

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
HOT SPRINGS DIVISION**

**In Re: Alfred William Bettis and
Mary Lou Bettis, Debtors**

**No. 6:09-bk-76412
Ch. 13**

OPINION

Before the Court is a Motion for Relief from Stay filed on March 30, 2010, by creditor Ford Motor Credit Company, LLC [Ford Motor]. In its motion, Ford Motor states that its interest in its collateral, a 2002 Ford F-150 [Vehicle], is not adequately protected and that the debtors have committed a material default with respect to their confirmed plan. The Court held a hearing on the motion on May 4, 2010. At the conclusion of the hearing, the Court took the matter under advisement. For the reasons stated below, the Court denies Ford Motor's motion.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (G). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Background

On December 21, 2009, the debtors filed their chapter 13 bankruptcy petition, schedules, and plan. On Schedule B, the debtors listed the Vehicle and valued it at \$4,810.00. On Schedule C, the debtors claimed an exemption in the Vehicle in the amount of \$2,277.00. On Schedule D, the debtors stated that Ford Motor held a secured claim in the Vehicle in the amount of \$2,533.00, and held no unsecured claim. Additionally, Schedule D reflects that Ford Motor's lien on the Vehicle was acquired in 2005 and is secured by a purchase money security interest.

The debtors filed a proposed plan on December 21, 2009. Ford Motor filed its proof of claim on February 1, 2010. Neither Ford Motor, nor any other party, filed an objection to confirmation of the debtors' proposed plan. On February 23, 2010, the Court entered an order confirming the debtors' chapter 13 plan. The confirmed plan requires the debtors to make a \$150.00 monthly payment to the trustee, beginning within 30 days from the date the debtors' bankruptcy petition was filed. The plan does not state specifically when creditors should begin receiving payments or how the \$150.00 payments will be apportioned among creditors. The debtors' plan treats Ford Motor's debt of \$2,533.00 as a fully secured debt, and proposes monthly payments to Ford Motor in the amount of \$49.00.¹ The plan characterizes these \$49.00 payments as monthly payments and provides for no adequate protection payments to Ford Motor. Also, the debt to Ford Motor is not listed as a debt that would be paid by the debtors directly.

On March 30, 2010, Ford Motor filed its Motion for Relief from Stay. Ford Motor requests relief from the automatic stay for "cause" under 11 U.S.C. § 362(d)(1) for two reasons: (1) Ford Motor's interest is not adequately protected and (2) the debtors committed a material default with respect to their confirmed plan by failing to make any payments to Ford Motor, either pre- or post-confirmation, in violation of § 1326(a)(1) and the court's mandate in *In re Butler*, 403 B.R. 5 (Bankr. W.D. Ark. 2009).

Stipulations and Testimony at the May 4 Hearing

At the May 4 hearing, the parties read stipulations of fact into the record, which are summarized in pertinent part as follows:

- (1) the debtors have used the Vehicle daily since the filing of their chapter 13 petition;

¹ In the debtors' plan, Ford Motor is referred to as "Riser," which, according to the contract attached to Ford Motor's proof of claim and the parties' stipulations, is the seller of the Vehicle.

(2) the debtors intend to use the Vehicle daily during the remaining period of their chapter 13 plan;

(3) the Vehicle is depreciating in value as it is used and as it gets older;

(4) the amount sufficient to provide Ford Motor with adequate protection for its collateral is \$49.00 per month;

(5) the debtors have made the following payments to the chapter 13 trustee as of the date of the hearing:

| | |
|-------------------|----------|
| January 19, 2010 | \$150.00 |
| February 22, 2010 | \$150.00 |
| March 18, 2010 | \$150.00 |
| April 19, 2010 | \$150.00 |

(6) as of May 3, 2010, disbursements to Ford Motor are behind \$146.16 for principal and \$50.92 for interest;

(7) prior to confirmation of the debtors' plan, the trustee made no adequate protection payments to Ford Motor, or to any other party;

(8) following confirmation of the plan, and up until May 3, 2010, the chapter 13 trustee has only made the following disbursements:

| | | |
|---------------|--|----------|
| March 1, 2010 | Trustee: Salary and Expenses | \$16.50 |
| March 1, 2010 | Dickerson Law Firm: Attorney Kicker Fee | \$226.80 |
| March 1, 2010 | Dickerson Law Firm: Attorney Kicker Fee | \$56.70 |
| April 1, 2010 | Trustee: Salary and Expenses | \$8.25 |
| April 1, 2010 | Dickerson Law Firm: Attorney Kicker Fee | \$113.40 |
| April 1, 2010 | Dickerson Law Firm: Attorney Kicker Fee | \$28.35 |

(9) the debtors' attorney has received \$340.20 of his \$1000.00 "kicker fee." After the debtors' attorney receives \$1000.00 for his "kicker fee," Ford Motor will begin receiving its specified monthly payment of \$49.00;

(10) assuming the debtors continue to make all of their plan payments in full to the trustee, the \$49.00 monthly post-confirmation payments will be disbursed to Ford Motor beginning October 2010.

Linda McCormack, attorney for the chapter 13 trustee, testified at the May 4 hearing. McCormack confirmed that Ford Motor had not received any disbursements from the trustee's office. She stated that the reason Ford Motor did not receive any pre-confirmation payments was because its proof of claim was filed in the month of confirmation, and "the trustee pays based on claims." She agreed that October 2010 was the approximate date when Ford Motor would receive its first payment under the debtors' confirmed plan. She testified that the debtors are current and have made all of their plan payments in full and on time and that the trustee has not made any payments for force-placed insurance.

Separate debtor Mary Lou Bettis also testified at the May 4 hearing. Ms. Bettis is not employed. Mr. Bettis is employed, and he uses the Vehicle to drive to work. Ms. Bettis testified that the Vehicle was important to her family; without the Vehicle, Mr. Bettis would have to use the van that Ms. Bettis currently is using to try to find employment. Ms. Bettis testified that they have full insurance coverage on the Vehicle and Ford Motor is listed as the lienholder on the policy. She testified that she expected no changes that would prevent her from making her plan or insurance payments.

In closing argument, Ford Motor's counsel stated that, preferably, Ford Motor would like this Court to order that the debtors modify their confirmed plan to require that plan payments begin to Ford Motor; in essence, to provide for adequate protection payments post-confirmation. In the alternative, Ford Motor requested relief from the automatic stay for cause. The Court declines to address Ford Motor's request that the Court order the debtors to modify their plan; a request that the Court order the debtors to modify their confirmed plan should be brought under § 1329. The issue currently before the Court is a motion for relief from stay, which the Court addresses below.

Applicable Law

Under 11 U.S.C. § 362, the Court shall grant relief from the stay "for cause, including the lack of adequate protection of an interest in property of [a] party in interest." 11 U.S.C.

§ 362(d)(1). “Cause” is a “broad and flexible concept which permits a bankruptcy court, as a court of equity, to respond to inherently fact-sensitive situations.” *In re Indian River Estates, Inc.*, 293 B.R. 429, 433 (Bankr. N.D. Ohio 2003). Adequate protection is compensation, monetary or otherwise, paid to a creditor for the depreciation of its collateral. *United States Ass’n of Tex. v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 370 (1988) (“interest is not adequately protected if the security is depreciating during the term of the stay”). At the hearing, Ford Motor argued that cause exists to grant relief from the stay because Ford Motor did not receive either pre- or post-confirmation adequate protection payments and will not receive any payments until October 2010.

This court held in *In re Butler* that when a creditor’s interest in personal property is not adequately protected, adequate protection payments are required *before and after* confirmation of the debtor’s plan. *In re Butler*, 403 B.R. 5, 12 (Bankr. W.D. Ark. 2009). In *Butler*, Ford Motor Credit Company, LLC [FMC], filed an objection to confirmation of the debtors’ proposed plan, because—as in the present case—the trustee’s practice of paying the trustee’s expenses and the debtors’ attorney’s kicker fee before making payments to a secured creditor resulted in the creditor not receiving any payments for several months after the plan is confirmed. *Id.* at 10. The court held that under § 1326, the trustee is only required to distribute “as soon as practicable the payments made by the debtor to the trustee pursuant to § 1326(a)(1).” *Id.* at 14; 11 U.S.C. § 1326(a)(2). The court stated that “the timing and the amount of payments to specific creditors is determined by the trustee in accordance with the bankruptcy code.” *Butler*, 403 B.R. at 14. However, the court sustained FMC’s objection because it found that the plan as proposed was not confirmable; under the code, the debtors were required to make adequate protection payments to FMC until the trustee began disbursing payments to creditors under the plan. *Id.* at 16–17. In the present case, Ford Motor did not object to confirmation of the debtors’ plan. Although Ford Motor has not received pre- or post-confirmation adequate protection payments, that is not sufficient cause to grant Ford

Motor relief from the automatic stay under § 362(d)(1), as will be discussed below.

Pre-Confirmation Payments

Pursuant to § 1326(a),

(a)(1) *Unless the court orders otherwise*, the debtor shall commence making payments not later than 30 days after the date of the filing of the plan or the order for relief, whichever is earlier, in the amount—

(A) proposed by the plan to the trustee; . . . and

(C) that provides adequate protection *directly to a creditor* holding an allowed claim secured by personal property to the extent the claim is attributable to the purchase of such property by the debtor for that portion of the obligation that becomes due after the order for relief, reducing the payments under subparagraph (A) by the amount so paid and providing the trustee with evidence of such payment, including the amount and date of payment.

11 U.S.C. § 1326(a)(1) (emphasis added). Section 1326(a)(1) requires the debtor to begin making two kinds of payments, relevant to this case, not later than 30 days after the petition is filed: (1) under subsection (A), the debtors must make a payment in the amount proposed by the plan *to the trustee*; and, (2) under subsection (C), the debtors must make a payment in an amount that provides adequate protection *directly to a creditor*. Subsection C allows the amount of the payment required by subsection (A) to be reduced by the amount of the payment made under subsection (C). However, the requirements of § 1326(a)(1)(A) and (C) are subject to this section's introductory clause— “unless the court orders otherwise.”

General Order 32 of the United States Bankruptcy Court for the Eastern and Western District of Arkansas orders debtors to make pre-confirmation adequate protection payments directly to the trustee's office, instead of to the creditor as required by subsection (C). General Order 32 also designates what the amount of pre-confirmation adequate protection payments shall be in cases, such as the present case, where the plan

proposes no adequate protection payments. General Order 32 states, in relevant part:

1. Adequate Protection Payments. All adequate protection payments which shall become payable on or after October 17, 2005, pursuant to the requirements of 11 U.S.C. § 1326(a)(1)(B) and (C), shall be paid as follows: . . .

b) If the Chapter 13 Plan provides for a § 1326(a)(1)(C) pre-confirmation adequate protection payment to a creditor holding an allowed claim secured by personal property to the extent that the claim is attributable to the purchase of such property by the Debtor for that portion of the obligation that becomes due after the order for relief is entered, *said payment shall be paid through the Chapter 13 Trustee and not directly to the creditor. If no adequate payment is designated in the proposed plan, the payment amount shall be the amount of the proposed plan payment to said secured creditor.*

. . .

d) The Chapter 13 Trustee shall distribute pre-confirmation adequate protection payments to any creditor identified by the Debtor's Plan and *for which a proof of claim has been filed*, as soon as practicable after receipt of said payment from the Debtor.

Under § 1326(a)(1), the debtors were required to commence making plan and adequate payments by January 21, 2010. Subsection (A) requires that the debtors' plan payments must be made to the trustee's office. However, General Order 32 amends subsection (C), by requiring that the debtors' pre-confirmation adequate protection payments also be made to the trustee's office. Additionally, General Order 32 requires that the pre-confirmation adequate protection payment must be in the amount of the proposed plan payment when no adequate protection payments are proposed in a debtor's plan. The reduction of the plan payment by the adequate protection payment as provided for in subsection (C) is not obviated by General Order 32. In the present case, the debtors met the above requirements. The debtors began making \$150.00 payments to the trustee's office on January 19, 2010. Therefore, the Court finds that the debtors met their obligations under § 1326(a)(1) and General Order 32.

Counsel for the trustee testified that the reason Ford Motor did not receive any pre-confirmation adequate protection payments was because it filed its proof of claim the same month as confirmation. Under General Order 32, paragraph 1(d), the trustee distributes pre-confirmation adequate protection payments to creditors for which a proof of claim has been filed. Therefore, to the extent Ford Motor contends that the trustee's office should have disbursed pre-confirmation adequate protection payments to Ford Motor, this contention is not cause for relief from the automatic stay.

Post-Confirmation Payments

Regarding post-confirmation payments, the court held in *Butler* that "confirmation of a plan does not obviate the requirement for adequate protection." *Butler*, 403 B.R. at 17. This requirement presupposes that (1) adequate protection is necessary to protect the creditor's interest, and (2) the creditor has not agreed to receive less than is necessary to protect its interest through negotiation with the debtor. Under the bankruptcy code, secured creditors may accept a plan that provides less than the amount sufficient to provide the holder with adequate protection. 11 U.S.C. § 1325(a)(5). Section 1325(a)(5) sets forth how a secured claim must be treated in a plan in order for the plan to be confirmable. This section is written in the disjunctive and, therefore, only requires the debtor to meet one of three requirements:

(A) the holder of such claim has accepted the plan;

(B) the plan provides that—

...

(iii) if . . .

(II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan; or

(C) the debtor surrenders the property securing such claim to such holder.

11 U.S.C. § 1325(a)(5). The court's opinion in *Butler* recognizes that the creditor may accept less than the amount necessary for adequate protection in a footnote in the context of its discussion of §1325(a)(5)(B)(iii)(II):

The purpose of [§1325(a)(5)(B)(iii)(II)] is to make sure that creditors whose claims are secured by personal property remain adequately protected during the period of the plan or until the creditor's claim is paid in full. For example, if adequate protection is determined to be \$200.00 per month and the balance of the debt is \$2000.00, the debtor cannot confirm a plan unless he proposes to pay that creditor at least \$200.00 per month.⁵

⁵ *Unless, of course, the creditor otherwise accepts the plan under § 1325(a)(5)(A).*

Butler, 403 B.R. at 13 (emphasis added).

General Order 20 of the United States Bankruptcy Court for the Eastern and Western District of Arkansas requires that objections to the confirmation of a debtor's plan in chapter 13 bankruptcy cases be filed within 10 days after the § 341 meeting of creditors is concluded, and states that "[i]f no objections to confirmation are filed within the time fixed in the 341(a) hearing notice, the plan will be confirmed without further notice or a hearing." In the case before the Court, if \$49.00 was necessary to protect Ford Motor's interest at the time of confirmation, Ford Motor should have objected to the proposed plan. By not objecting to the plan, Ford Motor is deemed to have accepted its terms. *In re Carter*, 390 B.R. 648, 651 (W.D. Mo. 2008) (citing *In re Basham*, 167 B.R. 903, 904–05 (Bankr. W.D. Mo. 1994) (stating that "a number of courts have held that a creditor who fails to object to a Chapter 13 plan is deemed to have accepted it.")).

The proposed plan did not provide for any adequate protection payments either through the trustee's office or to Ford Motor directly. The debtors' proposed plan was confirmed by court order on February 23, 2010. A confirmed plan "bind[s] 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, has accepted, or has rejected the plan." 11

U.S.C. § 1327. The confirmed plan “acts as a binding contract and an order of the bankruptcy court.” *In re Jenkins*, 2010 WL 1643607, *3 (B.A.P. 8th Cir. 2010). Here, the confirmed plan only provides for monthly payments on account of Ford Motor’s claim, to be paid through the trustee’s office. This is different from what § 1326(a)(1)(C) requires. However, § 1326(a)(1)(C) only applies if the court has not “ordered otherwise.” In *Butler*, adequate protection payments were required to continue post-petition, pursuant to § 1326(a)(1), because there was no court order ordering otherwise. In this case, the Court’s order of confirmation approved a plan that provided for no post-petition adequate protection payments to Ford; the plan only provided for a \$49.00 monthly payment to be paid through the trustee’s office, which the trustee would then distribute pursuant to its requirements under the bankruptcy code.² The debtors have consistently made their \$49.00 payment as part of their \$150.00 plan payment on time and in full to the trustee’s office. Therefore, the debtors have complied with the terms of their plan and are not in default.

Conclusion

Throughout the course of their bankruptcy, the debtors have complied with this Court’s orders regarding adequate protection payments. Pre-confirmation, the debtors complied with the adequate protection requirements as set forth in General Order 32 and made a payment in an appropriate amount to the trustee’s office on account of Ford Motor’s claim. Post-confirmation, the debtors complied with their confirmed plan, a plan to which Ford Motor did not object, by making their plan payments in full and on time to the trustee’s office as set forth in the plan. Both General Order 32 and the order of confirmation set forth payment directives that differ from those set forth in

² After a plan is confirmed, “the trustee shall distribute any such payment in accordance with the plan as soon as is practicable.” 11 U.S.C. § 1326(a)(2). The trustee determines the timing and the amount of payments to specific creditors in accordance with the bankruptcy code. *Butler*, 403 B.R. 14. To the extent Ford Motor believes that the trustee’s disbursements in this case are not in compliance with the bankruptcy code or *Butler*, it can file the appropriate action.

§ 1326(a)(1)(C); however, such deviation is expressly permissible under § 1326(a)(1). Section § 1325(a)(5), by being worded in the disjunctive, allows the Court to confirm a plan that has been accepted by the creditor under § 1325(a)(5)(A) even though the plan may not comply with § 1325(a)(5)(B). Ford Motor accepted the plan by failing to object to the confirmation of the proposed plan.

For these reasons, the Court finds that there is not cause under § 362(d)(1) to grant Ford Motor's motion for relief from the automatic stay. Additionally, because only a motion for relief from the stay is before the Court, the Court will not consider ordering the debtors to modify their confirmed plan. Accordingly, Ford Motor's motion is denied.

IT IS SO ORDERED.

June 9, 2010

DATE



BEN T. BARRY
UNITED STATES BANKRUPTCY JUDGE

cc: James C. Hunt, attorney for debtor
Louis W. Light, attorney for Ford Motor
Jack W. Gooding, chapter 13 trustee

EOD 6/10/2010
by A Smith