

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: August 23 2011

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 10-38438
	)	
Annemarie J. Hari,	)	Chapter 13
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

**MEMORANDUM OF DECISION AND ORDER**  
**DENYING CONFIRMATION OF CHAPTER 13 PLAN**

This matter came before the court for an evidentiary hearing on confirmation of Debtor’s proposed Amended Chapter 13 Plan. [Doc. # 36]. Debtor, her attorney and the Chapter 13 Trustee appeared in person. Debtor was granted leave to, and did, submit a memorandum in support of her Amended Plan. [Doc. # 44]. The Chapter 13 Trustee objects to confirmation, arguing that the Amended Plan does not meet the disposable income test of 11 U.S.C. §1325(b)(1)(B). For the reasons that follow, the court agrees. The court will, therefore, sustain the Trustee’s objection and deny confirmation of the Amended Plan.

**FACTUAL BACKGROUND**

Debtor is a fifty-year-old single woman with no dependents. She is employed as a licensed pharmacist at a Rite Aid Pharmacy, where she has worked for twenty-two years.

In 1992, Debtor was diagnosed as meeting the parameters of super morbid obesity. [Debtor’s Ex. I]. As a result, over twenty years ago, she underwent gastric bypass surgery and has significantly reduced

her weight. However, she has experienced a number a negative side effects due to malabsorption syndrome resulting from the surgery. Debtor testified that the side effects include vitamin deficiencies, requiring her to take multiple non-prescription supplements. She also must follow a special diet consisting of organic foods. Another side effect that Debtor has experienced is serious dental problems. She testified that she has had eleven implants and multiple crowns and that she currently requires additional dental treatment that will cost over \$8,000. [See Debtor's Ex. H]. The record is silent, however, as to when such dental work will be completed and the type of payment plan, if any, that will be accepted. Debtor also testified that she has experienced hair loss problems due to the malabsorption syndrome and requires the services of a beautician to look presentable for work.

Debtor filed for relief under Chapter 13 of the Bankruptcy Code on December 30, 2010. Debtor's Schedule D shows total secured debt in the amount of \$222,190.00. Her secured debt includes \$215,434.00 secured by a mortgage on her home, which she values at \$182,400.00, and \$6,756.00, which represents the lease payments owed on her Nissan Altima at the time of filing. The lease expired before the hearing in this matter, and Debtor testified that Nissan Motor Acceptance Corporation will not lease her another vehicle while her bankruptcy case is pending. Debtor's bankruptcy schedules also show unsecured nonpriority debts in the total amount of \$90,329.29.

Debtor's Schedule I shows gross monthly wages in the amount of \$9,542.54 and net monthly wages after payroll deductions in the amount of \$5,000.34. [Debtor's Ex. E]. Deductions from Debtor's pay include \$477.12 as a voluntary contribution to a 401(k) plan and a 401(k) loan payment of \$772.57. According to Debtor, her 401(k) loan will be paid in full by April 2013.

Debtor's Schedule J shows total monthly expenses of \$4,912.42. [Debtor's Ex. F]. Those expenses include a mortgage expense of \$1,664.97, a real property tax expense of \$352.10, a food expense of \$450.00, a medical and dental expense of \$250.00, as well as a \$100.00 beautician expense and \$60.00 veterinarian expense. Debtor testified that her real property tax expense is understated by \$50.00. She also testified that her medical costs are higher than what is budgeted as the Schedule J budget does not include non-prescription supplements that she must take or her anticipated dental work. Nevertheless, as reported on Schedule J, Debtor's monthly income after expenses is \$87.92. In addition, Debtor testified that she received an income tax refund for 2009 of approximately \$5,000.00 and will also receive an income tax refund for 2010 in the amount of \$5,000.00.

As required, Debtor also filed a Chapter 13 Statement of Current Monthly Income and Calculation

of Commitment Period and Disposable Income on Official Form B22C, also known as the “means test” form. Part I of Form B22C reflects a debtor’s average income during the six calendar months before filing the bankruptcy petition. Debtor reports monthly income in the amount of \$8,787.20. Because Debtor’s income is above the applicable median family income, as set forth in Part II, Debtor was also required to complete Part III of the form, which includes a calculation of deductions from income that are allowed under 11 U.S.C. § 707(b)(2). The Part III deductions include Internal Revenue Service (“IRS”) National and Local Standards for many categories of expenses. In addition to the National Standard deduction of \$60.00 on line 24B for health care, a debtor may deduct on line 36 the total average monthly amount that she actually expends on health care that is required for her health and welfare. Also, in addition to the National Standard deduction that includes food and clothing expenses on line 24A, a debtor may deduct on line 44 an additional food and clothing expense not to exceed five percent of the IRS National Standard.

Debtor’s Form B22C includes a \$190.00 deduction on line 36 for health care expenses and no additional deduction on line 44 for food and clothing. It also includes a mortgage expense deduction on line 47 in the amount of \$1,664.97 and indicates that her mortgage payment does not include property taxes. However, it does not appear that Debtor deducts her monthly property tax expense elsewhere on Form B22C. The expenses that Debtor reports total \$7,933.11, leaving a monthly disposable income of \$854.09.

In her Amended Plan, Debtor proposes a sixty-month plan with payments beginning at \$87.92 per month and increasing to \$300.00 per month after twenty-eight months. [Doc. # 36, ¶ 1(a)]. In addition, Debtor proposes to pay into the Plan all income tax refunds. [*Id.*, ¶ 1(c)]. The plan indicates that unsecured creditors will be paid a dividend of not less than 5.26%. [*Id.*, ¶ 4(a)].

### **LAW AND ANALYSIS**

The Trustee objects to Debtor’s pending proposed amended Chapter 13 plan, arguing that it fails to meet the projected disposable income test set forth in 11 U.S.C. § 1325(b)(1)(B). While the objecting party has the initial burden to produce evidence in support of an objection, “[d]ebtors have the ultimate burden of proof to show the requirements of 11 U.S.C. § 1325 have been met.” *In re Lofty*, 437 B.R. 578, 584 (Bankr. S.D. Ohio 2010); *In re McCarty*, 376 B.R. 819, 821 (Bankr. N.D. Ohio 2007); *see also Hardin v. Caldwell (In re Caldwell)*, 895 F.2d 1123, 1126 (6th Cir.1990); *Ed Schory & Sons, Inc. v. Francis (In re Francis)*, 273 B.R. 87, 91 (B.A.P. 6<sup>th</sup> Cir. 2002).

Section 1325(b)(1)(B) provides that if a trustee objects to confirmation of a plan, unless unsecured creditors’ claims will be paid in full, the court may not approve the plan unless “as of the effective date of

the plan . . . the plan provides that all of the debtor's *projected* disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). In determining whether all of a debtor's *projected* disposable income will be applied to make plan payments to unsecured creditors, the court "begin[s] by calculating disposable income, and in most cases, nothing more is required." *Hamilton v. Lanning*, – U.S.–, 130 S. Ct. 2464, 2475 (2010). However, the court may go further and "may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." *Id.* at 2478.

"Disposable income" is defined with respect to above-median income debtors, such as Debtor in this case, in § 1325(b)(2) and (3). Those sections provide that "disposable income" means current monthly income ("CMI"), as defined in § 101(10A) and limited in § 1325(b)(2), less amounts reasonably necessary to be expended for the maintenance and support of debtor and debtor's dependents as determined in accordance with the means test set forth in 11 U.S.C. § 707(b)(2)(A) and (B). Form B22C facilitates this calculation, thus yielding monthly disposable income as defined in § 1325(b)(2) and (3).  

In this case, the Trustee objects to Debtor's proposed Amended Plan as it fails to provide for monthly plan payments to unsecured creditors of \$854.09, the monthly disposable income calculated on Debtor's Form B22C. The Trustee also objects to the failure of the Amended Plan to provide for an increase in monthly payments in an amount equal to Debtor's monthly 401(k) loan payment of \$772.57 as of the date the loan will be paid off.<sup>1</sup> The court agrees that Debtor's proposed monthly plan payments of \$87.92, to be increased to only \$300.00 after twenty-eight months, does not, on the record before the court, satisfy the requirements that all of her projected disposable income be applied to payment of her unsecured

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<sup>1</sup> At the hearing, the Trustee also challenged Debtor's calculation of CMI on the income side of the disposable income equation and presented his own calculation, which resulted in a higher figure than what is reflected on Debtor's Form B22C. The Bankruptcy Code defines "current monthly income" as follows:

[T]he average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on --

(i) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii). . . .

11 U.S.C. § 101(10A). Courts have construed this definition in at least two ways: (1) CMI consists of income received during the applicable six-month period, regardless of when it was earned, *In re Burrell*, 399 B.R. 620, 627 (Bankr. C.D. Ill. 2008); *In re Katz*, No. 2:10-bk-50721-TD, 2011 Bankr. LEXIS 1906, \*9, 2011 WL 1990813, \*3 (Bankr. C.D. Cal. 2011); and (2) CMI requires that the income be both "received" and "derived" (or earned) during the statutory six-month period, *In re Arnoux*, 442 B.R. 769, 776 (Bankr. E.D. Wash. 2010); *In re Meade*, 420 B.R. 291, 305-07 (Bankr. W.D. Va. 2009). In this case, Debtor's CMI, and thus her disposable income, differs depending on which definition is applied. As the parties have not addressed this issue, and because it does not change the court's decision regarding confirmation of the proposed Amended Plan, the court assumes for purposes of this opinion that Debtor's CMI is as set forth on her Form B22C.

debt.

Debtor testified that her monthly 401(k) loan payment of \$772.57 would cease after March 2013 as her loan would be paid in full. Thus, repayment of the loan during the life of the Amended Plan constitutes a change in circumstances that is virtually certain to occur. Under *Lanning*, the court must therefore consider income that becomes available after the loan is repaid as projected disposable income. The failure of the Amended Plan to provide for plan payments to increase by the amount of Debtor's 401(k) payment after the loan is repaid is alone reason to deny confirmation of the plan. See *Nowlin v. Peake (In re Nowlin)*, 576 F.3d 258, 267 (5<sup>th</sup> Cir. 2009); *Burden v. Seafort (In re Seafort)*, 437 B.R. 204, 211-13 (B.A.P. 6<sup>th</sup> Cir. 2010).

Debtor also mistakenly relies on Schedules I and J in calculating proposed monthly plan payments of \$87.92. Nevertheless, she asserts that her health care costs are actually higher than the \$250 included in her Schedule J budget and, thus, higher than the \$190 shown on line 36 of Form B22C for amounts actually expended on health care as those amounts do not include non-prescription supplements that she must take due to her malabsorption syndrome. She does not, however, quantify those increased costs such that a more accurate estimation of her health care expenses can be calculated. Moreover, Debtor's failure to include her cost of supplements in her health care expense reported on line 36 is not a change in circumstance as contemplated in *Lanning*. Rather, any difference in her actual health care expenses and that which is reported on line 36 is simply an error that should be corrected by filing an amended Form B22C.

Debtor also argues that she has greater expenses for food due to her special dietary needs and for clothing due to her position as a pharmacist. Again, this argument does not constitute a change in circumstances as contemplated in *Lanning*. The means test permits an additional food and clothing expense on line 44 of Form B22C, not to exceed 5% of those combined allowances under the IRS National Standard. However, Debtor did not include the additional expense deduction on her Form B22C.

Debtor also argues that the fact that the lease on her Nissan has expired since filing her petition is a changed circumstance that impacts her projected disposable income. The court disagrees. The means test calculation of disposable income includes the IRS Local Standard in the amount of \$496 for an ownership/lease expense for one vehicle.

Finally, Debtor offered evidence and testimony, which the court credits given her medical history, of dental work at a cost of over \$8,000 that is necessary but that has not yet been done. While the court finds this to be an expense that is necessary and virtually certain to occur, Debtor offered no evidence or

testimony regarding when the dental work will be done or the manner of payment that will be accepted. Without this information, the court cannot determine an adjusted disposable income figure to account for this expense.

While the court does believe that Debtor's Form B22C [Doc. # 37] does not accurately reflect her projected disposable income, for the reasons discussed above, Debtor has not met her burden of showing that the requirement of § 1325(b)(1)(B) has been met – that is, that the Amended Plan provides that all of her projected disposable income be applied to make payments to her unsecured creditors.

**THEREFORE**, for the foregoing reasons, good cause appearing,

**IT IS ORDERED** that confirmation of Debtor's Amended Chapter 13 Plan [Doc. # 36] be, and hereby is, **DENIED; and**

**IT IS FURTHER ORDERED** that Debtor is granted leave to file another proposed amended Chapter 13 plan and an amended Official Form B22C, if any, on or before **September 9, 2011**; and

**IT IS FURTHER ORDERED** that a further confirmation hearing will be held on **October 18, 2011, at 3:00 o'clock p.m.**