

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dua Van Ly

Chapter 7

Debtor(s).

Bky Case No.: 04-32576

NOTICE OF HEARING ON MOTION TO DISMISS CHAPTER 7 CASE

TO: The Debtor, all creditors and other parties in interest:

The United States Trustee has filed a motion to dismiss the above-captioned case for substantial abuse under 11 U.S.C. §707(b).

The Court will hold a hearing on this motion, before the Honorable Dennis D. O'Brien, U.S. Bankruptcy Judge, at 11:00 a.m. on September 8, 2004, in Courtroom No.228A, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

Any response to this motion must be filed and delivered not later than September 2, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than August 27, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dua Van Ly

Chapter 7

Debtor(s).

Bky Case No.: 04-32576

NOTICE OF HEARING AND MOTION TO DISMISS UNDER 11 U.S.C. § 707(b)

TO: The debtor(s) and other entities specified in Local Rule 9013-3.

1. The United States Trustee, by his undersigned attorney, moves the Court for the relief requested below and gives notice of hearing.

2. The Court will hold a hearing on this motion, before the Honorable Dennis D. O'Brien, U.S. Bankruptcy Judge, at 11:00 a.m. on September 8, 2004, in Courtroom No.228A, at the United States Bankruptcy Court, United States Courthouse, at 316 North Robert Street, in St. Paul, Minnesota.

3. Any response to this motion must be filed and delivered not later than September 2, 2004, which is three days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays), or filed and served by mail not later than August 27, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This Court has jurisdiction over this motion pursuant to 28 U.S.C. Sections 157 and 1334, FED.R.BANKR.P. 5005 and Local Rule 1070-1. The United States Trustee has standing to file this

motion pursuant to 28 U.S.C. Section 586(a) and 11 U.S.C. Section 307. This proceeding is a core proceeding. The petition commencing this Chapter 7 case was filed on April 29, 2004. The case is now pending in this Court.

5. This motion arises under 11 U. S. C. Section 707(b) and FED.R.BANKR.P. 1017, 2002 and 4004. This motion is filed under FED.R.BANKR.P. 9014 and Local Rules 9013-1 to 9013-5. Movant requests that this case be dismissed.

6. From the lists, schedules and statements filed by the debtor, it appears that he has the ability to pay a substantial portion of his dischargeable debt without hardship.

7. The debtor lists the following debts:

- (a) On Schedule D, Creditors Holding Secured Claims, the debtor lists three claims totaling \$ 245,051.03. One of the claims is to Bremer Bank in the amount of \$9,000.00 and is secured by a 1996 Lexus. The remaining two claims are to TCF and Washington Mutual Bank for a 1st and 2nd mortgage in the amount of \$236,051.03. The debtor valued the homestead at \$190,200.00, however, copies of the debtor's property tax statement show that the total estimated market value is \$207,100.00.
- (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 five claims totaling \$42,309.16.
- (d) The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. These debts are comprised of credit incurred to purchase consumer items. *See*

Debtor's Schedule F

8. On Schedule I, Current Income of Individual Debtor(s), the debtor lists Total Monthly Gross Income of \$3,461.47. However, in review of documents received from the debtor, it appears that the debtor's 2003 income was \$56,412.00. According to the debtor's tax returns for 2001, 2002 and 2003 he was employed by Dalton Gear Company and Modern Manufacturing. Based on the debtor's historical 2003 income, his Total Monthly Gross Income is \$4,701.00. That sum, less payroll deductions for taxes of \$869.97, and Insurance and Union Dues of \$154.61, leaves a Total Monthly Net Income of \$3,676.42.

9. On Schedule I, the debtor also lists two dependents, a son 12 and a daughter who is 17. However, in review of the debtor's tax returns for 2001, 2002 and 2003 he lists dependents, but they are not his children, rather they are his siblings. In 2001 the tax return lists three dependents, two sisters (Sang Ly, ages 22 and Ut Ly, age 17) and one brother age 15 (Sai Ly). In 2002 the tax return only lists one dependent, a 23 year old sister (Sang Ly). In 2003 the tax return lists one sister Ut Ly who's is 19.

10. The debtor is single, but has listed a co-debtor on Schedule H by the name of Pheng Ly You, who lives at the same address and is also listed on several of the documents attached to the debtor's tax returns, such as the Wells Fargo Bank (mortgage), and Washington Mutual Home Loans and TCF Bank (checking accounts). The debtor did list Pheng Ly You's employer, "Kurt Manufacturing" but did not list her income and expenses. It is unclear if she is the mother of the children or whether they live together and share all income and expenses. If this is the case the spouse/co-debtor's income and expenses are as follows.

\$ 1,876.46	Total Monthly Net Income
(333.30)	Car payment
(300.00)	Food
(120.00)	Clothing
(30.00)	Laundry/Drycleaning
(120.00)	Transportation
<u>(300.00)</u>	Home Payments
\$ 673.16	Disposable Income

11. On Schedule J, Current Expenditures of Individual Debtor(s), the debtor lists Total Monthly Expenses of \$ 3,050.00. The debtor's claimed expenses appear to be appropriate.

12. Total Monthly Net Income of \$3,676.42. plus the additional disposable income of \$673.16 from co-debtor, give the debtor a Total Combined Monthly Net Income of \$4,349.58. That sum, less the total Monthly Expenses of the debtor of \$2,750.00, provides the debtor with a monthly disposable income of \$1,599.58. Over a 36 month chapter 13 plan the debtor would have \$57,584.88 in which to pay his Unsecured Non-priority claims of \$42,309.16 in full. 13. The debtor is currently employed, and there does not appear to be any likelihood that his employment will be terminated at any time in the future.

14. The debtor has the ability to repay a substantial portion of his general unsecured debt and there appears to be no reason for his unwillingness to do so.

15. The United States Trustee may call Thomas Kleiner, Bankruptcy Analyst, , Office of U.S. Trustee, 1015 United States Courthouse, 300 South Fourth Street, Minneapolis, Minnesota, as a witness.

WHEREFORE, the United States Trustee respectfully requests that this chapter 7 case be dismissed.

Dated: July 26, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
MN ATTY No. 158410
(612) 664-5505
(612) 664-5516

VERIFICATION

I, Michael R. Fadlovich, 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: July 26, 2004

Signed: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dua Van Ly

Chapter 7

Debtor(s).

Bky Case No.: 04-32576

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

This memorandum is submitted pursuant to Local Rule 9013-2(a). It appears that dismissal of this Chapter 7 case is appropriate under 11 U.S.C. 707(b).

Analysis

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.

11 U.S.C. § 707(b)(1994). The United States Trustee bears the burden of showing substantial abuse.

In re Dubberke, 119 B.R. 677, 679 (Bankr. S.D. Iowa 1990).

(1) The Debtor's Debts Are Primarily Consumer Debts.

Section 101(8) of the Bankruptcy Code defines "consumer debts" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(8) (1994). "Debt" is defined as a "liability on a claim." 11 U.S.C. § 101(12) (1994). "Claim" is defined as a "right to

payment, whether or not such right is reduced to judgment, liquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5)(A) (1994).

The purpose of the debt generally determines whether a debt is a consumer debt. *Zolg v. Kelly (In re Kelly)*, 841 F.2d 908, 913 (9th Cir. 1988); *In re Palmer*, 117 B.R. 443, 446 (Bankr. N.D. Iowa 1990). If the credit transaction does not involve a business transaction or a profit motive, it is usually regarded as a consumer debt. *Palmer*, 117 B.R. at 446 (citing *In re Booth*, 858 F.2d 1051, 1054-55 (5th Cir. 1988)); *In re Berndt*, 127 B.R. 222, 223 (Bankr. D.N.D. 1991) (citing *Kelly* and *Booth*, but distinguishing *Booth* by concluding that private investment debts, not used to further an ongoing business, were consumer debts).

In the present case, it appears that the debtor's debts are 100% consumer debts.

**(2) The Granting of Relief under Chapter 7 Constitutes
Substantial Abuse of Chapter Seven 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)).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not relevant factor, and likewise, the debtor cannot be forced to file a Chapter 13

petition after a 707(b) dismissal order is entered if the debtor is qualified for Chapter 13 relief. *Fonder*, 974 F.2d at 999. "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." *Id.*

In addition, the Eighth Circuit holds that a bankruptcy court may reject the credibility of amended schedules when the amendments are offered after a Section 707(b) motion is filed and the amended schedules seek to decrease income and/or increase expenses because the debtor swore as to the accuracy of the initial schedules. *Fonder*, 974 F.2d at 1000.

In *In re Mathes*, the bankruptcy court held that the ability to repay 35% of the debtor's debt to unsecured creditors was a substantial abuse of the Bankruptcy Code. BKY 96-32602, slip op. at 8-9 (Bankr. D. Minn. August 21, 1996). The court took into consideration that the debtor would not suffer undue hardship by complying with a Chapter 13 plan, that the unsecured debt of the debtor was primarily credit card debt that was not incurred as the result of an emergency or other unforeseen contingency, that the conduct of the debtors by amending his schedules to increase his expenses after the Section 707(b) motion was filed was not credible. *Id.*, slip op. at 408.

On appeal, the District Court of Minnesota affirmed the Bankruptcy Court's decision. *Mathes v. Stuart (In re Mathes)*, Civil File No. 3-96-906, slip op. (D. Minn. July 2, 1997) The District Court held that the finding of substantial abuse with a 35% threshold was appropriate:

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."

Id., slip op. at 6-7.

In the present case, the debtor has the ability to repay 100% of his general unsecured creditors in less than thirty six months. His ability to fund a Chapter 13 plan is grounds to dismiss this case for substantial abuse under Section 707(b).

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.

Dated: July 26, 2004

Respectfully submitted,

HABBO G. FOKKENA
United States Trustee
Region 12

By: /s/ Michael R. Fadlovich
Michael R. Fadlovich
Trial Attorney
United States Trustee's Office
1015 United States Courthouse
300 South Fourth Street
Minneapolis, MN 55415
MN ATTY No. 158410
(612) 664-5505
(612) 664-5516

CERTIFICATE OF SERVICE

In Re:)	
)	
Dua Van Ly)	Bankruptcy No. 04-32576
)	
Debtor(s).)	Chapter 7 Case
)	
)	

I, Terri L. Frazer, declare under penalty of perjury that on July 26, 2004, I served a copy of the foregoing proposed Notice of Hearing on Motion to Dismiss Chapter 7 Case, Notice of Hearing and Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law and proposed Order by U.S. mail, postage prepaid, to each person named below:

Dua Van Ly
161 Yorkton Ridge
St. Paul, MN 55117

Gregory J. Walsh
Walsh and Gaertner PA
525 Park Street, Suite 230
St. Paul, MN 55103

Michael J. Iannacone
8687 Eagle Point Blvd
Lake Elmo, MN 55042

Dated: 7-26-04

By: 
Office of the United States Trustee

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Dua Van Ly

Chapter 7

Debtor(s).

Bky Case No.: 04-32576

ORDER

At St. Paul, Minnesota, the _____ day of _____, 2004.

This matter came before the Court for hearing on the Motion of the United States Trustee's Office for an Order dismissing this Chapter 7 case pursuant to 11 U.S.C. §707(b). Appearances were noted in the record.

Based on the motion by the U.S. Trustee, the debtor's schedules filed under oath, and all the files, records and proceedings herein,

IT IS HEREBY ORDERED:

That this Chapter 7 bankruptcy case is dismissed as a substantial abuse pursuant to 11 U.S.C. Section 707(b).

The Honorable Dennis D. O'Brien
United States Bankruptcy Judge