THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: August 19, 2014

G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In the matter:

Lonnie J. Carr, and Terry A. Jones-Carr,	Case No. 13-34450-GMH
Debtors.	Chapter 13

DECISION AND ORDER ON TRUSTEE'S OBJECTION TO PLAN CONFIRMATION

The trustee objects to confirmation of Lonnie and Terry Carr's proposed chapter 13 plan because the Carrs' plan does not commit to unsecured creditors the entire amount the Carrs are paying toward a 401(k) loan once the loan is paid off. The Carrs contend that they were making pre-bankruptcy contributions to the 401(k) plan but could not continue those contributions until they repaid the loan. They argue that after the loan is repaid they should only have to commit to the plan the amount by which the loan repayment exceeds their previous 401(k) plan contributions. Although disagreeing on many of the facts, the parties have presented a legal question: Does the Carrs' projected disposable income, which 11 U.S.C. §1325(b)(1)(B) requires the plan to apply to pay unsecured creditors, include the full amount the Carrs are currently paying toward their 401(k) loan once the loan is repaid, even if they intend to resume 401(k) contributions once the loan is repaid and would have been making those contributions absent the loan payments?

I

The following facts are not in dispute. The debtors, who are below-median, filed this chapter 13 case on November 4, 2013. Their schedules listed a deduction from income of $353.25 per month for a 401(k) loan repayment and net monthly income of $406.29.

In February 2014, the debtors proposed a pre-confirmation amended plan that provides for plan payments of $94 per week, or $407 per month, through November 2014, when the debtors' 401(k) loan will be fully repaid, to be followed by weekly payments of $121, or $524 per month. Because adding the $353 monthly loan repayment amount to the debtors' proposed monthly plan payment of $407 significantly exceeds $524, the amended plan's $524 monthly payment presumably reflects the difference between the $353 monthly payroll deduction for Mr. Carr's loan repayment and his expected 401(k) contribution deduction. The Carrs say this contribution deduction will be withheld from Mr. Carr's paycheck beginning on November 12. The proposed plan estimates that no payment will be made to unsecured creditors.

The trustee objects. He contends that, as a matter of law, the Carrs cannot take 401(k) plan contributions into account when calculating projected disposable income because they were not contributing to their 401(k) plan in the six months before filing their chapter 13 case. According to the trustee, once the Carrs repay their loan, the amount they were committing to loan repayment necessarily becomes disposable income within the meaning of §1325(b) and, therefore, must be devoted to the plan for the benefit of unsecured creditors.

II

Section 1325(b)(1)(B) requires that when the trustee or an unsecured creditor objects to plan confirmation, the plan must provide that "all of the debtor's projected disposable income to be received in the applicable commitment period . . . be applied to make payments to unsecured creditors." 11 U.S.C. §1325(b)(1)(B). The Code does not define "projected disposable income," but "disposable income" is defined as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . . for the maintenance and support of the debtor", charitable contributions, and business expenses. 11 U.S.C. §1325(b)(2). "Current monthly income" is defined: It means (excluding some irrelevant details and an inapplicable timing caveat) "average monthly income from all sources that the debtor receives . . . without regard to whether that income is taxable income, derived during the 6-month period ending on" the last day of the month before the debtor filed the case. 11 U.S.C. §101(10A). So, "current monthly income"—which is something of a misnomer—requires a backward-looking calculation.

"Income" for purposes of "current monthly income" and thus for purposes of "disposable income" is broad reaching but not all encompassing. For example, §101(10A) excludes from current monthly income benefits received under the Social Security Act. *Id.* And Congress has exempted from disposable income contributions to qualified retirement plans and amounts committed to repay loans drawn on those plans. See 11 U.S.C. §§541(b)(7), 1322(f).

It is undisputed that the Carrs' 401(k) plan is a qualified retirement plan and that the amounts they are contributing to repaying their 401(k) loan "do not constitute 'disposable income' under section 1325." §1322(f). Similarly, it is uncontested that the Carrs' current disposable income—i.e., their current monthly income less the $352 per month payment toward their 401(k) loan and reasonable expenses during the six months before filing their petition—is $0.

Where the trustee and the Carrs disagree is on how to calculate "projected disposable income." As mentioned above, the Code does not define "projected disposable income." *Hamilton v. Lanning*, however, provides guidance. 560 U.S. 505, 524 (2010).

Lanning explains that in most circumstances "projected disposable income" is simply the product of multiplying a debtor's disposable income by the number of months in her proposed plan's commitment period. But this multiplication method of projecting disposable income sometimes requires adjustment, as in the circumstances that faced Lanning. In the six months before Lanning filed for bankruptcy she received a one-time buyout from a former employer, making her income during the six-month look-back period unrepresentative of either her income at the time of confirmation or, likely, her income during the plan's commitment period. Lanning proposed a plan premised on a calculation of projected disposable income that took account of the prepetition income anomaly and failed to repay general unsecured creditors in full. The trustee objected to the plan contending that projected disposable income should be derived mechanically by multiplying disposable income by the number of months in the plan regardless of the debtor's particular circumstances.

The Supreme Court rejected the trustee's proposed rigid adherence to the mechanical approach. It held that "*projected* disposable income" must be forward looking; thus, the Code allows a bankruptcy court calculating projected disposable income to "account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." 505 U.S. at 524. An accounting made for known or virtually certain changes in the debtor's income and expenses that has occurred before confirmation or will occur during the commitment period has become known as a "*Lanning* adjustment."

The parties agree that because the Carrs will fully repay their 401(k) loan during the commitment period, a *Lanning* adjustment is necessary to calculate projected disposable income accurately. Section 1322(f) provides that amounts required to pay 401(k) loans "shall not constitute 'disposable income' under section 1325." §1322(f). When the Carrs repay the loan, which is virtually certain to occur in a few months, §1322(f) will no longer shelter the income the Carrs devote to monthly loan payments.

But the parties disagree over the *Lanning* adjustment's amount. The trustee contends that projected disposable income should be adjusted by $353.25, which is the monthly amount the Carrs pay on their loan, times the number of post-repayment months in the commitment period. The Carrs argue that the adjustment should be less because, absent the loan repayment, they would continue a historic practice of contributing six percent of Mr. Carr's income to the 401(k) plan, and such contributions do not constitute disposable income for purposes of §1325(b)(2). 11 U.S.C. §541(b)(7)(A) & (B) (amounts withheld by an employer from employee wages or received by an employer from an employee for contribution to a qualified benefit plan "shall not constitute disposable income as defined in section 1325(b)(2)"). According to the Carrs, they “were making weekly contributions at the rate of six percent of Mr. Carr’s gross pay to [his] 401(k) plan. [They] stopped making contributions when they were informed they could no longer make contributions to their retirement plan at the same time they were repaying their 401(k) loan.” Doc. 36, 1. In support of this assertion the Carrs cite 26 CFR 1.401(k)-1(d)(3)(iv)(E)(2).

The CFR section on which the Carrs rely is unavailing. It simply speaks to when a hardship distribution is deemed necessary to satisfy an immediate and heavy financial need: “A distribution is deemed necessary to satisfy an immediate and heavy financial need of an employee if . . . the employee is prohibited, under the terms of the plan or an otherwise legally enforceable agreement, from making elective contributions and employee contributions to the plan and all other plans maintained by the employer for at least 6 months after receipt of the hardship distribution.” 26 CFR 1.401(k)-1(d)(3)(iv)(E)(2). The CFR section does not, as the Carrs suggest, prohibit an employee from making plan contributions while repaying a loan. The terms of the plan itself presumptively govern when a plan participant can make contributions. And the Carrs have neither identified the plan terms under which they were allowed to borrow from the plan nor any law, regulation, or legally enforceable agreement that might restrict their ability to contribute to the plan until the loan is repaid. Their brief simply declares—with no offer of support other than the CFR cite—that they have been legally prohibited from making contributions since they took out the loan and that they can resume contributions when the loan is repaid.

While contesting the Carrs’ description of the factual circumstances surrounding their contributions and loan repayment, the trustee principally responds that the Carrs’ ability to resume making 401(k) payments in the future is irrelevant to calculating their projected disposable income under §1325(b). He principally relies on *Burden v. Seafort & Schuler* (*In re Seafort & Schuler*), 437 B.R. 204 (B.A.P. 6th Cir. 2010), and two decisions from this district that follow *Seafort*: *In re Noll*, 2010 WL 5336916 (Bankr. E.D. Wis. Dec. 21, 2010); and *In re Lippe*, an oral ruling available at http://www.wieb.uscourts.gov/opinions/opinions/search/1/page:2 (last visited August 18, 2014).

The *Seafort* case is similar to the Carrs' case. The debtors were eligible participants in their employers' 401(k) plans. At the time they filed their petitions, however, they were not contributing to those plans; instead, each was repaying a 401(k) loan. The debtors were due to repay their loans during their chapter 13 plan's commitment period, and once they repaid the loans, the debtors intended to continue contributing to their 401(k) plans in the same amount as the loan repayments. The debtors argued that the loan repayment should have no effect on projected disposable income because their contributions should be similarly excluded from the projected disposable income calculus based on text the Bankruptcy Abuse Prevention and Consumer Protection Act added to §541(b)(7), namely, "that such amount [contributions to qualified employer retirement plans] . . . shall not constitute disposable income as defined in section 1325(b)(2)". Both the Sixth Circuit Bankruptcy Appellate Panel and the Sixth Circuit rejected the debtors' argument.

The Bankruptcy Appellate Panel held that because §541(b) excludes certain property from the estate, §541(b)(7)'s text can operate only as of the filing of the petition, which is when the estate is created, as directed by §541(a). Based on this, the lack of a similar exclusion from §1306's definition of property of the estate (which in part incorporates §541), and policy concerns, the panel held that §541(b)(7) "does not exclude income which becomes available post-petition in order to start making contributions to a 401(k) plan". 437 B.R. at 209. So, reasoned the panel, that income must be included in projected disposable income and cannot be used to start making payments to a 401(k) plan. *Id*. at 210.

The Sixth Circuit, in a decision to which the trustee here makes no mention, affirmed. 669 F.3d 662 (6th Cir. 2012). The Sixth Circuit first reasoned that future voluntary 401(k) contributions cannot reduce disposable income because Congress didn't address the issue in chapter 13:

> The easy inference is that Congress did not intend to treat voluntary 401(k) contributions like 401(k) loan repayments, because it did not similarly exclude them from "disposable income" within Chapter 13 itself. *See* § 1322(f) (stating that "any amounts required to repay such loan shall not constitute 'disposable income' under section 1325").

Id. at 672. The Sixth Circuit found further support for its conclusion in the fact that Congress didn't provide that 401(k) contributions were a reasonable expense: "Congress also does not consider voluntary contributions as 'reasonable and necessary expense[s]' deductible from 'disposable income,' *see* § 1325(b)(3), because it did not list them in § 707(b)(2)(A) & (B)." *Id.* And, like the Bankruptcy Appellate Panel, the Sixth Circuit concluded that the "most natural reading of section 541(b)(7) is that it excludes from property of the estate only those contributions made before the petition date." *Id.*

As the Carrs point out, other courts have disagreed with *Seafort*'s narrow reading of §541(b)(7)'s direction that a debtor's contributions to retirement plans shall not constitute disposable income. See, e.g., *In re Drapeau*, 485 B.R. 29 (Bankr. D. Mass. 2013); see also *In re Melander*, 506 B.R. 855, 867 (Bankr. D. Minn. 2014) (collecting cases); *Seafort*, 437 B.R. at 217 (Shea-Stonum, J., dissenting). But that disagreement is not one that must be resolved to answer the question presented here.

The Carrs concede that they are not now making 401(k) contributions; thus, the crux of the current dispute is over the calculation of *projected* disposable income. Again, projected disposable income equals disposable income times the number of months in the commitment period, unless "changes in the debtor's income or expenses . . . are known or virtually certain at the time of confirmation." *Lanning*, 560 U.S. at 524.

As an initial matter, the parties agree that projected disposal income must account for the fact that the Carrs will repay their 401(k) loan during the plan term. Section 1322(f) excludes the 401(k) loan repayments, thus reducing the Carrs' disposable income. The loan is due to be repaid soon; its repayment will result in a change in the Carrs' disposable income that is "known or virtually certain" at the time of confirmation. See *Nowlin v. Peake* (*In re Nowlin*), 576 F.3d 258, 266 (5th Cir. 2009); *McCarty v. Lasowski* (*In re Lasowski*), 575 F.3d 815, 819 (8th Cir. 2009).

The Carrs concede the need for a *Lanning* adjustment to account for the upcoming repayment of the loan. Again, they argue that to calculate the amount of that adjustment properly one should take into account the fact that once they repay their loan, they will return to their prepetition 401(k) contribution amount. They cast this argument in two ways. First, they argue that §541(b)(7) excludes their 401(k) contributions from disposable income once they resume making those contributions. Second, they argue that their 401(k) contributions are "amounts reasonably necessary to be expended . . . for the[ir] maintenance or support", thus reducing their disposable income under §1325(b)(2).

The Carrs have not demonstrated under either theory that their projected disposable income should take into account future 401(k) contributions. They have not shown, for example, that under the terms of the 401(k) plan and any participation election made before filing their petition, it is known or virtually certain that once they repay their loan, Mr. Carr's employer will once again deduct contribution amounts from his wages. And, even presuming that §541(b)(7)'s exclusion can affect the calculation of projected disposable income when the debtor is due to resume contributions in the commitment period, the exclusion of future 401(k) contributions when none were made in the look-back period must satisfy the *Lanning* test—the future contributions must be known or virtually certain at the time of confirmation. The Carrs' mere expression of an intent to begin making contributions at some point in the future is an insufficient basis on which to find that those contributions are known or virtually certain to occur.

The Carrs' argument that projected disposable income should account for 401(k) contributions because those contributions are a reasonable expense fails for the same reason. The Carrs are below-median debtors. So, whether an amount they spend on their maintenance and support is reasonable must be determined based on the totality of the facts, rather than by looking to IRS standards, as provided in 11 U.S.C. §707(b)(2). See 11 U.S.C. §1325(b)(3). See also *New York City Employees' Retirement Sys. v. Sapir (In re Taylor)*, 243 F.3d 124,129 (2d Cir. 2001); *In re Bruce*, 484 B.R. 387, 389-90 (Bankr. W.D. Wash. 2012); *In re Woodman*, 287 B.R. 589, 593 (Bankr. D. Me. 2003); Cf. *Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 422-32 (1985) (construing "reasonably necessary" in the Age Discrimination in Employment Act to require resolution by a finder of fact on a case-by-case basis).* But the Carrs do not contend that they are currently making 401(k)

* The IRS standards don't allow 401(k) plan contributions as reasonable expenses. See http://www.irs.gov/Individuals/Collection-Financial-Standards; see also *Seafort*, 669 F.3d at 670-71. In *Seafort* the Sixth Circuit reasoned that voluntary 401(k) contributions did not play a role in determining disposable income because they are not an expense considered in the means test provided for in 11 U.S.C. §707(b): "Congress also does not consider voluntary contributions as 'reasonable and necessary expense[s]' deductible from 'disposable income,' *see* §1325(b)(3), because it did not list them in §707(b)(2)(A) & (B)." 669 F.3d at 672. Congress, however, differentiated between above- and below-median debtors for purposes of determining whether expense amounts are reasonably necessary to their maintenance and support, limiting only above-median debtors to those amounts that are

contributions; thus, they have no contributions—reasonable or not—that could be factored into the calculation of disposable income at the time of plan confirmation. They instead ask the court to take account of planned future contributions in determining projected disposable income. But, again, nothing the Carrs have submitted establishes that those contributions are known or virtually certain to occur on some future date within the commitment period.

III

For the foregoing reasons,

IT IS ORDERED that the trustee's objection to confirmation of the debtors' proposed chapter 13 plan is SUSTAINED.

IT IS FURTHER ORDERED that the debtors have 14 days to propose a further modified chapter 13 plan providing for the devotion of all disposable income for a period of no less than 36 months.

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allowed by the IRS guidelines as provided in §707(b)(2). See §1325(b)(3).