**IN THE UNITED STATES BANKRUPTCY COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**ROANOKE DIVISION**

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| **IN RE**: | ) | **CHAPTER 7** |
| | ) | |
| **MICHAEL S. FENSTER,** | ) | **CASE NO. 7-03-05002** |
| | ) | |
| **DEBTOR** | ) | |

## MEMORANDUM DECISION

The matter before the Court is the United States Trustee's Motion to Dismiss for Substantial Abuse filed July 14, 2004 in which the United States Trustee (U.S. Trustee) alleges that the debtor, Michael S. Fenster, a physician, listed excessive expenses in his schedules and proposed a family budget that is excessive and unreasonable, thereby inaccurately presenting his true financial condition. The matter was set for trial and heard on February 24, 2005. Both the U.S. Trustee and the Debtor have filed briefs and the matter is now ready for decision. Based on the reasons stated below, the Court will deny the U.S. Trustee's motion.

## FINDINGS OF FACT

The Debtor in this case practices medicine as an interventional cardiologist with gross income of $426,375 in 2001, $354,592 in 2002 and $393,599 in 2003. In 2001, the Debtor and his wife separated and he purchased a condominium in Roanoke for approximately $400,000, essentially all of which he financed by means of a loan secured by a mortgage on the property.[1] In the Spring or early Summer of 2002, the Debtor became aware of a business opportunity in which he would open a wine bar as part of an existing restaurant. (Transcript, p.

[1] The Debtor listed a claim amount of $401,804.00 for the mortgage on this property held by Bank of America as of the filing of the petition.

34). The Debtor purchased a majority ownership of the corporation which owned the restaurant and undertook operation of the restaurant in addition to opening the wine bar. Unbeknownst to the Debtor,[2] the restaurant had been operating at a loss and there were many problems the Debtor encountered in attempting to take over operation of the restaurant and make a profit. The kitchen was not up to applicable code standards and had to be renovated, debts owed to suppliers had to be paid, and other cosmetic renovations had to be made such as painting, replacing furniture and replacing fixtures. The Debtor had a wine cellar built and had to stock the cellar. The Debtor took out a second mortgage of $100,000 on his condominium to finance these undertakings.[3] The restaurant reopened in March 2003 under the Debtor's management. Financial problems with the restaurant escalated despite various infusions of cash from the Debtor[4] and the restaurant closed in October 2003, shortly preceding the filing of this bankruptcy on November 25, 2003. The Debtor testified that he even took out his 401(k) and retirement savings to put into the business, and his bankruptcy schedules do not indicate that he has any

[2] The Debtor admitted at trial that he failed to complete any due diligence before entering into the venture and entered into the transaction solely on the word of the other shareholders involved in the project. The U.S. Trustee has not made any contention that Dr. Fenster's wine bar investments were incurred for a "personal" purpose within the meaning of 11 U.S.C. § 101(8), which provides the definition of a "consumer debt".

[3] That the $100,000 was spent on renovations to the restaurant was the Debtor's testimony at trial. The U.S. Trustee offered a partial transcript of the Debtor's § 341 Meeting of Creditor in which, the U.S. Trustee argues, the Debtor had stated that the money was used for improvements to the condominium. After review of the transcript, the Court finds that the Debtor's prior testimony was ambiguous and based on the Debtor's unequivocal testimony at trial, the Court finds that this portion of the Debtor's secured debt is a business debt.

[4] Dr. Fenster testified that he "floated a loan" to the business every month for approximately $5,000. In later testimony, he revealed that he had borrowed money from his 401(k) to invest in the property. The Court will assume the $5,000 was funded through a combination of the Debtor's income, distributions or loans from his 401(k) and credit cards.

such property remaining.[5]

At the end of October 2002, at the same time the Debtor was undertaking this major business venture, he changed jobs to a position in North Carolina, where he worked during the week, returning to Roanoke on the weekends for visitation with his children.[6] The Debtor's then-fiancée managed the restaurant during the week while the Debtor was working in North Carolina, despite her inexperience in restaurant management. The Debtor rented a small house in North Carolina, but maintained at trial that Roanoke was his actual residence due to the fact that he did not keep many personal items in North Carolina and considered the condominium in Roanoke his home. The U.S. Trustee has contended that the Debtor's support of his fiancée was unreasonable and excessive. The Debtor testified at trial that he provided a vehicle for her to drive and paid the insurance on that vehicle.[7] Beyond that expense, there is no further evidence of his support of his fiancée or her ten-year-old daughter, of whom she shared equal physical custody with the girl's father, other than the rent-free use of his condominium. At trial Dr. Fenster testified that Ms. Herrington, the fiancée, was paid a salary of $800 per month while the

[5] The Debtor's federal income tax returns for the years 2001, 2002 and 2003 introduced at trial indicate that he reported taxable distributions of $2,783 and $16,085 from one or more retirement accounts in 2002 and 2003, respectively. The U.S. Trustee did not introduce any evidence that Dr. Fenster was the beneficiary of any retirement account in existence at the time of bankruptcy filing.

[6] The Debtor has since changed jobs again and was living in Ohio at the time of trial.

[7] This vehicle was apparently a 1996 Mercury Mountaineer, having indicated mileage of 120,000 and an indicated value of $4,075 reported on Schedule B, but needing repairs totaling approximately $1,200 according to such Schedule. Insurance expense of $204.67 per month was listed in Schedule J, but the allocation of this amount among the Pontiac Firebird, the Mercury Mountaineer and a 1973 Mercedes 450 SL (valued at $6,000) which Dr. Fenster had inherited from his mother was not disclosed by the evidence. Only the Firebird was indicated to be subject to any lien indebtedness on the filing date.

the restaurant was in operation for her services as its manager. (Transcript at p. 97).

In the summer of 2003, the Debtor attempted, albeit with little apparent determination, to sell his condominium, listing it at a price above $600,000[8], but was not successful and decided to keep it. On his Statement of Intention, Dr. Fenster stated that he intended to retain the condominium and pay both mortgages on the property. At the time of filing, the Debtor was current on his obligations on his mortgages, but by the date of trial was approximately ten months in arrears. Because the Debtor lost his job in North Carolina and has had to relocate to Ohio, he indicated at trial that he intended to sell the condominium.

In addition to the Debtor's condominium, he listed two other secured debts on Schedule F: a loan secured by the Debtor's 2002 Pontiac Firebird in the amount of $15,792.09 at the time of filing[9] and two time-share units in the Bahamas with an unknown value and an obligation of $31,982.54 as of the time of filing. The Debtor stated on his Statement of Intention that he intended to retain these properties and pay those obligations.

Dr. Fenster filed his Chapter 7 bankruptcy petition and schedules on November 25, 2003, listing $3,648 in unsecured priority tax debt, $401,686.79 in general unsecured debt and $550,588.63 in secured debt. The Debtor conceded that his debts were primarily consumer debts, assuming the Court considers the mortgage debt to be consumer debt.[10] Of the unsecured

[8] The Debtor testified that he had consulted with a realtor as to an appropriate listing price and was told that if he was seriously trying to sell the property, he should list it between $400,000 and $500,000.

[9] The proof of claim filed by the creditor holding the lien on the vehicle listed a debt of $11,110.85 on the filing date.

[10] The legislative history of the Bankruptcy Code states that "consumer debt does not include a debt to any extent that the debt is secured by real property." 124 Cong. Rec. H11, 909 (daily ed. Sept. 28, 1978). However, most courts have refused to follow the legislative history

debt, $152,594.81 is debt relating to the Debtor's medical school education ($125,594.81 of which is non-dischargeable), $984.63 is medical debt, approximately $173,630.69 is debt attributable to the failed restaurant and the remaining $74,010.26 is personal consumer debt. This unsecured consumer debt represents 18% of the Debtor's unsecured debt and 27% of the Debtor's dischargeable debt. However, approximately $45,466.40 of the $74,476.66 in personal debt is a loan obtained by the Debtor's ex-wife[11], indicating that the Debtor had personal credit card debt of $29,010.26. This credit card debt represents approximately 7% of the Debtor's total unsecured debt and approximately 10.5% of the Debtor's dischargeable unsecured debt. The Court finds that Dr. Fenster's debts are "primarily consumer debts".

On Schedule I, Dr. Fenster reported a gross monthly income of $24,999.38 less payroll deductions for taxes, social security and insurance of $10,147.59 for a net monthly income of $14,851.80. The United States Trustee has argued two issues regarding the Debtor's income. First, he argues that Dr. Fenster misrepresented his net disposable income by showing his spousal support payment as a post-tax expense rather than a pre-tax deduction from monthly gross income, thereby failing to reveal the tax benefits to which the Debtor is entitled for those payments, although the Debtor did list as an information item a prospective tax refund of 2003

because the actual wording of the statute makes no such distinction and instead include home mortgages when determining the classification of debts as consumer. Lawrence P. King, 6 **Collier on Bankruptcy** ¶ 707.04[3][b] at p. 707-21 (15th Ed. Rev.), citing *In re Goodson*, 130 B.R. 897 (Bankr. N.D. Okla. 1991); *In re Johnson*, 115 B.R. 159 (Bankr. S.D. Ill. 1990), and *In re Bryant*, 47 B.R. 21 (Bankr. W.D.N.C. 1984).

[11] At trial, the Debtor testified that this loan was an unsecured loan obtained by his wife that he "received" or "inherited" in the divorce. The Debtor testified that he signed a property settlement agreement in the summer of 2001 in which the he presumably assumed liability on this the debt. There was no further evidence regarding the liability of Dr. Fenster on this loan.

on his schedules at a value of $1. The Debtor argues that Schedule I is technically correct as it only asks for payroll deductions and further, the Debtor turned over a pro-rata portion of his tax refund for 2003 upon receipt of it. He argues that he had not received a tax refund for 2002 and had not expected one for 2003. In fact, the Debtor testified at trial that he had communicated his desire to his accountant to "break even" on his taxes, meaning he would like to avoid either over-withholding or owing any taxes at the end of the year. He further testified that after this conversation with his accountant, he did not expect a refund for 2003. The U.S. Trustee did not introduce any evidence to contradict this testimony. Second, the U.S. Trustee argues that the Debtor failed to report various bonuses he received on his Schedule I. At trial, the Debtor testified that he received a signing bonus of $25,000 in January 2003 and another $25,000 bonus in June 2003 and that neither of these bonuses was reflected on Schedule I because under his contract such bonuses were non-recurring. Dr. Fenster testified that he did not expect them to be repeated after his bankruptcy filing and in fact they were not. The Debtor did receive additional compensation in the amount of $100,000 above his contract salary in 2004, but he testified that he was only able to do so because his partner's medical license was suspended and Dr. Fenster had to "cover" for him for six weeks. Dr. Fenster testified that, at the time of filing, he was not aware that suspension proceedings had been instituted against his partner and therefore could not then have anticipated such additional compensation. No evidence to the contrary was presented.

Schedule J indicated monthly expenses of $18,206.67, including $10,000.00 in support payments, $3,264.00 in mortgage payments, $1,205.00 in student loan payments and $893.00 in rent for an apartment in North Carolina. The U.S. Trustee has argued that the Debtor has inflated his expenses by "confusing his personal convenience with the necessity of maintaining two households." (Reply Brief of U.S. Trustee p. 4.) At trial, the Debtor testified that he did not take extravagant vacations or spend money on luxury items he could not afford prior to filing bankruptcy. Schedule J did not include a monthly expense for the time-share units in the Bahamas.[12] Shortly after filing his petition, the Debtor determined he could not afford that payment obligation and at trial indicated he had or would be surrendering that property.

The United States trustee also solicited testimony at trial from the standing Chapter 13 trustee for the Roanoke Division, Rebecca B. Connelly. She testified that she had reviewed the Schedules in this case and performed some calculations as the Debtor's ability to pay. She determined that Dr. Fenster would have $5,369 in net disposable income per month which he could devote to a Chapter 11 plan, even without making adjustments for excessive expenses.[13] She testified that if the Debtor reduced his monthly housing expenses by $3,000, there would be an additional $108,000 available for creditors. The trustee also calculated that without making adjustments to living expenses, the Debtor could pay approximately 70% to his general unsecured non-student loan creditors who filed claims over the life of a 36 month plan,

[12] According to the creditor's proof of claim the monthly principal and interest obligation for this purchase was $654.41. Dr. Fenster and his fiancée were jointly liable for this obligation. In addition they were responsible for real estate taxes and maintenance fees for this property, the monthly pro rata amount of which cannot be determined from the creditor's proof of claim (#14 in the claims registry).

[13] The trustee arrived at this number, according to her testimony, by taking a gross income of $393,599, then subtracting $114,000 for spousal support, $181 for a moving expense, $65,747 for federal taxes and $34,957 for state and local taxes to arrive at a net yearly income of $178,714. This figure results in a monthly net income of $14,892. She then calculated his expenses without adjustment for housing expense and found that his monthly expenses should be $9,523 by taking the total amount shown on Schedule J, subtracting the support payments she had already taken into account on her income analysis and adding back a claimed amount for health insurance. She testified that a monthly payment of $5,369 for 36 months would result in $193,284.

not taking into account fees or interest or charges. She determined that if the Debtor reduced his monthly expenses by $3,000 per month, he would be able to pay 100% of the non-student loan claims which have been filed in the case. She calculated that allowing the full amount of expenses claimed by the Debtor, he could pay 48% of all scheduled, non-student loan unsecured debt in the case. If he reduced his expenses by $3,000, she determined he could pay 78% of all scheduled, non-student loan unsecured debt.[14]

In summary, the U.S. Trustee alleges in his motion that the Debtor has misstated his financial condition or claimed excessive and unreasonable living expenses in various ways:

1. The statement of net monthly income is false and misleading because it does not take into account additional tax reductions the debtor is entitled to and has claimed based on payments of spousal support in the amount of $9,500 per month. Such deductions result in a reduction of taxes of approximately $38,000 per year.

2. The statement of income fails to include bonuses and other potential compensation to the Debtor.

3. The Debtor makes monthly payments of $3,264 on a condominium in Roanoke and also has additional expenses in connection with this residence that the Debtor only used on weekends and was primarily occupied by a woman who, at the time of filing, was the Debtor's fiancée and has since become his wife.

4. The Debtor listed household expenses which apparently include living

[14] All calculations by the trustee were done assuming the Debtor would be making his monthly student loan payments as per those notes. The Debtor included those monthly payments totaling $1,205.00 on his Schedule J, so the trustee's calculations for the amount of debt he could potentially pay through a plan did not include the claims of Dr. Fenster's educational lenders.

expenses for the Debtor's fiancée.

## CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. A motion to dismiss for substantial abuse is a "core" bankruptcy matter pursuant to 28 U.S.C. § 157(b)(2)(A).

A court may dismiss a Chapter 7 bankruptcy case upon a motion by the United States Trustee if the case is filed by a debtor with primarily consumer debts and granting relief would be a substantial abuse of Chapter 7 provisions. 11 U.S.C. § 707(b). **Collier on Bankruptcy** (15th Ed. Rev.) points out that Congress was concerned with the abuse of consumer debt and that § 707(b) of the Code was adopted as "part of a package of consumer credit amendments" included in the Bankruptcy Amendments and Federal Judgeship Act of 1984. Lawrence P. King, 6 **Collier on Bankruptcy** ¶ 707.LH[2] at p. 707-32 (15th Ed. Rev.). Section 707(b) only applies to an individual debtor whose debts are "primarily consumer debts". Bankruptcy Rule 1017(e), implementing this section, provides that the "United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing." It is unmistakably clear that such motions are not to be readily granted and that the onus is upon the U.S. Trustee to prove that the case is abusive, both by the quoted language in Rule 1017(e) and also by the last sentence in § 707(b), granting a presumption in favor of the debtor. The Bankruptcy Code does not attempt to define "substantial abuse" and the courts have struggled to apply this provision given the plethora of factual situations presented by debtors. In summary, Congress appears to have been concerned about persons who knowingly or recklessly live beyond their means, who live the good life using the resources of their creditors to do so and then choose to walk away from their debts even though they have the financial ability to pay them and although their income levels may have given them the access to the credit markets which have made their liberal lifestyles possible. This Court is sensitive to the concerns of the U.S. Trustee which have prompted the filing of the present motion, concerns which have prompted Congress to amend the Bankruptcy Code to require debtors who are financially able to do so to make a sincere effort to pay a significant portion of their obligations before being granted a discharge. However, this legislation was passed well after the Debtor filed his case and this Court is bound by the Code as enacted at the time of Dr. Fenster's filing.

As a threshold matter, the Debtor has argued that because the amount of his unsecured debt is higher than $307,675[15], thereby making him ineligible for Chapter 13, a motion to dismiss for substantial abuse is improper. The Debtor quotes from *In re Green*, 934 F.2d 568, 573 (4th Cir. 1991) and *In re Mastroeni*, 56 B.R. 456 (Bankr. S.D.N.Y. 1985) to support this proposition.[16] The Court is not impressed with this position for several reasons.

[15] Pursuant to § 109(e) of the Bankruptcy Code in effect at the time of filing, a debtor is ineligible for Chapter 13 if the amount of his unsecured debts is higher than $290,525 or the amount of his secured debt is higher than $871,550.

[16] More specifically, the Debtor quotes the following language from *Green*: "A *per se* rule dismissing Chapter 7 petitions in which the debtor has the ability to substantially repay his creditors could only be effective if the debtor is also eligible for Chapter 13." 934 F.2d at 573. The Debtor also quotes the following language from *Mastroeni*:

> A dismissal of a Chapter 7 consumer debtor's petition pursuant to 11 U.S.C. § 707(b), when the debtor is ineligible for Chapter 13 relief and where Chapter 11 is not a meaningful alternative, would not be consistent with the legislative intent to encourage repayment in those instances where the debtor has sufficient income to repay creditors fully or partially. Indeed, a dismissal in such circumstances would be tantamount to a denial of a discharge under 11 U.S.C. § 727, without establishing any of the statutory grounds for barring such discharge.

56 B.R. at 459.

First and foremost, the statute itself contains no such provision. Second, while this Court would certainly honor and follow the Fourth Circuit's definitive ruling on this point, the opinion in *Green* was not dealing with a case where the debtor was ineligible for Chapter 13 relief, rather it was dealing with the argument that one who seeks bankruptcy relief although able to pay his debts over a reasonable time is *per se* an abuser of the bankruptcy system. The Court was not faced with a case where, and did not rule that, a debtor whose debts exceed the Chapter 13 jurisdictional limit is insulated from a § 707(b) "substantial abuse" motion. Third, the fact that post-filing earnings are not property of the bankruptcy estate in a Chapter 11 case although they are in a Chapter 13 case does not preclude a debtor from filing a Chapter 11 plan which proposes to devote some portion of such earnings to the benefit of creditors. While it is true as a general proposition that a Chapter 11 plan must be approved by creditors and the court while a Chapter 13 plan must be approved by the court only and that most consumer debtors do come within the Chapter 13 maximum debt limits, a good faith effort to propose and obtain confirmation of a Chapter 11 plan providing for a reasonable payback to creditors from Dr. Fenster's post-filing earnings would certainly have been compelling evidence of his desire to "do right" by his creditors and could certainly have been followed, if unsuccessful, by a conversion to Chapter 7. Lastly, such a result, as the United States Trustee points out, would mean that the worst possible abusers of their consumer creditors, those who incurred exceptionally large debts in excess of Chapter 13 debt limits, would thereby find immunity from a § 707(b) challenge. *See In re Krohn*, 886 F.2d 123, 127 (6th Cir. 1989) and *In re Scheinberg*, 134 B.R. 426, 429-30 (D. Kan. 1992). Such a result is not likely to have been intended by Congress and has little, if anything, to commend it on policy or logical grounds.

The Court, to the extent that it is a legal question rather than a matter of fact, concludes that Dr. Fenster's debts are "primarily consumer debts" within the meaning of 11 U.S.C. § 707(b). Because the wording of the statute makes no distinction between mortgage indebtedness and other consumer debt, the Court is bound to conclude that Dr. Fenster's condominium acquisition debt is consumer debt despite the legislative history noted in footnote number 10, *supra*, of this decision.

The Fourth Circuit Court of Appeals has adopted a "totality of the circumstances" test in determining whether substantial abuse has occurred. *In re Green, supra*, 934 F.2d at 570. In *Green*, the Court listed a number of factors to be considered:

> (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; and
> (5) whether the petition was filed in good faith.

*Id.*, at 570. The *Green* court further held that:

> Exploring these factors, as well as the relation of the debtor's future income to his future necessary expenses, allows the court to determine more accurately whether the particular debtor's case exemplifies the real concern behind Section 707(b): abuse of the bankruptcy process by a debtor seeking to take unfair advantage of his creditors.

*Id.*, at 572. The Court in *Green* further pointed out that a vast majority of circuit courts have held that the debtor's ability to repay is the primary factor to be considered. *Id.* District Judge Kiser of this District has recently analyzed *Green* in *In re Harrelson*, 323 B.R. 176 (W.D. Va. 2005). This opinion offers the most recent analysis by a court to which an appeal from this court lies detailing how a motion pursuant to § 707(b) for alleged substantial abuse ought to be determined. This Court will undertake, therefore, to apply the methodology of that decision in deciding the present Motion.

*Ability to repay*

In *Harrelson*, Judge Kiser emphasized that "the ability to repay, although not a dispositive factor, is the primary factor in determining substantial abuse." *In re Harrelson*, *supra*, 323 B.R. at 179 (citing *Shaw v. U.S. Bankruptcy Administrator*, 310 B.R. 538, 540-41 (M.D.N.C. 2004) and *In re Norris*, 225 B.R. 329, 333 (Bankr. E.D. Va. 1998)).[17] Judge Kiser went on to note that *Green* requires courts to look at the totality of the circumstances and stated that a court "may not dismiss debtors' ability to repay debts as an irrelevant factor." In fact, it should be the primary factor in determining substantial abuse. *Id.* Courts have held that a debtor's ability to repay weighed in favor of a substantial abuse finding when the debtors could only pay 29% and 47% of their debt over a period of years. *In re Harrelson*, *supra*, 323 B.R. at 178. *See Shaw v. U.S. Bankruptcy Administrator*, *supra*, 310 B.R. at 540-41 and *In re Norris*, *supra*, 225 B.R. at 333. The *Green* court goes on to state, however, that solvency alone is not a sufficient basis for a finding that the debtor has in fact substantially abused the provisions of Chapter 7. In Dr. Fenster's case, the U.S. Trustee projected the Dr. Fenster could pay his creditors $5,369 per month[18] without making any adjustments to expenses, but with some

[17] **Collier on Bankruptcy** (15th Ed. Rev.) points out that in enacting § 707(b),

> Congress rejected attempts by the consumer credit industry to permit creditors to move for dismissal of cases on the basis that the debtor had an ability to pay debts. It also rejected the idea that a case should be dismissed simply because a debtor could pay a "reasonable portion" of his or her debts (defined as 50%), as well as the use of a five year period to determine whether such portion could be paid. The resulting section 707(b) is thus more narrow than the provisions originally sought be the consumer credit industry and targeted only at debtors who can pay their debts without difficulty.

Lawrence P. King, 6 **Collier on Bankruptcy** ¶ 707.LH[4], at p. 707-32, -33 (15th Ed. Rev.)

[18] See footnote number13, *supra*.

adjustments to Schedule I which the U.S. Trustee alleges would accurately reflect the Debtor's income. Over a 36 month plan, the U.S. Trustee calculates that this would provide $193,284 to Dr. Fenster's creditors. The U.S. Trustee argues that if Dr. Fenster reduced his monthly living expenses of $4,752 by $3,000 by finding less costly housing, Dr. Fenster could pay 100% of the claims filed in his case. While the Court does believe that Dr. Fenster does have a substantial ability to pay his creditors, it concludes that the United States Trustee's methodology to reach that conclusion is defective. Rather than taking the Debtor's filing date income as the starting point, he takes Dr. Fenster's 2003 income as reflected in that year's income tax returns and uses that figure to offset against appropriate expenses to derive a presumed available excess income available to pay creditors. If there had been no variations in that income during the year, this approach would be safe from criticism. That year's income, however, included $50,000 in pre-petition bonus compensation paid to Dr. Fenster in the first year of his new job in Winston-Salem and which was not a right to future income which he possessed on his petition filing date. In addition, that income, as previously noted in footnote number 5, included $16,085 in retirement account distribution which was not a recurring item of income. The Court concludes that the proper way to go about it is to start with the actual gross income monthly as of the filing date ($24,999.38) and then reduce the deduction for payroll taxes and social security by the tax impact of the deductibility of the $9,500 alimony paid by Dr. Fenster to his former wife. While the evidence before the Court is not sufficient for the Court to be confident of what the net after-tax effect would be, based on a federal tax rate for 2003 of 35% for an unmarried individual having over $200,000 of taxable income, the projected tax savings would be $3,325 monthly, assuming, as appears to be the case, Dr. Fenster's income tax withholding did not take into account the deductibility of almost 40% of his regular monthly income. This amount would be even greater if the state income tax effect were taken into account. The federal tax savings alone would increase his monthly "take home" pay from $14,851.80 to $18,176.80.[19] The Court will now address the expense side of the equation. While the purchase of a 100% financed $400,000 luxury condominium and the purchase of a "time-share" interest in two Bahamas condominium units may have been lifestyle choices Dr. Fenster had the right to make when he was paying his creditors their due, they are excessive and unreasonable living expenses when he wishes to leave his creditors behind holding worthless claims against him so that he can continue to enjoy the very liberal standard of living which his level of income makes possible. Dr. Fenster's monthly expenses associated with the ownership of the Roanoke condominium (and possibly including the Bahamas "time-share" units as well) are reported in his Schedule J as follows: condominium mortgage payments - $3,264, real estate taxes - $375, and homeowners association dues of $220. Utility expense associated with the ownership and use of these properties is not included in these calculations. The total of the listed amounts is $3,859. The Court agrees with the United States Trustee that in determining Dr. Fenster's ability to pay his creditors during the late Fall of 2003, such expenditures were excessive and unreasonable. The Court believes that the evidence presented supports a finding that Dr. Fenster could have rented at the time of his bankruptcy filing a very satisfactory and comfortable apartment in Roanoke, suitable for his visitation with his children and for his own occupancy when his work schedule permitted, fairly easily for no more than $1,000 per month. Even accepting the $893 per month rental obligation of his Winston-Salem residence, such a finding would permit reduction of his monthly

[19] In addition, the Debtor's 2003 income tax return reported $13,500 in other "Schedule C" income for the year, which would suggest an additional approximate $1,100 per month in before-tax income available to Dr. Fenster for his obligations.

obligations by $2,859 to $15,348.[20] This would make available $2,829 per month for payment to his unsecured creditors in addition to the $1,205 per month already allocated in his budget for his student loan obligations. The total of these two amounts is $4,034. A Chapter 11 plan proposing to distribute to unsecured creditors (which of course would include any deficiency claims of under-secured creditors) the $36,426.50[21] pro rata 2003 tax refund plus $4,000 per month for 36 months would yield a total of $182,000, before consideration of administrative expenses of a chapter 11 case. Even making an allowance of $25,000 to cover filing fee, legal expenses and other administrative expenses of a chapter 11 case and after payment of the reported priority tax debts of $3,648, a payout to general unsecured creditors of $153,352 would appear to be a reasonable prospect. Of course the amount of any deficiency claims of under-secured creditors and the extent to which creditors would file claims is unknowable at this point, but a plan which might pay general unsecured creditors approximately one-third or more of their claims seems reasonable to anticipate. Three years seems a reasonable balance between the legitimate claims of creditors and the Debtor's understandable desire for a fresh start. Accordingly, the Court concludes that the Debtor has the ability to pay a substantial amount, although less than half of what he owes, to his unsecured creditors over a reasonable three year period without depriving

[20] At trial the Court sustained the Debtor's objection to questions concerning his income, expenses and other circumstances as of that time. This ruling was based on the rationale that whether or not a bankruptcy filing is substantially abusive should be determined based on the circumstances that existed at the time of filing. Subsequent consideration has cause the Court to question the correctness of its ruling, including but not limited to *Green*'s admonition to look at the debtor's "proposed" budget. Schedule J involves the debtor's budget at the time of filing. Even if the Court's ruling was incorrect, however, that error should not affect the analysis of this decision as the Court has determined that the Debtor even at the time of filing had the ability to make significant payments to his creditors and has determined that important factor under *Green*, *supra*, and *Harrelson, supra*, adversely to the Debtor.

[21] Debtor's Memorandum in Response to United States Trustee's Brief in Support of His Motion to Dismiss, at p. 3.

the Debtor or his dependents of the reasonable necessities of life. More than 25% of the projected distribution to general creditors would presumably be allocable to his non-dischargeable educational loan indebtedness, a significant reduction of that continuing claim against Dr. Fenster's future income. This factor weighs in favor of granting the Motion.

*Petition filed as a result of a sudden illness, calamity, disability or unemployment*

The Court in *Harrelson* held that this factor weighs in favor of dismissal when the filing is not due to some "unforeseen tragedy." *In re Harrelson*, *supra*, 323 B.R. at 178 (citing *In re Norris*, *supra*, 225 B.R. at 333 and *In re Vansickel*, 309 B.R. 189, 211 (Bankr. E.D. Va. 2004)). The Debtor alleges that precipitating cause of his bankruptcy was the failure of his attempt to successfully and profitably operate the restaurant and wine bar, not his inability or unwillingness to handle his consumer debt obligations, and that this business failure constituted a "calamity" under the first *Green* factor. Not only does a business failure not qualify as an "unforeseen tragedy" of the nature contemplated in *Harrelson*, but also the Court has been unable to find any case law which would indicate that a business failure such as this should be considered a "calamity" for the purposes of a §707(b) analysis, as counsel for the Debtor contends.[22] While some cases do refer to the "calamity" of a business failure, those cases deal with the business as the debtor and are not found in the § 707(b) context. This Court believes the *Green* court to have implied that a calamity would be defined as an outside, unforeseeable event

[22] In fact, many cases which do refer to calamities generally refer to either catastrophic natural disasters or major events affecting the economy on a large scale. *See In re Easton*, 883 F.2d 630 (8th Cir. 1989) (natural destruction of crops a calamity); *Pulley v. Legreide (In re Pulley)*, 295 B.R. 28 (Bankr. D.N.J. 2003) (legislature's exercise of discretion would disrupt the bond market, causing calamity); *Miller v. New Am. High Income Fund*, 755 F. Supp. 1099 (D. Mass 1991) (1980's Wall Street scandals national economic calamity); and *In re Simon II Litig.*, No. 00-CV-5332, 2002 U.S. Dist. LEXIS 25632 (E.D.N.Y. Oct. 22, 2002) (effects of tobacco use on population a calamity).

or series of events having a disastrous effect on the debtor. In this case, an unsuccessful restaurant venture hardly qualifies as an unforeseeable event. Two other courts agree with this proposition. In *In re Tindall*, 184 B.R. 842 (M.D. Flor. 1994), the court found that three failed business ventures did not constitute a calamity:

> This is not like the loss of employment; there are risks inherent in business ventures which do not accompany regular employment. While the circumstances are unfortunate, there is no sudden illness, calamity, disability, or unemployment.

*Id.*, at 844. Likewise, although dating prior to the *Green* decision, in *In re Krohn*, 87 B.R. 926 (N.D. Ohio 1988), the court analyzed a similar factor in a §707(b) analysis. In that case, the debtor argued that the loss of his job two years prior to filing bankruptcy coupled with stock market losses constituted an unforeseen calamity. The court found that the debtor quickly regained employment, negating that issue, and further that the debtor should have been aware that certain risks of loss are associated with security investments. *Id.* at 930. This Court adopts this rationale and finds that because it is common knowledge that restaurant ventures often fail, the Debtor should have been aware of the substantial risk of loss of his investment. In this case the Debtor could be further faulted for not doing his due diligence before entering into the venture and for attempting to run the business on his and his fiancée's admittedly very limited knowledge of restaurant management. Accordingly, this factor weighs in favor of a substantial abuse determination.

*Whether the Debtor made consumer purchases far in excess of his ability to pay*

Case authority on this point varies widely. In *In re Vansickel*, *supra*, 309 B.R. at 211, the court held that "relatively modest" debts including $28,000 in unsecured debt did not weigh in favor of dismissal, holding that due to the statutory presumption in favor of granting a debtor bankruptcy relief, the Trustee did not meet his burden of proof in establishing substantial abuse. In *In re Norris*, however, the court held that this factor did weigh in favor of dismissal when the debtors incurred more than $90,000 of unsecured debt, lived in an expensive home, dined out, and utilized their 401(k) plans to create a reserve fund for future expense. *In re Norris, supra*, 225 B.R. at 333. Additionally, another district court held this factor weighed in favor of dismissal when the debtors purchased a $4,000 bedroom suite, spent $1,000 a month for their daughter's college expenses, lived in a home they could not afford but were unwilling to leave, and purchased two new cars. *Shaw v. Bankruptcy Administrator, supra*, 310 B.R. at 540-41.

In Dr. Fenster's case, up until the accumulation of the business debts, he claims he was easily servicing his debts. (Transcript, p. 89). It is not easy to evaluate this claim due to Dr. Fenster's somewhat erratic employment and income history. Since 2001 at least, his income has been very high, but even so has been subject to significant variation, with his 2001 gross income being more than $70,000 greater that his following year's income. He has worked in at least three different locations between 2002 and this year. In 2003, the year of his Chapter 7 filing, approximately $50,000 of his income for that year was in the form of non-recurring pre-petition bonus compensation. His own financial disclosures indicate that he was not easily servicing his consumer debt. According to his Schedule I, at the time of filing he had gross current income of essentially $25,000 per month and "take home" pay of $14,851.80 a month. While it is true his income tax withholding was excessive, based on the deductibility of the alimony paid to his former wife, according to his testimony he believed at the time that the withholding was set at a level which would cause him to "break even" at tax filing time, meaning no material tax payment or refund being due. Therefore, he was attempting to manage his living expenses and consumer debt servicing on that $14,851.80 figure. Against that income, however, he reported monthly expenses of $18,206.67. It should be noted here that even that figure was understated because it failed to include the $654.41 per month payment for the Bahamas time-share units. It may be even more understated if the amounts listed in Schedule J for real estate taxes and homeowners association dues do not include the amounts required for those same time-share units. Schedule J reports a monthly mortgage obligation of $3,264. According to the answers given to question number 3(a) in the Debtor's Statement of Financial Affairs, the monthly payments on the original $400,000 purchase money financing and the second deed of trust for $100,000 used for the restaurant venture were $2,890.44 and $420.23, respectively. Accordingly, more than 85% of the monthly mortgage payment was purely a consumer debt obligation, treating all of the second deed of trust debt as a business or investment purpose loan. Schedule J does not include any of Dr. Fenster's monthly credit card debt obligations, which were a mix of consumer and business purpose debt. Neither did it include the payment on the substantial debt of his former wife for which he was apparently responsible under the terms of their separation agreement, debt which was certainly consumer in nature. Nor did it include any amount, other than the above-referenced second deed of trust payment, for Dr. Fenster's various "Napa Alley" wine bar obligations. It did include $1,205 per month for three student loans, which Debtor's counsel argues are actually business in nature rather than personal. It is not necessary for the Court to decide the merit of that contention because even laying it to the side, the significant excess of Dr. Fenster's monthly consumer debt obligations, most prominent of which was a $10,000 total obligation to his children and former wife, over his regular "take home" pay, is readily apparent. Even adjusting his tax withholding to what it should have been, it appears that, at the very best, Dr. Fenster had reached the limit of what even his impressive income would permit, and more likely had exceeded it, even disregarding the obligations he incurred in the terribly misguided restaurant venture.

*Excessive and unreasonable family budget*

This factor has been discussed earlier in the "ability to pay" section of this decision and that discussion is incorporated by reference. While the Debtor's budget was not outrageous considering his high income, it was excessive and unreasonable in the context of the financial circumstances in which he found himself in 2003. His refusal to undertake a serious effort during the Summer of 2003 to sell his very expensive condominium indicates his unwillingness to adjust his own standard of living and that which he provided to his fiancée to reflect his obligations to his creditors. This factor weighs against the Debtor.

*Accuracy of the Debtors' schedules*

Neither the Debtor, nor the U.S. Trustee or the Court upon its own inquiry has been able to find a case in which a single explainable inconsistency was found to trigger a finding against the debtor on this point. The cases the Court was able to locate which expounded upon this point required at the least unexplained discrepancies and more commonly gross recklessness with regard to the accuracy of the schedules or an actual intent to conceal assets on the schedules. *See In re Vansickel*, *supra*, 309 B.R. at 196 (unexplained discrepancy in payroll deductions reported on schedule I versus earnings statements of the debtor held against debtor); *In re Duncan*, 201 B.R. 889 (Bankr. W.D. Pa. 1996) (multiple inaccuracies, errors and omissions together led court to question good faith and candor in filing of schedules); *Kestell v. Kestell (In re Kestell)*, 99 F.3d 146 (4th Cir. 1996) (bad faith found - one factor was debtor's failure to report an *anticipated* tax refund and sick leave benefits or to turn them over to the trustee upon receipt). In *In re Shaw*, 311 B.R. 180, 185 (Bankr. M.D.N.C. 2003), the Court found that errors in the schedules were not made with intent to mislead any parties and therefore did not weigh in favor of dismissal. The same is true in this case. Although the U.S. Trustee maintains that the Debtor filed inaccurate schedules by failing to reflect the tax effects of his spousal support payments, the Debtor's testimony at trial as to the conversations he had with his accountant indicates that the Debtor believed that these tax effects were reflected in the amount withheld from his paycheck, as he had attempted to avoid either owing taxes or receiving a refund for tax year 2003. The Court finds that the Debtor did not attempt to be misleading by reporting his income and expenses in the manner in which he did. Nevertheless, the Fourth Circuit has held that an inaccuracy is a factor and therefore relevant, regardless of a lack of motive. *In re Harrelson, supra*, 323 B.R. at 179. Even so, the Court is not persuaded that the Debtor's schedules were inaccurate because they failed to reflect the over-withholding on his income taxes in the absence of evidence that such excess withholding was intended by or even known to the Debtor and where the amounts reported in Schedule I were the actual amounts being withheld from Dr. Fenster's salary at the time of filing.

The U.S. Trustee also argues that the Debtor failed to report significant bonuses. The Debtor testified at trial that prior bonuses he had received had been one-time bonuses and he had no way to determine whether or not he would be entitled to any bonus in the future at the time of filing. The U.S. Trustee did not offer any evidence such as an employment contract to controvert the Debtor's testimony that there was no expectation of future bonuses and the Court finds that including non-contractual pre-petition bonuses in Schedule I was not even required by such schedule, much less that it weighs in favor of a substantial abuse determination. This factor weighs in Dr. Fenster's favor.

*Good or bad faith*

Judge Ellis of the Eastern District of Virginia in *McDow v. Smith*, 295 B.R. 69

(E.D. Va. 2003), a case involving a motion to dismiss for “cause” under 11 U.S.C. § 707(a), stated generally that “a debtor’s ‘bad faith’ or ‘lack of good faith’ is evidenced by the debtor’s *deliberate* acts or omissions that constitute a misuse or abuse of the provisions, purpose, or spirit of the Bankruptcy Code.” 295 B.R. at 74-5 (emphasis added). Of particular significance on this point would be a finding of wrongdoing on the part of the debtor, either in the accumulation of the debt or in the filing of the Chapter 7 petition. *Id.*, at 82. Most cases resulting in a finding of bad faith involve egregious factual situations wherein the debtor has accumulated massive amounts of credit card debt with no intent to repay the debt, lives a lifestyle far above what he or she could afford and/or intends to avoid a large single debt. *In re Zick*, 931 F.2d 1124, 1129 (6th Cir. 1991). *See generally In re Haddad*, 246 B.R. 27 (Bankr. S.D.N.Y. 2000) (in addition to an living an extravagant lifestyle, debtor not candid in disclosure requirements and attempted to claim a wedding band as exempt while unmarried); and *In re Ragan*, 171 B.R. 592 (Bankr. N.D. Ohio 1994) (case dismissed under 707(b) after debtor withdrew more than $160,000 from IRA and recklessly spent it all with little or no regard for obligations to creditors). The Court finds that the Debtor was not exercising bad faith in filing his Chapter 7 petition. In this case, the Debtor’s probably most reckless spending was not consumer spending, but rather business spending in, at best, optimistic hopes of, and, at worst, a foolish attempt to, establish a “California wine bar” in Roanoke, Virginia. There is no evidence before the Court that the Debtor attempted to convert non-exempt property into exempt property in anticipation of bankruptcy; in fact, the Debtor took money from his 401(k) plan, which is indicative that he was trying to pay his debts. There is also no evidence that the Debtor intentionally misstated his assets or liabilities in his schedules. The Court concludes that the filing was made in good faith and on the advice of counsel. This factor weighs in favor of the Debtor.

*Other factors*

The Court of Appeals's opinion in *Green*, *supra*, did not hold that the factors it enumerated were exclusive or exhaustive. It adopted a "totality of circumstances" test which called for consideration of factors "such as" the ones specifically listed. 934 F.2d at 572. *Accord, In re Vansickel, supra,* 309 B.R. at 196, fn. 9. One factor that should be noted is that upon receipt of the unanticipated tax refund for 2003, the Debtor turned over the appropriate pro-rata portion to the Chapter 7 trustee for distribution to his creditors. The Debtor had indicated a 2003 tax refund of $1.00 for information purposes on his Schedule B. While the Debtor is certainly to be commended for turning over this tax refund to the Trustee, he was simply doing what he was obligated to do under the Bankruptcy Code and Rules, even though there are, sad to say, many bankruptcy debtors who have received tax refunds in which the bankruptcy estate had an interest and spent the money before the Trustee could manage to get possession of it. The fact that granting the United States Trustee's Motion will result in the dismissal of the present case, unless the Debtor chooses to convert it to Chapter 11, and the loss of a bankruptcy estate of at least $36,426.50, which otherwise would be administered by the Chapter 7 Trustee and with some certainty distributed to creditors, is a factor which would seem to weigh against a substantial abuse dismissal as Dr. Fenster's creditors could potentially be prejudiced by such action. The United States Trustee, however, is certainly entitled to maintain his position that permitting the case to go forward constitutes an abuse of the bankruptcy system, perhaps in the hope that a ruling adverse to Dr. Fenster in this matter would force him into a Chapter 11 case which would presumably result in a better deal for the creditors. The Court concludes that the tax refund issue is not a factor which clearly weighs in either direction in determining the present motion.

Another factor the Court concludes ought to be taken into account is the substantial amount of non-dischargeable debt which Dr. Fenster will continue to shoulder even if the Motion is denied and he receives his general discharge. At the time of filing the Debtor was faced with the stark fact that each month he was obligated to pay in combined alimony and child support $10,000 to his former wife. Because the separation agreement setting forth these terms and their duration was not introduced in evidence, the Court is left somewhat in the dark on this point, although there was certainly no contention made that this was a short-term obligation. The burden of proof on a motion to dismiss for alleged "substantial abuse" is clearly upon the United States Trustee rather than the Debtor, who enjoys the benefit of a presumption in favor of relief, and therefore the Court concludes that any inferences it can draw on this point must be in favor of the Debtor. In addition to this heavy support obligation, Dr. Fenster also knew that he would continue to be liable for three educational loans requiring monthly payments of $1,205 to retire a remaining filing date aggregate balance of $125,594.81.[23] Although discharged of his legal liability for the remaining balance due on his automobile, as a practical matter Dr. Fenster was likewise obliged to continue to make the $420 per month car payment or face the prospect of losing the vehicle. He also intended at that time to continue making the payments on his two deed of trust loans against his residence property, the payment of which would at the very least continue to strain his financial resources. While the Court, for reasons previously stated, disagrees with Dr. Fenster's decision-making with respect to this property, the fact remains that as of the filing date he did plan to continue making these payments, knowing that he would most definitely lose that property if he failed to do so. The Court concludes that these circumstances of continuing heavy post-filing obligations against the Debtor's admittedly substantial income

[23] Per Schedule F.

weigh against granting the United States Trustee's Motion.

Finally, the Court believes that there is one remaining "other" factor which ought to be considered. That is the fact that because of the level of his debt, Dr. Fenster was ineligible to file a Chapter 13 petition. While the Court, as earlier noted, does not believe that such fact offers an absolute defense to a section 707(b) motion, it is a circumstance which Dr. Fenster and his counsel could reasonably consider in deciding what to do. A Chapter 11 case, while certainly feasible for one in Dr. Fenster's circumstances, was undoubtedly more involved, expensive and uncertain than either a "normal" Chapter 7 or 13 case and was not created to be the natural alternative for a bankruptcy debtor who earns income but is ineligible to file a Chapter 13 case. This also is a factor weighing against granting the Motion.

## DECISION

Dr. Fenster has made some egregious financial mistakes. These mistakes were the result of some near reckless decisions on his part following the breakup of his marriage in 2001, involving both consumer and non-consumer debt. The two most significant of these were his decisions, after becoming obligated to the tune to $10,000 per month to his children and estranged wife, to purchase, all on borrowed money, an exceptionally expensive (for this area) condominium far beyond that which he reasonably needed, and to embark, seemingly almost as a lark, on an open-ended effort to bring a California wine bar to Roanoke, Virginia, resulting in a money pit which was deeper than even his first rate income could fill. On the other side of the ledger, the Court does not find or believe that he incurred his debt with any intent to avoid paying for it. That said, he seems to feel no moral obligation to his creditors extending anything beyond whatever his ability is legally under the Bankruptcy Code to walk away from responsibility to those from whom he can derive no further benefit. There is no suggestion in the evidence that Dr. Fenster was interested in anything other than the quickest and easiest "out" from his financial predicament. If this Court were writing on a blank slate and had been given the authority to deny Chapter 7 bankruptcy relief to the Debtor simply on the ground that he did not absolutely need it and could pay his creditors, who after all lent money to Dr. Fenster in good faith upon his promise to repay and to enable him to pursue his personal dream of owning a wine bar, by a combination of sale of assets and "belt-tightening" of liberal personal living expenses, it would certainly do so.

The critical test, however, is not whether the United States Trustee or this bankruptcy judge believes that recourse to Chapter 7 bankruptcy, by one who with diligence and alteration of lifestyle might manage to pay a substantial portion or even all of his debt, is not particularly admirable, but rather the test is to apply the law Congress has provided and determine whether this Debtor has the right under such law and his individual circumstances to seek a discharge from his dischargeable debts and make a "fresh start" in his financial life. To dismiss the case under § 707(b), the Court must find that to grant such relief would constitute a "substantial abuse" of the bankruptcy laws. In making this determination there are significant factors pointing in opposite directions. Weighing in favor of the Motion are the following:

1. The petition was not filed due to sudden illness, calamity, disability or unemployment, but as a result of a reasonably foreseeable business failure.

2. The Debtor did make consumer purchases beyond his means to pay for them although, due to his high income level, this was most likely not apparent to him at the time, or apparently even at the time of trial. This discrepancy was certainly significant in degree, although whether it rose to the point of being "far" beyond his ability to pay is not so clear.

3. The debtor's personal living expenses, principally associated with the ownership of a

$400,000 condominium, were excessive and unreasonable in the late Summer and Fall of 2003 in light of his then existing circumstances and obligations to his creditors.

4. Based on his regular income at the time of filing, the Debtor had the financial capability to pay some reasonable portion of his earnings to creditors in a Chapter 11 case and to pay over a period of three years a significant portion, although probably something less than 50%, of his debt to his unsecured priority and general creditors.

Factors weighing against the Motion are as follows:

1. The Debtor's current income and expenses were accurately recorded in his schedules and in accord with the instructions for the information required to be included in Schedules I and J. The material excess of income tax withholding over his actual income tax obligation is troubling, but the Court does not believe that this can be held reasonably against the Debtor in light of the uncontradicted testimony that such excess was neither intended by or known to Dr. Fenster, who had consulted his tax accountant to try and make sure that his withholding amount was properly set.

2. There is no evidence before the Court that Dr. Fenster incurred cash advances on his credit cards for consumer purchases.

3. Dr. Fenster filed his chapter 7 petition on the advice of counsel and in good faith.

4. The Debtor's ineligibility to file a chapter 13 case, while not a defense to a § 707(b) motion, confronted him with a difficult choice between filing a chapter 7 petition and facing the gauntlet of defending against a likely § 707(b) motion, or filing a chapter 11 case which would be considerably more involved, uncertain, and expensive than either a chapter 7 or a chapter 13 case. Furthermore, Dr. Fenster understood (even though it may not have not impacted his decision-making), based on the advice of his counsel, that he could not obtain a discharge from

his educational loan debts or his child and spousal support obligations even in a chapter 7 case and that his continuing liability for such substantial amounts (more than $11,000 monthly) impacted his ability to make substantial payments to his other unsecured creditors.

This is a fairly even split among the "totality of the circumstances" factors governing a determination under *Green* and *Harrelson, supra,* which as Bankruptcy Judge Mayer points out are to be "weighed" rather than simply counted. *In re Vansickel, supra,* 309 B.R. at 196. In light of the express statutory presumption in favor of granting relief provided in § 707(b) and the legislative history noted in **Collier on Bankruptcy**[24] that Congress refused to enact legislation that would have imposed an obligation to repay some portion or all of one's obligations upon those bankruptcy debtors who had the financial ability to do so, the Court concludes that in such a finely balanced case the benefit of the doubt must go to the Debtor. *See generally, McDow v. Smith, supra, and In re Moreland,* 284 B.R. 825 (Bankr. W.D. Va. 2002)(Krumm, C.J.). While many believe that it is "abusive" for one to seek bankruptcy relief as a first resort rather than as a last one in the face of serious financial distress, that clearly was not the rationale adopted by Congress when it enacted § 707(b) into the Bankruptcy Code. Accordingly, the Court by separate order will deny the U.S. Trustee's Motion to Dismiss.

This 14th day of July, 2005.

William F. Stone, Jr.

UNITED STATES BANKRUPTCY JUDGE

[24] See footnote number 17.