





1           The Court has subject matter jurisdiction over this  
2 case and the contested matter. 28 U.S.C. § 1334. This case  
3 and all related proceedings have been referred to this Court  
4 for decision. 28 U.S.C. § 157(a) and the Standing Order of the  
5 United States District Court-Eastern District of Tennessee  
6 entered July 18, 1984.

7           This contested matter is a core proceeding because it  
8 involves matters concerning the administration of the estate  
9 and confirmation of a plan. 28 U.S.C. § 157(b)(2)(A) and (L).

10           Having considered the entire record in the case,  
11 including the evidence offered by counsel in the stipulations  
12 and the arguments and briefs of counsel, the Court now makes  
13 its Findings of Fact and Conclusions of Law orally on the  
14 record pursuant to Rule 7052 of the Federal Rules of Bankruptcy  
15 Procedure.

16           The Court finds that the Trustee's objection should be  
17 sustained. The facts to which the parties stipulated as  
18 amended on May 17, 2012 found at Docket Entry No. 41 are  
19 incorporated by reference herein; however, the Court will  
20 summarize the facts for the oral record.

21           The case commenced with the filing of a voluntary  
22 Chapter 13 petition on December 16, 2011. The plan was  
23 confirmed on February 13, 2012 and a *de novo* review of  
24 confirmation was set for hearing for review of whether the  
25 debtor had committed all of her disposable income for the

1 applicable commitment period and whether the plan was filed in  
2 good faith. The issues were raised by the Chapter 13 Trustee  
3 in his objection to the confirmation of the plan. The plan is  
4 36 months in length with weekly payments of \$225, plus income  
5 tax refunds available for creditors.

6           Based on these payments and the claims which have been  
7 filed in the case the dividend to unsecured creditors, as the  
8 plan is currently proposed, is projected to be 26.7 percent.  
9 The claims bar date has passed. Certain modifications have  
10 been made to the original plan to produce this result.  
11 However, the debtor who made voluntary contributions to her  
12 401(k) plan prepetition is still proposing to make voluntary  
13 contributions of \$81.14 a month to the retirement plan. The  
14 Trustee contends that these sums should be included in her plan  
15 payments. If included, the dividend to unsecured creditors  
16 would increase to 35.3 percent.

17           According to the debtor's Schedules I and J, the  
18 debtor's average monthly income is \$2,613.70 and her average  
19 monthly expenses are \$1,636, resulting in a monthly net income  
20 of \$977.70. Schedule I also reflected pre-petition loan  
21 payments for two 401(k) loans totaling \$364.91 per month as  
22 well as voluntary 401(k) contributions of \$164.02 per month.  
23 The debtor's amended Schedule I reflects four dependents. The  
24 appropriate commitment period is 36 months.

25           One of the 401(k) loans has been paid and the debtor

1 has agreed that the amount equal to that payment will now be  
2 included in the Chapter 13 payment. The voluntary contribution  
3 to her 401(k) plan has been reduced to the amount of \$81.14, as  
4 mentioned above, from \$164.02. The debtor will continue to  
5 make payments on the remaining loan from the 401(k) plan and  
6 the Trustee is not opposing that payment. The total proposed  
7 401(k) contributions for the loan and the contribution for the  
8 retirement plan are estimated to be 8 percent of the debtor's  
9 current income of which 5 percent of the 8 percent is allocable  
10 to the loan repayment and 3 percent is allocable to the  
11 voluntary contribution to the 401(k) account. This voluntary  
12 contribution is consistent with, or less than, the amount  
13 contributed for the six months prior to the filing of the  
14 petition.

15           The debtor is approximately 52 years of age and wants  
16 to retire at age 62. She's contributed to the 401(k)  
17 retirement plan since 1993 and the current amount of her  
18 contributions is consistent with her contributions during the  
19 six months prior to filing. She reported her balance in the  
20 account as of the petition date to be \$6,000. The parties have  
21 now stipulated that there is actually \$88,300 in the account.  
22 She incurred the 401(k) loans to offset her living expenses and  
23 pre-petition medical costs from surgery requiring a month's  
24 leave of absence from work. Most of the debtor's scheduled  
25 claims in this case are non-medical consumer debts.

1           The Sixth Circuit has already addressed whether  
2 voluntary contributions may be made postpetition by a debtor in  
3 a Chapter 13 case in which creditors are not receiving a  
4 hundred percent. Seafort v. Burden (In re Seafort), 669 F.3d  
5 662 (6th Cir. 2012). The court found:

6           Although "awkward" perhaps, we conclude, based on the  
7 language and structure of Chapter 13, incorporating  
8 § 541, that Congress intended to exclude from  
9 disposable income and projected disposable income  
10 available for unsecured creditors only voluntary  
11 retirement contributions already in existence at the  
12 time the petition is filed.

13 Id. at 674 (footnote omitted).

14           As such, the \$81.14 is disposable income which should  
15 be made available to unsecured creditors. Failure to include  
16 that sum results in the debtor failing to provide all of her  
17 disposable income during the applicable commitment period as  
18 required by 11 U.S.C. § 1325(b)(1)(B).

19           The debtor raises several points to distinguish her  
20 argument from the argument raised by the debtor in Seafort.  
21 First, she contends the disposable income must be received by  
22 the debtor. Relying on the presence of the word "received" in  
23 11 U.S.C. § 1325(b)(1)(B), the debtor argues that the payment  
24 into the 401(k) is more like a benefit such as insurance or  
25 payroll taxes than income. She argues she only has an account

1 owed to her from her employer. She cites no case authority for  
2 this interpretation of the word "receive."

3           The Court finds that the fact that she can change the  
4 amount she is contributing in order to make the needed plan  
5 payments is evidence that the debtor controls this income. Her  
6 ability to control the payments supports the Court's finding  
7 that she could physically receive the income if she chose to.  
8 The amount in question is not the employer's contribution to  
9 her plan, but, rather, income she would otherwise receive but  
10 for her directive that it be sent elsewhere. The Court is not  
11 prepared to limit the term "receive" to include only physical  
12 receipt. For this reason, the Court finds this argument  
13 unpersuasive.

14           The debtor also tries to distinguish between  
15 contributions simply continued, rather than contributions first  
16 begun after the post-petition completion of a 401(k) loan  
17 repayment. The Bankruptcy Appellate Panel in Burden v. Seafort  
18 (In re Seafort), 437 B.R. 204, 209 (B.A.P. 6th. Cir. 2010),  
19 found that contributions made prepetition could be continued  
20 without those sums being included in disposable income. The  
21 Sixth Circuit on appeal rejected the BAP's reasoning and found  
22 that post-petition voluntary contributions were not excluded  
23 from disposable income.

24           This Court does not see any difference in the income  
25 the debtor receives, which the debtor wants to contribute to a

1 401(k) retirement plan at the time of filing, and income which  
2 becomes available after the repayment of a 401(k) loan, as  
3 discussed in Seafort. In either case, the debtor is choosing  
4 to prefer her future, rather than address her current  
5 creditors.

6 If Congress had intended to exclude voluntary 401(k)  
7 contributions from disposable income it could have  
8 drafted § 1322(f) to provide for such an exclusion, or  
9 provided one elsewhere.

10 Seafort at 670 (quoting In re Prigge, 441 B.R. 667, 677 (Bankr.  
11 D. Mont. 2010)).

12 The next argument the debtor makes is that the  
13 contribution is not diverting property of the estate. The  
14 Sixth Circuit also reviewed this argument in In re Seafort and  
15 the cases cited in the debtor's brief. Relying on the  
16 exclusion from property of the estate contained in Section  
17 541(b)(7)(A) and (B), the debtor argues that contributions to a  
18 401(k) plan are excluded from property of the estate. If they  
19 are not property of the estate, then the debtor argues there is  
20 nothing that the unsecured creditors are missing so there is no  
21 harm to them by continuing to withhold these amounts from the  
22 plan payments.

23 In Seafort, the Sixth Circuit reads this section  
24 differently. It found that the exclusion in 541(b)(7) referred  
25 to contributions or withholdings that had been made before the

1 debtor filed for relief and that the specific language in  
2 Section 541(b) (7) (A) and (B) excepting "such sums" referred  
3 only to such sums as were withheld or contributed prepetition  
4 by the debtor. Seafort at 670, 672.

5           Based on that analysis, the Court must also reject  
6 this argument of the debtor. The debtor will retain the  
7 benefit of her past savings pursuant to the terms of the  
8 Bankruptcy Code, but may not continue to make additional  
9 contributions at the expense of her creditors.

10           The Trustee also objected on the basis of good faith  
11 if the Court found that the contributions may be excluded from  
12 disposable income. The Court having found that such income  
13 must be included, the Court need not further address the issue  
14 of good faith, having already found that the amended plan is  
15 not confirmable. The Court does acknowledge that the debtor  
16 framed the good faith issue somewhat differently than the  
17 Trustee.

18           The debtor argues that proposing a dividend less than  
19 a hundred percent does not rise to the standard of bad faith  
20 under 11 U.S.C. § 1325(a) (3). The Court does want to clarify  
21 that the Court does not find that a plan of less than a hundred  
22 percent is, per se, evidence of bad faith. As stated by the  
23 Sixth Circuit in determining good faith, the Court must look at  
24 the totality of the circumstances. However, having previously  
25 found that the plan was not confirmable on other grounds, the

1 Court will not go through the factors cited in Metro Employees  
2 Credit Union v. Okoreeh-Baah (In re Okoreeh-Baah), 836 F.2d  
3 1030, 1033 (6th Cir. 1988).

4 For the foregoing reasons, the Court denies  
5 confirmation of the modified plan. The Court will give the  
6 debtor 14 days to file an amended plan in compliance with the  
7 Court's ruling. Failure to do so will result in the dismissal  
8 of the case, there being no confirmable plan before the Court.  
9 Court will issue a separate order for the ruling that it has  
10 announced on the record.

11 In the event that this opinion is requested to be  
12 transcribed by any party, the Court reserves the right to make  
13 any edits as to format, style, or grammar, in addition to those  
14 rights which the Court has under Rule 9024, which makes Federal  
15 Rule of Civil Procedure 60(a) applicable to bankruptcy  
16 proceedings.

17 Do the parties have any other questions or any issues  
18 which the Court has not addressed?

19 MS. WEST: I don't think so, Your Honor. I anticipate  
20 that we will request it to be transcribed, so.

21 THE COURT: All right.

22 MR. RANNICK: Your Honor, two issues that I can see.

23 We've had a conversation about do we take this up  
24 'cause we're --

25 THE COURT: Uh-huh. (Indicating an affirmative

1 response)

2 MR. RANNICK: -- this, of course, is a first  
3 impression. My argument was a first impression type of an  
4 argument as to the issue of "received." And we're not -- we  
5 haven't heard back yet whether I want to have collateral help  
6 from some of the national organizations; haven't heard yet.

7 I'd like to get the transcript back and then I'm also  
8 going to ask the Court for, if we could have a status  
9 conference before this order is final so that I could have an  
10 interlocutory order to appeal. Because I need the stay in  
11 place if we take this up. If we deny confirmation, then we're  
12 kind of stuck. I'd ask the Court for permission to look  
13 forward.

14 So if we can get a copy of the transcript and as  
15 promptly as the transcript is done, then I would hope that I  
16 could have a status conference and then the Court would enter  
17 its order so we would know procedurally what we're going to do.

18 It's also possible the client may convert. I don't  
19 know that answer but before the time starts running to make the  
20 decision, I ask the Court's consideration since it is a rather  
21 novel issue that we're dealing with, the wake of the Seafort  
22 decision, I ask the Court's consideration to help us kind of  
23 talk. Because I've not had a chance to talk with my client  
24 about the implications of going forward with, further in the  
25 Chapter 13 mode at this stage.

1           THE COURT: All right. I would anticipate it will  
2 take since we're already to Thursday -- it's probably -- I will  
3 not see a transcript, despite how efficient Ms. Young is, that,  
4 probably until Monday.

5           So I would not anticipate there being an order  
6 entered, probably, till sometime next week. That would then  
7 give you all two weeks after that.

8           Let me ask: Is the Trustee agreeable to working out  
9 something?

10           Otherwise, I guess you're going to need to file some  
11 sort of a motion to impose a stay pending appeal and go through  
12 that process, but I wouldn't expect the actual order, if you're  
13 wanting a transcript, to probably be entered until early, at  
14 the earliest, early next week.

15           MR. RANNICK: We would, we would request a transcript  
16 and --

17           THE COURT: All right.

18           MR. RANNICK: -- we will be asking --

19           MS. WEST: We can -- we're willing to work with  
20 debtor's counsel to make sure that the stay is imposed during  
21 the appeal process and --

22           THE COURT: Well, do you want to just set a status  
23 conference, then, two weeks from today? 'Cause if --

24           MR. RANNICK: Two weeks from today -- I'm not -- I've  
25 been asked to speak at a church camp that week and I'm not sure

1 if I'm going to be able to be here Thursday. Ms. Whaley may be  
2 here.

3 THE COURT: All right.

4 MR. RANNICK: I may be here, but I may not be.

5 THE COURT: Do we have anything available earlier that  
6 week, specially set it?

7 MR. RANNICK: I'm speaking -- I'm doing Monday through  
8 Thursday.

9 THE COURT: Oh.

10 MR. RANNICK: I'll be back Friday morning. I'll be --  
11 I'll certainly be here Friday. I probably will be here  
12 Thursday, but I've just been notified that there's some loose  
13 ends I'm trying to --

14 MS. WEST: Is that Friday, the 20th?

15 THE COURTROOM DEPUTY: Yes.

16 MS. WEST: I have a -- we have a special-set hearing  
17 that I anticipate is going to be moved because parties, not all  
18 parties can be there. And so I'm waiting to hear back on that  
19 date.

20 So that Friday would work for me, if it works for  
21 Mr. Rannick.

22 MR. RANNICK: Work for me as well.

23 THE COURT: The 20th. And that'll still be within  
24 your two-week period for appeals. All right.

25 What time?

1 MS. WEST: I'd prefer 9:00 to 12:00, but I will be  
2 here whenever it's agreeable for everyone.

3 MR. RANNICK: Just bright and shiny. This is -- it  
4 won't take but a minute just for a status.

5 THE COURT: All right.

6 Do I have anything else that day, Ms. English, on the  
7 20th?

8 THE COURTROOM DEPUTY: No.

9 THE COURT: All right. Let's set it at --

10 MS. WEST: Or 8:00 is fine with me, if that's better  
11 for Mr. Rannick and the Court.

12 THE COURT: I'm sure the Court would prefer 9:00.

13 MS. WEST: Okay.

14 THE COURT: All right. Set it at 9:00 on Friday, the  
15 20th.

16 MS. WEST: Okay. Thank you.

17 THE COURT: And, Mr. Rannick, obviously, if your  
18 client chooses to convert or not to go forward with it, please  
19 let us know. Because that --

20 MR. RANNICK: I will.

21 THE COURT: -- would alleviate the need for that and  
22 we won't need to get a court reporter set up here for Friday.

23 MR. RANNICK: Yes, Your Honor.

24 THE COURT: All right.

25 MR. RANNICK: Thank you.

1 MS. WEST: Thank you.

2 THE COURT: Thank you.

3 (Proceedings concluded at 2:41 p.m.)

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CERTIFICATE

10 I, court approved transcriber, certify that the  
11 foregoing is a correct transcript from the official electronic  
12 sound recording of the proceedings in the above-entitled  
13 matter.

14 /s/ Janice Russell

July 30, 2012

15 Janice Russell, Transcriber

Date

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