The relief described hereinbelow is SO ORDERED.

SIGNED this 19th day of May, 2021.

Robert D. Berger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

Benjamin Dwain Trickey, Jr., **Case No. 20-20951-7**

Debtor.

Order Concluding Motion to Dismiss Must be Set for Evidentiary Hearing

Debtor Benjamin Trickey, Jr. filed a Chapter 7 bankruptcy petition to address significant unsecured debt. The United States Trustee ("UST") moved to dismiss Debtor's case under 11 U.S.C. § 707(b)(3),[1] arguing that Debtor's case was an abuse under the totality of the circumstances test of that statute. The parties presented their positions in a motion and response, and the Court heard oral argument on the same. The central issues are Debtor's monthly voluntary contribution to his retirement, Debtor's monthly payment toward his (significant) student loans, and a domestic support obligation payment that will end shortly after Debtor's

[1] All statutory references in this order are to Title 11, United States Code (the Bankruptcy Code) unless otherwise indicated.

petition was filed.

As more fully discussed below, the Court concludes that Debtor's voluntary contribution to his retirement savings of $283.31 per month, Debtor's monthly payment of $413 to his student loan creditors, and the $2313.81 domestic support obligation that will end three to four months after filing are all matters upon which the Court must hear evidence. The Court sets this matter for a status conference so that an evidentiary hearing can be set to determine whether the UST can carry it burden of proof to show abuse under the totality of the circumstances test found in § 707(b)(3).

I. Procedural and Factual Background

Debtor filed a Chapter 7 bankruptcy petition on June 30, 2020. Debtor scheduled real estate valued at $325,000, with a mortgage of $288,028, and personal property including a 2014 Ford Focus valued at $5582. Debtor has very little in his retirement savings: only $2900. Debtor has significant unsecured debt, including $137,728 in student loans and $59,021 consisting of mostly credit cards or charge accounts. A portion of the student loan debt is for loans for Debtor's daughter's education.

Debtor is a pharmacist and had been employed by his current employer for only three months prior to filing his petition. Debtor's monthly gross income is $9443.96; from that, Debtor pays taxes and other deductions, including a $283.31 voluntary contribution to his retirement and a $2313.81 domestic support obligation. Debtor's net take-home pay is $4651.92, and combined with his current-wife's monthly contribution of $800, Debtor's combined monthly income is $5451.92. Debtor reports that his monthly expenses (which include a $413 student loan payment) leave him with only $3.92 net each month.

The UST filed a motion to dismiss Debtor's case, arguing that Debtor's case was an abuse

under the totality of the circumstances test of § 707(b)(3). The UST argues that Debtor "improperly" deducts $700 per month for voluntary retirement contributions and student loan payments and will soon have an additional $2300 per month because his domestic support obligation will end in October 2020. Debtor responds that he has been artificially suppressing his monthly expenses to comply with the court-ordered domestic support obligation to his former wife, and that he has put off important repairs to his home and vehicle, reduced orthodontal care, and reduced health savings account and retirement contributions to be able to make the payments. Once ended, Debtor argues, he will need the funds to address these delayed expenses. Debtor also argues that his student loan payments would be permissible in a Chapter 13 repayment plan, so it would be illogical to find bad faith for proposing to pay them in a Chapter 7 case. And then regarding his retirement contributions, Debtor argues that, again, the retirement contributions would be permitted in a Chapter 13 plan and he points out that he is in his late fifties, the only working member of his household, and has very little saved.

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 a motion under § 707(b)(3) by a preponderance of the evidence.[2]

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."[3] A debtor's high income is not dispositive.[4] 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*[5] 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."[6] The "other relevant or contributing factors" are whether the debtor "suffered any unique hardships, such as sudden illness, calamity, disability,

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[2] *In re Smith*, 585 B.R. 168, 175 (Bankr. W.D. Okla. 2018).

[3] *Id*.

[4] 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.").

[5] 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).

[6] *In re Stewart*, 175 F.3d at 808.

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 "the debtor's good faith."[7]

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

The UST challenges Debtor's Chapter 7 filing on three fronts: (1) Debtor's voluntary contribution to his retirement savings of $283.31 per month, (2) Debtor's payment of $413 to his student loan creditors, and (3) the $2313.81 domestic support obligation that will end three to four months after filing. The Court will address each issue in turn.

1. Voluntary Contributions to Retirement

Debtor reports that he is in his late fifties and has only $2900 saved for his retirement. He has recently begun contributing $283.31 each month to his retirement savings. Debtor argues that his retirement contribution would be permitted in a Chapter 13 repayment, *i.e.*, it would be excluded from being available in a Chapter 13 repayment plan, so it should not be considered by the Court in its analysis under § 707(b)(3). The UST counters that this $283.31 represents an "ability to pay;" the primary factor for analyzing abuse under § 707(b)(3).

There is no clear consensus on whether voluntary retirement contributions are permissible over objection in a Chapter 13 plan.[8] Neither the Supreme Court nor the Tenth

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[7] *Id.* at 809-10.

[8] *In re Davis*, 960 F.3d 346, 351-53, 355 (6th Cir. 2020) (collecting cases; ultimately concluding that voluntary contributions to retirement accounts are excluded from the Chapter 13 calculation of disposable income); *In re Melendez*, 597 B.R. 647, 656 (Bankr. D. Colo. 2019) (discussing lines of cases: some holding that they are *per se* impermissible, some holding that they are permissible even if the debtor did not make the contributions prior to filing, and some permitting them when the postpetition contribution is consistent with prepetition contributions and the plan meets the good faith test of § 1325(a)(3)); *In re Smith*, 585 B.R. at 179-80 (discussing same); *In*

Circuit have weighed in on the question.[9] But regardless, some courts have concluded that even if those contributions would be permissible in a Chapter 13 plan, it does not necessarily follow that they should not or could not be a factor to consider under § 707(b)(3). For example, In *In re Smith*, the bankruptcy court considered a debtor's argument that "because retirement contributions or repayments of retirement loans would be excluded from being available in a Chapter 13 plan they should not be considered in a hypothetical Chapter 13 analysis under § 707(b)(3)."[10] The bankruptcy court in *Smith* called this reasoning "flawed" for three reasons: (1) as noted above, "ability to pay" is only one factor to consider under *Stewart*'s totality of the circumstances test, (2) Congress can choose to fashion relief in each Chapter under the Code as it sees fit, and entitlement to relief under each Chapter has its own set of qualifiers, and (3) even under Chapter 13, a debtor must establish good faith, regardless of Chapter 13's exclusion of retirement contributions from disposable income.[11] As a result, the bankruptcy court in *Smith* joined the "majority of cases" holding that a court must consider voluntary retirement

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re Vanlandingham, 516 B.R. 628, 634 (Bankr. D. Kan. 2014) (discussing cases and concluding that voluntary retirement contributions should be excluded from the calculation of disposable income).

[9] In an opinion discussing a debtor's voluntary retirement contributions vis-à-vis repayment of a Health Education and Assistance Loan (HEAL), the Tenth Circuit did say that those voluntary contributions were not necessary to a minimal standard of living. *Woody v. U.S. Dep't of Justice (In re Woody)*, 494 F.3d 939, 952 (10th Cir. 2007). Only the HEAL loan, with a different standard for discharge, was challenged on appeal, and the Circuit stated: "To be sure, we agree with the principle that saving for one's retirement is a laudable goal that should generally be encouraged. However, we also agree with the many other courts that have held that, in the context of bankruptcy proceedings, retirement contributions should not take precedence over repayment of preexisting debts. Voluntary contributions to retirement plans are not reasonably necessary for a debtor's maintenance or support and must be made from disposable income. Although investments may be financially prudent, they certainly are not necessary expenses for the support of the debtors or their dependents. Investments of this nature are therefore made with disposable income; disposable income is not what is left after they are made." *Id.* (internal quotations omitted).

[10] 585 B.R. at 179.

[11] *Id.*

contributions as disposable income and a factor for possible abuse under § 707(b)(3).[12]

As this Court previously stated in *In re King*, however, the Court "rejects a *per se* rule that treats all voluntary contributions to retirement plans as disposable income."[13] The Court also notes that there are cases concluding that voluntary contributions to retirement should *not* be considered as disposable income when assessing ability to pay under § 707(b)(3).[14] Ultimately, in line with "the Tenth Circuit's case-by-case analysis on section 707(b) motions to dismiss,"[15] the Court continues to favor using a non-exclusive variety of factors to determine whether voluntary retirement contributions are reasonable, such as:

> (1) the age of the debtor and the amount of time until expected retirement;
> (2) the likelihood that stopping payments will jeopardize the debtor's fresh start;
> (3) the number and nature of the debtor's depend[e]nts;
> (4) evidence that the debtor will suffer adverse employment conditions if the contributions are ceased;
> (5) the debtor's yearly income;
> (6) the debtor's overall budget; and
> (7) any other constraints on the debtor that make it likely that the retirement contributions are reasonably necessary expenses for that debtor.[16]

As the Court has noted, self-funded retirement planning is the norm, and is favored by Congress with special tax advantages and protections.[17] Denying a debtor the ability to contribute to such plans would contradict the public policy and Congressional encouragement of self-sustained

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[12] *Id.* at 180.
[13] *In re King*, 308 B.R. 522, 530 (Bankr. D. Kan. 2004).
[14] *See, e.g.*, *In re Kubatka*, 605 B.R. 339, 364 (Bankr. W.D. Pa. 2019) ("What the Court cannot do is ignore the absurdity of finding a chapter 7 filing abusive solely based on the legal fiction that retirement funds are available when they are not actually required to be paid to creditors in chapter 13. Therefore, contrary to the Trustee's assertions, the Court concludes that it *must not* consider the Debtors' voluntary retirement account contributions or retirement account loan repayments as disposable income when assessing their ability to pay under section 707(b)(3)(B) to the extent that those funds will not actually be available in chapter 13.").
[15] *In re King*, 308 B.R. at 531.
[16] *Id.*
[17] *Id.*

retirement.[18] The Court will need to hear evidence so it can assess the factors stated above to determine whether, under the totality of the circumstances, the UST can carry its burden to show that Debtor's contribution of $283.31 per month toward his retirement while filing a Chapter 7 bankruptcy petition is an abuse of the bankruptcy process.

2. Payment to Student Loan Creditors

Debtor schedules $137,728 in student loan debt and notes in his Schedule J that he is paying $413 a month toward that debt. Again, Debtor argues that his student loan payments would be permissible in a Chapter 13 repayment plan, so it would be illogical to find abuse for proposing to pay them in a Chapter 7 case.

Debtor is correct that this Court has concluded that an above-median Chapter 13 debtor's separate classification of student loan claims for payment before other general unsecured claims was not unfairly discriminatory under § 1322(b)(1).[19] In *In re Engen*, this Court considered the different fact-based tests bankruptcy courts have used to determine whether separately classifying student loans in Chapter 13 bankruptcy plans would be unfair discrimination and the significant impact of student loan debt on Chapter 13 plans, and concluded that student loans *should* be treated differently.[20] Other courts in this District have also "blessed" certain "preferential" treatments by above-median debtors of student loans in Chapter 13 cases. In *In re Knowles*, Judge Karlin permitted above-median Chapter 13 debtors to provide for pro-rata distribution to student loan creditors within their plan, and then also directly make contractual payments to the student loan creditors from their excess discretionary income, concluding that the scenario was not unfair discrimination under § 1322(b)(1) based on the facts of that case.[21] In

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[18] *Id.* at 531-32.
[19] *In re Engen*, 561 B.R. 523, 551 (Bankr. D. Kan. 2016).
[20] *Id.* at 544-550.
[21] 501 B.R. 409, 422 (Bankr. D. Kan. 2013.The debtors in *Knowles* had a negative projected

In re Stull, Judge Nugent concluded that under the facts of the case, an "above-median debtor may separately classify and pay a non-dischargeable obligation from income he or she earns in excess of the projected disposable income that must be committed to the unsecured pot," but that paying interest on the student loans while only partially paying other allowed claims was not permissible under § 1322(b)(1) and (b)(1).[22] Finally, although Judge Somers did not permit separate classification of student loans in an above-median debtor's case in *In re Kane*, he did so because the difference in distribution to unsecured creditors from the proposed classification was to reduce the dividend from seventy-one percent to fourteen percent and would "significantly burden" the unsecured creditors under the facts of that case.[23] In other words, if Debtor had filed his petition under Chapter 13, he generally would be permitted to continue to make his monthly student loan payments.

A Chapter 13 bankruptcy is a different animal than a Chapter 7 bankruptcy. Separate classification of claims in a Chapter 13 plan is expressly permitted by § 1322(b)(1), and even discrimination amongst those classifications is permitted as long as it is not "unfair." This is often the express reason why Chapter 13 is more attractive to debtors, and one of the ways the Code encourages debtors to choose Chapter 13 over Chapter 7. This Court's conclusion in *Engen*, that the discrimination was *not* unfair, was based in part on reasoning that without separate classification, Chapter 13 debtors would be faced with *increased* student loan debt at the end of their plans, defeating the purpose of the fresh start and reducing the possibility that debtors would be in better fiscal health at the end of their plans.[24] That said, the "unfair"

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disposable income on their means test. *Id.* at 419.

[22] 489 B.R. 217, 222-24 (Bankr. D. Kan. 2013).

[23] 603 B.R. 491, 497-98 (Bankr. D. Kan. 2019).

[24] *In re Engen*, 561 B.R. at 541-42.

discrimination analysis in Chapter 13 required a fact-based inquiry,[25] and Chapter 13 debtors also have to pass the good faith tests of § 1325(a)(3) and (a)(7).[26]

The Court concludes that there can be no absolute rule on the impact of student loan payments in an analysis under § 707(b)(3); there must be an evaluation of the totality of the circumstances to determine whether a debtor's student loan payments should be considered disposable income in an ability to pay analysis.[27] The Court needs to determine whether a particular debtor's student loan payment proposal in a Chapter 13 case would be "unfair," and whether that debtor could pass the good faith tests of the Code. In addition, is the student loan debt so large that it would increase in principal during a Chapter 13 plan?[28] Would a distribution to other unsecured creditors be minimal given a debtor's overall debt picture?[29] Would a debtor's "ability to obtain a fresh start in bankruptcy . . . be severely constrained" by forcing the debtor into a Chapter 13 plan?[30]

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[25] *Id.* at 538-39.

[26] Chapter 13 debtors must propose plans (§ 1325(a)(3)) and file petitions (§ 1325(a)(7)) in good faith.

[27] *See, e.g.*, *In re Thurston*, No. 07-35092, 2008 WL 3414138, at *5 (Bankr. N.D. Ohio Aug. 8, 2008) ("[W]hile subject to certain guiding principles, a totality of the circumstances inquiry under § 707(b)(3)(B) is not conducive to absolutes.").

[28] *In re Jordan*, 428 B.R. 430, 436 (Bankr. N.D. Ohio 2010).

[29] *Id.*

[30] *In re Thurston*, 2020 WL 34141378, at *5; *see also In re Martin*, 371 B.R. 347, 355-56 (Bankr. C.D. Ill. 2007) (discussing cases concluding that student loans are a "special circumstance" for adjusting expenses under § 707(b)(2), and concluding: "Chapter 13 is not a reasonable alternative. A Chapter 13 filing would result in only partial payment of the student loan during the term of the Chapter 13 case and, most likely, a substantial balance would still be due upon completion of the case. Student loan debt is non-dischargeable and, as such, must be paid. The existence of this debt is a distinct, particular, additional, and extra factor which this Court should consider in determining whether abuse exists here. This Court finds that the Debtors' obligation to pay their student loan debt is a 'special circumstance' and that the Debtors are entitled to an expense adjustment of $178 for their monthly student loan payment."); Kristi Rose Sutton & Inan Uluc, *Student Loans: The Most Special of Circumstances*, 93 Am. Bankr. L.J. 711 (2019) (summarizing the differing case law approaches for "special circumstances" under § 707(b)(2)(B)(i) and arguing for a case-by-case analysis of whether there is "no reasonable alternative" but to maintain the student loan payment; arguing that this approach

Here, Debtor attaches to his response to the UST's motion to dismiss a proposed Chapter 13 means test, purporting to establish a negative pool. The UST has not had the opportunity to respond to Debtor's calculations and the Court has no evidence concerning the questions above. The Court again concludes that it does not have the facts it needs to make a decision. The parties will either need to stipulate to the facts needed, or an evidentiary hearing will need held.

3. Payment of Debts that Cease After Filing

Finally, Debtor currently pays a $2313.81 domestic support obligation that will end three to four months after filing. The UST contends these payments should be redirected to unsecured creditors in a repayment plan. Debtor counters that he will need the funds to address and cure delayed expenses. Again, Debtor appears to rely on the theory that he would be able to shift the funds to deferred expenses in a Chapter 13 repayment plan, so the funds should not be "counted against him" in the § 707(b)(3) analysis.

This Court has previously held that a "debtor's actual, post-petition circumstances can demonstrate abuse under the totality-of-the-circumstances test."[31] In other words, a debtor's postpetition change in circumstances for the better should be taken into account for purposes of determining abuse under § 707(b)(3). The Court also noted that it would consider "both current and foreseeable circumstances of a debtor's financial condition," and that § 707(b)(3) "is not dependent on the petition date and what happens prior to filing; rather, whether to dismiss a case for abuse may depend on developments occurring after filing but before discharge is granted."[32]

But, postpetition events can cut both ways. The Court concludes that it can consider not only Debtor's postpetition reduction in expenses, but also his postpetition need to attend to

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"correctly analyzes student loans as good faith, non-dischargeable, unsecured debts").

[31] *In re Vogeler*, 393 B.R. 240, 242-43 (Bankr. D. Kan. 2008).

[32] *Id.* at 243.

deferred expenses. "[S]ection 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."[33] The end of one expense item is not, by itself, conclusive.[34] Again, the Court will need evidence to consider the totality of the circumstances and application of the Tenth Circuit's *Stewart* factors to determine whether the UST can carry its burden to show abuse concerning Debtor's domestic support obligation.

III. Conclusion

The Court will set the UST's motion to dismiss for a status conference by separate order. 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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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE

[33] *In re McKay*, 557 B.R. 810, 817 (Bankr. W.D. Okla. 2016); *In re Mondragon*, No. 7-05-10665-MR, 2007 WL 2461616, at *4 (Bankr. D.N.M. Aug. 24, 2007) ("[T]he debtor's financial situation as of the date of the filing of the petition, as well as post-petition changes to a debtor's income and expenses are relevant to the determination of whether a debtor's Chapter 7 petition should be dismissed under § 707(b)(3).").

[34] *See In re Lindstrom*, 381 B.R. 303, 309 (Bankr. D. Colo. 2007) (concluding that the surrender of a vehicle, and resulting increase of $700 in monthly income, was insufficient alone to warrant dismissal under § 707(b)(3)); *In re Scarafiotti*, 375 B.R. 618, 636 (Bankr. D. Colo. 2007) (concluding that an increase of $803 in disposable monthly income due to not have a vehicle payment was not sufficient to warrant dismissal under § 707(b)(3) because the debtors may need to replace their vehicles due to their current high mileage cars).