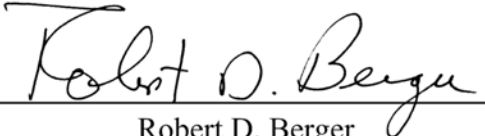


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 23rd day of February, 2022.




Robert D. Berger
United States Bankruptcy Judge

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

In re:

**ROBERT C. MARTIN AND
ANNE M. MARTIN,**

Debtors.

Case No. 20-21007
Chapter 7

ORDER GRANTING MOTION TO DISMISS OR CONVERT

This matter comes before the Court on the motion of the United States Trustee to dismiss this Chapter 7 case, or permit the debtors to convert it to Chapter 13, under 11 U.S.C. § 707(b)(3).¹ The Court will grant the Trustee's motion

¹ ECF 72. While the Trustee's motion cites § 707(b)(2) in addition to § 707(b)(3), the Trustee withdrew his subsection (b)(2) argument at the October 26, 2021 hearing on this motion.

because the totality of the circumstances of the debtors' financial situation demonstrates that granting relief in this case would be an abuse of the provisions of Chapter 7.

I. Procedural Background and Stipulated Facts

Debtors Robert and Anne Martin filed for bankruptcy under Chapter 7 on July 20, 2020. Their debts are primarily consumer debts. Around half of the Martins' scheduled unsecured debt of \$161,234.33 represents priority tax debt to the IRS and the Wisconsin Department of Revenue.

The Martins have two elementary-school-aged children. Their means test shows an annual gross income of \$116,723.40—nearly \$40,000 above the Kansas median for a family of four. They live with Mr. Martin's mother and pay no rent. However, the Martins do make occasional cash contributions, which Mr. Martin estimated at \$200 per month, to his mother for utilities or other bills.

Mr. Martin uses a car owned by this mother to commute to work and pays no rent or insurance for that car. The Martins also own a Honda Pilot, but have not made any car payments since filing for bankruptcy.

Mr. Martin contributed \$10,803.25 to his retirement account in 2020, and another \$6891.01 through September 10, 2021.

On October 1, 2020, the Trustee moved to convert or dismiss the Martins' Chapter 7 case for abuse under 11 U.S.C. §§ 707(b)(2) and (b)(3). In that motion (not the one at issue here), the Trustee argued that conversion or dismissal was

appropriate (1) under § 707(b)(2) because the Martins had improperly claimed a riding mower as a second vehicle on their means test to avoid the presumption of abuse,² and (2) under § 707(b)(3) because the Martins' monthly net income was enough to pay 100% of their unsecured debt over 60 months. The Martin agreed to convert their case to Chapter 13, and an agreed order to that effect was entered on November 2, 2020.

However, on December 24, 2020, facing a motion by the Chapter 13 trustee to dismiss their case for failure to file documents required under 11 U.S.C. § 521, the Martins moved to convert their bankruptcy case back to Chapter 7. In that motion, the Martins asserted that “[d]ue to the effects of the COVID-19 pandemic on Debtors income, they are not able to comply with the terms of the Chapter 13 plan,” and that “Debtors are now qualified to file for relief under Chapter 7 of the Bankruptcy Code.” The Martins filed an amended means test on February 8, 2021, in which they calculated a monthly disposable income of \$594.48, or \$35,668.80 over 60 months, which generated a presumption of abuse. However, they also filed a rebuttal in which they declared that their current monthly income had decreased by \$1,177.20 in December 2020 and that they expected the decrease to continue. This Court granted the Martins' motion, and an order converting their case back to Chapter 7 was entered on February 16, 2021.

² The Martins have stipulated that the riding mower is not street legal, that they did not use it as a car, and that their purpose in claiming it as a second vehicle on the means test was to avoid the presumption of abuse. See ECF 87 ¶¶ 7-9.

The following month, on March 22, 2021, the United States Trustee filed the present motion to dismiss the case or allow the Martins to convert back to Chapter 13.³ In his motion, the Trustee argues that the Martins' monthly income has only decreased by \$480.18, rather than the \$1,177.20 they claimed in their rebuttal; that the Martins' amended Schedule J improperly deducts monthly amounts of \$754.97 in voluntary retirement contributions and \$631 for payments toward unsecured tax debt; that the Martins pay no rent but scheduled housing expenses of \$1,500 per month, which is \$692 more than the IRS Local Standard for their county and household size; that while the Martins claimed \$800 in out-of-pocket health care expenses per month on their means test, their 2020 records showed out-of-pocket expenses of only \$562.92; and that while the Martins claimed \$60 in additional food and clothing expenses on their means test, they could not provide any documentation in support of it.

In their objection to the Trustee's motion, the Martins assert that Mr. Martin "continues to use vacation and holiday time to make up for reduced hours and both his net and gross income have decreased since the case was filed."⁴ Their objection continues:

More pressing are the Debtors' expenses. One of the Debtors' minor children is a Type-1 diabetic and Mr. Martin is a Type-2 diabetic. As a result, the Debtors turn to nearly all organic, natural, and non-GMO food that costs significantly more. There is a dearth of groceries available in Coffeyville, and only a few restaurants can

³ ECF 72.

⁴ ECF 75 at 1.

handle the specialized dietary needs, so restrictions, especially in the middle of a pandemic, can be difficult to navigate.⁵

The Martins argue that they “attempted in good faith to work within the confines of a Chapter 13 bankruptcy” but “were unable to afford even a single payment, much less propose a feasible plan.”⁶

The Martins stipulated prior to the hearing that Mr. Martin has never used paid time off from work to make up for reduced hours,⁷ but maintain that his income has decreased.

II. Evidentiary Hearing

The Court held an evidentiary hearing via Zoom on the Trustee’s motion to dismiss or convert on October 26, 2021. At the hearing, Mr. Martin testified that he is employed by SP Foundry as a system administrator. When he was first brought on to the company in March 2019, he had a “laundry list” of tasks to accomplish and worked a lot of overtime. However, now that those tasks are complete, he works approximately 40 hours per week. Mr. Martin is 42 years old; he anticipates working for at least 25 more years.

Before starting work at SP Foundry in March 2019, Mr. Martin was self-employed and did not contribute to a retirement plan. He began contributing to

⁵ *Id.* at 2.

⁶ *Id.*

⁷ ECF 87 ¶ 39.

retirement at SP Foundry when he first became eligible to do so. He testified that he contributes 3% of each paycheck and does not remember ever contributing 10%. Mr. Martin denied ever participating in an employee stock purchasing plan at the company.

The Martins own a Honda Pilot and a John Deere tractor/mower, which they have pledged as security for loans owed to Royal Credit Union. Mr. Martin explained that they have not made any payments on those loans since filing for bankruptcy because “the total payment on each of those vehicles is outside our ability to pay.”

Both Mr. Martin and the Martins’ elder son are diabetic. To manage this condition, Mr. Martin testified, the family uses a “homeopathic allergy elimination technique” in which they try to eliminate any “unnatural or inorganic” items from their diet. They buy what food they can from Walmart, but often have to order products online, or travel up to an hour-and-a-half away, to find foods that meet their dietary restrictions. These all-natural and organic foods “come at a premium” of up to 2-3 times the cost of “inorganic” foods. Mr. Martin conceded that his kids sometimes get “M&Ms” or “donuts”: “They get things that other kids get.”

Mr. Martin testified that COVID-19 masking restrictions have affected where the family shops, as the Martins “don’t believe it is a great idea” to mask their children—the younger child because of his age, and the older child because of his “nervous reaction” to masks. This has made it harder, he explained, for the family to get the things they normally use and the foods they normally eat.

On cross-examination, Mr. Martin acknowledged that he and his son depart from their specialized diet “from time to time.” He was not able to estimate how much money the family currently spends per month on food and housekeeping supplies, but thought that it would be reasonable to spend \$1,500 to \$2,000. The Trustee showed Mr. Martin IRS standards of \$955 for food and \$79 for housekeeping supplies; Mr. Martin testified that his family probably spends “double that,” reasoning that the foods required by their specialized diet cost “way more in the store.”

When asked if he and his wife have tried to reduce their expenses, Mr. Martin answered, “A little bit.” The Martins canceled their satellite internet service in July or August 2021; they have also tried eating out less often. Mr. Martin characterized eating out as a “crutch,” acknowledging that restaurant food isn’t as “wholesome” as what they can prepare at home. Mr. Martin is unaware of any other expense that could be reduced without depriving the family of adequate food, clothing, shelter, and other necessities.

Mrs. Martin testified that she agrees with the statements made by her husband, and that she is likewise unaware of any other ways in which their expenses could be reduced.

During closing arguments, the Trustee drew the Court’s attention to Exhibit 9, which shows that during March, April, and May 2021, the Martins spent an average of \$2,121.33 per month on food and housekeeping supplies, and an additional \$1,418.31 per month at restaurants. The Martins argued that one of the

“downsides” to living in a remote area of Kansas is a “lack of access to certain utilities, food, and other aspects of modern life,” adding that “the money is just not there” to make Chapter 13 plan payments.

III. Analysis

Section 707(b)(1) of the Bankruptcy Code provides that a bankruptcy court:

may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts, or, with the debtor’s consent, convert such a case to a case under chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this chapter.

Because the Martins are individual debtors whose debts are primarily consumer debts, section 707(b)(1) permits dismissal or conversion if the Court finds that granting relief would be an abuse of the provisions of Chapter 7. Section 707(b)(3) provides:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider—

(A) whether the debtor filed the petition in bad faith; or

(B) the totality of the circumstances . . . of the debtor’s financial situation demonstrates abuse.

In considering the totality of the circumstances, a court has broad discretion to review any factors that are relevant to the debtor’s situation. *In re Smith*, 585 B.R.

168, 175 (Bankr. W.D. Okla. 2018). The moving party bears the burden of proof to support a § 707(b)(3) motion by a preponderance of the evidence. *Id.*

In *In re Stewart*, the Tenth Circuit identified a number of factors for courts to consider in determining whether the “totality of the circumstances” demonstrates abuse. *See In re Stewart*, 175 F.3d 796, 809 (10th Cir. 1999).⁸ The primary factor is the debtor’s ability to repay his debts. *Id.* Other factors include whether the debtor: (1) “suffered any unique hardships, such as sudden illness, calamity, disability, or unemployment”; (2) engaged in “extravagant spending”; (3) made accurate statements in his petition and schedules; (4) “will enjoy a stable source of future income”; (5) could significantly reduce expenses “without depriving him of adequate food, clothing, shelter, and other necessities”; (6) qualifies for Chapter 13 relief; (7) could “obtain relief through private negotiation”;⁹ and (8) filed the case in good faith. *Id.* at 809-10. These factors are not exclusive, and the analysis must be made on a case-by-case basis. *See id.* at 809.

Here, the Court holds that that the totality of the circumstances demonstrates that granting relief in this case would be an abuse of the provisions of Chapter 7.

⁸ Although *Stewart* was decided pre-BAPCPA, most courts continue to apply the *Stewart* factors post-BAPCPA in determining whether the “totality of the circumstances” demonstrates abuse under § 707(b)(3). *See Smith*, 585 B.R. at 175.

⁹ This factor weighs against dismissal where a debtor fails to make a showing to the contrary. *See Stewart*, 175 F.3d at 810 (citation omitted).

As to factor (1), diabetes imposes extra costs on the Martins in the form of medical supplies and the cell phones (plus cell phone service) needed for continuous glucose monitoring.

As to factor (2), the Martins are spending, on average, an extravagant \$1,418 per month at restaurants.

As to factor (3), the Martins have made a number of materially inaccurate statements to this Court. They represented that their monthly income had decreased by \$1,177.20 as of December 2020 when it had only decreased by \$480.18.¹⁰ While that misrepresentation could have been the result of mathematical error, the Martins also represented that Mr. Martin “uses vacation and holiday time to make up for reduced hours” even though he has never done so. They claimed \$800 in monthly out-of-pocket medical expenses on their amended means test after spending a monthly average of \$563 over the past year.¹¹ Furthermore, Mr. Martin testified that he only withholds 3% of his income (which percentage he did not remember ever increasing) for retirement when the Martins’ amended Schedule I—and their pretrial factual stipulations—demonstrate that he withheld around 10% of his income in 2020 and was on track to do so again in 2021.

¹⁰ The Martins’ means test shows that Mr. Martin earned an average of \$8,726.95 per month during the six months before they filed for bankruptcy. Their rebuttal, filed in February 2021, states that their monthly income decreased by \$1,117.20 beginning in December 2020. However, Mr. Martin’s paystubs show that he received \$19,031.01 over five biweekly paychecks in December 2020 and January 2021, for a monthly average of $\$19,031.01 \div 5 * 26 \div 12 = \$8,246.77$ —a decrease of \$480.18 from the six-month average.

¹¹ Compare ECF 64, lines 7g and 22, with Ex. 8 #6.

The largest factual disconnect, though, is the one between the Martins’ asserted dietary needs and their documented restaurant spending. The Martins argue—and Mr. Martin testified—that diabetes management (along with their resulting desire to avoid “unnatural or inorganic” foods) governs their food expenditures. However, Exhibit 9 shows that the following debits posted to the Martins’ bank account during March, April, and May 2021:

3/1/2021	Casey’s Pizza	\$52.57
3/1/2021	McDonald’s	\$19.24
3/1/2021	Rib Crib	\$78.00
3/1/2021	Rib Crib	\$105.00
3/3/2021	Sonic	\$24.18
3/8/2021	Casey’s Pizza	\$61.15
3/8/2021	El Pueblito	\$56.00
3/8/2021	[Omega] Chocolate	\$45.22
3/8/2021	Hideaway	\$100.00
3/8/2021	Braum’s	\$31.60
3/15/2021	Braum’s	\$25.69
3/15/2021	Donut Palace	\$40.21
3/15/2021	Hideaway	\$160.00
3/15/2021	Braum’s	\$1.74
3/15/2021	Rib Crib	\$75.00
3/18/2021	Subway	\$12.02
3/19/2021	Sonic	\$13.87
3/22/2021	Donut Palace	\$14.19
3/22/2021	Donut Palace	\$52.03
3/22/2021	The Yoke Bar and [Grill]	\$107.00
3/23/2021	Casey’s Pizza	\$45.94
3/25/2021	Sonic	\$37.38

3/29/2021	Braum's	\$14.41
3/29/2021	El Pueblito	\$58.00
3/29/2021	Rib Crib	\$103.00
3/31/2021	Braum's	\$21.44
4/1/2021	Subway	\$54.51
4/5/2021	Casey's Pizza	\$37.08
4/5/2021	Donut Palace	\$36.33
4/5/2021	Logan's	\$103.00
4/5/2021	McDonald's	\$14.75
4/5/2021	Hideaway	\$120.00
4/5/2021	QuikTrip	\$15.49
4/5/2021	El Pueblito	\$60.00
4/7/2021	Sonic	\$39.35
4/12/2021	Braum's	\$6.29
4/12/2021	Donut Shop	\$27.42
4/12/2021	El Pueblito	\$55.00
4/12/2021	McDonald's	\$44.37
4/12/2021	Red Lobster	\$180.00
4/12/2021	Signet Coffee	\$23.44
4/14/2021	Sonic	\$20.10
4/15/2021	Carl's Jr.	\$24.09
4/16/2021	McDonald's	\$27.31
4/19/2021	Rib Crib	\$86.00
4/19/2021	[Omega] Chocolate	\$56.99
4/19/2021	Hideaway	\$110.00
4/19/2021	Donut Palace	\$19.39
4/19/2021	Saiko	\$77.38
4/21/2021	Casey's Pizza	\$38.29
4/26/2021	Braum's	\$6.29
4/26/2021	Casey's Pizza	\$63.45

4/26/2021	Donut Palace	\$66.23
4/26/2021	El Pueblito	\$71.00
4/26/2021	McDonald's	\$30.04
4/26/2021	The Yoke Bar and [Grill]	\$72.00
4/26/2021	Braum's	\$3.93
4/30/2021	Braum's	\$30.29
5/3/2021	Braum's	\$5.23
5/3/2021	Casey's Pizza	\$66.74
5/3/2021	Donut Palace	\$18.17
5/3/2021	Rib Crib	\$90.00
5/3/2021	Sonic	\$12.22
5/7/2021	Casey's Pizza	\$63.45
5/10/2021	Casey's [General] Store	\$42.50
5/10/2021	Donut Palace	\$13.25
5/10/2021	El Pueblito	\$61.00
5/10/2021	McDonald's	\$9.83
5/10/2021	[Omega] Chocolate	\$41.26
5/10/2021	Hideaway	\$107.00
5/11/2021	Big G's Burgers	\$10.67
5/12/2021	El Pueblito	\$75.50
5/14/2021	Braum's	\$9.52
5/14/2021	Braum's	\$25.81
5/15/2021	Sonic	\$33.89
5/15/2021	Sonic	\$4.04
5/17/2021	Casey's Pizza	\$50.92
5/17/2021	El Pueblito	\$62.00
5/17/2021	Signet Coffee Roasters	\$13.63
5/17/2021	Donut Shop	\$19.97
5/19/2021	McDonald's	\$49.48
5/20/2021	El Pueblito	\$70.23

5/20/2021	Sonic	\$42.09
5/24/2021	Casey's Pizza	\$45.94
5/24/2021	Casey's Pizza	\$54.24
5/24/2021	Donut Palace	\$36.61
5/24/2021	Rib Crib	\$88.00
5/27/2021	Braum's Store	\$35.86
5/27/2021	Subway	\$4.38
5/28/2021	Sonic	\$16.82

Such expenditures, taken together, are wholly inconsistent with the Martins' professed dietary needs.

As to factor (4), Mr. Martin anticipates that his employment with SP Foundry will continue. As to factor (5), the Martins could significantly reduce their restaurant spending without depriving the family of adequate food, clothing, shelter, and other necessities. As to factor (6), the Martins qualify for Chapter 13 relief. As to factor (7), the Martins have not showed that they are unable to obtain relief through private negotiation. As to factor (8), this case does not contain the indicia of bad faith observed by the Tenth Circuit in *Stewart*.

Finally, the evidence before this Court demonstrates that the Martins have the ability to pay a significant percentage of their debt. Their amended Schedule J improperly deducts \$631 per month for payments on unsecured tax debt, and Mr. Martin testified that he is only withholding 3% of his income for retirement; taking him at his word, this means that amended Schedule I overstates his voluntary

retirement contributions by \$528 per month.¹² Correcting these two items reveals \$1,159 in monthly disposable income, or \$69,540 over five years. The Martins' amended Schedule J also deducts \$1,500 per month for housing expenses even though (1) the Martins live rent-free with Mr. Martin's mother, to whom they contribute at most \$200 per month; (2) the IRS local standard for monthly housing expenses in Montgomery County, Kansas, as reported by the U.S. Trustee Program,¹³ was \$808 when this case was filed and is \$810 today; and (3) Mr. Martin testified that they have no current plans to move out of his mother's house.

Reducing the Martins' scheduled housing expenses from \$1,500 to the current local

¹² The Martins' amended Schedule I deducts retirement contributions of \$754.97 per month, which is 10% of Mr. Martin's listed monthly gross income of \$7,549.75. If he is only withholding 3% of his listed monthly gross income, or \$226.49, then amended Schedule I overstates his monthly retirement contributions by $(\$754.97 - \$226.49) = \$528.48$.

This order expresses no opinion as to whether the Martins may permissibly deduct a voluntary 3% retirement contribution. *Cf. In re King*, 308 B.R. 522, 530-31 (Bankr. D. Kan. 2004) (adopting case-by-case analysis in determining whether voluntary retirement contributions represent disposable income for purposes of § 707(b)). Although the Tenth Circuit did state in *Woody v. U.S. Dep't of Justice (In re Woody)*, 494 F.3d 939, 952 (10th Cir. 2007), that "retirement contributions should not take precedence over repayment of preexisting debts," that case was about the dischargeability of a HEAL loan under 42 U.S.C. § 292f(g), which has a much higher "unconscionability" standard—whether that statement applies in the context of a § 707(b) matter is questionable.

¹³ Section 707(b) refers to standards "issued by the Internal Revenue Service." The IRS provides local standards, by county and state, for housing and utilities combined. See <https://www.irs.gov/businesses/small-businesses-self-employed/local-standards-housing-and-utilities>. The U.S. Trustee Program divides each such standard into two parts: "Non-Mortgage" and "Mortgage/Rent." See <https://www.justice.gov/ust/means-testing/20210515>. The Martins do not challenge the Trustee's use of the divided local standard.

standard yields an additional \$690 in monthly disposable income, or an additional \$41,400 over five years. Finally, schedules notwithstanding, the \$1,418 per month that the Martins spend at restaurants would add up to \$85,080 over five years. Either way, the Martins apparently have the ability to pay more than half of their scheduled unsecured debt in a Chapter 13 case.¹⁴

IV. Conclusion

The debtors' ability to pay, together with the other evidence before the Court as analyzed under *In re Stewart*, demonstrates that granting relief in this case would be an abuse of the provisions of Chapter 7. For that reason, the Trustee's motion to dismiss or convert is hereby granted under 11 U.S.C. § 707(b)(1) and (3). If the Martins do not convert this case back to Chapter 13 within 21 days, the case will be dismissed.

IT IS SO ORDERED.

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¹⁴ This order expresses no opinion as to what the Martins would actually be required to pay under a Chapter 13 plan.