



THIS ORDER IS SIGNED AND ENTERED.

Dated: October 12, 2021

Rachel Blise

**Hon. Rachel M. Blise
United States Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

In re:

Nathan Robert Rada and Jessica Rose Rada,

Debtors.

Case No. 21-10825-rmb

Chapter 13

DECISION AND ORDER ON TRUSTEE’S OBJECTION TO CONFIRMATION

Nathan and Jessica Rada (“Debtors”) filed a chapter 13 plan (the “Plan”) in which they proposed to pay directly two claims held by GM Financial that are secured by two of the Debtors’ vehicles. The chapter 13 trustee (“Trustee”) objected to the Plan, asserting the Debtors are required to pay the GM Financial claims through the Trustee. For the reasons set forth below, the Court overrules the Trustee’s objection.

Background

The Debtors filed their chapter 13 petition on April 19, 2021, along with a proposed chapter 13 plan (ECF No. 3). The Plan is a “100% plan,” meaning that all of the Debtors’ priority and general unsecured creditors will receive payment in full.

In the Plan, the Debtors propose to make payments on three claims secured by the Debtors’ three vehicles: (1) a claim in the amount of \$20,648.68 held by Honda Financial Services and secured by a 2020 Honda Talon; (2) a claim in the amount of \$58,441.71 held by

GM Financial and secured by a 2021 Chevrolet Silverado; and (3) a claim in the amount of \$47,416.98 held by GM Financial and secured by a 2021 Chevrolet Colorado.¹ The proof of claim filed by Honda Financial Services indicates a minimal pre-petition arrearage of \$489.28, and there is no pre-petition arrearage owed to GM Financial on either of its claims. Under the terms of the Debtors' contracts with GM Financial, the last payments are due to GM Financial after the last payment under the Plan would be due.

The Debtors propose to pay Honda Financial Services through the Trustee, meaning that the Trustee will disburse payments to Honda Financial Services out of the monthly payments that the Debtors submit to the Trustee under the Plan. The Debtors propose to pay both GM Financial claims directly, meaning that the Trustee will not disburse any funds to GM Financial on account of those two claims.

The Trustee objected to the Plan based on, among other things, the Debtors' proposal to pay GM Financial directly. The practical impact of the direct payments is that the Trustee will not be able to monitor the monthly payments to GM Financial, and the Trustee will not be able to collect his statutory fee on the payments made directly by the Debtors. *See* 28 U.S.C. § 586(e). The Trustee estimates that this fee would add approximately \$115.69 per month to the Plan payment, in addition to the monthly debt service. (ECF No. 22 at 2.)

Discussion

The issue before the Court is whether a bankruptcy court may approve a chapter 13 plan in which the debtors propose to make direct payments to certain secured creditors. The Trustee agrees that chapter 13 debtors can make direct payments to creditors whose claims are based on

¹ The secured creditors have since filed proofs of claim with amounts that vary slightly from the amounts included in the Plan. The variances are not relevant for present purposes, so the Court refers to the amounts in the Plan.

leases or are secured by home mortgages, but he contends that payments made to all other pre-petition creditors during the life of a chapter 13 plan must be made through the Trustee, including payments to secured creditors whose claims are unimpaired.

As support for his position, the Trustee asserts that it is a “long-standing practice in the Western District of Wisconsin to require all payments, other than home mortgages and leases, to be paid ‘through the plan’ as opposed to directly by the debtor.” (ECF No. 22 at 1.) The Trustee does not cite any statute or rule prohibiting the sort of direct payments proposed by the Debtor, and the Court has found none. Accordingly, the Court cannot endorse the Trustee’s view that all payments made to pre-petition creditors (other than home mortgage and lease creditors) must be disbursed through the Trustee.

The Seventh Circuit addressed this issue in *In re Aberegg*, 961 F.2d 1307 (7th Cir. 1992). There, the debtors proposed to pay directly the holder of their residential mortgage, while paying other creditors through their chapter 13 plan. *Id.* at 1308. The Seventh Circuit rejected the trustee’s argument that the monthly mortgage payments must be disbursed through the trustee. *Id.* at 1309. The court relied on 11 U.S.C. § 1326(c), which provides that “[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan,” and on 11 U.S.C. § 1322(a)(1), which provides that a debtor need submit to the trustee “all or such portion of future earnings or other future income . . . as is necessary for the execution of the plan.” The court concluded that this language “gives bankruptcy courts the discretion to permit debtors to make payment directly to some secured creditors provided that the plan meets all the confirmability requirements set forth in § 1325(a).” *Id.* Though the Seventh Circuit considered a claim secured by a home mortgage in *Aberegg*, the court’s decision was not expressly limited to such claims.

The Trustee argues that two decisions from this district somehow restrict the applicability of *Aberegg* to home mortgages. *In re Spindler*, 623 B.R. 543 (Bankr. W.D. Wis. 2020); *In re Hanson*, 310 B.R. 131 (Bankr. W.D. Wis. 2004). Neither case supports the Trustee’s position. In *Spindler*, the Trustee objected to the debtors’ proposal to pay certain claims directly as part of a chapter 12 plan. 623 B.R. at 544-45. The court concluded that the confirmability of a plan that includes direct payments must be judged on a case-by-case basis. *Id.* at 548. After considering the creditor’s ability to monitor and enforce direct payments, the added costs to the debtors of making payments through the trustee, and the potential for abuse, the court overruled the trustee’s objection and allowed the direct payments. *Id.* at 549.

The Trustee acknowledges that the court in *Spindler* permitted direct payments to certain creditors in a chapter 12 case, but he argues that chapter 13 cases are distinguishable because of a difference in the language of § 1225(a)(5)(B)(ii) and § 1325(a)(5)(B)(ii). (ECF No. 22 at 1.) Section 1225(a)(5)(B)(ii) provides that the court should confirm a plan that a secured creditor has not accepted if “the value, as of the effective date of the plan, of property to be distributed *by the trustee or the debtor* under the plan on account of such claim is not less than the amount of the claim.” 11 U.S.C. § 1225(a)(5)(B)(ii) (emphasis added). In contrast, § 1325(a)(5)(B)(ii) includes no reference to distribution by the debtor, providing that the court should confirm a plan if “the value, as of the effective date of the plan, of property *to be distributed under the plan* on account of such claim is not less than the allowed amount of such claim.” 11 U.S.C. § 1325(a)(5)(B)(ii) (emphasis added).

The Court concludes that Congress did not intend by the omission of a reference to the debtor in § 1325(a)(5)(B)(ii) – and the inclusion of such a reference in § 1225(a)(5)(B)(ii) – to require all payments under a chapter 13 plan to be made by the Trustee while allowing some

payments under a chapter 12 plan to be made by the debtor. This is so for several reasons. First, § 1325(a)(5)(B)(ii) applies only if the secured creditor has not accepted the plan. *See* 11 U.S.C. § 1325(a)(5)(A). Here, GM Financial has not objected to the plan and therefore has accepted it. *See, e.g., In re Foley*, 606 B.R. 790, 797 (Bankr. E.D. Wis. 2019). The language in § 1325(a)(5)(B)(ii) on which the Trustee relies therefore is not applicable to the GM Financial claims. Second, the Trustee’s interpretation would conflict with § 1326(c), which specifically contemplates that someone other than the trustee may make payments to creditors under the plan. *See* 11 U.S.C. § 1326(c) (“*Except as otherwise provided in the plan or the in the order confirming the plan, the trustee shall make payments to creditors under the plan.*”) (emphasis added). Third, the Trustee’s interpretation would prohibit debtors from paying directly *any* pre-petition secured creditors provided for in the plan. Yet, as the Trustee concedes, and as the Seventh Circuit held in *Aberegg*, debtors may pay their home mortgage creditors directly, at least for maintenance payments under § 1322(b)(5). The Court can discern no basis for interpreting § 1325(a)(5)(B)(ii) as the Trustee suggests but carving out an exception for home mortgage creditors. Finally, § 1222(a)(1) is identical to § 1322(a)(1), with both statutes requiring that the plan “provide for the submission of all *or such portion* of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” 11 U.S.C. §§ 1222(a)(1), 1322(a)(1) (emphasis added). The Seventh Circuit relied on § 1322(a)(1) to conclude that chapter 13 debtors may pay certain creditors directly and submit only the portion of their income to the trustee as necessary to fund payments to be disbursed by the trustee under the plan. *Aberegg*, 961 F.2d at 1309-10.

The *Hanson* decision likewise does not support the Trustee’s position. In that case, the debtor proposed to pay directly a non-dischargeable, unsecured student loan. *Hanson*, 310 B.R.

at 132-33. However, the direct payments would not be at the contract rate; instead, the debtors would make a reduced payment during the plan. *Id.* at 134. The court held that the proposed direct payments were not permitted because maintenance payments under § 1322(b)(5) “must respect the interest rate and the monthly payment in the original contract during the plan.” *Id.* at 134. The debtors’ proposed plan therefore did not comply with § 1322(b)(5) and unfairly discriminated among unsecured claims. *Id.* at 135. The court also held that the plan “proposes an impermissible direct payment” to the creditor, but the court did recognize that a debtor may deviate from the “normal practice” of disbursement by the trustee “when the debtor demonstrates a significant reason for doing so.” *Id.*

The *Hanson* case therefore stands for the unremarkable proposition that a debtor cannot propose maintenance payments under § 1322(b)(5) on a long-term debt that deviate from the payments required under the parties’ contract. The *Hanson* court did not hold that a debtor may never directly make maintenance payments to a secured creditor whose claim is unimpaired.²

The Court agrees with the Debtors that a chapter 13 plan may provide for direct payment to certain creditors. Some courts have determined that a debtor may pay a secured creditor directly if the creditor’s claim is not impaired under the plan. *See, e.g., In re Clay*, 339 B.R. 784, 786 (Bankr. D. Utah 2006) (“a debtor may choose to pay secured creditors directly so long as those creditors’ rights are not altered”). Other courts have articulated a variety of factors that courts can or should consider in determining whether to confirm a plan that provides for direct payments by the debtor. *See, e.g., In re Perez*, 339 B.R. 385, 409 (Bankr. S.D. Tex. 2006)

² As the Trustee notes, the *Hanson* court stated that § 1322(b)(5) “has been interpreted by this court to permit current monthly home first mortgage payments to be paid directly to the creditor without deduction of a trustee fee. Payments on all other claims (including home mortgage arrearages) must be made to and through the trustee.” *Hanson*, 310 B.R. at 133. The court cited no authority for this proposition, and the statement was unnecessary to the court’s holding.

(collecting cases and identifying 21 factors from those cases); *see also In re Curran*, No. 09-27858-SVK, 2009 WL 2591640 (Bankr. E.D. Wis. Aug. 20, 2009) (applying *Perez* factors). The determination is within the Court's discretion and should be made on a case-by-case basis.

The factors identified in *Perez* are not binding on this Court, though they are instructive. The Court has discretion to consider and weigh different factors in each case. *See Spindler*, 623 B.R. at 548. Certain factors identified in *Perez* are particularly relevant in this case:

1. *Whether the proposed plan modifies the debt.* The Plan does not propose to modify the two claims held by GM Financial; that is, the claims are not impaired. Rather, the Debtors propose to do exactly what § 1322(b)(5) permits – maintenance of payments pursuant to the parties' contract while the case is pending on a secured claim on which the last payment is due after the date on which the final payment under the Plan will be due.³

2. *The consent, or lack thereof, by the affected creditor to the proposed plan treatment.* As noted above, by its lack of objection GM Financial has accepted the Plan pursuant to § 1325(a)(5)(A), and the Court must confirm the Plan if the other requirements of § 1325 are met.

3. *The potential burden on the trustee.* The Court interprets this factor to include the burden imposed by a plan that proposes significant direct payments but few payments to be disbursed by the trustee, which would result in minimal compensation paid to the trustee vis-à-vis the size of the case.⁴ Here, the Plan will not impose a burden

³ There is no pre-petition default on either of the claims, so the Court need not decide whether the result in this case would be different if the Plan provided for curing of a default, as also permitted by § 1322(b)(5).

⁴ It is possible that such a plan designed to take advantage of the chapter 13 system without its attendant costs may not be proposed in good faith. *See* 11 U.S.C. § 1325(a)(3).

on the Trustee. The Trustee will disburse approximately \$100,000 to the Debtors' creditors under the Plan, and the Trustee will receive his statutory fee pursuant to 28 U.S.C. § 586(e) for those payments. The disbursements, and the Trustee's resulting fee, under the Plan are far greater than many chapter 13 plans in this district. The Trustee has not identified any special burden imposed by this case in general or by direct payment of the two GM Financial claims in particular that warrants collection of an even higher fee.

4. *The unique or special circumstances of a case.* The circumstances of this case counsel in favor of allowing direct payment. The Debtors propose a plan through which all their creditors will be paid in full, and the Debtors' income is more than sufficient to support the proposed monthly payments. The Trustee has raised no concerns regarding feasibility of the Plan, and direct payment of the two claims will have no discernable impact on the Debtors' other creditors or the Debtors' ability to perform under the Plan.

5. *The good faith of the debtor.* This will almost always be the most important factor in the analysis. Section 1325 requires the Court to find both that the case was filed in good faith and that the plan was proposed in good faith before the Court can confirm a chapter 13 plan. *See* 11 U.S.C. § 1325(a)(3), (7). The Court finds that the Debtors have acted in good faith in all respects. They found themselves in financial trouble and proposed a plan by which they could pay all their creditors within the five years permitted by chapter 13 of the Bankruptcy Code.

Also relevant is that the Debtors need not have mentioned the two debts to GM Financial in the Plan because they do not seek any relief available in chapter 13 with respect to those debts. *See, e.g., In re Limon*, 616 B.R. 380, 381 (Bankr. E.D. Wis. 2020)

(“[N]o provision of the Bankruptcy Code requires that a chapter 13 plan provide for all allowed secured claims.”). The Debtors’ income is such that they can commit sufficient funds each month to perform a 100% plan and still have money left to pay the two GM Financial loans. Had the Debtors simply left the GM Financial claims out of the Plan, they would be free to make payment arrangements with GM Financial directly, and the Trustee would have no basis to object to the Plan. The Court will not require payment of the GM Financial claims through the Trustee simply because the Debtors in good faith disclosed all their debts to the Trustee and their other creditors.

Applying the factors discussed above, the Court concludes that the Debtors may pay directly the two secured claims held by GM Financial. The Court emphasizes that its decision is dependent on the facts and circumstances of this particular case, in which the Debtors proposed to pay their unsecured debts in full, the relevant secured claims were not in default pre-petition, the last payment on each debt is due after the date on which the final payment under the Plan is due, and the Plan does not impose a burden on the Trustee. The result may be different in another case.

Conclusion

For the foregoing reasons, the Trustee’s objection to confirmation based on the Debtors’ proposal to pay directly the secured claims of GM Financial is overruled. The Trustee and one of the Debtors’ other creditors objected to the Plan on other bases, and the Court previously sustained those objections. The Debtors shall file an amended plan addressing those objections within 14 days after entry of this Order.

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