

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Brian K. Fenner,**

**Chapter 7**

**Debtor(s).**

**BK 03-38636 DDO**

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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 under 11 U.S.C. §707(a) and (b).

The Court will hold a hearing on this motion at 9:30 A.M. on May 20, 2004, in Courtroom No. 228 A, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than May 17, 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 May 11, 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 K. Fenner,**

**Chapter 7**

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

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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 at 9:30 A.M. on May 20, 2004, in Courtroom No. 228 A, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than May 17, 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 May 11, 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 December 29, 2003. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707 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 may have the ability to pay a substantial portion of his unsecured debt without hardship.

7. The debtor lists the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtor lists three claims totaling \$ 106,000.00, secured by 1995 Honda Accord, 2002 Larson Lxi boat and a contract for deed on the homestead.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtor lists one claim totaling \$ 500.00.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtor lists nine claims totaling \$ 38,783.00.

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 gross income of \$ 4,118.00 or \$ 49,416.00 per year. This amount is less than the gross income of \$ 54,000.00 for 2002 listed on the Statement of Financial Affairs. The debtor lists he has been employed as a Telecomm Manager at Northern Tool and Equipment for 10 years. The debtor lists monthly net income of \$ 2,407.00. The debtor is divorced and lists no dependents. On Schedule J, the debtor lists monthly expenses

of \$ 2,586.00.

10. On February 23, 2004, the United States Trustee wrote to the debtor for additional financial information. *See* Att. Ex. 1.

11. The debtor failed to respond to the United States Trustee's letter and failed to provide the information requested in that letter.

12. The United States Trustee cannot complete his Section 707(b) investigation with the information listed in his letter. Therefore, pursuant to FED. R. BANKR. P. 1017(e)(1), the United States Trustee hereby advises the debtor and his counsel that all of the information listed in attached Exhibit 1, shall be submitted for the court's consideration at the hearing.

13. The failure of the debtor to cooperate with the United States Trustee by turning over the information requested prior to or as a response to the Section 707(b) Motion to Dismiss is a basis to dismiss this case for bad faith under Section 707(b) and under Section 707(a).

14. In the alternative, the United States Trustee would argue that the historical income of the debtor would indicate that his gross and net income on Schedule I is greater than the amount calculated by approximately \$ 382.00 per month plus the debtor is repaying a 401K loan to himself over his other creditors of \$ 391.00; therefore, his schedule I income may be upwards of \$ 773.00 higher than the net on Schedule I. The debtor is also seeking to retain a boat, which is not an essential asset. Based on these adjustments, there appears to be sufficient disposable income to pay creditors in a hypothetical Chapter 13 plan ( $\$ 869.00 \times 36 = \$ 31,284$  or approximately 80% of unsecured debts).

15. The United States Trustee reserves the right to amend his argument that the debtor has an ability to pay under Section 707(b) and that the case should be dismissed on that basis, once the information requested is submitted.

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

Dated: April 14, 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  
(612) 664-5516



**U. S. Department of Justice**

Office of the United States Trustee

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

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

*612 / 664-5500  
FAX 612 / 664-5516*

February 23, 2004

James J. Dailey  
Dailey Law Office  
3 Civic Center Plaza, Suite 400  
Mankato, MN 56001

Re: *Brian K. Fenner*, Bankr. No. 03-38636

Dear Mr. Dailey:

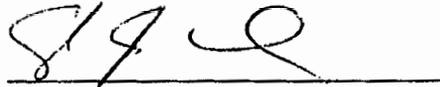
As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation of this case. Please provide **copies** of the following information on or before March 26, 2004. Please be advised, any original documents provided will not be copied or sent back to you.

1. Copies of last three pay stubs for the debtor.
2. Copies of the 2001, 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. Copies of check stubs or receipts for last three months of boat payments.

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

Sincerely,

HABBO G. FOKKENA  
UNITED STATES TRUSTEE

A handwritten signature in black ink, appearing to read 'S. J. Wencil', written over a horizontal line.

Sarah J. Wencil  
Trial Attorney

cc: Brian K. Fenner  
Michael S. Dietz, Chapter 7 Trustee

**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: April 14, 2004

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

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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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 of Section 707(a)**

Section 707(a) provides:

The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including —

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees and charges required under chapter 123 of title 28 [ 28 U.S.C. § 1911 et seq.]; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow ... the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

11 U.S.C. § 707(a). Dismissal for cause is not limited to the three examples set forth in Section 707(a); use of the word “including” means that the examples are nonexhaustive. *Huckfeldt v. Huckfeldt* (*In re Huckfeldt*), 39 F.3d 829, 831 (8<sup>th</sup> Cir. 1994) (*see* citations therein).

The Eighth Circuit Court of Appeals has specifically adopted the reasoning of the

bankruptcy court in *In re Khan*, 172 B.R. 613 (Bankr. D. Minn. 1994) to determine whether bad faith may be “cause” under Section 707(a). *Huckfeldt*, 39 F.3d at 832. The Bankruptcy Court in *In re Khan*, held that bad faith under Section 707(a) is the following:

[T]he Court should look first at the debtor’s manifested attitude toward the integrity of the bankruptcy process. The real question should be whether the debtor is in bankruptcy with an intent to receive the sort of relief that Congress made available to petitioners under the chapter in question ... and is willing to responsibly carry out the duties that Congress imposes on debtors as the cost of receiving such relief.

[B]ad faith in the filing of a Chapter 7 petition would be evidenced by a pervasive and orchestrated effort on the party of the debtor to obtain the benefits of a bankruptcy filing while at the same time intentionally and fraudulently taking action to avoid any of the detriments. Such an effort might involve ..., without a concomitant acceptance of the statutory duties of financial disclosure, cooperation with the trustee, and surrender of non-exempt assets.

172 B.R. at 625 (citations omitted).

The failure of the debtor to provide the information requested in the Motion to Dismiss is cause to dismiss under Section 707(b). Under Section 707(b), Congress designated the United States Trustee as the only party, besides the Bankruptcy Court, who has standing to bring a Section 707(b) motion to dismiss. 11 U.S.C. § 521(3) states that “the debtor shall ...cooperate with the trustee as necessary to enable the trustee to perform the trustee’s duties under this title.” *See* 11 U.S.C. § 324(a) (stating that bankruptcy court had power to “remove a trustee, other than the United States trustee.” Therefore, indicating that the use of the term “trustee” in the Bankruptcy Code may include the United States trustee.). In addition, Local Bankruptcy Rule 2020-1 provides: "The ... debtor shall comply with all reasonable requirements promulgated by the United States Trustee with respect to ... furnishing information and the debtor shall cooperate with the trustee and the United States Trustee in furnishing information reasonably required for the proper

administration of the estate.”

The information requested by the United States Trustee in attached exhibit 1 is reasonable and should not be burdensome for the debtor to acquire. Most of the information requested consists of check stubs, copies of tax returns or loan agreements, which one would expect an individual to maintain or would expect to be easily obtainable.

The United States Trustee will request that the Bankruptcy Court dismiss this case for cause pursuant to Section 707(a) if the debtor fails to cooperate with the United States Trustee’s Office in its investigation pursuant to Section 707(b) by turning over the information requested pursuant to Federal Bankruptcy Rule 1017(e)(1).

#### **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 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 present case, the debtor has a duty to cooperate with the Office of the United States Trustee by providing it with information to determine whether the case should be dismissed for substantial abuse. Under Section 707(b), Congress has designated the United States Trustee as the only party, besides the Bankruptcy Court, who has standing to bring a Section 707(b) motion to dismiss. As noted above in the analysis of Section 707(a), the debtor has a duty to cooperate with the United States Trustee pursuant to the Bankruptcy Code and the Local Bankruptcy Rules. Federal Bankruptcy Rule 1017(e)(1) recognizes that the debtor must turnover information by allowing the United States Trustee to designate the documents that must be submitted by the debtor prior to or at the hearing held pursuant to Section 707(b).

In the present case, the debtor has a duty to cooperate with the Office of the United States Trustee by providing it with information to determine whether the case should be dismissed for substantial abuse. Under Section 707(b), Congress has designated the United States Trustee as the only party, besides the Bankruptcy Court, who has standing to bring a Section 707(b) motion to dismiss. As noted above in the analysis of Section 707(a), the debtor has a duty to cooperate with the United States Trustee pursuant to the Bankruptcy Code and the Local Bankruptcy Rules. Federal Bankruptcy Rule 1017(e)(1) recognizes that the debtor must turnover information by allowing the United States Trustee to designate the documents that must be submitted by the debtor prior to or at the hearing held pursuant to Section 707(b).

This Bankruptcy Court, in *In re Veenhuis*, 143 B.R. 887 (Bankr. D. Minn. 1992)(Dreher, J.), noted that the Eighth Circuit Court of Appeals did not eliminate bad faith analysis under its ability to pay analysis:

[T]here is nothing in either *Harris* or *Walton* that suggests that the ability to fund a chapter 13 plan out of future earnings is the *only* factor to consider [for Section 707(b) abuse]. On the contrary, the Walton court expressly stated that ‘the court may take the petition’s good faith and unique hardships into consideration under section 707(b).’ *Walton*, 866 F.2d at 983. Furthermore, both *Harris* and *Walton* cited with approval language from *In re Kelly*, 841 F.2d 908 (9<sup>th</sup> Cir. 1988), stating that the inability to fund a chapter 13 plan out of future earnings will not ‘shield a debtor from section 707(b) dismissal where bad faith is otherwise shown.’ *Harris*, 960 F.2d at 76; *Walton*, 866 F.2d at 985. To hold otherwise would defeat section 707(b)’s goal of denying a discharge both to debtors who are non-needy and those who are dishonest....

*In re Veenhuis*, 143 B.R. at 888.

The failure of the debtor to submit the information requested will prevent the United States Trustee from determining whether substantial abuse is present. It is reasonable that such conduct by the debtor, which cause the United States Trustee and the Bankruptcy Court to be unable to make an ability to pay analysis, is a basis to dismiss a case for substantial abuse.

The United States Trustee requests that the Bankruptcy Court dismiss this case for substantial abuse if the debtor fails to provide all of the requested documentation at the hearing on this motion. In the alternative, the United States Trustee requests that the Bankruptcy Court find that based on historical income and the adjustments to Schedule I and Schedule J noted in the motion, that the debtor has an ability to pay under the substantial abuse test.

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: April 14, 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  
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(612) 664-5516

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Brian K. Fenner,**

**Chapter 7**

**Debtor(s).**

**BK 03-38636 DDO**

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**CERTIFICATE OF MAILING**

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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 April 14, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707, 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):**

James J. Dailey  
Dailey Law Office  
3 Civic Center Plaza, Suite 400  
Mankato, MN 56001

Michael S. Dietz  
206 South Broadway, Suite 505  
First Federal Building  
P O Box 549  
Rochester, MN 55903-0549

Brian K. Fenner  
413 South Main Street  
Le Sueur, MN 56058

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

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

**In re:**

**Brian K. Fenner,**

**Chapter 7**

**Debtor(s).**

**BK 03-38636 DDO**

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**ORDER**

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At St. Paul, 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(a) and (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.

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