

Chapter 13 confirmation
Good faith
Party in Interest

Richard and Joyce Ogden, Case No. 04-60389-fra13

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Unpublished

Objection to confirmation of the debtors' chapter 13 plan of reorganization was made by a creditor who had sold a business to a trust controlled by the debtors. After the sale, the debtors caused the receivables of the business to be transferred to a separate company or trust controlled by the debtors. This company collected the income from the business, while the trust which had purchased the business defaulted on its obligation to make payments to the secured creditor, causing the secured creditor to foreclose on the remaining assets of the business. The objecting creditor eventually sued the various debtor-controlled entities and obtained a judgment finding the transfers to be fraudulent. At the time the bankruptcy was filed, there was an action pending in U.S. District Court against the debtors personally.

Debtors argued that the objecting party was not a "party in interest," because it had not filed a proof of claim, and thus was not a proper party to file an objection to confirmation under Code §1324. In rejecting debtors' argument, the court adopted a liberal definition of "party in interest," as anyone who has a practical stake in the outcome of a case, whether or not they have filed a proof of claim.

The court denied confirmation on a number of grounds. First, given the debtors' pre-petition history of engaging in a pattern of activity designed to thwart the interests of creditors, and the fact that those activities may continue post-petition (debtors had not dismantled their web of interrelated business entities), the court found that the plan had not been proposed in good faith. Second, a car debtors had purchased for cash had been transferred in a sham transaction to a trust to which the debtors were purportedly making payments. The value of the car was not, and should have been, part of the Best Interest of Creditors test. Finally, it was determined that the plan was not feasible as it made no provision for payment of priority tax claims. Debtors were given 45 days to submit a modified plan, or the case would be dismissed.

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 04-60389-fra13
RICHARD T. OGDEN and)
JOYCE M. OGDEN,)
) MEMORANDUM OPINION
) Debtors.)

After a long and confusing financial ride, Debtors now seek refuge in Chapter 13. For the reasons set out in this opinion, confirmation of the Debtors' proposed plan will be denied; however, the Court will not, for now, foreclose any possibility of reorganization.

I. PROCEDURAL ISSUES

The Debtors' proposed plan was filed on February 3, 2004 (Doc. No. 11). The confirmation hearing was conducted, after several postponements, on September 15, 2004. Objections to confirmation have been filed by the Internal Revenue Service (Doc. No. 12), Oregon Department of Revenue (Doc. No. 14), creditors

1 Gloria and Robert Jakobitz (Doc. No. 18), and the Trustee (Doc. No.
2 45). The Trustee's objection includes a motion to dismiss the case.

3 Mr. and Mrs. Jakobitz allege that Debtors are indebted to
4 them because of events surrounding the sale of the Jakobitzes'
5 business to a trust controlled by the Debtors. They have not filed
6 a proof of claim. The Debtors assert that the Jakobitzes lack
7 standing to object to confirmation because of their failure to file
8 a proof of claim. They rely on In re Stewart, 46 B.R. 73 (Bankr.
9 D.Or. 1985) (Hess, C.J.). In that case the Court held that an
10 objecting creditor was not a "party in interest" because it had not
11 filed a proof of claim. Since the creditor was not a party in
12 interest, it had no standing to object to confirmation.

13 Code § 1324 provides that:

14 After notice, the court shall hold a hearing on
15 confirmation of the plan. A party in interest may
16 object to confirmation of the plan.

17 The term "party in interest" is not defined in the Code.
18 Case law has characterized a "party in interest" as anyone with a
19 stake in the outcome of the case. See Davis v. Mather (In re Davis),
20 239 B.R. 573 (BAP 10th Cir. 1999)(party in interest includes those
21 whose pecuniary interests are directly affected by the bankruptcy
22 proceedings as well as those who have an interest in the property to
23 be administered and distributed under the Chapter 13 plan); In re
24 Amatex Corp., 755 F.2d 1034, 1041-44 (3d Cir. 1985)(anyone who has a
25 practical stake in the outcome of a case); In re Johns-Manville
26 Corp., 36 B.R. 743, 754 (Bankr. S.D.N.Y. 1984)(anyone who will be

1 impacted in any significant way in the case). It is not clear that
2 the interest has to be economic, or that the allowance or payment of
3 a claim is the only basis for an "interest." A person may, for
4 example, have an interest in the outcome of a Chapter 13
5 confirmation because the discharge in Chapter 13 is more extensive
6 than that allowed in Chapter 7. § 1328. This is precisely why the
7 Jakobitzes are objecting: they believe that Debtors' liability to
8 them may be discharged in a Chapter 13 case, but will not be under
9 Chapter 7.

10 In my view, the Jakobitzes are "parties in interest," and
11 have standing to object to Debtors' efforts to discharge any debt
12 they may have to the Jakobitzes. Had Congress intended that the
13 right to object be limited to creditors, or holders of claims (each
14 of which is defined), it would have said so. Since it did not, it
15 stands to reason that the right to object under § 1324 is not
16 limited to those who have filed a proof of claim.

17 II. BACKGROUND

18 A. Debtors' Family Trusts

19 The principal feature of the Debtors' financial life is the
20 creation of a series of trusts and limited liability corporations.
21 The trusts were created with the advice and assistance of a company
22 known as National Trust Services. The Debtors' intention in
23 creating the trusts was to "avoid liability." In theory, the
24 Debtors avoid personal liability respecting their business and
25 personal transactions by conducting their financial life through a
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1 series of supposedly independent trusts. Of course, another way to
2 characterize the arrangement is to say that the effect of the trusts
3 is to put the Debtors' assets beyond the reach of their creditors.

4 At the center of the scheme is the Ogden Family Trust.
5 Satellite trusts and LLCs include Oak Den (a pun on Ogden?) LLC, the
6 Ogden Family Freedom Trust, said to be a charitable trust,
7 Timberline Telecom LLC, the "Mom's Bus" Trust, and a number of other
8 entities. The central trust was originally funded from the proceeds
9 of the sale of the Debtors' home in California. There ensued a
10 series of inter-trust transfers, including:

11 - Real property was transferred to the Southern Oregon Trust,
12 controlled by the Debtors' parents. While the property originally
13 belonged to the Debtors, or their trust, they are now paying rent to
14 the parents' trust.

15 - The family trust transferred cash to the Freedom
16 (charitable) Trust, which then purchased a van for the benefit of
17 the Mom's Bus Trust. Mom's Bus was dissolved and the vehicle
18 returned to the charitable trust, which in turn transferred it to
19 another charitable trust controlled by a neighbor in Josephine
20 County. The Debtors agreed to make monthly payments to the
21 neighbor's charitable trust to pay for the van.

22 - One or more of the family trusts have made a substantial
23 contribution to the legal fees owed personally by the Debtors.

24 B. Jakobitz Litigation
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1 In April 1999, the Debtors negotiated the purchase from Mr.
2 and Mrs. Jakobitz of the Jakobitzes' shares in ECI, a local
3 telecommunications company. The purchaser was Oak Den Ventures, a
4 trust created by the Debtors.¹ The contract of sale provided that
5 the Oak Den Trust would, for approximately \$590,000, buy all of
6 Jakobitzes' shares in ECI Communications, Inc. In addition, the
7 purchaser undertook to pay lines of credit owed to Wells Fargo Bank
8 and American Express, which lines were owed by the corporation and
9 guaranteed by the Jakobitzes. To secure payment, the sellers
10 "retained" a security in ECI's receivables until the amount due to
11 them was paid in full. However, ECI does not appear to be a party
12 to the agreement, and there is no evidence in this record that ECI
13 itself granted a security interest in any assets. Likewise, there
14 is no evidence of any action to perfect the security interest,
15 whatever it may actually have been.

16 Two other aspects of the transaction are worth noting: first,
17 there was clear and unmistakable disclosure to the Jakobitzes that
18 they were dealing with a trust, and not with the Debtors
19 individually. Second, and related to the first: there is no
20 provision for any personal guarantee of any obligation to Jakobitz
21 by the Debtors.

22 Debtors' testimony at the confirmation hearing was that ECI
23 had been losing substantial amounts of money every month, and that

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25 ¹ Strictly speaking, the Oak Den Ventures Trust was created by the Ogden Family Trust.
26 Such niceties aside, all of the trusts and corporations involved were clearly under the control of the Debtors.

1 they were unable to turn it around. Jakobitz maintained that the
2 real value of the company lay in the fact that it possessed a number
3 of accounts, which gave it value to larger telecommunication
4 companies which were in the process of buying up smaller ones.

5 After the sale closed, Oak Den's trustees (in other words -
6 the Debtors) caused ECI to transfer its receivables to a separate
7 company controlled by the Debtors or their trusts. This company
8 collected ECI's income, while ECI defaulted on its obligations to
9 Wells Fargo, forcing a sale of ECI's assets that were collateral.
10 Eventually, the collateral was transferred to yet another Debtor-
11 controlled entity.

12 Jakobitz eventually sued the various Debtor-controlled
13 entities, and obtained judgments finding the transfers to be
14 fraudulent. There was, at the time this case was commenced, an
15 action against the Debtors personally in the District Court for this
16 district.

17 After the collapse of the telephone venture, Mr. Ogden
18 obtained employment from a company called Silver Cache. Silver
19 Cache is owned and operated by the Ogdens' son-in-law. Its
20 capitalization and source of funds remain something of a mystery on
21 this record. The company reported gross sales of between \$175,000
22 and \$220,000 for its fiscal year of 2002-2003. However, it reported
23 zero dollars in taxable income on its last returns.

24 Mr. Ogden is, essentially, a salesman for the company. He is
25 to paid \$2,600 per month. Payment is presently being made directly
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1 to him as what he characterizes a "W-2 employee." Previously, Mr.
2 Ogden was paid by Ogden and Associates, LLC, which received payment
3 from Silver Cache on account of Ogden's activities.

4 III. ANALYSIS

5 A. Good Faith

6 In order to confirm a plan of reorganization, the Court must
7 find that "the plan has been proposed in good faith and not by any
8 means forbidden by law;" Code § 1325(a)(3). This section requires
9 more than an absence of illegality or malice.

10 [T]he proper inquiry is whether the [debtor] acted
11 equitably in proposing [his] Chapter 13 plan. A
12 bankruptcy court must inquire whether the debtor has
13 misrepresented facts in his plan, unfairly manipulated
14 the Bankruptcy Code, or otherwise proposed his Chapter
15 13 plan in an inequitable manner. . . . [T]he court
16 must make its good-faith determination in the light of
17 all militating factors.

18 In re Goeb, 675 F.2d 1386, 1390 (9th Cir. 1982). A debtor's good
19 faith should be determined on a case-by-case basis. Id.

20 It has been questioned whether a plan may be said to be in
21 good faith if the debtor has liabilities that may be excluded from
22 discharge in a Chapter 7 case, and the proposed plan is
23 indistinguishable from a Chapter 7 in its financial effect. See In
24 re Warren, 89 B.R. 87 (BAP 9th Cir. 1988); In re Le Maire, 898 F.2d
25 1346 (8th Cir. 1990). The Debtors' case is indeed indistinguishable
26 from a Chapter 7. They propose to pay \$100 a month for 36 months,
resulting in an estimated 1% dividend to general unsecured
creditors, and to retain their vehicle and other personal property.

1 If a debtor is devoting his or her entire disposable income
2 to plan payments, however, the fact that the plan results in a low
3 percentage repayment to unsecured creditors is not relevant in
4 determining good faith. State of Oregon v. Seldon (In re Seldon),
5 121 B.R. 59, 62 (D.Or. 1990). Moreover, the mere fact that a
6 chapter 13 plan proposes to discharge debts otherwise
7 nondischargeable under chapter 7 is not sufficient in itself to
8 prevent confirmation, Id, but is another factor the court may weigh
9 in its good faith analysis.

10 The Jakobitzes assert that the Debtors' liability to them
11 would be excepted from discharge in a Chapter 7 case under Code
12 § 523(a)(2), (4) or (6). It is not clear on the record before the
13 Court that this would necessarily be the case. There is no doubt
14 that the Jakobitzes were mistreated by the Ogdens. However, it must
15 also be said that the transaction was not structured in a way to
16 give them much protection. There was no personal guarantee to
17 ensure the Ogdens were ultimately responsible for payment. The fact
18 that the Ogdens may have made it clear that they would not give a
19 guarantee does not relieve the Jakobitzes of the obligation to
20 insist on one if they want that sort of protection. It appears also
21 that ECI itself did not give a security interest in any of its
22 assets. In short, the Jakobitzes' dischargeability claims are
23 problematical.

24 This is not to say that discharge in Chapter 7 would be a
25 sure thing. There is considerable reason to believe that the
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1 Debtors cannot fully account for their financial history prior to
2 their bankruptcy. It is also apparent that there were several
3 transfers, including those that actually created the trusts, that
4 were intended to hinder or delay creditors. If that is the case,
5 discharge in Chapter 7 might be denied under Code § 727.

6 Finally, careful consideration should be given to the general
7 prepetition history, which discloses a pattern of activity designed
8 to thwart the interest of creditors. That these activities may
9 continue is demonstrated by the fact that the Debtors have failed to
10 wind up and liquidate their various trusts and other independent
11 entities as part of their reorganization. Given the totality of
12 these circumstances, the Court concludes that the Debtors' plan has
13 not been proposed in good faith, and should not be confirmed.

14 B. Best Interest

15 The plan must provide for payment, over its lifetime, of an
16 amount at least equal to what would be paid to creditors in Chapter
17 7. § 1325(a)(4). This plan fails to do so.

18 The family car, which is provided for in paragraph 4 of the
19 plan, was originally purchased for cash, with the money subject to
20 the Debtors' control. They have now, through a series of
21 transactions, transformed the arrangement so that they are making
22 monthly payments to an entity that purports to hold the security
23 interest. The transaction is a sham. There is no evidence that
24 payments are actually being made, or that the purported secured
25 creditor intends to enforce the agreement. What the transaction
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1 foreclose the possibility of reorganization altogether, and will
2 therefore order that the Debtors, if they elect to do so, shall
3 submit a modified plan within 45 days of the date of the order
4 accompanying this opinion. Should they decline to do so, or if the
5 plan they submit cannot be confirmed, the case will be dismissed
6 unless the Debtors elect to convert the case to one under Chapter 7.

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FRANK R. ALLEY, III
Bankruptcy Judge