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HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re:	)	BAP No.	EC-05-1229-ABPa
CAO HUU TRAN,	)	BK. No.	04-23582
	)		
Debtor.	)		
_____	)		
CAO HUU TRAN,	)		
	)		
Appellant,	)		
	)		
v.	)	<b>MEMORANDUM<sup>1</sup></b>	
	)		
HARRAH'S OPERATING COMPANY,	)		
INC.; HARVEY'S TAHOE	)		
MANAGEMENT CO., INC.;	)		
LAWRENCE J. LOHEIT; THE	)		
GOLDEN 1 CREDIT UNION,	)		
	)		
Appellees.	)		
_____	)		

Submitted Without Argument on May 17, 2006

Filed - August 8, 2006

Appeal from the United States Bankruptcy Court  
for the Eastern District of California

Honorable Thomas C. Holman, Bankruptcy Judge, Presiding

Before: ALBERT,<sup>2</sup> BRANDT and PAPPAS, Bankruptcy Judges.

<sup>1</sup> This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

<sup>2</sup> Hon. Theodor C. Albert, United States Bankruptcy Judge for the Central District of California, sitting by designation.



1 continued by Judge McManus to August 24, 2004. At the continued  
2 hearing on August 24, 2004, the only additional evidence offered  
3 by Debtor was his own declaration and those of his family members  
4 indicating Debtor's intention to attend Gamblers' Anonymous  
5 meetings. In the "Supplemental Declaration of Debtor Cao Huu  
6 Tran..." Debtor acknowledged the importance of stopping his  
7 gambling and reported his intention to attend regular Gamblers'  
8 Anonymous meetings.

9 Confirmation of that plan was denied. In its opinion, filed  
10 October 8, 2004, the Court held that Debtor did not satisfy his  
11 burden of showing that his plan was feasible and proposed in good  
12 faith. In his Memorandum Opinion, Judge McManus cited to  
13 Debtor's large gambling losses incurred just months prior to the  
14 bankruptcy filing, the fact that Debtor borrowed money from  
15 friends and family members and lost it gambling, and that Debtor  
16 admitted to gambling even after filing his bankruptcy petition.  
17 The Bankruptcy Court had before it the "Supplemental Declaration  
18 of Cao Huu Tran..." referenced above. Judge McManus, however,  
19 stated that he had no confidence that Debtor would not gamble  
20 while his case was pending, which would render him unable to  
21 perform his plan. Judge McManus stated that he did not believe  
22 Debtor's claims that he had remedied his gambling problem and so  
23 denied confirmation.

24 On October 15, 2004, the Chapter 13 Trustee filed a Motion  
25 to Dismiss, citing "unreasonable delay that is prejudicial to  
26 creditors" as cause for dismissal of Debtor's bankruptcy case.  
27 The Bankruptcy Court, the Honorable Thomas Holman presiding,  
28 conditionally denied the Motion to Dismiss after a hearing on

1 November 3, 2004, because Debtor had in the meantime filed a  
2 Second Amended Chapter 13 Plan. Judge Holman also stated that  
3 the dismissal motion was denied conditioned upon the Debtor  
4 obtaining "confirmation of a plan by December 21st" (the  
5 "conditional dismissal"). Further, in the Court's November 3  
6 minute order, it was provided that the Chapter 13 Trustee could  
7 file a declaration setting forth the failure to meet the  
8 condition and submit an order dismissing the case without further  
9 notice.

10 Debtor filed a Second Amended Plan on October 18, 2004.  
11 Harrah's, Harvey's, and the Chapter 13 Trustee (collectively,  
12 "Appellees") filed objections to confirmation of that plan.  
13 Debtor filed his "Declaration of Debtor Cao Huu Tran in Support  
14 of Debtor's Response..." where again he declares that he had  
15 attended "either weekly or else every two weeks..." Gamblers'  
16 Anonymous meetings. He further declares his determination to  
17 resist further gambling. A confirmation hearing was held on  
18 December 21, 2004. At that hearing Debtor asked for a  
19 continuance to submit an additional plan. The Bankruptcy Court  
20 allowed Debtor an additional 10 days to file a further amended  
21 plan. The deadline to confirm the plan was extended to March 1,  
22 2005, and the conditional dismissal order was modified  
23 accordingly. In its minute order dated December 21, 2004, the  
24 Court indicated that the Debtor had failed again to prove  
25 feasibility, among other grounds.

26 Debtor filed his Third Amended Plan on January 3, 2005.  
27 Once again, Appellees filed objections to confirmation. Debtor  
28 filed his additional "Declaration of Cao Huu Tran in Support of

1 Debtor's Reply..." wherein again he declares he had attended  
2 Gamblers' Anonymous approximately weekly and again vows his  
3 determination to resist gambling.

4 At the confirmation hearing held on March 1, 2005, the Court  
5 heard from Harrah's and Harvey's that the principal objection was  
6 that Debtor "still has not cured the concerns of Judge McManus  
7 back in August upon which he based his denial of Debtor's  
8 original plan. Debtor still has a gambling problem which has not  
9 been addressed, and there is a feasibility issue based on that."  
10 At the hearing, Debtor told Judge Holman that he had been  
11 attending the Gamblers' Anonymous meetings "two or three times a  
12 month." At the request of the objectors, the court continued the  
13 matter "for an evidentiary hearing and attest (sic) the accuracy  
14 and credibility of Mr. Tran's claim that he has stopped gambling  
15 and that he is in fact attending his Gamblers' Anonymous  
16 meetings." After quizzing Debtor about the identity of persons  
17 who could vouch for his attendance at the Gamblers' Anonymous  
18 meetings, and after hearing Debtor's testimony about the  
19 existence of possible written records, the Court afforded the  
20 objectors an opportunity to conduct limited discovery. At the  
21 hearing, the Court informed Debtor about its skepticism  
22 concerning his alleged steps to curb his gambling.

23 The Court further told Debtor's counsel "I'm particularly  
24 interested in whether Mr. Tran has been attending his gambling -  
25 Gamblers' Anonymous meetings. I know he submitted information  
26 along those lines. The creditors don't believe it. They think  
27 it's self serving. And so that's, I think, the issue that got us  
28 to the point of them wanting to do some discovery and set this

1 for evidentiary hearing." The Court set the evidentiary hearing  
2 for approximately 60 days later and set a discovery cutoff  
3 deadline of April 29, 2005. The Court specifically requested  
4 that the parties be prepared to name their witnesses and  
5 documents to be introduced for the continued hearing on May 3,  
6 2005. No formal further extensions were made of the Court's  
7 earlier conditional dismissal.

8 On April 22, 2005, Harvey's and Harrah's filed their  
9 "Creditor's Pre-Evidentiary Hearing Statement" wherein, among  
10 other things, it was claimed that discovery requests had been  
11 propounded on the gambling issue but no response had been, as of  
12 that date, timely given by Debtor.

13 A continued confirmation hearing was held on May 3, 2005.  
14 Harrah's and Harvey's argued that they had not received timely  
15 responses to their discovery requests from Debtor<sup>4</sup>, and that  
16 Debtor did not produce any other evidence to support his plan  
17 beyond his self-serving statements contained in his earlier  
18 declarations. When asked by the Court if Debtor had submitted  
19 any other evidence to support confirmation, Debtor stated nothing  
20 further was submitted, although, apparently, an unnamed declarant  
21 had come forward at 7:00 p.m. the night before but was unwilling  
22 to come to court and was only willing, in any event, to testify  
23 as to dates of (presumably Debtor's) attendance (at the Gamblers'  
24 Anonymous meetings)<sup>5</sup>. The Court was unwilling to accept this

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25  
26 <sup>4</sup> Apparently, some answers were given on the day before the  
27 discovery cutoff. Debtor admits these were untimely.

28 <sup>5</sup> This mystery declaration was not included in the record on  
appeal.

1 declaration or offer of proof in absence of the witness'  
2 attendance to testify. Moreover, since Debtor did not know the  
3 witness' address, Debtor did not think he could be subpoenaed  
4 either. Debtor acknowledged that if the unnamed witness could  
5 not be persuaded to testify, then Debtor could not produce any  
6 witnesses. The Bankruptcy Court denied confirmation, holding  
7 that Debtor failed to submit evidence establishing that his Third  
8 Amended Plan was feasible and submitted in good faith, although  
9 "debtor has had every opportunity to try and substantiate this  
10 plan."

11 In its order of May 3, 2005, the Court noted:

12 This matter was continued from March 1,  
13 2005, to allow the parties an opportunity to  
14 engage in discovery and to specifically allow  
15 the debtor an opportunity to present evidence  
16 of his good faith and the feasibility of his  
17 proposed amended plan. The debtor did not  
18 timely respond to a discovery request made by  
19 objecting creditors, and has not filed  
20 supplemental evidence. The trustee's  
21 Harrah's Operating Company's and Harveys  
22 Tahoe Management's objections are sustained  
23 and the motion to confirm is denied.

24 The debtor failed to carry the burden of  
25 establishing the requirements of 11 U.S.C.  
26 § 1325(a)(3) and (6). Specifically, the  
27 debtor failed in his burden of submitting  
28 sufficient evidence establishing that his  
plan is feasible and submitted in good faith,  
particularly in light of his admission of  
post-petition gambling. The court also  
relies on Judge McManus' findings that the  
debtor's prior actions in and out of this  
court show a lack of his good faith in  
providing for his debts. The debtor's  
actions subsequent to Judge McManus' ruling  
do not show his good faith and cure the  
impact of his prior actions. In fact, his  
failure to respond to discovery regarding his  
post-petition gambling activities (by timely  
responding or objecting to Harrah's and  
Harvey's interrogatories) shows his lack of  
good faith in proposing and supporting this  
plan.

1 Plan confirmation can be denied for  
2 failing to satisfy one or more of the  
3 prerequisites of 11 U.S.C. § 1325. In re  
4 Padilla, 213 B.R. 349, 352 (9th Cir. BAP  
1997); Keith M. Lundin, Chapter 13  
Bankruptcy, 3d. Ed. § 217.1 (2000 & Supp  
2004).

5 Harrah's and Harvey's request for  
6 dismissal is denied. These creditors did not  
7 request this relief in their original moving  
papers.

8 However, nothing was further said concerning the already entered  
9 order of the Court from December 21, 2004 conditionally  
10 dismissing the case.

11 After confirmation of Debtor's Third Amended Plan was denied  
12 on May 3, 2005, the Chapter 13 Trustee submitted a declaration of  
13 Edna Froloff, his assistant, in support of his earlier Motion to  
14 Dismiss, consistent with the Bankruptcy Court's direction at the  
15 November 3, 2004 hearing and its conditional dismissal. In the  
16 declaration, Ms. Froloff states that the Bankruptcy Court entered  
17 an order requiring Debtor to confirm a plan by December 21, 2004,  
18 and that Debtor had not confirmed a plan within that time (or  
19 within the further extended deadline of March 1, 2005).

20 The Bankruptcy Court entered an order dismissing the case on  
21 May 16, 2005. Debtor appeals the order dismissing his bankruptcy  
22 case.

### 23 JURISDICTION

24 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334  
25 and § 157(b)(1). We have jurisdiction under 28 U.S.C. §§ 158(b)  
26 and (c).





1 Debtor appears to be under the impression that this appeal  
2 is of both the order denying confirmation and the order  
3 dismissing the case. Fed. R. Bankr. P. 8002(a) provides, in  
4 part, that a notice of appeal "shall be filed with the clerk  
5 within 10 days of the date of the entry of the judgment, order,  
6 or decree appealed from." The order denying confirmation of  
7 Debtor's Third Amended Plan was entered on May 11, 2005. Debtor  
8 filed a notice of appeal on May 26, 2005. While the notice of  
9 appeal was not filed within 10 days of the denial of confirmation  
10 as required by Rule 8002(a), this Panel may still consider the  
11 confirmation issues raised in this appeal.

12 Orders denying plan confirmation are interlocutory when the  
13 petition itself has not been dismissed. Nicholes v. Johnny  
14 Appleseed of Wash. (In re Nicholes), 184 B.R. 82, 86 (9th Cir.  
15 BAP 1995). The denial of confirmation was therefore not a final  
16 appealable order. Debtor's Notice of Appeal was filed 10 days  
17 after the order dismissing the bankruptcy case was entered and  
18 clearly states that Debtor "appeals...from the Entry of Order of  
19 Dismissal by the bankruptcy judge...on May 16, 2005." The order  
20 dismissing the case was a final order. However, an appeal from a  
21 final judgment draws in question all earlier non-final orders and  
22 all rulings which produced the judgment. Munoz v. Small Bus.  
23 Admin., 644 F.2d 1361, 1364 (9th Cir. 1981). Because the  
24 Bankruptcy Court's decision to dismiss the case relied upon  
25 Debtor's third and last failure to confirm a plan, the parties  
26 briefed the issues, and no prejudice is apparent, the order  
27 denying confirmation can properly be considered here. Wall  
28 Street Plaza, LLC v. JSJF Corporation (In re JSJF Corporation),

1 344 B.R. 94 (9th Cir. BAP 2006). Based upon the record  
2 presented, however, this Panel does not find any basis for  
3 disturbing that ruling.

4 Section 1307(c) provides, in pertinent part:

5 Except as provided in subsection (e) of this  
6 section, on request of a party in interest or  
7 the United States trustee and after notice and  
8 a hearing, the court may convert a case under  
9 this chapter to a case under chapter 7 of this  
10 title, or may dismiss a case under this  
11 chapter, whichever is in the best interests of  
12 creditors and the estate, for cause, including

13 -  
14 (1) unreasonable delay by the debtor that is  
15 prejudicial to creditors;....

16 11 U.S.C. § 1307(c). The list of "causes" in section 1307(c) is  
17 not exhaustive. Valenti v. Valenti (In re Valenti), 310 B.R.  
18 138, 151 (9th Cir. BAP 2004), citing, Leavitt v. Soto (In re  
19 Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

20 The Chapter 13 Trustee's Motion to Dismiss cited  
21 "unreasonable delay that is prejudicial to creditors" as the  
22 basis for the request to dismiss Debtor's case. The "Declaration  
23 of Edna Froloff in Support of Motion to Dismiss" filed on May 11,  
24 2005 states that Debtor did not obtain confirmation of a plan  
25 within the time required by the Bankruptcy Court. By the time  
26 Debtor's case was dismissed, plan confirmation had been denied  
27 three times and Debtor had received several opportunities to  
28 provide evidence regarding correction of his gambling compulsion  
in support of the feasibility of the plan, and to show that the  
plan was proposed in good faith.

After the Chapter 13 Trustee filed his Motion to Dismiss,  
the Bankruptcy Court set a deadline by which Debtor was to  
confirm a plan. That deadline was extended twice to give Debtor

1 every opportunity to comply with the requests of the Court. At  
2 the May 3, 2005 hearing, Debtor's counsel admitted that Debtor's  
3 responses to the Appellee's interrogatories were untimely, and  
4 also that Debtor was unable to produce any other evidence in  
5 support of his plan. Moreover, this failure to timely respond to  
6 discovery, or to produce any further evidence or witnesses  
7 concerning Debtor's gambling must be viewed with the Bankruptcy  
8 Court's admonition from the March 1 hearing in mind.

9 The further continued hearing of May 3 was to have been the  
10 evidentiary hearing wherein Debtor's credibility was to be  
11 tested. Debtor was already on clear notice that the self-serving  
12 declarations of Debtor were not adequate because they were not  
13 believed. For Debtor to still have provided untimely responses,  
14 and to have not been prepared with witnesses or other evidence at  
15 the May 3 hearing, sought more indulgence than the court was  
16 prepared to give. Nor can Debtor reasonably argue that the Court  
17 did not make perfectly clear at the March 1 hearing that the May  
18 3 hearing was to be an evidentiary hearing wherein Debtor's  
19 claims of forbearance from gambling were to be tested. See,  
20 Khachikyan v. Hahn (In re Khachikyan), 335 B.R. 121, 126-28 (9th  
21 Cir. BAP 2005). The parties were expected to be ready to proceed  
22 at the May 3 hearing. Id. at 127.

23 In Vomhof v. U.S., 207 B.R. 191 (D. Minn. 1997), the  
24 Bankruptcy Court denied confirmation of the debtors' plan,  
25 continued a motion to dismiss and gave the debtors time to file  
26 income tax returns that were needed to determine whether debtors'  
27 plan would be feasible. The Bankruptcy Court provided that if  
28 debtors failed to comply with its order to file the tax returns

1 by a certain date, the case would be dismissed without further  
2 notice. When the debtors did not comply with the Court's order,  
3 the case was dismissed. Id. at 192. The debtors appealed to the  
4 District Court, which affirmed the dismissal. The District Court  
5 found that the debtors were clearly required to produce the tax  
6 returns, and that they did not produce those returns. The  
7 District Court stated that the tax returns were "necessarily  
8 helpful for determining the feasibility of a proposed plan," and  
9 the debtor's failure to provide the returns was prejudicial. Id.  
10 at 193. The Vomhof court stated that "[f]ailure to supply  
11 crucial information required by a court order is proper grounds  
12 for dismissal under section 1307(c)(1)." Id.; See also, Howard  
13 v. Lexington Inv., Inc., 284 F.3d 320 (1st Cir. 2002). In this  
14 case, definitive evidence concerning Debtor's gambling addiction  
15 was "crucial information" on the central issues of good faith and  
16 feasibility, particularly where Debtor admitted to gambling post  
17 petition.

18 Here, the Bankruptcy Court conditionally dismissed the case  
19 subject to a final opportunity to confirm a plan. The deadline  
20 for confirmation was extended by nearly six months. Debtor also  
21 did not timely comply with discovery requirements directed to  
22 this issue despite a deadline set by the Court, and despite the  
23 great emphasis placed by the Court at the March 1 hearing that  
24 the continued date was to be an opportunity to test Debtor's  
25 self-serving testimony.

26 Debtor argues that it was an abuse of discretion to deny  
27 confirmation on the basis of skepticism regarding Debtor's  
28 possibly continued gambling "since no evidence was presented to

1 controvert Debtor's sworn statement to the contrary..."

2 Appellant's Brief p. 16-17. However, Debtor misconstrues the

3 operation of a burden of proof. Debtor clearly had the burden of

4 proving both feasibility, In re Wagner, 259 B.R. 694 (8th Cir.

5 BAP 2001), and good faith. In re Soost, 290 B.R. 116 (Bankr. D.

6 Minn. 2003).

7 "Burden of proof" is defined as "a party's duty to prove a

8 disputed assertion or charge." Black's Law Dictionary, 8th Ed.

9 (1999). The burden of proof includes both the burden of

10 production and the burden of persuasion. Christopher B. Mueller,

11 Laird C. Kirkpatrick, 1 Federal Evidence § 62 (2d ed. 2005). To

12 satisfy the burden of production, a party must introduce

13 sufficient evidence to make out a prima facie case. 150 N. St.

14 Assoc. Ltd. P'ship v. City of Pittsfield, 184 B.R. 1, 7 (Bankr.

15 D. Mass. 1995). A party carries the burden of production by

16 introducing evidence sufficient to support the findings of fact

17 that are necessary to prevail. Id., citing, Federal Evidence,

18 § 64 at 317 (2d ed. 1994). The burden of persuasion is met by

19 introducing evidence that persuades the judge to find the facts

20 necessary if the party is to prevail. 1 Federal Evidence § 65

21 (2d ed. 2005).

22 Here, the problem is that the Court made very clear that it

23 did not believe Debtor's declaration that he had cured his

24 gambling problem. Therefore, when it developed at the May 3

25 hearing that the Debtor had no other witnesses or admissible

26 evidence to lend support to Debtor's assertion, the Court, as

27 trier of fact, was not persuaded that Debtor had proved the key

28 element of feasibility, irrespective of what evidence Appellees

1 did or did not offer.

2 The Bankruptcy Court is within its power to set reasonable  
3 deadlines for the Debtor to accomplish goals in the  
4 reorganization, and failure to meet these deadlines can be  
5 "cause" for dismissal based on unreasonable delay. See, In re  
6 Dilley, 125 B.R. 189, 193-94, 198 (Bankr. N.D. Ohio 1991); In re  
7 Gomes, 26 B.R. 124, 126 (Bankr. D.R.I. 1983). Moreover, section  
8 105(a) provides that the court may "issue any order, process, or  
9 judgment that is necessary or appropriate to carry out the  
10 provisions of this title." Howard, 284 F.3d at 323. Delays in  
11 achieving confirmation should not be limitless. Debtor has cited  
12 no authority which would suggest that three opportunities to  
13 confirm a plan and three extensions of the deadline to obtain  
14 confirmation were not ample under the circumstances, nor that a  
15 year and a month from the petition date was not an unreasonable  
16 delay prejudicial to creditors. Therefore, "cause" to dismiss  
17 pursuant to section 1307(c)(1) was shown, and the Bankruptcy  
18 Court did not abuse its discretion.

19 **CONCLUSION**

20 The order dismissing the case is AFFIRMED.

21  
22  
23 Brandt, Bankruptcy Judge, dissenting.

24  
25 Although I don't disagree with the practicality of the  
26 bankruptcy judge's, or the majority's, ruling, I must  
27 respectfully dissent: an opposed chapter 13 confirmation is a  
28 contested matter governed by Rule 9014, Fed. R. Bankr. P., In re

1 Hull, 251 B.R. 726, 731 (9th Cir. BAP 2000), and there are  
2 disputed material factual issues: feasibility, good faith, and  
3 underlying these, whether debtor now (at the time of  
4 confirmation) has his gambling problem under control, and his  
5 credibility. Those issues require an evidentiary hearing, Rule  
6 9014(d); In re Kachikian, 335 B.R. 121, 126-127 (9th Cir. BAP  
7 2005), and debtor didn't get one. That debtor previously had a  
8 gambling problem does not necessarily indicate that he still  
9 does, and the only evidence on that point is his uncontradicted  
10 declaration. His credibility is untested, and the lack of  
11 corroboration, without a determination that he is not credible,  
12 is not sufficient.

13 Nor are there any findings to support what were essentially  
14 terminating discovery sanctions, imposed without notice or  
15 motion, see In re Shubov, 253 BR 540 (9th Cir. BAP 2000).

16 Thus I would reverse the denial of confirmation, and,  
17 because the dismissal was predicated on the failure to confirm,  
18 that order as well.

19 Finally, although it is of no legal significance, one cannot  
20 help but marvel at the irony (and chutzpah) of two casinos  
21 objecting to confirmation of a debtor's plan on the ground that  
22 he has a gambling problem.