

**UNITED STATES BANKRUPTCY COURT
FOR THE
DISTRICT OF NEW HAMPSHIRE**

In re:

BK No. 98-11670-MWV
Chapter 13

Thomas A. Nisbet and
Minson Nisbet,
Debtors

MEMORANDUM OPINION

The Court has before it the Chapter 13 Plan of Reorganization filed by Debtors Thomas A. Nisbet and Minson Nisbet. Northern Electronic's Automation, Inc. has filed an objection to confirmation seeking to dismiss the Chapter 13 proceeding. Objections to confirmation have also been filed by the Chapter 13 Trustee and the Trustee for Insertion Machine Sales, Inc.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. § § 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

DISCUSSION

Thomas A. Nisbet and Minson Nisbet (collectively "Debtors") filed for relief under Chapter 7 of the Bankruptcy Code on April 29, 1998. The Debtors were granted a discharge on August 14, 1998. Prior to the Debtors' discharge, Northern Electronics Automation, Inc. ("NEA") filed an adversary proceeding in this Court (Adv. NO. 98-1099-MWV) to except from discharge, pursuant to 11 U.S.C. § 523(a)(4) & (6), a judgment obtained against Thomas A. Nisbet and Insertion Machine Sales, Inc. in the Superior Court for the State of New Hampshire, Rockingham County. Insertion Machine Sales, Inc. is a corporation run by the Debtors. On January 5, 1999, prior to a hearing on NEA's Motion for Judgment on the Pleadings, the

Debtors moved to convert their case to Chapter 13. On January 6, 1999 the Court granted the Debtors' Ex Parte Motion to Convert to Chapter 13 and vacated the Order of Discharge dated August 14, 1998. On January 13, 1999 NEA moved for reconsideration of the Court's grant of the Debtors' Ex Parte Motion to Convert to Chapter 13 based on the assertion that the Debtors failed to establish that their unliquidated unsecured debts meet the jurisdictional requirements of 11 U.S.C. § 109(e). The Court denied the motion on February 16, 1999.

The Debtors' first Chapter 13 plan was filed on January 27, 1999. On or about that date, the Debtors amended their bankruptcy petition schedules to reflect combined monthly income of \$3,954.07 and monthly expenses of \$3,558.52. The plan proposed to make monthly payments to the Chapter 13 Trustee in the amount of \$395.55 for sixty months, totaling \$23,733.00. The plan proposed to yield a six percent distribution to unsecured creditors. Debtors filed an "Amended Chapter 13 Plan" on September 2, 1999, proposing to pay the Chapter 13 Trustee sixty monthly installments of \$625.00, totaling \$37,500.00. A "Second Amended Chapter 13 Plan," which is currently before the Court, was filed on September 22, 1999. The Second Amended Chapter 13 Plan proposes payments of \$800.00 per month for a total of \$48,000. The distribution to unsecured creditors, if all scheduled debts are allowed, is twenty-eight percent of their claims.

NEA filed an objection to confirmation on July 21, 1999 seeking to dismiss the Chapter 13 proceeding on the grounds that the Debtors' plan was filed in bad faith. In support of its contention, NEA argues that the Debtors' original bankruptcy petition included debts that exceed the jurisdictional limits under Chapter 13 pursuant to section 109 of the Bankruptcy Code. NEA also argues that the Debtors have failed to provide sufficient evidence to support their amendment of the petition to delete certain creditors now alleged to be creditors of Insertion Machine Sales, Inc, which has filed for relief under Chapter 7 of the Bankruptcy Code.

In Chapter 7 there is no limitation on the amount of debt that may be discharged. In an abundance of caution, bankruptcy practitioners not concerned with Chapter 13 debt limitations routinely include all

possible creditors in order to make the discharge as broad as possible. Had the Debtors originally filed under Chapter 13 the petition would have taken into consideration the jurisdictional requirements of section 109. The Court finds this explanation for the amendment to the list of Debtors' creditors reasonable and allows the amendment.

Secondly, NEA argues that the conversion from Chapter 7 to Chapter 13 was made in an attempt to obtain a discharge of the NEA judgment, which NEA argues would be excepted from discharge in a Chapter 7 proceeding. Again, the Court rejects the argument that this factor alone is sufficient evidence of bad faith to deny confirmation of the Chapter 13 plan. See Mason v. Young, 237 B.R. 791, 799 (10th Cir. BAP 1999) (an attempt to discharge a debt in a Chapter 13 case that is not dischargeable in a Chapter 7 case is not per se bad faith unless combined with other factors that show an overall effort to avoid paying creditors). Congress, in its wisdom, limited the exceptions to a Chapter 13 discharge in order to encourage debtors to use their post-petition earnings to repay their creditors. Unlike Chapter 7, debts that would be excepted from discharge pursuant to sections 523(a)(4) and (6) under Chapter 7 are dischargeable in a Chapter 13 plan. 11 U.S.C. § 1328(a). See In re Levine, 10 B.R. 168, 170 (Bankr. D.Mass. 1981).

In determining whether the Debtors' Chapter 13 plan may be confirmed, the Court must determine that it was proposed in good faith. 11 U.S.C. § 1325(a)(3). "Good faith" is not defined by the code. Therefore, bankruptcy judges must look to the facts and circumstances of each case and make a determination based on a totality of the circumstances. See In re Keach 225 B.R. 264, 267 (Bankr. D.R.I. 1998); In re Baez, 106 B.R. 16, 18-19 (Bankr. D.P.R. 1989). In reviewing the Chapter 13 plan for confirmation "bankruptcy judges should exercise their judicial discretion and assess the evidence to ensure that it meets the guidelines established by section 1325." First National Bank of Boston v. Fantasia (In re Fantasia), 211 B.R. 420, 423 (1st Cir. BAP 1997) (citing Fidelity & Casualty Co. of N.Y. v. Warren (In re Warren), 98 B.R. 87 (9th Cir. BAP 1988)). Courts have developed a number of factors to look to in determining whether a Chapter 13 plan was filed in good faith, including but not limited to: (1) the amount of the proposed payments and the amount of the debtors surplus; (2) the debtor's employment history,

ability to earn, and likelihood of future increases in income; (3) the probable or expected duration of the plan; (4) the accuracy of the plan's statement of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court; (5) the extent of preferential treatment between classes of creditors; (6) the extent to which secured claims are modified; (7) the type of debt sought to be discharged and whether such debt is non-dischargeable in Chapter 7; (8) the existence of special circumstances such as inordinate medical expenses; (10) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act; (11) the burden which the plan's administration would place on the trustee. See Pioneer Bank of Longmont v. Rasmussen (In re Rasmussen), 888 F.2d 703, 704 (10th Cir. 1989); Flaygare v. Boulden 709 F.2d 1344, 1347-48 (10th Cir. 1983); United States v. Estus (In re Estus), 695 F.2d 311, 317 (8th Cir. 1982); In re Baez, 106 B.R. 16, 19 (Bankr. D.P.R. 1989). Although the judgment to NEA may be excepted from discharge under a Chapter 7 case, the Court finds that this factor alone is not sufficient to require dismissal of the Chapter 13 plan. Based on the totality of the circumstances, applying the factors listed above, the Courts finds the Debtors filed their Plan in good faith pursuant to section 1325(a)(3).

Disposition of NEA's objection does not end the Court's inquiry. Also before the Court is the "Chapter 13 Trustee's Objection to Confirmation of the Plan dated February 22, 1999." The objection claims that the Debtors fail to use all of their disposable income for the benefit of creditors and that certain expenses listed on Schedule J of the bankruptcy petition are uncommonly high. Specifically, the Chapter 13 Trustee references high monthly allowances for food (\$750), clothing (\$200), transportation (\$475), and recreation (\$400).

The Court notes that Debtors have amended "Schedule J - Current Expenditures of Individual Debtors" a total of three times. Following conversion of their case to Chapter 13, the Debtors filed an amended Schedule J claiming significantly higher monthly expenses than were claimed when the case was under Chapter 7. The Debtors have twice amended their schedules following the Chapter 13 Trustee's objection. Ultimately, the amendments have reduced the total monthly expenses to an amount closer to that

claimed in the original filing. The most recent amendments, filed on September 22, 1999, project monthly expenses of \$3,216.02, representing a \$78.98 decrease from expenses claimed on the Debtors' original Schedule J. However, many of the expenditures claimed by the Debtors remain uncommonly high. In fact, a review of the original Schedule J filed by the Debtors reveals that many of the claimed expenses have increased dramatically throughout the various amended schedules. The following are examples of significant increases in expenses claimed by the Debtors between their original filing and their most recent amendments:

<u>Item</u>	<u>Original Schedule J</u>	<u>Most Recent Schedule J</u>
Home Maintenance	\$60.00	\$100.00
Clothing	\$75.00	\$170.00
Transportation	\$220.00	\$440.00
Recreation	\$100.00	\$270.00
Charitable Contributions	\$0.00	\$65.00
School Lunches	\$54.00	\$200.00

On September 9, 1999 a hearing on confirmation and other motions pending before the Court pertaining to this case was held. The Court heard testimony from the Debtors and arguments from counsel regarding the appropriateness of the claimed expenses. All matters were continued pending the Court's consideration of the Debtors' Second Amended Plan and the various objections to confirmation. Upon further consideration, the Court finds that objections made by the Chapter 13 Trustee have not been adequately addressed and that the Debtors have not contributed all of their disposable income to the plan as required by Chapter 13. As indicated above, the broader discharge provided by Chapter 13 is intended to encourage debtors to use all of their post-petition disposable income to fund a plan. A review of the history of the plans and amendments submitted by the Debtors indicates that the Debtors have evidently not been encouraged sufficiently to comply with the spirit of Chapter 13, and the Court will not confirm the plan as

presently proposed. Unless the Debtors file an amended Chapter 13 plan contributing significantly more disposable income to fund the plan within 30 days, the case will be dismissed.

In finding that the expenses claimed by the Debtors are excessive, the Court notes expenses claimed for home repair, clothing, laundry and dry cleaning, recreation, transportation, and school lunches are of particular concern. At the request of the Court, NEA submitted a proposed Chapter 13 plan on behalf of the Debtors which proposes significant reductions in each of these categories. Although the Court does not adopt NEA's plan, it finds that it is much closer to a confirmable plan than that which has been offered by the Debtors.

Finally, the Court notes that on September 17, 1999 the Chapter 7 Trustee for Insertion Machine Sales, Inc., which, as noted previously, has filed for relief under Chapter 7 of the Bankruptcy Code, filed an objection to confirmation of the plan, asserting that Insertion Machine Sales, Inc. and/or its Chapter 7 Trustee may have claims against the Debtors for preferential or fraudulent transfers that are not provided for in the Chapter 13 plan. Because the Court finds that the Debtors' plan is not confirmable for the reasons set out previously, this objection is moot.

FINDINGS AND CONCLUSION

In summary, the Court finds:

1. NEA's prayer for relief in the form of dismissal of the Chapter 13 proceeding is denied. The Debtors amendment of creditors upon conversion of the case from Chapter 7 to Chapter 13 was not made in violation of the jurisdictional requirements of 11 U.S.C. § 109. Furthermore, the Court finds that the Debtors Chapter 13 plan was not filed in bad faith.
2. Confirmation of the Debtors' Chapter 13 plan is denied. The Debtors have failed to submit a plan which proposes to use all of their post-petition disposable income to fund the plan.
3. The Debtors shall have 30 days to file a Chapter 13 plan in a manner consistent with this opinion.

For the reasons outlined above, the Court This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DONE and ORDERED this 1st day of November, 1999, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge