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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-14-1056-DKiTa  
)  
PAUL RICHARD CHERRETT AND )  
COLLEEN COURTNEY CHERRETT, ) Bk. No. RS 13-24792-SC  
)  
Debtors. )

ASPEN SKIING COMPANY, )  
)  
Appellant, )

v. ) O P I N I O N  
)

PAUL RICHARD CHERRETT; )  
COLLEEN COURTNEY CHERRETT; )  
ART CISNEROS, Chapter 7 )  
Trustee, )  
)  
Appellees. )

Argued and Submitted on October 23, 2014  
at Malibu, CA

Filed -November 7, 2014

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

Honorable Scott C. Clarkson, Bankruptcy Judge, Presiding.

Appearances: Scott H. Talkov of Reid & Hellyer appeared and  
argued for appellant Aspen Skiing Co.; Kathleen J.  
McCarthy of the Law Office of Thomas H. Casey,  
Inc. appeared and argued and Leslie Keith Kaufman  
of Kaufman & Kaufman appeared for the appellees  
Paul and Colleen Cherrett.

Before: DUNN, KIRSCHER, and TAYLOR, Bankruptcy Judges.

1 DUNN, Bankruptcy Judge:  
2

3 Appellant Aspen Skiing Company ("Aspen") appeals the  
4 bankruptcy court's order denying its motion to dismiss Paul and  
5 Colleen Cherretts' (the "Cherretts") chapter 7 case under  
6 § 707(b)(1) based on its finding and conclusion that the  
7 Cherretts' debts were not primarily consumer debts.<sup>1</sup> We AFFIRM.

8 **I. FACTUAL BACKGROUND**

9 A. Pre-Bankruptcy Events

10 Paul Cherrett ("Paul")<sup>2</sup> works in the hospitality industry and  
11 has worked for a number of employers during his career.  
12 Apparently, Paul is good at what he does, and his compensation  
13 historically has been high.

14 Beginning in 1998, Paul's employment compensation packages  
15 have included loans to assist him in securing housing. On  
16 January 16, 1998, Paul's new employer at that time, Four Seasons  
17 Hotel - Austin, provided, through its owner, two interest-free  
18 loans totaling \$150,000 to the Cherretts to assist them in  
19 purchasing a residence in Austin, Texas. The Cherretts  
20 subsequently sold their Austin residence on August 9, 2002, for a  
21 profit after repaying the senior secured loan and the "employer-  
22 sponsored" subordinate loans secured by the property.

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23  
24 <sup>1</sup> Unless otherwise indicated, all chapter and section  
25 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-  
26 1532, and all "Rule" references are to the Federal Rules of  
27 Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule"  
28 references are to the Federal Rules of Civil Procedure.

<sup>2</sup> We refer to Mr. Cherrett by his first name for  
convenience. No disrespect is intended.

1           On August 12, 2002, Paul's new employer, Four Seasons Hotel  
2 - Jackson Hole, provided, through its owner, an interest-free  
3 loan to assist the Cherretts in acquiring a residence in Jackson,  
4 Wyoming (the "Jackson Residence"). When the Cherretts ultimately  
5 sold the Jackson Residence in 2009, they realized a profit of  
6 approximately \$250,000 after paying all liens on the property,  
7 including the employer-sponsored loan.

8           Paul first was contacted by Aspen in December 2006 to  
9 consider an employment opportunity, but since the open position  
10 was essentially comparable to his current job, he thanked Aspen's  
11 representative but indicated that he was not interested.  
12 Approximately three months later, Paul received an e-mail from a  
13 "headhunter" about a position with Aspen of substantially greater  
14 responsibility. He expressed interest and went through the job  
15 interview process.

16           Apparently, Aspen liked what they heard in his interviews,  
17 and Paul entered into employment negotiations with Aspen. The  
18 initial salary proposed by Aspen, at least from Paul's  
19 perspective, did not cover the high cost of living/housing in the  
20 Aspen, Colorado area. Ultimately, Paul accepted a written offer  
21 of employment from Aspen that included a \$300,000 salary, a  
22 "signing bonus" of \$75,000, participation in an incentive plan  
23 for potential additional compensation annually, and the following  
24 provisions for a "housing loan" ("Housing Loan"):

25           Your offer includes a housing loan of up to \$500,000,  
26 which would be second to your primary mortgage. This  
27 program will include an annual bonus guaranteed to  
28 offset your tax liability for the interest on this  
loan, calculated at a 35% tax rate. You will receive a  
guaranteed annual bonus of up to \$33,750 to offset the  
annual interest on this loan, as well as your tax

1 liability (\$25,000 in interest, \$8,750 for taxes,  
2 assuming principal of \$500,000). This bonus will be  
3 paid simultaneous to the date upon which annual  
4 interest on the loan is due, to ensure you have no  
5 annual out of pocket expenses related to the financing  
6 of this loan. You will not be required to repay any  
7 additional interest on this loan, if your employment  
8 with [Aspen] continues through 2015.

9 In addition, Paul agreed with Aspen that if his employment with  
10 Aspen terminated (other than as a result of death or disability)  
11 or he ceased to reside at the property purchased with the Housing  
12 Loan (either alternative designated as a "Repayment Event") prior  
13 to December 31, 2015, Paul would be required to pay the following  
14 amounts in addition to repayment of the Housing Loan:

15 If the Repayment Event occurs in years 1-2, the  
16 reimbursement amount will be \$140,000[;] If the  
17 Repayment Event occurs in years 3-4, the reimbursement  
18 amount will be \$120,000; If the Repayment Event occurs  
19 in years 5-6, the reimbursement amount will be  
20 \$100,000; If the Repayment Event occurs in years 7-8,  
21 the reimbursement amount will be \$80,000.

22 An aspect of Paul's prospective employment with Aspen that  
23 particularly interested him was the potential for participating  
24 in expanding the "Little Nell Hotel" brand beyond the Aspen,  
25 Colorado area. Aspen owned one Little Nell Hotel, but there was  
26 a project already under way to build a new Little Nell Hotel in  
27 Jackson Hole, Wyoming. One of Paul's roles with Aspen was "to  
28 grow the [Little Nell] brand."

Paul went to work for Aspen in the spring of 2007. When he  
accepted the job, he realized that he would have to live in the  
Aspen, Colorado area, at least for a while.

In June 2007, the Cherretts purchased a condominium in  
Basalt, Colorado ("Colorado Residence") for \$995,000, and Paul  
began living in it. The Cherretts contributed cash, borrowed

1 \$417,000 secured by a first trust deed on the Colorado Residence,  
2 and borrowed \$500,000, the Housing Loan, from Aspen secured by a  
3 second trust deed, to fund the purchase of the Colorado  
4 Residence. When he bought the Colorado Residence, Paul hoped  
5 that it would appreciate in value so that when it was sold, the  
6 Cherretts would realize a profit. Initially, at least, Paul  
7 considered the Colorado Residence to be a "place holder until we  
8 got settled." The Cherretts purchased the Colorado Residence at  
9 the "very peak of the real estate bubble."

10 When the Cherretts bought the Colorado Residence, Mrs.  
11 Cherrett ("Colleen")<sup>3</sup> continued to reside in the Jackson  
12 Residence. The Colorado Residence was a 1400 square feet, two  
13 bedroom condominium. The Jackson Residence was a 4,000 square  
14 feet, four bedroom house. The Cherretts have two children. At  
15 the time that they bought the Colorado Residence, their son was  
16 graduating from high school and would be off to college in the  
17 fall. However, their daughter had two years more in high school,  
18 and Colleen stayed with her at the Jackson Residence until she  
19 graduated from high school, by which time, the Jackson Residence  
20 was sold. Colleen did not move to the Colorado Residence until  
21 June or July 2009.

22 In the meantime, 2008 brought the recession, and Aspen  
23 "pulled the plug" on expanding the Little Nell Hotel brand to  
24 Jackson Hole. In addition, the value of the Colorado Residence  
25 plummeted, and the Cherretts' hopes of realizing a profit on  
26

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27 <sup>3</sup> Again, we refer to Mrs. Cherrett by her first name for  
28 convenience. No disrespect is intended.

1 resale evaporated. Paul remained with Aspen until 2011, when he  
2 resigned from Aspen to go to work for Talisker Mountain Company  
3 ("Talisker") in Park City, Utah, at a higher level of  
4 compensation. He worked for Talisker for a year and then  
5 attempted to start his own business. In April 2013, he accepted  
6 employment with a Hilton company and moved to California.

7 B. The Cherretts' Bankruptcy Proceedings

8 The Cherretts filed their chapter 7 petition in the  
9 bankruptcy court for the Central District of California on August  
10 30, 2013. In their petition, the Cherretts stated that their  
11 debts were primarily "consumer debts," as defined in § 101(8).  
12 The only real property listed on their Schedule A was the  
13 Colorado Residence, and on their Schedule D, the Cherretts valued  
14 the Colorado Residence at \$420,000 and listed two undisputed  
15 debts: a \$417,000 fully secured first mortgage debt to Everhome  
16 Mortgage, and a \$550,000 debt to Aspen, of which \$547,000 was  
17 listed as unsecured. The only other debts included in the  
18 Cherretts' schedules were two unsecured debts on Schedule F: a  
19 \$25,444 student loan debt to Sallie Mae, and a \$4,200 debt for  
20 homeowners association dues. In their schedules, the Cherretts  
21 indicated that they intended to surrender the Colorado Residence.

22 On November 27, 2013, Aspen filed a motion to dismiss  
23 ("Motion to Dismiss") the Cherretts' chapter 7 case as an abuse  
24 under § 707(b)(1) and Rule 1017, arguing that the Cherretts had  
25 sufficient projected disposable income to pay all or  
26 substantially all of their creditors in full through a chapter 13  
27 plan. Aspen relied on the Cherretts' admission in their petition  
28 that their debts were primarily consumer debts but also cited the

1 Ninth Circuit's decision in Zolg v. Kelly (In re Kelly), 841 F.2d  
2 908, 913 (9th Cir. 1988), for the proposition that, "[i]t is  
3 difficult to conceive of any expenditure that serves a 'family  
4 . . . or household purpose' more directly than does the purchase  
5 of a home."

6 On December 4, 2013, the Cherretts amended their bankruptcy  
7 petition to state that their debts were primarily business debts.  
8 On the same day, the Cherretts filed their opposition to the  
9 Motion to Dismiss, arguing that their debts (focusing on the  
10 Housing Loan debt) were primarily "Non-Consumer" debts.  
11 Consequently, § 707(b)(1) did not apply, and their chapter 7 case  
12 was not an "abuse." They argued that if second mortgage debt,  
13 such as the Housing Loan, was incurred for a business purpose or  
14 with a profit motive, it was not "consumer debt."

15 Aspen filed a reply on December 11, 2013, challenging the  
16 Cherretts' credibility and reiterating its position, based on In  
17 re Kelly, that debts incurred for the purchase of a personal  
18 residence are consumer debts.

19 The bankruptcy court scheduled an evidentiary hearing  
20 ("Hearing") for January 22, 2014 on the Motion to Dismiss,  
21 limited to the issue of "whether the debt owed to [Aspen] is a  
22 consumer debt or non-consumer debt." The parties subsequently  
23 exchanged discovery; Aspen's counsel took the deposition of Paul;  
24 and the parties filed trial briefs and evidentiary submissions.

25 At the Hearing, Paul testified and was examined at length by  
26 counsel for both Aspen and the Cherretts. The bankruptcy court  
27 then heard argument and engaged in extensive colloquy with  
28 counsel. At the conclusion of the Hearing, the bankruptcy court

1 announced its findings and conclusions orally. Specifically, the  
2 bankruptcy court found that Paul's purposes in securing the  
3 Housing Loan were primarily employment and business purposes.  
4 Accordingly, the bankruptcy court determined that the Housing  
5 Loan was not consumer debt and denied the Motion to Dismiss.

6 On February 3, 2014, the bankruptcy court entered an order  
7 ("Order") denying the Motion to Dismiss for the reasons stated on  
8 the record at the Hearing. Aspen filed a timely Notice of  
9 Appeal.

## 10 II. JURISDICTION

11 The bankruptcy court had jurisdiction under 28 U.S.C.  
12 §§ 1334 and 157(b)(2)(A) and (O). However, before we can review  
13 this appeal, we must consider our own jurisdiction to hear it.

14 We have jurisdiction to hear bankruptcy appeals from final  
15 orders, judgments and decrees. See 28 U.S.C. § 158. Given the  
16 unique nature of bankruptcy proceedings, we apply a pragmatic  
17 approach to determine the finality of orders. Congrejo Invs.,  
18 LLC v. Mann (In re Bender), 586 F.3d 1159, 1163 (9th Cir. 2009).  
19 A bankruptcy court order is final and thus appealable "'where it  
20 1) resolves and seriously affects substantive rights and 2)  
21 finally determines the discrete issue to which it is addressed.'" SS Farms, LLC v. Sharp (In re SK Foods, L.P.), 676 F.3d 798, 802  
22 (9th Cir. 2012)(quoting Dye v. Brown (In re AFI Holding, Inc.),  
23 530 F.3d 832, 836 (9th Cir. 2008)).

24 Generally, an order denying a motion to dismiss is  
25 interlocutory. Hickman v. Hana (In re Hickman), 384 B.R. 832,  
26 836 (9th Cir. BAP 2008)(citing Sherman v. SEC (In re Sherman),  
27 491 F.3d 948, 967 n.24 (9th Cir. 2007)(reviewing § 707(a) motion  
28

1 to dismiss); and Dunkley v. Rega Props., Ltd. (In re Rega Props.,  
2 Ltd.), 894 F.2d 1136, 1137-39 (9th Cir. 1990)(reviewing § 1112(b)  
3 motion to dismiss)). But the new provisions added to § 707(b)  
4 under the Bankruptcy Abuse Prevention and Consumer Protection Act  
5 of 2005, Pub. L. 109-8, 119 Stat. 23 (2005) ("BAPCPA"), "manifest  
6 a congressional policy to police all Chapter 7 cases for abuse at  
7 the outset of a Chapter 7 proceeding, and . . . raise pragmatic  
8 considerations that indicate that the denial of a § 707(b) motion  
9 to dismiss is different from the denial of other motions to  
10 dismiss [e.g., Civil Rule 12(b) or § 1112(b)(1)-(4) motions]." McDow v. Dudley, 662 F.3d 284, 288 (4th Cir. 2011). "Section  
11 707(b) creates a statutory gateway based on whether the case is  
12 abusive, and an order denying that motion to dismiss as abusive,  
13 in effect, finally and conclusively resolves the issue. If the  
14 denial of a § 707(b) motion to dismiss cannot be appealed  
15 immediately to the district court, the Chapter 7 proceedings  
16 would have to be completed before it could be determined whether  
17 the proceedings were abusive in the first place." Id. at 289-90  
18 (citation omitted).  
19

20 The Ninth Circuit has not yet specifically addressed the  
21 finality of orders denying motions to dismiss chapter 7 cases for  
22 abuse under § 707(b) after BAPCPA. However, the First, Third,  
23 Fourth, Fifth, Seventh and Eighth Circuits consider such orders  
24 to be final based on practicality, judicial efficiency and other  
25 pragmatic considerations. See Morse v. Rudler (In re Rudler),  
26 576 F.3d 37, 43-44 (1st Cir. 2009)(holding that an order denying  
27 a motion to dismiss under § 707(b), "where the dispute at issue  
28 turns on a question of law," is final because delaying

1 consideration of the legal question in such an order "may  
2 frustrate both principles of judicial economy and Congress's goal  
3 of ensuring that debtors allocate as much of their resources as  
4 possible toward repaying their debts. . . . [M]otions to dismiss  
5 for abuse under section 707(b) are subject to statutory  
6 deadlines, presumably foreclosing renewed requests for dismissal  
7 as the Chapter 7 case proceeds."); In re Christian, 804 F.2d 46,  
8 48 (3d Cir. 1986)(determining it had jurisdiction to review an  
9 order denying a motion to dismiss a chapter 7 case under  
10 § 707(b), based on judicial efficiency and practicality, for, if  
11 such an order was "not now appealable the entire bankruptcy  
12 proceedings must be completed before it can be determined whether  
13 they were proper in the first place"); McDow v. Dudley, 662 F.3d  
14 at 290 (holding that "pragmatic considerations of preserving  
15 resources for creditors in bankruptcy and promoting judicial  
16 economy weigh heavily in favor of recognizing the finality of an  
17 order denying a § 707(b) motion to dismiss"); U.S. Trustee v.  
18 Cortez (In re Cortez), 457 F.3d 448, 453-54 (5th Cir.  
19 2006)(determining that a district court's order remanding a  
20 bankruptcy court's order denying the trustee's motion to dismiss  
21 under § 707(b) is a final order because the remand order left  
22 only ministerial tasks for the bankruptcy court); Ross-Tousey v.  
23 Neary (In re Ross-Tousey), 549 F.3d 1148, 1152-54 (7th Cir.  
24 2008)(determining that the district court's remand order and the  
25 bankruptcy court's order denying the U.S. Trustee's motion to  
26 dismiss under § 707(b)(2) and (b)(3)(B) were final), abrogated on  
27 other grounds by Ransom v. FIA Card Servs., N.A., 562 U.S. 61  
28 (2011); Stuart v. Koch (In re Koch), 109 F.3d 1285, 1288 (8th

1 Cir. 1997):

2 If [orders denying dismissal for substantial abuse]  
3 cannot be appealed, bankruptcy proceedings must 'be  
4 completed before it can be determined whether they were  
5 proper in the first place.' In re Christian, 804 F.2d  
6 [46,] 48 [(3rd Cir. 1986)]. Requiring trustees to  
7 complete Chapter 7 proceedings before appealing denial  
8 of their § 707(b) motions wastes debtor resources that  
9 should be used to pay creditors, and forces trustees  
10 and bankruptcy courts to expend their scarce  
11 institutional resources on abusive Chapter 7  
12 petitioners. Thus 'the policies of judicial efficiency  
13 and finality are best served' by allowing prompt  
14 appellate review of § 707(b) denials. Zolg v. Kelly  
15 (In re Kelly), 841 F.2d at 911.

16 We agree with the reasoning of the circuits that have  
17 addressed the issue regarding the finality of orders denying  
18 § 707(b) motions to dismiss. If such an order is not considered  
19 final, the moving party and the debtor will have to wait until  
20 the case is completed, which "wastes debtor resources that should  
21 be used to pay creditors, and forces trustees and bankruptcy  
22 courts to expend their scarce institutional resources on abusive  
23 Chapter 7 petitioners." McDow, 662 F.3d at 290 (quoting Koch,  
24 109 F.3d at 1288)(internal quotation marks omitted). Moreover,  
25 postponing the appeal until the end of the bankruptcy case could  
26 result in the need to unwind various administrative actions,  
27 likely with some difficulty (e.g., having to revoke the debtor's  
28 discharge, potentially compelling creditors to disgorge  
distributions made by the trustee).

Alternatively, even if the Order is interlocutory, we have  
jurisdiction to review it because we earlier granted leave to  
appeal to the extent necessary under 28 U.S.C. § 158(a)(3) based

1 on the pragmatic considerations discussed above.<sup>4</sup>

2 **III. ISSUE**

3 When denying the Motion to Dismiss for abuse under  
4 § 707(b)(1), did the bankruptcy court err in finding that the  
5 Housing Loan was non-consumer debt?

6 **IV. STANDARDS OF REVIEW**

7 We review de novo issues of statutory construction and  
8 conclusions of law, including a bankruptcy court's interpretation  
9 of the Bankruptcy Code. Samson v. W. Capital Partners, LLC (In  
10 re Blixseth), 684 F.3d 865, 869 (9th Cir. 2012)(per curiam).

11 We review a bankruptcy court's findings of fact for clear  
12 error. Decker v. Tramiel (In re JTS Corp.), 617 F.3d 1102, 1109  
13 (9th Cir. 2010)(quoting Leichty v. Neary (In re Strand), 375 F.3d  
14 854, 857 (9th Cir. 2004)). "We will affirm a [bankruptcy  
15 court's] factual finding unless that finding is illogical,  
16 implausible, or without support in inferences that may be drawn  
17 from the record." U.S. v. Hinkson, 585 F.3d 1247, 1263 (9th Cir.  
18 2009) (en banc). See also Anderson v. City of Bessemer City,  
19 N.C., 470 U.S. 564, 574 (1985)("Where there are two permissible  
20 views of the evidence, the factfinder's choice between them  
21 cannot be clearly erroneous."). We must accept a bankruptcy  
22

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23 <sup>4</sup> Aspen filed its opening brief on March 24, 2014. In its  
24 opening brief, Aspen argued that the Order was final.  
Alternatively, Aspen sought leave to appeal.

25 On March 26, 2014, a clerk's order was issued ("Clerk's  
26 Order Re: Finality"), asking the Cherretts to respond to the  
question of whether the Order was final. After reviewing the  
27 Cherretts' and Aspen's responses to the Clerk's Order Re:  
Finality, an order was issued on May 12, 2014, granting leave to  
28 appeal to the extent necessary under 28 U.S.C. § 158(a)(3).

1 court's findings of fact unless we have a definite and firm  
2 conviction that a mistake has been committed. In re JTS Corp.,  
3 617 F.3d at 1109.

4 We review de novo mixed questions of law and fact. Id.

#### 5 V. DISCUSSION

6 Under § 707(b)(1), after notice and a hearing on a motion by  
7 a party in interest, the bankruptcy court may dismiss a chapter 7  
8 case when an individual debtor has primarily consumer debts and  
9 if the bankruptcy court finds that granting relief would be an  
10 abuse of the provisions of chapter 7.<sup>5</sup> Restated, there are two  
11 prerequisites to dismissal under § 707(b)(1): 1) the debtor has  
12 primarily consumer debt; and 2) the bankruptcy court finds that  
13 granting the debtor's petition would be an abuse of chapter 7.  
14 Price v. U.S. Trustee (In re Price), 353 F.3d 1135, 1138 (9th  
15 Cir. 2004). The moving party bears the burden of proof to  
16 support a § 707(b)(1) motion by a preponderance of the evidence.  
17 In re Baker, 400 B.R. 594, 597 (Bankr. N.D. Ohio 2009).

18 Only the first § 707(b)(1) prerequisite is at issue in this  
19 appeal. The bankruptcy court denied the Motion to Dismiss  
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21 <sup>5</sup> Section 707(b)(1) provides, in relevant part:

22 After notice and a hearing, the court, on its own  
23 motion or on a motion by the United States trustee,  
24 trustee (or bankruptcy administrator, if any), or any  
25 party in interest, may dismiss a case filed by an  
26 individual debtor under this chapter whose debts are  
27 primarily consumer debts, or, with the debtor's  
28 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. . . .

1 because it found that the Cherretts did not have primarily  
2 consumer debt, as the Housing Loan, which formed the bulk of  
3 their debt, was non-consumer debt. Aspen challenges this fact  
4 finding on two grounds: 1) the Housing Loan is consumer debt as a  
5 matter of law under § 101(8), as interpreted by Zolg v. Kelly (In  
6 re Kelly), 841 F.2d 908 (9th Cir. 1988) ("Kelly"); and 2) the fact  
7 that the Housing Loan was employer-sponsored is irrelevant  
8 because the determination of whether the Housing Loan qualifies  
9 as consumer debt turns on Paul's purpose. If Paul's purpose for  
10 incurring the Housing Loan was primarily for personal, family or  
11 household use, then the Housing Loan would qualify as consumer  
12 debt. Aspen contends that Paul obtained the Housing Loan  
13 specifically to purchase the Colorado Residence as his personal  
14 residence. The Housing Loan thus qualifies as consumer debt.<sup>6</sup>

15 Given Aspen's contentions, this appeal turns on whether we  
16 agree with the bankruptcy court's characterization of the Housing  
17 Loan as non-consumer debt. We therefore begin our analysis by  
18 examining the definition of "consumer debt" under § 101(8).

19 Section 101(8) defines "consumer debt" as "debt incurred by  
20 an individual primarily for a personal, family, or household  
21 purpose." Consumer debt includes both unsecured and secured  
22

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23 <sup>6</sup> In its motion to dismiss, Aspen claimed that the  
24 Cherretts had sufficient disposable income to pay their unsecured  
25 creditors through a chapter 13 plan. However, the Cherretts'  
26 schedules, which were signed under penalty of perjury and were  
27 the sole evidence before the bankruptcy court on this point,  
28 indicated that their unsecured debt exceeded the statutory  
maximum under § 109(e). The Cherretts therefore were potentially  
ineligible for relief under chapter 13, as noted by the  
bankruptcy court at the Hearing.

1 debt. Kelly, 841 F.2d at 912. Whether a particular secured debt  
2 is or is not characterized as consumer debt under § 707(b)  
3 depends on the purpose of the debt. Price, 353 F.3d at 1139;  
4 Kelly, 841 F.2d at 913. See also Stine v. Flynn (In re Stine),  
5 254 B.R. 244, 249 (9th Cir. BAP 2000)("It is the purpose for  
6 which the debt was incurred that determines whether it is a  
7 consumer debt.")(citing Kelly, 841 F.2d at 913)(emphasis added));  
8 Cypher Chiropractic Ctr. v. Runski (In re Runski), 102 F.3d 744,  
9 747 (4th Cir. 1996)("[C]ourts have concluded uniformly that debt  
10 incurred for a business venture or with a profit motive does not  
11 fall into the category of debt incurred for 'personal, family, or  
12 household purposes.'")(citations omitted); and A.L. Lee Mem'l  
13 Hosp. v. McFadyen (In re McFadyen), 192 B.R. 328, 333 (Bankr.  
14 N.D.N.Y. 1995)("The courts generally ascribe a business purpose,  
15 rather than a personal, family or household purpose to debts  
16 which are incurred 'with an eye toward profit' and which are  
17 'motivated for ongoing business requirements.'")(citations  
18 omitted)(emphasis in original).<sup>7</sup>

19 Aspen insists that Kelly definitively classified all  
20 mortgage debt as consumer debt. It points out that this holding  
21 in Kelly was reinforced in Price v. U.S. Trustee (In re Price),  
22 353 F.3d 1135, 1139 (9th Cir. 2004). The Kelly holding therefore  
23

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24 <sup>7</sup> In a home loan context, an expectation of profit alone,  
25 in our view, does not satisfy the Kelly standard for a non-  
26 consumer debt. It is a truism that every red-blooded American  
27 who buys a home expects a profit when it is sold. If that  
28 expectation were enough to take home loan debt outside of the  
consumer debt category, the exception would swallow the Kelly  
rule.

1 is the rule of law in the Ninth Circuit.

2 In Kelly, the debtors filed a petition under chapter 7.  
3 They scheduled \$181,350 in assets, \$147,000 in debt secured by  
4 mortgages against their home and \$25,000 in unsecured debt owed  
5 to certain defendants in a state court action which the debtors  
6 lost. Kelly, 841 F.2d at 910. The bankruptcy court sua sponte  
7 found that the debtors owed primarily consumer debts and that  
8 granting them chapter 7 relief would be a substantial abuse  
9 because they could easily pay all of their debts. It accordingly  
10 dismissed the debtors' chapter 7 case. After moving for  
11 reconsideration with the bankruptcy court, which was denied, the  
12 debtors appealed to the BAP, which reversed the bankruptcy court  
13 on the ground that the debtors did not have primarily consumer  
14 debts because most of their debts were secured by real estate  
15 mortgages. Kelly v. Solot (In re Kelly), 70 B.R. 109, 111-12  
16 (9th Cir. BAP 1986).

17 On appeal, the debtors argued that debts secured by real  
18 property were never consumer debts. Because 85% of their debts  
19 was secured by their home, the debtors maintained that they could  
20 not have primarily consumer debts. Dismissal under § 707(b) was  
21 inappropriate.

22 The Ninth Circuit disagreed with this contention because a  
23 literal reading of § 101(8) and related statutes (i.e., § 101(12)  
24 and (5)(A)) "inexorably [led] to the conclusion that consumer  
25 debt includes secured debt."<sup>8</sup> Kelly, 841 F.2d at 912. It went on

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27 <sup>8</sup> The Ninth Circuit issued Kelly years before BAPCPA.  
28 Kelly cited § 101(7), 101(4)(A) and (11), which, at the time, set  
forth the definition of "consumer debt," "claim" and "debt,"  
(continued...)

1 to note that secured debt neither was excluded from nor included  
2 in consumer debt automatically. Id. at 913. The Ninth Circuit  
3 concluded that it “must look to the purpose of the debt in  
4 determining whether it falls within the statutory definition.”  
5 Id.

6 Upon review of the debtors’ mortgage debts, the Ninth  
7 Circuit determined that \$95,000 consisted of a lien the debtors  
8 assumed in purchasing their home and \$32,000 represented a home  
9 equity line of credit incurred for home improvements and the  
10 repayment of credit card debts. Id. It concluded that all of  
11 those debts “fit comfortably within the [Bankruptcy] Code’s  
12 definition of consumer debt.” Id.

13 We acknowledge that on its facts, Kelly characterized  
14 mortgage debt as consumer debt. But Aspen overlooks one of the  
15 main points of Kelly: Kelly held that, “[w]hile secured debt is  
16 not automatically excluded from consumer debt, it is not  
17 automatically included either. We must look to the purpose of  
18 the debt in determining whether it falls within the statutory  
19 definition.” Id. (Emphasis added.) Notably, though Aspen urges  
20 us to apply Kelly to the circumstances here without further  
21 analysis, it also zeroes in on Paul’s purpose in obtaining the  
22 Housing Loan as an alternative basis for reversing the bankruptcy  
23 court.

24 Aspen contends that the Cherretts base their  
25

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26 <sup>8</sup>(...continued)  
27 respectively. Section 101(8), (5)(A) and (12) currently set  
28 forth these definitions. Although the numbering of these  
definitions under § 101 has changed, the definitions themselves  
have not since the Ninth Circuit decided Kelly.

1 characterization of the Housing Loan as non-consumer debt on  
2 Aspen's purpose in providing the Housing Loan. According to  
3 Aspen, the Cherretts argue that the purpose of the Housing Loan  
4 was to augment Paul's compensation. In making such an argument,  
5 the Cherretts focus on the lender's motive. But, Aspen asserts,  
6 the debtor's purpose, not the lender's purpose, is the  
7 controlling determinant under § 101(8). Section 101(8)  
8 specifically states that consumer debt is debt incurred by an  
9 individual debtor for a personal, family or household purpose.  
10 The lender's motive thus is irrelevant to determining whether a  
11 secured debt qualifies as a consumer debt. Moreover, Aspen  
12 contends, if the lender's motive was the determining factor,  
13 every mortgage loan would be non-consumer debt because every  
14 lender has a profit motive when it extends a mortgage loan.

15 Aspen further argues that the Cherretts did not incur the  
16 Housing Loan for a business purpose. The Housing Loan did not  
17 become a non-consumer debt simply because it was part of Paul's  
18 compensation. Also, Aspen claims, the Housing Loan was not a  
19 condition for his employment.

20 At the Hearing, the bankruptcy court found that "[Paul's]  
21 purpose of securing that debt, or incurring that debt, was for  
22 employment purposes. The man needed to make money. He wanted to  
23 take the job. He knew he - to leave a [secure] position, he  
24 wanted to make more money." Tr. of Jan. 22, 2014 hr'g, 103:15-  
25 19. It concluded that Paul incurred the Housing Loan for a  
26 business purpose; he "did it so he could work at a very  
27 prestigious, top of the line, equal to the Four Seasons, equal to  
28 the best hotels in the world [employer] . . . ." Tr. of Jan. 22,

1 2014 hr'g, 104:5-7. The bankruptcy court therefore ruled that  
2 "primarily this loan was incurred for a business purpose." Tr.  
3 of Jan. 22, 2014 hr'g, 103:20. Based on the record before us, we  
4 perceive no error in the bankruptcy court's conclusion that  
5 Paul's primary purpose in obtaining the Housing Loan was for  
6 business (i.e., employment).

7 As Aspen recognizes, the key factor in determining whether  
8 secured debt is consumer debt lies in the debtor's purpose in  
9 incurring the secured debt. Where the debt was incurred for more  
10 than one purpose, the primary purpose of the debt will determine  
11 its nature. See, e.g., Price, 353 F.3d at 1139; Swartz v.  
12 Strausbaugh (In re Strausbaugh), 376 B.R. 631, 639 (Bankr. S.D.  
13 Ohio 2007)(quoting 2 Collier on Bankruptcy ¶ 101.08, at 101-47  
14 (Lawrence P. King ed., 15th ed. rev. 2004)("If a debt is incurred  
15 partly for business purposes and partly for personal, family or  
16 household purposes, the term 'primarily' in the definition  
17 suggests that whether the debt is a 'consumer debt' should depend  
18 upon which purpose predominates. Presumably, this determination  
19 would normally turn on the purpose for which most of the funds  
20 were obtained.")). Based on the record before us, the bankruptcy  
21 court did not err in finding that Paul's primary purpose in  
22 obtaining the Housing Loan was employment related.

23 Paul repeatedly asserted that he obtained the Housing Loan  
24 to purchase the Colorado Residence, not only in hopes of  
25 realizing a profit on resale, but also because it was an integral  
26 part of his entering into employment with Aspen. He testified at  
27 the Hearing that he believed the Housing Loan "was both  
28 compensation and [he] certainly expected to profit from

1 appreciation." Tr. of Jan. 22, 2014 hr'g, 15:16-18.

2 When he decided to accept employment with Aspen, Paul  
3 "look[ed] at everything in totality[.]" Tr. of Jan. 22, 2014  
4 hr'g, 53:13. He considered the salary offered by Aspen, along  
5 with the Housing Loan; together, the salary and the potential for  
6 appreciation in the Colorado Residence "[were] considerably more  
7 than [he] was making" with his previous employer. Tr. of Jan.  
8 22, 2014 hr'g, 53:14.

9 In his declaration attached to the Cherretts' opposition to  
10 the Motion to Dismiss, Paul asserted that accepting the position  
11 with Aspen required that he move from Jackson, Wyoming to Aspen,  
12 Colorado. Because real estate was expensive in Aspen, Colorado,  
13 and his income with Aspen would not allow him to buy real estate  
14 there, Aspen offered to help Paul in the purchase of housing.  
15 Specifically, he stated that "in lieu of a higher salary,  
16 extended in the offer of employment, [Aspen offered] an interest-  
17 free loan tied to [his] employment and to be secured by a trust  
18 deed against the [real estate] he was to purchase." Paul further  
19 asserted that, "given the initial salary offered, and in lieu of  
20 a higher salary, and specifically to compensate for the higher  
21 cost of housing in [Aspen, Colorado], Aspen offered to pay the  
22 difference between the purchase price and the amount [he and  
23 Colleen] could afford to pay."

24 At his December 6, 2013 deposition, Paul explained that,  
25 when discussing the terms of Aspen's employment offer, he  
26 expressed concern over the cost of living in Aspen, Colorado. He  
27 therefore asked Aspen, "[W]hat other ways could [he] be  
28 compensated, for instance, to allow [him] to live in the area[?]"

1 Tr. of Dec. 6, 2013 deposition, 10:14-16. Paul explained that he  
2 had received benefits from his prior employer in Jackson,  
3 Wyoming, that he was not receiving from Aspen. He then went on  
4 to state that Aspen "offered the [Housing Loan] and the potential  
5 for appreciation in balance and bonus plan. So, you know, [he]  
6 was looking for a greater net return in time, and one of those -  
7 part of that was appreciation of the home." Tr. of Dec. 6, 2013  
8 deposition, 37:22-25, 38:1.

9 At the Hearing, Paul testified that the Housing Loan was  
10 made part of the negotiations for his employment with Aspen. He  
11 stated that he "assume[d] it was because [he] had to weigh the  
12 total compensation package, and it either [came] in the form of a  
13 salary or other things that convey[ed] with that." Tr. of Jan.  
14 22, 2014 hr'g, 6:3-5. He emphasized later at the Hearing that  
15 "the solution to let's say the income that [he] needed to accept  
16 the position in Aspen [Colorado] and live in Aspen [Colorado]  
17 required that [Aspen] come up with a compensation package that  
18 included salary and something else. So, that's where the  
19 [H]ousing [L]oan came in in the form of a bonus." Tr. of Jan.  
20 22, 2014 hr'g, 9:12-16. Paul testified that the Housing Loan was  
21 offered instead of a higher salary. He also testified that Aspen  
22 even had characterized the Housing Loan as "a deferred  
23 compensation bonus plan." Tr. of Jan. 22, 2014 hr'g, 40:21-22.

24 The written offer presented by Aspen supports Paul's view of  
25 the Housing Loan as part of his employment with Aspen. The  
26 written offer provided that it "include[d] a housing loan of up  
27 to \$500,000." It further provided him an annual bonus to offset  
28 annual interest on the Housing Loan and his tax liability for the

1 interest on the Housing Loan.

2 Paul further explained that he felt he had no choice but to  
3 purchase the Colorado Residence based on his compensation from  
4 Aspen. He testified that if he "wanted that compensation plan  
5 and [he] wanted that interest free loan, [he] needed to buy a  
6 home with that money." Tr. of Jan. 22, 2014 hr'g, 11:18-20. He  
7 believed that "[Aspen] said if [he] want[ed] to work here [in  
8 Aspen, Colorado], here's [his] compensation plan. This is what  
9 [he could] do with the money. So, [he] had to buy a home with  
10 it. There was no other way [the offer] was written." Tr. of  
11 Jan. 22, 2014 hr'g, 11:22-24. Paul explained that it "made more  
12 economic sense to [Aspen] to give [him] a housing loan and pay  
13 [him] a certain wage," given the high cost of rent and the amount  
14 of compensation offered by Aspen. Tr. of Jan. 22, 2014 hr'g,  
15 38:25, 39:1-2. He thus purchased the Colorado Residence "because  
16 it just seemed like it was the most cost effective and . . . a  
17 financially advantageous route to take." Tr. of Jan. 22, 2014  
18 hr'g, 39:2-4.

19 At his deposition, Paul stressed that the "only thing [he]  
20 could have benefitted from was the appreciation of the [Colorado  
21 Residence]." Tr. of Dec. 6, 2013 deposition, 39:5-6. "[T]he  
22 benefit to [him] would have been at the end when the [Colorado  
23 Residence] was sold that [he] had some type of appreciation."  
24 Tr. of Dec. 6, 2013 deposition, 39:8-10. He further explained  
25 that he had a profit motive in purchasing the Colorado Residence  
26 because "at the time housing prices were skyrocketing, and so the  
27 opportunity there was to benefit from that increasing market."  
28 Tr. of Dec. 6, 2013 deposition, 91:19-21.

1 Paul provided ample evidence that he obtained the Housing  
2 Loan for a business purpose with respect to his employment with  
3 Aspen. Given his testimony at the Hearing, his deposition and  
4 his declaration, as well as the written offer of employment from  
5 Aspen, the bankruptcy court had sufficient evidence to find that  
6 Paul's purpose in obtaining the Housing Loan was primarily  
7 related to his employment. We discern no clear error by the  
8 bankruptcy court in making that determination.

9 **VI. CONCLUSION**

10 To dismiss a chapter 7 case for abuse under § 707(b)(1), the  
11 bankruptcy court must find that: 1) the debtor had primarily  
12 consumer debt and 2) granting his petition would be an abuse of  
13 chapter 7. Only the first prerequisite is at issue on appeal.  
14 Here, the Cherretts provided ample evidence through Paul's  
15 testimony at the Hearing, at his deposition and in his  
16 declaration, that their purpose in obtaining the Housing Loan was  
17 primarily business/employment-oriented. Based on the evidence  
18 before it, the bankruptcy court did not clearly err in finding  
19 that the Housing Loan was not consumer debt within the meaning of  
20 § 101(8). The bankruptcy court properly denied the Motion to  
21 Dismiss when it determined that the first prerequisite of  
22 § 707(b)(1) was not met. We AFFIRM.