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In re Case No. 09-16492-A-7
LAURA MACIEL LEON and DC No. GMA-1
GUILLERMINA NAVARRO DE MACIEL
Debtor.

A hearing was held August 26, 2010, on the motion of the debtors to confirm their first modified plan (the "Modified Plan"). The chapter 13 trustee opposed confirmation of the Modified Plan. The court set a post-hearing briefing schedule, and the matter was deemed submitted as of September 9, 2010. This memorandum contains findings of fact and conclusions of law required by Federal Rule of Bankruptcy Procedure 7052 and Federal Rule of Civil Procedure 52. This is a core proceeding as defined in 28 U.S.C. §157(b) (2) (A) and (L).

The debtors filed their chapter 13 case on July 10, 2009. Along with the petition, they filed a chapter 13 plan. The plan was confirmed without objection, by order entered October 5, 2009.

The Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income ("Form B-22") was filed with the petition. Form B-22 shows that the

1 debtors are above median debtors, but that their monthly
2 disposable income under Bankruptcy Code § 1325(b)(2) is a
3 negative number. Therefore, they were not required in their plan
4 to make payments to unsecured creditors. In fact, the initial
5 plan confirmed in the case shows a 0% dividend to unsecured
6 creditors.

7 The chapter 13 trustee's opposition to confirmation of the
8 Modified Plan shows the differences between the original plan and
9 the Modified Plan. In the original plan, the creditor holding
10 the deed of trust on the debtors' home was treated in Class 1.
11 At that time, the creditor was shown as "Homecome Financial."
12 That loan is now apparently held by GMAC Mortgage, LLC ("GMAC").

13 In the original plan, the prepetition arrears to this
14 creditor were shown as \$7,000, and the trustee was responsible
15 for paying the monthly contract installment of \$941.58.

16 In the Modified Plan, there are no Class 1 creditors.

17 In the original plan, GMAC secured by a 2008 Chevrolet was
18 classified in Class 2 and given a monthly dividend of \$836.04.
19 Snap On Credit was also treated as a Class 2 creditor with a
20 monthly dividend of \$18.53. Apparently, in the Modified Plan,
21 the GMAC claim was given accelerated payments of \$985 per month.¹
22 Snap On Credit has been deleted from the Modified Plan.

23 Both the Modified Plan and the original plan show the same
24

25 ¹The trustee's opposition to confirmation of the Modified
26 Plan shows a payment to GMAC on the car loan of \$985 a month.
27 The debtors did not dispute that number at the hearing. However,
28 the copy of the Modified Plan filed with the court does not
include the attachment describing how GMAC will be paid on the
car loan under the Modified Plan.

1 Class 3 creditor, City Auto, as holding collateral that is being
2 surrendered.

3 In the original plan, there are no Class 4 creditors. In
4 the Modified Plan, GMAC is shown as a Class 4 creditor whose
5 claim will be paid directly by the debtors in the amount of
6 \$797.95 a month with a maturity date of 2037.

7 The debtors state in their motion to confirm the Modified
8 Plan that the purpose of filing the Modified Plan is that the
9 debtors have entered into a loan modification agreement with GMAC
10 to reduce the amount of their monthly payments and to capitalize
11 the arrears provided for originally in the chapter 13 plan. The
12 debtors state that GMAC required that a motion to modify the
13 chapter 13 plan to reflect the terms of the loan modification be
14 filed. The debtors indicate that the Modified Plan reduces the
15 monthly payments to GMAC. Originally, those payments under the
16 initial plan were a monthly contract installment of \$941.58 a
17 month plus a monthly dividend of \$150 per month as payment on the
18 arrearage. After the loan modification with GMAC, the monthly
19 contract payment will be \$797.95 a month.

20 Additionally, on June 4, 2010, a document entitled
21 "Stipulation Re: Loan Modification Agreement and Order Thereon"
22 (the "Loan Modification Stipulation") was filed. Curiously, the
23 document was filed by U. S. Bank National Association as Trustee
24 for RASC 2006KS2. Nonetheless, the Modified Plan shows the
25 affected creditor as GMAC Mortgage, LLC. Attached as an exhibit
26 to the Loan Modification Stipulation is a document entitled
27 "Fixed Rate Loan Modification Agreement." That agreement is
28 between the debtors and GMAC, and states that the lender is GMAC.

1 In any event, the debtors have entered into a loan modification
2 agreement with the holder of the first deed of trust on their
3 residence, whoever that lender may be.

4 The proof of claim for the loan was filed September 24,
5 2009, by "U. S. Bank National Association as Trustee for RASC
6 2006KS2." This is the same entity that filed the Loan
7 Modification Stipulation. The proof of claim also refers to GMAC
8 Mortgage, LLC, and states that the claim is secured by the
9 debtors' residence at 430 Alta Vista Street, Porterville, CA.
10 This is the same property referred to in the plan and in the
11 Fixed Rate Loan Modification Agreement. The proof of claim filed
12 September 24, 2009, states that the amount of the secured claim
13 is \$201,269.77.

14 The Fixed Rate Loan Modification Agreement states that as of
15 the effective date, the principal balance is \$114,249.61.

16 Looking at the proof of claim, showing a secured claim of
17 over \$200,000, and at the Fixed Rate Loan Modification Agreement,
18 showing a principal balance of \$114,249.61, it appears at first
19 that the loan modification may have resulted in a significant
20 benefit to the debtors. On the other hand, the debtors scheduled
21 the creditor as having a secured claim of \$106,404 and the note
22 attached to the proof of claim shows an initial obligation of
23 \$107,000. Therefore, it would appear that the most likely
24 explanation is that the proof of claim was simply in error.

25 The maturity date of the initial obligation was January 1,
26 2036, according to the note attached to the proof of claim. The
27 maturity date of the Fixed Rate Loan Modification Agreement is
28 the same. Therefore, under the Fixed Rate Loan Modification

1 Agreement, the debtors have a lower monthly payment and the same
2 maturity date.

3 The initial obligation was an adjustable rate note that
4 began at 8.1%. The interest rate under the Loan Modification
5 Agreement is a fixed rate of 7%. The debtors state in their
6 response to the trustee's objection to confirmation of the
7 Modified Plan that:

8 "Essentially, Debtors will be required to pay the arrears
9 once to the unsecured creditors and again to the mortgage
10 creditor at the end of their modified mortgage, effectively
11 doubling the cost of curing the arrears. By requiring the
12 plan to continue for 60 months, the Court would create a
13 strong disincentive to future debtors seeking modification
14 of mortgages during Chapter 13 plans. If debtors delay
15 modification until after the completion of the Chapter 13
16 plans, there is no guarantee that the current modification
17 programs will be available. Delaying modification efforts
18 may result in the loss of the ability to modify, thus
19 thwarting future debtors' fresh start."

20 In the initial plan, the debtors paid the trustee \$2,151 per
21 month, of which \$941.58 a month was for payment of the mortgage
22 that the debtors now propose to pay outside the plan. The
23 debtors propose to pay to the trustee the sum of \$1,200 a month
24 pursuant to the Modified Plan commencing July 25, 2010. The
25 original plan had a commitment period of 60 months, while the
26 Modified Plan has a term of 51 months.

27 The Modified Plan states that the trustee has distributed
28 \$11,129.64 to GMAC Mortgage, LLC, and that the trustee will not
be required to recover those funds and nor will the creditor be
required to return those funds to the trustee. Of course, a
significant portion of those funds goes to the ongoing monthly
payment. To the extent that those funds were for the arrearage,
neither the Modified Plan nor the Fixed Rate Loan Modification

1 Agreement state how, if at all, those payments are applied.

2 The Trustee's Opposition.

3 The trustee argues:

4 "In the present case, the only factor for modification of
5 the Chapter 13 plan is due to the fact the debtors modified
6 their home loan. As a result, the debtors now have
7 disposable income on their schedule I and J. This should be
8 used to pay the unsecured creditors in their case. There is
9 \$19,164.00 of unsecured creditors. If the debtors continue
10 to pay for the balance of the 60 months, the unsecured
11 [creditors] will receive that disposable income."

12 The trustee points out that the Modified Plan accelerates
13 the payment on a \$45,000 vehicle instead of using the funds to
14 pay unsecured creditors. According to the trustee, the original
15 commitment period was 60 months and the Modified Plan should not
16 change that commitment period.

17 The debtors, on the other hand, argue that they are taking
18 on additional personal burden by having capitalized the arrearage
19 on their deed of trust. Therefore, they argue they should not be
20 required to pay unsecured creditors anything and should be
21 allowed to reduce the commitment period to 51 months.

22 Applicable Law.

23 Bankruptcy Code § 1329 governs modification of a confirmed
24 plan. It states that a confirmed plan may be modified upon the
25 request of the debtor or the trustee or the holder of an
26 unsecured claim to increase or reduce the amount of payments on
27 claims; to extend or reduce the time for such payments; or to
28 alter the amount of the distribution to a creditor.

29 The parties agree that the debtor has the burden to prove by
30 a preponderance of the evidence that the Modified Plan complies
31 with the requirements of § 1329.

1 Courts have differed about what showing must be made for a
2 chapter 13 plan to be modified. In re Anderson addressed this
3 issue in dicta. 21 F. 3d 355 (9th Cir. 1994). There, the Ninth
4 Circuit stated in dicta that the party seeking modification of a
5 confirmed plan "must bear the burden of showing a substantial
6 change in the debtor's ability to pay since the confirmation
7 hearing and that the prospect of the change had not already been
8 taken into account at the time of confirmation." Id. at 358.

9 On the other hand, the Ninth Circuit Bankruptcy Appellate
10 Panel addressed the issue slightly differently in In re Powers,
11 202 B.R. 618 (9th Cir. BAP 1996). Observing that the Anderson
12 statement quoted above was dicta, the BAP declined to hold that a
13 substantial and unanticipated change in circumstances was
14 required to modify a confirmed plan. The BAP stated:

15 "In sum, the only limits on modification are those set forth
16 in the language of the Code itself, coupled with the
17 bankruptcy judge's discretion and good judgment in reviewing
18 the motion to modify. . . . Although changed circumstances
19 are not a prerequisite to modification, the court may
20 properly consider them in exercise of its discretion."

21 The Powers view was reiterated in In re Pak, 378 B.R. 257,
22 268 (9th Cir. BAP 2007).²

23 This court will exercise its discretion to consider the
24 debtors' circumstances in ruling on confirmation of the Modified
25 Plan.

26 We will first address the length of the Modified Plan.

27 ²The overall holding of Pak was disapproved by the Ninth
28 Circuit decision of In re Kagenveama, 541 F.3d 868 (9th Cir.
2008). However, now that the United States Supreme Court has
decided Lanning, the Pak decision has renewed viability.
Hamilton v. Lanning, 650 U.S. ____ (2010).

1 Section 1329(b)(1) states that § 1322(a), 1322(b), and 1323(c),
2 and the requirements of § 1325(a) apply to any modification of a
3 confirmed plan. The requirement that an above median income
4 debtor have an applicable commitment period in its plan of not
5 less than five years is found at § 1325(b)(4). That subsection
6 is not included in the requirements for plan modification. In
7 this case, however, the debtors had a negative monthly disposable
8 income (See their Form B-22 at line 59). The Ninth Circuit
9 stated in Kagenveama that the requirement of a five year
10 "applicable commitment period is inapplicable to a plan submitted
11 voluntarily by a debtor with no projected disposable income." In
12 re Kagenveama, 541 F.3d 868, 875 (9th Cir. 2008). While Lanning
13 disapproved Kagenveama's holding about how "projected disposable
14 income" should be calculated, it did not disturb the Ninth
15 Circuit's holding in Kagenveama that where there is no "projected
16 disposable income, there is no applicable commitment period."

17 The debtors here in their initial plan chose to, but were
18 not required to, propose a plan that extended for 60 months.
19 Now, they seek to shorten the term to 51 months.

20 The trustee asks the court to consider the 11th Circuit
21 decision of In re Tennyson, 611 F.3d 873 (11th Cir. 2010). Terry
22 Tennyson was an above median income debtor. However, based on
23 the Form B-22 formula, his disposable income was a negative
24 \$349.30. The 11th Circuit decided Tennyson after and in light of
25 the Supreme Court decision in Lanning. The 11th Circuit squarely
26 disagreed with Kagenveama about the applicable commitment period
27 for above median debtors who yet have a negative disposable
28 income. According to the 11th Circuit in Tennyson, "Section

1 1325(b)(4) clearly shows that the 'applicable commitment period'
2 shall be five years for an above median income debtor, such as
3 Tennyson. Id. at 877. "The plain reading of § 1325(b)(4)
4 indicates that an above median income debtor, such as Tennyson,
5 is obligated to form a bankruptcy plan with an 'applicable
6 commitment period' of no less than five years, unless his
7 unsecured debts are paid in full." Id.

8 In other words, the 11th Circuit found compelling the
9 argument that the phrase "applicable commitment period" be read
10 as a temporal requirement for the length of a bankruptcy plan for
11 an above median income debtor, regardless of that debtor's
12 disposable income. The Tennyson court thus disagrees completely
13 with the 9th Circuit in Kagenveama.

14 The Tennyson court concluded that its interpretation was
15 bolstered by the Supreme Court's decision in Lanning. The 11th
16 Circuit stated:

17 "Lanning opens the door for the possibility that the final
18 projected disposable income accepted by the bankruptcy court
19 may not be the result of a strict § 1325(b)(1)(B)
20 calculation. The 'applicable commitment period' must have
21 an existence independent of the § 1325(b)(1)(B) calculation.
22 If 'applicable commitment period' were left dependent upon
23 projected disposable income, as Tennyson recommends, then it
24 would necessarily be dependent on the multitude of
25 indeterminate factors that Lanning has allowed to be used in
26 the determination of projected disposable income. This in
27 turn would leave 'applicable commitment period' an
28 indeterminate term. In order for 'applicable commitment
period' to have any definite meaning, its definition must be
that of a temporal term derived from § 1325(b)(4) and
independent of § 1325(b)(1)." Id. at 878-879.

25 But, however persuasive that argument may be, we are in the
26 9th Circuit, and the portion of Kagenveama that addresses the
27 meaning of the phrase "applicable commitment period" is not
28 disturbed the Supreme Court's decision in Lanning.

1 Also, the statutory requirement of a 60 month commitment
2 period does not apply to a plan modified after confirmation under
3 § 1329. The court has found no case law to the contrary. In re
4 Tennyson does not address the question of post confirmation
5 modification.

6 On the other hand, the trustee has also objected that the
7 Modified Plan has not been filed in good faith. Here also the
8 debtors have the burden of proof.

9 Under all the circumstances, the court is not persuaded that
10 the debtors have met their burden of proof on the issue of good
11 faith. The Loan Modification Stipulation allows the debtors a
12 lower monthly payment on their mortgage while maintaining the
13 same maturity date. This, then, is a net benefit for the
14 debtors. They use this change in their circumstances as a reason
15 to modify their 60 month plan to 51 months and increase the rate
16 at which the creditor secured by their 2008 Chevrolet Tahoe is
17 paid on its \$45,000 claim. The debtors' mortgage payments under
18 the Loan Modification Stipulation are \$797.95 a month. The
19 payments proposed to the chapter 13 trustee are \$1,200 a month.
20 These numbers total \$1,997.95 per month.

21 Under the initial plan, the debtors made payments of \$2,151
22 per month. This is \$153.05 more than they are now proposing to
23 pay. The debtors have not explained why this amount should not
24 be used to pay unsecured creditors for the balance of the term of
25 their plan. Under the circumstances, the court cannot conclude
26 that reducing the commitment period to 51 months; reducing the
27 payments to the chapter 13 trustee; or increasing the payments to
28 the creditor secured by the Chevrolet Tahoe, is in good faith or

1 warranted by or necessitated by the Loan Modification
2 Stipulation.

3 For the foregoing reasons, the motion to confirm the
4 Modified Plan will be denied.

5 The court will defer entering an order denying the motion to
6 confirm the Modified Plan to allow the chapter 13 trustee and the
7 debtors an opportunity to attempt to arrive at a consensual order
8 allowing the Modified Plan to be confirmed without further
9 hearing.

10 DATED: October 4, 2010

11 /s/

12 WHITNEY RIMEL, Judge
13 United States Bankruptcy Court
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