IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE: **CHAPTER 13**

SENECA MCFIELD **CASE NO. 0601659EE**

Seneca McField *Pro Se* Debtor

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Edward Ellington, Judge

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON THE *MOTION TO CONVERT TO CHAPTER 7* FILED BY REGIONS BANK AND THE *MOTION TO VOLUNTARILY DISMISS CHAPTER 13* FILED BY THE DEBTOR

THIS MATTER came before the Court on the *Motion to Convert to Chapter 7* filed by Regions Bank, the *Joinder in Motion to Convert to Chapter 7* filed by OmniBank, and the *Response to Motion to Convert Chapter 13 to Chapter 7* filed by Seneca McField (Debtor). Also before the Court is the *Motion to Voluntarily Dismiss Chapter 13* filed by the Debtor and the *Response to Motion to Voluntarily Dismiss Chapter 13* filed by OmniBank. After considering all pleadings and

the brief of Regions Bank, the Court finds that the *Motion to Convert to Chapter 7* is well taken and should be granted. After considering the Debtor's *Motion to Voluntarily Dismiss Chapter 13* and *Response to Motion to Voluntarily Dismiss Chapter 13* filed by OmniBank, the Court finds that the motion is not well taken and should be denied.

FINDINGS OF FACT

On August 18, 2006, the Debtor, Seneca McField, filed a petition for relief under Chapter 13 of the United States Bankruptcy Code. At the time he filed his petition, the Debtor was represented by Michael G. Pond. Other than filing the creditor matrix with his petition, the Debtor's filing was incomplete. The Debtor did not file any of the lists, schedules, statement of financial affairs or other documents required by 11 U. S. C. § 521[1] or Interim Federal Rule of Bankruptcy Procedure 1007[2]. As of the date of this opinion, March 8, 2007, the Debtor has not filed any of the documents required by § 521 or Interim Rule 1007.

On August 28, 2006, Regions Bank, an unsecured creditor of the Debtor, filed a *Motion to Convert to Chapter 7* (Motion to Convert). In its Motion to Convert, Regions Bank (Regions) alleges that the Debtor filed his petition in order to stop a foreclosure by OmniBank and that the Debtor has no intention of proceeding with the Chapter 13 bankruptcy. Regions states that it would be in the best interest of the Debtor's creditors and all parties in interest if the Debtor's case was converted to a Chapter 7 so that a Chapter 7 trustee could liquidate the Debtor's estate for the benefit of all creditors. On September 29, 2006, OmniBank filed a *Joinder in Motion to Convert to Chapter*

[1]Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

[2]Hereinafter, all rules refer to the Federal Rules of Bankruptcy Procedure unless specifically noted otherwise.

7 (Joinder) in which OmniBank alleges that the Debtor's Chapter 13 filing was in bad faith and for the sole purpose of delaying creditors from proceeding against him.

On September 9, 2006, the Debtor filed a *Motion to Voluntarily Dismiss Chapter 13* (Motion to Dismiss). In his motion, the Debtor states that he is now able to deal directly with his creditors and that it would be in his best interest to dismiss his Chapter 13 bankruptcy.

On September 14, 2006, the Debtor filed a *Response to Motion to Convert Chapter 13 to Chapter 7* (Debtor's Response). In his response, the Debtor states that he has an absolute right to dismiss his Chapter 13 petition, and therefore, the Motion to Convert should be denied and his Motion to Dismiss should be granted and his case dismissed.

On September 29, 2006, OmniBank filed its *Response to Motion to Voluntarily Dismiss Chapter 13* (Response). OmniBank states that instead of being dismissed, the Debtor's case should be converted to a Chapter 7.

A trial was held on the Motion to Convert, the Joinder and the Debtor's response, and the Motion to Dismiss and OmniBank's Response on October 20, 2006. At the trial, the Debtor testified that he filed his petition in order to stop OmniBank's foreclosure and that he "never planned on–I got the letter from the court to turn in some paperwork, but I never planned on turning anything in." Record at 8, *Motion to Convert to Chapter 7, et. al.* (October 20, 2006). At the conclusion of the trial, the Court gave the parties until November 9, 2006, to file briefs.

On October 30, 2006, the Debtor filed *Petitioner's Motion to Supplement the Record*. Then on November 9, 2006, Michael G. Pond filed a *Motion to Withdraw* in which he stated that it would be "in the best interest of the parties" if he were allowed to withdraw as attorney for the Debtor. Both motions were set for hearing on November 27, 2006. At the hearing, the Court orally granted

both motions. On December 19, 2006, the Court signed an order allowing Mr. Pond to withdraw and giving the Debtor until January 15, 2007, to obtain new counsel. As of this date, the Debtor has not obtained new counsel.

Regions filed its *Memorandum in Support of Motion to Convert* on October 18, 2006, and on November 10, 2006, Regions filed its *Supplemental Brief in Support of Motion to Convert.* In the order allowing Mr. Pond to withdraw, the Court also gave the Debtor and his new counsel until January 25, 2007, to file briefs in support of the Debtor's Motion to Dismiss and in opposition to the Motion to Convert. To this date, the Debtor has not filed a brief in support of his Motion to Dismiss or in opposition to the Motion to Convert.

CONCLUSIONS OF LAW

I.

This Court has jurisdiction of the subject matter and of the parties to this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A).

II.

Several issues are before the Court: (1) Does the Debtor have an absolute right to dismiss his case pursuant to § 1307(b) when Region's Motion to Convert is pending; (2) If the Debtor does not have an absolute right to dismiss his case, does cause exist to convert his case to a Chapter 7 pursuant to § 1307(c); and (3) What is the effect of the automatic dismissal provision found in § 521(i).

A.

As stated above, the first issue before the Court is whether the Debtor has an absolute right

to dismiss his case pursuant to § 1307(b) when the Motion to Convert by Regions is pending. Section 1307 provides in pertinent part:

> **§ 1307. Conversion or dismissal**
>
> . . . .
>
> (b) On request of the debtor at any time, . . . , the court shall dismiss a case under this chapter. . . .
>
> (c) Except as provided in subsection (e) of this section, on request of a party in interest . . . and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause . . . .

The Debtor submits that subsection (b) gives him the absolute right to dismiss his case, whereas, Regions argues that the Debtor's right to dismiss is not absolute when a motion to convert is pending.

There is a split of authority on whether § 1307(b) grants a debtor the absolute right to dismiss his case. This Court is not aware of any decision by the United States Court of Appeals for the Fifth Circuit which addresses the issue of whether a debtor has an absolute right to dismiss his Chapter 13. However, two other Courts of Appeals have addressed the issue: the Eighth Circuit in *Molitor v. Edison (In re Molitor),* 76 F.3d 218 (8th Cir. 1996), and the Second Circuit in *Barbieri v. RAJ Acquisition Corp. (In re Barbieri),* 199 F.3d 616 (2nd Cir. 1999).

In *Molitor*, the Eighth Circuit had a very similar fact situation as in the case at bar. The debtor in *Molitor* filed a Chapter 13 petition in order to stop an eviction proceeding. A creditor immediately filed a motion to dismiss or to convert. The debtor then filed a motion to voluntarily dismiss his case. The bankruptcy court refused to allow the voluntary dismissal and converted the case to a Chapter 7. The district court affirmed the bankruptcy court's holding. In affirming the

lower courts, the Eighth Circuit applied its holding from a prior decision, *In re Graven,* 996 F.2d 378 (8th Cir. 1991), and held

> that analogous provisions of Chapter 12, § 1208(b) and (d), did not afford the Chapter 12 debtor an unlimited right to voluntary dismissal. "We conclude that the broad purpose of the bankruptcy code, . . . , is best served by interpreting section 1208(d) to allow a court to convert a case to Chapter 7 upon a showing of fraud even though the debtor has moved for dismissal under subsection (b)." *Id.* at 385 (*In re Graven,* 996 F.2d 378).
>
> We believe that same broad purpose as well as the principles of statutory construction employed in *Graven* apply equally well to the nearly identical provision of Chapter 13 and the instant case. As in *Graven,* we are mindful that the purpose of the bankruptcy code is to afford the honest but unfortunate debtor a fresh start, not to shield those who abuse the bankruptcy process in order to avoid paying their debts. *Id.* As in *Graven,* we also look to the overall purpose and design of the statute as a whole rather than viewing one subsection in isolation.

Molitor v. Edison (In re Molitor), 76 F.3d 218, 220 (8th Cir. 1996).

The Second Circuit found unpersuasive the Eighth Circuit's reasoning in *Molitor* that a debtor's right to dismiss is conditional. In the case before the Second Circuit, *Barbieri*, during a hearing on a motion to sell property, the bankruptcy judge indicated an intention to convert the debtor's case to a Chapter 7. At that point, the debtor's attorney moved to voluntarily dismiss the debtor's case. The bankruptcy judge denied the debtor's motion and *sua sponte* converted the case to a Chapter 7. The district court affirmed the conversion. However, in reversing the lower courts, the Second Circuit found that § 1307(b) grants a debtor the absolute right to dismiss his Chapter 13 petition. In examining § 1307(b), the Second Circuit found that "(s)ection 1307(b) unambiguously requires that if a debtor 'at any time' moves to dismiss a case that has not previously been converted, the court 'shall' dismiss the action. The term 'shall,' as the Supreme Court has reminded us, generally is mandatory and leaves no room for the exercise of discretion by the trial court." *Barbieri,* 199 F.3d at 619 (citation omitted). The Second Circuit went on to say that this

"conclusion reflects the intention of Congress to create an entirely voluntary chapter of the Bankruptcy Code. . . .Congress has provided for another procedure by which a creditor may force an unwilling debtor into a Chapter 7 liquidation: an involuntary petition under 11 U.S.C. § 303." *Id.* at 620 (citations omitted).

This Court has previously followed the Eighth Circuit's finding in *Graven* that a Chapter 12 debtor does not have an absolute right to dismiss his case. In *In re Goza*, 142 B.R. 766 (Bankr. S.D. Miss. 1992), a Chapter 12 debtor filed a motion to voluntarily dismiss his petition after the Chapter 12 trustee demanded an accounting of the debtor's activities. The Court found that "the right of dismissal must be viewed in the overall context of the code." *Goza*, 142 B.R. at 771. The Court went on to find that the debtor had reaped significant benefits and enjoyed a safe harbor with the filing of his petition, and therefore, the Court would not grant the debtor's motion to voluntarily dismiss his case so that he could "subvert the duties and responsibilities placed upon him by the same code to which he so fervently clings." *Id.* The Court further held that allowing a debtor to dismiss his case upon a challenge from the trustee "would quickly change (Chapter 12) from an avenue for the 'honest, but unfortunate debtor' seeking to get a fresh start to a frequently traveled thoroughfare for the unscrupulous seeking to hinder, delay and defraud their creditors." *Id.*

In addition, while not controlling, the Fifth Circuit's affirmation of the bankruptcy court's interpretation of § 1208(b) in *In re Foster*[3] is persuasive. The bankruptcy court in *Foster* held that "(w)hen the facts show that the debtors have abused the legal process and the bankruptcy process through fraud, the bankruptcy court has the authority to convert a chapter 12 proceeding to a chapter

[3]*Foster v. North Texas Production Credit Assoc. (In re Foster)*, 121 B.R. 961 (Bankr. N.D. Tex. 1990), *aff'd w/o opinion*, 945 F.2d 400 (5th Cir. 1991), *cert. denied*, 502 U.S.1074, 112 S.Ct. 972, 117 L.Ed.2d 136 (1992).

7 liquidation, even though the debtors have filed a motion to dismiss the chapter 12 proceeding." *Foster,* 121 B.R. at 961.

Furthermore, in a recent case which involved a Chapter 13 debtor, *In re Fonke,* 310 B.R. 809, 812-13 (Bankr. S.D.Tex. 2004), the bankruptcy court examined some of the decisions that have held that a debtor does not have an absolute right to dismiss his Chapter 13 bankruptcy. *See, e.g., In re Cobb,* 2000 WL 17840 (E.D.La. 2000); *In re Powers,* 48 B.R. 120 (Bankr. M.D.La. 1985); *In re Crowell,* 292 B.R. 541 (Bankr. E.D.Tex. 2002); *In re Jones,* 231 B.R. 110 (Bankr. N.D.Ga. 1999); *In re Zarowitz,* 36 B.R. 906 (Bankr. S.D.N.Y. 1984); *In re Jacobs,* 43 B.R. 971 (Bankr. E.D.N.Y. 1984); *In re Howard,* 179 B.R. 7 (Bankr. D.N.H. 1995). After reviewing the case law, the *Fonke* court held:

> (A) reading of § 1307(b) in conjunction with § 1307(a) supports the proposition that a debtor does not have an absolute right to dismiss under § 1307(b). Section 1307(a) states that a "debtor may convert a case under this chapter to a case under chapter 7 of this title at any time. Any waiver of the right to convert under this subsection is unenforceable." In contrast to § 1307(b), § 1307(a) does not indicate that the debtor must first "request" conversion in order to convert his or her case. The fact that § 1307(b) is predicated with the requirement that the debtor must "request" dismissal, whereas § 1307(a) does not, further supports the notion that § 1307(b) does not provide an absolute right to dismissal, since the debtor must first apply for such dismissal from the court. It is inherent that any filing made before this Court not be done in bad faith or in furtherance of a fraudulent or bad faith purpose. Inasmuch as the statute requires the Debtor to "request" dismissal, the Court imposes a duty on the Debtor that the Debtor's request not be made in bad faith.

Fonke, 310 B.R. at 814.

After reviewing the above cited case law, this Court finds persuasive the reasoning set forth in *Molitor, Graven, Foster* and *Fonke.* That is, this Court agrees that a debtor's right to dismiss is not absolute. However, this Court does agree with the Second Circuit that forcing a debtor to stay

in a Chapter 13 against his will "would contravene the strictly voluntary nature of Chapter 13"[4] because the real effect of forcing a debtor to stay in a Chapter 13 would be that all or part of a debtor's earnings would be paid over to the Chapter 13 Trustee for up to five years.[5]

However, when a debtor files a motion to voluntarily dismiss his Chapter 13 after a motion to convert the case to a Chapter 7 has been filed, this Court does not agree with the Second Circuit that the debtor's right to voluntarily dismiss his case trumps the motion to convert. Rather, this Court agrees with the reasoning of the Eighth Circuit in *Molitor* that the Court must look to the Code as a whole and not to just one subsection. Therefore, the Court finds that when a motion to convert is pending, the Court will not grant a debtor's motion to dismiss until the Court considers the motion to convert. While this holding may seem contrary to the voluntary nature of a Chapter 13, in reality it is not. If the Court finds that a debtor's Chapter 13 was not filed in good faith and converts a debtor's case to a Chapter 7, the debtor may find his assets in a Chapter 7 not of his choosing, nevertheless, his future earnings are not subject to control by the Court.

In the case at bar, Regions and OmniBank allege that the Debtor's bankruptcy filing was not in good faith, and therefore, Regions'[6] Motion to Convert should be granted. As state previously, this Court finds that a debtor's right to dismiss his Chapter 13 bankruptcy is not absolute when a motion to convert is pending or when there are allegations of bad faith or of fraud. Consequently, in the case at bar, the Court will not grant the Debtor's Motion to Dismiss until considering the Motion to Convert filed by Regions.

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[4]*Barbieri*, 199 at 618.

[5]§§ 1322(a)(4) and 1325(c).

[6]Regions filed its Motion to Convert in which OmniBank filed a joinder. For purposes of this opinion, the Court will refer to the motion and the joinder collectively as Regions' Motion to Convert.

B.

Having found that the Debtor does not have an absolute right to dismiss his case, the Court must determine if there is cause to convert the Debtor's case to a Chapter 7 pursuant to § 1307(c). Section 1307(c) lists ten causes for conversion or dismissal, "whichever is in the best interests of the creditors and the estate." However, the listing in § 1307(c) is not exclusive–"cause for conversion has been found for reasons in addition to those listed in § 1307(c)." Keith M. Lundin, *Chapter 13 Bankruptcy,* 3rd Ed., § 312-1 (2000 & Supp. 2004).

Section 1307(c) provides in pertinent part:

> **§ 1307. Conversion or dismissal**
>
> . . . .
>
> (c) Except as provided in subsection (e) of this section, on request of a party in interest. . .and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, including–
>
> > (1) unreasonable delay by the debtor that is prejudicial to creditors; . . . ; (3) failure to file a plan timely under section 1321 of this title; (4) failure to commence making timely payments under section 1326 of this title; . . . .

In *In re Stoller,* 351 B.R. 605 (Bankr. N.D.Ill. 2006), the bankruptcy court listed several factors under Seventh Circuit authority that should be considered when determining whether bad faith exists to convert a Chapter 13 to a Chapter 7, including:

> a. the nondischargeability of the debt; b. the time of the filing of the petition; c. how the debt arose; d. the debtor's motive for filing the petition; e. how the debtor's actions affected creditors; f. the debtor's treatment of creditors both before and after the petition was filed; g. whether the debtor has been forthcoming with the bankruptcy court and the creditors. *In re Sidebottom,* 430 F.3d 893, 899 (7th Cir. 2005); *In re Love,* 957 F.2d 1350, 1359 (7th Cir. 1992).
>
> Furthermore, in evaluating whether a petition was filed in good faith, the inquiry looks at both subjective and objective criteria. In short, "the good faith inquiry is

> both subjective and objective. That is, both objective evidence of a fundamentally unfair result and subjective evidence that a debtor filed a petition for a fundamentally unfair purpose that was not in line with the spirit of the Bankruptcy Code are relevant to the good faith inquiry." *Love,* 957 F.2d at 1357.
>
> Finally, a debtor's pre-petition conduct may sometimes be relevant to the bad faith inquiry. *Id.* at 1359.

Stoller, 351 B.R. at 621-22.

In a case where the bankruptcy court had converted a Chapter 13 to a Chapter 7 on its own motion, the district court found that "(s)everal courts have found that a lack of good faith is sufficient cause for a bankruptcy court to take action under section 1307. . . .To determine whether a debtor acted in good faith, courts look to a totality of the circumstances." *Toles v. Powers,* 1999 WL 1261453 (N.D.Tex. 1999)(citations omitted).

In *In re Gaudet.* 61 B.R. 349 (Bankr. D.R.I. 1986), a case with the exact same fact situation as the case at bar (a debtor filed a Chapter 13 petition in order to stop a foreclosure; the debtor never made a plan payment and never intended to pay creditors through a Chapter 13 plan), the court found "(t)he debtor's general conduct and demonstrated lack of credibility, which we view as a blatant bad faith attempt to misuse the bankruptcy process, required denial of the motion to withdraw his Chapter 13 petition. . . .(his) failure to propose a plan in good faith, his unreasonable delay, and failure to commence making timely payments, also constitute tangible cause for conversion." *Gaudet,* 61 B.R. at 350 (citations omitted).

Applying the § 1307(c) cause factors and the holdings of *Stoller*, *Toles* and *Gaudet* to the case at bar, the Court finds that it is in the best interest of the creditors and of the estate that the Debtor's case be converted to a Chapter 7. The Debtor filed his petition on August 18, 2006. In the six months he has been in bankruptcy, the Debtor has not filed any of his schedules or lists as required by the Code and the Rules; he has failed to file a plan; and has failed to make a single

payment to the Chapter 13 Trustee. As stated previously, the Debtor testified that he "never planned on–I got the letter from the court to turn in some paperwork, but I never planned on turning anything in." Record at 8. The Debtor further testified that he filed bankruptcy to stop OmniBank's foreclosure because he had a "loan that was in place" that would pay off OmniBank but that he needed a little more time. Record at 7. However, under cross-examination, the Debtor admitted that he still had not obtained any alternative financing. Record at 38.

As further evidence of the Debtor's lack of good faith in filing his Chapter 13 petition, the Court finds that the Debtor was not eligible to be a debtor under Chapter 13 pursuant to § 109(e). Section 109(e) states that "(o)nly an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $307,675 and noncontingent, liquidated, secured debts of less than $922,975, . . . may be a debtor under chapter 13 of this title." 11 U.S.C. § 109(e). The Debtor testified that he owned a condominium in Sarasota, Florida, on which he owed over two million dollars. Record at 31. Therefore, according to the Debtor's own testimony, he was over the secured debt limit of $922,975 and was not eligible to be a debtor under Chapter 13. Consequently, the Court finds that the Debtor's ineligibility to be a Debtor under Chapter 13 is cause under § 1307 to justify conversion. See *In re Bobroff,* 32 B.R. 933, 936 (Bankr. E.D.Penn. 1983)("(C)ause under § 1307 is sufficiently broad to authorize conversion when the unsecured debts of a chapter 13 debtor exceed $100,000.")

Therefore, considering the totality of the circumstances surrounding the Debtor's filing of his Chapter 13 petition, the Court finds that for cause shown, it is in the best interest of the creditors and of the estate that this case be converted to a Chapter 7.

C.

The Court finds the decision of the United States Supreme Court issued on February 21,

2007, in the case of *Marrama v. Citizens Bank of Massachusetts,* 549 U.S. ___, 127 S.Ct. 1105 (2007), to be consistent with the Eighth Circuit's holding in *Molitor* that the a court must look to the Code as a whole and not to just one subsection, and therefore, also supportive of this Court's findings.

In *Marrama* the Supreme Court had before it the issue of whether a debtor had an absolute right to convert from a Chapter 7 to a Chapter 13. The debtor's creditors and Chapter 7 trustee alleged that the debtor had engaged in prepetition bad-faith conduct which did not give him the right to convert to a Chapter 13. In its opinion, the Supreme Court acknowledged the long held principal that the purpose of the Bankruptcy Code is to give a fresh start to an honest but unfortunate debtor[7], however, it went on to find that once a debtor engaged in activities that took him out of the category of "honest but unfortunate debtors" he was no longer in the class of debtors that the bankruptcy laws were enacted to protect. The Supreme Court agreed with the debtor's creditors and Chapter 7 trustee and found that because of the debtor's actions, he did not have an absolute right to convert to a Chapter 13. The Supreme Court went on to find that

> Nothing in the text of either § 706 or § 1307(c) (or the legislative history of either provision) limits the authority of the court to take appropriate action in response to fraudulent conduct by the atypical litigant who has demonstrated that he is not entitled to the relief available to the typical debtor. On the contrary, the broad authority granted to bankruptcy judges to take any action that is necessary or appropriate "to prevent an abuse of process" described in § 105(a) of the Code, is surely adequate to authorize an immediate denial of a motion to convert filed under § 706 in lieu of a conversion order that merely postpones the allowance of equivalent relief and may provide a debtor with an opportunity to take action prejudicial to creditors.

Marrama, 127 S.Ct. at 1111-12 (footnotes omitted).

Applying this same reasoning to the case at bar, the Court finds that while there has not been any allegations of fraudulent acts on the part of the Debtor, this Court does find that the Debtor's

[7]*Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 112 L.Ed.2d 755 (1991).

filing was not in good faith and that his actions have been an abuse of the bankruptcy process. At the time he filed his Chapter 13 petition, the Debtor was not eligible to be a Chapter 13 debtor because his debts exceeded the amounts permissible in § 109(e). In addition, the Debtor testified that he filed his petition in order to stop OmniBank's foreclosure but that he had no intention of complying with any of the requirements imposed on a debtor by the Bankruptcy Code or the Bankruptcy Rules: the Debtor has not filed any of the lists, schedules, statement of financial affairs or other documents required by § 521 or Interim Federal Rule of Bankruptcy Procedure 1007, nor has the Debtor made a single payment to the Chapter 13 Trustee as required by § 1326.

Consequently, the Court finds that its holding that the Debtor does not have an absolute right to dismiss his Chapter 13 and its granting of Regions' Motion to Convert is consistent with the Supreme Court's reasoning in *Marrama* that a court has the authority to prevent an abuse of process by a debtor who is not an "honest but unfortunate" debtor.

D.

The Court must now address the issue of "automatic dismissal" under § 521(i). A very good review of this confusing code section is found in the recent opinion of *In re Parker,* 351 B.R. 790 (Bankr. N.D.Ga. 2006). In *Parker,* the debtor did not obtain credit counseling from an approved agency. Once the debtor was made aware of the problem, the debtor requested and was granted an extension of time to obtain credit counseling from an approved agency. The debtor then obtained such counseling and participated in his bankruptcy case. When his trustee sought to sell an asset that the debtor wanted to retain, the debtor moved to dismiss his case for failure to comply with § 521. The court reviewed § 521 and held that the debtor's motion to dismiss would be denied. Rather than "reinvent the wheel," this Court adopts the holding from Judge Mary Grace Diehl's opinion in *Parker*:

Section 521(i) is one of the most confusing of the sections added by BAPCPA.[8] Like many of the other provisions of BAPCPA, it was designed to prevent abuses by debtors who do not take their responsibilities seriously and fail to provide the Court and interested parties with the information necessary to administer a bankruptcy case. However, the language of the section, particularly when taken together with related sections of the Bankruptcy Code, raises more questions than it answers. The relevant language is as follows:

> (i)(1) Subject to paragraphs (2) and (4) and notwithstanding section 707(a), if an individual debtor in a voluntary case under Chapter 7 or 13 fails to file all of the information required under subsection (a)(1) within 45 days after the date of the filing of the petition, the case shall be automatically dismissed effective on the 46th day after the date of the filing of the petition.

It is worthwhile to note that Section 521(i) refers to the *information* required by Section (a)(1) and not to any specific documents. Moreover, Section 521(a)(1)(B) which is all of the information that Section 521 addresses with the exception of a list of creditors (which appears in Section 521(a)(1)(A)), is prefaced by the phrase "unless the court orders otherwise." Section 521 does not set forth the time period within which the Court can "order otherwise," as BAPCPA does in numerous other sections. The statute would seem to permit the Court to excuse the filing requirements in a case at any time, before or after the 45-day period, under appropriate circumstances. . . .

The Court is aware that several other bankruptcy courts have taken a more hard-line approach to the interpretation of Section 521(i). *See, e.g., In re Wilkinson,* 346 B.R. 539 (Bankr. D.Utah 2006); *In re Fawson,* 338 B.R. 505 (Bankr. D.Utah 2006); *In re Conner,* 2006 WL 1548620 (Bankr. N.D.Fla. 2006); *In re Lovato,* 343 B.R. 268 (Bankr. D.N.M. 2006); *In re Williams,* 339 B.R. 794 (Bankr. M.D.Fla. 2006). Although the facts in those cases may justify dismissal in order to accomplish the section's clear intent to remove protection from debtors who fail to comply with their bankruptcy duties and thereby protect the rights of creditors, the facts of this case demonstrate why the blanket application of the language is misplaced. Here, the interests of creditors and the bankruptcy estate, as represented by the United States Trustee, the Trustee and an individual creditor, are best served by the denial of the Debtor's motion.

> . . . .

It is the. . .creditors who are in the best position to determine whether they have sufficient information to proceed. If they do not, Section 521(i)(2) allows for an order of dismissal on an expedited basis. . . .Congress could not have intended to

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[8]The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended § 521 and took effect on October 17, 2005.

> establish a procedure which interferes with the liquidation of an estate and the payment of creditors where the issue is not raised by creditors or their representative, the Trustee.
>
> An "automatic dismissal" also deprives creditors of the opportunity to seek a dismissal with other conditions, such as a dismissal under Section 109(g) or Section 349(a). Each of those sections allow the court to determine that the conduct of a debtor has been such that access to the court or to the availability of a discharge of certain debts should be curtailed. In contrast, an automatic dismissal without a court order permits a debtor to return to court immediately, with the only consequence being the need to seek an extension of the automatic stay pursuant to 11 U.S.C. § 362(c)(3). . . .

Parker, 351 B.R. at 800-02 (footnote omitted)(footnote added)

Applying the *Parker* analysis of § 521, the Court finds that given its ability to "order otherwise" under § 521(a)(1)(B), the Court determines that it is not in the best interest of the creditors and of the estate to have this case dismissed for failure of the Debtor to file the information required by § 521. As stated previously, this Court will not reward the Debtor's lack of a good faith filing by allowing the case to be "automatically dismissed."

CONCLUSION

The Debtor testified that he filed his Chapter 13 petition in order to stop a foreclosure by OmniBank. The Debtor further testified that he had no intention of filing any of the information as required by the Code. The Court finds that based on this testimony and on the fact that the Debtor was not eligible to be a debtor under Chapter 13 and after reviewing the totality of the circumstances surrounding the Debtor's case, the Debtor's Chapter 13 filing lacked good faith. Therefore, the Court finds that since Regions had filed a motion requesting that the Debtor's case be converted to a Chapter 7 before the Debtor moved to voluntarily dismiss his case, it is in the best interest of the creditors and the estate that the above styled case be converted to a Chapter 7.

A separate judgment consistent with this opinion will be entered in accordance with Rule

9021 of the Federal Rules of Bankruptcy Procedure.

This the 8th day of March, 2007.

/s/ EDWARD ELLINGTON
EDWARD ELLINGTON
UNITED STATES BANKRUPTCY JUDGE