

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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July 12, 2002

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Post Office Box 690
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Subject: *In re Dwain and Linda Swenson,*
Chapter 7; Bankr. No. 02-40154

Dear Counsel:

The matter before the Court is the United States Trustee's Motion for Judgment on the Pleadings [re: United States Trustee's Motion to Dismiss for Substantial Abuse] and Debtors' response. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter 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 Motion will be granted and Debtors' case will be converted to Chapter 13.

SUMMARY OF FACTS. Dwain and Linda Swenson ("Debtors") filed a Chapter 7 petition and schedules in mid-February 2002. Based on their Schedules I and J, Debtors had disposable income of at least \$560.78. The United States Trustee filed a motion to dismiss the Chapter 7 case under 11 U.S.C. § 707(b) because this amount of disposable income would be sufficient to fund a Chapter 13 plan. In the Motion, based on Debtors' testimony at their § 341 meeting of creditors, the United States Trustee also identified an additional \$160 that could be used to fund a Chapter 13 plan. In their response to the Motion to Dismiss, Debtors set forth four expenses that they had either forgotten or understated on their Schedule J. They also stated that Debtor Linda Swenson's work hours had been reduced and that their monthly income was thus reduced by \$151.72. Debtors further argued that a Chapter 13 plan was not feasible because Debtor Linda Swenson's employment

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situation was unstable and that both Debtors, due to their age, would have difficulty finding new employment if either would lose their job.

The United States Trustee moved for a judgment on the pleadings based on his recalculation of Debtors' disposable income, which was based on Debtors' response to the Motion to Dismiss and some discovery documents regarding Debtor Linda Swenson's pay. The United States Trustee calculated that Debtors' actually had monthly income of \$2,540 and expenses (not including repayment of unsecured, pre-petition debt) of \$2,105.25. This left Debtors with monthly disposable income of \$434.75, which, the United States Trustee argued, would fund a Chapter 13 plan. In their response, Debtors again argued the uncertainty of Debtor Linda Swenson's employment and the difficulty she would face in finding a new job.

APPLICABLE LAW. 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 Pamela E. 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 (B.A.P. 9th Cir. 1995)).

DISCUSSION. Debtors' disposable income of \$434.75 will allow them to fund a Chapter 13 plan that will provide a meaningful repayment of pre-petition debt. Over a three-year plan, Debtors can repay about 60% of the pre-petition unsecured claims plus the case trustee's commission. Over a five-year plan, they can pay virtually all this debt. Accordingly, the United States Trustee's Motion for Judgment on the Pleadings will be granted.

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In their latest response, Debtors asked that they be allowed to convert their case to Chapter 13, rather than having it dismissed. The Court will, therefore, enter an order converting this case to Chapter 13.

If Debtors face employment troubles during the term of their Chapter 13 plan, they may file a motion to modify their plan payments, as needed. See 11 U.S.C. § 1329 and Local Bankruptcy Rule 3015-4.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

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

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUL 15 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

JUL 15 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota

By *CF*

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Total labels: 4