UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Bankruptcy Judge
Modesto, California

September 4, 2014 at 3:30 p.m.

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1. 13-90901-E-12 ANDREW NAPIER — **CONTINUED STATUS CONFERENCE RE: CHAPTER 12 VOLUNTARY PETITION**
5-9-13 [1]

Debtor's Atty: Scott A. CoBen

Notes:

Continued from 8/21/14 to be heard in conjunction with Trustee's Motion to Dismiss.

2. 13-90901-E-12 ANDREW NAPIER — **CONTINUED MOTION TO DISMISS CASE FOR FAILURE TO MAKE PLAN PAYMENTS**
JPJ-1 Scott A. CoBen
4-8-14 [206]

No Tentative Ruling: The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling.

Local Rule 9014-1(f)(1) Motion - Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, and Office of the United States Trustee on April 8, 2014. By the court's calculation, 44 days' notice was provided. 28 days' notice is required.

The Motion to Dismiss has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The Debtor filed opposition. If it appears at the hearing that disputed material factual issues remain to be resolved, a later evidentiary hearing will be set. Local Bankr. R. 9014-1(g).

The court's decision is to xxxxx the Motion to Dismiss and xxxxxxx.

SEPTEMBER 4, 2014 HEARING

XXXXXXXXXXXXXXX

AUGUST 21, 2014 HEARING

The Chapter 12 Trustee seeks dismissal of the case on the basis that the Debtor is $23,320.79 delinquent in plan payments, which represents three (3) months of the plan payment. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6).

Counsel for Debtor responded, stating that Debtor will be current by the date of this hearing. Debtor did not offer any evidence concerning his default or how he would be able to cure such a substantial default.

The Debtor has failed, or refused, to provide any testimony under penalty of perjury with his original opposition to the Motion to Dismiss. Rather, the court is provided only with a short, one-line response. Dckt. 216.

Further, no explanation is provided as to why the Debtor has defaulted under the confirmed plan, why such default should not likely reoccur, and how the Debtor could come up with the "extra" money to cure the defaults.

OVERVIEW OF CURRENT BANKRUPTCY CASE

This not being the Debtor's first bankruptcy case, and not first Chapter 12 bankruptcy case in which he confirmed and then default on the plan, the court continued the hearing for further briefing and presentation of evidence. Additionally, the Debtor's ex-wife brought to light allegations that the Debtor has not truthfully and accurately disclosed his assets, has made multiple misrepresentations to the court and creditors, and has not filed or prosecuted his bankruptcy cases in good faith. FN.1.

FN.1. As with all "ex-'s (ex-spouse, ex-partner, ex-director, ex-client), the court does not assume that the allegations are true. However, it is usually one of the "ex-'s" who has knowledge of a debtor's misdealings. The Chapter 12 Trustee, creditors, and U.S. Trustee (with an occasionally referral to the U.S. Attorney) are usually up to the task of addressing such allegations and misconduct, if it occurs and comes to light. However, in some situations the "interests" of such parties may not align with how the misconduct is a substantial abuse of the federal judicial process and federal courts.

This court has previously conducted a general review of the Debtor's

multiple prior bankruptcy cases and multiple defaults. This is Debtor's third case since March 2010. The Debtor has already been "challenged" in this case with complying with the Bankruptcy Code, fulfilling his fiduciary obligations, and being forthright with the court. As stated by the court in the Civil Minutes from the confirmation hearing,

> "In his declaration, the Debtor states that Exhibit A is his budget showing $5,100.00 a month in disposable income. This is not the number shown on the budget for average monthly income (which does not list any personal expenses). The Debtor provides no testimony as to how he computes $75,000.00 a month in gross income and the $67,280.00 a month in expenses. The court is not provided with any historical analysis of the income and expenses or evidence to give any credibility to these numbers. This Debtor has filed and confirmed plans in two prior Chapter 13 cases, both of which were dismissed because of substantial defaults under the plans. Clearly the financial information provided by the Debtor to the Chapter 12 Trustee, creditors, and the court did not bear accurate in light of actual events. FN.1. The Debtor has failed to provide the court with any credible testimony as to the feasibility of this Plan. Rather, he merely provide a "believe me because I say its true" statement.
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> [FN.1.]
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> Case No. 10-27953, Filed March 29, 2010; Dismissed March 15, 2011.
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> In Chapter 12 case 10-27953 the Debtor confirmed a Chapter 12 Plan on July 26, 2010. Dckt. 97. The Plan required monthly payments by the Debtor of $28,320.92. Plan, Dckt. 90. The budget that the Debtor provided in support of confirmation listed monthly average income of $83,256. Exhibit A, Dckt. 92. The average monthly expenses shown on the budget were $55,799. On January 20, 2011, the Chapter 12 Trustee filed a motion to dismiss, asserting that the Debtor was $43,057 delinquent in plan payments, with another monthly payment of $19,236.92 being due on February 1, 2011. Motion, Dckt. 176; Declaration, Dckt. 178. No opposition was filed to the motion.
>
> Case 11-21063, Filed January 14, 2011; Dismissed May 20, 2013.
>
> In Chapter 12 case 11-21063 the Debtor confirmed a Chapter 12 Plan on August 31, 2011. Order, Dckt. 88. Under the terms of the Plan the Debtor was required to make $7,050 a month payments of the Chapter 12 Trustee for a period of 36 months. Plan, Dckt. 77. The Debtor provided his declaration in support of confirmation, providing an income and expense projection which was filed as Exhibit A. Declaration, Dckt. 75; Exhibit A, Dckt. 76. For the income projections the Debtor testified to having average gross monthly revenues of $66,000 and monthly non-personal expenses of $56,880. This resulted in his

testimony that his average monthly net income was $9,120.00. On March 21, 2013, the Chapter 12 Trustee filed a motion to dismiss asserting that the Debtor was $34,600 in default on the plan payments. Motion, Dckt. 185; Declaration, Dckt. 187. No opposition was filed to the Motion.

...

(6) The debtor will be able to make all payments under the plan and to comply with the plan;

Court Finding: This element is the most problematic for the Debtor in Possession. For two prior cases the Debtor's in Possession testimony under penalty of perjury as to the financial operation of his business and assurances that the two prior confirmed plan were feasible have turned out to be inaccurate. The declaration in the present case is devoid of any evidence from which the court can determine whether the Debtor's in Possession conclusions that the current Plan is feasible are realistic.
The Debtor in Possession argues that he has so significantly changed his business in the last several months that no historic data is relevant. He further argues that he has paid a significant amount to creditors under the prior two plan. As the court noted at the hearing, when a person has a business which generates substantial cash flow and has substantial debt to be paid, making partial payment two prior times and defaulting is not a significant victory. Though significant payments were made, significant defaults occurred and significant claims went unpaid.

The creditor support the Plan, from which the court infers that they believe the Plan is feasible. The court will rely on this inference as "evidence" presented by the creditors their withdrawal of oppositions and affirmative support at the confirmation hearing.

Though sketchy at best, the court will find that this plan is "feasible as any possible plan could be in this case" and give the Debtor in Possession and creditors what they want confirmation of the Plan. As the court admonished the Debtor in Possession at the confirmation hearing, if he defaults under this Plan, the court expects him to immediately address the default with his counsel. In the past, it appears that the Debtor ignored the defaults and left it to the Chapter 12 Trustee to file and obtained orders dismissing the case.

Civil Minutes, Dckt. 186.

In confirming the Plan, the court noted that the Debtor was getting a second second-chance, and should not squander it. It appears that he has, spending monies for purposes other than performing his confirmed Chapter 12 Plan. His ex-wife, has raised significant issues concerning the information provided to this court under penalty of perjury by Mr. Napier. While the court

acknowledges that an ex-spouse may not be the most unbiased, often times an "ex-" (spouse, partner, business associate) may provide accurate information.

The Chapter 12 Trustee reported that the Debtor appeared at the Trustee office today (May 22, 2014) to make a payment of over $30,000.00. Debtor's counsel that $25,000.00 of these monies represent an advance payment of future work to be done by the Debtor for a customer. No explanation is provided as to how the Debtor, in the ordinary course of business, without having to "borrow" against future work which has not been done, can make the payments promised under the confirmed Plan.

UNITED STATES TRUSTEE'S RESPONSE

On July 23, 2014, the United States Trustee filed a response in support for the motion to dismiss. After laying out the background of the case, notably the multiple bankruptcy filings of the Debtor, the United States Trustee reviews subsequent developments since the May 22 continuance.

Following the May 22nd continuance, the United States Trustee performed a Bankruptcy Rule 2004 Examination of the Debtor, pursuant to the June 3, 2014 order authorizing the examination. Dckt. 226. On July 9, 2014, the Debtor produced a number of documents including Debtor's bank statements for the period covering January 1, 2013 through May 31, 2014 ("Applicable Period"). On July 16, 2014, the Bankruptcy Rule 2004 Examination of the Debtor took place.

In the response, the United States Trustee notes all of the serious concerns that arose from the Bankruptcy Rule 2004 Examination. These include:

1. During the Applicable Period, the Debtor spent more than $50,000 on airline tickets, hotels and other travel expenses. See Exhibit 8, Dckt. 232; see also Spyksma Declaration, at ¶ 8.3, Dckt. 233;

2. During the Applicable Period, the Debtor spent more than $12,000 at restaurants. See Exhibit 9, Dckt. 232; see also Spyksma Declaration, at ¶ 9, Dckt. 233;

4. During the Applicable Period, the Debtor spent more than $18,000 on goods and services that could be considered luxuries (or, at least, do not appear to have been reasonably necessary for the Debtor's maintenance or support). Exhibit 10, Dckt. 232; see also Spyksma Declaration, at ¶ 10, Dckt. 233;

5. The Debtor failed to disclose his interest in the Tri Counties 6036 bank account on Schedule B. This account was open on the Petition Date. Compare Schedule B, at item 2, Dckt. 1 with Exhibit 4 at p.58, Dckt. 232;

6. The Debtor failed to disclose his rental of a storage space (at StorKwik SelfStorage) on his Schedules and Statements (including on Schedule G). Compare Dckt. 1 with Exhibit 20 at pp. 247-48, Dckt. 232;

7. During the Applicable Period, the Debtor's deposits into his

bank accounts totaled only $622,194.16. See Exhibit 1, Dckt. 232; Spyksma Declaration, at ¶11, Dckt. 233. On average, that is less than $37,000 per month ($622,194.16 / 17 months). This is substantially less than what the Debtor reported on his Schedule I($75,000), or what he projected in his Plan Declaration (at least $65,000). In fact, the Debtor's monthly income never once reached $75,000 during the four full months preceding the filing of this case. See Exhibit 11 to the Response. The discrepancy calls into question the accuracy of Schedule I and the Plan Declaration at the time that they were prepared;

8. The $25,000 payment mentioned in the Civil Minutes for the hearing on the Motion to Dismiss was funded by Roy Reeves. According to the Debtor, Mr. Reeves buys and sells dirt. The $25,000 represents an advance for future work. However, even as of July 16, 2014, the Debtor still had not started the work. There is no contract between the parties. Exhibit 20 at pp. 258-62, Dckt. 232;

9. As noted above, in his Plan Declaration, the Debtor testified that he had no domestic support obligations. See ¶ 13, supra. While this statement was true, it was arguably misleading. That is because Ms. Leysa Napier had filed an application for spousal support in June 2013. The Debtor filed a responsive declaration on July 12, 2013 (i.e., only 10 days before the Plan Declaration was filed). See Exhibits 14 and 15, Dckt. 232. Unquestionably, the request for spousal support was relevant to the whether the Debtor's plan was feasible.

After laying out the concerns, the United States Trustee argues that under 11 U.S.C. § 109(g), the debtor may be ineligible from filing a new bankruptcy case for 180 days because of a willful failure to appear before the Court in proper prosecution of the case. Under Section 109(g), there are two elements that must be satisfied: 1) the debtor must have filed to appear before the Court in proper prosecution of the case (leading to the dismissal of the debtor's case) and 2) the failure must have been "willful."

Applying these factors, the United State Trustee argues that both are satisfied as to the Debtor. As to the first element, the United States Trustee first reviews applicable law. The United States Trustee argues that a debtor's failure to make plan payments can constitute "a failure. . .to appear before the court in proper prosecution of the case." *See In re King*, 126 B.R. 777, 780-81 (Bankr. N.D. Ill. 1991) ("Section 109(g) does not merely require a debtor to come physically before the bankruptcy judge when the case is set. Willful failure to 'appear before the court in the proper prosecution of the case' can also include a Chapter 13 debtor's willful failure to pay under his plan."); *In re Wen Hua Xu*, 386 B.R. 451, 457 (Bankr. S.D. N.Y. 2008) ("[C]ourts have held that this section can apply to a debtor's willful failure to pay under a chapter 13 plan…. 'Proper prosecution,' in this context must necessarily encompass, at the least, compliance with the statutory duties of a debtor."). Applying the law, the United States Trustee asserts that the element is satisfied because the Debtor has failed to make substantial payments in the instant case as well as in Debtor's two prior cases.

As to the second element, the United States Trustee argues that willful" means "deliberate or intentional, rather than accidental or that which is beyond the debtor's control." *See In re Wen Hua Xu*, 386 B.R. at 455. But repeated failures to abide statutory or judicial directives do support an inference of willful conduct. *See id.* at 456. Applying the law, the United States Trustee argues that the Debtor had the clear financial ability to make the plan payments but instead chose to superfluously spend an exorbitant amount of money on hotels, airline tickets, and other luxuries. The United States Trustee argues that this strongly suggests an inference of willfulness. *See, e.g.*, *In re King*, 126 B.R. at 779 ("The Debtors are therefore well able to make payments due to the Trustee under their Plan …. They have willfully failed to do so despite knowing of their obligation to do so and having the financial ability to do so.") (emphasis added); *In re Patel*, 48 B.R. 418, 419 (Bankr. M.D. Ala. 1985) (failure to make plan payments was willful where "[c]reditors have been forced to wait for payments that were never made, while petitioner has prospered.") (emphasis added).

The United States Trustee asks for the court to enter an order (1) dismissing the case under Section 1208(c) and (2) bar the Debtor from filing a new case for 180 days pursuant to Section 109(g).

CHAPTER 12 TRUSTEE SUPPLEMENTAL PLEADINGS

On August 6, 2014, the Chapter 12 Trustee filed a supplemental brief to the motion to dismiss in support of having the motion denied.

In his support, the Chapter 12 Trustee argues that after review of the case, it would be in the best interest of the creditors to keep the case open. While the Chapter 12 Trustee does note that the Debtor remains to be delinquent of one plan payment in the amount of $8,500.79, he argues that keeping the case going is best for the creditors.

The Chapter 12 Trustee states that he has reviewed the Bankruptcy Rule 2004 Examination transcript and reviewed the financial statements to conclude that the Debtor makes enough money to support the remainder of the plan as well as the business.

The Chapter 12 Trustee suggests and argues that the court should appoint an accountant to act as the Debtor's accountant and bookkeeper in order to ensure that the Debtor makes the remaining plan payments. Furthermore, the Chapter 12 Trustee argues that the Debtor should be ordered to file Monthly Operating Reports and be required to attend status conferences at least quarterly to ensure compliance with the plan.

The court knows nothing about the person identified as "Ralph Juarez" by the Trustee as a possible accountant and bookkeeper for the Debtor. The Trustee states that if the court does not dismiss the case then the Chapter 12 Trustee shall filed a motion for Mr. Juarez to be employed.

Interestingly, the Chapter 12 Trustee's supplemental response is devoid of any legal authority for appointing an "accountant" or a "bookkeeper" to take over the fiduciary and other Plan duties of a Chapter 12 Debtor in a Chapter 12 case. The Chapter 12 Trustee does not provide the court with any

authorities for the Chapter 12 Trustee to select and have appointed an "accountant" or a "bookkeeper" for the Debtor in a Chapter 12 case. FN.2.

FN.2. In connection with this case, it has been made clear to the court that this Chapter 12 case can be converted to one under Chapter 7, with the Chapter 7 trustee authorized to continue in the operation of the business as the independent fiduciary. 11 U.S.C. § 1208(d). Additionally, pursuant to 11 U.S.C. § 105(a) and applicable state law, the court can appoint a receiver under the Chapter 12 Plan to take control of the assets, perform the plan, and then turn the business and assets back over to the Debtor upon completion of the plan.

The Chapter 12 Trustee has provided as an exhibit correspondence from the proposed "accountant" and "bookkeeper" as to his understanding of his duties. Clearly, he does not see it as a task other than inputting the information from the Debtor and then doing with it what the Debtor says. "I believe that the majority of the work would be done by my general staff with my oversight." Exhibit A, Dckt. 237. The court is at somewhat of a loss, based on the pleadings filed, how the Chapter 12 Trustee is suggesting that having bookkeeping staff do the work remedies the substantial breaches, misrepresentations, and diversions of monies by Debtor.

DEBTOR'S RESPONSE

On August 7, 2014, Debtor filed a response. Debtor argues that the motion to dismiss should be denied.

In his response, the Debtor admits to not be current on his plan payments but that "it is anticipated that [Debtor] will be current on his plan payments by the time of the [August 21st hearing]." Dckt. 240.

In support for denying the motion to dismiss, the Debtor argues that: 1) all of the creditors receiving payments under the plan oppose the dismissal of the case; 2) the Chapter 12 Trustee opposes the dismissal of the case subject to the appointment of an accountant; and 3) Debtor has paid all domestic support obligations and has no further domestic support obligations.

The Debtor concludes by arguing that it is not in the best interest of the creditors to dismiss the case. Furthermore, while admitting that the Debtor "has spent money that should have been devoted to plan payment," Debtor asserts that "the remedy for this behavior is the appointment of [an accountant] to take control of [Debtor's] finances leaving [Debtor] to drive the tractors." Dckt. 240.

The Debtor provides his testimony in opposition to the Motion. In his declaration he states,

a. Debtor supports Trustee's recommendation for the Debtor to have an accountant;

b. Debtor supports Trustee's recommendation that monthly operating reports be filed timely;

c. Debtor supports Trustee's recommendation that quarterly status conferences be held;

d. Debtor wants the accountant to be the disbursing agent to receive payments from Debtor's customers, make payments to the Chapter 12 Trustee, and then release funds to Debtor for his business expenses.

Declaration, Dckt. 241. As discussed below, the Debtor provides scant evidence of what monies were misspent, how that occurred, or why he would not be working to continue improperly diverting monies notwithstanding having a bookkeeper. The Declaration is pregnant with foreshadowed future diversions.

Though professing to have the bookkeeper handle all of the monies, Debtor says that while the bookkeeper will receive "all" payments from clients and make disbursements to the Chapter 12 Trustee, the only disbursements to be made to the Debtor will be "to pay business expenses." Debtor has previously stated that his only income is from this business. Schedule I, Dckt. 1 at 32; Statement of Financial Affairs Responses to Questions 1 and 2, *Id.* at 35; Declaration in Support of Confirmation, ¶ 6, incorporating Exhibit A, Dckts. 10, 11; and Declaration in Support of Confirmation, ¶ 12, incorporating Exhibit A, Dckts. 152, 153.

This testimony under penalty of perjury taken as true, then the Debtor would have no money for paying any personal expenses. The Debtor's ability to pay his personal expenses is dependent (based on the evidence to date) on using monies earned from the operation of his business. Thus, in saying that the bookkeeper will disburse monies to him only for business expenses, Debtor is also stating that he has additional monies or will be secretly collecting monies from his business, diverting them around the bookkeeper.

The above testimony relating, to the extent it does, to misrepresentation to the court and creditors, and the diversion of monies, covers a total of five lines in the declaration. Debtor then spends fourteen lines testifying as to what a bad person his ex-spouse is and how he has determined that his ex-spouse routinely makes false statements to the court. (The irony of the Debtor reaching such a determination as to another is not lost on the court, and presumably on the Chapter 12 Trustee and the U.S. Trustee.)

CREDITOR STATEMENTS SUPPORTING DEBTOR'S CONTINUED POSSESSION AND CONTROL UNDER PLAN NOTWITHSTANDING MISREPRESENTATIONS, BREACHES OF FIDUCIARY DUTY, AND DIVERSION OF PLAN MONIES

Bankruptcy cases can make for strange bedfellows, and a good Chapter 11 or 12 attorney can find the common ground by which plans can be confirmed with broad creditor support. These compromises relate to issues concerning creditor liens, priority of payment, why some dividend is better than no dividend, and the like. However, a "deal" between a debtor and creditors does not work for the creditors to "sanctify and absolve" parties for conduct to corrupt the federal judicial process and commit fraud upon the court.

Four creditors have provided the court with their claim specific response to the Trustee's Motion. These statements are as follows:

A. CNH Capital America, LLC Response, Dckt. 244, states in its entirety,

> "Creditor, CNH CAPITAL AMERICA, LLC, submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.
>
> Creditor, CNH CAPITAL AMERICA, LLC, opposes the dismissal of the case."

B. NAEDA Financial Ltd., L.P., Response, Dckt. 245, states in its entirety,

> "Creditor, NAEDA Financial Ltd,. L.P., submits the following in response to the motion to dismiss case filed by the Chapter l2 Trustee.
>
> Creditor, NAEDA Financial Ltd., L.P., opposes the dismissal of the case. Creditor, NAEDA Financial Ltd., L.P., is satisfied with the confirmed plan and opposes the dismissal of the case."

C. Mesa Leasing, Inc. Response, Dckt. 246, states in its entirety,

> "Creditor, MESA LEASING, INC., submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.
>
> Creditor, MESA LEASING, INC., opposes the dismissal of the case. Creditor, MESA LEASING, INC., is satisfied with the confirmed plan and opposes the dismissal of the case."

D. Deere & Company Response, Dckt. 247, states in its entirety,

> "Creditor, DEERE & COMPANY, submits the following in response to the motion to dismiss case filed by the Chapter 12 Trustee.
>
> So long as the Debtor remains current on his plan payments, DEERE & COMPANY opposes the dismissal of the case."

These "Responses" by the Creditors raise several questions. First, none of them address, or appear to reflect any knowledge of the Debtor having diverted substantial amounts of money ($80,000.00) to his personal use (travel, lodging, and luxuries), leading to the defaulted plan payments.

Second, The Deere & Company response can be read (less charitably then as phrased by the Debtor) as stating, "so long as the Debtor pays us on the deal we made, he can misrepresent to and defraud the court – just as long as

we get ours."

At the hearing, the court will afford sufficient time for the attorneys for each of these creditors to provide the court with their client's respective analyses and position as it relates not merely to a default in plan payment, but the diversion of the monies and misrepresentations to the court.

DISCUSSION

The United States Trustee's response provides succinctly all of the problems with Debtor's case. Ranging from excessive and unjustifiable spending on luxury goods to failure to disclose bank accounts and support obligations, the Debtor has not been forthright in this case. As discussed below, the court finds multiple grounds to grant the motion to dismiss.

11 U.S.C. § 1208(c) authorizes the bankruptcy court to dismiss a case for cause. In relevant part, such causes that constitute for cause are:

> (1) unreasonable delay, or gross mismanagement, by the debtor that is prejudicial to creditors;. . .
>
> (4) failure to commence making timely payments required by a confirmed plan;. . .
>
> (6) material default by the debtor with respect to a term of a confirmed plan;. . .
>
> (9) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation; and
>
> (10) failure of the debtor to pay any domestic support obligation that first becomes payable after the date of the filing of the petition.

11 U.S.C. 1208(c).

While "bad faith" is not specifically listed as one of the enumerated causes to justify dismissal under § 1208(c), bad faith may constitute cause for dismissal. *Leavitt v. Soto* (*In re Leavitt*), 171 F. 3d 1219, 1224 (9th Cir. 1999) (bad faith held to be cause for dismissal under chapter 13's mirrored statute, § 1307(c)). When determining whether a debtor filed his petition in bad faith, a court must apply a totality of the circumstances, considering the following factors:

> (1) Whether the debtor "misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or otherwise [filed] his Chapter 13 [petition or] plan in an inequitable manner;
>
> (2) The debtor's history only intended to defeat state court litigation;
>
> (3) Whether the debtor only intended to defeat state court litigation; and

(4) Whether egregious behavior is present.

In re Pandol, No. 10-19733-B-12, 2010 Bankr. LEXIS 6495, at *2 (Bankr. E.D. Cal. Sept. 29, 2010) (citations omitted).

It is painfully obvious that the Debtor has not followed the terms of the confirmed Plan. The Debtor has been spending an exorbitant amount of money outside of the confirmed Plan. $50,000 for travel expense, $12,000 at restaurants, and $18,000 on luxury goods and services are most certainly not terms of any Chapter 12 confirmed plan. Debtor here took it upon himself to act outside the terms of the Plan and spend money (a large amount of it) on items and services that were not for the betterment of the estate or creditors. FN.3.

FN.3. It is equally curious that the Debtor, so strapped for cash and ability to generate a profit, justified confirming a Chapter 12 Plan with a 0.00% dividend to creditors holding general unsecured claims, but during the first year of the Plan has been able to spend $80,000.00 for travel, lodging, and luxuries. This further impugns the Debtor's credibility and ability to serve as a plan administrator in a bankruptcy case.

Applying the causes under § 1208(c) to the instant case, there are multiple grounds in which dismissal is proper. The Debtor has grossly mismanaged funds by spending superfluous and unnecessary monies on travel, restaurants, and hotels instead of putting that money towards fulfilling the Plan obligations. Through this gross mismanagement, there has been a substantial diminution of the estate (upwards of $80,000 in the past year and a half alone). The multiple filings of the Debtor which all led to dismissal and the inability for the Debtor to follow the terms of the Plan make rehabilitation highly unlikely. Lastly, the Debtor did not disclose the domestic support obligations (or the potential of such, assuming that the Debtor acted in some form of good faith) and failed to timely pay such obligations after confirmation of the plan.

Most notably, the Debtor remains to be delinquent on payments. Failure to make plan payments is sufficient cause to dismiss the case. 11 U.S.C. § 1208(c)(6). On this ground alone, there is sufficient basis to dismiss the case. The evidence concerning the superfluous and unjustifiable spending on non-essential goods suggests that the Debtor willfully ignored the terms of the plan and chose not to make the plan payments in order to take vacations to Las Vegas. Lavish vacations were not part of the Debtor's plan.

Furthermore, the Debtor has not been forthright with the court from the start of this case. In short, the Debtor has **only** acted in bad faith. Debtor did not disclose an interest in a bank account at the time of filing the petition. Debtor failed to disclose the existence of domestic support obligations. Debtor has provided little to no explanation concerning the discrepancies in Schedules I and J of Debtor's petition and his sworn declarations for the instant motion. Debtor failed to sufficiently explain where large sums of money, such as the $25,00.00 advance for future work in which the Debtor has not provided any contract of the future work nor explanation of the terms of such advance, "magically" appear from to satisfy

Debtor's obligations.

Debtor is constantly hiding the ball, hoping that satisfying any deficiencies will cure any and all problems (fraud, misrepresentation, and breach of fiduciary duties) that have run rampant in this case from the get go. Debtor has acted on his own accord in spending estate funds without providing any authorization, justification, or permission. For example, Debtor has not provided any explanation on where he got the past due domestic support obligation payment nor under what authority he was acting under to pay such past due payments. Overall, Debtor has acted egregiously, whether it be through the gross spending of estate funds outside the Plan's terms or acting without any authority and diminishing the value of his Chapter 12 estate.

The Chapter 12 Trustee and Debtor's suggestion that hiring an accountant will cure the deficiencies and problems that the case has experienced so far is unpersuasive. The plan nor the court should provide for professional "babysitters" so that the Debtor may be left "to drive the tractors off the cliff a fifth time." Such a bookkeeper (or in this situation the non-professional staff of the bookkeeper actually doing the work) would not be able to cure the breaches or prevent them in the future.

The Debtor, first as the Debtor in Possession and then as the Plan Administrator is a fiduciary to the bankruptcy estate and plan estate. The Chapter 12 Plan provides that the property of the estate shall revest in the Debtor upon confirmation. Order, First Amended Chapter 12 Plan attached, ¶ 5.01, Dckt. 193. Even though revested in the Debtor, the property remains subject to the Bankruptcy Code, including 11 U.S.C. § 363. Collier on Bankruptcy, Sixteenth Edition, ¶ 1227.02. The Debtor has chosen to take on the responsibility to serve as the plan administrator, and handle the plan estate monies in the same manner as an independent fiduciary could (and is now proposed) to hold and control those assets. The court would well anticipate the Debtor being the first to the courthouse if the accountant/bookkeeper had used $80,000.00 of the monies for the purposes used by the Debtor through this confirmed Plan.

A trust (fiduciary relationship) is created as a matter of California law when there is a transfer of assets by which one obtains control and another is to share in the profits. *Schaake v. Eagle Automatic Can. Co.*, 135 Cal. 472 (Cal. 1902). A fiduciary owes a duty "to act with the utmost good faith for the benefit of the other party." *Persson v. Smart Inventions, Inc.*, 125 Cal. App.4th 1141, 1160 (2005) (citing *Bacon v. Soule*, 19 Cal. App. 428, 434 (1912))(internal quotations omitted).

Therefore, because of the delinquent payments and the apparent willfulness in not abiding by the terms of the Plan and the failure to provide any explanation or justification for spending outside the terms of the Plan, the relief is proper pursuant to 11 U.S.C. § 1208. However, it remains to be determined if the relief should be dismissal with only an six month prohibition on filing yet a fourth bankruptcy case in four years, dismissal of the bankruptcy case with prejudice, or conversion to a case under Chapter 7. Alternatively, if the Debtor were to prosecute a plan amendment which provided for an appointment of a receiver to take control of the business and assets for the term of the Plan and the diverted $80,000.00 and additional monies paid to the ex-spouse were accounted for, the court would have yet another option.

3. 11-93411-E-11 **SANJIV/SHEENA CHOPRA** **CONTINUED STATUS CONFERENCE RE: VOLUNTARY PETITION 9-27-11 [1]**

Debtors' Atty: Robert M. Yaspan

Notes:

Continued from 6/12/14 to allow the Debtors/Plan Administrators to determine what other post-confirmation motions are required and whether the case should be administratively closed.

Operating Report filed: 7/23/14

[RMY-44] Debtors' Motion for Final Decree Closing Chapter 11 Case filed 7/23/14 [Dckt 955]; Granted