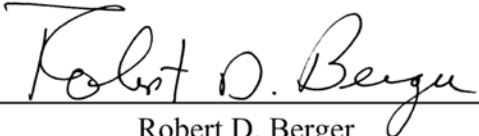


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 7th day of July, 2023.




Robert D. Berger
United States Bankruptcy Judge

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

In re:

BENJAMIN DWAIN TRICKEY, JR.,

Debtor.

Case No. 20-20951

Chapter 13

ORDER SUSTAINING TRUSTEE'S OBJECTION TO CONFIRMATION

This matter comes before the Court on the Chapter 13 Trustee's objection to confirmation of debtor Benjamin Trickey's second amended Chapter 13 plan.¹ The Court will sustain the Trustee's objection because Trickey's plan does not comply

¹ ECF 142. Trustee W.H. Griffin appears in person. Debtor appears by attorneys Kristina S. Zhilkina-Crump and Christopher Coons. Plan confirmation is a core proceeding under 28 U.S.C. § 157(b)(2)(L). Venue here is appropriate under 28 U.S.C. § 1409(a).

with 11 U.S.C. § 1325(b)(1)(B),² which requires him to pay all of his “projected disposable income” into the plan during the applicable commitment period.

I. Factual Findings

Trickey is a 60-year-old pharmacist. He lives in Olathe, Kansas, with his non-filing spouse, Gissella Osborn, and his two stepsons, ages 15 and 13.

Trickey has been a pharmacist since 1986. He is currently employed at Walmart in Leavenworth, Kansas, where he is guaranteed 56 hours of work per two-week pay period. He often works additional hours at other Walmart stores in Kansas, mostly in Topeka, Lawrence, and Gardner. At the beginning of the COVID-19 pandemic,³ Trickey averaged around 90 hours of work per pay period; he now averages around 80 hours per pay period.

Trickey and Osborn have been married since 2015. Osborn has a business degree from the Catholic University of Peru but does not work outside the home. However, she has income from her first marriage: \$840 per month in structured settlement payments associated with her ex-husband’s retirement plan⁴ and \$1,200 per month in child support. Osborn spends that money on her two sons, whom she

² 11 U.S.C. § 1325(b)(1)(B). Except for those in note 1 *supra*, all references to statutes in this order are to Title 11, United States Code (the “Bankruptcy Code”).

³ The World Health Organization declared the COVID-19 outbreak a pandemic in March 2020. Mayo Clinic Staff, *Coronavirus disease 2019 (COVID-19)*, <https://www.mayoclinic.org/diseases-conditions/coronavirus/symptoms-causes/syc-20479963> (last visited June 27, 2023).

⁴ Osborn testified that she had fewer than 12 payments left to receive under the structured settlement.

homeschools.⁵ She refuses to contribute any of her income toward the household expenses she and Trickey share.⁶

Trickey's 84-year-old mother lives in Arkansas with his 65-year-old brother. Trickey drives seven hours each way to visit her once a month. In October 2021, Walmart offered Trickey a job in Arkansas, which he accepted.⁷ He moved in with his mother, intending for Osborn and the children to join him after their home was sold. However, Osborn refused to move, and Trickey returned to Kansas. On the day of the hearing, his mother was in the hospital, and his brother had suffered a recent stroke.

⁵ Specifically, Osborn testified that she spends her income on homeschool co-op tuition, soccer clubs, music lessons, speech therapy, field trips, clothes, shoes, electronics, computers, and restaurant meals for the children (who also receive a combined \$1,900 per month in Social Security disability payments). The Trustee does not argue that any of these expenditures should be attributed to Trickey as income under 11 U.S.C. § 101(10A)(B)(i).

⁶ Although Trickey's original Schedule I (ECF 1) added "Wife's contribution" of \$800 to his monthly income, his most recent Schedule J (ECF 136) states that Osborn "does not contribute to the household" at all. The latter is consistent with Osborn's testimony at the hearing:

Trustee: So with the income you have, not your children's income, the \$2,040, there's none available to help support the house?

Osborn: I don't believe so.

Trustee: So if your husband can't make the house payments or the payments to the Chapter 13 plan, it's going to fail?

Osborn: Probably. Mm-hmm.

Trustee: Okay.

⁷ See ECF 95.

Osborn traded cryptocurrency during the pendency of this case in an (unsuccessful) attempt to earn money at home. She was vague as to how much money she had lost, but Trickey testified that he had given her \$7,000 to invest in 2021 and that the money was “gone.”

Osborn bought a 2011 Honda CR-V on March 6, 2023, borrowing \$8,000 at 10.99% interest. She made a \$1,900 down payment on the vehicle with money from a joint savings account into which she does not contribute. Although Trickey is not obligated on the loan, he is currently making the monthly payments of \$262.48.

Trickey drives a 2014 Ford Focus with 240,000 miles on the odometer. His commute to Leavenworth takes 55 minutes (35-40 miles) each way. Trickey testified that it is “probably not realistic” to expect the Focus, which was totaled in 2022 following damage to its hood and front quarter panel, to last more than another year.

Trickey’s first marriage ended in 2013. His ex-wife was awarded child support and alimony totaling around \$2,300 per month. Trickey completed the child support payments in 2019 and the alimony payments in 2020. However, he currently owes around \$125,000 in student loans for two of his three now-adult children. Some of the loans are not yet in repayment; the rest are in COVID forbearance. Trickey does not know how much his monthly payments will be once all of the loans are in repayment; he testified that the lender “won’t be able to talk to [him]” until “the bankruptcy is taken care of.”

Trickey's bank statements show that his checking account balance increased from \$18.43 to \$4,685.54 between August 22, 2022, and April 14, 2023. The statements also reflect a number of transfers between his checking and savings accounts during that time period, the net effect of which was \$3,799.86 from checking to savings⁸ (all but around \$300 of which was subsequently withdrawn). In addition, Trickey loaned his daughter \$4,000 from checking, about half of which she has since repaid, and gave her \$350 for dental work.

Trickey recently spent \$1,288 to replace the family's hot-water heater. He received an estimate of \$5,400 to repair and repaint wood rot on the outside of their home as mandated by their homeowners' association. Trickey testified that the home's HVAC system, which is around 22 years old, is—according to a technician—“on borrowed time.”

Trickey and Osborn testified about their own medical conditions, those of the children, and the medical and dental care their family requires. They both explained that the family frequently eats out at restaurants due to Osborn's health issues.⁹

⁸ Trickey opened the savings account on September 9, 2022. He withdrew \$3,000 from savings on February 28, 2023, and withdrew another \$500 on April 6, 2023. The account had an ending balance of \$300.10. Because all of the money in savings (other than \$0.24 in interest) came from checking, the net effect of the inter-account transfers was $\$3,000 + \$500 + \$300.10 - \$0.24 = \$3,799.86$ from checking to savings. See Trustee's Exs. K-1 through K-4.

⁹ Osborn testified that she has had fibromyalgia for several years, that she suffers from constant pain, and that the pain becomes “excruciating” at times. “When it happens,” she explained, “I'm going to be in bed for two weeks, three weeks, four weeks” Osborn was also recently diagnosed with Type 2 diabetes.

The Trustee's case administrator, Andrea Cozadd, testified that if Trickey's Chapter 13 plan is to run 60 months from conversion, and if all priority claims are to be paid in full, Trickey's monthly payments would need to increase to \$325.

II. Procedural History

Trickey originally filed this case under Chapter 7 on June 30, 2020. Citing the income received by Osborn and her sons, the United States Trustee moved to dismiss or convert the case for abuse under § 707(b)(3). After the Court determined that the UST's motion would require an evidentiary hearing, the UST moved for summary judgment. The Court declined to enter summary judgment but ordered Trickey to amend his Schedules I and J, his Chapter 7 statement of monthly income (Official Form 122A-1), and his Chapter 7 means test calculation (Official Form 122A-2) to accurately account for the income of Osborn and the children.

After Trickey filed amended schedules and forms, he converted this case to Chapter 13 on July 13, 2022. His first amended Chapter 13 plan proposed monthly payments of \$100. The Chapter 13 Trustee objected to confirmation, arguing that (1) Trickey would not be paying all of his projected disposable income into the plan as required by § 1325(b)(1)(B); (2) the plan would not pay all priority claims in full as required by § 1322(a)(2); and (3) Trickey had not proposed the plan in good faith as required by § 1325(a)(3). Three days before the evidentiary hearing on the Trustee's objection, Trickey filed a second amended plan that increased his monthly payments from \$100 to \$275. However, the new plan did not resolve the Trustee's

objections, and the hearing took place as scheduled on May 19, 2023. Following that hearing, the Trustee filed the “protective objection” at issue here, in which he reiterated and incorporated his previous objections—this time in response to Trickey’s second amended plan.

III. Analysis

Under § 1325(b)(1)(B) of the Bankruptcy Code, Trickey’s proposed Chapter 13 plan cannot be confirmed unless all of his “projected disposable income” during the applicable commitment period will be paid into the plan for the benefit of his unsecured creditors.¹⁰ The Bankruptcy Code does not define “projected disposable income,” but it does define other terms (here in relevant part):

- “Disposable income” means current monthly income received by the debtor less amounts reasonably necessary to be expended for the maintenance and support of the debtor and his dependents, *see* 11 U.S.C. § 1325(b)(2);
- “Current monthly income” means the debtor’s average monthly income, including amounts paid on a regular basis for the household expenses of the debtor or his dependents, during the last six full months before the debtor filed for bankruptcy, *see* 11 U.S.C. § 101(10A);

¹⁰ Section 1325(b)(1)(B) applies here because the Trustee objects to confirmation and Trickey’s proposed plan will not pay all allowed unsecured claims in full. *Cf.* 11 U.S.C. § 1325(b)(1)(A).

- If the debtor is above-median-income, amounts “reasonably necessary to be expended” under § 1325(b)(2) “shall be determined in accordance with” § 707(b)(2)(A) and (B),¹¹ *see* 11 U.S.C. § 1325(b)(3); and
- Amounts withheld from wages by an employer as contributions to a qualified retirement plan “shall not constitute disposable income, as defined in § 1325(b)(2),” *see* 11 U.S.C. § 541(b)(7).

Here, then, Trickey’s “disposable income” under § 1325(b)(2) equals his “current monthly income” under § 101(10A), less “amounts reasonably necessary to be expended” for his and his dependents’ maintenance and support as determined in accordance with § 707(b)(2)(A) and (B),¹² less wages withheld by his employer as contributions to a qualified retirement plan under § 541(b)(7).

To calculate a debtor’s *projected* disposable income under § 1325(b)(1)(B), a bankruptcy court should start by calculating the debtor’s disposable income under § 1325(b)(2)—but may then “account for changes in the debtor’s income or expenses that are known or virtually certain at the time of confirmation.” *Hamilton v. Lanning*, 560 U.S. 505, 524 (2010). For an above-median-income debtor, this calculation takes place on Official Form 122C-2 (“Chapter 13 Calculation of Your

¹¹ There is “no simple way to lay out all of the expenses and reductions” that take place in accordance with § 707(b)(2)(A) and (B). *See* Keith M. Lundin, *Lundin on Chapter 13* § 94.1 (“Big Picture: Too Many Issues”) ¶ 32, lundinonchapter13.com (last visited June 28, 2023).

¹² “By setting an objective test for the debtor’s total expenses, the section 707(b) formula permits a debtor the flexibility to spend more than the allowance in one category, such as rent, and less in another, such as transportation.” *Collier on Bankruptcy* ¶ 1325.11 (Richard Levin & Henry J. Sommer eds., 16th ed.).

Disposable Income”).¹³ The result is the “projected disposable income” that the debtor must pay into his Chapter 13 plan. The form plan used in the District of Kansas includes a space for that amount at line 3.3.¹⁴

Ordinarily, to determine whether a debtor’s Chapter 13 plan satisfies § 1325(b)(1)(B), the Court would compare the amount listed on line 3.3 of the plan with the amount calculated on Form 122C-2. But Trickey has not filed Form 122C-2. He did, however, file an amended Form 122A-2 (“Chapter 7 Means Test Calculation”)—which is mostly, but not entirely, identical to Form 122C-2—three weeks before this case was converted to Chapter 13.¹⁵ Thus, the Court’s analysis will begin with Trickey’s amended Form 122A-2.

On that form, Trickey reported current monthly income of \$11,769.14 (lines 4 and 39a), deducted \$11,077.18 for allowed expenses and debt payments (line 39b), and was left with \$691.96 in monthly disposable income (line 39c). However, in calculating that amount, he:

- deducted \$776 for vehicle operating expenses (line 12) although the IRS Local Standards amount for two cars is only \$376;¹⁶

¹³ Use of the Official Forms is mandated by Fed. R. Bankr. P. 9009(a).

¹⁴ The District of Kansas has adopted a Local Form Chapter 13 plan as authorized by Fed. R. Bankr. P. 3015.1. Line 3.3 of the form plan provides: “Plan payments include the following projected amount being paid pursuant to the means test calculation from Official Form 122C-1 and-2: \$_____.” *Chapter 13 Plan*, <https://www.ksb.uscourts.gov/sites/ksb/files/Ch13Plan.pdf> (last visited June 27, 2023).

¹⁵ See ECF 96.

¹⁶ See IRS Local Transportation Expense Standards - Midwest Census Region (Cases Filed Between May 1, 2020 and October 31, 2020, Inclusive),

- deducted (and did not add back in) \$2,308.80 for child support and alimony payments (line 19) that he was no longer making; and
- deducted \$225.23 for administrative expenses (line 36), whereas such expenses would only be $0.099(\$275) = \27.23 predicated on a monthly payment of \$275.

Correcting those figures would add $\$(776 - 376) + \$2,308 + \$(225.23 - 27.23) = \$2,906$ to the monthly disposable income calculated on Trickey's amended Form 122A-2.

Trickey's most recent Schedule I budgets \$1,088.62 per month for voluntary retirement contributions (line 5c). The Trustee does not argue that those contributions should be included in Trickey's disposable income.¹⁷ However, Form 122A-2, which does not apply in Chapter 13, does not account for such contributions. Doing so would deduct \$1,088.62 from Trickey's monthly disposable income.¹⁸

https://www.justice.gov/ust/eo/bapcpa/20200501/bci_data/IRS_Trans_Exp_Std_MW.htm (last visited June 28, 2023).

¹⁷ See ECF 131 at 6. The Trustee *does* argue that such contributions, which Trickey was not making before this case was converted to Chapter 13, evidence a lack of good faith under § 1325(a)(3). See *id.* at 7 (citing *In re Melendez*, 597 B.R. 647 (Bankr. D. Colo. 2019)). Because Trickey's proposed plan does not satisfy the disposable-income requirement, the Court need not rule on the good-faith issue now. The Court does observe, however, that Trickey is 60 years old, with minimal retirement savings—and that other bankruptcy courts “have been reluctant to find bad faith based solely on the amount of a debtor's proposed post-petition 401(k) contributions.” *In re Perkins*, Case No. 22-20025, 2023 WL 2816687, at *7 (Bankr. S.D. Tex. Apr. 6, 2023).

¹⁸ If Trickey had completed Form 122C-2, line 41 of that form would have instructed him to deduct “amounts that [his] employer withheld from wages as contributions for qualified retirement plans, as specified in 11 U.S.C. § 541(b)(7).” A number of

With those adjustments, Trickey's monthly disposable income would be \$691.96 (as calculated on Form 122A-2) + \$2,906 – \$1,088.62 = \$2,509.34.

Trickey also reported “special circumstances”¹⁹ on his Form 122A-2 (line 43): a \$413 student loan payment and a \$1,047 reduction in monthly income. (Form 122A-2, which is used in Chapter 7, does not contain a separate section for adjustments to income or expenses under *Lanning*.) However:

- Trickey's trial brief and testimony both suggest that he will not make any student loan payments while in bankruptcy, such that the student loan would not be an “additional expense” under § 707(b)(2)(B);²⁰ and

bankruptcy courts have held that § 541(b)(7) excludes retirement contributions from disposable income without regard to whether the debtor was making those contributions before filing for bankruptcy. *See, e.g., In re Vanlandingham*, 516 B.R. 628 (Bankr. D. Kan. 2014).

¹⁹ Under § 707(b)(2)(B), a debtor may demonstrate “special circumstances that justify additional expenses or adjustments of current monthly income for which there is no reasonable alternative.” To do so, the debtor must itemize each additional expense or adjustment to income, provide “documentation” for each such expense or adjustment, provide a “detailed explanation of the special circumstances that make such expense or adjustment to income necessary and reasonable,” and attest under oath to the accuracy of the information provided. *See* 11 U.S.C. § 707(b)(2)(B)(ii), (iii).

²⁰ *See Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 70-71 (2011) (“If a debtor will not have a particular kind of expense during his plan, an allowance to cover that cost is not ‘reasonably necessary’ within the meaning of [§ 1325(b)(2)].”). At the hearing, Trickey testified that he contacted “the lender” and was told that “until the bankruptcy was done,” he “could not access the website and . . . could not make payments.” According to his trial brief: “Debtor anticipates making student loan payments *once the bankruptcy is complete*.” ECF 137 at 5 (emphasis added).

- His most recent Schedule I reports monthly gross earnings of \$11,274.49—*higher* than the six-month prepetition average that would otherwise apply under § 101(10A).

Under these facts, Trickey has demonstrated neither special circumstances under § 707(b)(2)(B), nor a “known or virtually certain” change under *Lanning*, that would justify deducting the student loan payment or reducing his monthly income.

Therefore, under the evidence currently before the Court, Trickey’s projected disposable income is the same as his disposable income: \$2,509.34 per month. And because Trickey’s second amended plan proposes to pay only \$275 per month, the plan does not satisfy § 1325(b)(1)(B).

At the hearing, the parties focused on the accuracy of the amended Schedules I and J Trickey had filed three days earlier. Both parties seemed to assume that the “monthly net income” calculated on Schedule J was equivalent to projected disposable income under § 1325(b)(1)(B). But it is not. Under *Lanning*, the calculation of projected disposable income has two steps: first, calculate disposable income under § 1325(b)(2), and second, account for changes in the debtor’s income or expenses that are “known or virtually certain” at confirmation. “There is no suggestion in [*Lanning*] that a bankruptcy court may rely on the term ‘projected’ to otherwise deviate from [that] formula—for example, by including income that the formula excludes, such as Social Security benefits, or altering expense allowances permitted by the formula.” *Collier on Bankruptcy* ¶ 1325.11 (Richard Levin & Henry J. Sommer eds., 16th ed.). Thus, regardless of how long a case has been

pending,²¹ an above-median-income debtor's monthly net income and projected disposable income are calculated differently—and those calculations may yield different results.

An above-median-income debtor's projected disposable income is calculated on Form 122C-2 according to § 1325(b) and *Lanning*. It is a function of the amounts (and categories) specified in § 101(10A), § 707(b)(2)(A) and (B), and § 541(b)(7), and it determines how much the debtor is *required* to pay into his Chapter 13 plan. In contrast, the debtor's monthly net income is calculated on Schedules I and J. It is a function of the debtor's current income and expenses, whatever those may be, and it shows whether the debtor can *afford* to pay the required amount into his plan—i.e., whether the plan is feasible.²² Here, for example, if Trickey's monthly net income is \$285.65, then it would not be feasible for him to pay \$2,509.34 a month into a Chapter 13 plan.

This is not to say, however, that Trickey cannot propose a confirmable Chapter 13 plan. He makes more than \$100,000 per year and, other than his

²¹ In his trial brief, the Trustee argues that because “circumstances have changed” since this case was filed, Trickey's disposable income “should be determined based on the income and expenses shown on Schedules I and J.” ECF 131 at 3.

²² See *In re Puetz*, 370 B.R. 386, 389 (Bankr. D. Kan. 2007) (“Schedules I and J show whether a debtor's plan is feasible, but they no longer determine disposable income for above-median income debtors.”), *overruled on other grounds by Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61 (2011). “Feasible” is another way of stating the requirement in § 1325(a)(6) that “the debtor will be able to make all payments under the plan and to comply with the plan.”

family's restaurant spending²³ (which seems to be driven by Osborn), appears to live a relatively modest lifestyle. His testimony (and Osborn's) about the family's expenses—for things like home repair, medical and dental treatment, prescription medications, and transportation—suggests that his projected disposable income could actually be less than \$2,509.34 per month. But testimony alone is not enough. Section 1325(b) requires Trickey, as an above-median-income debtor, to show that the expenses are “reasonably necessary” as determined in accordance with § 707(b)(2)(A) and (B). That means that if an expense is not of a type or amount deductible under § 707(b)(2)(A), Trickey must justify it with “special circumstances” under § 707(b)(2)(B). And if the expense does not exist yet, he must establish that its future existence is known or virtually certain under *Lanning*. In other words, to show that his projected disposable income is lower than the \$2,509.34 calculated here, Trickey must show how the expenses about which he and Osborn testified fit into the framework provided by § 1325(b) and *Lanning*. And to do that, he must complete and submit the correct forms: Official Form 122C-1 (“Chapter 13 Statement of Your Current Monthly Income and Calculation of Commitment Period”) and Official Form 122C-2.

As to Osborn, who is not a debtor, section 1325(a) only requires Trickey's good faith—not hers.²⁴

²³ For example, Trickey's latest bank statement shows that he spent, by the Court's math, a total of \$1,244.66 in restaurants between March 11 and April 14, 2023. *See* Trustee's Ex. J-8.

²⁴ *Cf. In re Welch*, 347 B.R. 247, 251 (Bankr. W.D. Mich. 2006) (“[T]he question before me is not whether the [debtor's] family is substantially abusing the

IV. Conclusion

Confirmation of Trickey's second amended plan is hereby denied for failure to comply with 11 U.S.C. § 1325(b)(1).²⁵ If Trickey wishes to propose a third amended plan, he shall file one, along with Forms 122C-1 and -2, within 45 days of the date of this order.

IT IS SO ORDERED.

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provisions of Chapter 7 but whether [the debtor] herself is substantially abusing those provisions.”).

²⁵ Because the plan does not comply with § 1325(b)(1), the Court need not rule on the Trustee's arguments regarding payment of priority claims under § 1322(a)(2) and good faith under § 1325(a)(3).