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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	WW-11-1478-JuHki
)		
ROBBYN DALE MATTSON and RENEE)	Bk. No.	10-50455
DIANE MATTSON,)		
)		
Debtors.)		
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ROBBYN DALE MATTSON; RENEE)		
DIANE MATTSON,)		
)		
Appellants,)		
v.)	O P I N I O N	
)		
DAVID M. HOWE, Chapter 13)		
Trustee,)		
)		
Appellee.)		
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Argued and Submitted on March 23, 2012
at Seattle, Washington

Filed - April 5, 2012

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Brian D. Lynch, Bankruptcy Judge, Presiding.

Appearances: Matthew J.P. Johnson, Esq. argued for appellants
Robbyn Dale Mattson and Renee Diane Mattson;
Michael G. Malaier, Esq. argued for appellee,
David M. Howe, Chapter 13 Trustee.

Before: JURY, HOLLOWELL, and KIRSCHER, Bankruptcy Judges.

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1 JURY, Bankruptcy Judge:

2 Chapter 13¹ above-median debtors, Robbyn Dale Mattson and
3 Renee Diane Mattson ("Debtors"), moved to modify their confirmed
4 plan under § 1329 due to their post-confirmation increase in
5 income. Debtors proposed to increase plan payments and shorten
6 the term of their plan from five years to three years. The
7 chapter 13 trustee and appellee, David M. Howe, objected to the
8 shortened term, contending that Debtors were above-median and
9 required to contribute their increased income to a five year
10 plan.

11 The bankruptcy court granted Debtors' motion to increase
12 their payments under the plan, but denied their request to
13 shorten the term. The court held that in addition to satisfying
14 the good faith requirement under § 1325(a)(3), which applies to
15 modified plans by reference in § 1329(b)(1), Debtors also had to
16 show a substantial, unanticipated change in their circumstances
17 since the time of confirmation and that their proposed
18 modification correlated to their change in circumstances. The
19 bankruptcy court found that Debtors' proposed reduction in the
20 term of their plan did not correlate with their change in
21 circumstances (i.e., the increase in their income), nor did they
22 offer any justification for reducing the length of their plan
23 payments. This appeal followed.

24 Although the reasoning of the bankruptcy court for denying
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26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
28 and "Rule" references are to the Federal Rules of Bankruptcy
Procedure.

1 the shortened term deviates from our precedent, for the reasons
2 stated below we nevertheless AFFIRM.

3 **I. FACTS**

4 The facts in this appeal are not in dispute and are
5 adequately summarized in the bankruptcy court's published
6 decision, In re Mattson, 456 B.R. 75 (Bankr. W.D. Wash. 2011).
7 We incorporate the relevant facts below and supplement them when
8 needed.

9 On December 21, 2010, Debtors filed their chapter 13
10 petition. Their schedules listed assets including a house, four
11 vehicles, various funds in bank accounts, personal and household
12 furnishings and over \$83,000 in a retirement account, most of
13 which were exempted. Debtors' Schedule F listed \$163,367 in
14 unsecured debt.

15 Schedule I showed that Debtors were employed by the Camas
16 School District. Ms. Mattson was a teacher, earning an average
17 of \$3,067 per month; Mr. Mattson was listed as a "substitute
18 janitor" from which he had no earnings yet per month and also
19 showed an average \$1,200 per month from operation of a business.
20 Debtors' combined average monthly income totaled \$4,267 per
21 month. Debtors' Schedule J reflected expenses of \$4,117 per
22 month, leaving a monthly net income of \$150 per month.

23 Schedule I stated that Mr. Mattson had just been hired as a
24 substitute janitor within a week before the bankruptcy filing,
25 and while he had not commenced work yet, he anticipated getting
26 \$16.50 per hour for what work he would be given. That was
27 expected to reduce his other income from "operation of a
28 business." Mr. Mattson's businesses were not identified in the

1 schedules, but the bankruptcy court noted that the case was
2 filed as "f/d/b/a Robbyn D. Mattson Insurance" and "d/b/a East
3 County Battery Doctors." Debtors' Statement of Financial
4 Affairs Number 18 identified prior businesses as "insurance
5 sales" and "reconditioning/sales of automotive batteries."
6 Schedule I further noted that Mr. Mattson also earned
7 approximately \$2,760 a year coaching sports but this income was
8 excluded from Schedule I as it was only for two months of the
9 year and would not be available during an average month.

10 Debtors' Form B22C indicated they were above-median debtors
11 and reflected a projected disposable income of \$253 per month,
12 although the Form B22C also noted that it didn't accurately
13 reflect Debtors' projected income because it reflected the
14 income from Mr. Mattson's previous job and his seasonal income.
15 Looking to the prior six-month period, Debtors argued, showed a
16 substantially higher amount than their average income would be
17 going forward, given Mr. Mattson's lower income from the new job
18 and the unavailability of the seasonal income.

19 Debtors filed a chapter 13 plan which proposed a \$150 per
20 month payment for 60 months, for total payments of \$9,000.
21 Those payments went to Debtors' attorney and unsecured
22 creditors, who were expected to receive 2% on their claims.
23 Debtors proposed to pay directly the secured creditors on their
24 home and one vehicle. The bankruptcy court confirmed Debtors'
25 plan by order entered on March 2, 2011.

26 Just over two and a half months later, on May 24, 2011,
27 Debtors filed amended Schedules I and J. On amended Schedule I,
28 Mr. Mattson was now listed as a "janitor" (rather than

1 substitute) and the average monthly income for both Debtors had
2 increased to a total of \$5,936 per month. Ms. Mattson's income
3 had increased slightly more than \$400 a month, and Mr. Mattson's
4 income had doubled, to over \$2450 per month. The amended
5 Schedule J listed higher expenses totaling \$4,906 per month,
6 nearly \$800 per month higher than the original schedule. While
7 the amended Schedule J no longer reflected business operation
8 expenses of \$288 per month, indicating Debtors' apparent
9 abandonment of Mr. Mattson's previous business, expenses in
10 nearly every other category increased. Some of the increases
11 reflected potentially expected changes due to Mr. Mattson's
12 increase to full time employment as a janitor (increases in
13 transportation and clothing, for example). However, the amended
14 Schedule J also included increased expenses in other areas (for
15 example, electricity and heating fuel for Debtors' home, home
16 maintenance, food, medical and dental expenses, vehicle
17 maintenance and licensing, and recreation and entertainment).
18 In total, though, the amended Schedule I and Schedule J showed
19 an overall increase in monthly excess income to \$1,030 per
20 month.

21 Approximately three weeks after the amended schedules were
22 filed, or just over three months after the plan had been
23 confirmed, Debtors filed their amended plan and a motion for
24 modification on June 15, 2011. In their motion to modify,
25 Debtors stated that modification was necessary because their
26 income had increased. Under the amended plan and motion,
27 Debtors' plan would be modified to provide for increased
28 payments of \$900 per month in June 2011 and then \$1,000 per

1 month beginning with the July 2011 payment and the term of the
2 plan would be reduced from 60 to 36 months. Debtors' amended
3 plan proposed to pay their attorney and unsecured creditors, who
4 would receive a payout increasing from \$4,000 to \$30,000.

5 The chapter 13 trustee objected to Debtors' motion, arguing
6 that Debtors should be required to pay the increased \$1,000
7 monthly payment for the confirmed commitment period of 60
8 months. Under the originally filed means test, from which
9 Debtors had increased their income, Debtors had a positive
10 monthly disposable income of \$253 per month. Given the positive
11 disposable income figure, the trustee argued, Debtors were not
12 permitted under the Ninth Circuit's decision in Maney v.
13 Kagenveama (In re Kagenveama), 541 F.3d 868 (9th Cir. 2008), to
14 seek a deviation from the 60 month commitment period and Debtors
15 cited no authority in their motion which would allow them to do
16 so. The trustee maintained that because Debtors' income had
17 increased there was no reason why Debtors could not make
18 payments for 60 months. Lastly, the trustee argued that
19 Congress clearly intended that above-median debtors propose and
20 complete a 60 month plan.

21 Debtors replied that they were not bound to any
22 predetermined commitment period because income based
23 calculations under § 1325(b) were not applicable to
24 modifications under § 1329 under our holding in Sunahara v.
25 Burchard (In re Sunahara), 326 B.R. 768 (9th Cir. BAP 2005).
26 Debtors argued that as long as their proposed amended plan was
27 filed in good faith and met the other requirements of chapter 13
28 incorporated into § 1329, they could reduce the duration of the

1 plan, without consideration of the applicable commitment period
2 in the confirmed plan. Debtors also cited other bankruptcy
3 court decisions in the Ninth Circuit which they contended
4 authorized the debtor to amend his or her plan to less than 60
5 months. In re Hall, 442 B.R. 754, 760-61 (Bankr. D. Idaho
6 2010); In re Ewers, 366 B.R. 139, 143 (Bankr. D. Nev. 2007).

7 After a hearing on July 5, 2011, the matter was submitted
8 and the bankruptcy court issued its published opinion. In it,
9 the court decided that a predictable test for crafting and
10 reviewing plan modifications was preferable to the good faith
11 analysis espoused in In re Sunahara. Accordingly, the court
12 held that, in addition to the Sunahara good faith analysis, plan
13 modification under § 1329 also requires the moving party to show
14 that there has been a substantial change in the debtor's
15 circumstances after confirmation "which was unanticipated or
16 otherwise could not be taken into account at the time of the
17 confirmation hearing, and that the change in the plan
18 correlate[s] to the change in circumstances." In re Mattson,
19 456 B.R. at 82 (emphasis in original). In light of this
20 standard, the bankruptcy court found that Debtors' proposed
21 modification to shorten the term of their plan did not correlate
22 with the change in circumstances—their increased income. Id.

23 The bankruptcy court also addressed the relevance of the
24 applicable commitment period to plan modifications. The court
25 found that § 1329(c), which states that a plan "modified under
26 this section may not provide for payments over a period that
27 expires after the applicable commitment period under section
28 1325(b)(1)(B)," suggested that the applicable commitment period

1 did not go away with modification, but was fixed at
2 confirmation. Id. at 83. In other words, “[t]he plan may be
3 extended by the Court for good cause, though not beyond five
4 years, but the applicable commitment period from § 1325(b)
5 cannot be altered.” Id. However, the bankruptcy court did not
6 accept the trustee’s position that, unless a debtor proposed to
7 pay the unsecured creditors in full, the length of the plan
8 could not be reduced under § 1329(a)(2). The court acknowledged
9 that a debtor’s financial circumstances may change in a way that
10 justified a reduction in plan length as demonstrated by In re
11 Ewers, 366 B.R. 139.²

12 The bankruptcy court entered the Memorandum Decision on
13 August 26, 2011. Debtors timely appealed.

14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction over this proceeding
16 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction
17 under 28 U.S.C. § 158.

18 **III. ISSUE**

19 Whether the bankruptcy court abused its discretion in
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21 ² In Ewers, the debtors’ income went down when they retired
22 after confirmation of their plan. They moved to reduce the term
23 of their plan from five years to three years. The bankruptcy
24 court held that the term of a modified plan is not restricted to
25 the applicable commitment period that was first established
26 under § 1325(b). The court found that the debtors’ chapter 13
27 plan may be modified to a three-year plan without paying their
28 unsecureds in full, if the plan otherwise satisfied the
requirements of § 1329(b), which included the requirement of
good faith under § 1325(a). In the end, the bankruptcy court
allowed the trustee to provide further briefing on the issue of
the debtors’ good faith with respect to the timing of their
retirement.

1 denying Debtors' request to shorten the term of their plan from
2 five years to three years.

3 **IV. STANDARDS OF REVIEW**

4 Modification under § 1329 is discretionary. In re
5 Sunahara, 326 B.R. at 772; Powers v. Savage (In re Powers), 202
6 B.R. 618, 623 (9th Cir. BAP 1996). A bankruptcy court abuses
7 its discretion if it applies the wrong legal standard or its
8 findings are illogical, implausible or without support in the
9 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,
10 832 (9th Cir. 2011).

11 While the bankruptcy court's decision whether to allow
12 modification is reviewed for abuse of discretion, whether the
13 bankruptcy court was correct in its interpretation of the
14 applicable statutes is reviewed de novo. Towers v. United
15 States (In re Pac.-Atlantic Trading Co.), 64 F.3d 1292, 1297
16 (9th Cir. 1995).

17 Whether a plan modification has been proposed in good faith
18 by the debtor is a question of fact, and the bankruptcy court's
19 findings on that issue are reviewed for clear error. Downey
20 Sav. & Loan Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1497 (9th
21 Cir. 1987). A factual finding is clearly erroneous if it is
22 illogical, implausible, or without support in inferences that
23 can be drawn from the facts in the record. United States v.
24 Hinkson, 585 F.3d 1247, 1262-63 (9th Cir. 2009) (en banc).

25 We may affirm on any ground supported by the record.
26 Siriani v. Nw. Nat'l Ins. Co. (In re Siriani), 967 F.2d 302, 304
27 (9th Cir. 1992).

1 **V. DISCUSSION**

2 Chapter 13 plan modification is governed by § 1329.

3 Section 1329(a) provides for post-confirmation plan
4 modifications under four delineated circumstances, two of which
5 are relevant here:

6 At any time after confirmation of the plan but before
7 the completion of payments under such plan, the plan
8 may be modified, upon request of the debtor . . . ,
9 to—

10 (1) increase . . . the amount of payments on claims of
11 a particular class provided for by the plan;

12 (2) extend or reduce the time for such payments[.]

13 When a debtor's proposed modifications fall within one or
14 both of these provisions, the bankruptcy court must then decide
15 whether the proposed modification complies with § 1329(b)(1).
16 That section states: "[s]ections 1322(a), 1322(b), and 1323(c)
17 of this title and the requirements of § 1325(a) of this title
18 apply to any modification under subsection (a) of this section."
19 The statute's reference to § 1325(a) means that the plan as
20 modified must be proposed in good faith under § 1325(a)(3). In
21 this Circuit, bankruptcy courts make good faith determinations
22 under § 1325(a)(3) on a case-by-case basis, after considering
23 the totality of the circumstances. See Leavitt v. Soto (In re
24 Leavitt), 171 F.3d 1219, 1224-25 (9th Cir. 1999); 550 W. Ina Rd.
25 Trust v. Tucker (In re Tucker), 989 F.2d 328, 330 (9th Cir.
26 1993); Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1390 & n.9 (9th
27 Cir. 1982); see also Smyrnos v. Padilla (In re Padilla), 213
28 B.R. 349, 352 (9th Cir. BAP 1997).

Notably missing from § 1329 is any express requirement that
a substantial and unanticipated change in the debtor's financial

1 circumstances is a threshold requirement to overcome the res
2 judicata effect of a confirmed plan under § 1327(a).³ However,
3 concerns over the finality of a confirmed plan led to the
4 judicially developed substantial and unanticipated change test
5 to inform the court on the initial question of whether the
6 doctrine of res judicata prevented modification of a confirmed
7 plan. See Murphy v. O'Donnell (In re Murphy), 474 F.3d 143, 149
8 (4th Cir. 2007). The Fourth Circuit, which is the only Court of
9 Appeals to apply the substantial and unanticipated change test,
10 explained the multi-step analysis for plan modification using
11 the test:

12 [W]hen a bankruptcy court is faced with a motion for
13 modification pursuant to §§ 1329(a)(1) or (a)(2), the
14 bankruptcy court must first determine if the debtor
15 experienced a substantial and unanticipated change in
16 his post-confirmation financial condition. This
17 inquiry will inform the bankruptcy court on the
18 question of whether the doctrine of res judicata
19 prevents modification of the confirmed plan. If the
20 change in the debtor's financial condition was either
21 insubstantial or anticipated, or both, the doctrine of
22 res judicata will prevent the modification of the
23 confirmed plan. However, if the debtor experienced
24 both a substantial and unanticipated change in his

20 ³ Section 1327(a) addresses the finality of chapter 13 plan
21 confirmation orders: "The provisions of a confirmed plan bind
22 the debtor and each creditor, whether or not the claim of such
23 creditor is provided for by the plan, and whether or not such
24 creditor has objected to, has accepted, or has rejected the
25 plan." We have observed that "[t]he purpose of § 1327(a) is
26 the same as the purpose served by the general doctrine of res
27 judicata. There must be finality to a confirmation order so
28 that all parties may rely upon it without concern that actions
which they may thereafter take could be upset because of a later
change or revocation of the order" Great Lakes Higher
Educ. Corp. v. Pardee (In re Pardee), 218 B.R. 916, 923 (9th
Cir. BAP 1998), aff'd 193 F.3d 1083 (9th Cir. 1999). We use the
term res judicata in its generic sense to encompass the claim
preclusion and issue preclusion doctrines.

1 post-confirmation financial condition, then the
2 bankruptcy court can proceed to inquire whether the
3 proposed modification is limited to the circumstances
4 provided by § 1329(a). If the proposed modification
5 meets one of the circumstances listed in § 1329(a),
6 then the bankruptcy court can turn to the question of
7 whether the proposed modification complies with
8 § 1329(b)(1).

9 Id. at 150 (citing Arnold v. Weast (In re Arnold), 869 F.2d 240,
10 243 (4th Cir. 1989).

11 The First, Fifth and Seventh Circuits have rejected this
12 approach and do not impose on parties seeking to modify a
13 confirmed plan the threshold requirement of the substantial
14 unanticipated change test. See Barbosa v. Soloman, 235 F.3d 31,
15 41 (1st Cir. 2000), Meza v. Truman (In re Meza), 467 F.3d 874,
16 878 (5th Cir. 2006), and In re Witkowski, 16 F.3d 739, 746 (7th
17 Cir. 1994) all holding that no change in circumstances is
18 required. The Ninth Circuit has not directly ruled on the issue
19 but in Anderson v. Satterlee (In re Anderson), 21 F.3d 355, 358
20 (9th Cir. 1994) suggested in dicta that the substantial and
21 unanticipated change test applies.⁴ See Pak v. eCast Settlement
22 Corp. (In re Pak), 378 B.R. 257, 268 (9th Cir. BAP 2007).

23 Although dicta from the Ninth Circuit is persuasive, we are
24 bound only by the Ninth Circuit's holdings and not by the
25 court's election, whether express or implied, to leave open
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27 ⁴ In In re Anderson, which was not a plan modification
28 case, the Ninth Circuit stated that the trustee can request a
modification under § 1329(a), but bears "the burden of showing a
substantial change in debtor's ability to pay since the plan was
confirmed and that the prospect of that change had not already
been taken into account at the time of confirmation." 21 F.3d
at 358.

1 particular legal questions.⁵ However, in interpreting a
2 statute, we have been instructed to follow the plain meaning
3 rule and apply a statute according to its terms unless to do so
4 would lead to absurd results. U.S. Trustee v. Lamie, 540 U.S.
5 526, 534 (2004). As a consequence, we have traditionally taken
6 a plain meaning approach to statutory interpretation questions.
7 For this reason, in In re Powers, Max Recovery, Inc. v. Than (In
8 re Than), 215 B.R. 430, 435 (9th Cir. BAP 1997), and McDonald v.
9 Burgie (In re Burgie), 239 B.R. 406, 409 (9th Cir. BAP 1999), we
10 held that the res judicata doctrine did not apply to plan
11 modifications and, therefore, the substantial and unanticipated
12 change test was unnecessary as a threshold requirement because
13 the plain language of § 1329 did not support this judicially
14 created requirement.⁶ See also Ledford v. Brown (In re Brown),
15 219 B.R. 191, 195 (6th Cir. BAP 1998) (same).

16 Despite our not adopting the substantial and unanticipated

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18 ⁵ For this same reason, we are not convinced that the
19 Supreme Court's dicta in Ransom v. FIA Card Servs., N.A., ____
20 U.S. ____, 131 S. Ct. 716 (2011) fares any better. The issue in
21 Ransom also was not about plan modification but whether the
22 debtor was entitled to a car-ownership deduction for purposes of
23 the means test when he owned his car free and clear. The
24 Supreme Court held that the debtor was not entitled to a
25 deduction expense for a vehicle which he did not have. The
26 court further held that "[t]he appropriate way to account for
27 unanticipated expenses like a new vehicle purchase is not to
28 distort the scope of a deduction, but to use the method that the
Code provides for all Chapter 13 debtors (and their creditors):
modification of the plan in light of changed circumstances."
Id. at 730.

⁶ We are bound by these prior decisions. Ball v.
Payco-Gen. Am. Credits, Inc. (In re Ball), 185 B.R. 595, 597
(9th Cir. BAP 1995) (holding that the Panel is bound by
decisions of prior Panels).

1 change test as a prerequisite to plan modification, we have
2 held, as did the Seventh Circuit in In re Witkowski, that the
3 bankruptcy court may consider a change in circumstances in the
4 exercise of its discretion. In re Powers, 202 B.R. at 623. In
5 the end, in evaluating plan modifications, it may make little
6 practical difference whether the bankruptcy court applies the
7 substantial and unanticipated change test as a threshold
8 requirement or uses it as a discretionary tool.⁷

9 In light of this background, and the purpose behind the
10 substantial and unanticipated change test, we conclude that to
11 the extent the bankruptcy court applied the test it was harmless
12 error given that Debtors did experience a substantial and
13 unanticipated change in their post-confirmation income. Thus,
14

15 ⁷ As the bankruptcy court in In re Klus, 173 B.R. 51, 58
16 (Bankr. D. Conn. 1994) noted:

17 There may be little practical difference between those
18 two positions. The plain language of subsection (3)
19 of § 1329(a) requires a post-confirmation change in
20 circumstances, i.e. payment on the claim outside of
21 the plan. While subsections (1) and (2) contain no
22 such requirement, the significance of that fact is
23 limited by § 1329(b)(1), which requires that the
24 modified plan comply with § 1325(a). If, for example,
25 a creditor seeks to modify the plan to increase
26 payments to the unsecured creditor class under
27 § 1329(a)(1), the modification cannot be approved
28 unless the debtor has the ability to make the
increased payments. See § 1325(a)(6). If the debtor
has satisfied the obligation to use all disposable
income to fund the plan, see § 1325(b), the creditor's
modification will be disapproved unless there has been
a post-confirmation improvement in the debtor's
financial circumstances. Conversely, any effort by
the debtor to reduce payments is circumscribed by the
good faith requirement of § 1325(a)(3)

1 even under the Fourth Circuit's more stringent standard, the
2 doctrine of res judicata did not prevent Debtors from modifying
3 their plan under § 1329(a)(1) or (2).⁸ Nevertheless, the
4 bankruptcy court was still required to determine whether
5 Debtors' proposed modification to reduce the term of their plan
6 complied with § 1329(b)(1) and its cross reference to the good
7 faith requirement under § 1325(a)(3).

8 In this regard, the bankruptcy court acknowledged our
9 holding in In re Sunahara that § 1329(b)(1) does not reference
10 or otherwise incorporate the provisions concerning the
11 disposable income test and applicable commitment period
12 contained in § 1325(b).⁹ See also In re Hall, 442 B.R. at 761
13 (holding because § 1329 does not include any reference to
14 § 1325(b), even though § 1329 includes specific reference to
15

16
17 ⁸ Whether Debtors should have been allowed to modify their
18 plan by increasing plan payments under § 1329(a)(1) is not at
19 issue in this appeal.

20 ⁹ Section 1325(b)(1) states:

21 If the trustee or the holder of an allowed unsecured
22 claim objects to the confirmation of the plan, then
23 the court may not approve the plan unless, as of the
24 effective date of the plan—

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

28 (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.

1 other Code sections, the requirements of § 1325(b) should not be
2 applicable to § 1329 modifications).¹⁰ As a result, if a
3 debtor's plan modification was challenged, he or she need not
4 show that all of their projected disposable income was devoted
5 to making plan payments under the modified plan. In re
6 Sunahara, 326 B.R. at 781-82.

7 However, as the bankruptcy court aptly observed, In re
8 Sunahara did not leave a wide open field for modifications to be
9 approved. In re Mattson, 456 B.R. at 79; see also Barbosa, 235
10 F.3d at 41 (noting that "as a practical matter, parties
11 requesting modifications of Chapter 13 plans must advance a
12 legitimate reason for doing so"); In re Powers, 202 B.R. at 622
13 ("Although a party has an absolute right to request modification
14 between confirmation and completion of the plan, modification
15 under § 1329 is not without limits."); In re Meeks, 237 B.R.
16 856, 859-60 (Bankr. M.D. Fla. 1999) ("[T]he Debtors need not
17 demonstrate a substantial, unanticipated change in circumstances
18 in order to modify their confirmed chapter 13 plan. However,
19 neither can Chapter 13 debtors simply modify their plans willy
20 nilly.").

21 The Sunahara Panel held that

22 [I]mportant components of the disposable income test
23 are employed as part of a more general analysis of the
24 total circumstances militating in favor of or against
25 the approval of modification, without requiring
tortured and illogical statutory interpretations
(where the outcome differs depending upon which party

26 ¹⁰ Although there is a split of authority on this issue, the
27 majority of courts hold that post-confirmation modifications are
28 not governed by § 1325(b). In re Grutsch, 453 B.R. 420, 424 &
n.14 (Bankr. D. Kan. 2011) (collecting cases).

1 is seeking modification, whether a certain party has
2 objected, or whether 'extraordinary circumstances'
exist, etc.).

3 326 B.R. at 781. Thus, the Panel instructed the bankruptcy
4 court to "carefully consider whether modification has been
5 proposed in good faith." Id. (citing § 1325(a)(3)). We
6 reasoned that a good faith determination

7 necessarily requires an assessment of a debtor's
8 overall financial condition including, without
9 limitation, the debtor's current disposable income,
10 the likelihood that the debtor's disposable income
11 will significantly increase due to [greater] income or
12 decreased expenses over the remaining term of the
original plan, the proximity of time between
confirmation of the original plan and the filing of
the modification motion, and the risk of default over
the remaining term of the plan versus the certainty of
immediate payment to creditors.

13 Id. at 781-82; see also In re Grutsch, 453 B.R. at 427 ("The
14 good faith requirement of § 1325(a)(3) fills the gap that would
15 otherwise exist, allowing all parties to object to inappropriate
16 payment terms—whether excessive or inadequate—in a proposed
17 modification.").

18 Here, the bankruptcy court believed that the good faith
19 test lacked predictability and therefore added the requirements
20 of the substantial and unanticipated change test and that the
21 change in the plan correlate to the change in circumstances.
22 456 B.R. at 82. We conclude that the bankruptcy court's second
23 requirement—that the proposed modification correlate to
24 Debtors' change in circumstances—necessarily implicates a good
25 faith analysis. See In re Savage, 426 B.R. 320, 324 & n.3
26 (Bankr. D. Minn. 2010) (in order to comply with the "good faith"
27 requirement of § 1325(a)(3), "the required change in financial
28 circumstances should be directly resonant with the nature of the

1 proposed modification").¹¹ Indeed, we view the bankruptcy
2 court's correlation requirement as simply another factor that
3 may be considered under the totality of circumstances approach
4 to a good faith analysis in this Circuit. We emphasize,
5 however, that no single factor is determinative of the lack of
6 good faith.

7 Contrary to the bankruptcy court's belief that the good
8 faith test lacks predictability, we continue to accept that a
9 good faith analysis under § 1325(a)(3), although not an exact
10 science, adequately guides the exercise of the court's
11 discretion for deciding plan modification issues.

12 [O]ur reliance in Sunahara on the § 1325(a)(3) good
13 faith standard is vulnerable to criticism that it
14 introduces a level of subjectivity that could yield
15 disparate results. That subjectivity, however, is
16 constrained by settled law of the circuit that good
faith is to be assessed through the matrix of whether
the plan proponent 'acted equitably' taking into
account 'all militating factors' in a manner that
equates with the 'totality' of circumstances.

17 Fridley v. Forsythe (In re Fridley), 380 B.R. 538, 543 (9th Cir.
18 BAP 2007) (citation omitted). Thus, the Fridley Panel dismissed
19 the argument that adopting the reasoning in In re Sunahara would
20 license "circumvention of § 1325(b) by the ploy of confirming a
21 plan that complies with § 1325(b) and then promptly modifying

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23 ¹¹ Similar to the bankruptcy court here, the bankruptcy
24 court in In re Savage required that any modification that would
25 reduce a debtor's payment obligations and creditors'
26 distribution rights to be supported by a material, adverse
change in the debtor's financial circumstances, that took place
after the confirmation of the original plan. 426 B.R. at 324.
27 Recently, the Eighth Circuit Bankruptcy Appellate Panel in
Johnson v. Fink (In re Johnson), 458 B.R. 745, 749 (8th Cir. BAP
28 2011) has cited with approval the holdings in In re Savage and
In re Mattson.

1 the plan in a manner that does not comply with § 1325(b). Such
2 a stratagem plainly would be an unfair manipulation of the
3 Bankruptcy Code, which is a factor named in Goeb as indicative
4 of a plan proponent not acting equitably and, hence, not in good
5 faith." Id.

6 The "settled law" in this Circuit referred to by In re
7 Fridley demonstrates that the good faith test under § 1325(a)(3)
8 is neither ill-defined nor does it lack a predictable base. In
9 In re Goeb, the Ninth Circuit set forth a generalized test for
10 good faith that includes consideration of the substantiality of
11 proposed plan payments; whether the debtor has misrepresented
12 facts in the plan; whether the debtor has unfairly manipulated
13 the Bankruptcy Code; and whether the plan is proposed in an
14 equitable manner. 675 F.2d at 1390. At the very least, these
15 factors direct attention away from the amorphous good faith
16 concept, bringing relevant facts to the foreground. Moreover,
17 the standards set forth in In re Goeb offer a solid framework
18 for evaluating a variety of circumstances, which is consistent
19 with the discretionary aspect of plan modifications. At bottom,
20 determinations of good faith are made on a case-by-case basis,
21 after considering the totality of the circumstances. Id.
22 Finally, bankruptcy courts are not free to ignore the concept of
23 good faith in plan modifications given that § 1329 specifically
24 references § 1325(a) and its good faith requirement.

25 The bankruptcy court's holding and the facts of this case
26 fit within a conventional good faith analysis. The burden of
27 establishing that a plan is submitted in good faith is on the
28 debtor. Fid. & Cas. Co. of N.Y. v. Warren (In re Warren), 89

1 B.R. 87, 93 (9th Cir. BAP 1988); see also In re Hall, 442 B.R.
2 at 758 (moving party bears the burden of showing sufficient
3 facts to indicate that modification of debtors' confirmed
4 chapter 13 plan is warranted). Further, the bankruptcy court
5 has an independent duty to determine whether a chapter 13 plan
6 is proposed in good faith. Villanueva v. Dowell (In re
7 Villanueva), 274 B.R. 836, 841 (9th Cir. BAP 2002).

8 Here, the record shows Debtors failed to meet their burden
9 of proving that the shortened term of their plan was made in
10 good faith under the Goeb standards. Those standards clearly
11 require more than a showing of Debtors' subjective good faith.
12 Simply put, Debtors' contribution of a portion of their
13 increased income to their plan for a three year period does not
14 amount to per se good faith.

15 Indeed, the bankruptcy court considered whether Debtors'
16 proposal was made in good faith in light of the relevant
17 militating factors. The court found Debtors were not retiring,
18 leaving the employment market or changing jobs in some other way
19 nor did they contend they had health issues. Debtors do not
20 dispute these findings on appeal nor do they point to any facts
21 in the record which showed they would be unable to continue
22 their increased payments beyond the 36 month period that they
23 proposed. Although the doctrine of res judicata did not prevent
24 Debtors from shortening the term of their plan, they advanced no
25 legitimate reason for doing so under the circumstances.

26 As a consequence, in light of Debtors' increased income,
27 allowing them to shorten the term for their plan would be an
28 inequitable result under In re Goeb. See also In re Stitt, 403

1 B.R. 694, 703 (Bankr. D. Idaho 2008) (noting that the “good
2 faith requirement of § 1325(a)(3) gauges the overall fairness of
3 a debtor’s treatment of creditors under a plan”). In addition,
4 Debtors’ proposed modification to shorten the term of the plan
5 when their income significantly increased is inconsistent with
6 the overall policies of chapter 13 and the enactment of BAPCPA,
7 which “has been read to tighten, not loosen, the ability of
8 debtors to avoid paying what can reasonably be paid on account
9 of debt.” In re Kamell, 451 B.R. 505, 508 (Bankr. C.D. Cal.
10 2011). As the bankruptcy court aptly noted, “there is clearly
11 more that could—in ‘good faith’—be paid to their creditors.”
12 In re Mattson, 456 B.R. at 79.

13 Finally, we emphasize that the continued absence from
14 § 1329(b)(1) of any reference to § 1325(b) is conclusive as to
15 whether a debtor may modify his or her plan to reduce the term
16 below the applicable commitment period required for an original
17 plan. “Congress is presumed to act intentionally and
18 purposefully when it includes language in one section of the
19 Bankruptcy Code, but omits it in another section.” In re Ewers,
20 366 B.R. at 143. Congress, aware of the function of the means
21 test in chapter 13 relating to confirmation of original plans,
22 did not amend § 1329(b)(1) to incorporate § 1325(b). As noted
23 by the bankruptcy court in In re Ewers, “BAPCPA added the term
24 [applicable commitment period] in § 1329(c), which deals with
25 the maximum length of a modified plan, obviously as a conforming
26 amendment. . . . ‘Three years’ in § 1329(c) was switched to
27 ‘the applicable commitment period under section 1325(b)(1)(B),’
28 no doubt, to be harmonious with § 1325(b).” Id. at 143. Having

1 taken the opportunity to amend § 1329(c), Congress's decision
2 not to amend § 1329(b) may be seen as deliberate.

3 Therefore, the plain language of § 1329(a)(2), which
4 authorizes modifications to extend or reduce the time for
5 payments under the plan, continues to control. As the
6 bankruptcy court correctly acknowledged, a debtor's
7 circumstances may justify a reduction in plan length. Mattson,
8 456 B.R. at 83 (citing In re Ewers, 366 B.R. 139).¹² In the end,
9 the appropriateness of any particular modification is subject to
10 the court's discretion, as limited by § 1329.

11 VI. CONCLUSION

12 For the reasons stated, we conclude that the bankruptcy
13 court did not abuse its discretion in denying Debtors' proposed
14 modification to shorten the term of their plan. Accordingly, we
15 AFFIRM.

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23 ¹² Although the trustee cites Maney v. Kagenveama (In re
24 Kagenveama), 541 F.3d 868 (9th Cir. 2008), we do not find this
25 decision persuasive for purposes of this appeal. As the
26 bankruptcy court in In re Stitt observed, "while Kagenveama
27 guides bankruptcy courts in interpreting certain new terms in
the Code, it does not require them to retreat from the pointed,
28 case-by-case analysis used to determine whether a plan has been
proposed in good faith as formulated in its earlier decisions."
403 B.R. at 702.