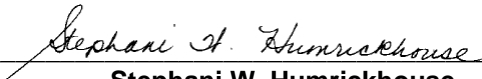




**SO ORDERED.**

**SIGNED this 23 day of March, 2010.**

  
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**Stephani W. Humrickhouse**  
**United States Bankruptcy Judge**

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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

**IN RE:**

**CASE NO.**

**KIMBERLY ROSS THELEN**

**09-006653-8-SWH**

**DEBTOR**

**ORDER DENYING MOTION TO DISMISS**

The matter before the court is the bankruptcy administrator's motion to dismiss pursuant to 11 U.S.C. § 707(b)(1). A hearing took place in Raleigh, North Carolina on February 8, 2010.

Kimberly Ross Thelen filed a petition for relief under chapter 7 of the Bankruptcy Code on August 10, 2009. The bankruptcy administrator filed a statement of presumed abuse on September 22, 2009. At issue is the appropriate formula by which to calculate the debtor's child care expenses for purposes of Official Form B22A, pursuant to which the means test is calculated. The debtor averaged her monthly child care expenses for the same six-month pre-petition period over which her income was averaged and, using that calculation method and the resulting expense figure, the presumption of abuse did not arise. The bankruptcy administrator contends that only the debtor's child care expense for the month preceding her filing should be used, in which case the presumption

of abuse does arise. The bankruptcy administrator and counsel for the debtor agree that this particular aspect of the means test calculation presents questions of first impression in this district.

The debtor, Ms. Thelen, is employed as an electrical engineer with Belcan Corporation. Along with her petition under chapter 7, the debtor filed a completed Official Form B22A (Statement of Current Monthly Income and Means-Test Calculation). According to the form, her current monthly income (“CMI”) as defined under 11 U.S.C. § 101(10A) is \$5,025.50. That figure represents her average gross monthly income during the six-month period preceding the date on which she filed her petition, *i.e.* February 1, 2009 through July 31, 2009. A debtor’s CMI is calculated for purposes of the means test, according to the directions provided on Form B22A, as follows:

All figures must reflect average monthly income received from all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing. If the amount of monthly income varied during the six months, you must divide the six-month total by six, and enter the result on the appropriate line.

Official Form B22A, Part II ¶ 2. In this case, the debtor’s CMI is substantially higher than the monthly income she received as of the petition date because, during the preceding six-month period, Ms. Thelen’s work hours were significantly cut, resulting in a correspondingly substantial loss of income. The CMI average includes four months at approximately \$6,725 per month, and two months at \$1,625 per month. The debtor’s gross monthly income in August 2009, at the time the petition was filed, was \$1,625 per month. That amount was reported on Schedule I.

This scenario is not uncommon. See, e.g., In re Shelor, 2008 WL 4344894 at \*1 (Bankr. M.D.N.C. 2008) (debtor’s income “plummeted” during the six months preceding chapter 13 filing and his actual income at the time the petition was filed was less than half the “average monthly

income” reflected for the six-month period). CMI reported on Form B22A often is significantly different from the income reported on Schedule I, as that schedule recognizes in its introductory paragraph: “The average monthly income calculated on this form may differ from the current monthly income calculated on Form 22A, 22B, or 22C.”

The six-month averaging period used to calculate CMI, as defined and required in 11 U.S.C. § 101(10A)(A)(i), has an exacerbated effect on the means test result when the debtor’s income plummets prior to the filing and the debtor’s expenses – in this case, expenses for child care – are dramatically reduced just pre-petition. Line 30 of Form B22A allows a debtor to deduct child care expenses, as follows:

Other Necessary Expenses: childcare. Enter the total *average* monthly amount that you *actually* expend on childcare—such as baby-sitting, day care, nursery and preschool. Do not include other educational payments.

Official Form B22A, line 30 (emphasis added). In line 30, the debtor indicated that her child care expenses were \$1,213.33 per month. Debtor’s counsel indicated that this number represents the average child care cost per month, over the same six months used to calculate CMI, and the calculations include four months at \$1,820 per month and two months at a cost of zero. Counsel explained that when the debtor worked full time, she incurred costs for child care in relation to her work schedule. When her work hours were dramatically reduced, she no longer needed extensive child care, and she responded by eliminating those costs. The bankruptcy administrator readily agrees that the basis for reducing these expenditures was not only reasonable, but laudable. The debtor properly reacted to her income reduction by decreasing her expenses pre-petition.

The Schedules I and J filed along with the debtor’s petition illuminate the change in the debtor’s financial circumstances more fully. On Schedule I, which calls for an “estimate of average

or projected monthly income at time case filed [sic],” the debtor reports her current average monthly net income as \$1,498.25. On Schedule J, her child care expenses as of the time the case was filed are reported as zero. Paragraph 19 of Schedule J requires a debtor to “describe any increase or decrease in expenditures reasonably anticipated to occur within the year following the filing of this document,” and the debtor responded that “[w]hen her hours were drastically reduced effective June 1, the debtor [took] over the child care which was costing \$1820 per month.” The debtor has fully and accurately disclosed her financial situation at the time of her bankruptcy filing.

With the single exception of the child care cost reported on Form B22A, the bankruptcy administrator does not question the accuracy of the CMI calculations or the debtor’s income and expenses as stated on Schedules I and J. During the hearing, counsel for the bankruptcy administrator emphasized that there is no indication that the debtor’s petition was filed in anything other than good faith, and that the change in the debtor’s child care costs is the direct result of the debtor’s prudent, cost-saving measures. However, as the bankruptcy administrator interprets 11 U.S.C. § 707(b)(2)(A)(ii)(I) and Form B22A, the debtor may claim as an expense only the amount that she spent per month *as of the time the petition was filed*, not the six-month average of the amounts she actually spent during the six months preceding her filing. Here, although the debtor no longer incurs child care costs, had eliminated those expenses prior to filing the petition, and will not incur those expenses for the foreseeable future, she claimed an actual average monthly child care cost of \$1,213.33. A snapshot of her “actual” monthly child care cost at the time the petition was filed indicates expenses of zero, which, if factored into the expense calculations along with her high CMI, would give rise to a presumption of abuse.

In response, the debtor argues that the calculations should be made on an “apples-to-apples” basis in order to present a clearer picture of her financial condition. If her previous salary is used to obtain a historical picture of her income, the debtor reasons, then the child care expenses during that same period, which *were* “actual,” should be accounted for as well. The debtor concludes that applying different formulas to income and expenses on the facts of this case skews the calculation toward an unfair, absurd, and unduly harsh result. Counsel for the bankruptcy administrator acknowledges that the “mechanical nature” of the means test as he interprets it sometimes results in anomalies, and that in this particular case the result would be “draconian.” In his view, the language of the statute presents little opportunity to avoid it.<sup>1</sup>

### DISCUSSION

This district is no stranger to the machinations of the means test, and it is well understood that the test is complicated in both interpretation and application. See, e.g., Musselman v. eCast Settlement Corp., 394 B.R. 801 (E.D.N.C. 2008) (construing, in the context of the means test, the calculation of “projected disposable income” and determining what amounts are “reasonably necessary to be expended” for above-median debtors in a chapter 13 case); In re Alexander, 344 B.R. 742, 749 (Bankr. E.D.N.C. 2006) (concluding that to find chapter 13 debtor’s projected disposable income, “one simply takes the calculation mandated by § 1325(b)(2) and does the math,”

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<sup>1</sup>Courts do have the ability to reset the time in which to calculate CMI pursuant to 11 U.S.C. § 101(10A)(A)(ii), but that authority is contingent on a debtor not having filed a statement of income. See 11 U.S.C. § 521(a)(1)(B)(ii). Here, the debtor has already filed the Schedule I. See In re Shelor, 2008 WL 4344894 at \*1-2 (Bankr. M.D.N.C. 2008) (CMI calculation period could not be adjusted because the debtor had not promptly obtained an order excusing the filing of the Schedule I and setting a new hearing, which would have established a new six-month period). The debtor does not assert any grounds on which to strike the statement of income. The court has not been asked to consider whether she may still have the right to move for authority to strike her Schedule I.

while acknowledging widespread debate about that process within the bankruptcy courts and community); In re Hoff, 402 B.R. 683 (Bankr. E.D.N.C. 2009) (invoking exercise of discretion to adjust six-month period over which income is calculated for purposes of Schedule I in a chapter 13 case involving seasonally-employed debtors).

The parties agree that this particular issue – whether the debtor’s claimed monthly child care expenses may reflect an actual six-month average of amounts actually expended, or must instead reflect the snapshot of monthly cost at the time the petition is filed – apparently has eluded focused discussion thus far. They are largely right. The extent to which it is, or is not, common practice to average child care expenses over some range of months does not appear to be the subject of a published opinion. The context in which this issue arose also is uncommon: most inquiries have focused on whether a debtor’s expenses have increased, not whether they decreased.

Questions of statutory construction require the court to look first to the language of the statute. “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.” Lamie v. U.S. Trustee, 540 U.S. 526, 534, 124 S. Ct. 1023, 1030 (2004) (internal quotation marks and original citation omitted). The bankruptcy administrator’s starting point is 11 U.S.C. § 707(b), which provides, in relevant part, that

[t]he debtor’s monthly expenses shall be the debtor’s applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor’s *actual* monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent.

11 U.S.C. § 707(b)(2)(A)(ii)(I) (emphasis added). In essence, the statute juxtaposes the required use of expenses found on National Standard and Local Standard tables, which are *not actual* as to the debtor, with Other Necessary Expenses as set forth in the categories described by the IRS, which are to be actual as to the debtor. The bankruptcy administrator contends that “the operative word in this portion of the statute is the word ‘actual,’” and that the issue is whether the debtor’s claimed expenses represent her actual expenses. Bankr. Admin.’s Mot. to Dismiss at ¶ 6.

According to Black’s Law Dictionary, the term “actual” means “existing in fact; real.” Black’s Law Dictionary 35 (7th ed. 1999). Using that definition, the court cannot entirely agree with the bankruptcy administrator’s characterization of the issue because the amounts that the debtor spent are not in dispute. The court believes the bankruptcy administrator’s challenge really is a temporal one – that the debtor failed to claim her actual monthly child care cost *as of the time of filing*. Schedule J calls for the estimate of the “average or projected monthly expenses of the debtor and the debtor’s family *at [the] time [the] case [is] filed,*” but there is no corresponding temporal requirement in the statute. Debtor’s Schedule J (emphasis added). Nor is there one in line 30 of Form B22A, which implements the statute. Instead, Form B22A requires that the claimed amount reflect a monthly total for different forms of child care, and that the amount be the “total average monthly amount” that the debtor “actually” expends. Official Form B22A, line 30.

The statutory means test requires income to be averaged over a six-month pre-petition period to arrive at CMI, but it does not require that expenses be averaged over that same period.<sup>2</sup> However,

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<sup>2</sup>The statute includes the language “as in effect on the date of the order for relief,” but both the language and the structure of that sentence indicate that the phrase pertains to the Internal Revenue Service standards in effect for the area in which the debtor resides, not the expenses. It is implausible to read “*as in effect* on the date of filing” to refer to expenses. Expenses may be incurred, or expended, but are not “in effect.” The court interprets that language to refer to the

Official Form B22A does provide more information, and its use is mandated by Bankruptcy Rule 1007(b)(4), which provides:

Unless § 707(b)(2)(D) applies, an individual debtor in a chapter 7 case shall file a statement of current monthly income prepared as prescribed by the appropriate Official Form, and, if the current monthly income exceeds the median family income for the applicable state and household size, the information, including calculations, required by § 707(b), prepared as prescribed by the appropriate Official Form.

Fed. R. Bankr. P. 1007(b)(4). The use of the official forms promulgated by the Judicial Conference also is required by Bankruptcy Rule 9009, which provides that the forms “shall be construed to be consistent with these rules and the Code.” Fed. R. Bankr. P. 9009.

Form B22A directs a debtor to disclose “the total average monthly amount that you actually expend on childcare.” Black’s Law Dictionary defines “average” as follows: “1. A single value that represents a broad sample of subjects; esp. in mathematics, the mean, median or mode of a series. 2. The ordinary or typical level; the norm.” Black’s Law Dictionary at 131. In other words, Form B22A specifically does *not* require a “snapshot” of the debtor’s child care expenses for a specific point in time, *i.e.* the month in which the petition was filed, but rather supports the conclusion that more than one period of time must be considered in order to implement the average calculation.

Though it calls for an average, Form B22A does not specify the time period over which to calculate average child care expenses, or for the calculation of the other necessary expenses listed. It appears that the most appropriate time periods likely vary according to context. In a related “necessary expense” category, taxes (Form B22A, line 25), similar language prompts some courts

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“applicable monthly expense amounts” and “categories specified as Other Necessary Expenses,” as issued by the IRS and in effect at the time of filing.

to look to a debtor's most recent tax return, if one is available, and to use that as a basis by which to calculate a monthly average before adjusting to account for any factors that are unique to the current year. In In re Lipford, 397 B.R. 320, 334 (Bankr. M.D.N.C. 2008), the court concluded that "any method that reasonably and accurately reflects the debtor's actual tax expense for the six-month period would meet the requirements of line 25 on Form B22A." In language similar to that used for the child care expense in line 30, the debtor was directed to enter the "total average monthly expense that you actually incur for all federal, state, and local taxes." Official Form B22A, line 25. The court assumed the relevance of the six-month period required by § 101(10A)(A)(i) to calculate income, and calculated the "average monthly tax expense" with reference to previously filed tax returns in order to avoid the inclusion, in expenses, of amounts withheld from paychecks but ultimately refunded to the debtor. 397 B.R. at 333-35; see also In re Barbour, 2009 WL 3053697 (Bankr. E.D.N.C. 2009) (citing Lipford with approval and determining chapter 7 debtor's actual monthly tax expense with reference to previously filed tax returns and tax refunds); In re Gray, 2009 WL 3486658 (Bankr. M.D.N.C. 2009) (holding that tax expense is calculable using prior year's tax returns and earnings statements).

In this case, the issue is simply whether the debtor's actual expenditures may appropriately be averaged over the same six-month period of time as her income. The court concludes that for purposes of the means test, averaging the debtor's actual child care expenses over the six-month CMI period is both reasonable and uniquely appropriate. The debtor's income and child care expenses were linked both before her change in employment status and after, when she intentionally adjusted those expenses to reflect her diminished income and diminished need for child care. The court does not hold that a six-month averaging period must be used, or that child care expenses

incurred in the month prior to filing a petition under chapter 7 cannot ever be representative of the average amount actually spent per month. There may be other reasonable and accurate forms of measurement as well, and the official form leaves room to determine an average amount based on factors relevant to the case at hand. In this case, lacking a better alternative or a different calculation mandated by statute, the classic apples-to-apples formula works perfectly.

The court's conclusion is based wholly on the plain language of the statute and its interpretation of Form B22A, but it is worth noting that this holding also is consistent with public policy. The debtor reduced her expenses, prepetition, to align with her prepetition reduction in income. That undertaking is indicative of the debtor's good faith and entirely in keeping with prudent financial management. Ironically, had she continued to incur the same expenses, or even increased them instead of promptly reducing them, the presumption of abuse would not have arisen. That untoward result is wholly inconsistent with sound public policy.

For the foregoing reasons, the bankruptcy administrator's motion to dismiss is DENIED.

**SO ORDERED.**

**END OF DOCUMENT**



**SO ORDERED.**

**SIGNED this 18 day of September, 2009.**

A handwritten signature in black ink that reads "Randy D. Doub". The signature is written in a cursive style and is positioned above a horizontal line.

**Randy D. Doub**  
**United States Bankruptcy Judge**

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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
FAYETTEVILLE DIVISION**

**IN RE:**

**RALPH A. BARBOUR**

**DEBTOR**

**CASE NO.**

**09-00553-8-RDD**

**CHAPTER 7**

**ORDER CONDITIONALLY GRANTING MOTION TO DISMISS  
CHAPTER 7 PROCEEDING PURSUANT TO 11 U.S.C. § 707(b)(1) OR (b)(3)**

Pending before the Court is the Motion to Dismiss Chapter 7 Proceeding Pursuant to 11 U.S.C. § 707(b)(1) or (b)(3) filed on April 14, 2009 (the "Motion to Dismiss") by the Bankruptcy Administrator and the Response to Motion to Dismiss filed on April 21, 2009 (the "Response") by Ralph A. Barbour (the "Debtor"). A hearing was conducted in Fayetteville, North Carolina on August 6, 2009.

The Debtor filed a voluntary petition for relief under chapter 7 of title 11 of the United States Code (the "Bankruptcy Code") on January 26, 2009. On March 18, 2009, the Debtor filed his Amended Chapter 7 Statement of Current Monthly Income and Means Test Calculation (the "Amended CMI Statement") which determined that he was an above-median debtor but that based on the calculation of his current monthly income, the presumption of abuse did not arise.

After review of certain documents, the Bankruptcy Administrator requested the Clerk of the Court to issue a notice of presumed abuse. The Statement of Presumed Abuse was timely docketed on March 17, 2009. The Bankruptcy Administrator subsequently filed the Motion to Dismiss pending before the Court.

Pursuant to his Motion to Dismiss, the Bankruptcy Administrator asserts that the Debtor understated his current monthly income, as defined by the Bankruptcy Code, and overstated his tax expenses in calculating his disposable income under the means test. By doing so, the Bankruptcy Administrator maintains that the Debtor manipulated the means test in a fashion that resulted in the Debtor showing that he had no disposable monthly income available for his distribution to creditors. As such, the Bankruptcy Administrator asserts that the Debtor, in fact, has disposable monthly income and, therefore, disputes the Debtor's assertion that the presumption of abuse does not arise in this case.

The Bankruptcy Administrator further argues that when taken as a whole, even if the presumption of abuse does not arise, this case should be dismissed based on the totality of the circumstances of the Debtor's financial situation. The Debtor disputes that he has any disposable monthly income based on the means test and that the Motion to Dismiss should be denied.

The Bankruptcy Administrator asserts that this case should be dismissed pursuant to either section 707(b)(1) or 707(b)(3) of the Bankruptcy Code based on the Debtor's abuse of the provisions of chapter 7.

Section 707(b)(1) provides that the Court may dismiss a case under chapter 7 or, with the consent of the debtor, convert a case to chapter 11 or 13, should the court determine that granting relief would be an abuse of the provisions of chapter 7. To determine whether granting relief would

be an abuse, a court should presume an abuse if the debtors current monthly income reduced by certain amounts and multiplied by 60 is not less than the lesser of 25 percent of the debtor's nonpriority unsecured claims, or \$6,575, whichever is greater; or \$10,950. Section 707(b)(1)(A)(i).

In addition to the court's ability to find abuse under section 707(b)(1), even if a presumption of abuse does not arise or is rebutted by a debtor, the court has the authority to dismiss a case under section 707(b)(3).

Section 707(b)(3) provides:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in which subparagraph (A)(i) of such paragraph does not arise or is rebutted, 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.

BAPCPA includes the judicially created totality of the circumstances test in section 707(b)(3). *In re Hartwick*, 359 B.R. 16, 20 (Bankr. D.N.H. 2007); *see also* Eugene R. Wedoff, *Means Testing in the New § 707(b)*, 79 AM. BANKR. L.J. 231, 236 (2005)(reading § 707(b)(3) to allow judicial determination of debt paying ability). The changes in BAPCPA lowered the standard for a court to find abuse. Pre-BACPCPA, a court was required to make a finding of "substantial abuse" of the provisions of the chapter 7. However, BAPCPA specifically lowers the standard to simply "abuse." *In re Lipford*, 397 B.R. 320, 339 (Bankr. M.D.N.C. 2008).

The Debtor disputes that he miscalculated his current monthly income. Furthermore, the Debtor states that the tax expenses he used to calculate his disposable income under the means test

are those amounts which the federal, state, and local governments withheld from his salary. He testified that he believed the election of one exemption is appropriate for a single individual with no dependents. The Debtor argues that based on his calculations, he satisfies the means test, does not have any disposable monthly income, and meets the standards such that the presumption of abuse does not apply. Therefore, the Debtor requests that the Motion to Dismiss be denied.

Since the Bankruptcy Administrator raises issues with the Debtor's current monthly income and the calculation of the Debtor's monthly expenses, the Court shall address each individually.

### **I. Current Monthly Income**

The Bankruptcy Administrator asserts that the Debtor has not properly calculated his current monthly income as required by the Bankruptcy Code. Current monthly income ("CMI") is defined as the average monthly income from all sources that the debtor receives...without regard to whether such income is taxable income, derived during the 6-month period ending on the last day of the calendar month preceding the petition date if the debtor files a schedule of current income and expenditures (commonly known as Schedules I and J) and any amounts paid to the debtor on a regular basis for the household expenses of the debtor or the debtor's dependents, subject to certain limitations. 11 U.S.C. § 101(10A). Since the Debtor filed his petition on January 26, 2009, the Debtor should average his monthly income from July 1, 2008 through December 31, 2008 (the "CMI Period") to calculate his CMI.

Based on an analysis of the documents provided by the Debtor, the Bankruptcy Administrator asserts that the CMI of the Debtor was \$6,823.00 during the CMI Period.

The Debtor disputes the Bankruptcy Administrator's calculation and claims that his CMI was \$5,991.44, as reflected on the Amended CMI Statement. The Debtor argues that the Bankruptcy

Administrator does not properly calculate his CMI since the Debtor is no longer working overtime and no longer has as many overtime opportunities available to him. Since those opportunities no longer exist, the Debtor believes that the overtime wages he earned during the CMI Period should not be considered in calculating his CMI.

At the hearing, the Bankruptcy Administrator introduced into evidence the Debtor's pay advices from DuPont for the period of August 16, 2008 through March 15, 2009.<sup>1</sup> In addition, the Bankruptcy Administrator provided the Court copies of the payroll advices from the Debtor's part-time employer, CVS - Revco Discount Drug Center ("CVS"), for the period of October 4, 2008 through March 14, 2009. The Debtor testified that he started working part-time at CVS in October 2008.

Since the Bankruptcy Administrator did not have all of the payroll advices from the CMI Period, his office reviewed copies of the bank statements provided by the Debtor to locate any deposits from DuPont during the CMI Period. At the hearing, the Bankruptcy Administrator elicited testimony from the Debtor regarding certain deposits into the Debtor's bank account from DuPont in July 2008 and August 2008. The Debtor testified that funds from DuPont, his full-time employer, were deposited into his checking account on July 3, 2008; July 15, 2008; July 18, 2008; July 31, 2008; July 31, 2008; August 15, 2008; and August 22, 2008. He stated that these amounts represented his regular bi-monthly net deposits and net deposits representing overtime hours from DuPont.

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<sup>1</sup>The Debtor and counsel indicated that they provided the Bankruptcy Administrator all of the necessary payroll advices for the relevant CMI Period. Furthermore, they asserted that Michael Peavey, the Chapter 7 Trustee, also had a complete copy of the Debtor's payroll advices. The Bankruptcy Administrator disputed that his office received all of the payroll advices for the CMI Period.

By using the deposits from DuPont shown on the bank statements, the Bankruptcy Administrator's office was able to approximate the Debtor's gross income for the six week period during the CMI Period even though he did not have the corresponding payroll advices. Rick Hinson, an analyst with the Bankruptcy Administrator's office, testified that he calculated the approximate gross amounts of these deposits based on the withholding amount shown on the payroll advices provided by the Debtor. Mr. Hinson testified that the net deposits resulted after approximately twenty-nine (29%) was withheld from the Debtor's gross wages. He stated that he believed this estimate was accurate as the Debtor testified that he had made no changes in his withholding or exemption status during the CMI Period and that twenty-nine (29%) was consistent with the amounts withheld on the payroll advices from August 15, 2008 through December 31, 2008.

The Debtor failed to present any evidence to dispute the accuracy of Mr. Hinson's calculations. In fact, the Debtor admitted that the deposits shown on his bank statements were made by DuPont for the payment of wages, either hourly or overtime, during the CMI Period.

Therefore, the Court finds that determining the percentage of the debtor's withholding based on dividing the debtor's gross wages by a debtor's net wages for the same period is an appropriate method of determining the debtor's average withholding percentage should the debtor fail to timely provide all of the necessary payroll advices during the CMI period. In this case, the resulting percentage (29%) shall be used to calculate the Debtor's gross wages for the period of July 1, 2008 through August 15, 2008 based on the net deposits made by DuPont during that time frame.

Mr. Hinson testified that based on his calculations, the Debtor's CMI would be \$6,823.00 a month. This amount includes wages in the amount of \$6,023.00, as well as an \$800.00 contribution from his girlfriend for household living expenses.

The Debtor believes this approach is improper since it takes into account overtime hours the Debtor no longer has available. The Debtor argues that his present situation should be considered in calculating CMI and alleges that the Court should consider his actual earning capacity as of the filing date. The Debtor's position is incorrect. Based on the definition of current monthly income as set forth in Section 101(10A) of the Bankruptcy Code, which defines CMI, *all* sources of income that he receives during that six month period are included in the calculation of CMI. (emphasis added).

Therefore, based on Mr. Hinson's testimony and the evidence presented, the Court finds that the Debtor's CMI for the period of July 1, 2008 through December 31, 2008 is \$6,823.00. Line 12 of the Amended CMI Statement filed by the Debtor is inaccurate.

## **II. Line 25 Taxes - Other Necessary Expenses**

Line 25 of the Amended CMI Statement lists the Debtor's average monthly tax expenses as \$1,489.00. Counsel for the Debtor asserts that the amount listed on Line 25 was calculated based on the amounts withheld from the Debtor's gross wages during the CMI Period. The Bankruptcy Administrator objects to the Debtor's calculation of the tax withholding amounts as an expense on Line 25.

Line 25 provides that an expense which is allowed as a tax expense is "the total average monthly expenses that you *actually* incur for all federal, state, and local taxes..." See Official Form 22A. (emphasis added).

Courts have recognized the inherent difficulty in calculating the actual tax expense required for Line 25. Significant efforts and expense might be required to calculate the proper amount. *In re Lipford*, 397 B.R. 320, 334 (Bankr. M.D.N.C. 2008). However, courts also recognize that a

debtor's actual withheld tax during the CMI period is not necessarily an appropriate method for determining the expense allowed for Line 25. *Id.* at 332-4. In *Lipford*, Judge Waldrep noted that there is an inherent lack of reliability of withholdings and, in fact, a debtor could over-withhold taxes from his gross income, thereby allowing for an expense on Line 25 that could later result in a refund by the Internal Revenue Service. *Id.* at 334. (citing *In re Bishop*, No. 07-50432, slip op. 9-10 (Bankr. E.D.Ky. Sept. 17, 2007)(2007 Bankr.LEXIS 3096)). Consequently, courts have struggled to find a method that would not overly burden the debtor to calculate an accurate amount of the actual taxes paid during the CMI period.

The Internal Revenue Code (the "IRC") provides that persons are required to have accurate amounts withheld from gross wages. 26 U.S.C. §§ 3401-3406. *Lipford*, 397 B.R. at 334. However, many taxpayers have underwithheld, overwithheld, or had unusual circumstances that allowed them to take increased or decreased deductions which could impact the taxpayers' ultimate tax liability. The end of year reconciliation occurs with the completion of the tax return. *Id.*

The Debtor testified that his withholdings were calculated based on one exemption and, that to his knowledge, he was entitled to claim a personal exemption for himself on his tax returns. The Court does not question the Debtor's ability to qualify for one exemption when calculating his federal taxes but notes that during the three years prior to the filing of this case, the Debtor received a federal tax refund in excess of \$5,000 each year. More specifically, the Bankruptcy Administrator introduced copies of the Debtor's tax returns for 2006, 2007, and 2008. In 2006, the Debtor received a federal tax refund in the amount of \$5,728.00; in 2007, the Debtor received \$10,512.00;<sup>2</sup> and, in 2008, the Debtor received a federal tax refund on 5,754.37. In addition, the Debtor received a

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<sup>2</sup>The Debtor testified that since the filing of the bankruptcy case he has been notified of an audit by the Internal Revenue Service and repayment of approximately \$5,300.00 has been requested for the 2007 tax year.

refund from the State of North Carolina in 2008 for \$1,433.00. Even though the Debtor may qualify to withhold monies in connection with a certain number of exemptions, historically, for this Debtor, that amount does not accurately reflect the amount of tax he actually incurred during those years.

The question remains how should Line 25 be calculated. In *In re Lipford*, the Bankruptcy Court in the Middle District of North Carolina set forth a logical solution to what could be a complicated issue. 397 B.R. at 334. After considering the extreme of allowing a debtor to utilize his withholding amounts and requiring a debtor to prepare tax documents, Judge Waldrep determined that where the six-month period occurs during which a period for which federal and state tax returns were prepared and filed, a debtor should use the tax rates indicated on those returns. *Id.* The *Lipford* Court recognized that a debtor should remove from the prior year's return actual changes such as charitable deductions, non-reoccurring income changes, and make other adjustments demonstrable by a debtor. *Id.* at 334. *See also In re Bernard*, 397 B.R. 605 (Bankr. D. Mass. 2008); *In re Stimac*, 366 B.R. 889 (Bankr. E.D.Wis. 2007).

The CMI Period in this case fits the first of Judge Waldrep's scenarios. With respect to the amount of tax withheld, Mr. Hinson testified that he calculated the actual amount withheld for taxes by adding those amounts shown on the payroll advices for the period of August 16, 2008 through December 31, 2008. In order to calculate that actual amounts withheld for July 1, 2008 through August 15, 2008 for which the Bankruptcy Administrator did not have the necessary payroll advices, Mr. Hinson testified that reviewing the payroll advices provided by the Debtor for the other months, he was able to calculate the withholding percentage from the DuPont deposits made between July 1, 2008 and August 15, 2008. Based on his calculations, twenty-nine percent (29%) of the Debtor's gross income was withheld for tax purposes. With these figures, the Bankruptcy Administrator was

able to calculate the total tax withholdings during the CMI Period and then divide such amount by six for the average actual monthly withholding.

However, in order to complete the calculation of an actual tax expense for Line 25, Mr. Hinson also considered whether the Debtor received a tax refund for 2008 since the six month CMI Period fell during the same year. The Debtor testified that he received a tax refund in the amounts of \$5,963.00 from the Internal Revenue Service and a refund in the amount of \$1,433.00 from the State of North Carolina resulting in a total 2008 refund of \$7,396.00. If spread over the entire year, those refunds result in an average monthly refund amount of \$616.33.

Determining the appropriate tax rate can also be accomplished by subtracting one-twelfth of the previous years tax refunds from the average monthly taxes withheld. Mr. Barbour's overwithholding of taxes skews the computation of CMI if tax refunds are not considered. Line 25 requires expenses *actually* incurred by a debtor for all federal, state, and local taxes. Use of the previous years tax refund to compute actual tax expense is further corroborated by the fact that Mr. Barbour received significant tax refunds in 2006 and 2007. In addition, Mr. Barbour's wages during the CMI period are similar in amount as his previous years income.<sup>3</sup>

With these amounts, the Bankruptcy Administrator established that the actual monthly tax expense for Line 25 should be \$1,215.00 during the CMI Period - being computed by deducting the monthly amount of the 2008 tax refunds from the average monthly amount of \$1,831.00 withheld by his employers. The Court agrees with the Bankruptcy Administrator's reliance on the standards

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<sup>3</sup> Based on the tax documents submitted to the Court, Mr. Barbour's 2006 gross income was \$66,775.00; his 2007 gross income was \$71,107.00; and his 2008 gross income was \$75,367.00 as compared to the 2009 projected gross income of \$81,876.00. The Debtor's gross income - as calculated based on the means test requirements - includes an \$800.00 a month payment, \$9,600.00 annually, that he receives from his girlfriend to assist with the monthly household expenses. This contribution may not be taxable under the Internal Revenue Code and therefore, was not considered as part of his gross income in 2008 accounting for the slightly higher increase in income from 2008 to 2009.

for determining a debtor's actual tax liability as set forth in *Lipford* and finds that the Debtor's monthly actual tax expense is \$1,215.00. Therefore, Line 25 of the Amended CMI Statement is inaccurate.

### **III. Additional Expenses**

The Debtor disputes that his Line 25 actual tax expense during the CMI Period was \$1,215.00. He testified that he may be required to pay a portion of the 2007 tax refund back to the IRS based upon its disallowance of certain medical deductions. At the hearing, the Bankruptcy Administrator conceded that the Debtor should be allowed a \$100.00 monthly priority expense for Line 44, not Line 25, related to his tax repayment obligations to the IRS and/or the State of North Carolina.

Furthermore, the Debtor testified that even though he may have received a tax refund, those funds were used to pay his personal and real property taxes to Cumberland County and the City of Fayetteville since his mortgage does not require the payment of the real property taxes into escrow. The Debtor testified that he pays \$3,200.00 a year in real estate taxes to the City of Fayetteville and County of Cumberland. Counsel argued that this expense is necessary for the Debtor to maintain his real property and that this amount, divided by 12, should be credited as an expense on the Amended CMI Statement. Although, there is no specific line item on Form 22A for real property taxes, the Court recognizes though that most lenders require an escrow payment for taxes and, therefore, those tax amounts paid by the Debtor may be considered as part of the monthly mortgage expense incurred by the Debtor on Line 42.

The Bankruptcy Administrator did not object to the allowance of the property tax expense on Line 42. However, the Bankruptcy Administrator stated that the Debtor did not inform him that

the property taxes were not included as part of the mortgage payment. Consequently, the Bankruptcy Administrator had no way of knowing that the debtor included that amount in his Line 25 expense on the Amended CMI Statement. Therefore, based on the evidence presented, the Court finds that Line 42 should reflect a credit of \$267.00 representing one-twelfth of the Debtor's real property tax liability.

#### **IV. Abuse of Chapter 7**

Taking the findings addressed above into consideration, the Debtor's CMI is \$6,823.00 and the total of the allowed deductions is \$6,576.72. By subtracting the allowed deductions from the CMI, the Court determines that the Debtor's monthly disposable income is \$246.28 and his 60-month disposable income is \$14,776.80. Therefore, the Court finds a presumption of abuse pursuant to Section 707(b)(1) since the Debtor's 60-month disposable income exceeds \$10,950.00.<sup>4</sup> The Court further finds that the granting of relief would be an abuse of under chapter 7 since no relevant additional facts or evidence was presented to overcome the presumption beyond those matters addressed as part of this order. Therefore, pursuant to section 707(b)(1), the Bankruptcy Administrator's Motion to Dismiss is **GRANTED**.

However, the Debtor is afforded the opportunity to consider converting this case to chapter 13. The Debtor has ten (10) days from the entry of this Order to file a Motion to Convert this case

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<sup>4</sup>Since a presumption of abuse has been established under Section 707(b)(1) and the Debtor has failed to rebut that presumption, the Court declines to consider whether the facts of this case represent abuse under Section 707(b)(3).

to a case under chapter 13 of the Bankruptcy Code. If the Debtor fails to do so, the case shall be dismissed as an abuse under Section 707(b)(1) of the Bankruptcy Code.

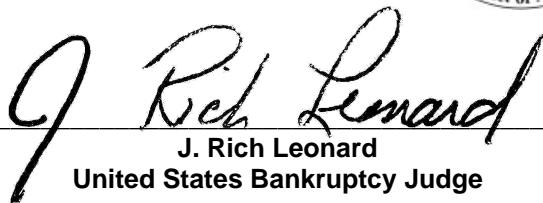
**SO ORDERED.**

**END OF DOCUMENT**



**SO ORDERED.**

**SIGNED this 17 day of March, 2010.**

  
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J. Rich Leonard  
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

**IN RE:**

**JUDITH GAIL EDWARDS,  
DEBTOR.**

**CASE NUMBER: 09-09250-8-JRL  
CHAPTER 7**

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**ORDER DENYING MOTION TO DISMISS FOR ABUSE**

This matter is before the court on the Bankruptcy Administrator's motion to dismiss the chapter 7 proceeding pursuant to 11 U.S.C. § 707(b)(1). A hearing on this matter was held on March 9, 2010, in Raleigh, North Carolina.

The debtor filed for relief under chapter 7 of the Bankruptcy Code on October 23, 2009. Section 707(b)(1) authorizes the court to dismiss a case filed by an individual debtor whose debts are primarily consumer debts where it is found that granting relief would be an abuse. Abuse for an above-median debtor is determined by a series of calculations under 11 U.S.C. § 707(b)(2). First, the debtor's monthly expenses are subtracted from her total monthly income. After deducting expenses, the remaining balance is multiplied by 60. If the balance, multiplied by 60, is either (1) greater or equal to \$6,575.00 or 25 percent of the nonpriority unsecured debt, whichever is greater; or (2) greater or equal to \$10,950.00, then a presumption of abuse exists. § 707(b)(2)(A)(i)(I)-(II). Here, the debtor acknowledges that abuse is presumed. Although the

debtor's response to the trustee's motion does not raise the defense of special circumstances, the court finds that this is a case where special circumstances exist.<sup>1</sup>

Pursuant to 11 U.S.C. § 707(b)(2)(B)(i), the presumption of abuse may be rebutted by demonstrating special circumstances which justify additional expenses or adjustments of current monthly income. Any number of extra costs may constitute a finding of special circumstances, “[i]ndeed any legitimate expense that is out of the ordinary for an average family. . .could be considered.” 6 Collier on Bankruptcy ¶ 707.05[2][d] (15th ed). To make a showing of special circumstances the debtor must: (1) create itemized documentation of each expense or adjustment to income; (2) provide an explanation for why such expense is reasonable and necessary; and (3) affirm under oath the accuracy of the documentation. § 707(b)(2)(B)(ii)-(iii). Even when the debtor has shown special circumstances, the presumption of abuse remains intact unless the adjustments to expenses brings the debtor's available income below the amount triggering the presumption. § 707(b)(2)(B)(iv).

At the hearing, Sandra Edwards Cary, the debtor's sister, testified on the debtor's behalf. On April 18, 2009, the debtor suffered a massive brain stem stroke, leaving the debtor totally disabled. Due to this serious medical condition, the debtor is unable to live without constant medical care. The debtor receives monthly income from three sources: social security disability in the approximate amount of \$1,803.00, retirement disability from the State of South Carolina in the approximate amount of \$1,376.00, and private disability from Aetna in the approximate amount of \$250.00. Ms. Cary provided the requisite itemized documentation and testified to

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<sup>1</sup> Although the debtor claimed \$6,000.00 of special expense deductions on her Form B22A she did not meet the statutory requirements for establishing them. Thus a hearing was necessary.

such. The documentation shows that the debtor's monthly income is consumed by the costs of assisted living, medications, insurance, doctors' appointments, and other medical supplies.

These expenses are not only reasonable but are medically necessary to sustain the debtor's life.

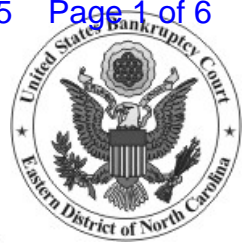
The prognosis is that the debtor will remain in her present state for the remainder of her days.

The court finds that the debtor has not only shown a situation of special circumstances, but has sufficiently rebutted the presumption of abuse. Furthermore, the court finds that under the Code, a hearing on special circumstances may not be necessary in every case. The debtor is only required to attest under oath to the accuracy of the information provided. 11 U.S.C.

§ 707(b)(2)(B)(iii). This can be accomplished by the filing of an affidavit. The "debtor may make such circumstances known to the United States trustee [or Bankruptcy Administrator] . . . in hopes that a decision will be made that no dismissal motion should be filed." 6 Collier on Bankruptcy ¶ 707.05[2][d] (15th ed). Families, like the debtor's, need not be routinely brought into court and made to undergo questioning about emotionally sensitive subjects if they can otherwise meet the statutory requirements for demonstrating special circumstances.

Based on the foregoing, the motion to dismiss is **DENIED**.

**END OF DOCUMENT**



**SO ORDERED.**

**SIGNED this 19 day of June, 2009.**

A handwritten signature in black ink that reads "Randy D. Doub". The signature is written in a cursive style and is positioned above a horizontal line.

**Randy D. Doub**  
**United States Bankruptcy Judge**

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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
FAYETTEVILLE DIVISION**

**IN RE:**

**CASE NO.**

**MARY ANNE ETHINGTON,**

**08-09384-8-RDD**

**DEBTOR**

**ORDER GRANTING BANKRUPTCY ADMINISTRATOR'S MOTION TO DISMISS  
CHAPTER 7 PROCEEDING OR TO CONVERT TO CHAPTER 13 WITH DEBTOR'S  
CONSENT PURSUANT TO 11 U.S.C. § 707(b)(1)**

Pending before the Court is the Motion of the Bankruptcy Administrator to Dismiss Debtor's Chapter 7 Case pursuant to 11 U.S.C. § 707(b)(1) (the "Motion to Dismiss"), and the Response in Opposition to the Bankruptcy Administrator's Motion to Dismiss filed by Mary Anne Ethington (the "Debtor"). A hearing was held in Fayetteville, North Carolina on May 7, 2009.

The issue before the Court is whether the Debtor's Thrift Savings Plan (the "TSP") loan repayment is an involuntary deduction under the Internal Revenue Manual (the "IRM"), thereby allowing such payments to be deducted as an "Other Necessary Expense" under Section 707(b)(2)(A)(ii)(I) of the Bankruptcy Code. Based on the following, the Court finds that pursuant to 11 U.S.C. § 707(b)(2)(A)(ii)(I) and Section 5.15.1.10 of the IRM, the Debtor's TSP loan repayment is not an involuntary deduction. Furthermore, because of the inability of the Debtor to

deduct the TSP loan repayment as an Other Necessary Expense, the Debtor fails the means test and abuse is presumed.

### **BACKGROUND**

On December 30, 2008, the Debtor filed a voluntary petition for Chapter 7 relief in the United States Bankruptcy Court for the Eastern District of North Carolina. The Debtor has been employed by the Department of Defense for twenty-six years. Her current monthly income listed on her amended form B22A is \$7,340.54 and her deductions are \$7,260.22. Included in the deductions is a \$650.04 monthly TSP loan repayment which is classified as an involuntary deduction for employment on Line 26 of the form. Based on the amended B22C form, the Debtor's sixty month disposable income under Section 707(b)(2) totals \$4,819.20<sup>1</sup> and, therefore, there would be no presumption of abuse.

On March 18, 2009, the Bankruptcy Administrator (the "BA") filed the Motion to Dismiss. The BA challenges whether the TSP loan repayment is an involuntary deduction under Section 5.15.1.10 of the IRM. The BA asserts that an involuntary deduction must be a deduction that is a requirement of the debtor's job. The BA maintains that the TSP loan repayment was not a requirement of the Debtor's job and, therefore, should not be allowed as an involuntary deduction on from B22C.

On March 31, 2009, the Debtor filed her response to the Motion to Dismiss asserting that the deduction for the TSP loan repayment was allowable under applicable law. The Debtor contends that the TSP loan payment was an involuntary deduction since she had no choice in having the payment automatically deducted from her wages.

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<sup>1</sup>The sixty month disposable income of \$4,819.20 is calculated based on sixty months times the Debtor's monthly disposable income of \$80.32.

At the hearing, the Debtor testified that she took out the TSP loan in 2004 after her husband left the marital residence. She stated that the proceeds of the loan were used to pay Pennsylvania real estate taxes, her son's tuition, credit card debt and other loans. The Debtor immediately began repaying the TSP loan at a monthly rate of \$650.04 through payroll deduction. The payroll deductions lasted through the means testing period and the TSP loan was repaid in January 2009.

### **DISCUSSION**

Based on the evidence presented to the Court, the Debtor has failed to establish the TSP loan repayment as an involuntary deduction under the IRM. Under 11 U.S.C. § 707(b)(2)(A)(ii), a debtor may deduct "Other Necessary Expenses" as determined by the Internal Revenue Service (the "IRS"). Involuntary deductions are considered a necessary expense allowed under the IRM.

Section 707(b)(2)(A)(ii)(I) states that "the debtor's monthly expenses shall be the debtor's . . . actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides . . . ." 11 U.S.C. 707(b)(2)(A)(ii)(I). The "Other Necessary Expenses" issued by the IRS are found in the IRM. Part five, chapter fifteen, section one of the IRM is labeled the Financial Analysis Handbook. IRM, Section 5.15.1. The handbook sets forth three types of allowable expenses, including "Other Expenses." IRM, Section 5.15.1.7. "Other Expenses" is listed as an allowable expense if it meets the necessary expense test; "expenses that are necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income." *Id.* Involuntary deductions are considered "Other Expenses" that satisfy the necessary expense test "if [the expense] is a requirement of the job." IRM, Section 5.15.1.10. The IRM expressly provides that "contributions to voluntary retirement plans are not a necessary expense." IRM, Section 5.15.1.23.

Though this issue is of first impression before this Court, two cases arising in other jurisdictions have dealt squarely with the issue of whether a loan repayment to a 401(k) plan loan is an involuntary deduction. See *In re Turner*, 376 B.R. 370 (Bankr. D. N.H. 2007); *In re Barraza*, 346 B.R. 724 (Bankr. N.D. Tex. 2006). In *Turner*, the debtor made voluntary contributions to her 401(k) retirement plan and repaid the loans from that plan as a direct deduction from her paycheck. *Turner*, 376 B.R. at 373. In that case, the debtor was required to pay the 401(k) loan for the duration of her employment. *Id.* A default by the debtor would not have caused her employment to be terminated, but would have resulted in a direct taxable distribution which would have been reported to the IRS. *Id.* The court in *Turner* reasoned that “the fact that the debtor took a loan against those [voluntary contributions] under loan terms that mandate repayment by payroll deductions does not change the nature of the funds when debtor repays them.” *Turner*, 376 B.R. at 373 (quoting *In re Lenton*, 358 B.R. 651, 657 (Bankr. E.D. Pa. 2006)). The *Turner* court concluded that because the debtor’s initial contributions were voluntary and the loan repayment was not required for her employment, the loan repayment was not an involuntary deduction.

Similarly, the Bankruptcy Court in the Northern District of Texas, in *In re Barraza*, followed the same reasoning. 346 B.R. 724 (Bankr. N.D. Tex. 2006). The *Barraza* Court concluded that because the only consequence to the debtor in defaulting on his 401(k) loans was a taxable distribution and not loss of employment, the loan repayments did not qualify as involuntary deductions. *Barraza*, 346 B.R. at 730.

The facts in this case are similar to both the facts in *Turner* and *Barraza*. The Debtor’s TSP loan was borrowed from the Debtor’s voluntary TSP account and her account balance was reduced by the amount of the loan. When the Debtor repaid the loan, her payments were reinvested in her

individual TSP account. In essence, she was repaying her original voluntary contribution to her TSP account in order to maintain its balance and avoid the tax consequences related to an early withdrawal. The “nature of the funds”, *Turner* 376 B.R. at 373, does not change from the time the voluntary contributions are first deposited, through the borrowing of those same funds and then the subsequent repayment. The fact that the funds were repaid by a direct deduction from her payroll account does not change the fact that the Debtor’s original contribution to the TSP account was voluntary. Therefore, because the funds originate from the Debtor’s voluntary contribution, the repayment of such funds is not considered an involuntary deduction.

The TSP Manual states that “when [the debtor] agree[s] to the loan terms, ... [she] agree[s] to repay the loan in full and [she] authorize[s] payroll deductions.” *TSP Manual at 8*. The Debtor authorized the loan repayment through payroll deduction and an involuntary deduction can not occur where the Debtor, not the employer, authorizes the payroll deduction.

Finally, the TSP loan repayment was not a requirement of the Debtor’s employment. The TSP manual informs the borrower to read the TSP Fact Sheet “Bankruptcy Information” in the event of a bankruptcy.<sup>2</sup> The TSP Fact Sheet “Bankruptcy Information” informs the borrower that if he ceases to make loan payments, the TSP will close his loan and report the unpaid loan balance to the IRS as a taxable distribution. The TSP manual also states that a taxable distribution will be declared on the borrower’s unpaid balance if he fails to replenish the funds which are withdrawn.

The Debtor testified at the hearing that she would not lose her job if she stopped making payments on the TSP loan. Had the Debtor discontinued the TSP loan repayments, the only consequence for failing to pay back the loan is that she would have been taxed on the distribution.

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<sup>2</sup>[Http://www.tsp.gov/forms/publications.html](http://www.tsp.gov/forms/publications.html).

Because the repayment of the TSP loan is not a requirement of the Debtor's employment, it is not an involuntary deduction under "Other Necessary Expenses" of 11 U.S.C. § 707(b)(2)(A)(ii) or the IRM.

Consequently, the TSP loan repayment is not an involuntary deduction and, therefore, may not be deducted on Line 26 of form B22C. Based on the non-allowance of the TSP loan repayment deduction, the Debtor's total deductions allowed under 11 U.S.C. § 707(b)(2) is \$6,610.18 and her current monthly income is \$7,340.54. Thus, the Debtor's monthly disposable income is \$730.36 and her sixty month disposable income would be \$43,821.60 which exceeds \$10,950.00,<sup>3</sup> the amount at which abuse is presumed. Therefore, the Court finds a presumption of abuse of the provisions of Chapter 7 and that grounds exist to justify dismissal of the case for abuse. However, on May 19, 2009, Debtor moved to convert the case to Chapter 13. The Court views the motion to convert as consent to convert to Chapter 13 under Section 707(b)(1) of the Bankruptcy Code. The Court therefore affirms the order entered May 28, 2009 to convert this case to Chapter 13.

**SO ORDERED.**

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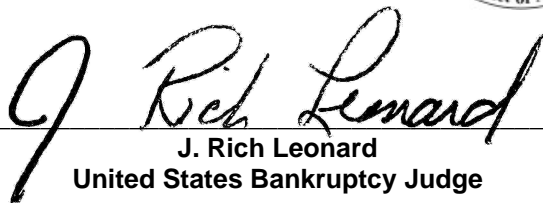
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<sup>3</sup>The Court "may dismiss a case filed by an individual debtor . . . if it finds that the granting of relief would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b)(1). "The court shall presume abuse exists if the debtors current monthly income reduced by [expenses] and multiplied by 60 is not less than the lesser of (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or \$6,575, whichever is greater; or (II) \$10,950." 11 U.S.C. § 707(b)(2)(A)(i). In this case, 25% of the Debtor's nonpriority unsecured claims is \$16,630.81. *See Schedule F*. Therefore, for abuse to be presumed, the Debtor's current monthly income multiplied by sixty must exceed \$10,950.00.



**SO ORDERED.**

**SIGNED this 15 day of December, 2009.**

  
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J. Rich Leonard  
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
RALEIGH DIVISION**

**IN RE:**

**CASE NO.**

**THERESA C. SANCES,**

**09-01138-8-JRL**

**DEBTOR.**

**ORDER DISMISSING CASE**

The matter before the court is the bankruptcy administrator's motion to dismiss. After a hearing on August 4, 2009, Judge A. Thomas Small, now retired, directed the debtor to amend her schedules and Form B22A, and continued the hearing before the undersigned. The continued hearing was conducted in Raleigh, North Carolina on December 9, 2009.

Theresa C. Sances filed a petition for relief under chapter 7 of the Bankruptcy Code on February 13, 2009. On March 26, 2009, the bankruptcy administrator filed a motion to dismiss for cause pursuant to 11 U.S.C. § 707(a) and, in the alternative, for abuse pursuant to § 707(b). After a hearing on August 4, 2009, Judge Small found that Mrs. Sances had not properly completed her Schedule I because she did not include her dependents' and her spouse's information, and that she did not comply with the instructions for calculating current monthly income on her Amended Means Test. Specifically, Mrs. Sances did not include \$1,600 paid from the debtor's non-filing spouse to Mrs. Sances for household expenses as income, and it was "plainly visible comparing the relative

salaries of Mr. and Mrs. Sances and in looking at the expenses listed on Schedule J that the non-filing spouse regularly pays a majority of the bills such as the mortgage, household expenses, utilities, food, transportation, and health care for the debtor," while none of those contributions was reflected on her means test. Similarly, the marital deduction was improperly calculated. Because the omissions prevented the bankruptcy administrator and the court from determining whether the chapter 7 filing constituted an abuse, Judge Small gave the debtor 15 days to amend her schedules and Form B22A.

Amended schedules and an amended Form B22A were filed on August 17, 2009. The amended Schedule I listed \$1,600 as a "contribution from husband to debtor's household expenses," and deducted the same amount from the spouse's income. Amended Schedule I also listed Mr. Sances' monthly income of \$14,292.50 and the deductions taken from his paycheck totaling \$4,959.18, leaving him with a net monthly take home income of \$9,434.32. After deducting the \$1,600 paid to Mrs. Sances, Mr. Sances' average monthly income is listed as \$7,834.32. Mrs. Sances' total average monthly income is listed as \$2,181.84, consisting of her \$711 in wages, minus \$129.16 in payroll deductions, plus the \$1,600 from Mr. Sances.

Mrs. Sances' Schedule J lists no rent or mortgage payment, no payments for water and sewer, telephone, home maintenance, health insurance, or car insurance. It lists \$60 for electricity, \$1,000 for food, \$300 for clothing, \$100 for laundry and dry cleaning, \$35 for medical expenses, \$400 for transportation and \$200 for recreation, for total expenses of \$2,095. At the hearing, Mrs. Sances testified that her husband pays the mortgage and the property taxes. He owns the vehicle she drives, and he pays for the gasoline. Mr. Sances also pays the electric bill, telephone bill, garbage and water bills, and for their children's cell phones, the family groceries, and a family health insurance policy.

Mrs. Sances also testified that because money is tight, Mr. Sances does not use his income to pay for anything other than the household expenses and his own credit card. He no longer gives Mrs. Sances \$1,600 per month, but he does pay the expenses directly that the \$1,600 used to cover.

Section 101(10A) defines "current monthly income" for purposes of the means test, and the definition is restated in the instructions for Form B22A. Specifically, debtors must list the average monthly income from all sources the debtor receives, 11 U.S.C. § 101(10A)(A), and "any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents[.]" 11 U.S.C. § 101(A)(B). In her Amended Form B22A, line 8, Mrs. Sances listed only the \$1,600 Mr. Sances paid to her for household use, but nowhere does she list all of the sums paid directly by Mr. Sances for the household expenses of Mrs. Sances and their children. In line 17, she indicates that Mr. Sances retains \$7,834.32 from his paycheck that is "NOT paid on a regular basis for the household expenses of the debtor or the debtor's dependents." However, her testimony was clear that this amount is used entirely for household expenses including the mortgage and family bills.

It is clear that the amendments to Schedules I and J and Form B22A made after Judge Small's order still do not accurately reflect Mr. Sances' contributions to the household expenses as required by the Bankruptcy Code. Mrs. Sances' counsel argued that Mr. Sances' expenses would have been the same whether or not Mrs. Sances lived in the residence. The question is not whether Mr. Sances' expenses would change, however, but whether Mrs. Sances received a benefit. If she did not live in the residence, she would have to incur expenses to reside elsewhere. Similarly, if Mrs. Sances did not drive a vehicle owned by Mr. Sances, and for which he paid for the fuel, she would have to pay for her own transportation. These are the debtor's expenses that are paid by her spouse.

Accordingly, Mr. Sances makes regular payments for the household expenses of the debtor that must be included in Mrs. Sances' current monthly income. The failure to account for these expenses also artificially inflates the marital deduction on line 17.

Section 707(b) provides that the court may dismiss a case if granting relief would be an abuse of the provisions of chapter 7. The court must presume a case is abusive if a debtor's means test as calculated on Form B22A reflects that the debtor could repay a certain amount of unsecured debt in a chapter 13 case. In this case, the debtor's B22A is so inaccurate, the court cannot determine whether the presumption of abuse arises.

Section 707(a) provides that the court may dismiss a case under chapter 7 for cause, including unreasonable delay by the debtor that is prejudicial to creditors and failure to file the information required by § 521(a)(1). Mrs. Sances filed her schedules on time, and she was completely candid in her testimony at the hearing and does not appear to be trying to hide information. But, even after amending the schedules and means test with instructions from the court, the information is so erroneous that the court cannot get a true picture of the debtor's financial situation. Accordingly, the court finds it appropriate to dismiss the case for cause pursuant to § 707(a).

Based on the foregoing, the bankruptcy administrator's motion to dismiss is **ALLOWED**.

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