

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY 04-34187

*Robert Thomas McKellar and
Jacqueline Marie McKellar,*

Chapter 13 Case

Debtors.

**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 19, 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 19, 2004 (the "Plan").

6. The Plan provides that the debtors will pay the Trustee \$375.00 per month for 60 months, for a total of \$22,500.00 (the "Plan Funds"), with \$3,273.00 to unsecured creditors, for a dividend to unsecured creditors of six percent (6%).

7. According to Schedule I filed herein, debtors are married with no dependants. The debtor husband is employed at Monson Trucking as a Truck Driver and has been so employed for 12 years. His Schedule I shows his gross monthly income from his employment at \$4,249.00, with \$1,234.00 deducted from his paycheck. The debtor wife is employed at the Pine County License Center as an Office Manager and has been so employed for 13 years. Her

schedule I shows gross monthly income of \$2,121.00, with \$573.00 deducted from her paycheck. Their combined monthly net income is \$4,563.00. The debtors informed the Trustee that they generally receive an annual income tax refund. However, the debtors' income tax refund is not included in the plan.

8. The debtors' Schedule J shows household expenses of \$4,188.00 per month.

9. The Trustee has asked the debtors to modify their plan to provide for payment of the income tax refunds into the plan. To date, the debtors have failed to modify their plan as requested by the Trustee.

10. 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) for the next 36 months toward their plan payments. Debtors under chapter 13 should contribute all disposable income to the debtors' plan. *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991). "Disposable Income" includes all of the debtors' income which is "not reasonably necessary to be expended" by the debtors. 11 U.S.C. §1325(b)(2).

11. 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 filed July 19, 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

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

*Robert Thomas McKellar and
Jacqueline Marie McKellar,*

Debtors.

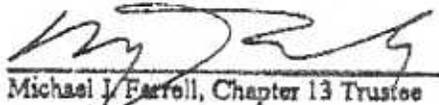
BKY 04-34187

Chapter 13 Case

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
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY 04-34187

*Robert Thomas McKellar and
Jacqueline Marie McKellar,*

Chapter 13 Case

Debtors.

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 debtor and which is not reasonably necessary to be expended... for the maintenance or support of the debtor or a dependent of the debtor". Essentially, this statute requires the debtor to propose a plan that is fully funded, in the sense that the debtor commits to making sufficient payments to pay all the amounts required to be paid to creditors under the proposed plan. A debtor under chapter 13 should contribute all disposable income to the debtor's plan. *In re McDaniel*, 126 B.R. 782, 784 (Bankr. D. Minn. 1991). Upon objection under 11 U.S.C. §1325(b), the debtor must prove that the plan commits all of debtor's disposable income over the three-year period. *In re Sitarz* 150 B.R. 710, 718 (Bankr. D. Minn. 1993).

Here, the debtors testified that they receive an annual income tax refund. This is additional disposable income, yet the plan has not been amended to include such additional income. It is unreasonable for the debtors not to amend their plan to include the excess income. Accordingly, 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

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

*Robert Thomas McKellar and
Jacqueline Marie McKellar,*

Debtors.

BKY 04-34187

Chapter 13 Case

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:

Robert Thomas McKellar
20313 Blackbird Road
Pine City, MN 55063

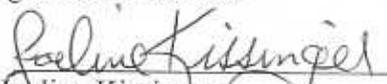
Jacqueline Marie McKellar
20313 Blackbird Road
Pine City, MN 55063

Curtis K. Walker, Esq.
4356 Nicollet Ave. S.
Minneapolis, MN 55409

Wells Fargo Bank, N.A.
c/o McCalla, Raymer, et. al.
Bankruptcy Department
1544 Old Alabama Road
Roswell, Georgia 30076

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

Executed: September 7, 2004


Joeline Kissinger

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

*Robert Thomas McKellar and
Jacqueline Marie McKellar,*

Debtors.

BKY 04-34187

Chapter 13 Case

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 19, 2004 is DENIED.

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