

**IN THE UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF ARKANSAS  
LITTLE ROCK DIVISION**

**IN RE: HARRY WILLIAM O'DONOHUE, JR.  
DEBTOR**

**4:03-bk-18035-E**

**ORDER GRANTING UNITED STATES TRUSTEE'S MOTION TO DISMISS**

This matter comes before the Court on the United States Trustee's ("UST") motion to dismiss this bankruptcy petition as a substantial abuse of chapter 7 of the United States Bankruptcy Code, ("**the Code**"), 11 U.S.C. § 101, *et seq.* This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(b), 157(a), and 157(b)(1). The following constitutes the Court's Findings of Fact and Conclusions of Law as required by Rule 52 of the Federal Rules of Civil Procedure and made applicable to this proceeding by Rule 7052 of the Federal Rules of Bankruptcy Procedure. For the reasons set forth below, the Court grants the UST's Motion to Dismiss.

**FACTUAL BACKGROUND**

Harry William O'Donohue, Jr. ("**Debtor**") filed his voluntary chapter 7 petition for relief on July 8, 2003. His schedules reflect secured debt of \$49,000.00 and general unsecured consumer debt consisting entirely of credit cards totaling \$78,382.62. Schedule I indicates that the Debtor is a self-employed wholesale used car salesman with a net monthly income of \$1,066.66 and that he is divorced with no dependants. The Debtor listed total monthly expenses of \$1,383.00, leaving him with negative disposable income of \$316.34 monthly. The Debtor's response to Question 1 of his First and Second Amended Statement of Financial Affairs discloses that his annual gross income

for the three year period (2001, 2002, 2003) prior to his bankruptcy case was \$10,000.00, <\$600.00>, and \$4,800.00, respectively.

The UST filed a motion to dismiss pursuant to 11 U.S.C. § 707(b), and on April 29, 2004 the Court held a hearing on the UST's motion. The exhibits and testimony presented at trial demonstrate that the Debtor's credit card debts increased from approximately \$2,765.03 to in excess of \$78,581.59 during the twelve (12) month period preceding the petition filing date. The record further reflects that the Debtor failed to disclose a minor child as a dependent.

## **DISCUSSION**

### **I. The Eighth Circuit**

*In re Walton*, 866 F.2d 981 (8th Cir. 1982), is the leading Eighth Circuit case dealing with "substantial abuse." The court in *Walton* held that a debtor's inability to pay will not shield that debtor from Section 707(b) dismissal where bad faith is otherwise shown. *Walton*, 866 F.2d at 984-985. This language however raises the issue of what constitutes "bad faith" in the context of Section 707(b) and whether it duplicates or adds to other Bankruptcy Code provisions. Case law clearly establishes that the issue of bad faith in this context is closely linked to the concept of the "honest debtor."

### **II. Dismissal under § 707(b) where there is credit card abuse**

The Ninth Circuit Court of Appeals in *In re Padilla*, 222 F.3 d 1194, (9th Cir. 2000), specifically held that accumulating credit card debt in anticipation of filing for bankruptcy is a type of misconduct contemplated by § 707(b). "Consistent with *Padilla*, the court *In re Motaharnia*, 215 B.R. 63 (Bankr. C.D. Cal. 1997) determined that five factors should be evaluated in determining whether dismissal is appropriate in a case

where there is substantial credit card debt:

- (1) whether the overwhelming percentage of the debtor's unsecured debt is due to credit cards;
- (2) whether the debtor has used so many credit cards that it would multiply the workload of the court to adjudicate each §523(a)(2) action separately;
- (3) whether there is no economic incentive to individual creditors to bring a §523 action;
- (4) whether the credit card debt was used for luxury goods, high lifestyle or improper purpose; and
- (5) whether the debtor has tried to make an honest effort to repay these obligations before filing bankruptcy.

*In re Motaharnia*, 215 B.R. 63 (Bankr. C.D. Cal. 1997) (emphasis added). The statutory presumption in favor of granting the debtor's discharge may be overcome by the presence of factors indicating dishonesty of the debtor. *Motaharnia*, 215 B.R. at 73; *see also In re Krohn*, 886 F.2d 123 (6th Cir. 1989) (finding that in efforts to curb "substantial abuse," Congress did not intend bankruptcy relief to extend to the dishonest or non-needy debtor.).

Although there is a presumption in favor of granting the relief requested by the Debtor under 11 U.S.C. § 707(b), in this case, the presumption has been completely overcome by the evidence indicating the Debtor's dishonesty. This lack of credibility was evidenced by the Debtor's claim that he did not know his current address and by his testimony regarding his income. Moreover, the Debtor testified in a very limited and cagey manner, only providing information which appeared to help his case, such as stating that his present monthly income is only two hundred dollars (\$200). The evidence presented by the UST leads the Court to believe, however, that the Debtor has additional income, other than what he stated during his testimony.

Additionally, the Court finds that Debtor demonstrated a lack of respect for the

bankruptcy system by filing Schedules and Statement of Financial Affairs which evidenced a complete disregard for accuracy by failing even to list his minor child. “[A]ccuracy, honesty, and full disclosure are critical to the functioning of bankruptcy, and are inherent in the bargain for the discharge.” *In re Kestell*, 99 F.3d 146, 149 (4th Cir. 1996) (citation and internal quotations omitted). The Debtor’s dishonesty, as demonstrated by his testimony, as well as the omission of his minor child from his Schedules and Statement of Financial Affairs, coupled with the forty-four thousand dollars (\$44,000.00) in credit card debt accumulated within two months before the petition filing date, constitute bad faith and demonstrate that the Debtor has failed to live up to his responsibilities inherent in the bargain for a discharge of his debts.

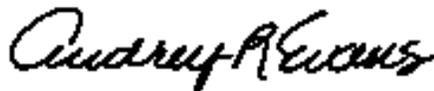
**CONCLUSION**

In light of the foregoing, the Court finds the Debtor has engaged in an abuse of the bankruptcy system and that granting the Debtor a discharge would constitute a substantial abuse of the provisions of chapter 7 of the Bankruptcy Code.

Accordingly, it is hereby

**ORDERED** that the UST’s motion to dismiss is **GRANTED** and therefore, the Debtor’s case is **DISMISSED**.

**IT IS SO ORDERED.**



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HONORABLE AUDREY R. EVANS  
UNITED STATES BANKRUPTCY JUDGE  
Date: June 2, 2004

cc:  
Cecil Glen Davis, attorney for Debtor  
Jim Hollis, attorney for United States Trustee  
Richard L. Ramsay, chapter 7 Trustee