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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA

6 In re

Case No. 05-16471-A-13F
DC Nos. HDN-1; GB-2

7 JOE GUILLEN TORRES

8 Debtor.
9
10
11 _____/

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
REGARDING DEBTOR'S MOTION
TO CONFIRM SECOND AMENDED
PLAN; AND MOTION OF CREDITOR,
JANE DOE, TO DISMISS CASE

12 A hearing was held January 19, 2006, on the motion of the
13 debtor to confirm a Second Amended Plan (the "Second Amended
14 Plan") and on the motion of creditor Jane Doe to dismiss the
15 chapter 13 case. Following the hearing, the court took both
16 matters under submission. This memorandum contains findings of
17 fact and conclusions of law required by Federal Rule of
18 Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52.
19 This is a core proceeding as defined in 28 U.S.C. §157(b)(2)(A),
20 (L) and (O).

21 Procedural History and Background Facts.

22 As a preliminary matter, the debtor filed the Declaration of
23 Joe Torres and a Memorandum of Points and Authorities in support
24 of confirmation of the Second Amended Plan on January 18, 2006.
25 He filed a proof of service showing that those documents were
26 served by mail on January 18, 2006, on counsel for Jane Doe and
27 were faxed to counsel for Jane Doe on the same date. At the
28 hearing, when made aware of these late filed documents, counsel

1 for Jane Doe asked that the documents be stricken. The court
2 granted that request, holding that neither the Declaration nor
3 the Memorandum of Points and Authorities filed January 18, 2006,
4 would be considered in ruling on the motion to dismiss or the
5 motion to confirm the Second Amended Plan. However, the court,
6 at the request of the debtor, agreed to take judicial notice of
7 the docket in the case, including the claims register, reflecting
8 the fact that the bar date for filing proofs of claim was
9 December 19, 2005, and that as of the date of the hearing on
10 January 19, 2006, no proof of claim had been filed by Jane Doe.

11 This chapter 13 case was filed August 18, 2005. The debtor
12 filed a First Amended Chapter 13 Plan on September 21, 2005, and
13 a Second Amended Plan (the one under consideration here) on
14 November 3, 2005. The Second Amended Plan contemplates the
15 debtor paying the trustee \$540 per month for 36 months.
16 Unsecured creditors are to receive a distribution of not less
17 than fourteen percent.

18 Jane Doe moved to dismiss in October 2005. The hearing on
19 that motion was continued from time to time, pursuant to
20 stipulation among the parties, to January 19, 2006. Jane Doe
21 also objected to the confirmation of the First Amended Plan and
22 the Second Amended Plan. A hearing on her objection to
23 confirmation of the Second Amended Plan was also continued from
24 time to time by agreement to be heard on January 19, 2006.

25 The Trustee had also moved to dismiss the case, but the
26 trustee withdrew his motion to dismiss at the hearing on January
27 19th, having obtained the debtor's agreement to certain changes
28 in the Second Amended Plan.

1 As stated above, the last day for non-governmental creditors
2 to file proofs of claim in this case was December 19, 2005, and
3 Jane Doe has not filed a formal proof of claim.

4 Additionally, the debtor in this case was the debtor in a
5 prior chapter 7 case, Case No. 05-14727, filed June 10, 2005. In
6 that case, the debtor failed to file a Summary and Schedules A
7 through J, a Statement of Financial Affairs, or the Attorney's
8 Disclosure of Compensation. As a result, the court ordered the
9 case dismissed. The order dismissing the case was entered August
10 4, 2005. The dismissal order does not bar the debtor from a
11 further bankruptcy filing. Therefore, the chapter 7 case filed
12 in June 2005 and dismissed in August 2005 created no statutory
13 impediment to the debtor filing this case. Bankruptcy Code
14 § 109(g)(1) was not implicated by the prior filing and dismissal.

15 The objection to confirmation and the motion to dismiss
16 raise several issues. The primary thrust of Jane Doe's argument
17 is that the debtor here filed this chapter 13 case in bad faith.
18 Thus, she argues, the Second Amended Plan should not be
19 confirmed, and the case should be dismissed. She also argues
20 that the debtor is not a proper debtor due to the prior filing
21 and Bankruptcy Code § 109(g)(1). For the reasons set forth
22 above, this latter argument is not persuasive. Therefore, the
23 balance of these findings will focus on the "good faith" issue.

24 The debtor has asked the court to take judicial notice of
25 the fact that no proof of claim has been filed by Jane Doe.
26 According to the debtor, because Jane Doe has not filed a formal
27 proof of claim, she has no standing to move to dismiss or to
28 object to plan confirmation.

1 Does Jane Doe Have Standing?

2 Bankruptcy Code § 1307(c) allows a "party in interest" to
3 move to dismiss or convert a chapter 13 case. Section 1324
4 provides that "a party in interest" may object to plan
5 confirmation.

6 A number of courts have discussed whether a creditor who has
7 not filed a proof of claim by the bar date in a chapter 13 case
8 is a party in interest within the meaning of § 1307 or § 1324.
9 The decision perhaps with the most onerous effect on such
10 creditors is In re Stewart, 46 B.R. 73 (Bankr. D. Or. 1985). In
11 that case, the court held that to be a "party in interest" a
12 creditor must be the holder of an allowed unsecured claim. In
13 order to have an allowed unsecured claim, the creditor must have
14 filed a proof of claim. The Stewart court considered whether any
15 other writings filed by the creditor in that case could
16 constitute an informal proof of claim and concluded that the
17 objections to confirmation filed by the creditor did not amount
18 to an informal proof of claim. Thus, the creditor in that case
19 was not a party in interest and had no standing to object to plan
20 confirmation.

21 Since Stewart was decided, it has been criticized by several
22 bankruptcy courts. An Iowa bankruptcy court held that the
23 Bankruptcy Code does not require the allowance of a claim before
24 the claimant may object to a plan.

25 "In providing who might object to plans, Congress used the
26 broad term 'party in interest.' It did not restrict the
27 filing of objections to creditors who hold allowed claims.
[citation omitted] Nor does the status of creditor appear
to hinge on the entity having filed a proof of claim."

28 In re Turpen, 218 B.R. 908, 911 (Bankr. N.D. Iowa). The Turpen

1 case arose prior to the claims bar date, and the court declined
2 to decide whether creditors who had filed untimely claims would
3 be parties in interest.

4 In In re Ungar, the court held that an objection to
5 confirmation could be considered an informal proof of claim. 70
6 B.R. 519 (Bankr. E.D. Penn. 1987). The court allowed an
7 objection to confirmation to constitute an informal proof of
8 claim. The court stated:

9 "For a variety of reasons, I believe that the failure of the
10 creditor here to state an amount due in its pleading is not
11 a fatal defect to treating that pleading as an informal
12 proof of claim. First, courts have permitted creditors to
13 amend proofs of claim subsequent to the bar date in order to
14 increase the amount sought by the creditors from the estate.
[citations omitted] If the failure of a writing to mention
the amount claimed bars it from being considered as a proof,
amendments to increase the amount, made after the
limitations period, would not be permitted." Id., at 522.

15 The court went on to state that an informal proof of claim should
16 show that a demand was made against the estate and show the
17 creditor's intention to hold the estate liable. No statement of
18 the amount owing was necessary. Id.

19 The bankruptcy court in In re Joiner generally agreed with
20 the above proposition. 93 B.R. 130 (Bankr. N.D. Ohio 1988). The
21 Joiner court declined to require that an informal claim must set
22 forth the amount of the claim. The Joiner court observed that
23 equitable considerations were very important to courts
24 considering whether a pleading should be considered an informal
25 proof of claim. Id. at 133. The court observed that "an
26 inflexible requirement that an informal proof of claim state the
27 amount of the claim appears inappropriate. Claims are defined so
28 broadly in the Bankruptcy Code that there may be circumstances

1 where it would be either impossible or purely speculative to set
2 forth the precise amount of the claim prior to the bar date."
3 Id. at 134.

4 A Minnesota bankruptcy court considered the issue in In re
5 Larson. 245 B.R. 609 (Bankr. D. Minn. 2000). In that case, the
6 court stated that to qualify as an informal proof of claim, a
7 document must state the nature and the amount of the claim as
8 well as the claimant's intent to hold the estate liable. The
9 objection to confirmation in the Larson case met those criteria.
10 Id. at 614, ftn. 1.

11 The Northern District of California Bankruptcy Court
12 considered the issue in In re Rolyne, 266 B.R. 453 (Bankr. N.D.
13 Cal. 2001). In that case, the objection to confirmation did not
14 contain any language about the nature or amount of the creditor's
15 claim. Therefore, the court held that the document was not an
16 informal proof of claim.

17 The Eighth Circuit Bankruptcy Appellate Panel has also
18 addressed this question. In re Michels, 286 B.R. 684 (8th Cir.
19 BAP 2002). The Eighth Circuit BAP observed that an objection to
20 plan confirmation might serve as an informal proof of claim
21 conferring standing to object to confirmation. The Bankruptcy
22 Appellate Panel observed that to qualify as an informal proof of
23 claim, "the document must state the nature and amount of the
24 claim as well as indicate the claimant's intent to hold the
25 debtor liable and pursue the claim." Id. at 691.

26 The Ninth Circuit Court of Appeals has also considered the
27 informal proof of claim question, although not in the context of
28 standing to object to confirmation of a chapter 13 plan. The

1 court has stated:

2 "For these documents to constitute an informal proof of
3 claim, they must state an explicit demand showing the nature
4 and amount of the claim against the estate, and evidence and
intent to hold the debtor liable."

5 In re Sambo's Restaurants, Inc., 654 F.2d 811, 815 (1985). The
6 Ninth Circuit observed that it had a long-established liberal
7 policy toward amendments of proofs of claim:

8 "Although this policy cannot override the rules themselves,
9 within the rules we are liberal in what kind of
10 documentation we will treat as a sufficient informal proof
of claim." Id. at 816.

11 The Ninth Circuit expressed the same view in Pizza of
12 Hawaii, Inc., 761 F.2d 1374 (9th Cir. 1985).

13 Therefore, the question for this court is whether documents
14 filed by Jane Doe prior to December 19, 2005, can be construed as
15 constituting an informal proof of claim.

16 In her objections to confirmation filed October 18, 2005,
17 Jane Doe stated that she had commenced a civil action in state
18 court "against Debtor and titled Jane Doe v. Joseph G. Torres
19 . . . for childhood sexual abuse, sexual battery, and intentional
20 and negligent infliction of emotional distress." She observed
21 that ten days before trial was to begin, the debtor filed his
22 chapter 7 case, which was dismissed.

23 On October 31, 2005, Jane Doe filed a Memorandum of Points
24 and Authorities in support of her motion to dismiss. In that
25 document she stated:

26 "Doe is the former stepdaughter of Debtor. On December 15,
27 2003, Doe commenced an action in Fresno County Superior
Court against Debtor entitled Jane Doe v. Joseph G. Torres
28 . . . for childhood sexual abuse, sexual battery, and
intentional and negligent infliction of emotional distress,

1 based on the fact that Debtor sexually molested Doe."
2 The document goes on to describe that the debtor filed his
3 chapter 7 case just ten days before trial was set to begin. The
4 declaration of Monique Alonso filed October 31, 2005, reiterates
5 these assertions.

6 Do these statements rise to the level of an informal proof
7 of claim? In the court's view, they do. First, they do show the
8 nature of the claim against the debtor and an intent to hold the
9 debtor liable. It is true that the amount of claim is not
10 stated, but because the debtor filed his first bankruptcy case
11 just before trial, and considering the nature of the claim, the
12 court does not find that a defect here. The amount was subject
13 to proof of damages in state court, and debtor's actions
14 prevented a determination by the trial court of liability or
15 damages. This is not like a breach of contract claim in which an
16 amount certain can be stated.

17 Additionally, the motion to dismiss was originally filed
18 well before the claims bar date and then continued from time to
19 time. The documents filed by Jane Doe in the motion to dismiss
20 indicate that she is a party aggrieved by the filing of the
21 bankruptcy case. This is another reason for the court to hold
22 that she has standing to move to dismiss.

23 Were the Case and/or the Plan Filed in Good Faith?

24 The court will now consider the parties' arguments with
25 respect to dismissal and confirmation of the plan.

26 As Jane Doe relies on the same grounds in arguing that the
27 court should dismiss the case and should deny confirmation, the
28 court will consider both matters together. In essence, Jane Doe

1 asserts that the bankruptcy case and the plan were filed in bad
2 faith.

3 Bankruptcy Code § 1325(a)(3) requires a chapter 13 plan to
4 be proposed in good faith. Although good faith is not among the
5 specifically enumerated reasons that a court may dismiss or
6 convert a chapter 13 case, it is generally held that it is
7 appropriate to dismiss a chapter 13 case if it is not filed in
8 good faith.

9 Grounds for Dismissal for Bad Faith.

10 In In re Leavitt, the Ninth Circuit Court of Appeals
11 described grounds to dismiss a chapter 13 case for bad faith.
12 171 F.3d 1219, 1224 (9th Cir. 1999).¹ According to the Ninth
13 Circuit in Leavitt, the court should consider:

- 14 • whether the debtor misrepresented facts in his petition or
15 plan, unfairly manipulated the Bankruptcy Code, or otherwise
16 filed his chapter 13 petition or plan in an inequitable
17 manner;
- 18 • the debtor's history of filings and dismissals;
- 19 • whether the debtor intended only to defeat state court
20 litigation;
- 21 • whether egregious behavior is present.

22 Good Faith as a Requirement for Confirmation of a Chapter 13
23 Plan.

24 The debtor has the burden to establish good faith. This
25

26 ¹In Leavitt, the bankruptcy court had dismissed the chapter
27 13 petition with prejudice under § 349(a). Here, the court is
28 not considering dismissal with prejudice, but simply whether the
case should be dismissed.

1 burden has been characterized as especially heavy when a
2 "superdischarge" is sought. In re Warren, 89 B.R. 87, 93 (9th
3 Cir. BAP 1988). Generally, in evaluating whether a plan is
4 proposed in good faith, the court looks at the totality of the
5 circumstances. Id. at 92. A number of specific factors are
6 relevant guidelines in determining whether a chapter 13 plan is
7 proposed in good faith. These factors include:

- 8 • The amount of the proposed payments and the amounts of the
9 debtor's surplus;
- 10 • The debtor's employment history, ability to earn, and
11 likelihood of future increases in income;
- 12 • The probable or expected duration of the plan;
- 13 • The accuracy of the plan's statements of the debts,
14 expenses, and percentage of repayment of unsecured debt, and
15 whether any inaccuracies are an attempt to mislead the
16 court;
- 17 • The extent of preferential treatment between classes of
18 creditors;
- 19 • The extent to which secured claims are modified;
- 20 • The type of debt sought to be discharged and whether any
21 such debt is nondischargeable in chapter 7;
- 22 • The existence of special circumstances such as inordinate
23 medical expenses;
- 24 • The frequency with which the debtor has sought relief under
25 the Bankruptcy Code;
- 26 • The motivation and sincerity of the debtor in seeking
27 chapter 13 relief; and
- 28 • The burden which the plan's administration would place on

1 the trustee.

2 Id. at 92-93.

3 Some of those factors are relevant here, while others are
4 not.

5 In In re Eisen, the Ninth Circuit stated that in determining
6 whether a petition has been filed in bad faith, courts are guided
7 by the standards used to evaluate whether a plan has been
8 proposed in bad faith. Id. at 470. The court must review the
9 totality of the circumstances. Id.

10 In the Eisen case, the Ninth Circuit concluded that there
11 was no doubt that the debtor had filed his petition in bad faith.
12 He had timed the filing to frustrate a state court action and had
13 submitted contradictory and misleading descriptions of his
14 assets. Id.

15 Misrepresentation of Facts.

16 Jane Doe has asserted that the debtor has misrepresented
17 facts in his petition and plan. The statements made in the
18 debtor's schedules of assets and liabilities in the bankruptcy
19 case conflict with statements made by the debtor in deposition
20 testimony in the state court litigation, and with the marital
21 settlement agreement between the debtor and his wife.

22 These discrepancies are not entirely explained by the
23 passage of time between the deposition and the filing of the
24 case. As one bankruptcy court put it, "Viewed individually,
25 Debtor's omissions may seem insignificant. Collectively they
26 give the Court cause for concern . . . On the scales described in
27 the case law, this is a factor which weighs against finding
28 Debtor has proposed his plan in good faith." In re James, 260

1 b.R. 498, 506 (Bankr. D. Id. 2001).

2 For instance, Torres has testified that he entered into a
3 marital property settlement agreement with his wife on January
4 10, 2005, pursuant to which she was awarded the real property at
5 5481 West Dayton Avenue, Fresno, California, and a 1955 Ford
6 Thunderbird and a 1991 Nissan 300Z. Yet, in a deposition on
7 April 8, 2005, Torres testified that he lived at 5481 West
8 Dayton, Fresno, California.

9 At his deposition in April 2005, Torres testified that he
10 had not thought of retirement "real seriously" yet. He stated
11 that there was no retirement age at Xerox Corporation, his
12 employer. In the April deposition, he testified that he drives a
13 1991 Nissan and that he still has the 1955 Thunderbird. These
14 are the cars that, according to the marital property settlement
15 agreement, were transferred to Mrs. Torres in January 2005. Mr.
16 Torres testified that on April 29, 2005, he signed a declaration
17 of unrepresented party testifying that on January 1, 2005, he
18 entered into the marital property settlement agreement.

19 In the bankruptcy petition Torres stated that he owned no
20 vehicles but had transferred a Ford Thunderbird and a Nissan
21 automobile to his former wife in February 2005. In the April
22 2005 deposition, he testified that he owned the vehicles. Yet in
23 the Statement of Financial Affairs he testified that they were
24 transferred to Carol Torres in February 2005. Schedule J shows
25 \$85 per month in car insurance expenses.

26 At the deposition in April, Torres testified that he lived
27 in the house on Dayton Avenue, had lived there nine years, and
28 owned it jointly with his wife. By the time he filed his

1 chapter 13 case, Torres asserted that his only assets were his
2 interest in his pension and his interest in a note receivable
3 from his wife, other than household goods and furnishings and
4 clothes. Although the judgment of legal separation was not
5 entered until August 2, 2005, Torres asserts that his debts are
6 not community debts but rather his own debts. Other than the
7 unliquidated, contingent and disputed obligation to Jane Doe, his
8 scheduled debts consist of about \$42,000 in consumer credit card
9 debt. Only two of the credit card creditors filed timely proof
10 of claim in amounts of \$4,248.11 and \$6,524.65 respectively.

11 According to Torres, the discrepancies between the state
12 court testimony and the schedules are explainable. He says that
13 he was retired from Xerox as of June 28, 2005. He asserts that
14 he does not own real estate because of a trust, although the self
15 settled trust did not preclude him from dealing with the property
16 in a marital settlement agreement. He also asserts that as of
17 January 10, 2005, pursuant to a property settlement agreement,
18 his interest in real estate went to his ex-spouse. This does not
19 explain his testimony at the deposition that he did own real
20 estate. He acknowledged that he does own a 1998 Ford, which he
21 says is fully exempt. However, he did not list it on his
22 schedules.²

23 Despite transferring property to a trust, Torres did enter
24 into a marital property settlement agreement, according to him,
25 which awarded his wife the real property and the cars. According
26 to Torres, the judgment of legal separation was filed August 2,

27
28 ²November 14, 2005 declaration of Joe Torres.

1 2005, incorporating the settlement agreement awarding Mrs. Torres
2 the real property and the cars.

3 As Judge Pappas has observed in a similar context, "this
4 state of the record is problematic." In re James, 260 B.R. 498,
5 508 (Bankr. Id. 2001).

6 The Debtor's History of Filings and Dismissals.

7 Here, it is undisputed that Torres filed a chapter 7 case in
8 June 2005, failed to file documents, and the case was dismissed.

9 Did the Debtor Only Intend to Defeat State Court Litigation?

10 The chapter 7 case was filed ten days before trial was set
11 to begin. Shortly after the chapter 7 case was dismissed, this
12 case was filed.

13 Is egregious behavior present?

14 This is the second case filed by Joe Torres, the first
15 chapter 7 case having been dismissed for failure to file
16 documents. According to Torres, his attorney mistakenly filed a
17 chapter 7 case, and therefore he let it be dismissed so that the
18 correct chapter 13 case could be filed. The court can consider
19 the impact of both cases. The chapter 7 case was filed ten days
20 before trial. There are discrepancies among the marital
21 settlement agreement, the deposition testimony in the state court
22 action, and the schedules and statement of affairs in the chapter
23 13 case.

24 The Terms of the Second Amended Plan and Other Factors.

25 The Second Amended Plan contemplates continuing for 36
26 months with the debtor paying \$540 per month to the trustee.
27 There are no creditors in Class 1 (long term delinquent secured
28 claims); Class 2 (secured claims modified by the plan or that do

1 not extend beyond its length); Class 3 (secured claims satisfied
2 by the surrender of collateral); Class 4 (secured claims paid
3 directly by the debtor); Class 5 (priority unsecured claims);
4 Class 6 (special unsecured claims). There are no executory
5 contracts or unexpired leases dealt with by the plan. The only
6 claims dealt with by the plan are general unsecured claims which
7 the plan states will receive not less than a 14% dividend.³

8 The debtor claims that he is retired.

9 As there are no secured claims, they are not modified.

10 If Jane Doe were to prevail in her state court action, her
11 claim would likely be nondischargeable in a chapter 7 case under
12 Bankruptcy Code § 523(a)(6).

13 As relevant, the issues really are any misrepresentations in
14 the plan or in the schedules of assets and liabilities; the prior
15 chapter 7 filing; the fact that any debt owing to Jane Doe is
16 likely nondischargeable in a chapter 7 case; and the debtor's
17 motivation and sincerity in seeking chapter 13 relief.

18 Conclusion.

19 The relevant factors described above cause the court to
20 find and conclude that the case was not filed in good faith and
21 the plan was not proposed in good faith. The chapter 7 case was
22 filed immediately before the trial in Jane Doe's lawsuit was set
23 to commence. Although it was dismissed, the chapter 13 case was
24

25 ³The plan as drafted states that distribution to unsecured
26 creditors shall be no more than \$32,000, which is estimated at
27 14% based on esatimated claims. The trustee required the debtor
28 to eliminate this sentence to obtain the trustee's agreement to
confirmation. Therefore, the plan simply requires 14% to
unsecured creditors.

1 filed immediately thereafter. The court finds that the debtor
2 filed the cases to defeat the state court litigation.

3 Based on the inconsistencies among the deposition testimony,
4 the marital settlement agreement, the debtor's declaration in
5 connection with these motions, and the bankruptcy schedules, the
6 court finds that the debtor has misrepresented the facts. While
7 each misrepresentation in itself may be minor, together they
8 present a pattern of misrepresentation.

9 The type of debt that Jane Doe is asserting is a debt that
10 would be nondischargeable in a chapter 7 case. Thus, the
11 debtor's burden to establish good faith is heavy. In re Warren,
12 supra, at 93.⁴ The court further finds that the case was filed
13 to prevent the state court trial from going forward.

14 For all the above reasons, the court finds and concludes
15 that the case was filed and the plan proposed in bad faith.
16 Therefore, the court will issue a separate order denying
17 confirmation of the plan and dismissing the chapter 13 case.
18 DATED: March 17, 2006.

19 /S/

20
21 WHITNEY RIMEL, Judge
United States Bankruptcy Court
22
23
24

25 ⁴One bankruptcy court has criticized the statement in Warren
26 that the debtor's burden when a chapter 13 plan would result in a
superdischarge is especially high. In re Selden, 116 B.R. 232
27 (Bankr. D. Or. 1990). Nonetheless, the proposition does not
28 appear to have been rejected by an appellate court in the Ninth
Circuit.