Dated: February 01, 2013
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re	
BRIAN B. MCCULLER,	Case No. 12-24864-K
Debtor.	Chapter 11
SSN: xxx-xx-6948	

MEMORANDUM AND ORDER RE CONFIRMATION OF DEBTOR'S CHAPTER 11 PLAN COMBINED WITH RELATED ORDERS AND NOTICE OF THE ENTRY THEREOF

The instant core proceedings[1] arise out of the confirmation hearing held on January 3, 2013, to consider the proposed "Plan of Reorganization" filed by the plan proponent, the above-named chapter 11 debtor in possession, Brian B. McCuller ("Mr. McCuller"), and the "Objections to Debtor's Plan of Reorganization" filed thereto by the objector, Ms. Brooke McCuller, the former spouse of Mr. McCuller ("Ms. McCuller").

[1] 28 U.S.C. § 157(b)(2)(A), (I), and (L).

The ultimate question for judicial determination is whether Mr. McCuller's proposed chapter 11 plan should be confirmed.

Based on the case record as a whole, including the testimony of Mr. McCuller and Ms. McCuller, the trial exhibits, and statements of counsel for the parties, the following shall constitute the court's findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052.

BACKGROUND FACTS AND JUDICIAL HISTORY

The relevant background facts and judicial history may be summarized as follows: On May 9, 2012, Mr. McCuller filed a voluntary petition commencing this individual chapter 11 case. Though the bankruptcy court's involvement began only recently, Mr. McCuller and his ex-wife, Ms. McCuller, have been subject to divorce and related post-divorce proceedings since 2008. These divorce proceedings and the resulting related debts are what primarily precipitated the commencement of this chapter 11 case and have led to this instant contested confirmation hearing and related matters. After notice and opportunity for a hearing, Ms. McCuller is the only objector regarding confirmation of Mr. McCuller's chapter 11 plan.

To summarize the precipitating background events and judicial history, Mr. McCuller and Ms. McCuller were duly and lawfully married on June 25, 1994, in Laurel, Mississippi. They have two children from this marriage. After years of marriage and for reasons not before this court, the Chancery Court of DeSoto County, Mississippi, ("Mississippi Court") entered a "Divorce Decree" on June 30, 2008, that ratified, confirmed, and approved a "Property, Child Support, and Child Custody Agreement" consensually executed by Mr. McCuller and Ms. McCuller on the same date ("Divorce Agreement") with the advice and counsel of their respected attorneys. The Divorce Agreement was settled out of court by the parties and their attorneys and merely approved by the Mississippi Court.

The Divorce Agreement thoroughly provided for the parties' intent regarding property settlement, child custody and support, and other related matters such as health insurance, school tuition, debt payments, legal fees, and etc. Specifically important to this chapter 11 case, Mr. McCuller agreed to pay Ms. McCuller: child support of $3,166.00 per month; any and all reasonable medical costs not covered by

health insurance of the two minor children; private school tuition for the two minor children; half of the costs and expenses of extracurricular activities that are not school related; and, most importantly here, "lump sum alimony" totaling $540,000.00 to be paid in bi-monthly installments of $2,250.00. The lump sum alimony was labeled as "not modifiable" and ceases only if Ms. McCuller dies or remarries.

At the time of the Divorce Agreement, Mr. McCuller's annual gross income was approximately $380,000.00. Mr. McCuller worked as a partner and certified public accountant for a local accounting firm. In 2009, due to no fault of his own, Mr. McCuller's salary was reduced from the approximate amount of $380,000.00 to approximately $190,000.00 due to circumstances related to the economic recession. Later in 2011, Mr. McCuller's accounting company was bought out by another firm, and, due to no fault of his own, his salary was further reduced to approximately $180,000.00 annual gross income plus the potential for bonuses. He testified that his annual salary at this time is approximately $183,600.00.

Due to these changed circumstances that were beyond his control, the lump sum alimony award to Ms. McCuller understandably became more difficult than Mr. McCuller originally anticipated at the time of the execution of the Divorce Agreement. Along with other legal actions related to the Divorce Agreement, Mr. McCuller sought relief in the Mississippi Court seeking to modify the lump sum alimony payments. Related to these proceedings, Mr. McCuller sought a declaratory judgment from the Mississippi Court regarding an interpretation of the lump sum alimony clause of the Divorce Agreement. Specifically, whether the lump sum alimony labeled as "not modifiable" was indeed such or whether such alimony, though labeled as lump sum alimony, was in substance periodic alimony and subject to modification under applicable Mississippi law. On March 8, 2011, Chancellor Percy L. Lynchard, Jr. issued an order that determined the lump sum alimony to indeed be lump sum alimony that was not modifiable under applicable Mississippi law regardless of any changed circumstances.

The Mississippi Court proceeded to schedule and hear other related matters. However, aware that he could not modify the lump sum alimony in the Mississippi courts and that the changed circumstances left him challenged at best if not completely unable to make full payments required under the Divorce

Agreement, Mr. McCuller filed this chapter 11 petition on May 9, 2012, seeking financial relief. The commencement of the chapter 11 case had the effect of automatically staying most actions against him and bringing his property and claims to such property under the jurisdiction of this court. See 11 U.S.C. § 362(a) and 28 U.S.C. §§ 1334(e)(1), 157(a).

On May 30, 2012, Ms. McCuller filed a § 362(d)(1) motion for relief from the automatic stay seeking in effect to modify the automatic stay as to Ms. McCuller and allow all matters relating to the Divorce Agreement to be heard and determined in the Mississippi Court. Mr. McCuller timely responded on June 5, 2012, asking that the motion be denied as relief in this court was needed based on his changed circumstances. After a preliminary hearing on this contested matter under § 362(d)(1), the parties consented to and the court entered on August 1, 2012, an "Order Conditionally Denying Motion for Relief from Automatic Stay." Accordingly, Ms. McCuller's motion was consensually denied conditioned on Mr. McCuller making periodic § 361(1) adequate protection payments consisting of (1) monthly child support payments of $3,166.00, (2) an immediate payment of $5,500.00, (3) ongoing monthly payments of $2,834.00 payable in two monthly installments, and (4) payment of the children's medical expenses. In addition, Mr. McCuller was to promptly file a chapter 11 plan and disclosure statement within 30 days. Any default under this relief from stay order would cause the automatic stay to be terminated upon Ms. McCuller's mere notice of default being filed. To date, it appears to the court that all payments have been paid as due by Mr. McCuller under the § 362(d)(1) order and the automatic stay has not been modified.

Thereafter on August 31, 2012, Mr. McCuller filed a disclosure statement under § 1125 with an exhibit that included the proposed chapter 11 reorganization plan. On September 28, 2012, Ms. McCuller filed an objection to the disclosure statement. At a hearing on October 2, 2012, the disclosure statement was provisionally approved upon oral amendments being incorporated into an amended disclosure statement. An amended disclosure statement was filed on October 11, 2012, and the chapter 11 plan was formally filed on October 3, 2012. Ms. McCuller filed an objection to the confirmation of the plan on November 8, 2012.

Mr. McCuller's chapter 11 plan places Ms. McCuller's claim referred to above in its own separate class, "Class III." The chapter 11 plan seeks to pay the state court ordered child support in full as it comes due, $3,166.00 per month. The child support claim is not impaired under the plan. See § 1124. In regards to the lump sum alimony award, the plan proposes to disburse $2,834.00 per month plus one-half of any bonuses the Mr. McCuller receives. In addition, once all plan payments are completed to the secured creditor of class II, JP Morgan Chase Bank, the monthly payments to Ms. McCuller would increase by $628.08 per month for a total monthly payment of $3,462.08. The lump sum alimony claim is impaired under the plan because payments are not paid in accordance with the court order. The court ordered lump sum alimony payments are to be $4,500.00 per month. The chapter 11 plan does not seek to modify the total amount of lump sum alimony to be paid, rather it seeks to defer payment of the lump sum alimony over a period of five years at a reduced monthly amount. At the end of the five year plan period, the remaining lump sum alimony still owing will not be discharged and will instead revert back to the payment installments ordered by the Mississippi Court.

TREATMENT OF LUMP SUM ALIMONY

The primary issue presented to the court is whether the plan is confirmable as regards the treatment of Ms. McCuller's lump sum alimony claim. Along with other arguments, Ms. McCuller asserts that the plan treatment of her lump sum alimony claim satisfies neither § 1129(a)(9)(B)(ii) nor § 1129(a)(13) of the confirmation requirements. Failure to satisfy these requirements renders a plan not confirmable by a bankruptcy court. In order to determine whether the plan satisfies these two requirements the court must engage in an analysis of lump sum alimony under Mississippi law and the Bankruptcy Code's treatment of such lump alimony.

In resolving divorces, Mississippi law allows courts to award what is labeled "lump sum alimony." Lump sum alimony is a creature of Mississippi law that predates the Mississippi Supreme Court's landmark decision in *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), which formally adopted the doctrine of equitable distribution and abandoned the title theory method of distribution. *See*

In re Rustin, 2011 WL 5443067 (Bankr. S. D. Miss. 2011) (discussing lump sum alimony as applied under the title theory and the doctrine of equitable distribution).

Lump sum alimony has been described by the Mississippi Supreme Court as "a method of dividing property under the guise of alimony." *Ferguson*, 639 So.2d at 926. Lump sum alimony can take on the nature of either periodic alimony or an equitable property distribution. *Barrett v. U.S.*, 74 F.3d 661, 665 (5th Cir. 1996). Where lump sum alimony acts like periodic alimony, the Mississippi courts may modify the award under equitable considerations. However, where the lump sum alimony acts like an equitable property distribution, the Mississippi courts cannot modify it because it becomes a vested right from the date of the judgment. "[L]ump sum alimony is treated like a traditional debt and is even chargeable to the estate of the payor spouse." *Id.* In essence, this latter form of lump sum alimony acts as an enforceable contract, while the former serves as a form of support. The characteristics of the award control the treatment of lump sum alimony. *Id.*

In the instant case, the Mississippi Court has resolved which form the lump sum alimony takes; it is in the nature of an equitable property distribution and not periodic alimony. ". . . [I]t is abundantly clear that the provision for the payment of alimony as written in the property settlement agreement incorporated in this Court's decree is an obligation for the payment of lump sum alimony, not periodic, which is not subject to modification by this Court." Order, *McCuller v. McCuller*, 07-08-1730, ¶5 (Ch. DeSoto Miss. Mar. 9, 2011). This determination by the Mississippi Court is a final order and is not reviewable by this court because of the doctrine of *res judicata*. Therefore, the primary issue before this court regards how the debt labeled by the Mississippi Court as lump sum alimony and not modifiable by the Mississippi courts is treated under the Bankruptcy Code.

Section 101(14A) defines domestic support obligations ("DSO"), along with other requirements, as being "in the nature of alimony, maintenance, or support . . . without regard to whether such debt is expressly so designated." Lump sum alimony though expressly designated as "alimony" may be in the nature of periodic alimony or an equitable property distribution as discussed above. This court finds the modifiable nature of the lump sum alimony determinative when trying to discern whether lump sum

alimony is a DSO. DSOs are given special priority and treatment under the Bankruptcy Code. See 11 U.S.C. §§ 362, 507, 523, 1307, 1325, and 1328. The reason for this special status relates to the policy goal of assuring that spouses, former spouses, and children are properly supported in life. DSOs are state court remedies and are subject to modification in state court based on guidelines, factors, and other equitable considerations. Mississippi uses twelve factors established in *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993), to order alimony, and these factors generally appear to look at the needs and ability to pay of the divorcing spouses. On the other hand, equitable property distributions aim to fairly divide and split assets accumulated by the spouses prior to the divorce, and any transfers vest immediately upon entry of a court order and are not modifiable absent fraud or some other contract remedy. Applicable Mississippi law uses eight factors established in *Ferguson*, 639 So.2d at 928-29, to equitably divide property, and these factors generally appear to value property and distribute it as equitably as possible. Therefore, where a Mississippi court uses the label "lump sum alimony," any court later interpreting that order must determine whether the Mississippi courts can modify that lump sum alimony. Where the Mississippi courts have authority to modify the lump sum alimony, the lump sum alimony is properly designated as alimony for purposes of § 101(14A) and is a DSO. However, where the Mississippi courts do NOT have authority to modify the lump sum alimony, the lump sum alimony is NOT properly designated as alimony for purposes of §101(14A) and is in the nature of an equitable property distribution.

Section 523(a)(5) makes a debt for DSOs nondischargeable. Although not a DSO, section 523(a)(15) nonetheless makes such debts to a former spouse incurred by the debtor in the course of a divorce other than those in § 523(a)(5) nondischargeable. Typically, alimony and child support are the most common DSO under § 523(a)(5); while, property settlements or equitable property distributions are common forms of debt under § 523(a)(15). Regardless, lump sum alimony whether in the nature of periodic alimony or an equitable property distribution is nondischargeable under the Bankruptcy Code[2].

[2] Mr. McCuller and Ms. McCuller consented at the confirmation hearing on January 3, 2013, that the court could and should make a final determination as to the dischargeability of all debts owed by Mr. McCuller to Ms. McCuller

Though dischargeability determinations regarding lump sum alimony do not turn on which of the two sections applies, treatment under a chapter 11 plan hinges on whether lump sum alimony is classified under § 523 (a)(5) or § 523 (a)(15). Section 1129(a)(9)(B)(ii) requires that the debtor to pay in full the amount allowed of a § 507(a)(1) claim, a DSO, on the effective date of the plan if the class has not accepted the plan. Section 1129(a)(14) only allows a plan to be confirmed if all matured DSOs are first paid and all ongoing DSO payments that mature are paid timely. A chapter 11 plan cannot be confirmed if the payment terms of a DSO have been modified or if the amount of the allowed, non-accepting DSO claim is not paid in full on the effective date. The appropriate court for modification of a DSO is the state court that rendered the judgment. The bankruptcy courts are not the appropriate forum for challenging and modifying DSOs, and the bankruptcy courts do not have authority or jurisdiction to implement such modifications. The same cannot be said for property settlements dealt with under § 523 (a)(15).

Unlike DSOs, no express provision exists that limits a chapter 11 plan from modifying a vested equitable property distribution and no express provision requires arrearage on an equitable property distribution claim to be paid in full on the effective date. Equitable property distributions are to be treated like any other right that vests under a contract and is not given special classification under the code. This treatment is as a general unsecured debt subject to pro rata distribution under the plan from available estate assets subject to the ordinary individual chapter 11 tests: best interest of creditors test under § 1129(a)(7)(A)(ii); the projected disposable income test under § 1129(a)(15)(B); the good faith test under § 1129(a)(3), and others as appropriate under the given circumstances.

The lump sum alimony at issue here is in the nature of an equitable property distribution treated under § 523(a)(15) and is not a DSO under§§ 523(a)(5) and 101(14A). The Mississippi court issued a final order finding that the lump sum alimony is not modifiable and is not periodic alimony. This language by the Mississippi Court is determinative for this court, and this court finds that, because the

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under the Divorce Agreement without the necessity of bringing a separate adversary proceeding to determine dischargeability. As resolving the applicable subsections under 523 is essential to whether the chapter 11 plan is confirmable, the court now makes the dischargeability determinations in this confirmation order, at the request of the parties' attorneys.

lump sum alimony is not modifiable and is not periodic alimony, the lump sum alimony at issue in this case is not a DSO and does not receive special priority and treatment under the Bankruptcy Code. The bankruptcy court has the authority and jurisdiction to confirm a plan that modifies a vested contract right, such as the vested lump sum alimony of the Divorce Agreement. The court finds the chapter 11 plan proposed by Mr. McCuller seeking to modify the lump sum alimony and to extend payments over a period of five years, sufficiently satisfies the requirements of § 1129(a)(9)(B)(ii), § 1129(a)(14), and § 1129(b)(2)(B) because the lump sum alimony is not a DSO under § 523(a)(5) subject to the requirements of these sections and all other DSOs of Mr. McCuller (*e.g.,* child support) are to be paid in accordance with the requirements of these subsections.

TREATMENT OF PRIVATE SCHOOL TUITION

Another debt owed to Ms. McCuller is private school tuition under the Divorce Agreement for Mr. and Ms. McCuller's two children. The Divorce Agreement under paragraph14 clearly specifies that Mr. McCuller "shall be responsible for all costs of private schooling for the parties' minor children from K-3 until graduation." This responsibility includes but is not limited to books, uniforms, and tuition. Putting this debt at instant dispute is a statement at the end of paragraph 14 that reads: "The parties agree that [Mr. McCuller's] payment of said private schooling costs shall not be considered as child support."

At the confirmation hearing on January 3, 2012, Mr. McCuller testified that he believes this private school debt to be dischargeable. In order for parties to clarify their position on this private school debt, this court requested additional responses by counsel specifically addressing treatment of the private school debt under the Bankruptcy Code and the chapter 11 plan. In response, Mr. McCuller amended his position under § 1127(a) indicating that he seeks treatment of the private school debt as a § 523(a)(15) nondischargeable debt to be treated similar to the lump sum alimony[3]. Contrarily, Ms. McCuller believes

[3] The chapter 11 plan filed on October 3, 2012, and subject to this confirmation order originally indicated that the private school debt to Ms. McCuller would be discharged. This plan provision was later amended under § 1127(a) and by a Memorandum submitted by Mr. McCuller, where he sought to have the private school debt be declared nondischargeable under § 523(a)(15). Through consent by counsel of both parties, the plan is amended to remove the treatment of the private school tuition as dischargeable. Ms. McCuller asserts, in relevant part here, that the private school debt is nondischargeable under § 523(a)(5) and not § 523(a)(15).

the private school debt is in the nature of child support and should, therefore, be nondischargeable under § 523(a)(5). The issue before the court is whether the private school debt is a DSO and subject to treatment under § 523(a)(5) or (15) noting the express language of the Divorce Agreement declaring the private school debt as NOT child support.

Though school tuition for minor children ordinarily is in the nature of support, the court is hesitant to ignore the express intent of the parties in the Divorce Agreement. The court, noting the State Court's "Divorce Decree," is aware that the child support awarded Ms. McCuller is already in excess of the statutory guidelines for awarding child support in Mississippi. As Mr. McCuller is already paying excess child support as compared to statutory guidelines, this court believes that the particular facts and circumstances of the private school debt at issue here are not ordinary. Mr. and Ms. McCuller agreed to payment of excess child support and also agreed to payment of private school debts to be declared NOT child support. Ms. McCuller, through her testimony on January 3, 2012, indicated it is her strong desire to have the children attend a private school, specifically the religious private school they have been and are currently enrolled.

Noting that private school education is not necessary for actual support of children but often can be deemed child support, this court finds this private school debt, being expressed as not child support by the parties, was a debt intended for Ms. McCuller and not the actual support of the children. Further, the court finds Ms. McCuller, understandably seeking the best interests of her children, sought to have a portion of her equitable property division be directly correlated to sending her children to a private school. The express language of the Divorce Agreement deeming this debt not child support supports this finding. Though this court can look beyond a divorce judgment's express designation (i.e., label) when determining a DSO under § 101(14A) for purposes of dischargeability under § 523(a)(5), the particular and extraordinary facts and circumstances of this debt do not require or warrant looking beyond the label used in the Divorce Agreement itself. Accordingly, the private school debt is not child support under § 523(a)(5) and, likewise, is not a DSO under § 101(14A). For the aforementioned reasons used when discussing lump sum alimony above, a debt arising out of a divorce agreement that is not a DSO is

properly nondischargeable under § 523(a)(15) and, therefore, can be modified under a chapter 11 plan. The chapter 11 plan[4] regarding private school debts sufficiently satisfies the requirements of § 1129(a)(9)(B)(ii), § 1129(a)(14), and § 1129(b)(2)(B).

GOOD FAITH TEST

Section 1129(a)(3) requires the plan to be proposed in good faith and not by any means forbidden by law. Good faith is not defined under the Bankruptcy Code. Generally, good faith in proposing a plan means that the plan has a reasonable likelihood that it will achieve a result consistent with the objectives and purposes of the Bankruptcy Code. *In re Madison Hotels Assocs*., 749 F.2d, 425 (7th Cir. 1984); *see also Tenn-Fla Partners v. First Union Nat. Bank of Florida*, 229 B.R. 720, 734 (W.D. Tenn. 1999). The court must examine the totality of the circumstances on a case-by-case basis to determine whether the plan complies with § 1129(a)(3). *Id.*; see *also Federal Nat. Morg. Ass'n v. Village Green I GP*, 2012 WL 6045896 (W.D. Tenn. 2012).

Ms. McCuller objected to the plan alleging, inter alia, that the plan does not satisfy this good faith requirement because of prior litigation that occurred in the Mississippi courts and because Mr. McCuller may seek future DSOs obligations in the Mississippi court as needed and appropriate under the law. Ms. McCuller alleges, among other things, that Mr. McCuller is "forum shopping" and that going back and forth between the bankruptcy court and Mississippi courts (*i.e.*, "ping-pong" jurisdiction) has caused attorney fees to be incurred and has frustrated her ability to collect from Mr. McCuller.

Though the court is cognizant to the high cost of attorney fees in the case and the frustration caused from having to litigate the post-divorce proceedings in multiple courts, this court, considering a totality of the particular facts and circumstances and applicable law, finds that Mr. McCuller has carried his burden of demonstrating the plan was proposed in good faith. Mr. McCuller has undergone a significant change in circumstances since the Divorce Agreement was finalized, as his income has

[4] The chapter 11 plan is as amended by the "Memorandum" filed by Mr. McCuller on January 18, 2013, incorporating the private school debt to be nondischargeable under § 523(a)(15) rather than being dischargeable. This inures to Ms. McCuller's benefit and is a favorable amendment (but, of course, not the § 523(a)(5) treatment sought by Ms. McCuller).

decreased from approximately $380,000.00 per year to $180,000.00 per year. This change in circumstance caused Mr. McCuller hardship in paying his obligations arising from the Divorce Agreement. Mr. McCuller first sought relief from the Mississippi Court, seeking to modify his obligations under the Divorce Agreement. After the Mississippi Court determined that it could not modify the lump sum alimony under Mississippi law, Mr. McCuller sought relief in this bankruptcy court and now proposes the plan at issue here. Mr. McCuller does not seek to modify the DSOs or the total amount of lump sum alimony to be paid and does not seek to discharge his obligations to Ms. McCuller that arose from the Divorce Agreement. Rather, he seeks to modify the payment terms of the lump sum alimony for a period of five years. The plan before the court proposes to use disposable income from his employment to pay all DSOs as they become due and to pay lump sum alimony in payments of $2,834.00 per month plus one-half of any bonuses that Mr. McCuller receives. In addition, once all payments are completed to the secured creditor of class II, JP Morgan Chase Bank, the monthly payments to Ms. McCuller would increase by $628.08 per month for a total monthly payment of $3,462.08.

The court further finds as noted earlier, under the particular facts and the totality of the circumstances including Mr. McCuller's testimony, that the plan is proposed in good faith in accordance with § 1129(a)(3) and fairly attempts to make lump sum alimony payments to Ms. McCuller in accordance with the objectives and purposes of the Bankruptcy Code. Seeking relief under the Bankruptcy Code by Mr. McCuller was a last and not a first resort.

BEST INTEREST OF CREDITORS TEST

Section 1129(a)(7) requires impaired claims to either have accepted the plan or receive as much under a chapter 11 plan as the claims would have received under a chapter 7 liquidation case. Here, Mr. McCuller's schedules indicate he has approximately $382,085.00 in assets with equity of approximately $44,436.23 in those assets. Even if Ms. McCuller were to receive all of this equity under a chapter 7 liquidation case, the amount received under a chapter 7 liquidation case would never come close to the amount to be received under the chapter 11 plan. The chapter 11 plan proposes to pay the lump sum alimony claim an amount of $2,834.00 per month for five years. Without discounting for the time value

of money, these payments will total $170,040.00 at the end of the plan. Even usurious discount rates would not bring the present value of these payments at the effective date below the amount of equity available that would be received by creditors under a chapter 7 liquidation. The other claims likewise will receive significantly more under the chapter 11 plan than a chapter 7 liquidation case, and there is no need to go into an in-depth analysis of this test, as no creditors have raised an objection regarding it. The court finds, under the totality of the circumstances including the debtor's schedules and chapter 11 plan and testimony by Mr. McCuller, that the plan is in the best interest of creditors and the requirements of § 1129(a)(7) are satisfied. A hypothetical chapter 7 liquidation analysis supports this conclusion.

FEASIBILITY REQUIREMENT

Section 1129(a)(11) requires the plan to not likely be followed by liquidation or the need for further financial reorganization of the debtor or, stated more simply, requires the plan to be feasible. Feasibility is a factual question that depends on whether the plan has a reasonable likelihood of success. *In re Brice Road Developments, L.L.C.*, 392 B.R. 274, 283 (6th Cir. B.A.P. 2008) (*citing In re Howard*, 212 B.R. 864, 878 (Bankr. E. D. Tenn. 1997) (*citing In re Foertsch*, 167 B.R. 555, 566 (Bankr. D. N. D. 1994)); *In re Made in Detroit, Inc.*, 299 B.R. 170, 176 (Bankr.E.D.Mich.2003) (*citing Kane v. Johns–Manville Corp.*, 843 F.2d 636, 649 (2nd Cir.1988)), *aff'd*, 414 F.3d 576 (6th Cir.2005)). The 6th Circuit has developed a set of six factors for determining feasibility in a chapter 11 business debtor case and these factors have some bearing on individuals. *See Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co., Inc. (In re U.S. Truck Co., Inc.)*, 800 F.2d 581, 589 (6th Cir.1986). Essentially, the court looks to whether Mr. McCuller has the earning power, capital, and ability to fund a plan.

In the instant case Mr. McCuller, a licensed CPA in good standing, has an equity interest and partner position in a large, prominent accounting firm, and presently earns a significant salary of $180,000.00 per year plus any bonuses. The accounting firm appears to be reliable employment, and Mr. McCuller additionally appears to be very likely to continue to earn significant income over the term of the plan. Under the facts of this case, the court finds the plan indeed is feasible under § 1129(a)(11).

Furthermore, Ms. McCuller objects to the plan asserting that Mr. McCuller may seek to alter his DSOs in the Mississippi courts at a later date. She contends that such modifications of DSOs represent further financial reorganizations that do not allow the plan to be confirmable under § 1129(a)(11). The court is not sufficiently persuaded that § 1129(a)(11) feasibility incorporates such an interpretation. As discussed above, DSOs are primarily state court remedies aimed at providing support to a spouse, a former spouse, or a child. Modification of DSOs should be sought in the appropriate state court, and the Bankruptcy Code is consistent with this deference to the state courts. See 11 U.S.C. §§ 362, 507, 523, 1307, 1325, and 1328. Any future attempts to modify the instant DSOs by Mr. McCuller in the Mississippi Courts are subject to Mississippi law and not federal bankruptcy law. Mississippi law, though factoring in financial considerations of the payor, is concerned with considerations, such as fault or misconduct, length of the marriage, and the needs of the payee, that go beyond a mere assessment of the payor's financial condition. *See Armstrong*, 618 So.2d 1278 (Miss. 1993). This court is convinced that such DSO modifications are not the form of financial reorganization referenced in § 1129(a)(11) that would render a plan unconfirmable. In addition, any foreseeable or hypothetical DSO modifications that Ms. McCuller suggests are imminent would be unlikely to jeopardize the chapter 11 plan. The plan still appears to be feasible under the circumstances because it would still be reasonably likely to succeed given Mr. McCuller's earnings and abilities.

ADEQUATE INFORMATION

As a final objection, Ms. McCuller objected on the basis that the disclosure statement and plan do not contain adequate information under § 1125, which renders the plan not confirmable under § 1129(a)(1). Specifically, Ms. McCuller believes the disclosure statement and/or plan should detail how prepetition bonuses received by Mr. McCuller were used and also seeks additional information regarding future bonuses. Mr. McCuller, upon request by Ms. McCuller, gave a full accounting of the prepetition bonuses to Ms. McCuller. In addition, the documentation provided to Ms. McCuller was entered into the record as trial exhibit no. 1 at the January 3, 2012 confirmation hearing. Ms. McCuller does not argue that she is not adequately informed; rather, she contends that other creditors are not adequately informed

on these prepetition bonuses. No other creditors have raised objections regarding adequate information or any other matter in this case.

Considering the case record as a whole and the testimony of Mr. McCuller as to his bonuses, the court finds under § 1125(a)(1) that prepetition bonuses are not relevant to a hypothetical investor seeking to make an informed decision to the plan in accordance with § 1125(a)(1) because the plan is not contingent upon those bonuses and no other creditor has objected. Furthermore, Mr. McCuller has testified that he expects to receive annual bonuses early in each calendar year, but he cannot know the amount of such bonuses as they are discretionary to his employer. The court finds under § 1125(a)(1) that his disclosure of future bonuses is sufficient and adequate under the circumstances because it is not reasonably practicable for Mr. McCuller to provide any further detail on the amount of any future bonuses. Ms. McCuller's objection regarding inadequate information as to the bonuses is overruled. Mr. McCuller also has agreed to provide copies of his annual tax returns to Ms. McCuller's attorney herein during the five-year term of this plan as well as information regarding increased income and/or bonuses.

CONCLUSION

For the foregoing reasons, this court is sufficiently satisfied under all the relevant facts and circumstances that Mr. McCuller has carried the required burden of proof by a preponderance of the evidence; that his "Plan of Reorganization" meets all the required statutory requirements of § 1129(a)-(b); and that Ms. McCuller's objection to confirmation of the plan should be denied. Of course, Mr. McCuller's discharge here will be delayed until the completion of all his payments under his confirmed plan. See 11 U.S.C. § 1141(d)(5). The court also notes that confirmation of Mr. McCuller's plan does NOT discharge Ms. McCuller's unpaid domestic balance, if any, that may be outstanding at the time of the granting of his discharge.

The Bankruptcy Court Clerk shall cause a copy of this Memorandum and Order to be sent to the following persons:

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Mr. Brian B. McCuller Chapter 11 Debtor in Possession 3807 Cardinal Ave. Memphis, TN 38111	David Blaylock, Esq. Attorney for Ms. McCuller 6000 Poplar Ave., Suite 400 Memphis, TN 38119
Theodore K. Cummins, Esq. Attorney for Wells Fargo Bank, NA 5050 Poplar #114 Memphis, TN 38157	Sean M. Haynes, Esq. Trial Attorney Office of the U.S. Trustee 200 Jefferson #400 Memphis, TN 38103

Bankruptcy Court Clerk also shall cause a separate notice of the entry of the order confirming Mr. McCuller's "Plan of Reorganization" to be sent to all creditors and other parties in interest including the United States Trustee for Region 8.