

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

BKY: 04-44468 (RJK)
Chapter 13 Case

Kathleen J. Fuller

Debtor.

**NOTICE OF HEARING AND
MOTION OBJECTING TO CONFIRMATION OF PLAN**

TO: The Debtor, Debtor's attorney, Chapter 13 Trustee, United States Trustee, and other parties in interest as specified in Local Rule 9013-3(a)(1).

1. Honeywell Federal Credit Union, a secured creditor of the Debtor herein, by its undersigned attorney, moves the Court for the relief requested below and gives notice of hearing herewith.

2. The Court will hold a hearing on this motion at 10:30 a.m. on October 21, 2004, before the Honorable Robert J. Kressel, in Courtroom No. 8 West, U.S. Courthouse, 300 South Fourth Street, Minneapolis, MN 55415, or as soon thereafter as counsel can be heard.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 20, 2004, which is 24 hours before the time set for the hearing, or filed and served by mail not later than October 18, 2004, which is three days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE RELIEF REQUESTED IN THE MOTION WITHOUT A HEARING.**

4. This motion arises under 11 U.S.C. §1322 and Local Rule 3015-3.

5. The Petition commencing this Chapter 13 Case was filed on August 11, 2004, and the case is now pending in this Court. This Court has jurisdiction over this motion pursuant to 11 U.S.C. §1324 and §1307(c), Bankruptcy Rule 3015(f), Local Rule 3015-3.

6. On May 17, 2004, Debtor executed a Closed-End Note, Disclosure, Loan and Security Agreement (hereinafter "**Agreement**") in the amount of \$11,620.55 in favor of Honeywell Federal Credit Union. To secure the loan, Debtor provided Movant with a security interest in a 1998 Honda CRV EX, VIN #JHLRD1861WC089145. The principal balance owing on this loan is \$11,620.55 plus interest and late fees.

7. The Debtor has never made any payments on the above-described loan and is in arrears in the amount of \$544.00.

8. The Debtor's Chapter 13 Plan is objectionable because it fails to cure the arrearages. In addition, the Plan fails to adequately protect Movant from substantial depreciation of the vehicle because the Plan does not provide for payment to Movant until the fifth month of the Plan. Debtor's Plan is not proposed in good faith within the meaning of 11 U.S.C. §1325(a)(3).

9. Therefore, it is requested that the Court deny confirmation of Debtor's Plan and order conversion of this case to a case under Chapter 7 or order dismissal of this case.

WHEREFORE, Movant, by its undersigned attorney, moves the Court for an Order denying confirmation of Debtor's Chapter 13 Plan and dismissing this case.

PETERSON, FRAM & BERGMAN
Professional Association

DATED: 9/16/04

/e/ Daniel W. Fram
Daniel W. Fram
Attorney for Honeywell Federal Credit Union
50 East Fifth Street, Suite 300
St. Paul, MN 55101
(651) 291-8955
Attorney License No. 31409

VERIFICATION

I, Bill Pavlik, a Senior Loan Servicing Representative with Honeywell Federal Credit Union, 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.

DATED: 9/16/04

/e/ Bill Pavlik
Bill Pavlik, Sr. Loan Servicing Rep.
Honeywell Federal Credit Union

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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Chapter 13 Case

Kathleen J. Fuller

Debtor.

MEMORANDUM OF LAW IN SUPPORT
OF OBJECTION TO DEBTOR'S CHAPTER 13 PLAN

INTRODUCTION

Honeywell Federal Credit Union (hereinafter "**Honeywell**") submits this Memorandum of Law in support of its Objection to Debtor's Chapter 13 Plan.

FACTS

On May 17, 2004, Kathleen J. Fuller (hereinafter "**Debtor**") executed a Closed-End Note, Disclosure, Loan and Security Agreement (hereinafter "**Agreement**") in the amount of \$11,620.55 in favor of Honeywell. To secure the loan, the Agreement provided for a security interest in a 1998 Honda CRV EX (VIN # JHLRD1861WC089145). The principal balance owing on this loan is \$11,620.55 plus interest and late fees. According to the Debtor's bankruptcy schedules, the vehicle is now worth \$10,425. Significant pre-petition arrearages exist on the loan because the Debtor has never made a payment. The Agreement required monthly payments in the amount of \$272.

The Debtor's Chapter 13 Plan is objectionable because it fails to cure the arrearages within a reasonable time. In addition, the Plan fails to adequately protect

Honeywell from substantial depreciation of the vehicle because the Plan does not provide for payment to Honeywell until the fifth month of the Plan.

ANALYSIS

I. THE CHAPTER 13 PLAN MAY NOT BE CONFIRMED IF THE CREDITOR IS NOT ADEQUATELY PROTECTED FROM SUBSTANTIAL DEPRECIATION OF THE COLLATERAL.

The concept of adequate protection is not limited to pre-confirmation proceedings.

According to the Eighth Circuit case of In re Hanna, "a reorganization plan [must] provide[] a secured creditor adequate protection for the full value of his claim." 912 F.2d 945, 951 n. 10 (1990) (quoting, In re Monnier Bros. 755 F.2d 1336, 1339 (8th Cir. 1985)). The case of In re Parker further emphasizes this point in the context of a Chapter 13 case:

In conclusion, the debtors are arguably entitled to cure and reinstate their note in accordance with the graduated payment scheduled as if there had been no pre-petition default. On the other hand, the right to cure and reinstate does not vitiate the obligation to afford a secured party adequate protection of its interest in collateral.

46 B.R. 106, 108 (N.D. Ga. 1985) (emphasis added).

In re Johnson illustrates the concept of conditioning approval of a Chapter 13 confirmation upon adequate protection in the context of depreciating collateral. 63 B.R. 550 (Bankr. D. Col. 1986). This Colorado case involves a bank's objection to confirmation of a plan in which the debtor proposed to delay payments on a secured pickup until three and a half years into a five-year plan. Id. at 551. At the time in question, the amount owed was \$4,500 but the bank's secured claim was only \$2,500

based upon the stipulated value of the vehicle. Both parties acknowledged that depreciation would occur, and that by the time the bank began receiving Plan payments, the value of the vehicle would be minimal. Id. The Court concluded:

By the time payments to the Bank commence the underlying collateral will have little or no value. Thus, the Bank will have gone from being a fully secured creditor to being virtually a wholly unsecured creditor. In the language of the United States Supreme Court in the *Worthen* case, *supra*, the debtor's treatment of the bank's claim removes "the quality of an acceptable investment for a rational investor." In order for the debtor's Plan to be confirmed, it must deal fairly with the Bank's claim and provide the Bank with "adequate protection" of its interest in the collateral, not only as of the date of confirmation, but on an ongoing basis.

Id. at 554 (Internal cites omitted). Based upon this rationale, the Court refused to confirm the chapter 13 Plan. Id.

The holding in Johnson comports with Minnesota law. In Hanna, the Eighth Circuit ruled:

The lien retention requirement itself is not met if payments under the Plan to reduce the principal amount of the claim will not keep pace with the depreciation of the lien collateral.

912 F.2d at 951. Although Hanna involved a Chapter 12 case, the principles of Hanna apply to Chapter 13 because of the analogous Plan requirements.

In the instant case, the Debtor's Plan resembles the Johnson case. The Debtor borrowed the sum of \$11,620.55 on May 17, 2004 to finance her purchase of the vehicle. To date, she has failed to make any pre-petition or post-petition payments and proposes to delay plan payments to Honeywell until January of 2005. The Debtor has already acknowledged that the vehicle has depreciated in value since May because she lists the secured claim amount as \$10,425. The 1998 Honda CRV will continue to significantly depreciate and may not be well-maintained.

The case may be more egregious than in Johnson. At least in Johnson, there did not appear to be any arrearages owing on the vehicle. In contrast, the Debtor in this case Plan makes no attempt to cure the substantial arrearages that have arisen. Therefore, based upon the above analysis, Honeywell objects to the Debtor's Chapter 13 Plan as the basis the Plan does not treat Honeywell's claim fairly due to the lack of adequate protection.

II. THE CHAPTER 13 PLAN DOES NOT PROVIDE FOR A CURE OF ARREARAGES WITHIN A REASONABLE AMOUNT OF TIME.

As indicated by the Objection, there are a substantial amount of pre-petition as well as post-petition arrearages owing to Honeywell because no payments have ever been made on the May 17, 2004 loan. However, the Debtor's Plan makes no attempt to cure the arrearages. Considering that the original contract payments were \$272, the Debtor's plan payment of \$261 beginning in the fifth month of the plan will not cure the arrearages.

The payment amount and the delay is unacceptable under Minnesota law.

In re Brady articulates the District of Minnesota's position on a reasonable amount of time to cure a pre-petition arrearage:

Those courts which allow cures in Chapter 13 cases over lengthy periods of time, up to and including five years, do violence to this provision and congressional intent. It was Congress' feeling that although a cure would be extended some period of time, that should not be lengthy time so that the financial impact on secured creditors, although existent, is minimal. Thus, in Minnesota it is unusual for plans to provide for cure of defaults in any period of time that significantly exceeds twelve months.

86 B.R. 166, 170 (Bankr. D. Minn. 1988) (emphasis added). Accord, In re First Federal Savings and Loan Assoc. of Minneapolis, 18 B.R. 192 (Bankr. D. Minn. 1982).

Although the two above cases concerned curing defaults on real estate mortgages, the need for curing the arrearages on vehicles is even more of a concern. In contrast to real property, automobiles depreciate at an alarming rate. Unfortunately, the Debtor's Plan does not seek to begin making any payments until the fifth month of the Plan. Therefore, the Plan does not provide for curing the pre-petition arrearages within a reasonable amount of time.

CONCLUSION

For the above-stated reasons, Honeywell Federal Credit Union requests that the Court deny confirmation of the Debtor's Chapter 13 Plan.

PETERSON, FRAM & BERGMAN, P.A.

Dated: 9/16/04 By: /e/ Daniel W. Fram
Daniel W. Fram (Att. ID No. 31409)
Attorneys for Honeywell Federal Credit Union
50 Fifth Street East, Suite 300
St. Paul MN 55101-1197
Telephone: 651-291-8955

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UNITED STATES BANKRUPTCY COURT
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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Daniel W. Fram, the undersigned attorney with the law offices of Peterson, Fram & Bergman, P.A., attorneys licensed to practice in this Court, with an office at Suite 300, 50 East Fifth St., St. Paul, MN 55101, declare that on the 16th day of September, 2004, I served the annexed: (1) Notice of Hearing and Motion; (2) Memorandum of Law; and (3) proposed Order upon each of the parties listed below by mailing to each of them a copy of each thereof, enclosed in an envelope, first-class postage prepaid, and by depositing same in the post office at St. Paul, MN, directed to them at their last known addresses, as follows:

United States Trustee
300 S. 4th St., Suite 1015
Minneapolis, MN 55415-1329

Robert J. Everhart, Esq.
P.O. Box 120534
New Brighton, MN 55112

Jasmine Z. Keller
12 S. 6th Street, Suite 310
Minneapolis, MN 55402

Kathleen J. Fuller
5451 - 5th Street NE
Apt. 110
Fridley, MN 55421

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

DATED: 9/16/04

/s/ Daniel W. Fram

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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Chapter 13 Case

Kathleen J. Fuller

Debtor.

ORDER DENYING CONFIRMATION OF PLAN

AT: U.S. Courthouse, Minneapolis, MN

The above-entitled matter came before the Court on October 21, 2004, on the Motion of Honeywell Federal Credit Union, Movant, objecting to the confirmation of the Chapter 13 Plan. Based upon the statements of counsel and all of the files, records, and proceedings herein, the Court now finds that cause exists entitling Movant to the requested relief.

NOW, THEREFORE, IT IS HEREBY ORDERED that confirmation of the Chapter 13 Plan is denied and the case is dismissed.

BY THE COURT:

DATED: _____

Robert J. Kressel
United States Bankruptcy Court Judge