

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF KENTUCKY
LEXINGTON**

IN RE:

**JEANNA LYNN GOSSERT
STEVEN ERIC GOSSERT**

CASE NO. 11-30355

DEBTORS

**ORDER DENYING CONFIRMATION OF
AMENDED CHAPTER 13 PLAN DATED AUGUST 9, 2011**

Chapter 13 Trustee Beverly Burden objected to confirmation of the debtors' amended Chapter 13 plan (Doc. 22) arguing income in excess of the amount of debtors' prepetition 401(k) contribution is disposable income, may not be contributed to a Roth IRA account, and must be included in the plan payment. The debtors, by counsel, responded, (Doc. 26), arguing debtors should be allowed to reduce the Roth contribution and allocate the funds to increase the plan payment by \$213 and increase the 401(k) contribution by \$600. The parties filed joint stipulations of fact, (Doc. 39), and briefs (Debtors, Doc. 41; Trustee, Doc. 40), the matter was submitted. The court, having considered the stipulated facts, briefs, and applicable law, and being sufficiently advised, finds as follows:

The debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on May 25, 2011. Schedule I, filed concurrently with the petition, indicates Steven Gossert is employed as a project manager with Gallatin Steel and Jeanna Gossert is self-employed with The Open Door Christian Book Store, LLC.

Jeanna Gossert is the sole member of the bookstore which ceased operations prepetition. The assets of the bookstore were fully encumbered by valid liens. The debtors are individually liable on several of the debts owed by the bookstore by virtue of personal guarantees.

In September or October 2010, the debtors took a distribution from the retirement account Steven Gossert had at his prior job. The gross distribution was approximately \$82,000.

The debtors received a net amount of \$65,601.60, which was deposited into their joint checking account.

Between September 9, 2010, and October 27, 2010, the debtors made capital contributions or loans to the bookstore totaling \$40,000. The bookstore used the funds in the ordinary course and for debt service. The debtors also used some of the net proceeds from the distribution to purchase a 2006 Dodge Dakota truck for Steven.

Prepetition, the debtors had a history of making contributions to Roth IRA accounts, one account for each debtor. From January 2009, through and including April 2010, two automatic debits, each for \$333.00 monthly, were recorded against the debtors' checking account for contributions to the Roth IRA accounts. The contributions stopped after April 2010, due to a decrease in income relating to Steven Gossert's job loss.

Contributions to the Roth accounts resumed in March 2011, and were being made as of the date of the filing of the chapter 13 petition, May 25, 2011. Each debtor was contributing \$416 monthly to a Roth IRA. The contributions were made by automatic debits against the debtors' bank accounts.

Schedule I, as originally filed, shows payroll deductions from Steven Gossert's wages of \$341.66 for a 401(k) retirement account and \$813.00 for a Roth IRA. As of the date of the filing of the petition, there was no payroll deduction from Steven Gossert's wages for a Roth IRA or any other retirement account other than the \$341.66 deducted monthly for the 401(k).

The original chapter 13 plan, filed with the petition, proposed a plan payment of \$220 while the debtors would continue the 401(k) and Roth contributions as reflected on Schedule I. In response to a negative confirmation recommendation by the Chapter 13 Trustee, the debtors filed an amended plan dated August 9, 2011, increasing the plan payment to \$420 and providing the following special provision in section VII.B:

The Debtors have maintained a high level of contribution into their 401k and Roth IRA's for years. The Debtors cashed in about 80,000 of their retirement to pay creditors prior to filing the Chapter 13 bankruptcy. The Chapter 13 trustee

maintains that a continued contribution into the ROTH IRA is not [an] allowed expense therefore the Debtors will increase their plan payment 213 dollars to 433 per month and shall increase the 401 k deduction 600 dollars with the remaining amount that was being contributed to the Roth IRA.

The trustee objected to this special provision arguing income in excess of the 401(k) contribution of \$341.66 is disposable income and must be included in the plan payment, not used for a contribution to a Roth IRA. The matter was briefed by the parties and submitted for determination.

Based on the record in this matter, the plan as proposed does not satisfy the disposable income test and is in conflict with *In re Seafort*, --- F.3d ----, 2012 WL 469723 (6th Cir. February 15, 2012), a recent opinion of the Sixth Circuit Court of Appeals.

First, the monthly Roth IRA contributions the debtors were making at the time of the commencement of their Chapter 13 case are not payroll deductions withheld by an employer and therefore are not excepted from property of the estate or from a debtor's disposable income under 11 U.S.C. § 541(b)(7).

Second, consistent with the opinion in *Seafort*, the debtors cannot reduce their disposable income by commencing or increasing contributions to a 401(k) retirement account postpetition. Indeed, the Sixth Circuit's reliance on the case of *In re Prigge*, 441 B.R. 667 (Bankr. D. Mont. 2010), and its *gratis dictum* in footnote 7 of the *Seafort* opinion, suggests debtors cannot make retirement contributions of any kind after filing a Chapter 13 petition.

Third, the debtors may not deduct their Roth IRA contributions or the postpetition increased 401k contributions from their projected disposable income as a "special circumstance." The fact the debtors made sacrifices, including withdrawals from their retirement savings, in a failed effort to avoid bankruptcy is not a "rare or unusual" occurrence justifying a finding of "special circumstances." See *In re Campbell*, Case #11-51573, Memorandum Opinion and Order (Doc. 39) (Bankr. E.D. Ky., January 18, 2012) (Wise, J.).

Therefore, IT IS ORDERED:

In light of the Chapter 13 Trustee's objection and pursuant to 11 U.S.C. § 1325(b), confirmation of the amended plan is denied. The debtors shall have fourteen days from the date of this order to file an amended plan consistent with this order and applying all of the debtors' projected disposable income received in the applicable commitment period to payments under the plan. The Chapter 13 Trustee shall tender an order continuing the confirmation hearing to the next available date.

Copies to:
Debtors
All parties receiving electronic notification

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Tuesday, February 28, 2012**  
**(jms)**