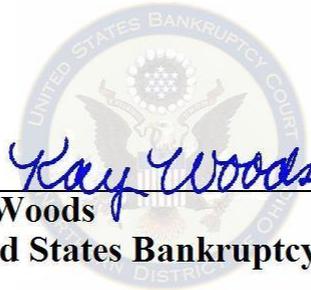


**IT IS SO ORDERED.**



**Dated: April 12, 2011  
05:06:05 PM**

**Kay Woods  
United States Bankruptcy Judge**

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

<b>IN RE:</b>	*	
	*	
	*	<b>CASE NUMBER 10-44201</b>
	*	
<b>PATRISHA A. STIEGLER,</b>	*	<b>CHAPTER 7</b>
	*	
<b>Debtor.</b>	*	<b>HONORABLE KAY WOODS</b>
	*	

\*\*\*\*\*  
**MEMORANDUM OPINION REGARDING MOTION OF  
UNITED STATES TRUSTEE TO DISMISS CASE**  
\*\*\*\*\*

This cause is before the Court on Motion of the United States Trustee to Dismiss Case for Abuse Pursuant to 11 U.S.C. Sections 707(b)(1), (b)(2), and (b)(3) ("Motion to Dismiss") (Doc. # 14) filed by the United States Trustee for Region 9, Daniel M. McDermott ("UST") on February 2, 2011. The UST moves to dismiss the voluntary chapter 7 petition filed by Debtor Patrisha A. Stiegler ("Debtor") on November 9, 2010. Prior to filing the Motion to Dismiss, the UST filed a statement of presumed abuse on January 10, 2010.

The Court held a preliminary hearing on the Motion to Dismiss

on March 3, 2011. At that time, the parties requested that the issues raised in the Motion to Dismiss be bifurcated so that the Court could first determine the legal issue for dismissal under § 707(b)(2), *i.e.*, whether the Debtor's unemployment compensation was properly excluded on the Means Test for the purpose of determining current monthly income ("CMI"). The Court ordered the parties to brief the issue: the UST was to submit a brief on or before March 24, 2011; and the Debtor's response brief was due on or before April 14, 2011. The UST filed Brief in Support of Motion of the United States Trustee to Dismiss Case for Abuse Pursuant to 11 U.S.C. Sections 707(b)(1), (b)(2), and (b)(3) ("UST's Brief") (Doc. # 17) on March 8, 2011. On March 30, 2011, the Debtor filed Brief in Opposition to United States Trustee's Motion to Dismiss ("Debtor's Brief") (Doc. # 18). On April 6, 2011, the UST filed Reply to Brief in Opposition to United States Trustee's Motion to Dismiss ("UST's Reply") (Doc. # 19).

As the sole issue of whether unemployment compensation is included or excluded in calculating CMI has been fully briefed, the Court will rule on this issue based upon the briefs. For the reasons set forth below, this Court finds and holds that unemployment compensation benefits do not fall within the exclusion of "benefits received under the Social Security Act" (11 U.S.C. § 101(10A)(B)) and, thus, are includable in calculating CMI.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in

this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

### **I. FACTS**

The Debtor is married and has a two-year old child. The Debtor's spouse did not file a bankruptcy petition. The Debtor's chapter 7 petition states that her debts are "primarily consumer debts." (Pet. at 1.) Schedule F to the Petition lists unsecured nonpriority debts in the amount of \$125,767.94, including student loans in the amount of \$41,566.94, credit card debt and store credit. The Debtor did not schedule any secured debt on Schedule D or any priority unsecured debt on Schedule E. In addition, the Debtor does not list any co-debtors on Schedule H. The Debtor's Schedule A lists no interest in real property. Her Schedule B lists personal property in the aggregate amount of \$2,710.00.

Currently unemployed, the Debtor states on Schedule I that she has no income; however, prior to filing the Petition, the Debtor received unemployment compensation of approximately \$875 per month. The Debtor's spouse is listed as a service tech for AT&T, earning gross monthly wages of \$6,449.00. (Sched. I.) Schedule I reflects monthly gross income of \$6449.00 (which computes to \$77,388.00 annually) and a net household income of \$4,756.00 per month.

The Debtor's Statement of Financial Affairs ("SOFA") shows that

she received unemployment compensation in each of the years 2008, 2009 and 2010, as well as income from employment in 2008 and 2010. (SOFA at 1-2.)

When the Debtor completed the Chapter 7 Statement of Current Monthly Income and Means-Test Calculation on Form B22 ("Means Test"), she identified unemployment income in the amount of \$875.00 per month on line 9 and attributed this amount as a benefit under the Social Security Act. As a consequence, the Debtor did not include her unemployment compensation in calculating CMI. Because the Debtor's annualized income of \$77,388.00 is above the applicable state median income for a household of three, she completed the full Means Test, marking the box that the presumption of abuse does not arise.

The UST asserts that the Debtor failed to accurately calculate her income because she excluded unemployment compensation in determining CMI. The UST contends that the Debtor's unemployment compensation should be included as income, which would show disposable income exceeding the statutory threshold of abuse.

## **II. LEGAL ARGUMENTS AND ANALYSIS**

The UST acknowledges that there is a split of authority among bankruptcy courts on whether unemployment compensation should be used to calculate CMI, but represents that the only District Court to consider the issue and the majority of bankruptcy courts to do so have concluded that unemployment compensation is not a benefit received under the Social Security Act that may be excluded from

income on the Means Test. The UST cites *Washington v. Reding* (*In Re Washington*), 438 B.R. 348, 350 (M.D. Ala. 2010); *In re Overby*, 2010 WL 3834647, 2010 Bankr. LEXIS 3183 (Bankr. W.D. Mo. Sept. 24, 2010; *In re Winkles*, 2010 WL 2680895, 2010 Bankr. LEXIS 2151 (Bankr. D.D. Ill. July 6, 2010); *In re Kucharz*, 418 B.R. 635, 642 (Bankr. C.D. Ill. Oct. 28, 2009); and *In re Baden*, 396 B.R. 617 (Bankr. M.D. Pa. 2008) all for the proposition that benefits received under the Social Security Act do not include unemployment benefits. The UST notes that *In re Munger*, 370 B.R. 21 (Bankr. D. Mass. 2007) and *In re Sorrell*, 359 B.R. 182 (Bankr. S.D. Ohio 2007) are to the contrary. (UST's Brief at 4.)

The Debtor relies only on *In re Sorrell* to support her position that unemployment compensation is excludable from CMI. The Debtor posits that states, in enacting unemployment programs, are "required to follow federal mandates that are 'inextricably entwined with the Social Security Act.'" (Debtor's Brief at 1, apparently quoting *In re Sorrell* without citation.)

There is, indeed, a split of authority on whether state unemployment compensation benefits fall within the definition of "benefits received under the Social Security Act." If unemployment compensation is a benefit received under the Social Security Act, it is excluded from the definition of CMI. (11 U.S.C. § 101(10A)(B).) The published decisions that have considered whether or not to exclude unemployment compensation from CMI as a "benefit under the Social Security Act" have thoughtfully and thoroughly considered the

plain language of the Bankruptcy Code, the legislative history behind the exclusions in § 101(10A)(B) and similar language in § 522, the purpose and context of the 2005 amendments that resulted in BAPCPA, the history of the Social Security Act and much more. This Court will not review all of the cases here, but does find persuasive the thorough analysis of Judge Thomas L. Perkins in *In re Kucharz*. Judge Perkins first noted:

Unemployment payments are excludable only if they are properly characterized as benefits received under the Social Security Act. It not sufficient that the benefits are merely "related to" or "envisioned by" or "induced by" the SSA. More is required. They must have been received *under* the SSA.

418 B.R. 635 at 641 (emphasis in original). The Court then found that "under" meant "required by" or "in accordance with." *Id.*

Judge Perkins reasoned that:

Unemployment benefits are paid as required by state law, not by the SSA. To the extent that extended benefits may, from time to time, be required by federal law, and paid, in part, with federal funds, they are required by the EUCA and by stand-alone bills that are passed in times of high unemployment, not by the SSA or any amendments to the SSA. Thus, a purely textual analysis favors the conclusion that unemployment benefits are not received under the SSA.

*Id.* (emphasis added.) Because the language of the provision was ambiguous, however, Judge Perkins found it appropriate to also consider the context of the statute.

Debtors who are retired or who no longer work because of a disability usually have a predictable fixed income stream. Working debtors, however, are subject to a variety of unforeseeable events that affect their jobs and income, such as plant closings, downsizing, layoffs, reduction in hours, job changes, etc. Unemployment compensation is a temporary, partial substitute for wages lost due to the involuntary unemployment of one who

intends to return to the workforce. The theory behind CMI is premised upon the assumption that their recent earnings history is a valid predictor of how much debtors are likely to earn in the future. Since unemployment benefits replace lost wages, including those benefits in the CMI calculation is consistent with the predictive purpose of the provision. Excluding those benefits would be inconsistent with the statute's policy and purpose. The fallacy of using \$0 during periods of temporary unemployment as a predictor of future earnings once the debtor is reemployed seems obvious. In this regard, unemployment compensation is unlike old age, survivors and disability benefits received under the SSA, and is unlike payments to victims of war crimes, crimes against humanity or terrorism. None of those excluded benefits is a temporary substitute for lost wages. So a contextual analysis weighs in favor of including unemployment benefits in a debtor's CMI.

*Id.* at 642. (emphasis added.)

This Court also finds that both the text and the context of § 101(10A)(B) weigh in favor of including unemployment compensation benefits in calculating CMI. This Court adopts the analysis in *In re Kucharz*, being persuaded that the better view is that unemployment compensation benefits do not fall under the exclusion to CMI as "benefits received under the Social Security Act." As a consequence, the Debtor was required to include her unemployment compensation in the Means Test.

As the Debtor has conceded, inclusion of her unemployment benefits gives rise to the presumption of abuse. (Debtor's Brief at 1.) The Debtor argues, however, that if the presumption of abuse arises, she has rebutted that presumption based on the "unreliability of the unemployment income." (*Id.*) The Debtor further represents that she "has learned that her unemployment benefits have been completely exhausted, as shown by the document

attached hereto." (*Id.* at 2.) The attached document is an Inquiry Response Letter from the Ohio Department of Job and Family Services, dated March 25, 2011. The Debtor failed to attach any type of declaration or affidavit concerning the attachment to her brief.

The Debtor acknowledges that she would have approximately \$850 per month to fund a chapter 13 plan if she were to continue to receive \$875 in unemployment benefits each month, but "without the unemployment income, Debtor does not possess the means to fund a Chapter 13 plan." (Debtor's Brief at 2.)

In reply to the Debtor's argument that she has rebutted the presumption of abuse, the UST contends that the presumption of abuse "may **only** be rebutted by demonstrating special circumstances, . . . that justify . . . adjustments of current monthly income for which there is no reasonable alternative." (UST's Reply at 2, quoting 11 U.S.C. § 707(b)(2)(B)(i).) The UST notes that the Debtor bears the burden of proving special circumstances, citing *Eisen v. Thompson*, 370 B.R. 762, 762-774 (N.D. Ohio 2007).

The UST further notes that the statute has both procedural and substantive requirements, which the Debtor has failed to meet. Specifically, the UST argues that the Debtor did not comply with the procedural requirement of providing a declaration with an explanation concerning why the special circumstances rebutted the presumption. (UST's Reply at 3.) See *In re Vaccariello*, 375 B.R. 809, 814-15 (Bankr. N.D. Ohio 2007) (debtors did not meet procedural requirement because they failed to provide in their declaration an

explanation of why student loan payment was a special circumstance that rebutted presumption).

This Court agrees that the Debtor has failed - both procedurally and substantively - to demonstrate special circumstances to rebut the presumption of abuse. The Debtor simply attached a document indicating that her unemployment compensation benefits have been exhausted. She failed to provide any information concerning her ability or inability to obtain alternative income to replace the unemployment compensation benefits. The Debtor provided no information that she has conducted any type of job search or that she is unable to find work with income to replace the unemployment compensation. That being said, however, if the Debtor chooses to convert her case to chapter 13, she could, under the analysis of the Supreme Court decision in *Hamilton v. Lanning*, 130 S. Ct. 2464 (2010) use the termination of unemployment compensation benefits to determine projected disposable income to the extent such termination is "known or virtually certain." *Id.* at 2478 (holding that "when a bankruptcy court calculates a debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation.")

### **III. CONCLUSION**

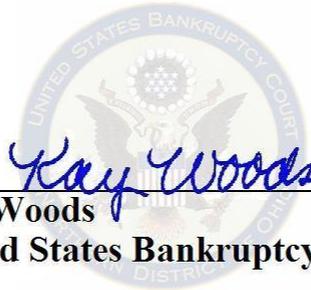
The Court finds that the Debtor's unemployment compensation benefits are not a "benefit received under the Social Security Act" and thus, are not excluded from the definition of CMI. Accordingly, the Debtor was required to include her unemployment compensation

benefits in calculating her CMI. With the inclusion of such benefits, the presumption of abuse arises. The Court further finds that the Debtor failed to rebut the presumption of abuse based on special circumstances. As a consequence, the UST's Motion to Dismiss under 11 U.S.C. § 707(b)(2) is well taken. The Court will provide the Debtor fourteen (14) days to convert her case to one under chapter 13. If the case is not converted within fourteen days after entry of the order in this case, the Court will enter any order granting the Motion to Dismiss.

An appropriate order will follow.

# # #

**IT IS SO ORDERED.**



**Dated: April 12, 2011  
05:06:05 PM**

**Kay Woods  
United States Bankruptcy Judge**

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

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<b>Debtor.</b>	*	<b>HONORABLE KAY WOODS</b>
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**ORDER REGARDING MOTION OF  
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This cause is before the Court on Motion of the United States Trustee to Dismiss Case for Abuse Pursuant to 11 U.S.C. Sections 707(b)(1), (b)(2), and (b)(3) ("Motion to Dismiss") (Doc. # 14) filed by the United States Trustee for Region 9, Daniel M. McDermott ("UST") on February 2, 2011. The UST moves to dismiss the voluntary chapter 7 petition filed by Debtor Patrisha A. Stiegler ("Debtor") on November 9, 2010. Prior to filing the Motion to Dismiss, the UST filed a statement of presumed abuse on January 10, 2010.

For the reasons set forth in this Court's Memorandum Opinion

entered on this date, the Court hereby provides the Debtor fourteen (14) days to convert her case to one under chapter 13. If the case is not converted within fourteen days after entry of the order in this case, the Court will enter any order granting the Motion to Dismiss.

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