



The following constitutes
the order of the court. Signed August 25, 2006

Marilyn Morgan
Marilyn Morgan
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:
MINERVA RAMIREZ,
Debtor.

Case No. 06-51278-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 debtor's motion for continuation of the automatic stay pursuant to § 362(c)(3). For the reasons set forth, the motion is granted.

FACTUAL BACKGROUND

The debtor had one prior case dismissed within the year. The timeline of relevant facts is as follows.

- Nov 2004 Ramirez' two older children went to live with their father while the debtor recovered from surgery.
- 01/14/05 Prior case filed. Her reply to Capital One's objection states that 3 of her 5 children were living with her.
- 04/06/05 Plan in prior case confirmed.

1 May 2005 Ramirez asserts in this motion that she became disabled and unable to work. While she
2 did receive state disability payments, her income was substantially reduced. She also
3 required surgery for her disability, which was not covered by insurance. During that
4 time, she sent her two older children to live with their father. However, when she
5 learned that the two teenagers were being abused, she had them return to her home,
6 which caused her expenses to increase.

7 Feb 2006 Two oldest children return to live with her. At that time, her ex-husband did not resume
8 support payments although the children had returned to live with her. Her living
9 expenses increased by approximately \$800 per month.

10 04/20/06 Prior case dismissed.

11 07/10/06 Ramirez refiled to protect her vehicle, which is necessary for transportation to work and
12 to medical and dental appointments for herself and her children. She asserts that her
13 circumstances have changed in that she is again employed since her disability has been
14 treated, she expects child support payments to resume shortly through court order, and
15 her boyfriend will contribute more to household expenses. She has reopened her child
16 support case.

17 Capital One, the secured creditor on the debtor's vehicle, a 2001 Honda Civic, disputes that there
18 has been a substantial change in circumstance since the dismissal of the prior case. It questions her
19 ability to make the plan payments because she is dependent on the boyfriend's contribution, and her
20 expenses have increased by \$800 since the prior filing. Its secured claim as of the commencement of
21 this case is \$11,628.61.

22 The debtor responds that her increase in expenses is directly attributable to the increase in living
23 expenses from having two teenage children in the household. Their expenses are higher than that of the
24 younger children. The debtor asserts that her circumstances have changed be she has regained her
25 health and employment. She has also received a raise in her position as a legal secretary for the
26 Monterey County Department of Child Support Services. She also receives a contribution of \$550 from
27 her boyfriend, who is the father of the two youngest children.

28 Capital One responds that the debtor's reply is not consistent with her motion since the debtor's
two oldest children did not reside with her at the time she filed the first petition. Capital One believes
the \$800 increase in expenses is significant enough to hinder plan performance. Notwithstanding the
debtor's assertions, Capital One contends that the boyfriend's contribution to household expenses is
speculative.

LEGAL DISCUSSION

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

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

* * *

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

(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;

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

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial 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

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

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed. . . .

Under this section, the automatic stay terminates on the thirtieth day after the filing of a second case

1 when an individual has been a debtor in a prior bankruptcy case pending within the preceding one-year
2 period. However, the debtor may seek a continuation of the stay beyond the original thirty day period
3 if:

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

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

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

- 11 1) the debtor had more than one case pending in the preceding year;
- 12 2) the first case was dismissed because the debtor failed to:
 - 13 a. file or amend the petition or other documents without substantial excuse;
 - 14 b. provide court-ordered adequate protection, or
 - 15 c. perform the terms of a confirmed plan.
- 16 3) or there is no substantial change in the debtor's affairs and no other reason to believe the case
17 will result in a fully performed chapter 13 plan.

18 Id. The presumption of the absence of good faith can only be rebutted by clear and convincing
19 evidence. § 362(c)(3)(C).

20 To determine whether the debtor has established the requisite good faith under § 362(c)(3),
21 courts have looked to the totality of the circumstances. In re Ball, 336 B.R. 268, 274 (Bankr. M.D.N.C.
22 2006); In re Galanis, 334 B.R. 685, 693 (Bankr. D. Utah 2005). Courts look specifically at the same
23 factors for determining good faith in confirmation of a chapter 13 plan, as well as to the objective futility
24 of the case and the subjective bad faith of the debtor. In re Mark, 336 B.R. 260, 267 (Bankr. D.Md.
25 2006). In this circuit, those factors are set forth in In re Warren, 89 B.R. 87, 93 (BAP 9th Cir. 1988),
26 as follows:

- 27 1. The amount of the proposed payments and the amounts of the debtor's surplus;
- 28 2. The debtor's employment history, ability to earn, and likelihood of future increases in income;

- 1 3. The probable or expected duration of the plan;
- 2 4. The accuracy of the plan's statements of the debts, expenses and percentage of repayment of
3 unsecured debt, and whether any inaccuracies are an attempt to mislead the court;
- 4 5. The extent of preferential treatment between classes of creditors;
- 5 6. The extent to which secured claims are modified;
- 6 7. The type of debt sought to be discharged, and whether any such debt is nondischargeable in
Chapter 7;
- 7 8. The existence of special circumstances such as inordinate medical expenses;
- 8 9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- 9 10. The motivation and sincerity of the debtor in seeking Chapter 13 relief; and
- 10 11. The burden which the plan's administration would place upon the trustee.

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

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

22 See In re Baldassaro, 228 B.R. 178, 188 (Bankr. D.N.H. Feb. 24, 2006); In re Ball, 336 B.R. 268, 274
23 (Bankr. M.D.N.C. 2006); In re Havner, 336 B.R. 98, 103 (Bankr. M.D.N.C. 2006); In re Galanis, 334
24 B.R. 685, 693 (Bankr. D. Utah 2005); In re Montoya, 333 B.R. 449, 457-58 (Bankr. D. Utah 2005).
25 These factors are neither weighted nor exhaustive. Montoya, 333 B.R. at 458.

26 The debtor has met her burden of showing that this case was filed in good faith. The factors that
27 I find persuasive are as follows:

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Warren Factors	
1. The amount of the proposed payments and the amounts of the debtor's surplus;	The debtor is 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;	The debtor has been employed by the Monterey County Department of Child Support Services for 3 years. In that time, she has received raises totaling about \$1,200 per month. Her employment is stable, and she expects further increases as her tenure increases.
3. The probable or expected duration of the plan;	The plan is a 60 month plan that cures the arrearage on secured debt but does not provide a distribution to unsecured creditors.
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;	The confusion in the debtor's declarations has led to some question as to the accuracy of the schedules. The court is persuaded that the apparent inconsistency is unintentional since Schedule I doesn't necessarily indicate whether dependents reside with the debtor. Moreover, her memory failure doesn't have an economic bearing on her current circumstances.
5. The extent of preferential treatment between classes of creditors;	There is no preferential treatment between creditors.
6. The extent to which secured claims are modified;	Secured claims are not modified under the plan.
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.
8. The existence of special circumstances such as inordinate medical expenses;	The debtor's income was affected by her temporary disability and by her ex-spouse's failure to resume making support payments after their children returned to reside with her. She has since returned to work, received a raise, and receives a contribution to household expenses from her boyfriend.
9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;	There was only one prior case pending.
10. The motivation and sincerity of the debtor in seeking Chapter 13 relief;	The debtor has expressed a sincere intention to successfully complete her chapter 13 plan. She submits that the case was filed in good faith.
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.

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Baldassaro Factors	
1. The timing of the petition;	The debtor commenced this case within 3 months from the dismissal of her prior case, demonstrating a desire to cure the arrearage on her secured debt.
2. How the debt(s) arose;	The debts in this case are substantially the same as those in the prior case. The new debts relate to her disability and associated surgery.
3. Debtor's motive in filing the 2 nd petition;	The debtor filed this case to protect her vehicle, which is necessary for her transportation to work and to medical and dental appointments for herself and her 5 minor children.
4. How the debtor's actions affected creditors;	Creditors would be affected by a continuation of the stay.
5. Why the debtor's prior case was dismissed;	The prior case was dismissed when the debtor failed to make payments under a confirmed plan. That failure was the direct result of a loss in income caused by a disability and inability to work. That circumstance coincided with increased living expenses and a former spouse's failure to pay support.
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 factor #2 above.]</i>
7. Whether the trustee or creditors object to the motion to continue the stay.	Capital One objects to the debtor's request for a continuation of the automatic stay.

In addition to these good faith factors, courts look to the objective futility of the case and the subjective bad faith of the debtor. In re Mark, 336 B.R. 260, 267 (Bankr. D.Md. 2006). As to the objective futility of the case, the debtor's monthly income has increased by \$1,200 since the filing of the prior case. It appears unlikely to the court that the debtor's boyfriend would fail to make his contribution to the household given that he is the father of the two youngest children. The debtor has also commenced proceedings to enforce child support payments by the father of the two oldest children. Given that the debtor's budget allows a surplus, any additional support payments would provide a

1 Case No. 06-51278

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SERVICE LIST

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