No. 08-998

In The
Supreme Court of the United States

JAN HAMILTON,
CHAPTER 13 TRUSTEE,

Petitioner,

v.

STEPHANIE KAY LANNING,

Respondent.

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

BRIEF FOR PETITIONER

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December 2009

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QUESTION PRESENTED

Whether, in calculating the debtor's "projected disposable income" during the plan period, the bankruptcy court may consider evidence suggesting that the debtor's income or expenses during that period are likely to be different from her income or expenses during the pre-filing period.

PARTIES TO THE PROCEEDINGS

The petitioner in this case is Jan Hamilton, Chapter 13 Trustee. The respondent is Debtor Stephanie Kay Lanning. The United States of America appeared Amicus Curiae in the appellate proceedings below.

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The opinion of the Court of Appeals is reported at 545 F.3d 1269 and is reprinted at Pet. App. 1-32. The Bankruptcy Appellate Panel's ("BAP") opinion is reported at 380 B.R. 17 and is reprinted at Pet. App. 33-53. The Memorandum and Opinion of the Bankruptcy Court is not officially reported, but can be found at 2007 WL 1451999 and is reprinted at Pet. App. 54-82.

JURISDICTION

The judgment of the Court of Appeals was entered November 13, 2008. The Trustee timely filed a petition for writ of certiorari on February 3, 2009, which was granted on November 2, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, 11 U.S.C. §§ 101-1532 ("BAPCPA") are reprinted at Pet. App. 83-96. The pre-BAPCPA version of 11 U.S.C. § 1325 is reprinted in the Appendix at App. 1. A black-lined version of 11 U.S.C. § 1325 showing the deletions and additions of BAPCPA is provided at App. 2.

STATEMENT OF THE CASE

BAPCPA brought sweeping revisions to the Bankruptcy Code that drastically altered the manner in which bankruptcy courts determine what Chapter 13 debtors must pay to unsecured creditors. These provisions limit the discretion of bankruptcy courts through formula. The Judicial Conference of the United States created the "Statement of Current Monthly Income and Disposable Income Calculation" (Official Form 22C) to implement this formula.

The Tenth Circuit affirmed the decisions of the BAP and the Bankruptcy Court, which allowed the substitution of judicial discretion for the statutorily prescribed formula, since the debtor's income at the time of filing was significantly lower than that reflected by the formula. This analysis has been coined the "forward-looking" approach. The "mechanical" approach, advocated by the Trustee, follows the established formula.

1. The Chapter 13 formula begins initially with the historical average of the income received by the debtor during the six months prior to the filing of the bankruptcy petition (debtor's "current monthly income"). The formula next determines whether a debtor is "above median income" or "below median income." § 1325(b)(3).[1] This determination compares

[1] All statutory citations are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, as amended by BAPCPA, unless otherwise indicated.

the debtor's "current monthly income" to the median income figures for households of the same size in the specific geographic area in which the debtor resides. These above median and below median classifications are new to the Bankruptcy Code and are treated differently. The major distinction between the two is how the debtor's expenses are calculated.

The below median income debtor is allowed to deduct from her "current monthly income" her actual expenses. For an above median income debtor like Ms. Lanning, expense allowances, most of which are based upon IRS standards, are next deducted through the incorporation of the expense side of the Chapter 7 "means test" calculation. § 1325(b)(2) and (3). This results in the statutorily defined "disposable income" for the debtor.

"Disposable income" is newly defined in BAPCPA. Previously, this was generally determined by reference to Schedules I (income) and J (expenses) (Official Forms 61 and 62 respectively). For an above median income debtor, Form 22C[2] now determines, for the most part, what is to be paid to unsecured creditors. The rationale for the distinction between below median and above median income debtors is that Congress desired that debtors who could afford to do so would be required to pay more to unsecured creditors. By imposing a formula, it prevented above

[2] "Form 22C" was originally "Form B22C". These forms are nearly identical, and the terms are used interchangeably.

median income debtors from creating expense budgets that left nothing for unsecured creditors.

These new income and expense standards only come into play upon the objection of the Chapter 13 Trustee or an allowed unsecured creditor. Then, a debtor must pay to her unsecured creditors all of her "projected disposable income" "to be received" in the "applicable commitment period" "as of the effective date of the plan." § 1325(b)(1)(B). These phrases are at the center of the controversy before this Court.

Although Congress changed the definition of "disposable income," it left undefined the term "projected disposable income." Likewise, as under the 1978 Code, BAPCPA did not define "effective date of the plan." These terms have always impacted the timing of determination of income, for purposes of establishing what is to be paid to creditors. Since the purpose of the Chapter 13 formula is now to determine what is to be paid to "unsecured creditors," rather than creditors generally, these terms and their definitions have become newly significant.

2. Courts have struggled with the new statutory formula for Chapter 13. Broadly stated, should the statutes be read strictly to control the amount a debtor must pay to unsecured creditors, or should changes in circumstances, evident at the time of filing, be taken into account, even if not expressly permitted by the governing statutes? Courts are divided into roughly two camps: "mechanical" and "forward-looking."

The mechanical courts hold that the formula controls and that "projected" is nothing more than a modifier of "disposable income," as it was under prior law. This group contends that one should "do the math" and project it forward. The results may sometimes be harsh, sometimes not. Regardless, Debtor may soften the result. She may file under or convert to Chapter 7, where the test is different. The filing of the bankruptcy petition may be delayed. Further, there is a statutory option that permits the shifting of the six-month look back period under § 101(10A).

The forward-looking group contends the court may look at changes in circumstances beyond what the formula permits because "projected disposable income" must have a different meaning than "disposable income" to give effect to every word of the statute. This group, including the bankruptcy court here, also suggests that a plain reading of the statute leads to absurd results, thus allowing the court to ignore the statutory formula.

3. Debtor Stephanie Lanning filed her Chapter 13 bankruptcy petition and related documents on October 16, 2006. Per her Form B22C, Ms. Lanning's "current monthly income" was $5,343.70. As a result, her income was determined to be above the median income for a household size of one in the state of Kansas ($36,631.00 annually). As an above median income debtor, Ms. Lanning was required to, and did, complete the remainder of the form, taking allowed statutory and IRS standard deductions. This resulted in "monthly disposable income" of $1,114.96.

At the time of the filing of this case, Debtor Stephanie Lanning's actual income was not accurately reflected by the formula, because she had received a substantial "buy out" from her former employer within the six months prior to the filing of her bankruptcy petition. Consequently, her net Form 22C result dictated that she pay an amount to her unsecured creditors that her actual budget reflected she could not pay.

On Schedule I, Ms. Lanning indicated that her actual monthly income was $1,922.00 per month, which when annualized to $23,064.00 is notably less than the applicable median income. Moreover, after deducting Ms. Lanning's actual expenses as reported on Schedule J, her actual monthly disposable income was only $149.03. The Chapter 13 Plan provided for monthly plan payments of $144.00 for 36 months and to pay unsecured creditors "any funds not necessary to satisfy administrative expenses, secured claims and priority claims within the initial 36 months of this plan." J.A. 93.

In an attempt to resolve this anomaly, Ms. Lanning filed a Motion for Determination that Chapter 13 Statement of Current Monthly and Disposable Income (Form B22C) Does Not Determine Plan Payment. J.A. 103. By this motion, the debtor reported that the historical income average utilized in Form B22C was artificially inflated due to "buyout" payments that she had received from a previous employer during the six months prior to filing. As a result, her monthly gross income for April of 2006

was $11,990.03 and for May of 2006 was $15,356.42. The parties stipulated that these payments were unlikely to recur in the future. The net effect was that her B22C monthly income was $5,343.70 compared to her actual monthly income on the date of filing of $1,922.00. Debtor contended she should be able to deviate from the B22C result because of this drop in income, while the Trustee contended that once the bankruptcy was filed, the court had no statutorily based authority to act in a manner other than as proscribed.

The Trustee filed a response in opposition to Ms. Lanning's motion and also filed an Objection to Confirmation of Debtor's Chapter 13 Plan. The Trustee asserted that Debtor must pay to her unsecured creditors the net result from B22C. He also contended that her plan must run 60 months, which is the "applicable commitment period" for a debtor with above median income.

4. In its decision entered May 15, 2007, the bankruptcy court sustained the Trustee's objection as to the length of the plan, holding that an above median income case must run 60 months unless unsecured creditors are paid in full.[3] However, the court overruled the remainder of the Trustee's objection and granted the debtor's motion to deviate from the B22C result. The court found that "the net income

[3] This portion of the ruling was not appealed and is not before this Court.

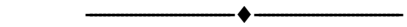
number obtained from Form B22C is the debtor's 'projected disposable income' unless the debtor can show that there has been a substantial change in circumstances such that the numbers contained in that form are not commensurate with a fair projection of debtor's income in the future." Pet. App. 56.

The Tenth Circuit found that the Chapter 13 version of the "means test" is a "starting point" for determining what a debtor should pay to her creditors. The Court also found that if there was a "substantial change in circumstances" not reflected in the 22C formula, the Court could refer to Schedules I and J in order to divine what should be paid to unsecured creditors. In so holding, the Court recognized that it was "read[ing] into the statute a presumption" as the phrases "starting point" and "substantial change in circumstances" are nowhere found in the statute. Pet. App. 24.

The bankruptcy court's analysis, affirmed by the Tenth Circuit, also characterizes the result in Ms. Lanning's case as "absurd." This brings into play this Court's decision in *In re Lamie*, although the Tenth Circuit did not expressly address the concept. The Chapter 13 Trustee argued that "absurd" and "harsh" are not the same. *Lamie v. U.S. Trustee*, 540 U.S. 526 (2004).

5. The Trustee appealed the bankruptcy court's ruling that the statutes at issue are a mere starting place for the discussion and that pre-confirmation changes in income could be taken into account by the

court in determining what should be paid to unsecured creditors. The BAP and Tenth Circuit Court of Appeals affirmed the bankruptcy court's holding. The Trustee contends the lower courts erred in their failure to follow the text of statutes relevant to determining "disposable" and "projected disposable income." This Court granted certiorari.



SUMMARY OF THE ARGUMENT

The Tenth Circuit determined that bankruptcy courts may consider changes in debtor's circumstances, present at the time of filing of the bankruptcy, to determine what a Chapter 13 debtor is required to pay to unsecured creditors. This holding is contrary to the plain text of § 1325(b) and is not supported by either the statutory or legislative history of BAPCPA.

Congress perceived that creditors were not receiving fair treatment in bankruptcy. Right or not, Congress believed bankruptcy judges were at least partially responsible for debtors not paying enough money to their unsecured creditors. This eventually resulted in the enactment of BAPCPA. The new law, widely criticized for its lack of clarity, was at least crystal clear in one major regard: Congress intended to divest bankruptcy courts of their broad power to determine what should be paid to creditors. Congress' intent was boldly expressed in the creation of the Chapter 7 "means test," a portion of which was

incorporated into Chapter 13. The purpose was to require debtors to pay as much as they could to their unsecured creditors. Ignored by many courts, the means test is a clear and unequivocal road map for courts to follow. The legislative history indicates, without question, that Congress intended to reduce judicial discretion in this area.

For above median income debtors, Congress added to § 1325(b) a new subparagraph (3) which defines what amounts could be deducted in order to ultimately translate "current monthly income" into "disposable income." Previously, this had been largely discretionary, although general guidance was within the prior statute. Now, "amounts reasonably necessary to be expended . . . *shall* be determined . . . " in accordance with the expense side of the Chapter 7 means test. § 1325(b)(3) (emphasis added). This new provision is particularly important because it specifically directs courts to determine the reasonableness of expenses in accordance with certain IRS guidelines, both in the first instance and in the event the debtor seeks to deviate from the statutory mandate because of "special circumstances." This formula is now represented by Form 22C.

There are two broad schools of thought regarding the question of whether bankruptcy courts may deviate from the Chapter 13 version of the means test. These divergent positions are commonly referred to as "forward-looking," which is the view of the Tenth Circuit, and "mechanical," which is the concept advocated by the Trustee. Even the Tenth Circuit

candidly admitted that both positions are not without problems. The Trustee's view does better service to the statute than the forward-looking approach.

The forward-looking view is well intentioned, but mostly result driven. It consists, in the first place, of varied judicial inventions to avoid the strict language of the statute. Such terms as "presumptively correct," "substantial change in circumstances," and "starting point" are used in the Tenth Circuit opinion. These phrases are not contained, or even suggested, in § 1325(b) or elsewhere. The quarrel this camp has with the new statute is actually with respect to phrases that have been in § 1325(b) since 1984. These are "effective date of the plan," "disposable income," "to be received," and "projected disposable income." These terms had settled meanings under pre-BAPCPA case law. By now challenging the application of these phrases, the forward-looking camp completely ignores the new statutory formula, if debtor's circumstances pre-confirmation differ from the "disposable income" figure obtained by following the new rules.

The bankruptcy court characterized the result in Ms. Lanning's case as "absurd." However, if it is absurd, it is only because Debtor did not avail herself of various options. She could have waited two months to file. She could have used § 101(10A) to have the court select a different six-month look back period that was more representative of her actual income. She could have filed, or converted her case to, a Chapter 7 and argued "special circumstances" on the income side of the means test equation. Finally, she

could have even dismissed and re-filed to obtain a different result. Any statute with monetary or time parameters may, at times, result in harsh, or even what one might call absurd results. This is the nature of limiting statutes.

Courts have generally commented upon the lack of BAPCPA legislative history. However, if one looks at the 2000 version of BAPCPA considered by the 106th Congress, which is identical to the current law with respect to § 1325(b), it is apparent that Congress was clear in its resolve.

> "It is intended that there be a uniform, nationwide standard to determine disposable income used in chapter 13 cases based on means test calculations. . . ."

146 CONG. REC. S11,703 (2000) (Statements of Sen. Grassley).

A text-based interpretation of § 1325(b) cannot and does not support the various result driven judicial inventions, which have developed post BAPCPA. The mechanical approach is true to pre-BAPCPA case law and is in line with the legislative history. It is only the mechanical view that results in the preservation of the Chapter 13 version of the means test, while the forward-looking approach results in the destruction of this formula and the substitution of judicial discretion. The mechanical approach is faithful to the language of the statute and the expressed intent of Congress.

ARGUMENT

I. Congress Intended To Curtail Judicial Discretion In Chapter 13 As Shown By The Statutory And Legislative History Of BAPCPA.

The Tenth Circuit held that the 2005 amendments to the Bankruptcy Code permitted the bankruptcy judge to ignore the Chapter 13 version of the means test, if the income circumstances of the debtor, pre-confirmation, were substantially different than on the date of filing from the required six month look back snapshot. The court's analysis begins with the conclusion that the debtor would be precluded from Chapter 13 relief if the Trustee's mechanical view of § 1325(b) was adopted. This result driven, forward-looking approach ignores the textual mandates and statutory history of the Chapter 13 provisions at issue. The Tenth Circuit's utilization of such phrases as "substantial changes in circumstances" and "starting point" is the product of judicial invention. Those phrases are not found in the applicable statutes. The approach taken by the Tenth Circuit results in the Chapter 13 means test formula being discarded.

The BAP decision, cited with favor by the Tenth Circuit, concluded that that the BAPCPA amendments gave us "no reason to believe that Congress intended to eliminate the bankruptcy court's discretion to deviate from an application of that formula where significant circumstances support doing so." Pet. App. 51. There is no textual or even historical support for this proposition. Reliance upon a negative

inference, when the statute is so specific in this regard, is wrong. Congress said what it meant and meant what it said. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

A. Statutory Overview.

BAPCPA is not Congress' first effort to effect comprehensive changes to bankruptcy law. The 1978 Bankruptcy Reform Act, Pub. L. No. 103-394, 107 Stat. 4106 (the "1978 Code") completely replaced the 1898 Bankruptcy Act. Even prior to 1978, there were notable amendments relative to what we now know as "Chapter 13." In 1933, Congress created XIII (Wage Earner Bankruptcies), which allowed for the payment of all or part of an individual's obligations over an indefinite period of time. Basic concepts of XIII were retained in the 1978 Code with the introduction of Chapter 13.

The 1978 Code contained no provisions governing how courts should determine the amount of money to be paid to creditors. The only statutory guidance provided was what is now § 1325(a)(3). It required the plan to be filed "in good faith." Good faith, however, was not defined by the 1978 Code. This was the focus of most confirmation disputes. Myriad decisions grappling with the application of this statute to individual cases resulted. *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983). Predictably, if not by definition, judicial discretion was implicit in every

case, since the concept of good faith is not susceptible to an analytic grid.

1. Chapter 13 Plan Confirmation Standards.

§ 1321 requires a Chapter 13 debtor to file a plan of reorganization. That plan must meet certain standards, which are found in §§ 1325 and 1322.[4]

The starting place to unravel the statutory web underlying the current confirmation process is § 1325(b)(1) and (2). Subsection (b) was introduced through the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 317, 98 Stat. 333, 356 (1984). This amendment incorporated a new "ability to pay" test, also referred to as the "best effort" test. *In re Jones*, 55 B.R. 462, 465 (Bankr. D. Minn. 1985). The debtor's financial circumstances were largely examined by reference to Schedules I and J. Then, as now, the provisions of § 1325(b) were operative only upon the objection of the Chapter 13 Trustee or an allowed unsecured claimant.

Four key phrases contained in the 1984 amendments to § 1325 remain in BAPCPA and are at issue. These terms are "disposable income," "projected disposable income," "effective date of the plan," and "to be received." Of these terms, only "disposable income"

[4] Section 1322 is not directly implicated in the dispute currently before this Court.

was defined in the 1984 amendments, but it was redefined in BAPCPA. The other three terms were not defined in the 1984 amendments, nor are they defined in BAPCPA. However, case law, spanning 21 years, addressing those terms is consistent with the mechanical view of BAPCPA. The mechanical view is thus in line with this court's holding that legislation will not be construed to depart dramatically from longstanding bankruptcy practice, absent an affirmative indication from Congress of intent to do so. *Cohen v. de la Cruz*, 23 U.S. 213, 221 (1998).

a. "Disposable Income."

In the 1978 Code, § 1325(b)(2) generally defined "disposable income" as "income received by the debtor and which is not reasonably necessary to be expended for maintenance or for support of the debtor or a dependent of the debtor." There are many bankruptcy cases where the parties litigated, and bankruptcy judges decided, what was "reasonably necessary." *In re Anes,* 195 F.3d 177, 180-81 (3d Cir. 1999). The wide array of divergent opinions in this area likely suggested to Congress that a redefinition of "disposable income" was appropriate.

BAPCPA introduced new definitions of "disposable income" and "reasonably necessary," which contain specific mandates. These definitions incorporate two other bankruptcy statutes, as later explained. § 1325(b)(2) now reads as follows:

> "(2) . . . 'disposable income' means *current monthly income* received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less *amounts reasonably necessary to be expended . . .*"

(emphasis added).

b. "Projected Disposable Income."

Under the 1984 version of § 1325(b)(1), the Court could confirm the plan only if the debtor proved she was committing to her plan all of her "projected disposable income." *Anderson v. Satterlee (In re Anderson)*, 21 F.3d 355, 357 (9th Cir. 1994). The phrase "disposable income" was statutorily defined. In a Chapter 13 case, it meant all income that was not required for the reasonable, necessary living expenses of the debtor and her dependents. *In re McDaniel,* 126 B.R. 782, 784 (Bankr. D. Minn. 1991), *see also In re Jones,* 55 B.R. at 465.

The phrase "projected disposable income" has been in § 1325(b)(1) since 1984, but has never been specifically defined. Section 1325(b)(1) now provides, in relevant part:

> "[I]f the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve

> the plan unless, as of the effective date of the plan –
>
> * * * (B) the plan provides that all of the debtor's projected disposable income to be received in the *applicable commitment period* beginning on the date that the first payment is due under the plan will be applied to make payments to *unsecured creditors* under the plan."

§ 1325(b)(1)(B) (emphasis added).

The undefined phrases "projected disposable income" and "effective date of the plan" are unchanged from the 1984 version.

c. "Amounts Reasonably Necessary To Be Expended."

With BAPCPA, Congress introduced § 1325(b)(3), which provides a precise definition of "amounts reasonably necessary to be expended." Previously, the phrase was very generally defined. It now provides, "[a]mounts reasonably necessary to be expended ***shall*** be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2) if . . . " the debtor is an "above median income debtor." § 1325(b)(3) (emphasis added).

The remaining portion of § 1325(b)(3) defines "above median income" and "below median income" for debtors, by comparing the debtor's income with those of households of the same size and in the same geographic region. § 1325(b)(3)(A)-(C).

Most courts have held that for a below median debtor, a plan need run only 3 years. For an above median debtor, the plan must run 5 years to satisfy the "applicable commitment period" requirement. Pet. App. 77. This distinction is only important here because Stephanie Lanning is an above median income debtor. She is thus required to determine her expenses in accordance with § 707(b)(2) and to pay her "projected disposable income" for 5 years. Pet. App. 75, 79.

The Question Presented, as accepted for review by this Court, refers to both income and expenses. The debtor's expenses were not challenged. However, sense cannot be made of the Question Presented without reference to both the income and expense sides of the equation.

d. The Chapter 7 Means Test As Incorporated Into Chapter 13.

Section 1325(b)(3) incorporates only a portion of the Chapter 7 means test for above median income debtors. Congress was clear. It used the word "shall." As a result, for an above median income debtor the expense side of the "disposable income" equation is not subject to judicial discretion, except as specifically provided in § 707(b).

Under prior law, § 707(b) was designed to permit a court to determine if a Chapter 7 bankruptcy filing was abusive. The BAPCPA version is roughly ten times

as long and is most detailed. Now, § 707(b)(2)(A)(ii)(I)-(V) provides deductions for national and local IRS standards, certain actual expenses for the care of elderly, ill, or disabled household members, school expenses for minor children, and the costs of administration of the Chapter 13 plan. § 707(b) now contains a prescription rather than general guidance.

Subsections (iii) and (iv) provide the formula for deducting payments for secured debts and priority debts. These deductions are incorporated into the means test and, for Chapter 13 purposes, into Form 22C. In the Chapter 7 context, these standards, found in § 707(b)(2)(A) and a portion of § 707(b)(2)(B), permit the rebutting of the "presumption of abuse," if the debtors prove that their actual expenses are higher and constitute "special circumstances." There is no "presumption of abuse" in Chapter 13.

Chapter 13 permits a showing of "special circumstances" on the expense side only. The courts below were wrong in concluding that "projected disposable income" can be rebutted upon a showing of "special circumstances" at the time of confirmation. Congress did not incorporate the means test wholesale into Chapter 13. § 1325(b)(3). Congress eliminated a debtor's ability to claim "special circumstances" on the income side. The logical conclusion to be made here is that income was to be determined, and fixed, in another manner.

e. "Current Monthly Income."

A Chapter 13 debtor's "disposable income" is newly defined in § 1325(b)(1) as, in the first instance, "current monthly income." § 101(10A) defines "current monthly income," which is a new term in the Bankruptcy Code. 11 U.S.C. § 101(10A) provides:

> "The term 'current monthly income' –
>
> (A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on –
>
> (i) the last day of the calendar month immediately preceding the date of the commencement of the case if debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
>
> (ii) the date on which current income is determined by the court for purpose of this title if the debtor does not file the schedule of current income as required by 521(a)(1)(B)(ii) and (other income inclusions and exclusions not pertinent to this discussion.)"

Congress provided two six-month look back period options, for determining "current monthly income." The first is clearly the six months prior to the bankruptcy filing. § 101(10A)(A)(i). The second option is an alternate six-month period, as determined by the court. § 101(10A)(A)(ii). The second

option could have been, but was not chosen by Ms. Lanning. For further discussion of the second option under § 101(10A) *see* Section II(B)(2)(b) infra.

B. Legislative History.

Extensive legislative history of the prior versions of BAPCPA discloses clear congressional intent supporting the Trustee's view of § 1325(b) and related statutes. To date, in this and other cases, the legislative history of BAPCPA has not been well developed, primarily because the inquiry has been directed at the immediate history surrounding its passage in 2005. As a consequence, most courts, including the Tenth Circuit, have given short shrift to the examination of congressional intent. The Tenth Circuit concluded that "[l]egislative materials are of limited assistance in trying to divine the intent of Congress when it defined 'disposable income' rather than 'projected disposable income.'" Pet. App. 28. Other circuit level cases on § 1325(b) note there is "scant legislative history." *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652, 656 (8th Cir. 2008). The *Petro* court in the Sixth Circuit also examined only the limited legislative history of the current version of BAPCPA. *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369, 376 (6th Cir. BAP 2008). In *Kagenveama*, the Ninth Circuit made a brief foray into the legislative history with reference to the warnings of the Chapter 13 Trustees. *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 875 (9th Cir. 2008). These cases suggest clear legislative history would be

welcome. Examination of the legislative history of the prior attempts to pass bankruptcy reform legislation is appropriate and revealing.

1. Legislative History Is Helpful In Determining Congressional Intent.

The starting point for determining congressional intent is always the existing statutory text. *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432 (1999), *see also Lamie*, 540 U.S. at 527. The Trustee contends that the statute is clear and unambiguous. The inquiry could stop here, as the terms invented by the forward-looking group are simply not found in the text of the statute.

The Tenth Circuit found that the operative statutes were "plain" but "unclear." Pet. App. 14. This conclusion is hopelessly contradictory, since the adjective "plain" means "clear." *Merriam-Webster Online Dictionary*, 12 December 2009, www.merriam-webster.com/dictionary/plain. Through this equivocation, the court was able to find that it was following the plain meaning of the statute, but since it was unclear, it could substitute its own lexicon for the text of the statute. These two notions are obviously inherently mutually exclusive. Although the Trustee contends the mandates are clear and the dispute should be resolved based upon their plain language, surely the terms at issue are not to be labeled unclear or ambiguous simply because the parties do not agree as to their meaning. "A mere disagreement among litigants

over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong." *Bank of America Nat'l Trust and Sav. Ass'n v. 203 North LaSalle*, 526 U.S. 434, 461 (1999) (concurring opinion).

Generally, if the statute's language is plain, it is then the sole function of the courts to enforce it according to its terms, unless the disposition required by doing so is absurd. *Hartford Underwriters v. Union Planters Bank*, 530 U.S. 1 (1942); *Lamie,* 540 U.S. at 534. The results of this statute are not absurd, but may sometimes be harsh. Regardless, the results here are mostly so because of choices made by Debtor and her counsel.

"Where . . . the resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Toibb v. Radloff*, 501 U.S. 157 (1991), *citing Blum v. Stenson,* 465 U.S. 886, 896 (1984). While the Trustee contends the statute is clear, if this Court determines it is not, then certainly the legislative history must come into play. Ultimately, it will be shown that should this analysis be pursued, required or not, the legislative history of this statute is conclusive: Congress intended to drastically reduce judicial discretion of bankruptcy judges.

Additionally, however, this Court has, on many occasions, examined the legislative history of a statute

to confirm an analysis or conclusion. In a non-bankruptcy context, this Court concluded "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, *in the absence of a clearly expressed legislative intent to the contrary*, that language must ordinarily be regarded as conclusive." *Reves v. Ernst & Young*, 507 U.S. 170 (1993) (internal citations omitted) (emphasis added). If this Court should determine that the clear language of the statute supports Debtor, then examination of the legislative history is still appropriate.

Moreover, what the courts below have done constitutes much more than a mere tweaking of the statutes to remedy a perceived omission. The net effect of the Tenth Circuit's forward-looking interpretation is a significant rewrite of the underlying statutes. "There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted." *Mobil Oil Corp. v. Higginbotham,* 436 U.S. 618, 625 (1978). This Court has also reviewed legislative history when Congress has been silent. *Grogan v. Garner*, 498 U.S. 279 (1991).

2. Legislative History Of Prior Versions Of A Statute, Not Enacted, May Disclose Congressional Intent.

As in *Lamie*, the legislative processes behind the current law may be instructive. "The legislative history of a prior bill that was not enacted can be useful

to interpret language in a bill that was ultimately enacted." *In re Kimbro*, 389 B.R. 518, 525 (6th Cir. BAP 2008), *citing Dawson Chemical Co. v. Rohm & Haas Co.,* 448 U.S. 176, 204 (1980) (additional internal citations omitted). This Court utilized the legislative history and statutory background to confirm an interpretation of the Bankruptcy Code in *Johnson v. Home State Bank*, 501 U.S. 78 (1991). In the present case, the legislative process can best be seen by first tracing the prior attempts to amend the statute through the enactment of BAPCPA.

3. The Overall Legislative History Supports A Mechanical, Plain Reading Of BAPCPA.

The absence of significant specific legislative history of the 2005 legislation has troubled many courts interpreting the BAPCPA version of § 1325(b) and related statutes. Pet. App. 29. BAPCPA came out of the 109th Congress as Pub. L. No. 109-8. The process leading to the passage of this legislation began in 1998. The House of Representatives and the Senate passed several versions of bankruptcy reform over the years. BAPCPA was a culmination of those years of effort. Significant legislative history is available for prior versions of BAPCPA, particularly the 2000 efforts of Congress, at least as it relates to §§ 1325(b) and 707(b), which are identical to the

current version.[5] Review of the legislative history from 2000 reveals that the criticism made of the implementation of the IRS standards, ultimately used in the Chapter 7 means test formula, was considered and rejected. H. Rep. No. 109-31 (109th Cong. 2005).

a. 1998 – The 105th Congress.

The 105th Senate passed S. 1301, which is an early version of BAPCPA. It contained no objective measures of repayment capacity or expense formula. The House version (H. Report No. 3150) provided for the use of IRS standards to measure debtor's ability to repay and to determine reasonableness of expenses. The interim report filed for H.R. 3150 stated that the IRS standards were to be "mandatory," in contrast to the Senate proposal, which relied upon judicial discretion. H. Report No. 105-540 (105th Cong. 1998).

Although the conference agreement passed the House, it did not pass in the Senate. H. Report No. 105-794 (105th Cong. 1998). It did not contain the language currently found in § 1325(b)(3), namely, the description of how to calculate the expense side of the equation for an above median income debtor. The Joint Explanatory Statement noted that the House

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[5] A summary of pre-BAPCPA legislative efforts is contained in John McMickle's article *Living Expenses in Chapter 13: A Fresh Look at Bankruptcy Reform*, XXVII ABI Journal 1, C, 70-71 (Feb. 2008).

and Senate had agreed to use the expense formula, which was in the House legislation for measuring repayment capacity under § 707(b). The legislation did not pass that year.

b. 2000 – The 106th Congress.

The Senate considered H. Report 2415. This bill contained language that is identical to the BAPCPA version of § 1325(b). It also incorporated the IRS expense allowance concept for determining allowed living expenses for above median income debtors. Senator Chuck Grassley (R-Iowa) addressed the Senate when it considered the conference report.

The Senator's detailed description of the § 1325 amendments gives great insight into Congress' intent. It also bolsters the mechanical application of the means test formula in Chapter 13. In his description of H.R. 2415 before the Senate, judicial discretion was obviously to be lifted from the page.

> "HR 2415 is the culmination of these efforts and is intended to both remove unequivocally the bankruptcy court's discretion with regard to whether a debtor with ability to pay should be dismissed from chapter 7, and to restrict as much as possible reliance upon judicial discretion to determine the debtor's ability to pay."

146 CONG. REC. S11,700 (2000) (Statements of Sen. Grassley). He further stated,

> "It is intended that there be a uniform, nationwide standard to determine disposable income used in chapter 13 cases based on means test calculations. . . . This section both requires (1) that all of the debtor's disposable income be applied to pay unsecured creditors, and (2) that for debtors whose current monthly income is in excess of the applicable median income level, their disposable income be determined using basic means test concepts which define current monthly income (101(10A)) and allowable expenses (707(b)(2)(A)(ii), (iii) and (B))."

Id. at S11,703. The Senator also specifically described the bill, section by section. The intent of Congress to adopt the mechanical approach is unmistakable in his description of § 1325:

> "Once net monthly income is determined, it is then multiplied by the applicable commitment period to determine the total amount which the plan must apply over its duration to pay unsecured creditors. If the plan does not apply all of disposable income to pay unsecured creditors, the plan is not confirmable."

Id. The "special circumstances" language of § 707(b) originated with the 2000 version and is found in the conference report. H. Rep. No. 106-970 at 9 (106th Cong. 2000). H.R. 2415 was ultimately pocket-vetoed by President Clinton.

c. 2005 – The 109th Congress.

On April 14, 2005, the House took up S. 256. H. Res. 211 (109th Cong. 2005); H. Rep. No. 109-42 (109th Cong. 2005). Thereafter, the House passed S. 256, which was subsequently signed into law on April 20, 2005. Pub. L. No. 109-8, 119 Stat. 23. The BAPCPA versions of § 1325(b)(3) and § 707(b)(2) are identical to those found in the 2000 version.

When Congress amends the bankruptcy laws, it does not write "on a clean slate." *Emil v. Hanley,* 318 U.S. 515 (1943). "[T]his Court has been reluctant to accept arguments that would interpret the [Bankruptcy] Code, however vague the particular language under consideration might be, to effect a major change in pre-Code practice that is not the subject of at least some discussion in the legislative history." *United Savings Assn. of Texas v. Timbers of Inwood Forest Associates, Ltd.,* 484 U.S. 365, 380 (1988). Without question, a proper review of the legislative history of the prior attempts to pass bankruptcy reform legislation supports Congressional intent to not only remove judicial discretion, but to impose a strict standard for determining what was to be paid to unsecured creditors. This legislative history supports the Trustee's position. It is obvious that Congress did not intend to permit courts to substitute their discretion for that formula, even if the debtor's circumstances, at the time of filing, were different than those suggested by the six-month look back period under § 101(10A).

II. The Tenth Circuit Erred In Adopting The Forward-Looking Approach.

With the enactment of BAPCPA, Congress implemented a mechanical test by which a debtor's "projected disposable income" is to be determined. Judicial discretion has been largely eliminated, by statute, through the incorporation of § 707(b)(2)(A) and (B) into § 1325(b). "The formula remains inflexible and divorced from the debtor's actual circumstances." Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H. Rep. No. 109-31, pt. 1 at 553 (2005).

Notwithstanding the statutorily mandated formula, the Tenth Circuit held that the net result on Form 22C constitutes debtor's "projected disposable income" under § 1325(b)(1)(B) *unless* "there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future." Pet. App. 3-4.[6] The Tenth Circuit's forward-looking approach is textually flawed, not historically or legislatively supported, and is result driven.

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[6] *See also Frederickson,* 545 F.3d 652 (8th Cir. 2008), *cert. denied*, 129 S. Ct. 1630 (2009); *In re Nowlin*, 576 F.3d 258 (5th Cir. 2009); *In re Turner*, 574 F.3d 347 (7th Cir. 2009); *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369 (6th Cir. BAP 2008).

A. The Mechanical View Is Better Supported By The Language Of The Statute Than The Forward-Looking Approach.

Section 1325 provides for an above median income Chapter 13 debtor to pay to her unsecured creditors all of her "projected disposable income" over the term of the plan. § 1325(b)(2) explicitly provides the definition for "disposable income." That definition starts the calculation with the debtor's "current monthly income" – a number based upon the debtor's historical average income as required by § 101(10A). This mathematical computation is not amenable to judicial discretion.

1. Congress Intended "Projected" To Modify The Defined Term "Disposable Income."

Neither BAPCPA nor prior law provided a separate definition for "projected disposable income." Proponents of the forward-looking approach suggest this creates an ambiguity. This ambiguity arises, however, only when the reader *presumes* Congress meant more than simply projecting forward the historical income described in the statute. This presupposition requires the reader to perceive an ambiguity that allows one to ignore the statutory definition of "disposable income."

The more plausible and supportable explanation, however, is that a separate definition was not provided because one was not necessary – that Congress

intended the debtor to begin the "projected disposable income" calculation with her six-month historical income. "Projected disposable income" is not a free-standing concept divorced from the definition of "disposable income." It is simply the debtor's "disposable income" projected forward. *Kagenveama,* 541 F.3d at 873; *see also Musselman v. eCAST Settlement Corp.*, 394 B.R. 801 (E.D.N.C. 2008). Under this interpretation of the statute, no ambiguity arises.

If Congress intended a separate definition for "projected disposable income," it easily could have provided one. However, it chose not to do so. Courts should presume that Congress meant what it said and said what it meant. *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) *(plurality opinion)*, *citing Connecticut Nat'l Bank,* 503 U.S. at 253-54. The statute does not instruct the court to abandon expressly defined terms when the result of a strict reading is undesirable. The text of BAPCPA is clear. As this Court held in *Lamie*, it is the duty of the judiciary to enforce the plain meaning of statutory text, rather than "soften the import of Congress' chosen words, even if [the Court] believes the words lead to a harsh outcome." *In re Lamie*, 540 U.S. at 528. Judicial creation of a presumption where one was not legislatively provided, or even necessary, is clearly at odds with this Court's prior rulings.

The Tenth Circuit noted the *Alexander* court's observation that Congress elected to adopt the new definition of "disposable income" in § 1325(b)(2) despite the warnings of the Chapter 13 Trustees. The

Trustees warned that strict use of the Form 22C formula would lead to anomalous results in some cases, namely that above median income debtors might pay less than they would prior to BAPCPA. Pet. App. 20-21, *citing In re Alexander*, 342 B.R. 742, 747 (Bankr. E.D.N.C. 2006). In *Alexander*, the court reasoned that the legislature's lack of response to this concern supports a presumption of legislative awareness and intent regarding the consequences of the language with respect to making debtors pay what they can and preventing abuse. *Alexander*, 342 B.R. at 748. The Tenth Circuit dismissed this history by concluding, "[f]or all anyone knows, Congress may have believed that chapter 13 trustees were mistaken and that section 1325 actually would allow bankruptcy courts to do precisely what chapter 13 trustees thought it would not." Pet. App. 30. This conclusion is based upon pure conjecture. It is just as reasonable, if not more so, to assume that the *Alexander* court was correct, and that Congress was aware its efforts would create anomalous results.

2. Historically, "Projected Disposable Income" Has Been Connected To "Disposable Income."

The major changes to § 1325 under BAPCPA were to the definition of "disposable income" in § 1325(b)(2) and the requirement that debtor's "projected disposable income" now be paid to *unsecured creditors* (rather than to creditors generally) and over the "applicable commitment period" (rather than

three years) in § 1325(b)(1)(B). *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 873 (9th Cir. 2008). *See also* App. 2-5. The distinction between "applicable commitment period" and plan length is important to Chapter 13, although not pertinent to the issues presented to the Court.

Pre-BAPCPA, the term "disposable income" was an essential element of the term "projected disposable income." Then, as now, courts debated whether the amount to be paid to creditors was fixed early in the case or should be a moving target. However, it can be said that under the predecessor statute, the term "projected" was always connected to the term "disposable" and was not given a separate and independent meaning. BAPCPA did not overrule this significant body of law. It is only because of resistance to the profound changes in § 1325(b) that some have sought to now create a new meaning, where previously there was no dispute.

> "For the two decades between 1984 and 2005, upon objection to confirmation by the Chapter 13 trustee or the holder of an allowed unsecured claim, the Chapter 13 debtor had to commit all 'projected disposable income' to payments under the plan for at least three years. Disposable income was determined by deducting from the debtor's actual income expenses 'reasonably necessary' for the maintenance and support of the debtor and dependents of the debtor, including business expenses for a debtor . . . "

Keith M. Lundin, *Chapter 13 3rd Edition,* § 466.1 (2007).

Some courts determined that debtor's "projected disposable income" was a 36-month multiplier of her monthly income, and then assessed how much of that was disposable under the statutory definition. *In re Killough,* 900 F.2d 61, 64 (5th Cir. 1990); *Anderson*, 21 F.3d 355, 357 (9th Cir. 1994); and *Solomon*, 67 F.3d at 1128, 1132 (4th Cir. 1995). ("[R]ather than engaging in hopeless speculation about the future, a court should determine projected disposable income by calculating a debtor's present monthly income and expenditures and extending those amounts over the life of the plan.") (internal citations omitted).

Other courts determined that "projected disposable income" was actual income, over the life of the plan, as opposed to what one might estimate at the time of confirmation.[7] Those courts include the 10th Circuit. *In re Midkiff*, 342 F.3d 1194 (10th Cir. 2003); *see also In re Freeman*, 86 F.3d 478 (6th Cir. 1996); and *Rowley v. Yarnall*, 22 F.3d 190 (8th Cir. 1994).

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[7] In any event, under either theory, the Trustee could always file a motion to modify plan payments under § 1329, post confirmation, to the extent he was not estopped by § 1327 *res judicata* provisions. § 1325 has always contained confirmation standards, while § 1329 has always governed post confirmation modification of plans.

The "projected is actual" courts have now been overruled by the language of BAPCPA.

> "'Disposable income' for purposes of § 1325(b) is no longer based on *actual* income at or near confirmation. Instead, BAPCPA substitutes a new concept, current monthly income (CMI), that is an average of income received by the debtor during the six months before the month of the petition. Chapter 13 debtors are small, volatile economies. CMI mirrors the debtor's financial circumstances during the slide into Chapter 13. CMI is easily manipulated by the timing of the petition. CMI does not change as the debtor's circumstances change from the petition to confirmation and through the years of the Chapter 13 case. These issues disconnect the disposable income test from the reality of individual Chapter 13 debtors and their plans."

Keith M. Lundin, § 466.2-3.

Both of these theories had, at their base, the assumption that "projected disposable income" was "disposable income," either estimated at the time of filing, or actual, which was then projected over the life of the plan. "Before the enactment of BAPCPA, 'projected disposable income' was understood to be the same as 'disposable income' as defined in § 1325(b)(2)." *In re Thomas, et al.,* 395 B.R. 914, 921 (6th Cir. BAP 2008). This Court has held that the Bankruptcy Code shall not be construed to erode past practice, absent a clear indication that Congress so intended. *Cohen*, 23 U.S. at 221. No such intent is

evident with regard to Congress' continued use of the word projected in § 1325(b)(1)(B). Consistency demands that in BAPCPA "projected disposable income" must continue to be read to incorporate the definition of "disposable income" in § 1325(b)(2), as did prior case law.

There was no change, express or implied, to support the proposition that "projected" now has a new meaning under BAPCPA. As noted by the Ninth Circuit, "Any change in how 'projected disposable income' is calculated only reflects the changes dictated by the new 'disposable income calculation'; it does not change the relationship of 'projected disposable income' to 'disposable income.'" *Kagenveama*, 541 F.3d at 873.

Congress is presumed to have been aware of the status of the law. It did not address issues that had been decided by the courts over a 21-year history of the 1984 amendments to the 1978 Code. It has long been held that silence of Congress, despite opportunity to speak, infers legislative approval of the judicial construction. *Missouri v. Ross*, 299 U.S. 72, 75 (1936); *see also Francis v. Southern Pac. Co.*, 333 U.S. 445, 450 (1948).

3. Connecting "Projected Disposable Income" With "Disposable Income" Is Supported By The Text Of § 1129.

The intent of Congress to view "projected disposable income" consistently with the § 1325(b)(2)

definition of "disposable income" is also evident when one looks to § 1129. That section states, in pertinent part, that the court can confirm a plan only when:

> "(15) In a case in which the debtor is an individual and in which the holder of an allowed unsecured claim objections to the confirmation of the plan . . .
>
> (B) the value of the property to be distributed under the plan is not less than the projected disposable income of the debtor *(as defined in section 1325(b)(2))* to be received during the 5-year period beginning on the date that the first payment is due under the plan, or during the period for which the plan provides payments, whichever is longer."

§ 1129(a)(15)(B) (emphasis added). It is clear that the drafters intended "projected disposable income" to have a definition incorporating "disposable income" as defined in § 1325(b)(2). The courts below have summarily rejected this argument. Pet. App. 27-28, n.7. However, these courts have ignored what § 1129 expressly states – that Congress considered § 1325(b)(2) to *define* "projected disposable income."

4. Forward-Looking Courts Have Erroneously Held The Mechanical Approach Renders The Word "Projected" Superfluous.

Central to the forward-looking argument is that the term "projected disposable income" in § 1325(b)(1)(B) must have a definition apart from that

of "disposable income" in § 1325(b)(2). Otherwise, the term projected is rendered superfluous. However, the majority of courts misapprehend the mechanical approach, which does not ignore the term, but rather assigns to it the same meaning as asserted by forward-looking courts. The term "projected," which is not defined in the statute except by inference in § 1129, "means '[t]o calculate, estimate, or predict (something in the future), based on present data or trends.'" *Nowlin*, 576 F.3d at 263, *citing In re Jass,* 340 B.R. 411, 415 (Bankr. D. Utah 2006) (*quoting Am. Heritage College Dictionary* 1115 (4th ed. 2002)). Contrary to the assertions of forward-looking supporters, this definition is not inconsistent with the mechanical approach. Rather, mechanical application of the means test simply provides a uniform method for calculating the "data" or "trends" to be projected into the future. Thus, the mechanical approach is also future oriented in that respect. The courts below and others examining this concept simply are reluctant to give up discretionary powers. Congress intended otherwise.

A cardinal rule of statutory interpretation is to adopt a reading that does not treat statutory terms as mere surplusage. *Williams v. Taylor*, 529 U.S. 362 (2000). The Trustee suggests that it is only the mechanical approach that accomplishes this end. The word "projected" can be given meaning without the judicial creation of a presumption or ignoring the statute altogether. The Ninth Circuit cited this Court's decision in *Negonsott v. Samuels*, 507 U.S. 99,

106 (1993), for the proposition that courts must give meaning to every clause and word of a statute. *Kagenveama,* 541 F.3d at 872.

The *Kagenveama* court reasoned that "projected" is simply a modifier of the defined term "disposable income." In order to give meaning to *every* word of § 1325(b)(1), the debtor's "disposable income" is merely projected out over the applicable commitment period. *Id*. Thus, one just multiplies the debtor's net monthly disposable income by the number of months in the applicable commitment period. *Alexander*, 344 B.R. at 742.[8]

Moreover, if the two terms are not linked, then the definition of "disposable income" in § 1325(b)(2) becomes a "floating definition with no apparent purpose." *Kagenveama*, 541 F.3d at 573, *citing Alexander*, 344 B.R. at 749. Also, § 1325(b)(2) begins "[f]or purposes of this subsection, the term 'disposable income' means. . . ." The only other time the words "disposable income" are used within that subsection is in the phrase "projected disposable income" in § 1325(b)(1)(B). Thus, ignoring the connection between "projected disposable income" and "disposable

[8] *See also Kagenveama*, 527 F.3d 990 (9th Cir. 2008); *In re Austin*, 372 B.R. 668 (Bankr. D. Vt. 2007); *In re Brady*, 361 B.R. 765 (Bankr. D. N.J. 2007); *In re Hanks*, 362 B.R. 494 (Bankr. D. Utah 2007); *In re Miller* 361 B.R. 224 (Bankr. N.D. Ala. 2007); *In re Girodes*, 350 B.R. 31 (Bankr. M.D.N.C. 2006*); In re Tranmer*, 355 B.R. 234 (Bankr. D. Mont. 2006).

income" also renders the phrase "for purposes of this subsection" superfluous.

5. The Mechanical Approach Gives Effect To The Phrases "To Be Received," "Will Be Applied To Make Payments," And "As Of The Effective Date Of The Plan" Found In § 1325.

The Tenth Circuit acknowledged that both the mechanical approach and the forward-looking approach were not without problems. Pet. App. 23. But, the court dismissed the potential criticism for the liberties it took with the imposition of a presumption by suggesting the mechanical camp ignores the phrases "as of effective date of the plan," "to be received in the applicable commitment period," and "will be applied to make payments." *Id.* In creating the presumption, the court again relied on the principle of statutory construction that a statute, upon the whole, should be so construed so that "no clause, sentence, or word shall be superfluous, void or insignificant." Pet. App. 24, *citing TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). "We think that these textual problems . . . outweigh the concern about implying a presumption." *Id*.

However, these phrases have little impact on the "projected disposable income" discussion. If anything, their impact is neutral. "[T]here is nothing illogical or superfluous in language requiring that, *as of the effective date of the plan,* the plan provide that all of

the resulting mathematical calculation (*i.e.,* projected disposable income) *to be received in the applicable commitment period . . . will be applied* to make payments to unsecured creditors." *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio 2009). Without citing to the congressional record for support, forward-looking courts suggest these phrases reveal congressional intent to look to the debtor's actual income to be received during the life of the plan, rather than the historical average income. *In re Hardacre*, 337 B.R. 718 (Bankr. N.D. Tex. 2006). This interpretation is not supported by the legislative history of § 1325, discussed supra, which unequivocally demonstrates congressional intent to utilize a formulaic approach to determining the amount to be paid to creditors.

Even more emphasis is inappropriately placed upon the meaning of the phrase "effective date of the plan." This argument ignores the realities of Chapter 13. The most common understanding of the meaning of "effective date" is the "date on which the provisions of a plan of reorganization become effective and binding on the parties." Kenneth K. Klee, *Adjusting Chapter 11: Fine Tuning the Plan Process*, 69 Am. Bankr. L.J. 551, 560-61 (1995); *see also In re Potomac Iron Works, Inc*., 217 B.R. 170 n.1 (Bankr. D. Md. 1997) (listing bankruptcy code sections in which the term "effective date" appears). For purposes of Chapter 13, this date will likely be the date upon which the confirmation order becomes final and non-appealable. Unlike the confirmation process in Chapter 11, a plan may be confirmed very quickly in

Chapter 13. Plans are generally filed with the petition. The debtor must begin making payments within 30 days of the filing of the petition. § 1326(a)(1). The confirmation hearing must now be held between 20 and 45 days after the First Meeting of Creditors, which is held between 20 and 50 days after the filing of the case. §§ 341 and 1324(b), Fed. R. Bankr. P. 2003(a). So, the effective date can be as soon as two months after filing.

Moreover, the Tenth Circuit violated the very rule of construction upon which it relies. It is the forward-looking view that eviscerates § 1325. The Chapter 13 version of the means test is discarded, if the debtor can show her circumstances at confirmation are different than as stated in the 22C formula. The notion that Congress' inclusion of these catch phrases is somehow more supportive of the forward-looking position, thereby allowing it to ignore the statutory proscription, is plainly wrong. The mechanical approach provides just as much meaning, if not more so, to the phrases, and does so without undermining the effect of other statutory provisions. So, even utilizing the Tenth Circuit's own analysis and reasoning, the forward-looking approach does more damage to the statutory framework than does the Trustee's mechanical view.

Only by improperly finding that "projected disposable income" is a separate, but undefined, term can one make even the weakest of arguments that these phrases support this strained reading of the § 1325(b)(1). It makes no sense to define "disposable

income," completely ignore the definition upon a showing of changes in circumstances, and then project income based upon some different, but statutorily undefined standard. This is exactly what Congress sought to avoid. Furthermore, there is no support whatsoever for abandoning the statutory formula entirely, as is suggested by forward-looking view.

In any event, even if this Court determines the mechanical approach renders the word "projected" superfluous, it is not required to adopt the forward-looking approach. In *Lamie*, this Court adopted a reading of the text of § 330 that rendered the word "attorney" in § 327 without effect. "Surplusage does not always produce ambiguity and our preference for avoiding surplusage constructions is not absolute." *Lamie*, 540 U.S. at 536, *citing Chicksaw Nation v. United States*, 534 U.S. 84 (2001) ("[T]he preference is sometimes offset by the canon that permits a court to reject words as surplusage if inadvertently inserted or if repugnant to the rest of the statute"). Here, using the term "projected" as a means to deviate from the statutory formula is unquestionably at odds with the language and legislative intent of BAPCPA.

6. Congress Incorporated § 707(B) Into Chapter 13 Only On The Expense Side Of The "Projected Disposable Income" Equation.

Congress provided for consideration of "special circumstances" on both the income and expense sides

of the equation in Chapter 7 with § 707(b)(2)(B). However, § 1325(b)(3) incorporates this section only as to the determination of allowable expenses. Section 1325(b)(3) provides, for an above median income debtor,

> "(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of 707(b)(2)."

Thus, the consideration of special circumstances provided in § 707 is applicable *only* on the expense side of the projected "disposable income" calculation. Further, the Tenth Circuit, while suggesting the mechanical approach does not permit adjustments to account for "special circumstances" only mentioned, but did not address or discuss the implications of Congress' failure to incorporate the income adjustment formula from § 707(b). To allow judicial consideration of such circumstances with regard to income ignores Congress' desire to limit such discretion.

The portions of the legislative history cited by the Trustee supporting his interpretation are consistent with the statute and are compelling. However, there is one isolated suggestion in the congressional record to the contrary. "As with the means test, adjustments are also permitted to income or expenses based on the 'special circumstances' provisions of the means test." 146 CONG. REC. S11,703 (2000) (Statements of Sen. Grassley). This statement is incorrect, not consistent with the rest of the legislative history, and not supported by the text of § 1325(b)(3).

7. The Forward-Looking Camp's Reliance On Schedule I Is Misplaced.

Some forward-looking courts, including the bankruptcy court, reference Schedule I as support for the majority approach. Pet. App. 69-70. However, there is no statutory support here for this proposition. § 1325 makes no reference to Schedule I or to § 521 (the statutory predicate for Schedule I). Thus, proponents of the forward-looking approach suggest this Court ignore express definitions of "disposable income" and "current monthly income," in favor of artificially connecting Schedule I to § 1325 in an effort to support its cause.

These courts suggest that "projected disposable income" must be a future-oriented concept to give meaning to Schedule I. Pet. App. 69-70. However, this approach ignores the significance of Schedule I apart from any implication in determining the debtor's "projected disposable income." It is not necessary to create a link between Schedule I and "projected disposable income" to give it meaning. There is also a complete lack of authority for such a leap.

Although BAPCPA has stripped Schedule I of its utility in determining the amount a debtor must repay unsecured creditors, the form is still quite important. Schedule I provides a mechanism for trustees and bankruptcy courts to determine if the plan and the petition were filed in good faith, as required by § 1325(a)(3) and (7) respectively. (*See Flygare*, 709 F.2d at 1347, for a discussion of "good faith" factors.)

The Trustee also utilizes Schedule I, in conjunction with Schedule J, to determine if the proposed plan is feasible. § 1325(a)(6). Moreover, the parties consider Schedule I to analyze a plan for possible post confirmation modification. § 521(a)(1)(B)(ii) and § 1329.

B. The "Absurd Results" Standard Is Misapplied By Forward-Looking Courts.

The bankruptcy court reasoned that following the mechanical approach leads to "absurd results." Pet. App. 70-72. *See also Frederickson,* 545 F.3d at 659. However, this finding is not supported by the text of BAPCPA, the legislative and statutory history of the provisions, nor this Court's prior guidance with regard to the absurd results analysis. *Lamie,* 540 U.S. at 534; *see also Kagenveama,* 541 F.3d at 875.

It is true that a mechanical application of the "projected disposable income" formula may effectively deny Ms. Lanning Chapter 13 bankruptcy relief because of decisions she and her counsel made. It is unlikely she could fund a plan that required her to pay the net result of Form 22C to her unsecured creditors. It is from this result that the Tenth Circuit obtains its premise. *Lamie* provides a template for application of the "absurd results" standard, when applicable. Harsh or illogical results are not necessarily absurd.

1. Application Of *Lamie*.

In *Lamie*, debtor's counsel filed an application for his fees to be paid from the Chapter 7 estate pursuant to § 330(a). *Lamie*, 540 U.S. at 526. The 1994 amendments to the Code had deleted the phrase "or to the debtor's attorney" from § 330(a)(1), and the court's below held that § 330(a)(1) no longer authorized compensation to debtor's counsel unless employed by the trustee and approved by the court pursuant to § 327. This Court affirmed, although recognizing that the amended statute was now ungrammatical, with its missing "or," and that the Court's interpretation rendered the term "attorney" in § 330(a)(1)(A) superfluous. *Id.* at 536. In discussing whether the court should adopt a different reading, it stated, "[w]e should prefer the plain meaning since that approach respects the words of Congress." *Id*. The same holds true here.

Harsh results are not uncommon and, at times, are even intended under the law. Limiting statutes will by definition always disadvantage those parties who do not fit within the framework. For example, the eligibility standards of § 109 deny Chapter 13 relief to some debtors. Only an individual with noncontingent, liquidated, unsecured debts of less than $307,675 and secured of less than $922,975 may be a debtor in Chapter 13. § 109(e). Likewise, debtors might not be successful in claiming more favorable exemptions because of the venue requirements of § 522(b)(3). Similarly, a creditor holding a claim secured by a vehicle purchased 911 days prior to filing

may have its claim drastically reduced, whereas a similarly situated creditor with collateral purchased within 910 days of the date of filing will be paid in full. § 1325(a)(9)(*). Some farmers may not qualify for relief under Chapter 12 § 101(18).

Moreover, the results of the mechanical approach are neither consistently harsh nor weighted for or against debtors. In *Kagenveama*, the effect was opposite of that in *Lanning*, where Form 22C provided a more "debtor-friendly" result. It is clear that Congress intended to implement a uniform standard for assessing the debtor's ability to pay. Congress concluded that a debtor's historical income from the six months prior to filing was a "more reliable indicator" of a debtor's ability to pay than taking a snapshot of income and expenses as of the date of filing. *In re Austin*, 372 B.R. 668, 679 (Bankr. D. Vt. 2007). Although the majority of courts have disagreed with that concept, that neither makes it inherently flawed, nor does it give courts license to ignore the statutory mandate.

2. Debtor May Avoid A Harsh Result Of The Chapter 13 "Means Test" Through Various Elections.

If the results of this case are absurd, they are only so because the debtor did not avail herself of any of the options available to her which might have mitigated the results of the means test. These options included delaying the filing of the case, electing the

second option in § 101(10A), filing under or converting to Chapter 7, or even dismissing and re-filing.

a. Delay Of Filing To Select A More Representative Six Months.

The debtor in a voluntary bankruptcy case always has control over the date of the filing of the petition. Certainly, in some cases, delay may be less attractive to the debtor due to an imminent foreclosure sale, vehicle repossession, or garnishment. However, the record provides no evidence to suggest that Ms. Lanning could not have reasonably delayed her bankruptcy filing. Debtor's own Statement of Financial Affairs discloses that there were no pending actions against her. J.A. 33-34. Moreover, her Chapter 13 Plan asserted that she was current on her mortgage payments. J.A. 94. By delaying the bankruptcy filing by approximately two months, Ms. Lanning's "current monthly income" calculation would not have included the "buyout" payments that drastically skewed her six-month average income. It is apparent that delaying the filing in this case was a reasonable option that would have mitigated the harsh results. This Court should note that this option is available to any potential debtor, and thus does not support a finding that a mechanical application of the statutory formula leads to absurd results.

b. Changing The Six-Month Look Back Period – § 101(10A)(A)(ii).

If utilizing a look back period based upon the debtor's income from the six months immediately preceding the bankruptcy filing would cause anomalous or harsh results, § 101(10A)(A)(ii) provides a statutory mechanism to provide the debtor relief. Under that section, the debtor may seek leave from the court to delay the filing of Schedule I pursuant to Fed. R. Bankr. P. 1007(c), and ask that the court assign a different, more representative six-month look back period. *In re Hoff*, 402 B.R. 683 (Bankr. E.D.N.C. 2009); *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio, 2009). Notably, this option does not permit the court to throw away the formula or to use it as "starting place." It merely permits the court to move the six-month period that starts the "projected disposable income" calculation.

Ms. Lanning did not avail herself of § 101(10A)(A)(ii), as she filed her Schedule I at the time she filed her petition for relief. Nor was this subsection discussed in the opinions of the courts below. The first case of note discussing § 101(10A)(A)(ii) in detail was *In re Shelor*, Slip Copy, 2008 WL 4344894, Case No. 08-80738C-13D (Bankr. M.D.N.C., September 23, 2008). This was long after Ms. Lanning's case was filed, and likewise after submission of the parties' briefs to the Tenth Circuit. The first appearance of this discussion in this case was in the Chapter 13 Trustee's Petition for Certiorari. However, any discussion of Debtor's

options cannot be had without consideration of § 101(10A)(A)(ii).

c. Dismissing And Re-Filing.

If the debtor files a bankruptcy petition, then discovers her historical income is not reflective of her anticipated income, the debtor may always dismiss and re-file. There is no code provision prohibiting this. Although there is authority to the contrary, courts have generally refused to find that dismissal and re-filing for purposes of taking advantage of a different time frame under BAPCPA is abusive. *In re Murphy*, 375 B.R. 919, 923 (Bankr. M.D. Ga. 2007) (Debtor's dismissal of a prior case and re-filing to avoid the special treatment of "910 claims" was not in bad faith). Further, this Court has previously held that all serial filings are not necessarily prohibited. *Johnson,* 501 U.S. at 87.

d. Initially Filing Or Converting To Chapter 7.

In further support of the alleged "absurd results," the Tenth Circuit mistakenly concludes categorically that since Ms. Lanning is an above median income debtor, she would not qualify for Chapter 7 relief. This is not accurate. In a Chapter 7, Ms. Lanning would be afforded the right to plead "special circumstances" on both the income and expense side of the equation. As a result, Chapter 7 may have provided relief that Chapter 13 could not afford her.

Again, Congress did not incorporate all of § 707(b) into § 1325(b)(3), so Ms. Lanning can only plead "special circumstances" on the expense side of the equation in a Chapter 13.

e. Chapter 13 Debtors May Establish "Special Circumstances" On The Expense Side Per § 707(b)(2)(B).

BAPCPA provides yet further relief from harsh results for an aggrieved debtor. "Special circumstances" may be demonstrated in Chapter 13 on the expense side of the means test equation. The standard explained in the statute, by way of example, "such as a serious medical condition . . . to the extent such special circumstances that justify additional expenses . . . for which there is no reasonable alternative." § 707(b)(2)(B)(i). Debtors are required to prove up these circumstances by providing documentation together with a detailed explanation. The changes were also capped at the lesser of 25% of the debtor's nonpriority unsecured claims or $6,000, whichever is greater, or $10,000.[9] Although the court is given some discretion, the circumstances must obviously be of some materiality, for a substantial reason, and must be included with the original bankruptcy filing.

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[9] These dollar amounts are adjusted every three years by the Judicial Conference of the United States as required by § 104(b).

Thus, the statute does not inherently create absurd results. Even when the outcome may appear absurd, here, it is only due to choices made by Debtor to ignore statutory and procedural mechanisms available to soften the effect.

3. Chapter 13 Provides Creditor Protections To Prevent Abuse.

The Tenth Circuit endorsed the *Hardacre* analysis, which, in part, suggested that the debtor might manipulate the bankruptcy filing date to take advantage of the six-month look back period. Pet. App. 16-17. This conclusion is disingenuous and ignores reality. The timing of the bankruptcy petition has always been one that a debtor may control, and such is the case under either approach. Moreover, *Hardacre* and the Tenth Circuit ignore the fact that BAPCPA left in place safeguards to prevent abuse and preserve the integrity of the process. *Johnson,* 501 U.S. at 87-88 (describing how the confirmation standards of §§ 1325(a)(3), (4), (5) and (6) each provide protections for creditors).

To meet the good faith requirement for confirmation under § 1325(a)(3), debtor must act in good faith in determining "current monthly income." *Hoff*, 402 B.R. at 686-87. Moreover, creditors and the Chapter 13 Trustee are protected by the ability to challenge the filing (or re-filing) of the case under the new § 1325(a)(7), which requires that the action of the debtors in filing the petition be in good faith. New

language in the "relief from stay" provisions similarly protects creditors upon a debtor's re-filing. §§ 362(c)(3) and (4) now require that if a debtor had a bankruptcy case pending within one year prior to filing which was dismissed, the debtor must first demonstrate that the new filing is in good faith in order to be protected by the stay provisions of § 362.

The above provisions work in concert to protect against debtor abuse of the Chapter 13 process. The argument asserted by forward-looking supporters suggests nothing to detract from these safeguards, nor do they describe how the forward-looking approach provides any greater protections for creditors than does the mechanical approach.

C. The Judicial Creation Of A Rebuttable Presumption Is Not Supported By The Statute.

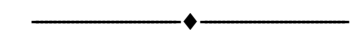
The courts below held that the 22C formula was presumed to be the debtor's "projected disposable income" and was the "starting point" for discussion subject to a showing of substantial change in circumstances. Pet. App. 31-32. However, the concepts of a "rebuttable presumption," "starting point," or "changes in circumstances," substantial or otherwise, are pure judicial invention. The Tenth Circuit reads into the statute a presumption that was not provided for. It does so in direct contradiction of the statutory mandates and without support from the legislative history. *Mobil Oil Corp.,* 436 U.S. at 625.

Moreover, Congress knows how to create a presumption when it desires to do so. It did precisely that with BAPCPA in § 707(b)(2)(A)(i). That section provides:

> "In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court *shall presume* abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of – (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater, or (II) $10,000."

§ 707(b)(2)(A)(i) (emphasis added).

Congressional intent to create a presumption in § 707(b) is textually undeniable – "the court shall presume." Yet, Congress chose not to insert such language when referencing "projected disposable income" in § 1325(b)(2). The phrase "shall presume" does not appear in § 1325. It has long been held by this Court that when Congress has included language in one part of the statute, yet excluded it from another, it did so purposely. *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 439-40 (2002). Thus, the only conclusion to be made here is that Congress purposely chose not to create the rebuttable presumption in § 1325 touted by forward-looking courts.



CONCLUSION

The Tenth Circuit should be reversed. This Court should find that Congress said what it meant and meant what it said. While the specific result in this case may be distasteful, limiting statutes, by their nature, occasionally create unpalatable results. The text of the statutes at issue here do not permit bankruptcy judges to countermand the specific formula for determining "disposable income" and hence, "projected disposable income." Likewise, this Court should conclude, in answering the Question Presented, that for above median income debtors, bankruptcy courts may deviate from the means test result only on the expense side in conformity with the procedures and guidance established by Congress. The text of the statutes and the legislative history of BAPCPA demonstrate conclusively that Congress intended to drastically limit judicial discretion, and did so. This Court's decision must give effect to that demonstrated intent.

Respectfully submitted,

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December 2009 *Attorneys for Petitioner*

11 U.S.C. § 1325 (2004)
Prior to the Enactment of BAPCPA

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if –

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan

on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder; and

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan – the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(A) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)) in an amount not to exceed 15 percent of the gross income

of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.

Black-lined Version of 11 U.S.C. 1325 With Changes Introduced By BAPCPA*

§ 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if(*) –

(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;

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* Additions to the statutory text are indicated with underlining, and deletions are marked by strikethrough.

(*) Section 1228(b) of the Act – Chapter 11 and Chapter 13 Cases. – The court shall not confirm a plan of reorganization in the case of an individual under chapter 11 or 13 of title 11, United States Code, unless requested tax documents have been filed with the court.

(2) any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid;

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date;

(5) with respect to each allowed secured claim provided for by the plan –

(A) the holder of such claim has accepted the plan;

(B)~~(i) the plan provides that the holder of such claim retain the lien securing such claim; and~~

(i) the plan provides that –

(I) the holder of such claim retain the lien securing such claim until the earlier of –

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328; and

(II) if the case under this chapter is dismissed or converted without completion of the

plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if –

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder; ~~and~~

(6) the debtor will be able to make all payments under the plan and to comply with the plan.;

(7) the action of the debtor in filing the petition was in good faith;

(8) the debtor has paid all amounts that are required to be paid under a domestic support obligation,and that first become payable after the date of the filing of the petition if the debtor is

required by a judicial or administrative order, or by statute, to pay such domestic support obligation; and

(9) the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308. For purposes of paragraph (5), section 506 shall not apply to a claim described in that paragraph if the creditor has a purchase money security interest securing the debt that is the subject of the claim, the debt was incurred within the 910-day(**) preceding the date of the filing of the petition, and the collateral for that debt consists of a motor vehicle (as defined in section 30102 of title 49) acquired for the personal use of the debtor, or if collateral for that debt consists of any other thing of value, if the debt was incurred during the 1-year period preceding that filing.

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the ~~three year~~ applicable commitment period beginning on the date that the first payment is due under the

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(**) So in original. Probably omitted "period".

plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term "disposable income" means current monthly income ~~which is~~ received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts ~~and which is not~~ reasonably necessary to be expended –

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for ~~including~~ charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as ~~that term is~~ defined in section 548(d)(4)) in an amount not to exceed 15 percent of ~~the~~ gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section

707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than –

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals,the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4.

(4) For purposes of this subsection, the "applicable commitment period" –

(A) subject to subparagraph (B), shall be –

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than –

(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest

median family income of the applicable State for a family of the same number or fewer individuals; or

(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $525 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

(c) After confirmation of a plan, the court may order any entity from whom the debtor receives income to pay all or any part of such income to the trustee.