No. 17-13899

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

In re: RACHEL C. GUILLEN,
Debtor.

NANCY J. WHALEY,
Trustee/Appellant,

– v. –

RACHEL C. GUILLEN,
Debtor/Appellee.

On Direct Appeal from the United States Bankruptcy Court
For the Northern District of Georgia, Atlanta Division
Case No. 15-64860-JRS

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS AND NATIONAL CONSUMER BANKRUPTCY RIGHTS CENTER IN SUPPORT OF APPELLEE AND SEEKING AFFIRMANCE OF THE BANKRUPTCY COURT'S DECISION

NATIONAL ASSOC. OF CONSUMER
BANKRUPTCY ATTORNEYS, AND THE
NATIONAL CONSUMER BANKRUPTCY RIGHTS
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January 23, 2018

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to FRAP 26.1 and Eleventh Circuit Local Rule 26.1-2, Amici Curiae, the National Association of Consumer Bankruptcy Attorneys and the National Consumer Bankruptcy Rights Center make the following disclosure:

1) The following parties have an interest in the outcome of this case:

- American InfoSource LP (Agent for Creditor)
- Capital One Bank (USA), N.A. (Creditor)
- Comenity Bank (Creditor)
- Department Store National Bank (Creditor)
- Guillen, Rachel (Debtor/Appellee)
- Heath, J. Erik (Amici counsel)
- Jefferson Capital Systems, LLC (Agent for Creditor)
- Joyner, Maria (Appellant’s counsel)
- Midland Credit Management, Inc. (Agent for Creditor)
- Midland Funding, LLC (Creditor)
- National Association of Chapter 13 Trustees (Amicus curiae)
- National Association of Consumer Bankruptcy Attorneys (Amicus curiae)
- National Consumer Bankruptcy Rights Center (Amicus curiae)
- Portfolio Recovery Associates, LLC (Creditor)

- Quantum3 Group, LLC (Agent for Creditor)
- Roach, Eric (Appellant's counsel)
- Rothbloom, Howard (Appellee's counsel)
- Sacca, Hon. James R. (U.S. Bankruptcy Judge, N.D. Ga.)
- Safir, K. Edward (Amicus counsel)
- TD Bank (Creditor)
- The Rothbloom Law Firm (Appellee's counsel)
- Von Maur, Inc. (Creditor)
- Wells Fargo Bank, N.A. (NYSE:WFC) (Creditor)
- Wells Fargo Card Services (Creditor)
- Whaley, Nancy (Trustee/Appellant / Appellant's counsel)

2) Is party/amicus a publicly held corporation or other publicly held entity?

NO

3) Does party/amicus have any parent corporations? **NO**

4) Is 10% or more of the stock of party/amicus owned by a publicly held corporation or other publicly held entity? **NO**

5) Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? **NO**

6) Does this case arise out of a bankruptcy proceeding? **YES**. If yes, identify any trustee and the members of any creditors' committee. **Nancy J. Whaley, Chapter 13 Trustee**

This 23rd day of January, 2018.

/s/ Jon Erik Heath
J. Erik Heath
Ga. Bar No. 940564
Attorney for Amici Curiae

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* 1

CONSENT 2

AUTHORSHIP AND FUNDING OF *AMICI* BRIEF 2

STATEMENT OF THE ISSUES 3

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE GENERAL FRAMEWORK OF CHAPTER 13 BANKRUPTCY CENTERS ON FLEXIBILITY FOR THE DEBTOR. 6

A. Chapter 13 is Designed to Confer a Number of Benefits on Debtors.................... 7

B. Debtors Have Primary Control Over The Terms Of The Chapter 13 Repayment Plan. 8

II. DEBTORS DO NOT NEED TO SHOW A CHANGE IN CIRCUMSTANCES TO MODIFY THEIR REPAYMENT PLANS. 10

A. The Favored Approach from *Jourdan*: Debtors Need Not Show Changed Circumstances Before Modification, While Other Parties Do. 11

B. The Alternative Approach from *Witkowski*: Changed Circumstances Are Not Necessary For Any Movant To Show, But They Can Be Considered. 19

C. The Minority Approach from *Arnold*: A Substantial Change In Circumstances Is Absolutely Required. 21

III. A MODIFICATION UNDER SECTION 1329 IS A STATUTORY EXCEPTION TO *RES JUDICATA*. 25

CONCLUSION 27

CERTIFICATE OF COMPLIANCE 28

CERTIFICATE OF SERVICE 29

TABLE OF AUTHORITIES

Cases

Anderson v. Satterlee,
21 F.3d 355 (9th Cir. 1994) 22

Barbosa v. Soloman,
235 F.3d 31 (1st Cir. 2000)... 18, 19, 25

Barnes v. Whelan,
689 F.2d 193 (D.C. Cir. 1982)...10

Bobroff v. Continental Bank (In re Bobroff),
766 F.2d 797 (3d Cir.1985)...7

Florida Dep't. of Rev. v. Gonzalez,
832 F.3d 1251 (11th Cir. 2016) 27

Frazer v. Drummond (In re Frazer),
377 B.R. 621 (B.A.P. 9th Cir. 2007) 7

Green Tree Acceptance v. Hoggle (In re Hoggle),
12 F.3d 1008 (11th Cir. 1994) .... passim

Harris v. Viegelahn,
— U.S. —, 135 S. Ct. 1829 (2015)...6, 7

In re Arnold,
869 F.2d 240 (4th Cir. 1989) 5, 22, 23

In re Bateman,
331 F.3d 821 (11th Cir. 2003) 26

In re Boone,
53 B.R. 78 (Bankr. E.D. Va. 1985)...17

In re Cameron,
274 B.R. 457 (Bankr. N.D. Tex. 2002)..25

In re Euler,
251 B.R. 740 (Bankr. M.D. Fla. 2000) 9, 18, 22

In re Fitak,
92 B.R. 243 (Bankr. S.D. Ohio 1988) 17, 18, 23

In re Fluharty,
23 B.R. 426 (Bankr. N.D. Ohio 1982) 7

In re Frost,
123 B.R. 254 (S.D. Ohio 1990) 13

In re Gronski,
86 B.R. 428 (Bankr. E.D. Pa. 1988) 12, 17

In re Guillen,
570 B.R. 439 (Bankr. N.D. Ga. 2017) 25

In re Jourdan,
108 B.R. 1020 (Bankr. N.D. Iowa 1989) 5, 12, 13

In re Ladieu,
548 B.R. 49 (Bankr. D. Vt. 2016) 8, 13, 15, 20

In re Meeks,
237 B.R. 856 (Bankr. M.D. Fla. 1999) 12, 14, 24

In re Moseley,
74 B.R. 791 (Bankr. C.D. Cal. 1987) 12

In re Murphy,
474 F.3d 143 (4th Cir. 2007) 5, 23

In re Studer,
237 B.R. 189 (Bankr. M.D. Fla. 1998) 19

In re Than,
215 B.R. 430 (B.A.P. 9th Cir. 1997) 19, 20, 25

In re Williams,
108 B.R. 119 (Bankr. N.D. Miss. 1989). 25

In re Wilson,
157 B.R. 389 (Bankr. S.D. Ohio 1993) 23

In re Witkowski,
16 F.3d 739 (7th Cir. 1994) 5, 19, 20, 22

Kokoszka v. Belford,
417 U.S. 642 (1974) 6

Ledford v. Brown (In re Brown),
219 B.R. 191 (B.A.P. 6th Cir. 1998) 19, 20

Meza v. Truman (In re Meza),
467 F.3d 874 (5th Cir. 2006) 19

Powers v. Savage (In re Powers),
202 B.R. 618 (B.A.P. 9th Cir. 1996) 20

Ryan v. United States (In re Ryan),
389 B.R. 710 (B.A.P. 9th Cir. 2008) 7

Slater v. U.S. Steel Corp.,
871 F.3d 1174 (11th Cir. 2017) (en banc) 6, 8

United Student Aid Funds, Inc. v. Espinosa,
559 U.S. 260 (2010) 7

Wallis v. Justice Oaks II, Ltd.,
898 F.2d 1544 (11th Cir. 1990) 26

Statutes

11 U.S.C. § 1307 8

11 U.S.C. § 1307(b) 8, 26

11 U.S.C. § 1321 8

11 U.S.C. § 1322(d) 8

11 U.S.C. § 1324(a) 9

11 U.S.C. § 1325(a) 10

11 U.S.C. § 1325(a)(3) 10, 14

11 U.S.C. § 1325(a)(4) 9

11 U.S.C. § 1325(a)(6) 9

11 U.S.C. § 1325(b) 10

11 U.S.C. § 1327(a) 10

11 U.S.C. § 1328(a) 10
11 U.S.C. § 1329(a) 10, 14
11 U.S.C. § 1329(b) 11
11 U.S.C. § 707(a) 7

Treatises

8 Collier on Bankruptcy ¶ 1328.01 (rev. 15th ed. 2008) 7
8 Collier on Bankruptcy ¶ 1329.02 (rev. 15th ed. 2008) 13, 26
8 Collier on Bankruptcy ¶ 1329.03 (rev. 15th ed. 2008) 14

Legislative History

H. Rep. No. 95-595 (1977) 16
Pub. L. No. 95-598, 92 Stat. 2549 (1978)...17
Pub. L. No. 98-353, 98 Stat. 333 (1984)..18
S. Rep. No. 95-989 (1977) 16

STATEMENT OF INTEREST OF *AMICI CURIAE*

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 rights that are critical to the bankruptcy system's operation. Yet consumer debtors with limited financial resources and minimal exposure to that system often are 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.

NACBA is also a nonprofit organization, with approximately 3,000 consumer bankruptcy attorney members nationwide. NACBA advocates 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., Slater v. U.S. Steel Corp*., 871 F.3d 1174, 1179 (11th Cir. 2017) (en banc).

NCBRC and NACBA have a vital interest in the outcome of this case. Over the course of a chapter 13 debtor's three- to five-year repayment plan, issues often arise that justify modifying the terms of the repayment plan. The proper standard for granting a debtor's requested modification of a repayment plan is thus an

important issue to all consumer debtors who seek to obtain a fresh start by completing the years-long chapter 13 process. NACBA member attorneys represent individuals in a large portion of these consumer bankruptcy petitions filed. These consumer debtors, and their attorneys, must be able to rely on the flexibility inherent in the chapter 13 process when requesting plan modifications. This Court's ruling will clarify the appropriate standard for such a request.

CONSENT

The parties have consented to the filing of this amicus curiae brief.

AUTHORSHIP AND FUNDING OF *AMICI* BRIEF

Pursuant to Fed. R. App. P. 29(c)(5), no counsel for a party authored this brief in whole or in part, and no person/entity other than NACBA, its members, NCBRC, and their counsel made any monetary contribution toward the preparation or submission of this brief.

STATEMENT OF THE ISSUES

Whether Chapter 13 debtors are required to show an unanticipated change in circumstances in order to exercise the statutory right to modify their repayment plans under 11 U.S.C. § 1329.

SUMMARY OF ARGUMENT

Chapter 13 bankruptcy is a wholly voluntary process that is initiated by debtors seeking a fresh start by repaying as much of their debts as they can afford, typically over a three- to five-year period. This repayment plan helps maximize the ultimate repayment to creditors. In return, and in order to encourage debtors to pursue and complete this process, Congress created a number of incentives for chapter 13 filers.

One of the greatest incentives is the "flexibility" and control chapter 13 debtors have over the terms of the repayment plan. *See Green Tree Acceptance v. Hoggle (In re Hoggle)*, 12 F.3d 1008, 1010-11 (11th Cir. 1994). Only the debtor is tasked with the duty of proposing a repayment plan, which the bankruptcy court must confirm if it complies with the Bankruptcy Code. The debtor also has greater control to ensure its success, either by seeking later modification, or by voluntarily dismissing the case.

The main issue presented by this case concerns whether debtors are required to make a threshold showing before seeking modification. The litigants

approach this issue as a binary question. Trustee/Appellant proposes that this Court adopt the minority *Arnold* approach, which ostensibly requires any party seeking modification to show an unanticipated substantial change in the debtor's financial condition. Debtor/Appellee proposes that this Court adopt the *Witkowski* approach, which contains no threshold requirement.

Amici here argue that the correct approach contains elements of each. Debtors, who maintain control of the chapter 13 plan, should have much more flexibility in their requests for modification, and need not show changed circumstances. Other parties, who – by design – have less control over the precise terms of debtors' repayment plans, should be required to substantiate motions for modification with a change in circumstances. This approach, which is endorsed by a growing number of courts and the leading consumer bankruptcy treatise, more closely reflects the voluntary nature of Chapter 13 bankruptcy.

ARGUMENT

As this Court has explained, "[u]nder 11 U.S.C. § 1329, the Debtor may modify a Chapter 13 plan at any time after it is confirmed, provided that the plan, as modified, conforms to the requirements of § 1322." *Hoggle*, 12 F.3d at 1009. As *Hoggle* implicitly recognized, there is no statutory requirement for the debtor to experience a change in circumstances before seeking such modification.

Courts have approached this statutory silence in at least three ways. The favored approach requires trustees and creditors who seek modification to show a change in circumstances, but recognizes that debtors trying to succeed in repayment should face a lower threshold. *See In re Jourdan*, 108 B.R. 1020, 1023 (Bankr. N.D. Iowa 1989). A second approach does not require any party to show a change in circumstances, although such change can be a relevant factor in deciding whether modification is appropriate. *See In re Witkowski*, 16 F.3d 739, 746 (7th Cir. 1994). The most criticized and inflexible approach – that urged by Trustee – requires anyone seeking modification to show an unanticipated and substantial change in the debtor's financial condition. *In re Murphy*, 474 F.3d 143, 150 (4th Cir. 2007) (citing *In re Arnold*, 869 F.2d 240 (4th Cir. 1989)).

In order to further the purpose of Chapter 13 bankruptcies, this Court should adopt the *Jourdan* approach as the proper standard for modifications under Section 1329. Alternatively, this Court should adopt the *Witkowski* approach applied by the bankruptcy court below. Both of these approaches are superior to the flawed approach from the Fourth Circuit. Regardless of whether this Court sides with *Jourdan* or *Witkowski*, the bankruptcy court below did not abuse its discretion in modifying the debtor's repayment plan. *See Witkowski*, 16 F.3d at 746 (abuse of discretion standard); *see also Hoggle*, 12 F.3d at 1011 n.4.

I. THE GENERAL FRAMEWORK OF CHAPTER 13 BANKRUPTCY CENTERS ON FLEXIBILITY FOR THE DEBTOR.

In order to understand why either the *Jourdan* or *Witkowski* approach matters, it is important first to understand some basic concepts of Chapter 13 bankruptcy.

The overarching principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. *Harris v. Viegelahn*, — U.S. —, 135 S. Ct. 1829, 1838 (2015); *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974). There are two primary vehicles for a consumer debtor to obtain a fresh start under the Bankruptcy Code: Chapter 7 liquidation and Chapter 13 repayment.

"Chapter 7 allows a debtor to make a clean break from his financial past, but at a steep price: prompt liquidation of the debtor's assets." *Harris*, 135 S. Ct. at 1835. "In contrast, a debtor who proceeds under Chapter 13 may keep his prepetition property but must repay his creditors over time, generally from what he earns after filing bankruptcy." *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1179 (11th Cir. 2017) (en banc). Because of these payments, creditors "usually collect more under a Chapter 13 plan than they would have received under a Chapter 7 liquidation." *Harris*, 135 S. Ct. at 1835. Thus, "[p]roceedings under Chapter 13 can benefit debtors and creditors alike." *Harris*, 135 S. Ct. at 1835.

A. Chapter 13 is Designed to Confer a Number of Benefits on Debtors.

Chapter 13 bankruptcy is also a "wholly voluntary alternative to Chapter 7." *Harris*, 135 S. Ct. at 1835; *see* 11 U.S.C. § 303(a); *In re Fluharty*, 23 B.R. 426, 428 (Bankr. N.D. Ohio 1982) ("A debtor may not be required to file Chapter 13, as it has been suggested that this may be in violation of the Thirteenth Amendment's prohibition against involuntary servitude."). In order to encourage debtors to opt for these voluntary repayment plans, Congress added a number of incentives in Chapter 13 well beyond the mere retention of assets. *See Frazer v. Drummond (In re Frazer)*, 377 B.R. 621, 631 (B.A.P. 9th Cir. 2007) ("The legislative history behind chapter 13 relief supports and promotes debtor rehabilitation"); *Bobroff v. Continental Bank (In re Bobroff),* 766 F.2d 797, 803 (3d Cir.1985).

For example, a "discharge under Chapter 13 is broader than the discharge received in any other chapter." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 268 (2010) (quoting 8 Collier on Bankruptcy ¶ 1328.01, p. 1328-5 (rev. 15th ed. 2008)). This "broad discharge was provided by Congress as an incentive for debtors to opt for relief under that chapter rather than under chapter 7." *Ryan v. United States (In re Ryan)*, 389 B.R. 710, 719 (B.A.P. 9th Cir. 2008).

Further, unlike a Chapter debtor, the Chapter 13 debtor has the absolute right to request dismissal of his bankruptcy case at any time. *Compare* 11 U.S.C. § 707(a) (Chapter 7 case can be dismissed "only for cause") *with* 11 U.S.C. §

1307(b) ("On request of the debtor at any time… the court shall dismiss a case under this chapter"). After dismissal, the Chapter 13 debtor can file a new case and plan. *In re Ladieu*, 548 B.R. 49, 65 (Bankr. D. Vt. 2016).[1] Alternatively, if the chapter 13 is not working for the debtor, the debtor has an absolute right to convert the case to a chapter 7 bankruptcy. *See* 11 U.S.C. § 1307(a).

All of these advantages to filing a Chapter 13 bankruptcy help encourage debtors to opt for the voluntary repayment process over the less-preferred Chapter 7 liquidation.

B. Debtors Have Primary Control Over The Terms Of The Chapter 13 Repayment Plan.

The nucleus of a chapter 13 bankruptcy is the repayment plan, through which debtors repay a portion (or all) of their debts through their future earnings over a period of typically three- to five- years. *See* 11 U.S.C. § 1322(d)(1)-(2); *Slater*, 871 F.3d at 1179.

The Code assigns chapter 13 debtors with the exclusive responsibility of designing and filing the repayment plan. 11 U.S.C. § 1321. "While the Chapter 13 trustee may advise the debtor on the preparation and performance under the plan, there is no authority for either a Chapter 13 trustee or a creditor under any circumstances to file a plan." *In re Euler*, 251 B.R. 740, 745 (Bankr. M.D. Fla.

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[1] A dismissal of a chapter 13 bankruptcy could, however, limit the debtor's protection from the automatic stay in future cases. *See* 11 U.S.C. § 362(c)(3).

2000). Instead, these parties in interest can only "object to confirmation of the plan," *see* 11 U.S.C. § 1324(a), if it fails to meet the requirements of the Code.

The Code generally requires the debtor's proposed repayment to satisfy four tests in order to be confirmed by the court: the best interest of the creditors test, the feasibility test, the good faith test, and the disposable income test.

A. Best Interest of the Creditors Test: The Bankruptcy Code provides that 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]." 11 U.S.C. § 1325(a)(4). This test ensures that general unsecured creditors would not be harmed by a debtor's choice of chapter 13 over chapter 7. That is, unsecured creditors must receive as much in a chapter 13 as they would have received if the debtor initially filed chapter 7 instead.

B. Feasibility Test: Section 1325(a)(6) requires that the "debtor will be able to make all payments under the plan and to comply with the plan." If the plan does not meet this standard, often called the feasibility test, confirmation may be denied. Under this test, the debtor must show sufficient income or other financial resources to make the proposed payment. In practice, a plan is considered feasible if the debtor's net monthly income, as reflected on Schedule J, is equal to or greater than the debtor's proposed plan payment.

C. Good Faith Test: Section 1325(a)(3) requires that "the plan [be] proposed in good faith and not by any means forbidden by law." The good faith standard provides a check on actions that abuse the bankruptcy system. It is intended to address specific misconduct, repayment plans proposed for an improper purpose, or anything else that would bring the case within the ambit of bad faith. *Barnes v. Whelan*, 689 F.2d 193 (D.C. Cir. 1982).

D. Disposable Income Test: Section 1325(b) permits the chapter 13 trustee or the holder of an allowed unsecured claim to object to confirmation if the debtor does not propose to pay into the plan all of his or her projected disposable income to be received during the applicable commitment period. Simply put, this test ensures that the debtor contributes enough income towards repayment.

If the debtor can propose a plan that meets all of these requirements for confirmation, then the court must confirm the plan, 11 U.S.C. § 1325(a), at which point it becomes binding on all parties, 11 U.S.C. § 1327(a). After completing the repayment plan, the debtor receives a discharge of most, if not all, debts. 11 U.S.C. § 1328(a).

II. DEBTORS DO NOT NEED TO SHOW A CHANGE IN CIRCUMSTANCES TO MODIFY THEIR REPAYMENT PLANS.

Once a Chapter 13 plan is confirmed, the language of the Code is clear it may be modified "[a]t *any time* after confirmation of the plan but before the completion of payments under such plan." 11 U.S.C. § 1329(a) (emphasis added).

The only statutory requirement of a modification is that the modified plan itself complies with the above rules governing the content of Chapter 13 plans. *See* 11 U.S.C. § 1329(b); *Hoggle*, 12 F.3d 1009.

The issue here is whether a debtor must additionally show a change in circumstances to support modifying the confirmed plan. There are three general approaches to this issue. Under the *Jourdan* approach, the debtor is not required to show any change in circumstances, but the trustee and creditors are. The *Witkowski* approach does not impose changed circumstances as a threshold requirement for any party seeking modification. The approach advanced by Trustee/Appellee here – the *Arnold* approach – takes the most extreme route, and requires any movant to show an unanticipated and substantial change in circumstances. This Court should adopt the *Jourdan* approach as the best fit for the framework of Chapter 13 bankruptcy.

A. The Favored Approach from *Jourdan*: Debtors Need Not Show Changed Circumstances Before Modification, While Other Parties Do.

This Court should adopt the well-reasoned rule that many other courts and the leading consumer bankruptcy treatise have followed, which may impose a requirement of changed circumstances on the trustee or creditors, but not on the debtor. This rule properly implements the policy this Court recognized two decades ago, that "[t]he flexibility permitted in the formation of Chapter 13 plans

represents a central element in the implementation of the Congressional goal to encourage expanded use of Chapter 13." *Hoggle*, 12 F.3d at 1010.

1) Different Standards For Debtors and Trustees/Creditors Make Practical Sense, and Respect the Voluntary Nature of Chapter 13 Proceedings.

In furtherance of the flexibility sought through chapter 13, many courts have recognized that a "debtor's ability to seek modification is not as greatly restricted as a creditor's, even on issues previously raised." *Jourdan*, 108 B.R. at 1023; *In re Meeks*, 237 B.R. 856, 859 (Bankr. M.D. Fla. 1999) (debtors "need not demonstrate a substantial, unanticipated change in circumstances in order to modify their confirmed chapter 13 plan."); *In re Gronski*, 86 B.R. 428, 432 (Bankr. E.D. Pa. 1988) ("the power of a debtor to request post-confirmation amendments is much broader than that of a creditor"); *In re Moseley*, 74 B.R. 791, 799 (Bankr. C.D. Cal. 1987) ("Because Chapter 13 is a voluntary debt repayment program, no threshold should be required for a debtor's motion to amend a plan"). This approach best fits the framework of the voluntary Chapter 13 process for a number of reasons.

First, the approach makes practical sense because Chapter 13 debtors can obtain the same result without modification. As described above, the debtor is the party who bears the initial responsibility for designing the terms of the plan, to which the trustees and creditors can only object if it does not comply with the

Code. *See supra*, at I.B. Even after confirmation, the debtor retains significant control over those terms. As described by the *Ladieu* court:

> When an individual files for Chapter 13 relief, they do so of their own volition to offer their creditors a repayment plan, which, if confirmed, must be deemed to represent the debtor's best effort at the time. If the debtor, for any reason, wishes to change the terms of the bargain they made in their confirmed plan, they may simply dismiss their case and file a new case and plan — without confronting the finality of the confirmation order. And, if they pursue that path, they must meet all of the requirements of confirmation. Alternatively, debtors may seek to modify their confirmed plan.

Ladieu, 548 B.R. at 65. In other words, requiring debtors to show a change in circumstances before they request modification makes little sense because debtors retain the right simply to dismiss the Chapter 13 case and start over under new proposed terms anyway. *See Jourdan*, 108 B.R. at 1022 ("If this Court denies [Debtor's] application to modify his plan, he could achieve the result he seeks by dismissing and refiling."); *In re Frost*, 123 B.R. 254, 259 (S.D. Ohio 1990).

The leading consumer bankruptcy treatise takes this same approach. "[S]ection 1329 does not require the debtor to show cause to modify the plan. Because chapter 13 is completely voluntary, the debtor may propose any modified plan that satisfies the requirements of chapter 13." 8 Collier on Bankruptcy ¶ 1329.02, p. 1329-5 (rev. 15th ed. 2008) (further noting that "the debtor often could achieve the same result by dismissing the case and filing a new chapter 13 case.").

By contrast, however, "[t]he right of the trustee or the holder of an unsecured claim [to seek modification] should be limited to situations in which there has been an unanticipated substantial change in the debtor's income or expenses…" *Id.* at ¶ 1329.03, p. 1329-7.

To be clear, however, this rule does not mean that Chapter 13 debtors can simply seek to modify their plans "willy nilly." *Meeks*, 237 B.R. at 859. For example, the modification itself must be for one of the four purposes outlined by the Code. *See* 11 U.S.C. § 1329(a)(1)-(4). Of course, the modified plan must also still meet specific statutory requirements for a confirmed plan. *Hoggle*, 12 F.3d at 1012. For example, "[l]ike the initial plan, modifications must be proposed in good faith." 11 U.S.C. § 1325(a)(3).

Second, because neither the creditors nor the trustee have the same level of control over the initial terms of the plan, it is reasonable to hold those parties to a different standard when they seek modifications. Examining how these roles differ, the *Ladieu* Court provided a strong rationale supporting this difference:

> By contrast [to a debtor], a trustee and creditors are only brought into a Chapter 13 case when an individual files a Chapter 13 petition, and their role is limited generally to filing a claim and responding to the plan. When a trustee or unsecured creditor seeks to modify a confirmed plan, the party asks the court to require the debtor to comply with a repayment arrangement the debtor did not choose. This is a dramatically different context for modification than that of debtors and warrants a different set of criteria.

Ladieu, 548 B.R. at 65. Needless to say, if a debtor is coerced into less desirable repayment terms, it is considerably more likely that the bankruptcy case will eventually fail – either because the debtor finds it more difficult to maintain payments, or because the debtor eventually gives up and voluntarily dismisses the case.

Finally, allowing debtors this kind of flexibility benefits all parties, including creditors. For example, it is entirely possible that a debtor proposes a plan that hindsight later reveals to have been overly ambitious, but does not face any otherwise changed circumstances. Under the *Arnold* approach, this overly-ambitious debtor may be blocked from any kind of modification, although his or her ambitions rewarded creditors with higher payments. It hardly seems fair to punish such a debtor, by denying subsequent modification, for initially attempting to pay more money to creditors. By way of further example, here, the attorneys' fees at issue resulted in a tremendous benefit to the unsecured creditors.[2] Again, it hardly seems fair to deny the debtor the ability to modify the plan to include payment for services that benefited the entire bankruptcy estate.

[2] There is also the alternative question of whether these attorneys' fees themselves constitute a change in circumstances. Because Appellee aptly argues that point, *amici* will not address it. (*See* Appellee's Br., at 24-25.)

In short, debtors approach chapter 13 repayment plans from an entirely different place than trustees and creditors. It makes good sense to hold the parties to different standards when it comes to modifying those plans.

2) Congress Had Different Concerns About The Various Parties' Abilities To Seek Modification.

The legislative history of Section 1329 further supports the *Jourdan* approach. Congress had entirely different concerns when it sought to allow debtors to modify plans, than when it expanded that ability to trustees and creditors.

When Congress overhauled the Code in 1978, it was clearly concerned about the success rate of Chapter 13 repayment plans. As the Senate report explains:

> The problems which caused financial distress to begin with, such as large families, underemployment, heavy medical expenses without adequate health insurance or simple overpurchasing, do not magically disappear on the filing of a petition under chapter XIII. These factors among others often make performance of chapter XIII plans very difficult, and in many cases are eventually dismissed or converted to ordinary bankruptcy after some payments have been made.

S. Rep. No. 95-989, at 12 (1977); *see also Hoggle*, 12 F.3d at 1011. Hoping to help "promote greater success under chapter 13 plans," Congress thus installed a number of mechanisms to help debtors complete their repayment plans. H. Rep. No. 95-595, at 125 (1977). For example, "[i]f a problem [arose] in the execution of the plan, the [final] bill permit[ed] modification of the plan, either through a

scaling down of payments, a temporary moratorium, or an extension of time for performance." *Id.*

Section 1329 was thus born, which simply read that "[a]t any time after confirmation but before the completion of payments under a plan, the plan may be modified to…" effect the allowed changes. Pub. L. No. 95-598, 92 Stat. 2549, 2651 (1978) (enacting 11 U.S.C. § 1329). Notably, this original language "did not explicitly state that the right to seek a post-confirmation modification was limited to the debtor exclusively. However, the legislative history clearly indicated that such exclusivity was intended." *In re Fitak*, 92 B.R. 243, 248 (Bankr. S.D. Ohio 1988) (citing H.R. Rep. No. 95-595, at 431 (noting only that "the debtor may request a modification of the plan")).

This legislative intent was also clear from the "espoused policies behind Chapter 13" as a whole, and those underlying the filing of the plan, both of which "stress that the filing of a Chapter 13 plan is the debtor's exclusive right and, further, that Chapter 13 is an entirely voluntary act by the debtor." *In re Boone*, 53 B.R. 78, 79-80 (Bankr. E.D. Va. 1985). As a result, it became uniformly established that "post-confirmation modification of a Chapter 13 plan pursuant to § 1329(a) could be effected *only* by a Debtor." *Gronski*, 86 B.R. at 431 (emphasis added); *see also Boone*, 53 B.R. at 80.

In 1984, Congress cracked the door open for creditors and trustees to pursue modification in some circumstances as well. At the time, lawmakers were concerned that Chapter 13 debtors were not paying as much as they could afford towards their repayment plans. As a result, it created the disposable income test (also known as the ability-to-pay standard), described *supra* at 10, which ensured that "all of the debtor's projected disposable income… will be applied to make payments under the plan." Pub. L. No. 98-353, 98 Stat. 333, 356 (1984) (enacting 11 U.S.C. § 1325(b)). Congress simultaneously amended Section 1329(a) by enabling other parties to seek modification to ensure that the new "ability-to-pay standard would be made applicable to plan modifications following confirmation" as well. *Fitak*, 92 B.R. at 249 (quoting *Oversight Hearings on Personal Bankruptcy Before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary,* 97th Cong., 1st Sess. 181, 215-16, 221 (1981-82)); *Barbosa v. Soloman*, 235 F.3d 31, 40 (1st Cir. 2000). By allowing creditors and trustees to seek modification in conjunction with the disposable income test, the legislature ensured that creditors could seek to modify a plan in response to a substantial change in the debtor's financial condition. *See id.*; *see also Euler*, 251 B.R. at 745-46.

Throughout these legislative enhancements, as the *Hoggle* Court recognized, the overall legislative intent for Chapter 13 bankruptcies centers around

"flexibility" for the debtors trying to complete repayment. *Hoggle*, 12 F.3d at 1010. This policy is best implemented by following the *Jourdan* approach.

B. The Alternative Approach from *Witkowski*: Changed Circumstances Are Not Necessary For Any Movant To Show, But They Can Be Considered.

An alternative approach derives from a plain reading of Section 1329, which facially does not require any party to show a change in circumstances prior to seeking modification. Although this approach is better than Trustee's proposed rule, it is less desirable than the *Jourdan* approach because it does not read the language of Section 1329 in harmony with the policies underlying chapter 13.

In the leading case on this approach, the Seventh Circuit aptly noted that "[b]y its terms, § 1329 does not provide for any threshold requirement to modify a bankruptcy plan." *Witkowski*, 16 F.3d at 742; *see also Meza v. Truman (In re Meza)*, 467 F.3d 874, 877-78 (5th Cir. 2006); *Barbosa*, 235 F.3d at 41; *Ledford v. Brown (In re Brown)*, 219 B.R. 191, 195 (B.A.P. 6th Cir. 1998). This "unambiguous" language thus creates "the absolute right to seek a modification." *Id*. at 744; *see also In re Than*, 215 B.R. 430, 435-36 (B.A.P. 9th Cir. 1997) ("[t]he unanticipated, substantial change test is judicial gloss to § 1329"); *In re Studer*, 237 B.R. 189, 193 (Bankr. M.D. Fla. 1998).

But again, this "absolute right to seek a modification" is not the same as an absolute right to obtain one. Instead, under the *Witkowski* approach, courts may be

permitted to consider various factors to determine whether to modify a repayment plan, perhaps including whether circumstances have changed. *See Witkowski*, 16 F.3d at 746; *Brown*, 219 B.R. at 195; *Than*, 215 B.R. at 436; *Powers v. Savage (In re Powers)*, 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996). But the Code does "not require a minimal showing of a change in circumstances" before modification can be sought. *Id*. Thus, under this approach, changed circumstances may be considered by the bankruptcy court in deciding whether modification is appropriate, but they are not a threshold requirement.

The problem with applying the same standard to trustees and creditors as to debtors is that the parties do not stand on equal footing in the initial design of the chapter 13 plan, or even in its execution. As described above, it is the debtor's exclusive duty to design the content of the plan. The trustee and creditors may respond to the debtor's proposal and file claims, but they cannot propose their own plans. It is also the debtor's voluntary decision to maintain plan payments. Thus, "[w]hen a trustee or unsecured creditor seeks to modify a confirmed plan, the party asks the court to require the debtor to comply with a repayment arrangement the debtor did not choose." *Ladieu*, 548 B.R. at 65. Coercing the debtor into a repayment plan that the debtor did not chose conflicts with the "voluntary" nature of the Chapter 13 process.

Further, the legislative history discussed *supra* at II.A.2., indicates that in 1984, Congress specifically sought to empower trustees and creditors to seek modification only in response to changes in the debtor's financial circumstances. Nothing in that history suggests that Congress desired these other parties to have any broader authority to seek modification than under those circumstances. This legislative intent stands in sharp contrast to the concerns voiced about debtor-sought modifications in 1978, where the drafters of the Code aimed to create flexible repayment terms that facilitated the debtor's successful completion.

The *Witkowski* approach, while better than the misguided *Arnold* approach, simply does not take into account these important differences between the various parties in a chapter 13 bankruptcy.

C. The Minority Approach from *Arnold*: A Substantial Change In Circumstances Is Absolutely Required.

At a minimum, this Court should fully reject Trustee's interpretation of *Arnold* that requires a substantial change of circumstances. Not only is that approach a minority view, but its genesis shows that the approach has developed without any consideration of the above issues.

First, a careful reading of the *Arnold* case itself shows that it does not create the absolute rule for which it has somehow become known. In *Arnold*, the debtor's annual income skyrocketed from \$80,000 to \$200,000 – a substantial change by any measure. In response, the trustee sought a modest increase in the debtor's

bankruptcy payments from $800 to $1,500. *Arnold*, 869 F.2d at 242. In allowing the trustee to obtain such a modification, the court noted that "[a]lthough § 1329(a) does not explicitly state what justifies such a modification, it is well-settled that a substantial change in the debtor's financial condition after confirmation *may* warrant a change in the level of payments." *Id.*, at 241 (emphasis added).

It thus appears that the *Arnold* Court was not saying that a change of circumstances was *necessary* for any modification – just that it "may warrant" modification. The *Witkowski* Court noted this important distinction when it reconciled the *Arnold* approach with its own. *See Witkowski*, 16 F.3d at 744 ("Contrary to Witkowski's portrayal, *Arnold* does not hold that Sec. 1329 itself required any 'change in circumstance.' Rather the court merely stated that such a showing justified modification."); *Anderson v. Satterlee*, 21 F.3d 355, 358 (9th Cir. 1994) (reading *Arnold* as requiring a trustee to show change in circumstances if debtor objects to the modification); *Euler*, 251 B.R. at 744 n. 3 (citing *Arnold* for the proposition that a "non-debtor plan proponent" needs to show changed circumstances).

The *Arnold* Court's discussion of *res judicata* is similarly revealing. The decision only applies *res judicata* as it relates to a requested "increase in the amount of monthly payments" – in other words, as it relates to those motions

brought by trustees and creditors. *See Arnold*, 869 F.2d at 243. To support this rationale, the Court relied on authority addressing the *res judicata* question in a similar context: a motion brought by the trustee and creditors. *See Fitak*, 92 B.R. at 248. Given the posture of *Fitak* and *Arnold*, which both involved motions for modification brought by trustees and/or creditors, it is hardly surprising that the courts imposed higher standards to justify modifying the debtor's payments. *See also In re Wilson*, 157 B.R. 389, 391 (Bankr. S.D. Ohio 1993) (citing *Arnold*, and noting that a small increase in income was "not a change which is so substantial that a trustee's motion for modification should be granted *over the debtor's opposition*." (emphasis added)).

These outcomes from *Arnold* and *Fitak* are not inconsistent with the favored *Jourdan* approach above. If a trustee or creditor sought "an increase in the amount of monthly payments," as was done in *Arnold*, a substantial change in circumstances may be required. But *Arnold* did not answer the question of whether a debtor needed to make the same requisite showing.

At some point, despite *Arnold*'s somewhat limited scope, courts began citing the case as absolutely requiring a "substantial and unanticipated change in [the debtor's] post-confirmation financial condition." *Murphy*, 474 F.3d at 150 (interpreting *Arnold*). Importantly, *Murphy* involved a similar procedural posture as *Arnold*, as both cases involved trustees who sought to increase the debtor's

payments. When applying *Arnold*, the *Murphy* Court rewrote its rules (a) by imposing a "substantial and unanticipated change" as an absolute prerequisite to modification, and (b) by extending that standard to all modifications, regardless of who seeks the modification and why. *See id.*, at 149-150. As explained above, however, *Arnold* was not so absolute, nor did it have the facts in front of it to issue such a broad mandate.

Just as the *Arnold* decision was twisted, without any explanation, by later decisions, so too was this Circuit's *Hoggle* decision. The *Hoggle* case itself approved of a debtor-sought modification to cure post-petition mortgage payments. *Hoggle*, 12 F.3d at 1011-12. Again, although this Court found the post-petition changes in the debtors' financial circumstances *warranted* the modifications, this Court stopped short of *requiring* such a change. *Id*. As with *Arnold*, some later decisions may have interpreted *Hoggle* as implementing such a requirement, (*see* Appellant's Br., at 21,) but without much analysis supporting such a broad extension of *Hoggle*, those cases are hardly persuasive here. Further, as shown above, there are many courts within the Eleventh Circuit that have gone another direction entirely. *Meeks*, 237 B.R. at 859.

In short, the supposed *Arnold* approach results mostly from a limited and well-reasoned decision that was carelessly extended beyond its original text. This

Court should reject Appellant's interpretation of *Arnold*, which perpetuates the errors of the *Murphy* Court, and adopt the *Jourdan* approach instead.

III. A MODIFICATION UNDER SECTION 1329 IS A STATUTORY EXCEPTION TO *RES JUDICATA*.

Once the bankruptcy court has determined that modification under Section 1329 is appropriate, then the *res judicata* question is automatically answered because Section 1329 is a statutory exception to the doctrine.

As the court below properly reasoned, "[t]he common-law principle of res judicata… does not apply 'when a statutory purpose to the contrary is evident.'" *In re Guillen*, 570 B.R. 439, 444 (Bankr. N.D. Ga. 2017) (quoting *Witkowski*, 16 F.3d at 744 (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991))). As even Trustee acknowledges, there is "a statutory exception in the Bankruptcy Code which allows relief from a confirmed plan under 11 U.S.C. § 1329." (Appellant's Br., at 9;) *see also In re Cameron*, 274 B.R. 457, 460 (Bankr. N.D. Tex. 2002) ("Section 1329(a) of the Bankruptcy Code creates a statutory exception to the binding effect of a confirmed chapter 13 plan because it authorizes certain post-confirmation modifications to such a plan."); *see also Barbosa*, 235 F.3d at 38; *Than*, 215 B.R. at 435; *In re Williams,* 108 B.R. 119, 123 (Bankr. N.D. Miss. 1989).

Again, this rationale rings especially true for debtors, as they are bound by confirmed Chapter 13 plans in a much different way than creditors. Unlike

creditors, debtors can escape a Chapter 13 plan that is not working simply by exercising their right to dismiss the case at any time. *See* 11 U.S.C. § 1307(b). By itself, this ability to walk away and start over shows that the *res judicata* effects of a confirmed plan are entirely different for debtors than for other parties. As described above, due to the voluntary nature of Chapter 13 bankruptcies, debtors alternatively have considerably more leeway to obtain future modifications of the plan to ensure successful completion. *See also* 8 Collier on Bankruptcy ¶ 1329.02, p. 1329-5 (rev. 15th ed. 2008) ("Res judicata does not bar such modifications by the debtor; the debtor often could achieve the same result by dismissing the case and filing a new chapter 13 case.").

Given this background, Trustee's reliance on this Court's decisions in *Justice Oaks II* and *Bateman* for its *res judicata* argument is misplaced. (*See* Appellant's Br., at 14-16.) In *Justice Oaks II*, the creditors filed a separate adversary proceeding to challenge particular issues that were determined by the confirmation of a Chapter 11 reorganization plan. *Wallis v. Justice Oaks II, Ltd.*, 898 F.2d 1544, 1547-48 (11th Cir. 1990). In a somewhat similar scenario, a creditor in *Bateman* challenged the propriety of a Chapter 13 plan a year after its confirmation by moving to dismiss the bankruptcy. *In re Bateman*, 331 F.3d 821, 823 (11th Cir. 2003). But significantly, neither *Justice Oaks II* nor *Bateman* dealt with the specific issue here concerning the applicability of *res judicata* to a debtor-

sought modification under Section 1329. This difference is crucial because, unlike future litigation or motions to dismiss, Section 1329 operates as a clear statutory exception to *res judicta*.[3]

CONCLUSION

For the reasons stated above, *amici curiae* ask this court to affirm the decision of the Bankruptcy Court of the Northern District of Georgia below.

Respectfully submitted,

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[3] *Amicus Curiae* National Association of Chapter Thirteen Trustees (NACTT) cites an additional case in this line of authority: *Florida Dep't. of Rev. v. Gonzalez*, 832 F.3d 1251, 1258 (11th Cir. 2016). (*See* Br. Of Amicus Curiae NACTT, at 4.) Like *Justice Oaks II* and *Bateman*, however, *Gonzalez* did not address any issues concerning modification under Section 1329.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because this brief contains 6,238 words, excluding parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This filing complies with Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-point type.

3. This brief has been scanned for viruses pursuant to Rule 27(h)(2).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on January 23, 2018. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify, pursuant to 11th Cir. R. 31-3 and Fed. R. App. P. 25(a)(2)(B), that on January 23, 2018, I have dispatched one originally signed brief and six copies to a third-party commercial carrier for delivery to the clerk within three days.

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