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

**ORDERED PUBLISHED**

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. HI-11-1702-PaJuH  
CHRISTOPHER DEAN NG and SHEILA ) Bankr. No. 10-02001  
MARIE NG, )  
Debtors. )  
----- )  
CHRISTOPHER DEAN NG; SHEILA )  
MARIE NG, )  
Appellants, )  
v. ) O P I N I O N  
DAVID C. FARMER, TRUSTEE; )  
UNITED STATES TRUSTEE, )  
Appellees. )  
----- )

Argued and Submitted on July 19, 2012  
at Pasadena, California

Filed - September 7, 2012

Appeal from the United States Bankruptcy Court  
for the District of Hawaii

Hon. Robert J. Faris and Hon. Lloyd King,  
Bankruptcy Judges, Presiding

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Appearances: Jean Christensen argued for appellants Christopher Dean Ng and Sheila Marie Ng. Terri Hawkins Didion argued for appellee United States Trustee.

Before: PAPPAS, JURY and HOLLOWELL, Bankruptcy Judges.

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1 PAPPAS, Bankruptcy Judge:

3 Christopher Dean Ng and Sheila Marie Ng ("Debtors") appeal  
4 the bankruptcy court's order dismissing their chapter 7<sup>1</sup> case  
5 under § 707(b)(3)(B). We AFFIRM.

## **FACTS**

On June 30, 2010, the date Debtors filed a chapter 7 bankruptcy petition, Mr. Ng was employed as an electronic technician for GE International. According to Debtors' original Schedule I, Mr. Ng received \$7,439.47 as his monthly salary; he was also eligible for overtime compensation. In addition, he received a military pension of \$1,439.88 per month. Mrs. Ng was not employed and had no income.

14 From Mr. Ng's monthly salary, he made a voluntary  
15 contribution of \$520.74 to an employer 401(k) plan, and a \$343.42  
16 payment on a pension loan. According to their original Schedule  
17 J, Debtors' monthly expenses totaled \$5,225.00, which included a  
18 \$300.00 payment on a prepetition income tax liability.

19        Unsecured debt listed on the Debtors' original Schedule F was  
20 \$38,261.00, which included three student loans and three credit  
21 card accounts. A priority federal tax claim was listed on  
22 Schedule E for \$10,213.11. Schedule D listed secured claims  
23 totaling \$484,830.70, of which Debtors suggested that \$112,480.70  
24 was unsecured because the assets securing the claims were worth  
25 less than the debts. The bankruptcy court would later find that

<sup>1</sup> Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Debtors' primary purpose for filing for bankruptcy relief was to  
2 surrender their former residence and discharge the mortgage debt  
3 secured by the property in the amount of \$464,602.18.

4 The United States Trustee ("the UST") filed a motion on  
5 November 22, 2010 to dismiss the Debtors' bankruptcy case under  
6 § 707(b) (1) alleging that granting relief to Debtors would  
7 constitute an abuse of the provisions of chapter 7. In  
8 particular, according to the UST, a presumption of abuse arose as  
9 provided under § 707(b) (2) because: (a) Debtors' income was  
10 understated and well above the state median, and (b) they had  
11 taken a mortgage deduction on their means test form for real  
12 property that the Debtors intended to surrender, thus triggering a  
13 presumption of abuse.

14 The UST also argued that dismissal was in order because, as  
15 set forth in § 707(b) (3) (B), based on the totality of the  
16 circumstances, Debtors had the financial ability, without  
17 hardship, to repay their creditors. In addition to a general  
18 challenge based on the amount of Debtors' income, the UST  
19 highlighted three areas of concern in gauging their ability to pay  
20 their debts: Debtors' voluntary retirement plan contributions,  
21 their pension loan repayments, and the existence of the tax debt  
22 that could be repaid through a chapter 13 plan.

23 Debtors opposed dismissal. Regarding § 707(b) (2), they  
24 asserted that no presumption of abuse arose in their case because  
25 they were allowed to claim the mortgage deduction under the means  
26 test even though they intended to surrender the house. They  
27 opposed dismissal under § 707(b) (3) (B) because: (1) the bankruptcy  
28 court has discretion to determine if retirement contributions are

1 a reasonably necessary expense; (2) it was correct for them to  
2 take a monthly expense on Schedule J for a prepetition tax  
3 liability because, under a hypothetical chapter 13 plan, they  
4 would be required to pay the priority tax claim in full; and (3)  
5 they disagreed with the UST's calculations of income and expenses.

6 The bankruptcy court conducted its first hearing on the UST's  
7 dismissal motion on January 19, 2011. After hearing from counsel  
8 for Debtors and the UST, the court took the issues under  
9 submission.

10 On February 9, 2011, the bankruptcy court entered a  
11 Memorandum of Decision concerning the dismissal motion. The court  
12 denied the motion to dismiss under § 707(b) (2), ruling that the  
13 Debtors "are permitted to deduct their mortgage payments  
14 notwithstanding their intentions to surrender the Property."  
15 Memorandum of Decision at 7, February 9, 2011.<sup>2</sup> However, the  
16 bankruptcy court ordered a further hearing be held on dismissal  
17 under § 707(b) (3) (B) to allow the parties to submit additional  
18 evidence and information on whether the bankruptcy filing was an  
19 abuse under the totality of the circumstances. In doing so, the  
20 court expressed particular concern with the Debtors' monthly  
21 retirement contributions and pension loan repayments.

22 On June 9, 2011, in connection with Mr. Ng's employment,  
23 Debtors relocated from the island of Hawaii to Maui. Since they  
24 were not reimbursed by Mr. Ng's employer for relocation moving  
25 expenses, Debtors disclosed to the UST in a July 17, 2011  
26 declaration that they had terminated the monthly retirement plan

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27  
28       <sup>2</sup> The UST has not appealed the bankruptcy court's decision  
         under § 707(b) (2).

1 contribution, and that the prepetition pension loan had been  
2 repaid.

3       The bankruptcy court conducted a status conference on the  
4 motion to dismiss on September 22, 2011. The UST informed the  
5 court that Debtors' retirement contributions had stopped, and that  
6 the prepetition pension loan had been repaid. The UST also  
7 informed the court that Debtors had submitted updated pay advices  
8 to the UST indicating that Mr. Ng received a substantial increase  
9 in income over the amount reflected in Debtors' Schedule I. The  
10 court directed Debtors to submit revised Schedules I and J and set  
11 the final hearing on dismissal under § 707(b) (3) (B) for November  
12 16, 2011.

13       Debtors submitted amended Schedules I and J on October 3,  
14 2011. Mr. Ng's gross monthly salary had indeed increased from  
15 \$7,439.00 to \$8,804.77. Even though the Debtors had advised the  
16 UST in the declaration that they had stopped making the  
17 contribution to the 401(k) plan, their amended schedule showed  
18 that they resumed pension contributions of \$264.16 per month.  
19 Further, the amended schedules disclosed that Debtors had again  
20 borrowed against Mr. Ng's pension and were making monthly payments  
21 of \$289.68 to repay that loan.

22       According to the amended schedules, Debtors claimed their  
23 monthly gross income from all sources was \$10,295.85 (which  
24 included the military pension). The amended Schedule J showed  
25 increased monthly expenses, including \$400.00 per month for back  
26 taxes. Debtors' monthly net income was now allegedly \$165.43.

27       The UST submitted a supplemental brief on the motion to  
28 dismiss under § 707(b) (3) (B) on October 26, 2011. The UST

1 analyzed Debtors' original and amended schedules, along with the  
2 pay advices recently submitted by the Debtors. The UST calculated  
3 that, based on the pay advice for the period ending September 18,  
4 2011, year-to-date earnings from Mr. Ng's employment should be  
5 \$99,508.10, or \$11,347.40 per month.<sup>3</sup> Adding the income from the  
6 military pension, the UST argued that Debtors had understated  
7 their monthly income in their schedules by more than \$2,500.00.  
8 Additionally, the UST challenged Debtors' renewed 401(k)  
9 contribution, the pension loan repayment, and their continued  
10 payment of the prepetition tax debt. Based on these calculations,  
11 the UST argued that the bankruptcy court should dismiss the case  
12 under § 707(b) (3) (B) because, considering the totality of the  
13 circumstances, Debtors clearly had the ability to pay their debts  
14 from their future earnings without hardship.

15 On November 2, 2011, Debtors filed a further opposition to  
16 the UST's dismissal motion, contending that: (1) the increase in  
17 Mr. Ng's pay was the result of overtime hours and there was no  
18 expectation that the overtime would continue; (2) the voluntary  
19 retirement contributions are not unreasonable given Mrs. Ng's  
20 health problems; (3) the new retirement loan was used by Debtors  
21 to pay about \$8,000.00 in moving expenses. Debtors' declarations  
22 were offered to support these expenses and to detail Mrs. Ng's  
23 health issues. The declaration from Mr. Ng also provided updated  
24 pay advices through November 13, 2011, showing a decrease in his  
25 income between September 18 and November 13.

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26  
27       <sup>3</sup> The annual pay period ending September 18, 2011 covered 38  
28 weeks. The UST divided the gross amount of \$99,508.10 by 38,  
multiplied that number by 52, and divided by 12 to arrive at a  
gross monthly income of \$11,347.40.

1       At the beginning of the second hearing on the motion to  
2 dismiss on November 16, 2011, the bankruptcy court indicated its  
3 concern with what it felt were the dilatory tactics of Debtors:

4       You know, I'm troubled with this case. It's taken too  
5 long. The U.S. Trustee's office is clearly being jerked  
6 around. The facts, the arguments, everything changes on  
7 the Debtors' side when things are raised by the Office  
8 of the United States Trustee. The case – it's a chapter  
9 case. It's – it's a year and a half old. On the  
10 other hand, if we believe everything that the Debtors  
11 say, there is a certain sympathetic push on their side.

12      Hr'g Tr. 2:23-3:5, November 16, 2011. After hearing arguments of  
13 counsel, the bankruptcy court ruled that Debtors "do have the  
14 ability to file a plan in chapter 13." Id. at 23:18-20. The  
15 court granted the UST's motion to dismiss the Debtors' bankruptcy  
16 case under § 707(b) (3) (B).

17      The bankruptcy court entered extensive findings of fact and  
18 conclusions of law and an order dismissing the bankruptcy case on  
19 November 28, 2011. In making its decision, the court applied the  
20 criteria in Price v. U.S. Tr. (In re Price), 353 F.3d 1135,  
21 1139-40 (9th Cir. 2004), to determine if the totality of the  
22 circumstances justified dismissal under § 707(b) (3). The court  
23 pointed out that, even if it accepted Mr. Ng's most recent  
24 declaration, with accompanying new pay advices that showed a  
25 decrease in annualized monthly income, and even if the court were  
to allow the pension contributions and pension loan repayments  
challenged by the UST, Debtors would still have \$2,201.33 in net  
monthly income with which they could repay unsecured creditors.

26      Nevertheless, the bankruptcy court agreed with the UST  
27 regarding the impropriety of allowing Debtors to contribute to the  
28 retirement account and access pension loans under these

1 circumstances. In part, the court noted that it would be "unfair  
2 to creditors to allow the debtors . . . to commit part of their  
3 earnings to the payment of their own retirement fund." Conclusion  
4 of Law ¶ 30, November 28, 2011. The court observed that Mr. Ng  
5 was only 43 years old, and that he had indicated that he would not  
6 retire for at least twenty years. Moreover, the court found, the  
7 future health expenditures identified for Mrs. Ng were  
8 speculative, and that Mr. Ng had an existing military pension.  
9 Under these facts, the court concluded that the Debtors' intent to  
10 continue monthly contributions to a second pension plan of \$264.15  
11 was "not reasonably necessary for the support of Debtors for  
12 purposes of analyzing the Debtors' ability to repay creditors."  
13 Conclusion of Law ¶ 32, November 28, 2011.

14 Debtors filed a timely notice of appeal on December 11, 2011.

15 **JURISDICTION**

16 The bankruptcy court had jurisdiction under 28 U.S.C.  
17 §§ 1334(b) and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.  
18 § 158.

19 **ISSUE**

20 Whether the bankruptcy court abused its discretion in  
21 dismissing the Debtors' bankruptcy case under § 707(b)(3)(B).

22 **STANDARD OF REVIEW**

23 A bankruptcy court's decision to dismiss a case under  
24 § 707(b)(3)(B) is reviewed for abuse of discretion. In re Price,  
25 335 F.3d at 1138; Gomes v. U.S. Tr. (In re Gomes), 220 B.R. 84, 86  
26 (9th Cir. BAP 1998). In determining whether a bankruptcy court  
27 abused its discretion, we review whether the bankruptcy court  
28 applied the correct rule of law. United States v. Hinkson, 585

1 F.3d 1247, 1262 (9th Cir. 2009) (en banc). We then determine  
2 whether the court's application of that rule was illogical,  
3 implausible, or without support in inferences that may be drawn  
4 from the facts in the record. *Id.* (quoting Anderson v. City of  
5 Bessemer City, N.C., 470 U.S. 564, 577 (1985)).

6 **DISCUSSION**

7 Section 707(b)(1) and (3)(B) of the Bankruptcy Code operate  
8 in tandem to allow a bankruptcy court to dismiss a chapter 7 case  
9 for abuse of the bankruptcy process based on the totality of the  
10 circumstances:

11 **§ 707. Dismissal of a case or conversion to a case**  
12 **under chapter 11 or 13 . . . (b)** (1) After notice and a  
hearing, the court, on . . . a motion by the United  
13 States trustee . . . may dismiss a case filed by an  
individual debtor under this chapter whose debts are  
primarily consumer debts . . . if it finds that the  
granting of relief would be an abuse of the provisions  
of this chapter. . . . (3) In considering under  
14 paragraph (1) whether the granting of relief would be an  
abuse of the provisions of this chapter in a case in  
which the presumption in paragraph (2)(A)(i) does not  
arise or is rebutted, the court shall consider. . . .  
15 (B) [whether] the totality of the circumstances . . . of  
the debtor's financial situation demonstrates abuse.  
16

17 No guidance is provided in § 707(b)(3)(B) as to the factors a  
18 bankruptcy court should consider in evaluating a request for  
dismissal of a bankruptcy case for abuse under the totality of the  
19 circumstances, other than that those circumstances should relate  
20 to "the debtor's financial situation." While BAPCPA changed the  
21 standard for dismissal in this context from "substantial abuse" to  
22 "abuse," in analyzing the new § 707(b) the courts have recognized  
23 that it is "best understood as a codification of pre-BAPCPA case  
24 law and, as such, pre-BAPCPA case law is still applicable when  
25 determining whether to dismiss a case for abuse." In re Clark,

1 2012 Bankr. LEXIS 1639 \* 4 (Bankr. N.D. Cal. 2012) (quoting In re  
2 Stewart, 383 B.R. 429, 432 (Bankr. N.D. Ohio 2008)); In re  
3 Stewart, 410 B.R. 912, 922 (Bankr. D. Or. 2009). These bankruptcy  
4 courts, and the bankruptcy court in this appeal, have therefore  
5 continued to apply the non-exclusive list of factors to be  
6 considered when evaluating the totality of the circumstances  
7 identified for use under pre-BAPCPA Code provisions in In re  
8 Price:

9 (1) Whether the debtor has a likelihood of sufficient  
10 future income to fund a Chapter 11, 12, or 13 plan which  
would pay a substantial portion of the unsecured claims;  
11 (2) Whether the debtor's petition was filed as a  
consequence of illness, disability, unemployment, or  
some other calamity; (3) Whether the schedules suggest  
12 the debtor obtained cash advancements and consumer goods  
on credit exceeding his or her ability to repay them;  
13 (4) Whether the debtor's proposed family budget is  
excessive or extravagant; (5) Whether the debtor's  
14 statement of income and expenses is misrepresentative of  
the debtor's financial condition; and (6) Whether the  
15 debtor has engaged in eve-of-bankruptcy purchases.

16 353 F.3d at 1139-40. Although the Ninth Circuit indicated that  
17 this list was non-exclusive, it also held that:

18 The primary factor defining substantial abuse is the  
19 debtor's ability to pay his debts as determined by the  
ability to fund a Chapter 13 plan. Thus, we have  
20 concluded that a "debtor's ability to pay his debts  
will, standing alone, justify a section 707(b)  
dismissal."

21  
22 Id. at 1140 (quoting In re Kelly, 841 F.2d 908, 914 (9th Cir.  
23 1988)); see also Reed v. Anderson (In re Reed), 422 B.R. 214, 233  
24 (Bankr. C.D. Cal. 2009) (debtor's ability to pay constitutes abuse  
under totality of the circumstances test of § 707(b)(3)(B) even if  
25 debtor passes the means test of § 707(b)(2)).

26  
27 Whether a debtor has the ability to repay creditors under  
28 § 707(b)(3)(B) is a question of fact that requires a bankruptcy

1 court to examine the debtor's actual income and expenses. Ross-  
2 Tousey v. Neary (In re Ross-Tousey), 549 F.3d 1148, 1162 (7th Cir.  
3 2008). In performing this review, "courts may take into account  
4 both current and foreseeable circumstances." In re Hartwick, 359  
5 B.R. 16, 21 (D. N.H. 2007); see also Boyce v. U.S. Tr. (In re  
6 Boyce, 446 B.R. 447, 452 (D. Or. 2011); In re Reed, 422 B.R. at  
7 214, 232.

8 In this case, in evaluating the totality of the  
9 circumstances, the bankruptcy court examined Debtors' income and  
10 expenditures in two general areas: (1) as proposed in the original  
11 dismissal motion of the UST, that three adjustments to income for  
12 pension contribution, loan repayment, and tax payment should be  
13 disallowed and the freed-up money be made available to creditors;  
14 and (2) at the time of rendering the court's final decision, the  
15 increase in Debtors' income could be taken into consideration by  
16 the court in determining Debtors' net income available for payment  
17 to creditors. We perceive no error in the bankruptcy court's  
18 analysis and agree with the court that the totality of the  
19 circumstances established an adequate basis for dismissal under  
20 § 707(b) (3) (B).

21 A. The Retirement Contribution

22 In analyzing a § 707(b) motion, the Ninth Circuit has held  
23 that bankruptcy courts have discretion to determine whether  
24 retirement contributions are a necessary expense for a particular  
25 debtor based on the facts of each individual case. Hebbring v.  
26 U.S. Tr., 463 F.3d 902, 905 (9th Cir. 2006). The contributions  
27 should be allowed if it appears "reasonably necessary" for the  
28 future support of a debtor or the debtor's dependants. Craig v.

1     Educ. Credit Mgmt. Co. (In re Craig), 579 F.3d 1040 (9th Cir.  
2     2009). Because deciding whether contributions are reasonably  
3     necessary involves a factual question, the Ninth Circuit has  
4     instructed:

5         In making this fact-intensive determination, courts  
6     should consider a number of factors, including but not  
7     limited to: the debtor's age, income, overall budget,  
8     expected date of retirement, existing retirement  
9     savings, and amount of contributions; the likelihood  
   that stopping contributions will jeopardize the debtor's  
   fresh start by forcing the debtor to make up lost  
   contributions after emerging from bankruptcy; and the  
   needs of the debtor's dependents.

10     Hebbring, 463 F.3d at 907.

11             The bankruptcy court expressly discussed the Hebbring  
12     criteria in its decision. The court first noted that Debtors  
13     already were receiving a military pension payment. The court was  
14     also cognizant of Mr. Ng's age (forty-three) and the details of  
15     Debtors' income and budget. Mr. Ng had informed the UST that he  
16     would not retire for at least twenty years. The court reasoned  
17     that interrupting Debtors' retirement contributions for the three-  
18     to-five year term of a hypothetical chapter 13 plan would have  
19     "less of an impact when the retirement will not occur for two  
20     decades." Discounting the amount of retirement savings and lost  
21     contributions, the court concluded that Mr. Ng "could restart his  
22     contributions after completing payments to unsecured creditors and  
23     still set aside substantial amounts to fund a second pension  
24     fund." This finding is not clearly erroneous.

25             Debtors' primary concern about disallowance of the 401(k)  
26     plan contributions focused on the impact of the future medical  
27     bills of Mrs. Ng. Debtors had submitted the declaration of Mrs.  
28     Ng wherein she described her medical condition. However, there

1 was no evidence submitted from any professionals providing her  
2 care. The court had evidence that Debtors had "extensive" medical  
3 insurance coverage, and that Schedule J estimated medical expenses  
4 of only \$100.00 per month. The court decided that Debtors'  
5 concerns for the future were understandable but speculative.

6 Considering the record, the bankruptcy court did not clearly  
7 err in finding that the voluntary contribution being made to Mr.  
8 Ng's 401(k) plan was not reasonably necessary for Debtors'  
9 support, and the court did not abuse its discretion in disallowing  
10 the contribution as an adjustment to income.

11 B. The Pension Loan Repayment

12 The bankruptcy court also expressed misgivings with Debtors'  
13 continued payment of the new pension loan. It noted that a  
14 debtor's borrowing from a retirement account does not give rise to  
15 a secured or unsecured claim or debt under the Bankruptcy Code, a  
16 conclusion supported in the Ninth Circuit decision in Egebjerg v.  
17 Anderson (In re Egebjerg), 574 F.3d 1045, 1049 (9th Cir. 2009).<sup>4</sup>  
18 For this reason, the bankruptcy court aligned itself with what it  
19 described as a majority of courts, agreeing with one such court  
20 that,

21 Loan repayments to retirement accounts are considered  
22 "disposable income" because of their unique character;  
the debtor is in essence repaying a loan to himself.  
Thus it would be unfair to creditors to allow the  
23 debtors in the present case to commit part of their  
earnings to the payment of their own retirement fund.  
24

25 Conclusion of Law ¶ 30, November 28, 2011, citing In re Speith,

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26  
27       <sup>4</sup> Debtors object to consideration of Egebjerg in this  
context because Egebjerg concerned dismissal under § 707(b)(2).  
28 However, the UST cited to Egebjerg for the general proposition  
that a loan from a retirement account is not a debt, a holding  
upon which the bankruptcy court and this Panel may rely in this  
setting. Simply put, Egebjerg decided that, via pension loan  
repayments, a debtor seeking a chapter 7 discharge should not be  
allowed to pay himself in preference to creditors.

1 427 B.R. 621, 625 (Bankr. N.D. Ohio 2009) (quoting In re Gonzalez,  
2 378 B.R. 168 (Bankr. N.D. Ohio 2007); accord In re Zeigler, 2009  
3 WL 5943248 (Bankr. D. Colo. 2009); McVay v. Otero (In re Otero),  
4 371 B.R. 190 (Bankr. W.D. Tex. 2007); In re Esquivel, 239 B.R. 146  
5 (Bankr. R.D. Mich. 1999).

6 The bankruptcy court concluded that Debtors' pension loan  
7 repayment of \$238.68 each month should be disallowed as an income  
8 adjustment and made available to pay unsecured debts. This ruling  
9 was not clearly erroneous. The bankruptcy court did not abuse its  
10 discretion in disallowing this payment as an adjustment to  
11 Debtors' income.

12 C. The Tax Payment

13 Finally, as to the \$400.00 monthly payment Debtors were  
14 making to satisfy a prepetition income tax liability, the  
15 bankruptcy court earlier in the case had observed that such a  
16 payment, standing alone, was probably not abusive because the  
17 amount Debtors proposed to exclude from their income on account of  
18 the payment was only "slightly higher than the amount they would  
19 have to pay under a chapter 13 plan." Memorandum of Decision at  
20 11, February 9, 2011. However, the court changed its position  
21 after the final hearing on dismissal. Instead, the bankruptcy  
22 court determined that the tax debt was "a prepetition debt that  
23 would be paid in full using the Debtors' excess income in a  
24 chapter 13 plan." Conclusion of Law ¶ 33, November 28, 2011. If  
25 Debtors paid the tax debt through a chapter 13 plan, it could be  
26 satisfied with payments of \$170.00 per month rather than the  
27 Debtors' proposed \$400.00 per month in chapter 7. Therefore, in a  
28 chapter 13 plan, Debtors would have an extra \$230.00 per month

1 that could be used to pay unsecured creditors. The bankruptcy  
2 court did not abuse its discretion in disallowing the \$400.00  
3 adjustment to income for purposes of analyzing Debtors' ability to  
4 pay creditors.

**D. Debtors' Objections to the Disallowed Income Adjustments**

6       Debtors challenge the bankruptcy court's decision to disallow  
7 the pension contribution and loan repayment. They argue that the  
8 UST failed to meet its burden of proving grounds for disallowance  
9 of these payments at the first hearing on the motion to dismiss on  
10 January 19, 2011. Specifically, Debtors cite to the bankruptcy  
11 court's Memorandum of Decision entered after that hearing, wherein  
12 it stated:

13 There is not enough evidence for me to determine whether  
14 the Craig factors<sup>5</sup> are met. The only evidence offered  
15 by the U.S. Trustee, which bears the initial burden, is  
16 Mr. and Mrs. Ng's testimony that they do not anticipate  
17 retiring for about twenty years, and Mr. Ng is already  
receiving some retirement income from another source.  
Although the debtors do not bear the burden of proof,  
Mr. and Mrs. Ng have not provided any evidence that  
these contributions are reasonable and necessary for  
their family's maintenance and support.

19 Memorandum of Decision at 11, February 9, 2011. In their opening  
20 brief in this appeal, Debtors argue that this excerpt from the  
21 bankruptcy court's decision represents a ruling by the court that  
22 the UST failed to carry its burden of proof on the pension  
23 contribution/loan payment issues because it did not offer evidence  
24 to address several of the Hebrbring criteria:

25 No evidence was offered as to the Ngs' then-existing  
retirement savings or as to whether stopping all

<sup>5</sup> In In re Craig, the Ninth Circuit panel adopted the Hebbring factors in determining whether retirement contributions should be allowed. 579 F.3d at 1047.

1       retirement contributions for 60 months would jeopardize  
2       their ability to retire at a reasonable level of  
3       comfort.

3       Debtors' Op. Br. at 29.

4           Of course, Debtors' argument incorrectly assumes that the UST  
5       must submit proof concerning all the Hebbring factors to establish  
6       that pension contributions or pension loan repayments should be  
7       disallowed in a given case. Instead, the Ninth Circuit merely  
8       instructs that bankruptcy courts "should consider" the  
9       nonexclusive list of Hebbring factors. There is no requirement  
10      that proof of all the factors be submitted.

11          The bankruptcy court acknowledged that it had considered the  
12       evidence offered by the UST on at least two of the Hebbring  
13       factors: Mr. Ng's age, and his expectations of working at least  
14       twenty more years. Although not explicitly acknowledged, the  
15       court also had before it evidence that Debtors were receiving a  
16       military pension. Debtors' complaint that the UST had not  
17       adequately investigated the amount of their available savings is  
18       disingenuous because they provided inconsistent statements to the  
19       UST regarding those savings. And although Debtors' original  
20       schedules I and J had indicated a loan repayment and pension  
21       contribution, they had denied that they had any retirement savings  
22       plan or pension in their original Schedule B at line 12. Dkt. No.  
23       1 at 33.

24          In commenting on its decision to require Debtors to provide  
25       evidence on the reasonableness of their contributions and  
26       repayments to the retirement plan, the court observed:

27          What do the Debtors reasonably need to have in their  
28       retirement plan? That's the bottom line. Does the  
      money end up in the retirement plan or does it go to the

1 Creditors? And if they have a reasonable need for that,  
2 then maybe it's not abusive, but if they don't have a  
3 reasonable need for that, in light of all their  
circumstances, then perhaps it is abusive.

4 Hr'g Tr. 5:19-25, February 23, 2011. Fairly read, the bankruptcy  
5 court's comments noted that, from the evidence submitted thus far,  
6 Debtors must establish a reasonable need for the pension plan  
7 contributions and loan repayments, or the bankruptcy court might  
8 consider them, in light of the totality of the circumstances, to  
9 be abusive. We consider the bankruptcy court's statements as an  
10 acknowledgment that the UST had established sufficient facts to  
11 shift to the debtors the burden to produce other evidence to show  
12 the reasonableness of the contributions and repayments. It was  
13 not an error for the bankruptcy court to continue the dismissal  
14 motion for a further hearing to afford Debtors the opportunity to  
15 do so. Trial courts are vested with "ample discretion to control  
16 their dockets." Med. Lab. Mgmt. Consultants v. Am. Broad. Co.,  
17 306 F.3d 806, 826 (9th Cir. 2002). This discretion necessarily  
18 includes the option to refuse to rule on particular issues, id.,  
19 and to consider additional evidence. Pit River Home & Agr. Coop.  
20 Ass'n v. United States, 30 F.3d 1088, 1096 (9th Cir. 1994).

21 In sum, we conclude that the bankruptcy court did not err in  
22 its decision to disallow Debtors' pension contribution, loan  
23 repayment and tax payment<sup>6</sup> as adjustments to income in its  
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25 <sup>6</sup> In this appeal, Debtors' have paid little attention to the  
fact that they were making payments on their prebankruptcy tax  
26 debt. They address this circumstance is a single sentence in  
their brief: "The Ngs submit that the court erred in disallowing  
27 the tax payment for purposes of section 707(b)(3)(B), because in a  
hypothetical chapter 13 case, the Ngs would be required to pay  
28 this priority tax in full except in the unlikely event that the  
Internal Revenue Service agreed to different treatment of the

(continued...)

1   § 707(b) (3) abuse analysis. Even if it were not to consider the  
2   increases in Debtors' income following the first hearing on  
3   dismissal, the evidence showed that Debtors could potentially pay  
4   their creditors an additional \$1,466.38 per month over the modest  
5   amounts they acknowledged. Since Debtors had the ability to pay  
6   such a significant amount to their creditors, under the totality  
7   of the circumstances, granting them relief under chapter 7 case  
8   would be an abuse, and the bankruptcy court properly dismissed the  
9   case under § 707(b) (3) (B).

10   E. The bankruptcy court did not abuse its discretion in  
11   considering the increased income of Debtors.

12       The bankruptcy court also determined that Debtors' ability to  
13   pay their unsecured creditors was further enhanced by the  
14   increases in Mr. Ng's income that occurred after the first hearing  
15   on dismissal. We find no abuse of discretion in this  
16   determination because, simply put, as the weight of authority  
17   instructs, the bankruptcy court may properly consider changes in  
18   Debtors' circumstances, and events affecting their income and  
19   expenses, that occur between the time of the petition, the filing  
20   of the motion for dismissal, and the time of any decision on the  
21   § 707(b) motion.

22       The Fifth Circuit addressed this issue in U.S. Tr. v. Cortez  
23   (In re Cortez), 457 F.3d 448, 455-56 (5th Cir. 2006). It held

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25       <sup>6</sup>(...continued)  
26   claim." Debtors' Op. Br. at 36. It is true that Debtors must pay  
27   this debt, and it is not subject to discharge in a chapter 7 case.  
28   However, the bankruptcy court could properly consider the payment  
   as a measure of Debtors' ability to pay their debts. Moreover,  
   because the tax debt need only be repaid in full over the full  
   term of a hypothetical chapter 13 plan, Debtors would have  
   additional funds monthly to pay to their other creditors because  
   the per month payment to the IRS would be less.

1 that the ability to repay creditors is based on the debtor's  
2 financial circumstances at the time of discharge. *Id.* This  
3 conclusion was based on the plain text of § 707(b) (1), which  
4 requires the bankruptcy court to determine whether "the granting  
5 of relief" would be an abuse of chapter 7. The court explained  
6 that "the granting of relief" is a reference to the discharge a  
7 debtor receives in a chapter 7 case, and therefore the bankruptcy  
8 court "may act on the basis of any development occurring before  
9 the discharge is granted." *Id.* Although the Cortez decision was  
10 based on pre-BAPCPA law, Congress did not change the statutory  
11 language requiring the bankruptcy court to determine whether "the  
12 granting of relief" to the debtor would constitute an abuse.  
13 Compare § 707(b) (1986) with § 707(b) (1) (2006).<sup>7</sup> The Supreme  
14 Court has cautioned that we should "not read the Bankruptcy Code  
15 to erode past bankruptcy practice absent a clear indication that  
16 Congress intended such a departure." Hamilton v. Lanning, 130  
17 S.Ct. 2464, 2473 (2010). No intent by Congress to change the rule  
18 announced in Cortez is evident from BAPCPA.

19 Moreover, Debtors concede that the case law lines up against  
20 them on this issue:

21 The Ngs acknowledge that a majority of courts [have]  
22 held that it is appropriate to look at post-petition  
events affecting income and expenses in evaluating  
whether the granting of relief would be an abuse under  
section 707(b) (3). See, e.g., In re Crink, 402 B.R.  
23 129, 170-76 (Bankr. M.D.N.C. 2009); In re Dowleyne, 400  
24 B.R. 840, 846 (Bankr. M.D. Fla. 2008); In re Henebury,  
361 B.R. 595, 607-11 (Bankr. S.D. Fla. 2007); and In re  
25 Pennington, 348 B.R. 647, 651 (Bankr. D.Del. 2006).

26 Debtors' Op. Br. at 31.

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28 <sup>7</sup> BAPCPA divided the older § 707(b) into seven subsections.  
The new § 707(b) (1) retains the wording "the granting of relief"  
and context from the older statute.

1        In reviewing Debtors' income and expenses, the bankruptcy  
2 court examined each of the Price factors, "in particular reviewing  
3 the Debtors' ability to repay creditors over time." Finding of  
4 Fact ¶ 26, November 28, 2011. In its decision, the bankruptcy  
5 court found that, even accepting Mr. Ng's declaration filed  
6 shortly before the last hearing showing a decrease in income for  
7 the preceding two months, Debtors' gross monthly income from wages  
8 and his military pension totaled \$12,231.86. As it noted, even if  
9 the bankruptcy court were to allow Debtors to make the pension  
10 plan contributions and loan and tax payments opposed by the UST,  
11 Debtors would still have over \$2,200.00 in net monthly income with  
12 which they could repay unsecured creditors. But, as discussed  
13 above, if those three monthly expenditures are disregarded, the  
14 court calculated that the Debtors' monthly net income available  
15 for payment to unsecured creditors would be \$3,155.17.

16       Given these amounts, the bankruptcy court concluded that  
17 Debtors "have the ability to repay unsecured creditors over time."  
18 Conclusion of Law ¶¶ 34, 35, November 28, 2011. This analysis  
19 satisfied the first Price criterion, and the Panel is satisfied  
20 that it alone justifies dismissal under § 707(b)(3)(B). But the  
21 bankruptcy court also found that two other Price criteria were  
22 satisfied. The court found that the bankruptcy filing was not  
23 caused by illness, disability, unemployment or other calamity. In  
24 addition, the court determined that the Debtors' amended Schedules  
25 I and J "understated the debtor's gross wages received in 2011."  
26 Conclusion of Law ¶ 36, November 28, 2011.

27       Debtors' objections to the bankruptcy court's consideration  
28 of their post-motion increase in income fall into two categories:

1 (1) they object to the bankruptcy court's conclusion that they  
2 understated their income, and its calculation of net monthly  
3 income; and (2) they object that their increase in income was a  
4 circumstance not discussed "with particularity" in the UST's  
5 original motion to dismiss and, thus, the UST and bankruptcy court  
6 were precluded from considering these circumstances by Rule  
7 1017(e). Debtors' objections lack merit.

8 As to the court's conclusions regarding increases in income,  
9 the UST had provided evidence to the court that there was an  
10 increase in the Debtors' income between amounts listed in the  
11 original schedules and amended schedules. The UST also submitted  
12 pay advices, provided by Debtors, showing an additional  
13 significant income increase during the summer months of 2011,  
14 which was not reflected in their amended Schedules I. Debtors did  
15 not dispute that they experienced some increase in income during  
16 the pendency of the bankruptcy case. However, they contended that  
17 the inclusion of the "spike" in income during the summer months of  
18 2011 was inappropriate for purposes of weighing the UST's  
19 dismissal motion because, as stated in the declaration of Mr. Ng,  
20 "I have no reason to expect that my work hours will increase in  
21 the foreseeable future." In response, the UST objected both to  
22 the timeliness<sup>8</sup> of Mr. Ng's declaration, as well as his competence  
23 to testify regarding future employment hours. Significantly,  
24 Debtors provided no evidence from the employer regarding Mr. Ng's  
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26       <sup>8</sup> The Ng declaration regarding the summer spike was  
27 submitted the night before the final hearing on the motion to  
28 dismiss. Although the bankruptcy court did not strike the  
declaration as the UST requested, it did cite the late submission  
as an example of how "[t]he U.S. Trustee's office is clearly being  
jerked around."

1 potential future overtime.

2        We decline to disturb the bankruptcy court's calculations of  
3 Debtors' monthly net income. The UST's evidence showed, without  
4 contradiction, that Mr. Ng's earnings had substantially increased  
5 during the bankruptcy case, even excluding the summer income  
6 spike, as compared with Debtors' proof suggesting that Mr. Ng was  
7 not expecting future overtime income. In making a choice between  
8 these two versions of the facts, the bankruptcy court did not  
9 clearly err in finding that Debtors had incorrectly stated their  
10 income and expenses on their amended schedules, nor did it err in  
11 its calculations that Debtors had significant net monthly income  
12 with which to pay unsecured creditors. Where there are two  
13 permissible views of the evidence, the fact finder's choice  
14 between them cannot be clearly erroneous. Kekauoha-Alisa v.  
15 Ameriquest Mortg. Co. (In re Kekauoha-Alisa), 674 F.3d 1083, 1092  
16 (9th Cir. 2012) (citing Anderson, 470 U.S. at 574).

17        While these factual findings are sufficient for us to affirm  
18 the bankruptcy court's dismissal order, we also agree with the  
19 bankruptcy court's decision to disallow the three adjustments to  
20 income urged by Debtors in this case. Consequently, the  
21 bankruptcy court could properly conclude that the Debtors' monthly  
22 net income at the time of the second hearing was \$3,155.17. We  
23 agree with the bankruptcy court that this sum demonstrated that  
24 the Debtors have the ability to repay unsecured creditors over  
25 time. Because the Debtors had the ability to repay their  
26 creditors, under the Price criteria, dismissal of the chapter 7  
27 bankruptcy case under § 707(b)(3)(B) as an "abuse" was justified.

28        Debtors also argue that the bankruptcy court could not take

1 into consideration their post-bankruptcy increase in income,  
2 because it was not pleaded "with particularity" in the UST's  
3 original motion to dismiss. Debtors based this contention on Rule  
4 1017(e), which provides in relevant part:

5 (e) Dismissal of an individual debtor's chapter 7 case,  
6 or conversion to a case under chapter 11 or 13, for  
7 abuse. The court may dismiss or, with the debtor's  
8 consent, convert an individual debtor's case for abuse  
9 under § 707(b) only on motion and after a hearing on  
10 notice to the debtor, the trustee, the United States  
11 trustee, and any other entity as the court directs. (1)  
12 Except as otherwise provided in § 704(b)(2), a motion to  
13 dismiss a case for abuse under § 707(b) or (c) may be  
14 filed only within 60 days after the first date set for  
the meeting of creditors under § 341(a), unless, on  
request filed before the time has expired, the court for  
cause extends the time for filing the motion to dismiss.  
The party filing the motion shall set forth in the  
motion all matters to be considered at the hearing. In  
addition, a motion to dismiss under § 707(b)(1) and (3)  
shall state with particularity the circumstances alleged  
to constitute abuse.

15 Rule 1017(e). Debtors argue that Rule 1017(e)(1) required the UST  
16 to plead with particularity all circumstances it contends  
17 constitute abuse in its dismissal motion, and that the UST was  
18 thereafter barred from relying upon other facts or circumstances  
19 to support dismissal in subsequent pleadings or proceedings.

20 The language of the Rule does not support Debtors'  
21 interpretation. The Rule requires the UST to "set forth in the  
22 motion all matters to be considered at the hearing." The UST  
23 complied with that requirement by arguing "with particularity" in  
24 its original motion that Debtors had sufficient income to pay  
25 unsecured creditors, and that three adjustments to the amount of  
26 income advocated by Debtors were required. The hearing required  
27 by Rule 1017(e) was held, and the UST presented its evidence.  
28 Although the UST's evidence was not deemed conclusive by the

1 bankruptcy court as a result of the first hearing, the court  
2 implicitly determined that the UST had offered sufficient evidence  
3 to require that Debtors justify their proposed deductions from  
4 income. This required a continued hearing. But before the  
5 hearing was conducted, fundamental changes in Debtors' financial  
6 situation occurred. At the hearing, the bankruptcy court was  
7 required to consider both Debtors' present and foreseeable  
8 circumstances. When it did, it decided that Debtors could pay  
9 their creditors, and that dismissal under § 707(b)(3)(B) for abuse  
10 was proper.

11       Debtors argue in their briefs that "The Ngs respectfully  
12 suggest that Rule 1017(e)(1) generally provides a sensible and  
13 just cutoff for the consideration of post-petition events in a  
14 section 707(b)(3)(B) motion." Reply Br. at 10. However, Debtors'  
15 narrow reading of Rule 1017(e)(1) is unsustainable in light of the  
16 requirements of § 707(b)(1) and the cases interpreting it. To  
17 hold that § 707(b)(1)'s requirement that the bankruptcy court  
18 determine whether "the granting of relief" would be an abuse of  
19 chapter 7 is limited to facts existing at the time of the filing  
20 of their petition, or the UST's motion to dismiss, would deprive  
21 the bankruptcy court of considering "any development occurring  
22 before the discharge is granted." In re Cortez, 157 F.3d at 455.  
23 Adoption of Debtors' approach violates a basic rule of  
24 construction of the Code: that any real or perceived conflict  
25 between a provision of the Bankruptcy Code and a Rule must be  
26 resolved in favor of the Bankruptcy Code. See 28 U.S.C. § 2075;  
27 United States v. Towers (In re Pac. Atl. Trading Co.), 33 F.3d  
28 1064, 1066 (9th Cir. 1994). We thus reject Debtors' argument that

1 Rule 1017(e) (1) limits a bankruptcy judge's discretion to consider  
2 post-petition changes in a debtor's circumstances in examining the  
3 totality of the circumstances in making its final determination on  
4 a request for dismissal under § 707(b) (3) (B).

5 All things considered, we conclude that the bankruptcy court  
6 applied the correct legal rules in making its rulings, and its  
7 findings were not illogical, implausible, or without support in  
8 inferences that may be drawn from the facts in the record. The  
9 bankruptcy court therefore did not abuse its discretion in  
10 dismissing Debtors' bankruptcy case under § 707(b) (3) (B).

11 **CONCLUSION**

12 We AFFIRM the decision of the bankruptcy court.

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