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.

Dated: June 04 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 06-32985
	)	
Amanda K. Kubista and	)	Chapter 7
William J. Kubista, II,	)	
	)	
Debtors.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER REGARDING MOTION TO DISMISS

This case is before the court on the United States Trustee's ("the UST") motion to dismiss Debtors' Chapter 7 case for abuse under 11 U.S.C. § 707(b)(3) [Doc. # 11] and Debtors' response [Doc. # 21]. A hearing was held that Debtors, their counsel and counsel for the UST attended in person. The court has jurisdiction over this case pursuant to 28 U.S.C. §1334 and the general order of reference entered in this district. Proceedings to determine a motion to dismiss 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 witness, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the court will grant the UST's motion and dismiss Debtors' Chapter 7 case unless they convert the case to a Chapter 13.

BACKGROUND

Debtors are married and have two children, ages 5 and 18 months. Amanda Kubista has worked as a nurse at Toledo Hospital for nine years, and William Kubista is a purchaser for The Andersons, where he

has worked for twenty-one years. Both employers are stable locally-based companies. At the hearing, Amanda Kubista ("Kubista") testified regarding Debtors' financial condition. She testified that, while Debtors were building their home in late 2004 and early 2005, she was working both overtime at Toledo Hospital and a second job as a paramedic in Rossford, Ohio. In building their existing home, Debtors incurred debt secured by a first mortgage granted in January 2005 and a second mortgage granted in July 2005. Their first mortgage provided for graduated payments during the first four years of its term, beginning at $1,200 and increasing to $1,707 per month. William Kubista also borrowed from his 401(k) plan in order to put a downpayment on the home and currently owes approximately $23,000 on that loan.

In February 2005, Debtors purchased a 2005 Chrysler van. Kubista testified that she traded in the SUV that she had been driving in order to buy a vehicle more conducive to transporting her children. In doing so, her car payment was increased by $100.

Kubista went on maternity leave during June, July and August 2005 when her second child was born. She testified that she received no pay during this time. To assist paying their expenses during this time, she borrowed funds from her own 401(k) plan, on which she currently owes approximately $3,500. She makes monthly payments of $97 on that loan, which will be paid off in 2010. Because their new home was not in Rossford, when they moved Kubista was no longer able to work as a paramedic for that community. And on returning to work after her maternity leave, her hours were cut with no overtime being offered. Although this created a financial strain, Debtors continued to satisfy their debt obligations.

In March 2006, Debtors purchased a 2006 GMC Sierra, replacing an older vehicle that was in need of repairs. They also incurred a credit card expense of $352 at a local restaurant where Debtors had taken their family after their baby was baptized. Although their credit card debt by March 2006 totaled approximately $50,000, Kubista testified that they were making timely payments each month on that debt, albeit generally by making the required minimum payments. However, Debtors began using their credit cards to pay for other monthly expenses, such as groceries and gas, in order to be able to make the debt payments. They also used credit cards to pay on other credit cards in an attempt to consolidate their debt, an attempt that was not entirely, if at all, successful.

While making timely minimal payments on their debt, the financial strain led Debtors to file their Chapter 7 petition on October 20, 2006. Debtors' petition states that their debts are primarily consumer debts. Their bankruptcy schedules show unsecured nonpriority debt, consisting entirely of credit card debt, in the amount of $63,160, secured debt of $292,233 relating to their home, valued at $256,000, secured debt of $21,655 relating to their 2005 Chrysler van, valued at $15,500, and secured debt of $20,951 relating to

their 2006 GMC Sierra, valued at $24,000. Their schedules show minimal, if any, nonexempt assets. Debtors' amended Schedule I shows total gross monthly income of $7,945 and monthly income after payroll taxes and deductions of $5,400, which does not include $304 withheld monthly as payroll deductions in payment of loans from both Debtors' 401(k) plans. In addition, Kubista testified that Debtors received an income tax refund in 2005 in the amount of approximately $7,000. She testified that the refund was greater than it had been in previous years because of the interest deduction on their home and the additional deduction after the birth of their second child. Having previously claimed zero exemptions for payroll withholding purposes, Kubista testified that she does not expect as large a refund in the future since they now claim two exemptions and, as a result, less money is withheld from their paychecks. Debtors' Amended Schedule J [Doc. #19] shows total monthly expenses of $5,391, including, among other things, a mortgage expense of $2,508, car payments of $521 and $360 for the Chrysler van and the GMC Sierra, respectively, $75 for haircuts, and $235 for telephone, cell phone, cable television and internet expenses.

At the time their petition was filed, Debtors indicated that they intended to reaffirm their home mortgage debts as well as the debts relating to both vehicles. However, Debtors subsequently decided not to reaffirm the debt secured by the Chrysler van, as they owed more than the value of the vehicle. No further payments on that debt have been made since their October 2006 payment. Although Debtors' amended Schedule J, filed on January 2, 2007, includes a $521 monthly payment on the debt secured by the Chrysler van, Kubista testified that she anticipates purchasing a different vehicle, which her sister has agreed to finance for her, with a payment in the range of $350 to $400. On January 26, 2007, the court granted the secured creditor with respect to the debt owed on the Chrysler van relief from the automatic stay.

The UST filed a timely motion to dismiss for abuse under § 707(b)(3), arguing that Debtors did not deal fairly with their creditors and that the totality of the circumstances are such that they have the ability to repay at least a portion of their unsecured debt.

LAW AND ANALYSIS

This case must be decided under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23, ("BAPCPA" or "the Act") as it was filed on October 20, 2006, after the effective date of the Act. Where debts are primarily consumer debts, the court may, after notice and a hearing, dismiss a Chapter 7 petition "if it finds that the granting of relief would be an abuse of the provisions of [Chapter 7]." 11 U.S.C. § 707(b)(1). Before BAPCPA, courts considered whether to dismiss a case for "substantial abuse" under § 707(b) based on the "totality of the circumstances." *See, e.g., In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989); *In re Price*, 353 F.3d 1135, 1139 (9th Cir. 2004). The Sixth

Circuit explained that "substantial abuse" could be predicated upon either a lack of honesty or want of need, to be determined by the totality of the circumstances. *Krohn*, 886 F.2d at 126. Congress incorporated this judicially created construct in § 707(b)(3) by requiring a court to consider "(A) whether the debtor filed the petition in bad faith; or (B) the totality of the circumstances . . . of the debtor's financial situation demonstrates abuse." 11 U.S.C. § 707(b)(3)(A) and (B). Although pre-BAPCPA case law applying these concepts is still helpful in determining abuse under § 707(b)(3), under BAPCPA, Congress has clearly lowered the standard for dismissal in changing the test from "substantial abuse" to "abuse." *In re Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007).

In this case, the UST first argues that Debtors have dealt unfairly with their creditors by living beyond their means and incurring debt when they were unable to pay their creditors. The court, however, finds as a matter of fact that Debtors' conduct does not constitute unfair dealings with their creditors. Much of the debt was incurred at a time when Kubista was working a second job and receiving overtime pay at the hospital. After the birth of their second child and the loss of both the second job and the overtime pay, Debtors began to struggle but continued to meet their debt obligations by making at least minimal monthly payments, even up until the time they filed their bankruptcy petition. Although Debtors incurred debt when celebrating their child's baptism at a local restaurant and did so at a time when their finances were strained, they were still making payments on their debts. While they may not have always made the best financial choices, as is often the case with debtors filing for bankruptcy relief, they conducted their affairs with honest intent to pay their creditors.

The UST also argues that the totality of the circumstances show that Debtors have the ability to repay their unsecured creditors. The court agrees. Factors relevant to determining whether a debtor is "needy" include the ability to repay debts out of future earnings, which alone is sufficient to warrant dismissal. *Krohn*, 886 F.2d at 126. Other factors 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." *Id.* at 126-27. "Courts generally evaluate as a component of a debtor's ability to pay whether there would be sufficient income in excess of reasonably necessary expenses to fund a Chapter 13 plan." *Mestemaker*, 359 F.3d at 856 (citing *In re Behlke*, 358 F.3d 429, 435 (6th Cir. 2004)).

In this case, the UST argued, among other things, that the 401(k) loan repayments of $305 per month

could be used to pay unsecured creditors. Even if Debtors continue to make the 401(k) loan payments, the court finds that they have the ability to repay a meaningful portion of their unsecured debt. Debtors both enjoy stable employment, with one of them employed at the same job for twenty-one years and the other for nine years at stable locally-based companies. There is no indication that either Debtor is in danger of losing his or her job or that either anticipates a future decrease in income within the next five years. Debtors received $7,000 as an income tax refund in 2005. Although they anticipate a smaller refund going forward as a result of increasing their exemptions from zero to two for withholding purposes, Kubista testified that the deduction for home interest was also a significant factor in the $7,000 refund in 2005, a deduction that will continue to be available to Debtors. Even if the decreased tax withholding results in a income tax refund that is diminished by as much as one-half, or $3,500, annualized Debtors would still have income in excess of their expenses of approximately $290 per month. In addition, Debtors are no longer making the $521 monthly payment on the Chrysler van. They wisely anticipated surrendering the van and purchasing a more affordable vehicle with a payment of only $350 to $400, thus yielding at least an additional $121 per month.[1] The court also finds that further belt tightening is possible, with an annual haircare expense shown on amended Schedule J of $900 and annual telephone/cable TV/cell phone/internet expenses of $2,820. Reasonable reductions in these expenses would improve Debtors' monthly cash flow and the ability to devote funds to repayment of unsecured creditors. Another fact that demonstrates Debtors are not needy is that they are living in a new $256,000 home that they intend to keep even though the extant mortgage debt exceeds its value. In essence they seek a Chapter 7 discharge of their unsecured debt now to subsidize that lifestyle choice in the future. Nevertheless, just considering the decreased car payment and Debtors' income tax refund, the court finds that an amount averaging out to be $410 per month could be paid into a Chapter 13 plan, or $24,600 over sixty months, a period that coincides with the applicable commitment period of a Chapter 13 plan for above median income debtors such as the Kubistas. 11 U.S.C. § 1325(b)(4). As Debtors' schedules show unsecured debt in the amount of $63,160, an amount less than the limits for eligibility for relief under Chapter 13, and no unsecured priority debt, unsecured creditors may potentially receive a dividend greater than 30% under a Chapter 13 plan, or more if claims are not filed by

[1]Had they not made that choice, the court would have imputed the ability to reduce their ongoing monthly secured debt payments totaling over $870 associated with two late model motor vehicles without depriving them of basic reliable transportation for work and family needs.

all creditors as frequently occurs.[2]

The court finds that, based on these facts, granting Debtors relief under Chapter 7 of the Bankruptcy Code would be an abuse of the provisions of that chapter given the totality of their financial circumstances. *See In re Behlke,* 338 F.3d 429, 437 (6th Cir. 2004) (finding *substantial* abuse where debtors had the ability to pay at least a 14% dividend to their unsecured creditors).

THEREFORE, for all of the foregoing reasons, good cause appearing,

IT IS ORDERED that the United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b)(3) [Doc. # 11] be, and hereby is, **GRANTED**. Debtors are allowed 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 by separate order of the court.

[2]It is not known what impact the surrender of the Chrysler van would have on Debtors' total unsecured debt and thus on a Chapter 13 plan. It appears that this vehicle is a so-called "910 motor vehicle." *See* 11 U.S.C. § 1325(a) [hanging paragraph]. This court has not addressed whether surrender of such vehicles may be treated in a Chapter 13 plan as full satisfaction of debt or whether any deficiency may still be asserted by the creditor and paid as an unsecured claim. It need not do so here. Even if the *entire* debt of $21,655 were treated as unsecured, a meaningful dividend approximating 25% could still be paid to unsecured creditors over 5 years time.