UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 97-41065
	)	Chapter 13
KEITH NEIL HAFFER	)	
Soc. Sec. No. 032-42-2005	)	MEMORANDUM OF DECISION RE:
	)	PLAN DATED MAY 15, 1998 AND
Debtor.	)	GRAND LABS' DISMISSAL MOTION
	)	AND OBJECTION TO EXEMPTIONS

The matters before the Court are the confirmation of Debtor's modified plan dated May 15, 1998 and Grand Laboratories, Inc.'s motion to convert or dismiss and objections to Debtor's claim of exemptions. These are core matters under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying Order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that confirmation of Debtor's plan dated May 15, 1998 must be denied and that Grand Laboratories' motion to convert or dismiss will be held in abeyance until November 4, 1998.

I.

Keith N. Haffer filed a Chapter 13 petition on November 17, 1997. In his schedules filed December 8, 1997, Debtor claimed exempt, in addition to a homestead and household goods, two non-homestead lots in Lincoln County, South Dakota, an annuity valued at $70,000.00, a handgun valued at $300.00, valueless term [life insurance] policies, and some individual retirement accounts valued at $161,000.00. He claimed the IRAs exempt under the new S.D.C.L. § 43-45-16. On Schedule I, Debtor stated he had a wife and

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daughter but he failed to set forth his non-debtor wife's income, if any. He stated his monthly income was $5,103.00. He stated on Schedule J that his monthly expenses were $8,070.00. His expenses thus exceeded his income by $2,967.00 per month. He scheduled Grand Laboratories (Grand Labs) as holding an unsecured, unliquidated claim for $121,650.80. The other unsecured claims totaled $12,765.00 and also were described as unliquidated. These included a claim of $2,765.00 held by his wife. Debtor also listed his wife as holding a secured claim of $4,500.00. The security was listed as all property of Advantage Bioconsultant, Inc. Debtor's only other secured creditor was his home mortgage holder. Debtor did not schedule any unsecured priority creditors.

Confirmation of the first plan that Debtor proposed was denied. On January 12, 1998, Grand Labs filed an objection to Debtor's claimed exemptions. Grand Labs stated the lots in Lincoln County were subject to its liens and that their value exceeded the amount allowed by statute. Grand Labs also argued that the $70,000.00 annuity and the IRAs claimed by Debtor did not qualify as an exempt property under South Dakota law. Grand Labs also claimed that the IRA exemptions were excessive as governed by S.D.C.L. § 43-45-18.

Debtor responded on January 27, 1998. He said he is entitled to $3,000.00 per year from the annuity but conceded the remainder was estate property. He also stated that his IRA accounts were

derived from a qualified employee benefit plan as that term is used in S.D.C.L. § 43-45-17. Grand Labs' other objections were not addressed in the response.

Grand Labs filed its proof of claim on February 5, 1998. It stated it had a claim for $155,239.00 that was partially secured by the lots in Lincoln County. Attached to the proof was a copy of the state court judgment on which the claim is based.

On April 17, 1998, Grand Labs moved for dismissal or conversion of the case to Chapter 7. It argued Debtor had no reasonable prospect of confirming a plan. Debtor responded on April 20, 1998 that he had now proposed a confirmable plan.

Confirmation of Debtor's second plan was denied May 7, 1998. Debtor filed a third plan, dated May 15, 1998. Trustee Dale A. Wein objected to the plan because it did not include a liquidation analysis, Schedule I and J failed to reflect contributions of Debtor's non-filing spouse, and some expenses seemed excessive. The Trustee also wanted a copy of Debtor's 1997 income tax return to assess feasibility and good faith. Grand Labs objected on May 22, 1998. It also pointed out that the plan did not contain a liquidation analysis, some preferential or fraudulent transfers had not been recovered, its secured claim was not recognized, interest was not paid on the secured claim, and the plan was not offered in good faith.

A combined evidentiary hearing was held July 8, 1998 on the

confirmation of Debtor's May 15, 1998 plan, Grand Labs' objections to Debtor's claimed exemptions, and Grand Labs' motion to dismiss or convert. Appearances included A. Thomas Pokela for Debtor, Trustee Wein, and Robert E. Hayes for Grand Labs.

Both Debtor and his wife testified why certain real and personal property was transferred from joint ownership to the wife's sole ownership around the time of the state court lawsuit with Grand Labs. Both tried to explain their present and anticipated incomes. Debtor also testified about the annuity of which he is a beneficiary. He conceded $250.00 of the monthly benefits could be claimed exempt. Several related exhibits were received. An amended Schedule I was submitted as an exhibit but it has not been filed with the Clerk. The amended Schedule I indicated the couple's combined income was $7,858.00, which was still short of Debtor's monthly expenses by $212.00. Several exhibits requested by the Court were received from Debtor after the hearing.

II.

All Chapter 13 plans must meet several requirements. The first four requirements apply to all types of claims. The plan must comply with the Code, provide for the payment of all clerk's fees at or before confirmation, be proposed in good faith, and pay creditors as much they would receive in a Chapter 7 liquidation. 11 U.S.C. §§ 1325(a)(1), (2), (3), and (4).

Good faith. The good faith requirement under § 1325(a)(3) is a factual determination for the Bankruptcy Court. *Handeen v. LeMaire (In re LeMaire)*, 898 F.2d 1346, 1349 (8th Cir. 1990). The court must consider whether the debtor has stated his debts and expenses accurately, whether the debtor has made any fraudulent misrepresentations to mislead the court, or whether the debtor has unfairly manipulated the Code. *Id.* (quoting therein *Education Assistance Corp. v. Zellner (In re Zellner)*, 827 F.2d 1222, 1227 (8th Cir. 1987). Further, the totality of the circumstances approach first recognized in *Zellner* remains. *Id.* at 1349. Thus, it is also appropriate for the court to consider factors such as the type of debt sought to be discharged and whether that debt is non dischargeable under Chapter 7, the debtor's motivation and sincerity in seeking Chapter 13 relief, and discrimination among claim holders. *Id.* at 1349-50 and 1350 n.5. The purpose or spirit of Chapter 13 should not be abused. *Id.* at 1350. Pre-filing conduct is not determinative of good faith but is relevant. *Id.* at 1352. Relief should be limited to honest debtors who seek to reinstate themselves in the business world. *Id.*

Good faith should be evaluated on a case-by-case basis. *Id.* at 1353. The weight accorded each factor will vary with the circumstances of the case. *Id.*

Best interests of creditors test. To satisfy § 1325(a)(4),

the debtor's plan must provide that all creditors will get at least as much as they would if the debtor's non exempt assets were liquidated in a Chapter 7 case. The estate to be hypothetically liquidated under this section includes all pre- and post-petition estate property under §§ 541 and 1306 that is not exempt. *Zellner*, 827 F.2d at 1225. Ideally, a liquidation analysis should be attached to the proposed plan. Section 1325(a)(4) establishes the *minimum* plan payments a Chapter 13 debtor must make; it is separate from the good faith requirement of § 1325(a)(3) or the disposable income requirement of § 1325(b)(1). *See Stuart v. Koch (In re Koch)*, 109 F.3d 1285, 1288-90 (8th Cir. 1997).

Disposable income. Certain other confirmation requirements must be met that depend on the type of claim presented. Unsecured claim holders must receive, upon their objection, the debtor's disposable income over the three-year term of the plan. 11 U.S.C. § 1325(b). As stated above, these required payments of disposable income are in addition to the minimum payments required under the best interest of creditors test. *Compare* 11 U.S.C. §§ 1325(a)(4) and 1325(b)(1); *Koch*, 109 F.3d at 1288-89. Disposable income is that income - from exempt or non exempt sources - that is not reasonably necessary for the support of debtor or his dependents. 11 U.S.C. § 1325(b)(2); *Koch*, 109 F.3d at 1289.

III.

Based on the totality of the circumstances presented in this case, the Court concludes that Debtor has not proposed his modified plan of May 15, 1998 in good faith. Several facts are demonstrative.

First, Debtor has not presented sufficient evidence to show that his IRAs are exempt under S.D.C.L. § 43-45-16. There has been no showing that these funds were initially in a qualified employee benefit plan as described by § 43-45-17 and that the exemption still applies if qualified plan funds are rolled into an IRA.

Second, the plan does not recognize that both the IRAs and the entire monthly annuity payments may constitute disposable income. As discussed in *Koch*, a debtor's income in a Chapter 13 case includes both exempt and non exempt sources. *Koch*, 109 F.3d at 1289. Though these exempt funds were obtained pre-petition, that may not exclude them from disposable income. *See Koch*, 109 F.3d at 1290.

Debtor's plan also has not been proposed in good faith because his current Schedule I is incomplete. Though an amended Schedule I was offered as evidence, a verified copy has not yet been filed and noticed in compliance with F.R.Bankr.P. 1009(a). The evidence also indicates that other schedules may be inaccurate or incomplete.

The final indicator of Debtor's lack of good faith in proposing this Chapter 13 plan is his and his wife's transparent

arrangements regarding ownership of property and businesses in which they are jointly involved. These inconcrete business arrangements appear to have been triggered by both Grand Labs' litigation and judgment and Debtor's bankruptcy rather than any specific business purpose. As an example of their own confusion about their businesses and who owns what and does what, Debtor's schedules state he gave, as security for his wife's claim against him, a mortgage on property owned by a corporation of which his wife is the sole shareholder.

In addition to Debtor's lack of good faith, confirmation of Debtor's May 15, 1998 plan must be denied because it is not feasible. The source and amounts of Debtor's income are unclear and quite tenuous. Even under the unfiled Schedule I and the current schedule J, Debtor's expenses still exceed his and his wife's income.

Debtor must file by October 5, 1998 the needed amendments to his schedules. The Court will give Debtor until October 19, 1998 to file another modified plan and notice it (on shortened notice) for a confirmation hearing on November 3, 1998. If a plan is not confirmed by November 4, 1998, Grand Labs' motion to dismiss will be granted upon an affidavit of default by Attorney Hayes.

In light of Debtor's substantial assets (exempt and non exempt), the modified plan may need to provide for the full payment of all claims to establish good faith under § 1325(a)(3) and to

meet the disposable income requirement of § 1325(b)(1) as discussed in *Koch*. The modified plan must treat Grand Labs' claim as set forth in Grand Labs' proof of claim since no objection to it has been filed. 11 U.S.C. § 502(a) and F.R.Bankr.P. 30012(f). The modified plan will also need to treat Jeralyn Haffer's claim as unsecured since testimony established her claim is not secured by any estate property. To do otherwise would perpetuate Debtor's lack of good faith.

An appropriate order will be entered.

Dated this 18 day of September, 1998.

BY THE COURT:

Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk
By: _____
Deputy Clerk
(SEAL)

UNITED STATES BANKRUPTCY COURT
SEAL

CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: _____
Date: 9-21-98

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

SEP 21 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

Case: 97-41065 Form id: 122 Ntc Date: 09/21/98 Off: 4 Page : 1
Total notices mailed: 5

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Aty	Pokela, A. Thomas PO Box 1102, Sioux Falls, SD 57101
Trustee	Wein, Dale A. Bankruptcy Trustee, PO Box 1329, Aberdeen, SD 57402-1329
Aty	Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty	Hayes, Robert E. PO Box 1030, Sioux Falls, SD 57101-1030