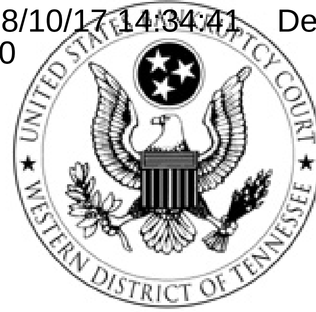
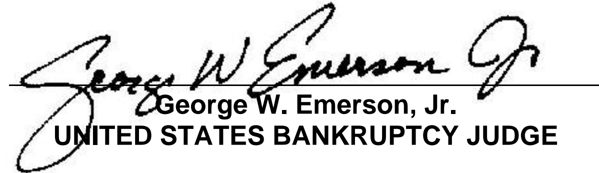


Dated: August 10, 2017
The following is SO ORDERED:



George W. Emerson, Jr.
UNITED STATES BANKRUPTCY JUDGE

THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE

In re

Frederick Taliaferro Hodges, Case No. 16-24467-E

Debtor. Chapter 7

ORDER GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on the motion for partial summary judgment filed by Samuel K. Crocker, the United States Trustee for Region 8 ("U.S. Trustee"), and Frederick Taliaferro Hodges' ("Debtor's") objection thereto. The parties have now filed a Joint Stipulation of Issues, which states that the single issue before the Court is whether or not Debtor's student loans are "consumer debts" or "non-consumer debts." The Court's resolution of this single issue, the parties have agreed, will also resolve the issue of whether Debtor's debts are primarily consumer debts or are not primarily consumer debts within the meaning of 11 U.S.C. § 707(b)(1), and thus whether the

U.S. Trustee's motion to dismiss Debtor's petition, as being an abuse of Chapter 7, should be granted as set forth in the Joint Stipulation of Issues (Chapter 7 Case No. 16-24467, ECF No. 121).

The U.S. Trustee filed a Statement of Undisputed Facts on May 8, 2017, and counsel for Debtor has indicated that Debtor has no objection to the Statement of Undisputed Facts. The Court, therefore, has relied upon the Statement of Undisputed Facts, as well as the Court's own docket, and the pleadings and papers filed by the parties in this case, in making the following findings of fact:

1) On May 16, 2016, Debtor filed a Voluntary Petition under Chapter 7 of Title 11 of the Bankruptcy Code. (*Id.*, ECF No. 1).

2) On Debtor's original petition, he checked the box on Part 6, Question 16a, on the sixth page, indicating that his debts are primarily "consumer debts." Debtor signed the petition, declaring under penalty of perjury that the information was true and correct. (*Id.*).

3) On Debtor's original Statement of Financial Affairs, filed on May 11, 2016, and Debtor's Amended Statement of Financial Affairs, filed on July 26, 2016, Debtor checked the box on Part 3, Question 6, indicating that Debtor has primarily "consumer debts." (*Id.*, ECF Nos. 1 and 27). As of the date of this order, Debtor has not amended this statement.

4) On Debtor's Schedule E/F, "Creditors Who Have Unsecured Claims," filed with the original petition on May 11, 2016, Debtor listed "Dhhs/hrsa" with two non-priority, unsecured claims in the amounts of $9,103.00, and $5,650.00, described as "Government Miscellaneous Debt." Also on his original Schedule E/F, Debtor listed Navient as a non-priority creditor and described the non-priority student loan claim as "Educational," in the total amount of $144,400.00. Debtor concedes, as the U.S. Trustee stated, that Debtor's debts to these two creditors are student loan debts, totaling $159,153.00.

5) On May 11, 2016, Debtor filed a Statement of Current Monthly Income in which he indicated that he had total current monthly income of $16,400.00. He also filed a Chapter 7 means test calculation on which he indicated that the presumption of abuse does not arise. (*Id.*, ECF No. 4).

6) On May 18, 2016, Debtor filed an Amended Schedule E/F which, for the first time, included the IRS as a non-priority unsecured creditor with a total claim of $250,000.00. The debt owed to the IRS was described as "IRS - 2006-2012." (*Id.*, ECF No. 11).

7) Debtor's Chapter 7 meeting of creditors was conducted on July 13, 2016. On July 25, 2016, the U.S. Trustee filed a so-called "10-day Statement." The 10-day Statement is a minute entry on the Court's docket which reads:

> As required by 11 U.S.C. Sec. 704(b)(1)(a), the United States Trustee has reviewed the materials filed by the debtor(s). Having considered these materials in reference to the criteria set forth in 11 U.S.C. Sec. 707(b)(2)(A), and, pursuant to 11 U.S.C. Sec. 704(b)(2), the United States Trustee has determined that: (1) the debtor's(s') case should be presumed to be an abuse under section 707(b); and (2) the product of the debtor's current monthly income, multiplied by 12, is not less than the requirements specified in section 704(b)(2)(A) or (B). As required by 11 U.S.C. Sec. 704(b)(2) the United States Trustee shall, not later than 30 days after the date of this Statement's filing, either file a motion to dismiss or convert under section 707(b) or file a statement setting forth the reasons the United States Trustee does not consider such a motion to be appropriate. Debtor(s) may rebut the presumption of abuse only if special circumstances can be demonstrated as set forth in 11 U.S.C. Sec. 707(b)(2)(B).

8) On July 26, 2016, Debtor again filed an Amended Schedule E/F, to add First Tennessee Bank as a non-priority, unsecured creditor with a debt of $250,000.00. The debt to First Tennessee was described as "Lawsuit." (*Id.*, ECF No. 26).

9) On August 8, 2016, Debtor filed an Amended Voluntary Petition in which he checked the box on Part 6, Question 16a, on the sixth page, indicating that his debts were *not* primarily

"consumer debts," and Debtor also checked the box on Part 6, Question 16b, on the sixth page, indicating that his debts are primarily "business debts." (*Id*., ECF No. 31 at 6). Debtor signed the Amended Voluntary Petition, declaring under penalty of perjury that the information was true and correct. *Id.*

10) On August 12, 2016, the U.S. Trustee filed a motion to dismiss Debtor's case pursuant to 11 U.S.C. § 707(b)(2) or (3).

11) Debtor amended Schedule E/F several times. Debtor filed an Amended Schedule E/F on May 18, 2016. This first Amended Schedule E/F did not amend the descriptions of the debt owed to Dhhs/hrsa or Navient. (*Id*., ECF No. 11 at 5 and 8). Debtor filed another Amended Schedule E/F on July 26, 2016. This second Amended Schedule E/F did not amend the descriptions of the debt owed to Dhhs/hrsa or Navient. (*Id*., ECF No. 26 at 5, 8). Finally, on September 5, 2016, Debtor filed a third Amended Schedule E/F. The third Amended Schedule E/F listed Dhhs/hrsa's claims for the same amount as Debtor's original Schedule E/F, but described the debt as "Government Miscellaneous Debt Business Debt." Debtor also amended Navient's claim description as "Educational Business Debt," but left the remainder of the creditor's description unaltered.

12) Debtor's obligations to Dhhs/hrsa and Navient are student loans totaling $159,153.00. Substantially all of Debtor's student loans were used to fund tuition and fees for Debtor's medical school education.

13) Included with Debtor's original petition, filed on May 11, 2016, Debtor filed his Schedule J which stated that Debtor had an installment payment of $1,000.00 per month for student loans. (*Id*., ECF No. 1 at 37). The U.S. Trustee's Statement of Undisputed Facts indicates, without any opposition from Debtor, that Debtor testified at his meeting of creditors that he is instead only

making payments on one student loan in the amount of $350.00 per month and the remainder of his loans are in forbearance. *(Id.*, Statement of Undisputed Facts, ECF No. 98 at 6). As of the date of this order, Debtor has not amended Schedule J.

ANALYSIS

11 U.S.C. § 707(b)(1) provides, in pertinent part, that the Court may dismiss (or voluntarily convert to Chapter 11 or Chapter 13) a Chapter 7 case filed by an individual debtor, whose debts are primarily consumer debts, if the Court finds that the granting of relief would be an abuse of the provisions of Chapter 7. Debts are "primarily" consumer debts, for § 707 (b) purposes, if the consumer debts owed are equal to over fifty (50) percent of the total dollar amount of a Debtor's debts. *In re Booth*, 858 F.2d 1051, 1055 (5th Cir. 1988); *Price v. U.S. Trustee* (*In re Price*), 353 F.3d 1135, 1139 (9th Cir. 2004); see also *In re Lapke*, Case No. 07-81140, 2008 WL 355575 at * 3 (Bankr. Neb. 2008) and cases cited therein.

The issue before the Court in this case is whether Debtor's debts are primarily "consumer debts" or "business debts." Debtor's student loans are of such magnitude that their characterization will determine the issue. If Debtor's student loans are "consumer debts," as asserted by the U.S. Trustee, then the majority of Debtor's debt will be "consumer debt." If Debtor's student loans are considered "business debts," as Debtor argues, then the majority of Debtor's debt will be "business debt" (i.e. not "consumer debt" for 707(b) purposes).

Counsel for Debtor urges the Court to apply the "profit motive" test to determine whether or not Debtor's student loans are "consumer" or "business" debts, and to find that the facts of this case show that Debtor's student loans were obtained with an eye toward profit, making the student loans "business debts." Debtor argues that because Debtor's student loan proceeds were only used

for medical school tuition and fees, instead of living expenses, they pass the profit motive test. In effect, Debtor argues that all debts incurred for *tuition and fees* while obtaining a professional degree would pass the profit-motive test and Debtor's student loans would fall within this category.

The U.S. Trustee initially urges the Court to find that all student loan debt fits within the definition of "consumer debt" as defined in 11 U.S.C. § 101(8): "The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose." The U.S. Trustee asserts that courts interpreting consumer protection legislation, with language that is similar to that of § 101(8), have found student loan debt to be consumer debt. Alternatively, the U.S. Trustee urges the Court to adopt a more narrowly tailored version of the "profit motive" test: one that requires the student loans to be incurred for a business purpose in existence at the time the loan is incurred, or for advancement in Debtor's current employment, or advancement in an organization in which Debtor is a member. The U.S. Trustee argues that Debtor's student loans do not fit within the narrow version of the "profit motive" test because he was not engaged in business at the time of the making of the loans and did not advance any current employment prospects Debtor had at that time.

After reviewing the relevant pleadings and arguments of counsel, as well as the undisputed facts presented to the Court, the Court finds that judicial estoppel prevents Debtor from now asserting that Debtor's student loan debts are not consumer debts. "The doctrine of judicial estoppel 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase.'" *White v. Wyndham Vacation Ownership, Inc.,* 617 F.3d 472, 476 (6th Cir. 2010)(citation omitted). Further, the doctrine exists to "preserve the integrity of the courts by preventing a party from abusing the judicial process

through cynical gamesmanship. . .(although) [i]t should be applied with caution to avoid impinging on the truth-seeking function of the court, because the doctrine precludes a contradictory position without examining the truth of either statement." *Id.* (citations omitted). "Because the rule is intended to prevent improper use of judicial machinery, judicial estoppel is an equitable doctrine invoked by the court at its discretion." *New Hampshire v. Maine*, 532 U.S. 742, 750; 121 S.Ct. 1808, 1815 (2001).

The Sixth Circuit has suggested a two-factor test to determine if judicial estoppel should be applied: a party should be barred from 1) asserting a position that is contrary to one that the party has asserted under oath in a prior proceeding, where 2) the prior court adopted the contrary position either as a preliminary matter or as part of a final disposition. *Browning v. Levy*, 283 F.3d 761, 775 (6th Cir. 2002). Although there is no set formula for assessing when judicial estoppel should apply, it is well-established that at a minimum, a party's later position must be clearly inconsistent with its earlier position for judicial estoppel to apply. *Lorillard Tobacco Co. v. Chester, Willcox & Saxbe, LLP,* 546 F.3d 752, 757 (6th Cir. 2008).

However, judicial estoppel should not be applied in cases of conduct amounting to nothing more than mistake or inadvertence. *Id*. at 776. Such circumstances may include where the debtor lacks knowledge of the factual basis of the undisclosed claims and where the debtor has no motive for concealment. *Id*. (citation omitted).

The Court initially notes that this case has proceeded from Debtor's initial representation that he was eligible for Chapter 7 relief, that his Debts were "primarily" consumer debts, and that no presumption of abuse arose. (Chapter 7 Case No. 16-24467, ECF No. 4). The Court has signed multiple orders, with Debtor's consent, including reaffirmation agreements. The Court appointed

a Chapter 7 Trustee who reviewed Debtor's petition and statements and presided over Debtor's § 341 meeting of creditors. Debtor now concedes in the Joint Stipulation of Issues filed with the Court that if the Court does not adopt Debtor's *new* position that his student loan debts are "business debts," the granting of relief under Chapter 7 would be an abuse of the provisions of Chapter 7 and Debtor's case will be dismissed or converted to Chapter 11 (Chapter 7 Case No. 16-24467; ECF No. 121).

The Court takes guidance from *In re Jones*, 556 B.R. 327 (Bankr. E.D. Mich. 2016). In that case, the debtor, a nurse, filed a Chapter 7 case, declaring under penalty of perjury that her statements were true and correct and that her debts were primarily consumer debts. After the U.S. Trustee filed its motion to dismiss, debtor amended her petition and means test to state that her debts were not consumer debts (90% of the debtor's debts in that case were student loan debts). The Court found that her failure to explain her inconsistent positions with regard to the character of her loans, along with the suspicious timing of her amendments, was evidence of the "gamesmanship" prohibited by judicial estoppel. *Id.* at 335.

The case before the Court is alarmingly similar. Debtor does not allege mistake or inadvertence here, instead Debtor alleges that the student loans were incurred twenty years ago and Debtor and counsel were unable to determine if his student loans were business debts until they received further information from his medical school and student loan lenders "through the discovery process." This indicates that had the U.S. Trustee not filed the "10-day Statement," followed by a motion to dismiss Debtor's case, Debtor would not have amended his schedules regarding the character of his student loans. The Court should not encourage the amendment of schedules to suit a Debtor's needs. "We will not consider favorably the fact that White updated her

initial filings after the motion to dismiss was filed. To do so would encourage gamesmanship, since White only fixed her filings after the opposing party pointed out that those filings were in accurate." *White v. Wyndham Vacation Ownership, Inc.,* 617 F.3d 472 (6th Cir. 2010).

Debtor has failed to explain the suspicious timing of his change in positions, both of which were taken under oath. Debtor altered his position after amending his schedules to include other large business debts, and immediately after the U.S. Trustee's minute entry which indicated that a motion to dismiss would be filed shortly thereafter. The timing of Debtor's change of position is indicative of his having motive for doing so: Debtor's original petition was filed on May 16, 2016, he amended his Schedule E/F, changing the character of his student loans, on September 5, 2016. This amendment was after Debtor had amended his schedules to add other, substantial, non-consumer debt (i.e. the debts owed to the IRS and to First Tennessee) so that his student loans would cause his indebtedness to exceed the 50% threshold for his debts to be "primarily" non-consumer, *if* his student loans were included.

Debtor changed his position regarding a fact which was in existence at the time of the filing of his original petition: whether his student loans were consumer debts or business debts. Debtor changed his position regarding the character of his loans when it was advantageous for him to do so. " Judicial estoppel is most commonly applied to bar a party from making a factual assertion in a legal proceeding which directly contradicts an earlier assertion made in the same proceeding or a prior one." *Pikeville Energy Group, LLC v. Spradlin (In re Alma Energy, Inc.),* 439 B.R. 92 (6th Cir. BAP 2010).[1]

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[1] The Court notes that this is not the only evidence that Debtor is playing "fast and loose" with the information he disclosed to the Court. Debtor listed student loan payments on his Schedule J in the amount of $1,000.00. At his meeting of creditors, Debtor testified that he

The Court here finds that Debtor has, in fact, played fast and loose with the bankruptcy court, with the administration of this bankruptcy case, and with the disclosures on Debtor's schedules as filed with the Court. Judicial estoppel is applied at the discretion of the Court, and the Court finds that this case exhibits the type of deliberate vacillation that should not be allowed when a Debtor files statements with the Court under penalty of perjury.

The U.S. Trustee's motion for partial summary judgment is hereby GRANTED.

It is so ORDERED.

cc: Debtor
Counsel for Debtor
Chapter 7 Trustee
U.S. Trustee
Matrix

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actually only pays $350.00 per month towards his student loan debt because part of the loans are in deferment. Debtor has offered the Court no explanation for this glaring discrepancy which served to inflate his overall expenses on Schedule J, thereby decreasing the apparent amount of his net income.