No. 21-1322

In The
Supreme Court of the United States

JAN M. SENSENICH, CHAPTER 13 TRUSTEE,

Petitioner,

v.

PHH MORTGAGE CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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MOTION OF THE NATIONAL ASSOCIATION OF CHAPTER THIRTEEN TRUSTEES FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The National Association of Chapter 13 Trustees (NACTT), a nonprofit organization of Chapter 13 bankruptcy trustees and practitioners, respectfully requests leave under Supreme Court Rule 37 to file the accompanying brief as *amicus curiae*.

The NACTT has obtained the consent of the Petitioner, Jan M. Sensenich, to the filing of the brief, but the Respondent, PHH Mortgage Corporation, has not consented.

This case presents a question of the authority of bankruptcy courts to impose noncompensatory sanctions for repeated noncompliance with mortgage servicing requirements, including noticing requirements under Rule 3002.1. The NACTT's member trustees disburse funds to mortgage creditors every month in accordance with confirmed Chapter 13 plans and in reliance on the notices under Rule 3002.1. The NACTT's member trustees, moreover, practice primarily in bankruptcy courts and thus have strong interests in questions of the authority of those courts.

The NACTT offers expertise and a national perspective on these issues and submits that its input may assist the Court in its consideration of this petition. As a general matter, moreover, "it is preferable to err on the side of granting leave" to file an *amicus curiae* brief. *See Neonatology Associates, P.A. v. Comm'r of Internal Revenue*, 293 F.3d 128, 133 (3d Cir. 2002).

WHEREFORE, the premises considered, the NACTT requests the Court approve the filing of the accompanying brief as *amicus curiae*.

Dated: May 3, 2022

Respectfully submitted,

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STATEMENT OF THE IDENTITY OF THE *AMICUS CURIAE*, ITS INTEREST, AND THE SOURCE OF ITS AUTHORITY

The National Association of Chapter 13 Trustees (NACTT) is a nonprofit organization of Chapter 13 bankruptcy trustees and practitioners.[1] The NACTT's member trustees, whose interests the NACTT represents, play a vital role in the implementation of Chapter 13 plans, receiving payments from debtors and distributing those payments in accordance with confirmed plans.

The NACTT's members are regular practitioners and parties in bankruptcy courts and rely on the authority of those courts. They thus have strong interests in questions about bankruptcy courts' powers to ensure compliance by all parties with the rules for bankruptcy notices and with the requirements for properly applying payments under confirmed Chapter 13 plans.

The petitioner, Trustee Jan M. Sensenich, has consented to the filing of this brief, but the respondent, PHH Mortgage Corporation, has not consented. The

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[1] Pursuant to Supreme Court Rule 37, the NACTT states that notice was given and that the Petitioner has consented to the filing of this brief, but that the Respondent has not. The NACTT further states that no counsel for a party authored this brief in whole or in part and that neither counsel for a party nor any party made a monetary contribution intended to fund the preparation or submission of the brief. The NACTT is a nonprofit association and has used its own resources in preparing this brief.

NACTT is filing, along with this proposed brief, a request for leave to file it.

SUMMARY OF THE ARGUMENT

Bankruptcy courts need the power to respond appropriately when confronted with systemic failures in the servicing of mortgage loans during bankruptcy cases. These failures threaten the fresh start that the Bankruptcy Code promises to debtors who attempt to cure and maintain mortgage payments on their homes under Chapter 13 plans. The decision below would strip courts of authority granted by the Rules of Bankruptcy Procedure to support the requirements of the Bankruptcy Code.

A key feature of Chapter 13 of the Bankruptcy Code is the power, codified in § 1322(b)(5), to cure a mortgage default over time while maintaining the regular payments on the claim. Bankruptcy Rule 3002.1 supports the Congressional desire to allow families in arrears on their mortgages to keep their homes, by mandating that lenders provide notices of postpetition payment changes and notices of any fees, costs, or charges incurred during the case, ensuring that all parties are aware of the mortgage status and can see the records that will survive bankruptcy. Before the adoption of Rule 3002.1, a debtor could diligently complete payments under a Chapter 13 plan only to find that the mortgagee had misapplied payments or a new

mortgage default had arisen during the plan, undermining the success achieved.

Consistent with the importance of the Rule, Rule 3002.1 includes robust authority to impose sanctions for noncompliance. It specifically permits courts to exclude evidence of information not properly noticed under the Rule, and it authorizes awards of reasonable costs and attorney's fees caused by a creditor's noncompliance. It also provides open-ended authority to award "other appropriate relief." Fed. R. Bankr. P. 3002.1(i).

Despite the broad language, the Circuit Court below adopted a restrictive interpretation of this authority, concluding that the sanctions specifically authorized by the Rule involve only compensatory relief and that the "other appropriate relief" must be limited to similar relief. That holding is at odds with the text of the Rule. The Rule does not contain an extensive list of specific sanctions from which to derive a common thread—at most, it involves two specific items. And one of those is not even clearly limited to compensatory relief. The structure of the Rule, moreover, is fully consistent with broader authority. Courts have construed similar language in statutory text in just this way.

The holding of the Circuit Court on this important question of federal law undermines bankruptcy court authority to address systemic noncompliance with the requirements of properly servicing mortgages during Chapter 13 cases. This Court's intervention is

necessary to avoid the perception that creditors face little financial risk from neglecting the systems involved.

ARGUMENT

The Bankruptcy Court imposed sanctions on PHH based on its systemic disregard of procedures and orders in Chapter 13 cases. The requirements that PHH ignored are important; they are crucial to the success of many Chapter 13 plans. Yet the Circuit Court below concluded that the Bankruptcy Court had almost no power to sanction PHH for its noncompliance (even though the same court had previously found similar violations by PHH). This holding sends the wrong message. Material sanctions are not a routine matter, but parties assume that systemic indifference to the rules will be costly. The decision below undermines that assumption and thus discourages the investments needed to comply with the Bankruptcy Code and Rules.

I. Bankruptcy Rule 3002.1 is crucial for Chapter 13 plans that involve residential mortgages.

Bankruptcy Rule 3002.1 is critical to the success of Chapter 13 cases that involve residential mortgages. It requires mortgage claimholders to provide information needed to keep the claims current during a Chapter 13 plan. Without that information, debtors

might dutifully make payments under a Chapter 13 plan over a three- to five-year period only to learn, at the conclusion of the case, that the mortgage servicer had not accurately accounted for payments or had assessed additional, undisclosed costs or fees and that the claim had fallen behind. The Rule is thus crucial to the "fresh start" promised by Chapter 13.

Though the Bankruptcy Code protects loans secured by a debtor's principal residence from most types of modification, *see* 11 U.S.C. § 1322(b)(2), it does allow a debtor in a Chapter 13 case to cure a default on a mortgage obligation over time while maintaining the regular payments that come due after the filing of the case, *see* 11 U.S.C. § 1322(b)(5). When a plan includes this kind of provision, it requires the creditor to accept regular payments, as if the loan were current, while the debtor repays the arrearage. *See* John Rao, *Fresh Look at Curing Mortgage Defaults in Chapter 13*, Am. Bankr. Inst. J., Feb. 2008, at 14.

This process is more complicated than it sounds. The nonbankruptcy accounting remains relevant if the debtor's plan fails, so servicers generally maintain "two sets of books" during a plan treating a mortgage under § 1322(b)(5): one record tracks the status of the loan under the bankruptcy plan and one tracks the status under nonbankruptcy law. *See generally* Keith M. Lundin, *Lundin on Chapter 13*, § 131.3, at ¶ 22, LundinOnChapter13.com (last visited April 27, 2022). Servicers must handle escrow payment determinations differently during the case to account for escrow amounts included in the prepetition claim arrearage.

See id. at ¶¶ 65; *In re Rodriguez*, 629 F.3d 136, 140-42 (3d Cir. 2010). They must also ensure that automated assessments of fees and costs are not asserted improperly. *See In re Jones*, 366 B.R. 584, 590 (Bankr. E.D. La. 2007), *supplemented*, No. 03-16518, 2007 WL 2480494 (Bankr. E.D. La. Aug. 29, 2007), *rev'd in part sub nom*. *Wells Fargo Bank, N.A. v. Jones*, 391 B.R. 577 (E.D. La. 2008) (noting, prior to the adoption of Rule 3002.1, that it was "common to see late charges, fees, and other expenses assessed to a debtor's loan as a result of postpetition accounting mistakes made by lenders" and positing that "lenders refuse to make [required] adjustments because few debtors challenge their accounting and even less pay out their entire loan before discharge"). And, if a debtor completes payments under a plan, the creditor must properly incorporate the bankruptcy accounting into the post-bankruptcy accounting. Without adequate systems and training in place, that process can go horribly wrong. *See Saccameno v. U.S. Bank, N.A.*, 943 F.3d 1071, 1078-81 (7th Cir. 2019) (detailing the years-long ordeal a borrower endured to correct errors made by Ocwen Loan Servicing—an entity that later merged into the current PHH Mortgage Corporation—in connection with a successful Chapter 13 case).

Bankruptcy Rule 3002.1 was added to "aid in the implementation of § 1322(b)(5)." Fed. R. Bankr. P. 3002.1 advisory comm. note to 2011 adoption. Prior to its adoption, no rule directly required creditors to notify anyone of payment changes or postpetition assessments. Between creditor concern about violating

the automatic stay and systemic breakdowns and servicing errors, this information was not being communicated fully.

Consistent with its importance, the Rule provides courts robust authority to sanction parties for noncompliance. It consists of two subdivisions. Subdivision (i)(1) authorizes the specific sanction of excluding evidence of information not properly noticed. But subdivision (i)(2) provides broader authority to award "other appropriate relief." It also specifies the power to assess costs and attorney's fees. Fed. R. Bankr. P. 3002.1(i).

II. The Circuit Court below erred in holding that Rule 3002.1 authorizes only compensatory relief.

Despite the broad language under Rule 3002.1(i)(2), the Circuit Court below held that the Rule authorizes only compensatory relief. That holding undermines the Rule's enforcement mechanism and thus threatens its effectiveness.

The Circuit Court's holding is at odds with the text of the rule. The phrase "appropriate relief" is not defined in the Rules of Bankruptcy Procedure, and its meaning in normal usage is "open-ended," as this Court has recognized in recent cases. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (citing *Sossaman v. Texas*, 563 U.S. 277, 286 (2011)).

The Circuit Court majority, however, interpreted the language narrowly, concluding that the specific

relief authorized by the Rule is compensatory in nature and that the general language is thus best construed to be in the same class. Both steps in that reasoning are suspect.

First, the specific relief authorized under the Rule is not strictly compensatory. As Judge Bianco noted in his dissent, the sanction of excluding evidence based on a failure to provide notice is not always proportionate to the harm. In the context of Civil Rule 37, courts have recognized that the sanction can include a punitive aspect that serves a deterrent purpose. *See*, *e.g.*, *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988) ("[A]lthough preclusion of evidence and dismissal of the action are harsh remedies . . . , they are necessary to achieve the purpose of Rule 37 as a credible deterrent. . . .").

Second, the structure of Rule 3002.1(i) does not support the limitation the Circuit Court read into the broad sanctioning authority. The Rule does not involve a long list of specific examples accompanied by a catchall term. It includes two provisions. One is the specific authorization in subdivision (i)(1) to exclude evidence. The other is the broad power in subdivision (i)(2) to "award other appropriate relief," with a specification that this power includes the power to award reasonable expenses and attorney's fees. The list of specific examples, in other words, consists of barely more than one item. Defining a class based on such a limited set involves a great deal of subjectivity.

The structure of the Rule suggests that the drafters intended to provide bankruptcy courts broad authority to impose appropriate sanctions *in addition to* the power to exclude evidence. Construing the broad language to be limited by the specific examples in this situation would undermine its purpose.

The Rules Committee modeled Rule 3002.1(i) on sanctioning authority under Rule 37 of the Federal Rules of Civil Procedure. Courts have interpreted the authority under Rule 37 expansively. This Court, in fact, concluded that trial courts must have the power to impose severe sanctions in "appropriate cases" for discovery abuses, "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976).

The majority opinion below, however, parsed Rule 37 and perceived a distinction between the power to impose "appropriate" sanctions under Rule 37(c)(1)—language similar to Rule 3002.1(i)—and the authority to issue "just" orders under Rule 37(b)(1). The distinction between these two qualifiers is elusive. Both are open-ended terms that require courts to weigh the propriety of sanctions based on the circumstances.

The point that Rule 3002.1(i) calls on bankruptcy courts to exercise their judgment in addressing noncompliance is worth emphasizing. Bankruptcy courts have expertise in this area and familiarity with the

goals of Rule 3002.1. And, as the trial courts in the bankruptcy system, bankruptcy courts have the best vantage to evaluate a party's failure or misconduct. *Cf. Cooter & Gell v. Hartmarx Corp*., 496 U.S. 384, 404 (1990) ("The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence."). Rule 3002.1(i) sensibly gives bankruptcy courts the power to craft any "appropriate" relief.

Subdivision (i)(2) does not suggest otherwise just because it states that the broad power to award appropriate relief includes the specific power to award costs and attorney's fees. The term "including" is not generally a limiting term, *see* 11 U.S.C. § 102(3), and it serves the obvious purpose in Rule 3002.1(i) of overriding the "American Rule" regarding attorney's fees. Other circuit courts have correctly concluded that similar statutory language does not cabin a broad grant of discretionary authority. *See Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994) ("[T]he key language of the OSH Act is broad. It authorizes a court to 'order all appropriate relief.' The further language including certain remedies, like reinstatement, indicates the availability of the named remedies, but does not purport to limit 'all appropriate relief' to those remedies only."); *Gaffney v. Riverboat Servs. of Indiana, Inc.*, 451 F.3d 424, 460 (7th Cir. 2006) ("[W]e read 'any appropriate relief' as an umbrella label; in turn, the phrase 'including restraining violations . . . and reinstatement' indicates that the

umbrella of available remedies encompasses both legal and equitable relief [including compensatory and punitive damages].").

III. The Circuit Court's error is harmful.

The panel majority clearly believed that PHH's conduct did not warrant the sanction the Bankruptcy Court imposed, dismissing the concerns as "overwrought" and "hyperventilation." For the reasons Judge Bianco articulated in his dissent, the NACTT disagrees with that assessment. But that is not the question presented to this Court. The decision below did more than just find the sanctions excessive; it held, as a matter of law, that noncompensatory sanctions are simply unavailable under Rule 3002.1(i), regardless of how appropriate they may be. That holding leaves bankruptcy courts without adequate power to respond to systemic noncompliance. Bankruptcy courts "are engaging in a broad search for appropriate remedies when mortgage holders or servicers fail to follow the Rule," recognizing that "persistent noncompliance will defeat the goal of curing mortgages through Chapter 13 cases if tolerated by the bankruptcy courts." Keith M. Lundin, *Lundin on Chapter 13*, § 131.3, at ¶ 157, LundinOnChapter13.com (last visited April 27, 2022). The Circuit Court's holding in this case undercuts those efforts.

Practical considerations all but guarantee that only a fraction of the instances of noncompliance with Rule 3002.1 lead to claims for any relief. In some cases, that may be because debtors do not know of the

noncompliance. Invalid charges and errors may lurk on accounts as amounts owed but not immediately due. A debtor might confront these amounts only when he or she refinances the mortgage or sells the home. *See In re Jones*, No. 03-16518, 2012 WL 1155715, at *7 (Bankr. E.D. La. Apr. 5, 2012) ("Most debtors simply do not have the personal resources to demand the production of a simple accounting for their loans, much less verify its accuracy, through a litigation process."). In other cases, the amounts may be known, but they may be small enough in relation to the burden and potential cost of litigation that the debtor just pays them. *See*, *e.g.*, *In re Blanco*, 633 B.R. 714, 755 (Bankr. S.D. Tex. 2021) (citing Kara Bruce, *Closing Consumer Bankruptcy's Enforcement Gap*, 69 Baylor L. Rev. 479, 480 (2017)).

These circumstances support noncompensatory sanctions in appropriate cases. *Cf. Saccameno v. U.S. Bank, N.A.*, 943 F.3d 1071, 1089 (7th Cir. 2019) (noting that high punitive tort damages in relation to compensatory damages might be permissible when, for example, "the probability of detection is low" or "there is a risk that limiting recovery to barely more than compensatory damages would allow a defendant to act with impunity"). Compliance with the requirements of Rule 3002.1 and § 1322(b)(5) demands attention and investment from mortgage servicers. Any indication that courts are not serious about compliance is likely to threaten progress on these issues. Faced with evidence of systemic neglect, bankruptcy courts need the power to respond appropriately.

CONCLUSION

Consistent with its importance to the Chapter 13 bankruptcy process, Rule 3002.1 expressly grants broad powers to address noncompliance with its mandatory provisions. Neither the text of the Rule nor its purpose supports the Circuit Court's restrictive interpretation of its enforcement provisions. The majority's dismissal of the systemic concerns sends a message to mortgage servicers that they need not take these issues seriously. The NACTT urges the Court to grant the Trustee's petition for a writ of certiorari to correct that error.

Dated: May 3, 2022

Respectfully submitted,

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