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7 UNITED STATES BANKRUPTCY COURT  
8 EASTERN DISTRICT OF CALIFORNIA  
9

10 In re Case No. 06-10472-A-13K  
11 TITUS ALEXANDER GAY and DC No. PK-1  
12 SUSAN ELIZABETH GAY  
13 Debtor. FINDINGS OF FACT  
AND CONCLUSIONS OF LAW  
RE MOTION TO EXTEND  
AUTOMATIC STAY

14 Titus and Susan Gay filed their first bankruptcy case April  
15 8, 2005, to stop a foreclosure of their home. That case was  
16 dismissed on May 17, 2005, because the debtors, who were then in  
17 pro se, failed to file a master address list.

18 The Gays filed their second case on May 12, 2005. They  
19 filed a first modified chapter 13 plan in that case on June 3,  
20 2005. The creditors' meeting was continued until August 25, when  
21 it was finally completed, and after that, objections to  
22 confirmation of their chapter 13 plan were sustained on October  
23 5, 2005. Thereafter:

24 Nothing was done to get a plan confirmed for over two months  
25 until December 7, 2005, when the Debtors filed a motion to  
26 confirm another first modified chapter 13 plan. That motion  
was denied for substantive and procedural reasons on January  
11, 2006.

27 On January 17, 2006, the Debtors filed a motion to confirm a  
28 second-modified chapter 13 plan. The Trustee objected  
because that plan did not properly provide for treatment of  
a substantial priority tax claim. That motion was

1 purportedly to be heard on March 1, 2006, but the matter was  
2 not calendared because the Debtors had set it for hearing at  
3 the wrong time. The clerk gave Debtors' counsel notice of  
the calendaring problem on February 1, 2006. The problem  
was not corrected.

4 Thereafter, the Debtors again did nothing to get a plan  
5 confirmed for over two more months. Finally, the Bank filed  
6 this motion to dismiss on March 17, 2006. The Trustee filed  
7 his motion on March 20, 2006. Both matters were noticed to  
8 the Debtors and their counsel and set for hearing on April  
9 5, 2006. *One day before the hearing*, the Debtors filed a  
10 proposed third-modified plan and noticed a confirmation  
11 hearing on May 10, 2006. The court heard the dismissal  
12 motions, and the arguments of Debtors' counsel, and took  
13 those matters under submission. (Findings of Fact and  
14 Conclusions of Law of the Hon. W. Richard Lee regarding  
15 motions to dismiss chapter 13 case, filed April 13, 2006, in  
16 Case No. 05-13869-B-13 ("Findings of Fact Dismissing Second  
17 Chapter 13 Case").

18 Judge Lee granted the motions to dismiss observing that by  
19 the date of the hearing, the Gays had been in chapter 13  
20 bankruptcy through two cases for almost one year. Borrego  
21 Springs Bank had not received mortgage payments since prior to  
22 March 2004.

23 This case was filed, as the Gays' third bankruptcy, on April  
24 19, 2006, only six days after the Findings of Fact Dismissing  
25 Second Chapter 13 Case.

26 Shortly after they filed this case, the Gays moved to extend  
27 the automatic stay. The debtors acknowledged that they have the  
28 burden of proof that their third case is filed in good faith and  
assert that they have met that burden of proof. The Gays say  
that their circumstances have changed since their second chapter  
13 case was filed in that Mr. Gay's income has become more stable  
and that "all of the organizational issues have been resolved."  
(Expedited BAPCPA Motion to Reinstate the Stay, filed April 19,  
2006, at p. 5). They also point out that the chapter 13 trustee

1 is holding over \$18,000 from payments into their prior cases.  
2 Borrego Springs Bank opposed the motion to extend the stay. The  
3 Bank argued that the debtors could not establish by clear and  
4 convincing evidence that this case was filed in good faith.

5 The court held an evidentiary hearing and made findings of  
6 fact and conclusions of law on the record. These written  
7 findings of fact and conclusions of law amend those oral  
8 findings. This memorandum contains findings of fact and  
9 conclusions of law required by Federal Rule of Bankruptcy  
10 Procedure 7052 and Federal Rule of Civil Procedure 52. This is a  
11 core proceeding as defined in 28 U.S.C. §157(b)(2)(A), (G) and  
12 (O).

13 The motion to extend the stay is brought under Bankruptcy  
14 Code § 362(c)(4), effective October 2005. That section provides  
15 that the automatic stay shall not go into effect upon the filing  
16 of a case, if two or more cases of that debtor were pending  
17 within the previous year but were dismissed (with exceptions not  
18 relevant here). However, within thirty days of the filing of the  
19 latter case, a party in interest may request the court to order  
20 that the automatic stay take effect in the case. However, the  
21 party so moving must demonstrate that the filing of the latter  
22 case is in good faith as to the creditors to be stayed.

23 The statute goes on to state that a case is presumptively  
24 filed not in good faith if certain facts exist. If the  
25 presumption arises, it may be rebutted by clear and convincing  
26 evidence to the contrary.

27 When the stay applies to all creditors, there are three  
28 categories of facts that establish a case as presumptively not

1 filed in good faith.

- 2 • First, two or more previous cases under which the individual  
3 was a debtor were pending within a one year period.
- 4 • Second, the previous case was dismissed after the debtor  
5 failed to file or amend a petition as required without  
6 substantial excuse or failed to provide adequate protection  
7 as ordered by the court or failed to perform the terms of a  
8 plan confirmed by the court. Mere inadvertence or  
9 negligence shall not be substantial excuse unless the  
10 dismissal was caused by the negligence of the debtor's  
11 attorney.
- 12 • Third, there has not been a substantial change in the  
13 financial or personal affairs of the debtor since the  
14 dismissal of the next most previous case, or if any other  
15 reason to conclude that the latter case will not be  
16 concluded with a discharge or a confirmed plan exists.

17 There is some inconsistency in the wording of this statute.  
18 Section 362(c)(4) only applies to individual debtors who had two  
19 or more cases pending within the previous year but were  
20 dismissed. Section 362(4)(d)(i)(I) states that there is a  
21 presumption of a case not being filed in good faith if two or  
22 more previous cases in which the individual was the debtor were  
23 pending within the one year period. It would thus seem that the  
24 presumption of a case not being filed in good faith will always  
25 arise upon the filing of the third case when two previous cases  
26 have been pending within the previous year but were dismissed.

27 The court must apply this statute to the facts here. The  
28 presumption of the case not being filed in good faith does arise.

1 Mr. and Mrs. Gay have, as they acknowledge, been debtors in two  
2 previous chapter 13 cases that were pending within the last year  
3 and were dismissed. In order to prevail on their motion to  
4 impose the stay, they must rebut the presumption that the case  
5 was not filed in good faith by clear and convincing evidence.

6 Clear and convincing evidence "is that weight of proof which  
7 produces in the mind of the trier of fact a firm belief or  
8 conviction as to the truth of the allegations sought to be  
9 established, evidence so clear, direct and weighty and convincing  
10 as to enable the fact finder to come to a clear conviction,  
11 without hesitancy, of the truth of the precise facts of the  
12 case." Shafer v. Army & Air Force Exch. Serv., 376 F.3d 386, 396  
13 (5<sup>th</sup> Cir. 2004).

14 The debtors' second chapter 13 case was dismissed after they  
15 failed to file a confirmable plan within a reasonable time  
16 without substantial excuse. In that case, Judge Lee found that  
17 the delay had prejudiced creditors. The court stated "Debtors'  
18 inability to get a plan confirmed on several occasions, and the  
19 long unexplained gaps between confirmation attempts, lead to the  
20 conclusion that this chapter 13 case has not been expeditiously  
21 administered. The delay in this case is unreasonable. Moreover,  
22 debtors' counsel's efforts at the hearing to explain the delays  
23 did little to persuade the court otherwise."

24 A presumption of the case not being filed in good faith  
25 arises if there has not been a substantial change in the  
26 financial or personal affairs of the debtors since their prior  
27 case. Here, the debtors attempted to persuade the court that  
28 there had been a substantial change in their financial and

1 personal affairs. This attempt was made more difficult because  
2 they filed their new case only six days after their second case  
3 was dismissed.

4 In order to rebut the presumption here, the debtors must  
5 come forward with clear and convincing evidence that the  
6 circumstances of the prior cases do not arise to the debtors'  
7 deliberately trying to delay and impeded creditors. There is no  
8 evidence of any such deliberate attempt here. Rather, a review  
9 of the entire record of these three cases leads to a conclusion  
10 that the delay was in the first case inadvertence on the debtors'  
11 part and in the second case attributable largely to debtors'  
12 counsel not promptly proceeding to plan confirmation.

13 The debtors must come forward with clear and convincing  
14 evidence that there is a substantial likelihood in this case that  
15 they will be able to confirm a chapter 13 plan that will pay  
16 creditors. This is the most important fact. Other than the fact  
17 that they have managed to be in chapter 13 for a year in one case  
18 or another without confirming a plan or any of their creditors  
19 being paid, the debtors' circumstances are very sympathetic. Mr.  
20 Gay has a business. He is unsophisticated with respect to  
21 financial and bookkeeping matters, but he does have the ability  
22 to obtain contracts for the business in which he is engaged.  
23 Mrs. Gay has been a school teacher for fifteen years. It may  
24 well be that Mr. Gay's business has now turned around and can  
25 produce a profit and the Gays' can confirm a chapter 13 plan.  
26 But, the Gays have not come forward with clear and convincing  
27 evidence of that.

28 The only evidence given to the court with respect to the

1 debtors' ability to confirm a plan and make the payments was the  
2 profit and loss year to date comparison, Exhibit 2. And neither  
3 that document nor the testimony of Mr. Gay about it persuades the  
4 court by clear and convincing evidence that anything has  
5 significantly changed since the entire period of time in 2005 in  
6 which the debtors were trying to confirm a plan.

7 The financial information about Mr. Gay's business from  
8 January 1 to the end of March in 2006 was available at the time  
9 of the hearing on the motion to dismiss the second case. The  
10 2005 tax returns were available. And while the business may  
11 eventually be successful, the Gays have not come forward with  
12 clear and convincing evidence that they have thought out how that  
13 will take place.

14 This is a motion brought under Bankruptcy Code § 362(c)(4)  
15 to reinstate the stay. That section was added by the Bankruptcy  
16 Abuse Prevention and Consumer Protection Act of 2005. However,  
17 under these facts, had that section not been in effect, and had  
18 the creditor brought a motion for relief from stay upon the  
19 filing of the third case, the court would have been inclined to  
20 grant it. That is, in this particular case, the Bankruptcy Abuse  
21 Prevention and Consumer Protection Act of 2005 did not affect the  
22 outcome.

23 For the foregoing reasons, the motion to impose the stay is  
24 denied.

25 DATED: August 17, 2006.

26  
27 /s/\_\_\_\_\_  
28 WHITNEY RIMEL, Judge  
United States Bankruptcy Court