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IT IS SO ORDERED.

Dated: January 5, 2024



Beth A. Buchanan

Beth A. Buchanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)
)
GLORIA JEAN HAMILTON) Case No. 21-12060
) Chapter 7
Debtor) Judge Buchanan

MEMORANDUM OPINION DENYING
UNITED STATES TRUSTEE’S MOTION TO DISMISS
[Docket Number 18]

This matter is before this Court on the *Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. § 707(b)(3) with Memorandum in Support (“Motion to Dismiss”)* [Docket Number 18]; the *Debtor’s Response to the Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. § 707(b)(3) (“Response”)* [Docket Number 25], and the *Reply of the United States Trustee to Response Filed by the Debtor (“Reply”)* [Docket Number 26].

The United States Trustee (“UST”) seeks to dismiss¹ the Chapter 7 bankruptcy case of Debtor Gloria Jean Hamilton (“Debtor”) pursuant to 11 U.S.C. § 707(b)(3)(B). During a status conference held on January 12, 2023, the UST and Debtor agreed that the facts were not in dispute and the matter came down to two legal issues: when analyzing a debtor’s budget for abuse and ability to pay creditors pursuant to 11 U.S.C. § 707(b)(3)(B), should a non-filing spouse’s social security income and a debtor’s monthly voluntary contributions to a retirement plan be included as income in the analysis? The parties indicated that the matter could be determined on the parties’ briefing, the Debtor’s Second Amended Schedules I and J [Docket Number 54], and the joint *Stipulations of the Parties* [Docket Number 55].

The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334 and the standing General Order of Reference in this district.

I. FACTUAL AND PROCEDURAL BACKGROUND

Debtor filed her petition for relief under chapter 7 of the United States Bankruptcy Code on September 23, 2021.² Debtor’s Official Form 122A-1 (Chapter 7 Statement of Your Current Monthly Income) reflects that the Debtor’s income is below the median income for a household of two. Schedule D of the Debtor’s bankruptcy schedules lists secured debts totaling \$124,249.47. Schedule E/F of the Debtor’s bankruptcy schedules lists priority unsecured tax debt totaling \$28,073.61 and non-priority unsecured debt totaling \$54,754.08. The nature of the Debtor’s debts is primarily consumer/non-business.

¹ In the Motion to Dismiss, the UST noted that, as an alternative to dismissal, the UST would agree to the Debtor’s conversion to chapter 13 [Docket Number 18, p. 9 n.4].

² All of the facts are taken from Debtor’s Second Amended Schedules I and J and the *Stipulations of the Parties* [Docket Numbers 54 and 55].

The Debtor is employed as a Production Manager for Hydro Systems, Inc. and earns approximately \$6,380.00 per month, or \$76,560.00 annually. The Debtor has worked for her current employer for approximately a year and a half. After taxes and certain pre-tax deductions for insurance and a \$188.00 voluntary contribution to a retirement plan, the Debtor's monthly income totals \$4,420.00.

The Debtor's husband, William Douglas Manning ("Non-filing Spouse"), is not employed. The Non-filing Spouse receives monthly social security income totaling \$3,635.30, or \$43,623.60 annually with an anticipated increase in this amount by 8.7% beginning in January of 2023.³ After deducting Medicare premiums of \$697.20, the Non-filing Spouse receives net social security income of \$2,938.10 per month. Accordingly, Debtor's gross annual household income, if the Non-filing Spouse's social security income is included, totals approximately \$120,183.60.

Debtor's Second Amended Schedule J reveals monthly expenses totaling \$3,938.10. This amount includes some joint expenses of the Debtor and her Non-filing Spouse such as their monthly mortgage payment, utilities and food. Subtracting the \$3,938.10 in expenses from the Debtor's monthly income of \$4,420.00 (after taxes and certain pre-tax deductions), the Debtor has monthly net income totaling \$481.90.

The parties stipulated to these income and expense amounts listed on the Second Amended Schedules I and J, with the following qualifications:

- a. The Second Amended Schedule I does not include the Non-filing Spouse's social security income.
- b. The Second Amended Schedule J does not include the following expenses that are exclusive to the Non-filing Spouse:

³ Although the parties stipulated to an expected increase in social security benefits, the parties did not amend their Stipulations to account for whether the expected increase occurred.

- i. Part-C Insurance: \$114 per month;
- ii. Chase Bank Credit Card: \$390 per month;
- iii. Capital One Credit Card: \$87 per month;
- iv. Macy's Credit Card: \$40 per month.

c. If the Court determines that the Non-filing Spouse's social security income must be included on Schedule I under the totality of the circumstances analysis of § 707(b)(3), the United States Trustee will not object to inclusion of the above-referenced Non-filing Spouse expenses on Schedule J for purposes of evaluating the Debtor's ability to repay creditors over 36 months.

If the Non-filing Spouse's social security income of \$2,938.10 is included in the calculation of net income, and the Non-filing Spouse's additional expenses described above are subtracted out, the Debtor's household monthly net income totals \$2,789.00.

II. LEGAL ANALYSIS

Pursuant to 11 U.S.C. § 707(b)(1), a bankruptcy court may dismiss a case filed under chapter 7 by an individual debtor whose debts are primarily consumer debts or convert the case to chapter 11 or 13 with the debtor's consent, if the court finds that the "granting of relief would be an abuse of the provisions of [chapter 7]." 11 U.S.C. § 707(b)(1). Unless rebutted by "special circumstances," abuse is presumed under § 707(b)(2) if a debtor fails to pass the so-called "means test," which is a mathematical calculation based on a debtor's "current monthly income" (as defined by § 101(10A)) less various monthly expenses allowed by the statute. 11 U.S.C. § 707(b)(2); *In re Goble*, 401 B.R. 261, 276 (Bankr. S.D. Ohio 2009). A court may also find abuse under § 707(b)(3) if a debtor files a petition in "bad faith" or when "the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." 11 U.S.C. § 707(b)(3)(A) and (B).

In this case, the UST requests dismissal under § 707(b)(3)(B) arguing that the totality of the circumstances of the Debtor's financial situation demonstrates an abuse of chapter 7. The UST,

as the movant, carries the burden of demonstrating that the Debtor's case should be dismissed under this provision. *In re Phillips*, 417 B.R. 30, 39 (Bankr. S.D. Ohio 2009); *Goble*, 401 B.R. at 274.

In re Krohn, 886 F.2d 123 (6th Cir. 1989) and *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir. 2004) are the “seminal pre-BAPCPA cases in the Sixth Circuit addressing the ‘totality of circumstances’ test under former § 707(b).”⁴ *Phillips*, 417 B.R. at 39. In *Krohn* and *Behlke*, the Sixth Circuit held that a case should be dismissed if the totality of a debtor's circumstances demonstrate a lack of “need” and provided factors relevant to the analysis. “Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future income. That factor alone may be sufficient to warrant dismissal.” *Krohn*, 886 F.2d at 126; *Behlke*, 358 F.3d at 434-35 (noting that “*Krohn* clearly holds that the ability to pay may be but is not necessarily sufficient to warrant dismissal for . . . abuse”). Other relevant factors include “whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.” *Behlke*, 358 F.3d at 434 (quoting *Krohn*, 886 F.2d at 126-27).

Focusing on the ability to repay debts out of future income factor emphasized in *Krohn*, the UST maintains that the Non-filing Spouse's social security income and the Debtor's voluntary

⁴ While the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) substantially revised § 707(b), pre-BAPCPA Sixth Circuit case law remains instructive to the determination of whether a debtor's case constitutes an abuse under the totality of circumstances analysis. *In re Phillips*, 417 B.R. 30, 39 (Bankr. S.D. Ohio 2009) (“BACPA's adoption of the ‘totality of the circumstances’ language in § 707(b)(3) is best understood as codification of pre-BAPCPA case law.” (citing *Goble*, 401 B.R. at 276 (internal quotation marks omitted))).

retirement contributions should be considered when determining whether the Debtor's financial situation, under the totality of the circumstances, demonstrates abuse under § 707(b)(3)(B). The UST notes that if these two income sources are factored in, the Debtor would have the ability to repay 100% of her priority and non-priority unsecured debts listed on Schedule E/F within 36 months.⁵

A. SOCIAL SECURITY INCOME

1. Social Security Income—The Parties' Positions

On the issue of social security income, the UST relies heavily on *In re Meehean* for the proposition the social security income may still be considered under § 707(b)(3)(B)'s totality of circumstances analysis notwithstanding the exclusion of social security income from the presumption of abuse analysis under § 707(b)(2). *In re Meehean*, 611 B.R. 574, 585 (Bankr. E.D. Mich. 2020), *aff'd*, *Meehean v. Vara (In re Meehean)*, 619 B.R. 371, 379 (E.D. Mich. 2020). Noting that "totality" is an "inclusive term," the UST argues that § 707(b)(3)(B) permits inquiry into the entirety of a debtor's financial situation. *Id.* at 376. Referencing § 707(b)(1), the UST observes that the only limit that Congress placed on what a bankruptcy court may consider in evaluating a debtor's financial situation under the totality of circumstances analysis is a debtor's contributions to qualified religious or charitable organizations. If Congress had wanted to exclude social security income from the totality of circumstances analysis under § 707(b)(3)(B), it could have done so.

The Debtor disputes that her Non-filing Spouse's social security income should be included in the § 707(b)(3)(B) totality of circumstances analysis. The Debtor relies on § 407 of the Social Security Act, which provides that:

⁵ The parties agree that if this Court is to consider the Non-filing Spouse's social security income, then it is also appropriate to subtract the Non-filing Spouse's expenses that are not included on Schedule J.

(a) In general

The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

(b) Amendment of section

No other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.

42 U.S.C. § 407(a) and (b). The Debtor maintains that § 407 of the Social Security Act is widely recognized to exist for the purpose of protecting social security benefits from the claims of creditors.

The Debtor observes that the Sixth Circuit in *Behlke* noted that one way courts determine a debtor's ability to pay under the totality of the circumstances analysis is to evaluate whether a debtor has sufficient income to fund a chapter 13 plan. *Behlke*, 358 F.3d at 435. Citing the Sixth Circuit decision of *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011), the Debtor maintains social security income is not included in the calculation of projected disposable income under § 1325(b). As such, even if the Debtor were to convert her case to chapter 13, she would not be required to contribute her Non-filing Spouse's social security income towards the repayment of creditors. She further notes that every circuit court to have addressed the issue has held that excluding social security income from income available to pay creditors under a chapter 13 plan—standing alone—cannot constitute lack of good faith under § 1325(a)(3). As such, excluding the Non-filing Spouse's social security income under a hypothetical chapter 13 analysis would significantly reduce any distribution to creditors.

The UST counters that § 407 of the Social Security Act is not implicated under a § 707(b)(3)(B) analysis. Section 407 is focused on the forced seizure of social security income under a legal proceeding. Citing *Meehan*, the UST maintains that a totality of circumstances

analysis under § 707(b)(3)(B) only seeks to determine if a debtor has an ability to repay creditors. *Meehan*, 619 B.R. at 378. Such an analysis does not make social security income “subjected to” the operation of any bankruptcy law. *Id.*

On the issue of ability to pay under a hypothetical chapter 13 analysis, the UST again argues that the totality of circumstances test is broad and not limited by the definitions of projected disposable income under § 1325(b). Moreover, the UST notes that bankruptcy courts in this district have held that even though social security income is excluded from the projected disposable income test under § 1325(b), social security income may still be considered under the good faith analysis of § 1325(a)(3). As such, it is not a forgone conclusion that social security income would not be considered under chapter 13. Regardless, the UST maintains that a debtor’s inability to qualify for chapter 13 is only one factor to be considered under a § 707(b)(3) totality of the circumstances analysis.

2. Social Security Income—Legal Analysis

As the parties’ positions illustrate, there is much debate over the treatment of social security income in bankruptcy, particularly in the context of whether social security income should be considered when determining if a debtor is entitled to bankruptcy relief. There are many well written and reasoned opinions on both sides of this divide. Ultimately, this Court is persuaded that excluding social security income from consideration of a debtor’s ability to repay debts out of future earnings under the totality of circumstances test does not constitute abuse under § 707(b)(3)(B). This Court’s conclusion is based on the broad protection of social security income provided by § 407(a) of the Social Security Act as recognized by many courts in one form or another.

a. Court of Appeal Decisions Addressing the Interplay Between the Bankruptcy Code and the Social Security Act

Unlike other sources of household income, social security income receives special protection under the Social Security Act. The Court of Appeals for the Sixth Circuit has described § 407 as a “strong and clear anti-assignment provision” and quotes the Supreme Court’s recognition that § 407 “‘imposes a broad bar against the use of any legal process to reach all social security benefits.’” *Hildebrand v. Social Security Admin. (In re Buren)*, 725 F.2d 1080, 1084 (6th Cir. 1984) (quoting *Philpott v. Essex Cty. Welfare Bd.*, 409 U.S. 413, 416-17 (1973)).

In one form or another, circuit courts of appeal have upheld the protection of social security income within the confines of the Bankruptcy Code. For example, when considering whether the Bankruptcy Reform Act of 1978 repealed § 407, the Sixth Circuit held that the broad protections of this provision of the Social Security Act remained intact. *Buren*, 725 F.2d at 1081. As such, the Sixth Circuit concluded that the Social Security Administration could not be compelled to pay social security benefits to a chapter 13 bankruptcy trustee. *Id.*⁶

Building on the Sixth Circuit’s recognition in *Buren* regarding the applicability of § 407 in bankruptcy, the Court of Appeals for the Eighth Circuit held that the anti-assignment provision of § 407 of the Social Security Act “operates as a complete bar to the forced inclusion of past and future social security proceeds in the bankruptcy estate.” *Carpenter v. Ries (In re Carpenter)*, 614

⁶ Buttressing its holding, the Sixth Circuit observed that Congress “forthrightly declared its wish” that § 407 not be considered repealed when it subsequently amended § 407 to add § 407(b), which provides that “[n]o other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section.” *Id.* at 1087 (noting that the legislative history supports that § 407(b) was intended to counter decisions by some bankruptcy courts that considered social security income listed by a debtor to be income for purposes of Chapter XIII and ordering the Social Security Administration to pay the debtor’s social security income to the bankruptcy trustee). *See also, Carpenter v. Ries (In re Carpenter)*, 614 F.3d 930, 935-36 (8th Cir. 2010) (observing that Congress reacted to court decisions limiting the scope of the Social Security Act such as *United States v. Devall*, 704 F.2d 1513 (11th Cir. 1983) and *Walker v. Treadwell (In re Treadwell)*, 699 F.2d 1050 (11th Cir. 1983) by amending the Social Security Act to add § 407(b)).

F.3d 930, 936 (8th Cir. 2010) (citing *Buren*, 725 F.2d at 1086, which noted that “social security payment only become part of a debtor’s estate if he chooses to include them”).⁷ The issue in *Carpenter* was whether a lump sum social security payment that the debtor received prepetition was exempt or otherwise not included in the bankruptcy estate. *Id.* at 931. The Eighth Circuit held that the social security payment was excluded from the chapter 7 bankruptcy estate pursuant to § 407 of the Social Security Act. *Id.* Finding *Buren* instructive, the Eighth Circuit observed that:

§ 407 does not contain any qualifying language. It explicitly demands that no past or future social security payments may be subject to the operation of any bankruptcy law. Section 407 also instructs that it is not to be limited by any other provision of law, without express reference to § 407.

Carpenter, 614 F.3d at 936 (internal citations omitted). This led the Eighth Circuit to conclude that “§ 407 must be read as an exclusion provision, which automatically and completely excludes social security proceeds from the bankruptcy estate.” *Id.*

The Court of Appeals for the Fifth Circuit similarly found that § 407 of the Social Security Act is intended to protect social security payments from the operation of bankruptcy law. *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220, 223 (5th Cir. 2012). The issue in *Ragos* was whether social security benefits are included in a chapter 13 debtor’s projected disposable income for purposes of calculating the required payment to creditors under § 1325(b)(1)(B) and whether a debtor’s chapter 13 plan is proposed in good faith under § 1325(a)(3) if a debtor fails to include such social security benefits in their plan payments. *Id.* at 221, 226-27.

The Fifth Circuit held that social security benefits are not included in the projected disposable income calculation. *Ragos*, 700 F.3d at 221. The Court of Appeals found that although

⁷ Under the prior version of § 407 of the Social Security Act, the Court of Appeals for the Eleventh Circuit held that “[a] narrow implied limitation of section 407 appears to be the only way to effectuate the operation of a Chapter 13 plan for an individual whose regular income consists of social security benefits.” *United States v. Devall*, 704 F.2d 1513, 1518 (11th Cir. 1983). Reaching the opposite conclusion, the Sixth Circuit in *Buren* noted that “[a]s a practical matter, a willing debtor can simply sign his check over to the trustee.” *Buren*, 725 F.2d at 1086.

the term “projected disposable income” is not defined by the Bankruptcy Code, “the statutory definition of ‘current monthly income’ [11 U.S.C. § 101(10A)(B)] explicitly ‘excludes benefits received under the Social Security Act.’” *Id.* at 223. Given that “current monthly income” is the starting point for determining “disposable income” [11 U.S.C. § 1325(b)(2)], “it makes little sense to circumvent that prohibition by allowing social security income to be include in *projected* disposable income.” *Id.* (emphasis in the original).

The Fifth Circuit added that the “conclusion that Congress exempted social security benefits from projected disposable income is also bolstered by [§§407(a) and (b) of the Social Security Act].” *Ragos*, 700 F.3d at 223. Citing to the same legislative history as the Sixth Circuit did in *Buren*, the Fifth Circuit found that §§ 407(a) and (b) of the Social Security Act “read together with the Bankruptcy Code, express the clear intent of Congress to protect Social Security payments from [the] bankruptcy process.” *Id.* at 224. The Fifth Circuit noted that its conclusion was supported by the Sixth Circuit’s decision in *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011),⁸ which similarly held that benefits received under the Social Security Act should not be included in projected disposable income, and the Eighth Circuit’s holding in *Carpenter* that the clear language of § 407 of the Social Security Act prohibits subjecting social security benefits to the operation of any bankruptcy law. *Ragos*, 700 F.3d at 224 (citing *Carpenter*, 614 F.3d at 936); *see also*, *Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314, 1318 (10th Cir. 2012) (similarly citing *Baud* and *Carpenter* with approval for the same propositions).⁹

⁸ Section 407 of the Social Security Act was not raised in *Baud*. The Sixth Circuit based its holding on the Bankruptcy Code statutory definitions of “current monthly income” and “disposable income.” *Baud*, 634 F.3d at 345-347. The Sixth Circuit further noted that “this clear indication by Congress that Social Security benefits are to be treated differently post-BAPCPA must override BAPCPA’s purpose of ensuring that debtors ‘repay creditors the maximum they can afford,’ because any application of that purpose must be ‘consistent with the statutory text.’” *Id.* at 347 (internal citation omitted).

⁹ Having concluded that the debtors were not required to include social security benefits as part of their projected disposable income for purposes of calculating their payment to creditors, the Fifth Circuit further concluded that the

While the specific issues of law as well as the chapter of the Bankruptcy Code under which these issues arose differ, at the foundation of each of these circuit court opinions is a deep rooted understanding that social security income is afforded special protection under § 407 of the Social Security Act, even within confines of the Bankruptcy Code.

b. Lower Court Decisions Addressing the Interplay Between the Bankruptcy Code and the Social Security Act

Lower courts, however, continue to disagree on the scope of the safeguard provide by § 407 of the Social Security Act. Some courts, like those favored by the UST, conclude that § 407's directive is not implicated by consideration of a debtor's social security income when determining if a debtor has sufficient income to pay the debts sought to be discharged in bankruptcy. *Meehean v. Vara (In re Meehean)*, 619 B.R. 371, 379 (E.D. Mich. 2020); *Mains v. Foley (In re Mains)*, 2012 U.S. Dist. LEXIS 23802, at *13, 2012 WL 612006, at *5 (E.D. Mich. Feb. 24, 2012). These courts reason that the “entire focus of section 407 is on a third party's compelled acquisition through legal process of someone else's Social Security benefits.” *Mains*, 2012 U.S. Dist. LEXIS 23802, at *13, 2012 WL 612006, at *5. “But considering the availability of Social Security benefits in determining a debtor's “abuse’ under § 707(b)(3)(B) does nothing to subject those benefits to the legal process or to the ‘operation of any bankruptcy or insolvency law.’” *Meehean*, 619 B.R. at 378. The rationale being that including social security income in the totality of circumstances

debtors' retention of social security benefits alone was “legally insufficient to support a finding of bad faith under [§ 1325(a)(3)] the Bankruptcy Code.” *Ragos*, 700 F.3d at 227

In *Baud*, the Sixth Circuit recognized that there was a split of authority on whether a bankruptcy court may consider a debtor's decision to not commit available social security benefits to unsecured creditors under the good faith analysis of 11 U.S.C. § 1325(a)(3). *Baud*, 634 F3d at 346 n.13. The Sixth Circuit, however, did not address that issue because the debtors in *Baud* chose to devote their social security benefits towards payment of their unsecured creditors. *Id.*

As noted previously, the parties differ on what, if any, significance the good faith analysis under § 1325(a)(3) has on the § 707(b)(3)(B) analysis of a debtor's ability to pay under the totality of the circumstances. To the extent that § 1325(a)(3) is even relevant under a § 707(b)(3)(B) analysis, this Court does not need to address the issue for purposes of reaching a decision on the matter currently before this Court.

assessment “does nothing more than assist in determining whether the debtor has the ability to pay.” *Id.* Even if a court determines that a debtor has the ability to repay creditors when factoring in social security income, this “does not result in the Social Security benefits being transferred, assigned, execute on, or ‘subjected to’ the operation of any bankruptcy law, but only (when considered with other relevant factors) in the denial of Chapter 7 relief.” *Id.*

As further support, these courts look to the language of § 707(b) itself:

Congress chose to place only one limit on what the Bankruptcy Court may consider in evaluating a debtor’s financial situation in determining whether, under § 707(b)(3)(B), his/her Chapter 7 petition is abusive, namely, “the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions . . . to any qualified religious or charitable entity or organization.” Section 707(b)(1). With this single exception, § 707(b)(3)(B) permits inquiry into the entirety of the debtor’s “financial situation.” This contrasts notably with the inquiry under § 707(b)(2), which presumes abuse if the debtor’s “current monthly income” (a term of art that is defined by the Bankruptcy Code to exclude Social Security benefits, see 11 U.S.C. § 101(10A)(B)(ii)(I)) exceeds a certain amount. If Congress had intended, in like manner, to exclude Social Security benefits from the § 707(b)(3)(B) inquiry, it easily could have done so by adding the words “in light of his current monthly income” at the end of this subsection. Instead, Congress directed the Bankruptcy Court to evaluate abuse based on the “totality” of the debtor’s financial situation with no such limitation. This suggests that the Bankruptcy Court should consider all of the debtor’s income and expenses, as well as any other factors relevant to his/her financial situation.

Meehan, 619 B.R. at 376; *see also, In re Riggs*, 495 B.R. 704, 716-17 (Bankr. W.D. Va. 2013).

Other courts, like those favored by the Debtor, believe that such a restrictive interpretation of the protections of social security income in bankruptcy proceedings does a disservice to the language and spirit of § 407 of the Social Security Act. These courts note that § 707(b)(3)(B) of the Bankruptcy Code cannot effectively rid itself from the constraints of § 407(a) without an express reference to § 407. *In re Moriarty*, 530 B.R. 637, 646 (Bankr. W.D. Va. 2015) (noting that § 407(b) of the Social Security Act “cautions that unless expressly stated, courts may not construe

any other statute ‘to limit, supersede, or otherwise modify’ the protections particularly afforded to Social Security benefits.”); *cf. Buren*, 725 F.2d at 1081 (holding that the Bankruptcy Reform Act did not repeal the protections of § 407 by implication). Absent any express limitation on its applicability, these courts agree that § 407 excludes the consideration of social security income under the totality of circumstances analysis of § 707(b)(3)(B). *Moriarty*, 530 B.R. at 645-46 (holding that social security income is excluded from consideration under § 707(b)(3)(B) as a matter of law); *In re Utrata*, 2019 Bankr. LEXIS 2463 (Bankr. S.D. Ohio Aug. 6, 2019) (concluding that social security income does not constitute income to calculate a debtor’s ability to pay under § 707(b)(3)(B) (citing *Carpenter v. Ries (In re Carpenter)*, 614 F.3d 930, 933-37 (8th Cir. 2010)); *In re Johnson*, 2014 Bankr. LEXIS 798, at *7-8, 11, 2014 WL 814740, at *3-4 (Bankr. W.D. Mo. Feb. 28, 2014) (noting that § 407 must be read broadly as an exclusionary provision, citing *Carpenter*, 614 F.3d at 936, such that “Social Security income should not be considered in assessing the totality of a debtor’s financial circumstances when ruling on a motion to dismiss under § 707(b)(3)(B)”).

These courts likewise reject the argument that Congress knew how to exclude social security benefits when it meant to do so—such as under § 707(b)(2)’s presumption of abuse test—but chose not to do so under § 707(b)(3)(B)’s totality of a debtor’s financial circumstances analysis. *Moriarty*, 530 B.R. at 646; *Johnson*, 2014 Bankr. LEXIS 798, at *8, 11, 2014 WL 814740, at *3. The *Johnson* court noted that Congress’s failure to “specifically exclude Social Security benefits from property of the estate under § 541 (although it specially excluded certain other items) . . . did not prevent the Eighth Circuit in *Carpenter* from concluding that based on § 407, Social Security income was not property of the bankruptcy estate.” 2014 Bankr. LEXIS 798, at *8, 11, 2014 WL 814740, at *3. Indeed, the Eighth Circuit noted that “there is no way to

construe § 407 in a manner which would not conflict with the Bankruptcy Code.” *Carpenter*, 614 F.3d at 936-37 n.3. Yet, the Eighth Circuit found that such conflicts or redundancies did not undermine the broad scope of § 407. *Id.* (referencing the Sixth Circuit’s observation that Bankruptcy Code provisions that permit debtors to exempt social security benefits are merely “hortatory reaffirmations of the uncontested fact that social security payments only become part of a debtor’s estate if [the debtor] chooses to include them” and not a repeal by implication of § 407(a) of the Social Security Act (citing *In re Buren*, 725 F.2d at 1086)).

Nor, these courts hold, can a bankruptcy court do indirectly what it is forbidden to do directly by § 407. Adopting an interpretation—as some courts have—that “operation” of any bankruptcy law in § 407(a) requires something akin to “control” over social security income before the protections of § 407 are implicated, ignores the reality of the consequences that follow from such an interpretation. *Moriarty*, 530 B.R. at 646-47. Including social security income for purposes of the “ability to pay” analysis under § 707(b)(3)(B) indirectly results in social security benefits being “subject to” the claims of creditors in a bankruptcy proceeding. *In re Suttice*, 487 B.R. 245, 253 n13 (Bankr. C.D. Cal. 2013). It is essentially an “ultimatum” to a debtor that if the debtor wants to obtain bankruptcy relief, he or she must be willing to include social security income in the resources available to pay creditors. *Moriarty*, 530 B.R. at 647 (noting that while it is not an explicit rule, the practical effect would be to exercise control over social security benefits); *Johnson*, 2014 Bankr. LEXIS 798, at *7, 2014 WL 814740, at *2 (agreeing that denying access to bankruptcy “for failure to include Social Security income makes that income subject to the operation of a bankruptcy law, specifically § 707(b)(3)”). Such a result “is antithetical to the purpose of § 407 of the Social Security Act.” *Suttice*, 487 B.R. at 253 n13.

Again, there are well reasoned opinions on both sides of this divide. In the end, this Court agrees that excluding social security income as a factor in determining financial need for bankruptcy relief should not mandate a finding of abuse under § 707(b)(3)(B). This Court recognizes that “Congress, within the limits set by the Constitution, is free to deny access to bankruptcy as it sees fit,” *Krohn*, 886 F.2d at 127, however, the implication that courts should deny chapter 7 relief to debtors unwilling to commit social security income towards the repayment of their creditors using an expansive reading of § 707(b)(3)(B) is inconsistent with the protections afforded social security income under the Social Security Act.

With the exception of the Debtor’s 401(k) contributions, which this Court will address next, the exclusion of the Non-filing Spouse’s social security income is the only factor that the UST asserts warrants dismissal.¹⁰ For the foregoing reasons, this Court concludes that excluding the Non-filing Spouse’s social security income from the analysis of the Debtor’s ability to pay does not result in an abuse of the chapter 7 process such as to warrant dismissal of this case under § 707(b)(3)(B).

¹⁰ Even the cases upon which the UST relies for dismissal for abuse under § 707(b)(3)(B) were partially (and perhaps significantly) influenced by factors other than social security income. *In re Riggs*, 495 B.R. 704, 724 (Bankr. W.D. Va. 2013) (concluding that to not require some repayment of creditors in order to obtain a discharge “when [the debtors’] financial predicament is the predictable result of their continued excessive consumer spending and borrowing rather than one precipitated by some unforeseen external event or calamity, would constitute an abuse of the provisions Chapter 7.”); *In re Meehean*, 611 B.R. 574, 585 (Bankr. E.D. Mich. 2020) (“[T]he Debtors clearly have the ability to fund a Chapter 13 that pays all of their unsecured debts in only 41 months. And the Debtors, who have no dependents, can do this even while continuing to drive their two nearly-new and rather expensive leased vehicles.”); *Meehean v. Vara (In re Meehean)*, 619 B.R. 371, 379 (E.D. Mich. 2020) (“The Bankruptcy Court could also have mentioned that the excessiveness of debtors’ unsecured debt (\$43,100), all of which debtors accumulated since 2008 when \$163,870 in such debt was discharged in their last Chapter 7 proceeding, makes them particularly undeserving of relief in bankruptcy as outrageous abusers of consumer credit who are merely seeking an advantage over their creditors Plainly, debtors in this case do not deserve a fresh start in light of their outrageous abuse of consumer credit.” (cleaned up and citations omitted)).

B. RETIREMENT CONTRIBUTIONS

The second item that the UST takes issue with is the Debtor's voluntary monthly 401(k) retirement contribution of \$188.00 on her Amended Schedule I [Docket Number 54]. Unlike social security income, both the UST and the Debtor agree that retirement contributions may be considered for purposes of determining a debtor's ability to pay under § 707(b)(3)(B)'s totality of the circumstances analysis. They differ, however, as to whether retirement savings are ever permitted as a reasonable deduction when calculating a chapter 7 debtor's disposable income for purposes of § 707(b)(3)(B).

The UST argues that chapter 7 debtors may never deduct 401(k) contributions from disposable income when doing so would be to the detriment of their creditors. In support, the UST cites two bankruptcy court decisions from the Southern District of Ohio—*In re Pandl*, 407 B.R. 299 (Bankr. S.D. Ohio 2009) and *In re Stackhouse*, 582 B.R. 445 (Bankr. S.D. Ohio 2018). While the Debtor acknowledges that retirement contributions generally are not appropriate deductions from disposable income, the Debtor advocates for a case-by-case approach versus the *per se* rule favored by the UST. In support of her position, the Debtor cites two bankruptcy court decisions from the Northern District of Ohio—*In re Blankenship*, 398 B.R. 457 (Bankr. N.D. Ohio 2008) and *In re Kunkelman*, 417 B.R. 489 (Bankr. N.D. Ohio 2009).

Each of these bankruptcy court decisions turn to a great extent on their interpretation of the Sixth Circuit's decisions in *Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775 (6th Cir. 1995) and *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir. 2004). Unlike the case before this Court, *Harshbarger* was a chapter 13 case involving retirement loan repayments. The issue in *Harshbarger* was whether chapter 13 debtors could reduce their disposable income by the amount of retirement loan payments deducted monthly from the debtor-wife's payroll while proposing a

chapter 13 plan that paid less than 100% to unsecured creditors. 66 F.3d at 776. Affirming the district court’s dismissal of the debtors’ chapter 13 case for failure to submit a confirmable plan, the Sixth Circuit rather succinctly found that the repayment of the retirement loan was not necessary for the “maintenance or support” of the debtors under § 1325(b) and therefore should be included in disposable income available to pay creditors. *Id.* at 777.¹¹

¹¹ With the enactment of BAPCPA, Congress subsequently added two “exclusionary sections” relating to 401(k) loans and 401(k) contributions. *Seafort v. Burden (In re Seafort)*, 669 F.3d 662, 666 (6th Cir. 2012). The first, § 1322(f), “specifically excludes from § 1325(b)’s definition of ‘disposable income’ amounts required to repay retirement account loans.” *In re Phillips*, 417 B.R. 30, 41 (Bankr. S.D. Ohio 2009); *see also Seafort*, 669 F.3d at 666 (“The first, § 1322(f), is clear: It states in relevant part that ‘any amounts required to repay such loan shall not constitute “disposable income” under section 1325.”).

The second provision, § 541(b)(7)(A), provides in relevant part:

(b) Property of the estate does not include—

(7) any amount—

(A) withheld by an employer from the wages of employees for payment as contributions—

(i) to—

(I) an employee benefit plan that is subject to title I of the Employee Retirement Income Security Act of 1974

except that such amount under this subparagraph shall not constitute disposable income as defined in section 1325(b)(2)[.]

11 U.S.C. § 541(b)(7)(A) (emphasis added). Section 541(b)(7) is “less than clear” and has been the subject of three subsequent Sixth Circuit Court of Appeals opinions regarding the treatment of retirement contributions in chapter 13 cases.

In *Seafort*, the Sixth Circuit concluded that § 541(b)(7)(A) was not so broad as to allow a debtor repaying a 401(k) loan through a chapter 13 plan to change those payments to voluntary post-petition 401(k) contributions once the loan was paid in full. *Seafort*, 669 F.3d at 674. In *Davis*, the Sixth Circuit determined that § 541(b)(7)(A) did shield post-petition monthly retirement contributions to a 401(k) plan from creditors by excluding them from a debtor’s disposable income, but only so long as those contributions were regularly withheld from the debtor’s wages prior to the debtor’s bankruptcy filing. *Davis v. Helbling (In re Davis)*, 960 F.3d 346, 357 (6th Cir. 2020). The need for regular withholding of the 401(k) contributions prior to the bankruptcy filing was again emphasized in the Sixth Circuit’s subsequent *Penfound* opinion with its holding that a debtor who had historically contributed to a 401(k) plan but was unable to do so in the six months prior to the bankruptcy filing was not permitted to exclude his voluntary contributions to a retirement plan based on the historical amount. *Penfound v. Ruskin (In re Penfound)*, 7 F.4th 527, 534 (6th Cir. 2021) (concluding that the “bankruptcy code’s text does not permit a Chapter 13 debtor to use a history of retirement contributions from years earlier as a basis for shielding voluntary post-petition contributions from unsecured creditors”).

The parties did not address—nor will this Court—what, if any, impact these Sixth Circuit decisions may have in the context of a § 707(b)(3)(B) analysis.

In a much quoted passage, the Sixth Circuit observed that:

In these circumstances, “it would be unfair to the creditors to allow the Debtors in the present case to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.”

Id. at 778 (citing *In re Jones*, 138 Bankr. 536, 539 (Bankr. S.D. Ohio 1991)).

Building on *Harshbarger*, the Sixth Circuit in *Behlke* also held that voluntary contributions to a 401(k) or other retirement plan should be included in disposable income—in this case under the § 707(b) analysis of whether a chapter 7 case should be dismissed for substantial abuse. *Behlke*, 358 F.3d at 435. The debtors in *Behlke*, like the Debtor in this case, did not dispute that 401(k) contributions should never be considered as part of the disposable income analysis. *Id.* at 436. Rather, they argued that the bankruptcy court erred in finding that the 401(k) contributions were not reasonably necessary for maintenance and support in their particular case given that “they had only \$48,200 in retirement savings between them at the time of the bankruptcy filing.” *Id.*

Considering the bankruptcy court’s findings of fact, the Sixth Circuit noted that in addition to the \$48,200 in retirement savings, the bankruptcy court found that the debtors had excess income aside from the 401(k) contributions, as well as stock options that may have some future value, plus equity in their residence that may appreciate in value over time. *Behlke*, 358 F.3d at 436. Upon “applying *Harshbarger* and finding that the debtors had accumulated retirement savings as well as other personal and real property of potentially significant future value,” the bankruptcy court ultimately concluded that Mr. Behlke’s monthly 401(k) contribution, which was 6% of his gross income, “should be included as disposable income for purposes of determining the debtors’ ability to pay their creditors out of future earnings.” *Id.* Based on these findings, the Sixth Circuit found no clear error in the bankruptcy court’s determination that “the 401K contribution in this case was not reasonably necessary to the maintenance and support of the debtors.” *Id.*

Construing *Harshbarger* and *Behlke* broadly, some courts—like *Pandl* cited by the UST—appear to adopt a *per se* rule that 401(k) contributions are not permissible deductions when determining a debtor’s ability to pay under a § 707(b)(3)(B) totality of the circumstances analysis. In *Pandl*, the court stated that “[t]here is no question that 401(k) contributions should be included in the calculation of a debtor’s income for purpose of § 707(b)(3). To hold otherwise would force a debtor’s creditors to fund the debtor’s retirement plan.” *Pandl*, 407 B.R. 299, 302 (Bankr. S.D. Ohio 2009) (citing *In re Croskey*, 2007 Bankr. LEXIS 153, 2007 WL 1302571 (Bankr. N.D. Ohio 2007)). The *Croskey* court, cited by *Pandl*, relied upon its earlier decision in *In re Glenn*, 345 B.R. 831, 836 (Bankr. N.D. Ohio 2006). In *Glenn*, the court held “as a matter of law” that neither 401(k) contributions nor 401(k) loan repayments “are allowable expenses when defending against a § 707(b) action”). *Glenn*, 345 B.R. at 836. The *Glenn* court explained that the reasoning for this approach is “straightforward: ‘it would be unfair to the creditors to allow the Debtors in the present case to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend.’” *Id.* (quoting *In re Behlke*, 358 F.3d at 435, citing *In re Harshbarger*, 66 F.3d at 778).

In subsequent decisions, however, the court that authored the opinions in *Glenn* and *Croskey* tempered its stance on the treatment of 401(k) contributions and loan repayments under the § 707(b)(3)(B) analysis. In *Gonzalez*, the court noted that 401(k) contributions and loan repayments are not *ordinarily* permitted deductions when determining a debtor’s ability to repay creditors. *In re Gonzalez*, 378 B.R. 168, 174 (Bankr. N.D. Ohio 2007) (emphasis added). The court recognized though that the totality of the circumstances test under § 707(b)(3)(B) “requires that a court consider all relevant factors, thus leaving open the possibility that situations will arise requiring that a debtor be permitted to expense against their ‘disposable income’ contributions

and/or loan repayments made to a retirement account.” *Id.* The court reiterated this perspective in the *Blankenship* and *Kunkelman* cases cited by the Debtor. *See In re Blankenship*, 398 B.R. 457 (Bankr. N.D. Ohio 2008) (observing that while the court has not generally permitted debtors to expense voluntary retirement contributions for purposes of § 707(b)(3)(B), such a conclusion “is not an absolute rule”); *In re Kunkelman*, 417 B.R. 489 (Bankr. N.D. Ohio 2009) (“This Court, while not adopting an absolute prohibition on the practice, has generally not permitted debtors to deduct against their disposable income allocation made for retirement savings[.]”).

In determining whether retirement contributions and/or loan repayments may be permissible under a § 707(b)(3)(B) analysis, the *Blankenship* and *Kunkelman* courts found it appropriate to consider such factors as whether the debtor is at or near retirement age and the extent of the debtor’s retirement savings. *Kunkelman*, 417 B.R. at 494 (citing *Blankenship*, 398 B.R. at 461-62); *see also In re Tucker*, 389 B.R. 535, 540 (Bankr. N.D. Ohio 2008) (considering factors such as “(1) the debtor’s age and time left until retirement; (2) level of yearly income; (3) overall budget; (4) amount of monthly contributions; (5) needs of any dependents; and (6) other constraints which make it likely that retirement contributions are reasonably necessary expenses for this particular debtor” (citing *In re Beckerman*, 381 B.R. 841, 848 (Bankr. E.D. Mich. 2008))). These subsequent developments in the case law on which *Pandl* relies undermine the UST’s argument for a *per se* rule that 401(k) contributions are never permissible deductions when determining a debtor’s ability to pay under a § 707(b)(3)(B) totality of the circumstances analysis.

Nor does *Stackhouse*—a case also cited by the UST—mandate such a *per se* rule. The *Stackhouse* court observed that the Sixth Circuit’s decision in *Behlke* “has generally been interpreted as standing for the proposition that a debtor’s voluntary contribution to their retirement plan is not a reasonable and necessary expense.” *Stackhouse*, 582 B.R. 445, 452 (Bankr. S.D. Ohio

2018) (emphasis added). While the *Stackhouse* court ultimately concluded that the debtors' 401(k) contributions were not reasonable and necessary expenses in determining the debtors' ability to repay creditors under § 707(b)(3)(B), it did not reach that conclusion as a matter of law. Rather, the *Stackhouse* court considered facts specific to the debtors' circumstances. In particular, the court found that "there [was] no evidence that the Debtors [were] planning on retiring any time soon, or that their employment [was] unstable, or that they [were] going to become disabled and [would] have to rely on disability benefits." *Id.* Such findings by the court in *Stackhouse* likewise undermine the UST's argument in favor of a *per se* rule regarding 401(k) contributions in the context of a § 707(b)(3)(B) analysis. Accordingly, this Court declines to adopt such a *per se* rule.

Turning to the circumstances in this case, the Stipulations of the Parties [Docket Number 55] and the Debtor's Amended Schedules I and J [Docket Number 54] provide this Court with limited information by which to evaluate the reasonableness of the Debtor's 401(k) contributions. Schedule I reflects that the Debtor's voluntary monthly retirement contribution is \$188.00, which represents approximately 3% of her gross monthly wages of \$6,380.00. In briefing, Debtor counsel indicated that the Debtor is 62 years old, her Non-filing Spouse is 72 years old and retired, and that she and her Non-filing Spouse's combined retirement savings totaled only \$590.71 [Docket Number 25, p. 2]. These facts support that the Debtor's rather nominal retirement contribution of \$188.00 per month is a reasonably necessary expense in this particular case. While these facts were not stipulated to by the UST, they were not disputed in the UST's reply. Lacking additional information, and taking into account that the burden of proof lies with the UST, this Court cannot conclude that the Debtor's \$188.00 monthly contribution to a retirement plan supports dismissal or conversion pursuant to § 707(b)(3)(B).

III. CONCLUSION

Because neither the Non-filing Spouse's social security income nor the Debtor's monthly retirement contribution supports a finding of abuse under 11 U.S.C. § 707(b)(3)(B) based on the facts and analysis presented,¹² the *Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. § 707(b)(3) with Memorandum in Support* [Docket Number 18] is DENIED.

SO ORDERED.

Distribution List:

Default List Plus

Benjamin Sales, Esq.

¹² The Debtor's Amended Schedules I and J, filed after the parties' briefing, include a calculation of monthly net income that is significantly higher than what was calculated in the original schedules, even without inclusion of the Non-filing Spouse's social security income or the amount of the Debtor's voluntary retirement contribution [Docket Number 54]. The UST does not analyze whether this net income, over a three year period, would pay a sufficient return to unsecured creditors in a hypothetical Chapter 13 case to support a finding of abuse under § 707(b)(3)(B). Nor is it clear from the Stipulations of the Parties [Docket Number 55] that they intended this Court to address this issue. Because the issue was not sufficiently briefed or stipulated to by the parties and because they chose to proceed without an evidentiary hearing, this Court concludes that the issue has been waived.