The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: February 26 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 05-75054
	)	
Fredric Lax,	)	Chapter 7
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION

This case is before the court on a Motion to Dismiss [Doc. # 103] filed by creditor Union Hospital, Inc., and objections to the motion filed by Debtor [Doc. # 116] and by the Chapter 7 Trustee [Doc. # 108]. Union Hospital, Inc. seeks dismissal of this case for cause under 11 U.S.C. § 707(a), asserting as cause that Debtor lacks good faith in seeking relief under Chapter 7. The court has jurisdiction over this case under 28 U.S.C. § 1334(a) and (b) and the general order of reference entered in this district. *See* 28 U.S.C. § 157(a) and (b)(1). Proceedings to determine whether a case commenced under Title 11 should be dismissed directly affect administration of the estate and adjustment of the debtor-creditor relationship and are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(2)(A) and (O).

The court held a hearing at which Union Hospital, Inc. and Debtor presented testimony and documentary evidence in support of their positions. The court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the court will grant Union Hospital, Inc.'s motion.

FACTUAL BACKGROUND

Debtor Fredric Lax ("Debtor"), who is 56 years old, is married with one three-year-old child from his current marriage, two children from a previous marriage, who were ages 16 and 20 at the time Debtor filed his bankruptcy petition in October 2005, and three stepsons, ages 12, 15 and 18 at the time of filing. Debtor is currently employed as a neurosurgeon at St. Rita's Hospital in Lima, Ohio. Before his employment at St. Rita's Hospital, Debtor practiced medicine under contract with Union Hospital, Inc. ("Union") in Terre Haute, Indiana. That contract was the result of recruitment efforts by Union to bring another neurosurgeon into the Terre Haute community. At that time, Debtor was practicing medicine in Parma, Ohio, where he earned approximately $150,000 per year. Debtor testified that because of the increasingly high cost of medical malpractice insurance in Ohio, he decided to accept the contract offered by Union, which, as described below, immediately provided a significant increase in his income. In July 2002, Debtor entered into a Physician Services Agreement ("Agreement") with Union.

The Agreement provided, among other things, for a $5,000 relocation reimbursement, a one-time payment of $25,000 to Debtor to assist in paying expenses to start up his practice in Terre Haute, as well as a guarantee of $500,000 as an annualized net practice income ("NPI"), defined as cash receipts from his medical practice less cash disbursements for operating expenses. Under the NPI provision, which was effective as of September 3, 2002, Union was obligated to pay to Debtor the difference between his actual NPI and $500,000 during his first year of practice. After the initial twelve month period, the Agreement gave Debtor the option to renew the NPI provision for a second twelve month period. In partial consideration for the relocation reimbursement, start-up reimbursement, and NPI guarantee, Debtor agreed to maintain his medical practice on a full-time basis for a period of twenty-four months after termination of the Agreement if the NPI provision remained in effect for the initial twelve month period only, and for thirty-six months after termination of the Agreement if the NPI provision remained in effect for a twenty-four month period. During the term of the Agreement, Union was also required to pay for Debtor's practice operating expenses up to a maximum of $250,000 in any twelve month period. The Agreement further provided that if Debtor completed the applicable practice commitment period, all payments made to him under the Agreement would be forgiven. But if Debtor failed to maintain a full-time medical practice in Terre Haute for the entire practice commitment period, the Agreement provided that he must repay the sums advanced to him by Union in accordance with the provisions set forth therein. The Agreement provides that any sums to be repaid to Union are payable with interest calculated at the prime interest rate plus two

percent per annum over a period not to exceed thirty-six months.[1] The Agreement also provides that "Union agrees to allow delayed repayment in the form of a Promissory Note or other instrument if requested by Physician, the length of which repayment shall not exceed thirty-six (36) months." [Union Ex. 1, ¶ 2.5].

During the recruitment process, Union representatives explained to Debtor that there had been three neurosurgeons in the area but that one had left Terre Haute, one was actively looking for opportunities elsewhere, and one they expected would be retiring in the near future. Relying on such representations, Debtor believed he could establish and build a successful practice in neurosurgery in Terre Haute. Ultimately that did not occur. The two neurosurgeons who were working in Terre Haute neither left nor retired. After arriving in Terre Haute, Debtor's practice was slow to grow. At the end of his first year, Union recruited Dr. Wilson, a fourth neurosurgeon, to practice in Terre Haute.[2] Dr. Wilson specializes in spinal surgery. According to Debtor, this further hampered Debtor's ability to grow his practice, there being a greater demand for elective spinal surgery in the area than other types of neurosurgery and, being a general neurosurgeon, he was not as skilled or as experienced in this surgical specialty. Debtor had several discussions with representatives from Union regarding his belief that there was not enough work for four surgeons. Nevertheless, Debtor testified at the hearing that at the end of his first year at Union, he was still hopeful that his practice could grow and was still thinking that one neurosurgeon would be leaving and one would be retiring. He, therefore, elected to renew the Agreement's NPI guarantee for a second year. However, Debtor described his practice as "dead" by December 2004, generating income that barely even covered his operating expenses. Debtor's total collections before expenses during the two year period beginning in September 2002 were only $293,000. According to Debtor, after the NPI guaranteed payments ceased, he was forced to use credit cards to cover living expenses for his family.

On December 23, 2004, Debtor provided notice to Union that he was closing his practice at the end of January 2005 and moving back to Ohio. Union, in turn, responded by letter stating that Debtor would owe it $1,043,574 under the terms of the Agreement if he left his Terre Haute practice at that time. There is no dispute that Debtor was aware of the obligations claimed by Union under the Agreement when he returned to Ohio. On February 1, 2005, Union received a letter from counsel representing Debtor in the contract dispute denying that Debtor owed Union anything.

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[2] Pursuant to the Agreement, Union agreed not to bring an additional neurosurgeon into the community before July 1, 2003.

Notwithstanding his unsuccessful practice in Terre Haute, the court finds Debtor's testimony credible that he had intended to make Terre Haute his home and fulfill his practice commitment under the Agreement both at the time he entered into the Agreement and at the time he elected to extend the Agreement an additional year. But due to his unsuccessful attempt to build a medical practice, Debtor left Terre Haute in late January 2005 and began working at St. Rita's Hospital in Lima, Ohio on February 1, 2005. Eventually, Union filed a lawsuit against Debtor in the United States District Court for the Southern District of Indiana alleging breach of contract. That case was pending at the time Debtor filed his bankruptcy petition. In that action, Union sought recovery of funds it paid to Debtor, as well as costs and attorney fees as provided in the Agreement. Debtor filed an answer and counterclaim, alleging a material breach of the Agreement by Union. Debtor's counsel advised him that the cost in attorney fees to defend against Union's claims would be at least $100,000. Debtor filed a Chapter 11 bankruptcy petition on October 14, 2005.

At the hearing, Debtor testified regarding his financial condition. Debtor testified that when he left Terre Haute, he was in dire financial straits, had saved no money during the two years that he worked there, and had charged his multiple credit cards to their limits. He testified that, effective February 2005, he has a five-year employment contract with St. Rita's Hospital under which he received $500,000 per year for the first two years and will receive $500,000 plus an incentive payment during the last three years. The contract, however, does not describe the basis for any incentive payment and no incentive payment has yet been made, although he is just beginning his third year. During his first year in Lima, Debtor also took trauma calls at Memorial Hospital one weekend per month, earning an additional $3,500 per month.

Debtor's original Schedules I and J show monthly income after payroll deductions of $27,709, which includes the additional $3,500 per month, and monthly expenses in the amount of $23,545, resulting in monthly net income of $4,164. Debtor's listed expenses include, among other things, $6,628 in home mortgage payments, $1,100 in payments for child support, $1,400 for food, $1,400 for recreation, $1,233 for home maintenance, and $2,229 for all utilities (electric, heat, water/sewer, telephone, cable and internet). In addition to child support payments, Debtor lists $2,000 in monthly payments for support of additional dependents not living in his home. He states in an affidavit submitted in support of his opposition to Union's motion to dismiss that he provides funds for the needs of all of his children, including college tuition and other expenses for his adult children who are 19 and 21 years old. [Doc. # 117, Lax Aff. ¶ 11]. Debtor also lists a $1,000 monthly car payment, but lists no vehicles or secured debt owed on any vehicle in his Schedules B and D. In January 2006, Debtor amended his Schedule I to reflect monthly income of

$24,209 rather than $27,709. Because of the recent hiring of an additional neurosurgeon by Memorial Hospital, he no longer provides call coverage at that hospital and no longer receives the $3,500 in supplemental income.

Debtor also testified regarding two homes, one in Terre Haute and one in Lima, that are titled in his wife's name. He explained that after his divorce from his first wife, his credit was ruined due to his ex-wife's failure to keep the mortgage on the home current. The home was granted to her in the divorce but Debtor was a responsible party under the note and mortgage. He testified that he could not get financing in his name for a home when he and his family moved to Terre Haute or when they moved back to Ohio. Debtor further testified that a mortgage broker advised him and his wife to apply for a mortgage in his wife's name only. She did so and obtained the necessary financing. Debtor testified that both homes were titled only in his wife's name for this reason and not in order to hide assets. The Terre Haute home was purchased in 2002 before Debtor experienced the financial problems that arose due to his failed medical practice. It was titled in his wife's name at a time when Debtor was clearly not contemplating bankruptcy but, rather, anticipated increased income and a successful practice in this new location. This fact supports Debtor's testimony that the homes were not titled in his wife's name for the purpose of hiding assets from his creditors in bankruptcy, and particularly, from Union. Nevertheless, Debtor's testimony that a mortgagee for the home in Lima would not allow his name to be on the mortgage or deed is not credible. Debtor's wife was not employed when the Lima home was purchased. While the court does not find that Debtor was attempting to "hide" assets, as he has fully disclosed the extensive mortgage payments he makes on his wife's behalf, it does find that Debtor was attempting to structure his financial affairs so as to protect assets from the reach of his creditors.[3]

Debtor testified that the Terre Haute home is a 7,000 square foot home with an indoor pool that was purchased for $250,000 and in which he invested an additional $75,000. The house has been for sale since February 2005. The house remains unsold, notwithstanding a drop of $75,000 from the original asking price of $425,000. The record is silent regarding the amount of equity, if any, that Debtor's wife has in this property. The purchase price of the Lima home, a 2,500 square foot home on 25 acres, was $650,000. It was purchased using $20,000 as a down payment that was obtained primarily from Debtor's earnings in February 2005 at St. Rita's Hospital and carries three mortgages, one of which is to the seller with a balloon

[3] Similarly, Debtor lists on Schedule I a monthly car payment in the amount of $1,000 and claims on Schedule C a $1,000 exemption in a 2003 Honda X2000 valued at $20,000. As indicated earlier, Debtor lists neither the Honda nor any debt secured by the Honda in his bankruptcy schedules.

payment of $165,000 due in 2008. Debtor testified that he wanted to live in an area that other physicians live for the purpose of networking in order to obtain referrals and to ensure that his contract with St. Rita's Hospital is renewed after its five-year term expires. Debtor is currently paying $6,628 in monthly home mortgage payments, approximately $5,000 of which is for the Lima home and the balance for the Terre Haute home.

Other property listed in Debtor's bankruptcy schedules include a time share in Kauai, Hawaii, valued at $10,000 and which is not subject to any security interest, and personal property totaling $409,408. Debtor's personal property includes a pension annuity valued at $150,000, a defined benefit plan valued at $185,000, and an IRA valued at $55,000, all of which Debtor claims are exempt.[4]

Debtor also testified regarding the monthly reports filed in his Chapter 11 case before it was converted to Chapter 7. He reported expenses during this time period for trips to San Diego, San Francisco, St. Louis and Florida for which he incurred expenses for airfare and meals for both himself and his wife. Debtor explained that while one trip to Florida in January 2006 was for the purpose of vacationing, the remaining trips were for the purpose of furthering his professional career. To that end, he attended a cervical spine research seminar, a week-long course on the treatment of aneurysms, a meeting for the American Association of Neurological Surgeons, and a trip paid for in part by a manufacturer to demonstrate its medical equipment. Debtor further explained that physicians' spouses typically accompany them on such trips in order to facilitate the networking that occurs.

After filing his petition, Debtor testified that he, through counsel, engaged in negotiations with Union. During these negotiations Union offered to settle its claim for $300,000. Debtor testified that he rejected the offer because the $300,000 only addressed Union's claim and it still left him to deal with other creditors. Debtor never filed a Chapter 11 plan. He testified that he did not anticipate Union accepting any plan he might propose and did not believe he could obtain confirmation of a plan without Union's acceptance. Therefore, on April 18, 2006, he moved to convert the case to one under Chapter 7, and the court granted the motion on June 8, 2006.

LAW AND ANALYSIS

Union moves for dismissal of this case "for cause" under § 707(a), arguing that Debtor is not pursuing a Chapter 7 discharge in good faith. The burden of proving "cause " under § 707(a) is on Union as the moving party. *In re Horan*, 304 B.R. 42, 46-47 (Bankr. D. Conn. 2004); *see In re Cohara*, 324 B.R.

[4] The Trustee and Union have objected to Debtor's claimed exemption in the defined benefit plan and Union has also objected to his claimed exemption in the IRA.

24, 27 (B.A.P. 6th Cir. 2005). *Contra In re Tamecki*, 229 F.3d 205 (3d Cir. 2005)(once evidence is provided to impugn good faith, burden shifts to debtor to prove good faith). Section 707(a) provides:[5]

> The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including –
>
> > (1) unreasonable delay by the debtor that is prejudicial to creditors;
> > (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
> > (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

Noting that the word "including" is not meant to be a limiting word in § 707(a), the Sixth Circuit has interpreted the statute as permitting a bankruptcy court to dismiss a Chapter 7 petition if it finds that the petition was not filed in good faith. *Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1126-27 (6th Cir. 1991); *see* 11 U.S.C. § 102(3); *cf. Marrama v. Citizens Bank of Mass.*, 549 U.S. –, 2007 WL 517340, *4 (2007) (noting that the nonexclusive list of causes justifying dismissal under § 1307(c) does not mention bad faith but recognizing that dismissal for bad-faith is implicitly authorized by the words "for cause" in that section). *Contra In re Padilla*, 222 F.3d 1184 (9th Cir. 2000). The Sixth Circuit observed in *Zick* that "[t]he facts required to mandate dismissal based upon a lack of good faith are as varied as the number of cases." *Id.* at 1127. While dismissal based on lack of good faith must, therefore, be undertaken on an *ad hoc* basis, the Sixth Circuit cautioned that "[i]t should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." *Id.* at 1129.

In *Zick*, the Sixth Circuit found "particular merit" in employing a "smell test" in determining a lack of good faith under § 707(a). *Id.* at 1127. It relied on the following factors in that determination: (1) the debtor reaffirmed debt and arranged his obligations so as to reduce his creditors in the case to a single creditor, (2) the debtor failed to make significant lifestyle adjustments or efforts to repay, (3) the debtor was paying unsecured debts to insiders and had transferred or assigned contracts between himself and his corporation, (4) the debtor filed the case in response to his sole creditor obtaining a mediation award and

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[5] Section 707 was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "the Act"), effective October 17, 2005. Because Plaintiff's bankruptcy case was filed before the effective date of the Act, all references to the Bankruptcy Code in this opinion are to the pre-BAPCPA version of the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, sec. 1501(b)(1), Pub. L. No. 109-8, 119 Stat. 23, 216 (stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act).

(5) the unfairness of the debtor's use of Chapter 7 under conditions in which, rather than the fresh start contemplated by the Bankruptcy Code, the debtor appeared to be seeking a "head start." *Id.* at 1128-29.

Further guidance in applying this "smell test" is offered by *In re Spagnolia*, 199 B.R. 362 (W.D. Ky. 1995), in which the court compiled a list of the following factors utilized by courts in determining whether dismissal for lack of good faith is warranted:

> 1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.
> 2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle.
> 3. The debtor filed the case in response to a judgment pending litigation, or collection action; there is an intent to avoid a large single debt.
> 4. The debtor made no effort to repay his debts.
> 5. The unfairness of the use of Chapter 7.
> 6. The debtor has sufficient resources to pay his debts.
> 7. The debtor is paying debts to insiders.
> 8. The schedules inflate expenses to disguise financial well-being.
> 9. The debtor transferred assets.
> 10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors.
> 11. The debtor employed a deliberate and persistent pattern of evading a single major creditor.
> 12. The debtor failed to make candid and full disclosure.
> 13. The debts are modest in relation to assets and income.
> 14. There are multiple bankruptcy filings or other procedural "gymnastics."

Id. at 365. While the existence of only one of these factors, standing alone, may not be sufficient to support a dismissal for lack of good faith under § 707(a), dismissal may be warranted where a combination of these factors is present. *Id.*

In this case, the court finds that factors 2, 3, 4, 5, 6, 7, and 10 are present. There is no dispute that Debtor filed his bankruptcy petition in response to the breach of contract action filed against him by Union. While more than a single debt is involved in this case, the Union debt constitutes over eighty-eight percent of Debtor's unsecured debt. Most significantly, the court finds that the manner in which Debtor structured and conducted his personal financial affairs after leaving Terre Haute is indicative of his lack of good faith in seeking a Chapter 7 discharge.

Notwithstanding the fact that he and his wife had not yet sold their Indiana home and the fact that he knew he faced at least a potential liability in excess of one million dollars, Debtor and his wife purchased a $650,000 home on twenty-five acres in Lima, Ohio. While the notes, mortgages and deed are said to be

in his wife's name, since his wife was not at the time the home was purchased and is not now employed, they clearly intended that Debtor pay her $5,000 per month mortgage obligations, as well as the property taxes and other substantial associated costs of such a home, funds that could otherwise be used to satisfy, at least in part, the Union debt.

The evidence before the court shows that Debtor has made little or no lifestyle adjustment and that he lives, if not a lavish, an extremely comfortable lifestyle. Although Debtor testified that he no longer has an indoor pool and has much less square footage in his Lima home than he did in his Terre Haute home, his Schedule J still reflects an expansive lifestyle. He earns monthly income after payroll deductions of $24,209, which is approximately one-third of the annual median income in Ohio for a family of five,[6] and spends all but $664 of that money every month. Before he moved to Terre Haute, his family, albeit a smaller one, lived on an annual income of $150,000. Debtor's monthly expenses of $2,229 for utilities, $1,400 for food, $1,233 for home maintenance, and $1,400 for recreation are indicative of his lack of any meaningful belt tightening. These expenses are extraordinarily and unnecessarily high.

Debtor and his wife continued to vacation in Florida, and Debtor continues to pay for his wife to travel with him on business trips or trips relating to furthering his expertise in his profession. He also continues to pay expenses for which he has no obligation to pay, including the expenses of his adult children. *See In re Davidoff*, 185 B.R. 631, 635 (Bankr. S. D. Fla. 1995) (recognizing "the gross unfairness and detriment that creditors would experience if bankruptcy allowed a debtor's personal obligations to be eradicated while a debtor continued to pay another's debts and freely spend" and concluding that a debtor "may not discharge personal liability to creditors so that the funds will be of use to another"). Furthermore, it appears that Debtor has structured his assets in order to put them beyond the reach of his creditors. In addition to the deed to the Lima home being in his wife's name only, Debtor's bankruptcy schedules show that he claims a $1,000 exemption for a vehicle valued at $20,000 but that he does not own any vehicle.

Debtor has also made no meaningful effort to repay his debt to Union. Although Debtor argues that he has made such efforts by filing a Chapter 11 petition initially rather than a Chapter 7, he never filed a Chapter 11 plan and he rejected Union's offer to settle for $300,000 its claim for over $1,043,574 because that amount did not also satisfy all of his other creditors. Given Debtor's very substantial income, if he chose to undergo some financial belt tightening, he would be in a position to repay a significant portion of

[6] The annual median income for a family of five in Ohio is $75,190. In his affidavit submitted in support of his response to Union's motion to dismiss, Debtor states that he has three children and three step-children and that three of those children reside with him and his wife. [Doc. # 117, Lax Aff. ¶ 11].

the debt owed to his creditors, including Union, over a reasonable period of time in a Chapter 11. Instead, Debtor has now chosen to seek a discharge in Chapter 7.

The court agrees with Debtor that ability to pay, standing alone, does not constitute adequate cause for dismissal under § 707(a). The structure of pre-BAPCPA § 707 as applied by the Sixth Circuit dictates that ability to pay cannot stand alone as the measure of cause for dismissal under § 707(a), and likely also informs the Sixth Circuit's caution in *Zick* that dismissals under § 707(a) based on lack of good faith must be carefully confined to egregious cases. Section 707(b) authorized dismissal of individual debtors' Chapter 7 cases where granting a discharge would be a substantial abuse, provided that only the court or the United States Trustee were permitted to bring such a motion. Congress also limited dismissals for substantial abuse under § 707(b) to debtors "whose debts are primarily consumer debts," a classification that does not apply to Debtor. Under Sixth Circuit case law applying § 707(b), an ability to pay alone can constitute substantial abuse justifying dismissal. *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989); *In re Behlke*, 358 F.3d 429 (6th Cir. 2004). Given the structure of § 707 and the express limitations placed by Congress on the dismissal authority of § 707(b), lack of good faith as "cause" under § 707(a) as interpreted by *Zick* must necessarily be something different than "substantial abuse" under § 707(b). *In re Weeks,* 306 B.R. 587 (Bankr. E. D. Mich. 2004); *cf. In re Linehan,* 326 B,R, 474, 477-82 (Bankr. D. Mass)(discussing (and rejecting) *Zick* and case law that follows *Zick*, as well as conflicting case law that rejects *Zick* due to the statutory structure of § 707); *In Re Farkas*, 343 B.R. 336 (Bankr. S.D. Fla. 2006)(also discussing circuit split on issue of whether lack of good faith is cause under § 707(a)). As ably argued by Debtor's counsel at the hearing, the precise contours of these differences are exceedingly difficult to draw. Nevertheless, as binding authority on this court, *Zick* shows that the Sixth Circuit believes they can be drawn while still preserving the integrity of the statutory structure. So while ability to pay cannot alone be sufficient to justify dismissal for cause, *Weeks,* 306 B.R. at 590-91*; see In re Huckfeldt*, 39 F.3d 829, 831-32 (8th Cir. 1994), the Sixth Circuit has recognized it as one factor that may be considered. *Merritt v. Franklin Bank (In re Merritt)*, 211 F.3d 1269 (Table), 2000 WL 420681, *3 (6th Cir. April 12, 2000) (finding ability to repay debts "a relevant inquiry into whether the petition was filed in good faith"); *Zick*, 931 F.2d at 1128 (citing with approval *In re Brown,* 88 B.R. 280, 283-84 (Bankr. D. Haw. 1988) wherein the court considered the debtor's substantial income and ability to repay through adjustment of lifestyle as factors in the good faith analysis). Union has met its burden of proving that there is more here than an ability to pay justifying dismissal of this case: where a debtor is aware of a significant financial obligation owed by him and has the opportunity, but fails, to take any steps to structure his financial affairs in a manner that would allow him to begin to address the

obligation, cause exists to dismiss this Chapter 7 case for lack of good faith.

Notwithstanding that Debtor has already converted this case from Chapter 11 to Chapter 7, the court will allow him an opportunity to file a motion to re-convert the case to Chapter 11. *See* 11 U.S.C. § 706(a); Fed. R. Bankr. P. 1017(f)(2). Debtor may not be eligible for relief through Chapter 13, *see* 11 U.S.C. § 109(g)(both pre- and post- BAPCPA), and BAPCPA significantly changed the substantive law governing individual debtors' Chapter 11 cases, *e.g., In re Bullard*, Case No. 06-30051, 2007 Bankr. LEXIS 100 (Bankr. D. Conn., January 16, 2007), should this case be dismissed and sought to be filed anew under Chapter 11. In the court's view, it would be in the best interests of all involved for the parties to resolve their dispute. Further, it appears to the court that the best and most efficient avenue for doing so remains at this point through the bankruptcy process. This is so at least in part because all parties are essentially looking to Debtor's income as the resource for resolution of the dispute, whether in or out of bankruptcy. Resumption of full blown litigation in the federal court lawsuit pending in the Southern District of Indiana will negatively impact that resource through higher legal fees and costs and more time and delay litigating far from home to the detriment of all. Debtor is 56 years old with a working life and an earning potential that he credibly testified will be limited in his field by age. As it is with all of us, that clock is ticking. Moreover, while Union is Debtor's most substantial creditor, he still has other unsecured debt approaching $100,000 that must also be addressed. This court does not automatically equate lack of good faith in seeking a Chapter 7 discharge with lack of good faith necessitating dismissal for cause under 11 U.S.C. § 1112. Finally, the court notes that neither Union nor any other creditor had any legal basis for seeking to except its debt from Debtor's discharge under 11 U.S.C. § 523, *cf. Zick,* or for objecting to his discharge under § 727. *See* 11 U.S.C. § 1141(d)(2) and (3). The deadline for taking action on either front expired on October 6, 2006, without commencement of any adversary proceeding seeking relief under § 523 or § 727.

A separate order in accordance with this memorandum of decision will be entered.