SO ORDERED.

SIGNED this 18th day of December, 2018.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re	)	
	)	
Jennifer Brammer Elliott,	)	Case No. 18-80054-C7
	)	
Debtor.	)	
	)	

ORDER DENYING MOTION TO DISMISS

This case came before the court for a hearing on October 16, 2018 on the Bankruptcy Administrator's motion to dismiss the Debtor's case under 11 U.S.C. § 707(b)(1) and 707(b)(3) as an abuse of the provisions of Chapter 7 of the Bankruptcy Code. Having considered the motion in light of the entire record in this case, including the Debtor's schedules and statements, the motion and briefs, the exhibits, testimony, and arguments of counsel, and for the reasons set forth below, the court will deny the motion.

JURISDICTION

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina. This is a core proceeding under 28 U.S.C. § 157(b)(2), which this court may hear and determine.

FACTS

The Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 24, 2018 (the "Petition Date"). This filing is the Debtor's first petition for relief under the Bankruptcy Code. The Debtor is a resident of Orange County, North Carolina. She is 46 years old and the primary custodial parent of her high school aged son. She holds a B.A., M.Ed., and Ph.D. from the University of Virginia and has been employed in various positions in academia and in the private sector.

On her schedules, the Debtor lists assets totaling $25,114.47, including a 2011 Honda Accord,[1] funds in a checking account, and a security deposit held by her landlord. She lists liabilities totaling $216,133.00, including $10,500.00 secured by her vehicle, $1,806.00 in priority debt, and $203,827.00 in general unsecured debt. Her nondischargeable student loan debt totaled $165,120.00 at the time of filing. The Form 122A-1, Chapter 7 Statement of Current Monthly Income, filed with her petition shows below-median income with no presumption of abuse.

On the day after the Petition Date, the Bankruptcy Administrator filed a statement that no presumption of abuse arose under 11 U.S.C. § 707(b)(2). The Debtor's § 341 meeting was held on March 9, 2018, and the Chapter 7 trustee subsequently filed a report of no distribution. On April 24, 2018, the Bankruptcy Administrator filed the present motion to dismiss case under 11 U.S.C. § 707(b)(1) and (3).

The basic facts of the case are that the Debtor was unemployed from February 2017 to the end of January 2018. She received unemployment compensation for twenty weeks and compensation for her work as a National Science Foundation panelist during 2017, such that her total income for 2017 was $24,268.08. She also worked as an independent contractor with Purdue University on one project during that time,

[1] The Debtor's original schedule A/B listed the 2011 Honda Accord with a value of $105,000.00. She subsequently amended her schedules to correct the typographical error and show the value as $10,500.00.

receiving $8,000.00 in January 2018. She was finally offered full-time employment on January 22, 2018 and accepted the offer immediately; her petition was filed January 24, 2018. The Debtor began work at her current job on January 31, 2018 for Globant, a software company, as a digital strategist at a salary of $95,000.00 per year.

At the hearing on the Bankruptcy Administrator's motion, the Debtor offered extensive testimony with respect to her background, education, employment, and personal life. The Debtor was a third grade teacher for five years when she returned to the University of Virginia full-time for coursework for her Ph.D. Her student loans are a result of obtaining both her B.A. and her Ph.D. She finished her coursework for the Ph.D. in 2011, and defended her dissertation and graduated in 2013. She commuted from Lynchburg, Virginia, where she lived with her husband and son, to Charlottesville during the years she attended the University of Virginia.

In 2011 the Debtor accepted a job at the University of Cincinnati for a salary of $60,000.00 per year, and she and her husband began the moving process to Cincinnati. For fourteen months they owned their home in Lynchburg while also paying rent in Cincinnati. The Debtor then left the job at the University of Cincinnati to become a consultant, but lost that private sector job in December 2013. She and her husband separated at that time, after his loss of sobriety, and the Debtor eventually, following a nine-month period of unemployment, found a position at the University of North Carolina ("UNC") beginning in September 2014. Her most recent salary at UNC was $103,000.00 per year.

The Debtor and her husband divorced in 2016. The Debtor did not receive any spousal support, alimony, or lump sum payments in connection with the separation and divorce. The court-ordered child support from her ex-husband is $650.00 per month, although her ex-husband did voluntarily contribute more per month during her period of unemployment in 2017 and 2018. The child support obligation ends in

November 2019. The Debtor took over the marital credit card debts at the time of the divorce; these debts resulted from the move to Cincinnati and the financial issues of that time. When the Debtor took the position at UNC she began a credit card repayment plan directly with the lenders. She completed two and a half years of her five-year repayment plan, paying between $800.00 and $1,000.00 per month until she lost her employment in February 2017.

In June 2016, while employed by UNC, the Debtor had major surgery. She was out of work for eight weeks, with an eighteen-month period of recovery, and faced significant medical expenses for an extended period of time. The Debtor lost her position with UNC in February 2017 and experienced another period of unemployment until January 31, 2018. During this time she depleted her two retirement accounts.[2] The Debtor did not use credit cards to pay for her expenses during this period of unemployment.

Schedule E/F filed by the Debtor shows $165,120.00 in a consolidated student loan. There are six other general unsecured debts listed: (1) Chase, in the amount of $12,829.00; (2) Chase, in the amount of $9,755.00; (3) Citi, in the amount of $10,515.00; (4) Discover, in the amount of $125; (5) Lowes Synchrony, in the amount of $4,809.00; and (6) UNC Physicians, in the amount of $674.00, in connection with her surgery.

The Debtor first contacted bankruptcy counsel in May 2017, and then met with counsel in August 2017, gathered her financial information, and filed her petition in January 2018. The Debtor waited to file her petition until she received payment from Purdue University for her contract work in order to have funds to pay her bankruptcy counsel's fee.

[2] The Debtor listed a retirement account in the amount of $420.00 in Schedule A/B.

ANALYSIS

The Bankruptcy Administrator's motion to dismiss relies on 11 U.S.C. § 707(b)(1) and (b)(3). Section 707(b)(1) provides:

> (b) (1) After notice and a hearing, the court, . . . may dismiss a case filed by an individual debtor under this Chapter whose debts are primarily consumer debts, or, with the debtor's consent, convert such a case to a case under Chapter 11 or 13 of this title, if it finds that the granting of relief would be an abuse of the provisions of this Chapter . . . .

Section 707(b)(3) provides:

> (3) In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this Chapter in a case in which the presumption in paragraph (2)(A)(i) does not arise or is rebutted, the court shall consider –
>
> (A) whether the debtor filed the petition in bad faith; or
>
> (B) the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse.

The wording of subsection (b)(3) provides that a determination of whether a particular bankruptcy filing constitutes an abuse of Chapter 7 due to bad faith or totality of the circumstances is only to be made if the presumption of abuse does not arise or is rebutted. Because of the Debtor's unemployment and reduced income in 2017, when she filed her petition and Form 122A-1 in January 2018, her income was below-median and a presumption of abuse did not apply. Thus, the standard for dismissal as abusive in this situation is whether the Debtor filed her petition in bad faith or whether the totality of the circumstances of the Debtor's financial situation demonstrates abuse. The Bankruptcy Administrator made no assertion of bad faith in his motion to dismiss; an assertion of bad faith in the Bankruptcy Administrator's pre-trial brief related to the fact the Debtor filed her petition one day after accepting her new job offer. The Bankruptcy Administrator made no further attempt to show bad

faith in filing at the hearing. Therefore, the crux of the motion to dismiss is whether the totality of the circumstances of the Debtor's particular financial situation at the time of filing demonstrates abuse. The Bankruptcy Administrator, as the moving party seeking a determination that this case is abusive pursuant to § 707(b)(3), bears the burden of proof by a preponderance of the evidence. *In re Williams*, No. 5:10CV00049, 2010 WL 3292812, at *3 (W.D. Va. Aug. 19, 2010); *In re Griffin*, No. 13-00574-GS, 2015 WL 350944, at *4 (Bankr. D. Alaska Jan. 22, 2015); *In re Lamug*, 403 B.R. 47, 53 (Bankr. N.D. Cal. 2009).

Consideration of the totality of the circumstances of the Debtor's financial situation at filing must include her new job offer, but it must also include the financial instability of her life over the previous seven years. After the Debtor accepted the position at University of Cincinnati in 2011, she and her then husband experienced the financial issues with having a double housing expense—the home mortgage in Lynchburg as well as rental expense in Cincinnati. After a short time in Cincinnati the Debtor experienced marital separation, loss of employment for nine months, and moving expense to North Carolina. Once established in Chapel Hill, North Carolina the Debtor initiated a voluntary repayment plan with her creditors for the marital debt previously incurred. The Debtor did not receive personal spousal support during the separation, move, and divorce. The Debtor then incurred expenses from a major surgery in June 2016, of which only a debt of $674.00 remains unpaid according to her schedules. Following her loss of employment at UNC, the Debtor did not depend on her credit cards for living expenses, but used state unemployment compensation, contract work, and depletion of her retirement accounts for her expenses in 2017.

The pre-BAPCPA analysis of the totality of the circumstances approach to identifying substantial abuse in Chapter 7 cases in the Fourth Circuit centered on the debtor's ability to pay creditors plus five additional factors. *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991). This analysis is still instructive for the question of

abuse in the filing of a Chapter 7 petition under the totality of the circumstances of the debtor's financial situation pursuant to § 707(b)(3)(B). *Calhoun v. U.S. Trustee (In re Calhoun)*, 650 F.3d 338, 342 (4th Cir. 2011); *In re Barger*, No. 09-51299, 2010 WL 1904771, at *2 (Bankr. M.D.N.C. May 7, 2010); *In re Martin*, 417 B.R. 354, 358 (Bankr. M.D.N.C. 2009). In addition to Debtor's ability to pay a dividend to her unsecured creditors, the court should consider (1) whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment; (2) whether the debtor incurred cash advances and made consumer purchases far in excess of ability to repay; (3) whether the debtor's proposed family budget is excessive or unreasonable; (4) whether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition; and (5) whether the petition was filed in good faith. *Green*, 934 F.2d at 572. While ability to pay is the primary factor that courts consider for a § 707(b)(3)(B) motion, as instructed by the statute the totality of the Debtor's financial circumstances remains relevant.

Section 707(b)(2) sets forth a screening mechanism to determine whether the court should presume abuse in a Chapter 7 proceeding. When analyzing a case under § 707(b)(3)(B) there is no presumption of abuse (or the presumption has been rebutted) according to those standards established in § 707(b)(2). In this case, due to the Debtor's unemployment and lack of regular income when she filed her petition, there was no presumption of abuse based on the Form 122A-1 calculations. Two cases from the Middle District of North Carolina show the scrutiny of the facts necessary in order to determine whether the filing of the Chapter 7 case is an abuse under § 707(b)(3) when no presumption of abuse arises. In *Barger*, the court determined the debtor did not have the ability to pay a meaningful amount to her unsecured creditors in a hypothetical Chapter 13 plan, despite the Bankruptcy Administrator's assertion that she had a total of approximately $432.00 per month in disposable income. 2010 WL 1904771, at *2. The

court noted that the debtor had $20,000.00 in student loan debt out of $50,000.00 of unsecured debt and that a substantial portion of her unsecured debt was for two deficiency claims related to vehicles that the debtor purchased for another person and were never in her possession. *Id*. at *1. The debtor stopped using credit cards and participated in a debt consolidation plan for seven months prior to filing her petition. *Id.* In addition she provided accurate information at the filing of her petition and was forthcoming with updated information requested by the Bankruptcy Administrator, an important consideration for the court, in allowing her to remain in her Chapter 7 case. *Id.* at *2. In *In re Crink*, the court considered the debtors' financial reversals over a period of years and found that, based on the totality of the debtors' financial circumstances in the case, allowing the debtors to continue in a Chapter 7 would constitute an abuse of the Bankruptcy Code pursuant to § 707(b)(3)(B). *In re Crink*, 402 B.R. 159, 176-77 (Bankr. M.D.N.C. 2009). Due to the substantial housing costs of the debtors in the case, they had negative disposable monthly income and there was no presumption of abuse under § 707(b)(2). *Id*. at 166. Nevertheless, the evidence presented at the hearing showed excessive housing costs for a property without any equity, an ability to repay creditors with a 42% dividend according to the court's calculation, and credit card debt for discretionary items incurred beyond the means to repay. *Id.* at 170-76. The analysis of these factors, among others, resulted in a finding of abuse necessitating dismissal of the debtors' case. *Id*. at 177. A reading of the § 707(b)(3)(B) cases from the Middle District of North Carolina demonstrates the importance of eliciting a full picture of a debtor's financial situation at a hearing on a motion to dismiss.

In the present case, the Debtor suffered a series of financial reversals, including relocation, unemployment, divorce, and major surgery, over a period of years culminating a second extended period of unemployment. After her most recent job loss, she delayed immediately filing bankruptcy as she needed to receive her compensation

from Purdue University as an independent contractor before she had funds to file her Chapter 7 petition. There is no evidence that the Debtor obtained any cash advances or made consumer purchases in excess of her ability to pay in the months leading up to the filing of her petition. In fact, the evidence shows that the Debtor was circumspect in using credit cards, and the credit card debt listed on her petition is the result of old marital indebtedness that she took responsibility for in her divorce. The Debtor disclosed her current financial situation on Schedule I, including her new job and $8,000.00 contract fee from Purdue University when she filed her petition, and she was generally forthcoming with her financial situation during the pendency of the case. However, it did come to light at the hearing that the Debtor's boyfriend had moved in with her sometime around the Petition Date and contributed $200.00 a month for utilities for a period of time thereafter. No further evidence of financial assistance by the boyfriend was established at the hearing. The Bankruptcy Administrator also argued at the hearing that the Debtor should have filed amended schedules I and J to show updated income and expenses on March 28, 2018 when the Debtor filed an amended Schedule A/B to correct a scrivener's error in the value of her vehicle. However, the court cannot find any requirement in the Bankruptcy Code or Rules for a Chapter 7 debtor to file amended schedules to update postpetition changes in income and expenses.[3]

[3] Nor does case law support the Bankruptcy Administrator's assertion. *See Vasquez v. Adair (In re Adair)*, 253 B.R. 85, 90 (B.A.P. 9th Cir. 2000)("The Bankruptcy Code and Rules require that a debtor supplement the information in his or her schedules only in limited circumstances. Section 541(a)(5) provides that certain types of property not implicated here become property of the estate if acquired by a debtor within 180 days of the filing of the bankruptcy petition. Rule 1007(h) requires that a debtor file a supplemental schedule in the event that he or she acquires property covered by the provisions of § 541(a)(5). Thus, the Bankruptcy Code specifically requires that a debtor supplement the information contained in his or her schedules in certain prescribed circumstances. If Congress or the Bankruptcy Rule drafters had intended to impose a broader duty of ongoing disclosure, either could have expressly so provided.").

The Bankruptcy Administrator attempted to show at trial that the Debtor could make a substantial contribution to her unsecured creditors with the current income she is enjoying eight months after filing her petition. Using certain national standard figures and figures from a hypothetical Schedule J that the Debtor filled out in discovery,[4] the Bankruptcy Administrator used Form 122A-1 to estimate that the Debtor could make an approximate $1,000.00 per month dividend to unsecured creditors in a Chapter 13 plan.[5] In essence, the Bankruptcy Administrator argues that the Debtor's regular student loan payment estimated at $1,200.00 should be paid into a Chapter 13 plan with a distribution to all unsecured creditors. The Debtor's scheduled unsecured debt is approximately 80% student loan debt and 20% credit card and medical debt. Customary practice in this district would require a Chapter 13 plan that provides for an equal rate of distribution to all unsecured creditors. Provided all scheduled claimants filed proofs of claim in the Debtor's hypothetical Chapter 13 case, the bulk of the Debtor's plan payments would go to her non-dischargeable student loans. With $1,000.00 per month distributed to unsecured creditors as proposed by the Bankruptcy Administrator, a 36-month plan would pay approximately 17.5 % to non-student loan unsecured creditors.

Ability to repay debts is an important component of the assessment of the Debtor's current financial situation, but other financial considerations mitigate against

[4] The postpetition Schedule I and Schedule J filled out by the Debtor during the discovery process at the request of the Bankruptcy Administrator were not filed in the case. They were admitted at trial as Exhibit 8.

[5] A bankruptcy analyst from the Bankruptcy Administrator's office explained how she calculated disposable income for the Debtor according to a hypothetical Form 122A-1 using her current salary in her position with Globant for a six month period and one sixth of her part-time income from UNC that the Debtor is earning for teaching fall semester 2018. The analyst estimated disposable income to be $2,330.17 pursuant to this hypothetical form, and then showed a reduction for the child support received and the Debtor's contribution to her 401(k) plan totaling $1,288.34. According to the testimony of the analyst, the Debtor could fund a Chapter 13 plan with a dividend of approximately $1,000 per month. Though the analyst appeared to be giving an opinion based on specialized knowledge, she was not qualified as an expert. The court will give her testimony and Exhibit 7 the appropriate weight.

dismissal in the Debtor's case. The Debtor's credit card debt is older, has been paid down through a debt repayment plan, and is a result of the Debtor taking the sole responsibility for payment of the debt in connection with her divorce. The Debtor's expenses are not extravagant and are reasonable considering her professional job and commuting requirements.[6] As a 46-year old woman with no retirement savings, her 401(k) contribution through her employer is financially responsible. In addition, the evidence does not support a finding that the Debtor's income will remain at its present level or increase over the next three years. The evidence is that she has maximized her salary at Globant, her income will drop by $650.00 per month next year when child support payments end, she is juggling two jobs which is likely not sustainable, and job security in her field appears questionable—she is already looking for alternate employment.

The Bankruptcy Administrator relies on *In re Beckett*, 442 B.R. 638 (N.D. Ohio 2010), one of a series of § 707(b)(3) cases with a large amount of nondischargeable student loan debt that also includes *In re Ramlow*, 417 B.R. 479 (Bankr. N.D. Ohio 2009) and *In re Thurston*, No. 07-35092, 2008 WL 3414138 (Bankr. N.D. Ohio Aug. 8, 2008). In the first of these cases, *Thurston*, the court rejected the United States Trustee's argument that the debtor should be required to pay her $1,000.00 student loan payment into a Chapter 13 plan for the benefit of all unsecured creditors and instead utilized a totality of the circumstances analysis. *Id.* at *6. The court considered that unsecured creditors would receive only a 14% dividend in a Chapter 13, and reasoned that if the debtor's fresh start in bankruptcy was conditioned on her seeking Chapter 13 relief as opposed

[6] There was testimony concerning the Debtor's sale of her Honda and purchase of a 2017 Mazda several months after filing her Chapter 7 case; however, the testimony regarding the circumstances of the repairs necessary for the Honda and the requirement of a vehicle for her significant commute was credible and the terms of her vehicle purchase are in line with those regularly allowed in Chapter 13 in this district.

to Chapter 7 relief, her debt burden could actually increase over the pendency of a Chapter 13 plan. *Id.* The court denied the motion. *Id.* at *7. Then in *Ramlow*, the court found that a divorced single mother with $50,000.00 in student loan debt and an ability to pay at least $24,000.00 to unsecured creditors did not file an abusive Chapter 7 case when other considerations mitigated against dismissal. 417 B.R. at 485. The court cited several reasons for allowing the debtor to remain in her Chapter 7 case including the fact that much of the debt at issue in the case stemmed from her divorce. *Id.* at 484. The court found that the debtor's expenses were in line with a single mother with two teenage children, and that nothing indicated the debtor was trying to discharge unsecured debts while retaining and spending for luxury goods. *Id.* Then in *Beckett*, where the debtor was faced with approximately $200,000.00 in unsecured debt, 60% of which was student loans, the court granted the motion to dismiss. 442 B.R. at 646. The court distinguished *Thurston*, finding any distribution to non-student loan creditors would be more than de minimis, and distinguished *Ramlow*, because the debtor had shown no unforeseen circumstances such as divorce, was supporting a 26-year old son, and was filing bankruptcy due to a gradual accumulation of consumer debt. *Id.* at 644-5. The analysis in this line of cases supports the Debtor. Here, the Debtor has weathered unemployment, divorce, and major medical expenses, she made a good faith effort to repay her credit card debt through a repayment plan, and she incurred no new consumer debt for several years prior to her filing.

Notwithstanding, the Bankruptcy Administrator argues that the timing of the Debtor's filing weighs against her—that if she had filed either two months earlier or two months later then her Chapter 7 filing would have been acceptable. This argument is not well taken. Two months before the Petition Date, the Debtor had met with counsel but did not have the funds to retain counsel. She had already depleted her retirement savings to cover living expenses (rather than incur credit card debt) and had

no other assets to liquidate. While the Bankruptcy Administrator critiques her delay in filing, he offers no guidance as to how the Debtor should have resolved the issue of the attorney fee. The court will not fault a debtor for waiting to file until having sufficient funds to retain counsel. As for the alternate argument that she should have waited two additional months to file because that would have shown that she "tried," there is already ample evidence on the record that the Debtor made every reasonable effort to repay her creditors and to not incur any new debt prior to filing Chapter 7.

The application of § 707(b)(3) to the Debtor must necessarily encompass some period of time in assessing her financial situation. However, in this case the relevant period of time is not simply the few days in which the Debtor accepted a new job and filed for Chapter 7. Nor is it the time of recent unemployment until she started the new job. In this particular case, the financial timeline analyzed to determine the Debtor's financial situation must cover a period of years, as unforeseen circumstances included divorce, major medical expenses, and two periods of unemployment. The court concludes that although the Debtor could make a plan payment for three years in a Chapter 13 plan, the bulk of such payment would go to her student loans and only a small portion to her older credit card debt which she had already made a significant effort to repay. After the financial instability of the past seven years, the Debtor's attempts to get ahead of her older debt and not incur any new debt, and then the most recent financially devastating period of unemployment prior to her filing, this Debtor is deserving of a fresh start. The Bankruptcy Administrator has simply not met his burden of proof in this case and shown that the totality of the Debtor's financial circumstances demonstrate that granting relief would be an abuse of Chapter 7. As a result, the Debtor may remain in her Chapter 7 case and receive her discharge.

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