UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

In Re SCOTT MICHAEL SMITH, **Debtor.**	**Bankruptcy Case No. 09-00416-JDP**

MEMORANDUM OF DECISION

Appearances:

Kelly Beeman, Boise, Idaho, for Attorney for Debtor.

David W. Newman, Boise, Idaho, Assistant United States Trustee.

Introduction

The United States Trustee ("UST") filed a Motion to Dismiss this bankruptcy case under 11 U.S.C. § 707(b)(1) and § 707(b)(3). Docket No. 26. The motion was set for hearing on August 4, 2009, at which time evidence was presented through exhibits and witness testimony, and counsel presented oral arguments. At the conclusion of the hearing, the Court took the issues under advisement. The Court has now considered

the evidence and arguments presented in light of applicable law, and this Memorandum sets forth the Court's findings and conclusions, and resolves the motion. Fed. R. Bankr. P. 7052; 9014.[1]

Procedural History

On February 25, 2009, Debtor Scott Michael Smith filed a chapter 7 bankruptcy petition. Docket No. 1. Debtor's schedules and the Statement of Financial Affairs were filed with the petition. *Id*. Debtor also filed a Form 22A "means test" calculation at that time, in which he checked the box indicating "[t]he presumption [of abuse] does not arise." Docket No. 3.

On June 1, 2009, the UST filed the Motion to Dismiss.[2] In it, the UST acknowledged that based upon Debtor's Form 22A, no statutory

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[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 – 1532, and all rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001 – 9037.

[2] On April 6, 2009, chapter 7 trustee Richard E. Crawforth filed a Report of No Distribution, in which he certified that there was no property available for distribution to creditors in the case, and that the estate had been fully administered. Docket entry dated April 6, 2009. But for the resolution of the UST's motion, this case is ready to close.

presumption of abuse arises in this case . However, the UST argued that if the totality of the circumstances is considered, dismissal for abuse is warranted under § 707(b)(3). Debtor contests the motion and disputes the UST's allegation.

Analysis and Disposition

A. Section 707(b).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made significant changes to the former Bankruptcy Code. The Ninth Circuit recently observed that the focus of BAPCPA is squarely on repayment of a debtor's creditors in bankruptcy to the greatest extent possible. *Egebjerg v. Anderson (In re Egebjerg)*, ___ F.3d ___, 2009 WL 2357706 *2 (9th Cir., August 3, 2009) (citing H.R.Rep. No. 109-31, pt. 1 at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89).

One important change under the amendments is found in new § 707(b)(1), which effectively repealed the pre-BAPCPA Code's

presumption in favor of affording relief to chapter 7 debtors.[3] Instead, the Code now provides, in pertinent part:

> (b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debs are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title if it finds that the granting of relief would be an abuse of the provisions of this chapter.

11 U.S.C. § 707(b)(1).[4]

Amended § 707(b) contains two different standards for application by a bankruptcy court to determine when a filing constitutes an "abuse" under § 707(b)(1). The first is an objective test set forth in § 707(b)(2). Under this approach, the prospective chapter 7 debtor's income and expenses are analyzed via a mathematical matrix commonly referred to as

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[3] Section § 707(b) formerly provided that "[t]here shall be a presumption in favor of granting the relief requested by the debtor." 11 U.S.C. § 707(b) (2004), *amended by* 11 U.S.C. § 707(b) (Pub. L. 108-9, 119 Stat. 23 (Apr. 20, 2005).

[4] Debtor concedes that his debts are "primarily consumer debts," and thus this section is applicable to this case.

the "means test," to judge whether a bankruptcy filing under the debtor's financial circumstances gives rise to a presumption of abuse. 11 U.S.C. § 707(b)(2). As noted above, the UST does not contend that a statutory presumption of abuse under § 707(b)(2) arises in this case.[5]

The Code's second test for abuse is a subjective one found in § 707(b)(3). That statute provides:

> (b)(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(I) of such paragraph does not arise or is rebutted, the court shall consider—
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> > (A) whether the debtor filed the petition in bad faith; or
> > (B) the totality of the circumstances (including whether the debtor seeks to

[5] After the hearing and the issues raised by the UST's motion were taken under advisement, the Ninth Circuit issued its decision in *Ransom v. MBNA (In re Ransom)*, ___ F.3d ___ , 2009 WL 2477609 (9th Cir., Aug. 14, 2009). In that decision, the Ninth Circuit determined that, in completing the means test, a debtor may not claim an "ownership expense" for a vehicle payment if the debtor does not indeed intend to make such a monthly payment. It is possible that Debtor would be unable to "pass" the means test as interpreted in *In re Ransom*, because Debtor claimed an ownership expense for an older BMW vehicle he owns outright. But because this issue was not raised by the UST, nor argued by the parties, the Court declines to consider it.

> reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b)(3).

The UST also concedes that Debtor has not exhibited bad faith in filing this chapter 7 case, so the Court need not consider subparagraph § 707(b)(3)(A) in its analysis. Instead, the UST contends that dismissal is appropriate solely because "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse."

B. Totality of the Circumstances and Ability to Pay Debts.

1. Totality of the Circumstances.

Prior to BAPCPA, the Code provided for dismissal of a chapter 7 case if the court found "that the granting of relief would be a *substantial* abuse of the provisions of this chapter." 11 U.S.C. § 707(b) (2004), *amended by* 11 U.S.C. § 707(b) (Pub. L. 108-9, 119 Stat. 23 (Apr. 20, 2005) (emphasis supplied)). Clearly, the change in text from "substantial abuse" to "abuse" in the post-BAPCPA Code signifies that a lower threshold is necessary to

warrant dismissal under § 707(b). *See In re Lamug*, 403 B.R. 47, 52 (Bankr. N.D. Cal. 2009); *In re Talley*, 389 B.R. 741, 745 (Bankr. W.D. Wash. 2008); *In re Mitchell*, 357 B.R. 142, 153 (Bankr. C.D. Cal. 2006).

Importantly, though, the prior version of the Code also allowed the bankruptcy court to find a filing was an abuse, albeit a substantial abuse. 11 U.S.C. § 707(b) (2004), *amended by* 11 U.S.C. § 707(b) (Pub. L. 108-9, 119 Stat. 23 (Apr. 20, 2005). Pre-BAPCPA courts utilized a "totality of the circumstances" examination to determine whether substantial abuse was present. *See Price v. United States Trustee (In re Price)*, 353 F.3d 1135, 1139 (9th Cir. 2004). BAPCPA codified the "totality of the circumstances" language. As such, pre-BAPCPA case law is instructive. *In re Sullivan*, 370 B.R. 314, 319 (Bankr. D. Mont. 2007) ("Because Congress retained the phrase "totality of the circumstances" in BAPCPA, the Court concludes that it may look to pre-BAPCPA case law to construe the meaning of that phrase under § 707(b)(3)"); *see also In re Davis*, 378 B.R. 539, 547 (Bankr. N.D. Ohio 2007); *In re Mitchell*, 357 B.R. at 153.

2. Ability to Pay Creditors.

In one important pre-BAPCPA case, *Zolg v. Kelly (In re Kelly)*, the Ninth Circuit reviewed the dismissal by a bankruptcy court of a debtor's chapter 7 petition for "substantial abuse." 841 F.2d 908 (9th Cir. 1988). In affirming the dismissal, the panel stated,

> we hold that the debtor's ability to pay his debts when due, as determined by his ability to fund a chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse.

Id. at 914. The *In re Kelly* court further held that "a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse." *Id.* at 915.

Nevertheless, *In re Kelly* did not establish a *per se* rule. While the ability to repay debts alone may justify dismissal, it does not compel it. Likewise, though the debtor may be unable to repay debts, dismissal may still be proper if other factors suggest abuse. *Id.* For example, the Ninth Circuit has suggested that, in addition to ability to pay debts, other factors may indicate that a filing is a substantial abuse, including whether the

schedules suggest the debtor obtained cash advances and purchased consumer goods on credit beyond his or her ability to repay; whether the debtor's proposed family budget is excessive or extravagant; whether the debtor's statement of income and expenses misstates his or her true financial condition, and whether the debtor engaged in eve-of-bankruptcy purchases. *In re Price*, 353 F.3d at 1139-40. In this case, the UST bases its argument for dismissal solely on Debtor's alleged present and future ability to repay his debts.

C. Debtor's Budget.

In urging dismissal for abuse, the UST takes issue with several of the items listed in Debtor's schedules I and J. Docket No. 1. After the motion was filed, Debtor amended those schedules to address some of the UST's concerns. Docket No. 29. But even after the amendments, several areas of disagreement concerning the budget remain between Debtor and the UST.

1. Schedule I – Debtor's Income.

The UST contends that Debtor's inclusion of a payroll deduction of $730 for child support on Debtor's amended Schedule I was improper

because that support obligation is also listed as an expense on his amended Schedule J. The UST is correct, and Debtor did not appear to dispute this at the hearing. Obviously, Debtor is not entitled to include the child support payments twice in his budget, and thus the Court will disregard that entry when calculating Debtor's income under amended Schedule I.

The UST also points out two needed changes to the budget that actually benefit Debtor's argument. First, as Debtor noted in his schedules, he intends to surrender his home to the mortgage creditor. Statement of Intention, Docket No. 1. Given this intention, the UST suggests that Debtor's payroll taxes deducted from his wages should be increased from $957 to $1,331 to account for the mortgage interest tax deduction he will forfeit. The Court agrees. Exhibit 109 shows the tax computation figures developed by the UST's analyst to arrive at the $1,331 figure, and Debtor has not challenged this conclusion. Thus, in calculating Debtor's income, the Court will utilize the higher payroll tax figure of $1,331 per month.

Second, the UST also suggested including a Public Employee Retirement System of Idaho ("PERSI") deduction of $319 per month in Debtor's income calculations due to the fact that Debtor is employed by the State of Idaho. Because contributions to PERSI are required from all state employees, the Court also agrees this deduction is proper.

Finally, on Schedule I, Debtor originally claimed he received $333 per month from his consulting contract with Battelle Energy Alliance ("Battelle"), an arrangement that has been in place for five years. In his amended Schedule I, however, he omitted that additional income entirely. When questioned about this change, he testified that he will not seek to renew this contract in the Fall of 2009, nor does he believe it would be renewed even if he wanted to do so, as Battelle has hired someone whose job description encompasses the work Debtor had previously been doing. The Court accepts Debtor's explanation, and the $333 per month in additional income will not be considered.

However, as is shown by Exhibit 105, a work invoice, Debtor is owed $1,400 for services already provided to Battelle from February 6,

2009, through May 10, 2009. To account for these monies, the UST divided the total due over a period of five months and arrived at the figure of $280 per month of additional income that should be reflected on Debtor's schedules. The Court agrees the $1,400 is income due to Debtor that will likely be paid to him in the near future, and that it is appropriate that his schedules reflect this additional income. The Court therefore adopts the UST's suggestion regarding this item.

2. Schedule J – Expenses.

The UST contends that Debtor's amended Schedule J contains two errors. Both of these items involve payments on prepetition unsecured debts which Debtors lists as "expenses" in Schedule J.

The first is a $200 monthly payment to Debtor's mother for her loan of the money needed to file the bankruptcy petition. This appears to be exactly as the UST characterizes it: an unsecured debt that properly belongs on Schedule F.[6] The payment is not a proper expense item.

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[6] Debtor offers no document or other evidence to show this debt even exists, let alone that it is secured and that the payment should be considered an on-going monthly expense.

The same is true as to the CareCredit veterinary account payment of $205 per month. This is another unsecured debt for prebankruptcy veterinary services that does not belong on Schedule J.[7]

Two further issues were raised by the UST in his motion and at the hearing. The first is the $350 expense listed by Debtor in Schedule J under "Auto". Debtor testified that he is rejecting a lease on his newer truck, and intends to retain and drive his 1990 BMW, on which there is no debt. However, Debtor lists the $350 "Auto" item on his Schedule J as an estimate of what he expects to pay in the likely event he needs to replace the BMW. In other words, this item represents an anticipated, rather than an actual, expense. The UST seemed to accept this explanation for the purposes of this discussion, and so the Court will do so likewise, though the Court suspects Debtor can replace a vehicle for less than $350 per month.

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[7] There was considerable testimony from Debtor concerning whether the veterinary bill was incurred jointly by Debtor and Paige Barber, Debtor's "landlord/roommate/fiancé," or whether the debt is solely that of Ms. Barber. But even assuming Debtor is liable for the vet bills, the payment is not properly included on Schedule J.

The second issue involves Debtor's payments on a domestic support obligation for $730 per month in child support. Exs. 101, 107. This obligation will apparently continue until Debtor's youngest child reaches the age of majority in March, 2012. Ex. 101. In its § 707(b)(3) "totality of circumstances" analysis, the Court may consider reasonably foreseeable future occurrences. *See In re Lamug*, 403 B.R. at 53-54; *In re Maya*, 374 B.R. 750, 754 (Bankr. S.D. Cal. 2007); *In re Pennington*, 348 B.R. 647, 651 (Bankr. D. Del. 2006). Thus, the Court will consider the fact that, beginning in April, 2012, Debtor will no longer be obligated to pay $730 per month for child support, and that this amount would be available to pay creditors.

3. Summing it Up.

Taking the adjustments discussed above into account yields the following modified income and expense conclusions:

Debtor's gross monthly income:	$5,125
Minus payroll deductions:	
Payroll taxes:	1,331
Health Insurance:	114
PERSI Contributions:	319

Total Net Monthly Take Home Pay:	$3,361

Monthly expenses:	
Mortgage/Rent:	$600
Telephone:	59
Food:	300
Clothing:	30
Laundry:	30
Recreation:	100
Medical/Dental:	150
Transportation:	400
Auto Insurance:	200
Charitable:	100
Auto Loans:	350
Child Support:	730
Total Monthly Expenses:	$3,049

Net monthly Income:	$3,361
	- 3,049
	$ 312

D. Debtor's Chapter 7 Filing Constitutes an Abuse.

Based upon the Court's calculations, it appears that even without the additional income from the Battelle contract, Debtor has the ability to pay, at present, over $300 per month to his creditors. Beginning in April, 2012, Debtor's ability to pay will be increased by the amount of $730 per month. If Debtor were to propose a 60-month repayment plan under

chapter 13, even the lower $312 payment blossoms into a total of $18,720, the majority of which would be distributed to Debtor's creditors to satisfy his debts.[8] Other bankruptcy courts have concluded that abuse existed when the amount available for monthly payment amounts was not especially large. *See e.g. In re Baeza*, 398 B.R. 692, 698 (E.D. Cal. 2008) ($479 per month); *In re Sullivan,* 370 B.R. at 323 ($406.12 per month); *In re Davis*, 378 B.R. at 549 ($165.86 presently and $399 in the near future). For purposes of § 707(b)(3), considering the totality of the circumstances, and in particular, considering Debtor's ability to pay his creditors, the Court, in the exercise of its discretion, concludes that Debtor's chapter 7 filing

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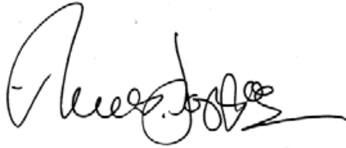
[8] In its consideration of Debtor's ability to pay creditors, the Court looks at Debtor's actual income and expenses, and need not conduct a chapter 13 analysis based upon the means test. Even so, the Court notes that Debtor's amended Form 22A monthly disposable income is $72. Ex. 2. Under recent Ninth Circuit case law, if the appropriate disposable income figure is negative, Debtor, as an above-median income debtor, could propose a plan calling for a monthly payment in an amount and for a duration of his choosing. *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 876 (9th Cir. 2008). However, Debtor would have to prove such a plan was submitted in good faith. 11 U.S.C. § 1325(a)(3). In this case, Debtor's means test monthly disposable income is a positive number, so to confirm a chapter 13 plan, he would have to propose to pay all his disposable income into that plan for 60 months. 11 U.S.C. § 1325(b)(1), (4).

constitutes an abuse.

Conclusion

The UST's motion to dismiss will be granted unless the Debtor promptly converts his case to one under chapter 13. A separate order will be entered.

Dated: August 28, 2009



Honorable Jim D. Pappas
United States Bankruptcy Judge