

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Lamar and Estelle Robertson**

**Chapter 7**

**Debtor(s).**

**Bky Case No.: 04-41211**

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**NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE**

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TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion, before the Honorable Robert J. Kressel, U.S. Bankruptcy Judge, at 9:30 a.m. on October 6, 2004, in Courtroom No.8 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street, in Minneapolis, Minnesota.

Any response to this motion must be filed and delivered not later than October 1, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than September 27, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: \_\_\_\_\_

CLERK OF BANKRUPTCY COURT

By: \_\_\_\_\_  
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Lamar and Estelle Robertson**

**Chapter 7**

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**Bky Case No.: 04-41211**

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**NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)**

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TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion, before the Honorable Robert J. Kressel, U.S. Bankruptcy Judge, at 9:30 a.m. on October 6, 2004, in Courtroom No.8 West, at the United States Bankruptcy Court, United States Courthouse, at 300 South Fourth Street, in Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than October 1, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than September 27, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays).

Local Bankruptcy Rule 9006-1. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file

this motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on March 9, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors have listed the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtors have listed five claims totaling \$259,931.00. Three of the claims are for mortgages on two homes, one in Minneapolis (claimed to be their current homestead) and one in New Orleans (claimed to be a prior homestead). The remaining claims are for a 1996 Dodge Dakota and a 1993 Ford Probe, both of which will be retained. The debtors are current on all of their secured claims.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors have listed one claim to the IRS in the amount of \$4,200.00.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors have listed fourteen claims totaling \$ 8,961.00.
- (d) The debts listed in the debtors' Schedule of Liabilities appear to be primarily consumer debt. These debts are comprised of credit incurred to purchase consumer items. *See*

Debtors' Schedule F.

8. On Schedule I, Current Income of Individual Debtor(s), the debtors have listed a Total Monthly Net Income of \$3,700.00. However, according to copies to the debtors paycheck stubs their Actual Combined Monthly Net Income is \$ 4,417.53 <sup>1/</sup> There may also be additional source of income for Mr. Robertson from Filmtec, where he has also worked for the past two years. The debtors are married and have one dependent who is their grandson.

9. On Schedule J, Current Expenditures of Individual Debtors, the debtor have listed Total Claimed Expenses of \$4,191.00. Several of these expenses are excessive and should be reduced by the following. Gas/Electric in the amount of \$325.00 should be reduced by \$100.00. Mortgage in the amount of \$1,300.00 should be reduced by \$292.00 since the debtors' actual mortgage payment on their Minneapolis home is \$1,007.79, based on information received from the debtor. The third

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<sup>1/</sup>For security, copies of debtors' pay stubs are not attached to this motion so as to avoid dissemination of sensitive information over the internet. Upon request, the U.S. Trustee can provide a copy of these documents to the court, counsel for the debtor (if a copy was not retained) or the chapter 7 trustee.

Estelle Robertson - \$1,605.94 Average bi-weekly net pay (this amount includes automatic repayments on 2 loans which were added back to her pay since they are voluntary and should not be included) x 26 pay period per year \$41,754.44 divided by 12 months in year = \$3,479.54 monthly net income.

Lamar Robertson - based on paycheck stub for pay period ending 5/1/04 his YTD gross of \$5,687.59 divided by the 10<sup>th</sup> pay period = \$568.76 x 26 pay periods = \$14,787.76 divided by 12 months = \$1,232.32. With deductions for taxes of \$294.32 (this was figured the same as his income) Total Monthly Net Income \$ 938.00

mortgage payment in the amount of \$300.00 should be eliminated since it is payment on their second home in New Orleans.<sup>2/</sup> Tax payments in the amount of \$150.00 should be eliminated. The debtors' Auto Installments were listed at \$541.00, but their actual monthly payment is \$730.00 so an additional \$189.00 can be added to their claimed expenses. Total Adjusted Monthly Expenses are therefore \$3,538.00.

10. Total Monthly Claimed Net Income of \$4,417.53, minus the Adjusted Monthly Expenses of \$3,538.00 provides the debtors with a monthly disposable income of \$879.53. Over a 36 month chapter 13 plan the debtors would have \$31,663.08 with which to repay creditors. This would easily pay 100% of their Unsecured Priority Claims of \$4,200.00 and their Unsecured Non-priority Claims of \$8,961.00.

11. The debtors are currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future.

12. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their unwillingness to do so.

13. The United States Trustee may call Lynn Stoltzman, Bankruptcy Analyst, Office of U.S. Trustee, 1015 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, as a witness.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be

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<sup>2/</sup>The debtors also provided the U.S. Trustee with information showing that their actual mortgage payment on the New Orleans home is \$935.12. However, the U.S. Trustee used the stated figure on Schedule J for the calculations herein.

dismissed.

Dated: September 14, 2004

Respectfully submitted,

HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /s/ Michael R. Fadlovich  
Michael R. Fadlovich  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
MN ATTY No. 158410  
(612) 664-5505  
(612) 664-5516

## VERIFICATION

I, Michael R. Fadlovich, attorney for the United States Trustee, the movant named in the foregoing motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed on: September 14, 2004

Signed: /s/ Michael R. Fadlovich  
Michael R. Fadlovich  
Trial Attorney

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Lamar and Estelle Robertson**

**Chapter 7**

**Debtor(s).**

**Bky Case No.: 04-41211**

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**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS**

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This memorandum is submitted pursuant to Local Rule 9013-2(a). It appears that dismissal of this Chapter 7 case is appropriate under 11 U.S.C. 707(b).

**Analysis**

A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) of the Bankruptcy Code, which provides:

After notice and a hearing, the court, on its own motion or on a motion by the United States trustee but not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b)(1994). The United States Trustee bears the burden of showing substantial abuse.

*In re Dubberke*, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

**(1) The Debtor's Debts Are Primarily Consumer Debts.**

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to

payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debtor's debts are 100% consumer debts.

**(2) The Granting of Relief under Chapter 7 Constitutes  
Substantial Abuse of Chapter Seven of the Bankruptcy Code.**

To satisfy the "substantial abuse" standard under Section 707(b), the Eighth Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a 13 plan. *In re Walton*, 866 F.2d 981, 984 (8th Cir. 1989) (following *In re Kelly*, 841 F.2d 908, 914-15 (9th Cir. 1988); *United States Trustee v. Harris*, 960 F.2d 74, 76 (8th Cir. 1992); *Fonder v. United States*, 974 F.2d 996, 999 (8th Cir. 1992); *Huckfeldt v. Huckfeldt (In re Huckfeldt)*, 39 F.3d 829, 831 (8th Cir. 1994) (comparing § 707(b) to § 707(a)).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13

petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "The essential inquiry remains whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the Code." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In *In re Mathes*, the bankruptcy court held that the ability to repay 35% of the debtor's debt to unsecured creditors was a substantial abuse of the Bankruptcy Code. BKY 96-32602, slip op. at 8-9 (Bankr. D. Minn. August 21, 1996). The court took into consideration that the debtor would not suffer undue hardship by complying with a Chapter 13 plan, that the unsecured debt of the debtor was primarily credit card debt that was not incurred as the result of an emergency or other unforeseen contingency, that the conduct of the debtors by amending his schedules to increase his expenses after the Section 707(b) motion was filed was not credible. *Id.*, slip op. at 408.

On appeal, the District Court of Minnesota affirmed the Bankruptcy Court's decision. *Mathes v. Stuart (In re Mathes)*, Civil File No. 3-96-906, slip op. (D. Minn. July 2, 1997) The District Court held that the finding of substantial abuse with a 35% threshold was appropriate:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated),

Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Id., slip op. at 6-7.

In the present case, the debtors have the ability to repay 100% of their general unsecured creditors in less than thirty six months. Their ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

WHEREFORE, the United States Trustee submits this memorandum in support of his motion to dismiss the above-captioned case as a substantial abuse of the Bankruptcy Code.

Dated: September 14, 2004

Respectfully submitted,

HABBO G. FOKKENA  
United States Trustee  
Region 12

By: /e/ Michael R. Fadlovich  
Michael R. Fadlovich  
Trial Attorney  
United States Trustee's Office  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415  
MN ATTY No. 158410  
(612) 664-5505  
(612) 664-5516

CERTIFICATE OF SERVICE

In Re:	)	
	)	
Lamar and Estelle Robertson	)	Bankruptcy No. 04-41211
	)	
Debtor(s).	)	Chapter 7 Case
	)	
	)	

I, Terri L. Frazer, declare under penalty of perjury that on September 14, 2004, I served a copy of the foregoing proposed Notice of Hearing on Motion to Dismiss Chapter 7 Case, Notice of Hearing and Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law and proposed Order by U.S. mail, postage prepaid, to each person named below:

Lamar and Estelle Robertson  
3410 Irving Avenue North  
Minneapolis, MN 55412

James Skonnord  
311 Ramsey Street  
St. Paul, MN 55102

Dwight R.J. Lindquist  
1510 Rand Tower  
527 Marquette Avenue  
Minneapolis, MN 55402

Dated: 9-14-04

By:   
Office of the United States Trustee

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

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**Chapter 7**

**Debtor(s).**

**Bky Case No.: 04-41211**

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**ORDER**

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At Minneapolis, Minnesota, the \_\_\_\_\_ day of \_\_\_\_\_, 2004.

This matter came before the Court for hearing on the Motion of the United States Trustee's Office for an Order dismissing this Chapter 7 case pursuant to 11 U.S.C. §707(b). Appearances were noted in the record.

Based on the schedules filed by the debtors under oath, the motion by the U.S. Trustee, and all the files, records and proceedings herein,

**IT IS HEREBY ORDERED:**

That this Chapter 7 bankruptcy case is dismissed as a substantial abuse pursuant to 11 U.S.C. Section 707(b).

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The Honorable Robert J. Kressel  
United States Bankruptcy Judge