No. 21-6898

IN THE

Supreme Court of the United States

JASPER STEVENS
AND BRENDA LOUISE MURRAY STEVENS,

Petitioners,

v.

ROBERT S. WHITMORE,

Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

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This supplemental brief, filed pursuant to Rule 15.8 of this Court, brings to the Court's attention recently updated information on the United States Department of Justice website, which was updated after the filing of the petition for a writ of certiorari in this case.

Petitioners Jasper Stevens and Brenda Louise Murray Stevens ("Petitioners") filed their petition for a writ of certiorari on January 12, 2022. The statutory provision considered therein is 11 U.S.C. § 554(c), Pet. 1, which states:

> Unless the court orders otherwise, any property scheduled under section 521(a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

A. On January 21, 2022, the Department of Justice Updated Critical Information That Has a Direct Bearing on the Question Before This Court

The question presented in the petition for a writ of certiorari in this case is: "Whether an asset can be abandoned to a debtor where (1) the asset is not administered prior to the closing of the bankruptcy case; and (2) the asset is scheduled only in the "statement of the debtor's financial affairs?"" Pet. i.

Central to answering this question is determining whether an asset that is disclosed only on the "statement of the debtor's financial affairs" is considered a "scheduled asset". Information posted on the Department of Justice website confirms that it is.

On January 21, 2022, the United States Department of Justice ("Department of Justice") updated its "Sample Chapter 7 Case and Illustrative Forms 1, 2, and 3", at https://www.justice.gov/ust/sample-chapter-7-case-and-illustrative-forms-1-2-and-3-0/. In order to clarify a trustee's role and responsibilities, examples are provided therein involving a hypothetical trustee, Jenny Ward ("Ward"), and a hypothetical debtor, Sam Martin ("Debtor"). Particularly noteworthy is the example provided for Asset #11, quoted as follows:

> "ABC Preference (Asset #11) - Debtor disclosed in response to Statement of Financial Affairs, Question #3, that numerous payments were made to ABC Supply Company within 90 days prior to bankruptcy. Ward's investigation reveals that approximately $5,000 was paid by the Debtor to ABC Supply Company on account of an

> antecedent debt within the preference period. Ward lists the preference action as a scheduled asset with an "unknown" value in Form 1, Column 2, and discloses the estimated net value as $5,000 in Form 1, Column 3.
>
> Ward commences an adversary proceeding to recover the preference under § 547(b). In its answer, ABC Supply Company alleges that the transfer constituted a contemporaneous exchange for new value to the Debtor which cannot be avoided under § 547(c)(4). Because negotiations to settle the preference action for $2,000 are pending, Ward records the remaining value of the preference action to be administered as $2,000 in Form 1, Column 6. Ward explains this new valuation (17) in a note on Form 1, and further notes as a "major activity affecting case closing" that settlement negotiations are pending in the case.
>
> Upon receipt of the preference action settlement proceeds, Ward will use UTC 1141-000, Scheduled Preference/Fraudulent Transfer Litigation, when recording the deposit on Form 2."

This pertinent "Sample Chapter 7 Case and Illustrative Forms 1, 2, and 3" is part of the reference materials provided to Chapter 7 Trustees to instruct them in the administration of Chapter 7 bankruptcy cases. The scenarios are based on hypothetical "information regarding Debtor's assets from an analysis of: (1) the petition, schedules and statement of financial affairs filed by Debtor; (2) Debtor's testimony at the § 341(a) meeting..., and (3) the information received from creditors and other parties-in-interest." These are examples, as the reference material notes, wherein the "Debtor has not amended the schedules and statements originally filed."

In Asset #11, the asset ("an antecedent debt within the preference period") was "disclosed in ...[the] Statement of Financial Affairs [11 U.S.C. § 521(a)(1)(B)(iii))]". It is identified as a "*scheduled asset* with an "unknown" value". (Emphasis added.) It is also recorded on Form 2, using "UTC 1141-000, *Scheduled* Preference". (Emphasis

added.) Thus, as the Department of Justice acknowledges here, an asset disclosed on the "statement of the debtor's financial affairs" is a "scheduled asset."

This is significant, since the instant case before this Court turns on the interpretation of the phrase, "scheduled under section 521(a)(1) of this title". Pet. 2. A correct interpretation directly determines whether the bankruptcy court properly authorized Chapter 7 Trustee Robert S. Whitmore ("Trustee") to settle Petitioners' legal claims against Ocwen Loan Servicing, LLC ("Ocwen"). A misinterpretation exposes millions of citizens in this country, like the Petitioners here, to revocation of the "fresh start" required by the Bankruptcy Code.

When the Petitioners filed for Chapter 7 bankruptcy, they disclosed legal claims against Ocwen ("Ocwen Claims") in their Statement of Financial Affairs (11 U.S.C. § 521(a)(1)(B)(iii)), when they provided case details about the Ocwen Claims, noting that the case was "Pending" in the "Superior Court of California County of Riverside" under case number MCC1600867 and caption "Jasper Stevens and Brenda Louise Murray Stevens . . . vs. OCWEN Loan Servicing, LLC [et al]." CA9. AOB. 9. The Trustee thoroughly investigated these claims and decided not to administer them. The Petitioners' bankruptcy was thereafter discharged and the Petitioners' bankruptcy case was closed. Under Section 554(c), those claims were "abandoned to the [Petitioners]" because the claims were "scheduled under section 521(a)(1)" and not "administered at the time of the closing of [the Petitioners' bankruptcy] case." 11 U.S.C. § 554(c). Nevertheless, when Ocwen tried to secure a settlement with the Trustee nearly two years later, the Petitioners' bankruptcy case was reopened, and

the bankruptcy court, the Ninth Circuit Bankruptcy Appellate Panel, and the Ninth Circuit Court of Appeals ruled that the Trustee retained authority to dismiss and settle the Ocwen claims, holding that "absent Trustee or court action, to be abandoned under § 554(c), property must be scheduled on a schedule, not just listed on the [debtor's statement of financial affairs]." Pet.App. 4a-7a.

Consistent and in concert with the updated information on the Department of Justice website, the Department of Justice has published other reference material currently in use by Chapter 7 trustees across the United States that clearly shows that an asset disclosed on the "statement of the debtor's financial affairs" is a "scheduled asset". For example:

Instructions for Form 1 – Individual Estate Property Record and Report – under "Column 1: Asset Description (Scheduled and Unscheduled Property)": states, in relevant part: "...all "scheduled assets" of the debtor from the original petition, schedules, *and statement of financial affairs* should be listed." (Emphasis added). Thus, assets disclosed on the original "statement of the debtor's financial affairs" are considered "scheduled assets".

The *Instructions for Form 1* also clearly states, "[t]he term "unscheduled assets" refers to all estate assets that are *not* on the debtor's *original* schedules and statements". (Emphasis added.)

These distinctions are critical. Since the Petitioners disclosed the Ocwen Claims in their original "statement of the debtor's financial affairs" filed on June 24, 2017, the Ocwen Claims are therefore a "scheduled asset". CA9. ER. 52.

In the *Instructions for Form 2 – Estate Cash Receipts and Disbursements Record*, under "Column 5: Deposit", it clearly states, "There are 24 UTCs [Uniform Transaction Codes] that apply to deposits. UTCs in the 1100 series are used for receipts from the liquidation of *scheduled assets* (e.g., assets listed by the debtor on the original schedules *and statements*)" (Emphasis added). Thus, this additional reference provided by the Department of Justice also confirms that assets listed on the original "statement of the debtor's financial affairs" are "scheduled assets". It also notes that UTCs in the 1200 series are used for receipts from *unscheduled assets* (e.g., assets added on *amended* schedules and assets discovered by the trustee). (Emphasis added.)

In the *Primary Uniform Transaction Code List*, under "Scheduled Assets", it assigns "1149-00x" to "Other Litigation/Settlements". This list makes no distinction whether the "other litigation/settlements" was disclosed on a literal schedule or on the "statement of the debtor's financial affairs". Again, litigation or settlements disclosed on the original "statement of the debtor's financial affairs" is a "scheduled asset" and would be deemed abandoned if not administered prior to the closing of the bankruptcy case, pursuant to 11 U.S.C. § 554 (c).

In the *Primary Uniform Transaction Code Reference Guide,* under "Special Situations, 1. Receipts", it states, "*[s]cheduled assets are those listed by the debtor on the original schedules and statements.* Unscheduled assets, or assets not originally scheduled, are those added by the debtor on amended schedules and statements and

other assets discovered by the trustee. Separate UTCs are used to distinguish scheduled and unscheduled assets." (Emphasis added).

In the *Primary Uniform Transaction Code Reference Guide*, it also provides these examples under "Receipts":

> Definition: UTCs 1142 and 1242 apply when a trustee receives funds from personal injury litigation.
>
> Example: The trustee receives $50,000.00 from a personal injury litigation action. The Form 2 should reflect $50,000.00 in receipts within UTC 1142 or 1242, depending on whether the personal injury claim was *reported on the Schedule B or Statement of Financial Affairs that was initially filed at the Court.* (Emphasis added.)

Thus, a "litigation action" can be considered as a "scheduled asset" if it is disclosed on *either* the Schedule B *or* Statement of Financial Affairs that was originally filed in the bankruptcy court. This distinction is significant and pertinent to the matter before this Court. The Ninth Circuit panel held that "§ 554(c) requires property to be disclosed on a literal schedule," Pet.App. 3a, and "absent Trustee or court action, to be abandoned under § 554(c), property must be scheduled on a schedule, not just listed on the [statement of the debtor's financial affairs]." Pet.App. 4a-7a. Therefore, the Ninth Circuit panel's holding is diametrically opposed to the view of "scheduled assets" held by the United States Department of Justice.

In view of the foregoing, it is clear that the Ninth Circuit created incongruous results by permitting abandonment: (1) where the debtor discloses an asset on any piece of paper entitled "Schedule," but not where the debtor discloses the asset only on the Statement of Financial Affairs ("SOFA"); and (2) where the debtor lists the

asset only on a Schedule A/B, but not where the debtor listed the asset only on a "SOFA". Pet.App. 6a-7a. "This disparity in outcome rests on no substantive policy or reasoning but on the mere happenstance that the [...] entry was or was not made on a pleading entitled 'schedule.'" *In re Hill*, 195 B.R. 147 (Bankr. D.N.M. 1996), at 149; *accord Bird v. Hart,* 616 B.R. 826, 829 (D. Utah 2020), at 829 n.1. In addition, and most importantly, the Ninth Circuit panel's holding is at odds with the view of "scheduled assets" held by the U.S. Department of Justice.

This issue is vitally important and needs to be resolved by this Court to protect the rights of debtors and creditors throughout this country. The Ninth Circuit's rule is a hyper-technical interpretation which is "inconsistent with the Bankruptcy Code in letter, and intolerable in practice." *In re Kane*, 628 F.3d 631, 643 (3d Cir. 2010).

Where an asset is disclosed on a SOFA, it provides notice to the bankruptcy court and creditors, just as it provides notice to the trustee. See *Ashmore v. CGI Grp., Inc.*, 923 F.3d 260 (2d Cir. 2019), at 281 (disclosure of asset on a SOFA gives "the trustee and the bankruptcy court . . . sufficient notice to take steps to protect the creditors' interests"); *Hamilton v. State Farm Fire & Cas. Co.*, 270 F.3d 778, 784 (9th Cir. 2001) ("creditors base their actions on the disclosure statements and schedules").

While the Ninth Circuit panel asserts that "[t]he Debtors could have amended their schedules," Pet.App. 11a, this is inapposite. The Department of Justice has provided clear direction to trustees throughout the United States that assets disclosed on the *original* schedules and statements are considered "scheduled assets". And, in the Department of Justice's view, disclosing an asset on *either* a Schedule B

or a "statement of the debtor's financial affairs" suffices to identify a "scheduled asset" that is abandoned pursuant to 11 U.S.C. § 554(c).

This is truly one of the clearest cases pertaining to the important question presented in this petition that this Court will ever see.

In the interest of helping Congress to achieve national uniformity on a federal Bankruptcy issue that has absorbed countless hours in the federal and state court systems—and that threatens to continue to do so—this Court should seize the opportunity to determine the interpretation that aligns with Section 554(c) as it was originally intended and which is clearly outlined by the U.S. Department of Justice. *See* U.S. Const. art. I, § 8, cl. 4.

CONCLUSION

The Ninth Circuit panel's ruling in this case has created a split between other Circuit Courts and is diametrically opposed to the view and directives of the U.S. Department of Justice. The petition for a writ of certiorari should therefore be granted, and the judgment of the Ninth Circuit Court of Appeals vacated.

Respectfully submitted,

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Date: January 27, 2022

FILED

DEC 23 2020

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: JASPER STEVENS; BRENDA LOUISE MURRAY STEVENS, Debtors, --- JASPER STEVENS; BRENDA LOUISE MURRAY STEVENS, Appellants, v. ROBERT S. WHITMORE, Chapter 7 Trustee, Appellee.	No. 20-60044 PRO BONO BAP No. 19-1325 ORDER

Pursuant to this court's October 15, 2020 order, Kellam Conover, Esq., is hereby appointed to represent appellants for purposes of this appeal only. The Clerk shall amend the docket to reflect that Kellam Conover, Esq., Gibson, Dunn & Crutcher LLP, 1050 Connecticut Avenue, N.W., Washington, DC 20036, Email: KConover@gibsondunn.com, is pro bono counsel of record for appellants.

Within 30 days after the date of this order, appellants shall, and appellee may, complete and submit the Ninth Circuit Mediation Questionnaire. *See* 9th Cir. R. 3-4. The Clerk shall transmit the Mediation Questionnaire to counsel with this

order. Counsel shall return it according to the instructions contained in the Mediation Questionnaire.

Briefing shall proceed as follows: the opening brief is due February 19, 2021; the answering brief is due March 22, 2021; and the optional reply brief is due within 21 days after service of the answering brief.

The Clerk shall serve a copy of this order on appellants individually.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Katie de la Serna
Deputy Clerk
Ninth Circuit Rule 27-7