UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT
HARTFORD DIVISION

In re:	**Chapter 7**
NORMAN A. SPERRY, JR.	**Case No. 22-20287 (JJT)**
Debtor.	

UNITED STATES TRUSTEE'S SUPPLEMENTAL MEMORANDUM TO HIS MOTION TO DISMISS THE DEBTOR'S CHAPTER 7 CASE

William K. Harrington, the United States Trustee for Region 2 (the "United States Trustee"), in furtherance of his duties and responsibilities set forth in 28 U.S.C. § 586(a)(3) and (5), hereby files this Supplemental Memorandum to the United States Trustee's Motion to dismiss the Chapter 7 case of Norman A. Sperry, Jr. (the "Debtor") pursuant to 11 U.S.C. § 707(b)(1) based upon a presumption of abuse arising under 11 U.S.C. § 707(b)(2). In support of this motion, the United States Trustee, through counsel, states as follows:

I. JURISDICTION

1. The Court has subject matter jurisdiction under 28 U.S.C. § 1334(a) and (b), 28 U.S.C. § 157(a) and (b)(1), and 28 U.S.C. § 151. A motion to dismiss is a core proceeding impacting discharge and case administration. 28 U.S.C. § 157(b)(2)(A) and (B).

II. ISSUE PRESENTED

2. May a Chapter 13 debtor obtain a favorable modification of mortgage during his Chapter 13 case, then convert his Chapter 13 case to one under Chapter 7 and still rely upon a monthly mortgage arrearage expense which existed on the Chapter 13 Petition Date but which no

longer existed upon conversion of the case to one under Chapter 7 in order to escape a presumption of abuse pursuant to 11 U.S.C. § 707(b)(1) and (2)?

III. RELEVANT ADDITIONAL FACTS

3. On August 21, 2023, the United States Trustee filed a Joint Stipulation of Facts which was negotiated with the Debtor, through his counsel Gregory F. Arcaro, Esq. Both the United States Trustee and the Debtor adopt those stipulated facts as if set forth in detail herein.

4. On May 12, 2023, the United States Trustee filed a Motion for an Order Dismissing the Debtor's Chapter 7 Case which is the subject of this litigation. ECF 67. The United States Trustee incorporates the facts, allegations and legal references contained therein into this document.

5. On April 29, 2022 (the "Petition Date), the Debtor had an unpaid mortgage balance on his residence of approximately $314,724.00 which included a mortgage arrearage of approximately $100,529.75 owing to NewRez, LLC ("NewRez").

6. On January 5, 2023, a compromise, approved by the Bankruptcy Court during the Chapter 13 phase of the Debtor's bankruptcy case, the Debtor's mortgage obligations to NewRez were modified from a traditional first mortgage to: (a) a traditional first mortgage with a reduced unpaid mortgage balance of $249,059.39; (b) a first mortgage arrearage of $0; and a second mortgage of $68,713.31with a 30-year, interest-free, balloon payment due at the end of 30-years.

7. On January 31, 2023, the Debtor's Chapter 13 case was converted, at Debtor's request, to one under Chapter 7.

8. On February 20, 2023, as required by Local Bankruptcy Rule 1019-1(a), the Debtor filed a Statement of Current Monthly Income and Means Test Calculation ("Chapter 7 Means Test").

9. On his Chapter 7 Means Test, the Debtor concluded that his "monthly disposable income" was a negative $190.69 and that his Chapter 7 case was not presumptively abusive pursuant to 11 U.S.C. § 707(b)(1) and (2). ECF 56, page 11. The Debtor "achieved" this negative monthly disposable income figure utilizing a "monthly cure amount" expense of $1,733.33 concerning the Debtor's $104,000.00[1] NewRez mortgage arrearage. ECF 56, page 10.

10. The United States Trustee has calculated that by removing the $1,674.05 "monthly cure amount" expenses from the Debtor's Chapter 7 Means Test results in the Debtor having "monthly disposable income" of $1,543.64 and a 60-month disposable income figure of $92,618.40 at line 39d of the Chapter 7 Means Test.

11. Since under the United States Trustee's calculation, the Debtor's Chapter 7 Means Test, Line 39d is above $15,150.00, there would be a presumption of abuse in the Debtor's case which would then allow the Debtor the right to rebut that presumption giving specific circumstances and appropriate facts.

12. On his Statement of Financial Affairs, the Debtor stated that he was the defendant in a foreclosure action captioned: *Ditech Financial LLC v. Sperry*, CV19-6109139-S. The Debtor stated that this foreclosure litigation was pending on the Petition Date (04/29/22). The United States Trustee takes issue with Debtor's statement that the foreclosure litigation was pending at that time as it appears that the foreclosure litigation was dismissed on March 20, 2022, by Order entered on that case's docket by the Honorable Claudia A. Baio. The United States Trustee requests that the Bankruptcy Court take judicial notice of this foreclosure litigation and its dismissal well prior to the Petition Date. No other foreclosure litigation

[1] Debtor approximated his NewRez mortgage arrearage as being $104,000.00 on his filed bankruptcy documents; however, upon the filing of the NewRez proof of claim, the Debtor has acknowledged that the actual NewRez mortgage arrearage was $100,442.81 which results in a more accurate but immaterially lesser "monthly cure amount" of $1,674.05 instead of the $1,733.33 listed by the Debtor.

involving the Debtor appears when searched in the Connecticut Superior Court Case Look-Up website.

IV. ARGUMENT

A. The Debtor's debts are primarily consumer debts.

Section 707(b)(1) is applicable to the Debtor's because his debts are primarily consumer debts. *See In re Vianese*, 192 B.R. 61, 67-68 (Bankr. N.D.N.Y. 1996) (liabilities are primarily consumer debts if the debtor's consumer debts exceed half of the debtor's obligations); *see also* ECF 1, page 6, question 16.

B. The Presumption of abuse may arise in the Debtor's case.

Section 707(b)(2)(A)(i) provides that the court shall presume abuse exists if the debtor's current monthly income, reduced by allowed deductions and multiplied by 60, is not less than the lesser of, 25 percent of the debtor's nonpriority unsecured claims, or $9,075[2], whichever is greater, or $15,150[3]. 11 U.S.C. § 707(b)(2)(A)(i).

The Debtor's Means Test Form [ECF 56] indicates that there is no presumption of abuse. However, after considering the Debtor's current monthly income and making one expense adjustment for an obligation which no longer existed on the date Debtor's Chapter 13 case was converted to one under Chapter 7, the United States Trustee has determined that the presumption of abuse does indeed arise in this case if the Debtor's monthly mortgage arrearage expense[4] of $1,733.33, which no longer existed on the date of conversion, is omitted from the Debtor's Chapter 7 Means Test calculation. According to the United States Trustee's calculation, on the date of his Chapter 13 case's voluntary conversion to one under Chapter 7, the Debtor enjoyed

[2] This figure is "updated" every three years and became effective on April 1, 2022.
[3] This figure is "updated" every three years and became effective on April 1, 2022.
[4] See ECF 56, page 7 at question 34 – "Shellpoint Mortgage Servicing" "monthly cure amount."

monthly disposable income of $1,543.64 and a 60-month total disposable income figure of $92,618.40 instead of the negative disposable income figures calculated by the Debtor.

C. BAPCPA and the Chapter 7 Means Test.

"The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.L.No.109-8, 119 Stat.23, became effective October 17, 2005. One goal of the BAPCPA was to 'address what Congress perceived to be abuses of the bankruptcy process. Among the abuses identified by Congress was the easy access to Chapter 7 proceedings by consumer debtor, who if required to file under Chapter 13, could afford to pay some dividend to their unsecured creditors.' *In re Hardacre*, 338 R.R. 718, 720 (Bankr.N.D.Tex.2006) (Citing 151 Cong. Rec. S2549. 2469-70 [Mar. 10, 2005]). The principal method fashioned to steer debtors away from Chapter 7 and into a bankruptcy repayment plan is a retooled version of § 707(b)." *In re Perelman*, 419 B.R. 168, 172 (Bankr.E.D.N.Y.2006).

"Section 707(b)(2) codifies a Means Test which provides a formula which calculates a debtor's average monthly disposable income over a 60-month period by deducting statutorily specified allowable expenses, secured debt payments and priority debt payments from current monthly income." *Perelman*, 419 B.R. at 172. "The Means Test is intended to be applied as a strict mechanical test, with bankruptcy courts having little discretion in applying the test." *In re Addison*, 580 B.R. 24, 28 (Bankr.E.D.N.Y.2018) (citations omitted). *See also In re Rivers*, 466 B.R. 558, 568 (Bankr.M.D.Fla.2012) ("[I]t is widely recognized that the Means Test provides a nondiscretionary formula for determining whether the Court should presume that the case is an abuse of the provisions of Chapter 7").

D. The Debtor's Feeble and Questionable Chapter 13 Performance.

The United States Trustee does not contest that, on April 29, 2022 (the "Petition Date"), had the Debtor filed a Chapter 7 petition for relief instead of one under Chapter 13 and had completed a Chapter 7 Means Test at that time, the Debtor's Chapter 7 case would not have been presumed abusive due to the actual existence of Means-Test-allowable-expense attributable to Debtor's NewRez mortgage arrearage of $100,529.75.

Instead of choosing relief under Chapter 7 and for reasons best known to the Debtor, he chose the path of seeking relief under Chapter 13. Although choosing to proceed under Chapter 13, the Debtor failed utterly to propose a plan of reorganization which was confirmable. The Debtor filed a series of three Chapter 13 plans over a period of nine months with each successive plan garnering an objection from Standing Chapter 13 Trustee Napolitano ("Trustee Napolitano") with the Debtor finally abandoning his Chapter 13 efforts only after obtaining a mortgage modification agreement with NewRez.

The Debtor's original Chapter 13 Plan proposed to make monthly plan payments of $2,437.00 to Trustee Napolitano with the bulk of those monies being applied to the NewRez mortgage arrearage. ECF 2. However, it seems that once the Debtor entered negotiations for a mortgage modification with NewRez, the Debtor's First Amended Chapter 13 Plan, filed on August 19, 2022, proposed monthly plan payments of only $410.00 and did not appear to dedicate any of those monies to the NewRez mortgage arrearage or even acknowledge that mortgage's continued existence. ECF 21. The Debtor's Second Amended Chapter 13 Plan, filed October 17, 2022, acknowledged the NewRez mortgage and noted that "FHA-HAMP Loan Modification in Progress" and proposed to make monthly plan payments of $405.06 to Trustee Napolitano with none being dedicated to the NewRez arrearage.

The Debtor's original Chapter 13 Plan was in "effect" from April 29, 2022, until August 19, 2022, when the Debtor filed his First Amended Chapter 13 plan. During that time, the Debtor should have made at least three (and perhaps four) monthly Chapter 13 plan payments to Trustee Napolitano in a minimum amount of $7,311 (or as much as $9,748.00 if four payments were due). The Debtor made total Chapter 13 plan payments to Trustee Napolitano of only $5,782.68 concerning all three of Debtor's Chapter 13 plan iterations. ECF 57.

Once that mortgage modification was approved by the Bankruptcy Court and the Debtor was relieved of his $100,529.75 NewRez mortgage arrearage, the Debtor wasted little time before abandoning his "efforts" to provide a dividend to his unsecured creditors before filing a Notice of Conversion (and subsequent Amended Notice of Conversion) to rid himself of the obligations he voluntarily undertook when filing his Chapter 13 petition for relief. The United States Trustee objectively questions the Debtor's good faith efforts to prosecute his Chapter 13 case as it was abandoned not because the Debtor could not afford its proposed monthly Chapter 13 plan payments but because he could more easily afford to do so due to the elimination of the NewRez mortgage arrearage. The Bankruptcy court entered an Order converting the Debtor's Chapter 13 case to one under Chapter 7 on January 31, 2023.

As the Debtor failed to obtain confirmation of any of his three proposed Chapter 13 plans, no distribution was made to any of Debtor's creditors by Trustee Napolitano. According to the Chapter 13 Standing Trustee's Final Report and Account, except for $415.43 for the expenses of administration paid to Trustee Napolitano, the Debtor received a refund of all the monies he had made as Chapter 13 payments to Trustee Napolitano. ECF 57.

In addition to the Debtor's other failures to prosecute his serial Chapter 13 plans, the Debtor, while a Chapter 13 debtor, undertook to purchase a new 2023 Hyundai Elantra which he

valued at $23,080.00 but where he took on additional debt of $39,176.80 to purchase it on October 25, 2023 incurring that debt while still a Chapter 13 debtor and neither disclosed that purchase at the time it was made nor obtained the Bankruptcy Court's approval to take on that indebtedness although that obligation would seriously hamper the Debtor's ability to prosecute his Second Amended Chapter 13 plan which consideration was still before the Court at that time. ECF 61, Amended Schedule D.

In addition, the United States Trustee considers it likely that the Debtor's new vehicle purchase was made during the Chapter 13 phase of his bankruptcy case with the Debtor knowing about his upcoming conversion motion and in order to have the new vehicle's debt rendered dischargeable in his subsequent Chapter 7 case and/or open to reduction through a present-value redemption demonstrating further manipulation of the bankruptcy process by the Debtor who failed to objectively demonstrate that he ever intended to prosecute a viable Chapter 13 plan in good faith. *See* Fed. R. Bankr. P.1019(A).

Finally, the Debtor, upon conversion of his Chapter 13 case to one under Chapter 7 is required to file a statement of intention, within 30 days of conversion or before the first date set for the meeting of creditors, concerning his post-petition "acquisition" of his 2023 Hyundai Elantra and his intentions toward the disposition of that property; however, the Debtor failed to do so. *See* Fed. R. Bankr. P. 1019(A) and (B).

E. The Debtor's Chapter 7 Means Test.

The United States Trustee does not contest that, on April 29, 2022 (the "Petition Date"), had the Debtor filed a Chapter 7 petition for relief instead of one under Chapter 13 and had completed a Chapter 7 Means Test at that time, the Debtor's Chapter 7 case would not be

presumed abusive due to the existence of the NewRez $100,529.75 mortgage arrearage on the Petition Date.

The United States Trustee does suggest, however, that once the Debtor entered into the NewRez mortgage modification agreement and that mortgage modification was approved by the Bankruptcy Court and the $100,529.75 mortgage arrearage ceased to exist, the Debtor was no longer entitled to resurrect that dead expense in order to avoid funding a dividend to his unsecured creditors since he had the present ability to do so while still a Chapter 13 debtor and certainly was able to do so after his case was converted to Chapter 7.

On the Debtor's Chapter 7 Means Test, he states that he is a household of 1 and disclosed annualized [then] current income of $100,003.56. The median family income for a household of 1 in the State of Connecticut, applicable at the appropriate time, was $72,497.00. ECF 56, page 2. The Debtor's income disclosures identified him as an "above median debtor" and required the Debtor to complete the second part of the Chapter 7 Means Test (Official Form 122A-2). *Id.*

Among the expenses which the Debtor claimed, which acted to reduce his monthly disposable income, was a "monthly cure amount" of $1,733.33 for the Debtor's arrearage on his NewRez (Shellpoint) mortgage. Debtor's inclusion of that amount[5], which no longer existed prior to the conversion of Debtor's case, as a legitimate and existing allowable expense on Debtor's Chapter 7 Means Test, is the focus of the United States Trustee's Motion to Dismiss. The United States Trustee does not dispute any other entry on the Debtor's Chapter 7 Means Test.

[5] The Debtor listed the NewRez arrearage as being $104,000.00; however, the NewRez proof of claim reduced that figure to $100,529.75. Correspondingly, the Debtor's monthly cure amount figure of $1,733.33, listed on his Chapter 7 Means Test should also be reduced to $1,675.50. However, for the purposes of the United States Trustee's motion, the difference in those amounts is not relevant.

F. The purposes of the Bankruptcy Code's Chapter 7 and BAPCPA are not served by allowing Debtor to include, as an allowed expense, a debt on his Chapter 7 Means Test that ceased to exist before the conversion of Debtor's Chapter 13 case to one under Chapter 7.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 367 (2007). BAPCPA is "intended as a comprehensive reform measure to curb ab uses and improve fairness in the federal bankruptcy system." *Connecticut Bar Association v. United States of America*, 620 F.2d 81, 85 (2nd Cir. 2010). *See also* H.R.Rep. No.109-31, *reprinted* in 2005 U.S.C.C.A.N 88, 89 (describing purpose of BAPCPA as "to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors") *Id.*

The United States Trustee acknowledges that in the normal course of a Chapter 13 case's conversion to one under Chapter 7 is that the Debtor's bankruptcy petition, schedules, and statements "shall be deemed to be filed in the chapter 7 case, *unless the court directs otherwise*." Fed. R. Bankr. P. 1019(A) [emphasis added].

In the Debtor's case, it may be necessary for the Bankruptcy Court to "deem" the Debtor's NewRez mortgage monthly cure amount to an inappropriate expense on the Debtor's Chapter 7 Means Test since it ceased to exist more than a month before the Order converting Debtor's Chapter 13 case to one under Chapter 7 was granted and entered on the case docket. The United States Trustee believes that the Bankruptcy Court has the authority to do so in furtherance of both the letter and spirit of the Bankruptcy Code as amended by BAPCPA pursuant to 11 U.S.C. § 105 which allows the Bankruptcy Court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

"Section 105(a) of the Bankruptcy code gives the court equitable power to 'issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.' This Court has long recognized that Section 105(a) limits the bankruptcy court's equitable powers, which 'must and can only be exercised within the confines of the Bankruptcy Code.' *FDIC v. Colonial Realty Co.*, 966 F.2d 57, 59 (2nd Cir. 1992) (quoting *Norwest Bank Worthington v. Ahlers*, 484 U.S. 197, 206(1988). It does not 'authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law or constitute a roving commission to do equity.' *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986)." *In re Dairy Mart Convenience Stores, Inc.*, 351 F.3d 86, 91-92 (2nd Cir. 2003).

V. CONCLUSION

The United States Trustee cannot state, at this time, that he can demonstrate that the Debtor filing his Chapter 13 case, his utter failure to successfully prosecute a confirmable Chapter 13 plan, and his subsequent abandonment of any attempt to do so once he received his mortgage modification and just when that put him in a strong financial condition to confirm a Chapter 13 plan are irrefutable badges of bad faith. Objectively at least, it appears that the Debtor was, at least, not serious enough about prosecuting his Chapter 13 case to get it done even when he, again objectively, had the wherewithal to do so. Chapter 13 is a voluntary chapter where a debtor always has the option of asking that his Chapter 13 case be dismissed. The Debtor "took his ease" in Chapter 13 for his own purposes until a more favorable prospect came along in the form of a mortgage modification, and then he abandoned even his efforts to provide his unsecured creditors with any dividend.

BAPCPA has had a powerful effect on those consumer bankruptcy filers and their creditors alike. Its purpose is to "encourage" bankruptcy debtors to try harder to provide some

recompense to those who extended them credit while still allowing those debtors to obtain a fresh start. BAPCPA attempts to even a playing field that a great many, including the Congress of the United States, considered far to tilted toward profligate borrowers who regularly discharged their debts albeit still possessing the ability to offer a significant repayment to their respective creditors. The Debtor's case is one such case where he can provide a significant dividend to his creditors presently but is relying upon his earlier Chapter 13 filing to freeze time and allow him to claim a crucial debt expense that no longer exist when he finally dropped the pretense of prosecuting a Chapter 13 case and shifted his focus to escaping liability to his creditors via a Chapter 7 conversion in order to avoid the effect of BAPCPA's Chapter 7 Means Test.

WHEREFORE, The United States Trustee requests relief in the form of an Order disqualifying the Debtor's NewRez monthly mortgage cure expense from his Chapter 7 Means Test calculation and dismissal of the Debtor's case as presumptively abusive.

Dated: August 25, 2023
New Haven, Connecticut

Respectfully submitted,
WILLIAM K. HARRINGTON
United States Trustee for Region 2

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