

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

In re:

BKY 04-34385

*Scott D. Rivers and
Kimberly K. Benjamin-Rivers,*

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 October 28, 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 October 27, 2004, which is 24 hours (1 business day) before the time set for the hearing, or filed and served by mail not later than October 25, 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 29, 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 August 12, 2004 (the "Plan").

6. The Plan provides that the debtors will pay the Trustee \$350.00 per month for 36 months, for a total of \$12,600.00 (the "Plan Funds"), with \$5,212.00 to unsecured creditors, for a dividend to unsecured creditors of thirty one percent (31%).

7. The debtor husband is a welder for Northland Process and his Schedule I shows his gross monthly income from his employment at \$2,556.67, which includes \$216.67 for overtime each month. The debtor husband has \$432.23 deducted in payroll taxes and social security. The debtor wife works as a Case Manager for the Mille Lacs Band of Ojibwe and her Schedule I shows her gross monthly income from her employment at \$3,400.02. The debtor wife has \$1,199.64 deducted in payroll taxes, social security and insurance. The debtor wife also

receives additional income, \$495.00 for child support, and \$800.00 from the St. Croix Tribal Council. The debtors receive a total gross monthly income of \$5,619.82. The debtors' Schedule J shows household expenses of \$5,266.17 per month, including \$1,105.00 in daycare and diaper expense.

8. The debtors overstated their daycare expenses by approximately \$450.00 per month. The Trustee has requested the debtors to amend their schedules and delete the extra expense, to no avail. The debtors testified at the §341 Meeting of Creditors that they usually receive \$2,500.00 to \$3,500.00 per year in income tax refunds, however, the plan does not include this income. The plan should be modified to include language that they will furnish the Trustee with tax returns for three years and turnover the tax refunds to the Trustee each year when received. Also, the debtors have not included language confirming that they are pledging to the plan all of their disposable income during the life of the plan for the benefit of their unsecured creditors. Paragraph 11 of the plan should include this pledge. Paragraph 8 of the plan reflects a default with U.S. Bank in the amount of \$884.00. The U.S. Bank default has been paid, however the plan has not been amended to reflect this.

9. 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 his 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. 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). "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).

9. 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 August 12, 2004.
2. For such other relief as may be just and equitable.

Ulvin and Sullivan Attorneys PA

Dated: October 8, 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
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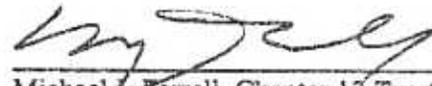
BKY 04-34385

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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: 10-8-04



Michael J. Farrell, Chapter 13 Trustee

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

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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 debtor's 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 have overstated their daycare expenses and receive income tax refunds. They have not agreed to include their income tax refunds to the plan. The U.S. Bank default has been paid. The debtors have not amended their schedules and plan to reflect their actual expenses or to contribute additional income and tax refunds to the plan. The plan should be modified to include the additional income and to include language that they will furnish the Trustee with tax returns for three years and turnover the tax refunds to the Trustee each year when received. Accordingly, the debtors' plan should be denied, because all of the debtors' 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: October 8, 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 October 8, 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:

Scott D. Rivers
8633 125th Street
Milaca, MN 56353

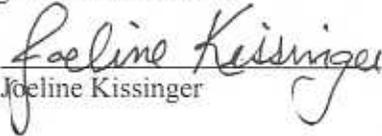
Kimberly K. Benjamin-Rivers
8633 125th Street
Milaca, MN 56353

Shelden M. Vie, Esq.
503 Jackson Avenue NW
Elk River, MN 55330

James A. Geske, Esq.
Wilford & Geske
7650 Currell Blvd., Suite 300
Woodbury, MN 55125

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

Executed: October 8, 2004


Joeline Kissinger

UNITED STATES BANKRUPTCY COURT
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ORDER DENYING CONFIRMATION OF CHAPTER 13 PLAN

At St. Paul, MN, October 28, 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 August 12, 2004 is DENIED.

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