The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Mary Ann Whipple
United States Bankruptcy Judge

Dated: January 12 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 05-37134
	)	
Frank Lee Shuff, Jr.,	)	Chapter 7
Jennifer Lynne Shuff,	)	
	)	
Debtors.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION TO DISMISS

This case came before the court for hearing on the United States Trustee's ("UST") Motion to Dismiss [Doc. # 12] and Debtors' opposition [Doc. # 13]. The UST moves to dismiss Debtors' Chapter 7 case for substantial abuse pursuant to 11 U.S.C. § 707(b). He argues that Debtors have sufficient disposable income to fund a Chapter 13 plan and pay a significant portion of their unsecured debt.

The court has jurisdiction over this case under 28 U.S.C. §1334 and the general order of reference entered in this district. Proceedings to determine the dismissal of a case under § 707(b) are core proceedings that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(A).

Regardless of whether or not specifically referred to in this decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the UST's motion will be granted.

FACTUAL BACKGROUND

Debtors filed their Chapter 7 petition on July 15, 2005. They are married and have one daughter, who is five years old. Debtor Frank Shuff is employed as a district manager at Glazers Distributor. Although he has worked for his current employer for only three years, there is no evidence suggesting that his employment is anything but stable. Debtor Jennifer Shuff is employed as a teacher by Toledo Public Schools, where she has worked for the past twelve years.

Debtors' Schedule I reflects combined gross monthly wages of $9,013, and net monthly wages of $6,303. In addition to withholding taxes, insurance and union dues, their payroll deductions include a deduction of $279.44 per month as repayment to Frank Shuff's 401k plan and a mandatory deduction of $166.51 from Jennifer Shuff's pay for the Ohio State Teachers Retirement System.

Debtors' Schedule J indicates that their monthly expenses total $6,433. Their itemized expenses include a payment of $2,122 on their home mortgage debt and $870 on two automobiles, a 2005 Chrysler Pacifica and a 2005 Chrysler Sebring. Debtors intend to reaffirm their debt on the mortgage and on both automobiles, notwithstanding their lack of any equity in their home or either vehicle. Other notable expenses include $500 for home maintenance, $800 for food, and $200 for recreation, newspapers and magazines. Jennifer Shuff testified that their home is a turn-of-the-century farmhouse that has required many repairs. Since purchasing the home in 2000, they have remodeled the kitchen and the bathroom and have replaced or repaired the roof. She testified that all of the work on the house has been done by Debtors themselves and that $500 per month is her estimate of what is necessary to continue the maintenance of their home. She also testified that she spends between $150 and $200 per week on food for her family.

Debtors own no non-exempt assets that are unencumbered by a creditor's security interest. Their home, which Debtors value at $141,000 and which has a property tax valuation of $ 132,200, [*see* Debtor's Ex. 1], is subject to a first mortgage in the amount of $247,015. Although Jennifer Shuff's testimony is not entirely clear, it appears that at some point after purchasing their home, Debtors refinanced the home for an amount in excess of its value based upon an inaccurate appraisal of the home. Debtors acknowledge in their response to the UST's Motion to Dismiss that their debts

are primarily consumer debts and their schedules so indicate. Their unsecured nonpriority debts total $40,584, almost all of which consists of credit card debt. No major medical expenses, unemployment, or other unexpected financial crisis precipitated their bankruptcy filing.

LAW AND ANALYSIS

The version of §707(b) that was effective at the time Debtors filed their petition provides as follows:[1]

> After notice and a hearing, the court, on its own motion or on a motion by the United States trustee, . . . 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.

11 U.S.C. § 707(b). Viewed in light of the court's ability to raise the substantial abuse issue sua sponte, it appears that the presumption in favor of granting relief under Chapter 7 is something other than simply a rule regarding the burden of production and burden of proof. *In re Kelly*, 841 F.2d 908, 917 (9th Cir. 1988). It is "in reality a caution and a reminder to the bankruptcy court that the Code and Congress favor the granting of bankruptcy relief, and that accordingly 'the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present.'" *Id.* (citation omitted); 4 Alan N. Resnick, et al., *Collier on Bankruptcy* ¶ 15th ed. 2003); *see also In re Krohn*, 886 F.2d 123, 128 (6th Cir. 1989) (referring to the presumption found in § 707(b) as a "statutory preference" in favor of granting relief).

Debtors have acknowledged that their debts consist primarily, if not entirely, of consumer debts. Thus, the first prerequisite for dismissal under § 707(b) has been satisfied. The second prerequisite requires a finding that granting relief to Debtors under Chapter 7 would be a substantial abuse.

The Bankruptcy Code does not define "substantial abuse."[2] Instead, Congress left its meaning to be determined by the courts. The amendment that added the applicable version of subsection (b) to § 707 was enacted in 1984 in response to an increasing number of bankruptcies being filed by people perceived as non-needy debtors. *Krohn*, 886 F.2d at 126 (quoting S. Rep. No. 65, 98th Cong.,

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[1] Section 707(b) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005("BAPCPA"), which was effective on October 17, 2005.

[2] The court notes that BAPCPA amended § 707(b), in part, by deleting the word "substantial" and providing that the court may dismiss a case filed by an individual debtor if it finds that the granting of relief would simply be an "abuse" under Chapter 7.

1st Sess. 53, 54 (1983)). The legislative history indicates that the amendment "was intended to uphold 'creditors' interests in obtaining repayment where such payment would not be a burden." *In re Laury-Norvell*, 157 B.R. 14, 16 (Bankr. N.D. Ohio 1993) (quoting S. Rep. No. 65, 98th Cong., 1st Sess. 53, 54 (1983)). While courts that have addressed the issue have developed various formulations for analyzing whether the filing of a debtor's petition rises to the level of "substantial abuse," *see In re Attanasio*, 218 B.R. 180 (Bankr. N.D. Ala. 1998) (providing an exhaustive discussion of the various standards employed), this court is bound by the approach set forth by the Sixth Circuit in *Krohn*.

In *Krohn*, the court held that "substantial abuse can be predicated upon either lack of honesty or want of need." *Krohn,* 886 F.2d at 126. The Sixth Circuit set forth a totality of the circumstances test to determine 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.*

The UST does not allege that Debtors lacked honesty in their relationship with their creditors. Instead, he asserts that Debtors are not "needy" such that discharge of their debts is warranted. One of the primary factors to be considered when determining whether a debtor is needy "is his ability to repay his debts out of future earnings." *Id.* Indeed, "that factor alone may be sufficient to warrant dismissal for substantial abuse." *Id.* The Sixth Circuit explained that "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." *Id.* Other factors to be considered include "whether the debtor enjoys a stable source of 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." *Id.* at 126-27.

In order to determine whether a debtor has the ability to pay, courts often evaluate whether the debtor has sufficient disposable income to fund a Chapter 13 plan. *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 435 (6th Cir. 2004). "Disposable income" is defined as "income which is received by the debtor and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor. . . ." 11 U.S.C. § 1325(b)(2).

In this case, Debtors' Schedules I and J reflect a deficit in their monthly budget of approximately $130. Thus, their budget, as postulated, leaves no room for repaying their debt by funding a Chapter 13 plan. But the court is not bound to accept their budget as presented, and may independently evaluate the reasonableness of the expenses presented. Indeed Debtors' expenses reflect little, if any, "good old-fashioned belt tightening" that the court finds could be accomplished without depriving them of adequate food, clothing, shelter or other necessities. *See Krohn*, 886 F.2d at 127-28. In particular, the court finds Debtors' food expense of $800, home maintenance expense of $500, and entertainment expense of $200 to be excessive in light of the debt they owe their creditors. While Jennifer Shuff testified regarding kitchen, bathroom and roof repairs and remodeling already completed, there is no evidence of any specific repairs that are still required or anticipated that would justify a budget of $500 per month, or $6,000 per year, for home maintenance. The court finds that Debtors' average monthly home maintenance expense can each be reduced by at least $250. The court also finds that Debtors' monthly food expense for a family of three including a small child, can be reduced by at least $150 per month, to $650.00. And while some expenditure for recreation is certainly reasonably necessary, the court finds Debtor's monthly entertainment expense could be reduced by at least $100, to an average of $1,200 per year. These reductions alone total $500 per month.

In addition, Frank Shuff's monthly income is reduced by a payroll deduction of $279.44 for repayment of a loan from his 401K plan. The court is well aware of the potential tax and other financial consequences of not repaying such a loan. But under binding Sixth Circuit precedent, that expenditure must be treated as not necessary for the maintenance or support of Debtors or their dependents. *See Behlke*, 358 F.3d at 435-36 (applying in the context of a § 707(b) motion the reasoning in *Harshbarger v. Pees (In re Harshbarger),* 66 F.3d 775 (6th Cir. 1995), that it would be unfair to creditors to allow debtors "to commit part of their earnings to the payment of their own retirement fund while at the same time paying their creditors less than a 100% dividend."). As such, it must be considered disposable income available to apply to repayment of their debt.[3]

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[3] The court notes that BAPCPA has amended the definition of "disposable income" to exclude any amounts required to repay a 401K loan. *See* 11 U.S.C. § 1322(f). However, the BAPCPA amendment is only applicable to cases filed on or after October 17, 2005. *See* Bankruptcy Abuse Prevention and Consumer Practice Act, Title XV, § 1501(a) and (b)(1). Because Debtors' case was filed on July 15, 2005, in the event that they convert this case to one under Chapter 13, the pre-BAPCPA definition of "disposable income" and the case law interpreting that definition will apply. *See* 11 U.S.C. § 348(a) (providing that the "[c]onversion of a case from a case under one chapter to a case under another chapter of this title. . . does not effect a change in the date of the filing of the petition. . .").

The reductions in Debtors' expenses as discussed above, together with the amount now being deducted as a 401K loan repayment, would provide approximately $779 per month that could be applied to payment of their unsecured debt. If this amount is so applied over a period of three years, the minimum time period required to meet the disposable income test of 11 U.S.C. § 1325(b), creditors will receive $28,044 or approximately a 69 percent dividend. If $779 per month is applied to payment of their debt over a period of just under four and one-half years, creditors will receive 100 percent of the amount they are owed. By comparison, the Sixth Circuit in *Behlke* affirmed granting a motion to dismiss under § 707(b) where the bankruptcy court projected that debtors would be able to pay only a 14% dividend to their general unsecured creditors over a three year period. *Behlke*, 358 F.3d at 437-38.

In determining whether granting relief to Debtors would be a substantial abuse of Chapter 7 in light of their ability to repay such a significant portion of their debt, the court also considers other relevant factors. Debtors are professionals who appear to enjoy relatively stable sources of income and are eligible for adjustment of their debts under Chapter 13, factors that weigh in favor of granting the UST's motion. Their statement of affairs [Doc. #1] shows income of $122,670 in 2003 and $111,989 in 2004. The court also considers the fact that Debtors pay a total of $870 per month on two late model (2005) vehicles, the debts for which they are willing to reaffirm, notwithstanding their lack of equity in the vehicles. Similarly, they are willing to reaffirm, and to continue paying $2,122 per month on, a $247,015 mortgage debt on their home that is valued at less than $150,000. According to Ms. Shuff's testimony, which the court finds credible, their house has been the proverbial money pit and the cause of their request for bankruptcy relief. Based on all of the circumstances, however, it is not appropriate for their unsecured creditors to bear the burden of the expense of repairing, remodeling and financing Debtors' historic home. *See In re Mooney*, 313 B.R. 709, 714-15 (Bankr. N.D. Ohio 2004)("[T]here is nothing inherently wrong with owning an expensive home. However, if the mortgage payment on that home is so large that a debtor falls behind in payments to other creditors, eventually seeking to discharge most of these debts in chapter 7 *while still keeping the house*...this would be a substantial abuse;" emphasis original).

On these facts, the court finds that Debtors can make significant repayment of their debt without depriving them or their dependent daughter of adequate food, clothing, shelter and other necessities. While "there is no 'cutoff' or bright-line test under which an ability to pay a certain percentage over a three-to-five year period would or would not be substantial abuse regardless of

other circumstances," *Behlke*, 358 F.3d at 438, having considered the totality of the circumstances, the court finds that any presumption in favor of granting relief is overcome and concludes that granting Debtors a discharge in this case would be a substantial abuse of the provisions of Chapter 7.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the United States Trustee's motion be, and hereby is, **GRANTED**. Debtors are granted thirty (30) days from the date of this order to file a motion to convert to a Chapter 13 case or the case will be dismissed.