Case No. 23-15860

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JORDEN MARIE SALDANA,

Debtor-Appellant,

v.

MARTHA G. BRONITSKY, Chapter 13 Trustee,
Trustee-Appellee,

On Appeal from the United States District Court
for the Northern District of California
No. 5:22-cv-06223-BLF
Hon. Beth Labson Freeman

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT, FINALITY AND TIMELINESS

This is an appeal from the Order Affirming the Bankruptcy Court Order on Appeal entered by the United States District Court for the Northern District of California on May 15, 2023.[1] (EOR at p. 11) This order affirmed two (2) separate orders of the United States Bankruptcy Court, Northern District of California, Oakland Division, the Honorable Roger Efremsky presiding. The orders are as follows:

1. Order Sustaining Objection To Confirmation filed July 28, 2022 (EOR at p. 3) and
2. Confirmation Order filed September 26, 2022 (EOR at p. 5).

The debtor/Appellant Jorden Marie Saldana (the debtor) filed a Notice of Appeal of the Bankruptcy Court Orders on October 8, 2022 (EOR at p. 64). including an election to proceed before the District Court as contemplated by 28 U.S.C. 158(c)(1)(A) and Rule 8001(e).[2] After the District Court Order was filed,

[1] Excerpts of Record have been filed herein.

[2] 2 Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. 101-1532 and "Rule" references are to the Federal Rules of Bankruptcy Procedure.

the debtor filed a Notice of Appeal of that Order on June 4, 2023, under Fed. R. App. P. 4(a)(1)(A) and 6(b). (EOR at p. 825)

This appeal arises out of a core proceeding before the Bankruptcy Court, the confirmation of a Chapter 13 plan. The Bankruptcy Court had jurisdiction under 28 U.S.C. §§ 1334 and 157 (b)(2)(L). The District Court had jurisdiction to hear the first appeal under 28 U.S. C. §§ 158 and 1334(a). The Ninth Circuit has jurisdiction to hear this appeal under 28 U.S.C. § 158(d)(1).

The Confirmation Order is a final order. *Bullard v Blue Hills Bank*, 575 U.S. 496, 502-3, 135 S. Ct. 1686, 1692 (2015). Because it was entered on September 26, 2022, the fourteen-day time limit to file a Notice Of Appeal (Rule 8002(a)(1)) expired on October 10, 2022, so the Notice of Appeal of the Confirmation Order to the District Court was timely. The Order Sustaining Objection to Confirmation was interlocutory and therefore not final – see, *Bullard v Blue Hills Bank,* 575 U.S. at 503; *Giesbrecht v Fitzgerald (In re Giesbrecht)*, 429 B.R. 682, 687 (9th Cir. BAP 2010) – but became final upon the entry of the Confirmation Order. *Bullard v Blue Hills Bank,* 575 U.S. at 503. Therefore, the appeal of that Order to the District Court was also timely. The debtor filed the Notice of Appeal to the Ninth Circuit on June 4, 2023, within 30 days of entry of the District Court Order, so this appeal is timely under Fed. R. App. P. 4(a)(1)(A).

This appeal has a twist regarding standing which is not uncommon when a debtor appeals a chapter 13 confirmation order. Under chapter 13, only the debtor may propose a plan. § 1321. Normally, the proponent of a confirmed plan would not have standing to appeal an order which on its face seems to grant the relief requested by the debtor. However, a well-settled exception has been recognized by the appellate courts in the Ninth Circuit. As noted above, denial of confirmation of a plan proposed by the debtor, which happened here, is not a final appealable order. In order to achieve finality to appeal the disputed issue, a confirmation order is needed. To obtain that final order, a debtor may then amend the plan to comply with the bankruptcy court's ruling, which amended plan will then be confirmed. Such amendment, however, is essentially against the legal position asserted by the debtor in the original plan. As a consequence, several cases, including *In re Giesbrecht*, supra, 429 B.R. at 688; *Rodriguez v Bronitsky (In re Rodriguez)*, 620 B.R. 94, 98 (9th Cir. BAP 2020), and *In re Sisk*, 962 F. 3d 1133, 1141 (9th Cir. 2020) have all concluded that the debtors are the true parties aggrieved by the Bankruptcy Court's rulings and therefore have standing to appeal. The debtor here is a party aggrieved and has standing. *Fondiller v Robertson (In re Fondiller),* 707 F. 2d 441, 443 (9th Cir. 1983).

STATEMENT OF ISSUES ON APPEAL

FIRST: DID THE BANKRUPTCY COURT ERR IN SUSTAINING THE TRUSTEE'S OBJECTION TO VOLUNTARY RETIREMENT CONTRIBUTIONS AS A MEANS TEST DEDUCTION?

Where this issue was raised and ruled on below: The debtor raised this issue by showing her intent to take the voluntary retirement contribution as a deduction from income as in her Original Schedule I (EOR at p. 293) and in her declaration in support of her Means Test. (EOR at p. 184). The trustee objected to the debtor taking this deduction in her Amended Objection to Confirmation (EOR at p. 157) and the issue was summarized in the Pre-Hearing Statement. (EOR at p. 155). The bankruptcy court ruled on the issue in the Order Sustaining Objection to Confirmation. (EOR at p. 3).

SECOND: DID THE BANKRUPTCY COURT ERR IN CONFIRMING A PLAN PREDICATED ON AN ERRONEOUS INTERPRETATION OF THE STATUTES?

Where raised and ruled on below: The Confirmation Order (EOR at p. 5) confirmed the Amended Plan that the debtor was required to file that did not allow her to deduct the voluntary contribution from her disposable income.

STANDARD OF REVIEW

The question of whether a voluntary contribution to a retirement plan is excepted from disposable income is an issue of statutory interpretation, a conclusion of law, which is reviewed de novo. *Simpson v Burkart (In re Simpson)*, 557 F. 3d 1010, 1014 (9th Cir. 2009).

The Ninth Circuit stands in the same position as did the district court in reviewing the bankruptcy court's orders. *In re Ctr. Wholesale, Inc.,* 759 F. 2d 1440, 1445 (9th Cir. 1985).

In general, when reviewing decisions of the bankruptcy court, legal conclusions are reviewed de novo and factual determinations are reviewed for "clear error." *Blausey v U.S. Trustee (In re Blausey)*, 552 F. 3d 1124, 1132 (9th Cir. 2009); *Hamad v Far East Nat'l Bank (In re Hamada)*, 291 F. 3d 645, 649 (9th Cir. 2002). This court must first determine de novo whether the bankruptcy court identified the correct legal rule to apply to the relief requested. *United States v. Hinkson*, 585 F.3d. 1247, 1262 (9th Cir. 2009). If the bankruptcy court identified the correct legal standard, this court must determine whether the application of the law was illogical, implausible or without support in inferences that may be drawn from the facts in the record. *Id.*

INTRODUCTION AND STATEMENT OF THE CASE

This case was filed on April 13, 2022, as a voluntary chapter 13 bankruptcy. (EOR at p. 266) The petition and related schedules demonstrate the debtor is single, has no dependents and is employed as a Surgical Technician with monthly gross income of $8,081. (EOR at p. 293). Her budget includes an ongoing voluntary retirement contribution of $484 as a payroll deduction in Schedule I and repayment of two retirement loans as an expense on Schedule J. (EOR at p. 293). Concurrent with the petition, the debtor filed a chapter 13 plan requiring monthly payments of $300.00 for 60 months with a corresponding dividend of 0% to general unsecured creditors (EOR at p. 234) as well as Official Forms 122C-1 and 122C-2 (hereinafter "Means Test"). (EOR at p. 252). The initial Means Test demonstrates the debtor is above-median and includes a deduction of $601 at line 41 representing the monthly payments for two retirement loans (EOR at p. 262) before arriving at Disposable Monthly Income ("DMI") of $115.90. The debtor filed a declaration in support of the plan where she stated that she had "reduced my voluntary retirement shown as TSA Fidelity EE on my paychecks to 6% which equates to $484 per months in order to make ends meet…." which showed that she had been making a regular voluntary contribution to her retirement plan and reduced it for her chapter 13 budget. (EOR at p. 197). That the voluntary contribution was ongoing was also

supported by the Debtor's Pre-Hearing Conference Statement filed on July 21, 2022, a fact not disputed by any admissible evidence. (EOR at p. 145).

Martha Bronitsky ("trustee") was appointed to act as chapter 13 trustee, and on April 22, 2022, she filed an Objection to Confirmation of Chapter 13 Plan (EOR at p. 211) seeking minor additions and corrections to the papers and questioning the calculations used in the Means Test. On April 25, 2022, the debtor filed the minor amendments (EOR at p. 199, 201) and on May 20, 2022, the trustee filed an Amended Objection to Confirmation of Chapter 13 Plan which removed some of the grounds and changed the Means Test objection to seek a reduction in the amount listed on line 41 to reflect amortization of the retirement loans over the term of the plan (EOR at p. 190). On June 29, 2022, the debtor filed an Amended Means Test which increased the monthly deduction on line 41 from $601 to $747 which reflected amortization of the retirement loans over the term of the plan ($263/mo.) and the addition of $484 as a go-forward retirement contribution. (EOR at p. 173). On July 1, 2022, the trustee filed another Amended Objection raising for the first time the issue to be determined in this appeal – whether the debtor was entitled to deduct her voluntary retirement contribution(s) from disposable income as calculated by the Means Test – with the trustee arguing that it was an impermissible deduction. The changes were summarized for the bankruptcy court in the above-mentioned

Pre-Hearing Statement, (EOR at p. 145), which also addressed the new legal issue raised by the trustee regarding the ongoing voluntary contributions to the retirement plan.

On July 28, 2022, the court conducted a confirmation hearing, and after hearing the arguments of counsel, the court sustained the trustee's Objection To Confirmation. (Transcript of July 28th hearing, EOR at p. 147). A written order followed. (EOR at p. 3). Although the bankruptcy court recognized the controversy nationwide over whether voluntary contributions to retirement plans could be deducted from the Means Test, including acknowledging that two circuit courts had allowed the deductions[3], it followed the decision issued by the Ninth Circuit Bankruptcy Appellate Panel ("BAP") in *Parks v Drummond (In re Parks),* 475 B.R. 703 (9th Cir. BAP 2012). sustaining the objection.[4]

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[3] This brief discusses the one published circuit court opinion, *Davis v. Helbling (In re Davis),* 960 F. 3d 346 (6th Cir. 2020), from the Sixth Circuit. The other circuit court ruling is an unpublished disposition from the Fourth Circuit, *Gorman v Cantu¸* 713 Fed. Appx. 200 (4th Cir. 2017), in which the sole retirement contribution issue was whether the bankruptcy court erred in making a factual finding that the debtor had not displayed bad faith in deducting her voluntary contribution from disposable income. The circuit's decision that the factual finding was not clearly erroneous offers nothing to the arguments before this court.

[4] Decisions of the Ninth Circuit Bankruptcy Appellate Panel are not binding precedent. *Bank of Maui v Estate Analysis, Inc.* 904 F. 2d 470, 472 (9th Cir. 1990); *State Compensation Insurance Fund v Zamora (In re Silverman)*, 616 F. 3d 1001, 1005 (9th Cir. 2010). Although persuasive, they are not even binding on bankruptcy courts. *In re Arnold,* 471 B.R. 578, 588 (Bankr. C.D. CA. 2012);

In response to that ruling, and in order to obtain a final appealable order, on August 15, 2022, the debtor filed another amended plan (EOR at p. 134) which increased the payments to be made through the plan, maintained the 60-month term, and increased the dividend to general unsecured creditors from 0% to 34%. On August 16, 2022, another amended plan was filed requiring monthly payments of $300 until August 2023 and payments of $680 for the remainder of the 60-month term with a corresponding dividend of 20% to general unsecured creditors. (EOR at p. 127). The changes in these amended plans eliminated the ongoing retirement deduction as an appropriate deduction from the Means Test. On August 23, 2022, the Debtor filed an Amended Means Test removing the deduction on line 41 for ongoing retirement contributions and leaving only the amortized payment for retirement loans in the sum of $281 (EOR at p. 113) but erroneously calculating the trustee's fee on line 36 assuming payments of $300 per month for 60-month term and arriving at DMI of 435.90. Two days later, the debtor again amended the Means Test to rectify this error, resulting in DMI of $409.77. (EOR p. 94) Finally, another amended plan was filed on September 19, 2022, which provided for monthly payments of $300 until August 2023 and monthly payments of $728 for the remainder of the 60-month term. (EOR at p.

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*Zimmer v PSB Lending Corp. (*In *re Zimmer)*, 313 F. 3d 1220, 1225-26 (9th Cir. 2002).

86) This final amended plan, titled the Third Amended Plan, was confirmed by the court on September 26, 2022. (EOR at p. 5).

The facts of the case are undisputed; at no time did the trustee dispute the debtor's assertions regarding her retirement plan contributions and the bankruptcy court did not conduct an evidentiary hearing to resolve disputed facts. The bankruptcy court made all the rulings based on the written record and statements of counsel. The debtor does not quibble with the ministerial amendments she made to amortize the retirement loan repayments over the 60-month plan or the other minor adjustments so that the proper payments, including the trustee's fee, were made over the course of the plan. The one clean, legal issue for the Ninth Circuit to decide is whether the debtor could deduct her regular, ongoing voluntary contributions to her retirement plan from the amount the Means Test required her to pay to her unsecured creditors under her chapter 13 plan.

ARGUMENT

A. SUMMARY OF ARGUMENT

The debtor recognizes that the issue raised in this appeal was decided against her by the BAP ten years ago in *In re Parks*. The BAP conducted a statutory construction analysis and concluded that when Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act in 2005

("BAPCPA") it explicitly allowed the deduction of the amounts necessary to repay loans from retirement accounts from disposable income for the Means Test[5] (§ 1322(f)). However, rather than providing a similar provision for deduction of ongoing contributions in chapter 13, it instead amended § 541(b), which provides exclusions from property of the estate as defined in § 541(a), by adding subparagraph (b)(7) and ending it with what has been termed the "hanging paragraph," discussed more thoroughly below. Following a textual analysis and a standard canon of statutory construction, the BAP concluded that because Congress knew how to explicitly allow the deduction by doing so at § 1322(f) for the loan repayments, it must have intentionally *not* done the same for ongoing contributions. Therefore, in a nutshell, the BAP disallowed the deduction by concluding Congress had not properly amended the Bankruptcy Code to accomplish that outcome, even if it was consistent with Congressional intent to protect a debtor's savings for retirement. Part F of the Argument below criticizes the statutory analysis employed by the BAP and demonstrates the flaws and inconsistencies contained in that ruling.

Before and after the BAP's ruling, a majority of bankruptcy courts and at least one circuit court in a published opinion, *Davis v Helbling (In re Davis),* 960

[5] How the Means Test works is in Part B of Argument below.

F. 3d 346 (6th Cir. 2020), have ruled the opposite.[6] They have construed the hanging paragraph of § 541(b)(7) to reflect the Congressional intent to allow the deduction of regular, ongoing contributions from disposable income in the Means Test. The debtor urges this court to similarly reach the same conclusion by following one of two alternate analytical paths.

First, this court could follow the reasoning of the Sixth Circuit in *Davis*, where it applied its own set of canons of statutory construction, the "reenactment" canon, the "presumption against ineffectiveness" canon, and the "rule against surplusage" canon, to conclude that Congress intended to allow debtors to deduct the ongoing contributions from the Means Test. This analytical pathway is discussed in Part C below. In the alternative, this court could follow the analysis sometimes referred to as the current monthly income ("CMI") test, first proposed by a bankruptcy court in this circuit, *In re Bruce*, 484 B.R. 387, 394 (Bankr. W.D. Wash. 2012), which challenged the BAP's holding in *In re Parks,* and later followed by *In re Anh-Thu Thi Vu*, 2015 WL

[6] A sampling of the decisions which allowed this deduction from disposable income, for varying reasons, is as follows: *Baxter v Johnson (In re Johnson),* 346 B.R. 256 (Bankr. S.D. Ga. 2006); *In re Nowlin*, 366 B.R. 610 (Bankr. S.D. Tex. 2007); *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013); *In re Devillers*, 358 B.R. 849 (Bankr. E.D. La. 2007); *In re Cantu*, 553 B.R. 565 (Bankr. E.D. Va. 2016); *In re Jensen*, 496 B.R. 615 (Bankr. D. Utah 2012); *In re Reed*, 515 B.R. 580 (Bankr. E.D. Wisc. 2014); *In re Whitt*, 616 B.R. 323 (Bankr. S.D. Miss. 2020); and *In re Bruce*, 484 B.R. 387 (Bankr. W.D. Wash. 2012).

6684227 (Bankr. W.D. Wash. 2015). (Appendix Part B at p. 1). It was also proposed in a law review article, *401(k) Contributions Under Post-BAPCPA Case Law,* 32-MAR Am. Bankr. Inst. J. at 20. This approach applies the disposable income clause of § 541(b)(7) to the calculation of current monthly income, defined in § 101(10A), the starting point for calculating disposable income. The definition of current monthly income has as its basis the average of monthly income that the debtor received in the six calendar months before the bankruptcy case was filed. If retirement contributions are excepted from this income by § 541(b)(7), then disposable income is reduced and the amount available to pay creditors will be less by that same amount in the Means Test. The full argument behind this approach is set forth in Part D below.

Several other alternative approaches have been used by bankruptcy courts in deciding whether ongoing contributions may be deducted from projected disposable income. The district court decision on appeal discusses these approaches in its opening summary of the issues. These differing approaches highlight the controversy § 541(b)(7) and its hanging paragraph have caused and highlight the indisputable fact that the issue is far from settled. However, the debtor asserts that discussion of those methods is not necessary when these two well-articulated analytical pathways lead to the correct result. Following either

methodology, this court is urged to reverse the bankruptcy court's legal conclusion and allow the deduction from disposable income.

B. DERIVATION OF PROJECTED DISPOSABLE INCOME FROM THE MEANS TEST AND SETTING THE STAGE FOR DISPUTE BY THE ADDITION OF § 541(b)(7)

To allow this court to understand the legal significance of the decision the debtor is requesting, an understanding of the framework for calculating projected disposable income and its impact on the payments required in support of a chapter 13 plan is helpful.

Section 1325(b)(1) provides that, after objection, a chapter 13 plan cannot be approved "unless…[it] 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." Section 1325(b)(2) defines "disposable income" as the debtor's "current monthly income…less amounts reasonably necessary to be expended...for the maintenance or support of the debtor." § 1325(b)(2)(A)(i). For debtors with above-median income (such as the debtor here) the "amounts reasonably necessary to be expended" are determined by the

National and Local Standards promulgated by the IRS. § 1325(b)(3).[7] "Projected disposable income," as used in § 1325(b)(1), is not defined in the Bankruptcy Code, but the Supreme Court held in *Hamilton v Lanning*, 560 U.S. 505, 524, 130 S. Ct. 2464, 177 L. Ed. 2d 23 (2010), that it is simply the debtor's disposable income adjusted for any "changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." *Id.*

To determine a debtor's projected disposable income therefore entails a two-step process. First, the debtor's current disposable income is determined by the formula prescribed in § 1325(b)(2). Then, if applicable, that sum is adjusted for changes "known or virtually certain" to occur during the commitment period. *Lanning* at 524. Where, as here, the debtor expects no changes in financial circumstances, her projected disposable income is simply her disposable income as defined in § 1325(b)(2), which refers to disposable income in relationship to current monthly income. Current monthly income is the average monthly income in the six-month period before the bankruptcy is filed. § 101(10A) Therefore, disposable income depends on current monthly income averaged over

[7] Section 1325(b)(3) states in relevant part "(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than – (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner…."

six months and projected disposable income is current monthly income adjusted by the reasonable and necessary expenses set forth in § 1325(b)(3) with reference to § 707(b)(2)(A) and (B).[8]

Before the enactment of BAPCPA, the majority of bankruptcy courts ruled that wages voluntarily withheld as contributions into retirement plans were part of a debtor's disposable income. *See*, for example, *In re Johnson*, 241 B.R. 394, 399 (Bankr. E.D. Tex. 1999); *In re Merrill*, 255 B.R. 320, 323-24 (Bankr. D. Or. 2000), with at least one circuit court joining in, Anes *v Dehard (In re Anes),* 195 F. 3d 177, 180-81 (3rd Cir. 1999). BAPCPA amended the Bankruptcy Code and added § 547(b)(7), which in relevant part, provides:

> (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 –
>
> (l) [a retirement plan] except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2).

[8] Section 707(b)(2)(A) and (B) provide in detail how to calculate reasonable and necessary expenses for the Means Test and are set forth in full in the Excerpts of Record (EOR at p. 401).

That last part is referred to as the "hanging paragraph." Its meaning has led to the controversy upon which this appeal turns. The courts struggling with its meaning and application have focused primarily on two aspects of the amendment: (1) its placement in § 541 which defines property of the estate, not disposable income in a chapter 13; and (2) what "except that" provides an exception to. Some courts have concluded that the hanging paragraph means that retirement contributions plainly "shall not constitute disposable income." *Baxter v Johnson (In re Johnson)* 346 B.R., 256, 263 (Bankr. S. D. Ga. 2006). Others disagreed, focusing on the placement of the hanging paragraph in § 541, where property is defined, not disposable income such as in § 1325 (b). *See*, for example, *In re Parks*, supra, 475 B.R. at 709, which construed subparagraph (7) as excluding from disposable income only accumulated retirement contributions withheld by employers, not the ongoing contribution amount. Other courts have made a distinction between cases where the debtor had been regularly contributing to the retirement plan with voluntary withholdings and cases where the debtor wanted to start making those contributions only upon filing chapter 13. *Burden v Seafort (In re Seafort)*, 437 B.R. 204, 210 (6th Cir. BAP 2010). Since a debtor's current monthly income is defined as her average income over the six months preceding bankruptcy, § 101(10A), a prior ongoing contribution would not be included, but a new one would be, in current monthly income. *See*

also In *re Vu*, 2015 WL 6684227, at *4. Because the debtor here has been making her voluntary contributions by paycheck withholdings for years, the distinctions drawn by *Vu* and others are not pertinent here. However, the two issues noted above abound in the discussions by these courts.

The debtor asserts that this background sets the stage for the analytical arguments below. If BAPCPA's addition of the hanging paragraph in new subparagraph (b)(7) was intended to apply to ongoing contributions, then they are not part of projected disposable income and the amount the debtor must pay into her chapter 13 plan for unsecured creditors will be less.

C. APPLICATION OF DAVIS'S STATUTORY CONSTRUCTION CANONS

The Sixth Circuit recognized that the text of subparagraph (7), set forth above, creates ambiguity. It excludes from property of the estate "any amount withheld by an employer from the wages of employees for payment as contributions" to a retirement plan. Then the hanging paragraph further states "except that such amount under this subparagraph shall not constitute disposable income as defined in Section 1325(b)(2)." Does "such amount" encompass the continued contributions, such that ongoing ones are excluded from disposable income? Or does it merely refer to those already withheld and accumulated before the filing? And what does "except that" provide an exception to? As the

Sixth Circuit said "[n]either reading makes perfect sense" and "context points in both directions." *In re Davis,* 960 F. 3d at 353-54. However, "[e] established canons of construction counsel us to rule in favor of Davis." *Id.* at 354.

First, the Sixth Circuit noted that Congress had enacted BAPCPA at a time when the vast majority of bankruptcy courts had ruled that ongoing voluntary contributions were to be included in projected disposable income. Its insertion of the hanging paragraph into § 541(b)(7) was a substantial change to the statutory text and must have been intended to alter existing law. *Id.* The *Davis* court then cited to the reenactment canon which provides that "whenever Congress amends a statutory provision, 'a significant change in language is presumed to entail a change in meaning.' *Arangure v* Whitaker, 911 F. 3d 333, 341 (6th Cir. 2018)." *Id.*[9] It secondly looked at the presumption against ineffectiveness, a canon recognized by the Supreme Court in *United States v Castleman*, 572 U.S. 157, 178 (2014), which said the presumption reflects "the idea that Congress presumably does not enact useless laws." *Id.*

[9] The United States Supreme Court has recognized the reenactment canon in *Oklahoma v Castro-Huerta,* 142 S. Ct. 2486, 2487-88, 213 L. Ed. 847 (2022) (recognized the canon but it did not apply here) and in footnote 3 to J. Alito's dissent in *Minerva Surgical, Inc. v Hologic, Inc.*, 141 S. Ct. 2298, 2315, 210 L. Ed. 689 (2021) where the footnote gives a lengthy explanation of how the canon works).

Finally, it considered the canon against surplusage which provides a "related command: It conveys the familiar rule that courts should 'give effect, if possible, to every word Congress used.' *Nat'l Assn. of Mfrs. v. Dept of Def.*,138 S. Ct. 617, 632, 199 L. Ed. 2d 501 (2018)…." *Id.* In essence, this canon means that if a provision can either be interpreted as creating an outcome already achieved by another provision or instead given a meaning that results in a different outcome, the latter should be preferred. Here, that would mean "a construction of the hanging paragraph that leaves both it and § 1325(b)(2) with independent effect." *Id.* at 354-55.

Toggling these three canons together, the *Davis* court concluded that the hanging paragraph is "best read to exclude from disposable income the monthly [retirement plan contribution] amount that Davis's employer withheld from her wages prior to her bankruptcy. That interpretation reads the amendment to § 541(b), which added the hanging paragraph, in a way that actually amends the statute." *Id* at 355.

Summarizing the *Davis* view in her own words, the debtor asserts: what else was Congress attempting to do with the hanging paragraph if it did not intend to change the prevailing view that ongoing contributions could not be deducted from disposable income? Applying the canons of reenactment, presumption against ineffectiveness, and presumption against surplusage can

only lead to the conclusion that Congress meant to exclude the contributions from sums which must be contributed to a chapter 13 plan. Congress had recognized the importance of a debtor repaying retirement plan loans by adding § 1322(f)[10] to the section establishing the contents of a plan. It is not plausible that it would have so protected the plans by making certain loans were repaid within the timeframe of the chapter 13 without also intending in § 541(b)(7) to encourage ongoing contributions to such plans so that debtors could plan for their retirements in a meaningful way.

The *Davis* court, after applying its logical statutory construction analysis, still had to deal with some awkward language in § 541(b)(7) created by its use of the conjunction "except that" when it introduces the exclusion of retirement plan contributions from disposable income: "(l) [a retirement plan] …*except that* such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)." (emphasis added.) Many other courts have tussled with the unusual placement of that term because it is not clear what it is "excepting from". As the Sixth Circuit stated: "An exclusion from disposable income…. cannot be understood as an exception to an exclusion from property

[10] § 1322(f) states: "A plan may not materially alter the terms of a loan described in section 362(b)(19) and any amounts required to repay such loan shall not constitute 'disposable income' under section 1325." Section 362(b)(19) refers to loans taken by debtors from their retirement plans.

of the estate." *Id* at 355. It refers to the usage of the term as a "grammatical oddity" but noted other provisions of the Bankruptcy Code where "except that" signals something other than an exception from a general rule. Its conclusions are the most sensible way to deal with this odd language: "This use of 'except that' is certainly not grammatically correct. But Congress's use of 'awkward or even ungrammatical' language does not alleviate our obligation to interpret the statute as best we can." *Id.* In other words, stop agonizing if Congress used inept terms when a reasonable interpretation of a statute's meaning is at hand.

D. THE CMI/DISPOSABLE INCOME APPROACH

The CMI interpretation was first introduced by a bankruptcy court in this circuit, *In re Bruce*, 484 B.R. 387, 394 (Bankr. W.D. Wash. 2012), and its suggested approach was also espoused by a law review article, *401(k) Contributions Under Post-BAPCPA Case Law,* 32-MAR Am. Bankr. Inst. J. at 20. Under this approach, the disposable income clause itself can create an exception from the general rule for determining the amount of current monthly income defined at § 101(10A) of the Code. By the definition, CMI is calculated by averaging the monthly income that the debtor receives in the six calendar months before the bankruptcy filing. That means that retirement contributions specified in § 541(b)(7) during the relevant six months are not counted in calculating CMI (as happened with the debtor in this case), so the CMI is

reduced.[11] Since the CMI is the start point for determining disposable income, that income is thereby reduced. When one begins the calculation of projected disposable income with the reduced CMI, it follows that the funds available to pay unsecured creditors will be likewise less.

As *Bruce* and other subsequent authorities have argued, the CMI interpretation provides a reasonable explanation for the placement of the disposable income clause in § 541. Subparagraph (b)(7) states an exception from property of the estate for retirement contributions made before a bankruptcy case filing. Similarly, deductions of retirement contributions from CMI are also applied before bankruptcy, and the subparagraph's definition of excluded contributions affects both estate property and CMI. This interpretation gives meaning to the words "except that" in § 541(b)(7) – i.e., the general rule of the definition at § 101(10A), basing CMI on all the debtor's income, is made subject to an exception for the withheld retirement contributions.

Debtors who have been making regular retirement contributions for six months before their bankruptcy filing will obtain the full amount of their monthly contributions as a deduction from CMI. A debtor who has not had

[11] As noted in the Statement of the Case above, the debtor's original Schedule I and Means Test budget deducted her withheld contributions from her income, so the net income shown did not include them.

regular deductions withheld from her income prior to filing would not be entitled to begin making them in a chapter 13 unless she makes like payments to her unsecured creditors as part of projected disposable income or is otherwise proposing an 100% repayment plan. Since the debtor here had regular deductions withheld in the six months prior to filing, under the CMI approach, her disposable income would not include those amounts withheld.[12]

The CMI approach offers another principled method for this court to rule for the debtor and reverse the bankruptcy court's requirement that voluntary retirement contributions are included in projected disposable income. Notably, when the BAP decided *In re Parks* in 2012, the CMI interpretation was not argued to it, nor had it even been developed in the case law. It arose from the many courts trying to make sense of the "except that" lead into the exclusion from disposable income. It is a plausible interpretation of the BAPCPA amendment which has puzzled so many.

E. THE DEBTOR'S APPROACH HAS BEEN ENDORSED BY THE LEADING BANKRUPTCY

[12] This court is reminded that in order to make ends meet, the debtor voluntarily lowered the amount withheld and proposed to make a *lower* contribution than that to which she would be entitled under the CMI approach.

TREATISE AND IS CONSISTENT WITH OFFICIAL FORM 122C-2

The Judicial Conference of the United States between 2005-2008 created official forms to be used in calculating projected disposable income in the Means Test required by the passage of BAPCPA in 2005. These forms are now denominated Official Form 122C-1, Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period, and Official Form 122C-2, Chapter 13 Calculation of Your Disposable Income. Examples of the debtor's Forms 122C-1 and 122C-2 are referenced in the Statement of Case above and found in the Record. The Committee Notes from the Judicial Conference when these forms were created a comment about including an exclusion from the disposable income of voluntary retirement plan contributions at Line 41 of Form 122C-2: "[A] line entry is provided for deduction of contributions by the debtor to certain retirement plans, listed in § 541(b)(7)(B) since that provision states that such contributions 'shall not constitute disposable income, as defined in section 1325(b).'" Judicial Conference of the United States, Official Bankruptcy Form 122 (Committee Note), (2005-2008). Several Bankruptcy court decisions[13] have relied in part on line 41 and the Committee

[13] *See*, for example, *In re Whitt*, 616 B.R. 328, 330 (Bankr. S.D. Miss. 2020).

Notes as manifesting the intention of Congress that voluntary retirement contributions are not included in disposable income.

A leading treatise on bankruptcy law currently reaches the same conclusion:

> The reference to disposable income under section 1325(b)(2) makes clear that the provision is also intended to exclude the listed withholdings and payments [retirement contributions] from the disposable income calculation under that provision so that chapter 13 debtors may save for their retirement.

5 COLLIER ON BANKRUPTCY ¶ 541.23[1] (16th ed. 2019).

The treatise reaches this conclusion by recognizing that this reading of the hanging paragraph is

> "[i]n accord with the numerous other provisions enacted in 2005 that similarly protect retirement savings, and render such savings immune from creditor claims in bankruptcy, as well as the general government policy of encouraging retirement savings."

Id. (internal citations omitted).

Line 41 of Official Form 122C-2, the Committee Notes, and the leading treatise on bankruptcy all support the debtor's assertion here that Congress intended to deduct her voluntary retirement plan contributions from disposable

income for the purposes of the Means Test's implementation in her chapter 13 case. This court will not be treading on new ground to allow the deduction.

F. THE CONCLUSION OF *PARKS* AND SIMILAR AUTHORITY THAT SECTION 541(b)(7) APPLIES ONLY TO PRE-PETITION CONTRIBUTIONS IS FLAWED

Both the bankruptcy court and the district court followed the BAP opinion *In re Parks* in reaching their conclusions that voluntary retirement contributions could not be deducted from disposable income. The BAP and other cases, both before and after *Parks* was published in 2012, determined that § 541(b)(7) was limited to protecting only pre-petition retirement contributions "withheld by an employer from wages of employees for payment as contributions" to a retirement plan. To be clear, this is not a protection for the sums held in debtors' qualified retirement accounts, such protection being unnecessary since such assets are already excluded from the bankruptcy estate by case law, *See, Patterson v. Shumate,* 504 U.S. 753, 765, 112 S. Ct. 2242 (1992), and exempted by statute, § 522(c)(3).[14] Rather, under *Parks*, the addition of this subparagraph has the very limited purpose of protecting funds already withheld by an employer which have

[14] Section 522(c)(3) in relevant part provides a federal exemption for retirement funds.

not yet been deposited into the retirement account from being included in the § 1325(b)(2) calculation of disposable income. Since this transfer of funds usually occurs simultaneously with the issuance of a paycheck, that interpretation makes the amendment "much to do about nothing." It is difficult to believe that could have been Congress's intent.

The reasoning of *Parks* has come under fire from several subsequent bankruptcy court decisions, with the most in-depth critical analysis found in *In re Huston*, 635 B.R. 164, 172-176 (Bankr. N.D. Ill. 2021). The bankruptcy court in *Huston* followed the CMI approach set forth in *In re Vu* to reach the conclusion that § 541(b)(7) applies to post-petition contributions. In so doing, it rejected the reasoning in *Parks*. It first noted that *Parks* implied a time reference in § 541(b)(7) when it contains no temporal limitation in its text. The BAP looked to §§ 541(a)(1) and (a)(6)[15] for the time provisions, which define property of the estate as of the commencement of the case and then exclude any wages earned after commencement of the case. Section 541(b) sets forth exceptions to what is

[15] Sections 541(a)(1) and (6) provide "(a) The commencement of a case under section301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held: (1) except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case….(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case."

included in the estate and makes no reference to "as of the commencement of the case." Without this temporal limitation, it is a mistake to conclude that subparagraph (b)(7) applies only to assets in existence on the petition date. *Id.* at 172-73.

The *Huston* court then finds fault in *Parks'* emphasis on fact that the hanging paragraph is located within § 541 rather than § 1306, which defines property of the estate in a chapter 13.[16] *Parks* had reasoned that because § 541(a)(6) included only prepetition wages in the estate, § 541(b)(7) must only exclude contributions from wages earned prepetition. It concluded that only if the hanging paragraph was included in § 1306 could it impact postpetition wages and withholdings. *Parks,* 475 B.R. at 708. The *Huston* court noted that nothing prevents the subsection (b) exclusions from applying equally in § 1306 as they do to § 541, especially since § 1306 starts by incorporating the § 541(a)(1) definition of property. Moreover, the words "such amount" found in the hanging paragraph are not textually limited to that subparagraph; they could apply

[16] Section 1306 provides "(a) Property of the estate includes, in addition to the property specified in section541 of this title – (1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and (2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first. (b) Except as provided in a confirmed plan order confirming a plan, the debtor shall remain in possession of all property of the estate."

equally to any contributions to retirement plans. *Huston*, at 174. The Huston court also found support in the leading bankruptcy treatise, Collier on Bankruptcy, for the hanging paragraph applying to post-petition contributions: "[Such restriction] 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." 5 Collier on Bankruptcy ¶ 541.23 (16th ed. 2021). The debtor notes that *Parks* relied on an earlier edition of Collier's (the 15th edition), cited in *In re Prigge*, 441 B.R. 667, 677 n. 5 (2010), which seemed to endorse its interpretation of § 541(b)(7) as only applying to prepetition contributions still in the employer's hand. As quoted above, the current edition of this well-respected treatise now supports the opposite view.

The final hole the *Huston* court sees in *Parks'* reasoning is its finding support in the fact that retirement contributions are not included in the detailed categories of deductible expenses incorporated into the chapter 13 Means Test by § 1325(b)(3). It sees that as "beside the point." Since the hanging paragraph in § 541(b)(7) expressly excludes the contributions from disposable income, there was no reason to include them in the reasonable and necessary expenses. Or, on the flip side, if they had been included in those expenses, there would be no need for the hanging paragraph; it would have been redundant. *Id.* at 176.

Huston's analysis calls into question many of the tenets relied upon to reach the holding in *Parks*. Similar conclusions were reached in *In re Perkins*, 2023 WL 2816687 (Bankr. S.D. Tex. 2023) [Appendix, EOR at p.], which also noted that § 1306's plain language modifies § 541 as a whole. This means § 541(b)(7) is equally applicable to the ongoing wages which are property of the estate in a chapter 13, causing contributions withheld from those wages to be excluded from disposable income. *Perkins* at *4. The *Perkins* court also observed the dynamic nature of a chapter 13, which made applying § 541(b)(7) on an "'on going basis' as the debtor is paid is 'more consistent with the dynamic nature of chapter 13 cases.' Egan, 458 B.R. at 845." Id. at *5.

The BAP in *Parks* also agreed with other authorities that this Circuit's decision in *Egebjerg v. Anderson (In re Egebjerg),* 574 F. 3d 1045, 1052 (9th Cir. 2009), lends support to its conclusions. This reliance is misplaced. In *Egebjerg*, debtors in a chapter 7 tried to deduct 401(k) loan repayments from their chapter 7 means test under § 707(b)(2) as an "other necessary expense." Because those loan repayments were not included in the fifteen categories of allowed expenses, the Ninth Circuit ruled against the debtors. However, because the decision was in the context of a chapter 7, the court was not taking into account the exclusionary language in the hanging paragraph which references

disposable income under § 1325(b)(2), a reference only applicable in a chapter 13. *Egebjerg* provides no support for *Parks'* holding.

The cases such as *Parks* which apply a restrictive reading of § 541(b)(7) to deny debtors the opportunity to deduct voluntary contributions from their disposable income walk technical paths to avoid the obvious: that the addition of this subparagraph is essentially meaningless unless Congress intended it to apply to post petition contributions. Bankruptcy courts across the country have recognized this reality and have given real meaning to the hanging paragraph despite its awkward structure. The debtor urges this court to adopt this practical outcome.

G. ALLOWING THE DEDUCTION FROM DISPOSABLE INCOME DOES NOT ENCOURAGE GAMING THE SYSTEM AND IS SOUND PUBLIC POLICY

The dissent in *Davis* and other sources have argued that allowing chapter 13 debtors to deduct voluntary retirement contributions from their disposable income will lead to mischief. They posit that debtors who had never, or at least not recently, contributed to employer sponsored retirement plans would begin doing so in order to deduct the contributions from disposable income and decrease what they must pay to unsecured creditors through their plans. The two

approaches espoused in this brief – the *Davis* statutory construction approach and the CMI interpretation – are both premised on the fact that the debtor in question had regular withholding of such contributions before the Chapter 13 was filed. Neither suggests that a debtor could commence the voluntary deductions after the filing of a chapter 13 case. Nor does the debtor here fit into the category of such a debtor. As the record reflects, she had been contributing to her retirement plan for years prior to the filing and proposed withholding less than she had in the past in order to make her required plan payments. Therefore, in this case no abuse can arise.

On a more general scale, however, the Bankruptcy Code has a built-in remedy for those who try to game the system: bad faith. Under § 1325(a)(3) in order for a plan to be confirmed, it must be proposed in good faith. Bankruptcy courts regularly rule on challenges to this provision, with trustees and creditors frequently trying to defeat confirmation by asserting bad faith. If this court rules that a deduction of the voluntary contribution from disposable income is proper, that holding would not prevent a trustee or creditor from arguing a plan was not proposed in good faith if the facts of the case so warrant. In fact, a bad faith argument would be expected if a debtor wanted to start withholdings anew or increase prior withholdings in a chapter 13 case. Therefore, a mechanism to

prevent abuse of a policy allowing the deductions is already in place – a tried and true remedy in bankruptcy proceedings.

The debtor asserts that despite the ineptness of its language and the odd placement of the disposable income deduction in § 541, Congress intended to implement its public policy of encouraging debtors to contribute to plans which would provide them protection from poverty when they retire. This policy was explicitly recognized when BAPCPA assured the ongoing repayment of loans from such plans would not be disturbed in a chapter 13 by enacting § 1322(f), which allowed the loan repayment deduction from disposable income. It is difficult to perceive that Congress assured retirement plan loans would be repaid but did not intend to allow ongoing contributions to the plans in order to protect a debtor's future. This intent is also confirmed by the provisions in § 522, the statute directed primarily to exemptions, where in §§ 522(b)(3)(c), (b)(4) and (d)(12) Congress protected debtors' retirement accounts from creditors of the estate.

A policy grounded in bankruptcies in the United States is to give the honest but unfortunate debtor a fresh start. *Harris v Viegelahn*, 575 U.S. 510, 518, 135 S. Ct. 1829, 191 L Ed. 2d 783 (2015). A fresh start without the ability to save for retirement would be a diminished goal.

CONCLUSION

The bankruptcy court and the district court below followed nonbinding BAP precedent, without further analysis in light of Davis, and denied the debtor the opportunity to contribute to her qualified retirement plan during her chapter 13 case. She asserts that this ruling has a serious negative impact on the fresh start to which she is entitled as an honest but unfortunate debtor. Moreover, the Sixth Circuit and the majority of bankruptcy courts around the country have implemented the Congressional intent to protect such ongoing contributions from being included in disposable income, despite the awkward placement and wording of that protection in the Bankruptcy Code. The debtor here does not stand alone, asserting an outcome that will benefit only herself. A holding that would allow the deduction from disposable income for ongoing contribution withholdings can affect literally thousands of Chapter 13 debtors in this circuit in the years to come. Some are already protected by decisions such as *in re Bruce* or *in* re *Vu* but many are not, due to the BAP opinion in *Parks.* This brief provides the court with two principled paths to allow the ongoing deductions. The debtor urges this court to follow those methodologies and reverse the court below.

Dated: September 11, 2023

/s/ Michael J. Primus

MICHAEL J. PRIMUS
Attorney for Debtor/Appellant

CERTIFICATION OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6

Pursuant to Ninth Circuit Rule 28-2.6, Appellant confirms that he is not aware of any related cases pending in this Court.

CERTIFICATION OF COMPLIANCE

FRAP 32(A)(7)(C)

Ninth Circuit Rule 21-1

This brief is proportionately spaced, 14 point "Times New Roman" font. The word processing program on which this document, Appellant's Opening Brief, was prepared counts 8872 words in the entire document (including the proof of service).

Dated: September 11, 2023

/s/ Michael J. Primus
MICHAEL J. PRIMUS
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PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: 500 Alfred Nobel Drive, Suite 135, Hercules, California.

On September 11, 2023, I served the document described as **APPELLANTS' OPENING BRIEF**

1.TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling Ninth Circuit Rules and FRAP, the foregoing document will be served by the court via NEF and a hyperlink to the document.

On September 11, 2023, I checked the CM/ECF docket for this bankruptcy case and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

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