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7 UNITED STATES BANKRUPTCY COURT
8 EASTERN DISTRICT OF CALIFORNIA
9 FRESNO DIVISION

9 In re) Case No. 11-17873-B-13
10 Kevin James Maxwell and)
11 Tonia Noel Maxwell,) DC No. RSW-3
12 Debtors.)
_____)

13
14 **MEMORANDUM DECISION REGARDING MOTION
TO CONFIRM FIRST MODIFIED CHAPTER 13 PLAN**

15 Robert S. Williams, Esq., appeared on behalf of the debtors, Kevin James Maxwell and
16 Tonia Noel Maxwell.

17 Kristen M. Gates, Esq., appeared for the chapter 13 trustee, Michael H. Meyer, Esq.

18 Before the court is a motion by the debtors, Kevin and Tonia Maxwell (the
19 “Debtors”) who seek to modify their confirmed chapter 13 plan (the “Motion”). The
20 chapter 13 trustee, Michael H. Meyer, Esq. (the “Trustee”) objects to the Debtors’ first
21 modified chapter 13 plan (the “Plan”). He contends that the Plan does not satisfy the
22 “good faith” requirement of 11 U.S.C. § 1325(a)(3)¹ (the “Objection”). This contested
23 matter was argued before the court on October 2, 2013, and taken under submission after
24 both sides filed supplemental briefs. For the reasons set forth below, the Trustee’s
25 Objection will be sustained and the Debtors’ Motion will be denied.

26
27 ¹Unless otherwise indicated, all chapter, section, and rule references are to the
28 Bankruptcy Code, 11 U.S.C. §§ 101–1532, and to the Federal Rules of Bankruptcy Procedure,
Rules 1001–9036, as enacted and promulgated *after* October 17, 2005, the effective date of the
Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L.
No. 109-8, 119 Stat. 23.

1 This memorandum decision contains the court's findings of fact and conclusions of
2 law required by Federal Rule of Civil Procedure 52(a), made applicable to this contested
3 matter by Federal Rules of Bankruptcy Procedure 9014(c) and 7052. The court has
4 jurisdiction over this matter under 28 U.S.C. § 1334, 11 U.S.C. §§ 1325 and 1329 and
5 General Orders 182 and 330 of the U.S. District Court for the Eastern District of
6 California. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

7 **Background and Findings of Fact.**

8 **The Modified Plan.** The Debtors filed a petition for relief under chapter 13 in
9 July 2011. Their initial chapter 13 plan was confirmed in October 2011. The Debtors
10 have one dependent child, age 19, and their income is above the applicable median for a
11 family of three. Their disposable income was therefore determined by application of the
12 Means Test (Form B22C). The Debtors' initial plan required a monthly payment to the
13 Trustee in the amount of \$4,762.38 for a term of 60 months. It provided nothing (0%) to
14 general unsecured creditors, all of the plan payments being devoted to priority and
15 secured claims and to administrative expenses. The initial plan provided for the curing of
16 arrearages and maintenance of post-petition mortgage payments on two residential real
17 properties. One of those properties is the Debtors' residence. The monthly contract
18 installment for the residence mortgage was stated in the initial plan to be \$2,618.68. The
19 arrearage to be cured through the plan was stated to be \$31,341.64, which was to be cured
20 with a monthly payment of \$652.95.² The total monthly payment the Trustee was making
21 on account of the residence mortgage was approximately \$3,271.63.

22 Sometime in mid-2013, the Debtors negotiated a modification of their residence
23 mortgage which restructured the debt and cured the arrearage. On November 6, 2013, the
24 court entered an order, approved by the Trustee, authorizing the Debtors to modify their
25 residence mortgage. The application for that order was submitted ex parte and states that
26

27 ²CitiMortgage, Inc., filed a timely proof of claim for the residence mortgage showing a
28 balance due of \$425,906.30 with an arrearage of \$35,724.70

1 the monthly mortgage payment will decrease by more than \$1,000 in the modified
2 mortgage to \$1,559.71. In addition, the mortgage modification eliminates the need for the
3 arrearage payment reducing the debt service burden by an additional \$652.95 per month.
4 Altogether, the mortgage modification results in a monthly cash flow savings of
5 \$1,711.92 (current mortgage service \$3,271.63 - new mortgage payment \$1,559.71).

6 On June 13, 2013, the Debtors filed the proposed modified Plan which is now
7 before the court. In the Plan, the mortgage payments on both of their real properties will
8 now be paid directed by the Debtors, in Class 4. The monthly payment to the Trustee will
9 decrease to \$500 beginning in June 2013, and the unsecured creditors will receive an
10 “unknown” dividend on their unsecured claims.³ In support of this Motion, the Debtors
11 explain that their household and living expenses have increased by \$1,996.64⁴ which
12 exceeds the savings realized by the mortgage modification. The Motion pleads that the
13 Plan has been proposed in good faith.

14 **Trustee’s Objection.** The Trustee objects on the grounds that the Plan is not
15 proposed in good faith. The argument focuses on the fact that the Debtors are committing
16 essentially nothing to the unsecured creditors even though their combined average
17 monthly income has increased and their monthly mortgage expense has decreased
18 significantly. At the time the Objection was filed, the Debtors had not yet provided
19 amended schedules, or supporting documentation to illustrate their current financial

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21 ³The monthly dividend on account of the Class 2 automobile loan will be \$475 so the
22 new Plan payment does not appear to cover the Class 2 debt service and the corresponding
23 Trustee’s fee. The Plan payment will increase to \$709.39 in October 2015, after the Debtors pay
24 off a loan from their retirement account, but it is not clear how much, if any, of the additional
money will be distributed to the unsecured creditors. The Plan lists priority tax claims totaling
\$5,903, but no proofs of claim were filed for the priority debts.

25 ⁴The increase in living expenses is broken down as follows:

26 heating expense + \$400, home maintenance + \$400, additional food + \$650,
27 monthly clothing + \$100, laundry and dry cleaning + \$100, transportation
28 + \$100, insurance + \$37.25, and repayment of a retirement loan \$209.39 (to
terminate in September 2015).

1 situation.⁵ The Motion was originally set for hearing on July 31, 2013. At the request of
2 Debtors' counsel, it was continued to August 28th to give Debtors an opportunity to
3 provide supporting expense documents to the Trustee. The court also requested from the
4 Trustee a statement of unresolved issues in advance of the continued hearing.

5 Prior to the continued hearing, the Trustee filed a status report based on his review
6 of documents provided by the Debtors. The Trustee acknowledged that the Debtors'
7 actual utility bills for the months of May and June 2013 were \$803.46 and \$975.25,
8 respectively. The Trustee contends, *inter alia*, that the food expense, which more than
9 doubled on amended schedule J, in the average amount of \$1,200 per month (\$400 per
10 person), is not reasonable and necessary. The Debtors' food expense is now almost twice
11 the national standard for a family of three.⁶ The Trustee also questions the reasonableness
12 and necessity of a mini-storage expense in the amount of \$93 per month. At the
13 conclusion of the hearing, the court offered the parties an opportunity to submit
14 supplemental briefing on the "good faith" issue raised by the Trustee. Both the Trustee
15 and the Debtors filed supplemental briefs.

16 **Issues Presented.** This "powder keg" was ignited by the fact that the Debtors
17 have, since confirmation of their initial plan, enjoyed a significant increase in monthly
18 income and substantially reduced their monthly mortgage expense, but have
19 correspondingly increased their monthly living expenses to more than compensate for the

20
21 ⁵Prior to the initial hearing, the Debtors did file amended schedules I and J. The amended
22 schedules disclose an increase in "combined average monthly income" from \$7,751.49 to
23 \$8,499.10, an increase of \$747.61. They also reflect the lower mortgage payment on their
24 residence and many of the increased living expenses referred to in the Debtors' Motion. After
25 allowing for the increased income and offsetting expenses, amended schedule J states that the
Debtors have a monthly net income of \$490.47. The Debtors again amended schedules I and J
after the continued hearing, on November 4, 2013. The amended schedules show a monthly net
income of \$500.04.

26 ⁶The Debtors' expense records were not filed with the court. At the hearing, the Debtors'
27 counsel acknowledged that some of the records provided to document the "food" expense
28 included the purchase of non-food items, such as pots and pans. The Trustee also notes that the
Debtors are "eating out all the time." Hr'g Tr. 6:19, Oct. 2, 2013.

1 savings. The Trustee contends, based on the “totality of the circumstances” that the
2 Debtors’ failure, or refusal, to commit at least some of the saved money to their unsecured
3 creditors constitutes a lack of the “good faith” which they must show to modify a
4 confirmed plan. § 1325(a)(3) made applicable here by § 1329(b)(1).

5 In response, the Debtors take issue with the good faith objection because the
6 modified plan does not decrease the 0% distribution offered to the creditors in the original
7 confirmed plan. The Debtors question whether it is appropriate for the Trustee to raise
8 the “good faith” objection and seek an increase in the distribution to unsecured creditors
9 when the only modification proposed in the Plan is to accommodate the modified
10 mortgage. They contend that the “good faith” test has been satisfied because their
11 increased living expenses are “reasonable and necessary” and request an evidentiary
12 hearing to prove the point. The Trustee does not contend that the amended schedules do
13 not reflect the Debtors actual living expenses. For purposes of this Memorandum the
14 court will assume, without finding, that the expenses stated in amended schedule J reflect
15 the actual living expenses.

16 **Analysis and Conclusions of Law.**

17 When the Debtors confirmed their initial chapter 13 plan, the distribution to
18 unsecured creditors was a function of the debtor’s “projected disposable income.”
19 § 1325(b)(1)(B). The term “projected disposable income” is a number that is calculated
20 through the Means Test based on the debtor’s income and various allowed deductions.
21 The Means Test determines, *inter alia*, which statutes will govern the calculation of
22 “disposable income,” how much the debtors must pay to their unsecured creditors, and
23 how long the debtors’ chapter 13 plan must provide for those payments.

24 The Means Test was created as part of BAPCPA, which Congress enacted “to
25 correct perceived abuses of the bankruptcy system” and to “help ensure that debtors who
26 *can pay creditors do pay them.*” *Ransom v. FIA Card Services, N.A. (In re Ransom)*, 131
27 S.Ct 716, 721 (2011) (emphasis in original, citations omitted). The deductions allowed
28 on the Means Test are governed by statute and the Internal Revenue Service guidelines

1 and the court has limited discretion to vary those deductions. The Means Test was
2 designed by Congress “to measure debtors’ disposable income and, in that way, ‘to
3 ensure that [they] repay creditors the maximum they can afford.’” *Id.* at 725.

4 The Bankruptcy Code gives the court some discretion to allow an additional
5 “special circumstance” expense when there is a true need for the expense due to
6 circumstances which are clearly beyond the debtor’s control and for which there is no
7 reasonable alternative. Cases in which the courts have allowed the deduction of extra
8 expenses usually involve extraordinary situations, “which not only put a strain on a
9 debtor’s household budget, but they arise from circumstances normally beyond the
10 debtor’s control.” *Egebjerg v. United States Trustee (In re Egebjerg)*, 574 F.3d 1045,
11 1053 (9th Cir. 2009) (citation omitted).

12 The Debtors long ago confirmed a chapter 13 plan, without objection from the
13 Trustee, which presumably satisfied the “disposable income” test as governed by
14 § 1325(b)(1)(B). The Debtors now seek to modify that plan. Pursuant to § 1329(b), the
15 “projected disposable income” test of § 1325(b)(1)(B) is no longer an absolute
16 requirement. *See Sunahara v. Burchard (In re Sunahara)*, 326 B.R. 768, 781 (9th Cir.
17 BAP 2005). However, it is fundamental that modification of a confirmed chapter 13 plan
18 must be sought in “good faith.” § 1325(a)(3). The Debtors have the burden of proof here.
19 Good faith must be determined based on the totality of the circumstances and the “total
20 circumstances” analysis includes “important components of the disposable income test
21” *Id.* In other words, once a chapter 13 plan is confirmed, the question of
22 “disposable income” merges into the “good faith” analysis which “necessarily requires an
23 assessment of a debtor’s overall financial condition including, without limitation, the
24 debtor’s current disposable income” *Id.* at 781-82.

25 One of the “good faith circumstances” which the court must consider here is the
26 mandate that debtors who can pay their creditors should pay their creditors. *In re*
27 *Ransom*, 131 S. Ct. at 721. True, the Supreme Court’s often quoted statement in *Ransom*
28 was made in reference to the chapter 13 means test, which is not literally applicable here,

1 however there is no reason why the policy issues in favor of paying creditors should
2 evaporate once the initial plan is confirmed, and it is not inappropriate for the Trustee to
3 raise the issue here. Indeed, the Trustee has stated his intention to move for a hostile plan
4 modification to increase the plan payment if the court grants the Debtors' Motion. Such
5 "hostile" action is authorized under the Bankruptcy Code and may be appropriate when a
6 debtor's financial situation substantially improves:

7 Thus, part of the statutory bargain inherent in chapter 13 is that the
8 debtors must, for the prescribed life of the plan, run the gauntlet of
9 exposure to trustee or creditor requests to increase payments.
10 BAPCPA, by creating a debtor's duty to make information available
to those who could propose modifications, actually reinforced this
aspect of the statutory bargain.

11 *Fridley v. Forsythe (In re Fridley)*, 380 B.R. 538, 544 (9th Cir. BAP 2007).

12 Here, the Debtors' initial plan was confirmed based on a "projected disposable
13 income" as determined in the Means Test. Now that the Debtors are trying to modify
14 their confirmed plan, they want to jettison the Means Test deductions completely and
15 move forward with a Plan payment based on their actual living expenses. The Debtors
16 request an opportunity for an evidentiary hearing to prove that their actual living expenses
17 are "reasonable and necessary"; however, it is undisputed that the current actual living
18 expenses greatly exceed the statutory expenses allowed for confirmation of the initial
19 plan. With the enactment of BAPCPA, Congress clearly intended that debtors who seek
20 bankruptcy relief, and whose lifestyle may interfere with the ability to fully pay their
21 creditors, must be prepared to make some adjustments to their lifestyle in a good faith
22 effort to repay the creditors as much as they can afford. This duty continues so long as a
23 debtor enjoys the protection of chapter 13.

24 The Debtors have enjoyed a substantial increase in their monthly income, which
25 arguably compensates for a reasonable increase in their cost of living, the Trustee's
26 Objection is not based on the increased income. They have also negotiated a
27 modification of their mortgage which will, hopefully, improve the ability to keep their
28 home. The combined monthly benefit from these two events is more than \$2,400. Yet,

1 the Debtors are not willing to share any of this benefit with their unsecured creditors, and
2 are essentially asking the creditors to fund the cost of their comfortable lifestyle, a
3 lifestyle they weren't allowed under the Means Test. The record is devoid of any
4 evidence to suggest that the Debtors, who are no longer constrained by the statutory
5 Means Test, have made any adjustments to their lifestyle in an effort to pay the unsecured
6 creditors as much as they reasonably can. There is no showing upon which the court can
7 even infer that the increased monthly living expenses are due to circumstances beyond
8 their control.⁷ Absent such a showing, the court cannot find that the modified Plan is
9 proposed in good faith.

10 **Conclusion.**

11 Based on the foregoing, the Trustee's Objection will be sustained. The Debtors'
12 Motion to modify the confirmed chapter 13 plan will be denied, subject to the parties'
13 ability to negotiate a compromise within 14 days.

14 Dated: November 8, 2013

15
16 W. Richard Lee
17 W. Richard Lee
18 United States Bankruptcy Judge
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23 ⁷The Debtors increased their average home maintenance and utility expense by \$800 per
24 month based on the need for roof repairs and electricity bills for two of the hottest months of the
25 year. There is no evidence to show what roof repairs are required or what they might cost. The
26 court accepts the fact that hot weather in the summer months and the need for roof repairs may
27 constitute an unusual circumstance, but they are essentially short term problems and cannot be
28 used as a basis for determining average expenses over the remaining life of the Plan. At the
same time, the Debtors attribute the entire increase in food expense, \$650 per month, to the
eating habits of their teenage son. They offer no supporting evidence to show what, where and
how much food their son actually consumes.