The court incorporates by reference in this paragraph and adopts as the findings and analysis 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: July 20 2007

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 06-32908
	)	
Andrew R. Rodenhauser,	)	Chapter 7
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION DENYING MOTION TO DISMISS

This case is before the court on the United States Trustee's ("the UST") motion to dismiss Debtor Andrew R. Rodenhauser's ("Debtor") Chapter 7 case for abuse under 11 U.S.C. § 707(b)(3) [Doc. # 21]. The court held an evidentiary hearing that Debtor, his 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 witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the following reasons, the court finds that granting relief to Debtor would not be an abuse of the provisions of Chapter 7 and it will deny the UST's motion.

BACKGROUND

Debtor is married and has one minor child. He received his bachelor's degree, majoring in accounting, in 1985. From 1988 to 1998, Debtor was employed as an accountant at Pierce Insurance

Agency. After leaving Pierce Insurance Agency in 1998, he was employed at Fremont Plastic Molds as an accountant until 2000. At that time, Debtor was earning approximately $50,000 per year. In 2000, he was asked to return to Pierce Insurance Agency. The owner of the agency had died and, although it required him to take a cut in pay to approximately $32,000, he chose to return to work there due to the potential of becoming a part-owner of the agency with one of the children of the deceased owner. However, that potential did not materialize. In May 2005, when another child of the deceased owner purchased the business, Debtor's employment was terminated by the new owner. Thereafter, until December 2005, Debtor received unemployment compensation in the amount of approximately $1,200 per month. Although he has been actively searching for new employment, he has been unsuccessful in finding anything in his field. He has remained unemployed since May 2005 and is now searching for work outside the field of accounting.

On October 13, 2006, Debtor filed a petition for relief under Chapter 7 of the Bankruptcy Code. Debtor's petition states that his debts are primarily consumer debts. His bankruptcy schedules show unsecured, nonpriority debt, consisting entirely of credit card debt, in the amount of $271,323, unsecured priority debt in the amount of $350, secured debt of $148,500 relating to Debtor's home, valued at $100,000, and no nonexempt assets. Debtor's Schedule I shows that neither he nor his current spouse, whom he married in August 2005, have any funds. At the hearing, Debtor testified that his wife has never been employed. Debtor's Schedule J shows total monthly expenses of $3,027, including a mortgage expense of $1,100 and child support payments of $340.

Debtor testified that, at the time of the hearing, he was current on his mortgage payments and one month behind in payments for child support. In order to pay his expenses, Debtor withdrew his entire retirement savings during 2005, consisting of approximately $80,000. He testified that he used this money to pay for his monthly living expenses and to make monthly payments on his credit card debt in the amount of approximately $4,000. By August 2006, Debtor had exhausted the retirement funds and began selling his personal property to generate income. He testified that he sold "everything [he] could sell," including his car. Debtor also borrowed approximately $6,000 from his mother postpetition for living expenses.

Debtor testified that his credit card debt was incurred over a period of nine or ten years. He testified that, since 2003, he has used his credit cards to help pay his living expenses and that, had he been able to become part-owner of Pierce Insurance Agency as planned, he would have been able to satisfy his credit card obligations. During the years that he incurred the debt, he took advantage of promotional interest rates offered by different credit card companies and opened and transferred balances to those accounts. Although he was generally making only the minimum payments required, before becoming unemployed in 2005, his

payments were always timely and he was never over his credit limits. In 1999, Debtor had taken a second mortgage on his house in the amount of $36,000 and paid approximately $28,000 on his credit cards. Again, in 2005, Debtor refinanced his home in order to lower his monthly payments and paid some of his credit card debt. Nevertheless, Debtor testified that his credit card debt became overwhelming in 2005 after losing his job. And with the exception of a few charges in early January 2006, by the end of 2005, Debtor had stopped using his credit cards. His last credit card payment was made in January 2006.

Debtor admits to having a "gambling problem" and testified that by late 2005, after realizing that he could not pay his credit card debt, he went on a number of trips to Las Vegas and Atlantic City as a last-ditch effort to satisfy his credit card obligations. He made five trips to Las Vegas and Atlantic City during 2006 and one trip to Windsor, Canada, in October 2006, shortly before filing his bankruptcy petition. On each of his trips to Las Vegas and Atlantic City, Debtor's only expense was his airfare or transportation, which expenses he testified totaled approximately $2,000 during 2006. Rather than incurring additional credit card debt, Debtor paid for his airfare using his debit card during 2006. In addition to his transportation expense, he testified that he spent $500 per trip for gambling, none of which is included in his credit card debt.

Although Debtor testified that his credit card debt includes gambling related expenses before 2005, he testified that he charged such expenses only once every couple of years. To the extent that Debtor's large credit card debt includes gambling related expenses, it appears that such debt was primarily incurred between seven and ten years before filing his bankruptcy petition. According to the testimony of the UST's bankruptcy analyst, most of Debtor's credit card debt was incurred between 1996 and 2000. Thereafter, according to the analyst's testimony, new unsecured debt was drastically reduced, with no net increase in debt between 2004 and 2006. The bankruptcy analyst testified that, although the concealing of assets is a concern where there is a large discrepancy between the amount of unsecured debt as compared to assets reported on a debtor's bankruptcy schedules, there is nothing to indicate that occurred in this case.

The UST filed a timely motion to dismiss for abuse under § 707(b)(3).

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 13, 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. In making this determination, the Sixth Circuit further explained as follows:

> [A] court should ascertain from the totality of the 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. Congress essentially 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 states that his motion is predicated on the totality of the financial circumstances prong of § 707(b)(3). The court's focus under this prong is whether the debtor is "needy." Factors relevant to this determination include whether the debtor has the ability to repay debts out of future earnings, 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. *Krohn*, 886 F.2d at 126-27. In this case, although actively seeking employment, Debtor has remained unemployed for nearly two years. Thus, at this time, he has no ability to repay his debts out of future income as he has no source of future income and, as such, is not an "individual with regular income" eligible to file for relief under Chapter 13. 11 U.S.C. §§ 109(e), 101(30). Lacking income, the only consumer debtor remedies under Ohio law for managing repayment of unsecured debt – a municipal court trusteeship funded from wages or consumer credit counseling – are likewise unavailable. No argument has been made or evidence presented that Debtor can or should reduce his current living expenses as a means to repay creditors. Instead the evidence shows that Debtor has sold assets, including a car, used his retirement account and borrowed money from his mother post-petition to fund family living expenses. The

court finds that the totality of the circumstances of Debtor's financial situation show his need for bankruptcy relief. The UST has not demonstrated that the totality of Debtor's financial circumstances demonstrate abuse of the provisions of Chapter 7.

The UST's primary arguments really more appropriately address the bad faith prong of § 707(b)(3), that is, whether a debtor is seeking a "head start" rather than a "fresh start" by filing for relief under Chapter 7. *See Krohn*, 886 F.2d at 127-28. While not exhaustive, factors the Sixth Circuit has identified as relevant to this determination include "the debtor's good faith and candor in filing schedules and other documents, whether he has engaged in 'eve of bankruptcy purchases,' and whether he was forced into Chapter 7 by unforeseen or catastrophic events."

The UST does not question Debtor's honesty in filing schedules in this case. Rather, he argues that granting Debtor relief under Chapter 7 would be an abuse because his debt was not incurred as a result of any catastrophe but was accumulated in order to finance his living expenses. While this may be true, it is insufficient by itself to demonstrate bad faith. *Cf. In re Jensen*, Adv. Case No. 05-0530, 2007 WL 1673442, *17 (Bankr. E.D. Pa. June 11, 2007) ("If improvident financial decisions were the litmus for good faith, few debtors might pass. If courts routinely denied confirmation to debtors based solely on poor financial management and prepetition spending beyond their means, without a finding of any additional aggravating factors, the "good faith" inquiry would swallow the whole and contradict Congressional intent.").

The court acknowledges that the accumulated amount of Debtor's credit card debt is unusually large. There is no indication, however, that Debtor incurred the debt with the intention of having the debt later discharged in bankruptcy, thus attempting to obtain a "head start." The large amount is not a conclusive factor demonstrating a lack of intention to repay amounting to bad faith absent other aggravating circumstances not present on the record in this case. The greatest share of Debtor's credit card debt was incurred seven to ten years ago. Debtor was an employed professional when he incurred the most substantial portion of the debt in issue. His return to the insurance agency in 2000 for a material cut in pay, a year in which he added $35,934.32 in unsecured debt according to the UST's analysis, was undertaken with the sincere but dashed belief that the opportunity offered greater long term career and income potential. Debtor incurred debt on which he had been routinely and timely been making the payments on the contractual terms set by his creditors for many years. In addition, he refinanced his home and made a $28,000 payment on his credit card debt using the proceeds of the refinancing. It was not until his employment was terminated that he became overwhelmed by the debt, unable to make even minimum payments any longer, and eventually sought the protection of bankruptcy. While his debt was not incurred

due to any catastrophe, he was forced into Chapter 7 by a catastrophic event, namely, his unemployment. Congress has not limited Chapter 7 relief to discharge of debt incurred only as a result of unforeseen or catastrophic events. Nor has Congress limited amounts of debt that may be discharged under Chapter 7, in notable contrast to the debt eligibility limitations of Chapter 13, *cf.* 11 U.S.C. § 109(e).

Nevertheless, the UST also contends that Debtor did not fairly deal with creditors in that he could have used funds to repay creditors that were instead used on gambling trips during the year before filing. Faced with what Debtor viewed as a hopeless situation, he improvidently chose to attempt paying his debt with gambling proceeds. He did not, however, increase his debt by any material amount as a result of this choice. While it is true that the funds used by Debtor for gambling purposes could have been paid to creditors, his choice does not represent an attempt to obtain an advantage over his creditors. Instead Debtor's choice represents his failed attempt to repay those creditors. There is no evidence or allegation that Debtor has been deceptive in any manner with any of his creditors; significantly, none of Debtor's credit card lenders commenced dischargeability adversary proceedings against him under 11 U.S.C. § 523(a), [UST Ex. 1], despite the large amounts several of them are owed according to Debtor's Schedule F, [UST Ex. 2-16–2-21].

Viewing all the circumstances, the court finds that the UST has also failed to show that Debtor filed his Chapter 7 petition in bad faith such that the granting of relief would be an abuse under § 707(b)(3).

The court will enter a separate order denying the United States Trustee's motion to dismiss.