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6 UNITED STATES BANKRUPTCY COURT
7 EASTERN DISTRICT OF CALIFORNIA
8 FRESNO DIVISION

9 In re) Case No. 08-15277-B-13
10 Emilio F. Gonzalez,) DC No. MHM-1
11 Debtor.)
_____)

12 **MEMORANDUM DECISION REGARDING TRUSTEE'S**
13 **OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN**

14 This memorandum decision is not approved for publication and may not be cited except
15 when relevant under the doctrine of law of the case or the rules of res judicata and claim
16 preclusion.

17 Michael H. Meyer, Esq., appeared in his capacity as the chapter 13 trustee (the
18 "Trustee").

19 Scott Lyons, Esq., appeared on behalf of the debtor, Emilio Gonzalez (the "Debtor").

20 Before the court is an objection by the Trustee to confirmation of the Debtor's
21 chapter 13 plan pursuant to 11 U.S.C. § 1325(a)(3) and 11 U.S.C. §a1325(a)(7) (the
22 "Objection"). The Trustee contends that neither the chapter 13 plan nor the chapter 13
23 petition were filed in good faith. For the reasons stated below, confirmation of the
24 chapter 13 plan will be denied. The court will issue an order to show cause why the case
25 should not be dismissed.

26 This memorandum decision contains the court's findings of fact and conclusions of
27 law required by Federal Rule of Civil Procedure 52(a), made applicable to this contested
28 matter by Federal Rule of Bankruptcy Procedure 7052. The court has jurisdiction over
this matter under 28 U.S.C. § 1334, 11 U.S.C. § 1325¹ and General Orders 182 and 330 of

¹Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-

1 the U.S. District Court for the Eastern District of California. This is a core proceeding as
2 defined in 28 U.S.C. §§ 157(b)(2)(A) & (L).

3 **Background and Findings of Fact.**

4 After a hearing on the Objection, the court took the matter under submission to
5 permit the Debtor to file a supplemental brief. Three days after the date set for filing of
6 the supplemental brief, the Debtor filed a modified plan without noticing it for a hearing.
7 The only difference between the original plan and the modified plan is the commitment
8 period, which the Debtor extended from 36 months to 60 months. The court deems the
9 Objection to apply to the modified plan (the “Plan”).

10 The Debtor filed his chapter 13 petition on August 28, 2008, less than four years
11 after receiving a chapter 7 discharge in a case filed in May 2005. Therefore, pursuant to
12 § 1328(f)(1), the Debtor is not eligible to receive a discharge in this chapter 13 case.²

13 The Debtor listed no real property in his schedules. He listed a value of \$1400 for
14 his personal property and exempted it under C.C.P. § 703. The Debtor listed a single
15 secured debt of \$213 for a ring which is no longer in the Debtor’s possession. The Debtor
16 listed no unsecured priority debt, and unsecured nonpriority claims consisting of a
17 deficiency balance on an automobile loan,³ credit card and medical debt, and child
18 support. The Debtor lists gross income from employment of \$2,516 each month, from
19 which \$1,445 is deducted for taxes, insurance, and child support. The Debtor’s expenses
20 are listed as \$946, leaving him with a net income of \$125 with which he intends to fund
21 his Plan.

22 The Debtor’s Plan provides for a payment of \$125 per month, for a total of \$7,500

23
24 9036, as enacted and promulgated *after* October 17, 2005, the effective date of The Bankruptcy
25 Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat.
26 23.

27 ²The Debtor is not eligible to receive a discharge in any chapter 13 case filed before May
28 20, 2009, four years after his prior chapter 7 case, 05-14140, was filed.

³However, the Debtor underestimated the deficiency balance on his repossessed
automobile by \$14,000.

1 being paid over the five year term of the Plan.⁴ Approximately 10%, or \$750, will be
2 retained by the Trustee as an administrative expense. An additional \$2,600 will be paid
3 to Debtor's attorney at the rate of \$113 per month for 23 months. That leaves
4 approximately \$4,100 for distribution to the unsecured creditors' claims which presently
5 total over \$21,000. If the Debtor completes this Plan, he will only pay less than 20% of
6 his unsecured debt and those payments won't even start until the 24th month of the Plan.
7 At the conclusion of the five years, the Debtor will still owe the balance of the unsecured
8 debt. The net effect of the Plan will be to prevent the unsecured creditors from
9 attempting to collect from the Debtor for five years.⁵

10 **Issues Presented.**

11 The Trustee objects to confirmation on the grounds that the Plan was not filed in
12 good faith pursuant to § 1325(a)(3), and that the petition itself was not filed in good faith
13 pursuant to § 1325 (a)(7). The Trustee points out, "[i]n essence, for \$125 a month the
14 debtor is obtaining the stay of collection when no discharge will be granted." The Debtor
15 conceded at the hearing that there is no factual issue here. The issue is one of law: Is the
16 petition and Plan filed in good faith where the Debtor is not eligible for a discharge, and
17 where the Plan does not propose to pay in full the claims which cannot be discharged? In
18 other words, is it fair for the Debtor to hold off his creditors for up to five years while
19 committing to pay them only a fraction of what they are owed?

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22
23 ⁴The original plan provided for payments for 36 months and scheduled \$9,113 of
24 unsecured debt. The modified plan provides for payments for 60 months and lists the same
25 amount of unsecured debt, however, the Debtor underestimated the deficiency claim on his
26 repossessed automobile by \$14,000 and so the unsecured claims filed to date exceed \$20,000.
27 The deadline for filing claims for nongovernmental claimants is January 5, 2009. Therefore, the
28 modified plan will pay little more than the 16% originally proposed to holders of unsecured
claims.

⁵Outside of bankruptcy the asset exemption protections of the California Code of Civil
Procedure would be available to the Debtor as well as the four-year statute of limitations on
collection.

1 **Analysis and Conclusions of Law.**

2 Pursuant to §1325(a)(3), the Debtor cannot confirm a chapter 13 plan not filed in
3 good faith. In addition, the Debtor cannot confirm a plan unless the petition itself is filed
4 in good faith. §1325(a)(7). A case can be dismissed if the petition was not filed in good
5 faith. § 1307(c). The Debtor has the burden of proof on each element of confirmation. *In*
6 *re Arnold and Baker Farms*, 177 B.R. 648, 654 (9th Cir. BAP 1994). “Good faith” is
7 essentially an element of a debtor’s qualification to be in chapter 13 in the first place. *See*
8 *Marrama v. Citizens Bank of Massachusetts (In re Marrama)*, 127 S.Ct. 1105, 1111.

9 While the Bankruptcy Code does not define “good faith,” § 1307(c), sets forth a
10 nonexclusive list of ten, “causes” for dismissal or conversion. These examples are merely
11 illustrative and not exclusive. *Wile v. Household Bank F.S.B. (In re Wile)*, 304 B.R. 198,
12 204 (Bankr. E.D.Pa. 2004). A lack of good faith is “cause” for dismissal or conversion
13 under § 1307(c). *Id.* The court should consider the totality of the circumstances when
14 making the “good faith” determination. The court can determine that a debtor is not
15 acting in “good faith” without having to find that the debtor is acting in “bad faith”
16 (dishonesty of belief or purpose). *In re Guastella, supra*, 341 B.R. at 920.

17 It does not appear from the schedules, or the Plan, that there is any reorganization
18 in progress here. Indeed, the relief which the Debtor needs, a discharge of his unsecured
19 debts, is unavailable to the Debtor at this time through any chapter of the Bankruptcy
20 Code because he received a chapter 7 discharge in a case filed less than four years before
21 this case. §§ 727(a)(8) and 1328(f)(1). Therein lies the reason why this bankruptcy case
22 appears to be an abuse of the bankruptcy system. The Plan will stay any enforcement
23 action by the creditors whose claims cannot be discharged in this case, yet will pay
24 nothing to those creditors for up to two years (all Plan payments during that time will go
25 to the Trustee and Debtor’s counsel). Before the Debtor has to make any payments to
26 unsecured creditors in this case, he will be in a position to dismiss this case and re-file a
27 new chapter 13 which proposes to pay nothing to the unsecured creditors for another two
28 years and sets the Debtor up for a discharge after the third year. The Debtor here is trying

1 to effectuate an “end run” around the express restrictions of § 1328(f)(1).

2 The mere fact that a debtor has filed successive bankruptcy petitions does not
3 constitute a lack of good faith, but circumstances may indicate a lack of good faith in
4 proposing a subsequent chapter 13 plan to the extent they reflect the debtor’s intent to
5 misuse the relief afforded by the bankruptcy code. As the court explained, in *In re*
6 *March*, 83 B.R. 270, 275 (Bkrtcy E.D.Pa., 1988):

7 [S]everal of the factors traditionally addressed by courts making the good
8 faith inquiry pursuant to section 1325(a)(3) are no longer relevant. I
9 conclude that the scope of good faith inquiry must be limited to those
10 factors which address (1) whether the debtor has deliberately misinformed
11 the court of facts material to confirmation of the plan; (2) whether the
12 debtor intends to effectuate the plan as proposed and (3) whether the
13 proposed plan is for a purpose not permitted under the Bankruptcy Code.
14 *See Zellner; Barnes.*

15 Additionally, I recognize that there is a requirement that a
16 bankruptcy be filed in good faith which is separate and apart from the
17 requirement that a chapter 13 plan be proposed in good faith. *Matter of*
18 *Madison Hotel Associates*, 749 F.2d 410 (7th Cir. 1984). *See also e.g., In re*
19 *Kinney*, 51 B.R. 840 (Bankr.C.D.Cal.1985) (tenth bankruptcy in just over
20 two years was filed solely to prevent foreclosure by virtue of the automatic
21 stay and was not filed in good faith). In the case at bench, Savin's objections
22 appear to be addressed, at least in part, at the debtor's good faith in filing
23 rather than at good faith in proposing the plan. (Footnote omitted.)
24 Frequently, in the chapter 13 context there will be an overlap between the
25 two good-faith inquiries because the debtor's plan must be filed within a
26 very short time after the case is commenced. Bankr. Rule 3015.

27 *Id.*

28 In this case it appears that the only purpose for the filing of both the petition and Plan
was to prevent collection attempts by the unsecured creditors and not for any effort of
reorganization nor to obtain a discharge.

“Once ‘cause’ has been established, whether conversion or dismissal is more
appropriate is a question Congress left to the sound discretion of the bankruptcy court.”

Id. at 206 (citations omitted). Even if the court were to grant additional time for a second
modified plan to be filed, it does not appear from the Debtor’s schedules that he can
afford to make a plan payment with a meaningful return to the unsecured creditors.

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1 **Conclusion.**

2 Based on the foregoing, the court is persuaded that this chapter 13 case and the
3 chapter 13 plan were not filed in good faith. Accordingly, confirmation of the Plan will
4 be denied pursuant to 1325(a)(3) and § 1325(a)(7). The court will set a hearing on an
5 order to show cause why the case should not be dismissed pursuant to § 1307(c) on
6 December 18, 2008.

7 Dated: November 25, 2008

8
9 /s/ W. Richard Lee
10 W. Richard Lee
11 United States Bankruptcy Judge
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