



The following constitutes
the order of the court. Signed November 16, 2006

Marilyn Morgan
Marilyn Morgan
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:
DWIGHT D. MORGAN and DAWN M. MORGAN,
Debtors.

Case No. 06-52183-MM
Chapter 13

**MEMORANDUM DECISION AND
ORDER ON DEBTOR'S MOTION TO
CONTINUE THE AUTOMATIC STAY
AS TO ALL CREDITORS**

INTRODUCTION

Before the court is the debtors' motion for continuation of the automatic stay pursuant to § 362(c)(3). For the reasons set forth, the motion is granted.

FACTUAL BACKGROUND

The debtors had one prior case dismissed within the year. They filed a chapter 13 petition on March 19, 2004, their chapter 13 plan that provided a 10% distribution to unsecured creditors was confirmed on June 1, 2004, and the case was dismissed on September 8, 2006 when they defaulted on the confirmed plan. The reason that the debtors missed their plan payments is that they incurred unanticipated medical expenses, the debtor wife became unemployed, and they suffered other illnesses in the extended family. The debtor wife required several emergency surgeries, which were followed by an extended unpaid leave of absence from work. The absences ultimately resulted in her termination

1 from her employment. Upon her recovery, both of her parents became critically ill, and the debtor
2 traveled to be their caregiver. Providing care to her parents not only precluded the debtor wife from
3 finding new employment, the debtors incurred additional expenses associated with the travel and her
4 parents' healthcare. The unanticipated expenses precluded the debtors from making their plan
5 payments.

6 Seven weeks following the dismissal of their prior case, the debtors filed this case to protect their
7 vehicle. The debtors' proposed chapter 13 plan does not provide for modification of any secured debt.
8 Since the prior case, circumstances have changed in that the debtors do not anticipate any medical
9 expenses or issues, their extended family is in good health, and the debtor wife is receiving
10 unemployment benefits that will assist them while she seeks full-time employment. The debtor husband
11 has stable employment as an audio technician for the same employer for sixteen years.

12
13 **LEGAL DISCUSSION**

14 Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), the
15 automatic stay terminates on the thirtieth day after the petition if the debtor had one prior petition
16 pending in the preceding year. Sections 362(c)(3)(B) & (C) provide:

17 (3) [I]f a single or joint case is filed by or against debtor who is an individual in a
18 case under chapter 7, 11, or 13, and if a single or joint case of the debtor was
19 pending within the preceding 1-year period but was dismissed, other than a case
20 refiled under a chapter other than chapter 7 after dismissal under § 707(b) –

21 * * *

22 (B) on the motion of a party in interest for continuation of the automatic stay and
23 upon notice and a hearing, the court may extend the stay in particular cases as to
24 any or all creditors (subject to such conditions or limitations as the court may
25 impose) after notice and a hearing completed before the expiration of the 30-day
26 period only if the party in interest demonstrates that the filing of the later case is
27 in good faith as to the creditors to be stayed; and

28 (C) for purposes of subparagraph (B), a case is presumptively filed not in
good faith (but such presumption may be rebutted by clear and
convincing evidence to the contrary) –

(i) as to all creditors, if –

(I) more than 1 previous case under any of chapter 7, 11, and 13 in which
the individual was a debtor was pending within the preceding 1-year;

1 (II) a previous case under any of chapters 7, 11, and 13 in which the
2 individual was a debtor was dismissed within such 1-year period, after
the debtor failed to –

- 3 (aa) file or amend the petition or other documents as required
4 by this title or the court without substantial excuse (but
5 mere inadvertence or negligence shall not be a substantial
6 excuse unless the dismissal was caused by the negligence
of the debtor’s attorney);
(bb) provide adequate protection as ordered by the court; or
(cc) perform the terms of a plan confirmed by the court; or

7 (III) there has not been a substantial change in the financial or personal
8 affairs of the debtor since the dismissal of the next most previous case
9 under chapter 7, 11, or 13 or any other reason to conclude that the later
case will be concluded –

- 10 (aa) if a case under chapter 7, with a discharge; or
11 (bb) if a case under chapter 11 or 13, with a confirmed plan
that will be fully performed. . . .

12 Under this section, the automatic stay terminates on the thirtieth day after the filing of a second case
13 when an individual has been a debtor in a prior bankruptcy case pending within the preceding one-year
14 period. However, the debtor may seek a continuation of the stay beyond the original thirty day period
15 if:

- 16 1) a motion is filed;
17 2) there is notice and a hearing;
18 2) the hearing is held before the expiration of the original 30 day period; and
19 3) the debtor proves that the filing of the new case is in good faith as to the creditors to be stayed.

20 In re Castaneda, 342 B.R. 90, 93 (Bankr. S.D. Cal. 2006). The moving party bears the burden of proof
21 of these requirements. Id. at 94.

22 There is a rebuttable presumption that the second case is not filed in good faith if:

- 23 1) the debtor had more than one case pending in the preceding year;
24 2) the first case was dismissed because the debtor failed to:
25 a. file or amend the petition or other documents without substantial excuse;
26 b. provide court-ordered adequate protection, or
27 c. perform the terms of a confirmed plan.
28 3) or there is no substantial change in the debtor’s affairs and no other reason to believe the case

1 will result in a fully performed chapter 13 plan.

2 Id. The presumption of the absence of good faith can only be rebutted by clear and convincing
3 evidence. § 362(c)(3)(C). However, the burden is reduced to a preponderance of the evidence if there
4 is no presumption of bad faith. In re Montoya, 342 B.R. 312, 316 (Bankr. S.D. Cal. 2006). The burden
5 of establishing that the presumption of bad faith applies to the case is on the objecting creditor. Id.

6 To determine whether the debtor has established the requisite good faith under § 362(c)(3),
7 courts have looked to the totality of the circumstances. In re Ball, 336 B.R. 268, 274 (Bankr. M.D.N.C.
8 2006); In re Galanis, 334 B.R. 685, 693 (Bankr. D. Utah 2005). Courts look specifically at the same
9 factors for determining good faith in confirmation of a chapter 13 plan, as well as to the objective futility
10 of the case and the subjective bad faith of the debtor. In re Mark, 336 B.R. 260, 267 (Bankr. D.Md.
11 2006). In this circuit, those factors are set forth in In re Warren, 89 B.R. 87, 93 (BAP 9th Cir. 1988),
12 as follows:

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

25 A number of courts, recognizing that certain factors, such as the type of debt and the debtor's conduct
26 in the second case, are less significant under the more limited superdischarge under the BAPCPA, have
27 modified the test for good faith to include additional factors:

- 28 1. the timing of the petition;

- 1 2. how the debt(s) arose;
- 2 3. the debtor's motive in filing the 2nd petition;
- 3 4. how the debtor's actions affected creditors;
- 4 5. why the debtor's prior case was dismissed;
- 5 6. the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to fund a plan; and
- 6 7. whether the trustee or creditors object to the motion to continue the stay.

7

8 See In re Baldassaro, 338 B.R. 178, 188 (Bankr. D.N.H. Feb. 24, 2006); In re Ball, 336 B.R. 268, 274

9 (Bankr. M.D.N.C. 2006); In re Havner, 336 B.R. 98, 103 (Bankr. M.D.N.C. 2006); In re Galanis, 334

10 B.R. 685, 693 (Bankr. D. Utah 2005); In re Montoya, 333 B.R. 449, 457-58 (Bankr. D. Utah 2005).

11 These factors are neither weighted nor exhaustive. Montoya, 333 B.R. at 458. Where no presumption

12 of bad faith arises, and no party objects, a request to extend the stay should be liberally granted. In re

13 Warneck, 336 B.R. 181, 182 (Bankr. S.D.N.Y. 2006).

14 Here, the presumption of the lack of good faith arises because the previous case was dismissed

15 for failure to perform under the terms of a confirmed plan. However, the debtors have met their burden

16 of showing that this case was filed in good faith. The circumstances supporting this finding are as

17 follows:

| <u>Warren Factors</u> | |
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| 1. The amount of the proposed payments and the amounts of the debtor's surplus; | The debtors are contributing all of their disposable income in the amount of \$155 to the plan and are complying with the payment requirements set forth in § 1325(b). |
| 2. The debtor's employment history, ability to earn, and likelihood of future increases in income; | Although the debtor wife is currently seeking employment, the debtor husband has been employed as an audio technician for the same employer for sixteen years, and he expects to receive pay increases as his tenure increases. |
| 3. The probable or expected duration of the plan; | The plan is a 60-month plan. |

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|----|--|---|
| 1 | 4. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of unsecured debt, and whether any inaccuracies are an attempt to mislead the court; | There have been no assertions that the schedules are inaccurate. The proposed plan provides that unsecured creditors will receive no distribution under the plan. This factor weighs against the debtors' favor. |
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| 4 | 5. The extent of preferential treatment between classes of creditors; | There is no preferential treatment between classes of creditors. |
| 5 | | |
| 6 | 6. The extent to which secured claims are modified; | Secured claims are not modified under the plan. |
| 7 | | |
| 8 | 7. The type of debt sought to be discharged, and whether any such debt is non-dischargeable in Chapter 7; | There are no debts that would be non-dischargeable in a chapter 7. |
| 9 | | |
| 10 | 8. The existence of special circumstances such as inordinate medical expenses; | The debtors defaulted under the plan payments in their prior case because they incurred unanticipated medical expenses, the debtor wife became unemployed as a result of the same medical condition, and the debtors incurred additional expenses associated with the illnesses of the debtor wife's parents. As a result of the parents' illness, the debtor became their caregiver and was unable to work for a period of time. |
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| 16 | 9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act; | There was only one prior case pending. |
| 17 | | |
| 18 | 10. The motivation and sincerity of the debtor in seeking Chapter 13 relief; | The debtors have expressed a sincere intention to successfully complete their chapter 13 plan. They submit that the case was filed in good faith. |
| 19 | | |
| 20 | 11. The burden which the plan's administration would place upon the trustee. | This case would not impose any undue administrative burden on the Trustee's office. |
| 21 | | |
| 22 | <u>Baldassaro Factors</u> | |
| 23 | 1. The timing of the petition; | The debtors commenced this case within seven weeks of the dismissal of their prior case. |
| 24 | 2. How the debt(s) arose; | The debts in this case are substantially the same as those in the prior case. |
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| 26 | 3. Debtor's motive in filing the 2 nd petition; | The debtors filed this case to protect their vehicle. |
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| 4. How the debtor's actions affected creditors; | Creditors in this case would be affected by a continuation of the stay. This factors weighs against the debtors' favor. |
| 5. Why the debtor's prior case was dismissed; | <i>[Already addressed in #5 above.]</i> |
| 6. The likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to fund a plan; | <i>[Already addressed in # 1 and 2 above.]</i> |
| 7. Whether the trustee or creditors object to the motion to continue the stay. | Finally, there are no objections to the debtors' motion. |

CONCLUSION

For the reasons set forth above, the debtor's motion to continue the automatic stay is granted.

Good cause appearing, IT IS SO ORDERED.

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Case No. 06-52183

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