

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

-----  
In re:

*Robert W. Wittmers, and  
Dianna L. Wittmers,*

Debtor(s).

BKY 04-43386

Chapter 13 Case

-----  
**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION OF  
CHAPTER 13 PLAN AND FOR DISMISSAL OF CASE**

TO: All parties in interest pursuant to Local Rule 9013-3:

1. Jasmine Z. Keller, Chapter 13 Trustee (the "Trustee"), by and through her undersigned attorneys, moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion at 10:30 a.m. on September 2, 2004 in Courtroom 7 West, 7th Floor, United States Courthouse, 300 South 4th Street, Minneapolis, Minnesota.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on September 1, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than August 30, 2004, which is three business days before the time set for the hearing. **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

4. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334, Bankruptcy Rule 5005 and Local Rule 1070-1. This proceeding is a core proceeding. The petition commencing this chapter 13 case was filed on June 16, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. § 1322 and 1325 and Bankruptcy Rule 3015. This motion is filed under Bankruptcy Rule 9014 and Local Rules 3015-3, 9006-1, 9013-1 through 9013-5, and such other Local Rules as may apply. Movant requests relief with respect to denial of confirmation of the debtors' Chapter 13 Plan dated June 16, 2004 (the "Plan"), and for dismissal of the case.

6. Husband is employed as a fabrication manager for Holaday Circuits, Inc., with gross wages of \$4,085/mo. and net income of \$2,981, according to the debtors'

Schedule I on file herein. Wife lists her occupation as “food service director” for Aramark, with gross and net incomes of \$2,400/mo. and \$1,897/mo., respectively. Combined, the debtors’ net income totals \$4,878/mo. The debtors list no dependents on their Schedule I

7. The debtors list total expenses of \$4,587/mo. on their Schedule J on file herein, leaving them with disposable income of \$291/mo.

8. The Plan proposes that the debtors will pay the Trustee \$291/mo. for 36 months, for a total of \$10,476. After payment of the debtors’ attorney fees (estimated at \$1,250), the balance of the funds, net of the Trustee’s fee (estimated at 10% of the total funds), in the amount of \$8,274, is to be paid entirely to the debtors’ nonpriority unsecured creditors, whose claims total approximately \$60,186. The dividend to unsecured creditors is approximately 14%.

9. Following the meeting of creditors in this case, held on July 21, 2004, the Trustee’s undersigned representative sent an e-mail to the debtors’ attorneys office, questioning a number of expenses claimed by the debtors in their Schedule J, and requesting further information (including copies of utility bills) to establish the reasonableness of these expenses. The debtors have failed and refused to comply with this request, although the confirmation hearing was continued from August 5, 2004 to the present date to give them additional time to comply.

10. The following expenses listed on the debtors’ Schedule J appear to be unreasonable and/or unnecessary for a two-person household:

Electricity and heating fuel	\$450
Telephone	150
Home maintenance	200
Food	500
Transportation	425
Personal care \$50/supplies & paper products \$35/ Toiletries \$40	125

11. The Trustee objects to confirmation of the Plan on the grounds that the debtors are not proposing to pay all of their “disposable income” for the next 36 months into the plan, as required by 11 U.S.C. § 1325(b)(2).

12. The Trustee further objects to the Plan on the grounds that it has not been filed in good faith, as required by 11 U.S.C. § 1325(a)(3).

13. Dismissal of this case for cause is appropriate under 11 U.S.C. § 1307(c), due to the debtors’ failure to cooperate with the Trustee in her reasonable requests for information.

14. If necessary, the debtors, and Thomas E. Johnson, or another employee of

the Trustee may be called to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests an order as follows:

1. Denying confirmation of the debtors' Chapter 13 plan.
2. Dismissing this case.
3. For such other, further and different relief as to the Court appears just, equitable and in accordance with statute.

Jasmine Z. Keller, Trustee

Dated: August 24, 2004

By: /e/ Thomas E. Johnson  
Thomas E. Johnson, ID # 52000  
Margaret H. Culp, ID # 180609  
Counsel for Chapter 13 Trustee  
310 Plymouth Building  
12 South 6th Street  
Minneapolis, MN 55402-1521  
(612) 338-7591

#### VERIFICATION

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, the movant named in the foregoing notice of hearing and motion, declare under penalty of perjury that the foregoing is true and correct according to the best of my knowledge, information and belief.

Executed: August 24, 2004

/e/ Thomas E. Johnson

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

-----  
In re:

*Robert W. Wittmers, and  
Dianna L. Wittmers,*

Debtor(s).

-----

BKY 04-43386

Chapter 13 Case

**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION AND  
MOTION TO DISMISS**

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies upon the verified Schedules on file and of record herein.

LEGAL DISCUSSION

11 U.S.C. § 1325(b)(1) states that, upon objection by the Trustee, the court may not confirm a Chapter 13 plan unless the plan either provides for full payment of allowed claims or commits all of the debtors' disposable income for 36 months toward the plan payments. "Disposable income" is defined in 11 U.S.C. § 1325(b)(2) as "income which is received by the debtor and which is not reasonably necessary to be expended – (A) for the maintenance and support of the debtor or a dependent of the debtor, . . . " 11 U.S.C. § 1325(b)(2)(A). The debtors' budget contains numerous expenses that appear to be unreasonable or unnecessary, in whole or in part. The Trustee has requested further explanation and proof of these expenses (such as copies of utility and telephone bills), but to date the debtors have not complied with this request. Confirmation should be denied based on the debtors' failure to comply with the requirements of 11 U.S.C. § 1325(b)(1).

The Trustee also contends that confirmation should be denied on the grounds that the debtors' case and plan have not been filed in good faith. "The bad faith determination focuses on the totality of the circumstances, specifically: (1) whether the debtor has stated his debts and expenses accurately; (2) whether he has made any fraudulent representation to mislead the bankruptcy court; or (3) whether he has unfairly manipulated the bankruptcy code. *In re LeMaire*, 898 F.2d 1346, 1349 (8th Cir.1990)." *In re Molitor*, 76 F.3d 218, 221 (8<sup>th</sup> Cir. 1996). The debtors have proposed a minimum term plan that will pay only 14% of their unsecured debts. They have not accurately stated their expenses. They have failed to respond to the Trustee's request for substantiation of the challenged expenses. Based on all of the foregoing circumstances, the court should deny

confirmation of the Plan as having been filed in bad faith.

Dismissal of a case is appropriate for “cause” under 11 U.S.C. § 1307(c). The Trustee contends that dismissal of the case is appropriate where, as here, the debtors have failed to comply with their statutory duty to comply with the Trustee’s reasonable requests for information. *11 U.S.C. § 521(3)*.

### CONCLUSION

For the reasons stated herein, the Trustee respectfully requests that confirmation of the debtors’ proposed Chapter 13 plan be denied, and that this case be dismissed.

Respectfully submitted:

Dated: August 24, 2004

/e/ Thomas E. Johnson  
Thomas E. Johnson, ID # 52000  
Margaret H. Culp, ID # 180609  
Counsel for Chapter 13 Trustee  
310 Plymouth Building  
12 South 6th Street  
Minneapolis, MN 55402-1521  
(612) 338-7591

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

-----  
In re:

*Robert W. Wittmers, and  
Dianna L. Wittmers,*

Debtor(s).

BKY 04-43386

Chapter 13 Case

-----  
**ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN  
AND DISMISSING CASE**

At Minneapolis, MN, \_\_\_\_\_, 2004.

The above-entitled matter came on for hearing before the undersigned United States Bankruptcy Judge on the Chapter 13 Trustee's objection to confirmation of the debtors' proposed Chapter 13 plan and motion to dismiss.

Appearances were noted in the minutes.

Upon the foregoing objection, arguments of counsel, and all of the files, records and proceedings herein:

IT IS ORDERED:

1. Confirmation of the debtors' proposed Chapter 13 plan is DENIED.
2. This case is DISMISSED

\_\_\_\_\_  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
FOURTH DIVISION

-----  
In re:

*Robert W. Wittmers, and  
Dianna L. Wittmers,*

Debtor(s).

BKY 04-43386

Chapter 13 Case

-----  
**UNSWORN DECLARATION FOR PROOF OF SERVICE**

I, Thomas E. Johnson, employed by Jasmine Z. Keller, Chapter 13 Trustee, declare that on August 24, 2004, I served Notice of Hearing and Motion Objecting to Confirmation of Chapter 13 Plan and for Dismissal of Case, Memorandum of Facts and Law, and proposed Order on the individual(s) listed below, in the manner described:

**By e-mail:**

United States Trustee  
1015 United States Courthouse  
300 South 4<sup>th</sup> Street  
Minneapolis, MN 55415

**By first class U.S. mail, postage prepaid:**

Robert W. Wittmers  
Dianna L. Wittmers  
5708 County Road 101  
Minnetonka, MN 55345

Robert J. Hoglund, Esq.  
Attorney at Law  
PO Box 130938  
Roseville, MN 55113

Buchalter, Nemer, Fields & Younger  
Adam J. Bass  
18400 Von Karman Avenue, Suite 800  
Irvine, CA 92612

And I declare, under penalty of perjury, that the foregoing is true and correct.

Executed: August 24, 2004

/e/ Thomas E. Johnson