UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In Re: **JERRY A. NARDELLA,** Debtor.	Case No.: 17-31934 (JKS) Judge: Hon. John K. Sherwood Chapter 11

DECISION AND ORDER RE: CONFIRMATION OF THE DEBTOR'S CHAPTER 11 PLAN

The relief set forth on the following pages, numbered two (2) through eight (8), is hereby **ORDERED**.

John K. Sherwood

HONORABLE JOHN K. SHERWOOD
UNITED STATES BANKRUPTCY JUDGE

Dated: April 24, 2020

INTRODUCTION

Jerry A. Nardella (the "Debtor") filed a Chapter 11 Plan that was not opposed by any creditor or the Office of the United States Trustee. At the confirmation hearing, the Court questioned whether the Plan was submitted in "good faith" because the Debtor was committing over $20,000 per month to pay a $2.2 million first lien on his principal residence, which is worth $1.8 million. Meanwhile, the unsecured creditors are receiving a 2.5% dividend. Obviously, the Debtor would be able to pay a better dividend to his unsecured creditors if he did not elect to devote the lion's share of his future income to remain in his fully encumbered luxury home. The Court asked the Debtor to submit supplemental pleadings to address this issue and reserved decision. For the reasons set forth below, the Court holds that the Plan will be confirmed subject to the condition that the Debtor clarify that Amex and Lakeland Bank will participate in the Class 5 distribution and increase the distribution to the extent necessary to maintain the 2.5% dividend provided under the Plan.

STATEMENT OF FACTS

1. The Debtor filed a Chapter 11 Plan of Reorganization (the "Plan") on March 11, 2019.[1]
2. The following table represents the different creditor classes and their treatment provided by the Debtor's Plan: [2]

Class	Description	Treatment
1	**Secured claim of Specialized Loan Servicing LLC.** Total claim amount = $2,236,859.59 + per diem interest after 2/28/19 in the amount of $115.35.	Judgment of $2,236,859.59 to be paid in 240 equal monthly installments of $12,972.88 + an escrow payment of $7,491.15 for a total monthly payment of

[1] ECF No. 66.
[2] *Id*. at 12-14.

		$20,464.03 commencing on the effective date of the Plan with interest calculated at 3.5% per annum.
2	**Secured Claim of Wells Fargo Bank, N.A.** Total claim amount= $973,070.94.	Reclassified as general unsecured and be paid consistent with Class 5. Pursuant to an agreement between the parties, $50,000 of Wells Fargo's claim is to be treated as secured with the balance of the claim falling to Class 5. [See Doc. 102].
3	**Secured Claim of Boiling Springs Savings Bank.** Total claim amount= $506,646.41.	Reclassified as general unsecured and be paid consistent with Class 5.
4	**Secured Claim of Estate of Leonard Rubin.** Total claim amount= $90,000	Reclassified as general unsecured and be paid consistent with Class 5.
5	**General Unsecured Claims.** (Classes 2, 3, & 4) Total claim amount= $1,569,717.35, plus approximately $146,000 of claims held by 3 unsecured creditors scheduled by the Debtor.	Payment Interval = Quarterly; Payment Amount/Interval = pro-rata distribution after payment in full of Chapter 11 Administrative expenses. Approximately $40,000 available for distribution to Class 5. Total Payout is approximately 2.5%. Quarterly Payment Amount = $3,000.

3. On March 3, 2020, the Court held a confirmation hearing regarding the Debtor's Plan. At the hearing, no creditor objected to confirmation. Ballots accepting the Plan were filed by every impaired creditor that cast a ballot – Wells Fargo, Boiling Springs and the Estate of Leonard Rubin. There were no ballots rejecting the Plan.[3]

[3] ECF No. 104.

4. At the confirmation hearing, the Court raised the issue of good faith with respect to the Plan under 11 U.S.C. § 1129(a)(3) and requested Debtor's counsel submit a brief addressing the issue.

5. On March 10, 2020, the Debtor submitted a Supplemental Brief and Certification in support of confirmation of the Plan.[4] The Supplemental Certification describes the relationship Debtor has with each of his creditors. The Debtor claims that when the 2008 financial crisis hit, his income significantly decreased thereby causing Wells Fargo to initiate a foreclosure action, which resulted in the Superior Court of New Jersey entering a final judgment against the Debtor. Because of the final judgment, the Debtor filed this Chapter 11 case.[5] Additionally, the Debtor claims that Boiling Springs funded many of Debtor's major real estate developments. Throughout the years, the Debtor has borrowed and paid back millions of dollars to Boiling Springs. The Debtor also notes that just prior to the financial crisis, the Debtor signed a lease with Boiling Springs. Boiling Springs later requested to be released from the lease and the Debtor obliged without asking for compensation. Finally, the Debtor claims that Leonard Rubin had been an investor and partner of his for years in many projects. The fourth mortgage is security for a project the Debtor and Rubin were working on before Rubin passed.[6]

ANALYSIS

The Debtor argues that the Plan is proposed in "good faith" and it is fair and equitable to all creditors. The Debtor highlights the fact that the four (4) creditors that have appeared in the

[4] ECF No. 106.
[5] ECF No. 106-2 at 2-3.
[6] *Id*. at 3-5.

case hold mortgages against the Debtor's residence and support the Plan. The Debtor also notes that there are no tax claims.[7] For the most part, the Court agrees with the Debtor's arguments. Wells Fargo, Boiling Springs and the Estate of Leonard Rubin are sophisticated parties and to the extent they have decided to accept the 2.5% dividend on their unsecured claims, it is not the Court's place to second guess. But there are other unsecured creditors in this case that have not appeared and have not filed proofs of claim – Amex ($6,000 undisputed claim), Credit Bureau of Lancaster County ($281 disputed claim) and Lakeland Bank ($139,823 undisputed claim).[8] Because this is a Chapter 11 case, Amex and Lakeland Bank do not have to file proofs of claim since their claims were scheduled by the Debtor as undisputed and they should share in the distribution to unsecured creditors (Class 5).[9] The Debtor has not addressed (or even acknowledged the interests of) these creditors who have not actively participated in the case or the confirmation hearing but will be bound by the terms of the Plan if it is confirmed. The Court is concerned by the treatment of unsecured creditors under the Plan and must decide whether it should impose the terms of the Plan on creditors who have received notice of the Plan but who have decided to remain silent.

Even in the absence of creditor objections, the Court has a duty to determine if a debtor's plan has been proposed in good faith.[10] The Third Circuit has stated that in the analysis of § 1129(a)(3)'s good faith requirement, "the important point of inquiry is the plan itself and whether such a plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code."[11] Where a debtor seeks to pay little to no dividend to creditors while

[7] ECF No. 106 at 3, 7.
[8] ECF No. 31, Schedule E/F at 1-2.
[9] *In re Stephanie's Too, LLC*, 2020 WL 119752, *2 (Bankr. D.N.J. Jan. 9, 2020) (citing *In re Dynamic Brokers, Inc.*, 293 B.R. 489, 495 (B.A.P. 9th Cir. 2003)).
[10] *In re Greate Bay Hotel & Casino, Inc.*, 251 B.R. 213, 221 (Bankr. D.N.J. 2000) (citing *In re Bolton*, 188 B.R. 913, 915 (Bankr. D. Vt. 1995)).
[11] *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150 n. 5 (3d Cir. 1986).

maintaining an expensive lifestyle, courts look to the debtor's budget and determine whether the debtor is making the best offer of payment to the creditors.[12] Additionally, a debtor's failure to use the "full reach of its disposable resources to repay creditors is evidence that the plan is not proposed in good faith because such conduct frustrates [the code's] objective."[13]

A case that addresses the issue of good faith where a debtor is making significant payments to secured creditors and meager payments to unsecured creditors is *In re Osborne*. That case involved a good faith objection to the debtor's proposed plan. The debtor's monthly income was projected to be $20,000 and the plan proposed to make $20,000 in total distributions to the general unsecured creditors over five (5) years.[14] The court reviewed the debtor's budget and stated, "[i]n light of the debtors' high cost lifestyle, the court cannot conclude that the plan will achieve a result consistent with the objectives and purposes of the Bankruptcy Code." Thus, the plan did not satisfy § 1129(a)(3).[15] The Court further stated, "the notion of a debtor receiving the privilege of a chapter 11 discharge, while making meager repayment to creditors and enjoying what many would view as a 'privileged' lifestyle, is likely to offend the integrity of the bankruptcy system and send the wrong message to the public."[16]

Similarly, the Court in *In re Harman* refused to confirm a plan after examining the debtor's budget and held that:

> . . .a debtor's failure to make anything close to the best offer of payment to the creditors violates both 11 U.S.C. §§ 1129(a)(3) and

[12] *In re Harman*, 141 B.R. 878, 889 (Bankr. E.D. Pa. 1992); *see also In re Osborne*, 2013 WL 2385136, *5 (Bankr. E.D.N.C. May 30, 2013); *In re Weber*, 209 B.R. 793, 797-98 (Bankr. D. Mass. 1997) (finding that "an individual debtor in Chapter 11 must make a sufficient financial commitment to creditors to satisfy the good faith requirement").
[13] *In re Walker*, 165 B.R. 994, 1001 (Bankr. E.D. Va. 1994); (citing *In re Kemp*, 134 B.R. 413, 415 (Bankr. E.D. Cal. 1991).
[14] *In re Osborne*, 2013 WL 2385136 at *4.
[15] *Id.* at *9.
[16] *Id.* at *10.

> (b)(1). It is not an act of 'good faith' to propose a plan in which the Debtors retain one hundred (100%) [percent] of the expenditure necessary to support a lavish lifestyle, and, consequently, require the creditors to either wait 30 years for payment or accept a guaranteed payment of fifteen (15%) percent—or twenty-five (25%) if they are lucky.[17]

The court noted that the debtor was making $400,000 annually, was maintaining a lavish lifestyle and was able liquidate one of his homes in order to provide for payment to creditors.[18] The court gave the debtor leave to amend the plan and suggested reductions in the debtor's monthly expenses.[19]

These cases illustrate the Court's concern here. If the Debtor did not choose to live in a $2 million home, he could use some of the funds now devoted to his mortgage debt to improve the dividend to his unsecured creditors. Such a plan would certainly be consistent with the objectives and purposes of the Bankruptcy Code. But the Debtor has decided that he would rather pay less to unsecured creditors and more to his first mortgagee so that he can retain his house. Though this occurs in many individual homeowner bankruptcy cases, it is rare to see such high mortgage debt even in New Jersey where real estate is expensive.

The best arguments in favor of confirmation are that the Debtor is insolvent, the Plan provides a better return to unsecured creditors than they would receive in a Chapter 7 case and every creditor that has appeared in the case supports confirmation. The Debtor has argued that he needs to live in an impressive house to entertain his out-of-town business associates. The Court does not give this argument much weight. As suggested above, this decision turns on the rights of

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[17] *In re Harman*, 141 B.R. at 889; *see also In re Kemp*, 134 B.R. at 415 (holding that a debtor with approximately $40,000 in monthly income, a monthly payment of $4,000 over ten (10) years on a $300,000 claim was inconsistent with the objectives of the Code).
[18] *Id.* at 888.
[19] *Id.* at 889.

the silent unsecured creditors, both of whom are sophisticated parties. Based on the record, they were served with the Plan and had the opportunity to object but did not. Thus, the Court may presume that they understood the terms of the Plan and did not oppose confirmation. Indeed, the key difference between this case and cases like *Osborne* and *Harman* cited above is the absence of objecting creditors. It should be clear that to the extent any creditor or the United States Trustee objected to confirmation on the grounds of good faith, the Court would have been sympathetic. Though confirmation of this Plan may send the wrong message to the public, the public view is best expressed by the creditors that have a financial stake in the outcome.

CONCLUSION

The Plan will be confirmed subject to the condition that the Debtor clarify that Amex and Lakeland Bank will participate in the Class 5 distribution. The inclusion of these claims in Class 5 must not reduce the return to general unsecured creditors below the 2.5% provided under the Plan. Thus, the Debtor will have to increase the payments to Class 5 to account for these claims. Counsel for the Debtor should submit a revised confirmation order which amends the treatment of Class 5 consistent with this decision.