

(5) With monthly disposable income of \$1,086.00, the Debtors could repay \$39,102.00 or 77% of their unsecured debt in three years and \$65,170.00 or 128% in five years.

On November 23, 1998 the Debtors filed an amended Schedule J, in which they indicated their monthly income at the time of filing was really \$5,184.27, and an amended Schedule J, in which they indicated their monthly expenses at the time of filing were really \$ 5,313.00. On the same date, the Debtors filed their response to the U.S. Trustee's motion. They attached Exhibit A, a recapitulation of the expenses shown on amended Schedule J, and Exhibit B, explanations for the following expense items: Clothing, Laundry, Transportation, Recreation, Charity, Education, College Funds, Cell Phone, and Union Dues. They also attached Exhibit C, a copy of Douglas Devine's employment contract, and Exhibit D, a salary schedule. Based on all those documents, the Debtors maintained they had no disposable income to service any debts other than those already covered in Schedule J.

On December 18, 1998 the Court conducted a preliminary hearing on the motion and response by telephone. Stephen W. Newport, the Debtors' attorney of record since the date of filing, and James L. Snyder, the Assistant U.S. Trustee for this District, advised the Court that the controversy turned on the actual expenses—specifically whether those amounts exceeded amounts previously allowed by the Court in disposing of other section 707(b) motions. The Court directed the parties to file their exhibits by February 4, 1999 and scheduled the matter for an evidentiary hearing on February 18, 1999 over the Iowa Communications Network (ICN).

On January 15, 1999 the U.S. Trustee filed her exhibit list. The U.S. Trustee indicated she would be offering the following exhibits: original Schedules I and J; her October 22, 1998 letter to Debtors' attorney; Mr. Newport's November 6, 1998 response to that letter; Debtors'

Amended Schedules and their response to the motion to dismiss; Mr. Newport's December 22, 1998 letter; and her January 5, 1999 response to that letter.

Then on January 21, 1999, the U.S. Trustee filed a motion for continuance related to mandatory computer training for U.S. Trustee Offices in Region 12 . On January 22, 1999 the Court granted the motion and continued the evidentiary hearing to March 18, 1999 over the ICN.

On February 4, 1999 the Debtors filed their exhibit list. They indicated they would be offering the following: a telephone bill from GTE Wireless; clothing receipts, check carbons and check registry; check registry and receipts for recreation; transportation receipts; and check registry for hair cuts.

On March 18, 1998, the Court conducted the evidentiary hearing from Des Moines over the ICN. John F. Schmillen, Assistant U.S. Trustee for the Northern District of Iowa, appeared on behalf of the U.S. Trustee for Region 12 because Mr. Snyder had another conflict. Mr. Newport represented the Debtors. During the course of Douglas Devine's testimony, the Court found it necessary to admonish him to answer the questions as best he could—without turning to the person seated in the front row of benches in the courtroom in Davenport for input. Only Douglas Devine testified

At the conclusion of the testimony and arguments, the Court took a recess to review and reflect on the exhibits and testimony. Thereafter the Court resumed the hearing and entered her findings and conclusions on the record. Given the controlling Eighth Circuit case law and the facts presented, the Court found that dismissal was warranted. The Court then asked whether the Debtors wanted the option of converting to Chapter 13. Mr. Newport indicated they did. Accordingly, the Court prepared an order that granted the U.S. Trustee's motion to dismiss

effective April 2, 1999 unless the Debtors converted to Chapter 13 by April 1, 1999. The Court entered a minute order to that effect on March 22, 1999.

On March 29, 1999 Mr. James C. Wherry entered his appearance on behalf of the Debtors. To date, Mr. Newport has not filed a motion to withdraw his appearance as Debtors' counsel.

On March 29, 1999 Mr. Wherry also filed a "Motion for Reconsideration/Rehearing in Order to Enlarge The Record." Mr. Wherry contends Mr. Devine, an undercover police officer, "became confused during his testimony because he was too busy trying to hold the button down on the speakerphone to be able to get all of this across." Mr. Wherry requests the court accept additional evidence with respect to the following expenses: clothing; laundry and dry-cleaning; transportation; recreation; charitable contributions; and education. With respect to charitable contributions, he adds: "The U.S. Trustee's complaint of these bills, consistently paid by the Debtors, is a violation of 707(b), per se. This law has been amended and that must be respected."

To date, the U.S. Trustee has not filed any kind of response.

Having reviewed the history of the case and the status of the record already presented, the Court finds that the pending motion must be denied because:

- (1) The Debtors have already provided written explanations for various expense items;
- (2) Douglas Devine's testimony was at best cumulative as to documentary evidence regarding actual expenses;
- (3) Douglas Devine's testimony sufficiently explained why he believed there were special circumstances that justified the Debtors maintaining the lifestyle they set forth on Amended Schedule J;

(4) Douglas Devine did not appear to be confused or intimidated by the ICN proceeding but rather simply appeared to be unfamiliar or unsure of certain details of his own case, much like many other witnesses the Court has observed in traditional courtroom settings over the years;

(5) Natalie Devine did not testify;

(6) The Court did not disallow the charitable deductions;

(7) The Court fully considered the Debtors' written and Douglas Devine's verbal explanations about the categories of expenses and the special circumstances before entering her findings and conclusions on the record;

(8) The Court's ultimate disposition of the motion did not turn on the accuracy of the expenses but on the reasonableness of the expenses in light of her prior rulings in section 707(b) controversies; and

(9) The motion fails to specify what "additional evidence" would be offered that could not have been offered before the record closed.

THEREFORE, IT IS HEREBY ORDERED that the Debtors' Motion for Reconsideration/Rehearing in Order to Enlarge the Record is denied.

IT IS FURTHER ORDERED that the case will be dismissed on July 16, 1999 unless the Debtors file a motion to convert to Chapter 13 by July 15, 1999.

Dated this 6th day of July, 1999.

LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE