

IT IS SO ORDERED.



**Dated: September 27, 2007
12:20:15 PM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**GARRETT P. HOELZEL and
KIMBERLY A. HOELZEL,

Debtors.**

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* **CASE NUMBER 07-40598**
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* **CHAPTER 7**
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* **HONORABLE KAY WOODS**
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**MEMORANDUM OPINION REGARDING
UNITED STATES TRUSTEE'S MOTION TO DISMISS**

This cause is before the Court on United States Trustee's Motion to Dismiss Case for Abuse ("Motion to Dismiss") (Doc. # 14), which was filed by the United States Trustee for Region 9 ("UST") on June 6, 2007. The Motion to Dismiss is based solely on 11 U.S.C. § 707(b)(3), with UST arguing that Debtors have the ability to repay their creditors based upon the totality of the circumstances. UST concedes that the presumption of abuse does not arise in Debtors' Form 22A.

Debtors Garrett P. Hoelzel and Kimberly A. Hoelzel ("Debtors") filed Debtor's [sic] Response to United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. Section 707(b)(3) ("Response") (Doc. # 18) on July 2, 2007. Debtors' Response posits that their case should not be dismissed because Congress did not place any cap on mortgage expenses and "they should not be required to change their living expenses to create income to pay unsecured creditors." (Resp. at 2.)

The Court held a preliminary hearing on July 26, 2007, at which time an evidentiary hearing was scheduled for August 7, 2007 ("Hearing"). Each of the Debtors and Michael Buzulencia, Chapter 7 Trustee in this case ("Trustee"), testified at the Hearing. Pursuant to stipulation of the parties, the Court admitted into evidence Exhibits 1 through 5 offered by UST. UST's Exhibits 6 and 7, as well as Defendants' Exhibit A, were also admitted into evidence without objection.

At the conclusion of the Hearing, the Court requested the parties to submit post-hearing briefs, which have also been considered in rendering this opinion. UST filed United States Trustee's Post-Hearing Brief (Doc. # 23) on August 8, 2007; Debtors filed Debtors' Post-Hearing Brief (Doc. # 24) on August 17, 2007.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). The following constitutes the Court's

findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. Even if not specifically mentioned in this decision, the Court has considered (i) the testimony of all witnesses, (ii) all exhibits admitted into evidence, and (ii) all briefs and oral arguments of counsel.

I. FACTS

Debtors filed a voluntary petition pursuant to chapter 7 of Title 11 of the United States Code on March 23, 2007 ("Petition Date") (Doc. # 1). On May 30, 2007, Debtors filed amended Summary of Schedules and Form 22A (Doc. # 12).

Mr. Hoelzel is employed as a math teacher at the Mahoning County Career and Technical Center; Mrs. Hoelzel works part-time in a doctor's office.¹ In addition to teaching math for the past eighteen years, Mr. Hoelzel has coached football for seven years. He expects both positions to continue without change into the foreseeable future. As of the Petition Date, Mrs. Hoelzel had been employed for only one month; however, she was still employed as of the Hearing.

Debtors' original Schedules I and J did not include any business income or business expenses. Debtors amended Schedule I (line 17) to include income of \$4,648.00 from Mrs. Hoelzel's business. Mrs. Hoelzel owns 100% of a limited liability company that operates a spa and/or beauty salon known as Shear Perfection

¹Debtors have two school-age children, ages 13 and 17.

or Shear Perfection ("Shear Perfection").² According to Mrs. Hoelzel, Debtors purchased Shear Perfection in April 2006 while she was unemployed in order to provide her with an income. The purchase price of \$35,000.00 was furnished by Mrs. Hoelzel's mother, Mary Ann Kaso, through a \$32,000.00 loan ("Home Savings Loan") taken out by Mrs. Kaso from Home Savings & Loan. Neither Debtor is obligated on the Home Savings Loan.

Debtors amended Schedule J to include \$5,803.00 as "regular expenses from operation of business," which also relate to Shear Perfection. Despite instruction to attach a "detailed statement" of the business expenses, Debtors failed to attach any statement regarding the claimed business expenses.

Although currently working, Mrs. Hoelzel has not been continuously employed. She testified that she left the workforce in 1995 and then returned in approximately 2001. She was injured in March 2004; however, despite being injured, she continued to work until June 2004, when she began to collect workers compensation benefits.³ She was released to return to work in March 2007, but Mrs. Hoelzel testified that her previous position had been terminated in April 2005. Mrs. Hoelzel began new

²Debtors listed the business in their schedules using both spellings.

³There was no evidence concerning the cause or extent of Mrs. Hoelzel's injuries. There was also no evidence that the injury might pose a limitation on Mrs. Hoelzel's ability to work in the future. Mrs. Hoelzel testified that she was able to work at Shear Perfection nearly every day from the time the business was purchased in April 2006 until she returned to the workforce in March 2007. Furthermore, Debtors' schedules do not indicate any debt for medical expenses.

employment in March 2007, where she continues to work part-time, making \$6.85 per hour. She testified that her work hours "vary" and that she makes approximately \$500.00 per month. In somewhat contradictory testimony, Mrs. Hoelzel stated that the income figure of \$683.00 per month on Schedule I was "pretty close" to being accurate. Because Schedule I has not been amended, the Court finds that Mrs. Hoelzel's monthly income is \$683.00.

Debtors' Schedules show total assets of \$249,993.31, of which \$195,100.00 is the value of Debtors' residence. Debtors list \$376,834.36 in liabilities, consisting of \$260,010.77 in secured debt and \$116,823.59 in unsecured nonpriority debt. Debtors do not list any priority unsecured debt. The secured debt relates entirely to the first and second mortgages on Debtors' residence. The unsecured nonpriority debt is listed exclusively as "credit card debt," "line of credit," or "loan."⁴ Schedule F includes an "Unsecured Loan" to Mary Ann Kaso in the amount of \$32,000.00, which, according to Mrs. Hoelzel, is to reimburse her mother for the Home Savings Loan. As set forth below, payment of the Home Savings Loan is included as a business expense; accordingly, the debt to Mrs. Hoelzel's mother is counted twice by Debtors in calculating their liabilities.

Based on the testimony of Debtors, it is clear that their debts are almost entirely consumer debts (as opposed to business

⁴In addition, Schedule F lists one debt to "GMAC" for a "Lease," but indicates \$0.00 as the amount of the claim.

related debts), which is consistent with the face of Debtors' petition, where the nature of Debtors' debts is marked as primarily consumer debts.

A. The House

Debtors purchased a new home in February 2004 for approximately \$200,000.00, with no money down.⁵ They have a conventional thirty-year mortgage through US Bank. Mr. Hoelzel testified that they currently owe approximately \$187,000.00 on the US Bank note secured by the mortgage. Debtors' monthly mortgage payment to US Bank is \$1,264.00, which does not include taxes and insurance.⁶

In addition to the first mortgage on the residence, Debtors have a second mortgage, which was incurred about fifteen months after purchase of the house. Mr. Hoelzel testified that Debtors obtained the second mortgage in the amount of \$75,000.00 in the spring of 2005 to pay off credit card debt.⁷ Debtors' monthly payment on the second mortgage, which is also a thirty-year loan, is \$906.00.⁸

⁵Mr. Hoelzel testified that Debtors had a "bridge" loan when they purchased the house. He did not provide any details about the amount of the bridge loan or when it was paid.

⁶Debtors list expenses for taxes of \$250.00 per month and insurance of \$70.00 per month.

⁷The record is devoid of evidence regarding whether any of the credit card debt was incurred as a result of Mrs. Hoelzel's period of unemployment.

⁸Unlike the first mortgage, however, this payment is deducted from Mr. Hoelzel's paycheck. He testified that he gets paid every two weeks (resulting in one extra payment being made on the second mortgage each year.) According to Mr. Hoelzel, Debtors changed the payment method on the second mortgage from monthly to bi-weekly in February 2007 because it was "easier" to budget by

Debtors contend that they could afford the house when it was purchased because they were both working at that time; however, as set forth below, this Court is not able to conclude that this assertion is true. The evidence indicates that, to the contrary, Debtors were living above their means when they purchased their current residence. Although there was no testimony concerning Mrs. Hoelzel's pre-injury income in 2004, it is doubtful that Debtors required \$75,000.00 (the amount of the second mortgage) to replace the lost income due to her injury. Mrs. Hoelzel's current earnings of \$6.85 per hour would be \$14,248.00 per year if she worked full-time. Mrs. Hoelzel was out of work for almost three years. If she earned approximately \$27,000.00⁹ per year prior to her injury, the \$75,000.00 proceeds from the second mortgage, coupled with the more than \$6,000.00¹⁰ she received in workers compensation benefits, would have totally made up for her lost earnings. Since there was no testimony whatsoever about her pre-injury earnings, however, this Court is not able to evaluate whether the second mortgage was needed to replace Mrs. Hoelzel's lost income.

Mr. Hoelzel's testimony about how the \$75,000.00 proceeds from the second mortgage were used was all over the map. He testified

having the payment taken out of his paycheck.

⁹Twenty-seven thousand dollars per year is almost twice what Mrs. Hoelzel would earn at her current job if she worked full-time.

¹⁰Debtors' Statement of Financial Affairs shows that Mrs. Hoelzel received \$6,342.00 in 2005 for disability. There is no indication that Mrs. Hoelzel received any disability payments in 2006 or 2007, despite her testimony that she was not released to return to work until March 2007.

that \$3,700.00 was used for household improvements, with the remainder used to pay down credit cards. He also said that Debtors used this money to pay for normal living expenses. He later stated that he could not recall how they spent the money from the second mortgage. Without providing any elaboration, Mr. Hoelzel testified that Debtors may have used \$10,000.00 as a down payment on the house¹¹ or that they might have put \$10,000.00 "into the house." Mrs. Hoelzel testified that money from the second mortgage was used to make payments on their credit cards and to purchase some unidentified items for the house.

Excluding reimbursement to Mrs. Kaso for the Home Savings Loan, Debtors list approximately \$84,000.00 in unsecured debt, of which \$52,659.45 is listed as "credit card" debt for thirteen different credit cards. Thus, it appears that, contrary to Mr. Hoelzel's testimony that Debtors could afford the house when they were both working, Debtors were never in a position to afford their current residence. They continued to make their mortgage payments by charging tens of thousands of dollars to cover other expenses.

Debtors' ownership of their residence, therefore, appears to be beyond their means - both at the time of purchase and now. Although Debtors testified that they have not signed any reaffirmation agreements, their Chapter 7 Individual Debtor's Statement of Intention ("Statement of Intention") indicates that

¹¹This testimony conflicts with Mr. Hoelzel's prior testimony that Debtors purchased the house with no money down approximately fifteen months prior to taking out the second mortgage.

they intend to reaffirm both mortgages.¹² Mr. Hoelzel testified that he assumed Debtors would keep making their mortgage payments and retain the house.

B. The Tax Refund

Mr. Hoelzel testified at some length about the federal income tax refund Debtors received for tax year 2006 ("Tax Refund"). According to Mr. Hoelzel, Debtors received tax refunds in each of the nineteen years he has been employed. Although he did not recall the exact amount of the 2004 and 2005 tax refunds, Mr. Hoelzel stated that Debtors' combined federal and state income tax refunds are usually in the range of \$4,000.00 to \$5,000.00. In prior years, Debtors used an accountant to file their returns and they received the applicable refunds by check through the mail. However, for tax year 2006, Debtors used a rapid refund method whereby the return was filed electronically so they could receive the Tax Refund in a shorter period of time.¹³

For tax year 2006, Debtors were entitled to receive a Tax Refund in the amount of \$8,200.00. Despite being in financial difficulty, Debtors chose to "go a different route" and use the rapid refund method, which, according to Mr. Hoelzel cost them

¹²In addition, the Statement of Intention provides for Debtors to assume three leases - one for an office (which presumably relates to Shear Perfection since there was no evidence of any other business or need for an office), and two for automobiles with GMAC. The two vehicles in question are late model cars, *i.e.*, a 2005 Pontiac G6 and a 2006 Buick Rondeveuz (sic). Debtors' Schedule J sets forth combined auto expenses of \$454.00.

¹³Mr. Hoelzel stated that Debtors chose the rapid refund method for tax year 2006 because they needed money to pay their real property taxes.

\$400.00 of the Tax Refund. By using the rapid refund method, Debtors received a total Tax Refund in the approximate amount of \$7,400.00.¹⁴ Mr. Hoelzel testified that he was "surprised" at the large amount of the Tax Refund, which he attributed to the accountant fully depreciating Shear Perfection.

Because of the rapid refund method, Debtors received the Tax Refund on March 7, 2007. Debtors first contacted an attorney about filing for bankruptcy relief in or about August 2006. Mr. Hoelzel stated that they delayed filing a petition on the advice of their lawyer, who told them to wait until after receipt of the anticipated Tax Refund in 2007. According to Mr. Hoelzel, when they "conclusively" decided to file bankruptcy in or about February 2007, they had already filed their tax return for tax year 2006. In contradiction, he also testified that the accountant filed their federal income tax return on March 4, 2007.

According to Mr. Hoelzel, the Tax Refund was used to (i) pay real estate taxes in the amount of \$1,566.00; (ii) purchase food in the range of \$1,600.00 to \$2,000.00 (\$1,187.65 of which was spent at Sam's Club); (iii) purchase clothes for the entire family in the approximate amount of \$2,000.00; and (iv) purchase other

¹⁴Debtor's checking account (Ex. 6) indicates a deposit of \$7,398.00 on March 7, 2007, which Mr. Hoelzel described as the Tax Refund. He testified that Debtors received the Tax Refund in two checks, which he thought totaled \$7,500.00, but he acknowledged that the amount was between \$7,400.00 and \$7,800.00.

unidentified "necessities."¹⁵ In answer to questions posed by counsel for UST, Mr. Hoelzel also identified certain restaurant receipts for the sixteen-day period between receipt of the Tax Refund and the Petition Date.

As set forth above, at the time Debtors received the Tax Refund, they intended to seek bankruptcy protection. According to Mr. Hoelzel, he was aware that, if Debtors did not spend the Tax Refund, the money they had at the time of filing would go to Trustee to pay Debtors' creditors. Mr. Hoelzel further testified that he thought it was "fair" for Debtors to purchase clothes and spend money at restaurants in the less than three-week period prior to filing their bankruptcy petition.

C. The Business

Testimony about Shear Perfection was quite confusing and often contradictory. Mr. Hoelzel refused to answer any questions about the business, stating that all such questions had to be directed to his wife. Despite owning the business and being identified as the knowledgeable person about it, Mrs. Hoelzel's knowledge about Shear Perfection was surprisingly thin.

According to Mrs. Hoelzel, her mother took out the Home Savings Loan for Debtors' benefit. Mrs. Kaso prepares the books

¹⁵Mrs. Hoelzel testified that Debtors had trimmed their expenses prior to filing their bankruptcy petition by limiting unnecessary trips and cutting back on food. She stated that Debtors had previously lived more extravagantly than they do now.

for Shear Perfection and manages the salon.¹⁶ Although Mrs. Kaso is not paid for the work she performs, Shear Perfection directly makes the monthly payment on the Home Savings Loan in the approximate amount of \$750.00.¹⁷ According to Mrs. Hoelzel, Shear Perfection paid the Home Savings Loan every month until August 2007 when there was not sufficient cash flow to do so. At that time, Mrs. Kaso paid the Home Savings Loan from her own personal funds. When asked if her mother would continue to work at Shear Perfection if the business did not pay the Home Savings Loan, Mrs. Hoelzel stated that she "would hope so."

Mrs. Hoelzel testified that, although she does not have a background in accounting or bookkeeping, she is familiar with the business. She stated that she sees and understands the accounting sheets prepared by her mother. Mrs. Hoelzel testified that she knows how much money comes in each month as "rent" from the independent contractors (stylists) who work in the salon and she knows generally what the business pays for rent for the facility, utilities, and maintenance expenses. Despite expressing familiarity with the business, she expressed surprise at the business loss documented on Amended Schedules I and J.¹⁸ Indeed,

¹⁶Mrs. Hoelzel testified that, until March 2007 when she became re-employed, she spent time every day at the business. She currently goes into the business after work on Fridays and on Saturdays.

¹⁷As set forth above, since Shear Perfection pays the Home Savings Loan directly as a business expense listed on Schedule J and the debt to Mrs. Kaso also appears on Schedule F, this debt is counted twice in determining Debtors' liabilities.

¹⁸Mrs. Hoelzel stated that the salon pretty much breaks even.

Mrs. Hoelzel stated that the business could not be losing \$1,100 to \$1,200 per month and questioned whether the loss was annual, monthly or for the past six months. Mrs. Hoelzel stated that she "probably" has put some money into Shear Perfection, but characterized her input as "ten dollars here or there."

Mrs. Hoelzel stated that she does not know if she intends to continue to operate Shear Perfection.¹⁹ She further testified that there were no potential purchasers for the business. Mrs. Hoelzel expressed the hope that the salon would become profitable and stated, without elaboration, that she thought Shear Perfection had the potential for becoming profitable.

Trustee testified that he had requested information about the Tax Refund after the § 341 meeting and had received some receipts. He further stated that he had investigated the possibility of selling Shear Perfection, but that he would only be able to liquidate the stock of the limited liability company. He noted that most of the physical assets would likely be classified as fixtures attached to the rented real estate and would not be saleable. Trustee estimated that Shear Perfection would be worth \$2,500.00 to \$3,500.00, if sold.

II. ANALYSIS

Section 707(b)(2) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") provides for dismissal

¹⁹Mrs. Hoelzel projected that, if she ceased operating Shear Perfection, the independent contractor/stylists would lose their jobs.

of a chapter 7 case when there is a presumption of abuse. A presumption of abuse may arise based upon a detailed calculation of the debtor's income and expenses over the course of the six-month period preceding the petition date - commonly referred to as the "means test." See 11 U.S.C. § 707(b)(2).

In the instant case, UST acknowledges that there is no presumption of abuse based upon Debtors' completion of the means test. (Mot. to Dismiss ¶ 4.) Instead, UST relies on § 707(b)(3) to argue that Debtors' case should be dismissed based on the totality of the circumstances. (*Id.* ¶ 5.)

In the event the means test does not give rise to a presumption of abuse - as in the instant case - or the presumption is successfully rebutted by the debtor, § 707(b)(3) provides an alternative rationale for dismissing the debtor's chapter 7 petition:

In considering under paragraph (1) whether the granting of relief would be an abuse of the provisions of this chapter in a case in which the presumption in subparagraph (A)(i) of such paragraph does not arise or is rebutted, the court shall 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 (West 2006).

"[T]he two grounds for dismissal under § 707(b)(3) are best understood as a codification of pre-BAPCPA case law[,] and as

such, pre-BAPCPA case law applying these concepts is still helpful in determining whether there is abuse pursuant to § 707(b)(3).²⁰ *In re Wright*, 364 B.R. 640, 643 (Bankr. N.D. Ohio 2007). However, Congress has changed the standard for dismissal under BAPCPA from "substantial abuse" to "abuse." *In re Fisher*, 2007 WL 2079781 at *2 (Bankr. N.D. Ohio 2007)("[U]nder BAPCPA, Congress has clearly lowered the standard for dismissal in changing the test from 'substantial abuse' to 'abuse.'"); *In re Wright*, 364 B.R. at 642 ("[A] debtor's Chapter 7 case may [now] be dismissed for just 'abuse,' as opposed to 'substantial abuse'").

The Sixth Circuit Court of Appeals, interpreting pre-BAPCPA § 707(b), held that Congress intended to deny chapter 7 relief to the "dishonest or non-needy debtor." *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). The *Krohn* Court reasoned that a debtor's ability to repay his debts out of future earnings may be sufficient to warrant dismissal based upon lack of need, particularly "where [a debtor's] disposable income permits liquidation of his consumer debts with relative ease." *Id.*; See also *Behlke v. Eisen (In re Behlke)*, 358 F.3d 429, 434-35 (6th Cir. 2004) ("*Krohn* clearly holds that the ability to pay may be but is not necessarily sufficient to warrant dismissal for substantial abuse. . . . [W]e are bound by

²⁰ As a consequence, a number of bankruptcy courts in the Northern District of Ohio have applied pre-BAPCPA case law in considering whether abuse exists under § 707(b)(3). *In re Wright*, 364 B.R. 640 (Bankr. N.D. Ohio 2007); *In re Mestemaker*, 359 B.R. 849 (Bankr. N.D. Ohio 2007); *In re Simmons*, 357 B.R. 480 (Bankr. N.D. Ohio 2006).

Krohn."); and *Mestemaker*, 359 B.R. 849, 856 (Bankr. N.D. Ohio 2007) ("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.").

Other factors to be considered in determining whether a debtor is "needy" 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 126-127.

Courts and commentators alike have recognized that the § 707(b)(3) "totality of the circumstances" analysis requires a bankruptcy court to undertake an analysis of a debtor's "actual debt paying ability" independent of the means test analysis under § 707(b)(2). *In re Mestemaker*, 359 B.R. at 853-56. As Judge Wedoff, Bankruptcy Judge for the Northern District of Illinois, wrote in the introduction to his leading article on the subject:

[I]f a section 707(b) motion properly raises the question, a bankruptcy judge has a duty to consider the actual financial situation of a debtor who is not subject to a means test presumption; . . . the judge should find abuse where the debtor can repay a sufficient amount of unsecured debt[.] . . . [T]he means test serves to guide, rather than foreclose, such determinations of abuse.

Hon. Eugene R. Wedoff, *Judicial Discretion to Find Abuse under 707(b)(3)*, 71 Mo. L. Rev. 1035, 1037 (2006).

The Court's analysis of the totality of the circumstances also

allows it to consider both prepetition and postpetition circumstances of the Debtor. *In re Fisher*, 2007 WL 2079781 at *2 (citing *Trustee v. Cortez (In re Cortez)*, 457 F.3d 448, 455 (5th Cir. 2006)); *In re Mestemaker*, 359 B.R. at 855-56; *In re Hartwick*, 359 B.R. 16, 21 (Bankr. D.N.H. 2007).

Congress also eliminated the pre-BAPCPA express statutory presumption in favor of granting debtor the requested relief. Neither party enjoys a presumption concerning abuse in a post-BAPCPA § 707(b)(3) analysis. *In re Nockerts*, 357 B.R. 497, 505 (Bankr. E.D. Wis. 2006) (“[T]he UST does not enjoy the benefit of a presumption of abuse when pursuing a § 707(b)(3) motion.”); *In re Wright*, 364 B.R. at 642 (“Congress . . . eliminated in BAPCPA . . . [the] presumption in favor of allowing the debtor’s case to proceed[, which existed in former § 707(b)].”). As the party bringing the Motion to Dismiss, therefore, UST carries the burden of proof to demonstrate that dismissal is appropriate under § 707(b)(3). *In re Graham*, 363 B.R. 844, 853 (Bankr. S.D. Ohio 2007); *In re Wright*, 364 B.R. at 642.

Not all of the *Krohn* factors will be applicable to each case. Applying these factors here, however, this Court finds that the totality of Debtors’ circumstances indicate abuse. First, Debtors enjoy a stable source of future income. Mr. Hoelzel testified that both his teaching and coaching positions are secure and that he does not anticipate any future changes to either. Although Mrs. Hoelzel has not been employed at her current position for long,

there was no evidence that her job would not continue into the indefinite future. Debtors' Post-Hearing Brief argues that Mrs. Hoelzel's health may limit her ability to work in the future, but there was absolutely no evidence on this point.

Second, Debtors' total debt does not exceed the threshold for qualification under chapter 13. See 11 U.S.C. § 109(e).

Third, Mrs. Hoelzel's period of unemployment does not appear to have precipitated the bankruptcy filing. Debtors were living above their means prior to Mrs. Hoelzel's injury and unemployment. Their lifestyle is the cause of their bankruptcy filing rather than some unforeseen or catastrophic event.

Last, neither Debtor has a good understanding of the income and expenses associated with operation of Shear Perfection. Despite being a college-educated math teacher, Mr. Hoelzel is willfully ignorant of the business operations. Although Mrs. Hoelzel states that she is familiar with the business and understands the books, her testimony demonstrates that she knows relatively nothing about the actual business; instead, her knowledge is based on what she hopes will happen with Shear Perfection. As a consequence, neither Debtor appears to understand how continued operation of Shear Perfection affects their income and expenses.

As set forth above, Debtors are living beyond their means. With belt-tightening, Debtors should have some amount to repay a portion of their debts out of future earnings and still have

sufficient funds to provide adequate food, shelter, and clothing for themselves and their children. Moreover, neither Debtor exercises any degree of control over their spending. Mrs. Hoelzel testified that her mother not only takes care of the books for the business, but that "for years" Mrs. Kaso has written all of the checks to pay the household bills for Debtors. Even if the Court credits Mrs. Hoelzel's testimony that Debtors have previously trimmed excess expenses by watching travel, gas, and limiting unnecessary trips, such cost cutting measures are insignificant in light of Debtors' spending habits. Indeed, Debtors argue that "they should not be required to change their living expenses to create income to pay unsecured creditors." (Resp. at 2.)

A. The House

Debtors' monthly mortgage payment consists of paying the primary mortgage to US Bank in the amount of \$1,264.00 and the second mortgage to HBSC in the amount of \$906.00. As a consequence, the combined mortgage payment, which does not include taxes or insurance, is \$2,170.00 per month. In addition, pursuant to Schedule J, Debtors state that they spend \$399.00 per month for utilities (excluding telephone and cable) and maintenance, \$250.00 per month for property taxes, and \$70.00 for homeowner's insurance.

The Bankruptcy Allowable Living Standards, Local Housing and Utilities Standards for cases filed on and after February 1, 2007, are applicable to this case. A household of four or more in Mahoning County, Ohio, is allowed \$741.00 per month for

mortgage/rent and \$470 per month for non-mortgage/rent, *i.e.*, a total of \$1,211.00. Although the allowances are not dispositive regarding how much Debtors should spend on housing, Debtors' housing expenses are completely out of line with the applicable standards.²¹ Debtors' monthly mortgage expense, alone, is nearly twice the allowable mortgage and non-mortgage expense.

Debtors have indicated their intention to retain their house, in spite of the excessive and disproportionate mortgage expense. Debtors contend that they should not have to change their lifestyle to pay their unsecured debt. However, courts in this district - both pre and post BAPCPA - have held that it is an abuse of the chapter 7 process to continue to maintain an expensive home at the expense of unsecured creditors. *In re Mooney*, 313 B.R. 709 (Bankr. N.D. Ohio 2004) is a pre-BAPCPA case, where the debtors had a "whopping" monthly mortgage payment, including taxes and insurance, of \$1,759.42. *Id.* at 714. Despite the presumption in favor of debtors in the former § 707(b), the court held:

Of course, there is nothing inherently wrong in 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 those debts in Chapter 7, while still keeping the house, this would be a substantial abuse of the provisions of Chapter 7.

Id. at 714-15. Judge Kendig rather colorfully stated that "[t]here

²¹If Debtors' housing expenses were more in line with the allowances for this geographic area, they would have disposable income with which to pay their unsecured creditors.

is something wrong when these expenses continue and unpaid creditors are told by the bankruptcy court to shinny up a cactus." *Id.* at 716.

As Judge Harris noted in *In re Zayas*, "it is safe to presume that financial circumstances establishing 'substantial abuse' under former subsection 707(b), should naturally and necessarily establish 'abuse' under amended subsection 707(b)." *In re Zayas*, 2007 Bankr. LEXIS 1104 at *8 (Bankr. N.D. Ohio 2007). In *Zayas*, the debtors purchased a home in 1999 for \$292,000.00 with an \$8,000.00 down payment. They valued the house at \$330,000.00 at the time of their petition in 2006, but they owed \$360,000.00 on the house because of refinancing. In addition, the *Zayas* debtors owed nearly \$70,000.00 in credit card debt. The court pointed out that the debtors' mortgage, tax, and interest payments were in excess of \$3,000.00 per month, which was substantially higher than the applicable Local Housing and Utility Standard in Cuyahoga County, Ohio of \$1,516.00 for a family of four. The *Zayas* Court held: "Of course, the debtors would prefer not to surrender their residence. But the debtors do not have a right to live in the house of their choosing at the expense of their unsecured creditors." *Id.* at *14

This Court agrees with the *Mooney* and *Zayas* courts that, although there is nothing inherently wrong with Debtors wanting to keep or keeping their current residence, they cannot do so at the expense of their unsecured creditors. Debtors propose to continue

their current lifestyle by affirming both mortgages and assuming their current car leases, while paying nothing to the holders of debt for credit card purchases and unsecured loans. The Court finds that this course of conduct constitutes abuse of the chapter 7 process.

B. The Tax Refund

Debtors testified that they received and spent their entire federal income tax refund in the approximate amount of \$8,000.00²² in the sixteen-day period prior to the Petition Date. According to Debtors, they contacted an attorney about filing for bankruptcy protection as early as the summer of 2006, although they did not file until late March 2007. Mr. Hoelzel testified that Debtors intended to file for bankruptcy protection when they filed their tax return and when they received the Tax Refund a few days later. Mr. Hoelzel expressly stated he understood that, if Debtors had any part of the Tax Refund in their possession at the time the bankruptcy petition was filed, such money would go to Trustee for the benefit of their creditors. Instead of paying any of their debt or maintaining money for Trustee to pay their debts, Debtors chose to spend the entire Tax Refund on what they term "necessities."

Debtors spent most of the Tax Refund on unidentified personal items. Mr. Hoelzel testified that they spent approximately

²²Debtors received at least \$7,400.00 and could have received a federal income tax refund of \$8,200.00. (See *supra* pp. 9-10.)

\$2,000.00 on food in this short period of time, despite their asserted monthly expenditure of \$620.00 for food on Schedule J. Moreover, these food expenditures do not include the four times Debtors dined in restaurants. Debtors also spent \$2,000.00 on clothes in this time period, despite the Schedule J monthly clothing expense of \$150.00. When questioned, Mr. Hoelzel cavalierly stated that he thought it was "fair" for Debtors to make these purchases instead of paying their creditors.

A similar situation occurred in *In re James*, 345 B.R. 664 (Bankr. N.D. Iowa 2006), wherein the debtor received two bonuses of more than \$13,000.00 at a time when debtor and his wife were experiencing financial trouble. The first bonus, in an amount of approximately half of debtor's credit card debt, was received shortly before debtor first contacted an attorney about filing bankruptcy. Debtor did not pay down any of his existing debt, but instead spent the money on frivolous "treats" for himself, presents for family members, and everyday living expenses. *Id.* at 667. The court held that James's conduct constituted bad faith.

To be sure, many debtors spend unwisely as they descend financially into insolvency. But that does not mean each is doing so with an eye toward discharging his unpaid debts. Moreover, James's spending did not lack the element of calculation. He testified that as opposed to paying any of his debts, he chose to enjoy the bonus money as a reward. He chose this use of the money at a time when he was contemplating bankruptcy.

Id. at 668.

Here, Debtors contend that they spent the Tax Refund on

necessities rather than luxury items or frivolous purchases. The kind of purchases in the instant case may, indeed, differ from those made in the *James* case. However, Debtors, like James, spent a large sum of money at a time they intended to file for bankruptcy. In fact, Debtors testified that they intentionally waited to file their petition until after they received the Tax Refund. Debtors made no effort to pay any of their creditors with a portion of the Tax Refund.

This Court finds that Debtors' conduct regarding the Tax Refund (*i.e.*, the timing of receipt, method of receipt, and expenditure of the entire refund amount in just over two weeks) constitutes abuse under the totality of the circumstances.

C. The Business

Mrs. Hoelzel's ownership and operation of Shear Perfection is the most puzzling aspect of Debtors' case. Although neither Debtor knows or understands much about the business, both know that the business has never made a profit since it was purchased nearly a year and a half ago. Mrs. Hoelzel believes the business has potential to become profitable, but that belief is not based on any concrete facts and appears to be wishful thinking.

Debtors concede that, without the business operations, their income and expenses would be more or less even. Operation of Shear Perfection and Debtors' mortgages expenses are the reasons Debtors show a substantial deficit in their monthly disposable income. Mrs. Hoelzel testified that she does not know if she "intends" to

continue to own and run Shear Perfection, but this testimony is at odds with the Statement of Intention regarding assumption of the office lease.

Although Mrs. Hoelzel is the owner of Shear Perfection through a limited liability company, the business was purchased with money obtained by Mrs. Hoelzel's mother through the Home Savings Loan. Mrs. Kaso also handles the books and provides day to day management of the business. The business is Mrs. Hoelzel's in name only; for all intents and purposes, Shear Perfection appears to be the business of Mary Ann Kaso. Under the circumstances, it is beyond comprehension why Debtors continue to operate a money-losing business. The business is a drain on Debtors' income that could otherwise be used to pay their creditors. The Court understands that Mrs. Hoelzel wants to keep operating Shear Perfection on the chance that it will become profitable. Debtors' creditors, however, should not be penalized while Mrs. Hoelzel pursues this dream. The Court finds that Debtors' conduct regarding Shear Perfection constitutes abuse under the totality of the circumstances.

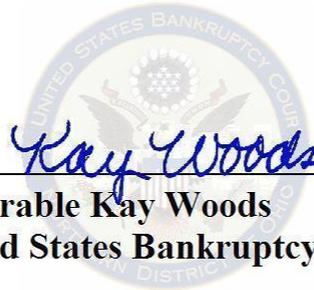
III. CONCLUSION

In summary, for all of the reasons set forth above, this Court finds that the totality of Debtors' circumstances constitute an abuse of the chapter 7 process. Accordingly, UST's Motion to Dismiss is well taken. The Court will conditionally grant UST's Motion to Dismiss, but will hold in abeyance execution of the Order

for ten days for Debtors to convert to chapter 13 if they so desire.

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IT IS SO ORDERED.



**Dated: September 27, 2007
12:20:15 PM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

**GARRETT P. HOELZEL and
KIMBERLY A. HOELZEL,**

Debtors.

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CASE NUMBER 07-40598

CHAPTER 7

HONORABLE KAY WOODS

**O R D E R
CONDITIONALLY GRANTING MOTION TO DISMISS**

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court finds that, based on the totality of the circumstances, as required by § 707(b)(3), Debtors have the ability to repay a substantial portion of their unsecured debt. Accordingly, it would be an abuse to permit Debtors to continue to proceed under chapter 7. The United States Trustee's Motion to Dismiss Case For Abuse filed by Saul Eisen, United States Trustee for Region 9, on June 6, 2007, is conditionally granted, as follows: Debtors have ten days from the date of this Memorandum Opinion and Order to convert their case to a proceeding under

chapter 13 of the Bankruptcy Code; if the case is not converted in that ten-day period, Debtors' case will be dismissed.

IT IS SO ORDERED.

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