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(Appellant)

UNITED STATES BANKRUPTCY APPELLATE
PANEL OF THE NINTH CIRCUIT

In re

WARREN W. WIEGAND and
CAMILLE A. WIEGAND,

Debtors,

Bankruptcy Case No. 07-60620 -13

BAP No. MT-07-1361

ROBERT G. DRUMMOND,
Chapter 13 Standing Trustee,

Appellant/Trustee,

v.

WARREN W. WIEGAND and
CAMILLE A. WIEGAND,

Appellees/Debtors,

ON APPEAL FROM THE UNITED STATES BANKRUPTCY
COURT FOR THE DISTRICT OF MONTANA

BRIEF OF APPELLANT

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ROBERT G. DRUMMOND,
Chapter 13 Standing Trustee,

Appellant/Trustee,

v.

WARREN W. WIEGAND and
CAMILLE A. WIEGAND,

Appellees/Debtors,

CERTIFICATION REQUIRED BY BAP RULE 8010(a)-1(b)

The undersigned, Appellant, certifies that the following parties have an interest in the outcome of this appeal. These representations are made to enable judges of the Panel to evaluate possible disqualification or recusal:

Appellees/Debtors: Warren and Camille Wiegand

Attorney for Appellees/Debtors: D. Randy Winner

Appellant/Trustee: Robert G. Drummond

DATED this _____ day of January, 2008.

Robert G. Drummond
Appellant/Trustee

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I.

BASIS OF APPELLATE JURISDICTION

This is an appeal of an Order from the United States Bankruptcy Court for the District of Montana. This court has jurisdiction over this matter pursuant to 28 U.S.C. § 158(b)(1).

II.

STATEMENT OF ISSUE PRESENTED

Did the United States Bankruptcy Court for the District of Montana err in overruling the Trustee's Objection to Confirmation by holding that business expenses may be deducted from gross business income to calculate current monthly income as defined by 11 U.S.C. § 101(10A)?

III.

STANDARD OF REVIEW

This court reviews issues of law, including interpretation of the Bankruptcy Code and Rules of Procedure, *de novo*, and reviews findings of fact for clear error. *Bunyin v. United States (In re Bunyin)*, 354 F.3d 1149, 1150 (9th Cir. 2004); *Schook v. CBIC (In re Schook)*, 278 B.R. 815, 820 (9th Cir. B.A.P. 2002).

IV.

STATEMENT OF THE CASE

1. The Debtors, Warren W. Wiegand and Camille A. Wiegand, filed their Chapter 13 bankruptcy case in the United States Bankruptcy Court for the District of Montana on May 31, 2007 (Excerpt No. 1). The Debtors filed their schedules, Statement of Affairs, and Summary of Schedules on June 15, 2007 (Excerpt No. 2). Contemporaneously with the schedules, the Debtors filed Form 22C (Excerpt No. 3).

2. The Debtors filed a Chapter 13 Plan dated June 19, 2007 (Excerpt. No. 5). The Debtors' Plan required that the Debtors pay \$298.00 per month for a period of thirty-six months.

3. The Debtors filed a Notice of Amendment to Form 22C on August 24, 2007 (Excerpt No. 9). Contemporaneously, the Debtors filed Amended Schedules I and J (Excerpt No. 10). On the same day, the Debtors filed an exhibit detailing the Debtors' business income and expenses (Excerpt No. 11).

4. The Trustee objected to confirmation of the Debtors' June 19, 2007 Plan, alleging that the Debtors' thirty-six month Plan was incorrectly calculated. The Trustee alleged that the Debtors erroneously deducted ordinary and necessary business expenses on Line 3b of Form 22C which incorrectly reduced the Debtors' annualized current monthly income to make them "below median" income Debtors (Excerpt No. 6).

5. A hearing was held on confirmation of the Debtors' Chapter 13 Plan on September 21, 2007. Prior to the hearing, the Debtors filed a Memorandum of Law, alleging that they had properly calculated current monthly income as defined by the Internal Revenue Code (Excerpt No. 12).

6. The bankruptcy court entered an Order denying confirmation of the Debtors' Chapter 13 Plan on other grounds. The court overruled the Trustee's disposable income objection in its Order (Excerpt No. 13).

7. The court further clarified its Order overruling the Trustee's objection by Memorandum of Decision, dated October 9, 2007 (Excerpt No. 15).

8. The Trustee filed a protective objection to confirmation of the Debtors' Plan on the same grounds as the previous objection (Excerpt No. 16). The court overruled the protective objection (Excerpt No. 19) and confirmed the Plan (Excerpt No. 20).

V.

ARGUMENT

A. **The Bankruptcy Court Erred by Holding that Business Expenses are Deducted from Income in Computing Current Monthly Income.**

Under the old Chapter XIII of the Bankruptcy Act, debtors were not required to commit a specific portion of their income to make payments under a Chapter 13 Plan. Ch. 541, 30 Stat. 544 (repealed 1978). The same was the case under the Bankruptcy Reform Act of 1978. Pub. L. No. 95-598, 92 Stat. 2549 (1978). Consumer reorganization cases under the 1978 Act did not require a debtor to pay general unsecured creditors any more than they would have received under liquidation in a Chapter 7. 11 U.S.C. § 1325(a)(4) (1978).

The 1984 Amendments to the Code added the disposable income requirement as a condition for confirmation of a debtor's Chapter 13 Plan. That section provided:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that *all of the debtor's projected disposable income* to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325(b)(1) (1984) (emphasis added).

Thus, the 1984 Amendment added the idea of “projected disposable income” as a requirement for confirmation of the Plan. The 1984 Amendment defined disposable income as:

[I]ncome which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor . . .; and

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

11 U.S.C. § 1325(b)(2) (1984).

Thus, disposable income was defined as income, less expenses for the maintenance and support of the debtor and expenditures necessary for the continuation, preservation, and operation of the debtor's business.

Changes under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) allowed the deduction of business expenses from “current monthly income” to calculate “disposable income.” That Act amended 11 U.S.C. § 1325(b) to provide in pertinent part:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

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

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

....

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

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

....

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

11 U.S.C. § 1325(b).

Thus, as amended under BAPCPA, the term disposable income means current monthly income less amounts reasonably necessary to be expended for:

(A) Maintenance or support of the debtor; or

(B) If the debtor is engaged in business, for the payment of expenditures

necessary for the continuation, preservation, and operation of such business.

BAPCPA also added the newly defined "current monthly income" which appears at 11 U.S.C. § 101(10A) which provides in pertinent part:

(10A) The term "current monthly income"—

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521 (a)(1)(B)(ii); or

....

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

11 U.S.C. § 101(10A).

Thus, current monthly income means average monthly income for the six month period prior to the filing of the bankruptcy case “without regard to whether such income is taxable income.” Disposable income is distinguished from current monthly income. The statute specifically provides that disposable income is calculated by determining current monthly income (income from all sources) and then subtracting reasonable and necessary expenses and expenses necessary for the continuation, preservation, and operation of the debtor’s business. This is consistent with practice under prior law under which disposable income would be calculated by listing business income on Schedule I and deducting business expenses on Schedule J.

If the debtor has “below median” current monthly income, the applicable commitment period is 3 years. 11 U.S.C. § 1325(b)(4) provides in pertinent part:

(4) For purposes of this subsection, the "applicable commitment period"—

(A) subject to subparagraph (B), shall be—

(i) 3 years; or

(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—

....

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

....

11 U.S.C. § 1325(b)(4).

If the debtor has “above median” current monthly income, the applicable commitment period is 5 years.

The bankruptcy court erred because it did not correctly distinguish current monthly income from disposable income. It determined that the Debtors correctly deducted business expenses to calculate current monthly income, instead of requiring that the Debtors deduct their expenses from current monthly income. As a result, the court confirmed a Plan with a 3 year applicable commitment period.

This court should hold that Congress specifically allowed the deduction of business expenses from current monthly income under 11 U.S.C. § 1325(b)(2)(B) to calculate disposable income. Where Congress includes particular language in one section of a statute, but omits it from another section of the same act, it is generally assumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion. *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 537, 114 S.Ct. 1757, 1761 (1994). The legal maxim *expressio unius est exclusio alterius* - the expression of one thing is the exclusion of another - should guide this court. *In re Century Cleaning Corp.*, 195 F.3d 1053, 1057 (9th Cir. 1999). This court should apply that maxim and determine that the business expense deductions are purposefully excluded from the calculation of current monthly income and purposefully allowed as a deduction from current monthly income. The resulting current monthly income determines the applicable commitment period under 11 U.S.C. § 1325(b)(4).

By allowing the deduction of business expenses in calculating current monthly income, the court rendered 11 U.S.C. § 1325(b)(2)(B) superfluous. If business expenses are deducted to calculate current monthly income, then § 1325(b)(2)(B) would allow them to be deducted a

second time. Such an interpretation should be frowned upon. *Rake v. Wade*, 508 U.S. 464, 471, 113 S.Ct. 2187, 2192 (1993).

B. Form 22C Incorrectly Requires Deduction of Business Expenses in Calculating Current Monthly Income.

Form 22C incorrectly allows the Debtors to deduct their business expenses in calculating their current monthly income in Part 1 of the form. This court should recognize that Form 22C should allow debtors to deduct their business expenses as “other necessary expenses” in Part 4 of the form. This court should adopt the reasoning of the bankruptcy court in *In re Arnold*, 376 B.R. 652, 2007 WL 3035586 (Bankr. M.D. Tenn. 2007). The *Arnold* court correctly recognized that “unless official Form 22C is changed as it should be, below-median debtors should subtract the business deductions allowed under 11 U.S.C. § 1325(b)(2) listed on Schedule J from their current monthly income.” (Citing *In re Upton*, 363 B.R. 528, 532 (Bankr. S.D. Ohio 2007); *In re Risher*, 344 B.R. 833, 835 (Bankr. W.D. Ky. 2006); *In re McGuire*, 342 B.R. 608, 611 (Bankr. W.D. Mo. 2006)). *Id.* at 654, 655. That court determined that “official Form 22C, Part 1, Line 3, which permits the deduction of business expenses to determine ‘current income’ is simply wrong.” *Arnold* at 654. This court should adopt the reasoning of the *Arnold* court and determine that Form 22C incorrectly allows the deduction of business expenditures in the calculation of current monthly income.

C. The Bankruptcy Court Erred by Holding that Current Monthly Income is Calculated in the Same Fashion as Required by the Tax Code.

In determining that current monthly income is determined by looking to the Internal Revenue Code in Title 26, the bankruptcy court referenced an article written by the Honorable Eugene R. Wedoff and his article “*Means Testing in the New Section 707(b)*,” Am.Bankr.L.J., Vol 79, Issue 2, p.231 (2005). Judge Wedoff stated that, because the definition of current monthly income distinguishes between “income from all sources” and “taxable income,” it reflects the distinction in the Internal Revenue Code between “gross income” and “taxable income.” Judge Wedoff stated that the Internal Revenue Code should provide “general guidance” for determining the income used in § 101(10A). Based upon this, the court below

erroneously determined that the Internal Revenue Code would give guidance for the calculation of current monthly income instead of guidance for the calculation of disposable income.

The authority cited by the court does not support the court's holding. Even Judge Wedoff suggested in his article that ongoing business expenses should be deducted from current monthly income as "other necessary expenses" under § 707(b)(2)(B)(ii)(I). He stated:

First, it is not entirely clear what expense items can be deducted as "other necessary expenses" - only those that are within a non-debt category specified in the IRM lists, or any non-debt expense that meets the IRM's "necessary expense test," regardless of whether it is included within one of the listed categories. Certainly, expenses in the categories already addressed in the National and Local Standards cannot qualify as "other" necessary expenses. Expenses for food, clothing, household supplies, personal care, housing, home utilities and transportation are limited by the amounts specified in the earlier standards. On the other hand, all ongoing business expenses - such as cost of goods sold, salaries to employees, and business insurance (in the words of the IRM test, expenses necessary "for the production of income") - should be deductible regardless of their specific inclusion in the "other necessary" lists. The necessary costs of operating a business must be paid if the business is going to continue to produce income.

Wedoff at 262.

The bankruptcy court's interpretation is contrary to the phrase "without regard to whether it is taxable income" incorporated in the definition of current monthly income appearing at 11 U.S.C. § 101(10A). The phrase "without regard to whether it is taxable income" indicates Congress' intent to distinguish current monthly income from taxable income. The calculation of income under the Internal Revenue Code is contrary to the plain language of the statute. The statute defining current monthly income does not reference deductions.

The error in the bankruptcy court's reasoning can easily be seen by referencing the Debtors' Amended Form 22C (Excerpt No. 9). The Debtors listed ordinary and necessary business expenses on Line 3b totaling \$5,175.00. The Debtors detailed the deductions included in this total on the attachment to Schedule J. The Debtors' schedule of business income and expenses (Excerpt No. 11) clearly demonstrates that the Debtors included payments on secured debts to Stockman Bank for their Peterbilt truck and payments to Anchor Credit for their trailers in the business deduction. The deduction for secured payments, however, is clearly required by Form 22C, Line 47. This deduction is allowed by 11 U.S.C. § 707(b)(2)(A)(iii) and is a category

that is specifically allowed as a reduction from current monthly income. Allowing the Debtors to deduct the payments as a business expenditure on Line 3b of Form 22C would actually give the Debtors double credit for the deduction on the truck and the trailers.

The writers of the form included deductions for domestic support obligations (11 U.S.C. § 1325 (b)(2)(A)(i)) in Part 4, Line 33, of the form as a deduction from current monthly income. The Debtors are also allowed charitable contributions (11 U.S.C. § 1325(b)(2)(A)(ii)) as a deduction in Part 4, Line 45. It is internally inconsistent in Form 22C to have expenditures for the continuation, preservation, and operation of the business (11 U.S.C. § 1325(b)(2)(B)) deducted in Part 1, Line 3(b), of the form in calculating current monthly income instead of a deduction from current monthly income and listed in Part 4 of the form along with the other deductions referenced in 11 U.S.C. § 1325(b)(2).

VI.

CONCLUSION

This court should determine that the bankruptcy court erred by holding that expenses incurred for the continuation, preservation, and operation of the business are deducted in arriving at current monthly income. This court should hold that business expenses are deducted from current monthly income to calculate disposable income. This court should determine that the bankruptcy court erred and that the Debtors' Plan fails to meet the disposable income requirement because of the Debtors' failure to propose a Plan that requires payments for the appropriate applicable commitment period as required by 11 U.S.C. § 1325(b)(4).

Finally, this court should determine that Form 22C incorrectly requires the Debtors to deduct business expenses from income in Part 1. This court should hold that business expenses are appropriately deducted in Part 4 of Form 22C.

DATED this _____ day of January, 2008.

Chapter 13 Standing Trustee
P. O. Box 1829
Great Falls, Montana 59403-1829

By _____
Trustee/Appellant

CERTIFICATE OF MAILING

I, the undersigned, do hereby certify under penalty of perjury that a copy of the within and foregoing BRIEF OF APPELLANT was mailed on the _____ day of January, 2008, at Great Falls, Montana, and directed to the following:

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Robert G. Drummond

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Appellees/Debtors,

CERTIFICATION REQUIRED BY BAP RULE 8010(a)-1(c)

The undersigned, Appellant, certifies that the following are known related cases and appeals:

None.

DATED this _____ day of January, 2008.

Robert G. Drummond
Appellant/Trustee