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UNITED STATES BANKRUPTCY COURT
DISTRICT OF IDAHO

IN RE:) CHAPTER 13
MICHAEL J. THIEL and)
STEFANIE A. THIEL,) CASE NO. 10-00434-TLM
)
Debtor(s).)
_____)

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF TRUSTEE'S
OBJECTION TO CONFIRMATION**

NOW COMES Kathleen A. McCallister, the standing Chapter 13 Trustee for the United States Bankruptcy Court for the District of Idaho, by and through her Staff Attorney, and respectfully submits this Supplemental Memorandum in support of her Objection to Confirmation and requests that confirmation of the amended plan filed on June 9, 2010, be denied.

STATEMENT OF THE CASE

The Debtors filed this case on February 26, 2010 pursuant to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA). The Debtors are above median income. The bar date has passed and the debtors have unsecured claims of approximately \$290,000.00 which includes unsecured claims filed in excess of \$141,845.75, a second mortgage which is being paid as an unsecured creditor in the amount of \$104,468.00, and priority unsecured claims of \$13,373.23. The Trustee expects that the amount of the unsecured debt will

increase when Western Federal Credit Union files their amended claim for the deficiency balance on the travel trailer.

The debtors plan proposes to make 4 payments of \$304 a month, 25 payments of \$1,607 a month and 31 payments of \$1,687.00 a month for a total of \$84,319.00. From this the Trustee is to pay priority taxes totaling \$13,373.23, a 2000 Ford F150 costing \$22,994.00, a 2008 GMC Yukon at \$44,502.00, and the Idaho State Tax Commission (ISTC) secured claim of \$2,000.00 which is \$2,309 with interest. After the payment of the priority and secured creditors there is approximately \$1,139.00 available for the unsecured creditors. The Trustee contends that the debtors plan does not meet the disposable income requirement of the Form 22C

An evidentiary hearing was held before the court on October 28, 2010. During the hearing, the Debtors testified regarding their unsuccessful post-petition efforts to seek replacement vehicles. Additionally, the Debtors testified that in their opinion, the 2nd mortgage on their real property was wholly unsecured, and that they believed that their 1st mortgage debt exceeded the current value of their real property.

ARGUMENT

THE DEBTORS' PLAN CANNOT BE CONFIRMED AS IT DOES NOT MEET THE DISPOSABLE INCOME REQUIREMENT OF LINE 59 OF FORM 22C

The Debtors in this case are above median income and subsequently the unsecured creditors must receive all of the debtors' projected disposable income as it is determined by a mathematical calculation on the form 22C for 60 months. The Debtors have filed a 22C form on February 26, 2010 which indicates that the debtors have disposable income of \$1,102.70 which would require unsecured creditors to receive \$66,162.00. The debtors proposed plan falls significantly short of reaching the disposable income requirement even as to debtor's calculations.

The Trustee contends that the debtor's 22C form is incorrect and that a correct form would show disposable income of \$1,699.76 a month. Attached hereto is Trustee's analysis of the Chapter 13 Statement of Current Monthly Income and Calculation form which is a side by side spreadsheet of the Debtors' 22C and the Trustees calculations. See Trustee's Exhibit A. Based on the documents provided, the Trustee has calculated Mr. Thiel's income for the six calendar months prior to filing as \$4147 which is slightly higher than the \$3994 listed by the debtors. The Trustee has also added the contribution from the debtor's son for the automobile that he is paying for. The Debtors have listed the debt on line 47 but not the contribution. The Trustee notes that the issue can be resolved if the debtors remove the expense on line 47 since they are not paying it directly.

The other changes made by Trustee are as follows: The trustee corrected the amount being paid to Western Union Credit Union on the 2008 GMC Yukon as the claim is slightly less than indicated in the plan, thus they will receive an average of \$683.00 a month instead of \$709.00 per month. The Trustee has increased the amounts on line 47 to include the secured debt of the ISTC. The Trustee has increased the amount of priority claims based on the proof of claims as filed, the Trustee has increased the amount deducted for the plan payments, and the Trustee has reduced the amount being paid into a qualified retirement deduction based on what is shown in the debtor's current paycheck stubs. The Trustee would note that the Debtors' Form 22C and the Schedule I fail to list Mrs. Thiel's child support; however, since the form allows her to deduct it, it would have no effect on the result and the Trustee did not include it in the Form 22C. At the end of the form the Trustee calculates that the unsecured creditors should receive \$1,699.76 per month. The debtors proposed plan pays unsecured creditors less than that over the whole term of the plan.

At the hearing in this case, counsel for Debtors sought to argue that as a result of the U.S. Supreme Court decision entitled Hamilton v. Lanning, 130 S.Ct. 2464, 2010 U.S. LEXIS 4568 (2010), that the court is no longer bound by the results of Line 59 of Form 22C, and that a bankruptcy court can simply review Debtors' Schedules I and J, and make its own determination of Debtors net monthly income which is to be contributed to their Chapter 13 Plan. Unfortunately, Debtors' counsel reading of the Lanning decision goes too far.

In affirming the holding of the Tenth Circuit Court of Appeals, the U.S. Supreme Court cited the following:

According to the Tenth Circuit, a court, in calculating "projected disposable income," should begin with the "presumption" that the figure yielded by the mechanical approach is correct, but the Court concluded that this figure may be rebutted by evidence of a substantial change in the debtor's circumstance. (Citation omitted).

Lanning, 130 S.Ct. at 2471. (Emphasis added).

Unlike the debtor in Lanning, the Debtors Thiel have failed to demonstrate a "substantial change in the debtor's circumstance" in the six (6) month period prior to filing that would allow this court to move from the mechanical approach required by BAPCPA. The Trustee argues that the Debtors have failed to demonstrate in either their schedules or by way of sworn testimony at their evidentiary hearing that such change has occurred, and without such a "trigger," that the Debtors, in order to propose a Plan capable of being confirmed, must meet the "disposable income" requirement as calculated by Line 59 of their Form 22C.

The Debtors filed and amended Schedule I and J on June 9, 2010. (Doc 34). Schedule I reveals that Mr. Thiel has a new job working for Taos Mountain, Inc., and has gross income of \$4,166.00. Mrs. Thiel's income has remained unchanged. Thus, the Debtors have \$19.00 more a month now than set forth in the 22C; there is no "substantial change" in circumstances.

During his presentation at hearing on October 28, 2010, counsel for Debtors continually asserted that as a result of the Supreme Court's decision in Lanning, debtors are now entitled to rely upon a "forward" looking approach and are no longer constricted by the calculations of the Form 22C. The Trustee believes that counsel for Debtors has misunderstood the Court's holding, and misconstrues the legal effect of the final paragraph of the majority's decision which instructs courts when calculating a "debtor's projected disposable income, the court may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." Lanning, 130 S.Ct. at 2478.

While the Debtors in this case believe that Lanning now affords the court *carte blanche* to conduct its own analysis, the Trustee believes that the Supreme Court did not go to that extreme in its decision. Rather, if a debtor can demonstrate a "substantial change" in her circumstance, which is "virtually certain" at the time of confirmation, then the court may utilize a forward looking approach with regard to a debtor's net monthly income available to fund a Plan. No such showing of "substantial change" has been demonstrated by the Debtors in this case which would allow this court to conduct an analysis beyond the requirements of Line 59 of Form 22C. Accordingly, the Trustee continues to believe that confirmation of the Debtors' Plan must be denied.

In this case, due to the significant disparity between the Debtor's Form 22C and their amended Schedules I and J, the Trustee has reviewed Debtor's Schedule J to determine what expenses are at variance with the applicable IRS allowances. Schedule J expenses can be divided between several categories. The first category is the National Standard for food, apparel and services, housekeeping supplies, personal care, and miscellaneous. It includes debtor's expenses for food, clothing, laundry, cable, school expenses, school lunches, HOA dues, the

warranty and recreation. The Debtor's expenses in this category total \$1,888.00 and their allowance is \$1,894.

The next category is the Debtor's local standards for housing and utilities, non-mortgage expenses. The debtors are allowed \$425.00; their expenses in this category total \$494.00. The last category is the transportation expenses. The debtors are permitted transportation expenses of \$422.00 a month; however, they have listed expenses totaling \$1,295.00 a month which include \$400.00 for auto insurance and \$895.00 for transportation expenses. This expense, which is \$873.00 higher than the IRS allowances, appears to be the crux of the problem on Schedule J. If one adds the \$1027 which is understated on Schedule I and the \$873 in overstated expenses on Schedule J one gets \$1,900.00 in additional available income which is about what it would take to pay the unsecured creditors what they should receive in this case with applicable Trustee's fees. Thus, the Trustee contends the debtors are not using all of their disposable income to fund the plan and that confirmation should be denied.

This court has previously held that the language of 11 U.S.C. § 1325(b)(3) limits above median income debtors to the expenses categorized in 11 U.S. § 707(b)(2)(A) and (B). In Re Meek, 370 B.R. 294, 305-306 (Bankr. D. Idaho 2007). But for the final paragraph of the majority's decision in Lanning, one could argue that a Lanning analysis should only be considered when evaluating a "change in circumstance" relating solely to a debtor's income. Perhaps unfortunately (or intentionally), the Supreme Court did speak of both income and expenses in its analysis, the import of this language remains unresolved. The Supreme Court in Lanning did not explicitly question, criticize or reject the propriety of Congress' use of the term "shall" in § 1325(b)(3) and § 707(b)(2) and its mandatory application of these figures for above

median debtors. The Trustee argues that such analysis is still required in this case for the Thiels as above median income Debtors.

In this case, the Debtors have not asserted (nor does the Trustee concede) that there are “special” circumstances which would allow them to claim transportation expenses in excess of the local IRS standard. For example, in In Re Tranmer, 455 B.R. 234, 251 (Bankr. D. Montana 2006) the debtors sought to take an additional \$180.00 per month expense based upon the distance they needed to travel for work and for other personal reasons. The bankruptcy court held that absent special circumstances, which means “circumstances beyond a debtor’s reasonable control . . . [but it] does not include debtor’s [sic] desire to remain living wherever they choose, even when their place of employment changes or requires a long commute,” debtors could not include expenses above the applicable IRS allowance. Tranmer, 355 B.R. at 251.

At the evidentiary hearing in this case, the Debtors testified that they had no equity in their home, that their monthly house payment on their first deed of trust was approximately \$2,241.00, and that as a result of having no equity in their home were seeking to “strip off” the second deed of trust encumbering their property. In a case with remarkably similar facts (In Re Stitt, 403 B.R. 694 (Bankr. D. Idaho)), Judge Pappas reviewed whether a debtor, who lived in Fairfield, Idaho (in a property in which he had no equity), and commuted to Mountain Home, Idaho, could reasonably expect his unsecured creditors to fund his lifestyle and desire to reside in a rural area. The court reasoned

Is it inequitable for Debtor to ask his creditors to subsidize his decision to work in Mountain Home, but live on an acreage in Fairfield in which he has no equity? Again, the record shows that Debtor understood that the bulk of his work responsibilities would be at the Mountain Home Air Force Base *before* choosing to purchase the land and build his house in Fairfield. It is not as if he was settled in a home, and only then informed that he would be reassigned to a new location farther away. All things considered, the Court concludes that Debtor’s attempt to use chapter 13 to maintain his comparatively expensive residence in Fairfield, in

which he has no equity, and which requires him to commute great distances to and from his employment, an inappropriate manipulation of the Code.

Stitt, 403 B.R. at 705.

In this case, the Debtors testified that their employment, for the entire time they lived in their residence in Canyon County, had always been in the Boise, Idaho, area. Accordingly, they are not unlike many Idaho citizens who reside in Canyon County and commute daily to Ada County for employment. The Trustee argues that their desire to live in Canyon County and maintain their pre-petition lifestyle is not a “special circumstance” which is beyond their control.

CONCLUSION

The Trustee believes that confirmation of the Debtors’ amended plan filed June 9, 2010, must be denied for the reasons set forth in this Supplemental Memorandum.

Dated: November 29, 2010

RESPECTFULLY SUBMITTED:

/s/
Charles M. Murphy, Staff Attorney

