UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	:	
	:	Case No. 11-52644
DEBRA SUE ALLEN,	:	Chapter 13
	:	Judge Hoffman
Debtor.	:	

In re:	:	
	:	Case No. 11-57895
CHARLES S. VERNON and	:	Chapter 13
ANNELIE N. VERNON,	:	Judge Caldwell
Debtors.	:	

In re:	:	
	:	Case No. 11-60619
ERIC M. LONGSTRETH and	:	Chapter 13
CANDACE L. LONGSTRETH,	:	Judge Preston
Debtors.	:	

OPINION AND ORDER SUSTAINING CHAPTER 13 TRUSTEES' OBJECTIONS TO CONFIRMATION OF PLAN AND STRIKING DEBTORS' SPECIAL PROVISION REGARDING PROPOSED TREATMENT OF POST-CONFIRMATION FEES IN CONFIRMED CASES AND DENYING CONFIRMATION IN UNCONFIRMED CASES

Before: CHARLES M. CALDWELL, JOHN E. HOFFMAN, JR. and C. KATHRYN PRESTON, Bankruptcy Judges.

C. KATHRYN PRESTON, Bankruptcy Judge.[1]

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[1] The Court derives its authority to issue this opinion 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,

The three above-captioned Chapter 13 cases[2] came before the Court on the Objections to

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or rule or order of court . . . ." The Court acknowledges that, because this is not an *en banc* decision, it is not binding upon the other bankruptcy judges in this district. *See, e.g.*, *United States v. Anaya*, 509 F. Supp. 289, 293 n.2 (1980), *aff'd sub nom.*, *United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982) ("*En banc* decisions are to be distinguished from those in which District Courts have designated a panel of several judges, but fewer than all, to establish uniformity within the district on recurring questions.").

[2] In addition to the above-captioned Chapter 13 cases, this Order also applies to the following 35 cases (collectively, "the Pending Cases") before Court on the same issue:

Zadoc Sabian Nahema Ayers, Case No. 11-60880
Kenneth E. Bauer, Case No. 11-60220
Ronald V. Bond and Tara L. Bond, Case No. 11-60002
Anna Christina Brown-Grant, Case No. 11-60076
Charlene Blake Carter, Case No. 11-61075
Phillip E. Carver and Laura Macioce-Carver, Case No. 11-62142
Patrick Sean Cheeseman and Vanessa Ann Cheeseman, Case No. 11-60396
Betty Lou Davis, Case No. 11-60288
Renee Cheryl Doran, Case No. 11-62195
James R. Gearheart, Case No. 11-61094
Timothy Wayne Hardy and Tina Marie Hardy, Case No. 11-59680
Michael John Henning and Christine Linette Henning, Case No. 11-59717
Steven A. High and Angela M. High, Case No. 11-61386
Marvin Ray Jenkins and Opal Darleen Jenkins, Case No. 11-59720
Colleen Renee Jones, Case No. 11-62152
Amy Marie Kosbab, Case No. 11-59588
Mary F. Krakau, Case No. 11-60884
Todd James Kuhl and DiAnn Kuhl, Case No. 11-61319
Jeffrey M. Layton and Penny Kay Layton, Case No. 11-61025
Brian R. Leary, Case No. 11-59845
Roger B. Lusk and Mildred E. Thompson-Lusk, Case No. 11-60535
Rashunn T. Lyons, Case No. 11-59663
Dallas Quiency Marshall, Case No. 11-60074
Carmen Rene Nantwi, Case No. 11-60895
Tiffany Marie Nulph, Case No. 11-59973
Christopher L. Pratt and Rebecca A. Pratt, Case No. 11-60136
Velma N. Ramey, Case No. 11-60812
James Michael Robinson and Frances Irene Robinson, Case No. 11-60158
Omar G. Ruiz and Sonya T. Ruiz, Case No. 11-61537

Confirmation and Joint Memoranda in Support of Trustees' Objections to Confirmation (collectively, "Trustees' Objections") filed by Chapter 13 trustees Jeffrey P. Norman ("Trustee Norman") and Frank M. Pees ("Trustee Pees" and collectively with Trustee Norman, "Trustees"), and Debtors' Position Statement Regarding Confirmation of Plan ("Position Statement" and collectively with Trustees' Objections, "Briefs"). In each case, Debtors included a Special Provision in Section H of their Chapter 13 Plans regarding the proposed treatment of certain post-confirmation fees for Debtors' counsel (the "Special Provision").

I. BACKGROUND

Debtors each filed a Petition for Relief under Chapter 13 of the Bankruptcy Code. In due course, Debtors filed their Chapter 13 Plans, each having a Special Provision that states: "Any post-petition, itemized fees shall be paid at no less than the per monthly distribution set forth in paragraph (A)(3) above, as an administrative priority claim pursuant to 11 USC section 507(a)(2)."[3] The Trustees timely objected to the Special Provision. Debtors filed the Position Statement in two of the above-captioned cases noting that their arguments applied to all of the Pending Cases. On January 20, 2012, the Court entered a

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August Alfred Simpkins, Jr. and Tammy Gail Simpkins, Case No. 11-61592
David William Sullenberger and Susan Ann Sullenberger, Case No. 11-60834
Earl L. Sullivan, Jr. and Susan E. Sullivan, Case No. 11-59865
Gregory Scott Thacker and Kathleen Rose Williamson-Thacker, Case No. 11-57619
Mitchell Dale Whealdon and Theresa Marie Whealdon, Case No. 11-61766
James B. Wiggins and Paula L. Wiggins, Case No. 11-60862

[3] In the Special Provision, Debtors' counsel referred to the subject fees as "post-petition, itemized attorney fees." However, counsel intended to address in the Special Provision only services rendered after confirmation of the Chapter 13 plan, for which an application would be filed (with an itemization of the services rendered and the time expended on each task). Although not precisely accurate, for lack of better nomenclature, the Court will hereinafter refer to the same as "post-confirmation fees" for the purpose of clarity.

scheduling order establishing a briefing schedule and setting oral argument. That order permitted any party with an interest in the issues presented in the Briefs or Special Provision to file amici curiae briefs, on or before February 29, 2012. The majority of the Pending Cases have been provisionally confirmed, with the Trustees' Objections held in abeyance and confirmation subject to this decision.

On March 23, 2012, the judges of the Columbus Division of the Court held a hearing regarding the Trustees' Objections. Trustee Norman appeared on his own behalf. David T. Powell appeared on behalf of Trustee Pees. Nannette J.B. Dean ("Ms. Dean") appeared on behalf of Debtors Charles S. Vernon and Annelie N. Vernon and Debtors Eric M. Longstreth and Candace L. Longstreth. James A. Nobile ("Mr. Nobile") appeared on behalf of Debtor Debra Sue Allen.[4] No other parties appeared or filed amici curiae briefs.

Chapter 13 debtors in this division of the Court must utilize a Mandatory Form Plan ("MFP") to provide for payment of their creditors and other claimants. Attorneys seeking to include a special provision in the MFP must comply with General Order No. 7, which provides that,

> [s]pecial [p]rovisions, if any, included in section H of the Mandatory Form Plan are restricted to those items applicable to the particular circumstances of the debtor(s). Special [p]rovisions shall not contain a restatement of provisions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules, or the Mandatory Form Plan.

Section A(3) of the MFP sets forth the treatment of administrative expenses, fees awarded as of confirmation, and § 1326(b) priority payments. Under the MFP, such fees and expenses are paid concurrently with Class 2 claims (claims secured by personal property and unexpired leases). Post-

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[4] Ms. Dean and Mr. Nobile also represent several other debtors in the cases listed in footnote 2.

confirmation fees are classified with Class 4 claims (secured claims not otherwise designated), which are paid concurrently with Class 3 claims (priority claims and pre-petition arrearages on domestic support obligations). The Special Provision attempts to alter this payment scheme. The Special Provision proposes payment of Debtors' attorney's fees awarded for post-confirmation services, as priority claims pursuant to Section A(3)[5] of the MFP.

Debtors asserted four arguments in support of their position. First, Debtors asserted that the MFP improperly classifies post-confirmation fees with secured claims when such fees are given priority status under 11 U.S.C. § 507(a)(2). Second, Debtors asserted that under § 1322, all claims of the same type must be given the same treatment. Under the MFP, a debtor's attorney's fees for services rendered through confirmation[6] are currently treated under Section A(3) of the MFP and paid concurrently with Class 2 claims, whereas post-confirmation fees for debtors' counsel are classified as Class 4 claims and addressed in Section E(1) of the MFP. According to Debtors, this results in the splitting of fees into two classes in violation of § 1322(a)(3). Third, Debtors emphasized that § 1326(b) allows for discretion as to when post-confirmation fees may be paid as it provides that they may be paid "before or at the time of payment to creditors under the plan." Debtors contended that the Special Provision is the equivalent of an agreement to different treatment, which is not prohibited under the Bankruptcy Code, and is an attempt

[5] The language in Section A(3) of the MFP for cases filed prior to July 1, 2011 differs from that for cases filed after July 1, 2011, given certain revisions to the MFP. The revisions to the language in Section A(3), however, have no material impact on this decision.

[6] The fees for services rendered through confirmation are addressed by Local Bankruptcy Rule ("LBR") 2016-1(b)(2)(A). If counsel for the debtor so chooses, he or she may accept the sum of $3,500 for such services, without filing an application or itemizing the services rendered. Such fees are locally called the "no look fee."

to balance the interests of all parties. Fourth, Debtors' counsel presented several practical reasons for the proposed treatment of post-confirmation fees pursuant to the Special Provision.

Although the Trustees agreed with Debtors' counsel that it would be more appropriate to include administrative expense claims for post-confirmation fees in Class 3 rather than Class 4 of the MFP,[7] the Trustees countered Debtors' position with several arguments: First, the treatment of post-confirmation fees as a Class 4 claim is consistent with §§ 1326(b), 507(a)(2), 1322(a)(2) and 1322(b)(4) of the Bankruptcy Code. The Trustees pointed out that the majority view on this issue is that payment of attorney fees concurrent with other claims is consistent with §§ 1322 and 1326. Second, if the plan is confirmed with this Special Provision, then allowance of post-confirmation fees could be considered a *de facto* plan modification, because it alters the payment stream to other creditors but without the protections afforded by the plan modification procedures established by the Bankruptcy Code and Local Bankruptcy Rules. Third, any changes to the MFP for payments to Debtors' counsel could have a negative impact on all parties appearing before the Court. The Trustees asserted that secured creditors and priority creditors in Class 2 and other classes would actually bear the burden of the proposed treatment under the Special Provision. Additionally, the Trustees argued that although pre-confirmation fees and post-confirmation fees both may be priority claims under §§ 503(b) and 507(a)(2), LBR 2016-1 provides different procedures for how the fee claims are allowed, what services may be included in each category, and how the fees are

[7] Counsel for Trustee Pees suggested that the fee provision could be moved to Section D(1) of the MFP, classifying attorney fees as a Class 3 claim. But the Trustees noted that any reclassification of post-confirmation fees from Class 4 to Class 3 would yield the same treatment: post-confirmation fees would be paid with the same disbursement priority as all other priority claims under § 507, and concurrently with other claims in both classes.

paid in Chapter 13 plans. *See* LBR 2016-1(b), (c) and (e). Finally the Trustees contend that the Special Provision violates General Order No. 7 entered in this District.

Thus, the issues before the Court are (1) whether the treatment of attorney fees in the MFP violates the provisions of 11 U.S.C. § 1322(a)(3); (2) whether there is a statutory basis for the treatment of post-confirmation fees as proposed in the Special Provision and pursuant to 11 U.S.C. §§ 507(a)(2) and 503(b); (3) whether the treatment of attorney fees in the MFP is consistent with 11 U.S.C. §§ 1326(b), 1322(a)(2) and 1322(b)(4); and (4) whether the Special Provision violates the provisions of General Order No. 7.

II. ANALYSIS

Upon review of the Briefs and after hearing all oral arguments, for the reasons discussed below, the Court will sustain the Trustees' Objections.[8] The Court's decision is based upon four conclusions: First, the treatment of post-confirmation fees in the MFP does not violate the provisions of § 1322(a)(3). Second, there is no statutory basis compelling the treatment of post-confirmation fees as proposed in the Special Provision. Third, the treatment of attorney fees, pre-confirmation and post-confirmation, in the MFP is consistent with the relevant provisions under Chapter 13. Fourth, the Special Provision violates the provisions of General Order No. 7.

A. The Treatment of Attorney Fees in the MFP Does Not Violate the Provisions of § 1322(a)(3).

[8] The Court is solely addressing the legal issues presented in the Briefs. Any reclassification of claims in the MFP is reserved for the Chapter 13 Form Plan Committee and is not for the Court to decide pursuant to this Order.

When analyzing the classification of claims under Chapter 13, §§ 1322(a)(3), 1322(b)(1) and 1122(a) (to which § 1322(b)(1) refers) must be read together. 11 U.S.C. § 1322(a)(3) provides:

> (a) The plan—
>
> (3) if the plan classifies claims, shall provide the same treatment for each claim within a particular class.

11 U.S.C. § 1322(b)(1) permits the classification of claims as follows:

> [T]he plan may—
> (1) designate a class or classes of *unsecured claims*, as provided in section 1122 of this title, but may not discriminate unfairly against any class so designated . . . .

(Emphasis added). 11 U.S.C. § 1122(a) further elaborates on proper classification of claims:

> (a) Except as provided in subsection (b) of this section, a plan may place a claim or an interest in a particular class only if such claim or interest is *substantially similar* to the other claims or interests of such class.

(Emphasis added).

1. There is No Statutory Requirement that All Substantially Similar Claims be Placed in the Same Class.

Debtors assert that under § 1322 all claims in the same class must be given the same treatment, and then posit that splitting the pre-confirmation fees and post-confirmation fees into two classes is a violation of § 1322(a)(3). Even if §§ 1322(a)(3), 1322(b)(1) and 1122(a) can be read to apply to the treatment of post-petition attorney's fees, a fact of which this Court is not convinced,[9] "[t]hese provisions [] allow

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[9] Sections 1322(a)(3), 1322(b)(1) and 1122(a) are rarely (if ever) applied to priority claims, because the Bankruptcy Code specifies the treatment of priority claims in other Code provisions. *See In re Balderas*, 328 B.R. 707, 718 n.14 (Bankr. W.D. Tex. 2005) ("Post-petition administrative claim holders are not included in the definition of 'creditor,' but are instead a creature of statute by virtue of section 503(b), whose expense claims are then accorded priority treatment under section 507(a)(1).").

the separate classification of an unsecured claim (or claims); there is no requirement that all claims which are 'substantially similar' be placed in the same class." *In re Blackwell*, 5 B.R. 748, 750 (Bankr. W.D. Mich. 1980) (citations omitted). Under § 1322(b), a Chapter 13 debtor may separately classify certain unsecured claims in his proposed plan, as long as the debtor does not discriminate unfairly[10] against any such class. 11 U.S.C. § 1322(b)(1); *In re Williams*, 231 B.R. 280, 281 (Bankr. S.D. Ohio 1999). Additionally, § 1122(a) permits similar claims to be placed in separate classes despite substantial similarity to each other, if the claims within each class are treated the same, and if the plan does not discriminate unfairly against any class so created. 11 U.S.C. § 1122(a). *See also Ledford v. McCormick* (*In re McCormick*), 27 B.R. 434, 437 (Bankr. S.D. Ohio 1983) ("As a general rule, a debtor may classify and discriminate among general creditors if such classification is reasonable and rational, and if such discrimination is not 'unfair' to other classes of general creditors. 11 U.S.C. §§ 1122 and 1322(b)(1)." (citations omitted)). Commenting on this issue, the Sixth Circuit Court of Appeals has stated:

> This circuit has recognized that section 1122(a), by its express language, only addresses the problem of dissimilar claims being included in the same class . . . . Section 1122(a) does not demand that all similar claims be in the same class . . . . To the contrary, the bankruptcy court has substantial discretion to place similar claims in different classes.

Thus, the issue of whether these sections apply to the treatment of attorney fees does not usually arise in this context.

[10] Unfair discrimination is not defined in the Bankruptcy Code. Thus, in determining whether a proposed Chapter 13 plan unfairly discriminates, courts have proposed a review of the totality of the circumstances on a case-by-case basis. *See In re Williams*, 231 B.R. 280, 281 (Bankr. S.D. Ohio 1999). *See also In re Riggel*, 142 B.R. 199, 202 (Bankr. S.D. Ohio 1992) (citing *In re Hosler*, 12 B.R. 395, 396 (Bankr. S.D. Ohio 1981) (setting forth test used to determine whether a proposed classification discriminates unfairly, including: "(1) whether the discrimination has a reasonable basis; (2) whether the debtor can carry out the plan without such discrimination; (3) whether the classification is proposed in good faith; and (4) the treatment of the class discriminated against." (citation omitted))).

In re Dow Corning Corp., 280 F.3d 648, 661 (6th Cir. 2002) (citations omitted) (internal quotation marks omitted).

Additionally, "[s]ome degree of discrimination is allowable; otherwise Congress wouldn't have modified the term with the word 'unfair.'" *Blackwell*, 5 B.R. at 751. *See also In re McKenzie*, 4 B.R. 88, 91 (Bankr. W.D.N.Y. 1980) ("It is difficult to imagine any classification of unsecured creditors which would not discriminate against some class in one manner or another. Classification in itself would seem to denote discrimination. The crux of the issue, however, is unfair discrimination."). Although the MFP classifies pre-confirmation fees and post-confirmation fees in separate classes and provides for payment of the pre-confirmation fees and post-confirmation fees on different terms, both types of fees must be paid in full for the plan to be completed. Where the fees are both paid in full over the term of the plan, it hardly seems that the disparate treatment is unfairly discriminatory.

The Court, therefore, concludes that there is no requirement in the Bankruptcy Code or Rules that pre-confirmation fees and post-confirmation fees be classified in the same class, or be treated exactly the same. Thus, the MFP is consistent with the provisions of the Bankruptcy Code and Rules.

2. Although Like Claims Should be Treated Similarly, Pre-confirmation and Post-confirmation Fees Are Not the Same.

Although administrative expense claims for pre-confirmation fees and post-confirmation fees could theoretically be treated identically, there are valid reasons to provide for differences in the timing of payment of such claims under a Chapter 13 plan. Pre-confirmation fees are compensation for services related to commencement of the case, administration of the case and the confirmation process. On the other hand, most post-confirmation fees are typically related to services rendered especially for the benefit of the

debtor, such as motions to suspend payments, incur debt, or sell property, and defense of motions to dismiss or for relief from the automatic stay. While many jurisdictions provide for a standard, "no-look" fee in Chapter 13 cases for pre-confirmation legal services, the allowance and payment of post-confirmation fees, whether benefitting the bankruptcy estate or the individual debtor, generally requires the submission of a fee application under § 330(a). *See Williams*, 378 B.R. 811, 823 (Bankr. E.D. Mich. 2007). As noted by the *Williams* court:

> Generally, 'services that benefit the debtor in connection with the case are services that facilitate the successful completion of the debtor's plan.' . . . Some other examples of services that might benefit the debtor are services rendered to defend a debtor's claim of exemptions; to defend a motion to lift stay; or to determine the nondischargeability of a debt. . . . Of course, even those services that benefit only the individual debtor, and not the debtor's estate, are only compensable under § 330(a)(4)(B) to the extent that they are 'reasonable' after consideration of the benefit and necessity of those services to the debtor in light of the other factors set forth in § 330(a)(3).

Williams, 378 B.R. at 823 (citations omitted).

But whether post-confirmation fees are rendered for the benefit of the debtor or for the benefit of the estate, fees awarded for post-confirmation services differ from services rendered pre-confirmation in a significant respect: they can dramatically impact payment to creditors under the confirmed plan. In *In re Balderas*, the court construed the language in § 1326(b)(1)[11] and discussed the disruptive impact of the

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[11] Section 1326(b)(1) provides:

> (b) *Before or at the time* of each payment to creditors under the plan, there shall be paid—
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> (1) any unpaid claim of the kind specified in section 507(a)(2) of this title[.]

11 U.S.C. § 1326(b)(1) (emphasis added).

payment of post-confirmation fees to debtor's counsel, which often result in the suspension of payments to other creditors. *In re Balderas*, 328 B.R. 707, 717–20 (Bankr. W.D. Tex. 2005). After considering revisions to a local rule that had previously allowed post-confirmation attorney fees to be paid first, the court concluded that attorney fees must be paid concurrently with other claims and directed that the maximum disbursement of attorney fees be paid at $100 per month. *Balderas*, 328 B.R. at 736. The *Balderas* court also stated, however, that the allowance of post-confirmation attorney fees could be considered a *de facto* modification of the plan due to the disruption of the payment stream to other creditors:

> Modifications must satisfy all the requirements of section 1325. A secured creditor could argue that the alteration effected by interrupting the stream of payments to pay the debtors' additional attorneys fees requires that the plan distribution scheme be reworked to assure that the creditor receives the present value of its allowed secured claim (set at filing . . .), reduced by payments already made to that creditor. By the same token, once fees are allowed, section 1326(b)(1) pretty clearly requires that they be paid either before or at the same time as payments are made to creditors pursuant to the plan, causing an inevitable dilution of the payment stream upon which confirmation was premised. . . . Thus, allowed administrative claims for debtors' attorneys must be paid, at the very least, in deferred cash payments along with distributions to other creditors, even though . . . distributions to other creditors (including secured creditors) will be proportionately reduced as a result.

Id. at 719–20. Likewise, another court noted:

> Chapter 13 debtors' attorneys who receive some or all of their fees through the plan must construct the plan so that distributions to the attorney do not threaten the availability of funds to make required equal installment payments to lienholders that are sufficient to provide adequate protection after confirmation. The collision of these stakeholders—the attorney armed with a priority claim and the lienholder entitled to adequate protection and equal monthly payments—will require more careful calculation of the funding of Chapter 13 plans after BAPCPA. Attorneys in some districts may have to adjust their practices to take smaller fee payments over a longer time in Chapter 13 cases.

Wells Fargo Fin. Ga., Inc. v. Baxter (*In re Williams*), 385 B.R. 468, 473 (Bankr. S.D. Ga. 2008)

(quoting 5 Keith M. Lundin, Chapter 13 Bankruptcy § 442.1, p. 442–43 (3d ed. 2000 & Supp. 2001-1)).

Section A(3) of the MFP provides for payment of pre-confirmation fees concurrently with other administrative claims and Class 2 claims (personal property liens and leases), and prior to payment of certain priority claims, pre-petition mortgage arrearages, pre-petition and post-petition lease arrearages, real estate taxes and other secured claims not otherwise designated. As a matter of policy, payment of pre-confirmation fees in this manner makes sense inasmuch as it insures that debtors have access to competent legal counsel to assist them in attaining the legal relief available from the bankruptcy court. However, all creditors have an opportunity to review the plan and object if they feel debtor's counsel is unduly favored by the MFP. The same cannot be said about the effect of the treatment of post-confirmation fees pursuant to the Special Provision.

The effect of the Special Provision is to load post-confirmation fees into Section A(3), resulting in their payment on an expedited basis and prior to numerous other claims. Post-confirmation fees can range from a few hundred dollars to several thousand dollars. The Special Provision does not, and indeed probably cannot, predict what these fees will be and thus creditors cannot adequately assess how their claims will ultimately be paid in the event that post-confirmation fees are allowed. A fee application is required for post-confirmation fees, but certain fee applications (those under $1,000) are not routinely served on all creditors, and fee applications do not advise creditors of the impact on the plan payment stream resulting from allowance of the requested fees. If post-confirmation fees are allowed, such proposed classification would result in dilution of the combined pool of claims held by administrative expense claimants and Class 2 creditors, resulting in lower payments or delay in payment to affected

creditors and claimants. Further, the impact of the Special Provision would be reduction of the funds available to make payments to other classes. This could result in insufficient funds to make required payments to secured creditors classified in Class 4 throughout the life of the plan. Even with interest payments made under a plan, secured creditors bear the risk of a decline in the value of their collateral if distributions are delayed.[12] Thus, such front-loading of attorney fees could result in a *de facto* plan modification. This is an unacceptable result, because a fee application for an award of post-confirmation fees is not a plan modification made pursuant to the procedures established by the Bankruptcy Code and Local Bankruptcy Rules. Conversely, pursuant to the provisions of the MFP, pro rata distributions are equitable to all parties because payments to priority and secured creditors in Classes 3 and 4 are likely to be only slightly reduced when post-confirmation fees are allowed.

Thus, the Court concludes that the Special Provision providing for payment of post-confirmation fees as set forth in Section A(3) of the MFP deleteriously impacts creditors in Class 2 and other classes. That being the case, there is a reasonable basis for the separate classification of pre-confirmation fees and post-confirmation fees, and a reasonable basis for disparate treatment under the MFP.

B. There is No Statutory Basis for the Treatment of Post-confirmation Fees as Proposed in the Special Provision.

In the MFP, post-confirmation fees are classified in Class 4. Other claims falling into Class 4 are pre-petition mortgage arrearages, lease arrearages, real estate taxes and secured claims not otherwise

[12] Counsel for Trustee Pees also argued that under the proposed scheme priority claimants could potentially receive little or no distribution from a debtor's plan payments, in any given month. While perhaps true, this argument is not compelling, because even if post-confirmation fees are allowed as proposed, priority claims must be paid in full for a plan to be completed and for debtors to receive a discharge.

classified. Section E(1) of the MFP provides for payment of Class 4 claims pro rata, in full, concurrently with Class 3 claims. The Special Provision takes post-confirmation fees out of Class 4, providing:

> Any post-petition, itemized fees shall be paid at no less than the per monthly distribution set forth in paragraph (A)(3) above, as an administrative priority claim pursuant to 11 USC section 507(a)(2).

In their Position Statement, Debtors primarily relied on the provisions of §§ 507(a)(2) and 503(b)(4) to support their position. Section 507(a)(2) provides as follows:

> (a) The following expenses and claims have priority in the following order:
> . . . .
> (2) Second, administrative expenses allowed under section 503(b) of this title, . . . and any fees and charges assessed against the estate under chapter 123 of title 28.

Although § 507(a)(2) provides that administrative expenses allowed under § 503(b) are second in priority, contrary to Debtors' suggestion, § 503(b)(4) does not support the payment of post-confirmation fees as proposed in the Special Provision. Section 503(b)(4) allows only certain specific attorney fees as a priority, as follows:

> (b) After notice and a hearing, there shall be allowed administrative expenses, other than claims allowed under section 502(f) of this title, including–
> . . . .
>
> (4) reasonable compensation for professional services rendered by an attorney or an accountant *of an entity whose expense is allowable under subparagraph (A), (B), (C), (D), or (E) of paragraph (3) of this subsection,*[13] based on the time, the nature, the extent, and the

[13] In Debtors' Position Statement, their counsel omitted the material language contained in § 503(b)(4) which is italicized above. Paragraphs (b)(3) and (b)(4) of § 503 provide for compensation of the *following entities*:

> value of such services, and the cost of comparable services other than in a case under this title, and reimbursement for actual, necessary expenses incurred by such attorney or accountant.

11 U.S.C. § 503(b)(4) (emphasis added). An attorney for a Chapter 13 debtor does not fall under any of the categories listed under paragraph (b)(3). Thus, Debtors' reliance on § 503(b)(4) is misplaced, and any post-confirmation fees incurred by Debtors' counsel would not be entitled to priority based upon that subsection of the Code. As discussed in § II.A. above, nowhere does the Bankruptcy Code mandate the treatment of attorney fees proposed in the Special Provision. In fact, § 1326(b) requires only that attorneys be fully paid concurrently with payments to creditors under the plan.

Notably, Debtors' counsel are already benefitting from the provisions of the MFP. First, under the MFP, although not so mandated, Debtors' counsel are receiving priority treatment, in terms of timing of payment, for their pre-confirmation fees that fall under LBR 2016-1(b)(2)(B). Such pre-confirmation fees are paid in set monthly installments prior to payments to Classes 3 and 4, which is a payment schedule superior to what is required under § 1326(b). Second, even though LBR 2016-1(e) provides that any

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> (A) a creditor that files a[n] [involuntary] petition under section 303 of this title;
> (B) a creditor that recovers, after the court's approval, for the benefit of the estate any property transferred or concealed by the debtor;
> (C) a creditor in connection with the prosecution of a criminal offense relating to the case or to the business or property of the debtor;
> (D) a creditor, an indenture trustee, an equity security holder, or a committee representing creditors or equity security holders other than a committee appointed under section 1102 of this title, in making a substantial contribution in a case under chapter 9 or 11 of this title;
> (E) a custodian superseded under section 543 of this title, and compensation for the services of such custodian . . . .

11 U.S.C. § 503(b)(3).

post-confirmation fees may be paid only after full payment of attorney fees for services rendered through confirmation, if a debtor's counsel accepts a "no look fee," that fee includes compensation for some services rendered post-confirmation.

C. The Treatment of Attorney Fees, Pre-confirmation and Post-confirmation, in the MFP is Consistent with §§ 1326(b), 1322(a)(2) and 1322(b)(4).

Debtors and the Trustees agreed that the payment of administrative expense priority claims under § 507(a)(2) is governed by several sections of Chapter 13:

- Section 1326(b) provides: "*Before or at the time* of each payment to creditors under the plan, there shall be paid—(1) any unpaid claim of the kind specified in section 507(a)(2) of this title." (emphasis added);
- Section 1322(a)(2) provides that the plan "shall provide for the full payment, in deferred cash payments, of all claims entitled to priority under section 507 . . . ;" and
- Section 1322(b)(4) provides that the plan may "provide for payments on any unsecured claim to be made concurrently with payments on any secured claim or any other unsecured claim."

Relying on *In re Bellamy*, 379 B.R. 86 (Bankr. D. Md. 2007), however, Debtors contend in their Position Statement that § 1326(b)(1) requires full payment of § 507(a)(2) priority claims before any payment to other creditors. Debtors' argument is fundamentally flawed. Full payment of § 507(a)(2) priority claims before distributions are made to other creditors is not mandated by § 1326(b)(1). Although post-confirmation fees may be allowable under § 330 and accorded priority treatment under §§ 507(a)(2)

and 503(b)(2), the plain language of Chapter 13 allows for concurrent payment of such fees so long as they are paid in full over the term of the plan. There is no absolute requirement that they be paid first. This is the majority view of courts addressing this issue. *See Balderas*, 328 B.R. at 717 ("[Section 1326(b)(1)] permits a court the option of ordering complete payment of allowed administrative expense claims in front of other creditors, or ordering their payment 'at the time of' payment to other creditors."). *See also Shorb v. Bishop* (*In re Shorb*), 101 B.R. 185, 186 (B.A.P. 9th Cir. 1989) ("[A]ttorney's fees must be paid before or contemporaneously with other creditors under § 1326."); *In re Bosse*, 407 B.R. 444, 448–49 (Bankr. D. Me. 2009) (discussing treatment of administrative expenses: "Neither is the 'priority' of attorney's fees patently clear from the legislative history of § 1326(b)(1); both the House and Senate Reports discuss the statutory fees of the chapter 13 trustee but do not refer expressly to a debtor's attorney's fees."); *In re Vinnie*, 345 B.R. 386, 388 (Bankr. M.D. Ala. 2006) (concluding that unlike § 726, Chapter 13 does not include a requirement that priority claims be paid in the order set forth in § 507); *In re Sanders*, 341 B.R. 47, 51 (Bankr. N.D. Ala. 2006) (stating that § 1326 requires "only that the trustee pay § 507(a)(2) administrative expenses before or contemporaneously with payments to other claimholders under the plan."); *In re Willis*, 2011 Bankr. LEXIS 4374, at *17–18 (Bankr. D. Kan. 2011) ("Section 1322(a)(2) merely requires that a Chapter 13 plan provide for full payment of § 507 priority claims, not that they be paid before other claims.").

Debtors' argument is also undercut by § 1322(a)(2). Section 1322(a)(2), which requires full payment of priority claims, specifically contemplates deferred cash payments, providing that the plan "shall provide for full payment, *in deferred cash payments*, of all claims entitled to priority under section 507 . . . ." 11 U.S.C. § 1322(a)(2) (emphasis added). Hence, a reading of §§ 1326(b)(1) and 1322(a)(2)

together, reveals that § 507(a)(2) priority claims may be paid over time so long as they are paid in full. *See Balderas,* 328 B.R. at 717 ("Reading [§§ 1326(b)(1) and 1322(a)(2)] *in pari materia*, as one must in construing competing sections of a coherent statutory scheme . . . the actual payout of claims having priority under section 507 can occur along with payments to creditors under the plan."). Even the *Bellamy* court, on which Debtors relied, stated that post-confirmation any unpaid, allowed claim for attorney fees to a debtor's attorney, must be paid "*in full*, either first or *at the same time* [as payment to creditors under the plan]." *Bellamy*, 379 B.R. at 98 (citing *In re Harris*, 304 B.R. 751, 757–58 (Bankr. E.D. Mich. 2004)) (emphasis added).

Debtors' additional arguments, that (1) the Special Provision is the equivalent of an agreement to different treatment, and (2) the proposed treatment is similar to adequate protection payments afforded secured creditors, are without merit. The proposed payments to Debtors' counsel, which are compensation for representing Debtors' interests in connection with their respective bankruptcy cases, are not comparable to adequate protection. "[A]dequate protection is what is paid to [a] creditor to compensate for depreciation in collateral value *prior* to confirmation . . . . [It] affords the holder of a secured claim compensation for any diminution in the value of the collateral *pending* confirmation of a plan." *See Balderas*, 328 B.R. at 718–19 (citations omitted). Notwithstanding Debtors' counsels' asserted attempt to strike a balance in the Debtors' plans to accommodate adequate protection payments to secured creditors, the Special Provision fails in this endeavor, because it unduly favors Debtors' counsel (who, unlike secured creditors, hold no lien interest that is entitled to adequate protection) to the detriment of the creditors awaiting payment.

The Court concludes that the treatment of attorney fees, pre-confirmation and post-confirmation, in the MFP is consistent with §§ 1326(b), 1322(a)(2) and 1322(b)(4).

D. The Special Provision Violates the Provisions of General Order No. 7.

Pursuant to the provisions of General Order No. 7,

> [s]pecial [p]rovisions, if any, included in section H of the [MFP] are restricted to those items applicable to the particular circumstances of the debtor(s). Special [p]rovisions shall not contain a restatement of provisions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, the Local Bankruptcy Rules, or the [MFP].

The Special Provision does not pertain to the particular circumstances of the Debtors, but rather solely relates to the treatment of post-confirmation fees for Debtors' counsel. Such treatment was not contemplated as a special provision in either the MFP or General Order No. 7. Moreover, post-confirmation fees are already specifically provided for in the MFP in Section E(1). Pursuant to General Order No. 7, Debtors are required to use the MFP unless they seek leave to use some variation. Debtors have never sought leave to alter the MFP. Debtors filed their Position Statement and requested therein that the Court find the language in Section E(1) of the MFP a violation §§ 1326, 1322 and 507 only after the Trustees objected to confirmation of the Chapter 13 Plans. Although Debtors' counsel may dislike the current treatment of post-confirmation fees under the MFP, the Special Provision violates the provisions of General Order No. 7.

III. CONCLUSION

The Court finds that the provisions of the MFP do not violate the Bankruptcy Code and that the Bankruptcy Code does not mandate full payment of post-confirmation fees first, or prior to the payment of other creditors. The Special Provision violates General Order No. 7, because the Special Provision

does not pertain to the particular circumstances of the Debtors, but rather solely relates to the treatment of post-confirmation fees for Debtors' counsel.

It is, therefore, ORDERED that:

1. The Trustees' Objections are **SUSTAINED**;
2. In all Pending Cases in which Debtors' Chapter 13 Plans have been confirmed, the Special Provision is hereby **STRICKEN**;
3. In any of the Pending Cases in which the Debtors' Chapter 13 Plans have not been confirmed, confirmation is **DENIED** and Debtors shall amend their Plans deleting the Special Provision, within 10 days of the date of entry of this Order; and
4. In all Pending Cases, the Trustees shall submit an order to the Court consistent with the provisions of this Order.

The Court recommends that the parties submit the issues presented by the Briefs to the Chapter 13 Form Plan Committee for review and revision of the MFP consistent with this Order, the Bankruptcy Code, Rules, and Local Rules.

IT IS SO ORDERED.

Dated: 9/13/12

Copies to:

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