

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re

**PETER MATTHEW CHATELL, f/o/o
CHATELL PROPERTY MANAGEMENT, INC.,**

Debtor.

CASE NO. 92-22651

DECISION & ORDER

BACKGROUND

On October 5, 1992, the Debtor, Peter Matthew Chatell (the "Debtor"), filed a petition initiating a Chapter 13 case. A Section 341 meeting of creditors and a hearing on confirmation were scheduled for November 4, 1992.

On his Statements of Financial Affairs and Current Income, the Debtor indicated that he had no income from any source for 1989 and 1990, \$10,000.00 in income from Chatell Property Management in 1991 and no current income. On the Summary of Schedules, the Debtor indicated that his current monthly expenditures were \$970.00.

On his Schedule of Assets and Secured Creditors, the Debtor listed real property at 136 Montpelier Circle ("Montpelier Circle"), Brighton, New York as being jointly owned with his former spouse and as having a value of \$135,000.00 with a mortgage against it in favor of Keycorp in the amount of \$97,000.00. The Debtor also listed his ownership of a 1985 Wellcraft Excalibur 27 foot boat which he valued at \$15,000.00 with a secured indebtedness against it in favor of Chase Lincoln First Bank ("Chase") in the amount of \$21,000.00 and a 1991 Corvette which he valued at \$32,000.00 with a secured indebtedness against it in favor of Nissan Motor Corp. ("Nissan") in the amount of \$34,355.00.

On his Schedule of Unsecured Creditors, the Debtor listed Surrey Hill Property Owners Association ("Surrey Hill") as an unsecured judgment creditor whose claim of \$12,000.00 was disputed and unliquidated. On his Schedules and the mailing matrix filed with the Court, the Debtor listed the address for Surrey Hill in care of a local accountant.

With his petition, the Debtor filed a Chapter 13 plan (the "Plan") which provided for the sale of Montpelier Circle, the surrender of the Wellcraft boat to Chase and the payment of regular monthly payments to Nissan on the 1991 Corvette. The Plan also proposed to classify unsecured claims into two separate classes and to treat the separate classes differently. The Plan proposed to place into Class 1 the criminal restitution portion of the Surrey Hill claim, believed to be in the amount of \$12,000.00, which was to be paid in full. Class 2 was to consist of the allowed claims of the remaining unsecured creditors, excluding Surrey Hill, which were to be paid a 10% dividend.

By motion (the "Lien Avoidance Motion") dated October 23, 1992 and made returnable at the time of the hearing on confirmation on November 4, 1992, the Debtor sought to avoid the judgment lien of Surrey Hill on Montpelier Circle pursuant to Section 522(f)(1). The Lien Avoidance Motion, which was served by the attorney for the Debtor on Surrey Hill at the address of its accountants, indicated that: Montpelier Circle was jointly owned by the Debtor and his non-debtor former spouse; the Debtor claimed a homestead exemption of \$10,000.00 in the property; there was a judgment lien in favor of Surrey Hill in the amount of \$85,976.60 which became a lien when the judgment was filed with the Monroe County Clerk's Office on June 24, 1992 (the "Surrey Hill Judgment"); the Judgment impaired his claimed exemption; and the Debtor would be commencing an adversary proceeding to avoid the Surrey Hill Judgment as preferential since it was filed within ninety days of the date of the petition.¹

By motion filed October 26, 1992 and by an order shortening time allowed to be made returnable on November 4, 1992 (the "Montpelier Circle Sale Motion"), the Debtor requested authority to sell Montpelier Circle in an arms length brokered sale pursuant to the terms of a purchase and sale contract dated June 20, 1992 (four days before the Surrey Hill Judgment was

¹ In fact the petition was filed 103 days after the filing of the Surrey Hill Judgment.

filed).

On November 2, 1992, Surrey Hill filed a cross-motion (the "Cross-Motion") to dismiss the Debtor's Chapter 13 petition which included opposition to confirmation of the Plan and the Lien Avoidance Motion. The Cross-Motion included as Exhibit A a copy of the complaint in the New York State Supreme Court action which resulted in the Surrey Hill Judgment. That complaint alleged that the Debtor, as the exclusive managing agent of Surrey Hill, had misappropriated and embezzled funds, committed fraud and converted Surrey Hill's assets, and that there were related criminal charges pending against him.

The Cross-Motion also asserted that the Debtor's petition should be dismissed, because the Debtor was not eligible to be a Chapter 13 debtor in that it was alleged that his non-contingent, liquidated, unsecured debts exceeded \$100,000.00 and he was not an individual with regular income within the meaning and intent of Section 109(e).

In opposition to confirmation of the Plan, the Cross-Motion asserted that it was not proposed in good faith as required by Section 1325(a)(3). The Cross-Motion highlighted certain factors which it believed should be considered by the Court in determining that the Debtor was not proposing his Plan in good faith. These factors were that: the Debtor listed Surrey Hill on his schedules and matrix at the address of its accountant rather than at its actual address or the address of its attorneys, even though its attorneys had represented Surrey Hill throughout the pending state court action and the Debtor's attorney had, prior to the filing of the petition, corresponded directly with those attorneys in an attempt to settle the Surrey Hill Judgment; the Lien Avoidance Motion and the Montpelier Circle Sale Motion had each been served on the accountants for Surrey Hill rather than on Surrey Hill itself or its attorneys; the Debtor listed Surrey Hill as having an unliquidated debt of \$12,000.00, notwithstanding that the Surrey Hill Judgment, which both the Debtor and his attorney had knowledge of, was for in excess of \$85,000.00; the purposes for the Debtors' Chapter 13 filing were not to reorganize but only to sell Montpelier Circle and obtain the \$10,000.00 exemption proceeds

for the Debtor and to obtain a superdischarge from the Surrey Hill Judgment that would otherwise be nondischargeable in a Chapter 7 case.

In opposition to the Lien Avoidance Motion, the Cross-Motion asserted that the Debtor was not entitled to a homestead exemption, since it was alleged that he did not actually reside at Montpelier Circle at the time of the filing of the petition and that the Surrey Hill Judgment clearly became a lien on Montpelier Circle more than ninety days before the filing of the petition and therefore was not preferential.

On November 4, 1992, the Lien Avoidance Motion, Montpelier Circle Sale Motion, Cross-Motion and hearing on confirmation were adjourned to afford the parties an opportunity to make written submissions to more fully present the contested issues to the Court and to attempt to negotiate a settlement of the various requests for relief.

Thereafter, a reply to the Cross-Motion was filed by the Debtor which asserted that he currently had disability and parental support income, was actively seeking employment out of state and had a job offer in Florida. In connection with the debt limitations set forth in Section 109(e), the Debtor asserted that the Surrey Hill Judgment was a default judgment, he disputed some of the alleged liability and he had a claim against Surrey Hill for two months worth of compensation in the approximate amount of \$10,000.00 which should be applied as an offset to the Surrey Hill Judgment.

On November 23, 1992, the Court denied the Surrey Hill Cross-Motion to Dismiss pursuant to Section 109(e) without prejudice to it being renewed by Surrey Hill as the Debtor's employment status and the nature and extent of the claims against him, especially the secured claims of Chase and Nissan, were further clarified.

On November 23, 1992, the Court granted the Montpelier Circle Sale Motion with the provision that the Chapter 13 Trustee (the "Trustee") hold the net proceeds of the sale in escrow, with the lien of the Surrey Hill Judgment to attach to the proceeds, including one-half of the proceeds which the Debtor's former spouse, Lou Ann Chatell, claimed were hers, pending the Court's

determinations: (1) on the Lien Avoidance Motion;² (2) of an adversary proceeding (the "Preference Action") which the Debtor commenced on November 4, 1992 to have the Court determine that the Surrey Hill Judgment should be avoided as a preferential transfer; and (3) on whether Lou Ann Chatell was entitled to one-half of the net proceeds of the sale of Montpelier Circle.³

In the Preference Action, the Debtor conceded that the Surrey Hill Judgment became a lien on Montpelier Circle more than 90 days before the filing of the petition but alleged that Surrey Hill was an insider of the Debtor within the meaning and intent of Section 101(31) of the Bankruptcy Code, and thus the extended one-year period for avoidability under Section 547(b)(4)(B) was applicable. By motion (the "Summary Judgment/Sanctions Motion") made returnable December 23, 1992, Surrey Hill moved for summary judgment and for the imposition of sanctions against the Debtor's attorney pursuant to Rule 9011. In the Motion, Surrey Hill established that it had entered into an October, 1990 Management Agreement with Brighton Service Group/CPM Services, Inc. to be its exclusive managing agent, a corporation of which the Debtor was the sole shareholder and director. Further, by the Affidavit of Joyce Smith, a member of the Board of Directors of Surrey Hill, it was established that Surrey Hill was not in any way one of the insider entities defined in the

² One of the issues to be determined in the Lien Avoidance Motion was whether the Debtor was entitled to a homestead exemption in Montpelier Circle.

³ Surrey Hill had, prior to the completion of the sale, asserted that Lou Ann Chatell did not have an interest in Montpelier Circle superior to its interest as a judgment lien creditor. In support of this contention, Surrey Hill alleged that under a December 11, 1991 Separation Agreement the Debtor's former spouse was to sign over her interest in Montpelier Circle upon the Debtor assuming all obligations under the Keycorp mortgage and taking steps necessary to have her released from the obligations under the Keycorp Note and Mortgage. However, by an agreement dated April 20, 1992, the same date that Surrey Hill had commenced its state court action against the Debtor, the Debtor and Lou Ann Chatell entered into a modification of the Separation Agreement which provided for the listing and sale of Montpelier Circle by October 1, 1992 and the division of the net proceeds equally between the parties. On October 3, 1993, Lou Ann Chatell commenced an adversary proceeding against the Debtor, the Trustee and Surrey Hill to obtain one-half of the net proceeds. That adversary proceeding was settled by Surrey Hill and Lou Ann Chatell on April 19, 1994.

non-exclusive list set forth in Section 101(31) and was not in any way an entity in control of the Debtor. On December 23, 1992, the Court granted the Summary Judgment Motion and reserved on the request for the imposition of sanctions, which it advised it would decide along with the hearing on confirmation and the Lien Avoidance Motion if the matter was not otherwise resolved by the parties.

All of these remaining matters continued to be adjourned pending the conclusion of the ongoing criminal proceedings against the Debtor and related discussions to determine whether the disputes among Surrey Hill, the Debtor and Lou Ann Chatell could be settled.

On February 12, 1993, Surrey Hill filed formal written objections to the confirmation of the Plan which alleged that: the Debtor was not a wage earner but simply sought the benefit of a Chapter 13 superdischarge without working to make plan payments; the Plan proposed to pay Surrey Hill less overall than it would receive as a creditor if the Debtor's case was a Chapter 7 case, because the Surrey Hill claim would be nondischargeable in and after a Chapter 7 proceeding; and the Debtor had throughout the Chapter 13 proceeding failed to proceed in good faith. The alleged elements set forth to show a lack of good faith were that the Debtor: (1) failed to send a good faith notice to Surrey Hill of the Chapter 13 proceeding, the Montpelier Circle Sale Motion and the Lien Avoidance Motion; (2) misrepresented the Surrey Hill indebtedness on his Schedules; (3) failed to appear for a Rule 2004 exam; (4) commenced a frivolous adversary proceeding to have the Surrey Hill Judgment avoided as preferential; and (5) made a questionable transfer to his former spouse of an interest in Montpelier Circle.

On January 21, 1994, the attorney for the Debtor advised the Court that the criminal proceeding against the Debtor had been resolved by a plea arrangement which included the Debtor making full criminal restitution to Surrey Hill in the amount of \$21,056.00.⁴

⁴ The funds to pay the criminal restitution were obtained from the Debtor's parents.

On December 10, 1993, the Debtor filed an amended Plan (the "Amended Plan") which provided that: the claim of Nissan would be treated as a fully secured claim with no payments to be made under the Plan, since the Debtor's 1991 Corvette had been surrendered to it;⁵ the claim of Chase would be treated as a fully secured claim with no payments to be made under the Plan, since the Wellcraft Boat had been surrendered to it; the claim of Lou Ann Chatell would be treated as a fully secured claim with no payments to be made under the Plan, with her interest in the net proceeds of the sale of Montpelier Circle to be determined in the pending adversary proceeding; unsecured creditors would be divided into two classes -- Class 1 would consist of Surrey Hill which was to be paid in full satisfaction of its claim the \$21,056.16 criminal restitution which it had already received and Class 2 would consist of the unsecured creditors, other than Surrey Hill, who had filed claims in the total amount of \$11,377.55 (these creditors would be paid a dividend of 10% on confirmation, which would be more than they would receive in a Chapter 7 case since the case would be a no asset case).⁶ The Amended Plan proposed that the Debtor would waive so much of his homestead exemption and right to receive the net proceeds of the sale of Montpelier Circle, being held in escrow by the Trustee, as would be necessary to make the 10% distribution to the Class 2 unsecured creditors and pay the Trustee's commissions. The Debtor contended that by the payment of the criminal restitution to Surrey Hill in the amount of \$21,056.16 Surrey Hill had already received more than the full amount of its alleged secured claim (\$12,577.58, which represents one-half of the net proceeds of the sale of Montpelier Circle as a judgment lien creditor if the Debtor had not claimed or been entitled to a homestead exemption) and 10% of the balance of its claim of \$75,582.59 which was unsecured (\$7,558.25), since these amounts would only be a total of \$20,135.84. As a result,

⁵ The surrender must have taken place after an order was entered on July 26, 1993 granting Nissan's motion to lift the stay to foreclose on the 1991 Corvette.

⁶ On December 9, 1993, the Amended Plan was served on Nissan and Chase and no objections to their treatment under the Amended Plan were filed by either of them.

the Debtor contended the Amended Plan should be confirmed since: (1) Surrey Hill and the other unsecured creditors were receiving more than they would receive in a Chapter 7 case; (2) the Plan was feasible, because the funds were available in cash; and (3) the clearly non-dischargeable portion of the Surrey Hill claim (the criminal restitution portion) was being paid in full.⁷

The final hearing on the confirmation of the Debtor's Plan, the Lien Avoidance Motion and the hearing on sanctions was scheduled for February 28, 1994. The Debtor was directed to file an amended budget of income and expenses (the "Amended Budget") with the Court before the final hearing and to appear at the final hearing.

At the February 28, 1994 hearing, Surrey Hill renewed its February 12, 1993 objections to confirmation. The Trustee also objected to confirmation of the Amended Plan as not being proposed in good faith, not being feasible and not complying with the provisions of Section 1325(a)(1) in that he believed that the treatment of Surrey Hill under the Amended Plan was in violation of Section 1322(b)(1) in that it unfairly discriminated against the non-criminal restitution portion of the Surrey Hill claim.

At the hearing, the Debtor testified that he filed Chapter 13 to get a fresh start because of his lost employment, heavy debts and recent divorce. As to why he filed a Chapter 13 case rather than a Chapter 7 case, even though he was unemployed at the time of the filing of the petition, the Debtor testified that he simply relied on the advice of counsel. He further testified that he did not know whether he would have filed bankruptcy if he did not have the Surrey Hill Judgment and that he always understood that any payments to be made to creditors in the Chapter 13 case would have to, and would in fact, be paid by his parents. The Debtor's testimony further indicated that although he was then currently employed, his parents, by his use of their credit card, were supplementing his

⁷ The Debtor contended that the disputed balance due on the Surrey Hill Judgment was not clearly non-dischargeable under Section 523(a).

income to the extent of between \$250.00 and \$450.00 per month in order for him to meet his monthly living expenses.

DISCUSSION

I. Request for the Imposition of Sanctions.

Bankruptcy Rule 9011⁸ requires the Court to impose an appropriate sanction if a document is signed in violation of the Rule. On the facts and circumstances of this case, the assertion in the Complaint in the Preference Action that Surrey Hill was an insider of the Debtor within the meaning and intent of Section 101(31)⁹ of the Bankruptcy Code was not well grounded in fact and not

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Rule 9011 provides:

(a) **Signature.** Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney, except a list, schedule, or statement, or amendments thereto, shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. A party who is not represented by an attorney shall sign all papers and state the party's address and telephone number. The signature of an attorney or a party constitutes a certificate that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. If a document is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person whose signature is required. If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

Rule 9011 has not been amended to reflect the changes in Federal Rule of Civil Procedure 11 made effective in December, 1993.

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Section 101(31) provides:

"insider" includes—

(A) if the debtor is an individual—

- (i) relative of the debtor or of a general partner of the debtor;
- (ii) partnership in which the debtor is a general partner;

warranted by existing law or a good faith argument for the extension, modification or reversal of existing law.

Section 101(31) of the Bankruptcy Code sets forth a non-exclusive list of insiders of the debtor for purposes of extending the avoidability period under Section 547(b)(4)(B) from ninety days to one year. Although this list of entities is non-exhaustive, the Official Comments and decided cases clearly indicate that for an entity not listed in Section 101(31) to be found to be an insider, which is a question of fact to be determined on a case by case basis, the entity must have a relationship with the Debtor which indicates that it has such control or influence over the Debtor that its relationships with the Debtor are not at arms length and require special scrutiny.¹⁰ Neither in the Complaint nor in any pleading filed or proceeding conducted in connection with the Preference

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- (iii) general partner of the debtor; or
 - (iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation—

- (i) director of the debtor;
- (ii) officer of the debtor;
- (iii) person in control of the debtor;
- (iv) partnership in which the debtor is a general partner;
- (v) general partner of the debtor; or
- (vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership—

- (i) general partner in the debtor;
- (ii) relative of a general partner in, general partner of, or person in control of the debtor;
- (iii) partnership in which the debtor is a general partner;
- (iv) general partner of the debtor; or
- (v) person in control of the debtor;

(D) if the debtor is a municipality, elected office of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

¹⁰ A transferee is an insider if, as a matter of fact, he exercises such control or influence over the debtor as to render their transaction not arms length. *In re Schuman*, 81 B.R. 583, 586 (9th Cir. BAP 1987); *In re Tanner*, 145 B.R. 672, 677 (Bankr. W.D.Wash. 1992).

Action or the Summary Judgment/Sanctions Motion did the Debtor or his attorney present facts from which the Court could have reasonably determined that Surrey Hill had such control or influence over the Debtor in connection with the entry of the Surrey Hill Judgment or otherwise that Surrey Hill was an insider of the Debtor within the meaning and intent of Section 101(31). If Surrey Hill had filed bankruptcy while the Debtor continued to act as its managing general agent, the Debtor might have been found to be an insider of Surrey Hill, but there is no factual basis whatsoever for this Court to determine Surrey Hill to be an insider of the Debtor.

Further, there was no case law provided to the Court by the attorney for the Debtor, or case law of which the Court is otherwise aware, which would indicate that Surrey Hill could have been found to be an insider of the Debtor.

Therefore, the Court believes that the Complaint in the Preference Action, signed by the attorney for the Debtor, alleging that Surrey Hill was an insider of the Debtor was not formed after a reasonable inquiry well-grounded in fact, nor was it warranted by existing law or a good faith argument for the extension, modification or reversal of existing law. As a result, it can only be assumed by the Court that the Complaint and the Preference Action were interposed for an improper purpose.

Since it appears that Rule 9011 has been violated, the Court is required to impose an appropriate sanction on the attorney for the Debtor.

As in the case of *In re Dwyer*, No. 93-20620 (Bankr. W.D.N.Y. December 31, 1993), the Court is cognizant that the awarding of sanctions meets two goals, deterrence and compensation. The Court is also aware that deterrence is the principal goal and the "courts should impose the least severe sanction that is likely to deter." *Jackson v. Law Firm of O'Hara, Ruberg, Osborne and Taylor*, 875 F.2d 1224, 1229 (6th Cir. 1989). As to the amount of sanctions to be imposed, the Court has considered the following additional factors: (1) the reasonable and necessary expenses incurred by Surrey Hill as a result of the commencement of the Preference Action; (2) the familiarity of the

attorney for the Debtor with the bankruptcy process; (3) the severity of the violation; and (4) the ability of the attorney for the debtor to pay any sanction imposed. *See Doering v. Union County Board of Chosen Freeholders*, 857 F.2d 191, 197 n.6 (3rd Cir. 1988).

The attorney for the Debtor has practiced in this Court for a number of years and continues to hold himself out as an attorney with expertise in both commercial and consumer bankruptcy cases. He is an attorney who the Court believes should, based on that experience, have detailed knowledge of the provisions of Sections 547 and 101(31).

On the facts and circumstances of this case, the Court finds that an award of sanctions against the attorney for the Debtor in the amount of \$1,400.00 is appropriate. In making its determination, the Court has reviewed the detailed time records and requests of the attorneys for Surrey Hill for services rendered in connection with the Preference Action. The sanction imposed, which is less than the amounts requested, represents what the Court finds to be the reasonable value of the services and disbursements to defend the Preference Action and an amount which the Court believes the attorney for the Debtor can pay.

The attorney for the Debtor shall pay the sanctions of \$1,400.00 to Surrey Hill within thirty days of the entry of this Decision and Order. Should he fail to make such payment, a separate judgment may be entered in favor of Surrey Hill.

II. Good Faith Plan.

Under 11 U.S.C. §1325(a)(3), a debtor must propose a Chapter 13 plan in good faith. The Debtor and his attorney assert that the Debtor's Plan was proposed in good faith, because it meets what they believe are fundamental purposes of Chapter 13 in that it pays creditors more than they would receive in a Chapter 7 case and it affords the Debtor a fresh start so that he is able to get on with his life, free of the Surrey Hill Judgment.

As this Court has previously advised in *In re Parlato*, No. 91-20179 (Bankr. W.D.N.Y. 1993), "good faith" in a Chapter 13 proceeding must be identified and defined on a case-by-case basis and requires a broad judicial inquiry into the totality of the circumstances to determine good faith. The initial inquiry is whether under the circumstances of the case there has been an abuse of the provisions, purpose of spirit of Chapter 13 or the Bankruptcy Code in the proposal. Once the issue of good faith has been questioned, the Debtor bears the burden to demonstrate that his plan has been proposed in good faith. This Court, in analyzing both the prior conduct and present circumstances of the Debtor, considers all relevant factors, including those enumerated in *In re Easley*, 72 B.R. 948 (Bankr. M.D.Tenn. 1987), and the many other cases which have addressed the issues of good faith filing and plan¹¹ to make a determination of good faith on a case-by-case basis.

One of the factors carefully scrutinized in making a determination of good faith, although not in itself determinative, is whether a substantial portion of the debts owed by the debtor might otherwise be nondischargeable in a Chapter 7 or 11 case. Section 1328(a) provides a broader discharge than provided in Chapter 7 or 11, often referred to as a "superdischarge," which allows a Chapter 13 debtor to discharge debts including those incurred as a result of fraud, embezzlement, larceny, and willful and malicious conduct. Clearly, confirmation of some Chapter 13 plans which would discharge such debts, especially if they are substantial, could result in an abuse of the purpose or spirit of Chapter 13 the Bankruptcy Code and the Bankruptcy System depending on other facts and circumstances presented.

Another factor carefully scrutinized in making a determination of good faith, especially in

¹¹ See, e.g. *In re Love*, 957 F.2d 1350 (7th Cir. 1992); *In re Schaitz*, 913 F.2d 452 (7th Cir. 1990). The Court of Appeals for the Seventh Circuit has set out a list of factors, among them was the nature of the debt, including the question of whether the debt would be dischargeable in a Chapter 7 proceeding, and the debtor's treatment of creditors both before and after the petition was filed. *Love*, 957 F.2d at 1357. The Court had considered in an earlier case whether the proposed payments indicated a fundamental fairness in dealing with one's creditors. *Schaitz*, 913 F.2d 452, 453 (7th Cir. 1990).

a case where there are substantial debts which might otherwise be nondischargeable outside Chapter 13, is the effort made by the Debtor to repay his creditors, including the percentage dividend proposed. Once again, this factor is not in itself determinative. However, a key inquiry is whether the Debtor is really trying to pay the creditors to the reasonable limit of his ability or trying to thwart them. *In re Schaitz*, 913 F.2d 452, 453 (7th Cir. 1990).

On all of the facts and circumstances of this case, the Court finds that the Amended Plan has not been proposed in good faith within the meaning and intent of Section 1325(a)(3). In essence, the Amended Plan, if confirmed, would allow the Debtor to have his parents purchase for him a superdischarge of the balance due on the Surrey Hill Judgment after they have paid the criminal restitution portion,¹² even though the balance of the amounts due to Surrey Hill might very well be determined to be nondischargeable in a Chapter 7 or 11 case. This balance represents 85% of the Debtor's overall remaining unsecured debt and the Amended Plan does not even propose to pay the same nominal 10% dividend to Surrey Hill on this portion of its claim as is being paid to the other unsecured creditors.

Furthermore, the Debtor does not propose to make any meaningful personal sacrifice or effort in connection with this proposed purchase of a superdischarge. Throughout this proceeding, which has been prolonged by the unresolved criminal proceedings, the Debtor has required the assistance of his parents to live since his monthly expenses have always exceeded his income.

In making its determination that the Amended Plan is not filed in good faith within the meaning and intent of Section 1325(a)(3), the Court has considered the following other factors in addition to the large potentially nondischargeable claim due to Surrey Hill which would be discharged and the Debtor's lack of meaningful participation or effort in the payments to be made

¹² The criminal restitution amount was paid as part of the Debtor's plea bargain agreement to keep him from being imprisoned and would otherwise be non-dischargeable even in Chapter 13, pursuant to Section 1328(a)(3).

under the Amended Plan: (1) the nominal 10% payment being made to the unsecured creditors other than Surrey Hill; (2) the overall treatment of Surrey Hill before and during the Chapter 13 case, including the improper scheduling of its address and the amount of its claim and the commencement of the Preference Action against it; (3) the treatment of Surrey Hill under the Amended Plan which proposes to pay it only the amount of the nondischargeable criminal restitution required to prevent the Debtor's imprisonment; and (4) the fact that at various times during the pendency of this Chapter 13 case the Court could have dismissed the Debtor's Chapter 13 case under Section 109(e), both on debt limitation grounds and because the Court may have found that the Debtor was not an individual with regular income within the meaning and intent of Section 109(e).¹³

Taken as a whole, the Plan and the surrounding facts and circumstances do not indicate a fundamental fairness in dealing with the creditors, especially Surrey Hill, or a sincere effort of repayment by the Debtor. Furthermore, to confirm the Amended Plan would, in this Court's opinion, result in an abuse of the policies, provisions and spirit of Chapter 13 and the Bankruptcy System. Therefore, confirmation of the Amended Plan is denied.

III. §522(f) Lien Avoidance.

At the hearing on February 24, 1994, the parties agreed that if the Court determined that the Amended Plan could not be confirmed because it did not meet any of the requirements of Section 1325(a), or otherwise, that the rights of the parties to the one-half of the net proceeds from the sale of Montpelier Circle being held in escrow by the Trustee subject to the rights and interests of the Debtor and Surrey Hill should not be determined by this Court, but would be determined by the New

¹³ Some courts have determined under certain facts and circumstances that family support should be considered to be a gift and not a source of regular income for Section 109(e) purposes. *See In re Cregut*, 69 B.R. 21, 22 (Bankr. D.Ariz. 1986).

York State Supreme Court. The Court has inferred from this agreement that if the Amended Plan is not confirmed, it is the Debtor's intention not to file a further amended Chapter 13 plan, but to have the case dismissed pursuant to Section 1307(b).

In view of the Court's determination, on all of the facts and circumstances of this case, that the Amended Plan cannot be confirmed as meeting the requirements of Section 1325(a), the Debtor shall have five (5) business days after the last day to appeal this decision, if the decision is not appealed, to file with the Court a statement either requesting that this case be converted to a Chapter 7 case or advising the Court that he intends to file a new Chapter 13 plan. In the event that the Debtor elects to convert his case to a Chapter 7 case, this Court will determine the rights of the parties to the amount which is being held by the Trustee. In the event that such a written statement is not filed with the Court within this period, this Chapter 13 case shall be dismissed. In the event the case is dismissed pursuant to these provisions, the Trustee shall pay over to the attorneys for Surrey Hill, Phillips, Lytle, Hitchcock, Blaine & Huber ("Phillips, Lytle"), the one-half of the net proceeds of the sale of Montpelier Circle which he is holding in escrow subject to the rights and interests of the Debtor and Surrey Hill as judgment lien creditor, together with any accrued interest. Phillips, Lytle is to hold the amounts so paid over to it in escrow in an interest bearing account pending a determination by New York State Supreme Court as to the rights of the parties in these proceeds of the sale of Montpelier Circle. Within sixty (60) days from the date it receives such funds from the Trustee, Phillips, Lytle shall commence an appropriate proceeding in New York State Supreme Court to have a determination made as to the rights of the parties in such proceeds. Should a proceeding not be commenced in New York State Supreme Court within such sixty (60) day period, \$10,000.00 plus pro rata accrued interest on such amount shall be paid over to the Debtor and the balance retained by Surrey Hill as a judgment lien creditor.

Nothing which has occurred in this Chapter 13 case shall be deemed by the New York State Supreme Court to be a waiver of any rights or arguments the parties may have with respect to their

interests in Montpelier Circle or its proceeds notwithstanding the sale of Montpelier Circle and the attachment of the Surrey Hill Judgment lien to the proceeds subject to the Debtor's claim of a homestead exemption.

IV. CLASSIFICATION AND TREATMENT OF UNSECURED CLAIMS.

The Trustee has objected to confirmation of the Amended Plan on the grounds that the classification and treatment of the Surrey Hill Judgment Claim violates the requirements of §1322(b)(1). Although the Court has considered the classification and treatment of the Surrey Hill Judgment claim as a factor in determining whether the Amended Plan was proposed in good faith, because the Court has denied confirmation on good faith grounds, it need not decide the classification issue at this time.

IT IS SO ORDERED.

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: April 28, 1994