UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

IN RE:	:	CHAPTER 7
Norman A Sperry	:	CASE NO. 22-20287
DEBTOR	:	August 25, 2023

MEMORANDUM OF LAW IN SUPPORT OF OBJECTION TO MOTION TO DISMISS

The Debtor herein, by and through his undersigned counsel, respectfully submits this Memorandum of Law in support of his *Objection to Motion to Dismiss* (ECF No. 71).

I. SUMMARY OF THE DEBTOR'S ARGUMENT

The Debtor respectfully submits that the proper date for calculation of the Means Test is the date of filing of the case, even if the case was filed as a Chapter 13 and later converted to a Chapter 7. Further, if a debtor qualified under the Means Test to file a Chapter 7 on the date of filing, even if the case was filed as a Chapter 13, he remains qualified if the case is later converted to a case under Chapter 7.

In this case, the Debtor's mortgage arrearage was more than $100,000.00 on the date the case was filed but was then eliminated by way of post – petition mortgage modification. This fact does not compel re – calculation of the Means Test, however, as the calculation pursuant to 11 U.S.C. §707(b)(2)(A)(iii)(for payment of secured debts) is intended to be a "snapshot of the matters as of the petition date". *In re Longo*, 364 B.R. 161 (Bankr. D. Conn. 2007)(Weil, J.).

II. INTRODUCTION AND PROCEDURAL HISTORY

In the *United States Trustee's Motion for an Order Dismissing Debtor's Chapter 7 Case Pursuant to 11 U.S.C. §707(b)(1) and (2) for Presumed Abuse* dated May 12, 2023 (the "Motion to Dismiss")(ECF No. 67). In the Motion to Dismiss, the Trustee argues that the Debtor's case should be dismissed under 11 U.S.C. §707(b)(1) and (2) based on alleged abuse of the bankruptcy process. The Trustee's argument is based essentially on one fact, which is the elimination of a mortgage arrearage that occurred between the date the Debtor's case was filed as a case under Chapter 13 and the date the Debtor's case was converted to a case under Chapter 7.

The Debtor's case was filed as a case under Chapter 13 on April 29, 2022 (the "Date of Filing")(*See*

Joint Stipulation of Facts[1], ¶1). On the Date of Filing, the Debtor had a very substantial mortgage arrearage to New Rez, LLC. The mortgage arrearage was in the amount of $100,529.75 (*See* Joint Stipulation of Facts, ¶5).

To cure and reinstate the mortgage was the primary purpose of the Debtor's Chapter 13 case (*See* Chapter 13 Plan (ECF No. 2). While the case was pending under Chapter 13, however, the Debtor and the mortgagee agreed to a modification of the mortgage that, among other things, cured and reinstated the mortgage (*See* Joint Stipulation of Facts, ¶30 and 31). The Court approved the loan modification on January 15, 2023 (*See* Joint Stipulation of Facts, ¶32).

Thereafter, on January 31, 2023 (the "Date of Conversion"), at the request of the Debtor, his case was converted to a case under Chapter 7 of the Bankruptcy Code (*See* Joint Stipulation of Facts, ¶37 and 38). On February 20, 2023, the Debtor filed a Chapter 7 Statement of Current Monthly Income (Form 122A-1) and Chapter 7 Means Test Calculation (Form 122A-2)(the "Chapter 7 Means Test") (*See* Joint Stipulation of Facts, ¶40). The Chapter 7 Means Test was calculated as of the Date of Filing, not as of the Date of Conversion, and accordingly included the Debtor's mortgage arrearage that existed on the Date of Filing (*See* Joint Stipulation of Facts, ¶41 - 44).

The Trustee asserts that the Means Test calculation in this case should be as of the Date of Conversion, not the Date of Filing, and seeks dismissal of this case because, in his view, the Debtor would not qualify for relief under Chapter 7 had it been *filed* on the Date of Conversion. This assertion is contrary to established case law.

III. ARGUMENT

The Means Test filed upon conversion from Chapter 13 to Chapter 7 is calculated on the Debtor's income and expenses as of the Date of Filing, without regard to subsequent changes between the Date of Filing and the Date of Conversion.

When the Debtor filed his case, his projected disposable income was -$190.69[2]. *See* ECF No. 3, Line 45. Upon conversion to Chapter 7, the Debtor filed Official Form 122A-1 and Office Form 122A-2 (ECF No. 56). The data in these forms was from the Date of Filing. Accordingly, the Debtor would have

[1] The Joint Stipulation of Facts was filed with the Court on August 21, 2023. See ECF No. 88.

[2] The Official Form 122A-1 and Office Form 122A-2 (ECF No. 56) contains an imprecise statement of the mortgage arrearage on the Date of Filing as $104,000.00. The actual arrearage was $100,529.75 (*See* Joint Stipulation of Facts, ¶43). This difference, however, is factually irrelevant. Utilizing the actual arrearage would result in a projected disposable income of -$132.85.

qualified for relief under Chapter 7 had his case been filed as such. It cannot be said that, on the Date of Filing, the Debtor's case was in any way an abuse of the Bankruptcy process.

The plain reading of the statutory scheme leads to the conclusion that the Means Test calculation is as of the Date of Filing. Bankruptcy Code Section 101(10A) indicates that "current monthly income" is determined by averaging the monthly income the debtor received over the previous six-month period ending on the last day of the calendar month immediately preceding the *date of the commencement of the case*. In addition, the standard expenses that the debtor may deduct for purposes of the means test are those that are in effect on the *date of the order for relief*. See 11 U.S.C. § 707(b)(2)(A)(ii). The debtor's monthly payments for secured debts are calculated as the sum of the total amounts contractually due in each month of the 60 months following *the date of the petition* divided by 60. 11 U.S.C. § 707(b)(2)(A)(iii). *In re Ellringer*, 370 B.R. 905 (Bankr. Minn. 2007). "If it is converted to a case under another chapter, the new figurative order directing that new track of remedies, deemed to have been issued coincident with the event of conversion, 'does not effect a change in the filing of the petition, the commencement of the case, or the order for relief,' per § 348(a)". *In re Chapman*, 431 B.R. 216 (Bankr. Minn. 2010). Further, under bankruptcy law, substantive interests and rights are generally fixed upon the filing of the bankruptcy petition. *In re Pier*, 310 B.R. 347, 354 (Bankr. N.D. Ohio 2004).

The proper date for calculation of the Means Test in a case converted from Chapter 13 to Chapter 7 is the Date of Filing. *In re Chapman*, 447 B.R. 250 (B.A.P. 8th Cir. 2011)("debtors are deemed to have filed a Chapter 7 case at the time the Chapter 13 case was filed").

The Means Test is based on the debtor's financial situation on the petition date. *See*, e.g., *In re McKay*, 557 B.R. 810 815-16 (Bankr. W.D. Okla. 2016) ("The great weight of authority holds that the means test calculation of § 707(b)(2) is based on a "snapshot" of a debtor's financial situation as of the petition date, without consideration of whether the debtor's expenses may change after that date"); *In re Rudler*, 388 B.R. 433, 438 (1st Cir. BAP 2008); *In re Rivers*, 466 B.R. 558, 567 (Bankr. M.D. Fla. 2012) ("the determination of whether to permit a Chapter 7 debtor to proceed in a liquidating case should be made as of the petition date").

Commencement of a bankruptcy case constitutes an order for relief. 11 U.S.C. §301(b). Pursuant to 11 U.S.C. §348, conversion of a case constitutes an order for relief under the chapter to which the case is converted. 11 U.S.C. §348(a). There is no change in the date of filing of the petition, commencement of the case, or date of the order for relief. Accordingly, filing is equivalent to conversion, and an application of §348(a) of the Bankruptcy Code mandates that the term 'filed under' incorporates the term converted

to. Therefore, a debtor who converts her chapter 13 case to chapter 7 is deemed to have filed a chapter 7 case as of the original petition date. *In re Resendez*, 691 F.2d 397, 399 (8th Cir. 1982) ("[I]t is also established that when there is a conversion, the debtors are deemed to have filed a Chapter 7 case at the time the Chapter 13 case was filed."); *In re Davis* (Bankr. S.D. Ga. 2013) See Also *In re Chapman*, 447 B.R. 250, 253 (B.A.P. 8th Cir. 2011)(holding that cases filed under chapter 13 and later converted to chapter 7, are considered to be "filed under" chapter 7 for the purposes of §707(b) (1)); *In re Knighton*, 355 B.R. 922, 926 (Bankr. M.D. Ga. 2006) ("[C]onverting a case from Chapter 13 to Chapter 7 causes the case to be one that is filed under Chapter 7 on the same date the Chapter 13 petition was filed.").

Despite the statutory scheme outlined above and weight of authority, the Trustee argues that the Debtor is obligated to file Chapter 7 Statement of Current Monthly Income (Form 122A-1) and Chapter 7 Means Test Calculation (Form 122A-2) but *calculated as of the Date of Conversion*, which would exclude the mortgage arrearage that existed on the Date of Filing. There is simply no authority that supports that position.

The Trustee is essentially arguing that the conversion of the Debtor's case constitutes a *new case* that was filed on the Date of Conversion. But there is no support for this conclusion. The cases that confronted this issue led to the opposite result.

For example, in *In re Kerr* (Bankr. W.D. Wash 2007; Case No. 06-12302)(attached), the debtors commenced a case under Chapter 13, but then converted their case to a case under Chapter 7. The Court in *Kerr* found that:

> Section 707(b)(2)(C) requires the debtor to state, in the schedule of current income required under Section 521, his or her "current monthly income." This is the same language that appears in Section 707(b)(2)(A)(i), where the presumption of abuse is described. Current monthly income is expressly defined in Section 101(10A) as the debtor's average monthly income received in the six-month period preceding "the date of the commencement of the case."...This definition is repeated in Form B22A, Part II, and in Form B22C, Part I, Line 1. The date of the "commencement of the case" does not change when the case is converted. 348(a). *Consequently, it is clear that "current monthly income" in a converted case is determined based on the initial filing date, admittedly, a date that could be years prior to the conversion date.*
>
> Similarly, the means test analysis looks at the debtor's expenses, which are referred to as "deductions" in Form B22A. There are three categories of expenses: necessary expenses defined by the Internal Revenue Service, necessary expenses defined by statute, and allowances for debt payment. Wedoff, at 252. See, also, Section 707(b)(2)(A)(ii)-(iv). Neither the Code nor the Rules define the terms "current expenditures" as used in Section 521(a)(1)(B)(2) or "monthly expenses" as used in Section 707(b)(2)(A). Section 707(b)(2)(A)(ii)(I), however, refers to "Other Necessary Expenses issued by the Internal Revenue Service ... as in effect on the date of the order for relief.". Because Section 348(a) retains the original date of the order for relief notwithstanding subsequent conversion of the case, *the Court holds that the debtors should include in Form B22A their*

expenses as of the original petition date. [Emphasis Supplied].

Other cases addressing this issue have reached similar conclusions. See e.g. *In re Willis*, 408 B.R. 803 (Bankr. W.D. Mo. 2009)("whether a presumption of abuse arises in a case will always be based on a debtor's Current Monthly Income as of the petition date."); *In re Fox*, 370 B.R. 639 (Bankr. N.J. 2007)("A logical and plain reading of § 707(b)(2)(A)(ii)(I) would make the point of reference for the determination of the debtor's monthly expenses the date the petition was filed, not the date of conversion..."); *In re Lawrence* (Bankr. D.C. 2016)(attached)(Means Test filed upon conversion properly included deduction for mortgage on property to be surrendered); *In re Kellett*, 379 B.R. 332 (Bankr. Or. 2007)("In addition, since § 348(a) provides that conversion 'does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief,' the Form B22A in a converted case is prepared based on the debtor's income averaged over the six months preceding the month during which the debtor's original bankruptcy petition was filed.").

IV. CONCLUSION

The Trustee may argue that application of foregoing statutory scheme and judicial interpretation of it will lead to the Debtor obtaining relief to which he is not entitled because he is no longer obligated to pay his mortgage arrearage in the future and should thus be forced back into Chapter 13 or have his case dismissed. This appeal to "rough justice" may have applicability under 11 U.S.C. §707(b)(3) and the "totality of circumstances". The issue raised in this case, however, is a matter of statutory interpretation of 11 U.S.C. §707(b)(1) and (2). From that perspective, it is clear that the weight of authority firmly supports the Debtor's position that Date of Filing is the proper date for calculating his Means Test, regardless of subsequent events. For this reason, the Motion to Dismiss should be denied.

THE DEBTOR,

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In re MICHAEL A. KERR and DAWNA L. KERR, Chapter 7, Debtors.
In re STEPHANIE M. KALLBERG, Chapter 7, Debtor.
Case No. 06-12302.
Case No. 06-12881.
United States Bankruptcy Court, W.D. Washington, at Seattle.
July 18, 2007.

MEMORANDUM DECISION APPLYING SECTION 707(b) TO CASES CONVERTED FROM Chapter 13 TO Chapter 7

KAREN OVERSTREET, Bankruptcy Judge.

These two matters came before the Court for hearing on June 1, 2007. Both cases involve the same legal issue and are addressed together in this opinion. In both cases the debtors initially filed voluntary petitions under Chapter 13 and subsequently converted to Chapter 7. After conversion, the Bankruptcy Court Clerk's office generated orders to show cause for dismissal due to the debtors' failure to file a new means test Form B22A post conversion as required by Local Interim

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Bankruptcy Rule ("LIBR") 1007-1(b).[1]

In their responses, the debtors challenged LIBR 1007-1(b) and denied that they were required to file Form B22A in a converted case. The Court requested the United States Trustee ("UST") to file a responsive brief in each of the cases. Because this is a matter of first impression in this district, the Court took the matter under advisement. Upon further review of the pleadings and record herein the Court issues this Memorandum Decision.

I. FACTUAL BACKGROUND

Ms. Kallberg filed a Chapter 13 petition on August 25, 2006. At the same time, she filed a Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Form B22C) which showed that she was an above-median income debtor for purposes of Section 1325(b) with monthly disposable income of $218.08 (Line 50, Form B22C). Her Chapter 13 plan proposed monthly payments of $670 over 60 months. Ms. Kallberg is a real estate agent working on commission. She was not able to confirm a Chapter 13 plan or pay her monthly plan payments. On February 5, 2007, she filed a motion to convert her case to Chapter 7, and the order of conversion was signed on March 22, 2007. There is

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no dispute that Ms. Kallberg's debts are primarily consumer debts.

Mr. and Ms. Kerr filed a Chapter 13 petition on July 17, 2006. The Kerr's Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income (Form B22C) reported that they were above-median income debtors with monthly disposable income of $5,977.06 (Line 58, Form B22C). The Kerrs confirmed a Chapter 13 plan on November 20, 2006, requiring plan payments of $5,500 per month. They subsequently experienced economic problems, however, and were unable to continue their plan payments. Their case was converted to Chapter 7 on March 27, 2007. It is undisputed that the Kerrs' debts are primarily consumer debts.

II. ISSUES

There are three issues before the Court: (1) Whether the presumption of abuse under Section 707(b)(1) applies in a case converted from Chapter 13 to Chapter 7; and if so (2) whether Form B22A (Chapter 7 means test form) must be filed after conversion to Chapter 7 pursuant to Section 521(a)(1)(B)(ii), Interim Rule 1007(b)(4), and LIBR 1007-1(b); and if so (3) whether the amounts for income and expenses required to be inserted in Form B22A should be determined by reference to the original petition date or the date of conversion.

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III. JURISDICTION

This Court has jurisdiction over the pending matters, and these are core proceedings. 28 U.S.C. §§ 1334, 1408; 28 U.S.C. §157(b)(2)(A).

IV. ANALYSIS

These cases were filed after the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and are therefore subject to the "means test" provisions of the statute. Under BAPCPA, Chapter 7 debtors with primarily consumer debts are required to complete and file a statement of current monthly income, also referred to as the "means test" form. 11 U.S.C. §521(a)(1)(B)(v). If the calculations in the means test form show that 1) the debtor's monthly disposable income is at least $166.67 per month, or 2) the debtor's monthly disposable income is at least $100 and would be sufficient to pay at least 25% of the non-priority unsecured claims in the case, then pursuant to Section 707(b)(2), the debtor's bankruptcy filing is presumed to be an abuse of the bankruptcy system and is subject to dismissal on motion of the UST or any party in interest. 11 U.S.C. §707(b)(1). To avoid dismissal, a debtor unable to rebut the presumption of abuse may consent to conversion to Chapter 13. As one commentator has stated,

BAPCPA eliminates the old §707(b) presumption in favor of the debtor's choice of Chapter 7, and replaces it with a new presumption, generated by

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the means test, that Chapter 7 relief is an "abuse" in cases where the debtor appears to have sufficient debt-paying ability.

Eugene R. Wedoff, *Means Testing in the New §707(b),* 79 Am. Bankr. L. J. 231, 234 (Spring, 2005).

The debtors in these cases do not dispute that had they filed their cases initially under Chapter 7, their cases would have been presumed abusive because their monthly disposable income exceeds the threshold described above. Because they have already tried and failed in their Chapter 13 cases, however, they argue that the presumption of abuse under Section 707(b) should not apply to them.

A. <u>Statutory Analysis of Section 707(b)</u>.

The debtors' argument that Section 707(b) is inapplicable to converted cases depends upon their interpretation of the following language: "[T]he court...may dismiss a case **filed** by an individual debtor **under this chapter...**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)(emphasis added). They interpret "filed under this chapter" to refer only to cases that are initially filed under Chapter 7. Because their cases were initially filed under Chapter 13, they contend that Section 707(b) is not applicable. The UST argues that the phrase "under this chapter" modifies the word "case," such that the plain meaning of the statute is to apply Section 707(b) to all "case[s] ... under this chapter" involving debtors who owe primarily

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consumer debts.

There are only two reported cases addressing the issues before the Court. The first case, *In re Perfetto,* 361 B.R. 27 (Bankr. D. R.I. 2007), rejected the debtors' narrow reading of Section 707(b) and held that a debtor whose case is converted from Chapter 13 to Chapter 7 is subject to the means test and is required to file Form B22A after conversion of the case. The facts in that case, however, were strong motivation for the court's decision; the debtor converted her case to Chapter 7 just two weeks after she filed the Chapter 13 petition, without any evidence of a change in her financial circumstances. Understandably, the court was sympathetic to the UST's argument that "the Debtor's interpretation, if accepted, would create a procedural charade wherein debtors could evade the means test by filing a Chapter 13 petition, then immediately converting the case to Chapter 7, and avoiding scrutiny under Section 707(b)." *Id.* at 30.

In the second case to address the issues, *In re Fox,* ___ B.R. ___, 2007 WL 1576140 (Bankr. D. N.J., June 1, 2007), the facts were more sympathetic to the debtor and the court reached the opposite result from *Perfetto*. In *Fox,* the debtor converted her case to Chapter 7 three months after filing a Chapter 13 because she was laid off from her job. On these facts, the court held that Congress, in enacting changes to Section 707(b), intended only that the means test provisions be applied to cases

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originally filed under Chapter 7.

This Court finds *Perfetto*'s construction of the applicable statutes and rules more persuasive. The debtors' argument construes Section 707(b) too narrowly, and even that narrow construction does not support the sweeping conclusion that the phrase "filed by an individual under this chapter" insulates debtors in converted cases from scrutiny for filing abuse.

Prior to BAPCPA, Section 707(b) was applied without question in cases converted from Chapter 13 to Chapter 7. *See, e.g., In re Morris,* 153 B.R. 559, 563-65 (Bankr. D. Or. 1993)(case converted from Chapter 13 to Chapter 7 dismissed under Section 707(b)); *In re Traub,* 140 B.R. 286, 291 (Bankr. D. N.M. 1992)(dismissal under Section 707(b) of a case converted from Chapter 11 to Chapter 7). Despite the major amendments to Section 707(b) under BAPCPA, the phrase at issue here was not changed.

Webster's Dictionary defines "filed" as "to put or keep (*e.g.,* papers) in useful order" or "to enter (*e.g.,* a legal document) on public official record." *Webster's II New Riverside University Dictionary* 477 (1988). Here, in the simplest sense, the debtors' cases were entered on the Court's docket under Chapter 13 by the filing of petitions in bankruptcy. The cases are now entered on the Court's docket under Chapter 7 as a result of the debtors' filing motions for conversion. While the cases were initially *filed* under Chapter 13, they are now *filed* under

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Chapter 7. If Congress meant to limit the application of the means test to debtors who initially or originally filed a petition under Chapter 7, that would have been simple to articulate.

Reading Section 707(b) in conjunction with other Code sections further persuades the Court that the debtors in these cases are subject to Section 707(b). Section 348(a) provides:

Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, ..., does not effect a change in the date of the filing of the petition, the commencement of the case, or the order for relief.

In *Perfetto,* the court cited a number of cases for what it described as the proposition that debtors are deemed to have "filed under" the converted chapter as of the date of the filing of the original petition. *In re Perfetto,* 361 B.R. 27, 30 (Bankr. D. R.I. 2007), *citing In re Sours,* 350 B.R. 261, 268 (Bankr. E.D. Va. 2006); *In re Capers,* 347 B.R. 169, 170 (Bankr. D. S.C. 2006); *In re Lyons,* 162 B.R. 242, 243 (Bankr. E.D. Mo. 1993). The court in *Fox* commented that these cases do not directly support that proposition and concluded that Section 348 provides for the contrary. *Fox, supra,* at 7, fn 4 ("[Section] 348(a) specifically provides for the contrary and only provides an exception for certain sections of the Code, but does not specifically provide for an exception for § 707(b)." As this Court reads Section 348, however, the clear intent of the section

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is to retain the original filing date as the date of the "filing of the petition", "commencement of the case" or "order for relief" except in the circumstances provided for in subsections (b) and (c), where these terms are instead deemed to refer to the conversion date. Because Section 707(b) is not mentioned in either subsection (b) or (c) of Section 348, it follows that the original filing date

is retained upon conversion, but the case is otherwise treated as if the debtor had originally filed under the converted chapter.

This conclusion is consistent with other applicable statutes, rules and the Local Interim Bankruptcy Rules. Section 521(a)(1)(B)(ii) requires all debtors to file a schedule of current income and current expenditures unless the court orders otherwise. Rule 1007(b)(4) states that unless Section 707(b)(2)(D) applies (it does not in these cases), a "debtor *in a* chapter 7 with primarily consumer debts *shall* file a statement of current monthly income prepared as prescribed by the appropriate Official Form ... ." (emphasis added). Each of the debtors in the instant cases is now "in a chapter 7" and therefore subject to the requirements of Rule 1007(b)(4). Because the appropriate Official Form for a Chapter 7 is B22A, LIBR 1007-1(b) requires the debtors to file the Chapter 7 Official Form B22A upon

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conversion.[2] Rule 1019(2) provides for a new time period for filing a motion under Section 707(b) pursuant to Rule 1017. Rule 1017, in turn, provides that a motion under Section 707(b) must be filed within 60 days after the first date set for the meeting of creditors. Thus, after conversion, a motion under Section 707(b) would have to be filed within 60 days after the Chapter 7 Section 341 meeting.

Section 342(d) requires the Clerk to give notice to creditors "within 10 days after the date of the filing of the petition" if the presumption of abuse has arisen in a case. Section 348(c) states that Section 342 applies in a converted case "as if the conversion order were the order for relief." That language is effective to require the setting of a new Section 341 meeting under Section 342(a), which is based upon the "order for relief", but it provides no direction as to how the Clerk should comply with its duty to provide notice based upon the "date of the petition" in a converted case. The court in *Fox* regarded this inconsistency in the language as further proof that Congress did not intend to apply the presumption of abuse to converted cases. This Court is inclined to conclude that the inconsistency in the language in Section 342(d) is merely sloppy

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drafting; had the reference in that section been to "order for relief" instead of to the petition date, there would be no confusion.[3]

For the foregoing reasons, the Court holds that Section 707(b) applies in cases converted from Chapter 13 to Chapter 7 and that each debtor in these cases is therefore required to file a Form B22A. This conclusion requires the Court to examine what information regarding income and expenses should be included in the form.

B. <u>Income and Expenses</u>.

Section 707(b)(2)(C) requires the debtor to state, in the schedule of current income required under Section 521, his or her "current monthly income." This is the same language that appears in Section 707(b)(2)(A)(i), where the presumption of abuse is described. Current monthly income is expressly defined in Section 101(10A) as the debtor's average monthly income received in the six-month period preceding "the date of the commencement of the case." This definition is repeated in Form B22A, Part II, and in Form B22C, Part I, Line 1. The date of the "commencement of the case" does not change when the case is converted. Section

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348(a). Consequently, it is clear that "current monthly income" in a converted case is determined based on the initial filing date, admittedly, a date that could be years prior to the conversion date.

Similarly, the means test analysis looks at the debtor's expenses, which are referred to as "deductions" in Form B22A. There are three categories of expenses: necessary expenses defined by the Internal Revenue Service, necessary expenses defined by statute, and allowances for debt payment. Wedoff, at 252. *See, also,* Section

707(b)(2)(A)(ii)-(iv). Neither the Code nor the Rules define the terms "current expenditures" as used in Section 521(a)(1)(B)(2) or "monthly expenses" as used in Section 707(b)(2)(A). Section 707(b)(2)(A)(ii)(I), however, refers to "Other Necessary Expenses issued by the Internal Revenue Service ... *as in effect on the date of the order for relief*." (emphasis added). Because Section 348(a) retains the original date of the order for relief notwithstanding subsequent conversion of the case, the Court holds that the debtors should include in Form B22A their expenses as of the original petition date. The alternative, to compare income from the six months prior to Chapter 13 filing to expenses as of the conversion date, makes no sense. The debtors correctly point out that this comparison would almost always give rise to a presumption of abuse where the conversion was the result of a post-filing loss of income or increase in expenses.

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The debtors argue that using income and expense figures that predate the initial filing is misleading and does not present an accurate picture of their finances post-conversion. Whether the completed Form B22A would be misleading, however, would depend upon the time between the original filing of the case and the conversion date and any change of circumstances during that period of time. For example, in the case of the debtor in *Perfetto,* where the conversion occurred two weeks after the Chapter 13 case was filed, the information in Form B22A would be quite relevant and accurate. In the *Fox* case, where the debtor became unemployed after the petition was filed, Form B22A would not provide accurate information on the question of abuse. Instead, in the *Fox* case, the UST and creditors would obtain more accurate information from the debtor's post-conversion amended schedules I and J which, presumably, would demonstrate the lack of income to support expenses.

C. Form Over Substance.

The debtors argue that even if the presumption of abuse may be applied to them, they should not be required to file Form B22A because it merely repeats the information contained in Form B22C. While that may be the case for these debtors, there are substantive differences between Forms B22A and B22C that may impact other debtors and change whether the presumption arises.

For example, joint debtors may complete a single Form B22C, but each joint debtor must complete a separate Form B22A; spousal

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income is treated differently in Form B22A and B22C; disabled veterans are permitted an exclusion in Form B22A, but not in Form B22C; Chapter 13 debtors may deduct administrative costs of the Chapter 13 case in Form B22C, Part IV, Line 33, but may not in Form B22A, Part V (*see* Line 28); and a debtor whose income is equal to the median income is treated differently for purposes of Section 1325(b)(4) in Form B22C, Part II, Line 17 (debtor with income equal to median must propose five-year plan) than a debtor with the same income for purposes of Section 707(b)(7) in Form B22A, Part III, Line 15 (presumption of abuse does not apply to debtor whose income is equal to the median income). These illustrations highlight only some of the differences between the two forms. Rather than second guess the Bankruptcy Rules Committee responsible for designing Forms B22A and B22C, the Court concludes that the use of the forms for their intended purpose should be respected.

D. Motions to Dismiss under 707(b).

The debtors contend that the Court's decision will subject them to harassment by creditors who will bring motions under Section 707(b), relying on a presumption of abuse based upon outdated income or expense information. It is true that in revising Section 707(b) under BAPCPA, Congress expanded standing to bring a motion to dismiss under 707(b) to include any party in interest. The presumption of abuse, however, is just that — a presumption, and no more. The debtor has a right to rebut the

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presumption with a showing of changed financial circumstances between the filing and conversion dates (*See* Section 707(b)(2)(B)). Parties in interest, before bringing motions to dismiss based solely on the presumption afforded in Section 707(b)(2), would be well advised to compare the debtor's post-conversion Form B22A with post-conversion amended schedules I and J to determine if the debtor's filing really is abusive.

This Court's decision probably will create additional proceedings that could be avoided under the holding in *Fox*. There is no requirement, however, that the process of conversion be free from hurdles. To be sure, BAPCPA was not designed to improve judicial efficiency. Rather, the intent was to prevent abuse of the relief available under the Bankruptcy Code. A debtor who files bankruptcy in good faith under Chapter 13, then subsequently suffers a financial setback that forces conversion to Chapter 7, should have no difficulty rebutting the presumption of abuse if the debtor's circumstances have legitimately worsened. On the other hand, a debtor who converts a case under circumstances similar to the debtor in the *Perfetto* case should be subjected to the same scrutiny for abuse as would any other debtor filing initially under Chapter 7.

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CONCLUSION

For the foregoing reasons, the Court finds that each of the debtors is required to file Form B22A pursuant to Rule 1007(b)(4) and LIBR 1007-1(b).

Notes:

1. Unless otherwise indicated, all Code, Chapter, Section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§101 *et seq*. and to the Federal Rules of Bankruptcy Procedure **[Interim],** Rules 1001 *et seq*.

2. LIBR 1007-1(b) states that when a Chapter 7 case is converted to another Chapter, the debtor is required to file "amended schedules, statements, and documents required by Rule 1007(b)(1),(4),(5), and (6), Interim Fed. R. Bankr. P...."

3. In a converted case where the debtor has not filed Form B22A by the time the Section 341 meeting notice is issued, the Clerk may indicate that there is insufficient information to determine if there is a presumption of abuse. Following the filing of Form B22A, if the debtor has checked the box indicating that the presumption arises, the Clerk can send out notice to creditors of the existence of the presumption just as it does at the outset of cases filed originally under Chapter 7.

In re WILLIAM H. LAWRENCE, III, Debtor.

Case No. 15-00304

UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLUMBIA

Filed: August 25, 2016
August 24, 2016

(Chapter 7)
Not for Publication in West's Bankruptcy Reporter.

MEMORANDUM DECISION AND ORDER RE THE UNITED STATES TRUSTEE'S MOTION UNDER 11 U.S.C. § 707(b)(1) TO DISMISS CHAPTER 7 CASE FOR ABUSE

This case is pending as a case under chapter 7 of the Bankruptcy Code (11 U.S.C.). The U.S. Trustee filed a motion to dismiss this case under 11 U.S.C. § 707(b)(1), which permits dismissal of the case if the granting of relief under chapter 7 would be an abuse of the provisions of chapter 7. I will deny the U.S. Trustee's motion to dismiss insofar as it rests on an assertion that a presumption of abuse arose under 11 U.S.C. § 707(b)(2), and will set a hearing to take evidence to address whether the case should nevertheless be dismissed for abuse pursuant to § 707(b)(1) upon consideration of the totality of the circumstances pursuant to 11 U.S.C. § 707(b)(3)(B).

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I

The debtor filed a voluntary petition commencing this case as a case under chapter 13 of the Bankruptcy Code on June 4, 2015. The debtor's scheduled debts included amounts owed to the IRS in the amount of $570,322.00, which he marked as "disputed." On June 5, 2015, the chapter 13 trustee filed a motion to dismiss the case with prejudice based on the debtor's ineligibility to be a chapter 13 debtor due to the debt limits under 11 U.S.C. § 109(e) and alleging that the case was filed in bad faith because of that debt limit ineligibility. The debtor then, on June 18, 2015, voluntarily converted his case to chapter 7. The debtor's debts are primarily consumer debts, such that his case might be subject to dismissal under 11 U.S.C. § 707(b)(1) in the event that the granting of relief under chapter 7 would be an abuse of chapter 7. On July 31, 2015, because a chapter 7 *Means Test* form had not yet been filed by the debtor, the U.S. Trustee filed a statement indicating that she was unable to determine whether the debtor's case would be presumed to be an abuse under § 707(b)(2), which sets forth a so-called "means test" for ascertaining whether a presumption of abuse arises.

Section 707(b)(2)(A)(i) provides a so-called "means test" for ascertaining whether a presumption of abuse arises:

> [T]he court shall presume abuse exists if the debtor's current monthly income reduced by [allowable deductions] and multiplied by 60 is not less than the lesser of-

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> (I) 25 percent of the debtor's nonpriority unsecured claims in the case or $7,475, whichever is greater; or
>
> (II) $12,475.

On August 5, 2015, the debtor filed a *Chapter 7 Statement of Your Current Monthly Income* (Official Form 22A-1) and *Chapter 7 Means Test Calculation* (Official Form 22A-2). The forms reflect a current monthly income of $12,000. On the *Means Test* form, the debtor calculated deductions for allowances and expenses in the amount of $19,904.96, resulting in a negative monthly disposable income under 11 U.S.C. §

707(b)(2) of -$7,904.96, and he thus indicated on the form that the presumption of abuse does not arise. The $19,904.96 of expenses includes $13,696.02 of mortgage expenses related to a home that the debtor intended on the date of conversion to surrender.

On September 4, 2015, the U.S. Trustee filed her motion seeking to dismiss the case (unless the debtor elected to have the court convert the case to a case under chapter 11 of the Bankruptcy Code). In her motion, the U.S. Trustee objects to inclusion on the *Means Test* form of the $13,696.02 of mortgage expenses. When those expenses are eliminated, and replaced with the $2,264.00 housing allowance under IRS guidelines permitted as an expense under line 9a of the *Means Test* form when there is no mortgage expense, the result is that the *Means Test* form would show a positive monthly disposable income under § 707(b)(2) of

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$3,527.06. If that figure is used, the *Means Test* form would show that the debtor's case *is* presumed to be an abuse.[1] The U.S. Trustee seeks alternatively to have the court dismiss the case for abuse pursuant to § 707(b)(1) upon consideration of the totality of the circumstances pursuant to 11 U.S.C.

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§ 707(b)(3)(B). The court held a hearing on the motion on December 4, 2015, which, by agreement, the parties limited to the issue of whether there was a presumption of abuse.

II

The U.S. Trustee argues that the presumption of abuse under § 707(b)(2) arises in this case because, when the mortgage expenses are excluded from the debtor's means test calculation, the debtor's monthly disposable income multiplied by 60 is greater than $12,475, and thus is necessarily "not less than the lesser of" the amount specified in § 707(b)(2)(A)(i)(I) (whatever that amount might be) and the $12,475 amount specified in § 707(b)(2)(A)(i)(II). The debtor concedes that if a presumption of substantial abuse arose under the statute, the case must be dismissed.

The expenses deducted by the debtor to which the U.S. Trustee objects are mortgage payments of $8,186.71 per month and mortgage arrearage cure amounts of $5,509.31 for the debtor's principal residence located at 6629 31st Street, NW, Washington, DC 20015--a property that the debtor intends to surrender according to the *Chapter 7 Individual Debtor's Statement of Intention* (Official Form 8) that he filed after converting his case. The U.S. Trustee's position is that a deduction for secured debt payments cannot be included on the *Means Test* form when the debtor does not actually intend to make the payments

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going forward.

The debtor, however, argues that at the time of the filing of the petition he was contractually responsible for the $8,186.71 in monthly mortgage payments, regardless of whether he intended to surrender the property and regardless of whether that surrender would actually come to pass. Accordingly, that obligation is properly included in the calculation of the debtor's average monthly payments on account of secured debts under § 707(b)(2)(A)(iii).

As a preliminary matter, I note that the deductibility of the mortgage cure payments is an academic issue.[2] If the debtor's regular monthly mortgage payment of $8,186.71 is allowed as a means test deduction, the debtor's monthly disposable income on the *Means Test* form would be -$2,395.65 even if the deductions of mortgage cure payments are excluded. And if regular monthly mortgage payments are not allowed as a means test deduction, the presumption of abuse would arise even if the mortgage cure payments are allowed as a deduction. This moots the question, at least in this case, of whether

mortgage cure payments should be included on the debtor's *Means Test* form for chapter 7 when no mortgage cure was feasible (as apparently was the case here).

In support of her position that the debtor cannot claim the

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monthly mortgage payments as a means test deduction, the U.S. Trustee relies on an extension of a principle established in chapter 13 cases, including *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010); *Ransom v. FIA Card Services, N.A.*, 131 S.Ct. 716 (2011); and *In re Quigley*, 673 F.3d 269 (4th Cir. 2012), that the means test, as borrowed under 11 U.S.C. § 1325(b)(3) for purposes of chapter 13, is forward-looking in calculating "projected disposable income" under 11 U.S.C. § 1325(b)(1)(B). Some courts have extended this principle from chapter 13 to chapter 7 cases, and the U.S. Trustee urges this court to do likewise. *See, e.g., In re Byers*, 501 B.R. 82, 86 (Bankr. E.D.N.C. 2013).

The point is not settled, however, and the better-reasoned decisions hold that under the chapter 7 means test, debtors may deduct secured payments that are "scheduled as contractually due" on collateral they intend to surrender. *See, e.g., In re Denzin*, 534 B.R. 883, 884 n.2 (Bankr. E.D. Va. 2015) (acknowledging a split of authority on the issue among Fourth Circuit bankruptcy courts, but noting that the majority of chapter 7 bankruptcy court decisions, both before and after the *Lanning* and *Ransom* cases were decided, have held that chapter 7 debtors can permissibly deduct mortgage payments on collateral they intend to surrender); *In re Demesones*, 406 B.R. 711, 713-14 (Bankr. E.D. Va. 2008) (finding, as a matter of statutory construction, that the word "scheduled" as used in § 707(b)(2)(A)(iii)(I) would be

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rendered superfluous if the court were to exclude secured obligations relating to collateral the debtor intends to surrender), and; *Lynch v. Haenke (In re Lynch)*, 395 B.R. 346, 348-49 (E.D.N.C. 2008) (nothing in the plain language of the statute suggests that the mortgage expense deduction applies only to payments the debtor actually expects to make). This is so because the plain language of the chapter 7 means test in § 707(b)(2) and the means test as modified in § 1325(b) differ in crucial ways, as do their contexts and purposes.

To begin with, despite the U.S. Trustee's assertion that the two tests are "the same language, in the same statute," the two tests are plainly different in their statutory texts. In *Denzin*, the court discussed the chapter 13 test by beginning with *Lanning*:

> *Lanning* addressed the question of the proper calculation of the debtor's "projected disposable income." "Projected disposable income" in § 1325(b)(1)(B) is not defined although "disposable income" is defined in § 1325(b)(2), for purposes of § 1325(b) only, as the current monthly income received by the debtor less amounts reasonably necessary to be expended. Current monthly income, in turn, is defined in § 101(10A). It is the debtor's average monthly income for the six months preceding the filing of the petition. The definition makes no adjustment for unusually high or low income received during the six-month period. The six-month average may be, but is not necessarily, helpful in determining what an individual can reasonably be expected to earn on a regular basis during the three or five years of a chapter 13 plan. In *Lanning* the debtor received a one-time buyout payment during the six-month period. The chapter 13 trustee averaged the one-time buyout payment into the debtor's regular monthly income and

> computed a chapter 13 plan payment that the debtor would not be able

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> to sustain.
>
> **The Supreme Court focused on the adjective modifying "disposable income," the word "projected."** It held that, "While a projection takes past events into account, adjustments are often made based on other factors that may affect the final outcome." If there are known or virtually certain changes in the debtor's income from the six-month average, the changes are to be taken into account in determining the debtor's chapter 13 plan payment.

534 B.R. at 885 (emphasis added). The court in *Denzin* continued by examining *Lanning*'s progeny, *Ransom* and *Quigley*:

> All three cases [*Lanning*, *Ransom*, and *Quigley*] were chapter 13 cases determining the proper amount of the chapter 13 plan payment. All three involved pre-petition income (*Lanning*) or expenses (*Ransom* and *Quigley*) that the debtors knew at the confirmation hearing were different from their [post]-petition income or expenses. . . . . **Had the income or expense been included in the calculation of the chapter 13 plan payment, either the plan would have failed because the plan payment would have been too high, or the Congressional objective of reducing abuse by requiring debtors to pay their "projected disposable income" in the chapter 13 plan would have been frustrated.** The proper analysis is a forward-looking analysis. "Projected disposable income" is, as the Supreme Court held, a projection of future income. **The analysis is founded on the adjective "projected" in § 1325(b)(1)(B).** It achieves the Congressional objective of assuring chapter 13 debtors are making their best efforts in repaying their debts.

534 B.R. at 886 (emphases added).

In contrast, the chapter 7 means test does not contain any forward-looking language:

> The calculation of monthly expenses in a chapter 7 case under § 707(b)(2) is mechanical. The tables are clearly identified. The section uses mandatory language—"shall"—in referring to the tables. Debt payments are expressly excluded under § 707(b)(2)(A)(ii).

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> Secured debts are expressly included under § 707(b)(2)(A)(iii) which instructs how they will be calculated. They are calculated not on the actual payment when the petition is filed but on the average amount of the payments "contractually due to secured creditors" over 60 months.

Denzin, 534 B.R. at 887.

The U.S. Trustee argues that in *Lanning* "the Supreme Court adopted a definition of 'projected disposable income' in § 707(b)(2)," but that is incorrect. "Projected disposable income" does not appear in § 707(b)(2) but in § 1325(b).

> While § 707(b)(2)(A) and (B) are referenced in § 1325(b)(3), § 1325(b)(3) is a reference from § 1325(b)(2) which in turn is a

> reference from § 1325(b)(1)(B). **It is § 1325(b)(1)(B) that injects the modifier "projected" and the forward-looking aspect of the chapter 13 means test.** *Lanning* held that this included known or virtually certain changes in income. *Quigley* applied it to expenses.

Denzin, 534 B.R. at 887 (emphasis added).

These key differences in the statutory text are unsurprising because the tests arise in different contexts (chapter 7 versus chapter 13) and each serves a different purpose: the former to guard the door to chapter 7 relief and the latter to determine the amount to be paid to creditors in chapter 13.

> The chapter 13 means test uses the phrase "projected disposable income" while the chapter 7 means test only uses the phrase "disposable income." The one phrase allows for adjustments for known or virtually certain future changes. The other does not. The chapter 7 means test is not forward-looking, but is a static snapshot.

Denzin, 534 B.R. at 887.

Congress could well have intended that the test for a

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presumption of substantial abuse in chapter 7 be readily applied in a straightforward manner that assures certainty and ease of application. Interpreting the chapter 7 means test as written (as not including a consideration of future changes) assures such certainty and ease of administration, and that interpretation is not inconsistent with other provisions of the Bankruptcy Code.

The U.S. Trustee's citation to *In re Byers*, 501 B.R. 82 (Bankr. E.D.N.C. 2013), is unpersuasive. In that case, the court extended the relevant principle from *Lanning*, *Ransom*, and *Quigley* to the chapter 7 case before it without examining in detail the differences between the statutory texts of § 707(b)(2) and § 1325(b) (such as the addition of the word "projected" to the chapter 13 test). The U.S. Trustee's appeal to legislative intent is also unpersuasive. Citing H.R. Rep. 109-31(I) at 36 (2005), the U.S. Trustee argues that the purpose of the means test is to ensure those debtors who can afford to repay some portion of their unsecured debts are required to do so. Legislative intent, however, does not sway the analysis when, as here, the statute is susceptible of an ordinary, plain meaning. *In re Lynch*, 395 B.R. at 349-50 ("When [courts] adopt a method that psychoanalyzes Congress rather than reads its laws . . . we do great harm. Not only do we reach the wrong result with respect to the statute at hand, but we poison the well of future legislation, depriving legislators of the assurance that ordinary

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terms, used in an ordinary context, will be given a predictable meaning.") (quoting *Chisom v. Roemer*, 501 U.S. 380, 417 (1991)).

For purposes of considering the deduction of monthly mortgage payments "scheduled as contractually due" pursuant to § 707(b)(2)(A)(iii)(I), the reference in § 707(b)(2)(A)(iii)(II) to chapter 13 does not alter the foregoing analysis. Section 707(b)(2)(A)(iii)(II) provides in relevant part that a debtor is entitled under the means test to deduct an expense for "any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence . . . that serves as collateral for secured debts." An argument might be made that for *cure payments* the debtor attempts to deduct under that provision, the reference to "a plan under chapter 13" hauls in chapter 13 standards for whether the expense would be permitted for purposes of confirmation of a chapter 13 plan, such that a court is to decide whether the *cure*

payments would be allowed as an expense for purposes of determining "projected disposable income" under § 1325(b)(1)(B). The contrary argument is that § 707(b)(2)(A)(iii)(II) merely asks what amounts would be necessary under a chapter 13 plan to cure arrears in order for the debtor to maintain possession of the debtor's primary residence, without regard to whether the debtor could attain a confirmed chapter 13 plan calling for such cure payments to be

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made or whether the debtor, in a chapter 13 case, would actually attempt to cure the arrears. Interpreting § 707(b)(2)(A)(iii)(II) that way would be consistent with administering the means test as a mechanical provision that is readily applied in determining whether a presumption of abuse exists.

Regardless of which argument would prevail for purposes of a debtor's claiming an expense for *cure payments* under § 707(b)(2)(A)(iii)(II), for purposes of a debtor's claiming an expense for *monthly mortgage payments* "scheduled as contractually due" no argument can be plausibly made that the applicable provision, § 707(b)(2)(A)(iii)(I), hauls in "projected disposable income" concepts that apply to confirmation of a chapter 13 plan. A debtor is entitled to deduct "the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition" pursuant to § 707(b)(2)(A)(iii)(I). That provision makes no reference to chapter 13. Accordingly, for *monthly mortgage payments* "scheduled as contractually due" the § 707(b)(2)(A)(iii)(I) expense is allowed without any regard to whether the expense would be permitted when determining "projected disposable income" under § 1325(b)(1)(B).

The presumption of abuse under § 707(b)(2) does not arise in this case.

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III

The U.S. Trustee alternatively argues that this case should be dismissed as an abuse under § 707(b)(1) upon consideration under § 707(b)(3)(B) of the "totality of the circumstances." However, the court did not take evidence on that issue and reserved it for later determination if the court were to reject the U.S. Trustee's argument that there was a presumption of substantial abuse. Accordingly, a further hearing will be necessary.[3]

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IV

In accordance with the foregoing, it is

ORDERED that the U.S. Trustee's *Motion Under 11 U.S.C. § 707(b)(1) to Dismiss Chapter 7 Case for Abuse* (Dkt. No. 54) is denied to the extent if rests on the argument that a presumption of abuse arose under 11 U.S.C. § 707(b)(2). It is further

ORDERED that the clerk shall set a further hearing on the U.S. Trustee's *Motion Under 11 U.S.C. § 707(b)(1) to Dismiss Chapter 7 Case for Abuse* (Dkt. No. 54) to address whether the case should be dismissed under § 707(b)(1) upon consideration of the totality of the circumstances pursuant to 11 U.S.C. § 707(b)(3)(B).

Signed: August 24, 2016

/s/
S. Martin Teel, Jr.
United States Bankruptcy Judge

[Signed and dated above.]

Copies to: Recipients of e-notification of orders.

Footnotes:

[1.] By the court's calculation, the presumption of substantial abuse would still arise even if Line

35 of the *Means Test* form is changed to reflect that priority debts are substantially higher than the $18,337.00 of priority tax claims the debtor listed on Line 35. From an examination of the debtor's schedules and a proof of claim filed by the IRS, it appears that the debtor may owe $201,285.77 in priority taxes:

> (1) $188,259.10 "CIV PEN" claims that appear to be denoted on tax lien notices attached to the IRS proof of claim as 26 U.S.C. § 6672 liabilities;
>
> (2) $10,434.67 owed to the IRS for other priority tax claims; and
>
> (3) $2,592 for scheduled priority tax claims owed Maryland).

The IRS's proof of claim asserted that, based on tax liens, the $188,259.10 in § 6672 liabilities were secured claims, but the debtor's *Schedule D - Creditors Holding Secured Claims* shows that after taking into account the debtor's mortgage debt, there was no value available for the IRS to have allowed secured claims under 11 U.S.C. § 506(a), such that the claims were actually unsecured claims. Using the $201,285.77 figure would increase the deduction for priority taxes per month to $3,354.76, an increase of $3,049.14 per month over the $305.62 per month calculated by the debtor. Even adjusting for the $3,049.14 difference (and if the debtor is limited to a $2,264.00 housing allowance, as the U.S. Trustee asserts is appropriate), the monthly disposable income would be $477.92. Although that $477.92 is substantially smaller than the $3,049.14 net disposable income that the U.S. Trustee calculated is appropriate, a presumption of substantial abuse would apply because 60 times $477.92 equals $28,675.20 and under 11 U.S.C. § 707(b)(2)(A)(i), that far exceeds the maximum possible threshold of $12,475 for the presumption to arise.

[2.] The cure payments deducted on the *Means Test* form would appear to be allowable, if at all, under § 707(b)(2)(A)(iii)(II), not § 707(b)(2)(A)(iii)(I).

[3.] Ahead of any hearing on the "totality of the circumstances," I note the following issues that may be considered. Because of debt limitations in chapter 13, the debtor is not eligible for relief under chapter 13 of the Bankruptcy Code, but chapter 11 does not entail any debt limitation on eligibility for relief under chapter 11. In deciding whether abuse exists, it would be appropriate to look to whether the debtor could successfully pursue a case under chapter 11 that would achieve a meaningful distribution to creditors. In applying the "totality of the circumstances" test the debtor would not necessarily be limited to a housing expense of $2,264.00 as on the *Means Test* form once the debtor and the rest of his four-person household leave the 31st Street property. In addition, the projected attorney's fees, the U.S. Trustee's quarterly fees, and other administrative expenses of a chapter 11 case would have to be taken into account. The debtor may also have substantial priority tax debts (if they are not successfully disputed) that, under 11 U.S.C. § 1129(a)(9)(C), unless the holders of the tax claims agree otherwise, the debtor would be required, under a confirmed chapter 11 plan, to pay in full by June 5, 2020, with interest after the effective date of the plan.
