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PARTIES: Frank William Boykin  
CHAPTER: 13  
ATTORNEYS:  
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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

In re

FRANK WILLIAM BOYKIN,

Case No. 95-11129-MAM-13

Debtor.

**ORDER**

This matter is before the Court for the confirmation hearing on the Debtor's Third Amended Chapter 13 Plan dated April 22, 1996, and on the Court's Show Cause Order as to why the case should not be dismissed for failure to propose a viable plan. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is denying confirmation of the Debtor's plan and dismissing the case.

**FACTS**

**Procedural History**

The debtor, Frank William Boykin, II, filed his Chapter 13 case on May 12, 1995. He was in serious financial trouble on two fronts. He owed the federal and state governments at least \$85,000 in back taxes. He was not withholding sufficient monies from his trust fund income to cover the taxes. He owed his former wife and son, Melanie Stephens (Addison) and Frank William Boykin, III, respectively, unpaid support obligations of at least \$17,200 and other alimony/property settlement obligations as well.

Mr. Boykin's first plan dated May 22, 1995, proposed to pay the Internal Revenue Service \$72,841 as a priority claim and the remainder of its claim as unsecured. It proposed to pay the State of Alabama \$12,037 as a priority claim and the remainder as unsecured. The plan proposed to pay unsecured creditors 1% of their claims. The monthly plan payments were to be \$1,640.35. An amended Chapter 13 plan was filed on August 28, 1995, which included the same

provisions except the indication that the monthly payments of \$1,640.35 would yield unsecured creditors 4.19% instead of 1%.

On November 14, 1995, the debtor filed yet another plan in response to an objection to confirmation filed by Melanie Stephens. It proposed to treat the taxing authorities the same, but also proposed to pay Ms. Stephens \$21,400 as a priority claim. Unsecured creditors would then receive 0% on their claims. The confirmation hearing was commenced on January 29, 1996. At the continued hearing on February 26, 1996, the debtor filed another amended plan which increased the monthly payments to \$2,470 and provided that the sum would pay unsecured creditors 20%. The hearing on confirmation of this plan was set for April 22, 1996. On April 22, 1996, the debtor filed what the Court designated as a Second Amended Plan. It decreased payments to \$1,640.35 again, proposed to pay the taxing authorities in the same manner as before, proposed to pay Ms. Stephens \$17,000, and proposed to pay unsecured creditors 0%. The Second Amended Plan is the plan the Court considers in this order.

#### Bankruptcy Schedules

In his bankruptcy schedules, Mr. Boykin listed his employment income as \$4,584 per month. He also indicated he had trust income from a family trust of \$5,500 per month. His expenses totaled \$6,749.65 per month including \$1,800 for taxes on the family trust, \$1,000 for food, \$1,200 for "business travel, food & shelter", \$250 for telephone and \$40 for recreation.

#### Bankruptcy Court Testimony as to Debts, Assets and Income

When questioned about his income and expenses, Mr. Boykin showed an almost total lack of knowledge. He testified that his wife handled the finances. Mr. Boykin is a pilot for Sun Jet Airlines and is based out of Tampa, Florida. He has been employed by the company for more than 3 years. He continues to live in Mobile and to share the rental expense of a residence in Florida in which he stays part of each month. He maintains vehicles in both places.

Ms. Boykin lives in Mobile. She did not file bankruptcy because the tax and divorce debts were not hers and were incurred by Mr. Boykin before her marriage to him. She worked for an airline in 1995 and in 1996, but her job recently ended. She netted \$435 in monthly income from her job. To provide herself with transportation to and from work, she bought a new 1995 Ford Taurus which has monthly payments of \$405. Her entire net income was consumed by that payment.

Monthly, Mr. Boykin places the trust fund income, net of child support and tax withholding in an account in Ms. Boykin's name. She pays all family bills from that account.

The monthly expenses of the Boykins are as follows:

<b>INCOME OR EXPENSE</b>	<b>TESTIMONY AT TRIAL</b>	<b>TESTIMONY IN MS. BOYKIN'S DEPOSITION<sup>n</sup></b>	<b>BANKRUPTCY SCHEDULES</b>
INCOME			
Frank Boykin wages	\$ 4,097.00	\$ 4,584.00	\$ 4,584.00
Withholding	(967.86)	(955.00)	(956.00)
TRUST INCOME	5,500.00	5,500.00	5,500.00
Tax withholding	(1,435.00)	(1,200.00)	(1,800.00)
<b>TOTAL INCOME</b>	<b>\$ 7,194.32</b>	<b>\$ 8,529.00</b>	<b>\$ 7,328.00</b>
MORTGAGE	\$ 776.85	\$ 695.00	\$ 809.65
ELECTRICITY	169.86	170.00	200.00
GAS	—	30.00	30.00
TELEPHONE	324.15	—	250.00
WATER & SEWER	37.57	40.00	20.00
FOOD	420.78	425.00	1,000.00
CABLE	23.26	20.00	0.00
AUTO GAS & MISCELLANEOUS	333.17 (includes payment of prepetition bills)	—	350.00

<b>INCOME OR EXPENSE</b>	<b>TESTIMONY AT TRIAL</b>	<b>TESTIMONY IN MS. BOYKIN'S DEPOSITION<sup>n</sup></b>	<b>BANKRUPTCY SCHEDULES</b>
HEALTH INSURANCE	—	370.00	738.00 (but unclear—\$738 deduction from wages for “insurance”)
CLOTHES	45.80	50.00	20.00
BUSINESS TRAVEL & FOOD	1,000.00	800.00	1,200.00
AUTO INSURANCE	212.67	215.00	100.00
CLEANING	—	50.00	—
MEDICINE	15.90	20.00	20.00
DOCTOR	131.07	130.00	20.00
ACCOUNTANT	61.84	60.00	—
LIFE INSURANCE	80.00	80.00	unclear (\$738 deduction from wages for “insurance”)
HOME MAINTENANCE	55.97	50.00	0.00
CHILD SUPPORT	865.00	865.00	865.00
BARBARA BOYKIN CAR	405.49	410.00	Not listed since not Debtor's expense
VISA CARD	200.00	—	—
OTHER CREDIT CARDS	213.37	—	—
<b>TOTAL EXPENSES</b>	<b>\$ 5,254.75</b>	<b>\$ 4,480.00</b>	<b>\$ 5,622.65</b>
<b>NET INCOME AFTER EXPENSES</b>	<b>\$ 1,939.57</b>	<b>\$ 4,049.00</b>	<b>\$ 1,705.35</b>

<sup>n</sup>According to Stephens' Exhibit 4, these are the amounts for which there was testimony or for which Ms. Boykin furnished an exhibit.

At the filing of the case, the Boykins jointly owed Visa over \$3,000. The Boykins did not list their Visa credit card account as a debt in the debtor's schedule of debts. The reason

given was that Mr. Boykin needed a credit card for charging items when he was traveling. The unsecured bill of over \$3,000 was routinely paid during the case. Other prepetition unsecured bills were paid during the case: a debt to AmSouth Bank, debts to Exxon and Texaco, prepetition legal fees, a \$1,600 private investigator's bill, and a \$1,200 bill to McCoy Outdoor for sporting goods. All of these unsecured creditors have been paid substantially more than 0% or 1% of their claims.

While in Chapter 13, Mr. Boykin continued to belong to the Athelstan Club for some period of time, and he paid \$175 annual dues to a Mardi Gras society. In addition to all of their categorized expenses, the Boykins have monthly bills to J.C. Penney and Visa which average more than \$400 per month for unspecified purchases. Ms. Boykin testified that their tax problems have worsened. Apparently they still have not been withholding enough money and will owe \$17,025 in additional 1995 taxes. They propose to pay these taxes outside the plan at a rate of \$779 per month for two years. The Boykins are also having a child in September 1996 which will increase their household expenses.

Mr. Boykin and Ms. Stephens disagree as to the amount of Ms. Stephens' priority claim. Mr. Boykin believes it to be \$17,000; Ms. Stephens alleges that it is \$21,400. The matter is on appeal. Mr. Boykin's attorney indicated that if the amount were found to be \$21,400 at a later date, the debtor would amend his plan to pay all of the claim as required under the Bankruptcy Code. The exact amount is not important for this decision.

#### LAW

The requirements for confirmation of a Chapter 13 plan are established in 11 U.S.C. § 1325. In relevant part it provides:

(b)(1) If the . . . holder of any allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan

. . .

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

The plan does not meet this test.<sup>1</sup>

The Bankruptcy Code, at 11 U.S.C. § 1325(b)(2), defines what "disposable income" means in Section 1325(b)(1)(B). Disposable income is income

. . . not reasonably necessary to be expended . . . for the maintenance or support of the debtor or a dependent of the debtor; and . . . if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

Courts have interpreted this language to mean that a debtor should have "adequate" income left for their expenses, but a debtor should not be able to live or spend in a "first class" manner. *In re Easley*, 72 B.R. 948 (Bankr. M.D. Tenn. 1987). The issue is one of fact and a court should consider the totality of circumstances giving a debtor some latitude, especially if they are making a substantial payment of unsecured debt. *In re Gillead*, 171 B.R. 886 (Bankr. E.D. Cal. 1994).

Mr. Boykin proposes to pay \$1,640.35 per month into his plan for the benefit of creditors. He proposes to keep his remaining net income of approximately \$4,000 (after payment of taxes of approximately \$3,000 and \$865 in child support) for his own support. Even if the court considers his commute costs to Tampa as an expenditure necessary for the operation of a business, the expenses are too high. Mr. Boykin is not making the required sacrifice.

At the hearing in January, he was questioned about his family moving to Tampa to cut his expenses. No real attempt to make that move was shown. Instead, Mr. Boykin apparently believes it is appropriate for him to pay \$500 as his share of the monthly rent on an apartment

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<sup>1</sup>This plan is a five-year plan and disposable income will be devoted to creditor payments for 60 months pursuant to 11 U.S.C. § 1322(d).

shared by 2 or 3 people, spend \$30 per day on food, and maintain two cars just for his own transportation while paying his creditors, except for a chosen three, 0% or 1% of their debts. He could cut his travel and Tampa expenses by one-half or \$500 by taking his own food or moving to Tampa, reduce his telephone bill by \$275 by cutting down on the voluminous number of calls, cut his credit card bills by \$400 by not charging on his VISA or other credit cards for unspecified expenses, and cut automobile gas and maintenance bills by \$120 by eliminating one car, and have at least \$1,000 more per month to pay to creditors. It is not unreasonable to ask his family of three to live on about \$3,000 per month.

Since his expenses are not low enough for the Court to find that all of his net disposable income is being paid to creditors, the plan cannot be confirmed. It does not meet the test under 11 U.S.C. § 1325(b).

A plan must also be “proposed in good faith” pursuant to 11 U.S.C. § 1325(a)(3) in order to be confirmed. “Good faith” is not to be read as an inquiry into the ability of the debtor to pay his debts, but should be a review of whether the plan or case are an abuse of the bankruptcy process. *In re Khan*, 172 B.R. 613 (Bankr. Minn. 1994) (reviewing “good faith” in Chapter 7 context); *In re Greer*, 60 B.R. 547 (Bankr. C.D. Cal. 1986); *In re Kourtakis*, 75 B.R. 183 (Bankr. E.D. Mich. 1987), *In re Easley, supra*. Abusive behavior may include deficiencies or inaccuracies in a debtor’s schedules which might mislead the court, discriminatory treatment of creditors, and continued, inappropriate spending. All of these are present in this case.

Mr. Boykin continued to live as if no sacrifice was necessary once he was in Chapter 13. The Court told the debtor at one of the early hearings that his expenses were questionable. Mr. Boykin made no attempt at economy. He paid for sporting goods and club memberships, and his wife bought a new car. That spending now leaves him with no money to pay additional



1995 taxes of \$17,025. He expects his prebankruptcy creditors to be subordinated to this debt and allow the IRS to be paid 100% of that debt within 2 years.

Mr. Boykin flaunted Chapter 13, its purposes, and its rules. Mr. Boykin perused his debts and decided which were convenient to list and which were not. He gave unlisted creditors preferential treatment. The people he chose not to pay were the taxing authorities and his former wife. He paid AmSouth; he paid his domestic relations attorneys; he paid his travel and gas credit cards; he paid his private investigator. He wanted to use Chapter 13 to pay the debts he could not discharge if he filed a Chapter 7: his tax debt and his debt to his former wife. He carefully structured his plan and payments to pay no one else. He did not wish to suffer the hardships of Chapter 13 while gaining its advantages.

The Court also believes the Boykins were exceptionally cavalier in their information gathering and delivery for this case. Mr. Boykin stated that the income and expense figures he placed in his bankruptcy papers were numbers he arrived at after consultation with his wife. When she testified, she indicated that the figures in the schedules were Mr. Boykin's estimate at the time and that her numbers were different. Ms. Boykin, in deposition testimony, testified as to income and expense figures which were different from those to which she testified at court. The Court and opposing counsel heard three versions of the parties income and expenses. The failure to accurately and consistently report these facts has shown an indifferent attitude to this process and made it extremely difficult to conclude this case. Such behavior evidences a lack of good faith in the plan process and the Court finds that the debtor did not propose a plan in good faith pursuant to 11 U.S.C. § 1325(a)(3).

For the reasons stated above, it is appropriate to dismiss the case. The debtor has had many chances to formulate a confirmable plan. He did not do so. While in Chapter 13, his lifestyle has continued as before. He has even managed to increase the family debt significantly

with additional unpaid taxes and his wife's purchase of a new vehicle. There is no possibility that the plan will work as presently drafted. There was no showing that the Boykins have an ability to formulate a better plan, particularly now that additional taxes are owed, Ms. Boykin is unemployed, and the parties are still maintaining two residences.

THEREFORE IT IS ORDERED THAT

1. Confirmation of Frank William Boykin, II's Second Amended Chapter 13 plan dated April 22, 1996, is denied;
2. This case is dismissed with an injunction against refiling for 90 days from the date of the order;
3. Any monies held by the Chapter 13 Trustee shall be sent to Debtor's counsel, Mr. Herman Padgett.

Dated: May 3, 1996

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MARGARET A. MAHONEY  
CHIEF BANKRUPTCY JUDGE