IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Jamie Lynn Ballard and Bernadette Marie Ballard, Debtors.	C/A No. 07-03203-JW Chapter 13 **ORDER**

This matter come before the Court upon Chapter 13 Trustee William K. Stephenson, Jr.'s ("Trustee") objection to confirmation of Debtors' chapter 13 plan. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (L), and (O). Pursuant to Fed. R. Bankr. P. 7052, the Court makes the following Findings of Fact and Conclusions of Law.[1]

FINDINGS OF FACT

1. Jamie Lynn Ballard and Bernadette Marie Ballard ("Debtors") filed a petition for relief under chapter 13 of the Bankruptcy Code on June 14, 2007.

2. Debtors are above the median income for the State of South Carolina.

3. On June 29, 2007, Debtors filed a proposed chapter 13 plan ("Plan"). The Plan proposes to pay $580.00 per month for a period of 57 months to the Trustee. The distribution to unsecured creditors would be less than one-hundred (100%) percent. The Plan, though modeled after the chapter 13 form plan in this District,[2] contains additional language that seeks to bind Debtors' mortgage creditor to certain terms and to invoke the protections of 11 U.S.C. § 524(i).

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[1] To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

[2] See SC LBR 3015-1.

4. On July 4, 2007, Debtors filed an amended Statement of Current Monthly Income, which is a calculation of disposable income under the means test. In calculating disposable income, Debtors reduced their monthly income[3] by $210.00 for telecommunication expenses, $305.00 for cigarette expenses, and $332.00 as an ownership expense for a second vehicle that Debtors own free and clear of liens. Debtors' disposable income, as determined by this form, is $363.14 per month.

5. Trustee opposes confirmation of Debtors' Plan on grounds that the additional language contained in the Plan is not permissible and that Debtors reduction in their income based upon the foregoing expenses is not permissible.

6. Debtors assert that the Trustee lacks standing to raise the issue regarding the additional language added to the Plan, that such additions are otherwise valid under the Bankruptcy Code, that the form plan in this District is invalid, and that they are allowed to deduct the foregoing expenses in calculating disposable income.

7. At the confirmation hearing on the Plan, Debtors and Trustee indicated that they settled the issue of the cigarette expenses and that, under the circumstances of this case, Debtors could deduct $150.00 per month for this expense.[4] The parties did not settle other issues but Trustee indicated a willingness to allow Debtors to insert language in their Plan similar to the language used in the chapter 13 form plan used in the Western District of North Carolina for purposes of invoking 11 U.S.C. § 524(i). Debtors accepted this offer following the confirmation hearing. Trustee also indicated that he would allow Debtors $200.00 per month in additional

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[3] On their amended Statement of Current Monthly Income, Debtors indicate that their "current monthly income" is $6,411.50; however, on Schedule I Debtors' actual monthly income is $6,137.07. It appears from these documents that Mr. Ballard's actual current income has diminished from the six-month pre-petition average.

[4] The Court makes no determination as to whether $150.00 per month for cigarettes is an allowed expense under the means test but accepts the parties' stipulation on the issue.

operating costs for the second vehicle given the age of the vehicle,[5] thus the parties are essentially disputing whether Debtors are entitled to an additional $132.00 per month for the second vehicle. At the hearing, Debtors also sought to claim an additional $260.00 per month for child care expenses. The Trustee also opposes this expense since it was not asserted until after he negotiated a reduction in Debtors' cigarette expenses.

8. Debtors presented testimony regarding the reasonableness of their telecommunication and childcare expenses.

9. Debtors submitted a second amended Statement of Current Monthly Income and amended their Schedule J to reflect the inclusion of the childcare expense and the reduction of the cigarette expenses. Debtors also adjusted the amount of the debt payment to cure the arrearage on their home, to maintain the contractual payments on their first automobile, and to pay priority claims resulting in a net increase of $436.10 in deductions claimed under the means test. With all of these changes, Debtors' second amended Statement of Current Monthly Income indicates that Debtors have no disposable income; however, their amended Schedule J indicates that they have $445.01 per month in disposable income, although this schedule does not appear to be a reflection of Debtors' actual current expenses since Debtors' expenses in different categories correspond to certain amounts allowed by the means test.

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[5] This allowance appears to arise as an "additional operating expense" allowed by the Internal Revenue Service. See Internal Revenue Manual, Financial Analysis Handbook, § 5.8.5.5.2(3). However, the expense does not appear to be recognized by the United State Trustee pursuant to its publication regarding allowed vehicle expenses. See www.usdoj.gov/ust/eo/bapcpa/20070201/bci_data/IRS_Trans_Exp_Stds_SO.htm (setting forth local standard deductions allowed by the means test). Nevertheless, some courts have allowed this expense when they have otherwise denied a debtor an "ownership expense" for a vehicle owned free and clear of liens. See In re Howell, 366 B.R. 153 (Bankr. D. Kan. 2007). For the reasons stated herein, this Court does not determine whether this additional expense is allowable.

CONCLUSIONS OF LAW

I. Standing

11 U.S.C. § 1302(b)(2)(B) expressly grants Trustee standing to appear and be heard at any hearing regarding the confirmation of Debtors' Plan. See In re Andrews, 49 F.3d 1404, 1406-1407 (9th Cir. 1995). Therefore, Trustee may oppose confirmation on any grounds allowed by Title 11, regardless of whether Trustee is adversely affected by particular provisions of the Plan. See In re Erwin, 10 B.R. 138, 139 (Bankr. D. Colo. 1981) ("[T]he clear language requiring the trustee to be 'heard' concerning confirmation leads to the inescapable conclusion that the trustee is a 'party in interest' with standing to object to confirmation."). The added language in the Plan appears to do more than invoke the protection of 11 U.S.C. § 524(i) but may impermissibly alter the rights of the mortgage creditor in violation of 11 U.S.C. § 1322(b)(2). Therefore, the Trustee has standing and may oppose confirmation regardless of whether the mortgage creditor has raised the issue. See Andrews, 49 F.3d at 1406-1407. See also, In re Washington, C/A No. 05-14835-W, slip op. (Bankr. D.S.C. Apr. 27, 2006) (noting that the court may also *sua sponte* deny confirmation of a chapter 13 plan that does not meet the requirements of 11 U.S.C. § 1325(a)).

II. Form Plan

Debtors raise various objections to the chapter 13 form plan utilized in this District and SC LBR 3015-1. Debtors did not offer evidence as to why their Plan must deviate from the form plan or how they would be prejudiced by its use. See In re Wright, C/A No. 04-03832-W, slip op. at 1-2 (Bankr. D.S.C. Jul. 16, 2004) (holding "without a showing of prejudice or material need for an exception prior to the filing of a plan, a plan must comply with Local Rule 3015-1…") (emphasis added). Despite their argument, much of Debtors' Plan is modeled after the

form plan utilized in this District and therefore Debtors cannot attack the validity of the form plan while seeking confirmation of the same provisions. See id. at 2. Furthermore, the local rule at issue permits additions to the chapter 13 form plan and therefore the Court rejects Debtors' argument that the form plan and local rule impermissibly restrict Debtors' ability to propose alternative plan provisions in a chapter 13 plan or that they otherwise violate Title 11.

With regard to the additional language,[6] Debtors and Trustee have agreed that Debtors may include the following language in Debtors' Plan:

> Confirmation of the plan shall impose a duty on the holders and/or servicers of claims secured by liens on real property to apply the payments received from the trustee on the prepetition arrearages, if any, only to such arrearages; to deem the prepetition arrearages as contractually cured by confirmation; to apply the direct mortgage payments, if any, paid by the trustee or by the debtor(s) to the month in which they were made under the plan or directly by the debtor(s), whether such payments are immediately applied to the loan or placed into some type of suspense account; to notify the trustee, the debtor(s) and the attorney for the debtor(s) of any changes in the interest rate for an adjustable rate mortgage and the effective date of the adjustment; to notify the trustee, the debtor(s) and attorney for the debtor(s) of any change in the taxes and insurance that would either increase or reduce the escrow portion of the monthly mortgage payment; and to otherwise comply with 11 U.S.C. § 524(i).

Debtors shall substitute the foregoing language for the language contained in paragraph 10 of Debtors' Plan within ten (10) days of the entry of this Order.[7] Debtors are not required to notice this amendment to secured creditors since the amendment provided for herein does not otherwise alter such creditors' rights. See In re Dangerfield, C/A No. 04-13686-W, slip op. at 3 (Bankr. D.S.C. Aug. 23, 2005) (finding that debtors were not required to notice an amended

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[6] Some of the Debtors' proposed language has been rejected by other courts as violating the Bankruptcy Code. See In re Collins, C/A No. 07-30454, slip op., 2007 WL 2116416 (Bankr. E.D. Tenn. Jul. 19, 2007). This Court agrees.

[7] Despite the allowance of this language in Debtors' Plan in this case, based solely upon Trustee's consent, this Court is not convinced that such language is necessary to invoke the protections of a statute or to preserve Debtors' rights under that statute.

chapter 13 plan to a secured creditor since the amendment did not negatively alter the treatment of that creditor compared to the original chapter 13 plan).

III. 11 U.S.C. § 1325(b)

11 U.S.C. § 1325(b) allows the Trustee and unsecured creditors to oppose confirmation of a chapter 13 plan when the plan pays less than 100% to unsecured creditors or the debtor fails to devote all of his "projected disposable income" to the plan for an "applicable commitment period." These terms have previously been interpreted by this Court and are more fully discussed in other opinions. See In re Edmunds, 350 B.R. 636 (Bankr. D.S.C. 2006); In re Cushman, 350 B.R. 207 (Bankr. D.S.C. 2006).

In this case, Trustee seeks to eliminate Debtors' deduction of $332.00 per month as an "ownership expense" for a second vehicle owned free and clear of liens. Trustee is willing to allow Debtors an additional $200.00 expense per month in "operating costs" for this vehicle. Thus, Trustee is seeking a net increase of $132.00 per month in Debtors' disposable income,[8] based upon a second vehicle. Trustee also objects to Debtors' deductions of $210.00 per month for telecommunication expenses and $260.00 per month for daycare expenses. In total, Trustee seeks a total increase of $602.00 per month in Debtors' disposable income. Absent objection from the Trustee, the Court presumes that the other expenses set forth on Debtors' second amended Statement of Current Monthly income are proper.[9]

Debtors, through credible and persuasive testimony, have presented sufficient proof that their expenses for daycare and telecommunications are actual, reasonable, and necessary.

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[8] For the reasons stated in Edmunds, this Court does not believe that "disposable income" and "projected disposable income" are synonymous. See Edmunds, 350 B.R. at 643-644.

[9] The parties did not argue other matters raised in Edmunds that may reduce or increase Debtors' "projected disposable income," such as Debtors' actual income on Schedule I, and therefore, based upon the parties' stipulation as to the amounts at issue, the Court does not determine whether the calculation truly determines "projected disposable income," as the term was interpreted in Edmunds.

Although, as Trustee argues, the statute and the I.R.S. guidelines do not expressly provide for "telecommunication expenses," this Court errs on the side of allowing the expenses since the official form provides for such expenses.[10] See In re Morgan, C/A No. 06-11263-BCK-AJC, slip op., ___ B.R. ___, 2007 WL 2298010 (Bankr. S.D. Fla. Aug. 8, 2007) (noting that the means test form, as an official form, is entitled to a presumption of validity). Additionally, this Court and others have previously allowed debtors telecommunication expenses in addition to the standard housing and utility expenses. See In re Napier, C/A No. 06-02464-W, slip op., 2006 WL 4128358 (Bankr. D.S.C. Sept. 18, 2006); In re Plumb, C/A No. 06-10528, slip op., ___ B.R. ___, 2007 WL 2316357 (Bankr. W.D.N.C. Mar. 16, 2007). The Court does not believe that Debtors' monthly expense of $210.00,[11] which includes some allowance for cable television,[12] is so out of the ordinary so as to exclude the expense from Debtors' calculation of disposable income. Finally, Debtors' daycare expense of $260.00, though not promptly disclosed, appears to be necessary for Debtors to maintain their employment, as well as a reasonable and actual expense. Allowing these expenses would leave at issue whether Debtors are entitled to some allowance for their ownership of a second vehicle. The Court finds it unnecessary to determine this remaining issue since, even if the expense were disallowed, Debtors' Plan would appear to pay unsecured creditors an amount greater than that required by 11 U.S.C. § 1325(b).[13]

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[10] The I.R.S. Manual allows expenses for "optional telephones," which includes cell phones, call waiting, and long distance service, and for an "internet provider," if such expenses are for the health and welfare of the taxpayer or his dependents or for the production of income. See Internal Revenue Manual, Financial Analysis Handbook, § 5.15.1.10.

[11] Debtors' attribute $105.00 of this expense to their cell phone bill, which Mrs. Ballard testified was necessary for Debtors' employment since Debtors do not have a land line and their jobs require Debtors to have mobile telephone access. The remaining $105.00 of this expense is for Debtors' bundled bill for cable and internet services, which Mrs. Ballard testified was necessary for her employment and the education of her child. The court believes that the foregoing expenses are necessary for the health and welfare of Debtors and their dependent child or are otherwise for the production of income.

[12] Debtors' "internet provider" also provides cable television services.

[13] If Debtors were allowed only an additional $200.00 per month in "operating costs" for the second vehicle then Debtors would be required to pay at least $59.04 per month to unsecured creditors. If Debtors were allowed the full $332.00 per month as an "ownership cost" for the second vehicle, then Debtors would have no disposable

IV. Debtors' Schedules

11 U.S.C. § 521(a)(1)(B) requires Debtors to file "a schedule of current income and current expenditures." This requirement is satisfied through the filing of Schedules I and J. Schedule J, an official form, is titled as "Current Expenditures on Individual Debtor(s)" and contains the instruction that Debtors are to estimate their "average or projected monthly expenses" at the time the case is filed. Though the means test excludes from income certain benefits, like social security benefits, and allows certain expenses in standard amounts, the means test does not override Debtors' duty under 11 U.S.C. § 521(a)(1)(B) to report current income and current expenses.[14] See In re Ward, 359 B.R. 741, 745-746 (Bankr. W.D. Mo. 2007) (holding "nothing has changed with regard to the requirement that a debtor file complete and accurate schedules as prescribed by the appropriate Official Forms in accordance with § 521(a)(1) and Rule 1007. The requirement that debtors file schedules showing 'current income and current expenditures' in those provisions is simply not the same as the defined term, 'current monthly income....'"); In re Schmidt, 200 B.R. 36, 39, fn. 5 (Bankr. D. Neb. 1996) (finding debtors erred in using amounts allowed by the IRS in determining their expenses since debtors were only allowed to deduct actual expenses on Schedule J); In re Solomon, 277 B.R. 706, 712 (Bankr. E.D. Tex. 2002) (finding, regardless of a debtor's good faith in completing schedules, creditors are entitled to accurate schedules which reflect a debtor's actual financial condition).

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income under the form. Under both scenarios, using the figures stipulated by the parties, Debtors would pay more to their unsecured creditors under their Plan, as proposed, than the amount required by the foregoing calculations.

[14] In another case, Debtors' counsel argued that 11 U.S.C. § 707(b)(2)(A)(ii) allows debtors to only disclose expenses allowed by the means test rather than actual expenses. This argument was rejected. See In re Stone, C/A No. 07-03400-W, oral ruling (Bankr. D.S.C. Sept. 6, 2007). 11 U.S.C. § 707(b)(2)(A)(ii) is, pursuant to its terms, confined in a chapter 7 to determining whether there is a presumption of abuse and in a chapter 13 to determining whether a debtor's plan may be "approved" over an objection made pursuant 11 U.S.C. § 1325(b). This section does not negate a debtor's duty under 11 U.S.C. § 521(a) to report a debtor's true current income and expenses since such may be considered in determining whether a debtor's plan meets the standard for confirmation under 11 U.S.C. § 1325(a), including good faith and feasibility. See Edmunds, 350 B.R. at 648-649; In re Stone, C/A No. 07-03400-W, slip op. (Bankr. D.S.C. Sept. 10, 2007).

Debtors' Schedule J has failed in this regard since, in several categories, it reflects the expenses allowed by the means test rather than Debtors' actual current expenses. See In re Dinkins, C/A No. No. 06-2820-W, slip op. at 4 (Bankr. D.S.C. Aug. 16, 2006) (holding, in a post-Reform Act case, that a debtors schedules are to be an accurate representation of a debtor's current and actual financial situation). Therefore, Debtors shall file an amended Schedule J, consistent with the terms of this Order, within ten (10) days of the issuance of this Order or, on recommendation of the Trustee, this case may be dismissed pursuant to 11 U.S.C. § 521(i) for Debtors' failure to comply with 11 U.S.C. § 521(a)(1)(B).

CONCLUSION

Based upon the foregoing, Debtors shall propose an amended chapter 13 plan consistent with this Order within ten (10) days of the entry of this Order. Upon filing an amended Plan and amended Schedule J, Trustee shall either recommend the amended plan for confirmation or shall file a written objection to confirmation if the plan is otherwise objectionable under 11 U.S.C. § 1325(a). This case may be dismissed on recommendation of the Trustee unless, within ten (10) days of the entry of this Order, Debtors file an amended Plan and an amended Schedule J consistent with the terms of this Order.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 13, 2007