

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. BKY 04-33304

Kevin John Tix

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 at 11:00 a.m., on September 22, 2004, in Courtroom No. 228A, the 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 17, 2004, which is three days before the time set for the hearing (excluding Saturdays, Sundays, and holidays), or September 13, 2004, which is 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: Case No. **BKY 04-33304**

Devin John Tix 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 22, 2004, in Courtroom No. 228A, the 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 17, 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 September 13, 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 June 3, 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 two claims secured by his retirement account and his 1999 Doge Ram pick-up and motorcycle.

(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 six claims totaling \$ 23,832.02.

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 \$ 2,032, based on monthly gross income of \$ 3,720 or \$ 44,640.00 per year. The Statement of Financial Affairs provides that the debtors' historical annual income was \$ 55,853 in 2003 and \$ 50,639 in 2002. The United States Trustee wrote to the debtor on July 1, 2004 regarding his income and expenses. *See* Att. Ex. 1. The debtor responded on July 15, 2004. *See* Att. Ex. 2.

Based on the debtor's pay stub for the period ending 07/09/04, he has the following average

net income for 2004 (Att. Ex. 3^{1/}):

YTD Gross	\$ 24,924.01	Estimated gross of \$ 46,287.45 annual
YTD Federal Taxes	(\$3,683.74)	
YTD Soc Sec	(\$1,506.36)	
YTD Medicare	(\$352.29)	
YTD MN State	(\$1,365.52)	
YTD Life	(\$252.51)	
Less YTD Pre Tax Ins	(\$627.88)	
Less Tools	<u>(\$74.32)</u>	
Net	\$ 17,061.39 ^{2/}	

^{1/} Employer information and identification has been blocked from the copy attached to this motion due to public access to the internet, but a full copy may be made available at the hearing.

^{2/} The debtor is taking monthly payroll deductions for 401K of \$ 240.01 and for repayment of the 401K loan of \$ 534.08 per month. Voluntary contributions to retirement/pension accounts and repayments to 401K or retirement loans are not reasonable or necessary expenses for determining disposable income and that said contributions should be reflected in the calculation of disposable income.

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 (2^d 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, 401-402 (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).

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);

\$ 17,061.39 divided by 28th pay period = \$ 31,685.44 divided by 12 = \$ 2,685.44.

The United States Trustee requested tax returns, but only received the W-2 forms. The bank accounts submitted by the debtor show that on January 30, 2004, the debtor received \$513.00 from Minnesota and \$1,884.00 from the Internal Revenue Service for tax refunds. Att. Ex. 4^{3/} The debtor may be over withholding taxes of approximately \$ 200.00 per month. The United States Trustee will use this to off set any tax penalties and future tax changes due to the 401K adjustments.

10. On Schedule J, the debtor lists monthly expenses of \$2,319.00 per month. The debtor is paying for both a truck and motorcycle totaling \$ 680. Two vehicles are not necessary for the support of the debtor. This expense should be reduced by \$ 280.^{4/} There may be other expenses that are not reasonable or unnecessary. For example, the debtor states that he contributes \$ 200 to the household (the debtor lives with a girlfriend). The debtor could not document this expense. The utilities and other expenses, the debtor pays in full and does not split.

Adjusted expenses total \$ 2,039.00.

11. Average net monthly income of \$ 2,685.44 less monthly expenses of \$ 2,039 provides the debtor with monthly disposable income of \$ 646.44.

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)).

^{3/} Only the bottom portion of the bank statement is attached to this motion due to public access to the internet. A full copy may be provided at any evidentiary hearing.

^{4/} "[A] debtor should be able to "obtain, finance, and operate a perfectly serviceable [automobile] for no more than \$ 300.00 per month, and possibly less. This, then, is the maximum sum that should be attributed to his budget for transportation expenditures." *In re Mathes*, 1996 WL 1055813, *3 (Bankr. D. Minn. Aug. 21, 1996); *see also In re Wilkens*, 1997 WL 1047545, *3 (Bankr. D. Minn. March 26, 1997) (holding that \$ 275.00 - 300.00 for installment payments, \$ 75.00 - \$ 100.00 for costs of operation of vehicle, and insurance cost was sufficient).

12. Monthly disposable income of \$ 646.44 would enable the debtor to pay approximately \$ 23,271.84 or 87 % of the unsecured creditors (Schedule F of \$ 23,832 + Schedule D \$ 2,948 deficiency for vehicles = \$ 26,638) in a hypothetical thirty six month Chapter 13 plan. The debtor can pay approximately all of those debtors in approximately 42 months.

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. Pursuant to Rule 1017(e), the United States Trustee requests that the debtor provide copies of the 2002 and 2003 tax returns (plus schedules and other attachments) previously requested at or prior to the hearing on this motion.

16. 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 27, 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

Exhibit 1



**U.S. Department of Justice
United States Trustee**

*Districts of Minnesota, North Dakota,
South Dakota and Iowa*

*U.S. Courthouse, Suite 1015 (612) 664-5500
300 South Fourth Street FAX (612) 664-5516
Minneapolis, Minnesota 55415*

July 1, 2004

Michael Hamilton
PO Box 65
Hastings, MN 55033

Re: Kevin J. Tix
Bankruptcy No: 04-33304

Dear Mr. Hamilton:

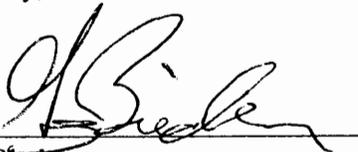
As you are aware, the Office of the United States Trustee must investigate every debtor pursuant to 11 U.S.C. § 707(b). There is incomplete information in the above named case for our office to complete its investigation. Please provide the following information on or before July 18, 2004:

1. Copy of last four pay stubs for debtor.
2. Provide any documentation showing that reduction for retirement is mandatory (if nothing is submitted, the United States Trustee shall assume that it is a voluntary contribution).
3. Copy of the 2001, 2002 and 2003 state and federal tax return, including attachments (W-2s, 1099s, etc) and "all" schedules.
4. Copies of canceled checks for General Contributions to Household Expenses from January, 2004 thru May, 2004.
5. Name of property owner.
6. Copies of debtor's canceled checks payable to utility sources from January, 2004 thru May, 2004.
7. Copies of debtor's canceled checks payable to telephone utility from January, 2004 thru May, 2004.
8. Copies of debtor's canceled checks payable to Home Maintenance sources from January, 2004 thru May, 2004.

9. Copies of debtor's canceled checks payable to food sources from January, 2004 thru May, 2004.
6. Copies of all car and motorcycle payment coupon(s).
7. Copies of billing statements, checks or receipts for last three months or other time period specified of the following expenses:
 - A) **Electricity and Heating Fuel** - (provide copies of billing statements from each utility source for January, 2004 thru May, 2004.)
 - B) **Telephone & Cell Phone** - (provide copies of billing statements from each utility source for January, 2004 thru May, 2004.)
 - C) **Home Maintenance** - (provide copies of billing statements, receipts and detailed explanation of improvement)
 - D) **Food** - (provide copies or receipts)
 - E) **Transportation/auto maintenance**- (provide copies of cancelled checks, invoices or receipts)
 - F) **Personal Incidentals** - (List incidentals and provide copies of canceled checks)
 - G) **Auto/Motorcycle Insurance** - (provide copies of insurance premiums and canceled checks)
8. Copies of complete bank statements from all checking, savings, investment or other financial accounts beginning with _____, 2003 thru _____, 2004.

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

Sincerely,

By, 
Greg Biedermann
Senior Bankruptcy Analyst

cc: Debtor
Mary Jo-Jensen Carter, Trustee

Exhibit 2

TANNER, HAMILTON & ASSOCIATES, P.A.

Attorneys and Counselors at Law

DAVID E. TANNER+
MICHAEL G. HAMILTON*

755 Westview Drive
P.O. Box 65
Hastings, MN 55033

RECEIVED

TELEPHONE (651) 437-8037
FAX (651) 437-1731

2004 JUL 16 A 9:28

July 15, 2004

OFFICE OF THE
UNITED STATES TRUSTEE

Mr. Greg Biedermann
Senior Bankruptcy Analyst
U.S. Department of Justice
United States Trust
U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, Minnesota 55415

RE: **Kevini John Tix**
Bankruptcy Case No. 04-33304

Dear Mr. Biedermann:

Enclosed herewith please find copies of various documents provided by my client in response to your letter dated July 1, 2004, in connection with his pending bankruptcy case. My client did his best in gathering the requested documents. However, some of the documents requested, such as receipts for transportation costs such as gas, and personal incidentals, i.e. toiletries, household cleaning supplies, etc., he does not retain. You should also be advised that his checkbook was recently stolen from his truck, together with other items. If you want a copy of the police report relating to the theft, please advise me accordingly.

For your information, be advised that the owner of the home where my client resides is Brenda Carl.

I hope that the enclosed documents are a sufficient response to your request. However, if there is anything else which you need from me or my client for purposes of your analysis, please do not hesitate to ask.

Thank you for your consideration.

Very truly yours,


Michael G. Hamilton

MGH:kk
Enc.
File No. 6295
cc: Kevin Tix

Exhibit 3

Earnings Statement



Period Ending: 07/04/2004
 Pay Date: 07/09/2004

KEVIN J TIX
1307 W 16TH ST
HASTINGS, MN 55033

Earnings	rate	hours	this period	year to date
Regular	21.4800	32.00	687.36	20,146.55
Overtime	32.2200	1.00	32.22	1,385.95
Personal	21.4800	8.00	171.84	343.68
Tlead			6.28	43.68
Bonus				250.00
D/T				10.74
Holiday				864.72
Shift				13.41
Shift				18.00
Vacation				1,847.28
Gross Pay			\$897.70	24,924.01

Deductions	Statutory	Other	
	Federal Income Tax	-131.47	3,683.74
	Social Security Tax	-54.21	1,506.36
	Medicare Tax	-12.67	352.29
	MN State Income Tax	-49.12	1,365.52
	Other		
	Glifc	-8.97	252.51
	Pretax Ins	-23.35*	627.88
	401K-M-50	-53.86*	1,495.45
	410KIn	-119.07	3,327.75
	Tools		74.32
Net Pay		\$444.98	

* Excluded from federal taxable wages

Your federal taxable wages this period are \$820.49

Other Benefits and Information	this period	total to date
Ermatch	26.93	747.76
401K		1,495.45
Personal		16.00
Vacation		34.00

*Cut in pay 1.50
 starting Jan 1 04
 less over time!*

COPY

Exhibit 4

ABOUT DIRECT DEPOSIT OF FUNDS) TO THE BANK AT THE ABOVE ADDRESS OR YOU MAY CALL THE TELEPHONE NUMBER SHOWN AT THE BOTTOM OF YOUR STATEMENT. SEE THE REVERSE SIDE IF YOU WANT TO REPORT DISCREPANCIES ON YOUR DEPOSIT ACCOUNT.

DEPOSITS AND OTHER ADDITIONS

<u>DATE</u>	<u>AMOUNT</u>	<u>DESCRIPTION</u>		<u>DATE</u>	<u>AMOUNT</u>	<u>DESCRIPTION</u>
0127	513.00	AUTOMATED DEPOSIT		0213	223.34	AUTOMATED DEPOSIT
		MN DEPT OF REVEN	MN Rev pay			AMESBURY GROUP PAYROLL
0130	1,884.00	AUTOMATED DEPOSIT		0220	243.97	AUTOMATED DEPOSIT
		US TREASURY 220	TAX REFUND			AMESBURY GROUP PAYROLL
0130	235.21	AUTOMATED DEPOSIT		0224	90.00	DEPOSIT REF # 12023435
		AMESBURY GROUP	PAYROLL			
0206	232.40	AUTOMATED DEPOSIT				
		AMESBURY GROUP	PAYROLL			

www.treasury.com

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 27, 2004

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

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re: Case No. **BKY 04-33304**

Kevin John Tix 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 Waltor; 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 87% of the general unsecured creditors in a hypothetical thirty six month 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 27, 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

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. BKY 04-33304

Kevin John Tix

Chapter 7 Case

Debtor(s).

UNSWORN CERTIFICATE OF SERVICE

I, Terri Frazer, declare under penalty of perjury that on August 27, 2004 I mailed copies of the foregoing: 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 first class mail postage prepaid to each entity named below at the address stated below for each entity:

Kevin John Tix
1307 West 16th Street
Hastings, MN 55033

Michael Hamilton
Tanner, Hamilton & Associates PA
PO Box 65
Hastings, MN 55033

Mary Jo Jensen-Carter
1339 E County Road D
Vadnais Heights, MN 55109

Executed on: August 27, 2004



Terri Frazer
Office of the United States Trustee

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Case No. BKY 04-33304

Kevin John Tix

Chapter 7 Case

Debtor(s).

ORDER

At St. Paul, Minnesota, the _____ 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