

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

Case No.: 04-44493

Michelle R. Fitzpatrick,

Chapter 13 Case

Debtor(s).

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

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

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), 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 October 21, 2004, in Courtroom No. 8 West, 8th Floor, 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 October 20, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than October 18, 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 chapter 13 case was filed on August 11, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. §§ 1307, 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 pertain. Movant requests relief with respect to denial of confirmation of the debtor's proposed Chapter 13 plan, dated August 11, 2004 (the "Plan") and dismissal of this case.

6. The Plan calls for the debtor to make payments to the Trustee of \$287 per month for 60 months, for a total of \$17,220¹ (the "Plan Funds").

¹ Confusingly, the plan lists the total payments as "\$28,884.00" in ¶ 1.d. In order to achieve total payments equal to that amount, the debtor would have to pay **\$481.40** per month for 60 months, or **\$601.75** per month for 48 months. Since the debtor's Schedules I and J reflect disposable income of only **\$322/mo.**, it is not likely that the debtor could

7. The Plan calls for the Plan Funds, net of the Trustee's estimated fee, to be disbursed as follows:

Fremont Investment & Loan (mortgage arrears)	7,360
Hennepin County Govt. Center (alleged secured claim)	4,800
Servicemaster (alleged secured claim)	1,800
IRS (priority tax claim)	4,140
MDR (priority tax claim)	1,704.60
MN Dept of Economic Security (alleged priority claim)	<u>6,480</u>
TOTAL	\$26,284.60

8. The Plan is underfunded.

9. The Plan does not provide for the submission of sufficient future income of the debtor as is necessary for the execution of the plan, contrary to 11 U.S.C. § 1322(a)(1).

10. The Plan requires the Trustee to make pro rata payments to the identified creditors in ¶ 7, above, over a period of time that exceeds the 60-month maximum duration of a Chapter 13 plan, in violation of 11 U.S.C. § 1322(d).

11. The Trustee contends that the Hennepin County Government Center, Servicemaster and MN Dept. of Economic Security claims are all non-priority unsecured claims. The debtor's proposed special treatment of these claims unfairly discriminates against other creditors in the same class, in violation of 11 U.S.C. § 1322(b)(1).

12. The debtor has failed to make any payments to the Trustee, although her first payment was due on September 29, 2004, according to 11 U.S.C. § 1326(a)(1). The failure to make plan payments when due, together with the debtor's apparent inability to propose a confirmable plan constitutes cause for dismissal under 11 U.S.C. § 1307(c)

13. If testimony is required, the debtor may be called to testify at the hearing on the objection.

have intended to pay either of these larger monthly payments. The Trustee assumes that the debtor's intention is to pay \$287/mo. for 60 months.

WHEREFORE, the Trustee moves the court for an order denying confirmation of the Debtor's proposed Chapter 13 plan, dismissing the case, and such other relief as may be just and equitable.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: October 12, 2004

By: /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
(612) 338-7591

VERIFICATION

I, Thomas E. Johnson, employed by the 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 on: October 12, 2004

Signed: /e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

In re:

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

FACTS

The Trustee relies upon the facts set forth in her verified motion which, for the sake of brevity, will not be repeated here.

LEGAL DISCUSSION

One of the fundamental requirements for confirmation of a Chapter 13 plan is found in 11 U.S.C. § 1322(a)(1), which states that a plan shall “provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” *11 U.S.C. § 1322(a)(1)*. Essentially, this statute requires the debtor to propose a plan that is fully funded, in the sense that the debtor commits to making sufficient payments to pay all the amounts required to be paid to creditors under the proposed plan.

Here, the debtor has only committed to paying a total of \$17,220 to the Trustee, yet the total to be paid to creditors in the Plan exceeds that number by over \$10,000. The plan is underfunded and therefore unconfirmable.

The debtor has also set up confusing and improper classifications of creditors for full payment, although a number of these creditors (i.e., Hennepin County Government Center, Servicemaster, and MN Dept. of Economic Security) arguably hold only general unsecured claims. It is a violation of the anti-discrimination provisions of 11 U.S.C. § 1322(b)(1) for the debtor to set up such separate classes of creditors for full payment, when other similarly situated creditors will receive less favorable treatment.

The Plan as filed also calls for the Trustee to make payments to creditors over a period well in excess of 60 months, contrary to the maximum plan term prescribed by 11 U.S.C. § 1322(d).

The debtor has failed to make any payments to the Trustee, although her first plan

payment was due on September 29, 2004, according to 11 U.S.C. § 1326(a)(1). The failure to make payments and apparent inability of the debtor to propose a confirmable plan are prejudicial to the debtor's creditors and warrant dismissal for "cause," under 11 U.S.C. § 1307(c)(1).

CONCLUSION

The debtor's plan is not confirmable, for a variety of reasons. Confirmation should be denied and the case dismissed.

Respectfully submitted:

Dated: October 12, 2004

Signed: /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
(612) 338-7591

UNITED STATES BANKRUPTCY COURT
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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 October 12, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan and for Dismissal of Case, Memorandum of Facts and Law and proposed Order on the individual(s) listed below, in the manner described:

By e-mail:

United States Trustee
1015 United States Courthouse
300 South 4th Street
Minneapolis, MN 55415

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

Michelle R. Fitzpatrick
3728 Stevens Ave. S.
Minneapolis, MN 55409

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

Executed: October 12, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

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ORDER DENYING CONFIRMATION AND DISMISSING CASE

At Minneapolis, Minnesota, _____.

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.

Appearances were noted in the minutes.

Upon the verified motion 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 DISMISSED.

United States Bankruptcy Judge