UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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Judge:	Hon. LaShonda A. Hunt

Appearance of Counsel:

Attorney for Debtors:

Robert J. Skowronski
Law Offices of Robert J. Skowronski, Ltd.
5491 N. Milwaukee Ave
Chicago, Illinois 60630

Attorney for Creditor:

Christopher H. Purcell
Sherman & Purcell LLP
120 S. LaSalle Street
Chicago, Illinois 60603

Name of Assigned Judge	LaShonda A. Hunt	**CASE NO.**	19bk01454
DATE	April 1, 2019		
CASE TITLE	In re Kenneth Malinowski		
TITLE OF ORDER	Order Regarding March 27, 2019 Plan (Dkt. 30)		

DOCKET ENTRY TEXT

The March 27 plan cannot be confirmed with the proposed language in Section 8.1. The debtor may file and serve an amended plan or file an agreed confirmation order that complies with this court's ruling in advance of the continued confirmation hearing date on April 15, 2019, at 10:30 a.m.

STATEMENT

This matter came before the court for a confirmation hearing on debtor Kenneth Malinowski's ("Malinowski") amended Chapter 13 plan dated March 8, 2019 (Dkt. 21). Prior to the March 25th hearing date, the standing Chapter 13 trustee ("trustee") expressed her intent to recommend that plan for confirmation. However, the court had questions about the language proposed in Section 8.1 of the plan. When Malinowski's counsel did not appear for the hearing, confirmation was continued to April 15, 2019. Malinowski subsequently filed an amended plan dated March 27, 2019 (Dkt. 30), and noted that Section 8.1, among other sections that have no bearing on the instant decision, had been changed. However, a comparison of the plans reveals that the Section 8.1 language in the March 8 and March 27 plans is identical. Unfortunately, that means Malinowski's plan remains unconfirmable.

Since Official Form 113 (Chapter 13 Plan) became effective in this district on December 1, 2017, practitioners, particularly for secured vehicle lenders, have questioned how to properly treat "cure and maintain" claims under Section 3.1 of the plan. This court has on many occasions attempted to orally explain why certain requirements cannot be imposed in or removed from plans. Nevertheless, Malinowski, at the urging of an objecting secured creditor, American Eagle Bank ("American Eagle"), added the same stock provisions to Section 8.1 of his plan. The purpose of this written order, then, is to clarify what constitutes confirmable language addressing Section 3.1 claims, whether listed in Section 8.1 of the plan or included in a separate confirmation order.

Malinowski filed his Chapter 13 petition (Dkt. 1) and plan (Dkt. 2) on January 17, 2019. Section 3.1 of the plan included American Eagle as a secured claimant for a 2017 Dodge Ram, and proposed that Malinowski would directly pay $434.10 monthly, and the trustee would repay approximately one month of pre-petition arrears at the contract interest rate. On February 4, 2019, American Eagle filed its timely proof of claim (POC 5), reflecting an identical amount for the current installment payment with a slightly lower arrearage. The sales contract attached to the proof of claim further confirmed that Malinowski owed $434.10 monthly, based on 13.99% interest, for 72 months beginning in October 2017.

American Eagle nonetheless filed an objection to confirmation a week later (Dkt. 18), asserting that the plan required the addition of language that: (1) mirrors the contract terms regarding interest and late charges; (2) provides for retention of its lien until the debt is satisfied; (3) states that the debt is ineligible for discharge; and (4) exempts its debt from the form requirement in the plan that upon stay modification a secured claim will no longer be treated by the plan. To resolve its objection, American Eagle requested the following language:

> The Debtor shall remain in full compliance, including but not limited to payments interest, late charges, etc. with the underlying retail installment contract as to the debt owed to American Eagle Bank and that debt shall not be discharged pursuant to Section 1328 of the Bankruptcy Code. American Eagle Bank shall retain its lien on the 2017 Dodge Ram until such time as the underlying retail installment contract is fully satisfied pursuant to applicable non-bankruptcy law. The provision in part 3.1 that removes the secured

> claim upon stay modification does not apply to the debt owed to American Eagle Bank. American Eagle Bank is allowed to add $550 in attorneys fees to the indebtedness without further notice, order or proof of claim.

On March 8, Malinowski amended his plan to add the above paragraph to Section 8.1 (Dkt. 21), and American Eagle withdrew its objection (Dkt. 24). Still, the bankruptcy court has an independent obligation to reject confirmation of plans that do not comply with the requirements of 11 U.S.C. § 1325(a). *See generally United Student Aid Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010). Because the language in Section 8.1 is inconsistent with the Bankruptcy Code and Rules, Malinowski's plan cannot be confirmed as proposed.

First, American Eagle maintains that Malinowski must specifically state in his plan that he agrees to comply with the terms of the underlying vehicle sales contract. Not true. Debtors are already obligated by virtue of nonbankruptcy law to pay what they owe contractually, unless a confirmed plan provides different treatment as allowed under the Code. Indeed, creditors' motions for relief from stay are regularly granted when direct-pay debtors fail to keep up with payments required under the contract. American Eagle might have an argument here if the plan actually proposed a change to the contract terms but it does not. In fact, Malinowski's numbers in Section 3.1 essentially mirror the monthly payment, arrearage, and interest rate set forth in American Eagle's proof of claim and sales contract. But even if that were not the case, there would still be no basis for denying confirmation of a plan merely because a debtor fails to add verbiage reciting contract terms that have not been altered by the plan.

Next, American Eagle challenges Malinowski's failure to include lien retention language in the plan. American Eagle is correct that 11 U.S.C. § 1325(a)(5)(B)(i) states if the holder of an allowed secured claim does not accept its treatment and the debtor does not surrender the collateral, then the plan must provide that:

> (I) the holder of such claim retain the lien securing such claim until the earlier of—
>
> (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> (bb) discharge under section 1328;

So, objecting secured creditors are entitled to have this statutory language added to plans that essentially affirms the retention of their liens until one of the stated conditions is met. But that is not what Section 8.1 says here. To the contrary, Malinowski proposes that American Eagle retains its lien until the underlying retail installment contract is satisfied *and* the debt is non-dischargeable. That is far different from the "lien retention language" afforded under the Code.

True, 11 U.S.C. § 1328(c)(1) does except from discharge long-term debts provided for under § 1322(b)(5), which is statutorily defined as debts for which "the last payment is due after the date on which the final payment under the plan is due." Neither Malinowski nor American Eagle asserts that this debt meets that criteria, though. And based on the court's rough calculation—Malinowski proposed 60 months of plan payments (until approximately February 2024) and the vehicle was financed for 72 months (until approximately November 2023)—this debt does not appear to qualify. Still, American Eagle argues for a shifting standard based on whether direct payments are actually completed before plan payments are finished. However, this court must enforce the Code as written. The determination of long-term debt status is fairly straightforward and asks only if the last payment on the vehicle loan is due after the final plan payment. If so, § 1328(c)(1) applies and the debt is not dischargeable. Plain and simple. There is no third option that allows creditors to suddenly deem debts provided for in a confirmed plan non-dischargeable based on the debtor's payment history during a plan term. Obligations are fixed at confirmation and the confirmed plan terms are binding on all parties under 11 U.S.C. § 1327(a). Therefore, if the debt does not satisfy § 1322(b)(5), a creditor has no right to demand such treatment in the plan.

Lastly, American Eagle asserts that its secured claim should remain intact upon stay modification but the form plan clearly states the opposite. Section 3.1 of the plan provides that "[i]f relief from the automatic stay is ordered as to any item of collateral listed in this paragraph, then, unless otherwise ordered by the court, all payments under this paragraph as to that collateral will cease, and all secured claims based on that collateral will no longer be treated by the plan." Because Fed. R. Bankr. P. 9009(a) prohibits any alteration of official

forms, that provision must remain intact as written. Secured creditors are not without a remedy, though, as the form plan language allows them to request further adequate protection beyond enforcement of state-law remedies as to their collateral in their motions for relief from stay. The court can determine then if additional relief is warranted. But Rule 9009(a) does not otherwise allow such changes to the form plan language.

Finally, American Eagle seeks to have $550 in attorneys' fees automatically added to its allowed secured claim. However, this court finds that such an award is unreasonable as the confirmation objections were not grounded in the Bankruptcy Code or Rules. Therefore, American Eagle will need to file an appropriate motion under Fed. R. Bankr. P. 2016(b), with supporting detail and itemization, justifying its request for costs of collection.

For all of the reasons stated above, neither the March 8 plan (Dkt. 21) nor the March 27 (Dkt. 30) plan can be confirmed. If Malinowski and American Eagle are able to agree on appropriate language in Section 8.1 that conforms to this court's ruling, the parties should file an agreed order on the docket that strikes the current provision in the latest March 27 plan and proposes an acceptable alternative. Otherwise, American Eagle can renew its objection to confirmation and be heard at the continued hearing on April 15, 2019, at 10:30 a.m., at which time counsel for Malinowski must also appear.

IT IS SO ORDERED.

Dated: April 1, 2019

LaShonda A. Hunt
United States Bankruptcy Judge