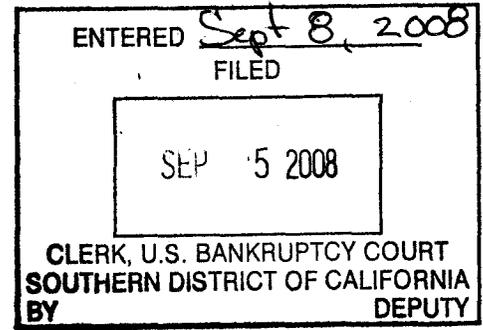


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA

10  
11 In re: Stephen Cascioppo and  
12 Rachelle Agatha,  
13 Debtors.

11 } BK. No. 07-06043-LT7  
12 }  
13 } MEMORANDUM DECISION  
14 }

15  
16  
17 Debtors Stephen Cascioppo and Rachelle Agatha (collectively, "Debtors") are a  
18 fortunate professional couple who enjoy income that is substantially greater than the  
19 applicable median income for San Diego County. Debtors suffered no catastrophic adverse  
20 life event prior to or after initiation of their chapter 7 case and, instead, filed bankruptcy to  
21 discharge an "unbearable" level of debt arising from voluntary decisions regarding debt  
22 acquisition. At issue in this case is whether Debtors should be able to discharge over  
23 \$160,000 of credit card debt as well as other liabilities or whether this case should be  
24 dismissed under 11 U.S.C. § 707(b)(3)(B) because such a discharge would constitute an  
25 abuse.

26  
27 A motion to dismiss a bankruptcy case is a core proceeding under 28 U.S.C.  
28 § 157(b)(2)(A). The Court has jurisdiction over core proceedings under 28 U.S.C. § 1334

1 and General Order No. 312-D of the United States District Court for the Southern District of  
2 California.

3  
4 This Memorandum Decision follows an evidentiary hearing held on June 18, 2008  
5 (the "Evidentiary Hearing") on the United States Trustee's Motion to Dismiss Case Pursuant  
6 to 11 U.S.C. § [sic] § 707(b)(3)(B)<sup>1</sup> (the "Motion") filed on January 28, 2008. This  
7 Memorandum Decision constitutes the Court's findings of fact and conclusions of law,  
8 pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

9  
10 **FINDINGS OF FACT**

11  
12 **1. Debtors' Voluntary Filing And Their Asset, Liability, And Income**  
13 **Information As Of The Filing Date.**

14  
15 a. Debtors filed a voluntary Chapter 7 petition (the "Petition") on  
16 October 29, 2007 and, in connection therewith, filed Schedules and a Statement of Financial  
17 Affairs (the "Schedules").<sup>2</sup> The Debtors acknowledge in the Petition that their pre-petition  
18 debts are primarily consumer debts within the meaning of 11 U.S.C. § 101(8).

19  
20 b. The Schedules disclose that Debtors owed \$1,175,941.86 in pre-  
21 petition secured debt.

22  
23  
24  
25 <sup>1</sup> Unless otherwise specified, references to code sections herein shall refer to Title 11 of the  
26 United States Code, also referred to as the Bankruptcy Code. References to the transcript of the  
Evidentiary Hearing, docket #44, are abbreviated "Tr."

27 <sup>2</sup> Docket #1. As requested in the Motion, the Court has taken judicial notice of the bankruptcy  
28 court's records in this matter pursuant to Federal Rule of Evidence 201. Specific schedules filed by  
the Debtors shall be referred to herein by name.

1 c. The majority of Debtors' scheduled secured debt, \$1,126,770.64,  
2 related to Debtors' former home in Dorado Hills, California (the "Dorado Hills Home").  
3 The Debtors' Statement of Intention disclosed Debtors' intention to surrender the  
4 Dorado Hills Home. Consistent therewith, a lienholder obtained an uncontested order for  
5 relief from the automatic stay on December 10, 2007, and, thereafter, the Court entered an  
6 order allowing a "short sale" of the Dorado Hills Home for \$730,000.<sup>3</sup> It is the  
7 understanding of the Court that the first trust deed holder agreed to waive its deficiency in  
8 connection with this sale, but it is not known whether the second trust deed holder will  
9 waive its deficiency in connection with this sale.<sup>4</sup> Tr. 8:6-16.

10  
11 d. Debtors also owed \$49,234.22 on account of two pre-petition car loans,  
12 one secured by a 2005 Ford F150 truck and one secured by a 2006 Ford Mustang.

13  
14 e. The Schedules disclose that Debtors also own a third car, a 2004 Acura,  
15 that is free and clear of any lien. The Debtors need the truck only on weekends when they  
16 travel as a family. Tr. 50:21-55, 51:1-11.

17  
18 f. Debtors' Schedules listed \$169,843.90 in pre-petition unsecured debt.  
19 All but \$4,089.69 of this debt is described as "miscellaneous credit card debt."

20  
21 g. Schedule I states that the Debtors have five dependants, all daughters,  
22 ranging in age from 17 to 11 years of age. While this statement is technically accurate, it is  
23

24  
25  
26 <sup>3</sup> Docket #38.

27 <sup>4</sup> The United States Trustee offered hearsay and unsworn testimony in this regard at the Evidentiary  
28 Hearing. Tr. 8:6-16. The Debtors did not dispute the testimony, but they also indicated that they  
had no such agreement with the second trust deed holder.

1 also true that the two older daughters<sup>5</sup> do not reside regularly with the Debtors and, indeed,  
2 visited only occasionally and sporadically during the last year. Tr. 48:17-20; 57:17-23.

3  
4 h. Schedule I identifies Debtors' then current net monthly income as  
5 \$14,150.21. This amount includes \$916.67 of distributions from Mr. Cascioppo's family  
6 trust. Mr. Cascioppo can neither invade principal nor increase trust distributions at this  
7 time. Tr. 60:19-21.

8  
9 i. Schedule J identifies \$18,576 of total monthly expenses. Mortgage  
10 payments on the Dorado Hills Home accounted for \$10,620 of this amount. Thus,  
11 Schedule I alleges that Debtors' monthly expenses exceeded monthly income by \$4,425.79.

12  
13 j. Consistent with the shared custody situation discussed in footnote 2,  
14 Schedule J showed monthly alimony, maintenance, and support paid to others of \$1,900.  
15 The amount of maintenance, support, and alimony may be subject to change, however, as  
16 one daughter has now reached the age of 18, has graduated from high school, and will not  
17 attend college. This will reduce support obligations by \$267 per month. Tr. 66:16-20.

18  
19 k. At the same time, however, Mr. Cascioppo's ex-wife currently seeks  
20 physical custody of another daughter who now resides with Debtors and in connection  
21 therewith may seek additional support in an unspecified amount. Tr. 65:13-20.

22  
23 l. As of the petition date the applicable median family income for a  
24 family of seven was \$93,696. Debtors received monthly income almost three (3) times this  
25 amount.

26  
27  
28 <sup>5</sup> Custody of the two older daughters is shared 50/50 by Mr. Cascioppo with his ex-wife who lives  
in Temecula and with whom these two daughters primarily reside. TR. 48:11-20; 57:9-19.

1 m. Mr. Cascioppo as the beneficiary of an extremely favorable employer  
2 funded retirement plan receives retirement contributions of \$1,747.05 per month. Trial  
3 Exh. 3 p.1. Mr. Cascioppo also has available to him a "flex spending plan" that provides for  
4 some tax avoidance in connection with certain healthcare expenditures. Tr. 61:10-25, 62:1-  
5 9.

6  
7 n. Schedule I establishes that Ms. Agatha currently makes voluntary  
8 contributions into an employer sponsored retirement plan of \$656.24 per month.

9  
10 o. Schedules B and C identify over \$200,000 of various forms of pre-  
11 petition exempt retirement savings.

12  
13 **2. Reasons For Bankruptcy Filing; San Diego Relocation.**

14  
15 a. There is no evidence that any negative life event such as serious illness  
16 or death, catastrophic loss, or termination of employment is the cause for Debtors' financial  
17 problems.

18  
19 b. Instead, Debtors blame their financial plight, including almost  
20 \$160,000 of credit card debt (and the failure to pay approximately \$25,000 of 2007 taxes),  
21 on a decision to relocate to San Diego and the resultant need to: (1) maintain two  
22 households for a few months while Mr. Cascioppo resided alone in San Diego; and (2) to  
23 make unspecified improvements to their Dorado Hills Home prior to sale. Debtors allege  
24 that when the Dorado Hills Home could not be sold so as to pay off the notes it secured and  
25 their huge credit card debts, their financial position became "unbearable." Declaration of  
26 Rachelle Agatha in Opposition to the United States Trustee's Motion (Docket #30,  
27 hereinafter "Agatha Decl.") at ¶¶3 & 4.

28

1           c.       The decision to relocate to San Diego was one of choice not of  
2 necessity; Debtors moved to allow Mr. Cascioppo to begin a new job that provided  
3 opportunities for financial as well as professional benefit. Tr. 52:9-23; 62:10-25 and 63:1-2.  
4 Previously, Mr. Cascioppo served as a California Superior Court Executive Officer for the  
5 County of Eldorado. Tr. 52:24-25 and 53:1. He accepted a new position with the  
6 San Diego Superior Court that provided an immediate salary increase as well as enhanced  
7 opportunities for future career advancement and additional salary increases. Tr. 62:10-25.  
8 Section 1 of Debtors' Statement of Financial Affairs indicates that Mr. Cascioppo earned  
9 \$135,662 from El Dorado County in 2006, but, as Schedule I demonstrates, he anticipated  
10 annualized income of \$144,123.60 in his new position.

11  
12           d.       Ms. Agatha is a certified public accountant who promptly obtained  
13 employment as a CPA with Sharp Healthcare after she moved to San Diego. Tr. 33:2-4 and  
14 Agatha Decl. ¶4. A comparison of Schedule I and Section 1 of Debtors' Statement of  
15 Financial Affairs indicates that Ms. Agatha's salary also increased from \$109,166 in 2006 to  
16 an annualized gross income of \$114,072.48. Ms. Agatha's actual income for 2007  
17 apparently cumulated to slightly below her 2006 salary level due to transition between jobs.

18  
19           e.       The Debtors appear to be sophisticated and intelligent. There is no  
20 evidence that their financial decisions to date were the result of any factor beyond their  
21 control.

22  
23           **3. Debtors' Responses To The Motion.**

24  
25           a.       In response to the Motion, Debtors submitted revised Schedule I  
26 ("Revised Schedule I") and revised Schedule J ("Revised Schedule J") as Exhibit A to the  
27 Agatha Declaration. A review of the Debtors' various Schedules I and J indicates, among  
28

1 other things, that Debtors incur expenses and, in connection therewith, enjoy a life style  
2 sufficiently above the median standard for San Diego County.

3  
4 b. Revised Schedule J shows a significant decrease in expenses related to  
5 Debtors' housing as a result of the surrender of the Dorado Hills Home. Debtors now rent a  
6 home for \$3,500 per month. Their current rent expense, alone, while substantially less than  
7 their previous mortgage payments, is over \$1,000 above the applicable IRS Standard for  
8 housing plus utilities for a family of five or greater. In selecting this rental, the Debtors  
9 rejected one more expensive rental. Agatha Decl. ¶7a.

10  
11 c. This significant decrease in housing expense and other small decreases  
12 in housing related expenses such as utilities and property insurance, however, is offset by  
13 substantial increases in other expense areas and the addition of significant expenses not  
14 previously scheduled. Agatha Decl. ¶7a-c; Trial Exh. 2 at 3.

15  
16 d. Revised Schedule J reflects expenses related to Debtors' three  
17 automobiles of \$1,250 per month. Agatha Decl. ¶7c., Trial Exh. 2 at 3. This represents a  
18 \$700 per month increase over the original Schedule J car related expenses. Car payments  
19 remain the same at \$1,171 per month for two of the three vehicles.

20  
21 e. Revised Schedule J includes \$780 for childcare. Agatha Decl. ¶7d;  
22 Trial Exh. 2 at 3. Childcare is allegedly necessary in order to provide transportation to  
23 school for the three children now aged twelve through fifteen. Id.

24  
25 f. Revised Schedule J significantly increases claimed expenses for food  
26 from \$900 to \$1,250 per month. Trial Exh. 2 at 3.

27  
28

1           g.     The most significant increase reflected in Revised Schedule J is in the  
2 area of taxes. The Debtors' real property taxes of \$583 are no longer scheduled. However,  
3 the Debtors testified that they have underpaid 2007 taxes significantly such that on a post-  
4 petition basis they will be required to pay \$2,076 monthly for twelve months to clear the  
5 arrearage. Agatha Decl. ¶ 9. They also schedule significant monthly estimated tax  
6 payments that were previously unscheduled. Agatha Decl. ¶10; Trial Exh.2 at 3.

7  
8           h.     The Debtors continue to spend \$691 monthly on cable, internet, and  
9 telecommunication expenses including expenses related to seven cell phones. Tr. 50:1-6.  
10 Mr. Cascioppo has a separate cell phone provided by his employer, although it is not clear  
11 from the testimony whether Debtors included this phone among the seven. Id.

12  
13           i.     Debtors' Revised Schedule I reflects increases in income for both  
14 Debtors in 2008. Trial Exh. 2. Thus, Debtors' gross income has increased from \$14,150.21  
15 on Schedule I to \$16,324.61 on Revised Schedule I. Id. The evidence, including the post-  
16 petition salary increase reflected in Revised Schedule I, establishes that the Debtors should  
17 enjoy regular income hereafter.

18  
19           j.     The result of the revisions is an admitted decrease in the amount by  
20 which the Debtors' expenses exceeded income from a negative of \$4,425.79 a month on  
21 Schedule I to a negative of \$1,672.89. Trial Exh. 2 at 3.

22  
23           k.     At the Evidentiary Hearing, Debtors attempted to introduce evidence of  
24 additional unscheduled expenses. See Trial Exh. 4, 5 and 6. These included attorneys' fees  
25 related to a post-petition custody and child support dispute initiated by Mr. Cascioppo  
26 against his ex-wife and evidence allegedly establishing actual food and clothing expenses  
27 from March 2008 through May 2008 in higher amounts than those set forth in Revised  
28 Schedule J. Id.; Tr. 58:10-22. Food expenditures allegedly averaged \$1,684.27 per month

1 as opposed to \$900 on Schedule J and \$1,250 on Revised Schedule J. Trial Exh. 4 & 5.  
2 Clothing expenses allegedly averaged \$833.06 over the three month period as compared  
3 with \$500 as set forth in Schedule J and Revised Schedule J. Id.

4  
5 1. Notwithstanding these allegedly increased expenses, Ms. Agatha  
6 testified that with the exception of the \$1,000 per month of attorneys' fees payable on  
7 account of Mr. Cascioppo's custody battle, the Debtors would "be fine" Tr. 45:16-17.  
8 Consistent with this testimony, the Debtors' closing brief states that: ". . . Debtors [sic]  
9 monthly expenses exceed their income by \$1,080.36 each month." Debtors' Closing  
10 Brief 4:4-5.<sup>6</sup>

11  
12  
13 **4. The United States Trustee Provides Calculations Indicating Debtors'**  
14 **Ability To Pay A Portion Of Their Unsecured Claims Even Assuming Many Of**  
15 **Debtors' Alleged Expenses.**

16  
17 a. The United States Trustee filed three declarations of bankruptcy analyst  
18 Randall A. Horton; the first with the Motion (hereinafter "Horton Decl. #1" at Docket #26),  
19 one with the Reply filed by the United States Trustee (herein after "Horton Decl. #2" at  
20 Docket #40), and the third with the United States Trustee's Final Brief (hereinafter "Horton  
21 Decl. #3" at Docket #48). Mr. Horton testified regarding the first two declarations and his  
22 calculations. Tr. 17-31. The Court will not summarize the exact calculations in detail in  
23 these findings, but notes, generally, that Mr. Horton's calculations persuasively establish that  
24 even if Debtors' expense allocations are true in many respects, that the Debtors have the  
25 ability to repay their creditors significantly. These calculations consistently and, in the  
26 opinion of the Court, appropriately do not include voluntary retirement contributions by  
27

28 <sup>6</sup> Docket #47.

1 Ms. Agatha and make appropriate modifications to both income and taxes in connection  
2 therewith. These calculations are provided in the alternative and utilize, in some cases, an  
3 IRS Guideline figure in an area such as housing while others utilize the actual rental  
4 expense of the Debtors. While these calculations do not consistently utilize the exact  
5 numbers as advanced by the Debtors, and in particular do not utilize the new expense  
6 evidence provided for the first time at the Evidentiary Hearing, they evidence an ability on  
7 the part of the Debtors to pay, at a minimum, \$50,000 of their unsecured claims. Tr. 31:5-  
8 11.

9  
10 b. The United States Trustee strongly objected to the introduction of the  
11 new expense evidence at the Evidentiary Hearing and reserved its right to object to other  
12 expense items as not reasonably necessary for the support of the Debtors and their family.  
13 Tr. 10:8-14.

## 14 15 **DISCUSSION**

16  
17 11 U.S.C. § 707(b)(3)(B) allows dismissal of a debtor's chapter 7 case where the  
18 debtor owes primarily consumer debts<sup>7</sup> and where: "the totality of the circumstances . . . of  
19 the debtor's financial situation demonstrates abuse." The plain language of  
20 section 707(b)(3)(B) requires that the Court evaluate both a debtor's pre and post petition  
21 financial position as well as other relevant factors. *See, e.g. In re Pennington*, 348 B.R. 647,  
22 651 (Bankr. D. Del. 2006) (financial condition at the time of hearing may be considered).  
23 The goal of this inquiry is to generally identify abuse, but most particularly to determine  
24 whether a debtor's receipt of a discharge under chapter 7 would constitute abuse because the  
25 debtor has the ability to make some payment to creditors. *See In re Mestemaker*, 359 B.R.  
26 849, 855 (Bankr. N.D. Ohio 2007) (clearly, Congress intended debtors who have the ability  
27 to pay debt to do so). Thus, a debtor's actual debt paying ability is the critical point of  
28

1 inquiry. *Id.*; *In re Lenton*, 358 B.R. 651, 663-664 (Bankr. E.D. Pa. 2006); *Pennington*,  
2 348 B.R. at 651. In conducting this inquiry, this Court considered all sources of income, all  
3 types of expenses, and all changes reasonably anticipated as demonstrated by the evidence  
4 submitted to the Court.

5  
6 Debtors enjoy benefits far greater than most. They enjoy professional careers that  
7 appear to be rewarding to them, both in terms of compensation and job challenge. Their  
8 salaries place them well above the median income for San Diego County, and the income  
9 the Debtors enjoy appears to be stable. While Ms. Agatha's job is new, she is a CPA. As a  
10 professional she has marketable job skills that she can continue to utilize to the benefit of  
11 her family. Significantly, she located employment at an enhanced salary after her move to  
12 San Diego. Similarly, Mr. Cascioppo has been employed in the California Superior Court  
13 System for a significant period of time. He left his prior job as a court executive in the  
14 Eldorado County Superior Court, to pursue an opportunity with the San Diego Superior  
15 Court that pays slightly more money and offers a better chance for long term professional  
16 advancement. Thus, the Court concludes easily that the Debtors will have steady cash flow  
17 from employment in the future.

18  
19 In addition to the cash flow that can reasonably be expected from employment,  
20 Mr. Cascioppo is also the beneficiary of a family trust which provides steady monthly  
21 income. Although the Trust does not allow him to invade principal or to increase income in  
22 any appreciable fashion in the near future, it provides another source of reliable income.

23  
24 Finally, the Debtors, unlike most who seek discharge under chapter 7, have  
25 significant retirement savings. The Debtors came into bankruptcy with more than \$200,000  
26 of exempt retirement savings. In addition, Mr. Cascioppo continues to be supported by  
27 generous employer contributions. The paystub provided to the Court by Debtors (Trial

28  

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<sup>7</sup> The parties agree that the Debtors' pre-petition debt is primarily consumer debt.

1 Exh. 3) evidences that his employer deposits approximately \$1,747.05 per month on his  
2 behalf into a tax deferred retirement account. Ms. Agatha has also increased retirement  
3 savings through post-petition contributions. Trial Exh. 3 at 2. Thus, the Debtors also have a  
4 "nest egg" for their retirement years, which continued to grow during the course of their  
5 bankruptcy case and should grow through employer contributions hereafter.

6  
7 In summary, the Debtors earn more than three times the median income for this  
8 community. As a result, their gross income exceeds the median for a family of seven by  
9 \$185,541 and the median for a family of five by \$199,341. They also have a high level of  
10 anticipated job security and their trust income and assets and past and future retirement  
11 savings provide additional protection. In short, by any estimation, Debtors enjoy income  
12 and other financial resources that are substantially above the average for this community. In  
13 determining whether abuse exists in connection with section 707(b)(3)(B), the Court can  
14 and should closely scrutinize any case where debtors enjoy income far above the median –  
15 especially when no adverse life events exist. *In re Wadsworth*, 383 B.R. 330, 333 (Bankr.  
16 N.D. Ohio 2007).

17  
18 In light of their significant income and retirement savings, the Court anticipated  
19 evidence of some non-economic difficulty that complicated Debtors' lives and caused the  
20 financial crisis that resulted in a bankruptcy. However, there is no evidence of any such  
21 difficulties. The clouds on Debtors' horizons are few. Debtors have not suffered from  
22 catastrophic loss or termination of employment, and neither death, disability nor serious  
23 illness has touched Debtors or their children. The only dark clouds that follow Debtors are  
24 their significant financial problems. Thus, this is not a case where the Debtors' financial  
25 problems arose from circumstances beyond their control.

26  
27 The evidence regarding the reason for Debtors' financial problems is slim.  
28 Ms. Agatha, in her declaration and in her testimony, blames these difficulties on the family's

1 need to maintain two separate households during the period when Mr. Cascioppo moved  
2 from his job in Eldorado County to a job in San Diego County. The Court, frankly, finds  
3 this explanation inadequate given the quantum of debt involved. Whatever the cause or  
4 causes, however, the Debtors were unable to maintain payments on \$1,126,770.64 of debt  
5 secured by their prior residence. As a result of the current housing market, the Debtors were  
6 unable to refinance the house or sell it for an amount sufficient to pay this debt in full. In  
7 addition, Debtors underpaid their 2007 income taxes by approximately \$25,557 and  
8 amassed credit card debt of more than \$160,000. Ultimately, the Debtors found this  
9 situation unbearable, and initiated a chapter 7 case. The Court notes that while the move  
10 may have created some financial hurdles, given the very positive short and long term  
11 benefits to the Debtors from the move, it is not the kind of catastrophic life event that points  
12 in favor of a discharge. Indeed, Debtors, in effect, argue that they should be allowed to  
13 discharge debt incurred largely – if not solely – to allow them enhanced income and  
14 professional advancement in the future. But, bankruptcy allows a fresh start – not a  
15 jumpstart at the expense of creditors – as the Debtors request. *Wadsworth*, 383 B.R. at 334.  
16 If the Debtors have the ability to repay their obligations in meaningful part, they should do  
17 so.

18  
19 The Debtors entered their chapter 7 case with substantial debt. However, they have  
20 decreased their debt from pre-petition levels. The United States Trustee's counsel  
21 represented at the time of the hearing that the Debtors closed a short sale on the  
22 Dorado Hills Home and that the senior lender has agreed to waive any deficiency resulting  
23 from this sale. The United States Trustee also suggests that the second trust deed lender  
24 may have made a similar agreement. The Court finds this substantially less likely given that  
25 the second trust deed lender did not receive any significant payment, but it is possible.

26  
27  
28

1 Thus, the Debtors have remaining unsecured debt of \$169,843.90 to approximately  
2 \$296,559.<sup>8</sup>

3  
4 Having cleared some but not all of their Dorado Hills Home related debt, the Debtors  
5 still face automobile secured debt, substantial pre-petition credit card debt, and other  
6 unsecured debt. They claim a total inability to pay any portion of their pre-petition debt due  
7 to current expenses incurred in maintaining and supporting their family. The Debtors are  
8 the parents of five daughters who appear to be normal healthy teenagers. As a result, they  
9 base their estimated expenses on a family of seven. It is worth emphasizing, however, that  
10 Debtors are double dipping when they ask the Court to assume that they are a seven person  
11 family. They ignore the custody arrangement and age of Mr. Cascioppo's two older  
12 children. These "children" do not principally live with Debtors and during the prior year  
13 visited only sporadically. Tr. 57:20-23. Mr. Cascioppo pays significant child support and  
14 spousal support that is deducted as an expense from his overall income. His ex-wife,  
15 however, provides some measure of support for these two children who live with her in  
16 Temecula. Further, Mr. Cascioppo testified that his 18 year old daughter will not attend  
17 college, that he will soon cease paying child support of \$267 for this daughter.

18  
19 The evidence before the Court also indicates that with the exception of recent  
20 attorneys' fees related to a resumption of warfare related to Mr. Cascioppo's divorce, the  
21 family is doing "fine." Ms. Agatha testified that except for these attorneys' fees they were  
22 able to meet their post-petition bills on a regular basis. Thus, the Debtors admit that their  
23 expenses exceed their liabilities by no more than \$1,080.36. Debtors' Closing Brief 4:4-5.  
24 As will be discussed below, the family enjoys a lifestyle that shows no evidence of economy  
25 or of any particular distress or belt tightening and, thus, they are doing "fine" even though

26  
27 <sup>8</sup> This number is based on the total amount of scheduled general unsecured claims plus the amount  
28 scheduled by the Debtors as the amount of the second trust deed lien on the Dorado Hills Home,  
assuming deficiency is not waived.

1 their budget includes numerous items that are beyond those reasonably necessary for their  
2 maintenance and upkeep.

3  
4 At issue in this case is whether, given the totality of the circumstances, the Debtors'  
5 situation warrants dismissal under 11 U.S.C. § 707(b)(3)(B). The United States Trustee  
6 bears the burden on this issue. The United States Trustee does not assert that this is the case  
7 where fraud is involved. The Court agrees. This is not a case of bad people doing bad acts.  
8 However, an examination of the totality of the circumstances requires the Court to look  
9 closely at this case to determine not whether the filing of the bankruptcy was abusive, but  
10 whether the result of a discharge in chapter 7 – discharge of all unsecured debt – would be  
11 abusive. The Court having examined the totality of the circumstances in this case,  
12 concludes that it would be abusive for the Debtors to receive a complete discharge of debts  
13 in this case and, as a result, dismissal is appropriate.

14  
15 The United States Trustee, while reserving the right to challenge the reasonableness  
16 of individual expenses, does not focus on most of the actual line items in Debtors' various  
17 Schedule J budgets. Instead, she assumes Debtors' alleged actual expenditures in most  
18 instances and then demonstrates that, notwithstanding these expenses, the Debtors remain  
19 capable of repaying a substantial portion of their unsecured debt. The Court finds the  
20 testimony of Randall Horton and his analysis in this regard to be compelling. Mr. Horton,  
21 assuming many, but not all of the Debtors' expense numbers, still found that they had the  
22 capability of paying almost 30% of their creditors on a worst case basis (without taking into  
23 account the waiver of deficiency on the first mortgage on the Dorado Hills Home). Horton  
24 Decl. #2 ¶4. The Court acknowledges that Mr. Horton's numbers do not include the  
25 Debtors' newest numbers for clothes, food, and support dispute legal fees among other  
26 items. However, they do include in some scenarios numbers for telecommunications, rent,  
27 and transportation that the Court finds either frankly excessive or, at a minimum, well above  
28

1 what is reasonable and necessary for the Debtors to enjoy not a bare bones existence but a  
2 rich and full one in San Diego County.

3  
4 The United States Trustee's analysis does focus on the Debtors' repayment of  
5 2007 taxes. Horton Decl. #2 ¶3.O.; Tr. 29:6-25, 30:1-25, 31:1-11. While the United States  
6 Trustee agrees that repayment must occur, she focuses on the fact that taxes could be repaid  
7 over time in a chapter 13 or 11 plan and/or that if taxes are paid in one year<sup>9</sup> that funds  
8 previously utilized for tax payments will be available in later years for payment to pre-  
9 petition creditors. The Court agrees that the existence of unpaid 2007 taxes does not justify  
10 the conclusion that Debtors could not repay pre-petition debt. Indeed, by the Debtors' own  
11 admission, counting every expenditure they currently make, reasonable or otherwise, after  
12 2007 taxes are paid they will have an excess of income over liabilities of \$990 per month.  
13 As a result, the Court finds that the Debtors can, in fact, make payments to their creditors at  
14 a level well above the level justifying a finding of abuse.

15  
16 The Court, in analyzing the evidence and reviewing the arguments also took a  
17 searching look at the Debtors' various Schedule Js and their allegations regarding their  
18 ability to repay their debts. The Debtors claim to have no ability to pay any portion of their  
19 pre-petition debt. The Court, after reviewing the evidence, finds this assertion not credible.  
20 The Court agrees that the Debtors will not be able to repay all of their pre-petition debt.  
21 However, the Court strongly believes that the evidence establishes that Debtors have the  
22 ability to pay a meaningful portion of this debt if, on a post-petition basis, they make  
23 appropriate modifications to their lifestyle for the short period of time necessary to make  
24 these payments under a chapter 13 or 11 plan. The question of what those economies  
25 should look like is a question for a later day, but the Court is well satisfied after reviewing

26  
27 <sup>9</sup> The Court notes that without any reductions in spending it might take more than a year, but the  
28 analysis is the same, and as discussed hereafter expenditure reduction should be assumed in  
calculating a reasonable level of debt.

1 the evidence in this case that appropriate areas for economy exist and that abuse exists  
2 where those economies are not adopted to allow payment to creditors.<sup>10</sup> In reaching this  
3 conclusion, the Court focuses on the following:

4  
5       **1. Housing.** The Debtors rent a house for \$3,500; this amount is substantially  
6 more than Applicable IRS Standards for a house plus utility expenses for a family of seven  
7 in San Diego County. The Debtors' filing is quite deceptive on this point, however, since  
8 five, not seven, people actually reside in the house on a full time basis. Again,  
9 Mr. Cascioppo's two oldest daughters apparently resided in the house only "sporadically"  
10 during the past year. Thus, while the Court will not determine what type of house the  
11 Debtors should rent, the Court is comfortable that they are renting well above the median in  
12 the relevant market and that a perfectly acceptable rental at a lower cost is available. In  
13 short, some portion of Debtors' rent could be applied towards payment of their creditors'  
14 claims while providing the Debtors' family with a comfortable home. *See, e.g. Wadsworth,*  
15 *383 B.R. at 334-335 (finding mortgage expenses excessive); In re Zayas, 2007 WL 987240*  
16 *at \*4 and \*5 (Bankr. N.D. Ohio 2007).*

17  
18       **2. Transportation.** The Debtors own three automobiles. These three  
19 automobiles are extremely expensive to operate and loan payments in connection with two  
20 of the cars are also significant. Apparently the truck is only used for weekend driving when  
21 the five (or seven?) family members travel together. It is not unreasonable to assume that  
22 the Debtors could consolidate to reduce their car ownership to two vehicles, one of which is  
23 used both to commute and to transport the family. The Court roughly finds that one third of  
24 the Debtors' car maintenance expenses are unnecessary for the reasonable maintenance and  
25 upkeep of the family. Because both of the financed vehicles were purchased within the  
26 910 days prior to the current bankruptcy filing, they may be unable to avoid payment in full

27  
28 <sup>10</sup> The Court, having concluded that the Debtors can make payments to their creditors  
notwithstanding payment of Mr. Cascioppo's custody battle attorneys' fees, does not decide at this

1 under a chapter 13 plan. However, by surrendering one vehicle they would significantly, if  
2 not entirely, reduce this debt and free up cash to make creditor payments. *Wadsworth*,  
3 383 B.R. at 334.

4  
5 **3. Communications.** The Debtors pay almost \$700 for cable, internet usage,  
6 landline telephones, and seven cell phones. Mr. Cascioppo has an additional cell phone that  
7 he uses for work. Tr. 49:17-21. The Debtors' creditors cannot be expected to indulge the  
8 family in such expenses as they are clearly excessive. *See, e.g. In re Gonzalez*, 378 B.R.  
9 168, 174 (Bankr. N.D. Ohio 2007).

10  
11 **4. Ms. Agatha's Voluntary Retirement Contribution.** Ms. Agatha asked that  
12 the Court reduce income by amounts that she deposits into a retirement fund. As noted, the  
13 Debtors' retirement picture is promising given the substantial amount of retirement funds  
14 they have amassed to date and the fact that Mr. Cascioppo is receiving retirement  
15 contributions from his employer of \$1,747.05 per month. The United States Trustee argues  
16 and the Court agrees that there is no reason to reduce the amount available to creditors by  
17 the amount that Ms. Agatha determines to use in this fashion. *See, Wadsworth*, 383 B.R. at  
18 334-335. This reduction should be eliminated with a resultant increase in income available  
19 to pay creditors. The Court acknowledges that this increase would not be dollar for dollar  
20 given the tax consequences.

21  
22 **5. Post-Petition "Actual Expenses."** The Debtors ask the Court to utilize their  
23 "actual expenses" for food, clothes, paper products, etc. based on information provided in  
24 Revised Schedule J and at the evidentiary hearing. The United States Trustee objected to  
25 the introduction of evidence provided at the evidentiary hearing on the grounds that it was  
26 not submitted on a timely basis, is not supported by corroborating documentation, and is  
27 unfairly prejudicial. The Court agrees that this evidence is of limited if any evidentiary  
28 \_\_\_\_\_  
time whether such expenses are reasonably necessary for section 707(b)(3)(B) purposes.

1 value, but will not strike it.<sup>11</sup> However, this evidence has no probative value as an indicia of  
2 the appropriate monthly expense for food and clothing. First, without any detailed  
3 information as to the actual purchases, the Court cannot determine the cause for substantial  
4 expenditure increases over both Schedule J and Revised Schedule J levels. These  
5 expenditures, even if actual and "basic," could reflect bulk purchases or seasonal shopping  
6 with resultant decreases in later months. Thus, the Court rejects this summary data as  
7 indicative of an annualized average. And, even if the Court accepts that Debtors actually  
8 spent these amounts, the Court is not required to conclude that spending at this level is  
9 reasonably necessary for the support of the Debtors and their children. The IRS guidelines  
10 may not be a ceiling, but they are relevant and helpful points of comparison. *In re Eckard*,  
11 2008 WL 859155 \*4 (Bankr. N.D. Ohio March 31, 2008). Here, the Debtors' expenses for  
12 food, clothing, utilities, telecommunication, and other such items, far exceed IRS Standards  
13 for a family of seven.

14  
15 And again, the Court emphasizes the significant problem with the use of seven  
16 person family IRS Applicable Guidelines as the starting point. The evidence is clear; for  
17 most purposes this is a family of five – not seven. As a result the expenses for food, etc.  
18 even more significantly overstate the amount allowed by the IRS Applicable Guidelines and  
19 reasonably required by Debtors' family. The Court notes that this is one of many areas  
20 where the Debtors show no attempt at economy. As a result, the Court reasonably  
21 determines that reductions in this area can occur without depriving the family of a  
22 reasonably appropriate standard of living. The Debtors correctly note that the Court must  
23 consider actual expenditures, but incorrectly infer that the Court is bound by the Debtors'  
24 spending decisions. If this were the case, abuse could not be found even in cases involving  
25

26  
27 <sup>11</sup> While the Court agrees that the Debtors appear to be engaging in inappropriate gamesmanship by  
28 profering this evidence for the first time at trial, the United States Trustee is not prejudiced given  
the Court's decision – a decision reached even after this evidence is evaluated.

1 outrageous excess. The Court declines to adopt a rule that, to use a tired but apt phrase,  
2 leaves the fox to guard the hen house.

3  
4 The Court's analysis of the Debtors' expenditures indicates that with appropriate  
5 economy and belt tightening funds are available to make some payment to creditors.  
6 Eliminating voluntary pension contributions and the third car or truck and the reduction in  
7 support obligations more than erases the shortfall of \$1,086.36.<sup>12</sup> Reasonable belt  
8 tightening in other areas, even if expenditures continue to exceed IRS Standards, allows  
9 Debtors to make additional or alternative funds available to creditors.<sup>13</sup> The Court finds no  
10 evidence that these reductions will deprive the Debtors of anything reasonably necessary for  
11 their maintenance. Indeed, given the total absence of evidence of any previous attempt at  
12 economy, the Court finds that Debtors have a variety of areas, probably not limited to the  
13 ones indentified above, where they can make appropriate short term economic adjustments.

14  
15 The United States Trustee notes and the Court acknowledges that the current abuse  
16 standard under Section 707(b)(3)(B) of the Bankruptcy Code reflects a significant statutory  
17 change under the Bankruptcy Abuse Consumer Protection Act of 2005 ("BAPCPA").  
18 Previously, a court was required to find "substantial abuse." Various courts articulated  
19 factors which a court should evaluate in determining whether the substantial abuse standard  
20 was met in a case. Clearly the BAPCPA change in this area was intended to lower the  
21 threshold that a party seeking dismissal must meet. *In re Maya*, 374 B.R. 750, 754 (Bankr.  
22 S.D. Cal. 2007). However, the Court believes that under the facts of this case, even under  
23 previous case law, this case would be appropriate for dismissal.

24  
25 <sup>12</sup> The Court assumes through a rough and Debtors-favorable estimate that a reduction of one third  
26 of automotive expenses, 13 percent of car payments, fifty percent of Ms. Agatha's voluntary  
27 retirement contribution (a net effect after taxes), and \$267 of support for Mr. Cascioppo's eldest  
28 daughter.

<sup>13</sup> It appears reasonable on this record to assume salary increases and a cessation of  
Mr. Cascioppo's legal fees over the next three to five years, but the Court's analysis does not include  
such assumptions.

1 First, the ability of the Debtor to make some payment to creditors was a significant  
2 factor, and, indeed, in many courts the controlling factor, even under the previous  
3 substantial abuse cases. *See Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 914 (9<sup>th</sup> Cir. BAP  
4 1988).

5  
6 Second, as emphasized above, this is not a case where there is any death, disease,  
7 disaster or other outside calamity that caused the Debtors to seek bankruptcy protection.  
8 Instead, the Debtors, both knowledgeable professionals and one a certified public  
9 accountant, incurred substantial debt beyond their ability to pay. They did so, in large  
10 measure, specifically in connection with a determination to seek new employment to  
11 improve their long term prospects for financial and professional success. The Debtors, thus,  
12 not only have not pointed to compelling forces beyond their reasonable control as a reason  
13 for bankruptcy, they actually expect their creditors to fully finance their future success. The  
14 absence of life adversity as a cause of a debtor's financial problems was a factor under the  
15 substantial abuse test applied by some courts in the past and underscores the abusive nature  
16 of a discharge in this case. *See, Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4<sup>th</sup> Cir.  
17 1991).

18  
19 Similarly, the Debtors' unpaid debt is significant and includes over \$160,000 of credit  
20 card debt. Debtors' testimony, while not entirely credible on this point, suggests that all  
21 credit card debt results from expenses incurred shortly before bankruptcy when Debtors  
22 determined to sell their home and move to San Diego. The incurrence of significant  
23 consumer credit card debt shortly prior to bankruptcy and well beyond the Debtors' ability  
24 to fully and appropriately repay previously was a factor in determining substantial abuse and  
25 underscores the appropriateness of an abuse finding in this case. *Id.*

26  
27 Also, as discussed above, the Debtors' proposed family budget is clearly excessive in  
28 light of the reasonable need to economize to fund creditor payments. There is no evidence

1 whatsoever of belt tightening – among other things the family operates two newer cars and a  
2 new truck, everyone has a cell phone, and expenditures for clothes, food, etc. are above the  
3 IRS Guidelines and continue to rise. Despite significant pre-petition retirement savings and  
4 significant post-petition employer retirement contributions, the Debtors' budget also  
5 includes voluntary retirement contributions. An excessive budget was a factor in finding  
6 substantial abuse, and such a budget exists in this case. *Id.*

7  
8 The Court notes that, while it does not find that the Schedules contain misleading  
9 information, the Debtors have been less than candid in their response to the Motion. The  
10 Debtors' attempt to portray themselves as a seven person family for the purposes of  
11 expenses is disingenuous. In fact this is for all practical purposes a five person family with  
12 two daughters living in another home and with the expenses related to those daughters  
13 largely, if not entirely, reflected in the substantial support payments that are listed in  
14 Schedule J. This lack of candor underscores the appropriateness of an abuse finding in this  
15 case.

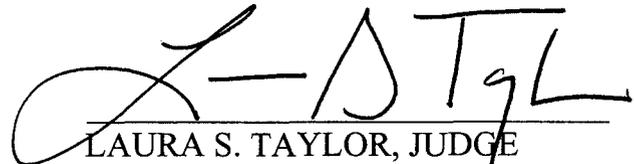
16  
17 And finally, the Court acknowledges that it is not clear as to whether the Debtors  
18 have access to chapter 13. However, the ability to access chapter 13 is not a deciding factor  
19 in section 707(b)(3)(B) cases. Even if a chapter 11 case is the Debtors' only option, they  
20 should be required to propose a chapter 11 plan and to provide their creditors with a  
21 meaningful opportunity for repayment. *Maya*, 374 B.R. at 755 (inability to access  
22 chapter 13 is not dispositive); *In re Zayas*, 2007 WL 987240 at \*3 (whether debtor will  
23 benefit from chapter 13 or 11 not controlling).

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**CONCLUSION**

Therefore, the Court Grants the Motion of the United States Trustee Seeking a Dismissal of Case Pursuant to 11 U.S.C. § 707(b)(3)(B). The United States Trustee should submit an appropriate form of judgment promptly.

DATED: September 4, 2008

  
LAURA S. TAYLOR, JUDGE  
United States Bankruptcy Court