

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Jerome D. Treadwell,

BKY 04-33831 GFK

Chapter 13

Debtor.

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

TO: All parties entitled to notice under 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. **NOTE: CONTESTED MATTERS ONLY THAT WERE
ORIGINALLY SCHEDULED TO BE HEARD BEFORE CHIEF JUDGE KISHEL
ON SEPTEMBER 23, 2004 ARE CONTINUED FOR HEARING TO
OCTOBER 28, 2004.** A hearing on this motion will be held before the Honorable Gregory F. Kishel, Courtroom 228B, U. S. Courthouse, 316 North Robert Street, St. Paul, Minnesota at 10:30 a.m. on October 28, 2004, or as soon thereafter as counsel may be heard.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on October 27, 2004, which is 24 hours (one business day) before the time set for the hearing, or filed and served by mail not later than October 25, 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. The Court has jurisdiction 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 June 30, 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 June 29, 2004 (the "Plan") and dismissal of this case. If testimony is necessary as to any facts relevant to this motion, the Trustee reserves the right to call an employee of the Chapter 13 Trustee, 310 Plymouth Building, Minneapolis, Minnesota, and/or the Debtor to present testimony.

6. The Plan calls for the Debtor to make payments to the Trustee of \$300 per month for 60 months for a total of \$18,000 (the “Plan Funds”).

7. The Plan calls for the Plan Funds, net of the Trustee’s estimated fee in the amount of \$883.02 (6.0%), to be disbursed as follows:

| <u>Claimant</u> | <u>Claim Amount</u> | <u>Claim Type</u> |
|--------------------------|---------------------|-------------------|
| Attorneys’ Fees | \$ 1,444.00 | Priority |
| Internal Revenue Service | \$ 3,050.00 | Priority |
| Minn. Dept. of Revenue | \$ 725.00 | Priority |
| Credit Acceptance | \$ 9,376.00 | Secured |
| Unsecured Creditors | \$ 2,386.13 | |
| TOTAL | \$ 18,000.00 | |

8. The Internal Revenue Service (“IRS”) has filed a proof of claim in the amount of \$6,225.07 as an unsecured claim with priority.

9. The Claim either has not been objected to or amended by the Claimant, and therefore is deemed allowed under 11 U.S.C. § 502(a). Paragraph 3 of the Plan provides that the Trustee shall pay priority claims in the amounts actually allowed. The requirements of 11 U.S.C. § 1322(a)(2) preclude confirmation of a plan unless it provides for full payment of all claims entitled to priority. The requirements of 11 U.S.C. § 1325(a)(5) with respect to allowed secured claims preclude confirmation. *11 U.S.C. § 1325(a)(5)(B)*.

10. Including the claims of the IRS, MDR and Debtor’s counsel, the total amount of the priority claims to be paid by the Trustee is \$8,394.07. In paragraph 7, the Plan requires payments on account of the secured claim of Credit Acceptance in the amount of \$9,376.00.

11. There is a discrepancy between the net funds to be paid into the plan by the Debtors (**\$18,000**) and the funds needed to pay the allowed priority and secured claims in the amount provided for in the Plan, (**\$20,232.94**) without consideration of any return to general unsecured creditors.

12. The feasibility of the Plan is also in question. The Debtor did not make his July 2004 payment until August 26, 2004, and as of the date of this Objection, has not made his August 2004 payment. It appears that another party made the July payment on his behalf, and he has provided the Trustee with a list of expenses previously undisclosed in his Schedule J. The Trustee objects to confirmation of the Plan on the basis that the Debtor will be unable to make all payments required by the Plan and to comply with the Plan in violation of 11 U.S.C. § 1325(a)(6). A copy of the Debtor’s payment history in his prior Chapter 13 case, BKY No. 03-38125, is incorporated herein and attached hereto as Exhibit A. A copy of his payment history in this case is incorporated herein and attached hereto as Exhibit B.

13. The case has been continued from month to month to enable the Debtor to file missing tax returns in the event that the claims of the taxing authorities are greater

than the amount owed by the Debtor.

14. As of the date of this Objection, there is no indication that the Debtor is willing to or will be able to increase payments to the Trustee to pay all allowed claims in the amount required to obtain a discharge under Section 1328 of the Bankruptcy Code.

15. As a result of the foregoing, the plan is no longer feasible.

16. The creditors, if any, of a class lower in priority than the class of the Claim(s) may never receive the distribution contemplated under the plan.

17. As a further result of the present circumstances, the lower priority creditors, if any, will be delayed from the collection of their claims during the pendency of this Chapter 13 case.

18. The effect of these circumstances is that the lower priority creditors, if any, will have detrimentally relied upon the confirmed plan with the expectation of future payment, only to discover at the end of the plan term that they will receive no payment.

19. All of these circumstances constitute cause for dismissal under Section 1307(c).

WHEREFORE, the Movant requests entry of an order dismissing this case, or converting this case to a case under Chapter 7, and for such other relief as the Court deems just and proper.

Jasmine Z. Keller, Chapter 13 Trustee

Dated: September 14, 2004

/e/ Margaret H. Culp
Thomas E. Johnson, #52000
Margaret H. Culp, #180609
Chapter 13 General Counsel
310 Plymouth Building
Minneapolis, MN 55402
(612) 338-7591

VERIFICATION

I, Margaret H. Culp, for Movant, declare, under penalty of perjury, that the foregoing is true and correct to the best of my knowledge, information and belief.

Dated: September 14, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

Jerome D. Treadwell,

BKY 04-33831 GFK

Chapter 13

Debtor.

**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 amounts required to be paid to creditors under the proposed plan.

Here, the Debtor has only committed to paying a total of \$18,000 to the Trustee, yet the total priority and secured claims filed to date or provided for in the Plan exceed that number, taking into consideration the fact that the total Plan Funds will be reduced by the Trustee’s statutory fee. The Plan is under-funded and therefore unconfirmable.

The Debtor has failed to make payments under the terms of the plan he proposed. The last payment received by the Trustee was received August 26, 2004 in the amount of \$300.00, and appears to be from a third party on the Debtor’s behalf. The delay and apparent inability of the Debtor to propose and comply with the terms of a plan or 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).

The Debtor appears to be incapable of making all of the payments required by his Plan. Even before the Debtor provided a list of additional expenses related to his role as a new father, it appeared that he would have great difficulty in making Plan payments. As evidence of this, the Court need look no further than his payment history in the last case, together with the fact that a third party had to make his first plan payment in this case, almost a month after the payment was due. Unless the Debtor can show that he is

able and willing to make all payments required by the Plan and to comply with the terms of the Plan, it should not be confirmed. *11 U.S.C. § 1325(a)(6)*.

CONCLUSION

The Debtor's plan is not confirmable because it does not propose sufficient payments to fully fund it. The Debtor appears to be incapable of making the payments required by the Plan. Confirmation should be denied and the case dismissed.

Respectfully submitted:

September 14, 2004

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

UNITED STATES BANKRUPTCY COURT
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UNSWORN DECLARATION FOR PROOF OF SERVICE

I, Margaret H. Culp, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on September 14, 2004, I served Trustee's Objection to Confirmation and Notice of Hearing and Motion for Dismissal or Conversion on the individual(s) listed below, in the manner described:

By facsimile:

United States Trustee
612-664-5516

Curtis K. Walker, Esq.
612-824-8005

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

Jerome D. Treadwell
709 Lafond Avenue, #2
St. Paul, MN 55104

Curtis K. Walker, Esq.
4356 Nicollet Avenue South
Minneapolis, MN 55409

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

Executed: September 14, 2004

/e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT
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Chapter 13

Debtor.

**ORDER SUSTAINING OBJECTION TO CONFIRMATION AND DISMISSING
CASE**

At St. Paul, Minnesota _____, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on Chapter 13 Trustee's Objection to Confirmation and Motion for dismissal or conversion of the Chapter 13 case.

Appearances were as noted in the minutes.

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

IT IS ORDERED:

1. The Trustee's Objection to Confirmation is **SUSTAINED**.
2. The Chapter 13 case is **DISMISSED**.

Gregory F. Kishel
Chief United States Bankruptcy Judge