The below described is SIGNED.

Dated: February 28, 2005

WILLIAM T. THURMAN
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: **Wayne E. Olson and** **Debra E. Olson,** **Debtors.**	**Bankruptcy Number:** **04-23551** **Chapter 7**

MEMORANDUM DECISION DENYING MOTION TO DISMISS CASE PER 707(B)

FILED BY UNITED STATES TRUSTEE

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An evidentiary hearing on the United States Trustee's Motion to Dismiss Case per 707(b) ("U.S. Trustee's Motion") was conducted on December 21, 2004 before the Honorable William T. Thurman in room 376, United States Courthouse, 350 South Main Street, Salt Lake City, Utah. Present at the hearing were Laurie Cayton, counsel for the U.S. Trustee, and David Snow, counsel for the Debtors. Evidence was taken, testimony was heard, representations were made, and arguments were had thereupon. At the close of the U.S. Trustee's presentation, the Debtors made the equivalent of a 12(b)(6) Motion for Directed Verdict. Based upon the same, the pleadings, and other court papers on file and good cause appearing, the Court made its findings of fact and conclusions of law on the record and granted the U.S. Trustee's Motion. The Court

now elects to memorialize those findings and conclusions in this Memorandum Decision, which will constitute its findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure.[1]

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 (I), 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.

FACTS

The Debtors' scheduled monthly expenses of $5,565 include expenses such as:

1) telephone - $303 (2 cell phones and 2 land lines)
2) home maintenance for their rental home - $165
3) food - $500 for 3 adults and 1 infant
4) clothing - $200
5) vet bills & pet food - $122
6) daughter's prenatal care & expenses - $150
7) payment for support of additional dependants not living at your home - $250
8) regular expenses from operation of business - $200

Mr. Olson testified that their food costs include payment for expenses of their adult unmarried

[1] Incorporated into the Bankruptcy Code via Bankruptcy Rule 7052.

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daughter, Heather, and her 4-month old baby living with the Debtors. Heather has minimal working experience and skills. She previously worked for Walmart at $8/hour before the birth of her baby and has not returned to work. At the present time, the father of the child is not providing support.

The Debtors purchased a puppy with a terminal illness for whom they have incurred numerous veterinary bills and continue to do so. Mr. Olson's obligation to pay child support of $1,000 per month from a prior marriage will end in May of 2005 and an additional $250 listed in the budget is for expenses of another daughter's travel to Utah and special requests such as the purchase of a school ring and letter jacket. This daughter is a minor and lives with her mother out of state.

The $150 per month expense item for their 19 year old daughter's prenatal care and expenses included buying the daughter a car. The food budget had been increased to include the costs of feeding this adult daughter and her new-born child and the clothing budget included purchase of maternity clothes.

Mr. Olson testified that he did not track his business expenses but that the $200 listed in the budget was for supplies for his home printer and copier such as toner and paper.

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ANALYSIS

11 U.S.C. § 707(b) provides:

> 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.[2]

The Tenth Circuit Court of Appeals uses the "Totality of the Circumstances Test," which holds that the debtor's ability to pay alone is not sufficient cause, but that the circumstances which led to the debtor's bankruptcy should be considered such as sudden illness, calamity, disability, unemployment, and whether the debtor's proposed family budget is excessive or unreasonable. The "Totality of the Circumstances" test is outlined in In re Stewart, 175 F.3d 796 (10th Cir. 1999), wherein the court found that Mr. Stewart's expenses could be reduced without depriving him of the necessities of life. Ten non-exclusive factors were listed in Stewart ,which assisted the court in determining whether granting of a discharge would be considered to be substantial abuse.

1) ability of the debtors to repay their debts from future earnings;

2) sudden illness, calamity, disability, or unemployment;

3) cash advances and consumer purchases in far excess of ability to pay;

4) an excessive or unreasonable family budget, defined by other courts as whether the debtors' expenses can be reduced without depriving him of adequate food, clothing, shelter and other necessities;

5) an accurate reflection of a true financial condition in the debtors' schedules and statement of income and expenses;

6) the debtors' good faith;

7) whether the debtors enjoy a stable source of future income;

8) whether the debtors are eligible for Chapter 13 relief;

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[2] 11 U.S.C. § 707(b) (2004).

9) whether state remedies exist to ease the financial predicament; and

10) the degree of relief obtainable through private negotiation.

In applying these Stewart factors to the facts before the Court in the present case, a finding of substantial abuse is not warranted.

Debtors could have supported a Chapter 13 payment of $1,360.00 per month, which would result in an 18% return to the class of general unsecured creditors over 36 months. It appears that substantial abuse could be found, if the ability to repay were the only factor to be considered by the court under the Stewart analysis. Absent a conversion to Chapter 13, the budget submitted by the Debtors is reasonable, as they would have to either repay the 401(k) or incur the taxes, penalties, and interest associated with a default. The unsecured portion of the vehicle loan is approximately $2,000, and the Chapter 13 cramdown would not result in a significant benefit to either the Debtors or other creditors. Finally, the Trustee's assertion that additional $1,000 per month would become available in May, 2005 following the cessation of child support payments for Mr. Olson's minor daughter, is speculative.

There are other factors to be considered, and in looking at the second factor, the Debtors have experienced other circumstances which have led to their current financial situation. Mr. Olson was recently divorced prior to his present marriage, and incurred additional expenses and debt as a result. In addition, one daughter became pregnant and had no other means of support.

Despite the implication inherent in the U.S. Trustee's motion, the Debtors object to the idea that their failure to abandon this daughter, though an adult, and their newborn grandchild, to their own resources under these circumstances constitutes abuse, substantial or otherwise, or bad faith.

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The U.S. Trustee also objects to the expenses incurred by the Debtors in caring for a pet with a significant birth defect. The Debtors were unaware of this defect when they purchased the animal, but have made a sincere effort to provide care for the animal, which cannot eat or eliminate without assistance. Reasonable people could disagree as to necessity of the expenses, but they cannot doubt the sincerity and the sacrifices made by the Debtors in caring for this pet.

In addition, Mr. Olson had been making significant efforts to deal with his debt load and reduce his expenses for some time prior to the bankruptcy filing, including borrowing against the greater part of his retirement account balance to settle some debts. In short, the Court finds that the Debtors have made a sincere effort to deal responsibly with the circumstances in which they find themselves and this effort should weigh against a finding of substantial abuse.

With the regard to the third factor, the Court takes note that another party also responsible for incurring the debt in this bankruptcy estate (i.e. the former spouse of Mr. Olson) is not before the court, and that a finding of substantial abuse in this case would not deny that person a discharge or serve in any way as a deterrent against future irresponsible behavior. Mr. Olson and the present Mrs. Olson have incurred very little debt and they do not have an excessive or unreasonable family budget. They drive one automobile between them, and have made efforts to cut their expenses as much as their circumstances will allow.

The Schedules and Statement of Financial Affairs filed in this case accurately reflect the financial condition of the Debtors at the time the case was filed. The motion of the U.S. Trustee does point out some post-petition income changes discovered as a result of a Rule 2004 Examination, but there is no allegation that the Debtors have misrepresented their financial condition as of the date the bankruptcy was filed.

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Mr. Olson is a regional sales manager overseeing a multi-state area. He is expected to travel to various locations around the Western United States to meet with employees, suppliers, customers, and other parties related his business. Both he and his employer consider travel and face-to-face contact to be critical to the success of the company he works for, and by mutual agreement and because of the type of industry, believe that those expenses are necessarily incurred by Mr. Olson in order to earn his commissions. Only a portion of these expenses are reimbursed, and then only after significant delay.

Mr. Olson had reached a point prior to the bankruptcy where he was no longer able to obtain the credit necessary to advance these costs, and he was forced to try to eliminate his travel expenses. This attempt resulted in a reduction of income and the dissatisfaction of his employer, placing his income and possibly his employment in jeopardy. This situation would only be exacerbated with the restrictions imposed on his spending and borrowing under a Chapter 13 plan. Add to this the changes in the company's compensation structure, as well as a looming buyout, and it becomes clear that the U.S. Trustee's assertion regarding stable future income cannot be made without significant qualification.

As for Mrs. Olson's employment, the record shows that she has changed jobs once since the case was filed, and her new employment is with a start-up company. Stability of employment is not guaranteed.

The Debtors have already reduced expenses to an extent that their ability to provide for necessities is endangered. They have only one car, which the Court finds is not a luxury. The vehicle is now four model years old, and neither the loan balance nor the monthly payment are excessive or more than what the Debtors would be forced to pay if, under a Chapter 13 plan, they

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were forced to surrender the vehicle and obtain post-petition financing on another.

As the court noted in In re Snow,[3] § 707(b) does not require a dismissal upon a finding of substantial abuse, but rather the code only states that the court "may" dismiss the case upon such a finding. Further, the court must find that the discharge would substantially abuse a provision of Chapter 7, not the Bankruptcy Code in general or Chapter 13.

CONCLUSION

Based upon the foregoing, the Court concludes that the U.S. Trustee has not met the burden of showing substantial abuse of the Bankruptcy Code pursuant to § 707(b). An order denying the U.S. Trustee's Motion to Dismiss Case per 707(b) was entered on January 12, 2005.

______________________________END OF DOCUMENT______________________________

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[3] In re Snow, Case No. 03-20144 (Bankr. D. Utah July 23, 2003).

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SERVICE LIST

Service of the foregoing **MEMORANDUM DECISION DENYING MOTION TO DISMISS CASE PER 707(B) FILED BY UNITED STATES TRUSTEE** will be effected through the Bankruptcy Noticing Center to each party listed below.

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