No. 19-1416

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

In re: Nancy Jean Burbridge,
Debtor.

Endurance American Insurance Company,
Appellant
— v. —
Nancy Jean Burbridge, et. al.,
Appellees

On Appeal from the United States District Court for the
Northern District of New York, No. 18-591

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

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Endurance American Insurance Co., v. Burbridge, et al., No. 19-1416.

Pursuant to 2d Cir. R. 26.1, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center make the following disclosure:

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

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

This day of October 17, 2019.

s/ Tara Twomey
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INTEREST OF *AMICI CURIAE*

The National Consumer Bankruptcy Rights Center (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 certain rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system are often 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.

The National Association of Consumer Bankruptcy Attorneys (NACBA) is also a nonprofit organization of over 2,500 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. Congress structured chapter 13 as a completely voluntary repayment program. Only a debtor may petition for chapter 13 bankruptcy, and conversely, a debtor cannot be forced to stay in a chapter 13 case involuntarily. The right to dismiss a chapter 13 case is essential to Congress's purpose of encouraging debtors to take advantage of chapter 13 where possible and of avoiding penalizing debtors for choosing chapter 13. *See Perry v. Commerce Loan Co.,* 383 U.S. 392, 395 (1966); H.R. Rep. No. 103- 835, at 57 (1994).

In this case, the Appellant seeks to establish a good faith requirement on the debtor's statutory right to dismiss her case. Congress did not impose such a condition, and judicial imposition of a good faith prerequisite to voluntary dismissal would be a mistake. Not only does

such a requirement go against the plain language of the statute, but also the negative effects of a judicially-made rule outweigh any possible positive result of—on a rare occasion—being able to challenge the bad faith of a debtor who seeks dismissal. It would be contrary to both the letter and intent of the law for this Court to adopt the position advanced by the appellant.

SUMMARY OF ARGUMENT

In enacting chapter 13, Congress expressed concern that forcing debtors "to toil for the benefit of creditors" would violate "the Thirteenth Amendment's involuntary servitude prohibition." *Toibb v. Radloff*, 501 U.S. 157, 165-66 (1991). Congress thus structured chapter 13 as a "completely voluntary" repayment program. H.R. Rep. No. 95-595, at 120 (1977).

A debtor cannot be forced into a chapter 13 repayment plan under any circumstances. Only a debtor may petition for chapter 13 bankruptcy and file a plan. 11 U.S.C. §§ 301(a), 1321. Likewise a debtor cannot be forced to stay in a chapter 13 case involuntarily. A chapter 13 debtor has the right to convert the case to chapter 7 or dismiss it outright "at any time." 11 U.S.C. § 1307(a), (b). Congress reinforced the right of immediate dismissal by making any waiver of such right unenforceable. *Id.*

Chapter 13 was intended to "encourage more debtors to repay their debts over an extended period rather than to opt for straight bankruptcy liquidation and discharge." H.R. Rep. No. 95-595 at 5 (1977). "In return for a debtor's resolve to commit more of his assets to the repayment of his creditors than would be required under a Chapter 7 liquidation, Chapter 13 of the Bankruptcy Code provides the debtor with a number of benefits unavailable under Chapter 7," such as the ability to retain his property. *In re Peters*, 44 B.R. 68, 71 (Bankr. M.D. Tenn. 1984); *see also In re Lennon*, 65 B.R. 130, 132 (Bankr. N.D. Ga. 1986) ("The statutory scheme of the Bankruptcy Code reflects a congressional intent to make attractive and encourage greater use, which must be voluntary, of Chapter 13 rehabilitation and creditor payment, rather than Chapter 7 liquidation with little or no creditor payment."). The right to voluntarily dismiss a chapter 13 case is essential to Congress's purpose of encouraging debtors to take advantage of

chapter 13 where possible and of avoiding penalizing debtors for choosing chapter 13. *See Perry v. Commerce Loan Co.,* 383 U.S. 392, 395 (1966); H.R. Rep. No. 103- 835, at 57 (1994).

The voluntary nature of chapter 13 is threatened by the Appellant's position that dismissal may be denied upon a finding of bad faith. But this Court has already considered and rejected Appellant's position in *Barbieri v. Raj Acquisition Corp. (In re Barbieri),* 199 F.3d 616 (2d Cir. 1999). There, this Court held that the debtor had an absolute right to dismiss her chapter 13, and noted that, "concerns about abuse of the bankruptcy system do not license us to redraft the statute."

Notwithstanding this Court's binding precedent, Appellant asserts that *Marrama v. Citizens Bank*, 549 U.S. 365 (2007), permits this Court to stray from the mandatory language in section 1307(b) by imposing a good faith requirement on a debtor before she may exercise her right to a voluntary dismissal. *Marrama* interprets similar yet distinguishable statutory text that addresses a debtor's right to convert a case from chapter 7 to chapter 13. In the case of conversion to a chapter 13, the debtor's right to convert is conditioned on the debtor being eligible for chapter 13, which in turn requires the debtor to be acting in good faith. No analogous condition applies to the debtor's dismissal of a chapter 13. Because the text interpreted by *Marrama* is fundamentally different from that in section 1307(b), the *Barbieri* decision remains binding, and the bankruptcy and district courts properly found that *Marrama* does not compel a different result. The lower court decisions should be affirmed.

ARGUMENT[1]

I. Statutory Framework

Bankruptcy: Bankruptcy law reflects a balancing act in which Congress has established the rules for adjusting debtor-creditor relationships. The two main purposes of bankruptcy are to provide a fresh start to the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *See Burlingham v. Crouse*, 228 U.S. 459, 473 (1913). Individuals seeking bankruptcy relief generally seek liquidation under chapter 7 of the Bankruptcy Code or propose a plan for repayment of a portion of their debt under chapter 13.

Chapter 13: Chapter 13 permits an individual debtor with a source of regular income to receive a discharge of certain debts after completing a bankruptcy plan that meets the Code's requirements. Chapter 13 debtors must also file a debt adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321. The chapter 13 plan, if confirmed, is the blueprint for adjusting debtor-creditor relationships.

A chapter 13 case is a unique proceeding under the Bankruptcy Code.[2] It is a chapter where the choice to participate is entirely voluntary by the debtor. 11 U.S.C. § 301(a). Only the debtor may file a plan. *See* 11 U.S.C. § 1321. Similarly, a debtor cannot be forced to stay in a chapter 13 case involuntarily. *See Toibb v. Radloff*, 501 U.S. 157, 165-66 (1991).

A chapter 13 debtor pays a consequence for voluntarily subjecting herself to a chapter 13 proceeding. Not only does her property as it exists on the petition date become subject to the

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local Rule 29.1(b), amici curiae affirm that no counsel for a party authored this brief in whole or in part, and no person or entity other amici and their counsel made any monetary contribution toward the preparation or submission of this brief.

[2] All references to the Bankruptcy Code or any chapters or sections herein are references to the United States Bankruptcy Code, 11 U.S.C. §§ 101-1532.

control of the court, 11 U.S.C. § 541(a), but she also makes available future income, as required by the Code, to repay her creditors for a period of up to five years under her chapter 13 plan. 11 U.S.C. § 1325(b). The income she pays in accordance with her chapter 13 plan is income that she could have retained if she had filed a chapter 7.

In addition, as is the case when any bankruptcy case is filed, the filing can be reflected on the debtor's credit for ten years, even if the case is voluntarily dismissed. *See* 15 U.S.C. § 1681c(a)(1). In exchange, the debtor gets the benefit of the automatic stay provided by section 362 and obtains the necessary breathing space in which to propose a plan to reorganize her finances. *See* 11 U.S.C. §§ 362, 1321. Assuming all goes as the plan contemplates, then she receives a discharge of her remaining dischargeable debt. *See* 11 U.S.C. § 1328.

II. Debtor's Right to Dismiss is Absolute and Under the Code's Unambiguous Language

Congress structured chapter 13 as a "completely voluntary" repayment program. H.R. Rep. No. 95-595, at 120 (1977). The right to voluntarily dismiss a chapter 13 case is essential to Congress's purpose of encouraging debtors to take advantage of chapter 13 where possible and of avoiding penalizing debtors for choosing chapter 13. *See Perry v. Commerce Loan Co.,* 383 U.S. 392, 395 (1966); H.R. Rep. No. 103- 835, at 57 (1994).

A debtor's right to dismiss a chapter 13 is provided by section 1307(b), is not time-sensitive, and is not conditioned on anything other than the fact the case has not been converted from another chapter:

> (b) On request of the debtor at any time, if the case has not been converted under section 706, 1112, or 1208 of this title, the court shall dismiss a case under this chapter. Any waiver of the right to dismiss under this subsection is unenforceable.

As with any exercise in statutory interpretation, a court begins with the text of the statute. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004); *In re Caldor Corp.,* 303 F.3d 161 (2d Cir. 2002) (The task of resolving a dispute over the meaning of a provision of the Bankruptcy Code "begins where all such inquires must begin: with the language of the statute itself."), quoting *U.S. v. Ron Pair Enters*., 489 U.S. 235 (1989). Where the statutory language is unambiguous, the court need not look further.

The language of section 1307(b) is unambiguous. It grants the debtor an absolute right to dismiss a chapter 13 case, so long as the case has not been converted. It affords no leeway to the court by using the word "shall" dismiss. The term "shall" creates an "obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998). Therefore, reading the section in its ordinary and natural sense, when a chapter 13 debtor requests dismissal of an unconverted case, the court must grant the motion.

If the meaning of section 1307(b) were not clear, it would be appropriate to consider the statute's legislative history to resolve any ambiguity. *See C.I.R. v Tufts,* 461 U.S. 300, 315, 103 S. Ct. 1826, 75 L. Ed. 2d 863 (1983). The legislative reports dealing with section 1307(b) reinforce the understanding that no exceptions limit a debtor's right to dismissal. The Senate Report accompanying the Bankruptcy Reform Act of 1978 states that this section confirms "without qualification" the right "of a chapter 13 debtor…to have the chapter 13 dismissed." S. Rep. No. 95-989, at 141(1978). Similarly, the House Report states: "Subsection (b) requires the court, on request of the debtor, to dismiss the case if the case has not already been converted from chapter 7 or 11." H.R. Rep. No. 95-595 at 428. Recognizing the voluntary nature of a chapter 13, Congress intended to give the debtor control and to be able to compel its dismissal.

III. *Marrama* Relies on Conditions Placed on Section 706(a) Which Have No Parallel for Section 1307(b)

Appellant, relying on rulings in other jurisdictions, asserts that the decision in *Marrama v. Citizens Bank*, 549 U.S. 365 (2007), sets precedent for a court to vary from the mandatory language in section 1307(b) by imposing a good faith requirement on a debtor before she may exercise her right to a voluntary dismissal. Although *Marrama*, interpreting a similar yet distinguishable statute that speaks to a debtor's right to convert a case from chapter 7 to chapter 13, found that such right was not absolute, its holding does not abrogate this circuit's authority in *Barbieri v. RAJ Acquisition Corp (In re Barbieri)*, 199 F. 3d 616 (2d Cir. 1999). That decision—holding that the right to dismissal is absolute—remains good law.

In *Marrama*, the Supreme Court was asked to determine whether a chapter 7 debtor had an unfettered right under section 706(a) to convert her case to a chapter 13 proceeding even when her behavior smacked of bad faith. *Marrama* answered that question "no," but to reach that conclusion, relied on a condition placed on section 706(a) by section 706(d). Section 706(a) sets forth when a debtor may request conversion:

> (a) The debtor may convert a case under this chapter to a case under Chapter 11, 12, or 13 of this title at any time, if the case has not been converted under section 1112, 1208, or 1307 of this title….

Subsection (d), however, places an additional condition before the court may convert a chapter 7 to another chapter:

> (d) Notwithstanding any other provision of this section, a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter.

The Supreme Court relied on the conditional language of subsection (d) and the eligibility requirements of a chapter 13 debtor, which included that the petition was filed in good

faith, to conclude that a bad faith debtor, who would not be eligible for chapter 13, did not have an absolute right to conversion because a chapter 13 plan could not be confirmed due to that bad faith. *Marrama*, 549 U.S. at 380-81. In doing so, the Court did not alter the unambiguous statutory language; instead, it recognized an existing statutory condition on the right established by subsection (a).

No similar subsection conditions the absolute right to dismissal in a chapter 13 case. Neither trial nor reviewing court may write a condition into the Code which is not already there. Congress clearly knew how to condition a right given to a debtor, as it did in section 706(d), and its failure to do so here compels the conclusion that no condition exists.

IV. Section 105(a) Does Not Provide a Statutory Basis for the Court to Impose a Condition Even When Bad Faith Exists

Several of the cases relied upon by Appellant use the power given to the bankruptcy courts by section 105(a)[3] to justify modifying the strict language of the statute to insert judicial discretion where none exists. Such reliance is misplaced. The Supreme Court itself, after some of those cases were decided, has precluded the use of section 105 to impose an equitable standard when such action runs contrary to the Code. In *Law v. Siegel*, 571 U.S. 41 (2014), the Court clarified that its comments in *Marrama* about the use of section 105(a) as authority for denying a debtor the automatic right to convert a case from a chapter 7 to a chapter 13 were merely dictum and were not intended to expand the use of section 105(a) if such use would run contrary to statute:

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[3] Section105(a) of the Bankruptcy Code provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process."

> *Marrama* most certainly did not endorse, even in dictum, the view that equitable considerations permit a bankruptcy court to contravene express provisions of the Code.

Id. at 425.

The context of the Supreme Court's decision in *Law v Siegel* is instructive to the matter before this court. There, as the records well reflects, the debtor had led the chapter 7 trustee down a time-consuming and expensive path by creating a false trust deed on his residence held by a fictitious foreign person with a name similar to a real person in the United States. By the time the trustee had succeeded in avoiding the false instrument, no estate asset other than the equity in the residence beyond the true voluntary liens could be used to pay some portion of the costs of administration caused by the debtor's bad faith conduct. Relying on section 105, existing Ninth Circuit authority, and equitable grounds, the bankruptcy court had surcharged the debtor's homestead exemption for the "egregious misconduct" which had created the false encumbrance, avoidance of which caused the high administrative expenses. Reversing this equitable decision by the bankruptcy court, the Court held that such use of section 105 was improper because the surcharge was expressly prohibited by the Code. *Id*. at 421-22. Section 105 could not be used to counter the debtor's "egregious misconduct."

The message could not be clearer: where the Bankruptcy Code unambiguously provides for a mandatory act by the bankruptcy court—"shall dismiss" upon the request of the debtor—the mandate cannot be side-stepped based on an equitable consideration using section 105(a). *Marrama* did not expand the use of section 105(a) to prevent abuse. As noted in *Law*, it relied on the codified condition set forth in section 706(d) to modify the apparent right set forth in section 706(a), not on equitable factors. Since no similar conditions modify section 1307(b), *Barbieri's* reasoning remains sound and its holding should control the outcome of this appeal.

See In re Burbridge, 585 B.R. 16, 21-22 (Bankr. N.D.N.Y. 2018) (*Marrama* did not abrogate *Barbieri* because statutes are not analogous); *In re Sinischo*, 561 B.R. 176 (Bankr. D. Colo. 2016) (granting debtor's request to voluntarily dismiss her case notwithstanding creditor's motion to convert the case to one under chapter 7); *In re Mills*, 539 B.R. 879 (Bankr. D. Kan. 2015).

V. The Negative Consequences of Not Allowing Automatic Voluntary Dismissals Outweigh Any Positive Benefits

The focus of Appellant's theory of this case is that a bad faith exception must be judicially written into the otherwise mandatory language of section 1307(b) to prevent abuse of the bankruptcy system. This focus is misplaced; the Code and Bankruptcy Rules already provide remedies to discourage such abuse. The very facts of this case demonstrate the existence of these remedies. Even though her dismissal motion was granted, appellee hardly has been given a get out of jail free card for violating the court order to sequester the IRA funds. To the contrary, she still faces civil contempt proceedings, which will proceed after case dismissal. In egregious cases, bankruptcy abuses can also be remedied by criminal proceedings. 18 U.S.C. §§ 157-158. And that is only what may occur in the federal system. The debtor now must return to the costly and perhaps financially devastating litigation in state court, which had driven her into the chapter 13 case in the first place. Whenever a debtor exercises her voluntary right to terminate the bankruptcy case, she immediately loses the protection of the automatic stay she sought in the first place. Whatever imminent threat to her financial well-being drove her to the bankruptcy court, be it a foreclosure, garnishment, repossession, or expensive litigation, will spring back to life, unimpeded by the respite the debtor had gained. This stark outcome is the one a debtor must face by giving up the protections bankruptcy gave her in exchange for her making available

income available to her creditors over the course of the plan. Moreover, the negative impact of a bankruptcy filing on a debtor's credit may remain for ten years even though the case was voluntarily dismissed. Thus, the court has remedies for the bad faith conduct, and the creditors are restored to all their rights against the debtor. The downside of conditioning dismissal on a good faith finding, if any, is minimal.

Flip this picture and consider what will happen in the bigger scheme of things if the right to voluntarily dismiss is taken away from potential chapter 13 debtors and their counsel. A debtor receives the protection of the automatic stay during her attempt to reorganize her finances and often the opportunity to save her home or car or a livable wage from the ravages of her creditors. In exchange, she makes available her disposable income for the duration of her plan to repay her secured, priority and unsecured debt. This income, however, is unavailable to the trustee in a chapter 7 and often costly for creditors to tap by using state court collection activities. A confirmed and completed chapter 13 plan is almost always a win for all concerned, including creditors who stop spending unproductive attorneys' fees.

There will be fewer chapter 13's, however, if the right to voluntary dismissal is taken away. Most potential debtors would rather file a simple chapter 7 and obtain a discharge of their dischargeable debt. The proceeding is quick, an average of four to five months from filing to discharge. The cost is typically fixed up front, with debtors' counsel receiving a set flat fee that is rarely exceeded with postpetition charges. The outcome is predictable, as an experienced lawyer, provided the necessary facts by the debtor, can advise which debts are likely nondischargeable or at least at risk for being so and therefore the debtor will know where she will end up financially in the near future. And, importantly, the debtor may keep all of her post petition income.

Therefore, there must be reasons why the potential debtor chooses instead to file a chapter 13, with less certain costs, outcome, and financial future. The reasons are many: a need to test the existence and extent of exemptions without risk if the ruling is unfavorable; a chance to use claims litigation to resolve a disputed debt more quickly and inexpensively than existing state court litigation with multiple parties and complexities; an anticipated increase in income which, if the debtor is given a breathing space, will allow the debtor to keep an encumbered asset by curing an arrearage; in some circumstances, the opportunity to reduce a secured loan to the value of the asset once a court has fixed that value at an affordable figure; and most commonly the opportunity to save a house or car by curing the arrearage under the provisions of a plan.

When debtors' attorneys analyze such circumstances with potential debtors, the chance to adjust debts under chapter 13 is often preferable. The option of trying, and possibly failing in, a chapter 13 is usually presents acceptable risks to the debtor. And, when the plan is confirmed, creditors win because they will receive some portion of the debtor's future income. However, the position advocated by Appellants, would make it much more difficult for counsel to urge debtors into a possibly favorable chapter 13 case if they instead risk conversion to chapter 7. Fewer attorneys will advise debtors to file chapter 13 cases; fewer debtors will choose to file them. That outcome is a loss to the creditor body because their opportunity to be voluntarily paid out of future income is foreclosed before it starts.

If this court follows its precedent and dismissal is still automatic upon request, debtors will continue to take the risks itdentified above with the potential for confirmed plans and substantial payments to creditors from future income. Other remedies exist that discourage bad faith conduct by the debtors. If this court instead conditions dismissal on court discretion, risk-adverse debtors will be counseled away from filing chapter 13 cases in the first place, and

creditors will lose the potential to receive payments on their claims. Amici submit the statute, the case law, and the policy of a totally voluntary chapter 13 all favor preserving the voluntary right to dismissal.

CONCLUSION

Congress created a voluntary chapter 13, where debtors may make available their future income in exchange for the many benefits discussed above. Creditors, particularly unsecured creditors at the end of the distribution order, stand to benefit from the future income payment stream. Take away the voluntary nature of this chapter, however, and many fewer debtors will file a chapter 13, and the creditor bodies will lose. Further, *Marrama* does not abrogate this circuit's precedent in *Barbieri*. The mandatory language of the statute is clear: debtors have an absolute right to voluntarily dismiss their chapter 13 case.

For all of these reasons, the decision of the bankruptcy court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(a)(7)(B), the brief contains 4,112 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in 12 point Times New Roman font. As permitted by Fed. R. App. P. 32(a)(6), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

_/s/Tara Twomey_____________________

TARA TWOMEY

CERTIFICATE OF SERVICE

I hereby certify that on October 17, 2019, I electronically filed the foregoing document, along with six paper copies, with the Clerk of the Court for the Second Circuit Court of Appeals by using the CM/ECF system and First-Class Mail.

I further certify that parties of record to this appeal who either are registered CM/ECF users, or who have registered for electronic notice, or who have consented in writing to electronic service, will be served through the CM/ECF system. I further certify that on this day I caused this brief to be served on pro se appellee, Laurie A. Todd, by Federal Express at the following address:

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_/s/ Tara Twomey_____________

TARA TWOMEY