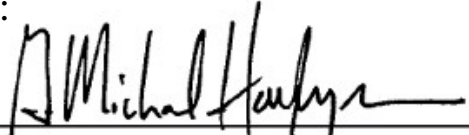




THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: July 29, 2016


G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In the matter:

Brittany Nicole King,

Case No. 16-24784-GMH

Debtor.

Chapter 13

DECISION AND ORDER ON DEBTOR'S MOTION TO INCUR DEBT

Soon after Brittany King filed this chapter 13 case, her car broke down. Reporting that her vehicle is unsafe and that she needs to drive to work, Ms. King asks the court to approve a loan for the purchase of a replacement vehicle.

Ms. King's motion encounters difficulty at the starting gate. Unlike debtors-in-possession under chapters 11 and 12, chapter 13 debtors do not enjoy all of the rights and powers of trustees. Compare 11 U.S.C. §§1107 & 1203 with 1303. Section 1303 grants all chapter 13 debtors certain rights to *use* estate property (like trustees under §363) but not to obtain credit (like trustees under §364). Section 1303 provides: "Subject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l), of this title." 11 U.S.C. §1303. Section 1304 authorizes some chapter 13 debtors to obtain credit "subject to any limitations on a trustee under sections 363(c) *and* 364 of this title

and to such limitations or conditions as the court prescribes". 11 U.S.C. §1304(b) (emphasis added). But §1304 applies only to chapter 13 debtors engaged in business. 11 U.S.C. §1304(a) & (b). This structure suggests that only chapter 13 debtors engaged in business may obtain new financing through court authorization under §364.

Ms. King is not engaged in business. She thus has no rights or duties under §364. Ms. King concedes that the Bankruptcy Code does not "explicitly" require a chapter 13 debtor who is not engaged in business to obtain court approval to obtain financing. CM-ECF Doc. 21 at 1. She instead suggests that the requirement is "implied". *Id.* at 2 & n.2. Ms. King relies on *In re Clemons*, 358 B.R. 714, 715–16 (Bankr. W.D. Ky. 2007). In *Clemons*, unlike here, an order confirming the debtors' chapter 13 plan required the debtors to move the court for authority to obtain credit. *Id.* at 715. Other courts state that either the court or the trustee may authorize chapter 13 debtors to obtain credit. See, e.g., *Chaney v. Grant (In re Chaney)*, 308 B.R. 588, 590–91 (Bankr. N.D. Ga. 2004); *In re Perkins*, 304 B.R. 477, 484 (Bankr. N.D. Ala. 2004); *In re Bagby*, 218 B.R. 878, 887 (Bankr. W.D. Tenn. 1998); *Cooper v. Rogers Used Cars (In re Cooper)*, Adv. Case No. 95-0757, 1995 WL 495987, at *2 (Bankr. W.D. Tenn. Aug. 9, 1995).

Section 1305 provides structural support for an inference that chapter 13 debtors (even those who are not engaged in business) can obtain post-petition credit. It authorizes the filing of proofs of claim for consumer debts "that arise[] after the date of the order for relief under this chapter, and that [are] for property or services necessary for the debtor's performance under the plan." 11 U.S.C. §1305(a)(2). Section 1322(b)(6), in turn, authorizes payment of "any claim allowed under section 1305" through the chapter 13 plan. 11 U.S.C. §1322(b)(6). This suggests that a debtor like Ms. King may incur §1305 consumer-credit debt before plan confirmation. The Code conditions allowance of post-petition consumer debt claims on pre-approval by the chapter 13 trustee, rather than the court: "A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that *prior approval by the trustee* of the debtor's incurring the obligation was practicable and was not obtained." 11 U.S.C. §1305(c) (emphasis added).

Ms. King emphasizes the practical need for approval of consumer-credit transaction like the one she proposes: "Regardless of what is required by the Code, all

finance companies require the court *or trustee's* approval in order for the debtor to incur debt." CM-ECF Doc. 21 at 2 (emphasis added). The Code's text and structure suggest that the chapter 13 trustee, rather than the court, is the appropriate source of that approval.

This allocation of responsibility makes sense. Courts that consider approval of credit purchases like Ms. King's undertake "to ensure that decisions made by a debtor to obtain credit do not interfere with the debtor's ability to perform under a confirmed chapter 13 plan, and, to the degree possible, to ensure a debtor is not making an imprudent financial decision that could lead the debtor back into bankruptcy." *Clemons*, 358 B.R. at 716. This undertaking may require consideration of a multitude of factors, including, as *Clemons* suggests in the context of a vehicle purchase, "(1) the terms of the credit agreement; (2) what alternatives to the proposed credit agreement were considered; (3) a description of the automobile that the debtor seeks to purchase, detailing the make, model, mileage, condition, and value—taking into account its reasonable market value, *e.g.*, as assessed by Kelly Bluebook, Edmunds, N.A.D.A., to name only a few; and (4) a copy of a current budget that includes the proposed credit payments." *Id.* (citing *In re Brown*, 170 B.R. 362, 366 (Bankr. S.D. Ohio 1994)). The trustee may explore these factors with the debtor and make an informed judgment about the necessity of the credit purchase far more expeditiously and efficiently than the court.

For these reasons, Ms. King's motion to incur debt is **denied**, but the court expresses no view on whether the trustee should exercise her discretion to authorize Ms. King's proposed credit purchase.

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