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

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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

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.

1 PAPPAS, Bankruptcy Judge:

2

3 Christopher Dean Ng and Sheila Marie Ng ("Debtors") appeal
4 the bankruptcy court's order dismissing their chapter 7¹ case
5 under § 707(b)(3)(B). We AFFIRM.

6

FACTS

7 On June 30, 2010, the date Debtors filed a chapter 7
8 bankruptcy petition, Mr. Ng was employed as an electronic
9 technician for GE International. According to Debtors' original
10 Schedule I, Mr. Ng received \$7,439.47 as his monthly salary; he
11 was also eligible for overtime compensation. In addition, he
12 received a military pension of \$1,439.88 per month. Mrs. Ng was
13 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

26

27 ¹ Unless otherwise indicated, all chapter, section and rule
28 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, 2011.² 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

27 ² The UST has not appealed the bankruptcy court's decision
28 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.³ 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.

26
27 ³ 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 7 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
26 to allow the pension contributions and pension loan repayments
27 challenged by the UST, Debtors would still have \$2,201.33 in net
28 monthly income with which they could repay unsecured creditors.

29 Nevertheless, the bankruptcy court agreed with the UST
30 regarding the impropriety of allowing Debtors to contribute to the
31 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
13 hearing, the court, on . . . a motion by the United
14 States trustee . . . may dismiss a case filed by an
15 individual debtor under this chapter whose debts are
16 primarily consumer debts . . . if it finds that the
17 granting of relief would be an abuse of the provisions
18 of this chapter. . . . (3) In considering under
19 paragraph (1) whether the granting of relief would be an
20 abuse of the provisions of this chapter in a case in
21 which the presumption in paragraph (2) (A) (i) does not
22 arise or is rebutted, the court shall consider- . . .
23 (B) [whether] the totality of the circumstances . . . of
24 the debtor's financial situation demonstrates abuse.

25 No guidance is provided in § 707(b) (3) (B) as to the factors a
26 bankruptcy court should consider in evaluating a request for
27 dismissal of a bankruptcy case for abuse under the totality of the
28 circumstances, other than that those circumstances should relate
to "the debtor's financial situation." While BAPCPA changed the
standard for dismissal in this context from "substantial abuse" to
"abuse," in analyzing the new § 707(b) the courts have recognized
that it is "best understood as a codification of pre-BAPCPA case
law and, as such, pre-BAPCPA case law is still applicable when
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
11 would pay a substantial portion of the unsecured claims;
12 (2) Whether the debtor's petition was filed as a
13 consequence of illness, disability, unemployment, or
14 some other calamity; (3) Whether the schedules suggest
15 the debtor obtained cash advancements and consumer goods
16 on credit exceeding his or her ability to repay them;
17 (4) Whether the debtor's proposed family budget is
18 excessive or extravagant; (5) Whether the debtor's
19 statement of income and expenses is misrepresentative of
20 the debtor's financial condition; and (6) Whether the
21 debtor has engaged in eve-of-bankruptcy purchases.

22 353 F.3d at 1139-40. Although the Ninth Circuit indicated that
23 this list was non-exclusive, it also held that:

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

29 Id. at 1140 (quoting In re Kelly, 841 F.2d 908, 914 (9th Cir.
30 1988)); see also Reed v. Anderson (In re Reed), 422 B.R. 214, 233
31 (Bankr. C.D. Cal. 2009) (debtor's ability to pay constitutes abuse
32 under totality of the circumstances test of § 707(b)(3)(B) even if
33 debtor passes the means test of § 707(b)(2)).

34 Whether a debtor has the ability to repay creditors under
35 § 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).⁴
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;
23 the debtor is in essence repaying a loan to himself.
24 Thus it would be unfair to creditors to allow the
25 debtors in the present case to commit part of their
26 earnings to the payment of their own retirement fund.

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

26
27 ⁴ Debtors object to consideration of Egebjerg in this
28 context because Egebjerg concerned dismissal under § 707(b)(2).
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.

5 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 factors⁵ 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
18 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 Hebbring criteria:

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

27
28 ⁵ 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
4 circumstances, then perhaps it is abusive.

5 Hr'g Tr. 5:19-25, February 23, 2011. Fairly read, the bankruptcy
6 court's comments noted that, from the evidence submitted thus far,
7 Debtors must establish a reasonable need for the pension plan
8 contributions and loan repayments, or the bankruptcy court might
9 consider them, in light of the totality of the circumstances, to
10 be abusive. We consider the bankruptcy court's statements as an
11 acknowledgment that the UST had established sufficient facts to
12 shift to the debtors the burden to produce other evidence to show
13 the reasonableness of the contributions and repayments. It was
14 not an error for the bankruptcy court to continue the dismissal
15 motion for a further hearing to afford Debtors the opportunity to
16 do so. Trial courts are vested with "ample discretion to control
17 their dockets." Med. Lab. Mgmt. Consultants v. Am. Broad. Co.,
18 306 F.3d 806, 826 (9th Cir. 2002). This discretion necessarily
19 includes the option to refuse to rule on particular issues, id.,
20 and to consider additional evidence. Pit River Home & Agr. Coop.
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 payment⁶ as adjustments to income in its

24
25 ⁶ In this appeal, Debtors' have paid little attention to the
26 fact that they were making payments on their prebankruptcy tax
27 debt. They address this circumstance in a single sentence in
28 their brief: "The Ngs submit that the court erred in disallowing
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
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

24 _____
25 ⁶(...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).⁷ 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
23 events affecting income and expenses in evaluating
24 whether the granting of relief would be an abuse under
25 section 707(b)(3). See, e.g., In re Crink, 402 B.R.
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 ⁷ 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 timeliness⁸ 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 ⁸ 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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