No. 14-1346

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In re Robert A. Wolf,
Debtor.

THOMAS P. GORMAN
Trustee-Appellant

— v. —

ROBERT A. WOLF,
Debtor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA – NO. 13-1409

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF DEBTOR-APPELLEE AND SEEKING AFFIRMANCE OF THE DISTRICT COURT'S DECISION

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July 7, 2014

CERTIFICATE OF INTEREST AND CORPORATE DISCLOSURE STATEMENT

Gorman v. Wolf – No. 14-1346

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure *Amicus Curiae* the National Association of Consumer Bankruptcy Attorneys makes the following disclosure:

1) For non-governmental corporate parties please list all parent corporations.
NONE.

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3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests. **NONE.**

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.
NOT APPLICABLE.

/s/ Tara Twomey
Tara Twomey, Esq.

Dated: July 7, 2014

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of more than 3,000 consumer bankruptcy attorneys nationwide. NACBA's corporate purposes include education of the bankruptcy bar and the community at large on the uses and misuses of the consumer bankruptcy process. Additionally, NACBA advocates nationally on issues that cannot adequately be addressed by individual member attorneys. It is the only national association of attorneys organized for the specific purpose of protecting the rights of consumer bankruptcy debtors. NACBA has routinely filed *amicus curiae* briefs in various courts seeking to protect the rights of consumer bankruptcy debtors. *See*, *e.g.*, *Kawaauhau v. Geiger*, 523 U.S. 57 (1998); *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013); *Gentry v. Siegel*, 668 F.3d 83 (4th Cir. 2012).

NACBA and its membership have a vital interest in the outcome of this case. NACBA members primarily represent individuals, many of whom file long term repayment plans under Chapter 13 and depend upon a consistently reliable vehicle to maintain the gainful employment necessary to make the plan payments. Thus, any issue regarding a debtor's ability to ensure such reliable transportation is in place before the start of the plan is of great significance to all such debtors.

CERTIFICATION OF AUTHORSHIP

Pursuant to FRAP 29(c)(5), the undersigned counsel of record certifies that this brief was not authored by a party's counsel, nor did party or party's counsel contribute money intended to fund this brief and no person other than NACBA contributed money to fund this brief.

SUMMARY OF ARGUMENT

It is well settled that no single factor is dispositive on the issue of whether a Chapter 13 petition was filed in "good faith," including the debtor's purchase of a new vehicle shortly before filing the petition. Rather, the good faith determination is based upon the totality of the circumstances, and it is subject to a limited form of review, as the pertinent findings of the bankruptcy court are entitled to deference. Yet, accepting the trustee's analysis in support of upsetting the bankruptcy court's good faith determination would essentially require elevating above everything else the significance of a new vehicle purchase shortly before filing bankruptcy – effectively imposing a rule of *per se* abuse in virtually all such cases – and it would also require turning a blind eye to the "clearly erroneous" standard of review.

A straightforward application of the totality of the circumstances test under the proper standard of review demonstrates that the bankruptcy court's good faith determination must be upheld as eminently reasonable under these circumstances. Indeed, the debtor's decision to trade in an already seven year old, out of warranty

Ford Mustang for a more economical, reliable, and practical Ford Focus that included service and maintenance, all for a reasonable and affordable cost, directly enhanced his prospects of satisfying all the payments to creditors under the plan. Such actions should be encouraged, not punished with a rule of *per se* abuse.

ARGUMENT

I. A PROPER ANALYSIS OF THE ISSUE COMPELS THE CONCLUSION THAT THE BANKRUPTCY COURT'S DETERMINATION OF GOOD FAITH MUST BE UPHELD

A. The Basic Legal Principles

On appeal from a district court's decision, this Court applies the same standard of review the district court applied to the bankruptcy court's decision – that is, it "'review[s] findings of fact for clear error and conclusions of law de novo.'" *In re Kielisch*, 258 F.3d 315, 319 (4th Cir. 2001) (quoting *In re Deutchman*, 192 F.3d 457, 459 (4th Cir.1999). "'In cases where the issues present mixed questions of law and fact, the court applies the clearly erroneous standard to the factual portion of the inquiry and de novo review to the legal conclusions derived from those facts.'" *In re Accelerated Recovery Sys., Inc.*, 431 B.R. 138, 141 (Bankr. W.D. Va. 2010) (quoting *Gilbane Bldg. Co. v. Fed. Reserve Bank*, 80 F.3d 895, 905 (4th Cir.1996). A finding of the bankruptcy court is "clearly erroneous" when "'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *U.S. v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012) (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948)).

The bankruptcy court's findings regarding whether the debtor filed the petition in "good faith" are reviewed under this standard for clear error. *In re Harenberg*, 491 B.R. 706, 719 (Bankr. D. Md. 2013) (citing *Behrmann v. Nat'l Heritage Found.,* 663 F.3d 704, 709 (4th Cir. 2011)). This includes the pertinent facts underlying the determination of good faith, such as the debtor's intent. *In re Catron*, 164 B.R. 912, 915 (Bankr. E.D. Va. 1994) aff'd, 43 F.3d 1465 (4th Cir. 1994); *Sunset Enters., Inc. v. B & B Coal Co., Inc.*, 38 B.R. 712, 716 (Bankr. W.D. Va. 1984)). It also includes the ultimate determination of the issue. *In re Montgomery*, 518 F.2d 1174, 1175 (4th Cir. 1975) ("The existence or absence of good faith in the transaction is a factual question to be determined by the Bankruptcy Judge and is reversible only if clearly erroneous."); *In re Hurdle*, 11 B.R. 304, 306 (Bankr. E.D. Va. 1981) (same); *Shaw v. U.S. Bankruptcy Administrator*, 310 B.R. 538, 542 (Bankr. M.D. N.C. 2004) (applying this standard to a good faith determination in a Chapter 7 case); *In re Barrett*, 964 F.2d 588, 591 (6th Cir. 1992) (the good faith determination is a factual question reviewed for clear error); *In re LeMaire*, 898 F.2d 1346, 1350 (8th Cir. 1990) (same); *In re Gier*, 986 F.2d 1326, 1328 (10th Cir. 1993) (same); *Behrmann,* 663 F.3d at 709 (the good faith determination on a motion to dismiss a Chapter 11 petition is a factual finding reviewed for clear error); *In re Coleman*, 426 F.3d 719, 728 (4th Cir. 2005) (same).

As for the meaning of "good faith" in this context, "there is no precise or comprehensive definition for the concept." *In re Daniel*, 260 B.R. 763, 766, n.1 (Bankr. E.D. Va. 2001). "Rather, 'good faith' is 'an amorphous notion, largely defined by

factual inquiry.' [Citation.] The inquiry must be performed on a case-by-case basis, it must be fact sensitive, and should focus on whether debtor's plan abuses the provisions, purpose, and spirit of chapter 13." *Daniel* at 766, n. 1 (citing *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir.1982); *see also Neufeld v. Freeman*, 794 F.2d 149, 152 (4th Cir.1986); *In re Solomon*, 67 F.3d 1128, 1134 (4th Cir. 1995). Certain factors are relevant to this determination, including:

> 'the debtor's financial situation, the period of time over which creditors will be paid, the debtor's employment history and prospects, the nature and amount of unsecured claims, the debtor's past bankruptcy filings, the debtor's honesty in representing the facts of the case, the nature of the debtor's pre-petition conduct that gave rise to the debts, whether the debts would be dischargeable in a Chapter 7 proceeding, and any other unusual or exceptional problems the debtor faces.'

In re Martellini, 482 B.R. 537, 541-42 (Bankr. D. S.C. 2012) (quoting *Solomon* at 1134). "These factors are not exhaustive and are not intended to be a 'check-list,' as a 'court's discretion in making the good faith determination is necessarily a broad one' and should be based on an examination of the totality of the circumstances on a case by case basis." *Martellini,* 482 B.R. at 542 (quoting *Deans* at 972); *In re Namie*, 395 B.R. 594, 596 (Bankr. D. S.C. 2008) ("no single factor is dispositive on the issue of good faith and the Court will not simply count the factors weighing for or against Debtor to determine good faith or lack thereof.").

"'At bottom, the determination is an equitable one.'" *In re McNeely*, 366 B.R. 542, 548 (Bankr. N.D. W.V. 2007) (quoting *Neufeld v. Freeman*, 794 F.2d at 152). The ultimate inquiry is "'whether or not under the circumstances of the case there has

been an abuse of the provisions, purpose, or spirit of [the Chapter] in the proposal or plan.'" *In re Bateman*, 515 F.3d 272, 283 (4th Cir. 2008) (quoting *Deans v. O'Donnell*, 692 F.2d at 972). "The central and more pertinent inquiry . . . is whether the debtor came to bankruptcy court seeking a fresh start under Chapter 13 protection with an intent that is consistent with the spirit and purpose of that law—rehabilitation through debt repayment—or with an intent contrary to its purposes—debt avoidance through manipulation of the Code." *In re McGovern*, 297 B.R. 650, 660 (Bankr. S.D. Fla. 2003). So the focus is upon ensuring honesty and fairness consistent with the general expectation that, in exchange for the rehabilitative opportunities, the debtor will "forego unwarranted luxuries and a lavish lifestyle," *McNeely,* 366 B.R. at 548-49, and "the spoils of imprudent purchases," *In re Wick*, 421 B.R. 206, 216 (Bankr. D. Md. 2010); *see also Daniel*, 260 B.R. at 767 ("honesty and full disclosure are the hallmarks of a good faith showing on the part of debtor"); *In re Forest Ridge, II, Ltd. P'ship*, 116 B.R. 937, 943 (Bankr. W.D. N.C. 1990) ("The purpose of the good faith requirement is to prevent abuse of the bankruptcy process by Debtors whose overriding motive is to delay creditors without benefiting them in any way or to achieve reprehensible purposes.").

B. The Trustee's Analysis in Support of Reversal is Inherently Flawed, As It Calls for the Imposition of a *Per Se* Abuse Rule, Fails to Apply the Proper Standard of Review, and Misconstrues the Record

The trustee acknowledges that "not . . . all vehicle purchases on the eve of bankruptcy are abusive" since the determination of good faith requires an examination of "the totality of the circumstances on a case by case basis." *Appellant's Opening Brief* [*AOB*] at 2, 10, 20. However, the trustee struggles to craft a clear and consistent theory under this controlling framework and is ultimately only able to support his contention of bad faith through an analysis that would essentially compel a finding of abuse in virtually every Chapter 13 case involving a debtor's purchase of a new vehicle shortly before filing bankruptcy.

The trustee proposes various formulations for a rule concerning the significance of a Chapter 13 debtor's purchase of a vehicle shortly before filing bankruptcy upon the determination of whether the debtor has acted in good faith. The various formulations focus upon whether the debtor made the purchase with knowledge that it would reduce the payout to creditors, the extent to which the new vehicle was really "necessary," whether the debtor acted with a specific intent to avoid debts, or whether the purchase was "motivated by" the bankruptcy; still others focus solely upon the debtor's mere act of having made the purchase on "eve of

bankruptcy" regardless of any knowledge or intent regarding its potential impact on the payout to creditors. *AOB* at 1, 8-9, 11-12, 15-19, 23, 30-31.[1]

All of these various rule formulations share a crucial common fallacy: they place too much individual significance upon this single factor in determining good faith; they would in effect compel a finding of *per se* abuse in virtually any case where the debtor simply purchases any new vehicle shortly before bankruptcy, even though the debtor testifies the vehicle was a reasonable expense necessary for successful completion of the plan, the evidence reasonably supports this conclusion, and there is no indication of dishonesty, fraud, misrepresentation, or any intent to thwart the provisions, purpose, and spirit of Chapter 13. In fact, even though that is precisely the

[1] At the District Court level, the trustee posited the key issue as "[w]hether a debtor's incurrence of secured debt and/or non-dischargeable debt in anticipation of and on the eve of a Chapter 13 bankruptcy may be abusive, or not in good faith." *AOB* (U.S.D.C) at 1. He changed the statement of the issues in his opening brief before this Court to add a knowledge and necessity component, positing the ultimately inquiry as "[w]hether the bankruptcy court erred in finding the Debtor's Chapter 13 was proposed in good faith when the Debtor knowingly lowered his disposable income available to repay creditors by purchasing a brand new vehicle on the eve of bankruptcy that he did not need." *AOB* at 1. The trustee then shifts back and forth among the various formulations focused upon the purchase itself, the knowledge of its effect, "necessity," and the debtor's intent. *See e.g.*, *id.* at 13 ("an improvident eve-of-bankruptcy vehicle purchased at the expense of creditors cannot have been proposed in good faith"); *id.* at 19 (Debtor knew "that incurring a monthly secured payment obligation would lower the monthly disposable income he would have available to repay his credit card and consumer debts"); *id.* at 15 (the "unnecessary purchase of a brand new vehicle in anticipation of an impending Chapter 13 filing and under the guise of prudent financial planning, is not a valid purpose for incurring additional debt on the eve of bankruptcy . . ."); *id.* at 23 ("the circumstances and facts surrounding Debtor's Chapter 13 case and proposed Plan are indicative of Debtor's intent to avoid his debts . . .").

situation we have here, the trustee claims there necessarily could be no conclusion other than that the debtor acted in bad faith simply on account of his vehicle purchase on the eve of filing bankruptcy. *Appellant's Reply Brief* (U.S.D.C.) at 1 (the trustee queries: "If the circumstances surrounding Debtor's eve-of-bankruptcy purchase vehicle do not represent [an] abusive incurrence of additional debt in contemplation of bankruptcy and a lack of good faith, then what does?"); *AOB* at 30-31 (arguing that the confirmation of the debtor's plan under these circumstances would endorse an "abusive practice").

It is clear that neither this nor any other single factor is dispositive: "The purchase of a vehicle and the immediate filing of a bankruptcy petition can be evidence of a bad faith filing. However, all the circumstances of a debtor's case must be weighed, and a single factor does not necessarily tilt the totality of the circumstances analysis toward a conclusion of bad faith." *In re Johnson*, 438 B.R. 854, 858 (Bankr. D. S.C. 2010) (finding good faith under the totality of the circumstances so as to reject a creditor's challenge to a Chapter 13 plan on the basis that the debtor had purchased two vehicles shortly before filing bankruptcy).

Moreover, in the context of this myopic focus upon the single factor of the prepetition vehicle purchase, the trustee fails to accord appropriate deference to the bankruptcy court's findings on the issue that is apparently the focal point of his concern about the purchase – the "necessity" of the vehicle. In an effort to undermine the factual bases of the court's findings here, the trustee repeatedly argues

there is insufficient evidence that the debtor *actually needed* a new vehicle at the time he traded in the then "mechanically sound" 2005 Ford Mustang for the 2013 Focus and the debtor simply *feared* the Mustang would break down or have to be replaced. *AOB* at 9, 10, 11, 12, 13, 15, 18-19, 24, 28-29, 30-31. Of course, the ultimate *truth* of these facts is not what matters. One cannot *prove* with certainty that the Mustang would have *in fact* broken down or needed to be replaced during the plan and, if so, whether the debtor would have *in fact* been incapable of qualifying for affordable interest rates, as the trustee's analysis would require.

What matters is that the debtor testified he believed this would be the case, and it was within the province of the bankruptcy court to make the determination as to the veracity and credibility of the debtor's explanations for the vehicle purchase. "Unless the Bankruptcy Judge has made a clear mistake applying the law to the facts, the factual findings of intent must be affirmed." *Sunset Enterprises, Inc. v. B & B Coal Co., Inc.*, 38 B.R. at 716. And so long as "the bankruptcy court's factual findings *are plausible* in light of the record viewed in its entirety, a reviewing court may not reverse even if it would have weighed the evidence differently." *In re Frushour,* 433 F.3d 393, 406 (4th Cir. 2005) (italics added).

The bankruptcy court's findings were surely "plausible" on this record. The Mustang was already seven years old, it was no longer covered under any warranty, and would have had to withstand five more years of wear and tear during the pendency of the Chapter 13 plan as the debtor's sole mode of transportation to and

from work. So it was plausible – indeed *most likely* – that the Mustang would have required substantial, potentially unaffordable repairs to maintain, forcing the debtor to buy a new car. The trustee in fact conceded as much at the hearing before the bankruptcy court. *Hr'g Tr.* at 30. As for the concern about future interest rates, that some debtors in other cases may have obtained "competitive and even favorable" interest rates in making vehicle purchases in the middle of a plan certainly does not mean the debtor here would both (a) be approved to make such a purchase and (b) ultimately obtain an affordable interest at the time of the purchase, as the trustee assumes would be the case. *AOB* at 28-29. Given the indisputably long term detrimental impact of filing bankruptcy upon one's credit rating, the court reasonably accepted as credible the debtor's testimony that he believed he would be unable to later qualify for an affordable rate, and it reasonably concluded there was a sufficient factual basis in support of a finding that the debtor faced such a risk. *Hr'g Tr.* at 83. This risk was clearly at least "plausible" in light of the record as a whole, and thus the court's finding here are entitled to deference and cannot be disturbed. *In re Frushour*, 433 F.3d at 406.[2]

[2] The trustee makes much of his argument in this context that the bankruptcy court "improperly took judicial notice" of the debtor's "unfounded assertions" about the risk of future exorbitant interest rates and the court's own "experience with Chapter 13 debtor refinancing" in finding such a risk substantiated. *AOB* at 28-29. At the outset, the trustee technically forfeited this claim in the District Court by raising it for the first time in his reply brief, when it is settled in this Circuit that a party is generally deemed to have abandoned any claim not raised in the opening brief. *Yousefi v. U.S. I.N.S.*, 260 F.3d 318, 326 (4th Cir. 2001); *Edwards v. City of Goldsboro*, 178 F.3d 231,

The other fundamental problem with the trustee's analysis is he simply misconstrues the record in arguing that the bankruptcy court failed to balance all the relevant factors based upon a misinterpretation of the Supreme Court's opinion in *Milavetz, Gallop & Milavetz, P.A. v. U.S.*, 559 U.S. 229, 239 (2010). This is just not the case. The trustee's claim rests principally on the notion that the court "disregarded" the fact that the debtor did not actually "need" the Ford Focus. *AOB* at 10, 11, 12, 24. The trustee's assertion really just reflects his disagreement with the court's ultimate finding on this point, because it is obvious from the record of the debtor's testimony and the court's discussion of this testimony that it specifically considered (and reasonably determined) whether the vehicle purchase was a reasonable and necessary expense incurred as a device of prudent planning.

The court did not simply conduct a "shallow analysis" or fail to "properly scrutinize" the factors in favor of its own "per se" rule, mistakenly gleaned from the *Milavetz* decision, that such prepetition purchases are necessarily non-abusive. The court specifically cited as the controlling law the factors that the Fourth Circuit has promulgated for making the good faith determination (*Order Overruling Trustee's Objection to Debtor's Plan* [*Order*] at 3) and it went on to specifically "[a]ddress the foregoing factors" as they applied in this case (*id.* at 3, 6-7). Its analysis was not bottomed on some sort of misinterpretation of the *Milavetz* decision concerning the

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241 (4th Cir. 1999). In any event, again, the trustee's entire line of argument concerning the true "necessity" of the prepetition vehicle purchase fails to accord proper deference to the findings of the bankruptcy court.

advice an attorney may give a debtor about incurring debt prepetition. The court simply discussed that opinion as additional support for its finding that, based on the totality of the circumstances, the petition was filed in good faith because it was not for the classically abusive purpose of loading up on unsecured debts that the debtor sought to have discharged. *Order* at 5-7. Indeed, in its final summation of the issue, *after* its discussion of *Milavetz*, the court stated: "In the end, a determination of good faith or bad faith is unique to each case and depends on the totality of the circumstances" – making clear that its decision was based upon a balancing of all relevant factors under the controlling law. *Id.* at 6.

C. A Proper Analysis of the Issue Demonstrates that the Bankruptcy Court's Good Faith Determination Must be Upheld

Considering the bankruptcy court's determination of good faith based upon all the relevant factors under the appropriate standard of review, its determination must be upheld as an eminently reasonable application of the law to the facts.

First, as the bankruptcy court itself aptly noted, the debtor had no previous bankruptcy filings, did not seek to discharge any otherwise non-dischargeable debts, and was not "dishonest in his representation of the facts" – a determination reserved for the bankruptcy court. *In re Official Comm. Of Unsecured Creditors for Dornier Aviation (N. Am.), Inc.*, 453 F.3d 225, 235 (4th Cir. 2006). Second, regarding the percentage of repayment, "'[a] *small* payout to general unsecured creditors may provide evidence of a Chapter 13 debtor's 'unfair manipulation' of the Bankruptcy Code.'" *In re Hurt*, 369

B.R. 274, 280 (Bankr. W.D. Va. 2007) (quoting *Deans v. O'Donnell*, 692 F.2d at 972). But here, the debtor proposed to repay 40 percent of the unsecured debts, which cannot be characterized as a "small" or insubstantial payout. *See Hurt* at 280 (finding a 33 percent dividend to creditors was not "so low" as to be indicative of bad faith); *Wick*, 421 B.R. at 209-217 (noting the debtor's proposed 15 percent payout to unsecured creditors was "not minimal" in finding the debtor acted in good faith). Third, as for the factor concerning his employment history and prospects, the record indicates the debtor had a stable full time job to which he commuted every day and which he intended to maintain throughout the plan with the assistance the more reliable, less expensive mode of transportation that the Ford Focus provided. *Hr'g Tr.* at 81-82.

Fourth, regarding the primary factor with which the trustee takes such exception here – "the nature of the debtor's prepetition conduct," *In re Solomon*, 67 F.3d at 1134 – specifically, the prepetition purchase of the Ford Focus, again, the record provides ample reasonable support for the bankruptcy court's findings that the purchase was a reasonable and necessary expense incurred on account of the inevitable reality that the much older out-of-warranty Mustang would need future, potentially substantial repairs to maintain. This would have forced the debtor to either pursue approval for the purchase of another vehicle with no guarantee that he would obtain an affordable loan, or attempt to absorb high repair and maintenance costs for the Mustang outside his normal budget. Either way, this inevitable risk jeopardized

the plan's success – consistently reliable and affordable transportation for work is vital to the debtor's ability to make the plan payments.

The trustee misses the point in complaining that the debtor did not need a "*brand new*" car with service and maintenance included. *AOB* at 12. As the debtor explained at the hearing, the Focus was "not in the least" a luxury car. *Hr'g Tr.* at 80. And as he has explained in his briefing, his total vehicle and transportation expenses, *including* the payment for the Focus, are *less* than the amount he is allocated for such expenses. *Appellee's Brief* (U.S.D.C.) at 8. As it stands, the debtor has very little left over each month for vehicle maintenance expenses – only about $20 – certainly less than what he believed it would cost to maintain the Mustang. *Hr'g Tr.* at 82-83. Hence the clear benefit of buying a practical and affordable new car with a service and maintenance package included: the majority of any such expenses would be covered so the debtor could easily manage them. So while the trustee asserts that the creditors received "no corresponding benefit," *AOB* at 12, the predictability and affordability in vehicle maintenance that this purchase afforded the debtor clearly inured directly to the benefit of the creditors insofar as it substantially increased the likelihood of the plan's long term success.

And no hallmarks of abuse or misuse can be gleaned from the evidence regarding the debtor's prepetition communications with his counsel. Initially, the trustee overstates his case in asserting the debtor acknowledged that, based on these communications, he made the purchase "*knowing*" it "*would*" "reduce" or "avoid"

repayment or "prejudice" his creditors. *AOB* at 8, 15, 18-19. The debtor simply testified he understood that his "monthly payment plan *could potentially be* lower if [he] had that [car] payment." *Hr'g Tr.* at 88, italics added. More importantly, the debtor denied having bought the car "on advice" of his bankruptcy attorney, saying: "I bought it after I had discussed bankruptcy with my attorney, but he never gave me the go-ahead or advice to buy a new car." *Id.* at 87. The bankruptcy court also specifically found "[t]here is no suggestion in this case that Debtor's counsel violated Section 526(a)(4) by advising the Debtor to go out and 'load up' on debt." *Order* at 5, n. 2. Indeed, in light of all the factors in this case, it is apparent that any communications between the debtor and his counsel regarding the purchase were geared toward the legitimate purpose of "enhanc[ing] financial prospects" and ultimately "improv[ing] [the debtor's] ability to repay," as opposed to fostering abusive objectives based on "false pretenses" or aimed at "making debts for purchases of luxury goods or services presumptively nondischargeable." *Milavetz*, 559 U.S. at 244.

For these reasons, this case is not at all like the bad faith cases of *In re McGovern*, 297 B.R. 650 (Bankr. S.D. Fla. 2003) or *In re Williams*, 475 B.R. 489 (Bankr. E.D. Va. 2012) on which the trustee so heavily relies. In those cases, the debtors not only acquired *luxury* vehicles on the eve of filing; the circumstances surrounding their filings revealed a clear intent to obtain an unfair benefit through manipulation of the process. *McGovern* at 652-622 (the debtor filed his petition the day before he was to be deposed in a creditor's action to execute upon a substantial judgment against him,

failed to disclose all of his income, and proposed to repay only 11 percent of the unsecured claims); *Williams* at 475 B.R. at 489-491, 494 (debtors initially proposed repaying less than 10 percent of the unsecured claims, proposed in their third plan to pay only about 28 percent, and failed to properly allocate all of their disposable income). These are the sort of additional common elements that tie together the bad faith cases: fraud, dishonesty, failure to disclose material facts, and proposals to retain unnecessary and unreasonable luxuries while paying only paltry portion of the debts. *See e.g.*, *Daniel*, 260 B.R. at 766-69; *In re Herndon*, 218 B.R. 821, 823-25 (Bankr. E.D. Va. 1998); *Martellini*, 482 B.R. at 539-45; *In re McNeely*, 366 B.R. at 542-43, 549; *Namie*, 395 B.R. at 595-98; *In re Amos*, 452 B.R. 886, 894-95 (Bankr. D. N.J. 2011).

Those elements are all absent from this case. The debtor acquired a practical, non-luxury vehicle coupled with a service and maintenance package at a reasonable expense, which ensured he would have a consistently reliable and affordable form of transportation with better gas mileage and lower insurance costs throughout the life of his plan. Such transportation was vital to his ability to maintain consistent gainful employment and thus vital to the satisfaction of all the plan payments. "Prudent" planning like this for successful completion of a Chapter 13 case should be lauded – not punished or discouraged through applying some sort of rigid or *per se* rule to such purchases that elevates the bar well above what is required under the totality of the circumstances test, as the trustee would have it. And in the end, nothing is "clearly erroneous" about the bankruptcy court's determination of good faith under the

totality of the circumstances; that determination was eminently reasonable on this record. Therefore, under the settled law of this circuit, the determination of good faith must be upheld.[3]

CONCLUSION

For these reasons, NACBA respectfully requests that this Court affirm the District Court's order upholding the bankruptcy court's confirmation of the plan.

Respectfully Submitted,

/s/ Tara Twomey
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[3] In the District Court, the trustee raised challenges to confirmation of the plan on the basis that the debtor's bankruptcy schedules reflected he had the actual ability to pay more than what he had devoted to the plan and that certain claimed expenses were not reasonable and necessary. *AOB* (U.S.D.C.) at 1, 4, 6, 17, 20, 24-29. The trustee neither raises nor argues any of these points before this Court, evidently based upon the recognition that this Court's recent opinion in *Mort Ranta v. Gorman*, 721 F.3d 241 (4th Cir. 2013) precludes any such challenges to the plan. *Id.* at 252 (quoting *Baud v. Carroll*, 634 F.3d 327, 345 (6th Cir. 2011) ("The bankruptcy court may not 'disregard the Code's definition of disposable income ... simply because there is a disparity between the amount calculated using that definition and the debtor's actual available income as set forth on Schedule I.'").

CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains 4,971 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In preparing this certification, I relied on the word-processing system used to prepare the foregoing Brief.

The foregoing Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word in 14-point Garamond font.

Dated: July 7, 2014.

/s/ Tara Twomey
Tara Twomey

CERTIFICATE OF SERVICE

Tara Twomey, attorney for amicus curiae, certifies that on this 7th day of July, 2014, she caused the foregoing Brief to be electronically filed. Copies of same have been served upon the following this same date by the CM/ECF system:

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