

So Ordered.

Dated: June 22, 2023



Rachel Blise

Rachel M. Blise
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Antinette S. Dixon,

Debtor.

Case No. 22-22589-rmb

Chapter 13

DECISION AND ORDER DENYING PLAN CONFIRMATION

The debtor filed a chapter 13 petition and plan on June 10, 2022. The original plan proposed that secured creditor Credit Acceptance Corp. would be paid \$3,725.00 at 5.25% interest and that the chapter 13 trustee would disburse payments to Credit Acceptance “pro rata.” This designation meant that Credit Acceptance would receive payment based on the “waterfall” in section 7.2 of the plan. That section provides that, after deducting his fee, the trustee will disburse payments to creditors in the following order as relevant here: first to “[a]ny equal monthly payments to secured creditors listed in Part 3,” second to “all attorney’s fees listed in § 4.3,” and third to “all secured debt (paid pro rata) without equal monthly payments in Part 3” By providing that Credit Acceptance would be paid “pro rata,” the original plan contemplated that Credit Acceptance would receive payments from the chapter 13 trustee only after the attorney’s fees listed in section 4.3 were paid in full.

Credit Acceptance objected to this treatment on the basis, among others, that the plan did not provide for equal monthly payments, to which Credit Acceptance is entitled under 11 U.S.C. § 1325(a)(5)(B)(iii)(I). The debtor thereafter filed an amended chapter 13 plan, which provides that Credit Acceptance will receive \$4,500 with 6.5% interest and that Credit Acceptance's claim will be paid in equal monthly payments of \$96.34. Credit Acceptance, apparently satisfied with these terms, has withdrawn its objection to confirmation.

The amended plan also provides that the debtor's attorney's fees will be paid in equal monthly installments of \$160.00. In total, the amended plan contemplates that the trustee will distribute a total of at least \$256.34 each month until the debtor's attorney's fees are paid. The debtor's monthly payment to the trustee is \$272.00, which would be just enough to cover the equal monthly payments and the trustee's fee.

The problem comes in how the debtor proposes to make her payments to the trustee. The plan provides that the debtor will make her plan payments through a payroll order issued to her employer. She is paid every two weeks, or 26 times a year. Multiplying \$272 by 12 months and dividing by 26 paychecks is just under \$126.00 per paycheck. The Court has issued an order to the debtor's employer to remit \$126 to the chapter 13 trustee every two weeks.

Under this payment schedule, in ten months of the year, the trustee will receive two payments from the debtor's employer, or a total of \$252. In two months of the year, the trustee will receive three payments from the debtor's employer, or a total of \$378. In the months that the trustee receives only two payments, the total of the payments will not be sufficient for the trustee to collect his fee *and* make payments of \$96.34 to Credit Acceptance and \$160 to the debtor's attorney. The chapter 13 trustee objected to the amended plan on that basis.

The debtor, as the proponent of the chapter 13 plan, bears the burden to prove that the plan is confirmable. *See In re Love*, 957 F.2d 1350, 1354-55 (7th Cir. 1992). The debtor argues that the Bankruptcy Code does not explicitly state that the distributions to creditors must be equal, only that the plan must provide for payments to the trustee which, in total, are sufficient to satisfy the equal monthly payment requirement of section 1325(a)(5)(B)(iii)(I). The debtor says that the plan is confirmable because the debtor ultimately will pay \$272 per month; she will just pay that amount in 26 installments over the course of each year, rather than 12 installments.

The debtor's position is flawed for two reasons. First, Credit Acceptance initially objected to the plan and later withdrew its objection after the debtor filed an amended plan. One basis for the objection was the creditor's insistence that it receive equal monthly payments under § 1325(a)(5)(B)(iii)(I). In withdrawing its objection, Credit Acceptance almost certainly relied on the amended plan's provision stating that the creditor would receive equal monthly payments in the amount of \$96.34. But under its plain terms, the plan cannot be administered in a way that would allow Credit Acceptance to receive \$96.34 each month.

Counsel for the debtor and the chapter 13 trustee agreed that, as the plan is proposed, the trustee would administer the plan as follows: in the months that the debtor does not contribute the full \$272, the trustee cannot disburse \$256.34 in equal monthly payments as provided in the plan. Instead, the trustee will subtract his fee from the \$252 remitted by the debtor's employer, and then pay Credit Acceptance and the debtor's attorney pro rata from the remaining funds. Let's say Credit Acceptance will receive, for example, only \$86.34 as its pro rata share of the funds available for distribution. The remaining \$10 would still be owed to Credit Acceptance for that month. This arrearage would build up until a month in which the debtor's employer remits three payments to the trustee. The trustee would use the surplus in that month to pay down the

arrears owed to Credit Acceptance (and to the debtor's attorney). Thus, despite what it says, the plan specifically contemplates that the monthly payments to Credit Acceptance (and to the debtor's attorney) will not, in fact, be equal.

Section 1325(a)(5)(B)(iii)(I) of the Bankruptcy Code provides that "if property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts." 11 U.S.C. § 1325(a)(5)(B)(iii)(I). The language is clear: with respect to each secured creditor, if the property to be distributed to the secured creditor under the plan is in the form of periodic payments, then the payments must be made monthly and each such payment must be equal. 11 U.S.C. § 1325(a)(5)(B)(iii); *see also In re Romero*, 539 B.R. 557, 559 (Bankr. E.D. Wis. 2015) ("The equal monthly payments required by the Bankruptcy Code are not those made to the trustee, but rather to the creditor."); *In re Enders*, No. 15-21737, 2015 WL 5772199, at *3 (Bankr. E.D. Wis. Sept. 30, 2015) ("In short, § 1325(a)(5)(B)(iii)(I) requires that a plan's periodic payments to secured creditors be in equal monthly amounts."). When a creditor insists, as Credit Acceptance did here, the plan must provide that the trustee's monthly distributions to that creditor be in equal amounts.

Though Credit Acceptance withdrew its objection to the plan, meaning that it has accepted the plan under § 1325(a)(5)(A), the Court will not, without more facts, assume Credit Acceptance fully understood that it would not receive equal monthly payments. Credit Acceptance preserved its right to insist on equal monthly payments and withdrew its objection only after the debtor filed an amended plan saying that Credit Acceptance would receive \$96.34 each month during the plan. Credit Acceptance likely did not appreciate that it would receive less than \$96.34 in some months and more than \$96.34 in others.

Second, the trustee is not able to comply with the express terms of the plan. Section 1326(c) of the Bankruptcy Code provides: “Except as otherwise provided in the plan or in the order confirming the plan, the trustee shall make payments to creditors under the plan.” 11 U.S.C. § 1326(c). That is, the trustee must follow the terms of the plan. *See In re Reid*, 480 B.R. 436, 445 (Bankr. D. Mass. 2012) (“[A] chapter 13 trustee is obligated to effectuate the distributions required of her by a confirmed plan; to that extent, at least, the plan binds the trustee.”). The trustee disburses payments to creditors on a set date each month. The debtor takes no issue with this payment schedule, and she does not suggest that the trustee should distribute payments any more or less frequently to accommodate specific provisions in a debtor’s plan. The debtor’s plan calls for the trustee to distribute at least \$256.34 each month on his disbursement date. The debtor’s plan also contemplates that in ten months of the year, the trustee will not have received sufficient funds to make those distributions and therefore cannot comply with the terms of the plan.

The debtor argues that the trustee can and should just follow the procedure he uses any time he does not have sufficient funds to make the equal monthly payments required under a confirmed plan. That situation arises when, for example, a debtor misses a plan payment or does not pay the full amount of the monthly plan payment. In those cases, the trustee uses the funds on hand to make distributions to creditors, and if he does not have sufficient funds for all the equal monthly payments provided for in the plan, then he distributes them pro rata. An arrearage in the equal monthly payments builds up, and the trustee pays that arrearage the next time he has funds available under the waterfall in section 7.2 of the plan.

The difference is that those cases involve a debtor’s default under the terms of her confirmed plan. The plan itself, when confirmed, contemplates that the debtor will make

payments to the trustee each month that are sufficient for the trustee to disburse the required equal monthly payments to creditors. The debtor's default may or may not be material, and may or may not lead to a motion to dismiss under § 1307(c)(6), but it is a deviation from the terms of the confirmed plan. Here, in contrast, the debtor's plan provides that the trustee, from the outset and by design, will not have sufficient funds to cover the required payments in most months.

The debtor could choose to make her plan payments directly to the trustee each month rather than through her employer on a bi-weekly basis. She did not. She also could choose to provide for smaller equal monthly payments to her attorney so that the trustee would have sufficient funds each month to make the payments required under the plan. She did not. Instead, she proposed a plan that will not allow the trustee to distribute monthly payments as he would be required to do under § 1326(c). Therefore, the plan is not confirmable under § 1325(a)(1) because it does not comply with the requirements of chapter 13.

For the foregoing reasons,

IT IS HEREBY ORDERED that the trustee's objection to confirmation (ECF No. 56) is SUSTAINED and confirmation of the debtor's amended chapter 13 plan (ECF No. 47) is DENIED.

IT IS FURTHER ORDERED that the debtor is granted leave to file an amended plan on or before **July 13, 2023**.

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