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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. MT-10-1465-PePaH
)
 DAVID C. WELSH and SHARON N.) Bk. No. 10-61285
 WELSH,)
)
 Debtors.)
)
 _____)
)
 ROBERT G. DRUMMOND, Chapter 13))
 Trustee,)
)
 Appellant,)
)
 v.) **O P I N I O N**
)
 DAVID C. WELSH; SHARON N.)
 WELSH,)
)
 Appellees.)
 _____)

Argued and Submitted on November 16, 2011
at Pasadena, California

Filed - February 17, 2012

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

Honorable Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding

Appearances: Robert G. Drummond appeared pro se.
 Edward A. Murphy appeared for appellees David C.
 and Sharon N. Welsh

Before: PERRIS,¹ PAPPAS, and HOLLOWELL, Bankruptcy Judges.

¹ Hon. Elizabeth L. Perris, Bankruptcy Judge for the
 District of Oregon, sitting by designation.

1 PERRIS, Bankruptcy Judge:

2
3 In this chapter 13² case, the bankruptcy court confirmed a
4 chapter 13 plan under which debtors David and Sharon Welsh
5 ("debtors") proposed to retain and continue to make payments on
6 six vehicle loans and that did not take into account monthly
7 Social Security income. The chapter 13 trustee appeals the order
8 confirming the plan, arguing that the bankruptcy court should
9 have considered both the payments on what he characterizes as
10 unnecessary vehicles and the Social Security income in
11 determining whether the plan was proposed in good faith.

12 Because we conclude that the bankruptcy court applied the
13 correct legal standard in determining good faith, we AFFIRM.

14 FACTS

15 Debtors filed a chapter 13 petition in May 2010. Debtors
16 had moved to Montana from North Carolina in 2006. After living
17 in rented housing for a time, debtors purchased an unfinished
18 house and obtained a construction loan to complete it. When the
19 construction loan was insufficient to pay for completion of the
20 work on the house, debtors used credit cards to finance the rest
21 of the construction.

22 After making payments on the credit card debt for 18 months,
23 debtors consolidated that debt at an interest rate of 15 percent.
24 Thereafter, they encountered financial difficulties and filed a
25 chapter 13 bankruptcy petition.

26
27
28 ² Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. § 101 et seq.

1 Sharon Welsh ("Sharon") works as a nurse at a hospital,
2 earning \$6,975 per month. She also receives \$1,100 per month in
3 pension income from an earlier employer. David Welsh ("David")
4 is unable to work because of a medical condition, and his
5 condition will not improve. He is retired and unemployed, but
6 reported that he receives \$358 from wages, salary and commission
7 each month. He also receives \$1,165 per month in Social Security
8 retirement income.

9 Debtors valued their house at \$400,000, on which they owe
10 \$330,593. Their monthly mortgage payment is \$2,177. They
11 reported unsecured nonpriority claims of \$180,504.15, of which
12 \$60,000 is a guaranty of their daughter's student loan debt. The
13 bulk of the remainder is credit card debt.

14 They own and make payments on six motor vehicles. According
15 to debtors' schedules and the proofs of claim filed by secured
16 creditors, many of those vehicles are over-encumbered. According
17 to the schedules, debtors owe \$3,065 on one Honda ATV and \$4,500
18 on a second Honda ATV; each is valued at \$2,700.³ Debtors have a
19 debt of \$37,936 secured by an Airstream trailer valued at
20 \$23,000. They own a 2006 Subaru Outback valued at \$9,500 on
21 which debtors owe \$10,680; a 2005 Toyota Matrix worth \$2,200 on
22 which they owe \$1,380; and a 2005 Ford F-250 valued at \$10,000 on
23 which they owe \$10,838.

26 ³ The bankruptcy court found that AHFC had filed a claim
27 in the amount of \$2,533.15 secured by a 2007 ATV. If the \$2,700
28 value attributed to each ATV is correct, the one securing the
AHFC loan is not over-encumbered.

1 Although David owns the Toyota,⁴ it is used by debtors'
2 daughter, who is a medical resident. According to Sharon's
3 testimony, their daughter is unable to make the payments on the
4 Toyota because she pays approximately \$1,000 per month on student
5 loans of \$150,000.

6 Debtors use one of the ATVs to plow their driveway in the
7 winter. Debtors' house is at the top of a ridge, at the end of a
8 mile-long driveway with hairpin curves. Plowing is necessary
9 because the cars cannot make it up the driveway in the winter
10 unless the driveway is plowed. They also use the ATVs to drive
11 on nearby Nature Conservancy land. They use the Airstream
12 trailer as lodging when they have guests staying with them.

13 Debtors completed Form B22C, which contains calculations
14 necessary to determine both the required length of a chapter 13
15 plan and the amount that must be paid to unsecured creditors
16 through the plan. The form requires a calculation of income
17 along with deductions of expenses, to determine what disposable
18 income a debtor has available.

19 Debtors' Form B22C lists current monthly income of
20 \$8,116.31, which does not include David's Social Security income.
21 This income is above the median for a household of the size of
22 debtors' household.

23 In calculating their deductions from income, debtors
24 deducted, in addition to other unchallenged deductions, monthly
25 payments on the six debts secured by motor vehicles, which total

26
27 ⁴ Sharon testified that she bought the Toyota. However,
28 the bankruptcy court found that the certificate of title and
promissory note both show that David is the owner.

1 \$1,350.22 per month. Deducting all of the expenses from the
2 current monthly income resulted in monthly disposable income
3 listed on Line 59 of Form B22C of \$218.12.

4 Debtors' Schedules I and J, which set out anticipated income
5 and actual expenses, show monthly income of \$7,692.68 (which
6 includes the Social Security payments) and expenses of \$7,298.00,
7 for a monthly net income of \$394.68. Schedule J shows that the
8 monthly payments on the vehicles total \$1,879, including \$113 and
9 \$158 for the two ATVs, \$419 for the Airstream trailer, and \$150
10 for the Toyota that is used by debtors' daughter.

11 Debtors' plan proposes to pay \$125 per month for 30 months,
12 then \$500 per month for 30 months, for a total of \$18,750 in plan
13 payments. The increase is a result of paying off the Subaru,
14 Ford F-250, and Toyota during the life of the plan. Sharon
15 testified that, although the payments on those three vehicles
16 will end during the plan period of sixty months, they will have
17 to replace the Subaru, because it has high mileage and she drives
18 it 75 miles every day.

19 The trustee objected to confirmation of debtors' plan,
20 arguing that it was not proposed in good faith. He objected to
21 what he characterizes as "minuscule" payments to unsecured
22 creditors while debtors live in a \$400,000 home and make payments
23 on several secured claims, and that debtors failed to commit all
24 of their disposable income to payments but instead are deducting
25 payments for unnecessary secured claims.

26 The court held a confirmation hearing at which it heard
27 testimony. The bankruptcy court wrote an opinion explaining the
28 decision to confirm the chapter 13 plan over the trustee's

1 objection. The court concluded that David's Social Security
2 income was properly excluded from the calculation of projected
3 disposable income. It also considered whether the plan was
4 proposed in good faith, as required by § 1325(a)(3). The court
5 took into account the totality of the circumstances and, in
6 particular, addressed the factors set out in Leavitt v. Soto (In
7 re Leavitt), 171 F.3d 1219, 1224-25 (9th Cir. 1999). The court
8 rejected the trustee's argument that the facts that debtor's plan
9 will pay only 8.5 percent of unsecured claims while debtors
10 retain and continue to make payments on a trailer, two ATVs, and
11 three vehicles, shows egregious conduct that indicates a lack of
12 good faith.

13 The court also pointed out that the payments on the secured
14 debts are authorized in the means test under § 707(b)(2)(A).
15 Debtors were current on all of those debts, so the court
16 refrained from determining whether the payments were reasonable.

17 The court rejected the trustee's argument that debtors'
18 exclusion of David's Social Security income from the disposable
19 income calculation shows a lack of good faith. The court
20 concluded that debtors had satisfied their burden of proving that
21 their plan was proposed in good faith, and overruled the
22 trustee's objections to confirmation.

23 The trustee appeals. He says that his argument is limited
24 to the bankruptcy court's determination of good faith, which he
25 argues was based on an incorrect view of the law. However, he
26 also argues that the court erred in allowing debtors' deductions
27 from income for the secured debt payments on what he views as
28 unnecessary, luxury items. Therefore, we will address both

1 issues.

2 ISSUES

- 3 1. Whether in calculating disposable income under § 1325(b) a
4 debtor can deduct expenses for payments on secured debts
5 regardless of the need for the collateral securing those
6 debts.
- 7 2. Whether the bankruptcy court applied the correct legal
8 standard in considering good faith under § 1325(a)(3).

9 STANDARD OF REVIEW

10 Both of the issues raised by the trustee relate to whether
11 the bankruptcy court applied the correct legal standard, which is
12 a question of law that we review de novo. Bunyan v. United
13 States (In re Bunyan), 354 F.3d 1149, 1150 (9th Cir. 2004); Shook
14 v. CBIC (In re Shook), 278 B.R. 815, 820 (9th Cir. BAP 2002).

15 DISCUSSION

16 1. Overview

17 Confirmation of a Chapter 13 plan is governed by § 1325.
18 The court shall confirm a plan if each of the requirements of
19 § 1325 are met. § 1325(a). The debtor has the burden to prove
20 that each element is met. Meyer v. Hill (In re Hill), 268 B.R.
21 548, 552 (9th Cir. BAP 2001).

22 Two of the Chapter 13 plan confirmation requirements are at
23 issue in this appeal. The first is the requirement that:

24 (B) the plan provides that all of the debtor's
25 projected disposable income to be received in the
26 applicable commitment period beginning on the date that
27 the first payment is due under the plan will be applied
28 to make payments to unsecured creditors under the plan.

§ 1325(b)(1).⁵ "Disposable income" is defined in § 1325(b)(2) as

⁵ This requirement applies only if the trustee or an
unsecured creditor objects to confirmation, which the trustee did
(continued...)

1 "current monthly income received by the debtor . . . less amounts
2 reasonably necessary to be expended" for certain expenses.

3 "Current monthly income" is defined in § 101(10A) as the debtor's
4 average monthly income received in the six months before
5 bankruptcy, "but excludes benefits received under the Social
6 Security Act[.]" § 101(10A) (A), (B). For debtors whose current
7 monthly income exceeds the median income for households of the
8 same size in the debtor's state, "[a]mounts reasonably necessary
9 to be expended under paragraph (2), other than subparagraph
10 (A) (ii) of paragraph (2), shall be determined in accordance with
11 subparagraphs (A) and (B) of section 707(b) (2) [.]" § 1325(b) (3).

12 The second requirement at issue in this appeal is that "the
13 plan has been proposed in good faith and not by any means
14 forbidden by law[.]" § 1325(a) (3).

15 2. Disposable income

16 The first issue is whether debtors correctly deducted their
17 payments on secured debt from their current monthly income to
18 determine their monthly disposable income. Although the trustee
19 says that his "disposable income objection is not at issue in
20 this appeal[.]" Appellant's Brief at 2, he devotes a good deal of
21 his brief to arguing that the debts secured by unnecessary,
22 "luxury" property should not be allowed as deductions in
23 calculating disposable income that is then projected over the
24 life of the plan.⁶ Given the internal inconsistency in the brief

25
26 ⁵ (...continued)
in this case.

27 ⁶ Although the trustee argued to the bankruptcy court
28 (continued...)

1 regarding whether, for above-median income debtors, all current
2 secured debt payments are proper expense deductions regardless of
3 the debtor's reasonable need for the collateral, we start our
4 analysis with that question.

5 "Disposable income" is a defined term. It "means current
6 monthly income received by the debtor . . . less amounts
7 reasonably necessary to be expended -

8 (A) (i) for the maintenance or support of the debtor or
9 a dependent of the debtor . . . ; and

10 (ii) [certain charitable contributions] and

11 (B) [certain business expenses].

12 § 1325(b) (2) (emphasis supplied). "Amounts reasonably necessary
13 to be expended" under § 1325(b) (2) (A) (i) and (B) "shall be
14 determined in accordance with subparagraphs (A) and (B) of
15 section 707(b) (2)" if the debtor has above-median income.
16 § 1325(b) (3).

17 Section 707(b) (2) (A) sets out the means test for presumed
18 abuse in filing a chapter 7 petition. Section 1325(b) (3)
19 incorporates the means test for determining the expenses to be
20 used in determining disposable income for above-median-income
21 debtors. The means test requires consideration of "the debtor's
22 current monthly income reduced by the amounts determined under
23 clauses (ii), (iii), and (iv), and multiplied by 60[.]"

24 _____
25 ⁶(...continued)
26 that David's Social Security income should be included in
27 calculating disposable income, he does not make that argument on
28 appeal. In any event, it is clear that Social Security income is
not part of disposable income. Disposable income is calculated
starting with "current monthly income," which in turn excludes
Social Security income. § 1325(b) (2); § 101(10A) (B).

1 § 707(b)(2)(A)(i). As relevant to this discussion, clause (ii)
2 provides:

3 (I) The debtor's monthly expenses shall be the debtor's
4 applicable monthly expense amounts specified under the
5 National Standards and Local Standards, and the
6 debtor's actual monthly expenses for the categories
7 specified as Other Necessary Expenses issued by the
8 Internal Revenue Service for the area in which the
9 debtor resides, as in effect on the date of the order
10 for relief[.]

11 § 707(b)(2)(A)(ii). Clause (iii), in turn, provides:

12 The debtor's average monthly payments on account of
13 secured debts shall be calculated as the sum of -

14 (I) the total of all amounts scheduled as
15 contractually due to secured creditors in each
16 month of the 60 months following the date of the
17 filing of the petition; and

18 (II) any additional payments to secured creditors
19 necessary for the debtor, in filing a plan under
20 chapter 13 of this title, to maintain possession
21 of the debtor's primary residence, motor vehicle,
22 or other property necessary for the support of the
23 debtor and the debtor's dependents, that serves as
24 collateral for secured debts;

25 divided by 60.

26 § 707(b)(2)(A)(iii) (2010).

27 Read together, § 707(b)(2)(A)(ii) and (iii) have been
28 understood to allow a debtor to deduct from current monthly
income those expenses set out in the IRS standards, and also any
payments on secured debt that will come due in the sixty months
after the petition date. See 6 COLLIER ON BANKRUPTCY ¶ 707.04[3][c]
at 707-37 (16th ed. 2011) ("[T]he means test allows deduction of
amounts payable on secured and priority debts, presumably on the
theory that a debtor should not be forced to default on secured
or priority debts in order to pay general unsecured debts in a
chapter 13 case."); Eugene R. Wedoff, Means Testing in the New

1 § 707(b), 79 AM. BANKR. L.J. 231, 274 (2005) (deduction for
2 payments on secured debt not dependent on whether the property
3 securing the debt is necessary or a luxury).

4 The trustee argues that this interpretation of the statute
5 is wrong and that, rather than allowing an expense deduction for
6 all payments on secured debts that will come due after the
7 petition, (iii) is merely interpretive of § 707(b)(2)(A)(ii). In
8 other words, (iii) directs how to calculate the amount that may
9 be deducted for secured debt when that secured debt is allowed by
10 the IRS as a "necessary" expense.

11 Although this approach would be consonant with one of
12 Congress's purposes in enacting the 2005 amendments to the
13 Bankruptcy Code ("BAPCPA") of assuring that debtors who can
14 afford to pay their unsecured creditors do so, the statutory
15 language does not support that interpretation. Section
16 707(b)(2)(A)(i) says that a debtor's current monthly income must
17 be "reduced by the amounts determined under clauses (ii), (iii),
18 and (iv)[.]" Amounts determined under clause (ii) are amounts
19 set out in the IRS standards. Amounts determined under clause
20 (iii) are payments on secured debts. Amounts determined under
21 § 707(b)(2)(A)(iii) are used to reduce the debtor's current
22 monthly income, just as amounts determined under
23 § 707(b)(2)(A)(ii) are used to reduce income.

24 The structure of § 707(b)(2)(A)(iii) also supports reading
25 (iii) as a stand-alone expense provision. Section
26 707(b)(2)(A)(iii)(I) refers to "the total of all amounts
27 scheduled as contractually due to secured creditors [in the
28 future.]" Section 707(b)(2)(A)(iii)(II) refers to cure payments

1 on a "debtor's primary residence, motor vehicle[s], or other
2 property necessary for the support of the debtor and the debtor's
3 dependents[.]" If the future secured debt payments referred to
4 in § 707(b)(2)(A)(iii)(I) were limited to secured debt payments
5 on property necessary for the debtor's or debtor's dependents'
6 maintenance and support, there would be no reason for
7 § 707(b)(2)(A)(iii)(II) to limit allowable cure payments to cure
8 payments on necessary property. Accord COLLIER at ¶ 707.04[3][c]
9 at pp. 707-37 (because amounts for cure are limited to necessary
10 property, "it is clear that the contractual payments are not
11 limited to only those secured debts that are for necessary
12 property"); Wedoff, 79 AM. BANKR. L.J. at 274 (in contrast to
13 deductions for currently due payments on secured debt, deductions
14 for curing arrearages on secured debt are allowed only if
15 property securing the debt is necessary to support the debtor's
16 needs).

17 To the extent there is any ambiguity in the statute, the
18 legislative history supports the common understanding. In
19 explaining the means test, the House Report describes the
20 expenses specifically mentioned in the statute, then lists as one
21 of "other specified expenses"

22 the debtor's average monthly payments on account of
23 secured debts, including any additional payments to
24 secured creditors that a chapter 13 debtor must make to
25 retain possession of a debtor's primary residence,
motor vehicle, or other property necessary for the
support of the debtor and the debtor's dependents that
collateralizes such debts[.]

26 H.R. Rep. No. 109-31, Pt. 1, 109th Cong., 1st Sess. (2005) at 13
27 n.61.

28 We conclude that the means test of § 707(b)(2)(A), which is

1 incorporated into chapter 13, allows a debtor to deduct from
2 current monthly income payments on secured debts, averaged over
3 sixty months as provided in § 707(b)(2)(A)(iii), regardless of
4 whether the collateral is necessary. The bankruptcy court did
5 not err in allowing debtors to make those deductions in their
6 disposable income calculation.

7 Neither party cites Am. Express Bank, FSB v. Smith (In re
8 Smith), 418 B.R. 359 (9th Cir. BAP 2009), or Yarnall v. Martinez
9 (In re Martinez), 418 B.R. 347 (9th Cir. BAP 2009), both of which
10 examined a debtor's ability to deduct secured debt payments in
11 calculating disposable income. In Smith, the debtors had
12 deducted amounts contractually due on two homes and a motor
13 vehicle that they intended to surrender. In Martinez, the
14 debtors had deducted payments that they were contractually
15 obligated to make on a mortgage that they were going to strip in
16 their chapter 13 plan.

17 In rejecting the debtors' ability to deduct the secured debt
18 payments that debtors would not be paying in Smith and Martinez,
19 the panel held that § 1325(b)(2) and § 1325(b)(3) must be read in
20 sequence, so that if an expense is reasonably necessary for a
21 debtor's or debtor's dependent's maintenance and support, then
22 the amount of the expense deduction is determined by the means
23 test of § 707(b)(2)(A). It reasoned that "[s]ection 1325(b)(2) .
24 . . requires the court to look at the necessity of the expense as
25 determined by the debtor on a real-time, forward-looking basis,
26 while section 1325(b)(3)'s incorporation of section 707(b)
27 requires a static, backward-looking inquiry[.]" Martinez, 418
28 B.R. at 356; accord Smith, 418 B.R. at 369.

1 Those cases do not mean that, where the debtor retains
2 property securing debt, does not strip the security interest, and
3 deducts the secured debt payment as an expense in applying the
4 means test, the bankruptcy court must determine whether the
5 encumbered property the debtors intend to retain is necessary or
6 unnecessary. The panel in Smith rejected the idea that the court
7 is required to determine whether property is necessary:

8 Debtors cannot have it both ways. Once they determine
9 that certain assets secured by liens are not necessary,
10 and they surrender those assets, the corresponding
11 debts disappear from section 1325(b)(2) and there is no
12 need to resort to section 1325(b)(3) and its dispatch
13 to the mechanical formulas of section 707(b)(2)(A) &
14 (B). The dissent suggests that we have restored to the
15 bankruptcy court the pre-BAPCPA discretion to decide
16 what are reasonable expenses. Not so - the debtors
17 made the decision about what assets they retained and
18 what assets they surrendered. Under our analysis the
19 role of the bankruptcy court is simply to hold them to
20 the consequences of their decision.

21 418 B.R. at 370-371 (emphasis supplied).

22 Smith and Martinez are factually distinguishable from this
23 case in which debtors intend to both retain and to pay for the
24 collateral without avoiding any liens. In Smith and Martinez,
25 the debtors, not the court, made the necessity determination.
26 The panel specifically rejected the idea that the court would
27 have to make a determination of necessity where the debtors have
28 chosen to retain the property and continue making the payments.

 We conclude that § 707(b)(2)(A)(iii) allows deduction as an
expense of payments on secured debt, unless the debtor determines
that payment on the outstanding amount of the secured claim is
unnecessary by either surrendering the property or avoiding the
lien securing the claim. The bankruptcy court did not err in
allowing debtors in calculating their disposable income to deduct

1 their secured debt payments on the six vehicles that they intend
2 to retain.

3 3. Good faith

4 The trustee argues that the bankruptcy court applied an
5 incorrect legal standard in considering whether debtors had
6 proposed their plan in good faith. He complains that the court
7 failed to take into account the "subjective" totality of the
8 circumstances of these debtors' situation by limiting
9 consideration to the factors set out for good faith in Leavitt v.
10 Soto (In re Leavitt), 171 F.3d 1219, 1224-25 (9th Cir. 1999). In
11 particular, he argues that, even where a debtor has satisfied the
12 mechanical requirements of § 1325(b), the bankruptcy court needs
13 to consider the sufficiency of the assets devoted to plan
14 payments, including in this case debtors' failure to include
15 Social Security income and their deduction as expenses of
16 payments on secured debts that are not necessary to their
17 maintenance or support in their calculation of projected
18 disposable income.

19 One of the requirements for confirmation of a chapter 13
20 plan is that it be proposed in good faith. § 1325(a)(3). "Good
21 faith" is not defined in the Bankruptcy Code. The Ninth Circuit
22 has held that "the proper inquiry is whether the [debtors] acted
23 equitably in proposing their Chapter 13 plan." Goeb v. Heid (In
24 re Goeb), 675 F.2d 1386, 1390 (9th Cir. 1982). In making that
25 inquiry, the court applies a "totality of the circumstances"
26 test, taking into consideration (1) whether the debtor
27 misrepresented facts, unfairly manipulated the Bankruptcy Code or
28 otherwise proposed the plan in an inequitable manner; (2) the

1 history of the debtor's filings and dismissals; (3) whether the
2 debtor intended only to defeat state court litigation; and (4)
3 whether the debtor's behavior was egregious. Leavitt, 171 F.3d
4 at 1224 (applying same factors for good faith filing of chapter
5 13 petition).

6 The bankruptcy court in this case took each of these factors
7 into consideration. The court expressly found that there was no
8 evidence "that Debtors misrepresented facts in their plan or
9 unfairly manipulated the Code," had any history of filings and
10 dismissals, or had filed chapter 13 to defeat state court
11 litigation. In re Welsh, 440 B.R. 836, 847 (Bankr. D. Mont.
12 2010).

13 In considering the fourth factor, the court rejected the
14 trustee's argument that debtors' continuing payments on debts
15 secured by what he characterized as luxury items, along with
16 their payment of one of their debts⁷ that allowed their adult
17 daughter to retain a car, while paying their unsecured creditors
18 only 8.5 percent of the claims, was egregious behavior that
19 showed bad faith. The court found that the ATVs that debtors
20 retained and on which they continued to make payments were not
21 luxuries, because at least one was required to plow the driveway
22 in the winter. It also found that the car that debtors' adult
23 daughter used was owned by David, so it was debtors' debt. The
24 retention and continued payment on the Airstream trailer, the
25

26 ⁷ It is unclear whether it is Sharon or David who owns
27 the car. Transcript of Confirmation Hearing at 16:20-17:5 (ER
28 11); 440 B.R. at 848. What is clear is that one of the debtors
owns the Toyota, not their daughter.

1 court concluded, was not by itself enough to find egregious
2 behavior. Id. at 848.

3 The court also rejected the trustee's argument that debtors'
4 failure to use David's Social Security income to increase their
5 plan payments is an indicator of egregious behavior. The court
6 noted that § 101(10A)(B) explicitly excludes Social Security
7 payments from the disposable income calculation, and 42 U.S.C.
8 § 407(a) specifically provides that Social Security payments
9 shall not be subject to operation of bankruptcy law. Id. at 850.

10 Although the court said that it considered the exclusion of
11 Social Security income as one of the totality of debtors'
12 circumstances, id. at 849, it also said that it could not find
13 bad faith based on exclusion of Social Security payments without
14 running afoul of 42 U.S.C. § 407(a). Id. at 850. The court went
15 on to explain that the adequacy of plan payments is determined by
16 the disposable income calculation, and that considering Social
17 Security for purposes of good faith would render the exclusion of
18 Social Security payments from the disposable income calculation
19 meaningless. Id.

20 The issue is whether, in determining whether a debtor has
21 filed a chapter 13 plan in good faith, the court may take into
22 consideration the debtors' failure to include income for plan
23 payments that the Code specifically excludes from current monthly
24 income, and the debtors' deduction of expenses that are expressly
25 allowed by the Code in calculating disposable income. In other
26 words, if the debtor has properly calculated projected disposable
27 income and so meets the minimum payment amount under
28 § 1325(b)(1)(B), can items used in that calculation be the basis

1 for a finding that the plan was not proposed in good faith. We
2 conclude that the 2005 BAPCPA modification of how disposable
3 income is calculated does not alter the pre-BAPCPA good faith
4 analysis.

5 The Bankruptcy Code does not define "good faith." In 1982,
6 the Ninth Circuit decided Goeb, which rejected a substantial
7 repayment requirement for chapter 13 confirmation. The court
8 noted that the Code included a minimum repayment requirement for
9 chapter 13 in § 1325(a)(4), by requiring that amounts paid on
10 unsecured claims could not be less than would be paid in a
11 chapter 7 liquidation. 675 F.2d at 1388. The "good faith"
12 inquiry, the court concluded, required looking at whether the
13 debtors "acted equitably in proposing their Chapter 13 plan."
14 Id. at 1390. In making that inquiry, the "bankruptcy court must
15 inquire whether the debtor has misrepresented facts in his plan,
16 unfairly manipulated the Bankruptcy Code, or otherwise proposed
17 his Chapter 13 plan in an inequitable manner." Id. Although the
18 court could consider "the substantiality of the proposed
19 repayment," ultimately the good faith determination must take
20 into account "all militating factors." Id.

21 In 1984, Congress amended § 1325 to add § 1325(b), which for
22 the first time introduced the requirement that, if there was an
23 objection to confirmation of a plan by the trustee or an
24 unsecured creditor, the debtor must provide for payment of the
25 debtor's "projected disposable income" over the life of the
26
27
28

1 plan.⁸ "Disposable income" was defined as income "received by
2 the debtor and which is not reasonably necessary to be expended .
3 . . for the maintenance or support of the debtor or a dependent
4 of the debtor[.]" § 1325(b)(2) (1984). Disposable income was
5 calculated relying primarily on the debtors' Schedules I and J,
6 which reflected actual anticipated income and expenses.

7 This change imposed a minimum payment requirement in
8 addition to the requirement of § 1325(a)(4) that unsecured claims
9 would receive not less than in a chapter 7 liquidation: If there
10 was an objection to confirmation, a debtor was required to devote
11 his or her projected disposable income as determined by Schedules
12 I and J to payments under the plan.

13 The analysis for good faith under § 1325(a)(3), however, did
14 not change. In 1999, the Ninth Circuit again considered good
15 faith in chapter 13 (this time in connection with good faith in
16 filing the petition), and again required consideration of the

18 ⁸ Section 1325(b)(1) provided:

19 If the trustee or the holder of an allowed unsecured
20 claim objects to the confirmation of the plan, then the
21 court may not approve the plan unless, as of the effective
date of the plan -

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

24
25 (B) the plan provides that all of the debtor's
26 projected disposable income to be received in the
27 three-year period beginning on the date that the first
payment is due under the plan will be applied to make
payments under the plan.

28 § 1325(b)(1) (1984).

1 totality of the circumstances. Leavitt, 171 F.3d at 1224. The
2 court directed bankruptcy courts to consider (1) whether the
3 debtor misrepresented facts, unfairly manipulated the code, or
4 otherwise acted inequitably in filing a petition or plan; (2) any
5 past history of bankruptcy filings; (3) whether the sole purpose
6 of debtor's petition or plan was to defeat state court
7 litigation; and (4) whether egregious behavior was present.

8 Under that formulation, the only substantial repayment
9 requirement was that set out in the Code. Although all
10 circumstances of the case were to be considered in determining
11 good faith, if a debtor was devoting all projected disposable
12 income to the plan, as calculated using Schedules I and J, the
13 amount of plan payment was not an indicator of a lack of good
14 faith.

15 The 2005 amendments changed how "disposable income" is
16 calculated for above-median-income debtors, substituting for
17 Schedules I and J a set formula based on historical income and
18 expenses determined in large part by IRS formulas. BAPCPA did
19 not, however, change the requirement that, if there is an
20 objection to confirmation, the plan must provide for payment of
21 all projected disposable income to unsecured creditors. All that
22 changed as relevant to the issue in this case was how disposable
23 income was to be determined. Instead of relying on Schedules I
24 and J, which were based in the debtors' economic reality,
25 Congress substituted a formula for above-median-income debtors
26 that is not necessarily based in the debtors' economic reality.

27 This change in how disposable income is calculated does not
28 change the pre-2005 good faith analysis, which requires

1 consideration of the totality of the circumstances but under
2 which a debtor's lack of good faith cannot be found based solely
3 on the fact that the debtor is doing what the Code allows. The
4 dissent would hold that the good faith "totality of the
5 circumstances" test allows the court effectively to override
6 other statutory provisions if, after the court's "unfettered
7 review," the court concludes that the plan treats the debtor's
8 unsecured creditors inequitably. We disagree.

9 Judge Pappas explained the different post-2005 approaches to
10 good faith:

11 In light of the [2005] amendment, some courts have held
12 that technical compliance with § 1325(b) creates a safe
13 harbor, and precludes a finding of bad faith. See In
14 re Alexander, 344 B.R. 742, 752 (Bankr. E.D.N.C. 2006)
15 (finding that calculation of a debtor's disposable
16 income must be determined under § 1325(b) and is not an
17 element of good faith); In re Farrar-Johnson, 353 B.R.
18 224 (Bankr. N.D. Ill. 2006) (good faith is a factor in
19 confirmation, but the calculations on Form B22C create
20 a safe harbor). At the other end of the spectrum,
21 other courts hold that § 1325(a)(3) ultimately requires
22 a debtor to contribute all he or she can afford to pay
23 creditors under a plan, regardless of what § 1325(b)
24 might otherwise dictate. See In re Anstett, 383 B.R.
25 380, 385-86 (Bankr. D.S.C. 2008); In re Upton, 363 B.R.
26 528, 536 (Bankr. S.D. Ohio 2007).

27 In re Stitt, 403 B.R. 694, 702-03 (Bankr. D. Idaho 2008).

28 Some courts have adopted an intermediate approach.

Under this approach, "the sufficiency of the assets
devoted to the plan is not a basis for a finding of
lack of good faith under § 1325(a)(3), unless there is
a showing of some sort of manipulation, subterfuge or
unfair exploitation of the Code by the debtor." In re
Williams, 394 B.R. 550, 572 (Bankr. D. Colo. 2008); see
also In re Briscoe, 374 B.R. 1, 22 (Bankr. D.D.C. 2007)
(recognizing exceptions for debtors "engaging in
subterfuge so blatant as to indicate that they have
'unfairly manipulated the Bankruptcy Code, or otherwise
proposed [their] Chapter 13 plan in an inequitable
manner.'" (quoting In re Goeb, 675 F.2d at 1390)).
This approach recognizes that even where a debtor has

1 satisfied the mechanical requirements of § 1325(b), a
2 more subjective analysis of the debtor's good faith and
3 the totality of the circumstances is mandated by
§ 1325(a)(3). In re Williams, 394 B.R. at 572.

4 Id. at 703.

5 In our view, taking advantage of a provision of the Code,
6 such as calculating disposable income under the test explicitly
7 set out in the Code, is not an indication of lack of good faith.
8 Thus, we reject those cases that allow a court to take into
9 consideration an above-median-income debtor's exclusion of income
10 or deduction of expenses that are allowed by the means test
11 formula in determining whether a debtor has proposed the plan in
12 good faith.

13 Section 1325(a)(3) still plays a role, and the court must
14 take into consideration the totality of the circumstances, based
15 on the factors the Ninth Circuit has articulated for determining
16 good faith. If, in proposing a plan, the debtor has
17 misrepresented facts, unfairly manipulated the Code, or engaged
18 in egregious behavior,⁹ a court may find that the plan was not
19 proposed in good faith. That finding may not, however, be based
20 on the mere fact that the debtor has excluded income or deducted
21 expenses that the Code allows.

22 The dissent argues that the bankruptcy court should have
23 considered debtors' failure to cram down the secured debts owed
24 on the over-encumbered items of personal property, presumably to

25
26 ⁹ The other two considerations, the debtor's history of
27 bankruptcy filings and dismissals and whether the debtor filed
28 chapter 13 to defeat state court litigation, are not pertinent to
the question of whether a court can find lack of good faith based
on the disposable income calculation.

1 free up additional funds for payments to unsecured creditors.
2 The trustee never raised the issue of cram down, and the panel
3 should not *sua sponte* raise good faith considerations neither
4 argued by the parties nor considered by the bankruptcy court.

5 Even if we were to consider it, we would reject the view
6 that cramming down secured debt to the fullest extent possible to
7 pay more to unsecured creditors is required for good faith. The
8 fundamental consideration in determining good faith under
9 § 1325(a)(3) is whether the debtor acted equitably in proposing
10 their chapter 13 plan. See Goeb, 675 F.2d at 1390. The
11 dissent's view that debtors must, if possible, cram down secured
12 creditors to pay more to unsecured creditors reallocates the
13 equities between secured creditors and unsecured creditors.
14 Cram-down may allow greater payments to unsecured creditors,
15 thereby being more "equitable" to that class of creditors. We
16 think that Congress made a policy choice in enacting BAPCPA to
17 prefer certain payments to secured creditors over unsecured
18 creditors in chapter 13 by providing that payments on certain
19 secured debts are expenses that may be deducted in calculating
20 disposable income. Whatever our view about the wisdom or
21 fairness of that policy choice, it is Congress's choice to make,
22 not the courts'.

23 The trustee points to two particular issues in this case,
24 arguing that the court should have taken into account both the
25 fact that debtors took expense deductions in the disposable
26 income calculation for payments on debt secured by assets that
27 are not reasonably necessary for debtors' or their dependents'
28 maintenance or support, and excluded income from Social Security.

1 As we discussed above, the Code allows debtors to deduct
2 current payments on secured claims as expenses in determining
3 disposable income. For debtors whose income exceeds the median
4 income, Congress has made the policy choice that payments on
5 secured claims are "[a]mounts reasonably necessary to be
6 expended" for the debtor's or the debtor's dependents'
7 maintenance and support. See § 1325(b)(3); § 707(b)(2). In
8 making its good faith determination under § 1325(a)(3), the
9 bankruptcy court cannot find lack of good faith based on a
10 debtor's deduction of those allowed expenses in their calculation
11 of disposable income. To do so would be to second-guess the
12 Congressional policy choice about what expenses are reasonably
13 necessary for a debtor's maintenance and support.

14 The same analysis applies to consideration of a debtor's
15 exclusion of Social Security income in calculating disposable
16 income. That income is specifically excluded from the disposable
17 income calculation for chapter 13 debtors. See
18 §§ 1325(b)(2); 101(10A)(B). In addition, 42 U.S.C. § 407
19 provides, as relevant here:

20 (a) The right of any person to any future payment under
21 this subchapter shall not be transferable or
22 assignable, at law or in equity, and none of the moneys
23 paid or payable or rights existing under this
subchapter shall be subject to execution, levy,
attachment, garnishment, or other legal process, or to
the operation of any bankruptcy or insolvency law.

24 (b) No other provision of law, enacted before, on, or
25 after April 20, 1983, may be construed to limit,
26 supersede, or otherwise modify the provisions of this
section except to the extent that it does so by express
reference to this section.

27 (Emphasis supplied.)

28 Again, the cases are split on the issue of whether a

1 debtor's exclusion of Social Security income in projected
2 disposable income is indicative of lack of good faith. Some
3 courts hold that a debtor's failure to commit available Social
4 Security payments to payments under the plan cannot be considered
5 in the good faith analysis under § 1325(a)(3). See, e.g., Fink
6 v. Thompson (In re Thompson), 439 B.R. 140, 143 (8th Cir. BAP
7 2010) (considering exclusion of Social Security payments from
8 "plan payments as part of the good faith analysis would
9 improperly render section 1325(b)'s ability to pay test
10 meaningless[;]" debtor's retention of Social Security income not
11 per se bad faith); In re Barfknecht, 378 B.R. 154 (Bankr. W.D.
12 Tex. 2007) (a debtor's retention of Social Security income, while
13 paying creditors less than 100 percent, is not evidence of bad
14 faith; the Code specifically allows exclusion of Social Security
15 income from disposable income calculation). Other courts hold
16 that such a failure may be considered as part of the totality of
17 the circumstances to determine good faith. See, e.g., In re
18 Upton, 363 B.R. 528 (Bankr. S.D. Ohio 2007) (although Social
19 Security payments are excluded from projected disposable income,
20 amount of proposed plan payments and retention of surplus from
21 excluded Social Security may be considered in determination of
22 good faith); In re Herrmann, 2011 WL 576753 (Bankr. D.S.C. Feb.
23 9, 2011) (can consider whether it is good faith for a spouse not
24 receiving Social Security income to avoid paying creditors by
25 claiming all household expenses, leaving little disposable
26 income, while spouse retains entire amount of Social Security
27 payments); In re Westing, 2010 WL 2774829 (Bankr. D. Idaho July
28 13, 2010) (sufficiency of assets devoted to plan, including

1 failure to use Social Security payments to meet necessary
2 expenses, thereby freeing up other income for plan payments, can
3 be considered in good faith analysis).

4 As with the expense deductions discussed above, the fact
5 that a debtor excludes income from the disposable income
6 calculation that Congress specifically allows the debtor to
7 exclude is not, by itself, probative of a lack of good faith. We
8 reject the reasoning of the cases that say that, because Social
9 Security payments are intended to provide for a recipient's basic
10 needs, a debtor must use the benefit payments to provide for
11 those basic needs, thereby freeing up other, non-exempt income,
12 for plan payments. E.g., In re Hall, 442 B.R. 754 (Bankr. D.
13 Idaho 2010). This approach simply does by indirection what the
14 Code says cannot be done, which is to include Social Security
15 benefit payments in a debtor's disposable income calculation.

16 We do not preclude consideration of other circumstances
17 indicative of a lack of good faith in a case in which a debtor
18 claims expenses for payments on debt secured by unnecessary
19 property and excludes income that the Code expressly excludes.
20 For example, a court may consider whether a secured debt was
21 incurred shortly before bankruptcy in an attempt to exclude the
22 income used for those payments from payments under the plan. A
23 court may consider whether a debtor who excludes income as
24 allowed by the Code allocates expenses in such a way as to allow
25 the build-up of a substantial surplus with the excluded income
26 over the life of the plan. See, e.g., Herrmann, 2011 WL 576753.
27 These additional facts, taken into account under the totality of
28 the circumstances, may show an unfair manipulation of the

1 Bankruptcy Code or egregious behavior, which are relevant to
2 whether the plan was proposed in good faith.

3 In this case, however, the trustee does not argue that there
4 are other circumstances that would support a finding of lack of
5 good faith. He does not argue that debtors incurred the secured
6 debt in anticipation of bankruptcy or to shield the payments on
7 that debt from unsecured creditors. Nor does he argue that
8 debtors are building up a substantial surplus as a result of
9 excluding the Social Security income. In fact, debtors propose
10 to devote the Social Security income to payments under the plan,
11 and according to their Schedules I and J, this will leave them
12 with a monthly surplus of approximately \$200. The trustee does
13 not claim that this modest surplus indicates a lack of good
14 faith.

15 The trustee seeks a holding that would allow the bankruptcy
16 court in this case to find a lack of good faith based solely on
17 debtors' calculation of disposable income that deducts expenses
18 the Code allows and excludes income the Code excludes. As we
19 have explained, those are factors that will not alone support
20 denial of confirmation under the good faith standard of
21 § 1325(a)(3).

22 The bankruptcy court in this case expressly said that it
23 considered the totality of circumstances in determining that
24 debtors had proposed their plan in good faith. In re Welsh, 440
25 B.R. at 847. It noted that the current secured debt payments are
26 deductions allowed in determining disposable income, and that the
27 Social Security income is income that the Code excludes from the
28 disposable income calculation. Although the court discussed the

1 necessity of the six vehicles debtors retained, along with the
2 related secured debt expenses that they deducted, it properly did
3 not find a lack of good faith based on those facts alone. It
4 also expressly declined to consider the fact that debtors receive
5 Social Security payments, a portion of which they are not
6 proposing to devote to plan payments.

7 Ultimately, the question of whether a plan is proposed in
8 good faith is a factual one. Leavitt, 171 F.3d at 1222-23. A
9 court must, however, apply the correct legal standard in reaching
10 that factual determination. In this case, the bankruptcy court
11 applied the correct legal standard in refusing to deny
12 confirmation based solely on debtors' exclusion of Social
13 Security payments and deduction of current payments secured by
14 arguably unnecessary collateral. Accordingly, we affirm the
15 court's order confirming debtors' chapter 13 plan.

16 CONCLUSION

17 The bankruptcy court applied the correct legal standard in
18 making its finding that debtors' plan was proposed in good faith.
19 The bankruptcy court did not err in concluding that debtors who
20 devoted the requisite disposable income, as defined by the Code,
21 to paying unsecured creditors met the requirement that their plan
22 be proposed in good faith, even though they could have paid more
23 to their unsecured creditors if they had stopped paying certain
24 secured creditors amounts that are statutorily permitted.
25 Therefore, we AFFIRM.

26
27 PAPPAS, Bankruptcy Judge, Dissenting:

28 I dissent because, in my opinion, the bankruptcy court

1 abused its discretion when it confirmed Debtors' chapter 13 plan
2 because it applied incorrect legal rules in determining that the
3 plan had been proposed in good faith as required by
4 § 1325(a)(3).¹⁰

5 The bankruptcy court concluded in this case that, in
6 performing a good faith analysis, it was precluded from
7 considering that David Welsh receives \$1,165 per month in Social
8 Security retirement benefits.¹¹ The bankruptcy court also
9 decided that, because Debtors were current on their monthly
10 payments to secured creditors, as a matter of law, it would not
11 consider whether it was reasonable for these above-median income
12 Debtors to continue to pay the full amount of all of their
13 secured debts through their chapter 13 plan, even though some of
14 those debts were secured by items that were patently unnecessary
15 to the success of Debtors' financial reorganization.¹² In these
16

17 ¹⁰ In addition to reviewing Trustee's challenges to the
18 bankruptcy court's good faith analysis under § 1325(a)(3), the
19 majority assumes that Trustee is also appealing the bankruptcy
20 court's decision regarding the amount of Debtors' "disposable
21 income" under § 1325(b)(2). While Trustee's argument is perhaps
22 somewhat equivocal, I understand his appellate brief to indicate
23 that this is not an issue. Moreover, in its decision, the
24 bankruptcy court noted that Trustee "withdrew the disposable
25 income objection" prior to entry of its decision. In re Welsh,
26 440 B.R. 836, 841 n.9 (Bankr. D. Mont. 2010). I therefore also
27 decline to join this part of the majority's opinion because, I
28 fear, it is dicta.

25 ¹¹ In re Welsh, 440 B.R. at 850 (holding that to consider
26 Social Security income in a good faith analysis would "[run]
27 afoul of 42 U.S.C. § 407(a)," and would be "duplicative" of
28 § 1325(b)'s "ability to pay" test.)

28 ¹² In re Welsh, 440 B.R. at 848 (holding that considering
(continued...)

1 two respects, I think the bankruptcy court erred. Contrary to
2 the majority, I believe we should vacate the order confirming the
3 plan and remand this case to the bankruptcy court to conduct a
4 proper § 1325(a)(3) good faith analysis.

5 I.

6 As the majority notes, it is Debtors' burden to show that
7 all of the § 1325 plan confirmation requirements have been
8 satisfied. Meyer v. Hill (In re Hill), 268 B.R. 548, 552 (9th
9 Cir. BAP 2001). One such requirement is § 1325(a)(3), which
10 requires that Debtors prove that "the plan has been proposed in
11 good faith." Good faith is not defined in the Code. However, it
12 is the long-standing law in the Ninth Circuit that, when there is
13 a contest about a chapter 13 debtors' good faith, the bankruptcy
14 court must focus upon whether the debtor's plan treats their
15 creditors "equitably." Goeb v. Heid (In re Goeb), 675 F.2d 1386,
16 1390 (9th Cir. 1982).¹³ In applying this test, a bankruptcy

17 _____
18 ¹²(...continued)
19 plan payments on current secured debts in a good faith analysis
20 ignores that such payments are authorized under the § 707(b)(2)
21 means test). The bankruptcy court reaffirmed this aspect of its
22 ruling in a subsequent decision, In re McHenry, 2011 WL 4625385
23 at *5-6 (Bankr. D. Mont. Sept. 30, 2011).

24 ¹³ Subsequent decisions from the Ninth Circuit, like
25 Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir.
26 1999) and Eisen v. Curry (In re Eisen), 14 F.3d 469 (9th Cir.
27 1994), have embellished upon the Goeb test. However, to be
28 precise, those cases analyzed a debtor's conduct in filing the
chapter 13 case in the first place, as opposed to whether the
debtor had proposed a plan in good faith. In apparent
recognition that these are distinct confirmation standards,
Congress added § 1325(a)(7) to the Code in 2005, which now
requires that a debtor also prove that the "filing [of] the
petition was in good faith." Other decisions, both pre- and
(continued...)

1 court "may consider the substantiality of the proposed repayment
2 [to creditors and] must make its good-faith determination in the
3 light of all militating factors." Id. To do justice in this
4 inquiry, the "bankruptcy courts should determine a debtor's good
5 faith on a case-by-case basis, taking into account the particular
6 features of each chapter 13 plan." Id.

7 The bankruptcy court in this case decided that Debtors' plan
8 was proposed in good faith, a ruling blessed by the majority.
9 However, in coming to its conclusion, the bankruptcy court did
10 not engage in the sort of unfettered "totality of the
11 circumstances" review mandated by In re Goeb. Instead, the
12 bankruptcy court applied a "not-quite totality of the
13 circumstances" test, and decided it should not consider two
14 highly relevant factors about Debtors' plan. That was error.

15 II.

16 First, the bankruptcy court noted that under 42 U.S.C.
17 § 407(a), Social Security benefits are not "subject to" any
18 bankruptcy law. In re Welsh, 440 B.R. at 843-44. It also
19 observed that, under § 101(10A), benefits received under the

20
21 ¹³(...continued)

22 post-BAPCPA have focused more narrowly on the provisions of the
23 debtor's proposed plan in determining a debtor's good faith.
24 See, e.g., Spokane Ry. Credit Union v. Gonzales (In re Gonzales),
172 B.R. 320, 325 (E.D. Wash. 1994); Fidelity & Cas. Co. of N.Y.
25 v. Warren (In re Warren), 89 B.R. 87, 90-93 (9th Cir. BAP 1988);
In re Frazier, 448 B.R. 803, 812-13 (Bankr. E.D. Cal. 2011).
26 Leavitt is instructive in providing one generic tenet for
27 application in any chapter 13 good faith review: to find a lack
28 of good faith, a bankruptcy court need not decide that the debtor
is acting with fraudulent intent, ill will directed to the
creditors, or that the debtor is affirmatively attempting to
violate the law. 171 F.3d at 1224-25.

1 Social Security Act are excluded from calculating a debtor's
2 "current monthly income" for purposes of determining eligibility
3 for chapter 7 relief under the § 707(b) "means test," a test
4 incorporated in chapter 13 to fix the amount of a debtor's
5 "disposable income" under § 1325(b)(2). Id. at 844-46. The
6 bankruptcy court reasoned that it would violate these statutory
7 provisions were it to consider Debtors' Social Security income in
8 deciding whether they have proposed their plan in good faith.
9 Id. at 849-50. This conclusion is surely incorrect for several
10 reasons.

11 Despite these statutes, the fact that a debtor receives
12 Social Security income is considered all the time, for many
13 different purposes, in chapter 13 cases. For example, a debtor's
14 monthly Social Security payments can provide the basis for a
15 bankruptcy court to find that a debtor has "regular income" to be
16 eligible for chapter 13 relief in the first place.¹⁴ Moreover,
17 in considering confirmation of a plan, since a debtor's monthly
18 Social Security benefits are available to pay living expenses and
19 plan payments, they are also properly taken into account to
20 decide whether, under § 1325(a)(6), "the debtor will be able to
21 make all payments under the [proposed] plan."¹⁵ In the context
22 of a chapter 13 case, there is no realistic reason to consider a
23

24 ¹⁴ See, e.g., Hagel v. Drummond (In re Hagel), 184 B.R.
25 793, 797 (9th Cir. BAP 1995); In re Bassett, 413 B.R. 778, 786-87
26 (Bankr. D. Mont. 2009); In re Spurlin, 350 B.R. 716, 721-22
(Bankr. W.D. La. 2006); In re Rigales, 290 B.R. 401, 403 (Bankr.
D.N.M. 2003).

27 ¹⁵ See In re Upton, 363 B.R. 528, 535 n.6 (Bankr. S.D.
28 Ohio 2007).

1 debtor's Social Security income for some purposes, but to ignore
2 that same income in determining a debtor's good faith.

3 That 42 U.S.C. § 407(a) may place Social Security benefits
4 out of the reach of, for example, a hungry chapter 7 bankruptcy
5 trustee trying to assemble funds to distribute to creditors is no
6 justification to disregard the existence of such income in
7 judging a debtor's good faith in proposing a particular plan
8 under chapter 13. In a chapter 13 case, a debtor's Social
9 Security benefits are not being garnished, seized, or "subjected
10 to" the reach of creditors. Plainly, consideration of Social
11 Security income does not violate either the letter or spirit of
12 42 U.S.C. § 407(a). Not surprisingly, then, and contrary to the
13 majority's conclusion, bankruptcy courts across the country have
14 recognized it is appropriate to consider the existence and amount
15 of a debtor's Social Security income in performing a chapter 13
16 good faith analysis.¹⁶

17 It is also not significant in judging a debtor's good faith
18 in a chapter 13 case that Social Security income is excluded by
19 § 101(10A) from the means test calculations in a chapter 7 case,
20 or from the process of determining an above-median income
21 debtor's plan payment under § 1325(b)(2).¹⁷ While a debtor's
22

23 ¹⁶ See, e.g., In re Herrmann, 2011 WL 576753 at *7-8, 11
24 (Bankr. D.S.C. Feb. 9, 2011); In re Mains, 451 B.R. 428, 434,
25 436-37 (Bankr. N.D. Mich. 2011); In re Thomas, 443 B.R. 213,
217-19 (Bankr. N.D. Ga. 2010); In re Upton, 363 B.R. at 535-37.

26 ¹⁷ See, e.g., In re Devilliers, 358 B.R. 849, 867 (Bankr.
27 E.D. La. 2007) ("[S]trict and technical compliance with the means
28 test does not necessarily satisfy any debtors' burden of good
faith. Determining whether a plan is proposed in good faith

(continued...)

1 projected disposable income as calculated under § 1325(b)(2) sets
2 a floor for chapter 13 plan payments, these calculations do not
3 constitute a safe harbor, nor dictate whether a debtor could
4 comfortably be paying more to creditors in a particular case.¹⁸

5 Like the many other bankruptcy courts that have done so,
6 this Panel should hold that Social Security income is a relevant
7 factor for the bankruptcy court to consider in evaluating a
8 debtor's good faith under a § 1325(a)(3). If Congress wanted
9 bankruptcy courts to exclude consideration of Social Security
10 benefits under § 1325(a)(3), it could have easily done so
11 expressly, as it did in § 101(10A). It did not, and we should
12 not strain to imply that restriction in reading other,
13 inapplicable statutes. In this case, when the bankruptcy court
14 held that it was constrained from considering Debtor's Social
15 Security payments, it erred.

16 III.

17 The bankruptcy court also held that, since these above
18 median-income Debtors were current on their monthly payments to
19

20 ¹⁷(...continued)
21 requires an analysis of the totality of the circumstances.”).

22 ¹⁸ Under § 101(10A), Social Security benefits are excluded
23 when determining under the § 707(b)(2)(A) means test whether a
24 statutory “presumption of abuse” arises in the case of a debtor
25 seeking relief under chapter 7. Interestingly, however, Social
26 Security income would apparently be relevant in determining
27 whether, in a case in which no statutory presumption arises,
28 granting the debtor chapter 7 relief would otherwise be an
“abuse” under § 707(b)(3). See In re Calhoun, 396 B.R. 270, 274
(Bankr. D.S.C. 2008). To make that decision, the statute
requires the bankruptcy court to consider whether “the totality
of the circumstances . . . of the debtor's financial situation
demonstrates abuse.” 11 U.S.C. § 707(b)(3)(B).

1 their many secured creditors, it could not consider whether it
2 was good faith for Debtors to propose a plan that allowed them to
3 continue to pay all of these secured debts in full, regardless of
4 whether it was reasonable under the circumstances for them to do
5 so. In re Welsh, 440 B.R. at 847-49. I disagree with that
6 conclusion. Again, that current payments to secured creditors
7 are deducted in a § 707(b)(2)/§ 1325(b) means test analysis is
8 not reason enough for the bankruptcy court to decline to exercise
9 its conscience in deciding whether, in proposing large plan
10 payments on unnecessary secured debts, the plan treats Debtors'
11 other creditors equitably.

12 Here, Debtors should reasonably be expected to propose a
13 chapter 13 plan that retains, and pays the debts secured by,
14 their home¹⁹ and necessary vehicles. But there is nothing in the
15 record to demonstrate that Debtors needed, or that they should
16 pay the debts for, a car their nonresident, physician-daughter
17 drives, two four-wheeler ATVs,²⁰ or an Airstream travel trailer.

18
19 ¹⁹ Debtors have significant equity in their spacious home.
20 Under different facts, however, a bankruptcy court should also
21 have a say under § 1325(a)(3) regarding whether a debtor should
22 be able to retain, and pay for, an expensive house that is
23 completely unreasonable for his or her needs. While this would
24 admittedly involve a subjective analysis by the bankruptcy court,
25 in my view that's exactly the approach § 1325(a)(3) and the case
26 law mandates, something which BAPCPA could have changed, but
27 clearly did not. While BAPCPA may have constrained the
28 discretion of the bankruptcy courts in some respects, it is
doubtful Congress intended BAPCPA as a vehicle for chapter 13
debtors to retain luxury houses subject to large mortgages at the
expense of their unsecured creditors.

²⁰ The bankruptcy court found that one ATV was needed by
Debtors to plow snow on their mile-long driveway in the winter.

(continued...)

1 The bankruptcy court erred in approving a plan as "good
2 faith" that allows these high-income Debtors²¹ to pay secured
3 creditors to retain unnecessary items. In reaching this
4 conclusion, I join a host of other courts that have decided that,
5 in reviewing the totality of the circumstances, § 1325(a)(3)
6 requires a bankruptcy court to examine the nature and amount of
7 secured debt being paid through a debtor's proposed plan.²²

8 As noted above, the chapter 7 means test calculations
9 incorporated in § 1325(b), and the good faith analysis required
10 by § 1325(a)(3), are distinct plan confirmation requirements.
11 While under § 1325(b), if the trustee objects, above-median
12 income chapter 13 debtors must pay at least their "projected
13 disposable income" to creditors through a plan, Congress did not
14 decide that a plan proposing to pay only that amount might not
15 otherwise fail the good faith test. While a debtor with a large
16 house, several cars, and other "luxury" secured debt, might
17 successfully navigate the means test, § 1325(a)(3) still requires
18 that the debtor treat the other creditors equitably in the
19
20

21 ²⁰ (...continued)

22 The only other use cited in the record for the ATVs was for their
23 recreation.

24 ²¹ Debtors' total monthly income exceeds \$9,200.

25 ²² See, e.g., In re Kramp, 2011 WL 4002614 at *1-2 (Bankr.
26 N.D. W. Va. Sept. 6, 2011); In re Hicks, 2011 WL 2414419 at *4-7
27 (Bankr. N.D. Ala. Jun. 15, 2011); In re Daniel-Sanders, 420 B.R.
28 102, 106-07 (Bankr. W.D.N.Y. 2009); In re Spruch, 410 B.R. 839,
843-44 (Bankr. S.D. Ind. 2008); In re Martin, 373 B.R. 731,
734-36 (Bankr. D. Utah 2007); In re Hylton, 374 B.R. 579, 586
(Bankr. W.D. Va. 2007).

1 plan.²³ In this case, Debtors' plan pays for recreational
2 vehicles and a car they do not use at the expense of their
3 unsecured creditors. On this record, that's not fair.²⁴

4 There is also no evidence in the record, nor mention in the
5 bankruptcy court's decision to explain why, even if these
6 unnecessary assets were to be retained, Debtors' plan did not
7 propose to "cram down" the secured debts owed on the over-
8 encumbered items, as allowed under § 1325(a)(5)(B).²⁵ In this

9
10 ²³ See In re Williams, 394 B.R. 550, 572 (Bankr. D. Colo.
11 2008) ("[Section] 1325(a)(3) allows for a more subjective
12 analysis of a debtor's good faith and the totality of the
13 circumstances, even where the debtor has met the mechanical
14 requirements of § 1325(b).").

15 ²⁴ The Utah bankruptcy court aptly described the function
16 of the § 1325(a)(3) good faith requirement as a "smell test" and
17 noted that "[i]t seems fundamentally inappropriate that a debtor
18 might file for bankruptcy relief and obtain a discharge of debt
19 while still enjoying a luxury item such as a recreational ski
20 boat and trailer" and paying unsecured creditors a minimal
21 amount. In re Martin, 373 B.R. at 736.

22 ²⁵ The majority would prefer to decline to consider in
23 this appeal that the amount being paid by Debtors under their
24 plan to secured creditors grossly exceeds the value of the
25 collateral securing those claims. The majority argues that
26 Trustee never raised this offensive feature of the plan in his
27 good faith challenge in the bankruptcy court. To me, this
28 approach to review of the bankruptcy court's decision is flawed
for at least two reasons. First, Debtors' treatment of their
secured debts was indeed a key feature of Trustee's objection to
confirmation of their plan. Of course, Trustee argued the claims
secured by Debtors' unnecessary assets should not be paid at all
through Debtors' plan. Given that objection, if those creditors
are to be paid, how much they should fairly receive should
certainly be fair game for the bankruptcy court, and for this
Panel on appeal, when considering Debtors' good faith. Second,
the bankruptcy court had an independent duty to decide whether
Debtors' plan satisfied the Code's confirmation requirements,
including § 1325(a)(3), even in the absence of an objection by

(continued...)

1 regard, the bankruptcy court and this Panel should instead ask
2 how it is good faith for Debtors to use chapter 13 to pay \$38,000
3 for an Airstream trailer worth \$23,000, \$7,500 for two ATVs worth
4 \$5,400, and \$19,000 for a pickup valued at \$10,000?²⁶

5 IV.

6 While it may be an amorphous, somewhat subjective standard,
7 at bottom, § 1325(a)(3) is designed to prevent confirmation of
8 inequitable plans. A bankruptcy court simply cannot decide if a
9 plan is proposed in good faith if it declines to consider either
10

11 ²⁵(...continued)

12 the trustee. United Student Aid Funds, Inc. v. Espinosa, 130 S.
13 Ct. 1367, 1381 & n. 15 (2010), citing In re Mammel, 221 B.R. 238,
14 239 (Bankr. N.D. Iowa 1998) (“[W]hether or not an objection is
15 presently lodged in this case, the Court retains the authority to
16 review this plan and deny confirmation if it fails to comply with
17 the confirmation standards of the Code.”). I question how that
18 duty can be discharged if the bankruptcy court, or this Panel,
19 declines to consider Debtors’ intent to pay secured creditors far
20 more than § 1325(a)(5)(B) would require in connection with the
21 equitable analysis mandated by § 1325(a)(3).

22 ²⁶ In a later decision, the bankruptcy court described
23 Debtors’ proposed payments under their plan to the unsecured
24 creditors in this case as “minuscule.” In re McHenry, 2011 WL
25 4625385 at *4 (“This Court, in Welsh, confirmed a plan that
26 permitted the debtors to make payments on secured claims,
27 including a \$400,000 home, while making only minuscule payments
28 to general unsecured creditors.”). I agree with this
description. Debtors’ plan proposes to pay secured debts,
excluding those for the house and one car, totaling about
\$65,000, while committing to pay their unsecured creditors, that
hold claims totaling \$180,000, \$14,700 over the sixty-month term
of their plan. Debtors’ schedules I and J reflect they have net
income available each month, after payment of living expenses and
secured debts, of \$395, which if paid to unsecured creditors,
would amount to \$23,700 over the term of their plan. If
Debtors’s plan omitted payments on their Airstream, one ATV, and
the car used by their daughter, another \$700+ per month, or
\$42,000, would be available for unsecured creditors.

1 that a debtor receives Social Security income, or the nature,
2 amount and reasonableness of the debtor's proposed payments to
3 secured creditors through a plan. Because the bankruptcy court
4 refused to consider such highly relevant facts as part of the
5 totality of the circumstances in Debtors' case, it applied an
6 incorrect legal analysis in examining Debtors' good faith, and
7 abused its discretion in confirming Debtors' plan. The
8 principles of fairness embodied in § 1325(a)(3) require that we
9 vacate the order confirming the plan and remand to the bankruptcy
10 court to perform a proper good faith analysis of Debtors' plan.²⁷

25 ²⁷ "[The] bankruptcy court[] cannot substitute a glance
26 [at some good faith factors, but not others,] for a review of the
27 totality of the circumstances [If] the [bankruptcy] court
28 below did not inquire adequately into whether the [debtor] acted
in good faith, we must reverse and remand" In re Goeb,
675 F.2d at 1391.