

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

James Kenneth Chambers,  
Jennifer Lynn Chambers,

Case No. 10-00856-als7

Debtors

Chapter 7

**MEMORANDUM OF DECISION  
(date entered on docket: June 7, 2011)**

COURSE OF PROCEEDING

The matter before the Court arises from the United States Trustee's ("U.S. Trustee") motion to dismiss this chapter 7 case pursuant to 11 U.S.C. section 707(b) ("Motion"). Joint debtors, James Kenneth Chambers ("James") and Jennifer Lynn Chambers ("Jennifer") (collectively, "Debtors") filed a voluntary chapter 7 petition on March 1, 2010 along with a "Chapter 7 Statement of Current Monthly Income and Means-Test Calculation" form ("Form 22A"). On April 30, 2010, the U.S. Trustee filed a Notice of Presumption of Abuse, and subsequently, on June 28, 2010, filed the pending Motion. An objection thereto was filed by Debtors on June 7, 2010. A final evidentiary hearing on the pending Motion was conducted on March 29, 2011 and thereafter the matter was placed under advisement. The court has jurisdiction of these matters pursuant to 28 U.S.C. sections 157(b)(1) and 1334.

FACTS

In the original filing, on the Chapter 7 Statement of Current Monthly Income and Means-Test Calculation ("Form 22A") the Debtors indicate that the presumption of abuse does not arise based upon the information contained in that document. According to Form 22A James' gross monthly income is \$4,843.12 and Jennifer's is \$3,809.70. The form calculates Annualized

Current Monthly Income for the Debtors' six member household at \$103,833.84. The applicable state median income for a family of six in Iowa is \$86,761. Debtors' Schedule F lists \$63,295.04 in unsecured non-priority debt.

According to his testimony at the hearing, James is paid on a commission basis in his employment as an auto-body technician. His wages vary based on the number of hours he works, the amount of business in the shop and his assigned duties. He testified that immediately prior to filing for chapter 7 relief he had been employed as a painter and had been working large amounts of overtime which increased his earnings. He is no longer employed as a painter and testified that his income is lower since filing for bankruptcy. Debtors' 2009 and 2010 tax returns were submitted as exhibits. The 2009 tax return shows a total income of \$97,613. The 2010 tax return shows a total income of \$105,832.

### DISCUSSION

A court may dismiss a chapter 7 case filed by an individual debtor with primarily consumer debts if the court finds that granting the debtor relief would be an abuse. See 11 U.S.C. § 707(b)(1) (2010). Section 707(b) is only applicable to debtors whose debts are primarily consumer debts. "Consumer debt" is defined in 11 U.S.C. section 101(8) as "debt incurred by an individual primarily for a personal, family, or household purpose." (2010). On Debtors' Schedules, they checked the box indicating that their debts were primarily consumer debts. This fact was not disputed in the pleadings or at the hearing.

With the enactment of BAPCPA, a bankruptcy court need only find that granting relief would be an "abuse" of the provisions of chapter 7.<sup>1</sup> See In re Booker, 399 B.R. 662, 665 (Bankr. W.D. Mo. 2009). The presumption of abuse is governed by 11 U.S.C. section 707(b) which provides, in relevant part:

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<sup>1</sup> The prior Code provision required a finding of "substantial abuse." 11 U.S.C. § 707(b) (2004).

(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter.

(2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of-

(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,575, whichever is greater; or

(II) \$10,950.

...

(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of income and to provide –

(I) documentation for such expense or adjustment to income; and

(II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.

(iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

(iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of –

(I) 25 percent of the debtor's nonpriority unsecured claims, or \$6,575, whichever is greater; or

(II) \$10,950.

(3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C § 707(b) (2010). The U.S. Trustee bears the burden of proof in showing that there is a presumption of abuse under 707(b)(2) or alternatively that the totality of the Debtors' financial circumstances demonstrates abuse under section 707(b)(3).

Section 707(b)(2) is based on an objective financial means test designed to measure a debtor's financial condition at the time of filing and to determine whether a debtor's filing constitutes abuse. This test involves computation of a debtor's current monthly income which is comprised of an average of the gross income received during the six months prior to filing. 11 U.S.C. § 101(10A) (2010). Section 707(b)(3) involves a subjective test which allows a court to dismiss a case for abuse if there is bad faith or if under the totality of the circumstances there is an ability to pay creditors. See 11 U.S.C. § 707(b) (2010). In reaching a decision the Court will separately address each code provision raised by the U.S. Trustee using the relevant standard.

#### 707(b)(2)

According to Form 22A filed by the Debtors, the presumption of abuse does not arise. The U.S. Trustee argues that when the appropriate expense figures are utilized on the Debtors Form 22A there is a presumption of abuse. The Court agrees that the presumption arises based on the Debtor's income in the six-months prior to filing upon deducting the correct allowable expenses.

U.S. Trustee's Exhibit A provides a side-by-side comparison of Debtors' Form 22A, and an adjusted Form 22A with revisions made by the Office of the U.S. Trustee. Upon review of this exhibit it is apparent that there were very few changes made to the Debtors' original Form 22A. The garnishment of \$1,083.33 that was deducted as a "court-ordered payment" was removed from line 28, and the amount for "payments on prepetition priority claims" was reduced from \$92.03 to \$42.80 at line 44. Due to the filing and the automatic stay, the garnishment should have terminated at the time of Debtor's filing. Although the garnishment by the Iowa Department of Revenue apparently did not cease at filing, the Debtors testified that all tax obligations have now been satisfied and no garnishments are currently in place. Under these circumstances, the Court agrees that the Debtors' deduction from wages for the garnishment is not appropriate. Similarly, the Court adopts the change in the payment on prepetition priority claims set forth by the U.S. Trustee. These changes alone result in a monthly disposable income of \$390.33 and raise a presumption on Form 22A.

Once the presumption of abuse arises, the Debtors must rebut the presumption by a showing of special circumstances. See 11 U.S.C. § 707(b)(2)(B). "Courts will often look to a reduction in a debtor's income relative to the income received in the statutory six-month period preceding the filing date . . . in determining whether special circumstances exist." In re Bohnenblusch, No. 10-79097-ast, 2011 WL 1102809 at \*2 (Bankr. E.D.N.Y. March 21, 2011) (citing 6 Collier on Bankruptcy 707.04[3][d] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) ("Such special circumstances could be simply a reduction in the debtor's income below the current monthly income figure."); 4 Bankr. Serv. L.Ed. § 37.366 (Updated 2011); cf. Hamilton v. Lanning, 130 S. Ct. 2464 (2010) (permitting courts to consider known or certain future changes in income when determining projected disposable income for Chapter 13 plan

confirmation purposes under Code Section 1325)). However, not every such change in income justifies a departure from the statutory calculation of income which is based on income received within the six months preceding the filing date. Id.

The court in In re Haman discussed the burden that the Debtor has when proving special circumstances.

For the Debtor to successfully demonstrate a special circumstance, she must fulfill both the procedural and substantive requirements of section 707(b)(2)(B). To satisfy the procedural requirements, a debtor must itemize each additional expense or adjustment of income and . . . provide . . . (I) documentation for such expense or adjustment to income; and (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable. Additionally, a debtor must attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

366 B.R. 307, 312 (Bankr. Del. 2007) (citations omitted).

Here, the Debtors have attempted to show special circumstances by explaining the varied nature of James' work and entering exhibits showing James' actual income as opposed to the income that was used in calculating Form 22A. Debtors claim that because Mr. Chambers was working as a painter during the six months preceding his bankruptcy filing, the numbers used to calculate Form 22A are incorrect. Debtors further argue that Mr. Chambers' work is cyclical which results in him having a higher income during the winter months but a lower income during the summer months. Debtors' bankruptcy filing was made on March 1, 2010, which is coming out of the winter months, making his reported income for the last six months disproportionately high. The testimony indicated that he earned less money in the summer, and that he would earn less money than the amounts shown on the schedules and on Form 22A. The Debtors assert that James' overall annual income has decreased significantly since the filing of their bankruptcy petition. The pay advices admitted at trial cover only the time period of December 19, 2009

through May 28, 2010. Consequently, the Court is unable to determine whether the lower income asserted by the Debtors is consistent with their actual income. The three months immediately after filing do show a small drop in income, however, these few pay advices are not enough to show special circumstances.

The 2009 and the 2010 income tax returns admitted into evidence provide a more meaningful measure of actual income. A comparison of Debtors' 2009 and 2010 income tax returns confirms, contrary to the Debtors' argument, that their income actually increased, rather than decreased, during 2010. The returns also reflect substantial refunds owing and received at least in part by the Debtors in each of these tax years. There is no evidence before the Court that indicates that refunds should not be anticipated under subsequently filed tax returns. The fact that James' income may be subject to seasonal fluctuations is insufficient to show that the Debtors are unable to make payments to creditors in the amounts set forth at 11 U.S.C. section 707(b). The Debtors are required to provide documentation related to any expenses or changes in income that support the claim of special circumstances. Based upon the evidence submitted the Debtors have not met this burden.

The court finds that the U.S. Trustee has adequately demonstrated that a presumption of abuse arises under the Means Test, based upon the income Debtors received within the six-months preceding the filing of their bankruptcy petition, and that this has not been rebutted by showing special circumstances.

707(b)(3)

Notwithstanding the finding under 11 U.S.C. section 707(b)(2), the Court may still consider whether there is an abuse under section 707(b)(3). Although the U.S. Trustee's Motion to Dismiss claimed both bad faith under subsection (A) and that the totality of the circumstances

demonstrated abuse under subsection (B), the U.S. Trustee did not discuss the bad faith argument in the pleadings or at the hearing. See 11 U.S.C. § 707(b)(3)(A) and (B) (2010). Nothing in the record indicates bad faith. Consequently, the analysis of abuse under this section will be limited to the totality of circumstances.

In United States Trustee v. Harris, the Eighth Circuit reaffirmed this circuit's position on when the totality of the circumstances shows an abuse.

The debtor's ability to pay his debts when due as determined by his ability to fund a chapter 13 plan is the primary factor to be considered in determining whether granting relief would be substantial abuse. We find this approach fully in keeping with Congress's intent in enacting section 707(b). . . . This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

960 F.2d 74, 76 (8th Cir. 1994) (quoting In re Walton, 866 F.2d 981, 984-85 (8th Cir. 1989)); see also In re Honkomp, 416 B.R. 647, 649 (Bankr. N.D. Iowa 2009) (citing In re Booker, 399 B.R. 662, 667 (Bankr. W.D. Mo. 2009)) ("When considering the § 707(b)(3)(B) totality of the circumstances, 'the Court should consider primarily, if not exclusively, the Debtors' ability to pay.'"). In considering the totality of the circumstances courts may consider post-petition developments in addition to the situation as it existed on the filing date. See In re Maiorino, 435 B.R. 806, 809-10 (Bankr. D. Mass. 2010).

The evidence related to the totality of the circumstances focused on Debtors' Schedule I, Current Income of Individual Debtors ("Schedule I"), and Schedule J, Current Expenditures of Individual Debtors ("Schedule J"). On Schedule I, the Debtors list total "Other" deductions at line 4(d) from monthly wages for dental, vision and life insurance, Employee Fund, meals, IPERS, a garnishment by the Iowa Department of Revenue and Tool Pay in the total amount of



\$1,313.38. The U.S. Trustee revised Schedule I by eliminating the garnishment and meal entries. In making this adjustment Debtors' combined average monthly income projected under Schedule I would be \$7,048.74. The U.S. Trustee also submitted exhibits which compared the Debtor's expenses on Schedule J with a budget based on the local IRS standards. Applying these revisions based upon the IRS standards did not result in a substantial change to the Debtors' expenses as they were listed, and in fact actually benefited the Debtors.<sup>2</sup> Utilizing these figures, the Debtors show an average net monthly income in the amount of \$1,383.18.

Debtors testified that James' monthly income number is incorrect. Schedule I included a statement that James had been receiving overtime but that it would now stop because his employer had recently hired a new employee. In spite of Debtors' position that their income has decreased, the Debtors have not filed an amended Schedule I to reflect this change. The exhibits submitted do show that James' income may be less than the \$5,830.40 amount listed on Schedule I for each month, but the exhibits show that his income has not dropped to a level which would make it impossible for Debtors to fund a chapter 13 plan. The Court finds that the U.S. Trustee has met its burden of proving abuse based on the totality of the circumstances.

It is hereby Ordered that

1. The Debtors' Objections are overruled and the Motion is granted.
2. The Debtors shall have fourteen (14) days from the date of this Order to convert their case to a chapter 13 or the case will be dismissed without further notice and hearing.

/s/ \_\_\_\_\_  
Anita L. Shodeen  
U.S. Bankruptcy Judge

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<sup>2</sup> The U.S. Trustee's changes to Debtors' Schedule J resulted in an increase of \$204.13 rather than a decrease to Debtors' average monthly expenses (Line 18).

Parties receiving this Memorandum of Decision from the Clerk of Court:  
Electronic Filers in this Chapter Case  
Others: James Chambers, Debtor  
Jennifer Chamber, Debtor