

ORIGINAL

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U.S. COURTS
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Attorneys For: Citizens Community Bank

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF IDAHO

In the Matter of)	Bankruptcy No. 03-41775
)	
JOHN L. MERZLOCK,)	MEMORANDUM OF CITIZENS
)	COMMUNITY BANK IN SUPPORT OF
Debtor.)	OBJECTION TO CONFIRMATION
_____)	

COMES NOW CITIZENS COMMUNITY BANK, an Idaho Banking Company, a creditor in the above referenced proceeding, by and through Craig W. Christensen, its attorney of record, and in support of its Objection To Confirmation of Debtor's Second Amended Chapter 13 Plan and Related Motions dated November 4, 2003, and submits this Memorandum.

FACTS

1. That on or about the 13th day of March, 2003, Citizens Community Bank as Plaintiff, filed its adversary proceeding in the District Court of the Sixth Judicial District of the State of Idaho, in and for the County of Bannock under Case No. CV-2003-1198B naming the Debtor, John L. Merzlock, as a party Defendant.

2. That on June 12, 2003, the Honorable N. Randy Smith, District Judge entered Judgment against the Debtor, John L.

MEMORANDUM OF CITIZEN COMMUNITY
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Merzlock, in an amount of \$206,256.14, comprised of a principal balance of \$189,675.21, accrued interest of \$12,592.30, advances of 400.00, additional interest of \$2,405.52, costs of court of \$173.11, and attorney fees of \$1,000.00.

3. That Debtor, John L. Merzlock, filed his petition under Chapter 13 of Title 11 of the U.S. Code on August 22, 2003 under bankruptcy case No. 03-41775 in the United States Bankruptcy Court for the District of Idaho.

4. That Debtor, John L. Merzlock, failed to file all schedules, the Statement of Affairs, and the Chapter 13 Plan on August 22, 2003 and was given an additional fifteen (15) days to file the same pursuant to Rule 1007(c).

5. That Debtor, John L. Merzlock, filed his Motion To Extend Time To File Schedules on or about September 8, 2003.

6. The Honorable Jim D. Pappas, Chief U.S. Bankruptcy Judge, executed his Order Granting Motion To Extend Time To File Schedules and granted Debtor until on or before September 15, 2003 to file his schedules, the Statement of Affairs, and the Chapter 13 Plan.

7. That Debtor, John L. Merzlock, failed to file his schedules, Statement of Affairs, and the Chapter 13 Plan on or before September 15, 2003; the schedules, Statement of Affairs, and the Chapter 13 Plan were not filed by Debtor, John L. Merzlock, until September 16, 2003.

8. That Debtor, John L. Merzlock, had a judgment rendered against him in a separate State Court proceeding for in excess of \$1.0 million of damages and punitive damages.

9. That Debtor, John L. Merzlock, in his schedule F reflects unsecured debts of \$518,887.74.

10. That Debtor, John L. Merzlock, is indebted to Citizens Community Bank in the judgment amount of \$206,246.14, which is an unsecured claim as reflected by Amended Proof of Claim filed by Citizens Community Bank in the bankruptcy proceedings.

11. That Debtor, John L. Merzlock, does not qualify under 11 U.S.C. §109(e) as "an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than (\$269,250.00) \$290,525.00..."

FEDERAL STATUTES

1. 11 U.S.C. §109(e) provides in part as follows:

"Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than (\$269,250.00) \$290,525.00 and noncontingent, liquidated, secured debts of less than (\$807,750.00) \$871,550.00 or an individual with regular income and such individual's spouse, except a stockbroker or a commodity broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than \$269,250 \$290, 525 and noncontingent, liquidated, secured debts of less than (\$807,750.00) \$871,550.00 may be a debtor under chapter 13 of this title."

CASE LAW

1. LIQUIDATED DEBT.

- A. *In re HO*, 274 B.R. 867, 39 Bankr.Ct.Dec. 92 (9th Cir.BAP (Cal.),2002.)

A debt is liquidated if the amount of the debt is readily determinable. *In re Slack*, 187 F.3d 1070, 1073 (9th Cir.1999); *In re Nicholes*, 184 B.R. 82, 89 (9th Cir. BAP 1995). Whether a debt is subject to "ready determination" depends on whether the amount is easily calculable or whether an extensive hearing is needed to determine the amount of the debt. *Slack*, 187 F.3d at 1074. See also *Nicholes*, 184 B.R. at 89 ("The test for 'ready determination' is whether the amount due is fixed or certain or otherwise ascertainable by reference to an agreement or by a simple computation.").

The panel in *Slack* stated that it was holding that "a debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided." 187 F.3d at 1075. However, that holding must be tempered by prior Ninth Circuit precedent (which *Slack* did not overrule) and the facts of that case.

Slack was a motion to dismiss that was granted early in the case on the premise that noncontingent, liquidated, unsecured debt reflected in certain state court litigation by an insurance company suing to recover payments exceeded the then-applicable \$250,000 limit. Two events had occurred before bankruptcy: the debtor had stipulated that plaintiff's actual damages were \$255,954 and the state court had issued a tentative decision that the debtor was jointly and severally liable for \$659,971. After the case was dismissed, but while the appeal was pending, the state court entered judgment against the debtor for \$854,060 (\$455,480 for the relevant plaintiff).

Stripped of its dicta, *Slack* stands for two straightforward propositions: first, **postpetition events are irrelevant to whether a debt is liquidated on the date of filing bankruptcy**, 187 F.3d at 1073; and second, a debtor's prebankruptcy stipulation in state court that a plaintiff suffered damages of \$255,954, liquidated the debt for § 109(e) purposes, making it "readily ascertainable, notwithstanding the fact that the

question of liability has not been finally decided." Id. at 1075.

Unfortunately, those two straightforward propositions are clouded by the ambiguous discussion in Slack of the effect of disputes over liability. In some places Slack appears to reject any link between liquidation and liability: "Therefore, the concept of a liquidated debt relates to the amount of liability, not the existence of liability. Even if a debtor disputes the existence of liability, if the amount of the debt is calculable with certainty, then it is liquidated for the purposes of § 109(e)." [*874] 187 F.3d at 1074-75 (citation omitted) (internal quotations omitted). In other places, Slack suggests liability does matter: "Whether the debt is subject to 'ready determination' will depend on whether ... an extensive hearing will be needed to determine ... the liability of the debtor." Id. at 1074. Finally, the Slack panel noted that, in a previous decision that did not involve a liability dispute, it had "declined to resolve the question whether a dispute regarding liability can render a debt unliquidated," 187 F.3d at 1075, and then said:

We resolve that question today. We hold that a debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided.

- B. In re PAPATONES, 143 F.3d 623, 40 Collier Bankr.Cas.2d 71 (C.A.1,1998.)

The question before us is whether the "liquidated" unsecured indebtedness owed by appellant James N. Papatones on the date he filed his chapter 13 petition totaled less than \$250,000, a prerequisite to eligibility for chapter 13 relief. See Bankruptcy Code [*624] § 109(e), 11 U.S.C. § 109(e). (FN1) The United States Bankruptcy Court for the District of Maine and the Bankruptcy Appellate Panel for the First Circuit responded in the negative.

We conclude that Papatones was ineligible for chapter 13 relief because the amount in which he was indebted to appellee Edward Elliott on the date of the filing of the chapter 13 petition had been adjudicated--at \$276,606.87--by a court of competent jurisdiction prior to the chapter 13 petition and neither the prepetition adjudication itself nor the postpetition docketing

of the judgment against Papatones violated the automatic stay which took effect immediately upon the filing of the chapter 13 petition.

2. **COMMUNITY PROPERTY AS DISPOSABLE INCOME.**

- A. *In re HULL*, 251 B.R. 726, 2000 WL 1160603 (9th Cir.BAP (Wash.),2000.)

Section 1322(a)(1) requires that the plan "provide for the submission of all or such portion of future earnings or other future income of the debtor ... as is necessary for the execution of the plan." (emphasis added). Section 1325(b)(1)(B) states:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan ... the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

The central issue is: what was Hull's projected disposable income (for the duration of the plan) at the time of confirmation? See *Anderson v. Satterlee* (*In re Anderson*), 21 F.3d 355, 358 (9th Cir.1994). The legal question raised is whether Hull's community property interest in the income of his non-debtor spouse is part of Hull's "disposable income."

The Sixth Circuit has held that, in the absence of evidence of bad faith, Chapter 13 eligibility should normally be determined by the debtor's schedules, without regard to post-petition events. See *In re Pearson*, 773 F.2d 751, 757 (6th Cir.1985). We agree, with the qualification that the "bankruptcy court should look past the schedules to other evidence submitted when a good faith objection to the debtor's eligibility has been brought by a party in interest." *In re Quintana*, 107 B.R. 234, 239 n. 6 (9th Cir. BAP 1989), *aff'd*, 915 F.2d 513 (9th Cir.1990) (a Chapter 12 case, construing § 109(f), which by incorporating a definition in § 101 (then (17A), now (18A), is parallel in structure to § 109(e)).

This approach is consistent with the need for expediency in determining eligibility, recognized in *In re Nicholes*, 184 B.R. 82, 87 (9th Cir. BAP 1995). Accordingly, at the eligibility stage, a bankruptcy court is not required to conduct proceedings to determine the allowance of specific claims. See *In re Wenberg*, 94 B.R. at 635, observing that the debtor's objection to the amount of a claim is "more appropriately addressed in a proceeding to determine the allowance of a specific claim under § 502 and should be separate from the application of § 109(e)." The bankruptcy court's approach was generally consistent with these rules.

B. *In re WILKINS*, 2001 WL 474314, 2001 WL 474314 (Bkrtcy.N.D.Cal.,2001.)

The trustee argues that Wilkins is not eligible to be a Chapter 13 debtor because he has no regular income and therefore does not meet the requirements of § 109(e) of the Bankruptcy Code. The court is reluctant to rule that gifts from a relative can never be considered income, as to make such a blanket rule would make many debtors ineligible for Chapter 13 relief which may be the only way to avoid loss of a home or deal with tax problems. The court does not need to rule on this issue, however, because it finds that the plan is filed in bad faith.

Wilkins filed his plan solely to avoid the costs of litigation with a creditor in state court. He has no intent to do right by his creditors. He enjoys a nice standard of living due to his wife's trust. Regardless of legal niceties, the assets of the trust are clearly available to him for the things he wants, like a new home. (FN1) The amount he proposes to pay into the plan is arbitrary, minimal, and, to his creditor, meaningless. All of this, the court concludes, amounts to bad faith. Accordingly, the Trustee's objection to confirmation of the plan will be sustained and this Chapter 13 case will be dismissed.

C. *In re BROWN*, 250 B.R. 382, 2000 WL 967874 (Bkrtcy.D.Idaho,2000.)

The term "secured debt" is not defined in the Bankruptcy Code. However, "debt" means liability on a claim. 11 U.S.C. § 101(12). The Supreme Court has instructed that the terms "claim" and "debt," as used throughout the Code, should be

considered coextensive. *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552, 557-58, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) (since Section 101(11) of the Bankruptcy Code defines "debt" to mean "liability on a claim," this definition reveals Congress' intent that definitions of debt and claim be coextensive); *Quintana v. Commissioner of Internal Revenue Service (In re Quintana)*, 915 F.2d 513, 517 (9th Cir.1990).

Under Idaho law, a corporation is a distinct and separate legal entity. *Jordan v. Hunter*, 124 Idaho 899, 865 P.2d 990, [*385] 996 n. 5 (1993); *Alpine Packing Company v. H.H. Keim Company, Limited*, 121 Idaho 762, 828 P.2d 325, 326 (1991). Ownership of stock in a corporation does not equate to ownership of corporate assets. *Pincock v. Pocatello Gold and Copper Mining Company, Inc.*, 100 Idaho 325, 597 P.2d 211, 214 (1979). PTMC owns the assets securing FSB's claims; Debtors merely own the shares of stock of the company. See 2 *Collier on Bankruptcy*, § 101.30[3], pg. 101-96 (15th ed. rev.) ("[W]hile the individual's interest in the partnership or corporation (which could be 100%) would be property of the estate, the assets of the partnership or corporation would not be.")

The Court, respectfully, is not inclined to adopt the expansive approach taken in interpreting the Code in the cases cited by Debtors. There is clear and sound authority to the contrary from this Court emphasizing that a debtor must have an interest in the specific collateral in order for the debt to be considered secured in the debtor's case. *In re Maxfield*, 159 B.R. 587, 588 (Bankr.D.Idaho 1993). See also *In re Tomlinson*, 116 B.R. 80, 82 (Bankr.E.D.Mich.1990). To the extent this authority is inconsistent with the reasoning in the cases relied upon by Debtors, the Court declines to follow it.

For the reasons set forth above, the Court concludes the debts owed to FSB under Debtors' guarantees of the corporate debt are properly characterized unsecured debts in Debtors' individual Chapter 13 case for purposes of determining their eligibility for relief under Section 109(e). Because the total due FSB on the guaranteed debt is approximately \$275,000, Debtors have unsecured debts in excess of \$269,250. Accordingly, Debtors are not eligible for relief under Chapter 13 and FSB's Motion to Dismiss will be granted.

- D. *In re LENARTZ*, 263 B.R. 331, 2001 WL 650702 (Bkrtcy.D.Idaho,2001:)

Given Debtors' financial situation and the offensive manner in which they have incurred much of their debt, allowing Debtors to escape dismissal under Section 707(b) for substantial abuse is a result this Court cannot accept. That Debtors do not currently qualify for Chapter 13 relief not a sufficient reason to avoid the conclusion that Debtors' petition must be dismissed for substantial abuse of the provisions of Chapter 7. 11 U.S.C. § 707(b). And, while they cannot be compelled to do so, if Debtors genuinely desire bankruptcy relief, they could explore a voluntary conversion and offering a repayment plan under Chapter 11. 11 U.S.C. § 1307(d).

3. **NONCONTINGENT.**

- A. *In re MAZZEO*, 131 F.3d 295, 84 A.F.T.R.2d 99-6469 (C.A.2 (N.Y.),1997.)

There was nothing contingent about the appellant's State tax liability at the time of filing of his petition, and the amount of this liability is liquidated. It is based upon the actual signed returns with the agreed upon amounts, under oath and filed by the appellant, as President of his corporate employer. No computation is required at all. The same is true of the federal tax liens for Mazzeo's unpaid prior taxes.

"Liquidated" denotes the ability to readily and precisely compute the amount due; the test is whether the amount "is capable of ascertainment by ... simple computation." *In re Sylvester*, 19 B.R. 671, 673 (9th Cir. BAP 1982). Several courts have determined that a claim is unliquidated only when a court cannot determine the amount of the claim without an evidentiary hearing....

"Contingent" denotes a debt for which liability depends upon the occurrence of some future event or condition which may never be fulfilled.... A claim is not contingent if it has come into existence and is capable of being enforced at the time the petition is filed....

...Neither "noncontingent" nor "liquidated" is defined in the Code. However, the Code's definitions of "debt" and of the key component of the definition of debt provide guidance.

The term "debt" is defined simply as "liability on a claim." 11 U.S.C. § 101(12). "Thus, the meaning of 'claim' is crucial to our analysis" of the meaning of "debt." Pennsylvania Department of Public Welfare v. Davenport, 495 U.S. 552, 558, 110 S.Ct. 2126, 2130-31, 109 L.Ed.2d 588 (1990) ("Davenport[*302] "). The term "claim" is defined, to the extent pertinent here, as a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

The meaning of "noncontingent".

It is generally agreed that a debt is contingent if it does not become an obligation until the occurrence of a future event, but is noncontingent when all of the events giving rise to liability for the debt occurred prior to the debtor's filing for bankruptcy. See, e.g., In re Knight, 55 F.3d at 236; In re Nicholes, 184 B.R. 82, 88 (9th Cir. BAP 1995); Brockenbrough v. Commissioner, 61 B.R. 685, 686-87 (W.D.Va.1986); In re All Media Properties, Inc., 5 B.R. 126, 133 (Bankr.S.D.Tex.1980), aff'd, 646 F.2d 193 (5th Cir.1981); 2 L. King, Collier on Bankruptcy 109.06[2][b] (15th ed. rev.1997).

A claim is contingent as to liability if the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event.... [A] creditor's claim is not contingent when the "triggering event" occurred prior to the filing of the chapter 13 petition.

Thus, a contingent debt is "one which the debtor will be called upon to pay only upon the occurrence or happening of an extrinsic event which will trigger ... liability." Brockenbrough v. Commissioner, 61 B.R. at 686.

We cannot view a debt as contingent merely because the debtor disputes the claim, for that would make the word "contingent," in the definition of "claim," redundant. See generally In re Nicholes, 184 B.R. at 89 ("even a bona fide dispute over liability for a claim does not make the debt contingent"); id. ("Debts of a corporation listed on an individual debtor's schedules are not rendered contingent simply because the individual debtor's liability for the corporation's debts is at issue."). Nor, by a future "event," do we refer to a judicial determination as to liability and relief, for a claim may be noncontingent even though it has not been reduced to judgment.

See 11 U.S.C. § 101(5) (A). Although the creditor's ability to collect the sum due him may depend upon adjudication, that does not make the debt itself contingent. "In broad terms, the concept of contingency involves the nature or origin of liability. More precisely, it relates to the time or circumstances under which the liability arises. In this connection liability does not mean the same as judgment or remedy, but only a condition of being obligated to answer for a claim." In re Knight, 55 F.3d at 236

In sum, where an unsecured claim, though disputed, is both noncontingent and liquidated, the debt that is coextensive with that claim must be included in the calculation that determines the debtor's Chapter 13 eligibility. Since no further event was required to trigger Mazzeo's responsible-person liability to the State, and since the amount of that liability was easily ascertainable from the filed tax returns, his dispute as to the applicability of the responsible-person statute to him does not make his debt to the State either contingent or unliquidated.

CONCLUSION

The Debtor, John L. Merzlock has through his bankruptcy Petition, Schedules, and Statement of Affairs, even after amendments thereto, failed to show the Court that he is eligible for relief under Chapter 13 of Title 11 of the United States Code.

The debts disclosed on his Schedules, even after amendment, show an individual who does not have, and is incapable of generating "regular income" as required by 11 U.S.C. 109(e). Mr. Merzlock has also failed to include not only the community assets of the marital community, but he has further failed to include the income and expenses of his spouse, Karma Merzlock, in his calculations.

The Schedules, both at the time of the initial filing, and after amendments thereto, reflect that Mr. Merzlock, on the date of

the filing of his petition, was obligated to pay noncontingent, liquidated, unsecured debts of greater than \$290,525.00.

The Chapter 13 petition should be denied and the matter either dismissed or converted to a Chapter 7 proceeding.

RESPECTFULLY SUBMITTED this 21st day of November, 2003.

CRAIG W. CHRISTENSEN, CHARTERED

By Craig W. Christensen
Attorney for Citizens Community Bank

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 21st day of November, 2003, a true and correct copy of the foregoing Memorandum of Citizens Community Bank In Support Of Objection To Confirmation was mailed, postage prepaid thereon, to the below named parties:

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