THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 01-53608
	)	
WILLIAM & DINA BEHLKE,	)	CHAPTER 7
	)	
DEBTOR(S)	)	JUDGE MARILYN SHEA-STONUM
	)	
	)	**ORDER GRANTING MOTION TO**
	)	**DISMISS**

This matter comes before the Court on a motion to dismiss filed by the United States Trustee pursuant to §707(b) of the Bankruptcy Code [docket #8] (the "Motion to Dismiss") and an objection to that motion filed by debtors [docket #10] (the "Objection"). During the hearing on the matter, counsel for debtors and the United States Trustee represented to the Court that there were no factual issues in dispute and that the matter could be decided on their arguments and the pleadings alone. Thereafter the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the arguments of counsel and the pleadings on file in this chapter 7 case, the Court makes the following findings of fact and conclusions of law.

FACTS

The following background facts are not in dispute in this matter and are the subject of stipulations between the parties:[1]

1. In December 1995, William Behlke was about to become a partner in a large law firm in California at which he had been practicing for six years.

2. Mr. Behlke left California and followed his then wife (now his ex-wife), Karen, to Ohio in an effort to save his marriage.

3. Because he moved to Ohio, Mr. Behlke lost his position in California. Mr. Behlke spent the next 13 ½ months out of work, first working to obtain a license to practice law in Ohio and then searching for employment.

4. In February 1997, Mr. Behlke obtained employment with Rubbermaid in its Office of Corporate Counsel.

5. The dissolution of the marriage between William and Karen Behlke became final on April 8, 1998. William and Karen Behlke had one child from their marriage whose custody they now share. William Behlke pays child support of $653.00 per month.

6. In March 1999, Rubbermaid merged with Newell Corporation to form Newell Rubbermaid, Inc. Seven attorney's jobs at Rubbermaid were eliminated leaving William Behlke as the only attorney in Rubbermaid's Office of Corporate Counsel. Newell retained its staff of four in-house attorneys in its offices in Freeport, Illinois, including the general counsel for Newell Rubbermaid, Inc. Mr. Behlke's employment at Newell Rubbermaid appears currently steady, though the possible early retirement of general counsel for Newell could signal an attempt to consolidate the office of general counsel at Newell.

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[1] During the hearing on this matter, after counsel represented to the Court that there were no factual issues in dispute, counsel were given an opportunity to confer regarding stipulations. Pursuant to that conference, a handwritten list of facts was admitted into evidence as Joint Exhibit A. Also stipulated to were the additional background facts set forth on pages 1-2 of the Objection.

7. In January 1999, Dina Behlke (then Dina Christopher) left her employment as a paralegal and began Mobile P.I. Mobile P.I. is a business which is employed (now exclusively) by the law firm of Friedman, Domiano & Smith to go to the homes of their various potential personal injury clients throughout northern Ohio and obtain the client's medical releases and signatures upon retainer agreements. If Mrs. Behlke obtains the requested signatures, Mobile P.I. is paid a flat fee for Mrs. Behlke's services. If not, Mobile P.I. receives no compensation. Mobile P.I. is not reimbursed for Mrs. Behlke's mileage or expenses. During the years 2000 and 2001, Ms. Behlke traveled throughout Medina, Cuyahoga, Summit, Stark, Trumbull, Portage, Mahoning, Wayne, Carroll, Holmes, Geauga, Columbiana, Tuscarawas, Ashland and Richland counties for work on behalf of Mobile P.I.

8. William and Dina Behlke were married on December 21, 1999.

9. On September 12, 2001, Mr. and Mrs. Behlke initiated this joint, voluntary chapter 7 bankruptcy. At the time of filing, the Behlkes owed a total of $163,944.00 in unsecured nonpriority debt which is "consumer" in nature. Of that amount, $30,140.00 is for a student loan debt owed by William Behlke.

10. The remaining $133,804.00 of unsecured nonpriority debt that was owed at the time of the bankruptcy filing is from various credit card accounts of both William and Dina Behlke.

11. According to the debtors' records, on December 31, 1998, debtors owed between them a total of $60,211.80 in credit card debt, which debt was mostly incurred between 1996 and early 1998 and primarily owed by William Behlke. On December 31, 1999, debtors' credit card debt totaled $100,353.00. On December 31, 2000, debtors owed a total of $124,437.72 in credit card debt.

12. Debtors' net monthly income totals $4,923.00 and their net monthly expenses total $4,749.00.

13. Debtors' Schedule I - Current Income of Individual Debtor(s) shows a voluntary monthly contribution of $460.00 to William Behlke's employer sponsored 401K plan.

14. Debtors' gross income for 1999 was $93,116.00 and their gross income for 2000 was $93,036.00.

15. For tax year 2000, debtors received an income tax refund of $2,313.00.

16. Debtors are eligible for relief under chapter 13 of the Bankruptcy Code.

DISCUSSION

Through the Motion to Dismiss, the United States Trustee contends that, because these debtors have disposable income with which to pay their creditors, granting them a chapter 7 discharge would constitute a substantial abuse of the bankruptcy system. In support of this contention, the United States Trustee relies upon §707(b) of the Bankruptcy Code which sets forth in pertinent part:

> [T]he court, on its own motion or on a motion by the United States trustee, . . . 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 . . . .

11 U.S.C. §707(b).

The term "substantial abuse" is not defined in the Bankruptcy Code, however, the Sixth Circuit Court of Appeals has determined that such a finding can be predicated upon a showing of either a lack of honesty or a want of need. *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989). The United States Trustee does not contend that these debtors have been dishonest. Accordingly, the issue before the Court is whether or not William and Dina Behlke are "needy" in the sense that their financial predicament warrants the discharge of their debts in exchange for liquidation of their assets.[2] *See id.*, *citing* 4 Collier on Bankruptcy, ¶707.07, at

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[2] On November 14, 2001, the chapter 7 trustee filed a report indicating that there are no assets to administer in this case. *See* "Report of Trustee in No-Asset Case" [docket #6].

707-20 (15th ed. 1989). Given the statutory presumption in favor of granting debtors a discharge, the United States Trustee bears the burden of proof on this issue. *See In re Regan*, 269 B.R. 693, 696 (Bankr. W.D. Mo. 2001).

The primary factor a court should consider in determining whether debtors are "needy" is ability to repay debts out of future earnings. *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989).

> That factor alone may be sufficient to warrant dismissal. For example, a court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease.

Id. One method of determining whether debts can be repaid out of future earnings is to evaluate whether debtors can fund a chapter 13 plan. *See, e.g., Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997); *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 914 (9th Cir. 1988).

In the case at bar, debtors have $174.00 per month of income in excess of their monthly expenses. However, this monthly excess does not reflect the $460.00 that Mr. Behlke voluntarily contributes to his employer-sponsored 401K plan. In the Motion to Dismiss, the United States Trustee looks, in part, to this monthly 401K contribution to support the argument that these debtors can fund a chapter 13 plan and repay their debts out of future income. In the context of funding a chapter 13 plan, "disposable income" is that "which is received by the debtor[s] and which is not reasonably necessary to be expended . . . for the maintenance or support of the debtor[s] or a dependent of the debtor[s]." 11 U.S.C. §1325(b)(2). In analyzing what should be included in "disposable income," the Sixth Circuit Court of Appeals has held that monthly payroll deductions to repay a loan from debtor's

ERISA qualified account must be included in income available to fund a chapter 13 plan if debtors do not propose to pay a 100% dividend to their creditors. *Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775 (6th Cir. 1995).

In this particular case, it does not appear that the $460.00 monthly contribution to a 401K plan is necessary to support debtors or their dependent (Mr. Behlke's minor child from a prior marriage) as their monthly income, without taking into account this 401K contribution, exceeds their monthly expenses by $174.00.[3] Although saving for retirement is, no doubt, important to these debtors, their Schedule B - Personal Property reflects accumulated retirement savings of $48,200.00.[4] In addition to these retirement savings, debtors' Schedule B also lists stock options on 1,025 shares of Newell Rubbermaid stock. Although these stock options did not appear to have any immediate value based upon the stock trading price on the date debtors filed their petition, there has been no evidence to indicate that such options are not now or could not become valuable in the future. These debtors also own the home which serves as their primary residence. On their Schedule A - Real Property, debtors listed the property as having a current market value of $135,000.00 with a first mortgage of $124,432.00 and there is no indication in debtors' Schedules that they are behind on any mortgage payments. Moreover, there has been nothing to indicate that the value of this real property will not appreciate.

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[3] Debtors' Schedule I - Current Income of Individual Debtor(s) and Schedule J - Current Expenses of Individual Debtor(s) takes into account Mr. Behlke's $635.00 monthly obligation for child support.

[4] On their Schedule C - Property Claimed as Exempt, debtors claim this entire $48,200.00 as exempt pursuant to Ohio Revised Code §2329.66(A)(10)(b).

If debtors' income and expenses remain relatively the same (and there was no argument or evidence from either party to suggest otherwise) and if Mr. Behlke's 401K contribution were added to debtors' excess monthly income and then applied toward the payment of debts through a chapter 13 plan, debtors could pay approximately 14% of their debts over 36 months. If payments were extended over a 60 month period, debtors could pay approximately 23% of their debts. *See* 11 U.S.C. §1322 (d) and §1325(b)(1)(B).[5] Based upon the Sixth Circuit's analysis in *Harshbarger* and the fact that these debtors have accumulated retirement savings as well as other personal and real property of potentially significant future value, the Court finds that Mr. Behlke's $460.00 monthly contribution to a 401K savings plan should be considered as "disposable income." *Compare In re Regan*, 269 B.R. 693, 696-97 (Bankr. W.D. Mo. 2001) (debtors' $169.40 monthly contribution for retirement plans was considered as income to pay creditors for §707(b) analysis because their monthly income, without considering this amount, exceeded their monthly expenses) *with In re Mills*, 246 B.R. 395, 402 (Bankr. S.D. Ca. 2000) (debtor's modest contribution to 401K plan not considered as income to pay creditors for §707(b) analysis where debtor was near retirement age and had no other retirement savings). The Court further finds that debtors' ability to pay at least a 14% dividend to their creditors without having to alter their budgeted expenses (other than a contribution to a retirement savings plan) lends to a finding that these debtors can repay debts out of future earnings through the funding of a chapter 13 plan. That these debtors may

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[5] These estimated distributions to creditors through a chapter 13 plan do not take into account fees that would be charged by the chapter 13 trustee and also assume that debtors would make pro-rata, concurrent payments on Mr. Behlke's non-dischargeable student loan.

only be able to pay their creditors 14 cents on the dollar does not act to change the Court's analysis and finding because, if it did, debtors could be encouraged to amass debt prior to filing chapter 7.

In addition to evaluating ability to pay debts out of future income, other factors to be taken into account to determine if debtors are "needy" include whether debtors enjoy a stable source of income, whether debtors' expenses can be reduced significantly without depriving them of adequate food, clothing, shelter and other necessities and whether debtors' financial situation is the result of an unforeseen or catastrophic event. *In re Krohn*, 886 F.2d at 126-28. Mr. Behlke has been employed in the same position since February 1997. Although debtors allude to a possibility that Mr. Behlke's employment could be eliminated through consolidation of Newell Rubbermaid's office of general counsel, the only evidence actually before the Court demonstrates that Mr. Behlke's employment is secure. As for Mrs. Behlke, the evidence before the Court demonstrates that her income (although minimal) has, over the past 3 years, been increasing. This increase, combined with the fact that Ms. Behlke possesses paralegal skills which could enable her to obtain other more highly paying employment, leads the Court to find that these debtors do enjoy a stable source of income.

The United States Trustee does not allege that these debtors expenses could be reduced and, upon review of debtors' Schedule J - Current Expenditures of Individual Debtor(s), it does not appear that the Behlkes' lifestyle is extravagant. However, it also does not appear that their lifestyle is an austere one as their monthly expenses include $1,121.00 for a mortgage payment, $500.00 for food, $150.00 for recreation and $666.84 for payments on two

automobiles. Moreover, there is no evidence before the Court to indicate that the Behlke's bankruptcy filing was precipitated upon a catastrophe or an unforeseen event. *Cf. In re Fessler*, 168 B.R. 622 (Bankr. N.D. Ohio 1994) (loss of employment of both breadwinners in household constitutes calamity); *In re Shepherd*, 147 B.R. 422 (Bankr. N.D. Ohio 1992) (debtor forced into bankruptcy due, in part, to psychological trauma of catastrophic events including (1) charge of rape against debtor's live-in companion, (2) murder of debtor's brother; (3) conviction of murder against debtor's other brother and (4) death of debtor's close personal friend). Instead, it appears that Mr. and Mrs. Behlke filed for bankruptcy to escape the burden of exorbitant but self-imposed credit card debt.

CONCLUSION

Based upon the foregoing, the Court finds that the United States Trustee has met the burden of demonstrating that these debtors are not "needy" and that granting them a chapter 7 discharge would be a "substantial abuse" of the bankruptcy system. Accordingly, the Motion to Dismiss will be granted. These debtors will, however, be given 10 days from the date of entry of this Order to convert this case to one under chapter 13 of the Bankruptcy Code. If a notice of conversion is not timely filed, this chapter 7 case will be dismissed without further notice or hearing.

IT IS SO ORDERED.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 4/4/02