original

No. 18-8465

IN THE SUPREME COURT OF THE UNITED STATES

Paula Kunsman, Petitioner,

v.

Joel Wall, Creditor/Respondent.

PETITION FOR REHEARING

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Paula Kunsman, Pro Se Debtor

The US Supreme court is to use matter of law as the applicable standard of appellate review to determine that Judge Ray dismissed debtor's Chapter 13 bankruptcy case without cause (no cause was stated in the hearing or in the order dismissing case). This motion for rehearing states with particularity each point of law or fact that the Debtor believes previous Appellate Courts has overlooked or misapprehended and must argue in support of the motion. One or more of the following situations exist: 1. A material factual or legal matter was overlooked in 11th Circuit decision;

Debtor filed Local Form 67 July 8, 2015 (Appendix J), stating DSO was paid in bankruptcy & Debtor's Schedule E shows DSO owed, filed& amended schedules in Oct 2015. Debtor paid $30 fee 5 times to amend schedules D,E or F because Trustee required Debtor to change Sch E, then change Sch F, in October Debtor added some creditors and change wording under "OTHER PROVISIONS" numerous times. At Confirmation hearing Jan14, 2016, Trustee didn't tell Judge that Debtor was paying DSO in bankruptcy pursuant to Local Form 67. Joel Wall was a priority &unsecured creditor so Proof of Claim was refiled by Debtor. Debtor had paid all payments, filed Chapter 13 plans and attended every confirmation hearing.

1. **Debtor lacked ability to hire a bankruptcy attorney ($1500 retainer) &** was granted paying filing fee in installments. Debtor had to pay previous bankruptcy filing fee dismissed because Debtor filing fee not paid.
2. **There was an evidentiary hearing on Nov 3, 2015 in which Judge Ray denied dismissing bankruptcy case.** Judge Ray ruled in Debtor's favor at one hr evidentiary hearing on Nov 3, 2015. Debtor was assured that bankruptcy case would not be dismissed. Appellant claimed her ½ of Voya account as exempt asset because it was put in her name on Mar 26, 2015. Voya Retirement account (equitably divided in Debtor's name on

Mar 26, 2015before Amendments to Final Judgement & could not be offset by a QDRO as evidence were presented in Evidentiary hearing Nov 3, 2015. Voya Retirement was listed on Schedule C an exempt asset. There was not confirmation hearing in Nov or Dec 2015.

3. **Property Settlement debt owed to Ex-husband Joel Wall is dischargeable in Chap 13 Bankruptcy.** Property Settlement and Other (non-support debt) can be discharged in a completed Chapter 13 case. Debtor claimed Voya 457 Deferred Compensation Plan account awarded in Magistrate's Report Final Judgment on Schedule B &claimed as exempt property on Schedule C. Debtor filed Claim against Seizure of Exempt Property, listing all Retirements accounts, including Voya account. At August 2015 hearing Trustee Joanna told Judge Ray 2 **times that Voya Retirement account was an exempt asset.**

Appellant can discharge money owed in bankruptcy &cites this Bankruptcy case *12-1130 Laurel M. Isiscoff Southern District of Fl. Doc 37 3/4/13* is Order Denying Plaintiff's Motion for summary judgment &Granting Defendant's summary judgment. Appellant cites: *Patterson v. Shumate, 112 S. Ct. 2242, 1992.* **(Courts determine divorce order impresses a constructive trust against Retirement asset or that asset belongs to nonfiling spouse as of time of entry of divorce order.)** Appellant cites: In re *Okrepka, No. 13-21559, 2015 WL 1014906 (Bankr. D. Kan. Mar. 4, 2015)* Creditor/ex-husband's objection to confirmation of debtor/ex-wife's chapter 13 plan & debtor's objection to secured claim filed by ex-husband's claim. Underlying divorce decree provided for an "equalization payment" of $55,000 to be made by Ex-wife to Husband within earlier of 90 days of ex-wife's graduation from college or 12 months. Ex-wife filed her chapter 13 petition resulting from her failure to make "equalization payment" which filing stayed those proceedings. **Court held that "equalization payment" was a debt that arose in course of parties' divorce, & that it was part of a property division settlement that was dischargeable under 11 US Code 523(a)(15) &not a "domestic support obligation"that was non-dischargeable under 11 US Code 523(a)(5).**

4. **DISMISSAL HAS SERIOUS CONSEQUENCES.** If a bankruptcy case is dismissed at **request of a trustee or creditor, or by the court** on its own motion, debtor may be prohibited from filing another bankruptcy case for 180 days [Bankruptcy Code Section 109(g)] or be required to file a motion to obtain permission to file another bankruptcy case (Bankruptcy Code Section 349). In a recent decision, *Marrama v. Citizens Bank of*

Massachusetts1 May 15 2007, United States Supreme Court upheld one of Basic equitable principles underlying bankruptcy law in **emphasizing that principal purpose of Bankruptcy Code is to grant a "fresh start" to "honest but unfortunate debtor."**

5. No REASON/CAUSE FOR DISMISSING CASE IS LISTED in Bankruptcy Judge Ray's Dismissal Order. Bankruptcy Judge Ray dismissed a Chapter 13 bankruptcy case at Confirmation hearing without cause, when the Order denying confirmation and dismissing case do not state the cause for the dismissal. Judge Ray never states any reasons on transcript why he is dismissing Debtor's bankruptcy case, instead of continuing case to next Confirmation hearing.

According to 11 US Code 1307 (c)(5) which states Bankruptcy case can only be dismissed for cause-both conditions have to be met "and" in 11 US CODE 1307(c)(5). None of reasons listed in 11 code 1307 would be grounds for dismissal of Appellant's bankruptcy case 15-18660. *11 US CODE 1307* STATES THE CAUSES FOR WHICH A BANKRUPTCY CASE MAY BE DISMISSED. *11 US Code §1307* states in (c) Except as provided in subsection (f) of this section, on request of a party in interest or United States Trustee and after notice & a hearing, Court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including- (5) **denial of confirmation of a plan & denial of a request made for additional time for filing another plan or a modification of a plan. If Bankruptcy Judge denies plan and a request for a new plan, then BANKRUPTCY CASE CAN BE DISMISSED FOR CAUSE.** "Since court did not comply with §1307(c)(5) when it preempted the debtor's chance to try again and dismissed the case after the first denial of plan confirmation, it **applied an incorrect legal standard**, thereby **abused its discretion.** Bankruptcy Code contemplates in §1307 (c)(5) that chapter 13 debtors be afforded more than one opportunity to confirm a chapter 13 plan before the case is dismissed or converted following denial of plan confirmation. As one of the elements of §1307(c)(5) "cause" was missing, mere denial of confirmation did not constitute the requisite cause. We REVERSE the order dismissing case and REMAND for further proceedings consistent with this decision." *case: 0606-100 Nelson NC-05-1293-KRyB Appeal U.S. Bankruptcy Court of Northern District of California 9th Circuit (Jaroslovsky) May 15, 2006. Appeal from U.S. Bankruptcy Court of Northern District of California, Honorable Alan Jaroslovsky, Bankruptcy Judge, Presiding. KLEIN, RYAN* and BRANDT, Bankruptcy Judges.* The debtor appeals the order dismissing her chapter 13

case. Ruling: **Debtor offered final opportunity to prepare viable plan or face dismissal.** Overview: The debtor filed a proposed chapter 13 plan under Fed. R. Bankr. P. 3015(b) Court: Eastern District of Pennsylvania (Fox). ISSUE: Whether Court correctly applied *11 U.S.Code § 1307(c)(5)* when it **dismissed the case without affording the debtor an opportunity to revise her plan** after it denied confirmation. Without affording an opportunity to modify the plan after denying confirmation, Court ruled that the case would be dismissed. STANDARD OF REVIEW: We review a decision to dismiss a chapter 13 case **for abuse of discretion.** *Ho v. Dowell (In re Ho), 274 B.R. 867, 871 (9th Cir. BAP 2002).* The application of an incorrect legal standard is one form of abuse of discretion. *Id.* Since court made no findings of fact, there is nothing to review for clear error. DISCUSSION: After reviewing Bankruptcy Code provision governing chapter 13 dismissals generally, we focus on 1st step of the statutory analysis, which requires a finding of "cause." RULING: **Order dismissing Debtor's chapter 13 case was reversed since debtor was not given opportunity to request additional time to amend plan.** *11 Bankruptcy Code § 1307(c)* **permits Court either to dismiss or to convert a case to chapter 7, "whichever is in best interests of creditors & estate, for cause" based on a nonexclusive list of items of "cause."**

11 U.S.C. § 1307(c). Ho, 274 B.R. at 877; accord, Rollex Corp. v. Assoc'd Materials, Inc. (In re Superior Siding &Window, Inc.), 14 F.3d 240, 242 (4th Cir. 1994), cited by In re SGL Carbon Corp., 200 F.3d 154, 159 n.8 (3d Cir. 1999); In re Erkins, 253 B.R. 470, 477 n.5 (Bankr. D. Idaho 2000); Henson, 289 B.R. at 749-54; In re Shockley, 197 B.R. 677, 680 (Bankr. D. Mont. 1996); In re Staff Inv. Co., 146 B.R. 256, 260-61 (Bankr.E.D. Cal. 1993); 7 COLLIER ON BANKRUPTCY § 1112.04[6] (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. rev. 2005)("COLLIER"); 8id. § 1307.4. **The court did not approach question of dismissal through mandatory two-step analysis of determining "cause" and then weighing alternatives.** The outcome of this appeal turns on initial statutory requirement that there be a determination of "cause." Bankruptcy Code designates items of "**cause**" in a nonexclusive list at § 1307(c)(1)-(10). Since triggering event was denial of plan confirmation, we search the list for an applicable "**cause.**" The statutory "**cause**" **that applies to denial of plan confirmation is § 1307(c)(5): "denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan."** The conjunction "and" in § 1307(c)(5) means that there are 2 **essential elements that each must be satisfied in order to constitute "cause" to convert or dismiss a case following Denial of confirmation of a plan:** (1) denial of confirmation; and (2) denial of a request

for time to file a new or a modified plan. As written, requirements of *11 US Code § 1307(c)(5)* are cumulative and mandatory. Id. **In other words, both elements must exist in order to constitute "cause" to dismiss or convert a chapter 13 case under that authority.** In this instance, 1st element under *11 US Code § 1307(c)(5)* is plainly satisfied because the court denied confirmation of the debtor's plan. The 2nd element under *11 US Code § 1307(c)(5),* however, presents a problem because there was **no "denial of a request made for additional time for filing another plan or a modification of a plan." Although debtor did not request additional time for filing another plan or modifying plan, Court did not afford her an opportunity to make such a request after it denied plan confirmation. We are persuaded that 2nd element of 11 US Code § 1307(c)(5) requires, at a minimum, Court must afford a debtor an opportunity to propose a new or modified plan following denial of plan confirmation.** 8 COLLIER ¶ 1307.04 **Because Court did not offer debtor such an opportunity, 2nd element of § 1307(c)(5) was not satisfied. It follows that there was no "cause" to dismiss or convert Chapter 13 case under that authority.** The policy underlying 2nd element of § 1307(c)(5) relating to a request for time to try again is chapter 13 plan confirmation is an iterative process. **A debtor who wishes to submit to rigors of living for a number of years in straightjacket of a plan that represents one's "best efforts" to pay creditors should, in principle, be permitted latitude to correct perceived deficiencies in proposed plans.**

11 U.S.Code § 1307(c)(5) (emphasis supplied).Since this language parallels the chapter ll conversion and dismissal provision, decisions under Bankruptcy Code § 1112(b) inform the analysis of § 1307(c). Compare 11 U.S.Code § 1112(b). We conclude, first, that the court did not comply with 2 step requirement of 11 U.S.Code § 1307(c) **to determine "cause" & then to weigh alternatives of conversion or dismissal based on "best interests of creditors and the estate," and, second, that § 1307(c)(5) "cause" based on denial of confirmation of a plan requires Court allow Debtor an opportunity to revise the rejected plan. Hence, we REVERSE and REMAND.** Court found that denial of plan confirmation does not significantly change status quo. Debtor remains free to propose another plan, trustee continues to collect funds from debtor in anticipation of a future distribution& automatic stay remains in place. "'Final' does not describe this state of affairs." Court examined statutory definition of "core proceedings" in bankruptcy context &found that it specifically **includes plan confirmation**, but does not mention denial of plan confirmation. Court found that, while not dispositive, this indicates Congress agrees with **Blue Hills' conception of term "proceeding", for plan confirmation purposes, as encompassing larger confirmation process &not ruling on each**

specific plan. Denial of confirmation **with leave to amend**, by contrast, changes little. The automatic stay persists. The parties' rights and obligations remain unsettled. Trustee continues to collect funds from debtor in anticipation of a different plan's eventual confirmation. The possibility of discharge lives on. "Final" does not describe this state of affairs. An order denying confirmation does rule out specific arrangement of relief embodied in a particular plan. But that alone does not make denial final. Appellant cites: *Smith, 180 B.R. 648, 651n. 12(D. Utah 1995)* "Since court did not comply with §1307(c)(5) when it **preempted debtor's chance to try again and dismissed case after first denial of plan confirmation, it applied an incorrect legal standard, thereby abused its discretion.** Bankruptcy Code contemplates in §1307(c)(5) that chapter 13 debtors be afforded more than one opportunity to confirm a chapter 13 plan before case is dismissed or converted following denial of plan confirmation. As one of elements of §1307(c)(5) "cause" was missing, mere denial of confirmation did not constitute the requisite cause. We REVERSE the order dismissing case and REMAND for further proceedings consistent with this decision."

Appellant sites: *Womble Carlyle Sandridge & Rice PLLC* "Although a debtor cannot appeal denial of her Chapter 13 plan of reorganization, she can still amend the plan prior to & even on date of confirmation, and if confirmation of her plan is denied, she almost always is given the opportunity to file a new plan."

6. **Bankruptcy Judge Ray instructed Trustee to prepare Dismissal order**, and she vaguely states "for reasons argued and stated on the record". In Judge Ray's Order to Deny Confirmation and Dismiss bankruptcy case, Judge Ray never states the reason why the Chapter 13 bankruptcy case was being dismissed. Judge Ray's order states that "for reasons argued and stated on the record" (referring to Jan 14, 2016 transcript of Confirmation hearing). But Judge Ray's Order denying Confirmation and dismissing case does not STATE a CAUSE for dismissing the case. Judge Ray abused/ did not follow 11 US BANKRUPTCY CODE 1307(c)(5) and CASE LAW. In order to know the reason why Judge Ray dismissed Debtor's Chapter 13 bankruptcy you must listen to the entire transcript (since that holds the reason why Debtor's Chapter 13 bankruptcy was dismissed). However, Judge Ray never states in transcript any reason why or cause for dismissal of case.

7. **District Court Judge Cooke, in Appeal 16-60163, didn't request transcript**, Debtor was not told what method of recording **District Court Judge Cooke** Appeal 16-60163 **elected.** District court Judge Cooke did not require a written transcript, and Debtor was told by Clerk/transcript office, District Judge had **access to audio recording of Jan 14, 2016 Confirmation hearing** and **could listen to audio** recording to decide appeal. Debtor did not realize 11th Circuit court did not have access to audio recording of Jan 14, 2016 Confirmation hearing &she immediately **ordered transcript for 11th Circuit court send to 11th circuit by transcription company.** Debtor paid for TRANSCRIPT of Jan 14, 2016 Confirmation hearing, was filed by Transcription company, as no redaction was needed, & 11th Circuit court had copy for appeal 18-10339. Appellant filed a SWORN Motion for Rehearing En Banc (19 pages Appendix B). Appellant filed a motion to order transcript for 11th Circuit ($150 which Appellant can't afford), but should have filed Motion to Allow transcript to be part of Record on Appeal.

11th Circuit Court should not have dismissed case because Transcript was filed by Transcript company in Dec 2018, and **Transcript proves that Judge Ray NEVER states in transcript any CAUSE or REASON for dismissing Debtor's bankruptcy case.** District Judge Cooke in Appeal 16-60163 did not explain why she dismissed it, rather than proceed to the merits. Rule 8001. Scope of Part VIII Rules; Definition of "BAP"; Method of Transmission (c) Method of transmitting documents. A document must be sent electronically under these Part VIII rules, **unless it is being sent by or to an individual who is not represented by counsel.** Debtor did not provide transcript to District court because she was told they have access to audio transcript of Jan 14, 2016 Confirmation hearing. "Court Reporter Statute, 28 U.S.C. § 753 (link is external) sets forth **proceedings to be recorded** including: **all proceedings in other cases** had in open court unless parties with the approval of Judge shall agree specifically to contrary; and such other proceedings as a judge of Court may direct or as may be required by rule or order of court as may be requested by any

party to the proceeding. By law, each session of court and every proceeding designated by rule or order of Court or by one of Judges **shall be recorded verbatim by electronic sound recording equipment. The method of recording may be elected by District judge.**"

Rule 8001 was amended effective October 17, 2005, but new provisions do not affect this case in any way. Rule 9006 "permits some filings or other acts to be accepted notwithstanding a missed deadline. It states that, on motion of party, Court may, for cause shown&in its discretion, permit the act to be done where the failure to act was the result of excusable neglect.'" *Lynch, 430 F.3d at 603 (quoting Fed. R. Bankr.P. 9006(b) (1)).* On its express terms, Rule deals with timeliness of a filing, not its content. While Rules 8001 and 9006 both may govern conduct required of debtor under Rule 8006, Lynch 430 F.3d at 605, it is clear that Court need only concern itself here with Rule 8001. Unlike situation in Lynch, Harris did file a timely record and designation. Because it was contents of filings that were at issue rather than timeliness of filings, Rule 9006, which concerns when a court should excuse a missed deadline, is not applicable. **We recognize some of cases above appear to conflict with our decision in Lynch in their determination that untimely filing of a designation or statement under Rule 8006 should be governed not by "excusable neglect" standard of Rule 9006 but by terms of Rule 8001.**

Compare *Lynch, 430 F.3d at 605 with Resolution Trust Corp., 45 F.3d at 73* (analyzing failure to file timely statement of issues under Rule 8001); In re *Fitzsimmons, 920 F.2d at 1474 (same); In re Comer, 716 F.2d at 177* (affirming district court's refusal to dismiss for failure to file timely designation of record &statement of issues under precursor to Rule 8006); In re *Winner, 632 F.2d at 661* (same). These cases enumerate general standards for courts to use in determining when a dismissal under Rule 8001 is appropriate. While our specific holding in Lynch appears not to comport with great majority of our sister courts, we need not address the potential conflict because this case does not involve the failure to file a timely submission but failure to file a specific component of what District court deemed Rule 8006 required. Rule 9006 and Lynch's holding are therefore not at issue. We are mindful that District court in dicta indicated that record appeared to support Bankruptcy court's dismissal. We **remand case so that District court can give Harris opportunity to respond to Court's concerns about his delay &determine whether Harris should have an opportunity to cure or whether a lesser sanction is warranted.**

In *Re Robert E. Harris, Appellant v. Albany County Office, Appellee, Mark Swimelar, Trustee, 464 F.3d 263 (2d Cir. 2006)* Debtor-appellant Robert

E. Harris appeals from a judgment of United States District Court for Northern District of New York (Sharpe, J.), dated June 14, 2004, dismissing debtor's appeal from orders of Bankruptcy Court for the Northern District of New York (Littlefield, B.J.), dated July 21, 2003 and October 15, 2003, for failure to include in Designation of record on appeal the transcript of a June 23, 2003 bankruptcy hearing as required by Federal Rules of Bankruptcy Procedure 8001 ("Rule 8001")&8006 ("Rule 8006"). Harris also appeals District court's denial of his motion for reconsideration of June 14, 2004 dismissal order. We hold District court abused its discretion under Rule 8001 when it dismissed **debtor's case for failure to include June 23 transcript in designation of record without first giving debtor notice and opportunity to respond** and **without determining whether a lesser sanction would have been appropriate.** The judgment of District court is **VACATED, & case REMANDED for proceedings not inconsistent with this opinion.** We review a district court's dismissal of a bankruptcy appeal on **procedural grounds for abuse of discretion.** See *In re Lynch, 430 F.3d 600, 603 (2d Cir. 2005) (per curiam); see also In re Tampa Chain Co., 835 F.2d 54, 55 (2d Cir. 1987) (per curiam)* (holding that District court's "decision to dismiss will be affirmed unless it has abused its discretion"). A **district court abuses its discretion when it "applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed [s] on the basis of an erroneous view of applicable law."**

Rule 8001, provides, inter alia, that " [a]n appellant's failure to take any step [including those outlined in Rule 8006] other than timely filing a notice of appeal does not affect validity of appeal, but is ground only for such action as District court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal." Fed. R. Bankr.P. 8001(a). The rule makes clear that District court enjoys discretion to dismiss an appeal in all cases except where debtor does not file a timely notice of appeal, in which case court has no choice but to dismiss the case.

We recently addressed standard for Rule 8001 dismissals in *In re Lynch, 430 F.3d at 605.* In that case, District court dismissed an appeal as untimely because debtor had not filed the record &designation of issues on appeal pursuant to Rule 8006 in a timely manner, even after having received a valid extension. We noted that " [b]y its terms, [Rule 8001] does not set standards for when dismissal is appropriate" & that some circuits had established conditions to constrain a district court's discretion to dismiss a case for failure to abide by a procedural rule. Id. We nevertheless declined to adopt any definitive standard in Lynch because we found that petitioner's failure to file a timely record &designation on appeal was governed by the "excusable neglect"

standard of Federal Rule of Bankruptcy Procedure 9006(b) (1) ("Rule 9006"), which governs enlargement of time for deadlines in bankruptcy proceedings.5 See id. We left open possibility "**that dismissal would be an unwarranted sanction for some errors, and hence, impermissible under Rule 8001(a).**" Id.; see also *In re Tampa Chain Co., 835 F.2d at 55* (holding that, in considering dismissal of an appeal, "**the court should exercise discretion to determine whether dismissal is appropriate in the circumstances**" presented by case.

Register.com, Inc. v. Verio, Inc., 356 F.3d 393, 398 (2d Cir. 2004) (internal quotation marks and citation omitted; alteration in original). Before reaching question of what standard District court should have applied in dismissing Harris's appeal, we must first address Harris's argument that he had not violated any procedural rule such that the district court could have sanctioned him at all, let alone dismissed his appeal. In his reply brief, Harris asserts that District court erred in dismissing Appeal because **transcript from June 23 hearing was not necessary to appeal and contained only oral argument, not any testimony.** Bankruptcy Rule 8006 governs what documents are required to perfect an appeal. It states that in pertinent part, Appellant shall file with clerk and serve on Appellee a designation of items to be included in the record on appeal. The record on appeal shall include items so designated by parties, Notice of appeal, Judgment order appealed from, and any opinion, findings of fact, & conclusions of law of court. If record designated by any party includes a transcript of any proceeding or a part thereof, party shall, immediately after filing designation, deliver to the reporter & file with clerk a written request for transcript &make satisfactory arrangements for payment of its cost.

Fed. R. Bankr.P. 8006. **While 8001 Rule does not expressly mandate that "record on appeal" include all transcripts of proceedings below, its provisions make clear that those documents which include "findings of fact" or "conclusions of law of Court" are deemed part of Record, including any transcripts, for which Rule makes express cost provisions.** While Harris is correct that June 23 hearing contained oral argument, not testimony, by parties, it also contained Bankruptcy judge's findings of fact & evidence on which he made his conclusions, namely Harris's admissions that he was behind in filing his tax returns for 2001, that he had not paid his post-petition taxes and that he had access to funds from which he could pay those amounts. The order from Bankruptcy court dismissing case specifically mentioned June 23 hearing. Accordingly, **without a transcript of proceedings, District court did not have a complete record to review Bankruptcy court's findings.** Because Harris violated Rule 8006, we must now examine whether District court judge properly dismissed the appeal because of that violation.

While we have declined to determine what considerations should govern a district court's dismissal under Rule 8001, several of our sister courts have undertaken such an analysis. 4th Circuit has cabined district courts' discretion to dismiss appeals under Rule 8001. *In Resolution Trust Corp. v. SPR Corp. (In re SPR Corp.), 45 F.3d 70 (4th Cir. 1995),* a panel of 4th Circuit, which included Justice Powell (retired), held that for late, non-jurisdictional filings in bankruptcy court, District court before dismissing an appeal under Rule 8001 must consider whether to: (1) make a finding of bad faith or negligence; (2) give the appellant notice or an opportunity to explain the delay; (3) consider whether the delay had any possible prejudicial effect on other parties; or (4) indicate that it considered the impact of sanction and available alternatives.

Id. at 72. 9th Circuit has also held that in Rule 8006 context, a district court should consider a party's bad faith and availability of alternative sanctions except in most egregious of **circumstances before dismissing the appeal under Rule 8001.** *In re Fitzsimmons, 920 F.2d 1468, 1474 (9th Cir. 1990).* Outside of the specific Rule 8001 context, other courts have likewise permitted bankruptcy appeals to continue despite a **party's failure to file a complete &timely non-jurisdictional designation of record on appeal.** *In re Comer, 716 F.2d 168, 177 (3d Cir. 1983)* (no error where " District court declined to dismiss appeal [having found] no prejudice to debtors or bad faith on the part of the creditors"); *In re Winner Corp., 632 F.2d 658, 661 (6th Cir. 1980)* ("This power (to dismiss), however, should not be exercised generally unless omission arose from **negligence or indifference of appellant" or bad faith.**) (internal quotation marks omitted); cf. *In re Beverly Mfg. Corp., 778 F.2d 666, 667 (11th Cir. 1985)* (adopting, in case where untimely appellate briefs were filed pursuant to Bankruptcy Rule 8009), "position of 6th Circuit, which has held **dismissal is proper only when bad faith, negligence or indifference has been shown**").

5th Circuit, in contrast, has taken a more flexible approach. *In re CPDC Inc., 221 F.3d 693 (5th Cir. 2000),* Court considered whether **District court had abused its discretion in dismissing an appeal because the petitioner had failed to file a timely statement of issues.** The court did not adopt a definitive list of factors as it noted other circuits had done in reviewing dismissals under Rule 8001, but rather held "in determining whether dismissal is an appropriate sanction, a district court should keep in mind that some infractions of rules of bankruptcy procedure are harmless and do not merit dismissal; and that primary goal of courts as enforcers of bankruptcy rules should be to ensure swift and efficient resolution of disputes pertaining to the distribution of bankruptcy estate." Id. at 699-700. Under this flexible rubric, Court found that in circumstances of case, District court had abused its discretion because there

was no contention that appellees were prejudiced by failure, District court had an adequate record upon which to decide merits of Appeal& there was no indication of bad faith. Id. at 700-01.

D.C. Circuit has also adopted a flexible rule similar to that of 5th Circuit. In *English-Speaking Union v. Johnson 353 F.3d 1013, 1021 (D.C. Cir. 2004)*, Court explained that two competing concerns framed its discussion. On the one hand, Court noted the strong presumption in favor of deciding cases on merits required that **dismissal should be used only as a last resort.** Id. "District courts need powerful tools to manage their dockets, prevent undue delay, and sanction those who abuse the system." Id. Because of these competing concerns, Court declined to set forth any specific factors that district courts should consider but held "District courts can achieve proper balance by considering **circumstances before them and explaining why it is in interest of justice to dismiss rather than to proceed to the merits.**" Id. at 1022.

We agree with flexible approach taken by 5th and D.C. Circuits and decline to adopt any fixed rules about what district courts must do in Rule 8001 context. Although we recognize that factors listed by 4th Circuit and other courts should ordinarily be considered by a district court when contemplating a Rule 8001 dismissal, we believe that a court should exercise its discretion given the factual circumstances of a particular case. Nevertheless, **courts should endeavor to explain why it is in the interest of justice to all parties, including secured and unsecured creditors, to dismiss a bankruptcy appeal on procedural grounds rather than to continue to merits of the appeal.** And because dismissal is a harsh sanction, moreover, we generally require a district court to consider whether a lesser sanction would be appropriate.

8. **In reading short Jan 14, 2016 Confirmation hearing transcript** (in Appendix of Petition for Writ of Certiorari), Judge Ray **never states a reason for dismissing case.** One of Judge Ray's first comments is "I'm going to deny confirmation and dismiss case". In fact Judge Ray states he will deny confirmation and dismiss case 3 times even though more information is given by Debtor and Trustee. Pg 19 line 2-16. Trustee Robin Weiner then states on pg 19 lines 18-21 "**I will not submit an order denying, your Honor.** That's going to be your decision. So continue if it's not confirmable or if it hasn't been added correctly?"

9. Trustee, Robin Weiner **should have paid Priority creditor IRS in Arrears with pre-confirmation funds** pursuant to: In re *Hufford 11 U.S.C.§ 349,§ 349(b),Number: 1111-001, Sept 29th, 2011* Ruling: Funds held by chapter 13 trustee ordered distributed to creditors with undisputed claims upon dismissal. Overview: In court's order dismissing the debtor's case on the grounds that their plan was unfeasible, Court directed **Trustee to disburse any funds on hand to the creditors.** In re *Streett 11 U.S.C.§ 362,§ 362(c),Number: 0512-044 April 23rd, 2012 Court: Northern District of Ohio (Speer)* Ruling: Trustee ordered to distribute funds to tax authority from preconfirmation plan payments based on warrant issued after dismissal but prior to reinstatement. Overview: The debtor filed a chapter 13 case. The Department filed a proof of claim based on unpaid taxes assessed by it against the debtor. The debtor made pre-confirmation plan payments to chapter 13 Trustee. Court dismissed case. Court: District of New Mexico (Jacobvitz).

10. **Bankruptcy Judge Ray should have given Debtor opportunity to convert bankruptcy case to a Chapter 7 bankruptcy.** Legislative history of section 706(a) confirms Congress did not intend for debtor's right to convert to be subject to judicial discretion. Because clear text of section 706(a) provides that a debtor's right to convert is not subject to judicial override, the Court's inquiry need not proceed beyond this point. *Lamie, 540 U.S. at 534.* But even if there were some ambiguity in the text of section 706(a), statute's legislative history makes absolutely plain that Congress did not intend personal property with "adequate protection" during the period in which a Chapter 13 debtor is making payments under a plan) to condition debtor's right to convert on approval of Bankruptcy court. The relevant committee reports state: Subsection (a) of this section gives debtor one-time absolute right of conversion of a liquidation case to a reorganization or individual repayment plan case. If the case has already once been converted from chapter 11 or 13 to chapter 7, then debtor does not have that right. **The policy of the provision is that debtor should always be given opportunity to repay his debts.** *S. Rep. No. 95-989, at 94; see H.R. Rep. No. 95-595, at 380.* One would be hard-pressed to create a clearer statement of congressional intent to place conversion decision in hands of debtor, unrestrained by court. That congressional committees described **debtor's conversion right as "absolute" & noted that he should "always" be given chance to repay his debts is compelling evidence Congress intended there to be no**

limitations on the debtor's right to convert beyond those present in the text of the statute itself.

Court of appeals' attempts to explain away this clear legislative intent to create an "absolute" right of conversion under section 706(a) are unconvincing. Court of appeals reasoned that Congress's reference to an "absolute right of conversion" could not be taken literally because provision itself limits conversion to instances where case has not been converted previously. Pet. App. 37. Congress did not describe right merely as "absolute," but as "**one-time absolute" entitlement.** *S.Rep. No. 95-989, at 94.* Nor is this argument strengthened by the existence of the caveat in section 706(d), limiting conversion to cases in which debtor is eligible to be a debtor under the new chapter. Senate Report also mentioned eligibility requirement of section 706(d), implying that when it called right in section 706(a) "absolute," Congress understood that statement to be subject to obvious qualification that debtor be eligible to proceed under new chapter. Congress was well aware of (a) **1 time-only limitation & (b) eligibility limitation, and nevertheless clearly stated that—subject to only those 2 limitations—Right to conversion was "absolute."** By doing so, it rejected possibility that other unexpressed limitations on right to convert might be judicially imposed. Court of appeals also sidestepped clear meaning of section 706(a)'s legislative history by misinterpreting the last sentence, which states, "The policy of provision is that **debtor should always be given opportunity to repay his debts**" *S. Rep. No. 95-989, at 94.* Court of appeals imported into this sentence view that section 706(a)'s conversion right applies only to "honest debtors." *Pet. App. 38.* A good-faith exception to "always" applicable "opportunity" would have been easy to note, &its absence is therefore telling. Nothing in legislative history—any more than in text itself—**supports Court of appeals' judicially created limitation on Right to conversion.** Legislative history is decisively to contrary. Bankruptcy Reform Act of 1978 - A Primer by Robert E. Ginsberg states: Court must confirm Chapter 13 plan once all affected secured creditors approve it & Court is satisfied that it is both feasible and offers unsecured creditors no less than they would have gotten had Debtor chosen a chapter 7 liquidation. *11 US Code § 1325(a). 11 US Code § 1325(a)(5)(B).* The creditor must also retain its security. All debtor has to pay is **secured portion of claim.** Balance owed is treated as any other unsecured claim under the plan. *Chapter 13 of the Bankruptcy Reform Act of 1978. An Attractive Alternative, 28 Depaul L. Rev. 1045 (1979). Compare 11 U.S.C. app. § 722 (Supp. 11 1978),* permitting a debtor to redeem certain personal collateral in liquidation cases by paying to secured creditor value of collateral. Unsecured creditors get no

vote at all in chapter 13. Instead, **court is to force debtor's plan on those creditors if satisfied that plan is in their best interests.** *11 US Code § 1325(a)(4).* Because general unsecured creditors can generally expect nothing in a consumer liquidation case, This is particularly true in light of generous new federal exemption provision. *11 US Code § 522(d).*

A plan offering them anything, i.e., something more than nothing, is clearly in their best interests and should be approved. There is nothing in the law specifically requiring the court to find that plan is debtor's best effort so long as it is proposed in good faith. *11 US Code § 1325(a)(3). 11 US Code § 727(a)(9)(B)(ii)* (payment of 70% of claims under a plan &debtor's best effort will allow granting of a discharge, even if a similar discharge was made within a 6 year period). *11 U.S.C.app.§ 727(a)(9) (Supp. II 1978).* If debtor completes payments under the plan, Debtor receives a discharge. *11 US Code § 1328(a).*

11.**Bankruptcy case 15-18660 should not have been dismissed because Debtor filed Adversary Proceeding on Jan 14, 2016 to determine dischargeability of debt owed to Joel Wall**. Pre Trial Conference hearing was scheduled for March 8, 2016.

12.In Sept 2016 I hired bankruptcy attorney to file Motion to Reopen Bankruptcy case. He reviewed court record and stated "I honestly believe that the **Judge probably was biased when he dismissed your case because he just got fed up with you in his courtroom**. He didn't want to see you again. I don't want to take a case that he is already sour about it. The # of filings in your case that he is tired of it."

Motion for Rehearing Petition for a Writ of Certiorari should be granted.

Debtor filed Amended Proof of Claim with Domestic Support Obligation for Priority Creditor Joel Wall being paid in Chapter 13 bankruptcy (Appendix I).

Appellant requests **Supreme Court order BANKRUPTCY CASE 15-18660 REINSTATED** so Trustee Robin Weiner to review17th amended Chapter 13 plan, filed with District Court Appellate brief case 16-60163. Debtor feels she must have an **attorney appointed.** Respectfully submitted,

Paula Runsman June 11, 2019