

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

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)	
In Re:)	Case No. 07-41189-705
)	
Ricky D. Hicks)	Chapter 7
)	
Debtor)	Hon. Charles E. Rendlen, III
)	U. S. Bankruptcy Judge
)	
)	Hearing Date: May 23, 2007
)	Hearing Time: 9:00 a.m.
)	
)	

**UNITED STATES TRUSTEE’S
MOTION TO DISMISS PURSUANT TO 11 U.S.C. §707(b)(2) and §707(b)(3)**

The United States Trustee (“UST”) for Region 13, through the undersigned counsel, moves the Court to dismiss this case pursuant to 11 U.S.C. §707(b)(2) and §707(b)(3)¹. In support of this motion, the UST respectfully states that:

I. Statement of Jurisdiction

1. This Court has jurisdiction of this matter under 28 U.S.C. §§1334(a) and (b), 28 U.S.C. §§157(a) and (b)(1), and 28 U.S.C. §151. This is a core proceeding under 28 U.S.C. §§157(b)(2)(A) and (B). This motion is filed pursuant to 11 U.S.C. §§707(b)(1) – (3).

2. Debtor filed a voluntary Chapter 7 petition on February 28, 2007.

3. The 341 meeting of creditors was continued to May 22, 2007 at 3:00 p.m.

¹Unless otherwise noted, all statutory section references herein are to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

4. Pursuant to 11 U.S.C. §704(b)(1)(a), the UST reviewed the material filed by the Debtors. On April 30, 2007, the UST filed a Statement of Presumed Abuse (the “10-Day Statement”) indicating that the UST believes the presumption arises in this case.

5. This Motion was filed within thirty (30) days of the 10-Day Statement and is timely.

II. Dismissal Under 11 U.S.C. Section 707(b)

6. 11 U.S.C. Section 707(b)(1) provides for dismissal of a chapter 7 case upon a finding of “abuse” by an individual debtor with “primarily consumer debts.” 11 U.S.C. §707(b)(1). The Debtors checked the box on the first page of their Voluntary Petition indicating that their debts are primarily “Consumer/Non-Business.” In addition, after reviewing the Debtors’ Schedules and other materials provided by the Debtors, the UST submits that the Debtors’ obligations are primarily consumer debts. *See* Schedules D, E, and F.

7. 11 U.S.C. Section 707(b)(2)(A)(I) requires the Court to presume that a debtor’s chapter 7 filing is abusive “if the debtor’s current monthly income reduced by amounts determined under clauses (i), (ii), (iii), and (iv) [of 11 U.S.C. §707(b)(2)(A)], and multiplied by 60 is not less than the lesser of –

(I) 25 percent of the debtor’s nonpriority unsecured claims in the case, or
\$6,000, whichever is greater; or

(II) \$10,000.

11 U.S.C. §707(b)(2)(A)(I).

8. Stated differently, if after deducting all allowable expenses from a debtor’s current monthly income, the debtor has less than \$100 per month in monthly disposable income (*i.e.*, less than \$6,000 to fund a 60 month repayment plan), the filing is not presumed abusive. If the

debtor has monthly disposable income of more than \$166.67 or more, or \$10,000 to fund a 60 month plan, the filing is presumed abusive. Finally, if the debtor has between \$100 and \$166.66 per month in disposable income, the case will be presumed abusive if that sum, multiplied by 60, will pay 25% or more of the debtor's non-priority unsecured debts.

9. The Debtor's Second Amended Statement of Current Monthly Income and Means Test Calculation ("Form B22A")² indicates that the presumption of abuse does not arise. The UST has identified errors with respect to the Debtor's expense deductions on his Form B22A, and has prepared her own corrected Form B22A³. The UST's corrected Form B22A reflects that the Debtor in fact has monthly disposable income totaling \$585.00, which multiplied by 60 exceeds \$10,000. Accordingly, contrary to the Debtor's assertion, and for the reasons discussed below, the presumption of abuse arises in this case.

A. UST's Adjustments to the Debtor's Calculation of Deductions Allowed Under §707(b)(2)

10. Line 23b of the Debtor's Second Amended Form B22A lists the average monthly payment for his vehicle as \$243.00. Based upon the balance of the secured debt as reported on Schedule D, the UST believes the average monthly payment is \$202.70.

11. Line 32 of the Debtor's Second Amended Form B22A lists the expense for telecommunications services as \$130.00. The UST believes a more reasonable amount is \$75.00.

12. Line 35 of the Debtor's Second Amended Form B22A lists the expense for continued

²A copy of the Debtors' Second Amended Form B22A is attached as **Exhibit 1**.

³A copy of the UST's Corrected Form B22A is attached as **Exhibit 2**.

contributions to the care of household or family members as \$650.00. Meeting of Creditors testimony by the Debtor indicates the contribution is voluntarily made to his twenty-one year old son, and not mandated by a Court Order. Additionally, meeting of creditors testimony, and documents received, indicate his son is a student who is employed part-time, and earns \$16.35 per hour working an average of eight to twelve hours per week. Debtor testified there is no physical or mental impairment which would prohibit his son from full time employment.

B. Debtors' Adjusted Deductions is Sufficient to Trigger the Presumption of Abuse Pursuant to 11 U.S.C. §707(b)(2).

13. Based on the adjustments to the Debtor's expenses as set forth above, the UST calculates that the Debtor's allowable expenses are \$4,364.00, compared to current monthly income of \$4,949.00. Using these figures, the Debtor has monthly disposable income pursuant to 11 U.S.C. §707(b)(2) in the amount of \$585.00, which would enable the Debtor to pay \$35,100.00 to general unsecured creditors over 60 months.

14. Because the Debtor has monthly disposable income sufficient to pay creditors more than \$10,000 over 60 months, the presumption of abuse arises under 11 U.S.C. §707(b)(2), and the Court should dismiss this case pursuant to 11 U.S.C. §707(b)(1) on that basis.

III. Dismissal Under 11 U.S.C. §707(b)(3)

15. Even if the presumption of abuse does not arise under 11 U.S.C. §707(b)(2) or is rebutted, a chapter 7 case may still be dismissed for totality of the circumstances of the debtor's financial situation demonstrates abuse. 11 U.S.C. Section 707(b)(3) provides:

In considering under [11 U.S.C. §707(b)(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) does not arise or is rebutted, the court shall consider –

(A) [whether the totality of the circumstances ... of the debtor’s financial situation demonstrates abuse.

11 U.S.C. Section 707(b), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), replaces dismissal based upon a “substantial abuse” under pre-BAPCPA §707(b) with a mere “abuse” standard.

16. Prior to enactment of the BAPCPA, courts considered a debtor’s bad faith, including inaccurate representations to the bankruptcy court, in deciding whether to dismiss a chapter 7 case for cause under 11 U.S.C. §707(a) or “substantial abuse.” *See, e.g., In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)(noting that “[c]ertainly the court may take the petitioner’s good faith and unique hardships into consideration under 11 U.S.C. Section 707(b)...”). In addition, under pre-BAPCPA case law, substantial abuse could be found where a debtor had sufficient income to fund a chapter 13 plan, and thus to repay his debts. *Id., see also In re Koch*, 109 F.3d 1285 (8th Cir. 1997).⁴

⁴Situations such as *In re Walton*, 866 F.2d 981 (8th Cir. 1989), where the Eighth Circuit upheld the bankruptcy court’s dismissal of a debtor’s chapter 7 case primarily because of his ability to pay, continue to be grounds for dismissal under the totality of the circumstances prong of amended 11 U.S.C. §707(b)(3). *See* 146 Cong. Rec. S11683-11729 (section by section explanation of HR 2415), Dec. 7, 2000. This legislative history provides:

[S]ituations in which courts dismiss debtors from Chapter 7 today clearly continue to be grounds for dismissal under HR 2415, including such cases as *In re Lamanna*, 153 F.3d 1 (1st Cir. 1998). In addition, since the standard is “abuse” rather than “substantial abuse,” the courts are clearly given additional discretion to control abusive use of chapter 7 when that is appropriate...

The “bad faith” and “totality of the circumstance” of the debtor’s situation is adopted as the appropriate standard. It is intended that all forms of inappropriate and abusive debtor use of chapter 7 will be covered by this standard, whether because of the debtor’s

17. Under 11 U.S.C. §707(b)(3) of the BAPCPA, dismissal is warranted based upon “abuse,” including in cases where the totality of the circumstances indicates the debtor has the ability to repay a substantial portion of his or her unsecured debt. That a chapter 7 case may be dismissed for “abuse” under 11 U.S.C. §707(b)(3) based on the debtor’s ability to pay is true even if that ability is not presumed as a result of the “means test” formula under 11 U.S.C. §707(b)(2). Indeed, because the “abuse” standard of 11 U.S.C. §707(b)(3) expressly applies when the presumption of abuse under the “means test” does not arise, “passing” the “means test” does not preclude a discretionary finding of abuse by the court. *See, e.g.*, Eugene W. Wedoff, *Means Testing in the New 707(b)*, 79 Am. Bankr. L.J. 231, 235 (2005).

18. As discussed more specifically below, the UST submits that the Debtors’ case should be dismissed pursuant to 11 U.S.C. §707(b)(3) because the Debtors’ financial situation demonstrates that the filing is an abuse.

A. The Debtor’s Petition should be dismissed pursuant to 11 U.S.C. Section 707(b)(3)(A).

19. The UST asserts that this case should be dismissed as an abuse under 11 U.S.C. Section 707(b)(3)(A). As discussed above, dismissal is warranted under 11 U.S.C. §707(b)(3)

conduct or the debtor’s ability to pay. If a debtor’s case would be dismissed today for “substantial abuse” as in *In re Lamanna*, . . .it is intended that the case should be subject to dismissal after HR 2415. . . . In dealing with ability to pay cases which are abusive, the presumption of abuse and the safe harbor protecting debtors from application of the presumption will not be relevant.

Although this legislative history pertains to an earlier version of bankruptcy reform legislation, because the amendment to 11 U.S.C. §707(b) in the BAPCPA is substantially the same and because there is little legislative history pertaining to the BAPCPA, this section by section discussion may be helpful to the Court.

based upon "abuse", as determined by the totality of circumstances.

**B. The Totality Of Circumstances Of The Debtor's Financial Situation
Demonstrates Abuse Pursuant to 11 U.S.C. Section 707(b)(3)(B).**

20. Alternatively, the UST asserts that this case should be dismissed as an abuse under §707(b)(3)(B), based upon the totality of the circumstances surrounding the Debtors' financial situation, because the Debtor has the ability to repay his debt. Specifically, the UST submits that the following expense listed on Schedule J should be eliminated:

- ▶ Child support of \$650.00.

21. As previously stated in paragraph 12 of this Motion, the \$650.00 expense is voluntary, and not mandated by a Court Order.

22. After adjusting the Debtor's reported expense as described above, the Debtor's total monthly expenses would be decreased by \$650.00, for total expenses of \$2,942.00.

23. The Debtor's Schedule I - Current Income of Individual Debtors lists \$3,580.00 in monthly net income. The Debtor's Schedule J - Current Expenditures of Individual Debtors lists monthly expenditures totaling \$3,592.00. Considering the Debtor's Schedule I and adjusted Schedule J, the disposable income available for repayment to creditors in a cause under Chapter 13 of the Code would be \$438.00. A monthly Chapter 13 payment of \$438.00 would repay sixty-four percent (64%) of the Debtor's debt over the course of a sixty (60) month plan.

WHEREFORE, the United States Trustee respectfully requests, pursuant to 11 U.S.C. §707(b)(1), that the Court dismiss this case, and for such other and further relief as may be just and proper.

Respectfully Submitted,

NANCY J. GARGULA
UNITED STATES TRUSTEE

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing was electronically mailed by the U. S. Bankruptcy Court, Eastern District of Missouri to those names listed below and / or by first class mail postage prepaid this 2nd day of May, 2007, to the following:

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