

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Todd M. Rogers,

Debtor(s).

Chapter 7

BK 04-31076 GFK

TRIAL MEMORANDUM

The United States Trustee submits this Trial Memorandum in support of his Motion to Dismiss, which is set for evidentiary hearing on September 29, 2004 at 9:30 a.m.

The petition commencing this Chapter 7 case was filed on February 25, 2004.

DEBTS

In the original Schedules, which have not been amended, the debtor lists the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtor lists three claims totaling \$ 489,000.00 secured by 2001 Maxim boat and boat slip and a first and second mortgage on the homestead. The debtor sold the boat for \$ 160,000 while this case has been pending (the outstanding loan balance is listed as \$ 159,000; there appears to be no deficiency). Remaining secured claims total \$ 329,000.
- (b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtor lists no claims.
- (c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtor lists ten claims totaling \$ 87,050.00. The debtor admitted in the answer that the debts are primarily consumer debt.

INCOME AND EXPENSES

On Schedule I, the debtor lists monthly household net income of \$ 8,950.00. The debtor is married and lists two minor aged dependents. At the time of filing, the debtor was separated from his spouse and maintained two households. Total household expenses on the two Schedule Js totaled \$ 10,205.00.

Debtor Income and Expenses

In the original Motion to Dismiss, the United States Trustee calculated that the debtor's monthly net pay was \$ 8,387.09 average net pay per month and that the debtor's expenses were \$ 4,275.00 per month.

In discovery for this hearing, the United States Trustee requested more current pay stubs. The most current pay stub provided is for the period ending 7/31/04. See Att. Ex. 1. In that pay stub, which is based on a year-to-date gross income of \$ 73,289.57, the debtor shows the following net income:

Year-to-Date Net Income	\$ 42,209.53
401K Voluntary	<u>\$ 4,397.36</u>
Total Net Income	\$ 46,606.89

\$ 46,606.89 divided by 7 months = \$ 6,658.13 average net pay per month. Based on the tax returns, the debtors gross income in 2003 totaled \$ 91,319.65, which is less than his year-to-date gross of \$ 73,289.57, which would average to \$ 125,639.27 annual income.^{1/} The debtor's income in previous years, however, was significantly greater: \$ 116,090.12 in 2002 and \$

^{1/} The tax returns are not attached to the motion due to private information, but would be an exhibit at the hearing.

156,602.11 in 2001.^{2/}

The debtor listed Schedule J expenses of \$ 6,225.00 per month. Based on information submitted, the United States Trustee believes this figure should be adjusted to \$ 4,275.00. A schedule of original Schedule J and the United States Trustee's adjustments is as follows:

Category	Schedule J	UST Adjustments
Rent/Mort	\$ 600	\$ 600
Elect/Fuel	\$ 100	\$ 100
Telephone	\$ 90	\$90
Maintenance	\$ 100	\$ 100
Food	\$ 275	\$ 275
Clothing	\$ 70	\$ 70
Laundry/Dry Cleaning	\$ 25	\$ 25
Medical and Dental	\$ 20	\$ 20
Transportation	\$ 225	\$ 225
Recreation	\$ 100	\$ 100
Charity	\$ 20	\$ 20
Life Insurance	\$ 200	\$ 0 ^{3/}
Health Insurance	\$ 350	\$ 0 ^{4/}

^{2/} The W-2 of the debtor was not attached to the 2001 tax return, but the W-2s of the spouse were attached for her two places of employment. Therefore, this figure is taken from the total wage line in the tax returns less the spouse's W-2s.

^{3/} Att. Ex. 2. Letter dated May 14, 2004 from counsel for the debtor represents that life insurance is included in the pay stub, which was used for the U.S. Trustee's net pay calculation above.

^{4/} Att. Ex. 2. Same explanation as footnote 3.

Boat Insurance	\$ 100	\$ 0 ^{5/}
Boat Payment	\$ 1300	\$ 0 ^{6/}
Home Equity Loan	\$ 320	\$ 320 ^{7/}
Alimony/Support	\$ 1,250	\$ 1,250 ^{8/}
Day Care	\$ 780	\$ 780 ^{9/}
Misc.	\$ 100	\$ 100
½ Child Expenses/Divorce decree	\$ 200	\$ 200
Total	6225	4275

Average net income of \$ 6,658.13 less average net expenses of \$ 4,275 provides the debtor with monthly net disposable income of \$ 1,950 per month. Disposable income of \$ 1,950 would

^{5/} Att. Ex. 3. Deposits from boat slip sale. \$ 156,799.31 payed to secured creditor and \$ 3,200 deposited to checking account (presumably to debtor). The debtor listed the boat as exempt on Schedule C and valued the boat at \$ 109,000. The exemption was claimed in the amount of \$ 0.00. The U.S. Trustee was also provided with the bill of sale, but is not attaching the document to this Memorandum because it contains information regarding the purchaser, which is not appropriate to file.

^{6/} Att. Ex. 3. Same explanation as footnote 5.

^{7/} This debt appears to be listed on Schedule F, but a copy of the home equity agreement was provided to the U.S. Trustee.

^{8/} According to the Divorce Decree, which is not attached because it contains private information regarding the former spouse which is not appropriate for filing, child support is \$1,000 per month and \$ 137 per month for child care for a total of \$ 1,137.00. Debtor is also ordered to pay 1/2 of insurance premiums and medical expenses. However, a separate category for this expense is elsewhere on Schedule J. No adjustment is made, however, to maintain a cushion for the support issue.

^{9/} As noted in the original Motion to Dismiss, the receipts provided for day care averaged to approximately \$ 580 per month. The debtor provided additional information regarding Saturday babysitting at \$ 50.00 per day, which appears appropriate, given that both the debtor and his present spouse are employed as car salespersons on Schedule I. The U.S. Trustee withdraws that adjustment from his original motion.

enable the debtor to pay \$ 70,200 of general unsecured debts of \$ 87,050 or approximately 81%.

Household Income and Expenses

The United States Trustee believes that the issue of fact in this hearing will relate to household income and expenses. Based on the adjustments above and based on the last verified information that the United States Trustee received household disposable income is as follows:

\$ 6,658.13 + Schedule I net income of spouse \$4,150¹⁰ = \$ 10,808.13 net household income.

Adjusted Schedule of debtor \$ 4,275 + Schedule J of spouse \$ 3,980 = \$ 8,255.00 household expenses.

Based on these figures, there is disposable income of \$ 2,553.13 per month, which would pay 100% of the general unsecured debts of the debtor in a hypothetical Chapter 13 Plan.

The fact issues, which the United States Trustee has not been provided with information of as of this date, are two fold:

1. In Att. Ex. 2, counsel for the debtor states that the spouse lost her job in March 2004. This information has not been verified through the debtor or the spouse. The United States Trustee has not been provided with information regarding whether she has been re-employed, receives unemployment benefits, or is presently unemployed. According to the tax returns, the spouse was employed at the same position at a car dealership in 2002 and 2003 and earned \$ 88,846.17 in 2003 and \$ 69,303.66 in 2002. In 2001, she was employed at two different dealerships and earned \$95,555.96.

¹⁰ The U.S. Trustee was previously provided with pay stubs of the spouse from the period through 3/30/04 and calculated that net income totaled \$ 4,367.45, which is relatively close to Schedule I, so no adjustment is made here.

2. The status of the marriage of the debtor and the spouse remains unknown. At this time, no divorce proceedings have been initiated and the parties were attempting to reconcile.^{11/}

The United States Trustee believes that these two issues will decide the outcome of the trial on September 29, 2004.

LEGAL ANALYSIS

The United States Trustee does not believe that there are any legal issues in this case, and he adopts his legal brief which was filed with the initial motion herein. A summary of the principles will be revised here. A Motion to Dismiss for Substantial Abuse is governed by Section 707(b) 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)).

In the present case, the debtor appears to have the ability to pay the unsecured creditors in a hypothetical thirty six month Chapter 13 plan. The deciding factors on the ability to pay issue will be the status of the spouse's employment or if the parties have commenced divorce proceedings.

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.

^{11/} Att. Ex. 4. Letter from debtor counsel dated August 10, 2004.

Dated: September 13, 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

Exhibit 1



12257 Point Douglas Drive
 HASTINGS, MN 55033
 651-437-9815

75-780
 919

PAY **NO DOLLARS AND 00/100**

DATE	AMOUNT
------	--------

08/06/04 \$0.00

TO THE
 ORDER
 OF
 TODD MARKAM ROGERS
 17106 FAIRHILL AVE
 FARMINGTON, MN 55024

VALLEY PONTIAC-BUICK-GMC
 VOID AFTER 90 DAYS

Merchants Bank
 1525 VERMILLION ST. (651) 437-7760
 HASTINGS, MN 55033-2845

NON - NEGOTIABLE
 AUTHORIZED SIGNATURE

 12257 Point Douglas Drive P.O. Box 186 Hastings, MN 55033	EMPLOYEE NAME			SOCIAL SECURITY NO.	EMPLOYEE NO.	CHECK NO.	
	TODD MARKAM ROGERS						
	DIVISION	DEPARTMENT		PERIOD BEGINNING	PERIOD ENDING	CHECK DATE	
1	11A		07/18/04	07/31/04	08/06/04		
EARNINGS/TAXABLE BENEFITS	HOURS	RATE	CURRENT	YEAR TO DATE	TAXES / DEDUCTIONS	CURRENT	YEAR TO DATE

NEW COMMISS		2,156.20		18,638.08	FEDERAL S-9	491.74	9,626.87
USED COMMISS		2,002.49		44,914.28	OASDI	249.92	4,200.80
INCENTIVE		229.10		5,603.23	MEDICARE	58.45	982.45
VACATION		0.00		3,783.98	STATE-MN S-9	164.76	3,018.94
DEMO ALLOWAN		0.00		350.00	PRETAX HLTH	159.77	2,460.60
TOTAL PAY	0.00	4,387.79		73,289.57	PRETAX DENTA	29.45	441.75
					LIFE INS	6.80	102.00
					ACCOUNTS REC	53.77	1,661.91
					CAR SAVINGS	130.00	1,155.00
					PRETAX PRO	16.25	243.75
					DEMO	50.00	400.00
					401K	263.27	4,397.36
					FLEX SPENDIN	62.50	937.50
					DEPENDENT CA	88.77	1,451.11
					OTH DEDUCTS	2,562.34	42,209.53
NET PAY		0.00		0.00			

BUICK

Exhibit 2



RADKE LAW OFFICE

Harvey J. Radke
Attorney at Law

105 Riverdale Drive
Hastings, MN 55033

Phone: **(651) 438-2783**

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

May 14, 2004

Re: Todd Rogers
Bky. No. 04-31076

Dear Ms. Wencil:

Pursuant to your request, please find enclosed:

- 1) The most recent pay stubs for Mr. Rogers and his wife, Vicki. They are currently separated and a divorce is expected. Vicki Rogers has been unemployed since March 22, 2004.
- 2) Copies of Mr. Rogers' 2001, 2002, and 2003 state and federal tax returns, including w-2s.
- 3) Retirement withholding is not mandatory. Enclosed is a copy of the retirement account statement.
- 4) The life insurance is whole life, and is deducted from his employer.
- 5) The boat and slip payments were made electronically from Mr. Rogers' US Bank Christmas Fund account, see the US Bank statements.
- 6) See Mr. Rogers' pay stubs for insurance withholdings.
- 7) See enclosed American Family check receipts.
- 8) Enclosed are the January, 2000 Findings of Fact, Conclusions of Law, Order for Judgment and Judgment and Decree from Todd Roger's previous marriage to Lynette Rogers. Child support is for the benefit of Alyssa Marie Rogers, age 8, see page 5. The payment is not for alimony and/or support for Mr. Rogers' current wife, Vicki, nor his son Colton Rogers. Mr. Rogers will have additional child support obligations for his son Colton.

OFFICE OF UNITED
STATES TRUSTEE

2004 MAY 14 A 9:04

RECEIVED

- 9) Enclosed please find receipts for day care expenses for Colton. Mr. Rogers does not have receipts for the additional baby sitting expenses incurred monthly in addition to day care.
- 10) Enclosed please find the Guaranty Home Equity Corp. agreement.
- 11) Enclosed please find Todd Rogers' bank statements for US Bank. Mr. Rogers does not maintain a check register.

Cordially,



Harvey J. Radke
enclosures

Exhibit 3



Official Receipt

DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

Member FDIC

Checks and other items received for deposit are subject to the terms and conditions of this bank's rules and regulations governing bank accounts, "Customer Agreement," as they may be amended from time to time. All items accepted for deposit are subject to later count and verification.

Comprehensive Banking Solutions, Dedicated Experts and Guaranteed Service - For all your small business banking needs, visit your local U.S. Bank office today.

usbank.com

[Redacted] 05/06/2004 02:27 USB
I-L PAY 510084223 H
\$156,799.31

BOA + Slip pay off

20133-1 (9/03)



Official Receipt

DEPOSITS MAY NOT BE AVAILABLE FOR IMMEDIATE WITHDRAWAL

Member FDIC

Checks and other items received for deposit are subject to the terms and conditions of this bank's rules and regulations governing bank accounts, "Customer Agreement," as they may be amended from time to time. All items accepted for deposit are subject to later count and verification.

Comprehensive Banking Solutions, Dedicated Experts and Guaranteed Service - For all your small business banking needs, visit your local U.S. Bank office today.

usbank.com

[Redacted] 05/06/2004 02:28 USB
DEPOSIT 104771235405 H
\$3,200.69

To checking

20133-1 (9/03)

Sold BOA +
+ Slip
160,000.00

Exhibit 4



RADKE LAW OFFICE

Harvey J. Radke
Attorney at Law

105 Riverdale Drive
Hastings, MN 55033

Phone: (651) 438-2783

RECEIVED

2004 AUG 11 A 9:43

OFFICE OF THE
UNITED STATES TRUST

August 10, 2004

Ms. Sarah J. Wencil
U.S. Dept. of Justice
U.S. Courthouse
Suite 1015
300 S. 4th ST
Minneapolis, MN 55415

Re: Todd Markam Rogers
Bky. No. 04-31076

Dear Ms. Wencil:

Enclosed please find copies of Mr. Rogers: 1) most recent pay stubs, 2) copies of the boat and slip sale to Mr. Todd Siewert, 3) pay stubs dating back to May 6, 2004 indicating the payment of insurance premiums, 4) names of Mr. Roger's daycare (babysitting) providers for his children while he is working, 5) Vickie and Todd Rogers are currently separated and neither has instituted a divorce proceeding as they continue to try to reconcile their marriage, and 6) nothing at this time, but will provide additional explanation in the near future.

Cordially,

Harvey J. Radke
enclosures

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Todd M. Rogers,

Chapter 7

Debtor(s).

BK 04-31076 GFK

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.

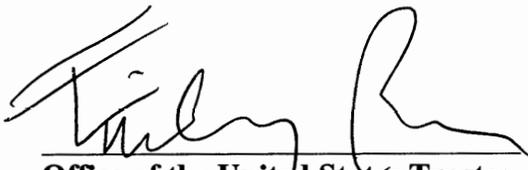
That on September 13, 2004, I served a copy of the Trial Brief in the above-referenced case by fax to debtor's counsel and by placing said copy in a postpaid envelope addressed to the person(s) hereinafter named, at the place and address stated below, which is the last known address, and by depositing said envelope and contents in the United States Mail at Minneapolis, Minnesota.

Addressee(s):

Harvey James Radke
1401 W. 76th St. Suite 400
Richfield, MN 55423

Todd W. Rogers
15571 Brookside Lane NW
Prior Lake, MN 55372

Michael Iannacone
8687 Eagle Point Road
Lake Elmo, MN 55042


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