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**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF WYOMING**

In re:)	
)	
Vede Jacob Miller,)	Case No. 13-20384
)	Chapter 7
)	
Debtor.)	
_____)	

**UNITED STATES TRUSTEE’S OPPOSITION TO DEBTOR’S
MOTION FOR PARTIAL SUMMARY JUDGMENT**

The United States Trustee, by and through his undersigned counsel, files this opposition to Debtor’s Motion for Partial Summary Judgment (the “**Motion for Summary Judgment**”) (Doc. # 24) requesting that the Court deny the Motion for Summary Judgment. The United States Trustee respectfully states and alleges as follows:

BACKGROUND

1. On July 10, 2013, the United States Trustee filed a motion to dismiss requesting the Court dismiss this case under 11 U.S.C. §§ 707(b)(1) and 707(b)(2), or, in the alternative, under 11 U.S.C. § 707(b)(3) (the “**UST Motion to**

Dismiss") (Doc. # 13). Specifically, the United States Trustee requested that the Court dismiss under 11 U.S.C. §§ 707(b)(1) and 707(b)(2), because the United States Trustee's calculation of the Debtor's "currently monthly income" ("**CMI**"), as that term is defined in 11 U.S.C. § 101(10A)(A), results in a presumption of abuse under 11 U.S.C. § 707(b)(2).

2. On August 28, 2013, Debtor filed an objection to the UST Motion to Dismiss (the "**Objection**") (Doc. # 26) contending that Debtor's calculation of CMI makes him "a below median income debtor" and therefore "no presumption of abuse can arise under 11 U.S.C. § 707(b)(2)" and dismissal is not appropriate. See Objection at ¶ 9. Debtor also filed his Motion for Summary Judgment requesting that the Court grant him partial summary judgment on the basis that there are no genuine issues of material fact as to whether dismissal is appropriate under 11 U.S.C. §§ 707(b)(1) and 707(b)(2), and therefore, this Court may enter judgment in favor of Debtor as a matter of law. Motion for Summary Judgment at p. 1 (Doc. # 25).

STANDARD FOR SUMMARY JUDGMENT

3. Federal Rule of Bankruptcy Procedure 7056, which incorporates Federal Rule of Civil Procedure 56, made applicable to this contested matter by Bankruptcy Rule 9014(c), states that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In this instance, the United States Trustee agrees with Debtor that there are no disputed

issues of material fact as to whether dismissal is appropriate under 11 U.S.C. §§ 707(b)(1) and 707(b)(2), but the United States Trustee disagrees with the Debtor as to the applicable law to be applied to these facts. As such, if the Court adopts the United States Trustee's position with respect to the applicable law, judgment in favor of Debtor would not be warranted.

ANALYSIS

A. Debtor's CMI Calculation.

4. By way of background, Debtor filed his petition on April 26, 2013 (Doc. # 1). Pursuant to 11 U.S.C. 101(10A)(A), the term "current monthly income" is defined as:

[T]he average monthly income from all sources that the debtor **receives** . . . without regard to whether such income is taxable income, **derived** during the six month period ending on the last day of the calendar month immediately preceding the date of the commencement of the case.

(Emphasis added). Accordingly, Debtor's applicable six (6) month CMI period began on October 1, 2012 and ended on March 31, 2013. It is undisputed that the Debtor had 13 bi-weekly pay periods during the CMI period. As discussed below, Debtor seeks to only include pay advices for 12 of those periods in his CMI calculation.

5. The Debtor's Motion for Summary Judgment asserts that "the crux of the dispute between the UST and Debtor (as it relates to 11 U.S.C. § 707(b)(2)) is whether a pay check in the amount of \$2,942.66 that was 'received' by Debtor on 10/10/12 should be included in Debtor's CMI calculation even though said

wages were ‘derived’ during a pay period outside of the applicable six (6) month CMI period.” Motion for Summary Judgment at p. 3 (Doc. # 25).

6. Debtor contends in his Motion for Summary Judgment that In re Arnoux, 442 B.R. 769 (Bankr. E.D. Wash. 2010) and In re Meade, 420 B.R. 291 (Bankr. W.D. Va. 2009) are the applicable law. Debtor contends those courts examined 11 U.S.C. § 101(10A)(A) and concluded that income must be both **“received” and “derived”** during the applicable six (6) month period in order to be included as part of Debtor’s CMI. Following this authority, Debtor seeks to exclude from CMI a pay check for the pay period beginning September 14, 2012 and ending September 30, 2012 in the amount of \$2,942.66. Motion for Summary Judgment at p. 5 (Doc. # 25). Debtor notes that if this pay check is excluded from Debtor’s CMI then Debtor is below median income for a household size of three (3) and there is no presumption of abuse under 11 U.S.C. § 707(b)(2). Id. at 5-6.

B. The Debtor's Construction of 11 U.S.C. § 101(10A)(A) Should Be Rejected.

7. The Debtor’s construction of 11 U.S.C. § 101(10A)(A) should be rejected for at least three reasons.

8. First, the Debtor’s construction of 11 U.S.C. § 101(10A)(A) ignores the plain meaning of the word “derived” in 11 U.S.C. § 101(10A)(A). Because the Bankruptcy Code does not define the word “derived” that term should be given its ordinary meaning. See, e.g., Hamilton v. Lanning, 130 S. Ct. 2464, 2471 (2010); Smith v. United States, 508 U.S. 223, 228 (1993). In ordinary use, “derived”

means “to take or **receive** esp[ecially] from a specified source.” Webster’s Ninth New Collegiate Dictionary 342 (1986) (emphasis added). In legal use “derived” means “[r]eceived from [a] specified source.” Black’s Law Dictionary 444 (6th ed. 1990) (emphasis added). Thus, the word “derived” in 11 U.S.C. § 101(10A)(A) is synonymous with the word “received” in 11 U.S.C. § 101(10A)(A).¹ Notwithstanding this fact, the Debtor asks this Court to impose a different meaning for the word “derived” for “means testing” purposes under 11 U.S.C. § 101(10A)(A) – “earned.” But nothing in 11 U.S.C. § 101(10A)(A) indicates that Congress intended such an anomaly, and as explained below, 11 U.S.C. § 101(10A)(A) should be broadly construed, not narrowly construed as the Debtor’s construction would set in motion. Accordingly, the Debtor’s construction of 11 U.S.C. § 101(10A)(A) should be rejected.

9. Second, the two decisions cited by the Debtor in his Motion for Summary Judgment, Arnoux and Meade, are not the only decisions to have considered the discreet issue raised before this Court.² Rather, other courts have considered the very same issue, and have concluded the opposite of Arnoux and Meade. See, e.g., In re Katz, 451 B.R. 512 (Bankr. C.D. Cal. 2011), and In re

¹ As the Supreme Court has recognized, there is nothing wrong with two different words within a single section being synonymous. See Wachovia Bank v. Schmidt, 546 U.S. 303, 314 (2006) (“Congress may well have comprehended the words ‘located’ and ‘established,’ as used in [28 U.S.C.] § 1348, not as contrasting, but as synonymous or alternative terms”).

² Debtor’s reliance on In re Meade is misplaced because that case is factually and legally distinguishable from the matter before this Court. In Meade, the court was presented with the issue of whether an annual bonus that the debtor received during the CMI period, on account of work which he performed over the entire previous year, should be added in its entirety and without apportionment, to other income that he earned over the CMI period. In this matter, the apportionment of income is simply not an issue before the Court.

Burrell, 399 B.R. 620, 622 (Bank. C.D. Ill. 2008). Along these lines, the most recent decision to address this issue, In re Katz, 451 B.R. at 512, constitutes the better reasoned approach to construing 11 U.S.C. § 101(10A)(A). In Katz, the court found that income need only be “received” during the applicable six (6) month period in order to be included as part of Debtor’s CMI calculation. On this issue, the court in Katz stated:

The plain meaning of § 101(10A)(A) controls, ... [and] states unequivocally and unambiguously that “current monthly income” means the “average monthly income from all sources that the debtor receives ..., derived during the 6-month period ending on (i) the last day of the calendar month immediately preceding the date of the commencement of the case....” As such, I conclude from the statute that CMI consists of income received during the applicable CMI period, regardless of when it was earned or when Katz’ services that led to the income were performed.

The statute does not address or limit the CMI calculation in Katz’ case to the time period in which Katz’ services that led to the income may have been performed. Instead, the statute requires the court to include all of Katz’ income from any “source” that he “received” in the applicable 6-month CMI period.

Id. This holding is consistent with In re Burrell, 399 B.R. 620, 622 (Bank. C.D. Ill. 2008), which also held “that ‘current monthly income’ consists of income received during the prescribed six-month period, irrespective of when it was earned.”

10. Both the Katz and Burrell decisions appear to be consistent with the Supreme Court’s treatment of CMI in Lanning, 130 S. Ct. at 2464, and the Ninth Circuit’s treatment of CMI in Blausey v. U.S. Trustee, 552 F.3d 1124 (9th Cir.

2009) as well.³ In Lanning, the debtor received a one-time buyout from her former employer during the CMI period, and the Supreme Court did not question the inclusion of those funds in the CMI calculation. See Lanning, 130 S. Ct. at 2464. In Blausey, the debtor received private disability insurance income during the CMI period, and the Ninth Circuit did not question the inclusion of those funds in the CMI calculation. See Blausey, 552 F.3d at 1124. In each case, the courts appeared to focus on when income was received rather than when, and in what manner, income was earned. Accordingly, because Katz and Burrell, as opposed to Arnoux and Meade, more closely mirror the treatment of CMI by the Supreme Court and the Ninth Circuit, they constitute the better reasoned decisions on this issue.

11. Third, because 11 U.S.C. § 101(10A)(A), and the “means test” as a whole, are properly characterized as remedial in nature, see In re Kucharz, 418 B.R. 635, 642 (Bankr. C.D. Ill. 2009), they should be construed broadly to avoid frustration of BAPCPA’s legislative purpose. See Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). “Congress designed the means test to measure debtors’ disposable income and, in that way, ‘to ensure that [they] repay creditors the maximum they can afford.’” Ransom v. F.I.A. Card Svcs., N.A., 131 S. Ct. 716, 725 (2011). Because the Debtor’s construction of 11 U.S.C. § 101(10A)(A) would frustrate that purpose by limiting the amount of income to be included in CMI, it should be rejected.

³ Blausey is the only Circuit level decision that the United States Trustee is aware of that has squarely considered the question of what should and should not be included in CMI.

12. Indeed, were the Debtor's construction of 11 U.S.C. § 101(10A)(A) accepted, it would needlessly prolong "means test" reviews in any number of cases. For example, in Lanning, the Debtor's construction of 11 U.S.C. § 101(10A)(A) would have required a detailed analysis of any employment contracts the debtor had entered into in order to determine the source of the debtor's one-time buyout and when funds should be considered earned. And, in Blausey, the Debtor's construction 11 U.S.C. § 101(10A)(A) would have required an analysis of any insurance contracts the debtor had entered into in order to determine the source of the debtor's private disability payments. This flies in the face of the "means test's" purpose of serving as a screening mechanism aimed at providing a "snapshot" of a debtor's financial circumstances at the time a case is filed in order to determine whether a case is presumptively abusive. See In re Kraft, No. 09-21052, 2011 WL 996760, at *4 (Bankr. D. Wyo. March 16, 2011). It also flies in the face of the truncated procedures established under the Bankruptcy Code for "means test" review. See 11 U.S.C. § 704(b). Because, the "means test," and its accompanying procedural mechanisms under the Bankruptcy Code, are not designed to delve into a debtor's actual financial circumstances, and because the Debtor's construction of 11 U.S.C. § 101(10A)(A) would, in any number of cases, require just the opposite, the Debtor's construction should be rejected.

C. The Adoption of Katz and Burrell in this District Will Ensure Consistency and Efficiency of Means Test Reviews in this District.

13. Applying Katz and Burrell in the District of Wyoming will ensure the continuation of a consistent and efficient review of chapter 7 cases for means testing purposes. Since BAPCPA's enactment, the United States Trustee has reviewed chapter 7 cases filed in this District in accordance with the principles set forth in Katz and Burrell, and therefore only accounted for income "received" during the applicable six (6) month period for purposes of calculating CMI. Further, the Chapter 13 Trustee for the District of Wyoming has maintained the same approach. Adopting the Debtor's position may create severe inefficiencies in the analysis, particularly in cases where the debtor is an hourly wage earner, as it may make it more difficult to determine the number of hours worked before and after the commencement of the CMI period. Such practical difficulties can be avoided by the Court simply adopting the rationale in Katz and Burrell – which, as explained above, is more consistent with Supreme Court and Circuit level treatment of CMI, and more consistent with 11 U.S.C. § 101(10A)(A)'s remedial nature.

CONCLUSION

Given the foregoing, the United States Trustee requests that the Court deny the Motion for Summary Judgment.

Dated: September 23, 2013.

Respectfully submitted,

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