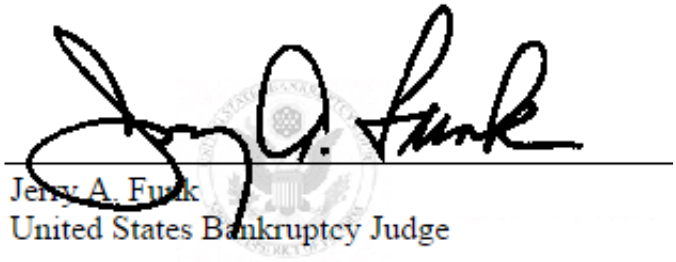
ORDERED.

Dated: October 24, 2019



UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

IN RE:

SHERMAN SCOTT MISSICK,

Chapter 7
Case No. 3:19-bk-0889-JAF

Debtor.
_____/

ORDER GRANTING U.S. TRUSTEE'S MOTION TO DISMISS

This case is before the Court on the Motion to Dismiss, pursuant to 11 U.S.C. § 707(b), filed by NANCY J. GARGULA, the United States Trustee for Region 21 (the "U.S. Trustee"). (Doc. 16). Debtor SHERMAN SCOTT MISSICK ("Debtor") filed a response in opposition (Doc. 20), to which the U.S. Trustee filed a reply (Doc. 22). For the reasons set forth herein, the Court determines the Motion to Dismiss should be granted.

Background

In March 2019, Debtor filed a voluntary petition under Chapter 7 of the Bankruptcy Code. The U.S. Trustee filed the instant Motion to Dismiss (the "Motion") in May 2019. (Doc. 16). The U.S. Trustee argues the bankruptcy petition should be dismissed, under § 707(b)(1), based on the

presumption of abuse arising under § 707(b)(2) and based on the totality of the circumstances pursuant to § 707(b)(3).

The parties agree the single dispositive issue is a pure legal question and that an evidentiary hearing is unnecessary. The issue is whether Debtor's debts are "primarily consumer debts" under § 707(b). More specifically, whether Debtor's student loans—which are federal non-private student loans that he incurred or guaranteed to fund his two children's post-secondary education—constitute "consumer debt" as defined by 11 U.S.C. § 101(8).

Debtor contends the loans, which amount to roughly $297,000.00 and comprise 62.5% of his total debt, are not consumer debt and, therefore, his debts are not "primarily consumer debt" for purposes of § 707(b). Debtor incurred the student-loan debt as Parent PLUS Loans and Grad PLUS Loans for his adult son and daughter. The daughter was born in May 1999; the son was born in September 1995.

Analysis

"Under 11 U.S.C. § 707(b)(1), the Court may dismiss or convert an individual's Chapter 7 case if the debtor has 'primarily consumer debts' and 'the granting of relief would be an abuse' of Chapter 7." In re Rucker, 454 B.R. 554, 555 (Bankr. M.D. Ga. 2011). The standard for dismissal under § 707(b) "is based on the fundamental notion that 'those who have the means to repay their creditors in whole or in part should do so.'" In re Millikan, 2007 WL 6260855, at *6 (Bankr. S.D. Ind. Sept. 4, 2007). "Generally, in evaluating a motion to dismiss under § 707(b), the threshold determination is whether debts are 'primarily consumer debts.'" In re Dickerson, 193 B.R. 67, 70 (Bankr. M.D. Fla. 1996).

Section 101(8) of "[t]he Bankruptcy Code defines consumer debt as 'debt incurred by an individual primarily for a personal, family, or household purpose.'" Rucker, 454 B.R. at 555; 11

U.S.C. § 101(8) (2019). "This naturally requires an inspection of the debtor's purpose or intent in incurring the student loan." Palmer v. Laying, 559 B.R. 746, 753 (D. Colo. 2016). "[S]tudent loans in general should be treated as 'consumer debt,' at least absent unusual facts or factors . . . ." In re Stewart, 201 B.R. 996, 1005 (Bankr. N.D. Okla. 1996); 2 Bankr. Service L. Ed. § 12:79.

The two Palmer opinions provide extensive analysis on this issue. The Palmer bankruptcy court sided with the U.S. Trustee and determined the subject student loans constituted consumer debt. In re Palmer, 542 B.R. 289, 298 (Bankr. D. Colo. 2015) ("Palmer I"). The Palmer district court reversed and held that, based on the evidence presented below, the student loans were *not* consumer debt. Palmer v. Laying, 559 B.R. 746, 753 (D. Colo. 2016) ("Palmer II").

In Palmer I, the bankruptcy court discussed four "concepts" guiding its analysis and stated that: 1) the traditional profit-motive test[1] should be applied narrowly in this context; 2) courts have held that student loans "may" constitute non-consumer business debt under limited circumstances; 3) "virtually all student loans" would constitute non-consumer debt if the profit-motive test is applied broadly; and 4) a narrow standard "tied to an existing business or to some requirement for advancement in a current job or organization, is necessary to avoid a student's aspirational goal or a wished-for 'hope and dream' being the focus" in determining whether the student-load debt is consumer debt. Palmer I, 542 B.R. at 297.

For the Palmer I court, the critical inquiry was whether the debt was tied to "the advancement of a tangible opportunity" related to work in which the debtor was engaged at the time the debt was incurred. Id. In Palmer II, however, the district court found the concerns with broad application of the profit-motive test to be unavailing. Palmer II, 559 B.R. at 757.

[1] 101 A.L.R. Fed. 771, § 3 (discussing profit-motive test).

The evidence from the Palmer decisions showed that the debtor incurred student loans to pursue a post-graduate degree in business administration prior to taking ownership of the insurance firm at which he was employed when he began his post-graduate education. Palmer I, 542 B.R. at 291. The debtor continued full-time employment at the insurance firm throughout his post-graduate program. The owners of the insurance firm had approached the debtor concerning his desire to purchase the firm prior to him beginning the education program. Id. The debtor's dissertation, however, "focused on the history of the Oregon wine industry" and not the insurance industry. Id. The Palmer I court found this dissertation topic demonstrated the student loans were unrelated to his insurance business endeavors. In contrast, the Palmer II court viewed the dissertation topic as sufficiently related to the debtor's business endeavors because the debtor "wanted to learn how the Oregon wine industry had become profitable, so he could use that knowledge to grow profit at [the insurance firm]." Palmer II, 559 B.R. at 756.

Having reviewed the limited case law on this issue, this Court concludes that some facts may conceivably exist that would warrant characterizing a student loan as a non-consumer debt. However, such facts are atypical. Stewart, 201 B.R. at 1005. Further, because the debtor is in a better position to prove such facts, the Court concludes there must be a *rebuttable* presumption that student-loan debt constitutes consumer debt and, in the context of a motion to dismiss under § 707(b), the burden must shift to the debtor to prove, by a preponderance of the evidence, that a student-loan debt is a not a consumer debt.

In an effort to condense the common threads throughout the opinions addressing this issue, the Court holds that to prove a student-loan debt is not a consumer debt, under § 101(8) of the Bankruptcy Code, a debtor must demonstrate that: 1) the student-loan debt is directly tied to the advancement of a tangible and impending business opportunity that is related to work in which the

debtor was engaged at the time the education program was undertaken; and 2) the debtor specifically intended to incur the debt to pursue that business opportunity. This question is fact intensive and must be addressed on a case-by-case basis. Further, the evidence must take into account which portions of the debt were incurred in pursuit of the business opportunity and which portions were not. Only those portions used to pursue the business opportunity may potentially constitute non-consumer debt. See In re Stewart, 175 F.3d 796, 807 (10th Cir. 1999) ("[W]e are unwilling to characterize the entire $218,000 [student-loan debt] as consumer debt."). Typically, this will encompass only tuition, books, school materials, and similar costs. Living expenses paid with proceeds from student loans, for example, generally would not be included. Finally, an evidentiary hearing will often be required due to the fact-intensive nature of this inquiry and because the debtor's actual intent (and credibility) is central.

Here, the parties frame the issue as a pure legal question and, after reviewing Debtor's argument, the Court agrees there is no need for an evidentiary hearing in this instance. Debtor filed a sworn affidavit attesting, "The purpose of the student loans taken out for my children to get further education was done so for the primary purpose of gaining an economic benefit for myself." (Doc. 21). The U.S. Trustee does not dispute this, and the Court accepts this attestation as fact.

Many courts have recognized that a "parent can reasonably assume that paying for a child to obtain an undergraduate degree will enhance the financial well-being of the child which in turn will confer an economic benefit on the parent." DeGiacomo v. Sacred Heart University, Inc. (In re Palladino), 556 B.R. 10, 16 (Bankr. D. Mass. 2016); see also Geltzer v. Xavarian High Sch. (In re Akanmu), 502 B.R. 124 (Bankr. E.D.N.Y. 2013); Jones v. Orton (In re Orton), 2018 WL 1577927, *4 (Bankr. M.D. Fla. Mar. 28, 2018) (Funk, J.).

However, all these opinions pertain to avoidance of constructively fraudulent transfers. In these cases, the question was whether the transferor-debtor received "reasonably equivalent value" in return for paying the tuition and education costs of his/her child. These opinions hold, and this Court agrees, that a parent may receive an "economic benefit" by funding his/her child's education insofar as enhancing the child's earning potential negates or mitigates the need for the parent to financially support the child. The important point, however, is that receiving an "economic benefit" by paying the child's tuition is not the same as incurring a student loan for a non-consumer purpose. Debtor's argument conflates these premises, but the two are not the same.

Receiving an economic benefit does not automatically make a transaction a non-consumer transaction and receiving an economic benefit by incurring a debt does not automatically mean the debt was incurred for a non-consumer purpose. For example, an individual may receive an economic benefit by incurring a personal car loan or residential mortgage loan *for end-consumer use*, yet both such debts clearly constitute consumer debts as contemplated by § 101(8). The failure of Debtor's argument is that there are no facts tying his student-loan debt to a tangible and impending business opportunity. Any arguable profit motive in Debtor's purpose is far too attenuated and insubstantial for the Court to conclude the student loans were not incurred for a family purpose; i.e., are not consumer debts.

If the Court were to adopt Debtor's argument, the result would be that no debt resulting in an "economic benefit" to the debtor would constitute a consumer debt. Essentially all debt results in some economic benefit to the debtor and would, therefore, constitute non-consumer debt. This is an untenable result that would nullify § 707(b) and effectively rewrite § 101(8). The judiciary is without authority to reshape or redefine the unambiguous language enacted by Congress and is clearly without power to effectively abrogate § 707(b).

Absent specific facts to the contrary, a student loan undertaken by a parent to fund his/her child's education is a consumer debt because such debt is incurred by an individual primarily for a family purpose, as contemplated under § 101(8). 11 U.S.C. § 101(8) (2019). Given the undisputed facts of this case, Debtor's student-loan debt constitutes "consumer debt." Debtor's total debt is, therefore, "primarily consumer debt" and this case is subject to § 707(b). The parties agreed, at the preliminary hearing, that this threshold question is the sole dispositive issue. As a result, this case is subject to dismissal.

Accordingly, it is hereby ORDERED that the U.S. Trustee's motion to dismiss under § 707(b) of the Bankruptcy Code is GRANTED. The Court will enter a separate final order of dismissal.