UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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In re:

TAMI LEE SCHROEDER, Debtor.	ORDER GRANTING MOTION IN LIMINE BY UNITED STATES TRUSTEE BKY 11-32962

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At St. Paul, Minnesota
August 1, 2012.

This is a Chapter 7 case. The United States Trustee brought a motion for dismissal under 11 U.S.C. §§ 707(b)(2) - (3). After a preliminary hearing on the motion, the Court scheduled an evidentiary hearing. Deadlines for completion of discovery and for the filing of supplemental briefing were set. Seven days before the date of the evidentiary hearing, the United States Trustee filed a motion in limine. Through it, he sought "an order establishing that the presumption of abuse arises in this case and that the Court take the United States Trustee's allegations regarding the debtor's and Brad Schroeder's expenses as established for purposes of this proceeding." He sought this relief as something in the nature of a sanction, on the ground that the Debtor had failed to respond to his discovery requests. But, he also argued that the evidence known to him supported the application of the presumption of 11 U.S.C. § 707(b)(2) in any case.

This order addresses that motion, on the pre-hearing filings and the arguments that counsel presented at the hearing.[1] The United States Trustee appears by Colin Kreuziger. The Debtor appears by Nicole L. Anderson.

The Debtor in this case is a married, employed person. Her husband, Brad Schroeder, did not join her in the bankruptcy filing. He has substantial income himself, in an amount markedly greater than the Debtor's. According to the Debtor, she and her husband allocate

[1] In light of the force and the extensive development of the U.S. Trustee's position, the hearing did not proceed to the taking of evidence.

the responsibility for the payment of the expenses of their five-person family between them, with each spouse paying certain expenses from that spouse's separate income.

For her initial bankruptcy filing, the Debtor completed Official Form B22A, the so-called "means test form." She did not recite an amount for her husband's income at Column B, line 3 ("Gross wages, salary, tips, bonuses, overtime, commissions.").[2] She included the figure of $3,641.89 in Column B, line 8 (which calls for "Any amounts paid by another person or entity, on a regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose."). This entry, she says, represents those amounts that her husband pays out of his own earnings, every month, toward certain expenses of the household.

The total of that figure and her own gross earnings per month from Column A, line 3, is $6,067.39, which the Debtor notes at line 12, "Total Current Monthly Income for § 707(b)(7)." Through the calculations under the ensuing Part III of the means test, claiming a household size of five,[3] the Debtor concludes that her income is less than the applicable median family income. This is her justification for checking the box for "The presumption does not arise [under § 707(b)(2)]," at the very beginning of the means test form.

The most basic thrust of the U.S. Trustee's original motion for dismissal was a challenge of this methodology. After the Debtor gave sparse responses to discovery requests on household and individual expenditures, the U.S. Trustee made that challenge the centerpiece of his motion in limine. In essence, the U.S. Trustee seeks an adjudication as a matter of law, on the basis of some facts conceded; some facts assumed for the sake of argument; and his argument for a particular methodology in completing the means test form.[4]

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[2]On the form, Column A is identified as "Debtor's Income," and Column B is identified as "Spouse's Income."

[3]In her Schedule I, the Debtor recites "Married" as her marital status, and lists three daughters between the ages of 12 and 18 as the dependents of herself and her spouse.

[4]The U.S. Trustee styles the motion under Fed. R. Civ. P. 37(d), seeking the punitive imposition of an adverse ruling on the merits as a sanction for failure to respond to discovery. There is something to this, given the Debtor's evasiveness about key issues, i.e., the nature and amount of specific expenditures she deems to her husband, and other aspects of the way this couple ostensibly manages their family fisc. However, this can also be approached as if it were a motion for summary judgment. The U.S. Trustee's

The Debtor relies on her own attorney's methodology for the means test calculus, and she maintains that the presumption does not apply. As she would have it, the only part of a non-filing spouse's periodic financial means that are to be deemed to a filing debtor under color of 11 U.S.C. § 101(10A)(B), for the calculation of "current monthly income" under 11 U.S.C. § 101(10A), are those sums that the non-filing spouse chooses to contribute to periodic household expenses. Citing *In re Boatright*, 414 B.R. 526 (Bankr. W.D. Mo. 2009), the Debtor urges that a non-filing spouse's gross income is not to be included at all at the beginning of the calculus (line 3). A bit more subtly, she maintains that the Court must give full deference to a given couple's peculiar understandings as to the individual responsibility for specific family expenses, as between them. She insists on this deference, even where it leaves a significant component of a non-filing spouse's earnings unapplied in the calculation and beyond consideration as available surplus income for the purposes of the means test.

As the U.S. Trustee points out, the Debtor's argument is not fully accurate in its summary of *Boatright*'s reasoning. Nor does it acknowledge the plain, unmistakable instructions on the very face of the means test form, which are directive to all debtors because they are part of an official form.

Form B22A, line 2, instructs any individual debtor who files for bankruptcy in the status of "[m]arried, not filing jointly, without the declaration of separate households set out in Line 2.b above," as follows:

> **Complete both Column A ("Debtor's Income") and Column B ("Spouse's Income") for Lines 3-11.**[5]

At line 8 (one of those for which both Columns A and B, for debtor and spouse, are to be completed), a debtor is required to disclose "[a]ny amounts paid by another person or entity, on a

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current evidentiary showing--derived from the Debtor's own statements in her original bankruptcy filing and the extant fruits of discovery to the Debtor--does shift a burden of production to the Debtor, under the analysis based on Rule 56 that the courts have used since the Supreme Court issued its trilogy of decisions on summary judgment in 1986. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574 (1986).

[5]Boldface in original.

regular basis, for the household expenses of the debtor or the debtor's dependents, including child support paid for that purpose." Considering the format of this form and its instructions in their entirety, it just does not make sense to include a non-filing spouse as "another person or entity," whose payments are to be credited to the debtor for calculation of income. That would be completely inconsistent with the earlier requirement that the spouse's own income be disclosed in full at lines 3-7. This is underlined by the clear directive in the second sentence of the instructions for line-entry 8:

> Do not include alimony or separate maintenance payments *or amounts paid by your spouse if Column B is completed*.[6]

Contrary to the Debtor's argument, a non-filing spouse's payment of expenses for a household that includes a filing debtor is accommodated at line 17, the "marital adjustment." Admittedly, this is done by a cognizance-in-the-negative: where "the basis for excluding the Column B income" via such an adjustment is disclosed in detail, the amount to be deducted here is for uses of cash other than regular household expenditures. This deduction leads to "current monthly income" for a determination on the presumption under § 707(b)(2). By implication, the difference between total gross income under line 2 and the marital adjustment under line 17 should be the total sum that the non-filing spouse pays on account of debts or expenses other than regular household ones--at least where such entries do not double-debit for deductions claimed by the debtor later, under lines 19-47.

Clearly, line 17 functions to ferret out the retention of "surplus" income that is generated de facto within the partnership of a marriage, but which is not being applied to meet individual or family obligations that are deemed appropriate under the sensibility of § 707(b)(2). The marital adjustment gives a filing debtor an option to deduct a portion of the non-filing spouse's income that is expended for proper purposes other than household expenses, to get down to the quantum of current monthly income, 11 U.S.C. § 101(10A), from which expense deductions are

[6]The emphasis is added.

made to determine "disposable income," in the sense of line 50 of the form. If there is such disposable income in a certain amount, it triggers the presumption of abuse. Line 17's requirement to specify the basis for excluding Column B income functions at least in part to vet the bona fides of non-filing spouses' expenditures that would shift component income-streams out of the means-test calculus, when they otherwise would be deemed available to debtors.

The U.S. Trustee included a pro forma Form B22A with his original filing on this motion. The line-entries for income items were based on disclosures that the Debtor had made regarding her husband's income and various expenses.[7] The form includes a line-entry of $7,779.65 in line 2, column B, to reflect the relevant quantum of gross wages for the Debtor's husband. The Debtor has not controverted this figure.[8]

When that amount was added to the previously-scheduled amount of the Debtor's gross wages, the current monthly income ("CMI") attributable to the Debtor for the purposes of 11 U.S.C. § 707(b)(7) (line 12) was $10,205.10. The U.S. Trustee then made reductions under color of the marital adjustment (line 17), for various payroll withholdings for the Debtor's husband--income and payroll taxes, 401k contributions, and medical insurance premiums. Net of those, the CMI attributable to the Debtor for the analysis on the presumption is $8,093.45.[9]

The theory of the U.S. Trustee's original motion went beyond that point in the sequence of calculation, to arrive at $3,210.00 in monthly disposable income deemed to the Debtor. However, it is possible to address the motion in limine without making evidence-based findings on expense deductions within the scope of 11 U.S.C. § 707(b)(2)(A)(ii). All the U.S. Trustee sought was a ruling that the presumption operates for this case, based on the extant information from the several sources. One can concede certain points of fact to the Debtor and her husband, even

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[7] As to the husband's income, the U.S. Trustee's counsel says that he received "payment advices"--i.e., paycheck stubs, under the arcane vocabulary of 11 U.S.C. § 521(a)(1)(B)(iv)--for the Debtor's husband, via the Debtor's responses to informal discovery requests.

[8] Presumably she could not, if it was derived from documents she herself had provided to the U.S. Trustee.

[9] The courts generally allow a non-filing spouse's payroll deductions to be included in the marital adjustment. *E.g.*, *In re Shahan*, 367 B.R. 732, 737 (Bankr. D. Kan. 2007).

substantial ones; and still the record at bar permits that ruling. And, the ruling should be imposed, because the Debtor failed to respond to the U.S. Trustee's proper discovery requests.

In his affidavit, Brad Schroeder attests in a summary fashion to having several debt obligations in his own right. He also states that he pays a number of other expenses on his own initiative. He and the Debtor separately attest in their affidavits to a marital understanding under which he has the great majority of control over the combined earnings of this couple. Brad Schroeder states that he directs the way in which the household's money is channelled to specific spending and debt repayment. He is very definite about having his "own expenses," though some of them seem to partly overlap with "the household expenses of [his] wife and [his] daughters." The remainder, he suggests, are independent liabilities that should be attributed to him alone--or, for which he alone takes responsibility at present.[10]

The six claimed expenditures that are most relevant to a marital-adjustment analysis for the Debtor's CMI are summarized below. (For the sake of analysis, the stated amounts of the monthly expenditures are based on materials in the record, giving the benefit of the doubt to the Debtor and her husband.)[11]

> 1. The expense of maintaining and remodeling a cabin co-owned by Brad Schroeder and his sister ($100.00 per month attributed);

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[10] He is also quite blunt in addressing one obvious question:

> My wife filed for bankruptcy protection for *her* debts. I pay for all of my debts. Her debts are matters that she acquired entirely on her *own*. I did not co-sign any of these debts. She did this behind my back.

(emphasis in original.)

[11] There is no evidentiary material in the record, as to the amount of these expenses, via affidavit or unsworn declaration from either the Debtor or Brad Schroeder. However, numerous prehearing e-mail communications between the lawyers are in the record as an exhibit to the U.S. Trustee's motion in limine. The e-mail communication is a joint effort at informal (i.e., less expensive) discovery. It features some of the usual, lawyerly bluster, posturing, and insinuation--from both sides. To some extent, the relevant factual recitations by the Debtor's counsel are an advocate's attempt to cow and deter the other side from proceeding. But, in the end, these statements can be treated as an offer of proof for a calculation that would be made with reference to the Debtor on the amount and purpose of these expenditures. It will be assumed that both lawyers could have mustered the evidentiary support for their factual assertions--even if the U.S. Trustee's efforts to get the Debtor to produce the underlying source documents received no response from the Debtor or her lawyers.

2. The amount paid per month on college expenses of an adult daughter of the Debtor and her husband ($1,108.00 per month attributed);

3. The expenses incurred for the operation of vehicles alleged by Brad Schroeder to be his own (amount not capable of attribution from the record);

4. The monthly payment on secured financing for an automobile driven by the adult daughter (and probably titled in her) (no specific amount of payment identified anywhere in the record);

5. The payments on "unsecured credit cards that are in [Brad Schroeder's] name only" ($300.00 per month attributed); and

6. The monthly payments for orthodontic care (braces) for another daughter of the Debtor and Brad Schroeder ($150.00 per month attributed).

The allowability of these asserted expenditures for the marital adjustment is analyzed as follows:

1. Per the Debtor's counsel, the cabin is "not currently inhabitable"; it is used as a hunting shack at most; and it is not used at all by the Debtor or the Schroeder children. With the enjoyment solely by the non-filing spouse (and the title probably having come to him by descent through his family), this expenditure is allowable toward the marital deduction.

2. The status of expenses that Brad Schroeder professes to pay toward the college education of an adult daughter is not entirely clear-cut, for the marital adjustment. If the daughter were to be considered as a dependent of both parents, such expenditures might be better categorized as an expense deduction for the Debtor. But, as a matter of law it is not settled whether an adult offspring is properly classified as a dependent of anybody, given the lack of a legal duty of parental support that can be translated to financial terms. The non-filing spouse here can be given the benefit of the doubt for his love and good will in making this expenditure, to the extent of the average of $1,108.00 per month disclosed in the record, toward the marital adjustment of the Debtor's CMI.

3. None of the e-mail communications identify any vehicles in this household, other than the three scheduled by the Debtor as being in joint title with her husband. There is no mention anywhere as to the ownership of a vehicle or vehicles titled solely in Brad Schroeder. The only possible inference is that the vehicles to which Brad Schroeder refers are the three scheduled by the Debtor. Expenditures related to them would fall under expense deductions

later in the means test. A marital adjustment is not properly taken for any operational expenses associated with these vehicles.[12]

4. The same thought goes to the monthly car payment that Brad Schroeder says he pays for his daughter's benefit, to enable her to possess a vehicle for her use. This sort of spending is less defensible as a dependent-related deduction. It is better credited to the non-filing spouse under a marital adjustment, as something ancillary to the payment of educational expenses. There is no evidence as to the amounts owing or payable to the lender anywhere in the record. One can be generous and attribute the IRS ownership expense allowance of $464.00 per month to increase the marital adjustment.

5. Brad Schroeder professes to have obligations on credit card accounts that are open under his name alone, and to be servicing the debt at an average total expenditure of $300.00 per month. But the Debtor's counsel acknowledged that the charges were for such things as tires, auto parts, school clothes for the children, and household purchases. The nature of this usage makes this a dependent-support obligation for the benefit of the Debtor and the children, distinguishable on the face of the statute from a marital-adjustment expenditure that would be linked principally or exclusively to the non-filing spouse's own consumption or debt service.

6. The regular payment for orthodontic care is also properly categorized as an expense deduction, because the child in question (by inference, a minor) is a dependent of the Debtor as well as her husband.

Were one to credit the total of the stated expenditures for cabin ownership and the adult daughter's college expenses and car payment ($1,704.00), to the marital adjustment, it still results in CMI of $6,389.45 to be deemed to the Debtor for line 18.[13] For his pro forma means-test calculation, the U.S. Trustee ran deductions from income (expenses, actual or deemed per the IRS standards), using a combination of the Debtor's own figures (from her Schedule J or from the incomplete discovery responses) and the IRS National and Local Standards. He largely deferred to the Debtor by choosing the larger amounts between the two.

The result was a total of $5,461.68 for expense deductions. Deducting that, the bottom line of disposable income to be deemed to the Debtor (line 50) is significant, $927.77. One

[12]The three scheduled vehicles are two 1994 Plymouth minivans and a 2004 Chevrolet Trailblazer. Apparently all of them are free and clear of liens.

[13]This calculation is straightforward, $8,093.45 minus $1,704.00 = $6,389.45.

can even debit the credit-card payments and orthodontic expenses covered by Brad Schroeder; disposable income of $477.77 is still to be attributed to the Debtor. These outcomes cover a span of legal permutations, but either is enough to trigger the presumption of abuse under § 707(b)(2).[14]

Activating the presumption on a prehearing motion was not contemplated under the scheduling originally ordered. However, it is warranted, given the Debtor's failure to respond to discovery requests of the U.S. Trustee that went directly to the evidentiary showings that both sides would have had to make, and which were made relevant by the competing substantive legal theories that both sides advanced. *See* Fed. R. Civ. P. 37(b)(2)(A)(i), 37(c)(1)(C), 37(d)(1)(A)(ii), and 37(d)(3), *as incorporated by* Fed. R. Bankr. P. 7037 (allowing court to "direct[ ] that . . . matters . . . be taken as established for the purposes of the action, as the prevailing party claims," as sanction for failure to respond to discovery requests in the first instance). The triggering of the presumption shifts the burden of production of evidence over to the Debtor. Fed. R. Evid. 301; 11 U.S.C. § 707(b)(2)(B). The statutory prescriptions for rebutting the presumption are difficult to meet. *In re Rudnick*, 435 B.R. 613, 615 (Bankr. D. Minn. 2010) (citing *In re Rieck*, 427 B.R. 141, 146 (Bankr. D. Minn. 2010).

The Debtor and her attorney cannot credibly claim to have been blindsided by the U.S. Trustee's motion in limine. They obviously thought enough of the statutory interpretation they used to justify their means test methodology. But given the lack of appellate precedent, the U.S. Trustee had equal latitude to argue the law on the marital adjustment. The Debtor and her attorney

[14] As the U.S. Trustee points out, the bare floor for the triggering of the presumption in this case would be disposable income of $121.00 per month: per 11 U.S.C. § 707(b)(2)(A), the lowest possible point at which the presumption activates for the debt structure of this case is a disposable income level of $120.92, the monthly payment that it would take to pay 25% of the total of the Debtor's scheduled unsecured debt ($29,021.00 per Schedule F) over a 60-month period. *See In re Foldenauer*, 403 B.R. 801, 802 (Bankr. D. Minn. 2009) (summarizing operation of presumption for three different increments of disposable income, that are outlined in § 707(b)(2)(A)). The statutory division points are subjected to biennial adjustments pursuant to 11 U.S.C. § 104(a); they were $117.08 and $195.42 for this case. Because this Debtor's disposable income is significantly greater than the higher measure, the Debtor's debt structure does not really bear on the outcome for this case. (It can be observed, however, that the total of scheduled unsecured claims in this case is not vast, compared to that in many Chapter 7 cases in this district. That circumstance does underline the implication from the outcome of the means test: the Debtor could make it through a Chapter 13 case, with the availability of financial resources that the statute deems to her from an ongoing and functioning marital relationship.)

had no right to stonewall discovery into subject matter that logically dovetailed with their opponent's legal theory.

However, a final ruling on the original motion will not be made now, however much that would serve a notion of just desserts. The Debtor and her attorney will be given an opportunity to present a rebuttal, if they think they have the evidence to meet their shifted burden of production.[15] If they do not take the opportunity, this case will be ripe for dismissal.

IT IS THEREFORE DETERMINED AND ORDERED:

1. The United States Trustee's motion in limine is granted, as a sanction under Fed. R. Civ. P. 37, for the Debtor's failure to respond to the U.S. Trustee's discovery requests.

2. As that sanction, and on the basis of the uncontroverted evidence and other factual content in the record for the U.S. Trustee's motion in limine, the Debtor shall be bound by the calculation of disposable income made in this order, and the presumption of abuse under 11 U.S.C. § 707(b)(2)(A)(i) shall apply to this case.

3. The Debtor is granted a further opportunity to rebut the presumption pursuant to 11 U.S.C. § 707(b)(2)(B), within the strict confines of that statute. To do so she must, *no later than 5:00 p.m. August 15, 2012*, file a *particularized* affidavit going to the the elements of proof identified in that statute, with a notice of reconvened evidentiary hearing and supplemental briefing on her theory for rebuttal. The hearing shall be set for a date no earlier than *October 15, 2012*. Between the filing of such materials and the date of the hearing, the Debtor shall respond fully and in good faith to all further discovery requests on the "special circumstances" identified by the Debtor in her proposal to rebut the presumption. All supplemental briefing and other reply materials from the United States Trustee shall be filed no later than seven days before the hearing.

4. If the Debtor does not timely act pursuant to Term 3, and if the Debtor has not converted this case to one under Chapter 13 via the filing of all documents required for such

[15]The Debtor and her attorney did not attempt to rebut the presumption in their response to this motion. The theory they used did not even acknowledge the possibility that the presumption would be applied before the receipt of evidence in the courtroom.

conversion under the local rules, the Court will dismiss this case after the deadline set under Term 3.

BY THE COURT:

/e/ Gregory F. Kishel

GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE