

1 P R O C E E D I N G S

2 THE COURT: All right. Let's return to the Jenkins
3 case, Ms. English.

4 * * *

5 THE COURTROOM DEPUTY: No. 137, Eleanor Jenkins.

6 THE COURT: All right. Is there anything else you
7 wanted to say?

8 MS. WEST: Not if Your Honor is ready to issue her
9 opinion.

10 THE COURT: All right.

11 We reserved the time for the Court to render an oral
12 opinion in this matter. The case is before the Court on a *de*
13 *novo* review of confirmation of the debtor's modified Chapter 13
14 plan, which was originally confirmed on February 13, 2012. The
15 parties submitted a revised Stipulation of Facts and have also
16 provided briefs.

17 The issues before the Court are first, whether the
18 debtor's post-petition voluntary 401(k) contributions are
19 deductible from the calculation of disposable income and
20 projected disposable income available to creditors pursuant to
21 11 U.S.C. § 1325(b)(2); and second, if post-petition voluntary
22 401(k) contributions are deductible from the calculation of
23 disposable income and projected disposable income, do the
24 debtor's circumstances warrant a finding by the Court of bad
25 faith pursuant to 11 U.S.C. § 1325(a)(3)?

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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