

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:)
) Chapter 13
PATRICK J. SMITHWICK,)
) Case No. BKY 04-44990
Debtor.)

OBJECTIONS OF THE UNITED STATES
OF AMERICA TO THE CONFIRMATION OF THE
DEBTOR'S CHAPTER 13 PLAN AND MOTION TO DISMISS

THE UNITED STATES OF AMERICA, Internal Revenue Service ("IRS"), by and through its attorneys, Thomas B. Heffelfinger, United States Attorney for the District of Minnesota and Roylene A. Champeaux, Assistant United States Attorney, submits the following objections to the Confirmation of Chapter 13 Plan proposed by this debtor and Motion to Dismiss:

1. The confirmation hearing is scheduled for November 18, 2004, at 10:30 a.m. at U.S. Bankruptcy Court, Courtroom 8 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415.

2. The Court has jurisdiction over these objections and Motion to Dismiss pursuant to 28 U.S.C. §§ 157 and 1334, Fed. R. Bankr. P. 5005 and Loc. R. Bankr. P. (D. Minn.) 1070-1. This is a core proceeding. The petition commencing this Chapter 13 case was filed September 7, 2004. This case is now pending in this Court.

3. These objections and Motion to Dismiss arise under 11 U.S.C. §§ 1322(a)(2); 1325(a)(6); and 1307(c) and Fed. R. Bankr. P. 3015. These objections and Motion to Dismiss are filed under Fed.

R. Bankr. P. 9013 and 9014 and Loc. R. Bankr. P. (D. Minn.) 3015-3, 3020-1 and 3020-3.

4. The United States, IRS, has an unsecured priority claim of \$22,377.96, secured claim of \$9,147.45, and an unsecured general claim of \$14,688.94 against this debtor. The total claim is \$46,214.35, as set forth in the filed Proof of Claim of the IRS, a copy of which is attached hereto as Exhibit A.

5. The IRS may have additional priority claims due from this debtor, but they are undetermined because the debtor has not filed complete federal income tax returns for the years 2001, 2002 and 2003 as explained in the Affidavit of Sandy Sullivan, which is attached as Exhibit B. On or about October 8, 2004, the debtor provided incomplete tax returns to the IRS that failed to list the debtor's W-2 income.

6. The Plan provides for the full payment of claims entitled to priority under 11 U.S.C. § 507; however, the Plan fails to provide for any payment on the IRS priority claim. While the Plan provides that the trustee will pay the amounts actually owed as priority claims, the actual amount of the priority claim of the IRS cannot be determined until this debtor files his federal income tax returns for the years 2001, 2002 and 2003.

7. Without a determination of the actual amount of the priority claim of the IRS, the feasibility of the debtor's Plan cannot be determined in accordance with 11 U.S.C. § 1325(a)(6).

8. Failure of the debtor's Plan to provide for full payment of the allowed priority tax claim of the IRS is grounds for dismissal of the case pursuant to 11 U.S.C. § 1307(c).

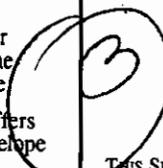
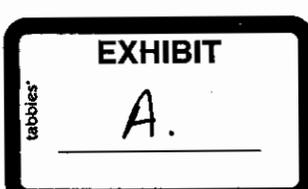
WHEREFORE, for the foregoing reasons, the United States prays that the Chapter 13 Plan filed by this debtor be denied confirmation and that the case be dismissed pursuant to 11 U.S.C. § 1307(c).

Date: October 18, 2004

THOMAS B. HEFFELFINGER
United States Attorney

/e/ Roylene A. Champeaux
By: ROYLENE A. CHAMPEAUX
Assistant United States Attorney
Attorney ID Number 154805
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5685

Attorneys for the United States
of America, IRS

UNITED STATES BANKRUPTCY COURT _____ DISTRICT OF MINNESOTA _____		PROOF OF CLAIM
Name of Debtor PATRICK J SMITHWICK		Case Number 04-44990
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A "request" of payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.		
Name of Creditor (The person or other entity to whom the debtor owes money or property): Department of the Treasury - Internal Revenue Service		  THIS SPACE IS FOR COURT USE ONLY
Name and address where notices should be sent: Internal Revenue Service Internal Revenue Service 316 North Robert Street Stop 5700STP St. Paul, MN 55101 Telephone number: (605) 226-7216 Creditor #:6058005		
Account or other number by which creditor identifies debtor: see attachment		Check here <input type="checkbox"/> replaces if this claim <input type="checkbox"/> amends a previously filed claim, dated: _____
1. Basis for Claim <input type="checkbox"/> Goods sold <input type="checkbox"/> Services performed <input type="checkbox"/> Money loaned <input type="checkbox"/> Personal injury/wrongful death <input checked="" type="checkbox"/> Taxes <input type="checkbox"/> Other _____ <input type="checkbox"/> Retiree benefits as defined in 11 U.S.C. § 1114(a) <input type="checkbox"/> Wages, salaries, and compensation (fill out below) Last four digits of SS #: _____ Unpaid compensation for services performed from _____ to _____ (date) (date)		
2. Date debt was incurred: see attachment		3. If court judgment, date obtained:
4. Total Amount of Claim at Time Case Filed: \$ <u>14,688.94</u> <u>9,147.45</u> <u>22,377.96</u> <u>46,214.35</u> (unsecured) (secured) (priority) (Total) If all or part of your claim is secured or entitled to priority, also complete Item 5 or 7 below. <input checked="" type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of the claim. Attach itemized statement of all interest or additional charges.		
5. Secured Claim. <input checked="" type="checkbox"/> Check this box if your claim is secured by collateral (including a right of setoff). Brief Description of Collateral: <input checked="" type="checkbox"/> Real Estate <input checked="" type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other <u>see below*</u> Value of Collateral: \$ <u>see below*</u> *All of debtor(s) right, title and interest to property - 26 U.S.C. § 6321. Amount of arrearage and other charges at time case filed included in secured claim, if any: \$ <u>9,147.45</u>		7. Unsecured Priority Claim. <input checked="" type="checkbox"/> Check this box if you have an unsecured priority claim Amount entitled to priority \$ <u>22,377.96</u> Specify the priority of the claim: <input type="checkbox"/> Wages, salaries, or commissions (up to \$4,925)* earned within 90 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507(a)(3). <input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507(a)(4). <input type="checkbox"/> Up to \$2,225* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507(a)(6). <input type="checkbox"/> Alimony, maintenance, or support owed to spouse, former spouse, or child - 11 U.S.C. § 507(a)(7). <input checked="" type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8). <input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507(a)(____). *Amounts are subject to adjustment on 4/1/07 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.
6. Unsecured Nonpriority Claim \$ <u>14,688.94</u> <input type="checkbox"/> Check this box if: a) there is no collateral or lien securing your claim, or b) your claim exceeds the value of the property securing it, or if c) none or part of your claim is entitled to priority.		THIS SPACE IS FOR COURT USE ONLY 
8. Credits: The amount of all payments on this claim has been credited and deducted for the purpose of making this proof of claim.		
9. Supporting Documents: Attach copies of supporting documents, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, court judgments, mortgages, security agreements, and evidence of perfection of lien. DO NOT SEND ORIGINAL DOCUMENTS. If the documents are not available, explain. If the documents are voluminous, attach a summary.		
10. Date-Stamped Copy: To receive an acknowledgement of the filing of your claim, enclose a stamped, self-addressed envelope and copy of this proof of claim.		
Date 09/23/2004	Sign and print the name and title, if any, of the creditor or other person authorized to file this claim (attach copy of power of attorney, if any): <u>Sandra Sullivan</u> _____ /s/ SANDRA SULLIVAN 46-00488, Bankruptcy Specialist	

Proof of Claim for Internal Revenue Taxes

Form 10
Attachment

Department of the Treasury/Internal Revenue Service

In the Matter of: PATRICK J SMITHWICK
3634 RAINBOW DRIVE
MINNETONKA, MN 55345

Docket Number	04-44990
Type of Bankruptcy Case	Chapter 13
Date of Petition	09/07/2004

The United States has not identified a right of setoff or counterclaim. However, this determination is based on available data and is not intended to waive any right to setoff against this claim debts owed to this debtor by this or any other federal agency. All rights of setoff are preserved and will be asserted to the extent lawful.

Secured Claims (Notices of Federal tax lien filed under internal revenue laws before petition date)

Taxpayer ID Number	Kind of Tax	Tax Period	Date Tax Assessed	Tax Due	Penalty to Petition Date	Interest to Petition Date	Notice of Tax Lien Filed: Date	Office Location
XXX-XX-0761	INCOME	12/31/1994	09/25/1995	\$578.66	\$941.01	\$3,114.64	12/05/1996	HENNEPIN E
XXX-XX-0761	INCOME	12/31/1996	12/01/1997	<u>\$1,847.00</u>	<u>\$1,002.10</u>	<u>\$1,664.04</u>	09/19/2000	HENNEPIN E
				\$2,425.66	\$1,943.11	\$4,778.68		

Total Amount of Secured Claims: **\$9,147.45**

Unsecured Priority Claims under section 507(a)(8) of the Bankruptcy Code

Taxpayer ID Number	Kind of Tax	Tax Period	Date Tax Assessed	Tax Due	Interest to Petition Date
XXX-XX-0761	INCOME	12/31/2001	1 UNASSESSED-NO RETURN	\$8,578.00	\$1,094.91
XXX-XX-0761	INCOME	12/31/2002	1 UNASSESSED-NO RETURN	\$9,570.00	\$622.41
XXX-XX-0761	INCOME	12/31/2003	1 UNASSESSED-NO RETURN	<u>\$2,468.00</u>	<u>\$44.64</u>
				\$20,616.00	\$1,761.96

Total Amount of Unsecured Priority Claims: **\$22,377.96**

Unsecured General Claims

Taxpayer ID Number	Kind of Tax	Tax Period	Date Tax Assessed	Tax Due	Interest to Petition Date
XXX-XX-0761	INCOME	12/31/1998	04/30/2001	\$1,966.00	\$1,610.67
XXX-XX-0761	INCOME	12/31/1999	04/30/2001	<u>\$664.83</u>	<u>\$377.01</u>
				\$2,630.83	\$1,987.68

Penalty to date of petition on unsecured priority claims (including interest thereon) \$7,089.52

Penalty to date of petition on unsecured general claims (including interest thereon) \$2,980.91

Total Amount of Unsecured General Claims: **\$14,688.94**

1 UNASSESSED TAX LIABILITIES(S) HAVE BEEN LISTED ON THIS CLAIM BECAUSE OUR RECORDS SHOW NO RETURN(S) FILED. WHEN THE DEBTOR(S) FILES THE RETURN OR PROVIDES OTHER INFORMATION AS REQUIRED BY LAW THE CLAIM WILL BE AMENDED.

INTERNAL REVENUE SERVICE FACSIMILE FEDERAL TAX LIEN DOCUMENT	Lien Recorded : 12/05/1996 - 12:06PM Recording Number: 006670520-27 UCC Number : Liber :
BANKRUPTCY DOCKET: 04-44990@MN	Page :
District: NORTH CENTRAL	IRS Serial Number: 419609359

This Lien Has Been Filed in Accordance with
Internal Revenue Regulation 301.6323(f)-1.

Name of Taxpayer :
PATRICK J & CAROL A SMITHWICK

Residence :
3634 RAINBOW DR
MINNETONKA, MN 55345-1035

With respect to each assessment below, unless notice of lien
is refiled by the date in column(e), this notice shall constitute
the certificate of release of lien as defined in IRC 6325(a).

Form (a)	Period (b)	ID Number (c)	Assessed (d)	Refile Deadline (e)	Unpaid Balance (f)
1040	12/31/1994	390-22-0761	09/25/1995	10/25/2005	\$3,367.63

Filed at: COUNTY RECORDER HENNEPIN E MINNEAPOLIS, MN 55487-0083	Total	\$3,367.63
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This notice was prepared and executed at ST. PAUL, MN
on this, the 04th day of December, 1996.

Authorizing Official: ACS	Title: SPF ADVISOR	41-01-0000
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INTERNAL REVENUE SERVICE FACSIMILE FEDERAL TAX LIEN DOCUMENT	Lien Recorded : 09/19/2000 - 08:00AM Recording Number: 007355884-27 UCC Number : Liber : Page :
BANKRUPTCY DOCKET: 04-44990@MN	
District: NORTH CENTRAL	IRS Serial Number: 410028374

This Lien Has Been Filed in Accordance with
Internal Revenue Regulation 301.6323(f)-1.

Name of Taxpayer :
PATRICK J SMITHWICK

Residence :
3634 RAINBOW DR
MINNETONKA, MN 55345-1035

With respect to each assessment below, unless notice of lien
is refiled by the date in column(e), this notice shall constitute
the certificate of release of lien as defined in IRC 6325(a).

Form (a)	Period (b)	ID Number (c)	Assessed (d)	Refile Deadline (e)	Unpaid Balance (f)
1040	12/31/1996	390-22-0761	12/01/1997	12/31/2007	\$2,876.03
1040	12/31/1997	390-22-0761	04/24/2000	05/24/2010	\$273.26

Filed at: COUNTY RECORDER HENNEPIN E MINNEAPOLIS, MN 55487-0083	Total	\$3,149.29
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This notice was prepared and executed at ST. PAUL, MN
on this, the 30th day of August, 2000.

Authorizing Official: ACS CALL SITE	Title: ACS	41-01-0000
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
BKY No. 04-44990

PATRICK J. SMITHWICK

Plaintiff,

v.

INTERNAL REVENUE SERVICE,

Defendant.

AFFIDAVIT

STATE OF SOUTH DAKOTA)

) ss.

COUNTY OF BROWN)

I, Sandra Sullivan, Bankruptcy Specialist, being first duly sworn, deposes and says:

1. I am employed by Area 9 of the Internal Revenue Service Small Business/Self-Employed Division.
2. One of my duties is to review Chapter 13 Bankruptcy petitions and the Government records regarding the petitioner.
3. I have determined Patrick J. Smithwick, has submitted incomplete Income tax returns on October 8, 2004 for the years ending December 31, 2001, December 31, 2002, and December 31, 2003 as W-2 wages are not included.

FURTHER YOUR AFFIANT SAYETH NOT.

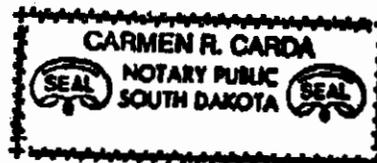
Date: October 18, 2004

Sandra Sullivan
Sandra Sullivan

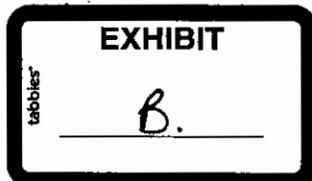
Subscribed and Sworn to Before Me

This 18th Day of October 2004.

Carmen R. Carda
NOTARY



My Commission Expires 2-1-10



UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:)
) Chapter 13
PATRICK J. SMITHWICK,)
) Case No. BKY 04-44990
Debtor.)

MEMORANDUM IN SUPPORT OF OBJECTIONS OF THE
UNITED STATES OF AMERICA TO THE CONFIRMATION
OF DEBTOR'S CHAPTER 13 PLAN AND MOTION TO DISMISS

THE UNITED STATES OF AMERICA, Internal Revenue Service ("IRS"), by and through its attorneys, Thomas B. Heffelfinger, United States Attorney for the District of Minnesota and Roylene A. Champeaux, Assistant United States Attorney, submits the following Memorandum in Support of its Objections to Confirmation of Debtor's Chapter 13 Plan and Motion to Dismiss.

1. The United States, IRS, has an unsecured priority claim of \$22,377.96, secured claim of \$9,147.45, and an unsecured general claim of \$14,688.94 against this debtor. The total claim is \$46,214.35.

2. Since no objections to the tax claims of the IRS have been filed, the claims are deemed allowed, pursuant to 11 U.S.C. § 502(a).

3. As the debtor has not filed complete federal income tax returns for the years 2001, 2002 and 2003, the actual tax liabilities are unknown. Any tax liabilities due for years 2001, 2002 and 2003 would be priority taxes, which must be paid in full. This debtor should be required to file his federal income tax

returns so that the tax liabilities can be fully determined and properly treated by the Plan.

4. The debtor's Plan fails to provide for adequate payments to fully pay the priority claims of the IRS under 11 U.S.C. § 507 as required under 11 U.S.C. § 1322(a)(2).

5. The debtor's Plan is not feasible because the debtor cannot establish that he can make all the payments under the Plan and comply with the Plan. As the proponent of his Plan, the debtor bears the burden of proving the factors set forth in 11 U.S.C. § 325(a). In re Hogue, 78 B.R. 867, 872 (Bankr. S.D. Ohio 1987) and In re Wagner, 259 B.R. 694, 700-701 (B.A.P. 8th Cir. 2001). The United States submits that the debtor is unable to establish that his Plan is feasible.

6. Failure of the debtor's Plan to provide for full payment of the allowed priority tax claim of the IRS is grounds for dismissal of the case pursuant to 11 U.S.C. § 1307(c).

WHEREFORE, for the foregoing reasons, the United States prays that the Chapter 13 Plan filed by this debtor be denied confirmation and that the case be dismissed pursuant to 11 U.S.C. § 1307(c).

Date: October 19, 2004

THOMAS B. HEFFELFINGER
United States Attorney

/e/ Roylene A. Champeaux
By: ROYLENE A. CHAMPEAUX
Assistant United States Attorney
Attorney ID Number 154805
600 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415
(612) 664-5685

Attorneys for the United States
of America, IRS

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 13

PATRICK J. SMITHWICK,

Case Number: 04-44990

Debtor.

UNSWORN DECLARATION
FOR PROOF OF SERVICE

I, Carla R. Kohl, employed by the Office of the United States Attorney, with office address 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, declares that on October 19, 2004, I served the Objections of the United States of America to Confirmation of Debtor's Chapter 13 Plan and Motion To Dismiss, Memorandum in Support of Objections and Motion to Dismiss and proposed Order on the entities named below by facsimile to each of them a copy thereof by faxing said copies to the person hereinafter named, at the place and address stated below, which known address, from the office of the United States Attorney at Minneapolis, Minnesota, addressed to each of them as follows:

FACSIMILE # (612) 338-9808

FACSIMILE # (612) 338-4529

Ian Traquair Ball, Esq.
12 S. 6th St., Ste. 326
Minneapolis, MN 55402

Jasmine Z. Keller, Esq.
Chapter 13 Trustee
12 S. 6th St., Ste. 310
Minneapolis, MN 55402

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 19, 2004

Signed: /e/ Carla R. Kohl
CARLA R. KOHL

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

Chapter 13

PATRICK J. SMITHWICK,

Case Number: 04-44990

Debtor.

UNSWORN DECLARATION
FOR PROOF OF SERVICE

I, Carla R. Kohl, employed by the Office of the United States Attorney, with office address 600 U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415, declares that on October 19, 2004, I served the Objections of the United States of America to Confirmation of Debtor's Chapter 13 Plan and Motion To Dismiss, Memorandum in Support of Objections and Motion to Dismiss and proposed Order on the entities named below by mailing to each of them a copy thereof by enclosing same in an envelope with first class mail postage and depositing same in the post office at Minneapolis, Minnesota, addressed to each of them as follows:

Ian Traquair Ball, Esq.
12 S. 6th St., Ste. 326
Minneapolis, MN 55402

Fidelity Bank
P.O. Box 2937
Wichita, KS 67201

Jasmine Z. Keller, Esq.
Chapter 13 Trustee
12 S. 6th St., Ste. 310
Minneapolis, MN 55402

Wells Fargo Card Svcs
P.O. Box 6412
Carol Stream, IL 60197

Office of the U. S. Trustee
1015 U.S. Courthouse
300 South Fourth Street
Minneapolis, MN 55415

Minnesota Department of Revenue
Collection Enforcement Unit
551 Bankruptcy Section
P.O. Box 64447
St. Paul, MN 55164

Patrick J. Smithwick
3634 Rainbow Drive
Minnetonka, MN 55345

Craig Anderson
Assistant Attorney General
Office of MN Attorney General
Tax Litigation Division

Bremer Bank
c/o Michelle R. Jester, Esq.
150 S. 5th St., Ste. 1800
Minneapolis, MN 55402

1100 NCL Tower
445 Minnesota Street
St. Paul, MN 55101-2128

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: October 19, 2004

Signed: /e/ Carla R. Kohl

CARLA R. KOHL

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:)
) Chapter 13
PATRICK J. SMITHWICK,)
) Case No. BKY 04-44990
 Debtor.)

ORDER

At Minneapolis, Minnesota, this _____ day of _____,
2004.

This matter came before the Court for hearing on Confirmation of the debtor's Plan. The United States of America, on behalf of the Internal Revenue Service, filed objections to confirmation and requested an Order denying confirmation and for an Order dismissing this case. Roylene A. Champeaux, Assistant United States Attorney, appeared on behalf of the United States. Other appearances were noted on the record.

It appears to the satisfaction of the Court that the debtor's Plan is not confirmable.

IT IS THEREFORE ORDERED:

1. Confirmation is denied.
2. The case is dismissed.

ROBERT J. KRESSEL
United States Bankruptcy Judge