

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY 04-33614 GFK

William E. Crane,

Chapter 13

Debtor.

NOTICE OF OBJECTION TO
CONFIRMATION OF PLAN AND
MOTION TO DISMISS

TO: All parties entitled to notice pursuant to LOCAL RULE 9013-3.

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

2. A hearing on this motion will be held at 10:30 a.m. on August 26, 2004 in Courtroom 228B, U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota or as soon thereafter as counsel may be heard.

3. Any response to this motion must be filed and delivered not later than 10:30 a.m. on August 25, 2004, which is 24 hours before the time set for hearing, or filed and served by mail not later than August 23, 2004, which is three business days before the hearing date. 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, FED. R. BANKR. P. 5005, and LOCAL RULE 1070-1. The proceeding is a core proceeding. The petition commencing this case was filed on June 18, 2004. The case is now pending in this court.

5. This motion arises under 11 U.S.C. §§ 1322 & 1325 and FED. R. BANKR. P. 3015 and LOCAL RULES 3015-1. Movant requests relief with respect to denial of confirmation of the Plan and for dismissal of the case.

6. The Debtor filed a Chapter 13 Plan dated June 18, 2004 (the "Plan"). The Plan provides for payments of \$1,600 per month for 12 months, then 24 additional payments of \$2,350 per month, concluding with an additional 24 payments of \$3,600 per month, for a total contribution of \$162,000. The Plan would allow for distribution on account of estimated nonpriority unsecured claims of approximately \$202,555.83, said amounts estimated at the time of filing. The claims bar date for general unsecured creditors expires on October 12, 2004. As

of the date of this objection, the proposed return to unsecured creditors appears to be no more than 8%.

7. To date, the Debtor has paid the Trustee \$1,600 and is current in contributions to the Plan through July 2004.

8. The Debtor's Plan proposes to pay the following claims: Attorneys' fees, \$1,250; Internal Revenue Service ("IRS") Priority Claim, \$38,088.55; Minnesota Department of Revenue ("MDR") Priority Claim, \$6,932; CIT Group Secured Claim for pre-petition mortgage arrearages, \$32,000¹; IRS Secured Claim, \$34,722 plus 4% interest; Trustee's Fees, \$9,169.81 (6%); and, \$16,339.64 to general unsecured creditors.

9. Among other things, Schedule J of the Debtor's petition provides for monthly mortgage payments of \$3,330 on the mortgages securing the Debtor's homestead. Based upon the petition and schedules, the household consists of the Debtor and his non-filing spouse. The Debtor proposes to continue paying an automobile lease payment of \$480 per month, and to continue paying \$500 per month on student loans.

10. The Trustee objects to confirmation of the Plan on the grounds that the Plan does not devote all of the Debtor's projected disposable income to payments under the plan. 11 U.S.C. § 1325(b)(1). A debtor under chapter 13 should contribute all disposable income to the debtor's plan. *In re Sitarz*, 150 B.R. 710, 718 (Bankr. D. Minn. 1993). *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991). "Disposable income" includes all of a debtor's income which is "not reasonably necessary to be expended" by the debtor. 11 U.S.C. § 1325(b)(2). "Reasonably necessary to be expended" does not necessarily mean that such expenses should be sufficient to maintain the debtor's former lifestyle, or to continue a pattern of "excessive consumption of nonessentials or inordinately high expenditures for purchases of necessities." *Sitarz*, 150 B.R. at 718. *McDaniel*, 126 B.R. at 784.

11. It is the Trustee's position that the Debtor's insistence on continuing to pay a monthly mortgage expense of \$3,330 for a household consisting of the Debtor and his non-filing spouse is excessive, particularly in light of the fact that the Debtor has failed to pay his federal and state tax obligations over a number of years, and, according to Schedule F, incurred a large student loan obligation while failing to do so.

12. On information available to the Trustee from the petition, schedules, statements, and testimony at the § 341 Meeting, it appears the Debtor has additional income or excessive expenses, the amount of which is disposable income and must be contributed to the chapter 13 plan.

13. In some cases, failure of a debtor to contribute all disposable income to a chapter 13 plan, thereby failing a "best efforts" test, demonstrates a lack of good faith as required by § 1325(a)(3) of the Bankruptcy Code and may be cause for dismissal. *In re Cordes*, 147 B.R. 498 (Bankr. D. Minn. 1992).

¹ The actual arrearage, according to Claim No. 6 filed by CIT Group, is \$43,176.77.

14. In the alternative, the Debtor has not shown that the proposed Plan is feasible. No documentary evidence has been provided as to a currently existing source of additional funds for the payment increases beginning in Year 2 of the Plan. It is the Trustee's position that permitting the Debtor to proceed with the proposed budget on a mere representation that higher payments will occur without a clear showing of feasibility simply contributes to further delay prejudicial to the interests of creditors. Confirmation of the Plan should be denied, and the case dismissed.

15. If necessary, the Trustee reserves the right to call a member of her staff and the Debtor to testify as to the matters alleged in this motion.

WHEREFORE, the Trustee requests entry of an order as follows:

- a. Denying confirmation of the Debtor's Plan;
- b. Dismissing the Chapter 13 case; and,
- c. Granting such other and further relief the Court deems equitable and just.

Dated: August 17, 2004

Jasmine Z. Keller, Trustee

/e/ Margaret H. Culp
Thomas E. Johnson, #52000
Margaret H. Culp, #180609
Counsel to the Chapter 13 Trustee
310 Plymouth Building
12 South Sixth Street
Minneapolis, MN 55402

VERIFICATION

I, Margaret H. Culp, an employee of Jasmine Z. Keller, the Standing Chapter 13 Trustee, declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge, information, and belief.

Dated: August 17, 2004

/e/ Margaret H. Culp

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MEMORANDUM IN SUPPORT OF OBJECTION TO CONFIRMATION

FACTS

The facts supporting the Trustee's objection are summarized in the accompanying motion and will not be repeated here. The Trustee also relies on the representations made by the Debtor in his Schedules.

LEGAL DISCUSSION

Pursuant to 11 U.S.C. § 1325(b)(1), a Debtor must contribute all of his disposable income to payments under a proposed plan of reorganization. Such contribution should be determined with respect to the need to treat creditors equitably, and not necessarily based upon a debtor's pre-filing lifestyle. *In re Sitarz*, 150 B.R. 710, 718 (Bankr. D. Minn. 1993). *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991). Where, as here, it is evident from the schedules that the monthly expenses of the Debtor are unreasonable and excessive rather than objectively reasonable as required by 11 U.S.C. § 1325(2)(A), the Plan fails to comply with the Statute and should not be confirmed.

The Trustee submits that it is inappropriate to divert \$3,330 to housing expenses for two people under circumstances where the Debtor appears to have financed such a lifestyle by avoiding his responsibilities to the state and federal governments. It is equally inappropriate to allow the Debtor to divert an additional \$480 in lease payments and \$500 in student loan payments apparently incurred while the Debtor failed to keep current on his tax and mortgage obligations. Essentially, if the proposed budget is determined to be appropriate, the Debtor will be allowed to divert a monthly total of \$4,310 per month to personal expenses while paying \$1,600, \$2,350, and \$3,600 per month in Plan payments over the life of the Plan.

The proposed increases in payments in later years of the Plan appear to be based upon nothing more than the Debtor's hope to increase them, without documented specific means to do so. It is not clear that the Plan is feasible, and the case should be dismissed for delay prejudicial to creditors. *11 U.S.C. § 1325(a)(6)*.

For the reasons stated herein, the Trustee respectfully requests that confirmation of the Debtor's proposed Plan be denied, that the case be dismissed, and for such other relief as the Court determines just and equitable.

Respectfully submitted:

Dated: August 17, 2004

/e/ Margaret H. Culp
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

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UNSWORN DECLARATION
FOR PROOF OF SERVICE

The undersigned, an employee of Jasmine Z. Keller, Standing Chapter 13 Trustee, declares that on August 17, 2004, she served the following:

1. Notice and Objection to Confirmation of Plan;
2. Memorandum of Facts and Law
3. Proposed order; and
4. Unsworn Declaration for Proof of Service

on each of the entities named below as follows:

By electronic means only:

U.S. Trustee
612-664-5516
Urosh Piletich, Esq.
651-351-3975

By United States Mail, postage pre-paid:

William E. Crane
15530 St. Croix Trail North
Marine on St. Croix, MN 55047

Urosh Piletich, Esq.
1675 South Greeley Street, Suite 100
Stillwater, MN 55082

James A. Geske, Esq.
7650 Currell Blvd., Suite 300
Woodbury, MN 55125
Attorneys for CIT Group

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

Dated: August 17, 2004

/e/ Margaret H. Culp

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ORDER

At St. Paul, Minnesota _____.

This matter came before the Court on the Chapter 13 Trustee's Objection to Confirmation of Plan and Motion to Dismiss. Appearances were noted on the record. Based on the files, the proceedings, and record herein,

IT IS ORDERED:

1. Confirmation of the Debtor's Plan is **DENIED**.
2. The Chapter 13 case is **DISMISSED**.

Gregory F. Kishel
Chief United States Bankruptcy Judge