

1 (Bankr. S.D. CA 2010). Since the matter was briefed by the
2 parties and thereafter was taken under submission, it
3 appears the senior lienholder filed a proof of claim,
4 asserting arrears of \$8,299.30. The parties have not
5 addressed what impact, if any, that proof of claim might
6 have on the confirmability of debtor's proposed plan.

7 Both sides have filed supplemental pleadings, and appear to
8 recognize that "good faith" is a requirement in proposing a
9 Chapter 13 plan, and in seeking its confirmation under 11 U.S.C.
10 § 1325 (a) (3).

11 At the conclusion of any good faith analysis, in a Chapter
12 20 case, the question which remains is what happens to the
13 stripped off junior debt. As this Court set out in arduous
14 detail in In re Victorio, 454 B.R. 759 (2011), because of
15 enactment of § 1328(f) combined with applicable prior law, debt
16 avoided under 11 U.S.C. §506(d) is not discharged. While payment
17 on it may be deferred over the life of a good faith plan, the
18 debt only goes away permanently if it is paid off in full or if
19 it is discharged. In re Leavitt, 171 F.3d 1219 (9th Cir. 1999).
20 Since it cannot be discharged because of § 1328(f), it continues
21 to exist, to be paid at some future date. Arguments such as
22 debtor here advances about her liability on the debt having been
23 discharged in her prior Chapter 7, are unavailing, as set out in
24 the discussion of Johnson v. Home State Bank, 501 U.S. 78 (1991),
25 in Victorio. While this matter has been under submission,
26 Victorio has been affirmed. 470 B.R. 545 (S.D. CA 2012).

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1 Which returns us to the good faith issue. When debtor filed
2 her case, and later filed the balance of her Schedules and her
3 Chapter 13 plan, she proposed to pay nothing to unsecureds, to
4 pay \$362 per month to the trustee, and to strip off the second
5 lien on her residence. Because the senior lender had not filed a
6 proof of claim for any arrears, the trustee calculated that the
7 plan would be completed in about 8 months. Debtor filed
8 Schedules I and J, showing income of \$4,572.50 and expenses of
9 \$4,210.50, with a net disposable income of \$362. Debtor did
10 disclose on her Schedule I that she received \$900 per month in
11 rental income. However, she did not include that information on
12 her calculation of her Current Monthly Income. Because that was
13 omitted, her form B22C showed that she was below median income,
14 and therefore had an applicable commitment period (ACP) of 3
15 years.

16 The Chapter 13 trustee objected to omission of the rental
17 income, and requested an amended B22C. Debtor prepared and filed
18 one, showing that inclusion of the rental income made debtor an
19 Above Median Income debtor, which in turn called for a 5 year
20 applicable commitment period. However, completion of the full
21 B22C also showed that debtor had a negative projected disposable
22 income. Under the rulings of the Ninth Circuit in In re
23 Kagenveama, 541 F.3d 868 (2008), and In re Flores, 692 F.3d 1021
24 (2012), where a debtor has no projected disposable income, the
25 applicable commitment period calculated under B22C is not
26 controlling. The Ninth Circuit has agreed to hear that matter en

1 banc in an order entered December 19, 2012. That order also
2 provided: "The three-judge panel opinion shall not be cited as
3 precedent by or to any court of the Ninth Circuit."

4 Regardless of how the Ninth Circuit answers the question in
5 Flores, the trustee points out that debtor's amended B22C is
6 incorrect because it claims an expense allowance of \$496 per
7 month for vehicle ownership while debtor has no such expense
8 because she owns the vehicle free and clear. See In re Ransom,
9 131 S.Ct. 716 (2011). Adding that \$496 back in to debtor's
10 former negative projected income of \$-401.14 yields a positive
11 projected disposable income of \$94.86, which then means debtor
12 has a required applicable commitment period of 5 years, and the
13 approximate 37 months debtor proposes is not legally sufficient.

14 As noted, the central question posited by this Chapter 20
15 case is whether debtor's plan is proposed in good faith. This
16 Court finds and concludes that it is not, when debtor's plan will
17 take approximately 37 months to complete paying nothing to
18 unsecured creditors. Because debtor is an above-median income
19 debtor, with a positive projected disposable income, debtor's
20 applicable commitment period is 60 months. Proposal of a plan
21 for a substantially shorter period of time without paying
22 anything to unsecured creditors (when there is an unsecured
23 creditor), is not a plan proposed in good faith.

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1 Accordingly, the trustee's objection to confirmation is
2 sustained and confirmation of the proposed plan is denied. Debtor
3 shall have twenty-eight (28) days from the date of entry of this
4 Order within which to file and serve an amended plan. If debtor
5 fails to timely do so, on or after the 31st day from date of
6 entry of this Order the trustee may lodge for consideration a
7 proposed order dismissing this case.

8 IT IS SO ORDERED.

9 DATED: JAN 22 2013



PETER W. BOWIE, Judge
United States Bankruptcy Court

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