

IT IS SO ORDERED.

Dated: 05:36 PM June 14 2006



**UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF OHIO
 EASTERN DIVISION**

IN RE:)	CASE NO. 06-50243
)	
JOHN REECE,)	CHAPTER 7
)	
DEBTOR(S))	JUDGE MARILYN SHEA-STONUM
)	
)	MEMORANDUM OPINION RE:
)	NECESSITY OF FILING MEANS TEST
)	DOCUMENTS BY AN INDIVIDUAL "NON-
)	CONSUMER" DEBTOR

This matter comes before the Court on debtor’s motion seeking an order excusing him from filing means tests documents [docket #14]. A hearing on the motion was held on April 19, 2006 at which counsel for debtor, Thomas Coffey, appeared. No responses to the motion were filed and, pursuant to the hearing on the matter, an order was entered granting debtor’s motion [docket #31]. This Memorandum Opinion is being entered to help clarify when an individual debtor will be not be considered a “consumer debtor” for purposes of the means test requirement. This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

Debtor filed his voluntary chapter 7 bankruptcy petition on March 1, 2006 so this case is governed by the Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Pursuant to BAPCPA, certain chapter 7 cases “filed by an individual debtor . . . whose debts are primarily consumer debts” will be dismissed if they are deemed to be an abuse. 11 U.S.C. § 707(b)(1) (2005). To determine whether the filing of a case is abusive, individuals filing chapter 7 are now required to make certain financial calculations and provide such information via the filing of a “Statement of Current Monthly Income and Means Test Calculation” (the “Means Test Form”). See Official Form B22A. See also 11 U.S.C. §§ 707(b)(2)(C); 521(a)(1)(B)(ii) (2005). Preparation of the Means Test Form can be onerous. See Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 277-78 (2005).

Through his motion, debtor contends that his debts are not primarily consumer debts and that he should, therefore, be excused from filing the Means Test Form. A “consumer debt” is defined as a “debt incurred by an individual primarily for a personal, family, or household purpose.” 11 U.S.C. §101(8) (2005).¹ In *In re Westberry*, 215 F.3d 589 (6th Cir. 2000), the Sixth Circuit Court of Appeals was asked to determine whether a tax obligation was a “consumer debt.” In so doing, the Sixth Circuit reviewed the “profit motive analysis” in which a debt is deemed not to be a “consumer” one if it was incurred with an eye toward profit. *Id.* at 593, citing *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988). In concluding that a tax obligation does not constitute a “consumer debt,” the *Westberry* Court noted that, although the “profit motive analysis” is one way to determine if a debt falls outside the category of consumer debt, there is nothing inherent in that test or in the Bankruptcy Code to suggest that such test is the only way to measure the nature of a debt. *Westberry*, 215 F.3d at 593. An alternative method of evaluating the nature of a debt, as cited by the Sixth Circuit in *Westberry*, is set forth in *In re Marshalek*, 158 B.R. 704 (Bankr. N.D. Ohio 1993).

With § 101(8) defining consumer debts as being those debts “incurred by an individual primarily for a personal, family or household purpose,” it is implicit that debts not falling within [any] of those three categories would be

¹ The definition of “consumer debt” was not changed by BAPCPA.

something other than a consumer debt. Although an individual may qualify as a debtor, such person is clearly not a consumer debtor under § 101(8) unless the bulk of his or her debt is incurred in the course of domestic consumption.

Marshalek, 158 B.R. at 707. *Cf. In re Bell*, 65 B.R. 575 (Bankr. E.D. Mich. 1986) (“where the total amount of the consumer debt is substantially less than the total amount of the non-consumer debt, the debts cannot be considered primarily consumer debts, even if there is a greater number of consumer debts”).

Based upon the foregoing, the Court finds that a debtor will not be considered an “individual debtor . . . whose debts are primarily consumer debts” if the bulk of that individual’s debts were (1) incurred with an eye toward profit or (2) incurred for something other than domestic consumption.

In the within case, debtor indicated on the front page of his petition that the nature of his debts were “business” (versus “consumer/non-business”). In Schedules D, E, F and G debtor lists almost \$3.5 million in total indebtedness. Of that, only \$311,548.00 appears to be for debtor’s domestic consumption: \$283,534.00 from Schedule D for payments on a home mortgage and automobile loans; \$24,746.00 from Schedule F for personal credit cards and \$3,268.00 from Schedule G for lease payments for an automobile. The remainder and, thus, bulk of debtor’s debt is the result of several failed business entities with which debtor was affiliated. *See, e.g.* Schedule E (listing a \$25,937.00 debt owing to the State of Ohio for sales taxes) and Schedule F (listing three debts totaling \$32,972.33 for business credit cards, one debt totaling \$231,042.00 for franchise royalties and four debts totaling \$475,937.21 owed to food vendors). *See also* Schedules D, H and Stmt. of Fin. Aff. Q3 and Q18. Accordingly, debtor is not an “individual debtor . . . whose debts are primarily consumer debts.”

As drafted, § 707(b)(1) applies only in “a case filed by an individual debtor under this chapter whose debts are primarily consumer debts” Notwithstanding that § 707(b)(1) does not apply to individual “non consumer” debtors, § 521(a)(1)(B) requires all debtors to file the information included in the Means Test Form “unless the court orders otherwise.” *See* 11 U.S.C. § 521(a)(1)(B) (2005). *See also* 11 U.S.C. § 707(b)(2)(C)

(2005) (“[a]s part of the schedule of current income and expenditures required under section 521, the debtor shall include a statement of the debtor’s current monthly income, and the calculations that determine whether a presumption arises under subparagraph (A)(i), that show how each amount is calculated”). BAPCPA has, therefore, placed the onus on individual “non consumer” debtors to make a request of the court that they be excused from filing the Means Test Form. If such a request is not made and granted and if the Means Test Form is not filed, an individual “non consumer” debtor will face dismissal of his or her case. 11 U.S.C. § 521(i)(1)(2005) (“if an individual debtor in a voluntary case under chapter 7 . . . fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition”).²

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² In an effort to eliminate the need for similar motions by other “non-consumer” debtors, the Court has entered Administrative Order 06-05 excusing “non-consumer” debtors from the Means Test Form filing requirement and permitting parties in interest in such cases to request a hearing at which debtor would be required to demonstrate why he or she should not be considered a “consumer” debtor for purposes of § 707(b)(1). A copy of Administrative Order 06-05 is available on Judge Shea-Stonum’s portion of the Court’s web site: www.ohnb.uscourts.gov.