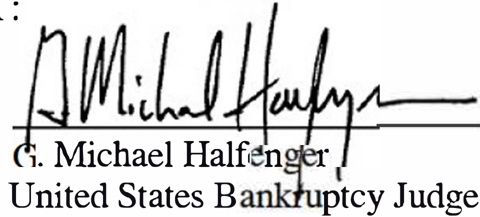
THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: November 8, 2014



G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

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In Re:

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| Jacqulyn M. Tucker, | Case No. 14-31262-GMH |
| Debtor. | Chapter 13 |

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**ORDER DENYING MOTION TO RECONSIDER**

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Ms. Tucker filed this chapter 13 case on September 5, 2014. Because she had a prior case dismissed within the last year, the automatic stay would expire on October 6, 2014, unless before that time, the court determined that she filed this case in good faith. See 11 U.S.C. §362(c)(3).

Ms. Tucker filed a motion to continue the automatic stay on September 11. To meet the October 6 deadline set by the statute, the motion was scheduled for a hearing on September 30. At 9:23 a.m. on September 30, Ms. Tucker's counsel filed an affidavit of no objection and a proposed order granting the motion.

I was not satisfied that the affidavit Ms. Tucker filed in support of the motion averred sufficient facts to establish that the case was filed in good faith. So I held the hearing as scheduled on September 30. Neither Ms. Tucker nor her counsel appeared at the hearing. Lacking an adequate showing of good faith, I denied the motion—orally on

September 30 and by written order entered October 1. As a result, the automatic stay expired by operation of law on October 6. 11 U.S.C. §362(c)(3).

On October 7, Ms. Tucker filed a motion to reconsider. She argues that no hearing should have been held and the motion granted simply because no one objected to the motion. She states, "based upon the language of [counsel's] Notice [of hearing] and from the debtor's attorney['s] experience, in similar circumstances, at all times prior, neither the debtor [n]or debtor's attorney['s] appearances are required, when no objection has been filed." CM-ECF, No. 13, 1. To be clear, Ms. Tucker here refers to the notice of the hearing her counsel served on interested parties; it states, "**Only** in the event that a timely Objection is filed, a hearing will be held . . . on September 30, 2014 at 2:30 p.m." CM-ECF, No. 7, 5 (emphasis in original).

I deny Ms. Tucker's motion for several reasons.

Ms. Tucker's motion for reconsideration invokes both Federal Rule of Civil Procedure 59(e) (incorporated by Federal Rule of Bankruptcy Procedure 9023), which governs motions to alter or amend judgments, and Rule 60(b) (incorporated by Federal Rule of Bankruptcy Procedure 9024), which governs motions for relief from judgments or final orders. Neither rule governs Ms. Tucker's motion for reconsideration of the order denying her motion to extend the stay, because that order is interlocutory. See *Santamarina v. Sears, Roebuck & Co.*, 466 F.3d 570, 571 (7th Cir. 2006). A trial court's authority to reconsider an interlocutory order "is governed by the doctrine of the law of the case, which authorizes such reconsideration if there is a compelling reason, such as a change in, or clarification of, law that makes clear that the earlier ruling was erroneous." *Id.* at 572. Ms. Tucker's motion to reconsider does not state a compelling reason to reconsider the order denying her motion to continue the stay.[*]

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[*] The standard for reconsideration of an interlocutory order is more lenient than that set forth in Rules 59(e) and 60(b). Thus, had I considered the debtor's motion under the standards she proposes, I would still have

Again, the sole basis stated by Ms. Tucker in support of her reconsideration motion is that the notice Ms. Tucker gave other parties of her motion to continue the stay stated that a hearing would occur only if someone timely objected. But a debtor's hearing notice neither limits the court's ability to hold a hearing on the motion nor alters the evidentiary burden that §362(c) requires the debtor to meet in order to obtain a continuation of the stay.

As explained above, when a debtor has had one prior case dismissed within the last year, the §362(a) stay expires 30 days after the debtor files the new case unless the court extends the automatic stay upon a finding that the debtor filed the most recent case in good faith. 11 U.S.C. §362(c)(3)(A) & (B). The statute imposes a presumption that a chapter 13 debtor did *not* file in good faith when either (a) the court dismissed the debtor's previous case because the debtor (i) failed to file or amend documents as required by the Code and had no good excuse, (ii) failed to provide adequate protection ordered by the court, or (iii) failed to perform the terms of a confirmed plan; (b) the debtor filed anew in the absence of any substantial change in her financial or personal affairs; or (c) there is "any other reason" to conclude that the debtor will not confirm and fully perform a plan in the new case. 11 U.S.C. §362(c)(3)(C)(i)(II) and (III). If the presumption arises, the debtor must prove by clear and convincing evidence that she filed in good faith in order to obtain an order continuing the automatic stay for more than 30 days after the petition date. §362(c)(3)(C).

Ms. Tucker's last case was dismissed because she failed to perform the terms of her confirmed plan—she failed to make plan payments and provide copies of tax returns to the trustee. Under §362(c)(3)(C)(i)(II)(cc), therefore, it is presumed that she did not commence

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denied the motion. What is more, my authority to grant reconsideration is called into doubt by §362(c)'s direction that the automatic stay "shall terminate with respect to the debtor on the 30th day after the filing" of the most recent case unless the court "at a hearing completed before the expiration of the 30-day period" determines that the debtor filed the case in good faith. §362(c)(2)(B). The 30-day period expired before Ms. Tucker filed her motion for reconsideration. But because Ms. Tucker's motion fails to state a plausible ground for reconsideration, I do not resolve whether §362(c) independently bars reconsideration.

this case in good faith. To obtain an order continuing the automatic stay, she had to prove that she filed this case in good faith by clear and convincing evidence. *Id.*

As mentioned above, Ms. Tucker filed an affidavit in support of her motion. The affidavit averred without further elaboration that Ms. Tucker's "income has increased", that she "has returned to her business in childcare [], which provides additional income", and that her "roommate has increased her contributions to the household." I found these generalities insufficient to demonstrate by clear and convincing evidence that Ms. Tucker filed this case in good faith.

Good faith determinations generally depend on an evaluation of the totality of the circumstances. *In re Love*, 957 F.2d 1350, 1355 (7th Cir. 1992). In the context of seeking a continuation of the stay under §362(c), any effort to demonstrate good faith minimally requires evidence of both subjective and objective good faith. A debtor must show first that she filed her case with the intent to use the bankruptcy process to obtain relief afforded by the statute, such as, in a chapter 13 case, to adjust her debts through the completion of a confirmed plan or to obtain a discharge. That is the subjective component of the inquiry. A debtor must also show that she plausibly can obtain that relief. That is the inquiry's objective component.

Ms. Tucker's filing history calls into doubt both whether she can show subjective good faith—that is, that she intends to do more than delay her creditors' ability to collect what she owes them—and whether she can show objective good faith—that is, whether she has the ability to complete a chapter 13 plan. This is Ms. Tucker's fourth case. She filed a chapter 13 case in 2003, and obtained a discharge in 2007. She then filed another chapter 13 case in 2011. Though she fully completed the plan in her 2011 case, she failed to file a certificate evidencing that she obtained financial management counseling. As a result, she did not receive a discharge. See 11 U.S.C. §1328(g)(1). Just three months later, she filed another chapter 13 case. Though she obtained confirmation of her plan in that case, she

failed to make the payments required by the plan, and her case was dismissed. Less than two months later, she filed this case.

Throughout these cases unsecured creditors were not getting paid. Her 2011 case paid 0% to unsecured creditors. And, again, unsecured creditors' claims were not discharged because Ms. Tucker failed to file a financial management certificate. Secured creditors received payments under the plan on their pre-petition debts, but Ms. Tucker was apparently not making post-petition payments, at least on her homestead. In her 2013 case, she listed a pre-petition mortgage arrearage of approximately $15,000. In the 17 months since Ms. Tucker filed the 2013 case, the arrearage has grown to $30,000 according to the estimate she includes in her proposed plan in this case.

In all events, the statutory presumption that Ms. Tucker did not commence this case in good faith required Ms. Tucker to prove in detail – that is, clearly and convincingly – that she will be able to confirm a plan and perform it fully. On this score I found the record far from convincing. Ms. Tucker is not employed; her schedules show $400 per month rental or business income but lack the business income detail called for by the official form. Her schedules list an $800-per-month contribution from a roommate, but nothing speaks to the roommate's intent and ability to contribute that amount for the plan's 60-month duration.

Of course, none of this establishes that Ms. Tucker filed this case in bad faith. The point is that Ms. Tucker's affidavit and other information in the record are insufficient to demonstrate clearly and convincingly that she filed the case in good faith. Indeed, Ms. Tucker's affidavit did not address the reasons the court dismissed her prior cases, it didn't explain why she was filing again, nor did it convincingly explain why one might reasonably expect that this case would succeed when her last case failed because she didn't make the required plan payments. As a result, Ms. Tucker needed to provide additional evidence at the hearing if she hoped to have her motion to continue the stay granted. By not appearing at the hearing, she doomed the motion.

Ms. Tucker's motion to reconsider, as explained above, argues that the mere lack of an objection entitled her to an order continuing the stay. That suggestion cannot be reconciled with §362(c): if the record is insufficient to demonstrate by the requisite standard of proof that the debtor filed in good faith, the motion must be denied.

Ms. Tucker's argument for reconsideration also ignores the motion practices I have posted on the court's website. About adjudicating motions to continue the automatic stay, the posted practice is that "[T]he Court *may* cancel the hearing if the written testimony and any other available evidence establish that the current case was filed in good faith. In the event the court is not satisfied that the debtor has met his or her burden of showing good faith . . ., the hearing will proceed at the scheduled time. If a hearing is held, the presentation of evidence is anticipated. The debtors are expected to attend and testify." http://wieb.uscourts.gov/index.php/judges/judge-halfenger/procedures (emphasis added) (last visited Nov. 5, 2014).

Consistent with the posted procedure, I have routinely held hearings on motions to continue the stay. I have granted such motions without a hearing only when there is no objection to the motion *and* I find that the debtor has submitted sufficient evidence to meet her burden of showing good faith. The language in Ms. Tucker's hearing notice suggesting that the mere lack of an objection would result in my canceling the hearing was just wrong. That it was wrong would have been obvious to anyone who reviewed the practices I have posted on the court's website and, more important, should be obvious to anyone who considers the effect of §362(c)'s presumption of bad faith.

The motion for reconsideration's sole premise thus ignores both my posted procedures and §362(c). It contains no "compelling reason" to reconsider the denial of Ms. Tucker's motion to continue the automatic stay.

The motion is denied.

SO ORDERED.

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