

**MAR 11 2005**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re:	)	BAP No.	CC-04-1251-MoMkMa
	)		
BARBARA VOELKEL,	)	Bk. No.	SA 04-11677-JR
	)		
Debtor.	)		
_____	)		
BARBARA VOELKEL,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
KAREN S. NAYLOR, Chapter 7	)		
Trustee,	)		
	)		
Appellee. <sup>1</sup>	)		
_____	)		

**O P I N I O N**

Argued and Submitted on November 18, 2004  
at Pasadena, California

Filed - March 11, 2005

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable John E. Ryan, Bankruptcy Judge, Presiding.

\_\_\_\_\_  
Before: MONTALI, MARKELL,<sup>2</sup> and MARLAR, Bankruptcy Judges.

<sup>1</sup> The chapter 7 Trustee is included as appellee for notice purposes only. She has not appeared in this appeal.

<sup>2</sup> Hon. Bruce A. Markell, Bankruptcy Judge for the District of Nevada, sitting by designation.

1 MONTALI, Bankruptcy Judge.

2  
3 **I. INTRODUCTION**

4 In this case, Barbara Voelkel ("Debtor") appeals the  
5 bankruptcy court's sua sponte order dismissing her chapter 7<sup>3</sup> case  
6 for substantial abuse. We REVERSE and REMAND because the court  
7 did not rebut the section 707(b) presumption, and we hold that the  
8 presumption in favor of a debtor's right to bankruptcy relief  
9 prevents dismissal for substantial abuse unless the court  
10 articulates and explains the "clear" abuse it finds from the  
11 evidence before it. We also hold that a finding of substantial  
12 abuse that is based on Debtor's future ability to pay is erroneous  
13 when such ability to pay requires Debtor to live at or near a  
14 subsistence level.

15 **II. FACTS**

16 Debtor filed chapter 7 bankruptcy on March 15, 2004, seeking  
17 to discharge \$139,561 in consumer credit card debt incurred over a  
18 twenty-year period.<sup>4</sup> On the petition date, Debtor was single with  
19 no dependents, owned no non-exempt property, and lived in an  
20 apartment in Santa Ana, for which she paid \$1,420 per month. She  
21 had been employed as a senior staff analyst for the County of  
22 Orange for thirteen years and ten months. According to Schedules  
23 I and J, her monthly income was \$4,179.64, and her monthly  
24 expenses were \$3,889, leaving disposable income of \$290.64. In

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25  
26 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

28 <sup>4</sup> According to Debtor's Schedule F, \$34,886 (25%) was  
incurred in the 1980s and \$104,675 (75%) between 1990 and 2004.

1 2002 and 2003 she earned, respectively, \$68,923 and \$74,616.

2 Nine days after Debtor filed for bankruptcy, the bankruptcy  
3 court sua sponte entered an order to show cause why the case  
4 should not be dismissed for substantial abuse pursuant to  
5 Bankruptcy Code section 707(b) (the "OSC"),<sup>5</sup> as interpreted by  
6 Zolg v. Kelly (In re Kelly), 841 F.2d 908 (9th Cir. 1988) and  
7 Gomes v. United States Trustee (In re Gomes), 220 B.R. 84 (9th  
8 Cir. BAP 1998). The OSC recites Debtor's monthly income and  
9 expenses as set forth in her schedules, and identifies the  
10 following expenses as "primarily consumer debt" and/or appearing  
11 to be excessive such that granting a discharge would be a  
12 substantial abuse of the court's power: (1) \$1,420 rent, (2) \$90  
13 Cable TV/Internet; (3) \$50 home maintenance; (4) \$500 food; (5)  
14 \$210 clothing; (6) \$60 laundry and dry cleaning; (7) \$200  
15 recreation; (8) \$488 car; and (9) \$205 other: gifts/grooming.<sup>6</sup>

16 In response to the OSC, Debtor filed a declaration under  
17 penalty of perjury that established the following unchallenged  
18 facts:

19 (1) Debtor accumulated her debts over ten to twenty years,  
20 with most of the purchases for necessities such as gasoline,

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21  
22 <sup>5</sup> Accordingly, the OSC was timely. Rule 1017(e)(2), which  
23 governs sua sponte dismissals under section 707(b), states: "If  
24 the hearing is set on the court's own motion, notice of the  
25 hearing shall be served on the debtor no later than 60 days after  
the first date set for the meeting of creditors under § 341(a).  
The notice shall set forth all matters to be considered by the  
court at the hearing."

26 <sup>6</sup> Debtor's other scheduled expenses were as follows: (1) \$80  
27 electricity and heating fuel; (2) \$30 water and sewer; (3) \$75  
28 telephone; (4) \$65 medical and dental expenses; (5) \$210  
transportation (not including car payments); (6) \$75 charitable  
contributions; (7) \$17 renter's insurance; (8) \$2 health  
insurance; and (9) \$112 auto insurance.

1 clothes, groceries, gifts, meals, and minimal travel. In about  
2 October 2002, Debtor realized she was spending more than she was  
3 earning and stopped making most purchases. There was no sudden  
4 change in financial circumstances; rather, the accruing interest  
5 pushed the debt to a level at which Debtor could no longer make  
6 the minimum payments, at which time she began to use her credit  
7 cards to take cash advances to cover the minimum payments.

8 (2) Debtor lived by herself in an apartment complex in Costa  
9 Mesa, occupying a one-bedroom unit with one bathroom and an extra  
10 room, which she used as a home office and storage area. Within  
11 three months, her monthly rent was scheduled to increase \$71, from  
12 \$1,420 to \$1,491. Supplies used by Debtor to clean her apartment  
13 and other home-maintenance costs averaged \$50 per month.

14 (3) Debtor worked at her office at the County, and had the  
15 ability to telecommute if she maintained an internet connection.

16 (4) Debtor's wardrobe consisted of conservative women's  
17 business suits required for her job, and casual, less expensive  
18 clothing to wear away from the office and at home. Purchasing  
19 these clothes cost on average \$210 per month; dry-cleaning and  
20 laundering them cost \$60 per month.

21 (5) Before filing for bankruptcy, Debtor decided to replace  
22 her 13-year old Nissan Sentra, which had 122,000 miles. Post-  
23 petition, Debtor purchased a 2004 Nissan Sentra, with a \$488-per-  
24 month payment, not including insurance (\$112) or operating  
25 expenses such as gas, oil changes, car washes and toll charges  
26 (\$210).

27 (6) As a single woman living alone, Debtor spent little time  
28 at home, eating out at sit-down meals once a week for lunch and

1 once or twice a week for dinner, with her remaining lunches at  
2 fast-food restaurants or sandwich shops. Food cost her \$500 per  
3 month, or about \$16.44 per day.

4 (7) Debtor saw an average of three movies per month and  
5 played golf twice a month, at a cost of \$120 (\$60 each). She  
6 spent \$80 per month on newspaper and magazine subscriptions,  
7 occasional plays, sporting events, and concerts. Debtor also  
8 spent \$205 per month for gifts for family and personal grooming,  
9 including hair-related services and products, and skin-care  
10 products. Having her hair cut, treated and styled on a regular  
11 basis was necessary to maintain an appropriate appearance as a  
12 senior staff analyst for the County. Debtor did not allocate the  
13 \$205 between gifts and grooming, nor did she submit any  
14 information regarding the size of her family or frequency of her  
15 family's gift giving.

16 Through written opposition to the OSC, Debtor's counsel  
17 argued that: (1) a discharge would not be a substantial abuse of  
18 chapter 7 because Debtor's \$290.64 disposable monthly income over  
19 thirty-six months would repay only 4.8% of her unsecured debts,  
20 which is not meaningful; (2) the court failed to sustain its  
21 burden of producing evidence sufficient to overcome the section  
22 707(b) presumption that Debtor is entitled to a discharge; (3)  
23 there was no evidence of bad faith; and (4) Debtor's budget did  
24 not show unreasonable expenses.

25 On April 28, 2004, the court held a hearing on the OSC (the  
26 "Hearing"). Counsel for the United States Trustee ("UST")  
27 appeared at the Hearing, and while not taking a position as to  
28 whether Debtor's case should be dismissed, contended that, under

1 Kelly and Harris v. United States Trustee (In re Harris), 279 B.R.  
2 254 (9th Cir. BAP 2002), the court does not bear the burden of  
3 producing evidence in support of a sua sponte dismissal under  
4 section 707(b). Debtor's counsel argued that Debtor's expenses  
5 were not unreasonable because they were within a few dollars of  
6 the Internal Revenue Service's Collection Financial Standards (the  
7 "IRS Standards").

8 On the record at the Hearing, the court noted its previous  
9 determination that it need not generate evidence, and rejected the  
10 IRS Standards as irrelevant to determining net disposable income  
11 to fund a chapter 13 plan. The court applied the following  
12 standard for calculating net disposable income for purposes of  
13 determining substantial abuse under section 707(b):

14 [D]isposable income means income which is received by  
15 the debtor which is not reasonably necessary to be  
16 expended for maintenance or support of the debtor or a  
17 dependent of the debtor. So the question is, what does  
18 she really need in order to--that's reasonably necessary  
19 for her subsistence? (emphasis added).

20 Based on Debtor's response to the OSC, the court found that  
21 \$90 was not unreasonable for cable Internet, given that Debtor  
22 telecommutes.<sup>7</sup> The court did not discuss Debtor's rent, and made  
23 no adjustments to it. The court expressly found that \$50 was not  
24 reasonably necessary for home maintenance, and allowed nothing for  
25 this expense. The court found \$300 for food to be an appropriate  
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27 <sup>7</sup> We note that Debtor never declared or argued to the  
28 bankruptcy court that she telecommutes; just that she was able to  
telecommute.

1 budget, and found reasonable \$30 for laundry,<sup>8</sup> \$50 for recreation,  
 2 and \$350 for a car. Without explaining the reasons underlying its  
 3 decision, the court allowed \$100 for clothes and \$50 for gifts and  
 4 grooming. The court allowed Debtor's \$205.83 deduction for  
 5 contribution to the County's version of social security.<sup>9</sup>

6 The following table summarizes the court's decision regarding  
 7 the nine categories of expenses identified in the OSC:

8 Expense	Scheduled amount	Allowed amount
9 Rent	\$1,420	\$1,420 <sup>10</sup>
10 Cable TV/Internet	\$90	\$90
11 Home maintenance	\$50	\$0
12 Food	\$500	\$300
13 Clothing	\$210	\$100
14 Laundry and dry cleaning	\$60	\$30
15 Recreation	\$200	\$50
16 Car	\$488	\$350
17 Other: Gifts/Grooming	\$205	\$50
18 Total expenses <sup>11</sup>	\$3,889	\$3,056

19 With Debtor's expenses so adjusted, the court calculated that  
 20 Debtor would have \$833 more per month to fund a chapter 13 plan.  
 21 Added to Debtor's scheduled disposable income of \$290.64 per

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22 <sup>8</sup> Debtor budgeted \$60 for laundry and dry cleaning. The  
 23 transcript from the Hearing reads that "the court will allow \$30 a  
 month as a reasonable laundry and -- expense."

24 <sup>9</sup> This amount is one of four payroll deductions from Debtor's  
 25 gross monthly wages of \$5,986.95.

26 <sup>10</sup> The court did not question Debtor's \$71 rent increase,  
 which Debtor anticipated paying as of July 2004.

27 <sup>11</sup> The total includes Debtor's expenses that were not  
 28 questioned by the court. These expenses total \$666. See supra  
 note 6.

1 month, the court calculated that Debtor would have \$1,123 per  
2 month times thirty-six months, or \$40,428, to fund a chapter 13  
3 plan, which the court found would yield approximately thirty-  
4 percent repayment to her unsecured creditors.<sup>12</sup> In its  
5 computation, the court did not consider the effect of chapter 13  
6 trustee fees<sup>13</sup> or Debtor's attorney fees on return to creditors, or  
7 the effect of Debtor's anticipated, unchallenged \$71 rent  
8 increase.

9 The court made the following findings in support of its  
10 "substantial abuse" determination:

11 Now, she has listed \$139,561 in debt. Of which  
12 most of that debt involves the use of credit cards. So  
13 she has shown a [sic] inability to control her spending  
14 habits. Matter of fact, her spending habits [sic] out  
15 of control. And she wants this Court to sign off on a  
16 Chapter 7 discharge of approximately \$140,000 of credit  
17 card debt when she has the ability to pay by controlling  
18 her expenses approximately \$40,000 on a Chapter 13 plan.  
19 I would divide that by \$139,000. Approximately 30  
20 percent to her creditors. This is a substantial abuse,  
21 and based on the findings of the Court, [sic] and the  
22 question is whether or not you want to convert this case  
23 to a chapter 13 [sic] and have the Court dismiss it.

24 The court gave Debtor until May 4, 2004 to convert her case  
25 to chapter 13 or the case would be dismissed. When Debtor did not  
26 convert the case, the court filed an order dismissing it on May 4,  
27 2004 (the "Dismissal Order"). The Dismissal Order was entered on  
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23 <sup>12</sup> The precise percentage is 28.97%. The actual dollar amount  
24 is \$40,451.04.

25 <sup>13</sup> The chapter 13 trustee fee is not to exceed ten percent.  
26 28 U.S.C. § 586 (e) (1) (B) (i); (e) (2). There is no additional fee  
27 for converting a chapter 7 case to a chapter 13. See Fee  
28 Schedule, Central District of California Bankruptcy Court (issued  
in accordance with 28 U.S.C. § 1930(b) and Rule 1006). Debtor  
calculated the Central District chapter 13 trustee fee to be  
eleven percent, but did not explain the basis for this  
calculation.

1 the docket on May 5, 2004. On May 12, 2004, Debtor filed her  
2 timely notice of appeal.

3 **III. ISSUE**

4 Debtor seeks a resolution of what she perceives to be  
5 conflicting decisions governing the evidentiary requirements  
6 applicable to section 707(b) dismissals depending on whether the  
7 movant is the bankruptcy judge or the UST. Debtor argues that the  
8 court abused its discretion by substituting its own value  
9 judgments for evidence required to overcome the presumption of  
10 entitlement to relief created by section 707(b) and that the court  
11 abused its discretion in dismissing her case under section 707(b).  
12 Thus the issue is:

13 Did the court abuse its discretion by sua sponte dismissing  
14 Debtor's case for substantial abuse under section 707(b) without  
15 expressly applying the section 707(b) presumption that Debtor is  
16 entitled to the requested relief, and without producing evidence  
17 of the reasonableness of Debtor's expenses?

18 **IV. JURISDICTION**

19 The court had jurisdiction via 28 U.S.C. § 1334 and  
20 § 157(b) (1), (b) (2) (A), and (b) (2) (O). We have jurisdiction under  
21 28 U.S.C. § 158(a) and (b), which provide appellate jurisdiction  
22 over final orders. The Dismissal Order is a final order. Kelly,  
23 841 F.2d at 911.

24 **V. STANDARD OF REVIEW**

25 An order dismissing a case for substantial abuse under  
26 section 707(b) is reviewed for abuse of discretion. Gomes, 220  
27 B.R. at 86. A bankruptcy court abuses its discretion if it bases  
28 its ruling on an erroneous view of the law or on a clearly

1 erroneous assessment of the evidence. Id.; Rule 8013 (weight  
2 accorded to bankruptcy court's factual findings). Before we may  
3 reverse under the abuse of discretion standard, we must be  
4 definitely and firmly convinced that the bankruptcy court  
5 committed a clear error of judgment. Price v. United States  
6 Trustee (In re Price), 280 B.R. 499, 501 (9th Cir. BAP 2002),  
7 aff'd 353 F.3d 1135 (9th Cir. 2004).

## 8 VI. DISCUSSION

### 9 A. Lack of findings

10 A threshold issue is the effect of the court's lack of  
11 explanation regarding its reduction of Debtor's clothing expense  
12 from \$210 to \$100 and her gift/grooming expense from \$205 to \$50.<sup>14</sup>  
13 Rather than make findings regarding these two categories of  
14 expenses, the court simply allowed a fixed amount for them. Over  
15 a thirty-six-month plan period, the disposable income created by  
16 the court's adjustment of these two categories totaled \$9,540.  
17 Without these funds, Debtor's repayment to creditors in a three-  
18 year chapter 13 plan, not considering chapter 13 trustee fees,  
19 Debtor's attorney fees, or Debtor's rent increase, would equal  
20 twenty-two percent.<sup>15</sup> Although Debtor's clothing and gift/grooming  
21 expenses comprise part of the court's determination of ability to  
22 pay, the lack of findings regarding these expenses is immaterial

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24 <sup>14</sup> The "findings" requirement of Rule 7052(a) applies to  
25 proceedings to dismiss under section 707(b). Rule 1017(f)(1);  
26 9014; Harris, 279 B.R. at 260 (Klein, J., dissenting). Although  
27 Rule 7052(a) provides that findings are unnecessary on motions,  
findings are desirable and ought to be made whenever decision of a  
matter requires the court to resolve conflicting versions of the  
facts. Canadian Comm'l Bank v. Hotel Hollywood (In re Hotel  
Hollywood), 95 B.R. 130 (9th Cir. BAP 1988).

28 <sup>15</sup>  $\$40,451 - \$9,540 / \$139,561 = 22.15\%$ .

1 if we can obtain a complete understanding of the issues from the  
2 record as a whole. Harris, 279 B.R. at 261.

3 The OSC reveals that the court perceived Debtor's clothing  
4 and gifts/grooming expenses as "excessive". Thus, although the  
5 court did not make findings at the Hearing regarding these  
6 expenses, the record is clear that the court perceived them as not  
7 necessary to support Debtor, as opposed to indicative of any bad  
8 faith. Because we can determine from the record the basis for the  
9 court's reduction of Debtor's clothing and gifts/grooming  
10 expenses, we may review the Dismissal Order.

11 B. Applicable law

12 Section 707(b) allows a court to dismiss a chapter 7  
13 bankruptcy case sua sponte when an individual has primarily  
14 consumer debt and the court finds that granting relief would be a  
15 "substantial abuse" of the provisions of chapter 7. Section  
16 707(b) was added to the Bankruptcy Code in 1984 as part of a  
17 package of consumer credit amendments designed to reduce perceived  
18 abuses of chapter 7, such as debtors who could easily pay their  
19 creditors avoiding their obligations through the chapter 7  
20 discharge. 6 Collier on Bankruptcy, ¶ 707.04 at 707-15 (Alan N.  
21 Resnick et al. eds., 15th ed. 2001); S. Rep. No. 98-65 at 54  
22 (1983).<sup>16</sup>

23 Section 707(b) provides, in relevant part:

24 After notice and a hearing, the court, on its own  
25 motion or on a motion by the United States trustee, but  
26 not at the request or suggestion of any party in  
interest, may dismiss a case filed by an individual

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27 <sup>16</sup> Prior to the addition of section 707(b), "cause," as  
28 specified by section 707(a) was the sole basis for dismissal of a  
chapter 7 case. 6 Collier, ¶ 707.04 at 707-15.

1 debtor under this chapter whose debts are primarily  
2 consumer debts if it finds that the granting of relief  
3 would be a substantial abuse of the provisions of this  
chapter. There shall be a presumption in favor of  
granting the relief requested by the debtor. . . .

4 Thus, dismissal under section 707(b) requires: (1) a motion  
5 by a court or the UST; (2) a debtor who has primarily consumer  
6 debts; and (3) a finding that granting relief would be a  
7 "substantial abuse" of chapter 7. 11 U.S.C. § 707(b); Price, 353  
8 F.3d at 1138.

9 In this case, the court moved for dismissal under section  
10 707(b), and Debtor did not oppose the characterization of her  
11 debts as primarily consumer debts.<sup>17</sup> Thus, the issue on appeal is  
12 whether the court abused its discretion in finding--without  
13 expressly considering the section 707(b) presumption, and without  
14 producing any objective evidence regarding the reasonableness of  
15 Debtor's expenditures--that granting relief would be a substantial  
16 abuse of chapter 7.

17 1. Substantial abuse

18 There is no mechanical formula for determining whether a  
19 debtor's use of chapter 7 is a "substantial abuse." Rather,  
20 Congress committed this question to the discretion of bankruptcy  
21 judges. Price, 353 F.3d at 1140.

22 The seminal Ninth Circuit decision interpreting "substantial  
23 abuse" is Kelly. In that case, the court held that a debtor's  
24 ability to pay debts when due, as determined by the debtor's  
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26  
27 <sup>17</sup> "[C]onsumer debt' means debt incurred by an individual  
28 primarily for a personal, family, or household purpose." 11  
U.S.C. § 101(8).

1 ability to fund a chapter 13 plan,<sup>18</sup> is the primary factor relevant  
2 to determining whether granting relief would be a substantial  
3 abuse. Kelly, 841 F.2d at 914. The court grounded this  
4 interpretation of substantial abuse in the legislative history,  
5 which shows that, as originally introduced in 1983, section 707(b)  
6 contained a formula for determining the exact point at which a  
7 debtor's ability to pay some debts would foreclose chapter 7  
8 relief. Kelly, 841 F.2d at 914. This formula was eliminated,  
9 however, in favor of the open-ended formulation ultimately  
10 codified. Id. Congress stated that the purpose of the statute  
11 was to "uphold [ ] creditors' interests in obtaining repayment  
12 where such repayment would not be a burden," and said that "if a  
13 debtor can meet his debts without difficulty as they come due, use  
14 of Chapter 7 would represent a substantial abuse." Id. (quoting  
15 S. Rep. No. 65, 98th Cong., 1st Sess. 53, 54 (1983)) (brackets in  
16 original).

17 Last year, the Ninth Circuit reaffirmed the holding in Kelly,  
18 clarifying that while a court *may* consider the totality of  
19 circumstances to determine substantial abuse, it is not *required*  
20  
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23 <sup>18</sup> The standard term of a chapter 13 plan is three years.  
24 Section 1322(c). It would likely be error to calculate ability to  
25 pay over a longer period. See Washington Student Loan Guar. Ass'n  
26 v. Porter (In re Porter), 102 B.R. 773, 777 (9th Cir. BAP 1989)  
27 (debtors must voluntarily choose to extend their plan beyond three  
28 years); cf. Graves v. Myrvang (In re Myrvang), 232 F.3d 1116, 1122  
(9th Cir. 2000) (bankruptcy court did not err in ordering  
repayment of non-dischargeable debt over five years); but  
see Behlke v. United States Trustee (In re Behlke), 358 F.3d 429,  
437-38 (6th Cir. 2004) (dismissal for substantial abuse not abuse  
of discretion when adjusted disposable income was sufficient to  
pay 14-23% in hypothetical three- and five-year plans).

1 to do so.<sup>19</sup> Price, 353 F.3d at 1140. Rather, a “debtor’s ability  
2 to pay his debts will, standing alone, justify a section 707(b)  
3 dismissal.” Id. (quoting Kelly, 841 F.2d at 914).

4 2. Section 707(b) presumption

5 Section 707(b) opaquely provides that: “[t]here shall be a  
6 presumption in favor of granting the relief requested by the  
7 debtor.” The Ninth Circuit has interpreted this presumption as  
8 “a caution and a reminder” to the bankruptcy court that the Code  
9 and Congress favor the granting of bankruptcy relief. Kelly, 841  
10 F.2d at 917. This means that, when the movant is the court, the  
11 court should “give the benefit of any doubt to the debtor and  
12 dismiss a case only when a substantial abuse is clearly present.”  
13 Id. (quoting 4 Collier § 707.08, at 707-19 (15th ed. 1987))  
14 (emphasis added).<sup>20</sup>

15 To rebut the section 707(b) presumption, evidence is  
16 required. Harris, 279 B.R. at 260-61; see also Kelly, 841 F.2d at  
17 917; Fed. R. Evid. 301. When the movant is the court, the burden  
18 of producing evidence rests on the debtor and, if appropriate,  
19 other parties, and the court is relieved of the burden of  
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21 <sup>19</sup> The other factors identified by the court include:  
22 (1) whether debtor’s petition was filed as a consequence of  
23 illness, disability, unemployment, or some other calamity;  
24 (2) whether the schedules suggest that debtor obtained cash  
25 advances and consumer goods on credit exceeding her ability to  
26 repay them; (3) whether debtor’s proposed family budget is  
excessive; (4) whether debtor’s Schedules I & J misrepresent her  
financial condition; and (5) whether debtor has engaged in eve-of-  
bankruptcy purchases. Price, 353 F.3d at 1139-40 (citing 3 Norton  
Bankruptcy Law & Practice 2d § 67:5, at 67-10 (William L. Norton,  
Jr. et al. eds., 1997)).

27 <sup>20</sup> Cf. Harris, 279 B.R. at 260 (finding of substantial abuse  
28 should be supported by preponderance of the evidence when movant  
is UST).

1 producing evidence. Kelly, 841 F.2d at 917. The court that moves  
2 to dismiss under section 707(b) may, however, rely on its own  
3 value judgments to determine the reasonableness of a debtor's  
4 expenses. Kelly, 841 F.2d at 915 (affirming bankruptcy court's  
5 disallowance as excessive one-half of debtors' \$500 per month  
6 recreation expense). When the movant is the UST, the presumption  
7 is rebutted only by objective, admissible evidence regarding the  
8 reasonableness of a debtor's expenses sufficient to support a  
9 finding of ability to repay. Harris, 279 B.R. at 261.

10       Excusing the court from the burden of producing evidence and  
11 imposing such burden on the UST is justified by the UST's ability  
12 to obtain and present evidence and the court's inability to do  
13 so.<sup>21</sup> For example, the UST has a duty to convene and preside at a  
14 meeting of creditors, at which the Debtor is required to appear  
15 and submit to examination about his or her finances under oath.  
16 11 U.S.C. §§ 341, 343; Rule 2004. The court, however, may not  
17 participate in that meeting. 11 U.S.C. § 341(c). For this same  
18 reason, it is appropriate to allow a court to rely on its value  
19 judgments to question the reasonableness of a debtor's expenses,  
20 while not permitting use of such judgments when the movant is the  
21 UST, who is able to develop other evidence. Otherwise the court  
22 would have no effective way of exercising its authority to dismiss

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23  
24       <sup>21</sup> Relieving the court from the burden of producing evidence  
25 does not render a judge unable to identify appropriate cases for  
26 dismissal under section 707(b) or deprive the reviewing court of a  
27 record for review. Before dismissing a chapter 7 case sua sponte  
28 for substantial abuse, the court must set forth all issues to be  
considered at the section 707(b) hearing. Rule 1017(e)(2). This  
provides a debtor with an opportunity to introduce evidence to  
contradict the court's proposed findings, and enables the court to  
make specific findings regarding the reasonableness of a debtor's  
expenses.

1 chapter 7 cases under section 707(b) sua sponte.

2 A court that relies on its own judgments to identify  
3 excessive expenses can draw on its own experience generally or  
4 specifically within the geographic area where the debtor resides.<sup>22</sup>  
5 The court cannot, however, rely on its value judgments in a manner  
6 that fails to give effect to the section 707(b) presumption.

7 In order to overcome the section 707(b) presumption in favor  
8 of the relief sought by Debtor, the court needed to articulate and  
9 explain the clear abuse before it. Interpreting the presumption  
10 in this manner ensures that the Debtor receives the benefit of the  
11 doubt that the presumption is designed to provide, and ensures  
12 that the reviewing court is presented with the precise factors  
13 upon which the bankruptcy court's substantial-abuse determination  
14 is based. Here, the court did not explain why Debtor's various  
15 budget items were excessive or identify what factors in addition  
16 to ability to pay and excessive spending, if any, the court was  
17 relying on in finding substantial abuse (such as Debtor's stable

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19 <sup>22</sup> Thus, we do not believe the court is duty bound to deny its  
20 own sua sponte inquiry into a substantial abuse case, as the court  
21 found itself obligated to do in In re Love, 61 B.R. 558, 559  
(Bankr. S.D. Fla. 1986), when it concluded its poetic disposition  
of the matter as follows:

22 Tell me raven, how to go.  
23 As I with the ruling wrestled  
24 In the statute I saw nestled  
A presumption with a flavor clearly  
in the debtor's favor.  
25 No evidence had I taken  
Sua sponte appeared foresaken [sic].  
26 Now my motion caused me terror  
A dismissal would be error.  
27 Upon consideration of § 707(b), in anguish,  
loud I cried  
28 The court's sua sponte motion to dismiss  
under § 707(b) is denied.

1 employment or lack of pre-petition health calamity). Accordingly,  
2 we must reverse.

3 The court's finding of ability to pay was based on a  
4 reduction of Debtor's future expenses to below the level required  
5 for Debtor to meet her basic needs as established by the  
6 unadjusted IRS Standards. Compare Education Credit Mgmt. Corp. v.  
7 Howe (In re Howe), 319 B.R. 886 (9th Cir. BAP 2005) (noting that  
8 unadjusted IRS Standards do not provide for certain expenses  
9 courts have recognized as necessary to maintenance of minimal  
10 standard of living) with Kelly, 841 F.2d at 915 n.9 (adopting less  
11 restrictive "best efforts" approach under section 1325(b)(2)(A) as  
12 test for determining debtor's "ability to pay").<sup>23</sup> The unadjusted  
13 IRS Standards represent a calculation of an individual's basic  
14 living expenses. Howe, 319 B.R. at 890. Here, the court's  
15 finding of "ability to pay" required lowering Debtor's future  
16 expenses more than \$400 per month below the aggregate levels  
17 established by the unadjusted IRS Standards:<sup>24</sup>

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19 ///

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21 <sup>23</sup> The unadjusted IRS Standards are set forth at  
22 [www.irs.gov/individuals/article/0,,id=96543,00.html](http://www.irs.gov/individuals/article/0,,id=96543,00.html) (January 21,  
23 2005). These expenses can be adjusted when adherence to them  
24 would result in the affected individual having inadequate means to  
25 provide for basic, necessary living expenses. Howe, 319 B.R. at  
26 890-91.

27 <sup>24</sup> Individuals who owe taxes to the IRS are allowed the total  
28 "National Standards" for their family size and income level,  
without regard to the amount actually spent. The National  
Standards embody five necessary expenses: food, housekeeping  
supplies, apparel and services, personal care products and  
services, and miscellaneous. Unlike with respect to the National  
Standards, the taxpayer is allowed the lesser of the amount  
actually spent or the standard Housing and Utilities expenses and  
Transportation expenses.

IRS Primary Category	IRS Sub-category	IRS Allowance	Scheduled expenses	Expenses allowed by Court
National Standards	Food	\$543	\$500	\$300
National Standards	Housekeeping supplies	\$51	\$50	\$0
National Standards	Apparel & services	\$207	\$270 <sup>25</sup>	\$130
National Standards	Personal care	\$44	\$205 (gift/grooming)	\$50
National Standards	Misc.	\$108	\$200 (recreation)	\$50
Housing and Utilities <sup>26</sup>	N/a	\$1,712, \$1,748 <sup>27</sup>	\$1,712, \$1,779 <sup>28</sup>	\$1,712
Transportation	Car ownership	\$475	\$488	\$350
Transportation	Operating costs	\$353	\$332 <sup>29</sup>	\$332
		\$0	\$132 <sup>30</sup>	\$132
<b>Total</b>		\$3,493, \$3,529	\$3,889, \$3,960	\$3,056

<sup>25</sup> Includes Debtor's clothing expense (\$210) and laundry/dry cleaning expense (\$60).

<sup>26</sup> Debtor's rent (\$1,420, \$1,491), Cable TV/Internet (\$90), electricity and heating fuel (\$80), water and sewer (\$30), renter's insurance (\$17), and telephone (\$75).

<sup>27</sup> The smaller number does not include Debtor's rent increase. The larger number includes the portion of Debtor's rent increase (\$36) allowed by the IRS Standards.

<sup>28</sup> The smaller number does not include Debtor's rent increase; the larger number does.

<sup>29</sup> Car insurance (\$112); operating costs (\$210).

<sup>30</sup> Medical and dental expenses (\$65), health insurance (\$2), and charitable contributions (\$75).

1 To the extent the court relied primarily on Debtor's future  
2 ability to pay in finding substantial abuse, it improperly applied  
3 an overall "subsistence" standard to a determination of what would  
4 be expected of Debtor to avoid abusing her bankruptcy  
5 entitlement.<sup>31</sup> We also note that the court's finding of "ability  
6 to pay" omitted the mandatory ten percent chapter 13 Trustee fee,  
7 fees for Debtor's counsel, and Debtor's rent increase, after  
8 subtraction of which Debtor, living at the subsistence level  
9 allowed by the court, would have only had \$31,350.24<sup>32</sup> to repay the  
10 \$139,561 owing to her creditors, rather than the \$40,000 found by  
11 the court.

12 We acknowledge that the court had broad discretion and that  
13 it was also concerned about the Debtor's long-time habit of  
14 borrowing in excess of her ability to pay. Indeed, Price tells us  
15 that consideration of such habits, and of an excess budget, may  
16 also bear on a court's decision to dismiss under section 707(b).<sup>33</sup>  
17 However, the court's discretion is bounded by the presumption,  
18 which must be applied expressly to ensure that debtors receive its  
19 benefit.

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21 <sup>31</sup> Of course, inability to pay will not shield a debtor from  
22 dismissal under section 707(b) when bad faith is otherwise shown.  
23 Kelly, 841 F. 2d at 915. There has been no finding of bad faith  
24 here, and we reject Debtor's argument that a finding of bad faith  
25 is required when a debtor cannot repay all of her debt. See,  
26 e.g., Price, 353 F.3d at 1140 (noting that Congress committed  
27 question of what constitutes substantial abuse to the discretion  
28 of bankruptcy judges within context of Bankruptcy Code).

26 <sup>32</sup> \$4,179.64/month of income - \$3,056 in monthly subsistence  
27 expenses allowed by court = \$1,123.64 - \$112.36 (10% trustee fee)  
28 - \$69.44 (\$2,500 attorneys fees amortized over 36 months) - \$71  
(rent increase) = \$870.84 x 36 = \$31,350.24. This is a 22.4%  
dividend.

<sup>33</sup> See supra note 19.

1 **VII. CONCLUSION**

2 For the reasons stated herein, we REVERSE and REMAND with  
3 instructions for the court to reconsider, in a manner consistent  
4 with this opinion, whether, expressly giving the benefit of "any  
5 doubt" to Debtor, substantial abuse is "clearly" present in this  
6 case.

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