

**United States Bankruptcy Court  
District of New Mexico**

**Document Verification**

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF NEW MEXICO

In re:  
LIN HARRIS and  
JERRE HARRIS,  
Debtors.

No. 7-02-18242 SA

**FINDINGS OF FACT AND CONCLUSIONS  
OF LAW ON US TRUSTEE'S MOTION TO DISMISS**

This matter is before the Court on the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b). The United States Trustee appears through its attorney Leonard Martinez-Metzgar. Debtors appear through their attorney Laurence Leshin. This is a core proceeding. 28 U.S.C. § 157(b)(2). As discussed below, the Court finds that the Motion should be granted, but only after debtors have had the opportunity to convert their case to a chapter 13 case.

In Stewart v. United States Trustee (In re Stewart), 175 F.3d 796, 808-09 (10th Cir. 1999), the Tenth Circuit Court of Appeals rejected an "ability to repay debt" test and adopted a "totality of the circumstances" standard to evaluate 707(b) motions. "A substantial-abuse analysis must be made on a case-by-case basis." Id. at 809. The analysis begins with a determination of whether the debtor can repay his or her debts. Id. Next, the Court should look at other relevant factors to see if "substantial abuse" occurred. Id. These other facts include whether debtor suffered any unique

hardships such as illness, calamity, disability or unemployment; whether cash advances and consumer purchases far exceeded ability to pay; whether there is a stable source of future income; whether the debtor's expenses can be significantly reduced without depriving him or her of necessities; and, finally, the debtor's good faith. Id. at 809-10. The Court is also mindful that there is a presumption in favor of granting the relief requested by the Debtors. 11 U.S.C. § 707(b). Against this backdrop, the Court will proceed to determine whether Debtors' case is a substantial abuse. The Court has reviewed the testimony and arguments presented at trial, and has reviewed the exhibits introduced into evidence, and now makes the following findings of fact and conclusions of law.

1. Debtors filed their voluntary chapter 7 petition on November 21, 2002.
2. Debtors have three children, ages 19, 18, and 12. The two older children now attend college; the younger one now attends public school.
3. Mr. Harris is an engineer with gross income of \$10,055 monthly. Mrs. Harris is a waitress with gross income of \$1,178 monthly. See Amended Schedules I and J (doc 12), UST Exhibit 7. Previously, by virtue of stock options arising

from his employment with Intel, the Debtors had combined income of about \$360,000 in CY 1999, \$700,000 in CY 2000 and \$240,000 in CY 2001. Several factors including the plunging stock market of 2001 and the apparently plunging market for high-end real estate after September 11, 2001 left Debtors with high amounts of unpaid tax, mortgage and consumer debt and cash flow difficulties which led to the filing of the petition.

4. Debtors' Schedule A lists one house, valued at \$330,000 but with no equity. The house was in foreclosure. Mr. Harris testified that the house was about to be sold. Debtors hoped to get some equity out, possibly \$18,000 depending on foreclosure attorney fees and costs. Debtors were unable to qualify for a mortgage to replace the house so they have entered a lease agreement with an option to purchase at a cost of \$2,000 per month. The rent/option to purchase payment will not be tax deductible.

5. Debtors' amended Schedules I and J, filed March 17, 2003, show \$8,012 total net monthly income and \$8,762 monthly expenses.<sup>1</sup> Income is net of a \$790 deduction for a 401(k) loan repayment.

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<sup>1</sup> Debtors' original schedules listed the same income but showed expenses of \$10,347.

6. Debtors' Exhibit F, totaling \$99,550 is mostly credit card debt, but there are also student loans of \$20,400.<sup>2</sup>

Debtors owed no cash advances. Debtors' debts are primarily consumer debts.

7. Debtors' marginal tax rates are: federal, 31% (26 U.S.C. § 1(a)(1)); state, 7.7% (§ 7-2-7 NMSA 1978 (2003 Cum. Supp.)).

8. Mr. Harris has a 401-k containing about \$100,000. He has 3 loans against the 401-k that total about \$36,339. He does not currently make voluntary 401-k contributions.

9. Because the Debtors will no longer have a mortgage deduction, their taxable income will increase by approximately \$27,800 for interest and \$2,400 for real estate taxes, based on their 2001 tax return (Exhibit 2(a), Schedule A.) This would increase their taxes as follows: federal, \$9,362 (31% rate); state, \$2,325 (7.7% rate). The total, \$11,687, works out to be a monthly additional expense of \$974.

10. If Debtors fail to repay the 401-k loan, the amount of the loan is included in debtors' income and is also subject to a penalty tax of 10%. See 26 U.S.C. § 72(t)(1).

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<sup>2</sup> Schedule F lists only one student loan of \$10,200. Mr. Harris testified that in fact there were two \$10,200 loans owed to the Bosque Preparatory School. These apparently are the "Educational Loan Repayments" listed on schedule J.

11. If Debtors were to not repay the 401-k loan the tax consequences would be: federal, \$14,899 (31% rate + 10% penalty); state, \$2,798 (7.7% rate), for a total of \$17,697.

12. If Debtors proposed a chapter 13 plan to pay their existing tax debt (\$16,700) plus the taxes due from a nonpayment of the 401-k plan (\$17,697), the plan would have to pay a total of \$34,397 in taxes.

13. The Court finds that the Debtors' amended expenses are not reasonable and can be significantly reduced.

14. Among the expenses are a home mortgage expense of \$2,862 (excluding real estate taxes and insurance). Mr. Harris testified that this figure would become \$2,000 per month upon the sale of the house, which was scheduled to take place shortly after the conclusion of the trial. Beyond that, however, the Court is of the opinion that reasonably comfortable housing for five persons can be obtained for no more than \$1,500 per month. There is no Code requirement that the Debtors' postpetition housing situation leave the Debtors and their family in the location (Corrales) or style to which they may have become accustomed. See In re Bottelberghe, 253 B.R. 256, 263 (Bankr. D. Minn. 2000)

15. The amended schedule J includes "Educational Loan Repayments" in the amount of \$142 per month. This represents

payments on two \$10,200 student loans from Bosque Prep, where the older children attended private school. This could constitute disposable income if the Debtors were to do a chapter 13 plan.

16. Entries for "Kids Educational & Extracurricular Fees" and "College Expenses (Fall 2003) 2 Kids, Books & Supplies" totaled \$450 per month. The remaining high-school age child is in public school. While at least one other court has ruled that paying for an adult child's college education is a reasonable chapter 13 expense, In re Gonzales, 157 B.R. 604, 607 (Bankr. E.D. Mich. 1993), this Court finds that adult children can be expected to finance their own education rather than have the creditors do so. Various programs, including, in New Mexico, the lottery scholarship program, help make that workable. And debtor parents may make some contribution to that effort by significantly sacrificing some other expenditures. See In re Leon-Guerrero and Facio, No. 13-99-12568, slip op. at 11 (Bankr. D. N.M. Oct. 19, 2000)(citing Bottelberghe, 253 B.R. at 263 (Chapter 13 debtors should have some reasonable latitude in determining the manner in which they will maintain and support themselves and their dependents.))

17. Debtors' budget (as currently proposed by Debtors, with amendments for the Court's "proposed reductions"), assuming nonpayment of the 401k plan and payment of the all taxes through a chapter 13 plan would be as follows:

INCOME	
Net, From Amended Schedule I	\$ 8,012
Add: 401k loan deduction	\$ <u>790</u>
Adjusted net income	\$ <u><u>8,802</u></u>

EXPENSES	
From Amended J	\$ 8,762
Less: Mortgage	\$ (2,862)
Less: \$1000 per month IRS	\$ (1,000)
Add: Rent	\$ 1,500
Less: Student loans	\$ (142)
Less: College expenses	\$ (450)
Add: increased taxes	\$ <u>974</u>
Adjusted total expenses	\$ 6,782

Therefore, there would be disposable income of \$2020 per month. Debtors could pay \$72,720 to a three year chapter 13 plan. This would pay all taxes, administrative costs, and result in a sizeable dividend to unsecured creditors.

18. The Court should examine other factors which may indicate substantial abuse. Stewart, 175 F.3d at 809. Therefore the Court needs to make additional findings.



19. Debtors did not incur their debts through any unique hardship such as an emergency, disaster, illness or unemployment.

20. Debtors income in previous years was significantly higher than it currently is. Mr. Harris' income from wages in 2000 was \$696,000. The debts incurred were not far in excess of the Debtors' abilities to pay at the time they were incurred. Debtors participated in consumer counseling without success before seeking bankruptcy relief.<sup>3</sup>

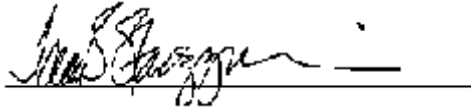
21. The Court finds that the Chapter 7 petition was filed in good faith.

22. Under the totality of the circumstances, the Court finds that to grant the chapter 7 relief sought by the Debtors would constitute a substantial abuse of the Code. In consequence, the United States Trustee's motion to dismiss should be granted. However, on the request of the Debtors, which was not opposed by the United States Trustee, the Court will permit the Debtors twenty days from the entry of this order to

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<sup>3</sup> In the summer of 2002, Debtors engaged in "credit counseling" with an entity called "Myvesta". Part of the arrangement required the Debtors to turn over their finances to Myvesta for three months while Myvesta sought to arrange payment terms with Debtors' creditors. Myvesta's efforts were unsuccessful, but cost the Debtors \$7,000. This transaction, which took place within a year of the filing of the petition, was not listed in the answer to question 9 of the Statement of Financial Affairs.

convert their case to one under chapter 13 of the Code,  
failing which the chapter 7 case will be dismissed.<sup>4</sup>

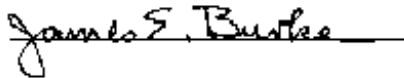


Honorable James S. Starzynski  
United States Bankruptcy Judge

I hereby certify that on October 15, 2003, a true and correct  
copy of the foregoing was either electronically transmitted,  
faxed, delivered, or mailed to the listed counsel and parties.

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<sup>4</sup> In the event of conversion, the findings and conclusions  
in this opinion are not intended to preclude the chapter 13  
trustee from conducting her own investigation of the Debtors'  
finances and other circumstances in connection with the plan  
or for any other reason.