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Northern District of Illinois
Eastern Division

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Judge: David D. Cleary

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Case No. 21 B 13170
	)	
WENDY SUE GIANNINI,	)	Chapter 13
	)	
Debtor.	)	Judge David D. Cleary

MEMORANDUM ORDER DENYING MOTION TO DISMISS

This matter comes before the court on the motion of Marilyn O. Marshall, Standing Trustee ("Trustee") to dismiss this case ("Motion to Dismiss" or "Motion"). The Motion and confirmation were continued several times, allowing the parties to discuss the issues in dispute. After the court entered a briefing schedule, Debtor Wendy Sue Giannini ("Debtor") filed an amended response ("Amended Response") to the Motion and the Trustee filed a reply ("Reply"). Having considered the papers filed and the arguments of the parties, the court finds that Debtor did not establish by a preponderance of the evidence that she will be able to make all payments under the plan and to comply with the plan. To the extent the Motion to Dismiss is construed as an objection to confirmation, it is sustained.[1] Confirmation will be denied with leave to amend. The court will not dismiss the case for unreasonable delay at this time, so the Motion to Dismiss will be denied and the confirmation hearing will be re-set.

I. BACKGROUND

Debtor filed for relief under chapter 13 on November 18, 2021. Her original Schedule I showed combined monthly income of $6,671. This is comprised of Debtor's Social Security income in the amount of $1,337 and pension/retirement income in the amount of $404. It also includes her spouse's take-home pay from employment of $1,350 as well as $3,580 described on

[1] A practice has developed in this district that allows parties to file a motion to dismiss and, to the extent the allegations are applicable, that motion also serves as an objection to confirmation.

line 8h as his severance. The severance is further explained at line 13 of Schedule I as follows: "Debtor's spouse receives early retirement payments from his former employer (United) until ONLY September 2022." *See* EOD 1.

Debtor's original plan proposed monthly payments of $365 for 58 months. Under that plan, Debtor stated that her unsecured creditors would receive 100 cents on the dollar. *See* EOD 7. As Debtor is above-median, her applicable commitment period is 60 months.

The Trustee filed the Motion to Dismiss on March 9, 2022.[2] She seeks dismissal of Debtor's case on several grounds, including:

- Failure to establish that she will be able to make all payments under the plan and to comply with the plan;
- Failure to commit all disposable income to the plan; and
- Failure to timely confirm a plan, which constitutes unreasonable delay.

On March 22, 2022, Debtor amended her plan to propose payments in the amount of $365 for months 1 through 4 and raised the payment to $375 for the remaining 56 months of the plan term. *See* EOD 30. She again stated that unsecured creditors would be paid in full. That same day, Debtor also amended Schedule I to reflect a change in income because of her spouse's new job, which reduced his take-home pay from $1,350 to $965. All other income streams remained the same. This amended Schedule I reduced Debtor's combined monthly income from $6,671 to $6,286. *See* EOD 31.

[2] The Trustee's Motion to Dismiss is found at docket #26. The Trustee also filed a motion to dismiss on January 24, 2022 ("January 24 Motion"). *See* EOD 20. In the January 24 Motion she sought dismissal only for: (1) failure to provide an Affidavit of Compliance; (2) failure to maintain payments; (3) failure to attend two meetings of creditors; (4) failure to provide the required identification and/or Social Security documentation; and (5) failure to confirm a plan in a timely manner. The court finds that the Motion to Dismiss superseded the January 24 Motion, so the January 24 Motion is moot.

A few weeks later, Debtor filed a second amended Schedule I. *See* EOD 40. She stated in this second amended Schedule I that she had been occupied as a caregiver since March 1, 2022, and was earning $895/month. Debtor also added income in the amount of $185 described as "friend contribution." The second amended Schedule I reflected a change in combined monthly income from $6,286 to $7,366, an increase of $1,080. The original and never-amended Schedule J calculated Debtor's monthly expenses as $5,267, which includes a deduction of $1,337 for the Social Security income. *See* EOD 1.

At the April 25, 2022 court hearing, the Trustee stated that there is no factual dispute that Debtor's spouse intends to look for more work. Taking that statement as true, she continued, the question is whether the legal standard for feasibility is satisfied. Hearing the parties agree that an evidentiary hearing was unnecessary, the court entered a scheduling order allowing the Debtor to file an amended response.

In her Amended Response, Debtor asserted that she need not commit all projected disposable income to her unsecured creditors because her plan provides that the value of the property to be distributed under the plan on account of her unsecured claims is not less than the amount of those claims. And, she contended that the Code does not require her to pay those unsecured claims more quickly than the applicable commitment period of 60 months, even if this means there are months during the plan term in which she has disposable income not committed to her creditors.

Debtor also disputed that her plan is not feasible. First, she attached a sworn statement from the friend who would be making the $185 contributions described in the second amended Schedule I. The statement reads as follows:

> I, Lisa Ross, am a friend of Wendy Giannini. I believe that a substantial portion of her debt was incurred for my benefit. As a result I contribute approximately

> $185 per month in cash payments to Ms. Giannini so that she can reliably pay the Chapter 13 Trustee.
>
> I declare under penalty of perjury that the foregoing is true and correct. Executed on 5/2/22 (date).

The declarant, Lisa Ross, then affixed her signature.

Next, Debtor explained that she "resumed part-time work as a caregiver with both a private agency at $15 per hour and with the State of Illinois at $17.50 per hour," although she indicated that the work began at the end of March 2022, rather than March 1, as stated in the second amended Schedule I. Amended Response, p. 5. Debtor attached a bank statement dated March 16, 2022 through April 15, 2022 that includes four receipts described as "Farruggia" totaling $619.89 "over an estimated 3 weeks' worth of work, projecting to approximately $895 per month." *Id.*, p. 6.

Debtor acknowledged that even with her additional income, "the loss of the severance creates a shortfall of approximately $518 per month compared to the current scheduled budget."[3] *Id.* Debtor, however, contends that her budget has "room … to find the additional necessary funds should her spouse not find additional work after his severance ends." *Id.*

II. LEGAL DISCUSSION

Relief under chapter 13 is available only to "an individual with regular income[.]" 11 U.S.C. § 109(e). The Code tells us this means an "individual whose income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title[.]" 11 U.S.C. § 101(30). An individual who qualifies for relief under chapter 13 must then

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[3] Second amended Schedule I combined monthly income $7,366.77
Minus severance ending in September 2022 $3,580.00
Minus monthly expenses budgeted on Schedule J $3,930.00
TOTAL - $143.23

Negative net income of $143.23 plus proposed plan payment of $375 = $518.23 shortfall

propose a plan that "shall provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan." 11 U.S.C. § 1322(a)(1).

Debtor seeks to confirm her chapter 13 plan, which requires that she satisfy each element of 11 U.S.C. § 1325(a). She bears the burden of establishing by a preponderance of the evidence that the requirements for confirmation of the proposed plan have been met. *See In re Shelton*, 592 B.R. 193, 201 n.5 (Bankr. N.D. Ill. 2018).

A. Debtor did not establish by a preponderance of the evidence that she will be able to make all payments under the plan and to comply with the plan

The Trustee contends that the court cannot confirm the plan because Debtor did not meet the requirement in 11 U.S.C. § 1325(a)(6) that she will be able to make all payments under the plan and to comply with the plan, i.e., that the plan is feasible.

Whether a plan is feasible is determined at confirmation. "To be feasible, the plan must have a reasonable likelihood of success as determined by the particular circumstances of the plan and the case." *Marshall v. Blake*, 885 F.3d 1065, 1083 (7th Cir. 2018) (quotation omitted), *overruled on other grounds by In re Wade*, 926 F.3d 447 (7th Cir. 2019). Although "the feasibility requirement is not rigorous," *In re Olson*, 553 B.R. 343, 348 (Bankr. N.D. Ill. 2016) (quotation omitted), the parties agree that the legal standard a plan proponent must satisfy is "that the Debtor's income exceeds expenses by an amount sufficient to make the payments proposed by the plan," *In re Lewis*, 459 B.R. 281, 290 (N.D. Ill. 2011) (quotation omitted).

"[A] plan showing a small deficit between current income and expenses may be feasible if there is a *reasonable likelihood* that the debtor's income will increase or that his expenses will diminish." *Fed. Nat. Mortg. Ass'n v. Ferreira*, 223 B.R. 258, 263 (D.R.I. 1998) (emphasis added). The court agrees with the *Ferreira* decision. A small deficit need not be dispositive on

the issue of feasibility. If there is a *reasonable likelihood* that a debtor's income will increase or expenses will diminish, the debtor can satisfy § 1325(a)(6).

In this case, Debtor does not dispute that her second amended Schedule I, in combination with the original Schedule J, shows negative net income of $143.23 once the severance pay ends in September 2022. When the plan payment of $375 is applied, this results in a shortfall of $518.23. Debtor asserts that, despite the negative net income on the schedules she filed under penalty of perjury, the plan is feasible because: (1) her budget has "room … to find the additional necessary funds"; and (2) her non-filing spouse will look for additional employment. The Trustee argues in opposition that, even taking those assertions as true, the plan is not feasible.

1. Evidence Does Not Establish that Debtor's Expenses Will Decrease or Income Will Increase

a. Reduction of Expenses

This debtor faces a monthly deficit of approximately $518. First, the Debtor argues that she will reduce her expenses. Her position is entirely unsupported by evidence. Debtor listed a few expenses in her Amended Response and, while unwilling to admit that those items are "unreasonably high," suggested that "there should be room" for reductions that would allow her to make the plan payments. She put forth no credible evidence that she will be able to decrease her expenses and that her income will exceed expenses when the severance pay ends. *See Marshall*, 885 F.3d at 1083; *Lewis*, 459 B.R. at 290 ("the bankruptcy court should be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan") (quotation omitted). These vague and unsubstantiated allegations do not constitute evidence that there is a reasonable likelihood Debtor's expenses will diminish.

b. Increase in Wages and Contributions

Debtor did not present evidence sufficient to establish a reasonable likelihood that she will reliably continue to receive regular income from her new caregiver positions as well as contributions from her friend.

First, she has not established that she will receive regular income from work as a caregiver. Debtor submitted bank statements with four separate entries over a two-week period which she alleges represent income from this new employment. Besides her unsupported allegations, there is no evidence that these vague descriptions on the bank statements are what she says they are.[4]

Moreover, there is no evidence that the work will be reliable and ongoing. Even if these receipts represent income from employment as a caregiver, Debtor has not yet received even one month's pay, and in fact her estimate of $895 per month is merely an extrapolation from those four receipts. As one court noted when finding a plan was not feasible:

> While the Debtor testified about the prospect of obtaining additional employment as a caregiver, and that she expects an uptick in her cleaning business, there was no testimony to demonstrate that the Debtor's income would increase to an amount sufficient to make the proposed Plan payments. Indeed, the Debtor cannot satisfy the requirement under 11 U.S.C. § 1325(a)(6) with zero or negative projected disposable income. Therefore, the Plan is not feasible.

In re Drago, No. 15-15615 (JNP), 2015 WL 9777745, at *4 (Bankr. D.N.J. Dec. 18, 2015) (citation omitted).

As for the contributions from her friend, Debtor attached a three-sentence sworn statement in which the friend declared that she "contribute[s] approximately $185 per month in

[4] The Federal Rules of Evidence require testimony or statement of a party to prove the content of a writing. "The proponent may prove the content of a writing … by the testimony, deposition, or written statement of the party against whom the evidence is offered." FRE 1007.

cash payments to Ms. Giannini[.]"[5] There is no evidence of an obligation on the friend's part; this appears to be entirely voluntary. There is no commitment to continued payment or to any length of time for payment. The court has no information regarding the friend's ability to maintain payments. Moreover, the payments are made in cash and no receipts were submitted. There is no written record that any contributions have ever actually been made.

2. Future Employment and Contribution by Spouse

Neither does the second element support Debtor's contention that there is a reasonable likelihood she will eliminate the shortfall in her budget. Even if there is no dispute that Debtor's non-filing spouse will look for additional employment, this alone is insufficient to demonstrate a reasonable likelihood that Debtor's income will increase. Debtor submitted no evidence at all regarding the efforts her spouse would make to obtain additional employment, including when that will occur, and how much he might expect to earn. In fact, the only evidence regarding the spouse's employment while this case has been pending is a *reduction* in his income between the original and amended Schedule I.

Courts recognize that a debtor need not provide a *guarantee* of future performance. *See In re Cruz*, No. 19-51697, 2020 WL 6038888, at *11 (Bankr. E.D. Mich. Oct. 12, 2020). But, especially in a case like the one before the court today, where a portion of the income is certain to be eliminated within a matter of weeks, the Debtor must provide something more than allegations to establish a reasonable likelihood of feasibility.

Debtor suggests that her position is analogous to those chapter 13 plans that rely on a balloon payment sometime during the plan term. When the success of a plan "hinges entirely

[5] 28 U.S.C. § 1746 governs the content that must be present in a declaration if it is to be offered as evidence to support a fact or an allegation. Here, the declaration meets the statutory requirements. The court, however, must review the declaration's contents, evaluate all evidence and determine whether a party meets its burden.

upon the happening of a speculative, contingent event," *In re Isaac*, No. 05 B 13874, 2005 WL 3939839, at *2 (Bankr. N.D. Ill. Nov. 16, 2005), there must be objective evidence of the debtor's commitment to realistically achieve the event and obtain the relief, *see In re Wagner*, 259 B.R. 694, 700 (B.A.P. 8th Cir. 2001) ("A definite declaration as to the source and the amount of funds necessary to enable the debtor to make the plan payments is required."); *In re Newton*, 161 B.R. 207, 217 (Bankr. D. Minn. 1993) ("For a proposed cure-by-sale to pass muster, the debtor must make certain objective commitments in the plan[.]"); *In re Gavia*, 24 B.R. 216, 218 (Bankr. E.D. Ca.), *aff'd*, 24 B.R. 573 (B.A.P. 9th Cir. 1982). *See also* 8 Collier on Bankruptcy ¶ 1325.07[1] (16th 2022) ("a plan calling for a large lump sum payment at the end of the plan, with no indication of how the funds will be obtained, does not meet the feasibility standard") (footnote omitted).

"To avoid potential abuse, debtors must show by *definite and credible evidence* that they will have the financial ability to make the balloon payment. While it is impossible to predict with absolute certainty, *mere speculation* as to the source of funds is not sufficient to satisfy feasibility." *Fantasia*, 211 B.R. at 423 (emphasis added) (citations omitted). As the Trustee summarized in her reply, "[t]he plan has an aspirational intent to pay creditors 100%, but no funds to do so." Reply, p. 3. The court agrees. For all of the reasons stated above, Debtor has not established by a preponderance of the evidence that she will be able to make all payments under the plan and to comply with the plan.

B. Application of 11 U.S.C. § 1325(b)(1)

Having determined that the plan is not feasible, the court cannot confirm it. Therefore, the court need not decide whether the plan satisfies 11 U.S.C. § 1325(b)(1). However, a brief discussion of this subsection may prove useful going forward.

11 U.S.C. § 1325(b)(1) states that when the trustee or an unsecured creditor objects to confirmation, the court may not confirm the plan unless, as of the effective date:

> **(A)** the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> **(B)** the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Debtor argues that the plan satisfies § 1325(b)(1)(A) because she will pay all unsecured creditors in full. Therefore, she need not commit all projected disposable income to the plan.

While this is a correct statement of the law, Debtor's position relies on a finding that her plan actually would pay all unsecured creditors in full. Debtor's plan is not feasible. She has not shown a reasonable likelihood that her income will increase, or that her expenses will decrease, or that the income added in the second amended Schedule I is reliable. Without the Debtor having satisfied the feasibility requirement for confirmation, the court cannot conclude that she proved by a preponderance of the evidence that her unsecured creditors will be paid in full.

If Debtor can overcome the issues identified in this order, however, and propose a feasible plan that pays unsecured creditors in full, then this future plan could satisfy 11 U.S.C. § 1325(b)(1)(A). As a result, Debtor would not be required to commit all projected disposable income to be received in her applicable commitment period. This includes the income remaining after Debtor makes her plan payment during the time her spouse is receiving severance. If she proposes a feasible plan that would provide for full payment to her unsecured creditors, Debtor has the option to pay that excess income into the plan in order to shorten the plan term, but she need not do so. *See* 11 U.S.C. § 1325(b)(4)(B) (the applicable commitment period "*may* be less than … 5 years … if the plan provides for payment in full of all allowed unsecured claims over a shorter period") (emphasis added).

III. CONCLUSION

For the reasons stated above, the Debtor's plan is not feasible. She has not satisfied the requirement of 11 U.S.C. § 1325(a)(6) that she will be able to make all payments under the plan and to comply with the plan. To the extent the Motion to Dismiss is construed as an objection to confirmation, that objection is sustained and confirmation is denied. At this time, however, the court is not prepared to conclude that cause exists to dismiss this bankruptcy case.[6] The court will re-set this case on the confirmation calendar, grant the Debtor leave to file an amended plan and grant the Trustee leave to file a motion to dismiss or objection to confirmation, if appropriate.

IT IS HEREBY ORDERED THAT the Motion to Dismiss at EOD 26 is **DENIED**. The January 24 Motion at EOD 20 is **MOOT**. Debtor may file an amended plan by **August 18, 2022**. The Trustee may file a motion to dismiss or objection to confirmation to this amended plan by **September 1, 2022**. The confirmation hearing and the application for compensation are re-set for hearing on **September 12, 2022 at 2:30 p.m**.

ENTERED:

Date: July 27, 2022

DAVID D. CLEARY
United States Bankruptcy Judge

[6] Trustee's Motion contained several bases for dismissal. Whether the parties resolved some issues through negotiation is unclear to the court. The parties briefed and argued the issues relevant to confirmation. These issues will be decided. The balance of the allegations are denied for failure to pursue and present evidence establishing a basis for relief.