2001 BNH 040 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Jill A. Amadon — Bk. No. 00-12723-JMD, Chapter 13

Jointly Administered With

In re: William Whitcomb, — Bk. No. 00-12735-JMD, Chapter 13

Debtors

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Chapter 13 Trustee

MEMORANDUM OPINION

I. INTRODUCTION

A confirmation hearing on the Debtors' First Amended Chapter 13 Plan (hereinafter the "Plan") in these jointly administered cases was held on August 28, 2001. The Chapter 13 Trustee and Keen-Cut Diamond Co., Inc, a secured creditor, (hereinafter "Keen-Cut") filed objections to confirmation. Prior to the hearing the Chapter 13 Trustee and the Debtors reached an agreement to resolve the Trustee's major objection by agreeing to file an amended plan providing for three additional plan payments in the amount of $5,511.00 each, which would increase the projected dividend for general unsecured creditors from 24% to 44%. The hearing proceeded by agreement of the parties on three aspects of the Plan which the Debtors did not agree to change and which were the subject of objection by Keen-Cut. Those questions involved

(1) the feasibility of the plan during the first twenty-four months, (2) the feasibility of the Debtors ability to make the balloon payment to pay Keen-Cut's claim in full on or before September 10, 2003, and (3) the appropriate interest rate to be paid on Keen-Cut's secured claim under the Plan.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

Jill A. Amadon filed a petition under Chapter 13 of the Bankruptcy Code on September 26, 2000. William Whitcomb filed a petition under Chapter 13 of the Bankruptcy Code on September 27, 2000. On December 11, 2000, this Court entered an order that the Debtor's cases be jointly administered.

The Debtors are co-owners and operators of Swanzey Lake Camping Area which was purchased from Swanzey Lake Camping Area, Inc., the predecessor in interest of Keen-Cut, in March, 1997. The purchase price was $615,555.00. The Debtors paid $75,000.00 at closing and Keen-Cut took back a promissory note (Exhibit 101) secured by a mortgage and security agreement (Exhibit 102) for the $540,555.00 balance. The promissory note provided for interest at 6.98% per annum and for fourteen installments of principle over two years with the balance to be paid on August 15, 1999. The Debtors were unable to secure bank financing when the promissory note came due and, after a contested hearing in Cheshire County Superior Court, the due date of the promissory note was extended for two years pursuant to the terms of the Purchase and Sale Agreement between the Debtors and Keen-Cut's predecessor dated December 26, 1996. *See* Exhibits 1 and 3. Accordingly, the entire balance of the promissory note was due and payable when the Debtors filed their respective petitions.

The Plan provides for the Debtors to make five monthly payments in the amount of $5,511.00 each during the months of May through September to the Chapter 13 Trustee for three years, for a total of

$82,665.00 in payments under the Plan. Those payments would be distributed by the Trustee in payment of the following administrative, secured arrearage, and unsecured priority claims:

Chapter 13 Trustee's Fee	$8,267.00
Attorney's Fees	$2,185.00
Keen-Cut Mortgage Arrearage	$20,600.00
Internal Revenue Service	$17,375.00
NH Dept. of Revenue	$90.00
Town of Swanzey	$12,566.00
TOTAL	$61,083.00

The balance of the Plan payments, $21,582.00, less interest on the secured claims of Keen-Cut and the Town of Swanzey, would, according to the Chapter 13 Trustee, provide an estimated 24% dividend to general unsecured creditors. The Chapter 13 Trustee has questioned the value of the campground property and whether the so-called best interest of creditors requirement under section 1325(a)(4) has been satisfied. The Debtors have agreed with the Chapter 13 Trustee to file an amended plan which will call for three additional monthly payments in the fourth year raising the total projected payments to unsecured creditors by $16,533.00 to a total of $38,115.00 for a projected dividend of 44% and the Trustee has withdrawn his objection under the best interests test. The Trustee raised other objections similar to those raised by Keen-Cut, but did not contest them at the hearing and agreed to be bound by the Court's resolution of the Keen-Cut objection.

The Plan provides that the $20,600.00 secured prepetition arrearage on Keen-Cut's claim will be paid through the Plan with interest at the rate of 8.5%. Keen-Cut does not object to the treatment of its secured arrearage. The Plan also provides for the Debtors to make monthly payments to Keen-Cut outside of the Plan in the amount of $4,299.18 each on account of principal and interest at the rate of 7.25% per annum on Keen-Cut's $479,400.00 secured claim. The Plan then calls for the remaining balance due on the loan to be paid through a balloon payment to Keen-Cut on September 10, 2003. If the Debtors make all payments required under the Plan, the balloon payment will be approximately $443,300.00. The Plan also requires the Debtors to make payments outside the Plan to other secured creditors for a tractor loan,

$500.00 per month, and $600.00 per month for a loan on another retail business. Jill Amadon testified that the total payments to the Trustee under the Plan and to secured creditors outside of the Plan, and current real estate tax accruals would be $107,000.00 per year.

Keen-Cut objects to the confirmation of the Plan because the Debtors cannot show that (1) they have the ability to pay the total payments required both under the Plan and outside the Plan during the first two years and (2) the Debtors have the ability to make a balloon payment in the amount of $443,300.00 at the end of the two years. Keen-Cut also objects to the 7.25% interest rate proposed for its secured claim on the grounds that it is inadequate to provide Keen-Cut with the present value of its secured claim under section 1325(a)(5)(B)(ii). Keen-Cut argues that an interest rate of 10% is more appropriate. The Parties agreed that the applicable federal funds rate is 5.3% and that the Court may determine the appropriate interest rate under the methodology in *In re Computer Optics, Inc.*, 126 B.R. 664 (Bankr. D.N.H. 1991).

Based upon the Debtors' agreement with the Chapter 13 Trustee, confirmation of the Plan will be denied. However, because the Debtors are not proposing to alter the treatment of Keen-Cut's secured claim, it is in the best interest of creditors and judicial economy for the Court to address the objections of Keen-Cut at this time.

III. DISCUSSION

A. Plan Feasibility

Keen-Cut argues that the Debtors' own projections demonstrate that the Plan is not feasible. The Debtors are projecting $188,200.00 in gross income and $84,000.00 in operating expenses during calendar year 2002, leaving $104,200.00 to fund Plan payments and secured obligations. *See* Exhibit 13. Jill Amadon testified on cross examination that Plan payments, secured obligations, and current real estate tax accruals would require $107,000.00 per year. Since current real estate taxes were included in that number and in the expense projections for 2002, the amount of the current annual real estate tax payments, $14,000.00, must be deducted resulting in the sum of $93,000.00 being required for Plan payments and

secured debt. Therefore, the Debtors projected net operating income exceeds the payments required under the Plan by $11,200.00, or 6% of projected gross income.

Under the Plan the Debtors have little margin for error or bumps in the road. However, in the four years that the Debtors have owned and operated the campground they have substantially increased the net operating income and have significantly improved the facility. The testimony reveals that the Debtors gross income has been:

1997	$71,793.00
1998	$97,164.00
1999	$117,801.00
2000	$105,529.00
2001 (projected)	$149,095.00

In addition, the Debtors have upgraded and improved the campground by adding rental units in existing buildings, upgrading the appearance and functionality of the grounds, rebuilding sites, upgrading plumbing and electrical service to many sites, and installing the state mandated septic system improvements at a total estimated total cost of $121,565.00. *See* Exhibit 5. Specifically, the Debtors rebuilt 6 sites last spring and plan to rebuild an additional 7 sites next spring, leaving 25 more sites that can be rebuilt in the future. *See* Exhibit 13. The Debtors further claim that the failure of many competing campgrounds to meet the state mandated septic requirements coupled with a general increase in demand for seasonal rentals has increased their business and is the reason the Debtors believe they can meet their projections. *See id*.

The Debtors have attempted over the last four years to upgrade the campground and to increase the number of seasonal rentals. Those efforts have been successful in both increasing and stabilizing their income from the campground. Although the margin for error in the first few years of the Plan is slim, the testimony leads the Court to the conclusion that the Debtors will be able to continue to improve the campground facilities and meet their income projections. Accordingly, while the Debtors' income and expense projections are aggressive, the Court finds that they are attainable and that the Plan meets the feasibility requirements of section 1325(a)(6).

2. The Balloon Payment

The Plan requires the Debtors to pay the claim of Keen-Cut in full on September 10, 2003, by making a balloon payment estimated at $443,300.00. Keen-Cut contends that the Debtors cannot demonstrate the ability to make the balloon payment and that the Plan is not feasible. Keen-Cut cites Chief Judge Vaughn's opinion in *In re Harris*, 199 B.R. 434 (Bankr. D.N.H. 1996) as establishing the standard in this district for confirmation of Chapter 13 plans requiring balloon payments. In *Harris*, Judge Vaughn stated:

> The first issue before the Court is whether the balloon payment proposed by the Debtor complies with 11 U.S.C. § 1325(a)(6). Section 1325(a)(6) provides that the Debtor must be "able to make all payments under the plan and to comply with the plan." Thus, the Court must determine the feasibility of the Debtor's plan.
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> According to Judge Lundin, "any Chapter 13 plan that proposes a balloon payment at some time in the future is suspect of confirmation unless there is proof of some special circumstance likely to produce a bucket of cash at just the right time to make the payment." 2 Keith M. Lundin, Chapter 13 Bankruptcy § 5.56 (2d ed.1994). Many courts have adopted this view.
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> In In re Brunson, 87 B.R. 304, 312 (Bankr. D.N.J. 1988), the court stated that "[a] plan that depends on the receipt of funds from unidentified and uncertain sources during the last month of a sixty-month plan must be scrutinized carefully. In this context, feasibility means 'that a reviewing court should confirm a plan only if it appears under all the circumstances that the plan has a reasonable likelihood of success.'" The court enumerated several factors to be considered in balloon payment cases:
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> 1) the equity in the property at the time of filing;
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> 2) the future earning capacity of the debtor;
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> 3) the future disposable income of the debtor;
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> 4) whether the plan provides for the payment of interest to the secured creditor over the life of the plan;
>
> 5) whether the plan provides for payment of recurring charges against the property, including insurance, local property taxes and utility charges; and

> 6) whether the plan provides for substantial payments to the secured creditor which will significantly reduce the debt and enhance the prospects for refinancing at the end of the plan.
>
> Id.

Harris, 199 B.R. at 436. Subsequent to *Harris*, the Bankruptcy Appellate Panel for the First Circuit applied the same *Brunson* factors cited by Judge Vaughn. *See The First National Bank of Boston v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423-24 (1st Cir BAP 1997). The inclusion of a balloon payment is not dispositive of a plan's feasibility. However, to avoid potential abuse, the proponent of such a plan must offer some evidence to show that the funds will be available at the time the balloon payment is due. *See Chelsea State Bank v. Wagner (In re Wagner)*, 259 B.R. 694, 700 (8th Cir. BAP 2001) (debtors have burden to prove that plan is feasible); *Fantasia*, 211 B.R. at 423 (debtors must show by definite and credible evidence that they will have the financial ability to make the balloon payment); *In re St. Cloud*, 209 B.R. 801, 809-10 (Bankr. D. Mass. 1997) (debtors established by a preponderance of the evidence that there is a reasonable likelihood of obtaining refinancing); *Harris*, 199 B.R. at 436 (plan too speculative and debtor provided no evidence of likelihood of refinancing).

The Court finds that the evidence presented at the hearing established that:

1. the campground had a value of at least $550,000.00, Keen-Cut's secured claim is $500,000.00 and, therefore, the Debtors had equity in the campground on the petition date;

2. the projected future income from the operation of the campground is attainable;

3. the net operating income of the campground is sufficient to fund the payments required by the Plan;

4. the Plan provides for the payment of interest on Keen-Cut's secured claim;

5. the Plan provides and the projections support a finding that the campground's income will be sufficient for the payment of recurring charges against the campground, including insurance and real estate taxes;

6. during the first two years of the Plan Keen-Cut's position will be improved by the payment of most of a real estate tax arrearage in the amount of $12,566.00, payment of Keen-Cut's prepetition mortgage arrearage in the amount of $20,600.00 with interest at 8.5%, and monthly mortgage payments to Keen-Cut in the amount of $4,299.18 which includes interest at the rate of 7.25%.

Accordingly, all of the *Brunson* factors are satisfied with the exception of the likelihood of the Debtors obtaining the refinancing necessary to make the balloon payment.

At the hearing Jill Amadon testified that the property had been offered for sale at $1,200,000.00 to $950,000.00 in the past year. On cross examination she admitted that only one offer had been received from that effort, but that the listing realtor insisted on maintaining a high asking price because the realtor believed that the property would have a higher value for residential home development. She also testified that the Debtors prior attempts to refinance the campground were unsuccessful due to their short history of operating the facility, the Debtors credit rating, and a lack of interest by many lenders in extending credit to a seasonal business. She also testified that her co-Debtor's brother, Robert Whitcomb, was prepared to assist the Debtors in refinancing the property. She testified that the brother had received a loan commitment from Bank of New Hampshire for $363,750.00 at an initial rate of 8.33% for the first five years with a twenty year amortization and a balloon payment after ten years. *See* Exhibit 19. She further testified that based upon that commitment an offer had been extended to Keen-Cut to pay off their claim at a discount, but that the offer was not accepted. Ms. Amadon admitted on cross examination that the brother had no legal obligation to assist them, but that he and his wife had told the Debtors they would assist in making the balloon payment in two years and had provided the Debtors with a letter confirming that commitment. *See* Exhibit 20. Finally, Exhibit 21, a personal financial statement for the brother and his spouse, signed by the brother and sworn before a Notary Public on August 20, 2001, was admitted into evidence by agreement. The personal financial statement indicates that the brother and his spouse have a net worth of four million dollars and liquid assets in excess of nine hundred fifty thousand dollars.

Jill Amadon's testimony and Exhibits 19, 20 and 21 established that the brother, Robert Whitcomb, has significant liquid assets, a substantial net worth, and was deemed sufficiently credit worthy to obtain a loan to permit him to buy the campground as an investment. Her testimony also suggests that the highest and best use of the campground property may not be as a campground. The evidence was credible and satisfied the burden on the Debtors to go forward with evidence to establish a likelihood that a sale or

refinancing of the campground will permit them to make the balloon payment required under the Plan. No other evidence was submitted on the ability and willingness of the brother to assist in refinancing the campground. Keen-Cut argues that the lack of a legally enforceable obligation to refinance on September 10, 2003, is fatal to the Debtors efforts to confirm the Plan. However, the Bankruptcy Code does not require absolute certainty that the balloon payment will be made, only that the likelihood of payment be based on more than pure speculation. *See Wagner*, 259 B.R. at 701; *Fantasia*, 211 B.R. at 423. The only evidence presented at the hearing supports a conclusion that the brother is able and willing to assist the Debtors in obtaining the financing necessary to make the balloon payment and that he has sufficient financial strength to do so. Accordingly, the Court finds that the Debtors have satisfied their burden of proof to establish a reasonable likelihood of their ability to make the balloon payment.

3. Interest rate on Keen-Cut's Secured Claim

The Plan proposes to pay interest at the rate of 8.5% on the cure of the $20,600.00 prepetition arrearage on the Keen-Cut secured claim. No objection was filed to this interest rate. The Plan proposes to pay 7.25% interest on Keen-Cut's secured claim which is to be paid over two years with monthly payments in the amount of $4,299.18 each with a balloon payment for the entire balance then due on September 10, 2003. Keen-Cut objects to the 7.25% interest rate and contends that it should be 10%. The Parties agreed that the applicable federal funds rate is 5.3% and that the Court may determine the appropriate interest rate under the methodology in *In re Computer Optics, Inc.*, 126 B.R. 664 (Bankr. D.N.H. 1991).

The 7.25% interest is not the sole consideration received by the principals of Keen-Cut on account of their secured claim. Jill Amadon testified that under the original agreement, and under the Plan, the principals of Keen-Cut will continue to live in one of the houses on the campground property at a rental rate of $62.00 per month. Ms. Amadon testified that a realtor had advised her that the market rent for that house would be $1,200.00 to $1,500.00 per month. Since the principals of Keen-Cut are paying $744.00

per year for a home worth at least $14,400.00, they are obtaining an economic benefit of at least $13,656.00 per year, disregarding any tax impact. The economic benefit is equal to 2.8% of the balance of the Keen-Cut secured claim. When added to the Plan interest rate of 7.25%, the benefit to Keen-Cut, and its principals, is 10.05% or more than the 10% which they claim is the appropriate rate. The Court finds that the effective interest rate of 10.5% (7.25% from the Plan + 2.8% received from the home rental) is 4.75% over the applicable federal funds rate and is adequate to provide payments to Keen-Cut under the Plan that are, as of the effective date of the Plan, equal in value to its secured claim as required by section 1325(a)(5)(B)(ii) of the Bankruptcy Code.

IV. CONCLUSION

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. Confirmation of the Plan shall be denied and the Debtors shall submit an amended plan within ten days of the date of this opinion. The findings of fact and conclusions of law shall be applicable to any such amended plan absent a material change in the terms of any such amended plan or a material change in circumstances. The Court will issue a separate order consistent with this opinion.

DATED this 6th day of September, 2001, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge