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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN

In re: MARK ZAPORSKI — CHAPTER 7
Case No. 06-51617
Debtor — HON. PHILLIP J. SHEFFERLY
______________________________/

DEBTOR'S BRIEF IN SUPPORT OF RESPONSE TO U. S. TRUSTEE MOTION TO DISMISS

SUMMARY

The U. S. Trustee raises four issues in its motion to dismiss this Chapter 7 case.

Under the presumed abuse standard imposed by the means test, two objections, first, can debtor claim ownership expense under the means test for one car, which is owned free and clear? Debtor claimed the allowance of $471 per month for the first vehicle, line 23.

Second, even if yes to above, can debtor claim ownership expense for a second car? Debtor claimed $332 per month for the second vehicle, line 24.

Debtor claims $473 vehicle operating expenses, line 22.

The U. S. Trustee argues that the lines 23 and 24 should be reduced to zero, but that line 22 should be increased to $673.

The net effect would be to increase monthly disposable income to $627.08, from $24.08 on debtor's amended means test form, B22.

Debtor's unsecured nonpriority claims are $103,240.00. Therefore, the debtor would need more than $166.67 per month current monthly income to flunk the means test.

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Debtor argues both vehicle expense deductions are allowable, and, special circumstances exist which justify him remaining in Chapter 7.

The second tier of objections relates to 707(b) totality of the circumstances, that, even if debtor passes the means test, his chapter 7 filing constitutes a substantial abuse under 707(b)(3) because of, three, his 401(k) loan repayments, $320.67 per month, and, four, his 401(k) contribution, $346.67 per month.

Although debtor did not claim the 401(k) loan repayment, $320.67 per month, as a deduction on the means test form, there is case law supporting deducting it as a payment on a secured claim, and as a special circumstance. (*In re: Thompson*, 350 B.R. 770 (N.D. Ohio 2006))

If the Court grants the objection as to both vehicle allowances, increasing the debtor's CMI to $627.08, deducting the loan repayment would still leave $364.10 per month CMI, and debtor would flunk the means test.

If the Court were to allow debtor line 23, but not line 24, that is, one vehicle ownership deduction, but not two, that would leave debtor's CMI at $295.08, still enough to flunk.

Under that scenario, deducting the 401(k) loan repayment would reduce debtor's CMI to a negative number, and he would once again pass the means test.

Should the debtor pass the means test under any scenario, the U. S. Trustee moves on to the second tier of arguments.

Debtor first argues that passing the means test ends the inquiry, and there is no basis to proceed to the old substantial abuse test.

Second, 11 USC 1322(f) states :

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> 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.

It makes no sense to say, debtor cannot file chapter 7, and should be in Chapter 13, because of the 401(k) loan repayment, when he can deduct that from any plan payment in a chapter 13.

Debtor argues that Form 22 controls the payment amount that he would have to make in a Chapter 13, so there would be nothing for unsecured creditors.

Failing that, Debtor's position is that both the the 401(k) loan repayment and contribution are special circumstances and reasonably necessary.

If the Court rejects these arguments, Debtor's $66.07 budget surplus would increase by the amount of the 401(k) contribution, $346.67, to $412.74.

With attorney fees, trustee fees, overdue property taxes and condominium assessments, and priority taxes owed by debtor, there still would be no meaningful recovery in a Chapter 13 for unsecured creditors.

FACTS

The parties have not yet finalized their stipulation of facts, which may or may not include the following

1. On August 24, 2006, debtor filed a voluntary petition for relief under Chapter 7.
2. The section 341 meeting of creditors was held and concluded on October 18, 2006.

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3. On October 19, 2006, the United States Trustee timely filed a Statement of Presumed Abuse.

4. On November 6, 2006, the United States Trustee timely filed its Motion to Dismiss.

5. Debtor Mark Zaporski was born on July 29, 1957.

6. He is unmarried, with no children.

7. He owns, free and clear, a 1997 Infinity, scheduled value of $5,000, with 144,000 miles on it, as of the petition filing date.

8. He owns, free and clear, a 1993 Ford pick up truck, scheduled value $1,000, with 194,000 miles on it, as of the petition filing date.

9. He started working for DTE on August 4, 1980, and is still employed there.

10. His debts are primarily consumer debts.

11. The Debtor's non-priority unsecured debt totals $103,240.

12. The surplus of Schedule I income over Schedule J expenses is $66.07.

13, His gross income per month is $6,101.33, an annual rate of $73,632, which is above the applicable median income for a household of one in Michigan.

14. Per the amended Statement of Current Monthly Income and Means Test Calculation, Form B22A, line 50, Debtor's monthly disposable income is $24.08.

15. Debtor's disposable income, Schedule I income minus Schedule J expenses, is $66.07 per month.

16. At the time September 30, 2006, he had a 401(k) account with a vested balance of $143,251.39.

17. $320.67 per month is deducted from his paychecks as 401(k) loan repayments.

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18. Loan one was for $5,000. The balance as of January 16, 2007 is $1,359. This loan will be paid off in April, 2008

19. Loan two was for $12,000. The balance as of January 16, 2007 is $5,161.77. This loan will be paid in full in February, 2009.

20. The loan repayment deduction is mandatory, the only way to stop it would be for Debtor to leave his employment.

21. $346.67 per month is deducted as further contribution to the 401(k) account.

22. The 401(k) loan repayment would be an allowable deduction from DMI if Mr. Zaporski converts his case to Chapter 13.

23. Mr. Zaporski has accrued pension benefits which would pay him $676.00 per month if he works for DTE until July 29, 2007.

24. He is eligible for Social Security benefits of $1491 per month at age 62.

25. He resides at 25715 Commerce Road, Walled Lake MI, and works as an engineer for DTE, a job which requires him to drive to various locations.

26. On form 23, line 23, debtor has claimed $471 per month ownership expense for one vehicle, and on line 24, $332 per month for his second vehicle.

27. On the same form, on line 22 he has claimed $473 per month operating expense for two vehicles.

28. As of the petition filing date, he owed non-dischargeable state income taxes of $525 and non-dischargeable federal income taxes of approximately $2,055.

29. As of the petition filing date, he owed delinquent condo association fees of $1,849.70.

30. As of the petition filing date, he owed propety taxes of $1,750.

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Debtor will need a new vehicle within five years.

31. Debtor's conversion of this Chapter 7 to Chapter 13 would resolve the U. S. Trustee motion to dismiss.

ARGUMENT

TRUSTEE OBJECTION ONE: Can a debtor claim the vehicle ownership expense described in the IRS Local Standards when calclulating expenses under the means test of section 707(b)(2) when the detor does not make a monthly payment?

TRUSTEE OBJECTION TWO: Can a debtor, having been allowed one vehicle ownership expense, claim another for a second vehicle?

Debtor does not see any validity to the second objection, that a debtor can be limited to one vehicle ownership deduction.

"Since the Debtor is the only driver in the household, he isonly entitled to claim deductions for one vehicle." Paragraph (12) of the U. S. Trustee's motion.

Nothing in the applicable IRS publications, rules, regulations, statutes or case law supports this allegation.

I. The plain language of the statute dictates that all debtors be permitted to deduct the car ownership expense under section 707(b)(2)(A)(ii)(I) even if a debtor does not make a monthly car payment.

A. The basic rules of statutory construction require the court to give effect to the plain language of the statute.

The starting point for the court's inquiry should be the statutory language of 11 U.S.C. § 707(b)(2)(A)(ii)(I) itself. *See Lamie v. U.S. Trustee*, 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004); *Toibb v. Radloff*, 501 U.S. 157, 160, 111 S.Ct. 2197, 2199 (1991); *United*

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States v. Ron Pair Enters., Inc., 489 U.S. 235, 241-42, 109 S.Ct. 1026, 1030-31 (1989); *United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir.1998) (en banc) ("In construing a statute we must begin,

and often should end as well, with the language of the statute itself."). 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). A result will only be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999), citing *Public Citizen v. Dept of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989). A plain reading of the statutory language in this case results not only in a reasonable outcome, but also one that is consistent with Congress's intent to create a uniform and fair test for determining the debtor's ability to pay under section 707(b).

The language of section 707(b)(2)(A)(ii)(I) is clear. It provides that the debtor's monthly expenses "***shall*** be the debtor's applicable monthly expense ***amounts specified*** under the National Standards and Local Standards…issued by the Internal Revenue Service..."(emphasis added). Transportation allowances fall under the Local Standards and are divided into two components: operating costs and ownership costs. The Internal Revenue Service ("IRS") specifies amounts to be used for each component. [1] Based on the plain

[1] The IRS publishes the ownership cost component of the Local Transportation Standard on a national basis, by number of cars. The operating cost component is published by number of cars and by Metropolitan Statistical Area and Census Bureau region. The Local Transportation Expense Standards may be found at http://www.irs.gov/businesses/small/article/0,,id=104623,00.html

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language of the statute debtors are permitted to deduct the amounts specified for both components from current monthly income in performing the means test calculation. There is simply no basis in the statutory language or the legislative history for treating the car ownership expense as a cap rather than an allowance.

B. By stating that the debtor "shall" use as his or her expenses the "amounts specified under the National Standards and Local Standards," Congress created a fixed allowance for debtors in the amounts specified, not merely a cap on the debtor's actual expenses.

For purposes of the means test of section 707(b), the amounts specified in both the National Standard and Local Standards, including transportation expenses, serve as fixed allowances rather than caps on the debtor's actual expenses. *See In re Prince, 2006 WL 3501281 (Bankr. M.D.N.C. Nov. 30 ,2006); In re Grunert*, -- B.R. --, 2006 WL 3359417 (Bankr. E.D. Wis. Nov. 20, 2006); *In re Haley*, -- B.R. --, 2006 WL 2987947 (Bankr. D.N.H. Oct. 18, 2006); *In re Hartwick*, No. 06-31241, 2006 Bankr. LEXIS 2755 (Bankr. D. Minn. Oct 13, 2006); *In re Fowler*, 349 B.R. 414 (Bankr. D Del. 2006). Because section 707(b)(2)(A)(ii)(I) "provides that the debtor's allowed expenses 'shall be' the 'amounts specified' under the Local Standards—and because the statute makes no provision for reducing the specified amounts to the debtor's actual expenses—a plain reading of the statute would allow a deduction of the amounts listed in the Local Standards even where the debtor's actual expenses are less." *See* Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 Am. Bankr. L.J. 231, 257-58 (2005). *See also* 6 *Collier on Bankruptcy* ¶ 707.05(2)(c)(i)(A. Resnick

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and H. Sommer, eds., 15th ed. Rev. 2005)("The better view is that, because the language refers to deducting the 'amount specified' in the standards, and not actual expenses, the ownership allowance specified

in the standards is the minimum amount to be deducted").

C. The UST's position is premised on the erroneous supposition that the methodology used by the Internal Revenue Service in evaluating a taxpayer's ability to pay is the same methodology used by Congress to determine a debtor's ability to pay under the Bankruptcy Code.

In developing the 707(b) means test, Congress went to great length to create an objective test, which it felt was a fair and appropriate method by which to determine a debtor's ability pay. The highly detailed and complex formulas set forth in amended 707(b) reflect Congress' attempts to balance two main objectives of the Bankruptcy Code: a fresh start for the debtor and the fair and orderly repayment of creditors when possible. By contrast, providing the taxpayer a fresh start or repayment of creditors, other than itself, is not a stated goal or objective of the IRS collection process. *See* Financial Analysis Handbook. Internal Revenue Manual § 5.15.1.1, ¶¶ 1-3 (hereinafter "IRM")(describing purpose of financial analysis and listing alternative case resolutions).

In weighing the interests of the debtor, secured creditors, unsecured creditors, and other parties in interest, Congress has reasonably determined, and clearly stated, that the amounts specified in the categories covered by the Local Standards, including the

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ownership component of transportation expenses, are fixed allowances. Conversely, the Internal Revenue Manual ("IRM") plainly provides that the amount specified for all the local standards (including housing, utilities and transportation expenses) serve as a cap. "The taxpayer is allowed the local standard or the amount actually paid, **whichever is less**." *See* IRM § 5.19.1.4.3.2 (emphasis in original). *See also* IRM § 5.15.1.1. available at www.irs.gov.irm/index.html. Neither did Congress use language similar to the IRM, which it could easily have done if it intended the Local Standards to apply as a cap. *See In re Fowler*, 349 B.R. At 418, nor did Congress incorporate wholesale the IRM financial analysis into the means test.

The legislative history of the bankruptcy amendments demonstrates that Congress specifically rejected the IRS methodology in enacting the means-test. A prior version of the bill, H.R. 3150 (105th Congress) included the following language regarding the use of the IRS Standards, which would have been codified as § 109(h)(3).

> "Projected monthly net income" means current monthly total income less –
>
> (A) the expense allowances under the applicable National Standards, Local Standards, and Other Necessary Expenses allowance (excluding payments for debts) for the debtor, the debtor's dependents, and, in a joint case, the debtor's spouse if not otherwise a dependent, in the area in which the debtor resides **as determined under the Internal Revenue Service financial analysis** for expenses in effect as of the date of the order for relief.

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(Emphasis supplied). H.R. 3150, § 101(4) (105th Congress 1998).

Congress discarded the direct reference to the "Internal Revenue Service financial analysis" in favor of the term "**amounts specified under the National Standards and Local Standards.**" The change from the prior version shows that Congress did not intend for the

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financial analysis in the IRM to be controlling. *See In re Fowler*, 349 B.R. at 419, citing *Transcontinental & W. Air, Inc. v. Civil Aeronautics Bd.,* 336 U.S. 601, 696 (1949)(relying on legislative history to prior unenacted bill for clarification of language used in bill that was ultimately enacted).

Debtor's interpretation is further supported by the Official Forms for means-testing that mandate use of the IRS figures as straight allowances, not as caps on actual expenses, for all IRS categories except Other Necessary Expenses. After careful consideration the Rules Committee noted that "[e]ach of the amounts specified by the IRS in the Local Standards are treated by the IRS as a cap on actual expenses, but because § 707(b)(2)(A)(ii)(I) provides for deduction in the 'amounts specified under the Local Standards,' the forms treat these amounts as allowed deductions." *See* Advisory Committee Notes on Forms, Forms 22A, 22B, & 22C, p.3 available at http://www.uscourts.gov/rules/BK_Forms_06_Official/Form_22AC_CN_Cum_1006.pdf. The Official Forms, like the Interim Bankruptcy Rules, were promulgated by the Rules Committee and approved by the Judicial Conference of the United States. Both the Rules and the Official Forms share the presumption of validity. *See, e.g.,* Federal

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Rule of Bankruptcy Procedure, R.1001; *In re Dominguez*, 51 F.3d 1502 (9th Cir. 1995)(Bankruptcy Rules presumptively valid); *In re Cluff*, 313 B.R. 323, 335 n.37 (Bankr. D. Utah 2004)(Official Forms, which are created for the same reasons as the Bankruptcy Rules, should be awarded the same deference and weight).[2] The view adopted by the Rules Committee and a growing number of courts considerably simplifies the use of the means test by all parties, and substitutes objectively reasonable expense deductions in place of alleged actual expenses. That Congress enacted a fixed, consistent and objective measure of the debtors' expenses, compared to the more subjective IRS inquiry, is neither absurd nor bizarre.

Here, the plain language of the statute and the legislative history are in accord. *See Ron Pair*, 109 S.Ct. at 1031 (the plain meaning of the statute should be "conclusive, except in the rare cases [in which] the literal application f the statute will produce a result demonstrably at odds with the intention of the drafters"); *In re Hardacre*, 338 B.R. 718, 727 n.6 (Bankr. N.D. Tex. 2006)(Congress created a mathematical protocol that allows debtors "a more generous deduction of mortgage and car ownership expenses than permitted by the Internal Revenue Service").[3] *See also* Wedoff, at 257-58. Both demonstrate Congress's intent to permit debtors to claim the Local Standards ownership expense based on the number of vehicles the

[2] The Notes further state that the ownership/lease component may involve debt payment. The use of the term "may" implies that the ownership component "may not" involve a debt payment as well. *See* Notes, supra, at p.3.

[3] After careful analysis of the "double-dipping" issue, the *Hardacre* court concluded that "double-dipping" was not permitted, but that the means test calculation for mortgage and ownership expenses should not follow the IRS analysis. *See Hardacre* 338 B.R. at 727. Despite this finding, the court went on in summary fashion to find that a debtor with an unencumbered car was ineligible for the car ownership deduction because such a deduction was not in accord with the IRS analysis. *See id.* at 728. The strict adherence to the IRS analysis in one circumstance and disregard of it (in favor a applying the plain language of the statute) is incongruent. Debtor submits that the *Hardacre* court erred in the part of its decision related to unencumbered vehicles.

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debtor owns, rather than on the number for which the debtor makes payments. The trustee's position is contrary to the plain language, and it is also demonstrably at odds with the legislative history.

D. The phrase "applicable monthly expense amounts" relates to the actual number of vehicles owned by the debtor, regardless of whether the underlying vehicles are paid in full.

The plain language of 707(b) permits a debtor to claim "applicable" monthly expense amounts. With respect to the car ownership expense, the term "applicable" simply relates to a determination of the number of vehicles owned by the debtors and which column to use in finding the appropriate figure in the Local Standards table (First Car or Second Car). In this way, the term "applicable" does not differ whether used in reference to monthly expense amounts, § 707(b)(2)(A)(ii)(I), or to State median income, *see, e.g.*, § 707(b)(6). Nothing in the statute suggests that the term "applicable" applies only to unencumbered vehicles.

Some courts, however, have erroneously construed the word "applicable" to mean "actual" in order to narrow the scope of the ownership allowance to debtors only with loan or lease payments. *See, e.g.*, *In re Harris*, -- B.R. 00, 2006 WL 2933891 (Bankr. E.D. Okla. Oct. 13, 2006); *In re Oliver*, 350 B,R. 294 (Bankr. W.D.Tex. 2006); *In re McGuire*, 342 B.R. 608 (Bankr. W.D.Mo. 2006). Such a construction is flawed because it requires interpretation of the word "applicable" in isolation and without regard to the word "actual," which is used in the same sentence. 11 U.S.C. § 707(b)(2)(A)(ii)(I) ("debtor's monthly expenses shall be the debtor's **applicable monthly expense**

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amounts specified under the National Standards and Local Standards, and the debtor's **actual monthly expenses** for the categories specified as Other Necessary Expenses")(emphasis added). Congress drew a distinction in the statute between "applicable" expenses on the one hand and "actual" expenses on the other. *In re Farrar-Johnson*, -- B.R. --, 2006 WL 2662709 at *5 (Bankr. N.D. Ill. 2006)(holding debtor entitled to housing allowance under Local Standards in excess of actual housing costs). "Other Necessary Expenses" must be the debtor's actual expenses. *Id.* In

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contrast, expenses under the Local Standards need only be "applicable" based on where the debtor lives and the number of vehicles owned. *See id.*

"Applicable" therefore applies only to the applicable <u>number</u> of vehicles owned by the Debtor, without reference to liens encumbering each vehicle. Accordingly, a debtor owning unencumbered vehicles may deduct ownership expenses for each vehicle in completing Form B22C.

II. Permitting all debtors to claim both operating costs and ownership costs furthers the reasonable public policy objectives of Congress by acknowledging older cars are more likely to need major repairs or replacement, by avoiding arbitrary distinctions between debtors, and by eliminating unfair bias against the poorest debtors.

Congress's determination that both creditors and debtors will be better served by the Bankruptcy Code if debtors have funds available for major repairs or replacement of older vehicles is a reasonable policy rationale for extending the ownership allowance to all debtors given the realities of car

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A. ownership.

It is reality that a car for which the debtor no longer makes payments is more likely to require major repairs or replacement. It is no surprise that average repair costs rise dramatically after 5 years – after the typical car owner has paid off the lien[4] on the vehicle and after the manufacturer's warranty has expired.[5] Indeed, automotive reliability studies show for example that the average 1998 vehicle is

2.5 to 5 times more likely than a 2003 vehicle to have problems with the engine, cooling system, air conditioning and suspension systems.[6] In addition, 9.3-14.8% of 1998 cars will suffer brake or electrical problems.

Arguments that debtors without car payments do not need the ownership allowance are based on the faulty assumption that the debtor's car is likely to run another five years—the likely length of a chapter 13 plan for a debtor above median income --without major repairs or replacement. *See* Marianne B. Culhane and Michaela M. White, *Taking the New Consumer Bankruptcy Model For a Test Drive: Means-Testing Real Chapter 7 Debtors*, 7 Am. Bankr. Inst. L. Rev. 27, 44-46 (1999). The operating cost component under the Local Standards include insurance, registration fees, ***normal maintenance*** , fuel, parking, and tolls. *See* IRM § 5.19.1.4.3.4. Significantly, operating costs do not include major repairs. As is evidenced by reliability studies, older cars, which are more likely to be paid off, are more likely to require major repairs that are not taken into account in the operating costs set forth in the Local Standards. The additional

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[4] The average length of a car loan is approximately 60 months. See Consumer Credit, Federal Reserve Statistical Release, November 7, 2005.

[5] A typical manufacturer's warranty lasts 3 to 5 years and typically covers everything except normal wear and tear and regular maintenance.

[6] See Used Car Buying Kit, Consumer Reports, available at www.consumerreports.org. (providing reliability studies for over 200 cars for the period 1997-2004).

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repair costs may be offset by the additional $200 permitted under the IRM for older and high mileage cars.[7] However, additional operating expenses merely represent amounts necessary to keep the car running, not amounts necessary to replace the vehicle. If the debtor's car breaks down within five years of filing, he or she may still be left with no funds to replace the car, no way to get to work, and no way to

pay creditors. Congress's determination to allow all debtors to take the ownership deduction regardless of whether they make car payments is a reasonable and sensible resolution to the problem faced by debtors with older cars that promotes both the idea of a fresh start for the debtor and the repayment of creditors.

B. Allowing all debtors to deduct the ownership allowance avoids arbitrary distinctions and eliminates unfair bias.

Allowing the full car ownership allowance where the debtor owns a vehicle but does not have any car payments avoids "arbitrary distinctions between debtors who only have a few car payments left at the time of their bankruptcy filing and those who finished making their car payments just before the filing." *See* Wedoff at 257-58. For example, Debtor A and Debtor B own vehicles of the same make, model and year. However, Debtor Apaid off her car loan the month before filing while Debtor B has one payment remaining after filing. Pursuant to the US Trustee's position, Debtor B is entitled to the car ownership allowance, but Debtor A is not. Nowhere in the text of the statute or in the legislative history is such an arbitrary distinction

[7] The UST does not acknowledge this additional $200 operating expense on its website, see http://www.usdoj.gov/ust/eo/bapcpa/20061001/meanstesting.htm. Instead, USTs only make the availability of such expense public when arguing against the availability of the ownership expense. UST's substitution of an additional operating expense for the ownership expense attempts to equate apples and oranges. As noted above, the operating expense keeps the car running, while the ownership expense relates to the acquisition or replacement of the vehicle.

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contemplated by Congress. To the contrary, in the bankruptcy context and for purposes of the means test both Debtor A and Debtor B "shall" deduct the "amounts specified" by the IRS.

Additionally, limiting the ownership allowance only to those debtors who make car payments as proposed by the US Trustee is also likely to have a disparate impact on the debtors who are more likely to purchase older, used cars. On average, consumers who purchased

used vehicles had the least income of all vehicle purchasers.[8] As noted above, older cars are more likely than new cars to require major repairs not covered in the operating cost component of the Local Standards. As such, the effect of the UST's position is more likely to be borne by debtors with lower incomes. By contrast higher income debtors who have the financial ability to purchase new luxury cars prior to filing for bankruptcy will realize the greatest benefit from the UST's position. Such a result is not only arbitrary but contrary to the purpose and spirit of the new means test. Certainly in creating the means test, Congress did not intend to reward debtors with the most economic resources and the greatest ability to pay.[9]

> "The means test applies clear and well-defined standards to determine whether a debtor has the financial capability to pay his or her debts. The application of such objective standard will help ensure that the fresh start provisions of Chapter VII will be granted to those who need them, while debtors that can afford to repay some of their debts are steered toward filing chapter 13 bankruptcies." 151 Cong. Rec. H2053 (April 14, 2005)(statement of Rep. Goodlatte).

[8] Data available for 1999-2000 shows that the "average **income** of someone who bought a **used** vehicle was $48,004, compared with $72,992 for lessees and $69,875 for new-vehicle purchasers. Those in the lowest **income** quintile were the most likely to buy a **used** car, with 80.9 percent of the group doing so." Monthly Labor Review, May 2003.

[9] "The means test applies clear and well-defined standards to determine whether a debtor has the financial capability to pay his or her debts. The application of such objective standard will help ensure that the fresh start provisions of Chapter VII will be granted to those who need them, while debtors that can afford to repay some of their debts are steered toward filing chapter 13 bankruptcies." 151 Cong. Rec. H2053 (April 14, 2005)(statement of Rep. Goodlatte).

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OBJECTION THREE: Can Debtor use his 401(k) loan repayment to reduce his gross monthly income?

OBJECTION FOUR: Can Debtor use his 401(k) continuing contributions to reduce his gross monthly income?

The Means Test is conclusive as to the debtor's ability to pay, and therefore, Mr. Zaporski's case should not be dismissed under the "totality of the circumstances" inquiry of section 707(b)(3) where the motion to dismiss is based solely on the debtor's ability to pay.

a. In amending section 707(b), Congress created a three-part inquiry to determine whether a debtor has committed abuse in filing under chapter 7, in which a determination of the debtor's ability to pay is a separate and distinct inquiry from questions of abuse under section 707(b)(3).

By amending section 707(b), Congress has created a three-part inquiry to determine whether granting debtor relief would constitute an "abuse" of the provisions of the Code: first, does the debtor have an ability to pay; second, did the debtor file in bad faith; and third, does the filing constitute an abuse in light of the totality of the circumstances?[10] Congress has emphasized the importance of a

[10] In fact, language in the House Report accompanying the BAPCPA demonstrates that Congress clearly intended the inquiry to determine if a debtor has committed abuse in filing under chapter 7 to be a three-pronged inquiry consisting of three separate factors. The Report refers to a motion under section 707(b)(2) as a motion to dismiss based on debtor's ability to pay while it refers to a section 707(b) motion as one based on debtor's ability to repay, bad faith, or the totality of the circumstances. H.R. Rep. No. 109-31, at 51 (2005).

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debtor's ability to pay in considering whether a chapter 7 filing constitutes abuse by developing an entirely separate and distinct inquiry. With the creation of the Means Test, Congress has effectively withdrawn consideration of the debtor's ability to pay from the more subjective and inherently vague inquiries under section 707(b)(3).[11]

b. Congress intended the Means Test to be conclusive as to determinations of abuse based on the debtor's ability to pay.

Under amended section 707(b)(1), the court, on its own motion or on a motion by a trustee or any party in interest, may dismiss a chapter 7 case if the court finds that the granting of relief would be an abuse of the provisions of the chapter. Section 707(b)(2) then sets out a complicated formula, or Means Test, which determines whether a presumption of abuse exists.[12] If the presumption of abuse does not

[11] The effect of the Means Test in eliminating the debtor's ability to pay as a factor from consideration under the "bad faith" test and the "totality of the circumstances" test of section 707(b)(3) is analogous to the effect the disposable income test of section 1325(b) had on the good faith test of section 1325(a)(3). Prior to the enactment of the disposable income test, some courts interpreted good faith to require "meaningful" payments to unsecured creditors; other courts took the opposite approach, interpreting the good faith requirement to refer to honesty and not to a debtor's substantive obligation with regard to level of payment. Some courts took a compromise position in which they looked to the "facts and circumstances" of each case and considered a number of factors, including a debtor's honesty and the levels of payments. 8 Collier on Bankruptcy, P 1325.LH (Matthew Bender 15th Ed. Revised) 2005. *See also, e.g., Flygare v. Boulden*, 709 F.2d 1344, 1347-48 (10th Cir. 1983); *In re* Estus, 695 F.2d 311, 316-17 (8th Cir. 1982).

In 1984, Congress added a disposable income test, which effectively preempted the use of the good faith test as the means for determining the adequate level of payments to creditors. As a result, most courts treat the disposable income test as eliminating the issue of adequate level of pay to creditors from the "facts and circumstances" of the case in applying the good faith test. 8 Collier on Bankruptcy, P 1325.08 (Matthew Bender 15th Ed. Revised) 2005. *See also, e.g., In re Smith*, 848 F.2d 813 (7th Cir. 1988); *Education Assistance Corp. v. Zellner*, 827 F.2d 1222 (8th Cir. 1987). Most courts still consider other factors under the "facts and circumstances" of the good faith test, but rely on the disposable income test as the vehicle for determining the adequate level of payments to creditors.

[12] If the presumption of abuse arises, a chapter 7 case may be dismissed unless the debtor is able to demonstrate special circumstances that warrant deviation from the Means Test formula.

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arise after applying the Means Test, the debtor's ability to pay cannot be a basis for a motion to dismiss on other grounds because Congress clearly intended the Means Test to be the exclusive mechanism for determining abuse based on the debtor's ability to pay.[13] As Senator Hatch pointed out,

> [s]ome have attempted to criticize this commonsense safeguard as somehow taking away bankruptcy protection. Let me be clear. The Means Test does no such thing. All it does is identify those who can repay at least some of their debts. It makes certain they enter into a chapter 13 reorganization and repayment plan rather than let them simply walk away from their obligations, no matter how steep or outrageous . . . . <u>The Means Test contained in the bill will provide a uniform standard to bankruptcy judges to evaluate the ability of bankruptcy filers to repay debts.</u>

151 Cong. Rec. S1842-S1843 (March 1, 2005)(statement of Sen. Hatch)(emphasis added). Senator Grassley emphasized that the Means Test is the mechanism to objectively determine a debtor's ability to pay by stating that "there is a simple process called a Means Test, where one puts down all of their income and assets and what they owe and through that makes a determination of whether they have the ability to repay some of their debt." 151 Cong. Rec. S2327

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[13] Arguments that Congress did nothing more than create a presumption of abuse, rather than a conclusive determination of the debtor's ability to pay, are belied by the fact that Congress also used the elements of the Means Test, including current monthly income and allowable expenses, for measuring the debtor's payments in a chapter 13 case. *See* 11 U.S.C. § 1325(b). Both the use of the Means Test in chapter 13 and the congressional record make clear that Congress viewed the Means Test as more than just an imaginary line which may or may not reflect the debtor's ability to pay. Rather, Congress has made clear its belief that the Means Test is the most appropriate measure of what a debtor can afford to pay.

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(March 9, 2005)(statement of Sen. Grassley). Comments by Representative Goodlatte also confirm that Congress intended a bright-line test to determine abuse based on a debtor's ability to pay. He stated that

> [t]he Means Test applies clear and well-defined standards to determine whether a debtor has the financial capability to pay his or her debts. The application of such objective standard will help ensure that the fresh start provisions of Chapter VII will be granted to those who need them, while debtors that can afford to repay some of their debts are steered toward filing chapter 13 bankruptcies.

151 Cong. Rec. H2053 (April 14, 2005)(statement of Rep. Goodlatte).

C. Jettisoning the elaborate, objective Means Test in favor of the subjective and inherently vague inquiries under section 707(b)(3) would render the recent amendments to section 707(b) meaningless.

Congress went to great lengths to create an objective Means Test, which it felt was a fair method by which to determine a debtor's ability to pay. The highly detailed and complex formulas set forth in amended 707(b) come only after extensive consideration by Congress and at a tremendous cost to the bankruptcy system.[14] The sole purpose of the Means Test and safe harbor provision is to identify debtors who seek to discharge their debts in chapter 7 even though

[14] Debtors will be required to provide more information and complete more forms; trustees and United States Trustees will have an increased workload due to increased paper work, filing additional statements and motions, and taking part in additional litigation; and clerks will have additional noticing responsibilities. The House Report estimated that the cost to the U.S. Trustee's Office alone, for the 2006-2010 period, will be approximately $150 million. H.R. Rep. No. 109-31, at 37 (2005).

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they have the means to pay those debts. It is designed to ferret out abuse by those with an ability to pay, and it was created to do so in a uniform and impartial manner.

The comments by Senator McConnell demonstrate that abuse based on ability to pay is determined under the Means Test.

> The bill currently before the Senate will institute a Means Test to sort out those who file chapter 7 but actually have the ability to live up to their obligations. This is not a draconian measure, by any means. Only about 7 to 10 percent of chapter 7 filers will be screened out by the Means Test . . . . Any debtor who earns less than their State's median income and that includes about 80 percent of the debtors in question will remain in chapter 7. Those earning more than the State median income will be allowed to deduct certain obligations and expenses from their net worth, thus allowing some of them to also remain in chapter 7. And anyone left will be able to show special circumstances for why they should be allowed to still file under chapter 7 . . . . Those remaining will be required to file under chapter 13. It is not too much to ask people to pay back what they owe when they clearly have the means to do so. And those who are abusing the system will be exposed."

151 Cong. Rec. S2113 (March 7, 2005)(statement of Sen. McConnell)(emphasis added).

Consideration of a debtor's ability to pay under a section 707(b)(3) inquiry would not only be duplicative, it would once again create a subjective test that would render the amendments to section 707(b) meaningless. It would be contrary to the congressional intent, not to mention illogical, to find that Congress developed such an elaborate, objective test intending that courts should effectively ignore

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its mandate and return to the nebulous inquiries of the past. To determine that a debtor has the ability to pay debts even though the Means Test concludes otherwise would be to invent a new means test, different from the uniform standard enacted by Congress after great deliberation to ensure that it appropriately balanced all of the interests involved.

Lastly, the Means Test reflects policy choices made by Congress as to factors that should be considered in determining a debtor's ability to pay. For example, Congress specifically excluded Social Security benefits from current monthly income; a choice that is consistent with other amendments that protect retirement benefits at the expense of creditors. Similarly, by permitting debtors to deduct the amounts specified in the IRS guidelines rather than limiting debtors to actual expenses, Congress has chosen not to penalize debtors for spending less than the IRS allowances. By comparing the *total* of allowed expenses to the debtor's current monthly income, Congress clearly intended that a debtor might spend more than the allowance for one category (e.g., rent) and less for another (e.g., food), as long as the end result did not leave $167 per month in disposable income.

By attempting to determine whether a debtor's ability to pay constitutes an abuse by methods other than the Means Test, the U.S.

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Trustee is attempting to circumvent the policy decisions made by Congress. It is not for the U.S. Trustee or this Court to second-guess Congress' choices; rather the task at hand is simply to apply the law as Congress wrote it.

d. Even in the event that a debtor's ability to pay remains a factor to be considered under section 707(b)(3), it should be given no more weight than any other factor and standing alone is insufficient to support a motion to dismiss.

Despite Congress' clear intent that a debtor's ability to pay should be determined through the objective Means Test, if a debtor's ability to pay remains a factor to be considered in the "totality of the circumstances" inquiries, it should be given no more weight than any other factor because the debtor's ability to pay was previously considered under the Means Test. Not only is considering a debtor's ability to pay under the "totality of the circumstances" inquiry duplicative and superfluous, giving it more weight than other factors or having it be the determinative factor under the "totality of the circumstances" inquiry would further undermine Congressional intent and defeat the inherent meaning of "totality" of the circumstances. Because the UST's 707(b)(3) motion is based solely on Mr. Zaporski's ability to pay it should be denied.

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e. 401(k) loan repayments

Although Debtor did not deduct the repayments under the means test, he could have, and should be allowed to do so.

Under section 707(b)(2) of the Bankruptcy Code (hereinafter "Means Test"), a debtor is directed to deduct from his current monthly income, as defined in 11 U.S.C. § 101(10A), the categories of expenses listed in subsections (ii), (iii) and (iv) of section 707(b)(2). 11 U.S.C. § 707(b)(2)(A)(i). The debtor's applicable monthly expense amounts include the debtor's actual monthly expenses for the categories specified as "Other Necessary Expenses" issued by the Internal Revenue Service. 11 U.S.C. § 707(b)(2)(A)(ii)

Debtor's 401(k) Loan Repayments are "Involuntary Deductions" within the meaning of the Internal Revenue Manual.

Line 26 of Official Form B22A directs the debtor to deduct.

> "Other Necessary Expenses: mandatory payroll deductions. Enter the total average monthly payroll deductions that are required for your employment, such as mandatory retirement contributions, union dues and uniform costs. Do not include discretionary amounts, such as non-mandatory 401(k) contributions.

The explanatory language of Line 26 is derived from section 5.10.1.10 of the Internal Revenue Manual ("IRM"), which lists "Involuntary Deductions" as a sub-category of "Other necessary expenses."

There is no question that the debtor's 401(k) loan repayments

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are "mandatory" or "involuntary." The terms "mandatory" and "involuntary" are not defined in the Bankruptcy Code or the Internal Revenue Manual. However, the ordinary definition of both terms suggests something that is required; something obligatory. *See* American Heritage Dictionary of the English Language (4th Ed. 2000)(mandatory – "required or commanded by authority; obligatory"; involuntary - "not subject to control of the volition"); *see also Rousey v. Jacoway*, 544 U.S. 320, 330 (2005)(looking to the ordinary meaning of terms not defined by the Bankruptcy Code). The required nature of the expense is reflected in the language of Form B22A, which specifies that non-mandatory 401(k) contributions are not included. Conversely, mandatory 401(k) loan repayments, as in this case, are allowable expenses. Similarly, the required nature of the expense is reflected in the IRM, which describes expenses that are a "requirement of the job".

Mr. Zaporski's 401(k) loan repayments are mandatory, involuntary and/or a requirement of the job based on both the language of the plan contract and the plan administrator's policy, neither of which can be modified by debtor. First, the contract between Mr. Zaporski and the Fidelity Net Benefits Plan specifically requires that his 401(k) loan

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repayments be deducted. As stated in the internet description, if Mr. Zaporski does not pay back his loan in a timely manner, in accordance with the terms of the loan,

"The outstanding loan balance will be considered a taxable distribution and in default. It will be subject to ordinary income taxes, a possibly to a 10% early withdrawal penalty if you are younger than age 59 1/2" So long as Mr. Zaporski works for DTE he has no discretion or authority to stop these automatic deductions from his pay. There is simply no basis for arguing that the deductions are voluntary. These are "required" deductions based on any definition of the word.

The practical reality captured by both the IRM, the Official Form, and the Code is that mandatory payroll deductions represent money which by definition is not available to the debtor to pay for any other expenses, including other debts. Denying the debtor the opportunity to deduct these amounts on the Means Test does not mean the funds no longer have to be repaid. Rather the consequence is that loan repayments would have to be made from funds the debtor is allowed for other expenses such as food, housing, medical, etc. In this case, there is ample evidence that Mr. Zaporski has no authority or ability to stop the loan

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repayments.

Section 362(b)(19) specifically permits the plan to continue to collect the debt through the deductions. Based on these facts, Mr. Zaporski's 401(k) loan repayments are "mandatory payroll deductions" or "involuntary deductions" within the meaning of Form B22A and the IRM.

f. Alternatively, the Debtor's 401(k) Loan Repayments, and contining contributions, Should be Considered "Other Necessary Expenses" Because They are Necessary for the Health and Welfare of the Debtor

Under section 5.15.1.10 of the IRM, "Other Necessary Expenses" must "meet the necessary expense test—they must provide for the health and welfare of the [debtor] and/or his or her family or they must be for the production of income." The IRM then provides examples of expenses and the conditions under which they may be considered "Other Necessary Expenses."

As the legislative history to the 2005 amendments makes clear, these categories of expenses identified by the IRS are non-exclusive. For example, the House Report accompanying the bill amending the Bankruptcy Code, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the "BAPCPA"), states:

The Internal Revenue Manual does not establish monetary

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amounts with regard to necessary expenses that it characterizes as "Other Expenses." Rather, it provides a non-exclusive list of these expenses, that must otherwise satisfy the "necessary expense test.

H. Rep. 109-31, 14, n. 66 (2005); *see also* 6 Collier on Bankruptcy, ¶ 707.05[2][d]; Advisory Committee Notes. The amount allowed for any necessary expense must be reasonable considering the debtor's individual facts and circumstances. *See* IRM § 5.15.1.17.5. There is no bright line test for determining what constitutes "necessary expenses." Rather each expense must be evaluated based on the debtor's individual facts and circumstances. A retirement account is a critical aspect of a debtor's overall financial health and stability. There is no question that lack of adequate retirement savings has become a more pressing problem as the baby-boomer generation begins to retire. Uncertainty about the future of Social Security benefits and the increasing expense of retiree health care suggest that retiring Americans will have to rely less on Social Security and Medicare and more on pensions and personal savings. At the same time, among employers there has been a pronounced shift away from guaranteed pension plan towards defined contribution plans, such as 401(k) plans. The importance of employee contributions to individual retirement plans should not be disregarded by per se rules that prohibit any

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consideration of 401(k) loan repayments as "necessary expenses". The better approach is to evaluate each debtor's circumstance on a case-by-case basis.

The Ninth Circuit Court of Appeals has recently identified a list of factors to consider in determining whether, for purposes of a motion to dismiss under section 707(b)(2), retirement contributions are a "reasonably necessary expense." *See Hebbring v. U.S. Trustee*, 463 F.3d 902 (9th Cir. 2006). While this case considered voluntary contributions to debtor's 401(k) plan in a pre-BAPCPA context, the list is equally applicable to the "necessary expense test" under section 707(b)(2)(A)(ii)(I). The list of factors considered by the *Hebbring* court included, but was not limited to, the debtor's age, income, overall budget, expected date of retirement, existing retirement savings, and amount of contributions; the likelihood that stopping contributions will jeopardize the debtor's fresh start by forcing the debtor to make up lost contributions after emerging from bankruptcy; and the needs of the debtor's dependents. See *Hebbring*, 463 F.3d at 907.

Applying the factors listed in *Hebbring* to this case demonstrates that the 401(k) loan repayments are a necessary expense. Mr. Zaporski will be 50 years old in July. He lives a modest lifestyle. He

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does not own a home, he is purchasing a condominium, which has no equity in it, and on which he is behind on both the property taxes and the association assesments.

His only possession that has any real value is his 401(k) plan. Unlike other seniors who could sell their homes or other assets to finance their retirement, Mr. Zaporski does not have any other assets to live on.

At first glance, the amount in his 401(k) may seem like a lot of money, but after one recognizes that he will draw upon his funds to live the rest of his life, it is clear that the balance reflects only a modest, and likely inadequate, retirement nest egg. It will be insufficient to replace his current income, even adding in Social Security benefits.

Mr. Zaposki's monthly expenses will only rise in the future. His rent expenses will increase. He will need a newer car, and without money saved in the bank, will need to finance the purchase. In addition, his auto insurance will rise to reflect the new car, because the financer will require full coverage insurance to protect its interest. Mr. Zaporski has a bad driving record, so it will cost him even more.

This is another reason he has hung on to the two antiques he currently drives.

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Clearly, stopping Mr. Zaporski from contributing to his 401(k) will jeopardize his ability to obtain a fresh start. Accordingly, the 401(k) loan deductions,and contributions, should be classified as a necessary expense.

Retirement savings has everything to do with the health and welfare of debtors and their families. With retirement age at 65 years (and sometimes younger) and the average life expectancy nearing 78 years,[15] retirement savings is all about whether someone will be able to maintain a minimal standard of living after leaving the workforce. Concluding that retirement savings play no role in the health and welfare of individuals and families ignores the fundamental shifts in our economy and society which place a greater emphasis on personal retirement savings.

Per the attached Market Watch report, Exhibit A, the average couple, retiring today, would need $200,000 just for future medical expenses.

Cutting that amount in half for Mr. Zaporski alone, he would still need $100,000 if he were retiring at age 65 today. The net value of his 401(k) account is less than that.

[15] *See* Life Expectancy, National Center for Health Statistics, Center for Disease Control, available at http://www.cdc.gov/nchs/fastats/lifexpec.htm. For a 54-year old white male, such as Mr. Lenton, the life expectancy is an additional 26.2 years resulting in a total of 80.2 years. At birth the average life expectancy in the United States is 77.9 years.

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He should be able to accumulate more in the work years left to him, but the medical costs are likely to increase at at least the same rate. He already suffers from asthma.

G. Section 362(b)(19) added to the Bankruptcy Code in 2005, supports the debtor's position that loan repayment should be considered an Other Necessary Expense under section 707(b)(2)(A)(ii)(I).

Section 362(b)(19) enacted by the 2005 amendments to the Bankruptcy Code specifically authorizes the repayment of the loans described in that section by excepting the continuation of such payments from the operation of the automatic stay. 11 U.S.C. § 362(b)(19); 707(b)(2). Section 362(b)(19) provides substantial Congressional support for the continuation of the repayment of loans taken against retirement accounts, as the loan in this case.

This new section provides:

"The filing of a petition under section 301, 302, or 3903 of this title… does not operate as a stay –"

(19) under subsection (a), of withholding of income from a debtor's wages and collection of amounts withheld, under the debtor's agreement authorizing that withholding and collection for the benefit of a pension, profit-sharing, stock bonus, or other plan established under section 401, 403, 408, 408A, 414, 457 or 501(c) of the internal Revue Code of 1986, that is sponsored by the employer of the debtor, or an affiliate, successor,or predecessor of such employer--
(A) to the extent that the amounts withheld and collected are used solely for payments relating to a loan from a plan

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> under section 408(b)(1) of the Employee Retirement Income Security Act of 1974 or is subject to section 72(p) of the Internal Revenue Code of 1986; or
> **(B)** a loan from a thrift savings plan permitted under subchapter III of chapter 84 of title 5, that satisfies the requirements of section 8433(g) of such title;
> but nothing in this paragraph may be construed to provide that any loan made under a governmental plan under section 414(d), or a contract or account under section 403(b), of the Internal Revenue Code of 1986 constitutes a claim or a debt under this title;

See 11 U.S.C. §362(b)(19).

The automatic stay provision in section 362 is triggered in most cases when a petition for relief is filed under either chapter 7 or chapter 13. Section 362 applies to both Chapter 7 and Chapter 13 cases. 11 U.S.C. §§ 103(a), 362(a). Under the plain language of new section 362(b)(19), the automatic stay does not apply to the collection of 401(k) loan repayments. Comparing section 362(b) with the Means Test further demonstrates that Congress intended such payments to continue and that a debtor's 401(k) loan repayments should be considered an appropriate expense. In every instance where the automatic stay is not in effect under 362(b) and which relates to debtor's expenses, such expense is an allowable deduction under the Means Test.

- Under 362(b)(1) the automatic stay does not apply to the commencement or continuation of a criminal action or proceeding.

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Section 707(b)(2)(A)(iv) provides that orders to pay criminal fines or restitution are allowable expenses. *See* Means Test line 28. *See also* 11 U.S.C. § 523(a)(7).

- Under section 362(b)(2) the automatic stay does not apply for withholding of income that is property of the estate or property of the debtor for payment of domestic support obligations. A debtor is entitled to deduct as an expense child support and alimony under section 707(b)(2)(A)(iv). *See* Means Test line 28.

- Under section 362(b)(9)(d) the automatic stay does not apply to tax assessments. The payment of taxes is an allowable expense under section 707(b)(2)(A)(ii). *See* Means Test line 25.

- Under section 362(b)(18) the automatic stay does not apply to perfecting real estate tax assessments and those assessments are allowable expenses under section 707(b)(2)(A)(ii). *See* Means Test line 25.

The United States' Trustee's Reasoning Leads to Absurd Results Because 401(k) Loan Repayments are not Disposable Income Under Chapter 13.

Should the debtor be forced to convert this case to a Chapter 13 bankruptcy, his 401(k) loan repayments are allowable expenses under the "disposable income test". 11 U.S.C. § 1322(f); 1325(b). Section

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1322(f) states:

> **(f)** 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.

11 U.S.C. § 1322(f). Why would Congress presume under section 707(b)(2)(A) that amounts paid for 401(k) loan repayments could be used to pay unsecured creditors, yet deny unsecured creditors access to those funds in a chapter 13 bankruptcy?

In contrast, the more simple and reasonable explanation that harmonizes these different sections of the Code, 362(b)(19), 707(b)(2), and 1322(f), is that Congress indeed believed, like the Advisory Committee on Bankruptcy Rules, that mandatory 401(k) loan repayments were already an allowable expense on the Means Test. Congress did not need to specifically incorporate section 362(b)(19) or 1322(f) into section 707(b)(2). The fact is that section 1322(f) was necessary to protect the retirement savings of below-median income debtors in chapter 13 because such debtors are not governed by section 707(b)(2) expense determinations.

h. Congressional Policy Supports the Protection of Retirement Funds.

Congress has acted repeatedly in recent years to stress the

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importance of retirement savings and to provide incentives that will help families accumulate retirement income through employer-sponsored retirement plans and IRAs. *See, e.g.,* The Pension Protection Act of 2006, Pub. L. No. 109-280 (2006)(making it easier for workers to save in 401(k) plans and increasing their incentives to do so by enacting a permanent tax credit); The Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16 (2001)(providing a tax credit to encourage low- and moderate- income households to save for retirement); *see also* the Automatic IRA Act of 2006, S3951, 109th Cong. (2006)(bill introduced Sept. 27, 2006 and designed to provide an automatic retirement savings vehicle for workers, including the self-employed, without access to a company retirement plan like a 401(k)). The 2005 amendments to the Bankruptcy Code were no exception to this trend. The new amendments contained eight new sections designed to protect the debtor's retirement savings in bankruptcy. *See* 11 U.S.C. §§ 101(10A)(B) (excluding Social Security payments from the definition of current monthly income); 362(b)(19) (automatic stay inapplicable to withholding of income for debtor's wages for retirement loan repayments); 522(b)(3)(C) (creating a new exemption for certain retirement funds); 522(d)(12)(creating another new exemption for

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certain retirement funds); 523(a)(18) (making amounts owed to certain retirement plans nondischargeable); 541(b)(7) (amounts withheld by employers as contributions to certain retirement plans not property of the estate); 707(b)(2) (permitting debtor's to claim mandatory payroll deductions as necessary expenses on the Means Test) and 1322(f) (prohibiting chapter 13 plan from altering terms of a loan from certain retirement accounts).

In promulgating uniform bankruptcy laws Congress has the task of balancing two main objectives: a fresh start for the debtor and the fair and orderly repayment of creditors to the extent possible. Indeed, only after years of debate and great deliberation did Congress enact amendments to the Code that it felt appropriately balanced all the interests of the parties. Among the choices made by Congress in the 2005 amendments to the Code was the decision to protect retirement savings at the expense of creditors. As indicated above, this choice is consistent with recent Congressional actions designed to promote individual retirement savings.

Under the UST's position, chapter 7 debtors are required to default on their retirement loans, which in turn would cause a reduction in the exempt retirement account for the benefit of creditors and impose significant tax liability on debtors. Thus, exempt

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retirement funds would, in effect, be used to pay creditors despite their exemption. This is exactly the opposite of the outcome Congress sought when it created specific exemptions for retirement accounts and limited debtors' and creditors' ability to alter retirement loan repayment provisions. *See* 11 U.S.C. §§ 362(19), 707(b)(2), 1322(f). Unsatisfied with Congress' policy decisions, the UST attempts an end-run around it by arguing that retirements savings are not necessary for the welfare of the debtor, that they are not allowable expenses under the Means Test, and that in fact the debtor should be required to forgo contributions to his retirement account for the benefit of creditors.

By contrast, the debtor's position more squarely comports with clear Congressional policy that seeks to protect retirement savings from creditors.

CONCLUSION

Debtor is allowed an ownership expense deduction on the means test for each of his two vehicles. If not, he is entitled to a deduction on the means test for his 401(k) loan repayment, and a special circumstances deduction for his 401(k) loan contribution.

Either of these findings should be conclusive to deny the U. S. Trustee motion in full.

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Should the Court disagree, Debtor contends continuing to make the 401(k) loan repayments and contributions from gross income does not constitute a substantial abuse justifying granting the U. S. Trustee motion.

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Kurt O'Keefe P30718
Attorney for Debtor
3156 Penobscot Building
Detroit MI 48226-4105
313.962.4630

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