

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA**

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In re: MATTHEW MARK HIGGINS,  
AMY BETH HIGGINS,  
  
Debtors.

Bky. Case No.: **03-36033 DDO**  
Chapter 7

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CHARLES W. RIES, TRUSTEE,  
  
Plaintiff,

vs.

ROCHESTER MOTOR COMPANY,  
dba ROCHESTER FORD, and  
AFFINITY PLUS FEDERAL CREDIT UNION,

Defendants.

Adv. Case No.: **04-3247 DDO**

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**AFFIDAVIT OF DERRICK N. WEBER**

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STATE OF MINNESOTA    )  
                                  ) ss.  
COUNTY OF HENNEPIN    )

Derrick N. Weber, being first duly sworn on oath, deposes and states as follows:

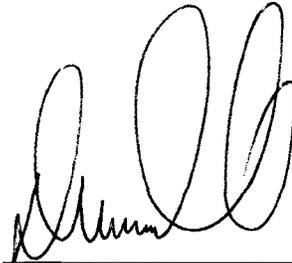
1. That affiant is an attorney duly licensed to practice law in the State of Minnesota and employed by Messerli & Kramer P.A. and is one of the attorneys of record for Affinity Plus Federal Credit Union.
2. Plaintiff's responses to Defendant Affinity Plus Federal Credit Union's Request for Admissions, Interrogatories, and Requests for Production of Documents to Plaintiff are non-responsive and evasive. Attached hereto and identified as Exhibits "A", "B", and "C" are true and correct copies of the Plaintiff's Response to Request for Admissions,

Plaintiff's Answers to Production of Documents, and Plaintiff's Answers to Interrogatories, respectively.

3. Defendant Affinity Plus Federal Credit Union requests and is entitled to summary judgment in its favor because Plaintiff cannot meet his burden pursuant to 11 U.S.C. §547 with respect to Defendant Affinity Plus Federal Credit Union, and also because Plaintiff has not and cannot rebut Defendant Affinity Plus Federal Credit Union's assertion that the "earmarking doctrine" is applicable in this case as relates specifically to Defendant Affinity Plus Federal Credit Union.

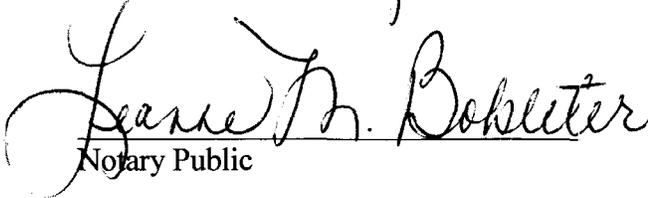
FURTHER YOUR AFFIANT SAYETH NOT.

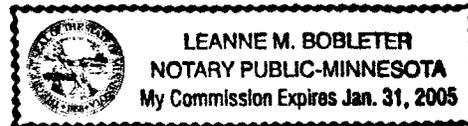
Dated: August 24, 2004.



Derrick N. Weber

Subscribed and sworn to before me  
this 24<sup>th</sup> day of August, 2004.

  
Notary Public



UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:

Chapter 7

Matthew Mark Higgins  
Amy Beth Higgins  
fka Amy Beth Meyer,

BKY NO: 03-36033

Debtors.

ADV NO: 04-3247

Charles W. Ries, Trustee,

Plaintiff,

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dba Rochester Ford, and  
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**PLAINTIFF'S RESPONSE TO REQUEST FOR ADMISSIONS**

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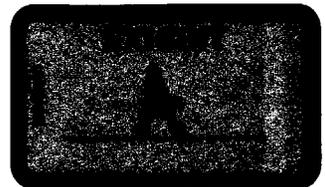
TO: AFFINITY PLUS FEDERAL CREDIT UNION AND TO ITS COUNSEL OF RECORD:

Comes now Plaintiff and for his Response to Defendant Affinity Plus Federal Credit Union's Request for Admission, states as follows:

Plaintiffs generally deny the Request for Admissions on the basis that the Defendant is attempting to obtain admissions as to facts or legal conclusions based upon facts which the Defendant knows is beyond the personal knowledge of the Plaintiff and is a subject of ongoing discovery.

1. Admit that Defendant Affinity Plus Federal Credit Union is neither a creditor nor a party to the Debtors' bankruptcy.

**RESPONSE:** Admit that based upon the bankruptcy schedules Affinity Plus Federal Credit Union is not a creditor, but if the Trustee is successful in this adversary action, Affinity Plus Federal Credit Union will presumably become a creditor.



2. Admit that Debtor Matthew Mark Higgins signed the note for the purchase and financing of the 2001 Mazda 626 together with Randy A. Higgins, a non-filing co-signor, and each was equally obligated to Defendant Affinity Plus Federal Credit Union for the debt.

**RESPONSE:** Plaintiff has insufficient information from which to form a belief or an opinion as to the accuracy of the allegation asserted above.

3. Admit that Debtor Amy Beth Higgins was not indebted to Defendant Affinity Plus Federal Credit Union, but was, indeed, a beneficiary of the trade of the 2001 Mazda 626 for the 2003 Ford Escort ZX2.

**RESPONSE:** Plaintiff has insufficient information from which to form a belief or an opinion as to the accuracy of the allegation asserted above.

4. Admit that at the time of the bankruptcy filing, the average retail value of the 2001 Mazda 626 was at least \$9,500.00, according to NADA.

**RESPONSE:** Plaintiff has insufficient information from which to form a belief or an opinion as to the accuracy of the allegation asserted above.

5. Admit that at the time of the bankruptcy filing, Debtors were insolvent.

**RESPONSE:** Plaintiff denies based upon information and belief the Debtors were solvent and further, pursuant to 11 U.S.C. § 547(f) the Debtors are presumed to be insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

6. Admit the applicability and validity of “the earmark doctrine”, as set forth in the Court’s holding in *In re Bohlen Enterprises, Ltd.*, 859 F.2d 561, 565, 18 Bankr. Ct. Dec. (CRR) 672, 19 Collier Bankr. Cas. 2d (MB) 986 (8<sup>th</sup> Cir.1988), is an appropriate defense in this matter, specifically, as the facts of this case relate to Defendant Affinity Plus Federal Credit Union.

**RESPONSE:** Objection to Request for Admission #6 based on grounds it requests a legal conclusion and is outside the scope of request for admission. Subject to and without waiving the foregoing objection, Plaintiff denies the request for admission on the basis that Plaintiff lacks information to admit.

7. Admit the existence of an agreement between the new lender, Rochester Ford-Toyota, and Debtors, Matthew Mark Higgins and Amy Beth Higgins whereby Rochester Ford-Toyota was to provide new funds that would be used to pay off a specific antecedent debt owned by Debtor Matthew Mark Higgins and a non-filing co-signor, Randy A. Higgins, to Defendant Affinity Plus Federal Credit Union.

**RESPONSE:** Plaintiff has insufficient information from which to form a belief or an opinion as to the accuracy of the allegation asserted above.

8. Admit that, in fact, performance of the agreement occurred according to the terms of said agreement between Rochester Ford-Toyota and Debtors, Matthew Mark Higgins and Amy Beth Higgins.

**RESPONSE:** Plaintiff has insufficient information from which to form a belief or an opinion as to the accuracy of the allegation asserted above.

9. Admit that the transfer of the check tendered by Rochester Ford-Toyota to Defendant Affinity Plus Federal Credit Union in the sum of \$16,669.00 did not result in any diminution of Debtors' estate.

**RESPONSE:** Plaintiff has insufficient information from which to form a belief or an opinion as to the accuracy of the allegation asserted above but specifically asserts that the \$16,669.00 is not the basis for the Plaintiff's course of action at this time.

10. Admit that Debtors did not exercise sufficient control over the disposition of the funds presented in the form of a check in the sum of \$16,669.00, tendered by Rochester Ford-Toyota to Defendant Affinity Plus Federal Credit Union, and that said funds, in fact, were neither Debtors' property nor part of Debtors' estate.

**RESPONSE:** Plaintiff has insufficient information from which to form a belief or an opinion as to the accuracy of the allegation asserted above but specifically asserts that the \$16,669.00 is not the basis for the Plaintiff's course of action at this time.

11. Admit that Plaintiff/Trustee did not file a timely objection to Debtors' exemption of the 2003 Ford Escort ZX2.

**RESPONSE:** Admit.

12. Admit that you have no legal basis for your assertion of a claim for costs and attorney's fees in this matter.

**RESPONSE:** Plaintiff has withdrawn his claim for costs and attorney's fees in this matter.

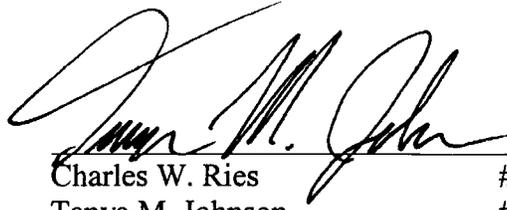
13. Admit that Affinity Plus Federal Credit Union has incurred attorney's fees and costs defending against your frivolous claims.

**RESPONSE:** Denied.

14. Admit that Affinity Plus Federal Credit Union is entitled to an award of attorney's fees and costs incurred as a result of defending against your frivolous claims.

**RESPONSE: Denied.**

Dated: July 27, 2004



Charles W. Ries #12767X

Tanya M. Johnson #0333220

MASCHKA RIEDY & RIES

Attorneys for Plaintiff

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201 North Broad Street

P.O. Box 7

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Telephone (507) 625-6600

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**PLAINTIFF'S ANSWERS TO PRODUCTION OF DOCUMENTS**

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TO: AFFINITY PLUS FEDERAL CREDIT UNION AND TO ITS COUNSEL OF RECORD:

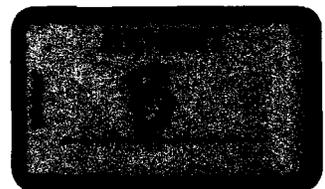
Comes now Plaintiff and for his Response to Defendant Affinity Plus Federal Credit Union's Production of Documents, states as follows:

1. Any and all documents, evidence, things, photographs, videotapes, slides, plats, drawings, models, drawings or other physical evidence identified in your responses to Defendant's Interrogatories served herewith.

**ANSWER:** Bankruptcy schedules are available at [www.mnb.uscourts.gov](http://www.mnb.uscourts.gov) or will be made available for inspection by Defendant's attorney.

2. Any and all correspondence, documents, memoranda, etc. which you have which related in any way to the subject matter of this litigation.

**ANSWER:** Documents will be made available for inspection by Defendant's attorney.



3. Any documents that you intend to introduce at trial.

**ANSWER:** Discovery is continuing and answers will be supplemented as documents become identified.

4. All documents related to Plaintiff's alleged damage.

**ANSWER:** Documents will be made available for inspection by Defendant's attorney.

5. Any and all documentary evidence, copies of any bills, receipts, or statements to support the Debtors' calculation of their household's monthly living expenditures from March 2003 to present, whether as asserted on their Schedule J or during the examination of the Trustee at the Meeting of Creditors, or otherwise.

**ANSWER:** None.

6. All documents related to the Debtors' employment including but not limited to payroll summaries and sick and vacation leave for the period beginning March 2003 to present, including Debtor Ms. Higgins' employment with Mayo Clinic.

**ANSWER:** None.

7. Copies of the Debtors' tax returns from 2002 to present and copies of any documents used to complete the tax returns including specifically but without limitation, all W-2 and 1099 forms.

**ANSWER:** Debtors' 2003 tax return is available for inspection. The other documentation is not within the custody or control of the Trustee.

8. Copies of all banking records and cancelled checks for all of the Debtors' banking accounts from March 2003 to present, including specifically, but without limitation statements that show ownership as well as an accounting of the deposit and withdrawal history of the monies used for the alleged deposit by Debtors in order to finance the 2003 Ford Escort ZX2 which is the subject of this action.

**ANSWER:** Documents will be made available for inspection by Defendant's attorney.

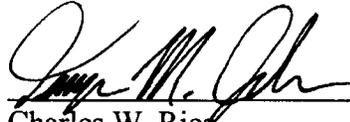
9. Copies of all documents used to establish the value of the assets listed on Debtors' Schedule B, including but not limited to NADA appraisal guides, appraisal reports, assessment documents, and insurance policies.

**ANSWER:** This information would need to be obtained from the Debtors' attorney and is not in the custody or control of the Trustee.

10. Copy of the audio recording of the Debtors' Meeting of Creditors.

**ANSWER:** This information is not in the control or custody of Trustee and can be obtained from the U. S. Trustee.

Dated: July 27, 2004



Charles W. Ries #12767X

Tanya M. Johnson #0333220

MASCHKA RIEDY & RIES

Attorneys for Plaintiff

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Telephone (507) 625-6600

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**PLAINTIFF'S ANSWERS TO INTERROGATORIES**

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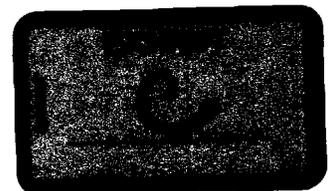
TO: AFFINITY PLUS FEDERAL CREDIT UNION AND TO ITS COUNSEL OF RECORD:

Comes now Plaintiff and for his Response to Defendant Affinity Plus Federal Credit Union's Interrogatories, states as follows:

1. Identify the person or person signing these answers to interrogatories and identify every other person assisting in the preparation of the answers. Identify all documents used or referred to in answering these interrogatories.

**ANSWER:** Charles W. Ries and Tanya M. Johnson.

2. Identify all other persons known to you to have any knowledge relating to the transactions and occurrences which are the subject matter of this action, whether obtained in the course of investigation, preparation for trial or otherwise, and state a summary of the likely knowledge possessed by each such person.



**ANSWER:** Matthew Mark Higgins and Amy Beth Higgins, formerly known as Amy Beth Meyers, Rochester Motor Company doing business as Rochester Ford and Affinity Plus Federal Credit Union.

3. List the names of any person referred to in your answers to interrogatories 1 and 2 whom you have interviewed, and state the date, time and location of each such interview, identify each person conducting, or otherwise present, at each such interview and identify all notes, transcripts and other documents relating thereto.

**ANSWER:** Plaintiff objects to Interrogatory Number 3 in that it seeks information protected from disclosure by the attorney/client and work product privileges. Subject to and without waiver of the foregoing general and specific objections, this answering Plaintiff has received testimony from the Debtors at the First Meeting of Creditors.

4. Have you taken or received any statements relating to the matters alleged in the complaint? If so:

- a. Identify each person from whom you have taken a statement, indicating whether the statement was oral, written, by a court reporter, tape recorder or otherwise reserved in some fashion;
- b. State the date, time and location of each such document;
- c. Identify each person taking the statement and any other person present during the taking of each such statement; and
- d. State whether the person from whom the statement was taken has been provided with a copy, specifying the date and place thereof.

**ANSWER:** Plaintiff objects to Interrogatory Number 4 in that it seeks information protected from disclosure by the attorney/client and work product privileges. Subject to and without waiver of the foregoing general and specific objections, Plaintiff has not taken or received any statements relating to the matters of alleged and complaint except for the testimony at the First Meeting of Creditors, which is available to the Defendant from the U. S. Trustee.

5. State whether you have obtained any photographs, slides, motion pictures, video tapes, plats, drawings, models, charts or other physical common demonstrative or illustrative evidence of any type or nature whatsoever. If so, state:

- a. The type of evidence obtained;
- b. A detailed description of its subject matter;
- c. When, where and by whom the evidence was obtained, taken, made or prepared;
- d. The identity of the person currently in possession and/or control of such evidence; and
- e. Whether you will make such evidence available to Defendant's attorneys for inspection or supply copies thereof the necessity of a motion to produce such evidence.

**ANSWER:** No.

6. Identify all persons whom you may call at trial, including all witnesses, to give testimony and for each such person, state the following:
- a. Full name, address, phone number and occupation;
  - b. The subject matter to which he or she may be asked to give testimony;
  - c. His or her qualifications to give expert testimony, if any, on that subject or subjects;
  - d. A summary of all facts as to which the witness will testify;
  - e. All opinions or conclusions, if any, to which the witness will testify; and
  - f. The grounds for those opinions or conclusion.

**ANSWER:** Matthew Mark Higgins and Amy Beth Higgins, formerly known as Amy Beth Meyers. Discovery is ongoing and identification of witnesses will be made available as they become identifiable.

7. Identify all of the assets that debtors' failed to list in their bankruptcy schedules and an estimation of value of each asset, include any assets disposed of within the six months prior to the date of the debtors' bankruptcy and/or any assets exposed during examination at the meeting of creditors.

**ANSWER:** Plaintiff objects to Interrogatory Number 7 in that it seeks information which is equally available to Defendant. Subject to and without waiver of the foregoing general and specific objections, Plaintiff states none known.

8. State with specificity the depth into which the Debtors' entire household income, from all sources beginning March 2003 to present, as claimed in their bankruptcy, has been examined, and the findings of the examination, including but not limited to:
- a. Debtor Amy Beth Higgins' income derived from her employment at Mayo Clinic, and her reasons for terminating her employment at Mayo Clinic;
  - b. Debtor Amy Beth Higgins' employer at the time of the bankruptcy filing and the income derived from said employer;
  - c. Debtor Matthew Mark Higgins' last place of employment, his last date employed, and monthly income derived from last full month of employment;
  - d. Dates and events related to Debtor Matthew Mark Higgins' unemployment;
  - e. Any disability insurance, social security, workers' compensation, unemployment, union, pension, etc., benefits received;
  - f. The reasons for any increase or decrease in the Debtors' income; and
  - g. Identification of all documents that support the Debtors' income.

**ANSWER:** Plaintiff refers Defendant to the Debtors' bankruptcy schedules.

9. State the debtors' living arrangements from March 2003 to present, including:

- a. Debtors' specific address(es);
- b. Whether Debtors rented or owned at each address;
- c. Number of individuals sharing each listed address;
- d. Identification of age and relationship to Debtors of individuals sharing each listed address;
- e. Debtors' monthly housing payment;
- f. Other individuals or entities contributing to the Debtors' monthly housing payment and the amount of the contribution;
- g. What is included in Debtors' monthly payment; and
- h. Debtors' reason for relocating.

**ANSWER:** Plaintiff refers Defendant to Debtors' bankruptcy schedules.

10. List Debtors' monthly living expenses from March 2003 to present, including:
- a. Reasons for any increases or decreases to Debtors' living expenses;
  - b. Specific calculations for income tax, social security, insurance, pension, and union dues that are deducted from Debtors' paycheck; and
  - c. Identification of all documents that support Debtors' living expenses.

**ANSWER:** Plaintiff refers Defendant to Debtors' bankruptcy schedules.

11. With respect to Debtors' Schedule J itemize and describe with specificity each and every independent expense making up the separate monthly expenditures asserted therein and your calculation of the necessity of each expense for the Debtors' maintenance or support.

**ANSWER:** Plaintiff objects to Interrogatory Number 11 in that it seeks information which is equally available to Defendant.

12. State Debtors' method of payment (i.e. check, cash, etc.) for Debtors' monthly living expenses as listed on Schedule J and described in Interrogatory Number 12 and include a description of any financial account used and the name of each individual to whom the financial account belongs.

**ANSWER:** Plaintiff objects to Interrogatory Number 12 in that it seeks information which is equally available to Defendant.

13. State with specificity the depth into which the Debtors' claimed monthly expense obligation has been examined, and the findings of the examination, including but not limited to any expense listed on the Debtors' Schedule J, or portion thereof, for which they are not solely liable and/or to what extent any expense may have been over-stated or miscalculated.

**ANSWER:** Plaintiff objects to Interrogatory #13 in that it seeks information which is equally available to Defendant.

14. State the basis for your calculation of the average retail market value of the 2001 Mazda 626 as asserted in your complaint.

**ANSWER:** The value of the 2001 Mazda 626 as asserted in the Complaint was the trade-in value of the vehicle allowed by Rochester Ford towards the purchased 2003 Ford Escort.

15. Itemize and state all damages related to the allegations in your Complaint.

**ANSWER:** Affinity received \$16,669.00 on a debt that had a security with fair market value of approximately half the amount received and the Debtors paid \$4,000 of such amount which is the amount the estate has asserted a claim to under 11 U.S.C. § 547.

16. State your understanding of the transaction involving the trade of the 2001 Mazda 626 for the 2003 Ford Escort ZX2.

**ANSWER:** The Trustee is attempting to obtain discovery relative to this transaction but believes at a minimum the Debtors paid \$4,000 toward the deficiency on the Federal Plus Credit Union obligation.

17. State the legal basis for your assertion to a claim for costs and attorney's fees.

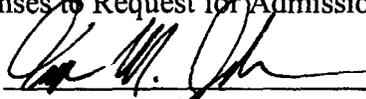
**ANSWER:** The Trustee has withdrawn his claim for costs and attorney's fees.

18. For each request for admission served herewith, or any part thereof, which you have denied, denied with qualifications, or answered in any other manner other than an unqualified admission, state in detail and with specificity:

- a. The full factual basis for the denial, qualification or failure to admit;
- b. Identify all documents supporting such denial, qualification or failure to admit;
- c. Identify all persons with knowledge supporting your denial, qualification or failure to admit.

**ANSWER:** Explained in Trustee's Responses to Request for Admissions.

Dated: July 27, 2004

  
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Charles W. Ries #12767X  
Tanya M. Johnson #0333220  
MASCHKA RIEDY & RIES  
Attorneys for Plaintiff  
201 North Broad Street, Ste 200  
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