

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

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In re:

*Judith N. Little,*

Debtor(s).

BKY 04-40506

Chapter 13 Case

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**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF  
CHAPTER 13 PLAN AND FOR CONVERSION OF CASE**

TO: All parties in interest pursuant to Local Rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), by and through her undersigned attorneys, moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on August 5, 2004, in Courtroom No. 7 West, United States Courthouse, 300 South 4th Street, Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on August 4, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than August 2, 2004, which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this case under Chapter 7 of Title 11, United States Code, was filed on February 3, 2004 and the case was converted to a case under Chapter 13 on June 9, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may apply. Movant requests relief with respect to denial of confirmation of the debtor's proposed Chapter 13 plan dated June 9, 2004 (the "Plan") and for re-conversion of the case to a case under Chapter 7 of Title 11, United States Code.

6. On her Schedule I on file herein, the debtor lists net income from all

sources of \$2,285.65 (including a \$500/mo. child support payment for a 15-year old daughter). On her Schedule J, the debtor lists monthly living expenses of \$3,719, leaving her with an income deficit of \$1,433.35/mo.

7. The debtor's Plan provides that she will make payments of \$664.27/mo. to the Trustee for 60 months, for a total of \$39,856.

8. This case was converted from a case under Chapter 7 one week after this Court entered an order, on June 2, 2004, for turnover of certain property and assets to the Chapter 7 trustee. On information and belief, the debtor did not turn over any of the items on the June 2 turnover order to the Chapter 7 trustee. The Trustee acknowledges, however, that the debtor has turned over to her copies of various bank and financial statements and state and federal income tax returns for 2003.

9. Among the assets **not** claimed as exempt on her Schedule C on file herein is an "inheritance received after date of filing," with a scheduled value of \$34,125.<sup>1</sup> The June 2 turnover order required the debtor to surrender the "approximately \$24,000 remaining of the \$34,125.00 inheritance" to the Chapter 7 trustee within 7 days of the date of the order. Instead, the debtor converted this case to a case under Chapter 13.

10. From her testimony at her meeting of creditors held on July 14, 2004, it appears as though it is the debtor's intention to use the inheritance to make up her income deficit of \$1,433.35/mo. and to make her Chapter 13 plan payment of \$664.27/mo. Based on the statement in the June 2 turnover order, to the effect that only \$24,000 remains, the inheritance will be completely dissipated within 12 months. Even if the full amount of the inheritance (\$34,125) is still on hand, the inheritance will be dissipated within 17 months, between the funds needed to subsidize the debtor's living expenses and the funds needed to make her monthly plan payment.

11. The Trustee objects to confirmation of the Plan on the grounds that it is not feasible.

12. The Trustee objects to confirmation of the Plan on the grounds that the debtor is not an "individual with regular income," as that term is defined in 11 U.S.C. § 101(30), and therefore she is not eligible for relief under Chapter 13.

13. The Trustee objects to confirmation on the grounds that this case was converted in bad faith for the sole purpose of avoiding having to comply with the terms of the June 2 turnover order, in particular, the requirement that the debtor turn over the

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<sup>1</sup> The debtor also claimed various IRA accounts as exempt under Minn. Stat. § 550.37, subd. 24. Since this case was converted, the Minnesota Supreme Court has decided the case of *Clark v. Lindquist*, 2004 WL 1632565, \*3 (Minn. Jul 22, 2004) (NO. A03-1951), which supports the debtor's claims of exemption to these assets.

remainder of her inheritance to the Chapter 7 trustee.

14. In light of the circumstances surrounding the conversion of this case, the debtor's ineligibility for Chapter 13 relief, and the existence of a non-exempt asset that could be liquidated for the benefit of creditors, the Trustee moves that this case be re-converted to a case under Chapter 7, on the grounds that conversion is in the best interest of the debtor's creditors.

15. If necessary, the Trustee, the Chapter 7 trustee, or the debtor, may be called to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests an order as follows:

1. Denying confirmation of the debtor's' Chapter 13 Plan dated June 9, 2004.
2. Converting this case to a case under Chapter 7 of Title 11, United States Code.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: July 28, 2004

/e/ Thomas E. Johnson  
Thomas E. Johnson, ID # 52000  
Margaret H. Culp, ID # 180609  
Counsel for Chapter 13 Trustee  
310 Plymouth Building  
12 South 6th Street  
Minneapolis, MN 55402-1521  
(612) 338-7591

#### VERIFICATION

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed: July 28, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

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In re:

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Chapter 13 Case

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**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION  
AND MOTION TO CONVERT CASE**

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the debtor in her Schedules, both those filed with the original Chapter 7 filing and those filed upon conversion of the case to Chapter 13.

LEGAL DISCUSSION

Only an "individual with regular income" is eligible for Chapter 13 relief. *11 U.S.C. § 109(e)*. The term "individual with regular income" is defined in *11 U.S.C. § 101(30)* as: "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title." *11 U.S.C. § 101(30)*. The debtor's income is clearly inadequate for her to make the payments required by the Plan, based on her own budget, as set forth in her verified Schedules I and J. The Trustee contends that the piecemeal distribution of an asset over time does not constitute "income." This is not a situation where the debtor's inheritance is generating interest or dividends which she is proposing to use to supplement her wage, child support and self-employment income. Instead, she is simply going to withdraw sufficient sums from the balance remaining in the inheritance to meet her obligations, including her Chapter 13 plan payment. Even if the liquidation of this asset is construed as "income," clearly the inheritance will be completely dissipated several years before the date her final plan payment is due. There is nothing in the debtor's schedules to show how she can come up with the additional approximately \$2,100/mo. needed to keep body and soul together and make her plan payment. The debtor is not an "individual with regular income."

The same general analysis supports the Trustee's objection that the Plan is not

feasible, in that the debtor will not be able to make all payments under the Plan and to comply with the Plan, as required by 11 U.S.C. § 1325(a)(6). The debtor's income is inadequate to meet basic living needs. Her inheritance will run out long before her plan ends.

The determination of whether a Chapter 13 plan has been proposed in "good faith" is based on the totality of the circumstances. *In re Molitor*, 76 F.3d 218 (8<sup>th</sup> Cir. 1996). "The bad faith determination focuses on the totality of the circumstances, specifically: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court; or (3) whether he has unfairly manipulated the bankruptcy code." 76 F.3d at 221 (citing *In re LeMaire*, 898 F.2d 1346, 1349 (8th Cir.1990)). In the present case, the factors that indicate a lack of good faith on the part of the debtor include the timing of the conversion and the patent lack of disposable income, as disclosed on her Schedules I and J. The debtor's motivation in converting the case to Chapter 13 was clearly to avoid having to comply with the turnover order, rather than a sincere desire to repay her creditors.

The Court has the power to dismiss or convert the debtor's case for "cause," and a nonexclusive list of grounds is included in the statute, 11 U.S.C. § 1307(c). The Trustee argues that the present plan is unconfirmable and the debtor is ineligible for relief under Chapter 13. Re-conversion of the case to Chapter 7 is in the best interests of the debtor's creditors, so that a trustee can be appointed to liquidate the debtor's non-exempt assets.

### CONCLUSION

Debtors should not be allowed to use Chapter 13 as a sanctuary whenever they run afoul of a Chapter 7 trustee. For the reasons stated herein, confirmation of the debtor's Chapter 13 plan should be denied and this case should be re-converted to a case under Chapter 7.

Respectfully submitted:

Dated: July 28, 2004

/e/ Thomas E. Johnson  
Thomas E. Johnson, ID # 52000  
Margaret H. Culp, ID # 180609  
Counsel for Chapter 13 Trustee  
310 Plymouth Building  
12 South 6th Street  
Minneapolis, MN 55402-1521  
(612) 338-7591

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**UNSWORN DECLARATION FOR PROOF OF SERVICE**

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on July 28, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan, Memorandum of Facts and Law, and proposed Order Denying Confirmation of Chapter 13 Plan and Converting Case on the individual(s) listed below, in the manner described:

**By electronic means:**

United States Trustee  
1015 United States Courthouse  
300 South 4<sup>th</sup> Street  
Minneapolis, MN 55415

**By first class U.S. mail, postage prepaid:**

Judith N. Little  
25645 Valleywood Lane  
Shoreview, MN 55331

Theresa A. Freeman, Esq.  
Neff Law Firm, P.A.  
720 Minnesota Center  
7760 France Ave. S.  
Bloomington, MN 55435

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: July 28, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

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Chapter 13 Case

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**ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN AND  
CONVERTING CASE**

At Minneapolis, MN, \_\_\_\_\_, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to confirmation of the debtor's proposed Chapter 13 plan and motion to dismiss or convert the case.

Appearances were noted in the minutes.

Upon the foregoing objection, arguments of counsel, and all of the files, records and proceedings herein:

IT IS ORDERED:

1. Confirmation of the debtor's Chapter 13 plan is DENIED.
2. This case is CONVERTED TO A CASE UNDER CHAPTER 7.

\_\_\_\_\_  
United States Bankruptcy Judge