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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	**In Proceedings Under Chapter 7**
JOSEPH MCGOWAN and LAURA MCGOWAN Debtors.	**Case No.: 09-19075**
	JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

This matter is before the Court on the Motion to Dismiss Case Pursuant to 11 U.S.C. § 707(b)(1) and (3) (the "Motion") filed by the United States Trustee for Region 9 (the "Trustee") over the objection of Joseph and Laura McGowan (the "Debtors").

The Court acquires core matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a), (b)(1), 28 U.S.C. § 1334 and General Order No. 84 of the District.

A hearing was held upon due notice to all entitled parties. After considering the record, generally, arguments of counsel and evidence adduced, the following constitutes the Court's factual findings and conclusions of law.

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On September 25, 2009, the Debtors filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code in the United States Bankruptcy Court for the Northern District of Ohio, Eastern Division. The Debtors are both employed full-time and have three children, aged 17, 19 and 21, respectively. For the past 18 months, Mr. McGowan has been employed as a business development manager earning a gross salary of $7,280 per month, or $5,481.62 after taxes. Mrs. McGowan has been employed as the director of a community services program for the past six years, the past two of which have been at a full-time level. She earns a gross monthly salary of

$3,666.67, or $2,820.42 after taxes. Debtors earn an annualized gross income of $131,360, which exceeds the applicable median family income of $81,134 for a family of five in Ohio. *See* http://www.justice.gov/ust/eo/bapcpa/20090315/bci_data/median_income_table.htm (median income amount for Ohio residents with a family size of five that filed a bankruptcy case between March 15, 2009, and October 31, 2009). The Debtors scheduled $561,021.00 in secured debt and $219,523.75 in unsecured debt. (UST Exh. 2). This petition is the Debtors' only bankruptcy filing.

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The dispositive issue before this Court is whether the Debtor's petition for relief, as amended, constitutes an abusive filing.

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The Trustee asserts that, under the totality of the circumstances, granting the Debtor a Chapter 7 discharge would be an abuse under 11 U.S.C. § 707(b)(3). The Trustee contends that a number of the Debtor's scheduled expenses are either excessive or wholly inappropriate. Additionally, the Trustee asserts that the Debtors' income level suggests that the case is abusive and a number of their expenses could be reduced without depriving them or their family of necessities.

The Debtors oppose the relief sought by the Trustee. The Debtors assert that they have negative monthly net income, and that they are entitled to claim the expenses objected to by the Trustee on Schedule J because they are expenses that are actually paid, regardless of whether they are improper in calculating disposable income. The Debtors further argue that their case should not be dismissed because their bankruptcy filing was due to financial issues with a former business partner and not as a result of extravagant spending.

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Section 707 of the Bankruptcy Code provides for dismissal of a Chapter 7 case or conversion to a case under chapter 11 or 13. A case is dismissed where a court finds that the granting of relief would constitute an abuse of the Chapter 7 provisions.

Title 11 U.S.C. § 707(b) 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)).
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> (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--
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> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or
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> (II) $10,000.

Section 101(8) of the Bankruptcy Code defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose."

Section 707(b)(2)(A) of the Bankruptcy Code sets forth the criteria for a presumption of abuse and constitutes the means test for a debtor's ability to repay his debts. The means test is a

form that presents a statement of the debtor's current monthly income and shows whether or not a presumption of abuse arises as a consequence of identifying monthly disposable income in excess of the limits described under Section 707(b)(2)(A)(ii), (iii) and (iv). If the presumption of abuse does not arise under Section 707(b)(2), or is rebutted, then the court considers the totality of the circumstances under 11 U.S.C. § 707(b)(3):

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

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") has amended the Bankruptcy Code in ways that impact the present Motion. First, BAPCPA removed the express presumption in favor of granting the relief requested by the debtor and, second, BAPCPA added § 707(b)(3) to the Bankruptcy Code as an additional basis for dismissal of a Chapter 7 debtor's bankruptcy case. *See* 11 U.S.C. § 707(b).

Pre-BAPCPA, a United States Trustee seeking dismissal of a chapter 7 case bore the burden of overcoming the strong presumption in favor of granting the discharge requested by the debtor. *In re Farrell*, 150 B.R. 116, 118 (Bankr. D.N.J. 1992). Historically, courts treated the pre-BAPCPA presumption in favor of granting the relief requested by the debtor as a "caution and reminder" for the court to "give the benefit of any doubt to the debtor and dismiss a case only when a substantial

abuse is clearly present." *In re Kelly*, 841 F.2d 908, 917 (9th Cir.1988); *see also In re Krohn*, 886 F.2d 123 (6th Cir. 1989). BAPCPA eliminated the substantial abuse standard utilized in determining if a debtor's case required dismissal and adopted a lower standard of abuse in considering a motion under § 707(b). *See* 11 U.S.C.§ 707(b)(3).

Pre-BAPCPA, a debtor's case could be dismissed for substantial abuse based upon either lack of honesty or want of need. *See Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir.2004); *see also In re Krohn*, 886 F.2d 123 (6th Cir.1989). BAPCPA codified the lack of honesty and want of need factors under § 707(b)(3). Therein, a debtor's case can be dismissed for abuse upon either bad faith (i.e., lack of honesty) or where the totality of the circumstances of the debtor's financial situation demonstrates abuse (i.e., want of need). 11 U.S.C. § 707(b)(3); *See In re Oot*, 368 B.R. 662, (Bankr. N.D. Ohio 2007); *In re Wright*, 364 B.R. 640, (Bankr. N.D. Ohio 2007); *In re Henebury*, 361 B.R. 595 (Bankr. S.D. Fla. 2007); *In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007); *In re Simmons*, 357 B.R. 480 (Bankr. N.D. Ohio 2006). "It is a closely related fundament of statutory construction that, where Congress codifies prior case law, those prior holdings remain not only good law, but should serve as a valuable touchstone for interpreting the statute." *In re Oot*, 368 B.R. 662, 666 (Bankr. N.D. Ohio 2007) (*citing CoStar Group Inc. v. LoopNet, Inc.*, 373 F.3d 544, 553 (4th Cir.2004)). Therefore, pre-BAPCPA decisions provide sound guidance and are instructive in evaluating motions to dismiss.

Where the presumption of abuse does not arise under § 707(b)(2), § 707(b)(3) grants a court the authority to dismiss a Chapter 7 case for either bad faith or the totality of the circumstances if the debtor's financial situation demonstrates abuse. 11 U.S.C. § 707(b)(3). Since there have been no allegations of bad faith brought by the Trustee against the Debtors, the Court's consideration

herein is focused on the totality of the circumstances.

The Bankruptcy Code does not define the phrase "totality of the circumstances." Notwithstanding, two pre-BAPCPA Sixth Circuit Court of Appeals decisions, *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir.2004) and *In re Krohn*, 886 F.2d 123 (6th Cir.1989), provide guidance regarding the totality of the circumstances test for dismissal under § 707(b). Among the factors to be considered in deciding whether the totality of the circumstances warranted a dismissal of the debtor's case under § 707(b), the *Krohn* court opined:

> A court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. Other factors relevant to need include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.

In re Krohn, 886 F.2d at 126; *accord Behlke v. Eisen*, 358 F.3d at 435. Additionally, to meet the burden established in 11 U.S.C. § 707 (b) for dismissal, the Trustee, who is the moving party, must prove by a preponderance of the evidence that the debts in question are consumer debts, and that granting relief would constitute abuse. *In re Browne*, 253 B.R. 854, 856-857 (Bankr. N.D. Ohio 2000).

To determine whether a debtor can significantly reduce his expenses, courts will look to the debtor's scheduled expenses to determine their reasonableness. *In re Mooney*, 313 B.R. 709, 715 (Bankr. N.D. Ohio 2004). This is not to say, however, that a court must simply accept the expense amounts a debtor schedules as necessary. In determining the reasonableness of a debtor's expenses,

a court must scrutinize those provided expenses and may "make downward adjustments where necessary." *In re Felske*, 385 B.R. 649, 655 (Bankr. N.D. Ohio 2008). Although a debtor need not reduce his expenses in such a way that he is living in poverty, the Bankruptcy Code envisions some sacrifice on the debtor's part in granting him relief. *Id.* at 656. A court need not get bogged down in minute details of the debtor's expenses, but the debtor must demonstrate that he is making some sacrifices to repay unsecured creditors. *In re Mars*, 340 B.R. 844, 850 (Bankr. W.D. Mich. 2006).

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Herein, the Debtors' case does not give rise to a presumption of abuse under § 707(b)(2). Rather, the Trustee seeks a dismissal of the Debtors' case based upon the totality of the Debtors' financial circumstances under § 707(b)(3).

Among the monthly expenses objected to by the Trustee on Debtors' Schedule J were $2,450 for college tuition for two of the Debtors' children, $220 for college books, $626 for student loan repayment, and $433 for 401(k) loan repayment. (UST Exh. 2). A majority of courts holds that debtors may not pay college expenses on behalf of adult children at the expense of the debtors' unsecured creditors. *In re Baker*, 400 B.R. 594, 598 (N.D. Ohio 2009). This Court has issued rulings consistent with the majority opinion, and has disallowed payment of college expenses for adult children absent a special circumstance. *Id.* Though it is admirable for Debtors' to attempt to pay their children's tuition, expenses related to their children's college tuition and books are improper in determining Debtors available disposable income.

In addition to paying tuition and book expenses, Mr. McGowan testified that they contribute for meal plans and food expenses for their two children in college. (McGowan, J., Direct). The Court finds his testimony to be generally credible. The Debtors scheduled a

monthly food expense of $1,129. (UST Exh. 9). Debtors provided an itemized food budget for the months of July through October, 2009. (Debtors' Exh. G). During the months of September and October, while their son and daughter are at school, $498 of that monthly food expense is devoted to food for their son and daughter. (Debtors' Exh. G). Debtors' food expense, which is in part supporting their two adult children, should be reduced by the amount apportioned for their adult children's expenses.

Furthermore, it is well settled that debtors may not favor one unsecured creditor over another. *Baker*, 400 B.R. at 599. Student loans, while generally nondischargeable, may not be accorded priority treatment under the Bankruptcy Code. *Id.* at 600. It is therefore improper to allow debtors to pay their student loan creditors while providing no distribution to other general unsecured creditors who face debt discharge. *Id.* Debtors, likewise, may not include their student loan payment expense in calculating monthly disposable income.

Interestingly, Debtors filed an Amended Schedule J and Amended Statement of Intention on the eve of the subject evidentiary hearing. The above expenses for Debtors' children's college expenses and tuition, and 401(k) loan repayment, remain unchanged. (UST Exh. 9). Despite the fact that Debtors reduced their recreation expenses from $500 to $200 and their miscellaneous expenses from $500 to $75, their negative disposable income went from a negative $3,704.96, as originally scheduled, to a negative $5,786.96, as amended. (UST Exh. 2, UST Exh. 9). The Court notes that the instructions accompanying Schedule J have not changed between the time of Debtors' filing and the time Amended Schedule J was filed, yet Debtors are claiming an additional $2,000 in expenses the evening before the evidentiary hearing. Part of the increase is accounted for by the mortgage payment, which was originally scheduled in the amount of $2,210

and amended to $3,371. (UST Exh. 2, UST Exh. 9). He testified that their mortgage payments may vary depending on the amortization schedule, $2,210 being the figure at a 15-year amortization and $3,371 being the figure for a 30-year amortization. (McGowan, J., Cross). He also testified, however, that he has not made a payment on the mortgage since at least September, 2009, and did not explain why the higher mortgage payment was substituted. (McGowan, J. Cross).

Debtors assert that they are not attempting to maintain an extravagant standard of living at the expense of their creditors. They note that they own three modest cars, two of which are older models with high mileage. Their home, however, is valued at $380,000 and carries two mortgages totaling over $540,000. (UST Exh. 2). Debtors initially intended to surrender the property, but on the eve of the evidentiary hearing filed an Amended Statement of Intention indicating that they planned to retain the property. (UST Exh. 9). Mr. McGowan testified that the intention to surrender the property was in anticipation of a job-related move; however, he also testified that they had decided not to move in December, 2009 but did not change their Statement of Intention until the evening prior to the hearing. (McGowan, J., Direct). The corresponding housing allowance listed in the IRS National Standards for a family size of five in Cuyahoga County is $1,080 per month. (UST Exh. 7). Even at the lower mortgage payment amount listed on Debtors' original Schedule J, their housing expense is more than double that of the IRS National Standards.

In determining whether the totality of the circumstances of a debtor's financial situation demonstrates abuse pursuant to § 707(b)(3), a court should consider the debtor's ability to repay his creditors out of future earnings. *In re Krohn*, 886 F.2d at 126. Substantial income weighs in

favor of abuse. *See In re Wadsworth*, 383 B.R. 330, 333 (Bankr. N.D. Ohio 2007)("Under any measure, a debtor, having a stable annual salary of almost $100,000.00, will be hard pressed to establish that they do not have the ability to pay some of their unsecured debt, such as through funding a Chapter 13 plan of reorganization."). The Debtors have a joint income of just over $130,000. Although the Debtors' schedules, as filed, indicate negative disposable income, apparent inability to fund a Chapter 13 plan is not determinative on the issue of abuse. *In re Krohn*, 886 F.2d at 127 ("[I]nability to qualify under Chapter 13 should not be dispositive of whether there may be a § 707(b) dismissal, since there are other factors to be considered in deciding if a debtor is needy.").

There is no evidence that the Debtors engaged in bad faith or other dishonest conduct. Bad faith, however, is not a requirement for dismissal under §707(b)(3). It is well established that a discharge in bankruptcy is conditioned on a debtor's willingness to make some sacrifices. *In re Felske*, 385 B.R. at 656. Herein, Debtors are attempting to retain a house with a scheduled value of $380,000, which has no equity. They are continuing to pay their adult children's college tuition, books, and college food expenses while discharging nearly $200,000 of unsecured debt. Additionally, they improperly prefer to repay some unsecured creditors, as opposed to other general unsecured creditors. Lastly, the timing of the filing of the Debtors' Amended Schedule J, along with their Amended Statement of Intention, is highly suspect when viewed against these findings.

Thusly, based on the totality of the circumstances of the Debtors' financial situation, it is hereby determined that granting the Debtors relief under Chapter 7 would constitute abuse pursuant to § 707(b)(3).

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Accordingly, the Trustee's motion to dismiss pursuant to 11 U.S.C. §§ 707(b)(3) is granted, and the Debtor's case is hereby dismissed. The Debtor's objection is hereby overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 3RD day of May, 2010

JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT