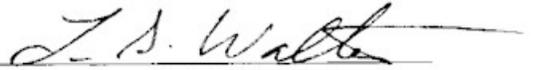


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: August 05, 2005


Lawrence S. Walter
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

In re: JAMES R. BROWN,

Debtor

Case No. 05-31401

Judge L. S. Walter
Chapter 7

**DECISION OF COURT DETERMINING THAT DEBTOR'S CASE SHALL
BE DISMISSED UNLESS CONVERTED TO CHAPTER 13**

The matter is before the court on the United States Trustee's Motion to Dismiss pursuant to 11 U.S.C. § 707(b) [Doc. 12] and the Response filed by Debtor James R. Brown [Doc. 14].

The court held a hearing to consider the matter on June 2, 2005. At the hearing, the parties requested and were granted the opportunity to file post-hearing briefs which have been filed with the court. [Docs. 23 and 24].

After reviewing the evidence presented at the hearing and analyzing the relevant law, the court determines that the United States Trustee has met its burden of proving substantial abuse

under 11 U.S.C. § 707(b). The court concludes that the Debtor's expenses are excessive and, if reduced to a reasonable amount, the Debtor's disposable income could fund a Chapter 13 plan that provides a meaningful distribution to unsecured creditors. The court will grant the Debtor thirty (30) days from the date of the entry of the decision and corresponding order to convert the case to one under Chapter 13. If the case is not converted, the court will dismiss the case with no further notice.

The following constitutes the court's findings of fact and conclusions of law supporting its decision.

FINDINGS OF FACT

On February 22, 2005, Debtor James R. Brown ("Debtor") filed his Chapter 7 bankruptcy petition and schedules listing secured debt totaling \$95,526.74 and unsecured debt amounting to \$45,803.40. [Doc. 1.] The unsecured debt is primarily credit card debt that, the Debtor attests, arises from his assumption of the credit card debt incurred by him and his former wife during their marriage. He assumed the debt as part of a divorce arrangement with his former wife. The Debtor testified that the credit card debt was largely a result of his former wife's spending habits.

Following the bankruptcy filing, the United States Trustee ("UST") filed a motion to dismiss the case pursuant to 11 U.S.C. § 707(b). The UST asserts that the Debtor's case should be dismissed for substantial abuse, or converted to a Chapter 13 case, because the Debtor has sufficient disposable income to fund a Chapter 13 plan. Although the Debtor's Amended Schedules I (income) and J (expenses) show no disposable income remaining each month, the UST asserts that the Debtor's listed expenses are unreasonable and, if reduced, the excess income could be used to fund the Chapter 13 plan.

The Debtor's Amended Schedule I reveals that the Debtor is a factory worker at the Honda plant in East Liberty Ohio and has worked at the plant for twenty years. [Doc. 8.] His

gross monthly income totals \$5230.00 which translates into a gross yearly income of approximately \$62,760.00. After deductions, the Debtor's net monthly income totals \$3600.00. The Debtor admitted at the hearing that his income during the last two years had been significantly higher, approximately \$75,000 in 2003 and \$85,000 in 2004, because of overtime pay. However, the Debtor testified that he cannot depend on overtime and expected it to decrease. Consequently, the Debtor reported only his base salary of \$62,760.00 on his Amended Schedule J.

At trial, the UST argued that given the Debtor's significant income, even with a reduction for some lost overtime, the Debtor should be able to pay his creditors a meaningful distribution through a Chapter 13 plan if he reduced his excessive expenses. The UST focused on Debtor's Amended Schedule J and its list of the Debtor's monthly expenses totaling \$4019.86. [Doc. 9.]

The Debtor's monthly itemized expenses are as follows:

<u>Type of Expense:</u>	<u>Amount:</u>
Rent / Mortgage	\$877.90
Electricity / Heat	\$329.86
Water / Sewer	\$ 65.89
Telephone	\$126.78
Cable TV	\$ 47.43
Trash Pick-up	\$ 17.00
Home Maintenance	\$200.00
Food	\$468.00
Clothing	\$175.00
Medical / Dental	\$ 48.00
Transportation	\$220.00
Recreation	\$175.00
Charitable Contributions	\$ 54.00
Life Insurance	\$ 49.00
Auto Insurance	\$150.00
Federal Taxes	\$140.00
School / Work Lunches	\$320.00
Truck Maintenance	\$ 41.00
Kids Extracurricular Activities	\$370.00
College Fees	\$ 13.00
Birthday and Christmas Gifts	\$ 97.00

Dog Food	\$ 20.00
<u>Toiletries</u>	<u>\$ 15.00</u>
TOTAL:	\$4019.86

[*Id.*; UST Ex. 2.] The Debtor testified that these expenses were necessary to support himself and his three dependent children ages 13 to 18. The Debtor and his former wife share joint custody of the children, but the two oldest children live in the Debtor's residence.

At the hearing, the UST presented contrary evidence regarding the necessity and reasonableness of the Debtor's monthly expenses. Ms. Jodi Mulvine, a paralegal from the UST's office, reviews Chapter 7 bankruptcy petitions for substantial abuse and to determine whether a Chapter 13 case would be more appropriate. As part of this process, she analyzes the expenses listed in a debtor's schedules to determine if they are reasonable. Based on her analysis of the Debtor's Amended Schedule J, Ms. Mulvine concluded that several of the Debtor's itemized expenses were excessive and could be reduced. By reducing his expenses to more reasonable values, Ms. Mulvine testified that the Debtor would have at least \$280 in monthly excess disposable income to fund a Chapter 13 plan. Ms. Mulvine calculated that with this disposable income, the Debtor could fund a plan paying approximately 22.20% to unsecured creditors over three years after taking into account the Chapter 13 Trustee's fees. Ms. Mulvine's conclusions regarding the excessive nature of the Debtor's expenses were further supported by counsel to the Chapter 13 Trustee who testified that his review of the Debtor's schedules revealed a "fat" budget that could be trimmed.

The specific expenses that the UST took issue with on the Debtor's Amended Schedule J include the following items which the UST then reduced to what it considered to be more reasonable values:

<u>Item:</u>	<u>DR Schedule J:</u>	<u>UST Reduced Amt:</u>	<u>Savings:</u>
Phone	\$127	\$ 60	(\$ 67)
Home Maintenance	\$200	\$100	(\$100)
Food	\$468	\$435	(\$ 33)
Clothing	\$175	\$100	(\$ 75)
Recreation	\$175	\$100	(\$ 75)
Life Insurance	\$ 49	\$ 0	(\$ 49)
Lunches	\$320	\$300	(\$ 20)
School Activities	\$370	\$100	(\$270)
Gifts	\$ 97	\$ 50	(\$ 47)

[UST Ex. 3.]

The Debtor disagreed with these conclusions.¹ He argues that many of these expenses are high because he is supporting teenage children. For example, the Debtor testified that his phone bill is high because he allows his children to use a cell phone. The Debtor stated that this was necessary to keep track of his teenage children.

The Debtor explained that the entertainment and school activities costs were also high because of his children. All three of his children were very active in sports and the costs were reflected in these expenses. The Debtor testified that the entertainment and school activities expenses included the cost of the Debtor driving to watch their sporting events, buying tickets and purchasing food items at the events, and for other entertainment expenses such as going to the movies.

The UST also took issue with the \$320 per month the Debtor spent on lunches in addition to the family's \$468 food expense. The Debtor testified that the lunch expense was for himself and his teenage children. He stated that lunches for his children cost \$30 per week and that his personal lunch expense was approximately \$4 per day. Together, the family's lunch expenses

¹ At the hearing, the Debtor argued that his mortgage and utilities expenses were reasonably close to the amounts reported on his Amended Schedule J and that his cable television was a necessary expense because of the lack of any other form of reception in his area. The court took the Debtor's evidence into consideration. However, these were not expenses that the Trustee took issue with at the hearing and the court does not otherwise consider these expenses to be unreasonable.

total approximately \$50 per week or \$200 a month which, the Debtor admitted, was less than the \$320 per month reported on the Debtor's Amended Schedule J.

CONCLUSIONS OF LAW

Bankruptcy Code Section 707(b) was enacted by Congress to curb what it considered to be a growing number of Chapter 7 bankruptcies filed by dishonest or non-needy debtors. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434 (6th Cir. 2004); *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). Section 707(b) grants bankruptcy courts the discretion to dismiss a Chapter 7 case when the debtor's obligations are primarily consumer debts and when the granting of relief to the debtor would amount to a "substantial abuse." *Krohn*, 886 F.2d at 126. Section 707(b) states:

After notice and a hearing by the court, on its own motion or on a motion by the United States Trustee . . . may dismiss a case filed by an individual debtor . . . 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)).

11 U.S.C. § 707(b). To determine whether a case should be dismissed under § 707(b), courts are advised to look to the totality of the circumstances. *Krohn*, 886 F.2d at 126. Courts should also consider the § 707(b) presumption in favor of the debtor. *In re Mooney*, 313 B.R. 709, 713 (Bankr. N.D. Ohio 2004). However, that presumption is overcome by a showing of dishonesty or lack of need / ability to pay. *Id.* The Sixth Circuit has provided factors to consider in determining whether a debtor is dishonest or non-needy. *Krohn*, 886 F.2d at 126. In the instant case, no party has provided any evidence of dishonesty on the part of the Debtor so the court's analysis will focus on whether or not the Debtor is "needy" pursuant to the Sixth Circuit's standard.

The “non-neediness” of a debtor is to be measured, in part, by the debtor’s ability to repay his debts out of future income. *Id.* Indeed, this factor alone “may be sufficient to warrant dismissal.” *Id.*; *Behlke*, 358 F.3d at 438. In the recent *Behlke* decision, the Sixth Circuit concluded that a Chapter 13 plan analysis was an appropriate method for determining whether a debtor can repay his debts using his future income. *Behlke*, 358 F.3d at 435. In other words, the court should consider whether a debtor has sufficient disposable income to fund a Chapter 13 plan. *Id.* “Disposable income” is defined as income “received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance and support of the debtor or a dependent of the debtor.” *Id.* (quoting 11 U.S.C. § 1325(b)(2)).

Other factors relevant to the debtor’s neediness include whether the debtor enjoys a stable source of future income, whether the debtor’s expenses could be reduced significantly without depriving the debtor or the dependents of adequate food, clothing, shelter and other necessities and whether the debtor’s financial situation is the result of an unforeseen or catastrophic event. *Krohn*, 886 F.2d at 126-28; *Behlke*, 358 F.3d at 437. In other words, to determine whether to dismiss a case under § 707(b) and Sixth Circuit precedent, the court should consider whether a debtor’s expenses are excessive and whether a “good old-fashion belt tightening” could result in money available to unsecured creditors. *Krohn*, 886 F.2d at 128; *Mooney*, 313 B.R. at 715.

In *Behlke*, the Sixth Circuit reviewed the debtors’ schedules and determined that the amount voluntarily contributed to a 401K plan, totaling \$460 per month, was not necessary for maintenance and support and should be considered part of the debtors’ disposable income that may be contributed to a Chapter 13 plan. *Behlke*, 358 F.3d at 435. Adding this amount to the debtors’ disposable income, the debtors had approximately \$634 per month to pay creditors. *Id.*

at 436. This would allow the debtors to pay approximately 14% to 23% of their debts in a Chapter 13 plan depending on whether the plan was three or five years in length. *Id.* at 437.

From this analysis, the Sixth Circuit concluded that the debtors in *Behlke* had the ability to fund a Chapter 13 plan and pay a substantial portion of their debts. *Id.* This factor, in addition to other factors including: 1) the debtors' stable income; 2) their comfortable lifestyle; and 3) the lack of an unforeseen or catastrophic event leading to the bankruptcy caused the Sixth Circuit to conclude that the lower court's dismissal of the case under § 707(b) was not an abuse of discretion. *Id.* at 437-38.

The UST likens this case to *Behlke*. The Debtor's employment includes a base salary of \$62,700 without consideration of the \$10,000 to \$20,000 per year the Debtor has earned in overtime pay over the previous two years. The UST asserts that with this sizeable income, the Debtor could fund a Chapter 13 plan if he only "tightens his belt" and reduces his excessive expenses.

The court recognizes that the standard is not a bright-line test and requires the court to consider the type and amount of each of the Debtor's expenses to determine whether it is excessive and capable of reduction. The court must review debtors' itemized budget and impose discipline and restraint on the lifestyle and spending choices of more affluent consumer debtors before they can claim an entitlement to relief under Chapter 7. *In re West*, 324 B.R. 45, 49 (Bankr. S.D. Ohio 2005). In describing the difficulty of applying this less-than-concrete test, one court has noted:

Ultimately, the courts are asked to weigh an infinite number of variables and circumstances and declare, "too much." There is nothing wrong with a nice home, multiple premium cell phone services, high speed internet access, zoo memberships, wine magazine subscriptions, dog treats, dog dental care items and

more. There is something wrong when these expenses continue and unpaid creditors are told by the bankruptcy court to shinny up to a cactus.

Mooney, 313 B.R. at 716. Although, again, there is no bright-line test, courts have considered non-essential and excessive expenses to include premium cell phone plans, country club expenses, a child's athletic activities and attendant travel expenses, high entertainment expenses and high gift expenses. *See West*, 324 B.R. at 48-49; *Mooney*, 313 B.R. at 715-16; *In re Walsh*, 287 B.R. 154, 156-57 (Bankr. E.D.N.C. 2002); *In re Smith*, 269 B.R. 686, 691 (Bankr. W.D. Mo. 2001).

In this case, the court agrees with the UST that many of the Debtor's expenses are not necessary for the support of the Debtor and his dependents and could be reasonably reduced. The court begins with a review of the Debtor's expenses for recreation and school activities. The Debtor testified that all three of his children were active in sports and that these activities had attendant costs including the Debtor's own travel time so he could watch the events and food items bought during or subsequent to the events. While a parent should encourage a child's interests and athletic abilities, the associated expenses cannot take precedence over the debtor's other financial obligations in a bankruptcy. *See Walsh*, 287 B.R. at 157. The court agrees with the UST that the Debtor could save \$345 per month by reducing his recreation and school activities expenses to more reasonable amounts.

The court further agrees with the UST as to the excessiveness of other expenses for a family of four in bankruptcy. Specifically, the court feels that the Debtor's monthly expense of \$97 for Christmas and birthday gifts is excessive and that a \$47 reduction of this monthly expense is reasonable. In addition, the court is not convinced of the necessity of a cell phone used by the Debtor's teenage children and, consequently, the Debtor's telephone expense could be reduced by approximately \$67. Furthermore, the Debtor did not respond to the UST's conclusions that the Debtor's monthly clothing expense could be reduced by \$75 or that the

Debtor's \$49 per month life insurance expense was unnecessary. The court concludes that these expenses could be reasonably reduced as suggested by the UST.

Finally, the court takes issue with the family lunch expense reported on the Debtor's Amended Schedule J. The Debtor's amended schedule states that the Debtor spends \$320 per month on lunches for himself and his children in addition to the \$468 per month spent on other food items. The UST argues that the extra expense for lunches, beyond the already high food budget, is excessive. At the hearing, the Debtor's own testimony supported the UST's argument. Specifically, the Debtor testified that his children's weekly lunch expense was \$30 and that his own personal lunch expense was \$4 per day. He admitted that his family's actual lunch expense was roughly \$200 per month or approximately \$120 less than what the Debtor reported on his Amended Schedule J. Certainly, the Debtor's scheduled lunch expense should be reduced to the amount actually spent per month on this budgeted item.

After making the above reasonable reductions, totaling \$703, the Debtor's monthly expenses are reduced to \$3317. Based on the Debtor's adjusted net monthly income of \$3600, the Debtor would have approximately \$283 per month of disposable income to fund a Chapter 13 plan. The court notes that the Debtor's disposable income would be substantially higher if he receives overtime pay commensurate with the overtime pay he received over the past two years. Even without the extra pay, the reasonable reductions discussed above should allow the Debtor to fund a three year plan in a Chapter 13 case paying unsecured creditors more than 20% on their claims. [UST Ex. 3.]

Based on the evidence, the court concludes that the Debtor has disposable income to fund a Chapter 13 plan providing a meaningful repayment to his creditors. This factor, along with the

stability of the Debtor's employment with Honda and the lack of any catastrophic event² causing a disruption in the Debtor's income, supports that granting a Chapter 7 discharge in this case would amount to a substantial abuse under 11 U.S.C. § 707(b). Accordingly, the Debtor's case will be dismissed unless the Debtor converts to Chapter 13 within the next thirty (30) days.

CONCLUSION

Based upon the foregoing, the United States Trustee's motion seeking to dismiss this case under 11 U.S.C. § 707(b) is sustained. The Debtor's Chapter 7 case will be dismissed, without further notice from the court, unless the Debtor takes action to convert the case to one under Chapter 13 within thirty (30) days from the entry of this decision and corresponding order.

SO ORDERED.

cc:

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² Although the Debtor experienced a recent divorce, it did not cause an income disruption that would be considered a catastrophic event leading to the bankruptcy. Nonetheless, the Debtor argues that it was catastrophic because the Debtor became obliged to repay his former spouse's significant credit card debt. However, the Debtor's assumption of a marital debt that he can afford, at least, to partially repay through a Chapter 13 plan prior to the debt being discharged does not amount to a catastrophe of the type contemplated under a § 707(b) analysis.

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