**Dated: March 25, 2009**
**The following is ORDERED:**

Jennie D. Latta
**UNITED STATES BANKRUPTCY JUDGE**

---

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

---

In re DIANE M. MILLER,
Debtor.

Case No. 09-20339-L
Chapter 13

---

Diane M. Miller,
Plaintiff,

v.

Adv. Proc. No. 09-00035

GMAC,
Defendant.

---

**MEMORANDUM OPINION**

---

ON MARCH 5, 2009, the Court conducted a hearing on the motion of GMAC LLC ("GMAC") for relief from the automatic stay and on the complaint filed by the Debtor seeking turnover of her vehicle. The vehicle was damaged in an accident. GMAC gained possession of the car after it paid for extensive repairs the Debtor was unable to afford. After consideration of the

testimony of the witnesses and review of the written exhibits, the court makes the following findings of fact and conclusions of law. These are core proceedings. 28 U.S.C. § 157(b)(2)(E) and (G).

**FINDINGS OF FACT**

Prior to the filing of this bankruptcy case, the Debtor, Diane M. Miller, purchased a 2003 Cadillac CTS from Bud Davis Cadillac. Although the date of the original purchase is disputed,[1] it is clear that on June 2, 2006, the Debtor entered into a Retail Installment Sale Contract (the "Contract") by which she agreed to pay $20,996.11 to Bud Davis Cadillac, Inc., for the purchase of the automobile, to be financed over 60 months with interest at 15.25%. Contract, p. 1 (Tr. Ex. 1.[2]) The contract was apparently assigned to GMAC, for the Certificate of Title reflects that GMAC holds the first lien effective June 2, 2006. Tr. Ex. 1-A. The Contract requires that the buyer maintain physical damage insurance for the term of the contract and makes failure to maintain such insurance a term of default. Contract, ¶¶ 2.d. and 4.b.

On January 25, 2007, the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code. Tr. Ex. 2. The court was not provided with a copy of the plan as originally proposed by the Debtor in that case, but the Agreed Order Resolving GMAC's Objection to Confirmation indicates that the plan was modified to provide GMAC a secured claim in the amount of $23,775.18 to be paid together with interest at 10.25% in payments of $509.00 per month. Tr. Ex. 3. It appears that GMAC took the position that its claim was entitled to be paid according to the

[1] The Debtor testified that she originally purchased the car in 2003, and that the Contract dated June 2, 2006, reflects a refinance of the purchase.

[2] The original trial record contained only the first page of the Contract and no evidence of the interest of GMAC in the vehicle. GMAC was ordered to supplement the record, which it did on March 16, 2009. The court has substituted the full contract as Tr. Ex. 1, and has numbered the Certificate of Title, Tr. Ex. 1-A.

terms of its contract by virtue of the hanging paragraph of Bankruptcy Code § 1325. The parties then compromised by providing for repayment of the full amount of the indebtedness at a reduced interest rate. The plan as modified was confirmed. Tr. Ex. 4. The Debtor made regular monthly payments until the case was voluntarily dismissed on November 25, 2008. Tr. Ex. 5. The Chapter 13 Trustee's records reflect that GMAC's claim was reduced to $13,320.03. Tr. Ex. 6. The Trustee's records further reflect that three checks, dated January 10, February 10, and February 23, 2009, were issued to the Debtor in repayment of funds received after the dismissal of her case. Tr. Ex. 6. The total amount of these payments was $7,980.00.

While the first Chapter 13 case was pending, the Cadillac was involved in an accident. The Debtor testified that she took the car to ABRA Body Shop for an estimate of the cost of repairs. She testified that she received a written estimate in the approximate amount of $4,000.00, and that on the basis of the estimate, she authorized ABRA to make the necessary repairs. The Debtor testified that she did not have insurance on the car at the time of the accident. She explained that she had intended to change insurance carriers because she could not afford the policy she had, but that the policy was cancelled when she failed to make payments. The Debtor knew, therefore, that she would have to pay for the repairs herself when she authorized the work to be done by ABRA.

The Debtor testified that the repairs were completed during the second week of October 2008, and that they cost substantially more than she expected. The cost of the repairs was approximately $6,000.00, rather than the $4,000.00 that was estimated. The Debtor said that she asked for an extension of two weeks, and then of another week, to pay for the repairs. She said that she thought she could get the money she needed from work or from family members. By the end of November she still had not paid for the repairs and learned that ABRA was claiming a mechanics

lien on the vehicle. She testified that she went to her bankruptcy attorney's office to see if the debt could be "put under the plan." The outcome of that meeting was the voluntary dismissal of her Chapter 13 case on November 25, 2008. Apparently the debt for repairs was so large that the Debtor could not afford the payments needed for her plan to pay out within its remaining life. The Debtor explained that when the funds that she had expected to receive from a family member were not made available, she decided that she would pay ABRA by filing a new Chapter 13 case.

GMAC introduced a copy of a notice provided to it by Tennessee Lien Mechanic's Lien Processors, dated December 12, 2008, indicating that the car would be sold to satisfy the debt to ABRA on January 9, 2009, at 10:00 a.m., unless $7,999.68 was paid to redeem it. Tr. Ex. 8. The notice indicates that a copy was also sent to the Debtor, but she did not testify that she received it. The Debtor testified that she learned on December 21, 2008, that GMAC had paid the body shop and taken possession of the car. The Contract provides that "if we [the Seller] pay any repair bills, storage bills, taxes, fines, or charges on the vehicle, you agree to repay the amount when we ask for it." Contract, ¶ 2.b. The Contract further provides that the security interest in the vehicle "secures payment of all that you owe on this contract" and "your other agreements in this contract." Contract, ¶ 2.c. Pursuant to the Contract, when GMAC paid the repair bill to ABRA, it was contractually entitled to be repaid by the Debtor upon demand, and repayment of that additional amount was secured by the vehicle.

The Debtor filed a new Chapter 13 petition on January 12, 2009. Tr. Ex. 9. Schedule B, filed with that petition, lists the 2003 Cadillac CTS "in debtor's possession" even though the car clearly was not in the Debtor's possession at the time of filing. The value of the vehicle is listed at $15,000.00. The claim of GMAC is listed at Schedule D in the amount of $13,320.00, the amount

that was left to be paid in the prior Chapter 13 case. The claim of ABRA and/or GMAC for the repairs to the vehicle is not listed. Tr. Ex. 9. The proposed Chapter 13 plan makes no provision for repayment of the costs of repairing the Cadillac. The plan proposes to pay GMAC $13,320.00 with interest at 6% and a monthly payment of $267.00. Tr. Ex. 10. As previously noted, the parties had agreed in the prior case that the Debtor would repay the full amount of the indebtedness owed to GMAC with interest at 10.25% and a monthly payment of $509.00 even though the Contract called for interest at 15.25% and monthly payments of $591.51.

The Debtor testified that she has the same job that she had in the prior case. Schedules I and J report net monthly income of $3,100.67, and expenses of $1,105.00, leaving projected disposable income of $1,995.67. Tr. Ex. 9. The Chapter 13 Trustee's records reflect that no payments have been made in the current case, although the proposed plan calls for payments of $890.00 every two weeks. The Debtor was questioned about the refunds she received from the Chapter 13 Trustee in her previous case. She testified as follows:

> That money – umm -- the three thousand something I had to pay back some debts that I owed. But at the same time, I was filing for the new case, and I thought they were going to start taking money out of my account – they were supposed to have stopped that and take the money out for my new account. So I said, well, I can use this for paying my bills, and that's where I thought it was coming from.

Transcription from Court Recording. The court understands the Debtor to be saying that because she was in the process of filing a new case and money would be taken from her paycheck, she felt free to use the money refunded by the Trustee to pay certain unspecified debts.

In support of her complaint for turnover, the Debtor testified that the Cadillac is her only means of transportation and that she uses it to get to and from work. She said that since the automobile accident, she has depended on rides from co-workers, sometimes paying for them. The

Debtor further stated that she expected to receive an income tax refund of approximately $4,000.00, and that she would pay this into the plan if the car was returned to her.

GMAC filed an original proof of claim on January 15, 2009, and an amended proof of claim on March 5, 2009.[3] The amended proof of claim lists a claim in the total amount of $24,908.82, which is divided between a secured portion in the amount of $13,884.92 (the value of the collateral), and unsecured portion of $11,023.90. No itemization of the claim is attached.

The Debtor filed a verified motion to extend the automatic stay on January 12, 2009, which was not opposed. The motion was granted on February 12, 2009. In the meantime, however, GMAC filed its motion for relief from the automatic stay on January 16, 2009. The Debtor filed her complaint for turnover on January 22, 2009. The meeting of creditors has been conducted, but the plan has not yet been confirmed.

## CONCLUSIONS OF LAW

The Debtor's Right to Compel Turnover

The Debtor argues that she is entitled to the return of her car because it is property of the estate that she may use in furtherance of her plan. GMAC counters that it should not be compelled to return the car because its interests are not adequately protected.

GMAC came into possession of the Debtor's automobile pursuant to the terms of the Contract. The failure of the Debtor to maintain physical damage insurance is an event of default under that Contract. Contract, ¶ 4.b. The Debtor's failure to pay GMAC for the repairs to the vehicle would also constitute an event of default if demand for repayment had been made prior to

[3] A court may take judicial notice of papers filed in the bankruptcy case. *See In re Senior Cottages of America, LLC*, 320 B.R. 895 (Bankr. D. Minn. 2005) (judicial notice taken of claims register); *In re Johnson*, 210 B.R. 134 (Bankr. W.D. Tenn. 1997).

the filing of the second Chapter 13 petition. *Id.* In the event of default, GMAC is entitled to take possession of the vehicle. The Contract provides: "If you default, we may take possession (repossess) the vehicle from you if we do so peacefully and the law allows it." Contract, ¶ 4.d. GMAC's possession of the vehicle was lawful at the commencement of the case. Nevertheless, GMAC is merely a secured creditor in possession because title to the vehicle remains with the Debtor. Pursuant to the Contract, the Debtor is entitled to recover possession by redemption:

> If we repossess the vehicle, you may pay to get it back (redeem). We will tell you how much to pay to redeem. Your right to redeem ends when we sell the vehicle.

Contract, ¶ 4.e. Upon the filing of the bankruptcy petition, an estate was created which included "all of the legal and equitable interests of the debtor in property." 11 U.S.C. § 541(a)(1). Although GMAC was lawfully in possession of the vehicle at the commencement of the bankruptcy case, the estate succeeded to the Debtor's right to recover possession upon redemption. The Debtor now seeks to recover possession, notwithstanding her failure to redeem, pursuant to section 542(a) of the Bankruptcy Code.

The Supreme Court has explained the relation between sections 541, 363, and 542.

> [Section] 541(a)(1) is intended to include in the estate any property made available to the estate by other provisions of the Bankruptcy Code. Several of these provisions bring into the estate property in which the debtor did not have a possessory interest at the time the bankruptcy proceedings commenced. . . . Section 542(a) is such a provision.

*United States v. Whiting Pools*, 462 U.S. 198, 205-207 (1983)(internal citations omitted). Bankruptcy Code section 542(a) provides:

> Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for,

> such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). In effect, section 542(a) grants to the bankruptcy estate a possessory interest it did not otherwise have. *See Whiting Pools,* 462 U.S. at 207. In exchange, "[t]he Bankruptcy Code provides secured creditors various rights, including the right to adequate protection, and these rights replace the protection afforded by possession." *Id.* The right of a trustee to use property of the estate is specifically conditioned upon the adequate protection of other interests in that property. *See* 11 U.S.C. § 363(e).

In a Chapter 13 case, it is the debtor, rather than the trustee, who has the right to use estate property pursuant to section 363. 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 [title 11]." 11 U.S.C. § 1303. Although there is no specific reference to section 542 in section 1303, based upon the debtor's exclusive right to use property of the estate in Chapter 13 cases, the right to compel turnover of property has been extended to Chapter 13 debtors. *See, e.g., TranSouth v. Sharon (In re Sharon),* 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999). In *Sharon* the Bankruptcy Appellate Panel held that a secured creditor's failure to turnover collateral repossessed but not sold prior to the commencement of a Chapter 13 case following "demand and tender of adequate protection by the [d]ebtor" violated the automatic stay. *Sharon,* 234 B.R. at 682.[4] The right of a trustee (or Chapter 13 debtor) to use property of the

[4] As the dissenting opinion in *Sharon* notes, there is significant disagreement about whether immediate turnover of collateral upon receipt of notice of the filing a bankruptcy petition without the necessity of filing an adversary proceeding is required by *Whiting Pools. Sharon,* 234 B.R. 676, 688-690 (Stosberg, B.J., dissenting). The dispute continues to the present day. *See* the excellent discussion of various approaches in *In re Singer,* 368 B.R. 435 (Bankr. E.D. Pa. 2007). The court need not weigh in on these questions at this time, however, because, at a minimum, *Sharon* requires demand for return of the vehicle and tender of adequate protection.

estate is specifically conditioned upon providing adequate protection of other interests in the property. Section 363(e) provides in pertinent part:

> Notwithstanding any other provisions of this section, at any time, on request of an entity that has an interest in property to be used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest.

11 U.S.C. § 363(e). For purposes of the Bankruptcy Code, protection is "adequate" when it provides an entity the realization of the "indubitable equivalent" of that entity's interest in property. 11 U.S.C. § 361(3).

The Debtor in this case claims the right to use the Cadillac as a means of transportation to and from work in furtherance of her plan. The Debtor has not satisfied the prerequisites for turnover, however. The Debtor did not file her complaint for turnover until *after* GMAC filed its motion for relief from the automatic stay, which raised the issue of adequate protection of its interests. Although the Debtor proposed a plan that provided for treatment of GMAC's claim, the proposed plan did not provide for repayment of the costs of repair and was silent with respect to the provision of insurance. Tr. Ex. 10. Proof of insurance is the minimum form of protection required to compel turnover of a vehicle, and failure to provide proof of insurance has been found to be a lack of adequate protection in numerous cases. *See, e.g., Singer*, 368 B.R. 435, 440 (Bankr. E.D. Pa. 2007)(insurance is most basic requirement of adequate protection); *In re Fitch*, 217 B.R. 286, 291 (Bankr. S.D. Cal. 1998)(demanding proof of insurance is valid request for assurance of adequate protection); *In re Richardson,* 135 B.R. 256 (Bankr. E.D. Tex. 1992)(creditor not compelled to turnover vehicle when debtor proved only that she had obtained one month policy covering her personal liability); *Sutton v. Ford Motor Credit Co. (In re Sutton*), 87 B.R. 46, 48 (Bankr. S.D. Ohio

1988) (conditioning return of automobile upon presentation of proof of insurance did not violate automatic stay). GMAC cannot be compelled to return the Debtor's vehicle until the Debtor tenders proof of insurance of its interest. Even then, GMAC asserts that it is nonetheless entitled to relief from the automatic stay.

**Cause for Granting Relief from the Automatic Stay**

GMAC alleges that it is entitled to relief from the automatic stay both for cause and because the Debtor has no equity in the automobile and it is not necessary for an effective reorganization. *See* 11 U.S.C. §§ 362(d)(1) and (2). The Debtor bears the burden of proof on all issues except the question of equity in the collateral. 11 U.S.C. § 362(g).

As cause for terminating the automatic stay, GMAC's motion lists a lack of adequate protection including the lack of insurance. At the hearing on GMAC's motion, the Debtor admitted that the vehicle was not insured at the time of the previous accident, and failed to prove that the vehicle is presently insured. The court has already noted that the Debtor's proposed plan is silent with respect to the provision of automobile insurance. GMAC is correct that its interest cannot be adequately protected if it is compelled to relinquish possession while its interest is not insured. The court is aware, however, that insurance coverage may be provided through the plan pursuant to a program adopted by the Chapter 13 trustees of this district if the Debtor does not have her own policy.

In addition to the lack of adequate protection, GMAC argues that cause exists for granting relief from the automatic stay because the Debtor has not proceeded in good faith with respect to its claim. A Chapter 13 plan cannot be confirmed unless it is proposed in good faith. 11 U.S.C. § 1325(a)(3). In addition, lack of good faith in filing a Chapter 13 petition may provide cause for

dismissing the case. *See Marrama v. Citizens* Bank, 549 U.S. 365, 373 (2007) and cases cited at note 1. And lack of good faith in filing a bankruptcy petition may also provide cause for relief from the automatic stay. *See, e.g., In re Laguna Assoc.*, 30 F.3d 734 (6th Cir. 1994) (Chapter 11 case); *In re Kornhauser,* 184 B.R. 425 (Bankr. S.D.N.Y. 1995). "Good faith" is not, however, defined in the Bankruptcy Code. Instead, the Sixth Circuit has indicated that "good faith is a fact-specific and flexible determination." *Alt v. United States (In re Alt),* 305 F.3d 413, 419 (6th Cir. 2002). The court must consider a "totality of the circumstances" to determine "'whether the debtor's proposed plan complies with the basic purposes of Chapter 13.'" *Metro Employees Credit Union v. Okoree-Baah (In re Okoree-Baah),* 836 F.2d 1030, 1033 (6th Cir 1988) (quoting *In re Raines*, 33 B.R. 379 (Bankr M.D. Tenn. 1983). Among the purposes and requirements of Chapter 13 is "fundamental fairness in dealing with one's creditors." *Matter of Jones*, 119 B.R. 996, 1002 (Bankr. N.D. Ind. 1990) (quoting *In re Rimgale*, 669 F.2d 426, 432-33 (7th Cir. 1982)). The Supreme Court has recently provided further guidance with respect to conduct that indicates a lack of good faith. While declining "to articulate with precision what conduct qualifies as 'bad faith' sufficient to permit a bankruptcy judge to dismiss a Chapter 13 case or to deny conversion from Chapter 7," it said that "the debtor's conduct must, in fact, be atypical." *Marrama v. Citizens Bank*, 549 U.S. 365, 127 S. Ct. 1105 n.11 (2007).

As evidence of the Debtor's lack of good faith, GMAC's counsel points to: (1) the Debtor's failure to maintain insurance on GMAC's collateral; (2) the Debtor's authorization of repairs that she knew she could not afford; (3) the Debtor's voluntary dismissal of the prior Chapter 13 case; (4) the Debtor's delay in filing her new case; (5) the Debtor's failure to attempt to redeem the vehicle prior to filing the second case; (6) the Debtor's failure to propose a plan that provides for repayment

of the debt for repairs; and (7) the Debtor's use of refunds received from the Chapter 13 trustee to pay unspecified creditors rather than GMAC. The court would add to this list the downward adjustment in the payment amount and interest rate proposed to be paid to GMAC from the first plan to the second.

The Debtor's counsel counters that the Debtor's second Chapter 13 petition was filed in good faith. He argues that the Debtor simply concluded that she could not afford the payments that would have been required to repay the post-petition obligation to ABRA in her prior case and determined that filing a new case was the best way to regain possession of her car and pay the related debts. He also points to the significant reduction in GMAC's secured claim in the prior Chapter 13 plan as evidence of her good faith.

While the court acknowledges that the Debtor made substantial payments to GMAC in the prior case, it is convinced that the Debtor's actions taken as a whole exhibit a lack of good faith with respect to GMAC. The Debtor could have demonstrated her good faith by proposing a second plan that attempted to put GMAC as nearly as possible in the position that it would have been in had the Debtor properly insured her vehicle. Had that been her intent, the Debtor's second plan would have provided for insurance on the vehicle and repayment of the cost of repairs. Further, had the Debtor intended to demonstrate her good faith toward GMAC, she would not have spent the substantial refunds she received from the Chapter 13 trustee without consulting her attorney. When she was given an opportunity to explain her use of the refunds, the Debtor's answers were vague and incomplete.

There can be no question that GMAC suffered harm as the result of the actions of the Debtor. The payment for the repairs to the Debtor's vehicle increased the amount of GMAC's claim beyond the value of its collateral, and the voluntary dismissal and refiling put GMAC's claim outside the

protection provided by the hanging paragraph of section 1325. Had the Debtor wished to demonstrate her good faith, she would have provided for payment of the claim of GMAC in full at the interest rate provided in the prior plan, or she would have explained why she was unable to do so. Rather than indicating good faith with respect to the claim of GMAC, the Debtor's actions indicate a desire to gain an advantage from her failure to insure her vehicle. The Debtor's actions are atypical of Chapter 13 debtors in the court's experience, and do not exhibit fundamental fairness with respect to the claim of GMAC.

The court agrees with GMAC that cause exists for granting relief from the automatic stay, both because the interests of GMAC are not adequately protected and because the Debtor has not proceeded in good faith.

**The Debtor Has No Equity in her Vehicle,**
**But It May Be Necessary for an Effective Reorganization**

As an alternative basis for obtaining relief from the automatic stay, GMAC's motion points to the Debtor's lack of equity in her car and asserts that the vehicle is not necessary for her effective reorganization. *See* 11 U.S.C. § 362(d)(2). It is up to GMAC to show that the Debtor has no equity in her car; the Debtor must show that the car is nonetheless necessary for her effective reorganization. 11 U.S.C. § 362(g).

Although the Debtor and GMAC do not agree on the value of the Debtor's car, it is clear that the Debtor has no equity. The Debtor acknowledges a debt to GMAC in the amount of $13,320.00 and a debt for repairs of "about $6,000.00." Thus, the Debtor acknowledges that a debt of at least $19,320.00 is owed with respect to her car. GMAC claims that the debt is actually higher. In her schedules the Debtor lists the value of her car at $15,000.00 while GMAC puts the value at

$13,884.92 in its proof of claim. Under either valuation, the Debtor has no equity in the car, and GMAC has carried its burden.

It is thus incumbent upon the Debtor to show that the vehicle is necessary for her effective reorganization. The Supreme Court has indicated that this requires a showing that "the property is essential for an effective reorganization that is in prospect." *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 376-77, 109 S. Ct. 626 (1988). This further means that the Debtor must show that she can propose a reorganization plan that is feasible. *See In re Louden*, 69 B.R. 723, 725 (Bankr. E.D. Mo. 1987). Most courts have found one non-luxury automobile to be necessary to an individual Chapter 13 debtor's effective reorganization. *See* cases collected at *McGlocking v. Chrysler Fin. Corp. (In re McGlocking)*, 296 B.R. 884, 887-88 (Bankr. S.D. Ga. 2003). The court is generally aware of the limited availability of public transportation in Memphis, Tennessee, and agrees that a car would be necessary to the Debtor's effective reorganization if the Debtor were able to propose a plan that is feasible.

The court has found that the Debtor has no equity, but that it is possible that the Cadillac is necessary for her reorganization effort. The court does not know, however, whether the Debtor is capable of proposing a feasible plan that fairly and adequately protects the interests of GMAC. The court has previously described what such a plan would look like. It would put GMAC as nearly as possible into the same position it would have been in had the Debtor not allowed her insurance to lapse. The plan proposed by the Debtor does not do that.

**CONCLUSION**

The interests of GMAC are not adequately protected under the Debtor's proposed plan and the plan was not proposed in good faith. Accordingly, the Debtor is not entitled to turnover, and GMAC is entitled to relief from the automatic stay. Because this case is still in its relatively early

stages and a plan has not yet been confirmed, however, the court will give the Debtor an opportunity to correct the deficiencies in her plan. The Debtor will be given fifteen days to file an amended plan. If she fails to do so, or if the plan as amended is not confirmed within thirty days after it is filed, then the automatic stay will terminate as to GMAC. Under the unique facts and circumstances of this case, GMAC will only be compelled to turnover possession of the Cadillac upon confirmation of a plan, if confirmation occurs.

The Court will enter separate orders in the bankruptcy case and in the adversary proceeding consistent with this opinion.

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendant
Attorney for Defendant
Chapter 13 Trustee