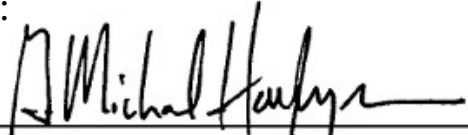




THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: June 28, 2016


G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In the matter:

Sara Gouthro and Donald Gouthro II,

Debtors.

Case No. 12-35699-GMH

Chapter 13

ORDER ON OBJECTION TO AFFIDAVIT OF DEFAULT

The trustee moved to dismiss this case in December 2015 because the debtors had not provided one-half of the net tax refunds they received in 2012 through 2014, as required by their confirmed plan. CM-ECF Doc. No. 27. On January 22, 2016, well after the objection deadline expired, the debtors objected to dismissal, contending they would “cure payments”, provide proof of filing their taxes within 60 days and file a plan modification to cure the tax-refund default. CM-ECF Doc. No. 33. Before a hearing to consider the motion’s merits, the parties filed a stipulation in which the trustee agreed to withdraw the dismissal motion and the debtors agreed to cure the tax-refund default. The debtors assured the trustee that they would either amend the plan on or before March 31, 2016, to provide for the payment of the refund arrears over the remainder of the plan term or pay the refund arrears to the trustee on or before May 31,

2016. CM-ECF Doc. No. 39. The stipulation afforded the trustee the right to have the case dismissed upon filing an affidavit averring that the debtors failed to perform under the terms of the stipulation. On March 18 the court approved the stipulation and ordered the debtors to perform under its terms. CM-ECF Doc. No. 40.

On June 10, the trustee filed an affidavit averring that the debtors were in default of the March 18 order—they neither filed an amended plan by March 31 nor paid the tax-refund arrearage to the trustee by May 31. CM-ECF Doc. No. 42. On June 13, the debtors filed an “objection” to the trustee’s affidavit. The objection states, “1. Debtor[s] will cure payments. 2. Debtor[s] will have proof of tax refunds filed by within [*sic*] 60 days[.] 3. Debtors will cure tax refund default via amended plan. WHEREFORE debtor[s] pray[] to this Court to deny the motion.” CM-ECF Doc. No. 43. The debtors also filed a plan modification on June 13, which purports to cure the tax-refund default. CM-ECF Doc. No. 44.

The debtors’ June 13 objection misunderstands the procedural posture of this case. The debtors defaulted on their obligation under the plan to provide the trustee with one-half of tax refunds received during the plan term. The trustee agreed to accept either (i) an amended plan curing that default, as long as the debtors filed that amendment by March 31, 2016, or (ii) payment of the refund arrears in full by May 31, 2016. In exchange the debtors agreed to afford the trustee the right to have the case dismissed without further proceedings if the debtors didn’t hold up their side of the deal. The parties jointly asked the court to make the deal’s terms the subject of a court order.

Under these circumstances, the debtors’ June 13 “objection” is frivolous. The March 18 order afforded the trustee a right to have the case dismissed on affidavit establishing a default of the duties that the order imposed on the debtors. The trustee filed an affidavit averring a default. There are only two potential non-frivolous responses to the affidavit: (1) an objection that contends that the trustee’s affidavit is

factually erroneous and the debtors performed as ordered, or (2) a request that the court expand the time set by the order for the debtors to perform. The second option requires that the debtors establish excusable neglect under Federal Rule of Bankruptcy Procedure 9006(b)(1). Both courses require a sufficiently detailed statement of facts to justify an evidentiary hearing about whether the trustee's averments were false or whether the debtors' default resulted from excusable neglect. Cf. *In re Canopy Financial, Inc.*, 708 F.3d 934, 936–37 (7th Cir. 2013).

The debtors' objection to the trustee's affidavit of default follows neither course. The debtors cannot show the trustee's affidavit was based on falsehood. The proposed plan modification the debtors filed on June 13 effectively concedes the accuracy of the trustee's averment that the debtors failed to cure the tax-refund default by May 31. And the objection alleges no facts suggesting excusable neglect. The objection to the affidavit of default copies, verbatim, the debtors' objection to the original motion to dismiss. Compare CM-ECF Doc. No. 33 to Doc. No. 43. That course is a non-starter.

The debtors' objection is overruled. The court will enter a separate order dismissing the case pursuant to the March 18 order and the trustee's June 10 affidavit of default.

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This order is notice to litigants and counsel before this court that similar meritless objections to affidavits of default risk sanctions under 11 U.S.C. §105(a) and Federal Rule of Bankruptcy Procedure 9011(c).

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