

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF SOUTH DAKOTA  
Northern Division

In re:	)	Bankr. No. 00-10183
	)	
MYRON L. HAAR	)	Chapter 7
Soc. Sec. No. 504-84-9022	)	
	)	
and	)	DECISION RE:
	)	UNITED STATES TRUSTEE'S
CHARMAINE R. HAAR	)	MOTION TO DISMISS FOR
f/k/a Charmaine R. McKee	)	SUBSTANTIAL ABUSE
Soc. Sec. No. 503-88-4985	)	
	)	
Debtors.	)	

The matter before the Court is the United States Trustee's Motion to Dismiss for Substantial Abuse and Debtors' response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the Motion shall be granted.

I.

Myron L. and Charmaine E. Haar ("Debtors") filed a Chapter 7 petition on August 31, 2000. They scheduled two secured creditors and many unsecured creditors, largely credit card companies. Debtors stated their combined monthly net income for their family of seven was \$3,217.26. Their average monthly expenses were stated to be \$3,254.34.

On November 27, 2000, the United States Trustee filed a Motion to Dismiss for Substantial Abuse. The United States Trustee's office argued that Debtors had understated their net income by including a payroll deduction for 401(k) loan repayments. The United States Trustee's office also argued that Debtors had

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erroneously included a car payment expense. The United States Trustee further disputed the appropriateness of private school tuition for Debtors' minor children. When these adjustments to Debtors' income and expenses were made, the United States Trustee's office claimed Debtors had monthly disposable income of \$862.16 with which they could repay a substantial portion of their unsecured claimants. The United States Trustee also noted that Debtor may have additional available funds if income taxes are not over withheld.

After some delay, Debtors filed a response to the United States Trustee's Motion on January 19, 2001. Debtors argued the importance of their repaying the 401(k) loans and the consequences of a default. They stated a vehicle payment would need to be included in their expenses to replace an aging car. They also stated that the vehicle expense already included in their expenses should have been labeled a legal expense regarding Debtor Charmaine Haar's continuing child custody battles with her former spouse. Debtors said they send their children to private school to provide stability and that the amount spent is reasonable. They also detailed several other corrections to their income and expenses schedules. Finally, Debtors argued that if all expenses except the 401(k) loan repayments were allowed, Debtors would have only \$392.26 available each month to pay creditors and that the repayment percentage, based on their total unsecured debts, would not be meaningful. It would also foreclose their ability to make

payments on a new or newer vehicle.

An evidentiary hearing was held April 3, 2001. Assistant United States Trustee Bruce J. Gering appeared for the United States Trustee. Randall B. Turner appeared for Debtors.

Craig Bumann, a certified public accountant employed by the United States Trustee's office as an analyst, reviewed his findings for the Court. Based on Debtors' year-end pay stubs and their Amended Schedule I, he found that Debtors' combined average monthly net income was \$4,586.19. This figure included Debtor Myron Haar's average monthly income from the National Guard. It did not recognize a payroll deduction for Debtor Myron Haar's repayment of two loans from his 401(k) plan with his other employer (\$341.48 per month) or a deduction for new contributions to his 401(k) plan (\$208.50 per month). Using Debtors' amended Schedule J, Bumann set forth what he found Debtors' reasonable expenses should be. He reached a total of \$3,227.90. Expenses he did not include were school tuition of \$328 and a student loan repayment of \$390.94. He allowed all other expenses as scheduled by Debtors. Based on these figures, Bumann calculated that Debtors had \$1,358.29 available monthly to pay unsecured creditors under a Chapter 13 plan. Bumann also testified that Debtor Charmain Haar's income may actually be slightly higher because he based his figures on the previous year when she only worked 11 months for her current employer.

Dale A. Wein, Chapter 13 trustee for the District of South Dakota, testified how a debtor's 401(k) loan debts could be treated

under a Chapter 13 plan. He stated that he works with the debtor and the debtor's attorney and tax preparer to calculate any penalty taxes arising from a 401(k) loan default. They then try to structure plan payments to allow timely repayment of those taxes during approximately the first year of the plan. While this results in lower payments to other creditors during that time, the plan term can then be extended to 48 or 60 months, if necessary, to alleviate any prejudice to those creditors.

As to the unsecured, non dischargeable student loan debts, Trustee Wein says these must be paid through the plan with other general unsecured claims without interest. He stated his policy, supported by case law, is that non dischargeable student loans cannot get preferential treatment unless all unsecured claims are paid in full over the plan term.

Trustee Wein also testified about the Aberdeen public school system. He said news reports indicate the average class size has decreased somewhat. He also concluded, based on his personal experiences as a parent and foster parent of children in these schools for the past several years, that the Aberdeen public schools provide appropriate education and activities and that they can meet any special needs children may have.

Debtor Charmaine Haar testified that she principally wants to continue sending her children to private school so that they are not uprooted. She also wants them to get a Christian education and a better education in smaller classrooms than public schools

provide. Originally, her grandmother helped pay the children's tuition and the family received some scholarship assistance. The family now pays in full the \$328 in monthly tuition.

Debtor Charmaine Haar said she presently works part-time at a Regis hair salon and has since late 1999. For a few months, she worked at both Regis and Aman Collection Service, Inc. She has worked just at Regis since February 2000. She hopes to increase her hours with Regis.

Debtor Myron Haar testified that before filing bankruptcy he paid \$228 every pay period (26 per year) on his 401(k) loans. He said the repayment term was 60 months maximum.

He said four children currently reside with him and his wife. One child goes to daycare part-time while his wife works. He said he did not take a tax credit for that child care expense due to an oversight.

The parties' closing arguments summarized the evidence and reiterated the case law earlier set forth in their pleadings. Debtors added the argument that their private school tuition payments may be considered a charitable donation, but they did not cite any statute or case law in support of this theory.

## II.

Section 707(b) of the Bankruptcy Code permits the dismissal of a Chapter 7 case upon a showing that granting the debtor relief would be a substantial abuse of the Bankruptcy Code. The section is intended to promote fairness to creditors and prevent the use of

Chapter 7 by non needy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997). "Substantial abuse" is not defined within the Bankruptcy Code. In interpreting the section, the Court of Appeals for the Eighth Circuit has held that the primary inquiry is whether the debtor has the ability to pay creditors under a Chapter 13 plan. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)); *Nelson v. Siouxland Federal Credit Union (In re Nelson)*, 223 B.R. 349, 353 (B.A.P. 8th Cir. 1998). A debtor's ability to pay is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 case. *Id.* The analysis includes the expectation that the debtor will put forth his best effort in a Chapter 13 plan. *In re Shelley*, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); *In re Beauchamp*, Bankr. No. 97-50487, slip op. at 6 (Bankr. D.S.D. May 28, 1998) (citing *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (B.A.P. 9th Cir. 1995), and *In re Schnabel*, 153 B.R. 809, 818 (Bankr. N.D. Ill. 1993)).

### III.

From the evidence presented, the Court concludes that allowing Debtors relief under Chapter 7 would be a substantial abuse of the bankruptcy process. When their present income is considered and after reasonable and necessary expenses are allowed, they have the ability to fund a meaningful Chapter 13 plan. Further, through a plan, all similarly situated creditors will be treated equally.

As this Court previously discussed in *In re Mendelsohn*, Bankr. No. 98-40099, slip op. at 10-11 (Bankr. D.S.D. Nov. 10, 1998), a debtor cannot voluntarily divert funds into a retirement account at the expense of creditors. See *Harshbarger v. Pees (In re Harshbarger)*, 66 F.3d 775, 777-78 (6<sup>th</sup> Cir. 1995); *In re Daniel J. and Arlene F. Goergen*, Bankr. No. 99-50511, slip op. at 3 (Bankr. D.S.D. March 17, 2000). The Court can find no basis to alter that conclusion here. Though Debtors may have to pay a tax penalty if they default on the 401(k) loans, repaying the loans is still essentially repaying themselves. *In re Cohen*, 246 B.R. 658, 665-67 (Bankr. D. Colo. 2000) (quoting *In re Shirley*, Bankr. No. 99-01365-W, 2000 WL 150835, slip op at 3 (Bankr. N.D. Iowa January 4, 2000)). Similarly, making retirement plan contributions is also essentially paying oneself. To do so when creditors stand waiting is unfair. Further, Trustee Wein set forth a very workable solution for insuring that any tax penalty on a 401(k) loan default is timely paid through a Chapter 13 plan.

As to the student loans, the Court agrees with Trustee Wein that as an unsecured claim, they must be repaid the same as the other general unsecured claims. Though a student loan debt may be non dischargeable, repayment cannot be accelerated through a plan. As Trustee Wein noted, however, by maximizing plan payments and extending the plan term, student loan debts can be greatly reduced through a Chapter 13 plan

The extra \$549.98 in monthly income that Debtors will have if they use their 401(k) money to repay creditors and the \$390.94 monthly they will have if they apply their student loan payments to all unsecured claims, combined, will produce a meaningful Chapter 13 plan payment. Whether private school tuition payments for some or all the minor children should also be discontinued during a Chapter 13 plan can be assessed at confirmation using the standards discussed in *Mendelsohn*, slip op. at 10-11 (cites therein). See, e.g., *In re Bottelberghe*, 253 B.R. 256, 263-64 (Bankr. D. Minn. 2000); *In re Jones*, 55 B.R. 462, 465-67 (Bankr. D. Minn. 1985). That will also be the time to assess whether Debtors are putting forth their best efforts if Debtor Charmaine Haar continues to work part-time.

On May 22, 2001, an order will be entered dismissing this case unless Debtors voluntarily convert their case to a Chapter 13 before that date.

Dated this 7<sup>th</sup> day of May, 2001.

BY THE COURT:

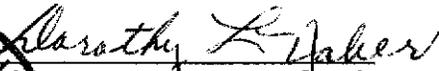


Irvin N. Hoyt  
Bankruptcy Judge

ATTEST:  
Charles L. Nail, Jr., Clerk

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.



  
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U.S. Bankruptcy Court, District of South Dakota  
By R. v.

NOTICE OF ENTRY  
Under F.R. Bankr.P. 9022(a)  
Entered

MAY 07 2001

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court  
District of South Dakota

Case: 00-10183 Form id: 122 Ntc Date: 05/07/2001 Off: 3 Page : 1

Total notices mailed: 7

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