

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF MINNESOTA  
THIRD DIVISION

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In re:

Case No.: 04-33204

*Robert Frank Osterday and  
Karla Rae Osterday*

Chapter 13 Case

Debtors.  
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**NOTICE OF HEARING AND MOTION OBJECTING TO CONFIRMATION  
OF MODIFIED CHAPTER 13 PLAN**

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

1. Michael J. Farrell, Chapter 13 Trustee (the "Trustee"), moves the court for the relief requested below and gives notice of hearing.

2. The court will hold a hearing on this motion on August 12, 2004 at 10:00 A.M. in Courtroom 228A, United States Courthouse, 316 North Robert Street, St. Paul, Minnesota 55101.

3. Any response to this motion must be filed and delivered not later than 10:00 a.m. on August 11, 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 9, 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 May 27, 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 9006-1, 9013-1 through 9013-5. Movant requests relief with respect to denial of confirmation of the debtors' proposed Modified Chapter 13 plan filed July 9, 2004, (the "Plan").

6. The Plan calls for the debtors to make payments to the Trustee of \$615.42 per month for 36 months, for a total of \$22,155.12 (the "Plan Funds").

7. The debtors' schedules reflect that the debtor husband is self-employed as a financial advisor, with a monthly income of \$2,151.00. The debtors' schedules reflect that the

debtor wife is a teacher with the Luverne Public Schools with a gross monthly income of \$4,370.90. The debtor wife's payroll deductions total \$1,920.90. The debtors combined total monthly income is \$4,601.00. The debtors' expenses, according to Schedule J are \$3,985.58 per month, leaving an apparent monthly income of \$615.42.

8. The Trustee has requested additional information from the debtors concerning the debtor husband's business so the Trustee could verify his income and expenses in order to determine feasibility. To date, the requested information has not been provided. Accordingly, because the information has not been provided, the feasibility of the plan is unknown.

9. Based on the information provided, the debtors' Plan is not feasible, and confirmation should be denied pursuant to 11 U.S.C. § 1325(a)(6).

10. Additionally, the payment provisions of the modified Plan are confusing and contradictory. At paragraph 12 of the modified plan, "summary of payments", the numbers do not add up to a mathematically correct total. It is not clear what amount the debtors are proposing to pay to unsecured creditors. Also, the plan does not pay priority creditors in full. The modified plan provides for funds of \$0.00 to \$2,000.00 to be paid to the IRS on its priority claims. The IRS has filed a proof of claim indicating it has a priority claim of \$5,131.36. Also, at paragraph 7, debtors indicate they are paying their current mortgage payments through the plan. The modified plan should only include amounts in default.

11. The debtors' Schedule J reflects a payment of \$360.00 per month for their 21-year-old son's college expenses. Because the debtors' 21-year-old son is no longer a dependent, there is no legal obligation of support. Accordingly, the debtors have an additional \$360.00 per month in disposable income they should commit to the plan.

12. If testimony is required, an employee of the Trustee, and the debtors, will be called to testify at the hearing on the objection.

WHEREFORE, the Trustee moves the court for an order denying confirmation of the debtors' proposed Modified Chapter 13 Plan filed July 9, 2004, and such other relief as may be just and equitable.

Ulvin and Sullivan Attorneys, P.A.

Dated: July 22, 2004

/e/ Patti J. Sullivan  
By: Patti J. Sullivan, ID #170124  
Counsel for Chapter 13 Trustee  
PO Box 16406  
St. Paul, MN 55116  
(651) 699-4825

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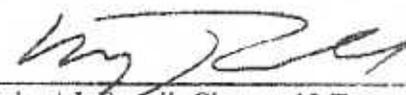
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VERIFICATION

I, Michael J. Farrell, 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: 7-22-04

  
\_\_\_\_\_  
Michael J. Farrell, Chapter 13 Trustee

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**MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION**

**FACTS**

The Trustee relies upon the facts set forth in his verified motion, which, for the sake of brevity, will not be repeated here.

**LEGAL DISCUSSION**

The “feasibility” requirement for confirmation of a Chapter 13 plan is largely subsumed in 11 U.S.C. § 1325(a)(6), which requires a finding that “the debtor will be able to make all payments under the plan and to comply with the plan.” Before a Chapter 13 plan can be confirmed, the bankruptcy court must determine that the debtor is able to make the payments required in the plan. 11 U.S.C. § 1325(a)(6). Because a debtor files for bankruptcy in the first instance after experiencing financial difficulties, it would be a waste of the bankruptcy system’s resources to affirm plans that debtors are unable to follow. The debtors have the burden of proving that the plan is feasible. In Re Endicott 157 B.R. 255 (W.D. Va 1993) citing In Re Hogue 78 Bankr. 867, 871 (Bankr. S.D. Ohio 1987)

The Trustee submits that the proposed Plan is not feasible. The Trustee has not been provided with documentation to verify income and expenses to ensure that the debtors have the income to ensure that the plan is feasible.

**Plan Does Not Pay Priority Claims in Full**

Section 1322(a)(2) provides that the plan shall provide for the full payment of all priority claims.

Section 1325(a)(1) provides that a Court shall confirm a plan if the plan complies with the provisions of the Bankruptcy Code.

The Trustee submits that the Plan in this case is not confirmable. The Plan does not, in fact, provide for the full payment of the allowed priority claims as required by Section 1322(a)(2) and therefore the Plan does not comply with the provisions of the Bankruptcy Code as required by Section 1325(a)(1).

The Plan provides that the Debtors shall pay in funds in the total amount of \$22,155.12.

The IRS has filed a proof of claim indicating that it has a priority claim of \$5,131.36. The Plan provides for \$0.00 to 2000.00 to be paid on the IRS's claim. There are insufficient funds being paid into the Plan to pay the priority claim of the IRS in full. As a result of the foregoing, the Plan does not provide for payment in full of the allowed priority claims and confirmation therefore should be denied.

### **Plan Does Not Commit all Disposable Income**

Section 1325(b)(1)(B) of the Bankruptcy Code provides that the court may not confirm a plan over the objection of the trustee unless the plan provides that all of the debtors' projected disposable income be paid into the plan. Disposable income is defined to mean income received by the debtor, which is not reasonably necessary for the maintenance or support of the debtor or his dependents.

The Debtors have disposable income, which they are not committing to their plan. According to the Debtors' Schedules I and J, they have monthly take home income of \$4,601.00 per month, and monthly living expenses of \$3,985.58 per month leaving \$615.42 per month in disposable income. The Debtors are proposing to pay \$615.42 per month to the Chapter 13 Trustee. However, the debtors list expenses on their Schedule J that are not necessary for their support. The Debtors list an expense of \$360.00 per month for their 21-year-old son's college expenses. Therefore, their son is no longer a dependent. The debtors have an excess of \$360.00 per month in disposable income, which they have not proposed to commit to the Plan.

Based on the foregoing, the Court must conclude that the Debtors are not in fact paying into the Plan all disposable income. As a result, based on the Trustee's objection, the Plan is not confirmable pursuant to Section 1325(b)(1)(B).

### **CONCLUSION**

The debtors' modified Plan is not feasible because the Trustee has not received the requested business forms and accounting information and feasibility cannot be determined without said documentation. Additionally, the Debtors are not paying their priority claims in full or committing all of their disposable income to the plan. Based on all of the foregoing, confirmation should be denied.

Respectfully submitted:

Dated: July 22, 2004

/e/ Patti J. Sullivan  
Patti J. Sullivan, ID #170124  
Ulvin and Sullivan Attorneys, P.A.  
Counsel for Chapter 13 Trustee  
PO Box 16406  
St. Paul, MN 55116  
(651) 699-4825

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**UNSWORN DECLARATION FOR PROOF OF SERVICE**

I, Joeline Kissinger, legal assistant for attorneys for Michael J. Farrell, Chapter 13 Trustee, declare that on July 23, 2004, I served the attached Notice of Hearing and Motion Objecting to Confirmation of Modified Chapter 13 Plan, Memorandum of Facts and Law, and proposed Order on the individuals listed below, in the manner described:

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

United States Trustee  
1015 United States Courthouse  
300 South Fourth Street  
Minneapolis, MN 55415

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

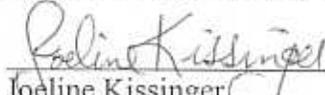
Robert Frank Osterday  
507 W Main  
Luverne, MN 56156

Karla Rae Osterday  
507 W Main  
Luverne, MN 56156

William P. Scott, Esq.  
P.O. Box 689  
Pipestone, MN 56164

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

Executed: July 23, 2004

  
\_\_\_\_\_  
Joeline Kissinger

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**ORDER DENYING CONFIRMATION OF MODIFIED CHAPTER 13 PLAN**

At St. Paul, Minnesota, \_\_\_\_\_.

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 Modified Chapter 13 plan.

Appearances were noted in the minutes.

Upon the verified motion and all of the files, records and proceedings herein:

IT IS ORDERED:

Confirmation of the debtors' Modified Chapter 13 plan filed July 9, 2004 is DENIED.

\_\_\_\_\_  
Dennis D. O'Brien  
United States Bankruptcy Court Judge