

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jon L. and Janet M. Johnson

Chapter 7

Debtor(s).

BK 04-31268

UNITED STATES TRUSTEE'S TRIAL MEMORANDUM

The United States Trustee filed a motion to dismiss this case under Section 707(a) and (b), which was set for an initial hearing on August 2, 2004 at 3:00 p.m. The United States Trustee subsequently dropped the allegation under Section 707(a) for failure to cooperate and is proceeding under Section 707(b) of the Bankruptcy Code. The Bankruptcy Court set the motion on for trial on October 26, 2004 at 1:30 p.m.

11 U.S.C. § 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).

In the present case, the United States Trustee alleged that the debts were primarily consumer debts. The debtors did not dispute this element of Section 707(b). Therefore, the issue before the Bankruptcy Court at the trial on October 26th, 2004 is whether the granting of relief under Chapter 7 would be a substantial abuse of the provisions of Title 11.

The Eighth Circuit has ruled that the primary consideration under the “substantial abuse” standard of Section 707(b) is whether the debtor has the ability to fund a 13 plan out of future income. *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).

In the District of Minnesota, there is no set percentage of repayment that must be met for substantial abuse to be present. The District Court of Minnesota opines that the determination of what is substantial should be made on a case-by-case basis:

In this Circuit, there is no clear cut formula or quantitative, threshold percentage of debt that must be repaid under a Chapter 13 plan in order to constitute grounds for dismissal for "substantial abuse." See Walton; Fonder; see also In re Schmidt, 200 B.R. 36, 38 (Bankr. D. Neb. 1996).... Rather, (and until such a threshold is articulated), Bankruptcy Courts are to use their best judgment to determine what repayment percentage is appropriate on a case-by-case basis. Considering the record before it, the Bankruptcy Court concluded, without comment, that a 35% repayment plan over a three year term was sufficient to constitute "substantial abuse." After conducting a de novo review of the record, this Court agrees. An ability to contribute more than \$17,000 towards \$ 44,000 of unsecured debt is "substantial."

Mathes v. Stuart (In re Mathes), Civil File No. 3-96-906, slip op. at 6-7 (D. Minn. July 2, 1997)
See also In re Shirley Wilkins, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.) (holding that the ability to pay 28% in three years or 49% in five years of unsecured debts was a substantial abuse under § 707(b)).

The Debtors' Case

In this case, the debtors scheduled secured debts totaling \$ 73,135.82 on Schedule D;

scheduled no priority unsecured debts on Schedule E; and scheduled general unsecured debts totaling \$ 94,964 on Schedule F. On Schedule I, the debtors listed that their net monthly income totaled \$ 3,750.80. Jon Johnson is listed as being employed as a Senior Field Manager for Scrantron Service Group for 21 plus years. Janet Johnson is listed as being employed as an Office Manager at Shoppers Supply in Spirit Lake, Iowa, for three months. The debtors disclose no dependents. On Schedule J lists that monthly household expenses total \$ 3,953.18. The UST intends to submit the schedules and statement as evidence at the hearing.

In the Supplement to the Motion to Dismiss, the United States Trustee (UST) concluded that the debtors' net monthly income based on Janet Johnson's April 24, 2004 pay stub and John Johnson's April 30, 2004 pay stub was \$ 5,424.67 average net pay per month. The UST noted that while several expenses on Schedule J appeared excessive, net income of \$ 5,424.67 per month less Schedule J expenses of 3,953.18 per month, without any adjustments, provided the debtors with monthly disposable income of \$ 1,471.49 per month. Monthly disposable income of \$ 1,471.49 per month provided the debtors with the ability to pay approximately \$ 52,973.64 or 55.7% of their unsecured debts in a hypothetical thirty six month Chapter 13 Plan. The debtors could pay \$ 88,289.40 or 93% of the unsecured creditors in a hypothetical sixty month Chapter 13 Plan. To the extent that the Supplement to Dismiss is not otherwise altered in this Trial Memorandum, the UST incorporates the Supplement herein.

In the response to the motion to dismiss, the debtors raised the following defenses: (1) Janet Johnson lost her job; (2) the UST's calculations for income included expense reimbursements for job expenses of Jon Johnson; and (3) high expenses for food, home maintenance, medical and dental,

clothing and telephone were justified in the debtors' circumstances. The response was not verified and little documentation was provided to support the response.

The UST served Interrogatories and a Request for Documentation to address the response raised by the debtors. The Interrogatories will be submitted as an exhibit. Based on the information received in response, the UST believes that the debtors have an ability to pay their debts from future income.

Income

In the response, the debtors stated that Janet Johnson was not employed. However, Ms. Johnson obtained employment at Collision Maters in Spirit Lake, Iowa, (supported Interrogatory response and pay stubs to be submitted at the hearing) and provided the UST with pay stubs for the weeks of 8/13/04 and 8/20/04 at her new employment (she also provided pay stubs through the period ending 7/31/04 for her former employment). Ms. Johnson receives net pay each week of \$ 268.52. This amount times 52 weeks in the year (\$13,963.04) divided by 12 months provides monthly net pay of \$ 1,163.59.

Jon Johnson provided the UST with several pay stubs through 9/3/04. The UST calculated the following net income based on the 9/3/04 80 hour work week pay stub^{1/}:

Line Item per Pay Stub	Amount on Pay Stub	UST Calculation
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^{1/} The debtors stated that the year-to-date average in the UST's Supplement to Motion to Dismiss was skewed because Mr. Johnson bought back vacation time; evidence of which was included in the pay stubs provided. Also, the debtors have stated that Mr. Johnson received a raise in April 2004. Therefore, the UST is using the flat 80 hour pay stub. This pay stub also adjusts for another change, which is that Ms. Johnson is now insured under Mr. Johnson's insurance program, so his health insurance premium has increased.

Employee Reimburse	384.98	0 ^{2/}
Car Allow	28.85	0 ^{3/}
Regular	2,084.62	2084.62
Fed wh	97.42	-97.42
Fed Med	28.81	-28.81
Fed OASDI/EE	123.18	-123.18
MN wh	47.44	-47.44
PT United Health	119	-119
PT Met Life Low	5	-5
PT Vision	6	-6
PT 401K	250.15	0 ^{4/}

^{2/} A letter provided by Mr. Johnson's employer verifies that the expense line item, reimburses Mr. Johnson for his employee expenses, which assertion was raised by the debtors in their response. The UST, therefore, took this calculation out in this Trial Memo.

^{3/} This amount is offset on the pay stub as well, so the UST took this calculation out of his formula.

^{4/} Cases re: 401K contributions: *See In re Behlke*, 358 F.3d 429, 435-36 (6th Cir. 2004); *In re Anes*, 195 F.3d 177 (3rd Cir.1999) (adopting per se rule that voluntary contributions to retirement plan constitute disposable income under Section 1325); *In re Prout*, 273 B.R. 673 (Bankr.M.D.Fla.2002); *In re Heffernan*, 242 B.R. 812, 818 (Bankr. D. Conn. 1999); *In re Johnson*, 241 B.R. 394 (Bankr. E.D. Tex. 1999); *In re Hansen*, 244 B.R. 799 (Bankr.N.D.Ill.2000); *In re Merrill*, 255 B.R. 320 (Bankr.D.Or.2000); *In re Cavanaugh*, 175 B.R. 369, 373 (Bankr. D. Idaho 1994); *In re Scott*, 142 B.R. 126, 135 (Bankr. E.D. Va. 1992) (holding not reasonably necessary under §1325(b)); *In re Fountain*, 142 B.R. 135, 137 (Bankr. E.D. Va. 1992) (holding cannot make voluntary contribution unless pay Ch. 13 creditors in full); *In re Ward*, 129 B.R. 664, 668 (Bankr. W.D. Okla. 1991); *In re Colon Vazquez*, 111 B.R. 19, 20 (Bankr. D. Puerto Rico 1990); *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985); *Collins v. Hesson (In re Hesson)*, 190 B.R. 229, 237-38 (Bankr. D. Md. 1996); and see cases following case by case analysis: *In re Taylor*, 243 F.3d 124 (2d Cir.2001) (adopting a case by case test to look at the age of the debtor, the mandatory nature of the contributions and impact on employment, dollar amount of any penalties, and other circumstances); *In re Awuku*, 248 B.R. 21, 32(Bankr. E.D.N.Y. 2000) (holding contribution into city employer's mandatory plan was reasonable); *In re Mills*, 246 B.R. 395, 401-

AT Supp Life	35.02	-35.02
AT Dep Life	1.5	-1.5
AT Supp AD&D	2.97	-2.97
AT Supp Ltd	2.71	-2.71
401K Loan ^{5/}	41.46	0 ^{6/}
Personal Use of Car	28.85	0
Total		1615.57

Net pay of \$1,615.57 x 26 pay periods in a year (\$42,004.82) provides Mr. Johnson with average monthly net income of \$3,500.40.

Based on these calculations, the debtors monthly net pay is \$1,163.59 (Ms. Johnson) + \$3,500.40 (Mr. Johnson) = \$4,663.99 joint monthly income.

Although not asserted by the debtors in the Response, the UST believes that the debtors under withhold their taxes from their pay stubs and will likely owe state and federal taxes at their present rate of withholding. The UST estimates that this liability will be approximately \$260.17 per month. To

402 (Bankr.S.D.Cal.2000) (holding that contribution was reasonable in circumstances); *In re Regen*, 269 B.R. 693 n. 2 (Bankr. W.D. Mo. 2001) (noting that limited contribution was permitted in Chapter 13 Plans, but holding for 707(b) purposes that contributions were not necessary for support of the debtors).

^{5/} In documents submitted to the UST, the debtors show in the check registers that they withdrew \$ 3,000 from Jon Johnson's 401K account on June 29, 2004 [post-petition and after this motion was filed on June 9, 2004], and spent \$ 2,768.50 on a "Sunlite camper" on June 29, 2004. The act demonstrates that 401K contribution and loan repayments are unreasonable in this case.

^{6/} Cases regarding repayment of loans on retirement funds. *Harshbarger v. Pees* (*In re Harshbarger*), 66 F.3d 775, 777-78 (6th Cir. 1995) (Chapter 13); *In re Anes*, 195 F.3d 177, 180 (3rd Cir. 1999); *In re Cohen*, 246 B.R. 658, 666-67 (Bankr. D. Colo. 2000) *In re Jaiyesimi*, 236 B.R. 145, 148 (Bankr. S.D.N.Y. 1999); *In re Delnero*, 191 B.R. 539, 543 (Bankr. N.D.N.Y. 1996); *In re Fulton*, 211 B.R. 247 (Bankr. S.D. Ohio 1997)).

calculate this figure, the UST used the tax rates on the 2003 Federal and State tax returns:

2003 Joint Wages = \$64,934

2003 Fed Tax = \$5724 or 8.8% of Joint Wages

2003 State Tax = \$ 2,333 or 3.5% of Joint Wages

Using the pay stubs used to calculate the estimated gross income of the Johnsons, the UST calculates the following annual income for 2004:

a. Mr. Johnson: \$2,498.45 Gross - Employee Expense \$ 384.98 - pretax deductions \$130 (health, vision and Metlife) = \$1983.47 taxable income per pay period x 26 = \$51,570.22.

b. Ms. Johnson: \$320 Gross x 52 weeks = \$16,640.

Total joint estimated income for 2004 \$68,210.22

The UST estimates that the debtors are withholding the following annual Federal taxes from their pay stubs:

a. Mr. Johnson: Federal withholding per stub = \$ 97.42 x 26 = \$ 2,532.92

b. Ms. Johnson: Federal withholding per stub = \$ 16 x 52 = \$ 832

Total Average Federal Taxes Being Withheld for 2004 = \$ 3,462.34

The UST estimates that the debtors are withholding the following annual State Taxes from their pay stubs:

a. Mr. Johnson: State withholding = \$ 47.44 per pay stub x 26 = \$1,233.44 per year

b. Ms. Johnson: State withholding = \$ 11 per pay stub x 52 = \$572 per year

Total Average State Taxes Being Withheld for 2004 = \$1,805.44

<u>Gross Wages</u>	<u>2003 Fed 8.8%</u>	<u>Ave W/H</u>	<u>Estimate Amt Owed</u>
\$ 68,210.22	6002.50	3,462.34	\$2540.16
	<u>2003 State 3.5%</u>	<u>Ave W/H</u>	<u>Estimate Amt Owed</u>
	\$ 2,387.34	1805.44	\$ 581.92

Estimated Tax Liability Total \$3,122.08 or \$260.17 per month

Adjusted Income Total = \$ 4,663.99 joint monthly income less \$260.17 tax liability = \$ 4,403.82
monthly joint net income.

Expenses

The debtors' Schedule J totals \$ 3,953.18. The UST requested the debtors' check register and copies of receipts or statements of various expenses in discovery. The debtors did provide a check register, which included all of their actual cost itemizations and which included an "Income/Expense" summary of those itemizations via their own classification for the period 4/1/04 - 9/04. The Income/Expense Summary is attached to the Trial Brief as Exhibit 1.

The UST has created a chart summarizing the Schedule J expenses, the register expense totals^{7/}, and the expenses that he believes should be adjusted for being unreasonable and unnecessary for the support and maintenance of the debtors.

Category	Schedule J	Register ^{8/}	Adjust to J
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^{7/} Attached to this Memorandum is Exhibit 2, which is the Summary of Categories for 4/1-8/31/04 on Exhibit 1 and on the underlying check registers for the two accounts that will be submitted at the trial. Essentially, this Summary takes the totals for 4/1-6/30 and 7/1 - 9/30; subtracts the 9/04 numbers because the month is incomplete, and averages the total by five months. The five month average formed the basis for the figures in this chart under Register.

^{8/} The check registers are attached. The summary prepared by the debtors is attached exhibit x. The itemization prepared by the debtors is attached as exhibit 2. The UST figures are averages of the

Mortgage	501.18	501.18	0
Elect & Gas	200	390.8 ^{9/}	0
Telephone	76	0	0
Jon's Cell	80	0	-80
Janet Cell	60	0	0
Garbage	20	0	0
Cable	42	0	0
Internet	24	23.95	0
Home Maint	200	204.32	0
Food	1000	1144.38	-500
Clothing	200	292.94	-50
Laundry	60	0	0
Medical	400	172.68	-200
Transportation	350	326.82	-20
Recreation	200	191.45	0
Charity	285	251.40	-30
Life Ins.	70	31.26	0
Health Ins.	45	0	-45
Auto Ins.	140	81.85	-50
Cash	0	17	0
Gifts	0	44.94	0
Household Goods	0	82.58	+200

totals of the months 4/1/04 to 8/31/04. A summary of how those calculations were drawn from the check register summaries is attached as exhibit x.

^{9/} This category includes heat and gas, telephones (Including Mr. Johnson's reimburseable cell phone), cable, and garbage.

Misc.	0	13.05	0
Computer	0	102.31	0
Postage	0	12.03	0
Repairs	0	11.90	0
Personal	0	5	0
Total	3953.18	3901.84	775
Adjust			
Adjusted J	\$ 3,178,18		

1. **Jon Johnson's cell phone expense.** The debtors provided Mr. Johnson's expense reimbursement vouchers and the employer handbook, which provides that this expense is reimbursed to Mr. Johnson. Both Schedule J and the check register include this reimbursed expense. As the UST took an adjustment for expense reimbursements in calculating income for the debtors, this expense should be eliminated.

2. **Food Expense.** The debtors' register reflects that they spent on average \$1,144.38 per month or approximately \$ 37.00 per day for dining out and groceries between April 1 and August 31, 2004. Generally, in this District, two persons maintain a food budget of approximately \$ 400 (or \$ 500 if personal and household items are not itemized on Schedule J). The UST believes that reduction of \$ 500 is supportable because it permits the debtors \$ 200 per person plus \$ 100 for work related eating expenses. The documents submitted by the debtors support this reduction.

The UST has summarized the debtors' food expenses from the itemized checking registers and from the receipts provided to the UST Office on to Exhibit 3 (Dining and Grocery Expenses from

Check Register and Receipts (The UST Food Summary)).^{10/} The columns on Exhibit 3 track the register/or receipt date(Date); whether the purchase is located on Jon Johnson's check register itemization (H) or Jan Johnson's check register itemization (W) (Party); whether the expense is categorized as dining (D) or grocery (G) on the registers or is solely a receipt (R) entry; where the expense was incurred (Description); the dollar amount listed in the checking register (Amount); the dollar amount on the receipt which is attributable to food ((R)\$ on Food); and an explanation regarding why a receipt was adjusted (Notes). The UST notes that the receipts are calculated over the period of June 2004- August 2004.^{11/}

Exhibit 3 summarizes how often the debtors eat out. In August 2004 alone, there are approximately 32 separate entries for restaurants (excluding Wal Mart, Cash (\$), Hy Vee, Bank, and Thate). As can be shown through Mr. Johnson's expense reimbursement vouchers, his average cost per meal on the road for his employer is approximately \$ 6.87 (which food expenses are reimbursed in overnight travel situations). Therefore, the bulk of these expenditures appear to be for recreational eating out, not in connection with work related expenses. Of the 32 restaurant entries in August, approximately 17 of those restaurant meals were in excess of \$ 10.00.

Between June 1 and August 31, 2004, the debtors attribute cash withdrawals of approximately \$ 1,400 to food expenditures (\$ 466 per month) on their checking registers. However, from the receipts provided which do not correspond to itemized entries (and are therefore, cash transactions), the total food purchases in those receipts total only \$ 343.61 over the three month period (or \$ 114.37

^{11/} The receipts are not attached to the Trial Memorandum because it is unlikely that they would scan. However, they will be submitted at the trial.

per month)^{12/}.

Further evidence that the cash withdrawals are not for food purchases can be ascertained from examining the frequency of cash withdrawals in connection with grocery and dining entries. For example, on May 14- 15 (a weekend), Ms. Johnson withdrew \$ 320 in cash, despite spending \$ 162.48 during the week prior (May 9 - 13) on groceries and eating out. In the week following the May 15th, the debtors spent an additional \$ 265.25 on groceries and eating out. The debtors spent a total of \$747.73 in a two week period on food expenses, which is not reasonable.

An adjustment to this category is reasonable. The base food expense of \$ 200 per person followed in this District plus \$ 100 for work food expenses is appropriate and more than reasonable in this case. The receipts indicate that a lot of household or other goods are being included in the \$ 1,000 figure on Schedule J, and a separate entry has been created for those expenses by the UST. Therefore, food expenses can be reduced for non-food items and for excessive and unnecessary eating out by the debtors.

3. Clothing Expenses. An adjustment for Schedule J is appropriate in this case. The UST has prepared a summary of all of the clothing expenditures noted in the check registers. Att. Ex. 4.^{13/}

In the debtors' response, the debtors state that they incurred large expenses to maintain a

^{12/} It should also be noted that the \$ 343 figure includes some receipts of dubious value, such as the July 30, 2004 receipt totaling \$ 120.05, but more than half of the receipt is for two cakes.

^{13/} The itemization used to prepare the UST Summary from the register is not attached to this trial memorandum, but will be submitted at trial. The UST would note that several "Shoppers" deposits into Ms. Johnson's bank account in excess of \$ 500 were categorized as "clothing". Those entries appear to be salary and are not included on the UST Summary.

professional dress code for work purposes. Mr. Johnson's employer's handbook states that the dress code at his employment is business casual. Ms. Johnson's employment level does not suggest the need for expensive business clothing.

As the UST Trustee Summary shows, Ms. Johnson is the primary clothing shopper. In the Supplement to the Motion to Dismiss, the UST noted that Ms. Johnson's net income totaled approximately \$ 1,250.00, and her net income at her present job at Collision Masters is slightly less. The register reflects random spending, rather than maintaining a professional wardrobe, which would justify a high Schedule J expense. \$ 75.00 or \$ 900 per year per person, is an appropriate level for maintaining the debtors' wardrobes. *See In re Shirley Wilkins*, 1997 WL 1047545 (Bankr. D. Minn. March 26, 1997) (Kishel, J.) ("... and \$ 75.00 per month for clothing purchases is ample to maintain the standard of living that § 1325(b)(2)(A) contemplates.").

4. Medical expenses. It appears from the register that the debtors' actual after insurance medical costs are lower than listed on Schedule J. An adjustment down is appropriate. The debtors submitted two letters from doctors regarding their medical condition, specifically Ms. Johnson.^{14/} The letters suggest that Ms. Johnson needs medication for osteopenia in her hips and spine and is stable and healthy and that Ms. Johnson suffers from arch pain, which the Doctor states is treatable by wearing appropriate foot wear. There is no indication that either debtors suffers from a debilitating medical condition.

5. Transportation. It appears from the register that the debtors' actual gas, repair and auto costs are less than listed on Schedule J. An adjustment down is appropriate.

^{14/} The letters are not attached but will be submitted at hearing.

6. Recreation. No adjustment to Schedule J has been proposed. However, it is of note that the debtors spent approximately 3,358.60 on a camper in July 2004, after this case was filed and while this motion was pending.

7. Charity. It appears from the register that the debtors' actual expense for charity is lower than that listed on Schedule J. An adjustment down is appropriate.

8. Life Insurance. The debtors' register reflects that they maintain life insurance with NW Mutual Life Insurance. Under the check register, the payments made are as follows: 2/20-\$ 1.15; 3/19 - \$ 58.32; 5/15 - 54.56; 8/22 - (3 pmts) \$ 29.51, 21.43, and 24.12. Total payments of \$ 187.58 or an average of \$ 31.26 per month (3/04 to 8/04 only). Therefore, no adjustment is made the UST, but the amount on Schedule J appears to be in excess of the payments made to the insurance company.

9. Health Insurance. The register reflects no health insurance premiums being paid. Both debtors are covered under Mr. Johnson's health plan, which is calculated under the income analysis.

10. Auto Insurance. The register reflects that auto insurance expenses are less than the amount listed on Schedule J. An adjustment downward is appropriate.

11. Household Goods. The UST has added an expense of \$ 200 into Schedule J. As noted, the register and receipts provided showed that many of the food expenses were actually household goods and/or personal maintenance expenses. A separate line item on Schedule J was not included for these expenditures. This amount also builds in a discretionary cushion into the budget.

Conclusion

The UST believes that the debtors' net income is approximately \$ 4,403.82. The debtors' do not have any dependants. The UST believes that several Schedule J expenses are unreasonable or unnecessary for the support of the debtors and proposes that the Court find adjusted expenses of \$ 3,178.18.

Net income of \$ 4,403.82 less adjusted expenses of \$ 3,178.18 will provide the debtors with monthly disposable income of approximately \$ 1,225.64, which would enable the debtors to pay \$ 44,123.04 through a hypothetical Chapter 13 plan of reorganization. This amount would be substantial for the debtors' fourteen general unsecured creditors, which total \$ 94,964.00 (46%). Whether the Court finds for the UST figures or some lesser number, the debtors appear to have an ability to pay some portion of their large amount of consumer general unsecured debt. Under the ability to pay test in the Eighth Circuit, the debtors' case should be dismissed under 11 U.S.C. § 707(b).

At this time, the UST expects to submit the following exhibits:

1. Schedules and Statement of Financial Affairs
2. Interrogatories and Request for Documents (and response).
3. Supplement to UST's Motion to Dismiss
4. Debtor Response to UST's Motion to Dismiss
5. Pay stubs for Janet Johnson at Collision Masters
6. Pay stubs for Janet Johnson at Shoppers
7. Pay stubs for Jon Johnson
8. 2003 Federal Tax Return (UST's copy is incomplete; debtors did not provide all of the attached schedules)

9. 2003 State Tax Return
10. Income/Expense Summary of Checking Registers for period 4/104 to 9/04, prepared by Debtors. (Exhibit 1 herein)
11. Check Register for Jon Johnson Account
12. Check Registers for Janet Johnson Account
13. UST Summary of Categories for 4/1/04 to 9/04 (Exhibit 2 herein)
14. UST Dining and Grocery Expenses from Check Register and Receipts
15. Underlying Food Receipts provided by debtors
16. Employer Reporting Instructions and Territory Management Book for Mr. Johnson's employment.
17. Mr. Johnson's employee expense reimbursement vouchers
18. UST Summary of Clothing Expenses per the Check Registers
19. Clothing receipts provided by debtors to UST
20. Recreation Receipts provided by debtors to UST
21. Utility receipts provided by debtors to UST
22. Transportation receipts provided by debtors to UST
23. Letters regarding medical condition of Ms. Johnson

The UST requested that the debtors provide any documents that they intended to use at trial and any defenses to the motion to dismiss in the Interrogatories and Request for Documents. The UST has not received any additional response from the initial compliance with the Interrogatories. The UST

reserves the right to submit any additional exhibits or arguments. All potential additional exhibits in the UST's possession at this time consist of documents provided by the debtors, summaries of those documents, or on the public record.

For witnesses, the UST intends to call one or both debtors in support of his motion. In addition, if necessary, the UST may call a bankruptcy analyst or legal clerk from the Office of the UST; or a member of the Chapter 13 Trustee staff, in the event the debtors call witnesses or submit information or defenses unknown to the UST at this time.

Dated: October 19, 2004

Respectfully submitted,
HABBO G. FOKKENA
United States Trustee
Region 12

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Exhibit 1



Both Accounts Added Together
Income/Expense

4/1/2004 Through 6/30/2004

9/14/2004

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Category Description	4/1/2004- 4/30/2004	5/1/2004- 5/31/2004	6/1/2004- 6/30/2004	OVERALL TOTAL
INCOME				
Uncategorized	100.00	0.00	0.00	100.00
Other Inc	0.00	0.00	1,000.00	1,000.00
Salary	4,817.71	4,537.24	4,383.07	13,738.02
TOTAL INCOME	4,917.71	4,537.24	5,383.07	14,838.02
EXPENSES				
Uncategorized	0.00	0.00	0.00	0.00
Auto	211.43	150.49	537.37	899.29
Cash	0.00	25.00	10.00	35.00
Charity	306.00	407.00	148.00	861.00
Clothing	208.01	432.33	177.68	818.02
Computer	394.51	0.00	117.05	511.56
Dining	763.17	777.96	159.77	1,700.90
Gas-Scantron	735.79	318.00	580.83	1,634.62
Gifts Given	0.00	59.72	0.00	59.72
Groceries	508.31	473.32	419.18	1,400.81
Home Repairs	144.66	346.59	247.73	738.98
Household	111.21	206.41	0.00	317.62
INCOME TAX	1,431.00	0.00	0.00	1,431.00
Insurance	0.00	54.56	0.00	54.56
Internet	23.95	23.95	0.00	47.90
Lodging-Scantron	243.87	203.37	156.39	603.63
Medical	120.00	235.17	226.26	581.43
Misc	15.52	26.54	4.10	46.16
Personal Care	25.00	0.00	0.00	25.00
Postage	0.00	0.00	60.15	60.15
Recreation	29.79	280.93	3,336.50	3,647.22
Repairs	43.24	16.28	0.00	59.52
SCANTRON TOOLS	0.00	0.00	8.86	8.86
SHIPPING SCANTRON	0.00	0.00	31.07	31.07
STATE INCOME TAX	630.00	0.00	0.00	630.00
Transfer	300.00	1,515.99	-173.00	1,642.99
Transfer From 401k	0.00	0.00	-3,000.00	-3,000.00
Utilities	399.67	527.21	251.02	1,177.90
Vehicle Insurance	0.00	152.06	91.63	243.69
Vehicle Maintenance-Scantron	0.00	30.98	0.00	30.98
TOTAL EXPENSES	6,645.13	6,263.86	3,390.59	16,299.58
OVERALL TOTAL	-1,727.42	-1,726.62	1,992.48	-1,461.56

Notice that there are no entries for mortgage payment for these 3 months. Due to my mis understanding I did not pay mortgage payment because I didn't receive a statement and I assumed they would start sending me statements when this was final. I have now started paying them again as you will notice on August report.

Both accounts added together

Income/Expense

7/1/2004 Through 9/30/2004

9/14/2004

Page 1

Category Description	7/1/2004- 7/31/2004	8/1/2004- 8/31/2004	9/1/2004- 9/30/2004	OVERALL TOTAL
INCOME				
Salary	4,350.00	3,990.21	1,940.00	10,280.21
TOTAL INCOME	4,350.00	3,990.21	1,940.00	10,280.21
EXPENSES				
Uncategorized	0.00	0.00	0.00	0.00
Auto	389.96	344.86	118.80	853.62
Bank Charge	0.00	159.07	13.21	172.28
Cash	50.00	0.00	0.00	50.00
Charity	248.00	148.00	125.00	521.00
Clothing	407.41	239.25	0.00	646.66
Dining	1,239.63	442.66	425.00	2,107.29
Gas-Scantron	542.95	630.42	446.93	1,620.30
Gift Given	50.00	70.00	0.00	120.00
Gifts Given	0.00	47.00	0.00	47.00
Groceries	517.23	422.03	0.00	939.26
Home Repairs	7.63	275.00	0.00	282.63
Household	70.25	25.00	0.00	95.25
INCOME TAX	0.00	0.00	300.00	300.00
Insurance	0.00	75.06	0.00	75.06
Internet	23.95	23.95	23.95	71.85
Legal	0.00	0.00	500.00	500.00
Lodging-Scantron	271.62	170.76	81.00	523.38
Medical	126.39	105.57	50.00	281.96
Misc	0.00	19.11	0.00	19.11
Mortgage	0.00	501.18	0.00	501.18
Recreation	302.38	269.09	207.07	778.54
Transfer	428.84	-418.52	100.00	110.32
Utilities	383.74	392.37	392.86	1,168.97
Vehicle Insurance	76.03	89.53	76.05	241.61
TOTAL EXPENSES	5,136.01	4,031.39	2,859.87	12,027.27
OVERALL TOTAL	-786.01	-41.18	-919.87	-1,747.06

Exhibit 2

SUMMARY OF CATEGORIES FOR 4/1 - 8/31 ON CHECK REGISTER

Category	4/1-6/30	7/1-9/30	Less Sept	Total	Ave 5 mos
Auto	899.29	853.62	-118.80	1634.11	326.82
Cash	35	50	0	85	17
Charity	861	521	-125	1257	251.4
Clothing	818.02	646.66	0	1464.68	292.94
Dining	1700.9	2107.29	-425	3383.19	676.38
Gifts	59.72	117	0	224.72	44.94
Groceries	1400.81	929.26	0	2340	468
Home Repair	738.98	282.63	0	1021.61	204.32
HH Goods	317.62	95.25	0	412.89	82.58
Ins	54.56	75.06	0	129.62	25.92
Internet					23.95
Medical	581.43	281.96	-50	813.39	172.68
Misc	46.16	19.11	0	65.27	13.05
Mort					501.18
Recreation	3547.22	778.54	3368.50	957.26 ^y	191.45
Utilities	1177.9	1168.97	-392.86	1954.01	390.8
Vehicle Ins.	243.69	241.61	-76.05	409.25	81.85
Computer	511.56	0	0	511.56	102.31
Postage	60.15	0	0	60.15	12.03
Repairs	59.52	0	0	59.52	11.90
Personal	25	0	0	25	5
Total					3896.5

Check Registers for April 1, 2004-August 31, 2004 for Janet and Jon Johnson's Accounts

W = Jan

H = Jon

^y This reduction does not reflect the September recreation expense on the register summary. This reduction reflects instead two per se unnecessary recreation expenses by the debtors on a camper. The first on 6/4 of Mr. Johnson's bank account shows \$ 500 paid to Fairmont Camper, and the next on 6/29 shows \$ 2,768.50 paid to Fairmont Camper. It appears that Mr. Johnson took out a 401K loan on 6/29 to finance this purchase.

Exhibit 3

DINING AND GROCERY EXPENSES FROM CHECK REGISTER AND RECEIPTS

H= Mr. Johnson Check Register
W=Ms. Johnson Check Register
D=Dining on Check Register
G=Grocery on Check Register
R=Receipt²

Date	Party	Category	Designation	Amount	(R)\$ on Food	Notes
8/1*	H	D	Subway work	8.51		
8/1*	H	D	Dominoes	18		
8/1*	W	G	Wal Mart	61.62		
8/2	W	G	Wal Mart	27.61		
8/4		R	Subway		5.31	
8/4		R	Wal Mart		1.96	
8/5	H	DR	Sneakys	18	16.19	(Rct dated 8/4)
8/6	H	DR	Ground Round	11	9.35	
8/6	H	D	\$	100		
8/7*	H	D	Embers	13.25		
8/7*	W	D	Taco Johns	4.80		
8/8		R	Apple Bees		24.50	(Rct date not clear)
8/9	H	D	Bergans Bar	41	37.59	(Rct dated 8/8)
8/9		R	Wal Mart		0	(23.98 in household goods)
8/9		R	Family Diner		4.82	
8/10	H	DR	Godfathers	6.13	6.17	(Rct dated 8/9)
8/10		R	Wal Mart		12.37	(19.40 household/total rct 31.77)
8/11	W	D	Taco Johns	4.94		
8/11	W	GR	Wal Mart	29.04	29.04	(Primarily dessert food)
8/11	W	G	Wal Mart	23.98		
8/12	H	DR	Perkins	39	39.08	
8/12	H	GR	Hy Vee	37.05	37.05	(Rct dated 8/14)
8/12		R	Amoco		11.45	(Non-fuel item)
8/13	W	D	Blondies	4.18		
8/13	W	G	Wal Mart	35.21		
8/13		R	Wal Mart		0	(39.10= all non-food items)
8/14*	H	D	Smoking Joes	21.17		
8/14*	H	D	\$	100		
8/14*	H	DR	Sneakys	20	17.31	(Rct dated 8/15)
8/16	H	D	Amoco	11.45		
8/16	W	D	\$	200		
8/16		R	Arbys		11.27	
8/16		R	Wal Mart		18.44	(50.32 total/31.88 =non-

² The receipts underlying this exhibit were provided to the Office of the UST out of order (e.g. multiple receipts of different dates on one page). Two July receipts are located with the June receipts.

Date	Day	Type	Merchant	Amount	Notes
8/17	H	D	Pizza Hut	17.50	food)
8/19	W	GR	Wal Mart	71.25	(No food items)
8/20	H	D	Family Diner	10.30	
8/20		R	Family Diner		5.30
8/20		R	McDonalds		4.45
8/21		R	McDonalds		4.31
8/21		R	Hammond Spur & Deli		34.70
8/22		R	Hammond Spur & Deli		25.25
8/22		R	Jimmy Food & Drink		12.50
8/24		R	Burger King		3.81
8/24		R	Pizza Hut		5.31
8/27		R	Burger King		3.81
8/27	H	D	United Bank	200	
8/27	H	G	Jenny Thate	30	
8/27	H	G	Hy Vee	74.50	
8/29*	H	D	Dagwoods	22.43	
8/30		R	Wal Mart		2.74 (43.65 of 46.39= non food)
8/31	W	D	\$	25	
8/31		R	Wal Mart		3.13 (56.73 of 59.86 =computer items)

Total Cash Food Purchases for August 2004 \$ 195.43
Total Cash Withdrawals Categorized as Cash \$ 425

7/1	H	D	Pizza Hut	18	
7/1	W	D	\$	50	
7/1		R	Wal Mart		0 (9.82 =office supply)
7/1		R	Wal Mart		2.85
7/2	H	D	\$	250	
7/2	W	D	Subway	5.50	
7/2	H	G	Hy Vee	47.99	
7/2	H	G	Magg Chickens	66	
7/3*	H	G	Hy Vee	17	
7/3*	W	G	Wal Mart	61.25	
7/6	W	D	Taco Johns	5.39	
7/8		R	Shoppers Supply		0 (12.95 =propane)
7/8		R	Wal Mart		0 (2.64 =floral plan)
7/9	H	D	Family Diner	10	
7/9	H	D	Dairy Queen	13.89	
7/9	W	G	Wal Mart	45.50	
7/9	W	G	Wal Mart	77.50	
7/11*	H	D	\$	100	
7/11*	H	D	Amoco	7.82	
7/12	W	D	Dairy Queen	1.92	
7/12		R	Wal Mart		0 (45.80 =household)
7/13	W	G	Dorn	5	
7/15	H	G	Hy Vee	46.43	

7/16	H	D	\$	100		
7/19	H	D	Subway work	13.97		
7/20	W	D	Dairy Queen	5.34		
7/20		R	Wal Mart		0	(9.50 =phone card)
7/21	W	G	Wal Mart	5		
7/22	W	D	\$	25		
7/22	W	D	\$	50		
7/22	W	D	\$	200		
7/23	H	D	Godys	21.55		
7/23	H	D	Amoco	7.82		
7/24*	H	D	Godfathers	13.07		
7/25		R	Wal Mart		1.90	(24.22 = household goods [see June rcts for copy])
7/26	W	D	MCDEENS	15.03		
7/27	W	D	Caseys	30.72		
7/27		R	MidWest Petro		0	(16.20= gas)
7/30	H	D	\$	200		
7/30	H	D	Amoco	16.16		
7/30		R	Wal Mart		0	(20.47 = layaway)
7/30		R	Wal Mart		120.05	(2 cakes at \$ 31 plus apiece/ dessert/party items [see June rcts for copy])
7/31*	W	GR	Jubilee		123.71	

Total Cash Used for Food Purchases in July 2004 \$ 124.80
Total Cash Withdraw in July 2004 as Food \$ 975

6/2	W	G	Wal Mart	11.55		
6/4		R	Shopper's Supply		.99	(25.81 =potting soil)
6/5		R	Wal Mart	.90		
6/6*	W	GR	Wal Mart	39.10		(38.19 =household)
6/7	W	GR	Wal Mart	44.95		(primarily junk food)
6/8	W	D	Godfathers	16.04		
6/8	W	G	Wal Mart	13.28		
6/10	W	D	Remingtons	10		
6/10	W	G	Pamida	38.84		
6/10	W	G	Wal Mart	8.28		
6/10	W	G	Dollar General	38.16		
6/10		R	Shopper's Supply		0	(15.91 =soil &bucket)
6/11	H	D	Tweetters	21.85		
6/12*	W	G	Hy Vee	104.29		
6/15	W	D	Taco Johns	6.82		
6/18	H	D	Last Chance	14		
6/18		R	?	11.41		
6/18	H	D	Chop Shop	21.38		
6/18		R	Wal Mart		1.01	(11.23 = household)
6/21	H	D	Rebels	12.65		
6/22	W	G	Wal Mart	95.27		(No food/all household and

plants)

6/23	H	D	Tweeters	10.69	
6/24	W	D	Pizza Ranch	6.49	
6/24	W	G	Wal Mart	25.46	
6/28	H	D	Apple Bees	24.50	
6/29	H	D	Amoco	9.85	
6/29		R	Chop Shop Grill		21.38
6/30	W	D	Subway Work	5.50	

Total Cash Used as Food in June 2004 \$23.38
 Total Cash Withdrawn in June as Food \$ 0

5/1*	H	D	Mother	26.40	
5/1*	H	D	Family Diner	10	
5/1*	H	D	Embers	10	
5/3	W	G	Wal Mart	51.16	
5/5	H	D	\$	200	
5/5	H	G	Godys	18.30	
5/5	H	G	Wal Mart	97.84	
5/6	W	D	Dagwoods	5.34	
5/9*	W	G	Dagwoods	19.86	
5/9*	W	G	Wal Mart	69.88	
5/13	W	D	Dagwoods	9.08	
5/13	W	G	Wal Mart	63.66	
5/14	W	D	\$	100	
5/15*	H	D	\$	200	
5/15*	H	D	\$	20	
5/18	W	G	Wal Mart	9.39	
5/19	W	D	Casey	13.17	
5/19	W	G	Wal Mart	5	
5/22*	H	D	\$	200	
5/22*	H	D	Hilo	37.69	
5/24	W	G	Wal Mart	12.94	
5/24	H	G	Hy Vee	60.61	
5/26	W	D	Pizza Ranch	9.87	
5/26	W	D	Dairy Queen	6.41	
5/29*	W	D	Caseys	5	
5/29*	W	G	Wal Mart	10.87	
5/29	W	G	Calvery	3	
5/29*	H	G	Hy Vee	35.94	
5/29*	H	G	Dollar General	14.87	

4/1	H	D	\$	100	
4/2	W	D	Subway Work	5.31	
4/4*	H	D	Subway	8.51	

4/4*	H	D	\$	100
4/5	W	G	Wal Mart	15.48
4/6	W	G	Wal Mart	14.42
4/11*	H	G	Hy Vee	12.34
4/11*	H	D	Pizza Hut	20
4/12	W	G	Wal Mart	84.24
4/12	W	D	MCDEENS	13.38
4/14	H	D	\$	100
4/15	H	D	FamilyDiner	20
4/15	W	D	\$	100
4/15	H	G	Hy Vee	103.81
4/18*	H	D	Pizza Ranch	13.89
4/18*	H	D	\$	100
4/21	H	D	Rebels	14.20
4/21	H	D	Pizza Ranch	141.88
4/21	H	G	Wal Mart	31.47
4/21	H	G	Fareway	83.86
4/21	H	G	Wal Mart	33.85
4/21	H	G	Fareway	6.78
4/26	W	G	Wal Mart	13.84
4/26	W	G	Wal Mart	27.27
4/26	W	G	Wal Mart	6.64
4/28	H	D	Jimmys	16
4/29	W	D	\$	10

Exhibit 4

CLOTHING EXPENSES PER THE CHECK REGISTERS

4/2	W	Shoppers	10.97
4/2	W	Shoppers	8.71
4/5	W	Shoppers	15.77
4/5	W	Main Street	23.54
4/9	W	Shoppers	10
4/9	W	Shoppers	24.42
4/12	W	Shoppers	6.18
4/19	W	Shoppers	19.75
4/19	W	Shoppers	13.25
4/22	W	Shoppers	17.8
4/22	W	Shoppers	15.89
4/22	W	Main Street	41.73
5/3	W	Salvation Army	24.01
5/3	W	Thrift Store	16.18
5/13	W	Shoppers	140
5/13	W	This N That	13.87
5/15	W	Fifth Street	25
5/15	W	Caryl Nelson	83
5/17	W	Clara's Closet	5.68
5/20	W	Shoppers	36.69
5/20	W	Kim Ingwerson	10
5/22	H	Franks Shoe Repair	4.00
5/23	W	Anchor Inn	59.15
5/23	W	Becky Stein	3
5/28	W	Jill Gremmis	11.75
6/3	W	Main Street	37.45
6/3	W	Shopko	39.60
6/6	W	Shoppers	10
6/10/	H	Shoppers	31.71
6/23	W	Goodwill	22.25
6/29	W	Savers	31.04
7/1	W	Shoppers	34.52
7/5	W	Wal Mart	23.39
7/8	H	Shoppers	12.95
7/12	W	6th Street	75
7/13	W	Shoppers	53.88
7/15	W	Wardrobe	17.98
7/26	W	Columbia	19.50
7/26	W	Wal Mart	50.14
7/30	W	Wal Mart	120.05
8/16	H	Christopher Banks	39.50
8/16	H	Wal Mart	50.32
8/17	W	Browns	57.74
8/23	W	Schwesers	31.83

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: October 19, 2004

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

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Jon L. and Janet M. Johnson

Chapter 7

Debtor(s).

BK 04-31268

CERTIFICATE OF SERVICE

I, Terri Frazer, 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 October 19, 2004, I served a copy of the Trial Memorandum Under 11 U.S.C. §707 in the above-referenced case by faxing said copy to counsel for the debtor and by mailing a copy through the United States Mail at Minneapolis, Minnesota.

Addressee(s):

Jeffrey Bagniefski
Bagniefski & Murakami
9 First Street N.W.
PO Box 6
Rochester, MN 55903
Fax # (507) 280-6797.

Jon L. and Janet M. Johnson
57854 - 718th Street
Jackson, MN 56143

Charles Ries
201 N. Broad Street # 200
PO Box 7
Mankato, MN 56002



**Office of the United States Trustee
Terri Frazer**