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 REPLY BRIEF

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I. INTRODUCTION[1]

Through their Opening Brief (the "Appellees' Brief"), *Appellees* Jason M. Lee and Janice Chen ("Appellees") advance several arguments in support of upholding the Confirmation Order. They start by arguing that: (1) the plain language of 11 U.S.C. § 1322(c)(2) permits the bifurcation of a short-term mortgage; and (2) section 1322(c)(2) was otherwise enacted in order to create a blanket exception to the anti-modification protections of 11 U.S.C. § 1322(b)(2) for short-term mortgages. Mission Hen addressed these arguments in its Opening Brief. As explained therein, section 1322(c)(2) is better interpreted to permit only the modification of the timing of payments on short-term mortgages that otherwise qualify for the protections of section 1322(b)(2). This interpretation avoids attributing an intent on the part of Congress to override existing Supreme Court precedent when no such intent is apparent in the text of section 1322(c)(2).

Appellees also argue that they met section 109(e)'s eligibility requirements based on the secured and unsecured amounts of the Mission Hen Claim, as determined by the Valuation Order. They contend that they were not bound by the scheduled amount of the Mission Hen Claim because the secured and unsecured portions of the claim were not readily ascertainable or determinable. This contention is not supported by the record or applicable law. To the contrary, as a matter of fact and law, the secured and unsecured portions of Mission Hen's claim were readily ascertainable from the face of Appellees' schedules, notwithstanding the fact that a valuation hearing was ultimately needed for the Property.

Lastly, Appellees argue that they met their burden of establishing that the Fourth Amended Plan was feasible. The record does not support this argument.

[1] Unless otherwise defined herein, all capitalized terms have the meaning ascribed to them in Mission Hen's Opening Brief.

Indeed, the record reflects that the feasibility of the Fourth Amended Plan was entirely dependent on Contributor's contributions and that Appellees failed to provide sufficient evidence to establish that Contributor's contributions were feasible in the context of their Fourth Amended Plan. The record further reflects that the Bankruptcy Court did not apply the correct law in assessing the feasibility of Contributor's contributions. For these reasons, as discussed more fully herein and in Mission Hen's Opening Brief, the Confirmation Order should be reversed.

II. ANALYSIS

A. APPELLEES WERE NOT ENTITLED TO MODIFY MISSION HEN'S CLAIM

Appellees begin their brief by arguing that the anti-modification provision of section 1322(b)(2) does not apply to the Mission Hen Claim. They specifically argue that the plain language of section 1322(c)(2) creates a blanket exception to the anti-modification protections of section 1322(b)(2) for mortgages that mature prior to the date on which a final chapter 13 plan payment is due (*i.e.*, short-term mortgages). (Appellees' Brief, pp. 7-13). Admittedly, this argument finds support in the majority opinion in *Hurlburt v. Black*, 925 F.3d 154 (4th Cir. 2019). Mission Hen confronted the argument in its Opening Brief. As explained in the Opening Brief, the majority's position in *Hurlburt* was based primarily on the rule of the last antecedent. According to the majority, under the rule of the last antecedent, the phrase "payment of the claim as modified," as used in section 1322(c)(2), "is most naturally read as permitting the modification of claims, not payments." *Hurlburt*, 925 F.3d at 161. Mission Hen disagrees.

As the dissent in *Hurlburt* recognized, the majority's application of the rule of the last antecedent was misguided. The dissent specifically made the following observation:

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> But [the majority's argument based on the rule of the last antecedent] misapplies the rule of the last antecedent. First off, the rule ordinarily applies to lists. For example, in the phrase "cats, dogs, or gerbils that are brown," the "that are brown" limitation would only apply to gerbils. The language would encompass a white cat, just not a white gerbil. Without a list, § 1322(c)(2) falls outside the usual scope of the rule of the last antecedent. And under any circumstances, the rule does not require the mechanical reading of only the single word before the modifying provision. Instead, "[t]he rule [of the last antecedent] provides that a limiting clause or phrase should ordinarily be read as modifying only the noun or *phrase* that it immediately follows."

Id. (*quoting Lockhart v. United States*, 577 U.S. 347, 351 (2016)) (emphasis and brackets in original). In the context of section 1322(c)(2), the "rule of the last antecedent comfortably supports the reading that only payments (of the claim) can be modified." *Id.* at 172-173.

The second argument that Appellees advance in support of their position is tied to the timing of the enactment of section 1322(c)(2). More specifically, Appellees note that section 1322(c)(2) was enacted after the Supreme Court's ruling in *Nobelman v. Am. Sav. Bank*, 508 U.S. 324 (1993), and that the statute should therefore be construed as overriding in its entirety the *Nobelman* court's holding as it applies to short-term mortgages. Mission Hen also addressed this argument in its Opening Brief. As explained in the Opening Brief, and as observed by the dissent in *Hurlburt*, "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. When Congress responds to decisions interpreting federal statutes, it "is often explicit, noting specific decisions in the statutory text or, by its terms, confronting a prior holding head on." *Id.* at 169. Moreover, "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)).

Section 1322(c)(2) was simply not enacted with the type of clarity required to overturn *Nobleman* as to an entire class of mortgages (namely, short-term mortgages). As a result, the dissent in *Hurlburt* correctly reached the following conclusion:

> I share with my colleagues the view that Congress intended debtors to be able to modify the timing of their mortgage payments. But I do not believe that Congress intended to eviscerate *Nobelman* altogether, as the majority would have it. It is instead my belief that a narrower reading of the statute, which would preserve a part of *Nobelman's* holding, is the superior one.

Id. In short, like the dissent in *Hurlburt*, Mission Hen submits that section 1322(c)(2) should be read to allow only the modification of the timing of payments on short-term mortgages, not the outright modification of short-term mortgages, in order to avoid reading the statute in a way that overturns the holding in *Nobelman* in its entirety as to short-term mortgages.

B. <u>APPELLEES WERE INELIGIBLE FOR RELIEF UNDER CHAPTER 13 OF THE BANKRUPTCY CODE</u>

Appellees next argue that they were eligible for relief under chapter 13 of the Bankruptcy Code because they satisfied the debt limit requirements under 11 U.S.C. § 109(e). (Appellees' Brief, pp. 13-16). They do not dispute that, at the time of their bankruptcy filing, the applicable debt limits were $419,275 in unsecured debt and $1,257,850 in secured debt. *See* 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). Nor do they dispute that their sworn schedules identified unsecured debts in

excess of $419,275.[2] Instead, Appellees argue that they were eligible for chapter 13 relief because the amount of Mission Hen's claim was not "readily ascertainable or determinable." (Appellees' Brief, p. 15). They base this argument on the fact that the secured and unsecured portions of the Mission Hen Claim could not be determined without a valuation hearing for the Property. According to Appellees, they are not bound by the scheduled amount of the Mission Hen Claim due to the allegedly unascertainable amount of the Mission Hen Claim at the time they filed their schedules.

It is indisputable 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). Notwithstanding this general rule, Appellees argue that the rule does not apply in this case because there was a dispute over the value of the Property. Stated differently, Appellees argue that they are not bound by the scheduled amount of Mission Hen's claim because the amount of the claim could not be determined until the value of the Property was established in the context of their Valuation Motion. This Court has recognized that "[s]o long as a debt is subject to ready determination and precision in computation of the amount due, then it is considered liquidated and included for eligibility purposes under § 109(e), regardless of any dispute." *In re Nicholes*, 184 B.R. 82, 91 (9th Cir. BAP 1995). At the same time, the Court has also recognized that, "if the dispute itself makes the claim difficult to ascertain or

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[2] As explained in Mission Hen's Opening Brief, Appellees' schedules identified unsecured claims totaling $488,456.18, consisting of the unsecured portion of Mission Hen's claim, as determined by Appellees' valuation of the Property ($373,180.67), the wholly-unsecured claim of Stonetree Manor Community ($21,030.39), the wholly-unsecured claim of Woodbury Community Association ($11,060.08), and designated unsecured claims totaling $83,185.04. (*See* Appx., 1:19, 22-28).

prevents the ready determination of the amount due, the debt is unliquidated and excluded from the § 109(e) computation." *Id.*

Ultimately, the merits of Appellees' argument turns on whether the amount of Mission Hen's claim was readily ascertainable or determinable. "A debt is readily determinable when it would only require a simple hearing to determine the amount of the debt." *In re Smith,* 419 B.R. 826, 829 (Bankr. C.D. Cal. 2009), *aff'd in part*, 435 B.R. 637 (9th Cir. BAP 2010). As noted above, Appellees contend that the amount of Mission Hen's claim was not readily ascertainable or determinable from their schedules because there was a dispute over the value of the Property that required an evidentiary hearing. The fact that an evidentiary hearing on the narrow issue of the value of the Property was needed did not make Mission Hen's claim unascertainable or undeterminable. Notably, the *In re Smith* court confronted a similar argument to the one Appellees advance in this case.

More specifically, like Appellees, the debtors in *In re Smith* argued that an undersecured debt cannot be determined at the time a debtor files schedules because a debt's undersecured status cannot be determined without a valuation motion and subsequent hearing to determine value, at which the court may have to consider multiple property valuations. *See id.* at 830. The *In re Smith* court rejected the notion that the potential need for a valuation motion or valuation hearing is a sufficient basis for excluding an undersecured debt from the eligibility calculation under section 109(e). *See id.* (describing the hearing to determine a debt's secured status as "simple"). The court went on to note that "[i]f a debtor could claim that the parties cannot know the undersecured amount [of a debt] upon filing of the schedules, then every undersecured claim would be beyond 11 U.S.C. § 109(e) analysis." *Id.* at 830, n. 7. In short, the fact that the bankruptcy court conducted an evidentiary hearing in connection with Appellees' Valuation Motion is an insufficient basis for excluding Mission Hen's claim from the eligibility calculations under section 109(e). And, as

previously discussed, Appellees' schedules clearly reflected that they exceeded the unsecured debt limit for chapter 13 eligibility. Alternatively, and as detailed more fully in Mission Hen's brief, Appellees exceeded the secured debt limit under section 109(e) because they were not entitled to bifurcate Mission Hen's claim and, thus, they had secured debts in excess of $1,257,850.

C. APPELLEES FAILED TO ESTABLISH THAT THE FOURTH AMENDED PLAN WAS FEASIBLE

The final argument that Appellees advance in their brief is that the bankruptcy court did not err in finding that their Fourth Amended Plan was feasible. (Appellees' Brief, pp. 19-21). They do not dispute the critical role that Contributor's declaration played in the Bankruptcy Court's feasibility determination. This likely because it is an undeniable fact that the Fourth Amended Plan was infeasible without the contributions from Contributor. However, Appellees argue that the Bankruptcy Court carefully reviewed the "evidence" (which presumably refers to the single declaration submitted by Contributor) and properly concluded that the Fourth Amended Plan was feasible. This argument ignores the Bankruptcy Court's observations regarding Contributor's declaration. Indeed, as explained in Mission Hen's Opening Brief, 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]). The Bankruptcy Court nevertheless accepted the declaration on the basis that no interested party objected to the declaration.

At bottom, however, the Mission Hen Objection was based on Mission Hen's argument that Appellees submitted inadmissible evidence to substantiate Contributor's ability to contribute to their plan – *i.e.,* the Mission Hen Objection raised evidentiary objections. (*See* Appx., 32:694-695). Mission Hen specifically complained that Contributor's declaration consisted of inadmissible conclusory

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averments. (*See id.*) Thus, the record does not support a finding that Mission Hen did not raise evidentiary objections to Contributor's declaration. Regardless, the ultimate issue is whether Contributor's declaration contained sufficient factual matter to support a finding that the Fourth Amended Plan was feasible. Mission Hen submits that it did not.

As noted in Mission Hen's Opening Brief, courts consider four factors when determining whether a plan relying on third-party contributions is feasible. *See In re Deutsch*, 529 B.R. 308, 312-313 (Bankr. C.D. Cal. 2015) (summarizing factors and collecting cases). The declaration Appellees submitted did not adequately address two of the four factors; namely, the length of Contributor's history of making contributions (or otherwise providing support for Appellees) and Contributor's financial ability to make the proposed contributions. More specifically, Contributor's declaration: (1) revealed that she had no history of making contributions in the amount stated in her declaration; and (2) contained an incomplete picture of her expenses and liabilities. By virtue of Appellees' failure to establish that Contributor had a history of making contributions and to provide a complete financial profile for Contributor, they fell short of their burden of establishing that the Fourth Amended Plan was feasible. And, in turn, this failure resulted in there being insufficient evidence to support a finding of feasibility. The lack of evidence also demonstrates that the Bankruptcy Court did not apply the correct legal rule for evaluating feasibility based on third-party contributions. It follows that the Bankruptcy Court erred in finding that the Fourth Amended Plan was feasible.

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III. CONCLUSION

For the reasons set forth herein, as well as those stated in Mission Hen's Opening Brief, the Confirmation Order should be reversed.

Dated: July 6, 2023

McGLINCHEY STAFFORD

By: */s/ Brian A. Paino*
BRIAN A. PAINO
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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 2,385 words.

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Dated: July 6, 2023

McGLINCHEY STAFFORD

By: */s/ Brian A. Paino*
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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 July 6, 2023, I served the document(s) described as follows: **APPELLANT'S REPLY BRIEF** follows:

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Executed on July 6, 2023, at Irvine, California.

Carol Rico

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BAP NO. CC-22-1250
MISSION HEN, LLC v JASON M. LEE, et al.
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