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

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October 13, 1989

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Re: Odean T. and Ardys R. Olson
Chapter 7 89—30026

Dear Counsel:

The United States Trustee has filed a motion to dismiss the Chapter 7 bankruptcy proceeding initiated by debtors Odean and Ardys Olson. A hearing on the motion was held on July 12, 1989 with the Court taking the matter under advisement and requesting simultaneous briefs. After considering the evidence adduced at the hearing, the arguments presented by counsel and the applicable law, the Court finds the trustee's argument persuasive and grants his motion.

Odean and Ardys Olson filed for relief under Chapter 7 of the Bankruptcy Code on March 14, 1989. The required statement of financial affairs and schedules were timely filed. The trustee's motion was filed on June 16, 1989. The basis of the motion was that Olsons' filing constituted a substantial abuse of Chapter 7. According to the trustee, Olsons would have sufficient income to fund a meaningful plan under Chapter 13 of the Code but for the tithes to be paid by Olsons, who are members of the Worldwide Church of God. The schedules of current income and expenses filed by Olsons indicate a monthly tithe of $780.00.

At the hearing, Odean Olson testified that the tithing practice of the Worldwide Church of God requires its members to donate ten percent of their income to the church as well as saving an additional ten percent for their personal use in paying for the expenses of celebrating various holy days and festivals. Every third and sixth year out of seven, another ten percent tithe is required for the support of widows, orphans and other needy persons. Olson's testimony also revealed that he was financially unable to procure medical insurance for his family, although his position with the South Dakota Department of Transportation paid for individual coverage for him. Further, for the past fifteen years, Olson has worked part-time at a local store to help meet his family's expenses. Other business ventures were also entered into, including the acquisition of rental property and a carpet cleaning business. However, neither of these ventures has ever produced a profit.

Olsons have priority and secured claims totaling $37,782.00 and unsecured claims totaling $14,017.64. Their monthly income is $2,618.00 and their monthly expenses, including the $780.00 tithe, total over $2,800.00.[1]

The trustee claims that the Olsons filing under Chapter 7 constitutes substantial abuse and that they have sufficient income to fund a Chapter 13 plan. Olsons counter that their debts are not primarily consumer debts and thus they are not subject to dismissal pursuant to 11 U.S.C. §707(b). Further, Olsons contend that their tithing does not constitute a substantial abuse of Chapter 7.

CONSUMER DEBTS

Olsons first contend that they are not subject to dismissal under §707(b) because their debts are not primarily consumer debts. The trustee correctly points out that this argument was never addressed at the hearing. Rather, it first came to light in Olsons' post-hearing brief. This procedure prevented the trustee from developing any testimony on the subject or otherwise addressing this issue. Although the Court cannot find any dispositive guidance in this procedural topic in either the Code or the Rules, it nevertheless remains a fact that raising an argument for the first time in a post-hearing brief, especially in a case such as this where the briefs were to be submitted simultaneously, places the

[1] This amount includes medical and dental coverage for Olson's family which was procured after the Olsons' bankruptcy filing.

party raising such argument at an unfair advantage. Hence, in this case and from now on, this Court will treat as waived an argument which is not brought forth prior to or at a hearing on the underlying issue. The Court thus will not address Olsons' consumer debt theory.

TITHES AND SUBSTANTIAL ABUSE

11 U.S.C. §707(b) 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 the 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.

The trustee relies upon In re Walton, 866 F.2d 981 (8th Cir. 1989) for the proposition that including a $780.00 monthly tithe constitutes a substantial abuse of Chapter 7. Under Walton, a court may consider future income of a debtor in determining whether a Chapter 7 petition should be dismissed for substantial abuse:

> The record establishes that Walton's monthly income is $1,818 and that his monthly expenses total $1,321. The monthly surplus of $497 would yield a yearly surplus of $5,964. The record also establishes that Walton's unsecured debts total $26,484. Thus, Walton could pay off more than two-thirds of his debts under a three—year plan. And in five years Walton's yearly surplus could repay 100 percent of his outstanding unsecured debt. We conclude, as did the District Court, that these facts adequately rebut the statutory presumption in 11 U.S.C. §707(b) in favor of granting the relief requested by the debtor.

Id. at 985 (citations omitted).

Many cases concerning this issue have been reported by the

bankruptcy courts of other districts. Most of the reported decisions concerning this issue are Chapter 13 cases. Several, including In re Gyurci, 95 B.R. 639 (Bkrtcy. D.Mn. 1989) and In re Gauckler, 63 B.R. 224 (Bkrtcy. D.N.D. 1986), concern the issue of substantial abuse in the setting of Chapter 7.

Interestingly, Gauckler (a case on which Olson's base much of their argument) is also factually similar, as the debtors therein were members of the Worldwide Church of God and the tithing required by their membership was a contributing factor to their desperate financial condition. The debtors in Gauckler had a monthly income of $1,802.56 and monthly expenses of $2,372.47, including a monthly tithe of $672.48 to the Worldwide Church of God. The family's lifestyle was not extravagant. Judge Hill went so far as to note that "the Debtors' monthly expenses are unrealistically low in the area of food and medical" and that their expenditure of $280.00 per month on food for a family of six would "purchase little more than subsistence level provisions." Id. at 225, 226. Turning to the issue of the propriety of the tithe, Judge Hill exercised a "hands off" approach, noting that "no court has suggested that a debtor must give up his good faith religious beliefs and obligations in order to come within the ambit of Chapter 7." Id. at 226. The debtors were thus granted relief.

Authority for Olsons' contention may also be found in In re Bien, 95 B.R. 281 (Bkrtcy. D.Ct. 1989). In Bien the Chapter 13 trustee objected to confirmation because the debtors' tithe to the Mormon Church prevented application of all of his disposal income to make payments as required under the Code. overruling the objection, Judge Shiff found the tithe to be a reasonably necessary expense for the maintenance or support of the debtor, noting that in the case of the Mormon religion, failure to pay the tithe resulted in the debtor's loss of full membership in the church. Thus, the court categorized the tithe as a "non—discretionary" expenditure required for full participation in the church, and concluded that the mandatory nature of the tithe placed it beyond the purview of the court's inquiry.

The trustee also has several cases to buttress his position that the tithe is not necessary for supporting the Olsons and that its inclusion constitutes a substantial abuse of Chapter 7. See e.g., Cyurci, supra, In re Hudson, 64 B.R. 73 (Bkrtcy. N.D.Oh. 1986) and In re Edwards, 50 B.R. 933 (Bkrtcy. S.D.N.Y. 1985). It should be noted that none of these cases are factually analogous to Olsons'. However, several cases under Chapter 13 are factually similar and such cases may provide guidance here because Walton's

interpretation of §707(b) is similar to the inquiry into the debtor's commitment of projected future income under § 1325(b)

The majority of Chapter 13 cases on this question hold that religious contributions are not necessary for the maintenance and support of the debtor or the debtor's dependent. See e.g. In re Tucker, 102 B.R. 219 (Bkrtcy. D.N.M. 1989), In re Miles, 96 B.R. 348 (Bkrtcy. N.D.F1. 1989), In re Reynolds, 83 B.R. 684 (Bkrtcy. W.D.Mo. 1988) , In re Curry, 77 B.R. 969 (Bkrtcy. S.D.Fl. 1987) , In re Sturgeon, 57 B.R. 82 (Bkrtcy. S.D.In. 1985), and In re Breckenridge, 12 B.R. 159 (Bkrtcy. S.D.Oh. 1980).

At least two Chapter 13 cases have allowed tithes: In re Navarro, 83 B.R. 348 (Bkrtcy. E.D.Pa. 1988) and In re Wood, 92 B.R. 264 (Bkrtcy. S.D.Oh. 1988). Navarro allowed a monthly expenditure of $120.00 for religious education for the debtors' son and a monthly tithe of $100.00. The court therein noted that the expenditures were not excessive and the debtors made such contributions pursuant to their sincerely held religious belief. In Wood, the court likewise approved the debtor's provision of a monthly church tithe of $43.00, noting that the tithe was not so inappropriate that modification of the amount was required.

Those cases which have disallowed tithes under Chapter 13 have generally premised such holding on the fact that the tithes are not necessary for the maintenance and support of the debtor under §1325(b)(2). See, e.g. Tucker and Miles, supra. This is not to say, however, that the courts automatically reject the inclusion of church tithes in plans submitted under Chapter 13. Reynolds, supra is a representative case in which Judge Koger held that tithes are not per se objectionable; rather such tithes may be allowable in a modest amount as determined on a case by case basis. Moreover, the courts have noted that tithing "should be encouraged. It supports the church financially which in turn allows the church to give spiritual comfort and sustenance to the community that supports it." Sturgeon at 83. See also, Breckenridge, supra. The courts also note, however, that allowing a debtor to include a tithe in his bankruptcy plan has the effect of requiring the debtor's creditors to contribute to the debtor's chosen charity. See, Curry at 970. See also, Tucker, supra.

The Olsons in this case find themselves in the midst of some very difficult circumstances. Ardys Olson suffers from Huntington's Chorea, which manifests itself in a palsy which prevents her from securing gainful employment. To generate extra income, Odean Olson works fifteen hours per week at a part—time

sales job in addition to his full-time position as an engineer with the South Dakota Department of transportation. Odean has also entered into other outside business ventures, none of which has succeeded. Further, Odean co—signed a note for a student loan for his son, which is now in default, and the Education Assistance Corporation now seeks recovery on the note from Odean.

Testimony at the hearing revealed that, despite their obvious good intentions and their sincere religious beliefs, the Olsons have only occasionally met the full tithing requirements of their church since first becoming members in 1968. While it appears that they have always met their first tithe (which goes directly for support of the church), they have not always been able to meet the second tithe (used to cover the costs of attending certain religious feasts and holy days[2]) or the third tithe (collected every two years out of seven, and which, in the greatest of ironies, is used for the support of the needy)

The Court agrees with several observations made by other judges of the bankruptcy courts regarding this Court's function in passing on debtor's religious convictions. The Court agrees with Judge Hill, who stated in Gauckler that:

> [t]his court will not presume to know by what avenue one ought to seek salvation and recognizes that in the eternal scheme of things material accomplishments count for naught. The Debtors seem quite sincere in their convictions and this court is not so presumptuous as to inflict its personal views of religious and financial responsibility upon them. However, it seems a quite stern and uncaring religion that would require faithful adherence to such a level of giving when the persons being asked to give are jeopardizing the welfare of their family in the course of compliance. In deed (sic), it is ironic that Debtors' church requires a ten percent (10%) donation for the support of the needy from the very persons who
> are in need.

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[2] It should also be noted that Olsons' weekly church attendance can be quite expensive, as the nearest Worldwide Church of God is in Rapid City. Thus, Olsons must make a trek in excess of three hundred miles round trip every week in order to attend church services.

Id. at 226. I also agree with Judge Koger who noted in Reynolds that:

> [b]y whatever name or rite, man has and will seek some entity or institution that answers the unanswerable questions and assuages the unassuageable doubts and concerns of our human existence. But that is each person's free choice; to seek or not, to believe or not; to contribute or not; and who or what is right is not for this Court or any other branch of the state or federal government to decide. This Court may not and must say what if any portion of debtor's income shall go to support his personal religious beliefs, but this Court may determine what constitutes those items reasonably necessary "to be expended — (A) for the maintenance or support of a debtor or a dependent."

Id. at 685 quoting 11 U.S.C. §1325(b) (2) (a).

Finally, I agree with Judge Sidman's observation in Breckenridge that:

> [c]hurch tithes, per se, are certainly not held in disfavor by this Court. However, in light of the severe financial difficulties of these debtors, it would appear prudent that they devote maximum resources under the plan to the repayment of their obligations, leaving a matter of tithing to their church to a time when they can better afford such a financial commitment.

Id. at 160.

The Court believes that Olsons' inclusion of a tithe of $780.00 per month in their schedules constitutes a substantial abuse of Chapter 7 of the Bankruptcy Code. However, the Court does not believe that the inclusion of any tithe would per se constitute such abuse. Such must be determined on a case by case basis. The trustee points out in his brief that the Olsons could fund a five year plan under Chapter 13 which would repay one hundred percent of their unsecured debt and still leave a

substantial amount which the debtors could contribute to their church. The trustee further notes that while the inclusion of a substantial tithe would arguably still be unreasonable, an objection thereto would be unlikely if the Olsons repay their unsecured creditors in full. The Court believes that this compromise offered by the trustee should be seriously reviewed by the Olsons.

The Court will grant the trustee's motion to dismiss. An order to that effect will be entered by the Court. However, the order Shall not become effective if, within ten days of the date of this memorandum, Olsons voluntarily convert the case to one under chapter *13,* pursuant to 11 U.S.C. §706(a). This constitutes the Court's findings of fact and conclusions of law. This is a core Proceeding under 28 U.S.C. §157(b).

Very truly yours,

Irvin N. Hoyt
Chief Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA

IN RE:	)	CASE NO. 89—30026
ODEAN T. OLSON and	)	CHAPTER 7
ARDYS R. OLSON,	)	
	)	ORDER GRANTING
	)	UNITED STATES TRUSTEE'S
Debtors.	)	MOTION TO DISMISS

Pursuant to the letter memorandum executed this date

IT IS HEREBY ORDERED that the motion of the United States Trustee to dismiss this case for substantial abuse under 11 U.S.C. §707(b) is granted.

IT IS FURTHER ORDERED that this order shall not become effective if, within ten days of the date of this order, debtors voluntarily convert this case to one under Chapter 13 pursuant to 11 U.S.C. §706(a).

Dated this 13th day of October, 1989.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

PATRICIA MERRITT, CLERK

By: _____
Deputy
(SEAL)