

1 which has rendered his current and anticipated monthly income
2 less than his prior monthly average.

3 The Trustee also objected on the ground that the plan was
4 not proposed in good faith since the Debtor was not entitled to a
5 discharge due to a recent discharge under Chapter 7 and the
6 Debtor had purchased an expensive vehicle. The Court took the
7 matter under submission to look at the state of the law under the
8 amended Bankruptcy Code to determine whether the Court has the
9 discretion to consider the circumstances in determining
10 "projected disposable income" or whether, as the Trustee
11 contends, the Court is limited to the information set out in the
12 Form B22C. For the reasons set forth above, the Court holds that
13 it is not limited to the information in the Form B22C, and may
14 consider the circumstances which exist as of the petition date.
15 The Court also finds that the plan was proposed in good faith.

16 This Court has subject matter jurisdiction pursuant to
17 28 U.S.C. § 1334 and General Order No. 312-D of the United
18 States District Court for the Southern District of California.
19 This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L).
20

21 **FACTS**

22 On January 17, 2006, the Debtor received a discharge under
23 Chapter 7. Three days later he purchased a 2004 Chevrolet
24 Silverado with funds borrowed from Capital-One Auto Finance. At
25 some point thereafter, Debtor incurred approximately \$23,000 in
26 medical bills.

1 On June 30, 2006, the Debtor filed this case and proposed a
2 plan paying \$570.00 per month with a 0% dividend to unsecured
3 creditors. The only creditor proposed to be paid under the plan
4 is Capital-One, the lienholder on Debtor's truck. The Debtor
5 arrived at the \$570.00/month figure by taking his average monthly
6 net income for the six months prior to the petition (as reported
7 on Form B22C line 58) and subtracting as an "Additional Expense
8 Claim" \$459.17 described as "Debtor no longer does freelancing
9 which makes disposable income negative." (See Form B22C line
10 59). The Debtor later explained that due to the hourly demands
11 of his new job and the prohibition of his new employer, he could
12 no longer do the freelance work which he had done to supplement
13 his income in the months prior to this case.

14 The Chapter 13 Trustee objected to confirmation of Debtor's
15 plan on the ground that Debtor had not committed all of his
16 "projected disposable income" to the plan as required under
17 Bankruptcy Code § 1325(b)(1)(B). Specifically, the Trustee
18 objects to the Debtor having claimed loss of income as an expense
19 on the Form B22C. Having removed this item, the Trustee arrived
20 at "Monthly Disposable Income Under § 1325(b)(2)" of \$285.57
21 (Form B22C line 58.). Multiplying this figure by the projected
22 term of the plan (60 months for this Debtor whose income exceeds
23 the applicable family median), the Trustee concludes that
24 Debtor's plan must provide payment to unsecured creditors of at
25 least \$17,134.20. As a legal matter, the Trustee contends that
26 under the newly amended Code, the Debtor is bound by the results

1 of the Form B22C. In other words, the Trustee contends that
2 Debtor's "projected disposable income" is to be based solely upon
3 the Debtor's average salary for the six months prior to the
4 petition and that the Court may not consider the Debtor's changed
5 circumstances.

6 The Debtor, on the other hand, contends that the recent
7 alterations in his income can be taken into consideration in
8 determining whether he is devoting all of his "projected
9 disposable income" to the plan. The Debtor explains that the
10 demands of his new job preclude him from supplementing his income
11 with freelance work as he had in the past. Thus, the six month
12 prepetition period reported in the Form B22C is not reflective of
13 his actual income. The Debtor declares that he ceased doing
14 freelance work as of May, 2006.

15 The Debtor also argues that the plan was submitted in good
16 faith - that this case was necessitated by the unanticipated
17 medical expenses.

18 On September 27, 2006, a hearing was held on the Trustee's
19 objection to confirmation. The Court requested additional
20 briefing which was completed on October 20, 2006, at which point
21 the Court took the matter under submission.

22 23 **DISCUSSION**

24 **Effect of the Form B22C Means Test**

25 Section 1325(b)(1) of the Bankruptcy Code requires that if a
26 creditor or the chapter 13 trustee objects, the court cannot

1 confirm the debtor's proposed plan unless either all claims are
2 paid in full, or the plan provides that all of the debtor's
3 "projected disposable income" will be paid to unsecured
4 creditors. Prior to October 17, 2005, "disposable income" was
5 defined as income that was not reasonably necessary for the
6 maintenance or support of the debtor or a dependent. 11 U.S.C.
7 § 1325(b)(2)(A) (2005). The courts generally considered the
8 debtor's budget as reflected in the bankruptcy Schedules I
9 (Current Income) and J (Current Expenditures).

10 However, because this case was filed after October 17, 2005,
11 the provisions of the Bankruptcy Abuse Prevention and Consumer
12 Protection Act ("BAPCPA") apply. Under amended § 1325(2)
13 "disposable income" is defined as "current monthly income
14 received by the debtor (other than child support payments, foster
15 care payments, or disability payments for a dependent child made
16 in accordance with applicable nonbankruptcy law to the extent
17 reasonably necessary to be expended for such child) less amounts
18 reasonably necessary to be expended. . . ." Under § 101(10A)
19 "current monthly income" is defined as "the average monthly
20 income from all sources that the debtor receives without regard
21 to whether such income is taxable income, derived during the
22 6-month period . . . immediately preceding the date of the
23 commencement of the case." 11 U.S.C. § 101(10A).

24 Pursuant to Bankruptcy Rule (Interim Rule) 1007(b)(6), a
25 debtor filing a petition under Chapter 13 is required to file
26 Official Form B22C, which is entitled "Statement of Current

1 Monthly Income and Calculation of Commitment Period and
2 Disposable Income." Form B22C is used to calculate a debtor's
3 current monthly income, applicable commitment period, and
4 disposable income based upon the average monthly income for the
5 six calendar months prior to the filing of the bankruptcy case.

6 Debtor contends that section 1325(b)(1)(B) does not mandate
7 that he pay unsecured creditors the disposable income calculated
8 on Form B22C. Debtor relies on the term "projected"
9 in section 1325(b)(1)(B), which modifies the term "disposable
10 income." Debtor contends that since the term "projected
11 disposable income" describes the monthly payment amount owed to
12 unsecured creditors in section 1325(b)(1)(B), and not the term
13 "disposable income" as provided in section 1325(b)(2), the Code
14 permits him to propose the more current, actual amount of his
15 income available for distribution.¹

16 As stated above, Debtor's actual current income is less than
17 his average income for the six months prior to the petition
18 because he has had to give up the freelance work he had been
19 doing.² Due to the significant reduction in income, the Debtor
20 argues that he no longer has the means to pay unsecured creditors

21
22 ¹ Debtor also argues that the Code mandates that "special circumstances" be considered
23 since § 1325 refers to § 707(b)(2)(A) and (B), which so provides. However, the reference in §
24 1325 to § 707 applies only to the determination of "amounts reasonably necessary to be
expended." It does not apply to the income aspect of the equation. Reference to "special
circumstances" in § 707 applies only to the calculation of expenses.

25 ² The Trustee complains that Debtor has provided no evidence that his current employer
26 forbids freelance work. However, Debtor has provided a letter from his employer explaining that
Debtor is prohibited by agreement from engaging in the type of freelance work Debtor had been
doing in the six months prior to the petition.

1 according to the "Monthly Disposable Income" calculation of Form
2 B22C. As noted, the Trustee disagrees.

3 The Court agrees with the Trustee's assertion that Debtor's
4 inclusion of "loss of income" as a deduction on Form B22C line 59
5 is not proper. The Court also agrees that the proper place to
6 account for the loss of income is on Schedules I and J, which
7 reflect the Debtor's income as of the petition date, and thus
8 arriving at a different disposable income on Schedule J. The
9 Court, however, took the matter under submission to consider the
10 Trustee's assertion that such "a change, however, would not alter
11 the CMI or B22C calculations of projected disposable income under
12 the Rotunda, Beasley, Guzman, Alexander and Barr analyses." To
13 be sure, the cases cited by the Trustee have indeed held that the
14 calculations based upon Form B22C were the final word no matter
15 whether the resulting "projected disposable income" reflected the
16 reality of the situation or not. See e.g. In re Guzman, 345 B.R.
17 640, 646 (Bankr.E.D.Wisc. 2006). Other courts have, however,
18 held to the contrary -- that additional information may be used
19 in determining "projected disposable income."

20 The Court has considered the case law on both sides and
21 finds the latter line of cases to be more compelling.

22 The case most closely on point is the recent case of In re
23 Grady, 343 B.R. 747 (Bankr.N.D.Ga. 2006). In Grady, the court
24 held that when determining "projected disposable income" the
25 court could take into consideration debtor-wife's recently
26 developed heart condition which precluded her from earning the

1 income she had for the months leading up to the petition -- that
2 "the Debtors are required to pay the projected disposable income
3 amount to the unsecured creditors based upon their financial
4 situation as of the petition date." Id. at 748.³

5 This Court agrees with the court in Grady that the plain
6 language of section 1325(b)(1)(B) provides that the term
7 "projected disposable income," is different from the term
8 "disposable income" under section 1325(b)(2). The term
9 "projected disposable income" in section 1325(b)(1)(B) is not
10 defined in the Bankruptcy Code and is a pre-BAPCPA term.
11 Congress did redefine disposable income as "current monthly
12 income less reasonable expenses", defined in turn as an average
13 of gross monthly wages of the six calendar months preceding the
14 petition date. 11 U.S.C. § 101(10A). However, Congress did not
15 revise the language of section 1325(b)(1)(B) to remove the term
16 "projected." That Congress continued the use of the additional
17 term "projected" in section 1325(b)(1)(B) indicates to this Court
18 a distinction from "disposable income" in section 1325(b)(2).

19 Thus, the Court holds that in order to determine the income
20 to be used for the purposes of determining "projected disposable
21 income" the Court and the parties must look to actual income at
22 the time the debtor filed the petition, not simply the average
23 historical income from the six months before. Form B22C line 58
24 provides a starting point. However, the Court holds that it may
25 consider evidence that would indicate that the "projected

26 ³ For an in-depth analysis of the issue the parties are directed to the discussion in Grady.

1 disposable income" is different than the figure reflected
2 therein, and can be greater than or less than the six month pre-
3 petition average.

4 In the case at hand, the Debtor has provided evidence that
5 the demands of his current job do not allow him to engage in the
6 freelance operations with which he had supplemented his income in
7 the months prior to the beginning of this case. This evidence is
8 not controverted. Accordingly, the Court accepts Debtor's
9 declaration that his current income leaves no projected
10 disposable income available for distribution to unsecured
11 creditors.

12 Of course, if this situation changes, the Trustee is free to
13 move to amend the plan in the future.

14 **Good Faith**

15 As discussed above, the Trustee argues that since the Debtor
16 is ineligible for a discharge in this case, having received one
17 in a Chapter 7 case on January 17, 2006, his plan cannot have
18 been proposed in good faith, particularly where it is being used
19 to fund the purchase of an expensive vehicle which is not
20 required as a reasonable and necessary expense.

21 As to the truck, it is a 2004 Chevrolet Silverado pick-up
22 truck valued at \$17,600.00 as of the date of the petition. The
23 Trustee has provided neither evidence nor authority for the
24 proposition that it is unnecessary or unreasonable per se. As
25 the Debtor points out, the fact that it is able to haul his
26 motorcycles does not render it unnecessary for ordinary

1 transportation. Further, there is no evidence that Debtor
2 anticipated filing this case when he purchased the truck. The
3 evidence before the Court is that the case was precipitated by
4 large and unanticipated medical expenses which were incurred
5 after the truck had been purchased.

6 As to the fact that Debtor cannot obtain a discharge in this
7 case, the Court has found no authority which would render that a
8 per se indication of lack of good faith. If Congress had
9 intended that a debtor, per se, not be eligible to file a Chapter
10 13 bankruptcy petition within a certain time period after
11 receiving a Chapter 7 discharge, either at all or only under
12 conditions requiring some minimum distribution to unsecured
13 creditors, they certainly knew how to write such a provision.

14 See 11 U.S.C.

15 § 109, 727(a)(9), and 1328(f). Moreover, § 727(a)(9)
16 demonstrates that Congress understood "good faith" to be
17 something separate from some threshold percentage distribution to
18 unsecured creditors because "good faith" is an independent
19 element to be satisfied in addition to a specified percentage.

20 Congress did not define "good faith" in the 2005 BAPCPA
21 amendments to the Bankruptcy Code. So we must resort to pre-
22 BAPCPA cases for amplification. Indeed, good faith has generally
23 been determined on a case-by-case basis, and courts have
24 identified a number of specific factors to be considered:

25 1) The amount of the proposed payments and the amount of the
26 debtor's surplus;

- 1 2) The debtor's employment history, ability to earn, and
- 2 likelihood of future increases in income;
- 3 3) The probable or expected duration of the plan;
- 4 4) The accuracy of the plan's statements of the debts, expenses
- 5 and percentage of repayment of unsecured debt, and whether any
- 6 inaccuracies are an attempt to mislead the court;
- 7 5) The extent of preferential treatment between classes of
- 8 creditors;
- 9 6) The extent to which secured claims are modified;
- 10 7) The type of debt sought to be discharged, and whether any
- 11 such debt is nondischargeable in Chapter 7;
- 12 8) The existence of special circumstances such as inordinate
- 13 medical expenses;
- 14 9) The frequency with which the debtor has sought relief under
- 15 the Bankruptcy Reform Act;
- 16 10) The motivation and sincerity of the debtor in seeking
- 17 Chapter 13 relief; and
- 18 11) The burden which the plan's administration would place upon
- 19 the trustee.

20 In re Warren, 89 B.R. 87, 92-93 (9th Cir.BAP 1988); In re
21 Tomasini, 339 B.R. 773, 779-780 (Bankr.Utah 2006).

22 A review of these factors convinces the Court that this case
23 was filed in good faith:

24 1. Based upon the Court's determination that Debtor's
25 projected disposable income takes into consideration his loss of

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1 freelance income, Debtor would have no surplus under the proposed
2 plan.

3 2. The plan accounts for Debtor's current ability to earn
4 an income. Any future increase can be accounted for by a motion
5 to modify.

6 3. The duration of the plan is the maximum 5 years.

7 4. There is no evidence that Debtor's financial statements
8 are inaccurate.

9 5. The only preferential treatment between classes of
10 creditors - payment of the secured claim at the expense of the
11 unsecured claims - is mandated by § 1325(a)(5).

12 6. No secured claims are modified.

13 7. No debt is sought to be discharged, whether
14 dischargeable in a chapter 7 or otherwise.

15 8. There are special circumstances precisely of the type
16 contemplated by this factor - inordinate medical expenses.

17 9. Debtor has sought bankruptcy relief twice within seven
18 months. However, Debtor explains that the second filing was
19 brought on by unanticipated and intervening medical expenses.

20 10. The Court has received no evidence which would give
21 rise to doubts as to Debtor's motivation and sincerity.

22 11. Finally, there is no inordinate administrative burden
23 on the Trustee.

24 Based upon the factors discussed above the Court finds that
25 Debtor's plan has been proposed in good faith.

26 ///

1 **CONCLUSION**

2 For the reasons set forth above, the Court denies Trustee's
3 objection to confirmation. Debtor's plan is hereby confirmed.
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5 IT IS SO ORDERED.

6 DATED: JAN - 3 2007

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10 
11 PETER W. BOWIE, Judge
12 United State Bankruptcy Court
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