

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

*Gary Thayne Beto and
Beverly Jean Beto,*

Debtors.

BKY 04-34127

Chapter 13 Case

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

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

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

2. The court will hold a hearing on this motion at 10:00 a.m. on September 23, 2004, in Courtroom 228B, 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 September 22, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than September 20, 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 July 15, 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 filed July 15, 2004 (the "Plan").

6. The Plan provides that the Debtors will pay the Trustee \$683.21 per month for 60 months, for a total of \$40,992.60 (the "Plan Funds"), with \$5.41 to unsecured creditors, for a dividend to unsecured creditors of .03 percent.

7. According to Schedule I filed herein, debtors are married with three dependants. The husband is employed at Newman as a customer service representative and has been so employed for 9 years. His Schedule I shows his gross monthly income from his employment at \$3,243.93, with \$1,053.28 deducted from his paycheck. The wife is employed at Crestline with a job in fabrication and has been so employed for 2 years. Her schedule I shows gross monthly

income of \$2,314.00, with \$558.55 deducted from her paycheck. Their combined monthly net income is \$3,946.10. The debtor husband testified at the 341 meeting of creditors that he believes the retirement figure used in schedule I is one that reflects a \$132.73 payroll deduction for a contribution to his 401(k) and \$138.67 for a loan repayment for a 401(k) loan.

8. The debtors' Schedule J shows household expenses of \$3,253.75 per month.

9. On Schedule B, debtors list a 401k through the Guardian Insurance and Annuity Co. Inc., with a value of \$11,613.86.

10. The debtors' Plan also proposes to pay a second mortgage to Citi Financial through the plan. The debtors are not behind in their mortgage payments. The second mortgage must be removed from the plan as it should be paid directly to the creditor. Also, the 401(k) contribution must be stopped. Accordingly, the debtors appear to have excess disposable income, which should be contributed to the plan.

11. The Trustee objects to confirmation of the Plan on the grounds that the debtors' proposed plan does not meet either of the alternative requirements for confirmation under 11 U.S.C. 1325(b)(1), in that it does not propose full payment of their unsecured claims, nor does it devote all of the debtors' projected "disposable income" as that term is defined in 11 U.S.C. §1325(b)(2).

12. If necessary, the debtors, and an 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 dated filed July 15, 2004.
2. For such other relief as may be just and equitable.

Ulvin and Sullivan Attorneys, P.A.

Dated: September 6, 2004

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

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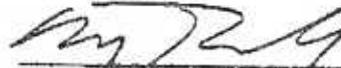
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VERIFICATION

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: 9-6-04



Michael J. Farrell, Chapter 13 Trustee

UNITED STATES BANKRUPTCY COURT
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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 upon the verified Schedules on file and of record herein.

LEGAL DISCUSSION

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 will be applied to make payments under the plan. 11 U.S.C. §1325(b)(1)(B).

"Disposable income" is defined in 11 U.S.C. §1325(b)(2)(A) as "income which is received by the debtors and which is not reasonably necessary to be expended... for the maintenance or support of the debtors or a dependent of the debtors. Numerous courts have found that a debtor's voluntary contributions to a pension plan – including a 401k plan are not reasonably necessary for the debtor's maintenance or support, and should be added back into the equation when computing the debtor's disposable income. See, e.g. In re Harshbarger, 66 F. 3rd 775, 777 (6th Cir. 1995); In re Scott, 142 B.R. 126, 135 (Bky. E.D. Va. 1992); In re Fountain 142 B.R. 135, 136-37 (Bky. E.D. Va. 1992).

Upon objection under 11 U.S.C. §1325(b), the debtors must prove that the plan commits all of debtors' disposable income over the three-year period. In re Sitarz 150 B.R. 710, 718 (Bankr. D. Minn. 1993).

In this case, debtors' plan should not be confirmed unless the debtors' voluntary 401(k) contributions and their proposed payments on their second mortgage arrearages which are non-existent, are added back into debtors' disposable income. The debtors' plan should be denied, as all of their disposable income has not been committed to the plan.

CONCLUSION

For the reasons stated herein, the Trustee respectfully requests that confirmation of the Debtors' proposed Chapter 13 plan be denied.

Respectfully submitted:
Ulvin and Sullivan Attorneys, P.A.

Dated: September 6, 2004

/e/ Patti J. Sullivan
Patti J. Sullivan, ID # 170124
Counsel for Chapter 13 Trustee
P.O. Box 16406
St. Paul Minnesota 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 September 7, 2004, I served the attached Notice of Hearing and Motion Objecting to Confirmation of 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 Forth Street
Minneapolis, MN 55415

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

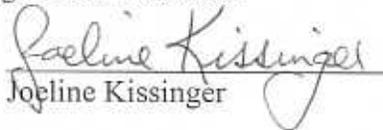
Gary Thayne Beto
6078 Hillton Road
Royalton, MN 56373

Beverly Jean Beto
6078 Hillton Road
Royalton, MN 56373

Stephen L. Heller, Esq.
Heller Law Firm
606 25th Avenue South #110
St. Cloud, MN 56301

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

Executed: September 7, 2004


Joeline Kissinger

UNITED STATES BANKRUPTCY COURT
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ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

At St. Paul, MN, September 23, 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. 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 filed July 15, 2004 is DENIED.

Gregory F. Kishel
Chief Judge of U.S. Bankruptcy Court