

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

ROGER ALLEN CLARY and
KAREN LYSTER CLARY,

Case No. 6:11-bk-04556-ABB
Chapter 7

Debtors.

MEMORANDUM OPINION

This matter came before the Court on the Motion to Dismiss (Doc. No. 13) filed by the United States Trustee (“UST”) seeking dismissal of this case pursuant to 11 U.S.C. Section 707(b) and the Response thereto (Doc. No. 42) filed by the Debtors Roger Allen Clary and Karen Lyster Clary. The final evidentiary hearing was held on November 7, 2012 at which the Debtors, their counsel, and counsel for the UST appeared.

The Court, in open Court, invited the parties to file post-hearing briefs by November 21, 2011. The UST timely filed a brief (Doc. No. 50) and the Debtors, on November 22, 2011, untimely filed a Motion seeking to extend the briefing deadline (Doc. No. 51). An Order was entered on November 30, 2011 (Doc. No. 53) denying the Debtors’ extension request. The Debtors, after the entry of the November 30, 2011 Order, untimely filed a post-hearing brief (Doc. No. 54), which was stricken by the Court pursuant to its Order entered on December 5, 2011 (Doc. No. 58).

The UST’s Motion to Dismiss is due to be granted pursuant to 11 U.S.C. Sections 707(b)(1), 707(b)(2), and 707(b)(3)(B). The Court makes the following findings of fact and conclusions of law after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

Bankruptcy Filing

The Debtors filed the above-captioned joint Chapter 7 case on March 31, 2011 (“Petition Date”).¹ Mrs. Clary has been the International Sales Manager for over twelve years for Metallurgical Products Company, an alloys manufacturer and supplier located in West Chester, Pennsylvania. Mr. Clary is the Senior Director for Safenet, Inc., a data protection and encryption company located in Belcamp, Maryland. Mr. Clary had been employed by Safenet for one month when the Debtors filed for bankruptcy protection.

Mr. Clary was previously employed as the Director of Operations at Faro Technologies, Inc., a manufacturer of computerized measurement devices, but lost his job in September 2010. He received severance pay of \$5,600.00 biweekly for six months beginning in September 2010 and then began working for Safenet.² Mr. Clary received \$15,000.00 from Safenet in April 2011 for relocation expenses.³ There was not a time period when Mr. Clary was not receiving income. The Debtors’ current gross annual income is \$226,159.76, or \$18,854.98 monthly.⁴

The Debtors have three adult daughters who reside with them and whom the Debtors consider dependents. The daughters, on the Petition Date, were twenty-one, twenty-one, and eighteen. The two older daughters attend college. Mr. Clary has a daughter from a previous marriage for which he was required to pay child support of \$620.00 per month. The child support obligation terminated in November 2011.

¹ Mrs. Clary filed three previous bankruptcy cases in the United States Bankruptcy Court for the Eastern District of Pennsylvania: (i) Case No. 97-bk-13256-DAS, Chapter 7, in which she obtained a Chapter 7 discharge on July 14, 1997; (ii) Case No. 96-bk-13653-DAS, Chapter 7, which was dismissed on May 17, 1996; and (iii) Case No. 91-bk-13693, Chapter 13, which was dismissed on April 20, 1995.

² Doc. No. 48, p. 6 (the annual income figure should be \$226,159.76, and not \$226,159.96, to result in gross monthly income of \$18,854.98).

³ Id.

⁴ Id. at p. 7.

The Debtors jointly own and were residing at 702 Palenci Court, Winter Springs, Florida (“Florida Property”) on the Petition Date. They, two months after filing this case, moved to Maryland to be closer to Mr. Clary’s work. They filed a Notice of Change of Address (Doc. No. 15) setting forth their new address is 1 Darney Court, Kingsville, Maryland 21087 (“Maryland Property”), which they rent pursuant to a written lease agreement executed by the Debtors on May 1, 2011.⁵ The Maryland Property is a three bedroom, two and a half bath, 2,900 square foot single family home situated on two and a half acres.

Financial Disclosures

The Debtors filed Schedules, Statement of Financial Affairs, Statements of Intention, and their Means Test on the Petition Date (Doc. No. 1). They, subsequent to the UST’s filing of its dismissal motion, filed a series of amendments to their income and expense disclosures, an amended Means Test, and several amended Statements of Intention regarding their secured debts.

The Debtors did not comply with the Order entered by the Court on September 6, 2011 (Doc. No. 32) establishing the deadline of September 26, 2011 for the filing of all amendments to their bankruptcy papers. The Debtors’ Amended Schedules I and J filed on September 27, 2011 and October 12, 2011 (Doc. Nos. 44 and 47) were untimely filed. The Debtors filed three reaffirmation agreements after the September 26, 2011 deadline.⁶

The reaffirmation agreements are vital in determining the Debtors’ secured debt intentions and obligations. The Schedules and Means Test amendments and tardily-filed

⁵ Debtors’ Ex. 3.

⁶ The Debtors’ reaffirmation agreement with Ally Financial for the 2009 Pontiac G8 (Doc. No. 46) should have been filed months earlier given Ally Financial executed the agreement in April 2011 and the Debtors executed it in June 2011.

reaffirmation agreements have made it difficult for the UST and the Court to ascertain the Debtors' actual monthly income and expenses and their intentions regarding their secured debts.

The Debtors listed in their original Schedules (Doc. No. 1) total assets of \$504,109.53, comprised of real property valued at \$279,183.00 and personal property valued at \$224,926.53. They listed total debts of \$763,214.81, comprised of secured debts of \$678,666.00, including a mortgage debt of \$524,442.00, and general unsecured debts of \$84,548.81, mostly consisting of credit card debts. The Debtors' debts are primarily consumer debts.

The Debtors assert they are ineligible for Chapter 13 pursuant to Section 109(e) of the Bankruptcy Code due to the significant unsecured portion of the Florida Property's mortgage debt. They contend they have no disposable income with which to fund a Chapter 11 plan.

Assets: Real Property

The Florida Property is the sole parcel of real property owned by the Debtors. It is a sizeable single-family residence with a pool and is located within a community governed by a homeowners' association. It is valued by the Debtors at \$279,183.00 in Schedule A and encumbered by a first-priority mortgage held by Capital One in the amount of approximately \$524,442.00. The Capital One mortgage has an adjustable rate of interest. The interest rate on the Petition Date was approximately 3.50%. The monthly mortgage payment is \$2,607.67. The Debtors stopped making mortgage payments in March 2011.⁷

⁷ Doc. No. 48, p. 8.

The principal balance of the Capital One mortgage exceeds the value of the Florida Property. The Florida Property had no equity on the Petition Date and the real estate market in which it is located continues to be a declining market. The Florida Property is vacant due to the Debtors' relocation to Maryland.

Capital One sought relief from the automatic stay of 11 U.S.C. Section 362(a) to pursue its foreclosure remedies regarding the Florida Property (Doc. No. 22). Capital One's supporting affidavit sets forth the Debtors were in default of the mortgage for failure to make mortgage payments. The Debtors did not oppose Capital One's stay relief motion and an Order was entered on July 29, 2011 granting the motion pursuant to 11 U.S.C. Section 362(d) (Doc. No. 24).

Debtors' Intention: The Debtors' intention regarding the Florida Property has been unclear and shifting throughout this case. They did not claim the Florida Property as exempt homestead property in Schedule C, but they describe it as homestead property in Schedule D. The Debtors set forth in their original Statement of Intention (Doc. No. 1), filed on the Petition Date, they intended to surrender the Florida Property.

The Debtors filed an Amended Statement of Intention (Doc. No. 14) on June 16, 2011 in which they revised their intention regarding the Florida Property from surrender to retention and reaffirmation of the mortgage debt. The Debtors filed this Amended Statement on the same day they filed their Notice of Change of Address. The Debtors, even though they had relocated to Maryland, intended to retain the Florida Property and be responsible for all of its related expenses. While this Amended Statement of Intention was in effect, the Debtors did not respond to Capital One's stay relief motion or make

any effort to cure the mortgage default. Such inaction is inconsistent with their intent to retain the Florida Property.

The Debtors, on September 26, 2011, filed a Second Amended Statement of Intention (Doc. No. 39) revising again their intention regarding the Florida Property. They set forth in their Second Amended Statement of Intention they intended to surrender and not retain the Florida Property.

The Debtors testified at the evidentiary hearing they do not intend to return to the Florida Property. The Debtors' expense disclosures reflect they continue to expend monies for the upkeep of the Florida Property despite their intention to remain in Maryland and Capital One's receipt of stay relief.

Vehicles and Boat

The Debtors own six cars: a 2009 Pontiac G8 GXP Sedan, 2008 Cadillac CTS, 2006 Cadillac Escalade, 2004 Pontiac Grand Am, 2003 Chrysler Sebring, and a 2000 Pontiac Grand Prix. The Debtors' daughters exclusively use the 2003 Chrysler Sebring and the 2004 Pontiac Grand Am. The Debtors pay all of the expenses associated with the Sebring and Pontiac Grand Am including insurance, gasoline, and maintenance. The Debtors own a 2006 Sea Ray boat 270 SLX with a 2006 Mercury 497 MAG motor and a 2007 Magic Tilt boat trailer (collectively, "Boat").

The 2004 Pontiac Grand Am, 2003 Chrysler Sebring, and 2000 Pontiac Grand Prix are free and clear of any encumbrances. The Debtors claim these three vehicles as fully exempt in Schedule C (Doc. No. 1). The 2009 Pontiac G8 GXP Sedan, 2008 Cadillac CTS, 2006 Cadillac Escalade, and Boat are encumbered by secured liens that exceed the value of the underlying collateral.

The Debtors set forth in their original Statement of Intention (Doc. No. 1) they intend to: (i) retain the 2009 Pontiac G8 GXP, 2008 Cadillac CTS, and 2006 Cadillac Escalade and reaffirm the secured debts encumbering these vehicles; and (ii) retain the Boat and reaffirm the secured debts encumbering that asset.

The Debtors, on September 26, 2011, filed a Second Amended Statement of Intention (Doc. No. 39) revising their intention regarding the 2008 Cadillac CTS. They revised their intention regarding this vehicle from retention to surrender. The Debtors have surrendered this vehicle.

The Debtors executed and presented to the Court for approval three Reaffirmation Agreements regarding two vehicles and the Boat. The Reaffirmation Agreements were approved pursuant to 11 U.S.C. Section 524(c) without hearings because the Debtors' counsel signed the documents certifying, among other things, the agreements were voluntary and did not impose any undue hardship on the Debtors or their dependents.

2006 Cadillac Escalade: The Debtors entered into a Reaffirmation Agreement with Wells Fargo (Doc. No. 37) pursuant to which they reaffirmed the 2006 Cadillac Escalade secured debt in the amount of \$20,443.21 with interest at the rate of 13.49% per annum requiring monthly payments of \$508.11 for forty-seven months.

The Debtors value the 2006 Cadillac Escalade at \$13,825.00 in Schedule B. The Debtors, pursuant to the Wells Fargo Reaffirmation Agreement, obligated themselves to make reaffirmation payments for this vehicle totaling \$23,881.17. The reaffirmation payments exceed the value of the vehicle by more than \$10,000.00.

2009 Pontiac G8: The Debtors entered into a Reaffirmation Agreement with Ally Financial (Doc. No. 46) pursuant to which they reaffirmed the 2009 Pontiac G8 secured

debt in the amount of \$32,836.04 with interest at the rate of 2.90% per annum requiring monthly payments of \$710.80 for forty-nine months.

The Debtors value this vehicle in Schedule B at \$25,975.00. They, pursuant to the Ally Financial Reaffirmation Agreement, obligated themselves to make reaffirmation payments for this vehicle totaling \$34,829.20. The reaffirmation payments exceed the value of the vehicle by more than \$8,800.00.

Boat: The Debtors entered into a Reaffirmation Agreement with BB&T (Doc. No. 45) pursuant to which they reaffirmed the Boat's secured debt in the amount of \$71,455.18 with interest at the rate of 7.24% requiring monthly payments of \$605.22 for 204 months.

The Debtors purchased the Boat in August 2008 for \$80,591.00, of which the Debtors financed \$76,607.38, as set forth in the BB&T Retail Installment Contract and Security Agreement (Doc. No. 45). The Debtors value the Boat at \$49,900.00 in Schedule B (Doc. No. 1). The BB&T Reaffirmation Agreement sets forth the scheduled monthly reaffirmation payments total \$123,464.88. The reaffirmation payments exceed the value of the Boat by more than \$73,000.00.

The Debtors use the Boat seasonally in Maryland. During the boating season they rent a slip for the Boat from MarineMax and pay rental fees of \$1,800.00 for April 1st through November 1st.⁸ Annualized, the slip fee is \$150.00 per month. MarineMax holds a security deposit of \$1,500.00. The Debtors store the Boat at the Maryland Property during the off-season. They pay monthly insurance premiums of \$140.00.

⁸ UST's Ex. 13.

401(k) Retirement Plans

The Debtors have 401(k) retirement plans through their employment with Metallurgical Products Company, Faro Technologies, and Safenet. Mrs. Clary values her retirement plan with Metallurgical Products Company at \$30,462.87 and claims it as fully exempt in Schedule C. Mr. Clary values his Faro Technologies retirement plan at \$73,987.01 and claims it as fully exempt in Schedule C. Mrs. Clary contributes \$404.30 monthly to her 401(k) plan and Mr. Clary contributes \$242.34 monthly to his Safenet 401(k) plan.⁹ Mrs. Clary took a loan from her 401(k) plan and makes monthly loan repayments of \$413.05.

Debtors' Income and Expenses

The Debtors each earn significant income. Their combined gross annual income exceeds \$200,000.00. Their annual income increased post-petition due to Mr. Clary's employment with Safenet. The Debtors' post-petition payment advices reflect the Debtors' current gross monthly income is \$18,854.98, or \$226,159.76 annually.¹⁰

The Debtors filed income disclosure documents, including three versions of Schedule I, setting forth differing monthly income amounts. They filed three versions of Schedule J setting forth their monthly expenditures. Their original Schedules I and J reflect monthly net income of \$141.37 (Doc. No. 1). Their Amended Schedules I and J reflect monthly net income of \$59.97 (Doc. Nos. 38, 44).

The Debtors, in each version of Schedule I, deduct their 401(k) contributions and loan repayments from their gross monthly income, resulting in total monthly income deductions of \$1,059.69. The Debtors assert they are entitled to these deductions, but

⁹ Doc. No. 44.

¹⁰ Doc. No. 48 (Stipulation) at p. 7, ¶ 28; UST's Exs. 18, 19, 20.

presented no authority in support of this assertion. The Bankruptcy Courts have consistently held voluntary 401(k) contributions and loan repayments cannot be excluded from a debtor's disposable income. The Debtors are not entitled to deduct their 401(k) contributions and loan repayments from their monthly gross income.

The Debtors listed in their original Schedule J monthly expenses of \$12,722.99. They included in their original Schedule J and Means Test the Florida Property mortgage payment and child support payment. They included these substantial expenses even though they intended to surrender the Florida Property and were not making mortgage payments to Capital One and the child support obligation had terminated.

They, in their amended schedules, removed the Florida Property mortgage payment and replaced that expense with the Maryland monthly rental expense of \$2,900.00 and replaced the child support expense with college expenses for two daughters. The Debtors reduced other expenses and increased others, resulting in total monthly expenses of \$12,059.49 in their Second Amended Schedule J. The net decrease in expenses between their original Schedule J and the Second Amended Schedule J is \$663.50.

The Debtors' monthly expenses in their Second Amended Schedule J totaling \$12,059.49 are:

- (i) \$2,900.00 for rent for the Maryland Property;
- (ii) \$400.00 for electricity and heating;
- (iii) \$375.00 for telephone;
- (iv) \$805.00 for other utilities including:
 - a. \$100.00 cable
 - b. \$100.00 oil/propane
 - c. \$350.00 Florida Property electricity
 - d. \$100.00 Florida Property water
 - e. \$155.00 Florida Property lawn care;
- (v) \$300.00 for unspecified "home maintenance";

- (vi) \$1,400.00 for food;
- (vii) \$10.00 for clothing;
- (viii) \$30.00 for laundry and dry-cleaning;
- (ix) \$400.00 for medical and dental expenses;
- (x) \$600.00 for transportation;
- (xi) \$10.00 for recreation;
- (xii) \$300.00 for insurance;
- (xiii) \$250.00 for homeowner's insurance for the Florida Property;
- (xiv) \$396.50 for life insurance;
- (xv) \$586.00 for auto insurance;
- (xvi) \$140.00 for Boat insurance;
- (xvii) \$62.50 for Florida Property homeowner's association dues;
- (xviii) \$700.00 for estimated income taxes;
- (xix) \$710.80 for unspecified auto installment payments;
- (xx) \$605.02 for Boat installment payments;
- (xxi) \$508.11 for 2006 Cadillac Escalade installment payments;
- (xxii) \$30.00 for pet care;
- (xxiii) \$90.56 for Onstar subscription;
- (xxiv) \$450.00 for college costs for two dependents;

While the Debtors eliminated the Florida Property mortgage from their Second Amended Schedule J, they included expenses totaling \$917.50 relating to the Florida Property.

The Debtors' income and expense disclosures are not consistent or reliable in determining the Debtors' actual monthly income and expenses. The Debtors, by deducting the 401(k) contributions and loan repayments from their monthly income, understated their disposable income.

UST's Motion to Dismiss

This case is governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005¹¹ ("BAPCPA"), which broadened the standard for dismissal of Chapter 7 cases from "substantial abuse" to "abuse" and created a rebuttable presumption of abuse. The UST asserts this case is abusive of the provisions of Chapter 7. It contends this case should be dismissed pursuant to Section 707(b)(1) of the Bankruptcy Code

¹¹ Pub. L. No. 109-8, 119 Stat. 23 (2005).

because the presumption of abuse arises pursuant to Section 707(b)(2) and the Debtors have failed to rebut the presumption. The UST, in the alternative, seeks dismissal based upon the totality of the circumstances of the Debtors' financial situation pursuant Section 707(b)(3)(B) of the Bankruptcy Code. The parties have stipulated to certain facts as set forth in their Stipulation of Facts (Doc. No. 48).

An abuse determination pursuant to Section 707(b)(2) turns upon a mathematical calculation. Every Chapter 7 debtor is required to file Official Form 22A entitled "Chapter 7 Statement of Current Monthly Income and Means-Test Calculation," commonly known as the "Means Test," in which the debtor itemizes his income and expenditures. The form calculates average monthly income, less allowable expenses, over a sixty-month period.¹²

Allowable deductions from monthly income include, as set forth in Section 707(b)(2)(A): (i) statutorily prescribed monthly expenses, including living expenses as set by national and local standards by the Internal Revenue Service; (ii) certain "reasonably necessary" actual monthly expenses; (iii) payments "contractually due to secured creditors in each month of the 60 months following the date of the petition;" and (iv) payments on priority claims (calculated as the total amount of debts entitled to priority, divided by 60).

A filing is presumed abusive pursuant to Section 707(b)(2) if the debtor's current monthly income, less allowed expenses, is greater than BAPCPA's statutory thresholds

¹² The calculations incorporate the Census Bureau's Median Family Income Data and the IRS' National Standards for Allowable Living Expenses and Local Standards for Transportation and Housing and Utilities Expenses.

for disposable income.¹³ A Chapter 7 filing is presumed abusive if there is net monthly income of \$195.42 or more, which translates into at least \$11,725.20 to fund a sixty-month plan. A debtor's financial condition in the six-month period preceding the bankruptcy filing date is relevant to an abuse analysis.

A debtor may rebut a presumption of abuse through the showing of "special circumstances" pursuant to Section 707(b)(2)(B)(i) of the Bankruptcy Code. To establish special circumstances a debtor must:

- (i) demonstrate there is no reasonable alternative to the additional expenses or adjustment of income;
- (ii) itemize each additional expense or adjustment of income;
- (iii) provide documentation for such expense or adjustment to income;
- (iv) provide a detailed explanation of the special circumstances that make such expense or adjustment to income necessary and reasonable; and
- (v) attest under oath to the accuracy of the information provided.

Congress included two non-exclusive examples of "special circumstances" in BAPCA: "a serious medical condition," or "a call or order to active duty in the Armed Forces." Neither the Debtors nor their children suffer from a serious medical condition. The Debtors have not been called or ordered to active duty in the Armed Forces.

The Debtors filed their original Means Test on the Petition Date. The UST timely filed its Motion to Dismiss on June 15, 2011, to which the Debtors did not respond until September 26, 2011 (Doc. No. 42). The Debtors, in late September 2011, began

¹³ A presumption of abuse arises, pursuant to the statutory calculation of 11 U.S.C. Section 707(b)(2)(A), where a debtor's current monthly income, less allowed expenses, and multiplied by 60 is not less than the lesser of: (i) twenty five percent of the debtor's nonpriority unsecured claims in the case, or \$7,025.00, whichever is greater; or (ii) \$11,725.00.

amending their Schedules and Means Test—months after they had moved to Maryland and months after the UST’s dismissal motion was pending.

The Chapter 7 Trustee Leigh R. Meininger concluded the Debtors’ Section 341 meeting of creditors on May 5, 2011 and designated this case a no asset case on August 16, 2011. He has taken no position on the UST’s dismissal motion.

Debtors’ Means Test

Income: The Debtors filed an original Means Test (Doc. No. 1) on the Petition Date and an Amended Means Test on September 26, 2011 (Doc. No. 40). They set forth in their original Means Test at Line 13 an annualized monthly income total of \$208,680.00, based upon gross monthly income of \$17,390.00, and in their Amended Means Test at Line 13 an annualized monthly income total of \$208,764.60, based upon gross monthly income of \$17,397.05.

The parties have stipulated to using \$208,750.00 as the Debtors’ annualized monthly income for means test purposes. The stipulated annualized monthly income amount is less than the Debtors’ current actual gross annualized income of \$226,159.76.

Expenses: The itemized expense deductions contained in the Debtors’ Means Tests are not consistent with their Schedules I and J. The Debtors, in their original Means Test, claimed deductions of \$17,314.98 from their monthly income resulting in disposable monthly income of \$75.02 (monthly income of \$17,390.00 less deductions of \$17,314.98). They claimed deductions of \$17,233.59 in their Amended Means Test resulting in disposable monthly income of \$163.46 (monthly income of \$17,397.05 less deductions of \$17,233.59).

Neither disposable monthly income amount contained in the Debtors' original Means Test or Amended Means Test meets or exceeds the Section 707(b)(2) presumption of abuse threshold of \$195.42. The Means Tests, as completed by the Debtors, do not reflect a presumption of abuse. The Debtors have asserted throughout this proceeding there is no presumption of abuse because they are entitled to claim the deductions contained in their Means Tests.

UST's Deduction Objections

The Debtors are above-median debtors; their household income exceeds the Florida State median income for a family of five. They are subject to BAPCPA's limitations on allowed expenses. The UST objects to several expense deductions claimed by the Debtors in their Amended Means Test. It objects to the figures utilized by the Debtors on Lines 21, 22, 23, 25, 28, 29, 34, 42, 45, and 50 in their Amended Means Test. The UST's post-hearing brief focuses on the objections to Lines 21, 25, 29, and 34 because the disallowance or reduction of any *one* of these deductions will establish the presumption of abuse exists.

Line 21: Line 21, entitled Housing/Utilities Adjustment, is for housing expenses that are in addition to the housing expenses of Lines 20A and 20B. Line 20A is for the deduction non-mortgage expenses for a debtor's applicable county and family size. Line 20B is for the deduction of mortgage or rent expenses for the debtor's applicable county and family size. The Means Test sets forth at Line 21:

Local Standards: housing and utilities; adjustment. If you contend that the process set out in Lines 20A and 20B does not accurately compute the allowance to which you are entitled under the IRS Housing and Utilities Standards, enter any additional amount to which you content you are entitled, and state the basis for your contention in the space below[.]¹⁴

¹⁴ B22A (Official Form 22A) (Chapter 7) (12/10).

The Debtors, pursuant to the IRS Housing and Utilities Standard for a family of five in Orange County, Florida, may claim a maximum deduction of \$528.00 in Line 20A and a maximum deduction of \$1,263.00 in Line 20B. They claim a deduction of \$528.00 in Line 20A for utilities for the Maryland Property and a deduction of \$1,263.00 in Line 20B for the Maryland Property rent. The Debtors fully expended the maximum allowable deductions of Lines 20A and 20B.

The Debtors assert their monthly utilities expense for the Maryland Property is \$1,275.00. Their monthly rent for the Maryland Property is \$2,900.00. The utilities expense for the Maryland Property exceeds the allowed housing expense deduction of Line 20A by \$747.00. The Maryland Property rental expense of \$2,900.00 exceeds the allowed rent deduction of Line 20A by \$1,637.00. The Debtors claim these overages as additional housing expense deductions, plus expenses related to the Florida Property, in Line 21.

The Debtors claim in Line 21 a deduction of \$3,301.50 comprised of the: (i) balance of the Maryland Property rent in the amount of \$1,637.00; (ii) balance of the utilities and maintenance for the Maryland Property in the amount of \$747.00; and (iii) utilities and maintenance for the Florida Property in the amount of \$917.50, which includes \$350.00 for electricity, \$100.00 for water, \$155.00 for lawn maintenance, \$250.00 for homeowner's insurance, and \$62.50 for homeowner association dues.

The UST asserts the Debtors are not entitled to claim any expense amounts in Line 21 on the grounds: (i) they are not entitled to claim any expenses for the Florida Property because they have surrendered it; (ii) the Maryland Property costs were not incurred within the six month period prior to the Petition Date; and (iii) if the Debtors are

allowed to claim expenses for the Maryland Property, the Debtors have failed to substantiate why they are entitled to claim expenses that exceed the IRS standards by \$2,384.00.

Line 25: The Debtors claim on Line 25 a deduction of \$4,140.06 for taxes. This deduction is inconsistent with the Debtors' prepetition payroll advices, which are controlling for means test purposes. Mr. Clary's payroll advices reflect an average of \$1,952.57 was deducted monthly from his prepetition earnings for federal income taxes.¹⁵ Mrs. Clary's payroll advices reflect an average of \$860.70 was deducted monthly from her prepetition earnings for federal income taxes.¹⁶ The Debtors' actual taxes for the Means Test calculation at Line 25 are \$2,813.28 based upon their payroll advices. They overstated their deduction for taxes in Line 25 by \$1,326.78.

Line 29: Lines 25 through 35 of the Means Test provide for the deduction of specifically defined "other necessary expenses." Line 29 provides for the deduction of necessary expenses for "education for employment or for a physically or mentally challenged child." The Means Test sets forth the Line 29 expense is:

the total average monthly amount that [a debtor] actually expend[s] for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.¹⁷

The Debtors listed a deduction of \$450.00 in Line 29 for college costs for their two eldest daughters.¹⁸ The UST asserts the Debtors are not entitled to claim any deduction for Line 29 because they did not establish their daughters are physically or mentally challenged.

¹⁵ UST's Ex. 16.

¹⁶ UST's Ex. 17.

¹⁷ B22A (Official Form 22A) (Chapter 7) (12/10).

¹⁸ Doc. No. 48 at p. 13, ¶ 51.

Line 34: The Debtors claim on Line 34 a deduction of \$1,122.57 for health (including dental and vision insurance) and disability insurance and contributions to a health savings account. This deduction is inconsistent with their prepetition payroll advices. Mr. Clary's payroll advices reflect average deductions of \$59.90, \$15.80, and \$16.02, and Mrs. Clary's payroll advices reflect average deductions of \$556.50 and \$91.67, resulting in an average monthly deduction of \$739.89.¹⁹ The Debtors' actual expense for the Line 34 deduction is \$739.89. They overstated their Line 34 expense by \$382.68.

Additional Objections: Lines 22, 23, 28, 42, 45, and 50

Line 22: Line 22 is a fixed transportation expense based upon the IRS' Local Transportation Expense Standards (based on the Southern Census Region) for either the cost of public transportation, or the cost to operate one or two vehicles. The fixed expense the Debtors may claim pursuant to the IRS standards for two vehicles is \$488.00. The Debtors claim a deduction of \$600.00 in Line 22 for vehicle operation costs. Their deduction exceeds the maximum allowed expense by \$112.00.

Line 23: The Debtors claim a deduction of \$580.49 in Line 23 for the secured debt obligation for the 2009 Pontiac G8. The UST asserts the correct deduction amount is \$547.27, which amount is based upon the reaffirmed secured debt of \$32,836.04 divided by the reaffirmation term of sixty months.

Line 28: Line 28 is for the deduction of court-ordered payments. The Debtors claim \$655.00 in Line 28 for child support obligations. The Debtors concede the support obligation terminated in June 2011. The UST consents to a deduction of \$1,020.09, but such deduction is unsubstantiated.

¹⁹ UST's Exs. 16, 17.

Line 42: The Debtors claim deductions for secured debt obligations in Line 42 for two vehicles and the Boat. They claim deductions of \$580.49 for the 2009 Pontiac G8, \$605.00 for the Boat, and \$398.02 for the 2006 Cadillac Escalade. The UST consents to deductions for each of these items, but asserts the deduction for the 2009 Pontiac should be \$547.27 and the deduction for the 2006 Cadillac Escalade should be \$340.72.

Line 45: The Debtors list in Line 45 a projected monthly Chapter 13 plan payment of \$181.62, which, when multiplied by the customary 10% Chapter 13 administrative expense, results in a monthly administrative expense of \$18.16. The UST asserts the projected average monthly plan payment should be \$6,914.50, which translates into an average monthly administrative expense of \$691.45.

Line 50: The Debtors assert they have monthly disposable income of \$163.48. The UST disputes their calculation and contends they have monthly disposable income of \$4,730.06.

Sustaining any one of the UST's objections to Lines 21, 25, 29, or 34 results in net monthly income that exceeds the threshold amount of \$195.42 and the presumption of abuse arises. The disallowance of the Line 21 and Line 29 deductions and reduction of the Line 25 and Line 34 deductions as advocated by the UST results in monthly disposable income of \$3,716.00 that could be distributed to the Debtors' creditors. Sustaining all of the UST's deduction objections results in monthly disposable income of \$4,730.06 that could be distributed to the Debtor's creditors.

Debtors' Responses

Maryland Property: The Debtors concede the utilities expenses of \$1,275.00 and the rental payment of \$2,900.00 for the Maryland Property exceed the applicable IRS standards. They concede the utilities expenses exceed the national average by \$747.00 and the rent exceeds the national average by \$1,637.00. The Debtors testified they chose the Maryland Property because they had limited rental choices. They explained the rental market in the Kingsville area of Maryland is competitive due to the proximity of Aberdeen Proving Ground.

Florida Property: The Debtors, even though they have no intention of returning to the Florida Property and recognize the mortgage indebtedness is dischargeable, contend they are entitled to claim a deduction of \$917.50 for Florida Property expenses in Line 21. The Debtors testified they believe they: (i) are responsible for maintaining the Florida Property while any foreclosure action is pending to prevent vandalism and damage, such as mold growth and deterioration of the HVAC system; (ii) are responsible for any injuries that are sustained on the Florida Property; (iii) continue to have personal liability for the homeowner association fees that accrue post-petition; and (iv) have a continuing obligation pursuant to the homeowner association rules to maintain the lawn and pool.

The Debtors testified they intend to continue to pay the monthly expenses of \$917.50 for the Florida Property until a foreclosure sale is consummated and the Florida Property is re-deeded. The Debtors explained they have made no attempt to rent the Florida Property to generate income because their deed contains a rental restriction.

Child Support and College Tuition: The Debtors concede the monthly payroll deduction for Mr. Clary's child support obligation has terminated, but they assert the obligation has been replaced with their obligation to pay for college for their two eldest daughters, who are adults. The Debtors presented no substantiation for their Line 29 deduction of \$455.00 for college expenses. They presented no evidence establishing either daughter is physically or mentally challenged or establishing their entitlement to claim a Line 29 deduction. They presented no evidence establishing special circumstances.

The Debtors assert in their Response (Doc. No. 42) a child support arrearage of \$2,621.01 is due and owing by Mr. Clary and he is making monthly payments of \$655.00 to satisfy the arrearage. The Debtors presented no evidence substantiating the alleged support arrearage. Even if such a debt existed, it would have been satisfied, at the latest, in December 2011.

State Income Taxes: The Debtors assert their move to Maryland has created additional expenses, primarily the imposition of Maryland State income taxes on their earnings. They assert Mrs. Clary has monthly payroll deductions of \$464.68 for taxes and Mr. Clary has monthly payroll deductions of \$758.88 for taxes. They contend they will no longer receive the home mortgage interest deduction for the Florida Property and anticipate an additional \$700.00 for monthly federal income taxes.

Vehicles and Boat: The Debtors explained they reaffirmed the vehicle and Boat debts because they "have a moral obligation" to pay their secured creditors. The Boat is their primary source of recreation.

Analysis

The Debtors, based upon the parties' Stipulation, have gross annual income of \$208,764.60, or \$17,397.05 monthly, for Means Test purposes. The monthly income figure to be utilized in Line 18 of the Debtor's Amended Means Test from which expenses are to be deducted is \$17,397.05.

The deductions claimed by the Debtors in Lines 21, 28, and 29 are not allowable and should be \$0.00:

Line 21: The Debtors had monthly housing expenses on the Petition Date which continued post-petition. They are entitled to claim housing expenses in Lines 20A and 20B up to the maximum allowed amounts of \$528.00 and \$1,263.00. The Debtors claimed the full amount of the allowable Line 20A and Line 20B deductions.

Their claim of additional housing expenses of \$3,301.50 in Line 21 is not allowable. They failed to justify their utilities and rent expenses for the Maryland Property that exceed the IRS standards. They failed to demonstrate there are no reasonable alternatives to the Maryland Property and that special circumstances justify the utilities and rent expenses for this property. The Debtors are not entitled to claim any expenses for the Florida Property because they surrendered the property. The Debtors are entitled to a \$0.00 deduction on Line 21.

Line 28: The Debtors failed to establish they are entitled to a child support deduction in Line 28. Mr. Clary's court-ordered child support obligation terminated and the Debtors provided no substantiation of any other child support obligation. The Debtors are entitled to a \$0.00 deduction on Line 28.

Line 29: The Debtors failed to establish they are entitled to an educational deduction for their adult daughters. The daughters are not physically or mentally challenged and the tuition expense is not a condition of employment. The Debtors have no legal obligation to provide a college education or support for their adult children. The Debtors are entitled to a \$0.00 deduction on Line 29.

The presumption of abuse arises pursuant to Section 707(b)(2) with the disallowance of any one of the Line 21, Line 28, or Line 29 deductions. The disallowance of these deductions results in additional monthly disposable income of \$4,406.50, which when added to the Debtor's calculation of monthly disposable income of \$163.46 in Line 50, totals monthly disposable income of \$4,569.96, or disposable income of \$274,197.60 for a sixty-month period.

The reduction of the Debtors' deductions in Lines 22, 25, and 34 causes the Debtors' income to further exceed the allowed statutory maximums.²⁰ The Debtors are entitled to a maximum statutory deduction of \$488.00 in Line 22A. They failed to justify their deduction of \$600.00. The proper deduction amount is \$488.00. The Debtors' deduction for taxes in Line 25 is inconsistent with their payment advices and inflated. The proper deduction is \$2,813.28. The Debtors' deduction for healthcare costs in Line 34 is inconsistent with their pay advices and inflated. The proper deduction is \$739.89.

The reduction of the Debtors' Line 22, 25, and 34 deductions to the proper deduction amounts results in additional monthly disposable income of \$1,821.46. The disallowed and reduced deductions from Lines 21, 22, 25, 28, 29, 34 altogether result in monthly disposable income of \$6,391.42, or disposable income of \$383,485.20 for a

²⁰ The UST's objections to the vehicle deductions in Lines 23 and 42 are *de minimus* when compared to the Line 21, 22, 25, 28, 29, 34 deduction objections and do not impact the presumption analysis.

sixty-month period. This disposable income amount is based on the Debtors' income figure as stipulated to by the parties for means test purposes, but their monthly disposable income is higher than \$6,391.42 when their current gross monthly income of \$18,854.98 is taken into account.

The Debtors' current household income, less their allowed deductions, exceeds the statutory maximums of the Bankruptcy Code. The Debtors failed to rebut the presumption of abuse. They presented no evidence establishing special circumstances as required by Section 707(b)(2)(B). Granting the Debtors relief would be an abuse of the provisions of Chapter 7. They have the ability to pay their unsecured debts in full. Their case is due to be dismissed pursuant to Sections 707(b)(1) and 707(b)(2) of the Bankruptcy Code.

Totality of the Circumstances

The UST, as alternative relief, seeks dismissal of this case based upon the totality of the circumstances of the Debtors' financial situation. The core inquiry of the totality of the circumstances test is whether the Debtors have a meaningful ability to repay their unsecured debts. The test requires the Court to deduct from the Debtors' income amounts reasonably necessary to be expended for the maintenance or support of the Debtors and their dependents. Pre-petition and post-petition events are relevant to the analysis.

The Debtors' current gross monthly income is \$18,854.98, or \$226,159.76 annually. The Debtors, based upon their Amended Schedule J in which they list monthly expenses of \$12,059.49, have monthly disposable income of at least \$6,795.49. Monthly

payments of \$6,795.49 made over sixty months would result in debt repayment of \$407,729.40.

The Debtors' general unsecured creditors, based upon the total debt amount of \$84,548.81 in Schedule F, and not accounting for possible claim objections and administrative costs, would receive a payout of one hundred percent. The unsecured portions of the Florida Property mortgage and the 2008 Cadillac CTS security interest would be paid one hundred percent.

The Debtors' monthly disposable income would increase dramatically if their budget included only reasonable and necessary expenses. Many of their monthly expenses are not reasonable or necessary and are excessive. The Debtors' expenditures for the Florida Property, the Boat, and three oversecured vehicles (the Cadillacs and Pontiac G8) are excessive and unreasonable based upon the circumstances. The costs associated with the Maryland Property are excessive and unreasonable. The Debtors could obtain more affordable housing. It is neither necessary nor reasonable for the Debtors to live in the Maryland Property, to maintain three oversecured vehicles, or to retain the Boat. Their telephone expense of \$375.00 is unreasonable and unsubstantiated.

The Debtors' monthly expenses would be substantially reduced if they downsized and obtained alternative housing with reasonable monthly mortgage or rental payments and surrendered the oversecured vehicles and Boat. Finding alternative housing would reduce the Debtors' rental and maintenance costs including utilities and landscaping. The Debtors had an opportunity to surrender the Boat, 2009 Pontiac G8, and 2006 Escalade, but instead of surrendering these assets and significantly reducing their expenses, they reaffirmed the debts.

The Debtors' ability to pay one hundred percent of their unsecured debts establishes it would be an abuse of the Chapter 7 provisions to grant them relief.

Additional circumstances establish granting the Debtors relief would constitute abuse:

- (i) This case is the Debtors' third bankruptcy case and they are sophisticated with bankruptcy procedure.
- (ii) The Debtors have stable employment with their respective employers.
- (iii) The Debtors overinflated their expenses and made statutorily prohibited deductions in their Means Test to manipulate the disposable income calculation and avoid repayment of their unsecured debts.
- (iv) The Debtors made multiple amendments to their Schedules and Means Tests in an attempt to obfuscate the Means Test analysis.
- (v) The Debtors have made no effort and have no intention to reduce their expenses and continue to live a luxurious lifestyle.
- (vi) The Debtors, months after the Petition Date, executed and filed three reaffirmation agreements pursuant to which they unnecessarily and unreasonably committed themselves to paying substantial monthly amounts for oversecured vehicles and the Boat.
- (vii) The reaffirmed vehicles and Boat have no equity.
- (viii) The Debtors subsidize their adult daughters by providing them vehicles and paying for all of their living expenses.
- (ix) Their bankruptcy filing was not the result of an unforeseen or catastrophic event.

The UST has established the totality of the circumstances of the Debtors' financial situation demonstrates granting the Debtors relief would be an abuse of the provisions of Chapter 7. The UST's Motion is due to be granted pursuant to Section 707(b)(3)(B).

CONCLUSIONS OF LAW

BAPCPA

This case is governed by BAPCPA. The BAPCPA amendments, as is manifest by the legislation's title, "Bankruptcy Abuse Prevention and Consumer Protection Act," were intended to curb what was perceived to be abusive bankruptcy practices, and to ensure debtors with the ability to repay their debts do so:

The purpose of the bill [S. 256] is to improve bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system and ensure that the system is fair for both debtors and creditors.

...

The heart of the bill's consumer bankruptcy reforms consists of the implementation of an income/expense screening mechanism ('needs-based bankruptcy relief' or 'means testing'), which is intended to ensure that debtors repay creditors the maximum they can afford.

H.R. REP. No. 109-31, pt. 1, at 2 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 89.

Congress created in Section 707(b) a needs-based test to remedy the "inherently vague" "substantial abuse" dismissal standard. *Id.* at 12, U.S.C.C.A.N. at 98. A Chapter 7 case filed by an individual with primarily consumer debts is subject to dismissal, or conversion with the debtor's consent, if, after notice and a hearing, a Court "finds that the granting of relief would be an abuse of the provisions of this chapter." 11 U.S.C. § 707(b)(1). The determination whether "abuse" exists is determined by applying the objective test set forth in Section 707(b)(2) or the subjective test of Section 707(b)(3).

A presumption of abuse arises pursuant to 11 U.S.C. Section 707(b)(2) when a debtor's current monthly income, reduced by certain allowable living expenses and multiplied by 60, is greater than \$11,725.00, which equates to approximately \$195.42 of monthly disposable income. Subsections (ii) through (iv) of Section 707(b)(2)(A) define

the allowable monthly expenses to be used in the means test calculation.²¹ A debtor whose household income exceeds the state median income is considered an above-median debtor whose monthly expenses are subject to BAPCPA’s strict limitations. 11 U.S.C. § 101(39A) (defining “median family income”); In re Wilson, 383 B.R. 729, 731 (8th Cir. BAP 2008).

The presumption of abuse is rebuttable upon a showing by a debtor of “special circumstances”:

In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income *for which there is no reasonable alternative*.

11 U.S.C. § 707(b)(2)(B)(i) (*emphasis added*). A debtor, to establish special circumstances, must:

- (ii) . . . itemize each additional expense or adjustment of income and to provide—
 - (I) documentation for such expense or adjustment to income; and
 - (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.
- (iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.

11 U.S.C. §§ 707(b)(2)(B)(ii), (iii). A debtor must further establish the additional expenses or adjustments:

- . . . (i) cause the product of the debtor’s current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of—

²¹ Subsections (iii) and (iv) of Section 707(b)(2)(A), which address the calculations of monthly payments on secured debt and priority claims, is not relevant to this proceeding in that the Debtor has no secured or priority debts.

- (I) 25 percent of the debtor's nonpriority unsecured claims, or \$7,025.00, whichever is greater; or
- (II) \$11,725.

11 U.S.C. § 707(b)(2)(B)(iv).

Section 707(b)(2)(B)(i) contains two examples of “special circumstances” justifying additional expenses or adjustment of monthly income: (i) “a serious medical condition”; and (ii) “a call or order to active duty in the Armed Forces.” The examples are non-exclusive by virtue of the precedent words “such as.” In re Armstrong, No. 06-31414, 2007 WL 1544591, at *2 (Bankr. N.D. Ohio May 24, 2007). A Bankruptcy Court has broad discretion to determine on a case by case basis whether special circumstances exist. In re Templeton, 365 B.R. 213, 216 (Bankr. W.D. Okla. 2007).

Congress enacted two subjective tests for determining abuse pursuant to Section 707(b)(3):

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

11 U.S.C. §§ 707(b)(3)(A), 707(b)(3)(B).

The Debtors' debts are primarily consumer debts. 11 U.S.C. § 101(8). The Debtors are subject to the provisions of Sections 707(b)(1) and 707(b)(3). They do not seek rejection of a personal services contract.

The UST seeks dismissal of the Debtors' case pursuant to 11 U.S.C. Section 707(b)(1), or in the alternative, Section 707(b)(3)(B). The UST has the burden to establish the Debtors' filing is abusive by a preponderance of the evidence. Dionne v.

Simmons (In re Simmons), 200 F.3d 738, 743 (11th Cir. 2000); In re Parada, 391 B.R. 492, 496 (Bankr. S.D. Fla. 2008).

Means Test Analysis

The Debtors' annual household income for means tests purposes, as the parties stipulated, is \$208,764.05 and exceeds the State Median Income of \$72,635.00 for a family of five in Florida. They are subject to the expense limitations of 11 U.S.C. 707(b)(2). The Debtors listed deductions in their Amended Means Test that exceed the statutory expense limitations.

Part V of the Means Test form contains enumerated expense deductions. Each line item describes a particular deduction. The Debtors' Line 21, Line 28, and Line 29 deductions are improper and should be \$0.00.

The Debtors failed to justify why they are entitled to claim additional housing expenses in Line 21 for the Maryland Property that exceed the IRS standards. The Debtors did not establish the Maryland Property expense overages in Line 21 are expenses "for which there is no reasonable alternative" and they are "necessary and reasonable" pursuant to 11 U.S.C. Section 707(b)(2)(B). The Debtors failed to establish special circumstances justifying the Line 21 expenses.

The Debtors deduct \$917.50 for expenses for the Florida Property in Line 21. Such expenses do not constitute "payments on account of secured debts" pursuant to 11 U.S.C. Section 707(b)(2)(A)(iii). The Debtors are not entitled to deduct any expenses for the Florida Property because they have surrendered it. White v. Waage, 440 B.R. 563, 567 (M.D. Fla. 2010). The Means Test is intended to give the Court guidance as to whether debtors have sufficient disposable income to pay their creditors. Ransom v. FIA

Card Servs., N.A., ___ U.S. ___, 131 S. Ct. 716, 725 (2011). Permitting debtors to claim expenses they will not actually pay frustrates legislative intent and creates an inaccurate picture of their financial reality. The deductions for Line 21 should be \$0.00.

Lines 25 through 32 of the Means Test form delineate “other necessary expenses,” categories that are not specially addressed by Section 707(b)(2) and do not involve debt repayment.²² Line 28 of the Means Test is for the deduction of “court-ordered payments” defined as an amount a debtor is “required to pay pursuant to the order of a court or administrative agency, such as spousal or child support payments.”²³ The Debtors are not entitled to a Line 28 deduction because they have no child support obligations. The amount for Line 28 should be \$0.00.

Line 29 of the Means Test is for the deduction of “education for employment or for a physically or mentally challenged child.”²⁴ The Means Test directs at Line 29: “Enter the total average monthly amount that you actually expend for education that is a condition of employment and for education that is required for a physically or mentally challenged dependent child for whom no public education providing similar services is available.”²⁵ The Debtors claim a deduction of \$450.00 for college tuition for their eldest daughters. Neither daughter is physically or mentally challenged. The tuition is not a condition of employment. The Debtors did not establish special circumstances in support of their tuition deduction. The Debtors are not entitled to a Line 29 deduction for college tuition and the amount in Line 29 should be \$0.00.

²² B22A (Official Form 22A) (Chapter 7) (12/10); In re Demonica, 345 B.R. 895, 901 (Bankr. N.D. Ill, 2006).

²³ B22A (Official Form 22A) (Chapter 7) (12/10) at Line 28.

²⁴ Id. at Line 29.

²⁵ Id.

The Debtors are not entitled to claim any support deductions for their adult children. The Means Test form contains no line item deduction the Debtors may utilize for the deduction of education expenses for their adult daughters.

The deductions contained in Lines 22, 25, and 34 are improper and inflated. The Debtors are entitled to a maximum statutory deduction of \$488.00 in Line 22A for two or more vehicles. They failed to justify their deduction of \$600.00. The deduction for taxes in Line 25 is inconsistent with their payment advices and inflated; the proper deduction is \$2,813.28. The deduction for healthcare costs in Line 34 is inconsistent with the Debtors' pay advices and inflated; the proper deduction is \$739.89.

The presumption of abuse arises pursuant to Section 707(b)(2) with the disallowance of any one of the Line 21, Line 28, or Line 29 deductions. The disallowance of these deductions results in additional monthly disposable income of \$4,406.50. The reduction of the Debtors' Line 22, 25, and 34 deductions results in additional monthly disposable income of \$1,821.46.

The disallowed and reduced deductions from Lines 21, 22, 25, 28, 29, 34 result in monthly disposable income of \$6,391.42, or disposable income of \$383,485.20 for a sixty-month period. The Debtors' monthly disposable income increases when their current gross monthly income of \$18,854.98 is taken into account.

The Debtors' current household income, less their allowed deductions, exceeds the statutory maximums of the Bankruptcy Code. The Debtors failed to rebut the presumption of abuse. They did not establish special circumstances exist pursuant to Section 707(b)(2)(B). Granting the Debtors relief would be an abuse of the provisions of

Chapter 7. They have the ability to pay their debts in full. Their case is due to be dismissed pursuant to Sections 707(b)(1) and 707(b)(2) of the Bankruptcy Code.

11 U.S.C. Section 707(b)(3)(B)

The primary inquiry of a Section 707(b)(3)(B) analysis is whether the debtor's financial situation indicates he has the ability to pay a substantial portion of his unsecured nonpriority debts. In re Henebury, 361 B.R. 595, 607 (Bankr. S.D. Fla. 2007). The Courts utilize the 11 U.S.C. Section 1325 definition of "disposable income" in conducting the ability to pay analysis. Id. at 611. Section 1325(b)(2) defines "disposable income" as:

(2) Current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonable necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed;

11 U.S.C. § 1325(b)(2).

A debtor's ability to repay creditors is a primary, but not a conclusive factor in determining whether abuse exists. In re Norwood-Hill, 403 B.R. 905, 912 (Bankr. M.D.

Fla. 2009). Other relevant factors include, but are not limited to:

(1) whether unforeseen or catastrophic events such as sudden illness, disability, or unemployment propelled the debtor into bankruptcy;

(2) whether the debtor's standard of living has substantially improved as a result of the bankruptcy filing or essentially remained the same;

(3) the debtor's age, health, dependents, and other family responsibilities;

(4) the debtor's eligibility for Chapter 13 relief and whether creditors would receive a meaningful distribution in a Chapter 13 case;

(5) the age of the debts for which the debtor seeks a discharge and the period over which they were incurred;

(6) whether the debtor incurred cash advances and made consumer purchases far in excess of the ability to repay;

(7) whether the debtor made any payments toward the debts or attempted to negotiate with her creditors;

(8) the accuracy of the debtor's schedules and statement of current income and expenses; and

(9) whether the debtor filed the petition in good faith;

(10) employment stability;

(11) retirement plan contributions and the debtor's age;

(12) whether living expenses can be reduced without depriving the debtor or his dependents of adequate food, clothing, shelter, and other necessities; and

(13) the availability of non-bankruptcy remedies including state law relief, private negotiations, and "good, old-fashioned belt tightening."²⁶

In re Krohn, 886 F.2d at 126-128; In re Norwood-Hill, 403 B.R. at 912-913; In re Carney, No. 07-31690, 2007 WL 4287855, at *3, 7-10 (Bankr. N.D. Ohio Dec. 5, 2007).

Post-petition pre-discharge events are relevant to a Section 707(b)(3)(B) analysis. In re Parada, 391 B.R. at 500; In re Henebury, 361 B.R. at 611. The Courts have "not viewed favorably debtors who seek to maintain expensive homes or vehicles while simultaneously seeking to discharge their voluntarily incurred unsecured obligations." In re Durczynski, 405 B.R. 880, 884 (Bankr. N.D. Ohio 2009). "[W]hen seeking bankruptcy relief, debtors may be expected to do some belt tightening, including, where necessary, foregoing the reaffirmation of those secured debts which are not reasonably necessary for the maintenance and support of the debtor and his family." Id. (citing In re

²⁶ In re Krohn, 886 F.2d at 128.

Wadsworth, 383 B.R. 330 (Bankr. N.D. Ohio 2007)). A budget is unreasonable where a debtor's expenditures manifest a desire to maintain a standard of living which precipitated the bankruptcy filing. Shaw v. United States Bankr. Adm'r (In re Shaw), 310 B.R. 538, 541 (M.D.N.C. 2004).

Retirement contributions should be included in the calculation of a debtor's income for Section 707(b)(3) purposes. In re Pandl, 407 B.R. 299, 302 (Bankr. S.D. Ohio 2009). "To hold otherwise would force a debtor's creditors to fund the debtor's retirement plan." Id.

The Debtors have disposable monthly net income even if all of their Schedule I expenses are allowed, which include impermissible retirement contributions and the 401(k) loan repayment. Their disposable monthly income increases substantially if the Debtors' excessive and unreasonable budget expenses were eliminated or reduced.

The Debtors' Schedule J contains significant expenses that are not reasonably necessary for their maintenance or support. The Debtors' expenditures for the Florida Property, the Cadillacs, Pontiac G8, and Boat are excessive and unreasonable based upon the circumstances. It is neither necessary nor reasonable for the Debtors to maintain three oversecured vehicles and the Boat. They have surrendered the Florida Property and there is no justification for their continued deduction of expenses for that property. Removal of these expenses increases their disposable income by more than \$1,825.00.

The Debtors' expenses for maintaining vehicles, college tuition, and living costs for their adult daughters are not allowable expenses. In re Haar, 373 B.R. 493, 500 (Bankr. N.D. Ohio 2007). These expenses are not reasonable or necessary. The Bankruptcy Courts have uniformly held "that supporting adult children at the expense of

unsecured creditors is not permissible.” In re Walker, 383 B.R. 830, 838 (Bankr. N.D. Ga. 2008); In re Lanza, 450 B.R. 81, 87 (Bankr. M.D. Penn. 2011) (“A debtor is not permitted to pay his adult child’s college tuition at the expense of his unsecured creditors.”). The Debtors have no legal obligation to support their adult daughters and are supporting them at the expense of their unsecured creditors. In re Walker, 383 B.R. at 838.

The Debtors have engaged in excessive post-filing spending and are paying unnecessarily high housing and car payments. Their costs relating to the Maryland Property are excessive. The Debtors do not require five vehicles and a boat. The expenses of the oversecured vehicles and Boat are excessive and unreasonable.

The Debtors have monthly disposable income of at least \$6,391.42, or disposable income of \$383,485.20 for a sixty-month period. Their monthly disposable income increases when their current gross monthly income of \$18,854.98 is taken into account. Their general unsecured creditors, based upon the total debt amount of \$331,000.00 (general unsecured creditors listed in Schedule F of \$84,548.81 plus the unsecured deficiency claims for the 2008 Cadillac and Florida Property of \$246,456.00), without claim objections and administrative costs, would receive a payout of one hundred percent.

The totality of the circumstances reflects abuse exists. The Debtors have a meaningful ability to repay *all* of their unsecured debts, including the unsecured portions of their mortgage and vehicle debts. This situation is the quintessential abusive situation Congress attempted to eradicate through enactment of 11 U.S.C. Section 707(b)(3)(B).

The Debtors' case is due to be dismissed based upon the totality of the circumstances pursuant to 11 U.S.C. Section 707(b)(3)(B).

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that the UST's Motion to Dismiss (Doc. No. 13) is hereby **GRANTED** and the above-captioned case shall be **DISMISSED** pursuant to 11 U.S.C. Sections 707(b)(1), 707(b)(2), and 707(b)(3)(B). The effective date of this Order is delayed fourteen (14) days to permit the Debtors to convert this case to a chapter of the Bankruptcy Code for which they are eligible.

Dated this 14th day of March, 2012.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge