

**UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa**

In re:	:	Case No. 02-05117-rjh-7
DAVID SCOTT WOLFE and	:	
VICKI R. WOLFE,	:	
	:	Chapter 7
Debtors.	:	
	:	

**ORDER—TRUSTEE'S MOTION TO DISMISS CASE
AND OBJECTION THERETO**

On June 4, 2003, the court heard the United States Trustee's Motion to Dismiss Case and Debtor's Objection Thereto. Attorney Jerrold Wanek represented Debtors David Scott Wolfe and Vicki R. Wolfe. Assistant United States Trustee James L. Snyder represented the United States Trustee, Habbo Fokkena. At the conclusion of the hearing, the court took the matter under advisement. The court considers the matter fully submitted.

The court has jurisdiction of these matters pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Upon review of the pleadings, evidence, and arguments of counsel, the court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 9014 and 7052.

FINDINGS OF FACT

1. David Scott Wolfe and Vicki R. Wolfe (hereinafter collectively, Debtors) filed a joint voluntary petition for chapter 7 bankruptcy relief on September 17, 2002.

2. Debtors scheduled three secured creditors holding claims amounting to \$203,574.50. GMAC Mortgage has a claim for \$152,337.00 secured by Debtors' home, which Debtors valued at \$185,000.00. GMAC d/b/a Ditech.com has a claim for \$47,994.00 also secured by Debtors' house. Wells Fargo Bank has a claim for \$3,200.00 secured by a 1988 Searay boat and boat lift, which is valued at \$3,243.50. Debtors' statement of intentions indicates that they will reaffirm each debt.

3. Debtors scheduled fourteen creditors holding \$74,508.86 in unsecured claims. Of the unsecured claims, none were identified as business debt. Debtors indicated that they had no creditors holding unsecured priority claims.

4. Debtors' scheduled claims are primarily consumer in nature.

5. Debtors have no scheduled dependants.

6. Debtors' schedule of current income indicated that David Wolfe earned gross monthly income of \$4,632.00 for a yearly total of \$55,584.00. From this amount, \$1,384.00 is withheld for payroll taxes and social security; \$116.00 for insurance; 64.00 for life/disability insurance; \$330.00 for 401k retirement plan; and \$136.00 for United Way/401k loan. David's net monthly pay after these deductions is \$2,602.00. David's wage statement for the period ending December 13, 2002 (Exh. R-12) shows a year-to-date total compensation of \$59,121.27 with one pay period remaining in the year. David testified that his annual salary as a BMW automobile technician is \$62,000.00, however, his income fluctuates based on hours worked. With the addition of another technician at his place of employment, David anticipates that his hours and income will decrease in 2003. He also works during the summer at Sun Valley Lake doing lake patrol duty for \$8.00 per hour.

7. Debtors' schedule of current income indicated that Vicki Wolfe earned gross monthly income of \$2,656.37 for a yearly amount of approximately \$31,876.00. From this amount, \$650.01 is withheld for payroll taxes and social security; \$127.84 for insurance; \$26.00 for 401k retirement plan; \$58.50 for life/disability; \$10.83 United Way/401k loan. Vicki's net monthly pay after these deductions is \$1,783.19.

8. Less than one month after filing for bankruptcy protection, Vicki Wolfe's job title changed from "Personal Banker" to "Underwriter II," and her salary increased from \$31,883.00 to \$33,158.00 as provided on her payroll statement.

9. Debtors scheduled their total combined monthly income as \$4,385.19.

10. Debtors' statement of financial affairs indicates that Debtors' income was \$83,560.00 for 2000 and \$81,552.00 for 2001. Based on the testimony and the schedule of current income, Debtors' income for 2002 exceeded \$91,000.00.

11. Debtors' schedule of current expenses indicates monthly expenses totaling \$4,200.00.

12. Debtors have scheduled the following amounts as direct payments for the cost of their home: home mortgage payment - \$2,286.00; electric and heating fuel - \$350.00; water and sewer - \$122.00; and home maintenance - \$200.00, for a total of \$2,958.00. The home maintenance item includes homeowner association dues of \$250.00 per year. They currently make a special assessment payment to the association in the amount of \$400.00.

13. Debtors scheduled telephone expense of \$131.00 per month and food expense of \$500.00. Debtors have home telephone service, as well as cellular telephone service.

14. David Wolfe works in Clive, Iowa, in the Des Moines metropolitan area, while Vicki Wolfe works in Downtown Des Moines. Their home is located on the shore of Sun Valley Lake, Ellston, Iowa, over eighty miles from their respective places of employment. Consequently, their round trip commute is over one hundred and sixty miles. Debtors ride to work together. They own two vehicles, one for warm weather use and one for use in the winter. Both vehicles are paid off. Debtors scheduled \$275.00 per month in transportation expenses.

15. Debtors purchased their home at Sun Valley Lake seven years ago. Sun Valley is something of a resort community located in an otherwise predominantly rural county. The community has a homeowners association, which requires the payment of \$250.00 per year in dues. There is currently a special assessment payable to the association in the amount of \$400.00 per year. Their home is a ranch style with a finished walkout basement. The main level is twelve hundred square feet, and the finished basement doubles the living area to twenty four hundred square feet total. The house has lake access, and as noted above, Debtors own a boat and boat lift that they plan to retain by reaffirming the debt owed on the items. Prior to the purchase of the home, they lived in West Des Moines, Iowa, and were a much shorter distance from David's place of employment.

DISCUSSION

The United States Trustee (hereinafter UST) filed a motion to dismiss Debtors' bankruptcy case pursuant to 11 U.S.C. §707(b) and contends that allowing Debtors to proceed under chapter 7 would result in a substantial abuse of the provisions of the chapter. UST argues that Debtor has sufficient disposable income to repay their unsecured consumer debt. In the motion, UST claims that in a hypothetical chapter 13, Debtors could generate

\$104,976.00 of disposable income over the course of a 36-month period. Such sum represents 140.89% of their total unsecured debt. In a hypothetical 60-month plan, the numbers increase to \$174,960.00 or 234.82% of their unsecured debt. UST's calculations include reducing certain of Debtors' expenses and recapturing 401k deductions for inclusion in Debtors' income. UST also argues that it is unreasonable and inequitable for Debtors to seek to discharge all of their unsecured debt while devoting an inordinate amount of their income to housing related expenses.

Debtors dispute UST's conclusions and calculations. They argue that the scheduled expenses filed with the court are accurate and reasonable. They argue that the Trustee's motion failed to take into consideration the financial ramifications of eliminating the pension contributions and loan repayments, and its impact on the money available to the Debtors upon retirement, as well as the severe negative adverse tax consequences to the them. Debtors maintain that their pension deductions are necessary expenses, and their removal would severely limit the amount available to them at time of retirement. They state that disposable income should not include voluntary contributions to retirement plans or retirement loan repayment. Debtors argue that they live moderately, and their current financial difficulties are due to unanticipated expenses including rising energy and fuel costs. They also contend that their high housing costs are due to a good faith attempt to pay unsecured creditors by taking on a second mortgage, and an adverse ruling in this matter will effectively cause them to lose their home. Finally, Debtors argue that their disposable income is minimal and granting them relief under chapter 7 would not be an abuse of its provisions.

Section 707(b) was enacted in 1984 in response to Congress's perception that an increasing number of unneeded debtors were using chapter 7 to escape paying consumer debts. In re Walton, 866 F.2d 981, 982-83 (8th Cir. 1989). After amendments in 1986 and 1998, § 707(b) now provides:

(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 contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

11 U.S.C. § 707(b) (2001).

In order to prevail on a motion to dismiss, UST must show that Debtors' debts are primarily consumer in nature, and that granting chapter 7 relief would result in substantial abuse of the provisions of the chapter. In re Praleikas, 248 B.R. 140, 143 (Bankr. W.D. Mo. 2000).

The Bankruptcy Code does not define "substantial abuse." In interpreting the term, the Eighth Circuit holds that the essential inquiry is "whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992). See also U.S. Trustee v. Harris, 960 F.2d 74, 77 (8th Cir. 1992); In re Walton, 866 F.2d at 984-85. While the Eighth Circuit Court does not adopt a wide ranging "totality of the circumstances test," Harris, 960 F.2d at 77, the bankruptcy court may consider a variety of factors. See In re Walton, 866 F.2d at 983- 85 (courts not foreclosed *inter alia* from

considering future income and inability to pay alone might not shield a debtor from dismissal under § 707(b)); see also In re Woodward, 265 B.R. 179, 187-88 (Bankr. S.D. Iowa 2001) (courts may consider additional relevant factors to determine that § 707(b) dismissal is proper). However, a debtors' ability to fund a chapter 13 plan is the primary factor to be considered. In re Walton, 866 F.2d at 985 (citing with approval the Ninth Circuit's analysis in Zolg v. Kelly (In re Kelly)), 841 F.2d 908, 914-15 (9th Cir. 1988).

The ability to fund a chapter 13 plan is determined by a calculation of the debtors' disposable income. Stuart v. Koch (In re Koch), 109 F.3d 1285, 1289 (8th Cir. 1997). "Disposable income" is defined as income not reasonably necessary for the support of the debtor, the debtor's dependents, or the debtor's business. Id. citing 11 U.S.C. § 1325(b)(2).

In this case, Debtors do not dispute UST's assertion that their debts are primarily consumer debts. A review of their schedules shows various unsecured claims identified as credit card debt, but none of the secured or unsecured claims are identified as business debt. No evidence was introduced at the hearing to indicate that any of the debts listed in the schedules were acquired for the purpose of obtaining a profit. Accordingly, the court finds that UST has met this element as required by § 707(b).

The court agrees that Debtors' deductions for pension contributions must be included in a calculation of disposable income under a hypothetical chapter 13 analysis. This court has consistently held that in determining disposable income, a debtor may not withhold amounts to be contributed to a retirement fund, absent compelling reasons. In re Ventling, Case No. 01-01153-CH slip op. at 7 (Bankr. S.D. Iowa June 6, 2002) (JH Dec. #363). The weight of case law supports this view. See In re Heffernan, 242 B.R. 812, 818 (Bankr. D. Conn. 1999) (payments to pension plan not reasonably necessary for

debtor's support, therefore disposable income for § 707(b) analysis); In re Watkins, 216 B.R. 394, 396 (Bankr. W.D. Tex. 1997) (same); see also, In re Festner, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985) (voluntary contributions to a pension may be prudent, but they cannot be made at the expense of unpaid creditors); In re Fountain, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992) (pension contributions are not necessary for maintenance and support of the debtor, and therefore, constitute disposable income); In re Cavanaugh, 175 B.R. 369, 373 (Bankr. D. Idaho 1994) (voluntary contributions to retirement plans are disposable income); In Re Cornelius, 195 B.R. 831, 835 (Bankr. N.D.N.Y. 1995) (same); Feldman v. Feldman (In re Feldman), 220 B.R. 138, 146 (Bankr. N.D. Ga. 1998) (voluntary contribution to 401k not necessary living expense in calculation of disposable income for § 523(a)(15) purposes). But see, In re Mills, 246 B.R. 395, 402 (Bankr. S.D. Cal. 2000) (holding no per se rule that pension contributions are not reasonably necessary for debtor's support and must be included as disposable income in § 707(b) analysis) and The New York City Employees' Retirement System v. Sapir (In re Taylor), 243 F.3d 124, 129-30 (2d Cir. 2001) (approving a "flexible solution" which relies on the bankruptcy court's discretion in considering various factors in the totality of circumstances to determine whether the contribution or any expense is reasonably necessary).

For purposes of a § 707(b), the ability to maintain a hypothetical chapter 13 plan is measured by evaluating the debtor's financial condition. In re Koch, 109 F.3d at 1288.

"The fact that a pension is exempt from the reach of creditors does not preclude a bankruptcy court from finding that the pension is also disposable income for purposes of [c]hapter 13." Taylor v. United States (In re Taylor), 212 F.3d 395 (8th Cir. 2000). "The

essential inquiry is whether the debtor's ability to repay creditors with future income is sufficient to make the [c]hapter 7 liquidating bankruptcy a substantial abuse of the Code." Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992).

Many other courts have held that repayment of pension loans and contribution to pension plans should be included in the calculation for disposable income. See e.g. In re Harshbarger, 66 F.3d 775, 777 (6th Cir.1995) (pension plan repayments should be included "as part of the disposable income in the bankruptcy estate" to satisfy 11 U.S.C. § 1325(b).); In re Anes, 216 B.R. 514 (Bankr. M.D. Pa. 1998) *affd*, 195 F.3d 177, 179 (3d Cir. 1999) (same); In re Estes, 254 B.R. 261, 263-266 (Bankr. D. Idaho 2000) (repayment of a 401K retirement fund is voluntary and not reasonably necessary for the maintenance and support of the debtor); In re Davis, 241 B.R. 704, 707-709 (Bankr. D. Mont. 1999) (concerning a Montana provision similar to ERISA, that mandatory deductions for retirement contributions are to be included in projected disposable income); In re Gilliam, 227 B.R. 849, 851 (Bankr. S.D. Ind. 1998) (repayment of pension loans included in projected disposable income and is not reasonably necessary for the support of the debtor); In re Johnson, 241 B.R. 394, 401 & 403 (Bankr. E.D. Tex. 1999) (chapter 13 debtor's proposal to repay a loan to a pension plan violated §1325(b)).

Further, the fact that a debtor might suffer adverse tax consequences as a result of failing to repay the pension loan does not alter this conclusion. See In re Scott, 142 B.R. 126, 135 (Bankr. E.D. Va. 1992) (finding "that the debtor may not avoid such [tax] liability and hardship to the detriment of his creditors."); In re Estes, 54 B.R. at 266-67 (Bankr. D. Idaho 2000) (tax "penalties are not sufficient to make these payments 'mandatory' and therefore excluded from the calculation of disposable income").

In this case, David Wolfe's deduction of \$496.00 and Vicki Wolfe's deduction of \$36.00 (amount rounded down to a whole dollar) from their monthly incomes for pension contributions and pension loan payments must be included in a calculation of disposable income.

The court also notes that there are errors in the calculation of David Wolfe's income and deductions. Debtors' petition and schedules were filed on September 17, 2002. Consequently, the last pay stub from which David Wolfe's income and deductions could be calculated would be that of September 13, 2002 (Exh. R-7). It appears that Debtors took the year to date numbers from that stub and divided by 9.5 to determine a monthly average for income and taxes withheld. ($44,053 / 9.5 = 4,637$ not $4,632$; Fed. Tax $7,700.60$ + state tax 2172.84 + SSI $2,656.63$ + Medicare tax $621.31 = 13,151.38 / 9.5 = 1384.3557$ or $\$1,384.00$).

Debtors' calculations err because the proper divisor using this method would be 8.5, in that the pay stub would reflect totals for the previous eight and a half months, August through the second week of September. Such error is borne out by multiplying David Wolfe's claimed monthly income of $\$4,632$ by 12 months for a yearly income of $\$55,584$. However, his pay stub for December 13, 2002 (Exh. R -12) shows his year to date gross earnings to be $\$59,121.27$.

Using Debtors' method and the Exh. R-7, the court calculates David Wolfe's monthly gross income to be $\$5,182.00$ ($44,053 / 8.5 = 5,182$ (rounded down to the whole dollar)). Said amount comports with David's testimony that he earned around $\$62,000.00$ in 2002. His monthly deductions for taxes would be ($13,151.38 / 8.5 = 1,547.176$ or $\$1,547.00$). Leaving his other deductions unchanged and subtracting the deductions from

his gross income would yield a total monthly take home pay of income of \$2,989.00 ($5,182 - (1,547 + 116 + 330 + 64 + 136 = 2,989)$).

UST calculates a similar figure for David of \$5,140.98 monthly or \$61,691.76 yearly gross income. UST's calculations of monthly deductions vary from the above resulting in a monthly net pay figure of \$3,106.42. UST calculates Vicki's gross income to be \$2,866.78 monthly and \$34,401.38 yearly. After the claimed deductions, he calculates her monthly net income to be \$1,910. The court notes that the yearly total exceeds the salary of \$33,158.00 provided on the wage statement. The six statements in evidence do not have a year to date totals. The statements also show only four hours of overtime pay through twelve weeks. While Debtors' monthly income total for Vicki does not include the raise that she received subsequent to filing, UST's total appears to be high, attributing more overtime income than she normally receives. However, in this case said deviations have little impact on the final resolution of this matter, and the court will use the figure provided for Vicki in Debtors' schedules.

As stated above, the amounts deducted for the 401k contributions and payment on the 401k loan must be included in the determination of disposable income. Accordingly, David Wolfe's monthly total income for a hypothetical chapter 13 analysis is \$3,481.00 ($\$2,989.00 + \$492.00 = \$3,481.00$), and Vicki Wolfe's monthly total income is \$1,819.00 ($\$1,783.00 + \$36.00 = \$1,819.00$). Their combined total monthly income is \$5,300.00 ($\$3,481 + 1,819 = \$5,300.00$).

Debtors scheduled monthly expenditures of \$3,295.00 (rounded up to the next dollar). UST argues that Debtors have overstated their expenses and suggests adjustments.

UST suggests that Debtors' food expense should be lowered by \$100.00 per month to \$400.00; telephone expense lowered by \$56.00 per month to \$75.00; and water and sewer expense lowered by \$57.00 to \$65.00 per month; and home maintenance expense lowered by \$100.00 to \$100.00 per month. The court finds these reductions are appropriate and supported by the record.

The \$400.00 food expense comports with amounts that this court has consistently allowed in previous cases. Debtors' sewer bill is set at \$21.00 per month and the water bills in evidence ranged in amount from \$24.31 (water usage plus tax) in August to \$51.71 (water usage plus tax) in June. Consequently, the highest monthly amount was \$73.71 while the lowest was \$45.31. Therefore, the court finds \$65.00 per month is reasonable.

Debtors have a cellular phone and a home phone. The home phone service appears to cost approximately \$40.00 per month. Debtors' cellular plan costs approximately \$65.00 plus tax per month. Additional charges for extended service and roaming fees result in higher monthly costs. The court finds that cellular phones have moved from being luxury items and have utility to call for assistance. However, persons filing for chapter 7 protection should not duplicate the services provided by home telephones and over use the cellular phones, driving up their monthly expenses. Accordingly, the court finds that \$110.00 per month is a reasonable amount for these debtors to spend on telecommunications.

Debtors testified that their home maintenance figure included association fees. Due to a special assessment those fees are \$650.00 per year. Debtors scheduled \$200.00 per month or \$2,400.00 per year for maintenance. In light of the fact that their home had its roof replaced recently, and the replacement was paid by insurance proceeds, the court finds the

additional \$1,750.00 per year to be excessive. The court agrees that the amount reduced to \$100.00 per month.

The foregoing reductions would provide an additional \$280.00 of disposable income. Said income could be used to pay unsecured creditors in a chapter 13 context.

Even if the court ignores these proposed adjustments and uses Debtors' scheduled expenses, Debtors have disposable monthly income of \$1,100.00 (\$5,300.00 – \$4,200.00 = \$1,100.00). Said disposable income would generate \$39,600.00 or approximately 53% of their unsecured debt over the course of three years and \$66,000 or 88% of their unsecured debt over five years. The adjustments in expenses would provide an additional \$10,080.00 over three years and \$16,800.00 over five years. Utilizing a five year plan, Debtors could pay their unsecured debt in full, and retain their home in Sun Valley, albeit not without some belt tightening.

UST additionally proposed that Debtors' housing expense be adjusted downward to \$1,000.00. He contends that this amount is sufficient for them to secure adequate housing for themselves. UST argues that Debtors spend an inordinate amount of their income for housing, and it is not reasonable for Debtors to spend \$2,958.00 in mortgage payments, taxes, and upkeep on their house instead of reducing their expenses so that they could fund a chapter 13 plan.¹

While the court acknowledges that the cost of Debtors' housing arrangements can be a factor in determining whether substantial abuse is present, it is reluctant to accede to

¹ UST is particularly concerned that Debtors' property has no equity, being encumbered by liens exceeding its value by over \$15,000.00. UST contends that it is inequitable for Debtors to reaffirm the two mortgages on the home while discharging all of their unsecured debt. However, the court notes that it is undisputed that Debtors used the proceeds of the second mortgage loan, some \$47,000.00, to pay unsecured creditors. In essence, they doing that which is at the heart of a chapter 13 plan, paying off unsecured creditors over time in order to retain their property. The meaningful difference is that they preferred certain unsecured creditors over others.

Trustee's request and find that \$1,000 per month is the penultimate, reasonable amount for two persons to spend for housing. While such items as food and clothing may be easily subject to a bright line rule, a person's home is subject to far more variables and practical considerations. Such factors can include the location of employment, the length of time in the home, the familial connections to the property, education facilities for children and other dependants, availability of alternate housing, the expense of relocating, and personal security, to name a few. Accordingly, the court will not make a definitive statement setting forth an amount that is reasonable, rather the court reserves the right to consider all the relevant factors and make a case-by-case determination of whether the expenditures are reasonable in light of all the circumstances.

In this case, the court need not reach the issue of whether Debtors' housing expenses are unreasonable. For the purposes of this motion, UST has already sufficiently demonstrated that Debtors have the means to fund a chapter 13 plan. Accordingly, the court finds that UST has overcome the statutory presumption for granting the requested relief. Allowing Debtors to proceed with their chapter 7 case will result in a substantial abuse of the provisions of this chapter. UST's motion to dismiss will be granted. However, the court will stay the execution of its order for fifteen days to provide the Debtors with the opportunity to convert their case if they so choose.

ORDER

IT IS ACCORDINGLY ORDERED as follows:

- 1) The United States Trustee's Motion to Dismiss is SUSTAINED.
- 2) Debtors David Scott Wolfe and Vicki R. Wolfe's chapter 7 case is DISMISSED pursuant 11 U.S.C. §707(b).
- 3) The execution of this order is hereby stayed for fifteen (15) days from the date of its entry to permit Debtors to take such actions as required to convert their case to another chapter, should they so choose.
- 4) Failure on the part of Debtors to take affirmative action within said fifteen (15) day period of time will cause the order dismissing the case to be entered without further notice and hearing.
- 5) Debtors' request for costs and attorney fees is DENIED.

Dated: _____

RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE