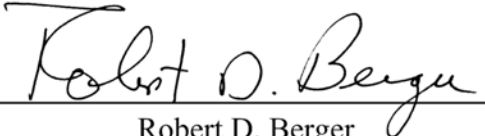




**The relief described hereinbelow is SO ORDERED.**

**SIGNED this 17th day of February, 2021.**

  
Robert D. Berger  
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS**

**In re:**

**Michael Julian Knopke,**

**Case No. 20-20652-7**

**Debtor.**

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**Order Setting Motion to Dismiss  
for Status Conference to Set Evidentiary Hearing**

Debtor Michael Knopke filed a Chapter 7 bankruptcy petition to restructure his financial affairs after the failure of his business and the separation of his marriage. The United States Trustee (“UST”) moved to dismiss Debtor’s case under [11 U.S.C. § 707\(b\)\(3\)](#),<sup>1</sup> arguing that Debtor had an ability to pay his creditors a significant dividend and that Debtor’s case was filed in bad faith based (at least in part) on Debtor’s monthly payment of what Debtor characterizes as a domestic support obligation.

The Court concludes that if Debtor’s payments are true state-court ordered domestic

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<sup>1</sup> All statutory references in this order are to Title 11, United States Code (the Bankruptcy Code) unless otherwise indicated.

support obligations, then fulfilling that legal duty is not an abuse of the bankruptcy system and Debtor's Chapter 7 petition was not filed in bad faith. The Court sets this matter for a status conference so that an evidentiary hearing can be set to determine whether the monthly payments are truly domestic support obligations, and whether the totality of the circumstances demonstrates abuse.

## **I. Procedural and Factual Background**

Debtor retained and paid his bankruptcy counsel in September 2019.<sup>2</sup> The UST alleges that the next month, in October 2019, Debtor and his wife filed a state court petition for separation, and in December 2019 signed a separation agreement. A final Journal Entry was then docketed in February 2020. The actual separation agreement is not before the Court.

Debtor then filed his Chapter 7 bankruptcy petition on April 23, 2020. In that petition, Debtor indicated that his debts were primarily business debts,<sup>3</sup> although he has since amended his petition to state that his debts are primarily consumer debts.<sup>4</sup> Debtor's Schedule A includes a legal interest in a single-family home valued at \$600,000 and several retirement accounts totaling just over \$100,000. Debtor's Schedule C includes both a mortgage on the real property and a home equity line of credit, but there is substantial equity in the home of nearly \$250,000. Debtor's Schedule E/F contains substantial unsecured debt. Much of that debt is designated as Debtor's business debt (about \$161,708) and an additional approximately \$72,763 is not designated other than general unsecured.

Prior to filing, Debtor was involved in two separate businesses. From 2011 to 2016, Debtor operated a junk removal business, and then from 2017 to 2019, Debtor operated a shave

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<sup>2</sup> [Doc. 1 p.39.](#)

<sup>3</sup> *Id.* p.6.

<sup>4</sup> [Doc. 24 p.6.](#)

company. For the fourteen months prior to filing his bankruptcy petition, however, Debtor worked as a construction manager. At filing, Debtor listed his take home pay after deductions as \$3913.65, but then indicated he had other monthly income of \$2300 from commissions and bonuses, yielding a combined monthly income of \$6213.65. Debtor stated that the bonus and commission amount was “a prediction over the next 12 months.” Debtor’s Schedule J included two items concerning domestic support obligations: first, Debtor listed \$1252 per month as “payments of alimony, maintenance, and support” and second, Debtor listed \$750 per month as “maintenance to wife.” Shortly after filing, Debtor amended his Schedule I and J. Of note, Debtor changed his net commission to \$1496.61 per month, and indicated that the number was based on the “last 3 months and prediction over the next 12 months.”<sup>5</sup> Debtor also amended his Statement of Financial Affairs to indicate the \$2002 total paid each month to his wife was “pursuant to court order for child support and maintenance.”<sup>6</sup>

The UST filed a motion to convert or dismiss Debtor’s case, arguing that Debtor’s case was an abuse of Chapter 7 under the totality of the circumstances or filed in bad faith. The UST alleges that Debtor’s monthly payments to his wife are structured as follows: (1) \$1252 in child support and (2) \$750 for spousal maintenance. The UST alleges that the spousal maintenance payment is actually to pay off part of the home equity line of credit that is secured by the family’s home, and that, regardless, it is to end in February 2021. The UST also alleges that Debtor paid \$10,000 to a car dealership as a down payment for a vehicle that was titled in his wife’s name, and now pays his wife a monthly amount to “lease” the vehicle. And finally, the UST alleges that Debtor’s predictions on his monthly commission are pessimistic, such that his true financial picture reflects an ability to pay creditors. Debtor responds that the Court does not

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<sup>5</sup> *Id.* p.23.

<sup>6</sup> *Id.* p.29.

have “jurisdiction” to review or recharacterize the state-court-ordered spousal maintenance payments, and that there are reasonable explanations for Debtor’s commission projections and the vehicle loan. At oral argument, the UST replied that it is not seeking to recharacterize the \$750 per month payment at all; just arguing that it is an indication of Debtor’s bad faith. The UST characterized the issue as “whether the debtor’s dealings with an insider, his wife, amounts to bad faith.” The Court is unclear if the UST is proceeding solely under the bad faith prong of § 707(b)(3) or also the totality of the circumstances prong.

## **II. Analysis**

The Court has jurisdiction of this contested matter under [28 U.S.C. §§ 1334\(a\) and \(b\)](#) and [28 U.S.C. §§ 157\(a\) and \(b\)\(1\)](#). Because this matter concerns the administration of the estate, it is a core proceeding pursuant to [28 U.S.C. § 157\(b\)\(2\)\(A\)](#).

### **A. Dismissal for Abuse under § 707(b)**

Section 707(b) governs the dismissal or conversion of a debtor’s bankruptcy petition to prevent abuse of the Chapter 7 provisions. Under § 707(b)(1), a debtor’s case may be dismissed or converted to Chapter 13 if the bankruptcy court “finds that the granting of relief would be an abuse of the provisions of this chapter.” Then under § 707(b)(3), if there has been no presumption of abuse (given the test set out in § 707(b)(2)) or that presumption has been rebutted, the court should consider “whether the debtor filed the petition in bad faith” or whether “the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse.” The UST, as the moving party, bears the burden of proof to support the motion by a preponderance of the evidence.<sup>7</sup>

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<sup>7</sup> *In re Smith*, [585 B.R. 168, 175](#) (Bankr. W.D. Okla. 2018).

## B. Totality of the Circumstances under § 707(b)(3)

There is no “mechanical formula” for assessing abuse under § 707(b)(3): “§ 707(b)(3) allows the court to make a broad, flexible review encompassing any factors that are relevant to the debtor’s financial condition, including post-petition events that affect a debtor’s finances.”<sup>8</sup> A debtor’s high income is not dispositive.<sup>9</sup> Rather, this is a totality of the circumstances test, and bankruptcy courts generally use a series of factors enumerated by the Tenth Circuit in *In re Stewart*<sup>10</sup> to analyze abuse under § 707(b)(3). Under *Stewart*, the “primary factor” is a “debtor’s ability to repay his debts out of future earnings.”<sup>11</sup> The “other relevant or contributing factors” are whether the debtor “suffered any unique hardships, such as sudden illness, calamity, disability, or unemployment,” whether the debtor’s “cash advances and consumer purchases far exceeded his ability to pay,” whether the debtor has a “stable source of future income,” whether the debtor’s “expenses can be significantly reduced without depriving him of adequate food, clothing, shelter, and other necessities,” whether the debtor qualifies for Chapter 13 relief, and

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<sup>8</sup> *Id.*

<sup>9</sup> 6 *Collier on Bankruptcy* ¶ 707.04 (Richard Levin & Henry J. Sommer eds., 16th ed.) (“The mere fact that a debtor has a relatively high income should not be sufficient to warrant a finding of abuse. To determine that a case was not filed in good faith solely on the basis of the debtor’s ability to pay even though the means test concludes otherwise would be to invent a new means test, different than the uniform standard enacted by Congress after great deliberation and compromise to ensure that it appropriately balanced all of the interests involved.”).

<sup>10</sup> 175 F.3d 796 (10th Cir. 1999). The *Stewart* case was decided prior to BAPCPA’s change to the dismissal standards in § 707(b), but “courts generally agree that because Congress added the phrase “totality of the circumstances” to BAPCPA, the pre-BAPCPA cases employing the Stewart Factors are applicable to the analysis of “abuse” under § 707(b)(3).” *In re Smith*, 585 B.R. at 175. See also *In re Jaramillo*, 526 B.R. 404, 410-11 (Bankr. D.N.M. 2015) (“The Bankruptcy Code does not define when the ‘totality of the circumstances’ requires dismissal. Prior to the enactment of the BAPCPA, the Tenth Circuit used a totality of the circumstances test to interpret the term ‘substantial abuse.’ Today, courts generally agree that because Congress added the phrase ‘totality of the circumstances’ to the BAPCPA, the pre-BAPCPA cases using that test are still applicable to the analysis of ‘abuse’ under § 707(b)(3).” (internal citations omitted).

<sup>11</sup> *In re Stewart*, 175 F.3d at 808.

“the debtor’s good faith.”<sup>12</sup>

### C. Application of § 707(b)(3) to Debtor’s Petition

The Court has not found helpful case law applying the above to the situation at hand, and no cases specifically considering whether the payment of a domestic support obligation can constitute abuse under § 707(b)(3). There are analogous situations, however. For example, in *In re Schumacher*,<sup>13</sup> at the time of filing, the debtor was voluntarily contributing \$1700 per month to his two adult children’s college tuition.<sup>14</sup> After filing, the debtor obtained relief from the automatic stay to finalize property and support issues with his ex-wife.<sup>15</sup> In the state court’s final divorce decree, the debtor was ordered to pay \$2000 per month for the adult children’s tuition for a specified period of time.<sup>16</sup> The bankruptcy court contrasted voluntary support payments for adult children with the debtor’s payment of court-ordered support, and concluded that “[w]hen a debtor has a legal duty to support another as a dependent or pursuant to a domestic support obligation, fulfilling that duty is not an abuse of the bankruptcy system.”<sup>17</sup> To contrast, the bankruptcy court concluded that where there is no legal duty, doing so “can constitute abuse.”<sup>18</sup>

That said, the bankruptcy court in *Schumacher* acknowledged that a divorce decree does not necessarily make something reasonable.<sup>19</sup> The bankruptcy court indicated that the state court’s decree would need to be analyzed to determine whether the payments were truly domestic support obligations.<sup>20</sup> The bankruptcy court found persuasive that jurisdiction’s body of

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<sup>12</sup> *Id.* at 809-10.

<sup>13</sup> [495 B.R. 735](#) (W.D. Tex. 2013).

<sup>14</sup> *Id.* at 738.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 742.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

case law examining the “definition of domestic support obligations for the purpose of determining whether a debt is dischargeable under [11 U.S.C. § 523](#)” and the definition of domestic support obligation given by the Code in § 101(14A).<sup>21</sup> After looking “to the parties’ intent and the practical function of the college-related expense to determine the nature of Debtor’s obligation,” the bankruptcy court concluded that the debtor and his ex-wife intended the college-related expenses to be a domestic support obligation and determined that the totality of the circumstances did not demonstrate abuse.<sup>22</sup> The bankruptcy court noted that “it would be abusive for a debtor to concoct a domestic support obligation he or she would not otherwise owe in order to reduce his or her disposable income,” but found no evidence that the college-related expenses were designed for that purpose in that case.<sup>23</sup>

The Court generally agrees with the consideration of the issues in *Schumacher*. The Court must conduct an evidentiary hearing to determine whether Debtor’s monthly payments to his wife are truly domestic support obligations, whether Debtor’s payments were artificially constructed in bad faith, and whether the totality of the circumstances demonstrates abuse. The UST has the burden to show bad faith or abuse under § 707(b)(3), and must put on evidence to satisfy that burden.

### **III. Conclusion**

The Court sets the UST’s motion to dismiss for a status conference on March 18, 2021, at 10:30 a.m. The parties should be prepared to discuss at that status conference the need for any discovery, and potential dates for an evidentiary hearing on this matter.

IT IS SO ORDERED.

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<sup>21</sup> *Id.* at 743.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 744.

ROBERT D. BERGER  
U.S. BANKRUPTCY JUDGE