

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos. NV-08-1332-MoJuH
)	NV-08-1335-MoJuH
FRANCISCO J. MARTINEZ;)	NV-08-1340-MoJuH
MELISSA J. STINE;)	
ALEX WATHEN,)	Bk. Nos. 08-14571-BAM
)	08-15414-LBR
)	08-15133-MKN
Debtors.)	

RICK A. YARNALL, Chapter 13
Trustee,

Appellant,

O P I N I O N

FRANCISCO J. MARTINEZ;

MELISSA J. STINE; ALEX WATHEN;

HAINES & KRIEGER, LLC,

Appellees.

Argued and Submitted by Videoconference
on May 19, 2009

Filed - October 5, 2009

Appeal from the United States Bankruptcy Court
for The District of Nevada

Hon. Linda B. Riegler, Bruce A. Markell, and Mike K. Nakagawa,
Bankruptcy Judges, Presiding.

Before: MONTALI, JURY and HOLLOWELL, Bankruptcy Judges.

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1 MONTALI, Bankruptcy Judge:

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3 In cases pending before three different bankruptcy courts,
4 above-median income chapter 13¹ debtors obtained orders valuing
5 and "stripping off" wholly unsecured junior liens against their
6 residences.² The debtors also proposed chapter 13 plans that
7 deducted the expenses associated with those stripped liens from
8 their "disposable income" devoted to plan payments. The
9 chapter 13 trustee objected to confirmation of the three plans,
10 and the three bankruptcy judges held a consolidated hearing on
11 the objections. The bankruptcy judges overruled the objections
12 and entered orders confirming the plans. The chapter 13 trustee
13 appealed each order. We REVERSE without reaching the trustee's

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15 _____
16 ¹Unless otherwise indicated, all chapter, section and rule
17 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
18 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as
19 enacted and promulgated after the effective date of The
20 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
21 Pub. L. 109-8, 119 Stat. 23 ("BAPCPA").

22 ²Terms such as "stripping off," "lien strip" or "motion to
23 strip" are actually misnomers that have become part of everyday
24 bankruptcy parlance. In fact, motions of this type are
25 authorized under Rule 3012, "Valuation of Security" ("The court
26 may determine the value of a claim secured by a lien on property
27 in which the estate has an interest on motion"). See,
28 for example, Guidelines for Valuing and Avoiding Liens in
Individual Chapter 11 Cases and Chapter 13 Cases, United States
Bankruptcy Court, Northern District of California, available at:
[http://www.canb.uscourts.gov/procedures/dist/guidelines/guideline
s-valuing-and-avoiding-liens-individual-chapter-11-cases-and-cha.](http://www.canb.uscourts.gov/procedures/dist/guidelines/guideline-s-valuing-and-avoiding-liens-individual-chapter-11-cases-and-cha)

For convenience, we will continue to use the more common
terminology throughout this opinion.

1 good faith objections.³ Our conclusion is reinforced by a
2 persuasive and compelling statement from our own court of appeals
3 just a few weeks ago: "Ironic it would be indeed to diminish
4 payments to unsecured creditors in this context on the basis of a
5 fictitious expense not incurred by a debtor." Ransom v. MBNA Am.
6 Bank (In re Ransom), 577 F.3d 1026, 1030 (9th Cir. 2009).

7 I. FACTS

8 In May 2008, appellees Francisco J. Martinez ("Martinez"),
9 Melissa J. Stine ("Stine"), and Alex Wathen ("Wathen")
10 (collectively, "Debtors") filed separate chapter 13 petitions and
11 filed their respective Statements of Current Monthly Income and
12 Calculation of Commitment Period and Disposable Income ("Form B
13 22C"). They each filed a motion to value collateral, to strip
14 off liens, and to modify rights of the holders of junior liens on
15 their respective residences, alleging in each instance that no
16 equity existed in the property beyond the secured claim of the
17 holder of the first priority lien. Significantly, in each case,
18 the Debtors alleged that "on the date the instant bankruptcy was
19 filed," no equity existed in the subject properties, and that the
20 affected junior lienholders were "wholly unsecured on the
21 petition date."

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24 ³In a separate opinion we are issuing concurrently with this
25 one we reach a similar conclusion regarding attempted deductions
26 from disposable income for payments not being made because the
27 underlying property has been voluntarily surrendered to the
28 secured creditors, leaving any remaining claim no more than
wholly unsecured. American Express Bank, FSB v. Smith (In re
Smith), No. WW-08-1311 (9th Cir. BAP Oct. 5, 2009).

1 In each case, the bankruptcy court entered an order
2 stripping the lien of the junior lienholder, finding that "on the
3 filing date of the instant chapter 13 petition," the claim was
4 "wholly unsecured." The courts therefore ordered that the junior
5 lienholders' "secured claims (sic) is 'stripped off' and shall be
6 treated as a 'general unsecured claim' pursuant to [section]
7 506(a)...", that each junior lienholders' claim "be reclassified
8 as a general unsecured claim," and that the junior lienholders'
9 "secured rights and/or lien-holder rights in the Subject Property
10 are hereby terminated."

11 Because the Debtors were above-median income debtors, they
12 calculated their "disposable income" for the purposes of plan
13 payments by utilizing the means test formula set forth in
14 section 707(b)(2)(A)(iii), which allows debtors to deduct from
15 their gross monthly income payments "contractually due to secured
16 creditors." See 11 U.S.C. §§ 1325(b)(3) and 707(b)(2)(A)(iii).
17 In each case, on the Form B 22C, the Debtors deducted from their
18 gross income the amounts due under the relevant contracts with
19 the respective junior lienholders, even though they were not
20 making these payments postpetition and even though they obtained
21 orders stripping off the relevant liens based upon petition date
22 values.

23 Consequently, Martinez's Form B 22C reflected a negative
24 disposable monthly income of \$104.90, even though the disposable
25 income would have been \$352.10 a month if the phantom payments to
26 the junior lienholder were excluded from the deductions.
27 Similarly, Stine's Amended Form B 22C reflected a disposable
28 income of \$22.50 a month if the payments for the stripped

1 mortgage were deducted. Removing the stripped mortgage payments
2 from the means test calculation leaves Stine's monthly disposable
3 income at \$377.50 a month. Wathen's Form B 22C reflected a
4 negative disposable income of \$390.67, even though his monthly
5 disposable income would have been \$209.33 if the payments on the
6 stripped junior lien were not included in the means test
7 calculation.

8 Appellant Rick A. Yarnall, the chapter 13 trustee
9 ("Trustee"), objected to confirmation in each of the cases,
10 arguing that the Debtors had failed to devote all of their
11 projected disposable income to payment of unsecured creditors as
12 required by section 1325(b) and that their plans were not
13 proposed in good faith. Following extensive briefing by Trustee
14 and the Debtors, the three assigned bankruptcy judges held a
15 consolidated hearing on the Trustee's objections to confirmation
16 of the Debtors' plans.⁴

17 Applying Maney v. Kagenveama (In re Kagenveama), 541 F.3d
18 868 (9th Cir. 2008), the bankruptcy courts each held that an
19 above-median income debtor's disposable income is determined as
20 of the effective date, and that the fixed formula of the means
21 test under section 707(b)(2) (as incorporated by section
22 1325(b)(3)) permitted the Debtors to deduct payments to the
23 junior lienholders, even though the Debtors intended to (and did)
24 strip the liens of those lienholders and would not (and did not)
25 make any postpetition payments to those lienholders.

26
27 ⁴Trustee's objection to the chapter 13 plan of a fourth
28 debtor was heard at the same time, but that case is not included
in this appeal.

1 On December 5, 2008, the courts in Martinez's and Stine's
2 cases entered orders confirming the chapter 13 plans and orders
3 overruling the Trustee's objections to confirmation. On December
4 8, 2008, the court in Wathen's case entered an order confirming
5 the chapter 13 plan. Trustee timely appealed.

6 We did not consolidate the appeals. Instead we authorized a
7 joint brief from appellees but they did not appear in these
8 appeals.⁵

9 The case was argued before us on May 19, 2009. On
10 August 14, 2009, the Ninth Circuit issued its Ransom decision.

11 II. ISSUE

12 In calculating their disposable income to be paid under
13 their plans, may chapter 13 debtors deduct payments to junior
14 lienholders to whom they will not be making payments under their
15 plans because their liens have been stripped (viz., valued at
16 zero)?

17 III. JURISDICTION

18 The bankruptcy court had jurisdiction under 28 U.S.C.
19 § 157(b)(2)(L) and § 1334. We have jurisdiction under 28 U.S.C.
20 § 158.

21 IV. STANDARD OF REVIEW

22 The issue presented in these appeals is purely one of law
23 and statutory construction; no factual dispute exists. "We
24 review issues of statutory construction and conclusions of law,
25 including interpretation of provisions of the Bankruptcy Code,

26
27 ⁵Haines & Kreiger, LLC, is the lawfirm that represented
28 Debtors in the bankruptcy courts. Although named in the caption,
we do not consider it an appellee.

1 de novo." Mendez v. Salven (In re Mendez), 367 B.R. 109, 113
2 (9th Cir. BAP 2007) (citing Einstein/Noah Bagel Corp. v. Smith
3 (In re BCE W., L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003)).

4 V. DISCUSSION⁶

5 A. Overview.

6 Section 1325(b)(1)(B) provides that if a trustee or
7 unsecured creditor objects to confirmation of a chapter 13 plan,
8 the court may not approve the plan unless, as of its effective
9 date, the plan "provides that all of the debtor's projected
10 disposable income to be received in the applicable commitment
11 period beginning on the date that the first payment is due under
12 the plan will be applied to make payments to unsecured creditors
13 under the plan." 11 U.S.C. § 1325(b)(1)(B).

14 In Kagenveama, the Ninth Circuit held a debtor's "projected
15 disposable income" for the purposes of section 1325(b)(1)(B) is
16 the debtor's "disposable income" as defined in subsection (b)(2)
17 "projected out over the 'applicable commitment period.'" Kagenveama,
18 541 F.3d at 872. The Ninth Circuit specifically
19 rejected the chapter 13 trustee's argument that section
20 1325(b)(1)(B) requires a forward-looking determination of
21 "projected disposable income."⁷ Id. at 8737-74. The Ninth
22

23 ⁶Our analysis as set forth in Smith (see footnote 3),
24 applicable to surrendered collateral, applies with equal force to
25 the facts presented by these three appeals wherein the liens have
26 been stripped. We incorporate that decision by reference and
reiterate that analysis in this Part V for completeness of our
record here.

27 ⁷Since Kagenveama's issuance, four other courts of appeal
28 (continued...)

1 _____
2 ⁷(...continued)
3 have rejected its reasoning and holding. In particular, the
4 Seventh Circuit held in In re Turner, 574 F.3d 349 (7th Cir.
5 2009), that a chapter 13 above-median income debtor could not
6 deduct as an expense his mortgage payments on property that he
7 intended to surrender. In reaching its holding, the Seventh
8 Circuit refused to apply a mechanical calculation that considers
9 expenses that exist on the petition date, noting that such a
10 mechanical test is appropriate for determining eligibility to
11 proceed under particular chapters.

9 Since the object of a Chapter 13 bankruptcy is to
10 balance the need of the debtor to cover his living
11 expenses against the interest of the unsecured
12 creditors in recovering as much of what the debtor owes
13 them as possible, we cannot see the merit in throwing
14 out undisputed information, bearing on how much the
15 debtor can afford to pay, that comes to light between
16 the submission and approval of a plan of
17 reorganization. Sometimes as in this case the
18 creditors will benefit from the new information. But
19 in other cases it will be the debtor The use of
20 the later date, which is consistent with the statutory
21 language though not compelled by it, is more sensible.

17 Id. at 355. See also Nowlin v. Peake (In re Nowlin), 576 F.3d
18 258 (5th Cir. 2009) (holding that "projected" disposable income
19 permits consideration of "reasonably certain" future events and
20 stating that the Ninth Circuit emphasized the modified definition
21 of "disposable income" without recognizing the independent
22 significance of the word "projected"); Hamilton v. Lanning
23 (In re Lanning), 545 F.3d 1269 (10th Cir. 2008), petn. for cert.
24 filed, 77 U.S.L.W. 3449 (Feb. 3, 2009) (Supreme Court has
25 requested briefing by the Solicitor General on the petition (129
26 S.Ct. 2820)) (holding that starting point for calculating chapter
27 13 debtor's projected disposable income is presumed to be
28 debtor's current monthly income, subject to showing of
substantial change in circumstances); Coop v. Frederickson (In re
Frederickson), 545 F.3d 652, 659 (8th Cir. 2008), cert. denied,
129 S.Ct. 1630 (2009) (holding that the means test is only a
starting point for determining a chapter 13 debtor's disposable
income). "[T]he final calculation can take into consideration
(continued...)

1 Circuit also rejected the argument that the "disposable income"
2 calculation of section 1325(b)(2) was a presumptive starting
3 point which could be supplemented by evidence of future or actual
4 "finances of the debtor." Id. at 874, overruling Pak v. eCast
5 Settlement Corp. (In re Pak), 378 B.R. 257, 267 (9th Cir. BAP
6 2007).

7 Section 1325(b)(2) defines "disposable income" as the
8 debtor's current monthly income less the amounts reasonably
9 necessary to be expended for, inter alia, the support of the
10 debtor and his or her dependents. 11 U.S.C. § 1325(b)(2).⁸

11
12 ⁷(...continued)
13 changes that have occurred in the debtor's financial
14 circumstances as well as the debtor's actual income and expenses
15 as reported on Schedules I and J." Frederickson, 545 F.3d at
16 659.

17 ⁸Section 1325(b)(2) provides:

18 (2) For purposes of this subsection, the term "disposable
19 income" means current monthly income received by the debtor
20 (other than child support payments, foster care payments, or
21 disability payments for a dependent child made in accordance
22 with applicable nonbankruptcy law to the extent reasonably
23 necessary to be expended for such child) less amounts
24 reasonably necessary to be expended --

25 (A) (i) for the maintenance or support of the debtor
26 or a dependent of the debtor, or for a domestic
27 support obligation, that first becomes payable
28 after the date the petition is filed; and

(ii) for charitable contributions (that meet the
definition of "charitable contribution" under
section 548(d)(3) to a qualified religious or
charitable entity or organization (as defined in
section 548(d)(4)) in an amount not to exceed 15

(continued...)

1 Section 1325(b)(3), however, restricts the ability of a
2 bankruptcy court to determine the "amounts reasonably necessary
3 to be expended" when the debtor has an above-median income.⁹

4 For a debtor with above-median income, "amounts reasonably
5 necessary to be expended under paragraph (2) . . . shall be"
6 calculated in accordance with section 707(b)(2)(A) and (B).

7 11 U.S.C. § 1325(b)(3). Section 707(b)(2) is the chapter 7
8 "means test" provision, and subsection (b)(2)(A)(iii) provides

9
10 ⁸(...continued)

11 percent of gross income of the debtor for the year
12 in which the contributions are made; and

13 (B) if the debtor is engaged in business, for the
14 payment of expenditures necessary for the continuation,
preservation, and operation of such business.

15 ⁹Section 1325(b)(3) provides:

16 (3) Amounts reasonably necessary to be expended under
17 paragraph (2), other than subparagraph (A)(ii) of paragraph
18 (2), shall be determined in accordance with subparagraphs
19 (A) and (B) of section 707(b)(2), if the debtor has current
monthly income, when multiplied by 12, greater than--

20 (A) in the case of a debtor in a household of 1 person,
21 the median family income of the applicable State for 1
earner;

22 (B) in the case of a debtor in a household of 2, 3, or
23 4 individuals, the highest median family income of the
24 applicable State for a family of the same number or
fewer individuals; or

25 (C) in the case of a debtor in a household exceeding 4
26 individuals, the highest median family income of the
27 applicable State for a family of 4 or fewer
28 individuals, plus \$575 per month for each individual in
excess of 4.

1 that the debtor's average monthly payments on account of secured
2 debts shall be calculated as the sum (then divided by 60) of

3 (I) the total of all amounts scheduled as contractually
4 due to secured creditors in each month of the 60 months
following the date of the petition; and

5 (II) any additional payments to secured creditors
6 necessary for the debtor, in filing a plan under
chapter 13 of this title, to maintain possession of the
7 debtor's primary residence, motor vehicle, or other
property necessary for the support of the debtor and
8 the debtor's dependents, that serves as collateral for
secured debts[.]

9 11 U.S.C. § 707(b)(2)(A)(iii).

10 B. The Expenses Are Not Necessary for Debtors' Support.

11 Holding that Kagenveama requires application of a backward-
12 looking or static measurement of an above-median income debtor's
13 expenses in determining projected disposable income, the
14 bankruptcy courts held that Debtors could deduct from their
15 current monthly income mortgage payments which they will not be
16 making. Thus, they held that postpetition events affecting
17 income or expenses (such as surrender of collateral or stripping
18 liens, even based on petition-date values) should not be
19 considered in deciding whether an above-median income debtor has
20 contributed all projected disposable income to a plan under
21 section 1325.

22 We disagree. Sections 1325(b)(2) and (b)(3), read together,
23 provide that if an expense is not reasonably necessary, it is not
24 included in the calculation of disposable income. If the expense
25 is reasonably necessary for a debtor's and/or dependants'
26 maintenance and support, and the debtor is an above-median income

1 debtor, section 1325(b)(3) requires the court to determine the
2 amount in accordance with section 707(b)(2).

3 A determination of whether an expense is reasonably
4 necessary requires a court to consider what the debtor has to say
5 about the financial realities existing at the time of
6 confirmation of a chapter 13 plan, particularly where the
7 affected lienholder consents by its silence. Here, where Debtors
8 have no intention of paying the mortgage payments either through
9 or outside their plans, and in fact have obtained orders
10 stripping the liens effective as of the relevant petition dates,
11 those mortgage payments cannot be necessary for the support of
12 Debtors or their dependents. They made the decision to strip the
13 liens, not the bankruptcy courts. Phantom payments cannot be
14 necessary. The fact that courts make the value determinations to
15 support the orders stripping the liens some time after the
16 petition dates is of no consequence. The Debtors alleged,
17 respondent under-secured creditors conceded by their defaults,
18 and the courts found that the petition date values were correct.
19 Had a creditor contended otherwise, the outcome may have been
20 different, but that is not what happened in any of these three
21 cases.

22 C. The Dicta of Kagenveama.

23 It goes without saying that we must follow binding precedent
24 in our circuit, as the bankruptcy court felt it must. We do not
25 read Kagenveama as binding precedent with respect to the
26 calculation of expenses under sections 1325(b)(2) and (b)(3).

1 Consequently, we are bound only by the Supreme Court's directive
2 to follow the plain meaning of the words of a statute unless they
3 lead to an absurd result.¹⁰

4 The issue before the Ninth Circuit in Kagenveama did not
5 involve either the determination of what are proper expenses
6 (under section 1325(b)(2)) or the measurement of them (under
7 section (b)(3)). Its only meaningful allusion to expenses to be
8 deducted from income is a passing reference to those two
9 subsections, without any analysis:

10 The revised "disposable income" test uses a formula to
11 determine what expenses are reasonably necessary. See
12 11 U.S.C. § 1325(b)(2)-(3). This approach represents a
13 deliberate departure from the old "disposable income"
14 calculation, which was bound up with the facts and
15 circumstances of the debtor's financial affairs.
16 In re Winokur, 364 B.R. 204, 206 (Bankr. E.D. Va.
2007); In re Farrar-Johnson, 353 B.R. 224, 231
(Bankr. N.D. Ill. 2006) (stating that "[e]liminating
flexibility was the point: the obligations of
[C]hapter 13 debtors would be subject to clear, defined
standards, no longer left to the whim of a judicial
proceeding") (internal quotations omitted).

17 Kagenveama, 541 F.3d at 874 (emphasis added).¹¹

18
19 ¹⁰U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 242
20 (1989) (plain meaning of legislation should be conclusive, except
21 in rare cases in which literal application of statute will
22 produce result demonstrably at odds with intention of its
23 drafters; in such cases, intention of drafters, rather than
24 strict language, controls); Lamie v. U.S. Trustee, 540 U.S. 526,
534 (2004) (when statute's language is plain, sole function of
courts, at least where the disposition required by statute's text
is not absurd, is to enforce statute according to its terms).

25 ¹¹Elsewhere in the opinion, in two footnotes, the
26 subsections are cited:

27 Disposable income is defined as "current monthly income
28 received by the debtor . . . less amounts reasonably
(continued...)

1 If those brief statements even rise to the level of dicta,
2 they are still not binding on us because there is absolutely no
3 analysis of whether sections 1325(b)(2) and (b)(3) operate as
4 one, albeit redundantly, or in sequence, with (b)(3) operative
5 only if (b)(2) triggers it. More specifically, there is no
6 analysis or discussion whether or how the subsections operate to
7 determine deductible expenses.¹² We therefore do not violate the
8 doctrine of stare decisis by applying an interpretation of the
9 statutory scheme that teaches that if an item is not necessary

10
11 ¹¹(...continued)
12 necessary to be expended[.]” 11 U.S.C. § 1325(b)(2). . . .
13 Section 1325(b)(3) requires that if a debtor’s annualized
14 current monthly income is greater than the median family
15 income of similarly-sized households, then “amounts
16 reasonably necessary to be expended” are determined in
17 accordance with § 707(b)(2).

18 Kagenveama, 541 F.3d at 872 n.1.

19 BAPCPA replaced the old definition of what was “reasonably
20 necessary” with a formulaic approach for above-median
21 debtors. 11 U.S.C. § 1325(b)(3). This formula
22 significantly changed the way in which “disposable income”
23 is calculated.

24 Id. at 873 n.2.

25 ¹²V.S. ex rel. A.O. v. Los Gatos-Saratoga Joint Union High
26 School Dist., 484 F.3d 1230, 1232 n.1 (9th Cir. 2007) (“we are
27 not bound by a holding ‘made casually and without analysis, ...
28 uttered in passing without due consideration of the alternatives,
or where it is merely a prelude to another legal issue that
commands the panel’s full attention ...’”), quoting United States
v. Johnson, 256 F.3d 895, 915 (9th Cir. 2001); see also Pakootas
v. Teck Cominco Metals, Ltd., 452 F.3d 1066, 1082 (9th Cir. 2006)
(quoting Johnson, holding that statements made without a
deliberate consideration of the issues presented are not binding
and may be revisited).

1 for a debtor's support or maintenance, a debtor cannot engage in
2 the fiction of pretending to pay for it.

3 It is true that figuring out "projected disposable income"
4 necessarily involves consideration of proper expenses to subtract
5 from "current monthly income". But the court in Kagenveama was
6 struggling with the competing views about how to define
7 "projected" with respect to the "income" half of the equation and
8 was not addressing whether the deducted expenses were necessary
9 for the debtor's support.¹³

10 Thus, while Kagenveama directs us to "look backward" to
11 define the income to be projected throughout the applicable
12 commitment period, it did not address the definition of expenses
13 or the measurement of them. Simply put, the opinion does not
14 direct how courts are to calculate the "disposable" portion of
15 "projected disposable income" (income minus expenses x temporal
16 period of three or five years = amount to be paid to unsecured
17 creditors). For this reason the opinion does not bind us to a
18 rule of how to determine the expenses that must be applied to the
19 income side of the equation, nor does it compel us to impose a
20 symmetry that neglects the reality of the case before us, viz.,
21 that Debtors decided that they did not need their extra vehicle
22 or their two houses.

23
24 ¹³In holding that "projected disposable income" is the same
25 as "disposable income," the Ninth Circuit relied on Anderson v.
26 Satterlee (In re Anderson), 21 F.3d 355, 357 (9th Cir. 1994)
27 (pre-BAPCPA case, determining the debtor's "disposable income"
28 and then projecting that sum into the future for the required
duration of the plan). This is how the court defined the term
"projected" within the phrase "projected disposable income."

1 We apply the words of the statute even though doing so
2 leaves us with a backward looking definition of projected
3 disposable income (because of Kagenveama) and a definition of
4 expenses which (because of the plain wording of the statute)
5 takes into account financial realities (the liens have been
6 stripped as of the petition date) occurring post-petition and
7 incorporated into a debtor's chapter 13 plan.¹⁴

8 Without citing Kagenveama anywhere in its opinion, the
9 Ransom court quoted our Panel's thinking on this very point:

10 However, in making that calculation [what debtors
11 can afford to pay their creditors], what is important
12 is the payments that debtors actually make, not how
13 many cars they own, because the payments that debtors
14 make are what actually affect their ability to make
15 payments to their creditors.

16 Ransom, 571 F 3d. at 1029-30 (emphasis added).

17 D. Two-Part Analysis of Subsections (b)(2) and (b)(3).

18 Under the statute, a debtor may deduct from income those
19 expenses reasonably necessary "for the maintenance or support of
20 the debtor or a dependent of the debtor." 11 U.S.C.

21 ¹⁴While this may be labeled a "forward-looking" approach to
22 expenses, it is actually consideration of "a fixed debt that we
23 know will disappear before the Chapter 13 plan is approved."
24 Turner, 574 F. 3d at 356. As Judge Posner stated on behalf of
25 the Seventh Circuit in Turner:

26 [B]ankruptcy judges must not engage in speculation
27 about the future income or expenses of the Chapter 13
28 debtor. That would unsettle and delay the Chapter 13
process as well as exaggerate how accurately a person's
economic situation in five years can be predicted. But
in this case there is no speculation; all that is at
issue is a fixed debt that we know will disappear
before the Chapter 13 plan is approved.

Id.

1 § 1325(b)(2)(A)(i).¹⁵ Thus, we read sections 1325(b)(2) and
2 (b)(3) in sequence, as follows: if a debtor says an expense is
3 not reasonably necessary for the debtor's and/or dependants'
4 maintenance and support, the inquiry ends at section 1325(b)(2)
5 as there is no amount to determine in section 707(b)(2) via
6 section 1325(b)(3). Stated otherwise, there is no corresponding
7 amount to subtract from the income component to get to what is
8 "disposable" for the above-median income debtor.

9 If the expense is reasonably necessary for the debtor's
10 and/or dependants' maintenance and support, then section
11 1325(b)(3) requires the court to determine the amount in
12 accordance with section 707(b)(2).¹⁶ Sections 1325(b)(2) and
13 (b)(3) require a two-step inquiry.

14 Applied to the facts before us, the Debtors valued their
15 residences such that payments to the stripped lienholders were
16 completely unnecessary to their maintenance and support. Thus
17 they had no payments to make. As in Ransom in a situation having
18 precisely the same economic effect (no lien at all there; no
19 secured debt to pay here), the court's words are instructive:

20 As did our BAP, we decide this issue not on the
21 IRS's manual, but instead on the statutory language,
22 plainly read, which we believe does not allow a debtor
23 to deduct an "ownership cost" (as distinct from an
24 "operating cost") that the debtor does not have. An

24 ¹⁵Subsection 1325(b)(2)(B) adds a deduction from current
25 monthly income for necessary expenses for a debtor engaged in
26 business.

26 ¹⁶This is because section 1325(b)(2) begins "For purposes of
27 this subsection, the term 'disposable income' means"
28 Then subsection (b)(3) begins "Amounts reasonably necessary to be
expended under paragraph (2) shall be determined"

1 "ownership cost" is not an "expense"--either actual or
2 applicable--if it does not exist, period.

3 577 F.3d at 1030 (citation and internal quotation marks omitted).

4 The bankruptcy courts believed that Kagenveama requires a
5 bankruptcy court to apply a "snapshot" petition-date analysis in
6 calculating both prongs of disposable income: expenses and
7 income. In other words, they felt they could not consider post-
8 petition events in determining whether expenses are reasonably
9 necessary for the maintenance and support of debtors and their
10 dependants. We disagree because, as noted, the clear language of
11 section 1325(b)(2) requires the expenses to be reasonably
12 necessary for the support and maintenance of the debtor. In
13 Smith we are holding that items that a debtor has surrendered or
14 intends to surrender are not necessary for his or her support or
15 maintenance. The concepts -- surrender and necessity -- are
16 mutually exclusive of one another.

17 So too, here, the notions that a wholly unsecured debt -- as
18 of the petition date -- must be paid as a secured debt cannot be
19 reconciled. Phantom payments for valueless collateral are not
20 reasonably necessary for a debtor's support and maintenance.

21 Section 1325(b)(2) therefore requires the court to look at
22 the necessity of the expense as determined by the debtor on a
23 real-time, forward-looking basis, while section 1325(b)(3)'s
24 incorporation of section 707(b) requires a static, backward-
25 looking inquiry, since 707(b) itself requires such an analysis.
26 See, e.g., Morse v. Rudler (In re Rudler), 576 F.3d 37 (1st Cir.
27 2009). Here, section 1325(b)(3) does not come into play, so we
28 are not bound by a backwards-looking inquiry.

1 This interpretation is consistent with the plain language of
2 the statute. The Ninth Circuit in Kagenveama acknowledged that
3 when a statute's language is plain, the court should enforce it
4 according to its terms. Kagenveama, 541 F.3d at 872. To the
5 extent that sections 1325(b)(2) and (b)(3) are ambiguous, this
6 interpretation avoids an absurd result and is consistent with the
7 intent of the statute's drafters.

8 Purely historical expenses which will never be paid under or
9 outside of the plan (phantom expenses) cannot be reasonably
10 necessary for a debtor's support or maintenance. To include them
11 in the calculation of disposable income ignores the different
12 functions of subsections (b)(2) and (b)(3).

13 In the cases before us, Debtors have chosen to value certain
14 liens at zero and will not be making any payments under or
15 outside their plans on the mortgages. Yet they are deducting
16 these mortgage payments as expenses "necessary" for their
17 support. Debtors cannot have it both ways. Either the expense
18 is necessary or it no longer exists as a secured obligation for
19 the purposes of their plans. Once Debtors opt to eliminate the
20 secured claims, payment of those claims is no longer an expense
21 that is necessary for their support under section 1325(d)(2).
22 Consequently, there is no need to resort to section 1325(b)(3)
23 and its dispatch to the mechanical formulas of section
24 707(b)(2)(A) & (B).¹⁷

25
26
27 ¹⁷Based on our analysis, we do not need to deal with the
28 merits of an alternate analysis to reach the same result as set
forth by the district court in Thissen v. Johnson, 406 B.R. 888
(E.D. Cal. 2009).

1 **VI. CONCLUSION**

2 For the foregoing reasons, we REVERSE.

3
4 HOLLOWELL, J., dissenting,

5 Under the guise of a plain meaning statutory analysis, the
6 majority holds that § 1325(b)(2) and (b)(3) must be read
7 sequentially, thereby arriving at a "common sense" result which
8 only permits an above median-income debtor to use the means test
9 to calculate expenses after the debtor demonstrates the expense
10 is reasonably necessary. While I sympathize with the majority's
11 desire to achieve a common sense result, I cannot agree with its
12 contorted statutory analysis.

13 Section 1325(b)(3) provides that when a debtor has an above-
14 median income, the reasonably necessary expenses to be deducted
15 from current monthly income ("CMI") "shall be" calculated in
16 accordance with § 707(b)(2)(A) and (B), otherwise known as the
17 means test. 11 U.S.C. § 1325(b)(3) (emphasis added). The word
18 "shall" is mandatory. Therefore, for the above median-income
19 debtor, expenses must be calculated under § 707(b)(2).

20 In re Farrer-Johnson, 353 B.R. 224 (Bankr. N.D. Ill. 2006).

21 Presumably, Congress believed the inclusion of the means
22 test into the calculation of an above median-income debtor's CMI
23 was the mechanism through which debtors would meet BAPCPA's goals
24 of ensuring debtors repay creditors the maximum they can afford
25 and reducing judicial discretion and non-uniformity. See
26 Marianne B. Culhane & Michaela M. White, Catching Can-Pay
27 Debtors: Is the Means Test the Only Way, 13 Am. Bankr. Inst. L.
28 Rev. 665, 677-683 (2005); Maney v. Kagenveama (In re Kagenveama),

1 541 F.3d 868, 875 (9th Cir. 2008); In re Alexander, 344 B.R.
2 742, 747-48 (Bankr. E.D.N.C. 2006) (Congress acted intentionally
3 when it inserted the means test into the calculation of
4 chapter 13 payment plans).

5 The Ninth Circuit, in Kagenveama, declined to "override the
6 definition and process for calculating disposable income under
7 § 1325(b)(2)-(3) as being absurd" even if it produced a less
8 favorable result for unsecured creditors. 541 F.3d 868, 875
9 (9th Cir. 2008). In contrast, the Ninth Circuit recently
10 determined, in Ransom v. MBNA Am. Bank (In re Ransom), 577 F.3d
11 1026 (9th Cir. 2009) that in order to reach a result consistent
12 with BAPCPA's goal of ensuring that debtors repay creditors as
13 much as possible, § 707(b)(2)(A)(ii)(I) could only be interpreted
14 to "apply" expense standards in cases where debtors in fact pay
15 such expenses.

16 Of course, as the majority notes, the somewhat inconsistent
17 holdings of Kagenveama and Ransom are not binding as to the
18 resolution of this case since they did not address the issue
19 presented here on appeal. However, I part with the majority's
20 contention that the Kagenveama court's statutory analysis and
21 discussion about how projected disposable income should be
22 calculated was "made casually and without analysis," and can be
23 dismissed as mere dicta. Instead, I believe the statutory
24 analysis undertaken by the Ninth Circuit in Kagenveama provides
25 important guidance for the interpretation of § 1325(b)(2) and
26 (b)(3).

27 In Kagenveama, the Ninth Circuit was confronted, as we are
28 here, with interpreting a subsection of § 1325(b) that contains

1 an imbedded definition in a following subsection. It did not
2 read the sections sequentially. Rather, the court held that the
3 definition of "disposable income" in § 1325(b)(2) gave meaning to
4 the phrase "projected disposable income" in § 1325(b)(1)(B).
5 541 F.3d at 873. The Kagenveama court refused to "de-couple
6 'disposable income' from the 'projected disposable income'
7 calculation simply to arrive at a more favorable result for
8 unsecured creditors, especially when the plain text and precedent
9 dictate[d] the linkage of the two terms." Id. at 875.

10 I agree with the courts that find the most natural reading
11 of § 1325(b)(3) "commands the application of Section 707(b)(2)(A)
12 and (B) to determine the meaning of the amounts 'reasonably
13 necessary to be expended'" under § 1325(b)(2). In re Burbank,
14 401 B.R. 67, 73 (Bankr. D.R.I. 2009) (citing In re Quigley,
15 391 B.R. 294, 299 (Bankr. N.D. W.Va. 2008)). Because
16 § 1325(b)(3) contains the definition of "amounts reasonably
17 necessary to be expended," it must be read to give meaning to
18 what is to be deducted by an above median-income debtor in order
19 to determine disposable income. As one bankruptcy court
20 correctly analyzed § 1325(b)(2) and (b)(3):

21 As with "disposable income," the term "amounts
22 reasonably necessary to be expended" appears only twice
23 in § 1325; once in § 1325(b)(2) and then in
24 § 1325(b)(3). If the Court were to require an
25 additional requirement that the expense also be
26 necessary for a debtor's "maintenance or support," it
27 would likewise render as surplusage the clear direction
28 in § 1325(b)(3) as to how "amounts reasonably necessary
to be expended" shall be determined.

26 In re Smith, 401 B.R. 469, 474 (Bankr. W.D. Wash. 2008).

27 Another court noted, "§ 1325(b)(3) states that the amounts
28 determined to be reasonably necessary under § 1325(b)(2) shall be

1 determined in accordance with § 707(b)(2)(A) and (B)--period.
2 The term 'reasonably necessary' in § 1325(b)(3) is not
3 superfluous--it is the very term that this section defines. For
4 that reason, . . . courts may [not] conduct a separate
5 'reasonably necessary' analysis beyond § 707(b)(2)." In re Van
6 Bodegom Smith, 383 B.R. 441, 448 (Bankr. E.D. Wis. 2008)
7 (ultimately holding that payments on surrendered collateral are
8 not "scheduled as contractually due" under § 707(b)(2)(A)(iii)(I)
9 and, therefore, cannot be deducted in a debtor's means test
10 calculation).

11 I do not agree that § 1325(b)(2) and (b)(3) should be read
12 sequentially. The statutory analysis put forth by the majority,
13 which reads § 1325(b)(2) and (3) sequentially, essentially adds
14 language to § 1325(b)(3) to read "after it is determined the
15 expense is reasonably necessary, then the amounts reasonably
16 necessary to be expended shall be determined in accordance with
17 § 707(b)(2)."

18 I cannot join my colleagues in an interpretation that upends
19 the statutory inclusion of the means test in chapter 13,
20 reverting back to the pre-BAPCPA judicial discretion as to what
21 expenses of a debtor are reasonably necessary. See Kagenveama,
22 541 F.3d at 874 (deliberate departure from the pre-BAPCPA
23 disposable income calculation was so that debtors would "be
24 subject to clear, defined standards, no longer left to the whim
25 of a judicial proceeding" (citation omitted)). The majority
26 contends the discretion of the bankruptcy court, under its
27 analysis, is only to hold debtors to the consequences of their
28 decisions about what assets they retain or surrender; however,

1 the reality of the majority's interpretation of the statute is
2 that bankruptcy courts will have the discretion to make
3 determinations about what expenses are "reasonably necessary."

4 While I sympathize with the majority's desire for a common-
5 sense solution to the problem created by incorporating the means
6 test into the chapter 13 above median-income debtor's calculation
7 of disposable income, I do not believe it is the role of the
8 judiciary to remedy outcomes that do not comport with our view of
9 common sense. See Id. at 875 ("If the changes imposed by BAPCPA
10 arose from poor policy choices that produced undesirable results,
11 it is up to Congress, not the courts, to amend the statute.").