

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re)	
)	
AMY E. HUISMANN	)	Case No. 13-10001
CINDY R. PRICE	)	Case No. 13-10008
DAVID E. & BARBARA A.	)	Case No. 13-10009
TIMBERLAKE)	
BRIAN K. & TANGELA A. TAYLOR	)	Case No. 13-10021
THOMAS B. & JOY K. JONES	)	Case No. 13-10055
SHAWN M. & LATONIA R. REID	)	Case No. 13-10123
THOMAS W. DAVIS	)	Case No. 13-10187
CRAIG R. FYFFE	)	Case No. 13-10193
JAMES R. & RENEE M. WEISNER	)	Case No. 13-10338
ABOAGYE K. KESSE	)	Case No. 13-10340
DONALD T. & MARY L. CRENSHAW	)	Case No. 13-10351
PETE J. & TAWNYA R. SPIVEY	)	Case No. 13-10410
DONALD P. DIRR	)	Case No. 13-10493
BRIAN J. ENGLE & RHONDA L.	)	Case No. 13-10514
JESSEE-ENGLE)	
ADAM T. & STACI L. KURTZ	)	Case No. 13-10579
CHRISTOPHER L. & DONNA G.	)	Case No. 13-10666
BARBER)	
GLORIA E. SMITH	)	Case No. 13-10686
SHEENA J. BUCHANAN	)	Case No. 13-10699
WADE D. & HEATHER M. DEPRIEST	)	Case No. 13-10807
JAMES R. & MELISSA A.	)	Case No. 13-10822
WOLOSCHEK)	
SAMUEL R. BOLING	)	Case No. 13-10917
TRAVIS M. & KATHERINE E.	)	Case No. 13-10944
STEWART)	
ELMER A. & DANA T. GREGORY	)	Case No. 13-10957
RICK S. JESSEE	)	Case No. 13-10980
DANIEL L. HOOD	)	Case No. 13-11055
MARGARET A. GARRETT	)	Case No. 13-11056
LISA D. HICKS	)	Case No. 13-11103
FREDERICK G. & MELISSA A.	)	Case No. 13-11128
TAYLOR)	
RICKY G. & MICHELLE A.	)	Case No. 13-11209
STEPHENSON)	
NATASHA C. VAUGHN	)	Case No. 13-11195
DAVID J. WETTERER	)	Case No. 13-11505
KATHY J. CONN	)	Case No. 13-11506
Debtors)	

ORDER DENYING MOTIONS FOR LEAVE

The debtors (the “Debtors”) in each of the above-captioned cases have filed a *Chapter 13 Plan* and a related *Motion For Leave* (collectively, the “Motions”) seeking authority to make certain modifications to the mandatory chapter 13 plan (the “Form Plan”) adopted for use in cases filed before the United States Bankruptcy Court for the Southern District of Ohio, Western Division at Cincinnati (the “Court”). The chapter 13 trustee, Margaret Burks (the “Trustee”), opposes the Motions. The Trustee summarized her specific objections by way of an *Objection to Confirmation of Plan* (collectively, the “Objections”), which she filed in each of the above-captioned cases. The Trustee also filed a separate *Motion to Schedule and/or Objection to Motion for Leave* (the “Joint Hearing Request”) suggesting that the Court set all the Motions for joint hearing and joint consideration of confirmation. The issues raised in the Motions and Objections span multiple cases pending before each of the three Judges sitting in Cincinnati.¹

At the outset, the Court notes that a majority of bankruptcy courts nationwide have adopted a form chapter 13 plan for use in their district. *In re Visintainer*, 435 B.R. 727, 729-30 (Bankr. M.D. Fla. 2010)(observing that approximately 70 percent of all bankruptcy courts use model chapter 13 plans). The standardized language of a form plan greatly facilitates review by creditors, the chapter 13 trustee and the court, thereby increasing the efficiency of administering chapter 13 cases. *In re Russell*, 458 B.R. 731, 735 (Bankr. E.D. Va. 2010); *In re Knecht*, 2012 Bankr. LEXIS 20 at *7 (Bankr. S.D. Ohio Jan. 6, 2012)(“[T]he task of the Chapter 13 Trustee ought not be made more onerous by unnecessary departures from the standard plan application in

¹ The Court derives its authority to issue this joint decision from 28 U.S.C. § 132(c), under which the judicial power of the Court may be exercised by a single judge, “[e]xcept as otherwise provided by law, or rule or order of court” Because this is not an *en banc* decision, the Court acknowledges that this decision is not binding upon the other bankruptcy judges in this district. *Rhiel v. OhioHealth Corp. (In re Hunter)*, 380 B.R. 753, 759 n.5 (Bankr. S.D. Ohio 2008)(citations omitted).

this community.”). Creditors are more “readily [able to determine] the effect of confirmation on their claims and the duties that confirmation imposes on them.” *In re Jackson*, 446 B.R. 608, 611 (Bankr. N.D. Ga. 2011). Debtors similarly benefit from the use of a form plan in that it provides a template which, if properly used, will likely result in confirmation of a debtor’s proposed plan. *In re Maupin*, 384 B.R. 421, 426 (Bankr. W.D. Va. 2007).

Like the majority of bankruptcy courts, this Court requires the use of a mandatory chapter 13 plan in the form adopted by each of the three localities for the Southern District of Ohio. *See* Local Bankruptcy Rule 3015-1(a)(1). Debtors wishing to use a plan that varies from the mandatory chapter 13 plan must file a motion requesting leave of the Court to do so. *See* Local Bankruptcy Rule 3015-1(a)(2). Leave will be granted only in such instances where “*exceptional circumstances related to the particular chapter 13 case*” are present. *Id.* (emphasis added).

1. Requested Modifications to Paragraph 1A of the Form Plan

The Debtors seek leave to modify Paragraph 1A of the Form Plan as follows:

1. MEDIAN INCOME/PLAN PAYMENT/PAYROLL DEDUCTION

A. MEDIAN INCOME

CHOOSE ONE: (X)

Debtor is BELOW median income.

Unless allowed unsecured claims are **projected** to be paid 100%, this Plan shall not **be projected to** provide for less than the sum of thirty-six (36) monthly Plan payments. ~~This provision does not prohibit Debtor from moving for leave to prepay the Plan prior to thirty six (36) months of Plan payments.~~

Debtor is ABOVE median income.

Current monthly income (CMI) minus means test expenses (IRS amounts) = Disposable income (D/I)

D/I (line 59 of the means test) \$ _____ TIMES 60 = \$ _____

Unsecured creditors ~~shall~~ **are projected to** receive this amount at a minimum absent special circumstances set forth herein. Unless allowed unsecured claims are **projected** to be paid 100%, this Plan

shall not be **projected to** provide for less than the sum of sixty (60) monthly plan payments. ~~This provision does not prohibit Debtor from moving for leave to prepay the Plan prior to sixty (60) months of Plan payments.~~

□ *Hamilton v. Lanning (In re Lanning)*, 130 S. Ct. 2464 (2010) circumstances ARE applicable to this case.

Debtor is unable to meet the disposable income amount to unsecured creditors because

Debtor will provide tax returns and paystubs to Debtor's attorney by April 15th of every year. Debtor's attorney will file a status report on Debtor's income and state whether *In re Lanning* circumstances still exist by April 30th of every year, and file amended Schedules I, J, and a motion to modify plan if income increases. This is a sixty (60) month plan.

The Debtors argue that the additional language clarifies that the statements made in Paragraph 1A of the Form Plan are based on projections as of the time of the confirmation. The Debtors maintain that without the additional language, the future tense of the sentence structure used in Paragraph 1A of the Form Plan makes such statements ambiguous and could be interpreted to negate the binding effect of Section 1327 of the Bankruptcy Code² under the holding of the United States Supreme Court in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010).

The Court disagrees. First, for those cases involving below median debtors, it is not appropriate to make a change in the Form Plan that is applicable to above median debtors, and vice versa. Therefore, the modifications to Paragraph 1A of the Form Plan are procedurally deficient in that the modifications are not tailored to the particular chapter 13 case. Local Bankruptcy Rule 3015-1(a)(2).

² Unless otherwise indicated, the terms "Bankruptcy Code," "Section" and "§" refer to Title 11 of the United States Code, 11 U.S.C. § 101 et seq., as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA").

Second, Paragraph 1A of the Form Plan is neither ambiguous nor at odds with *Espinosa*.³ Section 1325(b)(1) of the Bankruptcy Code provides that, if the trustee or an allowed unsecured creditor objects to confirmation of a chapter 13 plan, the court may not confirm the plan unless the plan provides either for payment in full of all allowed unsecured claims or payment to unsecured creditors of all of the debtor's *projected* disposable income over the applicable commitment period. 11 U.S.C. § 1325(b)(1)(emphasis added). The Sixth Circuit Court of Appeals has interpreted Section 1325(b)(1) of the Bankruptcy Code as imposing a temporal payment requirement (versus a monetary payment requirement), which obligates debtors to make payments over either a thirty-six (36) month duration for below median debtors or a sixty (60) month duration for above median debtors. *Baud v. Carroll*, 634 F.3d 327, 344 (6th Cir. 2011); *cert. denied, Baud v. Carroll*, 132 S. Ct. 997 (2012).

The Court views Paragraph 1A of the Form Plan as signifying the Trustee's standing objection to confirmation absent compliance by the debtor with the requirements of Section 1325(b)(1) of the Bankruptcy Code to either pay all allowed unsecured claims in full or to submit all projected disposable income over the applicable commitment period towards the payment of allowed unsecured claims. Paragraph 1A of Form Plan properly reflects the requirements of Section 1325(b)(1) of the Bankruptcy Code as interpreted by the Sixth Circuit Court of Appeals. It is not necessary to add the word "projected" to the Form Plan because the concept of "projected disposable income" is embodied in Section 1325(b)(1) of the Bankruptcy Code. The Debtors have failed to show exceptional circumstances warranting variance from the Form Plan for any particular chapter 13 case. Therefore, the Debtors' requested modifications to Paragraph 1A of the Form Plan are denied.

³ The Debtors' *Espinosa* argument is addressed in connection with the Debtors' requested modification to Paragraph 1B of the Form Plan relating to post-confirmation adjustments.

2. **Requested Modifications to Paragraph 1B of the Form Plan**

A. **Paragraph 1B— Requested Modifications to First Section**

The Debtors seek leave to modify the first section of Paragraph 1B of the Form Plan as follows:

B. PLAN PAYMENT

Debtor's first Plan payment is due within thirty (30) days of filing of the bankruptcy petition. Debtor shall pay to the Trustee ~~all projected disposable income in~~ the amount of \$_____ each month for **a total projected length of** approximately ___ months, but not to exceed five (5) years.

The Debtors propose to delete the phrase "all projected disposable income in" from Paragraph 1B of the Form Plan arguing that "it is contrary to the bankruptcy code to equate the month[ly] plan payment in the mandatory plan form as being all projected disposable income." The Court concludes that this proposed modification to the Form Plan is not justified. First, as previously discussed, the plan must provide for the payment of all of a debtor's projected disposable income to satisfy the requirements of Section 1325(b)(1) of the Bankruptcy Code.

Second, in practice, a debtor's projected disposable income is a component of the monthly plan payment. In each of these cases, the Debtors' projected disposable income will be applied to make payments to unsecured creditors with the balance of the monthly plan payment being disbursed to other creditor constituencies in accordance with the terms of the Form Plan. This conclusion is apparent when reading Paragraph 1B of the Form Plan in concert with the other provisions of the Form Plan, which clearly delineate how the plan payments are disbursed by the Trustee. *Compare, e.g.*, Paragraphs 3, 4, 8 and 11 of the Form Plan providing for payment by the Trustee of certain administrative, priority and secured claims from funds on hand with the Trustee, *with* Paragraph 12 of the Form Plan providing for direct payment by the debtor of certain claims. In fact, it appears from the parties' briefs that the Debtors and the Trustee

agree on the methodology for calculating projected disposable income and the overall plan payment amount. Having failed to demonstrate exceptional circumstances warranting variance from the Form Plan for any particular chapter 13 case, the Debtors' requested deletion of the phrase "all projected disposable income in" from Paragraph 1B of the Form Plan is denied.

Lastly, the Court likewise denies the Debtors' request to insert the phrase "total projected length of" to modify the plan length set forth in Paragraph 1B of the Form Plan. Paragraph 1B already states that the plan length is an approximation; therefore, the addition of the word "projected" is superfluous.

B. Paragraph 1B— Requested Modifications to Second Section

The Debtors seek leave to delete the second section of Paragraph 1B of the Form Plan, which provides as follows:

After the deadline for allowed claims has expired, if the Plan will complete in fewer months than the applicable commitment period set forth in 11 U.S.C. § 1325(b)(1)(B), the Trustee may notify Debtor's attorney via email, and at least fourteen (14) days later shall be entitled to file a notice of increased Plan percentage accordingly.

The Debtors contend that the Trustee should not be permitted to effectuate a post-confirmation increase in plan percentage by way of a notice. However, somewhat confusingly, the Debtors add the following language to Paragraph 30(b) of the plan:

Provided at least fourteen (14) days prior email notice is first given to Debtor's attorney and subject to the Debtor reserving the unprejudiced right to seek reversal of such increase based on unanticipated claims or amounts thereof, following confirmation of the Plan or the claims Bar Date, whichever is later, in the event the projected length of the Plan is then determined by the Trustee to be less than thirty-six (36) months, the Trustee may increase the percentage for distribution to general unsecured claims under the Plan to such percentage to cause the projected length of the Plan to be thirty-six (36) months by filing a notice of increased Plan percentage with the Court.

This language in Paragraph 30(b) suggests that the Debtors do not really quarrel with the procedural mechanism for post-confirmation increases in plan percentage as long as the Debtors have the opportunity to object to the Trustee's notice. It is the Court's understanding that the Trustee files a notice regarding an increase in plan percentage only if the debtor agrees with the Trustee's determination. In circumstances where the debtor disagrees with the Trustee's determination to increase the plan percentage, it is the Court's understanding that the Trustee files a motion to modify the plan—with opportunity to object—rather than a notice. In any event, to the extent that there is any ambiguity regarding a debtor's right to object to a notice filed by the Trustee to increase the plan percentage post-confirmation, the Court construes Paragraph 1B to afford the debtor with the right to object to any such notice.

A more substantive (and more oblique) contention raised by the Debtors is that the Trustee can never effectuate an upward adjustment in plan percentage when the total amount of claims filed comes in lower than expected—so-called “creditor apathy.” The Debtors argue that, if a confirmed chapter 13 plan complies with the applicable commitment period as projected at the time of confirmation, a post-confirmation modification to increase the plan percentage is not permitted given the binding effect of confirmation under Section 1327 of the Bankruptcy Code and the United States Supreme Court's holding in *Espinosa*.

Procedurally, the Court need not address the Debtors' argument since the claims bar date typically will not have passed at the time of confirmation, making the issue not ripe for judicial determination. *See* Local Bankruptcy Rules 3015-1(a)(2), (3)(requiring that variations from the Form Plan and special plan provisions must be applicable to the particular circumstances of the debtor's case); *see also In re Nys*, 2013 Bankr. LEXIS 93 at *20 (Bankr. S.D. Ohio Jan. 8, 2013)(rejecting a special plan provision that did not pertain to the particular circumstances of the

debtors but rather related to an issue that is present in numerous chapter 13 cases). Moreover, as previously discussed, the Debtors' right to object to any proposed post-confirmation modification is preserved under the Form Plan. Accordingly, it is not necessary to modify the language of the Form Plan to prevent any prospective preclusion argument under Section 1327 of the Bankruptcy Code and *Espinosa*.

Substantively, the Debtors' argument is questionable in light of the discussion in the seminal cases regarding BAPCPA's objective to maximize creditor repayment consistent with a debtor's ability to contribute his or her full disposable income. *Hamilton v. Lanning*, 130 S. Ct. 2464, 2475-76 (2010)(adopting a forward-looking approach to calculating disposable income, which approach maximizes payments to creditor where a debtor's disposable income supports making higher plan payments); *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 729 (2011)(noting that BAPCPA's core purpose is to ensure that debtors devote their full disposable income to repaying creditors); *Baud*, 634 F.3d at 357 (holding that "where each competing interpretation of a Code provision amended by BAPCPA is consistent with the plain language of the statute, [a court] must, as the Supreme Court did in *Lanning* and *Ransom*, apply the interpretation that has the best chance of fulfilling BAPCPA's purpose of maximizing creditor recoveries"). Additionally, the express statutory language of Section 1329 of the Bankruptcy Code contemplates (among other adjustments) post-confirmation modification of a plan to increase or reduce payments to a particular class of claims or to extend or reduce the time to make such payments. 11 U.S.C. § 1329(a)(1), (2).

As such, the Debtors have not established exceptional circumstances in any particular chapter 13 case to justify the requested alteration of Paragraph 1B of the Form Plan or the

inclusion of the special plan provisions in Paragraph 30(b), which requests are accordingly denied.

3. Requested Modifications to Paragraph 1C of the Form Plan

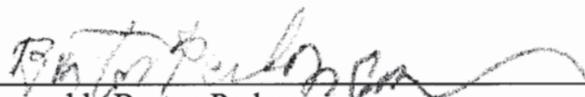
The Debtors seek leave to include a reference in Paragraph 1C of the Form Plan that refers the reader to Paragraph 30(a), where the Debtors include a special plan provision which states that Paragraph 1C of the Form Plan “reflect[s] the calculation of the liquidation percentage relating to 11 U.S.C. § 1325(a)(4), inclusive of hypothetical costs of sale, trustee fees, allowed secured claims, and exemptions, [which calculation] is set out in the separately filed liquidation analysis so as to show such necessary detail in the record.” The Debtors acknowledge that no substantive change is proposed to Paragraph 1C; rather, the Debtors seek only to point out to the reader that a separately filed liquidation analysis exists on the record.

It is the understanding of the Court that a separately filed liquidation analysis, which provides for the payment of “hypothetical costs of sale, trustee fees, allowed secured claims, and exemptions,” is required by the Trustee in every chapter 13 case. Therefore, the necessary detail regarding calculation of the liquidation plan percentage is already in the record. While a cross-reference in the Form Plan may be informative, it does not rise to the level of “exceptional circumstances” that warrants an alteration of Paragraph 1C of the Form Plan or the inclusion of the special plan provisions in Paragraph 30(a), which requests are accordingly denied.

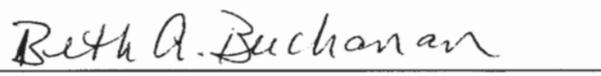
For the reasons set forth above, the Motions are DENIED. Because these matters have been otherwise disposed of, the Joint Hearing Request is DENIED as moot. **The Debtors shall amend their proposed plans to be consistent with this Order within fourteen (14) days of the entry date of this Order, or the respective cases shall be dismissed.**

IT IS SO ORDERED.

By the Court:


Honorable Burton Perlman


Honorable Jeffery F. Hopkins


Honorable Beth A. Buchanan

Distribution list:
Default List

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