NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

In re:	
PATRICK STANLEY ALLOCCO,	CHAPTER 7
Debtor.	CASE NO.: 16-10634 (SLM)

OPINION

APPEARANCES:

Paul E. Rusen
Collins, Toner & Rusen
123 Columbia Turnpike
Florham Park, NJ 07932
Counsel for the Debtor, Patrick Stanley Allocco

David E. Sklar
Scura, Wigfield, Heyer & Stevens, LLP
1599 Hamburg Turnpike
Wayne, NJ 07470
Counsel for Deja Vu Entertainment, LLC and Miami Music & Arts Production, Inc.

STACEY L. MEISEL, UNITED STATES BANKRUPTCY JUDGE

Movants Deja Vu Entertainment, LLC and Miami Music & Arts Production, Inc. (the "***Movants***") seek dismissal of debtor Patrick Stanley Allocco's ("***Debtor***") no-asset Chapter 7 case as presumptively abusive because he fails the net disposable income analysis set forth in section 707(b)(2) (the "***Means Test***") of the Bankruptcy Code.[1] In the alternative, Movants argue that dismissal is warranted for "abuse" of Chapter 7 based on the totality of circumstances. The crux of Movants' arguments is that the Court must exclude Debtor's so-called "phantom" monthly mortgage payments as permissible expenses in its Means Test analysis because Debtor failed to make any payments on account of his mortgage loan from its inception in 2007, and indeed, never will because the mortgaged property—Debtor's former primary residence—was abandoned, foreclosed upon, and ultimately sold at a sheriff sale post-petition. Movants assert that inclusion of these "phantom" secured debt payments results in a distortion of Debtor's actual financial condition and repayment ability.

Debtor disputes Movants' arguments in their entirety. He asserts, irrespective of pre-petition payment history or the post-petition sale of the property, the Means Test permits inclusion of his monthly mortgage payments as expenses because the payments were "scheduled as contractually due" as of the petition date.[2] Alternatively, Debtor argues that the totality of circumstances weighs in his favor because his current financial situation will not provide a substantial repayment to creditors nor and is not otherwise abusive.

The parties invite this Court to wade into a national split amongst bankruptcy courts regarding the proper statutory treatment of "phantom" secured debts for purposes of the Means Test. But, the Court need not enter those murky waters because the water in this case is crystal

[1] 11 U.S.C. §§ 101 *et seq.*
[2] 11 U.S.C. § 707(b)(2)(A)(iii).

clear. Here, Debtor owes no "average monthly payment" on account of a mortgage debt—let alone a "phantom" one—because his personal obligation on the mortgage loan was discharged in Debtor's prior 2007 Chapter 7 case. To the extent that any "phantom" contractual obligation remained, it was subsequently eradicated when Debtor's secured creditor-mortgagee obtained a foreclosure judgment prior to the commencement of this Chapter 7 case. Pursuant to the doctrine of merger, the mortgage merged into the foreclosure judgment, and the mortgage ceased to exist. As a matter of law, Debtor cannot claim *any* contractual payments on account of his mortgage loan because only a judgment claim remained. Once this mortgage expense is properly excluded from the Means Test, Debtor's Chapter 7 case is presumptively abusive. Dismissal is warranted because Debtor failed to rebut the presumption of abuse. Alternatively, the Court finds that dismissal is warranted based upon the totality of circumstances. The record demonstrates Debtor has an actual ability to repay his pre-petition debts after his monthly income is adjusted to reflect his legitimate expenses.

JURISDICTION AND VENUE

The Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334(b), 157(a), and the Standing Order of Reference from the United States District Court for the District of New Jersey dated July 23, 1984, as amended September 18, 2012. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O) because Movants object to Debtor's Chapter 7 discharge. Venue is proper under 28 U.S.C. §§ 1408 and 1409(a). Pursuant to Federal Rule of Bankruptcy Procedure 7052, the Court issues the following findings of fact and conclusions of law.

BACKGROUND

Debtor's Prior Bankruptcy Cases

Debtor is no stranger to this Court. Prior to the instant case, he filed four other petitions for bankruptcy relief under various Chapters, with varying degrees of success, over the course of nearly three decades. The Court takes judicial notice of the following dockets and their contents:[3] (i) Chapter 7 Case No. 91-28039 (WFT); (ii) Chapter 7 Case No. 07-26152 (MS) (the "***2007 Chapter 7 Case***"); (iii) Chapter 13 Case No. 13-22503 (DHS) (the "***2013 Chapter 13 Case***"); and (iv) Chapter 13 Case No. 15-27065 (SLM) (the "***2015 Chapter 13 Case***").[4] The relevant question here is: what is the impact of Debtor's prior bankruptcies?

2007 Chapter 7 Case

In the petition for the 2007 Chapter 7 Case, Debtor listed a mortgage in the amount of $655,000 (the "***Mortgage***") on his primary residence at 20 Turtle Road, Morris Township, New Jersey (the "***Property***").[5] The Mortgage is evidenced by: (a) a *Mortgage*, dated as of December 29, 2006, by and among Debtor, his wife, Abigail Allocco (with Debtor, the "***Borrowers***"), and the lender, Mortgage Lenders Network, USA, Inc. (the "***Original Lender***"); (b) an *Interest Only/Adjustable Rate Note*, dated December 29, 2006, in the amount of $655,000, by and among the Borrowers and the Original Lender (the "***Promissory Note***"); (c) an *Interest Only/Adjustable Rate Rider* to the Promissory Note, dated as of December 29, 2006, by and among the Borrowers and the Original Lender; and (d) a *Waiver of Marital Rights*, dated as of December 29, 2006, by

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[3] Federal Rule of Evidence 201(c) provides for discretionary judicial notice independent of litigants' requests. *See* FED. R. EVID. 201(c); Hon. Barry Russell, *Bankruptcy Evidence Manual*, § 201:3. Unless otherwise indicated, all citations to the record herein are to the instant Chapter 7 Case No. 16-10634.

[4] In a separate Chapter 7case commenced in 2014 by Patrick Allocco, Jr., Debtor's son, Movants commenced an adversary proceeding challenging the dischargeability of his father's debt. *See* Case No. 14-27259 (VFP) and related Adv. Pr. 14-02135 (VFP). Movants voluntarily withdrew, with prejudice, that action against Allocco, Jr. once they realized their mistake. *See* Chapter 7 Case No. 14-02135, Docket No. 10.

[5] Chapter 7 Case No. 07-26152, Docket No. 1 at 21.

and among the Borrowers and the Original Lender.[6] The Borrowers' first monthly mortgage payment was due March 1, 2007.[7]

In the 2007 Chapter 7 Case, Debtor sought to reaffirm the Mortgage.[8] However, the Property was already subject to a pre-petition foreclosure action brought by Aurora Loan Services, LLC ("***Aurora***"), the then-current holder of the Mortgage.[9] Aurora asserted that the amount due on the Mortgage Loan, inclusive of foreclosure fees and costs, was $736,574.35.[10] Aurora received relief from the automatic stay from the Bankruptcy Court to continue its foreclosure action.[11] Debtor received a discharge order.[12] The Chapter 7 Trustee subsequently abandoned the Property.[13]

2013 Chapter 13 Case

In his 2013 Chapter 13 Case, Debtor proposed a Chapter 13 plan that sought to, *inter alia*, modify the monthly payments on the Mortgage and discharge his debt to Movants.[14] Debtor acknowledged that he had not made *any* monthly payment on the Mortgage since its inception in March 2007.[15] Debtor also asserted that the Mortgage was "in dispute" in the Superior Court of New Jersey.[16] Accordingly, Debtor sought to "re-establish a payment schedule" pursuant to a loan modification with CPCA Trust 1st ("***CPCA***"),[17] the then-current holder of the Mortgage, to

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[6] Chapter 7 Case No. 07-26152, Docket No. 30-1. Identical documentation for the Mortgage Loan was filed in the instant Chapter 7 case. *See* Case No. 16-10634, Docket No. 8.
[7] Chapter 7 Case No. 07-26152, Docket No. 30-1 at 29.
[8] Chapter 7 Case No. 07-26152, Docket No. 1 at 62.
[9] Chapter 7 Case No. 07-26152, Docket Nos. 30 and 35.
[10] *Id.*
[11] *Id.*
[12] Chapter 7 Case No. 07-26152, Docket No. 75.
[13] Chapter 7 Case No. 07-26152, Docket No. 77.
[14] Chapter 13 Case. No 13-22503, Docket Nos. 30, 35.
[15] Chapter 13 Case No. 13-22503, Docket Nos. 12 and 24.
[16] *Id.*
[17] On May 15, 2012, Aurora assigned the Mortgage to CPCA. *See* Chapter 7 Case No 16-10634, Docket No. 8-2 at 23.

"account for [the then-market] valuation" of the Property to $325,000.[18] However, CPCA objected to Debtor's Chapter 13 plan arguing it was not feasible and failed to provide for payment in full of its claim.[19] Other creditors and the Chapter 13 Trustee also objected to plan confirmation. Debtor's Chapter 13 plan was subsequently denied, and the 2013 Chapter 13 Case was dismissed.[20] Debtor sought reinstatement,[21] which was denied.[22] The case was closed.[23]

2015 Chapter 13 Case

Debtor commenced a second Chapter 13 case in the Fall of 2015.[24] He listed the amount owed on the Mortgage (with default interest) as $1,194,050.00.[25] The Chapter 13 Trustee sought dismissal because Debtor's unsecured debts exceeded the statutory limit applicable to Chapter 13 cases pursuant to section 109(e) of the Bankruptcy Code.[26] The Court dismissed Debtor's 2015 Chapter 13 Case as abusive.[27]

The Instant Chapter 7 Case

This Chapter 7 case was commenced on January 14, 2016 (the "***Petition Date***"),[28] only one month after dismissal of Debtor's 2015 Chapter 13 Case, and on the same day the sheriff scheduled a foreclosure sale of the Property.[29] Importantly, prior to scheduling of the sheriff sale, the then-

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[18] *Id.*
[19] Chapter 13 Case No. 13-22503, Docket No. 16.
[20] Chapter 13 Case No. 13-22503, Docket No. 30.
[21] Chapter 13 Case No. 13-22503, Docket No. 35.
[22] Chapter 13 Case No. 13-22503, Docket No. 38.
[23] Chapter 13 Case No. 13-22503, Docket No. 38.
[24] Chapter 13 Case No. 15-27065, Docket No. 1.
[25] Chapter 13 Case No. 15-27065, Docket No. 1 at 11.
[26] Chapter 13 Case No. 15-27065, Docket No. 19.
[27] Chapter 13 Case No. 15-27065, Docket No. 32.
[28] Docket No. 1.
[29] Docket No. 22, ¶¶ 42-43 and Docket No. 8-1 at 3.

mortgagee, Castle Peak 2012-1 Loan Trust (the "***Mortgagee***"),[30] had already obtained a foreclosure judgment against the Property from the Superior Court of New Jersey.[31]

Debtor maintains this bankruptcy was precipitated by challenging personal and business-related disruptions, and his main objective was to negotiate a mortgage modification for the Property.[32] Movants challenge the credibility of Debtor's assertions.

Events Precipitating Debtor's Financial Distress

Beginning in 2002,[33] Debtor owned and operated a live concert promotion business throughout the United States, Latin America, and in Puerto Rico.[34] This business was his sole source of income.[35] However, in 2012, his financial situation drastically changed.[36] Specifically, when the headline American artist for a New Year's Eve 2011 concert in Luanda, Angola failed to appear for the show, Debtor's Angolese business partner took him and his son hostage in an effort to recover from Debtor some portion of a $300,000 advance given to the defaulting artist.[37] With the assistance of United States legislative representatives,[38] the kidnappers freed Debtor and his son, and they returned to the United States on February 19, 2012, ultimately settling the New Year's Eve dispute for $85,000.[39]

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[30] On June 19, 2012, CPCA assigned the Mortgage Loan to Castle Peak 2012-1 Loan Trust. *See* Docket No. 8-2 at 26-27.
[31] Docket No. 1, *Official Form 107, Statement of Financial Affairs for Individuals filing for Bankruptcy*, at 41 and Docket No. 8-1 at 3.
[32] After Debtor commenced this case, the Mortgagee denied a loan modification, obtained stay relief, and sold the Property at a sheriff sale. *See* discussion *infra* at 5. *See also* Docket No. 23-3. As noted in the Mortgagee's stay relief papers, not only did Debtor file multiple bankruptcy petitions, but his wife, Abigail Allocco, also filed a bankruptcy petition in 2015 in an effort to stay the Mortgagee's foreclosure proceedings (as co-debtor on the Mortgage). *See* Docket No. 8-1, ¶ 5. Mrs. Allocco also received a discharge in that case. *Id.*
[33] Docket No. 19-3, 6:18-25 ("***341 Mins.***").
[34] Docket No. 22, ¶ 4.
[35] 341 Mins., 7:4-5.
[36] Docket No. 22, ¶ 3.
[37] *Id.* ¶¶ 20-23.
[38] *Id.* ¶¶ 19-24; *see also* Docket No. 22, Exhibit C.
[39] Docket No. 22, ¶ 25.

It was during Debtor's detention in Angola that an existing litigation with Movants also matured. In 2010, Movants sued Debtor in Florida state court seeking to recover certain profits earned, and expenses paid, in connection with a joint concert promotion venture in Mexico in March 2010.[40] When Debtor was unable to appear at a hearing (due to his continuing detention in Angola), the Florida court issued a default judgment against him on January 5, 2012, in the amount of $445,580.00 (which Movants now estimate to be approximately $525,721.64).[41] Upon returning to the United States from Angola, Debtor ceased operating his concert promotion business and began a series of New Jersey-based hourly and/or salaried jobs.[42] He also filed the 2013 Chapter 13 Case seeking to discharge Movants' debt. As of the Petition Date, Debtor was employed by the Northstar New Jersey Lottery Group, LLC, earning a base salary of $80,026.38, with the potential for an annual incentive bonus (having earned $13,274.01 in bonus for 2015).[43]

In Debtor's *Official Form 122A-2 Chapter 7 Means Test Calculation*, Debtor listed his current monthly income as $10,333.65.[44] He recorded his average monthly payment on account of his mortgage as $6,884.38, and his total monthly payments on account of secured debts as $7,100.34.[45] Once he added in the $11,033.65 monthly cure amount[46] due on the mortgage, Debtor estimated that he had a monthly net deficit of -$12,839.07, resulting in a total projected deficit

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[40] *Id.* ¶ 13.
[41] *Id.* ¶ 14 and Exhibit A.
[42] Docket No. 22, ¶¶ 26-31.
[43] Docket No. 22, ¶ 32.
[44] Docket No. 1 at 50.
[45] Docket No. 1 at 52, 56.
[46] Interestingly, Debtor includes a monthly cure amount. However, there is no right to a monthly cure in a Chapter 7 liquidation case. A monthly cure of mortgage arrearages is a creature found in the Bankruptcy Code's reorganization chapters. The parties agree that Debtor's debts are primarily consumer in nature. *See* Docket Nos. 19-7 and 22, ¶¶ 50-51.

over a three year period of -$770,244.00.[47] However, Debtor also acknowledged the Mortgagee obtained a foreclosure judgment on the Property.[48]

Debtor's Mortgage Loan, History of Non-Payment, and Modification Efforts

Debtor inherited the Property from his parents.[49] He obtained the Mortgage on the Property in 2007 as part of a capital raise for his business.[50] According to Debtor, "venture capital" investors were "suppose[d] to take out" the Mortgage (and a second one on a second home), but they "fell through."[51] Debtor admitted that he had not made payments on his Mortgage in "100 months."[52] In other words, he made no monthly mortgage payments for nearly a decade.[53] The lack of payment resulted in the Mortgagee obtaining a foreclosure judgment. Nevertheless, in his petition in this case,[54] Debtor affirmed his intention to retain the Property and sought a modification of his monthly payments due under the Mortgage from $6,952.55 to $4,271.89.[55] He determined that this amount was feasible based upon his joint income with his wife.[56] In addition, Debtor owed approximately $690,672.86 in unsecured debt, which he mostly attributed to business debts.[57] Movants' claim constitutes over seventy-six percent (76%) of Debtor's general unsecured claims.[58]

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[47] Docket No. 1 at 58.
[48] Docket No. 1 at 41.
[49] 341 Mins., 6:1-2. Debtor testified the house had been in his family since 1952. *See* Docket No. 22, ¶ 49.
[50] 341 Mins., 6:2, 11-17.
[51] 341 Mins., 6:11-17. Debtor noted that he took out another mortgage on a second home he owned at that time as part of the capital raise, but ultimately lost that home to the mortgage lender via a short sale. *Id.* at 5:13-22.
[52] 341 Mins., 9: 19-21.
[53] Indeed, in his 2013 Chapter 13 case, Debtor stated that he had not made a mortgage payment "since the inception of the loan on or about March 2007." *See* 2013 Case No. 13-22503, Docket No. 12, ¶ 3. According to the Mortgagee, Debtor failed to make any monthly mortgage payments since 2007. Docket No. 8-1 at ¶ 9.
[54] Docket No. 22, ¶¶ 44-48; Docket No. 1 at 46 (*Official Form 108*).
[55] Docket No. 22, ¶¶ 35-38.
[56] *Id.* ¶ 46. However, in oral argument, Debtor concedes that he has no evidence to support an argument that the Mortgage was related to business debt instead of consumer debt.
[57] *Id.* ¶¶ 50-51.
[58] Docket No. 19, ¶ 6.

Mortgagee was not amenable to a modification of the Mortgage and, indeed, sought and received stay relief to foreclose and sell the Property.[59] The Chapter 7 trustee filed a *Notice of Abandonment* of the Property without objection.[60] Foreclosure sale occurred in September 2016, and Debtor has no remaining legal or possessory interest in the Property.[61]

The Motion to Dismiss

On April 18, 2016, Movants filed the present dismissal motion.[62] Movants challenge this case as presumptively abusive. Movants argue that Debtor should be barred, as a matter of law, from claiming a $4,271.89 expense for his mortgage payments when he has not made any actual payment for, in his own words, a "very long time."[63] Movants argue that Debtor's monthly disposable income should be $4,271.89, which would provide the Debtor with $256,313.40 in disposable income over a five (5) year period.[64] Movants also challenge the veracity of Debtor's claim of a zero net monthly income because, in his Chapter 13 petition filed just four months prior to commencement of this Chapter 7 case, Debtor reported an amount of $1,386.45.[65] Accordingly, upon exclusion of the Mortgage Loan debt, Movants argue that Debtor fails the Means Test and failed to present evidence sufficient to rebut the presumption of abuse.

In the alternative, Movants argue that dismissal for abuse is warranted under an analysis of the totality of circumstances. Debtor testified at his 341 Meeting of Creditors that, rather than servicing his monthly mortgage debt, he spent equivalent amounts on "helping [his] son and [his]

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[59] Docket Nos. 8, 13.
[60] Docket Nos. 10, 12.
[61] *See* Deed, recorded December 1, 2016, Evidencing Sheriff of Morris County's Sale to Debtor's Mortgagor (Castle Peak 2012-1 Loan Trust) as of September 30, 2016 (File No. 2016077230); *see also* Docket No. 23-3.
[62] Docket No. 19.
[63] Docket No. 19-1 at 7:21-22.
[64] Docket No. 19 at ¶ 5.
[65] *Id.*

grandchild and [his son's] girlfriend."[66] Debtor failed to disclose these payments as contributions for the "care of household or family members" in his *Official Form 122A-2 Means Test Calculation.*[67] Eliminating these voluntary support payments to non-dependents, Movants assert that Debtor's current income is adequate to repay a meaningful amount of his unsecured debt.

Debtor filed a timely opposition. He argued that irrespective of his history of non-payment, he was statutorily entitled to include the mortgage payments as an expense on his schedules, thereby resulting in his qualification for Chapter 7 under the Means Test formula.[68] Debtor also acknowledged that, if his loan modification efforts failed, he would seek a rental in the Morristown or Basking Ridge areas for approximately $2,000–2,500 a month.[69] Because of this decrease in housing expense, Debtor acknowledged that he would have potentially $1,922.00 per month in disposable income, and that this "potential disposable income may result in a payment to unsecured creditors of $69,192.00 over thirty-six (36) months (ten (10.0%) percent to unsecured creditors) or $115,320.00 over sixty (60) months (sixteen and seven-tenths (16.7%) to unsecured creditors."[70]

On May 10, 2016, the Court held an initial hearing on the motion and requested additional briefing on whether Debtor may deduct the monthly mortgage payments on the Means Test for purposes of determining abuse under sections 707(b)(1), 707(b)(2) and 707(b)(3) of the Bankruptcy Code. The parties filed their supplemental briefs shortly thereafter.[71] The United States Trustee subsequently obtained an extension of time to object to the discharge, which it

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[66] *Id.* ¶ 9.
[67] 341 Mins., 8:15-20.
[68] Docket No. 22.
[69] *Id.* ¶ 54.
[70] *Id.* ¶¶ 56-57.
[71] Docket Nos. 25 and 27.

ultimately did not pursue.[72] The Court held a second hearing and reserved its decision after oral argument.

ANALYSIS

This Court's interpretation of the Bankruptcy Code starts "where all such inquiries must begin: with the language of the statute itself."[73] Section 707(b)(1) of the Bankruptcy Code provides that "after notice and a hearing," the Court "may dismiss a case filed by an individual debtor under [Chapter 7] 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."[74] Section 707(b)(1) "focuses on the purpose of Chapter 7 relief under the Bankruptcy Code, primarily the issue of whether the petitioner is the honest and needy consumer debtor the Code was intended to protect."[75] As relevant here, abuse may be presumed upon an objective application of the Means Test or, in the alternative, established upon a subjective review of the totality of the circumstances.[76]

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[72] Docket Nos. 30, 31, 33 and 34. Of note, the United States Trustee sought additional time and information to determine "(i) whether the petition was filed in bad faith, (ii) whether the totality of circumstances indicates that it would be an abuse for the Debtor to obtain a discharge of his debts, or (iii) whether he has engaged in any of the activities for which discharge should be denied 11 U.S.C. § 727." *See* Docket No. 30 at 5 and Docket No. 33 at 5.

[73] *Ransom v. FIA Card Servs. N.A.*, 562 U.S. 61, 69 (2011) (quoting *U.S. v. Ron Pair Enter., Inc.*, 489 U.S. 235, 241 (1989)).

[74] 11 U.S.C. § 707(b)(1).

[75] *In re Citta*, Civ. Case No. 12-CV-02274, Bankr. Case No. 10-34162, 2012 WL 6624690 at *4 (D.N.J. 2012) (citing *Office of the United States Trustee v. Mottilla (In re Mottilla)*, 306 B.R. 782, 788 (Bankr. M.D. Pa. 2004) (further citations omitted)).

[76] *In re Toone*, Case No. 15–30535, 2016 WL 6106398, at *7 (Bankr. D.N.J. Oct. 16, 2016).

The Means Test and its Presumption of Abuse

As explained by the United States Supreme Court:

> Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) to correct perceived abuses of the bankruptcy system. In particular, Congress adopted the [Means Test] —'[t]he heart of [BAPCPA's] consumer bankruptcy reforms,' and the home of the statutory language at issue here—to help ensure that debtors who *can* pay creditors *do* pay them.[77]

Accordingly, the Means Test acts as a "screening mechanism to determine whether a Chapter 7 proceeding is appropriate."[78]

Courts utilize the Means Test to determine whether there is a presumption of abuse in a Chapter 7 debtor's case. The Means Test is a statutory formula that calculates a debtor's disposable income by deducting a list of "permitted expenses"[79] from the average of the debtor's "current monthly income" for the six months prior to the petition date.[80] Specifically, a court "shall presume abuse exists if the debtor's current monthly income" net of a debtor's permitted expenses as enumerated in Section 707(b)(2) is "not less than the lesser of—(I) 25 percent of the debtor's nonpriority unsecured claims in the case, or [$7,475], whichever is greater; or (II) [$12,475]."[81] Once abuse is presumed, "the debtor [may] rebut this presumption by showing special circumstances exist to justify an income or expense adjustment."[82]

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[77] *Ransom*, 562 U.S. at 61 (quoting H.R. REP. No. 109–31, pt. 1, p. 2 (2005)) (further citations omitted).
[78] *Id.* at 65 n.1.
[79] *Toone*, 2016 WL 6106398 at *7.
[80] *See* 11 U.S.C. § 101(10A) (Defining "current monthly income" to mean, in relevant part, the "average monthly income from all sources that the debtor receives (or in a joint case, the debtor and the debtor's spouse receives) without regard to whether such income is taxable income, derived during the 6-month period ending on – (i) the last day of the calendar month immediately preceding the [petition date] if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or (ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii)[.]")
[81] 11 U.S.C. § 707(b)(2)(A)(i). At the time of Debtor's filing, the statutory amounts were $7,475 and $12,475, respectively. *See* Docket No. 1 at 58. The statutory amounts are now $7,700 and $12,850, respectively.
[82] *Toone*, 2016 WL 6106398 at *7.

Section 707(b)(2)(A)(iii) permits a debtor to deduct average monthly expenses for secured debts, such as mortgages, from his or her "current monthly income." It provides, in relevant part, that the "debtor's ***average monthly payments on account of secured debts*** shall be calculated as the sum of . . . the total of all amounts ***scheduled as contractually due*** to secured creditors in each month of the 60 months following the date of the filing of the petition . . . divided by 60.[83] It is the meaning of the above-emphasized statutory language that is the issue here.

The parties spent a significant portion of their argument on the appropriate treatment of Debtor's so-called "phantom" monthly mortgage payments and specifically, whether Debtor may include them as "average monthly payments on account of secured debts" for purposes of the Means Test calculation where (a) Debtor has not been making such monthly payments since 2007, and (b) Debtor's interest in the Property has been foreclosed upon and sold post-petition.

As acknowledged by the parties, no controlling Third Circuit decision opines on the issue, and existing case law is split.[84] Under similar facts, courts have answered both in the affirmative (permitting a debtor to include such "phantom" mortgage payments for purposes of the Means Test if they were "scheduled as contractually due" as of the petition date, irrespective of a history of non-payment, a debtor's intent to surrender or a debtor's actual surrender of the underlying collateral)[85] and in the negative (excluding "phantom" contractual payments to prevent factual

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[83] 11 U.S.C. § 707(b)(2)(A)(iii) (emphasis added).

[84] This split, its origins, and its continuing proliferation has been most recently explained in a thorough opinion by the Honorable John P. Gustafson, United States Bankruptcy Judge for the Northern District of Ohio. *See In re Arndt*, Case No. 17-30226, 2017 WL 5164141 at *4 (Bankr. N.D. Ohio) (Nov. 6, 2017).

[85] *See, e.g., Morse v. Rudler (In re Rudler)*, 576 F.3d 37, 45-52 (1st Cir. 2009) (plain language of Bankruptcy Code allows Chapter 7 debtors to deduct payments contractually due on a secured debt notwithstanding the debtors' intention to surrender the collateral); *In re Navin*, 526 B.R. 81, 86 (N.D.Ga. 2015) (same); *In re Rivers*, 466 B.R. 558, 561 (Bankr. M.D. Fla. 2012) (same); *In re Grinkmeyer*, 456 B.R. 385, 387-389 (Bankr. S.D. Ind. 2011) (same); *In re Smale*, 390 B.R. 111, 118-119 (Bankr. Del. 2008) (holding same, though finding section 707(b)(2)(A)(iii)'s "scheduled as contractually due" language to be ambiguous).

distortion of a debtor's actual ability to repay creditors).[86] But these arguments lead the Court into a briar patch that is simply not required under the facts of this case, nor required under the plain meaning of the statute.

Debtor Discharged His Personal Liability on the Mortgage Loan in 2007

First, although the parties did not brief the issue, the Court must consider the effect of Debtor's discharge in his 2007 Chapter 7 Case on the Mortgage. It is black letter law that a discharge eliminates a debtor's pre-petition personal liability on a mortgage debt.[87] It does not, however, eliminate an individual's *in rem* liability on the lien.[88] Therefore, post-discharge, a mortgage lender whose lien is neither resolved nor avoided retains two rights against a debtor: (1) a "right to an equitable remedy"—i.e., to pursue foreclosure against the debtor; and (2) a "right to payment"—i.e., to satisfy its debt from the foreclosure sale proceeds.[89] This bundle of rights

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[86] *See, e.g., In re Fredman*, 471 B.R. 540, 541 (S.D. Ill. 2012) (holding that debtors could not deduct, as "amounts scheduled as contractually due to secured creditors", "phantom" mortgage payments owed on second home because debtors filed a *Statement of Intention* with their petition papers specifically declaring their intent to surrender the property, which would eliminate any future expenses); *In re White*, 512 B.R. 822, 829 (Bankr. N.D. Miss. 2014) (holding that secured debt for collateral that a debtor intends to, and in fact does, surrender is not "scheduled as contractually due", and requires exclusion as "phantom" payments for purposes of a Chapter 7 Means Test analysis); *In re Sterrenberg*, 471 B.R. 131, 135-136 (Bankr. E.D.N.C. 2012) (holding that debtor could not deduct secured payments for purposes of Chapter 7 Means Test where she intended to surrender the underlying collateral (home, boat, and car) as of the petition date); *In re Powers*, 534 B.R. 207, 214-215 (N.D. Fla. 2015) (holding that, under plain meaning analysis of section 707(b)(2), debtor was *not* entitled to take "phantom deduction" for mortgage payments that she was not actually making on a home that she had effectively abandoned prepetition, was currently in foreclosure, and that she intended to surrender).

[87] *Johnson v. Home State Bank*, 501 U.S. 78, 82-83 (1991) (a mortgage lien for which a debtor previously obtained a discharge of personal liability under a Chapter 7 remains a claim that can be treated under a Chapter 13 plan); *In re Kressler*, 40 F.App'x 712, 713–14 (3d Cir. 2002) (It is a "long-standing rule in bankruptcy that a lien is a property interest—an *in rem* claim rather than an *in personam* claim. When a lien secures real property, 'the creditor's lien stays with the real property until the foreclosure.' That is, a bankruptcy may extinguish personal obligations, but not in rem obligations.") (quoting *Dewsnup v. Timm,* 502 U.S. 410, 417 (1992) and citing *Johnson*, 501 U.S. at 83-84)); *In re Scotto-DiClemente*, 463 B.R. 308, 313 (Bankr. D.N.J. 2012) (holding that mortgagee's undersecured *in rem* claims against debtor had (i) survived debtor's previous Chapter 7 discharge, (ii) were properly included as unsecured debt against debtor in his subsequent Chapter 13 case, and (iii) resulted in debtor's ineligibility for Chapter 13), *aff'd sub nom In re DiClemente*, No. 11-28230 MBK, 2012 WL 3314840 (D.N.J. Aug. 13, 2012); *In re Mensah-Narh*, 558 B.R. 134, 138 (Bankr. D.N.J. 2016).

[88] *Johnson*, 501 U.S. at 80; *In re Scotto-DiClemente*, 459 B.R. 558, 565 (Bankr. D.N.J. 2011), *adhered to on denial of reconsideration*, 463 B.R. 308 (Bankr. D.N.J. 2012), and *aff'd sub nom In re DiClemente*, No. BR 11-28230 MBK, 2012 WL 3314840 (D.N.J. Aug. 13, 2012).

[89] *Johnson*, 501 U.S. at 84.

gives rise to an *in rem* claim against a debtor in a subsequent bankruptcy filing.[90] Such an *in rem* claim is equivalent to a "contingent right to payment" solely from the proceeds of a foreclosure sale.[91]

Considering Debtor's 2007 discharge, it is not surprising to this Court that Debtor had not made any monthly mortgage payments to Mortgagee since March 2007. Because of his discharge, Debtor no longer had any contractual obligation to pay the Mortgage. Hence, Debtor had no secured debt contractually due to satisfy the Means Test. Accordingly, the Debtor fails the Means Test set forth in section 707(b)(2).

The Mortgage Merged into the Foreclosure Judgment

This brings the Court to the second legal argument, which neither side addressed, that equally compels exclusion of Debtor's hypothetical monthly mortgage payments from the Means Test analysis: the merger doctrine. If Debtor had not discharged the Mortgage, thereby extinguishing the contractual payments due, the merger doctrine consumes any remaining doubt.

Pursuant to the merger doctrine, "a contract is deemed to merge with the judgment, thereby depriving a plaintiff from being able to assert claims based on the terms and provisions of the contractual instrument."[92] As a matter of New Jersey law, it is "well established that upon foreclosure, the mortgage agreement merges with the final judgment of foreclosure, and 'such decree represents the final determination of the debt.'"[93] "What had been a private claim under

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[90] *Johnson*, 501 U.S. at 83; *In re Scotto-DiClemente*, 463 B.R. at 313-314.

[91] *In re Stephan*, 588 F. App'x 143 (3d Cir. 2014) ("A mortgage interest in a property that has not yet been foreclosed is a classic contingent right to payment.") (citing *Johnson,* 501 U.S. at 84).

[92] *In re A&P Diversified Techs. Realty, Inc.*, 467 F.3d 337, 341-42 (3rd Cir. 2006) ("In New Jersey, as in many states, the mortgage is merged into the final judgment of foreclosure and the mortgage contract is extinguished.") (citing and quoting *In re Roach*, 824 F.2d 1370, 1377 (3rd Cir. 1987) (further citations omitted).

[93] *Summit Business Capital Corp. v. Quinn-Woodbine Realty & Leasing Co., L.L.C.*, Case No. F–16397-01, 2006 WL 1549791 at *4 (N.J. Super. Ct. App. Div. May 8, 2006) (citing *Virginia Beach Fed. v. Bank of New York/Nat'l Comm. Div.*, 299 N.J. Super. 181, 184 (N.J. Super. Ct. App. Div. 1997) (quoting *Colonial Bldg-Loan Ass'n v. Mongiello Bros.*, 120 N.J. Eq. 270, 276 (Ch. 1936)).

the mortgage contract becomes a special form of judgment [which] entitle[s] the plaintiff to writ of execution to sell the designated property to satisfy the amount determined to be due."[94] Simply put, the contractual claim is extinguished and only a judgment claim remains.[95]

In this case, Debtor's liability to the Mortgagee arose from the pre-petition foreclosure judgment, not the Promissory Note.[96] Again, looking at the plain meaning of the statute, a secured debt cannot be "contractually due" where there is no contract.[97] The doctrine of merger eliminated any contractual claim Mortgagee had against Debtor. Therefore, Debtor cannot include monthly mortgage payments as expenses for purposes of the Means Test analysis.[98]

Absent the claimed deductions for the Mortgage and related cure amount ($11,033.65), Debtor's total deductions of $23,172.72 are reduced to only $5,254.69.[99] With an adjusted current monthly income of $10,333.65, Debtor should have a disposable income of $5,078.96. Subtracting Debtor's claimed rent expense of $2,000 would still leave slightly more than $3,000 of disposable

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[94] *Summit Business Capital Corp.*, 2006 WL 1549791 at *4 (citing *Resolution Trust Corp. v. Griffin*, 290 N.J. Super. 88, 91, 674 A.2d 1032 (Ch. Div. 1994) (further citations omitted)).

[95] *See, e.g., Stendaro v. Federal Nat'l Mortgage Ass'n (In re Stendaro)*, 991 F.2d 1089 (3rd Cir. 1993) (finding that, under Pennsylvania law, merger extinguishes the mortgage terms unless the contract evinces a specific intent for term(s) to survive); *Roach*, 824 F.3d at 1377 (3d Cir. 1987); *Dobin v. Washington Mut. Bank, F.A. (In re Loehwing)*, 320 B.R. 281 (Bankr. D.N.J. 2005) (concluding, under New Jersey law, that the foreclosure judgement extinguished the contract, but permitting the sheriff's fees from the sale to be added to the foreclosure judgment). A specific provision of a mortgage may survive the judgment if the mortgage clearly evinces an intention by the parties to preserve the effectiveness of that provision. *See Roach*, 991 F.2d at 1095. However, nothing in the record before the Court evinces such an intention.

[96] *In re Ballard*, Case No. 07-61486, 2008 WL 783408, at *5 (Bankr. N.D. Ohio Mar. 25, 2008) (holding that no amount was contractually due on a claim secured by a judgment lien because the contract merged into the pre-petition foreclosure judgment, therefore dismissing debtor's Chapter 7 case as presumptively abusive)); *In re Goble*, 401 B.R 261 (Bankr. S.D. Ohio 2009) (observing that Chapter 7 dismissal decisions permitting deduction of monthly expenses on account of secured debt that the debtor intends to surrender may have been decided differently if, as in *Ballard*, there had been a pre-petition foreclosure judgment) (citing *Ballard*, 2008 WL 783408 at * 5).

[97] 11 U.S.C. § 707(b)(2)(A)(iii)(I).

[98] *See also In re Brandenburg*, Case No. 07-20244 2007 WL 1459402 (Bankr. E.D.Wis. May 15, 2007) (holding that debtor could not claim mortgage expenses in its Means Test analysis where home had been sold pre-petition pursuant to a foreclosure sale, and dismissing debtor's Chapter 7 case as presumptively abusive). The Court notes that, were Debtor in Chapter 13, he could move to cure the post-judgment mortgage default and seek reinstatement of the mortgage. 11 U.S.C. § 1322(c)(1). However, there is no commensurate provision for cure and reinstatement of post-judgment defaults in Chapter 7.

[99] Docket No. 1 at 56.

income per month, or $184,737.60 over the course of three years.[100] This amount is substantially greater than the $12,475 statutorily permitted under the Means Test as of the Petition Date, and therefore gives rise to a presumption of abuse.[101] Debtor also failed to rebut this presumption with special circumstances that would mitigate this conclusion. Therefore, this case must be dismissed. However, because Movants provided alternative grounds for dismissal, the Court's analysis will not cease here.

Totality of the Circumstances

Even if dismissal was not required for presumptive abuse (which it is), the Court finds that the totality of circumstances equally requires dismissal of this case as an abuse of the provisions of Chapter 7.

"Where 'granting of relief would be an abuse' of Chapter 7, the 'totality of the circumstances' test" set forth in Section 707(b)(3)(B) of the Bankruptcy Code "permits dismissal given a 'debtor's financial situation.'"[102] A debtor's financial condition is assessed as of the motion to dismiss.[103] A debtor's ability to pay is the primary factor in determining abuse, but ability to pay alone is insufficient.[104] Courts look to whether a debtor would have the ability to make payments from his or her disposable income that would be available to fund a Chapter 13 plan.[105] Voluntary support payments to non-dependents are added back to a debtor's disposable income

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[100] *Id.* at 58-59.
[101] 11 U.S.C. § 707(b)(2)(A)(i)(II).
[102] *In re Cardona-Pereira*, Case No. 08-18337, 2010 WL 500404, at * 5 (Bankr. D.N.J. Feb. 4, 2010) (citing 11 U.S.C. § 707(b)(3)).
[103] *Id.* (citing *In re Pennington*, 348 B.R. 647, 651 (Bankr. D. Del. 2006)).
[104] *Id.* (citing *In re Lenton,* 358 B.R. 651, 662–64 (Bankr. E.D. Pa. 2006); *Pennington*, 348 B.R. at 649). Debtor cites *In re Walker*, 361 B.R. 620, 624 (Bankr. M.D. Pa. 2008) for the proposition that once a debtor passes the Means Test, a court cannot subject a debtor to a "second examination" of his or her Schedules I and J income for purposes of determining totality of the circumstances. As the statute specifically requires consideration of the Debtor's "financial condition"—which in turn requires an analysis of his actual income and expenses—the Court disagrees. *Accord. In re Witcher*, 702 F.3d 619, 622 (11th Cir. 2012); *In re Lanza*, 454 B.R. 81 (Bankr. M.D. Pa. 2011).
[105] *Cardona-Pereira*, 2010 WL 500404 at * 5.

"because the moral obligation to a family member who is not a dependent does not take priority over the legal obligation to repay a creditor."[106]

Courts have observed that BAPCPA's substitution of "substantial abuse" with mere "abuse" in section 707(b) results in a less stringent standard.[107] At least one bankruptcy court in this Circuit continues to analyze the totality of circumstances according to nine factors that are "identical" to those previously considered to determine "substantial abuse" under the prior version of section 707(b).[108] These factors are as follows:

> (1) whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment; (2) whether the debtor made consumer purchases far in excess of his ability to repay; (3) whether the debtor's proposed family budget is excessive or unreasonable; (4) whether the debtor's schedules and statements of current income and expenditures reasonably and accurately reflect his true financial condition; (5) whether the bankruptcy petition was filed in bad faith; (6) whether the debtor engaged in eve of bankruptcy purchases; (7) whether the debtor enjoys a stable source of future income; (8) whether he is eligible for adjustment of his debts through chapter 13 of the Bankruptcy Code; and (9) whether the debtor's expenses can be reduced significantly without depriving him of adequate food, clothing, shelter, and other necessities.[109]

In sum, "[t]hese criteria require an examination of a debtor's pre-petition financial conduct and life-circumstances along with his current financial situation and future prospects to provide an understanding of the 'totality' of his financial circumstances."[110] The Court finds these criteria

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[106] *In re Haddad*, 246 B.R. 27, 37 (Bankr. S.D.N.Y. 2000) (dismissing Chapter 7 debtor's case as a "substantial abuse" pursuant to previous section 707(b) of the Bankruptcy Code where, among other things, debtor's support payments to her mother, a non-dependent, were added back into the court's disposable income analysis in determining the debtor's repayment ability) (citing *In re Richmond*, 144 B.R. 539, 542 (Bankr. W.D. Okla. 1992)). *See also In re Cox*, 249 B.R. 29, 32 (N.D. Fla. 2000) (disallowing debtor deduction for voluntary support payments made to non-dependent family members); *In re Meler*, 295 B.R. 625, 630-31 (D. Ariz. 2003) (affirming bankruptcy court's disallowance of debtor's voluntary support payments to his girlfriend and her four children from its disposable income analysis because debtor had no "legal or even moral responsibility" to make such payments); and *In re Carey*, Case No. 01--12541C--7C, 2002 WL 1544532, at *6 (Bankr. M.D. N.C. July 15, 2002) (disallowing debtor's claim to an expense deduction on account of voluntary support payments to adult children).

[107] *See In re Zuccarell*, 373 B.R. 508, 509 (Bankr. N.D. Ohio 2007).

[108] *In re Lanza*, 450 B.R. 81, 87-88 (Bankr. M.D. Pa. 2011).

[109] *Lanza*, 450 B.R. at 87 n.7 (citing *In re Miller,* 302 B.R. 495, 498 (Bankr. M.D. Pa. 2003) (citing *In re Krohn,* 886 F.2d 123, 126 (6th Cir. 1989) and *In re Green,* 934 F.2d 568, 572 (4th Cir.1991)).

[110] *Lanza*, 450 B.R. at 88.

helpful, though not controlling, in interpreting section 707(b)(3)(B). Ultimately, it is the debtor's ability to pay that is a "primary consideration" in the Court's consideration of the totality of circumstances.[111]

Debtor asserts that, at best, he may have a monthly disposable income of $1,922.00 to pay a 16.7% dividend to Movants and other unsecured creditors.[112] Debtor further argues that because his projected dividend to creditors is less than the 25% repayment threshold in the Means Test, he cannot make a "substantial" repayment to his creditors and therefore should not be required to make any.[113] Movants counter that a debtor's ability to pay as little as 12% over three years has been held to constitute abuse warranting dismissal.[114]

The Court finds hollow Debtor's professed inability to make a "substantial" repayment to creditors. At his 341 Meeting of creditors, Debtor stated that in lieu of making his monthly mortgage payments, he gave that amount, or approximately $4,271.89, to his adult son and his son's family.[115] Debtor failed to include these alleged voluntary support payments to his non-dependents in his Schedules, which results in a distortion of his financial condition. As discussed above, adding back amounts equal to his monthly mortgage payments demonstrates Debtor has a substantial ability to repay his prepetition debts.

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[111] *See In re Zegunia*, Case No. 14-36070 (Bankr. D.N.J. July 21, 2015) (Sherwood, J.) (available at http://www.njb.uscourts.gov/content/2015-judge-sherwood) (further citations omitted) (last viewed May 11, 2018.

[112] Docket No. 22-7 at 6.

[113] Docket No. 25, ¶ 14 (citing *In re Burbol*, Case No. 09–BK-08317, 2011 WL 890684, at *3 (Bankr. M.D. Pa. Mar. 9, 2011) (dismissing debtor's Chapter 7 case as abusive where debtor had ability to repay 50% of his pre-petition unsecured debt) (citing *Pennington*, 348 B.R. at 652 (utilizing the 25% repayment threshold in the Means Test as a benchmark for determining whether a Chapter 7 case is abusive, and dismissing Chapter 7 case where debtor demonstrated an ability to repay more than 25% of his prepetition unsecured debt)).

[114] *See Navin*, 548 B.R. at 351; *see also Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 437 (6th Cir. 2004) (14% repayment over three years was held to constitute abuse warranting dismissal).

[115] *Id.* ¶ 9.

Moreover, the equities weigh in favor of dismissal. Debtor did not commence this petition because of a "sudden calamity." The incident in Angola, while no doubt traumatic, occurred nearly four years prior to the commencement of this Chapter 7 case. While the events in Angola that lead to the closure of Debtor's business were undoubtedly distressing, the record shows that, since 2012, Debtor has been steadily rebuilding his financial life. With the ghost of unemployment past hanging over his head, nonetheless, Debtor challenges the reliability of his projected income because his current history of employment is "short-lived."[116] However, Debtor has been employed by his current employer for three years, and there is no reason in the record to anticipate his untimely termination. In fact, his position survived the privatization of his employer.[117]

What the record before this Court shows is a sophisticated, income-earning debtor that has avoided repaying his debts to Movants and other creditors for nearly a decade by strategically and repeatedly utilizing the protections of the Bankruptcy Code. It would be an abuse of the discharge provisions of Chapter 7 for Debtor's hinder-and-delay tactics to result in a total discharge of his debt to Movants. Accordingly, dismissal is equally warranted upon a review of the totality of circumstances.

CONCLUSION

For the foregoing reasons, the Debtor's Chapter 7 case is DISMISSED. An appropriate Order will follow.

Stacey L. Meisel

STACEY L. MEISEL
UNITED STATES BANKRUPTCY JUDGE

Dated: May 11, 2018.

[116] *Id.*
[117] Docket No. 22, ¶ 30.