AMERICAN BANKRUPTCY INSTITUTE

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Consumer Workshop I

Let the Winning Continue: Getting to Confirmation

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CONCURRENT SESSION

2020

Let the Winning Continue: Getting to Confirmation

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I. Chapter 13 Best Practices and Effective Case Management

This topic is so often covered in seminars and bar association newsletters, it seems as though the issues giving rise to such frequent discussion have all been worked out by now. Unfortunately, in the experience of judges, trustees and fellow attorneys, there is still significant ground to cover in improving Chapter 13 case management. Rather than run through the same familiar advice, let's hit the top three things any practitioner can do to improve their chapter 13 practice.

A. **Modernize and Streamline Your Law Practice.** When was the last time you looked at every facet of your practice and critically analyzed the processes and procedures with an eye toward innovation and efficiency? For many, the answer to that question may be "never" or "too long ago". Yes, we have updated our hardware and equipment and changed software vendors over time; but most are using the same practices and procedures they've used for many years or even decades. Technology moves so quickly, and the changes impact our practices, but also the very nature of the lives our clients are living today. Here are a few considerations for areas of improvement.

1. Go Paperless. Okay, it's not possible for an attorney to go 100% paperless. Ethically we have to hold onto wet signatures of petitions and schedules and fee agreements. However, digitizing your client files can streamline the intake process and provide ease of access wherever you find yourself. The costs savings from increased productivity and reduced staff time can be significant. It can take a little work, but the transition can be made gradually and without significant cost.

For those who are already utilizing paperless solutions, look for ways to expand. Provide a secure portal for clients to upload documents. Rather than printing documents and dropping at your office for scanning by a paralegal, let the client send the electronic copy directly. Make your intake questionnaire a fillable PDF document that the client can digitally sign and submit via email. Some software providers have web-based intake interviews that use password access to verify client identity. Consumers are familiar with web and PDF interfaces, as many industries are adopting systems that utilize this technology.

2. Use Technology to Streamline Processes. As a young lawyer, I saw many different checklists and tickler systems that were used to ensure tasks were completed in each case. This systematic approach is valuable in streamlining cases, but technology can take it to the next level. Firms can set up ticklers and reminders keyed on important milestones and dates in cases that will happen automatically or will remind a staff person or attorney to execute the task. For example, your case management software can be linked to an email or text messaging program and when a 341 meeting date is entered, a string of messages will be scheduled and delivered to the client without staff or attorney action. The first message tells the client when the meeting is, what to expect, and provides a map link. The second, two weeks later asks the client to forward or upload bank statements and paystubs covering the date of filing. The third message reminds the client that the meeting is happening in two days.

B. Evaluate and Update Your Intake and Due Diligence Tools. While technology advances have changed how we operate our law practices, its impact on our everyday lives has been even more broad. The same holds true for our clients' lives. The changes effect everything from what we purchase, to services we use, and how we pay for it. It is necessary to evaluate the tools we use to assist clients to ensure that we are performing our due diligence and providing the most complete full and fair disclosure possible.

1. Revise Your Intake Questionnaire and Document Checklist. If the tools you use to gather the information and data needed for the Petition and Schedules are more than 5 years old, it's time for a revision. The spread of digital payment services, like Venmo and Square, and digital savings services, like Acorns, mean that practitioners need to be asking different questions about financial accounts than we did even a few years ago. Add to that the rise of cryptocurrency and other difficult to track assets, like social media profiles with valuable followers, and you begin to realize there may be an entire line of inquiry you have been missing. Similarly, expenses are morphing as subscription-based services are becoming more prevalent. While Netflix has been a digital entertainment player for many years, newer services are replacing old cable television options. These companies include Amazon Prime, Disney+, and Sling. Subscriptions abound including driving monitoring devices, productivity apps, social media channel subscriptions, weight loss programs, and even educational applications for kids. Some households are spending in excess of $200-300 per month on various subscriptions that are unaccounted for in most budgets.

Where should you begin? Start by looking at your own household, talk to your children and grandchildren about what they are paying for every month, and what types of financial accounts they use. You will begin to uncover a world of digital transactions and assets that likely need to be disclosed in a consumer bankruptcy case. Re-write your intake questionnaire to ask about 21st century assets like digital payment and savings accounts, social media accounts (including number of followers and any revenue generated), and cryptocurrency. Include budget line items for specific types of subscription services or ask clients to list all the subscriptions they have and allocate those to the appropriate categories of expenses.

2. Utilize Digital Due Diligence Products. The benefits of digitization include the availability of improved and affordable due diligence products. Databases of information are easier than ever to access and becoming less expensive. Given the requirements of 11 U.S.C. 526(a), a consumer attorney can't be too careful in undertaking due diligence and verifying client answers to questions asked. There are great services available to aid in your work and reduce the time and money needed to make a probing inquiry.

Beginning with real property, title searches are the cheapest insurance policy you can buy. In Colorado, title companies offer Ownership & Encumbrance Reports for $5.00 per property. This will list all liens against the property, including tax liens and judicial liens. The judicial liens are based on name searches, so some caution and cross-checking are appropriate. The turnaround is usually about 24-48 hours.

To cross-check the judicial lien, a court record search is available for approximately $7.00 per search and will yield all civil, criminal, traffic and domestic cases state-wide for an individual name. These records can be compared to the judicial liens in the O&E Report. Don't forget to run a PACER search, for $0.25, to find prior bankruptcies and other federal cases. Finally, credit reporting can be helpful in showing not only debts, balances and even bankruptcy noticing addresses, but also judgments that have entered against the debtor.

Finally, the ease of obtaining tax transcripts can significantly reduce the element of surprise in bankruptcy cases and help practitioners to accurately advise clients on everything from timing to chapter selection. Transcripts are also a rich source of other information about a client's financial life. Looking at several years of transcripts will reveal businesses, mineral rights, retirement accounts, rental properties, and other assets or sources of income that the client may have overlooked disclosing. Clients can now obtain electronic transcripts from the IRS by creating an account and requesting them. Attorneys have access to a variety of vendors who can provide the same transcripts for a fee.

3. Request All Supporting Documentation Before a Case is Filed. The calls for extensive supporting documentation and evidence in Chapter 13 cases are frequent and common. However, trustees consistently complain that consumer attorney are not ready to provide that documentation when requested. Too often, the attorney is struggling to secure the information needed from clients who ignore calls and emails and seem to have disappeared from the earth once the case has been filed. Avoiding this scenario should be at the top of every attorney's list of urgent concerns. Include the request for detailed documentation of extraordinary expenses like out-of-pocket medical expenses, educational expenses, childcare costs, and utility expenditures in the initial document checklist. Provide instructions on how to find the information you are looking for, including telephone numbers of common utility providers, details needed in a summary of childcare expenses, each source of medical information including insurance company, pharmacy, vision center, dentist, chiropractor and other providers. It can even be helpful to offer a script that clients can use when contacting the providers. If clients fail to turn over the information, make it a follow up item due before sign-off. It may seem overwhelming or unnecessary, but you have your client's full attention when the pressure of foreclosure, garnishment or other negative financial action is pressing. Once you provide the relief of the automatic stay, the client's willingness to take action is significantly diminished.

C. **Provide Consistent, Written Advice and Information to Clients.** Bankruptcy lawyers are required to provide certain written disclosures to all clients pursuant to 11 U.S.C. 342(b) and 527(a) and (b). These instructions provide the barest of frameworks of information clients need to understand bankruptcy. Robust and thorough information, provided in intervals over the course of the case, can help to guide clients through the bankruptcy and protect the attorney from malpractice claims. Rather than dispensing this advice on an "as needed" basis, establish a procedure and process for disseminating these details in digestible pieces. Fit the disclosures to your practice and client by offering them in printed format, or via automated email. A good schedule for disclosures and communications include:

- At the initial client meeting, provide mandatory disclosures, fee agreement, and a timeline of next steps;

- Five to ten days after initial meeting, reinforce advice given on debts to pay, handling bank accounts and credit cards, reminders of next step;
- After documents have been returned and intake questionnaire is completed, provide instructions for completing credit counseling course;
- Two days before signing appointment, send Verification of Schedules for review.
- At signing meeting, have client sign off on Verification of Schedules and provide a “What Happens Next” information sheet or email;
- After case is filed, send client copy of all filed documents, along with 341 meeting preparation notes, Chapter 13 Essential Information, and Mortgage Payment Tracker (if applicable);
- Two days before Meeting of Creditors, remind client of time, date, location and necessary identification needed;
- The day after the Meeting of Creditors, send instructions about taking the financial education class;
- Three days before Trustee’s objection deadline, send client email or letter explaining that objections are common and what the process for resolution is;
- Include an explanation of the fee application and source of payments for the balance requested with the copy sent to the client;
- Forty-five days prior to a schedule change in plan payments, send a reminder of the new amount and date;
- Six months prior to a final payment, advise clients of need to be current on mortgage and finish plan payments on time;
- Thirty days before final payment, recommend another check of mortgage payments and confirm date of final payment;
- Once final payment is made, send Certificate re Discharge or other closing paperwork.

Communicating with clients in advance of major milestones and events in the case can assist in preventing anxiety and providing a clear direction and expectation for the case. Offering the same reminders, advice, and recommendations to every client, in every case, on a consistent timeline will also help eliminate panicked phone calls, staff scrambles and unsatisfactory results.

D. **Closely Manage the Claims Process.** Turning from internal processes to case requirements, there has never been a time when examining and managing creditor claims has been more critical to a Chapter 13 consumer client. With the recent changes to Rules 3001, 3002 and 3002.1, failure to monitor creditor claims can be detrimental to a case. There are three simple things every practitioner should do to tame the claims beast.

1. Review Every Claims Filed. Practitioners and staff should be reviewing each claim as it is filed to ensure that the creditor has complied with Rule 9037 by redacting personal identification information; verifying that there are not defects in the claim, such as statute of limitations issues, or failure of documentation; and determining whether the claim has been properly classified and provided for in the plan to the extent necessary.

2. Object to Creditor Claims. If a defect is found, it is critical to object. Rule 3001(c)(3) requires that the creditor on an open-ended or revolving consumer account must provide a statement showing, among other things, that it is the lawful owner of the debt. A debtor may have other reasons to object including statute of limitations, amounts listed in the claim conflict with recent statements from the creditors about the balance, or there are unreasonable fees. Objections to unsecured claims are often not pursued when the payout to class 4 creditors is insignificant. However, with the increase in Chapter 13 cases filed to reconcile excessive home equity, effective attack of unsecured claims is becoming an important skill for a practitioner to possess.

If an objection is made to the proof of claim, the creditor has the ultimate burden of persuasion as to the validity and amount of the claim. When claims are executed in accordance with Rule 3001, they constitute prima facie validity of the claim. An objecting party must produce evidence that then rebuts the claimant's prima facie evidence, and if such evidence is sufficient, the burden shift back to the claimant to demonstrate the validity of the claim. Conversely, claims filed without necessary documentation are not accorded this evidentiary value. Courts must then weigh the available evidence to determine whether to allow the claim. Most courts find that listing a creditor and amount owed on debtor s schedules constitutes some evidence of the debt owed. *Compare In re Dove-Nation*, 318 B.R. 147 (B.A.P. 8th Cir. 2004) (debtor's original schedules, signed under oath, admitting liability on debts, can constitute additional evidence supporting the claims) *with In re Kirkland*, 572 F.3d 838 (10th Cir. 2009) (debtor's schedules of no evidentiary value against an objecting trustee).

3. File Timely Claims on Creditors' Behalf. Chapter 13 debtors should file claims on behalf of secured creditors or creditors with non-dischargeable claims so that those creditors can share in the chapter 13 distributions. Failing to do so can result in a plan in which unsecured creditors receive significant dividends, while secured claims remain delinquent. Section 501(c) permits the debtor or trustee to file a proof of claim on behalf of a creditor, if a creditor does not timely file its own proof of claim. Claims filed by the debtor or trustee must be filed within 30 days of the claim bar date. It is critical to file the claims within the 30 days allotted. Late filed claims by the trustee or debtor are not treated the same as late filed claims by the creditor. *See In re Drew*, 256 B.R. 799 (B.A.P. 10th Cir. 2001).

II. Self-Employed or Small Business Debtors in Chapter 13

A. Business Records and Trustee's Duty to Investigate. Self-employed and small business debtors in Chapter 13 cases give rise to significant challenges for practitioners, trustees and judges. Too often, these debtors do not operate their businesses according to strict accounting principles, do not keep adequate or accurate records, and those very failings are what lead them to Chapter 13 to begin with. These difficulties are juxtaposed with the Chapter 13 trustee's duties under § 1302(c) of the Code to "investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuation of such business," and to then "file a statement of any investigation conducted . . . , including any fact ascertained pertaining to fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management of the affairs of the debtor." 11 U.S.C. §1106(a), cross-referenced in 11 U.S.C. §1302(c).

The *Handbook for Standing Trustees* prepared by the Executive Office for the United States Trustee suggests that debtors engaged in business should supply the following information to the standing trustee:

- Copies of federal and state tax returns, along with all supporting schedules, for at least the two years preceding the filing;

- Copies of financial statements furnished to a third party such as a trade creditor or a bank within the two years preceding the filing of the petition, including, but not limited to, the balance sheet, income statement and cash flow statement;
- Current books and records of the business, including checks and check registers;
- Monthly profit and loss statements for at least the year preceding the filing;
- Current schedule of accounts receivable and accounts payable;
- Current insurance policies.

Most Chapter 13 debtors would be very hard pressed to provide this information in any format in a reasonable amount of time. Not only do the debtors not have these documents, it would be difficult for them to construct them. Knowing what will be expected, debtors' counsel can anticipate the issues and start to prepare the client and the business for the Chapter 13 process.

B. Assisting Debtors in Preparing Business Records

In many cases, small business debtors have resorted to bankruptcy due to an urgent financial crisis. As a result, there is little time to untangle the web of transactions in advance of filing and set the business on the right path. Instead, counsel finds themselves acting as makeshift financial advisor and bookkeeper to the chapter 13 debtor. The best course is to urge the client to engage other professional help. However, that is often outside the financial capacity of the debtor. Instead, they look to their attorney for assistance.

To start, educate clients on the need to separate business and personal expenses. Co-mingling of income and expenses is the most prevalent and difficult issue to address in Chapter 13 cases. Determining which expenses are business expenses and which are personal requires a careful and probing investigation. It may be as simple as having the debtor sit down with their bank statements and a few highlighters to parse the expenses. Once the expenses are clearly distinguished, creating simple profit and loss statements is the next step. If the business has equipment or inventory, a detailed list of those items and their estimated value will also be important. Finally, inquire as to the debts of the business, including those the debtor has personally guaranteed. These initial actions can greatly assist the debtor and the trustee in determining the businesses financial health and the consumer's ability to adequately fund a Chapter 13 Plan.

C. Means Test Issues for Self-Employed and Small Business Debtors. A frequent issue addressed in cases of self-employed and small business debtors is whether the debtor may deduct business expenses when calculating their current monthly income. While the Courts are split, a recent decision from Bankruptcy Judge Elizabeth Brown in the District of Colorado, *In re Gonzalez*, 597 B.R. 133 (Bankr. D. Colo. 2018), provides a succinct overview of the majority and minority views.

The minority view, called the "Net Income Approach", holds that CMI only includes net business income.[1] The cases rely on the fact that Form 122C-1 provides a section that specifically instructs the debtor to net out business expenses from gross income to arrive at "Net monthly income from a business, profession or farm." Various courts who have followed this line of reasoning argue that the form represents the intended methodology for calculating business income and this method also aligns with the IRS definition of gross income derived from business for tax purposes.

The majority view acknowledges that the minority view has valid practical points, but reaches the opposite conclusion.[2] Namely, that CMI is the gross business revenue. This approach is the "Gross Income Approach." These courts focus on the definition of CMI in §101, which provides in relevant part that the term CMI is defined to include "the average monthly income from *all sources* that the debtor receives . . . *without regard to whether such income is taxable income . . .."* 11 U.S.C. 101(10A)(emphasis added).

While Judge Brown expresses dislike for both interpretations, she does ultimately adopt the Gross Income Approach favored by the majority. The failure of the Code to address deduction of business expenses by above-median debtors under §1325(b)(3) baffles the Court and commentators. However, it is unlikely that Congress will take steps in the near future to remedy this gaping omission. For the time being, it appears that self-employed and small business debtor will be forced into longer repayment plans based on the use of gross income for business debtors in making means test calculations.

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[1] *E.g., In re Roman,* 2011 WL 5593143, at *3-4 (Bankr. D.P.R. Nov. 16, 2011); *In re Romero*, 2013 WL 241742, at *2 (Bankr. S.D. Fla. Jan. 22, 2013); *In re Geiger*, 2010 WL 2756760, at *4 (Bankr. N.D. Ohio July 12, 2010).

[2] *See Drummond v. Wiegand (In re Wiegand),* 386 B.R. 238, 239 (9th Cir. BAP 2008); *In re Kuiwik*, 511 B.R. 696 (Bankr. N.D. Ga. 2014); *In re Compann*, 459 B.R. 478, 482-83 (Bankr. N.D. Ga. 2010); *In re Harkins*, 491 B.R. 518, 530 (Bankr. S.D. Ohio 2013); *In re Sharp,* 394 B.R. 207, 216 (Bankr. C.D. Ill. 2008); *In re Arnold,* 376 B.R. 652, 654 (Bankr. M.D. Tenn. 2007).

Advice on Filing Bankruptcy

(1) Paperwork and Money: Gather all papers on Document Checklist, complete Credit Counseling Briefing, and Bankruptcy Questionnaire. Bring in or send in your payments as scheduled. This way we can get your case filed as quickly as possible. Filing will stop the harassment and help protect you from losing property you want to keep.

(2) Don't Get Advice from Your Friends, Family or the Internet About Bankruptcy. Friends and family always mean well, but they don't have the training or experience to tell you how bankruptcy really works or to answer your questions about bankruptcy. Call us with all your questions and concerns and keep calling until we have answered all your questions and concerns. Every question you have is important. Every concern you have is important. Remember: Handling bankruptcy cases is our full-time job. Use us to get your answers.

(3) Debts to Pay: Of the debts we talked about (other than your normal monthly expenses for food, gas for the car, insurance, etc.) keep paying *only* on the following debts. If you are behind on these debts and the creditor has a lien on your property, you must get these debts up-to-date before we file your case if you want to be guaranteed the right to keep your collateral:

❑	Rent/Mortgage (if keeping house)	❑	______________________________
❑	Car Payment (if keeping)	❑	______________________________
❑	Household Expenses	❑	______________________________

(4) Debts Not to Pay and What to Say: Stop paying the rest of the debts we talked about and if they call you, tell them: **"I have hired an attorney to help me file for bankruptcy, please call their office."** Give creditors our contact information. If something happens, or if you receive any legal papers or other papers you do not understand, call us for help.

(5) Your Present Bank/Credit Union: If you owe money to a bank or credit union **OR y**ou have an account with **WELLS FARGO:**

(1) Open new accounts with a bank or credit union you don't owe money to.

(2)Stop putting money into your checking and savings accounts with that institution, change your direct deposit and all automatic payments and;

(3) Immediately get all monies out of the old accounts

After you file bankruptcy, the bank or credit union are allowed to take any money left in your account, applying it to any debt you owe. Make sure you pick an institution where you do *not* owe any money.

(6) Stop Using Your Credit Cards. If you continue to use any of your credit cards after you come to see us, you could be accused of fraud and, in the extreme; it could also negatively affect your right to get a bankruptcy discharge. So, stop using the credit cards *right now*. **This includes balance transfers, cash withdrawals, automatic debits, etc.** Call us before you do something you might regret.

(7) Credit Report: In most cases, we will pull your credit report. We use this to: (1) Help get complete information about your debts, (2) to make sure we don't miss something important, and (3) to find out how good or bad it reads, so that we can better advise you. The cost for the report is included in our fee.

(8) Possibly Dischargeable Taxes: Some taxes can be discharged in bankruptcy. Our office can give you a general idea of whether a tax obligation will be discharged, but we DO NOT provide guaranteed analysis of tax dischargeability. If you have significant past due taxes, we recommend you obtain a dischargability analysis. Please contact our office for a referral to a qualified attorney or CPA who can perform this analysis.

(9) Giving Up Your Home? If, as part of your case, you own (which means the title is in your name) and have decided to give up your home (in bankruptcy, we call it "surrender") to either

(1) get out from under mortgage payments that are too high; or
(2) get rid of a home for which the mortgage payoffs exceed the value of the home.

Please remember this: The home is yours to live in until the foreclosure sale takes place. Therefore, if you need a place to live, just stay in your home until the end of the inevitable foreclosure. Just because you have decided to give up the home does NOT mean you have to move out immediately. If you want to give up the home, you can stop making mortgage payments and continue to live in the home, because you cannot be evicted until the sale date. In most cases, this is a number of months. By living in your home for this time period, hopefully you can save up money to make an easier transition to another residence. **Continue to pay utilities during this time. Homeowners Association Dues may also need to be paid, contact us for more information.** To figure out when you need to move out of your home, keep track of the foreclosure paperwork served on you. Then call our office!

(10) Don't Pay Any Friends or Relatives/Don't Give Away, Sell, Transfer, or Trade in Any Vehicles, Equipment, Accounts, Land, Houses, or Other Property. If you want to get rid of some money or property, first check with us. That's why we're here. Maybe what you want to do is perfectly O.K. - but why take a chance? Call us before you do it. Otherwise, you might be doing something that is totally unnecessary or, worse, you might be doing something illegal or which could cause big problems in your bankruptcy case.

(11) Don't Buy Any Vehicles or Other Large Items of Personal Property: Such purchases could cause problems in your case. Be on the safe side. Check with us first!!!

(12) Don't Take Any Loans Against Your 401-K Retirement Plan or other Retirement Savings Plans. This money is protected. As a general rule, you want to leave it alone. Check with us first.

When in doubt – CONTACT OUR OFFICE!!
We are here to help you!!

Chapter 13
Client Verification Regarding Accuracy of Schedules and Understanding of Potential Non-Exempt, Non-Dischargeable Debts and General Expectations of the Bankruptcy Process

1. I have been advised by LAW FIRM that I am filing a Chapter 13 case.

2. I have listed all assets that I own, whether located at my home, at the home of another person or in storage.

3. I have listed all debts whether or not it is my desire to repay the creditor in the future.

4. I have listed all debts owed, including debts owed to any friends or family members.

5. I have not sold any property, pledged any collateral as security to a creditor, or given away or transferred any property within two years of the filing of the petition, except for those items in response to question #10 of the Statement of Financial Affairs.

6. I have not taken any cash advances, made any balance transfers or purchased any items using my credit card or line of credit in the past 90 days. If I have, they may not be dischargeable.

7. I have not paid any friends, relatives, and business associates, past or present partners, any money in the year preceding the filing of my bankruptcy.

8. I understand that if I do not continue to make my post petition payments to secured creditors, mortgage and car payments, that are payable outside of my Chapter 13 plan, a Motion for Relief from Stay maybe filed by the creditor. A Motion for Relief from Stay is a formal request to the Bankruptcy Court to release the property from the protection of the Court so the creditor may proceed with foreclosure or repossession. The firm may represent me in the Motion for Relief from Stay for an additional fee. Such representation is not included in the fees already paid.

9. I understand the following debts are non-dischargeable:

   a) Taxes.
   b) Debt incurred through fraud.
   c) Maintenance and Child Support.
   d) Student Loans.
   e) Personal injury damages caused when intoxicated.
   f) Criminal restitution.
   g) Fines, including parking tickets and toll road fees.

10. I understand that secured creditors may stop sending statements to my home. I must continue to mail the monthly payment to the payment center address that has been used in

the past. I may write a letter to the creditor, signed and dated requesting that the statements resume.

11. I understand that LAW FIRM will **not** negotiate any loan modifications on my (our) residence. All loan modifications are referred to a third party.

12. I understand that all communication with the Trustee on my case must be made through LAW FIRM. It is not in my best interest to communicate directly with the Trustee on my case.

13. I understand that the first Chapter 13 plan payment will be due (30) thirty days after the date of filing. I understand that this is prior to my 341 meeting of creditors and confirmation of my Chapter 13 plan. If this amount is amended, I will be notified by my attorney.

    My first Chapter 13 Plan payment is due_________________________________.

14. I understand that I should begin to make the regular mortgage payment the month after the Chapter 13 plan is filed. I should make this payment by mailing the payment "return receipt requested" and recording the payment on the back of the Essential Chapter 13 Information sheet provided by my attorney. I will reference the loan number on the payment.

    My first Mortgage payment to the lender is due _____________________ .

15. I understand that my homeowners' association dues should be paid the month after filing and kept current, if applicable.

    My first payment to the HOA is due ______________________________.

16. I understand that I should make the regular monthly car payment, if it is not paid through the Chapter 13 plan, the month after the Chapter 13 plan is filed, I should make this payment by mailing the payment to the payment address that was use prior to filing bankruptcy.

    My first payment to the vehicle lender is due _____________________________.

    My first payment to the vehicle lender is due _____________________________.

17. I will contact the attorney to advise them of any change in my address within 30 days. My attorney will file a Notice of Change of Address with the Court. I understand that failure to do so may be detrimental to my case.

18. I understand that if a Motion to Determine Secured Status or a Cram Down is being requested in my Chapter 13 plan, I must complete the Chapter 13 in order to make these effective. Conversion or dismissal will result in the full balance on the debt being due.

a) If the plan is not completed, I will be responsible for payments missed since the filing of the Chapter 13 plan.

______________________________	______________________________
Client Printed Name	Client Printed Name
______________________________	______________________________
Client Signature Dated	Client Signature Dated

WHAT HAPPENS AFTER YOUR CHAPTER 13 BANKRUPTCY CASE IS FILED?

Client Name ____________________________________
Spouse's Name (if joint) ____________________________________

How Creditors are Notified: After you sign your final papers, your case will be electronically filed with the Bankruptcy Court. The Court will prepare and mail you a notice which confirms the filing and schedules the meeting of creditors in your case. At the same time, the Court will send this notice to each of your creditors. This usually takes between ten days and three weeks. Once the creditor receives the notice, the creditor must stop all attempts to collect the debt.

Creditor Calls: After your case is filed, to make sure the creditor has notice of the bankruptcy, you should tell each creditor who calls that you have filed bankruptcy and the give them the bankruptcy case number. Once you tell a creditor these things, it is unlawful for the creditor to call again. Giving notice to the creditor over the telephone is just as binding under the law as the written notice sent by the Court. Please allow three weeks from your date of filing for the creditor to update their records. If after providing your case number you continue to receive calls from a creditor, you should take a name and telephone number and call our office immediately.

Required Monthly Payments: Although some of your debts will be discharged as a result of filing a bankruptcy, there are certain debts which you must continue to pay so that you have the right to keep the collateral which secures those debts. You must make regular payments on secured debts, including cars and mortgage payments, each and every month, *as the payments become due,* and send these payments directly to the creditor. **Most creditors stop sending statements after the bankruptcy is filed**. Even if you do not receive a statement, if you do not keep the payments up-to-date, the creditor can take steps to take your property away.

Important: If you ever lose collateral to one of these creditors due to non-payment or otherwise, the debt will NOT be discharged in the bankruptcy unless a Modified Plan is filed to reflect the surrender of the property. If you surrender property during bankruptcy that was not previously reflected as surrendered, you MUST contact our office to provide notice of the surrender. At that time, a Modified Plan will be filed to properly reflect the surrender of the asset.

Insurance: If you are keeping a home, mobile home, or car, on which you still owe money, you must keep the property properly insured. You must also keep the creditor to whom you owe such money informed and up-to-date regarding insurance coverage. If you do not keep such property insured, the creditor can take steps to take the property.

Payroll Deductions & Direct Debits: If you are paying any loans by payroll deduction or automatic deductions from a bank account, you need to read this information carefully.

After you file bankruptcy, any lender collecting payments by using a payroll or account deduction is supposed to stop taking money out. If you want to continue making payments by payroll deduction on one or more of the secured loans that you intend to keep up-to-date--for instance, on a house or car loan--you will need to start up a new payroll deduction with the lender.

Some lenders will also refuse to accept payments through the online bill pay systems or by telephone. Please check with your lender to ensure your payments are made on time!

Debts not Eliminated by Bankruptcy: Certain debts are not eliminated by bankruptcy. There are too many types of such debts to list them all here. Some of the most common include:

> ***Student Loans*****:** Student loans are usually not dischargeable in bankruptcy, except in cases of undue hardship. If you have a student loan, be sure you continue to make the regular payments unless we have discussed and agreed to pursue a hardship case. You will continue to owe money on that loan.
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> ***Most Taxes***: Most taxes will be paid through the Chapter 13 Plan, the remaining taxes will be discharged (eliminated) at the end of the case. The bankruptcy will stop collection upon these taxes until you receive a bankruptcy discharge. Even so, interest on non-dischargeable taxes will continue to accrue. Filing bankruptcy also will not get rid of any new taxes which become due after you file bankruptcy.
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> ***Alimony, Maintenance and Child Support:*** Debts in the nature of alimony or child support are not dischargeable in bankruptcy; therefore, you will continue to owe all such debts. If you are past due on these debts at the time of filing, we will provide for catch up in the plan.
>
> ***Other Divorce-Related Debts*****:** Many times, Separation Agreements or Court Orders will obligate a former spouse to pay and remain responsible for the payment of certain other debts (such as credit card debts) which, if you don't pay, will fall back on an ex-spouse for payment. These debts may be dischargeable in bankruptcy, but your ex-spouse may have the right to ask the Bankruptcy Court to make a determination that one or more these debts are not dischargeable, or he or she may take the position in a family court proceeding after your bankruptcy case that the debts were not discharged.

Property received by inheritance, divorce, or separation after filing: The advisability of filing a Chapter 13 bankruptcy is based on the amount of property you own at the time of filing. ***If you obtain or become "entitled" to additional property or even a greater interest in a piece of property by reason of inheritance, divorce decree, equitable distribution order, a marital separation agreement or personal injury action, you must notify our office IMMEDIATELY!***

Your Credit Report: After you file a bankruptcy case, the credit bureaus should report that you have filed "bankruptcy." We do not control how or when this information shows up on the credit report.

All debts that have been discharged should show a zero balance and have a notation that they were included in bankruptcy.

Your Co-Signer's Credit Report: If a debt is discharged, a cosigner who has not filed bankruptcy will continue to owe it. There may be a notation placed on the credit report of anyone who has co-signed or guaranteed a debt for you that you have filed bankruptcy. Usually, this takes the form of words to the effect that a debt "was included in the bankruptcy of another."

Leases: If you are leasing a motor vehicle, apartment, or household goods, and want to keep the items, you need to keep the lease payments up-to-date. In most situations, the owner just wants the payments and not the property so, if you keep the lease payments up-to-date, the owner should not try to take back the leased property. However, there is no guarantee in this regard, and there is a risk that you will lose the property if you do not come to an agreement with the owner.

Property being Surrendered: When you "surrender" property back to a creditor in a bankruptcy case, this simply means that you don't have to pay that creditor any more money. It does not mean that the property is automatically taken out of your name. In many situations, when you "surrender" property in a bankruptcy case, the creditor will promptly foreclose or repossess the property. However, there is no guarantee that the creditor will do so. Until something happens to get the property out of your name, you may have continuing obligations regarding the property--such as home owners association dues or property taxes that come due because the property is still titled in your name. Therefore, if the creditor does not quickly foreclose on or repossess the property that you surrender, you should contact the creditor for more information.

HOA Dues for Chapter 13 Bankruptcy In a Chapter 13 bankruptcy, if you are **surrendering** your home, the past due amount of the HOA dues will be discharged. You DO NOT have to continue to pay the HOA dues after the case is filed.

If you are **keeping** your home, the **past due amount** of HOA dues will be paid through the Chapter 13 plan. You should resume or continue to pay your dues beginning with the very next installment following your bankruptcy case filing.

Tax Refunds: Any tax refunds you are entitled to as of the date the bankruptcy case are reconciled through the Chapter 13 Plan. You are not required to turnover those funds to the Chapter 13 Trustee.

Non-Exempt Property: The Chapter 13 Plan will reconcile any non-exempt property. The Chapter 13 Plan must provide payments to creditors that equal or exceed the non-exempt assets.

Omitted Property or Creditors: It is very important that you review your petition and schedules very carefully. If you find that there are missing creditors or unlisted property, please notify our office IMMEDIATELY! If a creditor is not listed, it is possible they will not be discharged, and you will owe the debt after the bankruptcy case is over.

Documents for 341 Meeting: You will be required to provide a copy of your tax return, bank statements and paystubs received since your date of filing. **The tax return will be forwarded by our office on the day we file your case**, you will not have to bring a copy to the meeting.

You must provide the bank statements and paystubs to our office no later than one week prior to your 341 meeting. The paystubs and bank statements will cover the date of filing, up to and including, the date of the 341 meeting. This is information that you have not previously provided to our office. **This is a mandatory and non-negotiable request by the Trustee**. A paralegal in our office will contact you with a list of required documents via e-mail. Once this information is provided to our office, you will not be required to bring a copy to the 341 meeting. The attorney will provide the documents to the Trustee.

You will be required to bring an original, non-laminated, copy of your social security card to the 341 meeting. This card must be issued by the Social Security Administration for the United States. You will also be required to bring a valid photo ID. Failure to provide the requested documents at the 341 meeting may result in your 341 meeting being re-scheduled. An additional fee will be charged for representation at the re-scheduled meeting.

Please be aware the 341 meetings are set by the Court, not our office. The meetings are very difficult to change and the options are very limited. A request to change a 341 meeting may only be made in **extreme emergencies**, not out of convenience. If you must request to change your 341 meeting date, there is no guarantee that the Trustee will grant the request. If you request our office change your 341 meeting date, an additional fee will be required prior to our office submitting the request.

Financial Management Course: You will be required to complete the Financial Management Course prior to the discharge of your case. You will receive an email from our office regarding this course approximately three days after your 341 meeting. You will receive multiple brochures from vendors regarding this course, please disregard these brochures. This course DOES NOT need to be completed prior to your 341 meeting.

Most importantly, if you have ANY questions at all about your case, or other financial matters during the term of the bankruptcy, please call our office for help! Do NOT call the Trustee's office unless we instruct you to do so. We are here to help you!!

Meeting of Creditors Information Letter

I am writing to tell you that your case was filed on . Your 341 Meeting of Creditors has been scheduled for . The meeting will be held at Bryon G Rogers Courthouse, 1961 Stout St., 16th Floor, Room 200, Denver, CO 80294. ATTORNEY will meet you in the waiting room about 15 minutes before your meeting starts.

Please continue to forward **every bank statement and paystub** you receive until you attend your 341 meeting. This is information that we are required to furnish to the Trustee. It is critical to your case that I provide this information to the Trustee one week prior to your meeting.

Remember that your first Chapter 13 plan payment is due on . This may be before your meeting. The enclosed information sheet has details about your plan payment and mortgage payment, if applicable.

The Chapter 13 Trustee may send a letter regarding the 341 meeting, tax returns and Chapter 13 Debtor Questionnaire. **Please disregard this letter.** Our office will furnish all necessary information to the Trustee.

Please bring:

- **A photo ID and your Social Security card;**

During the meeting, the trustee will ask you questions about your case, the information in your petition and schedules. Tara will review all this information with you quickly prior to the meeting. We recommend that you review the enclosed petition now and immediately before you come to the meeting. If you find any errors or omissions, please let me know right away.

We understand that you may be worried about what to expect and what will happen at the meeting. To help alleviate some of that stress, we have created an information sheet to answer some frequently asked questions. Please take a few minutes to read over the tips sheet now. We have also prepared a map with directions to 1961 Stout St., Denver, CO. Please allow yourself plenty of time to get to the 341 meeting room.

Finally, you will receive numerous solicitations and reminders to complete a post-filing Financial Education course. While you are obligated to complete this course, it does NOT need to be completed prior to your 341 meeting. **PLEASE do not complete this course until you receive instructions from our office. You have already paid for it through the firm, we will get the details to you after the meeting.**

3773 Cherry Creek North Dr., Suite 575, Denver, Colorado 80209
(303) 825-0197 Telephone (303) 539-9823 Facsimile

You are on your way to a fresh financial start, please remember that we are here to help, please call or email with any questions or concerns you may have.

Sincerely,

Enc. Map with Directions
Tips on Attending 341 Meeting
Essential Chapter 13 Information
Bankruptcy Petition and Plan

Essential Chapter 13 Information

- Your monthly plan payment is **$_____________**.
- Your plan payment will change on _____to $_________
- Your plan payment will change on _____ to $_________.
- The first plan payment is due_________. Then each month on the _____of the month.
- The Chapter 13 Trustee's Address is: (send all payments here!)

  Payable to: Chapter 13 Trustee

  Mail to: Adam M. Goodson
Chapter 13 Trustee
P.O. Box 1169
Denver, CO 80201-1169

- Put your case number _______________ on all payments.
- The Trustee will accept check, money order or certified funds for your payments. The Trustee also has electronic payment options which are detailed on the enclosed pamphlet. Failure to make payments can result in dismissal of your case. The plan payment can be direct debited from your paycheck. Plans with direct debit have the highest success rate!! Call our office if you are interested in learning more about this option.
- If you are keeping a house or vehicle and making the payments "outside the plan," please make those payments on time. Failure to make your payments will result in turnover of the property, or dismissal of your case.
  - 1st mortgage payment due for the month of_________________.
- You may need Trustee permission to incur additional debt during a Chapter 13 Plan. If you need to purchase a vehicle or refinance your home, please contact our office for assistance.
- Remember – **We are here to help YOU!!!** Please call if you experience any of the following during the term of your Chapter 13 Plan:

- Job Loss
- Reduction In Pay
- Increase in Mortgage or Car Payment
- Illness/ Medical Bills
- Divorce or Separation
- Any Other Financial Issues

MORTGAGE PAYMENT RECORD

START WITH THE FIRST FULL MONTH AFTER FILING	Beside each month, write the date that you make the payment, the check or money order number or other identification of payment. KEEP ALL RECEIPTS WITH THIS RECORD FOR EASY RETRIEVAL.					
	2019	2020	2021	2022	2023	2024
JANUARY						
FEBRUARY						
MARCH						
APRIL						
MAY						
JUNE						
JULY						
AUGUST						
SEPTEMBER						
OCTOBER						
NOVEMBER						
DECEMBER						

Pre-Objection Deadline Letter

I would like to take this opportunity to provide a brief update on your case. Your 341 meeting will be held on_________________.

In the next week or so you may receive notice from the Court that one or more objections have been filed in your case. This is a very common occurrence in Chapter 13 cases. Having an objection filed in your case does not mean that the case was dismissed or is in jeopardy of being dismissed.

When your case was originally filed, the proposed plan was mailed to all creditors listed on your petition. The creditors are allowed to file an objection to your proposed plan. When these objections are filed, LAWYER will review the objection and consult with the opposing counsel and negotiate a resolution. Many times, this will require an amended plan to be filed. This amended plan may change your plan payment. I will notify you in writing of the amended plan and any changes in the plan payment amount.

Please keep in mind that the confirmation process can be lengthy and involve multiple objections and amended plans. This is all part of the normal process. LAWYER will attend all confirmation hearings. You will not be required to attend any hearing other than your 341 meeting unless specifically asked to attend by our office.

Please continue to pay the most recent plan payment to the Chapter 13 Trustee. Just because your plan has not been confirmed does not mean that you do not need to make the plan payments as directed by our office. You should also be making all payments on other secured debts, including cars and mortgage payments, that you agreed to pay outside of the plan in a timely fashion.

I understand that this process is unfamiliar and confusing. We are here to help you. Feel free to call me with any questions or concerns.

Sincerely,

3773 Cherry Creek Drive North, Suite 575; Denver, Colorado 80209
(303) 825-0197 Telephone (303)539-9823 Facsimile
www.COBankruptcySolutions.com

Post-341 Meeting – Financial Education Reminder

Congratulations on the successful completion of your 341 Meeting of Creditors. The next step in the bankruptcy process is to complete the Debtor Education Course. We recommend CREDIT COUNSELING AGENCY. You may complete your course via the internet at www.CCORG.org. Once you are at the CC Agency site, click on Bankruptcy Certifications and then AFTER bankruptcy. When asked, please indicate that LAW FIRM is a registered user. If you experience difficulties you may reach them at 1-800-XXX-XXXX. **The course must be completed within the next 14 days. Failure to complete the course will result in your case closing without a discharge entering.**

Once the course is completed, please notify our office. We will pull the certificate and file it with the Court.

Sincerely,

3773 Cherry Creek North Dr., Suite 575, Denver, Colorado 80209
(303) 331-3403 Telephone (303) 261-8290 Facsimile
coloradobankruptcyguide.com

Chapter 13 Fee Application Information

Enclosed please find the Chapter 13 Fee Application filed with the Court today. This Motion is a formal request to the Court to receive fees owed to LAW FIRM directly from the Chapter 13 Trustee. The fees will be paid from Chapter 13 Plan payments that you have remitted to the Trustee. You are not required to send any money directly to the LAW FIRM for these fees.

Feel free to call me with any questions or concerns.

Sincerely,

3773 Cherry Creek Drive North, Suite 575; Denver, Colorado 80209
303-825-0197 Telephone/ 303-539-9823 Facsimile
www.COBankruptcySolutions.com

Liquidation Issues under 1325(a)(4)

The value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date

Factors that impact:

- Trustee compensation under 11 USC 326
- Priority claims

Real Property

- Property tax assessment
    - In Utah, this seems to be the lowest floor allowed for value
- Current market analysis
    - Make sure comparables are similar (do not have houses with shared wall compared to stand alone houses)
- Appraisal

Determine if there is equity available for distribution

- Begin with the value
- Subtract mortgages and liens
- Cost of sale (8% for commissions and other concessions)
- Results in NET EQUITY
    - If non-debtor co-owner, allocate portions of equity
    - Subtract exemption (if any)
    - Results in NON-EXEMPT EQUITY
        - Subtract the 326 Trustee's compensation
            - USING NON-EXEMPT EQUITY ONLY IN CALCULATION
        - Subtract priority claims
            - Should be filed or verified
                - Do not use unassessed or non-filed tax liability
        - Results in the POT return to unsecured class

"Bare Legal Title" – often the poor man's estate planning (parents putting adult children on deed)

- 11 USC 541: bankruptcy estate constitutes all legal or equitable interest of the debtor in property as of commencement of the case
    - The existence and extent of interest is determined by state law
    - Resulting trust : person disposes of property under circumstances which raise an inference that the transferor does not intend the person taking or holding property to have beneficial interest in them
        - Burden of proof is on party seeking to establish the resulting trust

            - Standard is clear, explicit and unequivocal
                - Who remained in property
                - Who paid mortgage payments
                    - MORE than testimony or bald statements, provide bank statements showing accounts it came from
                - FACTS MATTER FOR RESULTING TRUST!
                    - EVIDENCE MATTERS FOR RESULTING TRUST!

Vehicles

- NADA
- KBB
- Classifieds
- Appraisal if classic automobile
    - Insurance value as well
- Some other basis for the valuation

Determine if there is equity available for distribution

- Begin with the value
- Subtract liens (if any)
- Subtract exemption
- Less cost of sale (currently use 15% for auction fees)
- Results in NON-EXEMPT EQUITY
    - Subtract 326 Trustee's compensation
    - Subtract priority claims
    - Results in the POT return to unsecured class

Bank accounts, cash or other liquid assets

- Amount held
- Less exemptions claim (if any)
- Results in NET EQUITY
    - Subtract the 326 Trustee's compensation
    - Subtract priority claims
    - Results in the POT to unsecured

Non-filing spouse Trustee's issues review

Can be an issue on BOTH means test and the budget
Things reviewed to determine how household finances are handled:

1) Length of marriage
2) Taxes
    a. married filing jointly or married filing separately
    b. joint tax obligations for prior year liabilities all being addressed by plan
3) House jointly titled
    a. Mortgage jointly taken out
        i. Is the mortgage arrears being cured in plan
4) Leases held in both names
5) Bank accounts
    a. All separate or any joint
    b. If joint, is it just each party contributing to the joint or full pay deposited
6) Vehicles
    a. Jointly owned
    b. Jointly insured
7) Health insurance under one policy
8) Other debts incurred together
    a. Review claims
    b. Cell phone plans
    c. Utilities

Marital Adjustment on means test

Per definition of current monthly income from § 101(10A) in conjunction with § 1325(b)(4)(ii)

- Monthly income debtor receives
- Any amount paid by entity other than debtor on regular basis for household expenses of the Debtor and Debtor dependents (includes NFS)
- Shall make a 5 year applicable commitment period if debtor and debtor's spouses income combined exceeds median family income

Marital adjustment is a reduction of the debtor's current monthly income the NFS income that is not encompassed within 101(10A) by excluding the NFS income not regularly paid for household expenses. <u>In re Toxvard</u>, 485 B.R. 423 (Bankr. D. Co. 2013).

Review of the marital adjustment necessary along with the how household finances are handled

- <u>Toxvard</u> – NFS mortgage was marital adjustment because income and expenses were kept separate though bank accounts, tax filings and segregation of pre-marital assets
    - But jointly owned vehicle expense was not a marital adjustment

- In re Vinger, 540 B.R. 782 (Bankr. D. Co 2015) – NFS ½ rent expense was not a marital adjustment because the parties financial lives were intertwined – same bank account which bills are paid, file joint tax return and jointly and severally liable on the leased home.
- In re Paliev, 2012 WL 3564031 (Bankr. E.D. Va. 2012) – Congress intended the debtor and NFS to be treated as a single economic unit were they act as a single economic unit
    - In re Skiles, 504 B.R. 871 (Bankr. N.D.Oh. 2014) has enumerated list of factors for single economic unit.

Review marital adjustments

- SUBSTANTIATE – with more than just Debtor's testimony
    - Court will not allow debtor to "arbitrarily pick a number out of the air for a marital adjustment" and the lack sufficient documentation results in denial of the deduction. In re Dugan, 2008 WL 3558217, (Bankr. D.Kan.)
- If paycheck withholdings on Line 13, cannot later include in taxes, 401k, etc.
    - Health insurance that family members are on?
- If revolving credit cards
    - Obtain statements
        - Possible 2004 examination of the NFS
    - Are there ongoing charges
    - Are the ongoing charges for household expenses covered otherwise in IRS standards
        - Food
        - Clothing
        - Utilities/Cell Phone/Internet
        - In re Vollen, 426 B.R. 359 (Bankr. D. Kan 2010): charges on credit cards for food, apparel and other typical household expenses may not be claimed as marital deduction.

Joint Expenses on budget should be shared proportionally:

Per Internal Revenue Manual 5.15.1.5

- Taxpayer only allowed the expenses required to pay
- If living with non-liable person and bills commingled, it may be necessary to review other income into household and expenses between parties.
    - Although assets and income of non-liable person may be reviewed to determine taxpayer's portion of shared income and expenses.
- Secured sufficient information concerning the non-liable person to determine proportionate share of total household income and expenses – review entire household information based on own facts and circumstances

Bankruptcy cases holding household expenses should be shared equally or at a minimum proportionally shared based on each member's income to total family income.

- In re McNichols, 249 B.R. 160 (Bankr. N.D.Ill 2000): more equitable and logical approach is to have debtor and NFS proportionally bear reasonable and necessary family expenses and exclude unnecessary luxury items from the family budget as it is inappropriate and unfair to unsecured creditors to allow luxury items through expedient ploy of allocations of expenses on the budget
- In re Carpenter, 318 B.R. 645 (Bankr. E.D. Va. 2003): debtor's plan not proposed in good faith after considering the family budget and proposal to pay NFS substantial debt outside of plan – effectively proposes to prefer other debt to the claims of his unsecured creditors
- In re Louviere, 389 B.R. 502 (Bankr. E.D. Tx 2008): debtor demonstrated the bankruptcy estate has not assumed a disproportionate share of the reasonable family expenses when the plan payment was $750 making debtors contribution to household expenses $1,156 during term of plan
- In re Waechter, 439 B.R. 253 (Bankr. D. Mass. 2010): typical cases courts look at the amount of pooled household expenses and assume the NFS contributed a proportional amount of income to pay the expenses – based on totality of circumstances, the debtor's plan in which she proposed to pay disproportionate amount of shared household expenses is not proposed in good faith.
- In re Stampley, 437 B.R. 825 (Bankr. E.D. Mich. 2010): unfair to debtor's creditors to allocate the debtor's income to payment of NFS sole expenses – the excess is a gift from spouse in bankruptcy to the NFS born by the debtor's creditors.
- In re Hermann, 2011 WL 576753 (Bankr. D.S.C. 2011): court found lack of good faith when debtor's income was used to pay the NFS expenses at the expense of the Debtor's unsecured creditors when NFS has resources, social security benefits, to pay those expenses

EXAMPLE:
BUDGET from NFS case
(Insert sheets)

[redacted]

Fill in this information to identify your case:

Debtor 1 [redacted]

Debtor 2
(Spouse, if filing)

United States Bankruptcy Court for the: DISTRICT OF UTAH

Case number
(If known)

Check if this is:
- ☐ An amended filing
- ☐ A supplement showing postpetition chapter 13 income as of the following date:

MM / DD/ YYYY

Official Form 106I

Schedule I: Your Income

12/15

Be as complete and accurate as possible. If two married people are filing together (Debtor 1 and Debtor 2), both are equally responsible for supplying correct information. If you are married and not filing jointly, and your spouse is living with you, include information about your spouse. If you are separated and your spouse is not filing with you, do not include information about your spouse. If more space is needed, attach a separate sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Employment

1. **Fill in your employment information.**

If you have more than one job, attach a separate page with information about additional employers.

Include part-time, seasonal, or self-employed work.

Occupation may include student or homemaker, if it applies.

	Debtor 1	Debtor 2 or non-filing spouse
Employment status	■ Employed ☐ Not employed	■ Employed ☐ Not employed
Occupation	Maintenance	
Employer's name	Western Quality Foods, L.C.	Grifols Biomat USA, INC.
Employer's address	997 N. Airport Rd Cedar City, UT 84720	2410 Lillyvale Ave Los Angeles, CA 90032
How long employed there?	Since 3/2003	

Part 2: Give Details About Monthly Income

Estimate monthly income as of the date you file this form. If you have nothing to report for any line, write $0 in the space. Include your non-filing spouse unless you are separated.

If you or your non-filing spouse have more than one employer, combine the information for all employers for that person on the lines below. If you need more space, attach a separate sheet to this form.

			For Debtor 1	For Debtor 2 or non-filing spouse
2.	**List monthly gross wages, salary, and commissions** (before all payroll deductions). If not paid monthly, calculate what the monthly wage would be.	2.	$ 3,449.00	$ 2,659.00
3.	**Estimate and list monthly overtime pay.**	3.	+$ 1,270.00	+$ 0.00
4.	**Calculate gross Income.** Add line 2 + line 3.	4.	$ 4,719.00	$ 2,659.00

[redacted]

			For Debtor 1	For Debtor 2 or non-filing spouse
	Copy line 4 here	4.	$ 4,719.00	$ 2,659.00
5.	**List all payroll deductions:**			
5a.	**Tax, Medicare, and Social Security deductions**	5a.	$ 458.00	$ 521.00
5b.	**Mandatory contributions for retirement plans**	5b.	$ 0.00	$ 0.00
5c.	**Voluntary contributions for retirement plans**	5c.	$ 42.00	$ 91.00
5d.	**Required repayments of retirement fund loans**	5d.	$ 0.00	$ 0.00
5e.	**Insurance**	5e.	$ 35.00	$ 8.00
5f.	**Domestic support obligations**	5f.	$ 0.00	$ 0.00
5g.	**Union dues**	5g.	$ 0.00	$ 0.00
5h.	**Other deductions.** Specify: WHAT IS VOL ACC?	5h.+	$ 0.00	+ $ 4.00
6.	**Add the payroll deductions.** Add lines 5a+5b+5c+5d+5e+5f+5g+5h.	6.	$ 535.00	$ 624.00
7.	**Calculate total monthly take-home pay.** Subtract line 6 from line 4.	7.	$ 4,184.00	$ 2,035.00
8.	**List all other income regularly received:**			
8a.	**Net income from rental property and from operating a business, profession, or farm** Attach a statement for each property and business showing gross receipts, ordinary and necessary business expenses, and the total monthly net income.	8a.	$ 0.00	$ 0.00
8b.	**Interest and dividends**	8b.	$ 0.00	$ 0.00
8c.	**Family support payments that you, a non-filing spouse, or a dependent regularly receive** Include alimony, spousal support, child support, maintenance, divorce settlement, and property settlement.	8c.	$ 0.00	$ 0.00
8d.	**Unemployment compensation**	8d.	$ 0.00	$ 0.00
8e.	**Social Security**	8e.	$ 0.00	$ 0.00
8f.	**Other government assistance that you regularly receive** Include cash assistance and the value (if known) of any non-cash assistance that you receive, such as food stamps (benefits under the Supplemental Nutrition Assistance Program) or housing subsidies. Specify:	8f.	$ 0.00	$ 0.00
8g.	**Pension or retirement income**	8g.	$ 0.00	$ 0.00
8h.	**Other monthly income.** Specify:	8h.+	$ 0.00	+ $ 0.00
9.	**Add all other income.** Add lines 8a+8b+8c+8d+8e+8f+8g+8h.	9.	$ 0.00	$ 0.00

10. **Calculate monthly income.** Add line 7 + line 9. 10. $ 4,184.00 + $ 2,035.00 = $ 6,219.00
Add the entries in line 10 for Debtor 1 and Debtor 2 or non-filing spouse.

11. **State all other regular contributions to the expenses that you list in *Schedule J.***
Include contributions from an unmarried partner, members of your household, your dependents, your roommates, and other friends or relatives.
Do not include any amounts already included in lines 2-10 or amounts that are not available to pay expenses listed in *Schedule J*.
Specify: 11. +$ 0.00

12. **Add the amount in the last column of line 10 to the amount in line 11.** The result is the combined monthly income. Write that amount on the *Summary of Schedules* and *Statistical Summary of Certain Liabilities* and Related *Data,* if it applies 12. $ 6,219.00
Combined monthly income

13. **Do you expect an increase or decrease within the year after you file this form?**
- ■ No.
- ☐ Yes. Explain:

[redacted]

Fill in this information to identify your case:

Debtor 1 [redacted]

Debtor 2
(Spouse, if filing)

United States Bankruptcy Court for the: DISTRICT OF UTAH

Case number
(If known)

Check if this is:
☐ An amended filing
☐ A supplement showing postpetition chapter 13 expenses as of the following date:
MM / DD / YYYY

Official Form 106J

Schedule J: Your Expenses

12/15

Be as complete and accurate as possible. If two married people are filing together, both are equally responsible for supplying correct information. If more space is needed, attach another sheet to this form. On the top of any additional pages, write your name and case number (if known). Answer every question.

Part 1: Describe Your Household

1. **Is this a joint case?**

■ No. Go to line 2.
☐ Yes. **Does Debtor 2 live in a separate household?**
 ☐ No
 ☐ Yes. Debtor 2 must file Official Form 106J-2, *Expenses for Separate Household* of Debtor 2.

2. **Do you have dependents?** ☐ No

Do not list Debtor 1 and Debtor 2.

■ Yes. Fill out this information for each dependent.............

Do not state the dependents names.

Dependent's relationship to Debtor 1 or Debtor 2	Dependent's age	Does dependent live with you?
Brother	31	☐ No ■ Yes
		☐ No ☐ Yes
		☐ No ☐ Yes
		☐ No ☐ Yes

3. **Do your expenses include expenses of people other than yourself and your dependents?** ■ No ☐ Yes

Part 2: Estimate Your Ongoing Monthly Expenses

Estimate your expenses as of your bankruptcy filing date unless you are using this form as a supplement in a Chapter 13 case to report expenses as of a date after the bankruptcy is filed. If this is a supplemental *Schedule J*, check the box at the top of the form and fill in the applicable date.

Include expenses paid for with non-cash government assistance if you know the value of such assistance and have included it on *Schedule I: Your Income* (Official Form 106I.)

			Your expenses
4.	**The rental or home ownership expenses for your residence.** Include first mortgage payments and any rent for the ground or lot.	4.	$ 1,007.00
	If not included in line 4:		
4a.	Real estate taxes	4a.	$ 0.00
4b.	Property, homeowner's, or renter's insurance	4b.	$ 0.00
4c.	Home maintenance, repair, and upkeep expenses	4c.	$ 180.00
4d.	Homeowner's association or condominium dues	4d.	$ 0.00
5.	**Additional mortgage payments for your residence,** such as home equity loans	5.	$ 0.00

Debtor 1 **Matthew Ashley Adams** Case number (if known)

6.	**Utilities:**		
	6a. Electricity, heat, natural gas	6a. $	**229.00**
	6b. Water, sewer, garbage collection	6b. $	**72.00**
	6c. Telephone, cell phone, Internet, satellite, and cable services	6c. $	**457.00**
	6d. Other. Specify:	6d. $	**0.00**
7.	**Food and housekeeping supplies**	7. $	**1,000.00**
8.	**Childcare and children's education costs**	8. $	**0.00**
9.	**Clothing, laundry, and dry cleaning**	9. $	**175.00**
10.	**Personal care products and services**	10. $	**150.00**
11.	**Medical and dental expenses**	11. $	**150.00**
12.	**Transportation.** Include gas, maintenance, bus or train fare. Do not include car payments.	12. $	**375.00**
13.	**Entertainment, clubs, recreation, newspapers, magazines, and books**	13. $	**200.00**
14.	**Charitable contributions and religious donations**	14. $	**0.00**
15.	**Insurance.** Do not include insurance deducted from your pay or included in lines 4 or 20.		
	15a. Life insurance	15a. $	**0.00**
	15b. Health insurance	15b. $	**0.00**
	15c. Vehicle insurance	15c. $	**116.00**
	15d. Other insurance. Specify: **Geico/ Motorcycle Insurance**	15d. $	**17.00**
16.	**Taxes.** Do not include taxes deducted from your pay or included in lines 4 or 20. Specify: **Vehicle Tax, License and Registration**	16. $	**39.00**
17.	**Installment or lease payments:**		
	17a. Car payments for Vehicle 1	17a. $	**347.00**
	17b. Car payments for Vehicle 2	17b. $	**0.00**
	17c. Other. Specify: **Non-filing spouse Furniture Payment**	17c. $	**150.00**
	17d. Other. Specify:	17d. $	**0.00**
18.	**Your payments of alimony, maintenance, and support that you did not report as deducted from your pay on line 5, *Schedule I, Your Income* (Official Form 106I).**	18. $	**0.00**
19.	**Other payments you make to support others who do not live with you.** Specify: **Non-filing spouse Family Support Payments**	19. $	**300.00**
20.	**Other real property expenses not included in lines 4 or 5 of this form or on *Schedule I: Your Income*.**		
	20a. Mortgages on other property	20a. $	**0.00**
	20b. Real estate taxes	20b. $	**0.00**
	20c. Property, homeowner's, or renter's insurance	20c. $	**0.00**
	20d. Maintenance, repair, and upkeep expenses	20d. $	**0.00**
	20e. Homeowner's association or condominium dues	20e. $	**0.00**
21.	**Other:** Specify: **Non-filing spouse fees and debt obligations**	21. +$	**675.00**
	Non-filing spouse employment uniform and supplies	+$	**100.00**
22.	**Calculate your monthly expenses**		
	22a. Add lines 4 through 21.	$	**5,739.00**
	22b. Copy line 22 (monthly expenses for Debtor 2), if any, from Official Form 106J-2	$	
	22c. Add line 22a and 22b. The result is your monthly expenses.	$	**5,739.00**
23.	**Calculate your monthly net income.**		
	23a. Copy line 12 *(your combined monthly income)* from Schedule I.	23a. $	**6,219.00**
	23b. Copy your monthly expenses from line 22c above.	23b. -$	**5,739.00**
	23c. Subtract your monthly expenses from your monthly income. The result is your *monthly net income*.	23c. $	**480.00**

24. **Do you expect an increase or decrease in your expenses within the year after you file this form?**
For example, do you expect to finish paying for your car loan within the year or do you expect your mortgage payment to increase or decrease because of a modification to the terms of your mortgage?

■ No.
☐ Yes. Explain here:

When calculating proportionality start with household income

- I use NET income from Schedule I, cause that is the amount available to fund household expenses – there may be other ways to run the same calculation.
    - Total NET household income: $6,219
    - Debtor = 67% with $4,184
    - NFS = 33% with $2,035
- Review Schedule J to identify household expenses
    - Basically all line items EXCEPT those designated as NFS
        - Car payment by NFS – generally non-luxury single car paid by NFS gets lumped into household expenses
            - Recreation vehicles, motorcycles, ATV, boats would be NFS only
        - Furniture payment listed here – I included in household expenses as it would seem the Debtor likely uses furniture – reasonable minds can differ
- Here, $4,764 is household expenses
    - Line 23b $5,739 less Line 19 $300 (NFS family support) and 21 $675 (fees and debt)
    - NFS proportional contribution should be $1,572 ($4,764 x 33%)
    - NFS actual contribution is net income less separate expenses: $2,035 less $975 = $1,060
    - Debtor's creditors are subsidizing the NFS expenses by $512
        - $18,432 over 36 months
        - $30,720 over 60 months
    - Debtor's proportional contribution should be $3,192
    - Debtor's actual contribution is $3,704 ($4,764 less $1,060 NFS actual contribution)
    - Debtor's separate expenses is his plan payment of $480
        - Actual plan payment should be $992
- The IRM and case law go through similar analysis

Household issues: expenses, "luxury" items, additional adults

Pigs get fat, hogs get slaughtered.

Disposable income = income received but not reasonably necessary to be expended for maintenance and support of the debtor or a dependent of the debtor. 11 U.S.C. 1325(b)(2).

- Disposable income is a determination made by the Court and thus is not required to accept at face value the financial figures set forth by the Debtor. In re Golematis, 2012 WL 3583154 (Bankr. E.D. Mich. 2012).
  - Chapter 7 cases with 11 U.S.C. § 707 objections are good areas to look at when trying to find support on both sides as they are two sides of same coin as ability to fund a chapter 13 plan is important factor considered in determining whether there is substantial abuse.
  - Proper methodology is to aggregate all expenses which are discretionary in nature and any excessive amounts in the relatively nondiscretionary line items such as food, utilities, housing and health expenses. In re Gonzales, 157 B.R. 604 (Bankr. E.D. Mich. 1993).
    - Court's analysis of disposable income should take individual circumstances and the expenses as a whole. In re Loper, 367 B.R. 660 (Bankr. D. Co. 2007).
    - Debtor may rebut presumption private school expenses are not necessary by compelling circumstances to warrant private school expenses OR cutting back on other expenses or increasing the plan term so creditors receive same distribution. In re Villegas, 2004 WL 3623504 (Bankr. D. Utah 2004).
  - POST-BAPCPA there is the overlay of IRS standards as the benchmark for expenses
    - Provide a basis to evaluate appropriate amount for specific expense category
    - NOT binding but could be a starting point for analysis
    - In re Mars 340 B.R. 844 (Bankr. W.D. Mich 2006): too many courts have "fretted" on line items in budget, but it should be upto debtor to decide how to spend share once the appropriate allotment has been made.

If there is questionable expense on budget – substantiate the expense!
PREFERABLY WITH MORE THAN DEBTOR'S TESTIMONY!

- High utilities
  - Statements
  - Bank posts
  - Equal payment plan
  - Line 28 Form 22C
  - In re Martin, 2013 WL 6196566 (Banrk. N.D. Ohio 2013): provided monthly electricity expenses for prior three years and propane expenses for year to support the increased deduction for utility expenses
- Cell phone
  - How many lines

  - What sort of plan
  - Purchasing luxury phone at same time
  - Included in Line 8 of Form 22C
- Home maintenance
  - Provide estimates or invoices from work done
  - Will not require new furnace/water heater/air conditioner/etc. EVERY year
  - If later need to modify to resolve missed payments or tax refunds for home maintenance, expect even further evidentiary proof to be required.
- Medical Expenses
  - HDHP deductible amount
  - Explanation of benefits showing co-pays
  - Bank posts to medical providers
  - Invoices
    - Dental
    - Pharmacy
    - Therapist
- School – tuition or fees
  - Invoice from school
  - Explanation why warranted
  - Make sure not on scholarship (need or other)
  - Line 29 Form 22C – capped at $170.83
  - In re Golematis, 2012 WL 3583154 (Bankr. E.D. Mich. 2012), preference for private school not sufficient to be reasonably necessary expense
  - In re Stout, 336 B.R. 138 (Bankr. N.D.Iowa 2006), $700 homeschool expense not reasonably necessary expense
  - In re Villegas, 2004 WL 3623504 (Bankr. D. Utah 2004), cutting back on other expenses allowed private school to be an allowed expense
- Recreation – kids activities (sports, tutor, camps)
  - Invoices
  - Bank draws
  - Explanation why warranted
  - In re Falke, 284 B.R. 133 (Bankr. D. Ore. 2002): daughter's golf and music lessons of $235 a month are not reasonably necessary expenses.
  - In re Walsh, 287 B.R. 154 (Bankr. E.D. N. Car. 2002): $300 hockey fees for elite play not reasonably necessary expense even with hope for "scholarship down the road" as the future cannot take precedence over the debtor's other financial obligations.
  - In re Stout, 336 B.R. 138 (Bankr. N.D.Iowa 2006), $500 skating for daughter is an extravagance inappropriate expense in chapter 7 case.
  - In re Schott, 2007 WL 914043 (Bankr. E.D. Mo. 2007): $158 for children to pay on elite soccer clubs not reasonably necessary expense.
- CONTINUED Contributions to care of household or family members

    - Must be CONTINUANCE – not just started AND must be ACTUAL
        - Must be ELDERLY, CHRONICALLY ILL OR DISABLED
    - Bank transfers
    - Western Union receipts
    - Direct deposit from pay advices
    - Invoices of bills paid on their behalf
    - Line 26 Form 22C
    - College students as contribution usually denied
        - In re Hicks, 370 B.R. 919 (Bankr. E.D. Mo 2007): Contribution to 21 year old college student not an allowed deduction
        - In re Harris, 415 B.R. 756 (Bankr. E.D. Ca. 2009): Contribution to adult daughter attending college and not living at home not an allowed deduction
        - In re Linville, 446 B.R. 522 (Bankr. D.N.M. 2011): Contributions to college expenses of children not an allowed deduction

Luxury items – almost always requires court ruling or settlement (pot to unsecured increase)

- Vehicle payments
    - For extra cars
        - Testimony sometimes is one does not work – why keeping it?
    - Over the IRS standard
- Trailer
- RV
    - Schedules may state: use for out of town work
    - Then when questioned at 341 about it, testimony is their employer pays for lodging or they travel 1-2 per year (with RV secured payment of $300/month plus insurance and other costs)
- Motorcycle
- Boat
- ATV

Luxury expenses

- Cigarettes
    - In re Woodman, 387 B.R. 589 (Bankr. D. Me. 2003)
- Marijuana
    - In re Andrick, 604 B.R. 577 (Bankr. D. Co. 2019)
- House cleaning

Additional adults (children/parents/others)
Determination of Household Size Methods

- Heads on Bed
- IRS Dependents Approach

    - Tax returns create a rebuttable presumption of household size and debtor's seeking to overcome presumption must provide evidence beyond "bare statements." In re Skiles, 504 B.R. 871 (Bankr. N.D.Ohio 2014)
- Economic Unit Approach

See above for college expenses for additional case law

- In re Sieman, 294 B.R. 276 (Bankr. E.D. Mich. 2003): support of four non-dependent family members may be commendable, it cannot be justified in bankruptcy context.
- In re Law, 2008 W.L. 1867971 (Bankr. D.Kan. 2008): adult son is not debtor's dependent and inclusion in means test calculation was in error.
    - Agreed with by In re Hays, 2008 WL 1924233 (Bankr. D. Kan. 2008): cannot claim expenses for no-dependent adults living in the home
        - Went further by saying: adult children whose income is used on regular basis for household expenses must be included in the current monthly income analysis
- In re Heinze, 2011 WL 143870 (Bankr. D. Wy. 2011): adult children and grand children do not meet criteria to be considered dependants despite moving back to parental home due to personal and financial issues.
- In re Coates, 2011 WL 5419676 (Bankr. D. Co. 2011): debtor's mother was not a dependent for means test as she was contributing to marital household to which she was hopeful to return; but the debtor's adult daughter was a dependent as she was claimed on debtor's taxes and provides care for the debtor's mother.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: JEFFERY DEAN JOLTES, Debtor.	Bankruptcy Case No. 19-10684 EEB Chapter 13

ORDER OVERRULING PLAN OBJECTION AND DISALLOWING IN PART CLAIM NO. 15

THIS MATTER comes before the Court on two related matters: (1) the Debtor's Objection to Claim #15 of Jessica Joltes; and (2) Ms. Joltes' Objection to Confirmation of the Debtor's Plan. Ms. Joltes is the Debtor's ex-wife. The main issue in contention is whether she is entitled to include in her priority claim for a domestic support obligation ("DSO") the net value of an automobile she was awarded in the divorce, but which was repossessed prior to her taking title. Following an evidentiary hearing on this matter, the Court concludes that the Debtor has appropriately calculated the amount of Ms. Joltes' DSO claim at $12,876. The Court further concludes that the Debtor has established all the statutory requirements for confirmation of his proposed plan.

I. BACKGROUND

The Debtor filed this chapter 13 bankruptcy case on January 31, 2019. Prior to filing, Ms. Joltes initiated divorce proceedings in Jefferson County District Court. That court entered a Stipulation of Temporary Orders on November 3, 2019. The Temporary Orders calculated the amount of monthly maintenance and child support that the Debtor was required to pay to Ms. Joltes until entry of permanent orders. The Temporary Orders further provided that, if the Debtor made monthly car payments on the car that Ms. Joltes was driving, a Honda, he could deduct that same amount from his monthly maintenance obligation.

The Debtor made only one payment on her car before he lost his job. While he was unemployed, he not only stopped making car payments, but he also fell behind on his maintenance and child support obligations. The Debtor informed Ms. Joltes that he could not make the Honda payments, and she made some, but not all, of the required payments during the pendency of the Temporary Orders.

On May 24, 2018, the state court entered a Decree of Dissolution of Marriage and Permanent Orders. Under the "Property Division" section, the state court awarded the Honda to Ms. Joltes and ordered that she assume all obligations related to that vehicle. Under the same subsection, the state court awarded the Debtor insurance proceeds on a Mazda that he had previously driven, but which had been totaled in an accident.

Sometime in July 2018, the car lender repossessed the Honda. Ms. Joltes contends that there was $9,113 of equity in the Honda at the time of repossession and she included this amount in her proof of claim. She asserts that the value of the Honda is a DSO, along with the past due maintenance and child support payments. Ms. Joltes also objects to the Debtor's proposed plan on the basis that he did not file his petition or plan in good faith and has not properly calculated his projected disposable income. She argues he improperly took deductions for court-supervised visitation expenses, his contributions to a retirement plan, and a health savings account.

The Debtor does not dispute that he owes Ms. Joltes for past-due maintenance and child support but disputes the manner in which she has calculated the amount due. He also objects to her claim to the extent it includes the alleged equity in the Honda. As to his proposed plan, he contends that he filed his plan in good faith, has properly calculated his projected disposable income, and is entitled to all the listed expense deductions.

II. CLAIM OBJECTION

When a creditor files a proof of claim, it is deemed allowed unless a party in interest objects. 11 U.S.C. § 502(a).[1] If a claim objection is filed, the court determines the amount of the claim as of the petition date after notice and a hearing and "shall allow such claim in such amount." *Id.* § 502(b). The filing of a claim objection triggers a shifting burden of proof. Fed. R. Bankr. P. 3001(f). A properly filed proof of claim is prima facie evidence of the proof and validity of the claim. The objecting party has the initial burden of going forward with evidence to support the objection. *Int'l Corp. v. Broadband Wireless Int'l Corp. (In re Broadband Wireless Int'l Corp.)*, 295 B.R. 140, 145 (10th BAP 2003). The evidence "must be of probative force equal to that of the allegations contained in the proof of claim." *Id.* If the objecting party meets this burden, then the burden shifts to the creditor, who has the "ultimate burden of persuasion as to the validity and amount of the claim." *Id.*

In this case, Ms. Joltes filed a timely proof of claim in the amount of $22,869.16. She asserts that this entire amount is entitled to priority treatment as a DSO claim under § 507(a)(1). The Debtor objects to the amount of this claim on three grounds: (1) inclusion of $9,113.69 for the alleged equity in the Honda as a DSO; (2) Ms. Joltes' calculation of the prepetition maintenance and child support obligations; and (3) the manner in which Ms. Joltes calculated the interest due on his maintenance and child support obligations.

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[1] All references to "section" or "§" shall refer to Title 11, United States Code, unless expressly stated otherwise.

A. Value of the Honda

Ms. Joltes argues that she is entitled to the value of the Honda because the Debtor's failure to make the car payments as provided in the Temporary Orders caused the car to be repossessed before she could take title. However, an examination of those state court orders does not establish that the Debtor had an obligation to make those payments.

The Temporary Orders required the Debtor to pay Ms. Joltes $1,813 per month in maintenance and $857 per month in child support. The Temporary Orders also provided that Debtor "will deduct the car payment he is making on the car [Ms. Joltes] is driving from the above maintenance obligation. [Ms. Joltes] will receive the <u>net amount</u>." Ex. 1, ¶ 2 (emphasis added). Ms. Joltes interprets this language as imposing a duty on the Debtor to make the Honda payments. This Court does not agree with that interpretation. It refers to the payments the Debtor "is making." At the time of the Temporary Orders, the parties must have informed the court that the Debtor was making those payments. The court's Order then merely reflected that fact and allowed that he could deduct the amount of those payments from his monthly maintenance obligation. The court was making clear that he would receive a credit for any payments made. This is not the same as an order *requiring* the Debtor to make the Honda payments. If the court had intended to direct one party to make the payments, the order would have included language like that employed in the Permanent Orders, described below.

The Temporary Orders were in effect from November 2017 through May 2018. For those seven months, the Debtor owed Ms. Joltes a total of $12,691 in maintenance, not including interest. While the Temporary Orders allowed the Debtor to deduct any payments he made on the Honda from his maintenance obligation, it did not require him to make those payments. Furthermore, nothing in the Temporary Orders awarded Ms. Joltes the value of the Honda in addition to the $12,691. She was entitled to include only the unpaid portion of the $12,691, plus applicable interest, as her prepetition maintenance claim.

The Permanent Orders is similarly lacking in evidence to support Ms. Joltes' position. That document is divided into several sections. Under the section entitled "Property Division," and the subsection entitled "Motor Vehicles," the state court found as follows:

> I. The Court finds that the parties own one vehicle: a 2014 Honda CR-V. The parties previously owned a 2015 Mazda 6, which was totaled. Husband received proceeds in the amount of $4,981.50 from his insurance company for the 2015 Mazda 6 that was totaled.
>
> II. Petitioner contends that the debt on the 2014 Honda CR-V exceeds the value of this vehicle. Petitioner requests that she be awarded this vehicle and has agreed to render Respondent harmless of any debts or liabilities associated with this vehicle.

> III. Respondent argues that the Kelley Blue Book value of the 2014 Honda CR-V is $14,385, which exceeds the $9,886.69 currently owed on the vehicle. Respondent requests that this vehicle be refinanced within 6 months, so that Respondent may rebuild his credit. Respondent further requests that he be allowed retained [sic] the $4,981.50 insurance payment he received for the 2015 Mazda 6.
>
> IV. The Court awards the 2014 Honda CR-V to Petitioner per the parties' stipulation made on the record. The Court finds the approximate value of this vehicle is $14,385. Petitioner shall assume all obligations (registration, insurance, etc.), and shall indemnify and hold Respondent harmless for any such obligation.
>
> V. The Court awards Respondent the $4,981.50 insurance payment he received for the 2015 Mazda 6.

Ex. 2, ¶ 9(b).

This Order refutes Ms. Joltes' claims in several ways. First, the Order finds that the value of the Honda was $14,385 and that the parties owed $9,886.69 to the car lender. That would indicate that there was approximately $5,000 in equity in the Honda. Based on those amounts, the Court awarded the Honda to Ms. Joltes and gave the insurance proceeds of about $5,000 attributable to the other vehicle to the Debtor. This amounted to a fairly even split between them of the equity associated with both vehicles.

Ms. Joltes would have this Court believe that the Honda appreciated in value after the Permanent Orders such that there was over $9,000 in equity at the time of repossession. It would be unusual for a car to appreciate in value over time, unless it was a collectible car or there were unusual improvements made to it. Ms. Joltes claimed that she put new tires on the Honda before its repossession, but it strains credibility to think that new tires added $4,000 in value. Moreover, the Court received no evidence to support her claim that there was over $9,000 in equity in the Honda.

Moreover, nothing in this Order indicated that she was to receive the full fair market value of the Honda of $14,385, free of any debt obligation. To the contrary, the Court ordered her to assume all liabilities associated with the Honda and to refinance it as soon as possible to remove the Debtor from the loan. The property division described in the Permanent Orders was effective as of the date the state court entered that order—May 24, 2018. *See Camack v. Camack*, 62 P.3d 1097, 1099 (Colo. App. 2002) (transfer of property between spouses as outlined in parties' divorce agreement effective at time divorce decree adopting agreement entered). Thus, as of May 24, 2018, Ms. Joltes was responsible for the Honda and the liabilities associated with that vehicle. It was her responsibility to pay any past-due car payments in order to avoid repossession.

Ms. Joltes argues she never would have agreed to take responsibility for the Honda and hold the Debtor harmless had she known that the Debtor had not made all the car payments as provided in the Temporary Orders. The evidence presented at trial, however, does not support this argument. After the parties filed for divorce, they communicated through the "Talking Parents" application, which keeps a written record of all correspondence. *See* Ex. 5. Records from that application show that the Debtor first told Ms. Joltes that she needed to make the car payment in February of 2018. In April, the Debtor sent Ms. Joltes a copy of a notice from Honda Financial that indicated it intended to repossess the car if it did not receive the past due amount in full. On April 12, Ms. Joltes told the Debtor that she made the Honda payment in full and that Honda Financial applied the payment to the January, February, and March payments. In early May, the Debtor again notified Ms. Joltes through the Talking Parents app that the May car payment was due and that she would need to pay it. Ms. Joltes requested his password to access his online account with Honda Financial, and the Debtor provided that information. Thus, at the time the state court entered the Permanent Orders, Ms. Joltes was well aware of the past-due payments owed on the Honda and she still agreed to assume all liabilities related to the vehicle. Moreover, whether she agreed to it or not, the state court ordered her to assume this responsibility.

Ms. Joltes points out that the Permanent Orders required the Debtor to pay the maintenance arrearages he owed her under the Temporary Orders by the end of June, 2018, which he failed to do. *See* Ex. 2, ¶ 11(VI). Ms. Joltes testified that, had she received these funds, she could have made the necessary car payments and avoided repossession. This may very well be true. And she wants to recover the cost of new tires that she put on the Honda before its repossession. But even if she has suffered these losses due to the Debtor's failure to make timely DSO payments, she cannot assert these claims in this Court in the first instance. She would have to go back to state court and request sanctions for contempt. The divorce court has the ability to award remedial sanctions to make Ms. Joltes whole. However, "[b]efore entering remedial sanctions, the court must conduct a hearing and find that the charged party knew of the subject court order, did not comply with such order, *and has the present ability to comply*." 3 Stephen Hess, *Colo. Practice, Methods of Practice* § 95.23 (6th ed. 2019). While Ms. Joltes would likely have no difficulty establishing the first two requirements, she may have difficulty establishing the third one. The Debtor lost his job and was unable to pay during the relevant time period. His inability to pay may cause the court to deny a request for sanctions. Nevertheless, Ms. Joltes is free to make her request. But she has to make it to the divorce court. Unless and until the state court awards her these damages, she cannot assert them in this bankruptcy proceeding. Therefore, her DSO claim is limited to the past-due amounts of child support and maintenance awarded by the state court, plus interest. To the extent her proof of claim includes anything attributable to the Honda, she is not entitled to include that amount in her proof of claim. Her claim is therefore reduced by $9,113.69.

B. Calculation of Past Due Maintenance and Child Support

While the Debtor does not dispute that he owes Ms. Joltes for past due maintenance and child support, he asserts that Ms. Joltes has incorrectly calculated the arrearages. For child support, Ms. Joltes' proof of claim states that the Debtor owes her \$3,022.73. The Debtor contends the amount should be \$2,554.89. At trial, the Debtor testified that the difference between these amounts is that Ms. Joltes failed to credit two payments he made to her in January and February 2018. He presented a receipt signed by Ms. Joltes that acknowledges these payments. Ex. 4. Ms. Joltes admitted her mistake in failing to these two payments. Accordingly, the Court will adjust the amount of the child support arrearage to \$2,554.89.

As for past due maintenance, Ms. Joltes claims the Debtor owes her \$9,367.68 while the Debtor claims the amount is \$6,777.84, a difference of \$2,589.84. There are two reasons for this disparity. One is Ms. Joltes' admitted failure to credit the two payments the Debtor made in January and February of 2018. Those payments reduce the Debtor's obligation by approximately \$994. The other is attributable to her inclusion of \$1,625.26, representing the amount that she paid Honda Financial in car payments. The Debtor argues that this is a "double-dip" because her calculation makes him liable for the full amount of maintenance owed under the Temporary Orders, *plus* an additional \$1,625.26 in car payments. The Court agrees with the Debtor. In fact, Ms. Joltes acknowledged this fact on the witness stand when she admitted that, if the Debtor had paid the \$1,625.26 in car payments to Honda, that amount would be *subtracted* from the total \$12,691 due to her. Ms. Joltes is not entitled to collect maintenance not ordered by the state court. Accordingly, the amount of the Debtor's maintenance arrearage is reduced to \$6,777.84, not including interest.

C. Calculation of Interest

The parties agree that statutory interest is due on the maintenance and child support arrearage but dispute how to calculate that interest. Pursuant to Colorado statute, the maintenance arrearage incurs interest at 8% per annum, compounded annually. Colo. Rev. Stat. § 15-12-101. "Compounded interest is calculated by adding the annually accrued interest to the principal base amount each year before determining the following year's interest." *Xiong v. Knight Transp., Inc.,* 77 F. Supp. 3d 1016, 1025 (D. Colo. 2014). The Debtor applied this principle when he compounded the interest owed on the arrearage on Oct. 31, 2018, one year after the Temporary Orders entered, and then again on a pro-rated basis on the petition date (January 31, 2019). This resulted in \$681.17 of interest due on the petition date. Ex. 9. Ms. Joltes calculated the interest due on the maintenance arrearage as \$883.10. Some of the difference between these two figures can be attributed to Ms. Joltes using a higher base arrearage amount, which, as discussed above, she is not entitled to recover. In addition, Ms. Joltes' appears to have arrived at her calculation by applying a standard compounding interest formula[2] to her estimate of the final arrearage amount owed on the petition date. While this formula may work to determine compounding interest on an investment with a set principal amount, it does not accurately calculate interest on a monthly debt obligation where the arrearage varies depending on how much the Debtor paid in any

[2] This formula is often expressed as $A=P*(1+r/n)^{n*t}$, with P being the principal amount invested, R being the interest rate, n being the number of times compounded per year, and t being the length of time invested.

given month. The Debtor's calculation is more accurate because it calculates interest based on the actual arrearage owed at the one-year mark and on a pro-rated basis from the one-year mark to the petition date.

The same is true for the child support arrearage. Colorado statute sets the interest due on child support arrearages at 12%, compounded monthly. Colo. Rev. Stat. § 14-14-106. Ms. Joltes' calculation applies the same standard compounding formula to her estimate of the final arrearage amount owed as of the petition date. This calculation uses the wrong arrearage amount and fails to account for the fact that the arrearage amount varied each month. To accurately compound interest on a monthly basis, the calculation must compound interest based on the actual arrearage owed in each month. The Debtor's calculation accomplishes this.

Accordingly, the Court finds that the correct amount of prepetition interest is $681.17 for the maintenance arrearage and $328.86 for the child support arrearage. This means that, as of the petition date, the total prepetition maintenance arrearage plus interest is $7,467.20 and the total prepetition child support arrearage plus interest is $2,883.75, for a total prepetition DSO claim of $12,876.

III. PLAN OBJECTIONS

Ms. Joltes has also objected to confirmation of the Debtor's proposed chapter 13 plan. Her objections can be grouped into five categories: (1) the proposed plan fails to meet the disposable income test in § 1325(b)(1)(B) due to the deduction of certain expenses; (2) the Debtor's alleged lack of good faith under § 1325(a)(3) and § 1325(a)(7); (3) the proposed plan is not feasible under § 1325(a)(6); (4) the plan fails to meet the best interests of creditors test in § 1325(a)(4); and (5) the proposed plan fails to pay her all the past-due maintenance and child support arrearages. The last objection is overruled because, as discussed above, the Debtor has correctly calculated the prepetition domestic support obligation he owes to Ms. Joltes and the proposed plan provides for payment of that priority claim with applicable interest. The remaining objections are dealt with below.

A. Disposable Income

Ms. Joltes' first objection is that the Debtor's plan fails to meet the disposable income test found in § 1325(b)(1)(B). Under that subsection, if either the trustee or an unsecured creditor objects to confirmation, a court may only confirm the plan if it provides for payment of all the debtor's projected "disposable income" during the applicable commitment period, which in this case is five years. 11 U.S.C. § 1325(b)(1)(B). Section 1325(b)(3) goes on to state that a debtor's "disposable income" for an above-median-income debtor must be determined in accordance with provisions in § 707(b)(2)(A) and (B), often referred to as the "Means Test." Under the Means Test, a debtor arrives at his disposable income by subtracting certain defined expenses from his or her current monthly income. A debtor performs this calculation on Official Forms 122C-1 (Chapter 13 Statement of Your Current Monthly Income and

Calculation of Commitment Period) and 122C-2 (Chapter 13 Calculation of Your Disposable Income).

In this case, the Debtor has calculated his "current monthly income," as that term is defined by § 101(10A), to be $8,987.34. From this amount, he deducted $9,127.48 in expenses and other deductions. This results in a disposable income of a *negative* $140.14 per month. Assuming this calculation is correct, § 1325(b)(1)(B) does not require the Debtor to pay any amount to unsecured creditors because his monthly disposable income is less than $0. Debtor's current plan proposes to pay unsecured creditors a total of $3,524. Because this amount exceeds the $0 required by the Means Test, the Debtor contends that the plan satisfies the disposable income test.

Ms. Joltes argues the Debtor's calculation of disposable income is incorrect and that he has overstated some of his expenses and deductions. In her written objection, Ms. Joltes listed seven different expenses for which she requested additional back-up documentation. Creditor's Objection to Confirmation, ¶ 1. At the evidentiary hearing, Ms. Joltes presented argument regarding only five of those monthly expenses: (1) a $320 car payment the Debtor makes to his sister to use her car; (2) $400 he sets aside in savings for a new car; (3) $450 to pay for court-ordered supervised visits with the parties' minor child; (4) a $400 contribution to a health savings account; and (5) a $307 contribution to his 401(k) retirement account.[3] She argues these expenses are overstated and that the Debtor should not be permitted to deduct them.

1. Schedule J Expenses

The first three contested expenses (car payment, savings for a car, court-ordered supervised visits) are listed *only* on the Debtor's Schedule J—they are *not* claimed as expenses on the Means Test. This is an important distinction. Prior to passage of Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), debtors calculated their disposable income by using the income and expense figures on Schedules I and J. However, Congress changed that for above-median income debtors when BAPCPA added the Means Test, which "supplants the pre-BAPCPA practice of calculating debtors' reasonable expenses on a case-by-case basis, which led to varying and often inconsistent determinations." *Ransom v. FIA Card Serv., N.A.*, 562 U.S. 61, 65 (2011). The revised language in § 1325(b) states that an above-median-income debtor's disposable income "shall be" determined in accordance with the Means Test in § 707(b)(2)(A) and (B). 11 U.S.C. § 1325(b)(3). The income and expenses listed on Schedules I and J are thus no longer relevant to the calculation of disposable income for above-median-income debtors. *See In re Smith*, 549 B.R. 188, 196 (Bankr. N.D. Miss. 2016) ("Congress mandated the method for calculating disposable income in § 1325, and Schedules I and J are no longer the basis for that method."). Thus, even if Ms. Joltes disagrees with the expense amounts listed on Schedule J, that is not a valid

[3] To the extent Ms. Joltes questioned an expense in her written objection but failed to present evidence or argument about that expense at the hearing, the Court deems that argument waived.

basis for a disposable income objection under § 1325(b)(1)(B) because those expenses are not part of the Means Test.

The only comparable expenses the Debtor claimed on his Means Test are the standardized deduction for "vehicle operation expense" in the amount of $218 and his deduction under "court-ordered payments" in the amount of $1,681. *See* Debtor's Amended Form 122C-2, ll. 21, 19. Ms. Joltes did not specifically object to either of these expense amounts and, in any event, the Court finds that the Debtor is entitled to take both of them.

The Means Test states that a debtor is permitted to take "applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides." 11 U.S.C. § 707(b)(2)(A)(ii)(I). The National and Local Standards referenced in this provision are tables that the IRS prepares listing standardized expense amounts. As relevant here, the Local Standards include an allowance for transportation expenses, which the IRS divides into a vehicle ownership expense and a vehicle operating expense. As explained by the Supreme Court, the vehicle ownership expense "encompasses the costs of a car loan or lease and nothing more." *Ransom v. FIA Card Serv., N.A.*, 562 U.S. 61, 71 (2011). The vehicle operation expense, on the other hand, covers expenses associated with maintaining a vehicle, such as maintenance, fuel, registration, inspections, parking fees, tolls, and driver's license. *Id.*

In this case, the Debtor testified that he wrecked the car he formerly owned and that he is currently saving to buy a new vehicle. In the meantime, he is paying his sister to use one of her cars. The Debtor's Schedule J lists the car payments he makes to his sister, along with expenses for vehicle insurance, and savings to buy a new car totaling, $1,025 per month. However, on his Means Test, the Debtor took only the standard vehicle operating expense, which under the IRS Local Standards is $218 per month. He is required to take this standard amount, regardless of his actual expense amount. *Id.* at 75 ("If a debtor's actual expenses exceed the amounts listed in the tables, for example, the debtor may claim an allowance only for the specified sum, rather than for his real expenditures."). Because there is no dispute that the Debtor regularly operates a vehicle and incurs expenses related to that operation, his deduction of $218 is proper. *See id*. at 70 (holding that a debtor may only claim an expense from the National or Local Standards if he or she actually incurs an expense in that category).

The other contested expense that is listed on the Debtor's Schedule J and not on his Means Test is for "court-ordered visitation expenses" in the amount of $450 per month. This expense is based on the Permanent Orders, which specified that Ms. Joltes would be allowed a certain number of supervised visits with the parties' minor child and ordered that the Debtor and Ms. Jotles must split the cost for those visits. Ex. 2, ¶ 14(II). The Debtor testified that, if Ms. Joltes participated in all the supervised visits permitted by the Permanent Orders, his share of the cost would be $450 per month, as listed on Schedule J. However, both parties testified that Ms. Joltes is not currently participating in supervised visits and has not done so since the petition date. If the

Debtor was paying this expense, he could have potentially listed it on his Means Test under "court-ordered payments." *See* Official Form 122-C2, l. 19. Court-ordered payments are a subcategory of "Other Necessary Expenses" allowed by § 707(b). For Other Necessary Expenses, if a debtor incurs one of the listed subcategories of expenses, he may "deduct his actual expense, no matter how high they are." *Ransom,* 562 U.S. at 75-76. However, despite the fact that he has listed this expense on his Schedule J, he did not deduct any amount for this expense in his Means Test calculation. He only listed $1,681 for court-ordered payments. This amount matches his monthly maintenance obligation under the Permanent Orders.[4] Ex. 2, ¶ 11(V). It does not include the additional $450 for court-ordered visitation expenses. Thus, this expense has not had any impact on his disposable income calculation.

The final two expenses challenged by Ms. Joltes are the Debtor's monthly payroll deductions in the amount of $220 for a health savings account and $307 for voluntary contributions to his retirement account. The Debtor listed these expenses on both his Schedules I and J and his Means Test calculation, thus they do impact disposable income. For the reasons set forth below, the Court concludes that the Debtor has properly deducted both in calculating his disposable income.

2. Health Savings Account

In addition to the IRS-defined expenses allowed under the Means Test, § 707(b) also specifies that a debtor is permitted to deduct expenses for "reasonably necessary health insurance, disability insurance, and *health savings account expenses* for the debtor, the spouse of the debtor, or the dependents of the debtor." 11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). On his Form 112C-2, the Debtor listed a deduction for a health savings account in the amount of $220.38. A review of the Debtor's paystubs shows that, for each two-week pay period, his employer regularly deducts $110 from the Debtor's pay for "Health Care Flex Spending." Ex. O. Ms. Joltes argues this expense is excessive because, by her calculation, the Debtor's monthly medical expenses are lower than $220 per month. Ms. Joltes did not admit evidence of her calculations and so the Court cannot determine the alleged amount of the excess. Nevertheless, the Debtor testified that the documents he provided to the chapter 13 trustee and to Ms. Joltes regarding his medical expenses were from 2018 and did not necessarily reflect his current medical expenses. He further testified, without contradiction, that his out-of-pocket medical expenses this year will be higher and that he just had surgery and expected his out-of-pocket expenses from that procedure alone to be close to $3,000. That amount would justify the Debtor's monthly contribution of $220 into a health savings account. The Court therefore concludes that the Debtor's deduction for a health savings account contribution is allowable. *See In re Melander*,

[4] The Court recognizes that the amount of maintenance the Debtor pays Ms. Joltes is apparently offset by child support that Ms. Joltes owes the Debtor. The Debtor's Schedule I lists the child support at $877 per month. However, under § 1325(b)(2), disposable income does not include "child support payments . . . for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child." 11 U.S.C. § 1325(b)(2). Thus, the Debtor is not required to include the child support he receives as income on his Means Test.

506 B.R. 855, 867 (Bankr. D. Minn. 2014) (finding debtor's health savings account deduction reasonable based on her testimony that she uses the full amount deducted over the course of one year).

3. Retirement Account Contributions

The Debtor's $307 per month contribution to a retirement account represents a somewhat thornier issue. Nothing in either § 1325(b) nor in § 707(b)(2) explicitly authorizes an expense deduction for retirement account contributions. However, when Congress passed BAPCPA, it included an amendment to § 541(b)(7) that addresses voluntary retirement fund contributions. In relevant part, that section provides that:

> (b) Property of the estate does not include--
> [. . .]
> (7) any amount—
> (A) withheld by an employer from the wages of employees for payment as contributions—
> (i) to—
> (I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974 or under an employee benefit plan which is a governmental plan under section 414(d) of the Internal Revenue Code of 1986;
> (II) a deferred compensation plan under section 457 of the Internal Revenue Code of 1986; or
> (III) a tax-deferred annuity under section 403(b) of the Internal Revenue Code of 1986;
>
> ***except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)***; . . . .

11 U.S.C. § 541(b)(7) (emphasis added). The italicized portion, sometimes called the "hanging paragraph," appears to allow a chapter 13 debtor to exclude voluntary retirement contributions from the disposable income calculation. However, not all courts are in agreement with the meaning of the hanging paragraph. Three lines of cases have emerged.

In what has been called the minority position, courts hold that the hanging paragraph *does not* permit a chapter 13 to exclude postpetition retirement contributions when calculating disposable income under § 1325(b)(2). These courts, including the only circuit court to address the issue, emphasize the placement of the hanging paragraph within the broader context of § 541. *Schuler v. Burden (In re Seafort)*, 669 F.3d 662, 672-73 (6th Cir. 2012). In *Seafort*, the Sixth Circuit focused on the fact that § 541 defines what is included and excluded from the bankruptcy estate at a fixed point in time—the petition date. In § 541(b)(7) specifically, the numbered subparagraphs that precede the hanging paragraph exclude from the estate retirement contributions that the debtor made prepetition. As such, the Sixth Circuit concluded, the hanging paragraph is also referring only to *prepetition* retirement contributions already withheld by a debtor's employer. The Sixth Circuit found this conclusion reinforced by the fact that the hanging paragraph begins with the phrase "except that such amount . . .," which the court interpreted to be referring to *prepetition* retirement contributions already made by a debtor as described in the preceding sentence. The Sixth Circuit therefore concluded that "the function of § 541(b)(7) was merely to clarify that pre-petition retirement contributions do not constitute property of the estate or post-petition disposable income." *Id.* at 673. The *Seafort* court also reasoned that, had Congress wanted to exclude ongoing postpetition retirement contributions from disposable income, it would have explicitly done so within chapter 13 itself, either in § 1325(b)(2) or in § 1306, which defines property of the estate in chapter 13 cases.

The second line of cases is derived from the reasoning of a lower court decision in the *Seafort* case. Prior to being affirmed by the Sixth Circuit, the Sixth Circuit Bankruptcy Appellate Panel ("BAP") came up with a slightly different interpretation of the hanging paragraph in § 541(b)(7). *Burden v. Seafort (In re Seafort)*, 437 B.R. 204 (6th Cir. BAP 2010), *affirmed on other grounds*, 669 F.3d 662, 672-73 (6th Cir. 2012). Like the Sixth Circuit, the BAP acknowledged the larger context of the hanging paragraph within § 541. However, the BAP held that this context meant that the hanging paragraph applies not only to contributions already made by a debtor but to "401(k) contributions which are *being made* at the commencement of the case." *Id.* at 209 (emphasis added). In other words, those contributions that a debtor is making on the petition date can be excluded from disposable income, but any contributions a debtor initiates postpetition would not be protected. For example, when the debtor in *Seafort* filed her petition, she was making monthly payments on a loan she had previously taken out from her 401(k) account. After she successfully repaid that loan postpetition, the debtor proposed to make the same monthly payment as a 401(k) contribution. The BAP held that the new postpetition contribution was not covered by the hanging paragraph and, as such, it was disposable income that the debtor had to pay to her unsecured creditors through her plan. Although the Sixth Circuit did not adopt this reasoning when it affirmed the BAP's decision, other courts have. These courts hold that "voluntary retirement contributions being made as of the date of petition do not constitute disposable income and debtors may continue making those contributions during the life of the plan." *In re Jensen*, 496 B.R. 615, 621 (Bankr. D. Utah 2013).

The third line of cases, usually described as the majority position, holds that the hanging paragraph excludes *all* voluntary retirement contributions from the disposable income calculation, whether or not debtor was making contributions at commencement of the case. *E.g., In re Vanlandingham*, 516 B.R. 628, 634 (Bankr. D. Kan. 2014). These courts reason that the "plain language" of the hanging paragraph requires this conclusion, even considering its placement within § 541. These courts point to § 1306, which defines property of a chapter 13 estate to include both the property described in § 541 held as of the petition date, plus all the property of the kind specified in § 541 that the debtor acquires *after* the petition date, plus the debtor's postpetition earnings. To adopt the minority interpretation of the hanging paragraph, these courts reason, would be "inconsistent with the forward- and backward-reaching scope of § 1306." *Id.* at 636.

These courts also note that nothing in the hanging paragraph itself has a temporal limitation, but it does refer to "disposable income." That term is a distinctly postpetition concept because it defines what a debtor must pay into a plan during the case. As one commentator described it:

> This conclusion [that § 541(b)(7) only protects retirement funds already in the hands of the employer] makes no sense, because any funds in the hands of the employer as of the chapter 13 petition date would never be considered to be disposable income, which only includes income received by the debtor after the petition is filed. Funds that have already been paid to the debtor's account are dealt with, and separately protected by, the exemption provisions of section 522(b)(3)(C), (d)(10)(E) and (d)(12). The fact that the provision appears in section 541(b)(7) is perhaps poor drafting, but the reference to disposable income under section 1325(b), which encompasses only postpetition income, removes any doubt that postpetition contributions to the specified plans that are withheld by employers are to be excluded from the disposable income calculation.

5 *Collier on Bankruptcy* ¶ 541.23[1] (Richard Levin & Henry J. Sommer eds., 16th ed. 2019).

This Court agrees with the majority view. Although the placement of the hanging paragraph within § 541 is strange, that is hardly the only head-scratching drafting mystery within BAPCPA. Most likely Congress placed the hanging paragraph within § 541(b)(7) to avoid having to repeat the rather lengthy description of the types of qualifying retirement plans. Whatever the reason, the focus of the hanging paragraph is chapter 13 "disposable income" and, as noted in Collier, prepetition retirement contributions could never be "disposable income." Thus, this Court holds that the hanging paragraph in § 541(b)(7) excludes voluntary retirement contributions from the disposable income calculation. In this case, the Debtor's paystubs show that, on the petition date and in the two months leading up to the petition date, he was contributing $307 per month to his retirement plan. This amount was properly excluded from the disposable income calculation under § 541(b)(7).

B. Lack of Good Faith

Although not contained in her written plan objection, Ms. Joltes argued at the evidentiary hearing that the Debtor had demonstrated a "pattern of bad faith" during his bankruptcy case. Section 1325 contains two good faith requirements to obtain plan confirmation: § 1325(a)(3) requires that the Debtor propose the plan in good faith and not by any means forbidden by law, and § 1325(a)(7) requires a finding that the Debtor filed his petition in good faith. Under both of these subsections, courts apply a totality of the circumstances test with similar, but not identical factors, to determine whether the debtor acted in good faith. *In re Sinischo*, 561 B.R. 176, 191 (Bankr. D. Colo. 2016). Because Ms. Joltes did not specify which subsection she was asserting, the Court will consider both.

1. Good Faith Filing of the Petition

The Tenth Circuit has established the following non-exhaustive list of factors for bankruptcy courts to consider in determining whether a chapter 13 debtor filed the petition in good faith: (1) the nature of the debt, including the question of whether the debt would be nondischargeable in a chapter 7 proceeding; (2) the timing of the petition; (3) how the debt arose; (4) the debtor's motive in filing the petition; (5) how the debtor's actions affected creditors; (6) the debtor's treatment of creditors both before and after the petition was filed; and (7) whether the debtor has been forthcoming with the bankruptcy court and the creditors. *In re Gier*, 986 F.2d 1326, 1329 (10th Cir. 1993). The focus of the analysis is on whether there has been an abuse of the provisions, purpose, or spirit of chapter 13. *Id.*

Applying these factors, the Court finds the Debtor filed his petition in good faith. The Debtor's chapter 13 case appears to be fairly routine. The Debtor has only unsecured debt, most of which is nonpriority credit card and medical bills, as well as student loans. The Debtor testified that he filed bankruptcy shortly after he lost his job, and that his loss of income caused him to fall behind on his maintenance and child support payments to Ms. Joltes. The Debtor now has a new job and has proposed a plan that will pay Ms. Joltes her priority DSO claim in full, as well as a relatively small priority tax debt he owes to the IRS. While the payment to unsecured creditors is small, the Debtor has met the disposable income requirement.

Ms. Joltes argues that the Debtor's failure to make the Honda payments and to pay all the prepetition maintenance required by the Temporary Orders demonstrates bad faith. The Court does not deny that the Debtor's failure to pay his maintenance and child support obligations caused hardship for Ms. Joltes and that there may be some hard feelings between the parties due to this failure. The Debtor's prepetition actions in the divorce action, however, do not demonstrate that the Debtor's *filing of a bankruptcy case* somehow constitutes an abuse of the Bankruptcy Code. The Debtor fell behind on his payments to Ms. Joltes due to lost income and has now proposed a plan to repay those amounts. This is a legitimate use of the chapter 13 process.

Ms. Joltes also argues that the Debtor has made misrepresentations and omissions in his schedules. She did not, however, present any evidence at trial to support this allegation. The only specific example she gave was the Debtor's listing of expenses on his Schedule J for court-ordered supervised visits when he is not currently incurring that expense. The Court agrees that it would have been more accurate for the Debtor to omit this expense from Schedule J. However, as discussed above, this fact is of little consequence in this case because the Debtor did not deduct the expense in his disposable income calculation and his plan nevertheless meets that requirement. Moreover, the Court recognizes that the Permanent Orders do in fact require the Debtor to pay the expense if Ms. Joltes resumes supervised visits. Because there is at least some possibility that the Debtor will have to pay the expense during his case, the Court concludes that the Debtor's inclusion of the expense on Schedule J does not establish a lack of good faith.

At trial, Ms. Joltes also pointed out an inconsistency between the Debtor's income as listed in the Temporary Orders and in the Permanent Orders. She further asserted that the Debtor's income decreased by over $2,500 per month just two weeks before their divorce hearing in mid-2018. The Court need not determine the veracity of these allegations because, even if true, they relate to the Debtor's conduct before the state court, not in this bankruptcy case. It is the Debtor's accuracy in his bankruptcy statements and schedules that are important in a good faith analysis, and there is no evidence that those pleadings provide anything other than an accurate disclosure of the Debtor's income. Thus, the Court concludes that the Debtor filed his petition in good faith.

2. Good Faith Proposal of the Plan

Prior to passage of BAPCPA, the Tenth Circuit adopted a non-exclusive list of eleven factors to assist in determining whether a chapter 13 debtor proposed a plan in good faith. *Flygare v. Boulden (In re Flygare)*, 709 F.2d 1344, 1347-48 (10th Cir. 1983). More recently, the Tenth Circuit, in *In re Cranmer*, 697 F.3d 1314, 1319 n.5 (10th Cir. 2012), noted that when BAPCPA added § 1325(b), its criteria subsumed most of the *Flygare* factors. As such, the good faith inquiry now "has a more narrow focus." *Id.* Post-BPACPA, a bankruptcy court must consider the following factors: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or (3) whether he has unfairly manipulated the Bankruptcy Code." *Id.* As discussed above, neither of the first two factors are applicable in this case.

On the final factor, unfair manipulation of the Code, Ms. Joltes argues that the Debtor's election to make a $307 per month contribution to his retirement account while not paying his creditors in full shows bad faith. As discussed above, this Court has determined that the Debtor appropriately excluded his retirement contribution from his disposable income calculation. Given this conclusion, there is some question as to whether Ms. Joltes may question that expense under a good faith analysis given the Tenth Circuit's decision in the *In re Cranmer*, 697 F.3d 1314 (10th Cir. 2012).

In *Cranmer*, the chapter 13 trustee had objected to confirmation of the debtor's plan because the he had excluded his Social Security benefits from the disposable income calculation, thereby allowing him to retain those benefits rather than committing them to his plan. The Tenth Circuit held that the debtor was correct in excluding the benefits because "the plain language of the Bankruptcy Code demonstrates SSI is excluded from the projected disposable income calculation." *In re Cramner*, 697 F.3d at 1318. The Tenth Circuit then rejected the trustee's argument that the debtor had not proposed his plan in good faith because he had excluded his Social Security income. The court held that, when the debtor excluded his Social Security income in calculating his plan payments exactly as permitted by the Bankruptcy Code, that exclusion could not constitute a lack of good faith. "It simply was not bad faith for [the debtor] to adhere to the provisions of the Bankruptcy Code and, in doing so, obtain a benefit provided by it." *Id.* at 1319. To hold otherwise, the Tenth Circuit held, would render the Code's express exclusion of Social Security benefits from the calculation of the debtor's projected disposable income, meaningless.

Applying this same reasoning to the facts of this case would seem to preclude application of the good faith test to the Debtor's retirement contributions. Because other provisions of the Code allow the Debtor to exclude those contributions from the disposable income calculation, *Cramner* instructs that this expense cannot be attacked under the guise of a good faith analysis. Nevertheless, other bankruptcy courts within the Tenth Circuit have distinguished *Cranmer* and subjected retirement contributions to a good faith analysis. *In re Melendez*, 597 B.R. 647 (Bankr. D. Colo. 2019), *In re Vanlandingham*, 516 B.R. 628, 638 (Bankr. D. Kan. 2014); *In re Jensen*, 496 B.R. 615, 622 (Bankr. D. Utah 2013). These courts reason that, unlike the Social Security benefits addressed in *Cranmer*, retirement contributions are voluntary expenses, the amount and timing of which are chosen by the debtor. "The decision is discretionary and is a choice to prefer the Debtor to his creditors. This discretion is a crucial difference." *In re Melendez*, 597 B.R. at 660 (internal citation omitted). Because there is a risk of abuse inherent in such discretion, the good faith test serves as a back stop to prevent debtors from taking unfair advantage of creditors. *See id*. at 661-62.

In this case, the Court need not decide whether the good faith test in § 1325(a)(3) applies to retirement contributions because, even if it does, this Court would find that the Debtor has met this test. In performing the analysis, other courts have found a lack of good faith where a debtor initiates a large retirement contribution on or near the petition date. *E.g.*, *In re Smith*, 2010 WL 240065, at *3 (Bankr. N.D. Ohio June 15, 2010) (finding debtor's decision to increase his contribution by five times on eve of bankruptcy to be bad faith). Courts also examine the amount of the contribution and how it compares to a debtor's total income and the amount the debtor's proposed plan payment. *Compare In re Melendez*, 597 B.R. at 660-61 (finding monthly retirement contribution of $995, equaling 20% of the debtor's income, to be bad faith) *with In re Vanlandingham*, 516 B.R. at 637-38 (finding debtor's contribution of 4% of her income to be in good faith). Here, the Debtor's paystubs show that in the two months leading up the petition date, he was making the same contribution to his retirement account--$307 per month. This represents only 3% of his gross monthly income and is well below the maximum contribution permitted by the IRS. The Debtor's proposed plan payments, which range from $317 to $516, exceed the amount of his monthly retirement contribution. Based on these circumstances, the Court finds the Debtor's contribution to be reasonable and that he filed his plan in good faith.

C. Best Interests of Creditors

Ms. Joltes' written objection alleges that the Debtor's plan fails to meet the "best interests of creditors test." That test is found in § 1325(a)(4) and requires that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date." 11 U.S.C. § 1325(a)(4). The Debtor's proposed plan contains a reconciliation that shows that, in a chapter 7 case, unsecured creditors would receive nothing, whereas under the plan, they will receive $3,524. Debtor's Third Amended Chapter 13 Plan, ¶ 3.2. This reconciliation satisfies the best interests of creditors test.

Ms. Joltes does not question the numbers in the reconciliation or present evidence as to what she believes a more accurate reconciliation would be. Her only argument is that the fees charged by Debtor's counsel are not reasonable. She complains that counsel's fees have increased by $2,500 since the beginning of the case. Ms. Joltes does not explain why this would affect the reconciliation, which estimates the payout in a hypothetical chapter 7 case and, by definition, does not include fees for debtor's counsel. Because Ms. Joltes has not provided any basis to question the Debtor's reconciliation, her objection under § 1325(a)(4) is overruled. To the extent Ms. Joltes objects to the fees of Debtor's counsel, she may file an objection to counsel's fee application at the appropriate time. The Court notes, however, the fees requested by counsel ($8,000) do not appear to be excessive given that resolution of Ms. Joltes' objection to the plan and her claim objection required an evidentiary hearing.

D. Feasibility

Finally, Ms. Joltes' written objection to the Debtor's plan cites to § 1325(a)(6). That section states that a court may only confirm a plan if the debtor "will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). Typically, courts look to a debtor's actual net monthly income on schedules I and J to determine if the debtor will be able to make the payments proposed in the plan. *See In re Olson*, 553 B.R. 343, 348 (Bankr. N.D. Ill. 2016) (holding that debtor must demonstrate that his "income exceeds expenses by an amount sufficient to make the payments proposed by the plan.") In this case, the Debtor's schedules show that he currently has a net monthly income of $317.49. Under the proposed plan, the Debtor will be making play payments in the amount of $317 for the first nine months, or through October 2019. After that, the payments will increase to $516 per month. This step-up in payments accounts for the fact that the Debtor's obligation to pay Ms. Joltes monthly maintenance will end in October of this year. Without the maintenance obligation, the Debtor's net income will increase enough to cover the increased plan payments.

Ms. Joltes did not address feasibility at the evidentiary hearing and Ms. Joltes' objection does not contain any specific reasons why she believes the Debtor's plan is not feasible, other than to question the same expenses on Schedules I and J that she did under the disposable income test. However, as to each of those expenses, she argues the Debtor has *overstated* the expense. If she were to succeed in that argument and the Debtor lowered his expenses accordingly, this would demonstrate that the Debtor has even more income available to make the plan payments. Thus, Ms. Joltes' feasibility objection is overruled.

IV. CONCLUSION

For the reasons set forth above, the Debtor's objection to Ms. Joltes proof of claim is SUSTAINED. The amount of Ms. Joltes' prepetition DSO claim is hereby allowed in the amount of $12,876. All other amounts are DISALLOWED.

Ms. Joltes objection to confirmation of the Debtor's Third Amended Plan is hereby OVERRULED. The chapter 13 trustee recently filed a Motion to Dismiss the Debtor's case due to his failure to make plan payments. The Court will therefore delay entry of an order confirming the Debtor's proposed plan until he is current on plan payments.

DATED this 25th day of October, 2019

BY THE COURT:

Elizabeth E. Brown, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Elizabeth E. Brown

In re: ANGEL GONZALEZ, PATRICIA GONZALEZ, Debtors.	Bankruptcy Case No. 18-10156 EEB Chapter 13

ORDER DENYING CONFIRMATION

THIS MATTER comes before the Court on the Debtors' Motion to confirm their Chapter 13 Plan and the Objection lodged by the chapter 13 trustee ("Trustee"). Both parties have briefed the legal issue presented of how a chapter 13 debtor, who owns and receives income from a business, should calculate his "current monthly income" ("CMI") and, specifically, whether he may deduct business-related expenses before arriving at this income figure.

I. BACKGROUND

In this case, Mr. Gonzalez owns and operates a lawn care business called Rocky Mountain Lawn Pros LLC (the "LLC").[1] It performs lawn maintenance, landscaping, and snow removal services. He is the LLC's manager and sole member. While he asserts that he is merely an "employee" of the LLC, he does not receive a paycheck as a salaried employee. Instead he receives the net profit from the business. He calculates it by taking the LLC's gross revenue and subtracting out the LLC's expenses, such as contract labor, dump fees, insurance, tools, and various supplies. The resulting net income figure "passes through" the LLC and becomes his individual taxable income.

When the Debtors filed their chapter 13 petition on January 9, 2018, they filed a Form 122C-1 to calculate their CMI. As permitted on that form, Mr. Gonzalez listed the gross monthly income from the LLC and deducted ordinary and necessary operating business expenses to arrive at a net monthly income figure of $2,353. This figure combined with his wife's monthly salary gave the Debtors a total CMI of $4,093 per month or $49,127 per year. This amount is well below the median family income and, therefore, the Debtors filed a three-year plan.

[1] Debtor Patricia Gonzalez is employed as a paraprofessional for a school district and earns a gross salary of $1,740 per month.

The Trustee asserts that Debtors calculated their CMI incorrectly. He contends that it should include Mr. Gonzalez's gross, rather than net, business income. Under that scenario, Debtors' combined CMI would increase to $11,303.62 per month or $135,643.44 per year. This level of income is above the median family income, even for a family of six, which is the size of the Debtors' household. This would require them to propose a five-year plan. The Trustee acknowledges that the Debtors may appropriately deduct business expenses in determining their disposable income to fund a plan, but not when arriving at the CMI figure.

II. DISCUSSION

The length of time a debtor must make plan payments (his "applicable commitment period") is set forth in both § 1322 and § 1325.[2] Section 1325(b)(4) sets the floor and § 1322(d) sets the ceiling. Together these two statutes require a below-median income debtor to make payments for no less than three years and no more than five years. The above-median income debtor must make payments for no less than five years and no more than five years or, put more simply, for exactly five years.[3]

Whether a debtor is an "above-median income debtor" or a "below-median income debtor" is determined by whether his CMI is less than the "median family income." This term is defined in § 101(39A) to refer to the median income as calculated and reported by the U.S. Census Bureau in the most recent year. The Census Bureau bases its numbers on surveys. Its report contains a breakdown of median incomes by both the state of residency and the size of the household. For example, in Colorado, for a one-person household, the median income is $56,698. For a six-person household like that of the Debtors, the median is $111,272. U.S. Dept. of Justice, U.S. Trustee Program, *Census Bureau Median Family Income by Family Size (Cases Filed Between November 1, 2017 and March 31, 2018 Inclusive)*, https://www.justice.gov/ust/eo/bapcpa/20171101/bci_data/median_income_table.htm.

The Census Bureau's calculation of median income is based on the debtor's gross income before any deduction for taxes or basic costs of living. "Census money income is defined as income received on a regular basis . . . before payments for personal income taxes, social security, union dues, medicare deductions, etc." United States Census Bureau, *Income: About*, https://www.census.gov/topics/income-poverty/income/about.html (last revised Feb. 29, 2016). Thus, the Census Bureau excludes sources of income that are not "regular," such as an inheritance or a severance payment, but it does not deduct taxes, which may regularly absorb as much as one-third of a debtor's income.

[2] All references to "§" or "section" shall refer to Title 11, United States Code, unless expressly stated otherwise.
[3] Of course, if the debtor pays all claims in full, then he or she may propose a shorter plan length. 11 U.S.C. § 1325(b)(4)(B).

CMI is defined as "the average monthly income from all sources that the debtor receives . . . *without regard to whether such income is taxable income* [during the historical six-month period prior to filing bankruptcy] . . . ." 11 U.S.C. § 101(10A) (emphasis added). Thus, CMI is a combination of all sources of income that a debtor "receives." There are three specific sources of income that are not included but none are relevant to this case. There is no mention in this definition of any deductions for personal or business expenses. It is focused solely on income.

For the average wage earner, these definitions and calculations are clear and simple to apply. We take the debtor's gross income and compare it to the Census Bureau's calculation based on both the debtor's location and household size. What is less clear is how we do this when the debtor's source of income is derived from a business that he owns. For example, assume that the debtor's business grosses income of $300,000, but after business expenses it only nets $20,000. If the debtor does not receive a salary from the business and only takes a distribution of the business's net profit, then he would only receive $20,000. For purposes of personal income taxation, he would only be taxed on this $20,000, not on the $300,000 of gross business revenue. *See* I.R.S. Pub. 334, *Tax Guide for Small Business (For Individuals Who Use Schedule C or C-EZ*, 2018 WL 1528048 (Jan. 29, 2018). Yet when we calculate this debtor's CMI, should we use the $300,000 gross revenues figure or the $20,000 net income passed on to the debtor? This is the question that this case presents. Many courts have weighed in on this question, but they do not agree on the answer.

At first blush, it would seem grossly unfair to use the $300,000 figure. After all, the debtor never sees anything but the $20,000. And requiring him to pay creditors based on the $300,000 figure would be impossible. In fact, the Code does not require him to make payments to creditors based on this phantom income figure. Plan payments to creditors are based only on his "disposable income." Disposable income for a below-income debtor is CMI minus the deduction of all kinds of expenses, business and personal. 11 U.S.C. § 1325(b)(2).

Congress could have, and perhaps should have, tied the applicable commitment period or the required plan length to the debtor's *disposable income*. Then it would not matter whether we deducted business expenses at the CMI stage or with the disposable income calculation as the result would be the same. But Congress did not tie plan length to disposable income.

If a Colorado debtor's business grosses only $80,000, it is his sole source of income, and he has a household size of six, then he is a below-median income debtor. Section 1325(b)(2)(B) expressly states that his disposable income is to be calculated after deducting "the payment of expenditures necessary for the continuation, preservation, and operation of [his] business." If the Code says it is to be deducted with the disposable income calculation, then by implication, it is not to be deducted at the CMI stage. Thus, at least with sole proprietorships, business expenses are not deducted from CMI. If the business grosses over the median family income, then this debtor must file a five-year plan, even though he receives a much lower net income from the business. This seems unfair and perhaps it is, but many courts have found that this is what the Code dictates.

Courts are split on whether it makes a difference if the business has gross revenues above the median family income and has been incorporated or is held in another form of entity, such as an LLC. In that case, it is the LLC or the corporation that has "received" the $300,000. The debtor has only received the $20,000. In applying these statutes, courts have adopted two differing, but well-reasoned interpretations.

A. The Minority View

The Debtors urge the Court to follow the minority view, which holds that CMI should include only net business income (the "Net Income Approach"). *E.g.*, *In re Roman*, 2011 WL 5593143, at *3-4 (Bankr. D.P.R. Nov. 16, 2011); *In re Romero*, 2013 WL 241742, at *2 (Bankr. S.D. Fla. Jan. 22, 2013); *In re Geiger*, 2010 WL 2756760, at *4 (Bankr. N.D. Ohio July 12, 2010). These cases point out that Official Form 122C-1, which is the form on which debtors calculate CMI, has a specific section that instructs the debtor to net out business expenses from gross income to arrive at "Net monthly income from a business, profession or farm." Official Bankr. Form 122C-1, at ¶ 5.

Federal Bankruptcy Rule 9009 requires debtors to use this official form. The Judicial Conference of the United States approved it. Thus, the minority view argues that this form indicates that the Net Income Approach is the intended methodology. The Net Income Approach also conveniently aligns with how the IRS defines gross income derived from a business for tax purposes. *See* 26 C.F.R. § 1.61-3(a) (defining "gross income" as "total sales, less the cost of goods sold.").

One court has held that using gross business revenues earned by an S corporation as the sole shareholder's CMI is akin to piercing the corporate veil without proof of the elements of veil piercing. *In re Geiger,* 2010 WL 2756760, at *3 (Bankr. N.D. Ohio July 12, 2010). "The Court rejects Trustee's attempt to overlook the corporation framework and treat Debtor as a sole proprietor." *Id.* at *2. On the other hand, it is difficult to understand why Congress would want to treat debtors differently based on the form of business entity they have chosen. Why would Congress want to treat sole proprietors less favorably than the sole shareholder of an S corporation? *See* Mark A. Redmiles & Saleela Khanum Salahuddin, *The Net Effect: Debtors with Business Income Are Permitted to Deduct Ordinary and Necessary Business Expenses in Calculating Current Monthly Income*, 27 Am. Bankr. Inst. J. 16 (Oct. 2008); David P. Eron & Nicholas R. Grillot, *Income Means Income—Except When It Doesn't*, 31 Am. Bankr. Inst. J. 28, 28 (Oct. 2012).

B. The Majority View

The majority view recognizes the practical points made by the minority but nevertheless concludes that CMI is the gross business revenue (the "Gross Income Approach"). *See Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238, 239 (9th Cir. BAP 2008); *In re Kuiwik*, 511 B.R. 696 (Bankr. N.D. Ga. 2014); *In re Compann*, 459 B.R. 478, 482-83 (Bankr. N.D. Ga. 2010); *In re Harkins*, 491 B.R. 518, 530 (Bankr. S.D. Ohio 2013); *In re Sharp*, 394 B.R. 207, 216 (Bankr. C.D. Ill. 2008); *In re Arnold*, 376 B.R. 652, 654 (Bankr. M.D. Tenn. 2007). These courts point to the definition of CMI contained in § 101, which in relevant part defines that term to include "the average monthly income from *all sources* that the debtor receives . . . *without regard to whether such income is taxable income* . . . ." 11 U.S.C. § 101(10A) (emphasis added). It contains no provision for the deduction of any expenses, business or otherwise. Leading chapter 13 commentators concur.

> CMI is not 'net' of expenses incurred in the production of income unless an expense reduces income before it is "received" by the Debtor. CMI includes income the debtor 'received' from a business without regard to whether that income is taxable . . . [and] even though some or all of that income is consumed by expenses that would be deductible for tax purposes.

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 379.1, ¶ 21 (4th ed. 2007).

Courts adopting the Gross Income Approach focus on the fact that § 1325(b)(2)(B) specifically instructs below-median income debtors to deduct "expenditures necessary for the continuation, preservation, and operation of such business" when calculating *disposable income*. 11 U.S.C. § 1325(b)(2)(B). If business expenses are to be deducted from CMI, then it makes no sense to also deduct them when calculating disposable income because that would permit the debtor to deduct business expenses twice.

Instead, the majority position interprets § 1325(b)(2)(B) to require a debtor to deduct business expenses when calculating disposable income, not when calculating CMI. In *Wiegand*, the court ruled that "[w]e can conclude from the statutory language that the specificity of § 1325(b)(2)(B) controls—business deductions are to be taken from a debtor's current monthly income to arrive at the debtor's disposable income." *Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238, 242 (9th Cir. BAP 2008). To interpret it otherwise would, in the majority's view, allow for either a double deduction of business expenses, or it would render § 1325(b)(2)(B) superfluous. *In re Harkins*, 491 B.R. 518, 536 (Bankr. S.D. Ohio 2013).

The majority view acknowledges that its interpretation conflicts with Form 122-C. However, "when an Official Bankruptcy Form conflicts with the Code, the Code always wins." *In re Wiegand*, 386 B.R. at 241. Courts and commentators alike have called for revisions to the Official Form so that it better aligns with the Code, but no change has occurred, even though the Judicial Conference revised this form (formerly Form B-22C) in 2015.

The majority also claims that its interpretation of § 1325(b)(2)(B) aligns with pre-BAPCPA practice. "Pre-BAPCPA bankruptcy practice is telling because [courts] will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure." *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010) (internal citation omitted) ("*Lanning*"). Before BAPCPA, business expenses were deducted from "income received by the debtor" to determine "disposable income" pursuant to § 1325(b)(1)(B). "Congress could have moved the deduction for business expenses from § 1325(b)(2)(B) to § 101(10A), but it did not." *In re Kuwik*, 511 B.R. 696, 702 (Bankr. N.D. Ga. 2014).

Reliance on pre-Code practice in this area, however, seems dubious to this Court. BACPA introduced numerous substantial changes to the calculation of income and expenses. To name a few, it introduced the term CMI, a historical income test. 11 U.S.C. § 101(10A). It brought into the Code the distinction between above- and below-median income debtors. *See* Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 438.1, ¶ 4 (4th ed. 2007). It forced above-median income debtors to submit to a five-year plan. 11 U.S.C. § 1325(b)(4)(A)(ii). The Code has always required a chapter 13 debtor to pay his "projected disposable income" over the life of his plan. The addition of "projected" to the disposable income analysis under pre-BAPCPA law was always understood to be a mere multiplier (disposable income multiplied by the number of months covered by the plan) rather than a reassessment or "projection" of disposable income in the future. But in *Lanning,* the Supreme Court held that "projected" now means that courts can alter the historical income figure of CMI and/or the allowable expense deductions to account for changes that are known or virtually certain to occur during the life of the plan. *Hamilton v. Lanning*, 560 U.S. 505, 517 (2010).

BAPCPA also injected brand new criteria for the deduction of expenditures by above-median income debtors. Pre-BAPCPA, the Code allowed all chapter 13 debtors who were engaged in business to deduct "payment of expenditures necessary for the continuation, preservation, and operation of [the] business." 11 U.S.C. § 1325(b)(2)(B) (2000), amended by Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub.L. No. 109-8, 119 Stat. 23 (2005). Since the adoption of BAPCPA, the above-median income debtor must now look to the permitted deductions under the means test set forth in § 707(b)(2). 11 U.S.C. § 1325(b)(3). The problem is that § 707(b)(2) makes no provision for business expenses. It states that a debtor's expenses "shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service." 11 U.S.C. § 707(b)(2)(A)(ii). The National and Local Standards and the Other Necessary Expenses referred to in this section are part of the IRS's Collection

Financial Standards, which are contained in its Financial Analysis Handbook ("Handbook"), available at http://www.irs.gov/irm/part5/irm_05-015-001.html.

The Net Income Approach deducts business expenses from CMI, so it does not have to reach this issue. But it does so without any supporting language in § 101(10A). Many courts adopting the Gross Income Approach argue that an above-median income debtor can appropriately deduct business expenses as "Other Necessary Expenses." The IRS Handbook does not define "Other Necessary Expenses." Rather, it merely states that "[o]ther necessary expenses that meet the necessary expense test are normally allowed." Handbook § 5.15.1.11. The Handbook then goes on to list sixteen categories of possible "other expenses" and describes when those expenses would be considered "necessary." *Id.* Those categories are: accounting and legal fees, charitable contributions, child care, court-ordered payments, dependent care, education, involuntary deductions, life insurance, secured or legally perfected debts, *other unsecured debts*, current year taxes, delinquent state and local taxes, optional telephones and telephone services, student loans, and repayment of loans made for payment of federal taxes. *Id.* at ¶ 3 (emphasis added). Business expenses are notably absent from this list.

Nevertheless, many courts adopting the Gross Income Approach point out that Congress intended the Handbook's list of Other Necessary Expense categories to be non-exclusive. *In re Kuwik*, 511 B.R. 696, 705 (Bankr. N.D. Ga. 2014) (citing H.R. Rep. No. 109-31, at 100 n.66 (2005)). Courts also focus on the Handbook's "necessary expense test," which states that necessary expenses include those "that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or *production of income*." Handbook § 5.15.1.8 (emphasis added). Since business expenses are generally necessary for a business owner's production of income, courts reason that this definition is broad enough to allow for deduction of business expenses as "Other Necessary Expenses" in the means test. *In re Kuwik*, 511 B.R. at 705; *In re Arnold*, 376 B.R. 652, 655 (Bankr. M.D. Tenn. 2007).

Some advocates of the Gross Income Approach point out that business expenses could also be included in the "other unsecured debt" category of Other Necessary Expenses. The Handbook states that "[e]xamples of unsecured debts which may be necessary expenses include: payments required for the production of income such as payments to suppliers and payments on lines of credit needed for business." Handbook § 5.15.1.11, ¶ 3. However, after instructing reliance on the Handbook's categories of Other Necessary Expenses, § 707(b)(2)(A)(ii)(I) then includes the following sentence: "Notwithstanding any other provision of this clause, the monthly expenses of the debtor shall not include any payments for debts." 11 U.S.C. § 707(b)(2)(A)(ii)(I). This sentence creates an interpretive knot that may be impossible to untangle, according to one commentary source:

> By definition, an obligation in the category "Unsecured Debts" is a "debt" excluded from allowable expenses by the "notwithstanding" sentence. This

> leads to the uncomfortable conclusion that Congress granted Chapter 13 debtors with CMI greater than applicable median family income an expense allowance in a category of Other [Necessary] Expenses specified by the IRS but then emptied that category of all meaning two sentences later in § 707(b)(2)(A)(ii)(I). It is not obvious what magic of statutory interpretation will avoid this strange aspect of [BAPCPA].

Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 477.12, ¶ 7 (4th ed. 2007).

However, the Gross Income Approach can still give meaning to the "notwithstanding" sentence in § 707(b)(2)(A)(ii). The intent behind the means test in § 707(b) is to ferret out those debtors who could make a meaningful repayment through a chapter 13 plan. If they could, then the means test dismisses their case unless they convert to chapter 13 (or chapter 11). To work the formula, the debtor determines his CMI and then deducts certain specified expenses. The "notwithstanding" sentence tells the debtor that, in making his deductions, he cannot deduct "any payments for debts." This reference to "debts" is not as broad as it appears. It only refers to the debtor's prepetition, non-priority, unsecured debts (the "Debts"). We know this because other provisions of the means test expressly provide for the deduction of secured debt payments (§ 707(b)(2)(A)(iii)) and priority debt payments (§ 707(b)(2)(A)(iv)). Therefore, the "notwithstanding" sentence would not prevent a debtor from deducting future business expenses necessary to the production of future income. It only prevents him from deducting the Debts because otherwise it would not represent a true picture of how much Debt the debtor could repay in the future.

Courts following the Gross Income Approach further point out that their interpretation harmonizes the provisions of § 1325(b)(2) and § 1325(b)(3). Congress explicitly instructs below-median income debtors to deduct business expenses in the disposable income calculation in § 1325(b)(2). "There simply is not a sufficient basis in the Code, legislative history, pre-amendment practice or the policies underlying BAPCPA to interpret § 1325(b)(3) to wipe out the express provision for the deduction of business expenses contained in § 1325(b)(2)(B). *In re Kuwik*, 511 B.R. 696, 705 (Bankr. N.D. Ga. 2014); *see also In re Harkins*, 491 B.R. 518, 539 (Bankr. S.D. Ohio 2013) ("It would make no sense to interpret 1325(b)(3) to take away what § 1325(b)(2)(B) so plainly gives.").

C. This Court's Interpretation

The Court dislikes both interpretations. The Net Income Approach reads into the definition of CMI the ability to deduct business expenses, without any statutory support. By doing so, it renders meaningless § 1325(b)(2)(B)'s deduction of business expenses at the disposable income phase for below-median income debtors or, worse, it allows for duplication of these deductions. On the plus side, the Gross Income Approach treats both above- and below-median income debtors alike, deducting business expenses only at the disposable income level. It can also be interpreted to treat sole proprietors the same as small business owners who conduct business through a corporation or LLC. But it requires interpretive backflips to read into the Code a deduction of business expenses for the above-median income debtor.

The passage of BAPCPA took many years. Reform legislation was first introduced in 1997. After many revisions, BAPCPA was signed into law in 2005. Despite this prolonged negotiation period, the final version of BAPCPA has been roundly criticized as poorly crafted, containing a multitude of "typos, sloppy choices of words, hanging paragraphs, and inconsistencies . . . . [as well as] "largely pointless but burdensome new requirements, overlapping layers of screening, mounds of new paperwork, and structural incoherence." Jean Braucher, *The Challenge to the Bench and Bar Presented by the 2005 Bankruptcy Act: Resistance Need Not Be Futile*, 2007 U. Ill. L. Rev. 93, 97 (2007). Why Congress did not endeavor to fix these issues before passage is unknown.

This Court's best guess is that § 1325(b)(3) contains one such typographical error. Subsection (2) was intended to lay out the general formula for all debtors to determine disposable income. This subsection allows deduction for "reasonably necessary:" (1) personal expenses ((b)(2)(A)(i)); (2) charitable deductions ((b)(2)(A)(ii)), and (3) business expenses ((b)(2)(B)). Without the addition of subsection (b)(3), all debtors could clearly deduct business expenses. Subsection (b)(3) states that amounts reasonably necessary to be expended under paragraph (b)(2), other than charitable contributions, shall be determined in accordance with the means test in § 707(b) for above-median income debtors. If Congress had limited the scope of (b)(3) to amounts reasonably necessary to be expended under paragraph (2)(A)(i), then it would have been clear that the only substitution for above-median income debtors would be a different set of deductions for personal expenses. The means test only covers personal and family household expenses. It does not speak to the issue of business expenses. Or Congress could have drafted (b)(3) to make an exception for both charitable contributions and business expenses, again leaving the scope of (b)(3) to be a substitution of only personal expense deductions. Either way there was likely a slip of the pen in drafting subsection (b)(3).

Without rewriting the Code in some manner, there appears to be no way to construe all these statutory provisions harmoniously. It gives the Court great pause to reach this conclusion because usually, with enough study and thought, the seemingly inconsistent provisions of the Bankruptcy Code are unraveled, and the Court is left with a greater appreciation for how expertly the Code provisions have been woven together. In this instance, however, the Court is unable to find the cohesive thread. As a result, the Court is faced with a sort of Sophie's choice.

When statutes cannot be construed harmoniously, courts must engage in an interpretative process to attempt to discern the legislature's intent. In doing so, "[c]ourts may consider the history of the subject matter involved, the end to be attained, the mischief to be remedied, and the purpose to be accomplished." Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 45:5 at 39 (7th ed. 2014).

Based on legislative history, the Supreme Court identified the heart of the consumer reforms enacted by BAPCPA. It is "to ensure that [debtors] repay creditors the maximum they can afford." *Ransom v. FIA Card Serv., N.A.,* 562 U.S. 61, 71 (2010) (quoting H.R. Rep. No. 109-31, pt. 1, at 2 (2005)). It is through this overall lens that we must construe these provisions.

With this focus, the Net Income Approach has immediate appeal. A debtor who receives only $20,000 from his business cannot possibly repay based on gross revenues of $300,000. But both approaches recognize that the Bankruptcy Code only requires a debtor to repay based on his disposable income and not on his CMI alone. Thus, we are not talking about how much a debtor pays into his plan. We are only concerned with how long his plan must last. Under the Gross Income Approach, which only allows the deduction of business expenses at the disposable income stage, many more debtors will be forced to remain in chapter 13 for five years. That result might well have been intentional. It certainly fits with the overall goal of making debtors repay the maximum they can afford.

Clearly, a below-median income debtor who operates a business as a sole proprietor deducts his business expenses only when calculating disposable income pursuant to § 1325(b)(2). Congress would never have intended for him to deduct the same expenses twice – initially with CMI and then again with disposable income. Duplicating the expenses would violate the underlying purpose of maximizing creditor return based on what a debtor can realistically pay.

Thus, with great reluctance, this Court adopts the Gross Income Approach. The fact that § 1325(b)(2) requires the deduction of business expenses during the disposable income calculation seems indicative of Congressional intent to have debtors deduct business expenses at that point rather than at the CMI stage. Form 122C-1's net income calculation completely ignores this specific provision of the Code. It also makes better sense to the Court to interpret § 1325(b)(3) in a manner that is consistent with § 1325(b)(2). This Court can conceive of no reason why Congress would prevent above-median income debtors from deducting business expenses in the disposable income calculation while at the same time allowing below-median income debtors to do so.

This Court agrees with the majority that the Code's failure to address deduction of business expenses by above-median income debtors "has to be a fundamental mistake in the deconstruction of the disposable income test by BAPCPA." Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy* § 477.12, ¶ 10 (4th ed. 2007). Indeed, as pointed about by retired Judge Lundin, Congress created similar confusion with its treatment of deductions of charitable contributions. The initial version of BAPCPA permitted below-median income debtors a special expense deduction for charitable deductions in § 1325(b)(2)(A) but made no such provision for above-median income debtors in § 1325(b)(3). Congress fixed the problem in 2006 by amending § 1325(b)(3) to apply the charitable contribution deduction described in § 1325(b)(2)(A)(ii) to above-median income debtors. *Id*. at § 477.12, ¶ 11 (citing 11 U.S.C. § 1325(b)(3), as amended by the Religious Liberty and Charitable Donation Clarification Act of 2006, Pub. L. 109-439, 120 Stat. 3285 (Dec. 20, 2006)). Unfortunately, Congress did not take that opportunity to also clarify the deduction of business expenses by above-median income debtors. Without a legislative fix, the Court regrettably sides with the majority in finding that the deduction of business expenses as Other Necessary Expenses is consistent with the description of Other Necessary Expenses in the Handbook, as well as the language of § 1325(b)(2).

Although the Gross Income Approach may unfairly target many small business owners, is not inconceivable that Congress intended for these debtors to submit to five-year plans. Congress could have chosen to tie the length of a debtor's plan to his disposable income, but it did not. Essentially, this is what the Debtors are arguing for – a test tied more realistically to a debtor's ability to pay. If his disposable income is below the median threshold, then he should not have to pay for five years. This has strong emotional appeal. Everyone knows that chapter 13 debtors struggle to make plan payments and, the longer the plan, the harder it is to remain on its strict budget. Nevertheless, we must presume that, when Congress tied plan length to the Census Bureau's calculation of median-income status, it knew it was tying it to a gross income figure. It makes little difference whether that income is derived from a business the debtor owns or his wages.

It is interesting that the Census Bureau, which derives its calculation of median income from survey responses, notes that "there is a tendency in household surveys for respondents to underreport their income," but less so with "income earned from wages or salaries [than with] other sources of income. . . ." United States Census Bureau, *Income: About*, https://www.census.gov/topics/income-poverty/income/about.html (last revised Feb. 29, 2016). Knowing this could explain why Congress tied plan length to gross income rather than net. When a debtor is a small business owner, in whatever legal form, there is a greater chance for underreporting of income. A small business owner has a great deal of discretion in determining what expenses the business will incur and pay before distributing net profit. In this case, the Trustee alleges that the LLC has paid many of the Debtors' personal expenses. Perhaps Congress "simply did not want those persons generating significant revenues through a business to have access to three-year chapter 13 plans." *Drummond v. Wiegand (In re Wiegand)*, 386 B.R. 238, 243 (9th Cir. BAP 2008). Under this interpretation, the only business owners who may file a three-year plan are those in which the business does not generate substantial income (above the median income threshold).

III. CONCLUSION

For the reasons stated, the Court concludes that the Debtors must file a five-year plan. Therefore, the Court DENIES confirmation of the Debtors' plan. Debtors must file a new plan within fourteen days of the date of this Order.

DATED this 27th day of September, 2018.

BY THE COURT:

Elizabeth E. Brown, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Joseph G. Rosania, Jr.

In re: ROBERT H. ANDRICK, SSN: xxx-xx-7324 BRENDA K. ANDRICK, SSN: xxx-xx-8821 Debtor.	Case No. 18-17556-JGR Chapter 13

ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

The issue presented to the Court is whether proposed expenditures for medical marijuana bars confirmation of a Chapter 13 Plan.

BACKGROUND

Robert H. Andrick and Brenda K. Andrick (collectively, "Debtors") filed their Chapter 13 bankruptcy case on August 28, 2018. They are above-median income debtors with primarily consumer debts and are not eligible for relief under Chapter 7 of the Bankruptcy Code.

The Chapter 13 Plan filed in the case proposes monthly payments in the amount of $681 over a sixty-month period, for a total of $40,860. The Plan provides for the retention of three motor vehicles and a home, with payments being made directly to the respective secured creditors. Under the Plan, unsecured claims are projected to receive a total amount of $33,794.

The Debtors' Schedule E/F listed total nonpriority unsecured debt in the amount of $196,545. Based on the amount of the scheduled unsecured claims, a projected unsecured claim dividend of approximately 17% was proposed through the Plan. Because timely-filed allowed unsecured claims only totaled $88,076, the unsecured dividend is now projected to be approximately 38%.

The Chapter 13 Trustee objected to confirmation of the Plan, raising numerous grounds. *See* Doc. 27. The United States Trustee ("UST") filed a separate objection, arguing, as a threshold matter, that the Plan cannot be confirmed because the Debtors seek to divert funds otherwise payable to creditors to purchase medical marijuana. *See* Doc. 53. The UST argues that the proposed expense for medical marijuana presents an absolute bar to confirmation.

This Court has subject matter jurisdiction over confirmation of the Plan under 28 U.S.C. § 1334, 28 U.S.C. § 157(a), and 28 U.S.C. §§ 157(b)(1) and (b)(2)(L).

THE DEBTORS' DISPOSABLE INCOME AND PROPOSED PLAN

Chapter 13 debtors are required to file a *Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period* (Official Form 122C—1). Above-median income debtors must also file a *Chapter 13 Calculation of Your Disposable Income* (Official Form 122C—2).

The Debtors' Form 122C-1 stated current monthly income of $14,188.95. The current monthly income translates to annual income of $170,267.40. The reported income only reflects Mr. Andrick's earnings. Ms. Andrick's monthly Social Security benefits of $1,936.50 are excluded from current monthly income pursuant to 11 U.S.C. § 101(10A)(B).

This compares to Mr. Andrick's income disclosed in the Debtors' Statement of Financial Affairs ("SOFA") of $187,262 for the 2016 calendar year; $147,408 for the 2017 calendar year; and $96,226 prior to the late-August filing in 2018. The Debtors also disclosed Social Security benefits of $22,782 in 2017 and $22,722 in 2016.

Form 122C-2 allows certain expenses and debt payments to be deducted from current monthly income and results in a calculation of disposable income. The Debtors claimed four persons for the purpose of determining deductions. In addition to themselves, the Debtors support an adult daughter and granddaughter. The Debtors' disposable calculation is summarized as follows:

Current Monthly Income			$14,188.95
Less:	IRS Expense Allowances:		
	Food, Clothing, Other	($1,694.00)	
	Healthcare Allowance	($208.00)	
	Housing: Insurance, Other	($646.00)	
	Vehicle Operating Expense	($436.00)	
	Vehicle 1 Cost	($220.47)	
	Taxes	($3,692.18)	
	Life Insurance	($253.00)	
	Additional Health Care	($2,646.00)	
	Telecommunications	($138.00)	
			($9,933.65)
Less:	Additional Expense Deductions:		
	Health Insurance	($187.50)	
	Additional Food and Clothing	($58.00)	
			($245.50)

Less:	Debt Payment:		
	Residence	($1,455.00)	
	Vehicle 1	($276.53)	
	Vehicle 2	($568.00)	
			($2,299.53)
Monthly Disposable Income			$1,710.27

The Debtors' Form 122C-2 claims two additional deductions for special circumstances totalling $1,110: expenses for cigarettes in the amount of $210 and expenses for medical marijuana in the amount of $900. The Debtors contend these additional deductions properly reduce their monthly disposable income to $600.27.

A plan providing for contributions of $1,710 per month over sixty-months would result in plan payments totalling $102,600 and, after payment of administrative expenses[1], yield a return of $89,360 to unsecured creditors. As stated above, timely-filed unsecured claims total $88,076.27. Accordingly, allowed claims would receive a 100% dividend under a plan with monthly payments of $1,710.

The Court also notes that prior to filing the bankruptcy case, Question 17 of the SOFA reflects that the Debtors were making monthly payments of $1,352 on account of a debt resolution program through Americor Funding. A proposed plan providing for monthly payments of $1,352 would result in total payments of $81,120 and funds available to pay unsecured claims in the approximate amount of $70,028—a pro rata dividend of nearly 80%. Here after filing bankruptcy, the Debtors proposed plan payment is $681.

The Plan proposed by the Debtors provides for monthly payments of only $681. This figure is arrived at by subtracting the expenses claimed on Schedule J from the net income listed on Schedule I and exceeds the Debtors' claimed disposable income by roughly $80.

The Chapter 13 Trustee objected to confirmation of the Debtors' proposed Plan. In addition to objecting to the claimed special circumstances deductions for cigarettes and marijuana, the Trustee argues that the Debtors' Plan was not proposed in good faith. Among other things, the Trustee argues that the Debtors' overstated their tax withholding and included excessive amounts in their Schedule J for food, uninsured medical expenses, miscellaneous spending, gifts, and pet expenses.

The Trustee further argues that the Debtors' calculation of disposable income should be based on a household size of two, rather that four, and that if the household size is four, any additional income received by the Debtors' daughter and granddaughter should be included in the calculation.

The Debtors dispute that their claimed expenses are excessive and argue that their calculation of disposable income is accurate.

[1] Administrative expenses consist of unpaid attorney's fee in the amount $2,980 and the Chapter 13 Trustee's commission of $10,260.

These disputes are factual in nature and the Court is not in a position to resolve these issues without receiving evidence.

Nevertheless, the facts relating to the proposed expenditure for the use of medical marijuana are not in dispute and present a separate dispositive legal issue.

BANKRUPTCY AND MARIJUANA

Medical and recreational marijuana use has been legalized under Colorado state law. Nevertheless, under federal law, marijuana continues to be listed as a Schedule I controlled substance under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (the "CSA").

The intersection between the marijuana industry and bankruptcy is generally found where plans of reorganization are proposed to be funded, at least in part, by proceeds generated through the production, sale, or use of marijuana. Courts addressing the issue have found the intersection to be a dead end.

The analysis is relatively straight forward. Regulation of marijuana under the commerce clause falls within Congress's power. *Gonzales v. Raich,* 545 U.S. 1 (2005). Marijuana is listed as a Schedule I controlled substance. *See* 21 U.S.C. § 812. As such, under 21 U.S.C. § 841(a)(1), it is "unlawful for any person to knowingly or intentionally … manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." Despite being legal under state law, activities associated with the marijuana industry are illegal under federal law and cannot be condoned by the bankruptcy courts. "[A] federal court cannot be asked to enforce the protections of the Bankruptcy Code in aid of a Debtor whose activities constitute a continuing federal crime." *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 805 (Bankr. D. Colo. 2012).

Rent-Rite involved the dismissal of a Chapter 11 reorganization where approximately 25% of the debtor's income was generated through leasing warehouse space for marijuana grow operations. *Id*. at 802.

In *In re Arenas*, 514 B.R. 887 (Bankr. D. Colo. 2014), the prohibition against marijuana-related activities was extended to cases under Chapter 7 and Chapter 13. The Debtors operated a marijuana grow business and sought relief under Chapter 7. Because the business became property of the bankruptcy estate, allowing the case to proceed would place the Chapter 7 Trustee in jeopardy of violating the CSA through the administration of the case. *Id*. at 892. Likewise, the conversion to Chapter 13 was not feasible, as the plan would be funded through proceeds from the business. "The Debtors are not entitled to convert their case to a case under chapter 13 because their reorganization would be funded from profits of an ongoing criminal activity under federal law and would necessarily involve the Chapter 13 Trustee in administering and distributing funds derived from the Debtors' violation of the CSA." *Id.*

Affirming the decision on appeal, the Tenth Circuit Bankruptcy Appellate Panel succinctly stated: "Can a debtor in the marijuana business obtain relief in the federal bankruptcy court? No." *Arenas v. United States Tr. (In re Arenas)*, 535 B.R. 845, 847 (B.A.P. 10th Cir. 2015).

This case presents the other side of the coin. The UST argues that the Debtors' Plan fails to meet the requirements of 11 U.S.C. § 1325(a) and (b) because it is not proposed in good faith and fails to provide for the payment of all disposable income. Specifically, the Plan is "premised on allowing a $900 per month deduction from disposable income to purchase illegal drugs." Doc. 53, p. 1.

The Chapter 13 Trustee and the UST have filed objections to the confirmation of the Debtors' Plan, triggering the operation of 11 U.S.C. § 1325(b), which provides:

> (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Subsection (b)(3) incorporates 11 U.S.C. § 707(b)(2) for purposes of calculating disposable income, including the reference to additional deductions for special circumstances.

Accordingly, the Debtors claim special circumstances deductions on Line 43 of their Form 122C-2 Chapter 13 Calculation of Your Disposable Income of $210 for "Cigarettes" and $900 for "Medical Marijuana."

The UST's objection argues:

1. The proposed expenditure for the purpose of marijuana is illegal under federal law;

2. No medical exception for the use of marijuana exists under federal law;

3. The Chapter 13 proceeding protects the Debtors' income from collection activities for five-years;

4. Unsecured creditors are not being paid in full, and under the terms of the plan are therefore subsidizing the purchase of illegal drugs; and

5. The proposed Plan requires the Court to authorize the use of post-petition income (property of the estate) for purchase of illegal drugs.

Because the objection is silent as to the claimed special circumstance deduction for cigarettes, the focus of this decision concerns the deduction for medical marijuana.[2]

The Debtors offer little by way of legal argument to support the claimed deduction, simply stating: "The expense for medical marijuana is her actual expense, and it is reasonably necessary to be expended. Debtor suffers from a chronic and severely painful medical condition for which marijuana is the only effective remedy. The Debtor uses it only when necessary for pain control. The Debtor does not use it for recreation." Doc. 52, p. 9. The Debtors argue that because medical marijuana is legal in Colorado, and Ms. Andrick holds a valid license, everything is "ok" and the claimed special circumstances deduction is permissible.

In *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 121 S. Ct. 1711 (2001), the Supreme Court rejected the notion that marijuana use for medical purposes creates an exception to the application of the CSA. "Furthermore, the very point of our holding is that there is no medical necessity exception to the prohibitions at issue, even when the patient is 'seriously ill' and lacks alternative avenues for relief." *Id*. at 494 n. 7.

Marijuana use, whether for medical or recreational purposes, remains illegal under federal law. The deduction of a medical marijuana expense cannot be allowed as either an ongoing out-of-pocket medical expense or as a deduction for special circumstances.

The Court is not unsympathetic to the Debtors' plight. However, because the Debtors' proposed Plan does not contribute all projected disposable income as required under 11 U.S.C. § 1325(b)(1)(B), it cannot be confirmed. Accordingly,

IT IS ORDERED that confirmation of the Debtors' Chapter 13 Plan filed August 28, 2018 (Doc. 2) is DENIED.

IT IS FURTHER ORDERED that the Debtors shall have until and including **August 8, 2019**, to file an amended plan, failing which the case will be dismissed.

Dated this 25th day of July, 2019.

BY THE COURT:

Joseph G. Rosania, Jr.
United States Bankruptcy Judge

[2] The Chapter 13 Trustee's Objection and the UST's Objection also cite 11 U.S.C. § 1325(a)(3), which requires that "the plan has been proposed in good faith and not by any means forbidden by law." Because the proposed Plan fails to provide for the payment of "all disposable income" under 11 U.S.C. 1325(b)(1)(B) the Court declines to address the good faith argument at this time.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: FIDENCIO MELENDEZ, Debtor.	Bankruptcy Case No. 18-12485 TBM Chapter 13

MEMORANDUM OPINION AND ORDER
DENYING CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN

I. Introduction.

Bankruptcy is a bargain. Chapter 13 of the Bankruptcy Code[1] "affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property." *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1690 (2015). The *quid pro quo* is the Chapter 13 plan. A debtor must propose and obtain Court approval of a "plan under which [the debtor] pay[s] creditors out of . . . future income." *Hamilton v. Lanning*, 130 S. Ct. 2464, 2469 (2010). If the debtor makes "all payments under the plan," the debtor earns the right to a discharge and "fresh start" free from most prior financial burdens.

In this case, Fidencio Melendez (the "Debtor") filed for Chapter 13 bankruptcy protection and immediately proposed a plan. His plan was simple. He proposed to pay $142 per month for 60 months to the Chapter 13 Trustee. Such payments were to be used to pay only his lawyer, the Internal Revenue Service, and Chapter 13 Trustee fees. The plan contemplated that the Debtor would continue to make substantial voluntary retirement contributions (almost $1,000 a month) for his own benefit so that he could retire early. Meanwhile, the Debtor proposed that his general unsecured creditors — including credit card companies holding about $66,000 in debt racked up before the bankruptcy — receive nothing.

The Chapter 13 Trustee objected that the Debtor's plan lacked good faith. The Court agrees and concludes that the Debtor's plan is an abuse of the purpose and spirit of Chapter 13 as well as a manipulation of the bargain represented by the Bankruptcy Code. So, the Court denies confirmation.

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[1] All references to the "Bankruptcy Code" are to the United States Bankruptcy Code, 11 U.S.C. § 101 et seq. Unless otherwise indicated, all references to "Section" are to sections of the Bankruptcy Code.

II. Jurisdiction and Venue.

This Court has jurisdiction to enter final judgment on the issues presented in this bankruptcy case pursuant to 28 U.S.C. § 1334. The plan confirmation dispute is a core proceeding under 28 U.S.C. § 157(b)(2)(A) (matters concerning administration of the estate), (b)(2)(L) (confirmation of plans), and (b)(2)(O) (other proceedings affecting the liquidation of the assets of the estate). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

III. Procedural Background.

The Debtor filed for protection under Chapter 13 of the Bankruptcy Code on March 29, 2018.[2] The same day, he filed a proposed "Chapter 13 Plan Including Valuation of Collateral and Classification of Claims" (the "Plan").[3] Standing Chapter 13 Trustee Adam M. Goodman (the "Chapter 13 Trustee") objected to confirmation of the Debtor's Plan on a number of grounds including "lack of good faith" under Section 1325(a)(3) (the "Objection").[4] The Court conducted an initial Confirmation Hearing and directed the parties to submit legal briefing on confirmation issues.[5] Thereafter, the Court presided over an evidentiary hearing on confirmation of the Debtor's Plan. During the evidentiary hearing, the Debtor testified as the only witness. In addition to the testimonial evidence, the Court admitted Exhibits A-H. Furthermore, the Debtor and the Chapter 13 Trustee introduced a "Statement of Stipulated Facts," which served to streamline the evidentiary hearing.[6] At the conclusion of the evidence, the parties presented the Court with their oral closing arguments. Thereafter, the Court took the dispute under advisement and now issues its decision. The Court commends the parties and counsel for their professionalism and very capable legal work throughout the contested confirmation process.

IV. Findings of Fact.

A. The Debtor's Background and Employment.

When he filed for bankruptcy protection, the Debtor was about 55 years old.[7] He lives alone and has no dependents. The Debtor graduated from high school and worked all his adult life, including work at a sheep farm, assembly plant, plastics plant, and his current long-term job. For the last 27 years, he labored at Carestream Health, Inc. (or its predecessors). The company provides imaging products and services for the health care industry. The Debtor is a production worker who prepares x-ray film. He operates and maintains machinery. Occasionally, his job requires physical labor, including cleaning machinery and pulling waste x-ray film sheets. The Debtor works 12-

[2] Docket No. 1 and Ex. A. Unless otherwise indicated, the Court will refer to particular documents contained in the CM/ECF docket for this Bankruptcy Case using the convention: "Docket No. ___."
[3] Docket No. 2 and Exhibit G.
[4] Docket No. 16.
[5] Docket No. 18.
[6] Docket No. 27.
[7] The Debtor was born on October 1, 1963. Stip. Fact No. 3.

hour shifts rotating between days and nights. His employment is stable, although he worries about the general business prospects for the x-ray film industry.

The Debtor wants to retire in about five years at age 60. During his testimony, the Debtor was adamant that he desires to be "done working" in a few years. After his early retirement, the Debtor plans "to do nothing." He wishes to "just relax."

B. The Debtor's Assets and Liabilities.

When he filed for bankruptcy protection, the Debtor listed \$500,750 in assets and \$253,288 in liabilities.[8] His largest asset is a 401(k) retirement account (the "Retirement Account") worth \$254,222.[9] His other significant asset is his home in Fort Collins, Colorado: a two-bedroom condominium that he has owned for 16 years. The real property is worth \$242,678 but is encumbered by a \$179,880 mortgage. So, the Debtor has some equity in the condominium. His other assets are quite modest in value and consist of: an older model car worth \$500; household appliances, furnishings, electronics, and clothes valued at \$875; and some financial assets (two small bank accounts, unpaid wages, and an anticipated tax refund) worth \$2,475. The Debtor claims all his assets (except \$1,002 in property) are exempt.[10]

On the liabilities side of his balance sheet, the Debtor's largest debt is his mortgage loan. The mortgage debt was substantially current as of the bankruptcy filing. The Debtor has continued to make monthly mortgage payments during the bankruptcy case, so the balance is declining. A few months after the bankruptcy filing, his mortgage lender filed a proof of claim for \$177,801.[11] In addition to his mortgage loan, the Debtor listed \$5,658 in priority taxes owed to the Internal Revenue Service.[12] The IRS' proof of claim is slightly less.[13] All of the Debtor's other liabilities (except a small loan against the Retirement Account) consist of credit card obligations. According to his Schedule F, the Debtor ran up credit card bills of \$64,992 prior to the bankruptcy filing.[14] But, creditors holding credit card claims filed proofs of claim totalling slightly more: \$66,130.[15]

C. The Debtor's Income and Expenses.

Consistent with his long-term employment, the Debtor has steady income. On his Schedule I, he estimated \$5,017 in monthly gross wages from his job at Carestream Health, Inc.[16] His "Chapter 13 Calculation of Disposable Income" Form 122C-2 lists the

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8 Ex. D.
9 Stip. Fact No. 5 and Ex. C.
10 Ex. C.
11 Ex. H.
12 Ex. C.
13 Stip. Fact No. 11 and Ex. H.
14 Ex. C.
15 Ex. H.
16 Ex. C. Schedule I is "forward-looking" and requires the debtor to estimate "monthly income as of the date you file this form." Such date generally is as of the petition date or shortly thereafter.

same amount of income.[17] The Debtor's pre-bankruptcy paystubs confirm $5,017 of gross monthly wages.[18] Since the Debtor's Schedule I and Form 122C-2 income calculations match, the Debtor has, in effect, disclosed that his average monthly income in the six months before his bankruptcy filing is the same as his estimated monthly income as of the petition date. Furthermore, the Debtor's income is "above-median" for a one-person household in Colorado.[19]

For the six months before he filed bankruptcy, the Debtor made voluntary contributions of $995 per month to his Retirement Account.[20] In addition, he repaid $146 per month to his Retirement Account for a loan he made himself from his Retirement Account three years ago. The Debtor anticipates that the Retirement Account loan will be repaid by November 2019 if he continues to repay at the current rate. The Debtor testified that he made regular voluntary contributions to his Retirement Account for about two decades. The size of his Retirement Account — $254,222 — corroborates the Debtor's testimony about his long-term contributions. The Debtor's other payroll deductions (for taxes and insurance), as identified on his Schedule I, appear standard. After subtracting all the Debtor's payroll deductions from his gross monthly wages, the Debtor estimated $2,472 in "combined monthly income" on his Schedule I.

The Debtor's expenses are modest. He pays $1,042 per month on the mortgage loan for his home.[21] According to his Schedule J, after subtracting the costs of food, utilities, transportation, and clothing, the Debtor estimates "monthly net income" of just $143. The Form 122C-2 means test calculation presented by the Debtor is slightly less and shows "monthly disposable income" of $ -81.[22] Both calculations — one "forward-looking" and the other "backward-looking" — were made on the basis of the Debtor "deducting" the $995 monthly contribution the Debtor has made and proposes to continue making to his Retirement Account.

D. <u>The Debtor's Chapter 13 Plan</u>.

The Debtor's Plan is exceedingly simple. The Debtor proposes to pay the Chapter 13 Trustee $142.03 per month for sixty (60) months resulting in total payments of $8,521.80.[23] The proposed monthly payments to the Chapter 13 Trustee mirror the Debtor's Schedule J estimate of "monthly net income." The Debtor states that such payments will be used as follows:

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17 Docket No. 5. Form 122C-2 is "backward-looking" in the sense that the debtor must calculate an "average monthly income . . . derived during the 6 full months before" the bankruptcy petition.

18 Ex. F.

19 Docket No. 5. The Debtor's annual income reported on his "Chapter 13 Statement of Current Monthly Income" Form 122C-1 was $60,200 compared to the "median family income" in Colorado for a one-person family of $56,698.

20 Ex. C and E.

21 Ex. C.

22 Docket No. 5.

23 Stip. Fact No. 9 and Ex. G.

$ 2,011.00	To be paid to Debtor's Counsel (for legal fees)
$ 5,658.28	To be paid to IRS (for satisfaction of priority debt)
$ 852.52	To be paid to Chapter 13 Trustee (for trustee compensation)
$ 8,521.80	Total

In addition, the Debtor proposes to make direct monthly payments of $1,042 on his mortgage loan. Further, he desires to continue paying back $68 to himself for the loan from the Retirement Account. And, implicit in the proposal is the Debtor's intention to continue his voluntary $995 per month 401(k) contribution to his Retirement Account. The rub comes on the $66,130 in credit card debt. Put bluntly, the Debtor proposes to stiff the credit card claims by paying nothing whilst voluntarily contributing $59,700 ($995 per month) to his own Retirement Account over the five-year Plan period.

V. <u>The Legal Issue</u>.

A. <u>The Objection</u>.

Only the Chapter 13 Trustee objected to the Plan. He contended:

> 1. Based upon a review of the Debtor's pay advices, it appears that the Debtor's net monthly income as reflected on Schedule I may be understated. An average of 16 pay advices provided by the Debtor reflect an average net monthly income of $3,205.53 while Schedule I reflects net monthly income of $2,472.28. The Debtor's Plan and Schedules should be amended to provide for the contribution of all additional disposable income to the instant Chapter 13 case. 11 U.S.C. § 1325(a)(3), 1325(b)(1)(B).
>
> 2. The Debtor's proposal to contribute $995 per month toward a Retirement Savings Account, while proposing a $0 distribution to unsecured creditors may be excessive and may indicate a lack of good faith [under] 11 U.S.C. § 1325(a)(3) and *In re Shelton*, 370 B.R. 861 (Bankr. N.D. Ga. 2007).

Objection at 1.[24] The Court refers to the Chapter 13 Trustee's first objection as the "Income Discrepancy Objection" and the second objection as the "Good Faith Objection."

Notably, the Chapter 13 Trustee's Income Discrepancy Objection was not specifically linked to the issue of contributions to the Debtor's Retirement Account. Instead, it was somewhat generic and targeted toward an alleged discrepancy between the Debtor's Schedule I and the Debtor's pay advices. The Chapter 13 Trustee

[24] The Chapter 13 Trustee's other objections were resolved by the time of the evidentiary hearing.

asserted the first objection under two statutes: Section 1325(a)(3) (lack of good faith) and Section 1325(b)(1)(B) (failure to contribute all projected disposable income).

Meanwhile, the Chapter 13 Trustee's Good Faith Objection directly attacked the Debtor's $995 monthly contributions to his Retirement Account. But the objection was made only under Section 1325(a)(3) (lack of good faith). The Chapter 13 Trustee did not expressly assert that retirement contributions were improper under Section 1325(b)(1)(B) (failure to contribute all projected disposable income). The Chapter 13 Trustee's citation to *Shelton*, 370 B.R. 861, clarified his position. In that decision, the court determined that post-petition contributions to a retirement plan were generally permissible but subject to the requirement of good faith under Section 1325(a)(3). Ultimately, the *Shelton* court denied confirmation of a Chapter 13 plan for lack of good faith.

In his "Brief in Support of Objection,"[25] the Chapter 13 Trustee's objections seemed to evolve. He no longer asserted any discrepancy between the Debtor's pay advices and Schedule I. So, the Income Discrepancy Objection fell away. Instead, the Chapter 13 Trustee focused exclusively on the Debtor's retirement contributions under the Good Faith Objection. He started his written briefing by emphasizing the "projected disposable income" requirement of Section 1325(b)(1): "the plan [must] provide[] that all of the debtor's projected disposable income . . . will be applied to make payments to unsecured creditors under the plan." Then, the Chapter 13 Trustee discussed Section 541(b)(7)(A)(i) and an "oddly worded 'hanging' paragraph." He stated:

> This hanging paragraph has created a further divide on the issue of whether post-petition voluntary retirement contributions are excluded from the disposable income calculation. Several lines of cases have emerged, with varying conclusions. Courts in the 10th Circuit have joined this debate, but it does not appear that there is any binding precedent on the issue.[26]

Next, the Chapter 13 Trustee provided an exposition about three "lines of cases": *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010); *In re Jensen*, 496 B.R. 615 (Bankr. D. Utah 2013); and *Baxter v. Johnson (In re Johnson)*, 346 B.R. 256 (Bankr. S.D. Ga. 2006). According to the Chapter 13 Trustee, the *Prigge* opinion "holds that a debtor may not make any post-petition voluntary contributions [to a retirement account]." And, the *Jensen* decision stands for the proposition that a debtor may "continue voluntary retirement contributions post-petition, but only if they were making contributions at the time of filing." Finally, the Chapter 13 Trustee acknowledged that the *Johnson* court "allows a debtor to exclude retirement contributions from the calculation of disposable income even if they were not making contributions at the time of filing."

25 Docket No. 20.
26 Docket No. 20.

But, after all that, the Chapter 13 Trustee did not advocate that the Court adopt any of the "lines of cases." Instead, he merely stated that "under the *Prigge* view, confirmation must be denied" while under *Johnson* and *Jensen*, the Debtor "must also show that his plan has been proposed in good faith under Section 1325(a)(3)." Then, supporting the remaining Good Faith Objection, the Chapter 13 Trustee presented his argument that the Debtor's Plan was not filed in good faith under Section 1325(a)(3).

At closing argument in the evidentiary hearing, the Chapter 13 Trustee again reiterated the holding of the *Prigge* decision: a debtor may not make *any* post-petition contributions to a retirement account. But counsel for the Chapter 13 Trustee did not advocate for that position. The Court pressed with the following questions and responses:

> Court: Are you saying that Chapter 13 debtors are prohibited from accumulating any retirement savings during the 5-year or 36-month period they are in bankruptcy?
>
> Chapter 13 Trustee Counsel: Your honor, the Trustee's position in this case is that the proposed distribution does not strike the appropriate balance . . . .
>
> . . . .
>
> Court: So you are not arguing for downright prohibition in every single case against some retirement savings?
>
> Chapter 13 Trustee Counsel: No, sir. [Not] in this case and on these facts.

The Chapter 13 Trustee then argued that the facts demonstrate that the Debtor's Plan lacked good faith under Section 1325(a)(3).

Based on the foregoing, the Court determines that, in the end, the Chapter 13 Trustee presented a single objection to confirmation of the Debtor's Plan: the Good Faith Objection. The Chapter 13 Trustee's objection is that the Debtor has not met his burden to show that the Debtor's Plan was filed in good faith under Section 1325(a)(3).

B. <u>The Response</u>.

In his "Brief in Support of Confirmation"[27] the Debtor contended: "The Trustee did not assert that the retirement contributions should be disallowed in their entirety and did not object to their allowance under 11 U.S.C. § 541(b)(7) [and 11 U.S.C. § 1325(b)(2)]." Instead, the Debtor stated the issue as follows: whether "the Debtor's proposal to contribute $995 per month towards a Retirement Savings Account, while proposing a $0.00 distribution to his unsecured creditors may be excessive and may

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27 Docket No. 21.

indicate a lack of good faith [under] 11 U.S.C. § 1325(a)(3)." Throughout the balance of the Debtor's legal brief and at the evidentiary hearing, the Debtor accepted that it was his burden to show good faith. He argued: "A bankruptcy court cannot simply decide that the payout to creditors is too small and refuse to confirm the plan."[28] In a nutshell, the Debtor contended that the facts establish that the Debtor's Plan was filed in good faith and his retirement contributions are necessary for his support and not excessive.

C. <u>Identification of the Legal Issue</u>.

The Court has struggled to identify which legal issues properly are before the Court and must be decided. Embedded in this case is a very difficult threshold question concerning projected disposable income under Section 1325(b)(1): May a debtor make *any* voluntary retirement contributions during the pendency of a Chapter 13 case if any party objects? This basic question is easy to state but difficult to answer because of the complex and convoluted interplay of a series of statutes, including: Sections 101(10A), 541(b)(7), 707(b)(2), 1306, 1322(f), 1325(a)(3), 1325(b)(1)(B), 1325 (b)(2), and 1325(b)(3). It is a very important question, since many Chapter 13 plans in this jurisdiction contain at least some proposed voluntary retirement contributions. But, neither the United States Supreme Court nor the Tenth Circuit Court of Appeals has weighed in yet. So, there is no controlling precedent.

The Chapter 13 Trustee correctly identified at least three major "lines of cases" on the issue. On the one side, in *Prigge*, 441 B.R. 667, the court effectively held that a Chapter 13 debtor may not make any post-petition voluntary contributions to a retirement account if any party objects.[29] The *Prigge* opinion often is cited as the "minority view." But, it has attracted substantial support, including the only circuit-level decision on the topic: *Seafort v. Burden (In re Seafort)*, 669 F.3d 662 (6th Cir. 2012); *Parks v. Drummond (In re Parks)*, 475 B.R. 703 (9th Cir. BAP 2012); *In re McCullers*, 451 B.R. 498 (Bankr. N.D. Cal. 2011); *In re Green*, 2012 WL 8255556 (Bankr. E.D. Cal. May 7, 2012) (unpublished).

On the polar opposite side, in *Johnson*, 346 B.R. 256, the court held that a Chapter 13 debtor generally may make post-petition voluntary contributions to a retirement account even if such debtor did not make such contributions before bankruptcy,[30] provided that the Chapter 13 plan was filed in good faith under Section 1325(a)(3).[31] Courts in the *Johnson* camp include: *In re Gallichio*, 2019 WL 171468

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[28] Docket No. 21.

[29] Put another way, the *Prigge* court concluded that voluntary retirement contributions are not excludable (or deductible) from projected disposable income under Section 1325(b)(1).

[30] The *Johnson* court concluded that voluntary retirement contributions are excludable (or deductible) from projected disposable income under Section 1325(b)(1).

[31] The *Johnson* court adopted a very narrow view of good faith under Section 1325(a)(3):

> Debtors are not required to contribute income from any of these sources [retirement contributions] to their Chapter 13 plans. Consequently, in determining good faith under § 1325(a)(3), I may not consider them . . . .

(Bankr. D.N.J. Jan. 9, 2019); *Miner v. Johns*, 2018 WL 2347095 (W.D. La. May 23, 2018); *In re Cantu*, 553 B.R. 565 (Bankr. E.D. Va. 2016), *subsequently aff'd Gorman v. Cantu,* 713 Fed. Appx. 200 (4th Cir. 2017) (affirmed on good faith issue; projected disposable income not addressed on appeal); *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013); *In re Hall*, 2013 WL 6234613 (Bankr. N.D. Ill. Oct. 22, 2013); *In re Egan*, 458 B.R. 836 (Bankr. E.D. Pa. 2011); *In re Gibson*, 2009 WL 2868445 (Bankr. D. Idaho Aug. 31, 2009); and *In re Shelton*, 370 B.R. 861 (Bankr. N.D. Ga. 2007).

In between the *Prigge* and *Johnson* extremes, some courts have carved out a sort of middle ground compromise: a Chapter 13 debtor may make post-petition voluntary contributions to a retirement account, but only to the extent that the proposed post-petition contributions are consistent with the level of pre-petition contributions and provided that the plan was filed in good faith under Section 1325(a)(3). *See In re Thompson*, 2018 WL 1320171 (Bankr. S.D. Ala. Feb. 28, 2018); *In re Garza*, 575 B.R. 736 (Bankr. S.D. Tex. 2017); *In re Read*, 515 B.R. 586 (Bankr. E.D. Wis. 2014); *Burden v. Seafort (In re Seafort)*, 437 B.R. 204 (6th Cir. BAP 2010), *aff'd on other grounds,* 669 F.3d 662 (6th Cir. 2012).[32]

Courts within the bounds of the Tenth Circuit, like their brethren across the country, have reached contrary results. For example, in *Jensen*, 496 B.R. at 621, a Utah bankruptcy judge adopted the middle approach and ruled: "voluntary retirement contributions being made as of the date of petition do not constitute disposable income and debtors may continue making those contributions during the life of the plan." However, a year later, a Kansas bankruptcy judge rejected the *Jensen* holding and instead sided with the more liberal *Johnson* line of cases. *In re Vanlandingham*, 516 B.R. 628, 634-35 (Bankr. D. Kan. 2014).

All the foregoing suggests that there is no clear judicial consensus on the projected disposable income question in relation to voluntary retirement contributions (*i.e.*, whether a debtor is permitted to make *any* voluntary retirement contributions during the pendency of a Chapter 13 case if any party objects?). Although it is a key question in Chapter 13 bankruptcy, reluctantly, the Court declines to decide the issue in the context of this case for several reasons.

First and foremost, the Chapter 13 Trustee has not directly objected to the Debtor's Plan — which contemplates substantial voluntary retirement contributions — on projected disposable income grounds under Section 1325(b)(1). Instead, the only remaining objection is the Good Faith Objection under Section 1325(a)(3). Second, since he did not object to the Debtor's Chapter 13 Plan on projected disposable income

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> Debtors may fund 401(k) plans in good faith, so long as their contributions do not exceed the limits legally permitted by their 401(k) plans.

Johnson, 346 B.R. at 263. Some courts in the *Johnson*-line of cases have employed a more holistic view of good faith under Section 1325(a)(3).

[32] The Sixth Circuit Court of Appeals rejected the middle ground approach invoked by the Bankruptcy Appellate Panel for the Sixth Circuit and instead endorsed the *Prigge* line of cases.

grounds, the Chapter 13 Trustee did not advocate that the Court adopt any of the three "lines of cases" he identified concerning voluntary post-petition retirement contributions or any other approach. In our adversarial system, failure to advocate is not particularly helpful and functionally often equates with waiver. What the Chapter 13 Trustee did was merely identify the split in case law on projected disposable income — without taking a position — and then move on to the "Good Faith Objection." Third, both the Chapter 13 Trustee and the Debtor centered the entire dispute on good faith under Section 1325(a)(3). Both sides agreed that the Debtor must meet his burden to establish good faith under Section 1325(a)(3). Fourth, the Court's decision (explained below) denying confirmation of the Debtor's Plan for lack of good faith under Section 1325(a)(3) is dispositive of the dispute in this case. As a result, the Court need not address the difficult projected disposable income issue in the context of this case.

The Court's prudential decision not to rule on the projected disposable income issue now is supported by analogous cases. For example, in *Gorman v. Cantu*, 713 Fed. Appx. 200 (4th Cir. 2017) (unpublished), a Chapter 13 trustee appealed confirmation of a Chapter 13 plan on the basis that the debtor was proposing post-petition retirement contributions. The Chapter 13 trustee objected for alleged lack of good faith under Section 1325(a)(3). He also presented the confusing three "lines of cases" and identified the statutory morass of projected disposable income. But, the Chapter 13 trustee did not ask for the appellate court to establish any standard. Accordingly, the Sixth Circuit Court of Appeals determined:

> This appeal, however, does not require that we resolve the statutory [projected disposable income] issue. As became clear at oral argument, the Trustee does not seek reversal on the ground that the majority [*Johnson*] approach adopted by the bankruptcy court is incorrect, or urge us to adopt some other identified standard. Instead, the Trustee argues . . . that a showing of good faith is a minimum requirement for exclusion of post-petition retirement contributions and . . . that the bankruptcy court erred in its good-faith determination.

Id. at 203. Thus, the appellate panel decided the dispute over post-petition retirement contributions solely on the good faith issue. Similarly, in *In re Rodriguez*, 487 B.R. 275 (Bankr. D.N.M. 2013), the Chapter 13 trustee focused his objection to plan confirmation on post-petition retirement contributions under Section 1325(a)(3) while stipulating that the debtor met the disposable income requirement. Consistent with the parties' approach, the court "confine[d] its consideration of the Debtor's voluntary retirement contributions to the good faith requirement under [Section] 1325(a)(3)." *Id*. at 285 n.11.

So, the Court finds that, in the exercise of its discretion, it should confine its decision to the single legal issue framed by the Good Faith Objection:

> Has the Debtor met his burden to establish that the Plan was filed in good faith where the Plan proposes zero distributions to unsecured creditors while permitting the Debtor to continue making substantial post-petition retirement contributions?

The more difficult projected disposable income issue will have to wait for another day or another case in which it is squarely presented and argued by the parties.

VI. Conclusions of Law.

A. Statutory Framework and Burden of Proof.

The statutory starting place for this dispute is Section 1325, which provides the main framework governing the confirmation of Chapter 13 plans. The first part of the statute — Section 1325(a) — contains a list of nine Chapter 13 plan requirements that must be established by the debtor and assessed by the Court in every Chapter 13 case. Good faith under Section 1325(a)(3) is one of those. That part of the statute states:

> Except as provided in subsection (b), the court shall confirm a plan if — . . . (3) the plan has been proposed in good faith and not be any means forbidden by law.

Congress did not define the term "good faith."

The Debtor bears the burden of proof concerning the elements of Section 1325(a), including the issue of whether the debtor filed his plan in good faith under Section 1325(a)(3). *In re Vinger*, 540 B.R. 782, 786 (Bankr. D. Colo. 2015); *In re McDonald*, 508 B.R. 187, 205 (Bankr. D. Colo. 2014) (citing *In re Anderson*, 173 B.R. 226, 229 (Bankr. D. Colo. 1993) and *Lincoln v. Cherry Creek Homeowners Ass'n (In re Lincoln)*, 30 B.R. 905, 910 (Bankr. D. Colo. 1983)); *In re Toxvard*, 485 B.R. 423, 432 (Bankr. D. Colo. 2013); *In re Loper*, 367 B.R. 660, 664 n.5 (Bankr. D. Colo. 2007). The legal standard is the preponderance of the evidence. *In re Fassi*, 2013 WL 2190158, at *1 (Bankr. D. Colo. May 21, 2013) (citing *Ho v. Dowell (In re Ho)*, 274 B.R. 867, 883 (9th Cir. BAP 2002)).

B. Good Faith Analysis under Section 1325(a)(3).

1. The *Flygare* and *Cranmer* Precedent on Good Faith.

Within the jurisdiction of the Tenth Circuit Court of Appeals, the seminal appellate precedent on the good faith requirement for plan confirmation in Chapter 13 is: *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983). In *Flygare*, the Tenth Circuit Court of Appeals announced a "totality of the circumstances" approach in which:

> The bankruptcy court must utilize its fact-finding expertise and judge each case on its own facts after considering all of the circumstances of the case. If, after weighing all the facts and circumstances, the plan is determined to constitute an abuse of the provisions, purpose or spirit of Chapter 13, confirmation must be denied.

709 F.2d at 1347 (quoting *U.S. v. Estus (In re Estus)*, 695 F.2d 311, 316-17 (8th Cir. 1982)). The Tenth Circuit adopted a list of eleven factors to be considered in the good faith analysis:

> (1) the amount of the proposed payments and the amount of the debtor's surplus;
>
> (2) the debtor's employment history, ability to earn and likelihood of future increases in income;
>
> (3) the probable or expected duration of the plan;
>
> (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
>
> (5) the extent of preferential treatment between classes of creditors;
>
> (6) the extent to which secured claims are modified;
>
> (7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7;
>
> (8) the existence of special circumstances such as inordinate medical expenses;
>
> (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
>
> (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and
>
> (11) the burden which the plan's administration would place upon the trustee.

Id. at 1347-48 (quoting *Estus*, 695 F.2d at 317); *see also Mason v. Young (In re Young)*, 237 F.3d 1168, 1174-75 (10th Cir. 2001) (reconfirming *Flygare* factors for good faith evaluation); *Robinson v. Tenantry (In re Robinson)*, 987 F.2d 665, 668 (10th Cir. 1993) (same); *Pioneer Bank v. Rasmussen (In re Rasmussen)*, 888 F.2d 703, 703-04 (10th Cir. 1989) (same). The *Flygare* list is "not exhaustive, and the weight given each factor will necessarily vary with the facts and circumstances of each case." *Flygare*, 709 F.2d at 1347-48.

The *Flygare* decision pre-dates changes to the Bankruptcy Code — including to Sections 1325(b)(1) and (2) — made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005) ("BAPCPA"). However, even post-BAPCPA, the Tenth Circuit Court of Appeals confirmed the vitality of *Flygare*. The key post-BAPCPA decision is *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314 (10th Cir. 2012).

In *Cranmer*, the debtor presented a Chapter 13 plan based upon the exclusion of Social Security income ("SSI") from the projected disposable income calculation. The Chapter 13 trustee objected to confirmation on two grounds: (1) failure to commit all projected disposable income under Section 1325(b)(1); and (2) lack of good faith under Section 1325(a)(3). The bankruptcy court "concluded SSI must be included in the projected disposable income calculation and that [the debtor's] failure to do so showed he did not propose his plan in good faith." *Cranmer*, 697 F.3d at 1316. Thus, the bankruptcy court denied confirmation. The district court reversed and held that "SSI need not be included in the projected disposable income calculation and failure to include it did not show . . . bad faith." *Id*.

On further appeal, the Tenth Circuit Court of Appeals sided with the district court and determined that SSI need not be included in the projected disposable income calculation. With respect to the Chapter 13 Trustee's good faith objection, the appellate panel endorsed *Flygare* and instructed:

> The good faith determination is made on a case-by-case basis considering the totality of the circumstances. *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983). In evaluating a debtor's good faith, courts should consider eleven non-exclusive factors [from *Flygare]* as well as any other relevant circumstances.

Cranmer, 697 F.2d at 1318-19. However, after listing the *Flygare* factors, the Tenth Circuit Court of Appeals recognized a "more narrow focus" post-BAPCPA in relation to "ability to pay." The appellate court stated:

> Since *Flygare* was decided, however, the Bankruptcy Code was amended to include 11 U.S.C. § 1325(b). . . . Section 1325(b)'s " 'ability to pay' criteria subsumes most of the *Estus* factors" and, therefore, the good faith inquiry now "has a more narrow focus." . . . A bankruptcy court must consider "factors such as whether the debtor has stated his debts and

> expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code."

Cranmer, 697 F.3d at 1319, n.5 (internal citations omitted). Turning to the facts in *Cranmer*, the Tenth Circuit Court of Appeals rejected the Chapter 13 trustee's good faith objection holding: "When a Chapter 13 debtor calculates his repayment plan payments exactly as the Bankruptcy Code and the Social Security Act allow him to, and thereby excludes SSI, that exclusion cannot constitute a lack of good faith." *Id*. at 1319.

2. <u>The Debtor's Plan Must Be Evaluated under the Totality of the Circumstances Standard</u>.

In this case, the Chapter 13 Trustee's only remaining objection is the Good Faith Objection under Section 1325(a)(3). Since the Chapter 13 Trustee did not directly contest the Debtor's projected disposable income calculation under Section 1325(b)(1), the Court accepts (for purposes of this case only) that the Debtor may exclude his continuing voluntary retirement contributions from projected disposable income under the Bankruptcy Code. *See Jensen*, 496 B.R. 615; *Johnson*, 346 B.R. 256. Thus, at least at first blush, *Cranmer* appears to suggest that such exclusion may not constitute a lack of good faith.

However, the Court determines that the "totality of the circumstances" test for good faith announced in *Flygare* still applies in this case and that the *Cranmer* SSI scenario is distinguishable. "SSI is a type of income that Congress has deemed shall not be a part of a debtor's disposable income." *Jensen*, 496 B.R. at 622. But, voluntary retirement contributions are altogether something different. That is because, unlike SSI, voluntary retirement contributions are "voluntary." Furthermore, unlike SSI, voluntary retirement contributions are not income at all. Instead, voluntary retirement contributions are more akin to expenses. Put another way, the Debtor proposes to take a portion of his income and then contribute or pay that income into his Retirement Account. The decision is discretionary and is a choice to prefer the Debtor to his creditors. "This discretion is a crucial difference." *Jensen*, 496 B.R. at 623. Thus, the *Cranmer* decision does not foreclose a "totality of the circumstances" good faith inquiry.

The Court's decision to analyze the Debtor's voluntary retirement contributions under the "totality of the circumstances" standard is consistent with analogous case law from within the jurisdictional confines of the Tenth Circuit Court of Appeals assessing voluntary retirement contributions. *See Vanlandingham*, 516 B.R. at 638 (noting that "when an 'abusive' case presents itself, the trustee and unsecured creditors are well-armed with the ability to object to confirmation for lack of good faith under § 1325(a)(3)"; and concluding that "[t]here likely are circumstances in which the voluntary postpetition commencement of 401(k) contributions may constitute a lack of good faith"); *Jensen*, 496 B.R. at 623 (distinguishing *Cranmer* and holding that "it is appropriate to subject the Debtor's [voluntary retirement] plan contributions to a good faith inquiry"); *Rodriguez*, 487 B.R. at 285-86 (applying *Flygare* good faith factors to voluntary retirement contributions).

3. <u>The Debtor's Plan Was Not Proposed in Good Faith</u>.

a. <u>The Debtor's Proposed Plan Offers Nothing for Unsecured Creditors</u>.

The Debtor earns $5,017 in monthly gross wages from his job. According to his Schedule I, he makes payroll deductions of $1,213 for taxes, Medicare, and Social Security. He proposes to make a voluntary contribution of $995 per month to his Retirement Account. From the income perspective, the proposed voluntary retirement contribution constitutes approximately 20% of the Debtor's gross monthly wages or 26% of monthly wages after subtraction of taxes, Medicare, and Social Security. *Compare Vanlandingham*, 516 B.R. at 637 (plan confirmed where debtor proposed "modest" voluntary retirement plan contribution of 4% of her income; unsecured creditors projected to receive 8.4% distributions on claims); *Jensen*, 496 B.R. at 617-18 (plan confirmed where debtors proposed voluntary retirement contribution of 8.5% of their income; unsecured creditors projected to receive 10.8% distributions on claims). From the expenses perspective, the proposed monthly voluntary retirement contribution is the Debtor's single largest expense after his monthly mortgage payment of $1,042. No other expenses come close.

In the Plan, the Debtor proposes to pay the Chapter 13 Trustee a monthly plan payment of just $142.03 while making a voluntary contribution of $995 per month to his Retirement Account. Doing the math, the Debtor's proposed monthly voluntary retirement contribution is more than seven times the amount of the monthly Plan payment. The same math applies over the five-year term of the Plan. The Debtor proposes to pay his Retirement Account $59,700, which is more than seven times the $8,521.80 in payments under the Plan. *Compare Vanlandingham*, 516 B.R. at 637 (plan confirmed where debtor proposed voluntary retirement contributions of less than half of proposed plan payments to Chapter 13 trustee). And, the payments under the Plan will only benefit the Debtor's lawyer, the Chapter 13 Trustee, and the Internal Revenue Service.

Prior to the bankruptcy, the Debtor ran up about $66,130 in unsecured credit card debt. Notwithstanding that, the Debtor proposes to pay his Retirement Account $59,700 over the five-year term of the Plan, he proposes to pay unsecured creditors exactly — nothing. If, instead, he decided to pay unsecured creditors rather than his Retirement Account, the Debtor would be able to pay more than 90% of filed unsecured proofs of claim. Even splitting the difference, unsecured creditors might be able to realize a respectable 45% repayment on their aggregate debt. But again, under the Debtor's proposal, such unsecured creditors will not even receive "pennies on the dollar."

b. <u>The Debtor Failed to Prove that the Plan Was Proposed in Good Faith</u>.

Having considered the *Flygare* factors as clarified by the *Cranmer* decision, the Court concludes that the Debtor failed to meet his burden to establish that the Plan was proposed in good faith. The Plan is an abuse of the purpose and spirit of Chapter 13 as well as a manipulation of the Bankruptcy Code. *Flygare*, 709 F.2d at 1347; *Cranmer*, 697 F.3d at 1319, n.5. More particularly, the Court questions the amount of the proposed payments to unsecured creditors — zero — as compared to the Debtor's proposed payments to himself through his voluntary contributions to his Retirement Account — $59,700. The difference in treatment is stark and telling. And, it provides a real insight into the purpose of the Debtor's Chapter 13 Plan. Clearly, the Debtor wishes to continue to enrich himself at the expense of his unsecured creditors. He ran up credit card debt before bankruptcy and now wants it extinguished so that he may retire early at age 60 and "just relax" for the rest of his years. The Debtor already has a very substantial nest egg of $254,222 in his 401(k) Retirement Account. In the Court's experience, the Debtor's savings is far more than most bankruptcy debtors. Further, it is exempt and completely protected. But, he wants more. And, he wants more at the expense of unsecured creditors who suffered by not being paid before bankruptcy. Both before and after bankruptcy, the Debtor has made sure always to continue to pay himself first through his Retirement Account.

The Debtor made no attempt to balance the interests of his creditors and himself through the bankruptcy process. In the context of discharge of student loans, the Tenth Circuit Court of Appeals stated:

> To be sure, we agree with the principle that saving for one's retirement is a laudable goal that should generally be encouraged. However, we also agree with the many other courts that have held that, in the context of bankruptcy proceedings, retirement contributions should not take precedence over repayment of preexisting debts.

Woody v. U.S. Dep't of Justice (In re Woody), 494 F.3d 939, 952 (10th Cir. 2007).[33] But, that is just what the Debtor proposes to do.

In the Good Faith Objection, the Chapter 13 Trustee cited to *Shelton*, 370 B.R. 861. That case is particularly instructive and compelling. The *Shelton* facts are eerily like this case. In *Shelton*, the debtor:

> . . . propose[d] a zero percent dividend (or 0% payout) to unsecured nonpriority creditors, a payment to secured creditors of $550 a month, and a contribution of $655 a

[33] *Woody* did not involve an objection to confirmation of a Chapter 13 plan. Further, the decision focused on discharge of a student loan under 11 U.S.C. § 523 and 42 U.S.C. § 292f(g). Nevertheless, the *Woody* discussion of voluntary retirement contributions in bankruptcy is analogous authority.

> month to his retirement plan. The proposed plan would permit Debtor, over the course of the plan, to shelter $39,300 in his retirement account, pay approximately $33,000 to secured creditors or lose the assets representing collateral, pay nothing to unsecured creditors, and discharge $89,237 in, primarily, credit card debt

Id. at 868. The bankruptcy court determined that voluntary retirement contributions are excludable from projected disposable income — a result consistent with the *Johnson,* 346 B.R. 256, line of cases. But, the *Shelton* plan faltered on the shoals of good faith. The *Shelton* court stated:

> BAPCPA does not direct a court to abandon viewing the totality of the circumstances, nor impose a requirement that a court blind itself to the full picture of a debtor's finances.
> . . . .
>
> The easiest way to violate § 1325(a)(3) is to misrepresent, lie, or otherwise mislead the court. A lack of good faith does not necessarily require malice or an intent to deceive. . . . Compliance with the law and honesty are necessary for good faith but are not alone sufficient. While a zero dividend plan, such as in the instant case, is not *per se* bad faith, the amount of the payment to creditors in relation to a debtor's ability to pay is a relevant factor in determining good faith. . . . A court is under no compulsion to shield its eyes from the record in assessing good faith. Exempted and excluded assets and income may be relevant to determining whether chapter 13 is being used for equitable purposes.
> . . . .
>
> A plan that proposes to pay 0% to creditors when a debtor could pay substantially more is not a plan proposed in good faith.

Id. at 868-69 (citations omitted); *see also In re Lott*, 2011 WL 1981740 (Bankr. N.D. Ala. May 23, 2011) (unpublished) (similar analysis). Closer to home, this case also is similar to the New Mexico decision: *Rodriguez*, 487 B.R. 275. In that case, the debtor proposed to voluntarily pay $733 per month (about 5% of his gross monthly wages) into his own retirement account. The *Rodriguez* court assessed such amount to be "a material sum in the context of the Debtor's plan." Citing *Flygare*, the court ultimately determined that the debtor "failed to demonstrate that his proposed Chapter 13 plan was filed in good faith" because of the voluntary retirement contributions. *Id.* at 285.

At the end of the day in this case, the Court is left with a hard decision. The Debtor has not misled the Court, engaged in fraudulent representations, or misstated his debts and expenses. To the contrary, he has been quite up-front and above-board. He admittedly wants to enlarge his already-substantial retirement savings, so he can retire early and then "just do nothing." But, it comes at the cost of his creditors. He proposes to voluntarily contribute $59,700 to his Retirement Account while leaving his unsecured creditors with nothing. In the Court's estimation, that type of plan is an abuse of the purpose and spirit of Chapter 13 as well as a manipulation of the Bankruptcy Code.

VII. Conclusion.

For the reasons stated above, the Court denies confirmation of the Debtor's Plan for lack of good faith under Section 1325(a)(3). Within 15 days from the entry of this Order, the Debtor shall either file an amended Chapter 13 plan consistent with this Order or convert the case to Chapter 7, failing which the Court may dismiss the bankruptcy case under Section 1307(c).[34]

Dated: February 20, 2019

By the Court:

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Thomas B. McNamara
United States Bankruptcy Judge

[34] In his Brief in Support of Confirmation, the Debtor requests that, in the event that the Court finds that the Plan is not proposed in good faith, the Court make a judicial determination as to the exact amount he can contribute to his Retirement Account. Unfortunately, the Bankruptcy Code does not provide a bright-line test that would enable the Court to make this kind of pronouncement, and the Court declines to create such a mathematical test from whole cloth. The Court must engage in the difficult test of examining each case separately — based on "its own facts and after considering all of the circumstances." *Flygare*, 709 F.2d at 1347.