

IN THE UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

IN RE  
JOSE HECTOR RESENDIZ  
Debtor

\*

Case No. 12-10603-B-13

\*

Chapter 13

**DEBTOR'S MEMORANDUM OF LAW IN SUPPORT OF  
PLAN CONFIRMATION**

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TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE:

COMES NOW, Jose Hector Resendiz, (herein "Debtor") by and through his attorney of record Eduardo V. Rodriguez, and files this his Memorandum of Law in support of Plan Confirmation.

### **I. Preliminary Statement**

1. The Debtor has proposed a chapter 13 plan (herein "Plan") that provides for a 5% dividend to the general unsecured class and also includes a child support arrearage claim or Domestic Support Obligation, (herein "DSO") in the amount of \$10,973.13 to be paid at 6% interest. The chapter 13 Trustee has not objected to Debtor's plan, however the Trustee is not recommending that the plan be confirmed stating that pursuant to 11 U.S.C. §1322(b)(10) in order to pay interest on a non-dischargeable unsecured claim the Debtor must propose a 100% repayment plan. The General Unsecured class in Debtor's Plan amounts to \$195,210.33. A 100% repayment plan would not be feasible.

### **II. Venue & Jurisdiction**

2. Venue of this proceeding lies in the Bankruptcy Court for the Southern District of Texas, Brownsville Division, pursuant to 28 U.S.C. §1409(a) in that Debtor initiated a voluntary petition under Chapter 13 of the Bankruptcy Code in this District.

3. The District Court has jurisdiction pursuant to 28 U.S.C. § 1334(b). This matter has been referred to the Bankruptcy Court by General Order 2005-12. This is a core proceeding under 28 U.S.C. § 157. To the extent this is not a core proceeding, Debtor consents to the entry of a final order by this Court. This Court has jurisdiction over the subject matter of this issue

pursuant to 28 U.S.C. §§151, 157, 157(b), 1331, 1332, and 1334, and 11 U.S.C. §105.

### **III. Bankruptcy Court's Authority**

4. Because bankruptcy judges are not Article III judges, they may not exercise the judicial power of the United States. *Stern v. Marshall*, 131 S.Ct. 2594, 2609 (2011) (“[T]he judicial power of the United States may be vested only in courts whose judges enjoy the protections set forth in [Article III].”). Bankruptcy judges therefore may not enter final judgments or orders in matters that fall within the exclusive authority of the Article III judiciary. The Court may, however, exercise authority over essential bankruptcy matters under the public rights doctrine. Under *Thomas v. Union Carbide Agricultural Products Co.*, a right closely integrated into a public regulatory scheme may be resolved by a non-Article III tribunal. 473 U.S. 568, 593 (1985). The Bankruptcy Code is a public scheme for restructuring debtor-creditor relations, necessarily including “the exercise of exclusive jurisdiction over all of the debtor's property, the equitable distribution of that property among the debtor's creditors, and the ultimate discharge that gives the debtor a ‘fresh start’ by releasing him, her, or it from further liability for old debts.” *Central Va. Cmty. College v. Katz*, 546 U.S. 356, 363–64 (2005); see *Northern Pipeline Constr. Co. v. Marathon Pipe Line co.*, 458 U.S. 50, 71 (1982) (plurality opinion) (noting in dicta that the restructuring of debtor-creditor relations “may well be a ‘public right’ ”). *But see Stern*, 131 S.Ct. at 2614 n. 7 (“We noted [in *Granfinanciera, N.A. v. Nordberg*, 492 U.S. 33, 56 n. 11 (1989)] that we did not mean to ‘suggest that the restructuring of debtor-creditor relations is in fact a public right.’”).

### **IV. Brief Statement of Facts**

5. On November 27, 2012, Debtor filed for chapter 13 bankruptcy protection and also filed his Chapter 13 Plan (herein “Plan”). [ECF. #1 & #2]

6. On November 27, 2012 Debtor also filed his B22C Form declaring the Applicable Commitment Period to be 36 months. [ECF #4].

7. On February 25, 2013 the First Meeting of Creditors was held, Debtor appeared and the meeting was concluded.

8. On May 10, 2013 the Chapter 13 Trustee (herein "Trustee") filed her Motion to Dismiss based on the Debtor's failure to amend his Chapter 13 Plan (herein "Plan") essentially requesting the Debtor to remove the 6% interest on the DSO and reclassify the claim as a general unsecured creditor. [ECF #34].

9. On May 24, 2013, the Motion To Dismiss was continued. [ECF #39].

10. Debtor's Plan classifies the pre-petition DSO in the amount of \$10,973.13 as a Priority Claim to be paid 6% interest under the 60 month Plan.

11. The Trustee, in order to recommend plan confirmation, has required the Debtor to amend his plan to remove the DSO that is currently classified as a Priority Claim being paid 6% interest under the Plan and reclassify it is a General Unsecured Claim to be paid 0% interest or propose a 100% dividend to the unsecured class of creditors. The Trustee does not dispute that the claim is a DSO as that term is defined in the U.S. Bankruptcy Code pursuant to 11 U.S.C. 101(14A).

#### **V. Issue**

12. **Can the United States Bankruptcy Court confirm a Chapter 13 Plan which proposes to pay 6% interest on a D.S.O claim without proposing a 100% dividend to the General Unsecured Class?**

## **VI. Argument & Authorities**

13. Title 11 was designed by Congress in 1978 to provide debtors with a “fresh start” by granting them a discharge from certain obligations, to distribute assets and pay claims in a predetermined scheme with a statutory system of priorities, and to provide debtors with an opportunity to reorganize, rehabilitate, or liquidate. A fresh start is the ultimate goal for any debtor in bankruptcy and for a debtor to complete a plan and still owe interest on a child support arrearage claim that could land him in jail by the Family Law Court will by no means grant the debtor his long awaited fresh start. As illustrated in Debtor’s admitted Exhibit #15, the Debtor is under a pre-petition Enforcement Order for non payment of child support which, if taken back to the family law court post-discharge, is punishable by confinement in jail for up to six months and a fine of up to \$500 for each violation. See Exhibit #15, Bates No 000098.

14. So how does the Debtor get to propose a plan that will provide for the statutory interest rate on the DSO? 11 U.S.C. §1322(b)(10) provides that [s]ubject to subsections (a) and (c) of this section, the plan may--

*“(10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims.”*

11 U.S.C. 1322(b)(10)

15. The Debtor may pay interest on the child support claim because of its 1<sup>st</sup> priority status as a “domestic support obligation” (“DSO”), a phrase added at section 101(14A) of the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). As a DSO, the debt (i) is a first priority debt under section 507(a)(1) of the

Bankruptcy Code, (ii) is defined to include any interest that accrues “**under applicable nonbankruptcy law**,” (emphasis added) and (iii) is nondischargeable under section 523(a)(5) of the Bankruptcy Code. Applicable nonbankruptcy law will be addressed later in this brief.

16. The term “domestic support obligation” was added to § 101 of the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”).

The term is defined in § 101(14A) as:

*[A] debt that accrues before, on or after the date of the order for relief in a case under this title, **including interest** (emphasis added) that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—*

*(A) owed to or recoverable by—*

*(i) a spouse, former spouse, or child of the debtor or such child's parent, legal guardian, or responsible relative;*

*...*

*(B) in the nature of alimony, maintenance, or support ... of such spouse, former spouse, or child of the debtor or such child's parent, without regard to whether such debt is expressly so designated;*

*(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—*

*(i) a separation agreement, divorce decree, or property settlement agreement;*

*(ii) an order of a court of record;....*

11 U.S.C. § 101(14A).

17. BAPCPA amended the priority scheme under § 507(a) and moved unsecured claims for pre-petition domestic support obligations owed to a spouse, a former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative, to a first priority position under newly added § 507(a)(1)(A). Newly added § 507(a)(1)(B) gives first priority to pre-petition support obligations owed to a government unit, subject to claims under §

507(a)(1)(A). Prior to the BAPCPA amendments, claims for alimony, maintenance or support were entitled to seventh priority under § 507(a)(7). Now, domestic support obligations of the debtor are entitled to first priority, subject to a carve out for the expenses of a trustee in administering assets that might otherwise be used to pay the support obligations

18. If, at the time of the bankruptcy filing, a debtor owes a matured DSO, the DSO recipient may assert a claim for the DSO amount which was due prepetition. That is, “[t]o the extent ... that a claim is for matured [DSO] payments unpaid at the time of the filing of the petition, the claim would be proper and would, therefore, be allowed to share in a distribution of the debtor's assets. Indeed, such a claim would be entitled to priority...” 4 Collier on Bankruptcy, ¶ 502.03[6][a] (Matthew Bender 2005). Such matured DSO claims are elevated to first priority payment in accordance with § 507(a)(1)(A), which provides in relevant part:

(a) The following expenses and claims have priority in the following order:

*(1) First:*

*(A) Allowed unsecured claims for domestic support obligations that, as of the date of the filing of the petition in a case under this title, are owed to or recoverable by a spouse, former spouse, or child of the debtor, or such child's parent, legal guardian, or responsible relative,....*

11 U.S.C. § 507(a)(1)(A).

Thus, an allowed unsecured DSO claim is entitled to first priority payment through the chapter 13 plan and should be paid with interest. Should the interest portion of the claim not be paid in the plan or by directly by the debtor, the debtor could be subject to post-discharge enforcement actions by the custodial parent. For example, “[t]o the extent that the amounts unpaid at the time of the filing of the petition are not satisfied in full from the debtor's assets, the

nondischargeability feature of such debt presupposes that after the debtor's discharge the spouse may proceed against after-acquired assets and exempt assets.” 4 Collier on Bankruptcy, ¶ 502.03[6][a] (*Matthew Bender 2005*); see also § 362(b)(2)(B) (which permits the collection of a domestic support obligation from property that is not property of the estate, permitting the non-debtor spouse who holds a nondischargeable claim, to collect the claim from property of the debtor without obtaining stay relief and without waiting for the granting of a discharge or the closing of the case).

19. A “domestic support obligation,” as the Bankruptcy Code now defines the term, includes not only a child support arrearage, but also interest accruing on the arrearage under applicable nonbankruptcy law. See 11 U.S.C. § 101(14A). The applicable nonbankruptcy law in this case is section 157.265 of the Texas Family Code, which provides (in pertinent part) that interest accrues on delinquent child support at the rate of six percent per year from the date the support is delinquent until the support is paid. As such, it is clear that the Texas Family Code, made applicable to Debtor’s bankruptcy case by 101(14A), entitles the DSO claimant to post-petition interest on pre-petition child support arrears. See e.g. *In re Anthony*, (453 B.R. 782; 2011 Bankr. LEXIS 2976); See also *Leeper v. Pennsylvania Higher Educ. Assistance Agency*, 49 F. 3d 98, 103 (3<sup>rd</sup> Cir. PA 1995 ) (citing *In re Crable*, 174 Bankr. 62, 63 (Bankr. W.d. Ky. 1994) (permitting accrual of post-petition interest on nondischargeable debt for child support during pendency of Chapter 13 proceeding); *In re Wright*, 438 B.R. 550, 551,52 (M.D.N.C. 2010) (holding that interest on past-due child support is a domestic support obligation).

20. Additionally, 11 U.S.C. § 1322(a)(2) requires that the Debtor's plan provide for the **full payment** (emphasis added) of all claims entitled to priority under Section 507, unless the holder of the claim agrees to a different treatment. Here the Attorney General filed a proof of

claim that requires the payment of 6% interest on the DSO and has not agreed to a different treatment.

21. Further, because all claims entitled to priority under § 507 must be paid in full pursuant to §1322(a)(2), the Court must deny confirmation of a plan that does not propose to pay post-petition interest accruing on a claim for a domestic support obligation. In re Reid, 2006 WL 2077572 (Bankr.M.D.N.C.2006). Thus, the Debtor's Plan must provide for the payment of any interest accruing pursuant to nonbankruptcy law on any claims for domestic support obligations.

22. Alternatively (i) the Debtor should be allowed to pay interest on the domestic support obligation outside the Plan. Inasmuch as the obligation is excepted from discharge under § 523(a)(5) of the Bankruptcy Code, the Debtor is not relieved from the obligation to pay interest on the claim. See 11 U.S.C. § 727(b). See e.g. In re Hernandez, (2007 WL 3998301 (Bkrcty.E.D.Tex.)(J. Rhodes); or (ii) the Debtor should be allowed to separately classify the DSO claim and pay it in full under the Plan. See e.g. In re Gentry, 2006 WL 6544156 (Bkrcty.N.D.Tex.) (J. Robert Jones). See also 11 U.S.C. 1322(b)(11).

23. The Debtor has acted in good faith and proposed a Plan that is confirmable. With respect to good faith, a totality of the circumstances test is used to determine whether a chapter 13 plan has been proposed in good faith, as required by 11 U.S.C. § 1325(a)(3). Suggs v. Stanley (In re Stanley), 224 Fed.Appx. 343, 346 (5th Cir.2007). Good faith factors include: (1) the reasonableness of the proposed repayment plan; (2) whether the plan shows an attempt to abuse the spirit of the Bankruptcy Code; (3) whether the debtor genuinely intends to effectuate the plan; (4) whether there is any evidence of misrepresentation, unfair manipulation, or other inequities; (5) whether the filing of the case was part of an underlying scheme of fraud with an intent not to pay; (6) whether the plan reflects the debtor's ability to pay; and (7) whether a

creditor has objected to the plan. *Id.* “In applying this test, the bankruptcy court ‘exacts an examination of all of the facts in order to determine the bona fides of the debtor.’ ” *Id.* (citing *In re Chaffin*, 816 F.2d 1070, 1074 (5th Cir.1987)). There has been no evidence of bad faith in proposing this plan.

24. Additionally, Section 1307 provides for conversion or dismissal of a case upon a debtor's failure to pay a domestic support obligation, and § 1328 requires a debtor to certify prior to discharge that all domestic support obligations due on or before the date of the certification have been paid. How can a debtor sign a §1328 certification at the end of the case if the DSO claim has not been paid in full? He cannot.

25. If the Debtor is not able to discharge the statutory interest on the DSO, not only will he not receive a fresh start, he will be subject to mandatory incarceration by the Family Law Court for failure to pay the DSO in full. Finally, the Court, pursuant to 11 U.S.C. §105 has the discretion and authority to approve the Debtor’s plan as filed.

## **VII. Conclusion**

26. Since, 11 U.S.C. § 1322(a)(2) requires that the Debtor's plan provide for the full payment of all claims entitled to priority under Section 507 and since the Texas Family Code requires the payment of 6% interest on DSOs and since the claim made the subject of this brief is a DSO, the Debtor’s plan, as proposed, should be confirmed by this Honorable Court.

Respectfully submitted,

By: /s/ Eduardo V. Rodriguez  
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CERTIFICATE OF SERVICE

I, Eduardo V. Rodriguez, hereby certify that a true and correct copy of the above and foregoing instrument was served electronically, if applicable, and by First Class United States Mail, postage prepaid, on October 4, 2013, upon all creditors and parties in interest whose names and addresses are listed on the attached Service List. Although the Service List is attached hereto for purposes of filing with the Bankruptcy Court, it is omitted from this mail out. A copy may be obtained upon request from the Debtors' attorney.

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