



**IT IS ORDERED as set forth below:**

**Date: March 4, 2016**

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro".

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**Barbara Ellis-Monro  
U.S. Bankruptcy Court Judge**

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**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

IN RE:

BENTON WADE and THERESA ANITA  
WADE ,

Debtor.

CASE NO. 15-66793-BEM

CHAPTER 13

ANTHONY HENDERSON,

Movant,

Contested Matter

v.

BENTON WADE and THERESA ANITA  
WADE,

Respondents.

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**ORDER AND NOTICE OF  
RESCHEDULED CONFIRMATION HEARING**

This case came before the Court for hearing on February 11, 2016 (the "Hearing") to consider confirmation of Debtor's proposed amended chapter 13 plan (the "Plan") [Doc. No.

23] and the objections thereto filed by the Standing Chapter 13 Trustee, Mary Ida Townson (the “Trustee”) and Anthony Henderson (“Henderson”). [Doc. No. 21]. Richard Valldejuli appeared on behalf of Debtors, Eric Thorstenberg appeared on behalf of Henderson and Albert Guthrie appeared on behalf of the Trustee. At the Hearing, testimony and documentary evidence were admitted into evidence. This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (L). Based upon the evidence presented, argument of counsel and the record in this case, the Court finds as follows:

**I. Procedural History and Facts**

In 2003 Debtor, Theresa Wade (“Ms. Wade”) and Henderson agreed that Ms. Wade would purchase certain property located at 5790 Dunn Road, Mableton, Georgia (the “Dunn Road Property”) either to rent out and then at some point sell, or to sell. In conjunction with the agreement to purchase the Dunn Road Property Ms. Wade was going to establish an entity called Thoughts 2 Action (“T2A”). Ms. Wade approached Mr. Henderson to invest in the purchase of the Dunn Road Property because Ms. Wade had taken certain classes and had the know how to invest in and sell property, but did not have funds with which to purchase property – having lost her job sometime in 2003. Henderson is Ms. Wade’s brother.

T2A was incorporated and Ms. Wade did purchase the Dunn Road Property in Henderson’s name. Ms. Wade was the 50% owner of T2A while Henderson and Benton Wade, Ms. Wade’s husband and co-debtor in this case (“Mr. Wade” and with Ms. Wade, “Debtors”) each owned 25% of the company. According to Henderson, Ms. Wade was to refinance the Dunn Road Property within 12 months of purchase, but she did not. Ms. Wade obtained an equity line secured by the Dunn Road Property in June, 2003. The equity line was in Henderson’s name. He testified that he did not know about the equity line and did not authorize the same. The evidence

was unrefuted that the proceeds of the equity line were used to renovate the Dunn Road Property. In February, 2007, Henderson and Ms. Wade, as president of T2A, entered into an agreement providing for: (i) reimbursement of the payments Henderson had made on the equity line, (ii) assumption of payments for the equity line by T2A, (iii) refinancing of the mortgages against the Dunn Road Property, assumption of the loans and title to the property by T2A, (iv) until sale of the Dunn Road Property payment of 12% of T2A's net income to Henderson; and (v) reimbursement of an insurance deductible paid by Henderson (the "February 2007 Agreement"). [Movant Ex. 10]. In September 2003, a second property, located at 950 Arum Drive, SW, Mableton, Georgia (the "Arum Drive Property") was purchased in Henderson's name by Ms. Wade.

Henderson believes that Ms. Wade operated other businesses through T2A and took money from T2A to the detriment of his interest in T2A. Henderson did not receive any payments on account of his interest in T2A. In addition, the articles of incorporation for T2A filed with the Georgia Secretary of State identify Henderson as the incorporator and registered agent of T2A. Henderson testified that he did not agree to these terms and that he did not sign the articles of incorporation. This allegation was unrefuted. Based on these allegations, and after Ms. Wade failed to perform under the February 2007 Agreement, in 2010, Henderson filed suit against Ms. Wade in Cobb County State Court. After a jury trial Henderson obtained a judgment against Ms. Wade in the amount of \$88,528 (the "Judgment"). [Movant Ex. 2]. The Judgment was dated April 26, 2013 and a fi fa was issued. *Id.* The Judgment does not indicate the basis for the Judgment, such as fraud, breach of contract, or some other claim.

Ms. Wade inherited property located in Miami in 2004 (the "Miami Property"). The Miami Property was subject to foreclosure in 2011 and again in 2013. Ms. Wade testified

that she was able to cure the default for the Miami Property in 2011 and take it out of foreclosure, but in 2013 she could not cure the default. So, in August 2013, she sold the property on an as-is basis to avoid the mortgage holder taking the Miami Property. Ms. Wade received \$64,917 from the sale.

In January, 2014, Debtors sold their residence located at 1037 Bettina Court, SW, Mableton, Georgia (the “Bettina Court Property”) on a “short sale” basis. The holder of the second position deed to secure debt, Pentagon Federal Credit Union (the “Credit Union”) received \$3,985 from the sale and a promissory note in the amount of \$18,000 from Debtors.<sup>1</sup> In conjunction with the short sale of the Bettina Court Property Mr. Wade requested that Henderson release the Judgment lien against the Bettina Court Property. Henderson agreed, provided Mr. Wade agreed to pay the equity line on the Dunn Road Property. Mr. Wade agreed, and on December 18, 2013, Henderson executed a Quit Claim Deed For Release Of Writ Of Fieri Facias [Movant Ex. 1]. Henderson testified that Mr. Wade paid the equity line for a few months and then quit paying while Mr. Wade testified that Henderson quit accepting the payments.

In April 2014, notwithstanding Ms. Wade’s sole ownership of the Miami Property, Mr. Wade used the cash proceeds from the sale of the Miami Property to purchase the Debtors’ current residence located on Laurel Circle in Atlanta (the “Laurel Circle Property”) in his name alone. [Movant Exs. 9, 14]. In February 2015, Mr. Wade transferred a one-half interest in the Laurel Circle Property to Ms. Wade. [Movants Ex. 15].

Ms. Wade testified that she lost her job in 2003, that she used the couples’ personal funds to try and make the T2A real estate venture successful, and that the use of those funds left her without the ability to pay for the Miami Property and the Bettina Court Property.

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<sup>1</sup> Mr. Wade testified that he signed the note, however, the promissory note attached to the Credit Union’s claim is signed by both Debtors and is dated January 24, 2014.

Mr. Wade testified that Debtors were not able to pay their debts after his wife lost her job and his overtime was reduced and that once Henderson “put a lien” on their house he began thinking that they would have to file bankruptcy. Ms. Wade and Mr. Wade each testified that Ms. Wade offered to give Henderson the Miami Property in satisfaction of the Judgment, but that Henderson declined the offer.

At some point in 2005, the Arum Drive Property was vacant and Henderson moved into that property. Ms. Wade and Mr. Wade each testified that when Henderson moved into the Arum Drive Property, the more desirable of the two properties associated with T2A, that there was no way to make a go of that venture. Although there have been various renters in the Dunn Road Property, at this point, the Dunn Road Property is vacant. Henderson currently owns both the Dunn Road Property and the Arum Drive Property. Henderson still lives in the Arum Drive Property.

Debtors argue that Henderson authorized Ms. Wade to purchase the Dunn Road Property and to take all actions she took with respect to the Dunn Road Property. Henderson disagrees, and testified, on the other hand, that he was kept totally in the dark about the financial aspects of the Dunn Road Property and that an equity line on the property was taken out in his name without his authorization. He also testified, and his testimony was unrefuted, that certain insurance proceeds in the amount of \$4,000 were kept by Ms. Wade and an additional \$1,300 of the proceeds were unaccounted for. Henderson testified further that he felt that Ms. Wade was using T2A to generate income while he was incurring debt on the mortgage and equity line for the Dunn Road Property.

Debtors filed their voluntary chapter 13 petition on August 31, 2015 (the “Petition Date”). Debtors filed a Motion to Avoid Lien with respect to the Judgment which was heard on

January 6, 2016. Henderson did not dispute the Debtors' valuation of their property or that the equity available in excess of exemption is limited to \$10,500, thus the Court entered an order avoiding the Judgment lien to the extent it exceeds \$10,500. [Doc. No. 32]. The Plan provides for bifurcation of the Judgment with the claim being treated as a secured claim to the extent of \$10,500 and with the balance being unsecured and subject to a pro rata distribution with other unsecured claims. At the time of the Hearing, the Plan provided for the greater of an 11% distribution or distribution of \$13,535 to unsecured creditors. Henderson is the largest creditor of either Debtor with a claim of \$87,308.<sup>2</sup> The vast majority of the other debt in the case is related to the short sale of the Bettina Court Property with the Credit Union's claims totaling \$36,462.90. [Doc. No. 15, proofs of claim, 2, 3].

The Trustee filed an Objection to Confirmation. [Doc. No. 26]. The Trustee objected on several grounds some which have been resolved and others that are proposed to be resolved by Debtors amending the Plan to increase the distribution to unsecured creditors to the greater of 19% or \$22,502. In addition, the Plan provides for distribution on the secured portion of the Judgment claim both monthly after confirmation and beginning after all other secured claims are paid. The Trustee has objected to this treatment as inconsistent and has requested that Debtors eliminate the provision delaying payment on the Judgment. Because of the need for amendment and the outstanding good faith objection, the Trustee could not recommend confirmation of the Plan at the Hearing.<sup>3</sup>

Henderson objects to confirmation of the Plan contending that Debtors did not file this case or the Plan in good faith. [Doc. No. 21]. According to Henderson, the Debtors' lack of

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<sup>2</sup> The Court notes that Henderson filed a proof of claim in the amount of \$87,308. It is not clear how this amount was calculated, but the Court assumes it includes the payment of \$782.57 referenced in Henderson's objection. See claim no. 5; Doc. No. 21.

<sup>3</sup> Debtors filed their Second Amended Plan on February 28, 2016 which conforms to the agreement with the Trustee. [Doc. No. 40]. The amendment did not resolve Henderson's objection.

good faith is shown by Ms. Wade's use of T2A to his detriment, her failure to pay him with the cash proceeds of the sale of the Miami Property, the payment of more on account of cell phone bills than on account of the Judgment and Mr. Wade's convincing him to release his lien against the Bettina Court Property. Henderson testified that he was unaware of the sale of the Miami Property while Mr. Wade testified that Mr. Henderson knew about the sale because some of Henderson's and Ms. Wade's siblings still live in Miami and would have, or did, keep Mr. Henderson apprised regarding the Miami Property. Henderson argues that the case should be dismissed, but that if it is not then the Debtors' exemption in the Laurel Circle Property should be disallowed, or the Judgment claim should be separately classified and paid in full.

### **Analysis**

Section 1325 of the Bankruptcy Code provides the requirements for confirmation of a proposed Chapter 13 plan. Section 1325(a) provides nine requirements for confirmation, which includes that a plan must be proposed in good faith and a case must be filed in good faith. *See* 11 U.S.C. § 1325(a)(3) and (7). The standard for analyzing good faith in filing the petition under 1325(a)(7) and the plan under 1325(a)(3) was recently discussed by the Eleventh Circuit in *Brown v. Gore (In re Brown)*, 742 F.3d 1309, 1316-1317 (11<sup>th</sup> Cir. 2014). The Court said:

As to subsection (a)(3), this Court has set forth a non-exhaustive list of factors relevant to whether a plan was proposed in good faith. *In re Kitchens*, 702 F.2d at 888-89. These factors are: (1) "the amount of the debtor's income from all sources"; (2) "the living expenses of the debtor and his dependents"; (3) "the amount of attorney's fees"; (4) "the probable or expected duration of the debtor's Chapter 13 plan"; (5) "the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13"; (6) "the debtor's degree of effort"; (7) "the debtor's ability to earn and the likelihood of fluctuation in his earnings"; (8) "special circumstances such as inordinate medical expense"; (9) "the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors"; (10) "the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his

creditors"; (11) "the burden which the plan's administration would place on the trustee"; (12) "the extent to which claims are modified and the extent of preferential treatment among classes of creditors"; (13) "substantiality of the repayment to the unsecured creditors"; and (14) "other factors or exceptional circumstances. *Id.*

These same *Kitchens* factors for subsection (a)(3) are equally relevant to determining whether a petition was filed in good faith under subsection (a)(7). Importantly too, "the facts of each bankruptcy case must be individually examined in light of [these] various criteria to determine whether the chapter 13 plan at issue was proposed in good faith." *Id.* at 888. While *Kitchens* does not use this phrase, it basically adopts a "totality of the circumstances" approach for determining good faith or lack thereof, which is what other circuits do, too. *See Id.*; see also *Sikes v. Crager (In re Crager)*, 691 F.3d 671, 675 (5th Cir. 2012) ("In this circuit, courts apply a 'totality of the circumstances' test to determine whether a Chapter 13 petition and plan are filed in good faith . . . ."); *Berliner v. Pappalardo (In re Puffer)*, 674 F.3d 78, 83 (1st Cir. 2012) (reversing because the bankruptcy court did not consider the totality of the circumstances when evaluating whether the debtor proposed his Chapter 13 plan in good faith but, rather, applied a per se rule that attorney-fee-centric Chapter 13 petitions and plans are filed and proposed in bad faith). Further, "prudence dictates that we hew to the overarching principle that the presence or absence of good faith should be ascertained case by case. *Id.*

Further, because the good faith requirement of § 1325(a)(7) was added to the Code in 2005 the analysis should not be identical to that undertaken under § 1325(a)(3). *In re O'Neal*, case no. 11-13535, 2012 Bankr. LEXIS 2412 \*13 (Bankr. N.D. Ga. April 18, 2012) (Drake, J.). As a result, in considering the good faith or lack thereof in filing this case, the Court will also consider "objective evidence of a fundamentally unfair result and subjective evidence that a debtor filed a petition for a fundamentally unfair purpose." *Id.* at \*15 (citing *In re McCreary*, No. 09-81743 2009 Bankr. LEXIS 4087 at \*7-8 (Bankr. C.D. Ill. Dec. 29, 2009). At bottom, the essential question before the Court is whether the debtor filed the petition for a "greedy and unworthy purpose" *Id.* (citing *In re Waldron*, 785 F.2d 936 (11<sup>th</sup> Cir. 1986)) as opposed to a rehabilitative purpose. *See Brown*, 742 F.3d at 1315, 1316 (noting that "Chapter 13 . . . is designed to facilitate adjustment of the debts of individuals with regular income through

extension and composition plans funded out of future income under the protection of the court” and “Chapter 13 enables a debtor to retain his non-exempt assets and use his regular income (instead of those assets) to repay his debts.”) (quoting *Kitchens*, 702 F.2d 887).

The Debtors bear the ultimate burden of proof on confirmation. *O’Neal*, 2012 Bankr. LEXIS 2412 at \*13. Notwithstanding, the Court has an independent duty to review the Plan and evaluate whether it complies with the Code. *United Student Aid Funds, Inc. v. Espinosa (In re Espinosa)*, 599 U.S. 260, 277 n. 14, 130 S. Ct. 1367, 1381 n. 14 (2010). Henderson focuses his objection on *Kitchens* factors 5 and 10. The Court will consider these factors in addressing the good faith necessary for confirmation.

Henderson asserts that the Judgment was entered because Ms. Wade defrauded him by taking unauthorized actions with respect to the Dunn Road Property and T2A. The Judgment contains no findings of fact and there is no evidence in the record regarding the jury charge. Henderson testified that Ms. Wade exceeded the authority he gave her with respect to the Dunn Road Property. The Power Of Attorney admitted into evidence by Debtors supports such a finding because it provides for the limited authority to “[d]o any and all acts necessary to purchase in my name the following described property. . .”. [Debtors Ex. 1]. Debtors argue that Henderson signed additional powers of attorney granting Ms. Wade broader authority to act on Henderson’s behalf. These are not of record, however. Thus, it appears that Ms. Wade likely took actions that were not specifically authorized by Henderson. However, the Judgment itself gives no indication that it is based on anything more than a breach of contract.

Similarly, with respect to the use of T2A, the evidence showed numerous checks payable to Ms. Wade and one payment to Mr. Wade. But there was no evidence with respect to whether T2A contributed to generation of these funds, nor was there any evidence regarding the

amount of funds Ms. Wade deposited with T2A. As such, the Court cannot find that T2A suffered a loss or other detriment due to the withdrawals represented by the checks. As a result, the Court does not infer from the checks drawn on the T2A account that the Judgment was based on fraudulent conduct by Ms. Wade.

In arguing that Debtors did not file this case in good faith, Henderson also points to the fact that Debtors had cash in hand in the amount of \$64,917 at the time Mr. Wade obtained the release of Henderson's Judgment lien and purchased the Laurel Circle Property while Henderson was left with the responsibility for paying 2 mortgages on the Dunn Road Property and one on the Arum Drive Property.

Ms. Wade could not articulate a reason why the Laurel Circle Property was purchased in Mr. Wade's name while Mr. Wade stated that he sold the Miami Property and purchased the Laurel Circle Property because Ms. Wade was overwhelmed with stress due to the Judgment. This rings a little hollow given Henderson's failure to actively seek to collect the Judgment. On the other hand, the testimony was undisputed that Debtors sought to satisfy the Judgment by transferring the Miami Property to Henderson and that because he was paying three mortgages he declined the offer. Thus, it is possible that Ms. Wade was stressed because of the foreclosure and the inability to satisfy the Judgment by transferring the Miami Property. Further, the inference that the purchase of the Laurel Circle Property in Mr. Wade's name alone was motivated by a desire to avoid the Judgment is somewhat undercut by the subsequent transfer of a one-half interest to Ms. Wade.

The Court is not convinced that the reason for filing this case was to avoid the Judgment since it appears that other than recording the fi fa Henderson had not taken any action to collect the Judgment prior to the filing of the case, and in fact, released his lien to allow the

short sale in exchange for a promise that the equity line would be paid by Mr. Wade. Rather, it appears that the Judgment, in conjunction with Debtors' inability to pay the deficiencies that resulted from the short sale of the Bettina Court Property, caused the filing.

Mr. Wade testified that even if they had used the proceeds from the sale of the Miami Property toward curing the default in payments on the Bettina Court Property it would have been underwater and was in need of significant repair, so instead of putting the proceeds into that property he purchased the Laurel Circle Property. Paying a judgment debt and debt related to the deficiency remaining after a short sale would generally be an appropriate use of Chapter 13. The question is whether, given the specific circumstances of this case, Debtors' motivation was to make payments on these debts to the best of their ability or whether they instead were motivated by a greedy or unworthy purpose.

The Court must conclude, given all the facts and circumstances in this case, that the motivation was to protect the Miami Property proceeds from creditors' claims. The Court so concludes because Debtors did not disclose to the short sale lenders that Ms. Wade had received the proceeds from the sale of the Miami Property at the time the short sale was consummated. In addition, it appears that Debtors made a calculated decision to walk away from the Bettina Court Property and buy a property that could be owned free and clear. Thus, it appears that the purchase of the Laurel Circle Property was intended to ensure that Debtors owned a residence free and clear while the lenders on the Bettina Court Property were left with unsecured debt of \$36,462.90 from the short sale and Henderson's Judgment remained unsatisfied.

Debtors argue that the purchase of the Laurel Circle Property was not the result of a plan or by design. However, unless the Plan provides payment sufficient to account for the

equity over and above Ms. Wade's exemption<sup>4</sup> in the Laurel Circle Property, the Court cannot conclude that this case or the Plan have been filed in good faith.

Accordingly, it is now, hereby

ORDERED that Movant's objection to confirmation is SUSTAINED and confirmation of the Plan which includes the second amended plan filed February 28, 2016, is DENIED; It is further

ORDERED and NOTICE IS HEREBY GIVEN that the hearing on confirmation of a plan amended in accordance with this order will be rescheduled to **March 22, 2016 at 1:00 p.m. in Courtroom 1402**, United States Courthouse, Richard B. Russell Federal Building, 75 Ted Turner Drive, SW, Atlanta, Georgia 30303,

**END OF ORDER**

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<sup>4</sup> In his written objection, filed pro se, Henderson sought to disallow the exemption. This was not pursued by counsel at the hearing which the Court assumes is the result of the Supreme Court's ruling in *Law v. Siegel*, 134 S. Ct. 1188, 1195 (2014) which would clearly not allow such a surcharge. In addition, counsel sought to classify the Judgment claim separately for payment in full. The obligation has not been determined to be non-dischargeable and the Court will not impose such treatment.

**Distribution List**

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