UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Case No. 3:12-bk-4856-PMG

Terrence James Williams,
Kechia Folks Williams,
a/k/a Kechia Williams,

Debtors. Chapter 7

ORDER ON MOTION TO DISMISS PURSUANT TO 11 U.S.C. SECTION 707(b)(1) BASED ON ABUSE ARISING UNDER 11 U.S.C. SECTION 707(b)(3)

THIS CASE came before the Court for a final evidentiary hearing to consider the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b)(1) Based on Abuse Arising under 11 U.S.C. Section 707(b)(3). (Doc. 21).

In determining whether a case should be dismissed as an abuse of the provisions of Chapter 7, §707(b)(3)(A) and §707(b)(3)(B) of the Bankruptcy Code provide that a Court may consider whether the petition was filed in bad faith, and whether the totality of the debtor's financial circumstances demonstrate an abuse. 11 U.S.C. §707(b)(3). A debtor's ability to repay his creditors is a primary factor to consider in determining whether a case is an abuse under the "totality of the circumstances" analysis of §707(b)(3)(B).

The Debtors appear to be responsible and credible, and have been affected by the downturn in the economy in recent years. The Debtors have attempted out of court resolution of their debts, and have

explained certain inaccuracies on their schedule of income. Based on their explanations, the Court finds that the Debtors did not file their Chapter 7 petition in bad faith within the meaning of §707(b)(3)(A) of the Bankruptcy Code.

The Debtors do have the ability to pay a substantial portion of their debts, however, if certain adjustments are made to their budget. Based on their ability to pay and other factors, the Court finds that this case should be dismissed under the totality of the circumstances test of §707(b)(3)(B) of the Bankruptcy Code.

Background

The Debtors, Terrence James Williams and Kechia Folks Williams, are married and have two dependent children. Mr. Williams is employed by Duke Energy, formerly Progress Energy, as a distribution design specialist. Additionally, the Debtors are the owners of a corporation known as TKMA Enterprises, Inc., which operates a daycare center. Mrs. Williams is employed as the daycare director at the center.

The Debtors filed a petition under Chapter 7 of the Bankruptcy Code on July 26, 2012.

On their schedule of assets filed with the petition, the Debtors listed three parcels of real property: (1) their homestead located in Hernando, Florida, with a scheduled value of $225,454.00 and a scheduled mortgage in the amount of $380,552.01; (2) a timeshare condominium located in Kissimmee, Florida, with a scheduled value of $500.00, and a scheduled lien in the amount of $7,762.49; and (3) a timeshare condominium located in Hilton Head, South Carolina, with a scheduled value of $500.00, and a scheduled lien in the amount of $4,032.46.

On their schedule of assets, the Debtors listed personal property with a total value of $82,542.42. The personal property includes: (1) a 401(k) account at Progress Energy with a scheduled value of

$48,558.42; (2) a 2004 Dodge Ram 1500 with a scheduled value of $7,700.00, and a scheduled lien in the amount of $10,609.56; and (3) a Key West 22.5' boat with Honda motor and Continental boat trailer with a scheduled value of $22,000.00, and a scheduled lien in the amount of $33,887.21.

On their schedule of liabilities, the Debtors listed general unsecured debt in the total amount of $98,349.05. The unsecured debts are primarily credit card obligations, and claims described as "factored" debts.

The United States Trustee (UST) filed a Motion to Dismiss the Debtors' case pursuant to §707(b)(3) of the Bankruptcy Code. According to the UST, the case should be dismissed pursuant to §707(b)(3)(A) because the petition was filed in bad faith, and pursuant to §707(b)(3)(B) because the totality of the Debtors' financial situation demonstrates that the granting of relief would be an abuse of the provisions of Chapter 7.

Discussion

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) in 2005, a Chapter 7 case could only be dismissed if it was found to be a "substantial abuse" of the provisions of the Bankruptcy Code.

Under BAPCPA, however, §707(b)(1) of the Bankruptcy Code provides that the Court may dismiss a Chapter 7 case if it finds that the granting of relief would be an "abuse" of the provisions of Chapter 7. 11 U.S.C. §707(b)(1).

It is generally recognized that the current standard for dismissal is "less stringent" than the former standard. "[P]rior to BAPCPA, a case could only be dismissed for 'substantial abuse,' as opposed to now for simply 'abuse.'" In re O'Brien, 373 b.R. 503, 505 (Bankr. N.D. Ohio 2007). "Under

BAPCPA, . . . the standard required for dismissal has been lowered from a showing of substantial abuse to a showing of abuse." In re Norwood-Hill, 403 B.R. 905, 912 (Bankr. M.D. Fla. 2009).

A Court's determination of abuse under §707(b)(1) "may be made under either of the standards set forth under §707(b)(2) and (3)." In re Chapman, 447 B.R. 250, 252 (8th Cir. BAP 2011).

Section 707(b)(2) provides a method to determine whether a debtor's case is presumptively abusive for purposes of dismissal under §707(b)(1). 11 U.S.C. §707(b)(2).

If the presumption of abuse does not arise under §707(b)(2), §707(b)(3) provides that the Court may nevertheless determine whether the case is abusive based on the debtor's bad faith or the totality of the circumstances. 11 U.S.C. §707(b)(3).

In this case, the Court finds that the granting of relief would be an abuse of the provisions of Chapter 7 based on the totality of the Debtors' financial circumstances. The primary factor considered by the Court in determining that the case is abusive under the "totality" standard is the Debtors' ability to repay a substantial portion of their debt. Additionally, other factors are also present in this case which demonstrate that the granting of relief would be an abuse of the provisions of Chapter 7.

Based on the Debtors' explanations of the events surrounding their case, however, the Court finds that the Debtors did not file the petition in bad faith.

A. Totality of the circumstances

In considering whether the granting of Chapter 7 relief would be an abuse of the provisions of Chapter 7, §707(b)(3)(B) provides that the Court shall consider whether "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." 11 U.S.C. §707(b)(3)(B). Accordingly, the section indicates that the "totality of the circumstances" should relate to the debtor's financial circumstances, but does not otherwise tell Bankruptcy Courts how to make the evaluation.

The §707(b)(3) analysis is a broad, flexible review that encompasses any factors that are relevant to the debtor's financial condition. In re Riley, 2010 WL 3718017 (Bankr. D. Mass.); In re Jensen, 407 B.R. 378, 384 (Bankr. C.D. Cal. 2009).

1. Ability to pay

It is generally accepted, however, that a debtor's ability to repay his creditors is the primary factor to consider under the "totality of the circumstances" analysis of §707(b)(3)(B). In re Lavin, 424 B.R. 558, 563 (Bankr. M.D. Fla. 2010); In re Norwood-Hill, 403 B.R. at 912.

> Under pre-BAPCPA case law, the majority of cases held that the ability to pay was the primary factor to consider. Reserving the ability to allocate more weight to this factor is in accord with pre-BAPCPA case law classifying the ability to pay as the prime consideration. Moreover, the impetus of BAPCPA was in part to ensure that debtors pay creditors the maximum they can afford. *See Ransom*, 131 S.Ct. at 721.

In re Sonntag, 2012 WL 1065482, at 4 (Bankr. N.D. W.Va.)(Emphasis supplied). "The primary inquiry of a Section 707(b)(3) 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 Clary, 2012 WL 868717, at 17 (Bankr. M.D. Fla.)(citing In re Henebury, 361 B.R. 595, 607 (Bankr. S.D. Fla. 2007)).

In this case, the Debtors have the ability to pay a substantial portion of their debts if certain adjustments are made to their budget.

a. Income

Mr. Williams is employed by Duke Energy, formerly Progress Energy. The parties stipulated that Mr. Williams "is paid his base salary biweekly in the gross amount of $3,037.44, which amount is equal to $78,973 per year or $6,582.23 per month." (Doc. 40, ¶ 3).

Additionally, "[d]uring all time periods relevant to this case, the Debtors have received approximately $2,000 in income per month from TKMA Enterprises, Inc." (Doc. 40, ¶ 6). According

to Mrs. Williams, she transfers approximately $2,000.00 per month from the daycare business bank account to the Debtors' personal bank account for the purpose of making their home mortgage payment. (Transcript, p. 32). Accordingly, this $2,000 per month is also income of the Debtors.

From his gross salary, Mr. Williams contends that he is entitled to certain deductions from income that total $2,523.02 per month. (Doc. 40, Trustee's Exhibit 15). Several of the deductions, however, are not appropriate for purposes of evaluating the totality of the circumstances under §707(b)(3)(B).

First, Mr. Williams claims a payroll deduction in the amount of $1,040.00 per month for withholding taxes. He acknowledges, however, that he deliberately causes the taxes to be "over-withheld" so that he will receive a refund after his actual taxes are calculated. (Transcript, pp. 13, 19-20). While this may be a prudent thing to do in many circumstances, such intentional over-withholding is not appropriate when determining a debtor's ability to repay his creditors under §707(b)(3). See In re Leggett, 2011 WL 802806, at 5 (Bankr. E.D. N.C.)(Since the debtors had an amount withheld that exceeded the amount due to the Internal Revenue Service, the monthly withholding deduction should be reduced in the calculation of disposable income.); and In re Ricci, 456 B.R. 89, 107 (Bankr. M.D. Fla. 2009)(Debtors were not permitted to manipulate their monthly income by claiming excessive increases to the amount withheld.). The Debtors assert that they purposely over-withhold so that they can use the refund to pay other expenses the following year. Despite their stated purpose, the Debtors "cannot be allowed to over-withhold to the detriment of [their] unsecured creditors." In re Edighoffer, 375 B.R. 789, 798 (Bankr. N.D. Ohio 2007).

Based on the amount of the income tax refunds received by the Debtors in past years, the UST asserts that the appropriate amount of the payroll deduction is $450.00 per month. (Doc. 40, Trustee's

Exhibit 15). Accordingly, for purposes of calculating the Debtors' monthly net income, the Court will consider a withholding deduction in the amount of $450.00 per month.

Second, Mr. Williams claims a deduction in the total amount of $641.00 for contributions to a 401(k) plan, and the amount of $253.90 for repayment of a 401(k) loan, for a total deduction of $894.90. (Doc. 40, Trustee's Exhibit 15).

If this were a Chapter 13 case instead of a Chapter 7 case, these deductions, or at least the deduction for repayment of the 401(k) loan, may be allowable for purposes of determining the amounts that the Chapter 13 debtor must submit for payment to creditors under his repayment plan. Section 541(b)(7) of the Bankruptcy Code, for example, provides that amounts withheld by an employer for contributions to a 401(k) plan as of the commencement of the case "shall not constitute disposable income as defined in section 1325(b)(2)," and §1322(f) of the Bankruptcy Code provides that amounts paid by a debtor on a 401(k) loan "shall not constitute 'disposable income' under section 1325." 11 U.S.C. §§541(b)(7), 1322(f). See In re Seafort, 669 F.3d 662 (6th Cir. 2012).

Section 1325, however, only applies in cases under Chapter 13 of the Bankruptcy Code. 11 U.S.C. §103(i). In re Pandl, 407 B.R. 299, 302 (Bankr. S.D. Ohio 2009)(Section 1322(f) "is limited in its applicability to a debtor who has filed a Chapter 13 case.")(citing In re Felske, 385 B.R. 649, 658 (Bankr. N.D. Ohio 2008)).

In Chapter 7 cases, such as the case presently under consideration, Courts generally recognize that 401(k) contributions and loan repayments should be included in a debtor's income for purposes of determining his "ability to pay" under §707(b)(3).

> There is also no question that 401(k) contributions should be included in the calculation of a debtor's income for purposes of §707(b)(3). To hold otherwise would

> force a debtor's creditors to fund the debtor's retirement plan. *See In re Croskey*, 2007 WL 1302571 (Bankr. N.D. Ohio 2007).

In re Pandl, 407 B.R. at 302. See also In re Edighoffer, 375 B.R. at 799(In analyzing the totality of the circumstances under §707(b)(3)(B), the debtor's retirement contribution must be included as income, since it would be unfair to creditors to allow the debtors to commit part of their earnings to their own retirement fund while they are not paying their creditors.), and In re Jacob, 447 B.R. 535, 542 (Bankr. N.D. Ohio 2010)(Loan repayments to retirement accounts are considered available income for the payment of creditors outside bankruptcy because the debtor is, in essence, repaying a loan to himself, and it would be unfair to creditors to allow debtors to commit part of their earnings to the payment of their own loan while at the same time discharging the loans from their other creditors.).

For these reasons, the Debtors' deductions from income for Mr. Williams' 401(k) contributions and the repayment of a 401(k) loan should not be allowed, and the sum of $894.90 will be considered as monthly income for purposes of determining the Debtors' ability to repay their creditors under §707(b)(3).

Third, Mr. Williams claimed a deduction from income in the amount of $107.76 as a "vacation deduction." (Doc. 1, Schedule I). As explained at trial, the vacation deduction is used "to buy extra days off" from work. (Transcript, p. 13). It appears that the deduction is purely an employee "option" that is not reasonably necessary to the Debtors' support. Further, Mr. Williams testified that his employer is no longer offering the option, and that the deductions will terminate at the end of 2013. (Transcript, p. 13). The "vacation deduction" should not be considered as a deduction from income when calculating the Debtors' ability to repay their creditors under §707(b)(3)(B).

If Mr. Williams' monthly income is adjusted to eliminate the payroll deductions for over-withheld taxes, 401(k) contributions, 401(k) loan repayments, and the vacation deduction, his net income is approximately $5,571.86 per month. (Gross salary of $6,582.23, minus allowed payroll deductions of $1,010.47 for withholding taxes and insurance = $5,571.76.).

Based on these figures, the Debtors have combined household income in the approximate amount of $7,571.76 per month. The combined monthly income of $7,571.76 represents Mr. Williams' net pay from his employment of $5,571.76 per month, and Mrs. Williams' income from the daycare business in the amount of $2,000.00 per month.

b. Expenses

The current expenditures of the Debtors are listed at $5,908.61 per month (Doc. 40).

It appears, however, that the Debtors have included at least two items on their schedule of expenses that are not reasonable or necessary for their support. In re Srikantia, 417 B.R. 505, 509 (Bankr. N.D. Ohio 2009). Specifically, the Debtors listed the amount of $342.73 as a monthly payment on a "boat loan," and the amount of $229.00 as the monthly payment for a "condo mortgage." (Doc. 40).

The boat is a Key West 22.5 foot boat with a Honda 225 motor and Continental trailer. The boat was valued at $22,000.00 on the Debtors' schedules, with a scheduled lien in the amount of $33,887.21. (Doc. 1, Schedule B).

The "condo mortgage" relates to a timeshare condominium located in Hilton Head, South Carolina. The timeshare condominium was valued at $500.00 on the Debtors' schedules, with a scheduled lien in the amount of $4,032.46. (Doc. 1, Schedule B).

Mr. Williams testified that the boat is solely a recreational boat, and that the timeshare condominium is used "strictly for recreation and vacation purposes." (Transcript, p. 14). Additionally, the parties stipulated that the boat and the "Coral Resort Timeshare" are used for recreational purposes. (Doc. 40, ¶¶ 13, 14).

The boat and timeshare condominium are luxury items, and the installment payments on the items should not be included as current monthly expenses in determining whether the Debtors have the ability to repay their creditors under §707(b)(3)(B).

> [F]or purposes of the means test, debt secured even by such items as luxury vehicles, pleasure boats, and vacation homes would be deductible. . . . However, if deductions of this sort allowed a wealthy debtor to avoid the presumption of abuse under the means test, an abuse might still be found in consideration of the "totality of the circumstances . . . of the debtor's financial situation" pursuant to 707(b)(3).

Hon. Eugene R. Wedoff, U.S. Bankruptcy Judge, Northen District of Illinois, *Means Testing in the New 707(b)*, 79 Am. Bankr. L.J. 231, 273 (Spring 2005)(quoted in In re Edighoffer, 375 B.R. at 794-95). In evaluating the totality of a debtor's circumstances under §707(b)(3)(B), any deductions or expenses in a family budget may be disallowed to the extent that they are excessive or unreasonable. In re Hornung, 425 B.R. 242, 250-53 (Bankr. M.D. N.C. 2010).

In this case, the Debtors' expenses for the boat and timeshare condominium are not reasonable or necessary for their support. In re Clary, 2012 WL 868717, at 19 (Bankr. M.D. Fla.)(Expenses for a recreational boat were disregarded in determining the debtors' ability to pay under §707(b)(3).). The expenses should be disregarded in determining the Debtors' ability to pay their creditors under §707(b)(3).

On their schedules, the Debtors listed current expenditures in the amount of $5,908.61 per month. (Doc. 40). If the payments for the boat and "condo mortgage" are eliminated from the scheduled

expenses, the Debtors' current expenses would amount to $5,314.61 per month. ($5,908.61 minus $594.00 = $5,314.61).

c. Disposable income

As shown above, the Debtors' total household income is approximately $7,571.76 per month, after excluding certain payroll deductions from Mr. Williams' salary, and including Mrs. Williams' income from the daycare business.

The Debtors' current expenses are $5,314.61 per month, after disregarding the boat and timeshare condominium payments.

Accordingly, the Debtors' disposable income equals the approximate sum of $2,257.15 per month. ($7,571.76 minus $5,314.61 = $2,257.15). Based on this disposable monthly income, the Court finds that the Debtors have the ability to pay a substantial portion of their unsecured debt for purposes of evaluating the totality of their financial circumstances under §707(b)(3)(B) of the Bankruptcy Code.

Courts often consider whether there would be a substantial distribution to creditors in the Chapter 13 context. In this case, although the disposable income distributed to unsecured creditors in a Chapter 13 plan would be less that the amount shown above, there would still be disposable income that would pay a substantial portion of the unsecured debt.

2. Other circumstances demonstrating abuse

Although "ability to pay" is the primary factor to consider under §707(b)(3)(B) of the Bankruptcy Code, it is well-established that other factors should also be considered under that subsection in determining whether a case is an abuse of the provisions of Chapter 7.

> Congress could have required dismissal based solely on a debtor's "ability to pay." Instead, Section 707(b)(3)(B) requires evaluation of the "totality of the circumstances." Thus, the UST must show something more than just the debtor's mathematical ability to pay. (Citations omitted).

In re Lavin, 424 B.R. 558, 563-65 (Bankr. M.D. Fla. 2010). See also In re Rudmose, 2010 WL 4882059, at 3 (Bankr. N.D. Ga.), and In re Norwood-Hill, 403 B.R. 905 (Bankr. M.D. Fla. 2009).

In this case, the Debtors have the ability to pay a substantial portion of their unsecured debt. Additionally, other factors are also present in the case which demonstrate that the granting of relief to the Debtors would be an abuse of the provisions of Chapter 7.

First, the schedules filed by the Debtors did not accurately disclose their current joint income. On the Debtors' Schedule I and "Form B22A Statement of Current Monthly Income and Means-Test Calculation," the income for Mrs. Williams was listed as "$0.00." Further, Schedule I includes an affirmative statement that "Spouse receives no income from her employment." (Doc. 1, Schedule I). After the UST filed the Motion to Dismiss, however, the parties stipulated that "[d]uring all time periods relevant to this case, the Debtors have received approximately $2,000 in income per month from TKMA Enterprises, Inc." (Doc. 40, ¶ 6). Mrs. Williams testified that she makes the monthly transfer from the business account to their personal account. (Transcript, p. 32). The parties have agreed that "if the income from TKMA Enterprises, Inc. were included on the Means Test form, the presumption of abuse would have arisen in the case." (Doc. 40, ¶ 9).

Second, the parties stipulated as follows:

> Within one month prior to bankruptcy, the Debtors vacationed in Jamaica. The Debtors spent approximately $3,000 on their Jamaican vacation. The Debtors were actively contemplating bankruptcy at the time of their vacation.

(Doc. 40, ¶ 16). Mr. Williams testified that the Jamaican vacation occurred "within a month or so of the bankruptcy," and that the Debtors had thought about filing a bankruptcy petition at the time of the vacation. (Transcript, p. 30). A debtor's vacation shortly before filing, at a time when there is little expectation that creditors will be repaid, is a factor that may be considered under §707(b)(3). In re Hornung, 425 B.R. 242, 254 (Bankr. M.D. N.C. 2010).

Third, as indicated above, the Debtors have sought to retain at least two luxury items after the filing of their bankruptcy petition. Specifically, they have proposed to continue making payments on a recreational boat and a timeshare condominium used solely for vacation purposes. A debtor's post-petition retention of luxury items, such as timeshare property, is a factor to consider under the totality of the circumstances test of §707(b)(3)(B). In re Booker, 399 B.R. 662, 670 (Bankr. W.D. Mo. 2009).

There is no evidence in the record that the Debtors suffer from any health concerns, or that Mr. Williams' employment is unstable. The Debtors have the ability to pay a substantial portion of their debts, and other factors are present in this case which demonstrate that the granting of relief would be an abuse of the provisions of Chapter 7. Consequently, the totality of the Debtors' financial circumstances show that this case should be dismissed pursuant to §707(b)(3)(B) of the Bankruptcy Code.

B. Bad faith

In determining whether a case should be dismissed as an abuse of the provisions of Chapter 7, §707(b)(3)(B) provides that a Court may consider whether the totality of the circumstances demonstrates abuse, and §707(b)(3)(A) provides that the Court may consider whether the debtor filed the petition in bad faith. 11 U.S.C. §707(B)(3). Determining a debtor's bad faith under §707(b)(3)(A) involves a subjective test, and the determination must be made on a case-by-case basis.

In re Hardigan, 490 B.R. 437, 444 (Bankr. S.D. Ga. 2013); In re Baird, 456 B.R. 112, 119 (Bankr. M.D. Fla. 2010).

In this case, the Court finds that the Debtors did not file their Chapter 7 petition in bad faith. Although certain troubling factors are present in the case, it appears that the Debtors have cooperated with the UST, and that they have explained a number of the circumstances that precipitated the filing of their bankruptcy case.

According to Mrs. Williams, for example, their financial difficulties stem from the decrease in enrollment at their daycare business. Mrs. Williams testified that the decline in enrollment resulted not only from the loss of jobs in the community, but also from the loss of state-funded children's programs. (Transcript, pp. 34-36). The parties stipulated that:

> A significant factor in Debtors' bankruptcy was the recent general downturn in the economy. High unemployment resulted in less demand for daycare, which had a negative impact on Debtors' business.

(Doc. 40, ¶ 15). Mr. Williams testified that the general economic decline caused a reduction in their business income, and that the business was not self-sustaining as a result. (Transcript, pp. 15-16).

Additionally, it appears that the Debtors attempted to resolve the financial difficulties by participating in an out-of-court payment plan, but that the bankruptcy filing became necessary in response to pressure from several of their creditors. In an effort to manage their debt prior to filing the bankruptcy petition, for example, the Debtors engaged a debt consolidation company known as Key Debt Solutions to negotiate with their creditors. According to Mr. Williams, the Debtors paid Key Debt Solutions approximately $5,000.00 to distribute to creditors pursuant to the workout efforts. (Transcript, pp. 17-18). A debtor's attempt to make payments or negotiate with his creditors is a factor

that may be considered in determining abuse under §707(b)(3) of the Bankruptcy Code. In re Lavin, 424 B.R. at 563; In re Norwood-Hill, 403 B.R. at 912-13.

Ultimately, however, three collection actions were filed against the Debtors, and Mr. Williams testified that the lawsuits were the events that triggered the Debtors' decision to file the bankruptcy petition. (Doc. 1, Statement of Financial Affairs; Transcript, pp. 16-18).

Finally, the Debtors testified that the inaccuracies in their schedules were not intentional. With respect to the failure to list their business income on Schedule I, for example, the Debtors contend that they did not understand that the transfer of funds from the business account to their personal account constituted "income" as contemplated by the schedules. Since they did not receive a paycheck from the business, and no W-2 form was prepared to show the receipt of wages, the Debtors assert that they did not believe that the transfers were "income" at the time that they signed the schedules. (Transcript, pp. 18, 32-33). As further evidence of their lack of intent to conceal the income, the Debtors show that they disclosed their 2010, 2011, and 2012 business income from TKMA Enterprises, Inc. on their Statement of Financial Affairs filed with the Schedules. (Doc. 1, Statement of Financial Affairs, Question 1).

The Debtors provided their tax returns to the Chapter 7 Trustee and the UST upon request. (Transcript, p. 19). The Debtors also provided copies of their bank statements to the Chapter 7 Trustee and UST prior to the §341 meeting of creditors. (Transcript, p. 33). The UST has not asserted that the Debtors have failed to cooperate in his investigation of this case.

In summary, the Debtors have shown that their financial difficulties were precipitated by legitimate economic circumstances, that they attempted to resolve their debt prior to filing the bankruptcy case, and that their failure to disclose the business income on Schedule I was not

intentional. It appears that the Debtors have cooperated in the UST's requests for information regarding the case. For these reasons, the Court finds that the Debtors did not file their case in bad faith within the meaning of §707(b)(3)(A) of the Bankruptcy Code.

Conclusion

The UST filed a Motion to Dismiss this case Pursuant to 11 U.S.C. §707(b)(1) Based on Abuse Arising under 11 U.S.C. §707(b)(3).

In determining whether a case should be dismissed as an abuse of the provisions of Chapter 7, §707(b)(3)(A) and §707(b)(3)(B) provide that a Court may consider whether the petition was filed in bad faith, and whether the totality of the debtor's financial circumstances demonstrate an abuse. A debtor's ability to repay his creditors is a primary factor to consider in determining whether a case is an abuse under the "totality of the circumstances" analysis of §707(b)(3)(B).

In this case, the Debtors have the ability to pay a substantial portion of their debts if certain adjustments are made to their budget for items related to excess withholding taxes, 401(k) contributions, 401(k) loan repayments, and installment payments for a recreational boat and timeshare condominium. Based on their ability to pay and other factors demonstrating an abuse of the provisions of Chapter 7, the Court finds that this case should be dismissed under the totality of the circumstances test of §707(b)(3)(B) of the Bankruptcy Code.

The Debtors have explained the events that resulted in their financial difficulties, however, and have also explained certain inaccuracies on their schedule of income. Based on their explanations, the Court finds that the Debtors did not file their Chapter 7 petition in bad faith within the meaning of §707(b)(3)(A) of the Bankruptcy Code.

Accordingly:

IT IS ORDERED that:

1. The Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b)(1) Based on Abuse Arising under 11 U.S.C. Section 707(b)(3) filed by the United States Trustee is granted, based on the totality of the Debtors' financial circumstances under §707(b)(3)(B) of the Bankruptcy Code, and the Chapter 7 case of the Debtors, Terrence James Williams and Kechia Folks Williams, is dismissed.

2. The effective date of the dismissal is delayed for a period of twenty-one (21) days from the date of this Order to permit the Debtors to convert their Chapter 7 case to a case under another chapter of the Bankruptcy Code if they wish to do so.

DATED this 23 day of September, 2013.

BY THE COURT

PAUL M. GLENN
United States Bankruptcy Judge