

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: July 01 2010

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:)	Case No. 10-31635
)	
John Steven Pennell and)	Chapter 13
Carolyn Marlene Pennell,)	
)	
Debtors.)	JUDGE MARY ANN WHIPPLE

ORDER DENYING CONFIRMATION OF AMENDED CHAPTER 13 PLAN

This case came before the court for hearing on confirmation of Debtors’ proposed Second Amended Chapter 13 Plan (“Plan”) [Doc. # 24]. The Chapter 13 Trustee appeared in person, and attorneys for Debtors and for creditor HSBC, Bank USA, N.A. (“HSBC”) appeared by telephone. The parties agreed that Debtors’ proposed Plan resolves the Objection to Confirmation [Doc. # 15] filed by HSBC with respect to the original plan filed by Debtors, and HSBC orally withdrew its objection at the hearing. Nevertheless, for the following reasons, confirmation of the Plan will be denied.

In order for a debtor’s Chapter 13 plan to be confirmed, it must satisfy each of the requirements of 11 U.S.C. § 1325. *Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir. 1990). At issue in this case are the requirements that the plan be proposed in good faith and that the plan is feasible. *See* 11 U.S.C. § 1325(a)(3) and (6). Debtors bear the burden of proving that these requirements are met. *Id.*; *In re Nosker*, 267 B.R. 555, 562 (Bankr. S.D. Ohio 2001). On the record before it, the court finds that Debtors’ plan meets neither the good faith nor the feasibility requirement.

Section 1325(a)(3) requires that “the plan has been proposed in good faith and not by any means

forbidden by law.” The Sixth Circuit Court of Appeals has suggested the following factors that a court may find meaningful in making the good faith determination:

- (1) the amount of the proposed payments and the amount of the debtor's surplus;
- (2) the debtor's employment history, ability to earn and likelihood of future increase in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief;
- (11) the burden which the plan's administration would place upon the trustee; and,
- (12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code.

Caldwell, 895 F.2d at 1126. The Sixth Circuit stressed, however, that this list is not exhaustive and “no one factor should be viewed as being a dispositive indication of the debtor’s good faith.” *Hardin v. Caldwell*, 897 F.2d. 529 (Table), 1990 WL 20457, *2 (6th Cir. March 6, 1990). At bottom, this court must determine whether the debtor’s plan “satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor’s available resources.” *Id.* In making this determination, particular scrutiny should be given a plan that proposes to pay only a small portion of a debt that could not be discharged in a chapter 7 case.

In this case, Debtors received a discharge in a Chapter 7 case filed on June 30, 2003. [Doc. # 1, p. 2/51]. It having been less than eight years since filing their Chapter 7 petition, they are not now eligible to receive a Chapter 7 discharge of their unsecured debts. *See* 11 U.S.C. § 727(a)(8). In their Plan, Debtors propose to pay \$50 per month to the Chapter 13 trustee for thirty-six months plus their income tax refunds for years 2010, 2011, and 2012, having filed this case after already having received their 2009 refunds of \$4,478 [Doc. #19, p.2/3]. Debtors have a minimal home mortgage arrearage of approximately \$545 that they propose to be paid under the Plan. The monthly payments proposed to be made are almost sufficient to pay just Debtors’ attorney fees of \$1,374, [Doc. #1, p. 36/51], and their arrearage over a thirty-six month period. Although the Plan provides that it will be extended to the extent necessary to pay unsecured creditors even a minimal 3% dividend (which amounts to a total of approximately \$425 of the scheduled unsecured debt of \$14,159.02), the court finds it unlikely that Debtors will continue their Chapter 13 plan after becoming eligible for a Chapter 7 discharge in approximately one year. And the court is not convinced

that simply providing for turnover of their income tax refunds demonstrates a sincere attempt to repay prepetition debt. Debtor John Pennell is applying for disability and Debtors have requested authority to use funds from Carolyn Pennell's 401(k) plan, both which will negatively impact the amount of any income tax refunds they might receive. Given the minimal home mortgage arrearage, the court finds that the primary purpose of Debtors' Plan is to permit them to, in effect, buy the automatic stay for \$50 a month to prevent the further garnishment of wages by GE Money Bank, [Doc. #1, p. 29/51, Q. 4], until they are eligible for a Chapter 7 discharge rather than to repay their prepetition debt.

To satisfy the feasibility requirement, debtors must show that they "will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). A feasibility determination requires the court to find "that there is a reasonable likelihood of success of plan completion and that debtors will be able to comply with all plan terms." *In re Ross*, 231 B.R. 635, 639 (Bankr. S.D. Ohio 1999). However, Debtors' current budget shows a monthly deficit of \$493. Although disability benefits may assist Debtors in addressing this deficit, no determination has yet been made as to whether Mr. Pennell qualifies for such benefits. Debtors have not otherwise demonstrated how they will be able to comply with the terms of the plan, even with the proposed minimal monthly payment of \$50.00.

On this record, the court cannot find that Debtors proposed Plan demonstrates a sincere attempt to repay prepetition debt and, thus, that they have proposed the Plan in good faith, or that Debtors will be able to comply with the terms of the plan. Debtors' counsel represented to the court that there are no additional facts that they would present through testimony or otherwise at a further hearing on confirmation.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that confirmation of Debtors' Second Amended Chapter 13 Plan [Doc. # 24] be, and hereby is, **DENIED**.