Dated: May 21 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 06-31813
	)	
Jerry Lee Vanhoose and	)	Chapter 7
Kathy Joette Vanhoose,	)	
	)	
Debtors.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION REGARDING MOTION TO DISMISS

This case is before the court on the United States Trustee's motion to dismiss for abuse brought under 11 U.S.C. § 707(b)(2) and (b)(3) [Doc. # 23] and Debtors' response [Doc. # 27]. After a hearing on the motion that Debtors and their attorney and the attorney for the United States Trustee attended in person, the parties agreed that the court should initially determine only whether there is a presumption of abuse under § 707(b)(2), leaving issues regarding abuse under § 707(b)(3) to be determined after discovery is conducted and an evidentiary hearing is held in the event no presumption exists. The dispositive issue to be determined is whether debtors may include in the calculation considered in determining whether there is a presumption of abuse under § 707(b)(2) a deduction from current monthly income for payments due on secured debt when debtors are surrendering the collateral securing the debt. Because the court concludes that § 707(b)(2) provides for such a deduction, the court will deny the motion to the extent brought under § 707(b)(2) and will set the motion for further hearing to the extent brought under § 707(b)(3).

BACKGROUND

Debtors are married and have no dependents. On July 19, 2006, they filed a joint petition for relief under Chapter 7 of the Bankruptcy Code, listing primarily, if not entirely, consumer debts. On their bankruptcy schedules, Debtors list a 2001 Bayliner boat/trailer ("the boat") with a current market value of $20,000. Schedule D shows that First Merit Bank holds a purchase money security interest in the boat in the amount of $21,258.88. Debtors indicate on their Statement of Intention filed with their petition that they will surrender the boat. On September 7, 2006, the court granted First Merit Bank's motion for relief from stay and authorized abandonment of the boat from the estate.

As required under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Debtors also completed and filed with their petition Official Form B22A, Statement of Current Monthly Income and Means Test Calculation. 11 U.S.C. § 707(b)(2)(C). They report total current monthly income ("CMI"), as that term is defined in 11 U.S.C. § 101(10A), in the amount of $5,283, which is above the median family income for a family of two in Ohio. Debtors' means test calculation involves deductions totaling $5,538.56, which include, among other things, a deduction for payments due on the boat debt during the 60 months following the date of filing their petition. Thus, Debtors report a negative monthly disposable income and indicate that a presumption of abuse under § 707(b)(2) does not arise.

The United States Trustee ("UST") disagrees. UST argues that Debtors' deduction for payments on debt secured by the boat is improper since Debtors intended to surrender the boat after filing their petition and because relief from the automatic stay has been granted with respect to the boat. The parties agree that a presumption of abuse arises only if the deduction is improper.[1]

LAW AND ANALYSIS

As amended by BAPCPA, § 707(b)(1) provides that the court, after notice and a hearing, "may dismiss a case filed by an individual debtor under [Chapter 7] whose debts are primarily consumer debts ... if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7]." Under § 707(b)(2) and (3), Congress provided two methods by which a party may prove abuse. Section 707(b)(2)(A) sets forth an extensive "means test" calculation to determine whether there is a presumption of abuse. The means test calculation permits a debtor to subtract certain allowed deductions from the debtor's CMI. Where the means test calculation results in sufficient disposable income such that a presumption of an abusive filing arises, a debtor may rebut that presumption by demonstrating "special circumstances" as set

[1] UST contends that a number of other figures used by Debtors in their means test calculation are also incorrect. However, even if the court assumes UST is correct as to all of those figures, Debtors' monthly disposable income remains a negative figure unless the boat payment deduction is omitted. The court need only address the permissibility of that deduction.

forth in § 707(b)(2)(B). Even if the presumption is rebutted or if no presumption arises in the first place, the court may still dismiss a case for abuse under § 707(b)(3), which directs the court to consider in any determination of abuse under § 707(b)(1) whether (A) the debtor filed the petition in bad faith or (B) "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." Under the totality of the circumstances test the court may consider both prepetition and postpetition circumstances including a debtor's actual ability to repay debts under a Chapter 13 plan. *See In re Mestemaker*, 359 B.R. 849, 855-56 (Bankr. N.D. Ohio 2007); *In re Hartwick*, 359 B.R. 16, 20 (Bankr. D.N.H. 2007).

The issue that this court must decide, whether § 707(b)(2)(A)(iii) permits a deduction from CMI for payments on debt secured by Debtors' boat when they intended to surrender the boat rather than reaffirm the debt, requires interpretation of the language of that subsection. UST argues that the statute is forward-looking and requires that debtors are actually making payments on the secured debt, while Debtors' position is that the means test is a snapshot view of their financial condition as of the time they filed their petition.

The starting point in interpreting any statute is the language of the statute itself. *Duncan v. Walker*, 533 U.S. 167, 172 (2001). "When the statute's language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Id.* (quoting *United States v. Ron Pair Enterprises*, Inc., 489 U.S. 235, 241 (1989)). However, in the "'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters' . . . the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242-43 (1989)(internal citations omitted).

Under the means test calculation, a debtor is entitled to deduct from CMI his or her "average monthly payments on account of secured debts." 11 U.S.C. § 707(b)(2)(A)(i) and (iii). Section 707(b)(2)(A)(iii) provides as follows:

> The debtor's average monthly payments on account of secured debts shall be calculated as the sum of –
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> (I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and
>
> (II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;
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> divided by 60.

Courts that have interpreted this subsection so far have reached different conclusions, with some courts reaching the same conclusion articulating different reasons for the result. This court has the benefit

of the extensive albeit non-binding analysis devoted to this issue to date. The weight of non-binding precedent does not necessarily produce the correct statutory interpretation, particularly with a new statute. Nevertheless, a clear majority of courts that have addressed the issue have, in this court's view, persuasively determined that a debtor may include in the means test calculation payments on secured debts even if the debtor intends to surrender the collateral post-petition, thus embracing a snapshot view of the statute. *See In re Simmons*, 357 B.R. 480 (Bankr. N.D. Ohio 2006)*; In re Zak,* No. 06-41241, 2007 Bankr. LEXIS 88, 2007 WL 143065 (Bankr. N.D. Ohio Jan. 12, 2007)*; In re Haar*, No. 06-31270, 2007 Bankr. LEXIS 544, 2007 WL 521221 (Bankr. N.D. Ohio Feb. 20, 2007)*; In re Walker*, No. 05-15010-whd, 2006 Bankr. LEXIS 845, 2006 WL 1314125 (Bankr. N.D. Ga. May 1, 2006) (debtors intended to surrender collateral and relief from stay had been granted); *In re Singletary*, 354 B.R. 455 (Bankr. S.D. Tex. 2006) (same); *In re Randle*, 358 B.R. 360 (Bankr. N.D. Ill 2006) (same); *In re Nockerts*, 357 B.R. 497 (Bankr. E.D. Wis. 2006); *In re Oliver,* No. 06-30076RLD13, 2006 Bankr. LEXIS 1607, 2006 WL 2086691 (Bankr. D. Or. 2006); *In re Sorrell*, 359 B.R. 167 (Bankr. S.D. Ohio 2007); *In re Hartwick*, 359 B.R. 16 (Bankr. D. N.H. Feb. 12, 2007); *In re Graham*, Case No. 06-54764, 2007 Bankr. LEXIS 720, 2007 WL 685945 (Bankr. S.D. Ohio Mar. 6, 2007)*; In re Longo*, No. 06-30781 (LMW), 2007 Bankr. LEXIS 902, 2007 WL 836762 (Bankr. D. Conn. Mar. 19, 2007); *In re Galyon*, No. 06-11985-WV, 2007 Bankr. LEXIS 969, 2007 WL 883394 (Bankr. W.D. Okla. Mar. 22, 2007); *In re Hoerlein*, No. 06-12159, 2007 Bankr. LEXIS 1043 (Bankr. S.D. Ohio Apr. 3, 2007); *In re Mundy*, No. 1-06-bk-00875MDF, 2007 Bankr. LEXIS 743, 2007 WL 620971 (Bankr. M.D. Pa. Mar. 1, 2007). This clear majority includes bankruptcy judges of this district. So far the bankruptcy judges of this district who have issued written opinions on this question have decided that a stated intent to surrender collateral does not preclude deduction of payments on underlying debt from CMI.

Other courts have relied on the use of "scheduled as" elsewhere in the Bankruptcy Code and/or the overall purpose of the means test and have found that the statute is forward-looking, concluding that debtors who do not intend to reaffirm and pay their secured debt postpetition may not deduct payments on account of such debt under the means test. *See In re Skaggs*, 349 B.R. 594 (Bankr. E.D. Miss. 2006); *In re Harris,* 353 B.R. 304 (Bankr. D. Okla. 2006); *In re Ray*, C/A No. 06-03988-DD, 2007 Bankr. LEXIS 623, 2007 WL 690131 (Bankr. D.S.C. Feb. 28, 2007).

In *Walker*, the first case to address the issue, the court noted that the term "scheduled" is not defined in the Bankruptcy Code. The court, therefore, applied the dictionary definition "to plan for a certain date" and concluded that the common meaning of "scheduled as contractually due" is "those payments that the

debtor will be required to make on certain dates in the future under the contract." *In re Walker*, 2006 Bankr. LEXIS 845 at *8-*9, 2006 WL 1314125 at *3. The court also noted that Congress expressly limited the additional deduction for payments required in a Chapter 13 case to cure and reinstate a secured debt set forth in the second clause of § 707(b)(2)(A)(iii) to debts that are secured by collateral that is necessary for the debtor's support. The court concluded that had Congress intended to limit the general deduction for secured debt payments to only those debts being reaffirmed, it could have included such language in the first clause of that section. *Id.,* 2006 Bank. LEXIS 845 at *11-*12, 2006 WL 1314125 at *4; *accord In re Simmons*, 357 B.R. at 485; *In re Nockerts*, 357 B.R. at 503; *see In re Randle*, 358 B.R. at 363 (finding Congress's choice of language shows a clear intent not to limit the deduction to payments debtors actually intend to make postpetition); *cf. In re Hoerlein*, 2007 Bankr LEXIS at *4-*6 (relies as other courts do on the basic bankruptcy principle that debts are not extinguished by Chapter 7 discharge). Because the debtors were still contractually obligated to make the payments on the date they filed their bankruptcy petition, the court found the deduction for payments on account of secured debt under § 707(b)(2)(A)(iii)(I) was proper.

While the same result was obtained, another approach was taken by Judge Speer of this district in *Haar*. In that case, the court agreed with UST that the word "scheduled" should be accorded its common usage in bankruptcy, that is, "those written materials which are required to accompany a debtor's petition." *In re Haar*, 2007 Bankr. LEXIS 544 at *18, 2007 WL 521221 at *6. The court first considered the term "contractually due." Because, notwithstanding the surrender of collateral securing a debt, a debtor's rights and duties under an otherwise enforceable prepetition contract remain after filing a bankruptcy petition, wherein debtors are required to disclose (i.e. schedule) all debts, the court found that a reading of just that term did not support the UST's forward-looking argument. *Id.,* 2007 Bankr. LEXIS 544 at *15-*16, 2007 WL 521221 at *5; *see In re Sorrell*, 359 B.R. at 184-85. The court next considered whether the modifier "scheduled as" compels a different conclusion and found that it did not. The court explained:

> For certain categories of debts, secured obligations included, the holder of the debt has no present and vested claim against the debtor. For example, a debtor is required to list obligations for which he or she is a codebtor, but so long as the primary obligor has not defaulted, the debtor has no contractual duty to make payments on the debt at the time the petition is filed. This would also be the case with debts which are scheduled as disputed, contingent, or unliquidated.
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> Consequently, in some limited circumstances, scheduling a debt in a petition will denote that the obligation is not "contractually due," thereby giving effect to the term "scheduled as" in the statute. Conceptually this makes sense. A debtor should not be able to take a deduction under the 'means test' on an [sic] contingent obligation, such as that arising when a debtor co-signs on a loan for a child, which is not presently due and may never become due.

> However, this is a far cry from the position advocated by the UST: that scheduling a debt in a petition means that the obligation is, for all purposes, no longer "contractually due" within the meaning of § 707(b)(2)(A)(iii)(I).

Id., 2007 Bankr. LEXIS 544 at *19-*20, 2007 WL 521221 at *6. The court concluded that "whether the word 'scheduled' is read according to its dictionary definition or in conformity with its common bankruptcy usage is really a distinction without a difference" and that under either interpretation, § 707(b)(2)(A)(iii) does not condition the deduction for payments on account of secured debt on actual payments being made postpetition. *Id.*. 2007 Bankr. LEXIS 544 at *20-*21, 2007 WL 521221 at *7.

For good reason, the "written materials which are required to accompany a debtor's petition" that the *Haar* court focused on were a debtor's schedules, not a debtor's statement of intention. As one court explained, "a debtor's statement of intention is not a schedule." *In re Sorrell*, 359 B.R. at 185. "The Bankruptcy Code, both before and after BAPCPA, distinguished, in plain language, between a schedule and a statement of intention." *Id.* (citing as support §§ 521(a)(1)(B) and (a)(2)). A debtor's schedules of property, who is owed what, executory contracts, co-debtors, actual income at filing and actual expenses at filing are signed under of penalty of perjury. *See* Official Form 6-Declaration. The Official Form 8-Chapter 7 Individual Debtor's Statement of Intention is not. There is no statutory basis to infer that Congress intended under § 707(b)(2)(A)(iii) to ignore the distinction between sworn statements of fact in schedules and the non-binding articulation of predictive intentions in Official Form 8. One result of UST's argument would be that a debtor who initially indicates an intention to surrender collateral would be treated differently in applying the presumption of abuse than an otherwise similarly situated debtor who initially indicates an intention to reaffirm a secured debt then does not and surrenders the collateral, perhaps because the secured creditor refused to reaffirm. Post-petition both debtors would end up in the same financial position, but with one case presumed to be abusive and one not. Likewise there is no statutory basis to infer that Congress intended such an unprincipled result, one which the court finds is at odds with the words of the statute. This court agrees that applying the dictionary definition or the common bankruptcy usage of "scheduled as" is a distinction without a difference and further agrees that, for the reasons discussed above, the plain language of § 707(b)(2)(A)(iii) does not impose a limitation on the deduction for secured debt payments based on the debtor's statement of intention or on post-petition events, such as the surrender of collateral or the granting of relief from stay. Under the means test, Congress set forth various categories of expenses that may be deducted from CMI and expressly stated how each category is to be calculated. *See* § 707(b)(2)(A)(ii), (iii), and (iv). Where Congress intended that actual expenses be deducted from CMI, it expressly so stated. *See* § 707(b)(2)(A)(ii)(I) (providing that certain categories of expenses "shall

be . . . the amounts specified under the National Standard and Local Standards, but permitting the debtor's "actual monthly expenses" for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service); § 707(b)(2)(A)(ii)(II) (permitting the continuation of "actual expenses paid" that are reasonable and necessary for care and support of elderly, chronically ill, or disabled household members and certain other family members); § 707(b)(2)(A)(ii)(IV) (permitting under certain conditions, the "actual expenses" for a dependent to attend a private or public elementary or secondary school); *cf. Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (stating "[w]here Congress includes particular language in one section but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

The few cases interpreting § 707(b)(2)(A)(iii) as a forward-looking provision do not persuade the court otherwise. In *Skaggs*, the court relied on the use of "scheduled as" in § 1111(a) wherein Congress is clearly referring to bankruptcy schedules.[2] The court concluded that the same meaning should be given the term in § 707(b)(2)(B)(A)(iii) and that a court should, therefore, refer to "the debtors' schedules and statements" in determining whether a debt is "scheduled as contractually due." *In re Skaggs*, 349 B.R. at 599. In *Harris*, the court followed the reasoning in *Skaggs* and found that "the means test was intended to 'ensure that those who can afford to repay some portion of their unsecured debts [be] required to do so'" *In re Harris*, 353 B.R. at 309. However, as one court observed, these cases do not articulate why a debtor's statements affect whether a debt is "scheduled." *In re Galyon*, 2007 Bankr. LEXIS 969 at *8, 2007 WL 883394 at *3. As indicated above, a statement of intention is not a schedule.

To the extent that *Skaggs* and *Harris* rely on the supposed general Congressional intent to ensure that debtors who can pay some portion of their unsecured debts be required to do so, such intent does not control over the specific language of § 707(b)(2)(A)(iii) setting forth a particular formula for calculating the deduction for payments on account of secured debt. *In re Randle*, 358 B.R. at 364-65; *cf. United States v. Granderson*, 511 U.S. 39, 68-69 (1994) (Scalia, J., concurring) ("It is beyond our province to rescue Congress from its drafting errors, and to provide for what we might think, perhaps along with some Members of Congress, is the preferred result."). Moreover, "[t]o the extent it is discernable, Congress' intent in enacting the Means Test was to create a 'mechanical' formula for presuming abuse of Chapter 7."

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[2] Section 1111(a) provides that "a proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(1) or 1106(a)(2) of this title, except a claim or interest that is *scheduled as* disputed, contingent, or unliquidated." (Emphasis added). This use of "scheduled as" supports the interpretation in *Haar*, that a debt that is not scheduled as disputed, contingent, or unliquidated is "scheduled as contractually due." *See Haar*, 2007 Bankr. LEXIS 544 at *20, 2007 WL 521221 at *6.

Id. at 363 (citing Report of the Committee on the Judiciary, House of Representatives, to Accompany S. 256, H.R. Rep. No. 109-31, Pt. 1, p. 553, 109th Cong., 1st Sess. (2005)). The reality of Congress' use of the mechanical formula of the means test is that the result does not necessarily comport with a debtor's actual income or actual expenses or ability to fund a Chapter 13 plan to repay creditors. However, "Congress did not remove the ability of bankruptcy courts to consider [actual] circumstances, including postpetition developments, in determining abuse." *In re Hartwick*, 359 B.R. at 21. Rather, in § 707(b)(3), it incorporated the judicially created totality of the circumstances test, which allows consideration of both prepetition and postpetition circumstances. *Id.* As one court explained:

> To allow a movant to include the outcome of future events as part of the means test would eliminate the distinction between the presumption of abuse test and the totality of the circumstances test.

In re Singletary, 354 B.R. at 465; *see In re Henebury*, No. 06-13354-BKC-PGH, 2007 Bankr. LEXIS 825, 2007 WL 853463 (Bankr. S.D. Fla. Mar. 16, 2007)(court considers fact of future non-payment of mortgage debt in § 707(b)(3) totality of circumstances analysis).

For the reasons discussed above, the court rejects the forward-looking approach urged by UST and finds that Debtors' deduction under the means test for payments on account of debt secured by the boat falls within the plain meaning of § 707(b)(2)(A)(iii)(I). The court will enter a separate order in accordance with this memorandum of decision.