

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division**

In re JOSUHA MYRON BANNON and) Case No. 05-61203-7
DANIELLE DEPERISIO BANNON,)
)
Debtors,)
_____)

ORDER

For the reasons stated in the accompanying memorandum, the motion of the United States Trustee to dismiss this case for substantial abuse is denied.

So ORDERED.

Upon entry of this order the Clerk shall forward copies to the United States trustee, the chapter 7 trustee, the Debtor and Frederick J. Getty, Esq., counsel for the Debtor.

Entered on this 10th day of March, 2006.



William E. Anderson
United States Bankruptcy Judge



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MEMORANDUM

This matter comes before the court on a motion by the United States trustee to dismiss this case for substantial abuse under Section 707(b) of the bankruptcy code.¹ Joshua Myron Bannon and Danielle Depersio Bannon (“the Debtors”) oppose the motion. This court has jurisdiction over this matter. 28 U.S.C. §§ 1334(a). This is a core proceeding. 28 U.S.C. §

¹ Herein, “Section” refers to the given section in the bankruptcy code. The bankruptcy code is codified at 11 U.S.C. § 101 et seq.

157(b)(2)(A). Accordingly, this Court may render a final order.

For the reasons stated below, the Court concludes that it would not be a substantial abuse of the provisions of chapter 7 for the Debtor to continue prosecuting this case under chapter 7. The motion will be denied.

Facts

Mr. Bannon is twenty-seven years old. For most of his adult life, he has worked as a service representative for car dealerships. In or before 2003, Mr. Bannon lived in Fredericksburg, Virginia, and worked at an Audi dealership in Alexandria, Virginia, earning approximately \$86,000.00 to \$96,000.00 per year. After he lost that job, he moved to Scottsville², Virginia, to reduce his living expenses. Within three weeks, he obtained employment with another Audi dealership, Flow Automotive, where he worked for two years. He testified that his income while at Flow Automotive was about \$55K-\$65K per year. His W-2 form indicated that he earned \$57,798.00 from Flow Automotive in the calendar year 2004.³ In late 2004, Flow Automotive restructured his compensation calculation, thereby reducing his annual income by about \$20,000.00. Mr. Bannon testified that Flow Automotive reduced his income because “they believed that [he] was making too much money for the position that [he] had.”⁴

On December 15, 2004, Mr. Bannon left Flow Automotive. He found employment within two weeks at West Broad Audi in Richmond, Virginia. West Broad Audi guaranteed him

² Scottsville, Virginia is near Charlottesville, Virginia.

³ Testimony of Mr. Bannon, see transcript of hearing, page 13, lines 9-25. The Court found Mr. Bannon to be a credible witness.

⁴ Testimony of Mr. Bannon, see transcript of hearing, page 23, lines 14-15.

a minimum annual income of \$45,000.00. From January of 2005 until June or July of 2005, he commuted 86 miles each way to work.⁵

Mrs. Bannon did not appear at the hearing. Mr. Bannon attempted to bring her but she declined to come to the hearing, stating that she did not care.⁶ Mrs. Bannon suffers from anxiety and depression. Over the past two years, she has visited the hospital on a regular basis as a result of her condition.⁷ Most of her medical expenses, which total \$10,792.60, are caused by this condition. Because of her medical condition, Mrs. Bannon was not employed for most of the two-year pre-petition period. It does not appear that she will be employed in the foreseeable future.

On January 15, 2005, the Debtors were married.⁸ On March 30, 2005, the Debtors filed a joint chapter 7 petition. They scheduled no real property.⁹ They scheduled \$7,500.00 in secured claims and \$4,000.00 in priority unsecured claims¹⁰. They scheduled general unsecured claims in the amount of \$41,979.90¹¹. They scheduled monthly gross income of \$5,008.49, including unemployment income of \$488.00¹². They scheduled monthly net income of

⁵ Testimony of Mr. Bannon, see transcript of hearing, page 9, line 1 to page 14, line 15.

⁶ Testimony of Mr. Bannon, see transcript of hearing, page 22, lines 21-23.

⁷ Testimony of Mr. Bannon, see transcript of hearing, page 27, line 18 to page 28, line 21.

⁸ Transcript, page 24, lines 6-7.

⁹ See Debtor's Schedule A.

¹⁰ See Debtor's Schedule D and E.

¹¹ See Debtor's Schedule F.

¹² See Debtor's Schedule I.

\$3,589.32 including the \$488.00 in unemployment income¹³. They scheduled net monthly expenses of \$3,673.67.¹⁴

On July 26, 2005, the United States trustee filed a motion under 11 U.S.C. § 707(b) to dismiss this case on the grounds that granting relief would constitute substantial abuse.

Discussion

A case under chapter 7 may be dismissed if (1) the debtors' debts are primarily consumer debts and (2) it would be a substantial abuse of the provisions of chapter 7 of the bankruptcy code to grant relief. 11 U.S.C. § 707(b)¹⁵.

"There shall be a presumption favor of granting the relief requested by the debtor." 11 U.S.C. § 707(b). The burden of proof and the burden of production in a motion to dismiss for substantial abuse clearly rests with the moving party, in this case the United States trustee. See 4 Collier on Bankruptcy, "Dismissal", ¶ 707.04[5][a], p. 707-27 (15th ed. rev.) (Citing Green v. Staples (In re Green), 934 F.2d 568 (4th Cir. 1991)). But, the presumption is meant to be something more than a rule about the burden of proof since that burden would already have been on the party seeking to dismiss the case. Collier, supra. "Therefore, it appears that the presumption is an indication that in deciding the issue, *the court should give the benefit of any*

¹³ Id.

¹⁴ See Debtor's Schedule J.

¹⁵ Section 707(b) provides:

(b) After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

doubt to the debtor and dismiss a case only when a substantial abuse is clearly present.” 4 Collier on Bankruptcy at 707-28. (Emphasis added.)

The first issue is whether the Debtors’ debts are consumer debts. Consumer debts are those "incurred by an individual primarily for a personal, family, or household purpose". 11 U.S.C. § 101(8). The Debtors do not deny that their debts are primarily consumer debts in this case.

We turn now to the second issue, that of substantial abuse. In Green, the Fourth Circuit provided trial courts with guidance to determine whether granting relief to a debtor would constitute substantial abuse. In Green, the debtor was employed as a bus driver, a job that he had held for at least 13 years. His income exceeded his necessary expenses by \$638.00 per month. He had earned \$46,000.00 during 1988, but asserted that he had been out of work for six months and estimated that he would only earn \$26,000.00 in 1989. The Bankruptcy Court granted the motion to dismiss the debtor’s case solely on the grounds that he had disposable income. The United States District Court affirmed the decision of the Bankruptcy Court.

On appeal, Fourth Circuit Court of Appeals held that the fact that the debtor had disposable income beyond his expenses was not sufficient in and of itself to warrant dismissal of the debtor’s case.

The Fourth Circuit Court of Appeals held that a debtor's ability to pay his or her debts when due, as determined by his ability to fund a Chapter 13 plan, does not, by itself, constitute substantial abuse. Green, 934 F.2d at 571-572. Rather, the Court concluded that “the determination must be made on a case-by-case basis, in light of the totality of the circumstances.” Green, 934 F.2d at 572. The Court remanded the case to the Bankruptcy Court

with instructions to consider the totality of the circumstances.

Because the Bankruptcy Court had based its decision solely on the fact that the debtor had disposable income, the Fourth Circuit Court of Appeals first addressed the degree to which a trial court should consider disposable income in rendering a decision on a motion under section 707(b).¹⁶ The Fourth Circuit first stated that the existence of disposable income does not, without more, constitute substantial abuse. The Court considered such a *per se* rule by first looking at the Congressional history.

The ambiguity of the statutory language is no doubt a reflection of Congress's inability to agree on a definition of substantial abuse which would encompass these countervailing considerations in all situations. Nevertheless, in unsuccessfully attempting to carve out such a definition, Congress considered and rejected the use of a threshold future income or ability to repay test (known as "mandatory Chapter 13") as a qualification for Chapter 7 relief for consumer debtors. [Footnote omitted.] *In re Deaton*, 65 B.R. 663, 665 (Bankr.S.D.Ohio 1968).

Green, 934 F.2d at 571.

The Court also rejected a *per se* rule in light of a fundamental precept of bankruptcy law. "The establishment of a future income threshold of eligibility for Chapter 7 by means of the *per se* rule we are urged to adopt would render this presumption [in favor of granting the relief requested by the debtor] toothless." Green at 573.

Finally, the Fourth Circuit rejected the *per se* rule after considering the Bankruptcy Code and Rules as a whole and Section 109¹⁷ of the Bankruptcy Code in particular. Id.

¹⁶ Disposable income is defined as "income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor. . ." 11 U.S.C. § 1325(b)(2).

¹⁷ Section 109(b), which concerns whether a person is eligible to be a chapter 7 debtor, provides:

- (b) A person may be a debtor under chapter 7 of this title only if such person is not--
(1) a railroad;
(2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan

As noted above, in Green the Fourth Circuit Court of Appeals listed five factors in addition to disposable income that trial courts should consider when entertaining a motion to dismiss for substantial abuse. They are:

- (1) Whether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment;
- (2) Whether the debtor incurred cash advances and 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 statement of current income and expenses reasonably and accurately reflect the true financial condition;
- (5) Whether the petition was filed in good faith;

Green, 934 F.2d at 572.

At the end of the Green opinion, the Fourth Circuit Court of Appeals cited three opinions that trial courts might find helpful in considering motions under section 707(b), thus providing three more factors.

association, building and loan association, homestead association, a New Markets Venture Capital company as defined in section 351 of the Small Business Investment Act of 1958, a small business investment company licensed by the Small Business Administration under subsection (c) or (d) of section 301 of the Small Business Investment Act of 1958, credit union, or industrial bank or similar institution which is an insured bank as defined in section 3(h) of the Federal Deposit Insurance Act, except that an uninsured State member bank, or a corporation organized under section 25A of the Federal Reserve Act, which operates, or operates as, a multilateral clearing organization pursuant to section 409 of the Federal Deposit Insurance Corporation Improvement Act of 1991 may be a debtor if a petition is filed at the direction of the Board of Governors of the Federal Reserve System; or

(3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union, engaged in such business in the United States.

- (6) Whether the debtor engaged in free-wheeling spending¹⁸;
- (7) Whether the debtor altered monthly obligations in statements to the court at least three times¹⁹; and
- (8) Whether the debtor chose Chapter 7 over Chapter 13 in order to voluntarily pay favored creditors²⁰.

Green, 934 F.2d at 573.

As with any totality-of-the-circumstances test, the analysis does not consist of an accounting, rather, each factor is considered in light of its weight and relevance in the case under consideration. A factor that is irrelevant in one case may be determinative in another.

A. The Debtors' Disposable Income.

The first issue is whether the Debtors have sufficient disposable income to fund a chapter13 plan. This is the primary factor to be considered by a bankruptcy court when considering a motion to dismiss a case for substantial abuse. See In re Harrelson, 323 B.R. 176, 179 (W.D.Va. 2005). (“[T]he ability to repay, although not a dispositive factor, is the primary factor in determining substantial abuse.”)

The amount of a debtor's disposable income is important in the context of a motion under Section 707(b) because it is one of three minimum amounts a debtor must pay through a chapter 13 plan if that plan is to be confirmed.²¹ In other words, it is a measure of the amount that the

¹⁸ See In re Grant, 51 B.R. 385, 396 (Bankr. N.D. Ohio 1985) (Cited in Green, 934 F.2d at 573.)

¹⁹ See In re Peluso, 72 B.R. 732, 738 (Bankr. N.D.N.Y. 1987) (Cited in Green, 934 F.2d at 573.)

²⁰ See In re Shands, 63 B.R. 121, 123 (Bankr. E.D. Mich 1985) (Cited in Green, 934 F.2d at 573.)

²¹ A debtor must commit all of his or her disposable income to plan payments if the plan is to be confirmed. See 11 U.S.C. § 1325(b)(1)(B). Additionally, the debtor must pay all priority claims as defined in section 507(a) in full, see 11 U.S.C. § 1322(a)(2), and must pay unsecured claims in an amount equal in an amount

Debtor could pay toward his or her unsecured debt if he or she chose to file a case under chapter 13. Disposable income may be defined as the difference between a debtor's net income and his or her net expenses.²²

The Debtors' Gross Monthly Income. Mrs. Bannon is currently unemployed. She has worked less than four weeks in the past two years. Mr. Bannon testified that his wife is no longer entitled to the unemployment income that she scheduled on Schedule I. The Court is also convinced that, because of her medical condition, she will not be able to earn income in the foreseeable future. Mrs. Bannon would not be able to contribute funding to a chapter 13 plan.

Before discussing Mr. Bannon's gross and net income for the period under consideration, it is necessary to discuss the peculiarities of the commissioned sales profession in general and the compensation scheme of Mr. Bannon's employment in particular. Typically, a salesperson may earn income in one, or more, of three different ways. First, the salesperson may earn a salary based on services rendered during a unit of time such as an hour or week. Second, the salesperson may be paid a commission, that is, a dollar percentage of his or her total sales. Finally, the salesperson may be paid what is sometimes referred to as a "spiff". A spiff is a fixed amount of compensation paid to a salesman (or other employee) for selling a certain good or performing a particular service for the employer, such as recommending another person for employment for a specialized position.

Mr. Bannon is compensated by way of all three methods. He is paid a set amount of money every two weeks which is designated on his payroll register as "salary". He is also paid

to what those creditors would receive if the case were a case under chapter 7 (commonly referred to as the best-interest-of-the-creditors test) see 1325(a)(4).

²² See footnote 16, supra, for the definition "disposable income" in the bankruptcy code.

a commission which is designated as such on his payroll register. He is also paid spiffs which are designated as such on his payroll register. All three of these, salary, commission, and spiffs were paid every two weeks by way of one check that was issued to Mr. Bannon six days after the end of the two-week pay period. Other than during his first two weeks of employment, which this court concludes was a training period, Mr. Bannon received both salary and commission on each check during the time under consideration. During that time he received a single spiff, in the amount of \$1,000.00.²³

Mr. Bannon's employer also paid him another kind of spiff, designated as a CSI on his pay report, which was paid by a check that issued separately from his bi-weekly check. It appears that the CSI compensation was paid on the 15th day of each month. Mr. Bannon's employer paid him three CSIs by way of three separate checks. One of the checks was in the amount of \$1,000.00 and two were in the amount of \$750.00 each.²⁴

Mr. Bannon earned \$20,649.36 in gross income for the nine two-week pay periods ended April 23, 2005. This amount is taken from Mr. Bannon's payroll register (United States trustee's Exhibit #4²⁵) which is a summary of his pay checks for the period from December 1, 2004, through April 23, 2005.

The United States trustee has compiled a summary of it's assertions regarding the Debtors' income and expenses²⁶. In the summary, the United States trustee has calculated Mr.

²³ Mr. Bannon testified at trial that the \$1,000.00 spiff was for introducing his employer to someone with valuable industry skills.

²⁴ The method used to determine these amounts is discussed below.

²⁵ The United States trustee's Exhibit #4 was provided by Mr. Bannon's employer.

²⁶ See United States trustee's Exhibit #7.

Bannon's gross and net income using the payroll register. The United States trustee assumes that the debtor's gross income on the payroll register, \$20,649.36, was earned over a seventeen-week period.²⁷ It is not clear on the face of the payroll register whether it covers seventeen weeks, as asserted by the United States trustee, or eighteen weeks.

The United States trustee assumes without discussion that the first check, dated January 7, 2001, covers only one week. It appears that this conclusion is incorrect. The gross amount of the check is \$2,000.00. There are three indications that the salary of \$2,000.00 constitutes compensation given to Mr. Bannon during a training period. First, the check is the first check that Mr. Bannon received from West Broad Audi. Second, unlike all subsequent checks, there is no indication on the check that any of the compensation amount, \$2,000.00, is for commissions, "CSIs" or "spiffs. Third, the amount of the check (\$2,000.00) is not equal to his salary in any subsequent two week periods, (\$1,350.00).

It stands to reason that the first check represents compensation for two weeks of training. If it were for only one week of work, Mr. Bannon's annualized income during that period would be \$104,000.00. Reason compels that West Broad Audi would not pay him an amount equal to more than twice his guaranteed salary of \$45,000.00 during a training period. While the court believes that the first pay period must have constituted two weeks, not one week as assumed by the United States trustee, the better treatment is to remove that check from the analysis completely. Doing so will generate a more accurate calculation of Mr. Bannon's expected income. Only the last sixteen weeks of the payroll register will be considered in estimating Mr. Bannon's expected future income.

²⁷ The bankruptcy analyst for the United States trustee testified that the pay statement was comprised of seventeen weeks. Transcript of Hearing, page 37, lines 17-24.

The payroll register (Exhibit #4) must be examined in some detail before calculating Mr. Bannon’s net income.

The pages in the payroll register concerning the amounts on the individual checks are numbered one to five (1-5), but the “Report Totals Page” is numbered page seven (7). *It appears, and the court concludes, that page 6 of the Exhibit #4 is missing.* This conclusion is supported by consulting the right side of the heading of each page of Exhibit #4 in which is disclosed the fact that the report includes checks *dated* from January 7, 2005 through *April 29, 2005*. Yet the last check on page 5 is *dated April 15, 2005*. The check summary for the check dated April 29, 2005, is missing.

Also missing is a separate check of unknown date²⁸ for \$750.00 for a CSI. The summary page indicates that the total CSI payments is \$2,500.00, yet there are only two such checks totaling \$1,750.00 on pages one through five. The missing page, page 6, must also contain a check in the amount of \$750.00 for a CSI.

Also, Mr. Bannon’s payroll register should contain detailed information for twelve (12) checks. The number of total checks, twelve, is indicated on page 7 of the Payroll Register in the upper right hand corner, and in the upper left hand corner, just below the heading.

The table below provides a summary of the above conclusions.

Check Count	Check Date	Gross Salary, Commission & Spiffs	Gross “CSI”	Total
#1	01/07/05	\$2,000.00		

²⁸ The Court concludes that the date of this check is April 15, 2005, because both of the other CSI checks issued on the fifteenth of the month.

#2	01/21/05	\$2,917.54		
#3	02/04/05	\$1,928.29		
#4	02/15/05		\$750.00	
#5	02/18/05	\$1981.72		
#6	03/04/05	\$2,039.53		
#7	03/15/05		\$1,000.00	
#8	03/18/05	\$2,086.38		
#9	04/01/05	\$1,798.98		
#10	04/15/05	\$1,684.62		
#11	04/15/05		\$750.00	
#12	04/29/05	\$1,712.30		
		\$18,149.36	\$2,500.00	\$20,649.36

As noted, because there is no method available to determine from the record whether the first paycheck reflects compensation for one or two weeks services by Mr. Bannon, and because the check is very probably for a training period, the first check will not be used in the calculation of his income.²⁹ Only the eight two-week pay periods defined by the checks dated January 21, 2005, through April 29, 2005, will be considered. Mr. Bannon’s gross income during that sixteen-week period was \$18,649.36, including all salary, commission, spiffs, and CSI.

Mr. Bannon’s average weekly gross for the sixteen-week period was \$1,165.58 [= \$18,649.36 / 16]. His annualized gross income is \$60,160.42 [= \$1,165.58 X 52]. His gross monthly income is \$5,050.87 [= \$60,160.42 / 12] as indicated by the payroll register dated April 29, 2005. The Debtors’ combined monthly gross income is \$5,050.87.

²⁹ It is improper to include Mr. Bannon’s income during this training period because it is not indicative of his future income, including commissions and spiffs, the determination of which is the purpose of the analysis. This reasoning applies whether the training period consisted on one week or two weeks.

Net Monthly Income. In order to calculate Mr. Bannon's monthly net income during the 16-week period under consideration, a number of items must be deducted from his gross income. They are (1) his federal taxes, Virginia state taxes, and social security and medicare taxes, which total \$4,677.27 (\$5,212.33 - 535.06)³⁰, (2) his health insurance premiums in the amount of \$697.04 (= \$784.17 - 87.13)³¹, and (3) his life insurance premiums in the amount of \$7.36. Subtracting these three amounts from his gross income of \$18,649.36 indicates that his net income was \$13,267.69 for the sixteen-week period. This does not include the reductions for garnishments in the amount \$1,087.14, or an item in the amount of \$1,000.00 designated as "ACCRC".³² Mr. Bannon's net income for the sixteen-week period was \$13,267.69, or \$829.23 per week. His annualized net income is \$43,119.99 [= \$829.23 X 52]. His net monthly income is \$3,593.33 [= \$42,119.99 / 12].

Expenses. The United States trustee does not object to the debtors expenses as provided in their schedule I, other than a \$50.00 monthly payment to the Internal Revenue Service which would be paid by the trustee through a chapter 13 plan,³³ The Debtors' monthly expenses for purposes of calculating their disposable income in chapter 13 total \$3,623.67, as asserted by the United States trustee.

Calculation of the Debtor's Disposable Income. The Debtors monthly expenses for

³⁰ This amount is calculated by deducting the taxes for the January 7, 2005, paycheck from the total taxes deducted during the eighteen-week period, an amount that is recorded on page seven of the Payroll Register.

³¹ This amount is calculated by deducting the health insurance premium for the January 7, 2005, paycheck from the total health insurance premiums deducted during the eighteen-week period, an amount that is recorded on page seven of the Payroll Report.

³² The debtor testified that he did not know the basis for this deduction.

³³ See exchange between the United States trustee and the bankruptcy analyst for the United States. Transcript of Hearing, page 41, line 1 to page 42, line 1.

purposes of calculation of their disposable income in a chapter 13 case, \$3,623.67, is greater than their net monthly income, \$3,593.33. The Debtors do not have net income sufficient to fund a chapter 13 plan.

B. Other Green Factors

(1) *Financial Trauma*. The first factor other than disposable income mentioned in Green concerns whether the debtor's filing was the result of "sudden illness, calamity, disability, or unemployment". The list is not exclusive. Under this factor, the court is to ascertain if the filing was precipitated by events beyond the debtor's control. The Debtors have experienced a number of traumas to their financial condition.

Mr. Bannon has changed jobs twice. In the first case, he was terminated. No evidence was introduced concerning the reason for the termination. In the second case, he left the position when new management reduced his compensation by \$20,000.00 per year. Each time that Mr. Bannon changed jobs, he experienced a decrease in income. While neither of these events are of great significance in the analysis, they must be considered. In each case he sought and found new employment within three weeks. In each case he was willing to move more than fifty miles to remain employed. In the second instance, he moved and took new employment in order to maintain the income that he was earning before Flow Automotive reduced it.

Mrs. Bannon suffers from depression and anxiety. While this may or may not be characterized as a sudden illness, it was nevertheless a precipitating factor in this case. The inability of Mrs. Bannon to obtain employment, as well as the burden of her medical expenses, constitute financial traumas that are, in significant part, the reason that the Debtors filed their petition.

The second major cause of the filing of this petition is a deficiency claim resulting from the sale of collateral, a Ford Focus, securing a debt. Mr. Bannon purchased the vehicle so that Mrs. Bannon would have transportation to and from work. The purchase was based on the assumption that she would find employment so that she could contribute to the marital debts. When Mrs. Bannon did not secure employment, he voluntarily relinquished the vehicle to save money on car payments and insurance. A deficiency in the amount of \$7,707.92 resulted.

Mr. Bannon also surrendered a truck resulting in a deficiency of approximately \$9,261.90. He did so when he could not make the \$470.00 per month payment to the creditor. When the Debtors filed their petition, Mr. Bannon was driving a 1999 Mazda pickup truck that he had borrowed from his father to make the 86-mile commute from Scottsville to West Broad Audi.

While the purchase and repossession of a vehicle does not constitute a financial trauma in and of itself, the debts arising from the purchase and surrender of the vehicles, and the resulting deficiencies, are not indicative of substantial abuse.

The Court concludes that the Debtors' financial problems are, at least in part due to one financial trauma, to wit, Mrs. Bannon's ongoing medical difficulties. This first factor does little to inform the court regarding whether to grant this motion.

(2) *Excessive Credit*. The second factor requires the court to ascertain whether the Debtors incurred cash advances and made consumer purchases *far* in excess of his or her ability to pay. In Green, the Fourth Circuit cited In re Grant, 51 B.R. 385, 396 (Bankr. 1985) as a case to consult regarding freewheeling spending. In Grant, the debtors purchased a men's suit for \$700.00 and women's clothes at Sak's Fifth Avenue for \$2,100.00 (both at 1985 prices). Both

purchases were evidently made within six months of the date of petition. The debtors in Grant also borrowed \$9,000.00 for Christmas presents less than eighteen months before the date of petition. The Court in Grant granted the motion to dismiss the case for substantial abuse.³⁴

The United States trustee does not assert that the Debtors have taken any cash advances. The United States trustee does not argue that the Debtors have incurred debt by purchasing luxuries or other non-necessities. Rather, the United States trustee asserts that the Debtors have incurred debt to pay living expenses and creditors. The United States trustee asserts that the Debtors have used credit card accounts not to accumulate assets, but rather to support a lifestyle they could not afford. There is no evidence that the Debtors engaged in spending habits similar to the debtors in Grant. There is no evidence that the Debtors have engaged in spending in pursuant of a luxurious lifestyle.

The Debtors financial problems are the result of Mrs. Bannon's medical problems, both in terms of the expenses incurred and in terms of the lost income, and the result of their inability to pay for two vehicles. Approximately \$27,942.60, more than 66%³⁵, of the Debtors' general unsecured debt was generated by these three events³⁶. None of this amount permitted the Debtors to live a luxurious lifestyle. This factor counsels in favor of denying the motion of the United States trustee to dismiss this case.

³⁴ There were other abuses in Grant. The debtors failed to accurately and realistically list their monthly expenditures, sent \$400.00 per month for living expenses to a child in college, and leased two vehicles, and incurred \$28,000.00 in debt in a two-year period when they were already owed \$37,000.00 in unsecured debt.

³⁵ The three debts total \$27,942.42 [= \$7,707.92 + \$9,261.90 + \$10,972.60]. The total general unsecured debt is \$41,979.90. The percentage is calculated thus: $\$27,942.42 / \$41,979.90 = 66.5\%$.

³⁶ Another of Mr. Bannon's debts, \$723.40 owed to Capital One credit card, was incurred to purchase a new transmission for a 1995 Honda Civic, so that he could continue to commuting to work. Mr. Bannon incurred this debt prior to moving to Scottsville.

(3) *Excessive Budget*. The third factor concerns whether the Debtors' proposed budget is excessive or unreasonable. It is first necessary to place this factor in context with the other factors in light of the purpose of the inquiry. As one court has stated:

Any determination of "substantial abuse" necessitates some evaluation of the debtors' expense and income statements, and thus some scrutiny of their personal spending habits, In re Gyurci, 95 B.R. 639, 643 n.3 (Bankr. D. Minn. 1989), but this Court's role is not to formulate the debtors' budget. Instead, it is to act if there is clear evidence of abuse. The last line of § 707(b) grants a presumption in favor of granting relief to the debtor, and this presumption should apply when examining the debtors' schedules. A stricter interpretation would lead to non-uniformity and confusion as judges pass personal judgement about how people should spend their money.

In re Tefertiller, 104 B.R. 513, 514-515 (Bankr. N.D.Ga. 1989).

The United States trustee asserts that Mr. Bannon's income is understated on the Debtor's schedule I. A budget concerns expenses and expenditures, not income. The assertion regarding Mr. Bannon's income is not relevant to a discussion of the debtor's budget. The only objection of the United States trustee to the Debtor's budget is the scheduling of a \$50.00 monthly payment to the IRS. This *de minimis* amount constitutes a disclosure of a current expense, not an expense that is excessive. The Debtors' budget is not excessive. This factor weighs in favor of denying the motion to dismiss.

(4) *Accuracy of the Debtors' Schedules and Statement of Financial Affairs*. The fourth factor for consideration is whether the Debtors' schedule and statement of current income and expenses reasonably and accurately reflect their true financial condition. The United States trustee asserts that Mr. Bannon had \$5,264.00 in gross monthly income, but reported only \$4,520.00 in gross monthly income. As noted above, the calculation of the United States trustee was based on a slight misreading of the Mr. Bannon's payroll register. The Court calculated his income as \$5,050.87. This is still more than \$500.00 less than the gross income as calculated on

the date of the hearing on this matter. While the differential is not insignificant, it is to some degree understandable given the fluctuations in Mr. Bannon's income and his initial guarantee of \$3,750.00 per month (= \$45,000.00 per year).

To the extent that this factor, standing alone, is relevant in this matter, it counsels slightly in favor of granting the motion. This fact without more, however, is not indicative of substantial abuse by the debtors.

(5) *Bad Faith*. Other than the differential in Mr. Bannon's income as scheduled on the date of petition and calculated as of April 29, 2005, the United States trustee does not argue that the Debtor filed this petition in bad faith. Mr. Bannon has attempted at every turn over the past three years to remain employed and generate an income to pay his expenses. Mrs. Bannon's failure to gain employment cannot be attributed to bad faith. The Debtors have not filed this petition in bad faith.

Conclusion

Whether it is substantial abuse of the bankruptcy code to permit a debtor to prosecute his case is to be determined by the totality of the circumstances. There shall be a presumption in favor of granting the relief requested by the debtor. This presumption indicates that the court should give the benefit of any doubt to the debtor and dismiss the case only when a substantial abuse is clearly present.

Whether the debtor could fund a chapter 13 plan is the primary factor in determining whether a motion to dismiss for substantial abuse should be granted. The Debtors do not have sufficient income to fund a chapter 13 plan.

The Debtors have experienced at least one financial trauma in the form of Mrs. Bannon's

medical condition. The majority of their financial problems stem from her condition and from the repossession of two vehicles. None of these problems indicate that the Debtors have filed this case in bad faith.

The Debtors did understate Mr. Bannon's gross monthly income by about \$500.00. The amount that they did schedule, however, represented \$750.00 per month more than his guarantee for services rendered in a commissioned position that he began just three months before the Debtors filed their petition. The Court does not believe that the Debtors scheduled Mr. Bannon's income with any intent to deceive the United States trustee, this Court or their creditors.

Applying the Green totality-of-the-circumstances test and considering the factors in Green, this Court concludes that it would not be a substantial abuse of the provisions of the bankruptcy code to permit the Debtor to continue as a debtor under chapter 7.

An appropriate order shall issue.

Upon entry of this Memorandum the Clerk shall forward copies to the United States trustee, the chapter 7 trustee, the Debtors and Althea Hurt Randolph, Esq., counsel for the Debtors.

Entered on this 10th day of March, 2006.



A handwritten signature in black ink, appearing to read "William E. Anderson", is written over a horizontal line. The signature is fluid and cursive.

William E. Anderson
United States Bankruptcy Judge

