UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

TELEPHONE (605) 224-0560
FAX (605) 224-9020

March 17, 2000

Bruce J. Gering,
Assistant U.S. Trustee
230 South Phillips Avenue, #502
Sioux Falls, South Dakota 57102

Brian L. Utzman, Esq.
Counsel for Debtors
2902 West Main Street, #3
Rapid City, South Dakota 57702-1552

Subject: *In re Daniel J. and Arlene F. Goergen,*
Chapter 7; Bankr. No. 99-50511

Dear Counsel:

The matter before the Court is the United States Trustee's February 29, 2000 Motion for Judgment on the Pleadings regarding her January 20, 2000 Motion to Dismiss for Substantial Abuse and Debtors' responses to both motions. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that the United States Trustee's motions must be granted.

SUMMARY. Daniel J. and Arlene F. Goergen ("Debtors") filed a Chapter 7 petition and their schedules and statement of financial affairs on October 25, 1999. The United States Trustee moved to dismiss the case for substantial abuse. In her motion, the United States Trustee alleged that Debtors had sufficient income (based on their income and expense schedules) to allow them to pay 40% of their unsecured claims in five years. The U.S. Trustee also alleged that Debtors had sufficient additional income, after the deletion of voluntary contributions to a retirement plan and loan repayments to a retirement plan, to pay 40% of their debt within three years or 71% of their debt within five years. Finally, the U.S. Trustee also alleged that Debtors had understated their income. If all income was included and if the retirement plan contributions and loan repayments were not made, the U.S. Trustee said Debtors could repay 80% of their unsecured claims within three years and 100% of their unsecured claims within five years. Based on this ability to pay, the U.S. Trustee moved to dismiss under 11 U.S.C. § 707(b).

Debtors responded that they should not have to give up their retirement plan contributions and that these contributions are not

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disposable income. They also claimed that the case should not be dismissed because they are "needy."

The U.S. Trustee moved for a judgment on the pleadings because Debtors had failed to deny any of the allegations in the dismissal motion and because Debtors had mischaracterized the Court of Appeals holding in *In re Walton*, 866 F.2d 981 (8th Cir. 1989). The U.S. Trustee also cited this Court to *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288-89 (8th Cir. 1997), where the court held that funds from an exempt source are considered income when determining a debtor's ability to fund a Chapter 13 plan.

Debtors responded that their answer met the requirements of F.R.Civ.P. 8 and 10. They also stated that Debtor Arlene Goergen's income was overstated on their Schedule I. Primarily, however, Debtors cited the Court to some cases for their proposition that their retirement funds contributions and loan repayments should not be considered "disposable income."[1] They cited two cases where a bankruptcy court concluded that a debtor should be allowed to make retirement fund contributions.

DISCUSSION. The governing case law in this Circuit is clear. A motion to dismiss under § 707(b) should be granted if the debtor has a substantial ability to pay creditors. *Koch*, 109 F.3d at 1288 (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)). Based on the current record,[2] Debtors have available income (after payment of necessary living expenses) of at least $336.86 per month and as much as $1,093.45 per month to pay unsecured claims holders. To allow Debtors to remain in a Chapter 7 when funds are available to pay claims through a Chapter 13 plan would be a substantial abuse of the bankruptcy process.

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[1] "Disposable income" may not be the most appropriate term to use in a substantial abuse analysis. "Disposable income" is defined by §§ 1225(b)(2) and 1325(b)(2) as a debtor's income in excess of reasonable family living and businesses expenses. Upon an appropriate objection, a Chapter 12 or 13 debtor may be required to pay this excess income to his unsecured creditors. In a substantial abuse analysis, the Court must consider whether a debtor can fund a Chapter 13 plan using all available sources of income. *Koch*, 109 F.3d at 1288-89. Thus, the substantial abuse analysis may be more akin to the good faith analysis under §§ 1225(a)(3) and 1325(a)(3) than to a "disposable income" analysis under §§ 1225(b)(2) and 1325(b)(2). *Compare, e.g., Solomon v. Cosby (In re Solomon)*, 67 F.3d 1128, 1133-34 (4th Cir. 1995), and *Koch*, 109 F.3d. at 1288-89.

[2] Debtors have not amended their Schedule I to correct any alleged error.

The four cases cited by Debtors regarding exempt funds are not persuasive because none dealt with a motion under § 707(b).[3] Moreover, the cases cited by Debtors do not recognize the double-edged sword aspect of exempt income in a substantial abuse analysis as discussed in *Koch*, 109 F.3d at 1289.

Finally, this Court has previously concluded in a substantial abuse analysis under § 707(b) that voluntary contributions to an employer-sponsored savings plan cannot divert funds otherwise available to pay creditors. *In re Mendelsohn*, Bankr. No. 98-40099, slip op. at 10 (Bankr. D.S.D. Nov. 10, 1998). Debtors have not cited any controlling authority that would alter that conclusion in this case.

The United States Trustee's February 29, 2000 Motion for Judgment on the Pleadings will be granted. Debtors will be given ten days from the entry of this letter decision to voluntarily convert their case to Chapter 13. If they chose not to do so, this Chapter 7 case will be dismissed upon the United States Trustee's January 20, 2000 Motion to Dismiss for Substantial Abuse

Sincerely,

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve copies on parties in interest)

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[3] In *Solomon v. Cosby (In re Solomon)*, 67 F.3d 1128 (4th Cir. 1995), the court held that the debtor's very large IRAs were not "disposable income" as defined by § 1325(b)(2), but it remanded the case for a determination of whether the debtor had offered his Chapter 13 plan in good faith where these funds were not used to pay creditors. In *Berger v. Pokela (In re Berger)*, 61 F.3d 624 (8th Cir. 1995), a Chapter 12 case, the issue was whether exempt post-petition funds became disposable income when they were used to acquire equity in a capital asset. The *Berger* decision was qualified in *Koch*, 109 F.3d at 1289. In *McDonald v. Burgie (In re Burgie)*, 239 B.R. 406 (B.A.P. 9th Cir. 1999), the issue was whether proceeds from a post-petition sale of a capital asset in a Chapter 13 case constituted disposable income. In *In re Ferretti*, 203 B.R. 796 (Bankr. S.D. Fla. 1996), the issue was whether personal injury proceeds that the debtor declared exempt in the Chapter 13 case, and to which no one objected, were disposable income. In *Koch*, the Court of Appeals specifically disagreed with the reasoning in *Ferretti*. *Koch*, 109 F.3d at 1289.

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Total notices mailed: 6

Debtor Goergen, Daniel Joseph PO Box 202, Ft. Meade, SD 57741
Debtor Goergen, Arlene Faye PO Box 202, Ft. Meade, SD 57741
Aty Utzman, Brian L. 2902 W Main St, #3, Rapid City, SD 57702-1552
Trustee Whetzal, Dennis C. PO Box 8285, Rapid City, SD 57709
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty Nash, Robert M. PO Box 1552, Rapid City, SD 57709