

**UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa**

<b>In re:</b>	:	<b>Case No. 01-01153-CH</b>
<b>TERENCE K. VENTLING and</b>	:	
<b>WANDA J. VENTLING,</b>	:	
	:	<b>Chapter 7</b>
<b>Debtor.</b>	:	
	:	

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**ORDER—TRUSTEE'S MOTION TO DISMISS CASE AND OBJECTION THERETO**

On September 4, 2001, a hearing was held on the United States Trustee's Motion to Dismiss Case and Debtor's Objection Thereto. Attorney Pamela A. Vandel represented the Debtors Terence K. Ventling and Wanda J. Ventling. Assistant United States Trustee James L. Snyder represented the United States Trustee, Barbara G. Stuart. At the conclusion of the hearing, the court took the matter under advisement. The court considers the matter fully submitted.

The court has jurisdiction of these matters pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). Upon review of the pleadings, evidence, and arguments of counsel, the court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 9014 and 7052.

**FINDINGS OF FACT**

1. Terence K. Ventling and Wanda J. Ventling (hereinafter collectively, Debtors) filed a joint voluntary petition for chapter 7 bankruptcy relief on March 19, 2001.

2. Debtors scheduled two secured creditors holding \$182,000 in claims. SMA Investment's claim for \$172,000 is secured by Debtors' home, which is valued at \$165,000. Chrysler Financial's claim for \$10,000 is secured by a vehicle, which is valued at \$5,000. Debtors' statement of intentions indicates that they will reaffirm each debt.

3. Debtors scheduled fifty-eight creditors holding \$106,739.27 in unsecured claims. Of the unsecured claims, Debtors labeled two as business debt totaling \$8,232.90.

4. Debtors scheduled one priority unsecured claim for taxes owing to the State of California in the amount of \$1,897.

5. On August 30, 2001, Debtors amended their schedules by adding the Internal Revenue Service as holder of priority unsecured claims of \$13,565.90 for 1995, \$9,864.19 for 1996, and \$4,410.48 for 1998, for a total of \$27,840.57, and Iowa Christian Academy as holder of a nonpriority unsecured claim of \$2,235.00.

6. Debtors' total unsecured debt is \$145,047.74.

7. Debtors' scheduled claims are primarily consumer in nature.

8. Debtors' schedule of current income indicated that Terence earned gross monthly income of \$4,999.01 for a yearly amount of approximately \$60,000.00. From this amount, \$1,149.76 is withheld for payroll taxes and social security; \$214.50 for insurance; and \$184.97 for "retirement."

9. Debtors' schedule of current income indicated that Wanda earned gross monthly income of \$4,481.34 for a yearly amount of approximately \$53,776.00. From this amount, \$1,076.05 is withheld for payroll taxes and social security and \$49.83 for insurance.

10. Debtors' scheduled their total combined monthly income as \$6,805.24.

11. Debtors' statement of financial affairs indicates that Debtors' income for 1999 was \$46,083.00. Wanda apparently did not work outside of the home and listed her occupation as

homemaker on the couple's income tax returns. Their joint income for 2000 was \$82,642.78.

Based on the testimony and the schedule of current income, Debtors' anticipated income for 2001 is approximately \$115,776.00.

12. Debtors identify four dependents, a son age 21 years, a son age 18 years, a daughter age 17 years, and a son age 9 years.

13. The eldest son is enrolled at Des Moines Area Community College (hereinafter DMACC) at the Boone campus. The next oldest son and the daughter are enrolled at DMACC at the Des Moines campus. The youngest son is enrolled at Iowa Christian Academy, a private school in Des Moines.

14. Debtors' schedule of current expenses indicates monthly expenses totaling \$6,787.00.

15. Debtors have scheduled the following amounts as direct payments for the cost of their home: house payment - \$1,947.00; utilities - \$750.00; water and sewer - \$75.00; and, home maintenance -\$120.00; for a total of \$2,892.00.

16. Debtors work in the downtown Des Moines area. They ride together to and from work. The round trip commute is approximately 8 miles.

17. Debtors carry SR22 "high risk" insurance on their vehicles. Four of the family members who drive are covered by the policy.

18. Terence testified that the cost of their homeowners insurance rose from approximately \$575.00 to approximately \$1,800.00 after they filed their bankruptcy petition. Debtors' schedule of expenses does not contain a separate entry for homeowners insurance.

19. Debtors have not used a checking account for approximately three years. Most of their financial transactions are carried out in cash. They also purchase money orders when cash is not acceptable. Debtors pay a fee each time they purchase the money orders.

20. Debtors offered no evidence that they make any accounting or keep a record of their income and expenses on a periodic basis.

21. On April 18, 2001, the United States Trustee (hereinafter UST) wrote to Debtors' counsel requesting additional information concerning their finances. UST did not receive a response.

22. On May 17, 2001, UST again wrote to Debtors' counsel requesting financial information and again received no response.

23. UST drafted the motion to dismiss based on Debtors' schedules without any additional information.

24. Debtors filed a response to the motion to dismiss and attached various documents to support their position. They included billing statements, letters, and a copy of their 1999 federal income tax return. They did not include a copy of their 2000 tax return.

### **DISCUSSION**

UST filed a motion to dismiss Debtors' bankruptcy case pursuant to 11 U.S.C. §707(b) and contends that allowing Debtors to proceed under chapter 7 would result in a substantial abuse of the provisions of the chapter. UST argues that Debtor has sufficient disposable income to repay a substantial portion of their unsecured consumer debt. In the motion, UST claims that in a hypothetical chapter 13, Debtors could generate \$82,728.00 of disposable income over the course of a 36-month plan resulting in the payment of 76.15% of their unsecured debt. In a hypothetical 60-month plan, Debtors' disposable income would be \$137,880 or 126.92% of their unsecured debt. After reviewing the evidence presented at hearing, UST revised the potential payment amounts, but still argued for dismissal.

Debtors dispute UST's conclusions and calculations. They argue that the scheduled expenses filed with the court are accurate and reasonable for a family of their size. Debtors presented evidence supporting the amount of their charitable contributions, and Terence testified concerning other expenses. Debtors maintain that their current financial difficulties are due to a series of unanticipated expenses, rising energy and insurance costs, and bad luck. They state that their disposable income is minimal and according them relief under chapter 7 would not be an abuse of its provisions.

Section 707(b) was enacted in 1984 in response to Congress's perception that an increasing number of unneedy debtors were using chapter 7 to escape paying consumer debts. In re Walton, 866 F.2d 981, 982-83 (8th Cir. 1989). After amendments in 1986 and 1998, § 707(b) now provides:

(b) 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 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. In making a determination whether to dismiss a case under this section, the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4)).

11 U.S.C. § 707(b) (2001).

In order to prevail on her motion to dismiss, UST must show that Debtors' debts are primarily consumer in nature, and that granting chapter 7 relief would result in substantial abuse of the provisions of the chapter. In re Pralleikas, 248 B.R. 140, 143 (Bankr. W.D. Mo. 2000).

The Bankruptcy Code does not define "substantial abuse." In interpreting the term, the Eighth Circuit holds that the essential inquiry is "whether the debtor's ability to repay creditors with future income is sufficient to make the Chapter 7 liquidating bankruptcy a substantial abuse of the

Code.” Fonder v. United States, 974 F.2d 996, 999 (8th Cir. 1992). See also U.S. Trustee v. Harris, 960 F.2d 74, 77 (8th Cir. 1992); In re Walton, 866 F.2d at 984-85. While the Circuit Court does not adopt a wide ranging “totality of the circumstances test,” Harris, 960 F.2d at 77, the court may consider a variety of factors. See In re Walton, 866 F.2d at 983- 85 (courts not foreclosed *inter alia* from considering future income and inability to pay alone might not shield a debtor from dismissal under § 707(b)); see also In re Woodward, 265 B.R. 179, 187-88 (Bankr. S.D. Iowa 2001) (courts may consider additional relevant factors to determine that § 707(b) dismissal is proper). However, a debtors’ ability to fund a chapter 13 plan is the primary factor to be considered. In re Walton, 866 F.2d at 985 (citing with approval the Ninth Circuit’s analysis in Zolg v. Kelly (In re Kelly)), 841 F.2d 908, 914-15 (9th Cir. 1988).

The ability to fund a chapter 13 plan is determined by a calculation of the debtors’ disposable income. Stuart v. Koch (In re Koch), 109 F.3d 1285, 1289 (8th Cir. 1997). “Disposable income” is defined as income not reasonably necessary for the support of the debtor, the debtor’s dependents, or the debtor’s business. Id. citing 11 U.S.C. § 1325(b)(2).

In this case, Debtors do not dispute UST’s assertion that their debts are primarily consumer debts. They admit as much in their objection to the motion to dismiss. Therefore, court finds that UST has met this element as required by § 707(b).

UST next asserts that Debtors overstated their expenses on their statement of current expenses, and identifies specific instances of excessive expenses. After noting that Debtors failed to provide adequate documentation of claimed expenses upon written request, UST argues that Debtors do not lack sufficient income to pay their debts, rather they have no idea where their money

goes. The court agrees with UST, and for the following reasons finds that Debtors have the ability to repay their creditors from future income.

Debtors scheduled their total combined monthly income as \$6,805.24. They indicated that Terence earned gross monthly income of \$4,999.01 for a yearly amount of approximately \$60,000.00. From this amount, \$1,149.76 is withheld for payroll taxes and social security; \$214.50 for insurance; and \$184.97 for “retirement” leaving a net monthly income of \$3,449.78. However, this court has consistently held that in determining disposable income, a debtor may not withhold amounts to be contributed to a retirement fund, absent a compelling reason such as a statutory or regulatory mandate. Debtors did not offer a compelling reason for the retirement fund contribution. Accordingly, the court finds that Debtors understated their total combined monthly income by \$184.97, and finds the correct amount to be \$6,990.00.

Turning to the scheduled expenses, the court notes that Debtors base their expenses on themselves and four dependent children. However, Debtors’ eldest son is already 21 years of age. Debtors did not claim him as a dependent on their 1999 income tax returns, the only year for which they supply documentation. Therefore, it is inappropriate for Debtors to include expenses incurred for his support, and their expenses must be adjusted accordingly.

UST argues that certain expenses exceed the amount reasonably necessary for the support of Debtors and their dependents and offers the following adjustments. UST would eliminate the \$300 monthly payment for tuition to Iowa Christian Academy, a private school, for their youngest son. The court agrees. While recognizing that parents have the right to educate their children in a manner that they feel is appropriate, the court has consistently held that debtors may not impose the

cost of private education upon their unsecured creditors. The court finds the expense not “reasonably necessary” for Debtors’ or their dependent’s support.

UST contends that monthly expenses of \$400.00 for transportation is excessive and would reduce the amount to \$200.00. Debtors raise the valid point that gasoline prices have risen dramatically, and consequently, the operating costs of the vehicles has risen as well. However, Terence testified that he and his wife work in the downtown area of Des Moines. They travel to work together in one vehicle, and the roundtrip commute is approximately eight miles. One son uses the second vehicle as his personal vehicle to travel to school and work. Their daughter uses the third vehicle and pays for its expenses.

The court agrees with UST. Debtors did not provide any documentation of actual expenses incurred for transportation. Given the short distance that Debtors commute and the availability of shopping close to the downtown area, \$400.00 is an excessive amount. To the extent that high fuel costs add to the total expense, the court notes that given its volatility over the past few years it is uncertain whether the price of fuel will remain high. Further, the court finds that it is unreasonable for Debtors to fully subsidize the transportation costs of their children. The fact that there are five licensed drivers in the family does not mean that necessary vehicular travel increases fivefold. The court finds that \$200.00 per month is a reasonable amount for transportation.

The court likewise agrees with UST that the expense item for auto maintenance is duplicative of the transportation expense. The above amount should provide for fuel and routine maintenance as well as amortize the expense of unanticipated repair. The court notes that Debtors own three vehicles, so should one break down; they would not be without transportation. To the extent that Debtors argue that their Town and Country automobile is unreliable and has required

frequent repair, the court notes that they intend to reaffirm the debt even though they value the vehicle at \$5,000.00 less than the debt owing against it. The court finds the additional \$65.00 monthly expense for auto maintenance not reasonably necessary.

UST originally disputed the \$365.00 monthly auto insurance payment. UST argued that it should be reduced to \$100 per month to reflect only insurance coverage for Debtors and not the minor drivers. At the hearing, Terence testified that he had his driver license suspended and upon reinstatement was required to carry SR22, "high risk" insurance. Debtors offered an insurance premium notice showing a prior balance of \$1,195.87, minimum due \$397.25, unpaid balance \$795.87, and a due date of 6/07/01. Debtors offered only the one statement. They did not offer the policy or the declarations page.

Terence testified that there are four drivers on the policy, and he must also maintain the SR22 policy for two years for the benefit of his son. It is unclear whether all the vehicles are covered by the policy. The statement indicates that it is for a "regular installment," but it does not indicate the installment period. The court finds that the stated insurance expense covers not only Debtors, but also their children. Therefore, it is appropriate that the expense be reduced; however, in view of the necessity for high-risk insurance for Terence, the court will only reduce the expense by \$100.00 per month. The court finds that \$265.00 per month for auto insurance for Debtors is reasonable under the circumstances.

UST argues that the food expense should be reduced from \$1000.00 to \$800.00. Debtors respond that \$1000.00 is not inordinately expensive for six people. However, as the court noted above, Debtors' eldest son attends DMACC in Boone and is not a dependent. The \$800.00 figure

comports with other decisions of this court for a family of five. The court finds that \$800.00 is a reasonable amount for food.

UST argues that Debtors recreation expense should be reduced from \$100.00 to \$50.00. According to the testimony, all of the family members except the youngest son have jobs. Debtors provide cable television in the home. The court finds that \$50.00 per month is sufficient for the purchase of newspapers, magazines, or for other recreational activities for Debtors and their youngest son. This amount for recreation is consistent with the court's previous decisions.

UST originally requested that Debtors' \$700.00 charitable donation expense be eliminated because they failed to provide documentation of the actual expense. At the hearing, Debtors provided their 1999 income tax returns showing charitable contributions of \$5,846.00 and a printout from First Assembly of God Church of charitable contributions made by Debtors from January 7, 2001 through June 3, 2001. Debtors' did not provide documentation of charitable contributions made in 2000.

Section 707(b) was amended in 1998 to provide "the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3)) to any qualified religious or charitable entity or organization (as that term is defined in section 548(d)(4))." 11 U.S.C. § 707(b). Clearly, by the plain language of the section, Debtors' continued charitable contributions cannot be considered in a disposable income analysis. The only question before the court is whether Debtors in fact make the contributions in the amount scheduled as a monthly expense.

Terence testified that Debtors attempt to tithe by giving 10% of their income to their church. The evidence showed contributions made to First Assembly of God Church varied from \$800.00 in February and April; to \$655.00 in January; to \$420.00 in May; to \$400.00 in March. On June 3, 2001, Debtors gave \$300.00. Debtors' average monthly payment was \$562.50 ( $3375 / 6 \text{ months} = \$562.50$ ) during this time period.

The only other evidence of charitable giving on the part of the debtors is the 1999 tax return which shows the \$5,396.00 was given by cash or check and \$450.00 was given other than by cash or check for a total of \$5,846.00. This is an average of \$487.17 per month, even including the amount for gifts other than by cash or check.

Such a scant record is hardly compelling evidence of monthly contributions of \$700.00. Debtors' average monthly payment for the above 18-month period is \$512.28 ( $\$9,221.00 / 18 \text{ months} = \$512.28$ ). The best evidence produced by Debtors supports the conclusion that their average monthly charitable contribution is \$513.00, and this is the amount the court will use in its disposable income analysis.

UST raises issue with monthly utility expenses. UST argues that Debtors overstated their monthly expenses for electricity, water and sewer. UST requests a reduction from \$75.00 to \$50.00 per month for water and sewer, and a reduction from \$750.00 to \$275.00 for electricity.

At hearing Debtors provided a billing history documenting water and sewer charges from March 2000 through May 2001. The charge for SW/STWR remained a constant \$14.71. The charge for water varied from a high of \$94.87 with \$4.74 tax in June 2000 to a low of \$6.43 with \$.38 tax in January of 2001. Misc. charges ranged from \$24.75 in October 2000 to \$0 in other months. Averages of each of the items yield \$37.63 for water, \$2.15 for tax, 14.71 for SW/STWR,

and \$2.73 for Misc. yielding a monthly total \$57.22. It is unclear from the record what the Misc. charges encompass; whether they are for late payments or otherwise.

Based on its own calculations, the court agrees that Debtors overstated their water and sewer expense. The court finds that a monthly expense of \$55.00 is reasonable for water and sewer.

To support the \$750.00 electricity expense, Debtors provided three utility bills. The bills include gas and electric charges. The March 20, 2001, bill shows an electric subtotal of \$218.54 and a gas subtotal of \$710.88. The bill includes a budget payment amount of \$796.00 and a budget balance after payment of \$1,886.08. The total amount owing shown on the bill is \$3,281.47. The May 18, 2001, bill shows an electric subtotal of \$164.12 and a gas subtotal of \$480.32. The total amount owing shown on the bill is \$1,751.81. The June 15, 2001, bill shows an electric subtotal of \$193.90 and a gas subtotal of \$190.93. The total amount owing shown on the bill is \$1,669.31.

Debtors live in a 3500 square foot home that has five bedrooms. It also has five furnaces with which it is heated, hence the high utility bills. It also has a heated swimming pool. However, Debtors did not heat it during the last year.

Debtors' living arrangements are troubling to the court for the following reasons. First, from testimony and the information supplied on the schedule, the court deduces that Debtors entered into a purchase agreement to buy the home in August of 2000. Apparently, they are purchasing the home on contract, although they did not provide the court or UST with copies of the contract. The schedules indicate that home is valued at \$169,000.00, the purchase price, but has \$172,000.00 owing against it. Debtors' monthly payment is \$1,947.00. Such a payment for a house of that value would require that the contract be short term, or have a relatively high interest rate.

Debtors are already “under water” on the investment and testified that they have wholly or partially missed payments.

Second, the court finds the timing of the home purchase troubling. On their schedules, Debtors do not indicate a date incurred for the majority of their debts. The dates that are provided are well in advance of the acquisition of the home. The court infers from the schedules that Debtors had in excess of \$100,000.00 in unsecured debt when they purchased their home. Standing alone, this fact might not elicit a great deal of comment.

However, in 1999 Debtors reported their joint income to be \$46,083.00. That year, Wanda apparently did not work outside of the home and listed her occupation as homemaker on the couple’s income tax returns. With Wanda employed outside the home, their joint income for 2000 rose over \$36,000.00 to \$82,642.78. Based on the testimony and the schedule of current income, Debtors’ anticipated income for 2001 at approximately \$115,776.00, an additional \$33,000.00 of income. Given that their income increased dramatically over the course of two years, it is not surprising that would choose to buy a home at this time. That they would file for bankruptcy protection seeking to discharge in the vicinity of \$100,000.00 of pre-acquisition debt within seven months of the purchase raises the court’s suspicions.

Third, the court finds the choice of the home purchased troubling. As noted previously, Debtors had unsecured obligations in excess of \$100,000.00 at the time of the purchase. The house that they chose to purchase is a large five-bedroom home. Debtors maintain that they need a large house because of the size of their family. They state that each child requires a separate bedroom. It is noted that Debtors’ three oldest children are attending college and will soon be emancipated from the requirement that they be furnished a separate room in the family home.

As to the utilities required to live in the home, Terence testified that they moved into the house in February 2000, and entered into the purchase contract in August of 2000. During that time period, they should have become familiar with the energy usage of the house and realized the usage and cost could only go up in the winter months.

Finally, the property includes a heated swimming pool, and in this area, nothing equates with luxury quite like a private, heated swimming pool. Debtors have indicated that they intend to reaffirm the debt on their house. Debtors' desire to discharge potentially \$100,000.00 in pre-acquisition debt and keep their house and swimming pool is decidedly unpalatable, at least for their unsecured creditors.

Taking the aforementioned facts into consideration, the court finds that Debtors' requested monthly allowance of \$750 for utilities is not reasonably necessary. The court recognizes that Debtors need adequate housing for their family. However, it is not appropriate to require unsecured creditors to subsidize a house that Terence aptly described as a "money pit," albeit a money pit with a heated swimming pool. The court agrees that the amount should be lowered to \$275.00.

In summation, the court granted UST's requests for reductions as follows: \$300.00 for tuition disallowed; transportation reduced from \$400.00 to 200.00; \$65.00 for auto maintenance disallowed; food reduced from \$1000.00 to \$800.00; auto insurance reduced from \$365.00 to \$265.00; recreation reduced from \$100.00 to \$50.00; charitable contributions reduced from \$700.00 to \$513.00; water and sewer reduced from \$75.00 to \$50.00; and electricity and gas reduced from \$750.00 to \$275.00. Based on the reductions, Debtors' reasonably necessary monthly expenses are \$5,185.00. Subtracting the expenses from their monthly income of \$6990.00 yields a monthly disposable income of \$1,805.00. Under a three-year plan, Debtors could pay \$64,980.00, minus

trustee and administration fees, to unsecured creditors. Under a five-year plan the amount increases to \$108,300.00.

The court also notes that while Debtors' ability to pay their debts from future income is the primary factor to be considered under 707(b), it is not the only factor that a court may consider. In this case the court finds various factors militate against granting relief for Debtors. First, as discussed earlier, the court is troubled by the timing and the choice of Debtors' housing purchase. Debtor added \$165,000.00 to their already considerable debt load by buying a large home with heated swimming pool. Now Debtors want to keep the house and discharge a large portion of the other debt. In essence, they want to prefer SMA Investments to their other creditors. Standing alone, this fact would cause the court to entertain a § 707(b) motion.

However, that fact is not isolated. Debtors' income has increased dramatically over the last three years. Rather than attempting to satisfy their existing debt obligations, they incur more debt and then seek to discharge the existing obligations.

Further, Debtors' finances are in complete disarray. While this is not unusual in bankruptcy, the court agrees with UST that these Debtors have no idea where their money goes. They do not have any type of accounting system in place. Debtors consistently add to their transactional costs by purchasing money orders to pay regular bills and paying late fees. They are currently not paying their scheduled expenses in a timely manner. They have made no attempt to alter their lifestyle leading up to or after the filing of their bankruptcy petition.

Accordingly, for all the foregoing reasons, the court finds that UST has overcome the statutory presumption for granting the requested relief. Granting Debtors a chapter 7 discharge would result in a substantial abuse of the provisions of the chapter. UST's motion to dismiss will be

granted. However, the court will stay the execution of its order for fifteen days to provide the Debtors with the opportunity to convert their case if they so choose.

**ORDER**

IT IS ACCORDINGLY ORDERED as follows:

- 1) The United States Trustee's Motion to Dismiss is sustained.
- 2) Terence K. and Wanda J. Ventling's chapter 7 case is dismissed pursuant 11 U.S.C. §707(b).
- 3) The execution of this order is hereby stayed for fifteen (15) days from the date of its entry to permit Debtors to take such actions as required to convert their case to another chapter, should they so choose.
- 4) Failure on the part of Debtors to take affirmative action within said fifteen (15) day period of time will cause the order dismissing the case to be entered without further notice and hearing.

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RUSSELL J. HILL  
U.S. BANKRUPTCY JUDGE