

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: **Bankruptcy No. 04-42742**

Dianne Marguerite LaFluer **Chapter 7 Case**

Debtor.

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

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 United States Bankruptcy Court will hold a hearing on this motion on September 22, 2004, at 10:30 a.m., in Courtroom No. 7 West, at the United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.

Any response to this motion must be filed and delivered not later than September 17, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays,) or September 13, 2004, which is seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.** Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: **Bankruptcy No. 04-42742**
Dianne Marguerite LaFluer **Chapter 7 Case**
Debtor.

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

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 at 10:30 a.m. on September 22, 2004, in Courtroom No. 7 West, the United States Court Courthouse, 300 South Fourth Street, Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than September 17, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or filed and served by mail not later than September 13, 2004, which is seven business days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). **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 May 13, 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 debtor, it appears that she has the ability to pay a substantial portion of her dischargeable debt without hardship.

7. The debtor lists the following debts:

(a) On Schedule D, Creditors Holding Secured Claims, the debtor lists three creditors totaling \$ 155,463.18, secured by homestead and a vehicle.

(b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtor lists no claims.

(c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtor lists six claims totaling \$ 26,777.78.

8. The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. *See* Debtor's Schedule F. The debtor checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtor lists monthly net income of \$3,016.31. This sum is based on monthly gross income of \$ 3,680.00 or annual gross income of \$44,160.00 per year. The debtor's Statement of Financial Affairs #1 states that her gross income in 2003 totaled \$ 76,364.00 and her gross income in 2002 totaled \$ 57,866.00. The United States Trustee wrote to the debtor and her counsel on July 7, 2004 to clarify the issue. Att. Ex. 1. The debtor responded under cover letter dated July 16, 2004. Att. Ex. 2.

Based on the debtors pay stub for period end 5/17/04^{1/}, the debtor has the following average net income in 2004:

YTD Gross	\$30,626.16	[annual average of \$ 72,389.11; 2003 tax return provides 2003 gross from employment totaled \$ 72,375.00].
YTD Deductions	(\$10,404.53)	[From the letter one deduction may include voluntary 403(b) contributions, but the U.S. Trustee cannot determine which deduction. The U.S. Trustee reserves the right to raise the issue at an evidentiary hearing, if necessary]
YTD Net	20,221.63	

\$ 20,221.63 divided by 11th pay period = \$ 1,838.33 average pay per period x 26 pay periods = \$ 47,796.58 divided by 12 = \$3,983.04 average net per month.

The debtor appears to be over withholding her federal taxes. In 2003, federal taxes were 11% of her gross earnings from wages, but the debtor withholds at about 17% (5269.08 withholding on pay stub divided into \$ 30,626.16). At a similar 11% rate, her withholdings should be \$ 3,368.88. The difference would provide additional income of about \$ 1,900 through the 11th pay period or \$ 4,490.91 per year or \$ 374.24 per month. The debtor's refund in 2003 totaled \$ 2,872 on her tax return or \$ 239 per month. The U.S. Trustee will use the lower figure for the purpose of this motion.

\$ 3,983.04 + \$ 239 + \$ 430 child support on I = \$ 4,652.04 average net income per month.

10. On Schedule J, the debtor lists monthly expenses of \$3,629.00.

11. Average net monthly income of \$4,652.04 less monthly expenses of \$3,629 provides the debtor with monthly disposable income of \$1,023.04.

12. Monthly disposable income of \$1,023.04 would enable the debtor to pay over 100% of her unsecured debt. The debtor can pay the unsecured creditors in a hypothetical thirty six month Chapter 13 plan with payments of approximately \$ 743.83.

13. The debtor is currently employed, and there does not appear to be any likelihood that

^{1/} Pay stubs and tax returns referenced in the motion are not attached due to public access of the internet, but may be made available at a hearing or upon request by debtor's counsel, to the extent copies were not retained.

her employment will be terminated at any time in the future.

14. The debtor has the ability to repay a substantial portion of her general unsecured debt and there appears to be no reason for her unwillingness to do so.

15. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

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

Dated: August 13, 2004

Respectfully submitted,
HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

Exhibit 1



U. S. Department of Justice

Office of the United States Trustee

*Districts of Minnesota, North Dakota,
South Dakota and Iowa*

FILE COPY

U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

612 / 664-5500
FAX 612 / 664-5516

July 7, 2004

Timothy C. Theisen
229 Jackson Street Suite 105.
Anoka, MN 55303

Re: *Dianne Marguerite LaFleur*, Bankr. No. 04-42742

Dear Mr. Theisen:

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation of this case. Please provide the following information on or before August 6, 2004:

1. Copies of last three pay stubs for the debtor.
2. Copies of the 2002 and 2003 state and federal tax returns, including attachments (W-2s).
3. Provide any documentation showing that any reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).
4. Provide any documentation showing that any reduction for a 401K loan or other pension loan is secured by any asset or is subject to mandatory repayment, other than the off set rights against the pension account or the tax consequences.
5. Provide a recent statement from any pension loan account, showing the balance outstanding, the amount of the monthly repayment, and the date the loan was incurred.

Please call if you have a question or concern about this letter.

Sincerely,

HABBO G. FOKKENA
UNITED STATES TRUSTEE

Sarah J. Wencil
Trial Attorney

cc: Dianne Marguerite LaFleur
Timothy Moratzka, Chapter 7 Trustee

Exhibit 2

Timothy Casey Theisen, P.A.

Law Office
www.theisenlaw.com

229 Jackson Street
Suite 105
Anoka, Minnesota 55303

RECEIVED

2004 JUL 19 A 9:39

Telephone: (763) 421-0965

Facsimile: (763) 421-9248

ttheisen@bitstream.net

OFFICE OF THE
UNITED STATES TRUST

July 16, 2004

Ms. Sarah Wencil
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

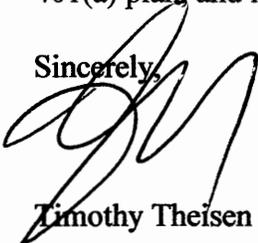
Re: Dianne LaFleur
BKY 04-42742

Dear Ms. Wencil:

Enclosed please find the documents you had requested.

The Travelers Life and Annuity, which my client believes to be a 403(b) plan, is an optional contribution. The Regions Hospital Retirement Savings Plus Plan is what she believes to be a 401(a) plan, and it represents employer-only contribution. She has no loan against either plan.

Sincerely,



Timothy Theisen

TCT/mkr

Enclosure

cc: Dianne LaFleur (via e-mail)

VERIFICATION

I, Sarah J. Wencil, trial 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: August 13, 2004

Signed: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: **Bankruptcy No. 04-42742**
Dianne Marguerite LaFluer **Chapter 7 Case**
Debtor.

MEMORANDUM OF LAW

The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

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. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make charitable contributions (that meet the definition of ‘charitable contribution’ under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4).

11 U.S.C. § 707(b) (1994) (as amended by Religious Liberty and Charitable Donation Protection Act of 1998). 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 debts listed on Schedule F are primarily consumer debts. The debtor checked on the Petition that the nature of the debts are consumer/non-business.

**(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)).

While bad faith on the part of the debtor may constitute substantial abuse under Section 707(b), bad faith is not required to be shown to satisfy the "substantial abuse" standard when the debtor is otherwise able to repay his or her debts out of future income:

This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

Walton, 866 F.2d at 985 (quoting *In re Kelly*, 841 F.2d at 914-15); *Harris*, 960 F.2d at 76 (stating that "egregious behavior" by the debtor is not a necessary element for a Chapter 7 case to be dismissed under Section 707(b)). While the unique hardships and the good faith of the debtor are relevant factors, those factors are not as important as the ability of the debtor to fund a Chapter 13 plan. *Walton*, 866 F.2d at 983; *see also Harris*, 960 F.2d at 77 (rejecting the "totality of the circumstances" test espoused by the Fourth Circuit Court of Appeals in *Green v. Staples (In re Green)*, 934 F.2d 568, 572 (4th Cir. 1991), in favor of examining whether a debtor may fund a Chapter 13 plan out of future income).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a 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 the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

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."

Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)

See also In re Shirley Wilkins, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.)

(holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

In the present case, the debtor has the ability to pay of the general unsecured creditors in full in

a hypothetical thirty six month Chapter 13 plan. The 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: August 13, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Sarah J. Wencil
Sarah J. Wencil
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
IA ATTY No. 14014
(612) 664-5500

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Bankruptcy No. 04-42742

Dianne Marguerite LaFluer

Chapter 7 Case

Debtor.

CERTIFICATE OF MAILING

The undersigned hereby certifies under penalty of perjury that she is an employee in the Office of the United States Trustee for the District of Minnesota, and is a person of such age and discretion as to be competent to serve papers and that on August 13, 2004, she served a copy of the attached: PROPOSED NOTICE OF HEARING, MOTION TO DISMISS UNDER 11 U.S.C. §707(b), MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND proposed ORDER by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

Dianne Marguerite LaFleur
730 Oakwood Drive
Anoka, MN 55303

Timothy C. Theisen
229 Jackson Street Suite 105
Anoka, MN 55303

Timothy Moratzka
901 Marquette Avenue Suite 1400
Minneapolis, MN 55402


Nancy Poole

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: **Bankruptcy No. 04-42742**
Dianne Marguerite LaFluer **Chapter 7 Case**
Debtor.

ORDER

At Minneapolis, Minnesota, this _____ day of _____, 2004, the United States Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtor is dismissed pursuant to 11 U.S.C. Section 707(b).

United States Bankruptcy Judge