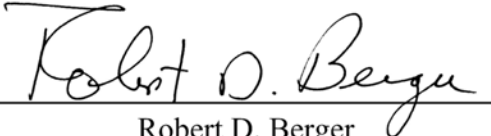


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 7th day of July, 2023.




Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

BRADFORD KENT SANDERS,

Debtor.

Case No. 19-20753

Chapter 13

ORDER DENYING CONFIRMATION AND DISMISSING CASE

Debtor Brad Sanders proposes a three-year Chapter 13 plan with monthly payments of \$1,230.¹ This matter comes before the Court on (1) creditor Tavish Carduff's objection to confirmation of the plan;² (2) the Chapter 13 trustee's motion

¹ ECF 6. Sanders appears by attorney Nick Steinwart. Plan confirmation is a core proceeding under 28 U.S.C. § 157(b)(2)(L). Venue here is appropriate under 28 U.S.C. § 1409(a).

² ECF 15. Carduff appears by attorney William Turner.

to dismiss the case;³ and (3) Carduff's motion to dismiss the case.⁴ The Court will deny confirmation for failure to meet the requirements of 11 U.S.C. §§ 1325(a)(7) and (b)(1); dismiss the case for cause under 11 U.S.C. § 1307(c); and order Sanders to show cause why the Court should not also hold, pursuant to 11 U.S.C. § 349(a), that his debt to Carduff will not be dischargeable in any future bankruptcy case.

Sanders is a software programmer and consultant. Prior to 2017, he was employed at VOS Design, a company he founded.⁵ He relinquished his company shares in a document dated January 1, 2017.⁶ Although Sanders received no money for the shares, VOS Design contributed \$1,000 per month toward his health insurance premiums for four years thereafter.⁷

Since giving up his shares in VOS Design, Sanders has been self-employed. He reported the following business income and expenses for federal income tax purposes between 2017 and 2020 (i.e., the years surrounding his bankruptcy petition):⁸

Year	Gross Income	Expenses Deducted	Net Income
2017	\$79,538	\$13,950 (car and truck \$9,632; office \$3,118; telephone \$1,200)	\$65,588

³ ECF 44. Trustee W.H. Griffin appears on the pleadings. Motions to dismiss a Chapter 13 case for cause under § 1307(c) are core proceedings under 28 U.S.C. § 157(b).

⁴ ECF 47.

⁵ See Trial Tr. 12:5-16.

⁶ See Debtor's Ex. N.

⁷ See Trial Tr. 57:23-59:8. The Court does not decide here whether Sanders should have included those contributions as income on his Schedule I.

⁸ See Cr.'s Ex. 7-10.

2018	\$63,990	\$11,873 (car and truck \$9,817; office \$2,056)	\$52,117
2019	\$80,850	\$22,924 (car and truck \$16,448; office \$6,476)	\$57,926
2020	\$104,910	\$8,345 (car and truck \$850; depreciation \$5,995; business use of home \$1,500)	\$96,565

Sanders testified that he earned the majority of his 2019 income from Sanders Products, a company owned by his brother.⁹ Most of Sanders' reported "car and truck" expenses are for his commute between his home in Overland Park, Kansas, and Sanders Products in Lawrence, which he drove six days out of seven in 2019, and for which he deducted the IRS rate of \$0.58 per mile.¹⁰

Carduff is Sanders' ex-wife. They were divorced in 2009. In the divorce decree, a Kansas court entered judgment against Sanders for \$49,744.78 plus interest¹¹ and ordered Sanders to return some of Carduff's property to her. Carduff testified as to what happened to that property:

⁹ See Trial Tr. 28:25-29:10.

¹⁰ See *id.* 30:3-23; see also Mileage Log, Debtor's Ex. R.

¹¹ See Judgment and Decree of Divorce ¶¶ 39-40, Cr.'s Ex. 1:

39. Respondent shall have a Judgment against Petitioner in the amount of \$49,744.78; this amount represents sums due and owing to Respondent from Petitioner as follows: \$4,370.00 from the equity in the marital residence, \$1,250.00 from the sale of the 1974 Porsche, \$2,965.78 from Respondent's portion of Petitioner's 401(k), \$42,671.00 from Petitioner's value in VOS Design, Inc., \$472.00 for debts due to Respondent and \$1,001.00 due to Respondent for the 2008 tax returns for a total of \$52,729.78 against which Petitioner was

Q. The court had ordered Mr. Sanders to give you some personal property; is that correct?

A. That is correct.

Q. And I guess the property was listed on some Exhibit C that is not attached to this -- to this divorce decree; is that correct?

A. Correct.

Q. What were the most important things on the list of personal items to you?

A. Photos and videos from our marriage and from my own life before marriage to him.

Q. Did Mr. Sanders ever provide you those videos and pictures?

A. In whole, no. He provided me with a drive that had a bunch of pictures on it, mostly of his work and his vacation, not my photos.

Q. Other than the car, the joint custody, and the divorce and I guess that drive, did you get anything else out of the divorce?

A. I got several things that he put out on the curb and urinated all over.¹²

given a credit of \$2,985 which represents payments on the Discovery card.

40. The Judgment is due and owing. For the first 120 days the Judgment is outstanding Respondent shall accumulate interest at the rate of 7% for the 120 day time period. If the Judgment is not paid after 120 days of the entry of the Judgment, the interest rate shall rise to the statutory rate in the state of Kansas or 10% whichever rate is higher.

¹² Trial Tr. 82:15-83:9 (referencing Cr.'s Ex. 1).

Sanders has made no voluntary payments to Carduff on the judgment.¹³ Carduff testified: “[H]e told me he would rot in jail before he would ever pay me a dime, and he has repeated that at least three times.”¹⁴

Other than Carduff, who filed a claim against Sanders for \$96,475.35, only four creditors filed claims in this case: the Kansas Department of Revenue, for \$3,813.41; the Internal Revenue Service, for \$22,239.28 (which was subsequently amended to \$33,036.28 to include Sanders’ 2019 tax debt); Cenlar, for \$235,898.69, for a mortgage on the home Sanders shares with his current partner; and Toyota Motor Credit, for \$32,501.28, for the 2018 Camry he purchased just four days before filing for bankruptcy.

Carduff garnished Sanders’s account at Commerce Bank for \$1,492 in 2017.¹⁵ Sanders has gone without a bank account since.

1. The “applicable commitment period” is five years.

Section 1325(b)(1) of the Bankruptcy Code¹⁶ provides that if an unsecured creditor (here, Carduff) objects to confirmation of a plan that does not pay her in

¹³ Sanders may have made one court-ordered payment of \$1,000, although Carduff did not remember receiving it. *See* Trial Tr. 84:24-85:19. He also paid Carduff \$2,500 at the outset of the divorce, also pursuant to court order but prior to the judgment at issue here. *See id.* 78:1-5.

¹⁴ Trial Tr. 80:11-12.

¹⁵ *Id.* 34:17-35:8, 38:18-19, 39:25-40:2 (“[T]here was a lot of trauma around this event and I swore at that point I am not going to have another bank account.”). Upon learning that \$500 of the money in the garnished account belonged to their daughter, Carduff returned \$500 to Sanders. *See* Cr.’s Ex. 3.

¹⁶ All citations to statutes in this order are to Title 11, United States Code (the “Bankruptcy Code”) unless otherwise indicated.

full, the court cannot confirm unless the plan provides that all of the debtor's projected disposable income during the "applicable commitment period" will be applied to the plan. The applicable commitment period—either three or five years—is determined by whether the debtor's "current monthly income" is below or above the state median for his household size. *See* 11 U.S.C. § 1325(b)(4); *see also* 11 U.S.C. § 101(10A) (defining "current monthly income").

According to Sanders, his current monthly income was \$4,262.83 (i.e., below the Kansas median) on the petition date, such that the applicable commitment period is three years.¹⁷ However, in calculating that figure, Sanders deducted "business expenses" of \$2,149 per month from his gross income.¹⁸

The majority view is that a self-employed debtor may not deduct business expenses when calculating his current monthly income (and thus the applicable commitment period). *See In re Gonzalez*, 597 B.R. 133, 137 (Bankr. D. Colo. 2018); Keith M. Lundin, *Lundin on Chapter 13* § 12.1, at ¶ 6, lundinonchapter13.com (last visited June 29, 2023). But even if he can (and this Court need not decide that question today), Sanders' deductions are inappropriate. He deducts \$700 per month

¹⁷ *See* Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period, ECF 1 at 54 (of 55); *id.* (stating that the Kansas median for two-person household was \$65,112 per year, or \$5,426 per month); *but see Census Bureau Median Family Income By Family Size*, https://www.justice.gov/ust/eo/bapcpa/20190401/bci_data/median_income_table.htm (last visited June 29, 2023) (providing that for cases filed between April 1 and April 30, 2019, Kansas median for two-person household was \$66,443 per year, or \$5,536.92 per month).

¹⁸ *See* Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period, ECF 1 at 54 (of 55).

for his personal income taxes, which he concedes is incorrect.¹⁹ He deducts \$50 per month for a portion of the personal insurance he also deducts on Schedule J. He deducts \$200 of his \$282 monthly telephone expenses while deducting an additional \$285 per month on his Schedule J.²⁰ And he deducts a whopping \$1,044 per month for the use of his personal vehicle, most of which represents the IRS mileage rate for his daily commute to his brother's company.²¹ Whether the IRS permits such deductions from taxable income is beside the point; they are not permissible here. *See* 11 U.S.C. § 101(10A) (defining current monthly income “without regard to whether such income is taxable income”). Without those deductions, Sanders is an above-median-income debtor²² who should have filed a five-year plan. Because his plan lasts for only three years, it does not satisfy § 1325(b)(1).

2. Sanders did not file his bankruptcy petition in good faith.

Section 1325(a) sets out a number of additional requirements for plan confirmation, among them that “the action of the debtor in filing the petition was in good faith.” *See* 11 U.S.C. § 1325(a)(7);²³ *Wachovia Dealer Servs. v. Jones (In re*

¹⁹ Trial Tr. 87:2-9.

²⁰ *See* ECF 1 at 52 (of 55); ECF 22-1. Sanders also concedes that he shares the telephone account with his two daughters and one daughter's boyfriend; his \$282 monthly bill includes not only fees for the three additional lines, but also equipment charges for three iPhones he appears to have financed post-petition. *See* Debtor's Ex. K.

²¹ *See* ECF 1 at 52 (of 55); ECF 22-1.

²² The median income in Kansas for a two-person household was \$66,443 per year, or \$5,536.92 per month, when Sanders filed his petition. *See* note 17 *supra*.

²³ A separate provision of § 1325(a) requires a debtor to have proposed his Chapter 13 *plan* in good faith. *See* 11 U.S.C. § 1325(a)(3). Because the Court finds that

Jones), 530 F.3d 1284, 1290 (10th Cir. 2008) (holding that elements of § 1325(a) are mandatory for confirmation). A debtor's *bad* faith in filing the petition may constitute cause under § 1307(c) to dismiss the case. *See In re Gier*, 986 F.2d 1326, 1329 (10th Cir. 1993). Both "good faith" under § 1325(a)(7) and "bad faith" under § 1307(c) are determined on a case-by-case basis under the totality of the circumstances. *See id.* However, whereas § 1325(a)(7) places the burden of establishing good faith on the debtor, § 1307(c) places the burden of establishing bad faith on the moving party. *See In re Wareham*, 553 B.R. 875, 880 n.21 (Bankr. D. Utah 2016) (citing *In re Werts*, 410 B.R. 677, 690 (Bankr. D. Kan. 2009)). Factors relevant to whether a Chapter 13 petition was filed in good (or bad) faith include:

the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

In re Gier, 986 F.2d at 1329 (quoting *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)).

Here, under the totality of the circumstances, Sanders has not only failed to satisfy his burden of establishing good faith under §§ 1325(a)(7)—Carduff has satisfied her burden of establishing bad faith under § 1307(c). Sanders' tax returns and income history suggest that he has unfairly manipulated his self-employment

Sanders did not file his petition in good faith, it does not reach the separate issue of Sanders' good faith in proposing his plan.

income for purposes of this case. And he appears to have done so before. During the 2009 divorce, the Kansas court found:

With regard to Petitioner's income, Petitioner testified that he should have attributed to him the annual income of \$56,000.00 per year based upon his current wages received to date from VOS Design, Inc. Respondent testified that Petitioner's income should be set at at least \$104,000.00 based on his 2008 tax returns The Court finds that Petitioner's annual income should be set at \$104,000.00.²⁴

Since entry of the judgment in 2009, Sanders has made no voluntary payments to Carduff; has vowed never to pay her; and has apparently gone to great lengths—including giving up his shares in the company he founded²⁵ and going unbanked since 2017—to avoid doing so. Yet aside from some recent taxes, he had no unsecured debts *except* the one to Carduff when he filed for bankruptcy.²⁶ He incurred additional secured debt for, and made a \$3,000 down payment on, a new car just four days before filing.²⁷ He provided deliberately obtuse answers when deposed by Carduff's counsel.²⁸ And he urinated on Carduff's belongings.

The principal purpose of bankruptcy is to give a “fresh start” to the “honest but unfortunate debtor.” *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367

²⁴ Judgment and Decree of Divorce ¶ 10, Cr.'s Ex. 1.

²⁵ Although Sanders testified that he gave up his shares in VOS Design in order to avoid paying for the company's ongoing expenses, the timing of the transaction suggests that he did so to avoid garnishment by Carduff.

²⁶ Sanders' debt to Carduff would not be dischargeable in Chapter 7. *Compare* 11 U.S.C. § 1328(a) *with* 11 U.S.C. § 523(a)(15).

²⁷ See Claim 2-1 at 6 (of 10).

²⁸ See, e.g., Cr.'s Ex. 4 at 14-15 (denying knowledge of own income).

(2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286 (1991)). But the facts of this case indicate that Sanders is motivated by a *desire* not to pay Carduff rather than an inability to pay her, *cf. In re Gier*, 986 F.2d at 1330, and that bankruptcy represents the latest round of the “games” he has played since 2008.²⁹

For these reasons, Carduff’s objection to confirmation is sustained under 11 U.S.C. §§ 1325(a)(7) and (b)(1); Carduff’s motion to dismiss is granted under 11 U.S.C. § 1307(c); the Chapter 13 trustee’s motion to dismiss is denied as moot; and Sanders is hereby ordered to show cause, within 30 days of the date of this order, why this Court should not hold pursuant to 11 U.S.C. § 349(a) that his debt to Carduff will not be dischargeable in any future bankruptcy case. Carduff may, but is not required to, file a reply within 21 days of Sanders’ response.

IT IS SO ORDERED.

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²⁹ Carduff testified: “[A]t the end of that first divorce hearing when we walked out and he had been ordered to pay the \$2,500[,] I was going down in the elevator. He stuck his foot in. He opens the elevator door. He stepped inside. He clapped his hands together and said, all right, let the games begin.” Trial Tr. 80:6-10.