

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.



Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:) Case No. 08-34057
)
Calvin C. Whitaker and) Chapter 13
Karen S. Whitaker,)
)
Debtors.) JUDGE MARY ANN WHIPPLE

MEMORANDUM OF DECISION AND ORDER
SUSTAINING OBJECTION TO CONFIRMATION OF DEBTORS’ CHAPTER 13 PLAN,
SETTING DEADLINE FOR FILING AMENDED PLAN AND RESCHEDULING
CONFIRMATION HEARING

This case is before the court on the Chapter 13 Trustee’s unopposed Objection to Confirmation of Debtors’ Chapter 13 Plan (“Objection”) [Doc. # 64]. 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).

Having considered the Trustee’s Objection, for the following reasons, the Objection will be sustained.

FACTUAL BACKGROUND

Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on July 31, 2008. Their bankruptcy schedules disclose an ownership interest in their home, which Debtors value at \$180,000. Debtors' Schedule D shows that their home is encumbered by three mortgages, a first mortgage held by Indymac Bank Home Loan Servicing ("Indymac Bank") as security for a debt of \$185,825.00, a second mortgage also held by Indymac Bank as security for a debt of \$47,291.00, and a third mortgage held by Fifth Third Bank as security for a debt of \$26,054.00. The court has granted motions filed by Debtors to avoid both the second and third mortgages and to treat the claims secured thereby as being wholly unsecured pursuant to *In re Lane*, 280 F.3d 663 (6th Cir. 2002). [Doc. ## 51, 52].

Debtors' bankruptcy schedules also show that they own six motor vehicles - four vehicles that they own outright and two vehicles, a 1995 Harley Davidson Sportster and a 2006 Harley Davidson Electric Glide, that are encumbered by liens securing debt in the amounts of \$4,159.95 and \$13,425.97, respectively. Debtors' schedules also show that they own a Dutchman travel trailer that they value at \$10,000 and that is encumbered by a lien securing debt in the amount of \$18,407.00.

Debtors' Schedule I shows combined gross monthly income of \$9,850.10, and combined income after payroll deductions in the amount of \$6,215.96. On their Schedule J, Debtors list monthly expenses totaling \$4,835.06, including payments of \$101.58 and \$320.99 on the two Harley Davidsons, and calculate their available monthly income after payroll deductions and actual expenses to be \$1,380.90.

Debtors also filed Official Form B22C, Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, also referred to as the "means test." On Form B22C, Debtors report current monthly income of \$9,917.10. Because this exceeds the applicable median family income in Ohio for Debtors' household size of two, 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 totaling \$2,975.61 for amounts scheduled as contractually due to secured creditors and, on line 48, a deduction in the amount of \$15.52, which represents the amount necessary to cure an arrearage owed to Indymac Bank.¹ The total secured debt payment of \$2,975.61 includes not only their first mortgage payment of \$1,589.47 but also their second and third mortgage payments of \$443.57 and \$342.69, respectively, a \$306.78 payment for their travel trailer, and payments of \$69.33 and \$223.77 for the two Harley Davidsons. Debtors also deduct the full IRS standard transportation ownership expense of \$489 on both lines 28 and 29 for two vehicles. However, they do not deduct from the \$489 expense amounts the secured debt

¹ It is not clear whether this arrearage relates to the first or second mortgage held by Indymac Bank.

payments for the two Harley Davidsons as directed on lines 28(b) and 29(b) in order to arrive at their “net” ownership expense deduction. Debtors also deduct a Chapter 13 administrative expense of \$46.53 as permitted on line 50. The net result of Debtors’ current monthly income less total deductions is the disposable income shown on line 59 in the amount of \$627.84.

Debtors’ Chapter 13 plan filed with their petition proposes that they pay to the Trustee \$1,380.00 per month for sixty months, plus all income tax refunds. This monthly payment amount equals Debtors’ income after expenses as calculated on their Schedules I and J. The plan provides that the second and third mortgages be stripped and paid as unsecured claims. [Doc. #4, ¶ 13]. Paragraph 4A of the proposed plan identifies Indymac Bank as a creditor holding a mortgage in real estate located at 1772 Lexington with no arrearage claim amount to be cured and states that post-petition mortgage payments will be paid directly by Debtors. This provision does not state that the proposed treatment pertains to the first mortgage on their home, although that can be inferred by combining ¶¶ 4A and 13. The plan also provides that the travel trailer will be surrendered in full satisfaction of the debt owed on it, [Doc. #4, ¶ 13], and that the two Harley Davidsons will be retained and paid directly by Debtors to their creditor, [Doc. #4, ¶ 3]. According to the plan, Debtors estimate total non-priority unsecured debt to be \$161,396.91 and indicate that unsecured creditors will be paid a dividend on their claims of \$64,558.76 or 40%, whichever is greater.

LAW AND ANALYSIS

The Trustee objects to Debtors’ 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).

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 the second and third mortgages that have been avoided and will be paid as unsecured claims under their Chapter 13 plan, and (2) Debtors cannot deduct the secured debt payment for the travel trailer that is to be surrendered under the plan. He also argues that the deductions representing the IRS standard transportation ownership expense taken by Debtors for two vehicles are greater than the deductions to which Debtors are entitled. Finally, the Trustee argues that the \$15.52 deducted on the means test to cure the arrearage on a debt secured by their home that is owed to Indymac Bank and the Chapter 13 administrative expense deduction of \$46.53 must be added to the disposable income figure on line 59 of Form B22C in determining the plan payment amount in order for unsecured creditors to receive the amount to which they are entitled under § 1325(b)(1)(B).

The Trustee's argument that deductions for surrendered property and avoided mortgages are not permissible 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 Debtors anticipate being available to pay unsecured creditors. Although the court agrees that "projected disposable income" is a forward-looking concept, *see In re Zimmerman*, 2007 Bankr. LEXIS 410, 2007 WL 295452 (Bankr. N.D. Ohio Jan. 29, 2007), it disagrees that Debtors' deductions for secured debt payments relating to the second and third mortgages and for the travel trailer to be surrendered are not proper in determining "disposable income" on the means test form.

While the Trustee's arguments raise issues relating to the expense side of the projected disposable income equation, this court previously addressed the income side of the equation in *Zimmerman*. In that case, 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).

While not synonymous, the “disposable income” calculation under the means test plays a role in determining “projected disposable income.” This court recently addressed that role in *In re Kelly*, No. 08-30084 (Bankr. N.D. Ohio April 23, 2009). The court noted the different methods of determining “projected disposable income” that have been employed by courts that have adopted the forward-looking approach in defining the term. In order to give meaning to the term, 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 re Demonica*, 345 B.R. 895, 900 (Bankr. N.D. Ill 2006). The court rejected this method, finding that it would render the provisions of § 1325(b)(2) and (3) meaningless and of no effect at all. *In re Kelly*, No. 08-30084, p. 5-6 (citing *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)).

Some 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 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). Courts employing this method 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.

Both of the last two approaches attempt to give meaning to the means test calculation under

§ 1325(b)(2) and (3) as well as to the term “projected disposable income” as contemplated in § 1325(b)(1)(B) and, in the end, will likely render similar results. Nevertheless, the latter approach is the approach adopted by the Sixth Circuit Bankruptcy Appellate Panel in *Thomas* and is the approach employed by this court in *Zimmerman* in addressing the income side of the “projected disposable income” equation and in *Kelly* in addressing the expense side of the equation. In *Kelly*, the court explained the approach it would employ as follows:

[T]he 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).

In re Kelly, No. 08-30084, p. 7.

With this approach in mind, the court addresses the specific issues raised in the Trustee’s Objection.

I. Secured Debt Deductions for First and Second Home Mortgages

A debtor 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). Nevertheless, the Trustee argues that Debtors are not entitled to take deductions of \$443.57 and \$342.69 on line 47 of Form B22C for the second and third mortgages on their home since their Chapter 13 plan provides that those mortgages be stripped and paid as unsecured claims and they do not intend to make payments on those mortgages. The cases cited by the Trustee in support of this argument, however, employ the approach that views “disposable income” through the lens of Chapter 13 and calculates it as of the date of confirmation of the debtor’s Chapter 13 plan. *See In re Hoss*, 392 B.R. at 471 (considering amounts “contractually due to secured creditors” as meaning secured debt payments as modified by the Chapter 13 plan); *McPherson*, 350 B.R. at 46 (same).

In *Thomas*, the Sixth Circuit Bankruptcy Appellate Panel addressed a similar circumstance. In that case, the debtors took secured debt deductions on their means test form for collateral that they intended to surrender under their Chapter 13 plan. Notwithstanding the fact that the debtors would not be making

payments on the secured debt obligation in the future, the panel held that they could deduct the payments in determining “disposable income” under § 1325(b)(2), finding “no logical reason why disposable income should be calculated differently in a chapter 13 case than it is in a chapter 7 case.” *Thomas*, 395 B.R. at 922. As in a Chapter 7 case, the debtors were entitled to deduct payments scheduled as contractually due to the secured creditor on the date the petition was filed. However, the panel explained that the “disposable income” figure obtained must then be adjusted where credible evidence shows that it does not reflect “projected disposable income.” *Id.* 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.

Applying the same reasoning in this case, Debtors are entitled to deductions on the means test for secured debt payments on their second and third mortgages since they were scheduled as contractually due on the date their petition was filed. Nevertheless, the Trustee has pointed to credible evidence in the record (*i.e.* Debtors’ Chapter 13 plan and the orders conditionally avoiding the second and third mortgage liens) that Debtors will not be making payments on their second and third mortgages in the future. This constitutes a significant change in Debtors’ financial circumstances that requires an upward adjustment of \$786.26 to the line 59 monthly disposable income figure in determining Debtors’ projected disposable income.

II. Secured Debt Deduction for Travel Trailer

The Trustee also argues that Debtors are not entitled to a deduction for secured debt owed on the travel trailer that is being surrendered under the Chapter 13 plan. However, as discussed above and as held in *Thomas*, Debtors are entitled to the deduction in calculating their “disposable income.”

Nevertheless, Debtors do not dispute that the travel trailer is being or has been surrendered, resulting in a decrease of \$306.78 in the monthly payments set forth as secured debt deductions on their means test. This too constitutes a significant change in Debtors’ financial circumstances and requires an additional adjustment in that amount to the disposable income figure on line 59 on the means test. *See Thomas*, 395 B.R. at 923.

III. Transportation Ownership Expense Deductions

The Trustee next argues that Debtors calculated their deductions for ownership of two vehicles incorrectly on lines 28 and 29 of Form B22C. The court agrees. As directed on Form B22C, the deduction permitted is a debtor’s *net* ownership expense for the vehicle, calculated as the IRS standard ownership expense less the average monthly payment for any debts secured by the vehicle as stated on line 47. Debtors took the full ownership expense deduction for two vehicles and failed to deduct the secured debt payments

relating to the two Harley Davidsons as stated on line 47 of their Form B22C in calculating those deductions. Consequently, the disposable income stated on line 59 of Form B22C is inaccurate and must be adjusted accordingly.

IV. Deductions to Cure Arrearage and for Chapter 13 Administrative Expenses

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 their primary residence (*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 \$15.52.

The Trustee argues that in arriving at the required plan payment amount the deduction to cure the arrearage on the Indymac mortgage must be added to Debtors' "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,² 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 \$15.52 cure payment deducted to calculate disposable income must be added back into the final figure that Debtors pay monthly into their Chapter 13 plan.

Similarly, the Trustee argues that the \$46.53 deduction for Chapter 13 administrative expenses on line 50 of Form B22C must be added to the final "projected disposable income" figure in calculating the proper monthly Chapter 13 plan payment. The court agrees. The expense is calculated as a percentage of the projected Chapter 13 plan payment in order to determine "disposable income." It follows then that the actual monthly plan payment must include the amount of the Chapter 13 administrative expense since that expense will be paid through the plan.

CONCLUSION

While the court finds that Debtors are entitled to the secured debt deductions for their second and third home mortgage and their travel trailer in determining "disposable income," it also finds that they incorrectly calculated their net transportation ownership expense. The correct calculation results in disposable income on line 59 of Form B22C in the amount of \$920.94.³ However, the Trustee has presented credible evidence of a substantial change in Debtors' financial circumstances that requires the court to adjust this otherwise presumptively correct figure in determining Debtors' projected disposable income that must

² It is not clear, however, that Debtors' Chapter 13 plan even provides for such cure payments to be made. [*See* Doc. # 4].

³ The proper calculation is as follows: Vehicle 1 ($\$489 - \$223.77 = \$255.23$) and Vehicle 2 ($\$489 - 69.33 = 419.67$).

be applied to make payments to unsecured creditors under their Chapter 13 plan. For the reasons discussed above, the court finds that \$1,093, the sum of the second and third mortgage payments that will be paid as unsecured claims and the payment for the travel trailer that is being surrendered, must be added to the \$920.94 disposable income calculated under the means test to reflect Debtors' projected disposable income to be received during the term of their Chapter 13 plan. In addition, Debtors' monthly plan payment must include the Chapter 13 administrative expense and any cure payments to be made on their mortgage, to the extent that Debtors' plan provides for such payments. Debtors offer no change in circumstances that would offset these adjustments. Because Debtors' proposed plan falls far short of what is required under the projected disposable income test under § 1325(b)(1)(B), the Trustee's Objection will be sustained. Debtors will be afforded an opportunity to file an amended plan and a further confirmation hearing will be scheduled. **THEREFORE**, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Chapter 13 Trustee's Objection to Confirmation of Debtors' Chapter 13 Plan [Doc. # 64] be, and hereby is, **SUSTAINED** and confirmation of Debtors' proposed Chapter 13 plan is **DENIED** [Doc. #4]; and

IT IS FURTHER ORDERED that Debtors shall file an amended plan on or before **May 12, 2009**. Objections to the amended plan must be filed on or before **May 26, 2009**, and a further confirmation hearing in the event that a plan is filed will be held on **June 9, 2009, at 3:00 o'clock p.m.** in Courtroom No. 2, Room 103, United States Courthouse, 1716 Spielbusch Avenue, Toledo, Ohio. **If no amended plan is filed by the deadline stated, this case will be dismissed under 11 U.S.C. § 1307(c)(1) and (7) without further notice or opportunity for hearing.**