IT IS SO ORDERED.

Dated: July 16, 2014
12:53:45 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 13-42724**
RYAN F. LAATSCH and	*	
MEGAN M. LAATSCH,	*	**CHAPTER 7**
	*	
Debtors.	*	**HONORABLE KAY WOODS**
	*	

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MEMORANDUM OPINION REGARDING MOTION TO DISMISS FOR ABUSE

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Daniel M. McDermott, the United States Trustee for Region 9 ("UST"), filed Motion to Dismiss the Case for Abuse Pursuant to 11 U.S.C. § 707(b)(1) and (3) ("Motion to Dismiss") (Doc. 17) on March 31, 2014. The UST urges the Court to find that the totality of the circumstances warrants dismissal of the chapter 7 case filed by Debtors Ryan F. Laatsch and Megan M. Laatsch. On April 22, 2014, the Debtors filed Request for Hearing on Motion to Dismiss Case for Substantial Abuse 707(b)(1)&(3) and Preliminary Response ("Response") (collectively, Doc. 21).

On June 24, 2014, the Court held an evidentiary hearing on the Motion to Dismiss ("Hearing"), at which appeared: the Debtors, with their counsel, Morris H. Laatsch, Esq., and Scott R. Belhorn, Esq. on behalf of the UST. Three witnesses provided testimony at the Hearing: (i) John Weaver, bankruptcy analyst for the office of the UST; (ii) Debtor Ryan F. Laatsch ("Ryan"); and (iii) Debtor Megan M. Laatsch ("Megan").

The Court admitted the following exhibits into evidence: Exhibits A through H offered by the UST and Exhibits 7 through 13 offered by the Debtors.[1] At the conclusion of the Hearing, the Court took the matter under advisement. The Court has reviewed and considered (i) the arguments of counsel, the testimony of the witnesses and the exhibits admitted into evidence at the Hearing; (ii) the documents filed by the UST and the Debtors in support of their respective arguments; and (iii) and the record as a whole. For the reasons set forth herein, the Court will deny the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 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

[1] Exhibits 1 through 3 were excluded as duplicative of the tax returns already admitted into evidence. Exhibits 4, 5, 6 and 14 were excluded as they were intended to be proffered for demonstrative purposes but were not specifically utilized during the Hearing.

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. BACKGROUND

The Debtors filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on December 16, 2013 ("Petition Date"). On June 11, 2014, the Debtors filed Amended Summary of Schedules, Schedule H and Declaration Concerning Debtor's Schedules (Doc. 26). The Debtors filed Second Amended Summary of Schedules, Schedule H and Declaration Concerning Debtor's Schedules (Doc. 30) on July 14, 2014.

The Debtors are married and have two children, ages 3 and 7. (Sched. J.) Both Debtors are employed: Ryan is a police officer and Megan is a licensed practical nurse. (Sched. I.) On their petition, the Debtors scheduled: (i) total assets of $158,260.00, of which $115,000.00 is the value of their residence; and (ii) total liabilities of $245,910.92, including $144,872.09 in secured debt and $101,038.83 in unsecured non-priority debt. (Second Am. Summ. Of Scheds.) The vast majority (*i.e.*, $71,155.55) of the Debtors' unsecured debt is from student loans. (Sched. F.) A promissory note and credit cards are the basis for the remaining unsecured debt of $29,883.28. (*Id.*)

A. Employment

Since June 2007, Ryan has been a police officer with the Youngstown Police Department and a member of the S.W.A.T. crisis response team. He testified that he expects this employment to continue for the foreseeable future. According to Schedule I, Ryan's monthly net income is $3,561.66. He testified that his paychecks fluctuate, despite a consistent hourly rate, due to overtime hours, special assignments and court appearances. He stated that his employer's overtime offerings have declined over the last few years, which has resulted in a reduction in his annual income of several thousand dollars each year since 2011.

Megan is a licensed practical nurse and has been employed with Akron Children's Hospital since the fall of 2010. She testified that her employment is also likely to continue for the foreseeable future although she hopes to arrange for a hiatus so that she can complete the required clinical training to become a registered nurse.[2] According to Schedule I, Megan's monthly take-home pay is $1,679.97.

[2] Megan testified that she has been taking courses at Brown Mackie College, a nursing college, to "bridge" her LPN degree to an RN degree. She stated that her classroom course work is complete, but she is required to complete clinical training in a hospital setting. She could complete the clinical training in 12 to 18 months, but such training would require her to work at least one day per week in a training hospital. She said that she has no immediate plans to complete the clinical training because she would have to quit her job at Akron Children's Hospital in order to do so; however, she and Ryan are actively seeking alternative arrangements to facilitate her temporary period of unemployment because the advanced license would result in a significant salary increase.

B. Student Loans

Both Debtors have outstanding student loan obligations. Ryan attended the University of Akron and the Stark State College Police Academy ("Police Academy"). His student loan debt consists of the following:

(i) $2,889.83 owed to Sallie Mae, Inc. for attendance at the Police Academy. This loan is co-signed by Richard R. Stalnaker, Ryan's uncle. Payments on this loan are current, with the Debtors making the monthly payment of approximately $50.00.

(ii) $642.82 owed to Great Lakes Higher Education Corporation ("Great Lakes") for attendance at the University of Akron. There is no co-signor on this loan. This loan is also current. The Debtors make the monthly payment of approximately $38.00.

Megan attended the University of Akron, Kent State University and Brown Mackie College. Her student loan debt consists of the following:

(i) $37,108.04 owed to Great Lakes for attendance at the University of Akron. This loan is co-signed by: (i) Michael Karipides, Megan's father; and (ii) Mary Hepler, Megan's aunt. Payments on this loan are current. The

monthly payment of approximately $313.00 is paid by Michael Karipides.[3]

(ii) $6,514.86 owed to American Educational Services for attendance at Kent State University. There is no co-signor on this loan. The payments on this loan are current and the monthly payment of approximately $50.00 is being paid by the Debtors.

(iii) $24,000.00 owed to Sallie Mae, Inc. for attendance at Brown Mackie College. This loan is not co-signed and is currently in deferment because Megan was taking classes through May 2014.[4] Megan anticipates that the in-school deferment will end and the repayment obligation of approximately $300.00 per month will begin soon.[5]

C. Tax Refunds

The Debtors had combined adjusted gross income of $86,129.00 in 2011; $79,050.00 in 2012; and $78,246.00 in 2013, which resulted in federal tax refunds of $5,976.00; $4,573.00; and $3,557.00,

[3] Megan testified that, although her father made the monthly payments on this loan on her behalf pre-petition and continued to do so as of the date of the Hearing, the Debtors intend to start paying this student loan and have included it in their budget, as outlined on Schedule J. Both Debtors testified, however, that despite budgeting for this debt on Schedule J, the Debtors do not have the money to make the payment.

[4] Amended Schedule H indicates that this loan is co-signed by Susie Karipides; however, Megan testified that this information was an inadvertent mistake and the loan does not have a co-signor. The Debtors' list of co-signors was updated on the Second Amended Schedule H.

[5] This loan appears on Schedule F, but its monthly payment is not included on Schedule J.

respectively, in each of those years. Ryan testified that he claimed zero dependents for federal tax withholding purposes in years 2011 through 2013. However, in late 2013 or early 2014, he changed his tax withholding to reflect two dependents in order to maximize his take-home pay. Fearing that he was not having sufficient tax withheld, approximately one week prior to the Hearing, Ryan changed the withholding back to zero dependents.

D. Debtors' Monthly Pay

Line 12 of Schedule I shows that the Debtors' combined monthly net income is $5,241.63. Against this income, Schedule J shows that the Debtors' total average monthly expenses are $5,214.50, resulting in a monthly net income of $27.13.

II. STANDARD OF REVIEW

Section 707(b) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") provides for dismissal of a chapter 7 case when the granting of relief would be an abuse of the provisions of chapter 7. According to the Bankruptcy Code:

> After notice and a hearing, the court . . . may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or . . . convert such a case . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter.

11 U.S.C. § 707(b)(1) (West 2014).

A presumption of abuse may arise based upon a detailed calculation of the debtor's income and expenses over the course of

the six-month period preceding the petition date — commonly referred to as the "means test." *See* 11 U.S.C. § 707(b)(2).

In the event the means test does not give rise to a presumption of abuse, or the presumption is successfully rebutted by the debtor, § 707(b)(3) provides an alternative rationale for dismissing the debtor's chapter 7 petition:

> In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter . . . the court shall consider–
>
> > (A) whether the debtor filed the petition in bad faith; or
> >
> > (B) the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse.

11 U.S.C. § 707(b)(3).

"[T]he two grounds for dismissal under § 707(b)(3) are best understood as a codification of pre-BAPCPA case law," and as such, pre-BAPCPA case law applying these concepts is still helpful in determining whether there is abuse pursuant to § 707(b)(3).[6] *In re Wright*, 364 B.R. 640, 643 (Bankr. N.D. Ohio 2007).

However, Congress has changed the standard for dismissal under BAPCPA from "substantial abuse" to "abuse." *In re Fisher*, No. 06-30487, 2007 WL 2079781, at *2 (Bankr. N.D. Ohio July 16, 2007) ("[U]nder BAPCPA, Congress has clearly lowered the standard

[6] As a consequence, the Bankruptcy Courts for the Northern District of Ohio have applied pre-BAPCPA case law in considering whether abuse exists under § 707(b)(3). *In re Wright*, 364 B.R. 640; *In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007); *In re Simmons*, 357 B.R. 480 (Bankr. N.D. Ohio 2006).

for dismissal in changing the test from 'substantial abuse' to 'abuse.'"); *In re Wright*, 364 B.R. at 642 ("[A] debtor's Chapter 7 case may [now] be dismissed for just 'abuse,' as opposed to 'substantial abuse' . . . ").

The Sixth Circuit, interpreting pre-BAPCPA § 707(b), held that Congress intended to deny chapter 7 relief to the "dishonest or non-needy debtor." *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). The *Krohn* Court reasoned that a debtor's ability to repay his debts out of future earnings may be sufficient to warrant dismissal based upon lack of need, particularly "where [a debtor's] disposable income permits liquidation of his consumer debts with relative ease." *Id.; see Mestemaker*, 359 B.R. at 856 ("Courts generally evaluate as a component of a debtor's ability to pay whether there would be sufficient income in excess of reasonably necessary expenses to fund a Chapter 13 plan."). Other factors to be considered in determining whether a debtor is "needy" include:

> [W]hether 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 126-27.

Courts and commentators alike have recognized that the § 707(b)(3) "totality of the circumstances" analysis requires a

bankruptcy court to undertake an analysis of a debtor's "actual debt paying ability" independent of the means test analysis under § 707(b)(2). *In re Mestemaker*, 359 B.R. at 853-56. As Judge Wedoff, Bankruptcy Judge for the Northern District of Illinois, wrote in the introduction to his leading article on the subject:

> [I]f a section 707(b) motion properly raises the question, a bankruptcy judge has a duty to consider the actual financial situation of a debtor who is not subject to a means test presumption; . . . the judge should find abuse where the debtor can repay a sufficient amount of unsecured debt. . . . [T]he means test serves to guide, rather than foreclose, such determinations of abuse.

Hon. Eugene R. Wedoff, *Judicial Discretion to Find Abuse Under 707(b)(3)*, 71 Mo. L. Rev. 1035, 1037 (2006). The court's analysis of the totality of the circumstances also allows it to consider both pre-petition and post-petition circumstances of the debtor. *In re Fisher*, 2007 WL 2079781, at *2 (citing *Trustee v. Cortez (In re Cortez)*, 457 F.3d 448, 455 (5th Cir. 2006)); *In re Mestemaker*, 359 B.R. at 855-56.

Congress also eliminated the pre-BAPCPA express statutory presumption in favor of granting the debtor the requested relief. Neither party enjoys a presumption concerning abuse in a post-BAPCPA § 707(b) analysis. *In re Nockerts*, 357 B.R. 497, 505 (Bankr. E.D. Wis. 2006) ("The UST does not enjoy the benefit of a presumption of abuse when pursuing a § 707(b)(3) motion."); *In re Wright*, 364 B.R. at 642 (stating that Congress eliminated in BAPCPA the presumption in favor of the debtor, which existed in former

§ 707(b)). As the party bringing the Motion to Dismiss, therefore, the UST carries the burden of proof to demonstrate that dismissal is appropriate under § 707(b)(3). *In re Graham*, 363 B.R. 844, 853 (Bankr. S.D. Ohio 2007); *In re Wright*, 364 B.R. at 643.

III. ARGUMENTS OF THE PARTIES

In conjunction with the Hearing, the parties' arguments were presented and supported in the following documents filed with the Court: (i) the UST's Motion to Dismiss; (ii) the Debtors' Response; (iii) the UST's List of Legal Authorities (Doc. 27) filed on June 20, 2014; (iv) the Debtors' Supplement to Preliminary Response Filed by Debtors in Response to Motion of United States Trustee to Dismiss for Substantial Abuse ("Supplement") (Doc. 28) filed on June 23, 2014; and (v) the parties' Stipulations (Doc. 29) filed on June 23, 2014.

A. UST's Position

The UST's Motion to Dismiss is premised upon the Debtors' chapter 7 case being an abuse pursuant to § 707(b)(1) and (3) of the Bankruptcy Code because the Debtors have the ability to repay a significant portion of the amount they owe their creditors. (Mot. to Dismiss at 1.) At the Hearing, Mr. Weaver testified that the Debtors' stated monthly net income of $27.13 is understated for the following three reasons: (i) the $452.00 expense budgeted for repayment of student loans on Schedule J should be included in monthly net income; (ii) the Debtors' year-to-date pay advices

indicate that the Debtors' monthly income is higher than listed on Schedule I; and (iii) the Debtors' federal tax refunds for the past several years show that they have too much withheld for federal income taxes, which, if corrected, could result in an additional $200.00 in monthly net income.

1. $452.00 Student Loan Expense

The Debtors' Schedule J (line 21) budgets $452.00 for the repayment of student loans, which the UST contends must be removed as a line-item expense and included in the Debtors' monthly net income for the purpose of calculating the Debtors' ability to repay their creditors. The UST acknowledges that student loans are excepted from discharge absent a showing of undue hardship, as set forth in 11 U.S.C. § 523(a)(8). (Mot. to Dismiss at 4.) The fact that debts incurred for educational purposes may be collected after discharge, however, does not mean that such debts may be preferred over other non-priority, unsecured creditors. (*Id.*) He argues that the Debtors cannot defend a motion to dismiss under § 707(b)(1) by agreeing to pay some unsecured, pre-petition claims while seeking to discharge others. (*Id.* at 3.) As a consequence, he states, "The Debtors' student loan payments should be made available to all of their unsecured creditors, including student loan lenders, on a *pro rata* fashion, as would be the case in a Chapter 13 plan." (*Id.* at 4.)

2. Debtors' Income

The UST argues that the Debtors have understated their income on Schedule I, which lists Ryan's gross monthly income as $5,529.00 and Megan's as $2,155.49. Mr. Weaver testified that he calculated each Debtor's gross monthly income based on the first four months' pay advices of 2014. He stated that, based on this data, Megan's average gross monthly income is $2,675.70;[7] however, under cross-examination, Mr. Weaver agreed that it was "approximately right" that Megan's average monthly pay was $2,500.00 (Hearing Tr. 10:39:01), which is approximately $350.00 more than the amount shown on Schedule I.

Mr. Weaver calculated Ryan's gross monthly income as $5,626.87, which is approximately $100.00 more than the amount reflected on Schedule I.

3. Income Tax Withholding

The UST's third argument is that the Debtors' income is understated because the Debtors received a federal tax refund for each of the past three years — $5,976.00 in 2011; $4,573.00 in 2012; and $3,557.00 in 2013. Mr. Weaver testified that, assuming the Debtors made no change to their tax withholdings,[8] they would receive a federal tax refund for 2014. Based on the 2013 refund,

[7] Using Megan's pay advice with a remit date of April 25, 2014, Mr. Weaver used the year-to-date gross income of $10,702.81 divided by four months to find average monthly gross income of $2,675.70.

[8] Ryan testified that for tax years 2011, 2012 and 2013, he claimed zero dependents for withholding purposes.

Mr. Weaver testified that the Debtors had their employers withhold approximately $294.00 more per month than necessary to meet their federal income tax obligations. He stated that, if the Debtors adjusted their withholdings for tax purposes, the Debtors could increase their monthly take-home pay by approximately $200.00.

B. Debtors' Position

The Debtors oppose each of the UST's arguments, contending that they do not have the ability to repay their unsecured debt because (i) their hypothetical chapter 13 plan would not result in payment to unsecured creditors because the plan would allow for separately classified co-signed loans; and (ii) as shown on Schedule J, they have a nominal net income of $27.13. Additionally, the Debtors argue that their income tax refunds are too unpredictable to be considered additional monthly income.

1. $452.00 Student Loan Expense

The Debtors testified that the $452.00 expense on line 21 of Schedule J is comprised of payments on four student loans, two of which are Ryan's and two of which are Megan's. As set forth above, all of the loans are currently being paid and are not in default. The Debtors further testified that, despite including payment for four student loans in their budget, they do not have the money to pay Megan's loan to Great Lakes in the amount of $313.00 per month because their take-home pay is consumed by ordinary expenses. There was no testimony about how the Debtors spend this "extra"

$313.00 per month since other necessary items, including housing, utilities, food, childcare, car payments, *etc.*, are accounted for in the Debtors' budget. (Sched. J.) Despite the Debtors' stated intention to start making the monthly payment to Great Lakes on this loan, Megan's father, one of the co-signors of the loan, has made this payment each month subsequent to the Petition Date. Mr. Karipides also made the payment on this student loan prior to the Petition Date.

The Debtors argue that, if they converted their case to chapter 13, the student loan payments included on Schedule J could, and would, be separately classified in a chapter 13 plan. The Debtors rely on *In re Russell*, 503 B.R. 788 (Bankr. S.D. Ohio 2013), to support their position that special treatment of co-signed loans complies with the provisions of 11 U.S.C. § 1322(b)(1) even where the co-signed student loans receive a significantly higher dividend than other unsecured creditors. (Supp. at 1.) As a consequence, the Debtors argue that the UST is incorrect that the entire $452.00 budget item for student loans would be included in their monthly net income for *pro rata* distribution to all unsecured creditors.

In addition, Megan has a third student loan, through Sallie Mae relating to her nursing training at Brown Mackie, in the amount of $24,000.00. Because this loan is in deferment, it was not included on line 21 of Schedule J. The Debtors testified that

this loan will not remain in in-school deferment status much longer because Megan stopped taking classes in May 2014. The Debtors represented that the monthly payment on this loan, which is not co-signed, will be approximately $300.00. The Debtors stated that they do not know how they will make the monthly payment on this loan when it comes out of deferment.

2. Debtors' Income

Although the Debtors disputed that their income has changed, they do not refute Mr. Weaver's calculation that Megan's actual monthly income is greater than it appears on Schedule I.[9] Debtors' counsel stated that, based on pay advices received January through April 2014 (the same as used by Mr. Weaver), he calculated Megan's gross monthly income as approximately $2,500.00 per month.[10] Counsel for the Debtors did not challenge Mr. Weaver's recalculation of Ryan's gross income.

Both Debtors state that their income will stay the same into the foreseeable future. Neither Debtor has received a raise. Ryan stated that his income varies because of court appearances,

[9] In the Debtors' Response, they state that the Schedule I figures are based on a pre-petition calculation of the gross bi-weekly earnings from paystubs dated June 2013 to November 2013. (Resp. at 2-3.)

[10] Using the year-to-date gross income of $11,928.33 from Megan's pay advice with a remit date of May 9, 2014, the Debtors argue that, over 10 pay periods, Megan received an average of $1,129.83 per paycheck, which multiplied by 26 pay periods and then divided by 12 months would result in an average monthly gross income of $2,584.00.

S.W.A.T. call-outs, *etc.*, but that his opportunities for overtime have decreased over the past few years.

3. Income Tax Withholding

The Debtors testified, and Mr. Weaver agreed on re-cross examination, that it is impossible to accurately calculate how much will be due for income taxes and, accordingly, an accurate withholding calculation cannot be made. Ryan said that, although in prior years he had claimed zero dependents for withholding purposes, he claimed two dependents for 2014 to increase his take-home pay. Ryan explained that he changed the withholding allowance back to zero "last week" (so the change is not reflected in any of the pay stubs at issue) because he was afraid that he was not having enough taxes withheld and he did not want to owe taxes at the end of the year. The Debtors also testified that their income tax refunds have decreased every year for the past three years.

IV. ANALYSIS

According to the Debtors' Form 22, the presumption of abuse does not arise pursuant to § 707(b)(2) because the Debtors' monthly disposable income determined by the Form's calculation is negative $459.00.[11]

[11] The Debtors' reported annualized income is $90,228.00, which is more than the median family income for a family of four (*i.e.* $76,381.00), but the additional adjustments in Part IV of Form 22 result in monthly disposable income under § 707(b)(2) of negative $459.00.

Unlike the means test analysis, however, in analyzing the totality of the circumstances, the Court may subjectively review the Debtors' income and expenses based upon pre-petition events and post-petition forecasts. The UST's argument for dismissal under § 707(b)(1) and (3) focuses on the Debtors' present and future ability to repay creditors: specifically, the Debtors' (i) understated income on Schedule I; (ii) over-withholding of federal income tax; and (iii) inclusion of their student loan expenses on Schedule J. According to the UST, adjusting for one or all of these circumstances would result in the Debtors' ability to repay a significant portion of their non-priority unsecured debt. The Court will address each of these arguments, in turn, but will leave the analysis of the student loan debt for last.

There is no dispute that the Debtors' debts are consumer debts as set forth in § 707(b)(1), as opposed to business debt. (Pet. at 1.)

A. Debtors' Understated Income

Based on the testimony of the Debtors and Mr. Weaver, the Debtors' income is understated on Schedule I. Using a look-back of the pay advices from January through April 2014, counsel for the Debtors stated that Megan's income was approximately $2,500.00 per month, representing an understatement of $350.00 per month. Mr. Weaver agreed with this statement although he testified that his calculation showed Megan's gross income was understated by

approximately $500.00 per month. Using either figure, it is clear that Megan's gross monthly income is more than reported on Schedule I as $2,155.49. Since Mr. Weaver conceded that Megan's gross monthly income was approximately $2,500.00 per month, the Court finds that Megan's gross monthly income should be adjusted by an additional $350.00 per month. Using the same ratio of gross income to net income that the Debtors utilized on Schedule I, the Court finds that Megan's take-home pay would increase by $273.00 per month.[12]

The Court finds the UST's argument regarding the understatement of Ryan's income less convincing. Mr. Weaver testified that Ryan's post-petition take-home pay is less than $100.00 more than what is shown on Schedule I.[13] Related to this point, Ryan testified that for the first half of 2014 he changed his withholding allowances to maximize his take-home pay, but has since returned to claiming zero dependents. This adjustment likely explains the approximately $100.00 increase in Ryan's monthly net income.

[12] Schedule I shows Megan's gross monthly income of $2,155.00 with a net of $1,679.00, which is approximately 78% of the gross; $273.00 is 78% of $350.00.

[13] Unlike Mr. Weaver's testimony regarding Megan's income, when testifying about Ryan's income, Mr. Weaver referred to his calculations taking into account gross income and withholding amounts. (Hearing Tr. 10:15:41.) Therefore, the Court believes that he was referring to Ryan's take-home pay.

B. Income Tax Withholding

The Debtors have not manipulated their tax withholdings in order to appear to have little or no disposable income. Mr. Weaver agreed with the Debtors that it is impossible to calculate exactly how much federal income tax will be owed at the end of a taxable year, so withholding during the year from regular pay is an estimate.

Mr. Weaver testified that the Debtors could have an additional $200.00 in monthly income if they adjusted their withholding allowances. Although the Debtors received a federal income tax refund in each of the years 2011, 2012 and 2013, the amount of such refund has declined each year. Any amount available for unsecured creditors in a theoretical chapter 13 plan, based upon the Debtors' alleged over-withholding for tax purposes, is somewhat speculative. Based upon Mr. Weaver's calculations and the provisions of the chapter 13 plan used in this Court,[14] the Debtors could adjust their withholding allowances to increase their monthly net income by approximately $171.00.[15] However, the Court finds that since Ryan's withholding adjustment from zero to two dependents resulted in $100.00 of additional monthly take-home

[14] Pursuant to Article I, Section 1B of the chapter 13 plan used in this Court, a debtor may be required to devote all annual tax refunds in excess of $1,500.00 to the repayment of creditors under the plan.

[15] Using the 2013 refund of $3,557.00 less the chapter 13 plan allowance of $1,500.00 divided over 12 months results in an approximate over-withholding of $171.00 per month.

pay, this figure is a more accurate reflection of the available net income based upon withholding adjustments.

C. Student Loan Payments

The student loans are a difficult issue in this case. The Debtors first argued that they could pay their monthly student loan payments in full "outside the plan" in a chapter 13 because those loans were not dischargeable. (Resp. at 3.)

> Approximately $65,000.00 of the Debtors' general unsecured debt in the amount of $101,038.00 are [sic] student loans. Forcing the Debtors into what could be described the 'black hole' of student loan debt repayment at the conclusion of the prospective chapter 13 proceeding in order to pay non-dischargeable student loans is unfair and clearly inconsistent with the goal of chapter 7 to provide the Debtors with a fresh start.

(*Id.* at 4.) The Debtors cite to *In re Templeton*, 365 B.R. 213 (Bankr. W.D. Okla. 2007); *In re Delbecq*, 368 B.R. 754 (Bankr. S.D. Ind. 2007); *In re Martin*, 371 B.R. 347 (Bankr. C.D. Ill. 2007); and *In re Haman*, 366 B.R. 307 (Bankr. D. Del. 2007) for this proposition. (Resp. at 4.)

The weight of authority, however, is against this argument. "A strong majority of courts agree that the non-dischargeability of a student loan is not, without more, a basis to permit a debtor to treat the student loan creditor more favorably than other unsecured creditors." *In re Nolan*, No. 07-33572, 2008 WL 2121143, at *3 (Bankr. N.D. Ohio May 20, 2008); *see, e.g.*, *In re Rooney*, 436 B.R. 454, 459 (Bankr. N.D. Ohio 2010) ("To treat certain

unsecured creditors more favorably simply because they hold a nondischargeable claim would elevate such claims to a priority status that was not intended by Congress."); *In re Beckett*, 442 B.R. 638, 644 (Bankr. N.D. Ohio 2010) ("Otherwise, all non-dischargeable debts would be entitled to favorable treatment, including those debts which arise from a debtor's wrongful conduct– *e.g.*, fraud, embezzlement and larceny.").

The Debtors' Supplement makes a second argument — that the Debtors' student loans could be separately classified and paid in full outside a chapter 13 plan because such loans are co-signed. The Supplement supports this argument by citing *In re Russell*, 503 B.R. 788 (Bankr. S.D. Ohio 2013).

Separate classification of loans that are co-signed by family and friends — even when such separate classification results in a higher payment to this class of non-priority creditors — is not prohibited by the Bankruptcy Code. *Id.* at 788, 798 ("[T]he Bankruptcy Code permits a Chapter 13 debtor's plan to pay a higher dividend to creditors holding cosigned consumer debts than it pays to other unsecured creditors," but "Congress did not intend to permit debtors to accelerate the payment of cosigned consumer debts, to overpay such debts or to pay interest to which creditors are not entitled."); *In re Rivera*, 490 B.R. 130, 133 (B.A.P. 1st Cir. 2013) ("Congress added the However Clause to § 1322(b)(1) specifically to carve out an exception to the 'unfair

discrimination' test, an exception that only applies to co-debtor-consumer claims."). "Often, the codebtor will be a relative or friend, and the debtor feels compelled to pay the claim. If the debtor is going to pay the debt anyway, it is important that this fact be considered in determining the feasibility of the plan." *Rivera*, 490 B.R. at 141.

As set forth above, only two of the four loans included on Schedule J are co-signed; these two loans consist of a total monthly obligation of $363.00.[16] The other two loans, Megan's student loan from American Education Services and Ryan's student loan from Great Lakes, would not be subject to separate classification because they are not co-signed. Therefore, the $50.00 and $38.00 monthly payments on these loans, respectively, would be included in, and added to, the Debtors' monthly net income.

D. Other "Totality of the Circumstances" Consideration

Based upon the Court's analysis, above, the Debtors could have as much as $461.00 in additional monthly net income, which, when added to their current disposable income of $27.00, equals $488.00. This amount is based on: (i) $273.00 from Megan's understated income; (ii) removing the $88.00 expense for student loans that are not co-signed; and (iii) adding $100.00 from over-

[16] Ryan's Sallie Mae loan for $50.00 per month and Megan's Great Lakes loan for $313.00 per month are both co-signed.

withholding of federal income taxes.[17] As a consequence, it appears that the Debtors have additional monthly net income that could be utilized to pay their non-priority unsecured debt.

This is not the end of the inquiry, however. There are other factors to also consider. If there is not enough disposable income to make significant payments to unsecured creditors, the case is not abusive.

The Debtors' Schedule G shows three vehicle obligations, all of which appear to have been incurred within the 910-day period prior to the Petition Date.[18] If the Debtors converted this case to one under chapter 13, pursuant to the hanging paragraph in § 1325(a)(9), each of the claims related to these three vehicles could not be bifurcated into secured and unsecured portions, but would have to be paid in full. Making these three vehicle payments would increase the Debtors' expenses from those currently shown on Schedule J.

The Debtors have indicated that they intend to reaffirm and pay for two vehicles – a 2012 Ford Fusion (leased vehicle) and a 2012 Honda Insight – and have surrendered their 2013 Ford Focus.

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[17] As the Court has already noted, however, the income tax issue is somewhat speculative.

[18] There was no testimony about why the Debtors had three late-model vehicles since there are only two drivers in the household. The three vehicles in question are 2012 and 2013 models. Obligations on the 2012 vehicles could have been incurred, at the earliest, mid-2011. Nine hundred and ten days prior to the Petition Date was June 20, 2011.

(Chapter 7 Individual Debtor's Statement of Intention.) Chapter 13 debtors do not have the option to surrender a vehicle purchased within 910 days prior to the petition date and to pay the creditor only a general unsecured claim.[19] Although the Debtors could still surrender the 2013 Ford Focus, the creditor would have the equivalent of a secured claim for the deficiency balance after the sale of the vehicle.

Based on Schedule D, the Debtors owe $20,542.00 on the 2013 Ford Focus, which would be reduced by some (presently unknown) amount if the vehicle is surrendered and sold. Although the amount of the secured claim for the 2013 Ford Focus is likely to be less than the balance on Schedule D, because the claim is based on a "910-day vehicle," the creditor could argue that it is entitled to be paid the full original monthly payment (approximately $350.00) until its claim is paid in full.[20] The Court cannot know how this

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[19] "910-claims cannot be bifurcated into secured and unsecured portions under section 506 and . . . such claims must be treated as fully secured." *Shaw v. Aurgroup Fin. Credit Union*, 552 F.3d 447, 452 (6th Cir. 2009); *see In re Long*, 519 F.3d 288, 291 (6th Cir. 2008) (In chapter 13, "the bankruptcy courts should not simply allow the debtor to surrender the car and then wipe out the deficiency."). This restriction in the "hanging paragraph" following § 1325(a)(9) applies when: (i) the creditor holds a purchase money security interest securing the debt that is the subject of the claim; (ii) the debt was incurred within the 910-day period preceding the date of the filing of the petition; and (iii) the collateral for that debt consists of a motor vehicle acquired for the personal use of the debtor. 11 U.S.C. § 1325(a)(9) (West 2014).

[20] Motion for Relief from Stay and Abandonment (Doc. 8) was filed in this case regarding the 2013 Ford Focus. This document indicates that the original monthly payment was $349.88, which included 2.96% interest. (Doc. 8 at 10.) No testimony was provided on these details.

would ultimately impact the plan, but if $350.00 per month[21] was required upfront to the creditor as payment on a secured claim for the surrendered 2013 Ford Focus, the Debtors would not be able to fund a plan with any significant dividend to unsecured creditors.

Taking the maximum of the Debtors' monthly net income as $488.00, the Court finds that, taking into account an additional monthly payment of approximately $350.00 for the Ford Focus, the Debtors would be left with about $133.00 per month to fund a chapter 13 plan. If the Debtors did not change their income tax withholding allowances "upfront," this amount would be even less — approximately $33.00 per month.

Additionally, chapter 13 debtors are also allowed to include payment of their attorney fees in their plan. Although Mr. Laatsch, who is Ryan's father, waived fees for filing the Debtors' chapter 7 case, there is no indication that he would waive his fees for a chapter 13 case, which requires more time and work.

As a result of these additional considerations in analyzing a potential chapter 13 plan for these Debtors, it does not appear that the Debtors have the ability to repay a significant dividend to their unsecured creditors under their current circumstances.

[21] The Court notes that the required payment may also be higher than the contract rate to reflect the permitted 5.25% interest rate. *See In re Taranto*, 365 B.R. 85, 90 (6th Cir. B.A.P. 2007) (holding that the *Till* prime-plus interest rate analysis applies, regardless of whether the contract rate is less than the market prime rate).

Based on the totality of the circumstances, this Court finds that the Debtors' chapter 7 case does not constitute abuse.

V. CONCLUSION

The Court, having considered all pleadings, arguments, testimony and exhibits and having reviewed the entire record in this case, finds that the UST has not sustained his burden of proving that the Debtors' chapter 7 case constitutes abuse. Accordingly, the Court will deny the Motion to Dismiss.

An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: July 16, 2014
12:53:45 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	**CASE NUMBER 13-42724**
RYAN F. LAATSCH and	*	
MEGAN M. LAATSCH,	*	**CHAPTER 7**
	*	
Debtors.	*	**HONORABLE KAY WOODS**
	*	

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ORDER DENYING MOTION TO DISMISS FOR ABUSE

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Daniel M. McDermott, the United States Trustee for Region 9 ("UST"), filed Motion to Dismiss the Case for Abuse Pursuant to 11 U.S.C. § 707(b)(1) and (3) ("Motion to Dismiss") (Doc. 17) on March 31, 2014. The UST urges the Court to find that the totality of the circumstances warrants dismissal of the chapter 7 case filed by Debtors Ryan F. Laatsch and Megan M. Laatsch. On April 22, 2014, the Debtors filed Request for Hearing on Motion to Dismiss Case for Substantial Abuse 707(b)(1)&(3) and Preliminary Response (collectively, Doc. 21).

The Court held an evidentiary hearing on this matter on June 24, 2014, at which appeared: the Debtors, with their counsel, Morris H. Laatsch, Esq., and Scott R. Belhorn, Esq. on behalf of the UST.

For the reasons set forth in the Court's Memorandum Opinion Regarding Motion to Dismiss for Abuse entered on this date, the Court hereby:

1. Finds that the UST has not sustained his burden of proving that the Debtors' chapter 7 case constitutes abuse pursuant to § 707(b)(1) and (3); and
2. Denies the Motion to Dismiss.

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