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4 UNITED STATES BANKRUPTCY COURT
5 EASTERN DISTRICT OF CALIFORNIA
6 MODESTO DIVISION
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12 In re) Case No. 05-93390-A-13G
13 MICHAEL and MARILYN VALGOS,) Docket Control No. RDG-1
14)
15 Debtors.) Date: March 6, 2006
16) Time: 2:00 p.m.
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17 **MEMORANDUM¹**

18 The chapter 13 trustee's objection that the plan proposed by
19 Michael and Marilyn Valgos ("the Debtors") does not satisfy 11
20 U.S.C. § 1325(b) will be sustained.

21 According to the Debtors' Official Form 22C, their current
22 monthly income exceeds the applicable median income. Therefore,
23 the Debtors completed Official Form 22C in its entirety in order
24 to project their disposable income for the life of the proposed
25 plan. See 11 U.S.C. §§ 707(b)(2)(A) and (B) & 1325(a)(3).

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27 ¹ This Memorandum supplants the court's earlier
28 Memorandum insofar as it dealt with the trustee's objection under
11 U.S.C. § 1325(b).

1 According to these calculations, the Debtors have monthly
2 projected disposable income of \$849.13.

3 Because the trustee has objected, and because the plan does
4 not propose to pay unsecured claims in full, the projected
5 \$849.13 must "be applied to make payments to unsecured creditors
6 under the plan." See 11 U.S.C. § 1325(b) (1) (B).

7 The plan, however, does not carve out this \$849.13, or any
8 other amount, for unsecured creditors each month of the 60-month
9 commitment period. Nonpriority unsecured creditors will be paid
10 nothing. Therefore, it seems clear that the plan cannot be
11 confirmed consistent with section 1325(b).

12 The Debtors nonetheless argue that the proposed plan does
13 not violate section 1325(b).

14 According to the Debtors' Official Form 22C, during the six
15 months prior to the filing of the petition, one of the Debtors,
16 Mr. Valgos, received a monthly disability benefit. The Debtors
17 assert that this benefit will end in the near future and
18 therefore the court should adjust their current monthly income
19 downward. The Debtors have failed, however, to point to any
20 provision in section 1325(b) that permits the court to make such
21 an adjustment.

22 Assuming an objection by the trustee or an unsecured
23 creditor, section 1325(b) (1) requires a chapter 13 debtor, not
24 paying unsecured creditors in full, to pay "all of the debtor's
25 projected disposable income to be received" during the plan's
26 "applicable commitment period" into the plan for payment to
27 "unsecured creditors."

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1 Section 1325(b) (4) defines the "applicable commitment
2 period." For a debtor over the applicable median income, like
3 the Debtors in this case, the applicable commitment period is not
4 less than five years.

5 Section 1325(b) (2) defines disposable income as "current
6 monthly income received by the debtor . . . less amounts
7 reasonably necessary" for the maintenance and support of the
8 debtor and the debtor's dependents, and for the continuation,
9 preservation, and operation of a business operated by the debtor.

10 "Current monthly income" is defined by 11 U.S.C. § 101(10A)
11 as the average of a debtor's income from all sources, without
12 regard to whether it is taxable, but excluding benefits received
13 under the Social Security Act, for the six-month period preceding
14 the filing of the petition.

15 Thus, section 1325(b) (2) requires that a debtor's
16 anticipated living and business expenses be deducted from an
17 historical average of the debtor's pre-petition income, and not
18 from the debtor's actual income on the date the petition is filed
19 or from some estimation of the debtor's future income.

20 To further complicate matters, section 1325(b) (3) provides
21 that if a debtor's current monthly income exceeds the applicable
22 median income, the amounts reasonably necessary to be expended
23 for the debtor's maintenance, support, and business under section
24 1325(b) (2) must be calculated pursuant to 11 U.S.C. §
25 707(b) (2) (A) & (B). That is, the debtor's expenses will be
26 limited to those permitted under the means test used in chapter 7
27 cases.

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1 In the chapter 7 context, the means test found at section
2 707(b) (2) applies to a chapter 7 debtor whose current monthly
3 income exceeds the applicable median income. When triggered, the
4 means test limits the amount of the expenses that may be deducted
5 from current monthly income. See 11 U.S.C. § 707(b) (2) (A)). See
6 also Official Form 22A, Part V. The permissible expense
7 deductions are laid out in section 707(b) (2) (A) (ii) - (iv).

8 For some expenses, primarily living, housing, and
9 transportation expenses, the limits imposed by the means test are
10 based on standards used by the Internal Revenue Service when
11 negotiating compromises with taxpayers owing delinquent taxes.
12 See 11 U.S.C. § 707(b) (2) (A) (ii) (I). However, a chapter 7 debtor
13 may, if reasonably necessary, supplement the amounts allowed
14 under the Internal Revenue Service standards for food and
15 clothing [up to five percent over what is permitted by the
16 National Standards] and for utilities [actual home energy costs].
17 See 11 U.S.C. § 707(b) (2) (A) (ii) (I) & (V).

18 Some actual expenses may be deducted under the means test,
19 albeit subject to a cap. For example, a chapter 7 debtor's
20 expenses may include up to \$1,500 in annual education expenses
21 for a minor child. See 11 U.S.C. § 707(b) (2) (ii) (IV).

22 Provided they meet the basic requirement of being reasonable
23 and necessary, other actual expenses may be deducted without
24 limitation. For example, a chapter 7 debtor may deduct all
25 expenses that are reasonably necessary for the care and support
26 of an elderly, chronically ill, or disabled household member or a
27 member of the debtor's immediate family. See 11 U.S.C. §
28 707(b) (2) (ii) (II).

1 Other actual expenses of a chapter 7 debtor may be deducted
2 but the means test requires that they be amortized over a 60-
3 month period. Amounts owed to secured and priority creditors are
4 calculated on this basis. See 11 U.S.C. § 707(b)(2)(iii) & (iv).

5 If, after making the permissible deductions from current
6 monthly income, the remaining current monthly income is less than
7 \$100 [or less than \$6,000 over five years], a chapter 7 debtor is
8 not presumptively abusing chapter 7 relief. If the remaining
9 amount is equal to or greater than \$166.67 [or \$10,000 or more
10 over five years], the debtor is presumptively abusing chapter 7
11 relief. If the remaining current monthly income is more than
12 \$100 but less than \$166.67, and is sufficient to pay a 25%
13 dividend over a five-year period on priority unsecured claims,
14 the debtor is presumptively abusing chapter 7 relief. See 11
15 U.S.C. § 707(b)(2)(A)(i)(I); Official Form 22A, Part VI.

16 A chapter 7 debtor who flunks the means test may attempt to
17 rebut the resulting presumption of abuse. Section 707(b)(2)(B)
18 explains how the debtor may rebut the presumption.

19 A debtor must prove that he or she is laboring under
20 "special circumstances," such as a serious medical condition or
21 active duty in the military, that warrant either, or both, the
22 deduction of additional expenses from current monthly income, or
23 adjustments to the debtor's current monthly income. See 11
24 U.S.C. § 707(b)(2)(B)(i). The economic impact of these further
25 expense deductions or income adjustments must result in the
26 debtor passing the means test. See 11 U.S.C. § 707(b)(2)(A)(i).

27 The Debtors in this case are arguing that there should be a
28 chapter 13 corollary to rebutting the presumption of abuse in a

1 chapter 7 case. That is, a chapter 13 debtor with current
2 monthly income over the applicable median income should be
3 permitted to demonstrate that his or her disposable income will
4 be less than projected under section 1325(b) because of the
5 debtor's special circumstances.

6 There are two problems with this argument.

7 First, in order to merit an adjustment to income and/or
8 expenses, a chapter 7 debtor must document under oath all
9 adjustments and provide a detailed explanation of the special
10 circumstances making those adjustments both reasonable and
11 necessary. See 11 U.S.C. § 707(b) (2) (B) (ii) & (iii).

12 The Debtors in this case have not filed anything, nor asked
13 leave to file anything, under oath or otherwise, documenting
14 either "special circumstances" or reasonably necessary
15 adjustments to income or expenses warranted by any special
16 circumstances.

17 The Debtors have asserted through their attorney that Mr.
18 Valgos' monthly disability benefit of \$1,740 will end sometime
19 during the plan. When will it end? Does the termination of the
20 benefit mean that Mr. Valgos is no longer disabled and may return
21 to work? If he returns to work, how much will he earn? If the
22 disability benefit will end, even though Mr. Valgos remains
23 disabled, will it be replaced by some other type of benefit?
24 Would the definition of current monthly income at section
25 101(10A) exclude any replacement benefit from current monthly
26 income?

27 The fact that Mr. Valgos has received disability benefits
28 may indicate that he is laboring under a special circumstance

meriting a downward income adjustment, at least in a chapter 7 case. However, the fact that those benefits will end, could also mean that his disability has ended or will end.

Assuming it is authorized by section 1325(b) to make a downward income adjustment to a chapter 13 debtor's current monthly income, the court will not do so without more specific and documented information concerning the debtor's special circumstances.

Second, while section 1325(b) refers to section 707(b) (2) (B), it does not incorporate section 707(b) (2) (B) into chapter 13 in its entirety. The only reference to section 707(b) (2) (B) in section 1325(b) appears in paragraph (b) (3), providing that "[a]mounts reasonably necessary to be expended under paragraph (2) [of section 1325(b)] shall be determined in accordance with subparagraphs (A) and (B) of section 707(b) (2)." That is, when deducting expenses from current monthly income, a chapter 13 debtor may deduct only those expenses permitted by section 707(b) (2) (A) as adjusted under section 707(b) (2) (B) in order to take into account the debtor's special circumstances.

But, nothing in section 1325(b) (3) authorizes the court to make adjustments to current monthly income, the reference to section 707(b) (2) (B) notwithstanding. The introductory language of section 1325(b) (3) gives context to this reference. Section 1325(b) (3) permits the application of section 707(b) (2) (B) only to determine "amounts reasonably necessary to be expended" on the debtor's and the debtor's dependents' maintenance and support as well as the debtor's business.

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1 Essentially, section 1325(b)(1) specifies whether a chapter
2 13 plan must provide for the payment of all projected disposable
3 income to unsecured creditors. When it must be paid, paragraphs
4 (2), (3), and (4) of section 1325(b) provide the equation to
5 project disposable income and the period of time it must be paid
6 to unsecured creditors. That equation has three variables: (1)
7 the length of the plan; (2) the debtor's future income; and (3)
8 the debtor's ongoing personal living and business expenses.

9 The mandatory length of a plan is the "applicable commitment
10 period," the period during which unsecured creditors must receive
11 the debtor's projected disposable income. For a debtor with
12 current monthly income in excess of the applicable median income,
13 section 1325(b)(4) requires a commitment period of five years.

14 Section 1325(b)(2) requires that a chapter 13 debtor's
15 future disposable income be predicted from the "current monthly
16 income received by the debtor. . . ." Given the definition of
17 current monthly income in section 101(10A), this prediction must
18 be based on the debtor's average income received over the six-
19 month period immediately preceding the filing of the petition.
20 Beyond permitting the court to exclude child support payments,
21 foster care payments, or disability payments received by the
22 debtor for a dependent child, section 1325(b)(2) does not permit
23 the court to make adjustments to this six-month historical income
24 average.

25 Logic suggests that any authorization to make adjustments to
26 a chapter 13 debtor's current monthly income would be found in
27 section 1325(b)(2). It is the provision supplying the income
28 variable to the disposable income equation. Section 1325(b)(2)

1 incorporates the defined term, "current monthly income," and it
2 permits limited exclusions [child support, foster care,
3 disability payments received by the debtor for a dependent child]
4 from current monthly income. But, nothing in section 1325(b) (2)
5 permits the court to make the type of income adjustment suggested
6 by the Debtors in this case.

7 From current monthly income, a chapter 13 debtor may deduct
8 reasonably necessary living and business expenses. See 11 U.S.C.
9 § 1325(b) (2) (A) (i) & (B). If the debtor's current monthly income
10 equals or is less than the applicable median income, what is
11 reasonable and necessary is left to the discretion of the court.
12 If the debtor's current monthly income exceeds the applicable
13 median income, these expenses are calculated using the means test
14 set out in section 707(b) (2) (A) with the proviso that the debtor
15 may show, under section 707(b) (2) (B), that special circumstances
16 warrant a downward adjustments to expenses. See 11 U.S.C. §
17 1325(b) (3) .

18 To the extent the Debtors believe that they should be
19 permitted to make a downward adjustment to their future income,
20 their recourse lies, not in asking the court to ignore what
21 Congress has written, but in persuading the trustee to abandon
22 his objection. After all, section 1325(b) has become an issue
23 only because the trustee raised the objection. He is not
24 required to raise the objection. Thus, if the Debtors' can
25 convince the trustee that the statutory formula does not
26 accurately predict their future income, the trustee may not
27 pursue the objection further.

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1 Application of section 1325(b) to this case compels the
2 conclusion that the Debtors' plan must provide for the payment of
3 all projected disposable income to unsecured creditors. It does
4 not do so. Therefore, the trustee's objection that the plan does
5 not comply with section 1325(b) will be sustained. The trustee
6 shall lodge a proposed order.

7 Dated:

8 By the Court

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11 Michael S. McManus, Chief Judge
12 United States Bankruptcy Court
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