

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Brian J. Pederson,

Chapter 7

Debtor(s).

BK 03-60998 DDO

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 Court will hold a hearing on this motion at 10:30 A.M. on January 27, 2004, in Courtroom No. 2, at the United States Bankruptcy Court, United States Courthouse, at 118 S. Mill Street, in Fergus Falls, Minnesota.

Any response to this motion must be filed and delivered not later than January 22, 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 January 16, 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:

Brian J. Pederson,

Debtor(s).

Chapter 7

BK 03-60998 DDO

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 January 27, 2004, in Courtroom No. 2, at the United States Bankruptcy Court, United States Courthouse, at 118 S. Mill Street, in Fergus Falls, Minnesota.

3. Any response to this motion must be filed and delivered not later than January 22, 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 January 16, 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 August 14, 2003. 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 he has the ability to pay a substantial portion of his dischargeable debt without hardship.

7. The debtor lists the following debts:

(a) On Schedule D, Creditors Holding Secured Claims, the debtor lists one claim totaling \$ 83,265.08 secured by a mortgage on the homestead.

(b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtor lists one claim totaling \$ 607.98.

(c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtor lists seven claims totaling \$ 26,617.77.

(d) The debts listed on Schedule F are primarily consumer debts.

8. On Schedule I, the debtor lists monthly net income of \$ 4,047.58, which includes his net income of \$ 1,145 from his employment and pension and the net income of \$ 1,062.35 for the spouse. The debtor is married and lists one minor aged dependent. On August 27, 2003, the United States Trustee wrote to the debtor for additional financial information. *See* Att. Ex. 1. The debtor responded on September 24, 2003. *See* Att. Ex. 2 (without attachments).

Based on the pay stub of Brian J. Pederson, for pay period ending 8/23/03, he has the following monthly net income, which is greater than the amount listed on Schedule I (Att. Ex. 3):

YTD Gross	\$ 23,540.16
Less YTD	
Fed.	(3365.69)
Soc. Sec.	(1459.51)
Medicare	(341.34)
MN State	(1347.17)
WAG	(900)
YTD Net Income	\$ 16,467.79 ^{1/}

\$ 16,467.79 divided by 35th pay period = \$ 470.50 average per pay period x 52 annual periods = \$ 24,466 divided by 12 months = \$ 2,038.83 average net pay per month.

Mr. Pederson also receives Navy pension income of \$ 1,840.23 per month.

\$ 2,038.83 + \$ 1,840.23 = \$ 3,879.06 total average monthly net income.

9. On Schedule J, the debtor lists monthly expenses of \$ 2,960.64.

10. Average net monthly income of \$ 3,879.10 less monthly expenses of \$ 2,960.64 provides the debtor with monthly disposable income of \$ 918.42.

11. The debtor can pay his unsecured creditors in full in a 36 month hypothetical chapter 13 plan with payments of \$ 757.10 per month.

12. The debtor is currently employed, and there does not appear to be any likelihood that his employment will be terminated at any time in the future.

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

14. Counsel for the debtor indicates that the debtor is going through a divorce, but

^{1/} The "WAG" may be a wage garnishment and may be subject to the automatic stay, which would increase the debtor's income by \$ 100 per week or \$ 433.00 per month. Since the year-to-date amount for the WAG is only for 9 periods, the average monthly income would be \$ 2,150.30.

states that the debtor pays all of the household expenses, while the former ex-spouse uses all of the disposable income for her unsecured debts, which would be prejudicial to the debtor's creditors. No changes were made to sworn Schedule I or Schedule J, and the debtor has not submitted anything to show that a court has imposed a support obligation at this time. The 2002 tax returns list that the spouse or ex-spouse grossed \$ 33,563.75 in 2002 in the same jobs, which is more than the \$ 17,635.08 gross income disclosed on Schedule I.

15. The United States Trustee may call the following witnesses:
 - (a) Gregory P. Biedermann, Senior Bankruptcy Analyst, or Thomas Kleiner, Bankruptcy Analyst, Office of U.S. Trustee, 1015 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota;
 - (b) The Debtor

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

Dated: November 14, 2003

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
(612) 664-5516



U. S. Department of Justice

Office of the United States Trustee

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

August 27, 2003

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

612 / 664-5500
FAX 612 / 664-5516

William Jones
P.O. Box 48
Park Rapids, MN 56470

Re: Brian Pederson
Bky 03-60998

Dear Mr. Jones,

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. §707(b). Please provide the following information on or before September 19, 2003;

1. Copies of the last three pay stubs for the debtor and non-filing spouse. If the pay stubs show a deduction for 401(k), please advise if the deduction is voluntary or mandatory. If the pay stubs show a deduction for 401(k) loan repayment, please advise as to the balance of the loan and the estimated payoff date.
2. Copies of 2001 and 2002 state and federal tax returns, including W-2s, 1099s, and all other attachments and schedules.
3. Copies of bank statements for the last six months for all accounts owned by the debtor and non-filing spouse.
4. Schedules I and J show that the debtor's household disposable income is \$1,086.94 per month. This would repay the debtor's priority and unsecured debts in about 25 months. Please advise if there are other factors our office should consider when analyzing this case for possible substantial abuse.

Please call if you have a question or concern about this letter. Thank you for your assistance in this matter.

Sincerely,

HABBO G. FOKKENA
United States Trustee

By 
Tom Kleiner
Bankruptcy Analyst

cc: Brian Pederson
424 1st Street SE
Wadena, MN 56482

Tamara Yon, Chapter 7 Trustee

William F. Jones Law Office

101 West Second Street P.O. Box 48
Park Rapids, MN 56470
Telephone (218) 732-3000 Fax: (218) 732-4000
E-Mail: wjoneslaw@yahoo.com

RECEIVED

2003 SEP 27 A 9 31

OFFICE OF THE
UNITED STATES TRUSTEE

WILLIAM F. JONES
ATTORNEY AT LAW

September 24, 2003

Mr. Tom Kleiner
Bankruptcy Analyst
US Department of Justice
Office of the United States Trustee
US Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

Re: Brian Pederson
Bky 03-60998

Dear Mr. Kleiner:

Pursuant to your letter of August 27, 2003, please find enclosed the following:

1. Copies of the last three pay stubs for the debtor. The non-filing spouse would not provide our office copies of her last three pay stubs.
2. Copies of 2001 and 2002 state and federal tax returns.
3. Copies of bank statements for the last six months. The enclosed bank statements are the only ones that the debtor could obtain. The non-filing spouse has control of all other paperwork.

In regard to the excess disposable income of \$1,086.94 per month, the debtor and non-filing spouse have separate bills that they pay. The debtor is responsible for all mortgage and household bills, along with expenses for minor child. The non-filing spouse pays her bills that she has in her own name, i.e. her own credit cards, etc. Therefore, the disposable income is the non-filing spouse's income and as we discussed the parties are going through a divorce and maintain separate households. All this being said it appears that my client has no disposable income and will have

none for quite some time as it is very probable that he will also be paying spousal maintenance in the future.

I appreciate your review of this and look forward to hearing from you should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. F. Jones', with a long horizontal flourish extending to the right.

William F. Jones

Attorney at Law

WFJ:mls

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12.000	40.00	8.50	480.00	153.00	.00	100.00	633.00
633.00	84.57	39.25	36.10	9.18			100.00
23540.16	3365.69	1459.51	1347.17	341.34			900.00
100.00							

EMPLOYEE NAME
 WA BRIAN J PEDERSON

CHECK NO. 081691 PERIOD ENDING 08/23/03 NET PAY \$363.90

RUSS DAVIS WHOLESALE, INC.

4390	BRIAN J PEDERSON	08/23/03	081691	08/23/03	081691	
Earnings	Hours	Cur Amt	Ytd	Deductions	Cur Amt	Ytd
REG	40.00	480.00	17679.68	FED W/H TAX	84.57	3365.69
OVT	8.50	153.00	3824.91	STATE W/H TAX	36.10	1347.17
BON			1751.57	FICA	39.25	1459.51
SIC			94.00	FICA MED	9.18	341.34
VAC			72.00	WAG	100.00	900.00

Pay Rate	Cur Earn	Cur Deduct	Net Pay	Ytd Earn	Ytd Deduct	Ytd Net
12.0000	633.00	259.92	363.90	23540.16	7072.37	16467.79

EMPLOYEE - PLEASE DETACH AND RETAIN FOR YOUR RECORDS

12.000	40.00	12.75	480.00	229.50	.00	100.00	709.50
709.50	103.73	43.99	41.50	10.29	100.00		
22907.16	3281.12	1420.26	1311.07	332.16	800.00		
100.00							
DEPT: WA	EMPLOYEE NAME: BRIAN J PEDERSON	CHECK NO: 081505	PERIOD ENDING: 08/16/03	NET PAY: \$409.99			

RUSS DAVIS WHOLESALE, INC.

4390 BRIAN J PEDERSON

08/16/03

081505

Earnings	Hours	Cur Amt	Ytd	Deductions	Cur Amt	Ytd
REG	40.00	480.00	17199.68	FED W/H TAX	103.73	3281.12
OVT	12.75	229.50	3671.91	STATE W/H TAX	41.50	1311.07
BON			1751.57	FICA	43.99	1420.26
SIC			94.00	FICA MED	10.29	332.16
VAC			72.00	WAG	100.00	800.00

Pay Rate	Cur Earn	Cur Deduct	Net Pay	Ytd Earn	Ytd Deduct	Ytd Net
12.0000	709.50	289.22	409.99	22907.16	6812.45	16094.71

12.000	40.00	11.00	480.00	198.00	.00	100.00	678.00
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678.00	95.87	42.04	39.27	9.83	100.00	
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22197.66	3177.39	1376.27	1269.57	321.87	700.00	
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100.00						
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WA	BRIAN J PEDERSON	CHECK NO. 081317	PERIOD ENDING 08/09/03	NET PAY \$390.99
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RUSS DAVIS WHOLESALE, INC.

4390 BRIAN J PEDERSON 08/09/03 081317

Earnings	Hours	Cur Amt	Ytd	Deductions	Cur Amt	Ytd
REG	40.00	480.00	16719.68	FED W/H TAX	95.87	3177.39
OVT	11.00	198.00	3442.41	STATE W/H TAX	39.27	1269.57
BON			1751.57	FICA	42.04	1376.27
SIC			94.00	FICA MED	9.83	321.87
VAC			72.00	WAG	100.00	700.00

Pay Rate	Cur Earn	Cur Deduct	Net Pay	Ytd Earn	Ytd Deduct	Ytd Net
12.0000	678.00	277.18	390.99	22197.66	6523.23	15674.43

VERIFICATION

I, Sarah J. Wencil, 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: November 14, 2003

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

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Brian J. Pederson,

Chapter 7

Debtor(s).

BK 03-60998 DDO

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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 of Section 707(b)

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 that the nature of his debts are consumer/non-business on the Petition.

**(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 present case, the debtor has the ability to pay his general unsecured creditors in full in a thirty six month hypothetical 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: November 14, 2003

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
(612) 664-5516

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Brian J. Pederson,

Chapter 7

Debtor(s).

BK 03-60998 DDO

CERTIFICATE OF MAILING

I, Emily Rohr, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

That on November 14, 2003, I served a copy of the 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 in the above-referenced case 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):

Brian J. Pederson
424 1st Street SE
Wadena, MN 56482

William F. Jones
Box 48
Park Rapids, MN 56470

Tamara L. Yon
P O Box 605
Crookston, MN 56716



**Office of the United States Trustee
Emily Rohr**

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Brian J. Pederson,

Debtor(s).

Chapter 7

BK 03-60998 DDO

ORDER

At Fergus Falls, 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.

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).

The Honorable Dennis D. O'Brien
United States Bankruptcy Judge