No. 11-1831

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

In re WAYNE ERIC PUFFER,
Debtor

L. JED BERLINER,
Appellant
- v.-
DENISE M. PAPPALARDO,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS, NO. 10-cv-30225

BRIEF OF THE AMICUS CURIAE NATIONAL ASSOCIATION OF CONSUMER BANKRUPTCY ATTORNEYS IN SUPPORT OF APPELLANT AND SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION.

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November 28, 2011

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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:

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/s/David G. Baker
David Baker
Attorney for the National Association of Consumer Bankruptcy Attorneys

Dated: November 28, 2011

CERTIFICATION UNDER FED. R. APP. 29(c)(5)

I certify as follows

(a) That no party's counsel authored the foregoing Amicus Curiae Brief in whole or in part;

(b) That no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and

(c) That no person, other than the amici curiae, its members, or its counsel, contributed money that was intended to fund preparing or submitting the brief.

Dated: November 28, 2011

/s/ David G. Baker
David Baker

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STATEMENT OF INTEREST

Incorporated in 1992, the National Association of Consumer Bankruptcy Attorneys ("NACBA") is a non-profit organization of approximately 4,800 consumer bankruptcy attorneys nationwide. Member attorneys and their law firms represent debtors in an estimated 300,000 bankruptcy cases filed each year. First Circuit NACBA members file many thousands of bankruptcy cases per year.

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 filed amicus curiae briefs in various appellate courts seeking to protect the rights of consumer bankruptcy debtors. See, e.g., Marrama v. Citizens Bank of Massachusetts, 127 S.Ct. 1105 (2007); United Student Aid Funds, Inc. v. Espinosa, 130 S.Ct. 1367, 176 L.Ed.2d 158 (2010); In re Weinstein, 164 F.3d 677 (1st Cir. 1999).

NACBA understands that the issue presented, generally, is the propriety of chapter 13 plans that pay the debtor's attorney's fee with little or no distribution to general unsecured creditors. NACBA members represent many individual low- and moderate-income wage earners. Sometimes these individuals are unable to afford to pay an attorney's fee in full prior to filing a chapter 7 case but are not eligible for free or low-cost legal services. NACBA members are concerned that affirmance of the district court decision, which was based on a per se rule against "fee only" chapter 13 plans, would have the effect of either denying access to the bankruptcy court for individuals who need bankruptcy relief, denying debtors' attorneys their just compensation, or both.

SUMMARY OF ARGUMENT

The test of whether a chapter 13 plan is proposed in good faith, as well as whether a chapter 13 petition is filed in good faith, is whether, under the totality of the circumstances, the debtor is attempting, for a legitimate purpose, to use the Bankruptcy Code to obtain a "fresh start." This is a fact-specific, case-by-case inquiry involving multiple factors, including the debtor's honesty and motivation.

The phenomenon of fee-only chapter 13 filings has arisen because of the extreme difficulty many debtors face in paying a chapter 7 attorney's fees prior to filing. When a debtor is eligible for chapter 7, has an immediate need for bankruptcy (e.g., due to impending wage garnishment or car repossession) and is unable to raise the funds to pay an attorney, a debtor should have the option of using chapter 13 to obtain a fresh start and pay his attorney fee debt. Nothing in the Bankruptcy Code or the policies underlying the Code precludes the use of such plans or justifies adopting a bright line rule that all such filings are in bad faith.

ARGUMENT

I. A "fee-only" chapter 13 plan is proposed in good faith if, under the totality of circumstances in the case, the Debtor proposed the plan for an honest purpose.

Under chapter 13 of the Bankruptcy Code, a chapter 13 debtor's petition must be filed in good faith, and a chapter 13 debtor's *plan* must be proposed in good faith. 11 U.S.C. §§ 1325(a)(3), (a)(7). Section 1325(a)(3) provides that a Chapter 13 plan shall be confirmed if "the plan has been proposed in good faith and not by any means forbidden by law." Section 1325(a)(7) directs that the court also find that "the action of the debtor in filing the petition was in good faith." The district court below mentioned the tests of good faith set forth in Keach v. Boyajian (In re Keach), 243 B.R. 851, 856 (B.A.P. 1st Cir. 2000) (limited to the question of honesty of purpose) and Sullivan v. Solimini (In re Sullivan), 326 B.R. 204 (B.A.P. 1st Cir. 2004) (totality of the circumstances) but did not apply those tests. The district court instead skipped over the good faith analysis, "adopting a bright-line rule that attorney fee-only cases, including this one, fail to satisfy the statutory good faith requirement." That bright-line rule is inconsistent with the plain language and underlying purpose of the Bankruptcy Code.

In Sullivan, the court observed that the same test applies to good faith under section 1325(a)(3) and section 1325(a)(7):

> Both inquiries advance one of the primary purposes of bankruptcy, which is to relieve the honest but unfortunate debtor from the weight of oppressive indebtedness, allowing the debtor to start afresh. Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

326 B.R. at 211-12. The Sullivan court further observed that "good faith" is an ambiguous, undefined concept requiring a fact-intensive determination on a case-by-case basis. Id. at 212. In the course of making such an inquiry, it is not appropriate to short-

circuit the case-by-case inquiry for a "bright-line" rule that all "fee-only" cases are not in good faith.

Where a debtor does nothing to mislead the court and honestly proposes a chapter 13 plan, he is entitled to relief under chapter 13 of the Bankruptcy Code to make a fresh start unless a careful fact-intensive inquiry shows that the plan is imposed for an improper purpose. By adopting the bright line, per se rule, the district court reached the unwarranted conclusion that no fee-only plan can ever serve a proper purpose.

In In re Lavilla, 425 B.R. 572, 580 (Bankr. E.D. Cal. 2010), the bankruptcy court, applying a totality of the circumstances test to determine whether a fee-only plan was in good faith, stated:

> In the recent case In re Molina, 420 B.R. 825 (Bankr.D.N.M. 2009), the court confirmed a chapter 13 plan under a similar set of circumstances. There, the trustee argued, citing In re Paley and In re Sanchez, No. 13-09-10955, 2009 WL 2913224 (Bankr. D. N.M. May 19, 2009), that the debtor's plan failed the "good faith" test as a matter of law solely because she was ineligible for a chapter 7

> discharge and was paying nothing through the chapter 13 except a portion of her administrative expenses. The trustee suggested, as does the Trustee here, that "good faith" under those circumstances should be a legal test, not a factual one. The Molina court declined the trustee's invitation to define a "per se bad faith" rule for chapter 13 debtors who could not get a chapter 7 discharge. The Molina court noted that "good faith" is not a legal test; it cannot be defined to exclude certain debtors based on their eligibility, or lack thereof, for a chapter 7 discharge. "Good faith" is a factual determination that must be made on a case-by-case basis. "However exactly good faith is defined, it would seem to be measured at least in part by the attitude and actions of the debtor." Id. at 830-31.

The district court below improperly adopted a bright line, per se rule that all fee-only Chapter 13 cases are filed in bad faith.

II. The bankruptcy court and district court erroneously applied a bright line per se rule that any "fee only" chapter 13 plan fails to satisfy the statutory good faith requirement.

The district court below relied heavily on In re Paley, 390 B.R. 53, 59 (Bankr. N.D. N.Y. 2008) for the bright line rule it adopted. However, the Paley court made it very clear that its holding was strictly limited to the facts of that case, facts which are clearly distinguishable from this case. Id. at 65. The debtors in Paley did not propose 36-month plans. The length of the plans (9 months and 12 months, respectively) was tied solely to the payment of attorney fees. The court in De Rua, No. 09-17529-B-13, DC No. MHM-1 (Bankr. E.D. Cal. Oct. 14, 2009) (unpublished, copy annexed in addendum) stated:

> The court in Paley did not proclaim that a plan which pays only attorney's fee is per se unconfirmable; the court was concerned about the debtors' attempt to tie the length of the plan to the payment of attorney's fees without any regard for the debtors' "ability to pay" something to their other creditors. "A plan whose duration is tied only to payment of attorney's fees simply is an abuse of the provisions, purpose, and spirit of the Bankruptcy Code." Id. at 59. Indeed, the Paley court was careful to limit the scope of its ruling to the facts before it, "[t]he court need not decide what would hypothetically satisfy good faith under §1325(a)(3), only that these plans do not."

Id. at 60.

In De Rua, the Debtor's plan proposed to pay all of her monthly net income ($40 a month) for 36 months. The proposed plan would pay the balance due on her attorney fee bill and the trustee's fees. Unsecured creditors would receive nothing. The court found the plan and petition to be in good faith.

The district court herein based its per se rule on language from cases finding fee-only plans not in good faith. Those cases, however, involved other factors which militate against a per se rule. The bankruptcy court in Buck conceded that "the plans in some of these cases also failed to meet good faith requirements on other grounds." 432 B.R. at 22; see In re Sanchez, 2009 WL 2913224 (Bankr. D. N.M. May 19, 2009) (serial filers); In re Lehnert, 2009 WL H63401 (Bankr. E.D. Mich. Jan. 14, 2009) (debtors did not devote all their disposable income to the plan); In re Dicey, 312 B.R. 456 (Bankr. D. N.H. 2004); In re Arlen, 2011 WL 66473, 2011 Bankr. LEXIS 1638 (Bankr. W.D. Mo. May 5, 2011).

Arlen involved two cases which proposed 16 and 19-month plans, respectively. Like Paley, they failed to devote all of the debtors' disposable income for the applicable commitment periods.

In In re Beck, 2007 Bankr. LEXIS 517 (Bankr. D. Kan. 2007), the court determined the reasonableness of attorney fees in ten chapter 13 cases, five of which were fee-only cases. The court observed that the necessity for these fee only cases arose as a ramification of Lamie v. United States Trustee, 540 U.S. 526, 124 S.Ct.1023, 157 L.Ed.2d 1024 (2004). In Lamie, the court construed the 1994 amendment of 11 U.S.C. § 330(a)(1) to mean that chapter 7 debtors' attorneys could not be awarded fees under section 330. Accordingly, chapter 7 debtors' attorneys were thereafter compelled to require full payment of their fee before filing. The court in Buck, 432 B.R. 13, n.15 (Bankr. D. Mass. 2010) also recognized this quandary:

> [T]his Court does not make light of the concern voiced by Attorney Berliner — despite his motives in so arguing — that some debtors are simply not able to afford the attorneys fees associated with filing a Chapter 7 case, and that the holding of the United States Supreme Court in Lamie v. U.S. Tr., 540 U.S. 526 (2004), without a Congressional "fix," has exacerbated the problem.

The post-Lamie problem for debtors became even worse after the adoption of the BAPCPA reforms as attorney fees rose due to the additional work required. As the recession has lingered, increasing numbers of would-be filers are unable to file because they cannot come up with the attorney's fee to file chapter 7.

In other circumstances, immediate filing of a bankruptcy petition may be necessary to prevent wage garnishment, car repossession, or other action against the debtor or the debtor's property. Debtors in these cases will rarely, if ever, have the ability to save up for the attorney's fees necessary to file chapter 7 without suffering adverse consequences. Though these facts are not before this Court, the district court's per se ruling would preclude debtors in these situations from obtaining much needed bankruptcy relief.

The district court acknowledged these problems, but questioned the benefit to debtors of fee-only plans. The court suggested that other alternatives are available to these debtors:

> In his final argument, Appellant suggests that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") backed him into a corner. BAPCPA, he says, "closed America's courthouse doors to a large number of prospective Chapter 7 debtors, locking them in an inescapable sweat box of financial despair while creditors hound them mercilessly." (Dkt. No. 10, App. Br. at 27.) Appellant explains that BAPCPA's new regulations "caused a 50% increase in legal fees [for Chapter 7 plans] on top of the doubling of costs . . . which left fee-paying Chapter 13 plans as the only means for many debtors to obtain desperately needed relief in a timely manner." (Id. at 28.) The bankruptcy court's logic in In re Buck casts doubt on these arguments, and the bankruptcy court suggested several possible ways to assist Debtors after BAPCPA. Appellant could have reduced his rate, referred his clients to a legal services organization, referred potential clients to a less experienced attorney whose fee was lower, or suggested that clients

> proceed with a Chapter 7 case pro se. In re Buck, 432 B.R. at 24.

Puffer, 453 B.R. 14, 21 (D. Mass 2011). The logic of the Buck court and the district court is essentially speculation about lack of benefit to the debtors and burdens on the trustee. In Beck, the court observed that many debtors will in fact often benefit from filing "fee-only" Chapter 13 plans:

> Furthermore, no evidence was presented at trial that there are sufficient attorneys available to file Chapter 7 cases pro bono, or for a reduced rate, for debtors whose financial problems could theoretically be as easily "handled" with a Chapter 7 filing. So even if a debtor opts to file a Chapter 13 – to provide a method to pay attorney fees – because he is unable to fund the up-front attorney fee required in many Chapter 7 cases, it cannot be presumed that the bankruptcy is somehow not for the debtor's benefit.

2007 Bankr. LEXIS 517, *22 (Bankr. D. Kan. 2007). Consideration of whether a particular plan is for the debtor's benefit could be a factor in a totality of the circumstances analysis, but the district court's bright line rule, in this case, that fee-only plans are always in bad faith, does away with that analysis. It is very clear that filing a fee-only can be to the debtor's benefit.

The district court criticized In re Elkins, No. 0-9-09254-8-JRL, 2010 Bankr. LEXIS 1085 (E.D. N.C. Apr. 13, 2010)[1] as the only case appellant could identify that upheld a fee-only plan and an "outlier." The district court also dismissed In re Molina, 420 B.R. 825 (Bankr. D. N.M. 2009), which approved a fee-only plan, as "unavailing" because the debtor in that case had no other options, being ineligible for Chapter 7. The district court apparently did not realize that the case it relied on, Paley, also involved debtors ineligible for Chapter 7, but the Paley court

[1] In addition to Elkins and the other cases cited in this brief which approve fee-only plans (In re De Rua, No. 09-17529 (Bankr. E.D. Cal. Oct. 14, 2009); In re Molina, 420 B.R. 825 (Bankr. D. N.M 2009); In re Beck, 2007 Bankr. LEXIS 517 (Bankr. D. Kan. 2007); In re Lavilla, 425 B.R. 572 (Bankr. E.D. Cal 2010)); and, In re Williams, No.07-00396-5-ATS (Bankr. E.D. N.C. Oct. 25, 2007), NACBA members have routinely had fee-only plans confirmed in other jurisdictions, albeit without opinions.

considered such ineligibility to be a mark of bad faith. Molina in fact carefully examined the issues in question and demonstrated why the analysis in Paley should have been rejected.

In In re Molina, 420 B.R. 825 (Bankr. D. N.M. 2009), the plan proposed to pay $50 a month for 36 months, with all the payments to go to the debtor's attorney and the trustee's commissions. The Debtor was, at the time of the filing, ineligible to file a Chapter 7 case. The court found that the plan was proposed in good faith, distinguishing Paley and Sanchez, also cases where the debtors were ineligible for Chapter 7 discharges. The court reasoned that a per se legal test that fee only plans are not in good faith does not comport with the totality of the circumstances test, which includes examination of the motivation and sincerity of the debtor.

The district court in this case criticized fee-only Chapter 13 plans as being disguised chapter 7 filings.

Certainly that can be an appropriate criticism in some cases. However, sometimes debtors who are not eligible for chapter 7 may in fact be asserting a plan in good faith. See Molina, 420 B.R. at 833; Lavilla, 425 B.R. at 579. Where the debtor is not trying to make an end-run around the provisions of the Code, the fact that the plan pays only attorney fees is just one factor to be considered in the totality of the circumstances.

The district court also suggested that fee-only filings should not be entertained because the chapter 13 trustee should not be burdened with the task of administering these cases:

> The problem with fee-only chapter 13 plans was well expressed by the bankruptcy judge in In re Buck. If fee-only plans were permitted, the trustee's sole purpose would be to assure that the attorney were paid. As the court wrote, "[t]o require [the trustee] to administer cases simply to make monthly payments to the Debtors' attorney and no other creditor defies both logic and the intent of Congress." Buck, 432 B.R. at 21.

In In re Williams, No. 07-00396-5-ATS (Bankr. E.D.

N.C. Oct. 25, 2007), the court rejected this administrative burden argument, stating:

> [T]he trustee argued that local debtors' attorneys are disguising chapter 7 cases as chapter 13 cases, with plans that primarily pay attorney's fees and provide little return to creditors. Because the trustee does not vary his commission depending on the plan filed, the trustee argues that this practice has an onerous administrative impact on his office. Counsel for the debtor contends that a plan is not filed in bad faith simply because it proposes to pay no more or no less than what is required under the Bankruptcy Code. The court agrees that the plan was not filed in bad faith. If the Code allows the case to be filed in a certain way, then the court cannot find that it is bad faith to do what the Code allows.

The present case involves a 36-month chapter 13 plan. The district court did not find that this plan failed to comply with any specific Code provision. Instead, the court misapplied precedent and used speculative policy considerations to reject out of hand all fee-only plans. It is not necessarily irrational, contrary to any provision of the Bankruptcy Code, or against a debtor's interests for him to pay his attorney fee debt out of future income pursuant to a Chapter 13 payment plan. When a debtor openly and honestly attempts to overcome difficult circumstances by doing so, he should be permitted to make this choice. The district court and the bankruptcy court below improperly short-circuited the totality of circumstances good faith analysis by adopting a bright-line, per se rule that such plans are always in bad faith.

This administrative burden rationale finds no support in the Bankruptcy Code or in any of the cases outside of Buck and this case. The chapter 13 trustee is charged with administering cases no matter how low the monthly payments or how many creditors there are. Her commission is fixed by law. See, e.g., In re Bernard, 201 BR 600 (Bankr. D. Mass. 1996). The trustee's purported "administrative burden" is a wholly improper basis for refusing to confirm a plan or dismissing a case.

CONCLUSION

For all the foregoing reasons, amicus respectfully requests that this Court reverse the decision of the district court.

Respectfully submitted,
National Association of Consumer Bankruptcy Attorneys
By its attorney.

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ADDENDUM

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POSTED ON WEBSITE

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re	)	Case No. 09-17529-B-13
	)	
Evangelina Hernandez De Rua,	)	DC No. MHM-1
	)	
Debtor.	)	
	)	

MEMORANDUM DECISION REGARDING TRUSTEE'S OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of res judicata and claim preclusion.

Michael H. Meyer, Esq., appeared in his capacity as the chapter 13 trustee (the "Trustee").

No appearance was made on behalf of the debtor, Evangelina Hernandez De Rua (the "Debtor").

Before the court is an objection by the Trustee to confirmation of the Debtor's chapter 13 plan pursuant to 11 U.S.C. §§ 1325(a)(3) and 1325(a)(7) (the "Objection"). The Trustee contends that neither the chapter 13 plan nor the chapter 13 petition were filed in good faith. For the reasons stated below, the Trustee's Objection will be overruled. The chapter 13 plan will be confirmed.

This memorandum decision contains the court's findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a), made applicable to this contested matter by Federal Rule of Bankruptcy Procedure 7052. The court has jurisdiction over this matter under 28 U.S.C. § 1334, 11 U.S.C.

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§ 1325[1] and General Orders 182 and 330 of the U.S. District Court for the Eastern District of California. This is a core proceeding as defined in 28 U.S.C. §§ 157(b)(2)(A) & (L).

Background and Findings of Fact.

This bankruptcy was filed under chapter 13 on August 6, 2009. The Debtor had previously filed a chapter 7 petition in February 2004, and received a discharge in that case in June 2004. She is not eligible for another discharge in chapter 7 until February 2012. However, she is eligible for a discharge in chapter 13.[2]

The Debtor is a below-median-income debtor within the meaning of § 1325(b)(3) so her "disposable income" is determined from schedules I and J. It appears from the schedules that the Debtor is a single parent committed to raising a 19-year-old disabled child. Her only source of income is a payment she receives from the State of California for "care giver" services in the amount of $872.62 per month. She also receives an SSI payment for her son in the amount of $870. Her total household income, after various deductions, is stated on schedule I to be $1,698.62. Her household expenses are stated on schedule J to be $1,658.48 leaving a monthly net income of $40.14.

The Debtor's schedules show that she has real property, her residence, valued at $98,637 subject to a mortgage of $69,536. The monthly mortgage payment is $874.45. She has personal property worth $950 and all of her assets are fully

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[1]Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated *after* October 17, 2005, the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

[2]11 U.S.C. § 727(a)(8) provides that a debtor cannot receive a discharge in chapter 7 if the debtor has already received a chapter 7 discharge in a case filed within the prior eight years. 11 U.S.C. § 1328(f)(1) provides that a debtor cannot receive a discharge in chapter 13 if the debtor has received a discharge in a case filed under chapter 7 within the prior four years. This case was filed more than five years after the prior chapter 7.

exempt. Her debts include the mortgage, which is apparently current because the chapter 13 plan does not propose to pay any arrearage through the plan. Her scheduled unsecured debts total $8,728, including a debt to Ford Motor Credit Company for a repossessed automobile. The Debtor has no scheduled priority debts. Three unsecured claims have been filed to date totaling $11,201.03 (including the claim of Ford Motor Credit Company).

The Debtor's attorney is Layne Hayden, Esq. Prior to the bankruptcy, she paid Mr. Hayden $2,226, plus the chapter 13 filing fee. The Debtor still owes Mr. Hayden $1,274, which she proposes to pay through the plan using all of her monthly net income, $40 per month (less trustee's fees) over a period of 36 months.[3] The proposed chapter 13 plan will pay nothing to the unsecured creditors.

Issues Presented.

The Trustee contends that both the bankruptcy case and the chapter 13 plan were filed in "bad faith" because the Debtor cannot receive a chapter 7 discharge and she is not paying anything to her creditors through this chapter 13. He contends that this chapter 13 case is just a disguised chapter 7 which should be a *per se* abuse of the Bankruptcy Code.

Analysis and Conclusions of Law.

Pursuant to §1325(a)(3), the Debtor cannot confirm a chapter 13 plan which is not filed in good faith. In addition, the Debtor cannot confirm a plan unless the petition itself is filed in good faith. §1325(a)(7). A case can be dismissed if the petition was not filed in good faith. § 1307(c). The Debtor has the burden of proof on each element of confirmation by a preponderance of the evidence. *U.S. v. Arnold and Baker Farms (In re Arnold and Baker Farms)*, 177 B.R. 648, 654 (9th Cir. BAP 1994). "Good faith" is essentially an element of a debtor's qualification to be in chapter 13 in the first place. *See Marrama v. Citizens Bank of Massachusetts (In re*

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[3]In the Eastern District of California, in a non-business case, the chapter 13 debtor's attorney may charge a "no look" fee of up to $3,500 without getting separate court approval.

Marrama), 549 U.S. 365, 373 (2007). The Bankruptcy Code does not define "good faith." The court should consider the totality of the circumstances when making the "good faith" determination. The court can determine that a debtor is not acting in "good faith" without having to find that the debtor is acting in "bad faith" (dishonesty of belief or purpose). *Guastella v. Hampton (In re Guastella)*, 341 B.R. 908, 920 (9th Cir. BAP 2006) (bankruptcy schedules which estimated the judgment creditors' claim at $0.00 were not prepared in good faith when they bear no relationship to reality).

The mere fact that a debtor has filed successive bankruptcy petitions does not constitute a lack of good faith, but circumstances may indicate a lack of good faith in proposing a subsequent chapter 13 plan to the extent they reflect the debtor's intent to misuse the relief afforded by the Bankruptcy Code. The good faith requirements under § 1325(a)(3) (good faith plan) and § 1325(a)(7) (good faith bankruptcy petition) are closely related. As the court explained, in *In re March*, 83 B.R. 270, 275 (Bankr. E.D. Pa. 1988):

> [S]everal of the factors traditionally addressed by courts making the good faith inquiry pursuant to section 1325(a)(3) are no longer relevant. I conclude that the scope of good faith inquiry must be limited to those factors which address (1) whether the debtor has deliberately misinformed the court of facts material to confirmation of the plan; (2) whether the debtor intends to effectuate the plan as proposed and (3) whether the proposed plan is for a purpose not permitted under the Bankruptcy Code. *See Education Assistance Corp. v. Zellner*, 827 F.2d 1222, 1226 (8th Cir. 1987); *Barnes v. Whelan*, 689 F.2d 193 (D.C. Cir. 1982).
>
> Additionally, I recognize that there is a requirement that a bankruptcy be filed in good faith which is separate and apart from the requirement that a chapter 13 plan be proposed in good faith. *Matter of Madison Hotel Associates,* 749 F.2d 410 (7th Cir. 1984). *See also e.g., In re Kinney,* 51 B.R. 840 (Bankr. C.D. Cal. 1985) (tenth bankruptcy in just over two years was filed solely to prevent foreclosure by virtue of the automatic stay and was not filed in good faith). In the case at bench, Savin's objections appear to be addressed, at least in part, at the debtor's good faith in filing rather than at good faith in proposing the plan. Frequently, in the chapter 13 context there will be an overlap between the two good-faith inquiries because the debtor's plan must be filed within a very short time after the case is commenced. Bankr. Rule 3015.

Id. (footnote omitted).

This court has previously ruled in an unpublished opinion involving similar facts that a chapter 13 plan, which paid only the attorney with nothing to the unsecured creditors for about two years, was not filed in good faith (*In re Gonzalez*, 2008 WL 5068837, court docket number 08-15277).[4] The key distinction between this case and the *Gonzalez* case was the fact that Mr. Gonzalez was not eligible for either a chapter 7 or a chapter 13 discharge. This court found that Mr. Gonzalez' second chapter 13 petition was simply a delaying tactic. The analysis was summarized as follows:

> It does not appear from the schedules, or the Plan, that there is any reorganization in progress here. Indeed, the relief which the Debtor needs, a discharge of his unsecured debts, is unavailable to the Debtor at this time through any chapter of the Bankruptcy Code because he received a chapter 7 discharge in a case filed less than four years before this case. §§ 727(a)(8) and 1328(f)(1). Therein lies the reason why this bankruptcy case appears to be an abuse of the bankruptcy system. The Plan will stay any enforcement action by the creditors whose claims cannot be discharged in this case, yet will pay nothing to those creditors for up to two years (all Plan payments during that time will go to the Trustee and Debtor's counsel). Before the Debtor has to make any payments to unsecured creditors in this case, he will be in a position to dismiss this case and re-file a new chapter 13 which proposes to pay nothing to the unsecured creditors for another two years and sets the Debtor up for a discharge after the third year. The Debtor here is trying to effectuate an "end run" around the express restrictions of § 1328(f)(1).

The Trustee cites the case of *In re Paley*, 390 B.R. 53 (Bankr. N.D.N.Y.

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[4]In *Gonzalez*, the debtor's plan provided for a payment of $125 per month, for a total of $7,500 being paid over the stated five year term of the plan. Approximately 10%, or $750, would have been retained by the trustee as an administrative expense. An additional $2,600 would be paid to the debtor's attorney at the rate of $113 per month for 23 months. That left approximately $4,100 for distribution to the unsecured creditors' claims which totaled over $21,000. If the debtor completed the plan, he would pay less than 20% of his unsecured debt and those payments would not have started until the 24th month of the plan. At the conclusion of the five years, the debtor would have still owed the balance of the unsecured debt.

2008) in support of his argument that a chapter 13 plan, which pays only the attorney's fees for a debtor who is then ineligible for a chapter 7 discharge, is not in "good faith." However, the facts in *Paley* are distinguishable in one critical regard. Neither of the plans in *Paley* proposed to run for the full 36 month "applicable commitment period" prescribed for "below-median-income" debtors in § 1325(b).[5]

The court noted in *Paley* that both debtors were seeking a chapter 13 discharge as soon as they had paid the balance due to their attorneys. The trustee did not object to the amount of the payments, she objected to the length of the plans, which was tied solely to the payment of attorney's fees. Had the debtors committed to make payments for the full 36 month "commitment period," the "unsecured creditors in both cases would have realized a meaningful return." *Id.* at 56. The court had little difficulty finding that the debtors, who had the ability but not the intent to fund a meaningful chapter 13 plan, were not acting in good faith. Their short-term plans were merely disguised chapter 7's.

The court in *Paley* did not proclaim that a plan which pays only attorney's fees is *per se* unconfirmable; the court was concerned about the debtors' attempt to tie the length of the plan to the payment of attorney's fees without any regard for the debtors' "ability to pay" something to their other creditors. "A plan whose duration is tied only to payment of attorney's fees simply is an abuse of the provisions, purpose, and spirit of the Bankruptcy Code." *Id.* at 59. Indeed, the *Paley* court was careful to limit the scope of its ruling to the facts before it, "[t]he court need not decide what would hypothetically satisfy good faith under § 1325(a)(3), only that these plans do not." *Id.* at 60.

Here, the Debtor is doing exactly what the Bankruptcy Code requires her to

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[5]The court in *Paley* wrote one decision to resolve two identical objections by the chapter 13 trustee in two virtually identical cases. Both involved below-median-income debtors living on fixed incomes. The plans proposed to only pay the debtors' disposable incomes for nine months and twelve months, respectively.

do so. Unlike the debtors in *Paley*, she has committed to pay her monthly disposable income to the chapter 13 trustee for an "applicable commitment period" of 36 months, which satisfies § 1325(b)(1)(B). The Ninth Circuit recognized long ago, for a debtor with very little disposable income, that "good faith" under § 1325(a)(3) does not require a substantial repayment to unsecured creditors. *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386 (9th Cir. 1982) (a chapter 13 plan which only pays 1% to unsecured creditors is confirmable if otherwise filed in good faith). "[T]he court must make its good-faith determination in the light of *all* militating factors." *Id.* at 1390 (emphasis in original).

The Debtor has no non-exempt assets so she does not have to pay anything to her unsecured creditors to satisfy the "chapter 7 best interest" test under § 1325(a)(4). Unlike the debtor in *Gonzalez*, this Debtor waited over four years after receiving her chapter 7 discharge and is therefore eligible to receive a chapter 13 discharge if she completes her plan. § 1328(f)(1). If her income or financial situation improve before completion of the Plan, then the Trustee or the holder of an allowed secured claim may seek modification of the plan under § 1329. *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868, 877 (9th Cir. 2008). None of the creditors have objected to confirmation of this Plan. If there is a reason why any of the unsecured debts should not be discharged, the creditors have the right to file an objection to the discharge of the their claims pursuant to § 1328(a). Unlike the circumstances presented in the *Gonzalez* and *Paley* cases, the court is persuaded that this Debtor is not trying to effectuate an "end run" around any provision of the Bankruptcy Code. The Plan does not overtly offend any established principle of bankruptcy law.

/ / /

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/ / /

Conclusion.

Based on the foregoing, the court is persuaded that this chapter 13 case and the chapter 13 plan were filed in good faith. Accordingly, the Trustee's objection to confirmation of the Plan pursuant to §§ 1325(a)(3) and 1325(a)(7) will be overruled. The Plan will be confirmed.

Dated: October 14, 2009

W. Richard Lee
United States Bankruptcy Judge

SO ORDERED.

SIGNED this 25 day of October, 2007.

A. Thomas Small
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

IN RE:	**CASE NO.**
ROGER LEE WILLIAMS	**07-00396-5-ATS**
DEBTOR	

ORDER DENYING OBJECTION TO CONFIRMATION

The matter before the court is the objection filed by eCast Settlement Corporation[1] ("eCast") to confirmation of the chapter 13 plan filed by Roger Lee Williams. The chapter 13 trustee, John F. Logan, filed a motion for confirmation but now contends that the plan was not filed in good faith and should not be confirmed.[2] A hearing took place in Raleigh, North Carolina on October 2, 2007.

Roger Lee Williams filed a petition for relief under chapter 13 of the Bankruptcy Code on February 28, 2007. eCast holds five unsecured claims against the debtor, representing various credit card account balances ranging from $833.11 to $34,180.49. The pertinent facts are undisputed. The debtor's annualized current monthly income is well above the North Carolina median family income.

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[1]eCast is the assignee of Bank of America/FIA Card Services, formerly MBNA, Bank of America, NA (USA), Direct Merchants Credit Card Bank (Metris), and GE Money Bank JC Penney Dual Card.

[2]In the Eastern District of North Carolina, it is the trustees' practice to file a motion for confirmation of the plan, and if there are no objections, the plan is usually confirmed.

The debtor's Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income ("Form 22C") shows a negative monthly disposable income of (-$26.65). In completing Form 22C, the debtor claimed the Internal Revenue Service ("IRS") Local Standard allowance for housing in the amount of $1,005. The debtor's current actual monthly residential mortgage payment is $541. The proposed plan calls for payments of $199 to the trustee for 36 months. According to eCast, after paying the administrative priority claims (consisting of attorneys fees and the trustee's commission), the plan will yield a return of approximately three percent to unsecured creditors.[3]

eCast contends that the plan fails to commit all of the debtor's disposable income to the payment of unsecured creditors as required by 11 U.S.C. § 1325(b)(1)(B). In calculating disposable income, eCast argues that the debtor improperly utilized the IRS Local Standard allowance for housing instead of his actual monthly housing expense. eCast contends that the proper deduction for housing is either the Local Standard allowance or the debtor's actual housing expenses, whichever is less. According to eCast, if the debtor had limited his housing deduction to the actual expense, his expenses would decrease by $464, resulting in a net projected disposable income of $437.35.

eCast further argues that the debtor should pay his disposable income into the plan for five years (rather than the three proposed), because the debtor's "applicable commitment period" under § 1325(b)(4) is five years. It is eCast's position that the debtor must stay in the plan for five years

[3]Despite eCast's calculation of a three percent return to unsecured creditors, the trustee's motion for confirmation provides that the debtor shall pay 36 monthly payments of $199, with the obligation to make payments terminating upon payment in full of allowed administrative priority claims. The motion further states, "[i]n this case, general unsecured creditors will receive: $-0-." It follows that the return to unsecured creditors will be zero percent, rather than three percent.

because the applicable commitment period is a temporal period set by statute. The debtor argues that the applicable commitment period is instead a multiplier used to determine the total required payout to unsecured creditors. The debtor contends that the term of the plan may therefore be shorter than the applicable commitment period if the unsecured creditors receive the total payout to which they are entitled in that shorter time.

Notwithstanding his motion for confirmation of the plan, the trustee argued at the hearing that the plan was not filed in good faith because of the minimal expected return to unsecured creditors and the administrative burden it would place on the trustee's office. For the reasons discussed below, the court will deny eCast's and the trustee's objections to confirmation, and the plan will be confirmed.

I. Issues

The creditor's objection raises multiple issues, many of which have arisen frequently since the passage of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). First, is monthly disposable income determined by the means test or is something more required? When applying the means test, may the debtor deduct the full IRS Local Standard allowance for housing or only actual housing expenses? And in the context of § 1325(b)(1)(B), is the "applicable commitment period" a multiplier used in a calculation, or is it a minimum time period that may affect the plan term? As courts have begun to address these issues in light of the BAPCPA revisions, a number of different views have developed.

eCast's objection to confirmation of the proposed plan triggered the application of § 1325(b)(1), which reads as follows:

> 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–
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (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.

11 U.S.C. § 1325(b)(1). Because the proposed plan distributions to eCast will not satisfy its claim, subparagraph (A) does not apply, and the requirements of subparagraph (B) must be met in order to confirm the debtor's plan. Subparagraph (B) contains the defined term "disposable income," as well as a new term, "applicable commitment period," which was added by BAPCPA. The BAPCPA revisions also tailored subparagraph (B) to focus specifically on payments to creditors holding unsecured claims.

II. Determining "Disposable Income"

"Disposable income" as it applies to § 1325 is defined as follows, in relevant part:

> For purposes of this subsection, "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child . . .) less amounts reasonably necessary to be expended–
>
> (A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation . . . ; and
>
> (ii) for charitable contributions . . . ; and
>
> (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2). Prior to BAPCPA, disposable income was determined by the debtor's Schedules I and J. Now, § 1325(b)(3) requires above-median debtors to use the means test to calculate disposable income.[4]

Many have expressed concern regarding this new method of determining disposable income, particularly questioning both the accuracy of the methodology and the implications of the results. In fact, during a hearing in which Judge J. Rich Leonard of this district heard several related cases involving the determination of disposable income, three of the four local chapter 13 trustees reported frustration with the new method. In re Alexander, 344 B.R. 742 (Bankr. E.D.N.C. 2006). Specifically, the issue was raised because "[a] debtor who may have had disposable income under the old law may now have little or no disposable income using the new calculation method." Id. at 746. The Alexander court examined the new statutory text and found that despite the trustees' expressed concerns about using the means test, "§ 1325(b)(2)-(3) plainly sets forth a new definition and method for calculating disposable income, and Form B22C is the tool for arriving at that disposable income figure under the new law." Id. at 747. Similarly, the court in In re Barr found that

> [t]here are new definitions of the income and expenses to be used for determining disposable income that are much different than under the former statute. These definitions are detailed and inflexible, particularly as to expenses and deductions for above-median-income debtors. . . . The use of "shall" in section 1325(b)(3) is mandatory and leaves no discretion with respect to the expenses and deductions that are to be deducted in arriving at disposable income.

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[4]Section 1325(b)(3) provides, "[a]mounts reasonably necessary to be expended under paragraph (2) shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than . . . the median family income of the applicable State . . . ." 11 U.S.C. § 1325(b)(3).

341 B.R. 181, 184-85 (Bankr. M.D.N.C. 2006). The court agrees with Alexander and Barr that the court is limited to use of the means test in determining the debtor's deductions and expenses for purposes of calculating disposable income.

III. Application of the Means Test: Proper Deduction for Housing Expenses

Relying on a recent case addressing Form 22C housing expense deductions, eCast contends that in applying the means test, the debtor should either deduct the Local Standard allowance or his actual mortgage expense, whichever is less.[5] However, in the IRS deductions section of Form 22C, the debtor entered the applicable IRS Local Standard allowance for housing ($1,005), less his actual monthly mortgage payment of $541 (as directed by the form), for a net mortgage expense of $464. In the section of the form entitled "Future payments on secured claims," the debtor entered his actual mortgage payment of $541. Thus, eCast argues that had the debtor deducted only his actual mortgage expense of $541, his overall expenses would decrease enough to have disposable income to commit to the payment of eCast's claim.

The debtor contends, relying on another line of cases, that § 707(b)(2)(A)(ii)(I) permits the deduction of the Local Standard allowance despite his lower actual mortgage expense. Section 707(b)(2)(A)(ii)(I) provides, in relevant part:

> The debtor's monthly expenses shall be the debtor's applicable monthly expense amounts specified under the National Standards and Local Standards . . . issued by the Internal Revenue Service for the area in which the debtor resides, as in effect on the date of the order for relief . . . .

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[5] The court in In re Rezentes, 368 B.R. 55 (Bankr. D. Haw. 2007), held that an above-median chapter 13 debtor may deduct the Local Standard for housing ownership or the actual amount spent, whichever is less. That court noted a line of cases holding (primarily in the context of vehicle ownership expenses) that debtors may not deduct Local Standard amounts for expenses that are not actually incurred.

11 U.S.C. § 707(b)(2)(A)(ii)(I). The cases interpreting this provision seem to turn on two factors: whether this section operates as a fixed allowance or a cap, and the meaning of the word "applicable." This court previously addressed these issues in the context of vehicle ownership expenses in In re Taylor, Case No. 06-01348-5-ATS (Bankr. E.D.N.C. Dec. 18, 2006). The court finds that the same reasoning applied in Taylor applies to the present case regarding housing ownership expense deductions. As stated in Taylor, regarding § 707(b)(2)(A)(ii)(I):

> This court is persuaded by and adopts the reasoning in In re Fowler, 349 B.R. 414 (Bankr. D. Del. 2006), and In re Prince, 2006 WL 3501281 (Bankr. M.D.N.C. Nov. 30, 2006), which hold that the section operates as a fixed allowance and that the term "applicable" means the standards applicable to the debtor, not the actual expenses that are applicable to the debtor. See Prince at *3 ("[t]o read section 707(b)(2)(A)(ii)(I) as permitting the courts to comb through the Internal Revenue Manual in order to pick and choose provisions to apply in a given case injects great uncertainty into the process of determining a debtor's expenses for purposes of the means test."); Fowler, 349 B.R. at 417-418 ("applicable" refers to the number of vehicles owned by the debtor, as opposed to "actual," which is used elsewhere in the section); see also Eugene R. Wedoff, Means Testing in the New § 707(b), 79 Am. Bankr. Inst. L.J. 231 (2005).

Taylor at 3. The court therefore holds that the debtor in this case is entitled to deduct the Local Standard allowance for housing ownership expenses in applying the means test to determine his disposable income.

IV. The Effect of the "Applicable Commitment Period"

eCast further objects to confirmation of the debtor's proposed plan because the plan will be completed in three years. eCast argues that the debtor's "applicable commitment period" under § 1325(b)(4) is five years, based on the debtor's above-median income status, and that the debtor must therefore remain in the plan for five years. On the other hand, the debtor argues that the applicable commitment period is a multiplier, used to determine the total amount that must be paid to unsecured creditors during the plan, regardless of the plan's duration.

Section 1325(b)(1)(B) requires the plan to direct all of the debtor's projected disposable income to be received in the applicable commitment period to the payment of unsecured creditors. "Applicable commitment period" is defined within § 1325 as follows:

> For purposes of this subsection, the 'applicable commitment period'–
> (A) subject to paragraph (B), shall be–
> (i) 3 years; or
> (ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than–
> (I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner . . . [.]

11 U.S.C. § 1325(b)(4). The court agrees with the debtor and many other courts and commentators that have addressed this provision: the applicable commitment period is a multiplier, not a minimum plan term. When an unsecured creditor objects to confirmation, the court may not approve the plan unless it meets the requirements of either subparagraph (A) or subparagraph (B) of § 1325(b)(1). Subparagraph (A) only applies if the objecting creditor's claim will be paid in full under the plan. To satisfy subparagraph (B), the debtor must multiply his annualized projected disposable income by the time period indicated by the applicable commitment period – either the number three or the number five, depending on whether the debtor's income falls below or above the state median income, respectively. Essentially, the applicable commitment period *is* a time period, but it does not set a minimum plan duration. The chapter 13 plan term is of course governed by a separate Code section, § 1322(d). The applicable commitment period may incidentally coincide with the plan term, but a debtor who is able to fulfill his obligations to unsecured creditors under the plan in a term that is shorter than the applicable commitment period is permitted to do so.

This issue recently came before the Bankruptcy Appellate Panel ("BAP") for the Eighth Circuit in In re Frederickson, in which the court held:

> the definition of "applicable commitment period" in § 1325(b)(4) as five years for an above-median debtor does not refer to a minimum plan duration. It refers, instead, to the time during which the debtor must pay projected disposable income to the Trustee for payment to unsecured creditors. Another statutory provision, § 1322(d), discusses the length of the plan related to above-median income debtors. Section 1322(d) would be superfluous if § 1325(b)(4) set the length of the plan.

In re Frederickson, ___ B.R. ___, 2007 WL 2752769, at *5, (8th Cir. BAP Sept. 24, 2007). The BAP cited a recent article in support of its position, in which Judge Randolph J. Haines discusses the present issue, as well as other current chapter 13 issues. Judge Haines views the applicable commitment period as a specified period of time, but not a minimum plan term. Referring to the applicable commitment period, Judge Haines states:

> To render "applicable commitment period" a minimum plan term requires something more than it being a temporal concept. The decisions that find it also to impose a minimum plan term generally fail to indicate why it carries any such additional meaning. Also, it is not an easy matter to divine this additional meaning, since the Code tells us precisely what it means - it means three years or five years, nothing more or less. This definition found in § 1325(b)(4) says nothing about a minimum plan duration. Also, here there is not even an additional word like "projected" that could suggest to courts the term "applicable commitment period" must mean something more than what it is defined to be: "3 years; or . . . not less than 5 years." When that number is multiplied by $/year, the result is a dollar amount, not a temporal concept at all.

Randolph J. Haines, Chapter 11 May Resolve Some Chapter 13 Issues, 8 Norton Bankr. L. Adviser 1, 3 (Aug. 2007) (quoting 11 U.S.C. § 1325(b)(4)).[6] Further, if a debtor wants to pay into the plan the total amount due to unsecured creditors in a time shorter than his applicable commitment period, it seems inefficient and unnecessarily costly to require the debtor to stay in the plan longer than necessary.

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[6]Judge Haines' article contains an analysis of chapter 11 provisions similar to the chapter 13 provisions in question, suggesting that chapter 11 may be useful in addressing certain chapter 13 shortfalls. However, for the purposes of the present case, this court does not find it necessary to draw such an analogy.

In the present case, the debtor has no disposable income. It follows that his projected disposable income is zero. As an above-median income debtor, his applicable commitment period would be five years. However, because the debtor has no disposable income, the amount that must be committed to pay unsecured creditors is zero (5 years x \$0 = \$0). The debtor's plan term is governed by § 1322(d)(1), which caps an above-median debtor's plan length at five years. The debtor's thirty-six month plan term is less than five years and is therefore permitted under the Code.

V. Good Faith

At the hearing, the trustee argued that local debtors' attorneys are disguising chapter 7 cases as chapter 13 cases, with plans that primarily pay attorney's fees and provide little return to creditors. Because the trustee does not vary his commission depending on the plan filed, the trustee argues that this practice has an onerous administrative impact on his office. Counsel for the debtor contends that a plan is not filed in bad faith simply because it proposes to pay no more or no less than what is required under the Bankruptcy Code. The court agrees that the plan was not filed in bad faith. If the Code allows the case to be filed in a certain way, then the court cannot find that it is bad faith to do what the Code allows. The trustee's objection is overruled.

Accordingly, the court holds that (1) disposable income is determined by applying the means test; (2) the debtor may deduct the IRS Local Standard allowing for housing ownership expenses; and (3) the applicable commitment period is a multiplier used to determine the amount owed to unsecured creditors under the plan. The creditor's objection to confirmation of the plan is **DENIED** and the debtor's plan is confirmed.

SO ORDERED.

END OF DOCUMENT

CERTIFICATION OF COMPLIANCE
WITH TYPE-VOLUME LIMITATION

I hereby certify that the foregoing Brief contains fewer than 5350 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 Courier New font, except for footnotes and electronic signatures.

Dated: December 14, 2011.

/s/ David G. Baker
David G. Baker

CERTIFICATE OF SERVICE

I hereby certify that I served the within Brief of Amicus Curiae the National Association of Consumer Bankruptcy Attorneys on counsel for all parties, electronically through the ECF System, on this 14th day of December, 2011.

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