No. 09-14628-EE

IN THE

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

In re TERRY ALAN TENNYSON,
Debtor.

NANCY J. WHALEY,
Trustee-Appellant

— v. —

TERRY ALAN TENNYSON,
Debtor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA – NO. 1:08-CV-3428-RWS

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLEE AND SEEKING AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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November 25, 2009

CERTIFICATE OF INTEREST AND
CORPORATE DISCLOSURE STATEMENT

Whaley v. Tennyson – No. 09-14628-EE

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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.

Pursuant to Eleventh Circuit Local Rule 26.1-1 the National Association of Consumer Bankruptcy Attorneys states the following attorneys, persons, associations of persons, firms, partnerships, or corporations have an interest in the outcome of this particular appeal:

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Dated: November 25, 2009

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STATEMENT OF INTERST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 4,000 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 400,000 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.

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 Court's ruling on the issues presented will affect debtors, both in this circuit and across the nation.

CONSENT

This brief is being filed with the consent of all parties.

STATEMENT OF FACTS

Debtor's Form B22C, filed on November 10, 2007, shows that the Debtor has a current monthly income ("CMI") of $3,229.37 and an annualized CMI of $38,752.44. *See* Form 22C, lines 12, 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, Form 22C reflects that the Debtor has negative disposable income in the amount of (-$349.30). *See* Form 22C, line 58. Schedule I reflects average monthly income of $2185.00 and Schedule J reflects monthly expenses of $1765.00 leaving "monthly net income" on Schedule J of $420.00.

The reason amounts differ between Form 22C and Schedules I and J, is attributable to the Debtor's expenses for "food, clothing, and other household expenses" and housing related expenses. Congress has determined that the Debtor, under the applicable IRS guidelines, is permitted to claim reasonable living expenses of $556.00 (for food, clothing, household supplies, personal care and other miscellaneous items). *See* Form 22C, line 24. However, Schedule J shows that the Debtor spends only $445.00 on such items (lines 5-6), or $111.00 less than the amount Congress has determined to be reasonable. More significantly, the IRS permits individuals to spend $314.00 on non-mortgage housing and utility expenses

and $868 for mortgage or rent expenses. The total combined allowable expenses for housing related costs is $1182. *See* Form 22C, lines 25A, 25B. However, debtor spends only $700 on these expenses.

The Debtor's Plan proposes using, in part, the savings from these two categories to pay $420 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 pay a tax claim of the Internal Revenue Service, and (d) the amounts needed to pay the secured debt on his 2004 Nissan truck.

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. While the Trustee concedes that Debtor's "disposable income" is negative, she nevertheless asserts that the Debtor has positive projected "disposable income" that should be calculated by looking to Schedules I and J (in this case $420 per month). The Trustee did not claim, nor could she have, that the Debtor experienced any significant change in his 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 arises because Schedule J shows that Debtor spends less in certain categories (e.g., living expenses and utilities/rent) than he is permitted under the IRS guidelines.

SUMMARY OF ARGUMENT

1. "Projected disposable income." 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. Few courts dispute that the definition and purpose of "disposable income" were significantly changed by the 2005 amendments to the Bankruptcy Code. Courts have, however, differed in interpreting the word "projected," which modifies the term "disposable income." Some courts have adopted a "mechanical" or "plain language" approach in which amounts paid to unsecured creditors are determined by mathematically projecting disposable income over the term of the debtor's plan of reorganization. Other courts use a "forward looking approach," which much like pre-BAPCPA case law, directs courts to consider the debtor's actual or anticipated income and expenses at the time of filing. A third category of decisions find the mathematical determination of "projected disposable income" presumptively correct, subject to a showing of a "substantial change in circumstances."

The mechanical or plain language approach, which was adopted by the district court and the bankruptcy court below, is the only reading of the statute that gives

meaning and purpose to all the statutory language. By contrast, the "forward looking approach" advocated by the chapter 13 trustee completely eviscerates the Congressionally mandated definition of "disposable income."

b. Applicable Commitment Period. Trustee argues the Debtor must propose a 60-month plan even though there is no "disposable income" payable to unsecured creditors. In this case, the Debtor spends less on housing and food than is allowed by the IRS deductions and has opted to devote that savings to making plan payments for 36 months. When Debtor's have no "disposable income," artificially extending chapter 13 plans makes little sense and, in fact, punishes debtors for spending less. Where no disposable income is available to "be received" by unsecured creditors, debtors should be permitted to propose chapter 13 plans shorter than 60 months

ARGUMENT

I. Statutory Framework

Individuals seeking bankruptcy relief generally seek a liquidation under chapter 7 of the Bankruptcy Code or a plan for repayment of their debt under chapter 13. Chapter 13 permits an individual debtor with a source of regular income to receive a discharge of certain debts after completing a bankruptcy plan that meets the Code's specifications, including an agreement to pay at least some of his or her debts. The bankruptcy court "shall confirm" a plan that meets the Code's requirements. 11

U.S.C. § 1325(a). Among these requirements is that the plan must have been filed in good faith and not by any means forbidden by law. 11 U.S.C. § 1325(a)(3).[1]

The plan must satisfy additional requirements if the trustee or an unsecured creditor objects to the plan. 11 U.S.C. § 1325(b)(1). Those requirements include that "all 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." *Id.* § 1325(b)(1)(B) (emphasis added).

a. *"Disposable Income" and "Projected Disposable Income."* Before BAPCPA, bankruptcy courts determined a chapter 13 debtor's "disposable income" by comparing the monthly income the debtor reported on Schedule I against the monthly expenses reported on Schedule J. *See* 11 U.S.C. § 521(a)(1)(B)(ii). Because the statute permitted the deduction from income of only those expenses deemed

[1] Other requirements include that: (a) the plan must comply with the Bankruptcy Code; (b) all fees and charges must be paid; (c) the bankruptcy petition must have been filed in good faith; (d) the plan must be as favorable to unsecured creditors as if there had been a liquidation under Chapter 7 of the Bankruptcy Code; (e) the plan must comply with specific restrictions on the discharge of secured debt; (f) the debtor must be able to make the payments under the plan; (g) the debtor must be current on any domestic support obligations; and (h) the debtor must have filed all federal, state, and local tax returns. 11 U.S.C. § 1325(a).

"reasonably necessary," 11 U.S.C. § 1325(b)(2) (2000),[2] bankruptcy courts exercised broad discretion in determining the amount of "disposable income" available to pay creditors under section 1325(b)(1)(B). Once the court settled on a disposable income figure, it would multiply that figure by the number of months in the plan to ascertain the debtor's "projected disposable income" to be applied to make payments to creditors over the life of the plan. *See, e.g., Anderson v. Satterlee*, 21 F.3d 355, 357-58 (9th Cir. 1994).

Congress changed the definition of "disposable income" in 2005. Section 1325 of the Code now defines "disposable income" "[f]or the purposes of [subsection (b)(1)(B)]" as the debtor's "current monthly income" less "amounts reasonably necessary to be expended" for purposes specified by the Code. 11 U.S.C. § 1325(b)(2). Thus, after BAPCPA, the first step in calculating "disposable income" for the purposes of section 1325(b) is to determine the debtor's "current monthly income." "[C]urrent monthly income" is defined by the Bankruptcy Code as "the average monthly income from all sources" that the debtor received in the six calendar

[2] Before BAPCPA, Section 1325(b) defined "disposable income" as "income which is received by the debtor and which is not reasonably necessary to be expended" for supporting the debtor or the debtor's dependents, qualifying charitable contributions, or continued operation of the debtor's business. 11 U.S.C. § 1325(b)(2) (A), (B) (2000).

months prior to filing the bankruptcy petition. 11 U.S.C. § 101(10A).[3] Congress has chosen to exclude certain forms of income from the statutory definition, including Social Security benefits. *Id.* § 101(10B). Under Federal Rule of Bankruptcy Procedure 1007(b)(6), all chapter 13 debtors must file a statement of current monthly income, prepared on Form 22C.[4] Fed. R. Bankr. P. 1007(b)(6).

The second step in calculating "disposable income" is to determine the "amounts reasonably necessary to be expended" for expenditures specified by the Code. 11 U.S.C. § 1325(b)(2). For debtors whose income is above the median income in the debtor's state for the debtor's household size (known as "above-median debtors"), the "amounts reasonably necessary to be expended shall be determined in accordance with subparagraphs (A) and (B) of [S]ection 707(b)(2)." 11 U.S.C. § 1325(b)(3)(emphasis added). Section 707(b)(2), in turn, specifies that certain of the debtor's expenses "shall be" the amounts set in National and Local Standards "issued by the Internal Revenue Service for the area in which the debtor resides."[5] 11 U.S.C.

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[3] If the debtor does not file a schedule of current income with the petition, the six-month period is the six calendar months prior to the date that the court determines the debtor's current income. 11 U.S.C. § 101(10A)(ii).

[4] This form, also known as "Form B22C," is titled "Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income." Debtors must also file "a schedule of current income and expenditures," which are reported on Schedules I and J, respectively. Fed. R. Bankr. P. 1007(b)(1)(B); *see* 11 U.S.C. § 521(a)(1)(B)(ii). Schedule I directs the debtor to report "average or projected income" at the time the petition is filed. Accordingly, a debtor's Schedule I income may be different from his statutorily defined "current monthly income," which reflects his average income for the prior six calendar months under 11 U.S.C. § 101(10A). *See* Fed. Bankr. Official Form 6 Sch. I.

[5] The Schedule J statement of current expenditures, by contrast, requires the debtor to estimate "average or projected" expenses at the time the petition is filed. Fed. Bankr. Official Form 6J.

§ 707 (b)(2)(A)(ii)(I). The debtor's expenses also include "actual monthly expenses for the categories specified as Other Necessary Expenses issued by the [IRS]." *Id.* and § 707(b)(2)(A)(i). Lastly, in calculating the amount of disposable income payable to unsecured creditors debtors may deduct other enumerated expenses including certain payments on secured debt.

The "amounts reasonably necessary to be expended" for above-median debtors must be calculated on Form 22C. Form 22C provides the allowable deductions from "current monthly income" set out in Section 707(b)(2). The form provides entry lines for deductions for each of the specified expenses allowed under the IRS Standards, for other necessary living expenses, and for payments on secured claims and priority claims. Fed. Bankr. Official Form 22C.

The final step in calculating an above-median debtor's "disposable income" on Form 22C is to subtract the total expenses allowed by Section 707(b)(2)—i.e., the "amounts reasonably necessary to be expended" under Section 1325(b)(2)—from the debtor's "current monthly income." Because an above-median debtor's expenses are calculated using IRS Standards, and in some cases averages, rather than actual expenditures, it is possible for the "amounts reasonably necessary to be expended" to exceed the debtor's "current monthly income." In that case, the debtor's "disposable income" is a negative number.

The courts agree that this is the correct way to calculate an above-median debtor's "disposable income" under Section 1325(b)(1)(B) as amended by BAPCPA. Courts have disagreed, however, over the relationship between "disposable income" and "projected disposable income" as those terms are used in that section. "Projected disposable income" is not separately defined from "disposable income." Some courts have concluded that "projected disposable income" is a mathematical projection of "disposable income." Other courts have construed "projected disposable income" to be unrelated to the statutory definition of "disposable income" and, as a result, apply the pre-BAPCPA method of calculating disposable income.

b. "Payments to Unsecured Creditors." At the same time that Congress changed how "projected disposable income" is calculated in section 1325(b)(1)(B), it changed the purpose for which "projected disposable income" is calculated. Before BAPCPA, "projected disposable income" was calculated to determine the total amount of payments the debtor was required to make "under the plan." 11 U.S.C. § 1325(b)(1)(B) (2000). Thus, the "projected disposable income" calculation was made to determine the amount to be paid to the holders of allowed secured, priority, administrative, and unsecured claims. Under section 1325(b)(1)(B) as amended by BAPCPA, however, "projected disposable income" is now calculated to determine the amount of payments to unsecured creditors only. 11 U.S.C. § 1325(b)(1)(B).

c. "*Applicable Commitment Period*." The other change that BAPCPA made to Section 1325(b) involves the "applicable commitment period" during which projected "disposable income" is to be paid. BAPCPA amended subsection 1325(b)(1)(B) to provide that "all 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." 11 U.S.C. § 1325(b). Subsection 1325(b)(4) states, "for the purposes of this subsection, the 'applicable commitment period'" is "not less than 5 years" for above-median debtors.[6] 11 U.S.C. § 1325(b)(4).

[6] The applicable commitment period is 3 years if the debtor is below median, and no commitment period applies if the plan provides that unsecured creditors will be paid in full. 11 U.S.C. § 1325(b)(4)(A).

II. Projected Disposable Income is a mathematical projection of "disposable income."

A. The plain language of 11 U.S.C. § 1325(b) provides a clear and specific formula for determining "disposable income."

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 represents the most sweeping set of amendments to the Code in more than a century. *See* Bruce M. Price and Terry Dalton, "From Downhill to Slalom: An Empircal Analysis of the Effectiveness of the BAPCPA (and Some Unintended Consequences)," 26 YALE LAW & POLICY REV. 135, 136 (2007). Both the concept and purpose of "disposable income" were significantly changed by the 2005 amendments to the Bankruptcy Code. *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 (for below-median income debtors) or specified allowances (for above-median income debtors). *See, e.g., Maney v. Kagenveama*, 541 F.3d 868 (9th Cir. 2008); *Musselman v. eCast Settlement Corp.*, 394 B.R. 801 (E.D.N.C. 2008); *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio 2009); *In re Burbank*, 401 B.R. 67 (Bankr. D.R.I. Feb. 24, 2009); *In re Swan,* 368 B.R. 12 (Bankr. N.D. Cal. 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..."

For above-median income debtors the "amounts reasonably necessary to be expended" are determined in accordance with 707(b)(2). In essence, the formula for determining "disposable income" for an above-median income debtor is:

{ **CMI** minus **specified adjustments**[7] and minus **707(b)(2) expenses**}.

Courts do not disagree that this is the formula for determining "disposable income." Rather courts have disagreed about how to apply the word "projected" to the term "disposable income." *Amicus* submits that projecting disposable income is a mathematical calculation in which "disposable income" is projected over the term of the debtor's plan. *See Kagenveama*, 541 F.3d 868, 871-76 (9th Cir. 2008)("To get from the statutorily defined 'disposable income' to 'projected disposable income,' 'one simply takes the calculation . . . and does the math.') *quoting In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006).

[7] Specified adjustments for child support payments, foster care payments, etc., are not germaine to this case.

B. The mathematical or plain language approach gives meaning to all the words of the statute and preserves the historical tie between "projected disposable income and "disposable income."

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); *Ross-Tousey v. Neary*, 549 F.3d 1148, 1157 (7th Cir. 2008). 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).

Section 1325(b)(2) states that "disposable income" is defined "for the purposes of this subsection," *i.e.*, section 1325(b). The only other mention of "disposable income" in that section is the requirement 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." 11 U.S.C. § 1325(b)(1)(B). Thus, if BAPCPA's definition of "disposable income" is to serve any purpose, it must be what is "projected" in determining the amount a debtor must pay unsecured creditors over the life of the plan. *In re Alexander*, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006). That is precisely how courts understood the function of the word "projected" before Congress changed the definition of "disposable income." *See Coop v. Frederickson*, 545

F.3d 652, 658 (8th Cir. 2008)(pre-BAPCPA, the court "would simply multiply the debtor's 'disposable income' by the number of months" in the plan).

Reading "projected disposable income" to mean "disposable income" multiplied by the number of months in the plan is also consistent with the common meaning of "projected." To "project" means "[t]o calculate, estimate, or predict (something in the future), based on present data or trends." *Amer. Heritage Dictionary of the English Language* (4th Ed. 2006). "Projected" in section 1325(b)(1)(B) modifies the defined term "disposable income," indicating that it is the debtor's "disposable income," as defined, that is to be calculated, estimated, or predicted into the future. This reading is confirmed in chapter 11 of the Bankruptcy Code, which refers to "projected disposable income of the debtor (as defined in section 1325(b)(2))." 11 U.S.C. § 1129(a)(15). Because the term "projected disposable income" is *not* defined, section 1129 can only be referring to a projection of the defined term, "disposable income."

Projecting disposable income, in this way, is not remarkably difficult or different than it was prior to the 2005 amendments. *Kagenveama*, 541 F.3d at 873-74 ("Congress's changes to § 1325(b) did not alter the historical tie between the concepts of 'projected disposable income' and 'disposable income'"). 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"). Aiming to reduce the discretion that bankruptcy courts exercised in determining a chapter 13 debtor's "projected disposable income" under section 1325(b)(1)(B), Congress changed the definition of "disposable income" in two significant ways. First, on the income side, Congress mandated calculation of the debtor's average income for the six months preceding the filing of the petition. *See* 11 U.S.C. 1325(b)(2) (defining "disposable income as "current monthly income," which, in turn, is defined as a six-month historical average and contains specified exclusions such as social security benefits); 11 U.S.C. § 101(10A). 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.

Second, on the expense side, for above-median debtors, Congress specifically defined the allowable deductions from "current monthly income". Rather than a "snap shot" of the debtor's estimated expenses as of the petition date and as shown on Schedule J, for "above-median" debtors Congress has mandated that "amounts reasonably necessary to be expended shall be determined in accordance with subparagraphs (A) and (B) of § 707(b)(2)." Under such means test formula created by Congress, the total allowed expenses for "above-median" debtors are not reflective

of the debtor's actual expenses. For example, section 707(b)(2) directs debtors to deduct amount permitted under the IRS guidelines, irrespective of whether debtor's actual expenses are above or below the guideline amounts. *See Ross-Tousey*, 549 F.3d 1148, 1162 (7th Cir. 2008); 11 U.S.C. § 707(b)(2)(A). Similarly, the total expense figure for an above-median debtor does not reflect actual expenses. *See In re Randle*, 358 B.R. 360 (Bankr. N.D. Ill. 2006), *aff'd* 2007 WL 2668727 (N.D. Ill. 2007).

In sum, Congress has developed a bright-line test based on an historical average as to income and a mathematical formula as to expenses. *See* 8 Collier on Bankruptcy ¶ 1325.08 [1] (15th ed. rev.). As the Seventh Circuit noted in *Ross-Tousey*, the plain language view "is more strongly supported by the language and logic of the statute." *Ross-Tousey*, 549 F.3d at 1148. Indeed, nothing in the statute suggests that courts are free to adjust either the debtor's "current monthly income" or allowed expenses to arrive at a different "disposable income."

C. Court decisions adopting the "forward looking" or "presumptive" approach are unpersuasive and incorrect.

Since the enactment of the BAPCPA, some courts have adopted a "mechanical" or "plain language" approach in which amounts paid to unsecured creditors are determined by mathematically projecting disposable income over the term of the debtor's plan of reorganization. *See* Part IIA, *supra*. Other courts use a "forward looking approach," which much like pre-BAPCPA case law, directs courts

to consider the debtor's actual income and expenses at the time of filing. *See, e.g., Coop v. Frederickson*, 545 F.3d 652 (8th Cir. 2008). A third category of decisions find the mathematical determination of "projected disposable income" presumptively correct, subject to a showing of a "substantial change in circumstances." *See, e.g., Hamilton v. Lanning*, 545 F.3d 1269 (10th Cir. 2008).

Court decisions adopting the "forward looking" or "presumptive" approach are unpersuasive and incorrect. For example, in *Frederickson*, the Eighth Circuit acknowledged that, pre-BAPCPA, it would "simply multiply the debtor's 'disposable income' by the number of months" in the plan to determine the amount of "projected disposable income" available to pay creditors. *Frederickson*, 545 F.3d at 658. The Eighth Circuit nevertheless concluded that it could disregard the *amended* definition of "disposable income" for purposes of determining "projected disposable income" because that definition is "based upon a debtor's historical income and IRS tables that provide regional averages for common expenses" and thus "does not take into consideration a debtor's current financial situation." *Id.* In other words, the Eighth Circuit rejected projecting into the plan period the BAPCPA calculation of disposable income because it would not necessarily provide an "accurate" picture of the debtor's ability to pay. *Id.* Instead, the Eighth Circuit applied the pre-BAPCPA method for determining "disposable income." In doing so, it sanctioned the complete

nullification of BAPCPA's definition of "disposable income"[8] and Congress's attendant objective—that the Eighth Circuit itself acknowledged—of "reduc[ing] the amount of discretion that bankruptcy courts previously had over the calculation of an above-median debtor's income and expenses." *Id.*

The Eighth Circuit was apparently convinced that by rejecting Congress's chosen methodology, it was actually advancing congressional intent to "requir[e] debtors to pay more to their unsecured creditors." *Id.* But any "problem" with applying the definition of "disposable income" as it appears in the text was created by Congress and is appropriately remedied by Congress, not the courts. *See Kagenveama*, 541 F.3d at 875; *Ross-Tousey*, 549 F.3d at 1161.

The Eighth Circuit's approach not only nullifies Congress's attempt to bring more uniformity to the calculation of "projected disposable income," but it also entirely distorts the payment scheme that BAPCPA established. For example, Congress excluded social security benefits from "disposable income," but social security benefits will be a source of income from which payments to unsecured creditors can be required in courts applying the Eighth Circuit's approach. *See* Schedule I, Line 11. Equally problematic is the fact that the pre-BAPCPA calculation yielded an amount that was used to make *all* payments under the plan, including

[8] By analogy, the reasoning of *Frederickson* 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."

secured debt, priority claims, and administrative expenses. But under BAPCPA, the calculation of "disposable income" takes into account amounts to be paid for secured claims, priority claims, and administrative expenses. BAPCPA thus made a corresponding amendment to Section 1325(b)(1)(B) to make clear that "projected disposable income" will be applied to make payments to *unsecured creditors only*. Under the Eighth Circuit's approach, if all of a debtor's "projected disposable income" under the pre-BAPCPA methodology must now be applied only to pay unsecured debt, then a debtor may have little or no income available to pay the superior claims.

The Tenth Circuit's decision, *Hamilton v. Lanning*, 545 F.3d 1269 (10th Cir. 2008), *cert. granted* 2009 WL 273221 (Nov. 2, 2009), while purporting to impose a "presumption"-based limitation on the Eighth Circuit's "forward looking" approach, suffers from the same flaws. Indeed, the approach adopted by the *Lanning* Court is no less divorced from the text of the Code than *Frederickson*. Nothing in Section 1325(b) suggests that courts may ignore the definition of "disposable income," whether on a showing of "changed circumstances" or not. *Lanning*, 545 F.3d at 1282. By allowing courts to reject the BAPCPA definition, the Tenth Circuit's approach permits the very exercise of discretion that Congress purposefully took away.

Furthermore, other sections of BAPCPA show that Congress knew how to create a presumption when it wanted to. *See* 11 U.S.C. § 707 (creating a presumption of abuse for Chapter 7 debtors who fail the "means test"). 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. Rumsfield*, 548 U.S. 557, 126 S. Ct. 2749, 2765-66 (2006); *Russello v. United States*, 464 U.S. 16 (1983). Thus, the so-called "presumptive" approach finds no support in the text, purpose, or structure of Section 1325(b) and should be rejected by this Court.

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); *Kagenveama*, 541 F.3d at 875 ("If the changes imposed by BAPCPA arose from poor policy choices that produced undesirable results, it is up to Congress, not the courts, to amend the law")

III. The interpretations of section 1325(b) urged by the chapter 13 trustee render the definition of "disposable income" irrelevant, and produce absurd results.

As the Debtor has already pointed out, the Trustee's position that projected disposable income is a forward looking concept represented by the difference

between Schedules I and J completely eviscerates the uniform standard for determining disposable income created by Congress in 2005. The Trustee's position also leads to the absurd result that debtors will have no funds to pay secured creditors, no funds to pay adequate protection, and no funds to pay arrearages on long term secured debts. Additionally, this Court's determination of the proper method for calculating disposable income will affect other debtors whose income is derived from sources that Congress specifically excluded from 'disposable income".

While not at issue in this case, this Court's decision will have a significant affect on Social Security recipients. The forward looking approach advocated by the chapter 13 trustee does not take into account types of income that Congress has excluded in measuring the debtor's ability to pay. For example, debtors who have Social Security income will frequently have "monthly net income"— the term used to describe the difference between Schedule I and J. However, Form B22C will show no "disposable income" **<u>because Congress specifically excluded Social Security income in determining CMI</u>**. *See In re Rotunda*, 349 B.R. 324 (Bankr. N.D.N.Y. 2006). A decision in favor of the chapter 13 trustee means that debtors would be required to pay over to unsecured creditors any of their Social Security income in excess of their expenses even though Congress has specifically decided that social security benefits will not be available to unsecured creditors.

IV. 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.

Amicus concur with debtor that where "disposable income" is negative the applicable commitment period is fundamentally irrelevant to the confirmation of debtor's plan. Furthermore, 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. Indeed, 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. For example, in this case because Debtor has no "disposable income" available to pay unsecured creditors, Debtor could propose a 5-year plan paying $252 per month instead of a 3-year plan paying $420 per month. The total amount paid would be the same, but under the 5-year plan secured creditors must wait longer to receive payments due to them and suffer a greater risk of nonpayment. Under the 5-year plan trustees must administer cases for a longer period of time. And, under the 5-year plan debtors must pay more interest to secured creditors under the present value calculation required by section 1325(a)(5)(B)(ii). 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 be to 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 $1182.00 on housing related expenses (rent and utilities). *See* Form 22C, line 25A and 25B. However, Schedule J shows that Debtors spend only $700.00 for these items. The difference of $482 represents funds that the Debtor would otherwise be allowed to spend, but instead has chosen to commit to his plan payments. The fact that Debtor is making an effort to pay off his 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 housing costs. The debtor in this case have chosen to skimp on these items in order to more quickly complete his plan and put his finances on track. There is no possible justification for the argument that once he has done this over 36 months he should then devote the money allowed by Congress for food and housing expenses to paying 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, Debtor respectfully requests that this Court affirm the decision of the District Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief, exclusive of the certifications, tables of contents and authorities and the identity of counsel at the end of the brief, is 6014 words in text and footnotes as counted by Microsoft Word, the word processing system used to prepare this brief. This brief has been prepared in a proportionally spaced typeface using Microsoft Word in Garamond14-point font.

I certify under penalty of perjury that the foregoing is true and correct.

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I hereby certify that on this 25th day of November, 2009 an original and 6 copies of the foregoing Brief of *Amicus Curiae* were sent to the Clerk for the Eleventh Circuit Court of Appeals via Federal Express and one copy sent via Federal Express, to counsel listed below:

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