

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)
)
David Andrew Hansen, and) **Bky. No. 04-31635**
Kathleen Greenlee Hansen,) Chapter 7
)
) **DEBTORS' RESPONSE TO**
) **U.S. TRUSTEE'S MOTION**
) **SEEKING EXTENTION OF**
) **TIME TO OBJECT TO**
) **DISCHARGE PURSUANT**
Debtors.) **11 U.S.C SECTION 707(b)**

TO: U.S. Bankruptcy Court; Habbo G. Fokkena, U.S. Trustee; Patti J. Sullivan,
Chapter 7 Trustee; and any other party entitled to notice.

1. The debtors, David and Kathleen Hansen, through their attorney, Craig W. Andresen, hereby submit the following response to the U.S. Trustee's motion seeking an extension of time to move to dismiss their case under 11 U.S.C. section 707(b). The debtors oppose the motion for an extension of time, and they request that the court order accordingly.

2. The court will hold a hearing on this motion at **2:00 p.m. on August 16, 2004**, in Courtroom No. 228B, U.S. Bankruptcy Court, U.S. Courthouse, 316 N. Robert Street, St. Paul, Minnesota.

3. This motion is governed by Fed. R. Bky. P. 1017(e) and Rule 9006(b)(3). This chapter 7 case was voluntarily commenced on March 18, 2004. The petition was accompanied by all the required lists and schedules. The section 341(a) meeting occurred as scheduled on April 23, 2004, and was concluded on that date. The debtors have complied with all requests for information from Patti Sullivan, the chapter 7 trustee,

and all requests for information from the U.S. Trustee.

4. On May 18, 2004, the U.S. Trustee requested additional information from the debtors consisting mainly of tax returns and paycheck stubs. On June 8, 2004, the debtors responded to the request for information from the U.S. Trustee, as noted in the U.S. Trustee's motion. On June 22, 2004, the U.S. Trustee filed a motion requesting an extension of time to file a motion under section 707(b) objecting to the debtors' discharge.

5. Because there is no cause to extend the deadline to object to discharge, the debtors respectfully request that the court deny the motion.

Respectfully submitted,

July 12, 2004
Date

/e/ Craig W. Andresen
Craig W. Andresen, #186557
Attorney for Debtors
2001 Killebrew Dr., Suite 330
Bloomington, MN 55425
(952) 831-1995

VERIFICATION

I, **Craig W. Andresen**, attorney for the debtors herein, declare under penalty of perjury that the foregoing Response is true and correct to the best of my knowledge.

July 12, 2004
Date

/e/ Craig W. Andresen
Attorney for Debtors

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:)
)
David Andrew Hansen, and) **Bky. No. 04-31635**
Kathleen Greenlee Hansen,) Chapter 7
)
) **MEMORANDUM IN SUPPORT**
) **OF DEBTORS' RESPONSE**
) **OPPOSING EXTENTION OF**
) **TIME TO OBJECT TO**
) **DISCHARGE PURSUANT**
Debtors.) **11 U.S.C SECTION 707(b)**

TO: U.S. Bankruptcy Court; Habbo G. Fokkena, U.S. Trustee; Patti J. Sullivan,
Chapter 7 Trustee; and any other party entitled to notice.

1. The debtors, David and Kathleen Hansen, through their attorney, Craig W. Andresen, hereby submit the following memorandum in support of their response to the U.S. Trustee's motion seeking an extension of time to file an objection under 11 U.S.C. section 707(b).

2. This motion is governed by Fed. R. Bky. P. 1017(e)(1). This portion of the Rule reads as follows:

(1) A motion to dismiss a case for substantial abuse may be filed by the United States trustee only within 60 days after the first date set for the meeting of creditors under § 341(a), unless, on request filed by the United States trustee before the time has expired, the court for cause extends the time for filing the motion to dismiss. The United States trustee shall set forth in the motion all matters to be submitted to the court for its consideration at the hearing.

The drafters of Rule 1017 apparently did not favor motions to extend the time for objecting to discharge under 707(b), and indicated that such motions were usually

unnecessary. The “Committee Note to 1991 Amendments” reads in part, in its fourth paragraph, as follows:

In general, the facts that are the basis for a motion to dismiss under § 707(b) exist at the time the case is commenced and usually can be discovered early in the case by reviewing the debtor’s schedules and examining the debtor at the meeting of creditors. Since dismissal for substantial abuse has the effect of denying the debtor a discharge in the chapter 7 case based on matters which may be discovered early, a motion to dismiss under § 707(b) is analogous to an objection to discharge pursuant to Rule 4004 and, therefore, should be required to be made within a specified time period.

See Bankruptcy Code, Rules and Forms, 2001 Edition, West Group, Rule 1017, Committee Note to 1991 Amendments, at page 630.

3. Furthermore, the generally liberal rules for enlargement contained in Bankruptcy Rule of Procedure 9006, expressly removes motions for enlargement of time for 707(b) motions from its terms. Instead, Rule 9006 requires that such motions may only be brought pursuant to Bankruptcy Rule of Procedure 1017. See Rule 9006(b)(3).

4. Therefore, the Bankruptcy Rules of Procedure require that a motion of the U.S. Trustee to extend the time for objecting to discharge under 707(b) be granted only for “cause.” The Committee Note to Rule 1017, quoted above, states that such motions normally ought to be brought within the originally scheduled sixty day deadline, and that such extensions are not normally necessary. The Committee Note observes that if the court mistakenly grants the debtor a discharge due to information about the debtor’s financial affairs which are not discovered during the original sixty day deadline due to fraudulent information supplied by the debtor, then “the debtor’s conduct may constitute the basis for revocation of the discharge under § 727(d) and (e) of the Code.”

Bankruptcy Code, Rules and Forms, 2001 Edition, Rule 1017, Committee Note to 1991

Amendments, at 630.

5. Therefore, the U.S. Trustee's motion seeking an extension of time should only be granted "for cause," which ought to mean delay by the debtor, fraudulent conduct or information supplied by the debtor, the need for additional time for discovery, or some other reason constituting cause for extension of time for filing a dischargeability complaint.

6. In his moving papers, the U.S. Trustee states that he believes that he has a meritorious case under section 707(b). However, in this case an objection is clearly not justified. Notwithstanding the U.S. Trustee's misinterpretation of the debtors' financial data, their verified Schedules I and J correctly show that they have no disposable income from which to fund a chapter 13 plan. However, the question of likelihood of success on the merits is irrelevant to the inquiry to whether there is "cause" to extend the deadline to object to discharge under section 707(b).

7. Paragraph 10 of the U.S. Trustee's moving papers contains his entire rationale for seeking of an extension of time. The reason given is that the chapter 7 trustee is pursuing assets of the debtor which could produce a large distribution to creditors. However, a "large distribution to creditors" due to nonexempt assets has never formed the basis for a section 707(b) motion, let alone for requesting an extension of time to bring a 707(b) motion. Essentially, the U.S. Trustee is asking the court to establish a rule whereby the deadline for bringing a 707(b) motion in any chapter 7 proceeding would routinely be extended until such time as the chapter 7 trustee determines if there are assets to be distributed to creditors. However, the Bankruptcy Code, and the Bankruptcy Rules of Procedure, establish that the debtor is entitled to

finality concerning matters of discharge and dischargeability well before the time for closing a case has arrived.

8. The U.S. Trustee's Memorandum of Law, on page 1, states that "cause" exists to extend the time period to object because the U.S. Trustee files such motions for the benefit of creditors and that the U.S. Trustee cannot determine whether it is in the best interest of creditors for the debtors to remain in the chapter 7, or be forced to convert to a chapter 13. Once again, the "best interest of creditors" has never been the standard for the court's decision of a 707(b) motion. Rather, the question is whether this chapter 7 filing constitutes a "substantial abuse" of the provisions of chapter 7. The Code makes clear there should be a presumption in favor of the debtor and against the U.S. Trustee when deciding such motions. 11 U.S.C. section 707(b).

9. In the Eighth Circuit and elsewhere, "substantial abuse" means whether or not the debtors have the ability to fund a chapter 13 plan. In re Walton, 866 F.2d 981, 984 (8th Cir. 1989) (following In re Kelly, 841 F.2d 908, 914, 915 (9th Cir. 1988); U.S. Trustee v. Harris, 960 F.2d 74, 76, (8th 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)). Courts have observed that while the unique hardships and the good faith of the debtor are relevant factors under section 707(b), 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 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).

“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 (8th Cir. 1992).

10. It is apparent that pursuant to virtually all the available case law, both within and without the Eighth Circuit, the standard for a 707(b) motion is whether, given the debtor’s present income and expenses, could the debtor propose a meaningful chapter 13 repayment plan. In the instant case, the U.S. Trustee has cited no authority for its position that the presence, or absence, of a large asset distribution by the chapter 7 trustee should have anything to do with the bringing of a 707(b) motion. The relevant question is can the debtor afford a chapter 13 case, and not will the debtor’s chapter 7 trustee be paying assets to unsecured creditors. Furthermore, under the Code, Bankruptcy Rules, and other relevant sources, it is clear that a 707(b) motion should be brought in an expedient manner, just the same as a nondischargeability complaint must be brought in an expedient manner. The debtor, the chapter 7 trustee, and all the other parties in interest are entitled to a much speedier resolution of these proceedings than what the U.S. Trustee proposes.

11. In the present case, the debtors have been completely forthright in their dealings with both the chapter 7 trustee and the U.S. Trustee. They have complied in a prompt and timely manner with all requests for information. The U.S. Trustee, in possession of all relevant information necessary to make a determination regarding whether a 707(b) motion should be made, chose not to make the motion by the expiration of the sixty day deadline. The U.S. Trustee has no meaningful cause to request an extension of the deadline now.

12. It is clear from the moving papers that the U.S. Trustee desires an extension of time only because he desires to see the outcome of the court's ruling on the debtors' claims of exemption of their pension and other retirement accounts. However, the debtors income and expenses are the proper issue under the case law cited. Also, due to factors known to the court and the parties, it is conceivable, or even likely, that this litigation may not be terminated for months or even a year or more. The court should reject this mistaken logic and rule that without good cause, a 707(b) motion must be made during the sixty day deadline originally imposed.

13. Therefore, the debtors respectfully request that the court deny the U.S. Trustee's motion for an extension of time.

Respectfully submitted,

July 12 , 2004
Date

/e/ Craig W. Andresen
Craig W. Andresen, #186557
Attorney for Debtors
2001 Killebrew Dr., Suite 330
Bloomington, MN 55425
(952) 831-1995

In re:

U.S. Bankruptcy Court
District of Minnesota

**David Andrew Hansen, and
Kathleen Greenlee Hansen,**

UNSWORN DECLARATION
FOR PROOF OF SERVICE

Debtor(s):

Bky. No. 04-31635

I, Catherine E. Clausen, employed by Craig W. Andresen, attorney licensed to practice law in this court, with office address of 2001 Killebrew Dr., Suite 330, Bloomington, Minnesota 55425, declare that on July 14, 2004, I served the annexed Debtors' Response to U.S. Trustee's Motion Seeking Extension of Time to Object to Discharge Pursuant to Section 707(b), and Memorandum in Support of Debtors' Response Opposing Extension of Time to Object to Discharge Pursuant to Section 707(b) upon each of the entities named below by mailing to each of them a copy thereof enclosing same in an envelope with first class postage prepaid and depositing same in the post office at Bloomington, Minnesota, addressed to them as follows:

Habbo G. Fokkena, U.S. Trustee
1015 U.S. Courthouse
300 S. Fourth St.
Minneapolis, MN 55415

Patti J. Sullivan, Trustee
P.O. Box 16406
St. Paul, MN 55116

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: July 14, 2004.

Signed: Catherine E. Clausen