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

IN RE:	)	**CHAPTER 7**
	)	
JAMES LEE JACOBS	)	
and	)	
JUDY KAY JACOBS,	)	**CASE NO. 04-74235**
	)	
DEBTORS	)	

MEMORANDUM DECISION

The matter before the Court is the United States Trustee's Motion to dismiss the Debtor's case as constituting alleged bad faith and "substantial abuse" pursuant to 11 U.S.C. § 707(b). In this Motion filed January 1, 2005 the United States Trustee ("U.S. Trustee") alleges that the Debtors, James and Judy Jacobs, acted with bad faith toward their creditors by scheduling excessive and unreasonable monthly expenses and by understating their monthly income. The matter was set for trial and heard on April 20, 2005. The matter has been fully briefed by the parties and is now ready for decision. For the reasons stated below, the Court will grant the U.S. Trustee's motion.

FINDINGS OF FACT

The Debtors, James and Judy Jacobs, work as a truck driver and a housekeeper for a car dealership, respectively. They have one son, who at the time of filing was fourteen years old. Their son had previously had back surgery, requiring the Debtors to make periodic trips to Kentucky for check-ups. At the time of filing, Mr. Jacobs had been employed by his employer for six and a half years. Mrs. Jacobs had been employed by her employer for three years. In the year preceding their filing of a Chapter 7 bankruptcy case, both had missed short periods of work due to medical problems. He missed approximately two or three weeks of work at least ten months prior to filing bankruptcy due to concerns that he may have had a heart attack. Mrs. Jacobs missed two weeks of work for gallbladder surgery approximately two months before filing. Other than these two incidents, there does not appear to have been any major medical problem or other factor arising outside of the Debtors' control which would have caused them financial difficulty.

The Debtors began contemplating bankruptcy in January 2004, and they filed their joint petition October 18, 2004, revealing $57,158.14 in unsecured debt and $78,859.33 in secured debt.[1] The unsecured debt includes $10,138.67 in medical debt, a $11,016.00 deficiency amount owed on a surrendered vehicle[2], $784.69 owed on a 401(k) plan loan and $35,218.78 of

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[1] Seven proofs of claim totaling $52,244.52 have been filed in this case:

Huntington National Bank for $11,308.45 (unsecured)
Discover Financial Services for $7,771.38 (unsecured)
First Community Bank for $29,203.53 (secured by mortgage on home)
Bluefield Regional Medical Center for $245 (unsecured)
Fashion Bug for $896.87 (unsecured)
BB& T for $2,329.70 (secured by 1995 Pontiac Grand Am; original purchase price of $3,856.10)
Cato for $489.59 (unsecured)

The aggregate totals of these claims are $20,711.29 unsecured debt and $31,533.23 secured debt.

[2] The testimony is unclear as to when the Debtors purchased a 1998 Jeep, but the creditor's (Huntington National Bank) proof of claim indicates a purchase date of December 28, 2000, at which time the Debtors financed a total of $17,471.59 and promised to make 66 monthly payments of $344.27 each. The Debtors could not testify as to exactly when they surrendered this vehicle; Mrs. Jacobs stated that she thought it was a significant amount of time prior to bankruptcy, but could not remember exactly when she called the secured creditor and asked that it repossess the Jeep. According to Mr. Jacobs' testimony, it was after the Debtors purchased two 2003 vehicles which added monthly payments totaling more than $766.99 to the Debtors' expenses. In its proof of claim Huntington National Bank claims a deficiency balance of $11,308.45.

credit card debt. The secured debt consists of debt owed on a 1995 Palomino Camper purchased in July 2002 for $3,152.41, a 2003 Chevrolet Trail Blazer purchased on October 8, 2003 for $27,869.04, a 2003 Chevrolet Silverado purchased on March 12, 2003 for $24,278.57, a 1995 Pontiac Grand Prix purchased on June 12, 2003 for $3,856.10, a computer, a bed and $29,385.41 in home mortgage debt. In view of the absence of any suggestion of borrowing for business or investment purposes, it appears that all of their debt was consumer debt.

On the Debtors' Schedule I, Mr. Jacobs reported a gross monthly income of $3,080, less payroll deductions of $1,105.36, (including $600 per month for income and social security taxes, $316.72 per month for insurance, a $121.72 monthly payment on the 1995 Palomino camper, and a $66.92 monthly payment for a 401(k) loan) for a net monthly income of $1,974.64. Mrs. Jacobs reports a gross monthly income of $1,360 less payroll deductions of $410 ($350 per month for taxes and social security and $60 per month for insurance) for a net monthly income of $950.00.

On the Debtors' original Schedule J, the Debtors listed monthly expenses of $3,462.39, approximately $500 more than their net income. The original Schedule J was later amended due to an error in listing the Debtors' mortgage payment twice on the Schedule. The amended Schedule J listed a total of $3,111.98 in expenses per month, still almost $200 more than the scheduled net monthly income of the Debtors. Monthly expenditures included a $350.41 mortgage payment and car payments totaling $934.13 among various other household expenses.

The U.S. Trustee has filed his motion to dismiss on several grounds, centering around an allegation that the Debtors' monthly expenses are unreasonable and excessive, but also on the ground that the Debtors' understated their monthly income by $1,073. Additionally, the U.S. Trustee argued that another contributing factor was that the male Debtor owns a house and land valued at $28,000 without liens while living in a house valued at $22,900 (per Schedule A) encumbered by a mortgage with a remaining balance at the time of filing of $29,385.41.

Unreasonable and excessive monthly expenses

Specifically, the U.S. Trustee objects to a payroll deduction of $121.72 for payment on the 1995 Palomino camper, and a monthly payment of $416.58 on a 2003 Chevrolet Silverado. When questioned about the necessity of retaining all three vehicles, Mrs. Jacobs testified that she used the Grand Prix to drive to and from work, a 45-minute commute each way, and that her mother sometimes borrows the vehicle because her own vehicle does not have air conditioning. As for the Trailblazer, Mrs. Jacobs stated that her son had had back surgery and they needed a reliable four-door vehicle which her son could easily get in and out of. She also testified that she needed the vehicle for periodic trips to Kentucky for her son's post-surgery check-ups. She later stated that they hoped to allow their son to use the Grand Prix after he turns 16 and obtains a driver's license, which would allow him to get a part-time job (if his doctors allow him to work) and to help pay the cost of car insurance after adding him to their insurance. The Debtors use the 2003 Silverado truck for Mr. Jacob's transportation to and from work. Mrs. Jacobs is unable to drive the truck due to its manual transmission. When questioned as to why the Debtors purchased these vehicles after already being obligated to pay for the 1998 Jeep, whether in form of continuing monthly payments or a deficiency resulting from its repossession, they both simply stated that they thought they could afford all the payments. The U.S. Trustee further objected to repayment of a 401(k) loan in the amount of $66.92 per month. Schedule F shows an outstanding balance of $784.69 on the loan at the time of filing. Mr. Jacobs acknowledged this payment, but stated that he had obtained the loan in order to make a down payment on his current residence. In addition to the 401(k) loan repayment, the U.S. Trustee objected to the deduction of contributions to the 401(k) plan averaging $54 per month.[3]

The final circumstance urged by the United States Trustee in support of his contention that the Debtors' living expenses are unreasonable, considering their financial circumstances, is that the Debtors live in a home valued at $22,900 with a lien of more than $29,385.41 while at the same time owning a house and land with a tax-assessed value of $28,000 without liens. Mr. Jacobs testified that he had inherited the house and land from his grandparents and that they had attempted to rent the property on a rent-to-own basis[4], but the tenants had failed to pay rent and the property was currently unoccupied. He further testified that they had attempted to sell the property, but had not had any prospective buyers, even at a price of $15,000 which Mr. Jacobs testified was a more accurate value for the property based on the condition of the improvements. He indicated that he was willing to surrender the property to the Chapter 7 Trustee so that it could be sold and the proceeds from the sale distributed to creditors.

Misstatement of income

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[3] This average was obtained by averaging the amounts taken out of Mr. Jacobs' paychecks for 401(k) contributions on the pay stubs submitted in the U.S. Trustee's Exhibit 5.

[4] Mr. Jacobs testified that he believed the value of the property to be approximately $15,000, the price agreed upon in the rent-to-own contract. He stated that he believed the value of the property was far less than the tax-assessed value due to the condition of the improvements on the property. He did not offer to explain why he and Mrs. Jacobs listed the property in the schedules as having a fair market value of $28,000 when he thought its actual value was only $15,000.

The U.S. Trustee argues that combined they have understated their gross monthly income by $1,073.22. To support this argument, the U.S. Trustee introduced a spreadsheet prepared by a paralegal, Deborah Charles, in the Office of the United States Trustee. Ms. Charles testified at trial that she arrived at a gross monthly income of $4,008.12 for Mr. Jacobs and $1,505.11 for Mrs. Jacobs by taking the year-to-date figure on each of their pay stubs received just prior to filing and dividing that number by the number of pay periods for the year up to that point to get an average pay per pay period. For Mr. Jacobs, because he was paid weekly, this number was then multiplied by 52 and then divided by 12 to get a monthly average. As for Mrs. Jacobs, Ms. Charles (on the basis that her pay was bi-weekly) divided the year-to-date gross income figure by 21, the number of pay periods as of her last pay stub, to get an average per pay period. She then took that number and multiplied it by 26 and then divided by 12 to get her monthly gross income. She then did similar calculations with tax and insurance figures and eventually determined a net monthly income of $2,839.32 for Mr. Jacobs and $1,224.16 for Mrs. Jacobs for a combined net monthly income of $4,263.50 (after adding in a prorated tax refund) if the Debtors did not make any contributions to a 401(k) plan, the 401(k) loan payment, and the payment on the camper.[5] Using this figure and the adjusted monthly expenses as proposed by the U.S. Trustee and noted above, the Debtors would have $1,568.10 per month in disposable net income, which could be used to pay a projected dividend of 60%, according to the U.S. Trustee's calculations.

The Debtors argued that since their income fluctuated to some degree due to the

[5] The camper payment, the 401(k) loan repayment and a 401(k) contribution were all deducted by Mr. Jacobs' employer from his gross earnings.

nature of Mr. Jacobs' employment as a truck driver, it would be more appropriate to only look at the 12 weeks prior to filing bankruptcy, and further argued that they had used a 12-week period in calculating their monthly income and it should be accepted by the Court as a more accurate picture of the Debtors' financial situation. The Court agrees with counsel for the Debtors that their actual average income at the time of filing is the proper figure to use, not the year-to-date income, which for a variety of reasons might not reflect accurately income at the time of filing. For example, if a debtor had been out of work for a substantial period during the early part of the year but had obtained regular employment several months prior to filing, using a year-to-date figure would substantially understate that individual's income as of the time of filing. Conversely, if a debtor had been very gainfully employed during the early part of they year, but then had lost that employment and was trying to get by with a minimum wage job at the time of filing with no good prospects for early improvement in that situation, using a year-to-date average would substantially overstate that person's filing date income.

On Schedule I, the Debtors list Mrs. Jacobs' gross monthly income as $1,360.00 per month and Mr. Jacobs' gross monthly income as $3,080.00. At trial, the Debtors submitted Exhibit B that showed Mr. Jacobs monthly net pay to be $1,960 for four weeks (which equals a monthly figure of $2,123.33) and submitted Exhibit A that showed Mrs. Jacobs' gross income to be $960 and net pay to be $780.05.

According to the Court's calculations[6], Mr. Jacobs averages a gross monthly income of

[6] To compute Mr. Jacob's gross income, the Court agreed with the Debtor that a period closer to the time of filing should be used to determine income at the time of filing, so the Court averaged the gross pay figures from each of the pay stubs provided and produced in Exhibit 5 (except the last pay stub, which has an ending date later than the filing date) to arrive at an average weekly pay of $921.35. This number was multiplied by 52 and divided by 12, thereby

$3,992.53, or $912.53 more than the $3,080 amount scheduled. By the Court's calculations[7], Mrs. Jacobs grosses on the average $1,793.75 per month, which is $433.75 more than the $1,360.00 amount scheduled. In the aggregate, the Debtors grossed $5,786.28, resulting in an understatement of their gross income by $1,346.28 or 23% per month, and 30% more than their scheduled aggregate gross income of $4,440.00. The Court finds its own calculations to be the most accurate approximation of the Debtors' income at the time of filing.

Ability to pay

The Court finds that Mr. Jacobs actual net monthly income at the time of filing available for debt repayment was $2,824.45[8] and Mrs. Jacobs actual net monthly income at the time of filing was $1,236.50[9], giving them a combined net monthly income of $4,060.95, which is $948.97 more than the total monthly expenses listed on the Amended Schedule J. The U.S. Trustee suggests that in addition to eliminating the 401(k) loan payment, 401(k) contribution and the camper payment, the Debtors should surrender the 2003 Chevrolet Silverado, thereby reducing their expenses as per Schedule J to $2,695.40. Taking the appropriate net monthly

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showing a monthly income of $3,992.53.

[7] Mrs. Jacobs' pay stubs for June and July indicate that she was paid twice monthly, but beginning in August, the paychecks appear to be bi-weekly. For purposes of its own calculations, the Court took the sum of Mrs. Jacobs gross pay for the entire period covered by the pay check stubs in evidence and divided such sum by the total number of days included in that period (100) to arrive at a daily average gross pay. This number was multiplied by 365 and then divided by 12 to arrive at a monthly gross income.

[8] To compute Mr. Jacobs net income, the Court took the net income on each pay stub and added back to that number the amounts which had been deducted for 401(k) contributions, 401(k) loan payments, camper payments, and a weekly $75 deduction for "savings".

[9] To reach this figure, the Court used the same methodology as described in note 7 except using net income figures. The U.S. Trustee does not dispute any deductions on Mrs. Jacobs' pay stubs.

income of $4,060.95, as calculated by the Court, and subtracting from that the suggested reduced monthly expenses of $2,695.40, the Debtors should have $1,365.55 in monthly disposable income which would result in a dividend to unsecured creditors of 67%[10] in a presumed thirty-six month Chapter 13 plan.

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". In summary, Congress appears to have been concerned about persons who knowingly or recklessly live beyond their means, who live "high on the hog" and use 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

[10] Assuming a 10% Chapter 13 Trustee commission and an $8,000 unsecured deficiency claim of Fifth Third Bank after the surrender of the Silverado.

although their income levels may have given them the access to the credit markets which have made their liberal lifestyles possible.

The Fourth Circuit Court of Appeals has adopted a totality of the circumstances test in determining whether substantial abuse has occurred. *In re Green*, 934 F.2d 568, 570 (4th Cir. 1991). 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.

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. Bankr. Adm'r,* 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)). 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.* The Trustee argues that granting relief to the Jacobs would result in substantial abuse of Chapter 7 provisions, and the Court, utilizing the analysis employed by Judge Kiser in *Harrelson,* agrees.

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 Jacobs argue that Mrs. Jacobs' surgery and resulting absence from work in August 2004 was a precipitating factor in their filing bankruptcy,[11] but this Court concludes that a two week absence from work without pay is not what the *Green* court or Judge Kiser had in mind. Mrs. Jacobs did not become unemployed (other than her two week absence from work) as a result of her surgery, nor did she become disabled. Nevertheless, for a couple in the Jacobs financial condition, such an event unquestionably disturbed their existing budget arrangements. Therefore, the Court will treat this as a neutral factor in its substantial abuse analysis.

[11] In the sense that the Debtors' various loan payments and other living expenses were such that even a relatively minor disruption of their usual income put them over the financial edge, this contention may well be a fair one, especially considering the amount of their medical debt. In the absence of the unreasonable and excessive consumer purchases on borrowed money, such a circumstance would be a perfectly valid justification for filing a non-abusive Chapter 7 case.

Whether the Debtors made consumer purchases far in excess of their 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*, *supra*, 225 B.R. at 333, 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. 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. U.S. Bankr. Adm'r, supra*, 310 B.R. at 540-41. In the Jacobs' case, the purchase of three vehicles within one year appears to have been the precipitating cause of the Debtors' financial downfall. They had a vehicle that they claimed was "undriveable," even though it was only 5 years old, so they decided to surrender that vehicle because they could not trade it as the debt against it was more than its value, and being aware that they almost certainly would still owe a deficiency on that vehicle, they purchased three more vehicles, all in 2003. This was all consumer debt and these purchase decisions, considered in the aggregate, were, in this Court's view, irresponsible. They began contemplating bankruptcy in January 2004, only a few months after the purchase of the Chevrolet Trailblazer, which added a $387.07 per month payment to the Debtors' expenses. They Debtors have also accumulated $35,218.78 in credit card debt over a period of time. While the purchase of the vehicles standing alone would not have been sufficiently in excess of their ability to pay to be considered substantial, the combination of such purchases together with the monthly payments on their large credit card balances[12] is sufficient for the Court to conclude that they did make consumer purchases far in excess of their ability to pay. The Debtors' have simply overextended themselves financially by taking advantage of excessive consumer credit, the precise problem which § 707(b) is designed to address. Therefore, this factor weighs in favor of finding substantial abuse.

Excessive and unreasonable family budget

The U.S. Trustee's main argument on this factor is that the Debtors spend $1,055.85 per month on vehicle payments, including the camper. The U.S. Trustee also argues that the Debtors spend $121.77 per month repaying a 401(k) loan, thereby avoiding repayment to unsecured creditors while repaying debt to themselves. The U.S. Trustee's argument is well taken on this point. Repayment of the 401(k) only serves to benefit the Debtors, and in essence they are simply repaying themselves. *In re Estes*, 254 B.R. 261, 265 (Bankr. D. Idaho 2000). The U.S. Trustee argues that if the Debtors' simply surrendered one of the 2003 vehicles and stopped making the payments on the 401(k) loan, there would be adequate funds to pay a substantial portion of their unsecured debt. With only one category having substantial value (that is, the vehicle payments) being in question on the Debtors' budget, it is difficult to determine that the budget generally rises to the level of "excessive and unreasonable", however the Court concludes that maintaining payments on three vehicles, considering their income and other obligations, as well as insurance, gas and other maintenance for such vehicles, is

[12] Assuming a credit card minimum payment obligation of 1.50% per month on a credit card indebtedness totaling $35,219, the monthly payment would be $528.

unreasonable for two drivers. Furthermore, the aggregate purchase price of the vehicles is excessive in comparison to the income of the Debtors. The Debtors, in their testimony at trial, gave reasons for owning all three cars as noted above and while the Court is somewhat sympathetic to those reasons, it is still unreasonable to purchase three vehicles whose combined purchase price was $56,003.71 in one year on either their scheduled gross annual income of $53,280 or the Court's determined gross annual income of $69,435.36. Therefore, this factor weighs in favor of finding substantial abuse.

Accuracy of the Debtors' schedules

This factor is the most troubling to the Court. After extensive consideration of the Debtors' Schedules and all exhibits before the Court, the Court is unable to determine how the Debtors arrived at the figures they listed in Schedule I and the Debtors did not satisfactorily explain those figures at trial. The exhibits submitted by the Debtors at trial were inconsistent with the Schedules and therefore did not aid in the Court's reconciliation of Schedule I with the pay stubs of the Debtors. Exhibit A appears to utilize the methodology of the U.S. Trustee of using year-to-date figures for Mrs. Jacobs, but shortening the time period. It appears that the Debtors took the year-to-date figures from the period beginning July 1 from the year-to-date figure from the period ending September 26 to arrive at a three month gross income of $3,780.02. The Debtors then apparently divided by 3.93, presumably to account for the last 4 days of September to arrive at a gross monthly income of $960.01. There are several problems with this calculation. First, if the Debtors were attempting to calculate gross income from the beginning of July through the end of September, they should have started with the year-to-date figure on the last statement prior to July 1, which would have been $9,330.41. The difference between that number and the year-to-date figure on the period ending September 26 is $4,527.6. Next, the Debtors should have used a divisor of slightly less than three, not slightly less than four to arrive at a gross monthly income. This carelessness as well as the irreconcilable figures on Schedule I lead to Court to no other conclusion than that the Schedules were grossly inaccurate. As noted above, the Debtors' actual gross income at the time of filing was $5,786.28, which is $1,346.28 more than the $4,440 listed for gross income on the Debtors' Schedule I. The Debtors may have calculated Mrs. Jacobs average income by including in their calculations the two-week period for which Mrs. Jacobs did not receive any pay. If this is the case, it was clearly not proper to calculate Mrs. Jacobs's filing date income by including two weeks of a twelve week period in which she earned no income due to her surgery. The proper divisor should be the number of weeks she earned income during that period because the goal is not to determine an average income for the twelve weeks preceding bankruptcy, but to use an average income during those weeks she earned income to provide a reasonably accurate and fair indication of the income she was actually earning at the time she filed. There was no evidence offered to suggest that Mrs. Jacobs was likely to have recurring episodes of absence from employment for surgery or similar health problems. Additionally, it appears that the figures for the camper payments and 401(k) loan repayment were calculated by taking the weekly amounts paid from Mr. Jacobs' pay stub and multiplying that number by 4. This understates the amount paid over the course of a year by four weeks. This miscalculation may be a contributing factor to the inaccuracy of the gross and net income on Schedule I. In any case, Schedule I is clearly erroneous as set forth above and the Court must find that this factor significantly weighs in favor of a finding of substantial abuse.

Bad faith

The United States Trustee alleges that three facts in this case are evidence of bad faith on the part of the Debtors in this case. First, that the Debtors understated their income on the schedules. That argument has been dealt with above and while the schedules are inaccurate and those inaccuracies indicate that the Debtors did not take care in preparing them, the Court is not persuaded that the Debtors supplied the figures they used with a definite intent to mislead their creditors, which would definitely justify a determination of bad faith. Second, the U.S. Trustee argues that the Debtors chose to live on property encumbered by a mortgage while owning property valued at $28,000 without liens and their intention to keep that property indicated bad faith. The Court rejects this argument. As noted above, the Debtors testified that not only was the property more accurately valued at $15,000 due to the condition of the improvements on the property, but also that they were willing to relinquish that property for its liquidation by the Trustee with proceeds benefitting their creditors.[13] This evidence from trial leads the Court to conclude that the Trustee has failed to prove bad faith through this issue; in fact, it supports a determination of their good faith. Last, the U.S. Trustee argues that the Debtors were acting in bad faith by paying back a 401(k) loan while attempting to avoid paying back their creditors. As noted above, the Debtors should not be entitled to include a payment to a 401(k) loan as a reasonable and necessary expense, but their desire to protect their retirement security is certainly not evidence of bad faith on their part.

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[13] This representation is subject to some question in view of the fact that the Debtor filed on December 3, 2004 an amended Schedule C claiming a $5,500 homestead exemption in the equity of this property.

Ability to repay

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.[14] *In re Harrelson, supra*, 323 at 178 (citing *Shaw v. U.S. Bankr. Adm'r, supra,* 310 B.R. at 540-41 and *In re Norris*, *supra*, 225 B.R. at 333). In this case, as discussed at length in the Findings of Fact section, the Debtors have net disposable income of $1,365.55 after determination of actual gross income and eliminating payments to the 2003 Chevrolet Silverado, the 1995 Palomino camper, the 401(k) loan payments and the 401(k) contributions, allowing an approximate dividend to unsecured creditors of 67% over the life of a thirty-six month Chapter 13 plan. Therefore, this factor weighs in favor of a substantial abuse finding.

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. One factor present in the Jacobs case and more commonly not present in other cases which precipitate § 707(b) "substantial abuse" motions is the fact that it is an asset case and one with a reasonably significant value in relation to the amount of their unsecured debt. If the property which Mr. Jacobs inherited could be sold by the Trustee for the $15,000 value estimated by Mr. Jacobs, it would generate a net return of $7,250 for administrative and general creditors after allowing for

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[14] According to Collier on Bankruptcy, Congress had in mind bankruptcy debtors who could reasonably easily pay <u>all</u> of their obligations within a presumed three year period of a typical Chapter 13 plan. 6 **Collier on Bankruptcy** ¶ 707.04[4] at pp. 707-24 and -25 (15^{th} ed. rev.) While this may well be true, this Court is bound to apply the words of the statutory language as interpreted by appellate courts.

the Chapter 7 Trustee's compensation in the maximum amount of $2,250[15] and $5,500 for the Debtors' unobjected to homestead exemption claim. This circumstance, as already noted, is substantial evidence of the Debtor's good faith, but in the Court's view is not enough to outweigh the other *Green* factors supporting a substantial abuse determination. The Court acknowledges that the result of this Court's decision in granting the United States Trustee's Motion may potentially prejudice the Jacobs' creditors, at least those who have filed claims in the present case, by foregoing an assured Chapter 7 administration of an actual bankruptcy estate and distribution to those creditors in favor of an uncertain future result from a dismissal of the present case.

DECISION

In conclusion, the Debtors ran up large credit card balances and made consumer purchases significantly in excess of their ability to pay, their monthly budget, considering their income and obligations, is excessive, and they inaccurately stated their income to a considerable degree in their bankruptcy schedules. In addition to these factors, the Debtors have an ability to repay a majority of their debt within 3 years. Granting the Jacobs Chapter 7 relief under the *Harrelson* analysis would result in substantial abuse of Chapter 7 provisions.[16]

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[15] 11 U.S.C. § 326(a): 25% of fist $5,000 and 10% of next $45,000 of moneys disbursed or turned over by the trustee to parties in interest, excluding the debtor.

[16] The Court acknowledges that under other authority the Jacobs' case would not be deemed abusive because the Court does not believe or find that the Jacobs incurred their excessive debt with intent not to pay it. Rather, the Court has no reason to believe, however irresponsible their decision-making may have been, that they did not intend to pay the excessive obligations they incurred. In short, the Court does not find that the Jacobs engaged in any knowing or intentional abuse of the bankruptcy system of the kind described in the following quotation:

> Many are the debtors who should have known that they were incurring debts that

For the reasons stated the Court by separate order will grant the U.S. Trustee's motion to dismiss for substantial abuse, subject to the Debtors' right to convert their case to one under Chapter 13, to propose a repayment plan to their creditors consistent with their ability to pay, within twenty days of the date below.

This 1st day of July, 2004.

William F. Stone, Jr.

UNITED STATES BANKRUPTCY JUDGE

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they would never be able to pay. The failure to appreciate the consequence is the essence of their problem, one which the Bankruptcy Code is designed to address. In contrast, instances of abuse arise when debtors incur debt with an actual intent never to repay. Substantiality requires further that this intent pervade the finances of the debtors. For them, bankruptcy must represent the final step of a deliberate process to avoid any meaningful measure of financial responsibility.

In re Wolniewicz, 224 B.R. 302, 306 (Bankr. W.D.N.Y. 1998). *See also* 6 **Collier on Bankruptcy**, *supra*, ¶ 707.LH[4] at pp. 707-32 and -33.