

1 **NOT FOR PUBLICATION**



7 **UNITED STATES BANKRUPTCY COURT**

8 **CENTRAL DISTRICT OF CALIFORNIA**

9 **SAN FERNANDO VALLEY DIVISION**

10

11 In re

12 DARRICK FLOYD MORGAN,

13 Debtor.

Case No. SV 06-10312 MT

Chapter 13

14 **MEMORANDUM OF DECISION AND**

15 **ORDER ON MOTION FOR ORDER**

16 **IMPOSING A STAY**

17 Date: March 16, 2006

Time: 2:00 p.m.

18 Place: Courtroom 302

19

20 Debtor filed this Chapter 13 bankruptcy on March 10, 2006. This is his third

21 Chapter 13 bankruptcy filing within the past year. Schedules, a Chapter 13 plan, and

22 other missing documents are due on March 25, 2006. His two recent prior filings were

23 filed September 15, 2005 and January 4, 2006, respectively. Both cases were

24 dismissed for failure to make the required pre-confirmation payments. Debtor does not

25 dispute that he falls within 11 U.S.C. § 362(c)(4)(A)(i) that states that "if a single or joint

26 case is filed by or against a debtor who is an individual under this title, and if 2 or more

single or joint cases of the debtor were pending within the previous year but were

1 dismissed, other than a case refiled under section 707(b), the stay under subsection (a)
2 shall not go into effect upon the filing of the later case.”

3 Accordingly, there is no automatic stay in Debtor’s current bankruptcy. Debtor
4 brings this motion to impose the stay against all creditors.

5 Debtor’s declaration states as follows:

- 6 1. There is a foreclosure sale scheduled for Friday, March 17, 2006 at 10:30
7 a.m. If the stay in not imposed, the Debtor will lose his house to the
8 foreclosure sale.
- 9 2. On or about September 2005, a Notice of Sale was filed on the Debtor’s
10 property and he sought refinancing to cure the default. The refinancing
11 took longer than expected and Debtor’s broker referred him to a paralegal
12 in order to file a Chapter 13 bankruptcy to stop the foreclosure sale.
- 13 3. Debtor filed bankruptcy on September 15, 2005. Debtor’s broker advised
14 Debtor to let his case get dismissed because the loan would be
15 completed. The case was then dismissed on November 9, 2005 for failure
16 to make the required payments to the Chapter 13 trustee.
- 17 4. Debtor filed another bankruptcy on January 4, 2006 because Debtor’s
18 refinance could not be consummated by the lender’s foreclosure sale date
19 and Debtor’s broker again advised him to file Chapter 13 to stop the sale.
- 20 5. As the refinance was about to close, the broker again told Debtor to allow
21 his case to get dismissed. Debtor’s bankruptcy was dismissed on March
22 3, 2006. However, the date before funding the new loan, a statement of
23 information revealed a tax lien against the Debtor and the refinance could
24 not go through because the Debtor’s loan-to-value increased.
- 25 6. Debtor has the ability and sufficient income to perform and complete a
26 reorganized Chapter 13 plan.

- 1 a. Debtor has a steady paying job and his wife currently works two
- 2 jobs.
- 3 b. Debtor has hired counsel to competently prepare his schedules in
- 4 order to make the plan feasible to repay the mortgage arrears and
- 5 the IRS.
- 6 c. Debtor wants the stay in his case in order to reorganize his debt in
- 7 a proper Chapter 13 to stop the foreclosure sale on his property
- 8 and resolve his income tax issues.
- 9 7. If the stay is imposed, the Debtor will immediately tender mortgage
- 10 payments to his lenders.
- 11 8. Debtor wants the stay imposed as to all creditors.

12 There was no time to provide for any written opposition before the hearing as this
13 motion was filed only two days before the foreclosure sale was scheduled. Notice was
14 to be provided by phone and fax or personal delivery. Foreclosing creditor Countrywide
15 did receive notice and informed Debtor’s counsel they would not be appearing, so no
16 opposition to the motion was presented at the hearing.

17 The Court has the discretion to impose the stay under certain circumstances. 11
18 U.S.C. §362(c)(4)(B) provides: “if, within 30 days after filing the later case, a party in
19 interest requests the court may order the stay to take effect in the case as to any or all
20 creditors (subject to such conditions or limitations as the court may impose), after notice
21 and a hearing, only if the party in interest demonstrates that the filing of the later case is
22 in good faith as to the creditors to be stayed.”

23 The burden of proof is delineated in §362(c)(4)(D) as follows:
24 [F]or purposes of subparagraph (B), a case is presumptively filed not in good faith (but
25 such presumption may be rebutted by clear and convincing evidence to the contrary) –
26 (i) as to all creditors if –
 (l) 2 or more previous cases under this title in which the individual was a
 debtor were pending within the 1-year period;

- 1 (II) a previous case under this title in which the individual was a debtor was
2 dismissed within the time period stated in this paragraph after the debtor
3 failed to file or amend the petition or other documents as required by this
4 title or the court without substantial excuse (but mere inadvertence or
5 negligence shall not be substantial excuse unless the dismissal was
6 caused by the negligence of the debtor's attorney), failed to provide
7 adequate protection as ordered by the court, or failed to perform the terms
8 of a plan confirmed by the court; or
9 (III) there has not been a substantial change in the financial or personal affairs
10 of the debtor since the dismissal of the next most previous case under this
11 title, or any other reason to conclude that the later case will not be
12 concluded, if a case under chapter 7, with a discharge, and if a case under
13 chapter 11 or 13, with a confirmed plan that will be fully performed; or
14 (ii) as to any creditor that commenced an action under subsection (d) in a previous
15 case in which the individual was a debtor if, as of the date of dismissal of such
16 case, such action was still pending or had been resolved by terminating,
17 conditioning, or limiting the stay as to such action of such creditor.

18 Debtor has properly filed the request to impose the stay within the 30 day time
19 frame. However, the presumption that this case has not been filed in good faith arises
20 under section 362(c)(4)(D)(i)(I) as to all creditors because debtor had 2 previous
21 pending bankruptcies within the 1 year period. Debtor may rebut the presumption by
22 clear and convincing evidence showing that this Chapter 13 case was in fact filed in
23 good faith. At the very least, if Debtor wishes to stop the foreclosure as to the secured
24 creditor on the house, Debtor must show by clear and convincing evidence that the filing
25 has been made in good faith as to the secured creditor, Countrywide.

26 At this hearing, I only considered the imposition of the stay as to Countrywide
who had a foreclosure sale scheduled for the morning of the day after the hearing. I will
not consider any motion as to the remaining creditors at this time. The notice to such
creditors would have been insufficient, and such shortened notice does not appear to be
warranted under any exigent circumstances as to those creditors. The Debtor wishes
to pursue his motion as to the remaining creditors after this initial hearing, so he is to
renotify the motion and mail it by March 21, 2006, and it will be heard on April 6, 2006
at 9:30 am on the Court's relief from stay calendar. That portion of his motion seeking a
stay as to the remaining creditors is continued. A copy of the order on this portion of the

1 motion should be included.

2 Turning to the merits of Debtor’s request, it appears that the question of “good
3 faith” controls here. Unfortunately, there is no definition of “good faith” under section
4 362(c)(4) or anywhere else in the Code. With respect to section 1325(a)’s mention of
5 good faith, courts in this Circuit have adopted a case-by-case approach, whereby a
6 multi-factor test is employed. In re Goeb, 675 F.2d 1386, 1390 (9th Cir. 1982); In re
7 Villanueva, 274 B.R. 836, 841 (9th Cir. BAP 2002). Courts are to use a “totality of the
8 circumstances” approach, with the underlying focus being on whether the debtor has
9 acted equitably in proposing his plan. Id. The inquiry should include, but is not limited
10 to (1) whether the Debtor has misrepresented facts in his plan, (2) whether the Debtor
11 has unfairly manipulated the Bankruptcy Code, and (3) whether the Debtor has
12 otherwise acted in an inequitable manner.

13 The “good faith” definitions already provided in this Circuit are broad and flexible
14 enough that it would be appropriate to use them in analyzing good faith under this
15 statutory section as well. In addition, “the court must draw upon prior cases interpreting
16 the phrase “good faith” because Congress was presumptively aware of such case law
17 when it used the term in the Bankruptcy Abuse Prevention and Consumer Protection
18 Act of 2005 (BAPCPA). “It has long been the rule that absent clear Congressional
19 intent to the contrary, judicial interpretations of prior law are determinative when
20 concepts, words, or statutory sections are adopted in an amended law on the same
21 subject.” In re Montoya, 333 B.R. 449, 457 (Bankr. D. Utah 2005) (citations omitted).

22 One bankruptcy court in the Southern District of Texas considered both objective
23 and subjective good faith in analyzing 11 U.S.C. § 362(c)(3), a similar provision under
24 the new law. In re Charles, 334 B.R. 207, 218 (Bankr. S.D. Tex. 2005). Analysis of
25 objective good faith acts as a threshold test. It looks at whether the case is likely to
26 result in a discharge, basically determining whether or not the case has a reasonable

1 likelihood of success. Id. at 219. After determining that there is a reasonable likelihood
2 of success, the court conducts a subjective good faith analysis and looks at the “totality
3 of the circumstances.” This “totality of the circumstances” test involves a consideration
4 of the following factors: (i) the nature of the debts; (ii) the nature of any collateral; (iii)
5 eve of bankruptcy purchases; (iv) the debtor’s conduct in the present case, (v) reasons
6 why the debtor wishes to extend the stay; and (vi) any other circumstances that weigh
7 on the wisdom of an extension. Id. No one factor is determinative. Id.

8 Another court has listed the following factors in determining if the debtor has filed
9 the bankruptcy in good faith under 11 U.S.C. § 362(c)(3): (1) the nature of the debt,
10 including the question of whether the debt would be nondischargeable in a chapter 7
11 proceeding; (2) the timing of the petition, (3) how the debt arose; (4) the debtor’s motive
12 in filing the petition, (5) how the debtor’s actions affected creditors; (6) the debtor’s
13 treatment of creditors both before and after the petition was filed; and (7) whether the
14 debtor has been forthcoming with the bankruptcy court and creditors. In re Montoya,
15 333 B.R. 449, 457-58 (Bankr. D. Utah 2005).

16 At the hearing, I found the Debtor did show by clear and convincing evidence that
17 he has filed this bankruptcy in good faith as to this creditor, Countrywide, as required
18 under section 362(c)(4)(D)(i)(I). Because of the emergency filing, no schedules or
19 Chapter 13 plan have been filed. This made it difficult to conduct a “totality of the
20 circumstances” test. However, based on my discussions on the record with Debtor’s
21 counsel in consultation with the Debtor, who was present, an analysis of the likelihood
22 of success in any Chapter 13 case was conducted.

23 The Debtor has tripled his income between the September 2005 and March 2006
24 bankruptcy filings, allowing for greater disposable income to dedicate to a plan. His wife
25 has also taken a second job and is committed to staying with two jobs in order to make
26 the plan work. Their combined monthly take-home pay is now around \$5,500 per

1 month, with a \$3,400 monthly mortgage payment. The Debtor represented that his
2 unsecured debt was fairly low, only a few thousand, and that his main problem was tax
3 debt. He estimates approximately an \$80,000 Franchise Tax Board liability and about
4 that same amount for the IRS. His counsel believes both debts can be eliminated after
5 he has been able to discuss them with the taxing authorities. They arise out of 1992,
6 1993 and 1994 taxes and Debtor has filed timely returns for those years.

7 Debtor states that he will tender all post-petition payments to Countrywide.
8 There is a \$3,400 April payment due by April 16, 2006, which Debtor states that he can
9 make. The total delinquency on the mortgage is approximately \$35,000 to \$40,000.
10 Debtor's counsel believes he can propose a plan which will pay that debt off in a 36
11 month plan. Debtor has \$100,000 equity in his home based on a November 2005
12 appraisal obtained for purposes of the earlier attempted refinance. Debtor essentially
13 admits that the plan may have problems if the taxing authorities disagree with his
14 analysis of that debt. He has a \$200 month automobile loan which is current. It
15 appears that Debtor and his counsel have carefully evaluated the viability of a Chapter
16 13 case and have a reasonable plan for making it work.

17 While the tax issues are somewhat of a wild card as to the confirmability of the
18 Chapter 13 plan or viability of the Chapter 13 reorganization, Debtor's counsel is an
19 experienced Chapter 13 attorney and has made a careful analysis of the likelihood that
20 a Chapter 13 plan will be successful. He appears to have put his own fees on the line.
21 Unless a plan is successful, he will have put in substantial work in negotiating with the
22 taxing authorities and not see any plan payments made to cover his supplemental fees.

23 While any refinancing is out of the question until the tax issues are resolved, that
24 is an option if Debtor is able to resolve his dispute with the FTB and IRS. In the current
25 Southern California housing market, Debtor and his wife have a great incentive to make
26 their reorganization plan work. Another mortgage or rental property at this monthly cost

1 would be difficult, and both spouses appear to have worked hard towards obtaining
2 solid professional employment in the area.

3 It appears that the totality of circumstances analysis that must be made at such
4 an early stage in a Chapter 13 case is necessarily that of a preliminary injunction -
5 likelihood of success on the merits combined with the likelihood of irreparable harm. A
6 foreclosure tomorrow would irreparably harm the Debtor where he has substantial
7 equity and appears highly likely to be able to save his home. There appears to be a
8 likelihood of success on the merits, i.e., a successful Chapter 13 reorganization.

9 As to the other factors enumerated by the courts, not all apply. Those that do
10 would also seem to militate in favor of the Debtor. There are no debts that are
11 nondischargeable. This is a debtor who simply got seriously behind in his payments
12 while training for a new job. The training period for his new employment paid one third
13 of what he makes now. The timing of the petition appears to be due to poor legal
14 advice rendered by a nonlawyer. This debtor was incorrectly advised by a non-lawyer
15 to let a pre-BAPCPA case be dismissed, and its concomitant automatic stay disappear,
16 when he could have sought an extension based on a refinancing delay at that time in
17 his earlier case. The Debtor has not run up credit cards or engaged in any pre-filing run
18 up of debts. The major debts are due to housing and taxes, a typical reason for
19 reorganization under Chapter 13. The secured creditor is protected from any future
20 failure of the Chapter 13 case by substantial equity in the house.¹

21 Balancing of the above factors, the Debtor has met his burden of proof as to this
22 secured creditor, Countrywide, and the automatic stay will be imposed solely as to that
23 creditor subject to the following conditions:

- 24 1. Debtor will make his full April mortgage payment by April 15, 2006;

25
26 ¹ I am making no ruling as to any future relief from stay motion at this time.

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CERTIFICATE OF SERVICE BY MAIL

MAR 17 2006

I certify that a true copy of this **ORDER** was served on _____
to the parties listed below:

[SEE ATTACHED SERVICE LIST]

Dated:

MAR 17 2006

Jewell M. Williams

DEPUTY CLERK

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