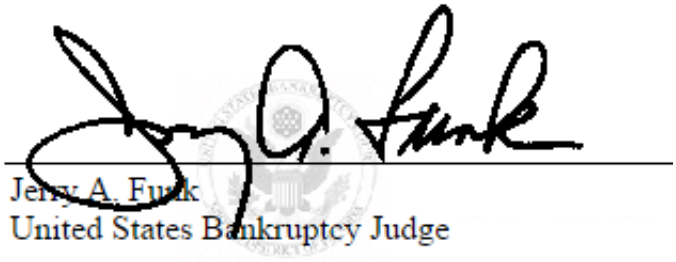
ORDERED.

Dated: May 22, 2019



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

Chapter 7

WAVERLY FREDERICK RUSAK and
KIMBERLY DUKES RUSAK,

Case No. 3:18-bk-3056-JAF

Debtors.
_____/

ORDER OVERRULING DEBTORS' OBJECTION TO UNITED STATES TRUSTEE'S MOTION TO DISMISS

This case is before the Court on WAVERLY FREDERICK RUSAK'S and KIMBERLY DUKES RUSAK'S (the "Debtors") objection to the Motion to Dismiss filed by UNITED STATES TRUSTEE DANIEL M. MCDERMOTT (the "U.S. Trustee") on December 11, 2018. (Doc. 19). The U.S. Trustee filed the Motion to Dismiss on November 28, 2018 (Doc. 15). His response to Debtors' objection was filed on February 28, 2019 (Doc. 26). Debtors filed their reply on March 12, 2019 (Doc. 27). For the reasons set forth below, the Court will overrule Debtors' objection to the Motion to Dismiss and permit the U.S. Trustee to proceed on both bases raised in the Motion to Dismiss.

Background

On August 31, 2018, Debtors filed a voluntary joint petition under Chapter 7 of the Bankruptcy Code. On October 4, 2018, the meeting of creditors required under 11 U.S.C. § 341(a) was held (the "October 4 meeting"). The Chapter 7 Trustee adjourned the October 4 meeting to October 18, 2018, (the "October 18 meeting"), at which time it was reconvened. The § 341(a) meeting was concluded on October 18.

The U.S. Trustee contends the Debtors' means test calculation indicates a presumption of abuse. The U.S. Trustee filed a statement of presumed abuse, as required by 11 U.S.C. § 704(b)(1)(A), within ten days of the October 18 meeting but more than ten days after the October 4 meeting.[1] The U.S. Trustee then filed a motion to dismiss the bankruptcy petition. The motion to dismiss asserts two bases: (i) presumption of abuse under the means test, pursuant to § 707(b)(2); and (ii) abuse under the totality of the circumstances, pursuant to § 707(b)(3). A trial has not been set on the Motion to Dismiss.

Debtors object to the U.S. Trustee's Motion to Dismiss and argue the first basis, concerning the presumption of abuse, should be stricken as untimely because the statement of presumed abuse was not filed within ten days of the October 4 meeting, as required by § 704(b)(l)(A). The U.S. Trustee argues the ten-day period began to run from the time the § 341(a) meeting was concluded, which occurred on October 18, rather than from the initial commencement of the § 341(a) meeting, which occurred on October 4.

[1] The statement was filed on October 29, 2018. (Doc. 10). The filing occurred within ten days of the October 18 meeting because the tenth day fell on a weekend.

Analysis

In a Chapter 7 case, "the United States trustee [ ] shall review all materials filed by the debtor and, not later than 10 days after the date of the *first meeting of creditors*, file with the court a statement as to whether the debtor's case would be presumed to be an abuse under section 707(b)[.]" 11 U.S.C. § 704(b)(l)(A) (emphasis added). The U.S. Trustee must file a motion to dismiss or convert within thirty (30) days of the filing of the statement of presumed abuse (sometimes referred to as a ten-day statement). 11 U.S.C. § 704(b)(2).

The question presented by Debtors' objection requires the Court to construe § 704(b)(l)(A) and determine what is meant by "first meeting of the creditors." The Court may go no further than the plain language unless an ambiguity exists. Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 251 (2010); Kehoe v. Fid. Fed. Bank & Trust, 421 F.3d 1209, 1212 (11th Cir. 2005).

The parties have not presented, and the Court has not found, any binding case law on the issue. The Persaud opinion cites to and discusses several bankruptcy opinions that have dealt with this issue. In re Persaud, 486 B.R. 251, 256-57 (Bankr. E.D.N.Y. 2013). Generally, bankruptcy courts that have ruled in favor of Debtors' interpretation conclude that using the commencement of the initial meeting as the starting point provides an ascertainable and definite date that is not subject to manipulation through the adjournment process. Id. at 255-56 (and cases cited therein); In re Close, 353 B.R. 915, 918 (Bankr. D. Kan. 2006) ("Panel trustees who preside over § 341 meetings can hold meetings open for months."). These opinions reason that it is inequitable and inefficient to allow the meeting to stay open indefinitely where the statute clearly contemplates informing the debtor of the presumption of abuse early in the case. These opinions, however, do not make clear why equity and efficiency are legally relevant to judicial construction of an otherwise valid statute. See, e.g., Close, 353 B.R. at 918 ("A statutory deadline should not be

extended or held captive so informally based on the panel trustee's unilateral decision."). The question of whether Title 11 "should" permit the panel trustee to adjourn a meeting of creditors and, thereby, extend the ten-day deadline is a question of policy within the purview of the legislative branch, not the judiciary. Under these circumstances, the judiciary cannot second-guess the policy decisions contained in the statutory language and substitute its own judgment for Congress's.[2]

In contrast, opinions that have accepted the U.S. Trustee's interpretation, in general, conclude that the term "first meeting of creditors" is a long-established term of art referring to the meeting required under § 341(a), as opposed to any subsequent meetings of creditors which the debtor is not required to attend. Persaud, 486 B.R. at 257 ("Prior to the adoption of the Bankruptcy Code in 1978, the term 'first meeting of creditors' was used to refer to the meeting of creditors, now required under § 341(a), in order to differentiate the first meeting from the special meeting and final meeting that were provided for at that time.").

Bankruptcy Rules 2003(f) and 2003(g) currently provide for special and final meetings of creditors and did so when § 704 was amended to include the ten-day requirement, in 2005. Thus, "[t]he word 'first' may therefore be understood to describe the 'type of meeting referred to, rather than the first convening of such meeting.'" Id. at 257-58 (quoting In re Molitor, 395 B.R. 197, 203 (Bankr. S.D. Ga. 2008) (discussing historical usage of "first meeting of creditors")).

[2] See James v. Nationstar Mortg., LLC, 92 F. Supp. 3d 1190, 1196 (S.D. Ala. 2015) ("Federal courts are not at liberty to second-guess or rewrite federal statutes merely because they disagree with legislative choices or think they can capture congressional intent more accurately and artfully than Congress itself did."); see also Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938, 1949 (2016) ("The dissent concludes that 'the government and people of Puerto Rico should not have to wait for possible congressional action to avert the consequences' of the Commonwealth's fiscal crisis. But our constitutional structure does not permit this Court to 'rewrite the statute that Congress has enacted.'").

Further, "Congress is presumed to know the content of existing, relevant law" when it enacts a statute. Lindley v. F.D.I.C., 733 F.3d 1043, 1055 (11th Cir. 2013). That is, Congress is presumed to know that Bankruptcy Rule 2003 allows for the continuance (or "adjournment" to a later date) of a meeting of creditors, as well as for subsequent "special" and "final" meetings. This presumption supports the conclusion that Congress's use of "first meeting of the creditors" refers to the meeting required under § 341(a), in contrast to any special or final meetings of creditors. In other words, the content of Rule 2003 shows that, if Congress intended for the ten-day period to start from the initial commencement of the § 341(a) meeting, such intent should be stated explicitly. The judiciary cannot read a requirement into a statute where language supporting the requirement does not exist.[3]

In light of the forgoing, the Court holds that, as used in § 704(b)(l)(A), the phrase "first meeting of the creditors" is a term of art that refers to the meeting required under § 341(a) in contrast to a special or final meeting contemplated under Bankruptcy Rules 2003(f) and 2003(g). The ten-day period begins to run on the day the § 341(a) meeting is concluded, not the date it is commenced.

Accordingly, it is hereby ORDERED that Debtors' objection to the U.S. Trustee's Motion to Dismiss is OVERRULED. The U.S. Trustee's statement of presumed abuse and Motion to Dismiss were timely filed, and the U.S. Trustee may proceed with the Motion to Dismiss on both bases raised therein.

[3] Additionally, while not necessary to the Court's holding, the Court notes that the ability to hold open a § 341(a) meeting cuts both ways. A debtor can, indirectly, hold open a § 341(a) meeting by failing to timely disclose required financial information. See Fed. R. Bankr. P. 4002(b). If the ten-day period began to run from the initial commencement of the § 341(a) meeting, a debtor could (intentionally or not) fail to timely disclose required financial information and delay the U.S. Trustee's ability to assess whether a statement of presumed abuse should be filed—potentially delaying the assessment by more than ten days and, in effect, time barring the U.S. Trustee from pursuing dismissal under § 707(b)(2). The Court cannot construe § 704(b)(l)(A) so as to allow a debtor to bar a U.S. Trustee from pursuing dismissal. Such a result defeats the intent of the 2005 amendments to the Bankruptcy Code.