

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:) Bankruptcy No. 04-32722
)
Edward A. Vaughn, Jr.)
) Chapter 7 Case
Debtor(s).)

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 on September 8, 2004, at 11:00 a.m., in Courtroom No. 228A, at the United States Courthouse, 316 North Robert Street, 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 Saturdays, Sundays, and holidays,) or August 27, 2004, seven days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING. Local Bankruptcy Rule 9006-1.

Dated: _____

CLERK OF BANKRUPTCY COURT

By: _____
Deputy Clerk

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:) Bankruptcy No. 04-32722
)
Edward A. Vaughn, Jr.) Chapter 7 Case
)
Debtor(s).)

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 at 11:00 a.m. on September 8, 2004, in Courtroom No. 228A, at the United States Courthouse, at 316 North Robert Street, 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 Saturdays, Sundays, and holidays), or filed and served by mail not later than August 27, 2004, which is seven business days before the time set for the hearing (excluding Saturdays, Sundays, and holidays). **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 May 4, 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 four claims totaling \$ 180,164.00, consisting of three mortgages on the homestead, and a lease on a 2001 Galant.

(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 nine claims totaling \$ 14,779.00.

8. The debts listed in the debtor's Schedule of Liabilities appear to be primarily consumer debt. *See* Debtor's Schedule F. The debtor checked on the Petition that the nature of the debts are consumer/non-business.

9. On Schedule I, the debtor lists monthly net income of \$ 2,938.00, based on gross income of \$ 3,466.67 or \$ 41,400.04 per year. The Statement of Financial Affairs lists that gross income in 2003 totaled \$ 48,900 per year. The United States Trustee sent a letter to the debtor on

June 30, 2004, to determine the correct income of the debtor. Att. Ex. 1. The debtor responded under cover letter dated July 15, 2004, with one pay stub and the 2003 W-2 Form. Att. Ex. 2 (no attachments). The 2003 W-2 form states that the debtor's income from the same job as listed on Schedule I was \$ 48,960.26.

Based on the pay stub of the debtor for period ending 4/18/04, which is approximately the 16th of 52 pay periods, he is averaging the following net income in 2004^{1/}:

YTD Gross	17,990.98
Less YTD Taxes	(2,944.79)
Less YTD Health and Dental	(220.80)
Less YTD Union	(130.48)
Net	\$ 14,696.91

\$ 14,696.91 divided by 16 = \$ 918 per pay period x 52 divided by 12 = \$ 3,979.87 average net pay per month. The YTD gross averages to gross annual income of \$ 58,470.69, which is more than 2003 income. Therefore, the U.S. Trustee would estimate that this amount is subject to a range of 84% (\$ 48,900/58,470.69) or \$ 3,343.09. The U.S. Trustee will use the lowest figure in the motion.

10. On Schedule J, the debtor lists monthly expenses of \$ 2,978.00.

11. Average net monthly income of \$ 3,343.09 less monthly expenses of \$ 2,978 provides the debtor with monthly disposable income of \$ 365.00.

^{1/} The United States Trustee has not attached the pay stub to the motion to avoid publication on the internet. Upon request, the United States Trustee can provide a copy to debtor's counsel to the extent a copy was not retained.

12. Monthly disposable income of \$ 365 would enable the debtor to pay approximately \$ 13,143.27 or 89 % of the unsecured creditors in a hypothetical thirty six month Chapter 13 plan. The debtor can pay 100 % of the unsecured creditors within a hypothetical sixty month Chapter 13 plan.

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. The debtor does not indicate any anticipated changes in income in excess of 10% on Schedule I.

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. As an alternative to dismissal, the United States Trustee does not oppose voluntary conversion of this case to Chapter 13.

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

Dated: August 5, 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



U. S. Department of Justice

Office of the United States Trustee

Districts of Minnesota, North Dakota,
South Dakota and Iowa

FILE COPY

U.S. Courthouse, Suite 1015

612 / 664-5500

300 South Fourth Street

FAX 612 / 664-5516

Minneapolis, MN 55415

June 30, 2004

Mark E. Ferkul
220 South Sixth Street Suite 2000
Minneapolis, MN 55402

Re: *In re Edward A. Vaughn, Jr.*, Bankr. No. 04-32722 DDO

Dear Mr. Ferkul:

As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation of this case. Please provide the following information on or before July 23, 2004:

1. Copies of last three most current pay stubs for the debtor.
2. Copies of the 2002 and 2003 state and federal tax returns, including attachments (W-2s).
3. Provide any documentation showing that any reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).

Please call if you have a question or concern about this letter.

Sincerely,

HABBO G. FOKKENA
UNITED STATES TRUSTEE

Sarah J. Wencil
Trial Attorney

cc: Edward A. Vaughn Jr.
Patti J. Sullivan, Chapter 7 Trustee

ATT. EX.1

Mark E. Ferkul

Attorney at Law
2000 Pillsbury Center
220 South Sixth Street
Minneapolis, Minnesota 55402

Telephone (612) 335-3777 / E-Mail MFERKUL@AOL.com
Fax (612) 349-2908

RECEIVED

2004 JUL 16 A 9

OFFICE OF THE
UNITED STATES TRUS

July 15, 2004

Sarah J. Wencil
Office of the United States Trustee
US Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, MN 55415

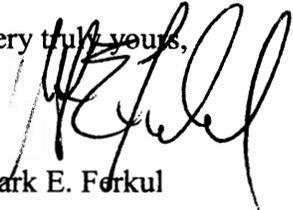
Re: Edward A. Vaughn, Jr.
Bky. No.: 04-32722 DDO

Dear Ms. Wencil:

Per your request, please find one pay stub dated April 18, 2004 and a W-2 for 2003 regarding Edward A. Vaughn, Jr. I requested a W-2 for 2002 and current pay stubs from the debtor. He informed me that he has not filed his 2002 or 2003 income tax returns. Mr. Vaughn does not make contributions for retirement as shown on the pay stub.

I will forward the 2002 W-2 and current pay stubs as soon as I receive them from the debtor.

Very truly yours,



Mark E. Ferkul

MEF:kh
Encl.

VERIFICATION

I, Sarah J. Wencil, trial 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: August 5, 2004

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

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:) Bankruptcy No. 04-32722
)
Edward A. Vaughn, Jr.) Chapter 7 Case
)
Debtor(s).)

MEMORANDUM OF LAW

The United States Trustee submits this memorandum in support of his motion to dismiss this case under 11 U.S.C. § 707(b). *See* Local Rule 9013-2(a).

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. 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).

(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 debts listed on Schedule F are primarily consumer debts. The debtor checked on the Petition that the nature of the debts are consumer/non-business.

(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)).

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).

Whether the debtor is eligible to file a petition under Chapter 13 after a Section 707(b) dismissal is also not a 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 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)).

In the present case, the debtor has the ability to pay approximately 88% of the general

unsecured creditors in a hypothetical thirty six month Chapter 13 plan. The debtor has the ability to pay all of the general unsecured creditors within a hypothetical sixty month hypothetical Chapter 13 plan. The 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: August 5, 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

CERTIFICATE OF MAILING

In re:)	Chapter 7 Case
)	
Edward A. Vaughn, Jr.)	Bankruptcy No. 04-32722
)	
Debtor(s).)	

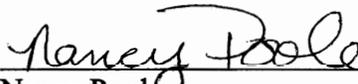
The undersigned hereby certifies under penalty of perjury that she is an employee in the Office of the United States Trustee for the District of Minnesota, and is a person of such age and discretion as to be competent to serve papers and that on August 5, 2004, she served a copy of the attached: PROPOSED NOTICE OF HEARING, MOTION TO DISMISS UNDER 11 U.S.C. §707(b), MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS AND proposed ORDER 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):

Edward A. Vaughn Jr.
616 Hawthorne Avenue East
St. Paul, MN 55104

Mark E. Ferkul
220 S. 6th Street Suite 2000
Minneapolis, MN 55402

Patti J. Sullivan
PO Box 16406
St. Paul, MN 55116



Nancy Poole

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:) Bankruptcy No. 04-32722
)
Edward A. Vaughn, Jr.) Chapter 7 Case
)
Debtor(s).) ORDER

At St. Paul, Minnesota, this _____ day of _____, 2004, the United States
Trustee's Motion to Dismiss under 11 U.S.C. § 707(b) came before the Court for hearing.

Appearances were noted in the record.

The Court made its findings of fact and conclusions of law on the record pursuant to Rule 52 of
the Federal Rules of Civil Procedure and Bankruptcy Rule 7052.

IT IS HEREBY ORDERED:

That the Chapter 7 bankruptcy case filed by the above-captioned debtor is dismissed pursuant
to 11 U.S.C. Section 707(b).

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