

1 as an expense on his Form B22C a \$900 per month deduction for the
2 payment contractually due on the junior lien he intends to strip
3 off. If that expense claim were allowed, Mr. Grant would have a
4 negative disposable income, with the correlative consequences
5 set out in In re Kagenveama, 527 F.3d 990 (9th Cir. 2008),
6 including no applicable commitment period. A recent decision of
7 the Bankruptcy Appellate Panel, In re Martinez, 418 B.R. 346
8 (2009) instructs that a debtor may not claim as an expense on the
9 Form B22C sums that the debtor intends to eliminate as an
10 obligation. If the expense claimed for the lien to be stripped
11 off is not allowed, Mr. Grant will have a positive disposable
12 income and, because he is an above-median-income earner, the
13 applicable commitment period would be 60 months, and monies would
14 become available for distribution to unsecured creditors, instead
15 of the 0% distribution Mr. Grant has proposed.

16 A threshold issue which counsel were asked to address is
17 whether this Court is bound by a decision of the Bankruptcy
18 Appellate Panel in a case on appeal from a different court. If
19 the Court is bound, then Martinez dictates the outcome.

20 As this Court has indicated previously, in In re Enriquez,
21 244 B.R. at 159-60, the Court is persuaded that BAP decisions
22 have not been determined to be binding. Bank of Maui v. Estate
23 Analysis, Inc., 904 F.2d 470 (9th Cir. 1990) held that a
24 bankruptcy court's imposition of sanctions on a creditor because
25 it ran afoul of a controlling BAP decision was improper. On
26 appeal, the district court affirmed the award of sanctions, but

1 the Ninth Circuit reversed. In his noted concurrence, Judge
2 O'Scannlain urged the Judicial Council of the Ninth Circuit to
3 adopt a rule making BAP decisions binding on all bankruptcy
4 courts in the Circuit under most circumstances. That the issue
5 remains an open one was reinforced in In re Zimmer, 313 F.3d
6 1220, 1225, n.3 (9th Cir. 2002), where the panel noted in part:

7 Although the binding nature of Bankruptcy
8 Appellate Panel decisions - an open question
9 in this circuit - is not squarely before us
10 in this case, we join Judge O'Scannlain's
11 call for the Judicial Council to consider an
12 order clarifying whether the bankruptcy
13 courts must follow the BAP.

14 While the Judicial Council has not taken such action as of
15 the present, it is sufficient to note that the question remains
16 an open one in the Ninth Circuit. For purposes of the present
17 matter the Court concludes it need not take a definitive position
18 on the issue of the binding effect of a BAP decision because the
19 Court concludes that the result reached by the BAP in Martinez is
20 correct.

21 Counsel for debtor, in a brief in In re Gallegos,
22 No. 09-05946, made a number of arguments in support of their
23 position that Martinez was incorrectly decided. Without having
24 to parse each of those arguments, or the rationale advanced by
25 the Martinez majority, the Court concludes there is a simpler
26 answer to whether a debtor may include as an expense payments
27 "contractually due to secured creditors . . ." 11 U.S.C.
28 § 707(b)(2)(A)(iii). Debtor claims he may deduct such an expense
29 because it was "contractually due" to a secured creditor on the

1 date of the filing of the petition. Martinez says he may not,
2 for multiple reasons.

3 Again, without parsing the rationale of the Martinez
4 decision, or the debtor's attacks on it, the Court points to the
5 language of § 707(b)(2)(A)(iii)(I):

6 (iii) The debtor's average monthly
7 payments on account of secured debts shall be
calculated as the sum of -

8 (I) the total of all amounts
9 scheduled as contractually due to
10 secured creditors in each month of
the 60 months following the date
of the petition

11 (Emphasis added.)

12 The premise of debtor's ability to strip off a junior lien
13 under the authority of In re Zimmer, 313 F.3d 1220 (9th Cir.
14 2002) is that the debt on the junior lien is unsecured. Debtor
15 so asserts in his Schedule D, filed under penalty of perjury.
16 To paraphrase In re Ransom, 577 F.3d 1026, 1030 (9th Cir. 2009):
17 "Ironic it would be if debtor could claim a junior lien wholly
18 unsecured for lien strip purposes under § 1322(b) while also
19 claiming it is a secured debt for purposes of deducting payments
20 'contractually due' under § 707." The Court believes, and
21 concludes, that debtor cannot have it both ways, precisely
22 because § 707(b)(2)(A)(iii) permits deduction only of payments on
23 secured debts that will be contractually due in the next 60
24 months. The statute does not permit a deduction for
25 contractually due payments on unsecured debts.

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1 Debtor's counsel, in its Gallegos brief, has urged a
2 "snapshot in time" analysis, and points to the fact that the
3 recorded lien is still in place at the moment of filing, so the
4 payments are still "contractually due" at that point in time.
5 While it is an interesting chicken-and-egg sort of discussion,
6 the Ninth Circuit has provided guidance in In re Scovis, 249
7 F.3d 975 (2001). There, the court held that courts should "look
8 to 11 U.S.C. § 506(a)" to determine a debtor's eligibility.
9 249 F.3d at 983. The court elaborated:

10 Through the inclusion of a § 506(a) analysis
11 to define "secured" and "unsecured" in the
12 § 109(e) context, a vast majority of courts,
13 and all circuit courts that have considered
14 the issue, have held that the unsecured
15 portion of undersecured debt is counted as
16 unsecured for § 109(e) eligibility purposes.

14 Id. Scovis held that a lien on real property which would be
15 avoidable because it impaired debtor's homestead exemption should
16 be counted as an unsecured debt for eligibility purposes, even
17 though the lien had not yet been formally avoided.

18 19 Conclusion

20 For the foregoing reasons, and including those set out in
21 In re Martinez, the Court finds and concludes that the Chapter 13
22 Trustee's objection to confirmation of debtor's proposed plan in
23 its present form should be sustained and confirmation denied
24 without prejudice.

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Debtor shall have thirty (30) days from the date of entry of this Memorandum Decision to file an amended Form B22 and an amended plan. If no such plan is filed within that time, this case will be dismissed, without prejudice.

IT IS SO ORDERED.

DATED: JAN 26 2010



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court