UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:
Keith and Barbara Nowak,

Case No. BKY 98-32981

Chapter 7 Case

MEMORANDUM
ORDER

Debtors.

I. Introduction

This matter came on for hearing on November 4, 1998 in Courtroom No. 228A, U.S. Courthouse, 316 N. Robert Street, Saint Paul, Minnesota, on the U.S. Trustee's motion to dismiss for substantial abuse under 11 U.S.C. Section 707(b). The U.S. Trustee was represented by Sarah J. Fagg, and the Debtors were represented by T. Oliver Skillings. The Court has jurisdiction over this proceeding pursuant to 28 U.S. C. Section 157 and 1334, Fed.R.Bankr.P. 5005 and Local Rule 1070-1. This is a core proceeding and the Chapter 7 case is now pending in this Court. The Court, having considered the briefs of the parties; the testimony, exhibits, and arguments offered at trial; and being fully advised in the matter, now makes this ORDER:

II. Background

Debtors filed their Voluntary Petition for Chapter 7 protection on May 14, 1998. The Nowak's Schedule D lists claims of $2,800, secured by a 1985 Ford Truck, a 1953 Triumph motorcycle(1), and a filter queen vacuum. Schedule E shows priority claims for unpaid taxes totaling $3,450.96. The Debtors have 32 unsecured claims totaling $12,911(2) on Schedule F and concede that their liabilities are primarily consumer debts for the purposes of a Section 707(b) analysis. Of the total of $12,911, $555 is apparently for unpaid food purchases, $2,269 for utilities (including telephone and cable TV), and $5,029 for medical and prescription expenses related both to Mrs. Nowak's medical ailments and the birth of a grandchild to the Debtors' then 16 year old daughter.

The Nowaks rent their home, and with the exception of a $595 security deposit held by their landlord, have no savings or retirement accounts. They had a total of $26 in two bank accounts at the time they filed their Chapter 7 case. Their 18 year old daughter and 2 year old granddaughter also live with them. Mr. Nowak works full time and commutes over 90 miles a day, Mrs. Nowak suffers from a host

of medical problems and disabilities which have prevented her from working or, most recently, completing a college degree.

III. Analysis

The Trustee argues that under 11 U.S.C. Section 707(b) these Debtors have the ability to pay a substantial portion of their dischargeable debt without hardship.

The case of In re Walton established the rule in the 8th Circuit that "[t]he primary factor that may indicate substantial abuse is the ability of the debtor to repay the debts out of future disposable income." In re Walton, 866 F.2d 981, at 984 (8th Cir. 1989), quoting 4 Collier on Bankruptcy, 707.07, at 707-19 (15th ed. 1988). The Walton court observed: "[a]lthough the statute does not mandate a future income test, we are satisfied that it does not preclude the consideration of future income in giving meaning to the `substantial abuse' standard." In re Walton, 866 F.2d at 984.

In analyzing the schedules, pleadings, and evidence presented at trial, the Court must determine what income would be available to fund a hypothetical Chapter 13 case for these Debtors, and what the Debtors' reasonable expenses would be under such a plan.

> This construction of Section 707(b) essentially requires the Bankruptcy Court to analyze the issue as if this were a confirmation hearing in a hypothetical Chapter 13 case, in which the debtor proposes a plan that provides that unsecured creditors are to receive nothing by way of distribution. The U.S. Trustee is deemed to be objecting to confirmation under 11 U.S.C. Section 1325(b). This provision is the so-called "best efforts" test; it requires a debtor, upon challenge, to demonstrate that her plan proposes to pay off as much debt as possible during its administration. In re Wilkens, 1997 WL 10475745 at 1 (Bankr.D.Minn 1997).

In this case, the Trustee disputes both the amount of available income and the appropriate monthly expenses of these Debtors. Under 11 U.S.C. Section 1325(b) "the burden of production [is] on the debtor, once the trustee or a creditor has taken the simple procedural expedient of objecting to confirmation." Id. quoting In re Sitarz, 150 B.R. at 718. But under Section 707(b)(3), "There shall be a presumption in favor of granting the relief requested by the debtor." 11 U.S.C. Section 707(b). In short, the Debtors need to rebut the objections raised by the U.S. Trustee's with credible evidence. See Id. at 2,

n.4.

IV. Income

The Trustee argues that the Debtors' schedules understate the income available to fund a Chapter 13 plan. According to the Schedule I originally filed by the Debtors, Barbara Nowak receives $1,072 per month in Veterans benefits.(4) Her husband, Keith Nowak, listed $3,318 per month of gross income on Schedule I but the Trustee concedes that the correct figure is $3,000.

Mrs. Nowak's receipt of $1,072 was based on her ongoing college enrollment. Mrs. Nowak testified quite credibly about her desire to complete her college degree so that she may find employment suitable to her disabilities and drawing on her life experiences. She has decided, after consulting with her doctors, that for medical reasons it is impossible to complete her degree at this time. Because Mrs. Nowak's disabilities and various medical conditions prevent her from going to school she now receives only $444 in monthly support payments. After reducing Mr. Nowak's $3,000 monthly salary by $305 (federal withholding taxes); $135 (state withholding taxes); and $229.50 (FICA), the total income available under a Chapter 13 plan would be $2,774.50.

V. Expenses

The U. S. Trustee disputes expenses claimed on the Debtors' Schedule J, which as originally filed on May 14, 1998, detailed $3,134 of monthly expenses. In addition to the expenses challenged by the U.S. Trustee, the Debtors placed a number of expense items in contention with their response to the U.S. Trustee's motion and testimony at trial.

Schedule J indicates monthly electricity and heating expenses of $353 per month, this amount includes payments the Debtors were making on an outstanding NSP bill before the bankruptcy filing. Testimony at the hearing established the October NSP bill at $77, the amount varies with seasonal energy use. In calculating a hypothetical Chapter 13 expense budget the Court will assume an average monthly expense of $100 for heating and electricity.(5)

The Trustee also challenges the Debtors' expenses for food and clothing. The Debtor's testimony convinces the Court that $130 per month for clothing is reasonable for this couple, as is $400 per month for food(6), particularly in light of Mrs. Nowak's special dietary restrictions.

The Debtors claim a $100 monthly expense for cable TV. Although the Court recognizes that these Debtors live in a rural location with limited recreational opportunities, this figure

seems excessive. Mrs. Nowak testified that the cable TV expense included a number of premium stations as well as occasional pay for view movies. The Debtor's schedules already contain a $150 monthly expense for recreation and entertainment. "The governing law does not require the proverbial existence in a dusty garret, . . . but it does contemplate some belt tightening." In re Mathes, WL 1055813 at 3 (Bankr.D.Minn. 1996). The Court will allow a $60 dollar cable TV expense and the $150 for additional recreational and entertainment expenses.

The final budget categories disputed by the U.S. Trustee involve transportation expenses. As previously noted, Mr. Nowak commutes over 90 miles per day in a 1985 Ford pickup with high milage. The debtors anticipate having to replace this vehicle and include a $200 expense for the purchase of a replacement, albeit, used vehicle. The U.S. Trustee concedes that $200 is a reasonable monthly payment for a replacement vehicle. The U.S. Trustee does not agree, however, that Mrs. Nowak should have her own vehicle until such time as she completes her college education and takes a job. This position is not reasonable.

The Nowak's home is ten miles outside the city of Mankato, Mrs. Nowak testified that in the past she has borrowed her mother's car to attend college and make other necessary trips. Apparently the borrowed car is even older than the Nowak's vehicle, irrespective of the car's age, the Debtor's credible testimony was that this arrangement with her mother is no longer possible.

Assuming that Mrs. Nowak would not go back to school during the pendency of a Chapter 13 plan, her need for her own vehicle is still considerable. (The remote location of her home makes completing a college degree without her own vehicle impossible). Mrs. Nowak's medical challenges, both physical and psychological, require frequent visits to health care professionals. She testified that she meets weekly with a psychologist in Mankato, and monthly with a psychiatrist at the Minneapolis Veterans' Hospital (a round trip of over 150 miles). Mrs. Nowak also has any number of orthopedic and dental problems which require frequent visits to various doctors and other health care providers. Mrs. Nowak has no medical insurance, although her veteran status entitles her to free care at the Veterans' Hospital. She takes a number of prescription drugs which are apparently dispensed at the Minneapolis Veterans' Hospital. In addition to the considerable health related reasons which require Mrs. Nowak's regular access to a second vehicle, Mrs. Nowak is also responsible for household shopping.

Given the Nowak's need for two vehicles the

court would allow an additional $200 monthly payment for purchase of a newer, more reliable vehicle for Mr. Nowak's use. The Nowak's still have at least six $200 payments remaining on the 1985 Ford, the pickup can become a second vehicle used by Mrs. Nowak. The court will increase the auto insurance amount to $75 per month to reflect the likely requirement that financing an additional vehicle purchase will require increased insurance coverage and costs. Finally, the $300 transportation expense seems quite reasonable for a family driving two to three thousand miles per month.

The debtors claim monthly expenses of $50 for medical and dental expenses, and zero for health insurance. It is unclear if Mr. Nowak receives health coverage from his employer, Mrs. Nowak has no health coverage other than her veteran benefits. Mrs. Nowak provided considerable testimony about the various treatments and medication her medical conditions necessitate. In light of that testimony, the scheduled $50 is completely inadequate.(7) There is also no provision in the schedules submitted to pay for dentures for Mrs. Nowak. The Court will adjust this budget amount to a more realistic $200 per month.

With the adjustments discussed above the Debtors' monthly expenses under a Chapter 13 case would be as follows:

Rent	$595
Electricity and heating	$100
Telephone	$100
Cable	$60
Garbage	$50
Home Maintenance	$75
Food	$400
Clothing	$130
Laundry	$50
Medical and dental	$200
Transportation	$300
Recreation, clubs and entertainment, newspapers, magazines	$150
Charitable contributions	$50
Renter's insurance	$36
Auto insurance	$75
Existing truck loan	$200
Loan for replacement vehicle	$200
Grooming	$50
Total	$2,821

Since the Debtors' monthly expenses under a Section 1325 analysis ($2,821) exceed the available income ($2,774.50), these Debtors do not now have the ability to fund a Chapter 13 plan. Since the existing 1985 Ford pickup loan will be paid off in six months, it appears that there could be $153.50 available to fund a Chapter 13 plan beginning in the seventh month. This $153.50, for the remaining 30 months of the 36

month plan proposed by the U.S. Trustee, would total $4,605, or 36% of the Debtors' unsecured debts.

VI. Substantial Abuse Analysis

The U. S. Trustee points to In re Mathes as authority for the dismissal of this case for substantial abuse. Mathes, 1996 WL 1055813. In Mathes the court found substantial abuse under Section 707(b) where "a Chapter 13 case could produce a minimum dividend of approximately 35 percent to unsecured creditors." Id. at 4. The District Court of Minnesota affirmed noting:

> "In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip. op. (D.Minn. July 2, 1997), (citation omitted).

In discussing the substantial abuse standard of Section 707(b), the 8th Circuit in In re Walton explains that the "legislative history indicates that the amendments to the Code were aimed primarily at stemming the use of Chapter 7 relief by unneedy debtors." In re Walton, 866 F.2d 981, 983 (8th Cir. 1988). That is not the case here.

Unlike the debtor in Mathes, who had accumulated substantial credit card debts to live substantially beyond his means, the Debtors in this case seek bankruptcy protection from unsecured debts which arise largely from medical expenses, food purchases, and home utility expenses. The Nowaks are more like the debtors in In re Renner, where the court found:

> The Debtors' financial situation appears to be the result not of irresponsible consumer spending, but rather a result of unfortunate health problems. Although there is a monthly budget excess which could be presently used to retire substantially all of their unsecured debt in a short period of time, this court does not believe their prospects for lasting income stability are particularly good nor does it believe that repayment would be prudent in view of the future. . . . This court believes that what now appears as disposable

> discretionary income will quite soon turn out to be critically necessary. From their schedules it appears that the Debtors presently have no savings of any kind. This court believes it would be prudent for them to save what they can now as a cushion against the future which may bring with it considerable unanticipated expenses not the least of which will be unreimbursed medical expenses. In re Renner, 70 B.R. 27, at 29 (Bankr.D.N.D. 1987).

In addition to the uncertainty of the Nowak's ongoing medical expenses, the Debtors cannot ignore the plight of their 18 year old daughter and two year old granddaughter, who live at home with minimal financial resources. Although the U.S. Trustee argues that they have no legal obligation to support these family members:

> The basic factual issue for the discretion of the Court to set upon is whether the total picture is abusive. . . . The factual problem is that the U.S. Trustee wishes, without malice aforethought, to impose its mindset on the lives of those who file bankruptcy. . . . we say with great emphasis that a family has the basic human right of keeping at home even a problem child[.]" In re Zaleta, 211 B.R. 178, at 181 (Bankr.Pa. 1997).

There is no abuse evident in this case. A review of the unsecured debts shows no extravagant lifestyle decisions, but a hard working family with unpaid medical, food, and household expenses. "[T]he bankruptcy court may also consider the debtor's good faith and unique hardships, so that the bankruptcy court is not required to dismiss a debtor's chapter 7 simply because the debtor has the naked ability to fund a chapter 13 plan. U.S. Trustee v. Harris, 960 F.2d 74 at 75 (8th Cir. 1992).

VIII.

Based on the foregoing, It is hereby ORDERED: The U.S. Trustee's motion to dismiss under 11 U.S.C. Section 707(b) is denied.

Dated: January 11, 1999 By the Court

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Dennis D. O'Brien

Chief U.S.
Bankruptcy Judge

(1) The schedules indicate no payments for a motorcycle loan, testimony indicated that the motorcycle was provided as additional security on the truck loan.

(2) The Debtor, Barbara Nowak, testified that one $223 debt was inadvertently listed twice on Schedule F. The original schedule listed 33 debtors for a total of $13,134.

(3) 707. Dismissal
. . . .
(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)).

(4) Although these payments are listed as exempt on the Debtors' Schedule C (under 11 U.S.C. Section 522(d)(5)), the payments are included in evaluating the Debtors' ability to pay under Chapter 13. See, In re Koch, Stuart v. Koch, 109 F.3d 1285, at 1288-1290 (8th Cir. 1997).

(5) Debtor Barbara Nowak testified that the NSP bill averages $100 per month with the last bill $77. Schedule F also shows debts to Interstate Power, Minnegasco, and Kaduce Plumbing and Heating. Although the court adapts the Debtors' figure, it seems likely that in a real Chapter 13 case that the Debtors would spend more than $1,200 a year in utility bills.

(6) See In re Wilkins, 1997 WL 1047545, <<http://www.mnb.uscourts.gov/BankWeb1/CourtDat/opinions/wilkins.gfk>>, a 1997 case where Judge Kishel allowed that for a single person "$300.00 per month for groceries, and $75 per month for clothing purchases, is ample to maintain the standard of living that Section 1325(b)(2)(A) contemplates." Id.

(7) Mrs. Nowak testified that she receives

prescription drugs at the VA Hospital for a $2 co-payment. An examination of the Debtors' schedules indicates that the debtors' owe $223 for prescriptions to the VA Medical Center. While it is unclear what time period this debt represents, it does point to the magnitude of the medical challenges and expenses facing these debtors.