UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

DANIEL M. DE STEFANO — CASE NO. 96-60137

Debtor — Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Presently before the Court is a motion by Daniel M. DeStefano ("Debtor") filed on December 13, 1996, to convert his chapter 13 case to a chapter 11. On January 23, 1997, a creditor, Jeanette Rizzo ("Rizzo") filed opposition. An evidentiary hearing was originally scheduled for February 17, 1997, and was adjourned once thereafter on the consent of the parties.

The Court held an evidentiary hearing on July 28, 1997 ("July hearing"), in Utica, New York. The evidentiary hearing was adjourned to August 25, 1997, and once thereafter on the consent of the parties. The Court continued the evidentiary hearing on January 9, 1998 ("January hearing"). The parties were given the opportunity to file memoranda of law and the matter was submitted for decision on February 9, 1998.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334(b), 157(a), (b)(1) and (b)(2)(A).

FACTS

On January 12, 1996, the Debtor initially filed a voluntary petition ("Petition") seeking relief under chapter 7 of the Bankruptcy Code (11 U.S.C. §§ 101-1330) ("Code"). The Debtor indicated in his Petition that he had no secured creditors and eight unsecured creditors. *See* Debtor's Schedules D and F. In Schedule F, the Debtor listed Rizzo as holding unsecured nonpriority claims arising out of a March 8, 1984 judgment and a July 19, 1994 judgment in the amounts of $189,273.13 and $85,126.00 respectively.[1] According to Schedules I and J, the Debtor's monthly gross income was $8,090.90 with monthly expenses of $7,783.24. On April 22, 1996, the United States Trustee's office ("UST") filed a motion requesting the Court to dismiss the Debtor's chapter 7 case pursuant to Code §§ 707(a) and (b) or other appropriate relief ("UST's motion").[2] At the hearing on the UST's motion, the Debtor requested that his chapter 7 case be converted to a chapter 13. The UST had no objection to a voluntary conversion and

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[1]The Debtor also listed Rizzo as holding a disputed claim in the amount of $950,000.

[2]The UST indicated in this motion that the Debtor's monthly income would increase to $8,936.96 if deductions for retirement and deferred compensation were excluded. Additionally, the UST pointed out that the Debtor's monthly expenses could be reduced to $4,909.15 based upon his recommendations. The UST calculated the Debtor's monthly disposable income as $4,030.81 and recommended that the Debtor could pay his debts in a chapter 13 plan.

the Debtor's case was converted to a chapter 13 pursuant to an Order dated June 6, 1996 ("June Order"). The Debtor filed a chapter 13 plan on July 23, 1996, providing for a monthly payment of $2,000 for a period of thirty-six months. The Debtor filed amended Schedules F, I and J on July 31, 1996. In Amended Schedule F, the Debtor listed an additional unsecured creditor holding a claim for $20,000 in attorneys' fees awarded in the 1994 Judgment which the Debtor indicated he previously included as part of Rizzo's claim.[3] The Debtor's amended Schedule I listed the Debtor's monthly income as $8,404.40 and amended Schedule J indicated monthly expenses of $5,868.17 leaving disposable income of $2,536.53. On September 12, 1996, the Debtor filed an amended chapter 13 plan ("proposed plan") which provided for a monthly payment of $2,500 for thirty-six months. According to the proposed plan, administrative expenses are paid out first and then a distribution of thirty-three percent without interest is made to the unsecured creditors, holding undisputed claims in the amount of $243,119.92. Rizzo almost immediately filed a motion to dismiss the Debtor's chapter 13 case pursuant to Code § 1307(c) on August 9, 1996. In a Memorandum-Decision, Findings of Fact, Conclusions of Law and Order, dated November 21, 1996 ("November Decision"), this Court found that the Debtor was ineligible to be a chapter 13 debtor as his unsecured debts exceeded the statutory limit thereby granting Rizzo's motion.[4] In its November Decision, the Court also provided the Debtor with the opportunity to convert his case to another chapter to avoid dismissal. The Debtor then

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[3]Therefore, Rizzo held undisputed claims in the amount of $254,399.13 and the other creditors held claims in the amount of $118,072.79.

[4]The Court found that the July 19, 1994 and March 8, 1984 judgments constituted unsecured debts because there were no assets to which they could attach as the Debtor listed no assets in his schedules not claimed as exempt property. *See* November Decision, at 9 n.1.

filed the instant motion to convert his case to chapter 11.

On or about March 8, 1984, Rizzo obtained a divorce from the Debtor, a physician, and a judgment in the amount of $91,671.01 ("1984 Judgment"). *See* Rizzo's Exhibit "B." Rizzo appealed the 1984 Judgment on or about March 22, 1984. *See* Rizzo's Exhibit "A"; Rizzo's Memorandum of Law filed on February 6, 1998 ("Rizzo's Memo."). Rizzo also obtained a judgment in the amount of $65,126 on or about July 19, 1994, representing a distributive award of the Debtor's medical license ("1994 Judgment") thereby modifying the 1984 Judgment. *See* Rizzo's Exhibit "A." Pursuant to this judgment, Rizzo's counsel was awarded $20,000 in attorneys' fees. *See id*. On or about October 26, 1994, Rizzo appealed the 1994 Judgment on the issues of a denial of interest on the distributive award and educational expenses. *See* Debtor's Exhibit 14. The Debtor then filed a cross-appeal of the 1994 Judgment on or about November 9, 1994, on the issue of the award of attorneys' fees. *See* Rizzo's Memo.; November Decision at 2. The Debtor testified that he made payments to Rizzo from on or about September 1 1984, through on or about May 28, 1985, and stopped making payments because of the appeal process. Rizzo testified that she could not recall whether she received these payments. Additionally, the Debtor testified that he made three payments to Rizzo in 1987 and three payments in 1988 which Rizzo acknowledged receiving. The Debtor further testified that he stopped paying Rizzo in July 1988 because he thought a settlement between the parties would take care of the 1984 Judgment. It was the testimony of the Debtor that he did not continue to pay on the 1984 Judgment after the 1994 Judgment was entered because he no longer considered the 1984 Judgment active. The Debtor testified that he paid Rizzo $1,000 per month beginning on or about October 7, 1994 under the direction of the 1994 Judgment until he filed his Petition for relief under chapter 7.

Rizzo acknowledge that she did receive payments totaling $15,000 with respect to the 1994 Judgment.

On or about October 17, 1990, the Debtor created the Daniel M. DeStefano Irrevocable Trust and transferred his real property located at 21 Sherman Oaks, New Hartford, New York ("Property") to the Trust reserving a life use to himself with a remainder to members of his biological family. *See* Rizzo's Exhibit "P" and "O." The Debtor testified that he received the Property upon the death of his third wife. The adjusted gross estate of his third wife was $146,740.58 and the fair market value of the Property was $102,000 upon her death. *See* Debtor's Exhibit "Q." It was the testimony of the Debtor that he created the Trust because he needed to do something for his family who had supported him both financially and emotionally.

Rizzo commenced an action against the Debtor in state court on or about September 18, 1995, seeking $950,000 in damages. *See* Debtor's Exhibit 16. The Debtor testified that he filed bankruptcy to stop the suit and the appeals and to get a resolution with respect to Rizzo. The Debtor testified that he has two retirement plans: New York State Retirement ("state retirement") and a Deferred Compensation Plan ("deferred compensation"). It was the testimony of the Debtor that he began contributing to deferred compensation in 1991. The Debtor testified that he began paying into state retirement as of the date of his full time employment, on or about August, 8, 1988, and has continued to pay every pay period for the past nine years. The Debtor testified at the January hearing that deferred compensation in the amount of approximately $7,500 per year is no longer payroll deducted which is not reflected in amended Schedule I. The Debtor indicated that these deductions stopped in the end of July 1997. The Debtor testified that he has fully disclosed all of his assets in his Petition and schedules. The year to date gross salary

of the Debtor in 1997 was $104,584.64. *See* Rizzo's Exhibit "TT."

ARGUMENTS

The Debtor points out that he is eligible for relief under chapter 11 pursuant to Code § 109(d) and he desires to make a good faith attempt to reorganize his debts in a chapter 11 proceeding. According to the Debtor, Rizzo has not shown a willingness to settle the eighteen year dispute and multiple litigations between them, while he has made many attempts to resolve the dispute. Also, the Debtor asserts that he has exhibited good faith by proposing a payment plan that maximizes his payments to the chapter 13 trustee. The Debtor points out that his mandatory contribution to state retirement is $3,022.76 per year. The Debtor argues that he has made good faith payments to the chapter 13 trustee of over $40,000 and made arrangements to borrow $26,322 from his exempt, compulsory state retirement. The Debtor points out that his annual base pay is $101,040 and his statutory deductions total $34,377.36 which leaves an annual base pay of $66,662.64.

Rizzo contends that the Debtor has not proven his good faith in requesting a conversion to chapter 11. Rizzo asserts that case law indicates that a debtor must show good faith in filing under any section of the Code. Rizzo points out that the UST found that the Debtor's chapter 7 filing constituted "a substantial abuse of the chapter 7 provisions of the Bankruptcy Code" because the Debtor "could pay all of his debts without undue hardship." Rizzo notes that the UST also determined that the chapter 7 "was filed in bad faith and with an intent to hinder, delay and defraud creditors." Rizzo argues that the Debtor filed for bankruptcy in bad faith as an

attempt to prejudice Rizzo and further evade his obligations to her. Rizzo asserts that the Debtor has sufficient income to pay all of his debts, including payments to Rizzo without resorting to bankruptcy. According to case law, Rizzo argues that a reorganization essentially involving a two party dispute which can be resolved in a non-bankruptcy forum is evidence of a bad faith filing. Rizzo argues that the Debtor filed in bad faith as the Debtor's schedules indicate that she is the only significant creditor and the bankruptcy case is a classic two party dispute grounded on matrimonial issues which can be resolved in a non-bankruptcy forum. Rizzo argues that the Debtor's motion to convert should be denied.

Rizzo contends that the Debtor showed bad faith in the pre-petition period. Even though from 1984 to 1998, the Debtor received a substantial salary and salary increases, Rizzo argues that the Debtor has refused to pay a significant portion of the 1984 and 1994 Judgments (collectively, the "Judgments"). Rizzo argues that the Debtor fraudulently transferred and conveyed away his interests in property otherwise subject to Rizzo's claims. Rizzo points out that the Debtor had the maximum deferred compensation taken out of his salary while paying nothing to her. Additionally, Rizzo alleges that the Debtor received $146,000 from his third wife's estate and made no payments to Rizzo from this amount.

During the bankruptcy process itself, Rizzo contends that the Debtor exhibited bad faith. Rizzo asserts that the Debtor attempted to reduce or eliminate Rizzo's claims while at the same time listing exemptions which he is not entitled to under the law. Rizzo also asserts that the Debtor exhibited bad faith by failing to remain current on his plan payments. Although the UST calculated the Debtor's monthly net income as $4,030.81, Rizzo points out that the Debtor has paid only $2,500 per month to the chapter 13 Trustee. While the Debtor has received pay

increases, Rizzo contends that they have not been made or offered to the chapter 13 trustee..

DISCUSSION

The Court has the discretionary power to grant or deny a motion for the conversion of a case from a chapter 13 to a chapter 11 pursuant to Code § 1307(d).[5] *See In re Funk*, 146 B.R. 118, 121 (D.N.J. 1992). A court considers the following: (1) whether the debtor is eligible for relief under chapter 11, *see* 11 U.S.C. § 1307(f); (2) whether the debtor has a reasonable prospect for a successful chapter 11 reorganization; and (3) whether the debtor filed and conducted his chapter 13 case in good faith. *See Funk,* 146 B.R. at 123-24; *In re Tornheim*, 181 B.R. 161, 169 (Bankr. S.D.N.Y. 1995), *appeal dismissed*, No. 95 CIV 8474(PKL), 1996 WL 79333 (S.D.N.Y. Feb. 23, 1996). A determination of good faith is examined on a case-by-case basis in light of the totality of the circumstances. *See In re Klevorn*, 181 B.R. 8, 10 (Bankr. N.D.N.Y. 1995) (citing *Eisen v. Curry* (*In re Eisen*), 14 F.3d 469, 470 (9th Cir. 1994)). The following factors are considered in an analysis of whether a chapter 13 petition was filed in good faith: (1) whether the debtor has few or no unsecured creditors; (2) whether there has been a previous petition filed by the debtor or a related entity; (3) whether the debtor's conduct pre-petition was proper; (4) whether the petition permits the debtor to evade court orders; (5) whether the petition was filed

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[5] (d) . . . at any time before the confirmation of a plan under section 1325 of this title, on request of a party in interest or the United States trustee and after notice and a hearing, the court *may* convert a case under this chapter to a case under chapter 11 . . . of this title.

11 U.S.C. 1307(d) (emphasis added).

on the eve of foreclosure; (6) whether the foreclosed property is the sole or major asset of the debtor; (7) whether the debtor's income is sufficient such that there is a likely possibility of reorganization; (8) whether the reorganization essentially involves the resolution of a two party dispute; and (9) whether the debtor filed solely to obtain the protection of the automatic stay. *See id.* 181 B.R. at 11. A determination of whether a debtor conducted his case in good faith involves an analysis of the following factors: (1) whether the debtor has been forthcoming with his creditors and the bankruptcy court; (2)whether the debtor filed a plan; and (3) whether the debtor treated creditors unfairly in the post-petition period. *See generally Matter of Love,* 957 F.2d 1350, 1357 (7th Cir. 1992); *Funk*, 146 B.R. at 124. The policy supporting a good faith analysis is to ensure that debtors are not abusing the provisions, purpose, or spirit of the Code. *See Matter of Love*, 957 F.2d at 1357. The purpose and spirit of chapter 13 is the rehabilitation and repayment of debt. *See In re Carver*, 110 B.R. 305, 308 (Bankr. S.D. Ohio 1990).

The Court finds that the Debtor is eligible for relief under chapter 11 pursuant to Code § 109(d). *See Toibb v. Radloff*, 501 U.S. 157, 166, 111 S. Ct. 2197, 2202, 115 L. Ed. 2d 145 (1991). The next consideration is whether the Debtor has established a reasonable prospect for reorganization. In the case of *In re Funk*, the issue before the court was whether to permit the debtor to convert from a chapter 13 to a chapter 11. 146 B.R. at 119. The court in *Funk* found that the debtor's failure to file a chapter 13 plan while in bankruptcy for a year indicated a lack of a desire on the part of the debtor to reorganize. 146 B.R. at 124. Although the debtor in *Funk* had a reasonable income, the court concluded that the debtor did not show a reasonable prospect for reorganization in a chapter 11 and denied the debtor's request for conversion. *Id*. at 121, 124. The Court finds *In re Funk* distinguishable from the matter before the Court because the Debtor

has paid $2500 per month under his proposed plan[6] and maintains a reasonable income.[7] It appears that the Debtor has a sufficient income to support reorganization in addition to a desire to formulate and comply with a plan.

To determine whether a chapter 13 debtor can convert to a chapter 11, it is necessary to examine whether the Debtor sought relief in a chapter 13 in good faith in light of the totality of the circumstances. If a debtor originally filed for relief in a chapter 13, a court will examine whether the debtor filed his petition in good faith. *See Funk*, 146 B.R. at 123-124. However, in this instance the Debtor originally filed a Petition for relief under chapter 7[8] so the Court must examine the Debtor's request to convert his case to a chapter 13 ("Request") to determine whether the Debtor sought relief under chapter 13 in good faith. With respect to the first factor, there is no requirement under the Code that a chapter 13 debtor have a specific number of unsecured or secured creditors. *See Klevorn*, 181 B.R. at 11; 11 U.S.C. § 109(e). The real test requires that the creditors are bona fide and there is a genuine need and ability to perform under the plan. *See Klevorn*, 181 B.R. at 11. According to the Debtor's schedules, his creditors held only unsecured claims in the total amount of $1,322,471.92. *See* Debtor's Schedules D, E, and

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[6]Upon review of its docket, the Court finds that the Debtor never obtained confirmation of his proposed plan. Both the chapter 13 trustee, Mark Swimelar, Esq. ("Trustee"), and Rizzo filed an objection to the proposed plan. Prior to the scheduled date for the confirmation hearing, the Court determined in its November decision that the Debtor was an ineligible chapter 13 debtor.

[7]The Debtor's gross income for 1997 was $104,584.64. *See* Rizzo's Exhibit "TT."

[8]The Debtor originally filed his Petition for relief under chapter 7 on January 12, 1996, and then his case was converted to a chapter 13 by the Court's June Order. After conversion, the effective date of the Debtor's Petition remains the original filing date, *see* 11 U.S.C. § 348(a), and there is no requirement under the Code for a debtor to file another petition.

F.[9] The Debtor listed eight unsecured creditors with Rizzo holding the largest undisputed claims at the time of his Request. *See* Debtor's Schedule F. There is no evidence before the Court that the claims of the Debtor's creditors are not bona fide. Rizzo contends that the Debtor did not need the protection of bankruptcy to pay his debts. An examination of the Debtor's income and expenses at the time of his Request indicate that the Debtor was unable to pay his creditors holding undisputed claims in the amount of $372,471.92 without the protection of bankruptcy. With respect to the second factor, while there was not a previous petition filed by the Debtor, the Debtor originally filed for relief under chapter 7. Rizzo points to the UST's motion in which it argued that the Debtor filed a chapter 7 case in bad faith as he could pay all of his debts without undue hardship.[10] The Court notes that the UST did not allege that the Debtor did not need the protection of bankruptcy and in fact recommended that the Debtor could pay his debts pursuant to a chapter 13 plan. The Court will consider the fact that the Debtor's chapter 7 petition may have been filed in bad faith as a factor in its analysis. Rizzo contends that the Debtor should not have requested a conversion to a chapter 13 as he should have known that he was ineligible. Although it was ultimately determined by this Court that the Debtor was an ineligible chapter 13 debtor, that fact is not determinative of whether the Debtor requested a conversion to a chapter 13 in good faith.

The Debtor's pre-petition conduct towards creditors is a relevant factor for the Court to

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[9]The Court notes that the Debtor filed his amended schedules after requesting relief under chapter 13.

[10]The Court never reached the issue of whether the Debtor's chapter 7 case was filed in bad faith as the case was converted to a chapter 13 upon the request of the Debtor and no opposition by the UST pursuant to the June Order.

consider. In the case *Matter of Love,* the court found that the chapter 13 debtor's refusal to pay his federal income taxes for a period of four years prior to filing for bankruptcy relief was evidence that the debtor's motive in filing was to avoid the full payment of this debt to the IRS. 957 F.2d at 1358. Rizzo alleges that the Debtor frustrated Rizzo's ability to collect on the Judgments in the pre-petition period by fraudulently transferring his interest in property. The Court recognizes that the Debtor did not make every effort possible to pay his obligations to Rizzo. At the same time, Rizzo has not proven that the Debtor fraudulently transferred his property away. During the pre-petition period, it is undisputed that the Debtor did in fact make some payments with respect to the 1984 Judgment and $15,000 on the 1994 Judgment which shows an attempt to pay his obligations to Rizzo. Based upon the Debtor's testimony, he stopped making payments to Rizzo on the 1984 Judgment at various points on the advice of counsel due to an appeal process and a proposed settlement between the parties. The Debtor further testified that he made the required monthly payments on the 1994 Judgment until he filed for bankruptcy. Therefore, there is no indication that the Debtor refused to pay his obligations to Rizzo in the pre-petition period as the debtor in *Matter of Love* which would indicate that the Debtor filed to further dely or eliminate payment to Rizzo. Whatever bad faith the Debtor may have exhibited in the pre-petition period is only a factor in the Court's determination of whether the Debtor filed his Petition in bad faith.

There is no evidence before the Court that the Debtor is attempting to evade any court orders. Additionally, it does not appear that the Debtor filed to obtain the benefit of the automatic stay ("Stay"). Rizzo filed a motion to obtain relief from the Stay in order to pursue her

appeal in state court of the 1994 Judgment.[11] *See* Debtor's Exhibit 14. Although the Debtor filed opposition to Rizzo's motion for relief from the Stay, there is no indication that the Debtor filed solely to stop the appeal process which was stayed at the time the Debtor filed his Petition. With respect to the seventh factor, it appears that the Debtor's income is sufficient for reorganization according to the Debtor's amended schedules indicating a disposable monthly income of $2,536.23. *See* Debtor's Amended Schedules I and J. Indeed, the Debtor's payments to the Trustee while in a chapter 13 weigh heavily in favor of the Debtor's ability to make payments under a chapter 11 plan.

Whether the debtor's reorganization involves the resolution of a two party dispute is a factor for the Court to consider. The fact that a debtor files for bankruptcy when a dispute is currently being litigated in state court with respect to the claim of the debtor's only creditor is evidence that the Debtor filed for an improper purpose. *See, e.g.*, *In re Newsome*, 92 B.R. 941, 942, 944 (Bankr. M.D. Fla. 1988) (finding that the chapter 13 debtor filed a petition for the improper purpose of getting out of a contract which the debtor found burdensome). In the case, *In re Griffith*, 203 B.R. 422, 423 (Bankr. N.D. Ohio 1996), a debtor filed for bankruptcy shortly after a state court ordered former marital property held by the debtor to be sold in order to satisfy a former spouse's claim. The court in *Griffith* concluded that the debtor filed for bankruptcy to avoid the effect of the state court judgment by having the bankruptcy court reexamine the previously litigated issue which the court characterized as "an attempt to abuse the spirit of the Bankruptcy Code." *Id.* at 425. In the case *In re Bandini*, 165 B.R. 317, 318-19 (Bankr. S.D. Fla.

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[11]Rizzo's motion was granted in part by this Court pursuant to an Order, dated June 24, 1996, which permitted her to apply for additional time to file and perfect her appeal on the issues of interest on the distributive award and payment for educational expenses.

1994), a judgment in state court was rendered against the debtor for alimony arrears and then the debtor filed for bankruptcy shortly thereafter listing his former spouse as an unsecured creditor for the amount of the judgment. The court in *Bandini* determined that the debtor filed for bankruptcy as an attempt to pursue the issue of alimony in two forums as evidenced by the debtor's appeal in state court of the judgment shortly after filing his petition. *Id*. at 320. Rizzo relies on *In re Purpura*, 170 B.R. 202, 203 (Bankr. E.D.N.Y. 1994), for the proposition that the Debtor's reorganization essentially involves a two party dispute which can be resolved in a non-bankruptcy forum. The debtor in *Purpura* filed for bankruptcy within days after his appeal of state court equitable distribution awards was denied by the New York Court of Appeals and the only significant creditor of the debtor was his former spouse. *Id*. at 205-06. The debtor in *Purpura* commenced an adversary proceeding seeking the turnover of funds that had been held in escrow for his former wife while the debtor's appeal was pending and also filed a motion in state court to have the judgment for equitable distribution vacated. *Id.* at 207. Therefore, the court in *Purpura* found that the debtor filed for relief under chapter 11 to block his former spouse's realization of her awards of equitable distribution and to relitigate the issue of equitable distribution. *Id*. The debtors in *Bandini*, *Griffith*, and *Purpura* filed for relief in bankruptcy as an attempt to resolve disputes previously litigated in state court and the Court finds that these cases are distinguishable from the matter before the Court. The Debtor did not file for relief shortly after an unfavorable judgment or a denial of an appeal as the debtors in *Bandini*, *Griffith* and *Purpura* which indicated an improper attempt to have a bankruptcy court essentially relitigate or reexamine a claim of a former spouse previously determined in state court. In fact, the Judgments against the Debtor were entered in 1984 and 1994 respectively and the Debtor

filed his Petition in 1996. The Debtor does not dispute that Rizzo holds a claim for the 1984 and 1994 Judgments. Additionally, there is no evidence before the Court indicating that the Debtor filed for relief as an attempt to pursue the claim of Rizzo, his former spouse, in two forums as the debtors in *Bandini* and *Purpura* who filed for relief in state court with respect to the claims of their former spouses after filing their Petition. While there are appeals pending in state court, they do not involve Rizzo's undisputed claims with respect to at least the amounts awarded to her pursuant to the 1994 and 1996 Judgments.[12] Thus, it does not appear that the Debtor is using the bankruptcy court as an appellate court to resolve previously determined domestic relations issues. *See In re Griffith*, 302 B.R. at 425.

On balance, the Court finds that the factors weigh in favor of finding a good faith filing by the Debtor. The policy supporting good faith is to ensure that a debtor is not abusing the protections offered in bankruptcy. The Debtor made a good faith attempt to convert to a chapter 13 even though he ultimately did not qualify as a chapter 13 debtor. While Rizzo is the only substantial creditor of the Debtor, the Court finds that the Debtor request for a conversion to a chapter 13 was a good faith attempt to reorganize his debts and not for the improper purpose of using the bankruptcy court to relitigate or "stonewall" Rizzo's Judgments. In light of the totality of the circumstances, the Court finds that the Debtor legitimately sought bankruptcy relief.

The next issue for the Court to determine is whether the Debtor conducted his case in good faith. A factor to consider is whether the Debtor has been forthcoming with his creditors and the bankruptcy court. There is no evidence before the Court that the Debtor misrepresented

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[12]The Debtor's only appeal is on the issue of attorneys' fees awarded to Rizzo's counsel as part of the 1994 Judgment. Rizzo's appeal involves amounts denied to her pursuant to the 1994 Judgment.

his assets in his Petition or his accompanying schedules. It appears that the Debtor has made a full and fair disclosure of his assets, liabilities and finances. As to the second factor, the Debtor filed a proposed chapter 13 plan evidencing his good faith attempt to reorganize his debts.

Another factor is whether the Debtor has treated his creditors unfairly throughout the bankruptcy process. Rizzo argues that the Debtor made few of the changes suggested by the UST's motion which is evidence of the Debtor's attempt to frustrate her collection of the Judgments. The UST suggested that the retirement and deferred compensation deductions should be included as part of the Debtor's disposable monthly income thereby increasing that income from $8090.90 to $8939.96. The Debtor's amended Schedule I lists his monthly income as $8404.40 and still includes these retirement deductions. However, the Debtor testified at the January hearing that deferred compensation is no longer being withheld from his income.[13] Rizzo points out that the UST calculated the Debtor's disposable income at $4030.81 and the Debtor's proposed plan only provides for the payment of $2500 per month.[14] Although the Debtor did not make all the changes suggested by the UST, the Debtor did make a majority of them and reduced his expenses from $7,782.34 to $5,868.17 leaving a disposable income of $2,536.53. *See* Debtor's Schedules I and J. Rizzo contends that the Debtor has attempted to reduce or eliminate her claims throughout the bankruptcy process which is evidenced by claiming improper

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[13]The Debtor indicated in his memorandum, submitted on February 6, 1998, that his state retirement deduction is mandatory.

[14]The Court notes that the issue of whether the Debtor's plan complied specifically with Code § 1325(a)(3), is not before the Court and was not raised by the parties. However, the amount of disposable income proposed in the Debtor's plan is relevant to the extent that is it was different from the amount suggested by the UST.

exemptions.[15] Rizzo contends that the Debtor showed bad faith by failing to remain current on his plan.[16] Although the Debtor fell behind in his monthly payments, the Debtor subsequently paid those arrears and has remained current under his proposed plan. In light of the totality of the circumstances, the Court finds that the Debtor has shown good faith throughout his bankruptcy.

Based upon the foregoing, it is hereby

ORDERED that the Debtor's motion for conversion from a chapter 13 to a chapter 11 is GRANTED; it is further

ORDERED that as a condition of this conversion, the Debtor must file a chapter 11 plan and disclosure statement within sixty days from the date of this order; and it is finally

ORDERED that in the event the Debtor does not file a plan and disclosure statement by that date, Rizzo may submit an order to this Court on ten days notice to the Debtor dismissing the chapter 11 case with prejudice.

Dated at Utica, New York

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[15]While Rizzo currently has a motion pending before the Court on the issue of the Debtor's alleged improper claim of exemptions, Rizzo has failed to articulate in this proceeding either through her papers or argument the basis for this alleged bad faith. The Court finds that the issue of whether the Debtor's exemptions are improper is not before the Court.

[16]Rizzo brought a motion to dismiss the Debtor's case for his failure to pay under his proposed plan for December 1996 and January 1997. Pursuant to an Order by this Court, dated May 28, 1997, the Debtor had 30 days to make the payments due under his plan.

this 13th day of May 1998

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge