UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

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In re:

DENNIS T. GLAVIN,
Debtor.

Chapter 7
Case No. 10-10094

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APPEARANCES:

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Hon. Robert E. Littlefield, Jr., Chief United States Bankruptcy Judge

**MEMORANDUM-DECISION AND ORDER**

The current matter before the court is a motion under 11 U.S.C. § 707(b)(3)(B)[1] by the United States Trustee ("UST") to dismiss the Chapter 7 case filed by Dennis Glavin ("Debtor") on the grounds that, given the totality of his financial circumstances, allowing this case to proceed in Chapter 7 would be an abuse of that chapter.

**JURISDICTION**

The court has jurisdiction pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(A), and 1334.

[1] Unless otherwise noted, all statutory references herein are to the Bankruptcy Code, 11 U.S.C. §§ 101 to 1532.

## FACTS

The pertinent facts are not in dispute and are set forth in the parties' Joint Statement of Issues and Stipulation of Facts dated June 7, 2010. (ECF No. 18.) The Debtor is 54 years old and single. He ran a consulting business in the State of Florida until August 2009, when he was forced to close its doors because of the lack of business. He defaulted on a number of his credit card accounts as a result. He moved to New York to secure his current marketing position with Collins & Scoville and seek a new start. The Debtor does not have an employment contract but is an at-will employee.

The Debtor filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on January 15, 2010. The Debtor lists no interest in real property nor does he list any secured creditors. The Debtor lists no ownership in any savings or retirement accounts. On Schedule F, the Debtor lists a total of $78,200.44 of unsecured, nonpriority debt. It consists mostly of consumer credit card debt.

In his amended Schedule I, the Debtor lists his monthly gross wages at the time of filing as $7,200. This equates to $86,400 annually. The Debtor's amended Schedules I and J also reveal that he has $4,759.24 in net monthly income with $3,041.00 in monthly expenses, equating to a $1,718.24 surplus each month.[2] The Debtor indicates that he does not anticipate any changes in income during the year following his filing.

On the Debtor's Form 22A ("means test"), an average of the Debtor's monthly income for the six months preceding his bankruptcy filing, he lists $3,200 in gross wages on Line 3.

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[2]In his original Schedules I and J, the Debtor lists gross monthly income of $7,800 and net monthly income of $5,155.85 with $3,041 in monthly expenses, equating to a monthly surplus of $2,114.85.

Annualizing the monthly income results in annual income of $38,400.00. Since the median income for a single person in New York was $46,485.00[3] at the time of filing, the Debtor falls below the median income and does not trigger the presumption of abuse pursuant to § 707(b)(2). Consequently, the Debtor does not need to fill out the remainder of the form to calculate his individual expenses or total monthly disposable income.

**ARGUMENTS**

The UST presents two arguments in support of her motion to dismiss the Debtor's case. First, relying upon § 707(b)(3)(B), the UST asserts that the court should dismiss the Debtor's Chapter 7 case because after considering the totality of the circumstances of the Debtor's financial situation, the Debtor, although perhaps not acting in bad faith, has the ability to pay back all debts owed to his creditors. She finds support for her position in the 2005 amendments to the Code and the bifurcated analysis that Congress created once a debtor satisfies the means test. She indicates that some of the "financial situation" factors the court may consider include a debtor's income, expenses, assets, and liabilities.

Second, the UST asserts that once the Debtor satisfies the means test by not triggering the presumption of abuse in § 707(b)(2)(A)(i), that determination is separate and apart from the Debtor's ability to pay under a totality of the circumstances analysis. She argues that the means test provides a preliminary, objective test to calculate excess income, and the totality of the circumstances inquiry provides a secondary, subjective test once the Debtor satisfies the means test. Therefore, once the Debtor satisfies the means test, that determination does not prohibit the court from performing a totality of the circumstances analysis. The UST contends that any

[3]www.justice.gov/ust/eo/bapcpa/20091101/bci_data/median_income_table.htm

financial factors that are relevant to the determination of the Debtor's ability to pay creditors should fall under the court's scrutiny.

The main thrust of the UST's arguments posits that the Debtor has the financial means to propose and execute a 100 percent Chapter 13 plan and still have almost $300 left over each month. According to the UST, The Debtor would need $1,420.64[4] per month of his $1,718.24 monthly surplus to support a 100 percent Chapter 13 plan. (UST's Br. in Supp. of Mot. to Dismiss 10-11, ECF No. 19.) Based on these financial factors, the UST asserts the Debtor should not find shelter in a Chapter 7. Additionally, she points out that the Debtor's current income is nearly twice the New York median and that the Debtor does not anticipate any changes in the near future. Under these circumstances, she argues that the numbers equate to abuse.

The Debtor responds by stating that the means test is conclusive regarding his ability to pay and that there is no pool of circumstances that exist justifying dismissal. He argues that the ability to fund a Chapter 13 plan in and of itself does not satisfy the statutory requirement. He states that he is a 54-year-old at-will employee with few assets and living alone. As such, he must have an emergency fund and plan for retirement. As a victim of the poor financial times, he says that he is the quintessential honest debtor and deserves the promise of a fresh start provided by a Chapter 7 discharge.

**DISCUSSION**

Section 707 sets out a roadmap for the dismissal of a Chapter 7 case. Subsection (a)

[4]The United States Trustee calculates this amount by taking the Debtor's total unsecured debt of $78,200.44 and multiplying it by 1.09% to take into account a Chapter 13 trustee's fees, which yields $85,238.48. Assuming this amount is paid out over a 60 month Chapter 13 plan, monthly payments of $1,420.64 would be needed. (UST's Br. in Supp. of Mot. to Dismiss 11, ECF No. 19.)

provides that a court may dismiss a case based on cause including delay, nonpayment of fees, and failure to file required information. 11 U.S.C. § 707(a). Subsection (b) allows for dismissal premised upon an abusive filing traceable to (1) failure to pass or rebut the means test found in § 707(b)(2); (2) bad faith; or (3) the totality of a debtor's financial circumstances. 11 U.S.C. § 707(b)(2) and (3).

In relevant part, § 707(b) states:

> (b) (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.
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> . . . .
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> (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 paragraph (2)(A)(i) 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 . . . of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b)(1) and (3).

The means test embodies "Congress' intent 'that there be an easily applied formula for determining when the Court should *presume* that a debtor is abusing the system by filing a Chapter 7 petition.' " *In re Henebury*, 361 B.R. 595, 603 (Bankr. S.D. Fla. 2007) (quoting *In re Fowler*, 349 B.R. 414, 419 (Bankr. D. Del. 2006)). The means test "is aimed at capturing a 'snapshot' of the debtor's financial state as of the date the petition is filed, rather than at constructing a forward-looking analysis of the debtor's financial situation." *Fokkena v. Hartwick*, 373 B.R. 645, 655 (D. Minn. 2007) (internal quotation marks omitted). It serves as a "backward looking litmus test performed using mathematical computation of arbitrary numbers,

often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt." *In re Benedetti*, 372 B.R. 90, 96 (Bankr. S.D. Fla. 2007) (quoting *In re Hartwick*, 352 B.R. 867, 870 (Bankr. D. Minn. 2006)). The means test provides the first step in combating abusive filers. *See Henebury*, 361 B.R. at 603-04.

The plain language of the statute provides that to even reach the § 707(b)(3) abuse tests, one must first satisfy the § 707(b)(2) means test. Thus, if § 707(b)(2) ensnares the debtor, a court will dismiss the case before reaching § 707(b)(3). If, however, § 707(b)(2) does not catch the debtor or the debtor successfully rebuts the presumption of abuse, the court "shall consider" whether the filing was in bad faith and the totality of the debtor's financial situation before the debtor can successfully exit the lands of § 707 with a discharge. As the Debtor's income was below the state median for a one-person household, no presumption of abuse arose under § 707(b)(2).

The Debtor poses some philosophical and rhetorical questions regarding the § 707(b)(2) and § 707(b)(3) tests but offers no answers or analysis. His hypothesis that § 707(b)(3) becomes irrelevant or that § 707(b)(2) subsumes § 707(b)(3) once the debtor satisfies § 707(b)(2) ignores the pure direction of the statute: there are three § 707(b) abuse questions, and all must be correctly answered as they are teed up. The fact that the Debtor was not subject to the means test as a below-median income debtor does not prevent the court from considering his ability to pay creditors out of future income when analyzing the totality of the circumstances of his financial situation. *In re Lanza*, No. 1:10-bk-06272MDF, 2011 WL 1134445, at *2-3 (Bankr. M.D. Pa. Mar. 25, 2011); *cf*. *In re Rudler*, 576 F.3d 37, 51 (1st Cir. 2009) ("totality-of-the-circumstances inquiry prescribed by section 707(b)(3)(B) . . . remains a backup option when the Trustee is

dissatisfied by the result of the means test").

Both sides cite *In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006), as support for their positions. In that case, the UST moved to dismiss based on the § 707(b)(2) means test or, alternatively, the § 707(b)(3)(B) totality test. The debtors passed the means test, which led the court to focus on the totality of the circumstances. Judge Kelley concluded:

> As § 707(b)(3) states, the court shall consider the totality of the circumstances "in a case in which the presumption . . . does not arise [(i.e., the debtor passed the means test)] or is rebutted [(i.e., the debtor failed the means test, but provided a sufficient explanation)]." This language suggests that an inquiry into a debtor's financial situation requires an inquiry into *more than* what is tested in the means test. . . .
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> Stated another way, while ability to pay is a factor in the totality of circumstances test, and may even be the primary factor to be considered, if it is the only indicia of abuse, the case should not be dismissed under that test. Given the detailed nature of the means test in § 707(b)(2), this Court holds that similar to the old totality of the circumstances test, more than an ability to pay (as shown on the debtor's Schedule I and J) must be shown to demonstrate abuse under § 707(b)(3)(B).

*Id.* at 507 (emphasis in original).

This court agrees with Judge Kelley that the mere ability to pay, i.e. having a surplus on a particular day at a particular time, does not, in and of itself, constitute abuse under § 707(b)(3). Such a test "would not survive the first case of a frugal family with income over the designated level but with unusually large medical expenses necessary to a child's life." *In re Kornfield*, 164 F.3d 778, 783 (2d Cir. 1999). A surplus in a vacuum today does not address the larger inquiry regarding the totality of a debtor's financial circumstances presently and moving forward. A determination of abuse must be made on a case-by-case basis with consideration given to all relevant circumstances. Questions beyond a debtor's ability to pay must be asked to ascertain an accurate picture of a debtor's financial situation such as: Why was the bankruptcy petition filed? What is the nature and extent of the debtor's debt? Is the employment of the debtor likely to

change? Are there extraordinary household or other expenses on the foreseeable horizon? Is there a reasonable expectation, beyond mere conjuncture, that the debtor's financial life may change? Are there special circumstances involving the debtor or dependents?

The UST does not suggest bad faith on the Debtor's part, and this court finds none based on the facts before it. As pointed out in *Nockerts, supra*, the ability to pay is a factor and, to this court, the primary factor in a § 707(b)(3) analysis. Standing alone, the ability to pay cannot equate to abuse. As indicated, *supra*, a passing result on the § 707(b)(2) objective test simply leads the court to consider more complex subjective inquiries under the § 707(b)(3) tests.

In a recent decision from the Western District of New York, *In re Anderson*, 444 B.R. 505 (Bankr. W.D.N.Y. 2011), Judge Bucki considered similar factors when analyzing the issue whether a desire to contribute to a retirement fund could rebut the presumption of abuse in § 707(b)(2)(A). The court found that the debtor was in good health and was gainfully employed, two indications of his ability to continue to work and ability to continue to pay creditors. *Id.* at 507. The fact that the debtor was 67 years old and on the brink of retirement (and therefore incurring a reduction in income) held no sway with the court. *Id.* at 507-508. "The mere desire for retirement provides no excuse" for a debtor to withhold disposable income from creditors. *Id.* at 508.

In the instant case, the Debtor has not had to confront the presumption of abuse. However, this analysis of the Debtor's financial universe must answer the transcendent issue whether the instant case constitutes an "abuse of the bankruptcy process by a debtor seeking to take unfair advantage of his creditors." *In re Wolf,* 390 B.R. 825, 831 (Bankr. D.S.C. 2008). The core of § 707(b)(3)(B) is a debtor's financial situation which must necessarily include a debtor's ability

to pay creditors. *Id.* at 833.

Taking each question in turn, the circumstances precipitating the Debtor's bankruptcy filing were his loss of employment and the resulting debt. The Debtor's debt consists primarily of consumer credit card obligations the Debtor amassed. The Debtor is now gainfully employed with no foreseeable changes on the horizon. His payroll deductions and expenses leave him with a monthly surplus of $1,718.24. The debtor only needs $1,420.64 to support a 100 percent Chapter 13 plan. The rest of the surplus could fund a retirement plan if the Debtor so desired.

The only justifications offered by the Debtor are his age, his new employment, his successful passage through the § 707(b)(2) test, and the perceived need to apply every discretionary dollar to retirement.[5] Like the debtor in *Anderson*, the Debtor can offer no legal basis as to why he should not be in a Chapter 13. He is single with no dependents, in apparent good health, with no extraordinary expenses, and no anticipated changes monetarily in the next year. He states that he is unsure of his future, but should circumstances arise that would make continued presence in a Chapter 13 improvident, § 1307 would allow the Debtor an escape hatch.[6]

There are no guarantees for success in Chapter 13 or in life, but it would be an abuse to allow this Debtor, with almost a $40,000 cushion above the state median income and no mitigating factors, to remain in Chapter 7.

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[5] This court is unaware of any legal precept that would necessarily prevent the Debtor from claiming a reasonable Schedule J expense for a retirement contribution. That proposed line item and its effect on Chapter 13 plan repayment percentage would initially be in the hands of the unsecured creditor body and the discretion of the Chapter 13 Trustee.

[6] Section 1307 (a) provides a that a "debtor may convert a case under [Chapter 13] to a case under chapter 7 . . . at any time." 11 U.S.C. § 1307(a).

## CONCLUSION

Based on the foregoing reasons, the totality of the Debtor's financial circumstances does not allow this court to condone a Chapter 7 filing. Accordingly, the UST's motion is granted, unless the Debtor voluntarily coverts his case to Chapter 13. The Debtor is given 45 days after entry of this order to obtain an order of conversion.[7] If the case is not converted, the UST shall submit an order dismissing the case.

It is so ORDERED.

Dated: June 22, 2011

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
Chief United States Bankruptcy Judge

[7] As there is no absolute right to convert under 11 U.S.C. § 706(a), the Debtor will need to file an appropriate motion on notice. *See Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007).