



**RADKE LAW OFFICE**

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June 16, 2004

Ms. Sarah Wencil  
U.S. Dept. of Justice  
300 S. 4<sup>th</sup> ST.  
Suite 1015  
Minneapolis, MN 55415

Mr. Michael J. Iannoccone  
Bankruptcy Trustee  
8687 Eagle Point Blvd.  
Lake Elmo, MN 55042

Clerk of U.S. Bankruptcy Court  
200 U.S. Courthouse  
316 N. Robert ST.  
St. Paul, MN 55101

Re: Todd Rogers  
Bky. No. 04-31076

Dear Sir or Madam:

Please find the Debtor's Answer to the Motion to Dismiss by the U.S. Trustee.

Cordially,

Harvey J. Radke  
Enclosures

UNSWORN DECLARATION OF SERVICE

I, Harvey J. Radke, declare that I served a true and correct copy of the Answer to the U.S. Trustee's Motion to Dismiss upon the Clerk of U.S. Bankruptcy Court, electronically filed; and Mr. Iannacone and the U.S. Trustee by hand-delivery on June 16, 2004.

Dated: June 16, 2004

  
\_\_\_\_\_  
Harvey J. Radke

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

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In Re:

Todd M. Rogers,

Debtor.

Chapter 7

Bky. No. 04-31076 GFK

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ANSWER

Todd M. Rogers, the above-named debtor, respectfully answers the allegations in the Motion to Dismiss under 11 u.s.c. section 707 by the U.S. Trustee, as follows:

1. Admit the allegations in Paragraphs 1, 2, 3, 4, 5, 7, 8, 13, and 15.
2. Deny the allegations in Paragraphs 6, 9, 10, 11, 12, and 14.

THEREFORE, Debtor Todd M. Rogers prays for denial of the Motion to Dismiss this Chapter 7 case.

Dated: June 16, 2004

  
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Harvey J. Radke  
Attorney At Law  
105 Riverdale Drive  
Hastings, MN 55033  
(651)438-2783  
Atty. No. 203993

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA

In Re:	}	
	}	
Todd M. Rogers,	}	Chapter 7
	}	
Debtor.	}	Bky. No. 04-31076 GFK
	}	

MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

Harvey J. Radke, attorney for Debtor, Todd M. Rogers, submits this memorandum in opposition to the motion to dismiss this case under 11 U.S.C. s. 707(b).

ANALYSIS

The United States Trustee bears the burden of showing substantial abuse under 707(b). In Re Dubberke, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990). If a credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. In Re Palmer, 117 B.R. 443, 446. The debts in the present case are primarily consumer debts.

To satisfy the “substantial abuse” standard under 707(b) the 8<sup>th</sup> Circuit has ruled that the primary consideration is whether the debtor has the ability to fund a Chapter 13 plan. In Re Walton, 866 F.2d 984 (8<sup>th</sup> Cir. 1989). “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”. Fonder v. United States, 974 F.2d 996, 999 (8<sup>th</sup> Cir. 1992).

In the present case, Debtor is employed as an automobile salesman at Valley Sales since 2001. Debtor is paid strictly on commission. Debtor filed for Chapter 7 relief on February 25, 2004 and based his income on an estimated yearly average income of \$84,600.00. At the time of completing Debtor’s Schedule I this was the Debtor’s best estimate for his average yearly income. The monthly income averages \$7,050.00. Debtor’s net monthly income averages \$4,700.00.

At the time, and currently is, separated from his wife, Vicki Rogers. Vicki Rogers was employed at the time of filing but is currently unemployed.

Debtor’s Schedule J. expenses total \$6,015.00. Included in the amount is a secured boat payment of \$1,250.00. Subtracting said payment leaves expenses of \$4,765.00. The Schedule J does not include child support that is sure to arise from his divorce to Vicki Rogers, for the couples’ child, Colton Rogers.

CONCLUSION

Based upon the facts in the present case, Debtor did not at the time of filing, nor does he currently have disposable income to pay his unsecured creditors consistently on a monthly basis. Based upon Debtors lack of ability to fund a Chapter 13 plan, the Motion to Dismiss Debtor's Chapter 7 Case should be denied.

Dated: June 16, 2004

Respectfully submitted,

  
\_\_\_\_\_  
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