

U.S. BANKRUPTCY COURT  
District of South Carolina

Case Number: 07-6058

Order

The relief set forth on the following pages, for a total of 13 pages including this page,  
is hereby ORDERED.

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**FILED BY THE COURT**  
**03/03/2008**



Entered: 03/03/2008

  
US Bankruptcy Court Judge  
District of South Carolina

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Denise Allawas,

Debtor.

C/A No. 07-06058-HB

Chapter 13

**ORDER**

This matter comes before the Court on the Objection of the Chapter 13 Trustee to confirmation of the Debtor's plan. The Trustee alleges that the plan has not been proposed in good faith under 11 U.S.C. § 1325(a)(3). After a proffer of evidence from the parties and a review of the schedules, statements, plan and documents on file, the Court finds as follows:

**FINDINGS OF FACT**

1. This Debtor filed for Chapter 13 relief on November 2, 2007.
2. Debtor proposes total plan payments of \$640 per month for a period of 60 months.
3. Debtor's plan proposes retention of two vehicles: a 2004 Pontiac Grand Prix sedan and a 2005 Harley Davidson Sportster motorcycle. Both vehicles are encumbered by liens, and Debtor proposes payment from her Chapter 13 plan of the motorcycle debt, scheduled at \$7,297, at the rate of \$150 per month plus 8.5% interest. Debtor proposes that the Trustee disburse \$340 per month to pay the claim of \$16,148.99 for the car, plus 8.5% interest.
4. The remainder of the plan payments are to be distributed to priority and administrative claims (attorney's fees are estimated in the plan to be \$2,609), to satisfy the Trustee's commission and then the plan provides for a dividend to general unsecured

creditors of "not less than 1%." Debtor has scheduled \$23,600 secured debt (consisting of the 2 vehicles plus \$306 for a non-purchase money security interest in household goods which Debtor moves to avoid), \$51.06 unsecured priority debt, and \$34,567 unsecured nonpriority debt. The unsecured debts appear to consist of credit card debt, utilities and some medical debts. The largest unsecured debts are scheduled as follows: A "line of credit opened 3/1/2007, last active 6/1/07" for \$11,923; \$2,812 for credit card purchases with the notation "opened 11/1/06, last active 9/1/07"; a Visa account for \$6,133; and a debt for "credit card purchases, opened 5/1/05, last active 8/2/07" scheduled at \$2,923. All other debts were less than \$1,000 each and included at least ten small balance credit cards, some for retail stores.

5. It cannot be determined from the schedules when the 2005 Harley Davidson was purchased nor the source of the purchase funds. The schedules provide the following information on Schedule D regarding the debt account: "Opened 12/1/06 Last Active 9/4/07." That creditor has not yet filed a claim with the court. The schedule further labels the debt a "Title Lien" and estimates the vehicle mileage as 15,000 miles. The Debtor's other vehicle has estimated mileage of 71,000 miles, and there is no evidence that it fails to function sufficiently to provide for the Debtor's needs. The Debtor has not provided any evidence to the Court indicating that she has a practical need for a second vehicle.

6. Debtor lives alone. Debtor's Schedule I lists monthly income of \$2,000 from veterans' disability benefits and \$806 from Social Security disability for a total Schedule I income of \$2,806. Schedule J expenses are \$1,891, leaving a monthly net income of \$915. The Debtor's statement of financial affairs indicates similar income since

2005, and her Schedule I states that “[n]o changes are expected in income.” This \$915 monthly net income is not impacted by any debt payment for the vehicles as the Debtor proposes payment of those debts through the Chapter 13 plan. The Trustee did not question any of the Debtor's claimed expenses set forth on Schedule J other than those associated with transportation. Her budget does not reveal any other items that are even arguably “luxuries.” The Debtor does not own any real estate, and her budget reflects a home rental expense of \$725, with minimal expenses for utilities.

7. Debtor's Schedule J lists monthly expenses associated with the vehicles as follows: property tax \$22; fuel \$300; insurance \$175. Combined with the Debtor's proposed plan payments for the vehicles, the Debtor's proposed total vehicle expenses are \$987 per month.<sup>1</sup>

8. Debtor's current monthly income as defined by § 1325(b) is below the median family income for one person, so her applicable plan commitment period is a minimum of 3 years and her expenses, including vehicle ownership and operating expenses, are not determined by standard expenses of 11 U.S.C. § 707(b)(2).

9. The parties agree that the Social Security disability income in the amount of \$806 may not be counted toward “disposable income” as defined by § 1325(b)(2), so the \$915 on Schedule J must be reduced to \$109 for the purpose of determining the amount due to be paid through the plan to unsecured creditors under § 1325(b)(1)(B). This reduction applies to both above-median income and below-median income debtors. Further reductions from that \$109 would be in order for the Debtor's transportation expenses, which are included in the plan in this case. After allowing this Debtor even the

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<sup>1</sup> Debtor proposes payments of \$490 per month through the plan for 60 months plus operating

most minimal expense for transportation, she would have no disposable income as defined by § 1325(b)(2) after excluding the Social Security disability income. The parties agree that she has therefore complied with the § 1325(b)(1)(B) requirement for plan confirmation.

10. At the time this Debtor filed for bankruptcy protection, the Local Standard vehicle ownership expense allowed under § 707(b)(2) to an above-median income debtor for retention of one vehicle was \$731, consisting of \$471 in ownership costs and \$260 in operating costs.

11. Despite exclusion from the projected disposable income test of § 1325(b), this Debtor has pledged a portion of her Social Security disability income to fund her plan. Debtor is proposing a monthly plan payment of \$640 to be funded with \$915 of actual projected funds available each month; \$806 of those projected funds are from Debtor's Social Security disability income.<sup>2</sup>

12. There is no evidence of prior bankruptcy filings or allegations of dishonesty in presenting the facts in this case. There is no evidence that the Debtor's debts would be nondischargeable in a Chapter 7 proceeding.

### **DISCUSSION AND CONCLUSIONS OF LAW**

The Debtor proposes retention of and payment for two vehicles – one a Harley Davidson motorcycle – and the Debtor has shown no reason that the added expense of the second vehicle is necessary. Trustee asserts that the Debtor is therefore not acting in good faith. He argues that if one vehicle were surrendered, she could pay more to

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expenses of \$497 for a total projected monthly transportation expense of \$987.

<sup>2</sup> See In re Siegel, No. 06-02291-dd, 2006 WL 3483987, at \*2 (Bankr. D.S.C. Nov. 20, 2006), where this Court held that income excluded from the definition of "current monthly income" may still be

unsecured creditors, or at least increase the likelihood that her plan will succeed by eliminating unnecessary, luxury expenses. Debtor counters with the fact that \$806 of her income cannot be counted when calculating the amount she is required to pay to unsecured creditors under the plan pursuant to the disposable income test, and therefore she can use these funds at her discretion – even for a luxury item or an unnecessary expense. Debtor also argues that she is voluntarily contributing most of the Social Security disability income to fund the plan even though this is not required of her, which she argues is evidence of her good faith.

11 U.S.C. § 1325(a)(3) provides that “the court shall confirm a plan if – . . . the plan has been proposed in good faith and not by any means forbidden by law.” The burden of proof is on the debtor, who must prove by a preponderance of the evidence that a plan is proposed in good faith. In re Hill, No. 04-04000-W, slip op. at 5 (Bankr. D.S.C. Sept. 1, 2004) and cases cited therein.<sup>3</sup> It is well established that in the Fourth Circuit a totality of the circumstances test is used for determining whether a Chapter 13 plan has been proposed in good faith. See In re Edmunds, 350 B.R. 636, 648 (Bankr. D.S.C. 2006) (citing Deans v. O'Donnell, 692 F.2d 968, 972 (4<sup>th</sup> Cir. 1982)). The non-exclusive factors to be considered include (1) the percentage of proposed repayment to creditors, (2) the debtor's financial situation, (3) the period of time over which creditors will be paid, (4) the debtor's employment history and prospects, (5) the nature and amount of unsecured claims, (6) the debtor's past bankruptcy filings, (7) the debtor's honesty in representing facts of the case, (8) the nature of the debtor's pre-petition

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voluntarily pledged by a debtor to prove feasibility.

<sup>3</sup> “In amending the Bankruptcy Code, Congress left § 1325(a)(3) intact and further emphasized the requirement of good faith by now requiring that courts find that a debtor acted in good faith in filing the

conduct that gave rise to the case, (9) whether the debts would be dischargeable in a Chapter 7 proceeding, and (10) any other unusual or exceptional problems the debtor faces." Hill, slip op. at 5-6 (citing Solomon v. Cosby (In re Solomon), 67 F.3d 1128, 1134 (4<sup>th</sup> Cir. 1995)).

This Court has previously held that "the Deans factors are each still relevant in cases filed after the effective date of the Reform Act." Edmunds, 350 B.R. at 649. Accordingly, the Deans factors of the percentage of proposed repayment and debtor's actual financial situation at the time of filing are still elements of good faith. Id. at 648-49. The Court must examine the totality of the circumstances on a case-by-case basis and must determine whether the plan represents an "abuse of the provisions, purpose or spirit" of Chapter 13. In re Geiger, No. 03-03550-W, slip op. at 4-5 (Bankr. D.S.C. June 20, 2003) (quoting Deans, 692 F.2d at 972).

Debtor asserts that her retention of and payment for both vehicles has no bearing on her good faith because she is paying a sufficient amount to her creditors. The analysis of this issue must begin with § 1325(b)(1)(B), which provides:

(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan –

....

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

"Disposable income" is defined in § 1325(b)(2) as "current monthly income" less "amounts reasonably necessary to be expended" for various reasons defined in the Bankruptcy Code. The definition of "current monthly income" at § 101(10A) was revised

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petition. See 11 U.S.C. § 1325(a)(7)." In re Edmunds, 350 B.R. 636, 647-48 (Bankr. D.S.C. 2006).

by BAPCPA to exclude, among other things, "benefits received under the Social Security Act." § 101(10A)(B). In this case, the parties agree that the Debtor's Social Security disability income of \$806 would be excluded from any calculation of her current monthly income and therefore her disposable income that must be committed to the plan. The Debtor falls below the applicable median family income, so § 1325(b)(3)(A) provides that her expenses *are not* determined by § 707(b)(2) standards. This Debtor must instead disclose her actual expenses. The Debtor's disposable income according to Schedules I and J, when considering the exclusion of the Social Security income as required by the Code and after allowing a minimal transportation expense, is \$0.<sup>4</sup> Therefore, the Debtor is in compliance with § 1325(b)(1)(B) in that she is paying all of her disposable income (as defined by law) to be received during the applicable commitment period to unsecured creditors under the plan. For the purposes of the disposable income test of § 1325(b)(1)(B) Congress made it clear that Social Security income is not to be considered in this mathematical calculation for any debtor. See § 101(10A)(B). Therefore, § 1325(b)(1)(B) does not require this Debtor to pay more to unsecured creditors in this case as a result of any actual excess income even though she could easily do so if she surrendered one of the vehicles.

However, even if the requirements of § 1325(b) are met, a debtor must, when challenged, demonstrate her good faith to gain confirmation of a plan under § 1325(a)(3) and (a)(7). Edmunds, 350 B.R. at 647. Since the Trustee has objected to confirmation, the Debtor must meet her burden of proof. An analysis of her good faith follows.

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<sup>4</sup> Debtor's \$915 "Monthly net income" on Schedule J, minus the Social Security disability income of \$806 leaves only \$109 before considering the Debtor's vehicle debt. More than this would be required to amortize the motorcycle debt of \$7297, the cheapest transportation alternative available to the Debtor.



**The percentage of proposed repayment to creditors and the period of time over which creditors will be paid**

Debtor argues that nothing is due from her to general unsecured creditors under the disposable income test of § 1325(b)(1), so any payment to such creditors is a sign of good faith. The Court disagrees. The Debtor proposes only a 1% repayment to general unsecured creditors over five years, and stretches payments to other creditors over a five-year period as well even though she has the actual ability to pay more quickly, so that she can retain and pay for a luxury item. Any points the Debtor gains for her voluntary repayment are countered by the lengthy repayment period and minimal amount. Therefore, examination of these factors yields no evidence of the Debtor's good faith.

**The Debtor's financial situation, employment history and prospects**

There is no evidence that this Debtor has any employment prospects or chances of increasing her income. Her budget states that she is disabled and her only income is from veterans' disability and Social Security disability benefits. It would therefore appear that her financial situation and her chances of performing under the plan would be increased by minimizing her debts and expenses. Instead, she has decided to retain an unnecessary item on a fixed income while creditors wait for or forego repayment. The Court finds no evidence of the Debtor's good faith after considering these factors.

**The nature and amount of unsecured claims and the nature of the Debtor's pre-petition conduct that gave rise to the case**

The only facts available to the Court regarding the Debtor's debts and pre-petition conduct are gleaned from her schedules and statements. All that is known is that the Debtor has scheduled substantial debt, given her income level, involving accounts listed as "opened" since 2005. Further, as the Harley Davidson is a 2005 model vehicle, the debt

associated with that vehicle must have been incurred within the past few years as well. Schedule D states that the most recent debt account encumbering that vehicle was "opened" in December of 2006. The debt for the car is also designated as "opened" in January of 2007 as a "title lien." It is unclear if any of this debt consists merely of the refinancing or shuffling of debt that accumulated during prior years, or whether it is new debt. It is clear from the Debtor's schedules that her income level has remained the same during this time period and the only sources of income disclosed are veterans' disability and Social Security disability benefits.

The Court has not been provided any evidence of the Debtor's historical expenses. However, it appears, due to the model year of the motorcycle, that the Debtor acquired a luxury item which the Debtor now values in her schedules at more than \$7,000 at a time when she was unable to pay her other debts and was continuing to incur additional debt. This is not necessarily unusual for debtors, and this Debtor is entitled to seek bankruptcy relief to remedy the harm of such decisions. However, acquiring a luxury item – whether it is a second car or a Harley – during a period of insurmountable debt is evidence of pre-petition bad faith on the part of the Debtor. Such bad faith may be purged by the filing of a bankruptcy petition in good faith and proposing a plan to remedy this unwise choice. However, voluntarily retaining a luxury item while at the same time asking the Court to confirm a plan that pays a minimal amount to unsecured creditors and stretches payment to other creditors over a 5 year period, while the Debtor clearly has the ability to pay more quickly, is evidence that the Debtor's plan is not proposed in good faith.

**Whether the debts would be dischargeable in a Chapter 7 proceeding,  
the Debtor's past bankruptcy filings,  
and any other unusual or exceptional problems the Debtor faces**

There is no evidence that the debts in question would be nondischargeable in a Chapter 7 case. There is no evidence of any prior bankruptcy filings, and the Court is not aware of any exceptional problems the Debtor faces other than her fixed income. These factors are neutral or weigh slightly in favor of the Debtor.

**The Debtor's honesty in representing facts of the case**

There are no allegations of the Debtor's dishonesty in representing the facts of this case. In fact, it appears that the Debtor has been very forthright in her position. As that position involves yet uninterpreted provisions of a new law, she is well within her rights to bring this matter before the Court as she has done. The Debtor's honesty and approach to this matter weigh in her favor.

**Summary of the good faith factors**

The Court finds that the Debtor was acting in good faith in *filing* the case given the uncertainty of the law on the points raised herein and therefore has no hurdle to confirmation under § 1325(a)(7). After considering the factors indicating good faith in the *filing of the plan*, they appear virtually equal in favor of the Debtor and against her. The good faith confirmation test is essentially a question of whether or not the Debtor is treating her creditors fairly. That question can only be answered after weighing all factors in a specific case. The Debtor has the burden of proving by a preponderance of the evidence that she is acting in good faith. On the facts available in this record the Debtor has not met her burden of proving that the plan was proposed in good faith. Therefore, pursuant to § 1325(a)(3) the plan cannot be confirmed.

Courts in other jurisdictions have faced issues similar to those presented here, though the good faith argument was made in only one of the cases. In In re Ward, 359 B.R. 741 (Bankr. W.D. Mo. 2007), the court held that while the debtor (who was above median income) was not required to include her Social Security disability income in the analysis of whether she was contributing all “projected disposable income” to her plan under § 1325(b)(1)(B), she was still required to propose a plan which met the § 1325(a)(3) good faith requirement. “The question thus remains as to whether a debtor taking advantage of a BAPCPA benefit expressly authorized by Congress might still be unfairly manipulating the Code.” Id. at 745. However, the court did not answer the question since the trustee in that case did not object to the plan on good faith grounds. Id.<sup>5</sup>

In In re LaSota, 351 B.R. 56 (Bankr. W.D.N.Y. 2006) the court actually imagined a debtor who elects to keep a prized Harley Davidson motorcycle, despite having filed bankruptcy. In LaSota, above-median income debtors spent less according to their Schedules I and J than what Form 22C established as current disposable income, and thus had \$1200 per month surplus. They wanted to save the excess in the bank “to build their future, while discharging 61% of their \$16,000 in credit card debt.” Id. at 57. The trustee argued that accumulating wealth is not the purpose of Chapter 13 and that the projected disposable income test and/or the good faith test require a 100% plan. Id. The court

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<sup>5</sup> See also In re Rotunda, 349 B.R. 324 (Bankr. N.D.N.Y. 2006), where the court overruled the trustee’s objection that the plan did not provide all projected disposable income to payment of unsecured creditors under § 1325(b)(1)(B). Above-median debtors had \$2,300 monthly Social Security income and actual Schedule J expenses less than Form B22C standard expenses. While the trustee did not argue good faith, the court stated that the debtor “is still required to propose a plan which meets the standards of good faith, as set forth in Code § 1325(a)(3).” Id. at 331. The court noted that the fact that a debtor may “confirm a chapter 13 plan without having to make any payments to unsecured creditors, despite having what appears to be surplus income based on Schedules I and J with which to make some level of payments to unsecured creditors, understandably does not set well with the chapter 13 trustees and the courts.” Id. at 332. However, the court noted that it was “Congress’ decision to exclude Social Security benefits from the payment of unsecured creditors’ claims. . . . This is a policy decision that the Court may perhaps question but it cannot

pondered the difficulty in trying to tell debtors what choices they should make, and noted that saving a modest house from foreclosure (rather than renting a house or apartment) might be a worthy choice. Id. at 59. However, “saving a \$10,000 Harley Davidson motorcycle that is the pride and joy of the debtor’s life” is not so worthy a choice. Id. LaSota did not involve the issue of excluded Social Security income. Nonetheless it demonstrates the willingness of courts to look at a debtor’s choices in relation to their treatment of creditors to determine a debtor’s good faith.

In conclusion, the Trustee’s objection to confirmation is sustained as the Debtor has failed to meet her burden of proving that her plan was proposed in good faith. To clarify, this decision does not find that actual excess income, arguably resulting from excluded Social Security income, must be counted toward a debtor’s current monthly income and thus towards his or her projected disposable income for the purpose of determining payment to unsecured creditors. The point is rather that a Chapter 13 debtor seeking the extreme relief of bankruptcy must also pass the good faith test of § 1325(a)(3). Examining the specific facts of this case that were available to the Court, this Debtor did not meet her burden of proof.

**IT IS THEREFORE ORDERED:**

That confirmation of the plan is denied. Debtor shall file an amended plan within 10 days of entry of this Order.

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alter.” Id. at 332-33.