

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	Bankr. No. 01-40825
)	
RONNY A. HOFER)	Chapter 7
a/k/a Ron Hofer)	
Soc. Sec. No. [REDACTED]-3747)	
)	
and)	DECISION RE: UNITED STATES
)	TRUSTEE'S MOTION FOR
TISHA D. HOFER)	JUDGMENT ON THE
a/k/a Tish Hofer)	PLEADINGS REGARDING
Soc. Sec. No. [REDACTED]-2257)	MOTION TO DISMISS FOR
)	SUBSTANTIAL ABUSE
Debtors.)	

The matter before the Court is the Motion for Judgment on the Pleadings filed by the United States Trustee and Debtors' response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Decision and accompanying Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that the United States Trustee's Motion shall be granted.

I.

Ronny A. and Tisha D. Hofer ("Debtors") filed a Chapter 7 petition on July 30, 2001. In their schedules, Debtors stated they had two secured creditors, one on a vehicle and another on their mobile home. The secured creditors' claims totaled \$33,828.00. Debtors said they intend to reaffirm both of these debts. In their schedules, Debtors further stated that as a priority unsecured claim, they owed their local county \$274.35 for mobile home taxes. Debtors scheduled twenty-seven general,

unsecured claim holders whose claims totaled \$8,161.52.

Debtors stated that their monthly, combined take-home income is \$2,630.00, and that their monthly expenses are \$2,511.00. Their monthly expenses include the payments for the secured debts they intend to reaffirm. Included in their monthly expenses is also \$216 in attorney's fees. Debtors have one dependent, their minor daughter.

The United States Trustee timely filed a Motion to Dismiss for Substantial Abuse. Therein, the United States Trustee alleged that Debtors' schedules show that they have at least \$119 per month to fund a Chapter 13 plan. That sum would allow Debtors to pay almost 50% of their unsecured debt (plus the trustee's fees) over a three-year plan or almost 80% of this debt through a five-year plan.

The United States Trustee further argued that Debtors would have an additional \$156 per month to fund a Chapter 13 plan if they discontinued a voluntary contribution to a 401k plan. The United States Trustee also noted that Debtors' attorney's fees will be paid within just a few months and that would free up another \$216 per month for plan payments.

In their response, Debtors stated their monthly expenses may increase if they are unable to enter into a reaffirmation agreement with the mortgage holder on their mobile home and if they need to

replace their two older vehicles. They also argued that Debtor Ronny A. Hofer's income listed on Debtors' schedules included some overtime hours that cannot be relied upon. Further, they claimed that since the overtime hours are voluntary, the income from those hours should not be considered income available to pay creditors. Debtors said their 401k contribution should be allowed because it "is routinely allowed in many other cases." Debtors further argued that their attorney's fees will not soon be paid because one or both of them is facing a criminal action involving bad checks and because they have already had to make restitution in one bad check case. Finally, Debtors argued that their present income is barely above the federal government's poverty level.

On October 31, 2001, the United States Trustee filed a Motion for Judgment on the Pleadings. She argued that Debtors' response to her Motion to Dismiss was insufficient under Fed.Rs.Civ.P. 8 and 10 and Local Bankr. R. 9014-2. Most important, the United States Trustee argued that Debtors' response failed to provide a cognizable defense to the allegations in her Motion to Dismiss. She noted that:

- 1) Debtors have adequate housing funds budgeted to accommodate any change they may need to make if they have to move from their mobile home;

- 2) there is no known statute or case law in this District that

exempts overtime funds from consideration as available income;

3) Debtors already have \$200 budgeted for car payments; and

4) case law in this District is well-settled that voluntary retirement contributions cannot be made at creditors' expense.

In their response to this Motion, Debtors argued that Fed.R.Civ.P. 8 is not applicable to a motion. Debtors next corrected an earlier statement. They now stated that their income listed in their schedules does not include any overtime hours. However, the excess is minimal, they argued, and it would quickly be spent if unforeseen medical or dental expenses arose.

As to the retirement fund contribution, Debtors say that S.D.C.L. § 43-45-16 allows them to protect retirement funds from creditors, and they argued that they should be allowed to make retirement fund contributions like employees of the State of South Dakota are. They also said that their income is much lower than the debtors had in *In re Robert D. and Susan R. Mendelsohn*, Bankr. No. 98-40099, slip op. at 11 (Bankr. D.S.D. November 10, 1998), which the United States Trustee had cited. Finally, Debtors argued that their attorney's fees payments will continue for several months.

II.

Section 707(b) of the Bankruptcy Code permits the dismissal of a Chapter 7 case upon a showing that granting the debtor relief

would be a substantial abuse of the Bankruptcy Code. The section is intended to promote fairness to creditors and prevent the use of Chapter 7 by non needy debtors. *Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288 (8th Cir. 1997).

"Substantial abuse" is not defined within the Bankruptcy Code. In interpreting the section, the Court of Appeals for the Eighth Circuit has held that the primary inquiry is whether the debtor has the ability to pay creditors under a Chapter 13 plan. *Id.* (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)); *Nelson v. Siouxland Federal Credit Union (In re Nelson)*, 223 B.R. 349, 353 (B.A.P. 8th Cir. 1998). A debtor's ability to pay is measured by evaluating the debtor's financial condition in a hypothetical Chapter 13 case. *Id.* The analysis includes the expectation that the debtor will put forth his best effort in a Chapter 13 plan. *In re Shelley*, 231 B.R. 317, 319 (Bankr. D. Neb. 1999); *In re Beauchamp*, Bankr. No. 97-50487, slip op. at 6 (Bankr. D.S.D. May 28, 1998) (citing *Hagel v. Drummond (In re Hagel)*, 184 B.R. 793, 798 (R.A.P. 9th Cir. 1995), and *In re Schnabel*, 153 B.R. 809, 818 (Bankr. N.D. Ill. 1993)).

III.

Debtors' initial argument against the United States Trustee's Motion for Judgment on the Pleadings is that they are not required to follow Fed.Rs.Civ.P. 8 and 10 when they are responding to a

motion. Local Bankruptcy Rule 9014-2(a), however, specifically provides that objections and other responses to a motion shall conform to Fed.Rs.Civ.P. 8 and 10. Thus, Debtors' response to the United States Trustee's Motion to Dismiss for Substantial abuse should have set forth Debtors' defenses in "short and plain terms" and should have specifically admitted or denied each averment.

As to the substantive issues raised in this case, none are novel. Following the 1998 decision in *Mendelsohn*, this Court has consistently held that a debtor may not make voluntary retirement fund contributions at the expense of his creditors. *In re Pamyla Hefner*, Bankr. No. 00-40944, slip op. at 3 & n.4 (Bankr. D.S.D. May 8, 2001); *In re Myron L. and Charmaine R. Haar*, Bankr. No. 00-10183, slip op. at 7 (Bankr. D.S.D. May 7, 2001) (cites therein); *In re David K. and Colleen L. Huskey*, Bankr. No. 00-10009, slip op. at 2 (Bankr. D.S.D. May 30, 2000); and *In re Daniel J. and Arlene F. Goergen*, Bankr. No. 99-50511, slip op. at 2 (Bankr. D.S.D. March 17, 2000). Whether the debtor is employed by a public or private entity has no bearing. Whether the available income arises from a potentially exempt source has no bearing. *Koch*, 109 F.3d at 1288-90. Accordingly, Debtors have -- in addition to the disposable income of \$119 set forth in their schedules -- another \$156 per month to fund a Chapter 13 plan.

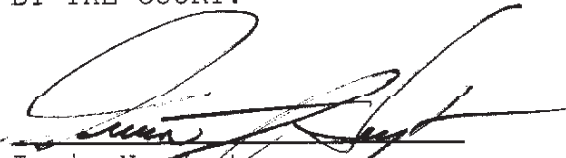
Debtors' available \$275 per month will fund a meaningful

Chapter 13 plan. Their total unsecured debt of \$8,161.52 is manageable. Using the \$275 per month, Debtors can pay unsecured claims and the trustee's fees in full through a three year plan. Further, their available funds will likely increase toward the end of a plan once they have their attorneys' fees paid, which will provide an expense cushion.


An order will be entered granting the United States Trustee's Motion for Judgment on the Pleadings. Debtors will be given ten days to voluntarily convert their Chapter 7 case to a Chapter 13 case. If they do not choose to convert their Chapter 7 case, it will then be dismissed for substantial abuse under § 707(b).

Dated this 5 day of December, 2001.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

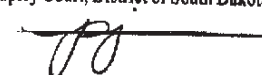
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Charles L. Nail, Jr., Clerk

By: 
Deputy Clerk



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