Dated: January 30, 2006
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

AMY L. HUMPHREY,

Debtor.

Case No. 05-34845-L
Chapter 7

ORDER CONDITIONALLY GRANTING
UNITED STATES TRUSTEE'S MOTION TO DISMISS

BEFORE THE COURT is the motion of Richard F. Clippard, United States Trustee for Region 8 ("UST"), to dismiss this Chapter 7 case pursuant to 11 U.S.C. § 707(a) or, in the alternative, § 707(b), on the basis that the petition was filed in bad faith. A response was filed by the Debtor denying that the case should be dismissed. The court conducted an evidentiary hearing on January 19, 2006, from which it makes the following findings of fact and conclusions of law. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A) and (O).

FINDINGS OF FACT

This bankruptcy case was commenced on September 19, 2005, upon the filing of a voluntary petition for relief under Chapter 7 of the Bankruptcy Code by Amy L. Humphrey (the "Debtor"). Tr. Ex. 1. The petition as originally filed failed to disclose the pendency of a bankruptcy case filed by the Debtor's attorney, Joseph Townsend, on behalf of the Debtor's husband, Randy Humphrey, on August 29, 2005. Tr. Ex. 2. The petition was subsequently amended to correct this omission after an examination of the Debtor conducted by the UST. The Individual Debtor's Statement of Intention, Official Form 8, filed with the petition, indicated that the Debtor intended to retain and reaffirm debts connected with a 2006 Chevrolet Tahoe, 2004 Crownline boat, and the Debtor's residence at 9087 Weeping Cherry Lane, Cordova, Tennessee. Form 8 was subsequently amended after the examination of the Debtor to indicate that the Debtor would surrender the boat, but retain the automobile and residence. Tr. Ex. 1. Schedules I and J, as originally filed with the petition, indicated that the Debtor was married with two sons, that she was a registered nurse working at Methodist University Hospital for 7 years, that she had monthly net income of $5,072, and total monthly expenses of $5,488. Schedule I was subsequently amended after the examination of the Debtor to indicate that the Debtor was "separated" rather than married. Tr. Ex. 1. Schedule J was also amended to delete from the Debtor's expenses the boat note of $342, reducing her monthly expenses to $5,146. The Debtor's attorney indicated in his response to the UST's motion and at trial that the failure to disclose the pending case filed by the Debtor's husband and the error in the disclosure of the Debtor's marital status resulted from "inadvertent mistake by the typist in preparing the petition." The Debtor offered no proof at trial in support of this statement.

Less than one month prior to the filing of her bankruptcy petition, the Debtor purchased a 2006 Chevrolet Tahoe automobile, financing $41,529.08 in acquisition costs. Tr. Ex. 9. The vehicle was described by the Debtor as being a two-wheel drive sports utility vehicle with a towing package, leather seats, a CD player, power windows, air conditioning, air bags, and traction control. The Debtor indicated that she chose this vehicle because it is big and safe. She explained that she drives from Memphis to Senatobia, Mississippi, and back every other week, a distance of some sixty miles each way, to pick up her son from a previous marriage, and that once last year it had snowed on one of her pickup or drop off days. The Debtor admitted that she thought that since she was filing a bankruptcy case, she should purchase "the nicest car I [could] because I [would] have it for several years." The Debtor also admitted that she could not tow a boat with a small car, and that this, too, had been a factor in her purchase. Finally, the Debtor admitted that she did not consider or do research about any other vehicle before purchasing the 2006 Tahoe. She explained that she had been driving a 2003 Tahoe owned by her husband, but that that vehicle was surrendered in connection with his bankruptcy case. She wanted to replace the 2003 Tahoe with a similar vehicle. The court notes that the Debtor's purchase was made *before* (and thus, by inference, *in anticipation of*) the filing of her husband's petition. Prior to the purchase of the 2006 Tahoe, the Debtor had no liability related to the purchase of a vehicle. The monthly note associated with the purchase of the 2006 Tahoe is $720. The Debtor testified that she gave no thought to the impact of her purchase on her creditors.

The Debtor continues to live in the marital home. The monthly mortgage payment is $1,881. The Debtor's husband lives in a home owned by the Debtor's brother in Senatobia, Mississippi, near the Debtor's family (and presumably near the Debtor's older son). The Debtor's husband pays rent

of $1,100 to live in this home. It is anticipated that the Debtor's husband will have to return to Memphis because residence within the city is a condition of his employment with the Memphis Fire Department. The Debtor admitted that she could have lived in her brother's home, but chose not to. No further explanation for her choice was offered.

The UST introduced proof through its analyst, Percy Baker, that the IRS Local Transportation Expense Standard for transportation, on a national basis, is $475 per month for the first car. Tr. Ex. 5. The UST also introduced evidence that the IRS Local Housing Expense Standard for Shelby County, Tennessee, for a family of three is $818 per month. Mr. Baker's analysis showed that if the Debtor's transportation expenses were reduced to the IRS national standard, she would have $171 in net monthly income. Tr. Ex. 6. If the Debtor's housing expenses were reduced to the IRS local standard, she would have $989 in net monthly income. Tr. Ex. 8. If both of these changes were made, the Debtor would have $1,160 per month in net monthly income, which would enable her to pay all of her unsecured obligations, totaling $19,857, in a little more than 17 months.

As indicated, the Debtor's unsecured claims listed on Schedule F total $19,857. These consist of two obligations, one to MBNA America for $19,750, and the other to Old Navy for $107. The Debtor explained that the MBNA America debt resulted from consolidation of other credit card obligations owed by her husband and dating from his previous marriage. She explained that he was not able to obtain sufficient credit on his own to consolidate all his obligations, so she joined him in making application for credit. She said that she understood that the debt would be repaid over about five years at an interest rate of 5%. She later found out that the interest rate actually was 23%. The Debtor did not explain why she did not realize sooner what the interest rate was or whether it

had initially been a lower, promotional rate and later increased to the higher rate. The Debtor testified that the MBNA debt was "one of the biggest factors leading to the [anticipated] divorce." She said that she was "mad because [the debt] was not mine." She said that "she hate[d] that we couldn't spend our money on other things [because] . . . we had to pay off her stuff."

CONCLUSIONS OF LAW

The Debtor's bankruptcy case was filed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, P.L. 109-8 ("BAPCPA"), October 17, 2005, thus the provisions of that law do not apply in this case. Although the UST cited § 707(a) in its motion, it is clear that its allegations are aimed at 11 U.S.C. § 707(b) which permits the court, on its own motion or on motion of the United States trustee, to dismiss a case filed by an individual debtor under Chapter 7 "if it finds that the granting of relief would be a substantial abuse of the provisions of [Chapter 7]."

> [Section 707(b)] represents a balancing of two interests. It preserves the fundamental concept embodied in our bankruptcy laws that debtors who cannot meet debts as they become due should be able to relinquish nonexempt property in exchange for a [financial] fresh start. At the same time, however, it upholds creditors' interests in obtaining payment where such payment would not be a burden. . . . [I]f a debtor can meet his debts without difficulty as they come due, use of Chapter 7 would represent substantial abuse.

S. Rep. No. 65, 98th Cong., 1st Sess. 53,54 (1983).

Whether a case will be dismissed for cause under § 707(b) is an equitable determination which is left to the discretion of the bankruptcy judge. *See Behlke v. Eisen (In re Behlke),* 358 F.3d 429, 433 (6th Cir. 2004) (citing *Indus. Ins. Servs., Inc. v. Zick (In re Zick),* 931 F.2d 1124, 1126 (6th

Cir. 1991)). The ability to pay alone may be sufficient to warrant dismissal of a case for substantial abuse. *See Behlke*, 358 F.3d at 434. One of the ways that courts determine whether a debtor has the ability to repay debts is to look at whether there would be sufficient income to fund a chapter 13 plan. *Id.* at 435. Further, the court may look at other factors to determine whether a debtor is truly needy, such as whether the debtor has a steady source of income, whether the debtor's expenses can be reduced significantly without depriving him or her of adequate food, clothing, shelter and other necessities, and whether the debtor' s financial situation is the result of an unforeseen catastrophic event. *Id.* at 437 (citations omitted). Finally, the court may consider the debtor's honesty in dealing with her creditors and the court. *Id.* at 434 (citing *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989)).

A review of the facts in this case indicates overwhelmingly that the Debtor has the ability to repay her debts, is not needy, and has not been honest in her dealings with her creditors or the court. The Debtor has a steady source of income. According to her Schedule I, she has been continuously employed by Methodist University Hospital as a registered nurse for seven years. In her Statement of Financial Affairs, the Debtor discloses income of $59,791, $75,309, and $69,810 in years 2005, 2004, and 2003.[1]

Before the filing of her bankruptcy case, the Debtor's expenses could have been reduced significantly. Both her housing costs and her transportation costs exceed what is reasonably necessary for herself and her family. While it is true that this case was filed before the effective date of BAPCPA (and thus the use of IRS guidelines is not mandated in this case), it nevertheless remains appropriate that the Court consider whether the Debtor made efforts to reduce her expenses

[1] Federal Rule of Evidence 201(e) authorizes the bankruptcy court to take judicial notice of the content of a debtor's Statement of Affairs and Schedules. *See Calder v. Calder (In re Calder)*, 907 F.2d 953, 955 n. 2 (10th Cir. 1990).

prior to filing. *See Krohn*, 886 F.2d at 126-27 ("Among the factors to be considered in deciding whether a debtor is needy is . . . whether his expenses can be reduced significantly without depriving him of adequate . . . necessities."). The Debtor did not make efforts to reduce her expenses prior to filing her bankruptcy case.

Although the Debtor testified that she was unable to sell her home, on closer examination it became apparent that no effort had actually been made to sell it. It was never listed for sale because an appraisal indicated a value less than the amount owed. It was not clear whether the Debtor was ever informed of the possibility of surrendering the home in the context of a bankruptcy case. The Debtor gave no indication that she had looked for less expensive housing.

Likewise, the Debtor made no effort to reduce her transportation costs. In purchasing the 2006 Tahoe, it seems evident that her uppermost concern was her own safety and comfort. She testified that she did attempt to purchase a "used car," but upon further questioning, this turned out to be a 2005 Tahoe. The Debtor rather obviously felt deprived at the loss of the 2003 Tahoe and wanted to put herself back in the same position she had been prior to the separation from her husband.

The separation itself raises questions. Although these persons reportedly have maintained separate residences since at least August of 2005, no petition for divorce has been filed by either of them. The Debtor indicated that "they" intend to use Mr. Townsend to obtain their divorce, but that she had been unable to afford his fee for an uncontested divorce with children. The Debtor and her husband both used Mr. Townsend to file their separate bankruptcy petitions. These facts raise the possibility of collusion.

The Court need not make an actual finding of collusion, however, to determine that the Debtor's need for bankruptcy protection resulted not from some unforeseen catastrophe, but from choices freely made. The Debtor decided to become obligated with her husband for the MBNA debt. She was under no compulsion to do so. The Debtor and her husband decided to purchase two late model vehicles and a boat in 2004. They were under no compulsion to do so. The Debtor and her husband decided to establish separate residences in 2005. There were under no compulsion to do so.[2] The Debtor decided to purchase a luxury vehicle in 2005 instead of a vehicle that would provide basic transportation. She was under no compulsion to do so. Each of these were poor choices, but they were choices. Had the Debtor made different choices, she would have no need for bankruptcy protection. There are choices she could make now that would enable her to repay her creditors. She could choose to convert her case to Chapter 13, surrender her home and car, obtain housing and transportation at a reasonable cost, and repay her unsecured debts in full over a relatively short period of time. The Court does not suggest that this choices would be without difficulty, but only that it could be made.

The Debtor has the ability to repay her debts and is not needy. The Debtor also has not been honest with the court or her creditors. She did not consider the impact on her creditors when she purchased the 2006 Tahoe, indicating at best a lack of concern for the repayment of those obligations and at worst an intent not to repay them. Further, the Debtor was not honest in preparing her bankruptcy schedules. She did not disclose the pendency of her husband's bankruptcy case and did not accurately disclose her marital status. But for the efforts of the UST, these false statements

[2] The Debtor offered no explanation for the separation other than her statement that the MBNA debt was one of the biggest factors leading to the separation. The Debtor gave no indication that she feared for her safety or the safety of her child. To the contrary, she indicated that she and Mr. Humphrey are "co-parents."

would not have been corrected. The statements were misleading and potentially detrimental to creditors. The fact that the same attorney filed both cases renders the explanation that these false statements resulted from "typographical errors" highly dubious. Bankruptcy relief is intended for the honest but unfortunate debtor. Mrs. Humphrey has been neither honest nor unfortunate. The granting of relief in this case would be a substantial abuse of the provisions of Chapter 7.

CONCLUSION

For the foregoing reasons, the motion of the UST is granted and this case will be dismissed on the twentieth day after this order becomes final and nonappealable unless the Debtor files a motion to convert her case to Chapter 13 prior to that date.

cc: Debtor
Attorney for Debtor
United States Trustee
Case Trustee