IT IS ORDERED as set forth below:

Date: November 08, 2010

Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE	)	
	)	CASE NO. 10-74514-WLH
KENNETH NEAL RUDMOSE and	)	
SUSAN GALE RUDMOSE,	)	CHAPTER 7
	)	
Debtors.	)	JUDGE WENDY L. HAGENAU
	)	

ORDER ON UNITED STATES TRUSTEE'S MOTION TO DISMISS PURSUANT TO 11 U.S.C. §§ 707(b)(3)

The United States Trustee's Motion to Dismiss Pursuant to 11 U.S.C. § 707(b)(3) ("Motion") came before the Court for hearing on October 15, 2010, at which Lindsay Swift appeared on behalf of the United States Trustee and Howard D. Rothbloom and Adam Herring appeared on behalf of the Debtors. At the hearing, both Debtors testified and the United States Trustee presented the testimony of Deborah R. Jackson. After consideration of the pleadings, the Debtors' Schedules and Statement of Financial Affairs, the testimony of the witnesses, and the evidence presented, the Court DENIES the Motion.

This matter is a core proceeding, over which this Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(A). The following constitutes the Court's findings of fact and conclusions of law.

FACTS

In 2000, the Debtors purchased a home for approximately $280,000.00, borrowing approximately $260,000.00 in connection with the purchase. The loan was secured by a first priority security deed on the house. The home is approximately 5,000 square feet in size and originally housed the Debtors and their two children. As of the petition date, one of the children attends college outside the city, coming home for an extended stay only on college breaks. A portion of the basement in the Debtors' home is used for Mrs. Rudmose's office space. At the time the home was purchased, both the Debtors were gainfully employed.

In 2007, Debtor Kenneth Rudmose decided to start a new business in a new field – insurance sales. While the wisdom of this decision can now be questioned, at the time the venture began, the Debtors had equity in their house and had money in the bank. Susan Rudmose had what the Debtors considered to be a good job and made $210,000.00 in 2007. The Debtors testified that they believed they could cover Mr. Rudmose's income shortfall during the time necessary to grow the insurance business. However, in late 2007, the recession began. In 2008, the Debtors obtained a line of credit, secured by a second priority security deed on their home, of approximately $48,000.00. During the same time period, the Debtors' credit card debt increased. In March 2009, the Debtors refinanced their house for an amount sufficient to pay the principal on the first security deed, plus approximately $48,000.00 owed on the second security deed and $56,000.00 of unsecured American Express debt. At the time of the refinancing, the Debtors' home appraised for approximately $395,000.00. Again, while hindsight shows the refinancing was likely a bad choice, the Debtors testified they thought the refinancing was a good idea because it would reduce the payments on these debts by decreasing the interest rates from 6.875% on the first lien and 16% on the American Express debt to a total of 4.5% on the refinanced note. However, the increased debt secured by the house and the shortened term (15 years) of the debt increased the monthly payment on the mortgage from approximately $2,300.00 to $3,116.00. According to the Debtors' schedules, the amount due now on the note which is secured by a first lien on the house is $335,799.00. The Debtors now estimate the value of the house to be $260,500.00.

Kenneth Rudmose's insurance business was not successful. In the meantime, Susan Rudmose's income declined in 2008 to $134,000.00 and in 2009 to $104,000.00. The decline in income was the result of a combination of reduced sales and reduced commissions on the sales that were made. Susan Rudmose testified that she expected her 2010 income to be even less than the 2009 income. Kenneth Rudmose's sole income at this point is a $2,500.00 per month payment from AllState Insurance in accordance with a non-compete agreement. This payment is only for 12 months. Mr. Rudmose is actively seeking a job.

On May 14, 2010, the Debtors filed their bankruptcy petition under chapter 7 of the United States Bankruptcy Code. Their schedules listed total assets of $606,521.00, and total liabilities of $671,468.00. Virtually all of the Debtors' unsecured debt is credit card debt. The Debtors also proposed to exempt $142,862.00 in assets in accordance with the Georgia Code (most of this 401(k) funds). According to the Debtors' Schedule I, the Debtor's combined average monthly income is $8,152.97. This sum is net of $546.86 per month in deposits made to Susan Rudmose's 401(k). According to the Debtors' Schedule J, their average monthly expenses are $12,619.06, leading to a net loss per month of $4,466.09. The Debtors intend to reaffirm the debt secured by their house which is scheduled at $335,799.00. The Debtors also intend to reaffirm two outstanding car loans in the amounts of $22,744.88 and $19,881.34. Thus, the Debtors intend to reaffirm $378,425.22 in debt.

The United States Trustee moved to dismiss the chapter 7 case as an abusive filing, arguing that the Debtors could make payments to creditors in a chapter 13 case or outside of bankruptcy if they changed their standard of living. The United States Trustee specifically objected to (i) the continuing deposits to the 401(k) plan, (ii) the amount of the monthly mortgage payment, (iii) the amount of the non-mortgage living expenses, (iv) payment of premiums for whole life insurance, (v) payment of debt on a boat, and (vi) college expenses, car payments and car insurance payments for the Debtors' children, both of whom are over the age of 18. The Debtors responded to the United States Trustee's Motion and agreed that the payment on the debt secured by the boat, as well as all of the expenses in connection with their two college-age children, should be excluded in determining monthly net income. The Debtors disagreed with the United States Trustee's other objections. The Debtors and the United States Trustee acknowledged, however, that, even if all of the non-house-related expenditures were reduced as suggested by the United States Trustee, the Debtors would still not have positive monthly income. In short, the focus of the Motion became the amount of the monthly mortgage and related house expenses and whether the Debtors should be required to surrender the house in order to make payments to general unsecured creditors.

LEGAL ANALYSIS

Under 11 U.S.C. § 707(b), the court is required to dismiss a case (or, if the Debtor consents, convert it) if granting relief under chapter 7 would be an abuse. The application of the means test as set out in 11 U.S.C. § 707(b)(2) determines whether a rebuttable presumption of abuse arises. If the presumption of abuse does not arise under Section 707(b)(2), or if it is rebutted, the court can nevertheless dismiss a chapter 7 case for abuse if the bankruptcy petition was filed in bad faith or if the totality of the circumstances of the debtor's financial situation demonstrates abuse. See 11 U.S.C. § 707(b)(3).

In this case, the United States Trustee seeks to have the Debtors' case dismissed only under 11 U.S.C. § 707(b)(3), because "the totality of the circumstances … of the debtor's financial situation demonstrates abuse." The United States Trustee acknowledges that the Debtors have "passed" the means test and has also agreed that there is no issue of the Debtors' good faith in filing the petition. Rather, the United States Trustee urges that the Debtors could change their lifestyle by eliminating certain expenses, principally their house, thereby freeing up additional funds with which to make payments on unsecured debt. The United States Trustee has the burden of proving abuse by a preponderance of the evidence. In re Beckerman, 381 B.R. 841, 844 (Bankr. E.D. Mich. 2008).

In analyzing whether the "totality of the circumstances" of the Debtors' financial situation demonstrates abuse, courts have enumerated the following factors to be considered.

> (i) Whether the bankruptcy filing was precipitated by an unforeseen catastrophic event such as a sudden illness or unemployment;
> (ii) Whether the debtor is eligible for chapter 13 relief;
> (iii) Whether there are non-bankruptcy remedies available to the debtor;
> (iv) Whether the debtor can obtain relief through private negotiations;
> (v) Whether the debtor's proposed budget is excessive or unreasonable;
> (vi) Whether the debtor has a stable source of future income;
> (vii) Whether the debtor could provide a meaningful distribution in a chapter 13 case; and
> (viii) Whether the debtor's expenses could be reduced significantly without depriving them and their dependents of necessities.

In re Walker, 383 B.R. 830, 837 (Bankr. N.D. Ga. 2008). To the extent the answers to these questions (other than (i)) are "yes", the factors point to a conclusion of "abuse" since they suggest alternatives to a chapter 7 filing. Many courts hold that the debtor's ability to pay a significant portion of his or her debts, either in or outside of a bankruptcy case, is the most significant fact. In re Lavin, 424 B.R. 558, 563 (Bankr. M.D. Fla. 2010); In re Mauer, 2009 WL 2461380 (Bankr. N.D. Ohio 2009); In re Norwood-Hill, 403 B.R. 905, 912 (Bankr. M.D. Fla. 2009); In re Freis, 2007 WL 1577752 (Bankr. W.D. Mo. 2007). However, the courts also generally hold that an ability to pay alone is not sufficient to justify dismissal of a case for abuse. In re Crink, 402 B.R. 159, 173 (Bankr. M.D.N.C. 2009); In re Cribbs, 387 B.R. 324, 334 (Bankr. S.D. Ga. 2008); In re Johnson, 318 B.R. 907, 918 (Bankr. N.D. Ga. 2005). As the court in In re Nockerts, 357 B.R. 497 (Bankr. E.D. Wisc. 2006) noted, "To apply the means test, dislike the result, and then examine the debtor's ability to fund a chapter 13 plan under Section 707(b)(3), renders the means test surplusage". Id. at 506. The language of Section 707(b)(3), "suggests that an inquiry into a debtor's financial situation requires an inquiry into more than what is tested in the means test." (*emphasis in original*). Id. at 507. This does not mean that satisfaction of the means test is the end of the inquiry on the ability to pay. Elements of the means test may have been manipulated or there may be steps that can be taken in a chapter 13 case to enhance a debtor's ability to pay, or the debtor's financial situation may have changed. In short, the totality of the circumstances means totality and not just ability to pay. With this background, the Court will examine each of the factors as they apply to Mr. and Mrs. Rudmose.

The evidence established that the bankruptcy filing was not precipitated by an unforeseen catastrophic event, such as a sudden illness or unemployment. The bankruptcy filing was precipitated by a combination of events, including the recession which began in 2007, a decline in Susan Rudmose's income over the past three years and the lack of success of Kenneth Rudmose in starting a new business venture shortly before the start of the recession. It is uncontested that the Debtors are eligible for chapter 13 relief. Thus, questions (i) and (ii) point to a determination of abuse.

The Debtors testified to some efforts they made to obtain relief through private negotiations or non-bankruptcy remedies. They testified they had attempted out-of-court workouts with the various credit card companies. Some of the credit card companies were willing to work out a long-term repayment plan, while others were not. The Debtors testified they made little effort to restructure their mortgage. They are current on their mortgage and were reportedly told that, until they defaulted on their mortgage, there could be no restructuring. The Court notes the mortgage payment of $3,116.00 is 27% of the gross income the Debtors reported on Schedule I. The Home Affordable Modification Program ("HAMP") guidelines target reductions in mortgage payments to 31% of gross income as a condition of modification. United States Treasury, Home Affordable Modification Program Guidelines (Mar. 4, 2009), www.ustreas.gov/press/releases/reports/modification_program_guidelines.pdf; Home Affordable Modification Program, Eligibility Requirements, www.makinghomeaffordable.gov (last visited Nov. 7, 2010). This is not to suggest the mortgage could not be modified, but only to observe such modification is not automatic. Moreover, given the more than $4,000.00 shortfall in monthly income, the amount of modification required in all debt to actually have funds available for creditors is significant. These two factors point slightly to a lack of abuse.

Finally, Kenneth Rudmose does not have a job presently, so a source of future income for him is unknown. Susan Rudmose is a national account manager with the John Henry Company. She is paid a $70,000.00 base salary, and then receives commissions on certain sales. Her income in 2007 was $210,000.00, but by 2009 had dropped to $104,000.00. She predicts income even lower for 2010. Thus, Susan Rudmose has some stable income in the form of the base salary, but the amount of commissions above the base is somewhat uncertain. Given the uncertainty of Mr. Rudmose's income, the uncertainty of Mrs. Rudmose's commissions and the three-year decline in Mrs. Rudmose's income, this factor points to a lack of abuse.

The analysis of the factors to this point leaves the Court with a sense of ambiguity – some of the factors suggest the potential for abuse, while others do not. None of the foregoing factors points strongly in either direction. There are two remaining factors for consideration: whether the Debtors' proposed budget is excessive or unreasonable, and whether the Debtors could provide a meaningful distribution in a chapter 13 case. These two factors address the Debtors' ability to pay a significant portion of their debt. Each of the foregoing will be analyzed below.

CHAPTER 13 DISTRIBUTION

The United States Trustee argues that, if the Debtors' standard of living were reduced, the Debtors could have a monthly disposable income of not less than $1,830.45. This disposable income, according to the United States Trustee, would pay at least 70% on the Debtors' unsecured debt over a 36-month period and could pay 100% of the Debtors' unsecured debt over a 60-month period. This disposable income assumes, however, that the Debtors' mortgage expense is reduced from $3,116.64 to the IRS standard of $1,351.00 per month and non-mortgage expenses are reduced from $1,452.50 to the IRS standard of $488.00 per month. The United States Trustee also assumes there are no 401(k) deposits, no payments for the Debtors' children and only minimal life insurance payments. At the hearing, the United States Trustee's witness, Ms. Jackson, testified that the distribution calculations did not include the deficiencies that would arise from the surrender of the house, the surrender of the lake lot, the surrender of the boat, and the surrender of either or both of the vehicles. Ms. Jackson testified that the additional liability from deficiencies, based on the amounts scheduled, would be about $210,000.00. By including the additional deficiency liability, the return to unsecured creditors would then decrease to about 30% on the Debtors' unsecured debt over a 36-month period and to about 50% of the Debtors' unsecured debt over a 60-month period. However, these calculations are not in accordance with 11 U.S.C. § 1325.

The Court asked at the hearing whether either the United States Trustee or the Debtors' counsel had calculated the projected disposable income which the Debtors' would be required to pay under a chapter 13 plan in accordance with 11 U.S.C. § 1325(b)(3). Neither party had made that calculation, and neither provided any evidence on that point. The determination of projected disposable income begins with the calculation of "disposable" income under 11 U.S.C. § 1325(b)(2). Therein, disposable income means, "current monthly income received by the debtor … less amounts reasonably necessary to be expended – … for the maintenance or support of the debtor or dependent of the debtor …." The statute continues to state that, "amounts reasonably necessary to be expended" under Section 1325(b)(2) are to be determined in accordance with subparagraphs (A) and (B) of Section 707(b)(2) if the debtor is an above-median income debtor. Thus, the calculation of disposable income for purposes of chapter 13 is virtually the same as the determination under the means test of 11 U.S.C. § 707(b)(2) which the Debtors "passed". Importantly for purposes of this Motion, Section 707(b)(2)(A) allows the debtor to reduce its income by the average monthly payments it makes on account of secured debt and any additional payments that are to be made to secured creditors necessary to retain a principal residence. Congress has, therefore, declared that the monthly house payment is completely deductible in the computation of determining presumed abuse under 11 U.S.C.

§ 707(b)(2) and, therefore, also acceptable for reducing the debtor's disposable income under Section 1325(b)(3). See In re Dumas, 419 B.R. 704 (Bankr. E.D. Tex. 2009). If the Debtors filed a chapter 13 petition, they would be entitled to deduct the entire amount of their mortgage payment, $3,116.64, from their monthly income in determining their projected disposable income for plan confirmation purposes.

Additionally, the Court notes that most courts allow the reduction of income for investment in a 401(k) plan in calculating disposable income in a chapter 13 case. See 11 U.S.C. § 541(b)(7)(A); In re Johnson, 346 B.R. 256 (Bankr. S.D. Ga. 2006); In re Lavin, 424 B.R. 558, 564 (Bankr. M.D. Fla. 2010); In re Norwood-Hill, 403 B.R. 905, 913 (Bankr. M.D. Fla. 2009); In re Smith, 2010 WL 2400065 (Bankr. N.D. Ohio 2010); In re Shelton, 370 B.R. 861 (Bankr. N.D. Ga. 2007); But contra In re Seafort, 2010 WL 3564709 (6th Cir. BAP 2010). The Court notes further that Section 1325(b) allows income to be further reduced by charitable contributions and that the Debtors regularly made charitable contributions according to their Statement of Financial Affairs. Further, under Section 707(b)(2)(A), the administrative expenses of administering a chapter 13 plan can be used as an expense in determining disposable income. Each of the foregoing (actual mortgage payment, payments to a 401(k), charitable contributions, and the cost of chapter 13 administration) could be used by the Debtors to reduce their disposable income. Moreover, the United States Trustee produced the testimony of Debra Jackson in support of the Motion. Ms. Jackson testified that, because the Debtors had been withdrawing funds from their 401(k) for living expenses, they were increasing their tax liability above their tax withholdings. According to Ms. Jackson's testimony, the Debtors should be withholding an additional $789.87 per month to cover the additional tax liability. The Debtors testified they intended to continue to utilize their 401(k) to the extent necessary to cover shortfalls in living expenses. Therefore, the evidence suggests there may be additional tax liability in the future, although the Court could not determine how much that might be.

On the other hand, the evidence at the hearing was that Mr. Rudmose's business expenses are only $1,000.00 per month now, as opposed to the $1,800.00 per month as identified in Schedule J. Thus, this change would increase the Debtors' disposable income by $800.00. In short, the Debtors' disposable income, for purposes of chapter 13, could not be determined based on the evidence presented to the Court and neither party calculated what the disposable income might be. Taking the United States Trustee's position with respect to the boat, the children's expenses, the life insurance, and the non-mortgage expenses, but permitting the reduction in income which comes from a monthly deposit to a 401(k) and for the full amount of the mortgage payment, it is possible that the Debtors could have positive net monthly income. However, this calculation does not provide for the increased tax withholding of $789.87 per month, nor the cost of administering a chapter 13 case, nor possible charitable deductions by the Debtors. Moreover, this calculation assumes that the non-mortgage expenses would be limited to $488.00 as opposed to the Debtors' budget of $1,452.50. The Court's review of the proposed non-mortgage expenses suggests that the Debtors would prevail on at least some of the more expensive items that are not controllable, including their homeowners association dues, electricity, gas, water, sewer and garbage. Therefore, based on the evidence presented, the Court cannot find that the Debtors could make any distribution in a chapter 13 plan following the procedures set out in 11 U.S.C. § 1325.

Moreover, the Court notes that this case differs from many reported decisions where a debtor, by filing a chapter 13, could utilize procedures for reducing the debt not available to them in a chapter 7. For example, in this case, the Debtors cannot "lien strip" because there is only one lien on their real property. Contra In re Gilmore, 09-64893 (Bankr. N.D. Ohio, June 8, 2010). Moreover, it appears the two vehicles, which the Debtors own and intend to reaffirm, were both acquired within 910 days of the filing of the bankruptcy petition, and, therefore, it is unlikely the Debtors would be able to reduce the amount of those secured claims. 11 U.S.C. § 1325(a); contra In re McPhail, 10-61090 (Bankr. N.D. Ohio, Aug. 27, 2010). Lastly, the Debtors have not included in their budget the payment of any debt such as back taxes or mortgage arrearage or student loans or the like which may be paid over time under a chapter 13 plan. Id. In short, the use of chapter 13 does not enhance the debtors' disposable income in this particular case. This factor points to a lack of abuse.

DEBTORS' BUDGET

The final factor for consideration is whether the Debtors' budget is reasonable. As stated above, this factor must be more than a dislike of the outcome of the means test. In re Nockerts, 357 B.R. at 506. The Court is looking for evidence of abuse; that is evidence that a debtor does not deserve the protection the Bankruptcy Code affords. The Court is not a fan of debtors with large houses. It is certainly bothersome to the Court that the Debtors have been unwilling to surrender their house, even though it appears to be larger than necessary and even though it appears more expensive than they can comfortably afford in their current financial situation. The Court believes there are situations where debtors keeping a large, expensive house in lieu of paying debts is an abuse under Section 707(b) or would cause a chapter 13 plan to be denied confirmation on good faith grounds. However, this is not such a case.

The Debtors bought the house 10 years ago for a purchase price of $260,000.00, which is not an egregious amount in this location. The reason for the high mortgage expense of the Debtors is not because of the purchase price of the house, but rather because they used the equity in their house to pay debt on the assumption that their income would rebound to "normal" levels. That did not happen, but it was not an unreasonable assumption on the part of the Debtors at the time. As to the non-mortgage living expenses, the Court could certainly pick at individual items, but concludes that largely the expenses are in line for a house of that size.

The Debtors have largely agreed to exclude the other budgeted items to which the United States Trustee objects for purposes of determining monthly income, other than the purchase of whole life insurance. The Court notes that there are cases which "disallow" the cost of whole life insurance as an "investment" (as opposed to term life insurance) in some circumstances. In re DeRosear, 265 B.R. 196, 211 (Bankr. S.D. Iowa 2001); In re Lipford, 397 B.R. 320 (Bankr. M.D.N.C. 2008). But contra See In re Mauer, 2009 WL 2461380 (Bankr. N.D. Ohio 2009) (disallowing as unreasonable term policies on the debtors' lives and allowing as reasonable debtors' whole life policy); See also In re MacNamara, 2009 WL 1606985 (Bankr. M.D. Pa. 2009) (disallowing as unreasonable debtors' term life policies and allowing as reasonable a whole life policy for one debtor). However, this factor would not be sufficient alone to dictate the outcome in this case and the amount spent on a whole life policy is not enough to change the Debtors' disposable income. Moreover, the Court was presented with no evidence as to the amount of the insurance, which Debtor was insured, the identity of the beneficiaries or the date(s) of the purchase. The United States Trustee seems to suggest that the purchase of whole life insurance is *per se* abusive and the Court declines to so rule.

The United States Trustee and its witness spent a fair amount of time criticizing and explaining the effects of the Debtors' decision to continue making deposits to their 401(k) and then removing money from the 401(k) to cover the shortfall in living expenses. The Debtors' approach, according to the United States Trustee's witness, has increased the Debtors' likely tax liability by $9,478.49. The Court agrees that the Debtors' approach does not appear to be financially sound. However, as discussed above, the deposits to the 401(k) may be permitted in calculating disposable income for purposes of chapter 13 and, therefore, are not presumptively abusive. The United States Trustee presented no evidence that the amount of the contribution had increased on the eve of bankruptcy. Contra In re Shelton, 370 B.R. 861 (Bankr. N.D. Ga. 2007). Moreover, the amount of the deposit is not sufficient to make a real difference in the Debtors' disposable income and, since the Debtors use it to cover living expenses, it is not really set aside anyway. These Debtors appear to continue to make poor financial decisions, but that is not atypical for Debtors. Unfortunately for these Debtors, they will be ineligible for a discharge of the debts that arise by virtue of their continued poor financial planning. Nevertheless, their actions in depositing funds into a 401(k) only to withdraw them later to cover living expenses, does not lead the Court to conclude that the chapter 7 case is an abuse.

Finally, the Court notes that the Debtors are reaffirming their mortgage debt of $335,799.00 and two car loans so that the total amount of reaffirmed debt will be $378,425.22. Of this, according to the Debtors' schedules, $81,661.22 would be unsecured if the cars and the house were returned, because of the values of the collateral. According to the Debtors' schedules, the total unsecured debt which will be discharged by a chapter 7 is approximately $126,148.00 (consisting of the debts scheduled on Schedule F and the deficiencies on the boat and lake house scheduled on Schedule D). If the scheduled deficiency on the house and cars ($81,661.22) is added, the Debtors' total unsecured debts $207,809.77. The Debtors, by reaffirming the amount of debt that they have, are agreeing to pay $81,661.22 on what is functionally unsecured debt. They are not obtaining a discharge of all debt, but rather will be carrying a hefty burden of debt obligations going forward. The fact that some debt is preferred over others, while unfortunate, is not unlawful. The debt which is being reaffirmed is secured debt and those creditors typically obtain priority.

The Court notes the lack of specific evidence in this case, which when presented to courts in other cases, has led to dismissal. Here, the Court has no evidence of the actual cost of the Debtors obtaining alternative suitable housing, no evidence of what the Debtors charged to their credit cards, no evidence of the nature and extent of the Debtors' living expenses over the last three years as the Debtors' income declined, and no evidence as to the amount of life insurance on each Debtor. Based on the evidence presented, the Court cannot find the Debtors' budget abusive.

CONCLUSION

When the Court evaluates the totality of the circumstances of the financial condition of the Debtors, it concludes the United States Trustee has not carried its burden of proving an abuse. The Court stresses again that these Debtors have "passed" the means test, and that there are no allegations of bad faith. Moreover there is no evidence that the Debtors have projected disposable income with which the Debtors can make a chapter 13 plan payment and no evidence that the Debtors can find alternative living arrangements sufficient to create monthly disposable income. In short, the Court is left with nothing more than the fact that the Debtors have a big house, which is more than they need and more expensive than they can afford. However, the house was purchased 10 years ago, at a time when the Debtors could afford the house, and was not purchased recently as a means of "parking" Debtors' equity.

The United States Trustee argues that it is unfair to allow Debtors to build up equity in a house at the expense of the unsecured creditors. If the Debtors' valuation is correct, however, the house is underwater by over $75,000.00. Before unsecured creditors would have any access to any equity, the value of the house must increase in value by not only this amount but also by the exemption available to the Debtors. The Court finds it unlikely that this “equity” will occur any time soon for these Debtors. The Court notes, finally, that, by retaining the case in a chapter 7, a trustee is appointed, and the Court hopes the chapter 7 trustee will evaluate the value of the house assigned by the Debtors. It is remarkable that, notwithstanding the Debtors’ debt load and the recession, they were able to refinance the house in March of 2009, and the lender obtained an appraisal of $395,000.00. If, of course, the Trustee determines that the value of the house exceeds the debt, the Trustee will have the right to sell the house and obtain any equity for the unsecured creditors.

The Debtors made efforts to pay their debts by refinancing their obligations. The Debtors continue to make efforts to pay some of their debts through the reaffirmations of their house and car loans. Mr. Rudmose has no employment, and Mrs. Rudmose’s income is continuing to decline. The debt which is being discharged was taken out over a period of time, with the expectation that the Debtors would return to their prior income levels and be able to pay the debt in full. These Debtors have no prior history of filing bankruptcy or repeat financial difficulty.

For the foregoing reasons, the Court finds the filing of the chapter 7 petition is not an abuse under 11 U.S.C. § 707(b)(3) and DENIES the Motion.

END OF DOCUMENT