



The relief described hereinbelow is SO ORDERED.

Signed November 17, 2009.

A handwritten signature in cursive script that reads "Robert D. Berger".

ROBERT D. BERGER
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**JAMES EDWARD AXFORD and
CANDICE KAY AXFORD,
Debtors.**

**Case No. 09-20915
Chapter 13**

ORDER GRANTING TRUSTEE'S MOTION TO DISMISS

The Chapter 13 trustee objects to confirmation of Debtors' plan and seeks dismissal because Debtors are not eligible for Chapter 13 relief. Debtors' unsecured debt exceeds the limit set by 11 U.S.C. §109(e). This matter constitutes a core proceeding over which this Court has jurisdiction.¹

Findings of Fact

Debtors filed their Chapter 13 petition on March 31, 2009. Debtors scheduled their homestead with a value of \$445,000.00. Debtors scheduled first and second mortgages on their homestead in the aggregate amount of \$805,172.30. Thus, the mortgage claims exceed the

¹ 28 U.S.C. § 157(b)(2)(A), (L), and (O); 28 U.S.C. § 1334.

collateral value by \$360,172.30. Debtors scheduled unsecured nonpriority debt totaling \$113,760.63. Debtors also have a vehicle which has a secured claim against it surpassing the vehicle's value by \$8,200.00 and an unsecured timeshare debt of \$12,692.22.

Conclusions of Law

Only an individual with less than \$336,900.00 in unsecured debts is eligible for Chapter 13 relief.² The vast majority of courts and all circuit courts that have considered the issue have included the unsecured portion of undersecured debt in calculating §109(e) eligibility.³ The anti-modification provision found in 11 U.S.C. §1322 does not create an exception to the rule.⁴ For purposes of determining §109(e) eligibility, the undersecured portion of a debt against the homestead must be included as unsecured debt.⁵

The trustee's motion to dismiss is GRANTED.

IT IS SO ORDERED.

###

ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS

² 11 U.S.C. §109(e).

³ *In re Scovis*, 249 F.3d 975 (9th Cir. 2001); *Miller v. U.S.*, 907 F.2d 80, 81-82 (8th Cir. 1990); *Matter of Day*, 747 F.2d 405, 407 (7th Cir. 1984); *In re Balbus*, 933 F.2d 246, 247 (4th Cir. 1991).

⁴ *In re Werts*, 410 B.R. 677 (Bankr. D. Kan. 2009).

⁵ *In re Groh*, 405 B.R. 674 (Bankr. S.D. Cal. 2009).