UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In Re: BKY 04-34379 DDO

*John S. Zobel,* Chapter 13

Debtor.

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**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. A hearing on this motion will be held before the Honorable Dennis D. O'Brien, Courtroom 228A, U. S. Courthouse, 316 North Robert Street, St. Paul, Minnesota at 10:30 a.m. on October 14, 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 13, 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 8, 2004 (October 11, 2004 is a federal holiday), 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 July 29, 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 filed July 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 $1,215 per month for 60 months, for a total of $72,900 (the "Plan Funds").

7. The Plan calls for the Plan Funds, net of the Trustee's estimated fee in the amount of $4,126.42 (6.3%), to be disbursed as follows:

| Claimant | Claim Amount | Claim Type |
|---|---|---|
| Attorneys' Fees | $ 1,000.00 | Priority |
| Internal Revenue Service | $ -0- | Priority |
| GRP Financial | $ 4,202.94 | Secured |
| Suburban Exteriors | $ 15,018.61 | Secured |
| Unsecured Creditors | $ 48,552.03 | |
| TOTAL | $ 72,900.00 | |

8. The Internal Revenue Service ("IRS") has filed Claim No. 2 in the total amount of $33,229.92, of which $29,276.53 is asserted to be an unsecured claim with priority. GRP Financial has notified the Trustee by letter that the actual arrearages on its secured claim are in the amount of $14,736.56. A copy of the letter is incorporated herein and attached hereto as Exhibit A. Suburban Exteriors ("Suburban") has filed Claim No. 1 as a secured claim in the amount of $33,908.05.

9. The Claim(s) either have not been objected to or amended by the Claimants, and therefore are 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. Paragraph 4 of the Plan provides that the Trustee will cure the actual amounts of any defaults. 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. It should be noted that the Debtor proposes to use the "cramdown" provisions of 11 U.S.C. § 1325(a)(5)(B) to fix the secured value of Suburban's claim at $14,000 plus interest at 12% for a total payment of $15,018.61. The Trustee, using a simple loan calculator, believes the actual payout on the claim would be $14,000 plus interest in the total amount of $1,486.74, for a total of $15,486.74. A copy of the amortization schedule is incorporated herein and attached hereto as Exhibit B.

11. At filing, the Debtor claimed an interest in a homestead that he valued at $525,000, encumbered by a first mortgage lien in favor of GRP Financial that he estimated at $365,400. As such, the total equity in the property is at least $159,600. The mechanics' lien judgment upon which Suburban's claim appears to be based was entered by the Minnesota District Court against both the Debtor and his non-filing spouse in the amount of $30,756.65 as of May 5, 2004.

12. Including the priority claim of the IRS and the secured claims of GRP Financial and Suburban that the Trustee may be obliged to pay, the total amount of the priority and secured claims to be paid by the Trustee is $77,921.14, unless the Debtor succeeds in his attempt to cram down the amount of the mechanics' lien claim.

13. If the Debtor's attempt to cram down Suburban's claim is unsuccessful, there is a substantial discrepancy between the funds to be paid into the plan by the

Debtor (**$72,900**) and the funds needed to pay both the allowed priority claims in full and the allowed secured claims the amount provided for in the plan (**$77,921.14)**, even without consideration of the Trustee's fee.

14. The Plan is internally underfunded as well. In Month One of the Plan (the first month after confirmation), the Debtor proposes that the Trustee distribute $83.33 to attorneys' fees, $300.21 to the mortgage arrears owed to GRP, and $790.45 to the secured claim of Suburban, for a total distribution in Month One of $1,173.99. Deducting the Trustee's fee at 6.3%, the monthly amount available for distribution is $1,142.99. As such, the Plan does not provide for sufficient funds to distribute in accordance with its terms, and the Trustee objects to confirmation on that basis.

15. There is no indication that the Debtor 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.

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

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

18. 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.

19. 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.

20. A review of the Debtor's budget shows that he and his non-filing spouse are devoting $2,916, or approximately 42% of their disposable income to housing, and $531 per month to lease payments on a 2002 Lexus automobile, and $482 per month to automobile insurance. Based upon the above expenses, it is the Trustee's position that the Debtor's Plan does not meet the "best efforts" test of 11 U.S.C. § 1325(b)(a)(B), and the Trustee objects to confirmation on that basis.

21. Based upon Claim No. 2 filed by the Internal Revenue Service, it appears that the Debtor has failed to remain current on his federal tax obligations in 2001, 2002, and 2003, while incurring a significant amount of debt.

22. 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: October 6, 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: October 6, 2004

/e/ Margaret H. Culp

**JASMINE Z. KELLER**
**STANDING CHAPTER 13 TRUSTEE**
**District of Minnesota**
12 South 6th Street
Suite 310
Minneapolis, MN 55402
Phone (612) 338-7591 Fax (612) 338-4529

August 16, 2004

CHAPTER 13
JASMINE Z. KELLER, TRUSTEE
2004 AUG 23 A 9:25

GRP Financial
360 Hamilton Avenue
White Palins, N.Y. 10601

Re: JOHN S ZOBEL
BKY #04-34379 DDO
Your Account Number: 12738

Dear Sir or Madam:

GRP Financial has been identified as a holder of a lien on property owned by the above-referenced debtor(s). The debtor(s) filed a case under Chapter 13 on 7/29/04 and proposed a plan providing for cure of the arrearages on your account with interest on the pre-petition arrearages over the term of 14 month(s).

To assist the Trustee in the administration of the case, please provide the information requested below. Please be advised that the Trustee will accumulate funds, but will not make payment in connection with GRP Financial('s) claim, until a determination of GRP Financial('s) interest has been made. Thank you for your prompt response.

Very truly yours (Sm)
Thomas E. Johnson
Thomas E. Johnson
Counsel

The following information is provided regarding the claim of GRP Financial:

Total arrears as of 7/29/04, per Chapter 13 Plan: $4,202.94

Actual arrears as of 7/29/04, if different: 14,736.56

Total interest over 14 month(s): _____
(To be calculated at 12% on the declining balance of the actual arrears)

Total to be paid (sum of previous two numbers): _____

Jon Toder
(Printed Name), Authorized Agent

Note: This letter is not intended as a substitute for a timely filed proof of claim. Please be sure to file a proof of claim with the Clerk of Bankruptcy Court.

EXHIBIT A

**Simple Loan Calculator V2.1**

| Pay# | Remaining Balance | Amt to Principal | Amt to Interest | Total Interest Paid |
|---|---|---|---|---|
| 1 | $13,349.55 | $650.45 | $140.00 | $140.00 |
| 2 | $12,692.60 | $656.95 | $133.50 | $273.50 |
| 3 | $12,029.07 | $663.52 | $126.93 | $400.42 |
| 4 | $11,358.91 | $670.16 | $120.29 | $520.71 |
| 5 | $10,682.05 | $676.86 | $113.59 | $634.30 |
| 6 | $9,998.42 | $683.63 | $106.82 | $741.12 |
| 7 | $9,307.96 | $690.47 | $99.98 | $841.11 |
| 8 | $8,610.59 | $697.37 | $93.08 | $934.19 |
| 9 | $7,906.24 | $704.34 | $86.11 | $1,020.29 |
| 10 | $7,194.85 | $711.39 | $79.06 | $1,099.35 |
| 11 | $6,476.35 | $718.50 | $71.95 | $1,171.30 |
| 12 | $5,750.67 | $725.69 | $64.76 | $1,236.07 |
| 13 | $5,017.72 | $732.94 | $57.51 | $1,293.57 |
| 14 | $4,277.45 | $740.27 | $50.18 | $1,343.75 |
| 15 | $3,529.77 | $747.68 | $42.77 | $1,386.52 |
| 16 | $2,774.62 | $755.15 | $35.30 | $1,421.82 |
| 17 | $2,011.92 | $762.70 | $27.75 | $1,449.57 |
| 18 | $1,241.59 | $770.33 | $20.12 | $1,469.69 |
| 19 | $463.55 | $778.03 | $12.42 | $1,482.10 |
| 20 | $0.00 | $463.55 | $4.64 | $1,486.74 |

EXHIBIT B

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In Re:

*John S. Zobel,* Case No. 04-34379 DDO

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

1. Underfunding.

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 $72,900 to the Trustee, yet the total priority and secured claims filed to date or provided for in the Plan may exceed that number, without even taking into consideration the fact that the total Plan Funds will be reduced by the Trustee's statutory fee.

In the alternative, the Plan fails to provide sufficient funds on a monthly basis to make the payments required by its terms, taking into account the Trustee's fees. The Plan is under-funded and therefore unconfirmable.

2. Failure to Meet "Best Efforts" Test.

The Plan does not devote all of the Debtor's projected disposable income to payments under the plan for necessary items. *11 U.S.C. § 1325(b)(1)(B).* A debtor under Chapter 13 should contribute all disposable income to the debtor's plan. *In re Sitarz*, 150 B.R. 710,718 (Bankr. D. Minn. 1993). *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991). "Disposable income" includes all of a debtor's income which is "not reasonably necessary to be expended" by the debtor. *11 U.S.C. § 1325(b)(2).*

"reasonably necessary to be expended" does not necessarily mean that such expenses should be sufficient to maintain the debtor's former lifestyle, or to continue a pattern of "excessive consumption of nonessentials or *inordinately high expenditures for purchases of necessities.*" *Sitarz*, 150 B.R. at 718. *McDaniel*, 126 B.R. at 784. (*Emphasis added*.)

In this case, it is apparent that the Debtor has pursued continuation of a lifestyle beyond his financial means. If GRP Financial files a proof of claim consistent with its stated estimate of arrears to the Trustee, the actual mortgage arrears claim is understated by nearly two-thirds. The Debtor has also failed to remain current on his obligations to the federal taxing authorities for the past three years. Such conduct should not be facilitated by confirming a Chapter 13 plan that appears to allow for continuation of such a pattern of excessive consumption.

Confirmation has been continued from month to month to allow the Debtor to remedy the problems with the Plan. The delay 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 because it does not propose sufficient payments to fully fund it, and the Debtor fails to meet the "best efforts" test of 11 U.S.C. §1325(b)(1)(B). Confirmation should be denied and the case dismissed.

Respectfully submitted:

October 6, 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
DISTRICT OF MINNESOTA
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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 October 6, 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

David G. Keller, Esq.
952-454-4232

**By first class U.S. mail, postage prepaid:**
John S. Zobel
1434 Kingswood Road
Eagan, MN 55122

Nancy T. Polomis, Esq.
Hellmuth & Johnson PLLC
10400 Viking Drive, Suite 300
Eden Prairie, MN 55344

David G. Keller, Esq.
Grannis & Hauge, P.A.
1260 Yankee Doodle Road, Suite 200
Eagan, MN 55121-2250

Paul A. Weingarden, Esq.
Usset & Weingarden, P.L.L.P.
4500 Park Glen Road, Suite 120
St. Louis Park, MN 55416
Attorneys for GRP Loan, LLC

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

Executed: October 6, 2004 /e/ Margaret H. Culp

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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In re: BKY 04-34379 DDO

*John S. Zobel,* Chapter 13

Debtor.

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**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**.

_____
Dennis D. O'Brien
United States Bankruptcy Judge