

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

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In Re. :
: 08-13684 ABC
CHRISTOPHER JOSEPH BARAJAS : (Chapter 13)
and MINDI ANN BARAJAS, :
: Debtors. :
- - - - -x

**ORAL RULING
REGARDING DEBTORS' MOTION TO CONFIRM PROPOSED CHAPTER 13 PLAN
AND CHAPTER 13 TRUSTEE'S OBJECTION THERETO**

Courtroom C

U.S. Bankruptcy Court
721 - 19th Street
Denver, Colorado 80202

August 11, 2008

BEFORE THE HONORABLE A. BRUCE CAMPBELL, JUDGE.

APPEARANCES:

For Debtors: John Turner
303 S. Cascade Ave., Ste. 101
Colorado Springs, CO 80903
Via Telephone

For Chapter 13 Trustee: William Lambert
P.O. Box 1169
Denver, CO 80201
Via Telephone

Proceedings recorded by electronic sound recording,
Transcript requested 9/4/08 by Judge Campbell
Transcript provided 10/3/08 by VERBATIM DIGITAL REPORTING, LLC
Cost of Transcript: \$58.40 (\$3.65 ~ Ordinary)

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P R O C E E D I N G S

THE CLERK: Your Honor, on the line I have Mr. John Turner and Mr. William Lambert on the Barajas matter and we're on the record.

THE COURT: Counsel, this is Judge Campbell. Can you hear me?

MR. TURNER: This is John Turner. I can hear you.

MR. LAMBERT: This is William Lambert. I can hear you.

THE COURT: Thank you. Good afternoon, gentlemen. We are convened this afternoon in the Chapter 13 proceedings of Christopher J. and Mindi A. Barajas, our Docket No. 08-13684. And we're set this afternoon for the Court's Findings and Conclusions and Ruling on a matter that tried a couple weeks ago.

Counsel, before we proceed with the ruling, let's get your appearances formally on the record, please.

MR. TURNER: Good afternoon, Your Honor. John Turner appearing on behalf of the debtors.

THE COURT: Thank you, Mr. Turner.

MR. LAMBERT: William R. Lambert representing the Standing Chapter 13 Trustee.

THE COURT: Thank you, Mr. Lambert.

The Court has jurisdiction over this matter

1 pursuant to 28 U.S.C. §1334 (a) and (b), and 28 U.S.C. §157
2 (a) and (b) (1). This is a core proceeding under 28 U.S.C.
3 §157(b) (2) (L) as it concerns confirmation of a Chapter 13 Plan
4 and an objection thereto.

5 Christopher J. and Mindi A. Barajas are joint
6 debtors in this Chapter 13 case. They have proposed a Chapter
7 13 Plan and seek its confirmation under §1325 of the
8 Bankruptcy Code.

9 The Chapter 13 Trustee has objected to
10 confirmation of this Plan asserting that the debtors' plan
11 should repay 100 percent of their general unsecured creditors,
12 rather than the 84 percent of Class 4 unsecured creditors it
13 purports to repay. The Chapter 13 trustee argues that under
14 the circumstances of these debtors, proposing less than a full
15 payment plan amounts to not proposing a plan in good faith,
16 thereby precluding confirmation under §1325(a) (3).

17 The trustee concedes that the debtors' proposed
18 plan commits all the debtors' projected disposable income as
19 they have computed it for a 60 month commitment period.
20 However, the trustee takes issue with one aspect of the way in
21 which the debtors have calculated projected disposable income.
22 Specifically, the Chapter 13 trustee contests the debtors'
23 calculation of average monthly payments on account of secured
24 debt pursuant to §1325(b) (3) and §707(b) (2) (A) (iii) (I), or
25 (3) (I), Roman Numeral One, that debtors have deducted from

1 current monthly income at arriving at projected disposable
2 income for §1325(b)(1) purposes.

3 The debtors, in turn, maintain that they have
4 properly computed their projected disposable income, including
5 their deductions for average monthly payments on account of
6 secured debt under §707, little b, Arabic 2, capital A,
7 Romanette 3, Roman Numeral 1; 707(b)(2)(A)(iii)(I), as the
8 same appears on line 47 of their Form B22C, and accordingly,
9 their proposed plan, both (a) satisfies the projected
10 disposable income requirement of §1325(b)(1), and (b) meets
11 all good faith requirements of §1325(a)(3) as those
12 requirements concern the amount of funding they are putting
13 into their plan.

14 Stated otherwise, the debtors maintain that they
15 have properly filled out their Form B22C, that they have
16 committed more than the bottom line monthly disposable income,
17 line 59, off their Form B22C amount to the plan for the
18 applicable 60 month commitment period, and that this puts to
19 rest any attacks on their proposed plan based upon projected
20 disposable income, or good faith, insofar as such attacks
21 concern the amount they are committing to pay into their plan.

22 The Chapter 13 trustee's original objection to
23 the debtor's proposed plan was couched both in terms of
24 §1325(a) good faith, and §1325(b)(1) the lack of all projected
25 disposable income. Shortly before trial, the trustee filed a

1 document stating that the remaining issue to be tried
2 concerned only whether the debtors' plan is proposed in good
3 faith as required by 11 U.S.C. §1325(a)(3). On the record of
4 this case, the good faith and disposable income issues are
5 entwined. Both parties tried and argued the case as such.
6 The debtors asserted their compliance with the disposable
7 income requirements of §1325(b) amounted to proof of good
8 faith under §1325(a)(3). The trustee argued that the debtors'
9 failure to commit all their disposable income under §1325(b)
10 amounted to failure to propose the plan in good faith under
11 §1325(a)(3).

12 With guidance from Federal Rules of Civil
13 Procedure Rule 15(b), the Court considers this plan and the
14 objection thereto under both subsections (a)(3) and (b) of
15 §1325.

16 This matter was tried to the Court on July 25th,
17 2008. After taking evidence and hearing argument, the Court
18 took the matter under advisement. We are reconvened, as I
19 said, this afternoon for the Court's Findings of Fact,
20 Conclusions of Law and ruling.

21 These debtors are an example of consumer debtors
22 that Congress sought through the 2005 amendments to the
23 Bankruptcy Code, to withhold a fresh start under Chapter 7.
24 If such debtors were to have bankruptcy relief, the Bankruptcy
25 Abuse Protection, and Consumer -- Bankruptcy Abuse Prevention

1 and Consumer Protection Act of 2005 requires that the relief
2 be in Chapter 13, where some future earnings must be paid to
3 creditors for a five year period before discharge can be
4 obtained.

5 These debtors are insolvent. While they
6 scheduled real property valued at \$200,000 and personal
7 property valued at \$131,607, their debts total more than
8 \$435,000, and almost all their property, to the extent it is
9 non-exempt, is encumbered well beyond its value.

10 In a Chapter 7, unsecured creditors would get
11 nothing, or next to nothing. Yet, these debtors have
12 substantial earning capacity. They make more than the median
13 income for households of their size in Colorado. Their
14 Schedule I shows gross monthly income of \$10,463. This is not
15 out of line with the total annual income reported on their
16 2007 Form 1040 Federal Income Tax Return of \$134,742.

17 Once debtors, like the Barajas, find themselves
18 in Chapter 13, if the trustee or any unsecured creditor
19 objects to confirmation of a Chapter 13 plan, the plan cannot
20 be confirmed unless over the life of the plan debtors pay
21 unsecured creditors in full, or fund the plan with an amount
22 prescribed by §1325(b). That amount is calculated by taking
23 the debtors' current monthly income, and I'll refer to that as
24 CMI, as that term is defined in §101(10)(a) of the Bankruptcy
25 Code, and reducing CMI, first by certain prescribed, fixed

1 national and local monthly living expenses based on IRS
2 standards for settling with delinquent taxpayers.

3 Next, reducing the CMI by monthly secured debt
4 payments. And finally, by reducing CMI by a monthly portion
5 of priority unsecured claims.

6 This results in a monthly disposable income
7 figure which must be funded into the Chapter 13 plan for the
8 applicable commitment period, in this case 60 months, because
9 the debtors are undeniably above the Colorado median income
10 for a household of their size.

11 The debtors' Chapter 13 trustee -- the debtors
12 and the Chapter 13 trustee agree that the debtors' CMI is
13 \$11,499. There is also no disagreement over reducing debtors'
14 CMI by monthly living expenses from the IRS Local and National
15 Guidelines for various categories. The issue over which the
16 parties disagree in this case in computing how much must be
17 paid into the proposed Chapter 13 plan arises concerning the
18 question of how much secured debt may these debtors service at
19 the expense of monthly payments to fund their plan. This is
20 the \$5,089.82 figure at line 47 of the debtors' Form B22C by
21 which the debtors reduce their CMI for average monthly
22 payments on account of secured debts as prescribed by
23 §1325(b)(2)(A)(iii)(I).

24 As the statute dictates, this number is derived
25 by taking, I quote, "The total of all amounts scheduled as

1 contractually due to secured creditors over the 60 months
2 following the filing of the case and dividing by 60."

3 The debtors' \$5,089.82 figure is made up of
4 monthly secured debt service for two home mortgages and seven
5 vehicles; a car, a truck, two motorcycles, two ATVs and a
6 trailer. This, the trustee argues, is simply too much. The
7 trustee contends that proposing to service that much secured
8 debt, while paying less than all that is owed unsecured Class
9 4 creditors, amounts to not proposing a Chapter 13 plan in
10 good faith.

11 The trustee maintains that the debtors are
12 required to fund their plan with all projected disposable
13 income and that projected disposable income is arrived at by
14 reducing CMI only by reasonable necessary expenses. The
15 trustee concludes it is simply not reasonably necessary for
16 these debtors to spend, on seven vehicles monthly, money that
17 could otherwise fund this Chapter 13 plan. Proposing a plan
18 with such expenditures for secured debt, the trustee argues,
19 is not proposing a plan in good faith, as required by
20 §1325(a)(3).

21 The debtors' response to the trustee's argument
22 is simple. Although the statute speaks of reducing CMI only
23 by reasonably necessary expenses in calculating precisely how
24 much money must go into a Chapter 13 plan, §1325(b)(3)
25 mandates in unambiguous terms, as follows, "Amounts reasonably

1 necessary to be expended in computing disposable income shall
2 be determined in accordance with subparagraphs (a) and (b) of
3 §707(b)(2)," end of quote.

4 For purposes of reducing CMI by secured debt
5 payments, §707(b)(2)(A)(iii) takes into account all amounts
6 scheduled as contractually due to secured creditors over 60
7 months. The language of the statute simply does not allow the
8 Court in dealing with an above-median debtor to exercise its
9 judgment as to how much secured debt service during the term
10 of a plan is reasonable or necessary for a given debtor.

11 In the circumstances of some Chapter 13 debtors,
12 Congress apparently contemplated favoring secured debt,
13 including undersecured debt, over general unsecured creditors
14 in placing no limits on monthly secured debt service in the
15 computation of projected disposable income.

16 This is, incidentally, the very same kind of
17 discrimination in favor of undersecured debt over unsecured
18 debt that Congress implemented in the last, so-called hanging
19 paragraph of §1325(a), and which in §1322(b)(2) has long been
20 with us discriminating in favor of undersecured home mortgage
21 lenders.

22 Other than the trustee's complaint concerning the
23 amount of secured debt for vehicles these debtors propose to
24 retain, the record is without evidence that these debtors have
25 proceeded in Chapter 13 other than in good faith. The debtors

1 have been honest and forthright in presenting complete and
2 accurate information in their bankruptcy papers. Before
3 filing bankruptcy, these debtors sought unsuccessfully to
4 resolve their financial difficulties by settling with their
5 creditors.

6 This is the first time these debtors have sought
7 Title 11 relief. These debtors made no attempt to file
8 Chapter 7 where, if not challenged, their general unsecured
9 creditors would receive nothing, or next to nothing. Instead,
10 they filed Chapter 13 where unsecured creditors may receive a
11 substantial dividend in excess of 50 cents on the dollar from
12 a 60 month plan.

13 Apart from retaining a truck, two motorcycles, to
14 ATVs and a trailer, the evidence does not indicate these
15 debtors are maintaining an extravagant or luxurious lifestyle.
16 These debtors have not sought to discharge in Chapter 13 debts
17 that would not be dischargeable in Chapter 7.

18 In short, the evidence in this record supports
19 that these debtors have proposed their Chapter 13 plan in good
20 faith under §1325(a) (3).

21 The Court concludes that the evidence of these
22 debtors' good faith is not overcome by the fact that these
23 debtors seek to retain collateral and pay secured debt as has
24 been permitted and, in fact, prescribed by Congress in
25 computing projected disposable income under §1325(b).

1 This notwithstanding, the debtors' plan is not
2 confirmable in its present state in the face of the trustee's
3 objection. The Court concludes that these debtors have failed
4 to calculate projected disposable income as is required by
5 §1325(b). Where a Chapter 13 plan is objected to by the
6 Chapter 13 trustee and does not pay unsecured creditors in
7 full, §1325(b)(1)(B) mandates that all of the debtors'
8 projected disposable income for the prescribed plan period be
9 paid into the plan for application on secured creditors. The
10 Court concludes the debtors' proposed plan, in its present
11 state, fails to do this and cannot therefore be confirmed.

12 As discussed above, in computing what must go to
13 funding a Chapter 13 plan that fails to pay unsecured
14 creditors fully, i.e. projected disposable income from
15 §1325(b)(1), a debtor starts with CMI. For over-median income
16 debtors, their current monthly income gets reduced by national
17 and local IRS standard living expense categories. That
18 number, in turn, gets reduced by average monthly payments on
19 account of secured debts. And it is here that the debtors'
20 proposed plan fails to commit all projected disposable income.

21 The Court finds that the debtors have reduced
22 their CMI by too much for monthly payments on account of
23 secured debt. The number they use on line 47 of their form
24 B22C is too big. The Court finds the calculation of that
25 number is not in accordance with the statute at

1 §707(b) (2) (A) (iii) (I), as incorporated in the Chapter 13 plan,
2 projected disposable income calculation by §1325 (b) (3).

3 §707(b) (2) (A) (iii) (I) dictates, in relevant part,
4 that the debtors' average monthly payment on account of
5 secured debts shall be calculated as the total of all amounts
6 scheduled as contractually due to secured creditors in each
7 month of the 60 months following the date of the petition,
8 divided by 60. Debtors' miscalculation arises with regard to
9 a financed 2006 Buick, for which at the time they filed their
10 case and filled out their Form B22C, they had a monthly
11 payment due to their secured creditor of \$642.42 for the next
12 60 months. Hence, they took 60 times \$642.42 and divided the
13 result by 60, resulting in \$642.42 as the amount by which they
14 reduced CMI on account to the secured debt -- or in account of
15 the secured debt payment each month on their '06 Buick.

16 The problem with this computation is that
17 according to both the terms of the debtors' proposed plan and
18 the testimony of the debtors, the '06 Buick in question has
19 been surrendered. If the debtors' schedules are correct, the
20 secured lender on this vehicle will realize \$12,900 and will
21 have an unsecured deficiency claim of \$25,654.

22 The debtors no longer have monthly payments on
23 account of this secured debt. In fact, under applicable
24 Colorado UCC Article 9 law, specifically Colorado Revised
25 Statutes 4-9-610, following a commercially reasonable time

1 after surrender of the vehicle within which the secured
2 creditor has to dispose of it, there will be no more monthly
3 amounts due to this secured creditor to be plugged into the
4 §707(b)(2)(A)(iii) calculation of projected disposable income.

5 Accordingly, these debtors' calculation of
6 \$719.71 for monthly disposable income on line 59 of their Form
7 B22C is short by approximately \$600. The monthly payment for
8 this '06 Buick belongs in that calculation as a reduction to
9 CSI [sic] only until the car was surrendered, or at most for a
10 commercially reasonable time thereafter to allow for
11 disposition of this collateral by the secured creditor, after
12 which there were no monthly payments contractually due on this
13 debt.

14 The debtors argue and cite Bankruptcy Court
15 decisions for the proposition that because at the time they
16 filed their case and filled out Form B22C they had amounts
17 scheduled as contractually due to a secured creditor for the
18 next 60 months on this vehicle, all these payments should go
19 into the calculation to reduce CMI and monthly disposable
20 income, even where the collateral is soon thereafter
21 surrendered.

22 The Court rejects this argument and the cases
23 which have followed it. In the context of reducing income by
24 actual projected expenses for secured debt service, it defies
25 common sense to read the words "scheduled as contractually

1 due" to include monthly payments the debtors do not anticipate
2 contractually owing after surrender of the collateral. To do
3 so simply results in a windfall to the debtors above what they
4 need to get along under the means test formula with each
5 dollar of that windfall being withheld from the projected
6 disposable income earmarked under §1325(b)(1) to go to general
7 unsecured creditors.

8 The potentially absurd result from the debtors'
9 proposed construction of the phrase, "amounts scheduled as
10 contractually due to secured creditors" in each month of the
11 60 months following the date of the petition found in
12 §707(b)(2)(A)(iii)(I), is well demonstrated by the facts of
13 this case.

14 When they filed their petition, these debtors had
15 seven vehicles, six of which had monthly payments to secured
16 creditors aggregating \$2,954.02 with each payment being
17 contractually due for the next 60 months. If shortly after
18 filing these debtors had surrendered not just their Buick, but
19 five other vehicles, their unsecured debt would have increased
20 by, according to their schedules, deficiencies totaling
21 \$65,337.37. And the debtors would free up for their own use
22 \$2,954.02 each month above their means test expenses. Their
23 proposed plan would pay \$765.00 per month in Class 4 unsecured
24 creditors in the amount of \$111,186.11, including \$65,337.37
25 of spillover deficiency claims, would receive \$38,511, or 34.6

1 cents on the dollar. At the same time, debtors would walk
2 away with \$2,954.02 each month for 60 months in spending money
3 over and above their means test calculation.

4 In light of Congress' intent in revising §1325(b)
5 of the Bankruptcy Code in 2005, that is a tortured if not
6 absurd construction of §1325(b) and its reference to
7 §707(b) (2) (A) (iii) (I).

8 Upon the foregoing findings and conclusions, it
9 is ordered that the Chapter 13 trustee's objection to
10 confirmation of the debtor's proposed Chapter 13 plan on the
11 grounds that the plan is not proposed in good faith under
12 Title 11, U.S.C. §1325(a) (3) is overruled.

13 Further ordered that the debtor's motion to
14 confirm their proposed Chapter 13 plan is denied on the ground
15 that such plan neither distributes to unsecured creditors
16 their amount of their claims, or provides that all of the
17 debtors' projected disposable income to be received over the
18 60 months of the plan will be applied to make payments to
19 unsecured creditors under the plan as is required by Title 11,
20 U.S.C. §1325(b) (1) (A) and (B).

21 And further ordered, the debtors shall have 15
22 days from entry of judgment on this ruling to file an amended
23 plan, motion to confirm, and Local Bankruptcy Rule 202 Notice,
24 failing which this case will be dismissed.

25 Thank you for your attention. The Court will be

1 in recess.

2 (Proceeding was concluded.)

* * * * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the electronically recorded **ORAL RULING REGARDING DEBTORS' MOTION TO CONFIRM PROPOSED CHAPTER 13 PLAN AND CHAPTER 13 TRUSTEE'S OBJECTION THERETO**, held on August 11, 2008, at the U.S. Bankruptcy Court, 721 19th Street, Denver, CO 80202, in the above-entitled matter.

October 3, 2008

(Original signed by
Julie Lord 10/3/08.)

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