BAP No. CC-22-1250

IN THE UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE NINTH CIRCUIT

In re:

JASON M. LEE and JANICE CHEN,

Debtors.

MISSION HEN, LLC,

Appellant,

v.

JASON M. LEE and JANICE CHEN, and AMRANE COHEN, Chapter 13 Trustee,

Appellees.

On Appeal from the United States Bankruptcy Court
for the Central District of California
Bankruptcy Case No. 8:22-bk-10127-MH

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF BASIS OF JURISDICTION

This appeal concerns an order confirming a chapter 13 plan, which Appellant Mission Hen, LLC ("Mission Hen") timely appealed pursuant to Fed. R. Bankr. P. 8002. By virtue of C.D. Cal. G.O. 13-05, and as authorized under 28 U.S.C. § 157(a), the bankruptcy court had jurisdiction under 28 U.S.C. § 1334 and 28 U.S.C. §§ 157(b)(1) and (b)(2)(L). The order at issue is a final order from which an appeal can be taken. *See Great Lakes Higher Ed. Corp. v. Pardee (In re Pardee)*, 193 F.3d 1083, 1087 (9th Cir. 1999). As a result, this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §§ 158(a)(1) and (b)(1).

II. STATEMENT OF THE ISSUE

Whether the bankruptcy court erred in entering the confirmation order at issue in this appeal (as defined below).

III. STANDARD OF REVIEW

A bankruptcy court's order confirming a chapter 13 plan is reviewed for an abuse of discretion. *See de la Salle v. U.S. Bank, N.A. (In re de la Salle)*, 461 B.R. 593, 601 (9th Cir. BAP 2011). Rulings on evidentiary objections are similarly reviewed under an abuse of discretion standard. *See United States v. Parks*, 285 F.3d 1133, 1138 (9th Cir. 2002). In considering whether a bankruptcy court abused its direction, this Court first determines *de novo* whether the bankruptcy court "identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1261-62 (9th Cir. 2009). If the Court determines that the bankruptcy court identified the correct legal rule, the Court then determines whether the bankruptcy court's factual findings were illogical, implausible, or "without support in inferences that may be drawn from facts in the record." *Id.* at 1262. "[I]issues of statutory construction and conclusions of law, including interpretation

of provisions of the Bankruptcy Code [are reviewed] *de novo*."[1] *Mendez v. Salven (In re Mendez)*, 367 B.R. 109, 113 (9th Cir. BAP 2007); *see also Villanueva v. Dowell (In re Villanueva)*, 274 B.R. 836, 840 (9th Cir. BAP 2002).

IV. STATEMENT OF THE CASE

A. THE MORTGAGE LOANS

On or about December 20, 2006, Jason Lee ("Lee") obtained a mortgage loan (the "First Loan") from IndyMac Bank, F.S.B. ("IndyMac") in the original principal sum of $846,359.00, the terms of which were set forth in a promissory note (the "First Note") secured by a deed of trust encumbering the real property located at 21 Twin Gables, Irvine, CA 92620 (the "Property"). (Appx., 4:117-137; 31:650-671).[2] Deutsche Bank National Trust Company, as Trustee for Residential Asset Securitization Trust Series 2007-A1 Mortgage Pass Through Certificates Series 2007-A1 is the current holder of the First Note. (*Id.* at 31:647). PHH Mortgage Corporation ("PHH") is the servicer for the First Loan. (*Id.*)

Concurrently with the First Loan, Lee obtained a home equity line of credit (the "Mission Hen Loan") from IndyMac with a credit limit of $211,589.00, the terms of which were set forth in a Home Equity Line of Credit Agreement secured by a deed of trust (the "Mission Hen Trust Deed") encumbering the Property. (Appx., 4:138-161; 9:183-204, 297-299). Mission Hen is the assignee of the Mission Hen Trust Deed and owner of the Mission Hen Loan. (*Id.* at 9:206-280, 297-299).

B. THE BANKRUPTCIES

On October 5, 2021, Lee filed a voluntary petition (the "First Bankruptcy") under chapter 13 of the Bankruptcy Code in the U.S. Bankruptcy Court for the Central District of California (the "Bankruptcy Court"), which was dismissed on

[1] All references herein to the "Bankruptcy Code" refer to Title 11 of the United States Code, 11 U.S.C. § 101 *et seq*.
[2] References to the Appendix are in the following format: Appendix Number: Page Number(s).

October 26, 2022. (Appx., 1:3, 8). The same day the First Bankruptcy was dismissed, Lee and Janice Chen (collectively, the "Debtors") commenced the bankruptcy case underlying this appeal by filing a voluntary petition for relief under chapter 13 of the Bankruptcy Code in the Bankruptcy Court. (*Id.* at 1:1-65). Debtors listed the Property in their *Schedule A*. (*Id.* at 1:11). They also identified the First Loan and Mission Hen Loan in their *Schedule D*, and indicated that they had monthly net income of $2,197.74. (*Id.* at 1:19-20, 33-34).

Along with their petition, Debtors filed an Original Chapter 13 Plan (the "Original Plan"). (Appx., 2:66-80). The Original Plan proposed to cure the arrears on the First Loan and bifurcate the Mission Hen Loan by treating it as only partially secured. (*Id.* at 2:71-72).

On January 26, 2022, Debtors filed a Motion for Order Determining Value (the "Valuation Motion") of Collateral wherein they sought an order: (1) valuing the Property at $1,045,000; (2) declaring PHH to hold a secured claim in the sum of $952,510.26; and (3) declaring that Mission Hen was entitled to a secured claim in the sum of $92,489.80 and an unsecured claim in the sum of $364,180.61.[3] (Appx., 4:84-161). Mission Hen filed an opposition to the Valuation Motion on March 24, 2022. (*Id.* at 11:302-355).

While the Valuation Motion was pending, on February 9, 2022, PHH filed a Proof of Claim on account of the First Loan. (Appx., 24:546). PHH subsequently filed an amended Proof of Claim (the "PHH Claim") on February 15, 2022. (*Id.*) The PHH Claim identifies a total amount due on the First Loan of $959,526.94 and reflects that Debtors owe a total of $11,746.38 in pre-petition arrears on the First Loan. (*Id.*)

[3] Debtors attached the Proofs of Claim that PHH and Mission Hen filed in the First Bankruptcy as exhibits to the Valuation Motion. (*See* Appx., 4:117-161).

On April 6, 2022, Mission Hen filed a Proof of Claim (the "Mission Hen Claim") on account of the Mission Hen Loan. (Appx., 24:551). The Mission Hen Claim identifies a total amount due on the Mission Hen Loan of $456,670.41. (*Id.*)

On July 8, 2022, Debtors filed *Amended Schedules I &J* reflecting an increase in their net monthly income from $2,197.74 to $5,897.74, which increase was attributable to a $3,700 increase in the contribution from Debtors' parents. (Appx., 16:369-373; *compare* 1:32). Shortly after they filed their *Amended Schedules I & J*, on July 20, 2022, Debtors filed a Declaration of Linda Chen Regarding Contribution to Chapter 13 Plan (the "Contribution Declaration"). (*Id.* at 19:396-400). Pursuant to the Contribution Declaration, Linda Chen ("Contributor"), the mother of Co-Debtor Janice Chen, declared that she was "able and willing" to contribute $4,900 per month (an increase from $1,200) toward Debtors' plan of reorganization. (*Id.* at 19:396-397 [¶¶ 3-4]). The Contribution Declaration infers that Contributor's contribution would be funded through the proceeds of the sale of her former residence. (*Id.*)

Following an evidentiary hearing, on July 29, 2022, the Bankruptcy Court entered an Order Re: Motion for Order Determining Value of Collateral (the "Valuation Order"). (Appx., 13:361-366; 22:415-416). The Valuation Order determined that, as of January 26, 2022, the Property had a value of $1,225,000. (*Id.* at 22:416). Based on this value, the Valuation Order declared PHH to be the holder of a secured claim in the sum of $959,526.94, and Mission Hen to be the holder of a secured claim in the sum of $265,473.06 and an unsecured claim in the sum of $204,030.50. (*Id.*)

On October 21, 2022, Debtors filed a Third Amended Chapter 13 Plan (the "Third Amended Plan"). (Appx., 27:567-584). The Third Amended Plan required Debtors to make monthly payments in the following amounts: (1) $2,115.99 for months 1 through 3; (2) $2,240.41 for months 4 through 6; (3) $5,813.03 for months

7 through 9; and (4) $6,293.10 for months 10 through 60. (*Id.*) Pursuant to the Third Amended Plan, Debtors proposed to pay the secured amount of Mission Hen's claim in the amount of $265,473.06, but the Third Amended Plan listed the "estimated total payments" to Mission Hen to be only $10,893.18. (*Id.* at 27:573).

On October 13, 2022, Mission Hen filed an Objection to Confirmation of Third Amended Chapter 13 Plan (the "Mission Hen Objection") wherein it objected to the Third Amended Plan on the grounds that: (1) Debtors were ineligible to be chapter 13 debtors; (2) the Third Amended Plan was not feasible; and (3) the Third Amended Plan sought to impermissibly modify the Mission Hen Claim. (Appx., 32:690-798).

Six days before the scheduled confirmation hearing, on October 21, 2022, Debtors filed a reply to the Mission Hen Objection. (Appx., 36:827-832). Concurrently therewith, Debtors filed a Fourth Amended Chapter 13 Plan (the "Fourth Amended Plan"). (*Id.* at 35:809-826). The sole purpose of the Fourth Amended Plan was to correct the "estimated total payments" to Mission Hen, which were listed as $10,893.18 in the Third Amended Plan but should have been $326,795.12. (*Id*. at 35:815; 50:1008 [LL 7-16]). Due to the timing and limited changes between the Third Amended Plan and Fourth Amended Plan, the Bankruptcy Court considered the Mission Hen Objection in the context of the Fourth Amended Plan. (*Id.* at 50:1008 [LL 2-25], 1009 [LL 1-15]).

Ultimately, on December 16, 2022, the Bankruptcy Court entered an Order Confirming Chapter 13 Plan (the "Confirmation Order") wherein it confirmed the Fourth Amended Plan. (Appx., 48:991-994). Mission Hen initiated this appeal by filing a Notice of Appeal of the Confirmation Order on December 29, 2022. (*Id.* at 148:995-1002).

V. SUMMARY OF THE ARGUMENT

This appeal involves mixed issues of fact and law. As a preliminary matter, Mission Hen seeks a determination from this Court regarding the scope of section 1322(c)(2) of the Bankruptcy Code and its applicability to the Mission Hen Loan. While other circuits (including the Fourth and Eleventh Circuits) have held that section 1322(c)(2) allows for the modification of short-term mortgage debts (i.e., debts upon which the last payment is due prior to the conclusion of a chapter 13 plan term), the Ninth Circuit has yet to speak on this issue. Mission Hen submits that section 1322(c)(2) is properly interpreted to allow for the modification of *the timing of payments* on short-term mortgage debts, but *not* the *amount* of the debt. Assuming the Court adopts this interpretation, Debtors are clearly ineligible for relief under chapter 13 of the Bankruptcy Code as their secured debts exceed the applicable debt limits. Even if the Court were to conclude that Debtors are permitted under section 1322(c)(2) to bifurcate the Mission Hen Claim, the face of their schedules demonstrates that they are nevertheless ineligible for relief under chapter 13 of the Bankruptcy Code. In any event, the Bankruptcy Court erred in concluding that the Fourth Amended Plan is feasible. Indeed, the feasibility of the Fourth Amended Plan is clearly dependent on contributions from Contributor, but there was insufficient information in the record to demonstrate that Contributor had the means to make long-term contributions toward the plan. For these reasons, as discussed more fully herein, the Confirmation Order should be reversed.

VI. ARGUMENT

A. MISSION HEN'S CLAIM WAS PROTECTED BY THE ANTI-MODIFICATION PROVISION OF 11 U.S.C. § 1322(b)(2)

Among the issues presented by this appeal is the issue of whether the Bankruptcy Court correctly determined that the Mission Hen Claim was excepted from the protections of section 1322(b)(2) of the Bankruptcy Code, which is

colloquially known as the "anti-modification provision." Section 1332(b)(2) provides that a chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence []." 11 U.S.C. § 1322(b)(2). In turn, however, section 1322(c)(2) of the Bankruptcy Code provides:

> Notwithstanding subsection (b)(2) [of Section 1322] and applicable nonbankruptcy law [] in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, *the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title*.

11 U.S.C. § 1322(c)(2) (emphasis added). The Bankruptcy Court determined that the exception set forth in section 1322(c)(2) applies to the Mission Hen Claim because the Mission Hen Loan matures during the term of the Fourth Amended Plan. For the reasons discussed below, the Bankruptcy Court erred in its interpretation of section 1322(c)(2).

1. The Anti-Modification Provision – 11 U.S.C. § 1322(b)(2)

The anti-modification provision was included in the Bankruptcy Code "to encourage the flow of capital into the home lending market." *Nobelman v. Am. Sav. Bank*, 508 U.S. 324, 332 (1993). There was concern that, in the absence of the protection encompassed by section 1322(b)(2), residential mortgage lenders would "be extraordinarily conservative in making loans in cases where the general financial resources of the individual borrower are not particularly strong." *See* Hearings Before the Subcomm. on Improvements of the Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 707 (1977) (statement of Edward J. Kulik, Senior Vice President, Real Estate Div., Mass. Mut. Life Ins. Co.); *see also Lomas Mortg., Inc. v. Louis*, 82 F.3d 1, 5 (1st Cir. 1996) (discussing history of anti-

modification provision). Plainly stated, "the prohibition found in § 1322(b)(2) against modification of the rights of home mortgage lenders was intended to make mortgage money on affordable terms more accessible to homeowners by assuring lenders that their expectations would not be frustrated." *First National Fidelity Corp. v. Perry*, 945 F.2d 61, 64 (3d Cir. 1991).

In *Nobelman*, the Supreme Court held that section 1322(b)(2) precludes a debtor from bifurcating a claim secured only by a security interest in the debtor's principal residence. *See Nobelman*, 508 U.S. at 332. Consistent with the precedent set by *Nobelman*, this Court has recognized that section 1322(b)(2) "operates to benefit creditors who may be classified as secured creditors after operation of [11 U.S.C. § 506(a)]." *Boukatch v. MidFirst Bank (In re Boukatch),* 533 B.R. 292, 296 (9th Cir. BAP 2015) (citation and internal quotations omitted). The Court specifically observed that:

> If, after applying § 506(a), the creditor's claim is determined to be "secured," which includes partially secured claims (i.e., undersecured claims), the creditor is still the "holder of a secured claim" and the debtor is unable to reduce or "strip down" the undersecured claim to the principal residence's fair market value.

Id. (citing *Nobelman*, 508 U.S. at 329-332). Applying this principle to this case, there is no dispute that Mission Hen is the holder of a partially secured claim, as determined by section 506 and evidenced by the Valuation Order. (Appx., 22:416). By virtue of this fact, the Mission Hen Claim preliminarily qualifies for the anti-modification protections of section 1322(b)(2). Debtors' ability to nevertheless modify the Mission Hen Claim turns on the scope of the exception set forth in section 1322(c)(2) and its applicability to the claim.

2. The Exception Created By Section 1322(c)(2)

As noted above, section 1322(c)(2), which was enacted as part of the Bankruptcy Reform Act of 1994, creates an exception to the anti-modification provision for certain debts that mature during the term of a chapter 13 plan. The statute has been the subject of debate since its enactment, with judges and commentators alike differing on the proper interpretation of the statute. To date, the Ninth Circuit has not squarely confronted the issue of whether section 1322(c)(2) permits a debtor to cram-down a claim that is otherwise protected by the anti-modification provision of section 1322(b)(2) if the last payment on the claim is due prior to the last plan payment. Other Circuits have confronted this issue. *See Hurlburt v. Black*, 925 F.3d 154, 158 (4th Cir. 2019); *Am. Gen. Fin., Inc. v. Paschen (In re Paschen)*, 296 F.3d 1203, 1208 (11th Cir. 2002).

a. *In re Witt*

The Fourth Circuit Court of Appeals discussed the competing interpretations of section 1322(c)(2) at length in *Hurlburt*. Prior to *Hurlburt*, the law in the Fourth Circuit was that section 1322(c)(2) could not be used to cram-down an undersecured mortgage loan upon which the last payment was due during the plan term. *See Witt v. United Cos. Lending Corp. (In re Witt)*, 113 F.3d 508 (4th Cir. 1997). In reaching this conclusion, the *Witt* court observed that the phrase "payment of the claim as modified," as used in section 1322(c)(2), was ambiguous because "[i]t [could not] be determined, merely from the statute's text, whether the words 'as modified' should apply to 'payment' or to 'claim.'" *Id.* at 511. Resolving this ambiguity is critical to the scope of section 1322(c)(2). Indeed, if the term "as modified" applies to the term "claim," then section 1322(c)(2) could be construed to permit a cramdown of a loan that is otherwise protected under section 1322(b)(2). *Id.* Conversely, if the term "as modified" applies only to the word "payment," or the phrase "payment of the claim," section 1322(c)(2) would permit only the

modification of "the amount or scheduling of the individual payments on the claim; the amount of the underlying claim itself could not be modified." *Id.*

The *Witt* court commented that:

> [i]t is quite plausible as a matter of common sense, we believe, that the phrase "as modified" also modifies "payment" and not "claim." After all, the subject of payment is the focus of § 1322(c)(2); it only deals with plan payment provisions when "the last *payment* on the original *payment* schedule" on a home mortgage loan "is due before the date on which the final *payment* under the plan is due."

Witt, 113 F.3d at 511 (emphasis in original). According to the *Witt* court, the word "payment" in the final clause of section 1322(c)(2) would become superfluous if the term "as modified" were applied only to the word "claim." *Id.* The court also noted that there was no need for Congress to have included the term "payment" in the final clause if section 1322(c)(2) were intended to permit modification of a claim – i.e., Congress could have simply drafted the statute to provide that a "plan may provide for ***the claim*** as modified pursuant to section 1325(a)(5)." *Id.* at 512-513. Finally, the *Witt* court observed that the "legislative history provides further support for the interpretation that only payment may be modified." *Id.* at 512. In particular, the *Witt* court emphasized that there was nothing in the legislative history of section 1322(c)(2) to support a finding that Congress intended section 1322(c)(2) to overrule the holding in *Nobelman* that a debtor cannot bifurcate their home mortgage loan. *Id.* at 512-513.

b. *Hurlburt*

For over twenty years, *Witt* was the law in the Fourth Circuit. The decision, however, was overturned by *Hurlburt* in 2019. The majority and dissenting opinion in *Hurlburt* reflect the competing views on section 1322(c)(2)'s application to short

term mortgage loans secured by a debtor's principal residence. In *Hurlburt,* the majority concluded that section 1322(c)(2) "is best read to authorize modification of claims, not just payments, and therefore a Chapter 13 plan may bifurcate a claim based on an undersecured homestead mortgage, the last payment for which is due prior to a debtor's final [plan] payment." *Hurlburt*, 925 F.3d at 161. Relying on the rule of the last antecedent, the majority observed that "the phrase 'payment of the claim as modified' is most naturally read as permitting the modification of claims, not payments." *Id.* at 162 (citation omitted). Moreover, the majority found it significant that the prefatory phrase in section 1322(c)(2) – "notwithstanding subsection (b)(2)" – is indicative of a Congressional intent for section 1322(c)(2) to "be an exception to or limitation on Section 1322(b)(2)'s anti-modification provision." *Id.* 162. The majority found most significant the fact that section 1322(c)(2) "provides that a chapter 13 plan 'may provide for payment of the claim as modified *pursuant to section 1325(a)(5) of this title*[,]'" and that a cramdown is the "very essence" of a modification under section 1325(a)(5). *See id.* at 163 (quoting 11 U.S.C. § 1332(c)(2) (emphasis in original).

The dissenting opinion in *Hurlburt* criticized the majority for reading section 1322(c)(2) in a way that completely overrides the holding in *Nobelman* – that a debtor may not reduce, or "cramdown," an undersecured claim secured by a principal residence – for an entire class of mortgages. *See id.* at 168. Indeed, the dissenting opinion emphasized that the majority's reading of section 1322(c)(2) "completely upends *Nobelman's* anti-modification ruling as it pertains to a large and important class of mortgages." *Id.* at 169. The dissenting opinion observed that "Congress must exhibit some modest degree of clarity before lower courts can adopt a reading of a statute that would undermine a significant, on-point Supreme Court precedent." *Id.* at 170. As the dissent noted, this is particular true when it comes to the Bankruptcy Code as the Supreme Court "has made clear that courts 'will not read

the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure.'" *Id.* at 170 (quoting *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010)).

According to the dissent in *Hulrburt*, Congress meant for section 1322(c)(2) to only create an exception to *Nobelman's* "prohibition against modifying the *timing of loan repayments*." *Id.* at 170 (emphasis in original). The dissenting opinion concluded with the following:

> In recognition of Congress's clarity and its undoubted supremacy in matters of statutory interpretation, I agree that *Nobelman's* disallowance of modification as to the timing of loan repayments can no longer stand. In recognition of the absence of that same clarity in the face of obvious Supreme Court precedent, I believe that *Nobelman's* reading of § 1322(b)(2) to prohibit bifurcation and stripdown remains good law. Overruling a Supreme Court decision *in toto* on the basis of what is, at best, an ambiguous congressional expression is not a course I am prepared to take. For the above reasons, I respectfully dissent.

Hurlburt, 925 F.3d at 176–77.

In addressing the various arguments advanced by the majority, the *Hurlburt* dissent pointed out that the rule of the last antecedent, as invoked by the majority, "provides that a limiting clause or phrase should ordinarily be read as modifying only the noun *or phrase* that it immediately follows." *Id.* at 172 (citation and internal quotations omitted) (emphasis in original). The dissent then noted that the phrase "as modified pursuant to section 1325(a)(5)," as used in section 1322(c)(2), immediately follows the phrase "payment of the claim," and, thus, the rule of the last antecedent "comfortably supports the reading that only payments (of the claim) can be modified." *Id.* at 173. Additionally, the dissent observed that the prefatory language

in section 1322(c)(2) – "notwithstanding subsection (b)(2)" – "simply makes clear that subsection (c)(2) provides a specific exception to the general anti-modification provision[,]" but does not support a reading of the statute that allows all forms of modification. *Id.* at 172. Lastly, the dissent found the reference to section 1325 contained within section 1322(c)(2) to "simply speak[] to the 'payment of the claim,'" not "to allow for any change to a 'claim' that could possibly be approved under § 1325(a)(5)." *Id.*

c. The Mission Hen Claim

The first issue presented by this appeal ultimately turns on this Court's interpretation of section 1322(c)(2). While Mission Hen appreciates the majority's reasoning in *Hulrburt,* it submits that the dissenting opinion in *Hurlburt* represents the correct interpretation of section 1322(c)(2) and that section 1322(c)(2) should not be read to allow for the cramdown of a "short-term" mortgage debt secured by a principal residence. Instead, section 1322(c)(2) merely permits Debtors to repay the remaining full balance due under the Mission Hen Loan over the term of their Fourth Amended Plan. Under the reasoning of the dissent in *Hurlburt*, Debtors' Fourth Amended Plan was not confirmable as it proposed a treatment of the Mission Hen Claim (namely, a cramdown) that violated section 1322(b)(2)'s anti-modification protections. *See* 11 U.S.C. § 1325(a)(1) (recognizing that a chapter 13 plan cannot be confirmed where it fails to comply with other applicable provisions of the Bankruptcy Code). On this basis alone, the Confirmation Order should be reversed.

B. THE BANKRUPTCY COURT ERRED IN DETERMINING THAT DEBTORS WERE ELIGIBLE FOR RELIEF UNDER CHAPTER 13

In addition to the violating section 1322(b)(2), the Fourth Amended Plan violated section 109(e) of the Bankruptcy Code. Section 109(e) generally restricts eligibility for chapter 13 bankruptcy based on certain secured and unsecured debt

limits. *See* 11 U.S.C. § 109(e). Confirmation of a chapter 13 plan should be denied where a debtor is ineligible under section 109(e). *See In re Silva*, 2011 WL 5593040, *4 (Bankr. N.D. Cal. 2011) (denying confirmation of a chapter 13 plan on the ground that the debtor was ineligible under section 109(e)). The Ninth Circuit has recognized that chapter 13 eligibility "should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith." *Scovis v. Henrichsen (In re Scovis)*, 249 F.3d 975, 982 (9th Cir. 2001).

As noted above, Mission Hen objected to the Fourth Amended Plan on the basis that Debtors were ineligible for relief under chapter 13 of the Bankruptcy Code. Neither Mission Hen nor any other interested party argued that Debtors' schedules were not made in good faith. Consequently, the analysis of Debtors' eligibility for relief under chapter 13 begins and ends with their schedules. *See In re Groh*, 405 B.R. 674, 675 (Bankr. S.D. Cal. 2009) (Noting that, when there is no suggestion that a debtor's schedules were not made in good faith, "the analysis [of eligibility under section 109(e)] begins and ends with a review of [the debtor's] schedules."). At the time Debtors filed their underlying bankruptcy, section 109(e) provided that "[o]nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $419,275 and noncontingent, liquidated, secured debts of less than $1,257,850 may be a debtor under chapter 13 of this title."[4] 11 U.S.C. § 109(e) (Jan. 2022); *In re Sofio*, 2022 WL 4111165, at * 3 (Bankr. D.N.M. 2022) (discussing debt limits as of January 2022). Debtors' schedules reflect that they did not meet these debt limits.

Notably, the Court's interpretation of section 1322(c)(2) impacts the analysis of Debtors' eligibility under section 109(e). This is because a mortgage debt is

[4] The debt limits set forth in section 109(e) were adjusted on April 1, 2022, and June 21, 2022, respectively. These adjustments are not relevant to this case since it was filed on January 26, 2022. *See* 11 U.S.C. § 104(c) (Providing that adjustments to the debt limits under section 109(e) "shall not apply with respect to cases commenced before the date of such adjustments.").

considered secured for purposes of the section 109(e) analysis if it is partially secured and not subject to modification. *See e.g., In re Smith*, 419 B.R. 826, 832 (Bankr. C.D. Cal. 2009), *aff'd in part*, 435 B.R. 637 (9th Cir. BAP 2010). Assuming the Court determines that the Mission Hen Loan was protected by the anti-modification provision of section 1322(b)(2), the face of Debtors' schedules reflected that they had secured debts of at least $1,418,180.67 – i.e., $952,510.26 for the First Loan and $465,670.41 for the Mission Hen Loan. (*See* Appx., 1:19-20). The amount of this secured debt clearly exceeded the debt limits in effect at the time Debtors filed their underlying case. *See* 11 U.S.C. § 109(e) (Jan. 2022).

Even if the Court were to construe section 1322(c)(2) to permit a cramdown of the Mission Hen Claim, the face of Debtors' schedules nevertheless reflected that they were ineligible under section 109(e). Indeed, Debtors' schedules identified unsecured debts well in excess of $419,275. They specifically identify Mission Hen as a secured creditor in their Schedule D, with a secured claim of $465,670.41, but indicate that $373,180.67 of Mission Hen's claim is unsecured.[5] (*See* Appx., 1:19). Debtors also identified secured claims held by Stonetree Manor Community in the amount of $21,030.39 and Woodbury Community Association in the amount of $11,060.08. (*Id.*) But they indicated that these claims are effectively unsecured due to the lack of equity in their residence. (*Id.*)

Where a claim is not obviously protected by the anti-modification provision, the unsecured portion of the claim is counted as unsecured for purposes of determining eligibility under section 109(e). *See In re Lantzy*, 2010 WL 6259984, *3 (9th Cir. BAP 2010). Thus, Debtors' Schedule D effectively identified unsecured

[5] Debtors indicate in their Schedule D that Mission Hen's claim is "disputed." (Appx., 1:19). Disputed debts are notably included in eligibility calculations under section 109(e). *See In re Stahl*, 2021 WL 1293853, *6 (9th Cir. BAP 2021) ("Unlike contingent and unliquidated debts, disputed debts – that is debts where debtors dispute their liability – should not be excluded from eligibility calculations [].").

claims totaling $405,271.14. In their Schedules E and F, Debtors identified additional unsecured claims totaling $83,185.04. (*See* Appx., 1:22-28). It follows that Debtors' own schedules reveal that they have unsecured debts totaling $488,456.18, which is well in excess of the unsecured debt limit under section 109(e). While Debtors argued that subsequent events in their bankruptcy should change the analysis under section 109(e), post-petition events do not change the debt limit analysis. *See In re Smith*, 419 B.R. at 829 (citing *Slack v. Wilshire Insurance Company (In re Slack)*, 187 F.3d 1070, 1072 (9th Cir. 1999)). To the contrary, given that no interested party questioned whether Debtors' schedules were filed in good faith, their eligibility under section 109(e) is determined by their originally filed schedules. *See Scovis*, 249 F.3d at 982. Based upon the foregoing, confirmation of the Fourth Amended Plan should have been denied on the ground that Debtors were ineligible to be chapter 13 debtors.

C. THE BANKRUPTCY COURT ERRED IN FINDING THAT THE FOURTH AMENDED PLAN WAS FEASIBLE

Even if Debtors met the eligibility requirements under section 109(e) and were permitted to modify the Mission Hen Claim, confirmation of the Fourth Amended Plan should nevertheless been denied on the basis that it was not feasible. Ultimately, the feasibility of the Fourth Amended Plan was dependent on a monthly contribution from Contributor. More specifically, Contributor agreed to contribute $4,900 per month toward the plan. (*See* Appx., 19:396-397). When determining the feasibility of a chapter 13 plan involving contribution payments from non-debtors, courts consider several factors, including:

> (1) the nondebtor's relationship to the debtor and motivation in making the contributions;
> (2) the nondebtor's long and undisputed history of making the contributions or otherwise providing support for the debtor;

> (3) the unqualified commitment of the nondebtor to make the contributions in a specific amount for the duration of the chapter 13 plan; and
> (4) the financial ability of the nondebtor to make the proposed contributions, including expenses and liabilities of the nondebtor that might take precedence over the contributions.

In re Deutsch, 529 B.R. 308, 313 (Bankr. C.D. Cal. 2015). A debtor has the burden of "providing admissible evidence to [] prove that a contribution payment is sufficiently reliable to render a proposed chapter 13 plan feasible." *Id.*

There was insufficient evidence before the Bankruptcy Court to support a finding that the Fourth Amended Plan was feasible based on the contribution from Contributor. Indeed, the only evidence Debtors submitted in support of Contributor's contribution was a declaration from Contributor wherein she averred that she was willing and able to contribute $4,900 per month. (Appx., 19:396-397). At the confirmation hearing on the Fourth Amended Plan, the Bankruptcy Court itself observed that the declaration from Contributor was lacking in detail. (Appx., 50:1011 [LL 12-25], 1012 [LL 1-25], 1013 [LL 1-25], 1014 [LL 1-6], 1018 [LL 20-24], 1019 [LL 1-8). However, the Bankruptcy Court ultimately overlooked the deficiencies with the declaration on the basis that no interested party objected to the declaration. This conclusion is not supported by the record. To the contrary, as it pertained to feasibility, the very essence of the Mission Hen Objection was that Debtors submitted inadmissible evidence to substantiate Contributor's ability to contribute to their plan. (*See* Appx., 32:694-695). As explained in the Mission Hen Objection, Contributor's declaration consisted of inadmissible conclusory averments. (*See id.*)

Even if Contributor's conclusory averments were accepted, they were insufficient to establish feasibility. In fact, neither the declaration nor any other evidence submitted by Debtors sufficiently addressed the second and fourth criteria

set forth in *In re Deutsche*. More specifically, Debtors failed to establish that Contributor had a long and undisputed history of making the contributions or otherwise providing support for Debtors. The declaration actually suggests that Contributor had no history of making contributions in the amount stated in the declaration, which amount was critical to the feasibility of the Fourth Amended Plan. Debtors likewise failed to present sufficient evidence of Contributor's financial circumstances. Contributor's declaration revealed that her contribution will be funded through proceeds from the sale of her former residence, but she does not clearly identify the amount of these proceeds – she instead merely avers that she "netted the entire purchase price [of $910,000] after transaction costs." (Appx., 19:396-397). Nor does Contributor provide sufficient information regarding her expenses and liabilities. Simply stated, it is impossible to determine from Contributor's declaration whether she has the means to make monthly contributions of $4,900 for the 5-year term of Debtors' Fourth Amended Plan.

This Court has recognized that "the system of voluntary bankruptcy depends upon full, candid, and complete disclosure by debtors of their financial affairs." *Searles v. Riley (In re Searles)*, 317 B.R. 368, 378 (9th Cir. BAP 2004). Accepting Contributor's conclusory and incomplete disclosures in her declaration is not consistent with this principle. Ultimately, a debtor should not be permitted to circumvent the disclosure requirements that are critical to the bankruptcy process by relying on third-party contributions. If anything, a contribution to a chapter 13 plan should be subject to greater, not less, scrutiny than a debtor's direct financial affairs. In short, the Bankruptcy Court erred in accepting the conclusory and incomplete information in Contributor's declaration, and otherwise failed to apply the correct legal rule in that it did not consider all of the factors relevant to feasibility based on a third-party contribution.

Assuming *arguendo* that Debtors met their burden of establishing the feasibility of Contributor's contribution, they nevertheless failed to propose a feasible plan. As noted above, Debtors' schedules (as amended) reflect that they have monthly net income of $5,897.72, *after accounting for Contributor's monthly contribution of $4,900*. (*See* Appx., 16:371). The Fourth Amended Plan requires Debtors to make monthly Plan payments of $6,293.10, starting in month 10 of the Plan. (*See* Appx., 35:810-811). Debtors obviously cannot afford the $6,293.10 monthly payments without the contribution from Contributor. In fact, even with Contributor's contribution, Debtors' monthly net income of $5,897.72 was less than the monthly payment they are required to tender in months 10 through 60 of the Fourth Amended Plan. (*See* Appx., 35:811). Nowhere in the Fourth Amended Plan or Debtors' other filings do they explain how they can afford to make monthly plan payments in an amount that exceeds their monthly net income. Moreover, by the time of the confirmation hearing on the Fourth Amended Plan, Debtors had demonstrated an inability to maintain their post-petition payments to PHH.[6] (Appx., 31:641). By virtue of the foregoing, there was insufficient evidence before the Bankruptcy Court to support the conclusion that the Fourth Amended Plan was feasible. It follows that confirmation of the Plan should have been denied on the ground of lack of feasibility.

VII. CONCLUSION

For the reasons discussed herein, the Confirmation Order should be reversed.

DATED: May 8, 2023

McGLINCHEY STAFFORD

By: */s/ Brian A. Paino*
BRIAN A. PAINO
Attorneys for *Appellant* **MISSION HEN, LLC**

[6] Debtors' counsel explained that the reason for the default on the First Loan was that Debtors were making the incorrect payment amount, but no admissible evidence was ever submitted to corroborate this position. (Appx., 51:1044 [LL 8-12]).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellant Mission Hen, LLC makes the following disclosure:

Mission Hen, LLC is a limited liability company organized under the laws of the State of California. No parent corporation or publicly held corporation owns 10% or more of Mission Hen, LLC's stock.

Dated: May 8, 2023

McGLINCHEY STAFFORD

By: */s/ Brian A. Paino*
BRIAN A. PAINO
Attorneys for Appellant **MISSION HEN, LLC**

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

BAP No. CC-22-1250

Mission Hen, LLC v. Jason M. Lee, et al. (In re Jason M. Lee and Janice Lee)

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

1. Mission Hen, LLC, Appellant and Secured Creditor
2. Jason M. Lee , Appellee and Co-Debtor
3. Janice Lee, Appellee and Co-Debtor
4. Amrane Cohen, Appellee and Chapter 13 Trustee

Dated: May 8, 2023

McGLINCHEY STAFFORD

By: */s/ Brian A. Paino*
BRIAN A. PAINO
Attorneys for Appellant **MISSION HEN, LLC**

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

BAP No. CC-22-1250

Mission Hen, LLC v. Jason M. Lee, et al. (In re Jason M. Lee and Janice Lee)

The undersigned certifies that the following are known related cases and appeals: None.

Dated: May 8, 2023

McGLINCHEY STAFFORD

By: */s/ Brian A. Paino*
BRIAN A. PAINO
Attorneys for Appellant **MISSION HEN, LLC**

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

Pursuant to Fed. R. Bankr. P. 8015(h)(1), Mission Hen, LLC makes the following certification:

1. This document complies with the type-volume limit of Fed. R. Bankr. P. 8015(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. Bankr. P. 8015(g), this document contains 5,685 words.

2. This document complies with the typeface requirements of Fed. R. Bankr. P. 8015(a)(5) and the type-style requirements of Fed. R. Bankr. P. 8015(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

DATED: May 8, 2023

McGLINCHEY STAFFORD

By: */s/ Brian A. Paino*
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Attorneys for *Appellant* **MISSION HEN, LLC**

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I, Carol Rico, declare:

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18201 Von Karman Avenue, Suite 350, Irvine, California 92612.

On May 8, 2023, I served the document(s) described as follows: **APPELLANT'S OPENING BRIEF** follows:

☒ **BY MAIL**: As follows:

☒ **FEDERAL –** I deposited such envelope in the U.S. mail at Ridgeland, Mississippi, with postage thereon fully prepaid.

☐ **BY OVERNIGHT COURIER SERVICE as follows:** I caused such envelope to be delivered by overnight courier service to the offices of the addressee. The envelope was deposited in or with a facility regularly maintained by the overnight courier service with delivery fees paid or provided for.

☐ **BY EMAIL SERVICE as follows:** By email or electronic transmission: Based on any agreement between the parties and/or as a courtesy, I sent the document(s) to the person(s) at the email address(es) listed on the service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

☒ **BY CM/ECF NOTICE OF ELECTRONIC FILING:** I caused said document(s) to be served by means of this Court's Electronic transmission of the Notice of Electronic Filing through the Court's transmission facilities, to the parties and/or counsel who are registered CM/ECF users set forth in the service list obtained from this Court. Pursuant to Electronic Filing Court Order, I hereby certify that the above documents(s) was uploaded to the website and will be posted on the website by the close of the next business day and the webmaster will give e-mail notification to all parties.

☒ **FEDERAL:** I declare that I am employed in the firm of a member of the State Bar of this Court at whose direction the service was made.

Executed on May 8, 2023, at Irvine, California.

Carol Rico

SERVICE LIST
UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT
BAP NO. CC-22-1250
MISSION HEN, LLC v JASON M. LEE, et al.
File # 109147.0001

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