No. 06-17083

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

EDWARD J. MANEY, CHAPTER 13 TRUSTEE.

Trustee/Appellant,

v.

LAURA F. KAGENVEAMA,

Debtor/Appellee

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

Brief of Amicus Curiae National Association of Consumer Bankruptcy Attorneys

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June 14, 2007

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EDWARD J. MANEY *v.* LAURA F. KAGENVEAMA, No. 06-17083

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4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

Dated: June 14, 2007

M. Jonathan Hayes, Esq.
Attorney for the National Association of Consumer Bankruptcy Attorneys

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STATEMENT OF INTEREST OF NACBA AS AMICUS CURIAE

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 2,500 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 500,000 bankruptcy cases filed each year. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See, e.g., Kawaauhau v. Geiger*, 118 S.Ct. 974 (1998); *In re Tanner*, 217 F.3d 1357 (11th Cir. 2000).

The NACBA membership has a vital interest in the outcome of this case. NACBA members primarily represent individuals, a significant number of whom file chapter 13 bankruptcies. The 2005 amendments created a new disposable income test under section 1325(b) for chapter 13 debtors. The Court's ruling on the issues presented will affect debtors, both in this circuit and across the nation.

FACTUAL BACKGROUND

Debtor's Amended Form B22C, filed on November 30, 2005, shows that the Debtor has a current monthly income ("CMI") of $6,168.21 and an annualized CMI of $74,018.52. EOR, pp.15 (line 2, 16 (line 15). Because the Debtor's annualized CMI exceeds the amount of the applicable median family income, the Debtor is "above-median". After taking statutorily permitted and actual expenses, Amended Form B22C reflects that the Debtor has negative disposable income in the amount of (-$4.04). EOR, p.19 (line 58). Schedule I reflects total monthly income of $4,096.26 and Schedule J reflects monthly expenses of $2,572.37, leaving "monthly net income" on Schedule J of $1,523.89. EOR, pp. 1 (line 15), 2 (lines 18, 20c).

The most significant reason for the difference between Form B22C and Schedules I and J, is the Debtor's expenses for food, clothing, and other household expenses. Congress has determined that the Debtor, under the applicable IRS guidelines, is permitted to claim reasonable living expenses of $1,430.00 (for food, clothing, household supplies, personal care and other miscellaneous items). EOR, p. 17 (line 24). However, Schedule J shows that the Debtor spends only $520.00 on such items, or $910.00 less than the amount Congress has determined to be reasonable. EOR, p.2 (lines 4, 5, 6, 9, 17).

The Debtor's Plan proposes using, in part, the savings from this category to pay $1,000 per month to the Chapter 13 Trustee for 36 months. These funds will be used to pay (a) counsel fees, (b) the trustee's commission, (c) the amounts needed to cure pre-petition mortgage arrears, (d) the amounts needed to pay the secured debt on her 2001 Dodge Truck, and (e) approximately $10,000 to unsecured creditors.

The Trustee objected to Debtor's Plan contending that, pursuant to 11 U.S.C. §1325(b)(4), the "applicable commitment period" for above-median debtors must be 5 years and that the Debtor's Plan therefore cannot terminate sooner than 60 months. The Trustee also asserted that the Debtor's "disposable income" should be calculated by looking to Schedules I and J (in this case $1,523.89 per month). The Trustee did not claim that the Debtor experienced any significant change in her income in the six months prior to filing or that any significant change in income is expected in the future. Instead, the Trustee's objection is based primarily on the fact that Schedule J shows that Debtor spends less in certain categories (e.g., living expenses) than she is permitted under the IRS guidelines.

SUMMARY OF ARGUMENT

The plain language of 11 U.S.C. §1325(b) provides a clear and specific formula for determining "disposable income" and requires the projection of such disposable income to determine payments to ***unsecured creditors***. As such, it changes both the definition and purpose of determining "disposable income." The bankruptcy court's interpretation of the statute is the only reading that gives meaning and purpose to all the statutory language. By contrast, the Chapter 13 Trustee's (the Trustee) and United States Trustee's (UST) interpretations of the statute 1) render meaningless the definition of "disposable income" enacted by Congress 2) ignore change in the statutory language, which now directs that disposable income shall be used to pay only *unsecured creditors*, 3) do not protect types of income which Congress has specifically excluded in measuring the debtor's ability and 4) completely ignore Congress's mandate regarding how above-median debtors should determine reasonably necessary expenses.

Lastly, Trustee argues the Debtor must propose a 60-month plan even though there are no funds payable to unsecured creditors. Artificially extending chapter 13 plans makes little sense and, in fact, punishes debtors for spending less. Where no disposable income will "be received" by unsecured creditors, debtors should be permitted to propose chapter 13 plans shorter than 60 months.

ARGUMENT

I. The plain language of 11 U.S.C. § 1325(b) provides a clear and specific formula for determining "disposable income" and requires the projection of such disposable income to determine payments to unsecured creditors.

The starting point for the court's inquiry should be the statutory language of 11 U.S.C. §1325(b)(2) itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). It has been well established that when the "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted).

Both the concept and purpose of "disposable income" were significantly changed by the 2005 amendments to the Bankruptcy Code. (BAPCPA) *See* 11 U.S.C. §1325(b). With the enactment of BAPCPA, the old understanding of disposable income was replaced with a new definition of "disposable income" based upon "current monthly income" and reasonable and necessary expenses or specified allowances. *See, e.g., In re Swan,* 2007 WL 1146485 (Bankr. N.D. Cal. Apr. 18, 2007); *In re Brady,* 361 B.R. 765 (Bankr. D.N.J. 2007); *In re Mitchell*, 2007 WL 1290349 (Bankr. Neb. Jan. 5, 2007); *In re Guzman*, 345 B.R. 640

(Bankr. E.D. Wis. 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006).

Section 1325(b)(2) states in relevant part:

> "For purposes of this subsection, the term 'disposable income' means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child ... less amounts reasonably necessary to be expended- (A)(I) for the maintenance or support of the debtor or a dependent of the debtor..."

In essence, the formula for determining "disposable income" is:

{ **CMI** minus **specified adjustments** and minus **reasonably necessary expenses**}.

Once "disposable income" is calculated it is "projected" to determine the amounts to be paid to unsecured creditors. Projecting disposable income, in theory, is not remarkably difficult or different than it was prior to the 2005 amendments. The significant change imposed by Congress, however, is in determining what amount is projected into the future. Prior to BAPCPA, plan payments were calculated by projecting the difference between the amounts listed on Schedules I and J (now called "monthly net income"). Congress has made clear its belief that a longer term historical income average would be more representative of the debtor's long term financial situation than a "snap shot" of the debtor's income as of the petition date and as shown on Schedule I.[1] Similarly, rather than a "snap shot" of the debtor' estimated expenses as of the petition date and as shown on Schedule J, for "above-median" debtors Congress has mandated that reasonably necessary expenses be determined pursuant to section 1325(b)(3). Section 1325(b)(3), in turn, directs that reasonably necessary expenses ***shall*** be based on the expenses detailed in sections 707(b)(2)(A) and (B). Accordingly, section 1325(b)(1)(B), as amended by Congress, now requires the projection of a different number—a number which is derived by calculating "disposable income" in accordance with 11 U.S.C. § 1325(b)(2).

Lastly, these computations result in a determination of the amount to be paid to ***unsecured creditors***.[2] Under amended section 1325(b), "disposable income" is no longer used to determine the appropriate ***plan payment***—a payment that previously included amounts to holders of allowed secured, administrative, priority and general unsecured claims.

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[1] Choosing to project a historical average rather than a snap shot of the debtor's income and expenses as of the day of filing can hardly be a "blind application" of historical figures into the future. *See* UST Brief at 9. The reality is that during the three to five year life of a chapter 13 plan, events may occur that effect a debtor's income or expenses. The appropriate mechanism for addressing these changes has always been, and continues to, be plan modification. *See* 11 U.S.C. § 1329.

[2] *See* Part III(B), *infra*.

Now, "disposable income" is only used to determine the payout, if any, to holders of allowed unsecured claims.

Since the enactment of the BAPCPA, several courts have considered the relevance of "disposable income" to a proposed chapter 13 plan. In general, two distinct lines of opinions have emerged. One set of courts has held that the plain language of the statute is controlling, and therefore, the projection of disposable income is based on current monthly income less reasonably necessary expenses. *See, e.g., In re Brady*, 361 B.R. 765 (Bankr. D.N.J. 2007); *In re Mitchell*, 2007 WL 1290349 (Bankr. Neb. Jan. 5, 2007); *In re Guzman*, 345 B.R. 640 (Bankr. E.D. Wis. 2006). By contrast, the other set of courts following *In re Hardacre* has held that the projection of disposable income must be based on anticipated income and/or expenses.*3*[1] *In re Hardacre*, 338 B.R. 718 (Bankr. N.D. Tex. March 6, 2006). *See also, e.g., In re Edmunds*, 350 B.R. 636 (Bankr. D.S.C. 2006). Unsatisfied with merely projecting "disposable income" into the future, as had been done prior to the 2005 amendments, these courts have sought to create and define a new term "projected disposable income" that simply disregards the

3 The majority of these cases are inapplicable to the case at bar because they deal with a significant change in debtor's income in the few months prior to filing.

statute's definition of "disposable income."4[1]

Section 1325(b)(2) states that the definition of "disposable income" is "for the purposes of this subsection." Nowhere else, other than in section 1325(b)(1)(B) and preceding the word "projected" does the term "disposable income" appear in the referenced subsection. Unless the definition applies to "projected disposable income" it has no meaning. That is, "if 'disposable income' is not linked to 'projected disposable income' then it is just a floating definition with no apparent purpose." *In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006).

By contrast, cases such as *In re Barr*, *In re Alexander*, and their progeny provide the only reading that gives meaning and purpose to all the statutory language. *See Negonsott v. Samuels*, 507 U.S. 99, 106 (1993)(courts must give meaning to every clause and word of a statute). In *Barr*, the court considered whether a proposed chapter 13 plan might be confirmed over the Trustee's objection where the plan proposed a total pay-in for the benefit of the unsecured creditors of $0.00, based on the Form B22C calculations, when the trustee argued that the debtor's Schedules I and J showed substantial "excess" income. The

4 By analogy, the reasoning of these courts would lead to the conclusion that for purposes of preparing one's federal income tax return one's "adjustable gross income" could be completely unrelated to one's "gross income."

debtor in that case was an above-median debtor. The court found that it could not depart from the formula prescribed by Congress, stating:

> "[T]he language of §1325(b)(3) is unambiguous in requiring that the expenses and deductions of above-median-income debtors be determined under §707(b)(2)(A) and (B). When the language of a statute is plain, the sole function of the courts is to enforce the statute according to its terms unless the disposition required by the text is absurd. *Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 157 L.Ed.2d. 1024 (2004). While many sources question whether §707(b)(2) and §1325(b) represent a fair and effective approach to catching abusers of the bankruptcy system or to insuring that debtors who can pay do pay, the court does not believe that the result in this case of applying §1325 (b)(3) as written can be rejected as absurd. Therefore, even if the Trustee's criticism of §1325(b) is correct, this court is not free to ignore revised §1325(b) or replace it with a standard pulled from §1325(a)(3)."

In re Barr, 341 B.R. 181 (Bankr. M.D.N.C. 2006). Accordingly, this Court should not disturb the careful balance among debtors in bankruptcy and their creditors that Congress achieved in enacting this new disposable income test. *See Union Bank v. Wolas*, 502 U.S. 151 (1991)("Whether Congress has wisely balanced the sometimes conflicting policies underlying [11 U.S.C. § 547] is not a question we are authorized to decide").

II. Nothing in the Bankruptcy Code creates a "presumptively correct" definition of disposable income subject to modification based on anticipated changes in income or expenses.

The United States Trustee seeks to temper the Trustee's wholesale disregard for Congress's definition of "disposable income" by inventing and advocating for a "presumptively correct" standard. However, the UST's "presumptively correct" standard apparently only applies to "significant increases or decreases in the debtor's income that are likely in particular cases." UST Brief at 10; *see also* UST Brief at 20. Thus, the UST's standard would be inapplicable to the present case in which the difference between Schedule I and J and Form B22C results not from a change in income, but rather from the debtor spending less than permitted by the IRS guidelines. Courts that have adopted the "presumptive" approach, like those that have created a new definition for "projected disposable income," have done so solely to deal with significant changes in income. *See, e.g., In re* Kibbe, 361 B.R. 302 (B.A.P. 1st Cir. 2007).5[1]

The "presumptively correct" standard is fatally flawed because there is simply no support in the statute for such a position. Indeed, the complete lack of statutory authority for such a presumption goes far beyond the "minor textual difficulties" acknowledged by the UST. UST Brief at 10.

The 2005 amendments to the Code make clear that Congress knew how to create a presumption. *See* 11 U.S.C. § 707(b)(2)(stating when the court "shall

5 Even courts that have adopted a presumptive approach have indicated that because section 1325(b)(3) states that expenses "shall be determined in accordance with subparagraph (A) and (B) of section 707(b)(2)" there is no basis for deviating from those allowed figures. *See, e.g., In re Teixeira*, 358 B.R. 484 (Bankr. D.N.H. 2006).

presume" abuse exists). The entire purpose of the vaunted means test in chapter 7 is to determine whether a presumption of abuse arises. Congress did not include such a presumption in section 1325(b)(2), even though it imported important elements of the means test into the disposable income test. Where Congress includes language in one part of the statute and excludes it from another part of the same statute, it is generally presumed that Congress acted purposely in the disparate inclusion or exclusion. *See Hamdan v. Rumsfeld*, __ U.S. __, 126 S. Ct. 2749, 2765-66 (2006); *Russello v. United States*, 464 U.S. 16 (1983).

III. The interpretations of section 1325(b) urged by the Trustee and UST are contrary to the legislative intent, render the definition of "disposable income" irrelevant, and produce absurd results.

A. These positions, if adopted by this court, would completely overturn Congressional policy decisions regarding how above-median debtors are to calculate disposable income.

In 2005, Congress significantly altered the method of determining the debtor's "disposable income" under section 1325(b). In creating the new disposable income test, Congress went to great lengths to create an objective test, which it felt was a consistent and appropriate method to determine a debtor's ability to pay. The highly detailed and complex formula reflects Congress's attempts to balance two main objectives of the Bankruptcy Code: a fresh start for the debtor and the fair and orderly repayment of creditors to the extent possible.

Congress also had to balance the interests of both secured and unsecured creditors in allocating debtors' limited resources.

In weighing all these interests, Congress created a new formula to determine the minimum amount that debtors must pay to their unsecured creditors to obtain confirmation of a chapter 13 plan over an objection. To hold that a debtor has a greater ability to pay unsecured creditors based on the estimates provided in Schedules I or J, even though the disposable income test concludes otherwise, would be to invent a new disposable income test different from the uniform standard enacted by Congress after great deliberation and effort to ensure that it appropriately balanced all of the interests involved.

For above-median income, chapter 13 debtors, Congress sought to create a mechanical formula for measuring expenses based upon the chapter 7 means test. *See* 11 U.S.C. §1325(b)(3); *In re Lee*, 352 B.R. 91 n.13 (B.A.P. 8th Cir. 2006); *In re Trammer*, 355 B.R. 234 (Bankr. D. Mont. 2006); *In re Guzman*, 345 B.R. 640, 642 (Bankr. E.D. Wis. 2006). Under the revised disposable income test, Congress has determined what expenses are reasonably necessary, thereby relieving courts from the duty to answer the difficult questions of lifestyle and philosophy that were prevalent under the old law. *See In re Guzman*, 345 B.R. at 642; *In re Farrar-Johnson*, 353 B.R. 224, 231 (Bankr. N.D. Ill. 2006)("Eliminating flexibility was the point: obligations of chapter 13 debtors would be subject to 'clear, defined standards,' no longer left 'to the whim of a judicial proceeding.'").

That Congress has decided to apply a consistent income formula to all debtors, protecting certain types of income from the reach of creditors, and to mandate the use of standardized expenses for above-median debtors makes the disposable income test different than it was prior to the 2005 amendments, but not unfair to unsecured creditors.

A. The Trustee's and UST's positions would produce an absurd result in which the debtors would potentially be required to pay the difference between schedules I and J only to unsecured creditors.

As amended by Congress, section 1325(b)(1)(B) plainly states that 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." (emphasis added). Previously, the calculation of disposable income was used to determine the amount of the debtor's monthly **plan payment**, not the amount available to pay unsecured creditors. This monthly plan payment, included for example, payments on arrearages owed to secured creditors. If "projected disposable income" and the amount payable to unsecured creditors is determined merely by looking at the difference between Schedules I and J, then debtors will have no funds to pay secured creditors; no funds to pay adequate protection and no funds to pay back arrearages on long term debts.6[1] The addition of the phrase "unsecured creditors" is a significant departure from the pre-2005 version that stated "will be applied to make payments under the

plan." Just as the definition of "disposable income" has changed so has the purpose for which it is calculated. The Trustee's position that "projected disposable income" is a forward-looking concept represented by the difference between schedules I and J, has the absurd result that the debtor in this case would be required to pay $1,523.89 per month to unsecured creditors, with no funds remaining to pay the arrearage on her home mortgage or the secured debt on her car. The UST's position simply takes no account of this fundamental change in language.

C. The Trustee's and UST's arguments also could lead to the conclusion that income derived from sources that Congress excluded from "disposable income" would have to be paid to unsecured creditors.

The Court's ruling in this case may affect other debtors whose income is derived from sources that Congress specifically excluded from 'disposable income". The methods of calculating disposable income advocated by the Trustee and UST do not take into account types of income that Congress has excluded in

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6 Schedule J has no line items to account for arrearages on mortgage loans or car loans. Instead, these secured debt payments are specifically provided for under the expenses permitted under section 707(b)(2). *See* 11 U.S.C. § 707(b)(2)(A)(iii).

measuring the debtor's ability to pay. For example, debtors who rely exclusively on Social Security income will frequently have "monthly net income"— the term describing the difference between Schedule I and J. However, Form B22C will show no "disposable income" **because Congress specifically excluded Social Security income in determining CMI**. *See In re Rotunda*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006). Under the Trustee's position debtors would be required to pay over to creditors their Social Security income in excess of their expenses. Similarly, the UST's "presumptive standard" fails to account for income specifically excluded by Congress from distribution to unsecured creditors.

IV. Where debtors' disposable income available to unsecured creditors is zero or less, the court may confirm a plan that is shorter in duration than the "applicable commitment period."

A. The court need not address whether the term "applicable commitment period" is a temporal or monetary component because debtors have zero disposable income available for unsecured creditors.

Section 1325(b)(1)(B) states that a court may not approve a debtor's chapter 13 plan over a creditor's objection unless:

> The plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period…will be applied to make payments to unsecured creditors under the plan.

In the 2005 amendments to the Code, Congress replaced the words "three-year" before the word "period" with "applicable commitment." The term "applicable commitment period" is defined in section 1325(a)(4) as 3 years or not less than 5 years. The question of whether the term is a temporal or monetary component has been the subject of much debate. *See In re Fuger*, 347 B.R. 94 (Bankr. D. Utah 2006); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006); *In re McGuire*, 342 B.R. 608 (Bankr. W.D. Mo. 2006).

However, there are cases, such as this one, where debtors have no disposable income pursuant to section 1325(b), in which the applicable commitment period is fundamentally irrelevant to the confirmation of the plan. *See In re Brady,* 361 B.R. 765 (Bankr. D.N.J. 2007); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006). Even under the reading of the statute most favorable to the Trustee, the applicable commitment period represents only a period of time over which debtors must make payments of their disposable income to unsecured creditors. It is not a minimum plan duration. *Compare* 11 U.S.C. §1322(d)(referring to plan duration not exceeding 5 years) with §1325(b)(1)(B)(discussing period over which disposable income must be paid to unsecured creditors). Because, in this case, disposable income is less than zero, the time period over which debtor must make payments to unsecured creditors is irrelevant. Instead, the plan duration will be determined by other considerations such as payments to secured creditors.

B. Artificially extending the chapter 13 plans to 60 months where no dividend is due to unsecured creditors, benefits no one and punishes debtors who spend less than the IRS guidelines permit.

It makes no sense to hold debtors hostage for 60 months where they can satisfy the requirements of section 1325(b)(1)(B) in a shorter period. *In re Fuger*, 347 B.R. at 97. There is simply no benefit to be gained by artificially extending chapter 13 plans. Where the disposable income calculation results in zero or a negative number, the primary effect of stretching out a plan from 36 to 60 months is that the monthly plan payment is reduced. As a result, secured creditors must wait longer to receive payments due to them and suffer a greater risk of nonpayment. Trustees must administer cases for a longer period of time. Debtors must pay more interest to secured creditors under the present value calculation required by section 1325(a)(5)(B)(ii). And the risk that debtors will fail to complete their plans increases significantly because there are 24 additional months in which the debtors may suffer a loss of income or unexpected expenses. Bankruptcy policy should avoid, not require, such consequences.

Additionally, forcing debtors into a 60-month plan punishes them for spending less than Congress allowed and devoting that savings to the repayment of secured creditors. For example, in this case the IRS guidelines permit Debtor to spend up to $1430.00 on food, clothing, household supplies, personal care, and other miscellaneous items. However, Schedule J shows that Debtors spend only $520.00 for these items. The difference of $910 represents funds that the Debtor would otherwise be allowed to spend, but instead has chosen to commit to their plan payments. The fact that Debtor is making an effort to pay off her creditors more quickly and achieve a fresh start sooner is a decision that should be lauded, not punished.

In fact, the funds that Trustee argues should be devoted to plan payments consist largely of funds the Debtor is permitted to spend on items like food and clothing. The Debtor in this case has chosen to skimp on these items in order to more quickly complete their plan and put their finances on track. There is no possible justification for the argument that once they have done this over 36 months they should then devote the money allowed by Congress for food and clothing to pay unsecured creditors for two more years. If anything, the debtors will need to spend more to "make up" for the needs that went unmet during the three year plan period.

Here the Debtor's disposable income available to pay unsecured creditors is less than zero. Accordingly, the time period over which the Debtor must make payments for the benefit of unsecured creditors is simply not relevant to confirmation of Debtors' chapter 13 plan.

CONCLUSION

For all the foregoing reasons, *amicus* respectfully requests that this Court affirm the decision of the bankruptcy court.

Respectfully submitted,

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June 15, 2007

Form 8. Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Number 06-17083

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__1. Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached opening/answering/reply/cross-appeal brief is

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Respectfully submitted

Dated: 6-14-07 By: [signature]

M. Jonathan Hayes
Attorney for Amicus Curiae

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I hereby certify that on this 14th day of June 2007, a copy of the foregoing brief has been mailed, first class mail, postage prepaid, to counsel listed below:

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