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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6 FRESNO DIVISION

6 In re) Case No. 05-13869-B-13
7 Titus Alexander Gay and)
8 Susan Elizabeth Gay,) DC No. GCL-2
9 Debtors.) DC No. MNE-3
_____)

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11 **FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING**
12 **MOTIONS TO DISMISS CHAPTER 13 CASE**

12 George C. Lazar, Esq., of Fox Johns Lazar Pekin & Wexler, appeared telephonically on
13 behalf of Borrego Springs Bank, National Association (the "Bank").

14 M. Nelson Enmark, Esq., appeared in his capacity as the chapter 13 trustee (the
15 "Trustee").

16 Patrick Kavanagh, Esq., of the Law Offices of Patrick Kavanagh, appeared on behalf of
17 debtors, Titus Alexander and Susan Elizabeth Gay (the "Debtors").

17 The Bank and the Trustee each brought motions to dismiss this chapter 13 case
18 based on unreasonable delay. The court has jurisdiction over this matter pursuant to 28
19 U.S.C. § 1334. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(A). For the
20 reasons set forth below, the Bank's and the Trustee's motions will be granted.

21 Under 11 U.S.C. § 1307(c),¹ a chapter 13 case may be converted to a case under
22 chapter 7, or dismissed, whichever is in the best interest of the creditors, for cause. The
23 statute defines "cause" to include "unreasonable delay by the debtor that is prejudicial to
24 creditors." § 1307(c)(1). Neither the Bank, nor the Trustee, nor the Debtors have
25 requested conversion of this case to chapter 7, so the court will limit its analysis to the
26 dismissal issue.

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¹Unless otherwise stated, all references and symbols referring to the Code, section or sections refers to the United States Bankruptcy Code 11 U.S.C. § 101, et seq., applicable to cases filed before October 17, 2005.

1 Here, both the Trustee, and a secured creditor that holds a substantial arrearage
2 claim, have moved for dismissal based on unreasonable delay. This is the Debtors'
3 second chapter 13 bankruptcy. The first petition, case no. 05-12737, was filed on April
4 8, 2005, to stop the Bank from foreclosing its mortgage against the Debtors' home. That
5 petition followed extensive workout efforts between the Debtors and the Bank and an
6 unsuccessful forbearance agreement. That case was dismissed on May 17, 2005, on the
7 court's order to show cause because the Debtors failed to file a master address list, in
8 compliance with the court's local rules. This case was filed on May 12, 2005, one day
9 after the hearing on the order to show cause, and five days before entry of the prior
10 dismissal order.

11 In this case, the Debtors applied for additional time to file their documents,
12 including the chapter 13 plan. A first-modified chapter 13 plan was filed on June 3,
13 2005. For reasons that are not clear from the record, the Trustee was not able to
14 complete the meeting of creditors until August 25, 2005. Objections to confirmation of
15 the first-modified chapter 13 plan were filed by the Trustee and others, including the
16 Bank. Those objections were sustained on October 5, 2005.

17 Thereafter, nothing was done to get a plan confirmed for over two months, until
18 December 7, 2005, when the Debtors filed a motion to confirm another first-modified
19 chapter 13 plan, which was materially different from the June 3, 2005, first-modified
20 plan. That motion was denied for substantive and procedural reasons on January 11,
21 2006. On January 17, 2006, the Debtors filed a motion to confirm a second-modified
22 chapter 13 plan. The Trustee objected because that plan did not properly provide for
23 treatment of a substantial priority tax claim. That motion was purportedly to be heard on
24 March 1, 2006, but the matter was not calendared because the Debtors had set it for
25 hearing at the wrong time. The clerk gave Debtors' counsel notice of the calendaring
26 problem on February 1, 2006. The problem was not corrected.

27 Thereafter, the Debtors again did nothing to get a plan confirmed for over two
28 more months. Finally, the Bank filed this motion to dismiss on March 17, 2006. The

1 Trustee filed his motion on March 20, 2006. Both matters were noticed to the Debtors
2 and their counsel and set for hearing on April 5, 2006. *One day before the hearing*, the
3 Debtors filed a proposed third-modified plan and noticed a confirmation hearing on May
4 10, 2006. The court heard the dismissal motions, and the arguments of Debtors' counsel,
5 and took those matters under submission.

6 By the date of the hearing, these Debtors had been in chapter 13 bankruptcy,
7 continuously through two proceedings, for almost one year. According to the Bank's
8 proof of claim, the Bank had not received mortgage payments since prior to March 2004.
9 By the time the Debtors filed this bankruptcy petition, the Bank's arrearage claim was
10 more than \$25,000. The Debtors offer no explanation for their failure to make the
11 prepetition mortgage payments, neither do they offer a clear explanation for their failure,
12 or inability, to get a plan confirmed in this case. The court notes from the claims docket,
13 that the Debtors have also failed to pay the real property taxes on their home for a
14 substantial period of time, and they have other secured and unsecured creditors whose
15 rights are stayed by this bankruptcy.

16 Chapter 13 cases are intended to be expeditiously administered. *In re*
17 *Michaelesco*, 312 B.R. 466, 469 (Bankr. D.Conn. 2004). Frequent and extended delays
18 in the course of a chapter 13, coupled with the inability to confirm a plan of
19 reorganization, is grounds for dismissal. *See Anderson v. U.S. on Behalf of Small*
20 *Business Admin.* 165 B.R. 445 (S.D. Ind. 1994).

21 A chapter 13 bankruptcy is by its very nature "prejudicial to creditors" by virtue
22 of the protections it affords to the debtors, including the automatic stays under §§ 362 &
23 1301. When a chapter 13 case is not administered expeditiously, and the debtors either
24 can't, or won't get a plan confirmed to pay their creditors, that delay only adds to the
25 prejudice. The delays in this case have been clearly prejudicial to the creditors. The
26 Debtors' inability to get a plan confirmed on several occasions, and the long unexplained
27 gaps between confirmation attempts, lead to the conclusion that this chapter 13 case has
28 not been expeditiously administered. The delay in this case is unreasonable. Moreover,

1 Debtors' counsel's efforts at the hearing to explain the delays did little to persuade the
2 court otherwise.

3 **Conclusion.**

4 Based on the foregoing, the Bank's and Trustee's motions will be GRANTED.
5 This case will be dismissed.

6 Dated: April _____, 2006

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

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