

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Mark and Koren Stansberry

Chapter 7

Debtor(s).

BK 04-50683 - GFK

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 2:00 p.m. on November 3, 2004, in Courtroom No.2, at the United States Bankruptcy Court, 416 United States Courthouse, at 515 West First Street, in Duluth, Minnesota.

Any response to this motion must be filed and delivered not later than October 29, 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 October 25, 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:

Mark and Koren Stansberry

Chapter 7

Debtor(s).

BK 04-50683

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 2:00 p.m. on November 3, 2004, in Courtroom No.2, at the United States Bankruptcy Court, 416 United States Courthouse, at 515 West First Street, in Duluth, Minnesota.

Any response to this motion must be filed and delivered not later than October 29, 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 October 25, 2004, which is seven days before the time set for the hearing (excluding intermediate Saturdays, Sundays and legal holidays). Local Bankruptcy Rule 9006-1.

3. **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 11, 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 debtors, it appears that they have the ability to pay a substantial portion of their dischargeable debt without hardship.

7. The debtors have listed the following debts:

(a) On Schedule D, Creditors Holding Secured Claims, the debtors have listed one claim totaling \$ 11,831.00 secured by a 1999 Chevrolet Silverado.

(b) On Schedule E, Creditors Holding Unsecured Priority Claims, the debtors have listed one claims totaling \$ 5,657.00. A Student Loan that is not payable until December 1, 2007.

(c) On Schedule F, Creditors Holding Unsecured Nonpriority Claims, the debtors have listed twenty six claims totaling \$ 45,780.36.

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

9. On Schedule I, the debtors listed monthly net income of \$ 3,864.22 and monthly gross income of \$ 5,200 (\$62,500 per year). The Statement of Financial Affairs provides that annual gross

income in 2003 totaled \$ 72,973.18. The debtors are married and have one dependent. On July 16, 2004, the United States Trustee wrote to the debtors for additional financial information. *See* Att. Ex. 1. The debtors timely responded on August 12, 2004. *See* Att. Ex. 2 (without attachments).

Based on the pay stub of Koren Stansberry ^{1/}, for pay period ending 7/30/04, she has the following net income:

YTD Net \$8,028.13 divided by pay period 16 = \$501.76 average per pay period x 26 annual periods = \$13,045.71 divided by 12 months = \$ 1,087.14 average net pay per month.

Based on the pay stub of Mark Stansberry ^{2/}, for pay period ending 6/28/04, he has the following net income:

YTD Net \$23,857.99 divided by pay period 13 = \$1,835.23 average per pay period x 26 annual periods = \$47,715.98 divided by 12 months = \$ 3,976.33 average net pay per month.

Total Combined Monthly Net Income \$5,063.47

10. The debtors submitted an Amended Schedule J, wherein they list monthly expenses of \$ 3,489.63.

11. Average net monthly income of \$ 5,063.47 less monthly expenses of \$ 3,489.63

^{1/}For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee and may submit the pay stubs at any hearing.

^{2/}For security, the pay stubs are not attached to avoid dissemination of sensitive information on the internet. Upon request, the U.S. Trustee can provide a copy of these documents to counsel for the debtor (if a copy was not retained) or the chapter 7 trustee and may submit the pay stubs at any hearing.

provides the debtor with monthly disposable income of \$ 1,573.84.

12. Monthly disposable income of \$ 1,573.84 would enable the debtors to pay approximately \$56,658.24 or 100 % of the unsecured creditors in a hypothetical thirty six month Chapter 13 plan.

13. The debtors are currently employed, and there does not appear to be any likelihood that their employment will be terminated at any time in the future.

14. The debtors have the ability to repay a substantial portion of their general unsecured debt and there appears to be no reason for their 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: September 7, 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
United States Trustee**

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

*U.S. Courthouse, Suite 1015
300 South Fourth Street
Minneapolis, Minnesota 55415*

*(612) 664-5500
FAX (612) 664-5516*

July 16, 2004

Edward Shaw
722 S 6th St.
Brainerd, MN 56401

Re: Mark & Koren Stansberry
Bankruptcy No: 04-50683

Dear Mr. Shaw:

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 August 13, 2004:

1. Copy of last four pay stubs for each debtor from all employment sources.
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 check stubs or receipts for last three rent/mortgage payments.
5. Copy of real estate rental agreement.
6. Copies of all car payment coupon(s).
7. Copies of billing statements, checks or receipts for last three months or other time period specified of the following expenses:
 -) **Electricity and Heating Fuel** - (provide copies of 12 months billing statements from each utility source)
 -) **Telephone & Cell Phone** - (provide copies of 12 months billing statements from each utility source)
 -) **Satellite/Cable** - (provide copies of billing statements)

Attached Exhibit "1"

ATTORNEY EDWARD R. SHAW
722 South 6th Street
Brainerd, Minnesota 56401
Rule 114 Qualified Neutral

RECEIVED

2004 AUG 12 A 9:10

OFFICE OF THE
UNITED STATES TRUSTEE
Phone (218) 825-7030
Fax (218) 822-3144

August 11, 2004

BY CERTIFIED MAIL

Greg Biedermann
Senior Bankruptcy Analyst
U. S. Trustee's Office
U. S. Courthouse, Suite 1015
300 South 4th Street
Minneapolis, Minnesota 55415

Re: Mark & Koren Stansberry
Bankruptcy case #04-50683

Dear Mr. Biedermann:

Enclosed please find the materials that you requested.

My clients' car payment is made via automatic deduction out of their bank account, therefore there are no checks showing the car payment.

My clients have saved receipts for almost all of their purchases, probably much more than the average person, including myself. However, there are of course some purchases they have made where they have not saved receipts.

Both of my clients work in the medical field, Ms. Stansberry is a phlebotomist, Mr. Stansberry is an ambulance driver, their clothes need to be washed on a daily basis, which accounts for a higher than usual laundry expense.

Mr. Stansberry is also often on the road out of town for training, which accounts for his cell phone expenses.

I have also submitted a draft of my clients' revised schedule J, Current Expenditures of Individual Debtor(s). I will send a signed copy within the next couple of days. Some of the expenses have been adjusted slightly downwards, some have been adjusted upwards, the net result is an increase of the total expenses to \$3,489.63 from \$3,441.87.

EXHIBIT "2"

As the debtors' Summary of Schedules indicates, they have \$45,780.36 of unsecured debt, and a gap of \$374.59 between their income and expenditures. As their unsecured debt is almost exclusively credit cards with interest rates of 18% and above, any available surplus income the debtors may have could not even cover the interest on the unsecured debt.

Debtors had a tax liability from the year 2001 in the approximate amount of \$6,500.00. They have been paying down this tax liability and completed paying it off in June, 2003.

In the year 2000, debtors cashed in a part of their 401(k) plan in an effort to pay off their unsecured debt. The withdrawal of the 401(k) plan created the tax liability I referred to earlier.

In the year 2002, debtors refinanced their 1999 Chevrolet Silverado and put that money towards their unsecured debt. Debtors also contacted the credit counseling agency referred to in their Statement of Financial Affairs in a last effort to deal with their unsecured debt prior to filing for bankruptcy.

Feel free to contact me if you have any questions.

Sincerely,



Edward Shaw

cc: Case Trustee, Dorraine Larison
Mark & Koren Stansberry

Enclosures

ERS:mas

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: September 7, 2004

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

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Mark and Koren Stansberry

Chapter 7

Debtor(s).

BK 04-50683

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

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 debtors 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 debtors have the ability to pay 100 % 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: September 7, 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:

Mark and Koren Stansberry

Chapter 7

Debtor(s).

BK 04-50683 - GFK

CERTIFICATE OF MAILING

I, Terri Frazer, certify under penalty of perjury that I am an employee in the Office of the United States Trustee for the District of Minnesota and am a person of such age and discretion as to be competent to serve papers.

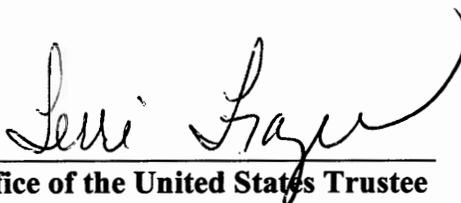
That on September 7, 2004, I served a copy of the Proposed Notice of Hearing, Motion to Dismiss Under 11 U.S.C. §707(b), Memorandum of Law in Support of Motion to Dismiss; and proposed Order in the above-referenced case by placing said copy in a postpaid envelope addressed to the person(s) hereinafter 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):

Mark and Koren Stansberry
27263 County Road 19
Merrifield, MN 56465

Edward Shaw
722 S. 6th Street
Brainerd, MN 56401

Dorriane A. Larison
1010 West St. Germain, Suite 600
St. Cloud, MN 56301



Office of the United States Trustee
Terri Frazer

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

In re:

Mark and Koren Stansberry

Chapter 7

Debtor(s).

BK 04-50683

ORDER

At Duluth, 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 debtors is dismissed pursuant to 11 U.S.C. Section 707(b).

The Honorable Gregory F. Kishel
United States Bankruptcy Judge