UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ROBERT F. CALLAHAN — CASE NO. 95-62196

Debtor

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 17, 1995, the United States Trustee ("UST") moved the Court for an order dismissing Robert F. Callahan's ("Debtor") voluntary petition for relief under Chapter 7 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"). Thereafter, on November 6, 1995, the Debtor filed opposition to the motion. On November 13, 1995, at Binghamton, New York, oral argument was heard on the UST's motion to dismiss pursuant to Code §707(b). On November 14, 1995, Angelos Peter Romas, Esq. ("A.Romas"), attorney for Stavroula Romas ("S.Romas"), a creditor in Debtor's case, filed an affidavit in support of UST's motion to dismiss.

Thereafter, the Court scheduled an evidentiary hearing on the motion for February 23, 1996, at Utica, New York.

On December 26, 1995, Debtor filed a motion ("discovery motion") pursuant to Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") 7037 and Federal Rules of Civil Procedure ("Fed.R.Civ.P.") 37(a)(2) and (4) seeking an order compelling the UST to answer interrogatories and awarding the expenses of the motion. The discovery motion was argued on January 8, 1996, at Binghamton, New York, and was temporarily withdrawn from the Court's consideration on consent of the parties pending argument of a motion filed on January 10, 1996, by UST, moving to strike Debtor's affirmative defense pursuant to Rule 12(f) of the Fed.R.Civ.P., incorporated by reference in Rule 7012(f) of the Fed.R.Bankr.P., or alternatively for partial summary judgment pursuant to Fed.R.Civ.P. 56(a), incorporated by reference in Fed.R.Bankr.P. 7056.[1]

On January 23, 1996, at Syracuse, New York, the Court heard the UST's motion and took the matter under submission. The evidentiary hearing has been adjourned pending the outcome of the Court's decision herein. The Court will also consider the Debtor's discovery motion in conjunction with the UST's Fed.R.Bankr.P. 7012(f) and 7056 motions.

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[1] The affirmative defense which the UST wishes to strike is Debtor's allegation that the UST's §707(b) motion was filed at the request or suggestion of S.Romas, a party in interest, and, therefore, is not valid and should be dismissed by the Court.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1), (b)(2)(A) and (O).

FACTS

In 1982, Debtor and two other individuals became shareholders of a business known as the Electronic Cave, Inc. ("corporation") which operated video game establishments in Broome County, New York. One of the video game establishments was located in Endicott, New York, in a building leased from the husband of S.Romas. Debtor executed the lease for the benefit of the corporation both individually and in a representative capacity. After approximately a one year involvement in the corporation, Debtor transferred his interest in the corporation to the other shareholders and, allegedly, left the business believing he had completely severed ties with it. Subsequently, S.Romas' husband passed away, leaving S.Romas with the interest in the real property leased to the corporation.

In 1985, A.Romas, the son of and attorney for S.Romas, informed Debtor that rental payments due from the corporation were in arrears by approximately $2,000 and alleged that Debtor was personally liable for the debt. In subsequent litigation, S.Romas obtained a judgment against Debtor, holding Debtor personally liable for unpaid rental payments and interest. See Debtor's

Response to Motion of the UST, filed January 18, 1996, at 3. Debtor alleges that the judgment, along with his already poor financial condition, occasioned the filing of a Chapter 13 petition in December of 1993. A proof of claim was filed by S.Romas in the amount of $22,273.03 in that Chapter 13 case.

Debtor asserts that in an effort to formulate an acceptable Chapter 13 plan, he attempted to reduce the amount of the judgment in favor of S.Romas by negotiating with A.Romas. Allegedly, A.Romas initially agreed to a reduction in the judgment, but then revoked such agreement. Debtor contends that these actions by A.Romas caused uncertainty and confusion which significantly hampered the formulation of a plan. A.Romas is alleged to have continually objected to information supplied by Debtor, and Debtor asserts that A.Romas was in frequent contact with the Chapter 13 Trustee attempting to obstruct Debtor's efforts to successfully reorganize in Chapter 13. See Debtor's Response to Motion of the UST at 3-4. A.Romas allegedly contacted Debtor, members of his family and at least one member of his staff at the school where Debtor is employed, despite the protection of the automatic stay. See Debtor's Response to Motion of the UST 4.

On March 29, 1995, Debtor's Chapter 13 case was dismissed. Debtor alleges that he did not oppose motion to dismiss the case because he decided that the Plan was not feasible considering A.Romas' obstructive tactics, the pending loss of employment by his wife and potentially larger home equity loan payments. See Debtor's Response to Motion of the UST at 4.

Subsequently however, on June 21, 1995, Debtor filed for

relief under Chapter 7 of the Code. On October 17, 1995, the UST filed his motion to dismiss the case pursuant to Code §707(b). On October 19, 1995, S.Romas filed a motion seeking an extension of time to file a Code §727 complaint. On November 6, 1995, Debtor submitted two affidavits opposing both UST's Code §707(b) motion to dismiss and S.Romas' October 19, 1995 motion seeking an extension of time. In Debtor's November 6, 1995, opposing papers he alleges A.Romas may have suggested or recommended that the UST file the Code §707(b) motion.

On November 13, 1995, as indicated, a hearing was held to consider the UST's motion to dismiss the case pursuant to Code §707(b). During the oral argument A.Romas allegedly attempted to argue the merits of the Code §707(b) motion to dismiss although refrained from doing so at the request of the Court, rather than arguing his own motion for an extension of time to file a Code §727 complaint objecting to discharge. See Debtor's Response to Motion of the UST at 5. On November 14, 1995, as indicated, A.Romas filed the Affidavit in Support of UST's Motion to Dismiss. The motion seeking an extension of time to file objections to discharge was granted by Order dated November 21, 1995.

ARGUMENTS

Debtor argues that the UST's motion pursuant to Fed.R.Civ.P. 12(f) and 56(a) is procedurally improper and, therefore, should be dismissed. Debtor contends that Fed.R.Civ.P. 12(f) governs defenses contained in pleadings filed in a lawsuit

and Debtor's contention that a creditor may not suggest or recommend a Code §707(b) motion to dismiss is not a "defense" which may be struck pursuant to Fed.R.Civ.P. 12(f). Moreover, Debtor argues that the UST's motion seeks to characterize Debtor's contention noted above as an "affirmative defense", which improperly implies Debtor has some burden of proof. Debtor also contends that the UST's motion pursuant to Fed.R.Civ.P. 56 is procedurally improper because the Rule deals with lawsuits, and the UST's motion is not subject to a "judgment" and, therefore, is not part of a lawsuit which may be governed by the rigors of Fed.R.Civ.P. 56.

Substantively, Debtor argues that the UST's motion should be denied on the merits because, as a matter of law, the UST is not permitted to file a motion pursuant to Code §707(b) at the request or suggestion of a party in interest, namely a creditor. In the alternative, Debtor asserts that the instant motion was filed by the UST well before it conducted any independent investigation into Debtor's case and that the UST acted solely at the urging of S.Romas and A.Romas. In support of this assertion, Debtor notes that the UST did not conduct a deposition of the Debtor and his wife until December 11, 1995.

The UST argues that its motion, pursuant to Rule 12(f) and 56(a) of the Fed.R.Civ.P. is procedurally proper in this contested matter filed pursuant to Fed.R.Bankr.P. 9014. The UST further contends that as a matter of substantive law, he is not prohibited from filing a motion to dismiss pursuant to Code §707(b) simply because such a request or suggestion was made by a party in

interest, since that prohibition, as a matter of grammatical construction, only applies to the sua sponte motion of a court.

With respect to his discovery motion Debtor contends that in an effort to determine the existence and extent of communications between A.Romas and the UST, he served interrogatories on the UST. UST objected to the interrogatories and refused to answer certain of them on the grounds that they were irrelevant and burdensome. Debtor contends that in an answer to one of the interrogatories, it was revealed that A.Romas drafted a Memorandum of Law dealing with the Code §707(b) issue on behalf of the UST, and that the UST claimed a work product privilege with respect to the Memorandum.

The UST contends that it has failed to respond to certain of the interrogatories because the information sought is irrelevant to the issues presented by its Code §707(b) motion and that further they create an "incredible burden on the United States Trustee." See Objection of UST to Debtor's Motion to Compel Interrogatories ¶ 16.

DISCUSSION

A. PROCEDURE

1. Fed.R.Civ.P. 56(a) and 12(f) in the context of a motion pursuant to Code §707(b).

In addressing Debtor's procedural arguments, it is first necessary to determine whether the dispute sub judice can be maintained as a contested matter or whether it should be an

adversary proceeding. The present dispute does not fall within any of the ten categories listed in Fed.R.Bankr.P. 7001 as matters properly commenced as adversary proceedings. Moreover, the Advisory Committee Note to Fed.R.Bankr.P. 9014 provides that "[w]henever there is an actual dispute, other than an adversary proceeding, before the bankruptcy court, the litigation to resolve the dispute is a contested matter." Here, the UST's motion is in actual dispute because Debtor is opposing the motion. However, it does not fit within the subject matter of an adversary proceeding as enumerated in Fed.R.Bankr.P. 7001. Therefore, the Court concludes that the present dispute is a contested matter pursuant to Fed.R.Bankr.P. 9014. See also Fed.R.Bankr.P. 1017(d) and (e).

As a contested matter, Fed.R.Bankr.P. 9014 specifically provides that Fed.R.Bankr.P. 7056, which incorporates Fed.R.Civ.P. 56, is applicable. Therefore, the Court finds that the UST's motion, pursuant to Fed.R.Civ.P. 56 is not procedurally improper. Likewise, Fed.R.Bankr.P. 9014 permits the Court to "direct that one or more of the other rules of Part VII shall apply." Thus, the fact that Fed.R.Bankr.P. 7012 is not specifically identified as applying to a contested matter does not prohibit this Court from directing its application.

2. Summary Judgment Standard.

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R. Bankr.P. 7056(c); see also,

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 2509 (1986); Federal Deposit Ins. Corp. v. Bernstein, 944 F.2d 101, 106 (2d Cir. 1991); Gallo v Prudential Residential Servs., Ltd. Partnership, 22 F.3d 1219, 1223 (2d Cir. 1994). The burden is upon the movant to establish that no issue of material fact exists. Bernstein, supra 944 F.2d at 106, citing Anderson, supra, 106 S.Ct. at 2514 and Celotex Corp. v. Catrett , 477 U.S. 317, 330 n. 2 (1986). When properly employed, summary judgment is a useful device for putting a swift end to meritless litigation. Quinn v Syracuse Model Neighborhood Corp., 613 F.2d 438, 445 (2d Cir. 1980). However, it is a drastic procedural weapon whose prophylactic function serves to cut off a party's right to present its case. Heyman v. Commerce and Industry Ins. Co., 524 F.2d 1317, 1320 (2d Cir. 1975), citing Donnelly v. Guion, 467 F.2d 290, 291 (2d Cir. 1972).

3. Motion to Strike.

A motion to strike Debtor's defense of creditor involvement pursuant to Fed.R.Civ.P. 12(f) and Fed.R.Bankr.P. 7012(f) should be denied unless the insufficiency of the defense is clearly apparent. In re Poughkeepsie Hotel Associates Joint Venture, 132 B.R. 287, 289 (Bankr. S.D.N.Y. 1991). Further in considering the UST's Fed.R.Civ.P. 12(f) motion the Court observes that the Debtor's contention that creditor involvement tainted the Code §707(b) motion is an affirmative defense on which the Debtor would typically have the burden of proof. However, Debtor's task is aided by the presumption found in Code §707(b) that he is entitled to Chapter 7 relief.

B. SUBSTANTIVE ARGUMENTS

Because this case essentially deals with the statutory interpretation of Code §707(b), the Court should begin its analysis with the language of the Code itself. U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241, 109 S.Ct. 1026, 1030 (1989), citing Landreth Timber Co. v. Landreth, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301 (1985); see also Metropolitan Stevedore Co. v. Rambo, 115 S.Ct. 2144, 2147 (1995). The Code is to be read "applying the 'ordinary, contemporary, common meaning' of the words used." U.S. v. Kinzler, 55 F.3d 70, 72 (2d. Cir. 1995), (citations omitted). When a statute addresses an issue with clarity, in all but the most extraordinary circumstances a court will not inquire into its meaning. Metropolitan Stevedore, supra, 115 S.Ct. at 2147 (citation omitted). A court must keep in mind that statutory interpretation is a "holistic endeavor" wherein a provision viewed in isolation may seem ambiguous; however, the provision is often clarified by examining the remainder of the statutory scheme in which it operates. United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd., 484 U.S. 365, 371, 108 S.Ct. 626, 630 (1988). In dealing with an ambiguous statute, a court may go beyond the language of the statute itself to divine Congressional intent and purpose. See Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1073 (2d Cir. 1993), citing SEC v. Robert Collier & Co., 76 F.2d 939, 940-41 (2d Cir. 1935) (L.Hand, J.).

Therefore, the Court begins its analysis with the language of Code §707(b). At first blush, it appears that Code

§707(b) is unambiguous. Code §707(b) appears to forbid the UST, as well as the Court, from initiating a motion to dismiss a bankruptcy case for substantial abuse at the request or suggestion of a party in interest. However, as noted by the Fourth Circuit Court of Appeals in In re Clark, 927 F.2d 793 (4th Cir. 1991), a closer analysis of the first sentence of Code §707(b) reveals that "the phrase 'but not at the request or suggestion of any party in interest' modifies only what the court may do, since 'the court' is the subject of the sentence." Id. at 797. In In re Morris, 153 B.R. 559 (Bankr. D.Or. 1993), the court found that after a careful reading of the provision of Code §707(b) and after a review of the Clark decision, the language of Code §707(b) was found to be ambiguous. This Court agrees with the analysis in Morris and finds that an examination of the language of Code §707(b) reveals an inherent ambiguity.

An examination of the genesis of Code §707(b) reveals how the ambiguity in the section arose. The section was initially added to the Bankruptcy Code in 1984 through the Bankruptcy Amendments Act, Pub.L. No. 98-353, §312(2), 98 Stat. 333. When enacted, the section read: "After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor..." Therefore, as initially enacted, only the court was limited by the "not at the request or suggestion" clause because at that time the UST was not mentioned in the section. The current version of Code §707(b) was adopted as part of the Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub.L. No. 99-

554, §219(b), 100 Stat. 3088, 3100-3101. The statute was amended by adding the words "or on the motion of the United States Trustee" after the words "on its own motion", while eliminating "and" and replacing it with the word "but" as the connecting clause. The 1986 amendments to Code §707(b) were enacted to allow the UST as well as the Court to file motions to dismiss for "substantial abuse" pursuant to §707(b). Clark, supra, 927 F.2d at 795, citing H.R. Conf. Rep. No. 958, 99th Cong. 2d Sess. 46-47, 1986 U.S. Code Cong. & Admin. News 5246, 5247-48. As noted by the court in Morris, although at the time of the amendment, the change in language and grammar probably appeared to be a simple, concise way of achieving the desired result, the structure of the new language created by the amendment is precisely what caused the ambiguity. Morris, supra, 153 B.R. at 562. In other words, although the amendment eliminated one ambiguity (whether the UST could file motions to dismiss for substantial abuse), a second ambiguity was created. The second ambiguity arose because it is unclear whether Congress intended the UST to be subjected to the same limiting clause ("not at the request or suggestion of any party in interest") which clearly applied to the court.

Although this Court is aware of possibly contrary authority to a finding that Code §707(b) is ambiguous, it does not believe such authority is convincing. In Matter of Christian, 804 F.2d 46, 48 (3d Cir. 1986), the court found that Code §707(b) was "plain and unequivocal on its face." It is essential to note, however, that in finding Code §707(b) unambiguous, the Christian court was faced with the task of determining whether a creditor

could file a motion to dismiss under Code §707(b). Therefore, the issue in the Christian case was not the same as that in the matter sub judice. In fact, in Christian, the court expressly refused to consider whether the UST lacked standing to file motions under Code §707(b) as the matter was not properly before the court. Id. at 49. Also of key importance in distinguishing the Christian case is the fact that the court was analyzing Code §707(b) as it was initially adopted in 1984.

The Court does not find In re Restea, 76 B.R. 728 (Bankr. D.S.D. 1987) particularly persuasive either. In Restea, the court asserted that Code §707(b) clearly and unequivocally prohibited both the court and the UST from filing a "substantial abuse" motion. However, in reaching that conclusion, the Restea court made no attempt to analyze the actual language of Code §707(b). Because this Court finds that the first sentence of Code §707(b) does not speak with clarity to the issue at hand, the Court must look beyond a plain reading of the statute.

For purposes of determining whether Congress intended to allow the UST to file Code §707(b) motions to dismiss at the request or suggestion of a creditor, the Court will examine the role of the UST in the bankruptcy process, legislative history and relevant policy considerations. An examination of the role of the UST in the bankruptcy process is particularly illuminating. The UST program was created by Congress to relieve bankruptcy judges of the duties of case administration imposed under the former Bankruptcy Act, and more specifically, "to avoid the appearance of bias and cronyism associated with the bankruptcy court's

appointment of trustees." In re Tornehim, 181 B.R. 161, 165 (Bankr. S.D.N.Y. 1995) (citing *Collier on Bankruptcy* ¶ 6.01[1] at 6-13, ¶ 6.01[2] at 6-14, ¶6.08[1] at 6-46), appeal dismissed 1996 WL 7933 (S.D.N.Y. 1996), see also, 28 U.S.C. §586 (enumerating the UST's duties and powers). At least in part, the UST's role is to "act as bankruptcy watch-dogs(sic) to prevent fraud, dishonesty and overreaching in the bankruptcy system." Tornheim, supra 181 B.R. at 165, (citing H.R. Rep. No. 595, 95th Cong, lst Sess., 88 (1977), 1978 U.S. Code Cong. & Admin. News 5787, 6049). In re Washington Mfg. Co., 123 B.R. 272, 275 (Bankr. M.D.Tenn. 1991); see also, Clark, supra 927 F.2d at 795 (citing In re Revco D.S., Inc., 898 F.2d 498, 500 (6th Cir. 1990) (finding that the trustee protects the public interest and ensures that bankruptcy cases are conducted in accordance with the law). If the UST is forbidden from filing a Code §707(b) motion simply because a party in interest made the suggestion to the UST, the UST would be severely hindered in its ability to perform at least in part its statutory obligations. Moreover, not only would parties be deterred from making pertinent information available, but "the court would be prevented from acting in cases where an abuse is most likely to occur." In re Busbin, 95 B.R. 240, 242 (Bankr. N.D.Ga. 1989).

Code §707(b) was intended to represent a compromise. On the one hand, it helps ensure that debtors who substantially abuse the bankruptcy process do not obtain relief under the provisions of the Code. However, Congress was not willing to attain that objective at any cost. Therefore, Code §707(b) has a counterbalancing policy mandate which forbids creditors from filing

harassing motions which would increase the expense of a bankruptcy case. *Collier on Bankruptcy*, 707.05 at 707-17 15th ed. (1995), citing 130 Cong. Rec. H1810-1811 (daily ed. June 19, 1984) (statement of Senator Metzenbaum). Congress was concerned that creditors and other parties in interest would routinely file Code §707(b) motions to which debtors with limited resources would have to respond or simply capitulate. Allowing the UST, as opposed to the Court, to examine and independently evaluate information provided by a party in interest through a request or suggestion that it file a Code §707(b) motion strikes the same balance Congress was trying to achieve. Debtors who substantially abuse the bankruptcy process will not be granted relief because creditor generated information comes directly to the Court's attention and thereby taints the process, nor will debtors be harassed because the UST is required to conduct an independent evaluation to determine whether there is sufficient evidence to warrant the filing of a motion with the court.[2] See Clark, supra 927 F.2d at 795 (4th Cir. 1991).

Finally, the legislative history supporting Code §707(b) reinforces the conclusion that Congress was primarily concerned with creditors bringing information on the issue of substantial abuse directly to the Court's attention. The House Conference Committee addressing Code §707(b) is helpful. It provides that:

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[2] It is important to note that the UST has attached to its motion papers numerous requests by Chapter 7 trustees to file 707(b) motions. In a supporting affidavit, UST states that in none of those cases was a Code §707(b) motion filed with the court. Therefore, none of the debtors in those cases were harassed because none of them were obligated to respond to Code §707(b) motions.

> Some question has arisen as to whether United States Trustees and panel trustees are considered 'parties in interest' for purposes of this section, and are thus precluded from bringing information to the attention of the court on the issue of substantial abuse, and moving for dismissal of a Chapter 7 case on those grounds...The Conference Report clarifies the ability of the U.S. Trustee under Section 707(b) to bring such information to the attention of the court. The **original intent** of the subsection was to preclude **creditors** from exercising this function. (emphasis added). Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 958, 99th Cong. 2d Sess., reprinted in 134 Cong. Rec. H8999 (daily ed. Oct. 2, 1986).

Therefore, by simply providing information to the UST or suggesting or requesting that the UST, as opposed to the Court, file a Code §707(b) motion to dismiss does not undermine the Congressional intent supporting Code §707(b). Further, the Court finds logical infirmities in Debtor's argument that simply because a party in interest suggests or requests that the UST file a Code §707(b) motion, the motion is automatically tainted.

The legislative history of Code §707(b) also indicates that Congress anticipated that panel trustees would work closely with the UST, which would include bringing to the attention of the UST "any information or evidence of fraud or abuse which may provide the basis for dismissal of a case under Section 707(b)." Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 958, 99th Cong. 2d Sess., reprinted in 134 Cong. Rec. H8999 (daily ed. Oct. 2, 1986). Therefore, in 1986 Congress must have anticipated that the panel trustee, though arguably a party in interest, would take affirmative steps to collect

information about a debtor which could possibly be later used by the UST to file a Code §707(b) motion. Morris, supra 153 B.R. at 562. If, while gathering such information, a creditor provides input to the panel trustee or UST that suggests that a particular debtor is substantially abusing the bankruptcy process, should such input automatically taint a subsequent §707(b) motion? It is not likely that Congress intended to sacrifice the primary goal of Code §707(b) to wit: denying a discharge to debtors who substantially abuse the bankruptcy process, where some creditor involvement finds its way into the UST's investigative process. The Court, however, should not consider a Code §707(b) motion filed by the UST if a party in interest made a suggestion or request to the UST to file the motion unless the UST fulfills its duty to independently evaluate information brought to its attention by a party in interest. See Busbin, supra 95 B.R. at 242. In order to comply with Congress' intent to halt creditor harassment and abuse of debtors, it is essential that the UST filter out all baseless, unwarranted and harassing requests or suggestions to file Code §707(b) motions. Only after the UST has met its burden of showing that it acted with independent judgment should the Court consider the Code §707(b) motion.

Lastly, the Court must address the issue of whether S.Romas' direct communication to the Court in the form of the November 14, 1995 affidavit in support of the UST's Code §707(b) motion, standing alone, warrants dismissal of the motion. As discussed above, it is not disputed that Code §707(b) prohibits a party in interest from requesting or suggesting that the Court

dismiss a case for substantial abuse. By filing the affidavit in support of UST's motion, S.Romas has tread dangerously close to the very conduct that Code §707(b) proscribes, but if it can be shown that the UST conducted an independent investigation of the Debtor's case, the Court may appropriately disregard the S.Romas affidavit and consider only the allegations of the UST.

Thus, the Court concludes that it cannot read Code §707(b) as the UST urges it to do. However, it likewise cannot embrace the urging of the Debtor. The Court is of the opinion that where the UST files a Code §707(b) motion, inquiry is necessarily invited as to the genesis of the motion. If it can be established that the motion results from a thorough investigation of the case from a substantial abuse perspective, albeit that some aspects of the investigation involved creditor input, then the Code §707(b) motion may be maintained. Morris, supra, 153 B.R. at 563. Conversely, if the motion is filed literally at the request or suggestion of a party in interest, including the panel trustee, absent an independent investigation by the UST, then it is totally flawed and must be denied.

Having reached the foregoing conclusion, the Court turns its attention to Debtor's discovery motion. As indicated, the UST objected to Debtor's request for a Fed.R.Bankr.P. 7037 order on the grounds of relevancy and undue burden. The UST seeks a protective order pursuant to Fed.R.Bankr.P. 7026 and Fed.R.Civ.P. 26(c). As to its relevancy objection, the UST asserts that since Debtor misread Code §707(b), it need not respond to those interrogatories focusing on S.Romas and A.Romas' alleged involvement which led to

the filing of the Code §707(b) motion. The Court disagrees with the UST and concludes that Debtor's Interrogatories #1, 2, 3, 4, 5, 9, 10, 11, 12, 13 and 14 are relevant and will elicit relevant responses from the UST pertaining to Romas' involvement with the Code §707(b) motion, if any.

The UST has, in fact, provided responses to Interrogatories #9 through 14, and they do not appear to be in dispute, with the exception of Document #52 identified as a "Memorandum in Support of Dismissal of Chapter 7 Petition (Protected by Work Product Privilege) Date: Not Dated, Author: Angelos Peter Romas." Presumably the UST is invoking the protection of Fed.R.Civ.P. 26(b)(5) with regard to Document #52, and while the issue of privilege does not necessarily arise on this motion, it is doubtful that the UST has complied with the requirements of the aforementioned Rule or that such a Memorandum is, in fact, privileged as the UST's work product. See U.S. vs. Adlman, 68 F.3d 1495, 1501 (2d Cir. 1995).

Interrogatories #6 through #8 require the UST to disclose certain policies, procedures and guidelines concerning communications with creditors, review of Chapter 7 cases and frequency of Code §707(b) motions over the past three years. As to these Interrogatories, the Court believes the UST properly seeks a protective order pursuant to Fed.R.Civ.P. 26(c) on the grounds of relevancy and undue burden.

The Court will deny Debtor's request for expenses, including attorneys fees, pursuant to Fed.R.Bankr.P. 7037 and Fed.R.Civ.P. 37(a)(4) because it concludes that the UST's refusal

to respond to Interrogatories #1 through #5 on the ground of relevancy was substantially justified given the uncertainty that abounds regarding the appropriate interpretation of Code §707(b).

Based on the foregoing, the Court will deny the motion of the UST to strike grounded upon Fed.R.Civ.P. 12(f) and Fed.R.Bankr.P. 7012(f), as well as the motion for summary judgment grounded upon Fed.R.Civ.P. 56 and Fed.R.Bankr.P. 7056, and direct that the contested matter proceed to an evidentiary hearing in due course, at which the burden will be on the UST to establish initially that the commencement of this contested matter followed an objective investigation of the Debtor's case and was not instituted simply at the request or suggestion of S.Romas.

Additionally, the UST shall within twenty (20) days of the entry of this order, provide written answers to Interrogatories #1 through #5 as set forth in the Interrogatories propounded by Debtor under date of November 20, 1995.

IT IS SO ORDERED.

Dated at Utica, New York
this 25th day of March 1996

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge