

UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN

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In re:

LEON C. SEARLES,  
JOHANNE M. SEARLES

Case No. DG 08-00545  
Hon. Scott W. Dales  
Chapter 7

Debtors.

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**ORDER REGARDING UNITED STATES TRUSTEE'S MOTION  
TO EXTEND TIME TO FILE MOTION TO DISMISS OR OBJECTION TO DISCHARGE**

This matter came before the court for a hearing on the motion of the United States Trustee (the "UST") to extend the time to file a motion to dismiss under 11 U.S.C. § 707(b), or objection to discharge under 11 U.S.C. § 727 (the "Extension Motion"). The issue before me is whether the UST may timely file a motion to dismiss based upon 11 U.S.C. §707(b)(3) without filing a statement within ten days of the first meeting of creditors declaring that the case is presumed abusive under 11 U.S.C. § 704(b)(1). The court has subject matter jurisdiction under 28 U.S.C. § 1334 and this contested matter is within the court's core jurisdiction under 28 U.S.C. § 157(b)(2)(A).

I. PROCEDURAL HISTORY

The Debtors filed a voluntary Chapter 7 petition on January 24, 2008. The court set the first meeting of creditors for March 4 2008. The deadline for objecting to discharge, or filing a motion to dismiss under Section 707(b)(3) was May 5, 2008. On that date the UST filed his

Extension Motion, and I granted the Motion. Because the UST filed the Extension Motion *ex parte*, however, I conditioned the extension on the Debtors' failure to object to the relief, thereby giving them an opportunity to oppose the extension. In the meantime, the UST filed a motion to dismiss, premised on 11 U.S.C. § 707(b)(3) and the "totality of circumstances," within the time as provisionally extended. Thereafter, the Debtors exercised their right to oppose the deadline extension, so I set the matter for oral argument in Lansing on June 25, 2008. At conclusion of the hearing, I took the matter under advisement. Following the hearing, the UST submitted a brief with additional authorities, including some I had already located.

The Debtors argue that I should deny the Extension Motion (and treat the UST's motion to dismiss as untimely) essentially on grounds of futility, arguing that the UST's dismissal motion is time-barred under 11 U.S.C. §704(b)(1)(A) and §704(b)(2). The Debtors urge me to hold that if the UST fails to file a statement of presumed abuse within ten days after the date set for the first meeting of creditors, then *any* motion to dismiss filed under 11 U.S.C. § 707(b) is untimely and therefore must be denied. In effect, the Debtors' objection to the Extension Motion raises a supposed time-bar to the UST's dismissal motion. For this reason, I will consider the UST's post-hearing brief.

## II. DISCUSSION

Section 707(b)(3) of the Bankruptcy Code authorizes a bankruptcy court to dismiss a case in which the presumption of abuse does not arise or is rebutted, if the court finds that the

debtor filed the petition in bad faith or finds, after considering the totality of the circumstances of the debtor's financial situation, that the debtor is abusing chapter 7. 11 U.S.C. §707(b)(3). Because the UST, in bringing a motion under Section 707(b)(3), does not benefit from any statutory presumption, I reject the Debtors' contention that the UST's failure to timely file a statement of presumed abuse precludes the filing of any motion under 11 U.S.C. § 707(b).

Section 704(b)(1)(A) and 704(b)(2), upon which the Debtors' argument relies, apply only to dismissal premised upon the presumption of abuse under Section 707(b)(1), not dismissal premised on Section 707(b)(3). See *In re Perrotta*, \_\_\_ B.R. \_\_\_, 2008 WL 2485568 (Bankr. D.N.H. June 17, 2008); *In re Ansar*, 383 B.R. 344, 348 (Bankr. D. Minn. 2008); *In re Perrotta*, 378 B.R.434, 438 (Bankr. D.N.H. 2007); *In re Byrne*, 376 B.R. 700, 701 (Bankr. W.D. Ark. 2007); *In re dePellegrini*, 365 B.R. 830, 831 (Bankr. S.D. Ohio 2007). "Simply stated, the ten day statement under §704(b)(1) is superfluous to a filing under §707(b)(3) if a determination has otherwise been made that a presumption of abuse does not arise." *In re Byrne*, 376 B.R. 700, 704 (Bankr. W.D. Ark. 2007). I do not find persuasive the statutory analysis in *In re Draisey*, 385 B.R. 274 (Bankr. D. Minn. 2008), because it fails to give effect to the last clause of Section 704(b)(2), which I read as limiting that subsection to dismissal motions premised upon presumed abuse.

The UST, when filing a motion to dismiss under 11 U.S.C. §707(b)(3), must prove his case by establishing either bad faith or the totality of the circumstances, without the luxury that a presumption affords. "Where no presumption of abuse arises, the thirty-day deadline in §704 does not apply to the UST ... [r]ather, the general deadline for filing a motion to dismiss in

Federal Rule of Bankruptcy Procedure 1017(e) is applicable.” *In re Ansar*, 383 B.R. at 348 (citing *In re Perrotta* and *In re dePellegrini*). Interim Bankruptcy Rule 1017(e)(1) says that “[e]xcept as otherwise provide in § 704(b)(2), a motion to dismiss a case for abuse under §707(b) or (c) may be filed only within 60 days after the first date set for the meeting of creditors under §341(a), unless on request filed before the time has expired, the court for cause extends the time for filing the motion to dismiss.” I find that the 60 day deadline, unadorned by any requirement relating to the statement of presumed abuse, applies to the UST’s “totality of circumstances” dismissal motion, because in my opinion Section 704(b)(2) does not provide otherwise. In other words, the UST need not file a statement regarding the presumption of abuse before filing a motion to dismiss that does not rely on the presumption. Therefore, the UST’s dismissal motion is not futile. Because the Debtors premised their opposition to the Extension Motion on the supposed futility or tardiness of the dismissal motion, I will overrule their objection to the Extension Motion.

NOW THEREFORE IT IS HEREBY ORDERED that the Debtors’ objection to the UST’s Extension Motion is OVERRULED and the Extension Motion is unconditionally GRANTED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order upon the Debtors, their counsel, and the Office of the United States Trustee, pursuant to Bankruptcy Rule 9022 and LBR 5004-5.