



**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
RIVERSIDE DIVISION**

In re:

Rufus Suttice and Karen Dianne Polley-Suttice,

Debtor(s),

Case No.: 6:12-bk-21006-SC

Chapter: 7

**ORDER AND OPINION DENYING MOTION
TO DISMISS FOR ABUSE**

Date: November 14, 2012

Time: 11:00 a.m.

Ctrm: Video Hearing Room 126
3420 Twelfth Street
Riverside, CA 92501

and

Courtroom 5C
411 West Fourth Street
Santa Ana, CA 92701

Before this Court is a Motion to Dismiss Case for Abuse ("Motion") pursuant to 11 U.S.C. § 707(b)(1) and 11 U.S.C. § 707(b)(3) by Movant Peter C. Anderson, the United States Trustee for the Central District of California (the "U.S. Trustee").

BACKGROUND

The pending Chapter 7 petition was filed on May 3, 2012. [Dk. 1]. The Debtors, Mr. Suttice and Mrs. Polley-Suttice (the "Debtors"), are 85 years old and 69 years old, respectively. The Debtors have a combined monthly income of \$8,532.90 as listed on their Second

1 Amended Schedule I, which consists of: \$1,072.90 from social security benefits, combined
2 pension or retirement income of \$6,572.00, Veteran Affairs (“VA”) Benefits of \$488.00, and
3 family contributions of \$400.00. [Dk. 66 at ¶3]. The Debtors have also set out their expenses
4 on their Second Amended Schedule J, totaling \$7,635.96. [Dk. 66 at ¶4]. The Debtors’ net
5 surplus income as listed on their Second Amended Schedules I and J is \$896.94 per month.
6 [Dk. 66 at ¶4].

7 On July 16, 2012, the U.S. Trustee filed this Motion. [Dk. 29] The U.S. Trustee’s motion
8 argues that the Debtors have a monthly surplus income of \$1,874.75 based upon the Debtor’s
9 First Amended Schedules and that their case should be dismissed for abuse. [Dk. 29 at ¶4].
10 The Debtors argued that there was additional information which had been inadvertently
11 omitted from their First Amended Schedule J. [Dk. 58 at ¶5]. The omitted items included an
12 additional mortgage payment, HOA dues, additional homeowner’s insurance, and personal
13 grooming which would reduce the Debtors’ net surplus income to \$1,116.07 per month. [*Id.* at
14 ¶5]. The Debtors later filed a Second Amended Schedule I and Schedule J which reflect a
15 current net surplus income of \$896.94 per month. [Dk. 66 at ¶4].

16 The hearing on the U.S. Trustee’s motion was held on November 14, 2012. During the
17 hearing, the U.S. Trustee argued for dismissal based on one factor, the ability to pay under a
18 chapter 13 plan, relying on the principals established in the Ninth Circuit case *In re Price*, 353
19 F.3d 1135, 1139-1140 (9th Cir. 2004). The U.S. Trustee argued that *Price* remains operative
20 law post-enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
21 (“BAPCPA”), and that subsequent cases in the Ninth Circuit continue to honor *Price* as guiding
22 authority. The U.S. Trustee focused its factual argument on the first *Price* factor, the ability of
23 the Debtors to fund a chapter 13 plan, which purportedly arises in this case because of the
24 Debtors’ monthly net surplus income. Because of the Debtors’ ability to fund a chapter 13
25 plan, the U.S. Trustee reasoned, the Debtors’ chapter 7 case should be dismissed.

26 The Debtors’ Counsel argued that the “ability to pay” factor from *Price* was abrogated by
27 BAPCPA, and would constitute an end-run around the means test found in 11 U.S.C. §
28 707(b)(2) if used post-BAPCPA. Additionally, protectively arguing that the *Price* factors might

1 remain valid, the Debtors' Counsel presented live testimony from each Debtor regarding their
2 age, health, medical conditions and future anticipated expenses related to their age, health
3 and medical conditions. This information indeed assists the Court in addressing other factors
4 set forth in *Price*.

5 DISCUSSION

6 **I. Post-BAPCPA Totality of the Circumstances Factors**

7 The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA")
8 modified the Bankruptcy Code by lowering the threshold standard in 11 U.S.C. § 707(b) from
9 "substantial abuse" to "mere abuse." *In re Reed*, 422 B.R. 214, 220 (Bankr. C.D. Cal. 2009).
10 Congress considered 11 U.S.C. § 707(b)(2) a codification of pre-BAPCPA case law which
11 courts used to determine if a filing was abusive. *Id.* Congress presented a general formula for
12 review of abusive cases in general situations. *In re Jensen*, 407 B.R. 378, 384 (Bankr. C.D.
13 Cal. 2009) citing *In re Fowler*, 349 B.R. 414, 420-421. Congress also anticipated that not all
14 cases would fit a general formula, and created a second method for courts to review filings for
15 abuse under 11 U.S.C. § 707(b)(3). *Id.*

16 Regardless of whether the debtor can rebut the presumption of abuse under 11 U.S.C.
17 § 707(b)(2), the U.S. Trustee may still bring an action under 11 U.S.C. § 707(b)(3). *In re Reed*
18 at 230. Where a means test does not apply to a debtor, the U.S. Trustee may still nonetheless
19 file a motion to dismiss under 11 U.S.C. § 707(b)(3) based on the totality of the circumstances.
20 *In re Baeza*, 398 B.R. 692, 696-697 (Bankr. E.D. Cal. 2008). 11 U.S.C. § 707(b)(3) permits a
21 case-by-case review of the totality of the circumstances in each case by weighing
22 circumstances that are unusual to general bankruptcy filings. *In re Jensen* at 384. The post-
23 BAPCPA case law indicates that the *Price* factors continue to serve as the primary test of what
24 factors a court should use to review the totality of the circumstances within the Ninth Circuit. In
25 *In re Wells*, a post-BAPCPA 2009 case, the Court stated,

26 "[T]here is little case law interpreting the phrase [totality of the circumstances]
27 under BAPCPA. Prior to BAPCPA, the Ninth Circuit looked to the "totality of
28 the circumstances" to interpret the term "substantial abuse" in former § 707(b).
Because Congress retained the phrase "totality of the circumstances" in

1 BAPCPA, the court may look to pre-BAPCPA case law to construe the
meaning of that phrase under § 707(b)(3).”

2 *In re Wells*, 08-14549-B-7, 2009 WL 159663 (Bankr. E.D. Cal. Jan. 21, 2009).

3 Additional courts within the Ninth Circuit have similarly held that *Price* is still controlling
4 for determining an abuse post-BAPCPA for 11 U.S.C. § 707(b)(3). See, *In re Baeza*, 398 B.R.
5 692, 696 (Bankr. E.D. Cal. 2008); *In re Lamug*, 403 B.R. 47, 54 (Bankr. N.D. Cal. 2009); *In re*
6 *Pak*, 343 B.R. 239, 244 (Bankr. N.D. Cal. 2006); and most recently in *In re Ng*, 477 B.R. 118,
7 126 (9th Cir. B.A.P. 2012).

8 The nonexclusive factors outlined in *Price* for courts to consider when reviewing the
9 “totality of the circumstances” under 11 U.S.C. § 707(b)(3) are:

- 10 1. Whether the debtor has a likelihood of sufficient future
11 income to fund a chapter 11, 12, or 13 plan which would pay
a substantial portion of the unsecured claims;
- 12 2. Whether the debtor's petition was filed as a consequence of
illness, disability, unemployment, or some other calamity;
- 13 3. Whether the schedules suggest the debtor obtained cash
advancements and consumer goods on credit exceeding his
14 or her ability to repay them;
- 15 4. Whether the debtor's proposed family budget is excessive or
extravagant;
- 16 5. Whether the debtor's statement of income and expenses is
misrepresentative of the debtor's financial condition; and
- 17 6. Whether the debtor has engaged in eve-of-bankruptcy
purchases.

18 *In re Price*, 353 F.3d 1135, 1139-1140 (9th Cir. 2004).

19 This Court agrees with the conclusions of the Ninth Circuit BAP in *In re Ng*, 477 B.R.
20 118, 126 (9th Cir. B.A.P. 2012), and finds that the factors outlined in *Price* provide meaningful
21 guidance to the Court in examining the totality of the circumstances.

22 **II. The Ability to Pay Factor and Social Security Income**

23 In reviewing the totality of the circumstances, the Court may take into account both
24 current and foreseeable circumstances. *In re Ng*, 477 B.R. 118, 126 (9th Cir. B.A.P. 2012).

25 Whether a debtor has the ability to repay creditors under § 707(b)(3)(B) is a question of
26 fact that requires a bankruptcy court to examine the debtor's actual income and
expenses. *Ross-Tousey v. Neary (In re Ross-Tousey)*, 549 F.3d 1148, 1162 (7th Cir.
27 2008). In performing this review, “courts may take into account both current and
foreseeable circumstances.” *In re Hartwick*, 359 B.R. 16, 21 (D. N.H. 2007); see also
28 *Boyce v. U.S. Tr. (In re Boyce)*, 446 B.R. 447, 452 (D. Or. 2011); *In re Reed*, 422 B.R.
at 214, 232.

1 *In re Ng*, 477 B.R. 118, 126 (B.A.P. 9th Cir. 2012).

2 The facts are simple in the present case. The Debtors have a surplus net income each
3 month of \$896.94. This surplus is created by inclusion into their income of \$1,072.90 from
4 Social Security Benefits (“SS Benefits”). The U.S. Trustee wants this case to be dismissed so
5 that the Debtors will be forced to file chapter 13 and propose a plan to pay their creditors with
6 their net surplus income. However, two realities exist in this case. The first is that, if the SS
7 Benefits are not required to be contributed to a chapter 13 plan, the Debtors would have to pay
8 nothing to their general unsecured creditors within that chapter 13 plan. The second reality is
9 that, unlike the 43 year old Mr. Ng in the Ninth Circuit’s BAP decision, Mr. Suttice is 85 years
10 old and Mrs. Polly-Suttice is 69 years old, and having the typical physical conditions attached
11 to those respective ages. Mr. Ng’s proposed contributions to his future retirement was certainly
12 debatable; however, for the Debtors, their future is now.

13 1. Chapter 13 Debtors Are Not Required to Contribute Social Security Income to
14 Chapter 13 Plans.

15 The Sixth, Eighth and Tenth Circuit Courts of Appeal have found that SS Benefits do not
16 have to be contributed to a chapter 13 plan. *Baud v. Carroll*, 634 F.3d 327 (6th Cir. 2011); *In re*
17 *Carpenter*, 614 F.3d 930 (8th Cir. 2010); *In re Cranmer*, 697 F.3d 1314 (10th Cir. 2012). This
18 Court has found no circuit courts of appeal cases that have ruled that SS Benefits must be
19 contributed to a chapter 13 plan. The Ninth Circuit Court of Appeals has apparently not ruled
20 on this issue. The Bankruptcy Appellant Panel of the Eighth Circuit Court of Appeals has also
21 ruled that SS Benefits do not have to be contributed to a chapter 13 plan. *In re Thompson*, 439
22 B.R. 140 (8th Cir. B.A.P. 2010). Several Bankruptcy Courts have also declined to require
23 debtors to contribute SS Benefits to a chapter 13 plan. *In re Bartelini*, 434 B.R. 285 (Bankr.
24 N.D.N.Y. 2010); *In re Wilson*, 397 B.R. 299 (Bankr. M.D.N.C. 2008); *In re Miller*, 445 B.R. 504
25 (Bankr. D.S.C. 2011); *In re Barfknecht*, 378 B.R. 154 (Bankr. W.D. Tex. 2007); *In re Ragos*,
26 466 B.R. 803 (Bankr. E.D. La. 2011); *In re Upton*, 363 B.R. 528 (Bankr. S.D. Ohio 2007); and,
27 *In re Vandebosch*, 459 B.R. 140 (M.D. Fla. 2011).

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1 A few bankruptcy court decisions have required contribution of SS Benefits to chapter
2 13 plans. These include *In re Herrmann*, CA 10-06523-JW, 2011 WL 576753 (Bankr. D.S.C.
3 Feb. 9, 2011); *Mains v. Foley*, 1:11-CV-456, 2012 WL 612006 (W.D Mich. Feb. 24, 2012); *In re*
4 *Nicholas*, 458 B.R. 516 (Bankr. E.D. Ark. 2011); *In re Thomas*, 10-67280-MHM, 2011 WL
5 350430 (Bankr. N.D. Ga. Feb. 3, 2011), and *United States v. Devall*, 704 F.2d 1513 (11th Cir.
6 1983).

7 This Court believes that Congress intended retirement entitlement benefits to be
8 protected, as shown by the Debtors' Social Security income being excluded under the means
9 test of 11 U.S.C. § 707(b)(2). *In re Welsh*, 465 B.R. 843, 859 (9th Cir. B.A.P. 2012). This
10 Court believes that the previously cited decisions from the Sixth, Eighth and Tenth are correct
11 in this regard.

12 In the case before the Court, if in a chapter 13, the creditors would receive nothing if the
13 SS Benefits are not contributed to the plan. Conversion of this case to a chapter 13 would be
14 a futile act, as the Creditors would receive nothing more than they would under the current
15 chapter 7 case. Dismissal with the aim of a conversion of the case to chapter 13 would result
16 in no benefit to unsecured creditors, and would waste the resources of debtors, creditors and
17 the Judiciary. However, this analysis does not end the discussion. Even if the Court were to
18 find that the SS Benefits should be included in payments to creditors under a hypothetical
19 chapter 13 plan, the current and future financial circumstances of these Debtors weigh heavily
20 under the first *Price* factor, as described below.

21 2. The Current and Future Financial Circumstances of the Debtors.

22 The Debtors' ongoing health concerns and the Debtors' remaining life spans add to the
23 consideration of both a non-viable chapter 13 plan and the overall consideration of the
24 Debtors' current and future financial situation.

25 The Debtors' live testimony indicated that Mr. Suttice is nearly 86 years old, and he
26 testified that he had two leaking heart valves prior to recent surgery. He is under frequent
27 medical observation and treatment. He is a 30 year veteran of the United States Army. Mrs.
28 Polly-Suttice has served as an employee of the United States Government for decades prior to

1 her retirement. Mrs. Polly-Suttice testified that due to a degenerative eye condition, she has
2 completely lost one eye, and now has a prosthesis. She further testified that she reasonably
3 expects within the next several years to lose her second eye, and thus will be totally blind.

4 This Court has taken judicial notice of the current Social Security Administration
5 Actuarial Life Table ("Table"), and notes that Mr. Suttice had a remaining life expectancy of
6 5.26 years. According to the same Table, Mrs. Polley-Suttice had a possible remaining life
7 expectancy of 16.79 years.

8 As Mrs. Polley-Suttice completely loses her vision, both she and her husband will need
9 additional physical care, including but not limited to, medical treatment, home care and
10 transportation. Mr. Suttice, almost 86 years old, will need someone to drive him to Riverside
11 for care at the Veterans Administration Hospital as his health and well being continues to
12 deteriorate. This couple will need to go shopping for groceries, they will need to visit doctors,
13 they may want to go to a house of worship. They may want to visit family members or friends.
14 Mrs. Polly-Suttice, now 69 years old, may require expensive medical and technological tools
15 and devices for her to function without vision. They may require a caretaker or home
16 healthcare worker to assist in daily tasks around the home. There may come a point, much
17 too soon, where every penny they will most likely be used for their basic living subsistence.

18 The U.S. Trustee's position that they should be assigned to a shut-in life for their
19 remaining few years, while spending all of their Social Security Benefits toward a chapter 13
20 plan, and all the while being wholly dependent on other federal and state funded medical and
21 disability programs, is untenable to this Court. It is rather that the Debtors save their Social
22 Security income for times and needs almost certainly too soon to come, than to subject the
23 Debtors, their creditors, and the Court's judicial resources to an unnecessary chapter 13 plan
24 process that would either impoverish the Debtors during their remaining years, or else pay the
25 creditors nothing.

26 While the ability to pay under a chapter 13 plan factor would normally weigh in favor of
27 dismissal, based on the specific facts and circumstances this Court has carefully considered in
28 this case, this Court finds that the first *Price* factor does not weigh in favor of dismissal. Unlike

1 the 42 year old Mr. Ng, with many years left to contribute additional funds to his retirement,
2 those days are gone for these Debtors. But even more so, even if this Court found that the
3 Debtors had an ability pay under a chapter 13 plan by voluntarily including all of their income,
4 the net weight of the other *Price* factors and circumstances of this case would outweigh their
5 ability to pay.

6 **III. The Remaining *Price* Factors**

7 The Second Price Factor: Illness, Disability, Unemployment, or Calamity

8 The second *Price* factor focuses on whether the Debtors' petition was filed as a
9 consequence of illness, disability, unemployment, or some other calamity. The facts and
10 circumstances of this case, as they address the second *Price* factor, weigh in favor of the
11 Debtors. The record of this case demonstrates that prior to the petition date, the Debtors
12 incurred medical bills and cost of living expenses due to the significant health problems of both
13 Debtors. The bankruptcy petition was the eventual result of the onset of disability of Mrs.
14 Polley-Suttice; however, Mr. Suttice's medical condition also contributed to this situation. There
15 was a strong, legitimate need to file for bankruptcy. This factor falls strongly in favor of denying
16 the Motion.

17 The Third *Price* Factor: Cash Advancements and Consumer Goods on Credit

18 Exceeding Ability to repay

19 The third *Price* factor focuses on whether the Debtors' schedules suggest the Debtors
20 obtained cash advancements and consumer goods on credit exceeding his or her ability to
21 repay those advancements or goods purchased on credit. This Court has reviewed the
22 Debtors' schedules in this matter, and finds that there is no indication that the Debtors
23 obtained cash advancements or made consumer good purchases exceeding their ability to
24 repay. There has been no presentation of evidence of any such activity. Accordingly, this
25 factor weighs in favor of the Debtors.

26 The Fourth *Price* Factor: Excessive or Extravagant Family Budget

27 The fourth *Price* factor focuses on whether the Debtors' proposed family budget is
28 excessive or extravagant. Here, this Court has reviewed the Debtors' Second Amended

1 Schedule J, and finds that there is nothing that is either excessive or extravagant as listed in
2 the Debtors' budget. There has been no presentation of evidence of any such activity. This
3 factor weighs in favor of denying the Motion.

4 The Fifth *Price* Factor: Statement of Income and Expenses is Misrepresentative of
5 Debtors' Financial Condition

6 The fifth *Price* factor focuses on whether the Debtors' statement of income and
7 expenses is misrepresentative of the Debtors' financial condition. The initial Schedules I and
8 J and First Amended Schedules I and J have been replaced with the Second Amended
9 Schedules I and J, as ordered by the Court at the evidentiary hearing on this matter. The
10 Court observes that the Debtors faced certain difficulties with former counsel, and that
11 evidence of non-attentiveness by that former counsel to the scheduled information
12 presentation by the Debtors resulted in some inaccuracies presented in the first two Schedule
13 J's. The Court also makes note of the recent acquisition and appearance of new, competent
14 counsel for the Debtors. This Court has reviewed the previously filed schedules, and the most
15 recent ones, and finds that there is nothing that appears to be materially misrepresentative of
16 the Debtors' financial condition within those schedules. The changes have been adequately
17 explained (and are not contradicted by any evidence). As such, this factor weighs in favor of
18 denying the Motion.

19 The Sixth *Price* Factor: Whether the Debtors Engaged in Eve-of-Bankruptcy Purchases

20 The final *Price* factor focuses on whether the Debtors engaged in eve-of-bankruptcy
21 purchases. This Court has reviewed the Debtors' schedules, and finds that there is no
22 indication of eve-of-bankruptcy purchases. There has been no presentation of evidence of
23 any such activity. As there are no eve-of-bankruptcy purchases, this factor would weigh in
24 favor of denying the Motion.

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CONCLUSION AND ORDER

The *Price* factors weigh in favor of the Debtors. The Debtors' case should not be dismissed for abuse. Accordingly, the Motion to Dismiss is **DENIED**.

IT IS HEREBY ORDERED.

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DATED: December 19, 2012

United States Bankruptcy Judge

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): **MEMORANDUM OF DECISION DENYING MOTION TO DISMISS FOR ABUSE** was entered on the date indicated as “Entered” on the first page of this judgment or order and will be served in the manner stated below:

1. **SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)** – Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of (*date*) 12/19/12, the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Stephanie Acuna sacuna@hmausa.com
- Lynda T. Bui (TR) trustee.bui@shblp.com, C115@ecfbis.com
- Everett L Green everett.l.green@usdoj.gov
- Avi Schild bk@atlasacq.com
- United States Trustee (RS) ustpreion16.rs.ecf@usdoj.gov
- Arnold H Wuhrman Wuhrman@serenitylls.com

Service information continued on attached page

2. **SERVED BY THE COURT VIA UNITED STATES MAIL:** A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

Rufus Suttice
Karen Dianne Polley-Suttice
29864 Winter Hawk Rd.
SUN CITY, CA 92586

Service information continued on attached page

3. **TO BE SERVED BY THE LODGING PARTY:** Within 72 hours after receipt of a copy of this judgment or order which bears an “Entered” stamp, the party lodging the judgment or order will serve a complete copy bearing an “Entered” stamp by United States mail, overnight mail, facsimile transmission or email and file a proof of service of the entered order on the following persons and/or entities at the addresses, facsimile transmission numbers, and/or email addresses stated below:

Service information continued on attached page