NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: TERRY LC CHIN, Debtor.	Case No. 2:17-bk-23694-RK Chapter 7 **AMENDED MEMORANDUM DECISION ON CREDITOR SHU SHAN TU'S MOTION TO DISMISS OR CONVERT DEBTOR'S CHAPTER 7 BANKRUPTCY CASE** [1] Date: March 20, 2018 Time: 2:30 p.m. Courtroom: 1675

Pending before this court is the Motion of Creditor Shu Shan Tu ("Creditor") to Dismiss ("Motion") (Docket No. 16) filed on February 16, 2018, seeking dismissal of this bankruptcy case. Debtor Terry LC Chin ("Debtor") filed an opposition to the Motion on March 5, 2018 (Docket No. 19). Creditor filed a reply to the opposition to the Motion on March 12, 2018 (Docket No. 20).

[1] This amended memorandum decision supersedes the memorandum decision filed and entered on July 2, 2018 (Docket Number 24).

The court held an initial hearing on the Motion on March 20, 2018. Alexei Brenot of the Law Offices of Sam X.J. Wu appeared on behalf of Creditor. Jonathan J. Lo of Lo & Lo LLP appeared on behalf of Debtor. The court indicated at the hearing that it would set an evidentiary hearing on the Motion because as a contested matter under Federal Rule of Bankruptcy Procedure 9014, it presented material issues of fact that required an evidentiary hearing. At the hearing, the parties indicated that they would rather not have an evidentiary hearing on the matter, and the court inquired whether the parties would waive the right to an evidentiary hearing to permit the court to rule on the papers only. Counsel for Debtor orally indicated that Debtor waived the right to an evidentiary hearing, but counsel for Creditor indicated that Creditor was not prepared to waive it at that time, but wanted to consider it and agreed to file a statement notifying the court and Debtor if after further consideration, Creditor would waive his right to an evidentiary hearing. Thereupon, the court set an evidentiary hearing on the Motion for May 25, 2018. Subsequently, on March 27, 2018, Creditor filed a statement indicating that he waived the right to an evidentiary hearing. By order filed on March 27, 2018, the court vacated the evidentiary hearing set for May 25, 2018 at 9:00 a.m. See Order Vacating Evidentiary Hearing on Creditor's Motion to Dismiss Scheduled for May 25, 2018, filed on April 17, 2018 (Docket No. 22). The motion was taken under submission.

Having considered the moving, opposing and reply papers, and oral arguments made at the hearing, the court makes the following findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52, and rules on the Motion as follows:

Many of the facts are undisputed. Debtor entered into a loan agreement with

Creditor upon which Creditor lent Debtor $36,000. Motion at 2:7-8 (page(s):line(s)). Debtor only repaid Creditor $10,000. *Id.* at 2:8. On February 9, 2016, Creditor filed an action in state court against Debtor alleging breach of the personal loan agreement, alleging that Debtor owed Creditor $46,000, $26,000 for the unpaid portion of the loan and $20,000 in punitive damages. *Id*. at 2:9-11. The parties settled the case and submitted to the state court a stipulated judgment in favor of Creditor against Debtor, which that court entered on August 8, 2017 in the amount of $35,628.50 ($26,000 for the unpaid portion of loan and $9,628.50 in attorney's fees and costs). *Id*. at 2:16-18. On November 6, 2017, Debtor filed her Chapter 7 bankruptcy petition in this court. *Id.* at 2:19-20. Creditor's judgment represents 63% of Debtor's non-priority unsecured debt of $56,284.19. *Id*. at 2:22-23. The above facts are not disputed by Debtor in her opposition to the Motion. Opposition at 1-11.

By the Motion, Creditor seeks dismissal of Debtor's bankruptcy case pursuant to 11 U.S.C. § 707(b), or in the alternative, conversion of this Chapter 7 bankruptcy case to one under Chapter 13. Motion at 1-9. Creditor argues that this case should be dismissed or converted to Chapter 13 pursuant to 11 U.S.C. § 707(b) because Debtor's bankruptcy petition is an abuse of the Bankruptcy Code and the petition was filed in bad faith. *Id.* at 8.

Because Debtor's Household Income Is Below the State Median Income, No Presumption of Abuse of Chapter 7 Arises, and Creditor Is Barred by 11 U.S.C. § 707(b)(7) from Moving to Dismiss on Grounds that Debtor Fails the Means Test Calculation.

"Under [11 U.S.C.] § 707(b)(1), after notice and a hearing on a motion by a party

in interest, the bankruptcy court may dismiss a chapter 7 case when an individual debtor has primarily consumer debts and if the bankruptcy court finds that granting relief would be an abuse of the provisions of chapter 7." *In re Cherrett*, 523 B.R. 660, 668 (9th Cir. BAP 2014)(footnote omitted). "Restated, there are two prerequisites to dismissal under § 707(b)(1): 1) the debtor has primarily consumer debt; and 2) the bankruptcy court finds that granting the debtor's petition would be an abuse of chapter 7." *Id., citing, Price v. U.S. Trustee (In re Price),* 353 F.3d 1135, 1138 (9th Cir. 2004). "The moving party bears the burden of proof to support a § 707(b)(1) motion by a preponderance of the evidence." *Id.* (citation omitted).

As to the first element as to whether Debtor has primarily consumer debt, this element is established by her admission on the bankruptcy petition that she has primarily consumer debt. Petition, Docket Number 1, at 6. Therefore, the court must find that Creditor has shown the second element by a preponderance of the evidence that granting relief would be an abuse of Chapter 7.

"As amended in 2005, the Bankruptcy Code authorizes bankruptcy courts to dismiss as abusive certain chapter 7 cases and presumes that abuse is present when the debtor fails what is commonly known as the 'means test.'" *Drury v. United States Trustee* (*In re Drury*), 2016 WL 4437555, slip op. at *9 (9th Cir. BAP 2016), *citing,* 11 U.S.C. 11 U.S.C. § 707(b)(1) and (b)(2)(A)(i); *In re Egebjerg,* 574 F.3d 1045, 1048 (9th Cir. 2009). "The means test measures the debtor's 'current monthly income' and determines whether that income (less certain allowed expenses and then multiplied by 60) exceeds threshold amounts designated in the statute. [11 U.S.C.] § 707(b)(2)(A)." *Id.* At the time of the filing of Debtor's bankruptcy case, the relevant designated

statutory threshold amount was $12,850. 11 U.S.C. § 707(b)(2)(A)(i)(II).

On the income side of the means test equation, 11 U.S.C. § 101(10A) provides that "current monthly income" means the average monthly income the debtor receives during the 6-month period preceding the date of commencement of the case. 11 U.S.C. § 101(10A). As the Bankruptcy Appellate Panel in *In re Drury* observed, "[g]enerally speaking, the term 'current monthly income' means the debtor's average monthly income, regardless of source, and includes amounts paid by others on a regular basis for the debtor's household expenses" and referred to 11 U.S.C. § 101(10A) for the full definition of "current monthly income." *In re Drury*, 2016 WL 4437555, slip op. at *9 n. 4. A Chapter 7 bankruptcy debtor declares "current monthly income" on Official Form 122A-1: Chapter 7 Statement of Your Current Monthly Income, which filed as part of a Chapter 7 bankruptcy petition. *See* 11 U.S.C. § 707(b)(2)(C).

On the expense side of the means test equation, 11 U.S.C. § 707(b)(2)(A) provides in part:

> 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. . . .

11 U.S.C. § 707(b)(2)(A)(ii); *see also, In re Drury*, 2016 WL 4437555, slip op. at *10-11.

Creditor argues that Debtor's bankruptcy case should be dismissed for abuse of Chapter 7 because she fails the means test under 11 U.S.C. § 707(b)(2)(A) because her income under the means test exceeds the threshold amount. Motion at 3-6.

Creditor argues that based on Debtor's monthly income of $2,613.97 from Schedule I: Your Income and her monthly expenses of $2,657.72 from Schedule J: Your Expenses, and disallowing expenses in excess of the IRS National and Local Standards, yields monthly disposable income of $871.58, which multiplied by 60 exceeds the threshold amount under 11 U.S.C. § 707(b)(2)(A) and which in turn constitutes abuse of Chapter 7. *Id.*

In opposition to the Motion, Debtor argues that based on her current monthly income, her case cannot be dismissed based on the means test calculation because she may rely on a "safe harbor" provision of 11 U.S.C. § 707(b)(7) for bankruptcy debtors with current monthly income less than the state median income for her family size. Opposition at 4-5.

Debtor on her Official Form 122A-1 filed as part of her bankruptcy petition stated under declaration of penalty of perjury that her current monthly income was $4,317. Official Form 122A-1, Petition, Docket Number 1, at 42-43. This amount of current monthly income of $4,317 annualizes at $51,804. *Id*.

Creditor in the Motion did not dispute Debtor's computation of her current monthly income on her Official Form 122A-1, and thus, it would appear that disputing Debtor's stated current monthly income on the means test is not part of his Motion. However, in his Reply, Creditor disputed Debtor's current monthly income, arguing that "Debtor should be forced to provide the Court with further proof of her income." Reply at 2. [2] However, Creditor did not offer any evidence in support of his Motion to

[2] Creditor's argument in support of the Motion first stated in the Reply that Debtor's bankruptcy case should be dismissed because Debtor's current monthly income is incorrect is improper because the argument was not raised in the original Motion. Local Bankruptcy Rule 9013-1(g)(4) states: "New arguments or matters raised for the first time in reply documents will not be considered." Creditor's argument that Debtor's current monthly income is incorrect

contradict Debtor's statement of $4,317 as her monthly income under declaration of penalty of perjury on the Official Form 122A-1. Therefore, Debtor's statement under declaration of penalty of perjury that her monthly income is $4,317 is the only evidence of her monthly income before this court for purposes of the means test and is unrebutted. Based on this record, the court finds that Debtor's current monthly income under 11 U.S.C. § 101(10A) is $4,317 per month.

The median annual income in California is $53,644 for a one person household. See Census Bureau Median Family Income by Family Size table posted at https://www.justice.gov/ust/eo/bapcpa/20171101/bci_data/median_income_table.htm. Debtor's current monthly income of $4,317 annualized by multiplying by 12 is $51,804, which is less than the California median annual income of $53,644 for a one person household.

The safe harbor provision of 11 U.S.C. § 707(b)(7)(A)(i) applies when an individual Chapter 7 bankruptcy debtor has income below the median household income in her state, which is the situation here. *See* 5 Levin and Sommer, *Collier on Bankruptcy*, ¶707.04[4][b] at 707-29 – 707-31 (16th ed. 2018). Under 11 U.S.C. § 707(b)(7)(A)(i), no party in interest may file a motion under 11 U.S.C. § 707(b)(2) if the current monthly income of the debtor, as of the date of the order from relief, when multiplied by 12, is equal to or less than the median family income of the applicable State for one earner. The language of this statute provides: "No judge, United States trustee (or bankruptcy administrator, if any), trustee or other person in interest may file a motion [to dismiss] under [11 U.S.C. 707(b)(2)] if the current monthly income of the

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is raised for the first time in his Reply and is thus improper and should be rejected on procedural grounds. However, assuming for the sake of argument that Creditor properly raised the argument in his Motion, the court addresses the argument on the merits as set forth herein.

debtor…and the debtor's spouse combined, as of the date of the order for relief when multiplied by 12, is equal to or less than---in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner[.]" 11 U.S.C. § 707(b)(7)(A)(i).

Since Debtor's annualized current monthly income of $51,804 is less than the California median income of $53,644 for a one earner household for cases filed after November 1, 2017, no presumption of abuse arises, and no party in interest, including Creditor, may bring motion to dismiss the Chapter 7 bankruptcy case of a debtor whose annualized household income is below the median household income in her state based on an alleged failure to satisfy a means test calculation because such a motion is precluded by 11 U.S.C. § 707(b)(7)(A)(i). [3]

Creditor Has Failed to Meet His Burden of Proving the Petition Was Filed in Bad Faith or the Totality of the Circumstances of Debtor's Financial Situation Demonstrates Abuse

Even if no presumption of abuse arises, a party in interest may seek dismissal of a Chapter 7 debtor's bankruptcy case on grounds that the petition was filed in bad faith or the totality of the circumstances of the debtor's financial situation demonstrates abuse. 11 U.S.C. § 707(b)(3)(A) and (B); *In re Reed,* 422 B.R. 214, 229-230 (C.D. Cal.

[3] Although not dispositive here, the court observes that Creditor's methodology for the means test calculation is incorrect because Debtor did not file an Official Form 122A-2: Chapter 7 Means Test Calculation, which would have required her to set forth her expenses claimed to perform the means test calculation. Debtor was not required to file an Official Form 122A-2 because she has below median household income. Although Debtor only filed Schedule I: Your Income and Schedule J: Your Expenses, and those forms were among the only forms available to compute Debtor's income and expenses, those forms are not used to compute the means test calculation, and Creditor incorrectly used those schedules to make a means test calculation. The correct forms are the Official Forms 122A-1 and 122A-2. Creditor needed to successfully challenge Debtor's statement of current monthly income on Official Form 122A-1 that she was a below median income debtor to be able to seek dismissal based on an alleged failure on the means test calculation. However, the court may consider Creditor's arguments that excessive expenses may indicate an abuse of Chapter 7 based on the totality of the circumstances or bad faith to warrant dismissal under 11 U.S.C. § 707(b)(3) as discussed below.

2009); *In re Mitchell,* 357 B.R. 142, 153-158 (Bankr. C.D. Cal. 2006).

11 U.S.C. § 707(b)(3)(A) provides that a case may be dismissed based on bad faith. However, the Bankruptcy Code does not define bad faith. *In re Mitchell,* 357 B.R. at 153; *In re Drury*, 2016 WL 4437555, slip op. at *21. In a Chapter 13 case, the Ninth Circuit has held that bankruptcy courts should consider the following non-exhaustive list of factors in determining whether a bankruptcy case should be dismissed on grounds of bad faith: (1) whether the debtor has stated inaccurate facts in his/her bankruptcy filing, attempted to improperly manipulate the Bankruptcy Code, or otherwise pursued bankruptcy relief in an inequitable manner; (2) the debtor's prior bankruptcy case filings and dismissals; (3) the motivation for the debtor's bankruptcy case filing, including any intent to impede state court litigation; and (4) any egregious conduct. *Leavitt v. Soto (In re Leavitt),* 171 F.3d 1219, 1224 (9th Cir. 1999)(citations omitted).

This court has applied these factors in determining whether a Chapter 7 bankruptcy case should be dismissed on grounds of bad faith. *In re Mitchell,* 357 B.R. at 153-158 (citations omitted). "First, the Court must evaluate whether, in light of all the relevant facts and circumstances, it appears that the debtor's intention in filing a bankruptcy petition is inconsistent with the Chapter 7 goals of providing a 'fresh start' to debtors and maximizing the return to creditors." *Id*. at 154-155. The court in *In re Mitchell* considered the following nine factors in determining whether the debtor's intention in filing bankruptcy is inconsistent with the Chapter 7 goals of providing a "fresh start" to debtors and maximizing return to creditors and whether the case should be dismissed under § 707(b)(3)(A):

1. Whether the chapter 7 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;

2. Whether debtor's petition was filed as a consequence of illness, disability, unemployment, or other calamity;

3. Whether debtor obtained cash advances and consumer goods on credit exceeding his or her ability to repay;

4. Whether debtor's proposed family budget is excessive or extravagant;

5. Whether debtor's statement of income and expenses misrepresents debtor's financial condition;

6. Whether debtor made eve of bankruptcy purchases;

7. Whether debtor has a history of bankruptcy petition filings and dismissals;

8. Whether debtor has invoked the automatic stay for improper purposes, such as to delay or defeat state court litigation;

9. Whether egregious behavior is present.

Id. at 154–55; *see also, In re Price*, 353 F.3d at 1139-1140; *In re Leavitt,* 171 F.3d at 1224; *In re Marshall*, 298 B.R. 670, 681 (Bankr. C.D. Cal. 2003). As stated by the court in *In re Mitchell,* no single factor is considered dispositive, but rather all of the facts in a case must be evaluated. 357 B.R. at 155, *citing, In re Powers*, 135 B.R. 980, 991-992 (Bankr. C.D. Cal.1991); *In re Marshall*, 298 B.R. at 681. Neither malice nor fraudulent intent by the debtor is required for a finding of bad faith. *In re Mitchell,* 357 B.R. at 155, *citing, In re Leavitt*, 171 F.3d at 1224. The court finds that the *Mitchell* factors as instructive in determining whether a Chapter 7 bankruptcy case should be dismissed on grounds of bad faith, and the Bankruptcy Appellate Panel of the Ninth Circuit has

approved this court's use of the *Mitchell* factors for this purpose. *In re Miller,* 2016 WL 5957270, slip op. at *7 (9th Cir. BAP 2016).

Creditor's basic argument is that Debtor filed her bankruptcy petition in bad faith in order to avoid paying the stipulated judgment reached in 2017 over Debtor's default under the 2010 loan agreement, which stipulated judgment that Creditor believes Debtor never intended to pay. Motion at 2, 7; Declaration of Shu Shan Tu attached thereto at 1-2. Creditor argues:

> . . . The judgment in the underlying dispute was entered on August 8, 2017. The Chapter 7 petition was filed on November 6, 2017. A mere three months passed from entering of judgment until the filing of the bankruptcy petition. Furthermore, there are only six creditors in this action. By far, the largest creditor is TU, whose judgment consists of 63% of Debtor's non-priority unsecured debt of $56,284.19. All of Debtor's other debts is not significant. This petition is simply a matter of attempting to avoid paying TU, as evidenced by the fact that Debtor Stipulated to a judgment in order to prolong, delay, and stop the prior collection litigation, while she had no intention whatsoever to pay (and in fact did not pay) any sum towards the stipulated judgment. Debtor's consent to the judgment was nothing more than Debtor laying plans to discharge her obligation to Creditor. The filing of this petition was in spite. Spite is not a proper motivation for filing a petition under the bankruptcy code.

Motion at 7.

In response to Debtor's argument, she stated in her declaration in opposition to the Motion as follows: "My reason for filing bankruptcy is not based on spite, but

because based on my income and expenses, I simply could not afford to pay my unsecured creditors as they become due on a monthly basis." Opposition at 10.

In the court's view, Debtor's failure to pay the stipulated judgment entered into in 2017 to repay the original loan agreement made in 2010 is not dispositive. While there is something may be said for Creditor's argument based on Debtor's relatively prompt default on the stipulated judgment by filing her bankruptcy petition only three months after she agreed to the stipulated judgment, in the court's view, the relevant date is 2010 when she took out the loan from Creditor and whether she had intent to repay the loan or not. Creditor was not out any more money when the parties entered into the stipulated judgment in 2017, over six years later. The more relevant inquiry is whether Debtor acted in bad faith in taking out the loan and got the money lent from Creditor in 2010, and the evidence of the totality of the circumstances of the loan agreement starting in 2010 does not show bad faith by the preponderance of the evidence. First, it is undisputed that Debtor repaid Creditor $10,000 on the $36,000 loan, which is not an insubstantial repayment. Motion at 2. Second, because Debtor was making payments on the loan, Creditor did not bring his collection lawsuit against her until 2016 after she defaulted about five years after she borrowed the money from Creditor. Third, as Debtor stated in her declaration in opposition to the Motion, she does not have sufficient income to repay her unsecured creditors. Debtor's contention is supported by her income and expense schedules filed under a declaration of penalty of perjury showing monthly net income of negative $43.75 based on income of $2,613.97 and expenses of $2,657.72 as reflected on her Schedules I and J to her bankruptcy petition. Petition, Document Number 1, at 26-31.

In support of the Motion, Creditor arguably only offered evidence of one bad faith factor under *Mitchell,* that is, the fourth factor – whether Debtor's proposed family budget is excessive or extravagant. Creditor argues Debtor's expenses are excessive based on the IRS standards and cites to the opinion of the Bankruptcy Appellate Panel of the Ninth Circuit in *In re Drury, supra* in support of his argument. According to the Bankruptcy Appellate Panel in *Drury*, the National Standards and Local Standards referenced in § 707(b)(2)(A)(ii)(I) are "'tables that the IRS prepares listing standardized expense amounts' that are used to determine a taxpayer's ability to pay past-due tax liability. But the National Standards and Local Standards are not self-explanatory. Bankruptcy courts sometimes must consult the IRS's Financial Analysis Handbook (IRM 5.15.1) in order to correctly interpret and apply the National Standards and Local Standards." *In re Drury*, 2016 WL 4437555, slip op. at *5 (citation omitted). These standards may be applied for purposes of determining the debtor's allowable expenses under the means test. *Id*., slip op. at *4. According to 11 U.S.C. § 707(b)(2)(A)(ii)(I), which applies to the means test calculation, a Chapter 7 bankruptcy 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. . . ."

As noted above, the court determines that there is no presumption of abuse because Debtor's annualized current monthly income is below the median household income in California, and a means test calculation cannot be used as the grounds for

dismissal of an individual debtor's Chapter 7 bankruptcy case under 11 U.S.C. § 707(b)(7). As one leading bankruptcy treatise, Collier on Bankruptcy, has observed, 11 U.S.C. § 707(b)(3) "does not permit a court to devise its own means test to determine ability to pay whenever the results of the congressionally devised means test in section 707(b)(2) are not satisfactory . . . ." 5 Levin and Sommer, *Collier on Bankruptcy*, ¶707.04[4][b] at 707-46 and n. 113, *citing, In re Roll,* 400 B.R. 674 (Bankr. W.D. Wis. 2008) and *In re Nockerts,* 357 B.R. 497 (Bankr. E.D. Wis. 2006). As Collier on Bankruptcy further observed, "Section 707(b)(2) was designed to provide an objective methodology to limit courts' widely varying results with respect to ability to pay." *Id.* at 707-46 and n. 114*, citing,* 151 Cong. Rec. S1842-S1843 (March 1. 2005)("The Means Test contained in the bill will provide a uniform standard to bankruptcy judges to evaluate the ability of bankruptcy filers to repay debts.")(statement of Senator Hatch). Collier on Bankruptcy in light of this statutory language and legislative history commented: "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." *Id.* at 707-46 and n. 115, *citing inter alia, Perlin v. Hitachi Capital America Corp. (In re Perlin),* 497 F.3d 364 (3rd Cir. 2007). Therefore, while review of Debtor's expenses under the means test analysis may be instructive, it is not determinative as to whether Debtor's expenses are excessive or extravagant to warrant dismissal of a Chapter 7 bankruptcy case for bad faith or abuse under the totality of the circumstances under 11 U.S.C. § 707(b)(3).

In the Motion at 3-6, Creditor contends that the following expenses claimed by Debtor on her schedules, i.e., Schedule J: Your Expenses, are grossly overstated and demonstrate an abuse of Chapter 7 and bad faith in filing this Chapter 7 bankruptcy case, and the court rules as follows:

1. Gas and Car Maintenance

Debtor claims $500 in transportation expenses a month, primarily for gasoline and car maintenance, on her Schedule J: Your Expenses. Creditor argues Debtor is only allowed $300 for transportation expenses. Motion at 3:22-25. First, because Debtor's annualized current monthly income is below median, there is no means test calculation of income and expenses as discussed above, which would require Debtor to comply with the IRS National and Local Standards in claiming her expenses. 11 U.S.C. § 707(b)(7). Second, Debtor's transportation expenses are not excessive or extravagant, but reasonable under the circumstances. In her declaration in opposition to the Motion, Debtor attested that she works two jobs and seven days per week. Opposition at 9 (Docket Number 19), Chin Declaration, ¶ 3. Debtor attested that she drives 40 minutes to her work both ways Monday through Friday. *Id*. She further attested that on weekends, she drives one hour and thirty minutes to her work each way. *Id*. She further attested that she pays $320 per month for gas alone. *Id.* The court finds that Debtor's testimony in her declaration to be credible and supports her claimed transportation expenses of $500 per month, primarily for gas and car maintenance, listed on her bankruptcy schedules, which show that such expenses are necessary for work and

reasonable, and not excessive or extravagant, under the circumstances, given the distances between her home in Llano, California, and her work in Lancaster, California, and Anaheim, California. It appears that Debtor needs to work two jobs in order to afford to pay her living expenses as reflected on her income and expenses stated on her Schedules I and J, and she reasonably incurs the claimed transportation expenses of $500 for gasoline and car maintenance to get to work and back home.

2. Medical Insurance and Expenses

Creditor argues Debtor has claimed expenses of $250 for both medical insurance and out of pocket medical expenses, but is only allowed to deduct $49 for her out of pocket medical expenses under the IRS Guidelines. Motion at 4:3-11. As stated above, Debtor is not absolutely restricted in claiming out of pocket medical expenses under the IRS Guidelines. As attested by Debtor in her declaration in opposition to the Motion, she suffers from various medical conditions, including Type 2 diabetes, high cholesterol and triglyceride levels, thyroid nodules, parotid node, osteoporosis, dry eye, sinus problems and tinnitus, which require her to prescription medication, vitamin supplements, and Eastern medicinal herbs on a daily basis. Opposition at 10, Chin Declaration, ¶ 5. The court finds that Debtor's testimony in her declaration to be credible and supports her claimed medical expenses on her bankruptcy schedules as necessary to treat her ongoing medical conditions and reasonable, and not excessive or extravagant, under the circumstances.

3. Contribution to Retirement Plans

Creditor notes that Debtor has deductions for two different retirement plans for a combined total contribution of $514.33 and that bankruptcy courts have discretion to determine whether retirement contributions are a reasonably necessary expense for a particular debtor based on the facts of each individual case, and Creditor thereby argues that such deductions should not be allowed. Motion at 4-5, *citing, Hebbring v. United States Trustee,* 463 F.3d 902, 906-907 (9th Cir. 2006). Debtor stated in her declaration in opposition to the Motion that these payments "are necessary as I am near retirement age and need this account for support during retirement". Opposition at 10, Chin Declaration at ¶ 6. In his Reply, Creditor argues that such expenses should not be allowed because part of these expenses are for repayment of a 401k retirement plan loan. Reply at 3, *citing, In re Egebjerg,* 574 F.3d at 1048. The court finds that Debtor's testimony in her declaration that she is 67 years old, has limited assets and needs to make these payments for support during retirement to be credible, and her testimony in light of the relatively modest amount of these payments for retirement contributions and loan repayment supports her claimed expenses as necessary and reasonable, and not excessive or extravagant, under the circumstances. Creditor's citations to *In re Egebjerg* and *Hebbring v. United States Trustee* dealing with deductions for retirement plan payments for the means test calculation and on income and expense schedules in calculating disposable income are inapposite because Debtor is not claiming her retirement plan payments as deductions

for her means test calculation or on her income and expense schedules. *In re Egebjerg,* 574 F.3d at 1048; *Hebbring v. United States Trustee,* 463 F.3d 902, 906-907. Debtor is not claiming expense deductions for her retirement plan payments for either the means test calculation or on her income and expense schedules to calculate disposable income. She was not required to list her expenses for the means test calculation because she is a below median income debtor. Debtor was required to complete income and expense schedules to calculate disposable income; she only listed a deduction of $218.10 as mandatory retirement plan contributions and listed $0.00 as voluntary retirement plan contributions on her income and expense schedules for purposes of calculating disposable income. The court notes that the Ninth Circuit in *Hebbring v. United States Trustee* held that voluntary retirement plan contributions are not per se indicative of abuse of Chapter 7, but the court must make a fact intensive determination whether there is bad faith or abuse of Chapter 7. *Hebbring v. United States Trustee,* 463 F.3d at 906-908; *accord, In re Craig,* 579 F.3d 1040, 1046-1047 and n 5 (9th Cir. 2009). As stated above, the court has made such a fact-intensive inquiry.

4. Disposable Income

Creditor argues that based on these allegedly improper deductions under the means test calculation, Debtor should have a monthly net disposable income of $871.58. Motion at 5:20-26. The court rejects Creditor's argument because it is premised on his argument that Debtor's claimed expenses are absolutely restricted by the IRS National and Local Standards for the means

test calculation of income and expenses, which are inapplicable here because Debtor's annualized current monthly income is below median. Moreover, Creditor has not otherwise shown by the preponderance of the evidence that Debtor's bankruptcy case was filed in bad faith or the totality of the circumstances demonstrate an abuse of Chapter 7 based on Debtor's disposable income because there is no presumption of abuse since Debtor has below median income and because the evidence shows the claimed deductions on Debtor's bankruptcy schedules are necessary expenses and reasonable, and not excessive or extravagant, under the circumstances. Moreover, as Collier on Bankruptcy stated: "It seems clear that the 'bright line test' of section 707(b)(7) means that no chapter 7 case should be dismissed based on debtor's ability to pay if the debtor has an income below the safe harbor threshold." 5 Levin and Sommer, *Collier on Bankruptcy*, ¶ 707.04[3][c] at 707-31 and n. 40, *citing,* H.R. Rep. No. 109-31, 109 Cong., 1st Sess. 51 (2005). As Collier on Bankruptcy further commented, "The median income threshold adopted by Congress for means testing recognizes that families with incomes below that threshold do not have the ability to pay significant amounts to their creditors while maintaining a reasonable living standard. Courts should not attempt to evade this congressional intent by using some alternative means test to find 'abuse' on thepart of debtors whose incomes are below the applicable median income threshold." *Id.*

The evidence before the court does not indicate the presence of other *Mitchell* factors to support of finding of bad faith to warrant dismissal of this case. The evidence

does not indicate that Debtor has sufficient income to fund a Chapter 11 or 13 plan to pay a substantial portion of the unsecured claims (first *Mitchell* factor). The evidence as reflected in Debtor's bankruptcy petition and schedules and her declaration in opposition to the Motion that her finances are tight, that is, she has to work two jobs, seven days a week, which generate modest income, below the state median household income, to afford her living expenses, which are not excessive or extravagant, and that her net monthly income as reflected on her income and expense schedules, Schedules I and J, is negative, or "in the red" (though slightly at negative $43.75). Debtor is elderly, 67 years old, at or nearing normal retirement age, and has numerous health problems requiring regular medication and treatment. These circumstances do not indicate a likelihood of sufficient future income to fund a Chapter 11 or 13 plan.

There is no evidence before the court that Debtor's petition was filed as a consequence of illness, disability, unemployment, or other calamity (second *Mitchell* factor) or that Debtor obtained cash advances and consumer goods on credit exceeding his or her ability to repay (third *Mitchell* factor).

There is insufficient evidence that Debtor's statement of income and expenses misrepresents her financial condition (fifth *Mitchell* factor). As previously discussed, Creditor challenged certain expenses claimed by Debtor on her Schedule J: Your Expenses as excessive or extravagant, but the court has determined that such expenses are necessary and reasonable.

There is no evidence that Debtor made eve of bankruptcy purchases (sixth *Mitchell* factor) or that Debtor has a history of bankruptcy petition filings and dismissals (seventh *Mitchell* factor).

There is no evidence that Debtor has invoked the automatic stay for improper purposes, such as to delay or defeat state court litigation (eighth *Mitchell* factor). Arguably, Creditor might contend that Debtor filed her Chapter 7 bankruptcy case to defeat his state court litigation to collect the loan debt, but that litigation was concluded before the bankruptcy petition was filed, and the automatic stay arising in this case does not affect that litigation since it is no longer pending. The issue is then whether egregious behavior is present.

There is insufficient evidence that egregious behavior is present on the part of Debtor (ninth *Mitchell* factor). As previously discussed, the court does not consider the circumstances of this case to show egregious behavior, that is, Debtor's filing of the bankruptcy case three months after entering into the stipulated judgment to settle the loan collection lawsuit, and Debtor's claiming of certain living expenses on her bankruptcy schedules do not show egregious behavior because Debtor is unable to pay her unsecured debts, including the loan debt, due to lack of sufficient income to pay her unsecured debts, and her claimed expenses are not excessive or extravagant.

The court also considers the four factors regarding bad faith in *In re Leavitt*: (1) whether the debtor has stated inaccurate facts in his/her bankruptcy filing, attempted to improperly manipulate the Bankruptcy Code, or otherwise pursued bankruptcy relief in an inequitable manner; (2) the debtor's prior bankruptcy case filings and dismissals; (3) the motivation for the debtor's bankruptcy case filing, including any intent to impede state court litigation; and (4) any egregious conduct. *In re Leavitt,* 171 F.3d at 1224.

There is insufficient evidence that whether Debtor has stated inaccurate facts in his/her bankruptcy filing, attempted to improperly manipulate the Bankruptcy Code, or

otherwise pursued bankruptcy relief in an inequitable manner (first *Leavitt* factor). Creditor contends that Debtor's financial statements are inaccurate and that Debtor has not been forthcoming with the bankruptcy court and creditors based on the impropriety of the expenses claimed by her on her bankruptcy schedules. Motion at 3-6, 8. This contention appears to fall within the first *Leavitt* factor. However, as previously discussed, Debtor's claimed expenses challenged by Creditor in the Motion are not improper on grounds that such expenses exceed the IRS Guidelines, which do not strictly apply because Debtor has below median income, and that such expenses are necessary and reasonable. The first *Leavitt* factor does not otherwise apply because Debtor filed for bankruptcy because she lacked sufficient income to pay her unsecured creditors as shown on her bankruptcy schedules (i.e., negative monthly net income as shown on her income and expense schedules, Schedules I and J, and her lack of nonexempt assets on her bankruptcy schedules).

There is no evidence of Debtor's prior bankruptcy case filings and dismissals (second *Leavitt* factor).

There is insufficient evidence of an improper motivation for Debtor's bankruptcy case filing, including any intent to impede state court litigation (third *Leavitt* factor). Creditor contends that Debtor filed for bankruptcy "out of spite" because she was simply trying to avoid paying Creditor by agreeing to stipulate to judgment to stop Creditor's state court action to collect the unpaid loan debt while planning to discharge her debt by promptly filing for bankruptcy three months later. Motion at 7. While this argument may have colorable merit, the court finds that the preponderance of the evidence does not support the existence of the third *Leavitt* factor because Debtor generally does not have

current income to pay her unsecured debts, while Creditor has the largest unsecured claim (63% of her unsecured debt), Debtor also owes sizable debts to other creditors, including credit card lenders, the loan debt owed to Creditor was incurred in 2010, well before Debtor filed for bankruptcy over five years later in 2017, before Creditor sued Debtor on the loan in 2016, Debtor had been making payments on the loan and had paid a substantial portion of the loan debt owed to Creditor by repaying $10,000 of the $36,000 loan, and unlike the debtor in *Leavitt,* Debtor does not have income and assets to make substantial payments of her outstanding unsecured debts as indicated by her subsistence budget shown on her income and expense schedules, Schedules I and J, reflecting negative net monthly income, even after having to work two jobs seven days a week, and which budget does not indicate lavish expenditures. *See In re Leavitt,* 171 F.3d at 1220-1226 (affirming the bankruptcy court's dismissal of debtor's Chapter 13 bankruptcy case after the bankruptcy court warned debtor that his Chapter 13 plan would not be confirmed unless he committed 30 percent of his income to pay unsecured creditors, which income included in 1999 $70,000, plus thousands of dollars in business profits, and debtor in that case had a waterproofing business worth $150,000 which he undervalued on his schedules at $10,000).

There is insufficient evidence of any egregious conduct by Debtor (fourth *Leavitt* factor) as discussed previously as to a similar factor under *Mitchell.* Creditor's arguments that Debtor's Chapter 7 bankruptcy case should be dismissed are that she improperly claimed overstated living expenses on her bankruptcy schedules and that she filed this bankruptcy case out of spite by agreeing to stipulate to a collection judgment regarding her loan debt owed to Creditor and then promptly filing for

bankruptcy to discharge the debt three months later. There is no egregious behavior as in *Leavitt* where the debtor engaged in various forms of bad conduct, such as failing to disclose assets and financial deadlines by omitting or undervaluing assets on his schedules and not disclosing financial transactions, and having sizable available income and assets to pay creditors, but unwilling to pay creditors anything in his Chapter 13 plan. *In re Leavitt,* 171 F.3d at 1220-1226.

Creditor argues that the Sixth Circuit's decision in *Industrial Insurance Services, Inc. v. Zick (In re Zick)*, 931 F.2d 1124 (6th Cir. 1991) supports his argument that Debtor's Chapter 7 bankruptcy case was filed in bad faith. *Zick* is factually distinguishable from this case, and it is a case law precedent which is not binding on the courts of a different circuit, including this court, though it may considered for whatever persuasive value it has. In *Zick*, the debtor filed a Chapter 7 bankruptcy petition a few days after the creditor, debtor's former employer, obtained a court-induced mediation award of $600,000 against the debtor for breach of a noncompetition agreement. *Id*. at 1125-1126. The debtor in *Zick* had available income to pay a substantial portion of the debt owed to the creditor, including his continuing monthly income of $7,000, plus pension plan benefits, plus his annual gross business income of approximately $361,000, plus additional income of his nondebtor spouse. *Id*. at 1128 and n. 6. The Sixth Circuit in *Zick* affirmed the bankruptcy court's dismissal of the Chapter 7 bankruptcy case, holding that the bankruptcy court had not abused its discretion in dismissing the case based on the factors considered by the bankruptcy court: "In this case, the [bankruptcy] court based its decision on (1) the debtor's manipulations which reduced the creditors in this case to one; (2) the debtor's failure to make significant

lifestyle adjustments or efforts to repay; (3) the fact that the petition was filed clearly in response to IIS' obtaining a mediation award; and (4) the unfairness of the debtor's use of Chapter 7 under the facts in this case. We believe that the factors noted by the bankruptcy court may be sufficient to support its findings of bad faith." *Id*. at 1127-1130.

Although there is a factual similarity between this case and *In re Zick* in that the debtor had filed for Chapter 7 bankruptcy right after the debtor entered into a consent judgment with a creditor, the circumstances are quite different. Unlike the debtor in *Zick* who had sizeable available income and assets to pay creditors, Debtor in this case does not have sizable available income and assets to pay creditors. The debtor in *Zick* had in 1991 regular monthly income of $7,000, annual gross business income of $361,000*,* additional income from pension plan benefits and through his nondebtor spouse, plus business assets. In contrast, Debtor in this case does not have sizable available income and assets to pay creditors because she works two jobs, seven days a week, only earning a monthly income of $2,613.17 in 2017, over 25 years after the *Zick* decision, and a net monthly income of negative $43.75 Looking at the factors relied upon by the bankruptcy court in *Zick* approved by the Sixth Circuit, this court comes out differently than Creditor and would find that such factors do not apply here. First, unlike in the debtor in *Zick,* Debtor also has more than one unsecured creditor, not just Creditor, but owes substantial sums to several credit card lenders as reflected on her bankruptcy schedules. Second, unlike the debtor in *Zick,* Debtor made efforts to pay Creditor on the loan before filing for bankruptcy, that is, she made payments on the loan and paid a substantial portion of the loan, $10,000 on the $36,000 loan. As to changing lifestyle to pay creditors suggested in *Zick,* the court is not sure what more Debtor could

not in this regard since she is elderly, 67 years old, nearing or at normal retirement age, working two jobs, seven days a week, driving hundreds of miles a week to work, living on a not lavish budget with necessary and reasonable expenses (i.e., food budget of $200 per month and housing budget of $400 per month as shown on her expense schedule, Schedule J), yet despite this frugal lifestyle, she has a net monthly income of negative $43.75 as shown on her income and expense schedules. Third, unlike in *Zick,* the evidentiary record is not that Debtor filed her bankruptcy case solely in response to the stipulated judgment entered in favor of Creditor, because as indicated in her bankruptcy schedules, Debtor owes unsecured debts to other creditors, and not just Creditor, and based on her limited income, does not have the ability to repay unsecured debts through a Chapter 11 or 13 plan. Fourth, unlike *Zick,* who had sizable available income and assets to repay creditors, Debtor's use of Chapter 7 under the facts of this case is not unfair because Debtor previously incurred unsecured debt, including the debt owed to Creditor, which she attempted to pay, but currently lacks the ability to repay through a Chapter 11 or 13 plan based on her limited income and reasonable and necessary living expenses, and despite her efforts to earn income by working seven days a week on two jobs. It is unfortunate that Creditor will suffer a loss of the remaining amount owed to him on the loan he made to Debtor for which he obtained a judgment, but under the circumstances of this case, given Debtor's partial payment of the loan and lack of current ability to repay unsecured debts, such as the loan debt owed to Creditor, based on her limited income, Debtor's bankruptcy case is a proper use of Chapter 7.

For the foregoing reasons, the court determines that Creditor has not proven by a

preponderance of the evidence that Debtor filed this Chapter 7 bankruptcy case in bad faith or that Debtor's bankruptcy case is an abuse of Chapter 7 under the totality of the circumstances to warrant dismissal of the case under 11 U.S.C. §707(b)(3).

Creditor's Request to Convert Debtor's Bankruptcy Case to Chapter 13 Is Barred by 11 U.S.C. §706(c).

As to Creditor's request to convert Debtor's bankruptcy case under Chapter 7 to one under Chapter 13, the court denies such request because under 11 U.S.C. § 706(c), the court may not convert a case under Chapter 7 to a case under Chapter 13 unless debtor requests or consents to such conversion. There is no showing that Debtor consents to conversion under 11 U.S.C § 706(a).

Conclusion

For the foregoing reasons, the court will deny Creditor's motion to dismiss this bankruptcy case with prejudice. A separate final order is being filed and entered.

IT IS SO ORDERED.

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Date: July 3, 2018

Robert Kwan
United States Bankruptcy Judge