

**IN THE UNITED STATES BANKRUPTCY COURT**  
**FOR THE EASTERN DISTRICT OF TENNESSEE**

In re

JESSE DEE HEBERT,

Debtor.

No. 03-24261

Chapter 7

[affirmed E.D. Tenn. 2:05-cv-131; 12/21/05]

**MEMORANDUM**

APPEARANCES:

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**MARCIA PHILLIPS PARSONS**  
**UNITED STATES BANKRUPTCY JUDGE**

This chapter 7 case came before the court for hearing on a motion to dismiss for lack of good faith pursuant to 11 U.S.C. § 707(a) filed by Jerry K. Galyon. For the reasons set forth below, the motion to dismiss will be granted. This is a core proceeding. *See* 28 U.S.C. § 157(b)(2)(A), (J) and (O).

I.

The debtor, Jesse D. Hebert, is thirty-one years old with no known health problems. A native of Texas where he attended both college and medical school, the debtor moved to Tennessee in 1998 to serve his residency in anesthesiology at the University of Tennessee Medical Center in Knoxville. Upon completing his residency at the end of June 2002, the debtor became employed with Hamblen Anesthesia P.C. to provide anesthesiology services to the Morristown/Hamblen County Hospital. His contract provided for gross monthly income of \$15,000 for the first six months of his employment and then \$18,000 a month thereafter.

During his residency, the debtor moonlighted at various health clinics, including MediCenter, a walk-in health clinic located in Pigeon Forge, Tennessee and owned by Dr. Larry Davenport. In April 2002, the debtor agreed to purchase MediCenter from Dr. Davenport for \$200,000. Unable to borrow the necessary funds for the purchase from a financial institution, the debtor approached Jerry Galyon, a Sevierville attorney and a patient at MediCenter. In May 2002, Mr. Galyon loaned the debtor \$50,000 for the initial payment to Dr. Davenport. Mr. Galyon also signed as co-maker with the debtor on two unsecured loans, one from Sevier County Bank in May 2002 and one from Mountain National Bank in December 2002 in the amounts of \$25,000 and \$200,000 respectively. The proceeds from these two loans were used to repay Mr. Galyon for his \$50,000 loan to the debtor, pay the balance owed to Dr. Davenport, and provide operating capital to the MediCenter, which the debtor set up immediately after the purchase from Dr. Davenport as a Tennessee Professional Limited Liability Corporation, MediCenter Walk-in Medical Clinic, PLLC. In return for being an accommodation party on the loans, the debtor conveyed to Mr. Galyon a 49% ownership interest in MediCenter. The transaction between the debtor and Mr. Galyon is set forth

in a contract dated December 3, 2002, modified by an Addendum dated December 12, 2002.<sup>1</sup> The contract provided that the debtor was responsible for the day-to-day operations of MediCenter and would work there full time or have other licensed medical providers on staff at all times although “[i]t is understood that Dr. Hebert has entered into an employment contract with the Morristown Anesthesiology Group for consideration of \$350,000 a year.” The parties’ contract also provided that Mr. Galyon was a silent partner in the business, that the debtor and “the proceeds from the operation of the MediCenter” were responsible for all of the debts of MediCenter and the loans from Sevier County and Mountain National Banks, and that the debtor would hold Mr. Galyon harmless from paying any of the debts. After entering into the December 2002 agreement with Mr. Galyon, the debtor through MediCenter began preparation to open and operate a string of medical spas (“MediSpas”) which would provide therapeutic massage and cosmetic services (*e.g.*, facials, laser therapy, prescription creams). The first MediSpa opened in March 2003 in Seymour, Tennessee in a building owned by Mr. Galyon; the second opened a few months later in Pigeon Forge. The MediSpas were never profitable and closed a few months after they were opened. In addition, the MediCenter experienced financial difficulties, with its office manager being fired in February 2003 after it was discovered that she may have embezzled thousand of dollars from the MediCenter although no criminal charges were ever brought against her. The debtor shut down the walk-in clinic in late October 2003 and then filed for personal bankruptcy relief under chapter 7 on November 28, 2003, after Mountain National Bank and Sevier County Bank began demanding

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<sup>1</sup>These documents were referred to, but not formally introduced by either party during the hearing. However, the documents are attached to Mr. Galyon’s pending complaint objecting to the debtor’s discharge and the debtor admits their authenticity in his answer. Accordingly, the court takes note thereof to provide the full background of the parties’ transaction.

payment from him.

Notwithstanding that MediCenter is a separate legal entity, the debtor filed the petition in the name of Jesse Dee Hebert, f/d/b/a Medi Center, and included not only his personal assets and liabilities, but also those of MediCenter, with no differentiation between the two. According to the schedules, the debtor has total assets of \$99,905.00 and total liabilities of \$492,288.80. The scheduled assets include \$42,064 in a retirement plan, \$46,775 in office and medical equipment and furnishings, \$3,550 in jewelry, \$2,200 in household furnishings and computer equipment, \$600 in books and paintings, a 1995 Ford F150 valued at \$2,000, a leased 2002 Ford Expedition with nominal value, cash and bank account funds of \$845, and the debtor's 51% interest in MediCenter, which the debtor indicates has \$0 value. The debtor also lists "for disclosure purposes only" various stocks at \$0 value which are in "revocable trusts owned by the debtor's parents." According to the debtor's statement of intention and Schedule G, he plans to surrender the 2002 Ford Expedition and reject three unexpired leases of surgical laser machines.

As for the scheduled liabilities, fifty-two creditors are listed. These include eight credit card companies collectively owed \$31,800; twenty-seven "open account" creditors owed collectively \$31,900; a student loan debt of \$20,000; debts to Charles Cooke and Londa Cooke in the amount of \$100,000 and \$22,618 respectively; loan obligations to Sun Trust Bank, Mountain National Bank, and Sevier County Bank in the respective amounts of \$20,200, \$188,536, and \$24,224; payroll and personal taxes in the amount of \$40,000 to the Internal Revenue Service; and unpaid wages of \$13,000 to Jenny Blakemore. Jerry K. Galyon is scheduled as a co-debtor on the Mountain National Bank and Sevier County Bank loans.

In the schedules of income and expenditures filed with the petition, the debtor indicates that

he is single with no dependents. His gross monthly income from Hamblen Anesthesia PC is listed as \$18,000 with payroll tax and social security deductions of \$5,637, a rent deduction of \$1,000, and “Allowance from Group” income of \$500 per month, bringing the debtor’s total net monthly income to \$11,863. The debtor lists his current monthly expenditures at \$3,096, leaving him excess monthly income of \$8,767.

In the statement of financial affairs, the debtor discloses that during the year preceding the bankruptcy filing, he made gifts of jewelry totaling \$16,500 to his mother and girlfriend and charitable donations of \$5,000. The debtor also indicates that he paid creditors sums totaling \$27,990 within the 90 days preceding bankruptcy.

## II.

11 U.S.C. § 707(a)<sup>2</sup> provides that a bankruptcy court may dismiss a chapter 7 case for “cause.” Although a debtor’s lack of good faith is not listed in the statute as an example of cause justifying dismissal of a chapter 7 case, the Sixth Circuit Court of Appeals has expressly held that that because a debtor’s good faith is an “implicit jurisdictional” or “threshold requirement” in all bankruptcy cases, lack of good faith is a valid cause for dismissal under § 707(a). *See Indus. Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1127 (6th Cir. 1991). The *Zick* court noted that

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<sup>2</sup>The court may dismiss a case under this chapter only after notice and a hearing and only for cause, including—

- (1) unreasonable delay by the debtor that is prejudicial to creditors;
- (2) nonpayment of any fees or charges required under chapter 123 of title 28; and
- (3) failure of the debtor in a voluntary case to file, within fifteen days or such additional time as the court may allow after the filing of the petition commencing such case, the information required by paragraph (1) of section 521, but only on a motion by the United States trustee.

11 U.S.C. § 707(a).

“[t]he facts required to mandate dismissal based upon a lack of good faith are as varied as the number of cases,” *id.* (quoting *In re Bingham*, 68 B.R. 933, 935 (Bankr. M.D. Pa. 1987)), with the court finding particular merit in the “smell test” described in *Morgan Fiduciary, Ltd. v. Citizens & S. Int’l Bank*, 95 B.R. 232, 234 (S.D. Fla. 1988).<sup>3</sup> *In re Zick*, 931 F.2d at 1127-28. The Sixth Circuit also quoted from its decision in *In re Krohn*, 886 F.2d 123 (6th Cir.1989), observing that the following language therein was “instructive ... as to § 707(a)” of the Bankruptcy Code even though *Krohn* dealt with dismissal under § 707(b) for substantial abuse:

Those courts which have reviewed the legislative history, have generally concluded that, in seeking to curb “substantial abuse,” Congress meant to deny Chapter 7 relief to the dishonest or non-needy debtor.

....

The goals of bankruptcy are to provide an honest debtor with a fresh start and to provide for an equitable distribution to creditors. The debtor herein, although he has minimal assets, appears to be seeking a “head start” with no attempt to deal with creditors on an equitable basis.

*In re Zick*, 931 F.2d at 1128 (quoting *In re Krohn*, 886 F.2d at 127-28).

Notwithstanding the foregoing, the *Zick* court cautioned that:

Dismissal based on lack of good faith must be undertaken on an *ad hoc* basis. [Citation omitted.] It should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross

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<sup>3</sup>In dismissing the bankruptcy case for lack of good faith, the bankruptcy court in *Morgan Fiduciary* observed that the debtor’s petition “fails to pass the ‘smell test.’” *Morgan Fiduciary, Ltd. v. Citizens & S. Int’l Bank*, 95 B.R. at 234. Upon appeal, the district court upheld the dismissal, finding the bankruptcy judge’s “perception, and candor in expressing it” to be “a sound exercise in judicial decision-making.” *Id.* The court quoted with approval the late Irwin Younger’s observation that “the most important item in the courtroom and all too seldom used is the judge’s nose. Any trial judge will inevitably come to the conclusion on occasion that a certain case or claim or defense has a bad odor. Simply put, a matter smells. Some smell so bad they stink.” *Id.*

negligence.

*In re Zick*, 931 F.2d at 1129.

The Sixth Circuit Court of Appeals decided the *Zick* case in 1991. Since that time, the Sixth Circuit has not revisited the issue of a chapter 7 debtor's good faith in a reported opinion, but has considered whether debtors filing under other chapters should have their cases dismissed for lack of good faith. On each occasion, the court has held that good faith determinations are to be based on a totality of the circumstances. *See Alt v. United States (In re Alt)*, 305 F.3d 413, 419-20 (6th Cir. 2002)(The court noted that the totality of the circumstances test used to determine whether a chapter 13 plan has been proposed in good faith should similarly be used to determine whether chapter 13 debtor has filed petition in good faith, although "given the more severe consequences, ... 'the bankruptcy court should be more reluctant to dismiss a petition under Section 1307(c) for lack of good faith than to reject a plan for lack of good faith under Section 1325(a).'""); *Trident Assocs. Ltd. P'ship v. Metro. Life Ins. Co. (In re Trident Assocs. Ltd. P'ship)*, 52 F.3d 127, 131 (6th Cir. 1995); *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 738 (6th Cir. 1994)(In both cases the court held that dismissal of a chapter 11 case for lack of good faith must be based on the totality of the circumstances.). Accordingly, in order to determine in the present case whether the debtor has sought bankruptcy relief in good faith, this court must examine the totality of the circumstances to see if they satisfy the *Zick* criteria.<sup>4</sup>

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<sup>4</sup>The Sixth Circuit in *Zick* did not specifically address who has the burden of proof as to the debtor's good faith or lack thereof but did cite with approval in a string citation the case of *In re Bingham*, 68 B.R. 933 (Bankr. M.D. Pa. 1987)(Where debtor's good faith is put into question, the debtor bears the burden of proving that the filing was made in good faith.). And, as previously noted, the court observed that good faith is an implicit jurisdictional requirement, which also suggests that the debtor has the ultimate burden of proof. *See Mich. Nat. Bank v. Quality Dinette*,  
(continued...)

To aid in this examination, courts have identified certain relevant factors which bear on the debtor's good faith, with the most frequently cited list being found in *In re Spagnolia*, 199 B.R. 362 (Bankr. W.D. Ky. 1995):

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.
2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle.
3. The debtor filed the case in response to a judgment pending litigation, or collection action; there is an intent to avoid a large single debt.
4. The debtor made no effort to repay his debts.
5. The unfairness of the use of Chapter 7.
6. The debtor has sufficient resources to pay his debts.
7. The debtor is paying debts to insiders.
8. The schedules inflate expenses to disguise financial well-being.
9. The debtor transferred assets.
10. The debtor is over-utilizing the protection of the Code to the unconscionable detriment of creditors.
11. The debtor employed a deliberate and persistent pattern of evading a single major creditor.
12. The debtor failed to make candid and full disclosure.
13. The debts are modest in relation to assets and income.
14. There are multiple bankruptcy filings or other procedural "gymnastics."

*Id.* at 365. Generally, "[t]he existence of only one of these factors will not ordinarily support dismissal 'for cause' under § 707(a), but the presence of a combination of factors will usually suffice." *In re Eddy*, 288 B.R. 500, 505 (Bankr. E.D. Tenn. 2002)(citing *In re Spagnolia*, 199 B.R. at 365).

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<sup>4</sup>(...continued)

*Inc.*, 888 F.2d 462, 466 (6th Cir. 1989)(The party bringing the action in federal court bears the burden of establishing that jurisdiction exists.). Other courts disagree on the issue. *Compare In re Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 207 (3d Cir. 2000)("Once a party calls into question a petitioner's good faith, the burden shifts to the petitioner to prove his good faith.") *with In re Johnson*, 318 B.R. 907, 912 (Bankr. N.D. Ga. 2005)(Burden is on moving party to demonstrate that cause exists for dismissal of Chapter 7 petition for lack of good faith.). Regardless of which party has the burden of proof, this court concludes as discussed *infra* that the debtor has not filed this chapter 7 case in good faith.

These *Spagnolia* factors are referenced by the movant Jerry Galyon in the instant case. According to Mr. Galyon, the debtor filed his chapter 7 case in bad faith because: (1) he has \$8,767 of excess disposable monthly income; (2) he has made no lifestyle changes and no effort to repay his debts, as evidenced by his gifts of jewelry totaling \$16,500 in the nine months proceeding the bankruptcy filing; (3) the bankruptcy filing was for the purpose of avoiding the debts cosigned by Mr. Galyon, which represent 48.4% of the debtor's total liabilities; (4) the debtor allowed an employee to embezzle funds from MediCenter; (5) the debtor made unauthorized withdrawals from MediCenter; and (6) the debtor's schedules and statement of financial affairs are incorrect because the debtor listed the stock as having no value and failed to include the retirement account on his statement.

In response, the debtor denies that his bankruptcy case was filed in bad faith and contends that unlike *Zick*, he did not file bankruptcy with "the intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence." See *In re Zick*, 931 F.2d at 1129. To the contrary, notes the debtor, he has 46 general unsecured creditors and the debts he cosigned with Mr. Galyon represent less than half of his total debt. As to his prepetition gifts, the debtor states that they were not extravagant given his income at the time. The debtor denies that he permitted an employee to embezzle funds or that he made unauthorized withdrawals from his business, noting that his withdrawals were salary. The debtor also disputes the contention that his schedules and statement of financial affairs are erroneous. He observes that he disclosed his retirement account on Schedule B and although he has since learned that the stock which he thought was in a trust in actuality belongs to him, he notes that he did in fact disclose the stock and has turned the stock over for liquidation to the chapter 7 trustee, along with the value of the prepetition gifts that he made to

the mother and girlfriend. The debtor denies that he has made no attempt to repay his debts, citing the \$27,990 in payments he made to creditors within the 90 days preceding his bankruptcy filing. Finally, as to his high income, the debtor responds that after his bankruptcy filing, his income substantially reduced, that he has only worked part-time and has had periods of unemployment of up to two months.

The hearing on Mr. Galyon's motion to dismiss was held on August 19, 2004. The only two witnesses were Mr. Galyon and the debtor. No documentary evidence was submitted other than two letters from Mr. Galyon to the debtor dated October 30, 2003. Little testimony was elicited by either counsel. To establish lack of good faith, Mr. Galyon relied primarily on the information set forth in the debtor's schedules regarding income, prepetition gifts, etc., while the debtor based his defense chiefly on the belief that ability to pay, standing alone, does not constitute lack of good faith and that the *Zick* standard for lack of good faith has not been satisfied because he did not engage in fraud, misconduct, or gross negligence and he has a substantial number of creditors. In this regard, the following testimony was presented, although after hearing the evidence, the court was left with the impression that the "whole story" had not been told by either party.

The debtor testified that he purchased the walk-in clinic from Dr. Davenport even though it was a "kind of sinking ship" because he enjoyed the rapport of the staff, saw familiar patients and cases, and wanted the clinic to survive because it serviced a need in the community. When asked how he had planned to fulfill both his obligations to the MediCenter in Pigeon Forge and to his anesthesiologist group in Morristown, the debtor testified that he thought that his work at the Morristown/Hamblen hospital would not be as demanding as at the University of Tennessee Medical Center and that he believed that he would be off early during the week and on weekends. The

debtor indicated that this expectation did not prove to be correct, and although he did not state how many hours a week he worked at the hospital, he did state that he worked approximately 40 hours per week as medical director of MediCenter, with 15-20 hours per week being during office hours and the rest after hours doing administrative activities. In addition, the debtor stated that he spent “some time” overseeing the MediSpas.

The debtor testified that he paid himself monthly draws of between \$4,000 and \$5,000 per month from the MediCenter, depending on the clinic’s financial condition, until February 2003 when the alleged embezzlement by the office manager was discovered. The debtor stated that these draws had been authorized by Mr. Galyon and were permitted under the parties’ written agreement, provided the other bills of the clinic were paid first. Mr. Galyon disputed both of these contentions, citing paragraph 6 of the agreement which provides that “[a]ll monthly payments including but not limited to the lease payments, utilities payments, employees’ salaries, taxes, insurance, supplies and bank notes shall be paid prior to disbursements between the [debtor] and [Mr. Galyon].” In this regard, the contract also provided that the debtor “will disburse profits from business at least quarterly” although there was no indication that MediCenter was ever profitable or that profits were disbursed during the time MediCenter was operated by the debtor.

The debtor testified that after the office manager left, “it was chaos in the [MediCenter] office,” that the permanent makeup artist on staff and the employee hired to do marketing for the MediSpas attempted to help out with the bookkeeping while the debtor found a new office manager. Whether a new manager was ever employed was not stated, but the debtor did continue with his MediSpa plans, which he believed would generate enough cash to “bail-out” the MediCenter. The MediSpas failed to generate profits and the debtor closed the spas after only a few months of

operations. The debtor testified that he attempted to mitigate the losses from the MediSpas by leasing their laser equipment to other doctors and that a couple of doctors used the equipment for a week, but their limited use did not generate enough money to cover the equipment's lease payments.

The debtor testified that until February 2003, the monthly payments to Mountain National and Sevier County Banks in repayment of the loans from these banks to the debtor and Mr. Galyon had been made by MediCenter. The debtor initially testified that he made no personal payments on either of these debts but later in his testimony stated that he could not recall if he had personally paid on the loans. The debtor indicated that he paid other debts of MediCenter from his personal account (*e.g.*, \$4,500 in payroll taxes, "rent at least once," "payroll a couple of times") and estimated that he invested roughly \$50,000 in attempts to keep the MediCenter open. The debtor testified that in the 90 days before his bankruptcy filing, he paid \$14,545 on his personal credit card debt and paid \$6,750 to Jared for jewelry he purchased for his mother or girlfriend.

According to the debtor, while he did not consult Mr. Galyon concerning daily operational decisions, "early on [he] kept [Mr. Galyon] informed" of MediCenter's condition and consulted Mr. Galyon more frequently after the office manager left, although the debtor admitted that he could be difficult to reach. The debtor testified that he discussed the opening and closing of the MediSpas with Mr. Galyon, but did not consult him before closing the MediCenter. The debtor admitted that on one occasion when the staff of MediCenter had been unable to reach him, the staff contacted Mr. Galyon who provided funds to cover a \$13,000 payroll check for MediCenter nurse practitioner, Jenny Blakemore, when she was threatening to quit, and that throughout 2003, Ms. Blakemore routinely did not cash her payroll checks because there were insufficient funds to cover the checks.

The debtor attributed the failure of the MediCenter and his resulting chapter 7 filing to the office manager's embezzlement from the MediCenter. The debtor admitted, however, that he "didn't keep a close enough eye on [the MediCenter]," "gave the office manager too much opportunity to misuse funds," and was "spread way too thin to keep a firm reign on everything." The debtor concluded that "once things started in motion they ... spun out of control" and he "didn't see an end to it and ... didn't think [MediCenter] could survive." The debtor testified that he talked to another doctor about taking over the clinic, but that when these talks were unsuccessful, he decided to close the facility.

The debtor testified that at the time he filed his bankruptcy petition, it was his intention to leave Tennessee and join a medical group in Texas where his salary would continue to be approximately \$18,000 a month. He was frustrated with and believed he was being treated unfairly by the Morristown/Hamblen County Hospital which had him undergo three urine screenings for drugs within a six-month period. The debtor testified that the drug test results had been negative, but because he believed that rumors of drug use would adversely affect his reputation, he voluntarily resigned from his employment with Hamblen Anesthesia in early December 2003 even though he had not yet signed a contract with the Texas medical group with which he had been negotiating.

Employment with the Texas group subsequently fell through when concerns about alleged drug use by the debtor were communicated to the Texas practice. As a result, the debtor had no income in January and February 2004 and only sporadic income thereafter when he began doing contract work for an anesthesia services staffing company. His gross monthly income for March, April, May, and June 2004 was respectively \$18,000, \$5,000, \$5,000, and \$0, with his gross income

for July 2004 between \$4,000 and \$5,000. At the time of the hearing in August, the debtor testified he had found employment in Dallas earning \$15,000 per month, although a contract had yet to be signed.

Lastly, the debtor testified that he has no prior bankruptcy filings, that he has accumulated no assets since the filing of his chapter 7, and that he has made no payments to family members. In light of his limited post-petition income, his only monthly post-petition expenditures have been rent, food, and malpractice insurance of \$1,200 per month. In addition, since April 2004, he has been paying the chapter 7 trustee the monthly sum of \$2,700.

Mr. Galyon testified he had no involvement with the operations of MediCenter and only provided financial backing. He stated that after the debtor informed him of the alleged embezzlement in January or February 2003, they only had two subsequent conversations. According to Mr. Galyon, he made numerous attempts to contact the debtor but the debtor would not return his calls or answer his letters with the exception of one letter in reference to the Seymour MediSpa. Mr. Galyon denied any involvement with the MediSpas and denied that the debtor discussed the MediSpas' closures with him. As previously noted, Mr. Galyon denied authorizing any salary payments to the debtor and testified that the sums withdrawn by the debtor from MediCenter totaled \$50,000.

Mr. Galyon testified that as a result of the debtor's default he has been called upon to pay the debts to Sevier County Bank and Mountain National Bank. He stated that he has paid approximately \$22,000 to Sevier County Bank in full satisfaction of that obligation and has been paying Mountain National Bank monthly payments of \$2,500. Mr. Galyon also testified that the chapter 7 trustee had advised him that he would be abandoning the bankruptcy estate's 51% interest

in MediCenter and the trustee had permitted him to pursue collection of the numerous insurance claims owed to MediCenter, to the extent the monies collected did not exceed the amounts owed to Sevier County Bank and Mountain National Bank. Mr. Galyon testified that he had already formed a new professional limited liability company that would own and operate a medical clinic at the old MediCenter site, under the supervision of Dr. Larry Davenport, the former owner of MediCenter.

The two letters submitted into evidence are both dated October 30, 2003, and are from Mr. Galyon to the debtor. In one letter, Mr. Galyon states that he has been unsuccessful in his attempts to reach the debtor and that the debtor had failed to return his calls. Mr. Galyon also states that he “called the MediCenter and it was closed. It seems it is closed every time I call. I called for you at Morristown Hamblen Hospital and was advised that you were on vacation.” The letter also indicates that the debtor had previously advised Mr. Galyon that he planned to talk to another doctor about working at or purchasing the MediCenter and Mr. Galyon asked for an update on this. Mr. Galyon expresses concern about what he views as the debtor’s “dilatory attitude” toward him and the MediCenter, concerns about the ability of MediCenter to meet its financial obligations, and concerns about the debtor’s health. In the other letter, presumably the second letter written, Mr. Galyon states that he received information at noon that day that the debtor was closing the MediCenter, the Pigeon Forge Spa and the Seymour Spa. Mr. Galyon requests in the letter that the debtor provide him with various financial information, including a list of all the assets and liabilities of the MediCenter and the spas, and questions whether the debtor claims that he provided notice to Galyon of the intended closures.

### III.

Applying the *Spagnolia* factors cited *supra* and other considerations often found in bad faith cases, it must first be noted that there is no evidence that the debtor herein reduced his creditors to a single creditor in the months preceding his chapter 7 filing, that he is paying debts to insiders, or that he has been transferring assets to evade creditors. Similarly, it must be noted that this is the debtor's first bankruptcy filing and there is no indication of "procedural gymnastics." *In re Spagnolia*, 199 B.R. at 365.

And, contrary to Mr. Galyon's assertions, the court does not find that the debtor failed to make a full and complete disclosure of his financial condition in his schedules and statement of financial affairs, at least with respect to his stock and retirement account. As evidence of the debtor's alleged bad faith, Mr. Galyon cites the fact that the debtor valued his stock at \$0, when in actuality it was worth approximately \$30,000, and points to the debtor's failure to list his retirement account in the pension funds section of his statement of financial affairs. However, the debtor testified that at the time of his bankruptcy filing he had listed the stock only as a formality because he believed, based on conversations with his parents and his attorney, that the stock would not be an asset of the estate because it was held in trust for him. This testimony was not contradicted and there is no indication that the stock's value was understated to mislead creditors. As to the omission of the retirement account from the statement of financial affairs, the court agrees with the debtor that the retirement funds were appropriately listed in Schedule B; the Pension Funds section of the statement of financial affairs is inapplicable to individual debtors.

Nonetheless, the court is bothered by the debtor's inclusion of MediCenter's debts and assets in his schedules. MediCenter was and is a separate legal entity from the debtor, and as a general rule the debtor would not be liable for the debts of MediCenter absent the execution of a

guaranty. The inclusion of MediCenter's debts without any indication as to the debtor's own personal liability for the obligations is misleading and makes it impossible for the court to accurately determine the debtor's actual indebtedness. A majority of the scheduled obligations are open account debts of the business and a review of the proofs of claim filed indicate that many are asserted solely against MediCenter. One of the claims scheduled by the debtor is for a personal loan from Charles Cooke in the amount of \$100,000. Yet the proof of claim filed by Mr. Cooke indicates that he is the husband of MediCenter employee Londa Cooke and that his claim of \$89,775.54 is for medical expenses the insurance company refused to pay due to lack of coverage caused by MediCenter's failure to pay the insurance premiums. Whether the debtor would be liable for these and other debts of MediCenter has never been established.

Furthermore, the court concludes that the debtor has sufficient resources to pay his debts, that he made little effort to repay his debts, and that the use of chapter 7 to evade his obligations is an "over-utiliz[ation of] the protection of the Code to the unconscionable detriment of creditors." *In re Spagnoliga*, 199 B.R. at 365. While ability to pay, standing alone, is generally insufficient to establish a debtor's lack of good faith in filing bankruptcy, it is a factor that a court may properly consider in evaluating the totality of the circumstances. *Merritt v. Franklin Bank (In re Merritt)*, 211 F.3d 1269, 2000 WL 420681, at \*\*3 (6th Cir. April 12, 2000)(unpublished op.)(citing *In re Spagnolia*, 199 B.R. at 366). The Sixth Circuit Court of Appeals implicitly reached this conclusion in *Zick* when it observed that its statement in *Krohn* that "Congress meant to deny Chapter 7 relief to the dishonest or non-needy debtor" applied not only to dismissals under §707(b) but also for cause under § 707(a). *In re Zick*, 931 F.2d at 1128. *See also In re Merritt*, 2000 WL 420681, at \*\*3 (dismissing case where debtor had substantial income and assets, failed to alter his lifestyle, and

failed to disclose assets on his schedules); *In re Emge*, 226 B.R. 396 (Bankr. W.D. Ky. 1998)(lack of good faith found where debtor, *inter alia*, had sufficient resources to pay her debts and had made no lifestyle adjustments); *In re Griffieth*, 209 B.R. 823 (Bankr. N.D.N.Y. 1996)(chapter 7 filed in bad faith where debtors had not made good faith attempt to pay primary creditor, had refused to engage in any belt-tightening, and could pay approximately one-half of debt while maintaining current lifestyle). When the debtor filed for bankruptcy relief, he had by his own admission, excess disposable income of \$8,767 per month. This amount did not include \$300 per month that the debtor contributed to charity, nor did it take into account that the debtor, an unmarried individual with no dependents, was spending excessive amounts of \$1,000 per month for rent, \$750 per month for food, and \$200 per month in clothing. Contribution of merely the excess disposable income and the \$300 monthly charitable donation to repayment of the debtor's obligations would in only 36 months repay creditors \$326,412, or approximately 66% of the debtor's scheduled debts totaling \$492,287.80. And, if the debtor has no or limited liability for the 30-odd debts totaling \$143,692.40 which appear to belong solely to MediCenter, the debtor could almost pay his debts in full (some 94%) within the same three year period. *Cf. In re Griffieth*, 209 B.R. at 831 (determination of lack of good faith included observation that without disturbing their relatively elevated lifestyle, debtors could fund approximately \$260,000 into a repayment plan over a sixty month period that would repay approximately one-half of debt owed to primary creditor). *See also In re Maide*, 103 B.R. 696, 700 (Bankr. W.D. Pa. 1989)("This Debtor who has acted in bad faith and is able to meet his obligations cannot use this court as an escape hatch simply because he has primarily business debts, the existence of which preclude a § 707(b) analysis. In enacting the 1984 amendments Congress intended to encourage repayment when feasible. When that intent is coupled with a bad faith filing,

there exists cause to dismiss pursuant to § 707(a.)”).

As to whether the debtor made any effort to repay his debts prepetition, the debtor did testify that he paid some of MediCenter’s bills with his own funds prior to the bankruptcy filing. However, during the nine months prior to the filing and while the debtor and MediCenter were in the debtor’s words, “just trying to hang on by their fingernails,” the debtor was giving \$100 a week to charity and making lavish gift purchases for his mother and girlfriend. In February 2003, the debtor gave his mother a \$9,000 diamond bracelet; in July 2003, he gave his girlfriend a \$2,500 bracelet and subsequently in August 2003 he gave her a \$1,100 watch. Then, in September 2003, the month before the MediCenter closing, the debtor gave his mother another bracelet, this one at a cost of \$3,000. Also, sometime during this same time frame, the debtor gave his girlfriend a \$900 necklace. Discretionary expenditures such as these belie the debtor’s assertion that he is seeking bankruptcy relief in good faith and indicate to the contrary that the debtor wishes to maintain his current lifestyle at the expense of his creditors.<sup>5</sup>

The unfairness of the debtor’s use of chapter 7 is further illustrated by the debtor’s behavior in operating and closing the medical clinic and spas. In agreeing to manage and supervise the clinic while he was already committed full-time at the Morristown/Hamblen Hospital, the debtor admittedly spread himself too thin and his negligent supervision of the staff led to its demise. These

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<sup>5</sup>At the same time that the debtor was purchasing extravagant gifts for loved ones, he was borrowing from a MediCenter employee to cover expenses. The debtor lists in his schedules an unsecured debt of \$22,618 to Londa Cooke for “personal loans.” Ms. Cooke has filed a proof of claim in this case asserting she is owed \$164 in unpaid wages as a MediCenter employee and \$24,800.98 for money loaned to MediCenter. Attached to the proof of claim is a statement signed by the debtor promising to be personally responsible for amounts borrowed. Additional supporting documents detail cash advances from Ms. Cooke’s credit cards dating from May to August 2003 used to pay MediCenter expenses.

problems were only compounded by the debtor's decision to open and supervise the ill-fated medical spas. Yet, even though the MediCenter was losing money, there was no indication that the debtor attempted to sell the business, sought other financing, or even met with the co-owner of MediCenter in an attempt to resolve his financial difficulties, other than the debtor's reference to talking to another doctor about taking over the clinic. And, when this one option fell through, the debtor unilaterally closed the clinic and went on vacation, leaving it up to an unidentified third party to inform Mr. Galyon who held a 49% interest in MediCenter of the closure. The debtor completed the walking away process by filing for bankruptcy relief less than a month later and then quitting his lucrative job to return to Texas, in effect washing his hands of the whole financial mess here in Tennessee. This conduct is especially unconscionable when the time frame is taken into consideration. The opening and closing of the MediSpas, the closing of the medical clinic, and the debtor's bankruptcy filing all took place less than a year after the debtor signed the agreement with Mr. Galyon on December 3, 2002, and only 18 months after the debtor purchased MediCenter from Dr. Davenport.

Not every debtor is entitled to the "fresh start" bankruptcy provides. As the Sixth Circuit Court of Appeals has explained:

The Bankruptcy Code is intended to serve those persons who, despite their best efforts, find themselves hopelessly adrift in a sea of debt. Bankruptcy protection was not intended to assist those who, despite their own misconduct, are attempting to preserve a comfortable standard of living at the expense of their creditors. Good faith and candor are necessary prerequisites to obtaining a fresh start. The bankruptcy laws are grounded on the fresh start concept. There is no right, however, to a head start.

*In re Zick*, 931 F.2d at 1129-30 (quoting *McLaughlin v. Jones (In re Jones)*, 114 B.R. 917, 926 (Bankr. N.D. Ohio 1990)). The debtor in the present case desires to obtain a head start, rather than

a fresh start. He wants to preserve his standard of living, his high income, and the discretion to make lavish gifts and generous charitable donations from that high income rather than pay his creditors. His conduct simply fails to pass the good faith “smell test.”<sup>6</sup>

And, contrary to the debtor’s assertion, this case does constitute one of the egregious cases found offensive by the Sixth Circuit in *Zick*. The two debts cosigned by Mr. Galyon constitute the debtor’s largest obligation and represent over 48% of the debtor’s total scheduled liabilities, including the MediCenter debts.<sup>7</sup> Collection efforts by these two entities prompted the debtor’s bankruptcy filing. Thus, the debtor is effectively avoiding a large single debt, the obligations cosigned by Mr. Galyon. *Cf. In re Merritt*, 2000 WL 420681, at \*\*3 (*Zick* standard of “intent to avoid a large single debt” satisfied by fact that the two judgment debts which led to the bankruptcy filing arose out of the same transaction and accounted for approximately 60% of the debtor’s non-mortgage liabilities).

#### IV.

In light of the foregoing, the court concludes that the debtor did not file this chapter 7 case in good faith and the case should be dismissed for cause pursuant to § 707(a). However, because dismissal is a harsh remedy, the court will permit the debtor a brief period in which to convert voluntarily to chapter 11 or 13. If the debtor so elects, the dismissal will not take effect. An appropriate order will be entered contemporaneously with the filing of this memorandum opinion.

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<sup>6</sup>The fact that the debtor’s income decreased postpetition is irrelevant to the question of whether the debtor was acting in good faith at the time he filed for bankruptcy relief.

<sup>7</sup>If what appears to be MediCenter debts were excluded, the obligations cosigned by Mr. Galyon would represent 61% of the debtor’s liabilities, easily a majority.

FILED: February 17, 2005

BY THE COURT

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MARCIA PHILLIPS PARSONS  
UNITED STATES BANKRUPTCY JUDGE