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WRITTEN DECISION - NOT FOR PUBLICATION

ENTERED 6-7-12
FILED
JUN 7 2012
CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY 79 DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) BANKRUPTCY NO: 09-06014-PB13
)
DEVON LYNN MORRIS) CHAPTER: 13
RACHEL MARIE MORRIS)
)
Debtors,) MEMORANDUM DECISION RE
) TRUSTEE'S MOTION FOR APPROVAL OF
) MODIFIED CHAPTER 13 PLAN
)
) DATE: 5/4/12
) TIME: 9:30 A.M.
) CRTRM: 1
)
_____) JUDGE: Margaret M. Mann

1 **I. INTRODUCTION**

2 David Skelton, the Chapter 13 Trustee ("Trustee") moved to modify the confirmed Chapter 13
3 plan ("Motion to Modify") of Debtors Devon Morris ("Mr. Morris") and Rachel Morris ("Ms. Morris")
4 individually or collectively, "Debtors") on November 8, 2010. After a first evidentiary hearing, the
5 Court entered an order on the Motion to Modify, denying it in part and granting it in part. Trustee
6 appealed the Court's order, which was reversed and remanded by the Ninth Circuit Bankruptcy
7 Appellate Panel. *Skelton v. Morris (In re Morris)*, 2011 Bankr. LEXIS 5297 (B.A.P. 9th Cir. Dec. 23,
8 2011) (unpublished). This Court then conducted proceedings to determine the issues presented upon
9 remand.

10 Despite the presence of other issues raised in connection with the Motion to Modify at earlier
11 times in its history, the issues eventually briefed and tried before the Court on remand have been
12 considerably simplified. The dispute before the Court is whether Trustee has meet his burden of proof
13 that Debtors' plan should be modified to increase payments to creditors in the face of Debtors' good
14 faith and feasibility objections. Considering the evidence before it, the Court finds Trustee's Motion to
15 Modify was brought in good faith and should be granted. However, the Court will require an alternate
16 payment structure to ensure the feasibility of the Modified Plan.

17 **A. Facts**

18 Debtors filed their chapter 13 petition for relief on April 30, 2009. Debtors' above median
19 income, derived entirely from Mr. Morris' employment at Microsoft, is unusually complicated. Not
20 only are there multiple components to his monthly salary, he also potentially receives five different
21 kinds of cash bonuses each year, including a gold star bonus, a review bonus, an award bonus, a
22 services incentive payout, and a services incentive advance at different times of the year. Mr. Morris
23 also potentially receives stock from his employer at year end in the form of a "Stock Spread Award."
24 These Stock Spread Awards are treated as taxable compensation and are available to pay Debtors'
25 expenses, as in fact occurred during this case. Not all bonus components are earned every year, and all
26 components but the monthly salary are paid in lump sums at different times during the year.

1 In their initial bankruptcy financial disclosures, Debtors did not treat these components of their
2 income consistently. On their Chapter 13 Statement of Current Monthly Income and Calculation of
3 Commitment Period and Disposable Income ("B22"), Debtors reported a six month historical monthly
4 income of \$12,027 after tax and payroll deductions, yielding a monthly disposable income of \$265.27.
5 The B22 income took into account Mr. Morris' 2008 year-end bonuses received, but not the Stock
6 Spread Award received in that six-month period. In their Schedule I, however, neither the bonuses nor
7 the Stock Spread Award were taken into account. Instead, Debtors reported only the monthly salary of
8 \$10,550. To further add to the confusion generated by the inconsistent financial disclosures, Mr.
9 Morris also gave an incomplete account of the three compensation components in his testimony at the
10 11 U.S.C. §341(a)¹ hearing. He testified his 2008 income was skewed by his receipt of a non-recurring
11 \$8000 gold star bonus, but did not mention the other variable bonuses or the Stock Spread Award
12 income items that contributed to his understatement of the Schedule I income.

13 Trustee understood the complexity sufficiently to object to confirmation of Debtors' initial
14 proposed plan on the grounds the Schedule I income was understated. He also objected that the B22
15 improperly deducted expenses for two rejected vehicles and a second trust deed that would be stripped
16 under the plan. After negotiations with Trustee to resolve these objections, Debtors agreed to increase
17 their plan payments from \$1,200 to \$1,350 a month, and increase the dividend to unsecured creditors
18 from 5% to 10%, or to \$41,439. Debtors' Plan was then confirmed by Judge Bowie on November 25,
19 2009.

20 Slightly under a year after confirmation, Trustee filed the Motion to Modify claiming a material
21 change in Debtors' circumstances warranted modification. This motion sought to increase Debtors'
22 monthly plan payments from \$1,350 to \$4,200, and to increase the dividend to unsecured creditors
23 from 10% to 30% (from \$41,439 to \$168,000). Trustee argued that Debtors' 2009 tax return showed a
24 taxable income of \$174,629 (\$14,552/month), reflecting that Debtors earned nearly \$5,000 per month
25 more than represented in the Schedule I. Debtors opposed the Motion to Modify on the ground that
26

27 ¹ Hereafter, all references to statutes will refer to the Bankruptcy Code, 11 United States Code Annotated,
28 unless otherwise stated.

1 Trustee's arguments were barred by res judicata because their income did not change materially from
2 2008, when Debtors' total income as reflected by their tax return was \$172,125. Trustee's response to
3 Debtors' opposition also raised the non-recurrent expenses of the lien strip and surrendered vehicles as
4 additional changes in the Debtors' ability to pay creditors as an additional reason to modify the plan.

5 The Court held an evidentiary hearing on the Motion to Modify on March 15, 2011 (the "March
6 2011 Hearing"). Trustee presented evidence of Debtors' increased income by proffering Mr. Morris'
7 paystubs for March 2009, January 2011 and year end 2010 into evidence. Mr. Morris testified at the
8 March 2011 Hearing that he was unsure of the income characteristic of the Stock Spread Award and
9 Trustee did not present further evidence of it. Based upon the lack of evidence to the contrary, the
10 Court concluded the Stock Spread Award was part of Debtors' 401k exempt assets based upon how it
11 appeared to have been handled in the year end paystubs, and did not take it into account in its ruling.
12 The Court rejected Debtors' claim preclusion argument but found that the law of the case precluded its
13 reconsideration of Judge Bowie's confirmation order that reflected the parties' resolution of the
14 discontinued car and second trust deed expense, and increased income issues. After the parties lodged
15 separate proposed orders, the Court entered its order denying in part and granting in part the Motion to
16 Modify by ordering Debtors to turn over their net bonuses (excluding the Stock Spread Award based
17 upon the lack of evidence clarifying what it was) that exceeded \$19,650.81 beginning with bonuses for
18 the year 2011. Because the bonuses received in the six-month period before Debtors filed their case
19 were reflected in the B22 calculation, even if not in the Schedule I calculations, the Court only
20 required the increase in bonuses to be paid.

21 Trustee appealed the Court's order. The Bankruptcy Appellate Panel vacated this Court's order
22 and remanded to determine the effect of intervening case law cited by Trustee that prohibited the
23 deduction of the payments from the means test calculation on two surrendered vehicles and the
24 stripped second trust deed. Remand was also granted for the Court to make further findings of fact
25 regarding whether Trustee's proposed modified plan complies with §1329, and particularly whether the
26 Stock Spread Award should be included as income.

1 The Court held two status conferences to ascertain the scope of issues on remand because the
2 issues had changed from what were initially before the Court on the Motion to Modify. The law of the
3 case issue was largely abandoned based upon the parties' mutual recognition of *Sunahara v. Burchard*
4 (*In re Sunahara*), 326 B.R. 768, 772 (B.A.P. 9th Cir. 2005), which held that the B22 calculation is not
5 directly germane to the Motion to Modify because the disposable income and applicable commitment
6 period tests imposed in §1325(b) are inapplicable under §1329(b)(1). While Trustee proffered a pro
7 forma B22, it was admitted as evidence of the reasonableness of Debtors' claimed expenses, rather than
8 on the deductibility of the non-recurrent expenses from the B22, and neither party's evidence the
9 second mortgage or the additional car expenses that were deducted on Debtors' original B22.

10 Trustee also filed a further amended Modified Plan. While a pro rata of \$168,000 to unsecured
11 creditors was still proposed, Trustee's new Modified Plan decreased the plan payments from \$4,200 to
12 \$3,000 per month. To supplement these payments, the Modified Plan also required Debtors to pay
13 60% of any bonuses but no additional portion of the Stock Spread Award received in 2012 through
14 2014, and to make a lump sum payment of \$19,000 from Debtors' funds on hand from liquidating
15 earlier Stock Spread Awards.

16 After the parties engaged in discovery, the evidentiary hearing proceeded on Debtors' objection
17 that Trustee's Modified Plan was not filed in good faith as required under §1325(a)(3), and was not
18 feasible as required by §1325(a)(6). The good faith objection was that Trustee's objection to Debtors'
19 increased income had previously been settled in the pre-confirmation modification. Debtors also
20 contend Trustee did not propose the Modified Plan in good faith because he only considered their
21 increased income and not their current increased expenses, and thus did not take into account what
22 disposable income Debtors actually have available to pay creditors. As to feasibility, Debtors argue
23 that their income is contingent and not paid regularly, and they cannot make plan payments increased
24 by over 100% as required by the Modified Plan.

25 Before the May 2012 evidentiary hearing, Debtors and Trustee agreed Debtors' net income in
26 2011 was as provided in Schedule I. No further testimony was adduced regarding increased income at
27 the hearing. Trustee testified regarding his good faith in proposing the further Modified Plan and
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1 Debtors both testified about their increased expenses. While Ms. Morris was knowledgeable about the
2 expenses she addressed in her testimony, she only testified regarding certain expenses. Mr. Morris
3 was, in contrast, not credible regarding the increased expenses because he had a poor recollection of
4 the household expenses and admitted that his wife was responsible for the household bills. The
5 credibility of each Debtor's testimony was also impaired by the extreme latitude with which they
6 estimated their expenses since most of the estimates were significantly higher than what they could
7 support with documentation or other corroboration. *See In re McClellan*, 428 B.R. 737, 745 (Bankr.
8 N.D. Ohio 2009) (requiring supporting documentation for claimed expenses that appeared over
9 inflated).

10 **B. Jurisdiction**

11 The Court has jurisdiction over this proceeding under 28 U.S.C. §§1334 and 157(b)(2)(L). *See*
12 *also Sunahara*, 326 B.R. at 772.

13 **C. Necessary Elements of Motion to Modify**

14 Modification under §1329 is discretionary. *Sunahara*, 326 B.R. at 772; *Powers*, 202 B.R. at
15 623. Chapter 13 plan modification is governed by §1329, and trustees may propose a modified plan, as
16 here, to increase the payments under the plan. "[T]he only limits on modification are those set forth in
17 the language of the Code itself, coupled with the bankruptcy judge's discretion and good judgment in
18 reviewing the motion to modify." *Powers*, 202 B.R. at 622. Code §1329(a)(1) limits the kinds of
19 modifications that can be proposed and §1329(b)(1) requires that the proposed modifications satisfy
20 only some of the same standards as required of the initial plan. *See* 11 U.S.C. §§1322(a), 1322(b) and
21 1323(c). As noted by the Bankruptcy Appellate Panel on appeal, citing *Powers v. Savage (In re*
22 *Powers)*, 202 B.R. 618, 623 (B.A.P. 9th Cir. 1996), *Max Recovery, Inc. v. Than (In re Than)*, 215 B.R.
23 430, 435 (B.A.P. 9th Cir. 1997), and *McDonald v. Burgie (In re Burgie)*, 239 B.R. 406, 409 (B.A.P.
24 9th Cir. 1999), neither the substantial and unanticipated change test, nor the disposable income test,
25 need be met for approval of a plan modification.

26 Since the only change from Debtors' plan to Trustee's Modified Plan was to increase the
27 payments and disposable net income payable to the unsecured creditors, no issue has been raised as to
28

1 the elements of §§ 1322(a) and (b). Since there was no change as to the treatment of secured creditors
2 either, no issue was raised as to the elements of §1323(c). Accordingly, the Court only analyzes the
3 evidence on the §1329(b) issues raised by Debtors: good faith under §1325(a)(3) and feasibility under
4 §1325(a)(6).

5 **D. Burden of Proof**

6 Prior to the evidentiary hearing on May 4, 2012 (the "May 2012 Hearing"), the Court requested
7 Debtors to file updated Schedules I and J to assist in its determination of the issues on remand. Their
8 updated Schedule I was prepared on an annualized basis using year 2011 and reflected the payroll
9 deductions taken from Mr. Morris' pay. The updated Schedule J was also prepared on an annualized
10 basis and reflected increased monthly expenses from approximately \$5,800 in early 2009 to \$9,900 in
11 2010. While Debtors complied, they objected to these updated Schedules being used to meet Trustee's
12 burden of proof on the feasibility and good faith issues. The Court overrules this objection for several
13 reasons.

14 As the moving party, Trustee bears the ultimate burden of persuading the Court that the
15 proposed modification is justified. *In re Hall*, 442 B.R. 754, 758 (Bankr. D. Idaho 2010); *In re*
16 *Murphy*, 327 B.R. 760, 774 (Bankr. E.D. Va. 2005) ("Since it is the trustee's motion to modify the
17 plan, the trustee has the burden of proof. Thus, any gaps in the evidence must be construed against the
18 trustee."). Debtors are mistaken that the Court's request for their updated schedules impermissibly
19 shifts the burden of proof to them from the Trustee. Burdens of proof have two components: the
20 burden of production and the burden of persuasion. "Burden of proof was frequently used to refer to
21 what we now call the burden of persuasion—the notion that if the evidence is evenly balanced, the
22 party that bears the burden of persuasion must lose. But it was also used to refer to what we now call
23 the burden of production—a party's obligation to come forward with evidence to support its claim."
24 *Dir v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). "Though the burden of proving the fact
25 remains where it started, once the party with this burden establishes a prima facie case, the burden to
26 'produce evidence' shifts." *Id.* at 273.

1 Although the Debtors argued that they would not have produced the update Schedules I and J
2 but for the Court's order, they were given the opportunity to withdraw them and wisely declined.
3 Trustee had meet his initial burden of presenting his prima facie case that Debtors had increased
4 income over what was presented in the initial Schedule I. Although Debtors' total taxable income only
5 increased minimally from \$171,380 in 2008 to \$176,091.95 in 2010, the year that the Motion to
6 Modify was filed, Mr. Morris' paystubs proffered by Trustee proved that Debtors' initial
7 representations of their income available to pay creditors was understated. While Debtors' income
8 stayed relatively constant over this period, these paystubs demonstrated how the array of bonuses, as
9 well as the Stock Spread Award, significantly increased Debtors' taxable income on an annual basis
10 from what was scheduled by Debtors. The tax returns reflected \$173,000 as the average taxable
11 income for these two years, while the Schedule I income representation made in early 2009 reflected
12 annual income of only \$126,000. Debtors' Schedule I for 2011 reflected the additional payroll and tax
13 deductions from this income and their presentation of this evidence was consistent with their burden of
14 challenging Trustee's prima facie case.

15 Trustee also met his prima facie case on Debtors' expenses by relying on their initial Schedule
16 J. Debtors' effort to fulfill their burden of production as to their increased expenses in defense of this
17 prima facie case does not alter Trustee's burden of proof. *Greenwich Collieries, id.* In any event, as
18 the sole party with access to evidence of their own income and expenses, Debtors bear the burden of
19 producing it. *See In re Rusty Jones, Inc.*, 110 B.R. 362, 373 (Bankr. N.D. Ill. 1990) (objector to
20 chapter 11 plan has burden of proof on affirmative defenses to confirmation). Further, Debtors bore a
21 statutory duty to cooperate with Trustee and provide evidence of their financial situation. 11 U.S.C.
22 § 521(a)(3); *see also Hickman v. Hana (In re Hickman)*, 384 B.R. 832, 841 (B.A.P. 9th Cir. 2008).

23 **E. Bad Faith**

24 **1. Income**

25 Debtors claim the Motion to Modify was not brought in good faith as required by §1325(a)(3)
26 because Trustee knew of the increased income before resolving his objections to their original plan,
27 and should have taken this income into account at this time. Although "good faith" is not defined in
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1 the Bankruptcy Code, "good faith is to be assessed through the matrix of whether the plan proponent
2 acted equitably taking into account all militating factors in a manner that equates with the totality of
3 circumstances." *Fridley v. Forsythe (In re Fridley)*, 380 B.R. 538, 543 (B.A.P. 9th Cir. 2007); *Hall*,
4 442 B.R. at 758; *Sunahara*, 326 B.R. at 781 (explaining that good faith "requires an assessment of a
5 debtor's overall financial condition"). The §1325(b) test disposable income test, while it does not
6 technically apply to post-confirmation modifications under §1329, applies here as an element of good
7 faith. *Sunahara, id.*

8 The Court finds Trustee met his burden of proof concerning his good faith in proposing the
9 Modified Plan. Increasing payments to unsecured creditors is his function in the bankruptcy system
10 and performing that function cannot constitute bad faith.² *See United States v. Aldrich (In re Rigden)*,
11 795 F.2d 727, 730 (9th Cir. 1986) ("The trustee also has a fiduciary obligation . . . to maximize
12 distribution to creditors."); *see also* 11 U.S.C. § 704(a)(1)

13 Trustee's failure to fully grasp how and why Debtors' income was distorted from what it
14 appeared to be in Schedule I was justified by Debtors' own actions. The Court too struggled initially
15 with the various forms of income from different time periods presented in this case. Debtors' failure to
16 account for the Stock Spread Award in either the B22 or Schedule I, and their inclusion of the non-
17 recurrent second trust deed and surrendered vehicle expenses in the B22, presented an inaccurate view
18 of their overall financial condition. These excluded income components were undeniably part of
19 Debtors' increased income. In fact, Trustee elicited testimony at May 2012 Hearing that Debtors
20 during the case periodically liquidated their Stock Spread Award account to pay living expenses.

21 At the May 2012 Hearing, Debtors also argued that the Trustee did not propose the Modified
22 Plan in good faith because he used the Debtors' 2011 income in the Modified Plan instead of using the
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24 ² Debtors did not cite any cases holding that a trustee lacked good faith in moving to modify a plan to increase
25 payments. In fact, good faith is rarely discussed in this context; likely because it is the fundamental function of
26 the trustee's job. *See Hall*, 442 B.R. at 763 (Court sought to reach an equitable result considering feasibility of
27 trustee's plan without directly discussing good faith); *Murphy*, 327 B.R. at 774 (denying trustee's modification of
28 plan in context of whether change in debtors' circumstances was anticipated, rather than on basis of bad faith.);
In re Sounakhene, 249 B.R. 801, 805 (Bankr. S.D. Cal. 2000) (stating that trustee was unfairly penalizing the
debtors by objecting to plan that used their capital asset of the equity in their home to pay creditors as proposed,
but not directly addressing the issue of good faith).

1 income from 2010 when the Motion to Modify was filed. As it happened, in 2011, Debtors' income
2 increased substantially as demonstrated by their 2011 year end pay stub introduced by Debtors at the
3 May 2012 hearing. This paystub reflects taxable income of \$196,170.60, nearly \$20,000 more than the
4 either of the previous three years when Debtors' income had stayed relatively constant.

5 Regardless, the Supreme Court in *Hamilton v. Lanning*, 130 S. Ct. 2464, 2478 (2010), held that
6 debtor's projected disposable income "may account for changes in the debtor's income or expenses that
7 are known or virtually certain at the time." Consistent with *Lanning*, Trustee adopted a forward
8 looking approach to income as of November 2010. It was appropriate for Trustee to take into account
9 the known increase in Debtors' income by 2011 in increasing the payments to creditors as of 2010.
10 The Supreme Court in *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 729 (2011) recognized the
11 BAPCPA's "core purpose of ensuring that debtors devote their full disposable income to repaying
12 creditors." Due to the 2011 increase in income, Debtors could pay more after 2010 and Trustee's
13 Modified Plan does not reflect a lack of good faith.

14 2. Expenses

15 Debtors also contend Trustee did not meet his burden of establishing a prima facie case of good
16 faith because he relied upon Debtors' original rather than current expenses when he proposed an
17 increased plan payment in response to Debtors' increased income. Trustee testified that in his twenty-
18 two years of experience as a trustee, he viewed it abnormal for debtors to increase expenses to the
19 extent seen here. He explained that "[m]ost debtors go all the way through without any modification"
20 and that he had "never seen anyone attempt this large of a modification." [Doc. 158, Transcript, at 79,
21 104-05]. Trustee also proffered an updated B22 to reflect a standard of what are reasonable expenses
22 as ordained by Congress and also elicited testimony of Debtors regarding their expenses.

23 The Court finds no lack of good faith here since it is highly unusual for debtors' expenses to
24 nearly double in two years, and that was what occurred here. Debtors' 2011 Schedule J reflected
25 monthly expenses of \$9,982 and the original Schedule J reflected monthly expenses of \$5,801.52.
26 Although the home mortgage payment and telephone expenses decreased slightly, nearly every other
27 expense increased. Electricity expenses increased by approximately \$80, water and sewer by \$190,
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1 home maintenance by \$75, health insurance by \$312, life insurance by \$35, and auto insurance by
2 \$140. Food increased by approximately \$250, clothing by \$100, and dry cleaning/laundry by \$100.
3 Transportation expenses increased by approximately \$770, car upkeep/repair by \$200, personal
4 hygiene by \$230, pets by \$150 and cell phone by \$220. Debtors also added expenses for homeowners
5 insurance (\$75), children's sports (\$150), gym membership (\$50), children's tutoring (\$150), pool
6 upkeep (\$65), landscaping (\$150), tax preparation (\$25), Ms. Morris' college tuition (\$110),
7 cigars/tobacco (\$200) and support for elders (\$300). Trustee contested most of these increased
8 expenses as not reasonable and necessary, and the Court does not find this position to have been
9 asserted in bad faith under the prevailing case law, which imposes a fair degree of parsimony on
10 debtors.

11 "Under the reasonably necessary standard, the appropriate amount to be set aside for the debtor
12 ought to be sufficient to sustain basic needs not related to the debtor's former status in society or the
13 lifestyle to which he is accustomed." *In re Andrade*, 213 B.R. 765, 768-769 (Bankr. E.D. Cal. 1997)
14 (internal quotations omitted); see *In re Mooney*, 313 B.R. 709, 716 (Bankr. N.D. Ohio 2004) ("There is
15 nothing wrong with a nice home, multiple premium cell phone services, high speed internet access, zoo
16 memberships, wine magazine subscriptions, dog treats, dog dental care items and more. There is
17 something wrong when these expenses continue and unpaid creditors are told by the bankruptcy court
18 to shinny up a cactus."); see also *In re Gillead*, 171 B.R. 886, 890-91 (Bankr. E.D. Cal. 1994). See *In*
19 *re Bohrer*, 266 B.R. 200, 201 (Bankr. N.D. Cal. 2001) (finding that Debtor cannot satisfy § 1325(b)(1)
20 by amending schedules to increase expenses to eliminate income surplus discovered by the trustee).
21 "[T]he object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover his living
22 expenses against the interest of the unsecured creditors in recovering as much of what the debtor owes
23 them as possible." *In re Turner*, 574 F.3d 349, 355 (7th Cir. 2009).

24 Addressing certain categories of expense in turn, pet expenses generally should not exceed
25 \$100; here, Debtors' pet expenses increased by \$150. The Court understands that pets age and need
26 greater care but it seems unlikely that Debtors' pet expenses, like many of their other expenses,
27 quadrupled in a two-year period. See *In re Glenn*, 345 B.R. 831, 839 (Bankr. N.D. Ohio 2006)
28

1 (dismissing debtors' chapter 7 case as substantial abuse of the bankruptcy code where, among other
2 things, debtor budgeted \$350 per month for pet care); *In re Weiss*, 251 B.R. 453, 463 (Bankr. E.D. Pa.
3 2000) (finding that a miscellaneous expense item of \$220 per month that included pet care is not
4 reasonably necessary); *see also In re Wyant*, 217 B.R. 585, 587 (Bankr. D.Neb.1998) ("[A]s between
5 the debtor's elderly horses and dogs and his creditors, I think that the creditors should be paid first.").

6 Extracurricular expenses should be limited. *See In re Nissly*, 266 B.R. 717, 720–21 (Bankr.
7 N.D. Iowa 2001) ("Recreation expenses are also too high. Recreation, children's activities, internet
8 costs, cable TV costs and gifts to family members total \$370.00 per month."). Increased expenses for
9 children's sports (increased by \$150 a month), the gym (included at \$50 a month), pool upkeep
10 (included at \$65 a month), the son's automobile insurance (increased by \$140 a month), and
11 tobacco/cigar purchases (included at \$200 a month) are luxuries to which chapter 13 debtors are not
12 entitled.

13 Non-compulsory schooling and educational expenses should not be bore by the creditors. *In re*
14 *Stephens*, 265 B.R. 335, 338 (Bankr. M.D. Fla. 2001) ("[T]he \$500.00 used by Debtor Wife to attend
15 school is not reasonably necessary for her maintenance or support."). Although it is admirable that Ms.
16 Morris is trying to earn her college degree, she must pay for it through student loans or savings. As to
17 the son's tutoring, people of limited means often seek tutoring from friends or the school at a
18 significantly reduced cost, if any. Regardless, it appears that Trustee included this expense in the
19 Modified Plan.

20 Three cars for a family are not reasonably necessary. *See In re Walsh*, 224 B.R. 231 (Bankr.
21 M.D. Ga. 1998) (finding that that the second car was a convenience or "a matter of preference rather
22 than urgent family necessity"). Debtors' son is not entitled to a car. Further, even if Debtors' have two
23 cars, IRS standards only allow costs for two cars, at a maximum of \$612 in San Diego, not the \$1,167
24 Debtors claim. *See In re Styles*, 397 B.R. 771, 774 (Bankr. W.D. Va. 2008) ("Precedent and statutory
25 interpretation affirm that because [d]ebtor owned three vehicles she appropriately checked boxes
26 claiming deductions that applied to a person owning two or more vehicles."); *see also* Keith M. Lundin
27 & William H. Brown, Chapter 13 Bankruptcy, 4th Edition, §476.1, at ¶ 5, Sec. Rev. May 24, 2011,
28

1 www.Ch13online.com. Even worse than the unnecessary monthly expense to upkeep their son's car is
2 the fact that Debtors pro-rationed this one-time purchase as part of their monthly automobile expenses.
3 Trustee's objections to certain expenses are not in bad faith when the objection is consistent with the
4 prevailing law.

5 Trustee's good faith is also demonstrated by his accommodation of several of the Debtors'
6 increased expenses. He accounted for additional expenses of \$300 a month for contributions to Mr.
7 Morris' mother and \$441.00 a month for educational expenses, such as tutoring for Debtors' son. [Doc.
8 148, at 16]. He also sought a total pro rata to creditors which was 15% lower than he felt he could
9 legally claim. Trustee's modified B22 reflects a monthly disposable income of \$4,748.60, which
10 would provide \$199,442 to unsecured creditors over the remaining life of the Modified Plan and
11 \$211,873.70 pro rata in total. [Doc. 148, at 18]. Yet, Trustee only requests \$168,000 for unsecured
12 creditors in the Modified Plan. While this number is an estimate of what should be paid to unsecured
13 creditors rather than a precise calculation, it more than overcomes Debtors' good faith challenge.

14 The Court finds Trustee has met his burden of persuasion that the Modified Plan was proposed
15 in good faith by including some of the increased expenses Debtors included on the updated Schedule J
16 and increasing the pro rata to creditors to \$168,000. *See Sunahara*, 326 B.R. at 781-82 (applying
17 totality of circumstances test).

18 **F. Feasibility**

19 For the Court to approve the Modified Plan, it must be feasible. *See* 11 U.S.C. § 1325(a)(6).
20 Feasibility is a question of fact. *First Nat'l Bank v. Fantasia (In re Fantasia)*, 211 B.R. 420, 423
21 (B.A.P. 1st Cir. 1997). "To satisfy feasibility, a debtor's plan must have a reasonable likelihood of
22 success, i.e., that it is likely that the debtor will have the necessary resources to make all payments as
23 directed by the plan. While the feasibility requirement is not rigorous, the plan proponent must, at
24 minimum, demonstrate that Debtor's income exceeds expenses by an amount sufficient to make the
25 payments proposed by the plan." *In re Bernardes*, 267 B.R. 690, 695 (Bankr. D.N.J. 2001).

26 The Court is concerned, however, with the feasibility of Trustee's Modified Plan because
27 Debtors receive a significant portion of their income as contingent bonuses and stock awards at year
28

1 end. Based upon the paystubs, Debtors' monthly salary has remained consistent at approximately
2 \$10,500 since the inception of the case and Debtors' monthly salary is accordingly not sufficient to
3 afford \$3,000 monthly payments. Debtors cannot make up the shortfall from saving their gross
4 bonuses since Trustee's plan requires 60% of the gross bonuses be devoted to the Modified Plan.
5 Another reason the Modified Plan is not feasible is that Debtors no longer have \$19,000 in their
6 Fidelity Stock Awards Account for the lump sum payment. *See Hall*, 442 B.R. at 763 (finding that
7 compelling Debtors to turn over funds already spent as part of a loan modification would be "naïve").

8 The Court has authority, however, to approve a motion in part while also providing alternative
9 means to accomplish the movant's goals to insure compliance with the Bankruptcy Code. *In re Keller*,
10 329 B.R. 697, 703 (Bankr. E.D. Cal. 2005) (approving debtor's motion to borrow, but offering debtors
11 alternative terms for their plan to be modified or completed); *In re Harter*, 279 B.R. 284, 286 (Bankr.
12 S.D. Cal. 2002) (explaining that at a prior proceeding the court granted in part and denied in part the
13 creditor's motion for modification of the debtor's chapter 13 plan); *Hall*, 442 B.R. at 762 (while
14 trustee's motion to modify the plan was granted in part by requiring the remaining funds from the lump
15 sum SSDI payments to be turned over to the trustee for distribution under the plan, the court did not
16 require any change to debtors' monthly payment amount); *see also Collier v. Valley Fed. Sav. Bank (In*
17 *re Collier)*, 198 B.R. 816 (Bankr. N.D. Ala. 1996) (applying, sua sponte, the disposable income test to
18 modify confirmed plan to pay creditors excess insurance proceeds from destruction of rental property).
19 Trustee specifically recognizes that the Court has the authority to modify his Modified Plan. *See*
20 Trustee's Supplemental Briefing, Docket No. 146, at 8:17-21.

21 To achieve both feasibility, and the \$168,000 pro rata proposed by Trustee in good faith, the
22 Court will approve an alternative structure for the Modified Plan. Through their current monthly
23 payments of \$1,350 a month, Debtors will pay \$41,439 to unsecured creditors over the course of their
24 Plan. To achieve the \$168,000 pro rata, Debtors must pay an additional \$126,561 over the remaining
25 60 month applicable commitment period, plus an additional \$12,656.10 to Trustee as a 10%
26 administrative fee. Though Debtors' monthly payments will remain \$1,350 a month, they will be
27 required to turn over \$42,187 each year end in 2012, 2013 and 2014. These three payments total
28

1 \$126,561, or the remaining amount necessary to achieve the \$168,000 pro rata. These payments are
2 feasible since they are approximately 60% of the \$70,000 in total bonuses and the Stock Spread Award
3 Debtors received in 2011. Within 30 days of the Court's order, Debtors will be required to pay
4 Trustee's additional administrative fee of \$12,656.10, perhaps by liquidating the Fidelity Stock Awards
5 Account on hand at present per Debtors' testimony.

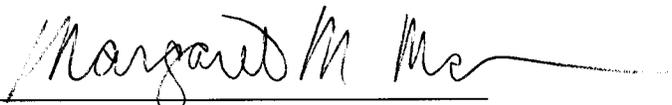
6 Although the monthly payments under the Modified Plan would normally end in March 2014,
7 the Court has discretion to allow the debtors to complete the plan payments beyond the applicable
8 commitment period. *See In re Hill*, 374 B.R. 745, 750 (Bankr. S.D. Cal. 2007); *Marshall v. Henry (In*
9 *re Henry)*, 368 B.R. 696, 701 (N.D. Ill. 2007); *see also* Matthew Bender & Co., *The Chapter 13 Plan*,
10 3A-34 Debtor-Creditor Law § 34.10, at 16 (2010). To receive their discharge, Debtors must turn over
11 whatever portion of the \$42,187 due in 2014 remains unpaid by March 2014, or if necessary by year-
12 end 2014.

13 With this alternative plan structure, Debtors will pay the \$168,000 to unsecured creditors as
14 Trustee requests, but the feasibility of the Modified Plan will not be adversely affected by requiring
15 increased monthly payments Debtors cannot necessarily make.

16 **II. CONCLUSION**

17 This Memorandum Decision constitutes the Court's findings of facts and conclusions of law
18 under 11 U.S.C. §7052(a). The Modified Plan, as further modified by the Court, is approved, and
19 Trustee may upload a confirmation order attaching a further modified plan consistent with this
20 decision.

21 Dated: June 7, 2012

22 
23 MARGARET M. MANN, JUDGE
24 United States Bankruptcy Court
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