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In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of:

LILA L. YOUNG  
p/d/b/a Mediclaims  
a/k/a Lila Lee Foster Norris

*Debtor*

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Chapter 13 Case

Number 92-41728

**MEMORANDUM AND ORDER**

Debtor filed her Chapter 13 petition on August 26, 1992. A confirmation hearing was held on January 20, 1993, and continued to February 26, 1993. Pursuant to the evidence adduced at the hearings, the documentation submitted by the parties, and the applicable authorities, I make the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

\_\_\_\_\_ Debtor's Chapter 13 petition and plan were filed on August 26, 1992. Debtor's summary of schedules listed \$250,000.00 in real property and \$10,580.00 in personal property. The real property consisted only of Debtor's home. *See* Schedule "A" - Real Property. On Schedule "B" - Personal Property, Debtor was required to list any ". . . art objects, antiques, stamp, coin . . . and other collections or collectibles." Debtor replied "none." *See* Schedule "B" - question 5. Question 6 of Schedule "B" required Debtor to list

"wearing apparel" and to provide current market value of the property. Debtor listed miscellaneous clothing valued at \$100.00. Question 7 required Debtor to list any furs and jewelry. Debtor listed a wedding ring and necklace valued at \$125.00. Debtor also listed on Schedule "B" that she had no interests in insurance policies.

On December 22, 1992, the United States Magistrate Judge in Savannah issued a search warrant for Debtor's home located in Savannah. The search warrant listed dozens of items including antiques, collectibles, silver, furs and jewelry which the Federal Bureau of Investigation ("FBI") expected to seize in connection with an investigation of the Debtor for insurance fraud. *See* Exhibit "B". The search warrant was executed on December 23, 1992, and an inventory of items seized was filed with the United States District Court on January 5, 1993, when the warrant was returned. *See* Exhibit "B".

Nearly all items the agents expected to be seized were seized when the warrant was executed. Those items included two crystal pheasants worth \$5,000.00, a tan and beige mink coat worth \$8,000.00, a "silver fox fling" worth \$500.00, and a silver serving set. The agents also seized dozens of pieces of jewelry including, necklaces, chains, earrings, and pins, which were made of silver, gold, diamonds, pearls, and other stones and jewels. *See* Exhibit "B" for a full description and list of items seized.

Besides the tangible assets listed above, the agents seized documents regarding Debtor's life insurance policies, and a personal financial statement dated May 16, 1992. *See* Personal Financial Statement of Lila L. Young, Exhibit "1". This personal

financial statement lists Debtor's interest in real estate including her home with a present value of \$259,000.00 and twelve acres of land owned by Debtor and her former husband and valued at \$270,000.00.

Debtor failed to list any of the seized assets on her petition and failed to list the real property Debtor owned with her former husband. On January 19, 1993, Debtor amended her schedules to include the land she owned with her former husband and received after their divorce, which she lists as "6 acres of marshland property in Louisiana valued at \$6,000.00, no liens thereon." Debtor also amended her petition, Schedule "B" - question 4, to add household goods, furnishings, and other items, increasing the values there from \$1,300.00 to \$8,750.00. Schedule "B" - question 5 was amended to include the \$5,000.00 crystal pheasants, a silver collection worth \$25,000.00, antiques, and other items, changing her answer to question 5 from none to property valued at \$33,410.00. Schedule "B" - question 6, which Debtor answered originally by listing an engagement ring and a necklace, was amended to include the mink coat worth \$5,000.00, the "silver fox fling" worth \$500.00, and other jewelry, which increased the value of such property from \$125.00 to \$26,500.00. The Debtor also amended her personal property schedules to show an interest in a pension plan and in life insurance policies. Overall, Debtor's amendments increased the value of her personal property by \$63,735.00. Debtor amended her Schedule "D" - Creditors Holding Secured Claims - to reveal liens against the insurance policies. Debtor also amended her Schedule "C" to increase the value of exemptions claimed.

A confirmation hearing was held on January 20, 1993, at which time Debtor

announced that her amended schedules had been filed. The hearing was continued to February 26, 1993. The Chapter 13 Trustee argued that Debtor's Chapter 13 plan did not meet the requirements for good faith and confirmation under 11 U.S.C. Section 1325(a)(3). The Chapter 13 Trustee did not file a written objection.<sup>1</sup> BancOhio filed an objection and appeared at the January hearing, but did not prosecute its objection at the February hearing on confirmation.

Debtor testified at the continued confirmation hearing and claimed that any errors in her original petition were due to mistake and oversight. Debtor met with her first attorney during her lunch break when the petition was completed. Debtor stated that she was upset and signed the papers without reading them. Debtor testified that she went to her attorney after receiving a foreclosure notice and that she filed the bankruptcy proceeding to save her home. Debtor could remember very little about the preparation of the petition. Debtor is now represented by another attorney who filed her amendments and who represented her at both confirmation hearings.

The Chapter 13 Trustee argues that Debtor's amendments filed after her property was seized by the FBI agents show her bad faith and lack of honesty before the court. Also, the real property omitted from Debtor's petition was listed as worth substantially more, \$270,000.00 for a 100% interest on the May 16, 1992, financial

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<sup>1</sup> The lack of written objection is of no benefit to Debtor. 11 U.S.C. §1325 requires the court to confirm a plan if certain requisites are met. It is Debtor's burden as proponent of the plan to establish all elements, including good faith, in order to gain confirmation. All parties in interest, including the Trustee, have standing to participate in the hearing, cross examine and call witnesses and introduce evidence in response to Debtor's *prima facie* case.

statement than in her amendment which listed the value as \$6,000.00 for her 50% interest. Debtor claimed she paid \$6,000.00 for her share and that the property is tied up due to shared ownership with her former husband's relatives.

Debtor argues that the amendments satisfy the good faith obligation and that her plan which will pay all claims in full over sixty months should be confirmed. Besides BancOhio, which did not prosecute its objection at confirmation, no other creditors have objected to Debtor's plan.

#### CONCLUSIONS OF LAW

Under 11 U.S.C. Section 1325(a)(3), every Chapter 13 plan must be filed in good faith before it can be confirmed. In prior decisions, this court has held that the "good faith requirement is one of the central, perhaps the most important confirmation finding to be made by the court in any Chapter 13 case." Matter of Kull, 12 B.R. 654, 658 (S.D.Ga. 1981), aff'd sub. nom.; In re Kitchens, 702 F.2d 885 (11th Cir. 1983). *See also* Matter of Whipple, 138 B.R. 137, 139 (Bankr. S.D.Ga. 1991). Although the Bankruptcy Code does not define "good faith," the Eleventh Circuit has set forth the following eleven factors to be considered:

- 1) The amount of the debtor's income from all sources;
- 2) The living expenses of the debtor and his dependents;

- 3) The amount of attorney's fees;
- 4) The probable or expected duration of the debtor's Chapter 13 plan;
- 5) The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
- 6) The debtor's degree of effort;
- 7) The debtor's ability to earn and the likelihood of fluctuation in his earnings;
- 8) Special circumstances such as inordinate medical expenses;
- 9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessor;
- 10) The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealing with his creditors;
- 11) The burden which the plan's administration would place on the trustee.

Kitchens, 702 F.2d at 888-89. This court has also adopted the substantiality of repayment and potential non-dischargeability of the debt in a Chapter 7 case as additional factors under the good faith analysis. Matter of Hale, 65 B.R. 893 (Bankr. S.D.Ga. 1986). Numerous other courts have adopted this "totality of the circumstances" test for determining good faith. Matter of Love, 957 F.2d 1350 (7th Cir. 1992); In re LeMaire, 898 F.2d 1346 (8th Cir. 1990); In re Okoreeh Baah, 836 F.2d 1030 (6th Cir. 1988); Neufield v. Freeman, 794 F.2d 149 (4th Cir. 1986). *See also* In re Rimgale, 669 F.2d 426 (7th Cir. 1982); Matter of Smith, 848 F.2d 813 (7th Cir. 1988); Matter of Jones, 119 B.R. 996 (Bankr. N.D.Ind. 1990); Matter

of Belt, 106 B.R. 553 (Bankr. N.D.Ind. 1989).

The debtor in Love, supra, was a member of a group that protested payment of income taxes. Debtor filed for bankruptcy after the IRS initiated levies against his assets and garnished his wages for failure to pay income taxes. The IRS filed a proof of claim with a higher priority debt, lower unsecured debt, and larger total debt than acknowledged by debtor in his plan. The IRS also listed a lien not listed by the debtor. Debtor failed to accurately list his income on his Chapter 13 plan and failed to list three life insurance policies.

The IRS moved to dismiss the Chapter 13 petition for lack of good faith. The motion was granted by the bankruptcy court and affirmed on appeal to the district court. The Seventh Circuit in affirming the decision, noted that the first issue to be decided was whether the Chapter 13 petition was filed in good faith. If the petition was not filed in good faith, the case could be dismissed for cause under Section 1307(c) or possibly converted to a Chapter 7 proceeding. The second issue to be addressed was whether the Chapter 13 plan, which provides payment to creditors, was proposed in good faith. Both the Chapter 13 petition and plan must be filed in good faith pursuant to Section 1325(a)(3) before the case can be confirmed. Love, 957 F.2d at 1354. Both issues should be decided under the totality of the circumstances test for good faith. Id. at 1356-57.

The good faith analysis under Section 1307(c) and Section 1325(a)(3) is not identical, but the two inquiries do overlap. Id. at 1360. *See also* In re Ristic, 142 B.R. 856,

859 (Bankr. E.D.Wis. 1992). Under Section 1307(c), the court is required to make a broad inquiry focusing upon fairness in filing the petition. Section 1325(a)(3) requires a more narrow inquiry focusing upon the Chapter 13 plan and its contents. Love, 957 F.2d at 1360. Considering the debtor's pre-petition tax protest activity, his motives for filing bankruptcy, his omission of substantial income, and proposal to pay only 10% of the IRS's unsecured claim, although debtor was capable of paying 100% based on his actual income, the Seventh Circuit in Love, supra, affirmed the lower court's dismissal for lack of good faith under Section 1307(c).

The two-step good faith test in Love is helpful in this case. Debtor's plan appears on its face to be a good faith effort to provide substantial payment to all creditors. The debtor has proposed a 100% plan. However, the first inquiry should focus upon fairness and honesty in filing the Chapter 13 petition. *See generally* In re Gaithright, 67 B.R. 384 (Bankr. E.D.Pa. 1986) (Good faith requires honesty and full disclosure). A debtor is required to list all of his assets on his bankruptcy petition, and may not pick and choose the assets to be listed. In re Chalik, 748 F.2d 616, 618 (11th Cir. 1984). A debtor that fails to list all of his assets on his bankruptcy petition may face prosecution under 18 U.S.C. Section 152 for bankruptcy fraud or under 18 U.S.C. Section 1001 for fraud. *See also* U.S. v. White, 879 F.2d 1509 (7th Cir. 1989) (Evidence supported bankruptcy fraud conviction for fraudulent nondisclosure of assets and other errors on debtor's petition).

Although the court recognizes Debtor's efforts to save her home, I cannot condone Debtor's material omissions, given under oath, from her bankruptcy petition.

Debtor realized her duty to disclose the value of her jewelry as she listed a ring and a necklace valued at \$125.00; however, she failed to list over \$20,000.00 of other expensive pieces of jewelry. Similarly, Debtor omitted \$33,410.00 in antiques and collectibles, and had originally stated in her petition that she had no such items. Debtor failed to list her fur coats, household goods, and other items. Only after the items were seized by the FBI did Debtor attempt to reveal such valuable assets to the court. Thus, I conclude that Debtor's Chapter 13 petition was not filed in "good faith." As a result Debtor's Chapter 13 plan cannot be confirmed and confirmation is hereby denied.

As a final consideration, I must note that this court will not place limitations on any criminal prosecution or proceedings arising out of this case. *See Barnett v. Evans*, 673 F.2d 1250 (11th Cir. 1982). Debtor alleged in her amendments that the seizure by the FBI did not comply with Section 1306(b) of the Bankruptcy Code. I conclude that this Bankruptcy Code section, which provides that the debtor is to maintain possession of property of the estate, was not intended to place limitations on criminal proceedings. Clearly, under 11 U.S.C. Section 362(b)(1), criminal actions against a debtor are not automatically stayed by the filing of bankruptcy and may continue unless extraordinary circumstances are present and the court orders otherwise.

Pursuant to 11 U.S.C. §1307(c) the court may convert or dismiss a case "for cause." Inasmuch as confirmation of the plan has been denied for reasons which preclude any possibility for cure by way of further amendments, I find that cause exists. Further, inasmuch as there are significant assets which could be liquidated to pay creditors' claims

if marshalled and protected by a Trustee and because Debtor's conduct suggests that she cannot be relied upon to deal forthrightly with others, I conclude that the "interest of creditors" is better served by administration under Chapter 7.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Debtor's Chapter 13 case is converted to a Chapter 7 case.

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Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_ day of April, 1993.