

**Dated: November 17, 2006**  
**The following is ORDERED:**



*Jennie D. Latta*

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**Jennie D. Latta**  
**UNITED STATES BANKRUPTCY JUDGE**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TENNESSEE  
WESTERN DIVISION

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In re

MAYNARD G. CHURCHILL,  
and MARY C. CHURCHILL,

Case No. 03-33907-L  
Chapter 13

Debtors.

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**ORDER DENYING TRUSTEE'S MOTION TO MODIFY PLAN AND  
SETTING STATUS CONFERENCE ON DEBTORS' MOTION TO DISMISS CASE**

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BEFORE THE COURT are two motions, one filed by the George W. Stevenson, Chapter 13 Trustee, seeking to modify the Debtors' plan to increase the percentage to be paid to unsecured creditors from 10% to 100%, and the second filed by the Debtors seeking to voluntarily dismiss their Chapter 13 case. The court conducted an evidentiary hearing to consider these motions on October 19, 2006. At the close of proof, the court took the matters under advisement and now makes the following findings of fact and conclusions of law. This is a core proceeding. 28 U.S.C. § 157(b)(1)(A) and (O).

## FACTS

The Debtors filed a voluntary petition under Chapter 13 of the Bankruptcy Code on August 13, 2003. At the same time, the Debtors filed schedules, a statement of financial affairs, and a proposed Chapter 13 plan. Their Schedule A listed real property consisting of their residence located at 4396 Morgantown, Memphis, Tennessee, with a stated value of \$30,000, securing a claim of \$18,000. Based upon the schedules filed, the Debtors' plan was confirmed by order entered October 19, 2003, calling for payments of \$74 semi-monthly for 60 months with the percentage to be paid to unsecured creditors to be determined by the Trustee based upon the proofs of claim actually filed. By order entered August 3, 2004, the percentage of the unsecured claims to be paid was set at 10%. By order entered November 17, 2004, the amount of the Debtors' semi-monthly payments was increased to \$103, as the result of additional priority claims filed.

On June 22, 2006, the Debtors filed a motion seeking permission to sell their residence. In the motion, they indicated that the debt secured by the residence had been fully paid outside of their plan, and they desired to sell their residence, with any funds remaining after payment of closing costs and additional expenses being paid to the Trustee, and their plan payments reduced accordingly. This motion was granted by order entered July 24, 2006. The order provided for payment of the net proceeds of the sale to the Trustee "for application to the Debtors' Chapter 13 case." Only after this order was final did the Trustee file his motion to modify the plan.

At the hearing on the pending motions, Ms. Churchill testified that the Debtors' home was purchased in 1977 for \$36,000 and was sold in 2006 for \$91,000 - \$92,000. Nancy R. Rigell, staff attorney for the Trustee, testified that as the result of the sale, the Trustee has on hand \$72,040.05, that there remains to be paid \$70,261.60 in unsecured claims, and that the plan is less than thirty-six

months old. Under the confirmed plan, unsecured creditors are entitled to be paid 10% of their claims. Based upon the testimony of Ms. Rigell, not more than \$7,026.16 is required to pay unsecured creditors 10% of their claims (there was no testimony concerning whether or not unsecured creditors have already received some payment on their claims). Ms. Rigell introduced one exhibit consisting of a print-out from the records of the Shelby County Assessor's Office, which shows that for the tax year 2003, the Debtors' residence had an appraised value of \$71,380 for purposes of tax assessment. Although the discrepancy between the Tax Assessor's appraisal and the Debtors' estimate of value in their schedules is substantial, the Trustee failed to prove that the Debtors' estimate was made in bad faith or was knowingly false.

The Trustee proposes that the entire proceeds from the sale of the Debtors' residence be used to pay unsecured creditors in full, with the small balance remaining being returned to the Debtors. The Trustee does not oppose the dismissal of the Debtors' case after distribution of essentially all funds on hand to creditors. The Debtors take the position that the case should be dismissed with all funds being returned to them, or in the alternative that they be required to pay no more than 70% of the claims of their unsecured creditors.

### **ANALYSIS**

The Trustee argues that, had the Debtors been truthful in the valuation of their property when they filed their schedules, the percentage to be paid to unsecured creditors would have been set much higher than it was. This is so because of the "best interest of creditors test," codified at 11 U.S.C. § 1325(a)(4)<sup>1</sup>, which provides for confirmation of a plan if "the value, as of the effective date of the

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<sup>1</sup> This case was filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA"). References to the Bankruptcy Code (title 11, United States Code) are to the Code prior to amendment.

plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate were liquidated under chapter 7 of this title on such date.” The Trustee argues further that any appreciation in the value of property of the bankruptcy estate, at least during the first 36 months of a plan, is disposable income and should inure to the benefit of creditors.

The Debtors argue that all of the proceeds from the sale of their home should be returned to them based upon their confirmed plan or in the alternative that they be required to pay no more than 70% of the unsecured claims. The Debtors contend that the determination of value of property to be distributed in a hypothetical chapter 7 case for purposes of the best interest of creditors analysis is to be made as of the effective date of the plan, not at the later date of sale of property. The Debtors concede through their attorney that at the time of the filing of their petition they had equity in their property of some \$50,000, which would have enabled them to pay 70% of their unsecured claims.

This case presents two issues. First, is the Trustee entitled now to obtain a modification of the Debtors’ confirmed plan when the Trustee failed to object to the terms of the plan based upon the best interest of creditors test prior to confirmation and the Debtors tendered funds in an amount sufficient to complete payments under the confirmed plan prior to the filing of the Trustee’s motion to modify? Second, if so, is appreciation in the value of a prepetition asset to be included within “projected disposable income” for purposes of determining the percentage to be paid to unsecured creditors when the plan is modified?

Pursuant to 11 U.S.C. § 1327, “[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not

such creditor has objected to, accepted, or has rejected the plan.” No creditor has sought modification of the Debtors’ confirmed plan. Although the Trustee has not sought revocation of the order of confirmation, the court notes that he would not be entitled to do so pursuant to the terms of 11 U.S.C. § 1330, which limits the period for obtaining revocation of a confirmed plan procured by fraud to 180 days after the date of the entry of the order of confirmation. More than 180 days has elapsed since the entry of the order of confirmation; further, the Trustee has failed to prove that confirmation of the plan was procured by fraud, which requires proof of a knowing misstatement of fact or a deliberately misleading omission. *See, e.g., Shell Oil Co., Inc. v. State Tire & Oil Co.*, F.2d 971, 974 (6th Cir. 1942); *see generally, McClellan v. Cantrell*, 217 F.3d 890, 892-93 (7th Cir. 2000). Instead, the Trustee seeks modification of the confirmed plan. Modification of a confirmed plan is governed by section 1329, which provides in pertinent part:

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. § 1329(a). A trustee’s right to request modification of a confirmed plan is limited: the modification must occur *before* the completion of payments under the plan. The Debtors have tendered sufficient funds to the Trustee to enable him to pay the remaining obligations under the confirmed plan. Have not the Debtors, therefore, completed their payments under the confirmed

plan? If so, the Trustee's motion is untimely. Neither the Supreme Court nor the United States Court of Appeals for the Sixth Circuit has addressed the precise question of whether tender of a lump sum in an amount sufficient to pay the percentage of unsecured claims set pursuant to a confirmed plan constitutes the completion of payments under a plan for purposes of section 1329(a). The overwhelming majority of district and bankruptcy courts that have addressed the question, however, agree that it does. *See* cases cited at Keith M. Lundin, *Chapter 13 Bankruptcy*, Vol. 3, § 253.1, nn. 27-28. A representative case is *Casper v. McCullough*, in which the debtors were able to tender a lump sum to the trustee two years after confirmation of their plan in an amount sufficient to pay 10% of the allowed claims of unsecured creditors, the percentage called for in the confirmed plan. After the tender, the trustee filed a motion seeking to modify the confirmed plan to increase the percentage to be paid to unsecured creditors. The bankruptcy court held that the trustee's motion was untimely because the debtors had completed payments under the plan. *Casper v. McCullough (In re Casper)*, 154 B.R. 243 (N.D. Ill. 1993). Another is *In re Sounakhene*, in which the trustee moved to modify a confirmed plan following the debtors' tender of a lump sum after refinancing their home in an amount sufficient to complete payments under their confirmed plan. The bankruptcy court ruled that the motion was untimely. *In re Sounakhene*, 249 B.R. 801 (Bankr. S.D. Cal. 2000).

This court is persuaded by these and similar cases. Once a debtor has tendered sufficient funds to a trustee to pay the percentage to unsecured creditors set in a confirmed plan, payments under the plan are complete, and the plan cannot thereafter be modified. The Debtors in the present case have completed the payments under their plan. The Trustee's motion is therefore untimely and is **DENIED**. The court need not, therefore, consider the second issue raised by the parties, whether

appreciation in the value of a prepetition asset is to be included in “projected disposable income” for purposes of determining the percentage to be paid to unsecured creditors under a modified plan.

Upon completion of the payments under a confirmed plan, debtors are entitled to entry of discharge as soon as practicable. 11 U.S.C. § 1328(a). As a result, the court is reluctant to dismiss the Debtors’ case in light of its current ruling. Accordingly, the court will withhold entry of an order granting the Debtors’ motion to dismiss their case until it conducts a status conference to consider whether the Debtors would prefer to receive a discharge. A **status conference** shall be conducted on **Thursday, December 7, 2006, at 10:00 a.m.**, in Courtroom 645, 200 Jefferson Avenue, Memphis, Tennessee.

cc: Debtors  
Attorney for Debtors  
Chapter 13 Trustee  
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