UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **WENDELL A DEADMOND, JR.,** and **RENAE A DEADMOND**, Debtors.	Case No. **06-60512-7**

MEMORANDUM of DECISION

At Butte in said District this 27th day of February, 2007.

In this Chapter 7 bankruptcy, after due notice, a hearing was held November 7, 2006, in Butte on the United States Trustee's Motion to Dismiss filed September 22, 2006. The United States Trustee ("UST") was represented at the hearing by attorney Daniel P. McKay, of Great Falls, Montana, and Debtors were represented by their attorney of record, R. Clifton Caughron, of Helena, Montana. The Court heard testimony from Lawrence C. Rezentes and Wendell A. Deadmond, Jr., and the UST's Exhibits 1 through 4 were entered into evidence without objection.

In this case, the UST moves to dismiss arguing that Debtors' case is a presumed abuse of Chapter 7 under 11 U.S.C. § 707(b)(2). In the alternative, the UST asks that this case be dismissed as an abuse of Chapter 7 based on the "totality of the circumstances" under § 707(b)(3). Debtors filed a response to the UST's motion on September 26, 2006. In their

response, Debtors do not dispute any of the UST's allegations but merely set the matter for hearing. However, Debtors did file amended Form B22A's on September 26, 2006, November 6, 2006, and December 15, 2006.[1]

This Memorandum of Decision sets for the Court's findings of fact and conclusions of law as required by Fed.R.Civ.P. 52(a), made applicable to the proceeding by Rule 7052, F.R.B.P. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 707. For the reasons discussed herein, the Court finds in favor of the Debtors.

BACKGROUND

Wendell and Renae Deadmond, the Debtors, are married and live in Helena, Lewis and Clark, Montana. Debtors filed their voluntary Chapter 7 bankruptcy petition on June 29, 2006, together with their Schedules, Statement of Financial Affairs, and Form B22A "Statement of Current Monthly Income and Means Test Calculation". Debtors do not list any dependents in their Schedules, but on their amended Form B22A filed December 15, 2006, Debtors disclose in Part VII that they help with their daughter's college expenses. Both Wendell and Renae are employed and work in Helena. Per their Schedules I and J, Debtors' combined monthly income, net of payroll taxes, is $3,262.63, while Debtors' combined total monthly expenses are $3,542.97.

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[1] The Court would generally not consider Debtors' amended Form B22A filed December 15, 2006, as such Form was filed after the hearing on the UST's Motion. However, the only change between Debtors' Form B22A filed November 6, 2006, and the Form B22A filed December 15, 2006, is an increase in Debtors' "transportation ownership/lease expense" as set forth on lines 23 and 24. The amendment by Debtors was presumably made in response to this Court's ruling in *In re Naslund*, ___ B.R. ____, 2006 WL 4038608 (Bankr. D. Mont. 2006), wherein this Court ruled that debtors were entitled to take the applicable housing and transportation allowances without consideration of their actual expense.

On Schedule B, Debtors list two motor vehicles: a "1995 Dodge Ram" and a "1983 GMC Surbanbun [sic]" that "does not run". Debtors apparently own both motor vehicles free and clear of any liens.

On the amended Form B22A filed December 15, 2006, Debtors checked the box on the top of the first page indicating that "The presumption does not arise." Debtors report both their "total currently monthly income for § 707(b)(7)", line 12, and their "current monthly income for § 707(b)(2)" as $5,518.00. At Part III "Application of § 707(b)(7) Exclusion", Debtors disclose at Line 15 that their annualized current monthly income of $66.216.00 exceeds the applicable median family income as determined at www.usdoj.gov/ust. [2] At Line 23, Debtors have taken a deduction of $471.00 for the ownership costs of a first vehicle and on Line 24 of Form B22A, Debtors take a $332.00 deduction for the ownership costs associated with a second vehicle.

Whether the presumption of abuse arises in a particular Chapter 7 case is determined at lines 48 through 55. In this case, the Debtors report their "60-month disposable income under § 707(b)(2)" as a negative $16,237.80 on line 51. Because Debtors' 60-month disposable income is less than $6,000.00, Debtors checked the box on the first page of Form B22A that the "presumption does not arise."

Debtors list one secured obligation totaling $83,957.67 on their Schedule D. The secured obligation relates to a Deed of Trust secured by Debtors' residence. Debtors' unsecured obligations total $49,228.25, of which $8,403.72 relates to medical bills, $15,659.69 relates to the repossession of a 2004 Volvo, and $2,500.00 pertains to a student loan obtained in 1997. On

[2] Debtors' indicate at Part III, line 14 that their household size is "3", even though they list no dependents on their Schedule I.

Schedule E, Debtors also disclose that they owe $3,433.00 for their 2004 income taxes.

APPLICABLE LAW

The Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005) ("BAPCPA") was signed into law by President George W. Bush on April 20, 2005, and with certain exceptions, is applicable to cases commenced after October 16, 2005.[3] The instant bankruptcy case was commenced on June 29, 2006, and is thus governed by the Bankruptcy Code, as amended by BAPCPA.

The dismissal or conversion of Chapter 7 bankruptcy cases is governed by 11 U.S.C. § 707(b). The Chapter 7 case of an individual debtor, whose debts are primarily consumer debts, may be dismissed under § 707(b)(1) if a bankruptcy court finds, after notice and hearing, "that the granting of relief would be an abuse of the provisions of" Chapter 7. The determination as to whether "abuse" exists in a given case is determined by applying the objective test found at § 707(b)(2) and/or the subjective test found at § 707(b)(3). The objective test of § 707(b)(2) is commonly referred to as the Means Test. The Means Test of § 707(b)(2) creates a presumption that abuse exists when a debtor's income is greater than the median income for his or her household size in the domiciliary state and his or her income less applicable expenses (as calculated pursuant to uniform standards) is sufficient to pay over a 60 month period at least the lessor of (1) the greater of 25% of the debtor's nonpriority unsecured claims or $6,000.00, or (2) $10,000.00. Explained in another way, the Means Test sets forth the congressionally determined calculations of a debtor's income and expenses, which, depending upon the result obtained from

[3] Unless otherwise indicated, all Code, chapter and section references are to the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 subsequent to its amendment by the Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005).

completing the calculations, creates a presumption that the bankruptcy filing is an abuse of Chapter 7 or permits the Chapter 7 case to proceed. The Means Test is set forth in § 707(b), and provides:

> (b)(1) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, trustee (or bankruptcy administrator, if any), or any party in interest, 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. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).
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> (2)(A)(i) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter, the court shall presume abuse exists if the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv), and multiplied by 60 is not less than the lesser of–
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> (I) 25 percent of the debtor's nonpriority unsecured claims in the case, or $6,000, whichever is greater; or
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> (II) $10,000.
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> (ii) (I) The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards, and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief, for the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case, if the spouse is not otherwise a dependent. Such expenses shall include reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or the dependents of the debtor. Notwithstanding any other provision of this clause, the monthly expenses of

the debtor shall not include any payments for debts. In addition, the debtor's monthly expenses shall include the debtor's reasonably necessary expenses incurred to maintain the safety of the debtor and the family of the debtor from family violence as identified under section 309 of the Family Violence Prevention and Services Act, or other applicable Federal law. The expenses included in the debtor's monthly expenses described in the preceding sentence shall be kept confidential by the court. In addition, if it is demonstrated that it is reasonable and necessary, the debtor's monthly expenses may also include an additional allowance for food and clothing of up to 5 percent of the food and clothing categories as specified by the National Standards issued by the Internal Revenue Service.

(II) In addition, the debtor's monthly expenses may include, if applicable, the continuation of actual expenses paid by the debtor that are reasonable and necessary for care and support of an elderly, chronically ill, or disabled household member or member of the debtor's immediate family (including parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent) and who is unable to pay for such reasonable and necessary expenses.

(III) In addition, for a debtor eligible for chapter 13, the debtor's monthly expenses may include the actual administrative expenses of administering a chapter 13 plan for the district in which the debtor resides, up to an amount of 10 percent of the projected plan payments, as determined under schedules issued by the Executive Office for United States Trustees.

(IV) In addition, the debtor's monthly expenses may include the actual expenses for each dependent child less than 18 years of age, not to exceed $1,500 per year per child, to attend a private or public elementary or secondary school if the debtor provides documentation of such expenses and a detailed explanation of why such expenses are reasonable and necessary, and why such expenses are not already accounted for in the National

Standards, Local Standards, or Other Necessary Expenses referred to in subclause (I).

(V) In addition, the debtor's monthly expenses may include an allowance for housing and utilities, in excess of the allowance specified by the Local Standards for housing and utilities issued by the Internal Revenue Service, based on the actual expenses for home energy costs if the debtor provides documentation of such actual expenses and demonstrates that such actual expenses are reasonable and necessary.

(iii) The debtor's average monthly payments on account of secured debts shall be calculated as the sum of--

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

(iv) The debtor's expenses for payment of all priority claims (including priority child support and alimony claims) shall be calculated as the total amount of debts entitled to priority, divided by 60.

(B)(i) In any proceeding brought under this subsection, the presumption of abuse may only be rebutted by demonstrating special circumstances, such as a serious medical condition or a call or order to active duty in the Armed Forces, to the extent such special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.

(ii) In order to establish special circumstances, the debtor shall be required to itemize each additional expense or adjustment of

> income and to provide--
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> > (I) documentation for such expense or adjustment to income; and
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> > (II) a detailed explanation of the special circumstances that make such expenses or adjustment to income necessary and reasonable.
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> (iii) The debtor shall attest under oath to the accuracy of any information provided to demonstrate that additional expenses or adjustments to income are required.
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> (iv) The presumption of abuse may only be rebutted if the additional expenses or adjustments to income referred to in clause (i) cause the product of the debtor's current monthly income reduced by the amounts determined under clauses (ii), (iii), and (iv) of subparagraph (A) when multiplied by 60 to be less than the lesser of--
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> > (I) 25 percent of the debtor's nonpriority unsecured claims, or $6,000, whichever is greater; or
> >
> > (II) $10,000.

Based upon information provided by Debtors and in preparation for the hearing, the UST prepared a Form B22A. *See* Exhibit 1. The UST's and Debtors' calculation of current monthly income for § 707(b)(2), as determined by lines 1 through 18, are identical. The difference between the UST's and Debtors' position stems from Debtors' calculation of their allowable expenses. As noted above, Debtors report their "total of all deductions allowed under § 707(b)(2)", found at line 47, as $5,788.63. By contrast, the UST has calculated that the "total of all deductions allowed under § 707(b)(2)" is $5,098.93. The primary areas of disagreement between Debtors' and the UST's calculation of the total of all deductions allowed under §

707(b)(2) are lines 21, 23 and 24.[4]

As noted in footnote 1, in *In re Naslund*, ___ B.R. ____, 2006 WL 4038608 (Bankr. D. Mont. 2006), this Court ruled that debtors were entitled to take the applicable Internal Revenue Service's mortgage or rent expense and transportation ownership or lease expense deductions, even when the debtors do not have a mortgage, or rent expense, automobile ownership expense or lease expense. Applying the Court's ruling from *Naslund*, and allowing Debtors' the full transportation ownership expense for two vehicles of $803.00, as opposed to the $400.00 utilized by the UST, increases the UST's total of all deductions allowed under § 707(b)(2) from $5,098.93 to $5,501.93. As a result, the UST's calculation of monthly disposable income under § 707(b)(2) drops to $16.07 and the 60-month disposable income under § 707(b)(2) is reduced from $25,144.20 to $964.20. This one change on Exhibit 1 changes the UST's presumed abusive filing to a nonabusive filing.

Similarly, increasing Debtors' monthly disposable income to $16.07, as opposed to the number of -270.63 used by Debtors, does not change Debtors' initial presumption determination at line 52, because in either case, Debtors' 60-month disposable income under § 707(b)(2) is less than $6,000.00, and thus, the presumption of abuse does not arise.

In addition to the foregoing, the UST also takes issue with Debtors' claimed adjustment of $310.32 on line 21 for "actual expenses above IRS standards". The Court agrees that Debtors failed to provide any justification for such expense, and the need for such expense is not reflected in Debtors' Schedule J. If the Court, however, deducted the adjustment of $310.32 from

[4] There are other discrepancies between the Form B22A completed by the UST and the Form filed by the Debtors on December 15, 2006, but the net difference is $23.62. The amount is so nominal that it has no measurable impact on the Court's decision in this matter.

Debtors' Form B22A, and deducted Debtors' claimed additional food and clothing expense of $37.00, as claimed on line 39, Debtors' allowable expenses would be reduced to $5,441.31. Subtracting the forgoing number of $5,441.31 from Debtors' agreed current monthly income of $5,518.00 results in $76.69 of monthly disposable income. Monthly income of $76.69 translates into $4,601.40 of 60-month disposable income. 60-month disposable income of $4,601.40 does not create a presumption of abuse under § 707(b)(2). Accordingly, the UST's request for dismissal under § 707(b)(2) must fail.

Although the Court has determined that there is no presumption of abuse under § 707(b)(2), the UST argues in the alternative that this case remains subject to dismissal under § 707(b)(3), which states:

> (3) 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 subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall consider–
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> > (A) whether the debtor filed the petition in bad faith; or
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> > (B) the totality of the circumstances (including whether the debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor) of the debtor's financial situation demonstrates abuse.

Unlike the Means Test of § 707(b)(2), § 707(b)(3) prescribes a more subjective test for abuse that is based on the "totality of the circumstances". The Bankruptcy Code, however, does not define the phrase, "totality of the circumstances." Prior to BAPCPA, courts in the Ninth Circuit looked to the "totality of the circumstances" to interpret the term "substantial abuse" in former § 707(b). *Price v. U.S. Trustee (In re Price),* 353 F.3d 1135, 1139-40 (9th Cir. 2004). Because Congress retained the phrase "totality of the circumstances" in BAPCPA, the Court concludes that it may

look to pre-BAPCPA case law to construe the meaning of that phrase under § 707(b)(3).

Prior to the enactment of BAPCPA, the history of 11 U.S.C. § 707(b) demonstrated that § 707(b) "was intended as the mechanism by which the court or the United States trustee could address general concerns regarding discharge of consumer debt" by debtors. *United States v. Padilla (In re Padilla)*, 222 F.3d 1184, 1194 (9th Cir. 2000). As noted by the Court in *Price*, "Congress added this section to the Code 'in response to concerns that some debtors who could easily pay their creditors might resort to chapter 7 to avoid their obligations.'" *Price*, 353 F.3d at 1138, *quoting* 6 COLLIER ON BANKRUPTCY ¶ 707.04 at 707-15. Indeed, this Court noted on a prior occasion that 11 U.S.C. § 707(b) was "enacted to impose a restraint on consumer debtors' access to Chapter 7 discharge by interposing bankruptcy courts as gatekeepers who could examine the worthiness of debtor petitions and dismiss those petitions deemed abusive." *In re Stiff*, 17 Mont. B.R. 474, 477 (Bankr. D. Mont. 1999) (quoting *First USA v. Lamanna (In re Lamanna)*, 153 F.3d 1, 3 (1st Cir. 1998)).

In order to prevail under 11 U.S.C. § 707(b), pre-BAPCPA, the UST was required to first show that a debtor's debts were primarily consumer debts, and second, that granting relief under Chapter 7 of the Bankruptcy Code would be a substantial abuse of Chapter 7. 11 U.S.C. § 707(b); *Price,* 353 F.3d at 1138. Because the term "substantial abuse" is not defined in the Bankruptcy Code, the Court in *Price* set forth six nonexclusive criteria for courts to consider when reviewing a case for substantial abuse.[5] *Price,* 353 F.3d at 1139-40. The *Price* Court,

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[5] Quoting 3 NORTON BANKRUPTCY LAW AND PRACTICE 2d § 67:5, at 67-10, the Court in *Price* set forth the following six criteria:

> (1) Whether the debtor has a likelihood of sufficient future income to fund a Chapter 11, 12, or 13 plan which would pay a substantial portion of the unsecured claims;

however, went on to explain that:

> [t]he primary factor defining substantial abuse is the debtor's ability to pay his debts as determined by the ability to fund a Chapter 13 plan. Thus, we have concluded that a "debtor's ability to pay his debts will, standing alone, justify a section 707(b) dismissal."

Price, 353 F.3d at 1140, quoting *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 914 (9th Cir. 1988).

Judge Thomas in *Price* further elaborated:

> . . . while "debtor's ability to pay his debts will, standing alone, justify a section 707(b) dismissal," *Kelly,* 841 F.2d at 914, the debtor's ability to pay his or her debts does not *compel* a section 707(b) dismissal of the petition as a matter of law. In addition, as *Kelly* noted, a bankruptcy court could make a finding of substantial abuse under the facts of a particular case even if the debtor did not have the ability to fund a Chapter 13 plan. *Id.* at 914-15. Thus, *Kelly* did not establish an absolute, *per se* rule. Rather, *Kelly* quite appropriately held that ability to fund a Chapter 13 plan is the most important consideration under § 707(b), and that a finding of ability to pay alone is sufficient to sustain a § 707(b) dismissal.

Price, 353 F.3d at 1140. Although the Court concluded that a debtor's ability to fund a plan is the most important consideration under § 707(b), the Court qualified that conclusion by declining to impose a bright line test or *per se* rule that would require a dismissal of a case if the debtor was able to fund a chapter 13 plan and enhancing the application of judicial discretion to determine abuse within the context of § 707(b). *Id.*

While this Court and the Ninth Circuit Court of Appeals previously referred to the totality of the circumstances in making a determination of substantial abuse, in a recent post-BAPCPA

> (2) Whether the debtor's petition was filed as a consequence of illness, disability, unemployment, or some other calamity;
> (3) Whether the schedules suggest the debtor obtained cash advancements and consumer goods on credit exceeding his or her ability to repay them;
> (4) Whether the debtor's proposed family budget is excessive or extravagant;
> (5) Whether the debtor's statement of income and expenses is misrepresentative of the debtor's financial condition; and
> (6) Whether the debtor has engaged in eve-of-bankruptcy purchases.

decision, one court characterized the Ninth Circuit's holding in *Kelly* as a *per se* rule that was codified by BAPCPA in § 707(b)(2), "with its presumption of abuse for debtors who have the ability to pay based on application of the means test formula." *In re Nockerts*, — B.R. —, 2006 WL 3689465 (Bankr. E.D.Wis. 2006), referencing *In re Ontiveros*, 198 B.R. 284 (C.D.Ill. 1996). The court in *Nockerts* cautions that:

> [W]hile ability to pay is a factor in the totality of circumstances test, and may even be the primary factor to be considered, if it is the only indicia of abuse, the case should not be dismissed under that test. Given the detailed nature of the means test in § 707(b)(2), this Court holds that similar to the old totality of the circumstances test, more than an ability to pay (as shown on the debtor's Schedule I and J) must be shown to demonstrate abuse under § 707(b)(3)(B).

Id. Judge Kelley in *Nockerts* concedes that a debtor's ability to fund a Chapter 13 plan could be a factor considered by the courts under § 707(b)(3) if the case involved below-median income debtors or if the debtors had, in some way, manipulated the means test.

While the Court appreciates Judge Kelley's cautionary statement in *Nockerts*, this Court concludes that a debtor's ability to pay is still an important factor under § 707(b)(3), notwithstanding the means test of § 707(b)(2). *In re Sorrell*, — B.R. —, 2007 WL 211276 (Bankr. D.Ohio 2007) ("the plain language of § 707(b)(3), read in conjunction with § 707(b)(1) and (2), is clear and compels a conclusion that a court must consider a debtor's actual debt-paying ability in ruling on a motion to dismiss based on abuse where the presumption does not arise or is rebutted"), and *In re Pak*, 343 B.R. 239 (Bankr. N.D.Cal. 2006) ("It would be counterintuitive to construe [§ 707(b)(3)'s use of the phrase 'the totality of the circumstances'], as used in BAPCPA, to exclude a consideration of the debtor's ability to pay."). The Court considers the discussion in *Price* to dispel any remaining conclusion that a bright line test or a

per se rule exists in the Ninth Circuit.

As mentioned above, following this Court's ruling in *Naslund*, neither the Form B22A prepared by the UST nor the Form B22A filed by Debtors on December 15, 2006, show a presumption of abuse under § 707(b)(2). Furthermore, the UST has not alleged, and this Court sees no manipulation by Debtors of the means test.[6] The skeletal record in this case also fails to show whether Debtors' bankruptcy petition was filed as a consequence of illness, disability, unemployment, or some other calamity, or whether Debtors obtained cash advances and consumer goods on credit exceeding their ability to repay them. The record similarly fails to show whether Debtors engaged in eve-of-bankruptcy purchases. The record also does not show that Debtors' proposed family budget is excessive or extravagant. The most the record shows in this case are inconsistencies in the filed schedules that do not establish abuse consistent with the above six factors. For example, after reviewing Debtors' Schedules and Statement of Financial Affairs, the Court saw on Debtors' Schedule I that both Debtors supposedly started new jobs within weeks of their June 29, 2006, petition date. Such assertion on Schedule I is contrary to question 1 on Debtors' Statement of Financial Affairs, wherein Debtors disclose that Wendell had year-to-date income of $336.47 from Associated through "9-17-05". Associated Foods is the same employer listed for Wendell on Debtors' Schedule I and it appears from Exhibit 3 that Wendell has been employed by Associates since 1988. The Court finds it similarly curious that

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[6] Judge Wedoff, in separate articles entitled *Means Testing in the New § 707(b)* [79 AM. BANKR. L. J. 231] and *Judicial Discretion to Find Abuse Under § 707(b)(3)* [25 AM. BANKR. INST. J. 1, April 2006], discusses some of the abuses that can occur, such as debtors who deduct payments on their Form B22 for luxury vehicles, boats and/or homes, or debtors who allow themselves to be underemployed or unemployed for the 6 month period prior to filing a bankruptcy petition.

Debtors report only $6,787.42 of income for 2005 on their Statement of Financial Affairs. Other unexplained discrepancies appear in Debtors' Statement of Financial Affairs, but the discrepancies do not show that Debtors have overstated their expenses or understated their income. The record also fails to show that Debtors filed their bankruptcy petition in bad faith, with an intent to hinder, delay or defraud their creditors.

Similarly, the Court is not convinced that Debtors could make any meaningful payment to their creditors under Chapter 13 of the Bankruptcy Code. BAPCPA substantially modified the disposable income test of § 1325(b) in the following manner: (1) disposable income [current monthly income] is determined by the debtor's average monthly income received within the six-month period ending on the last day of the calendar month immediately preceding the date of the commencement of bankruptcy petition (*see* §§ 1325(b)(2) and 101(10A)); (2) for debtors with income above the applicable state's median income, amounts reasonably necessary to be expended are determined as Debtor's applicable monthly expense amounts specified under the IRS National and Local Standards and the debtor's actual monthly expenses for the categories specified as Other Necessary Expenses for the area in which the debtor resides on the date of filing (*see* §§ 1325(b)(3) and 707(b)(2)(A) and (B)); and (3) projected disposable income, multiplied by the applicable commitment period is the amount to be paid to unsecured creditors, § 1325(b)(4).

Congress defined the term "current monthly income" ("CMI"), as set forth in § 1325(b)(2) at § 101(10A) as the average monthly income from all sources, with some exceptions, that the debtor receives during the 6-month period ending on the last day of the calendar month immediately preceding the date of the commencement of debtor's bankruptcy case. CMI

excludes Social Security benefits or payments to victims of war crimes, of crimes against humanity or terrorism, and in the context of a chapter 13 bankruptcy (*see* § 101(10A)(B)), also excludes alimony, child support, foster care, and child disability payments (§ 1325(b)(2)). CMI is calculated by having all debtors complete lines 1-23 of Form B22C, with the result being listed on line 21 as the debtor's "[a]nnualized current monthly income for § 1325(b)(3)." The term "disposable income" is defined at § 1325(b)(2) and is determined differently depending on whether the debtor's income is above or below the applicable median family income as determined by the debtor's place of residence and household size. If a debtor's annualized current monthly income, as set forth on Line 21 of Form B22C, is greater than the applicable state's median income for a household of the same size, reasonably necessary expenses are calculated using the "Means Test" of § 707(b)(2)(A) and (B).[7]

Because the Debtors in this case have above-median income, this Court's analysis would revert to an analysis similar to the analysis that this Court has already done in this case under § 707(b)(2), wherein this Court has determined that Debtors' Chapter 7 bankruptcy case is not deemed an abuse of Chapter 7 of the Bankruptcy Code. The Court acknowledges that its November 16, 2006, ruling in *Naslund* changed the issues in this case. However, the Court stands by its prior ruling in *Naslund*. Accordingly, for the reasons discussed herein, the Court finds that the UST has failed to show that this case should be dismissed under either § 707(b)(2) or § 707(b)(3).

IT IS THEREFORE ORDERED that the Court will enter a separate order in favor of the

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[7] If a debtor's annualized current monthly income is less than the state's applicable median income, the debtor is finished with Form B22C and proceeds to list income and expenses on Schedules I and J.

Debtors, Wendell and Renae Deadmond, and against the United States Trustee, denying the United States Trustee's Motion to Dismiss filed September 22, 2006.

BY THE COURT

HON. RALPH B. KIRSCHER
U.S. Bankruptcy Judge
United States Bankruptcy Court
District of Montana