

SEP 06 2017

SUSAN M. SPRAUL, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

In re:	)	BAP Nos.	NC-16-1333-JuFB
	)		NC-16-1334-JuFB
DENNIS MICHAEL ESCARCEGA;	)		NC-16-1335-JuFB
NANETTE MARIE SISK, dba About	)		NC-16-1336-JuFB
Face Skin Care;	)		NC-16-1358-JuFB
EUGENE EDWARD VICK;	)		
MARK IRVIN CANDALLA;	)	Bk. Nos.	16-50368-SLJ
JERI LYLE SALDUA MERCADO,	)		16-50548-SLJ
	)		16-50401-MEH
Debtors.	)		16-50659-SLJ
	)		16-50651-SLJ
<hr/>	)		
DENNIS MICHAEL ESCARCEGA;	)		
NANETTE MARIE SISK, dba About	)		
Face Skin Care;	)		
EUGENE EDWARD VICK;	)		
MARK IRVIN CANDALLA;	)		
JERI LYLE SALDUA MERCADO,	)		
	)		
Appellants.	)		

**O P I N I O N**

Argued and Submitted on June 22, 2017  
at San Francisco, California

Filed - September 6, 2017

Appeals from the United States Bankruptcy Court  
for the Northern District of California

Honorable M. Elaine Hammond, Bankruptcy Judge, Presiding  
Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

---

Appearances: James J. Gold of Gold and Hammes argued for appellants Dennis Michael Escarcega, Nanette Marie Sisk, dba About Face Skin Care, and Mark Irwin Candalla; James S.K. Shulman of the Law Offices of James S.K. Shulman argued for appellants Eugene Edward Vick and Jeri Lyle Saldua Mercado; Ben A. Ellison of Cairncross & Hempelmann, P.S. argued for National Association of Consumer Bankruptcy Attorneys, as Amicus Curiae, by special leave of the Panel, supporting the appellants' position.

---

Before: JURY, FARIS, and BRAND, Bankruptcy Judges.

1 JURY, Bankruptcy Judge:  
2

3 When Congress enacted the Bankruptcy Abuse Prevention and  
4 Consumer Protection Act of 2005 (BAPCPA), a primary purpose was  
5 to help ensure that debtors who **can** pay creditors **do** pay them  
6 the maximum they can afford. Ransom v. FIA Card Servs., N.A.,  
7 131 S. Ct. 716, 721 (2011); see also Whaley v. Tennyson (In re  
8 Tennyson), 611 F.3d 873, 879 (11th Cir. 2010) (“The heart of  
9 [BAPCPA’s] consumer bankruptcy reforms . . . is intended to  
10 ensure that debtors repay creditors the maximum they can  
11 afford.”). The Ninth Circuit in Danielson v. Flores (In re  
12 Flores), 735 F.3d 855 (9th Cir. 2013), embraced this ideal by  
13 ruling that if the provisions of § 1325(b)(1)(B)<sup>1</sup> are triggered  
14 by an objection, debtors must commit to a fixed plan term  
15 (either 36 or 60 months) because “[a] minimum duration for  
16 Chapter 13 plans is crucial to an important purpose of § 1329’s  
17 modification process: to ensure that unsecured creditors have a  
18 mechanism for seeking increased (that is, non-zero) payments if  
19 a debtor’s financial circumstances improve unexpectedly.” Id.  
20 at 860 (citing Fridley v. Forsyth (In re Fridley), 380 B.R. 538,  
21 543 (9th Cir. BAP 2007)).

22 Notwithstanding this background and purpose, debtors in the  
23

---

24 <sup>1</sup> Unless otherwise indicated, all chapter and section  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532 and  
26 “Rule” references are to the Federal Rules of Bankruptcy  
27 Procedure. References to various sections of the bankruptcy  
28 court’s Model Plan are indicated by “section \_\_ of the Model  
Plan.”

1 Northern District of California, San Jose Division sought to  
2 modify the district's mandatory Model Plan, which required a  
3 fixed plan term, so that the plan would be for an indeterminate  
4 duration. Such plan therefore could be completed without  
5 further modification and debtor discharged as soon as all  
6 priority and secured debt was repaid, insuring that the  
7 unsecured creditors would never receive any payment on their  
8 claims. Not only did the debtors propose such plans, but their  
9 chapter 13 trustee devised a mechanism by which she could avoid  
10 filing an objection to the proposed plan – an act which would  
11 trigger the mandatory imposition of the applicable commitment  
12 period under Flores<sup>2</sup> – by providing debtors' attorneys with a  
13 "draft objection" which allowed them to make required amendments  
14 to the plan outside the court proceeding. The brash purpose of  
15 the "draft objection" was to create a work-around of the impact  
16 of Flores for the local debtors' bar so that debtors could avoid  
17 paying unsecured creditors what they might be entitled to  
18 receive.

19 Two bankruptcy judges sitting in the San Jose Division  
20 challenged the propriety of these debtors' attempts to modify  
21 the Model Plan and issued a joint decision denying confirmation  
22 of such plans. Their well-reasoned ruling found that these plan  
23 provisions were inconsistent with the statutory requirements of

---

25 <sup>2</sup> The appellee/en banc appellant in Flores was the chapter  
26 13 trustee, seeking to ensure that unsecured creditors would  
27 receive payments on their claims if, during a plan's duration,  
debtors could afford to pay them.

1 §§ 1328 and 1329 which, read together, accord a discharge to  
2 debtors only if their plans could be modified upon motion by an  
3 unsecured creditor when debtors' circumstances changed and they  
4 became able to pay a return to such creditors – i.e., a return  
5 of more than the zero dollars debtors wanted to ensure they  
6 would receive – at some point during the plan's fixed duration.  
7 They also held that such plans were not proposed in good faith,  
8 because they unfairly manipulated the Bankruptcy Code and were  
9 proposed in an inequitable manner.

10 We AFFIRM the rulings of the bankruptcy court in these  
11 cases and in doing so endorse its conclusions that such plans  
12 are inconsistent with the statutory requirements of §§ 1328 and  
13 1329. We also agree the such provisions are not proposed in  
14 good faith, as a blatant attempt to avoid the consequences of  
15 modification under § 1329 which would compel debtors to pay  
16 their creditors what they are able to afford during the term of  
17 their chapter 13 plans. Moreover, we seriously question the  
18 tactics of this chapter 13 trustee who essentially colluded with  
19 the debtors' bar to avoid the consequence that filing an  
20 objection would have under controlling Ninth Circuit case law.  
21 Her role in insuring that unsecured creditors would never  
22 receive a dividend in these cases strikes the Panel as  
23 inconsistent with the diligence required of such trustees.

## 24 I. FACTS

### 25 A. Debtors and Counsel

26 Dennis Michael Escarcega (Escarcega), Nanette Marie Sisk  
27 (Sisk), Eugene Edward Vick (Vick), Mark Irvin Candalla  
28 (Candalla), and Jeri Lyle Saldua Mercado (Mercado)

1 (collectively, Debtors), each filed a chapter 13 petition in the  
2 San Jose Division of the United States Bankruptcy Court with the  
3 assistance of counsel from one of two different law firms – Gold  
4 and Hammes (G&H) or the Law Offices of James S.K. Shulman  
5 (Shulman) (collectively, Counsel).

6 Sisk is an above-median income debtor while the others are  
7 below-median income debtors. Debtors each proposed zero percent  
8 plans to unsecured creditors.<sup>3</sup> Neither the chapter 13 trustee  
9 (Trustee) nor any creditor objected to Debtors' plans.

#### 10 **B. The Model Plan**

11 Bankruptcy Local Rule (BLR) 1007-1 provides:

12 The Court may approve and require the use of  
13 pre-printed practice forms. The Court may also  
14 approve practice forms which are not pre-printed but  
15 the format of which is required to be followed.  
16 Practice forms may be adopted on a district-wide or  
17 division-wide basis. Required forms will be available  
18 in the Clerk's office, on the Court's website  
19 (<http://www.canb.uscourts.gov>) and, with respect to  
20 Chapter 13 practice, in the office of the Chapter 13  
21 Trustee or on the Chapter 13 Trustee's website.

22 Consistent with this rule, beginning February 1, 2016, the San  
23 Jose bankruptcy court orally announced that chapter 13 debtors  
24 were required to use the Model Plan posted on the court's  
25 website.<sup>4</sup>

---

26 <sup>3</sup> Although the orders denying confirmation vary from debtor  
27 to debtor due to their unique circumstances, those differences  
28 are not relevant to the issues raised in this appeal. In each  
order denying confirmation, the bankruptcy court stated that it  
was denying confirmation of the debtor's plan for the reasons  
stated in the memorandum decision entered on September 26, 2016.  
The court then provided additional reasons for denying  
confirmation with respect to some of the debtors.

<sup>4</sup> In August 2013, the Oakland and San Francisco Divisions  
(continued...)

1 Under section 5 of the Model Plan, debtors may propose  
2 additional provisions that modify the plan:

3 [A]s long as consistent with the Bankruptcy Code, the  
4 Debtor may propose additional provisions that modify the  
5 preprinted text. All additional provisions shall be on  
6 a separate piece of paper appended at the end of this  
7 plan. Each additional provision shall be identified by  
8 a section number beginning with section 5.01 and  
9 indicate which section(s) of the standard plan form have  
10 been modified or affected.

11 Debtors used the Model Plan and attached a separate page of  
12 additional plan provisions which modified the language in  
13 sections 1.01(a) and 2.12 of the Model Plan and others not at  
14 issue in this appeal.<sup>5</sup> Counsel developed additional provisions  
15 5.02(a) and 5.03 based on their belief that the Model Plan  
16 substantively abridged Debtors' rights without them. Set forth  
17 below are the objectionable Model Plan provisions and Counsels'  
18 arguments regarding those objections:

19 **1. Section 1.01(a) of the Model Plan:**

20 **Plan payments.** To complete this plan, Debtor  
21 shall:

22 a. Pay to Trustee \$\_\_\_\_\_ per month for \_\_\_\_\_ months  
23 from the following sources: (describe, such as wages,  
24 rental income, etc.):\_\_\_\_\_  
25 Debtor shall after \_\_\_\_\_ months, increase the monthly  
26 payment to \$\_\_\_\_\_ for \_\_\_\_\_ months.

27 \_\_\_\_\_  
28 <sup>4</sup>(...continued)

29 implemented the Model Plan. At the same time, the Santa Rosa  
30 Division allowed, but did not require, its use.

31 <sup>5</sup> Counsel also found sections 4.01, 4.04 and 4.05 of the  
32 Model Plan objectionable and added corrective language with  
33 respect to these sections. In its memorandum decision, the  
34 bankruptcy court allowed the additional provisions which modified  
35 those sections of the Model Plan and indicated that Counsel could  
36 include those modifications in future chapter 13 plans without  
37 the need for an evidentiary hearing.

1           **Objection to section 1.01(a) of the Model Plan:** Counsel  
2 interpret subsection (a) to require not only a specific dollar  
3 amount for the monthly payments, but also the precise number of  
4 months for those payments.<sup>6</sup> They contend that most debtors  
5 cannot precisely calculate the exact number of months it will  
6 take for the proposed monthly payment to complete the plan due  
7 to many factors, including fluctuations in the trustee's fee  
8 percentage throughout the term of the plan. They also argue  
9 that unless an unsecured creditor objects to the plan under  
10 § 1325(b), the term of the plan will be of no concern to the  
11 creditor. Zero dollars paid over 48 months or zero dollars over  
12 60 months have the same impact on the creditor. According to  
13 Counsel, neither term is more meaningful than the other - zero  
14 dollars is still zero dollars.

15           **Corrective Language:** To correct the perceived problems  
16 with section 1.01(a), G&H added additional provision 5.02(a)  
17 which provides: "The length of the plan as reflected in the  
18 cumulative terms of the monthly payments provided in section  
19 1.01(a) [of the Model Plan] is the estimated length of the  
20 plan." (Escarcega, Sisk, and Candalla plans).

21           Mr. Shulman added: "Notwithstanding [s]ection 1.01(a) [of  
22 the Model Plan], once the debtor has paid all allowed secured  
23 and priority claims and administrative expenses as provided for  
24 in this plan, the plan shall be deemed completed and no further

---

25  
26           <sup>6</sup> In section 1.01(a) of the Model Plan, Candella proposed a  
27 60 month plan, Escarcega proposed a 50 month plan (although the  
28 term of the plan is somewhat ambiguous), Mercado proposed a 36  
month plan, Sisk proposed a 60 month plan, and Vick proposed a 59  
month plan.

1 payment to the Trustee shall be required." (Vick and Mercado  
2 plans).

3 **2. Section 2.12 of the Model Plan**

4 This section provides:

5 **Class 7: All other unsecured claims.** These  
6 claims, including the unsecured portion of secured  
7 recourse claims not entitled to priority, total  
8 approximately \$ \_\_\_\_\_. The funds remaining after  
9 disbursements have been made to pay all administrative  
10 expense claims and other creditors provided for in  
11 this plan are to be distributed on a pro-rata basis to  
12 class 7 claimants.

13 **[select one of the following options:]**

14 **\_\_\_\_\_ Percent Plan.** Class 7 claimants will receive  
15 no less than \_\_\_% of their allowed claims through this  
16 plan.

17 **\_\_\_\_\_ Pot Plan.** Class 7 claimants are expected to  
18 receive \_\_\_% of their allowed claims through this plan.

19 **Objection to section 2.12 of the Model Plan:** Counsel  
20 complain that rather than offering the options of: "will  
21 receive \_\_\_% of their allowed claims" and "will receive an  
22 aggregate dividend of \$\_\_\_\_," which would make clear or  
23 determinable the precise dividend the creditors will receive,  
24 the Model Plan required the debtor to select between two  
25 nebulous ideas. According to Counsel, based on the provided  
26 choices, neither the creditors nor the debtor knew how much the  
27 dividends will be at the time the case is filed. Counsel  
28 contend that the two provisions to select from, which specify  
the dividend on general unsecured claims, require the debtor to  
convert the actual dollar amount intended to be the aggregate  
dividend into a calculated percentage of the estimate of the  
general unsecured claims.

Counsel further complain that both provisions allow the



1 dividend to be increased: the percent plan provides "no less  
 2 than \_\_\_\_%" and the pot plan states: "expected to receive  
 3 \_\_\_\_%." According to Counsel, no one should be authorized to  
 4 make that decision, but at some point the plan must be declared  
 5 completed, or not. Counsel argue that the vagueness of this  
 6 language leaves it open to a trustee to make arbitrary judgments  
 7 about what the dividend is. Counsel thus contend that the Model  
 8 Plan substantively abridges Debtors' rights by requiring them to  
 9 make payments to general unsecured creditors in excess of the  
 10 amounts required by the Bankruptcy Code.

11 **Corrective Language:** To correct these perceived problems  
 12 in section 2.12 of the Model Plan, G&H added additional  
 13 provision 5.03, which states:

14 Section 2.12 is modified to add the following, if  
 15 checked here:

16 ✓ Class 7 claimants shall receive an aggregate  
 17 dividend of \$0, which amount can be increased up to  
 18 \$1.00 to an amount sufficient for the trustee to  
 19 administer payments on these claims, which shall be  
 20 shared pro-rata based on the amounts of their  
 21 respective allowed nonpriority unsecured claims.  
 22 (Escarcega, Sisk, Candalla plans).

23 Mr. Shulman added:

24 Section 2.12 of the plan is modified to add the  
 25 following:

26 Class 7 claimants shall receive an aggregate  
 27 dividend of \$0. (Vick, Mercado plans).

#### 28 **C. The Confirmation Procedure for Debtors' Plans**

The San Jose bankruptcy court has on its website a chapter  
 13 calendar procedure packet along with forms.<sup>7</sup> The procedures

---

<sup>7</sup> Under Fed. R. Evid. 201, we can take judicial notice of  
 the bankruptcy court's website, [www.canb.uscourts.gov](http://www.canb.uscourts.gov), which  
 contains a link to the chapter 13 calendar procedure packet. See  
 (continued...)

1 provide that chapter 13 cases ready for confirmation will be  
2 confirmed expeditiously. Confirmation hearings are initially  
3 set on a "Chapter 13 Uncontested Confirmation Calendar." Absent  
4 timely objection and upon finding that the requirements of  
5 § 1325(a) are satisfied, the bankruptcy court will confirm the  
6 plan at the confirmation hearing. The procedures state that  
7 cases will be considered ready for confirmation when (1) the  
8 § 341(a) meeting of creditors has concluded; (2) no objections  
9 to confirmation have been filed, or such objections have been  
10 resolved or withdrawn without judicial intervention;  
11 (3) payments under the proposed plan are current; and (4) there  
12 are no other unresolved deficiencies.

13 Cases that are not ready for confirmation are placed on  
14 Trustee's pending list (TPL). It is generally up to Trustee to  
15 monitor the cases on the TPL. If the deficiencies have been  
16 cured, outstanding objections resolved, and payments are  
17 current, the matter is restored to the "Uncontested Confirmation  
18 Calendar." However, when matters are not resolved, parties are  
19 instructed to follow the same rules that apply to any motion in  
20 a bankruptcy case as provided by BLR 9014-1(a). Matters may be  
21 set for hearing on any available contested confirmation calendar  
22 date.

23 Because Debtors attached additional provisions to the  
24 Model Plan, the bankruptcy court directed Trustee to move their

25 \_\_\_\_\_  
26 <sup>7</sup>(...continued)

27 Daniels-Hall v. Nat'l Educ. Ass'n., 629 F.3d 992, 998-99 (9th  
28 Cir. 2010) (taking judicial notice of information on the websites  
of two school districts because they were government entities);  
New Mexico v. Bureau of Land Mgmt., 565 F.3d 683, 702 (10th Cir.  
2009) (courts may take judicial notice of government websites).

1 cases to the TPL so that the court would have the opportunity to  
2 determine if the additional provisions complied with the  
3 Bankruptcy Code. Counsel then filed motions for confirmation of  
4 the five uncontested plans, prepared supporting declarations and  
5 set hearings for the motions on the bankruptcy court's earliest  
6 contested confirmation calendars and served all creditors.

7 At the initial confirmation hearings, the bankruptcy court  
8 expressed its concerns about the additional provisions and made  
9 some preliminary comments about the plans' confirmability.<sup>8</sup>

10 Each case was then set for an evidentiary hearing or trial on  
11 confirmation. In advance of the hearings, the bankruptcy court  
12 issued scheduling orders directing Counsel to address certain  
13 legal issues raised by the additional provisions. Debtors filed  
14 initial and supplemental briefs addressing those questions.

15 G&H, counsel in the Candalla, Escarcega, and Sisk cases,  
16 objected to the procedure described above, contending that it  
17 violated the Bankruptcy Code. It argued that the initial  
18 hearing for each Debtor did not qualify as a confirmation  
19 hearing under § 1324(b) since confirmation of the plan was not  
20 substantively considered by the court at that hearing. G&H  
21 further asserted that all of the evidentiary hearings were held  
22 after the 45-day limit in § 1324(b) for a confirmation hearing.  
23 Accordingly, G&H maintained that the court violated § 1324(b) by  
24 failing to provide a procedure to calendar and hold timely and  
25 substantive confirmation hearings for its clients' proposed

---

26  
27 <sup>8</sup> The bankruptcy court perceived that the practice in the  
28 San Jose Division was the routine early termination of chapter 13  
plans without formally modifying the plan and without providing  
notice to anyone.

1 chapter 13 plans – all of which were uncontested.<sup>9</sup>

2 After the evidentiary hearings or trials for all Debtors,  
3 the bankruptcy court took the matters under submission.

4 **D. The Bankruptcy Court's Joint Memorandum Decision**

5 The bankruptcy court issued its joint memorandum decision  
6 on September 26, 2016, which was signed by the two judges  
7 assigned to Debtors' cases.

8 Addressing the procedural argument first, the bankruptcy  
9 court overruled G&H's argument that the multiple hearings on  
10 confirmation failed to comply with the 45-day time limit for  
11 confirmation under § 1324(b). The court noted that nothing in  
12 the statute required a substantive or conclusive hearing within  
13 the 45-day period. The court further found that placing  
14 Debtors' cases on the TPL was not tantamount to a de facto local  
15 rule that violated federal law. Rather, the bankruptcy court  
16 explained that it had a duty to consider whether a chapter 13  
17 plan complied with the Bankruptcy Code and it adopted a  
18 procedure to decide that question.

19 Next, the bankruptcy court disallowed additional provisions  
20 5.02(a) and 5.03 on the ground that those provisions violated  
21 §§ 1328(a) and 1329(b) and, therefore, rendered the plans  
22 unconfirmable under § 1325(a)(1) as a matter of law. In  
23 reaching its decision, the court relied upon a number of cases  
24 in this Circuit to support its holding that Debtors were

---

25  
26 <sup>9</sup> G&H was also concerned that the delay in confirming the  
27 plans would delay the start of the payment of attorney's fees.  
28 G&H asked the bankruptcy court to consider authorizing or  
ordering Trustee to start paying fees on these cases or ones  
similarly situated prior to confirmation.

1 required to specify the length of their plans and, absent  
2 modification, perform for that time period. See Anderson v.  
3 Satterlee (In re Anderson), 21 F.3d 355, 358 (9th Cir. 1994)  
4 (self-modifying plans are not authorized under the Code); In re  
5 Flores, 735 F.3d 855 (bankruptcy court may confirm a chapter 13  
6 plan only if the plan's duration is at least as long as the  
7 applicable commitment period, even if the debtor has no  
8 projected income); In re Fridley, 380 B.R. at 546 ("[T]he  
9 statutory concept of 'completion' of payments [under §§ 1328 and  
10 1329] includes completion of the requisite period of time  
11 . . . ."); Sunahara v. Burchard (In re Sunahara), 326 B.R. 768  
12 (9th Cir. BAP 2005) (Bankruptcy Code allows a debtor to modify a  
13 confirmed chapter 13 plan to complete the plan in less than 36  
14 months without paying all claims in full, so long as Bankruptcy  
15 Code requirements for plan modification are satisfied; i.e.,  
16 good faith); In re Keller, 329 B.R. 697 (Bankr. E.D. Cal. 2005)  
17 (early payoff with lump sum payment preempts the right of the  
18 trustee and the unsecured creditors to propose a modified plan  
19 during the remaining term of the plan should the circumstances  
20 warrant a modification). The court construed these cases  
21 collectively as standing for the proposition that a debtor who  
22 proposes a plan must perform under that plan over the term of  
23 the plan and, if the debtor's circumstances change, the debtor,  
24 creditors, or the chapter 13 trustee are entitled to ask that  
25 the plan be modified.

26 The bankruptcy court also observed that under the prior San  
27 Jose form plan, any additional funds received above the stated  
28 percent or amount were returned to debtors unless Trustee

1 obtained an order modifying the plan authorizing distribution of  
2 the additional funds. The court stated that Debtors hoped to  
3 "perpetuate this practice" by adding additional provisions  
4 5.02(a) and 5.03.

5 The bankruptcy court concluded that Debtors' modifications  
6 to the Model Plan were deliberately calculated to prohibit the  
7 Trustee from distributing excess funds. Accordingly, the  
8 bankruptcy court found that Debtors' plans were not proposed in  
9 good faith.

10 Debtors each filed a timely notice of appeal from the  
11 bankruptcy court's orders denying confirmation of their plans.  
12 As the orders were interlocutory, the Panel granted Debtors'  
13 leave to appeal on November 29, 2016.

## 14 **II. JURISDICTION**

15 The bankruptcy court had jurisdiction over this proceeding  
16 under 28 U.S.C. §§ 1334 and 157(b)(2)(L). We have jurisdiction  
17 under 28 U.S.C. § 158.

## 18 **III. ISSUES**

19 A. Whether the bankruptcy court's procedure for  
20 considering confirmation of Debtors' plans was tantamount to a  
21 de facto rule which abridged Debtors' substantive rights and  
22 violated § 1324(b).

23 B. Whether the bankruptcy court erred by finding that  
24 Debtors' additional provisions 5.02(a) and 5.03 violated the  
25 Bankruptcy Code.

26 C. Whether the bankruptcy court erred in finding that  
27 Debtors did not file their plans in good faith.

28

#### IV. STANDARDS OF REVIEW

1  
2 The validity of a local court rule is a question of law  
3 reviewed de novo. Pham v. Golden (In re Pham), 536 B.R. 424,  
4 430 (9th Cir. BAP 2015).

5 The bankruptcy court's conclusions of law and  
6 interpretation of the Bankruptcy Code are reviewed de novo.  
7 Boukatch v. Midfirst Bank (In re Boukatch), 533 B.R. 292, 294  
8 (9th Cir. BAP 2015).

9 The standard of review for a denial of confirmation is two  
10 part: (1) factual questions are reviewed for clear error; and  
11 (2) legal questions are reviewed de novo. Fid. & Cas. Co. of  
12 N.Y. v. Warren (In re Warren), 89 B.R. 87, 90 (9th Cir. BAP  
13 1988). An exercise of discretion based on an incorrect  
14 conclusion of law is also reviewed de novo. Id.

15 A bankruptcy court's decision that a debtor's plan was not  
16 proposed in good faith is a finding of fact reviewed for clear  
17 error. Mattson v. Home (In re Mattson), 468 B.R. 361, 367 (9th  
18 Cir. BAP 2012) (citing Downey Savs. and Loan Ass'n v. Metz (In  
19 re Metz), 820 F.2d 1495, 1497 (9th Cir. 1987)). A factual  
20 finding is clearly erroneous if it is illogical, implausible, or  
21 without support in inferences that can be drawn from the facts  
22 in the record. United States v. Hinkson, 585 F.3d 1247, 1262-63  
23 (9th Cir. 2009) (en banc).

#### V. DISCUSSION

##### 24 25 **A. The Framework of Chapter 13: Plan Confirmation and** 26 **Discharge**

27 The chapter 13 plan confirmation process implicates a  
28 number of different Bankruptcy Code sections and rules. Chapter

1 13 debtors must file a plan under which they agree to make  
2 monthly payments to a trustee from their future income which  
3 will be distributed to pay their creditors' claims in part or  
4 full. See § 1321 ("The debtor shall file a plan."). Section  
5 1322(a) contains a list of provisions that must be contained in  
6 a chapter 13 plan and § 1322(b) contains a list of provisions  
7 that may be contained in plan. Section 1322(b)(11) provides  
8 that the plan may "include any other appropriate provision not  
9 inconsistent with this title."

10 Section 1325 contains the requirements for confirmation of  
11 a chapter 13 plan. Among the requirements is that the plan must  
12 comply with the provisions of chapter 13 and with other  
13 applicable provisions of the Bankruptcy Code. See § 1325(a)(1).  
14 The plan must also have "been proposed in good faith and not by  
15 any means forbidden by law." § 1325(a)(3).

16 A plan that includes the required components of § 1322, and  
17 satisfies the general confirmation requirements of § 1325(a), is  
18 generally confirmed. However, when the chapter 13 trustee or an  
19 unsecured creditor objects to plan confirmation, § 1325(b)  
20 applies. That section provides in relevant part:

21 (1) If the trustee or the holder of an allowed  
22 unsecured claim objects to the confirmation of the  
23 plan, then the court may not approve the plan unless,  
24 as of the effective date of the plan -

25 . . . .

26 (B) the plan provides that all of the debtor's  
27 projected disposable income to be received in the  
28 applicable commitment period beginning on the  
date that the first payment is due under the plan  
will be applied to make payments to unsecured  
creditors under the plan.

For purposes of this subsection, the "applicable commitment



1 period" (ACP) shall be -

2 (i) 3 years; or

3 (ii) not less than 5 years, if [the debtor is above  
4 median]; and ... may be less than 3 or 5 years,  
5 whichever is applicable ..., but only if the plan  
provides for payment in full of all allowed unsecured  
claims over a shorter period.

6 §1325(b) (4).

7 Whether the plan is objected to or not, bankruptcy courts  
8 must make an independent determination that a chapter 13 plan  
9 satisfies the requirements of the Bankruptcy Code. United  
10 Student Aid Funds, Inc. v. Espinosa, 559 U.S. 260, 278 (2010)  
11 (Section 1325(a) "instructs a bankruptcy court to confirm a plan  
12 only if the court finds, **inter alia**, that the plan complies with  
13 the 'applicable provisions' of the Code. . . . [T]he Code makes  
14 plain that the bankruptcy courts have the authority - indeed,  
15 the obligation - to direct a debtor to conform his plan to the  
16 requirements of . . . [the Code].").

17 Section 1329(a) provides for modification of the plan after  
18 confirmation but before completion: "Any time after  
19 confirmation of the plan but before the completion of payments  
20 under such plan, the plan may be modified, upon request of the  
21 debtor, the trustee, or the holder of an allowed unsecured  
22 claim...." A plan may be modified to extend or reduce the time  
23 for payments under the plan. § 1329(a) (2). Plan modifications  
24 are subject to the plan requirements set forth in §§ 1322(a),  
25 1322(b), and 1323(c), as well as the requirements of § 1325(a).  
26 See § 1329(b) (1). Rule 3015(g) requires that not less than 21  
27 days notice of proposed plan modifications be sent to the  
28 debtor, the chapter 13 trustee and all creditors fixing the time

1 for filing objections.

2 Debtors who complete all payments required by a confirmed  
3 chapter 13 plan are eligible for a discharge. See § 1328(a).

4 **B. The bankruptcy court's confirmation procedure for Debtors'**  
5 **plans did not amount to a de facto local rule or violate**  
6 **§ 1324(b).**

7 G&H argues on appeal that by subjecting its clients to the  
8 more burdensome confirmation procedures, the bankruptcy court  
9 established an unwritten de facto local rule which abridged its  
10 client's substantive rights contrary to 28 U.S.C. § 2075<sup>10</sup> and  
11 violated § 1324(b). We disagree.

12 Section 1324(b) provides:

13 (b) The hearing on confirmation of the plan may be  
14 held not earlier than 20 days and not later than 45  
15 days after the date of the meeting of creditors under  
16 section 341(a), unless the court determines that it  
17 would be in the best interests of the creditors and  
18 the estate to hold such hearing at an earlier date and  
19 there is no objection to such earlier date.

20 The initial plan confirmation hearings were held within 45  
21 days of the § 341(a) meeting. As the bankruptcy court properly  
22 found, § 1324(b) requires that the court convene a hearing on  
23 confirmation of the plan between 20 and 45 days after the  
24 meeting of creditors under § 341, but nothing in the statute  
25 requires a substantive or conclusive hearing within this period.  
26 See In re Jones, 2017 WL 1364967, at \*1 (Bankr. D. Maine, Apr.

---

27 <sup>10</sup> 28 U.S.C. § 2075 provides in relevant part:

28 The Supreme Court shall have the power to prescribe by  
general rules, the forms of process, writs, pleadings,  
and motions, and the practice and procedure in cases  
under title 11.

Such rules shall not abridge, enlarge, or modify any  
substantive right.

1 12, 2017) (agreeing with In re Escarcega, 557 B.R. 755, 762-63  
2 (Bankr. N.D. Cal. 2016), and contrasting § 1324 with § 1224); In  
3 re Barajas, 2006 WL 3254483, at \*8 (Bankr. E.D. Cal. Nov. 8,  
4 2006) (Section 1324(b) does not require that a plan be confirmed  
5 within 45 days of the § 341(a) meeting of creditors, but  
6 requires only a hearing). Section 1224 states:

7 After expedited notice, the court shall hold a hearing  
8 on confirmation of the plan. A party in interest, the  
9 trustee, or the United States trustee may object to  
10 the confirmation of the plan. Except for cause, the  
11 hearing **shall be concluded** not later than 45 days  
12 after the filing of the plan.

13 (Emphasis added.) Notably, there is no such language in  
14 § 1324(b). Accordingly, there was no violation of § 1324(b).

15 Further, we do not construe the confirmation procedure used  
16 by the bankruptcy court in these cases as a de facto rule which  
17 delayed confirmation of Debtors' plans.<sup>11</sup> Although the  
18 confirmation procedure may have imposed additional burdens on  
19 G&H's clients, bankruptcy courts must make an independent  
20 determination that a chapter 13 plan satisfies the requirements  
21 of the Bankruptcy Code even if no creditor raises the issue.  
22 Espinosa, 559 U.S. at 278. Thus, to ensure that it confirms  
23 plans that in are full compliance with the Bankruptcy Code, the  
24 bankruptcy court here found it necessary to conduct multiple

---

24 <sup>11</sup> Even if the procedure used amounted to a de facto rule,  
25 courts generally agree that "there is a strong presumption that  
26 substantive rights are not abridged or modified by adoption of  
27 rules of procedure." In re Beaton, 211 B.R. 755, 763 (Bankr.  
28 N.D. Ala. 1997) (citing In re Decker, 595 F.2d 185, 188-89 (3rd  
Cir. 1979)); Benjamin v. Diamond (In re Mobile Steel Co.), 563  
F.2d 692, 699 (5th Cir. 1977). Here, the bankruptcy court's  
chapter 13 procedure utilized Rule 9014, which pertains to  
contested matters, and Counsel used that procedure.

1 hearings to avoid confirming plans which fail to comply with  
2 § 1325(a).

3 In sum, the bankruptcy court's confirmation procedure was  
4 neither tantamount to a de facto rule nor did it violate  
5 § 1324(b). Accordingly, contrary to G&H's arguments, none of  
6 its clients' substantive rights under the Bankruptcy Code were  
7 abridged by the confirmation procedure used by the court.

8 **C. The Trustee's decision not to object under § 1324(b) is**  
9 **questionable.**

10 An objection by the chapter 13 trustee or an unsecured  
11 creditor would have doomed all of the proposed special  
12 provisions. But the standing chapter 13 trustee took the view  
13 that it was not her job to raise objections under § 1325(b)(1).  
14 We disagree with the trustee's limited conception of her duties.  
15 We begin by identifying those duties.

16 Congress's use of the label "trustee" suggests that a  
17 standing chapter 13 trustee owes all of the traditional  
18 fiduciary duties of a trustee at common law. But holding a  
19 chapter 13 trustee to all of the standard duties of a trustee  
20 would create insoluble problems. For example, at common law,  
21 trustees owe a fiduciary duty of loyalty to the trust  
22 beneficiaries. See Pegram v. Herdrich, 530 U.S. 211, 224 (2000)  
23 (stating that "the common law . . . charges fiduciaries with a  
24 duty of loyalty to guarantee beneficiaries' interests"). But a  
25 chapter 13 trustee could not possibly fulfill a duty of loyalty  
26 to all of the creditors, the debtor, and other parties in  
27 interest who are beneficiaries of the chapter 13 estate, because  
28 there are always conflicts of interest among those

1 beneficiaries. The debtor's interests inevitably conflict with  
2 those of the creditors: the debtor wishes to pay as little as  
3 possible to creditors, while the creditors wish to receive as  
4 much as possible from the debtor. There are also conflicts of  
5 interest among creditors. Unless the funding of a chapter 13  
6 plan is sufficient to pay all claims in full, every creditor has  
7 an incentive to maximize the amount and priority of his own  
8 entitlements and to minimize the amount and priority of all  
9 other creditors' entitlements. In these circumstances, a  
10 standing chapter 13 trustee could not possibly protect the  
11 individual interests of the debtor and each and every creditor,  
12 as the fiduciary duty of loyalty would require him to do.  
13 Therefore, a chapter 13 trustee does not owe all of the duties  
14 of a traditional trustee at common law.

15 It is sometimes said that a chapter 13 trustee owes  
16 fiduciary duties primarily to unsecured creditors, but this is a  
17 mistake. Andrews v. Loheit (In re Andrews), 49 F.3d 1404, 1407  
18 (9th Cir. 1995) ("the primary purpose of the Chapter 13 trustee  
19 is not just to serve the interests of the unsecured creditors,  
20 but rather, to serve the interests of all creditors."). It is  
21 more accurate to say that, "the trustee's role spans the many  
22 competing interests in Chapter 13 cases. The trustee in a  
23 Chapter 13 case works with everyone and for no one." Keith M.  
24 Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th Edition,  
25 § 58.1, [www.Ch13online.com](http://www.Ch13online.com).

26 Instead of looking to the common law, we turn to the duties  
27 which the Code imposes on chapter 13 trustees. In relevant  
28 part, the Code provides that, "The trustee shall . . . appear

1 and be heard at any hearing that concerns . . . confirmation of  
2 a plan . . . ." § 1302(b).

3 The Ninth Circuit has held that § 1302(b) permits the  
4 chapter 13 trustee to object to plan confirmation on any ground,  
5 including grounds that protect specific groups of creditors  
6 rather than the entire creditor body. In re Andrews, 49 F.3d at  
7 1407-08 ("in order for a plan to be confirmed, each of the  
8 requirements of section 1325 must be present . . . . Thus, in  
9 reviewing the plan for confirmation, the Chapter 13 trustee may  
10 object if the plan fails to conform to all requirements in the  
11 Bankruptcy Code, not just § 1325(a)(5).") (citations and  
12 quotation marks omitted).

13 This panel has gone one step further and held that, "The  
14 chapter 13 trustee has an affirmative statutory duty to appear  
15 and be heard on the question of plan confirmation. . . . The  
16 trustee is charged with serving the interests of all creditors,  
17 secured and unsecured. . . . Thus, not only did the trustee  
18 have the right to appear, he had the obligation to appear and to  
19 object." Meyer v. Hill (In re Hill), 268 B.R. 548, 554-55 (9th  
20 Cir. BAP 2001); see also Searles v. Riley (In re Searles), 317  
21 B.R. 368, 374 (9th Cir. BAP 2004) ("the chapter 13 trustee has a  
22 duty to appear and be heard on plan confirmation . . ."); In re  
23 Jordan, 555 B.R. 636, 655 n.15 (Bankr. S.D. Ohio 2016) (citing  
24 and quoting In re Hill).

25 One court has explained why chapter 13 trustees must take a  
26 position on plan confirmation:

27 Unsecured creditors often have such small claims and  
28 such a low expectation of any payment that they do not  
retain counsel and they do not object to confirmation.  
The Chapter 13 standing trustee is paid from the

1 bankruptcy estate, and the trustee has fiduciary  
2 duties to creditors. The trustee is clearly required  
3 to "appear and be heard" at any confirmation hearing  
4 . . . . [T]he requirement that the trustee "be heard"  
5 suggests that the trustee must make a recommendation  
6 for or against confirmation. . . . The trustee may  
7 not equivocate about confirmation. The trustee must  
8 either recommend confirmation or object to  
9 confirmation. The Chapter 13 standing trustee should  
10 thus review all Chapter 13 plans in detail and should  
11 file objections to confirmation and claimed exemptions  
12 where warranted.

13 In re Foulk, 134 B.R. 929, 931 (Bankr. D. Neb. 1991).

14 Imposing a duty on chapter 13 trustees to object to plans  
15 whenever appropriate is necessary to permit the bankruptcy court  
16 to do its job. The Supreme Court has held that the bankruptcy  
17 court should not approve a plan providing for the discharge of  
18 student loans without making a determination of "undue  
19 hardship," even if the student loan creditor does not object to  
20 plan confirmation. United Student Aid Funds, Inc. v. Espinosa,  
21 559 U.S. 260, 278 (2010) ("to comply with § 523(a)(8)'s  
22 directive, the bankruptcy court must make an independent  
23 determination of undue hardship before a plan is confirmed, even  
24 if the creditor fails to object or appear in the adversary  
25 proceeding"). As we have noted above, this suggests that the  
26 bankruptcy court has an independent obligation, even in the  
27 absence of any creditor objection, to ascertain that all plan  
28 confirmation requirements are met. The bankruptcy court could  
not effectively carry out this responsibility without the  
chapter 13 trustee's assistance. Unlike the court, the trustee  
can ask questions of the debtor informally and at the meeting of  
creditors under § 341. The trustee, and not the court, is in a  
position to ask the questions that test the confirmability of

1 the debtor's plan.

2 The chapter 13 trustee in these cases made a deliberate  
3 decision not to raise any objections under § 1325(b). If the  
4 Trustee had done so, these debtors would have had to propose  
5 plans with three- or five-year minimum durations. The Ninth  
6 Circuit's en banc decision in Flores, holds that a debtor's plan  
7 must provide for payments for the entire "applicable commitment  
8 period" even if the debtor has no "disposable income."

9 The Trustee in these cases accurately described Flores as  
10 "impactful," because it means that, if the trustee or an  
11 unsecured creditor objects, debtors must remain in chapter 13  
12 longer. If the debtor truly has no "disposable income," the  
13 extended duration would not require the debtor to pay anything  
14 to unsecured creditors. But, as we point out above, the test  
15 has a powerful indirect effect; as long as the debtor's plan  
16 term continues, the plan is subject to modification under  
17 § 1329. This means that, if the debtor's net income rises, the  
18 trustee or a creditor could move for a modification of the plan  
19 that would require the debtor to pay more to unsecured  
20 creditors. Therefore, debtors have an interest in keeping the  
21 duration of their plans as short as possible, while unsecured  
22 creditors want maximum plan durations.

23 Faced with this conflict of interest, the Trustee chose to  
24 take the side of the debtors. She told the chapter 13 debtors'  
25 bar that she would prepare and send to Debtors' counsel a "draft  
26 objection" to the plan, so that Debtors' counsel could resolve  
27 her concerns and induce her to recommend confirmation. She did  
28 not file her objections precisely because "my objections trigger



1 a commitment period under 1325(b)(1)(B)."

2 As far as we can tell from the record, the chapter 13  
3 Trustee never explained why she made this choice. She evidently  
4 is careful to raise informally any objection that is available  
5 under § 1325(a), but has simply decided that it is not her job  
6 to raise objections under § 1325(b). In fact, she employed the  
7 draft objection procedure in order to avoid the risk of  
8 inadvertently triggering § 1325(b), even though that procedure  
9 requires her and her staff to do more work.<sup>12</sup> We do not think  
10 that the Trustee's choice can be justified.

11 A respected commentator argues that:

12 Creditors are responsible for representing their own  
13 interests in Chapter 13 cases, including objecting to  
14 confirmation when appropriate. The Chapter 13 trustee  
15 cannot substitute for diligent creditor policing of  
16 Chapter 13 plans. That the trustee shall appear and be  
17 heard with respect to confirmation should not be  
18 misinterpreted to mean that the Chapter 13 trustee has  
19 the duty to identify all objections to confirmation  
20 and to raise those objections without regard to  
21 whether creditors are protecting themselves.

22 Chapter 13 Bankruptcy § 58.5. We agree that chapter 13 trustees  
23 have a difficult job and that creditors are well advised to  
24 protect their own interests. We cannot agree, however, that a  
25 chapter 13 trustee should decide on a categorical basis, for no  
26 apparent reason, not to raise an important objection which could

---

27 <sup>12</sup> We encourage trustees, debtors, and creditors to attempt  
28 to resolve disputes without court intervention, because that  
saves the parties time and money. We cannot agree, however, that  
a standing chapter 13 trustee should agree with debtors' counsel  
to adopt a special procedure for the express purpose of depriving  
unsecured creditors of the benefits of a § 1325(b) objection.

1 benefit unsecured creditors.<sup>13</sup>

2 **D. The bankruptcy court did not err in finding that Debtors'**  
3 **additional provisions 5.02(a) and 5.03 violated the**  
4 **Bankruptcy Code.**

5 The bankruptcy court found that Debtors' additional  
6 provisions 5.02(a) and 5.03 did not comply with §§ 1328(a) and  
7 1329(a) and thus rendered the plans unconfirmable under  
8 § 1325(a)(1) as a matter of law.

9 **1. Counsel's Arguments**

10 Counsel argue that the bankruptcy court erred by finding  
11 that initial chapter 13 plans must have a fixed duration prior  
12 to completion and discharge. They assert that the holdings in  
13 Fridley and Sunahara do not support the bankruptcy court's  
14 decision because those cases involved confirmed plans whereas  
15 Debtors in this appeal are contesting the bankruptcy court's  
16 requirement that they include a temporal requirement in their  
17 initial plans. According to Counsel, this is a critical  
18 distinction; if Debtors' initial plans do not draw any § 1325(b)  
19 objections, Debtors need only comply with §§ 1322 and 1325(a).  
20 Neither of those sections requires a minimum duration for a plan  
21 which has not been objected to.

22 Counsel further contend that Flores supports their position  
23 that Debtors were not required to perform under their plans for

---

24 <sup>13</sup> Arguably, the bankruptcy court could raise the § 1325(b)  
25 issue itself. See § 105(a) ("No provision of this title  
26 providing for the raising of an issue by a party in interest  
27 shall be construed to prevent the court from, sua sponte, taking  
28 any action or making any determination necessary or appropriate  
to enforce or implement court orders or rules, or to prevent an  
abuse of process."). Because the bankruptcy court did not  
address this issue, we will not discuss it in the first instance  
on appeal.

1 a fixed duration of time. In Flores, the Ninth Circuit noted:

2 Our interpretation of § 1325(b)(1)(B) does not render  
3 that provision redundant with § 1322(d), which sets  
4 forth the maximum periods of time for a chapter 13  
5 bankruptcy, because § 1325(b)(1)(B) concerns the  
6 plan's **minimum** duration. . . . Furthermore, § 1325(b)  
is triggered only if the trustee or a creditor  
objects, whereas § 1322(d) applies in all cases, a  
distinction that suggests that Congress intended the  
sections to serve different functions.

7 In re Flores, 735 F.3d at 858 n.5. Relying on this footnote,  
8 Counsel argue that only an objection under § 1325(b) can prevent  
9 a debtor from exercising the debtor's right to propose and  
10 receive the benefits of a plan that, by its own language, may  
11 complete before or even after its initially estimated term, due  
12 to the many variables that make it impossible to predict the  
13 plan's exact duration at the plan's outset.

14 Finally, Counsel assert that "probable or expected plan  
15 durations" have long been typical in initial proposed plans. In  
16 United States v. Estus (In re Estus), 695 F.2d 311, 317 (8th  
17 Cir. 1982), the court held that in applying the Code's  
18 § 1325(a)(3)'s good faith requirement, a list of factors should  
19 guide the court, including consideration of "the probable or  
20 expected duration of the plan." See also Brown v. Gore (In re  
21 Brown), 742 F.3d 1309, 1316 (11th Cir. 2014); Meyer v. Lepe (In  
22 re Lepe), 470 B.R. 851, 857 (9th Cir. BAP 2012); In re Warren,  
23 89 B.R. at 93; Villanueva v. Dowell (In re Vallanueva), 274 B.R.  
24 836, 841 (9th Cir. BAP 2002). This "traditional good faith  
25 factor," Counsel argue, is irreconcilable with a durational  
26 requirement that must be included in all proposed chapter 13  
27 plans. Based on these cases, and due to the lack of a statute  
28 mandating a fixed term for chapter 13 plans which have not been

1 objected to, Counsel assert that Debtors could modify the Model  
2 Plan by "estimating" the length of their plans or providing  
3 early termination language.<sup>14</sup>

## 4 **2. Analysis**

5 We are not persuaded by any of these arguments. Granted,  
6 there is no language in §§ 1322 and 1325(a) that requires a  
7 chapter 13 plan to provide a fixed term or a minimum duration  
8 before completion or discharge in the absence of an objection.  
9 Counsel imply that the statutes' silence must be construed to  
10 mean that Debtors have unfettered discretion to pay off their  
11 plans earlier than the time period specified in section 1.01(a)  
12 of the Model Plan, thereby completing their plans for purposes  
13 of obtaining an early discharge and emerging from chapter 13.  
14 After all, they cannot state the length of the plans with any  
15 accuracy due to multiple variables, including the chapter 13  
16 trustee's fee percentage. This math problem only exists,  
17 however, because Counsel for these Debtors want to ensure that  
18 Debtors will never pay a single penny to nonpriority unsecured  
19 creditors without having to file their own plan modification.

20 Under statutory interpretation principles, the absence of  
21 any express reference in §§ 1322 or 1325(a) to a fixed term or  
22

---

23 <sup>14</sup> The National Association of Consumer Bankruptcy Attorneys  
24 as Amicus Curiae support Counsel's position. Amicus Curiae  
25 argues that in the absence of an objection, the plain language of  
26 the Bankruptcy Code indicates no specific time period is required  
27 for chapter 13 plans and thus the bankruptcy court erred in  
28 judicially creating an implied temporal requirement for plan  
confirmation. Amicus Curiae further assert that the flexibility  
of chapter 13 should not be compromised by the court's  
legislation and manipulation of the Bankruptcy Code so as to  
impose a rigid durational requirement.

1 minimum duration of time pertaining to a chapter 13 plan which  
 2 has not been objected to cannot be taken as conclusive evidence  
 3 of Congress's approval of Debtors' additional provisions 5.02(a)  
 4 and 5.03. "An inference drawn from a legislature's silence  
 5 certainly cannot be credited when it is contrary to all other  
 6 textural and contextual evidence of congressional intent."  
 7 Burns v. United States, 501 U.S. 129, 136 (1991) (abrogated on  
 8 other grounds by United States v. Booker, 543 U.S. 220 (2005)).  
 9 Therefore, we give no credence to Counsel's reliance on  
 10 Congress's silence in §§ 1322 and 1325(a) regarding a fixed or  
 11 minimum term for chapter 13 plans which have not been objected  
 12 to.

13 Looking at the statutory scheme as a whole, §§ 1328 and  
 14 1329 governing discharge and plan modifications, respectively,  
 15 are clearly material to the issues at hand. These statutes are  
 16 applicable to all chapter 13 debtors whether a party has  
 17 objected to their plans or not. Section 1328 provides that "as  
 18 soon as practicable after completion by the debtor of all  
 19 payments under the plan, . . . the court shall grant the debtor  
 20 a discharge of all debts provided for by the plan. . . ."

21 Section 1329 provides in relevant part:

22 (a) At any time after confirmation of the plan but  
 23 before the completion of payments under such plan, the  
 24 plan may be modified, upon request of the debtor, the  
 trustee, or the holder of an allowed unsecured claim,  
 to -

25 (1) increase or reduce the amount of payments . . . .

26 (2) extend or reduce the time for such payments. . . .

27 Under the plain language of § 1329(a)(1), a trustee or  
 28 unsecured creditor can seek to modify the initial plan by

1 increasing the amount of payments if a debtor experiences an  
2 increase in income postconfirmation.<sup>15</sup> Subsection (a)(2)  
3 explicitly allows a debtor to extend or shorten the term of his  
4 or her initial plan. What principled basis would there be for  
5 including subsections (a)(1) and (2) in § 1329 if a debtor,  
6 whose plan had not been objected to, had unfettered discretion  
7 to decide whether to pay off his or her plan early, thereby  
8 "completing" payments under the plan for purposes of discharge  
9 and plan modification - and without complying with the  
10 requirements for plan modification? There is none. Counsel  
11 would effectively have us read § 1329 out of existence.

12 Additional provisions 5.02(a) and 5.03 essentially give  
13 Debtors the right to pay off their plans and emerge from chapter  
14 13 prior to the expiration of the term of their plan set forth  
15 in § 1.01(a) of the Model Plan without the necessity of going  
16 through the plan modification process or giving notice to  
17 Trustee or unsecured creditors (who receive nothing under  
18 Debtors' plans). Yet, Trustee and unsecured creditors have the  
19 right to seek modification after confirmation of Debtors' plans,  
20 but before completion of payments. The early termination  
21 language in additional provision 5.02(a)<sup>16</sup> effectively cuts off  
22 the rights of Trustee and unsecured creditors to seek

---

24  
25 <sup>15</sup> Likewise, a debtor could seek to reduce the amount of his  
or her payments if his or her income decreased postpetition.

26 <sup>16</sup> Section 5.02(a) states: "Notwithstanding [s]ection  
27 1.01(a) [of the Model Plan], once the debtor has paid all allowed  
secured and priority claims and administrative expenses as  
28 provided for in this plan, the plan shall be deemed completed and  
no further payment to the Trustee shall be required."

1 modification should Debtors' income increase postconfirmation.<sup>17</sup>  
2 Estimating a plan length produces the same result, as neither  
3 Trustee nor unsecured creditors would know when the plan is  
4 complete for purposes of seeking modification. See In re  
5 Keller, 329 B.R. at 700 ("[W]hen a debtor makes an accelerated  
6 lump sum payment rather than the regular monthly payments  
7 required by the plan, the debtor is preempting the right of the  
8 trustee and the unsecured creditors to propose a modified plan  
9 should circumstances (such as an increase in the debtor's  
10 income) warrant a modification.").

11 Debtors cannot unilaterally skirt the specific procedural  
12 safeguards that apply to plan modifications:

13 Plan modification requires that notice and an  
14 opportunity to be heard be provided to the chapter 13  
15 trustee and all concerned creditors. Rule 3015(g).  
16 The plan modification process also allows for the  
17 court to consider the debtor's good faith in proposing  
18 early payoff modifications, as well as issues as to  
19 the debtor's overall financial circumstances, future  
20 earnings and income, and the elimination of future  
21 risks of nonperformance. In re Sunahara, 326 B.R. at  
22 781-82. What it does not allow is for the debtor to  
23 pay off a chapter 13 plan in a lump sum and present  
24 the trustee and creditors with the payoff as fait  
25 accompli, with no notice or opportunity for hearing.

26 In re Schiffman, 338 B.R. 422, 435 (Bankr. D. Or. 2006).

27 In sum, allowing additional provisions 5.02(a) and 5.03  
28 would render § 1329 a nullity at least insofar as it allows

---

24 <sup>17</sup> The bankruptcy court's reference to the Mercado case  
25 underscores the point. The Mercados proposed a 36 month plan.  
26 At the evidentiary hearing, Mr. Mercado testified that Mrs.  
27 Mercado, although not presently working due to the birth of the  
28 couple's child, planned to resume working as a nurse within the  
36 month period. Therefore, the early termination language would  
have eliminated any opportunity for unsecured creditors to  
receive a distribution despite the Mercados' increased income.

1 parties other than the debtor to seek to modify a plan. We  
2 cannot construe statutes in a way which renders them a nullity.  
3 Cty. of Santa Cruz v. Cervantes (In re Cervantes), 219 F.3d 955,  
4 961 (9th Cir. 2000). In this Circuit, a plan provision which  
5 amounts to a plan modification without notice to the chapter 13  
6 trustee or unsecured creditors and without otherwise complying  
7 with the plan modification provisions under § 1329 is not  
8 authorized. In re Schiffman, 338 B.R. at 435; see also In re  
9 Anderson, 21 F.3d at 357-58.

10 Fridley supports this analysis. In Fridley, this panel  
11 considered the interplay between discharge, plan modification,  
12 and plan duration in connection with the phrase "completion" of  
13 payments in §§ 1328 and 1329. To constitute "completion" of  
14 payments for purposes of discharge or plan modification, the  
15 Fridley panel confirmed that payments under a plan have to  
16 continue for the duration provided for in the initial plan,  
17 absent modification, before being considered "complete" for  
18 purposes of modification and discharge. Fridley, 380 B.R. at  
19 543-44.

20 In Fridley, the below median income debtors proposed a plan  
21 with a 36-month applicable commitment period (ACP) with no  
22 payment to unsecured creditors. The debtors' income increased  
23 postconfirmation, enabling them to pay off their plan in 14  
24 months. The debtors filed a motion seeking a discharge and the  
25 chapter 13 trustee objected, contending that the debtors' plan  
26 required that they remain in chapter 13 for the minimum 36  
27 months. This would give the trustee time to modify the plan and  
28 capture payments for unsecured creditors not anticipated by the



1 confirmed plan. The bankruptcy court denied the debtors' motion  
2 for entry of discharge.

3 This panel affirmed, concluding that the debtors' confirmed  
4 plan required a 36-month duration. The panel reasoned that the  
5 confirmed plan specified that length and to shorten the plan's  
6 length, a motion to modify under § 1329(a) would be required.  
7 In addition, the panel found that §§ 1328(a) and 1329(a)  
8 conferred an implied temporal requirement that a plan remain in  
9 effect for its designated duration unless formally modified.

10 In reaching its conclusion, the panel considered  
11 §§ 1328(a) and 1329(a) in connection with the ACP under  
12 § 1325(b)(1). The panel decided that the three year ACP in  
13 § 1325(b)(1) operated as a temporal requirement. 380 B.R. at  
14 546. Accordingly, the panel interpreted the phrases "completion  
15 by the debtor of all payments under the plan" and "completion of  
16 payments under [t]he plan" in §§ 1328(a) and 1329 respectively,  
17 finding that those phrases included an implied temporal  
18 requirement that a chapter 13 plan remain in effect for the ACP  
19 as specified in the plan. The panel concluded that "the  
20 statutory concept of 'completion' of payments [under §§ 1328 and  
21 1329] includes the completion of the requisite period of time."  
22 Id. at 546. In the end, the Fridley panel observed:

23 A debtor desiring to prepay a chapter 13 plan and  
24 obtain an early discharge without paying allowed  
25 unsecured claims in full must follow the § 1329  
26 modification procedure prescribed by Rule 3015(g). In  
27 exchange for a § 1328(a) discharge of more debts than  
28 can be discharged in chapter 7, the debtor's increases  
in income are exposed to the risk of being captured by  
way of § 1329 modifications proposed by the trustee or  
an unsecured creditor. The debtor cannot short-  
circuit that exposure merely by prepayment, but rather  
must obtain a § 1329 plan modification after having  
given the notice required by Rule 3015(g).

1 Id. at 544. Cf. In re Sunahara, 326 B.R. at 781 (“In  
2 determining whether to authorize modification that reduces a  
3 plan term to less than 36 months without full payment of allowed  
4 claims, the bankruptcy court should carefully consider whether  
5 the modification has been proposed in good faith.”).

6 Fridley’s reasoning in support of its holding is equally  
7 applicable to these cases. Carefully parsed, the phrases  
8 referring to the “completion” of payments in §§ 1328 and 1329  
9 are linked to the duration of the plan which is either fixed by  
10 the statutory ACP or, in the absence of an objection, by the  
11 debtor. In other words, the “completion” of payments in §§ 1328  
12 and 1329, which apply to all chapter 13 debtors, relates to the  
13 time period set forth in the initial plan and not the amount of  
14 the payments. It follows that for “completion” of payments to  
15 relate to a time period, that time period must be specifically  
16 stated in the plan.

17 In addition, Fridley underscores the necessity of seeking  
18 plan modification to shorten the length of a plan before the  
19 “completion” of payments. The BAP emphasized: In exchange for  
20 the benefits of filing chapter 13 (over chapter 7), the debtor  
21 must pay a price - the debtor’s increases in income are exposed  
22 to the risk of being captured by the trustee or an unsecured  
23 creditor. The possibility of capturing increases in income  
24 necessitates that the chapter 13 trustee or unsecured creditors  
25 are apprised of the term of the plan so that they can seek  
26 modification if the Debtor’s income increases. That term cannot  
27 be undefined simply because Debtors’ plans offered to pay  
28 unsecured creditors nothing. See In re Schiffman, 338 B.R. at

1 434 (“[E]arly payoff proposals . . . present opportunities for  
2 abuse by the less than forthcoming debtor.”).

3 The reasons for holding a chapter 13 debtor to a plan for a  
4 definite period of time were addressed by the Ninth Circuit in  
5 Flores. Again, the analysis in Flores was intertwined with plan  
6 modification under § 1329. The Flores court held that “a  
7 bankruptcy court may confirm a Chapter 13 plan under . . .  
8 § 1325(b)(1)(B) only if the plan’s duration is at least as long  
9 as the applicable commitment period provided by § 1325(b)(4).”  
10 735 F.3d at 862 (overruling Maney v. Kagenveama (In re  
11 Kagenveama), 541 F.3d 868 (9th Cir. 2008)).<sup>18</sup> The court  
12 observed: “A minimum duration for Chapter 13 plans is crucial  
13 to an important purpose of § 1329’s modification process: to  
14 ensure that unsecured creditors have a mechanism for seeking  
15 increased (that is, non-zero) payments if a debtor’s financial  
16 circumstances improve unexpectedly.” Id. at 860. If debtors  
17 were not bound to a minimum plan duration, “[c]reditors’  
18 opportunity to seek increased payments that correspond to  
19 changed circumstances would be undermined.” Id.

20 These cases, taken together, establish that Debtors’ plans  
21 must specify a length and cannot contain provisions which  
22 essentially amount to plan modifications shortening that length  
23 without complying with the procedural requirements of § 1329 and  
24 without obtaining a court order. There is nothing in the

---

25  
26 <sup>18</sup> Counsel’s reliance on footnote 5 in Flores is without  
27 merit. That footnote is not a holding and simply states that  
28 § 1325(b)(1)(B) is triggered only if the trustee or a creditor  
objects, whereas § 1322(d) applies in all cases, a distinction  
that suggests that Congress intended the two sections to serve  
different functions.

1 reasoning or rationale of Anderson, Fridley, Sunahara, or Flores  
2 which limits the holdings in those cases to debtors whose plans  
3 have been objected to and thus subject to the ACP under  
4 § 1325(b)(1). For each class of debtors - those bound to the  
5 statutory ACP and those who are not - the payments under the  
6 plan cannot be shortened and payments cannot be "completed,"  
7 absent modification, before the end of a definite period of time  
8 designated in the plan whether or not that period of time is  
9 fixed by the ACP or the debtor himself or herself.

10 Counsel have not articulated any Congressional intent nor  
11 any policy reason why debtors who have no ACP can terminate  
12 their plans before the expiration of a plan term which they have  
13 chosen by inserting additional provisions to the Model Plan.  
14 Nowhere do Counsel discuss § 1329 or the requirements for plan  
15 modification.

16 Moreover, the result the bankruptcy court reached is  
17 consistent with Congress's intent in enacting BAPCPA which was  
18 to ensure that debtors repay creditors the maximum they can  
19 afford. Ransom, 131 S. Ct. at 728; see also Baud v. Carroll,  
20 634 F.3d 327, 356 (6th Cir. 2011) ("[T]he focus of Congress in  
21 enacting BAPCPA was on maximizing the amount of disposable  
22 income that debtors would pay to creditors. And there are  
23 numerous circumstances in which disposable income might become  
24 available to [a debtor] after confirmation . . . ."); In re  
25 Tennyson, 611 F.3d at 879. It is not for this panel to  
26 contravene that policy.

27 Counsel argue that whether § 1325(a)(1) imports §§ 1328(a)  
28 and 1329(a) is the question to be considered here. They contend

1 that § 1329 applies only to plans that have already been  
2 confirmed. Therefore, according to Counsel, § 1325(a)(1) does  
3 not import § 1329 into the confirmation analysis in these case.  
4 Counsel are mistaken. Section 1325(a)(1) requires compliance  
5 with "the provisions of this chapter and with other applicable  
6 provisions of [Title 11]" - no provisions are excluded. Because  
7 Debtors' additional provisions 5.02(a) and 5.03 effectively  
8 provide for early termination and "completion" of payments  
9 without complying with the procedure or requirements for  
10 modification under § 1329 and Rule 3015(g), these additional  
11 provisions violate §§ 1328 and 1329 and thus render Debtors'  
12 plans unconfirmable as a matter of law.

13 Finally, the case law which uses the "probable or expected  
14 duration" of a plan for purposes of a good faith analysis are of  
15 little assistance to Debtors. None of the decisions cited by  
16 Counsel addressed whether, in the absence of an objection, an  
17 initial chapter 13 plan has to have a fixed or minimum term or  
18 whether debtors can modify plan forms to give themselves a right  
19 to pay off a chapter 13 plan early without adhering to the  
20 formal requirements for modification under § 1329. Therefore,  
21 the cases that use the "probable or expected duration" for  
22 purposes of a good faith analysis are neither controlling nor  
23 instructive on that issue. See Engebretson v. Mahoney, 724 F.3d  
24 1034, 1040 (9th Cir. 2013) (prior rulings are not binding  
25 precedent on issues that were not squarely addressed).

26 **E. The bankruptcy court did not err in finding that Debtors'**  
27 **plans violated § 1325(a)(3).**

28 All chapter 13 plans must be proposed in good faith and no

1 objection is necessary to raise the issue. The “probable or  
2 expected duration” of a plan is but one factor to use in a  
3 totality of circumstances analysis for purposes of determining  
4 good faith under § 1325(a)(3). “[N]o single factor is  
5 determinative of the lack of good faith. . . .  
6 [D]eterminations of good faith are made on a case-by-case basis  
7 after considering the totality of the circumstances.” In re  
8 Mattson, 468 B.R. at 371-72 (citing Goeb v. Heid (In re Goeb),  
9 675 F.2d 1386 (9th Cir. 1982)).

10 In Goeb, the Ninth Circuit set forth a generalized test for  
11 good faith: “whether the debtor has misrepresented facts in his  
12 plan, unfairly manipulated the Bankruptcy Code, or otherwise  
13 proposed his Chapter 13 plan in an inequitable manner.” 675  
14 F.2d at 1390. The Goeb court emphasized that the scope of the  
15 good faith inquiry should be quite broad. Id. at 1390 n.9.  
16 “[T]he standards set forth in In re Goeb offer a solid framework  
17 for evaluating a variety of circumstances. . . .” In re  
18 Mattson, 468 B.R. at 372. Finally, the Ninth Circuit has stated  
19 that a good faith analysis under § 1325(a)(3) may consider “the  
20 legal effect of the confirmation of a Chapter 13 plan in light  
21 of the spirit and purposes of Chapter 13.” Chinichian v.  
22 Campolonzo (In re Chinichian), 784 F.2d 1440, 1444 (9th Cir.  
23 1986).

24 Here, the bankruptcy court found that Debtors’ plans were  
25 not proposed in good faith based on additional provisions  
26 5.02(a) and 5.03 which violated §§ 1328 and 1329. The court  
27 concluded that the plans were deliberately calculated to  
28 prohibit the Trustee from distributing excess funds. The record

1 amply supports the lack of good faith. Debtors' modifications  
2 to the Model Plan put unsecured creditors at a disadvantage and  
3 thus amount to an unfair manipulation of the Bankruptcy Code.  
4 Moreover, the modifications violated one of the primary purposes  
5 behind enactment of BAPCPA which was to maximize payments to  
6 unsecured creditors. Debtors' additional provisions, which make  
7 an end run around the modification procedure under § 1329 and  
8 provide for early discharge under § 1328, blatantly violate that  
9 purpose. Accordingly, since the additional provisions violate  
10 the Bankruptcy Code and are inconsistent with the overall spirit  
11 and policies of chapter 13 and the enactment of BAPCPA, there is  
12 no basis to reverse the bankruptcy court's finding on good  
13 faith.

14 **F. The Model Plan does not exceed the court's rule-making**  
15 **authority.**

16 Due to our conclusions, we reject Counsel's argument that  
17 the Model Plan as written exceeds the bankruptcy court's rule-  
18 making authority because it is contrary to the Bankruptcy Code.  
19 The Model Plan and its required use do not abridge Debtors'  
20 substantive rights. Although the bankruptcy court declined to  
21 confirm the plans, its decision does not close the door on  
22 Debtors' ability to seek a good faith modification of a  
23 confirmed plan with a definite term at a later date pursuant to  
24 § 1329. Requesting modification to extend or reduce the time  
25 for payments under a plan is permitted by statute. In addition,  
26 by disallowing additional provisions 5.02(a) and 5.03, the  
27 bankruptcy court ensured that Trustee and unsecured creditors  
28 are not foreclosed from seeking modification before completion

1 of Debtors' plans if Debtors' income increases  
2 postconfirmation.<sup>19</sup>

3 **VI. CONCLUSION**

4 For the reasons stated, we AFFIRM.  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21

---

22 <sup>19</sup> Although G&H raises other issues with respect to the  
23 bankruptcy court's criticisms of documents filed by Escarcega and  
24 Candalla, those issues are not material to the resolution of this  
25 appeal. Accordingly, it is unnecessary to address them. See  
26 Dehart v. Lopatka (In re Lopatka), 400 B.R. 433, 440 (Bankr. M.D.  
27 Pa. 2009) ("The doctrine of judicial restraint suggests that a  
28 court should decide the fewest issues necessary to resolve the  
subject dispute.") (citing Morse v. Frederick, 551 U.S. 393, 431  
(2007)); PDK Labs., Inc. v. Drug Enf't Admin., 362 F.3d 786, 799  
(D.C. Cir. 2004) ("[T]he cardinal principle of judicial restraint  
is that if it is not necessary to decide more, it is necessary  
not to decide more.").