

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

**FILED**  
2000 MAR 23 PM 3:29  
U.S. BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

IN RE:

Michael Hollie Kyzer,

Debtor.

Jodi Waits,

Plaintiff,

v.

Michael Hollie Kyzer,

Defendant.

C/A No. 99-06445-W

Adv. Pro. No. 99-80375-W

**JUDGMENT**

Chapter 7

**ENTERED**  
MAR 24 2000  
K.K.M.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, Michael Hollie Kyzer's obligation of \$500.00 per month to Jodi Waits arising out of the Divorce Decree filed on January 23, 1998 is discharged pursuant to 11 U.S.C. §523(a)(15)(A).

Columbia, South Carolina,  
March 23, 2000.

  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the United States  
Bankruptcy Court for the District of South Carolina hereby certifies  
that a copy of the document on which this stamp appears  
was mailed on the date listed below to:

MAR 24 2000

TO: J.I. Poag  
Downey  
UST

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

**KELLEY MORGAN**

Deputy Clerk

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**ORDER**

Chapter 7

**ENTERED**  
MAR 24 2000  
K.K.M.

THIS MATTER comes before the Court upon the Complaint of Jodi Waits ("Plaintiff"), filed on October 22, 1999, seeking the determination that certain debts, arising from a property settlement agreement approved by the Family Court in the parties' divorce action, are excepted from discharge pursuant to 11.U.S.C. §§523(a)(5) and (a)(15).<sup>1</sup> At the trial, the parties stipulated that the only debt remaining in question was a \$500.00 per month payment and further stipulated that the debt was solely within the scope of §523(a)(15). After reviewing the pleadings, the evidence offered at trial, and the arguments of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law.<sup>2</sup>

**FINDINGS OF FACT**

1. Defendant filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code on

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<sup>1</sup> Further references to the Bankruptcy Code shall be by section number only.

<sup>2</sup> The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

July 30, 1999.

2. Plaintiff filed the above-captioned adversary proceeding on October 22, 1999, and Defendant timely filed an Answer.

3. Plaintiff is the ex-wife of Debtor and a creditor in Debtor's Chapter 7 case.

4. Plaintiff and Defendant were married on September 14, 1984, and two children were born of their marriage: Rachel Lynn Kyzer, born June 27, 1985; and Jacob Michael Kyzer, born June 19, 1989.

4. The parties were divorced by decree issued by the Family Court for the Eleventh Judicial Circuit, filed on January 23, 1998. The decree approved a written Property Settlement and Separation Agreement (the "Settlement Agreement") dated August 21, 1997.

5. The Settlement Agreement awarded the parties joint custody of the couple's two minor children; however, it provided that "[n]o child support shall be paid by either party."

6. The Settlement Agreement also provided a waiver of alimony by both parties and more specifically stated that "[t]he parties hereby forever waive, relinquish and release any and all right to any alimony, support or maintenance from the other respective party, their estate or assets."

7. Pursuant to the Settlement Agreement, Defendant was entitled to the exclusive possession of the former marital residence as well as full ownership of the parties' lawn maintenance business, KBS. In payment of Plaintiff's interest in the marital home and KBS, the Settlement Agreement provided that Defendant "shall pay to the Wife the sum of \$500.00 per month, with the first payment beginning on the 15th of September, 1997, and continuing each month thereafter for a period of ten (10) years."

8. As specified in the Settlement Agreement, Debtor paid \$500.00 on a regular basis. The

last payment was remitted on June 14, 1999; after which, due to Debtor's increasing financial problems, he ceased making the monthly payments.

9. The parties' two minor children resided with Defendant from the time the parties separated in October of 1996; however, in November of 1998, the fourteen-year old daughter went to reside with her mother. The ten-year old son went to reside with his mother for a short time following the divorce, but in November of 1998 he returned to live with Defendant, where he continued to reside until January of 2000. After Defendant relocated to North Carolina due to his employment, Plaintiff filed for custody of the son. The children presently live with Plaintiff.

10. During the first period of time during which the children lived with Plaintiff, Defendant voluntarily paid \$150.00 in child support and continued to do so until June 14, 1999, even though he was not ordered to do so by the Family Court nor was he required by the Settlement Agreement. However, during the time that the children resided with Defendant, Plaintiff did not nor was she required to pay any child support.

11. Defendant has a high school education. During the marriage, Defendant and Plaintiff jointly owned KBS; but, pursuant to the Settlement Agreement, he acquired sole ownership of the business. Due to the financial difficulties that the business was encountering, Defendant was forced to close it in May of 1999. The business never proved to be extremely profitable; in fact, Debtor's 1997 tax returns show KBS's Adjusted Gross Income as \$13,619.00 and Debtor's 1998 tax returns show KBS's Adjusted Gross Income as \$23,579.00. KBS's financial situation worsened when it lost its two largest accounts and could no longer meet its financial obligations. Subsequently, Defendant was employed by Jim Walter Homes, Inc. in May 1999. He was first employed as a Manager Trainee in the Cayce, South Carolina office but was then promoted to Branch Manger and was relocated to New Bern, North Carolina. His salary respectively

increased from a base salary of \$25,400.00 to \$28,900.00. Defendant's present salary is the highest salary he has earned throughout his career.

12. Debtor's Original Schedules I and J, filed with the Court on July 30, 1999, reflect the following information:

<b>INCOME:</b>	
Gross monthly Income	\$2,116.68
<b>TOTAL NET MONTHLY TAKE HOME PAY</b> (after deductions for taxes and insurance)	\$1,615.12
<b>EXPENDITURES:</b>	
Mortgage Payment	\$578.00
Utilities	\$125.00
Water and Sewer	\$66.00
Telephone	\$50.00
Home Maintenance	\$20.00
Food	\$450.00
Clothing	\$50.00
Laundry and Dry Cleaning	\$10.00
Medical and Dental Expenses	\$100.00
Transportation	\$100.00
Recreation	\$100.00
Homeowner's Insurance	\$40.00
<b>Total Monthly Expenses</b>	<b>\$1,689.00</b>

13. Defendant remarried on November 8, 1998 to Judy Wessinger. Prior to their marriage, Ms. Wessinger was employed part-time. She decided to stop working when Defendant's son, Jacob, who was still residing with him at the time, was out of school for the summer. Ms. Wessinger is presently unemployed.

14. Due to his relocation to New Bern, North Carolina, Defendant decided to sell the ex-marital home. When Plaintiff found out about Defendant's intention to sell the residence, she asserted that it could not be sold without satisfaction of her marital lien on the property. She then offered to purchase the home at a price equal to the amount which her mortgage company,

First Community Bank, was willing to loan her. On March 24, 1999, Defendant conveyed the ex-marital home to Plaintiff for the sum of \$60,775.00. After payment of the first mortgage on the property, the remaining sale proceeds were used to pay down to \$31,000.00 a joint debt of the parties to BB&T. The parties had incurred the debt to BB&T, which was secured by business equipment and the marital residence, for the lawn maintenance business. Defendant did not receive any money from the sale of his home, but his liability as well as Plaintiff's liability on the BB&T loan was reduced. Defendant's remaining liability to BB&T was discharged through his Chapter 7 case. BB&T never released Plaintiff from her personal liability for the loan and the unsecured portion of BB&T's mortgage is still outstanding. As of this date, no attempts have been made by BB&T to recover the remaining debt from the Plaintiff.

15. On February 9, 2000, Defendant submitted Amended Schedule I and J, reflecting his increased income due to his promotion with Jim Walter Homes, Inc. as well as an increase in his monthly expenses due to his relocation:

<b>INCOME:</b>	
Gross monthly Income	\$2,406.32
<b>TOTAL NET MONTHLY TAKE HOME PAY</b> (after deductions for taxes and insurance)	<b>\$1,815.14</b>
<b>EXPENDITURES:</b>	
Rent Payment	\$750.00
Utilities	\$250.00
Telephone	\$60.00
Home Maintenance	\$20.00
Food	\$300.00
Clothing	\$50.00
Laundry and Dry Cleaning	\$10.00
Medical and Dental Expenses	\$100.00
Transportation	\$150.00
Recreation	\$50.00
Renter's Insurance	\$20.00

Auto Insurance	\$68.00
Credit Card Payment	\$80.00
Child Support	\$565.25
House Payment	\$662.00
<b>Total Monthly Expenses</b>	<b>\$3,135.00</b>

16. Defendant and Ms. Wessinger presently reside in New Bern, North Carolina. They rent the upstairs of a home. The upstairs has two bedrooms and covers a total of 1800 squared feet.

They entered into a one year lease in April of 1999 and pay \$750.00 a month in rent.

17. Defendant suffers of asthma and digestion problems. He spends \$75.00 a month in medication for these medical problems.

18. Defendant does not own a car. Jim Walter Homes provides him with a company vehicle and reimburses him for the cost of gas. The transportation cost listed in Debtor's Schedule J involves the cost of gasoline and regular maintenance on Ms. Wessinger's Honda Accord.

19. Defendant is presently not paying any child support; however, Plaintiff has commenced state court proceedings to compel payment of child support. According to Child Support Guidelines, which must be applied by the state court in determining the amount of child support to be paid by the non-custodial parent, Defendant will have to pay \$565.26 per month in child support.

20. Defendant does not own a credit card of his own. The monthly payments toward the credit card listed in Debtor's Schedule J reflect payments toward debts incurred on a credit card which is in Ms. Wessinger's name but which is mainly used by Defendant to advance travel expenses pending reimbursement by Defendant's employer.

21. Ms. Wessinger owns a home in Lexington, South Carolina. The \$662.00 house payment on Debtor's Schedule J reflects the mortgage payment on the home. The house, which is solely

titled in Ms. Wessinger's name, is not listed for sale nor is it being rented.

22. Defendant has no bank account in his name. He and Ms. Wessinger keep a bank account which is in the wife's name and usually has a nominal balance.

23. Plaintiff has also remarried following her divorce with Defendant. Her husband, Mr. Waits, is a mechanic. She resides in the ex-marital home which she purchased from Defendant with her two children from their marriage. Mr. Waits' four-year old child from a previous marriage also resides with them.

24. Plaintiff is presently employed at AJ's Glass & Mirror and her net monthly income is \$1,473.53. Mr. Waits is presently employed as a mechanic; his net monthly income is \$1,425.89.

25. On June 14, 1999, Plaintiff entered into a loan agreement with Commercial Credit Corporation whereby she borrowed the sum of \$13,161.54 and secured the debt with a mortgage on the ex-marital home. Plaintiff used the money to build a pool and for minor improvements to the home.

26. On or about November 18, 1999, Plaintiff refinanced the home with CitiFinancial, Inc. She presently has two mortgages on the home with CitiFinancial. One of the mortgages is in the amount of \$77,656.51; the other is in the amount of \$10,000.

27. At the trial, Plaintiff testified as to the following information concerning her and Mr. Waits' income and expenses.

**INCOME:**

Plaintiff's Gross monthly Income	\$1,767.70
Mr. Waits' Gross monthly Income	\$2,310.00

**TOTAL NET MONTHLY TAKE HOME PAY**

Plaintiff's Take Home Pay	\$1,473.53
Mr. Waits' Take Home Pay	\$1,425.89

**TOTAL** **\$2,899.42**

**EXPENDITURES:<sup>3</sup>**

Mortgage Payment to CitiFinancial on 1st mortgage	\$723.82
Mortgage Payment to CitiFinancial on 2nd mortgage	\$209.13
Home Maintenance	\$20.00
Credit Cards	\$151.00
Car Payment	\$398.55
Car Insurance	\$80.96
Home Insurance	\$32.92
AAA Life Insurance	\$10.69
Property Taxes	\$74.16
Clothing	\$50.00
Entertainment	\$20.00
Medical	\$65.00
Food	\$100.00
Phone Bill	\$25.04
Cellular Phone Bill	\$45.97
Internet Service	\$21.95
Other	\$192.50
<b>TOTAL</b>	<b>\$2,221.69<sup>4</sup></b>

28. Defendant's witness, Kevin A. Grindstaff, who is a real estate appraiser for Holton Appraisal, estimated the ex-marital home's value on November 11, 1999 to be \$86,000.00. Mr. Grindstaff testified that the pool which Plaintiff built after she bought the home from Defendant added approximately \$5,000 to the value of the house; therefore, he estimated that the value of the home on or about March 24, 1999 was approximately \$81,000. Mr. Grindstaff's appraisal of

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<sup>3</sup> Plaintiff testified that she and Mr. Waits keep separate accounts; thus, the expenses that are reflected only include a portion of the Waits' family expenses. Evidence submitted by Plaintiff reflects that Mr. Waits' portion of monthly expenses amount to \$2,168.83 and include, among various credit card payments and other expenses, a monthly payment to Atlantic Coast Mortgage on a trailer home in the amount of \$260.00, along with insurance and property taxes on said trailer in the amount of \$64.99. Mr. Waits presently rents the trailer home for \$300.00 a month.

<sup>4</sup> In her list of monthly expenditures, Plaintiff also listed her legal fees, in connection with her divorce and her representation in this matter, totaling \$9,500.00.

the home was done in connection with CitiFinancial's mortgage.

29. Plaintiff's witness, John Dickerson, testified that he appraised the home on November 2, 1998 in connection with First Community Banks' loan to Plaintiff for the purchase of the ex-marital residence. He estimated the value of the home at that time to be approximately \$63,000 and further testified that the value of the home would have appreciated at a yearly rate of 2 to 3%.

30. On November 18, 1999, Plaintiff submitted a Credit Application to CitiFinancial for bill consolidation, and she represented the current value of the home to be \$86,000.

### CONCLUSIONS OF LAW

Plaintiff filed a Complaint seeking a determination by the Court that the payment of Plaintiff's medical insurance by Defendant was a nondischargeable obligation pursuant to §523(a)(5)<sup>5</sup> and the determination that payment of the wife's interest in the marital home and the parties' business in the amount of \$500.00 a month was nondischargeable pursuant to §523(a)(15). At the trial, the parties agreed that the obligation to pay uninsured medical expenses of the children is nondischargeable pursuant to §523(a)(5) and that the only debt which was at issue before the Court was the \$500.00 monthly payment which represented Plaintiff's interest in the ex-marital home and KBS, the parties' lawn maintenance business which closed in

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<sup>5</sup> The Settlement Agreement provides that "[t]he Husband will maintain the medical insurance policy which he currently has on both the children and the Wife, with Wife to reimburse Husband for the portion of the premium that is incurred for her continued insurance." In his Answer, filed with the Court on November 22, 1999, Defendant alleged that Plaintiff instructed the Defendant to stop purchasing insurance for her pursuant to the term of the Settlement Agreement because the cost was too great. Furthermore, Defendant alleged that the provision of the Settlement Agreement in regard to Plaintiff's medical insurance was impossible to carry out because Plaintiff is no longer a member of Defendant's family; therefore, she is no longer covered under the group policy available through Defendant's employment.

May of 1999 due to financial losses.

Divorce property settlements are generally dischargeable in bankruptcy; however, two exceptions are found in § 523(a)(15). Section 523(a)(15) provides as follows:

(a) A discharge under section 727; 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt --

(15) not of the kind described in paragraph (5) [alimony, maintenance or support] that is incurred by the debtor in the course of divorce or separation or in connection with a separation agreement, divorce decree or other order of a court of record, a determination made in accordance with State or territorial law by a governmental unit unless --

(A) the debtor does not have the ability to pay such debt from income or property of the debtor not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor and, if the debtor is engaged in a business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business; or

(B) discharging such debt would result in a benefit to the debtor that outweighs the detrimental consequences to a spouse, former spouse, or child of the debtor.

11 U.S.C. § 523(a)(15).

In Strong v. Strong (In re Strong), C/A No. 94-75489-W; Adv. Pro. 95-8100-W (Bankr. D.S.C. 11/14/1995), this Court found that the plaintiff bears the initial burden to prove the requirements of the first paragraph of §523(a)(15), dealing with the nature of the spousal debt. Once the plaintiff meets the initial burden, it shifts to the defendant to prove that he does not have the ability to pay the debt in question from income or property not reasonably necessary for his or his dependents' maintenance and support or to prove that the discharge of said debt would result in a benefit to him or her that would outweigh the detriment to the former spouse. *Id.*; see also Thompkins v. Thompkins (In re Thompkins), C/A No. 98-08015-W; Adv. Pro. 99-80046-W (Bankr. D.S.C. 09/07/1999); Turner v. Turner (In re Turner), C/A No. 98-06604-W; Adv. Pro. 98-80267-W (Bankr. D.S.C. 05/17/1999).

In the present case, the parties have stipulated that the debt in question was incurred by Defendant in the course of a divorce or in connection with a divorce decree; thus meeting the first requirement of §523(a)(15). Having met this prerequisite, the Court must consider whether Defendant has the ability to pay the debts. The Court must examine the parties' financial conditions as of the date of the trial. See Turner v. Turner (In re Turner), C/A No. 98-06604-W; Adv. Pro. No. 98-80267-W (Bankr. D.S.C. 05/17/1999). When considering the first test of §523(a)(15)(A), "the Court applies an 'ability to pay' test which equates to the Chapter 13 confirmation 'disposable income' test of §1325(b)(2)." Thompkins v. Thompkins (In re Thompkins), C/A 98-08015-W; Adv. Pro. 99-80046-W (Bankr. D.S.C. 09/07/1999) (citing Oswald v. Asbill (In re Asbill), 236 B.R. 192 192, 196 (Bankr. D.S.C. 1999). "Disposable income" is defined as "income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependant of the debtor." In re Silvers, C/A No. 95-70320-D (Bankr. D.S.C. 04/19/1995); see also Stone v. Stephenson (In re Stone), C/A 3:95-4000-19 (D.S.C. 05/14/1996).

After reviewing Debtor's Original and Amended Schedules and weighing the credibility of the parties, the Court finds that after deducting a reasonable amount for living expenses for Defendant and his dependents, Defendant does not have the ability to pay \$500.00 a month from his disposable income. Defendant's income is reasonable in relation to his educational background. The evidence before the Court reflects that Defendant's base salary is higher than it has ever been; and, even though there is the possibility of minor salary promotions within his position, there was no evidence presented that, when considering his education and job experience, Defendant's earnings will ever undergo a substantial increase which would impact the Court's determination of his ability to pay the debt to Plaintiff.

Furthermore, the Court finds that even after the adjustments cited by the Plaintiff, the Debtor's expenses are overall reasonable. At trial, Plaintiff questioned the reasonableness of the Debtor's rent payments. Plaintiff presented to the Court evidence of other living arrangements in the New Bern, North Carolina area; which varied from \$655.00<sup>6</sup> to 375.00 a month, the latter being a two-bedroom apartment in a subsidized housing project. Plaintiff also argued that several of the expenses listed in Defendant's schedules, such as the cost for transportation and for the mortgage payment on Ms. Wessinger's home, should not be calculated because they were solely for the support of his new spouse. The Court agrees that the expenses related to the mortgage payment on the house which is solely titled in Ms. Wessinger's name cannot be taken into account when determining Defendant's disposable income, especially given the fact that the house, which is presently vacant, presently has no income-producing value. See, e.g., Stone v. Stephenson (In re Stone), C/A No. 3:95-4000-19 (D.S.C. 05/14/1996); In re Silvers, C/A No. 95-70320-D (Bankr. D.S.C. 04/19/1995). However, the Court finds that, even when reducing the rent payment, excluding the house payment on Ms. Wessinger's home, and reducing the transportation cost, which involves payment of gas and regular maintenance on Ms. Wessinger's vehicle, Defendant's total reasonable monthly expenses still exceed his monthly income.

Defendant and Ms. Wessinger have a modest lifestyle; and, since his divorce from Plaintiff, Defendant has no assets to his name. The only major assets which he had retained ownership of pursuant to the Divorce Decree were the ex-marital residence and KBS, the lawn maintenance business. The ex-marital residence was sold to Plaintiff on March 24, 1999 for

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<sup>6</sup> The apartment complex which charged \$655.00 for a two-bedroom apartment also charged an application fee of \$25.00, a security deposit of \$250.00, a pet deposit of \$100.00, a pet fee of \$100.00, and offered garage or storage space for \$75.00 or \$40.00 per month respectively.

\$60,775.00,<sup>7</sup> and the entire purchase proceeds were used to the parties' mutual benefit by paying towards their significant joint debts. As a result, Defendant did not receive any money from the transaction. He received no benefit from the award of the marital residence that the Plaintiff did not receive. Arguably, the Plaintiff received a greater benefit from the marital residence because she received the \$500 per month payments for a period, received joint benefit from the application of the proceeds of sale, and acquired any value in the residence above the price she paid when she purchased the home from the Defendant. Furthermore, it is undisputed that the lawn maintenance business had little ongoing value after the divorce decree. It is uncontroverted that due to substantial financial losses which occurred as a result of the business' loss of two major customers, Defendant closed KBS in May of 1999. Whatever value due the Plaintiff from the business was lost due to changing economic and business conditions with no fault or wrongful intention of Defendant.

Defendant presently does not own a car and does not have a credit card nor a bank account in his name. The Court also takes into consideration that, even though Defendant is presently not paying any child support, the evidence indicates that Plaintiff has commenced the necessary state court proceeding to require Defendant to pay mandatory child support, which, according to the Child Support Guidelines,<sup>8</sup> would be in the amount of \$565.26. Considering the imminent and mandatory nature of this child support obligation, Defendant is reasonably unable to pay that obligation and the subject obligation to the Plaintiff.

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<sup>7</sup> After weighing the credibility of the witnesses and considering the evidence presented at trial, the Court finds that Plaintiff purchased the home for below fair market value.

<sup>8</sup> See South Carolina Code of Law § 43-5-580(b) and § 20-7-852(A), 1976 as amended.

Considering all these factors, the Court finds that pursuant to §523(a)(15), Defendant has met his burden to prove that he does not have the ability to pay the debt to Plaintiff.

“Subsections (A) and (B) of 11 U.S.C. §523(a)(15) are written in the disjunctive: a property settlement debt is non-dischargeable unless the Debtor can prove (A) he is unable to pay the debt, or (B) the benefit to the debtor of discharge outweighs the detriment to the creditor of discharge. Accordingly, a debtor must meet the burden on only one of the two prongs of Section 523(a)(15) to prevent the debt from being excepted from discharge.” *In re Strayer*, 228 B.R. 211, 216 (Bankr. S.D. Ind. 1996); see also *Turner v. Turner (In re Turner)*, C/A 99-06604-W; Adv. pro. 98-80267-W (Bankr. D.S.C. 05/17/1999). For these reasons, the Court finds it is unnecessary to address §523(a)(15)(B) at this time. It is therefore;

**ORDERED** that the unpaid balance of the debt owed to Plaintiff being payable at the rate of \$500.00 per month is discharged pursuant to §523(a)(15)(A).

**IT IS FURTHER ORDERED** that Plaintiff's request for attorney's fees is denied.

**AND IT IS SO ORDERED.**

Columbia, South Carolina,  
March 23, 2000.

  
UNITED STATES BANKRUPTCY JUDGE

**CERTIFICATE OF MAILING**

The undersigned deputy clerk of the United States  
Bankruptcy Court for the District of South Carolina hereby certifies  
that a copy of the document on which this stamp appears  
was mailed on the date listed below to:

MAR 24 2000

*TO: J.I. Poag  
Downey  
21ST*

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

**KELLEY MORGAN**

Deputy Clerk