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**IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

IN THE MATTER OF:
CHARLES LOPEZ and JULIE LOPEZ,

Debtors,

BANKRUPTCY RECEIVABLES MANAGEMENT,

Appellant,

v.

CHARLES LOPEZ and JULIE LOPEZ,

Appellees.

ON APPEAL FROM THE UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE NINTH CIRCUIT
BAP No. EC-01-1178 MoHRy

**BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY
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IN SUPPORT OF THE APPELLEES**

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**CORPORATE DISCLOSURE STATEMENT
AND STATEMENT OF INTEREST OF NACBA
AS AMICUS CURIAE**

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys (“NACBA”) is a non-profit organization of more than 1,300 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. Ninth Circuit NACBA members file many thousands of bankruptcy cases per year.

NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues which 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 appellate courts, including the Ninth Circuit, seeking to protect the rights of consumer bankruptcy debtors. *See* Kawaauhau v. Geiger, 118 S.Ct. 974 (1998); In re Su, 290 F.3d 1140 (9th Cir. 2002); Contractor’s State LB v. Dunbar, 245 F.3d 1058 (9th Cir. 2001); In re Gruntz, 202 F.3d 1074 (9th Cir. 1999); In re Been, 153 F.3d 1034 (9th Cir. 1998).

The NACBA membership has a vital interest in the outcome of this appeal. NACBA members primarily represent individual low- and moderate-income wage-earners. Such debtors are often coerced into signing reaffirmation agreements by creditors who aggressively assert security interests in personal property, even though these interests may be virtually worthless in a true economic sense. The security interests are asserted for the leverage they provide through the threat of repossession or replevin, thereby forcing reaffirmation and renewal of personal liability on pre-petition debts. *Amicus* is particularly concerned with the unlawful practices challenged in this action because post-discharge agreements that evade court scrutiny and the strict requirements for reaffirmation agreements set out in sections 524(c) and (d) present a serious threat to a debtor's ability to obtain a meaningful and effective fresh start. For this reason, *Amicus* supports the decisions below which give full force to the clear Congressional mandate that the reaffirmation requirements must be strictly enforced.

Additionally, the NACBA membership is concerned about potential creditor misuse in consumer bankruptcy cases of a ruling such as the appellant seeks in this case. The "new consideration" exception to the § 524 requirements advanced by the Appellant in this case will likely foster a new wave of creditor mischief not unlike the unfiled reaffirmation abuses of the

1990's. It will result in a proliferation of unwise reaffirmation agreements that will escape court scrutiny, obtained by creditors having nominally-secured interests in debtors' personal property. *Amicus* urges this court to adopt the bright line test set forth in the B.A.P. decision below that any agreement in which any part of the consideration for the agreement is based on a discharged debt is a reaffirmation agreement subject to the requirements of § 524, even if new consideration is provided.

I. THE BANKRUPTCY COURT AND BANKRUPTCY APPELLATE PANEL CORRECTLY HELD THAT THE APPELLANT VIOLATED THE DISCHARGE INJUNCTION BY COLLECTING ON AN INVALID REAFFIRMATION AGREEMENT.

A. The Decisions Below Embrace The Clear Congressional Intent That The Reaffirmation And Discharge Provisions Of § 524 Must Be Strictly Enforced.

It is well settled that the cornerstone of federal bankruptcy policy is the fresh start associated with a discharge of debt. In passing the Bankruptcy Code in 1978, Congress established that once a debtor meets the requirements of the law, he or she should obtain a meaningful and effective fresh start. *See, e.g.,* H.R. Rep. No. 595, 95th Cong., 1st. Sess. 117 (1977) (fresh start is the "essence of modern bankruptcy law"); H.R. Rep. No. 595, 95th Cong., 1st

Sess. 125 (1977) ("purpose of straight bankruptcy... is to obtain a fresh start"); H.R. Rep. No. 595, 95th Cong. 1st Sess. 118 (1977) (Chapter 13 designed to ensure "the debtor is given adequate exemptions and other protections to ensure that bankruptcy will provide a fresh start"); *id.*, at 118 (Whether debtor uses Chapter 7 or 13, "bankruptcy relief should be effective, and should provide the debtor with a fresh start."). *See also* H.R. No. 95-595, p. 128 (1977) ("Perhaps the most important element of the fresh start for a consumer debtor after bankruptcy is discharge. ... [This bill] proposes to remedy the deficiencies in the current discharge provisions and to make the discharge effective relief for consumer debtors".)

The Supreme Court has frequently expressed the same principle. For example:

This Court has certainly acknowledged that a central purpose of the Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy "a new opportunity in life with a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

Grogan v Garner, 110 U.S. 1945, 111 S.Ct. 654, 659, 109 L. Ed. 2d 308 (1991), *citing* Local Loan Co. v. Hunt, 292 U.S. 234, 244, 54 S.Ct. 695, 699, 78 L.Ed. 1230 (1934).

Perhaps the most essential element of the fresh start is freedom from using post-bankruptcy income to pay pre-bankruptcy debts.¹ The courts below were correct in finding that the Appellant, Bankruptcy Receivables Management, has undermined this principal by collecting money on a debt that was discharged in the Debtors' bankruptcy.

B. The Bankruptcy Code Does Not Permit A Waiver Of The Discharge Except Under Limited Circumstances.

The Bankruptcy Code provides that all pre-petition debts of the debtor, subject to the exceptions provided in § 523, are forever discharged upon the entry of the discharge pursuant to § 727(a). The discharge in bankruptcy unequivocally cancels the debtor's legal obligation to pay discharged debt. 11 U.S.C. § 727(b); In re Price, 871 F.2d 97, 98 (9th Cir. 1989). The legal effect of the discharge is further bolstered by the statutory injunction preventing collection of discharged debt that comes into existence

¹ For example, the Supreme Court stated in Local Loan Co. v. Hunt, *supra*, 292 U.S. at 245: “[t]he new opportunity in life and the clear field for future effort, which it is the purpose of the bankruptcy act to afford the emancipated debtor, would be of little value to the wage earner if he were obliged to face the necessity of devoting the whole or a considerable portion of his earnings for an indefinite time in the future to the payment of indebtedness incurred prior to his bankruptcy.”

upon entry of the discharge.² 11 U.S.C. § 524(a); In re Cherry, 247 B.R. 176, 182 (Bankr.E.D.Va. 2000)(purpose of permanent injunction set forth in § 524 is to afford debtors a financial fresh start).

Given the critical role that the discharge plays in effectuating a debtor's fresh start, it is understandable that Congress would carefully circumscribe the discharge provisions to ward off any potential creditor-induced waivers of this important right. In fact, the Code permits a debtor to waive the discharge in only two limited circumstances; by entering into a reaffirmation of a pre-petition debt that fully complies with the requirements of sections 524(c) and (d), or by making purely voluntary payments on the debt without any reaffirmation of personal liability as permitted by § 524(f).³

² The Appellant attempts to minimize the effect of the discharge by suggesting that it is often “colloquially stated” that in bankruptcy a debt is discharged, but that actually the debt is not “extinguished” because the debtor merely obtains the benefit of a permanent injunction. Appellant’s Brief, p. 34. Apart from whether this characterization of the discharge actually supports the Appellant’s argument in this appeal, § 727(b) clearly provides that the discharge entered under § 727(a) “discharges the debtor from all debts that arose before the date of the order for relief under this chapter....”

³ It is not wholly accurate to characterize voluntary payments made under § 524(f) as a “waiver” of the discharge since the debtor actually waives the discharge only temporarily with regard to each such payment; the debtor does not forego his or her right to assert the discharge in the event that the debtor elects to stop voluntarily repaying the debt.

The courts below were correct in concluding that the Debtors had not effectively waived their discharge because neither of these two conditions had been met.

C. A Post-Discharge Agreement Is Subject To The Strict Requirements Of § 524(c) Where Any Part Of The Consideration For The Agreement Is Based On A Discharged Debt, Even If New Consideration Is Provided.

The primary focus of the Appellant's brief is that this Court should use this case as a vehicle for overruling its opinion in In re Parker, 139 F.3d 668 (9th Cir. 1998), even though the issue decided in *Parker* is only tangentially related to the lower courts' opinions in this case. This lengthy discussion of *Parker* obscures the real issue in this case, which is whether the "Post-Discharge Retention Agreement" (hereinafter "PDRA") signed by the Debtors was in fact a reaffirmation agreement requiring compliance with sections 524(c) and (d).⁴

⁴ Although *Amicus* is tempted to respond to the Appellant's assault on *Parker* by presenting argument on why it was correctly decided, *Amicus* believes that this is not an appropriate case for a "rehearing" of *Parker* and will focus on the pertinent issues on appeal in this case. *Amicus* will point out, though, that there is ample support for this Court's holding in *Parker* from other Circuit Courts. See Capital Communications Fed. Cred. Union v. Boodrow, 126 F.3d 43 (2d Cir. 1997), *cert. denied*, 522 U.S. 1117, 118 S. Ct. 1055 (1998); Lowry Federal Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989); Home Owners Funding Corp. of America v. Belanger, 962 F.2d 345 (4th Cir. 1992), *see also* Collier on Bankruptcy ¶ 521.10 (15th ed. rev.).

Sections 524(c) and (d) set forth extensive and precise conditions that must be satisfied to establish a valid reaffirmation agreement. They are designed to ensure that reaffirmation agreements are “truly voluntary.” In re Gardner, 57 B.R. 609, 611 (Bankr.D.Maine 1986), *citing* S.Rep. No. 989, 95th Cong., 2d Sess. 162-164, reprinted in 1978 U.S.Code Cong. & Ad. News 5787, at 6123-6125. Because of the potential for abuse by creditors in coercing debtors to enter into ill-advised waivers of their discharge, reaffirmation agreements are “not favored” and the requirements of sections 524(c) and (d) are strictly enforced. In re Getzoff, 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995); In re Latanowich, 207 B.R. 326, 335 (Bankr.D.Mass. 1997) (§ 524(c) requirements are mandatory and since they “exist to protect a debtor from his or her own bad judgment, the debtor cannot waive them”); *see also* Conley v. Sears, Roebuck & Co., 222 B.R. 181 (D.Mass. 1998) (over \$165 million returned to debtors in payments made on unlawful reaffirmation agreements resulting from creditor’s “flawed legal judgment” in adopting policy of not filing reaffirmation agreements with bankruptcy courts).⁵

⁵ In response to the proceedings in *Latanowich* and the filing of the subsequent class action referred to in *Conley*, the Federal Trade Commission and the 50 state attorneys general became concerned about the reaffirmation abuses of several national retailers. This resulted in the filing of enforcement actions against these creditors and the entry of subsequent

Consistent with this purpose, § 524(c) is precisely drafted so as to bring within its reach agreements that are intended to evade the reaffirmation requirements by disguising their true nature. Congress clearly sought to prohibit this potential abuse by broadly defining the types of agreements subject to the reaffirmation requirements. Section 524(c) states that any agreement in which the consideration is based “*in whole or in part*” on a dischargeable debt is a reaffirmation agreement subject to the section’s requirements. If an agreement falls within this definition, irrespective of any recitals in the agreement suggesting that it is not a reaffirmation, it is void and unenforceable unless there has been full compliance with the conditions of sections 524(c) and (d). Getzoff, 180 B.R. at 574.

The Appellant readily admits that the PDRA signed by the Debtors did not satisfy the requirements of § 524(c). It suggests, however, that the agreement was not a disguised reaffirmation subject to § 524(c) because it was supported by new consideration. In arguing that the PDRA was somehow exempt from the § 524(c) requirements, the Appellant relies upon

consent orders based on violations of the FTC Act, 15 U.S.C. § 41 *et al.* See, e.g., United States of America v. Sears, Roebuck & Co., 97-10839-JLT (D.Mass.); Agreement Containing Consent Order, File No. 972-3187; In re Montgomery Ward Credit Corp. and General Electric Capital Corp., FTC Docket No. C-3839; In re The May Department Stores Co., FTC File No. 972 3189. Similar consent orders were reached with the state attorneys general.

the so-called “new consideration” exception adopted by a small minority of courts. See In re Heirholzer, 170 B.R. 938 (N. Ohio 1994); In re Peterson, 110 B.R. 946 (Colo. 1990). While *Heirholzer* and *Peterson* can be distinguished from this case, *Amicus* urges this Court to flatly reject the “new consideration” theory as did the B.A.P. below.

The fundamental flaw with the Appellant’s position is that it is completely unsupported by the language of the Code. Nowhere in § 524(c) is there provided an exception for an agreement that includes new consideration. On the contrary, § 524(c) plainly states that when any part of the consideration for the agreement is based on a dischargeable debt, even where new consideration exists, it is governed by the reaffirmation requirements. In re Gardner, 57 B.R. 609, 610-11 (Bankr.D.Me.1986) (agreement invalid under § 524(c) despite post-petition new consideration where “at least part of the consideration for the agreement is based upon the dischargeable debt”).

By using the language “in whole or *in part*”, Congress clearly contemplated that some of the consideration for a reaffirmation covered by § 524 will involve new consideration. In fact, it is hard to imagine a debtor ever entering into a reaffirmation agreement without there being some new consideration. If the creditor does not, for example, agree to forbear

enforcement of a valid lien, reduce the outstanding balance on a debt, provide more favorable payment terms, reestablish a line of credit or provide other new credit, there would be no sound reason for the debtor to reaffirm.⁶ Thus, the existence of new consideration, no matter how substantial, does not determine whether a creditor must comply with sections 524(c) and (d). In re Stevens, 217 B.R. 757, 760-61 (Bankr.D.Md.1998) (§ 524(c) "places little emphasis on whether the new consideration is sufficient, rather the thrust of the issue is whether any part of the consideration is based on a debt that is otherwise dischargeable").

The common sense approach adopted by the Code is essential if there is to be any effective enforcement of the discharge provisions. Adoption of the *Heirholzer* and *Peterson* reasoning would effectively eviscerate § 524(c) by permitting a creditor to simply evade the reaffirmation requirements by providing some new consideration. In re Lopez, 274 B.R. 854, 862 (B.A.P. 9th Cir. 2002)("If Congress wanted foxes guarding the henhouse, it would not have incorporated section 524(c) into the Bankruptcy Code"). As the

⁶ A debtor moved by a moral obligation to repay certain debts can unilaterally elect to make voluntary payments on the debt pursuant to § 524(f) without compromising his or her discharge by entering into a reaffirmation agreement.

court in *In re Zarro* observed:

Every reaffirmation agreement involves some element of new consideration. Otherwise, the debtor would not agree to pay the discharged debt. If new consideration saved a non-complying reaffirmation agreement, little would remain of the protection afforded by § 524(c).

In re Zarro, 268 B.R. 715, 721 (Bankr.S.D.N.Y. 2001).

The Appellant's proposed adoption of the new consideration exception would swallow Congress's consumer protections in their entirety, because, by definition, all reaffirmation agreements involve some new consideration.

D. The Courts Below Correctly Found That The Post-Discharge Agreement Was An Invalid Reaffirmation Agreement And Therefore Void And Unenforceable.

Even if this Court were to accept the Appellant's contention that the Debtors were provided new consideration, there can be no question that the PDRA signed by the Debtors was a reaffirmation agreement within the definition provided under § 524(c) and therefore subject to the requirements of that statute. The terms of the PDRA confirm that it was rooted in the discharged debt owed by the Debtors to the original creditor, Samuels Jewelers (later assigned to the Appellant). In the PDRA, the Debtors agreed to pay the sum of \$3,030.35, which was exactly the outstanding balance

owed on the discharged debt. The Debtors also agreed to pay this sum together with interest at the rate of 22.80%, which was the interest rate under the original agreement with Samuels Jewelers. These factors clearly establish that the consideration for the PDRA was based at least in part, if not completely, on the discharged debt.⁷

Appellant argues that the PDRA merely required the Debtors to make payments for the right to retain the secured property, that “its focus is exclusively on BRM’s *in rem* rights”, and that it did not re-impose any “personal liability” on the Debtors. Appellant’s Brief, p. 36. This belies the actual language in the agreement and the Appellant’s conduct.

The PDRA contains the customary language found in promissory notes. Paragraph 1 refers to the Debtors as “Promisor(s)” and states that they “agree(s) to pay BRM the sum of \$3,030.85, the principal balance due, plus interest at an annual rate of 22.80%.” It further states that the note amount is payable according to a specified payment schedule “**UNTIL PAID IN FULL.**” It is completely disingenuous for the Appellant to compare the soliciting of affirmative post-discharge promissory obligations to pay a sum certain, as obtained by the Appellants from the Debtors under

⁷ The trial judge in this case certainly had doubts about whether the claimed new consideration truly existed, noting that the Appellant’s supposed forbearance of its lien enforcement may have been an “empty gesture.” Record, Item J, p. 10.

the PDRA, with the mere mailing by a creditor of informational billing statements as in the case Appellant relies upon, In re Ramirez, 273 B.R. 620 (Bankr.C.D.Cal. 2002).

The Appellant's contention in this Court that the PDRA did not establish personal liability of the Debtors is not even consistent with the position it took in the lower court. In its brief before the B.A.P., the Appellant stated that under the PDRA, the Debtors "would be obligated to pay the entire remaining amount of the contract debt, plus interest at the contracted rate of 22.8% per annum, all payable at the rate of \$100.00 per month." BRM's Appellate Brief in BAP, p. vii.

In addition, the PDRA does not simply obligate the Debtors to make payments on the value of the security, which Appellant claims are made in exchange for the Appellant's forbearance of its *in rem* rights. Disregarding for the moment that the fair market value of the security conveniently equals the amount owed on the discharged debt, the PDRA requires the Debtors to make substantial interest payments above and beyond the value of the collateral.⁸

⁸ Even if the Appellant could claim entitlement to some compensation for the time-price differential of deferred payments on the value of the collateral without running afoul of the discharge injunction, the interest payments would not be determined by the original agreement between the parties. Where such payments are not separately negotiated and are instead provided

The PDRA also provides that in the event of default and any subsequent court action to “enforce” the agreement, the Debtors are required to pay attorney’s fees and court costs if BRM is the prevailing party. This imposes a personal liability on the Debtors that derives from the discharged debt. This liability would not exist but for the PDRA, and it provides the Appellant with a claim that would not exist post-discharge if the Appellant were simply enforcing its *in rem* rights. In re Griffin, 204 B.R. 308 (Bankr.D.R.I. 1997) (creditor’s attempt to obtain judgment for “interest and costs” based on discharged debt in addition to possession of property in state court replevin action violated discharge injunction); In re Inge, 158 B.R. 326 (Bankr.E.D.N.Y. 1993); In re Smiley, 26 B.R. 680 (Bankr.D.Kansas 1982).

The terms of the PDRA make clear that the debtors became personally obligated to repay the outstanding balance on the discharged debt. Unlike the retention with continuing payments option authorized by In re Parker, 139 F.3d 668 (9th Cir. 1998), where the only remedy for default is the loss of

to the debtors in a pre-printed form agreement based on the original contract rate, as in this case, the assumption must be that the consideration for the agreement to pay interest is grounded in the pre-petition, discharged debt. If the Appellant wishes to obtain payments under the original bargain between the parties, then it can accept voluntary payments from the debtors under the retention option authorized by this Court’s opinion in *Parker*, or it can negotiate such terms in a reaffirmation made in compliance with § 524.

the collateral, here the debtors have subjected themselves to a potential personal judgment and related collection remedies.

Finally, the terms of the PDRA do not reflect the voluntary repayment of a debt within the meaning of § 524(f). The personal liability imposed on the Debtors by the PDRA must be viewed in clear contrast to the voluntary repayments contemplated by § 524(f). Cherry, 247 B.R. at 183 (§ 524(f) “must be read in conjunction with the provisions of § 524(c) and (d) and not in negation of these reaffirmation mandates”). Moreover, the Debtors’ mere belief that they were obligated to make payments under the PDRA was sufficient to remove the agreement from the purview of § 524(f). In re Bowling, 116 B.R. 659 (Bankr. S.D.Ind. 1990) (“No transaction that leaves a debtor obligated to pay, or *believing that he or she is obligated to pay* any part of a discharged debt can be characterized as voluntary repayment within the meaning of section 524(f)”) (*emphasis added*); Lantanowich, 207 B.R. at 336 (“...the debtor’s mere submission of the agreement to the creditor is often enough to mislead the debtor into believing that he or she is legally obligated to honor it...”).

In sum, the agreement signed by the Debtors was an unlawful reaffirmation agreement. Accordingly, the Appellant’s conduct in accepting

payments under the agreement and seeking its enforcement violated the discharge injunction.

II. THE DECISIONS BELOW ARE SOUNDLY BASED UPON THE BANKRUPTCY CODE'S PURPOSES AND POLICIES.

Section 524 serves an important function of protecting debtors from “compromising” their discharge by making imprudent and uninformed decisions to reaffirm discharged debt. In re Getzoff, 180 B.R. 572, 574 (B.A.P. 9th Cir. 1995); *see also* In re Bowling, 116 B.R. 659, 664 (Bankr. S.D.Ind. 1990) (substantive and procedural requirements of § 524(c) intended to protect debtors from unwise deals).

In this case, the Debtors agreed to repay the outstanding balance on their discharged debt to BRM, which BRM claims was also the fair market value of the security, together with interest at the high rate of 22.8%. Had the PDRA been subjected to the scrutiny envisioned by § 524(c), the Debtors would have been afforded an independent review of the advisability of entering into the agreement, either through the advice of counsel or court oversight. This process is designed to provide debtors with independent

advice and critical information needed to make an informed decision on whether to waive the discharge.⁹

Had the proper procedures been followed, the Debtors would have had the opportunity to obtain advice or court review on, for example, whether their decision to finance the agreement at 22.8% interest was prudent and whether less affordable options existed, or they may have been provided some verification that the amount they agreed to pay actually reflected the property value of the collateral. *See In re Melendez*, 235 B.R. 173 (Bankr.D.Mass. 1999) (to satisfy the requirements of § 524(c)(3) and Bankruptcy Rule 9011, debtor's counsel must verify that creditor has valid security agreement, verify amount of creditor's claim, and must not accept creditor valuation of collateral without an independent investigation); *In re Kamps*, 217 B.R. 836, 849-850 (Bankr. C.D. Cal. 1998) (based on its statutory duty under the best interest of the debtor test under § 524(d)(2),

⁹ *See* 11 U.S.C. § 524(c)(3). The attorney affidavit is a certification not only that the debtor has been fully informed about the consequences of the reaffirmation agreement, but also that the agreement represents a "fully informed and voluntary" agreement, and does not impose an "undue hardship" on the debtor or the debtor's dependents. *See, e.g., In re Hovestadt*, 193 B.R. 382 (Bankr. D. Mass. 1996). If the reaffirmation is submitted to a bankruptcy court without an attorney affidavit and the reaffirmation was not negotiated by the debtor's counsel, then the bankruptcy court may approve the reaffirmation only if the court determines that it will not impose an "undue hardship" on the debtor or the debtor's dependents and that it is "in the best interest of the debtor." 11 U.S.C. § 425(c)(6)(A).

court ordered creditors seeking reaffirmation agreements to provide debtors with financial disclosures under Truth in Lending Act in all future cases); In re Bruzzese, 214 B.R. 444 (Bankr. E.D.N.Y. 1997) (court ordered that financial disclosures based on requirements of Truth in Lending Act be provided to debtors with all future reaffirmations).

The need for close scrutiny of reaffirmations entered into by debtors seeking the retention of secured personal property is shown in this case. In its brief, Appellant argues that the amount of the discharged debt is relevant to its post-discharge retention agreements because it sets the maximum that “one can collect (post-discharge) from one’s collateral.” Appellant’s Brief, p. 34. By way of example, Appellant notes that if the outstanding balance on a discharged debt were \$8,000 and the collateral was worth \$6,000, a “post-discharge agreement requiring the payment of \$8,000 would violate the discharge injunction because the consideration for it would be the discharged debt and not the value of the surviving *in rem* rights.” *Id.*

By its own admission, then, if the property in this case actually had a value of \$3,000 at the time the debtors signed the PDRA, the agreement would violate the discharge injunction. Although *Amicus* does not accept Appellant’s apparent belief that the test for whether an agreement must comply with § 524 should turn on the value of the collateral, a fundamental

problem with this approach from a policy perspective is that property values can be easily manipulated by creditors.¹⁰ For example, in In re Melendez, 224 B.R. 252 (Bankr.D.Mass. 1998), the court conducted an extensive analysis of the valuation tables of personal property used by a major national retailer in its reaffirmation program and found that the valuation techniques were “invalid.”¹¹

Unsophisticated debtors are likely to accept creditor-selected valuations where there is no attorney or court oversight as provided for

¹⁰ In 1978, Congress expressed aversion to the leverage associated with improper valuations of personal property security interests in a closely analogous situation. The Committee on the Judiciary stated:

Most often in a consumer case, a secured creditor has a security interest in property that is virtually worthless to anyone but the debtor. The creditor obtains a security interest in all of the debtor's furniture, clothes, cooking utensils, and other personal effects. These items have little or no resale value. They do, however, have a high replacement cost. The mere threat of repossession operates as pressure on the debtor to pay the secured creditor more than he would receive were he actually to repossess the goods.

H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 124 (1977); *See also In re Mayton*, 208 B.R. 61, 66 (9th Cir. BAP 1997) (“Considering that the subject matter of consumer finance transactions not infrequently is the stuff of which garage sales are made, insofar as the property remains viable, while it may be of use to the debtor, its resale value ... is ‘*de minimis*.’”).

¹¹ In particular, the *Melendez* court found that the valuation of jewelry was based on “even less reliable methodologies.” Melendez, 224 B.R. at 275. The depreciation table for jewelry was “developed from a telephone inquiry from one of the Sears’ attorneys to another client in the jewelry business.” *Id.*

under § 524. This clearly demonstrates why Congress did not include a “new consideration” exception in § 524 and instead required that all reaffirmation agreements be subject to court scrutiny.

III. THE DECLARATORY AND INJUNCTIVE RELIEF PROVIDED TO THE DEBTORS BY THE BANKRUPTCY COURT WAS AN APPROPRIATE EXERCISE OF THE COURT’S INHERENT AND STATUTORY POWERS.

Appellant argues that the bankruptcy court was without power to declare that the PDRA was void and order the return of payments made on it because no private right of action exists for a violation of § 524, citing this Court’s opinion in Walls v. Wells Fargo Bank, 276 F.3d 502 (9th Cir. 2002). As the B.A.P. below correctly noted, the decision in *Walls* does not leave a debtor without remedies for violations of the discharge injunction. This Court concluded that a debtor may seek appropriate remedies in a contempt proceeding. This Court did not, however, offer any view “one way or the other” on the extent of the bankruptcy court’s power in such proceedings. Walls, 276 F.3d at 507.

The Debtors sought to protect their discharge by requesting that the bankruptcy court enforce the discharge injunction issued in their bankruptcy case. Although the Debtors initially sought damages for the discharge

violation and did not explicitly designate their complaint as one brought in contempt, the Debtors sought declaratory and injunctive relief consistent with a contempt proceeding based on the Appellant's violation of the discharge injunction.¹²

By creating a specific discharge injunction, Congress clearly intended to broaden the remedies available for enforcement of the discharge. As stated in *Collier on Bankruptcy*, ¶ 524.L.H. at p. 524-46.1 (15th ed. rev.1999):

Section 524 is derived from Section 14f of the former Bankruptcy Act, which was added to Section 14 by the 1970 amendment to the Act. Before 1970, the effect of the discharge was to create an affirmative defense that the debtor could plead in any action brought on the discharged debt.

The Collier treatise then goes on to reprint the legislative history of the addition of Section 14f in the form of a statement by the House Committee on the Judiciary. That statement is summarized in the following passage:

¹² As noted by the B.A.P. below, the bankruptcy court could have required the Debtors to amend their complaint, but it was not an abuse of discretion to proceed with trial based on the requested relief without explicitly referring to the matter as a contempt proceeding. The Appellant cannot claim that it was unaware of the relief sought and the pre-trial proceedings and actual trial ultimately provided the Appellant with substantially greater protections and due process rights than are afforded under Bankruptcy Rule 9020.

The major purpose of the proposed legislation is to effectuate, more fully, the discharge in bankruptcy by rendering it less subject to abuse by harassing creditors. Under present law creditors are permitted to bring suit in State courts after a discharge in bankruptcy has been granted and many do so in the hope the debtor will not appear in that action, relying to his detriment upon the discharge. ... As a result a default judgment is taken against him and his wages or property may again be subject to garnishment or levy. ... S 4247 is meant to correct this abuse.

Id. at pp. 524-46.1-47 *citing* H.Rep. No. 91-1502, 91st Cong.2d Sess. 1-2 (1970).

Nothing in the relevant legislative history suggests that the discharge injunction was intended to take away important rights -- that is the right to obtain declaratory relief, restitution and other equitable relief when a creditor illegally collects on a discharged debt. This relief is consistent with a bankruptcy court's inherent contempt powers as well as its statutory powers authorized by § 105(a).

In sum, the relief granted in this case was an appropriate exercise of a bankruptcy court's power to enforce the discharge injunction.

CONCLUSION

For all the forgoing reasons, *Amicus* respectfully requests that this Court uphold the decisions below.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel certifies that this amicus brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 5,365 words printed in a proportionally spaced typeface.
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CERTIFICATE OF SERVICE

I hereby certify that I served 2 copies of this *Amicus Curiae* Brief of the National Association of Consumer Bankruptcy Attorneys by U.S. mail, postage prepaid, on this day of August, 2002 to counsel for all parties and/or parties of interest at the following addresses:

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