.]

11 U.S.C. § 362(c)(3)(A) (emphasis added).

Most courts have found no ambiguity in the phrase "with respect to the debtor." *See, e.g., Holcomb*, 380 B.R. at 816. Simply put "[s]ection 362(a) differentiates between acts against the debtor, against property of the debtor and against property of the estate." *In re Jones*, 339 B.R. 360, 363 (Bankr. E.D. N.C. 2006). If Congress meant to terminate the stay in its entirety, it would have done so in plain language as it did in section 362(c)(4)(A)(i). "Where Congress includes particular language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200 (1993) (internal quotation marks and alterations omitted). The inclusion of the words "with respect

to the debtor" in section 362(c)(3)(A), and their omission in section 362(c)(4), means that the sections of the automatic stay that are not "with respect to the debtor"—notably, sections 362(a)(3) and (a)(4) -- are not terminated after 30 days.

II. There Are No Overwhelming Reasons to Depart From Applying the Plain Meaning of the Phrase "With Respect to the Debtor"

The minority view has three justifications for departing from the natural construction of the words "with respect to the debtor" which has been adopted by the majority of the courts. None of them justify a departure from the plain meaning of those words.

A. The Phrase "With Respect to the Debtor" Limits the Scope of the Termination of the Automatic Stay, Not the Person to Whom it Applies

First is the argument that the purpose of adding the language "with respect to the debtor" is to identify the person as to whom the stay no longer applies after 30 days.

This construction of section 362(c)(3)(A) posits a concern by Congress for a blameless spouse who has filed bankruptcy for the first time. However, the language "with respect to the debtor" is not needed to differentiate between spouses in such situations due to the nature of a joint bankruptcy petition. When a joint petition is filed two cases are jointly administered. Joint administration decreases the costs of administration, benefitting both debtor and their creditors. 2

Collier on Bankruptcy ¶ 302.02[1]. However, absent substantive consolidation, the rights of the two debtors, and their creditors, are the same as if two separate cases had been simultaneously filed. *Id.* at ¶ 302.01[1](b). Therefore, the phrase "with respect to the debtor" would not be needed if the purpose was to preserve the automatic stay for the joint debtor who is filing bankruptcy for the first time. The termination or continuation of the automatic stay is decided by looking to the history and behavior of each debtor separately.

A further flaw with the minority view's position is that section 362(c)(4) does not include the language "with respect to the debtor," even though the situation of a joint debtor who is a first-time filer can occur just as easily when the case in question is the primary debtor's third filing as in a second filing. Under the minority view, the omission in section 362(c)(4) of the language "with respect to the debtor" compels the strange result that a joint debtor who is a first time filer forfeits the protection of the automatic stay even as to her separate property and income, merely because it is her spouse's third filing.

B. Terminating the Automatic Stay as to the Debtor is a Substantial Deterrent to Debtors Even if the Stay Continues as to Property of the Estate

The second argument is that terminating the stay only as to the debtor and the debtor's property, and not as to property of the bankruptcy estate, is not a harsh enough sanction to deter all abusive repeat filings. In *Reswick* the court opined that

> … the majority interpretation, would also render section 362(c)(3)(A) devoid of any practical effect. Very few creditors would seek to pursue only the debtor personally, or only property of the debtor.

Reswick, 446 B.R. at 368. The panel also felt that the majority interpretation so weakened section 362(c)(3)(A) that it would not deter repetitive bad faith filings.

> The alternative reading of section 362(c)(3)(A) would leave no meaningful consequence for a debtor filing a second case within a year and would not advance the goal of deterring a debtor's second filing, because there are very few practical situations in which a creditor would take action against a debtor or non-estate property.

Id. at 373.

The minority view's concern that an interpretation that the stay does not terminate as to property of the estate is not sufficiently harsh is misguided in two respects. First, it is not the province of the courts to rewrite the statute to conform to purported legislative intent. This is especially suspect when the supposed legislative intent is based on the general idea that BAPCPA was unreservedly hostile to debtors. While NACBA vigorously opposed passage of BAPCPA because it contained many provisions which cut back on debtor's substantive rights and imposed unnecessary procedural burdens, BAPCPA is not a legislative Christmas tree that incorporates every creditor's wish list. Many changes were made between the first bill that proposed substantial "reform" of the Bankruptcy Code and the final version. Some of the changes added even more provisions that could be construed as pro-creditor, but other changes either mitigated the effect on

debtors of pro-creditor provisions, or made changes in favor of debtors.[1] Therefore it would be incorrect to use a rule of construction that the most pro-creditor interpretation that can be wrung out of BAPCPA should be adopted, willy-nilly.

Second, the consequences of termination of the automatic stay as to the debtor and the debtor's property are greater than stated by the courts following the minority view. According to the minority view the termination of the automatic stay as to the debtor and the debtor's property is so insignificant to the debtor that this sanction would not deter a debtor from a bad faith filing. One court stated that the ability of a creditor to contact the debtor to ask for payment of a debt was small beer indeed.

> If § 362(c)(3)(A) merely allowed creditors to badger the Debtor with phone calls or obtain property of the debtor that is not property of the estate, then this section would be of no value.

In re Jupiter, 344 B.R. 754, 761-2 (Bankr. D. S.C. 2006).

This does not comport with the experience of NACBA members. Aggressive collection calls are a major impetus for individuals to contact bankruptcy attorneys. Individuals who are "collection proof" because they have limited assets and their income is not garnishable nevertheless contact NACBA members seeking

[1] For example, social security income is excluded from the means test due to a change in the definition of "current monthly income" in 11 U.S.C. § 101(10A)(B). *See Drummond v. Welsh,* 711 F.3d 1120, 1122 (9th Cir. 2013). Another improvement for low-income debtors is that there is now a provision for waiver of filing fees in Chapter 7 cases. *See* 28 U.S.C. § 1930(f)(1).

bankruptcy relief. Even after being advised that they are collection proof, many debtors remain so strongly motivated to file for bankruptcy for the peace of mind and finality of a bankruptcy discharge that they plead with the attorney to file a case for them, or, against legal advice, they file for bankruptcy *pro se*.

There are also many tangible detriments when the automatic stay has been terminated as to the debtor and the debtor's property, even if it remains in effect as to property of the bankruptcy estate.

If the debtor's income was being garnished when the bankruptcy petition was filed, termination of the stay allows the creditor to have the garnishment resume if the income is wages and the debtor has filed under Chapter 7. Some types of income are not property of the estate in either Chapter 7 or Chapter 13 cases, for example current or retroactive social security benefits. However, under the Debt Collection Improvement Act, 31 U.S.C. § 3716, the United States can initiate an offset of up to 15% of otherwise exempt income of the debtor. The automatic stay halts such collection, but if the stay is terminated, it can resume.

The automatic stay also prevents interception by the federal government of tax refunds for non-tax debt.[2] The debtor's tax refund may not be part of the bankruptcy estate, in whole or in part, and upon termination of the stay the tax

[2] Section 362(b)(26), which was added by BAPCPA, created an exception to the automatic stay for interception of tax refunds for tax debt if certain conditions are met, but otherwise the automatic stay applies to tax refund intercepts.

refund will be intercepted and applied to the non-tax debt before a discharge has been entered or a plan has been confirmed.

The termination of the automatic stay as to property that is not part of the bankruptcy estate because it is exempt is not a meaningless event of no benefit to creditors, contrary to the assertion made in *Jupiter,* 344 B.R. at 762, n.11. After being deposited with a bank, exempt social security payments can be taken to cover bank overdrafts. *Lopez v. Washington Mutual Bank*, 302 F. 3d 900, 904 (9th Cir. 2002). Exempt property in general is liable for domestic support obligations and for nondischargeable taxes. 11 U.S.C. § 522(c)(1).

If the debtor's driver's license is threatened with suspension for financial reasons, when the stay is terminated as to the debtor the state agency can complete the suspension of the license, as a personal license is not property of the bankruptcy estate. Even if the suspension is "only" for a couple of months, the impact is often profound – the debtor may lose his job, or if she is self-employed, may be unable to take on work that requires the use of a vehicle.

C. Congress Rationally Decided That Protection of Property of the Estate, as Provided in Section 362(c)(3), Should Decrease When the Debtor has Filed a Third Case

The District Court in this case rejected the proposition that maintaining the automatic stay as to property of the estate furthers the goal of equitable distribution

of the estate among creditors by preventing a single secured creditor from recovering more than its fair share to the detriment of other creditors.

> While that concern is a serious one, this Court does not find it likely that Congress would address it by offering protection to creditors of a repeat filer with one prior case under § 362(c)(3), while offering no protection to creditors of a repeat filer with two or more prior cases under § 362(c)(4).

Vitalich v. Bank of New York Mellon, 2016 U.S. Dist. LEXIS 105779 at 17-18* (N.D. Cal. 2016). The position that the failure to protect property of the estate in section 362(c)(4) means that property of the estate is not protected under section 362(c)(3), is flawed logic and ignores the other factors at play.

Whenever there are repetitive filings there is the potential for the bankruptcy to impose undue harm on one or more creditors. It was rational for Congress to decide that in a second filing the automatic stay should continue as to property of the estate even after 30 days in order to give a trustee the opportunity to thoroughly review the situation for the possible benefit of unsecured creditors, while not providing the same protection for the estate upon a third bankruptcy within a year. *In re Williams,* 346 B.R. 361, 369 (Bankr. E.D. Pa. 2006) ("In balancing the respective interests of an individual secured creditor against creditors as a whole, Congress apparently decided that the concerns of abusive bankruptcy filings as to secured creditors were less acute in instances of second filings within one year, as

opposed to third filings."). Indeed, the trustee in a second case will be motivated to scrutinize the debtor's petition and schedules, and more closely examine the debtor at the section 341 meeting, than when there was not a dismissal in the year before filing, because this may be the best, if not the only, chance to preserve assets for the benefit of unsecured creditors. It will also change the approach of the trustee in a second case when deciding whether to file a motion to dismiss, or whether to oppose a motion to dismiss filed by the debtor. While a debtor cannot be forced to remain in a Chapter 12 or Chapter 13 case, the trustee can request that the case be converted to Chapter 7 rather than be dismissed, or that the debtor be barred from filing another Chapter 13 case for a period sufficient for creditors repossess or foreclose.

D. Creditors Are Not Without Recourse

Under the majority view, even though the automatic remains in effect as to property of the estate, creditors who can show that they are not adequately protected or if the property is not necessary for an effective reorganization can move for relief from the automatic stay at any time after a second case is filed, as appellee did in this case. 11 U.S.C. § 362(d)(1) and (2). If a bankruptcy court does not rule on such a motion in a timely manner, the motion is considered granted, unless the parties agree that the stay should remain in effect or the court

finds good cause or compelling circumstances to delay a ruling. 11 U.S.C. § 362(e). Thus adopting the majority view does not impinge on the interests of secured creditors.

CONCLUSION

If the automatic stay is terminated pursuant to section 362(c)(3)(A), the automatic stay continues to apply to property of the bankruptcy estate. Therefore this court should reverse the bankruptcy court and abrogate *Reswick.*

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Local Rule 28-2.6, Amicus hereby states that there are no related cases in this Court.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Ninth Circuit Local Rule 29(d) because this brief contains 3,669 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

/s/ Tara Twomey
Tara Twomey
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing 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 August 25, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Tara Twomey
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