Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 08-30084
	)	
Michael James Kelly and	)	Chapter 13
Melissa Kay Kelly,	)	
	)	
Debtors.	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER
RE: OBJECTION TO CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN AND SETTING FURTHER, EVIDENTIARY HEARING ON CONFIRMATION

This case is before the court on the Chapter 13 Trustee's Objection to Confirmation of Debtors' Chapter 13 Plan ("Objection") [Doc. # 90] and Debtors' response [Doc. # 94]. The Trustee argues that Debtors' Chapter 13 plan does not meet the requirement of 11 U.S.C. § 1325(b)(1)(B) that all of their projected disposable income to be received during the applicable commitment period be applied to make payments to unsecured creditors.

The district court has jurisdiction over this Chapter 13 case pursuant to 28 U.S.C. § 1334(a) as a case under Title 11. It has been referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. A proceeding regarding the confirmation of a Chapter 13 plan is a core proceeding that the court may hear and decide. 28 U.S.C. § 157(b)(1) and (b)(2)(L).

FACTUAL BACKGROUND

Debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code on January 10, 2008. The case was converted to a case under Chapter 13 on September 3, 2008. Their bankruptcy schedules show that, at the time of filing, Debtors' interest in residential real estate located in Alger, Ohio, that was secured by a mortgage granted to Nation Star Mortgage, consisted of a right of redemption as the property had been sold at a sheriff's sale on January 8, 2008. Debtors' schedules show no other interest in real estate. Their schedules also show that they owned four vehicles at the time of filing, a 1999 Mercury Cougar, 1999 Ford F-150, 2003 Ford Taurus, and a 2002 Harley Davidson. Debtors stated an intention to surrender the residential real estate as well as the Ford F-150 and the Harley Davidson. In February 2008, relief from the automatic stay was granted as to the Ford F-150 and the Alger, Ohio real estate. Debtors have reaffirmed the debt secured by the Ford Taurus. Debtors' bankruptcy schedules also show unsecured nonpriority debts totaling $57,421.00 and no priority debt.

After conversion of their case, Debtors filed amended Schedules I and J and a second amended Form B22C, Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, also referred to as the "means test." [Doc. ## 63 & 84]. Debtors' combined gross monthly income reflected on amended Schedule I is $6,053.92, which is a decrease of $655.95 in income since the filing date, and their combined income after payroll deductions is $4,321.84. On their amended Schedule J, Debtors list monthly expenses totaling $4,841.00, including a home rental expense of $750 and an auto installment payment of $425,[1] and calculate their available monthly income after payroll deductions and actual expenses to be $141.92.

On their second amended Form B22C, Debtors report current monthly income of $7,004.98. Because this exceeds the applicable median family income in Ohio for Debtors' household size of four, they completed parts IV and V of Form B22C in order to calculate their disposable income. In doing so, they deducted on line 47 monthly payments for amounts scheduled as contractually due to secured creditors in the total amount of $2,050.27, which amount includes $1,450.00 for the Alger, Ohio residence that was sold at a sheriff's sale, $105.73 for the Ford F-150, $170.37 for the Ford Taurus, $221.67 for the Harley Davidson, and $102.50 for the Mercury Cougar. Debtors also included on line 48 deductions of $14.16 and $16.99, representing the amounts necessary to cure arrearages on the Ford F-150 and Ford Taurus, respectively. The net result of Debtors' current monthly income less total deductions is monthly disposable

[1] The $425 auto installment payment is the monthly payment owed on the Ford Taurus after Debtors reaffirmed a debt in the amount of $7,859.69 owed on that vehicle. [*See* Doc. # 30].

income shown on line 59 in the amount of $7.67.

Debtors filed an Amended Chapter 13 plan that proposes that they pay the Chapter 13 Trustee $150.00 per month for sixty months. [Doc. # 66]. The plan provides that the Ford F-150, the Harley Davidson and the Mercury Cougar will be surrendered, and that the Ford Taurus will be retained and the debt secured by it paid directly by Debtors to their creditor. The plan provides no further treatment with respect to the debt owed on the Ford Taurus. Specifically, it does not provide for cure through the plan of any arrearage. The plan further provides that the residential real property secured by the Nation Star mortgage be surrendered.[2] According to the plan, unsecured creditors will be paid a 10% dividend on their allowed claims.[3]

LAW AND ANALYSIS

A. The Parties' Arguments

The Trustee objects to Debtors' 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). That section 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). "Disposable income" is defined with respect to above-median income debtors, such as Debtors in this case, in § 1325(b)(2) and (3). Those sections provide that "disposable income" means current monthly income, 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).

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[2] Specifically, the plan provides that the "Nation Star Mortgage is secured by a mortgage on the Debtor's Residential Real Estate located at: 453 Circular Street, Upper Sandusky, OH 43351, and said security shall be SURRENDERED." [Doc. # 66, Amended Ch. 13 Plan, p. 1]. However, the Upper Sandusky address appears to be Debtors' current address, [*See* Doc. #1, Petition (setting forth the Upper Sandusky address as the address for Michael Kelly and the Alger, Ohio address as the address for Melissa Kelly) & Statement of Fin'l Affairs, ¶ 15 (setting forth the Alger, Ohio address as a prior address of Debtors and stating dates of occupancy from 2000 to September 2007)], and is real estate in which they have no ownership interest [*See* Doc. # 1, Schedule A]. For purposes of addressing the Trustee's Objection, the court will assume that reference to the Upper Sandusky address in the plan is an error and that Debtors intend to, and perhaps already have, surrendered the Alger, Ohio property.

[3]The non-government and government claims bar dates have passed in this case. The claims register and docket show allowed unsecured claims totaling much less than the $57,421.00 scheduled by Debtors. The court calculates that Debtors' proposed plan payments of $150 per month for 60 months will still not pay 100% of the allowed claims, making the disposable income issue raised by the Trustee's objection a ripe question required to be addressed by the court, even though it appears that Debtors' proposed plan payments would still pay substantially more than a 10% dividend to unsecured creditors.

The Trustee argues that the plan fails to meet the projected disposable income test because certain deductions taken by Debtors on Form B22C, which is used for calculation of disposable income under the means test, are not permissible deductions in a Chapter 13 case. Specifically, the Trustee argues that (1) Debtors cannot deduct secured debt payments for property that is to be surrendered under the plan, and (2) Debtors cannot deduct the $14.16 to cure an arrearage on the loan secured by the Ford F-150 that is being surrendered. He also argues that, in calculating Debtors' required plan payments, the $16.99 deducted on the means test to cure the arrearage on the loan secured by the Ford Taurus, which Debtors are retaining, must be added to the disposable income figure on line 59 of Form B22C in order for unsecured creditors to receive the amount to which they are entitled under § 1325(b)(1)(B). Finally, the Trustee argues that any income tax refunds to which Debtors are entitled during the applicable commitment period must also be part of the funds paid into the Chapter 13 plan.

In calculating Debtors' projected disposable income that the Trustee contends must be paid into Debtors' Chapter 13 plan in order to meet the requirement of § 1325(b)(1)(B), he adjusts the means test calculations accordingly and arrives at a figure of $941.19 that must be paid monthly into the plan. Because some of the monthly secured debt obligations for property being surrendered were also deducted from deductions that Debtors would otherwise have, namely, the IRS standard deduction for mortgage/rent expense and the IRS standard deductions for transportation ownership/lease expenses for two vehicles, the adjustment to the disposable income figure on line 59 of Form B22C is not a dollar for dollar adjustment. The Trustee arrives at the $941.19 figure as follows: $7.67 as calculated by Debtors on line 59, plus $732 (the difference between Debtor's $1,450 mortgage payment and the $718 local standard deduction for mortgage/rent expense), plus $170.37 (the amount of the Ford Taurus payment – although deducted on line 47 as a secured debt payment, this amount must also be, but was not, deducted on line 28 in computing the IRS standard transportation ownership expense), plus $31.15 (the amount of the cure payments).[4] According to the Trustee, all tax refunds received during the 60-month plan period must be paid into the plan in addition to the monthly $941.19 payment.

The Trustee's argument and calculation is premised on the fact that "projected disposable income" as contemplated in §1325(b)(1)(B) is a forward-looking concept and, therefore, must reflect income that

[4] The secured debt deductions for the other three vehicles that are being surrendered are not added to the line 59 disposable income figure since those amounts were also deductions from the IRS standard transportation expense. Thus, removing those deductions from both places is a wash and will not change the disposable income figure. The court notes that Debtors incorrectly deducted the secured debt payments on two vehicles rather than one on line 29, which calculates the IRS standard transportation ownership expense deduction for a second vehicle. The amount subtracted from that deduction is $324.17, the exact sum of the Harley Davidson payment of $221.67 and the Mercury Cougar payment of $102.50.

Debtors anticipate being available to pay unsecured creditors. Debtors agree that "projected disposable income" is a forward-looking concept but disagree as to how it should be calculated. According to Debtors, Schedules I and J rather than the means test should be the starting point for determining projected disposable income. Because all of their available income after expenses as reflected on amended Schedules I & J is committed to their Chapter 13 plan, Debtors argue that the Trustee's objection should be overruled.

The parties' arguments raise the issue of the role that the "disposable income" definition in § 1325(b)(2) and (3) plays in determining "projected disposable income" under § 1325(b)(1)(B). For the reasons that follow, the court adopts an approach that follows neither the Trustee's nor Debtors' method of calculating projected disposable income.

B. Relationship of "Projected Disposable Income" to "Disposable Income"

The parties' arguments raise issues relating to both the expense and income sides of the projected disposable income equation. This court has previously addressed the income side of the equation in *In re Zimmerman*, No. 06-31086, 2007 WL 295452, 2007 Bankr. LEXIS 410 (Bankr. N.D. Ohio Jan. 29, 2007). In *Zimmerman*, the court concluded that "projected disposable income" is a forward-looking concept and is not synonymous with "disposable income" as defined in § 1325(b)(2), which is based on historical income figures and expenses set forth in the means test. *Zimmerman*, 2007 WL 295452 at *6. A growing number of courts, including two circuit courts and the Sixth Circuit Bankruptcy Appellate Panel, have drawn a similar conclusion in order to give meaning to the terms "projected" and "to be received in the applicable commitment period" found in § 1325(b)(1)(B). *See e.g., Hamilton v. Lanning (In re Lanning)*, 545 F.3d 1269 (10th Cir. 2008); *Coop v. Frederickson (In re Frederickson)*, 545 F.3d 652 (8th Cir. 2008), *cert. denied* No. 08-950, —S.Ct.—, 2009 WL 210498, 2009 U.S. LEXIS 2016 (U.S. Mar. 23, 2009); *Hildebrand v. Petro (In re Petro)*, 395 B.R. 369 (B.A.P. 6th Cir. 2008); *Hildebrand v. Thomas (In re Thomas)*, 395 B.R. 914, 922-23 (B.A.P. 6th Cir. 2008) (citing cases); *Kibbe v. Sumski (In re Kibbe)*, 361 B.R. 302 (B.A.P. 1st Cir. 2007). *But see Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008) (rejecting a forward-looking approach and holding that to derive "projected disposable income," one simply calculates "disposable income" according to § 1325(b)(2) and then "projects" it out by multiplying "disposable income" by the number of months in the applicable commitment period).

Courts that have adopted the forward-looking interpretation have, nevertheless, employed different methods of actually determining projected disposable income. At least one court has disregarded the computation on Form B22C and, as to the income side of the equation, looked instead to the Debtor's Schedule I in order to give meaning to the term "projected disposable income." *In re Demonica*, 345 B.R.

895, 900 (Bankr. N.D. Ill 2006). It is this approach that Debtors urge the court to adopt as to both income and expense calculations in determining projected disposable income. The court declines to do so, however, as such an approach would render the provisions of § 1325(b)(2) and (3) meaningless and of no effect at all. *See Moskal v. United States*, 498 U.S. 103, 109-10 (1993) (stating "the established principle" that a court should give effect, if possible, to every clause and word of a statute). While the court may consider the income and expenses set forth in Schedules I and J, those schedules are not determinative of projected disposable income. *See Petro*, 395 B.R. at 377-78 (explaining that Schedules I and J capture a snapshot as of the date of filing and may not accurately reflect anticipated or actual changes in circumstances); *Kibbe*, 361 B.R. at 315 (concluding that figures set forth on Schedule I cannot be determinative because they ignore the new statutory definition of "disposable income" in § 1325(b)(2)).

Some courts require a debtor's Form B22C to reflect the debtor's financial circumstances as of the effective date of the plan. Those courts view the means test through the lens of Chapter 13 and do not permit a debtor to include certain deductions on Form B22C where the debtor's financial circumstances at the time of plan confirmation do not warrant such a deduction. *See In re Terrell*, No. 08-60172, 2008 WL 4488924, 2008 Bankr. LEXIS (Bankr. N.D. Ohio Sept. 30, 2008) (disallowing a deduction on Form B22C for a secured debt payment where the debtor was not paying the debt as secured debt on the effective date of the plan because the lien had been avoided); *In re McPherson*, 350 B.R. 38 (Bankr. W.D. Va. 2006) (same); *In re Hoss*, 392 B.R. 463 (Bankr. D. Kan. 2008) (same). They apparently do not distinguish between "disposable income" and "projected disposable income" and, instead, view the "disposable income" figure calculated on Form B22C as the figure to be "projected" in determining a debtor's compliance with the requirement that all projected disposable income be applied to make payments to unsecured creditors under the plan.

Other courts draw a distinction between a debtor's "disposable income" calculated under the means test and "projected disposable income." *See, e.g., Frederickson*, 545 F.3d at 659; *Thomas*, 395 B.R. at 922-23. These courts view the "disposable income" calculation of Form B22C as presumptively correct, or as a starting point, in determining projected disposable income, but the final calculation may take into account changes that have occurred in the debtor's financial circumstances. Under this approach, the Sixth Circuit Bankruptcy Appellate Panel concluded that the means test is a mechanical, formulaic test and that there is no basis for calculating disposable income under § 1325(b)(2) and (3) differently in a Chapter 13 case than it is in a Chapter 7 case. *See Thomas*, 395 B.R. at 922.

It appears that the last two approaches (*i.e.* adjusting the "disposable income" calculation when

completing Form B22C versus adjusting the "disposable income" figure obtained under the means test to reflect "projected disposable income") will, in the end, likely render similar results, and in fact render similar results in this case. Clearly, both interpretations attempt to give meaning to both the means test calculation under § 1325(b)(2) and (3) and the meaning of "projected disposable income" in § 1325(b)(1)(B). While the Trustee's argument employs the former approach, the latter approach is the approach adopted by the Sixth Circuit Bankruptcy Appellate Panel in *Thomas* and is the interpretation adopted by this court in *Zimmerman* in addressing the income side of the "projected disposable income" equation. In *Zimmerman*, the court explained as follows:

> [I]n determining a debtor's projected income to be received during the term of the Chapter 13 plan, the court will first look at debtor's "current monthly income" as defined in § 101(10A) and as limited in § 1325(b)(2). The court will presume that figure is the income projected to be received by the debtor during the term of the Chapter 13 plan unless the debtor, the trustee, or an unsecured creditor who has objected to confirmation of the plan can show that a substantial change in circumstances exists such that the court may conclude that the presumed figure does not reasonably project debtor's income in the future. A party attempting to justify an adjustment to the presumed figure should present documentation similar to that required by § 707(b)(2)(B).

In re Zimmerman, 2007 WL 295452 at *7. The court will adopt the same interpretation in determining the expense component of "projected disposable income" – that is, the court will presume that the "disposable income" figure resulting from the means test computation on Form B22C is the debtor's "projected disposable income to be received during the applicable commitment period," as contemplated by § 1325(b)(1)(B), unless the debtor, the trustee, or an unsecured creditor who has objected to confirmation of the plan can show that a substantial change in the debtor's financial circumstances exists such that the presumed figure does not reasonably reflect debtor's projected disposable income that will be available to pay unsecured creditors during the term of the Chapter 13 plan. As the court similarly concluded in *Zimmerman*, this construction of § 1325(b) gives effect to both the forward-looking language of § 1325(b)(1)(B) and the definition of "disposable income" in § 1325(b)(2) and (3) and is consistent with "the clear goal of consumer bankruptcy reform in BAPCPA, that is, 'to ensure that debtors repay creditors the maximum *they can afford*.'" *Id.* at *8 (quoting H.R. Rep. No. 109-31, Pt. 1, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89)(emphasis added).

With this interpretation in mind, the court will address the specific issues raised in the Trustee's Objection and Debtors' response.

1. Home Mortgage Payment Deduction

The Trustee argues that Debtors are not entitled to take a home mortgage payment deduction of $1,450 on line 47 of Form B22C. The court agrees, albeit for reasons other than those advanced by the Trustee.

Debtors may include as a deduction on the means test amounts "scheduled as contractually due to secured creditors" in the sixty months following the filing of their bankruptcy petition divided by sixty. 11 U.S.C. §§ 1325(b)(3)(A) and 707(b)(2)(A)(iii). In this case, Debtors' bankruptcy schedules show that their only interest in the real estate at issue is a right of redemption, as the property was sold at a sheriff's sale prepetition and Debtors are no longer living in the home. The question then is whether there are amounts "scheduled as contractually due" relating to the real estate that would entitle Debtors to the secured debt deduction.

Judge Kendig addressed a factually similar scenario in *In re Ballard*, No. 07-31486, 2008 WL 783408, 2008 Bankr. LEXIS 882 (Bankr. N.D. Ohio Mar. 25, 2008). In that case, Judge Kendig relied on the doctrine of merger in finding that the Debtors' contractual obligations under the mortgage were extinguished. Under this doctrine, "when a final judgment is rendered in an action for breach of contract, 'all the damages and causes of action arising from such breach of the contract become merged into such judgment.'" *Id.* 2008 Bankr. LEXIS 882 at *6 (quoting *Catawba West, Inc. v. Domo,* No. 920T043, 1993 Ohio App. LEXIS 2449, *4, 1993 WL 155633, *2 (Ohio App. May 14, 1993)). The court found that "by operation of law, the doctrine of merger works to merge the contract, in this case the promissory note secured by the mortgage, into the foreclosure judgment" and that upon merger, "the contract terms are extinguished." *Id.* at *8-9; *see Marietta Iron Works v. Lottimer*, 25 Ohio St. 621 (1874) (stating that "[t]he contract is merged in the judgment, and its terms are, therefore, no longer operative"). The court rejected the debtors' argument, raised also by Debtors in this case, that a contractual obligation continued, notwithstanding entry of a judgment of foreclosure, based on the fact that title remained in their name since the foreclosure sale had not yet been confirmed and their debts had not yet been discharged. The court explained:

> Their ownership of the property is irrelevant to the contractual liability on the note, either before the judgment or after the judgment. At the time of filing, the liability to the mortgage company was not based upon the contract, but upon the judgment. As outlined above, the contract ceased to exist upon entry of the judgment. Debtors are liable on the judgment and their liability remains secured by the real estate; thus scheduling the property on Schedule D was appropriate. However, since their liability is no longer contractual, the debt cannot be "scheduled as contractually due" under 11 U.S.C. § 707(b)(2)(A)(iii)(I) and therefore is not an acceptable expense on [the means test].

In re Ballard, 2008 Bankr. LEXIS 882 at *10. The court further found that the debtors' right of redemption was also "based not upon the contract, but upon the judgment" and, furthermore, "requires payment in full, not monthly payments." *Id.* at *13 (citing Ohio Rev. Code § 2329.33).

In support of their position, Debtors cite *In re Zak*, 361 B.R. 481 (Bankr. N.D. Ohio 2007), which is also factually similar except that the debtors were still residing in the home. Although, in that case, the court found that Debtors were entitled to take a deduction for the mortgage debt, its reasoning was based on the fact that Debtors had not yet surrendered the property. The court did not address the doctrine of merger.

This court finds the reasoning in *Ballard* persuasive. Because any liability of Debtors to Nation Star Mortgage was not at the time of filing their petition based upon a contract, but upon the foreclosure judgment, they were not entitled to deduct $1,450 on line 47 of Form B22C for amounts "scheduled as contractually due" to the mortgage company. Because this amount was also deducted from the IRS standard deduction for mortgage/rent expense to which Debtors are otherwise entitled, the net upward adjustment to the line 59 monthly disposable income figure of Form B22C is $732.

Moreover, even if the deduction was properly taken, Debtors do not dispute that they are surrendering, or already have surrendered, the real estate to Nation Star Mortgage as provided in their amended Chapter 13 plan. A similar circumstance was addressed by the Sixth Circuit Bankruptcy Appellate Panel in *Thomas.* Although the panel held that a debtor could deduct payments for collateral he intends to surrender in determining "disposable income" under § 1325(b)(2), it explained that this figure must then be adjusted where credible evidence shows that it does not reflect "projected disposable income." *Thomas*, 395 B.R. at 922-23. The panel specifically explained that "the calculation of *projected disposable income* will not include a deduction for a house the debtor intends to surrender, even though the debtor took the deduction under the means test set forth in § 1325(b)(2). *Id.* at 923.

2. Secured Debt Deduction for Motor Vehicles

The Trustee also argues that Debtors are not entitled to deductions for secured debt owed on vehicles that are being surrendered under the Chapter 13 plan. However, as discussed above and as held in *Thomas*, Debtors were entitled to those deductions in calculating their "disposable income."

Nevertheless, Debtors do not dispute that the Ford F-150, the Harley-Davidson and the Mercury Cougar are being or have been surrendered, resulting in a decrease of $429.90 in the monthly payments set forth as secured debt deductions on their means test. This change in Debtors' financial circumstances requires a reassessment, and perhaps an adjustment, to the "projected disposable income" that Debtors must,

under § 1325(b)(1)(B), apply to payments to unsecured creditors. *See Thomas*, 395 B.R. at 923. At this time, the court declines to rule on the proper adjustment to projected disposable income since, as discussed more fully below, other factors may also come into play that affect such an adjustment.

3. Deductions to Cure Arrearages

Under the means test, a debtor may deduct from current monthly income additional payments to secured creditors that are necessary for the debtor to maintain possession of a motor vehicle that is necessary for the support of the debtor and the debtor's dependents (*i.e.* cure payments). 11 U.S.C. § 707(b)(2)(A)(iii)(II). Debtors take this deduction on line 48 of Form B22C in the amounts of $14.16 and $16.99 for the Ford F-150 and Ford Taurus, respectively.

The Trustee argues that Debtors are not entitled to the $14.16 deduction. Since Debtors are surrendering the Ford F-150, this expense is clearly not an expense "necessary for the support of the debtor and the debtor's dependents." 11 U.S.C. § 707(b)(2)(A)(iii)(II). Moreover, the expense clearly is not an expense that Debtors plan on paying in the future and, for the reasons discussed above, is a change in their financial circumstances.

The Trustee also argues that in calculating the plan payment amount the $16.99 deduction for cure payments on the Ford Taurus retained by Debtors must be added to Debtors "projected disposable income" since such payments are being made to a secured creditor. To the extent that Debtors' Chapter 13 plan requires the Trustee to make these cure payments,[5] the court agrees. Because all of Debtors' projected disposable income must be applied to make payments to unsecured creditors under their plan, *see* 11 U.S.C. § 1325(b)(1)(B), the $16.99 cure payment deducted to calculate disposable income must be added back into the final figure that Debtors pay monthly into their Chapter 13 plan.

Although the adjustments relating to cure payments do not necessarily constitute substantial changes in Debtors' financial circumstances, taken together with all of the adjustments discussed above, the court could find that a substantial change in circumstances has occurred such that an upward adjustment of the amount that Debtors must pay into their Chapter 13 plan is warranted, absent a showing of existing circumstances that warrant offsetting such an adjustment.

4. Tax Refunds

The Trustee also objects to Debtors' proposed Chapter 13 plan because it does not include a provision that income tax refunds be paid into the plan. To the extent that Debtors' line 30 deduction on

[5] It is not clear, however, the Debtors' Chapter 13 plan even provides for such cure payments to be made. [*See* Doc. # 66, ¶ 3].

Form B22C for income taxes is not accurate and represents over-withholding such that they will be entitled to income tax refunds in the future, the court agrees that the income tax refunds constitute disposable income and that Debtors should include such refunds as part of the funds paid into their Chapter 13 plan. *In re Risher*, 344 B.R. 833, 837 (Bankr. W.D. Ky. 2006) (citing *In re Freeman*, 86 F.3d 478 (6th Cir. 1996)); *In re LaPlana*, 363 B.R. 259, 267 (Bankr. M.D. Fla. 2007) (explaining that "[b]y requiring the turnover of these future tax refunds to the Chapter 13 Trustee, a court is simply correcting a debtor's error of overestimating his or her tax liability made when completing the means test"); *In re Raybon*, 364 B.R. 587, 591 (Bankr. D.S.C. 2007).

5. Debtors' Income

Debtors' current monthly income as stated on their Form B22C is $7,004.98. Their combined gross monthly wages as stated on their amended Schedule I is $6,053.92. While it appears that Debtors' income has substantially changed and that the adjustments discussed above are offset by a decrease in their income, as discussed in *Zimmerman*, Schedule I does not necessarily tell the whole story. In *Zimmerman*, the court explained:

> In determining whether an adjustment is warranted where a debtor's income on Schedule I is substantially less than his or her current monthly income, the court must consider what it views as an expression of Congress' intent embodied in the concept of "current monthly income." In determining a debtor's ability to pay, Congress chose to incorporate into the Chapter 13 process an average over time rather than just a snapshot view of debtor's income, presumably with the intent to provide a more realistic view of a debtor's financial condition one way or another. Thus, the court will not simply rely on Schedule I, which constitutes such a snapshot view. Rather, a debtor must not only present documentation that his or her income has substantially decreased, but that the decrease is due to circumstances that the debtor demonstrates will continue during the term of the Chapter 13 plan. This approach will address concerns that a snapshot view might otherwise avoid.

In re Zimmerman, 2007 Bankr. LEXIS at *26.

The record before the court is insufficient to determine whether an adjustment to Debtors' current monthly income is warranted and, thus, whether such an adjustment offsets the adjustments to the expense side of the "projected disposable income" equation. The court, therefore, will not rule on the Trustee's Objection at this time but will instead hold an evidentiary hearing to determine whether an adjustment to Debtors' current monthly income is warranted. *Kibbe*, 361 B.R. at 315 ("If circumstances dictate...the bankruptcy court must make a fact based determination at the time of confirmation, whether by way of the parties' agreement or the taking of evidence.").

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the court will hold an evidentiary hearing on confirmation of Debtors' Amended Chapter 13 Plan [Doc. # 66] and the Amended Chapter 13 Trustee's Objection to Confirmation of Debtors' Chapter 13 Plan [Doc. #90] on **May 14, 2009, at 2:00 o'clock p.m.** in Courtroom No. 2, Room 103, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio.