The relief described hereinbelow is SO ORDERED.

SIGNED this 2nd day of April, 2025.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

ULISES G. SERNA and
ROSALIA I. ROSALES-SERNA,

Debtors.

Case No. 23-21328
Chapter 7

ORDER DENYING UNITED STATES TRUSTEE'S MOTION TO DISMISS OR CONVERT

Section 707(b)(1) of the Bankruptcy Code[1] states that a court may dismiss a Chapter 7 case or (with the debtor's consent) convert it to a Chapter 13, if the court finds that granting relief would be an abuse of the provisions

[1] I.e., Title 11, United States Code. All statutory references in this order are to the Bankruptcy Code unless otherwise indicated.

of Chapter 7.[2] If a case is not presumptively abusive under § 707(b)(2), § 707(b)(3) instructs the court to consider whether (A) the debtor filed the petition in bad faith, or (B) the totality of the circumstances of the debtor's financial situation demonstrates abuse to determine whether abuse exists.

This instant case is a voluntary Chapter 7 bankruptcy filed by debtors Ulises G. Serna and Rosalia I. Rosales-Serna.[3] The Sernas' case is not presumptively abusive under § 707(b)(2).[4] Thus, the United States Trustee ("UST") moves to dismiss or convert for abuse under § 707(b)(3)(B).[5] For the following reasons, the UST's motion will be denied.

I. **<u>FINDINGS OF FACT</u>**

An evidentiary hearing on the UST's motion was held before this Court on October 17, 2024. Debtors Ulises Serna and Rosalia Rosales-Serna were witnesses.

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[2] "Relief," in this sense, refers to a Chapter 7 discharge. *See U.S. Trustee v. Cortez (In re Cortez)*, 457 F.3d 448, 454-55 (5th Cir. 2006).

[3] The Sernas are represented by counsel Conrad Miller, Jr. The UST appears by counsel John W. Nemecek.

[4] The Sernas' "Chapter 7 Statement of Your Current Monthly Income" (Official Form 122A-1), i.e., the "means test" under § 707(b)(2), indicated there was no presumption of abuse.

[5] ECF 38. A motion to dismiss or convert is a core proceeding under 28 U.S.C. § 157(b)(2)(A). Venue in the District of Kansas is appropriate under 28 U.S.C. § 1409. This order constitutes the Court's findings of fact and conclusions of law under Fed. Rs. Bankr. P. 7052 and 9014(c).

Ulises is 42 years old and his wife, Rosalia, is 47 years old. They have two children: a 15-year-old daughter, who is in high school, and an 18-year-old son, who recently graduated high school in 2024 with plans to attend junior college. Both children reside with the Sernas. Ulises' mother, who was 66 years old as of the petition date, also resides with them.

The Sernas filed for Chapter 7 bankruptcy relief on November 6, 2023, to manage their "crushing debt … that is overwhelming them."[6] They list primarily consumer debts. Their bankruptcy schedules list total secured debt of $163,528 and total nonpriority unsecured debt of $170,313.17 (including $51,505 in student loans).

Ulises and Rosalia work full-time. Ulises is a program manager at Conexon, LLC, and Rosalia a disclosure desk specialist at First Federal Bank. Ulises is a salaried employee and Rosalia is hourly. Both are paid bi-weekly.

As reported in their originally filed Schedules I and J (filed on November 6, 2023), Ulises' monthly gross income (before payroll deductions) was $7,500, and Rosalia's was $3,354.28. After deducting taxes ($1,321.21 for Ulises and $497.64 for Rosalia) and insurance ($557.59 for Ulises only), the

[6] ECF 40 at ¶ 9.

Sernas' combined monthly income[7] amounted to $8,477.84.[8] Then, after subtracting their monthly expenses of $4,896.95 as reported on their Schedule J, the Sernas' disposable income[9] was $3,580.89.[10]

However, the Sernas' income soon changed as Ulises received a promotion in December of 2023 that increased his annual salary from roughly $70,000 to $90,270.

Yet, shortly thereafter, on January 11, 2024, the Sernas filed their amended Schedules I and J,[11] but did not incorporate Ulises' raise. Rather, the Sernas claimed their gross monthly income had decreased ($6,142.30 and $2,708.32 respectively), leaving them with $6,658.12 in combined monthly

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[7] The Court uses the phrase "combined monthly income" to refer to the Sernas' monthly income as set forth in their Schedule I, which is determined by calculating their estimated monthly gross wages, salary, and commissions as of the petition date minus payroll deductions: state and federal taxes, voluntary contributions to retirement plans, and insurance, etc., then, to the resulting figure, adding any additional sources of income (none listed here) and other regular contributions to expenses (none listed here).

[8] ECF 1 at 38.

[9] For reasons more thoroughly discussed below, the Court will use the term "disposable income" as defined under § 1325(b)(2)(A)(i), which means "current monthly income" as defined in § 101(10A) less "amounts reasonably necessary to be expended" for the maintenance and support of the debtor and their dependents. 11 U.S.C. § 1325(b)(2)(A)(i). Section 101(10A) defines "current monthly income" as the "average monthly income from all sources that the debtor receives … without regard to whether such income is taxable income, derived during the 6-month period ending on—the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income [Schedule I] as required by section 521(a)(1)(B)(ii)[.]" 11 U.S.C. § 101(10A)(A).

[10] ECF 1 at 38.

[11] ECF 18.

income—$1,819.72 less than first reported in their original Schedule I. It is unclear why Ulises' raise was not factored into their amended Schedule I nor why the Sernas reported reduced gross monthly income.

Nor did the Sernas amend their Schedule I (again) to include Ulises' raise *or* the subsequent income increases they received in early 2024: Ulises received a $3,600 bonus and Rosalia received a two-percent cost of living raise (which increased her hourly rate to $19.87).[12]

As for their amended Schedule J, the Sernas claimed their monthly expenses increased from $4,896.95 (per original Schedule J) to $7,324.48. The $2,427.53 increase was predominately caused by the inclusion of previously unreported expenses, such as:

- $400 for home maintenance and repair;
- $375 for additional mortgage payments;
- $300 for childcare and children's education costs;
- $179 for medical and dental expenses;
- $137 and $119 for payments to Nebraska Furniture Mart ("NFM"); and
- $617 to Nelnet for payments on Ulises' student loans.

The Sernas also increased amounts for existing expenses, including:

- $650.44 for electricity and gas (previously $292),
- $110 for water and sewer (previously $105), and

[12] According to their testimony, Ulises received his bonus and Rosalia received her raise in January or February of 2024, but no exact date was identified.

- $400 for clothing and laundry (previously $200).[13]

With their reduced combined monthly income ($6,658.12) and increased expenses ($7,324.48), the Sernas' disposable income, per their amended schedules, is –$666.36.

To summarize, the Sernas' original and amended Schedules I and J list the following income, deductions, and expenses:

	Original Schedules (11/6/23)	**Amended Schedules (1/11/24)**
Monthly Gross Income	**$10,854.28**	**$8,850.62**
Tax, Medicare, and social security deductions	$1,818.88	$1,678.15
Voluntary contributions for retirement	--	--
Insurance	$557.59	$514.35
Combined Monthly Income	**$8,477.84**	**$6,658.12**
Rental or home ownership expenses	$1,148.66	$1,148.66
Real estate taxes	$249.12	$286.21
Property insurance	$393.42	$393.42
Home maintenance, repair, and upkeep expenses	--	$400
Additional mortgage payments	--	$375
Utilities	$677	$1,040.44
Food and housekeeping supplies	$800	$800
Childcare and children's education costs	--	$300

[13] Ulises testified that the increase in expenses was due, at least in part, to the addition of the real estate taxes ($249.12) and property insurance ($393.42) in their amended Schedule J. However, those amounts were already included in their original Schedule J.

Clothing, laundry, and dry cleaning	$200	$400
Personal products and services	$120	$120
Medical and Dental Expenses	--	$179
Transportation	$700	$500
Entertainment, clubs, recreation, newspapers, magazines, and books	$200	$100
Charitable contributions and religious donations	$100	$100
Life insurance	$18.75	$18.75
Vehicle insurance	$290	$290
Nebraska Furniture Mart installment payment (1)	--	$137
Nebraska Furniture Mart installment payment (2)	--	$119
Nelnet-student loan payment	--	$617
Total monthly expenses	**$4,896.95**	**$7,324.48**
Disposable income	**$3,580.89**	**-$666.36**

Additionally, the Sernas contribute to employer-matched 401k retirement plans: Ulises contributes $452.60 per month ($208.89 bi-weekly) and Rosalia contributes $432.14 per month ($199.45 bi-weekly). But neither of those deductions were included in their original or amended Schedule I.

The Sernas also pay for and receive insurance through their employers: Ulises has dental, life, medical, and vision insurance; and Rosalia has dental and vision insurance for which she pays $168.55 per month; Rosalia's insurance deductions were not included in the original or amended Schedule I. Ulises also testified that his insurance premiums had increased by a total of $160 per pay period in the summer of 2024, meaning that an additional $346.67 (($160 × 26) ÷ 12) should be added to his insurance deduction.

At the hearing, the Sernas confirmed that most of the expenses in their amended Schedule J had not changed. They did note, however, that their out-of-pocket medical expenses were closer to $320 per month rather than $179 reported in their amended Schedule J due to the co-pays for Ulises' diabetes medications (including Mounjaro,[14] Metformin, and insulin shots) ranging from $70 to $100 per month, and their monthly mortgage payment, listed as $1,148.66 in their amended Schedule J, had increased to $1,400 per month. Incorporating these two changes, the Sernas' monthly expenses increase to $7,736.82, leaving them with disposable income of −$1,078.70.

II. CONCLUSIONS OF LAW

Section 707(b)(1) of the Bankruptcy Code states that a court may dismiss a Chapter 7 case or (with the debtor's consent) convert it to a Chapter 13 if the court finds that granting relief would be an abuse of the provisions of Chapter 7. If a case is not presumptively abusive under the mean's test provided by § 707(b)(2), § 707(b)(3)(B) instructs the Court to consider whether the totality of the circumstances of the debtors' financial situation

[14] The Court takes judicial notice that the projected Mounjaro expense may be understated significantly as, in 2025, some insurers have significantly increased the insured's monthly responsibility to $500 or more.

demonstrates abuse, to determine whether abuse exists. The movant (the UST) bears the burden of proving that the case is abusive. *In re Doherty*, 374 B.R. 288, 291 (Bankr. D. Kan. 2007).

As a preliminary matter, the Sernas argue that the Court cannot consider "raises, new jobs, bonuses, or other income earned" after the filing of the bankruptcy to determine abuse.[15] However, it is well-settled that the Court, under the totality of the circumstances analysis, implements a broad and flexible review of any factors that may be relevant to the debtor's financial condition, *including* post-petition raises, bonuses, and promotions. *See In re Smith*, 585 B.R. 168, 175 (Bankr. W.D. Okla. 2018).

A. <u>Totality of the circumstances: Ability to Pay</u>

A debtor's ability to pay their debts in a Chapter 13 has been recited as the "primary factor" for the court to consider under the totality of the circumstances test. *See Stewart v. U.S. Trustee (In re Stewart)*, 175 F.3d 796. 809 (10th Cir. 1999).[16] However, the Court must also consider other relevant

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[15] ECF 40 at ¶ 11.

[16] The UST brought this motion under § 707(b)(3), and if, as in this case, the debtors "pass" the mean's test under § 707(b)(2), it is questionable whether, after BAPCPA, the ability to pay should be a factor for purposes of § 707(b)(3). However, under the facts of this case, the Court need not decide that issue. *See In re Senk*, Case No. 22-20910, 2023 WL 11264311, at *1 n.10 (Bankr. D. Kan. Nov. 7, 2023) ("After the 2005 amendments to the Bankruptcy Code, it has been questioned whether the ability to pay should be a factor, primary or otherwise, under the § 707(b)(3) totality of the circumstances test.") (citing Nat'l Consumer L. Ctr, *Consumer L. & Prac.*, ¶ 13.4.7.4

factors, including but not limited to: (1) sudden illness, calamity, disability, or unemployment; (2) cash advances or consumer purchases in far excess of ability to repay; (3) excessive or unreasonable family budget; (4) accurate reflection of true financial condition in schedules and statements of income and expenses; (5) stable source of future income; (6) eligibility for Chapter 13; (7) existence of state remedies or private relief through negotiation; and (8) the debtor's good faith, to determine whether abuse exists. *See In re Stewart*, 175 F.3d at 809 (citing *Green v. Staples (In re Green)*, 934 F.2d 568, 572–73 (4th Cir. 1991), *In re Krohn*, 886 F.2d 123, 126–27 (6th Cir. 1989), and *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 4–5 (1st Cir. 1998)). The totality of the circumstances analysis is done on a case-by-case basis. *In re Stewart*, 175 F.3d at 809.

A debtor's ability to pay "is generally considered within the context of a hypothetical chapter 13 case." *U.S. Trustee v. Kubatka (In re Kubatka)*, 605 B.R. 339, 357 (Bankr. W.D. Pa. 2019). In a Chapter 13, a debtor's disposable income is calculated by determining their "current monthly income" as defined in § 101(10A) less "amounts reasonably necessary to be expended" for the maintenance and support of the debtor and their dependents. *See* 11 U.S.C. § 1325(b)(2)(A)(i). For below-median income debtors, the bankruptcy

(13th ed. 2023), *updated at* www.nclc.org/library; 6 *Collier on Bankruptcy* ¶ 707.04 (Richard Levin & Henry J. Sommer eds., 16th ed.).

court must determine whether the debtor's listed expenses are "reasonably necessary" for the debtor's maintenance. *See Saldana v. Bronitsky (In re Saldana)*, 122 F.4th 333, 339–40 (9th Cir. 2024); *c.f. In re Doherty*, 374 B.R. at 291 (§ 1325(b)(3) requires a specific calculation of reasonably necessary expenses for an above-median income debtor). Furthermore, "courts generally agree that under the totality of the circumstances, an ability to pay means something more than simply having monthly disposable income. It instead suggests the ability to generate a return to creditors that is meaningful or significant." *In re Kubatka*, 605 B.R. at 356 (citations omitted). Thus, the issue before the Court is whether the UST has proven that the Sernas have the ability to pay a meaningful or significant return to their unsecured creditors in a hypothetical Chapter 13.

The UST argues that the Sernas' under-estimated their combined monthly income on their amended Schedule I by failing to account for their raises and Ulises' bonus. Using pay advices (one dated May 30, 2024 for Ulises and one dated April 26, 2024 for Rosalia), it calculates the Sernas' combined monthly income to be $8,126.75 as summarized below:[17]

	Ulises	**Rosalia**
Monthly Gross	$7,543.16	$3,541.56
Taxes and Deductions	$1,887.47	$1,070.50

[17] UST's Trial Brief at 6, ECF 45. In calculating Ulises' and Rosalia's monthly gross income and taxes and deductions, the UST used this formula: (Bi-weekly Income × 26 pay periods) ÷ 12 months. *See id.* at fns.18–21.

Total Take Home	$5,655.69	$2,471.06
Combined Monthly Income:	$8,126.75	

Looking at the advices provided, the Court agrees that the Sernas' underestimated their income on their amended schedules but disagrees with the UST's calculations as it did not include Ulises' deductions for dental, life, medical, or vision insurance into its computation.[18] Yet, the particular paycheck provided to the Court does not show what Ulises' deductions are, making this determination more troublesome.[19]

Thus, to calculate Ulises' monthly deductions as they were on May 30, 2024, the Court used the year-to-date ("YTD") total for each deduction: $120 for dental, $187.50 for life, $2,234.10 for medical, and $31.90 for vision;[20] then divided the totals by the number of pay periods that had elapsed. Thus:

$$\text{Bi-weekly Deductions} = \text{YTD} \div \text{\# of Pay Periods}$$
with
$$\text{\# of Pay Periods} = \text{YTD Earnings} \div \text{Bi-Weekly Earnings}$$
with
$$\text{YTD Earnings} = \$38{,}296.06$$
and

[18] The UST calculates that Ulises' bi-weekly taxes and deductions are $871.14. UST's Trial Brief at 6 n.20; ECF 45. Although the UST did not "show its work", the Court assumes the UST added the assessed bi-weekly taxes of $662.15 and 401k contributions of $208.99.

[19] Often, benefits, such as insurance premiums that do not vary paycheck to paycheck, are deducted twice per month for employees who are paid bi-weekly. When there are three pay days in one month (which usually happens only twice per year), it is possible benefits may not be deducted from the paycheck falling on the third pay day. This appears to be the case here as there were three pay periods in May of 2024.

[20] UST's Ex. 3.

Bi-Weekly Earnings = $3,481.46

So, for example, to calculate Ulises' bi-weekly dental insurance deduction:

Bi-Weekly Deductions = $120 ÷ ($38,296.06 ÷ $3,481.46)
thus,
Bi-Weekly Deductions = $10.90

Finally, by multiplying the bi-weekly deduction ($10.90) by 26 pay periods, then dividing the resulting figure by 12 months, Ulises' monthly deduction for dental insurance is $23.64. The Court's findings for the remaining deductions are summarized below:

	Bi-Weekly	**Monthly**
Dental Insurance	$10.91	$23.64
Life Insurance	$17.05	$36.93
Medical Insurance	$203.10	$440.05
Vision	$2.90	$6.28

Then, after factoring in the $346.67 increase, Ulises' monthly deductions for insurance is $853.57. Combining the $452.60 in monthly 401k contributions and $1,434.66 in monthly income tax, Ulises' monthly deductions are $2,740.83.

With this change, the Sernas' combined monthly income is $7,273.38, which is $615.26 higher than the amount listed in their amended Schedule J ($6,658.12). Yet, this does not bring the Sernas out of the "red" as they still have a negative disposable income ($7,273.38 – $7,716.82 = –$443.44).

The UST next argues that a $3,600 bonus Ulises received in early 2024 and various $200 monthly payments from Ulises' mother should be factored into the Sernas' combined monthly income.

To include Ulises' bonus in the Sernas' monthly income, the Court must find that it would be reasonable to assume that Ulises, based on past receipt of similar bonuses, will receive bonuses in the future and can then use the future bonuses to fund a Chapter 13 plan. *See Hamilton v. Lanning*, 560 U.S. 505, 524 (2010) (a court may account for changes in the debtor's income "that are known or virtually certain to occur"); *In re Coates*, No. 10-41555, 2011 WL 5419676, at *9 (Bankr. D. Colo. Nov. 7, 2011) (the debtor's bonus would be considered under § 707(b)(3) because it was reasonable to assume that debtor would receive future bonuses as debtor had received an annual bonus every year for six years). However, Ulises' testimony undermines such a finding; he stated that he did not receive a bonus in 2023 and did not expect to receive another in 2024 or 2025. And the UST did not provide evidence to the contrary. Therefore, the bonus will not be included.

As for the $200 payments, the Sernas explained that the payments were received in accordance with an agreement between the Sernas and Ulises' mother where the Sernas agreed to "purchase" a laptop for the mother using their NFM account and in return, the mother made the monthly payments on the laptop by transferring $200 to the Sernas, who then made a corresponding $200 payment on their NFM account. Thus, the payments are arguably not "income", as defined in § 101(10A)(A)–(B)(i), as the Sernas did not receive the payments *for* household expenses. *See also Collier on Bankruptcy* ¶ 101.10A (Richard Levin & Henry J. Sommer eds., 16th ed.). Regardless, however, the Court need not decide that issue because Ulises' mother no longer makes any payments to the Sernas (her final payment was in August or September).

Moving to the Sernas' expenses, the UST disputes the reasonableness of the following:

1. Property taxes on their home, $282.61;
2. Homeowners insurance, $393.42;
3. Voluntary retirement contributions, $819.84 (in total); and
4. Student loan payments, $617.

As to expenses (1) and (2), the Sernas confirmed that their insurance and tax payments are included in their mortgage payments and agreed that the amounts should not have been listed separately from their mortgage in their schedules and should be removed.

For expense (3), the UST argues that the Sernas' voluntary retirement contributions should be treated as disposable income in a § 707(b)(3) analysis, or, at the very least, Rosalia's 12.5% contribution rate should be greatly reduced. Yet, it would be illogical to treat the Sernas' voluntary retirement contributions as disposable income under § 707(b)(3) when the same contributions would be excluded from the calculation in a Chapter 13. *See In re Vanlandingham*, 516 B.R. 628, 633–34 (Bankr. D. Kan. 2014) (discussing cases);[21] *In re Saldana*, 122 F.4th at 341–42; *In re Kubatka*, 605 B.R. at 364 (concluding that it would not consider retirement contributions in the ability to pay analysis because it would not "ignore the absurdity of finding a chapter 7 filing abusive solely based on the legal fiction that retirement funds are available when they are not actually required to be paid to creditors in chapter 13.") And, although Rosalia's individual contribution rate is rather high, the Sernas' cumulative contribution rate is only 7% of their gross monthly income, which is not unreasonable considering: (1) their ages (Ulises is 42 and Rosalia is 47), (2) their contributions are fully matched by their employers,[22] and (3) their paltry amassed retirement savings of $12,213.47 (as of the petition date).[23]

For expense (4), the UST argues the Sernas' $617 student loan payment cannot be deducted from the Sernas' disposable income because the

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[21] Although there may be some instances in which debtors use voluntary contributions nefariously (increasing their contributions post-petition to avoid paying their unsecured creditors), there is no evidence that the Sernas have done so here. *See generally In re Vanlandingham*, 516 B.R. at 637–38.

[22] Based on their pay advices, the Sernas' employers are matching 100% of their contributions. *See* UST's Trial Exs. 3, 4.

[23] ECF 1 at 11; UST's Trial Ex. 1 at UST's 033.

nondischargeability of the student loan is not a basis to treat student loan creditors more favorably.[24] However—in a hypothetical Chapter 13—the Sernas would be able to treat their student loans creditors more "favorably ahead of other general unsecured creditors [as this] furthers Congressional intent and protects the government's and the student loan program's fiscal health." *In re Engen*, 561 B.R. 523, 541-42 (Bankr. D. Kan. 2016).[25] Preventing the Sernas from deducting their $617 student loan payment for purposes of § 707(b)(3) when they would otherwise be able to do so in a Chapter 13 is nonsensical. For that reason, their $617 student loan expense will be included. Regardless, the Sernas' Chapter 13 plan could provide for the cure and the $617 monthly payment on their student loans under § 1322(b)(5). *See Collier on Bankruptcy* ¶ 1322.09 ("[Section 1322(b)(5)] can also be used, at the debtor's option, to cure defaults on unsecured debts such as student loans[.]").[26]

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[24] ECF 38, at 5 (citing *In re Adamski*, Case No. 14-33195, 2015 Bankr. LEXIS 1177, at *10 (Bankr. N.D. Ohio Apr. 9, 2015).

[25] *But see In re Kubatka*, 605 B.R. at 365-66 (finding that "categorically monthly student loan payments must be considered disposable income" but acknowledging that the "prohibition against a debtor favoring their student loan debts is not absolute.").

[26] Notably, the Sernas' student loan debt represents approximately one-third of the Sernas' general unsecured debt, thus, most of their unsecured claim distributions—even absent separate classification—would be paid on their student loan debt.

Finally, the UST claims the Sernas anticipate an overall increase in income and decrease in expenses, pointing to vague statements in the Sernas' reaffirmation agreements with NFM and Nation Star Mortgage (filed in January of 2024) in which the Sernas claimed they could afford the monthly payments due to (1) Rosalia's upcoming cost-of-living raise, and (2) the reduction of their expenses.[27] Yet, this argument takes the Sernas' statements out of the relevant context and calls for too broad of an interpretation that is not supported by the vague statements in the reaffirmations.

First, when those statements were made, Rosalia *anticipated*—not hoped for, a raise. As of now, the Sernas do not anticipate additional raises, and there is no evidence to suggest that they should. Thus, the possibility of future raises is too remote to include in the Sernas' monthly income calculations.

Second, in addition to the Sernas' statements in the reaffirmation agreements that they are reducing expenses, the UST argues that the Sernas expenses will also decrease "as their teenage children leave home and begin

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[27] ECF 20, 21, 26; UST's Trial Exs. 5 at UST's 006, 6 at UST's 012, 7 at 2. The Sernas had three reaffirmation agreements in total: two with NFM to reaffirm unidentified household goods and furnishings (ECF 20, 21) and one with Nationstar Mortgage to reaffirm the mortgage on their home (ECF 26). All three were approved by the Court. ECF 22, 27.

to support themselves."[28] Yet, neither argument alone supports a finding that the Sernas' expenses have decreased (and they are otherwise over-estimating their expenses) or their expenses are reasonably certain to decrease during the course of a three-to five-year plan.

Aside from the expenses discussed above, the Court concludes that the Sernas' remaining expenses as set forth in their amended Schedule J are generally reasonable for a family of five. Thus, after making the discussed adjustments, the Sernas' expenses are as follows:

Rental or home ownership expenses	$1,400
Real estate taxes	-
Property insurance	-
Home maintenance, repair, and upkeep expenses	$400
Additional mortgage payments	$375
Utilities	$1,040.44
Food and housekeeping supplies	$800
Childcare and children's education costs	$300

[28] UST's Trial Brief at 11, ECF 45. The UST's assumption that the Sernas' children (the eldest recently graduated high school and the youngest will not graduate until 2026) will move out during a three-to-five-year Chapter 13 plan is mere conjecture as it ignores the reality that most children in the United States continue to live with their parents well-into their early twenties. Rachel Minkin, et al., *Parents, Young Adult Children and the Transition to Adulthood*, Pew Rsch. Ctr. (Jan. 25, 2024) https://www.pewresearch.org/social-trends/2024/01/25/parents-young-adult-children-and-the-transition-to-adulthood/ (finding that among ages 18–24, 57% of children are living in a parent's home).

Clothing, laundry, and dry cleaning	$400
Personal products and services	$120
Medical and Dental Expenses	$320
Transportation	$500
Entertainment, clubs, recreation, newspapers, magazines, and books	$100
Charitable contributions and religious donations	$100
Life insurance	$18.75
Vehicle insurance	$290
Nebraska Furniture Mart installment payment (1)	$137
Nebraska Furniture Mart installment payment (2)	$119
Nelnet-student loan payment	$617
Monthly Expenses	**$7,037.19**

With the Court's adjustments to their combined monthly income and expenses, the Sernas' disposable income is $236.19. Over the course of a three-year plan,[29] the Sernas would pay $8,502.84—a five percent distribution—to their unsecured creditors. Such a distribution is neither significant nor meaningful. *See In re Kubatka*, 605 B.R. at 356 (observing that some courts consider § 707(b)(2)(A)(i)(I)'s 25% repayment threshold to be

[29] As below-median income debtors, the "applicable commitment period" for the Sernas' hypothetical Chapter 13 plan would be three years. *See* 11 U.S.C. § 1325(b)(4). In a five-year plan, the Sernas would pay $14,171.40 to their unsecured creditors, which amounts to an eight percent distribution.

"a helpful tool for determining abuse" but that the amount of unsecured debt and potential dividend are "inversely proportional" and a "strictly mathematical formula is likely inappropriate"). Thus, the "primary factor" of the totality of the circumstances test weighs in favor of the Sernas.

B. <u>Other *Stewart* Factors</u>

However, other factors weigh in favor of the UST. The Sernas have stable sources of future income and are eligible for Chapter 13 relief. Furthermore, the Sernas' schedules contained various inaccuracies: they double-counted their homeowner's insurance and tax payments; they underestimated their income in their amended Schedule I; and they failed to update their Schedule I to show that their income had increased due to Ulises' promotion and bonus and Rosalia's two-percent cost of living raise.

Yet, other factors weigh in favor of the Sernas. There is no evidence that the Sernas have taken cash advances or made consumer purchases that are in excess of their ability to repay. Nor is there any evidence that the Sernas' budget is excessive or unreasonable for a family of five.

The remaining factors are neutral. There is no evidence that the Sernas experienced sudden illness, calamity, or unemployment, or that the Sernas could obtain state remedies or private relief through negotiation. Finally, the

UST does not allege that the Sernas lacked good faith in filing their petition.[30]

III. CONCLUSION

The Court finds that, under the totality of the circumstances, the Sernas' financial situation does not demonstrate abuse. For those reasons, the Court finds that the granting of relief in this case would not be an abuse of the provisions of Chapter 7. The UST's motion to dismiss or convert this case for abuse under 11 U.S.C. § 707(b)(3) is therefore denied.[31]

IT IS SO ORDERED.

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[30] *See* 11 U.S.C. § 707(b)(2)(A) (directing court to consider "whether the debtor filed the petition in bad faith"); *c.f. In re Stewart*, 175 F.3d at 810 ("[U]nder the totality of the circumstances, we question [the debtor's] good faith in filing his petition . . . .").

[31] Not lost on this Court are the significant monetary and emotional costs associated with a § 707(b)(3) contested matter: there are additional formal and informal discovery demands to debtors; preparation for and attendance at an evidentiary hearing; a material increase in attorney's fees; delay in the discharge and interruption of the bankruptcy proceedings as a whole; and the additional emotional toll on the debtors, their families, and society in general. Indeed,

> It is this Court's experience that many consumer bankruptcies are filed by desperate individuals, who are financially, emotionally, and physically exhausted. Sometimes lost in the discussion that the bankruptcy discharge provides a fresh start to honest but unfortunate debtors is that, perhaps as importantly, it provides a commensurate benefit to society and the economy: People are freed from emotional and financial burdens to become more energetic, healthy participants.

In re Engen, 561 B.R. at 550.