



Entered on Docket  
May 19, 2008

Hon. Mike K. Nakagawa  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re )

ARDYTH A. POWER and )  
GEORGE E. POWER, )

Debtors. )

Case No. BK-07-51729-MKN

Chapter 13

Date: March 7, 2008  
Time: 2:00 p.m.

**MEMORANDUM DECISION ON CONFIRMATION  
OF DEBTORS' PROPOSED CHAPTER 13 PLAN**

A plan confirmation hearing was held on March 7, 2008. After presentation of oral arguments, the matter was taken under submission.

**BACKGROUND<sup>1</sup>**

Ardyth A. Power and George E. Power ("Debtors") filed a voluntary Chapter 13 petition on December 19, 2007, along with their Schedules of Assets and Liabilities, and a Statement of Financial Affairs. (Dkt# 1) Schedule "I" shows gross monthly income for Mrs. Power of \$3,285.45 and \$2,781.00 for Mr. Power. Schedule "I" shows the source of Mr. Power's income as being "VA. Disability." Schedule "I" also indicates that the Debtors have two minor children, ages 11 and 13. Schedule "J" shows average monthly expenses of \$4,775.00. Line

<sup>1</sup> In the text and footnotes of this Memorandum Decision, all references to "Section" shall be to provisions of the Bankruptcy Code appearing in Title 11 of the United States Code unless otherwise indicated. All references to "Rule" shall be to provisions of the Federal Rules of Bankruptcy Procedure unless otherwise indicated.

1 20(c) of Schedule “J” shows the Debtors net monthly income, i.e., the average gross monthly  
2 income on Schedule “I” minus the average monthly expenses on Schedule “J”, of \$466.06.

3 Debtors’ bankruptcy documents also included their Form 22C “Chapter 13 Statement of  
4 Current Monthly Income and Calculation of Commitment Period and Disposable Income”  
5 which showed gross monthly income for Mrs. Power as \$3,581.90 and zero (\$0.00) for Mr.  
6 Power. Line 8 of their Form 22C shows Mr. Power as having \$2,781.00 in “unemployment  
7 compensation claimed to be a benefit under the Social Security Act.” At the top of Form 22C,  
8 Debtors checked the boxes indicating that “The applicable commitment period is 3 years” and  
9 that “Disposable income is not determined under § 1325(b)(3).” Because the Debtors concluded  
10 that their annualized current monthly income on line 21 was less than the applicable median  
11 income on line 22, they followed the instruction on line 23 of Form 22C, and did not complete  
12 the remainder of the form<sup>2</sup>, including Parts IV, V and VI.<sup>3</sup>

13 On December 20, 2007, the Debtors filed a Chapter 13 plan that proposes payments over  
14 a 36 month period at \$465 per month. (Dkt# 14) On February 20, 2008, the Trustee filed an  
15 objection (“the Objection”)(Dkt# 23) asserting that the plan failed to provide for all disposable  
16 income to be paid unsecured creditors as required by Sections 1325(b)(1)(B) and 1325(b)(2).  
17 Specifically, the Trustee argued that the Debtor must include Mr. Power’s benefits from the  
18 Veterans Administration (“VA Benefits”) in the calculation of current monthly income.

19 On March 3, 2008, the Debtors filed a response (“Response”) asserting that the VA  
20 Benefits are excluded from the definition of current monthly income under Section 101(10A)(B)  
21 because the benefits are paid to Mr. Power on account of his status as a victim of war crimes.  
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23 <sup>2</sup> Parts IV, V and VI of Form 22C address the calculation of a Chapter 13 debtor’s  
24 allowable expenses to reach the amount of disposable income available for distribution to  
25 creditors, plus additional expense claims. Part VII of Form 22C directs the debtor to verify the  
information under penalty of perjury.

26 <sup>3</sup> On the same day as their bankruptcy petition, Debtors filed another copy of their Form  
27 22C (Dkt#10) that is missing the signature page.

1 (Dkt# 27) On March 6, 2008, the Trustee filed a reply (“Trustee’s Reply”) arguing that the VA  
2 Benefits are paid to Mr. Power on account of his diagnosis for post-traumatic stress disorder and  
3 not on account of a determination that he is the victim of a war crime. (Dkt# 28) According to  
4 the Trustee, inclusion of the VA Benefits would have two effects: (1) Debtors’ income would be  
5 higher than the median and require their plan to include payments over 60 months rather than 36  
6 months, and (2) their monthly payments would be \$782 rather than \$465 as proposed under the  
7 plan.

8 A hearing on confirmation of Debtors’ proposed plan was conducted on March 7, 2008.  
9 Debtors appeared along with their legal counsel and the Trustee appeared as well. No testimony  
10 was presented and the matter was taken under submission after oral argument based solely on the  
11 written record.

#### 12 APPLICABLE LEGAL STANDARDS ON PLAN CONFIRMATION

13 For a bankruptcy court to confirm a Chapter 13 plan, “each of the requirements of section  
14 1325 must be present and the debtor has the burden of proving that each element has been met.”  
15 In re Barnes, 32 F.3d 405, 407 (9th Cir. 1994). When there is a challenge to the adequacy of the  
16 debtor’s plan payments, the objecting party has “...at a minimum, ‘the initial burden of producing  
17 satisfactory evidence to support the contention that the debtor is not applying all of his  
18 disposable income’ to the plan payments.” In re Heath, 182 B.R. 557, 560-61 (B.A.P. 9th Cir.  
19 1995). Once satisfactory evidence has been provided, the burden of proof shifts to the debtor to  
20 prove that all disposable income is being applied to the plan payments. Id.

#### 21 DISCUSSION

22 Debtors’ response to the Objection is accompanied by Mr. Power’s affidavit explaining  
23 that he spent two months in enemy captivity during the Vietnam War. While in captivity, he  
24 attests that he was tortured by his captors before he was able to escape.<sup>4</sup> As a result of his

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26 <sup>4</sup> Presumably there would be no controversy over whether the actions by Mr. Power’s  
27 captors, e.g., physically beating and stabbing him, denying him food or sleep, interrogating him,  
and confining him in bamboo cages, would constitute torture under any definition.

1 experiences, Mr. Power apparently has been diagnosed with post-traumatic stress disorder  
2 (“PTSD”).

3 The Trustee does not dispute Mr. Power’s treatment by his captors and argues only that  
4 his VA Benefits are paid on account of his PTSD rather than his status as a victim of a war crime  
5 or a crime against humanity. Debtors’ counsel concedes that no determination of such status has  
6 ever been made, but that this Court should make such a determination as a matter of equity.  
7 Debtors also argue that if the VA Benefits must be included, the Court should confirm the plan  
8 with the same monthly payment amount of \$465 but increase the plan term to 60 months.

9 I. **Applicability of Section 101(10A)(B).**

10 Upon objection by a creditor or the trustee assigned to the case, Section  
11 1325(b)(1)(B) provides that a Chapter 13 plan may not be approved unless it provides that “all  
12 of the debtor’s projected disposable income to be received in the applicable commitment  
13 period...will be applied to make payments to unsecured creditors under the plan.” Section  
14 1325(b)(2) provides that “the term ‘disposable income’ means current monthly income received  
15 by the debtor...” The term “current monthly income” under Section 101(10A) “includes any  
16 amount paid by any entity other than the debtor ...on a regular basis for the household expenses  
17 of the debtor or the debtor’s dependents...but excludes benefits received under the Social  
18 Security Act, payments to victims of war crimes or crimes against humanity on account of their  
19 status of victims of such crimes....” 11 U.S.C. § 101(10A)(B).

20 Debtors do not argue that Section 101(10A) generally excludes all VA benefits from  
21 current monthly income. If this was the Debtors’ argument, the Court would reject it. See In re  
22 Waters, 2008 WL 216312 (Bkrcty.N.D.W.Va. 2008)(VA benefits included in current monthly  
23 income even though exempt under federal and state law). See also In re Shields, 322 B.R. 894,  
24 898 (Bkrcty.M.D.Fla. 2005)(social security, veterans disability, and retirement benefits treated  
25 as income for purposes of determining disposable income under § 1325). Compare In re  
26 Berchtold, 328 B.R. 808, 813 (Bkrcty.D.Idaho 2005)(VA disability benefits included as income

1 for purposes of determining hardship discharge for student loans). Debtors do argue, however,  
2 that the VA Benefits received by Mr. Power are excluded from current monthly income under  
3 Section 101(10A)(B) because of his status as a victim of a war crime.

4 The Court has no reason to question the physical and emotional trauma that Mr. Power  
5 suffered as a prisoner of war. Not surprisingly, the Trustee has presented no witnesses or  
6 evidence to contradict Mr. Power's affidavit. However, payments that a debtor receives from a  
7 third party on a regular basis are excluded only if they are received "on account of" the debtor's  
8 status as a victim of a war crime or a crime against humanity. Applicability of the exclusion  
9 turns on the meaning of the phrase "on account of" under Section 101(10A)(B).

10 In Rousey v. Jacoway, 544 U.S. 320 (2005), the Supreme Court interpreted the meaning  
11 of the phrase "on account of" in connection with Section 522(d)(10)(e) of the Bankruptcy Code.  
12 Section 522(d)(10)(e) provides that a debtor may exempt his right to receive a payment under a  
13 pension or similar plan "on account of illness, disability, death, age, or length of service..." The  
14 Court observed that "We have interpreted the phrase 'on account of' elsewhere within the  
15 Bankruptcy Code to mean 'because of,' thereby requiring a causal connection between the term  
16 that the phrase 'on account of' modifies and the factor specified in the statute at issue." 544 U.S.  
17 at 326. The Court applied this interpretation to the phrase in Section 522(d)(10)(e) since the  
18 context of the provision indicated no intention by Congress to deviate "from the term's ordinary  
19 meaning." Id.<sup>5</sup>

20 The record in this case establishes that the VA Benefits received by Mr. Power were not  
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22 <sup>5</sup> It is noteworthy that the statute in dispute in Rousey v. Jacoway includes a specific  
23 exemption for a debtor's right to receive "a veterans' benefit". See 11 U.S.C. § 522(d)(10)(B).  
24 Because Congress chose to expressly exclude from current monthly income under Section  
25 101(10A)(B) a regular payment received under the Social Security Act, but not a veterans'  
26 benefit as under Section 522(d)(10)(B), an inference can be drawn that Congress did not intend  
27 the exclusion in the former provision. See In re Perroton, 958 F.2d 889, 895 (9<sup>th</sup> Cir. 1992)("As  
28 a general rule, '[w]here Congress includes particular language in one section of a statute but  
omits it in another section of the same Act, it is generally presumed that Congress acts  
intentionally and purposely in the disparate inclusion or exclusion..").

1 paid because of his status as a war crime victim. Debtors' Exhibit "B" consists of a copy of a  
2 letter from the Department of Veterans Affairs ("VA"), dated February 21, 2006, which states in  
3 pertinent part that "We assigned a permanent 100% disability evaluation for your services  
4 connected disability/disabilities." Included with the letter is a copy of a "Rating Decision"  
5 explaining the basis for the disability evaluation.

6 According to the Rating Decision, Mr. Power was evaluated as having a continued post-  
7 traumatic stress disorder that is 100 percent disabling. That decision was based upon findings by  
8 a VA examiner that Mr. Power continues "to meet the criteria for a diagnosis of post traumatic  
9 stress disorder due to combat experiences and that your PTSD symptoms cause severe deficits in  
10 your occupational and social functioning." The examiner's opinion was weighed against other  
11 evidence in the record, leading the VA to conclude "that the 100 percent evaluation should be  
12 considered permanent in nature."

13 Nothing in the Rating Decision suggests that Mr. Power's treatment by his captors, rather  
14 than his PTSD, serves as the basis for his receipt of VA Benefits. Nothing in the letter from the  
15 VA suggests that treatment by Mr. Power's captors was even a factor in the VA's decision to  
16 provide disability benefits. The VA's focus on Mr. Power's condition rather than its source is  
17 consistent with the purpose of the veterans' disability benefit program.

18 In Rose v. Rose, 481 U.S. 619 (1987), a disabled veteran was held in contempt by a  
19 Tennessee family court for failure to pay child support from his veterans benefits. The contempt  
20 order was affirmed on appeal notwithstanding the veteran's assertion that only the Veterans  
21 Administration had jurisdiction to award child support from his VA benefits. In rejecting the  
22 jurisdictional challenge, the Supreme Court discussed the purpose of the benefit program. The  
23 Supreme Court stated that "Veterans' disability benefits compensate for impaired earning  
24 capacity...and are intended to 'provide reasonable and adequate compensation for disabled  
25 veterans and their families.'" 481 U.S. at 630, citing H.R. Rep. No. 96-1155, p.4 (1980), U.S.

1 Code Cong. & Admin.News 1980, p. 3307<sup>6</sup> and S.Rep. No. 98-604, p. 24 (1984), U.S.Code  
2 Cong. & Admin.News 1984, pp. 4479, 4488. The purpose of veterans disability benefits is to  
3 provide financial assistance to veterans who are disabled while serving in the armed forces,  
4 resulting in a diminished earning capacity. Id. The reason for the disability is not important as  
5 long as it was incurred while the beneficiary was serving in the military.<sup>7</sup>

6 In Paragraph 8 of his affidavit, Mr. Power states that but for his VA Benefits, "...I would  
7 not be able to provide for my family, because I am unable to work." Mr. Power's situation is  
8 consistent with the purpose of the veterans disability benefit program and even he does not  
9 suggest that he would be receiving disability benefit payments absent a determination that he  
10 suffers from PTSD. Because the record establishes that the VA Benefits are paid because of Mr.  
11 Power's PTSD and not his status as a war crime victim, the Court need not address counsel's  
12 argument that the bankruptcy court should determine that status<sup>8</sup>.

13 \_\_\_\_\_  
14 <sup>6</sup> The portion of House of Representatives Report 96-1155 cited in Rose states that "To  
15 be eligible to receive disability compensation, a veteran must have contracted a disease, suffered  
16 a nonmisconduct injury, or aggravated an existing disease or injury in the line of duty during  
17 active wartime or peacetime service and have been discharged under other than dishonorable  
conditions." The correct citation should be to page 4 of the Report and to page 3310 of the  
reprint.

18 <sup>7</sup> In Waters, supra, 2008 WL 216312 at \*4, the bankruptcy court distinguished between  
19 veterans disability benefits and veterans pension benefits as follows: "Disability compensation  
20 payments are paid to veterans who are disabled by injury, illness, or disease incurred or  
21 aggravated while on active duty. Pension benefits are paid to veterans with low incomes and  
low net worth who are disabled for reasons that do not relate to their military service."

22 <sup>8</sup> At first blush, the suggestion that this Court would be an appropriate forum to declare  
23 that Mr. Power is the victim of a war crime seems absurd. While a bankruptcy court is a court of  
24 equity, it has little or no authority in "criminal" matters. See, e.g., Knupfer v. Lindblade (In re  
25 Dyer), 322 F.3d 1178 (9<sup>th</sup> Cir. 1999)(no authority to impose criminal contempt sanction); In re  
26 Truck-A-Way, 300 B.R. 31 (E.D.Cal. 2003)(no authority to issue a search warrant); Alan  
27 Resnick and Henry Sommer, 3 Collier on Bankruptcy, ¶ 3.09[3] (15<sup>th</sup> Ed. Revised 2008)(no  
28 authority to issue writ of habeas corpus). The language of Section 101(10A) does not provide or  
imply, however, that a determination of a debtor's status as a war crime victim must be made by  
another forum. Other provisions of the Bankruptcy Code specifically anticipate that there will  
be an adjudication by some other tribunal. For example, Section 523(a)(11) requires a prior

1 The VA Benefits received by Mr. Power are not excluded from current monthly income  
2 as defined by Section 1325(b)(1).

3 **II. Confirmation of Debtors' Proposed Plan.**

4 The term "applicable commitment period" in Section 1325(b)(1)(B) is determined by  
5 Section 1325(b)(4) which provides, in pertinent part, that the period shall be "not less than 5  
6 years, if the current monthly income of the debtor and the debtor's spouse combined, when  
7 multiplied by 12, is not less than...the highest median family income of the applicable State for a  
8 family of the same number or fewer individuals..." 11 U.S.C. § 1325(b)(4)(A)(ii)(II). The

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10 judgment, order or decree regarding the debtor's fraud or defalcation in connection with  
11 depository institution or credit union and Section 523(a)(15) requires a prior agreement or decree  
12 in a marital dissolution proceeding involving the debtor.

13 Even if a prior adjudication of a debtor's status as a war crime victim is required under  
14 Section 101(10A)(B), where would a debtor seek such a determination? The War Crimes Act,  
15 18 U.S.C. section 2441, identifies the conduct prohibited as well as punishment upon conviction,  
16 but does not by its terms create for the victim a private right of action against the perpetrator of a  
17 war crime. Even if a private right of action did exist, acquisition of personal jurisdiction over an  
18 enemy combatant in a foreign conflict likely would be impossible. The United Nations Security  
19 Council apparently has not established a war crimes tribunal with respect to acts committed by  
20 Mr. Power's captors during the Vietnam War. An International Criminal Court ("ICC") was  
21 established in July 2002 pursuant to the Rome Statute of the International Criminal Court, but  
22 neither the United States nor Vietnam has ratified the treaty and therefore have not agreed to  
23 accept the ICC's jurisdiction. (A copy of the Rome Statute of the International Criminal Court is  
24 available in pdf form at <http://www.icc-cpi.int/about.html>.) Moreover, under the Rome Statute,  
25 the ICC has jurisdiction only over war crimes committed after it was established and there is no  
26 provision allowing an individual victim of a war crime to initiate a prosecution. (A list of the  
27 nations that have ratified the Rome Statute is set forth on the ICC's website.) There appears to  
28 be no meaningful avenue for a debtor to obtain a status determination under Section 101(10A)  
(B) other than in a bankruptcy proceeding.

29 If the Court were to proceed with a determination in the instant proceeding, notice to all  
30 creditors and other parties in interest would be appropriate since only the Trustee was served  
31 with the Debtors' Response to the Trustee's Objection. Only in the Response does it appear that  
32 the Debtors are asserting this legal theory for the first time. Likewise, the Trustee's Reply  
33 appears to have been served only on the Debtors. Thus, an issue impacting the rights of all  
34 parties has surfaced and the Court would require adequate notice to all parties in interest.

35 Even if the Court concluded in Mr. Power's favor, however, the absence of a causal  
36 connection between his status and the VA benefit payment still would require the payment to be  
37 included in the calculation of current monthly income.



1 parties in this case do not dispute that inclusion of Mr. Power's VA Benefits will push the  
2 Debtors' annualized income<sup>9</sup> above the median for a four-person family in the State of Nevada.<sup>10</sup>  
3 As a result, the applicable commitment period for the Debtors under Section 1325(b)(4) is not  
4 less than five years. During that commitment period, Section 1325(b)(1)(B) requires the Debtors  
5 to devote all of their "projected disposable income" to payment of unsecured creditors.

6 In his Objection, the Trustee acknowledges Debtors' assertion that their income is below  
7 the median. He then argues, however, that "The Trustee's calculation of the debtor's income  
8 was higher, putting them over the median income level with a Monthly Disposable Income (#58  
9 on the B22C calculation) of \$782.00." It is unclear where the Trustee obtained this figure since  
10 the Debtors never completed line 58 of their Form 22C. Moreover, it also is not clear whether  
11 that figure is derived from Debtors' Form 22C, Debtors' Schedules "I" and "J", information  
12 obtained at the first meeting or creditors, information obtained informally, or through some  
13 admixture of all of the foregoing.

14 Looking solely at raw numbers apparent in the written record, the only income difference  
15 between Form 22C and Schedule "I" is the gross income figure for Mrs. Power, i.e., Form 22C  
16 shows \$3,561.90 and Schedule "I" shows \$3,285.45 or a difference of \$276.45. Instead of  
17 monthly disposable income of \$465.00 as provided in the proposed plan, the Trustee proposes  
18 the amount of \$782.00, i.e., a difference of \$317. The Court assumes that the Trustee is  
19 asserting that some of the expenses claimed in Debtors' Schedule "J" are excessive since the  
20 Debtors never completed the expense portions of Form 22C.

21 Debtors' response to the Trustee's objection is puzzling. They first argue that "In this  
22 case, the debtors schedule "I" and "J" show disposable income of approximately \$465.00 per  
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24 <sup>9</sup> According to line 21 of Debtors' Form 22C, the Debtors' annualized current monthly  
25 income, based solely on Mrs. Power's income, is \$42,742.80. If Mr. Power's monthly VA  
Benefits are added, the combined annualized income would be \$76,114.80.

26 <sup>10</sup> According to line 22 of Debtors' Form 22C, the applicable median income for a family  
27 of four is \$66,095.00.

1 month. The Trustee has not challenged the income or the expenses.” See Response to Objection  
2 at 6:6-8. Obviously, the Trustee has challenged the Debtors’ income for purposes of determining  
3 projected disposable income under Section 1325(b)(1)(B). As indicated above, careful  
4 consideration of the Trustee’s argument also indicates that the Trustee is disputing the Debtors’  
5 expenses.

6 Debtors also argue that “Assuming arguendo the trustee is correct, and the debtors are not  
7 allowed to keep this money “out” of the calculation of B-22c, the plan would have to be  
8 increased to \$782.00 per month. A figure that the debtors could not pay.” Id. at 6:21-24. While  
9 the Debtors apparently do not dispute the \$782.00 figure suggested by the Trustee, they also do  
10 not explain how they could not afford to pay that amount if the Trustee’s figures are correct.

11 In spite of the Trustee’s arguments, Debtors suggest that they should be permitted simply  
12 to pay the same amount each month, i.e., \$465.00, but over a commitment period of 60 months  
13 rather than 36 months. See Response at 7:7-10. At this point, however, the only evidence of the  
14 Debtors’ expenses consists of their Schedule “J” which the Trustee apparently disputes and the  
15 Debtors’ original Form 22C that lacks expense information in Parts IV and VI. Mr. Power’s  
16 affidavit does not address the expense side of the projected disposable income equation.

17 It is clear that the Debtors’ plan is based on an incorrect commitment period since the  
18 Debtors have attempted to exclude Mr. Power’s monthly VA Benefits. It is unclear, however,  
19 whether the Debtors have committed all of their projected disposable income since the Trustee  
20 disputes their claimed expenses and the Debtors have not offered an adequate explanation of  
21 why their projected disposable income would be \$465.00 per month rather than \$782.00.

22 Under the circumstances, absent any other evidence, the Court must conclude that the  
23 Debtors have not carried their burden of proof on plan confirmation.

24 **CONCLUSION**

25 The Trustee’s objection to confirmation of Debtors’ Chapter 13 plan will be sustained.  
26 Confirmation will be denied without prejudice. A separate order has been entered concurrently  
27

1 herewith.

2

3 Copies noticed through ECF to:

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