

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
JAMES EDWARD LUEDTKE,) CASE NO. 08-21611 JPK
) Chapter 13
Debtor.)

MEMORANDUM OF DECISION CONCERNING FALK
PLI ENGINEERING & SURVEYING, INC.'S OBJECTION
TO CONFIRMATION OF THE DEBTOR'S PLAN

This Chapter 13 case was initiated by a petition filed by James Edward Luedtke ("Luedtke") on May 22, 2008. Luedtke's Chapter 13 plan was also filed on May 22, 2008. On July 18, 2008, the court entered its order scheduling proceedings with respect to confirmation of Luedtke's plan, which provided that objections to confirmation were due on August 18, 2008 and that the confirmation hearing would be held on August 25, 2008. On August 24, 2008, Falk PLI Engineering & Surveying, Inc. ("Falk") filed its objection to confirmation of Luedtke's Chapter 13 plan. This decision concerns the assertions made by Falk in its objection to confirmation.

It is first necessary to address the timeliness of Falk's confirmation objection. The July 18, 2008 order (record entry #14) includes the following statement:

In the event an untimely objection to confirmation is filed, counsel for the objectant will be expected to attend the confirmation hearing to bring to the Court's attention matters addressed in the objection required by 11 U.S.C. § 1325(a) to be considered by the Court in determining whether an order confirming the plan should be entered;¹ however, the Court may not deem the untimely objection to authorize the objectant to assert its interests with respect to confirmation of the plan.

FN1 The Court has an independent duty pursuant to §1325(a) to determine whether a plan of a Debtor should be confirmed. Accordingly, even if there are no objections to the plan, the Court may still deny confirmation if the proposed plan does not satisfy the requirements of 11 U.S.C. §1322 and §1325. If counsel for the Debtor(s) is aware of any provision of the Plan or the budget which

might result in denial of confirmation, the attorney for the Debtor(s) should consider attending the confirmation hearing even if no objections have been filed.

On August 15, 2008, Falk filed its Motion for Continuance of Confirmation Hearing and Enlargement of Time to Object to Confirmation and Enlargement of Time to Object to Debtor's Discharge (record entry #26). A focus of this motion was to delay/ reschedule the hearing on confirmation of Luedtke's Chapter 13 plan, so that Falk could conduct Rule 2004 examinations and formulate an objection to confirmation of Luedtke's plan. Paragraph 15 of the motion represents that Luedtke's counsel had no objection to continuance of the confirmation hearing and extension of the deadline for Falk to file an objection to confirmation of the plan. The court has consistently construed 11 U.S.C. § 1324(b) to provide a deadline for conducting of the Chapter 13 confirmation hearing, with the outside deadline being 45 days from the date of conclusion of the § 341 meeting. In the procedural practice of the United States Bankruptcy Court for the Northern District of Indiana, Hammond Division, the conclusion of the § 341 meeting is signaled by the Chapter 13 Trustee's filing of a "Notice of Conclusion of Meeting of Creditors and Motion to Set Confirmation Hearing", which in this case was filed on July 17, 2008. As a result, because the 45th day following the filing of this notice fell on a Sunday, the latest that the hearing on confirmation of Luedtke's Chapter 13 plan could have been held was September 1, 2008. The court did not enter an order with respect to Falk's continuance request, but Falk filed an objection to confirmation of the Chapter 13 plan on August 24, 2008, prior to the confirmation hearing held on August 25, 2008. Falk appeared at the hearing by counsel James E. Carlberg and advanced its arguments concerning its objections. This case has consistently proceeded on the assumption that Falk's objections to confirmation are viable and were considered timely, and the court now reaffirms that procedural perception. Falk's objections raise issues which the court must itself take into consideration in determining whether or not a plan should be confirmed, and more importantly, in this court's view, the

consequence of failure to timely object to confirmation of a Chapter 13 plan is left to the court's discretion, discretion which is clearly provided for in the above-quoted order which scheduled the confirmation hearing. Thus, the matter before the court is a contested matter initiated by Falk's Objection to Confirmation of Debtor's Proposed Chapter 13 Plan filed on August 24, 2008. The court has jurisdiction over this contested matter pursuant to 28 U.S.C. § 1334(b), 28 U.S.C. § 157(a) and (b), and N.D.Ind.L.R. 200.1. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

The record for determination of this contested matter was established at a hearing held on September 30, 2010. In addition to the testimony of James Edward Luedtke at that hearing, the record includes exhibits 1-17 submitted into evidence by Falk; the original schedules filed by Luedtke in the case and Amended Schedule B subsequently filed; the original Statement of Financial Affairs filed by Luedtke and the subsequent amendment of the Statement of Financial Affairs; and the Official Form 22C Statement filed by Luedtke at the inception of the case – of course in addition to the Chapter 13 plan at issue in the contested matter.

The assertions made by Falk's objection to confirmation are the following:

1. The plan does not properly provide for Falk's judgment lien under 11 U.S.C. § 1325(a)(5).¹
2. The plan was not proposed in good faith, precluding its confirmation under 11 U.S.C. § 1325(a)(3).
3. The action of the debtor in filing the petition was not in good faith (i.e., the case was not filed in good faith), thus precluding confirmation under 11 U.S.C. § 1325(a)(7).
4. The plan does not comply with 11 U.S.C. § 1325(b) with respect to payment of

¹ This assertion will not be addressed in this decision, in view of the fact that any interests of Luedtke in real property at the time of the filing of this case no longer exist due to foreclosure of those interests in separate proceedings and abandonment of those interests from the bankruptcy estate.

disposable income by the debtor for distribution on unsecured claims.

Issues 2, 3 and 4 above somewhat overlap with respect to the evidence to be applied to their determination, and to Falk's contentions as to their invocation.

Let's first address the law applicable to the "good faith" requirements of § 1325(a)(3) and § 1325(a)(7). Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), whether or not the debtor's action in filing a Chapter 13 petition was in good faith was not a specifically delineated element with respect to the court's consideration of confirmation of a plan under 11 U.S.C. § 1325(a). Prior to 2005, and going backward in time quite a distance, federal courts had developed various concepts for dealing with the sometimes overlapping considerations of whether a debtor's conduct in relation to the filing of a case and the debts sought to be affected by the case provided a separate ground for dismissal of a case for cause under 11 U.S.C. § 1307 and/or were to be considered with respect to whether or not a plan had been filed in a good faith for the purposes of 11 U.S.C. § 1325(a). The United States Court of Appeals for the Seventh Circuit had developed standards for testing the good faith of filing/confirmation with respect to a Chapter 13 case, but since the implementation of the BAPCPA, there is no controlling Seventh Circuit case on the issue, including one which defines any distinction or different criteria to be applied with respect to 11 U.S.C. § 1325(a)(3) and 11 U.S.C. § 1325(a)(7). The court has previously addressed its view of the criteria to be applied under these two sections in *In re Jongsma*, 402 B.R. 858 (Bankr. N.D.Ind. 2009), and with a nod to itself as to its plagiarism of its own material, the court's views of the standards to be applied in this case have not changed since *Jongsma*.

As stated in *Jongsma*, the standards to be applied under 11 U.S.C. § 1325(a)(3) are addressed as follows:

The United States Court of Appeals for the Seventh Circuit has stated standards for review of Chapter 13 plans under 11 U.S.C. § 1325(a)(3). The principal cases of the United States Court of

Appeals for the Seventh Circuit in this context are *In re Rimgale*, 669 F.2d 426 (7th Cir.1982) and *In re Smith*, 848 F.2d 813 (7th Cir.1988).^{FN4}

FN4. Jongsma's memorandum of law refers to the case of *In re Schaitz*, 913 F.2d 452 (7th Cir.1990). As stated in the very last sentence of that opinion:

We reserve for future consideration-whether in a subsequent appeal in this case or in another case-what we have been at pains to emphasize is the difficult question, unanswered in this circuit, of the precise meaning of that term ["good faith"] under chapter 13.

913 F.2d 452, 456. *Schaitz*, declining to substantively address the issue at all, has no precedential value with respect to 11 U.S.C. § 1325(a)(3).

In re Rimgale, *supra*, was decided at a time when courts primarily viewed good faith concerning a plan in the context of the debtor's efforts to pay unsecured creditors. The case essentially adopts a "totality of circumstances" approach, and then lists five specific criteria which the Court deems to be included within an evaluation under that test. The court notes the following with respect to the *Rimgale* five-factor test:

1. The first standard: "Does the proposed plan state *Rimgale's* secured and unsecured debts accurately" 669 F.2d 426, 432], misperceives the nature of a Chapter 13 plan. The new debtor states secured and unsecured debts accurately in schedules filed in the case, and the treatment of creditors in a Chapter 13 plan is merely an extension of the creditors disclosed in the initial schedules.

2. The second test of *Rimgale*: "Does it state *Rimgale's* expenses accurately" 669 F.2d 426, 432], has nothing whatever to do with the provisions of a Chapter 13 plan. Expenses of a debtor are stated in Schedule J, and under BAPCPA in Official Form B-22C.

3. The third prong of *Rimgale*: "Is the percentage of repayment of unsecured claims correct" 669 F.2d 426, 432] refers to the confirmation requirement of 11 U.S.C. § 1325(a)(4). Whether or not a plan complies with § 1325(a)(4) depends upon the valuation of assets constituting property a Chapter 7 estate on the date of confirmation of a plan in Chapter 13, the expense of administration projected onto those values if those assets were administered in a Chapter 7, and the resulting distribution to unsecured creditors on the effective date of the plan in a Chapter

13 case, which is the date of confirmation of that plan. Adopting a standard that requires that a plan's proposed treatment be "correct" under § 1325(a)(4) ignores the seminal issue-how is whether or not the distribution proposed by a plan is correct to be made? In many instances, the issue of whether or not a plan complies with 11 U.S.C. § 1325(a)(4) requires an evidentiary or negotiated determination: to state that a criteria of "good faith" is that the plan must at its outset anticipate the result of these determinations is unrealistic and ignores that Chapter 13 process.

4. The fourth criteria: "If there are or have been deficiencies in the plan do the inaccuracies amount to an attempt to mislead the bankruptcy court" 669 F.2d 426, 432], remains viable under any context.

5. The fifth criteria: "Do the proposed payments indicate 'a fundamental fairness in dealing with one's creditors' (citation omitted)" has been, as will be seen, supplanted by amendments to the Bankruptcy Code.

The foregoing aside, *Rimgale* remains the law of the Seventh Circuit, flawed as it is.

Rimgale was followed by *In re Smith*, 848 F.2d 813 (7th Cir.1988). It must be first borne in mind that *In re Smith* was a very focused case, dealing only with a plan's treatment of nondischargeable debt. The entire analysis of that case is focused on the issue of good faith in relation to a nondischargeable debt. The critical holding of *Smith* is stated as follows at 848 F.2d 813, 821:

Only where there has been a showing of serious debtor misconduct or abuse should a chapter 13 plan be found lacking in good faith. 5 *Collier on Bankruptcy*, ¶ 1325.04[3] at 1325-17 (footnotes omitted). See *Sutliff, supra*, 79 B.R. at 153 ("The Code does not define good faith but legislative history does not reveal any Congressional intent to give it a different meaning than it had historically.").

"The good faith requirement 'has long been the policing mechanism of bankruptcy courts....' " *Todd, supra*, 65 B.R. at 250-51 (quoting *In re Chase*, 43 B.R. 739, 745 (D.Md.1984)). The definition of good faith has historically not been limited to the debtor's accurately disclosing all material information on his plan and intending to fulfill it, but also to the factors *Rimgale* sets out, including the "debtor's motive in seeking Chapter 13 relief" and "circumstances under which debts were incurred." Thus, after BAFJA courts do and should continue to look at the

circumstances under which a debt was incurred and whether that debt would be dischargeable in Chapter 7. See, e.g., *Chaffin, supra*, 816 F.2d at 1073-74 and 836 F.2d at 216; *Sutliff, supra*, 79 B.R. at 154-55; *Easley*, 72 B.R. at 951-54; *Todd, supra*, 65 B.R. at 255-56.

Under the “totality of the circumstances” test, as read in light of BAFJA, the bankruptcy court erred in failing to consider the circumstances in which Smith's debts arose and the fact that they are otherwise nondischargeable.

Note again that *In re Smith* is focused upon the good faith of a Chapter 13 plan in relation to its treatment of a nondischargeable debt under Chapter 7. That issue is absent in this case.

Amendments to the Bankruptcy Code have impacted upon the “criteria” tests of both *In re Rimgale* and *In re Smith*. The impact of these amendments is extraordinarily well addressed in *In re Shafer*, 393 B.R. 655 (Bankr.W.D.Wis.2008). This court totally endorses the analysis of the Honorable Robert D. Martin in that case. As stated in that decision, pre-petition conduct of the debtor is now irrelevant in the determination of good faith under 11 U.S.C. § 1325(a)(3), and thus to the extent that Brooker contends that transfers of property or other activities by Jongsma prior to the filing of her petition is relevant under § 1325(a)(3), those contentions must fail. Whether or not the “percentage of repayment of unsecured claims [is] correct” has been negated by 11 U.S.C. § 1325(b). Thus, taking these two factors out of consideration, the test to determine “good faith” under 11 U.S.C. § 1325(a)(3), as stated in *Shafer, supra*, is the following:

To determine the good faith of the debtors, the totality of the circumstances test is still good law, and it applies both to the filing of the petition and to filing of the plan. The *Schaitz* inquiry is the ultimate issue when considering the circumstances: are the debtors trying to pay their creditors, or are they trying to thwart them?

393 B.R. 655, 661.^{FN5}

FN5. However, as previously stated, this court does not agree that *Schaitz, supra*, has any applicability due to its expressly not addressing issues of “good faith”.

Jongsma, 402 B.R. 858, 868-870.

The standards to be applied with respect to 11 U.S.C. § 1325(a)(7) are addressed as follows:

In order to confirm a plan under Chapter 13, the court must find that “the action of the debtor in filing the petition was in good faith”. This specific provision of 11 U.S.C. § 1325(a) was added by BAPCPA, and did not appear as a confirmation standard prior to October 16, 2005. There is very little law on the precise application of this section to confirmation of Chapter 13 plans.

While not directly on point, because it dealt with a dismissal “for cause” pursuant to 11 U.S.C. § 1307(c)—the decision of the United States Court of Appeals for the Seventh Circuit in *In re Love*, 957 F.2d 1350 (7th Cir.1992) is instructive. At the time that *Love* was decided, there was a debate in decided cases as to the overlap between 11 U.S.C. § 1325(a)(3)'s requirement that a plan be proposed in good faith and the nature of conduct of a debtor which could give rise for grounds for dismissal for “cause” under 11 U.S.C. § 1307(c). *Love* was the first case in the Seventh Circuit which dealt with a motion to dismiss under § 1307(c) for bad faith, as contrasted to an objection to confirmation of a plan based upon lack of good faith. In the court's view, the criteria stated in *In re Love* have viability with respect to the determination required under 11 U.S.C. § 1325(a)(7). The following recitation from *In re Love* is relevant to the court's determination:

B. Factors Considered Under the Totality of Circumstances Test

Having already determined that good faith under Section 1307(c) should be determined by looking to the totality of circumstances, the next question becomes what factors are appropriately considered under this test. As mentioned above, this court has not previously reviewed a bankruptcy court's good faith finding under Section 1307(c) of the Bankruptcy Code. This court has, however, evaluated good faith determinations made under Section 1325(a) of the Bankruptcy Code, and in *Smith* this court emphasized the similarities between these two good faith inquiries. *Smith*, 848 F.2d at 816, n. 3. Indeed, the same policy embodies the two good faith evaluations. *See id.* That is, one of the primary purposes of the good faith evaluation in both contexts is to “force[] the bankruptcy court to examine ‘whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [the Chapter]....’ ” *See id.* at 818 (quoting *Rimgale*, 669 F.2d at 431). At base, this inquiry often comes down to a question of whether the filing is fundamentally fair. *See Schaitz*, 913 F.2d at 453 (“the most fundamental and encompassing [factor when evaluating good faith] is whether the debtor has dealt fairly with his creditors.”) In other words, the focus of the good

faith inquiry under both Section 1307 and Section 1325 is often whether the filing is fundamentally fair to creditors and, more generally, is the filing fundamentally fair in a manner that complies with the spirit of the Bankruptcy Code's provisions.

Bankruptcy courts have expressed some confusion and frustration with regard to the proper focus of this Chapter 13 good faith inquiry. See, e.g., *In re N.R. Guaranteed Retirement, Inc.*, 112 B.R. 263, 271-73 (Bankr. N.D.Ill.1990), *affd*, 119 B.R. 149 (N.D.Ill.1990). We realize that the standard of fundamental fairness does not provide a great deal of needed guidance. Unfortunately, however, we cannot completely alleviate the confusion and at the same time retain the advantages of the totality of circumstances test. This is because as our definition of good faith becomes more precise, the bankruptcy court has less discretion to weigh the evidence first hand in making good faith evaluations. In short, the downside of the totality of circumstances test is a degree of uncertainty.

One area of uncertainty is whether the good faith inquiry is an objective or a subjective inquiry. *Id.* at 271. The fact is, the good faith inquiry is both subjective and objective. That is, both objective evidence of a fundamentally unfair result and subjective evidence that a debtor filed a petition for a fundamentally unfair purpose that was not in line with the spirit of the Bankruptcy Code are relevant to the good faith inquiry.

Moreover, the same evidence is often relevant to both an objective and subjective showing of unfairness. For example, if a debtor lies in his statement of assets and debts and if as a result of these misstatements one creditor will be disproportionately disadvantaged, this indicates objective unfairness. This same evidence, however, when coupled with other evidence, may also indicate that the debtor filed bankruptcy to thwart payment to a particular creditor, thereby indicating a subjective intent to unfairly abuse the spirit of the Bankruptcy Code.

Keeping in mind that the focus of the inquiry is fundamental fairness, the following nonexhaustive list exemplifies some of the factors that are relevant when determining if a Chapter 13 petition was filed in good faith: the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's

actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; *and whether the debtor has been forthcoming with the bankruptcy court and the creditors.* See *In re King*, 126 B.R. 777, 781 (Bankr. N.D.Ill.1991) (involved good faith evaluation under 1307(c)); *In re McKissie*, 103 B.R. 189, 192 (Bankr. N.D.Ill.1989) (same). See also *Schaitz*, 913 F.2d at 455-56 (discussing factors relevant to the good faith determination under Section 1325(a)); *Smith*, 848 F.2d at 817-18 (same); *Rimgale*, 669 F.2d at 432 (same). (emphasis supplied).

957 F.2d 1350, 1356-57.

As stated by *Love*, a focus of whether or not a petition has been filed in good faith is “whether the debtor has been forthcoming with the bankruptcy court and the creditors”, 957 F.2d 1350, 1357. As further stated:

For example, if a debtor lies in his statement of assets and debts and if as a result of these misstatements one creditor will be disproportionately disadvantaged this indicates objective unfairness.

957 F.2d 1350, 1357.

In *In re Love*, a critical focus of the presentation in the United States Bankruptcy Court; of the decision of the United States District Court in affirming the decision of the United States Bankruptcy Court; and in the decision of the United States Court of Appeals for the Seventh Circuit-was the accuracy of information provided to the court, creditors and the Chapter 13 Trustee in schedules filed by the debtor. While, admittedly, the accuracy of schedules and statements of affairs is one of several factors to be taken into consideration under the standard of “good faith” in the filing of a case, it is a critical factor. Although stated in the context of a Chapter 7 case, the need for accurate disclosure of information is equally necessary in a Chapter 13 case, and the court endorses the following analysis of the critical nature of disclosed information in bankruptcy filings, as stated in *In re Costello*, 299 B.R. 882, 899-900 (Bankr. N.D.Ill.2003):

Section 727(a)(4)(A) provides that the court may not grant a debtor a discharge if: “(4) the debtor knowingly and fraudulently, in or in connection with the case-(A) made a false oath or account....” 11 U.S.C. § 727(a)(4)(A). The burden of proof lies with the objecting creditor to establish five elements: (1) the debtor made a statement under oath; (2) the statement was false; (3) the debtor knew the

statement was false; (4) the debtor made the statement with intent to defraud; and (5) the statement related to the bankruptcy case in a material way. *Bailey*, 145 B.R. at 926; *Bank of India v. Sapru (In re Sapru)*, 127 B.R. 306, 314 (Bankr.E.D.N.Y.1991). Although the burden of proof rests on the creditor at all times, the debtor cannot prevail if he is unable to offer credible evidence after the plaintiff has established a prima facie case. *Sapru*, 127 B.R. at 316 (citation omitted).

The purpose of § 727(a)(4) is to ensure that the debtor provides dependable information to those who are interested in the administration of the bankruptcy estate. *Madonia v. Hasan (In re Hasan)*, 245 B.R. 550, 554 (Bankr.N.D.Ill.2000); *Brandt v. Carlson (In re Carlson)*, 231 B.R. 640, 655 (Bankr. N.D.Ill.1999). The debtor must disclose all ownership interests he holds in property. *Allard v. Hussan (In re Hussan)*, 56 B.R. 288, 292 (Bankr. E.D.Mich.1985). “ ‘The trustee and creditors are entitled to honest and accurate signposts on the trail showing what property has passed through the [d]ebtor's hands during the period prior to his bankruptcy.’ ” *Id.*, quoting *Guardian Indus. Products, Inc. v. Diodati (In re Diodati)*, 9 B.R. 804, 807 (Bankr. D.Mass.1981). It is not the debtor's responsibility to decide which assets are to be disclosed to creditors; rather, his job is simply to address each question and answer it accurately and completely. *Id.* (citation omitted).

The first thing that an objecting creditor must establish is that the Debtor made a statement under oath. Bankruptcy schedules and statements of financial affairs constitute statements under oath. *Northeast Fed. Credit Union v. Garcia (In re Garcia)*, 260 B.R. 622, 631 (Bankr. D.Conn.2001); *Senese*, 245 B.R. at 575 (finding that any statement made in a bankruptcy petition, schedule, or statement of financial affairs falls within the meaning of § 727(a)(4)(A)); *In re Bailey*, 53 B.R. 732, 735 (Bankr. W.D.Ky.1985) (noting that a false oath may consist of a false statement or omission in a debtor's schedules). In addition, testimony at a Federal Rule of Bankruptcy Procedure 2004 Examination is a statement under oath under § 727(a)(4). *Garcia*, 260 B.R. at 631. A creditor must next show that the statements made by the debtor were false. Whether the debtor made a false oath within the meaning of § 727(a)(4) is a question of fact. *Williamson v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 251 (4th Cir.1987); *Bailey*, 145 B.R. at 926. Filing bankruptcy schedules with material misrepresentations or omissions

to mislead creditors about the debtor's financial situation constitutes a false oath. *Britton Motor Serv., Inc. v. Krich (In re Krich)*, 97 B.R. 919, 923 (Bankr. N.D.Ill.1988) (citation omitted). Although not every single item need be scheduled and valued, "there comes a point when the aggregate errors and omissions cross the line past which a debtor's discharge should be denied." *Stathopoulos v. Bostrom (In re Bostrom)*, 286 B.R. 352, 360-61 (Bankr. N.D.Ill.2002) (citations omitted).

Further, a debtor cannot excise a false oath by making subsequent corrections to his bankruptcy petition. *Bensenville Community Ctr. Union v. Bailey (In re Bailey)*, 147 B.R. 157, 165 (Bankr. N.D.Ill.1992) (citation omitted) ("Subsequent voluntary disclosure through testimony or an amendment to the schedules cannot expunge the falsity of an oath."). Allowing a debtor to submit false schedules and then, on discovery, avoid the negative consequences of his dishonesty by amending those schedules "is contrary to the spirit of the law which aims to relieve honest debtors only." *Hussan*, 56 B.R. at 293. "The operation of the bankruptcy system depends on honest reporting. If debtors could omit assets at will, with the only penalty that they had to file an amended claim once caught, cheating would be altogether too attractive." *Rogers v. Boba (In re Boba)*, 280 B.R. 430, 435-36 (Bankr. N.D.Ill.2002), quoting *Payne v. Wood*, 775 F.2d 202, 205 (7th Cir.1985); *Mazer v. United States*, 298 F.2d 579, 582 (7th Cir.1962).

After the creditor has demonstrated that the debtor made false statements, he must establish that these statements were made knowingly and fraudulently. As in § 727(a)(2)(A), direct evidence of intent to defraud is seldom available. Fraudulent intent must be inferred from circumstantial evidence or by inferences based on a course of conduct. *Bailey*, 145 B.R. at 928; *Nat'l Post Office Mail Handlers, Watchmen, Messengers & Group Leaders v. Johnson (In re Johnson)*, 139 B.R. 163, 169 (Bankr. E.D.Va.1992). Moreover, if a debtor's bankruptcy schedules and statements indicate that the debtor is recklessly indifferent to the truth, the objecting creditor does not have to offer any additional evidence of fraud. *In re Johnson*, 139 B.R. at 166 (citation omitted) (noting that courts recognize that a reckless indifference to the truth is "the functional equivalent" of fraud); *Bailey*, 145 B.R. at 928 (citations omitted) ("The cumulative effect of a number of false oaths by the debtor with respect to a variety of matters establishes a pattern of reckless and cavalier

disregard for the truth by the debtor.”); *Calisoff v. Calisoff (In re Calisoff)*, 92 B.R. 346, 355 (Bankr. N.D.Ill.1988).

Finally, the creditor must show that the false statements made by the debtor relate materially to the bankruptcy case. A statement is considered material for purposes of § 727(a)(4) if it relates to the debtor's estate, involves the discovery of assets, or concerns the disposition of the debtor's property or his entitlement to discharge.

Williamson, 828 F.2d at 251; *Chalik v. Moorefield (In re Chalik)*, 748 F.2d 616, 618 (11th Cir.1984) (citations omitted); *Netherton v. Baker (In re Baker)*, 205 B.R. 125, 133 (Bankr. N.D.Ill.1997).^{FN7}

FN7. Again, the foregoing analysis was stated with respect to a proceeding to deny a discharge to a Chapter 7 debtor, potentially a much more serious circumstance than that presented by denying confirmation of a plan under 11 U.S.C. § 1325(a)(7). However, the necessity of being completely open and honest with the bankruptcy court, with the Chapter 13 Trustee, and most importantly with creditors as to a debtor's interests in property on the date of the filing of a bankruptcy petition is no less relevant in the context of confirmation of a Chapter 13 plan than it is in the context of considering whether a debtor's discharge in a Chapter 7 case should be entered.

While full and honest disclosure of property interests is only a factor to be considered in the analysis under 11 U.S.C. § 1325(a)(7), the court deems that factor to be the most critical factor in determining whether or not a petition was filed in good faith. The unjustified failure to disclose interests in property which comprises property of the bankruptcy estate under 11 U.S.C. § 541(a) taints a bankruptcy case from its beginning. Undetected, this failure results in a debtor's obtaining an unfair advantage over creditors, in violation of every standard for “good faith” enunciated by cases of the United States Court of Appeals for the Seventh Circuit. Detected, even if corrected, the court is confronted with determining whether or not the initial conduct by the debtor in tainting the case by non-disclosure constituted in essence an effort to “thwart” the debtor's creditors.

Jongsma, 402 B.R. 858, 871-875.

As stated in *Matter of Yonikus*, 974 F.2d 901, 904 (7th Cir. 1992):

Debtors have an absolute duty to report whatever interests they hold in property, even if they believe their assets are worthless or are unavailable to the bankruptcy estate (citations omitted).

Although not precisely parallel to either 11 U.S.C. § 1325(a)(3) or (a)(7) in scope, purpose or legal standards to be applied, 11 U.S.C. § 727(a)(4)(A) has been very strictly applied to both deny and to revoke discharges in Chapter 7 cases under circumstances in which the failure to fully disclose matters involved primarily assets which were of insignificant value or were subject to a assertions of exemption; See, e.g., *In re Bailey*, 147 B.R. 157 (Bankr. N.D.Ill. 1992); *In re Horton*, 252 B.R. 245 (Bankr. S.D.Ga. 2000); *In re Wilson*, 290 B.R. 333 (Bankr. C.D.Ill. 2002).

With respect to Falk’s objection concerning contribution of disposable income by Luedtke, 11 U.S.C. § 1325(b) provides in pertinent part the following:²

(b)(1) 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—

• • •

(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.

(2) For purposes of this subsection, the term “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 made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such 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, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3)) to a qualified religious or charitable entity or organization (as

² The Form B22C (Official Form 22C) filed by Luedtke at the inception of the case establishes that the applicable commitment period (term of the plan) must be five years. Nothing stated in this decision will alter the commitment period, and thus, Luedtke must contribute “disposable income” over a 60-month plan term, as contrasted to a 36-month plan term.

defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Before turning to the court's determination of facts with respect to the objection, certain contentions advanced by Falk will first be addressed. In paragraph 6(a) of the objection, Falk essentially asserts that a Chapter 13 case cannot be filed in good faith if one creditor's debts overwhelmingly predominate over those of other creditors, and that a case that is essentially targeted to one creditor is filed in bad faith. The standards outlined above provide no support for this contention, and Falk's contentions are unrealistic. For example, in the real world of today's housing market, the adoption of such a contention would preclude debtors who file bankruptcy from filing Chapter 13 cases [even in situations where they were compelled to do so under 11 U.S.C. § 707(b)] to avoid collection actions for a mortgage foreclosure deficiency, or to deal with solely tax or support issues when their present income – due to circumstances not of their making – precludes immediate payment of debts. While potentially disparate impact on a particular creditor due to the magnitude of that creditor's debt in relation to other debts in the case has been stated to be a factor under the "totality of circumstances" test, that factor is a very minor one which is by no means dispositive.

Paragraph 6(b) of the objection complains that the plan "fails to, in any manner, deal with payment in full of the non-dischargeable claim (of Falk)". This contention has no merit. First, Falk's claim has yet to be determined to be nondischargeable; in fact, the court denied Falk's request in Adversary Proceeding No. 08-2099 to determine that Luedtke's debt to Falk determined in a state court proceeding was excepted from discharge based upon principles of collateral estoppel. At this point in the case, Falk has a general unsecured claim, and nothing

further. Secondly, nondischargeable debts are to be provided for in the same manner as are debts of the same class, generally as unsecured claims: the only distinction is that nondischargeable debts survive a bankruptcy discharge and continue to be assertable against a debtor after the case is closed.

Paragraph 6(c) complains that the debtor has in part failed to definitively describe items of property which constitute those in general categories in Schedule B. The court views this assertion to be immaterially contentious in its seeming premise that debtors must specifically itemize each item of property which falls within each of the general paragraph categorizations of Schedule B. Moreover, in apparent response to this objection, the debtor filed an amended Schedule B which does delineate with specificity items of property under Schedule B.

Paragraph 6(f) complains of the debtor's treatment of the secured claim of USAA Federal Savings Bank. The claim of this creditor is a "910-day car" claim, in that the loan giving rise to the debt arose on November 29, 2006. Therefore, pursuant to the famous "dangling paragraph" in 11 U.S.C. § 1325(a), the debtor must pay the full amount of the debt to the creditor and cannot "cram down" the claim. The claim asserts the debt to be \$19,020.24, and it's the claims – not the provisions of plans providing for claims – which control the amount to be paid to a creditor. This contention also has no merit.

Falk's principal assertions are that Luedtke has failed to disclose certain of his interests in property; has failed to accurately state his available monthly/annual income; and has improperly asserted regular payment of expenses which were not in fact made. The court agrees with certain of Falk's contentions.

As stated above, a principal obligation of a debtor in any chapter under the Bankruptcy Code is to accurately disclose interests in property, debts, income, and expenses.³ As the court

³ In a Chapter 13 case, accurate disclosure of present and projected income and expenses is particularly important with respect to the computation of disposable income both for

addressed in *In re Jongsma, supra.*, a debtor's compliance with this obligation is the most critical element by which "good faith" under the "totality of circumstances" test is to be gauged.

Cutting to the chase, the court determines the following with respect to matters not disclosed or inaccurately disclosed by Luedtke.

First, on the date of the filing of the petition, Luedtke maintained an account described as a "green dot" account with Walmart. Deposits of Luedtke's income were made into this account, and payment of certain of Luedtke's debts were made from this account. This account was never disclosed in the bankruptcy filings. While it may be true that on the date of the petition there was less than \$8.00 in this account, the failure to disclose the account precluded creditors, the Chapter 13 Trustee and the court from reviewing the account as property of the estate, including review for potential preferential transfers or other avoidable transactions. The court deems the failure to disclose this account to be a material non-disclosure.

Luedtke's original Schedule B stated that he had no checking or savings account, or other account with a financial institution. The amended Schedule B, filed after the confirmation objection filed by Falk, discloses a bank account. Again, information concerning bank accounts held on the date of the petition is critical to investigation of potential avoidable transfers and potential availability of property to be considered under 11 U.S.C. § 1325(b)(4).

The original Statement of Financial Affairs filed at the inception of the case disclosed no "Other transfers" under section 10. The amended Statement of Financial Affairs – filed prior to Falk's objection but only several days prior to the confirmation hearing – disclosed a transfer of \$18,000.00 to Luedtke's daughters, Jaime and Katrina. The transcripts of the Rule 2004 examinations of James Luedtke, Jaime Luedtke and Katrina Luedtke admitted into evidence at

the purposes of the commitment period under § 1325(b), and for the purposes of actually determining the amount of disposable income which should be required to be contributed under that section.

the hearing held on September 30, 2010 disclose that James and Katrina testified that the amount transferred was \$18,000.00, but that Jaime testified the amount transferred was \$23,250.00. The court determines that Jaime's testimony is more credible, and that the actual amount of money provided by James Luedtke to his daughters for purchase of a parcel of real estate was \$23,250.00. Therefore, this is a transfer that was not reported when the case was filed, and when reported by means of an amended Statement of Financial Affairs, was understated.

James Luedtke apparently borrowed the money provided to Jaime and Katrina from his employer's 401(k) plan, creating a debt that he periodically repaid. While he acknowledged this debt in a Rule 2004 examination conducted by Falk and in the September 30, 2010 hearing, this loan transaction and the obligation to repay it monthly by a payroll deduction was never disclosed in his bankruptcy filings. The failure to disclose the indebtedness and the repayment of it is again material with respect to computation of disposable income under 11 U.S.C. § 1325(b).

With respect to the disclosure of ordinary income, based upon the evidence before the court, line 1 on Schedule I should have stated the amount of \$5,122.75⁴ as an average monthly income rather than the amount of \$5,027.00 as was stated. With respect to the Schedule I, line 4(b) stated deduction of \$381.00 per month for insurance, while the actual amount deducted is \$190.00. This discrepancy was never sought to be cured by amendment to Schedule I. Based upon the evidence, on May 22, 2008, line 12 on Schedule I should have stated \$1,106.64 (the net amount of the monthly pension payment (\$708.64), plus the "VA waiver" (\$398.00) which Luedtke testified was deposited monthly into an account for his

⁴ This amount is 1/12th of the gross earnings stated on line 7 of Luedtke's 2008 federal income tax return (Falk's Exhibit 4), which presumably includes a profit-sharing distribution in the gross amount of \$8232.03 from Luedtke's employer made in March of 2008. Luedtke's monthly gross income for the month of May, 2008 was \$5177 (Falk's Exhibit 1).

benefit)⁵. The combination of these understatements resulted in \$6,229.39 of monthly income, as contrasted to the \$6,056.87 disclosed in Schedule I.⁶

Turning to Schedule J, line 1 stated a “rent or home mortgage payment” of \$1,137.00. The evidence is clear that at the time the case was filed Luedtke was not making a mortgage payment and he was not paying rent to his daughters. In fact, his 2004 examination testimony, and the examination testimony of his two daughters, in September of 2008 established that Luedtke was not making any mortgage payments or paying any rent at that time, and hadn’t made any since the filing of his bankruptcy case in May, 2008. Thus, Schedule J should have stated “0.00” on line 1, which makes a huge difference in the computation of disposable income.⁷

Review of disclosure of actual and potential distributions by Luedtke’s employer under an employer/employee profit sharing plan is a little bit more involved. In March of 2008, Luedtke received a profit sharing distribution in the gross amount of \$8,232.03. As the court stated repeatedly at the September 30, 2010 hearing, the focus of determination of Falk’s objection is circumstances which existed during the time frame of filing of the case through the confirmation hearing. The court adheres to this focus, but it needs noting that Luedtke received another profit sharing distribution in the gross amount of \$13,290.48 in March of 2009, and that

⁵ Falk’s Exhibit 3 states that as of July 1, 2008, the “net pay” amount of the pension payment increased to \$829.48, which resulted in a total monthly pension payment of \$1227.48.

⁶ Again, as noted previously, Schedule I did not note on line 4(d) the monthly payment on the 401(k) loan.

⁷ The court recognizes that a debtor in transition between making a mortgage payment and finding other living accommodations may not be able to accurately state the amount to be paid monthly for the costs of providing habitation. However, in this case there was in fact no housing expense on the date the petition was filed, and even if one were to deem Schedule I to be somewhat forward looking as to anticipated expense, nearly four months after the case was filed there was no expense. Debtors in this situation must accurately disclose the circumstances which exist on the date of the filing of the petition; possible anticipated adjustments can be explained in notes/addenda to the required Schedules.

thus it was foreseeable that his income was actually fairly regularly potentially enhanceable by these annual profit sharing payments. There is nothing anywhere close to a clear disclosure in the documents filed with the court which alerts the Trustee, creditors or the court to this potentially regularized annual increase in income, again a factor highly material to determination of disposable income to be contributed by Luedtke. While perhaps the 2008 distribution is somewhat reflected in Schedule I, line 1, viewed through the lens of the evidentiary record, the manner of preparation of Schedule I is at best confusing in its inaccuracies and lack of detailed specificity.

Finally, at the time the case was filed Luedtke could have anticipated the receipt of a fairly large income tax refund. The manner in which this is supposed to be handled is that Schedule I, line 1 states gross wages, and Schedule I, line 4 states the debtor's current deduction for taxes, including income taxes. Customarily, the additional income provided by a regularized annual tax refund is disclosed on line 13 of Schedule I. Section E(8) of Luedtke's Chapter 13 plan states:

8. Debtor(s) has/have pro-rated the amount of tax refund income anticipated to be received during the pendency of this plan and included this amount on Schedule I.

What this provision actually means is beyond the court's present comprehension, and is not in any manner evident from Schedule I. Based upon Luedtke's wage statements which were placed in evidence, it appears that the amount of tax withholding stated on line 4(a) of Schedule I is less than the amount actually withheld, and perhaps Section E(8) of the plan reflects a monthly pro-rated deduction of the amount of income tax withholding on line 4(a) and a commensurate increase in line 6. However, given the way Schedule I was completed (it was never amended) in relation to the actual facts which existed on the date of the filing of the petition, Luedtke's accurate disclosure of information concerning income tax refunds is at best obtuse, and at worst highly questionable.

From the foregoing, it can be seen that the principal problem with Luedtke's disclosures in documents filed with the court is in relation to disposable income. Based upon the actual facts, disposable income available to creditors on the date of confirmation of the plan was potentially significantly more than that derived from the debtor's record disclosures.⁸

The plan filed in this case provides for a monthly payment of \$700.00 to the Chapter 13 Trustee. From that amount, \$375.00 per month is paid to USAA Federal Savings Bank; a balance of debtor's counsel fees of \$2,724.00 remains to be paid; and compensation to the Chapter 13 Trustee must be paid as well. Without computing with precision, less than \$300.00 per month would be paid on general unsecured claims – paragraph 9 of the plan actually provides that nothing will be paid on general unsecured claims. Based upon the court's determinations as stated above, the plan does not provide disposable income for the payment of general unsecured claims in conformity with 11 U.S.C. §1325(b); far more significantly, this inadequacy was shielded by the debtor's failure to disclose a number of material facts, as outlined above. The failure to disclose, in documents required by law to be filed with the court, a number of material facts important to determination of disposable income was, in the court's view, intentional on the part of the debtor. A few of these failures have been modulated somewhat by amendments to documents filed of record, and it appears to be the debtor's contention that a number of others can be corrected by an appropriate amendment to the plan. However, under the circumstances of this case, amendment of required filings and of the plan

⁸ Although the Form B22C (Official Form 22C) already provided for a five year commitment period, accurate declaration of dependents is material in determining disposable income for the purposes of 11 U.S.C. §1325(b). There are significant factual issues as to whether or not Jaime Luedtke and Kristen Luedtke were "dependents" of the debtor and his wife on the date that the case was filed, based upon the Rule 2004 examination testimony of both of them which essentially established they paid their own way for everything, except that they allowed their father to pay for the telephone because he used it so much for business. We'll leave it at that. The record is not developed enough in the court's view to allow for a determination that the daughters were not in fact dependents as a matter of law.

to accurately state the debtor's financial picture is somewhat tantamount to an "oh golly, you got me, now I'll make it right" approach to the absolute necessity for accurate filings at the inception of a bankruptcy case. There may be certain items in Schedule I and Schedule J that the debtor could not project with accuracy (particularly the potential for payment of future housing expense), but if that were the case, that is what the Schedules should have said – they should have stated the actual facts on the date of the filing, and the possibility that accommodations would have to be made in the future for presently unknown items. That was not done here. The Chapter 13 Trustee, creditors and the court rely upon the documents filed by debtors in a case to accurately state information necessary for determination of issues concerning confirmation of a Chapter 13 plan, including issues under 11 U.S.C. § 1325(b). When disclosures are not accurate, the entire foundation for fair treatment of creditors is undermined. The collapse of that foundation in a particular case cannot be cured by an attempted rebuilding of the foundation after extended proceedings which have probed and exposed the incidences of collapse.

The good faith standards of § 1325(a)(3) and of § 1325(a)(7) are to be analyzed under a "totality of circumstances" test, and one factor – that of accurate disclosure – while the most critical, is not determinative. The multi-factor tests of *In re Rimgale*, 669 F.2d 426 (7th Cir. 1982), of *In re Smith*, 848 F.2d 813 (7th Cir. 1988) and of *In re Love*, 957 F.2d 1350 (7th Cir. 1992) also focus in part on a debtor's prepetition conduct and the nature of debts sought to be affected by a Chapter 13 plan. In this case, Luedtke's prepetition conduct in relation to debts subject to arrangement in his case is essentially neutral at this point: the state court record utilized in determination of Falk's collateral estoppel contentions in Adversary Proceeding No. 08-2099 establishes only a knowing derivation of benefits from his wife's embezzlement, not active participation in her actions. Luedtke's primary motivation in filing a bankruptcy petition was benign – implementation of the automatic stay to quell Falk's collection actions, including

garnishment of his wages. Although tritely intoned in television and other media advertisements by debtors' bankruptcy practitioners, "saving the house", "saving the car", and stalling creditors' collection activities are the principal reasons people file bankruptcy petitions, reasons totally endorsed by 11 U.S.C. § 362(a) and by Chapters 7 and 13 in terms of relief available to most consumer debtors. However, Luedtke's disingenuously inaccurate disclosures of multiple items in his bankruptcy filings, coupled with the Chapter 13 plan's treatment of creditors based on them – violate all four of the perhaps largely displaced elements of *Rimgale*, and the most critical elements of *Smith* and *Love*, in relation to determination of the good faith of Luedtke under 11 U.S.C. § 1325(a)(3) and 11 U.S.C. § 1325(a)(7), and in the court's view establish the debtor's intent to thwart his creditors.

Based upon the foregoing, the court determines as follows:

A. The court finds that the action of James Edward Luedtke in filing the petition was not in good faith, and that Falk's objection to confirmation under 11 U.S.C. § 1325(a)(7) is sustained.

B. James Edward Luedtke's plan was not proposed in good faith, and Falk's objection to confirmation pursuant to 11 U.S.C. § 1325(a)(3) is sustained.

C. Due to the two foregoing determinations, the court deems it unnecessary to address the substance of Falk's objection regarding disposable income under 11 U.S.C. § 1325(b).

IT IS ORDERED, ADJUDGED AND DECREED that confirmation of the Chapter 13 plan of James Edward Luedtke filed on May 22, 2008 is DENIED.

Dated at Hammond, Indiana on April 8, 2011.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:
Debtor, Attorney for Debtor, Trustee, US Trustee, Attorney for Creditor