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

DATED: July 7, 2015

G. Michael Halfenger
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In Re:

Jason J. Kauth and Laura A. Kauth, Case No. 14-32145-GMH

Debtors. Chapter 13

DECISION AND ORDER

Jason and Laura Kauth owe more than $183,000 on student loans. They propose a chapter 13 plan under which they would pay unsecured creditors about $46,662 but would pay $44,400 of that amount to two student loan creditors. As a result, those two creditors would receive approximately 95% of the total amount paid to unsecured creditors.

The trustee objects on two grounds. First, she argues that the plan's greater payout to the two student loan creditors constitutes an unfair discrimination among unsecured creditors prohibited by 11 U.S.C. §1322(b)(1). Second, she argues that the

debtors' plan offends 11 U.S.C. §1322(b)(10) because it contemplates paying interest to the two student loan creditors but does not propose to pay all allowed claims in full. I start and end with the trustee's second objection.

Section 1322(b)(10) allows a chapter 13 plan to pay interest on nondischargeable unsecured claims only if it provides for full payment of all allowed claims:

> the plan may— . . . (10) provide for the payment of interest accruing after the date of the filing of the petition on unsecured claims that are nondischargeable under section 1328(a), except that such interest may be paid only to the extent that the debtor has disposable income available to pay such interest after making provision for full payment of all allowed claims[.]

11 U.S.C. §1322(b)(10).

The Kauths concede that their plan provides for payment of post-petition interest on unsecured student loan claims and that those claims are not dischargeable under §1328(a) because they are long-term obligations provided for by the plan under §1322(b)(5). See 11 U.S.C. §§1328(a)(1), 1322(b)(5). The Kauths' plan does not pay all claims. It pays only a small dividend to unsecured creditors other than the two student loan creditors receiving post-petition interest. As a result, the plan offends §1322(b)(10). See *In re Edmonds*, 444 B.R. 898, 902 (Bankr. E.D. Wis. 2010); *In re Stull*, 489 B.R. 217, 223–24 (Bankr. D. Kan. 2013).

Ignoring §1322(b)(10)'s text, the Kauths argue that this court should follow a line of bankruptcy court decisions choosing "congressional intent" and public policy over statutory language. Relying on *In re Freeman*, No. 06-10651, 2006 WL 6589023 (Bankr. N.D. Ga. Dec. 22, 2006), the Kauths contend that Congress could not have intended for §1322(b)(10) to apply when a plan provides for maintaining student loan payments, otherwise, they say, application of §1322(b)(10) would conflict with §1322(b)(5):

> The [*Freeman*] court concluded . . . that 11 U.S.C. § 1322(b)(5) and (b)(10) appear to conflict with each other "as curing a default and maintaining payments on an unsecured, long-term debt requires the debtor to pay interest on the balance of the debt.["] *See Freeman*, [2006 WL 6589023, at *1]. The court reasoned that "Congress intended to permit the cure and maintenance of long-term unsecured debts, notwithstanding the applicability of Section 1322(b)(10) . . . prohibiting the payment of interest on nondischargeable debts, would make the cure and maintenance of any long-term debt impermissible. Such a result could not have been intended by Congress".

CM-ECF Doc. No. 26 at 10 (quoting *Freeman*, 2006 WL 6589023, at *1–2).

Both *Freeman* and the argument the Kauths base on it are unpersuasive. Adherence to §1322(b)(10) does not render §1322(b)(5)'s cure-and-maintain provision inoperable. Section 1322(b)(10) only applies when a plan pays post-petition interest on *unsecured* claims. Thus, a plan may use §1322(b)(5)'s cure-and-maintain provision for secured debts under §1322(b)(5) regardless of whether it pays all claims. And a plan may provide for curing and maintaining long-term unsecured debts as long as it also provides for paying all allowed claims. Thus, while §1322(b)(10) limits some debtors' ability to cure and maintain long-term unsecured debt, it does not nullify §1322(b)(5) or even eliminate treatment of long-term unsecured debt using §1322(b)(5).

Because the two sections can function together without logical discord, there is no reason to "harmonize" the sections by concluding, as some courts have, that §1322(b)(5)'s provision for the curing and maintaining of long-term unsecured debt is an extra-textual "exception" to §1322(b)(10)'s restriction on the payment of interest on unsecured debt. See *Stull*, 489 B.R. at 223–24; *In re Kubeczko*, No. 12-13766, 2012 WL 2685115, at *5–7 (Bankr. D. Colo. July 6, 2012). Contra *In re Brown*, 500 B.R. 255, 266–68 (Bankr. S.D. Ga. 2013) ("harmonizing" §§1322(b)(5) & (10) by allowing plan that pays less than all claims to pay post-petition interest on student loan debt); *Freeman*, 2006 WL 6589023 at *2 (reasoning that §1322(b)(5) is an "exception" to §1322(b)(10) to confirm plan paying less than all claims but providing for payment of post-petition

interest on student loan debt).

Brown and other decisions have pointed out that before Congress added §1322(b)(10) in 2005, bankruptcy courts had routinely allowed debtors to pay student loans directly under §1322(b)(5). 500 B.R. at 268. Section 1322(b)(10)'s restriction on paying post-petition interest on unsecured claims makes that course more challenging. The Kauths contend that this is bad public policy. Like many debtors, they cannot afford to pay all of their debts through a chapter 13 plan. And, if they don't pay post-petition interest on their student loans, they will accumulate interest and penalties over the five years in which they must remain in their plan. This, they argue, leaves them worse off, rather than affording them a "fresh start"—the bankruptcy grail.

This may be correct. But, as the Supreme Court has repeatedly emphasized, courts lack the authority to rewrite statutes on policy grounds. Courts must follow the text, even when the text appears inconsistent with statutory objectives:

> "Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding," and that is no less true in bankruptcy than it is elsewhere. Whether or not the Government's theory is desirable as a matter of policy, Congress has not granted us "roving authority . . . to allow counsel fees . . . whenever [we] might deem them warranted." Our job is to follow the text even if doing so will supposedly "undercut a basic objective of the statute"[.]

Baker Botts L.L.P. v. ASARCO LLC, 135 S. Ct. 2158, 2169 (2015) (internal citations omitted).

Section 1322(b)(10)'s text, as Judge Shapiro remarked in *Edmonds*, is "very clear". 444 B.R. at 902. Applying that text, which is all this court properly can do, requires sustaining the trustee's objection to confirmation of the Kauths' plan.

So ordered.

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