

**UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF VIRGINIA  
Lynchburg Division**

In re JENNIFER L. SHOTWELL,                    )    Case No. 09-62300-LYN  
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**MEMORANDUM AND ORDER**

This matter comes before the court on a motion by the United States trustee to dismiss this case under 11 U.S.C. § 707(b) as an abuse of the provisions of chapter 7 of the Bankruptcy Code. Jennifer L. Shotwell (“the Debtor”) opposes the motion. The motion will be denied.

***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 enter 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.

***Facts***

In 2005, the Debtor and her former husband began divorce litigation. In December of

2006, she purchased real property commonly known as 4432 Bybee Church Rd., Troy, Virginia (“the Real Property”).<sup>1</sup>

In 2007, the Madison County Circuit Court awarded her ex-husband spousal support in the amount of \$2,878.00 per month, child support in the amount of \$1,122.00 per month, attorney’s fees in the amount of \$47,000.00(to her ex-husband’s attorney which she is currently paying to her ex-husband at the rate of \$400.00 per month), and primary custody of the children. Additionally, the Court ordered that the children see three different mental health professionals to help the children deal with parental alienation issues.<sup>2</sup> The Debtor’s marriage was dissolved and she has since remarried.

The Debtor currently owes her divorce attorney \$9,000.00, which she is paying at the rate of \$450.00 per month. The Debtor fell behind in her finances owing to the accumulation of the foregoing debts. Her attempts to modify the payment schedule on the debt secured by the Real Property were not successful.

The Debtor paid \$10,000.00 to her ex-husband’s attorney. When her appeal failed, she paid him her last \$5,000.00. In or about June of 2009, her ex-husband’s attorney filed a show cause motion against the Debtor for failing to pay his fees.

On July 20, 2009, the Debtor filed the instant chapter 7 petition. The Debtor scheduled priority unsecured claims in the amount of \$32,462.85 and scheduled general unsecured claims

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<sup>1</sup> The Debtor purchased the house in her name only. Her current husband does not have an ownership interest in the Real Property.

<sup>2</sup> The Circuit Court Order directed the Debtor’s ex-husband to pay the first \$500.00 per month of the therapist fees. Thereafter, the Debtor is to pay 72%.

in the amount of \$47,897.43.<sup>3</sup> The Debtor scheduled the Real Property as property of the estate at a fair market value of \$344,300.00.<sup>4</sup> The amount of the claim secured by the Real Property was scheduled at \$424,423,97.<sup>5</sup>

On Schedule I, the Debtor scheduled monthly gross income from her employment in the amount of \$10,262.72.<sup>6</sup> She scheduled Mr. Shotwell's gross monthly income as \$2,210.04. The Debtor scheduled monthly income from her employment and that of her husband in the total amount of \$12,472.76.<sup>7</sup> She scheduled \$10,128.52 in net income after payroll deductions. She scheduled monthly expenses in the amount of \$10,315.17.<sup>8</sup> Her monthly net income, as indicated on her Schedules I and J, is negative \$186.65. The Debtor and her husband support two children. The parties agree that the family monthly income is above the median income for families of four persons living in Virginia.

The Debtor also filed a Chapter 7 Statement of Current Monthly Income and Means-Test Calculation Form ("Form 22A"). On Form 22A, the Debtor indicated that the total family Current Monthly Income ("CMI")<sup>9</sup>, as defined by the Bankruptcy Code, was \$12,320.94.

The Debtor also scheduled family monthly deductions for certain expenses and

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<sup>3</sup> See Debtors' Schedules E & F.

<sup>4</sup> See Debtor's Schedule I.

<sup>5</sup> See Debtor's Schedule A.

<sup>6</sup> See Debtors' Schedule I.

<sup>7</sup> See Debtors' Schedule I.

<sup>8</sup> See Debtors' Schedule J.

<sup>9</sup> 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).

deductions for debt payments as is permitted on Form 22A by 11 U.S.C. § 707(b)(2). She scheduled deductions based on IRS National Standards (food, clothing, household supplies, personal care, and miscellaneous) in the amount of \$1,332.00. The Debtor also scheduled deductions based on IRS Local Standards (housing mortgage and non-mortgage expenses, and transportation expenses) in the amount of \$1,780.00 including two car payments in the amount of \$489.00 each. Under “Other Necessary Expenses”, the Debtor deducted payroll taxes in the amount of \$1,940.73 and court-ordered payments in the amount of \$4,000.00.

The Debtor deducted \$355.55 for health insurance and \$100.00 for charitable contributions. The Debtor deducted \$2,296.17 on her first mortgage and \$533.00 for her second mortgage on the Real Property. Finally, she deducted \$541.05 for payments on pre-petition priority claims including anticipated payments to her divorce attorney in the amount of \$450.00 per month. The Debtor’s deductions on Form 22A totaled \$12,878.50. Her monthly disposable income under the Chapter 7 Means Test on Form 22A as filed is calculated at negative \$557.56.

On October 8, 2009, the United States trustee filed a motion to dismiss this case for abuse under 11 U.S.C. § 707(b)(2)&(3)(B).

In December of 2009, the Debtor and her current husband vacated the Real Property. It was sold at a foreclosure sale in April of 2010. The Debtor drives a 2002 Toyota with more than 250,000 miles on it. Her husband drives a 1997 Nissan truck. The Debtor’s husband lost his employment in February of 2010, reducing the Debtor’s family gross monthly income to \$10,254.00. He is not eligible for unemployment income. The Debtor estimates that she will owe \$6,400.00 on her 2009 income taxes.

***Discussion.***

I.

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”).<sup>10</sup> Whether the prosecution of a chapter 7 case against an above-median income debtor constitutes abuse is determined under Sections 707(b)(1), (2) and (3).

Section 707(b)(1)<sup>11</sup> provides that a court may dismiss an individual case under chapter 7 if (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. There is no dispute that the Debtor’s debts are consumer debts.

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 statutory mathematical test (“the Means Test). The Debtor’s Means Test (Form B22A as filed) calculates the Debtor’s monthly disposable income under Section 707(b)(2) at negative \$557.56. The United States trustee argues that certain adjustments should be made under the Means Test that will result in the

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<sup>10</sup> 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).

<sup>11</sup> 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 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)).

Debtor's monthly income being positive.

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<sup>12</sup> tests is referred to herein as the Good Faith Test; the second is referred to herein as the Financial Situation Test. The United States trustee asserts that it would be an abuse of chapter 7 to permit the Debtor to continue as a Chapter 7 debtor under the Financial Situation Test.

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 (4<sup>th</sup> Cir. 1991)). Collier concluded under pre-BAPCPA law that the burden was heightened 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.

## II.

Under Section 707(b)(2), it is presumed that it would be an abuse of the provisions of

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<sup>12</sup> 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.

Chapter 7 to permit a debtor to proceed under that chapter if the debtor's monthly disposable income as determined by the Means Test, multiplied by 60, is greater than \$10,950.00.

The Means Test provides a method of calculating a debtor's monthly disposable income.

The calculation under the Means Test may be said to be determined by six quantities: (1) the Debtor's Current Monthly Income which is defined by statute; (2) statutory expenses that are allowed in amounts determined by the IRS national and local standards; (3) "Other Necessary Expenses" under IRS rules which are allowed in their projected amounts; (4) additional expenses specified at 11 U.S.C. § 707(b)(2)(A)(ii)(I-IV); (5) Secured debt under 11 U.S.C. § 707(b)(2)(A)(iii); and (6) Priority debt under 11 U.S.C. § 707(b)(2)(A)(iv).

The Debtor's Means Test indicates that she has negative \$557.56 in monthly disposable income. The United States trustee, however, disputes the Debtor's calculation of her disposable income. The United States trustee asserts that the Debtor's "current monthly income", as defined at 11 U.S.C. § 101(10A), is \$12,464.67, not \$12,320.94. The United States trustee also argues that the Debtor's Rent/Mortgage should be reduced from \$2,829.17 to \$1,004.00, the Debtor's Ownership Expenses for two vehicles should be reduced from \$978.00 to \$00.00, the Debtor's expenses for her divorce attorney's continuing legal fees should be reduced from \$450.00 to \$00.00, and the Debtor's payroll deductions should be reduced from \$2,296.28 to \$2,270.03. The United States trustee agrees that the Debtor would be permitted to deduct the \$400.00 per month being paid to her ex-husband's divorce attorney. The United States trustee calculates that the Debtor monthly disposable income under the Means Test is \$2,539.84.

It is only necessary to examine two of the reductions asserted by the United States trustee in order to conclude that the Debtor's Means Test monthly disposable income is negative. First

we consider the Debtor's Mortgage or Rent payment. The United States trustee argues that the Debtor has improperly calculated her available disposable income under the Means Test by including mortgage payments on the Real Property even though she has surrendered it.

Among the deductions that may be made from the CMI are a 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-

- (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
- (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 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 amounts for payments on property that the Debtor intends to surrender. One Court that is representative of the majority of courts 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)).



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 has previously agreed with the reasoning and holding by the Court in Walker. See this Court's memorandum in In re Lynch, Case 07-61043-LYN (2010). The payments on the Real Property are properly scheduled as contractually due during the first sixty months post-petition, the Debtor's surrender of that property notwithstanding. The differential between the Debtor's Means Test amount for Rent/Mortgage and that asserted by the United States trustee, \$1,725.17 (= \$2,829.17 - \$1004.00), will be deducted from the disposable income as calculated by the United States trustee.

The United States trustee also asserts that the Debtor should not be permitted to deduct the IRS Local Standard allowance for two vehicle payments of \$489.00 each because the Debtor and her husband make no actual payments on the two vehicles that they own. This Court, however, agrees with the rationale and holding in In re Hylton, 374 B.R. 579 (Bankr. W.D. Va. 2007) (Krumm, C.J.), in which the Court held that the debtors were entitled to deduct the full amount of the allowance for vehicle payments even if they owned the vehicle free and clear of any liens. The \$978.00 for the two payments will be deducted from the disposable income as

calculated by the United States trustee.

If one subtracts \$1,725.17 (the mortgage differential) and \$978.00 (the car payments differential) from \$2,539.84 (the amount of the Debtor's Means Test monthly disposable income as calculated by the United States trustee), the Debtor's monthly disposable income under the Means Test is calculated to be negative \$163.33, which is \$345.83 less than the required statutory minimum of \$182.50 (= \$10,950.00/60). Accordingly, it is concluded without considering the other disputed deductions that it would not be an abuse for the Debtor to continue to prosecute this case under chapter 7 based on 11 U.S.C. § 707(b)(2).

### III.

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. This Court has previously held that a finding that the debtor can fund a chapter 13 plan may be sufficient, without more, to support a conclusion that granting relief would be an abuse of the provisions of chapter 7. This Court has also held that 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.

Under Chapter 13, an above-median income debtor must pay all of his or her projected disposable income to the trustee for five years. See 11 U.S.C. § 1325(b)(1)-(3)<sup>13</sup>. "Projected

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<sup>13</sup> Section 1325(b)(1)-(3) provides:

- (b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan--
- (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
  - (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.
- (2) For purposes of this subsection, the term "disposable income" means current monthly income received by the

disposable income” is not defined in the Bankruptcy Code. “Disposable income” means the “current monthly income” received by the debtor less “amounts reasonably necessary to be expended for support” of the debtor and his or her dependents. 11 U.S.C. § 1325(b)(2)<sup>14</sup>.

“Current monthly income” is defined as the “average monthly income . . . that the debtor receives . . . during the 6-month period ending on the last day of the calendar month immediately preceding the date” of petition. 11 U.S.C. § 101(10A)<sup>15</sup>. The “amounts reasonable necessary to

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debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--

- (A)(I) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
- (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
- (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

- (A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
- (B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
- (C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$525 per month for each individual in excess of 4.

<sup>14</sup> A debtor is also allowed deductions for post-petition domestic support obligations, charitable contributions, and business expenses. See Subparagraphs 1325(b)(2)(A)&(B). Those deductions are not relevant to this discussion.

<sup>15</sup> Section 101(10A) provides  
The term "current monthly income"--

(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on--

- (I) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
- (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii); and

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as

be expended for support” under Subsection 1325(b)(2) are to be determined in accordance with 11 U.S.C. § 707(b)(2)(A)&(B) if the debtor’s “current monthly income”, when multiplied times twelve, is greater than the median annual income for a family of similar size in the debtor’s state, which is true in this case. 11 U.S.C. § 1325(b)(3).

To summarize, all of a debtor’s “projected disposable income” to be received during the pendency of the plan must be applied to make payments to the unsecured creditors. “Disposable income” means a debtor’s “current monthly income” less “amounts reasonably necessary to be expended for support” of the debtor and any dependents. The word “projected” in the phrase “projected disposable income” modifies each of the component parts of “disposable income”, that is, it modifies “current monthly income” and it modifies “amounts reasonably necessary to be expended for support”. “Projected disposable income”, then, means the “projected current monthly income” less “projected amounts reasonably necessary to be expended for support” where “reasonably necessary to be expended for support” is to be determined in accordance with Subparagraphs 707(b)(2)(A)&(B).

Under chapter 13, then, an above-median income debtor is required to pay an amount that, like the Means Test, is determined by six the same six quantities as the Means Test: (1) the debtor’s projected average monthly income as determined on the date of confirmation; (2) statutory expenses that are allowed in amounts determined by the IRS national and local standards; (3) “Other Necessary Expenses” under IRS rules; (4) additional expenses specified at 11 U.S.C. § 707(b)(2)(A)(ii)(I-IV); (5) Secured debt under 11 U.S.C. § 707(b)(2)(A)(iii); and (6) Priority debt under 11 U.S.C. § 707(b)(2)(A)(iv).

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victims of such terrorism.

A. The Debtor's Projected Income.<sup>16</sup>

The Debtor's income for purposes of the chapter 13 disposable income test is their projected current monthly income. A debtor's projected monthly income is the income that the debtor will receive in the future. While the starting point for determining that income is the Debtor's CMI, it is to be ultimately determine by considering any change in circumstances that a debtor may have experienced since the date on which he or she filed the petition. As the Court in Jass held.

The Court concludes that the word "projected" modifies the defined term "disposable income" as it is used in § 1325(b)(1)(B). Form B22C will always be the starting point for the Court's inquiry into whether the debtor is complying with the "projected disposable income" requirement of § 1325(b)(1)(B). The Court will presume that the number resulting from Form B22C is the debtor's "projected disposable income" unless the debtor can show that there has been a substantial change in circumstances such that the numbers contained in Form B22C are not commensurate with a fair projection of the debtor's budget in the future.

Jass, 340 B.R. at 418.

In this case, the Debtor listed her family's current monthly income for purposes of the Means Test at \$12,320.94, including \$2,210.04 earned by Mr. Shotwell. Circumstances, however, have changed. Mr. Shotwell is currently unemployed. He is attempting to find employment, but has been unable to do so. The United States trustee lists the Debtor's actual current monthly income at \$10,254.83. The Debtor's disposable income in chapter 13 would be calculated from income of \$10,254.83 per month.

B. The Debtor's Projected Expenses (Deductions).

The amount of deductions that are "reasonably necessary to be expended for support" is

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<sup>16</sup> Addendum A, attached hereto, contains a summary of the amounts determined herein on a table that is substantially in the form of Form 22A.

to be determined in accordance with Section 707(b)(2)(A)&(B). The deductions in Section 707(b)(2)(A) may be divided into five groups: (1) IRS Local and National Standards; (2) IRS Other Necessary Expenses; (3) Additional Statutory Expenses; (4) Payments toward secured debt; and (5) Payments toward priority claims.

1. IRS National and Local Standards.

A debtor may deduct the statutory monthly expense amounts specified under the IRS National Standards and Local Standards. 11 U.S.C. § 707b)(2)(A)(ii)(I). Courts have interpreted this provision in a number of different ways using at least seven different rationales.<sup>17</sup> Some have held that the amounts provided are maxima that a debtor may deduct.<sup>18</sup> Others have held that debtors are entitled to the full amount of the deduction.<sup>19</sup>

As noted above, this Court agrees with the rationale and holding in In re Hylton, 374 B.R. 579 (Bankr. W.D. Va. 2007) (Krumm, C.J.), in which the Court held that the debtors were entitled to deduct the full amount of the allowance for vehicle payments even if they owned the vehicle free and clear of any liens. The Debtor in this case, then, is entitled to deduct the full amounts allowed under the IRS National and Local Standards.

Under the National Standards, the Debtor has properly deducted \$1,332.00. Under the

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<sup>17</sup> See In re Swan, 368 B.R. 12 (Bankr. N.D.Cal. 1007) and discussion therein in which the court identifies seven different rationales used by courts to justify their holdings regarding IRS Standards. They are: (1) the “Plain Meaning” Rationale; (2) the “Applicable v. Actual ” Rationale; (3) the Unfair Results Rationale; (4) the Efficiency Rationale; (5) the “Ownership/Liability” Distinction Rationale; (6) the Policy Rationale; and (7) the Reliance on IRS Materials Rationale. These rationales are not mutually exclusive and that courts frequently rely on combinations thereof.

<sup>18</sup> See, e.g., In re McGillis, 370 B.R. 720 (Bankr. W.D.Mich.2007); and In re Rezentos, 368 B.R. 55 (Bankr. D.Haw.2007);

<sup>19</sup> See, e.g. In re Osei, 389 B.R. 339 (Bankr. S.D.N.Y.2008); In re Egbert, 384 B.R. 818 (Bankr. E.D.Ark.2008); In re Phillips, 382 B.R. 153 (Bankr. D.Mass.2008); In re Morgan, 374 B.R. 353 (Bankr. S.D.Fla.2007); In re Briscoe, 374 B.R. 1 (Bankr. D.D.C.2007); In re Swan, 368 B.R. 12 (Bankr. N.D.Cal.2007); In re Naslund, 359 B.R. 781 (Bankr.D.Mont.2006);and In re Farrar-Johnson, 353 B.R. 224 (Bankr.N.D.Ill.2006)

Local Standards, she has deducted the correct statutory amount of \$1,780.00. The Debtor's IRS National Standard and IRS Local Standard Deductions total \$3,132.00.

2. IRS Other Necessary Expenses.

A debtor may deduct "actual monthly expenses for categories specified as Other Necessary Expenses issued by the Internal Revenue Service." 11 U.S.C. § 707b)(2)(A)(ii)(I). These amounts are to be determined by the actual amount of the monthly expense for each item. See Hylton. The Debtor has properly listed \$1,940.73 for taxes and \$4,000.00 for court-ordered payments. The United States trustee has agreed that the Debtor may also deduct the monthly \$400.00 payments to her ex-husband's attorney as court-ordered payments. The total under this provision is \$6,340.73

3. Additional Statutory Expenses.

A debtor is permitted to deduct certain other expenses under 11 U.S.C. § 707b)(2)(A)(ii)(II)-(V). The Debtor has deducted \$455.55 under this category. The United States trustee has not objected to these expenses.

4. Payments Toward Secured Debt

A debtor is permitted to deduct payments toward secured debt. 11 U.S.C. § 707b)(2)(A)(iii). The Debtor may deduct the sum of 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 divided by sixty. The Debtor deducted \$2,829.17 for mortgage payments. This expense is allowed even though the Debtor has surrendered the Real Property.

5. Payments Toward Priority Claims

A debtor is permitted to deduct payments toward debt constituting priority claims. 11

U.S.C. § 707b)(2)(A)(iv). The Debtors may deduct each month the sum of the total of all amounts scheduled as due based on priority claims divided by sixty. The Debtor deducted \$541.05. The United States trustee objected to this deduction. For purposes of this analysis, this amount will not be allowed.

C. Calculating the Debtor's Disposable Income.

The Debtor's income for purposes of determining disposable income if the Debtor were prosecuting this case under chapter 13 would be negative. The amounts that she would be allowed to deduct from her gross income would be:

IRS Local and National Standards:	\$ 3,132.00
IRS Other Necessary Expenses	\$ 6,340.73
Additional Statutory Expenses	\$ 455.55
Payments toward Secured debt	\$ 2,829.17
Payments toward Priority Claims:	<u>\$ 00.00</u>
<u>Total Deductions:</u>	<u>\$12,736.45</u>

For purposes of the chapter 13 disposable income test, the Debtor's projected monthly income is more than \$2,000.00 less than her projected monthly deductions. Consequently, she would not be required by the disposable income test to make any payments in chapter 13.

Beyond this, the Debtor is facing additional legal and therapist fees in what appears to be a very litigious divorce proceeding that has continued for six years without an end in sight.

***Conclusion***

It is not an abuse of the provisions of Chapter 7 for the Debtor to prosecute this case under that chapter.

**ORDER**

For the foregoing reasons, the motion of the United States trustee to dismiss this Chapter 7 case for abuse is denied.



Upon entry of this Memorandum the Clerk shall forward a copy to the United States trustee, the chapter 7 trustee, and Douglas Little, Esq., counsel for the Debtor.

Entered on this 23<sup>rd</sup> day of August, 2010.

