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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No. NC-07-1201-DCaK
7	JOHN PAK,	)	Bk. No. 05-49326
8	Debtor.	)	
9	_____	)	
10	JOHN PAK,	)	
11	Appellant,	)	
12	v.	)	<b>OPINION</b>
13	eCAST SETTLEMENT CORPORATION;	)	
14	AMERICAN EXPRESS CENTURION	)	
15	BANK; MARTHA BRONITSKY,	)	
16	Trustee; UNITED STATES	)	
	TRUSTEE,	)	
	Appellees.	)	
	_____	)	

Argued and Submitted on October 26, 2007  
at Sacramento, California

Filed - November 7, 2007

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Leslie J. Tchaikovsky, Bankruptcy Judge, Presiding.

Before: DUNN, CARROLL,<sup>1</sup> and KLEIN, Bankruptcy Judges.

<sup>1</sup> Hon. Peter H. Carroll, Bankruptcy Judge for the Central District of California, sitting by designation.

1 DUNN, Bankruptcy Judge:

2 In this appeal, we address one of the most perplexing issues  
3 that has arisen in chapter 13 under the Bankruptcy Abuse  
4 Prevention and Consumer Protection Act of 2005 ("BAPCPA")--  
5 interpretation of the term "projected disposable income" in  
6 § 1325(b)(1)(B).<sup>2</sup> The debtor, John Pak ("Pak"), whose  
7 "disposable income" under the statutory definition was less than  
8 one third of his actual net income available to pay creditors,  
9 appeals the bankruptcy court's order dismissing his chapter 13  
10 case after denying confirmation of Pak's amended chapter 13 plan.  
11 We AFFIRM.

12  
13 **I. FACTS**

14 The factual background is not in dispute. Pak is a software  
15 engineer. He was laid off from his employment in April 2002 and  
16 did not find new employment until August 2005, approximately 39  
17 months later. During the period that he was unemployed, Pak  
18 lived on savings, unemployment benefits and distributions from  
19 his 401K plan. He also accumulated substantial unsecured debt.

20 Since August 2005, Pak has found work in his field as a  
21 software engineer, but as a "contract worker through a job shop,"  
22 with no health insurance or other benefits. His gross  
23 compensation is \$8,666.67 per month, for a total of \$104,004.04  
24 per year.

25 On October 31, 2005, Pak filed a voluntary chapter 7  
26 petition. His original schedules of income and expenses

27 \_\_\_\_\_  
28 <sup>2</sup> Unless otherwise indicated, all "Code," chapter and  
section references are to the federal Bankruptcy Code, 11 U.S.C.  
§§ 101-1532, as amended by BAPCPA, Pub. L. 109-8, 119 Stat. 23,  
as the case from which this appeal arises was filed after October  
17, 2005, the effective date of most BAPCPA provisions.

1 (Schedules I and J) showed net take home pay of \$5,530.20 per  
2 month and expenses of \$3,718.00, leaving a net monthly income of  
3 \$1,812.20. Pak listed general unsecured claims totaling  
4 \$172,931.24 in his Schedule F.

5 Pak filed an Official Form 22A ("Form 22A"), on which  
6 chapter 7 debtors calculate "current monthly income" under  
7 § 101(10A) and monthly expenses recognized under § 707(b)(2).<sup>3</sup>  
8 Since § 101(10A) requires that current monthly income be  
9 calculated historically, based on average gross income received  
10 during the six-month period ending with the month prior to the  
11 month during which his bankruptcy petition was filed, the  
12 "current monthly income" on Pak's Form 22A (\$2,666.67 monthly,  
13 and \$32,000.04 annually) was less than one third of his actual  
14 income at the time of his bankruptcy filing, because Pak was not  
15 employed during four of the six months of the relevant period.  
16 All parties agree that Pak's annualized "current monthly income"  
17 was below the median income for a California household of one  
18 person.

19 On April 14, 2006, the United States Trustee ("UST") filed a  
20 motion to dismiss ("Motion to Dismiss") Pak's chapter 7 case as  
21 an abuse under § 707(b)(3). On May 18, 2006, the bankruptcy  
22 court granted the Motion to Dismiss in a published decision, In  
23 re Pak, 343 B.R. 239 (Bankr. N.D. Cal. 2006). Pak filed a Motion  
24 to Convert Case to Chapter 13 on May 26, 2006, which the  
25 bankruptcy court granted on May 31, 2006.

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27 <sup>3</sup> Form 22 was known as Form B22 in the interim preceding  
28 the effective date of the official Forms. Some jurisdictions  
continue to refer to the official Form as Form B22.

1 Pak filed amended Schedules I and J ("Amended Schedules I  
2 and J") and a chapter 13 plan on June 26, 2006. Pak's Amended  
3 Schedules I and J reflected net take home pay of \$5,411.89 per  
4 month and expenses of \$4,421.99, with a balance of \$989.70 net  
5 monthly income. Pak's proposed chapter 13 plan provided for  
6 payments of \$300.00 a month for 36 months. On August 1, 2006,  
7 Pak filed an amended chapter 13 plan ("Amended Plan"), proposing  
8 payments of \$300.00 a month for 35 months, with a final payment  
9 of \$322.20 in month 36. Pak's proposed payments under the  
10 Amended Plan would total \$10,822.20. If Pak made chapter 13 plan  
11 payments based on his net monthly income, as reflected on his  
12 Amended Schedules I and J, his payments would total \$35,629.20  
13 over the life of a 36 month plan.

14 American Express Centurion Bank and eCast Settlement  
15 Corporation (collectively, the "Objecting Creditors"), the  
16 Trustee, and the UST each objected to confirmation of the Amended  
17 Plan, arguing that the Amended Plan failed to commit all of Pak's  
18 "projected disposable income" to payment of unsecured claims.  
19 Pak countered that the Amended Plan met "the requirements of  
20 § 1325 in that more than his statutory disposable income for 36  
21 months [was] committed to the plan."

22 After giving the parties opportunities to brief the issues  
23 and hearing oral argument, the bankruptcy court issued its  
24 memorandum of decision on December 14, 2006, published at 357  
25 B.R. 549 (Bankr. N.D. Cal. 2006), sustaining objections to and  
26 denying confirmation of the Amended Plan. The bankruptcy court  
27 entered an order denying confirmation of the Amended Plan on  
28 December 27, 2006.

1 Pak filed a Motion for Leave to Appeal the bankruptcy  
2 court's order denying confirmation of the Amended Plan with the  
3 Panel on January 4, 2007, which motion was denied based on the  
4 interlocutory nature of the order.

5 Pak subsequently waived the right to amend further his  
6 chapter 13 plan, at which point the bankruptcy court granted the  
7 Trustee's motion to dismiss Pak's bankruptcy case. The dismissal  
8 order was entered on May 10, 2007. Pak filed his Notice of  
9 Appeal on May 17, 2007.

10 On Pak's motion, the bankruptcy court entered an Order  
11 Staying Dismissal Pending Appeal on August 6, 2007.

## 12 13 **II. JURISDICTION**

14 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
15 §§ 1334 and 157(b)(1) and (b)(2)(L). We have jurisdiction  
16 pursuant to 28 U.S.C. § 158.

## 17 18 **III. ISSUE**

19 Whether the bankruptcy court erred in concluding that Pak's  
20 Amended Plan was not confirmable, as not committing all of Pak's  
21 "projected disposable income" to pay unsecured creditors, as  
22 required pursuant to § 1325(b)(1)(B).

## 23 24 **IV. STANDARD OF REVIEW**

25 We review issues of statutory construction and conclusions  
26 of law, including interpretation of provisions of the Bankruptcy  
27 Code, de novo. Einstein/Noah Bagel Corp. v. Smith (In re BCE W.,  
28 L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003); Mendez v. Salven (In

1 re Mendez), 367 B.R. 109, 113 (9th Cir. BAP 2007).

3 **V. DISCUSSION**

4 This appeal raises thorny issues of statutory construction.  
5 Since the Trustee and the Objecting Creditors objected to  
6 confirmation of Pak's Amended Plan, the immediate statutory  
7 battleground is § 1325(b)(1)(B), which provides:

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

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

(Emphasis added.)

15 Pak argues in effect that the bankruptcy court erred in not  
16 applying the term "disposable income" as defined in § 1325(b)(2)<sup>4</sup>

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18 <sup>4</sup> Section 1325(b)(2) provides:

19 For purposes of this subsection, the term "disposable  
20 income" means current monthly income received by the  
21 debtor (other than child support payments, foster care  
22 payments, or disability payments for a dependent child  
23 made in accordance with applicable nonbankruptcy law to  
24 the extent reasonably necessary to be expended for such  
25 child) less amounts reasonably necessary to be  
26 expended-

25 (A) (i) for the maintenance or support of the debtor or  
26 a dependent of the debtor, or for a domestic support  
27 obligation, that first becomes payable after the date  
28 the petition is filed; and

(ii) for charitable contributions (that meet the  
definition of "charitable contribution" under section  
548(d)(3) to a qualified religious or charitable entity  
or organization (as defined in section 548(d)(4)) in an  
amount not to exceed 15 percent of gross income of the  
debtor for the year in which the contributions are made;  
and

(continued...)

1 consistent with its "plain meaning." In Pak's view, the addition  
2 of the term "projected" to "disposable income" in § 1325(b)(1)(B)  
3 adds a mere multiplier, based on the number of months within the  
4 applicable commitment period (in this case, 36 months), to  
5 determine the minimum amount that a debtor must pay to his  
6 unsecured creditors in chapter 13 in order to satisfy the  
7 § 1325(b)(1)(B) condition to confirmation.

8 Statutory interpretation begins with a review of the  
9

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10 <sup>4</sup>(...continued)

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

14 The term "current monthly income" itself is defined in § 101(10A)  
15 as:

16 (A) . . . the average monthly income from all sources  
17 that the debtor receives (or in a joint case the debtor  
18 and the debtor's spouse receive) without regard to  
19 whether such income is taxable income, derived during  
20 the 6-month period ending on-

21 (i) the last day of the calendar month immediately  
22 preceding the date of the commencement of the case if  
23 the debtor files the schedule of current income  
24 required by section 521(a)(1)(B)(ii); or

25 (ii) the date on which current income is determined by  
26 the court for purposes of this title if the debtor does  
27 not file the schedule of current income required by  
28 section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than  
the debtor (or in a joint case the debtor and the  
debtor's spouse), on a regular basis for the household  
expenses of the debtor or the debtor's dependents (and  
in a joint case the debtor's spouse if not otherwise a  
dependent), but excludes benefits received under the  
Social Security Act, payments to victims of war crimes  
or crimes against humanity on account of their status  
as victims of such crimes, and payments to victims of  
international terrorism (as defined in section 2331 of  
title 18) or domestic terrorism (as defined in section  
2331 of title 18) on account of their status as victims  
of such terrorism.

1 language used by Congress in the current version of the law.

2 The starting point in discerning congressional intent  
3 is the existing statutory text, see Hughes Aircraft Co.  
4 v. Jacobson, 525 U.S. 432, 438 (1999), and not the  
5 predecessor statutes. It is well established that  
6 "when the statute's language is plain, the sole  
function of the courts--at least where the disposition  
required by the text is not absurd--is to enforce it  
according to its terms."

7 Lamie v. United States Trustee, 540 U.S. 526, 534 (2004)

8 (citations omitted). When the statutory language is ambiguous,  
9 however, courts may look beyond the statute itself to its  
10 legislative history and common usage of subject terms for  
11 guidance as to interpretation, as well as the context in which  
12 they are used. "Whether a statute is ambiguous is determined by  
13 reference to the language itself, the specific context in which  
14 that language is used, and the broader context of the statute as  
15 a whole." Hough v. Fry (In re Hough), 239 B.R. 412, 414 (9th  
16 Cir. BAP 1999) (quoting Robinson v. Shell Oil Co., 519 U.S. 337,  
17 341 (1997)). See In re Slusher, 359 B.R. 290, 295 (Bankr. D.  
18 Nev. 2007) ("In determining the sense of the words Congress chose,  
19 it is appropriate to investigate the contexts in which English  
20 generally and the Bankruptcy Code specifically employ the same or  
21 similar words.").

22 The term "projected disposable income" is not new with the  
23 BAPCPA amendments to the Bankruptcy Code. Before BAPCPA,  
24 "projected disposable income" was derived from "income not  
25 reasonably necessary for maintaining or supporting the debtor or  
26 a dependent, with that determination being made on an estimated  
27 basis at plan confirmation." Id. at 294. In most cases,  
28 disposable income was determined by subtracting the debtor's

1 monthly expenses, as set forth on Schedule J, from the monthly  
2 net income stated on the debtor's Schedule I.

3 Congress changed the determination of "disposable income" in  
4 chapter 13 under BAPCPA by adding extended, if not necessarily  
5 precise, definitional terms in §§ 1325(b)(2) and (b)(3)<sup>5</sup> and  
6 101(10A). However, Congress did not alter either the term  
7 "projected disposable income" in § 1325(b)(1)(B) or the  
8 requirement of § 1322(a)(1) that the debtor commit "such portion  
9 of future earnings or other future income of the debtor to the  
10 supervision and control of the trustee as is necessary for the  
11 execution of the plan." (Emphasis added.)

12 A number of courts have followed Pak's reasoning and have  
13 concluded that the term "projected" must be mechanically linked  
14 to the changed definition of "disposable income," both as a  
15 matter of "plain meaning" statutory interpretation and common

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16  
17 <sup>5</sup> Section 1325(b)(3) provides:

18 Amounts reasonably necessary to be expended under  
19 paragraph (2) shall be determined in accordance with  
20 subparagraphs (A) and (B) of section 707(b)(2), if the  
21 debtor has current monthly income, when multiplied by  
22 12, greater than-

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

26 (B) in the case of a debtor in a household of 2,  
27 3, or 4 individuals, the highest median family  
28 income of the applicable State for a family of the  
same number or fewer individuals; or

(C) in the case of a debtor in a household  
exceeding 4 individuals, the highest median family  
income of the applicable State for a family of 4 or  
fewer individuals, plus \$525 per month for each  
individual in excess of 4.

1 sense. The definition of "disposable income" in § 1325(b)(2) is  
2 expressly limited to § 1325(b) ("For purposes of this subsection,  
3 the term 'disposable income' means . . . "), but the words  
4 "disposable income" appear only at one other place in § 1325(b),  
5 as part of the phrase "projected disposable income." This has  
6 led some courts to conclude that "[i]f 'disposable income' is not  
7 linked to 'projected disposable income' then it is just a  
8 floating definition with no apparent purpose." In re Alexander,  
9 344 B.R. 742, 748 (Bankr. E.D.N.C. 2006). See, e.g., Coop v.  
10 Frederickson (In re Frederickson), No. 07-6025EA, 2007 WL 2752769  
11 (8th Cir. BAP Sept. 24, 2007); In re Kolb, 366 B.R. 802 (Bankr.  
12 S.D. Ohio 2007); In re Hanks, 362 B.R. 494 (Bankr. D. Utah 2007);  
13 In re Kagenveama, No. 05-28079-PHX-CGC, 2006 Bankr. LEXIS 2759  
14 (Bankr. D. Ariz. July 10, 2006); In re Tranmer, 355 B.R. 234  
15 (Bankr. D. Mont. 2006); In re Rotunda, 349 B.R. 324 (Bankr.  
16 N.D.N.Y. 2006); In re Guzman, 345 B.R. 640 (Bankr. E.D. Wis.  
17 2006); In re Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006).

18 The bankruptcy court's Kagenveama decision provides a  
19 typical example of the "plain meaning" analysis applied to  
20 "projected disposable income" in § 1325(b)(1)(B):

21 Care was taken by Congress to modify the old definition  
22 of disposable income and to replace it with one based  
23 upon "current monthly income." This is clear; there  
24 can be no doubt about it. Section 1325(b)(2) states  
25 what the definition of "disposable income" is "for the  
26 purpose of this subsection"; nowhere else, other than  
27 in Section 1325(b)(1)(B), do the words "disposable  
28 income" appear in the referenced subsection. Unless  
the definition applies to "projected disposable  
income," it has no meaning.

27 In re Kagenveama, 2006 Bankr. LEXIS 2759 at \*5. However, the  
28 Kagenveama court explicitly recognized the incongruous results

1 from its interpretation of "projected disposable income."

2 There are, of course, practical difficulties with the  
3 conclusion that "projected disposable income" is  
4 necessarily defined by "current monthly income." The  
5 most obvious is that historical current monthly income  
6 may or may not have any relationship to the actual  
7 income to be received by the debtors during the course  
8 of their Chapter 13 plan. For that purpose, the  
9 previous "I and J" approach would seem to yield a more  
10 reality-based number. However, Congress has chosen not  
11 to rely on I and J, notwithstanding their proven  
12 utility, and that is Congress' choice to make. But  
13 this case illustrates the problems caused by this  
14 approach. Debtor's Schedules I and J yield "disposable  
15 income" of \$1,523.89; however, "disposable income" as  
16 shown on Debtor's B22C form is a -\$4.04. Given the  
17 stated purposes of BAPCPA, it is both ironic and  
18 unfortunate that this Debtor with resources available  
19 to pay unsecured creditors will not be required to do  
20 so in this case.

21 Id. at \*5-7.

22 In our view, consistent with the holdings of most courts  
23 that have considered the issue,<sup>6</sup> Congress' retention of the term  
24 "projected" to modify "disposable income" in § 1325(b)(1)(B) is

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25 <sup>6</sup> See, e.g., In re McCarty, No. 06-51875, 2007 WL 2937126  
26 (Bankr. N.D. Ohio Sept. 28, 2007); In re Warren, No. 07-30721-  
27 DHW, 2007 WL 2683837 (Bankr. M.D. Ala. Sept. 6, 2007); In re  
28 Mancl, 375 B.R. 514, 516 (Bankr. W.D. Wis. 2007) ("As this case  
illustrates, the integration of the means test into the  
calculation of projected disposable income can hardly be  
characterized as seamless."); In re Meek, 370 B.R. 294 (Bankr. D.  
Idaho 2007); In re Knippers, No. 06-34841-H3-13, 2007 WL 1239297  
(Bankr. S.D. Tex. Apr. 26, 2007); In re Mullen, 369 B.R. 25  
(Bankr. D. Or. 2007); In re LaPlana, 363 B.R. 259 (Bankr. M.D.  
Fla. 2007); Kibbe v. Sumski (In re Kibbe), 361 B.R. 302 (1st Cir.  
BAP 2007); In re Gordon, 360 B.R. 679 (Bankr. S.D. Cal. 2007); In  
re Riggs, 359 B.R. 649 (Bankr. E.D. Ky. 2007); In re Slusher, 359  
B.R. 290 (Bankr. D. Nev. 2007); In re Bossie, No. A06-00432-DMD,  
2006 Bankr. LEXIS 3956, at \*4-5 (Bankr. D. Alaska Dec. 12, 2006);  
In re Casey, 356 B.R. 519 (Bankr. E.D. Wash. 2006); In re LaSota,  
351 B.R. 56 (Bankr. W.D.N.Y. 2006); In re Demonica, 345 B.R. 895  
(Bankr. N.D. Ill. 2006); In re Gress, 344 B.R. 919 (Bankr. W.D.  
Mo. 2006); In re Risher, 344 B.R. 833 (Bankr. W.D. Ky. 2006); In  
re Dew, 344 B.R. 655 (Bankr. N.D. Ala. 2006); In re McGuire, 342  
B.R. 608 (Bankr. W.D. Mo. 2006); In re Clemons, No. 05-85163,  
2006 Bankr. LEXIS 1366, at \*16-17 (Bankr. N.D. Ga. June 1, 2006);  
In re Hardacre, 338 B.R. 718 (Bankr. N.D. Tex. 2006).

1 ambiguous. It does not fit as neatly into the role of mindless  
2 multiplier as the "plain meaning" decisions would suggest, for  
3 the following reasons.

4 First, neither "projected" nor "projected disposable income"  
5 is defined in the Bankruptcy Code.<sup>7</sup> Yet, the addition of the

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7 <sup>7</sup> The term "projected disposable income" appears in five  
8 sections of the Bankruptcy Code other than § 1325(b)(1)(B), none  
9 of which purports to define it. See §§ 1129(a)(15)(B),  
10 1222(a)(4), 1225(b)(1)(B), 1225(b)(1)(C) and 1322(a)(4). Several  
11 courts and at least one commentator have cited § 1129(a)(15)(B),  
12 added by BAPCPA, as evidence for the proposition that "projected  
13 disposable income" is nothing more than "disposable income"  
14 annualized. See, e.g., Frederickson, 2007 WL 2752769; In re  
15 Berger, No. 07-10112-JDW, 2007 WL 1704403 (Bankr. M.D. Ga. June  
16 11, 2007); and Hon. Randolph J. Haines, Chapter 11 May Resolve  
17 Some Chapter 13 Issues, 8 Norton Bankr. L. Advisor 1 (Aug. 2007).

15 Section 1129(a)(15)(B) provides:

16 In a case in which the debtor is an individual and in  
17 which the holder of an allowed unsecured claim objects  
18 to the confirmation of the plan-

18 . . .  
19 (B) the value of the property to be distributed under  
20 the plan is not less than the projected disposable  
21 income of the debtor (as defined in section 1325(b)(2))  
22 to be received during the 5-year period beginning on  
23 the date that the first payment is due under the plan,  
24 or during the period for which the plan provides  
25 payments, whichever is longer.

23 (Emphasis added.)

24 Of course, contrary to § 1129(a)(15)(B)'s parenthetical  
25 "plain meaning" statement, "projected disposable income" is not  
26 defined in § 1325(b)(2). It is possible that in drafting  
27 § 1129(a)(15)(B), Congress intended to equate "projected  
28 disposable income" with a simple multiple of "disposable income,"  
as defined in § 1325(b)(2). Or, it is possible that Congress'  
use of the term "projected disposable income" in § 1129(a)(15)(B)  
is simply one more example of the "loose language" with which  
(continued...)

1 term "projected" to "disposable income" in § 1325(b)(1)(B)  
2 differentiates it from "disposable income," as defined in  
3 § 1325(b)(2). To interpret it otherwise tends to rob it of  
4 meaning. See, e.g., BFP v. Resolution Trust Corp., 511 U.S. 531,  
5 537 (1994) ("Congress acts intentionally and purposefully when it  
6 includes particular language in one section of a statute but  
7 omits it in another."); In re Jass, 340 B.R. 411, 415 (Bankr. D.  
8 Utah 2006) ("the Court must give meaning and import to every word  
9 in a statute").

10 The term "projected" is essentially forward-looking. It  
11 means "to calculate, estimate or predict (something in the  
12 future) based on present data or trends." Id. (quoting The  
13 American Heritage College Dictionary 1115 (4th ed. 2002)). It  
14 was so interpreted pre-BAPCPA. See Anderson v. Satterlee (In re  
15 Anderson), 21 F.3d 355, 357 n.5 (9th Cir. 1994).<sup>8</sup> Treating  
16 "projected" as future-oriented also is consistent with the  
17 § 1325(b)(1) requirement that its "projected disposable income"  
18 condition be applied "as of the effective date of the plan."

19 Like "projected disposable income," the term "effective date  
20 of the plan" is not defined in the Bankruptcy Code, and it has  
21 been interpreted differently in the various statutory contexts in  
22

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23 <sup>7</sup>(...continued)  
24 "BAPCPA is filled," as Pak recognizes. See Appellant's Reply  
25 Brief, at page 3, lines 18-19.

26 We agree with the bankruptcy court in In re Slusher, 359  
27 B.R. at 297, that none of the provisions of the Bankruptcy Code  
28 incorporating the term "projected disposable income" provides  
definitive guidance as to its interpretation.

<sup>8</sup> In Anderson, the Ninth Circuit noted that the definition  
of "project" was "to plan, figure or estimate for the future,"  
quoting Webster's Ninth New Collegiate Dictionary 940 (1984).

1 which it is used. See, e.g., In re Fleishman, 372 B.R. 64, 70-74  
2 (Bankr. D. Or. 2007) (compare interpretation under § 1325(a)(4)  
3 with interpretation of the term under § 1225(a)(4)).

4 In § 1325(b)(1), the most logical interpretation of the  
5 "effective date of the plan" is the date of plan confirmation, as  
6 a chapter 13 plan is not binding on the debtor and other  
7 interested parties until it is confirmed. See § 1327(a).<sup>9</sup> If  
8 the determination of the debtor's "projected disposable income to  
9 be received in the applicable commitment period" is to be made at  
10 the time of chapter 13 plan confirmation, which often occurs  
11 months after the petition date, it makes little sense to tie that  
12 determination exclusively to income information for the period of  
13 six months prior to the debtor's bankruptcy filing. In contrast,  
14 "disposable income" is calculated historically, based either on  
15 the debtor's income during the six full months preceding the  
16 debtor's bankruptcy filing, if, as in this case and in most  
17 cases, the debtor filed the required schedule of current income  
18 on Form B22A or Form B22C, or during the six months preceding the  
19 bankruptcy court's determination of the debtor's current income,  
20 if the debtor did not file such a schedule. See § 101(10A)(A)(i)  
21 and (ii).

22 The BAPCPA legislative history is generally not helpful in  
23 shedding light on why Congress should take such pains to add  
24 extended definitions for the terms "current monthly income" and

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25  
26 <sup>9</sup> Section 1327(a) provides:

27 The provisions of a confirmed plan bind the debtor and  
28 each creditor, whether or not the claim of such  
creditor is provided for by the plan, and whether or  
not such creditor has objected to, has accepted, or has  
rejected the plan.

1 "disposable income" in the Bankruptcy Code, while leaving the  
2 term "projected disposable income" unchanged. However, the  
3 BAPCPA legislative history does make clear that Congress intended  
4 to require debtors to "make a good-faith effort to repay as much  
5 as they can afford."<sup>10</sup>

6 Second, the "plain meaning" interpretation of "projected  
7 disposable income" takes leave of reality when faced with debtors  
8 whose incomes change dramatically, due to a change in employment  
9 status or otherwise during the six months preceding their  
10 bankruptcies. This is not a one-way ratchet problem: for every  
11 debtor whose increased income from the "disposable income"  
12 calculation would mean money left on the table that otherwise  
13 could be paid to creditors, there are debtors whose decreased  
14 income would effectively preclude their proposing a feasible  
15 chapter 13 plan. See Mancl, 375 B.R. at 517 ("Blind adherence to  
16 the Form B22C for the determination of a debtor's income could  
17 lead to arbitrary results based solely on the timing of the  
18 petition, potentially penalizing both debtors and creditors  
19 unfairly.").

20 For example, in Warren, 2007 WL 2683837, at \*1, during the  
21 six months prior to the debtor's chapter 13 filing, she received  
22 income from three sources: (1) \$5,514 a month from her employment  
23 by the state of Alabama; (2) \$800 a month distributions from her  
24 deceased father's estate; and (3) \$350 a month for her services

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26 <sup>10</sup> BAPCPA Presidential Signing Statement,  
27 <http://www.whitehouse.gov/news/releases/2005/04/20050420-5.html>.  
28 See 151 Cong. Rec. S2462-02 (Mar. 10, 2005) (statement of Sen.  
Sessions) ("People who need a fresh start under this bill will get  
one. The people who can pay some of their debts back will have  
to do that.").

1 as treasurer of the State Employees Grill. However, her services  
2 as State Employees Grill treasurer ended the month she filed her  
3 chapter 13 case, and the distributions from her father's estate  
4 were scheduled to end three months after her bankruptcy filing.

5 The chapter 13 trustee argued that the debtor's disposable  
6 income calculated in her schedule of current income on Form 22C  
7 "fixes the debtor's obligation during the life of the plan  
8 regardless of a change in circumstances." Id. at \*2. The  
9 bankruptcy court held that the Form 22C calculation created "a  
10 presumptive starting point for determining 'projected disposable  
11 income' that may be rebutted by evidence of the debtor's loss of  
12 a source of income included in that calculation." Id. at \*2.  
13 The bankruptcy court reached that determination based on its  
14 conclusion that interpreting "projected disposable income" as  
15 irrevocably tied to "disposable income," as defined in  
16 § 1325(b) (2), "would produce results at odds with both  
17 Congressional intent and common sense," in that it would force a  
18 debtor who otherwise was qualified for chapter 13 relief into a  
19 plan that clearly was not feasible. Id.

20 Similarly, in Jass, 340 B.R. 411, the bankruptcy court faced  
21 a situation where the chapter 13 debtors' Form B22C reflected  
22 "disposable income" of \$3,625.63 per month, but the debtors  
23 proposed to pay their unsecured creditors only \$790.00 a month in  
24 their chapter 13 plan. The trustee objected to confirmation of  
25 the debtors' plan, arguing that because the debtors were not  
26 proposing to pay \$3,625.63 each month to their unsecured  
27 creditors, their plan did not satisfy the "disposable income"  
28 test of § 1325(b) (1) (B). The debtors argued that medical

1 problems experienced by Mr. Jass resulted in a decrease in future  
2 income from what was set forth in their Form B22C, and they  
3 should not be bound by the form's "inadequate representations of  
4 their future budget." Id. at 414.

5 The bankruptcy court differentiated the terms "disposable  
6 income," as used in § 1325(b)(2), and "projected disposable  
7 income," as used in § 1325(b)(1)(B), holding that the word  
8 "projected" had independent significance, as being "future-  
9 oriented." Id. at 415. It determined that the Form B22C  
10 calculation was the starting point for the bankruptcy court's  
11 consideration of "projected disposable income," but further  
12 concluded that the Form B22C number could be rebutted if it "does  
13 not adequately represent the debtor's budget projected into the  
14 future." Id. at 415-16. It underlined its determination as  
15 consistent with the fundamental policies of the Bankruptcy Code,  
16 reasoning that,

17 If § 1325(b)(1)(B) required a debtor to always pay the  
18 calculated disposable income amount resulting from Form  
19 B22C, the Court would essentially foreclose the  
potential for bankruptcy relief from a group of chapter  
13 debtors who are otherwise eligible for relief.

20 Id. at 417.

21 The bankruptcy court ultimately concluded,  
22 Form B22C will always be the starting point for the  
23 Court's inquiry into whether the debtor is complying  
24 with the "projected disposable income" requirement of  
25 § 1325(b)(1)(B). The Court will presume that the  
26 number resulting from Form B22C is the debtor's  
27 "projected disposable income" unless the debtor can  
show that there has been a substantial change in  
circumstances such that the numbers contained in Form  
B22C are not commensurate with a fair projection of the  
debtor's budget in the future.

28 Id. at 418.

1 This case presents the opposite face of the same problem:  
2 The calculation of current income on Pak's Form 22A is materially  
3 reduced by Pak's unemployment during four of the six months  
4 averaged into the calculation. Because the term "disposable  
5 income" is included within the term "projected disposable  
6 income," we agree with the bankruptcy courts in both Jass and  
7 Alexander, 344 B.R. at 748, that the calculated "disposable  
8 income" of the debtor must be the starting point in determining  
9 "projected disposable income." The standards for determining  
10 "disposable income" initially anchor the term "projected  
11 disposable income." However, if the interpretation of "projected  
12 disposable income" is not to degenerate into absurdity, deriving  
13 "projected disposable income" from "disposable income" must be  
14 subject to the presentation of contrary evidence before  
15 confirmation of a debtor's chapter 13 plan. "Chapter 13 is not  
16 some alternative universe where reality dare not intrude."  
17 Mullen, 369 B.R. at 34. It makes no sense to interpret  
18 "projected disposable income," governing debtors' future payments  
19 under their chapter 13 plans, as cast in stone by their pre-  
20 bankruptcy history, without any opportunity for the trustee,  
21 creditors or the debtor to offer rebutting evidence as to changed  
22 income circumstances before the effective date of the plan.

23 In addition, treating "projected disposable income" as no  
24 more than a multiple of "disposable income" distorts application  
25 of the plan modification provisions of §§ 1323 and 1329.<sup>11</sup> Under  
26

---

27 <sup>11</sup> Section 1323(a) provides,  
28

(a) The debtor may modify the plan at any time before  
confirmation, but may not modify the plan so that the  
plan as modified fails to meet the requirements of

(continued...)

1 § 1323(a) pre-BAPCPA, nothing prevented a debtor from proposing a  
2 plan modification that would increase or decrease plan payments  
3 based upon changes in the debtor's circumstances prior to plan  
4 confirmation. Section 1323(a) was not amended by BAPCPA.  
5 However, if "projected disposable income" is treated as an  
6 unalterable multiple of "disposable income," as defined in  
7 § 1325(b) (2), such plan modifications would be prohibited. This,  
8 in effect, is the problem that the Warren and Jass courts were  
9 dealing with.

10 Postconfirmation plan modifications pursuant to § 1329  
11 present a more complex problem. If "projected disposable  
12 income," determined as of the effective date of the plan under  
13 § 1325(b) (1) (B), is no more than "disposable income" determined  
14 from the Form B22A or B22C multiplied by the number of months in  
15 the applicable commitment period, is that "projected disposable  
16 income" fixed and impervious to modification for the life of the  
17 plan? The Fourth Circuit has held that "the doctrine of res  
18 judicata prevents modification of a confirmed plan pursuant to  
19 §§ 1329(a) (1) or (a) (2) unless the party seeking modification  
20 demonstrates that the debtor experienced a 'substantial' and  
21 'unanticipated' post-confirmation change in his financial  
22 condition." Murphy v. O'Donnell (In re Murphy), 474 F.3d 143,

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23  
24 <sup>11</sup>(...continued)  
25 section 1322 of this title.

26 Section 1329(a) (1) provides,

27 (a) At any time after confirmation of the plan but  
28 before the completion of payments under such plan, the  
plan may be modified, upon request of the debtor, the  
trustee, or the holder of an allowed unsecured claim,  
to-

(1) increase or reduce the amount of payments on claims  
of a particular class provided for by the plan. . . .

1 149 (4th Cir. 2007) (citing Arnold v. Weast (In re Arnold), 869  
2 F.2d 240, 243 (4th Cir. 1989)).

3 This Panel, following the Seventh Circuit, rejected that  
4 position in Powers v. Savage (In re Powers), 202 B.R. 618, 622  
5 (9th Cir. BAP 2002), but concluded that "the circumstances of the  
6 debtor's changed financial situation can then be considered in  
7 exercise of the court's discretion." Id. See Barbosa v.  
8 Soloman, 235 F.3d 31, 41 (1st Cir. 2000); Matter of Witkowski, 16  
9 F.3d 739, 744-46 (7th Cir. 1994); Ledford v. Brown (In re Brown),  
10 219 B.R. 191, 193-95 (6th Cir. BAP 1998). Although the Ninth  
11 Circuit has not ruled on the preclusive effects of confirmed  
12 chapter 13 plans, dicta in Anderson suggest that at least in  
13 1994, the Ninth Circuit was inclined to the Fourth Circuit view.  
14 See Anderson, 21 F.3d at 358.

15 Ironically (and irrationally), if the Fourth Circuit  
16 position ultimately were to prevail, and the "plain meaning"  
17 courts' interpretation of "projected disposable income" were  
18 upheld, the debtor, trustee and unsecured creditors would be  
19 precluded from proposing chapter 13 plan modifications pursuant  
20 to § 1329(a) in the absence of the debtor's experiencing  
21 substantial income changes postconfirmation, while the bankruptcy  
22 court would be precluded from considering such changed financial  
23 circumstances preconfirmation. We conclude that interpreting the  
24 "projected disposable income" provision of § 1325(b)(1)(B) in  
25 that way makes no sense.

## 26 27 **VI. CONCLUSION**

28 For all of the reasons discussed above, we conclude that in

1 interpreting "projected disposable income" in § 1325(b)(1)(B),  
2 "disposable income," as defined in § 1325(b)(2), is the starting  
3 point for determining "projected disposable income," subject to  
4 adjustment, based on evidence, to reflect reality going forward.  
5 In this case, Pak's disposable income was skewed by four months  
6 of unemployment, averaged into the six months' prepetition  
7 determination of his current income on his Form 22A. The  
8 bankruptcy court appropriately considered the very substantial  
9 change in Pak's employment and financial situation following the  
10 extended period of his unemployment in determining whether to  
11 confirm the Amended Plan and declining to confirm it. We AFFIRM.

12  
13 KLEIN, Bankruptcy Judge, concurring:

14  
15 I agree that we should affirm the dismissal of the chapter  
16 13 case that was based on the refusal of a debtor who could fund  
17 a \$35,000 plan to propose a plan that pays more than \$10,822.20.  
18 Conceding that the statute makes it impossible to articulate an  
19 indisputably correct answer, I would prefer to affirm on a  
20 different theory.

21  
22 I

23 The chapter 13 "disposable income" objection-to-confirmation  
24 problem is a classic paradox. The emphasis in §§ 101(10A) and  
25 1325(b) on historical income as the threshold for confirming a  
26 chapter 13 plan over an objection contradicts the basic premise  
27 embodied in §§ 1306(a) and 1322(a)(1) that chapter 13 plans are  
28 funded by future income that really exists and runs counter to

1 the only thing that appears to be unambiguous about the 2005  
2 consumer amendments to the Bankruptcy Code: the policy that more  
3 debtors should be diverted from chapter 7 liquidations to chapter  
4 13 repayment plans.

5  
6 A

7 Neither the majority's solution of cutting the Gordian Knot  
8 by allowing present fact to trump § 1325(b)(2) "disposable  
9 income," nor the competing solution of rigidly adhering to a  
10 statutory construction of "disposable income" that ignores  
11 present fact in a manner that would bar from chapter 13 some  
12 debtors capable of paying at least as much as in chapter 7 while  
13 (as here) permitting others to pay less than what they could  
14 actually pay, is entirely satisfactory. The former, however, has  
15 the advantage of being more consistent with the policy of  
16 promoting payment through expanded use of chapter 13.

17 I submit there must be a better solution than cutting the  
18 Gordian Knot to achieve a practical common-sense result, instead  
19 of applying a rigidly-tunneled vision of § 1325(b) supported by  
20 invocations of "plain meaning" that serve as rhetorical devices  
21 to bolster unsatisfactory argument for an unpalatable result. In  
22 a sense, however, it is a false dilemma because the "either-or"  
23 choice does not account for other analyses. If I must choose  
24 between the two, then the Gordian Knot solution that has been  
25 applied by a substantial number of courts throughout the country  
26 fits better with the 2005 policy of increasing payments to  
27 creditors than a rigid analysis that offends the policy.

1 B

2 Any solution that will be serviceable in the long term must  
3 meet several criteria. First, it must, as in the facts of the  
4 present appeal, account for the debtor whose real income  
5 available during the life of the chapter 13 plan is greater than  
6 § 1325(b) "disposable income." Second, it must also account for  
7 the debtor whose real income is less than § 1325(b) "disposable  
8 income" but who can pay enough to fund an otherwise confirmable  
9 plan. While this second requirement may seem counterintuitive to  
10 those who think that no trustee or unsecured creditor would raise  
11 a § 1325(b) objection (§ 1325(b) applies only if objection is  
12 made) to a plan that is going to pay more than in chapter 7, the  
13 reality is that some unsecured creditors are animated by spite or  
14 a sense that they will have greater leverage if they can force a  
15 debtor out of bankruptcy.

16 Finally, our legal tradition requires that a solution must  
17 be based on a plausible construction of the language of the  
18 statute.

19  
20 II

21 If there is anything "plain" about the "disposable income"  
22 portion of the statute, it is that, in context, it is not  
23 "plain."

24 Justice Thomas, writing for a unanimous Supreme Court, has  
25 given us the applicable rule of statutory construction for when  
26 one may look beyond the mere words of the statute: "The  
27 plainness or ambiguity of statutory language is determined by  
28 reference to the language itself, the specific context in which

1 the language is used, and the broader context of the statute as a  
2 whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997) (9-0  
3 decision).

4 Robinson is consistent with the observation of Justice  
5 Scalia, also writing for a unanimous Supreme Court, that the  
6 interpretation of the Bankruptcy Code "is a holistic endeavor"  
7 and that "[a] provision that may seem ambiguous in isolation is  
8 often clarified by the remainder of the statutory scheme -  
9 because the same terminology is used elsewhere in a context that  
10 makes its meaning clear or because only one of the permissible  
11 meanings produces a substantive effect that is compatible with  
12 the rest of the law." United Sav. Ass'n of Texas v. Timbers of  
13 Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988) (9-0  
14 decision).

15 This implicates what is known as the doctrine of "whole  
16 statute" interpretation that we recently have described in  
17 connection with a different Bankruptcy Code conundrum. Wechsler  
18 v. Macke Int'l Trade, Inc. (In re Macke Int'l Trade, Inc.), 370  
19 B.R. 236, 252 (9th Cir. BAP 2007); 2A NORMAN J. SINGER, SUTHERLAND  
20 STATUTORY CONSTR. § 46:5 (5th ed. 1992).

21 When one considers the "whole statute," paths toward a  
22 resolution more satisfactory to me emerge.

### 24 III

25 One solution is based on a close reading of the provisions  
26 that implicate the term "current monthly income."

27 The context of § 1325(b) "disposable income" cannot be  
28 viewed in isolation from the definition of "current monthly

1 income" at § 101(10A), and the adjustments to "current monthly  
2 income" and expenses provided by § 707(b). All three of these  
3 sections were added to the Bankruptcy Code as an integrated whole  
4 in 2005. Moreover, context requires consideration of the  
5 debtor's duty under § 521(a)(1)(B)(ii) to file "a schedule of  
6 current income and current expenditures," the basic requirements  
7 for chapter 13 plan confirmation under § 1325(a), and the  
8 provisions under § 1329 for modifying a plan after confirmation  
9 in order to account for changes in income.

10  
11 A

12 "Current monthly income" is a Code-wide defined term that  
13 focuses on the average of the debtor's income for six calendar  
14 months before bankruptcy. The definition specifically cross-  
15 references the debtor's § 521(a)(1)(B)(ii) duty to file a  
16 "schedule of current income and current expenses," which  
17 schedules have been required by § 521 since 1984 and are the  
18 "Schedules I and J" that figure in the § 1325(b) debate. The  
19 existence of this cross-reference is indicative of an intended  
20 interconnection between historical income and current income.

21 "Current monthly income" has its most prominent role at  
22 § 707(b) in connection with the statutory formula for determining  
23 whether a consumer debtor's case under chapter 7 is an "abuse"  
24 warranting dismissal or conversion to chapter 11 or 13. An  
25 elaborate mechanism is prescribed for computing the monthly  
26 expenses to be deducted from current monthly income.

27 Of particular interest in the present context is the  
28 mechanism in § 707(b) for rebutting the statutory presumption by

1 demonstrating "adjustments of current monthly income for which  
2 there is no reasonable alterative." 11 U.S.C. § 707(b)(2)(B)  
3 (emphasis supplied). Such "adjustments of current monthly  
4 income" must be based on "special circumstances" and be  
5 "necessary and reasonable." The critical point for present  
6 purposes, however, is that there is a mechanism for adjusting  
7 "current monthly income" to reflect current circumstances so as  
8 to avoid unjust results.

9 It is perhaps natural that heretofore the "special  
10 circumstances" discussion has been focused on the expense side of  
11 the equation because that is where most of the action occurs.  
12 But the phrase "adjustments of current monthly income" must mean  
13 something because we do our best to try to give effect to all  
14 language in a statute. I submit that what is contemplated is a  
15 significant and not transitory change in income. The evidence  
16 supporting my view is in the language of § 707(b)(2)(B)(i):  
17 "special circumstances, such as . . . a call or order to active  
18 duty in the Armed Forces." One need only look at the official  
19 United States military pay tables to recognize that a call to  
20 active duty precipitates a substantial reduction in income for a  
21 typical military reservist consumer.

22 Although the calculations of current monthly income and  
23 monthly expenses required by § 101(10A) and § 707(b) appear in  
24 tableau format on Form B22A for chapter 7 cases and Form B22C for  
25 chapter 13 cases, the forms do not capture "special  
26 circumstances" adjustments to income. Since all the requirements  
27 of various versions of Form 22 (known as B22 in the interim  
28 preceding the effective date of the official Forms) are imposed

1 directly or indirectly by the statute, the statute controls  
2 whenever Form 22 diverges from the statute. Indeed, the Forms 22  
3 resulted from the mandate in § 707(b)(2)(C) that a statement of  
4 "current monthly income" and the calculations regarding the  
5 presumption of abuse be presented in conjunction with the  
6 schedules of current income and current expenses required by §  
7 521. Since the statute authorizes "adjustments of current  
8 monthly income," the statement of "current monthly income" on a  
9 form that does not attempt to capture such adjustments does not  
10 mean that there cannot be "adjustments of current monthly income"  
11 to reflect reality when "special circumstances" exist.

12 "Current monthly income" and the § 707(b) abuse calculations  
13 spill over to the chapter 13 plan confirmation provisions under  
14 § 1325. Since 1984, a plan that satisfies the basic § 1325(a)  
15 plan confirmation standards nevertheless may not, by virtue of  
16 § 1325(b), be confirmed over objection of the chapter 13 trustee  
17 or the holder of an allowed unsecured claim unless either the  
18 objecting creditor is being paid in full or all of the debtor's  
19 "projected disposable income" is committed to the plan for the  
20 requisite period. 11 U.S.C. § 1325(b). Also since 1984,  
21 § 1325(b) has contained a definition of "disposable income," but  
22 until 2005 that definition focused on "income which is received  
23 by the debtor and which is not reasonably necessary to be  
24 expended" for maintenance and support. 11 U.S.C. § 1325(b)(2)  
25 (repealed 2005).

26 The innovation in 2005 for § 1325(b)(2) came in two parts.  
27 First, the definition of "disposable income" was revised by  
28 substituting "current monthly income" in place of "income which

1 is received by the debtor." The friction generated by the  
2 introduction of this disconnect between present and past ignited  
3 the present debate that seems to be boiling down to a  
4 disagreement about whether the word "projected" is an adjective  
5 applied to a term of art ("disposable income") or instead whether  
6 "projected" is part of an integrated term ("projected disposable  
7 income") with a meaning different than "disposable income."

8 The second facet of the 2005 revision of § 1325(b)(2) was  
9 the addition of the requirement in § 1325(b)(3) that allowable  
10 expenses under § 1325(b)(2) for over-median income debtors be  
11 "determined in accordance with subparagraphs (A) and (B) of  
12 section 707(b)(2)." Of course, § 707(b)(2)(B) is precisely the  
13 provision that authorizes "adjustments of current monthly income"  
14 based on present facts. In other words, it is at least a  
15 plausible interpretation (I do not pretend it is perfect) that  
16 "current monthly income" as used in § 1325(b) can be adjusted  
17 under the mechanism provided by § 707(b)(2)(B) to recognize  
18 substantial and non-transitory changes in income.

19 It is no objection that § 1325(b)(3) applies only for over-  
20 median income debtors. The language is certainly mandatory for  
21 over-median income debtors ("Amounts reasonably necessary to be  
22 expended under paragraph (2) shall be determined . . ."), but a  
23 court presumably would have discretion (i.e. "may be determined")  
24 to apply similar analysis to other debtors. The more accurate  
25 view of § 1325(b)(3) is that it is mandatory for over-median  
26 income debtors, but optional for under-median income debtors.

27 It is perhaps more of an objection that the incorporation of  
28 § 707(b)(2)(B) into § 1325(b)(3) is done in terms that refer only

1 to the expense side of the equation. That would have some force  
2 if Congress had imported only § 707(b)(2)(A), which deals only  
3 with expenses. It loses force when one looks at the  
4 incorporation of § 707(b)(2)(B), which deals exclusively with  
5 rebutting a presumption of abuse (that can only arise after  
6 "current monthly income" netted with § 707(b)(2)(A) expenses).  
7 Since the presumption of abuse that is addressed by  
8 § 707(b)(2)(B) has literally nothing to do with chapter 13, the  
9 specific incorporation of § 707(b)(2)(B) into § 1325(b)(3) must  
10 mean that the provisions for making "adjustments" based on  
11 "special circumstances" is what is being imported without the  
12 irrelevant presumption of abuse rebuttal provisions. Congress  
13 must have meant something by specifying § 707(b)(2)(B); what  
14 else, besides "adjustment" safety valve, could it have been? It  
15 is difficult to imagine how only snippets of the special  
16 circumstances adjustments would be applicable. If this  
17 analysis were to be applied, then the problem presented by this  
18 appeal would be solved. The debtor has had a substantial and  
19 non-transitory increase in income that necessitates a  
20 § 707(b)(2)(B) "adjustment of current monthly income" based on  
21 "special circumstances" to an amount substantially higher than  
22 the \$2,666.67 upon which he relied to propose a \$10,822.20 plan.  
23 Hence, the court correctly sustained the § 1325(b) objection to  
24 confirmation and correctly dismissed the case when the debtor  
25 chose not to file another plan that took into account the  
26 appropriate "adjustments of current monthly income."

27

28

1 B

2 Further support for the construction outlined above is found  
3 at § 1329(a), which provides for modification of a plan after  
4 confirmation.

5 At any time between confirmation and completion of payments  
6 under a chapter 13 plan, the debtor, the trustee, or an unsecured  
7 creditor may request a plan modification that, among other  
8 possibilities, increases or reduces payments or extends or  
9 reduces the time for making payments. 11 U.S.C. § 1329(a)(1).  
10 Such modifications typically are based on changes in income.

11 While a modification must meet the plan confirmation  
12 requirements of § 1325(a), which is incorporated by § 1329(b)(1)  
13 ("the requirements of section 1325(a) of this title apply to any  
14 modification under subsection (a)"), it is significant that  
15 § 1325(b) does not apply to § 1329 modifications. Sunahara v.  
16 Burchard (In re Sunahara), 326 B.R. 768, 781-82 (9th Cir. BAP  
17 2005).

18 In sum, the construction of the statute that discerns the  
19 ability to adjust "current monthly income" based on "special  
20 circumstances" is a plausible reading of the relevant provisions  
21 of the Bankruptcy Code and accounts for both upward and downward  
22 adjustments to "current monthly income."  
23

24 IV

25 An alternative basis upon which we could affirm this appeal  
26 focuses on the basic confirmation requirements specified by  
27 § 1325(a).

28 Accepting at face value the debtor's argument that the

1 \$10,822.20 he proposes to pay into the plan is all that he must  
2 do under § 1325(b), the plan nevertheless must meet all  
3 confirmation requirements of § 1325(a).

4 Since it is apparent that the debtor actually could afford  
5 to pay about \$35,000 into a plan during the applicable commitment  
6 period, the question becomes whether the plan has been "proposed  
7 in good faith" as required by § 1325(a)(3).

8 As we explained in Sunahara, the § 1325(a)(3) analysis,  
9 among other things, "necessarily requires an assessment of a  
10 debtor's overall financial condition including, without  
11 limitation, the debtor's current disposable income, the  
12 likelihood that the debtor's disposable income will significantly  
13 increase due to increased income or decreased expenses over the  
14 remaining term." Sunahara, 326 B.R. at 781-82.

15 When the record establishes that there is a material  
16 disparity between what would be paid into a plan and what could  
17 be paid into a plan, the question of what should be paid into a  
18 plan becomes part of the confirmation process. A tool in the  
19 toolbox for dealing with this situation is the "good faith" plan  
20 confirmation requirement.

21 It is credible to argue that the debtor's plan is an  
22 intentionally passive-aggressive, "gotcha" response to the  
23 straightjacket that was nominally imposed by the 2005 amendments.  
24 While to some it smacks of delicious irony, there is a point of  
25 degree at which a debtor's proposed chapter 13 plan can move into  
26 the realm of overreaching that is lacking in "good faith."

27 In this context, it is significant that in the 2005  
28 amendments Congress restated the requirement that debtors file a

1 schedule of "current income and current expenditures" in cases  
2 under all chapters. 11 U.S.C. § 521(a)(1)(B)(ii). The provision  
3 that requires additional reporting of "current monthly income" in  
4 connection with the schedule of current income and current  
5 expenses appears only in chapter 7. 11 U.S.C. § 707(b)(2)(C).

6 Since Congress would not have required reporting of current  
7 information regarding income and expenses if such information was  
8 intended to be irrelevant, it follows that such information may  
9 be considered in the § 1325(a) "good faith" analysis required for  
10 chapter 13 plan confirmation.

11 Accordingly, the bankruptcy court's refusal to confirm the  
12 plan that would pay less than one-third of what the schedules of  
13 current income and expenses (Schedules I and J) suggest the  
14 debtor could pay, may be affirmed on the basis that the plan was  
15 not confirmable because the plan proponent did not by a  
16 preponderance of evidence establish that the plan was proposed in  
17 "good faith" as required by § 1325(a)(3).

18 This analysis, however, is less attractive than the analysis  
19 suggested above because it does not account for how one would  
20 deal with the debtor whose actual income has fallen below  
21 "current monthly income" in a manner that would permit an  
22 unsecured creditor animated by non-economic factors to block plan  
23 confirmation even though the debtor still has sufficient income  
24 to fund a chapter 13 plan and may desperately need to confirm  
25 such a plan in order to cure, for example, a mortgage default  
26 during the life of the plan.

\* \* \*

1  
2 Both of these alternative theories would support affirmance  
3 and appear to me to be more firmly grounded in the language of  
4 the statute than the approach of cutting the Gordian Knot. As  
5 noted at the outset, however, if I had to choose between the  
6 majority's approach and the alternative that "current monthly  
7 income" creates a straightjacket in which there is no flexibility  
8 for dealing with the actual facts of a particular case, I would  
9 agree with the substantial body of cases that go with cutting the  
10 knot.

11 Accordingly, I concur.  
12  
13  
14  
15  
16  
17  
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