IT IS SO ORDERED.

Dated: 09:26 AM July 07 2009

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 08-51263
	)	
ARTHUR THOMAS FIGUERO	)	CHAPTER 13
KAREN KAY FIGUERO	)	
	)	JUDGE MARILYN SHEA-STONUM
DEBTOR(S),	)	
	)	**MEMORANDUM OPINION**
	)	**GRANTING TRUSTEE'S MOTION TO**
	)	**MODIFY AND OVERRULING**
	)	**DEBTORS' OBJECTION**

This matter is before the Court pursuant to the following pleadings: (1) Motion to Modify Confirmed Plan and Increase Debtors' Monthly Payments ("Motion to Modify") filed by Keith L. Rucinski, the Chapter 13 Trustee ("Trustee")[docket #44]; (2) Objection to the Motion ("Objection") filed by the Debtors, Arthur Thomas and Karen Kay Figuero ("Debtors")[docket #45]; and (3) Trustee's Response to the Objection ("Response")[docket #54]. A hearing was held on February 5, 2009. Appearing at the hearing were the Trustee and Robert M. Whittington, counsel for the Debtors.

At the conclusion of the hearing, the Court set a deadline for the Trustee's Response and took the matter under advisement.

This proceeding arises in a case referred to this Court by General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This matter is a core proceeding under 28 U.S.C § 157(b)(2)(O) over which the Court has jurisdiction pursuant to 28 U.S.C § 1334.

I. BACKGROUND

The facts of this case are not in dispute and are a matter of record in the form of the relevant documents and pleadings filed with the Court. This chapter 13 case was commenced by Debtors, through counsel, on April 15, 2008. Debtors' chapter 13 plan ("Plan") was filed on April 19, 2008 and served by U.S. Mail upon all parties in interest [docket #12]. Pursuant to a notice sent by the Clerk of this Court on April 17, 2008, all creditors were notified that a confirmation hearing was scheduled for June 12, 2008 and that the deadline to object to confirmation was 5 days prior to the hearing [docket #9]. The Proof of Claim filing deadline ("Bar Date") was set for August 20, 2008 [docket #9].

The Plan provided with respect to the claim of First Merit Bank ("First Merit") that First Merit would be "paid in full with interest and in equal monthly amounts by the chapter 13 trustee...." The Plan specified that the collateral for this claim was a 2006 Pontiac, that the amount of the claim was estimated to be $15,790.00, that interest was to be paid on this claim at the rate of 8% per annum and that First Merit would receive a fixed monthly payment of $494.80.[1] No objection to the

[1] The Plan did not attempt to cram down the claim to the value of the vehicle because it appeared to the Debtors that this vehicle was purchased within 910 days prior to the

proposed treatment of this claim was ever filed by any party. On April 28, 2008, claim #4-1 was filed by Motor Service Corp ("Motor Service") for $16,149.46 for the 2006 Pontiac and identified Motor Service as the "servicing agent" for First Merit. Motor Service's claim does not state the value of the vehicle but stated an annual percentage rate of 16.99%.

The confirmation hearing was adjourned to July 31, 2008, and on that date the Trustee recommended confirmation. An order confirming the Plan ("Confirmation Order") was entered on August 4, 2008 [docket #21]. The Trustee's Motion to Modify was filed on December 29, 2008 and sought to increase plan payments from $674 to a payment of $786 based in part on discrepancies between the Debtors' petition and the secured claims of Motor Service, Litton Loan, and Fidelity Tax. The Motion to Modify also identified other claims that were either not listed or filed higher than listed in the Debtors' petition.

II. DISCUSSION

A. Issues Presented

The dispute in this case requires the Court to resolve the apparent tension between two provisions of the Bankruptcy Code: the *res judicata* effect of a confirmed plan under 11 U.S.C. § 1327(a) and the post-confirmation modification provisions of 11 U.S.C. § 1329. In his Motion To Modify, the Trustee contends that he is obligated to pay to Motor Service interest at the rate of 16.99% pursuant to its claim rather than the 8% rate provided for by the Debtors in their confirmed Plan. The Trustee submits that specific provisions of the Confirmation Order and Bankruptcy Code are applicable to demonstrate that Motor Service's claim controls over the Plan with respect to the

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filing of the petition.

interest rate that must be paid.

Conversely, Debtors argue that based on the lack of any objections to the Plan, Debtors' proposal to pay the 8% interest rate was binding on all parties pursuant to the Confirmation Order. Specifically, debtors contend that the Trustee cannot use a motion to modify to address a discrepancy in the interest rate set forth in a proof of claim filed prior to confirmation because the holding in *Storey v. Pees (In re Storey)*, 392 B.R. 266 (B.A.P. 6th Cir. 2008) dictates that plan modification under 11 U.S.C. § 1329 is limited to matters that arise post-confirmation.

B. In re Storey

The Court first turns its attention to the decision in *In re Storey*. *Storey* addressed the narrow question of whether a chapter 13 trustee's motion to modify a confirmed plan to correct the trustee's pre-confirmation mistake is precluded by 11 U.S.C. § 1327(a). *In re Storey*, 392 B.R. at 268. In *Storey*, no objections were filed to the plan and the plan was confirmed on March 30, 2006. *Id*. at 269. Almost a year later, on March 8, 2007, the trustee moved to modify the plan to increase the dividend to a particular class of creditors because the projected length of the plan failed to meet the applicable commitment period. *Id.* The trustee's pre-confirmation recommendation had been based on his erroneous projection that the plan would last 48 months. *Id.* However, during a routine review process following the claims bar date (May 23, 2006), the trustee realized he had mistakenly counted a secured claim twice in his initial calculation of plan length, and rather than the projected 48 months, the plan would only last 27 months. *Id*. The trustee moved to modify the plan in an effort to correct that plan length deficiency. *Id.*

In the *Storey* opinion, The Bankruptcy Appellate Panel of the Sixth Circuit ("BAP") engaged in a lengthy analysis of the interplay between § 1327 and § 1329, particularly the circumstances

under which post-confirmation modification is permitted while also taking into consideration the *res judicata* effect of a confirmed plan. The BAP concluded that the bankruptcy court abused its discretion in granting the trustee's motion to modify because "[t]he required plan length was an issue that could have been decided at confirmation had the Trustee or an unsecured creditor with an allowed claim objected. As such, the Trustee is barred from now raising the issue by means of a plan modification...." *Id.* at 273. In reaching its conclusion, the BAP reasoned as follows:

> Based on the guidance of the foregoing cases, we conclude that § 1327 precludes modification of a confirmed plan under § 1329 to address issues that were or could have been decided at the time the plan was originally confirmed. *See in re Welch*, 1998 WL 773999, *2 n. 1 ("Under 1327, ... an issue is precluded if it *could have been decided* at confirmation, whether or not it was actually decided."); *8 Collier on Bankruptcy* ¶ 1329.03 (15th ed. Rev. 2008) ("A trustee...may not raise as grounds for modification under [§ 1329] facts that were known and could have been raised in the original confirmation proceedings, because the order of confirmation must be considered *res judicata* as to that set of circumstances.") The practical impact of this conclusion is that modification under § 1320(a) will be limited to matters that arise post-confirmation.

Id. at 272 (Emphasis in original).

C. Analysis

The facts and circumstances in the case at bar are distinguishable from the scenario in *Storey*. At the time this matter was taken under advisement, the longstanding standard operating procedure of the Akron office of the Chapter 13 Trustee was to schedule confirmation hearings as soon as possible after the 341 meeting of creditors in conformity with 11 U.S.C. § 1324(b) so as to disburse funds to parties in interest without undue delay.[2] Thus, historically chapter 13 cases in Akron have

[2] Effective with cases filed in April, 2009 the Trustee began requesting that all confirmation hearings be set after the claims bar date for reasons expressed fully in *In re Robert*

been confirmed prior to the claims bar date, which is set for 90 days after the first date set for the 341 meeting of creditors pursuant to Fed. R. Bankr. P. 3002. As such, the Trustee did not attempt to modify plans until after confirmation because feasibility calculations could not be completed until the claims bar date passed and there was ample opportunity to resolve any discrepancies between the proposed plan and schedules and the proofs of claim as filed.

In light of the well-established procedure in Akron, this Court cannot conclude that the Trustee's post-confirmation Motion to Modify was in contravention of the holding in *Storey* because it did not seek to address matters that were already decided or which could have been decided at the time of plan confirmation. Here, as in the majority of chapter 13 cases in Akron, all of the pertinent facts regarding claims and, thus, ultimate feasibility were not known at the time of confirmation because the Bar Date had not passed and, therefore, not all of the claims had been reviewed in comparison to the Debtors' schedules and plan. As previously noted, the Motion to Modify set forth a substantial list of discrepancies between the plan's treatment of specific claimants and the claims as filed. The Confirmation Order could not be considered *res judicata* as to the aggregate amount of claims addressed in the Motion to Modify because those issues could only come into full focus post-confirmation.

Furthermore , the Trustee correctly argues that under certain provisions of the Confirmation Order and Bankruptcy Code, a confirmed plan does not substitute for an objection to a proof of claim. The Confirmation Order states as follows in pertinent part:

Lee Thomas, III, Case No. 09-51338, Trustee's Response to Debtor's Motion to Compel Trustee to Schedule Confirmation Hearing Pursuant to 11 U.S.C. 1324(b) and 11 U.S.C. 1302(b)(2)[docket #15]. This Court is concerned that such a practice ignores 11 U.S.C. § 1324(G).

> [T]he Plan is confirmed. The Debtor's plan is incorporated into this OCP [order confirming plan] as if fully rewritten herein, provided, however, that should there be any inconsistencies between the plan and this OCP this OCP shall control.
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> ....
>
> The valuation of secured claims listed in the Plan pursuant to Bankruptcy Code Section 506(a) shall be determined by the Court upon motion and the opportunity for hearing as discussed in the Court's decision in In re Fiorilli and ***Creditors shall not be bound by valuations made in the Plan and schedules unless this procedure is followed. Creditors seeking to be paid under the Plan must file a proof of claim pursuant to Bankruptcy Rule 3002. Absent an objection or court order, the Trustee shall pay proofs of claim as filed*** pursuant to Bankruptcy Code Section 502 and Bankruptcy Rule 3001(f).

See Confirmation Order, ¶¶ 1-2, 8-10 (Emphasis added)

Pursuant to 11 U.S.C. § 502(a), a filed proof of claim is deemed allowed unless a party in interest objects to it. *See also In re Fiorilli*, 196 B.R. 83, 85 (Bankr. N.D. Ohio 1996) (allowing creditor's failure to object to provision of plan valuing claim to determine value of claim prior to confirmation would ignore specific provision of Bankruptcy Code deeming creditor's proof of claim as allowed unless or until debtor or trustee objects.) Pursuant to Fed. R. Bankr. P. 3001, a creditor bears the initial burden of establishing its claim. However, during the claims allowance process, the burden of proof shifts between the parties. Once a creditor properly executes and files a proof of claim, its proof of claim is considered "prima facie evidence of the validity and amount of the claim." Fed. R. Bankr. P. 3001(f). Here, Debtors did not effectively shift the burden back to the creditor or the Trustee by objecting to Motor Service's claim. Thus, based on the foregoing authorities and due to Debtors' failure to object to Motor Service's claim, until further order of this Court, the interest rate and claim amount set forth in the claim controls. Debtors cannot simply remain silent,

hoping that once the Plan was confirmed the lower claim amount and interest rate stated in the Plan would trump proofs of claim as to which the bar date had not passed.

III. CONCLUSION

Based on the foregoing, the Trustee's Motion to Modify is **HEREBY GRANTED**. Debtor's Objection is **HEREBY OVERRULED**. Until ordered otherwise, the Trustee shall pay based upon the proof of claim, viz., Motor Service's claim in the amount of $16,149.46 plus 16.99% interest.

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cc: Robert M. Whittington, Counsel for Debtors
Keith L. Rucinski, Chapter 13 Trustee
United States Trustee