No. 20-60044 (PRO BONO)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re JASPER STEVENS; BRENDA LOUISE MURRAY STEVENS,

Debtors.

JASPER STEVENS; BRENDA LOUISE MURRAY STEVENS,

Appellants,

v.

ROBERT S. WHITMORE, Chapter 7 Trustee,

Appellee.

On Appeal from an Order of the Bankruptcy Appellate Panel
of the U.S. Court of Appeals for the Ninth Circuit
BAP No. 19-1325

OPENING BRIEF FOR APPELLANTS

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INTRODUCTION

This case involves one of the clearest instances of abandonment of an asset by a bankruptcy trustee that this Court will ever see. When Appellants Jasper Stevens and Brenda Louise Murray Stevens filed for bankruptcy, they detailed their pending state-court lawsuit against Ocwen Loan Servicing, LLC. ER-52. The Trustee, Appellee Robert Whitmore, "discussed" the lawsuit with them, ER-98, "reviewed" copies of the pleadings, ER-85, "determined that it was not a case he would normally pursue due to the potential high litigation costs and unpredictability of the result," ER-94, and filed a report finding "no property available for distribution" and deeming the estate "fully administered," ER-162. The bankruptcy case was closed in October 2017.

Had the Ocwen lawsuit been disclosed on a piece of paper entitled "Schedule," there would be no dispute that the Trustee abandoned it to Jasper and Brenda to pursue on their own. Under Section 554(c), "any property scheduled under section 521(a)(1)" and not "administered at the time of the closing of [the] case is abandoned to the debtor." 11 U.S.C. § 554(c). But because the lawsuit was disclosed only on a *different* Section 521(a)(1) filing—called a "Statement of Financial Affairs" (SOFA)—the Bankruptcy Appellate Panel (BAP) held the lawsuit was never abandoned and thus the Trustee could settle it nearly two years later over the debtors' objection. That ruling deprives Jasper and Brenda of their day in court, erases years

of effort they poured into a case the Trustee deemed worthless, and provides the Trustee and Ocwen with an unjustified windfall at Jasper and Brenda's expense.

The Bankruptcy Code does not permit, much less require, this counterintuitive and inequitable result. The text of Section 554(c) is clear: By its terms, the phrase "property scheduled under section 521(a)(1)" permits a trustee to abandon property disclosed under any subsection of Section 521(a)(1)—including a "statement of the debtor's financial affairs," 11 U.S.C. § 521(a)(1)(B)(iii). Contrary to the BAP's assumption, the text is not limited to property disclosed only on particular filings under subsections 521(a)(1)(B)(i) and (ii).

The BAP's basic error was to treat Section 554(c) as a provision concerned with "expectations for a *debtor*'s performance of statutory duties." ER-12 (emphasis added). In fact, Section 554(c) concerns a *trustee*'s statutory duties, as Congress intended it to provide an efficient mechanism for trustees to abandon property that they deem worthless or worth less than it would cost to liquidate. The phrase "property scheduled under section 521(a)(1)," 11 U.S.C. § 554(c), thus was not designed—as the BAP imagined—to penalize debtors for disclosing property on the wrong piece of paper, particularly where the disclosure prompts a fulsome analysis of the property's value by the trustee. Rather, the phrase includes all assets disclosed under Section 521(a)(1), as a trustee has knowledge of such assets and can make an

informed decision about them in administering the estate. Unquestionably, assets disclosed only on a SOFA are assets of which any diligent trustee is aware.

Because assets that are disclosed only on a SOFA can be abandoned by operation of Section 554(c), the Ocwen claims were abandoned to Jasper and Brenda, and the Trustee had no authority to enter into a settlement with Ocwen. The Court should reverse the order below and remand with instructions to order the Trustee to withdraw the settlement in the Ocwen litigation.

STATEMENT OF JURISDICTION

This appeal concerns a final order issued by the BAP, which affirmed the bankruptcy court's order granting the Trustee's motion to approve a settlement. The bankruptcy court had jurisdiction over these Chapter 7 bankruptcy proceedings pursuant to 28 U.S.C. § 157(b)(2)(A) and (O) and 28 U.S.C. § 1334. After the bankruptcy court issued its decision on November 25, 2019, ER-16–17, Appellants timely appealed to the BAP within 14 days on December 5, 2019, ER-127; *see* Fed. R. Bankr. P. 8002(a)(1).

The BAP had jurisdiction under 28 U.S.C. § 158(b)(1). After the BAP affirmed the bankruptcy court's decision on July 2, 2020, ER-4–5, Appellants timely petitioned for rehearing within 14 days on July 16, 2020, ER-180; *see* Fed. R. Bankr.

P. 8022(a)(1). After the BAP denied rehearing on August 4, 2020, ER-180, Appellants timely appealed the BAP's decision to this Court within 30 days on September 3, 2020. ER-137–41; *see* Fed. R. App. P. 4(a)(1)(A), 6(b)(1).

This Court has jurisdiction pursuant to 28 U.S.C. § 158(d)(1).

STATEMENT OF THE ISSUE

Section 554(c) of the Bankruptcy Code provides that "property scheduled under section 521(a)(1)" is "abandoned to the debtor" if not administered before the case is closed. 11 U.S.C. § 554(c). The asset at issue in this case was disclosed on a Statement of Financial Affairs under 11 U.S.C. § 521(a)(1)(B)(iii) and was not administered before the bankruptcy case was closed. The issue on appeal is:

I. Whether the BAP erred in concluding that the Trustee had not abandoned the asset to the debtors.

STATEMENT OF ADDENDUM

As required by Ninth Circuit Rule 28-2.7, the text of the pertinent statutory provision is as follows:

11 U.S.C. § 554. Abandonment of property of the estate.

* * *

> (c) 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.

STATEMENT OF THE CASE

This appeal concerns whether the bankruptcy court properly authorized the Trustee to settle Jasper and Brenda's legal claims against Ocwen.[1] When Jasper and Brenda filed for Chapter 7 bankruptcy, they disclosed the Ocwen claims in their Statement of Financial Affairs under Section 521(a)(1)(B)(iii), and the Trustee investigated the claims and decided not to administer them before the bankruptcy case was closed. Under Section 554(c), those claims were "abandoned to the debtor[s]" because they were "scheduled under section 521(a)(1)" and not "administered at the time of the closing of [the] case." 11 U.S.C. § 554(c). Nevertheless, when Ocwen tried to secure a settlement with the Trustee nearly two years later, the bankruptcy case was reopened, and both the bankruptcy court and the BAP ruled that the Trustee retained authority to settle the Ocwen claims.[2]

I. Statutory Background

When a debtor files for Chapter 7 bankruptcy, "all legal or equitable interests of the debtor in property as of the commencement of the case" become property of

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[1] Ocwen Loan Servicing, LLC and its successor by merger, PHH Mortgage Corporation, are collectively referred to herein as "Ocwen."

[2] Jasper and Brenda handled the Ocwen litigation *pro se*. They were represented by bankruptcy counsel in the bankruptcy court, switched counsel when the bankruptcy case was reopened, and were *pro se* in the BAP proceedings. In this Court, undersigned counsel are representing Jasper and Brenda on a *pro bono* basis pursuant to the Ninth Circuit's Pro Bono Appeals program.

the estate, 11 U.S.C. § 541(a)(1), and a trustee is appointed to "collect and reduce to money the property of the estate" for distribution to creditors, and to "close such estate as expeditiously as is compatible with the best interests of parties in interest," *id.* § 704(a)(1); *see also id.* § 1104 (appointment of trustee). Because "[b]ankruptcy proceedings are intended to grant debtors a 'fresh start,'" *Goudelock v. Sixty-01 Ass'n of Apartment Owners*, 895 F.3d 633, 637 (9th Cir. 2018) (citation omitted), "property acquired . . . by the debtor *after* the commencement of the case" generally remains property of the debtor, 11 U.S.C. § 552(a) (emphasis added). This includes assets the trustee decides not to liquidate before closing the case, which the law deems "abandoned" to the debtor. 11 U.S.C. § 554.

To facilitate the trustee's inquiry into and administration of estate property, debtors normally are required to file a series of attachments to their bankruptcy petition under Section 521(a)(1)—including "a list of creditors," 11 U.S.C. § 521(a)(1)(A), "a schedule of assets and liabilities," *id.* § 521(a)(1)(B)(i), "a schedule of current income and current expenditures," *id.* § 521(a)(1)(B)(ii), "a statement of the debtor's financial affairs," *id.* § 521(a)(1)(B)(iii), and other forms about employment, income, and expenses, *see id.* § 521(a)(1)(B)(iv)–(vi). These attachments cover a broad range of financial information: For example, the "Statement of Financial Affairs" asks various questions about the debtor's income, debts, pending insurance claims, and other information, *see* ER-50–56, and "Schedule A/B" asks a series

of questions about the debtor's property, *see* ER-29–34. There is also some overlap in the attachments: The SOFA asks, for example, whether "[w]ithin 1 year before you filed for bankruptcy, [you were] a party in any lawsuit," ER-52, while Schedule A/B asks about "[c]laims against third parties, whether or not you have filed a lawsuit," ER-33.

Based on these initial filings, the trustee has a duty to creditors to "investigate the financial affairs of the debtor," 11 U.S.C. § 704(a)(4), and the debtor must "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties," *id.* § 521(a)(3), and "surrender to the trustee all property of the estate and any recorded information" about that property, *id.* § 521(a)(4). In addition, the trustee holds a meeting of the creditors, at which "the trustee [must] orally examine the debtor" and inform the debtor of, among other things, "the effect of receiving a discharge of debts." *Id.* § 341(d).

Because not all estate property can be efficiently or quickly liquidated, Section 554 provides three ways for property to be abandoned to the debtor either expressly by the trustee or by the court, or automatically by operation of law when the case is closed:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the

> estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
>
> (c) 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(a)–(c). "Upon abandonment, the debtor's interest in the property is restored *nunc pro tunc* as of the filing of the bankruptcy petition." *Catalano v. Comm'r*, 279 F.3d 682, 685 (9th Cir. 2002).

II. Statement of Facts

A. The Ocwen Claims Were Disclosed, Investigated, And Intentionally Not Administered In The Bankruptcy Case.

On September 22, 2016, Jasper and Brenda filed a *pro se* complaint against Ocwen in the Riverside County Superior Court of the State of California. ER-98, ER-142. The operative complaint states claims for negligence, unfair business practices, and fraud under California law based in part on allegations that Ocwen "wanted to profit from the foreclosure of [Jasper and Brenda's] home" and therefore "deliberately misled [them] into believing [Ocwen] had accepted a short sale settlement offer" while a sale of their home was pending, "refus[ed] to provide necessary documentation" to the escrow agent for closing, and "filed a Notice of Default upon [their] home" shortly after the buyer had pulled out of the sale. ER-72–74.

While the Ocwen litigation was ongoing, Jasper and Brenda filed a voluntary petition for Chapter 7 bankruptcy on June 24, 2017. ER-18–65. Their SOFA indicated "Yes" in response to the question, "Within 1 year before you filed for bankruptcy, were you a party in any lawsuit," and provided case details about the Ocwen litigation, noting that it was "Pending" in the "Superior Court of California County of Riverside" under case number MCC1600867 and caption "Jasper Stevens and Brenda Louise Murray Stevens . . . vs. OCWEN Loan Servicing, LLC [et al]." ER-52. On their separate "Schedule A/B," Jasper and Brenda's bankruptcy attorney mistakenly answered "No" in response to a question about "Claims against third parties, whether or not you have filed a lawsuit." ER-33; *see* ER-98. As an extra "[p]recaution," however, "Ocwen Loan Servicing" was listed as a creditor for "Real Estate Mortgage," ER-41, and was provided notice of the bankruptcy petition, *see* ER-66.

After Mr. Whitmore was appointed Trustee, he investigated the Ocwen claims pursuant to his statutory duty to "investigate the financial affairs of the debtor[s]." 11 U.S.C. § 704(a)(4). He "discussed" the Ocwen claims with Jasper and Brenda at the creditors' meeting, ER-98, and they "provide[d] [him] with copies of litigation documents which [he] received and reviewed," ER-85. According to the Trustee, "[a]fter reviewing" the pleadings, he "determined that [the Ocwen litigation] was not a case he would normally pursue due to the potential high litigation costs and

unpredictability of the result." ER-94; *see also* ER-85 (Trustee declaration on motion to reopen the case stating the Trustee "received and reviewed" the pleadings in the Ocwen litigation and "[a]s a result, [he] concluded that there were no scheduled assets which would benefit this estate").

On August 31, 2017, the Trustee filed a no-asset report stating that he "ha[d] made a diligent inquiry into the financial affairs of the debtor(s)" and had concluded "there is no property available for distribution from the estate," and that the estate "has been fully administered." ER-162. No objections to the discharge were submitted by any creditors—including by Ocwen. *See* ER-163. After discharging Jasper and Brenda's debts, the bankruptcy court closed the case on October 11, 2017. ER-163.

B. For Nearly Two Years, Jasper And Brenda Continued To Pursue The Ocwen Claims.

At the parties' request, the Ocwen litigation was stayed during the pendency of the bankruptcy case. *See* ER-153–54. Within one month of the discharge, Ocwen successfully moved to lift that stay on November 6, 2017. ER-153. Ocwen made no argument that the claims remained estate property or that only the Trustee had authority to pursue them.

Over the next twenty-one months, Jasper and Brenda expended significant time and resources as *pro se* litigants opposing Ocwen on several rounds of motions: On December 27, 2017, they moved to strike Ocwen's previously briefed demurrer

to the First Amended Complaint. ER-152. Although the state court denied that motion, it sustained Ocwen's demurrer only in part. ER-151–52 (Feb. 8, 2018). After Jasper and Brenda filed a Second Amended Complaint, ER-151 (Mar. 12, 2018), they responded to another demurrer from Ocwen, which the state court sustained, ER-150 (July 26, 2018). After filing a Third Amended Complaint, ER-149 (Aug. 6, 2018), Jasper and Brenda opposed yet another demurrer from Ocwen, which the state court denied on December 12, 2018, ER-148.

Ocwen filed its Answer to the Third Amended Complaint on January 10, 2019, ER-147—nearly fifteen months after the Chapter 7 proceedings had closed. Ocwen still did not argue or assert any affirmative defense that the claims remained estate property or that only the Trustee had authority to pursue them. In the meantime, Jasper and Brenda conducted discovery, including briefing a motion to quash/or modify subpoenas, which was denied in part, ER-144–46 (July 8, 2019), successfully opposing a request for an order specially setting a discovery motion, ER-145 (May 21, 2019), and opposing a motion to compel a deposition until it was withdrawn, ER-144–45 (July 26, 2019). They also successfully opposed Ocwen's motion to strike the entire Third Amended Complaint. ER-147 (Feb. 13, 2019).

On June 5, 2019—nearly twenty months after the bankruptcy case had closed—Ocwen moved for summary judgment. ER-144. Jasper and Brenda timely

filed their opposition two months later on August 6, 2019, ahead of a trial date set for October 11, 2019. ER-143.

C. At Ocwen's Behest, The Bankruptcy Case Was Reopened So Ocwen Could Settle With The Trustee.

On June 28, 2019, weeks after filing its motion for summary judgment, Ocwen reached out to Mr. Whitmore *ex parte*, asking him to re-open the bankruptcy proceedings to administer a settlement, and offering "to pay $50,000 in exchange for a full settlement agreement with a broad release, including waiver of [any as-yet discovered claims under] California Civil Code § 1542." ER-87. At the time, the Third Amended Complaint sought damages against Ocwen for up to $555,000 (including treble damages on the fraud claim) plus punitive damages. *See* ER-84; ER-110. On July 24, 2019—the same day as an *ex parte* motion from the U.S. Trustee—the bankruptcy case was reopened. *See* ER-163. Mr. Whitmore was subsequently reappointed as Trustee. *See* ER-164.

On August 14, 2019, Ocwen and the Trustee jointly stipulated to the settlement and dismissal of Jasper and Brenda's claims in state court. *See* ER-88–90. Even though the Trustee had not yet moved for an order from the bankruptcy court authorizing him to administer the Ocwen claims or approving any settlement, Ocwen and the Trustee represented to the state court that the claims were "currently the property of the Bankruptcy Estate," ER-89, and that Mr. Whitmore "has authority to

settle the present action without Plaintiffs' approval," Attach. A, Notice of Settlement of Entire Case, *Stevens v. Ocwen Loan Servicing, LLC*, No. MCC1600867 (Cal. Super. Ct. Riverside Cty. Aug. 12, 2019). The Ocwen litigation was dismissed on August 19, 2019. ER-91; ER-97.[3]

III. Proceedings Below

On August 16, 2019, the Trustee moved the bankruptcy court for approval of the $50,000 settlement agreement. ER 92–93; ER-164. Jasper and Brenda opposed the motion on the basis that, under 11 U.S.C. § 554(c), the Trustee lacked settlement authority because he had abandoned the Ocwen claims by deciding not to administer them before the bankruptcy case was closed. ER-6; ER 103–07. Their new bankruptcy counsel also filed an amended Schedule A/B that included the Ocwen claims. ER-113–14. On November 25, 2019, the bankruptcy court approved the settlement after a hearing, but without issuing an opinion. ER-16–17.

After Jasper and Brenda timely appealed the bankruptcy court's ruling to the BAP of this Court, *see* ER-127–28, the BAP affirmed. Rather than construe the entire statutory phrase "property scheduled under section 521(a)(1)" found in 11 U.S.C. § 554(c), the BAP took a "strict approach" and concluded that "the word 'scheduled' in § 554(c) refers only to assets listed in a debtor's Schedules," ER-8–

[3] Jasper and Brenda have challenged that dismissal, and their challenge is currently pending before the California Court of Appeal. *See Stevens v. Ocwen Loan Servicing, LLC*, No. E074922 (Cal. Ct. App. filed Mar. 18, 2020).

11. Because the Ocwen claims had been disclosed only on a SOFA, the BAP held they had not been abandoned and the Trustee still had authority to administer them nearly two years after the bankruptcy case had been closed. ER-13–14. In support of this "rigid technical abandonment prerequisite," the BAP relied primarily on its own previous decisions and several district court and bankruptcy court decisions largely from the 1980s and early 1990s. *See* ER-8–10.

This appeal followed.

SUMMARY OF ARGUMENT

The BAP erred in holding that the Trustee retained authority to administer claims that were disclosed on Jasper and Brenda's SOFA filed under 11 U.S.C. § 521(a)(1)(B)(iii), but were not administered before the bankruptcy case was closed. By statute, those claims were "abandoned to the debtor[s]" because they were "scheduled under section 521(a)(1)" and were "not otherwise administered at the time of the closing of [the] case." 11 U.S.C. § 554(c). Once Jasper and Brenda emerged from bankruptcy, those claims—which the Trustee had determined were worthless—belonged to them, not the estate.

A. The text of Section 554(c) is clear: "[A]ny property scheduled under section 521(a)(1)" is abandoned if not administered by the close of the case. The Ocwen litigation was "scheduled under section 521(a)(1)" because Jasper and Brenda disclosed it in their required "statement of the debtor's financial affairs," 11 U.S.C.

§ 521(a)(1)(B)(iii). That they (mistakenly) did not *also* disclose it on their Schedule A/B under Section 521(a)(1)(B)(i) does not change this result because, for abandonment purposes, a disclosure need only be sufficient for "a proper investigation of the asset" by the Trustee, *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001)—which their disclosure undisputedly was. The BAP's contrary ruling ignores the phrase "under section 521(a)(1)" and creates the absurd result that abandonment can occur where an asset is mistakenly disclosed on the wrong "schedule," but not if it is mistakenly disclosed only on a SOFA.

B. The legislative history confirms that Section 554(c) applies to property disclosed on any filing under Section 521(a)(1). Far from "aid[ing] administration of the case," as Section 554(c) was intended to do, S. Rep. No. 95-989, at 92 (1978), the BAP's rule *requires* trustees to go through the cumbersome process of providing notice and a hearing to all creditors to abandon any burdensome or worthless assets that are disclosed only on a SOFA. Moreover, the BAP's rule conflicts with the well-established common-law rule—codified in Section 554(c)—that, where a trustee is "so situated as to be chargeable with . . . knowledge" of an asset from the debtor's filings, his failure to administer it constitutes an abandonment. *Dushane v. Beall*, 161 U.S. 513, 516 (1896). Indeed, the SOFA disclosure in this case gave the Trustee actual knowledge of the Ocwen lawsuit, allowing him to make an informed decision not to pursue it before the bankruptcy case was closed.

C. The BAP's rule also undermines several foundational policies of the Bankruptcy Code. It deprives debtors like Jasper and Brenda of a fresh start by allowing trustees to swoop in *years* after a case has closed and take control of assets that the trustee fully investigated—and, in the exercise of his fiduciary duty, deemed worthless at the time of bankruptcy—even though those assets later became valuable only because the debtors were willing to put in the work that would have been too costly for the trustee to undertake. The BAP's rule also encourages trustees not to liquidate or otherwise administer all assets of the estate during the bankruptcy proceeding—and instead to take a "wait and see" approach or not thoroughly investigate whenever an asset happens to be disclosed only on a SOFA.

D. The BAP's rule conflicts with the great weight of precedent, including the approach taken in at least two other circuits and the clear "trend among courts and bankruptcy appellate panels in recent years." *Bird v. Hart*, 616 B.R. 826, 829 (D. Utah 2020). This Court should join its sister circuits and the recent trend among other courts and hold that property disclosed only on a SOFA can be abandoned under Section 554(c).

STANDARD OF REVIEW

This Court "review[s] decisions of the BAP de novo and appl[ies] the same standard of review that the BAP applied to the bankruptcy court's ruling." *In re Boyajian*, 564 F.3d 1088, 1090 (9th Cir. 2009). The BAP reviewed de novo the

bankruptcy court's interpretation of the Bankruptcy Code and its determination that the Ocwen claims had not been abandoned. ER-7 (citing *In re Mwangi*, 764 F.3d 1168, 1173 (9th Cir. 2014); *In re Killebrew*, 888 F.2d 1516, 1519 (5th Cir. 1989)); *see* ER-16–17 (bankruptcy court ruling). The debtors argued that the Ocwen claims had been abandoned in their opposition to the Trustee's motion for approval of the settlement. *See* ER-103–07 (debtors' opposition).

ARGUMENT

This case turns on the meaning of the phrase "property scheduled under section 521(a)(1)" in 11 U.S.C. § 554(c). If that phrase includes only property disclosed on a piece of paper entitled "Schedule," as the BAP ruled, ER-11, then the BAP correctly affirmed the bankruptcy court's approval of the Ocwen settlement. If, however, the statutory phrase includes property disclosed on any of the financial attachments required by Section 521(a)(1)—particularly "a statement of the debtor's financial affairs" (SOFA) under Section 521(a)(1)(B)(iii)—then the Ocwen claims were abandoned to Jasper and Brenda when the bankruptcy case was closed, and the BAP erred in upholding a settlement the Trustee had no authority to administer.

Although this Court has not yet decided the issue, it should rule in this appeal that the statutory phrase "property scheduled under section 521(a)(1)" includes property disclosed on a SOFA under Section 521(a)(1)(B)(iii). That construction is the

only one consistent with the text, the trustee-focused intent animating the abandonment power of Section 554(c), and the basic purposes of the Bankruptcy Act. It is also the only construction consistent with the approach taken in at least two other circuits. *See Spaine v. Cmty. Contacts, Inc.*, 756 F.3d 542, 546–47 (7th Cir. 2014); *In re Furlong*, 660 F.3d 81, 87 (1st Cir. 2011); *infra* I.D. Reversal thus would ensure uniformity at the appellate level, while affirmance would create a circuit split.

The order below should be reversed.

I. THE BAP ERRED IN HOLDING THAT PROPERTY DISCLOSED ONLY ON A SOFA CANNOT BE ABANDONED UNDER SECTION 554(C).

Section 554(c) sets forth three ways for estate property to be abandoned to the debtor: The trustee can expressly abandon property "that is burdensome to the estate" or "of inconsequential value and benefit to the estate," 11 U.S.C. § 554(a); a court can order abandonment of such property, *id.* § 554(b); or a trustee can abandon property by operation of law by not administering it before the case is closed, *id.* § 554(c). This last provision sets forth in full:

> 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.

Id. § 554(c).

This Court "appl[ies] the traditional tools of statutory interpretation in construing the [Bankruptcy] Code." *In re Sisk*, 962 F.3d 1133, 1145 (9th Cir. 2020).

Accordingly, statutory construction of Section 554(c) "'must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purposes.'" *Id.* (citation omitted). "'If the language has a plain meaning or is unambiguous, the statutory interpretation inquiry ends there,'" *Animal Legal Def. Fund v. USDA*, 933 F.3d 1088, 1093 (9th Cir. 2019) (citation omitted), though the Court also can consider legislative history and purpose to "'confirm[ ] what [it] ha[s] concluded from the text alone,'" *Daniel v. Nat'l Park Serv.*, 891 F.3d 762, 775 (9th Cir. 2018) (citation omitted).

As the ordinary meaning of Section 554(c) makes clear, the phrase "property scheduled under section 521(a)(1)" includes property disclosed on a SOFA under Section 521(a)(1)(B)(iii). The legislative history confirms this interpretation, as it is the only interpretation that "aid[s] administration of the case," as Section 554(c) was intended to do, S. Rep. No. 95-989, at 92 (1978), and reflects the common-law rule that Section 554(c) was designed to codify. The BAP's interpretation, in contrast, conflicts with fundamental policies of the Bankruptcy Act by depriving debtors of a fresh start and encouraging trustees not to perform their duties diligently. For these reasons, the BAP's construction of the statute is at odds with the rule applied in other circuits and how most recent courts have construed the statute.

A. The Text And Context Of Section 554(c) Demonstrate That "Property Scheduled Under Section 521(a)(1)" Includes Property Disclosed On A SOFA.

The ordinary meaning of Section 554(c) is clear: "property scheduled under section 521(a)(1)" includes property detailed in a SOFA attachment under Section 521(a)(1)(B)(iii). The BAP's hyper-technical ruling that "property scheduled under section 521(a)(1)" includes *only* property listed on a piece of paper labeled as a "Schedule" under Section 521(a)(1)(B)(i) or (ii) impermissibly reads the word "scheduled" in isolation and contravenes how this Court determines whether property is properly "scheduled."

1. The Ordinary Meaning Of "Property Scheduled Under Section 521(a)(1)" Includes Property Disclosed On A SOFA Under Section 521(a)(1)(B)(iii).

Where "'a statute does not define a term,'" this Court "'typically give[s] the phrase its ordinary meaning,'" usually ascertained by "'consulting common dictionary definitions.'" *Animal Legal Def. Fund*, 933 F.3d at 1093 (citations omitted). Dictionary definitions contemporaneous with the 1978 Bankruptcy Act make clear that the ordinary meaning of "property scheduled under section 521(a)(1)" includes any property detailed in a SOFA attachment filed under Section 521(a)(1)(B)(iii).

To "schedule" something means "to add [it] in or as a schedule or appendix." *Webster's Third New International Dictionary* 2028 (1976). A "schedule," in turn,

is a generic "list or inventory," "[a] sheet of paper . . . annexed to a [written document], exhibiting in detail the matters mentioned or referred to in the principal document." Schedule, *Black's Law Dictionary* 1511 (4th ed. 1968); *accord Webster's Third New International Dictionary* at 2028 ("an appended statement of supplementary details usu[ally] accompanying a legal or legislative document"). To "schedule [property] under section 521(a)(1)" thus means to detail it in an attachment to a bankruptcy petition pursuant to Section 521(a)(1).

Section 521(a)(1) prescribes numerous such attachments that a debtor must include with a bankruptcy petition (or file shortly thereafter, *see* Fed. R. Bankr. P. 1007(c)):

- "a list of creditors," 11 U.S.C. § 521(a)(1)(A);
- "a schedule of assets and liabilities," *id.* § 521(a)(1)(B)(i);
- "a schedule of current income and current expenditures," *id.* § 521(a)(1)(B)(ii);
- "a statement of the debtor's financial affairs," *id.* § 521(a)(1)(B)(iii);
- "copies of all payment advices" from the debtor's employer within the previous 60 days, *id.* § 521(a)(1)(B)(iv);
- "a statement of the amount of monthly net income," *id.* § 521(a)(1)(B)(v); and
- "a statement disclosing any reasonably anticipated increase in income or expenditures" over the following twelve months, *id.* § 521(a)(1)(B)(vi).

Information on these documents is "scheduled" within the ordinary meaning of that verb because it is "add[ed] . . . as a[n] . . . appendix," *Webster's Third New International Dictionary* at 2028, to the debtor's bankruptcy petition and "detail[s] the matters" relevant to that petition, *Black's Law Dictionary* at 1511. Any property detailed on one of these documents, including on a SOFA, is therefore "property scheduled under section 521(a)(1)."

Consistent with this ordinary meaning, this Court and other courts of appeals have often described a debtor's SOFA as part of her bankruptcy "schedules." *See In re Blixseth*, 684 F.3d 865, 867 (9th Cir. 2012) (describing "bankruptcy schedules and statement of financial affairs" as "the Schedules"); *Sec. Ins. Co. of Hartford v. Machevsky*, 81 F. App'x 241, 242 (9th Cir. 2003) (unpublished) (describing the SOFA as a "portion of the bankruptcy schedules"); *see also Ashmore v. CGI Grp., Inc.*, 923 F.3d 260, 276 (2d Cir. 2019) (noting a SOFA could be viewed as "a parallel schedule"); *Hermann v. Hartford Cas. Ins. Co.*, 675 F. App'x 856, 857 (10th Cir. 2017) (unpublished) ("Debtors submitted a Statement of Financial Affairs in the bankruptcy proceeding, including schedules listing their assets"); *Spaine*, 756 F.3d at 544 (describing "schedule of personal property" and "statement of financial affairs" as filed "schedules").

The statutory phrase "property scheduled under section 521(a)(1)" thus clearly includes property disclosed on a SOFA under Section 521(a)(1)(B)(iii).

2. The BAP Erroneously Construed The Word "Scheduled" In Isolation.

The BAP did not purport to construe the full statutory phrase "scheduled under section 521(a)(1)," but instead concluded that the single "word 'scheduled' in § 554(c) refers only to assets listed in a debtor's Schedules." ER-11. That "strict approach," as the BAP called it, ER-8, is not permissible as a textual matter for three independent reasons.

a. The BAP's construction contravenes the bedrock principle of statutory interpretation that "a single word cannot be read in isolation." *Smith v. United States*, 508 U.S. 223, 233 (1993); *see*, *e.g.*, *Sky-Med, Inc. v. FAA*, 965 F.3d 960, 964–65 (9th Cir. 2020) (agency interpretation that "fixat[ed] on a single word in the statute" was unreasonable in light of immediately surrounding context). The word "scheduled" must be construed in light of the full phrase "scheduled under section 521(a)(1)." Had Congress intended that this phrase refer only to property disclosed on a piece of paper called a "Schedule"—*i.e.*, "a schedule of assets and liabilities," 11 U.S.C. § 521(a)(1)(B)(i), or "a schedule of current income and current expenditures," *id.* § 521(a)(1)(B)(ii)—Congress would have limited the phrase to property scheduled under *Section 521(a)(1)(B)(i) or Section 521(a)(1)(B)(ii)*. *See Bird v. Hart* ("*Hart*"), 616 B.R. 826, 829 (D. Utah 2020) ("Had Congress intended the narrower reading of the statute, it could have drafted Section 554(c) to specify that the

scheduling must occur under Section 521(a)(1)(B)(i) in particular."). Instead, Congress referenced Section 521(a)(1) as a whole in order to cover all of its subsections, not just a select few.

In fact, where Congress intended only a schedule of assets and liabilities specifically, it has said so. *See* 11 U.S.C. § 521(a)(2) ("if an individual debtor's *schedule of assets and liabilities* includes debts which are secured by property of the estate . . ." (emphasis added)). Congress' use of the broader phrase "property scheduled under section 521(a)(1)" thus confirms that Section 554(c) is not limited to property disclosed on one of the "schedules" required by Section 521(a)(1)(B)(i) or (ii). *See United States ex rel. Fortenberry v. Holloway Grp., Inc.*, 515 B.R. 827, 829 n.1 (W.D. Okla. 2014) ("If § 554(c) contemplated abandonment only when property is disclosed on schedules, then it would need to say so.").

b. Even taken on its own terms, the BAP's formalistic construction of the word "scheduled" ignored that "scheduled" is a verb, not a noun, and that an asset sometimes should be disclosed in multiple places—including on both a SOFA and a piece of paper entitled "Schedule."

i. By limiting "scheduled" property to "assets listed in a debtor's Schedules," ER-11, the BAP effectively equated the verb "to schedule" with the proper noun "Schedule." But as explained above, the ordinary meaning of the generic verb "to

schedule" is not so limited; rather, dictionary definitions make clear that "to schedule" something encompasses detailing it on any attachment to a legal document. *Supra* I.A.1. Section 521(a)(1) lists seven different attachments—yet the BAP's rigid approach excludes *five* of them because they are called something other than a "schedule," *see* 11 U.S.C. § 521(a)(1) (requiring "statement of . . . financial affairs," "statement of . . . monthly net income," "statement . . . [of] anticipated increase[s] in income or expenditures," "a list of creditors," and "copies" of payment advices). That is not a permissible approach to statutory construction. *See*, *e.g.*, *United States v. Cox*, 963 F.3d 915, 920–21 (9th Cir. 2020) ("[i]n view of these dictionary definitions"—which "do not define notice in relation to audience size"—"the ordinary meaning of 'notice' does not exclude one-to-one communications").

The BAP assumed that the word "scheduled" in Section 554(c) cannot encompass being disclosed on a SOFA because then Congress would not have needed to include the word "listed" in a separate provision on debts "'neither listed nor scheduled under section 521(a)(1).'" ER-11 (quoting 11 U.S.C. § 523(a)(3)). That is incorrect. Under Section 523(a)(3), a discharge order does not discharge a debt that is "neither listed nor scheduled under section 521(a)(1) . . . with the name . . . of the creditor to whom such debt is owed, in time to permit" the creditor to file a proof of claim and, if needed, a request for a determination of dischargeability. 11 U.S.C. § 523(a)(3). Importantly, what connects the debt to "the name . . . of the creditor"

such that Section 523(a)(3) can apply, *id.*, is the debtor's "list of creditors," *id.* § 521(a)(1)(A). The verbs "listed" and "scheduled" thus perform distinct functions: A debt is "scheduled under section 521(a)(1)" if it is detailed in an attachment required by Section 521(a)(1); and a debt is "listed" if, regardless of whether it is detailed in an attachment, it is connected to a listed creditor. A debt that is neither connected to a listed creditor ("listed") nor itself sufficiently detailed ("scheduled") is not discharged under Section 523(a)(3). Accordingly, the verb "scheduled" in Section 523(a)(3) has the same meaning as in Section 554(c).

ii. The BAP separately ignored that property often is scheduled in multiple places. The SOFA includes many detailed questions that overlap with information provided on other pieces of paper entitled "Schedule." The SOFA asks, for example, whether "[w]ithin 1 year before you filed for bankruptcy, were you a party in any lawsuit," ER-52, while Schedule A/B (a bit less clearly) asks about "[c]laims against third parties, whether or not you have filed a lawsuit," ER-33. Similarly, both documents require a debtor to list certain insurance claims, ER-33, ER-53; certain types of valuables, ER-30–31, ER-54; stored property, ER-30–31, ER-54; and certain types of securities, ER-32–33, ER-54.

In these circumstances, the issue is not—as the BAP formalistically assumed—whether the asset happens to be disclosed on a piece of paper entitled

"Schedule A/B" as opposed to a piece of paper entitled "Statement of Financial Affairs." Rather, for purposes of abandonment, this Court and other courts of appeals ask simply whether the disclosure is "so defective that it would forestall a proper investigation of the asset." *Cusano v. Klein*, 264 F.3d 936, 946 (9th Cir. 2001); *see also Spaine*, 756 F.3d at 546–47 ("incomplete schedules that were timely corrected through an oral disclosure" were sufficient for abandonment under Section 554(c)); *Furlong*, 660 F.3d at 87 (for "partially-scheduled claim[s]," "a debtor is required only to 'do enough itemizing to enable the trustee to determine whether to investigate further'" (citation omitted)); *Hart*, 616 B.R. at 831 (disclosures need only "allow the trustee to 'efficiently . . . identify and investigate a potential asset'" (citation omitted)).

As the First Circuit has explained, this pragmatic standard reflects that "'investigation is part of the Trustee's duties under § 704.'" *Furlong*, 660 F.3d at 87 (citation omitted). A trustee is statutorily required to "investigate the *financial affairs* of the debtor." 11 U.S.C. § 704(a)(4) (emphasis added). Where property is disclosed on a debtor's Statement of *Financial Affairs*, the trustee clearly must investigate and, if appropriate, administer the property. Like property disclosed on a piece of paper entitled "Schedule," property disclosed "on the SOFA" gives "the trustee and the bankruptcy court . . . sufficient notice to take steps to protect the creditors' interests." *Ashmore*, 923 F.3d at 281; *see also In re Hill*, 195 B.R. 147,

150 (Bankr. D.N.M. 1996) ("the information supplied in the debtor's statement of financial affairs made the trustee fully aware of the fraudulent transfer claim").

Indeed, the facts of this case confirm that disclosure on a SOFA gives a trustee not just constructive knowledge but even actual knowledge of an asset. Jasper and Brenda's SOFA disclosure prompted the Trustee to "discuss[ ]" the Ocwen claims with them at the creditors' meeting, ER-98, and to investigate further by requesting "copies of litigation documents which [he] received and reviewed," ER-85. Based on their disclosures and his own investigation, the Trustee actually knew about the Ocwen litigation and could make an informed "determin[ation] that it was not a case he would normally pursue due to the potential high litigation costs and unpredictability of the result." ER-94. The Trustee, with full knowledge of the scope and contemporaneous value of the Ocwen litigation, thus abandoned that litigation by intentionally not administering it before the bankruptcy case was closed.

c. In addition, the BAP's rigid statutory construction impermissibly "leads to . . . absurd result[s]." *United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020). Under the BAP's interpretation, Section 554(c) would permit abandonment if the debtor mistakenly disclosed an asset on the wrong piece of paper entitled "Schedule"—but not if the debtor mistakenly disclosed the asset only on a SOFA. "This disparity in outcome rests on no substantive policy or reasoning but on the mere happenstance that the erroneous entry was or was not made on a pleading entitled

'schedule.'" *Hill*, 195 B.R. at 149. "Taken to its extreme, the [BAP's] narrow interpretation creates the possibility that a placement or typographical error on a debtor's schedule of assets and liabilities could bar the debtor from benefiting from technical abandonment because the asset was not perfectly scheduled." *Hart*, 616 B.R. at 829 n.1.

Similarly, where an asset should be disclosed on *both* a Schedule A/B and a SOFA, the BAP's construction of Section 554(c) would permit abandonment if the debtor mistakenly listed the asset *only* on a Schedule A/B—but not if the debtor mistakenly listed the asset *only* on a SOFA. Again, there is no basis in policy or reasoning for this outcome. This "'Court disfavors constructions that would lead to [such] absurd . . . results.'" *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1043 n.6 (9th Cir. 2015) (alteration in original; citation omitted).

* * *

Because the meaning of Section 554(c) is clear, this Court has a "duty to follow the law as enacted by Congress" and is "bound to follow the plain meaning of [the statute]." *In re Albert-Sheridan*, 960 F.3d 1188, 1195 (9th Cir. 2020); *see also id.* at 1190 (reversing the BAP's construction of a Bankruptcy Code provision because "the plain text of the Code requires a contrary result"). But even if the phrase "property scheduled under section 521(a)(1)" were ambiguous, the BAP's admittedly "strict approach," ER-8, still should be rejected because "the Bankruptcy Code

'is to be construed liberally in favor of debtors,'" *Goudelock v. Sixty-01 Ass'n of Apartment Owners*, 895 F.3d 633, 637 (9th Cir. 2018) (citation omitted). A liberal construction of Section 554(c) would be particularly appropriate because many Chapter 7 debtors are *pro se* and may not "understand reporting distinctions which are frequently blurred." *Hill*, 195 B.R. at 149–50.

B. The Legislative History Of Section 554(c) Confirms That Trustees Can Efficiently Abandon Assets Disclosed Only On A SOFA By Deciding Not To Administer Them.

Although the text of Section 554(c) is clear, the legislative history of Section 554(c) reinforces the conclusion that assets disclosed on a SOFA and not administered before the case is closed are abandoned.

1. Section 554 was enacted as part of the Bankruptcy Act of 1978. The legislative history of this provision is otherwise "scant," *Midlantic Nat'l Bank v. N.J. Dep't of Envtl. Prot.*, 474 U.S. 494, 509 (1986) (Rehnquist, J., dissenting), but the Senate Report explained that Section 554(c) was intended "to aid administration of the case," S. Rep. No. 95-989 at 92. Properly construed, Section 554(c) "enables the trustee to rid the estate of burdensome or worthless assets, and so speeds the administration of the estate, . . . and also protects the estate from diminution." *Matter of Quanta Res. Corp.*, 739 F.2d 912, 915 (3d Cir. 1984) (citation omitted), *aff'd sub nom. Midlantic*, 474 U.S. 494. The BAP's construction, in contrast, would impede the efficient administration of estate property.

Estates often include assets that are either worthless or would be too costly or time-consuming to liquidate. Because a trustee has a fiduciary duty to creditors to maximize the liquidated value of the estate, he *cannot* administer such assets. *See*, *e.g.*, *In re Rigden*, 795 F.2d 727, 730 (9th Cir. 1986). As the Department of Justice's *Handbook for Chapter 7 Trustees* explains, "[i]f the sale will not result in a meaningful distribution to creditors, the trustee *must* abandon the asset." U.S. Dep't of Justice, Executive Office for U.S. Trustees, *Handbook for Chapter 7 Trustees* 4-14 (2012) (emphasis added), https://www.justice.gov/ust/file/handbook_for_chapter_7_trustees.pdf/download; *see also id.* 4-1 ("A trustee shall not administer an estate or an asset in an estate where the proceeds of liquidation will primarily benefit the trustee or the professionals, or unduly delay the resolution of the case.").

With Section 554, Congress provided three mechanisms for handling such worthless or administratively burdensome assets. The first two mechanisms—express abandonment by the trustee and court-ordered abandonment—require identification of every asset so abandoned, as well as "notice and a hearing" for all creditors. 11 U.S.C. § 554(a)–(b). It is not always practical, however, to provide notice to all creditors for each and every identified asset of inconsequential value. In no-asset cases, for example, the cost of providing notice of intent to abandon may well exceed the statutory amount for which the trustee can be reimbursed. *See* 11 U.S.C.

§ 326(a) (compensation of Chapter 7 trustee "not to exceed 25 percent on the first $5,000 or less" "upon all moneys disbursed . . . by the trustee to parties in interest").

Congress therefore included a third catch-all provision in Section 554(c). This provision "aid[s] administration of the case," S. Rep. No. 95-989 at 92, by allowing the trustee to efficiently abandon assets without requiring the trustee (or the court) to spend the time and expense of providing notice and a hearing. For this reason, it is "[t]he typical solution" in no-asset cases. Ginsberg & Martin on Bankruptcy § 5.06[A] (2008). Because Section 554(c) involves an implied, not an express, abandonment, it is limited to only those assets of which a court can reasonably assume the trustee had knowledge: *i.e.*, "property scheduled under section 521(a)(1) of this title." 11 U.S.C. § 554(c).

Construing "property scheduled under section 521(a)(1)" to include burdensome property disclosed only on a SOFA would facilitate the efficient administration of an estate. Regardless of the piece of paper on which such property is disclosed, it is property of the estate. *See* 11 U.S.C. § 541(a)(1) (defining property of the estate as "all legal or equitable interests of the debtor in property as of the commencement of the case"). It therefore must be administered or abandoned by the trustee; and where property is expressly disclosed on a SOFA, no trustee diligently performing

his duties can overlook it. Allowing the trustee to intentionally abandon such property simply by not administering it—without the rigamarole of notice and a hearing—enhances the efficient administration of the estate.

The BAP's construction, in contrast, would impede such efficiency by *requiring* a trustee to undertake Section 554(a)'s cumbersome "notice and a hearing" procedure, 11 U.S.C. § 554(a), to abandon any property disclosed only on a SOFA. The BAP offered no reason (and there is none) why Congress would have wanted to impose such administrative burdens on trustees merely because an asset was disclosed on a SOFA, but not also on a Schedule A/B.

2. This conclusion is reinforced by the fact that Section 554(c) was intended to "codify[ ] the judicially developed rule of abandonment." *Midlantic*, 474 U.S. at 501; *see also Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 93-137, Pt. II, at 181 (1973) (noting that the proposed abandonment provision "is new," but "[t]he concept of abandonment is well recognized in the case law"). At common law, it did not matter for abandonment purposes on which piece of paper an asset was disclosed.

"Although there had been no express recognition of an abandonment power in the pre-1978 bankruptcy statute, courts approved the trustee's exercise of such a power as part of his larger power to dispose of the assets of the estate." *Quanta Res. Corp.*, 739 F.2d at 916. Under this pre-1978 caselaw, there were two elements to an

implied abandonment: The trustee needed to have both "knowledge of the asset as property of the [debtor]" and an "intent to abandon it." Note, *Abandonment of Assets by a Trustee in Bankruptcy*, 53 Colum. L. Rev. 415, 421 (1953). Courts "presumed," however, "that a trustee ha[d] knowledge of all assets which [we]re scheduled" in the debtor's initial disclosures and that abandonment was intentional "if, within a reasonable time, [the] trustee fail[ed] to indicate an acceptance of such an asset." *Id.* at 421–23.

Section 554(c) straightforwardly codified both elements. The statutory requirement that the asset have been "scheduled under section 521(a)(1)," 11 U.S.C. § 554(c), reflects the common-law rule that a trustee is presumed to know of any asset for which he is "so situated as to be chargeable with . . . knowledge" from the debtor's filings, *Dushane v. Beall*, 161 U.S. 513, 516 (1896); *see also In re Webb*, 54 F.2d 1065, 1067 (4th Cir. 1932) (finding abandonment where the debtor's disclosure was "certainly sufficient to put him (the trustee) upon diligent inquiry as to the [asset]"). And the statutory requirement that the asset "not otherwise [be] administered at the time of the closing of a case," 11 U.S.C. § 554(c), reflects the common-law rule that a trustee intentionally abandons an asset when he "forbear[s] to act," *Dushane*, 161 U.S. at 516, and fails to administer it after "a reasonable time," *In re Tarpley*, 4 B.R. 145, 146 (Bankr. M.D. Tenn. 1980) (discussing pre-1978 caselaw).

Importantly, whether an asset is disclosed only on a SOFA or also on a piece of paper entitled "Schedule" would not have mattered under the common law. Either way, the trustee would be "so situated as to be chargeable with . . . knowledge" of the asset, *Dushane*, 161 U.S. at 516, because disclosure in either filing would be "sufficient to put him . . . upon diligent inquiry as to the [asset]," *Webb*, 54 F.2d at 1067; *cf. Ashmore*, 923 F.3d at 281 (disclosure on a SOFA gives the trustee "sufficient notice" to investigate); *Spaine*, 756 F.3d at 547–48 (similar).

The facts of this case confirm that disclosure on a SOFA gives a trustee actual knowledge of an asset—or at minimum makes him "so situated as to be chargeable with . . . knowledge" of the asset. *Dushane*, 161 U.S. at 516. Because of Jasper and Brenda's SOFA disclosure, the Trustee "discussed" the Ocwen litigation with them, ER-98, requested "copies of [the] litigation documents which [he] received and reviewed," ER-85, and ultimately "determined that it was not a case he would normally pursue," ER-94. Accordingly, the common-law rule of abandonment that Congress codified in Section 554(c) reinforces that property disclosed only on a SOFA is abandoned if not administered by the close of the case.

C. The BAP's Construction Is Inconsistent With The Broader Policy Of The Bankruptcy Code.

The BAP's rule also contravenes basic policies enshrined in the Bankruptcy Code by preventing debtors like Jasper and Brenda from obtaining a fresh start and by incentivizing trustees not to perform their fiduciary duties diligently. In fact, the

only one to benefit from the BAP's ruling is Ocwen, which allegedly committed fraud and then—after years of litigation against Jasper and Brenda (without disputing they had authority to pursue their claims)—secured a $50,000 sweetheart deal with the Trustee on claims alleged to be worth more than $555,000 plus punitive damages. *See* ER-84; ER-110.

1. The BAP's Construction Deprives Debtors Of A Fresh Start.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (citation omitted). The BAP's strict approach, however, deprives Jasper and Brenda of that fresh start by wiping away the years of hard work they put into the risky and time-consuming Ocwen litigation after the Trustee had declined to take it over during his administration of the bankruptcy estate.

It is well established that when a trustee concludes an asset would cost more to liquidate than the asset is worth, creditors have no entitlement to that asset even if it later becomes profitable to liquidate. *See*, *e.g.*, *In re Adair*, 253 B.R. 85, 91 & n.16 (B.A.P. 9th Cir. 2000) (no revocation of abandonment where asset's value "became ascertainable" only after the bankruptcy petition was filed). As this Court has explained, even "'mistakes in valuation will not enable a trustee to recover an abandoned asset,' not even upon 'subsequent discovery that the property has a greater value than previously believed.'" *Cusano*, 264 F.3d at 946 (citations omitted); *see*

also, *e.g.*, *Hutchins v. I.R.S.*, 67 F.3d 40, 44 (3d Cir. 1995) (similar). This rule makes good sense: Where an asset is too burdensome for *the trustee* to liquidate, it would affirmatively drain estate resources and thereby harm creditors were the trustee to put in the time and effort needed to liquidate the asset. Creditors should not gain a windfall merely because, after the case is closed, *the debtors* decide to put in their own time and money to liquidate the asset.

Yet that is precisely what the BAP's ruling effected here. When Jasper and Brenda filed for bankruptcy, the Ocwen claims were worthless to creditors. Ocwen had already succeeded in dismissing Jasper and Brenda's original complaint, and its demurrer on the First Amended Complaint was pending (and would be sustained in part). ER-152, ER-154, ER-156. There was no settlement on the table or even on the horizon. That is undoubtedly why the Trustee admittedly "determined that [the Ocwen litigation] was not a case he would normally pursue due to the potential high litigation costs and unpredictability of the result," ER-94, and declined to assume control over the litigation.

The Trustee changed his mind only because Ocwen pressed him nearly two years later to agree to a $50,000 settlement on claims then seeking $555,000 plus punitive damages. *See* ER-84, ER-87, ER-110. But Ocwen was quick to settle at that time only because, in the interim, *Jasper and Brenda* had spent an enormous amount of their own time and resources litigating the case *pro se* against Ocwen

(while neither the Trustee nor even Ocwen suggested they lacked authority to do so). In addition to attending half a dozen hearings, Jasper and Brenda wrote and filed hundreds of pages of pleadings—including two further amended complaints and briefing on two more demurrers, two motions to strike, an opposition to Ocwen's summary judgment motion, and three additional motions to quash/or modify subpoenas, to compel a deposition, and to specially set a discovery motion. *See* ER-143–152; *supra* 10–12.

Had the Trustee originally assumed control over the litigation and put in the same work as Jasper and Brenda, the $50,000 settlement that Ocwen eventually offered would not have even covered the Trustee's administrative expenses—and creditors would have received nothing.[4] It would contravene basic policy of the Bankruptcy Act for Jasper and Brenda's significant efforts to be wiped out and handed over to creditors when the Trustee did not—and, consistent with his fiduciary duty to creditors, could not—undertake those efforts on behalf of the estate.

2. The BAP's Construction Incentivizes Trustees To Shirk Their Fiduciary Duties.

The BAP reasoned that its construction "encourages debtors to fulfill" their statutory disclosure duties. ER-12. That turns the statutory regime on its head:

[4] In fact, the Trustee's attorneys are set to receive $13,850 from the eventual settlement merely for efforts related to finalizing and securing that settlement over the course of three months. *See* ER-122–24 (fees application describing work performed); ER-126 (order granting application of fees).

Debtors have disclosure duties primarily so that *trustees* can adequately perform their own statutory duties. By ignoring the central role of trustees, the BAP adopted a rule that would permit (and even incentivize) trustees not to perform their duties diligently.

a. Under the Bankruptcy Act, the "trustee is the 'legal representative' and 'fiduciary' of the estate," *In re AFI Holding, Inc.*, 530 F.3d 832, 844 (9th Cir. 2008); *see also* 11 U.S.C. § 323, with "a fiduciary obligation to conserve the assets of the estate and to maximize distribution to creditors," *Rigden*, 795 F.2d at 730; *see also*, *e.g.*, *Wisdom v. Gugino*, 649 F. App'x 583, 584 (9th Cir. 2016) (unpublished) (same); 11 U.S.C. § 704(a)(1). Although Section 521(a)(1) imposes certain disclosure duties on the debtor, the trustee has independent duties both "to ensure that a debtor files all schedules and statements required under section 521," *Handbook for Chapter 7 Trustees* 4-2, and to "investigate the financial affairs of the debtor," 11 U.S.C. § 704(a)(4).

The debtor's disclosure duties thus serve primarily to enable *the trustee* "to fulfill his duty to investigate the assets of the estate." *Hart*, 616 B.R. at 831 (citing *Furlong*, 660 F.3d at 87); *accord Cusano*, 264 F.3d at 946 (disclosures must enable "a proper investigation of the asset[s]"); *supra* 27. Once a trustee has sufficiently investigated an asset disclosed in the debtor's filings under Section 521(a)(1), he can make "an 'intelligent decision'" about distribution "'on the basis of all reasonably

available information.'" *Hart*, 616 B.R. at 830 (quoting *In re Krachun*, No. 13-22995, 2015 WL 4910241, at *4 (Bankr. D. Utah Aug. 14, 2015)). If, in the exercise of his good-faith judgment, it appears it would cost more than the asset is worth to liquidate it, the trustee must abandon it under Section 554(a) or (c). The responsibility for such abandonment, however, falls squarely on the trustee, not the debtor.

b. By focusing exclusively on a debtor's duties, the BAP ignored the ways its construction would allow trustees to shirk their duties with respect to assets that are disclosed only on a SOFA.

For example, if the trustee thinks such an asset is of uncertain value, the BAP's rule would allow him to take a "wait and see" approach and eschew administering it—knowing that, if the asset turns out to be valuable years later, he can reopen the case and claim the asset was not abandoned. That is arguably what happened in this case, where the Trustee was aware of the Ocwen litigation but chose not to pursue it before the bankruptcy case was closed. Similarly, if the value of an asset that is disclosed only on a SOFA is difficult to ascertain, the trustee could decide to turn a blind eye to that "readily available information," *Hill*, 195 B.R. at 149–50, and not bother doing his homework—knowing that, if the value of the asset becomes more readily ascertainable later on, he can reopen the case and claim the asset was not abandoned. That result is all the more likely when a trustee is tasked with administering a large estate with complex assets.

The BAP's rule even rewards trustees for taking a lax approach to debtors' schedules and *not* informing them if an asset happens to be scheduled on the wrong piece of paper. That, too, happened in this case, as the Trustee clearly knew of and investigated the Ocwen claims, yet never informed Jasper and Brenda that those claims should also be listed on a piece of paper entitled "Schedule." Going forward, other trustees in similar circumstances may well take the same tack and not tell debtors to amend their schedules—particularly if the value of the assets at issue is uncertain or difficult to ascertain.

A construction of Section 554(c) that permits abandonment of assets disclosed only on a SOFA would incentivize none of these bad behaviors. Instead, it would "place a burden on the trustee to examine and evaluate all the readily available information filed with a petition, regardless of its characterization"—just as the Bankruptcy Code envisions. *Hill*, 195 B.R. at 149–50. Because the BAP's construction runs counter to basic policies of the Bankruptcy Code, it should be rejected.

3. The BAP's Other Policy Concerns Do Not Support Its Construction Of The Statute.

The BAP mentioned two additional "bankruptcy policies," ER-12–13, but neither actually supports the BAP's construction.

a. The BAP worried that if property disclosed on a SOFA could be abandoned under Section 554(c), "the bankruptcy court and creditors [might] remain in the dark." ER-13. But where an asset is disclosed on a SOFA, that provides notice to

the bankruptcy court and creditors, just as it provides notice to the trustee. *See Ashmore*, 923 F.3d at 281 (disclosure of asset on a SOFA gives "the trustee and the bankruptcy court . . . sufficient notice to take steps to protect the creditors' interests"); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) ("creditors base their actions on the disclosure statements and schedules"). The creditors in this case, for example, were well aware of the Ocwen claims—not only because Jasper and Brenda had clearly disclosed the claims on their SOFA, but also because they had "discussed [the Ocwen litigation] with the Trustee at [the] meeting of creditors." ER-98.

The BAP also ignored that "the bankruptcy system *already* provides plenty of protections" to deter debtors from intentionally concealing assets through incomplete disclosure. *Ah Quin v. Cty. of Kauai Dep't of Transp.*, 733 F.3d 267, 275 (9th Cir. 2013) (emphasis added). Debtors obtain no benefit from intentionally filing an incomplete disclosure. Where an asset is intentionally concealed, "[r]evocation of abandonment is appropriate," *Cusano*, 264 F.3d at 946; *see also*, *e.g.*, *In re Fuller*, No. 18-00681-RLM-7A, 2020 WL 7346704, at *4 (S.D. Ind. Dec. 14, 2020); and if the asset is a legal claim, the debtor is judicially estopped from pursuing that claim, *Ah Quin*, 733 F.3d at 271–72 (only "an inadvertent or mistaken omission from a bankruptcy filing" defeats judicial estoppel). Debtors also face serious consequences for intentionally filing incomplete disclosures—including sanctions, *see*

Fed. R. Bankr. P. 9011(c), no discharge of their debts, *see* 11 U.S.C. § 727(a)(4)(A), and revocation of a discharge, *see id.* § 727(d)(1), "even if [the case] has long been closed," *Ah Quin*, 733 F.3d at 275 (discussing 11 U.S.C. § 350(b); Fed. R. Bankr. P. 5010). Appropriate cases may even be referred for criminal prosecution. *See* 18 U.S.C. § 152.

As this Court has recognized, these disincentives and penalties already "'adequately deter nondisclosure.'" *Ah Quin*, 733 F.3d at 275 (citation omitted). The BAP's rule thus would not deter fraud or protect creditors any more than the Bankruptcy Code already does. That rule would, however, give a second chance to trustees who intentionally fail to fully administer an estate.

b. The BAP also worried that not adopting a "bright line rule" in this context "would foster litigation" over "whether the unique facts of a case justify technical abandonment." ER-13. But recognizing that disclosure in any attachment under Section 521(a)(1) suffices *is* a bright-line rule. Appellants agree that, where an asset is not disclosed in *any* filing under Section 521(a)(1), abandonment cannot occur by operation of Section 554(c)—as other courts of appeals have uniformly concluded. *See*, *e.g.*, *Jeffrey v. Desmond*, 70 F.3d 183, 186 (1st Cir. 1995); *Tyler v. DH Capital Mgmt., Inc.*, 736 F.3d 455, 465 (6th Cir. 2013); *Vreugdenhill v. Navistar Int'l Transp. Corp.*, 950 F.2d 524, 526 (8th Cir. 1991); *Marshall v. Honeywell Tech. Sys. Inc.*, 828 F.3d 923, 925, 927 (D.C. Cir. 2016). But where an asset is disclosed on a

SOFA, the trustee, the court, and the creditors are all on notice of the asset. So long as the disclosure is sufficiently detailed to allow "a proper investigation of the asset," *Cusano*, 264 F.3d at 946—and there is no dispute that Jasper and Brenda's detailed disclosure satisfied this standard, *see* ER-52—the asset may be abandoned under Section 554(c).

D. The BAP's Ruling Is Against The Great Weight Of Precedent.

Jasper and Brenda detailed the Ocwen litigation in their SOFA, noting that it was "Pending" in the "Superior Court of California County of Riverside" under case number MCC1600867 and caption "Jasper Stevens and Brenda Louise Murray Stevens . . . vs. OCWEN Loan Servicing, LLC [et al]." ER-52. They then "discussed [the litigation] with the Trustee at [their] meeting of creditors," ER-98, and "provide[d] [him] with copies of litigation documents which [he] received and reviewed," ER-85. "After reviewing" the Ocwen litigation, the Trustee admits that he "determined that it was not a case he would normally pursue," ER-94, and filed a no-asset report concluding that "there is no property available for distribution" and that the estate "has been fully administered," ER-162–63. In these circumstances, the clear "trend among courts and bankruptcy appellate panels in recent years" is to find abandonment. *Hart*, 616 B.R. at 830 n.2.

1. To Appellants' knowledge, no circuit has adopted the BAP's "strict approach," ER-8, in a precedential decision—and that rigid construction is incompatible with the functional approach taken in other circuits. The Seventh Circuit has held that "incomplete schedules that were timely corrected through an oral disclosure" are sufficient for abandonment under Section 554(c) even where the only written disclosure was on a SOFA. *Spaine*, 756 F.3d at 544, 546–47. The First Circuit likewise has held that, with respect to "partially-scheduled claim[s]," a debtor need only "'do enough itemizing to enable the trustee to determine whether to investigate further'" under Section 554(c). *Furlong*, 660 F.3d at 87 (citation omitted); *see id.* ("The Trustee was able to conduct his investigation into the value of the claims with the help of the sixteen-count draft complaint before determining that it would not be cost-effective to pursue the claims."). And although the Second Circuit has not squarely construed Section 554(c) in a precedential decision, it has held that a *pro se* debtor who "listed his pending litigation on the SOFA, rather than the Schedule B," is not judicially estopped from pursuing that claim after the bankruptcy case is closed. *Ashmore*, 923 F.3d at 281.

Consistent with this Court's decision in *Cusano*, 264 F.3d at 946, the rule coming out of these and other recent cases is that "[p]artially scheduled assets can be abandoned by operation of Section 554(c), so long as the partial scheduling is sufficient to enable the trustee to determine whether he ought to investigate further."

Hart, 616 B.R. at 832; *accord In re Bernstein*, 525 B.R. 505, 509 (Bankr. N.D. Ga. 2015); *Krachun*, 2015 WL 4910241, at *4; *Fortenberry*, 515 B.R. at 829 & n.1; *Hill*, 195 B.R. at 150; *Osadon v. C&N Renovation, Inc.*, No. 05-17-00453-CV, 2018 WL 2126821, at *3 (Tex. App. May 9, 2018). Jasper and Brenda's detailed disclosure of the Ocwen claims on their SOFA easily fits within this rule.

2. The BAP cited no decision by a court of appeals for its contrary approach. Rather, it relied primarily on a handful of its own decisions, as well as district and bankruptcy court decisions. *See* ER-8–9. None of those cases is persuasive.

Indeed, the BAP itself recently held that an asset "not list[ed] . . . in [the debtor's] Schedule B," but "list[ed] . . . in his Statement of Financial Affairs" *is* abandoned by operation of Section 554(c). *In re Tadayon*, No. NV-18-1119-BKuTa, 2019 WL 1923044, at *1, *7 (B.A.P. 9th Cir. Apr. 29, 2019). Although the trustee there submitted a notice of abandonment specifically mentioning the asset at issue, *id.* at *6, that did not make *Tadayon* "a case involving express abandonment under § 554(a)"—as the BAP in this case assumed, ER-10. A Section 554(a) abandonment requires both "notice and a hearing," 11 U.S.C. § 554(a), and "there was no 'hearing'"—hence no Section 554(a) abandonment—in *Tadayon*, 2019 WL 1923044, at *6 n.7. Rather, *Tadayon* viewed the trustee's notice merely as "clear and unequivocal" *confirmation* of abandonment, *id.* at *7, and held that the asset "was technically abandoned under § 554(c)" because, as here, the SOFA disclosure was sufficient for

the trustee to "conduct[ ] an investigation into the [asset] before making the deliberate decision to abandon it from the estate," *id.* at *5, *7.

The decision below also relied on three earlier BAP cases. But as *Tadayon* explained, two are inapposite because they "involved debtors who were not proceeding in good faith." 2019 WL 1923044, at *6; *see In re Kayne*, 453 B.R. 372, 385 (B.A.P. 9th Cir. 2011) (upholding sanctions award based on intentionally misleading schedules); *In re Pretscher-Johnson*, No. NC-16-1180-BTaF, 2017 WL 2779977, at *2, *5 (B.A.P. 9th Cir. Feb. 23, 2017) ("nothing in the record shows that the trustee knew of the claims"). Moreover, all three cases cited by the BAP are distinguishable because the asset at issue either was inadequately disclosed, *see Pretscher-Johnson*, 2017 WL 2779977 at *2 (SOFA noted only dismissed "appeal of a 'Quiet Title' action against 'Aurora Bank, FSB et al.,'" not lawsuit filed during pendency of bankruptcy case), or was "'never scheduled'" in any written filing, *Kayne*, 453 B.R. at 384 (citation omitted); *see also id.* at 375 (SOFA disclosed only "'Action on promissory note,'" not promissory note itself); *In re Pace*, 146 B.R. 562, 565–66 (B.A.P. 9th Cir. 1992) (only a related asset was disclosed), *aff'd*, 17 F.3d 395 (9th Cir. 1994) (table).

The bankruptcy and district court cases cited by the BAP—most of which are decades old—also are not persuasive. Some did not purport, or had no occasion, to decide whether Section 554(c) prescribes abandonment of assets disclosed only on

a SOFA. *See In re Winburn*, 167 B.R. 673, 675–76 (Bankr. N.D. Fla. 1993) (disagreeing that abandonment arises merely because "the Trustee knew of the cause of action"); *In re McCoy*, 139 B.R. 430, 431 (Bankr. S.D. Ohio 1991) (asset was disclosed only "[a]t the meeting of creditors"); *In re Harris*, 32 B.R. 125, 126–27 (Bankr. S.D. Fla. 1983) ("no reference to" the asset in "the schedule of assets and liabilities . . . nor in the debtors' statement of financial affairs"). And the rest did not engage in a meaningful analysis of the statute, but instead followed other cases. *See Ashmore v. CGI Grp. Inc.*, No. 11 Civ. 8611 (AT), 2016 WL 2865153, at *4 (S.D.N.Y. May 9, 2016), *vacated and remanded on other grounds*, 923 F.3d 260 (2d Cir. 2019); *In re Fossey*, 119 B.R. 268, 272 (D. Utah 1990); *In re Medley*, 29 B.R. 84, 86–87 (Bankr. M.D. Tenn. 1983).

As with the BAP's own decisions, none of these outdated district and bankruptcy court decisions is binding on this Court; nor are they more persuasive than the circuit-level (and more recent district and bankruptcy court) cases going the other way. This appeal therefore presents the Court with a stark choice: Affirmance would create a circuit split, whereas reversal would ensure uniformity at the appellate level. Jasper and Brenda respectfully submit that the outcome reached in other circuits is also the correct one—*i.e.*, an asset disclosed only on a SOFA can be abandoned by a trustee by not administering it before the bankruptcy case is closed. Following that rule here requires reversal.

* * *

All Jasper and Brenda want is to have their day in court against a company they claim defrauded them. When they filed for bankruptcy, they made good-faith efforts to disclose and fully apprise the Trustee of the Ocwen litigation. The Trustee thoroughly evaluated that litigation and, in the exercise of his fiduciary duty, declared it valueless. Relying on the Trustee's abandonment, Jasper and Brenda spent the years, money, and effort pursuing the Ocwen litigation that the Trustee determined he did not want to (and could not) undertake. Now, over four years after commencing the Ocwen litigation, Jasper and Brenda should have a say in whether that case goes to trial. Consistent with the approach taken in other circuits, this Court should rule that the Ocwen claims were abandoned to Jasper and Brenda. The decision below should be reversed, and the Trustee should be ordered to withdraw the settlement in the Ocwen litigation.

CONCLUSION

The Court should reverse the BAP's order and remand with instructions to order the Trustee to withdraw the settlement in the Ocwen litigation.

Dated: February 19, 2021

Respectfully submitted,

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STATEMENT OF RELATED CASES

Appellants are unaware of any related cases pending in this Court within the meaning of Circuit Rule 28-2.6.

Dated: February 19, 2021

/s/ Kellam M. Conover
Kellam M. Conover

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Ninth Circuit Rule 32-1(a) because it contains 11,817 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Ninth Circuit Rule 28-2.6.

I certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionately spaced 14-point Times New Roman typeface.

Dated: February 19, 2021

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