IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

IN THE CENTRAL DIVISION

In re: **Kerry Glen Snow and Suzanne Taylor Snow,** Debtors.	Bankruptcy Number 03-20144 Chapter 7

MEMORANDUM DECISION AND ORDER ON UNITED STATES TRUSTEE'S MOTION TO DISMISS

Joel T. Marker, McKay Burton & Thurman, Salt Lake City, Utah for the Debtors.

Laurie A. Cayton, Salt Lake City, Utah for the United States Trustee.

The matter before the Court is the United States Trustee's ("Trustee") motion to dismiss the above captioned bankruptcy case pursuant to 11 § U.S.C. 707(b) (the "Trustee's Motion"). An evidentiary hearing (the "Hearing") was scheduled and heard on July 2, 2003. Laurie Cayton appeared on behalf of the United States Trustee and Joel Marker appeared for the Debtors. Following the hearing, the Court took the motion under advisement. This Memorandum Decision constitutes the Court's findings and conclusions and order. For the following reasons, the Court grants the Trustee's Motion but with certain conditions as set forth below.

FACTS

The Debtors filed this voluntary case on January 3, 2003 with this Court. They filed Statements of Affairs ("Statements") and Schedules on the same day and subsequently an amended Statement of Affairs ("Amendment"). Those documents were received into evidence at the Hearing. In addition, the Debtors gave testimony and introduced other written documentation in support of their reasons for filing their case and other matters relevant to the Trustee's Motion. The Trustee presented no other evidence.

Debtor Kerry Snow is a dentist ("Dr. Snow") having graduated from Washington University Dental School in 1985. At the conclusion of dental school, Dr. Snow had incurred approximately $75,000 in student loan obligations. In addition, his wife had approximately $5,000 in student loans. Following dental school, he bought into a dental practice in the Park City, Utah area and began his dental practice. Over seven years (1985 to 1992) four children were born. Evidence was presented that four of the six members of the family suffer from medical conditions requiring substantial medical expenses on a monthly basis. Dr. Snow argues that from the time of commencing his practice to the time of filing the petition in this case, he and his wife made multiple poor economic decisions each augmenting the last one, which resulted in he and Mrs. Snow filing this Chapter 7 case on January 3, 2003.

History of Dr. Snow's Dental Practice

Dr. Snow borrowed $21,000 from a local bank in 1986 to buy into the dental practice with another dentist. The other dentist had financial difficulties and Dr. Snow ended up borrowing an additional $10,000 to pay off back taxes and cure lease defaults the dental practice had incurred. Dr. Snow borrowed an additional $30,000 in 1987 to pay delinquent payroll taxes and cure additional lease defaults. The following year, the Debtors borrowed $80,000 to roll the existing business debts into one obligation and provide for additional capital.

The Debtors bought a home and financed substantially all of the purchase price in 1987. In 1990, Dr. Snow discovered a tax lien on the dental practice incurred by the other dentist, which Dr. Snow paid with additional borrowing of $15,000.

By 1992, the Debtors' debt picture shows loan balances of $100,000 for student loans, $1,711 on a auto loan, $102,226 on their home mortgage, consumer debts of approximately $6,500 and $100,000 in business related debt. The $100,000 business related debt grew to $120,000 by 1994 with a new obligation that paid off their prior business debt and provided capital for improvements to the business. During that year, the Debtors sold their first home and bought another home, incurring a mortgage of $283,200 and paid off their then existing consumer obligations of approximately $8,600. By 1995, their student loans had been paid down to $80,000. At that time, cash flow from the dental practice and some part time teaching by Mrs. Snow was still not paying all of their monthly obligations.

In 1996, the Debtors obtained a $220,000 Small Business Administration loan and paid off existing business debt, remodeled the dental office and bought new equipment. In 1997, they sold their second home in what they described as an effort to lower their mortgage obligation, bought another home with a first mortgage of $290,000, but borrowed $25,000 to remodel the home by taking out a second mortgage.

A $35,000 business line of credit was obtained in 1998 from a local bank to pay taxes. In 1999, the Debtors refinanced their residential second mortgage and increased it to $75,000 to pay off the existing second mortgage and pay down additional consumer debt incurred and back income taxes. During 1999, Dr. Snow determined that he needed to sell his dental practice to pay off other business related debts. He sold his practice for $400,000 and with the down payment of $270,000, paid off the SBA loan of $211,000 and $20,000 sales commission and used the remaining $39,000 to pay off outstanding office supply obligations. A note for $100,000 was issued by the buyer for the balance to be paid over seven years plus $30,000 in common stock was granted by the buyer to Dr. Snow. Mrs. Snow testified that the entire note amount was paid to the Debtors over the next two years. The stock was anticipated to be publicly traded, but never became such and is still restricted and may have no economic value to anyone except Dr. Snow at the present time. Dr. Snow was hired as an employee for the dental company which purchased his practice.

For unknown reasons, the Debtors bought a vacation timeshare for $9,000 also in 1999, most of which was financed and increased their home equity second mortgage loan to $175,000. Accordingly, by the end of 1999, the Debtors had a home first mortgage of $282,000, had obtained an auto loan for $26,970, a timeshare obligation of $7,482, another auto loan for $20,290, a business line of credit for $33,162, a second home mortgage for $175,000, two consumer credit card obligations totaling approximately $7,000 and student loans totaling $78,619. At this time, Dr. Snow's monthly gross income was $9,500.

In 2000, the home was refinanced with a first mortgage loan of $295,500. Mrs. Snow also obtained work as a part time teacher bringing in $7000 in 2000 which increased to $14,000 for 2001-2002 school year.

In 2002, another credit card was obtained and the balances increased monthly to pay ongoing family and business expenses. Some of the family expenses included significant monthly medical expenses, music lessons for the children, significant travel expenses for the family shuttling children from Park City to Salt Lake City and back several times per week for lessons and performances, auto loan payments, dining and fast food payments while shuttling children for performances and lessons, fees and costs of private lessons for the children, significant grocery and household supplies, pet care for four horses (reduced to two at the present), and other costs.

DISCUSSION

A. Jurisdiction

The Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

B. Analysis

11 U.S.C. § 707(b)[1] provides as follows:

> (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

[1] All further references to the United States Code are to Title 11 unless otherwise noted.

> contributions . . . to any qualified religious or charitable entity or organization . . . .

It appears that the parties do not dispute that the existing Debtors' debts are primarily consumer in nature. Accordingly, the Court must determine whether the filing of the Debtors's case was in "substantial abuse" of the requirements of Chapter 7 in the Bankruptcy Code.

While the "substantial abuse" standard is not defined, the Tenth Circuit Court of Appeals has adopted a "totality of the circumstances" standard. See Stewart v. United States Trustee (In re Stewart), 175 F.3d 796, 809 (10th Cir. 1999). The Tenth Circuit made one important distinction in adopting this standard. Other courts had relied on the debtor's ability to pay creditors as the dispositive factor in determining whether substantial abuse had occurred. The Tenth Circuit in Stewart specifically rejected this theory and determined that the correct analysis included ability to pay as a primary factor but that "other relevant or contributing factors, such as unique hardships, must also be examined" before dismissing a case under § 707(b). Id. Other factors that Stewart recognized besides ability to pay include (1) whether the debtor suffered any "unique hardships, such as sudden illness, calamity, disability, or unemployment;" (2) whether cash advances and purchases exceeded the debtor's ability to pay at the time; (3) whether the debtor has a stable source of future income; (4) whether the debtor's current expenses can be reduced "without depriving him of any necessities;" (5) whether the debtor qualifies for Chapter 13 relief; and (6) the debtor's good faith. Id. at 809-10. Each of these factors must be weighed on a case-by-case basis, accordingly, the Court evaluates each of these factors under the context of the Debtors' case.

(1) Ability to pay

The primary factor in determining whether substantial abuse has occurred is ability to pay. As emphasized in the Stewart case, this may not be the only factor considered by the Court, but carries substantial weight in the Court's decision. The Court has extensively reviewed the evidence presented at the Hearing as well as the filed statement and schedules in determining whether the Debtors have an ability to repay creditors and makes the following findings.

(a) The Debtors' budget

An Average Monthly Expense budget for the period November 1, 2002 through June 30, 2003 was introduced and received as evidence as part of Exhibit 6. This budget shows $9,949.62 in monthly expenses and $9,965.57 in income, leaving an excess of $16.35 in disposable income.

This budget causes the Court some concern. Exhibit 6 reflects Dr. Snow's average income was $8,296 for the period of November, 2002, through June, 2003. It also reflects additional income of a $10,369.52 "bonus" amount, $775 in gifts, $75.00 in interest earned and Mrs. Snow's income of $2,107.85. These amounts reflect an average total household income of $9,965.97 per month. This is contrasted with Schedule I, Current Income of Individual Debtor(s), filed on January 3, 2003, which reflects Dr. Snow's gross monthly income is $10,000 and Mrs. Snow's $100. After deductions of $3,000 for payroll taxes and social security, $310 for insurance, $100 for dues and $500 for a 401(k) contribution, the debtors Schedule I reflects a remaining monthly income of $6,190. Schedule J, Current Expenditures of Individual Debtor(s), reflects $6,918 in monthly family living expenses for a family of six people. These schedules were signed by both Debtors under penalty of perjury.

Exhibit 6 reflects monthly expenses of approximately $3,300 more than expenses reflected on Schedule J. Major differences between the budgets include: (a) children's allowances of $240.00 on Exhibit 6 and nothing on Schedule J; (b) home repairs on Exhibit 6 at $253.90 and nothing on Schedule J; (c) pet care at $91.17 on Exhibit 6 and nothing on Schedule J; (d) rent at $1,750 on Exhibit 6 and $1,500 on Schedule J; (e) auto repairs at $339.10 on Exhibit 6 and nothing on Schedule J; and (f) entertainment of $397.70 on Exhibit 6 and $50.00 on Schedule J. While Exhibit 6 is not in the same format as Schedule J, the Court has been able to identify enough differences to note the above modifications and notes other changes that amount to the total of the $3,300 discrepancy in living expenses.

(b) Monthly income

The Debtors' combined monthly income is also of concern to the Court. Mrs. Snow testified Exhibit 6 reflects net income to Dr. Snow and herself. On cross examination by the Trustee's attorney, Dr. Snow admitted that his gross monthly income was approximately $14,141. Deducting payroll expenses, particularly the $500 per month for the 401(k) contributions, and using the payroll expenses on Schedule J, the net take home is approximately the $9,965.97 reflected on Exhibit 6. Dr. Snow testified further that he was being conservative when he pegged his monthly income at $10,000 on Schedule J noting that he is paid on his production as a dentist. However, during 2000 his gross income was $153,110.30. In 2001 his gross income was $159,584.06 and for 2002, his gross income was $146,293.00, but did not include a bonus paid during 2003 of $10,395.52. These three years annual gross income averages to be $153,000 or $12,750 per month. This all suggests that Dr. Snow was being more than conservative in projecting an income almost $4,000 per month less than he made during the three prior years.

The Trustee argues that using the net income reflected on Exhibit 6 and the expenses on Schedule J with some adjustments, the Debtors should have approximately $2,500 per month that could go towards paying creditors in connection with either a Chapter 13 or 11 plan. The Trustee also argues that the Debtors' budget could be trimmed further by reducing other expenses such as elimination of the 401(k) contributions, lowering monthly life insurance premiums by reducing the amount of total coverage from the current $2,000,000 policy for Dr. Snow, reducing the number of cell phones being used by the family members and other miscellaneous expenses.

Before the Court comments regarding the Trustee's suggested reductions, the Court is concerned about the Debtors modifications to their budgets. Budgets filed with the Court under penalty of perjury should be accurate when filed. They should be carefully considered by Debtors when filling in the information required. Budgets should not be prepared to meet the needs of a response to a motion under § 707(b). The Trustee does not argue that there is bad faith on the part of the Debtors in any of the matters presented, however, the Court considers the modifications to raise significant issues, including issues of credibility.[2] The Court is aware that amendments may be made as a matter of course at any time before the case is closed. See Fed. R. Bankr. P. 1009(a). Notwithstanding Rule 1009, the Court believes that there should have been more effort put into preparing and filing Schedules I and J initially and notes that they still have not been formally amended.

Exhibit 6 is not submitted under penalty of perjury as is a schedule. The Trustee argues

[2] This Court has considered the importance of accurately reflecting actual expenses in filed budgets in the context of a Chapter 12 case. See In re Sorrell, 286 B.R. 798, 806 (Bankr. D. Utah 2002) (criticizing the filing of amended budgets in an attempt to reduce income available to repay creditors).

that it therefore lacks the authenticity of the schedules. The Court disagrees. Exhibit 6 was introduced through Mrs. Snow. She was sworn in prior to her testimony. She testified extensively regarding Exhibit 6, i.e. how it was prepared, that she personally prepared it from past records and how and why it differed from Schedule J. Accordingly, the Court accepts Exhibit 6 as an informal amendment to the information set forth on Schedule J. It does not excuse the Debtors from previously filing inaccurate schedules, however.

Using Exhibit 6 then as the touchstone of the accurate income and expenses of the Debtors, the Court needs to analyze whether the Debtors could propose a plan that could pay their creditors some reasonable dividend in determining whether the Debtors substantially abused the bankruptcy system in filing a Chapter 7 petition. Treated elsewhere in this opinion is the issue as to whether a plan should be in the context of Chapter 13 or Chapter 11. Under either chapter, it would appear that the only source for repayment to creditors would be through the Debtors' future income.[3]

Exhibit 3 consists of pay stubs from Dr. Snow's employment. They reflect gross year-to-date income of $77,778.47 through June 15, 2003. Annualizing that amount, the Court determines that gross income for the entire year will be approximately $168,500, higher than in 2000, 2001 and 2002 from the evidence presented on the Statement of Affairs. This figure is somewhat skewed by the fact that a bonus is given to Dr. Snow at the end of the calendar year, but is paid during the next calendar year. The Court, therefore, finds the Debtor's gross income

[3] There is no argument from the Trustee that the Debtors would be able to liquidate any asset for the payment to creditors. Indeed, it appears from the evidence that in a liquidation analysis, the Debtors would return zero to creditors. In fact, the Court notes from the docket that the Chapter 7 Trustee has already filed a no asset report.

will most likely be much the same as in the prior three years, or approximately $153,000. Exhibit 3 shows that there is a "401p" deduction of varying amounts per month. The Court interprets this to be consistent with the 401(k) deduction identified on Schedule J. Schedule J reflects a $500 average monthly deduction for a 401(k) contribution and the Court determines that there is an average of $500 per month deducted for contributions to a retirement plan at Dr. Snow's employment.

Exhibit 3 also shows a monthly deduction for KSN1A2. By consent of the parties following the hearing, the Court was informed that this represented a life insurance premium cost for Mrs. Snow ("Mrs. Snow's Insurance"). Exhibit 3 shows $3,000 deducted year-to-date for this purpose, however, it did not commence until the first paycheck to Dr. Snow in April which reflected a deduction of $1,000 and then $500 per month thereafter.

(c) Chapters 13 and 11 analysis

In a Chapter 13 or 11 plan, the Court would seriously consider not confirming a plan if the Debtors were contributing to a voluntary retirement plan or using life insurance as an investment vehicle.[4] The evidence of Mrs. Snow's Insurance for the $500 per month deduction is inconclusive and for the purpose of this memorandum decision is not considered, but it may be considered should the Debtors elect to proceed in another chapter. However, from the evidence

[4] See 11 U.S.C. § 1325(b)(1)(B); see also In re Bayless, 264 B.R. 719, 721 (Bankr. W.D.Okla. 1999) (holding that a Chapter 13 plan may not be confirmed if the debtors total net disposable income is not being contributed to the plan, including contributions being made to the debtor's retirement plan); but see In re Osborne, No. 02-24999-HRT, 2003 Bankr. LEXIS 326, at *11-12 (Bankr. D. Colo. Apr. 8, 2003) (rejecting *per se* rule and holding that the facts and circumstances of each case determine whether voluntary retirement contributions are a reasonably necessary expense to allow the debtor to continue to make contributions or whether they should be considered as part of the debtor's net disposable income).

before the Court, the Court determines that the Debtors would have at least $500 per month to contribute to a plan by the elimination of the 401p voluntary retirement plan contribution.

The Trustee further argues that the Debtors could and should make other cuts in their monthly expenses. The Debtors apparently agree. Mrs. Snow testified that from Exhibit 6, the Debtors have already made the following reductions: $80.00 per month for allowances has been trimmed due to their oldest son reaching the age of 18; approximately $133 per month has been reduced in their auto fuel expenses in not driving as much to and from their home in Park City to Salt Lake City for childrens' performances and lessons; approximately $134 per month has been reduced in their dining/fast food expenses for the same reason; and approximately $300 per month has been eliminated in the education fees/tuition costs by terminating them. These reductions total $647.00 per month in savings.

The Trustee argues that further cuts could be implemented by reducing the $400 per month life insurance premium cost on a $2,000,000 million policy for Dr. Snow; reducing or eliminating the three cell phones and two land telephone lines used by the Debtors; elimination of the veterinary and food costs for the horses by selling or otherwise removing that expense; eliminating the charitable contributions to the Debtors' church, or at least reducing the amount of charitable contributions to that amount contributed historically; eliminating bank charges by more careful planning; allowing little or no fast food dining; reducing recreational wants; reducing monthly expenses for gifts to others; reducing the quantity of groceries consumed and requiring the 18 year old son to contribute to the family's monthly income. By so doing, the Trustee has determined that approximately $2500 per month could be generated for unsecured creditors.

The Trustee's guidelines and suggestions are a bit hazy. No dollar amount was detailed as to what insurance premium would be appropriate nor what coverage should be carried. No numbers were given as to what savings could be had by the elimination of the telephone services. No evidence was presented as to what would be appropriate for a fast food budget for a family of six and no evidence was presented regarding what a family of six should be spending for groceries on a monthly basis. Further, no evidence was presented as to what the 18 year old son should be contributing to the family for income. The charitable contributions of $950 per month is quantifiable, however, § 707(b) forbids the Court from considering such in this motion. The bank charges of $86.14 per month are easily identifiable as is the pet care of $92.17 for care of the two horses. Gifts of $368.40 as per Exhibit 6 are identifiable as is the Entertainment/Recreation amount of $397.70 from the same exhibit but no evidence was presented as to what would be an appropriate amount to allocate for family or other gifts or for entertainment or recreation.

Accordingly, from the evidence presented, the Court makes the determination that in a hypothetical Chapter 13 or 11 plan, using the data presented at the hearing, the Debtors could propose a plan consisting of $500 per month from elimination of the 401p contributions, an additional $86.14 from elimination of the bank charges and an additional $92.17 from the elimination of the pet care for a total of $678.31. It would be pure speculation by the Court to arbitrarily determine what would be the appropriate amounts for life insurance premiums and total coverage, telephone expense, fast food, recreation/entertainment, gifts and contributions from an 18 year old son. This is not to say that such should not be considered. Simply, by the evidence presented, the Court cannot make a determination as to what would be the appropriate amount, if any. Further, Mrs. Snow testified that some reductions have already been made totaling a savings of $647 per month.

Based on the foregoing, the Court finds the Debtors could contribute $678 by elimination of some costs as argued by the Trustee, plus the other reductions mentioned by Mrs. Snow of $647 for a total of $1,325.00. Annualized, this amount would be approximately $15,900. Over a three year plan, the amount would be $47,770 and over a five year plan, the amount would be $79,500. Under the Trustee's theory, this would make a substantial return to unsecured creditors.

The Trustee's theory breaks down somewhat since no evidence was presented regarding costs of administration. These would include such costs as the Trustee's quarterly fees (in a Chapter 11 case) or a Chapter 13 Trustee's fees and professional fees for the Debtors and possibly professional fees for any committee appointed in a Chapter 11 case. Trustee quarterly fees are easily calculated by the amount of disbursements each quarter and Chapter 13 Trustee fees are determined at confirmation at a fixed percentage of the proposed contributions to the plan. [5] Professional fees for counsel and possibly others are more difficult. Although this case appears less complicated than other business cases considered by the Court, matters may arise that could escalate these fees. Accordingly, the Court is left to speculate what would be the actual amount available to unsecured creditors.

The actual percentage return to unsecured creditors is further clouded by what amount would be the total allowed claims. The Debtors' schedules reflect $192,603 in unsecured debts. Evidence was presented by way of Exhibit 4, an affidavit from counsel for EMC Mortgage

[5] See 28 U.S.C. § 1930(a)(6) for the United States Trustee fees amounts and 28 U.S.C. § 586(e)(1)(B) for a standing Chapter 13 Trustee's fees calculation.

Corporation ("EMC") which foreclosed on the Debtors' home on June 25, 2003, reflecting that the home was purchased by EMC at the foreclosure sale for the amount of the obligation owing to EMC. This is significant in that the Debtors' second mortgage in favor of U.S. Bank in the amount of $171,876.38, as established by Schedule D, was rendered completely unsecured by that foreclosure. In addition, an obligation listed on Schedule D as secured in favor of Deseret First Credit Union in the amount of $16,639.42 is somewhat misleading. The collateral securing that obligation, a 1998 Chevrolet Astro Van was surrendered pre-petition to the creditor which resulted in a deficiency claim of approximately $9,000. When the listed amount on Schedule F is added to the deficiency claims of U.S. Bank and Deseret First Credit Union, the total unsecured debt is approximately $373,478.[6]

Assuming that the Debtors could qualify for Chapter 13 relief and that the maximum allowed unsecured claims are now $373,478 and the Debtors propose a plan for a period of three years, and using the Court's above calculations of a hypothetical Chapter 13 plan, after deducting for Chapter 13 trustee's expenses of 10% or $4,777 and approximately $3,000 for attorneys fees,[7] there remains $39,993 in the pool for unsecured creditors. This results in a return to unsecured creditors of approximately 10%. Assuming a five year plan, the return would be

[6] This is a significant figure. It clearly exceeds the maximum allowable unsecured claims for Chapter 13 debtors. Section 109(e) provides that to be eligible for Chapter 13, a debtor may have a maximum of $290,525 for unsecured claims which are noncontingent, liquidated and unsecured as of the date of the filing of the petition. However, this unsecured amount was not finally determined until after the date of the filing of the petition, and accordingly, the Debtors may be eligible for Chapter 13 relief by a literal reading of this code section. The Court discusses this possibility *infra*.

[7] Based on the Court's experience, this fee may be appropriate, but no determination or signal is to be derived by this ruling as to what might be allowed.

approximately 18%.[8]

It would be very speculative to determine what might be returned to unsecured creditors in a Chapter 11 case. Based on the Court's experience, administrative costs would be substantially higher resulting in a lower percentage return. In addition, there is more uncertainty in a Chapter 11 case since creditors must affirmatively accept the plan where that is not required under Chapter 13.[9] Additional delay for payment to creditors would most likely result in a Chapter 11 setting as well. Should a Chapter 11 plan not be confirmed, the Court would most likely be called upon to consider dismissal or conversion under section 1112(b). The Court elects not to determine the appropriateness of conversion or dismissal in that context at this time.

(2) Whether the debtor suffered any unique hardships, such as sudden illness, calamity, disability, or unemployment

The second factor the Tenth Circuit suggested in its "totality of the circumstances" standard for substantial abuse is whether the debtor suffered any unique hardship, particularly sudden illness or some other event that may cause the Debtors to be unable to repay creditors. While the Debtors may argue that Dr. Snow's series of bad loan decisions constitute a unique hardship, the Court disagrees and finds no evidence to support a finding that unique hardship exists in this case so this factor favors dismissal.

(3) Cash advances and purchases exceeding the Debtors' ability to pay at the time they entered the transaction

The Court next considers whether the Debtor made credit purchases or took cash

[8] The Court makes no finding regarding the claims amount and possible administrative expenses nor is this hypothetical return to creditors meant to be binding in any way. This Chapter 13 analysis is intended for illustrative purposes only.

[9] See 11 U.S.C. § 1129(a)(8)(A) and 11 U.S.C. § 1325(a) and (b).

advances that exceeded their ability to pay. It appears that this is the case in at least one transaction, the purchase of the vacation timeshare in 1999.

(4) Stable source of future income

This factor favors dismissal. As noted in the discussion *supra* regarding the Debtors' ability to pay, Dr. Snow has earned a stable income for the last several years and continues to expect to earn approximately $150,000 per year. While Mrs. Snow's contribution to the household monthly income is uncertain, the income earned by Dr. Snow is sufficiently stable to meet this test.

(5) Current expenses can be reduced without deprivation of necessities

Again, as noted above in its analysis regarding the Debtors' ability to pay, the Court finds that current expenses can be reduced without depriving the Debtors' and their children of necessities. In fact, the Debtors testified that they have already begun to reduce expenses by allowing their home to be foreclosed and renting a home, reducing monthly housing costs. They have also sold two horses and have taken the children out of the performance groups they previously belonged to. However, despite these voluntary reductions, as noted above, the Court finds that expenses can be reduced further without depriving the family of necessities.[10]

(6) The Debtors' qualification for Chapter 13 relief

The Debtors argue that they may not qualify for Chapter 13 relief and, therefore, this factor favors allowing the Debtors to receive a discharge under Chapter 7. While not making a finding regarding the Debtors' eligibility under Chapter 13, the Court does comment that it may

[10] For an interesting discussion regarding this factor, see the unpublished decision by Chief Judge Glen E. Clark of In re Dabbas, No. 00-21217, August 24, 2000, posted on the Court's web page at http://www.utb.uscourts.gov/LocalOpinions/opinions/415opin.pdf.

be possible for the Debtors to qualify for Chapter 13 relief. The Debtors argue that the unsecured second mortgage deficiency claim causes them to exceed the unsecured debt limit established by § 109(e). Most courts agree that in evaluating those debt limits, courts must add the scheduled unsecured amounts to any amounts secured creditors are undersecured or unsecured as determined by § 506(a). That section provides that

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest . . . is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property . . . and is an unsecured claim to the extent that the value of such creditor's interest . . . is less than the amount of such allowed claim.

The Court agrees that the total unsecured debt, for determining eligibility under § 109(e), must include any unsecured amounts that exceed the value of a secured creditor's claim.[11]

However, it is not entirely clear when this eligibility issue, taking into account unsecured or undersecured amounts remaining from secured claims, should be determined and upon what evidence. The language of § 109(e) states that "[o]nly an individual with regular income that owes, *on the date of the filing of the petition*, noncontingent, liquidated, unsecured debts of less than $290,525 . . . may be a debtor under this chapter." 11 U.S.C. § 109(e) (emphasis added). This seems to indicate that the eligibility amounts must be determined by how the debts are categorized on the date of the petition. In order to evaluate a debtor's eligibility, then, it appears

[11] This conclusion is supported by case law. See e.g., Scovis v. Christen Brun Henrichsen (In re Scovis), 249 F.3d 975, 983 (9th Cir. 2001) ("There is no question that this undersecured debt is to be counted as unsecured for eligibility purposes."); Brown and Co. Securities Corp. v. Balbus (In re Balbus), 933 F.2d 246, 247 (4th Cir. 1991) ("In determining whether [the debtor] has less than $100,000 in unsecured debts under 11 U.S.C. § 109(e), the court must add the amount of unsecured debt and the amount by which secured creditors are undersecured."); Miller v. United States, 907 F.2d 80, 82 (8th Cir. 1990) ("the test of 11 U.S.C. § 506(a) should be used to determine the character of debts for purposes of 11 U.S.C. § 109(e)").

that courts may only look to the statements and schedules and the information that is contained within them in making an eligibility determination. While courts are split on this issue, the most recent Circuit Court of Appeals to analyze this issue stated unequivocally that eligibility may only be determined by the debtors schedules. See (In re Scovis), 249 F.3d at 982 ("We now simply and explicitly state the rule for determining eligibility under § 109(e) to be that eligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were made in good faith.") Other courts support this conclusion. See e.g., Comprehensive Accounting Corp. v. Pearson (In re Pearson), 773 F.2d 751, 756 (6th Cir. 1985) ("a court should rely primarily upon the debtor's schedules checking only to see if the schedules were made in good faith on the theory that section 109(e) considers debts as they exist at the time of filing"); In re Hanson, 282 B.R. 240, 245 (Bankr. D. Colo. 2002) (holding that eligibility may only be determined by looking at the debtor's schedules and the proofs of claim filed in the case).[12]

While this issue is not before the Court at this time, in order for the Court to determine whether this factor favors dismissal under the "totality of the circumstances" test, the Court notes that if the Court were to look at the Debtors' schedules in order to determine whether the Debtors are eligible for Chapter 13 relief, following the Ninth Circuit's standard of looking only at the debts as they exist at the time of filing, it appears that the Debtors may qualify to be in a Chapter 13 case. In the present case, the Debtors valued their home on their schedules at $465,000. This

[12] The Tenth Circuit has not ruled on this issue, but has noted the split in court opinion as to whether eligibility is determined by the debts as listed on the schedules or by evidence presented at further hearings. See Mason v. Young (In re Young), 237 F.3d 1168, 1171 n.1 (10th Cir. 2001).

would have made the second mortgage of U.S. Bank mostly secured, taking into account the Debtors' homestead exemption listed on Schedule C. It was not until nearly six months after the petition was filed that it was determined that the second mortgage was rendered unsecured. If the Debtors valued their home in good faith as of the date of the petition, it might be that the rendering of the U.S. Bank claim as unsecured much later would not prevent the Debtors from qualifying under § 109(e). Therefore, this factor favors neither the Trustee nor the Debtors.

(7) The Debtors' good faith.

The Court finds that the Debtors are proceeding in good faith. There is no evidence that the Debtors are attempting to conceal assets or any other fraudulent behavior normally associated with bad faith.

In analyzing the Stewart factors, most favor the Trustee's position while some favor the Debtors'. However, the Debtors contend that other factors should be considered by the Court which include the fact that the provisions of section 707(b) are permissive and not mandatory. They stress the phrase in the statute that a "court *may* dismiss a case" and not "*shall.*" (Emphasis added). Further, the Debtors argue that had they paid their consumer debts in 1999 from the sale of Dr. Snow's dental practice instead of the business debts, this motion would most likely would not have been filed. In addition, the Debtors contend that approximately $85,000 of the unsecured debt is non-dischargeable as student loans so that such would need to be paid in full at some time and only deferred in any plan. In effect, dismissal would have no effect on this non-dischargeable student loan debt, roughly 23% of the entire unsecured debt. Finally, the Debtors argue that Congress gave the Court guidance in these types of cases by specifically stating in section 707(b) that there shall be a "presumption in favor of granting relief requested by the debtor."

Taking all of the foregoing into consideration, the Court concludes that this case should be dismissed. The Court determines that it would be an abuse of the discretion given it by Congress to allow the Debtors to continue in the current Chapter 7 case and receive a discharge under that chapter. The primary basis for this determination is the amount of surplus income that the Debtors should have under a plan and the misleading Schedules I and J compared to Exhibit 6. However, it cannot conclude that this case should be dismissed without giving the Debtors some other option. Accordingly, the Court will allow the Debtors to convert to another chapter under which they determine is best suited to their situation, subject to qualifying for the same, within 10 days of the date of this Memorandum Decision and Order. Should the Debtors fail to so convert, the case will be dismissed.

Accordingly, the Court hereby

ORDERS that should the Debtors fail to convert this case to one under Chapter 13 or Chapter 11 within ten days from the entry of this order, the case shall be dismissed.

DATED this 21st day of July, 2003.

William T. Thurman

Judge William T. Thurman
United States Bankruptcy Judge

I, the undersigned, hereby certify that I served a true and correct copy of the foregoing **MEMORANDUM DECISION AND ORDER ON UNITED STATES TRUSTEE'S MOTION TO DISMISS** by mailing the same, postage prepaid, to the following, on the 21st day of July, 2003.

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Entered on Docket 7/23/03