

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
Lynchburg Division

In re RENA JOHNSON MOON,) Case No. 05-61873-7
)
Debtor,)
)
)
_____)

ORDER

For the reasons stated in the accompanying memorandum, the motion of the United States trustee to dismiss this case for substantial abuse shall be and hereby 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 Douglas Little, Esq., counsel for the Debtor.

Entered on this 24th day of February, 2006.



William E. Anderson
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF VIRGINIA
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In re RENA JOHNSON MOON,) Case No. 05-61873-7
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 Debtor,)
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)
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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. The motion is brought under section 707(b) of the bankruptcy code.¹ Rena Johnson Moon (“the Debtor”) opposes the motion.

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.

This court has jurisdiction over this matter. 28 U.S.C. §§ 1334(a). This is a core proceeding. 28 U.S.C. § 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 under this chapter. The motion will be denied.

I. Facts

On May 13, 2005, the Debtor filed an individual chapter 7 petition. The Debtor scheduled real property at a fair market value of \$144,800.00. The real property secures a mortgage in the amount of \$57,816.26.² The Debtor scheduled total secured claims in the amount of \$71,822.91, unsecured priority claims in the amount of \$1,184.00 and general unsecured claims in the amount of \$55,080.71.³ The Debtor began accumulating this debt in 1989. The greater part of the debt was incurred for household purposes.⁴

She scheduled monthly gross income of \$2,337.50 from her full-time position as a Nurse for the Charlottesville City School System.⁵ She scheduled monthly net income of \$1,411.98 from that position.⁶

She also scheduled net income of \$1,268.93 from a second position with Care Advantage

² See Debtor's Schedule A.

³ See Debtor's Schedules D, E and F.

⁴ Transcript of Hearing, page 21, line 25 to page 26, line 17. The Court found the Debtor to be a very honest, credible witness.

⁵ See Debtor's Schedule I.

⁶ See Debtor's Schedule I.

taking care of elderly persons in their homes.⁷ This estimated income is based on income received for six pay periods.⁸ The Debtor works four to eight hours per day at this job in addition to her full-time job with the Charlottesville City School System.⁹ One of the persons that she was taking care of when she filed her petition passed away before the date of this hearing, so she was waiting for another assignment at that time. The Debtor will experience a reduction in income until the additional work becomes available.¹⁰

Prior to filing her petition, the Debtor was working 10-12 hours per week at a third job as a nurse with "Our Lady of Peace". Shortly before filing her petition, the Debtor quit that job because she could not physically do it anymore.¹¹

The Debtor also scheduled additional "income" of \$625.00 based on a monthly financial contribution of her husband.¹² The Debtor indicated at the first meeting of creditors and at the hearing on this matter that her husband's gross monthly income from retirement from the United States Postal Service is \$2,650.00. She indicated at the hearing that her husband had taken a part-time job with an automobile dealership after she had filed her petition. The Debtor does not know how many hours he works at the dealership.¹³

The Debtor scheduled total monthly expenses in the amount of \$3,119.43.

⁷ See Debtor's Schedule I.

⁸ See Debtor's Schedule I.

⁹ Transcript of Hearing, page 17, lines 16-24.

¹⁰ Transcript of Hearing, page 17, line 25 to page 18, line 25.

¹¹ Transcript of Hearing, page 17, lines 2-15.

¹² See Debtor's Schedule I.

¹³ Transcript of Hearing, page 16, line 7-14.

On August 23, 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.

II. 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)¹⁴.

"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 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 Debtor's debts are consumer debts. Consumer debts are

¹⁴ 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)).

those "incurred by an individual primarily for a personal, family, or household purpose". 11 U.S.C. § 101(8). The Debtor does not deny that her 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.

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).¹⁵ The Fourth Circuit first held that the existence of disposable income does not, without more, constitute substantial abuse. The Court based the holding on three inquiries.

The Court first considered a *per se* rule basing dismissal solely on the existence of disposable income by 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 considered the Bankruptcy Code and Rules as a whole and section 109¹⁶ of the Bankruptcy Code in particular.

¹⁵ Disposable income is defined, for purposes of section 1325, which requires the debtor to pay all of his or her disposable income into the plan, 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).

¹⁶ 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 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

Moreover, nowhere in the Code is there a requirement that a debtor be insolvent in order to file for bankruptcy. Section 109, which the 1984 Amendments left unchanged, allows any person to be a debtor under Chapter 7 unless he comes within one of several limited exceptions, none of which apply to consumer debtors and none of which are predicated upon anticipated income. 11 U.S.C.A. § 109 (1979 & West Supp.1990). Section 109, taken together with the Senate report on Section 707(a) cited *infra*, provides a strong indication that Section 707(b) was intended to explicitly recognize the court's ability to dismiss a Chapter 7 petition for lack of good faith-- when "the total picture is abusive." *Waites v. Braley, supra*, 110 B.R. at 215 (quoting bankruptcy court Opinion and Order; *but see* 217, holding that neither bad faith nor fraud is an element required for a finding of substantial abuse).

Id.

The Fourth Circuit Court of Appeals next enumerated five additional factors 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;

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.

Green, 934 F.2d at 572.

The Fourth Circuit Court of Appeals also cited three opinions that trial courts might find helpful in considering motions under section 707(b), thus providing three additional, if not distinct, factors.

- (6) Whether the debtor engaged in free-wheeling spending¹⁷;
- (7) Whether the debtor altered monthly obligations in statements to the court at least three times¹⁸; and
- (8) Whether the debtor chose Chapter 7 over Chapter 13 in order to voluntarily pay favored creditors¹⁹.

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 Debtor's Disposable Income.

We first turn to whether the Debtor has disposable income that she could use to fund a chapter13 plan. This is the primary factor is 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.”)

¹⁷ See In re Grant, 51 B.R. 385, 396 (Bankr. N.D. Ohio 1985) (Cited in Green, 934 F.2d at 573.)

¹⁸ See In re Peluso, 72 B.R. 732, 738 (Bankr. N.D.N.Y. 1987) (Cited in Green, 934 F.2d at 573.)

¹⁹ See In re Shands, 63 B.R. 121, 123 (Bankr. E.D. Mich 1985) (Cited in Green, 934 F.2d at 573.)

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.²⁰ Disposable income is a measure of the amount that the 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 net expenses.²¹ In a case in which a married debtor files an individual petition, it is appropriate to consider the income and expenses of both spouses.

Net Monthly Income. On the date of petition, the Debtor was working two jobs. In her first job, a full-time position as a nurse for the Charlottesville City School System, she makes gross monthly income of \$2,337.50. She scheduled net income of \$1,411.98 from that position. This amount is properly included in the Debtor's net income for purposes of determining the Debtor's disposable income.

The Debtor also scheduled net income of \$1,268.93 from a second part-time position with Care Advantage on an "as-needed" basis. In this position, the Debtor takes care of elderly persons in their homes. One of the persons that she was taking care of at the time that she filed her petition passed away before the hearing on this matter, and so she was waiting for another assignment at that time.

The problem with including the full amount of \$1,268.93 as net income in the disposable

²⁰ 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 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 11 U.S.C. § 1325(a)(4).

²¹ See footnote 15, supra, for the definition "disposable income" in the bankruptcy code.

income calculation is that the Debtor cannot expect with any certainty that she will receive all of this amount of income every month. Chapter 13 is entitled “Adjustment of Debts of an Individual with Regular Income”. A debtor must have regular income to prosecute a chapter 13 case. This does not necessarily mean that a debtor must receive income in equal amounts at equal intervals of time. Rather, it means that a debtor must be able to ascertain the amount of expected income over time so that he or she may project a payment stream to the chapter 13 trustee with some certainty²². A chapter 13 trustee might object to the Debtor’s use of the full amount in calculating disposable income in a chapter 13 on the grounds that a plan that required the full amount would not be feasible. Consequently, this amount must be reduced to account for periods of time when the Debtor does not receive an assignment from Care Advantage. The problem is that the court has no evidence regarding the regularity of the Debtor’s employment with, or income from, Care Advantage.

While it is the burden of the Debtor to take all steps to disclose accurate information regarding her income in her schedules, it is the burden of the United States trustee to demonstrate the basis for a substantial abuse motion. The United States Trustee did not ask the Debtor how reliable this employment was. The Debtor disclosed on her original Schedule I that the position was part-time and was on an as-needed basis. The United States Trustee had ample opportunity to learn how reliable the Care Advantage income is. The United States Trustee could have simply asked the Debtor at the hearing on the motion. The Debtor’s net monthly income of \$1,268.93 from Care Advantage is properly included in the Debtor’s net income, but it must be

²² This requirement is sometimes referred to as the feasibility test. A bankruptcy court may not confirm a chapter 13 plan if does not find that the debtor will be able to make all payments under the plan and to comply with the plan. See 11 U.S.C. § 1325(a)(6).

considered in light of the fact that it is subject to downward fluctuations.

The Debtor scheduled additional “income” of \$625.00 as a contribution of her husband to household expenses.²³ The United States trustee argues that the Debtor’s husband could, perhaps, contribute more than the scheduled \$625.00 to fund the Debtor’s chapter 13 plan, had she filed her case under chapter 13.²⁴ The Debtor indicated at the first meeting of creditors and at the hearing on this matter that her husband’s gross monthly income is \$2,650.00.

The United States Trustee asked the Debtor to provide her husband’s expense statements, but they were not provided.²⁵ She made numerous requests of her husband for the information, but he declined to provide it, so the Debtor could not provide it to the United States Trustee.²⁶ The Debtor has been married to her husband for thirty-two years. He has never disclosed or discussed his separate expenses with her.²⁷ He has never provided more than \$625.00 toward their debts.²⁸

²³ The basis for the calculation that led Mr. Moon to pay the Debtor \$625.00 each month was not revealed at the hearing. It appears that he paid her his share of the insurance (\$160.00), his one-half share of the mortgage(\$301), and an additional amount equal to about one-half of other common expenses including utilities (\$164.00 = \$625.00 - \$160.00 - \$301.00) or perhaps his one-half share of the car payment (\$161.25). In any event, the Debtor and her husband have always conducted their financial lives separate and apart from each other, with the exception of some expenses that are necessarily shared because they require a single payment. The health insurance policy covers both the Debtor and her husband. Testimony of the Debtor, Transcript of Hearing, page 14, line 16 to page 15, line 8.

²⁴ In his opening argument, the United States Trustee asserted that “[t]here’s only one issue really that we’ve identified. . . . The issue revolves around the contribution that her husband makes towards the family income and whether or not it should be higher. . . .”

²⁵ Opening statement of the United States Trustee, Transcript of Hearing, page 5, lines 1-4.

²⁶ Transcript of Hearing, page 15, line 10 to page 16, line 14.

²⁷ Transcript of Hearing, page 19, lines 2-16.

²⁸ Transcript of Hearing, page 17, lines 18-21.

The burden of proof is on the United States Trustee in this matter. The United States Trustee could have asked Mr. Moon directly for the information. The United States Trustee did not propound any discovery against Mr. Moon. If the United States Trustee had served Mr. Moon with interrogatories and he failed to respond, the United States Trustee could have required his attendance at deposition. Fed. R. Bankr. P. 2004. ("On motion of any party in interest, the court may order the examination of any entity.") The United States Trustee did not conduct such an examination. Contribution for the Debtor's income is deemed to be \$625.00 per month for purposes of this motion.

The Debtor's total Net income, including the \$625.00, is \$3,305.91, subject to downward reductions in the Debtor's income from Care Advantage. The Debtor's expenses total \$3,119.43. The Debtor's monthly disposable income is \$186.48 or less, depending on her income from Care Advantage.

At \$186.48, the Debtor could pay \$6,713.28 during the pendency of a 36-month plan. Of this amount the chapter 13 trustee would be paid approximately 10% or \$617.23, and the Debtor's attorney would be paid approximately \$1,600.00. Unsecured creditors would receive \$4,496.05, a dividend of approximately 8.2% ($= \$4,496.05 / \$55,080.71$).

Given that the dividend percentage and the absolute amount are small and given that estimated payout to unsecured creditors is based on the fragile and unrealistic assumption that the Debtor would never experience a decrease in her income from Care Advantage, it must be concluded that this factor weighs in favor of denying the motion to dismiss.

B. Other Green Factors to be Considered.

(1) *Financial Trauma*. The first factor other than disposable income mentioned in Green

concerns whether the Debtor has experienced a financial trauma in the time leading up to the filing of the petition. One question that this factor raises is whether the absence of a trauma is reason to deny relief under chapter 7. In this case, the Debtor has not experienced a financial trauma. If a debtor has not experienced a large medical debt, an involuntary change in employment, or a change in the family structure such as a divorce or the death of a spouse, should that debtor still be afforded relief under chapter 7? Or should this factor be one that can only weigh in favor of the debtor?

The United States District Court for the Western District of Virginia has commented on this issue as follows:

Under the first factor, the bankruptcy petition was not filed because of sudden illness, calamity, disability, or unemployment. Courts have held that this factor weighs in favor of substantial abuse when filing is not due to some "unforeseen tragedy." *In re Norris*, 225 B.R. 329, 333 (Bank.E.D.Va.1998); see *In re Vansickel*, 309 B.R. 189, 211 (Bank.E.D.Va.2004). The [debtors] assert that the first factor requires a court to look more generally at the reason behind the filing. Even so, it is clear that the [debtors] did not file due to an unforeseen tragedy. Rather they filed because of sizeable debt which they gradually incurred over the years. Therefore, the first factor weighs in favor of a substantial abuse finding.

Harrelson, 323 B.R. at 178.²⁹ The record does not indicate that the Debtor has experienced a financial trauma in the relevant past. This factor weighs in favor of granting the motion to dismiss.

²⁹ Cf. *In re Attanasio*, 218 B.R. at 230-231. ("Several courts have stated that a factor to be considered in determining substantial abuse is whether the debtor's bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment. [Citing Green]. The reasoning appears to be that a debtor whose petition was filed because of an intention to incur debts without the ability to pay, should not be entitled to a Chapter 7 discharge, but, that a debtor whose bankruptcy petition was filed because of sudden illness, calamity, disability, unemployment, or other unforeseen forces over which there was no control, should be entitled to a Chapter 7 discharge. [¶] This Court respectfully disagrees. Clearly, bankruptcy is not limited to those debtors whose difficulties resulted from calamity and had Congress intended for calamity to be a threshold eligibility requirement for Chapter 7 relief it could have included that factor. Section 707(b) was intended and designed to address economic issues, therefore, it should be interpreted in a manner that focuses on a debtor's need for bankruptcy relief, rather than in a manner that attaches other significance to the reasons for the debtor's need for bankruptcy relief.")

(2) *Excessive Credit*. The second factor requires the court to ascertain whether the Debtor incurred cash advances and made consumer purchases *far* in excess of his or her ability to pay. The United States trustee does not assert that the Debtor has taken any cash advances. The United States trustee does argue that the Debtor has incurred debt by purchasing luxuries or other non-necessities. The United States trustee argues that the Debtor incurred debt to support a lifestyle that she could not afford. 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.³⁰

In the case at bar, the Debtor incurred debt over an extended period of time for household purchases. There is no evidence that she engaged in the kind of spending similar to the debtors in Grant. She accumulated her unsecured debt over a 16-year period. Almost all of it is credit card debt. If it is assumed that the Debtor paid an average interest rate of 15% during this period, and that she incurred the debt in equal amounts over time, then her accumulated principle debt over the period was approximately \$20,797.23, or \$108.00 per month³¹. Under this

³⁰ There were other abuses in Grant. The debtors had failed to accurately and realistically list their monthly expenditures, had sent \$400.00 per month for living expenses to a child in college, leasing two vehicles and incurring \$28,000.00 in debt in a two year period when they were already owed \$37,000.00 in unsecured debt.

³¹ If it is assumed that the Debtor has paid an average of 20% interest, which is probably more accurate than 15%, and has incurred the debt in equal amounts over time, then the Debtor has accumulated principle debt in the approximate amount of \$16,460.18, or \$86.00 per month.

assumption, more than 60% of the Debtor's current unsecured debt is interest charges. If it is assumed that the Debtor paid an average interest rate of 20%, which is probably more accurate than 15%, and that she incurred the debt in equal amounts over time, then the Debtor has accumulated principle debt in the approximate amount of \$16,460.80, or \$86.00 per month. Under this assumption, more than 70% of the Debtor's current unsecured debt is comprised of interest charges. The Debtor's problems are as much due to high interest charges as they are to her purchases of household goods. This factor weighs in favor of denying the motion of the United States trustee.

(3) *Excessive Budget.* The third factor concerns whether the Debtors' proposed budget is excessive or unreasonable. The United States Trustee asserted in his motion that the Debtor's budget is unreasonable in that it assumes an unreasonably low contribution from her husband. A budget consist of expenses. Mr. Moon's contribution to the Debtor's disposable income is not an element of the Debtor's budget, rather it is a supplement to the Debtor's income.

The United States Trustee has not asserted or argued that the Debtor's expenses are unreasonable. There is no evidence that such is the case. To the extent that this factor is relevant, it weighs in favor of denying the motion to dismiss.

(4) *Accuracy of the Debtors' Schedules and Statement of Financial Affairs.* The United States Trustee does not assert that the schedules or statements were inaccurate.³²

(5) *Bad Faith.* The United States trustee asserts in his motion to dismiss that the Debtor's attempt to pay her husband's debts is "preferential" and "antithetical to the goal of equitable distribution". Because the United States Trustee made no other statement regarding the

³² See United States Trustee's Motion to Dismiss, Docket entry # 9, page 5.

Debtor's bad faith, either at the hearing on this matter or in other pleadings, the court is left to assume that the statement refers to the Debtor's payment of her husband's insurance payment. It is difficult to follow the United States Trustee's argument. First, a preferential payment is one made to one's own creditor, not to the creditor of another. Second, the payment was made from funds provided by the Debtor's husband (the \$625.00) and not from the Debtor's own income. Third, the payment was simply a convenience; Mr. Moon paid the Debtor and she paid their insurance policy.

This Debtor has worked two and even three jobs in order to pay her own debts. Nothing in the record evidence bad faith on the part of the Debtor. To the contrary, the Debtor has attempted, by working as much as 80 hours per week, to pay her debts. This is evidence of good faith, not bad faith.

III. Conclusion

The Debtor might have some disposable income to fund a chapter 13 plan if her husband could supplement her income by an amount greater than \$625.00 or if her income from Care Advantage would not fluctuate below \$1,268.93. The United States Trustee has not carried the burden of demonstrating that the first assumption is true. The second assumption is false. If the Debtor were to attempt to fund a chapter 13 plan, she would pay less than 8.2% of her unsecured debt. There is a significant possibility that a chapter 13 trustee would object to the plan on the grounds that it would not be feasible. This primary factor counsels against granting the motion of the United States Trustee.

While the Debtor did not experience a financial trauma, there is nothing else in the record, she has committed no affirmative act, that counsels a finding of substantial abuse.

Applying the Green factors, this Court concludes that it would not be a substantial abuse of the provisions of chapter 7 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 Debtor and Douglas Little, Esq., counsel for the Debtor.

Entered on this 24th day of February, 2006.

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

William E. Anderson
United States Bankruptcy Judge