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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re  
MELVIN L. CARR, No. 04-10874  
Debtor(s).

Memorandum re Plan Confirmation

On March 20, 2003, a state court jury returned a judgment against Chapter 13 debtor Melvin Carr in a civil case which included claims for intentional infliction of emotional distress, nuisance, trespass and invasion of privacy. The jury found malice, fraud or oppression on the part of Carr and assessed actual damages of \$90,000.00 and punitive damages of \$10,000.00 against him and in favor of plaintiffs Russell Clanton and Vickie Hawkins-Clanton.

On April 4, 2003, Carr gave notes secured by deeds of trust to his real property to his attorney and his fiancé. The deeds of trust were recorded on April 7, 2003. A year and a day later, on April 8, 2004, Carr filed his Chapter 13 petition. He proposes to pay the Clantons about 40 cents on the dollar. They object.

Carr argues that the deeds of trust are not avoidable, so his plan meets the requirements of § 1325(a)(4) of the Bankruptcy Code that creditors receive as much as they would get in a Chapter 7. Carr completely misses the point; the issue in this case is not whether the deeds of trust are avoidable, but whether his plan has been proposed in good faith as required by § 1325(a)(3).

1 Whether a plan is proposed in good faith is determined on a case-by-case basis. However, the  
2 burden of establishing good faith is on the debtor. This burden is particularly heavy when a  
3 "superdischarge" is sought--i.e., the discharge of debts that would not be dischargeable in a chapter 7  
4 case. *In re Padilla*, 213 B.R. 349, 352 (9th Cir.BAP 1997). The bankruptcy court must consider the  
5 totality of circumstances, including prepetition conduct, in deciding whether the debtor has acted  
6 equitably, before it can make a finding of good faith. *In re Tucker*, 989 F.2d 328, 330 (9th Cir. 1993);  
7 *In re Goeb*, 675 F.2d 1386, 1390 (9th Cir.1982).

8 Regardless of whether the two deeds of trust are avoidable, Carr has not acted equitably. It is  
9 clear that he gave the two deeds of trust in order to protect his fiancé and his attorney at the expense of  
10 the Clantons. The court accordingly finds that the plan was not proposed in good faith. Confirmation  
11 will therefore be denied. Counsel for the Clantons shall submit an appropriate form of order.

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13 Dated: December 2, 2004

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16 Alan Jaroslovsky  
17 U.S. Bankruptcy Judge  
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