

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

May 30, 2000

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

Terry J. Sutton, Esq.
Counsel for Debtors
Post Office Box 1053
Watertown, South Dakota 57201-6053

Subject: *In re David K. and Colleen L. Huskey,*
Chapter 7; Bankr. No. 00-10009

Dear Counsel:

The matter before the Court is the United States Trustee's May 17, 2000 Motion for Judgment on the Pleadings. No response was received from Debtors. 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 Motion must be granted.

SUMMARY. David K. and Colleen L. Huskey ("Debtors") filed a Chapter 7 petition on January 24, 2000. On April 20, 2000, the United States Trustee moved to dismiss the case under 11 U.S.C. § 707(b) for substantial abuse. In her motion, the United States Trustee alleged that Debtors have disposable income of \$981.70 per month, which will allow them to repay 41% of their unsecured debt in three years or 69% of their unsecured debt in five years. The United States Trustee's calculations included an increase in Debtors' monthly income by disallowing retirement contributions. The calculations also included a deduction in a clothing expense from \$500 to \$200 and another deduction of \$290 per month for college expenses for an adult daughter.

Debtors filed an objection to the United States Trustee's Motion on May 15, 2000. They responded that: \$61 of the monthly retirement contribution was mandatory; the \$498 paid monthly to a credit union includes \$332 in car payments and only \$104 for retirement savings; 5% of their earnings may be devoted to retirement savings under a previous ruling of this Court (no citation); they failed to include real estate taxes and home owners insurance on their schedules of expenses; and their clothing expense is not unreasonable. After these adjustments, Debtors

Re: David & Colleen Huskey
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stated they would have only \$651 in disposable income per month and that a failure to apply this amount to Chapter 13 plan payments was not evidence of bad faith because they would pay only 27% of unsecured debt over three years or 46% over five years.

The United States Trustee filed a Motion for Judgment on the Pleadings on May 17, 2000. Therein, the United States Trustee argued that \$651 per month in disposable income, the amount conceded by Debtors, does permit them to make meaningful payments under a Chapter 13 plan and that the Chapter 7 case should be dismissed.

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. *Stuart v. Koch (In re Koch)*, 109 F.3d, 1285,1288 (8th Cir. 1997) (citing *In re Walton*, 866 F.2d 981, 983 (8th Cir. 1989)). Based on the current record,¹ Debtors have available income (after payment of necessary living expenses) of at least \$651 per month to pay unsecured claims holders. To allow Debtors to remain in a Chapter 7 when these significant funds are available to pay claims through a Chapter 13 plan would be a substantial abuse of the bankruptcy process.

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. Further, assisting adult children with college expenses cannot take precedence over paying creditors. *Id.* at 8-10.

The United States Trustee's May 17, 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 April 20, 2000 Motion to Dismiss for Substantial Abuse

Sincerely,

/s/ Irvin N. Hoyt

Irvin N. Hoyt
Bankruptcy Judge

INH:sh

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

¹ Debtors have not amended their Schedule I to correct any alleged error.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Northern Division

In re:)	Bankr. No. 00-10009
)	
DAVID K. HUSKEY,)	Chapter 7
Soc. Sec. No. 527-70-6964)	
)	
and)	ORDER SETTING DEADLINE FOR
)	DEBTORS TO CONVERT TO
COLLEEN L. HUSKEY,)	CHAPTER 13 IN LIEU
Soc. Sec. No. 503-68-3826)	OF DISMISSAL OF CASE
)	
Debtors.)	

In recognition of and compliance with the letter decision entered this day,

IT IS HEREBY ORDERED that the United States Trustee's May 17, 2000 Motion for Judgment on the Pleadings in GRANTED; and

IT IS FURTHER ORDERED that Debtors have until June 9, 2000 to voluntarily convert this Chapter 7 case to a Chapter 13 case; and

IT IS FURTHER ORDERED that should Debtors decline the opportunity to voluntarily convert this Chapter 7 case to a Chapter 13 case, this Chapter 7 case shall be dismissed without further notice or hearing upon the United States Trustee's April 20, 2000 Motion to Dismiss for Substantial Abuse.

So ordered this _____ day of May, 2000.

BY THE COURT:

ATTEST:
Charles L. Nail, Jr., Clerk

Irvin N. Hoyt
Bankruptcy Judge

By: _____
Deputy Clerk
(SEAL)