IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

IN RE: MELANIE JOYCE PIKE **CASE NO. 95-00015MEE**

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

Before this Court for consideration is the Debtor's *Motion for Summary Judgment* in which the Debtor seeks a denial of the United States Trustee's *Motion to Dismiss* her chapter 7 case. In support of her *Motion for Summary Judgment*, the Debtor asserts that as a matter of law the U.S. Trustee is prohibited from bringing a motion to dismiss pursuant to § 707(b) of the Bankruptcy Code[1] where the motion to dismiss is made at the suggestion of a creditor. After considering the arguments of counsel and otherwise being fully advised in the premises, this Court holds that the

[1] Hereinafter, all code section refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless specifically noted otherwise.

Debtor's Motion for Summary Judgment is not well taken and should be denied.

The Debtor filed her petition for relief under Chapter 7 of the Bankruptcy Code on January 5, 1995. On March 17, 1995, the United States Trustee filed her motion to dismiss the Debtor's case pursuant to § 707(b) of the Bankruptcy Code. The Debtor and the U.S. Trustee entered into a stipulation regarding the motion to dismiss and have filed the stipulation with the Court. The stipulation incorporates correspondence from a creditor's attorney to the Chapter 7 Trustee and the U.S. Trustee. In the correspondence the creditor's attorney discussed certain discrepancies contained in the Debtor's schedules and statement of financial affairs and suggested that the Debtor's filing was in bad faith and amounts to a substantial abuse of the provisions of the Bankruptcy Code. The Debtor filed the present *Motion for Summary Judgment* seeking a dismissal of the U.S. Trustee's *Motion to Dismiss*.

To support her *Motion for Summary Judgment*, the Debtor relies on the parties' stipulation to the fact that an attorney for a creditor corresponded with the U.S. Trustee suggesting that either the Debtor should convert her chapter 7 case to a case under chapter 13 or her case should be dismissed as a substantial abuse of the provisions of the Bankruptcy Code. The Debtor contends that as a result of the stipulation there exists no genuine issue of material fact, and that as a matter of law the clear and unambiguous language of § 707(b) prohibits the U.S. Trustee from bringing a motion to dismiss based on substantial abuse where a

party in interest has requested that the U.S. Trustee make such a motion.

Because the parties have incorporated the above mentioned correspondence into the stipulation which has been filed with the Court, the Court finds that there is no genuine issue of fact that the U.S. Trustee received correspondence regarding a § 707(b) motion to dismiss. Therefore, the remaining question is whether, as a matter of law, the U.S. Trustee is prohibited under § 707(b) from bringing a motion to dismiss based on substantial abuse where the motion was first suggested to the U.S. Trustee by a creditor.

Section 707(b) provides as follows:

> **11 USC § 707**
> **§ 707. Dismissal.**
> ...
> (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 the chapter. There shall be a presumption in favor of granting the relief requested by the debtor.

Authority regarding the issue is scarce. *Collier on Bankruptcy* states as follows:

> The substantial abuse issue must be raised by the court or by the United States trustee, and "not at the request of suggestion of any party in interest." Apparently if a party in interest does raise the substantial abuse issue the court may not hear it. Moreover, it is likely that once a party in interest raises the issue in a case, the court may not subsequently raise the same issue because it was initially suggested by a party in interest. This precludes creditors from

> filing harassing motions that would increase the expense of a bankruptcy case or from seeking dismissal after losing a discharge or dischargeability action.

4 Collier on Bankruptcy, 707.5 at 707-16, 17 (15th ed. 1995) (footnotes omitted).

The Court has located one reported case where the court construed the language set forth in *Collier* to support its holding that the clear and unambiguous language of § 707(b) precludes the U.S. Trustee from bring a motion to dismiss for substantial abuse where the motion was suggested to the U.S. Trustee by a party in interest. See In re Restea, 76 B.R. 728 (Bankr. D.S.D. 1987).

On the other hand, the Court has located three cases, one of which is a circuit court decision, holding that § 707(b) merely prohibits a party in interest from bringing a motion to dismiss for substantial abuse, it does not prohibit the party in interest from bringing grounds for such a motion to the attention of the U.S. Trustee. In the case of In re Busbin, 95 B.R. 240 (Bankr. N.D. Ga. 1989) the court reasoned:

> If it were held, however, that neither the court nor the United States Trustee could pursue a motion to dismiss pursuant to § 707(b) if the grounds for such a motion were brought to its attention by a party in interest, parties who would otherwise make such information available would be deterred from doing so. Additionally, the court would be prevented from acting in cases where an abuse is most likely to occur. In re Hudson, 56 B.R. 415 (Bankr. N.D. Oh. 1985). Both the court and the U.S. Trustee have a duty to independently evaluate any information which may be brought to light by a party in interest. Such a screening process will prevent the abuse of § 707(b) by creditors

seeking to use it as a means of harassing or intimidating debtors.

Id. at 242.

Likewise, the Fourth Circuit Court of Appeals considered the issue, holding:

> The language of section 707(b) only bars the court from dismissing a debtor's Chapter 7 petition "at the request or suggestion of any party in interest"; it does not bar the trustee from making a motion at the suggestion of a creditor, or the court from considering the motion. The phrase "but not at the request of suggestion of any party in interest" modifies what the court can do, since "the court" is the subject of the sentence. Section 707(b) imposes no such limitations on the trustee.
>
> This interpretation is bolstered by the fact that it does not interfere with the purpose of § 707(b)'s provision that parties in interest cannot address substantial abuse motions directly to the bankruptcy court. The trustee's ability to consider suggestions by creditors will not result in harassment of debtors because the trustee must make an independent judgment about whether it is appropriate to file a § 707(b) motion to dismiss. Moreover, barring the trustee from acting at the suggestion of a creditor could have the negative effect of deterring interested persons from making relevant information available to the trustee. This could impede significantly the trustee's obligation to investigate possibilities of substantial abuse.

U.S. Trustee for the Western District of Virginia v. Clark (In Re Clark), 927 F.2d 793, 797 (4th Cir. 1991)(citations omitted).

Finally, in considering the issue in In re Morris, 153 B.R. 559 (Bankr. D. Or. 1993) the court noted the discussion contained in *Collier*, but concluded:

> The statement in *Collier* is ambiguous. Specifically, it does not address the effect

> of a creditor's contact with the U.S. Trustee about a possible § 707(b) motion. The statement which appears could be intended only to address the circumstance of a creditor raising substantial abuse directly with the court. Since 1984 the statutory language clearly has condemned this. Whether contact with the U.S. Trustee also is a prohibited practice is a different, more complex issue.

Id. at 561. After reviewing the legislative history of § 707(b) the court in Morris held that § 707(b) does not prohibit the U.S. Trustee from bringing a motion to dismiss for substantial abuse simply because the motion was suggested to the U.S. Trustee by a party in interest.

This Court agrees with those cases holding that § 707(b) does not prohibit the U.S. Trustee from bringing a motion to dismiss based on substantial abuse where information was provided to her by a creditor or a request or suggestion was made by a creditor. Therefore, the Debtor's Motion for Summary Judgment should be denied.

A separate order denying the Debtor's *Motion for Summary Judgment* will be entered in accordance with this opinion.

THIS the 4th day of August, 1995.

UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
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ORDER DENYING MOTION FOR SUMMARY JUDGMENT

Consistent with the Court's memorandum opinion entered contemporaneously herewith, it is hereby ordered and adjudged that the Debtor's *Motion for Summary Judgment* should be, and hereby is, denied.

SO ORDERED this the 4th day of August, 1995.

UNITED STATES BANKRUPTCY JUDGE