UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

In re JAMES ELDRIGE RICHARDSON, IV,	)	Case No. 07-60057-LYN
	)	
Debtor.	)	
	)	

MEMORANDUM and ORDER

This matter comes before the court on a motion by the United States trustee under 11 U.S.C. § 707(b) to dismiss this case as an abuse of the provisions of chapter 7 of the Bankruptcy Code. James Eldrige Richardson, IV, ("the Debtor") opposes the motion. The motion will be denied.

I. Jurisdiction

This court has jurisdiction over this matter. 28 U.S.C. §§ 1334(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A). Accordingly, this court may render a final order. This memorandum shall constitute the Court's findings of fact and conclusions of law as directed by Fed.R.Civ.P. 52 which is made applicable in this contested matter by Fed. R. Bankr. P. 9014(c) and 7052.

II. Facts

On January 16, 2007, the Debtor filed a chapter 7 petition. The Debtor scheduled no priority unsecured claims and scheduled general unsecured claims in the amount of $48,719.42.[1]

[1] See Debtors' Schedules E & F.

The Debtor scheduled two parcels of real property as property of the estate, one in Virginia ("the Virginia Property") and one in Rhode Island ("the Rhode Island Property").[2] The Debtor scheduled the Rhode Island Property at a fair market value of $195,000.00 and the amount of the claim secured by the Rhode Island Property at $194,224.33.[3] The Debtor does not and never has lived in the Rhode Island Property. He purchased the Rhode Island Property in October of 2005 for his brother who agreed to make the mortgage payments. After making the payments for less than two years, the Debtor's brother moved to Florida and made no further payments. The Debtor declared on his statement of intentions that he intended to surrender the Rhode Island Property. At the hearing, the Debtor testified that he had received a notice of foreclosure on the Rhode Island Property.

The Debtor has been employed for sixteen years. He scheduled monthly gross income from his employment in the amount of $5,473.40[4]. He scheduled monthly payroll deductions in the amount of $2,267.47 and net monthly income in the amount of $3,622.59.[5] The Debtor scheduled monthly expenses in the amount of $6,156.98, including mortgage and utility payments on the Rhode Island Property in the total amount of 2,018.27.[6] The parties agree that the Debtor's monthly income is above the median income for families of two persons living in Virginia.

The Debtor also filed a Chapter 7 Statement of Current Monthly Income and Mean-Test

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[2] See Debtor's Schedule A.

[3] See Debtor's Schedule A.

[4] See Debtors' Schedule I.

[5] See Debtors' Schedule I.

[6] See Debtors' Schedule J.

Calculation Form ("Form 22A"). In Form 22A, the Debtor indicated that his current monthly income, as defined by the Bankruptcy Code, was $6,527.15. He also scheduled deductions for certain expenses and deductions for debt payments as is required by Form 22A. In the deductions for debt payment on secured claims, the Debtor included payments totaling $1,918.27 per month for the two mortgages on the Rhode Island Property and $159 per month (for 60 months) that would be necessary to cure the arrearage on the Rhode Island Property. His deductions on Form 22A for monthly taxes, expenses and secured debt, totaled $8,050.99. The Debtor's Form 22A current monthly income is less than his allowed deductions.

On March 26, 2007, the United States trustee filed a motion to dismiss this case for abuse under 11 U.S.C. §§ 707(b)(2) and 707(b)(3)(B)

III. Discussion

The United States trustee brings this motion on the grounds that it would be an abuse of chapter 7 to permit the debtor to continue prosecuting this case under that chapter. A case under chapter 7 may be dismissed for abuse. See 11 U.S.C. § 707(b) as revised by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").[7] Whether the prosecution of a chapter 7 case constitutes abuse is determined under Sections 707(b)(1), (2), (3) & (7).

Section 707(b)(1)[8] provides that a court may dismiss an individual case under chapter 7 if

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[7] Section 707(b) was revised and became effective on October 17, 2005, as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). See Pub. L. No. 109-8, 119 Stat. 23 (2005).

[8] Section 707(b) (1) provides:

> (b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of

(1) the debtor's debts are primarily consumer debts and (2) it would be an abuse of the provisions of chapter 7 of the bankruptcy code to grant relief to the debtor. The parties agree that the Debtor's debts are primarily consumer debts. The only issue before the Court is whether it would be an abuse of the provisions of chapter 7 to grant relief to the Debtor.

Section 707(b)(2) provides that abuse is presumed if a debtor's net monthly income exceeds a certain threshold amount as determined by a rather rigid mathematical test ("the Means Test"). The Means Test was designed to determine generally if the debtor has the ability to pay some of his or her debts through the provisions of a chapter 13 plan. The debtor may rebut the presumption of abuse by demonstrating that certain adjustments to expenses are warranted. See 11 U.S.C. § 707(b)(2)(B).

Section 707(b)(3) provides that, if the presumption in Section 707(b)(2) does not arise or is rebutted, the court shall consider "(A) whether the debtor filed the petition in good faith; or (B) [whether] the totality of the circumstances . . . of the debtor's financial condition demonstrates abuse." The first of these two separate and independent[9] tests is referred to herein as the Good Faith Test; the second is referred to herein as the Financial Situation Test.

Section 707(b)(7) provides that the Means Test found in Section 707(b)(2) does not apply

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relief would be an abuse of the provisions of this chapter. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

[9] The fact that "bad faith" and the "totality of financial circumstances" are listed in the disjunctive is very strong evidence that Congress intended that bad faith and the totality of the debtor's financial circumstances constitute independent grounds for relief. See Eugene W. Wedoff, Means Testing in the New 707(b), 79 Am. Bankr. L.J. 231 (2005). A bankruptcy court may dismiss a case if it finds that the debtor filed the petition in bad faith, *or* that the totality of the circumstances of the debtor's financial situation demonstrates abuse. Each of the two considerations is potentially sufficient for a finding of abuse. The debtor's financial situation must, therefore, have some separate implication in the context of abuse apart from considerations of bad faith for all debtors and considerations of the means test in Section 707(b)(2) for above-median debtors.

to debtors whose current median income is less than or equal to the median income for families of equal size in the applicable state ("below-median income debtors")[10]. This means that the Means Test applies only to debtors whose current income is greater than the median income for families of equal size in the applicable state ("above-median income debtors"). In Summary, a chapter 7 case may be dismissed for abuse. Abuse is determined under three separate and independently applied tests. The first test, the Means Test, is only applicable if the debtor's gross monthly income exceeds the median income for families of the same size in the state in which the debtor resides. The other two tests, the Good Faith Test and the Financial Situation Test, are applicable to all chapter 7 debtors

Burden of Proof. Under the pre-BAPCPA law, the burden of production and the burden of persuasion in a motion to dismiss under Section 707(b) rested with the moving party. See 4 Collier on Bankruptcy, "Dismissal", ¶ 707.04[5][a], p. 707-27 (15th ed. rev.) (Citing Green v. Staples (In re Green), 934 F.2d 568 (4th Cir. 1991)). Collier concluded under pre-BAPCPA law that the burden was heighten because the former Code provided that "the court should give the benefit of any doubt to the debtor." Collier, supra. That language, however, has been removed from the Code. While the burden of proof is no longer heightened, the United States trustee must still meet the burden of production and the burden of persuasion by a preponderance of the evidence.

A. The Means Test.

The Means Test is a rigid mathematical test designed to determine generally whether a

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[10] Section 707(b)(7) provides that no judge, United States trustee, trustee or party in interest may file a motion under Section 707(b)(2) if the debtor is a below-median income debtor. It does not actually provide that the test does not apply to such a debtor, but the practical effect is the same as if it did.

debtor has sufficient income to fund a chapter 13 plan. Abuse is presumed if a debtor's current monthly income ("CMI") is more than $167.00 greater than the sum of certain allowable expenses.[11] CMI is defined 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" preceding the month of the bankruptcy filing. 11 U.S.C. § 101(10A).

Among the deductions that may be made from the CMI are the debtor's average monthly payments on account of secured debts, which are defined as follows:

> The debtor's average monthly payments on account of secured debts shall be calculated as the sum of-
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> (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and
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> (II) 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, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

11 U.S.C. § 707(b)(2)(A)(iii).

The Debtor's CMI as listed on Form 22A is $6,527.15. His deductions total $8,050.99. The differential (CMI less deductions) is less than $167.00, the threshold requirement under the Means Test, and so abuse is not presumed. The United States trustee, however, argues that the Debtor should not be permitted to include the mortgage and utility payments on the Rhode Island Property which payments total $2,018.27. If the deduction is disallowed, the Debtor's net monthly income would be $378.43, an amount that exceeds the $167.000 threshold.

The issue is resolved by determining whether "amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition" include

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[11] In some cases, abuse is presumed if the Debtor's CMI only $100.00 more than the the sum of those certain allowable expenses. This rule of law is not relevant in this case.

amounts for payments on property that the Debtor intends to surrender. A number of Courts have considered this question, resulting generally in three lines of opinions. One Court that is representative of the majority of courts has reasoned:

> To determine the amount that may be deducted from CMI, "we must begin with the language of the statute itself." In re T.H. Orlando, Ltd., 391 F.3d 1287, 1291 (11th Cir.2004). " 'The plain meaning of legislation should be conclusive, except in the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." ' In re Paschen, 296 F.3d 1203 (11th Cir.2002) (quoting United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989)). In determining the plain meaning, "the Court must give meaning and import to every word in a statute." In re Jass, 340 B.R. 411, 2006 WL 871235, *2 (Bankr.D.Utah Mar.22, 2006) (citing Negonsott v. Samuels, 507 U.S. 99, 206, 113 S.Ct. 1119, 122 L.Ed.2d 457 (1993)). However, "[i]n interpreting one part of a statute, 'we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." ' In re Welzel, 275 F.3d 1308, 1317 (11th Cir.2001) (quoting Philbrook v. Glodgett, 421 U.S. 707, 713, 95 S.Ct. 1893, 44 L.Ed.2d 525 (1975)).
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> Here, the amounts to be deducted from CMI on account of secured debts are those amounts that are "scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition." 11 U.S.C. § 707(b)(2)(A)(iii). "When statutory language has not been expressly defined, we are to give that language its common meaning." In re Fretz, 244 F.3d 1323, 1327 (11th Cir.2001). Webster's Dictionary defines the word "schedule" as "to plan for a certain date." Random House Webster's Unabridged Dictionary 1713 (2d ed. rev.2001). The common meaning of "as contractually due" is that the debtor is legally obligated under the contract, in this case, a promissory note, to make a payment in a certain amount, with a certain amount of interest, for a set number of months into the future. Accordingly, payments that are "scheduled as contractually due" are those payments that the debtor will be required to make on certain dates in the future under the contract. These payments are limited by additional statutory language to only those payments required in each of the sixty months after the petition is filed.

In re Walker, WL 1314125 at page 3, (Bankr. N.D.Ga. 2006).

This Court agrees with the Court in Walker. The language of the statute is clear. The payments on the Rhode Island Property are properly scheduled as contractually due during the first sixty months post-petition, the Debtor's statement of intent to surrender that property

notwithstanding.

The second line of opinions holds that a declaration of intent to surrender collateral requires the removal of the payment amount from the Means Test analysis. These opinions hold that the date on which the Means Test is applied is the date on which the United States trustee files a motion to dismiss. They further hold that post-petition events that occur prior to the filing of the motion to dismiss should be considered. Accordingly, they hold, if relief from the stay has been granted permitting foreclosure or if the surrender of the property has been effected, the Court should not allow the Debtor to include the payments on the secured claim in the Means Test. See, e.g., In re Singletary, 354 B.R. 455 (Bankr. D.Tex 2006), In re Zak, 361 B.R. 481 (Bankr. N.D. Ohio 2007), and In re Nockerts, 357 B.R. 497 (Bankr. E.D.Wis. 2006).

This Court disagrees with this line of opinions. First, there is no support in the Bankruptcy Code for such an interpretation. Second, such an interpretation would, in many or most cases, permit the United States trustee to unilaterally determine whether payments on property such as the Rhode Island Property are included in the Means Test. This Court cannot agree that Congress intended such a rule in light of its concerns regarding the costs of administration of cases. Such a rule would also give debtors an adverse incentive to declare an intent to retain property when surrender was a foregone conclusion. Finally, if the argument is followed to its logical conclusion and adjustments are made to the Means Test continually during the pendency of the case, the Means Test would gradually become the Financial Situation Test and would have no independent significance.

A third line of opinions focuses on the phrase “scheduled as” and concludes that “the Debtor’s schedules and statements form the basis from which the Court should determine

whether a debt is "scheduled as contractually due." See, e.g., In re Skaggs, 349 B.R. 594, 599 (Bankr. D.Mo. 2006). This is the holding that the United States trustee urges this court to adopt.

The Skaggs Court reasoned that "scheduled as" means that the debt is actually listed on the debtor's schedules, not that it is planned for a date certain, as the Walker Court determined. This conclusion makes no difference if a debtor's schedules are considered as of the date of petition. A debtor who discloses his or her intent to surrender collateral property is still obliged to schedule the monthly amount of the payments that are due based on the debt for which the property serves as collateral.

The Skaggs Court counters by observing that debtors have a continuing obligation to amend their schedules to keep the information current. While that Court does not discuss further this continuing obligation to amend schedules, it implies that it would reason that the Means Test should be applied continuously during the pendency of the chapter 7 case. This result leads to the same issues that are raised by the second line of opinions.

The payments on a debt secured by the collateral to be surrendered must be scheduled when the petition is filed. Since any reassessment of the Means Test would only occur upon the actual surrender of the collateral, the debtor would have an adverse incentive to take steps to delay surrendering the collateral. In some cases, a debtor may even state an intent to retain the collateral, hoping to delay a motion for relief and foreclosure, or repossession, until the discharge order is entered and the case is closed.

The reasons for requiring debtors to amend their schedules on an ongoing basis is to permit the chapter 7 trustee to administer all assets of the debtor for the benefit of creditors. When the collateral is properly scheduled and the debtor's intent to surrender that property is

disclosed, the debtor has provided all information necessary for the chapter 7 trustee to administer the property for the benefit of creditors.[12] Requiring a debtor to amend schedules to disclose that the property had been surrendered pursuant to the stated intent of the debtor would serve no purpose other than to permit the United States trustee to recalculate whether the debtor had failed the Means Test.[13] Just because a debtor must amend his or her schedules whenever doing so will facilitate the administration of assets for the benefit of creditors does not mean that he or she must amend the schedules so that a party in interest may re-apply the Means Test.

Because, as is discussed below, the Disposable Income Test is a primary consideration under the Financial Condition Test and because it is based on projected income and expenses, the Debtor will not, ultimately avoid dismissal by deducting the payments and expenses relating to the Rhode Island Property .

The Skaggs Court also states "[t]o focus on the single term 'contractually due' without due consideration of the importance of the term 'scheduled' and the phrase 'in each of the 60 months following the date of the petition' will miss the actual meaning and the intent of § 707(b)(2)." This reasoning necessarily implies that the phrase "in each of the 60 months following the day of petition" modifies the word "scheduled", an implication that does not comport with the better reading of the rule. The rule requires debtors to include "amounts

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[12] See, e.g., In re Turner, 335, B.R. 755, 763 (Bankr. D.N.M. 2005) (Debtor has a duty to amend schedules to disclose all assets not previously disclosed), In re Okan's Foods, Inc., 217 B.R. 739, 752 (Bankr.E.D.Pa.1998) (Duty of disclosure continues throughout the case requiring debtors to amend schedules "whenever it becomes necessary in order to insure the accuracy and reliability of the information disclosed therein."), and In re Searles, 317 B.R. 368 (Bankr. 9th Cir. B.A.P. 2004) (Post-petition discovery of rights that actually existed at the time of filing must be addressed in the schedules, implying a duty to amend.)

[13] This, of course, does no absolve the debtor of his or her duty to answer any questions the chapter 7 trustee may have regarding the surrender or other disposition of the property.

scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition". The phrase "in each of the 60 months following the day of petition" follows immediately after, and per force modifies, "contractually due"; it does not modify "scheduled". It is the amounts that are contractually due in the sixty-month period that are to be deducted from income, not the amounts that are scheduled during the entire sixty-month period.

There is no presumption of abuse in this case under the Means Test.

B. The Good Faith Test.

In considering whether the granting of relief constitutes abuse, the Court is to consider whether the debtor filed the petition in bad faith. 11 U.S.C. § 707(b)(3)(A). The United States trustee does not assert that the petition was filed in bad faith. The motion to dismiss cannot be granted under this subparagraph.

C. The Financial Situation Test. If a motion is brought under 11 U.S.C. § 707(b)(3)(B), the Court must consider the totality of the circumstances of the debtor's financial situation. In order to determine whether abuse exists under this subparagraph in this case, it is necessary to consider a number of preliminary legal issues.

First, does the test in Section 707(b)(3)(B) include a consideration of a debtor's ability to pay some or all of his or her unsecured debt by funding a chapter 13 plan? Second, if it does, how should the court measure the debtor's ability to fund a chapter 13 plan? Third, is a finding that the debtor can fund a chapter 13 plan sufficient, without more, to support a conclusion that granting relief would be an abuse of the provisions of chapter 7? That is, does a finding of abuse require the presence of some other financial or non-financial factor?

1. The Debtor's Ability to Fund a Chapter 13 Plan is a Component of the Financial Situation Test. The first issue is whether the court should consider a debtor's ability to pay some or all of his or her unsecured debt by funding a chapter 13 plan ("the Disposable Income Test") when applying the Financial Situation Test in Section 707(b)(3)(B). This Court has previously held that the Disposable Income Test applies to below-median income debtors under Section 707(b)(3)(B). See In re Barker, Case No. 06-60835-LYN (2007). For the reasons state in Barker, it is concluded that the Disposable Income test also applies to above-median income debtors .

Section 707(b)(3)(B) requires bankruptcy courts to conduct an inquiry into the debtor's total financial circumstances including his or her ability to fund a chapter 13 plan.

2. Under the Financial Situation Test, whether a debtor has sufficient disposable income to fund a Chapter 13 Plan is to be determined as if the debtor were a debtor under Chapter 13. Having concluded that a debtor's ability to fund a chapter 13 plan is a component of the inquiry under Section 707(b)(3)(B), it is necessary to determine how the debtor's ability to fund a chapter 13 plan is to be measured. Because conversion to chapter 13 is the only viable alternative to dismissal in most chapter 7 cases, the proper measure is the minimum amount that the debtor would be required to pay if he or she had filed a petition under chapter 13.

Under chapter 13, a debtor must pay all of his projected disposable income to the trustee for three or five years depending on whether the debtor's income is above or below the median income for families of the same size as that of the debtor residing in the same state as that of the debtor. See 11 U.S.C. § 1325(b)(1)-(4). Disposable income is defined as monthly income received by the debtor less amounts reasonably necessary to be expended for the maintenance or

support of the debtor and his or her dependents. 11 U.S.C. § 1325(b)(2). The majority of courts that have considered the issue have determined that Schedules I and J, with some adjustments, may be used under the BAPCPA to determine "projected disposable income." See, e.g., In re Dew, 344 B.R. 655 (Bankr. N.D. Ala.2006); In re Schanuth, 342 B.R. 601 (Bankr.W.D.Mo.2006) (using current monthly income less debtor's expenses on Schedule J); In re Kibbe, 342 B.R. 411 (Bankr.D.N.H.2006) and In re McPherson, 350 B.R. 38 (Bankr. W.D.Va. 2006)

3. The presence of disposable income may be sufficient for a finding of abuse under Section 707(b)(3)(B) even in the absence of other factors. Prior to the enactment of the BAPCPA, a chapter 7 case could be dismissed if it would constitute a *substantial* abuse of the provisions of chapter 7 to allow it to proceed. In the Fourth Circuit, the movant was required to demonstrate something more than the debtor had the ability to fund a chapter 13 plan before the Court would grant the motion. See Green v. Staples (In re Green), 934 F.2d 568 (4th Cir. 1991). It was necessary to show the existence of some other factor, such as failure to disclose assets, the purchase of luxury items, the taking of cash advances or the absence of a financial trauma in the debtor's recent past.

One Court in the Seventh Circuit recently examined Section 707(b)(3)(B) in light of the rule in Green and concluded that the movant must still demonstrate some factor in addition to the debtor's ability to fund a chapter 13 plan. See In re Nockerts, 357 B.R. 497 (Bankr. E.D. Wisc. 2006)[14].

The "totality of circumstances" test has its roots in pre-BAPCPA law. Although

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[14] Nockerts concerns an above-median income debtor. The distinction is not relevant to this inquiry.

> the Seventh Circuit Court of Appeals had not weighed in on the issue, a District Court in this Circuit analyzed the case law in In re Ontiveros, 198 B.R. 284 (C.D.Ill.1996). The court explained that in ruling on "substantial abuse" motions under the prior version of § 707(b), the circuit courts devised three main approaches: (1) the *per se* rule of the Eighth and Ninth Circuits under which the debtor's ability to pay his debts, standing alone, justified dismissal; (2) the totality of the circumstances test of the Fourth Circuit which required a showing of more than an ability to pay; and (3) the hybrid approach of the Sixth Circuit which permitted the dismissal based on ability to pay alone, but also allowed the debtor to demonstrate mitigating circumstances. Id. at 287.
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> The means test of § 707(b)(2) appears to be a codification of the *per se* rule, with its presumption of abuse for debtors who have the ability to pay based on application of the means test formula. The Fourth Circuit's "totality of the circumstances" test was adopted by name in BAPCPA § 707(b)(3)(B), suggesting that *something other* than an ability to pay is required to succeed on a Motion to Dismiss under this section. Further, as illustrated in *Ontiveros,* examining the "totality" of the circumstances suggests considering more than one factor (i.e., ability to pay).

In re Nockerts, 357 B.R. at 505-506.

While a court may, and should, seek guidance from pre-revision authority when considering revised statutes,[15] it should also deviate from this tenet when the statutory revisions render the reasoning in the prior judicial authority inapplicable. This Court concludes that the conclusion in Green prohibiting dismissal under Section 707(b) when no factor other than a debtor's ability to pay is present, is not applicable under the BAPCPA.

The Court in Nockerts did not examine Green in light of the language in Section 707(b)(3). The Green Court based its ruling on three considerations. First, the Court considered a *per se* rule that based dismissal solely on the existence of disposable income, by looking at the Congressional history.

> The ambiguity of the statutory language is no doubt a reflection of Congress's inability to agree on a definition of substantial abuse which would encompass these countervailing considerations in all situations. Nevertheless, in unsuccessfully attempting to carve out

[15] See, e.g., In re Pfeifer, 2007 WL 926387 ("Because Congress retained the phrase "totality of the circumstances" in the BAPCPA, the Court concludes that it may look to pre-BAPCPA case law to construe the meaning of the phrase under § 707(b)(3).")

> such a definition, Congress considered and rejected the use of a threshold future income or ability to repay test (known as "mandatory Chapter 13") as a qualification for Chapter 7 relief for consumer debtors. [Footnote omitted.] *In re Deaton,* 65 B.R. 663, 665 (Bankr.S.D.Ohio 1968).

Green, 934 F.2d at 571. Given the extensive revision of Section 707(b), any reliance on prior legislative history is misplaced.

Second, the Court in Green looked to the language in pre-BAPCPA Section 707(b) providing that "[t]here shall be a presumption in favor of granting relief requested by the debtor." The Court in Green rejected a *per se* rule because it would "render this presumption [in favor of granting the relief requested by the debtor] toothless." Green at 573. This presumption, however, was removed from the Bankruptcy Code by the BAPCPA. Accordingly, it no longer provides a basis for requiring something more than a debtor's ability to pay.

Finally, the Fourth Circuit considered the Bankruptcy Code and Rules as a whole and section 109[16] of the Bankruptcy Code in particular.

> Moreover, nowhere in the Code is there a requirement that a debtor be insolvent

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[16] Section 109(b), which concerns whether a person is eligible to be a chapter 7 debtor, provides:

(b) A person may be a debtor under chapter 7 of this title only if such person is not--
(1) a railroad;
(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or
(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

> in order to file for bankruptcy. Section 109, which the 1984 Amendments left unchanged, allows any person to be a debtor under Chapter 7 unless he comes within one of several limited exceptions, none of which apply to consumer debtors and none of which are predicated upon anticipated income. 11 U.S.C.A. § 109 (1979 & West Supp.1990). Section 109, taken together with the Senate report on Section 707(a) cited *infra,* provides a strong indication that Section 707(b) was intended to explicitly recognize the court's ability to dismiss a Chapter 7 petition for lack of good faith-- when "the total picture is abusive." *Waites v. Braley, supra,* 110 B.R. at 215 (quoting bankruptcy court Opinion and Order; *but see* 217, holding that neither bad faith nor fraud is an element required for a finding of substantial abuse).

Id. The reasoning in Green is based on legislative history coupled with an absence of statutory language requiring an ability-to-pay test. This reasoning does not hold under the BAPCPA as the old legislative history is no longer applicable and the new law clearly indicates a legislative disposition towards an examination of a debtor's ability to fund a chapter 13 plan.

Because this Court does not believe that the Fourth Circuit would reach the same holding under the BAPCPA as it did in Green, it is concluded that a debtor's ability to pay, standing alone, may form the basis for dismissal under Section 707(b)(3)(B) when considered in light of the debtor's other financial circumstances.

The language of Section 707(b)(3)(B) supports this conclusion. First, the standard for dismissal has been reduced[17] from "substantial abuse" to "abuse". As a practical matter this revision of the statute does not alter the method of analysis. See In re Travis, 353 B.R. 520, 529 (Bankr. E.D.Mich. 2006) ("While the prior act refers to 'substantial abuse' and the new act refers to 'abuse', the language change is a distinction without a difference for purposes of analyzing whether granting relief to the debtor would be an abuse of the bankruptcy system.") Also see 6

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[17] The context of the statute indicates that Congress intended this change to effect a reduction in the threshold for abuse, notwithstanding the fact that in some other areas of law the removal of the word "substantial" from a standard indicates a heightening of that standard. For example, "substantial performance" is a lower level of performance than [complete] performance, and "substantial consummation" in bankruptcy is a lower level of consummation than "consummation".

Collier on Bankruptcy ¶ 707.05[1] (15th ed. rev.2006) ("The 2005 amendments also changed the standard for dismissal from 'substantial abuse' to 'abuse.' It is unclear how much impact this will have; few, if any, courts permitted a chapter 7 case to proceed because they found it to be an abuse, but not a substantial abuse, under prior law.")

Even though the change from "substantial abuse" to "abuse" has little practical effect on a court's analysis, it constitutes a signal from Congress that courts should take a closer look at a debtor's circumstances before allowing him or her to proceed in chapter 7. Given other revisions in the Bankruptcy Code, considering a debtor's ability to fund a chapter 13 plan in light of his or her other financial circumstances is a proper response to this signal.

Second, and more importantly, new Section 707(b)(3) divides the pre-BAPCPA Section 707(b) into two separate tests that are, as noted by Judge Wedoff, to be applied in the disjunctive. Section 707(b)(3)(A) allows courts to dismiss a case for bad faith by the debtor. Section 707(b)(3)(B) allows courts to dismiss the case if it finds doing so is proper based on "the totality of the circumstances *of the debtor's financial situation.*" (Emphasis added.) Section 707(b)(3) bifurcates the Green test and analysis into two separate and distinct test. Under the BAPCPA, the court is to consider *either* the totality of the debtor's financial situation *or* the debtor's bad faith. Issues concerning a debtor's actual financial situation, except as they may be compared to false information, are not to be considered as a component of bad faith, and issues of bad faith are not to be considered when considering a debtor's actual financial situation.

While a court should consider the Green factors suggested when considering the Financial Situation Test, it should not consider all of them. In Green, the Court listed a number non-exclusive factors, in addition to a debtor's ability to pay, for consideration under its pre-

BAPCPA totality-of-the-circumstances test. See Green, 934 F.2d at 572. The first two factors concern whether the debtor filed the petition because of "sudden illness, calamity, disability, or unemployment" and whether the debtor made pre-petition cash advances and consumer purchases far in excess of his or her ability to repay the resulting debt. The last two factors concern whether the petition was filed in good faith and whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition. These four Green factors are more properly considered as part of the inquiry into bad faith under Section 707(b)(3)(A) .[18]

The other factor in Green concerns whether the debtor's proposed family budget is excessive or unreasonable. This factor and a debtor's ability to pay are properly considered under Section 707(b)(3)(B) as a component of the debtor financial situation generally, and his or her disposable income in particular.

The only factors that should be considered under Section 707(b)(3)(B) are the debtor's actual projected financial circumstances. The test in Section 707(b)(3)(B) is, however, not limited to an examination of the Debtor's ability to fund a chapter 13 plan. The Court must consider the debtor's entire financial situation. A debtor's financial situation may be divided into three parts: (1) the debtor's assets; (2) claims against the debtor's assets[19]; and (3) the debtor's future income and expenses. Issues concerning disclosure of assets and claims in the context of

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[18] The Court in Green also endorsed three other factors examined by other courts: (a) whether the debtor engaged in free-wheeling spending (See In re Grant, 51 B.R. 385, 396 (Bankr. N.D.Ohio 1985); (b) whether the debtor altered monthly obligations in statements to the court at least three times (See In re Peluso, 72 B.R. 732, 738 (Bankr. N.D.N.Y. 1987)); and (c) whether the debtor chose Chapter 7 over Chapter 13 in order to voluntarily pay favored creditors (See In re Shands, 63 B.R. 121, 123 (Bankr. E.D.Mich 1985)). See Green, 934 F.2d at 573.

[19] Unsecured claims are properly included as claims against a debtor's assets.

abuse are more properly considered as inquiries into bad faith under Section 707(b)(3)(A). The same may be said for matters concerning unscheduled claims. In contrast, whether a debtor's actual future income is greater than his or her actual and reasonable future expenses will rarely be relevant to considerations of bad faith.

Section 707(b)(3)(B) necessarily requires an examination of a debtor's ability to fund a chapter 13 plan. If that examination reveals that the debtor may pay some minimum amount to his or her unsecured creditors, then the Court may find that it would be an abuse of chapter 7 to permit the debtor to continue under that chapter.

Why, then, does Section 707(b)(3)(B) not instruct courts to consider the debtor's ability to fund a chapter 13 plan? Because there are at least two other financial factors that may negate a finding of abuse even if a debtor can afford to fund a chapter 13 plan. First, the ability to fund a chapter 13 plan must be considered in light of the financial consequences of allowing a debtor to remain in chapter 7, that is, whether creditors will receive more in chapter 7 than they would in chapter 13. Section 707(b)(3)(B) requires courts to examine the liquidation value of the debtors non-exempt assets, the amount of claims against the debtor and the debtor's assets and the cost of prosecuting a case under chapter 13. It would not be an abuse for a debtor to prosecute a case under chapter 7 if the unsecured creditors would receive as much as or more than they would through a chapter 13 plan.

Second, the Court must consider the dividend that unsecured creditors would receive if the debtor converted to chapter 13. If the dividend would be de minimis, then it cannot be said that it would be abusive to permit the debtor to remain in chapter 7.

The Debtor's Disposable Income. We now examine whether abuse exists in this case

under Section 707(b)(3)(B). The inquiry focuses on the totality of the circumstances of the Debtor's financial situation beginning with the Debtor's ability to fund a chapter 13 plan. A debtor's disposable income in chapter 13 is the difference between his or her net monthly income and actual projected monthly expenses.

The Debtor's Net Monthly Income. The best indication of this amount is the debtor's recent income coupled with evidence of the projected stability of that income. The Debtor scheduled monthly gross income from his employment in the amount of $5,473.40 plus 1/12 of his annual bonus, or $416.66 per month. His total scheduled gross monthly income is $5,890.06. At the hearing on this matter, the Debtor testified that in August of 2007, his employer began laying off employees and eliminating overtime work for those who were retained. The Debtor testified that he has received no overtime income since that time. His employee statement of earnings indicate that he received monthly gross income of $4,594.30 in August, September, and October of 2007.[20] The statements indicate that he received monthly net income of $2,810.94, $2,688.47, and 2,893.92 for each of these three months respectively. For purposes of this analysis, it is concluded that the Debtor's monthly net income is $2,900.00 without overtime. If he begins to receive overtime income in the future as he has in the past, his monthly net income will be approximately $3,200.00 ($2,900.00 + [$300.00]), if net overtime income is calculated at $416.66 less taxes estimated at a marginal rate of 28%.

His payroll deductions include $143.99 in monthly 401(k) contributions and $160.78 in monthly 401(k) loan re-payments. The United States trustee argues that the Debtor should not be allowed to deduct these amounts from his gross income.

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[20] See Debtor's Exhibits 1-3.

Under the BAPCPA, the 401(k) account deductions are not part of the Debtor's income and must be excluded from the calculation of the amount that could be used fund a chapter 13 plan.

> Not all sources of income need be committed to a Chapter 13 plan.
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> . . .
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> Debtors are . . . permitted to shelter certain contributions to employee benefit plans (EBPs). "[*A*] *ny amount*" that is either "withheld by" or "received by" a debtor's employer for qualifying EBPs, deferred compensation plans, tax-deferred annuities, or state-law-regulated health insurance plans "shall not constitute disposable income, as defined in section 1325(b)(2)." 11 U.S.C. § 541(b)(7)(A) & (B) (emphasis added).
>
> Among the qualifying programs are any "employee benefit plan[s] ... subject to Title I of the Employee Retirement Income Security Act of 1974" ("ERISA"). *See* 11 U.S.C. § 541(b)(7)(A)(i)(I) & (B)(i)(I). This includes EBPs subject to 26 U.S.C. § 401(k) ("401(k) plans"). *See* 29 U.S.C. §§ 1002(3) (defining "employee benefit plan"), 1003(a) (defining ERISA's coverage). So long as a debtor's contributions are within the limits legally permitted by the EBP, "any amount" of this contribution is exempted from disposable income.
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> . . .
>
> . . . Sections 541(b)(7) and 1322(f) both plainly state that these contributions "shall not constitute disposable income." Congress has placed retirement contributions outside the purview of a Chapter 13 plan.

In re Johnson, 346 B.R. 256, 263-264 (Bankr. S.D.Ga. 2006). Also see In re Barraza, 346 B.R. 724, 732 (Bankr. N.D. Tex. 2006) and In re Devilliers, 358 B.R. 849, 864-865 (Bankr.E.D. La. 2007). The $143.99 is properly deducted from the Debtor's income for purposes of calculating his disposable income in chapter 13. That amount must be deducted from the United States trustee's calculation of disposable income.

The United States trustee also argues that the amount ($160.78) that is deducted from the debtor's paycheck for repayment a loan from his 401(k) account must be included in disposable income. The Loan will be paid off in 2011.[21] In addition to sheltering EBP contributions, the

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[21] Transcript of Hearing, p. 46, l. 24 to 48, l. 11.

BAPCPA also protects repayments of loans from EBPs, including loans from 401(k) plans. Section 1322(f) provides that "[A] plan may not materially alter the terms of a loan described in section 362(b)(19) [i.e., a loan from a qualifying employee benefit plans or retirement savings accounts], and any amounts required to repay such loan shall not constitute 'disposable income' under section 1325."

The Debtor's net monthly income is estimated to be $2,900.00 without overtime and $3,200.00 with overtime.

Allowed Monthly Expenses. The debtor scheduled $6,156.98 in monthly expenses. The United States trustee asserts that adjustments should be made on account of (1) the deductions for the mortgage payments and utilities on the Rhode Island Property should be eliminated ; (2) the Debtor's phone expenses should be reduced from $309.00 per month to $165.00 per month; (3) the Debtor's non-tuition payments to the debtor's son for support while attending college in the amount of $250.00 should be eliminated; and (4) the Debtor's car payments of $755.68 which should be reduced to $176.37.

The Rhode Island Property. The United States trustee correctly asserts that the mortgage and utility payments on the Rhode Island Property should not be deducted for purposes of the Financial Situation Test. The Debtor does not contest this assertion. The reduction is a total of $2,018.27.

Phone Expenses. The Debtor lists expenses of $199.00 for traditional telephone service and $110.00 for cell phone service, a total of $309.00. The Debtor testified at the hearing on this matter that he intended the $199.00 to represent the total for both traditional phone service and cell phone service. This amount includes cell phone service for his son who is at college. The

United States trustee asserts that the total should $165.00. For purposes of this analysis, the Debtor will be allowed to deduct $165.00 from his income in determining his disposable income. This requires a deduction of $144.00 ($309.00 - $165.00) from Debtor's expenses.

Vehicle Payments. The Debtor scheduled $755.86 in monthly car payments. This is the actual amount of payments, but the United States trustee argues that the total of the fourteen payments that remain due should be amortized over sixty months. To do so would result in sixty monthly payments of $176.37, a reduction of $579.49 per month.

The problem with this static analysis is that it assumes that the debtor will not need to acquire a replacement vehicle or incur increased repair expenses during the four year period after the debt is paid in full. Even if the Debtor retains the vehicle, maintenance and repair costs will increase. It is , however, appropriate to make some adjustment because the debtor has only fourteen more payments to make on the vehicle and because those payments are at or above the upper end of an allowable vehicle payment. For purposes of this analysis, it is estimated that the Debtor will incur an average monthly expenditure of $400.00 for both expected the increase in repair costs and the balance of the vehicle payments during the next sixty months. This results in a deduction of $355.86 per month from allowed expenses.

College Expenses for Son. The Debtor scheduled $250.00 per month in expenses that he was paying to his son in order to help support him at college. None of the money goes toward tuition. The Debtor testified that he ceased paying his son in August of 2007 because he no longer received overtime.[22] He does not anticipate making this payment in the foreseeable future. The disallowance of this expense is proper.

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[22] Transcript of Hearing, p. 43, l. 5-13.

Net Disposable Income. If we assume that the Debtor will receive overtime, his net income will be approximately $3,200.00. The debtor scheduled $6,156.98 in monthly expenses. This amount must be reduced by (1) $2,018.27 per month for the disallowance of the Rhode Island Property; (2) $144.00 per month for the reduction in telephone service; and (3) $355.86 per month for the adjustment of his vehicle payments; and (4) $250.00 for the elimination of his son's college support. This leaves $3,388.56 (= $6,156.98 - [$2,018.27 + $144.00 + $355.86 + $250.00])

The Debtor's adjusted projected expenses are almost $186.56 greater than his projected net income if most of the United States trustee's assertions are accepted in full. And if the United States trustee's assertion regarding the Debtor's vehicle payment is accepted, the Debtor would have only $35.07 per month to pay toward a chapter 13 plan, an amount that is de minimis. The Debtor does not have sufficient projected disposable income with which to fund a chapter 13 plan. Nor are there any other facts demonstrating abuse. He has been gainfully employed with the same employer for sixteen years. His expenses include $563.00 for child support. Some of the expenses that he has incurred were for surgery to remove a tumor from his son's brain. The motion will be denied.

III. Conclusion

The burden of proof is on the United States trustee to prove by a preponderance of the evidence that the continued prosecution of this chapter 7 case would constitute abuse. The Debtor in this case does not have sufficient income to fund a chapter 13 plan. The motion will be denied.

ORDER

For the reasons stated in the accompanying memorandum, the motion of the United States trustee to dismiss this case for abuse shall be and hereby is denied.

So ORDERED.

Upon entry of this Memorandum and Order the Clerk shall forward copies to the United States trustee, the chapter 7 trustee, the Debtor and R. Mitchell Garbee, Esq., counsel for the Debtor.

Entered on this 19th day of March, 2008.

William E. Anderson
United States Bankruptcy Judge