No. 16-1391

IN THE
UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE NINTH CIRCUIT COURT OF APPEALS

In re DAVID JOSEPH RYAN AND MELISSA ANN RYAN,
Debtors.

CIT BANK, N.A.
Appellant.

v.

DAVID JOSEPH RYAN AND MELISSA ANN RYAN,
Debtors-Appellees,

On Appeal from the United States Bankruptcy Court
for the District of Hawaii – No. 09-01604

BRIEF OF *AMICI CURIAE* THE NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER AND THE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLEE

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February 16, 2017

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

CIT Bank v. Ryan, et al., No. 16-1391

Pursuant to Fed. R. Bankr. 8012, Amicus Curiae, the ***National Consumer Bankruptcy Rights Center***, makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations. **NONE.**

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock. **NONE.**

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

This 16th day of February 2017.

s/ Tara Twomey
Tara Twomey, Esq.
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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

CIT Bank v. Ryan, et al., No. 16-1391

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3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

This 16th day of February 2017.

s/ Tara Twomey
Tara Twomey, Esq.
Attorney for Amici Curiae

CERTIFICATION REQUIRED BY BAP RULE 8015(a)-1(a)

CIT Bank v. Ryan, et al., No. 16-1391

The undersigned certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

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STATEMENT OF INTEREST OF *AMICI 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 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. A significant portion of Chapter 7 bankruptcy

debtors have real property that is subject to a mortgage loan or other lien. The Code requires a debtor to specify an intention with respect to real property that is so encumbered. When a debtor opts to "surrender" real property, he must make it available to the trustee, but surrender does not divest the debtor of all rights with respect to the property. A debtor retains the right to insist that foreclosure proceedings comply with state law. Any other finding would be out of balance with the rest of the Code and, if accepted, would impose greater burdens on owners of real property than on owners of personal property.

CERTIFICATION OF AUTHORSHIP

Pursuant to Fed. R. Bankr. P. 8017(c)(4), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than amicus curiae contributed money to fund this brief.

SUMMARY OF ARGUMENT

The Bankruptcy Code requires a debtor to provide a statement of intention regarding secured property at an early stage of the case. This requirement serves primarily a notice function. That is, the statement of intention does not require the debtor to relinquish any state law rights with respect to the secured creditor.

In 2005, Congress amended the Code and altered the obligations and remedies related to statement of intentions, but only with respect to personal property. As to real property, the statement of intention continues to serve primarily a notice purpose for creditors. When a debtor opts to surrender real property his obligation is limited to cooperating with the trustee's reasonable requests with respect to that property. This is because section 521(a)(2), which requires the statement of intention, may not be interpreted in a way that alters the debtor's or trustee's rights with regard to such property under the Bankruptcy Code. This language precludes any option for automatic turnover of estate property to a creditor or the relinquishment of all debtor's state law rights. Property abandoned (i.e. not administered) at

the close of the case reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed.

Failla v Citibank, N.A. (In re Failla), 838 F.3d 1170 (11th Cir. 2016), is wrongly decided. The Failla court concluded that estate property is surrendered to the secured creditor. Such a conclusion is not supported by any language in the Bankruptcy Code and is in direct contravention to the language of section 554(c).

Furthermore, the bankruptcy court correctly determined that, in chapter 7, grounds for denial of discharge are found in section 727 and are unrelated to the debtor's statement of intention. Therefore, denial of discharge is an inappropriate remedy for creditor complaints as to the debtor's treatment of collateral, even in the case of the debtor's refusal to surrender property to the trustee as required by section 521(a)(4). This is reasonable as the debtor never has the absolute right and ability to accomplish any of the choices that are specifically listed in section 521(a)(2).

ARGUMENT

I. WHEN THE COLLATERAL IS REAL PROPERTY, SECTION 521(A)(2) REMAINS A NOTICE STATUTE

A. Section 521(a)(2) As A Notice Provision

The requirement for an individual debtor in a Chapter 7 case to file a statement of intention regarding secured debts was added to the Bankruptcy Code in 1984. It originally applied only if the debtor had consumer debts secured by property of the estate. The background for the 1984 amendment was that secured creditors were unhappy that they could not easily ascertain what debtors intended to do with their collateral due to the automatic stay. *See, e.g., In re Belanger,* 118 B.R. 368, 370-71 (Bankr. E.D. N.C. 1990). The benefit of requiring the debtor to submit a statement of intention regarding the collateral at an early stage of the case was that it would avoid the cost to creditors of motions to modify the automatic stay that turned out to be superfluous once a debtor's intentions are known. Thus many courts, including this court and various court of appeals, concluded that the statement of intention provision served primarily a notice function. *In re Boodrow,* 126 F.3d 43, 50-51 (2nd Cir. 1997). *Accord In re Price,* 370 F.3d 362, 376 (3rd Cir.

2004) (reviewing legislative history and noting that creditors recommended a notice provision to remedy communication failures); *Mayton v. Sears Roebuck & Co. (In re Mayton),* 208 B.R. 61, 66 (B.A.P. 9th Cir. 1997) (section 521(2) is essentially a notice statute); *In re Irvine*, 192 B.R. 920, 921 (Bankr. N.D. Ill. 1996) ("the purpose behind the section is one of notice"); *In re Parker*, 142 B.R. 327, 329 (Bankr. W.D. Ark. 1992) ("[s]ection 521 is 'essentially a notice requirement adopted to permit secured creditors to ascertain the debtor's intentions early in the case.'"). Further, as enacted in 1984, nothing in section 521 suggested that "a creditor succeed[ed] automatically to any rights as a consequence of the debtors' failure to comply with its mandatory directives." *Lowry Fed. Credit Union v. West*, 882 F.2d 1543, 1546 (10th. Cir. 1989).

Prior to the enactment in 2005 of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005) ("BAPCPA"), neither section 521(a)(2) nor any other section set forth a specific remedy if the debtor failed to file a statement of intention, filed a defective statement, or did not take the action specified in the statement. Some courts held that relief from the

automatic stay was an appropriate remedy, *see, e.g., In re Donnell*, 234 B.R. 567 (Bankr. D. N.H. 1999), but none held that a debtor could be forced by a creditor to specifically perform the actions listed on the statement of intention.

B. BAPCPA Changed The Rules For Personal Property, But Not Real Property

Three provisions were added by BAPCPA that provide specific remedies for creditors holding allowed claims secured by personal property.

1. New subsection 362(h)(1) provides that if the procedures of section 521(a)(2) are not followed the automatic stay is terminated with respect to the personal property in question and the property is removed from the bankruptcy estate.

> (h) (1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated ***with respect to personal property*** of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such ***personal property*** shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—
>
> (A) to file timely any statement of intention required under section 521(a)(2) with respect to such ***personal property*** or to indicate in such statement that the debtor will either surrender such ***personal property*** or retain it and, if

> retaining such ***personal property***, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such ***personal property,*** or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and
>
> (B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

11 U.S.C. § 362(h)(1) (emphasis added). Section 521(a)(2)* (the hanging paragraph) was amended accordingly, to note that section 362(h) does alter the rights of the debtor and the trustee under the Bankruptcy Code regarding the collateral.[1]

2. New subsection 521(a)(6) introduces a new obligation on debtors, to "not retain possession" personal property where the creditor has an allowed claim for the purchase price unless the debtor reaffirms the debt or redeems the collateral.

> (a)(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of ***personal property*** as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in

[1] The hanging paragraph now reads as follows: "except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)." 11 U.S.C. § 521(a)(2)* (2016)

> such ***personal property*** unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—
>
> (A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or
>
> (B) redeems such property from the security interest pursuant to section 722;
>
> If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the ***personal property*** of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law, unless the court determines on the motion of the trustee filed before the expiration of such 45-day period, and after notice and a hearing, that such property is of consequential value or benefit to the estate, orders appropriate adequate protection of the creditor's interest, and orders the debtor to deliver any collateral in the debtor's possession to the trustee.

11 U.S.C. § 521(a)(6) (2016) (emphasis added). Section 521(a)(6) is the only section that potentially requires delivery of collateral, and as noted above, it is limited to personal property. This section will rarely be invoked, since it only applies when the creditor has an allowed claim for the full purchase price. *In re Donald,* 343 B.R. 523, 536-37 (Bankr. E.D. N.C. 2006); 4-521 Collier on Bankruptcy ¶ 521.14[4]. Rare or not, this

particular situation is the only one where the debtor may be obligated to relinquish physical possession of the property in question.

3. Finally, new subsection 521(d) removes any restrictions on the enforcement of *ipso facto* clauses where either section 521(a)(6) or section 362(h) is applicable.

> If the debtor fails timely to take the action specified in subsection (a)(6) of this section, or in paragraphs (1) and (2) of section 362(h), with respect to property which a lessor or bailor owns and has leased, rented, or bailed to the debtor or as to which a creditor holds a security interest not otherwise voidable under section 522(f), 544, 545, 547, 548, or 549, nothing in this title shall prevent or limit the operation of a provision in the underlying lease or agreement that has the effect of placing the debtor in default under such lease or agreement by reason of the occurrence, pendency, or existence of a proceeding under this title or the insolvency of the debtor. Nothing in this subsection shall be deemed to justify limiting such a provision in any other circumstance.

11 U.S.C. § 521(d). Although the text of section 521(d) does not explicitly refer to personal property, it follows that the scope of section 521(d), which is relevant only if section 521(a)(6) or 362(h) applies, is also limited to personal property.

Except in the circumstances set forth in section 521(a)(6), nothing in the 2005 amendments provides a mechanism by which creditors with allowed claims secured by personal property may avoid obligations

imposed by state law. *See In re Theobald*, 218 B.R. 133, 136 (B.A.P. 10th Cir. 1998). And, certainly nothing in the amendments alters the notice purpose of section 521(a)(2) with respect to real property.

C. BAPCPA Did Not Impose Similar Obligations With Respect to Real Property

All three of the new creditor-friendly remedies apply only where the collateral is personal property. If the collateral is real property, even the debtor's failure to file a statement of intention has no effect on the property's status as property of the bankruptcy estate, there is no termination of the automatic stay, and there is no validation of *ipso facto* clauses. This makes perfect sense when one considers that the 2005 amendments also expanded reach of section 521(a)(2), which now applies to all secured debts, not just consumer debts. Debtors who need to file bankruptcy will often have liens on their homes – statutory liens for unpaid property taxes, water bills or income taxes; judgment liens; homeowner's association liens; mechanics liens; junior liens securing home equity lines of credit. As a result of the expansion of the scope of section 521(a)(2), the scenario of multiple creditors holding liens on the same real property has become very common. Short deadlines,

automatic remedies, and hard and fast rules are ill-suited for this situation and would hamper the administration of the estate. Congress sensibly did not impose such rules where real property is involved.

CIT Bank's argument that a debtor who has indicated surrender of real property is thereby relinquishing all rights in or related to the collateral, including the right to insist that foreclosure proceedings comply with state law is out of balance with the rest of the Code. If accepted, it would impose greater burdens on owners of real property than on owners of personal property even though the only changes to section 521(a)(2) made by BAPCPA were to strengthen creditors' remedies as to personal property. This upends the distinctions between personal and real property established by Congress. Such an anomalous result cannot be correct.

This conclusion is bolstered by BAPCPA's addition of section 524(j). This section allows a secured creditor to ask a homeowner to remit normal mortgage payments without running afoul of the discharge violation. 11 U.S.C. § 524(j). That section would be meaningless if the debtor was limited to reaffirmation or total surrender. 4-521 Collier on Bankruptcy ¶ 521.14[5].

II. THE STRUCTURE OF THE BANKRUPTCY CODE INDICATES THAT THE DEBTOR SURRENDERS PROPERTY OF THE BANKRUPTCY ESTATE TO THE CHAPTER 7 TRUSTEE, NOT TO A SECURED CREDITOR.

The debtor has a duty to surrender to the trustee all property of the estate and all information relating to property of the estate. 11 U.S.C § 521(a)(4). This duty existed before the statement of intention was added to the Bankruptcy Code in 1984. The obligation to surrender property of the estate to the trustee does not typically require that debtors deliver physical possession of the property to the trustee. 4-521 Collier on Bankruptcy ¶ 521.16. Surrendering constructive possession to the trustee is the normal practice, and as long as the debtor cooperates with the trustee's reasonable requests the debtor is considered to have "surrendered" the property. *Id.*

The Supreme Court has emphasized that courts must construe the Bankruptcy Code consistently with the plain meaning of the statutory language. *U.S. v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242 (1989). Section 521(a)(2) contains its own saving clause that must guide interpretation of its subparts. 11 U.S.C § 521(a)(2) (final unnumbered paragraph). By the terms of the saving clause, subparts (A) and (B) of section 521(a)(2) must never be interpreted in a way that "shall alter

the debtor's or the trustee's rights with regard to such property under this title." *Id.*

The plain text of three Code sections leads inevitably to the conclusion that "surrender" under section 521(a)(2) means only surrender to the trustee and cannot mean the relinquishment of the debtor's or the bankruptcy estate's property rights to the secured creditor. These are Code sections 541(a), 521(a)(4), and 554(c). The sections follow the sequential order of events in a bankruptcy case: (1) the filing of the petition; (2) the administration of the bankruptcy estate; and (3) the closing of the bankruptcy case after entry of the discharge order. These sections define a continuous chain of custody over estate property during a bankruptcy. They exclude any option for an automatic turnover of estate property to a creditor.

The commencement of a bankruptcy case under any chapter creates a bankruptcy estate. 11 U.S.C. § 541(a). The chapter 7 bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The Bankruptcy Code states unambiguously that when the debtor's schedules include debts that are secured by property of the estate, this

property falls within the debtor's duty to "surrender *to the trustee* all property of the estate." 11 U.S.C. § 521(a)(4). The transfer of the debtor's property to the trustee is self-executing. The only way in which the debtor may exclude property from this general transfer ("surrender" to the trustee) is to elect to *retain* the property by redemption, reaffirmation, or exemption. 11 U.S.C. § 521(a)(2)(A) and (B).

Interpreting section 521(a)(2)(A) and (B) to require, or even to allow, a debtor to turn estate property over to a* creditor *would conflict with the trustee's rights under section 521(a)(4). The trustee has the right to wait until the close of a bankruptcy case, typically at least three months after the meeting of creditors, to decide whether to administer estate property. If the debtor transferred rights in property to a secured creditor at any time before the close of the bankruptcy case, trustees could not perform their statutory duty. *In re Kasper,* 309 B.R. 82, 92 (Bankr. D.D.C. 2004) ("'surrender' in [§ 521(a)(2)(A)] cannot mean anything inconsistent with the trustee's rights to 'surrender' under [§ 521(a)(4)]"); *see also In re Claflin*, 249 B.R. 840, 848 n.6 (B.A.P. 1st Cir. 2000).

The surrender of the debtor's rights in property to the trustee

pursuant to section 521(a)(4) has significant implications. The trustee steps into the debtor's shoes with respect to the property. The trustee becomes for the time being the legal owner of the property interest and may exercise the rights that go along with that interest.

Section 554 of the Code addresses what happens to property of the bankruptcy estate that the trustee decides not to liquidate ("administer") for the benefit of creditors. It provides:

> Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned ***to the debtor*** and administered for purposes of section 350 of this title.

11 U.S.C. § 554(c) (emphasis added). This is the effect of abandonment under section 554(c) as described by *Collier*:

> Upon abandonment under section 554, the trustee is divested of control of property because it is no longer part of the estate. Thus, abandonment constitutes divestiture of all of the estate's interest in the property. Property abandoned under section 554 reverts to the debtor, and the debtor's rights to the property are treated as if no bankruptcy petition was filed.

5-554 Collier on Bankruptcy ¶ 554.02[3] (*citing In re Dewsnup*, 908 F.2d 588, 590 (10th Cir. 1990), *aff'd* 502 U.S. 410 (1992)); *see also Catalano v. C.I.R*, 279 F.3d 682, 685 (9th Cir. 2002) ("Upon abandonment, the

debtor's interest in the property in restored nunc pro tunc as of the filing of the bankruptcy petition"). Again, section 521(a)(2)(A) and (B) cannot be interpreted to eliminate the debtor's rights under section 554(c) in property abandoned by the estate.

Here, the trustee did not to administer the property securing the debt. The bankruptcy court closed out the bankruptcy as a properly administered case. At that point the unadministered property listed in the Ryans' schedules reverted to them. The return of the property to the Ryans as if no bankruptcy petition was filed was consistent with the Ryans' selection of the "surrender" option on their chapter 7 statement of intention form.

III. THE ELEVENTH CIRCUIT'S *FAILLA* DECISION IS INCORRECT

In *Failla v Citibank, N.A. (In re Failla),* 838 F.3d 1170 (11th Cir. 2016), the Court of Appeals held that the debtors could not defend in state court against a foreclosure case brought by a mortgagee. The court did not hide its disdain for the debtors' delaying tactics, and its sympathy for the secured creditor frustrated by the plodding pace of foreclosure procedures in Florida state courts. The court however, in its

zeal to cut through these issues, created a wholly unnecessary judicial remedy.

The *Failla* court looked at the text of section 521(a)(2) and concluded that Congress must have intended that a two-step surrender process apply in chapter 7 cases. Citing to section 521(a)(4) the court acknowledged that "the debtor first surrenders to the trustee." 838 F.3d at 1175-76. Then, referring to section 521(a)(2), the court continued, "if the trustee abandons [the property], then the debtor surrenders it to the creditor." *Id.* at 1176. The court failed to mention Code section 554(c), which states unambiguously that at the close of a bankruptcy case the property of the bankruptcy estate "is abandoned to the debtor." 11 U.S.C. § 554(c). The court's view that estate property must be surrendered *to the creditor* contradicts the plain language of section 554(c). Fashioning such a remedy runs counter to the Supreme Court's directive that courts construe the Code based upon its plain language. *U.S. v. Ron Pair Enterprises, Inc.,* 489 U.S. 235, 242 (1989).

The *Failla* court opined that if the word "surrender" appearing in section 521(a)(2) and in section 521(a)(4) were construed to mean the same thing, the term would be redundant. The court concluded that the

word "must mean something different in each section." 838 F.3d at 1175. The court's statutory analysis was flawed. First, the same word appearing multiple times in the same statute can, and usually does, mean the same thing. "Generally, identical words used in different parts of he same statute are presumed to have the same meaning." *Robers v. U.S.*, 134 S. Ct. 1854, 1857 (2014) (internal quotations and citations omitted); *see also Brown v. Gardner*, 513 U.S. 115, 118 (1994). Second, even if the word "surrender" in subparts (a)(2)(A) and (a)(4) of section 521 refers to different aspects of the surrender process, these nuances do not support judicial creation of an entirely new creditor remedy never mentioned in the Code.

The *Failla* Court articulated a second statutory construction argument in support of its double surrender interpretation. The court pointed out that the terms "redeem" and "reaffirm" appearing in section 521(a)(2) affect the rights of creditors. Therefore, according to the court, "the word 'surrender' likely refers to a relationship with a creditor as well." *Id.* at 1176. This "likely" relationship led the court to conclude that "surrender" in section 521(a)(2) must mean the transfer of all the debtor's rights in property to *creditors*. *Id.* The problem with this

analysis is that the terms "redeem" and "reaffirm" (as well as the term "exempt," which the court did not mention) also directly involve the debtor's relationship *with the bankruptcy estate*. *In re Kasper,* 309 B.R. at 97-101. Exercising any one of the three retention options removes the property from the bankruptcy estate. There is thus a clear relationship between the section 521(a)(2) retention options and the *bankruptcy estate*. *Failla*'s "contextual" analysis is purely speculative and without support in the text of the Code.

Further, the *Failla* Court's analysis creates a conflict between section 521(a)(2) and the automatic stay. 11 U.S.C. § 362(a). "Surrender" of property to a secured creditor is not among the 28 listed exceptions to the operation of the stay. 11 U.S.C. § 362(b). Congress clearly knew how to create exceptions to the automatic stay. It did not create one for debts secured by real property based on the "surrender" election. 4-521 Collier on Bankruptcy ¶ 521.14[5]; *In re Kasper,* 309 B.R. at 93-94.

The practical effect under *Failla* is that debtor's real property is less protected than debtor's personal property, notwithstanding the 2005 amendments to the Code, and debtors with real property would be

better off not filing the statement of intention at all. This could not be a result that Congress intended. The correct interpretation of the meaning of "surrender" is that the debtors retain whatever state law rights that may exist as long as they do not conceal or remove the property, or physically obstruct access to the property if the creditor has a state law right to enter into or inspect the property.

IV. A DEBTOR'S DISCHARGE IS UNRELATED TO THE CHOICES MADE IN OR THE ACTIONS TAKEN AS A RESULT OF THE STATEMENT OF INTENTION

The secured creditor, CIT Bank, argued in state court, before the bankruptcy court, and in this appeal, that the debtors received their discharge "in exchange" for their statement of intent to surrender the property. CIT Opening Br. at 48. As the bankruptcy court correctly observed, none of the grounds for denial of discharge have anything to do with the statement of intention.

A. The Grounds for Discharge Denial Listed in Section 727 Do Not Incorporate Any Provisions From the Statement of Intention

In a Chapter 7 case the grounds for denial of discharge are found in 11 U.S.C. § 727(a). In sections 727(a)(2) to (a)(7) various kinds of bad

conduct in the bankruptcy case, or within a year of the filing of the case, are listed as grounds for denial of discharge. There is no reference to anything in section 521(a) as grounds for denial of a discharge, not even a refusal to surrender property to the trustee as required by section 521(a)(4). Withholding of information from an officer of the estate is grounds for denial of discharge, if done knowingly and fraudulently. 11 U.S.C. § 727(a)(4)(D). Simple failure to provide information to the trustee is not grounds for discharge, and there is nothing linking the debtor's discharge to providing information to a creditor.

If a debtor fails to surrender property to the trustee, the trustee can seek an order requiring the debtor to provide records or to deliver property of the estate to the trustee. If the debtor then refuses to comply with the order, there would be "cause" to dismiss the case under 11 U.S.C. § 707(a). *Miller v. Mathis (In re Mathis),* 548 B.R. 465, 470-71 (Bankr. E.D. Mich. 2016).

B. Because Fulfillment of the Debtor's Stated Intention is Not Fully Within the Debtor's Control, Denial of Discharge As a Sanction Would Be Fundamentally Inconsistent With the Bankruptcy Code's Fresh Start Policy

There is no indication that Congress intended to grant secured creditors the power to deny the debtor a discharge, but that would be the result if a discharge could be denied any time a debtor was not able to fulfill the choice made in the statement of intention. The debtor never has the absolute right and ability to accomplish any of the choices that are specifically listed in section 521(a)(2).

Reaffirmation - Reaffirmation is voluntary for the creditor as well as for the debtor. *See Matter of Turner,* 156 F.3d 713, 718-19 (7th Cir. 1998), and cases cited therein. A creditor may drive a hard bargain, even refusing to reaffirm unless the debtor agrees to more onerous terms than the original contract. *In re Jamo,* 283 F.3d 392, 400 (1st Cir 2002)(credit union's refusal to reaffirm mortgage unless other debts were also reaffirmed was not predatory or in violation of automatic stay). Debtors are not solely in control of the reaffirmation process.

Redemption - Redemption under section 722 only applies to tangible personal property, intended primarily for personal, family or household use, where the debt is a dischargeable consumer debt. 11 U.S.C. § 722. It is not an option as to the real property at issue in this appeal. Even where the collateral is tangible personal property, a debtor's good faith intention to use this option may not be possible if the value of the property turns out to be more than the debtor's estimate, or if the debtor is unable to obtain the lump sum payment that is required (for example, if the debtor's earned income tax refund that is the anticipated source of funds is delayed by the IRS). As with reaffirmation, the failure of the debtor to redeem property may be beyond his control despite his honest intent.

Surrender - As the bankruptcy court held, and as this brief argues elsewhere, CIT Bank's position, that "surrender" of real property in the context of the statement of intention means transfer of possession or transfer of title, is incorrect. Even if CIT Bank's position were correct, such transfers are not within the debtor's control. It is black letter law that one person cannot unilaterally force another person to become the owner of real property. 14 Powell on Real Property 81A.04[3] at 81A-77

("The grantor cannot thrust the property onto the grantee against his or her will, even if the conveyance is gratuitous."), as many debtors have learned the hard way. *See* Boyack and Berger, *Bankruptcy Weapons to Terminate a Zombie Mortgage,* 54 Washburn L.J. 451,453 (2015). In a Chapter 7 case a secured creditor cannot be required to take possession of or title to real property, no matter how much the debtor may want to get rid of the property and move on. *In re Canning,* 706 F.3d 64, 69-70 (1st Cir. 2013)("[t]he secured creditor, however, has the prerogative to decide whether to accept or reject the surrendered collateral ….."). The Chapter 7 secured creditor's right to refuse to become the owner of real property is not limited to obviously burdensome property, such as environmentally contaminated property. A secured creditor may have economic or other reasons to not complete the foreclosure process, and the chapter 7 debtor does not have the power to force the creditor to act according to the debtor's timetable, or indeed at all.

Denial of discharge as a sanction for failure to complete any of these options would be fundamentally inconsistent with the bankruptcy code's fresh start policy.

CONCLUSION

For the reasons stated above, the opinion of the bankruptcy court below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2017, I electronically filed the foregoing document with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

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