

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In Re:

In Proceedings Under Chapter 13

ROBERT AND LAURA EDDY

Case No.: 08-12136

Debtors.

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is the Trustee's objection to the confirmation of Debtors' Chapter 13 plan. The Court acquires core matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(b)(2), 28 U.S.C. § 1334, and General Order Number 84 of this District. After considering the parties' respective pleadings and conducting a hearing on confirmation, the Court rules as follows:

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The Debtors seek confirmation of their Modified Chapter 13 Plan wherein they propose a 26% dividend to unsecured creditors with a monthly plan payment of \$622. It is undisputed that the Debtors are above-median income debtors, with a gross monthly income of \$7,268.00. (*See* Amended Schedule I). The Debtors assert a household size of three, although they have no minor-age children. They include their employed 27 year-old son in their household size, who apparently makes no contribution to the payment of the Debtors' household expenses. (*See* Debtors' Amended Schedule I). The Debtors' 2007 federal tax return does not reflect any dependents.

On their Official Form 22(C), the Debtors take deductions for secured payments on a home and vehicle lease payments. With respect to the home, located at 4836 Fleharty in North Olmsted, the mortgage lender was granted relief from the automatic stay on March 12, 2009. The Debtors also filed a notice of change of address with the Court to reflect their current address as 25190 Butternut Ridge Road, North Olmsted. With respect to the vehicle lease, the Debtors indicate in Article 9 of their proposed modified plan that they intend to reject that lease. With these deductions on their Means Test, the Debtors show a \$344 negative monthly income. Furthermore, the Debtors' Amended Schedule I shows insurance deductions in the amount of \$673 per month. Pay advices submitted to the Trustee show insurance expense deductions that total only \$236.98.

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The Trustee alleges that the Debtors' plan should not be confirmed because the Debtors fail to devote all of their disposable income to unsecured creditors for the applicable commitment period in violation of 11 U.S.C. § 1325(b). In support of this argument, the Trustee alleges that the Debtors have improperly taken deductions on their Means Test for their mortgage and vehicle lease since they no longer own the home or lease the vehicle. If these improper deductions are removed, the Debtors would have disposable income in the amount of \$1,112.00 per month, which would yield an 85% dividend to unsecured creditors. Furthermore, the Debtors have failed to substantiate their claimed insurance expense deductions. With only \$236.98 per month for insurance shown on the Debtors' pay advices, the Debtors have overstated their insurance expense deduction by \$436.02 per month.

The Trustee also alleges that the Debtors' plan was proposed in bad faith in violation of 11 U.S.C. § 1325(a)(3) because the Debtors assert a household size of three, which includes an adult son who is employed but makes no contribution to the household expenses. If the Debtors reduced their household size to two, their disposable income would be \$1,433.00 per month, which would yield a 100% dividend to unsecured creditors.

In response to the Trustee's objection, the Debtors allege that the secured expense deductions on their Means Test are appropriate, that they "pass the means test" so the means test is "irrelevant" and the Court should rely solely on the Amended Schedules I and J, which shows \$622 per month in disposable income. The Debtors do not address the Trustee's allegation that their insurance expense deduction on Amended Schedule I is overstated or that inclusion of the adult son is improper. Nor did the Debtors desire to proceed with an evidentiary hearing to address these issues.

The issue for the Court's determination is whether Debtor's plan satisfies the requirements for confirmation found in 11 U.S.C. §§ 1325(a)(3) and (b).

Section 1325 of the Code sets forth the requirements for plan confirmation. The provisions of § 1325 at issue are as follows:

- (a) Except as provided in subsection (b), the court shall confirm a plan if—
 - (3) the plan has been proposed in good faith and not by any means forbidden by law. . .

- (b)
- (1) If the trustee or a holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan----
- (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
- (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.
- (2) For purposes of this subsection, the term "disposable income" means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended--
- (A) (i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and
- (ii) for charitable contributions (that meet the definition of "charitable contribution" under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and
- (B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.
- (3) Amounts reasonably necessary to be expended under paragraph (2), ..., shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals;

A debtor seeking reorganization under Chapter 13 bears the burden of establishing that the plan complies with the statutory requirements for confirmation. *In re Petrella*, 230 B.R. 829, 832 (Bankr.N.D. Ohio 1999). Therefore, the Debtors must demonstrate by a preponderance of the evidence that their plan satisfies the requirements of 11 U.S.C. § 1325. *See Grogan v. Garner*, 498 U.S. 279 (1991)(preponderance of the evidence standard presumed to be applicable in civil actions between private parties.)

Herein, the Debtors have not met their burden to show that their proposed modified plan meets the requirements of § 1325(b). Although the Debtors claim that this Court should ignore their Means Test because they “pass” it and rely solely on the Amended Schedules I and J, even that does not support confirmation of the Debtors’ plan. There has been no substantiation of the Debtors’ claimed insurance expense deductions. Per their Amended Schedule I, the Debtors claim \$673 per month in insurance deductions. However, the Trustee indicates that the Debtors’ pay advices show only \$236.98 per month for insurance expense deductions. The Debtors, therefore, have overstated their insurance expense deduction by \$436.02 per month.

Furthermore, the Debtors offer no coherent statutory or other authority for their argument that the Means Test is irrelevant where debtors “pass” the Means Test by claiming improper expense deductions. The deductions for the home, which the Debtors no longer own, and the leased vehicle, which the Debtors no longer possess, are improper. *In re Marchiona*, 393 B.R.

512, 520-21 (Bankr. N.D. Ohio 2008)(confirmation denied where debtor took deduction on means test for mortgage payment where stay relief had been granted.) This issue has also been decided by the Bankruptcy Appellate Panel for the Sixth Circuit, which is in accord with this Court's ruling in *Marchiona*. See *In re Thomas*, 395 B.R. 914 (BAP 6th Cir. 2008). In *Thomas*, the Bankruptcy Appellate Panel held that "if a trustee or unsecured creditor objects to the plan, the court *may not* confirm the plan if the court finds that debtor's schedules or other credible evidence require a reassessment of disposable income as determined by the means test under § 1325(b)(2) and (b)(3)." *Id.* at 923. Herein, the Debtors no longer make payments on the mortgage which secured their pre-petition residence and have stated an intent to surrender their leased vehicle. Accordingly, there is "credible evidence" that requires a reassessment of disposable income as determined by the means test. The Debtors have not met their burden with respect to confirmation under 11 U.S.C. § 1325(b).

Finally, an additional impediment to confirmation is whether the Debtors' plan was proposed in good faith as required by 11 U.S.C. § 1325(a)(3). The term "good faith" is not defined in the Bankruptcy Code and, in the Sixth Circuit, such determination requires consideration of the "totality of the circumstances." *Society National Bank v. Barrett*, 964 F.2d 588, 591 (6th Cir. 1992). The "critical issue is whether there is a sincerely-intended repayment of pre-petition debt consistent with the debtor's available resources." *Id.* at 592. Herein, the Debtors propose to pay their unsecured creditors a 26% dividend, while supporting an adult child who does not contribute towards payment of the monthly household expenses. The Debtors failed to respond to this aspect of the Trustee's objection. According to the Trustee, and undisputed by the Debtors, a reduction to a household size of two would leave the Debtors with

\$1,433.00 per month in disposable income. This monthly payment would yield a 100% dividend to unsecured creditors. Accordingly, this Court cannot find that the Debtors proposed their plan in good faith.

Accordingly, the Trustee's objection to confirmation of the Debtors' plan is hereby sustained. The Debtors' opposition thereto is overruled. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 16th day of
November, 2009.


JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT