IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Statesboro Division

IN RE:	)	Chapter 13 Case
	)	Number 88-60192
BRUCE W. HIGGINBOTHAM	)	
LINDA K. HIGGINBOTHAM	)	FILED
	)	at 3 O'clock & 50 min. P.M.
Debtors	)	Date: 3-22-89

ORDER

This Chapter 13 proceeding came before the court for confirmation. At the conflrmation hearing the debtors proposed a modification to their plan-providing for monthly payments to the Chapter 13 trustee of One Thousand Four Hundred Twenty Five and No/100 ($1,425.00) Dollars for a period of 60 months. The trustee now projects a dividend to unsecured creditors of 73 percent. The debtors' largest unsecured creditor, the United States of America, on behalf of its agency the Department of Health and Human Services, had objected to confirmation asserting that the debt which resulted from a series of Health Education Assistance Loans (HEAL) was nondischargeable. In addition, Farmers State Bank had objected, contending that the debtors had failed to devote all disposable income to the plan. Based upon the extension of the plan from 36 to 60 months both creditors withdrew their objections.

At confirmation, debtor, Dr. Bruce W. Higginbotham, testified that due to a change in employment the total income into the household was reduced to Four Thousand Seven Hundred Seventy Five and No/100 ($4,775.00) Dollars per month. The debtors' schedule of current monthly expenditures set forth expenses totaling Three Thousand Five Hundred Eighty Two and 48/100 ($3,582.48) Dollars for a family of nine, resulting in the sum of One Thousand One Hundred Ninety Two and 52/100 ($1,192.52) Dollars above monthly living expenses which is less than the One Thousand Four Hundred Twenty Five and No/100 ($1,425.00) Dollars per month payment the Trustee.

The debtors monthly expense statement proposed to continue a tithing payment to their church in the amount of Six Hundred Ninety and No/100 ($690.00) Dollars per month. This payment represents 10 percent of the debtors' gross monthly income. Debtor, Dr. Bruce W. Higginbotham, testified that this tithing payment is a requirement of his religious faith, and this court is convinced of the sincerity of the debtors in this belief; however, sincerity, honesty or genuineness in their religious belief does not equate to the good faith requirement of 11 U.S.C. §1325(a)(3).

The issue is whether this plan meets the good faith criteria for confirmation under 11 U.S.C. §1325(a)(3). This court is charged with the duty of making a case by case inquiry to determine whether the proposed Chapter 13 plan meets the statutory

criteria of good faith. In re: Hale 65 B.R. 893 (Bankr. S.D. Ga. 86); In re Steele, 34 B.R. 172 (Bankr. M.D. Al. 1983). Although a comprehensive definition of good faith is not practical, broadly speaking, the basic inquiry should be whether under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of Chapter 13 in the proposed plan. Kitchens v. Georgia Railroad Bank & Trust Co., 702 F.2d 885 (11th Cir. 1983).

The Kitchens decision set forth 13 factors to be considered on the question of good faith:

1. The amount of the debtor's income from all sources;
2. The living expenses of the debtor and his dependents;
3. The amount of attorney's fees;
4. The probable or expected duration of the debtor's Chapter 13 plan;
5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. The debtor's degree of effort;
7. The debtor's ability to earn and the likelihood of fluctua~ion in his earnings;

8. Special circumstances such as inordinate medical expenses;
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;
11. The burden which the plan's administration would place upon the trustee;
12. The substantiality of repayment; and
13. The potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens, supra at 888.

The application of the following Kitchen criteria to the facts of this case are critical in determining that the amended proposed plan fails to meet the confirmation criteria of good faith.

Living expenses of the debtor and his dependents.

The schedule of monthly expenditures of the debtors reveals a tithing payment in the amount of Six Hundred Ninety and No/100 ($690.00) per month. This payment represents 10 percent of the gross income of the debtors. Regardless of the sincere beliefs of the debtors, this diversion of funds means that on a monthly basis the debtors propose to retain substantial funds in excess of that which is necessary for the maintenance or support of the debtors and debtors' dependents.

The motivations of the debtors and their sincerity in seeking relief under the provisions of Chapter 13.

At the confirmation hearing, the debtors proposed a modification to extend the payment period under the plan from 36 months to 60 months in order to obtain the withdrawal of two objections to confirmation.

This extension increased the dividend to the unsecured creditors from 27 percent to 73 percent. The debtors have a good income and the schedule of monthly expenditures of the debtors reveals a reasonable monthly living expense in view of the size of the family, yet from this substantial monthly income, the debtors can only accomplish a 73 percent dividend to unsecured creditors over a 60 month period. In order to avoid the objection of the two largest unsecured creditors, the debtors in this case must propose a modest

monthly living expense and still a less than full payment to unsecured creditors over a 60-month period because of the tithing commitment. The motlvation of the debtors in seeking rellef from the Chapter 13 is not the repayment of debt and the effectualtion of a fresh start, but the use of the bankruptcy laws to prevent creditor action to enforce payment of debt which would disrupt the debtors' ability to meet their monthly tithing commitment. This is not an appropriate use of Chapter 13.

<u>The debtors' ability to earn and the likelihood of fluctuation in future earnings.</u>

The debtor, Dr. Bruce W. Higginbotham, is a physician. In partial consideration for his medical training, he agreed for a period of time to provide medical services to underserved areas in our society. This commitment entails a financial sacrifice on the part of the debtors during his service. The debtors' earning potential is far in excess of that which is being earned today. Debtor, Dr. Bruce W. Higginbotham, has the potential to and in all likelihood will earn substantially higher income upon completion of his commitment to provide medical care in underserved areas.

<u>Potential for nondischargeability of debt in Chapter 7.</u>

The largest single unsecured claim in this case is a debt in the amount of Forty Three Thousand Two Hundred Twenty and 90/100 ($43,220.90) Dollars due the United States of America through its agency the Department of Health and Human Services by virtue of "HEAL" loans. These type of educational assistance loans may not be dischargeable in a Chapter 7 liquidation. 11 U.S.C. §523(a)(8). <u>See</u> <u>also</u> 42 U.S.C. §294f(g); 42 C.F.R. §60.8(b)(5); <u>In re: Owens</u>, 82 B.R. 960 (Bankr. N.D. Ill. 1988); <u>Education Assistance Corp. v. Zellner</u>, 827 F.2d 1222 (8th Cir. 1987). This one claim amounts to over 60 percent of the unsecured claims which would be paid 73 percent in the debtors' amended proposed plan. Again, the principal motivation of the debtor is to prevent the enforcement of this debt obligation, to provide a partial repayment of this student loan over a 60-month period and subsequent discharge of the balance while continuing to meet his tithe commitment in full.

None of the factors, standing alone, are sufficient to find that good faith is lacking; however, in consideration of all the factors, this court cannot conclude that the debtors' plan is proposed in good faith, and confirmation must therefore be denied.

Debtors have not demonstrated a commitment to the spirit and purpose of Chapter 13 in proposing this plan. Chapter 13 affords a debtor the opportunity to set forth a plan to repay his debts to the extent possible in an orderly fashion from distributions from his future income while retaining his assets and maintaining a reasonable standard of living. Chapter 13 cannot be used for the purpose of stalling creditor action and proposing partial repayment of debt

over a 5-year period in order to preserve the ability of the debtor to meet another financial commitment, a church tithe.

Confirmation of this plan is not denied merely because the debtors wish to tithe, but must be denied because of the purpose for which this case was filed -- <u>to make a partial repayment of debts in order to tithe</u>. This purpose is not within the definition of "good faith" contemplated by Title 11. The court, therefore, does not reach the question of whether denying confirmation because of tithing payments would violate the constitutional provisions relating to religious freedom.

It is therefore ORDERED that confirmation of the debtors' amended proposed plan is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

This 22nd day of March, 1989.