

OCT 05 2009

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP Nos. NV-08-1332-MoJuH
	)	NV-08-1335-MoJuH
FRANCISCO J. MARTINEZ;	)	NV-08-1340-MoJuH
MELISSA J. STINE;	)	
ALEX WATHEN,	)	Bk. Nos. 08-14571-BAM
	)	08-15414-LBR
	)	08-15133-MKN
Debtors.	)	

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RICK A. YARNALL, Chapter 13  
Trustee,

Appellant,

O P I N I O N

FRANCISCO J. MARTINEZ;  
MELISSA J. STINE; ALEX WATHEN;  
HAINES & KRIEGER, LLC,

Appellees.

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Argued and Submitted by Videoconference  
on May 19, 2009

Filed - October 5, 2009

Appeal from the United States Bankruptcy Court  
for The District of Nevada

Hon. Linda B. Riegler, Bruce A. Markell, and Mike K. Nakagawa,  
Bankruptcy Judges, Presiding.

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Before: MONTALI, JURY and HOLLOWELL, Bankruptcy Judges.

1 MONTALI, Bankruptcy Judge:

2  
3 In cases pending before three different bankruptcy courts,  
4 above-median income chapter 13<sup>1</sup> debtors obtained orders valuing  
5 and "stripping off" wholly unsecured junior liens against their  
6 residences.<sup>2</sup> The debtors also proposed chapter 13 plans that  
7 deducted the expenses associated with those stripped liens from  
8 their "disposable income" devoted to plan payments. The chapter  
9 13 trustee objected to confirmation of the three plans, and the  
10 three bankruptcy judges held a consolidated hearing on the  
11 objections. The bankruptcy judges overruled the objections and  
12 entered orders confirming the plans. The chapter 13 trustee  
13 appealed each order. We REVERSE without reaching the trustee's

14  
15 \_\_\_\_\_  
16 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule  
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
18 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
19 enacted and promulgated after the effective date of The  
20 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
21 Pub. L. 109-8, 119 Stat. 23 ("BAPCPA").

22 <sup>2</sup>Terms such as "stripping off," "lien strip" or "motion to  
23 strip" are actually misnomers that have become part of everyday  
24 bankruptcy parlance. In fact, motions of this type are  
25 authorized under Rule 3012, "Valuation of Security" ("The court  
26 may determine the value of a claim secured by a lien on property  
27 in which the estate has an interest on motion . . . ."). See,  
28 for example, Guidelines for Valuing and Avoiding Liens in  
Individual Chapter 11 Cases and Chapter 13 Cases, United States  
Bankruptcy Court, Northern District of California, available at:  
[http://www.canb.uscourts.gov/procedures/dist/guidelines/guideline  
s-valuing-and-avoiding-liens-individual-chapter-11-cases-and-cha.](http://www.canb.uscourts.gov/procedures/dist/guidelines/guideline-s-valuing-and-avoiding-liens-individual-chapter-11-cases-and-cha)

For convenience, we will continue to use the more common  
terminology throughout this opinion.

1 good faith objections.<sup>3</sup> Our conclusion is reinforced by a  
2 persuasive and compelling statement from our own court of appeals  
3 just a few weeks ago: "Ironic it would be indeed to diminish  
4 payments to unsecured creditors in this context on the basis of a  
5 fictitious expense not incurred by a debtor." Ransom v. MBNA Am.  
6 Bank (In re Ransom), 577 F.3d 1026, 1030 (9th Cir. 2009).

7 **I. FACTS**

8 In May 2008, appellees Francisco J. Martinez ("Martinez"),  
9 Melissa J. Stine ("Stine"), and Alex Wathen ("Wathen")  
10 (collectively, "Debtors") filed separate chapter 13 petitions and  
11 filed their respective Statements of Current Monthly Income and  
12 Calculation of Commitment Period and Disposable Income ("Form B  
13 22C"). They each filed a motion to value collateral, to strip  
14 off liens, and to modify rights of the holders of junior liens on  
15 their respective residences, alleging in each instance that no  
16 equity existed in the property beyond the secured claim of the  
17 holder of the first priority lien. Significantly, in each case,  
18 the Debtors alleged that "on the date the instant bankruptcy was  
19 filed," no equity existed in the subject properties, and that the  
20 affected junior lienholders were "wholly unsecured on the  
21 petition date."

22 In each case, the bankruptcy court entered an order  
23

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24 <sup>3</sup>In a separate opinion we are issuing concurrently with this  
25 one we reach a similar conclusion regarding attempted deductions  
26 from disposable income for payments not being made because the  
27 underlying property has been voluntarily surrendered to the  
28 secured creditors, leaving any remaining claim no more than  
wholly unsecured. American Express Bank, FSB v. Smith (In re  
Smith), No. WW-08-1311 (9th Cir. BAP Oct. 5, 2009).

1 stripping the lien of the junior lienholder, finding that "on the  
2 filing date of the instant chapter 13 petition," the claim was  
3 "wholly unsecured." The courts therefore ordered that the junior  
4 lienholders' "secured claims (sic) is 'stripped off' and shall be  
5 treated as a 'general unsecured claim' pursuant to [section]  
6 506(a)...", that each junior lienholders' claim "be reclassified  
7 as a general unsecured claim," and that the junior lienholders'  
8 "secured rights and/or lien-holder rights in the Subject Property  
9 are hereby terminated."

10 Because the Debtors were above-median income debtors, they  
11 calculated their "disposable income" for the purposes of plan  
12 payments by utilizing the means test formula set forth in section  
13 707(b) (2) (A) (iii), which allows debtors to deduct from their  
14 gross monthly income payments "contractually due to secured  
15 creditors." See 11 U.S.C. §§ 1325(b) (3) and 707(b) (2) (A) (iii).  
16 In each case, on the Form B 22C, the Debtors deducted from their  
17 gross income the amounts due under the relevant contracts with  
18 the respective junior lienholders, even though they were not  
19 making these payments postpetition and even though they obtained  
20 orders stripping off the relevant liens based upon petition date  
21 values.

22 Consequently, Martinez's Form B 22C reflected a negative  
23 disposable monthly income of \$104.90, even though the disposable  
24 income would have been \$352.10 a month if the phantom payments to  
25 the junior lienholder were excluded from the deductions.  
26 Similarly, Stine's Amended Form B 22C reflected a disposable  
27 income of \$22.50 a month if the payments for the stripped  
28 mortgage were deducted. Removing the stripped mortgage payments

1 from the means test calculation leaves Stine's monthly disposable  
2 income at \$377.50 a month. Wathen's Form B 22C reflected a  
3 negative disposable income of \$390.67, even though his monthly  
4 disposable income would have been \$209.33 if the payments on the  
5 stripped junior lien were not included in the means test  
6 calculation.

7 Appellant Rick A. Yarnall, the chapter 13 trustee  
8 ("Trustee"), objected to confirmation in each of the cases,  
9 arguing that the Debtors had failed to devote all of their  
10 projected disposable income to payment of unsecured creditors as  
11 required by section 1325(b) and that their plans were not  
12 proposed in good faith. Following extensive briefing by Trustee  
13 and the Debtors, the three assigned bankruptcy judges held a  
14 consolidated hearing on the Trustee's objections to confirmation  
15 of the Debtors' plans.<sup>4</sup>

16 Applying Maney v. Kagenveama (In re Kagenveama), 541 F.3d  
17 868 (9th Cir. 2008), the bankruptcy courts each held that an  
18 above-median income debtor's disposable income is determined as  
19 of the effective date, and that the fixed formula of the means  
20 test under section 707(b)(2) (as incorporated by section  
21 1325(b)(3)) permitted the Debtors to deduct payments to the  
22 junior lienholders, even though the Debtors intended to (and did)  
23 strip the liens of those lienholders and would not (and did not)  
24 make any postpetition payments to those lienholders.

25 On December 5, 2008, the courts in Martinez's and Stine's

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26  
27 <sup>4</sup>Trustee's objection to the chapter 13 plan of a fourth  
28 debtor was heard at the same time, but that case is not included  
in this appeal.

1 cases entered orders confirming the chapter 13 plans and orders  
2 overruling the Trustee's objections to confirmation. On December  
3 8, 2008, the court in Wathen's case entered an order confirming  
4 the chapter 13 plan. Trustee timely appealed.

5 We did not consolidate the appeals. Instead we authorized a  
6 joint brief from appellees but they did not appear in these  
7 appeals.<sup>5</sup>

8 The case was argued before us on May 19, 2009. On August  
9 14, 2009, the Ninth Circuit issued its Ransom decision.

## 10 **II. ISSUE**

11 In calculating their disposable income to be paid under  
12 their plans, may chapter 13 debtors deduct payments to junior  
13 lienholders to whom they will not be making payments under their  
14 plans because their liens have been stripped (viz., valued at  
15 zero)?

## 16 **III. JURISDICTION**

17 The bankruptcy court had jurisdiction under 28 U.S.C.  
18 § 157(b) (2) (L) and § 1334. We have jurisdiction under 28 U.S.C.  
19 § 158.

## 20 **IV. STANDARD OF REVIEW**

21 The issue presented in these appeals is purely one of law  
22 and statutory construction; no factual dispute exists. "We  
23 review issues of statutory construction and conclusions of law,  
24 including interpretation of provisions of the Bankruptcy Code, de  
25 novo." Mendez v. Salven (In re Mendez), 367 B.R. 109, 113 (9th

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26  
27 <sup>5</sup>Haines & Kreiger, LLC, is the lawfirm that represented  
28 Debtors in the bankruptcy courts. Although named in the caption,  
we do not consider it an appellee.

1 Cir. BAP 2007) (citing Einstein/Noah Bagel Corp. v. Smith (In re  
2 BCE W., L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003)).

3 **V. DISCUSSION<sup>6</sup>**

4 A. Overview.

5 Section 1325(b) (1) (B) provides that if a trustee or  
6 unsecured creditor objects to confirmation of a chapter 13 plan,  
7 the court may not approve the plan unless, as of its effective  
8 date, the plan "provides that all of the debtor's projected  
9 disposable income to be received in the applicable commitment  
10 period beginning on the date that the first payment is due under  
11 the plan will be applied to make payments to unsecured creditors  
12 under the plan." 11 U.S.C. § 1325(b) (1) (B).

13 In Kagenveama, the Ninth Circuit held a debtor's "projected  
14 disposable income" for the purposes of section 1325(b) (1) (B) is  
15 the debtor's "disposable income" as defined in subsection (b) (2)  
16 "projected out over the 'applicable commitment period.'" Kagenveama,  
17 541 F.3d at 872. The Ninth Circuit specifically  
18 rejected the chapter 13 trustee's argument that section  
19 1325(b) (1) (B) requires a forward-looking determination of  
20 "projected disposable income."<sup>7</sup> Id. at 8737-74. The Ninth

21 \_\_\_\_\_  
22 <sup>6</sup>Our analysis as set forth in Smith (see footnote 3),  
23 applicable to surrendered collateral, applies with equal force to  
24 the facts presented by these three appeals wherein the liens have  
25 been stripped. We incorporate that decision by reference and  
reiterate that analysis in this Part V for completeness of our  
record here.

26 <sup>7</sup>Since Kagenveama's issuance, four other courts of appeal  
27 have rejected its reasoning and holding. In particular, the  
Seventh Circuit held in In re Turner, 574 F.3d 349 (7th Cir.

28 (continued...)

1  
2  
3 <sup>7</sup>(...continued)  
4 2009), that a chapter 13 above-median income debtor could not  
5 deduct as an expense his mortgage payments on property that he  
6 intended to surrender. In reaching its holding, the Seventh  
7 Circuit refused to apply a mechanical calculation that considers  
8 expenses that exist on the petition date, noting that such a  
9 mechanical test is appropriate for determining eligibility to  
10 proceed under particular chapters.

11  
12 Since the object of a Chapter 13 bankruptcy is to  
13 balance the need of the debtor to cover his living  
14 expenses against the interest of the unsecured  
15 creditors in recovering as much of what the debtor owes  
16 them as possible, we cannot see the merit in throwing  
17 out undisputed information, bearing on how much the  
18 debtor can afford to pay, that comes to light between  
19 the submission and approval of a plan of  
20 reorganization. Sometimes as in this case the  
21 creditors will benefit from the new information. But  
22 in other cases it will be the debtor . . . . The use of  
23 the later date, which is consistent with the statutory  
24 language though not compelled by it, is more sensible.

25 Id. at 355. See also Nowlin v. Peake (In re Nowlin), 576 F.3d  
26 258 (5th Cir. 2009) (holding that "projected" disposable income  
27 permits consideration of "reasonably certain" future events and  
28 stating that the Ninth Circuit emphasized the modified definition  
of "disposable income" without recognizing the independent  
significance of the word "projected"); Hamilton v. Lanning (In  
re Lanning), 545 F.3d 1269 (10th Cir. 2008), petn. for cert.  
filed, 77 U.S.L.W. 3449 (Feb. 3, 2009) (Supreme Court has  
requested briefing by the Solicitor General on the petition (129  
S.Ct. 2820)) (holding that starting point for calculating chapter  
13 debtor's projected disposable income is presumed to be  
debtor's current monthly income, subject to showing of  
substantial change in circumstances); Coop v. Frederickson (In re  
Frederickson), 545 F.3d 652, 659 (8th Cir. 2008), cert. denied,  
129 S.Ct. 1630 (2009) (holding that the means test is only a  
starting point for determining a chapter 13 debtor's disposable  
income). "[T]he final calculation can take into consideration  
changes that have occurred in the debtor's financial

(continued...)

1 Circuit also rejected the argument that the "disposable income"  
2 calculation of section 1325(b)(2) was a presumptive starting  
3 point which could be supplemented by evidence of future or actual  
4 "finances of the debtor." Id. at 874, overruling Pak v. eCast  
5 Settlement Corp. (In re Pak), 378 B.R. 257, 267 (9th Cir. BAP  
6 2007).

7 Section 1325(b)(2) defines "disposable income" as the  
8 debtor's current monthly income less the amounts reasonably  
9 necessary to be expended for, inter alia, the support of the  
10 debtor and his or her dependents. 11 U.S.C. § 1325(b)(2).<sup>8</sup>

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11  
12 <sup>7</sup>(...continued)  
13 circumstances as well as the debtor's actual income and expenses  
14 as reported on Schedules I and J." Frederickson, 545 F.3d at  
659.

15 <sup>8</sup>Section 1325(b)(2) provides:

16 (2) For purposes of this subsection, the term "disposable  
17 income" means current monthly income received by the debtor  
18 (other than child support payments, foster care payments, or  
19 disability payments for a dependent child made in accordance  
20 with applicable nonbankruptcy law to the extent reasonably  
reasonably necessary to be expended --

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

24 (ii) for charitable contributions (that meet the  
25 definition of "charitable contribution" under  
26 section 548(d)(3) to a qualified religious or  
27 charitable entity or organization (as defined in  
28 section 548(d)(4)) in an amount not to exceed 15  
percent of gross income of the debtor for the year

(continued...)

1 Section 1325(b)(3), however, restricts the ability of a  
2 bankruptcy court to determine the "amounts reasonably necessary  
3 to be expended" when the debtor has an above-median income.<sup>9</sup>

4 For a debtor with above-median income, "amounts reasonably  
5 necessary to be expended under paragraph (2) . . . shall be"  
6 calculated in accordance with section 707(b)(2)(A) and (B). 11  
7 U.S.C. § 1325(b)(3). Section 707(b)(2) is the chapter 7 "means  
8 test" provision, and subsection (b)(2)(A)(iii) provides that the  
9 debtor's average monthly payments on account of secured debts

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10  
11 <sup>8</sup>(...continued)

12 in which the contributions are made; and

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

15 <sup>9</sup>Section 1325(b)(3) provides:

16 (3) Amounts reasonably necessary to be expended under  
17 paragraph (2), other than subparagraph (A)(ii) of paragraph  
18 (2), shall be determined in accordance with subparagraphs  
19 (A) and (B) of section 707(b)(2), if the debtor has current  
monthly income, when multiplied by 12, greater than--

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

22 (B) in the case of a debtor in a household of 2, 3, or  
23 4 individuals, the highest median family income of the  
24 applicable State for a family of the same number or  
fewer individuals; or

25 (C) in the case of a debtor in a household exceeding 4  
26 individuals, the highest median family income of the  
27 applicable State for a family of 4 or fewer  
28 individuals, plus \$575 per month for each individual in  
excess of 4.

1 shall be calculated as the sum (then divided by 60) of

2 (I) the total of all amounts scheduled as contractually  
3 due to secured creditors in each month of the 60 months  
4 following the date of the petition; and

5 (II) any additional payments to secured creditors  
6 necessary for the debtor, in filing a plan under  
7 chapter 13 of this title, to maintain possession of the  
8 debtor's primary residence, motor vehicle, or other  
9 property necessary for the support of the debtor and  
10 the debtor's dependents, that serves as collateral for  
11 secured debts[.]

12 11 U.S.C. § 707(b) (2) (A) (iii).

13 B. The Expenses Are Not Necessary for Debtors' Support.

14 Holding that Kagenveama requires application of a backward-  
15 looking or static measurement of an above-median income debtor's  
16 expenses in determining projected disposable income, the  
17 bankruptcy courts held that Debtors could deduct from their  
18 current monthly income mortgage payments which they will not be  
19 making. Thus, they held that postpetition events affecting  
20 income or expenses (such as surrender of collateral or stripping  
21 liens, even based on petition-date values) should not be  
22 considered in deciding whether an above-median income debtor has  
23 contributed all projected disposable income to a plan under  
24 section 1325.

25 We disagree. Sections 1325(b) (2) and (b) (3), read together,  
26 provide that if an expense is not reasonably necessary, it is not  
27 included in the calculation of disposable income. If the expense  
28 is reasonably necessary for a debtor's and/or dependants'  
29 maintenance and support, and the debtor is an above-median income  
30 debtor, section 1325(b) (3) requires the court to determine the  
31 amount in accordance with section 707(b) (2).

32 A determination of whether an expense is reasonably

1 necessary requires a court to consider what the debtor has to say  
2 about the financial realities existing at the time of  
3 confirmation of a chapter 13 plan, particularly where the  
4 affected lienholder consents by its silence. Here, where Debtors  
5 have no intention of paying the mortgage payments either through  
6 or outside their plans, and in fact have obtained orders  
7 stripping the liens effective as of the relevant petition dates,  
8 those mortgage payments cannot be necessary for the support of  
9 Debtors or their dependents. They made the decision to strip the  
10 liens, not the bankruptcy courts. Phantom payments cannot be  
11 necessary. The fact that courts make the value determinations to  
12 support the orders stripping the liens some time after the  
13 petition dates is of no consequence. The Debtors alleged,  
14 respondent under-secured creditors conceded by their defaults,  
15 and the courts found that the petition date values were correct.  
16 Had a creditor contended otherwise, the outcome may have been  
17 different, but that is not what happened in any of these three  
18 cases.

19 C. The Dicta of Kagenveama.

20 It goes without saying that we must follow binding precedent  
21 in our circuit, as the bankruptcy court felt it must. We do not  
22 read Kagenveama as binding precedent with respect to the  
23 calculation of expenses under sections 1325(b)(2) and (b)(3).  
24 Consequently, we are bound only by the Supreme Court's directive  
25 to follow the plain meaning of the words of a statute unless they  
26  
27  
28

1 lead to an absurd result.<sup>10</sup>

2 The issue before the Ninth Circuit in Kagenveama did not  
3 involve either the determination of what are proper expenses  
4 (under section 1325(b)(2)) or the measurement of them (under  
5 section (b)(3)). Its only meaningful allusion to expenses to be  
6 deducted from income is a passing reference to those two  
7 subsections, without any analysis:

8 The revised "disposable income" test uses a formula to  
9 determine what expenses are reasonably necessary. See  
10 11 U.S.C. § 1325(b)(2)-(3). This approach represents a  
11 deliberate departure from the old "disposable income"  
12 calculation, which was bound up with the facts and  
13 circumstances of the debtor's financial affairs. In re  
14 Winokur, 364 B.R. 204, 206 (Bankr. E.D. Va. 2007); In  
re Farrar-Johnson, 353 B.R. 224, 231 (Bankr. N.D. Ill.  
2006) (stating that "[e]liminating flexibility was the  
point: the obligations of [C]hapter 13 debtors would be  
subject to clear, defined standards, no longer left to  
the whim of a judicial proceeding") (internal  
quotations omitted).

15 Kagenveama, 541 F.3d at 874 (emphasis added).<sup>11</sup>

16 \_\_\_\_\_  
17 <sup>10</sup>U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242  
18 (1989) (plain meaning of legislation should be conclusive, except  
19 in rare cases in which literal application of statute will  
20 produce result demonstrably at odds with intention of its  
21 drafters; in such cases, intention of drafters, rather than  
22 strict language, controls); Lamie v. U.S. Trustee, 540 U.S. 526,  
534 (2004) (when statute's language is plain, sole function of  
courts, at least where the disposition required by statute's text  
is not absurd, is to enforce statute according to its terms).

23 <sup>11</sup>Elsewhere in the opinion, in two footnotes, the  
24 subsections are cited:

25 Disposable income is defined as "current monthly income  
26 received by the debtor . . . less amounts reasonably  
27 necessary to be expended[.]" 11 U.S.C. § 1325(b)(2). . . .  
28 Section 1325(b)(3) requires that if a debtor's annualized  
current monthly income is greater than the median family  
(continued...)

1 If those brief statements even rise to the level of dicta,  
2 they are still not binding on us because there is absolutely no  
3 analysis of whether sections 1325(b)(2) and (b)(3) operate as  
4 one, albeit redundantly, or in sequence, with (b)(3) operative  
5 only if (b)(2) triggers it. More specifically, there is no  
6 analysis or discussion whether or how the subsections operate to  
7 determine deductible expenses.<sup>12</sup> We therefore do not violate the  
8 doctrine of stare decisis by applying an interpretation of the  
9 statutory scheme that teaches that if an item is not necessary  
10 for a debtor's support or maintenance, a debtor cannot engage in  
11

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12  
13 <sup>11</sup>(...continued)

14 income of similarly-sized households, then "amounts  
15 reasonably necessary to be expended" are determined in  
16 accordance with § 707(b)(2).

17 Kagenveama, 541 F.3d at 872 n.1.

18 BAPCPA replaced the old definition of what was "reasonably  
19 necessary" with a formulaic approach for above-median  
20 debtors. 11 U.S.C. § 1325(b)(3). This formula  
21 significantly changed the way in which "disposable income"  
22 is calculated.

23 Id. at 873 n.2.

24 <sup>12</sup>V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High  
25 School Dist., 484 F.3d 1230, 1232 n.1 (9th Cir. 2007) ("we are  
26 not bound by a holding 'made casually and without analysis, ...  
27 uttered in passing without due consideration of the alternatives,  
28 or where it is merely a prelude to another legal issue that  
commands the panel's full attention ...'"), quoting United States  
v. Johnson, 256 F.3d 895, 915 (9th Cir. 2001); see also Pakootas  
v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1082 (9th Cir. 2006)  
(quoting Johnson, holding that statements made without a  
deliberate consideration of the issues presented are not binding  
and may be re-visited).

1 the fiction of pretending to pay for it.

2 It is true that figuring out "projected disposable income"  
3 necessarily involves consideration of proper expenses to subtract  
4 from "current monthly income". But the court in Kagenveama was  
5 struggling with the competing views about how to define  
6 "projected" with respect to the "income" half of the equation and  
7 was not addressing whether the deducted expenses were necessary  
8 for the debtor's support.<sup>13</sup>

9 Thus, while Kagenveama directs us to "look backward" to  
10 define the income to be projected throughout the applicable  
11 commitment period, it did not address the definition of expenses  
12 or the measurement of them. Simply put, the opinion does not  
13 direct how courts are to calculate the "disposable" portion of  
14 "projected disposable income" (income minus expenses x temporal  
15 period of three or five years = amount to be paid to unsecured  
16 creditors). For this reason the opinion does not bind us to a  
17 rule of how to determine the expenses that must be applied to the  
18 income side of the equation, nor does it compel us to impose a  
19 symmetry that neglects the reality of the case before us, viz.,  
20 that Debtors decided that they did not need their extra vehicle  
21 or their two houses.

22 We apply the words of the statute even though doing so  
23

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24 <sup>13</sup>In holding that "projected disposable income" is the same  
25 as "disposable income," the Ninth Circuit relied on Anderson v.  
26 Satterlee (In re Anderson), 21 F.3d 355, 357 (9th Cir. 1994)  
27 (pre-BAPCPA case, determining the debtor's "disposable income"  
28 and then projecting that sum into the future for the required  
duration of the plan). This is how the court defined the term  
"projected" within the phrase "projected disposable income."

1 leaves us with a backward looking definition of projected  
2 disposable income (because of Kagenveama) and a definition of  
3 expenses which (because of the plain wording of the statute)  
4 takes into account financial realities (the liens have been  
5 stripped as of the petition date) occurring post-petition and  
6 incorporated into a debtor's chapter 13 plan.<sup>14</sup>

7 Without citing Kagenveama anywhere in its opinion, the  
8 Ransom court quoted our Panel's thinking on this very point:

9 However, in making that calculation [what debtors  
10 can afford to pay their creditors], what is important  
11 is the payments that debtors actually make, not how  
12 many cars they own, because the payments that debtors  
13 make are what actually affect their ability to make  
14 payments to their creditors.

15 Ransom, 571 F 3d. at 1029-30 (emphasis added).

16 D. Two-Part Analysis of Subsections (b) (2) and (b) (3).

17 Under the statute, a debtor may deduct from income those  
18 expenses reasonably necessary "for the maintenance or support of  
19 the debtor or a dependent of the debtor." 11 U.S.C.

---

20 <sup>14</sup>While this may be labeled a "forward-looking" approach to  
21 expenses, it is actually consideration of "a fixed debt that we  
22 know will disappear before the Chapter 13 plan is approved."  
23 Turner, 574 F. 3d at 356. As Judge Posner stated on behalf of  
24 the Seventh Circuit in Turner:

25 [B]ankruptcy judges must not engage in speculation  
26 about the future income or expenses of the Chapter 13  
27 debtor. That would unsettle and delay the Chapter 13  
28 process as well as exaggerate how accurately a person's  
economic situation in five years can be predicted. But  
in this case there is no speculation; all that is at  
issue is a fixed debt that we know will disappear  
before the Chapter 13 plan is approved.

Id.

1 § 1325(b) (2) (A) (i).<sup>15</sup> Thus, we read sections 1325(b) (2) and  
2 (b) (3) in sequence, as follows: if a debtor says an expense is  
3 not reasonably necessary for the debtor's and/or dependants'  
4 maintenance and support, the inquiry ends at section 1325(b) (2)  
5 as there is no amount to determine in section 707(b) (2) via  
6 section 1325(b) (3). Stated otherwise, there is no corresponding  
7 amount to subtract from the income component to get to what is  
8 "disposable" for the above-median income debtor.

9 If the expense is reasonably necessary for the debtor's  
10 and/or dependants' maintenance and support, then section  
11 1325(b) (3) requires the court to determine the amount in  
12 accordance with section 707(b) (2).<sup>16</sup> Sections 1325(b) (2) and  
13 (b) (3) require a two-step inquiry.

14 Applied to the facts before us, the Debtors valued their  
15 residences such that payments to the stripped lienholders were  
16 completely unnecessary to their maintenance and support. Thus  
17 they had no payments to make. As in Ransom in a situation having  
18 precisely the same economic effect (no lien at all there; no  
19 secured debt to pay here), the court's words are instructive:

20 As did our BAP, we decide this issue not on the  
21 IRS's manual, but instead on the statutory language,  
22 plainly read, which we believe does not allow a debtor  
23 to deduct an "ownership cost" (as distinct from an  
24 "operating cost") that the debtor does not have. An

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24 <sup>15</sup>Subsection 1325(b) (2) (B) adds a deduction from current  
25 monthly income for necessary expenses for a debtor engaged in  
26 business.

26 <sup>16</sup>This is because section 1325(b) (2) begins "For purposes of  
27 this subsection, the term 'disposable income' means . . . ."  
28 Then subsection (b) (3) begins "Amounts reasonably necessary to be  
expended under paragraph (2) shall be determined . . . ."

1 "ownership cost" is not an "expense"--either actual or  
2 applicable--if it does not exist, period.

3 577 F.3d at 1030 (citation and internal quotation marks omitted).

4 The bankruptcy courts believed that Kagenveama requires a  
5 bankruptcy court to apply a "snapshot" petition-date analysis in  
6 calculating both prongs of disposable income: expenses and  
7 income. In other words, they felt they could not consider post-  
8 petition events in determining whether expenses are reasonably  
9 necessary for the maintenance and support of debtors and their  
10 dependants. We disagree because, as noted, the clear language of  
11 section 1325(b) (2) requires the expenses to be reasonably  
12 necessary for the support and maintenance of the debtor. In  
13 Smith we are holding that items that a debtor has surrendered or  
14 intends to surrender are not necessary for his or her support or  
15 maintenance. The concepts -- surrender and necessity -- are  
16 mutually exclusive of one another.

17 So too, here, the notions that a wholly unsecured debt -- as  
18 of the petition date -- must be paid as a secured debt cannot be  
19 reconciled. Phantom payments for valueless collateral are not  
20 reasonably necessary for a debtor's support and maintenance.

21 Section 1325(b) (2) therefore requires the court to look at  
22 the necessity of the expense as determined by the debtor on a  
23 real-time, forward-looking basis, while section 1325(b) (3)'s  
24 incorporation of section 707(b) requires a static, backward-  
25 looking inquiry, since 707(b) itself requires such an analysis.  
26 See, e.g., Morse v. Rudler (In re Rudler), 576 F.3d 37 (1st Cir.  
27 2009). Here, section 1325(b) (3) does not come into play, so we  
28 are not bound by a backwards-looking inquiry.

1 This interpretation is consistent with the plain language of  
2 the statute. The Ninth Circuit in Kagenveama acknowledged that  
3 when a statute's language is plain, the court should enforce it  
4 according to its terms. Kagenveama, 541 F.3d at 872. To the  
5 extent that sections 1325(b)(2) and (b)(3) are ambiguous, this  
6 interpretation avoids an absurd result and is consistent with the  
7 intent of the statute's drafters.

8 Purely historical expenses which will never be paid under or  
9 outside of the plan (phantom expenses) cannot be reasonably  
10 necessary for a debtor's support or maintenance. To include them  
11 in the calculation of disposable income ignores the different  
12 functions of subsections (b)(2) and (b)(3).

13 In the cases before us, Debtors have chosen to value certain  
14 liens at zero and will not be making any payments under or  
15 outside their plans on the mortgages. Yet they are deducting  
16 these mortgage payments as expenses "necessary" for their  
17 support. Debtors cannot have it both ways. Either the expense  
18 is necessary or it no longer exists as a secured obligation for  
19 the purposes of their plans. Once Debtors opt to eliminate the  
20 secured claims, payment of those claims is no longer an expense  
21 that is necessary for their support under section 1325(d)(2).  
22 Consequently, there is no need to resort to section 1325(b)(3)  
23 and its dispatch to the mechanical formulas of section 707  
24 (b)(2)(A) & (B).<sup>17</sup>

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26 <sup>17</sup>Based on our analysis, we do not need to deal with the  
27 merits of an alternate analysis to reach the same result as set  
28 forth by the district court in Thissen v. Johnson, 406 B.R. 888  
(continued...)

1 **VI. CONCLUSION**

2 For the foregoing reasons, we REVERSE.

3  
4 HOLLOWELL, J., dissenting,

5 Under the guise of a plain meaning statutory analysis, the  
6 majority holds that § 1325(b)(2) and (b)(3) must be read  
7 sequentially, thereby arriving at a "common sense" result which  
8 only permits an above median-income debtor to use the means test  
9 to calculate expenses after the debtor demonstrates the expense  
10 is reasonably necessary. While I sympathize with the majority's  
11 desire to achieve a common sense result, I cannot agree with its  
12 contorted statutory analysis.

13 Section 1325(b)(3) provides that when a debtor has an above-  
14 median income, the reasonably necessary expenses to be deducted  
15 from current monthly income ("CMI") "shall be" calculated in  
16 accordance with § 707(b)(2)(A) and (B), otherwise known as the  
17 means test. 11 U.S.C. § 1325(b)(3) (emphasis added). The word  
18 "shall" is mandatory. Therefore, for the above median-income  
19 debtor, expenses must be calculated under § 707(b)(2). In re  
20 Farrer-Johnson, 353 B.R. 224 (Bankr. N.D. Ill. 2006).

21 Presumably, Congress believed the inclusion of the means  
22 test into the calculation of an above median-income debtor's CMI  
23 was the mechanism through which debtors would meet BAPCPA's goals  
24 of ensuring debtors repay creditors the maximum they can afford  
25 and reducing judicial discretion and non-uniformity. See

26  
27 \_\_\_\_\_  
28 <sup>17</sup>(...continued)  
(E.D. Cal. 2009).

1 Marianne B. Culhane & Michaela M. White, Catching Can-Pay  
2 Debtors: Is the Means Test the Only Way, 13 Am. Bankr. Inst. L.  
3 Rev. 665, 677-683 (2005); Maney v. Kagenveama (In re Kagenveama),  
4 541 F.3d 868, 875 (9th Cir. 2008); In re Alexander, 344 B.R.  
5 742, 747-48 (Bankr. E.D.N.C. 2006) (Congress acted intentionally  
6 when it inserted the means test into the calculation of chapter  
7 13 payment plans).

8 The Ninth Circuit, in Kagenveama, declined to “override the  
9 definition and process for calculating disposable income under  
10 § 1325(b)(2)-(3) as being absurd” even if it produced a less  
11 favorable result for unsecured creditors. 541 F.3d 868, 875 (9th  
12 Cir. 2008). In contrast, the Ninth Circuit recently determined,  
13 in Ransom v. MBNA Am. Bank (In re Ransom), 577 F.3d 1026 (9th  
14 Cir. 2009) that in order to reach a result consistent with  
15 BAPCPA’s goal of ensuring that debtors repay creditors as much as  
16 possible, § 707(b)(2)(A)(ii)(I) could only be interpreted to  
17 “apply” expense standards in cases where debtors in fact pay such  
18 expenses.

19 Of course, as the majority notes, the somewhat inconsistent  
20 holdings of Kagenveama and Ransom are not binding as to the  
21 resolution of this case since they did not address the issue  
22 presented here on appeal. However, I part with the majority’s  
23 contention that the Kagenveama court’s statutory analysis and  
24 discussion about how projected disposable income should be  
25 calculated was “made casually and without analysis,” and can be  
26 dismissed as mere dicta. Instead, I believe the statutory  
27 analysis undertaken by the Ninth Circuit in Kagenveama provides  
28 important guidance for the interpretation of § 1325(b)(2) and

1 (b) (3).

2 In Kagenveama, the Ninth Circuit was confronted, as we are  
3 here, with interpreting a subsection of § 1325(b) that contains  
4 an imbedded definition in a following subsection. It did not  
5 read the sections sequentially. Rather, the court held that the  
6 definition of "disposable income" in § 1325(b) (2) gave meaning to  
7 the phrase "projected disposable income" in § 1325(b) (1) (B). 541  
8 F.3d at 873. The Kagenveama court refused to "de-couple  
9 'disposable income' from the 'projected disposable income'  
10 calculation simply to arrive at a more favorable result for  
11 unsecured creditors, especially when the plain text and precedent  
12 dictate[d] the linkage of the two terms." Id. at 875.

13 I agree with the courts that find the most natural reading  
14 of § 1325(b) (3) "commands the application of Section 707(b) (2) (A)  
15 and (B) to determine the meaning of the amounts 'reasonably  
16 necessary to be expended'" under § 1325(b) (2). In re Burbank,  
17 401 B.R. 67, 73 (Bankr. D.R.I. 2009) (citing In re Quigley, 391  
18 B.R. 294, 299 (Bankr. N.D. W.Va. 2008)). Because § 1325(b) (3)  
19 contains the definition of "amounts reasonably necessary to be  
20 expended," it must be read to give meaning to what is to be  
21 deducted by an above median-income debtor in order to determine  
22 disposable income. As one bankruptcy court correctly analyzed  
23 § 1325(b) (2) and (b) (3):

24 As with "disposable income," the term "amounts  
25 reasonably necessary to be expended" appears only twice  
26 in § 1325; once in § 1325(b) (2) and then in  
27 § 1325(b) (3). If the Court were to require an  
28 additional requirement that the expense also be  
necessary for a debtor's "maintenance or support," it  
would likewise render as surplusage the clear direction  
in § 1325(b) (3) as to how "amounts reasonably necessary  
to be expended" shall be determined.

1 In re Smith, 401 B.R. 469, 474 (Bankr. W.D. Wash. 2008).

2 Another court noted, “§ 1325(b) (3) states that the amounts  
3 determined to be reasonably necessary under § 1325(b) (2) shall be  
4 determined in accordance with § 707(b) (2) (A) and (B)--period.

5 The term ‘reasonably necessary’ in § 1325(b) (3) is not  
6 superfluous--it is the very term that this section defines. For  
7 that reason, . . . courts may [not] conduct a separate

8 ‘reasonably necessary’ analysis beyond § 707(b) (2).” In re Van  
9 Bodegom Smith, 383 B.R. 441, 448 (Bankr. E.D. Wis. 2008)

10 (ultimately holding that payments on surrendered collateral are  
11 not “scheduled as contractually due” under § 707(b) (2) (A) (iii) (I)  
12 and, therefore, cannot be deducted in a debtor’s means test  
13 calculation).

14 I do not agree that § 1325(b) (2) and (b) (3) should be read  
15 sequentially. The statutory analysis put forth by the majority,  
16 which reads § 1325(b) (2) and (3) sequentially, essentially adds  
17 language to § 1325(b) (3) to read “after it is determined the  
18 expense is reasonably necessary, then the amounts reasonably  
19 necessary to be expended shall be determined in accordance with  
20 § 707(b) (2).”

21 I cannot join my colleagues in an interpretation that upends  
22 the statutory inclusion of the means test in chapter 13,  
23 reverting back to the pre-BAPCPA judicial discretion as to what  
24 expenses of a debtor are reasonably necessary. See Kagenveama,  
25 541 F.3d at 874 (deliberate departure from the pre-BAPCPA  
26 disposable income calculation was so that debtors would “be  
27 subject to clear, defined standards, no longer left to the whim  
28 of a judicial proceeding” (citation omitted)). The majority

1 contends the discretion of the bankruptcy court, under its  
2 analysis, is only to hold debtors to the consequences of their  
3 decisions about what assets they retain or surrender; however,  
4 the reality of the majority's interpretation of the statute is  
5 that bankruptcy courts will have the discretion to make  
6 determinations about what expenses are "reasonably necessary."

7       While I sympathize with the majority's desire for a common-  
8 sense solution to the problem created by incorporating the means  
9 test into the chapter 13 above median-income debtor's calculation  
10 of disposable income, I do not believe it is the role of the  
11 judiciary to remedy outcomes that do not comport with our view of  
12 common sense. See Id. at 875 ("If the changes imposed by BAPCPA  
13 arose from poor policy choices that produced undesirable results,  
14 it is up to Congress, not the courts, to amend the statute.").