

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MINNESOTA**

In re:

JOHN W. ZINK AND
CARRIE L. ZINK,

Debtors.

Bankr. Case No. 04-31521 GFK

Chapter 7 Case

**MEMORANDUM IN RESPONSE TO
U.S. TRUSTEE'S MOTION TO DISMISS**

INTRODUCTION

A. Procedural Background

Debtors, JOHN W. ZINK and CARRIE L. ZINK, filed a voluntary petition under Chapter 7 of the Bankruptcy Code on March 15, 2004. The meeting of creditors was held on April 19, 2004. The U.S. Trustee has demanded verification of income which debtors have supplied as it became available. Because of the lack of information the U.S. Trustee brought a motion to dismiss.

B. Factual Background

John W. Zink is the primary wage earner in the family. Carrie L. Zink has generally worked as wait staff and at the Ground Round in Burnsville which went out of business not long before the petition was filed. She began working at Joe Senser's in Eagan just before the debtors filed their petition. Her tips have been good although she has not paid taxes or social security on the tips and has the minimum held out on her minimum wage salary.

John Zink had to find a new line of work after 9/11 caused his income to drop drastically. He started working in the mortgage industry starting with Mortgages Unlimited. In 2002, the Zink's combined incomes were \$32,802 which was not enough to support their mortgage and monthly expenses. As a result they incurred additional unsecured debt. 2003 was a better year

with the combined income at \$64,054. However, mortgage refinancing was on a downturn. The Zinks were forced to file for bankruptcy and John Zink looked to American Alliance Mortgage as means to increase their income. While the income was better than he was experiencing toward the end at Mortgages Unlimited, it was not enough to meet the expenses. To stay current on their mortgage, John had to borrow \$8,000 from a relative. During this time the U.S. Trustee's office was trying to determine the Zinks actual income which became even more of a moving target when John jumped to a new industry and became a recruiter for Ajilon an employment service.

C. ARGUMENT

“Many bankruptcy court interpret the future income test as just one factor to be weighed in the ‘totality of the circumstances’, a more subjective standard vesting broad discretion in the bankruptcy judge. *In re Gyurci*, 95 B.R. 639, 642 (Bankr.D.Minn.1989);” *In re Piontek*, 113 B.R. 17, 19-22 (Bankr.D.Or. 1990). However, the Eighth Circuit adopted a stricter “future income” test causing the court to look at “the debtor’s ability to pay his debts out of his future income”. *In re Walton*, 866 F.2d 981, 983-984 (8th Cir. 1989). The U.S.Trustee reads *Walton* incorrectly if he claims that **future** means an income level that the debtor achieves at some future date. In *Walton* the debtor’s income exceeded his expenses **at the time of filing**. In this case the debtors’ combined incomes were well below the amounts claimed in their petition on March 15, 2004. Debtors argue that **future** income means simply the money that the debtors will have to fund a chapter 13 plan as determined by the court. *In re Piontek* does not stand for the right to look at future income levels because the debtor in that case changed jobs. Mrs. Piontek actually took a slight pay cut in August of 1989 after filing on March 3, 1989.

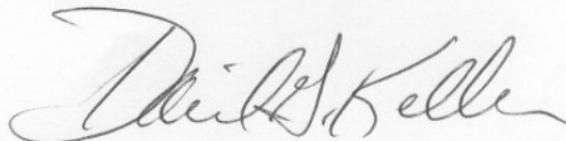
John Zink is not comparable to the physician in *Stewart v. U.S. Trustee*, 175 F.3d 796 (10th Cir. 1999) who filed just before entering into the high income part of his career. John Zink was forced out of a failing industry after September 11, 2001. He spent over two years trying to make it (and did to some extent for a period of time) in the mortgage business. Four months after filing for bankruptcy he starts a new career that may or not work out.

CONCLUSION

The case law does not support the claim of the U.S. Trustee to look far into the future to see if a debtor may someday make enough income to payback some of his creditors. There has been no bad faith. The debtor has simply made every effort to achieve the fresh start intended by bankruptcy law. Bankruptcy law provides a presumption in favor of discharge which the U.S. Trustee has not overcome.

John and Carrie Zink respectfully request that the U.S. Trustee's motion be denied.

Respectfully Submitted,

A handwritten signature in cursive script, appearing to read "David G. Keller".

David G. Keller (Reg. #124734)
Attorney for Plaintiff
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Suite 200
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651 456-9000

stee). I had started a new career in the mortgage lending
and Carrie worked for Ground Round in Burnsville.

In 2003 our incomes improved to \$64,054 in good part
my success as a mortgage broker with Mortgages unlimited.
we were still not able to catch up with the debt
in 2001 and 2002. In addition, refinancing had dropped
the end of 2003 and the Ground Round was closing.

On March 15, 2004, the date of filing, Carrie was
ng to work for Joe Sensor's in Eagan and I was looking for
mortgage brokerage. It is true that I did receive a pay
from Mortgages Unlimited on May 15, 2004 for commissions on
had generated earlier in the year. In the first four
in 2004 I earned \$4,366 with Mortgages unlimited (\$1,091
th). However, \$2506.90 was taken out for arrearages on
ce premiums (as a result my gross income was reduced to
r month). In June I went to work for American Alliance
e where I made \$10,833 over a 3.3 month period or \$3298
er month. These paystubs were supplied to the U.S.Trustee
w that my gross income over the first 7.3 months of 2004
d \$1738.77 well below the \$3750 used in our petition.

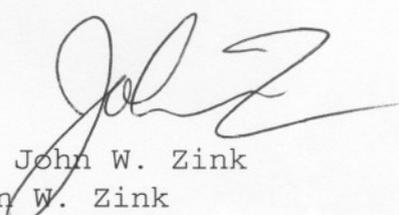
That on July 24, 2004 I started with Ajilon where
employment recruiter. My salary is \$923.08 per week.

This would put me a little above the income level shown on our schedule I. However, this is a new venture over 4 months after filing our petition. We have not been able to keep up with our monthly expenses and I have had to borrow \$8,000 from an uncle to keep the mortgage current. The money was paid to our mortgage company's attorney.

8. Carrie Zink has been fairly successful going full time at Joe Senser's right before the filing date. The U.S. Trustee correctly points out that her income has been above the \$725 shown on schedule I. We did not know what it would be at the time of filing. We believe it is less than the \$1244 per month claimed by the U.S. Trustee because there is little withholding from the \$5.15 wage and none from tips. We have maximized the net to try to keep up with expenses.

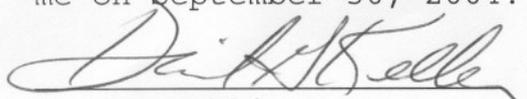
9. The U.S. Trustee's action has increased our expenses in regard to this case.

Further your affiant sayeth not.



/s/ John W. Zink
John W. Zink

Subscribed and sworn to before
me on September 30, 2004.



Notary Public

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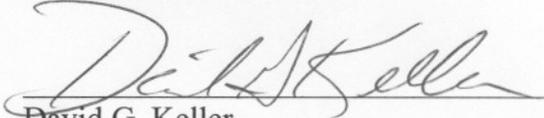
Chapter 7 Case

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2004 a true and correct copy of the Memorandum in Response to U.S. Trustee's Motion to Dismiss and Debtor's Affidavit was faxed to Sarah J. Wencil, Esq., U.S. Trustee's office at (651)664-5516. Copies were mailed to the following via United States mail, with postage thereupon, on September 30, 2004:

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David G. Keller