Nos. 16-1333, 16-1334, 16-1335, 16-1336, 16-1358

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

In re
DENNIS MICHAEL ESCARCEGA;
NANETTE MARIE SISK, DBA ABOUT FACE SKIN CARE;
EUGENE EDWARD VICK;
MARK IRVIN CANDALLA;
JERI LYLE SALDUA MERCADO;

Debtors/Appellants.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTORS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. Bankr. P. 8012, *amicus curiae*, the National Association of Consumer Bankruptcy Attorneys, states that it is a nongovernmental corporate entity that has no parent corporations and does not issue stock.

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (NACBA) is a non–profit organization consisting of more than 2,500 consumer bankruptcy attorneys nationwide.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, 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. NACBA has filed *amicus curiae* briefs in various cases seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Schwartz-Tallard v. America's Servicing Co. (In re Schwartz-Tallard),* 803 F.3d 1095 (9th Cir. 2015) (en banc); *Drummond v. Welsh* (*In re Welsh*), 711 F.3d 1120 (9th Cir. 2013); *Americredit Fin. Servs. v. Penrod (in re Penrod),* 636 F.3d 1175 (9th Cir. 2011).

The NACBA membership has a vital interest in the outcome of this case. Flexibility in the terms of a chapter 13 plan, to the extent permitted by the Code, is frequently essential to a debtor's successful completion of his plan. Because it is in the best interest of both debtors and creditors that the debtor make all plan payments, the Code affords debtors considerable discretion to tailor the terms of

their chapter 13 plans in accordance with their individual needs. In addition, the Code gives creditors and trustees ample opportunity to protect their own interests by objection to confirmation. Except for the requirement that a plan not exceed five years, the Code does not mandate that a plan specify a duration absent objection by a holder of an allowed unsecured claim or trustee. When, as here, a bankruptcy court imposes its own durational requirement, it oversteps its authority and diminishes the essential flexibility of the chapter 13 construct.

CERTIFICATION OF AUTHORSHIP

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

CONSENT

This amicus curiae brief is being filed with consent of the parties.

SUMMARY OF ARGUMENT

The Bankruptcy Code sets forth requirements for confirmation of a chapter 13 plan that balances the interests of debtors and creditors. Sections 1322 and 1325 delineate both mandatory and permissive plan provisions including a mandatory maximum duration of five years for chapter 13 plans. Section 1322(b)(11) allows a debtor to include other appropriate provisions not inconsistent with the Code. Therefore, so long as a plan complies with the requirements of sections 1322 and 1325(a) and no party has objected to its confirmation, as is the case here, confirmation should not be denied based on the absence of a specified plan duration—a judicially created confirmation requirement. By denying the plans in this case on that basis, the bankruptcy court committed reversible error.

Flexibility in terms of plan payments or other plan provisions is often essential to a debtor's ability to successfully complete a plan and therefore benefits both debtors and creditors. This flexibility extends to plan duration. The only mandatory provision in the Code with respect to duration is the five-year maximum. Absent objection, the Code is otherwise silent as to required time periods.

If the trustee or a creditor does object to a plan, however, section 1325(b)(4) imposes an "applicable commitment period" of three to five years. Unlike the mandatory five-year temporal requirement, this applicable commitment period is

triggered only upon objection. There are many reasons why a creditor might choose to accept a plan of indefinite duration and, in the event that the creditor does not believe that its interests are met, the Code provides ample opportunity for the creditor to protect its interests.

Absent objection, however, there is simply no basis for the Bankruptcy Court to impose a temporal requirement *sua sponte*. Permitting such interference suggests a breadth of equitable discretion the bankruptcy court does not enjoy and diminishes the flexibility necessary to allow a debtor to formulate plan that is feasible and practical.

ARGUMENT

I. In the absence of an objection from the chapter 13 trustee or an unsecured creditor, the Bankruptcy Code mandates no specific plan duration.

A. *The plain language of the Bankruptcy Code indicates no specific time period is required for chapter 13 plans.*

Consumers 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 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. Section 1321 directs debtors to file a debt adjustment plan, also known as a chapter 13 plan. 11 U.S.C. § 1321.

Chapter 13 plans that meet the requirements set forth in the Code are confirmed by the bankruptcy court. 11 U.S.C. §§ 1322, 1325. Debtors make payments under confirmed plans for the benefit of the debtors' secured and/or unsecured creditors. Upon completion of payments under the plan, debtors receive a discharge of all debts provided for by the plan, with limited exceptions. 11 U.S.C. § 1328(a).

Subchapter II of chapter 13 contains the statutory provision applicable to chapter 13 plans. Two critical sections of this subchapter are sections 1322 and 1325. Section 1322(a) delineates the mandatory provisions for chapter 13 plans. Section 1322(b) describes the permissive provisions that a debtor may incorporate into his or her chapter 13 plan. Among the permissive provisions is section 1322(b)(11) that allows the debtor to "include any other appropriate provision not inconsistent with this title." "This grant gives debtors considerable discretion to tailor the terms of a plan to their individual circumstances." *Greenpoint Mortgage Funding, Inc. v. Herrera* (*In re Herrera*), 422 B.R. 698, 710-11 (B.A.P. 9th Cir. 2010), *aff'd sub nom*., *Home Funds Direct v. Monroy* (*In re Monroy*), 650 F.3d 1300 (9th Cir. 2010). Section 1325(a) lists additional required standards for confirmation of a chapter 13 plan. Debtors' brief details how their plans satisfy all the requirements of section 1322 and 1325(a). *See* Appellant's Brief at p. 23-26.

Only two subsections of Chapter 13 refer to the duration of a chapter 13 plan. Section 1322(d)(1) states that: "the plan may not provide for payments over

a period that is longer than 5 years." Section 1325(b)(4) specifies an "applicable commitment period" or minimum duration of three or five years if the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan. *See* 11 U.S.C. § 1325(b); *Flores v. Danielson* (*In re Flores*), 735 F.3d 855, 858 n.2 (9th Cir. 2013). As the Ninth Circuit Court of Appeals has noted, section 1322(d)(1) applies in all cases, but section 1325(b) is triggered only if the trustee or unsecured creditor objects. *Id.* It is undisputed that neither the chapter 13 trustee nor any unsecured creditor objected to the proposed plans.

Here, the bankruptcy court did not find that the debtors' plans violated sections 1322(d)(1) or 1325(b). That conclusion should have ended the inquiry. "Where a statute specifically addresses the particular issue at hand, it is that authority,…that is controlling." *Penn. Bureau of Correction v. U.S. Marshals Serv.*, 474 U.S. 34, 43 (1985); *see also Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) (citations omitted) ("It is well established that 'when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.'").

Confirmation of the plans should have been approved in these cases, because (1) the Code specifically addresses the subject matter of plan duration, (2) the Code does not require the chronological term the bankruptcy court wanted to insert here, and (3) therefore the Court can be seen to have overstepped its proper role.

See also Drummond v. Welsh (*In re Welsh*), 465 B.R. 843, 854 (B.A.P. 9th Cir. 2012) ("lack of good faith cannot be found based solely on the fact that the debtor is doing what the Code allows").

B. *The bankruptcy court erred in judicially creating an implied temporal requirement for plan confirmation.*

There being no explicit durational requirement in the Bankruptcy Code applicable to Debtors' plans, the bankruptcy court instead implied a temporal requirement based on the purportedly "bedrock" of sections 1328(a) and 1329(b). *See* Decision at 29.

In relevant part, section 1328(a) states:

> (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification…have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter; the court shall grant the debtor a discharge of all debts provide for by the plan or disallowed under section 502 of this title, except any debt—…[listing nondischargeable debts].

Section 1329(b) states:

> (b)(1) Section 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section; (2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

These two sections, upon which the bankruptcy court relied, do not establish fundamental principles upon which a supplemental durational requirement can be based. First, these provisions have nothing to do with confirmation of a chapter 13 plan; they deal with the granting of a discharge and modification of a plan, respectively. Second, in contrast to sections 1322(d)(1) and 1325(b)(4), neither section 1328(a) nor section 1329(b) says anything about plan duration.[1]

In order to make its case for a further implied durational requirement, the bankruptcy court first bootstrapped sections 1328(a) and 1329(b) into the confirmation process by way of section 1325(a)(1). *See* Decision at 25. Section 1325(a)(1) states that the plan must comply "with the provisions of this chapter and with other applicable provisions of this title." 11 U.S.C. § 1325(a)(1). But reliance on these sections alone would still be insufficient to create a temporal requirement, because none of the sections speaks to plan duration. Based on the plain language of these sections, there is nothing that would preclude confirmation of Debtors' plans in these cases.

Not able to rely on any textual language of the Bankruptcy Code, the bankruptcy court turned to this Court's decision in *Fridley v. Forsythe* (*In re*

[1] Section 1329(b) expressly excludes the application of section 1325(b), which is the only chapter 13 provision that requires a specified plan duration. *See In re Sunahara*, 326 B.R. 768, 781 (B.A.P. 9th Cir. 2005) ("Section 1329(b) expressly applies certain specific Code sections to plan modifications but does not apply § 1325(b). Period. The incorporation of § 1325(a) is not, as has been posed by some courts, the functional equivalent of an indirect incorporation of § 1325(b).").

Fridley), 380 B.R. 538 (B.A.P. 9th Cir. 2007), and, after performing some contortions of logic, concluded that every plan must state a duration. *See* Decision at 25. In *Fridley*, the debtor had proposed a plan with a stated duration of thirty-six months. 380 B.R. at 540. The debtor sought to complete the plan and exit chapter 13 in fewer months. *Id*. This Court held, unremarkably, that when the debtor states the duration for his or her confirmed plan, an alteration to that plan length requires a modification pursuant to section 1329. *Id*. at 545. Other cases cited by the bankruptcy court stand for the same proposition. *See Sunahara v. Buchard* (*In re Sunahara*), 326 B.R. 768 (B.A.P. 9th Cir. 2005) (debtor confirmed a 36-month plan); *In re Keller*, 329 B.R. 697 (Bankr. E.D. Cal. 2005) (debtor confirmed a 48-month plan). It does not follow from these cases that every plan must state a specific duration. The conditional proposition "if x, then y" (if there is a stated plan length, then a modification is required to change that length) cannot logically be flipped to "if y, then x" (if modification is required to change a stated plan length, then there must be a stated plan length). Just because all salmon are fish does not mean that all fish are salmon. This Court should not accept the bankruptcy court's flawed reasoning.

C. *Bankruptcy courts are not tasked with protecting the interests of unsecured creditors, when debtors' plans otherwise comply with the provision of the Bankruptcy Code.*

This Court should similarly reject the bankruptcy court's *sua sponte* determination that a specified plan term is necessary to protect the interests of unsecured creditors. *See* Decision at 29 (suggesting (incorrectly) that the debtors' proposed plans eliminate the future opportunity for unsecured creditors to increase their distribution if the debtors' income increases). Congress and the Bankruptcy Code provided a mechanism by which holders of allowed unsecured claims may object to chapter 13 plans if they are dissatisfied with the proposed distributions under the plans. 11 U.S.C. § 1325(b). The mechanism is set forth in section 1325(b). Importantly, parties are not required to object based on section 1325(b), if they are otherwise satisfied with the plan. However, upon objection from certain parties-in-interest, subsection 1325(b)(1) and (b)(4) establish a three or five-year minimum plan length.

The plain language of this section precludes bankruptcy courts from raising the issue *sua sponte*. As Collier on Bankruptcy provides:

> The language of the provision and legislative history makes clear that, unlike the confirmation standards of section 1325(a), the ability-to-pay test may not be raised by the court *sua sponte*; nor may it be raised by the holder of only a secured claim or the holder of a claim which has not been allowed, or by the United States trustee. It may be raised only by the trustee or by the holder of an allowed unsecured claim.

8-1325 Collier on Bankruptcy, ¶ 1325.11[2] (16th ed.); *see also In re Reyes*, 106 B.R. 155, 157 (Bankr. N.D. Ill. 1989) ("Moreover, unlike Section 1325(a)(3), the plain language of Section 1325(b) precludes the Court from raising the disposable income issue *sua sponte*. Only an unsecured creditor or the Chapter Trustee may do so."); *In re Tracey*, 66 B.R. 63, 65 (Bankr. D. Md. 1986) ("Unlike the confirmation standards of § 1325(a), the ability-to-pay test may not be raised by the court *sua sponte*....").

Notwithstanding this limitation on *sua sponte* action, the bankruptcy court in this case essentially raises a section 1325(b) objection, but couches it in terms of 1325(a)(1), as discussed above. This Court should reject the bankruptcy court's efforts to protect unsecured creditors (and its assumption that creditors need and want such protection) by doing an end run around the text of section 1325(b). While bankruptcy courts are charged with ensuring plans comply with self-executing requirements of the Code, *see United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), that responsibility does not translate into a roving mandate to protect unsecured creditors in the event of changed future circumstances.

In any event, "'[courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties.'" *United States v.*

Samuels, 808 F.2d 1298, 1301 (8th Cir. 1987)(R. Arnold, J., concurring in denial of reh'g en banc); *see also In re Continental Cas. Co.,* 29 F.3d 292, 295 (7th Cir.1994) (adversarial process aids courts in producing evidence and ascertaining the relevant facts, to articulate the arguments for and against particular holdings, and to anticipate the ramifications of the rules they adopt.); *United States v. Haldeman*, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976) (avoiding adversarial process entails the risk of an improvident or ill-advised opinion on the legal issues tendered).

Further, it is incumbent upon creditors with notice of the chapter 13 case to review the plan and object to the plan if they believe it to be improper. *See* 8-1327 Collier on Bankruptcy ¶ 1327.02[1][a]; *see also HSBC Bank, USA, N.A., v. Blendheim* (*In re Blendheim*), 803 F.3d 477, 485 (9th Cir. 2015) (" It is neither the court's nor the debtor's responsibility to ensure that a creditor fully understands and appreciates the consequences of the bankruptcy proceeding."); *Heins v. Ruti-Sweetwater, Inc*., 836 F.2d 1263, 1265 (10th Cir. 1988) ("The Code contemplates that concerned creditors will take an active role in protecting their claims.").

D. *Chapter 13 was designed to provide the debtor flexibility in proposing a plan, and simultaneously provided trustees and holders of allowed unsecured claims a mechanism to object if they believed that the debtor had a greater ability to pay.*

Chapter 13 was "designed to serve as a flexible vehicle for the repayment of part or all of the allowed claims by the debtor." S. REP. 95-989, at 141, 95TH Cong., 2ND Sess. 1978, 1978 U.S.C.C.A.N. 5787, 1978 WL 8531. "A Chapter 13 debtor formulating a proposed plan of reorganization must include certain mandatory provisions, but also has at his disposal various discretionary provisions—the "tools" in the reorganization toolbox." *HSBC Bank, USA, N.A., v. Blendheim* (*In re Blendheim*), 803 F.3d 477, 485 (9th Cir. 2015). One such tool is section 1322(b)(11), which permits a chapter 13 plan to include any provision not inconsistent with the Code.

As this Court has noted, this section allows the debtor to, among other things, (1) provide for enhanced creditor account reporting requirements, (2) use a trustee's avoidance powers, (3) establish reserve funds to pay utilities in the event of default, and (4) pay taxes in a particular order. *See Herrera*, 422 B.R. at 710-11 (citing examples). It might permit variation in plan payments based on seasonal income, a temporary hiatus of certain types of plan payments, a delay in the vesting of property, or a provision providing for injunctive or equitable relief. *See id*. at 710, n.3 (citations omitted). This section also can easily encompass

provisions that provide for certain payments to creditors over an estimated period of time as in these cases.

Use of estimated plan durations is not contrary to the Code, and indeed, both before and after the enactment of section 1325(b), courts have considered the "probable or expected duration of the plan" as a factor in determining good faith. *See, e.g., U.S. v. Estus (In re Estus)*, 695 F.2d 311, 317 (8th Cir. 1982), *superceded by statute*; *Meyer v. Lepe* (*In re Lepe*), 470 B.R. 851, 857 (B.A.P. 9th Cir. 2012) (using the *Estus* factors including probable or expected duration of the plan). This oft-used formulation of the good faith test makes clear that plans using probable or estimated durations are not forbidden.

Further, there is no evidence in the record to support the bankruptcy court's theory that the unsecured creditors will be deprived of an opportunity to capture potentially higher distributions in the future, or that, even if there was a lost opportunity, that they were dissatisfied with the debtors' plans. Every chapter 13 plan must satisfy the best interest of the creditors test. 11 U.S.C. § 1325(a)(4) (the court "shall confirm a plan…if the value, as of the effective date of the plan, of property to be paid under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on the claim [in a chapter 7 case."). This test ensures that unsecured creditors receive as much in a chapter 13 as they would have under a chapter 7 liquidation. Even though the debtors' plans in this

case satisfied this test, the bankruptcy court presumed that unsecured creditors were disadvantaged and needed their future interests protected. Regardless of whether a plan has a specific duration or a specific payout with an estimated duration, unsecured creditors and the trustee have an opportunity to seek modification under section 1329 at any time prior to the completion of the payments under the plan.

While it is true that a plan with a probable, as opposed to a certain, duration may terminate sooner than the estimate, it does not follow that creditors will necessarily be dissatisfied with the plan. Creditors may prefer to be paid sooner, rather than later, as could be the case when the debtor specifies an amount to be paid instead of a time period over which the creditor will be paid. Creditors might prefer that debtors use funds that are not considered projected disposable income to repay them faster. And, few creditors' business models factor in the cost of monitoring cases on the chance that the debtors' income might increase during the life of the plan. In any of these scenarios, the concerns expressed by the bankruptcy court related to the opportunity to seek a modification under section 1329 are not relevant.

The bottom line is that there are many reasons why creditors, who will receive at least as much as they would in a chapter 7, and the chapter 13 trustee, who is tasked with advising and assisting the debtor in performance under the plan,

see 11 U.S.C. § 1302(4), may find plans, such as those proposed by debtors, to be acceptable. If they are not acceptable, those parties should object to the plan under section 1325(b). There was no objection to the proposed plans in these cases, and the bankruptcy court acts beyond its authority by substituting its judgment for that of all the other affected parties. The flexibility of chapter 13 should not be compromised by bankruptcy court's judicial legislation and manipulation of the Bankruptcy Code so as to impose a rigid durational requirement.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 27, 2017, I electronically filed the foregoing document with the Clerk of the Court for the Bankruptcy Appellate Panel for the Ninth Circuit by using the CM/ECF system.

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.

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