

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:)	CASE NO. 96-50344
GLEN DAVID SIMS)	
STEPHANIE MARIE SIMS)	CHAPTER 13
DEBTORS)	
)	
)	
)	JUDGE MARILYN
)	SHEA-STONUM
)	
)	
)	ORDER DENYING MOTION TO
)	STRIKE AND GRANTING
)	MOTION TO MODIFY PLAN
)	SUBSEQUENT TO
)		CONFIRMATION

This matter comes before the Court regarding the Motion to Modify Plan Subsequent to Confirmation (the "Motion") filed by Glen and Stephanie Sims (together, "Debtors"), the Response filed by Jerome Holub, the chapter 13 trustee (the "Trustee") and Debtors' Motion to Strike Response. The Court held an evidentiary hearing regarding the Motion.

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

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I. FINDINGS OF FACT

Based upon the testimony and other evidence admitted at the hearing, the following facts are undisputed.

A. Debtors' Bankruptcy Filing

On February 26, 1996 (the "Petition Date"), Debtors filed a petition under chapter 13 of the Bankruptcy Code. In their Schedules of Assets and Liabilities, Debtors stated that their residence had a value of \$70,000. As of the Petition Date, the residence was encumbered by a mortgage in the outstanding principal amount of \$68,694. Debtors' Schedule A. Pursuant to ORC § 2329.66(A)(1), Debtors claimed a \$10,000 exemption in their residence. Debtors' Schedule C. Consequently, the liquidation of Debtor's residence under chapter 7 of the Bankruptcy Code would not generate a return to their unsecured creditors.

Debtors scheduled other personal property with an aggregate value of \$8,363. Debtors' Schedule B. Regarding that personal property, Debtors claimed exemptions in the amount of \$6,430. Debtors' Schedule C. No party filed an objection to Debtors' claimed exemptions. Assuming that the liquidation of Debtors' personal property in a chapter 7 context would involve aggregate trustee's fees and administrative expenses of 25% of their non-exempt property's scheduled value, Debtor's general unsecured creditors would receive approximately \$1,450. The percentage dividend to unsecured claims thus would have been is approximately 8%.

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B. Debtors' Confirmed Chapter 13 Plan

Debtors' chapter 13 plan of reorganization, as confirmed by the Court (the "Plan"), provided for the payment of a 75% dividend to general unsecured creditors over a five-year period. The Plan further provided for the cure of a default in Debtors' prepetition mortgage payments owed to Source One Mortgage Corporation.

During the course of the Plan, Debtors have not defaulted in their payment obligations, and as of May 1999, have paid \$10,584.57 to Debtors' general unsecured creditors through their plan. If the Plan is modified as requested, Debtor's general unsecured creditors will receive 57% of their filed unsecured claims.

C. Debtors' Proposed Modification of Their Plan

On May 6, 1999, Debtors filed a proposed modification to the Plan pursuant to section 1329 of the Bankruptcy Code (the "Modification"). Pursuant to the Modification, Debtors sought to terminate their Plan payments after the payment of an additional \$800. The Modification was served on all Debtors' affected creditors, the Trustee and the U.S. Trustee. Debtor's counsel also served on these parties an Official Form 20 Notice, which provided a deadline of May 21, 1999 for the parties to request a hearing on the Modification (the "Notice"). No party filed a request for a hearing on or before May 21, 1999. However, the chapter 13 Trustee declined to endorse a proposed agreed order concerning the Modification. On June 16, 1999, he requested a hearing on the matter. Debtors moved to strike the request for a hearing.

D. Debtors' Rationale for the Modification

Debtors have three daughters, ages 12, 14 and 16. Debtors recently enrolled their 14 year-old daughter in Arlington Christian Academy at a cost of \$200 per month. Debtors believe that their daughter has benefitted from the change to a private school.

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Two of Debtors' daughters also participated in a six-week summer academic program at Kent State University where they were tutored in geometry and algebra.¹

In October 1998, Debtors' only car was destroyed in an accident. Debtors are driving and making payments of \$152 per month on a 1986 Oldsmobile which has 115,000 miles on it and is not in Debtors' name (the "Oldsmobile"). Debtors obtained the Oldsmobile from a member of their church. Debtors anticipate that they will get title to the Oldsmobile after it is paid off. As of the date of the hearing, Debtors had two payments left to pay-off the debt for the Oldsmobile. However, Debtors expect that the Oldsmobile will not last much longer, given its age and the extent to which Debtors use the car for their commute to and from work and the transportation of their children. Debtors believe that they need another car.²

¹ Debtors provided no testimony or other evidence regarding the cost of that program.

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Debtors' Schedule J did not include any expenditure for car payments, but included only an expenditure of \$80 per month for transportation. The Plan also did not provide for any expenditure for car payments. Debtors provided no evidence as to the amount of money they would have to spend to obtain a car which would be suitable for them.

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Since the Petition Date, Debtors' gross income has increased in an aggregate range of \$409 to \$474 per month. When Debtors filed their bankruptcy case, Stephanie Sims had gross wages of \$570 per month. Mrs. Sims now earns \$6.00 to \$6.50 per hour and works 30 hours per week at National City Bank. At \$6.00 per hour, Mrs. Sims' gross wages are approximately \$780 per month. At \$6.50 per hour, Mrs. Sims' gross wages are approximately \$845 per month. Consequently, Mrs. Sims' gross income has increased by approximately \$210 to \$275 per month.

On the Petition Date, Mr. Sims had gross wages of \$2,227.33 per month, based on no overtime, *i.e.*, working 40 hours per week. These wages indicate that Mr. Sims was paid approximately \$12.85 per hour at that time. Mr. Sims testified that he is currently being paid \$14 per hour.³ Consequently, Mr. Sims' gross income has increased by approximately \$199.34 per month.

Mr. Sims testified that, in order to make payments due under the Plan, and to fund Debtors' household expenses, he worked overtime during the first three years under the Plan. On average, Mr. Sims worked 48 hours per week. Mr. Sims stated that he was exhausted from working overtime and does not feel capable of continuing to do so. Mr. Sims further testified that Debtors seek to modify the Plan so that the money Debtors otherwise would use to fund the remaining term of the Plan could instead be used to finance Debtors' purchase of another car and to fund the cost of private school and other educational programs for Debtors' daughters.

II. CONCLUSIONS OF LAW

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Mr. Sims earns time and a half when he works in excess of 40 hours per week. Mr. Sims can work overtime on Tuesdays, Thursdays and Saturdays.

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A. The Court's Consideration of the Trustee's Response to the Proposed Modification

Because the Trustee did not file a formal opposition to the Modification within the time period stated in the Notice, Debtors contend that the Court should not have allowed the Trustee to participate in the hearing regarding the Modification and that the Court should strike the Response. Creditors who receive notice of an opportunity to request a hearing and who, without adequate justification, fail to do so in a timely manner, should be barred from expressing their opposition at a subsequently held hearing. However, given the practices of this Court with respect to chapter 13 plan confirmation, that standard is not properly applied to the Trustee.

Because I rely heavily in the first instance on the review of the Trustee and his staff of the specific economics of each plan, whether the Trustee files a formal objection or not, I will call upon him for such analysis. If a party who is seeking confirmation or modification of a confirmed plan does not obtain the Trustee's endorsement, I will inquire of the Trustee on what issues he may be focused. In short, confirmation and modification of confirmed plans require the Court to pass on the statutory requirements. Confirmation is not available simply because interested parties have not responded. The analysis performed by the standing chapter 13 Trustee appointed to address cases filed in Akron is quite simply extremely helpful to me in discharging my responsibility under 11 U.S.C. §§ 1325 and 1329.⁴ Neither the Trustee's inaction nor his filed views bind my decision, but I would not want to function without the benefit of the latter.

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Unless otherwise noted, all statutory references herein concern provisions of the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*

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In summary, it has been the long standing practice of this Court to look to the Chapter 13 Trustee in the first instance for an assessment of whether the economics of proposed plans satisfy the best interests and best efforts tests. When the Trustee is not satisfied with a particular Debtor's plan and whatever issues exist between the Trustee and the particular debtor cannot be resolved, the parties present their issues to the Court. The absence of the Chapter 13 Trustee's endorsement on a confirmation order or a proposed order that would modify the plan after confirmation is very significant. It signals to the Court that the confirmation analysis requires particular attention from the Court. In that process, the Court will almost invariably solicit the views of the Chapter 13 trustee. Against this backdrop of longstanding local practice, the Debtor's motion to strike the Trustee's motion for instructions is overruled.

B. The Modification Satisfies the Requirements of Section 1329 of the Bankruptcy Code.

Debtors have sought to modify the Plan pursuant to section 1329 of the Bankruptcy Code. § 1329(a) provides in pertinent part that:

At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee or the holder of an allowed unsecured claim to-

- (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan; [or]
- (2) extend or reduce the time for such payments

§ 1329 further provides that §§ 1322(a), (b) and (c) and the requirements of § 1325(a) apply to any modification. 11 U.S.C. § 1329(b)(1). See also Ledford v. Brown (In re Brown), 219 B.R. 191, 194 (Bankr. 6th Cir. 1998)("Modification of a plan is essentially a new confirmation. It must be consistent with the statutory requirements for confirmation."); Powers v. Savage (In re Powers), 202 B.R. 618, 623 (Bankr. 9th Cir. 1996)("[M]odification of a plan is essentially a new confirmation and must be consistent with the statutory requirements for confirmation).

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The Trustee agrees that the Modification satisfies §§ 1322(a), (b) and (c) and all but one of the subsections of § 1325(a). However, the Trustee contends that the Modification violates § 1325(a)(3) because Debtors have not proposed the Modification in good faith, *i.e.*, Debtor's "financial picture has improved, not deteriorated, since 1996." Trial Closing Statement, filed by the Trustee on July 7, 1999.

In evaluating the existence of good faith:

[T]he proper inquiry is whether the [debtor] acted equitably in proposing [his] Chapter 13 plan. A bankruptcy court must inquire whether the debtor has misrepresented facts in his petition, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. . . . [T]he court must make its good-faith determination in the light of all militating factors.

Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1390 (9th Cir. 1982).

The Court concludes that Debtors have proposed the Modification in good faith. Pursuant to the Plan, Debtors originally obligated themselves to pay more to their general unsecured creditors than is required by chapter 13 of the Bankruptcy Code. As of the date of the evidentiary hearing, Debtors were not in default under the Plan and for three years had paid all their projected disposable income to make payments under the Plan. Furthermore, Debtors' creditors already had received at least as much as they would have received if Debtors' estate were liquidated under chapter 7 of the Bankruptcy Code. Debtors do not need to make payments under their Plan for an additional two years in order to accomplish those results. Forbes v. Forbes (In re Forbes), 215 B.R. 183, 192 (Bankr. 8th Cir. 1997)(affirming approval of chapter 13 plan modification which shortened term of plan when debtor had devoted all of his disposable income in the three-year period beginning on the date his first plan payment fell due to the plan).

Debtors have reconsidered their commitment to a five-year term for their Plan. Making plan payments to their creditors for two more years is not required for Debtors to

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satisfy the requirements for confirmation, including the "best interest" and the disposable income tests. Consequently, Debtors would prefer to avoid the necessity of Mr. Sims working overtime and to allocate the income otherwise payable under the original Plan to obtaining a replacement for the Oldsmobile and to funding the cost of very reasonably priced, private educational programs for their daughters.

Given that the Plan, as modified, satisfies the provisions of § 1322(a), (b) and (c) and § 1325(a)(1), (2), (4), (5) and (6), Debtors' decision to shorten the term of their Plan and to reduce the percentage to be paid to their general unsecured creditors, so that Mr. Sims will not be required to work overtime and Debtors can reallocate their plan payments to the family needs which they have identified, does not demonstrate a lack of good faith. In re Witkowski, 16 F.3d 739, 747 (7th Cir. 1994) ("a modification of a plan under § 1329 does not require any minimal showing of a change in circumstances"); In re Brown, 219 B.R. at 195 ("§ 1329 does not contain a requirement for unanticipated or substantial change as a prerequisite to modification"). Consequently, the Modification has been proposed in good faith. Because the Modification satisfies § 1325(a)(3), as well as the other applicable requirements for confirmation, the Modification shall be, and hereby is, approved.⁵

IT IS SO ORDERED.

MARILYN SHEA-STONUM
Bankruptcy Judge

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Because the Modification satisfies the requirements of § 1329, the Court need not evaluate whether or not Debtors are entitled to a hardship discharge, pursuant to § 1328(b).

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DATED: 9/30/99