

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

|                  |   |                   |
|------------------|---|-------------------|
| IN RE:           | § |                   |
|                  | § |                   |
| VICTORIA MAFFEI, | § | Case No. 08-40466 |
|                  | § | (Chapter 13)      |
| Debtor.          | § |                   |

**MEMORANDUM OPINION**

This matter is before the Court to consider the “Motion for Summary Judgment Denying Chapter 13 Plan” (the “Motion”) filed by the Chapter 13 trustee. The Debtor, Victoria Maffei, opposes the Chapter 13 trustee’s Motion. At issue is whether the Debtor’s calculation of amounts reasonably necessary to be expended from her projected disposable income satisfies the requirements of 11 U.S.C. §1325(b). The Court exercises its core jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A), (L) and (O). This Memorandum Opinion embodies the Court’s findings of fact and conclusions of law. *See* FED. R. BANKR. P. 7052.<sup>1</sup>

**SUMMARY JUDGMENT STANDARDS**

Motions for summary judgment are authorized by Rule 56 of the Federal Rules of Civil Procedure, as adopted and applied to this proceeding by Rule 7056 of the Federal Rules of Bankruptcy Procedure. The entry of a summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and

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<sup>1</sup> To the extent any of the following findings of fact are construed as conclusions of law, they are hereby adopted as such. Likewise, to the extent any of the following conclusions of law are construed as findings of fact, they are hereby adopted as such.

admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (quoting FED. R. CIV. P. 56(c)). If a summary judgment motion is properly supported, a party opposing the motion may not merely rest upon the contents of its pleadings, but must demonstrate the existence of specific facts constituting a genuine issue of material fact for which a trial is necessary. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986) (citing FED. R. CIV. P. 56(e)).

The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion and identifying those portions of the “pleadings, depositions, answers to interrogatories, and affidavits, if any,” which it believes demonstrates the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. Here, it is the Debtor who bears the burden of proving that her claimed expenses are reasonably necessary. *See, e.g., Lynch v. Tate (In re Lynch)*, 299 B.R. 776, 779 (W.D. N.C. 2003); *In re Webb*, 262 B.R. 685, 688 (Bankr. E.D. Tex. 2001). Where the non-moving party bears the burden of proof, as in this case, then the party moving for summary judgment bears the initial burden of “informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex v. Catrett*,

477 U.S. 317, 323 (1986). The non-movant must then present “specific facts showing there is a genuine issue for trial.” FED. R. CIV. P. 56(e).

The Chapter 13 trustee and the Debtor have essentially stipulated in their pleadings that there is no factual dispute in need of resolution and have presented opposing motions for summary judgment based upon the application of appropriate law. For cases in which the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *See, e.g., Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8<sup>th</sup> Cir. 1995); *Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4<sup>th</sup> Cir. 1995). The Chapter 13 trustee’s Motion, the Debtor’s response and the record of this bankruptcy case establish the following body of relevant, uncontested facts:

### **UNCONTESTED FACTS**

The Debtor is a single woman who moved to Texas from California during 2006. The Debtor has a 25-year-old son, a 28-year-old daughter and a 4-year-old granddaughter. The Debtor supports both her daughter, who has employment and emotional problems relating to substance abuse, and her daughter’s 4-year-old child. The Debtor also makes monthly tuition payments for her 25-year-old son.

The Debtor earns a gross monthly salary of \$10,200 as a managing textile designer for a national retailer. After moving to Texas, the Debtor purchased a home in Collin County. The Debtor executed a Note dated August 25, 2006 in the original principal amount of \$494,500, secured by a Deed of Trust executed on the same date. The Note required the Debtor to make monthly mortgage payments of

\$3,943.33. The Debtor, however, was unable to make all of her monthly mortgage payments.

The Debtor filed a bankruptcy petition under Chapter 13 of Title 11 of the United States Code (the “Bankruptcy Code”) on February 29, 2008. At that time, the Debtor was more than \$20,000.00 in arrears on her mortgage payments. The Debtor also owed back taxes to the Internal Revenue Service, Collin County, and the State of California.

The Debtor annexed Official Form 22C (Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income) (“Form 22C”) to her bankruptcy petition. In her Form 22C, the Debtor stated that she is the only member of her household. The Debtor stated that the “total average actual monthly expense” that she will “continue to pay for the reasonable and necessary care and support of an elderly, chronically ill, or disabled member” of her immediate family “who is unable to pay such expenses” is \$500. The Debtor also deducted expenses relating to her home from her income in her Form 22C, including \$3,943 for her monthly mortgage payment, \$993.58 for property taxes, and \$164.00 for insurance.

In addition to her Form 22C, the Debtor annexed Schedule J (Current Expenditures of Individual Debtor(s)) (“Schedule J”) to her bankruptcy petition. Like her Form 22C, the Debtor’s Schedule J included an expense of \$500, which is described as “help for daughter.” The Debtor’s Schedule J also included a monthly payment of \$85 for “son’s tuition” as well as an attached, itemized list of

monthly “personal expenses” in the amount of \$845. These personal expenses consisted of a \$25 internet expense, a \$380 cell phone expense, \$100 for pet care, \$150 for personal care and grooming, \$90 for a swimming class, and \$100 for “education.”<sup>2</sup>

Litton Loan Servicing, L.P. filed a motion for relief from the automatic stay in the Debtor’s bankruptcy case on March 19, 2008. Litton thereby sought relief from the automatic stay to the extent necessary to foreclose on the Debtor’s home. The Court entered an order granting Litton’s motion on April 9, 2008.

The Debtor has made several amendments to the expenses listed in her Form 22C and her Schedule J since her petition date. The Debtor’s submitted her third amended Form 22C and her third amended Schedule J with her response to the Chapter 13 trustee’s Motion. The Debtor’s current Form 22C, which includes expenses relating to her surrendered home, calculates that the Debtor’s monthly disposable income under §1325(b)(2) is (\$3,058.16). In contrast, the Debtor calculates monthly net income of \$1,100 based on the expenses set forth in her current Schedule J. The Debtor’s current Schedule J does not include expenses relating to the Debtor’s surrendered home.

The Debtor had surgery of an unspecified nature after the petition date. The Debtor is obligated to pay for 20% of the cost of the surgery as well as for a related prescription and follow up visits to the doctor. The Debtor’s current Form

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<sup>2</sup> In her current Form 22C, the Debtor claims a monthly expense of \$100 for “education for employment or for a physically or mentally challenged child.”

22C increases her “Other Necessary Expenses: Health Care” from \$122 (claimed in her original Form 22C) to \$404 per month. The Debtor’s current Schedule J increases her medical and dental expenses from \$230 (claimed in her original Schedule J) to \$512 per month.

In her Chapter 13 plan, as amended, the Debtor proposes to make two monthly payments to the Chapter 13 trustee in the amount of \$780, followed by 58 monthly payments to the Chapter 13 trustee in the amount of \$1,100, for total payments to the Chapter 13 trustee of \$65,360. The Debtor proposes to pay nearly this entire amount to priority and secured creditors. The Debtor proposes to pay her unsecured creditors a pro rata share of only \$5,683.66. The Debtor estimates that her total general unsecured debt is \$47,391.97.

### **LEGAL DISCUSSION**

Section 1325(b)(1) of the Bankruptcy Code requires that “the court may not approve the plan unless ... the plan provides that all of the debtor’s projected disposable income to be received in the applicable commitment period ... will be applied to make payments to unsecured creditors under the plan.” 11 U.S.C. §1325(b)(1)(B). The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) significantly amended the method for determining a debtor’s projected disposable income under §1325(b). In this case, which is governed by the amended §1325(b), the Chapter 13 trustee argues that the Debtor is not proposing to contribute all of her projected disposable income to the Chapter

13 plan because certain expenses claimed by the Debtor are not reasonably necessary and should be disallowed.

### **A. The Debtor's Projected Disposable Income**

Before the passage of the BAPCPA, projecting a debtor's disposable income involved a flexible inquiry into Schedule I and the propriety of expenses detailed in Schedule J. As a result of the BAPCPA, "the former system of determining the reasonableness and necessity of expenditures ... through an evaluation of Schedules I and J has been supplemented by the required overlay of the standards otherwise utilized in §707(b)(2) to determine whether a presumption of abuse exists in a Chapter 7 case." *In re Sparks*, 360 B.R. 224, 227-228 (Bankr. E.D. Tex. 2006). In particular, new §1325(b)(3) provides that for debtors with current monthly income above the applicable state median income for their household size, such as the Debtor in this case, reasonably necessary expenses are to be calculated using the means test formula set forth in §707(b)(2)(A) and (B) in order to determine payments to unsecured creditors. Such "means test" standards are implemented in Chapter 13 cases through the calculation of "disposable income" built into Form 22C.<sup>3</sup>

In this case, the Debtor calculates monthly disposable income of (\$3,058.16) in her current Form 22C. The Debtor's calculation of her disposable income includes expenses relating to her home, which the Debtor has surrendered.

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<sup>3</sup> After the BAPCPA was enacted, three new Official Forms (22A, 22B and 22C) were created for individuals to complete and file in Chapter 7, 11, and 13 cases.

In her Motion, the Chapter 13 trustee argues that §1325(b) is forward-looking and that the Debtor's reasonably necessary expenses do not include expenses relating to the Debtor's surrendered home. The Chapter 13 trustee argues that, removing the amounts relating to the Debtor's surrendered home, adding the applicable IRS Local Standards for rent, and using all of the other expenses claimed in the Debtor's second amended Form 22C, the Debtor would have \$1,428.19 in monthly disposable income under the means test standards set forth in §707(b)(2).

The Debtor does not dispute the Chapter 13 trustee's calculations. In her opposition to the Motion, the Debtor argues that "projected disposable income" is a backward-looking concept and that the "plain meaning" of §1325(b)(2) requires the Court to look at the Debtor's pre-petition expenses for determining her disposable income. The Debtor asserts that §1325(b)(3), which incorporates §707(b)(2)(A)(iii)(I) for the purpose of determining amounts reasonably necessary to be expended under §1325(b)(2), clearly includes amounts owed pursuant to a contract, regardless of a debtor's stated intention to surrender the underlying property. The Debtor's argument, however, confuses cases relating to a determination of whether a presumption of abuse arises under §707(b) with cases relating to the calculation of how much disposable income a debtor will have to pay unsecured creditors over the term of a Chapter 13 plan.

The means test set forth in §707(b) embodies Congress' intent "that there be an easily applied formula for determining when the Court should *presume* that



a debtor is abusing the system by filing a Chapter 7 petition.” *In re Fowler*, 349 B.R. 414, 419 (Bankr. D. Del. 2006) (emphasis in original). “The means test presents a backward looking litmus test performed using mathematical computations of arbitrary numbers, often having little to do with a particular debtor's actual circumstances and ability to pay a portion of debt.” *In re Hartwick*, 352 B.R. 867, 868 (Bankr. D. Minn. 2006). The incorporation of means test standards for calculating the projected disposable income of above-median debtors, when juxtaposed with the forward-looking terms such as “projected,” “to be received” and “to be expended” used in §1325(b)(2), has created some confusion among bankruptcy practitioners as well as bankruptcy courts.

“Courts across the country have recognized that, though the calculation of ‘disposable income’ produced through the use of Form 22C will usually become the amount of ‘projected disposable income’ required for plan confirmation, such a result is not guaranteed.” *In re Louviere*, --- B.R. ----, 2008 WL 925824 (Bankr. E.D. Tex. 2008) (collecting authority). This is because the term “projected disposable income” has as a component an estimate of the future income and expenses of the debtor. Projected disposable income under §1325(b)(1)(B) “necessarily refers to income that the debtor reasonably expects to receive during the term of the plan,” *In re Hardacre*, 338 B.R. 718, 723 (Bankr. N.D. Tex. 2006), and the *projected* disposable income of the debtor may vary from the disposable income calculation if “the debtor can show that there has been a substantial change in circumstances such that the numbers contained in Form 22C are not

commensurate with a fair projection of the debtor's budget in the future." *In re Jass*, 340 B.R. 411, 418 (Bankr. D. Utah 2006), as cited in *In re Sparks*, 360 B.R. at 228 and *In re Louviere* at \*2. See also, e.g., *Kibbe v. Sumski (In re Kibbe)*, 361 B.R. 302 (B.A.P. 1<sup>st</sup> Cir. 2007); *Pak v. eCast Settlement Corp. (In re Pak)*, 378 B.R. 257 (B.A.P. 9<sup>th</sup> Cir. 2007); *Hamilton v. Lanning (In re Lanning)*, 380 B.R. 17 (B.A.P. 10<sup>th</sup> Cir. 2007); *In re Riggs*, 359 B.R. 649 (Bankr. E.D. Ky. 2007). See generally COLLIER ON BANKRUPTCY ¶1325.08[5][a] (15<sup>th</sup> ed. rev.) ("To the extent that courts give any meaning to the word "projected," and courts are supposed to give meaning to every word in a statute, they may have to disregard the debtor's prior income if circumstances have changed."). But see, e.g., *Coop v. Frederickson*, 375 B.R. 829 (8<sup>th</sup> Cir. B.A.P. 2007); *In re Hanks*, 362 B.R. 494 (Bankr. D. Utah 2007); *In re Alexander*, 344 B.R. 742 (Bankr. E.D. N.C. 2006).

Here, the parties appear to agree that the "disposable income" calculated by the Debtor through the use of her Form 22C differs from her "projected disposable income." The Debtor proposes in her Chapter 13 plan to make payments to her unsecured creditors despite the fact that she has negative "disposable income" according to her current Form 22C. Thus, the dispute in this case focuses on whether the expenses claimed by the Debtor are reasonably necessary as required by §1325(b)(3).

### **B. The Debtor's Reasonably Necessary Expenses**

Section 1325(b)(3) allows an above-median debtor, such as the Debtor in this case, to deduct her "actual monthly expenses for the categories specified as

Other Necessary Expenses” when calculating her disposable income for plan confirmation. 11 U.S.C. §707(b)(2)(A)(ii)(I). The term “Other Necessary Expenses” refers to the IRS Internal Revenue Manual’s listing of numerous categories of expenses that are not covered by the National Standards for food, clothing and other items or the Local Standards for housing, utilities, and transportation. According to the IRS Internal Revenue Manual, “Other Necessary Expenses” include items such as child care, education, taxes, mandatory payroll deductions, health care and telecommunication services. *See* IRS Internal Revenue Manual, Financial Analysis Handbook §5.15.1.10.

Section 1325(b)(3) of the Bankruptcy Code expressly requires “Other Necessary Expenses” to be “reasonably necessary.” 11 U.S.C. §1325(b)(3). In addition, in determining an above-median debtor’s eligibility for an “Other Necessary Expense” deduction, various bankruptcy courts have referred to or relied upon the Internal Revenue Service’s “necessary expense test” defined in the IRS Financial Analysis Handbook (the “IRS Handbook”) as “expenses ... necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income.”<sup>4</sup> *See, e.g., In re McGuire*, 342 B.R. 608, 612-13

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<sup>4</sup> The IRS Handbook is a subpart of the larger Internal Revenue Manual. The legislative history accompanying BAPCPA specifically references the IRS Handbook as the source of the applicable expenditure amounts under §707(b). *See* H.R. Rep. 109-31, at 13-14 (2005) (footnotes omitted), *reprinted in* 2005 U.S.C.C.A.N. 88, 99-100 (“In addition to other specified expenses, the debtor's monthly expenses-exclusive of any payments for debts (unless otherwise permitted)-must be the applicable monthly amounts set forth in the Internal Revenue Service Financial Analysis Handbook as Necessary Expenses under the National and Local Standards categories and the debtor's actual monthly expenditures for items categorized as Other Necessary Expenses.”). *But see generally* Hon. Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 *231*, 257-58 (2005) (explaining that the Internal Revenue Manual may not be the best source for analyzing BAPCPA).

(Bankr. W.D. Mo. 2006) (reviewing the IRS Handbook and the Internal Revenue Manual); *In re Hardacre*, 338 B.R. 718, 726-27 (Bankr. N.D. Tex. 2006) (finding the IRS Collection Financial Standards and the Internal Revenue Manual “instructive”); *In re Tranmer*, 355 B.R. 234, 252 (Bankr. D. Mont. 2006) (disallowing an expense and denying confirmation based on the necessary expense test for Other Necessary Expenses in the IRS Handbook). The IRS Handbook further provides that, “[t]he amount must be reasonable considering the taxpayer's individual facts and circumstances.”<sup>5</sup>

Here, the Debtor seeks to pay \$1,100 each month to her unsecured creditors in her proposed Chapter 13 plan. The standards set forth in §707(b)(2) produce a calculation of projected disposable income far in excess of this amount when her claimed “Other Necessary Expenses” are excluded – indeed, the standards set forth in §707(b)(2) produce a calculation of projected disposable income in excess of \$1,100 even when all of the “Other Necessary Expenses” claimed in the Debtor’s original Form 22C are included. In her affidavit in support of her opposition to the Chapter 13 trustee’s Motion, the Debtor suggests that her circumstances have changed since she filed her original Form 22C due to a surgery of an unspecified nature and related, unspecified medical bills. The Debtor’s amendments to her Schedule J, as well as her “amendments” to her

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<sup>5</sup> See IRS Internal Revenue Manual, Financial Analysis Handbook §5.15.1.7(1).

original Form 22C,<sup>6</sup> appear to be intended to address alleged post-petition changes in the Debtor's circumstances. The Debtor, however, has failed to present this Court with admissible evidence establishing the amount of any necessary expenses to be expended during the term of her proposed Chapter 13 plan or allowing the Court to determine the reasonableness of such expenses.<sup>7</sup> *See, e.g., In re Webb*, 262 B.R. 685, 688 (Bankr. E.D. Tex. 2001).

### CONCLUSION

For these reasons, the Court concludes that the Chapter 13 trustee's Motion should be **GRANTED**, the Chapter 13 trustee's objection to confirmation should be **SUSTAINED**, and confirmation of the Debtor's proposed Chapter 13 plan should be **DENIED** without prejudice. The Court will enter an Order consistent with this Memorandum Opinion.

Signed on 7/29/2008

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HONORABLE BRENDA T. RHOADES,  
UNITED STATES BANKRUPTCY JUDGE

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<sup>6</sup> Form 22C is a historical document designed to reflect the situation as it existed on the petition date, as more fully explained in *In re Littman*, 370 B.R. 820, 829-830 (Bankr. D. Idaho 2007). *See also In re Gordon*, 360 B.R. 679, 683-84 (Bankr. S.D. Cal. 2007).

<sup>7</sup> The Court notes in this regard that some of the expenses set forth in the Debtor's current Form 22C and her current Schedule J appear excessive when compared to the expenses of similarly situated debtors who have appeared before this Court – for example, the Debtor claims to spend and has budgeted \$200 a month every month for car repairs in her Form 22C and Schedule J, the Debtor has budgeted \$380 a month every month for telecommunication services in her Schedule J, and the Debtor claims to spend and has budgeted \$988 a month every month for the support of her daughter and granddaughter in her Form 22C and her Schedule J.