

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
Eastern Division

IN RE: IN PROCEEDINGS UNDER CHAPTER 7  
JOSEPH AND ANNA MARIE LONGO, CASE NO.: 04-18487  
Debtors. JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is a motion to dismiss filed by the United States Trustee (UST) pursuant to § 707(b) of the Bankruptcy Code. The Debtors, Joseph and Marie Longo, oppose such relief. The Court acquires core matter jurisdiction over the instant matter pursuant to 28 U.S.C. §§ 157(a) and (b), 28 U.S.C. § 1334, and General Order Number 84 of this District. Following a duly-noticed hearing, the following findings and conclusions are rendered:

On July 2, 2004, Joseph and Anna Marie Longo (Debtors) filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code. Debtors reside at 27350 Highland Road in Richmond Heights, Ohio. On Schedule A, Debtors value their residence in the amount of \$170,000.00. Two mortgages encumber their residence, a first mortgage arising from a loan by Fairbanks Capital Corporation and a second mortgage securing a debt owed to Citifinancial. Debtors owe secured creditors Fairbanks Capital Corporation \$143,600.00 and Citifinancial \$15,963.00, respectively. Debtors' Statement of Intention reflects that they intend to remain in their residence and continue repaying the secured debt.

Co-debtor Joseph Longo is employed as a driver for a local newspaper company where he has worked for the last six years. Anne Marie Longo works as a registered nurse. The Debtors combined

net monthly income is \$6,084.01 in 2005. *See* Schedule J. Debtors earned over \$90,000.00 in 2003 and expect to earn more than \$96,000.00 in 2005. *See* Statement of Financial Affairs.

The UST contends that the Debtors lack the need to receive a Chapter 7 discharge. He further contends that the Debtors have sufficient disposable income to warrant a conversion of their Chapter 7 case to Chapter 13 proceedings. Debtors object to the relief sought by the UST maintaining that they are in need of a Chapter 7 discharge.

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The issue before the Court is whether the Debtors' Chapter 7 case should be dismissed pursuant to § 707(b) or converted to Chapter 13 proceedings.

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The UST asserts that, on Schedule J, Debtors represent that in order to keep their home they will have to make monthly mortgage payments totaling \$1,875.00. On their Amended Summary of Schedules, Debtors indicate they owed secured obligations totaling \$170,621.00. The Debtors report general unsecured claims in the amount of \$91,074.00. Unsecured claims listed on Debtors' Schedule F and Amended Schedule F reflect the following, among other unsecured claims:

Cleveland Clinic Foundation - \$15,000.00  
American Education Services - \$52,000.00  
Colorado - \$3,717.00  
Colorado Financial - \$3,563.00

The UST contends that the obligation to the Cleveland Clinic is contingent in nature and will require payment only if co-debtor Anne Marie Longo ceases employment as a registered nurse. This debt relates to an educational grant provided by the Cleveland Clinic as an incentive for Ms. Longo to

obtain her nursing degree. According to the UST, Debtors do not have to make payments on this contingent and unliquidated claim. The Debtors have not refuted this assertion. The obligation to American Educational Services purportedly arises from student loans obtained by Ms. Longo as she pursued her nursing degree. Debtors include the monthly payment on her student loans as part of their Schedule J monthly budget. They acknowledge that the student loan debt will not be discharged in their bankruptcy. The consumer purchase obligations to Colorado and Colorado Financial are apparently duplicates.

The UST also contends that his examination of Debtors' Schedule F reveals that Debtors are seeking to discharge general unsecured debt of \$20,511.00 through their Chapter 7 bankruptcy. He provides the following calculation:

Total Debt Listed on Schedule F and Amended Schedule F - \$91,074.00  
Less Cleveland Clinic Grant - (\$15,000.00)  
Less Non-Dischargeable Student Loans - (\$52,000.00)  
Less Duplicate Claim - (\$3,563.00)  
Debt Subject to Discharge - \$20,511.00

The UST asserts that the Debtors have the ability to fund a Chapter 13 plan based on the foregoing calculations. Specifically, he asserts that in order to repay claims totaling \$20,511 over three years for a 100% plan, Debtors would need to commit \$569.75 each month. To repay a 100% dividend over five years, Debtors would have to pay \$341.85. He further contends Debtors earn enough income to fund Chapter 13 plan payments. On Schedule J, Debtors itemize monthly expenses in the amount of \$6,158.00. He also contends that the Debtors' estimate of expenses appears overstated and excessive. Debtors include the following expenses on Schedule J:

Cable - \$84.00

Food - \$850.00  
Transportation - \$350.00  
Recreation - \$200.00  
Tuition/Student Loans - \$434.00  
Cigarettes \$140.00<sup>1</sup>

The UST argues that Debtors can revise their budget to reduce or eliminate unnecessary expenses and prosecute a Chapter 13 case.

Debtors oppose the relief sought by the United States Trustee. They contend that by filing a Chapter 7 case they did not “substantially abuse” the bankruptcy system. Debtors contend that they made every effort to avoid bankruptcy. They state that their financial difficulties resulted from overextending themselves financially in the 1990s. In 2002, they refinanced their home at an interest rate between 9% and 10% to pay down \$15,000.00 of their unsecured debt. Still unable to make headway against the mountain of debt and its high interest rates and penalty fees, Debtors assert that they obtained a loan for a second mortgage in 2003, again, at an interest rate between 9% and 10%. From the proceeds of this loan, the Debtors paid an additional \$12,000.00 towards their unsecured debt, and \$4,000 towards tax debt. Additionally, Debtors attempted to pay their debts through consumer credit counseling. Debtors contend that this failed because they could not afford the monthly payments, and because the creditors refused to lower interest rates and/or continued to assess late fees.

Debtors further contend that Joseph Longo suffered a heart attack around the time Debtors obtained the second mortgage. Debtors assert that they appeared on August 9, 2004, at the section 341 meeting of creditors and were examined by the Chapter 7 panel trustee. They argues that the

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<sup>1</sup>The Debtors have two dependents.

panel trustee did not recommend that the UST take action pursuant to section 707(b). Lastly, Debtors assert that the UST filed this motion to dismiss on November 22, 2004, after obtaining an extension of approximately 60 days to do so.

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Section 707 of the Bankruptcy Code provides, in pertinent part:

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

11 U.S.C. § 707(b). Under 11 U.S.C. § 707(b), the Court may dismiss a case if it finds that a debtor's obligations are primarily consumer debts and the granting of relief would be a substantial abuse of the provisions of chapter 7. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429 (6th Cir. 2004), *citing*, *In re Krohn*, 886 F.2d 123(6th Cir. 1989); *In re Music*, 310 B.R. 359 (Bankr. N.D. Ohio 2004); *In re Pier*, 310 B.R. 347 (Bankr. N.D. Ohio 2004). Whether to grant or deny a 707(b) motion is left to the discretion of the bankruptcy court. *In re Belke*, F.3d at 434.

Debtors classify the nature of their debt as "Consumer/Non-Business" in their petition. Based on this representation and an examination of their indebtedness reported on Schedules D and F, Debtors' obligations appear to have been incurred for a personal, family or household purpose, satisfying the definition of consumer debt contained in 11 U.S.C. § 101(8). *In re Marshalek*, 158 B.R.

704 (Bankr. N.D. Ohio 1993); *In re Bell*, 65 B.R. 575 (Bankr. E.D. Mich. 1986); *In re Almendinger*, 56 B.R. 97 (Bankr. N.D. Ohio 1985).

In determining whether to apply § 707(b) to an individual debtor, a court should ascertain from the totality of circumstances whether the debtor is merely seeking an advantage over his creditors, or instead is “honest”, in the sense that his relationship with his creditors has been marked by essentially honorable and undeceptive dealings, and whether he is “needy” in the sense that his financial predicament warrants the discharge of his debts in exchange for liquidation of his assets. *Id.*, citing, 4 Collier [on bankruptcy] ¶ 707.07, at 707-20 [15th ed. 1989]. “Substantial abuse” can be predicated on a showing of either lack of honesty or a want of need. *In re Belke*, 358 F. 3d. at 433. Herein, the UST does not rely on a lack of honesty, but maintains that the debtors “lack the need” for a Chapter 7 discharge.

Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings. The Sixth Circuit in *Krohn* opined:

A court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. Other factors relevant to need include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.

*In re Krohn*, 886 F.2d at 126. The burden of proof is upon the UST to overcome the statutory presumption in favor of granting a debtor a discharge. *See* 11 U.S.C. § 707(b). This presumption can be overcome by a showing of dishonesty, lack of need or the ability to pay. *In re Mooney*, 313 B.R.

709, 713 (Bankr. N.D. Ohio 2004), *citing*, *Harris v. United States Trustee (In re Harris)*, 279 B.R. 254, 259 (B.A.P. 9th Cir. 2002).

Debtors assert that the Chapter 7 Trustee filed a “no asset” report and did not request that the UST pursue dismissal of their case pursuant to § 707(b). Debtors argue that they were duly examined by their panel trustee and that the panel trustee made no recommendation to convert or dismiss their Chapter 7 case. Such argument is without merit, as the Bankruptcy Code authorizes the Court or the UST to prosecute such relief under § 707(b) as sought herein. Thusly, it is not a requirement that a panel trustee recommend dismissal under § 707(b) before the UST may prosecute such an action. Moreover, § 307 of the Bankruptcy Code authorizes the UST to raise and appear on any issue in any case under Title 11. 11 U.S.C. § 307(b). *See also* 28 U.S.C. § 586 (a)(3)(the United States Trustee shall supervise the administration of cases and trustees in cases under chapter 7...).

Debtors also argue that their filing for bankruptcy relief under Chapter 7 was not a substantial abuse of the bankruptcy system. Such an argument reflects a misunderstanding of the express language of § 707(b). It is not the filing for relief under Chapter 7, as asserted by the Debtors, which gives rise to a potential substantial abuse. Rather, the substantial abuse occurs under § 707(b) where “...granting of relief would be a substantial abuse of the provisions of this chapter.” 11 U.S.C. § 707(b)(emphasis added).

Debtors’s Schedule I reflects that they jointly earn \$6,084.01 in monthly income. Schedule J reflects that total monthly expenses equal \$6,158.00. Schedule J includes the following expenses which are objectionable to the UST:

Food - \$850.00

Cable - \$84.00  
Home Maintenance and Upkeep - \$200.00  
Recreation - \$200.00  
Cigarettes - 140.00

Debtors report monthly net income of \$6,084.01. Their total earnings will approach \$100,000 this year. Debtors enjoy stable employment with the benefit of earnings in the top percentage of households in Cuyahoga County. Their scheduled debts are primarily consumer debts. The schedules have not been modified to offset any of the UST asserted bases for dismissal. They are eligible for debt relief under Chapter 13, and their scheduled monthly expenses are adjustable for a respectable dividend to unsecured creditors under Chapter 13.

According to the U.S. Census Bureau, the estimated median household income for Cuyahoga County in 2003 was \$38,204. (*See American Community Survey 2003 Data Profile for Cuyahoga County, Ohio at [www.census.gov/acs](http://www.census.gov/acs)*). Despite receiving annual income that more than doubles the median for the county in which they reside, Debtors seek to discharge \$20,511 in general unsecured debt. Debtors do not seek to discharge debt related to their home, car or student loans. Debtors elect to continue paying a monthly mortgage in the amount of \$1,875.00 in order to keep their personal residence. To allow the Debtors to receive a Chapter 7 discharge while retaining their house valued at \$170,000.00 and while earning roughly \$100,00.00 per year would allow them to receive a “head start rather than a fresh start.” *See In re Grant*, 51 B.R. 383 (Bankr. N.D. Ohio 1985).

Debtors’ Schedule I reflects a monthly income of \$6,084.00 balanced against monthly expenditures in the amount of \$6,158.00. The UST correctly notes that Debtors have improperly deducted \$1,015.36 for garnishments. Garnishments cease upon the bankruptcy filing. 11 U.S.C.



§ 362(a). Therefore, Debtors have more than sufficient income to support the prosecution of a Chapter 13 case.

Accordingly, the UST's motion to dismiss is hereby granted, and the Debtors' objection is overruled. The dismissal order will be held in abeyance for fourteen (14) days from the entry of this Order to allow the Debtors time to voluntarily convert to Chapter 13 proceedings. In the event this case is not converted within such fourteen (14) day period, the Chapter 7 case will be dismissed.

IT IS SO ORDERED.

Dated, this 17th day of  
March, 2005

/s/ Randolph Baxter

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RANDOLPH BAXTER  
CHIEF JUDGE  
UNITED STATES BANKRUPTCY COURT

