IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:	)	
	)	
PHILIP and RITA ERTHA,	)	Case No. 18-551
	)	
Debtors.	)	

ORDER

This case is before the court on the debtors' motion to modify and amended motion to modify (docs. 66, 76), and the trustee's objections thereto (docs. 74, 83). The parties have briefed the issues (*see* docs. 90, 95). The court has reviewed the arguments of the parties and the relevant law and finds as follows:

The debtors obtained a personal injury settlement arising from a postpetition motor vehicle accident in the amount of $56,243.81. (*See* doc. 71). The nonexempt proceeds of that settlement in the amount of $16,396.20 are property of the debtors' chapter 13 estate under Bankruptcy Code §§ 541 and 1306 and the debtors' confirmed plan. (*See* doc. 3, ¶12(b)); *see generally In re Waldron*, 536 F.3d 1239 (11th Cir. 2008).

The trustee argues that the liquidation requirement is not satisfied unless the debtors pay all of the nonexempt settlement funds to the case with the percentage to unsecured creditors to increase accordingly. The debtors' position is that they have already paid more than is necessary to satisfy the liquidation test even accounting for the settlement amount.

At confirmation, a debtor's plan must satisfy several separate requirements. Under the "projected disposable income test" of Bankruptcy Code § 1325(b), the debtor must apply all of his or her projected disposable income to the plan for the applicable commitment period (three or five years) if unsecured creditors are not being paid 100% of their claims. And under § 1325(a)(4)'s "best interest of creditors" test, also known as the liquidation test, unsecured

creditors must receive at least as much as they would if the case were a chapter 7 liquidation. The liquidation test also applies to any plan modification. *See* 11 U.S.C. § 1329(b)(1). The issue here is whether the plan payments used to satisfy the disposable income test can also be used to satisfy the liquidation test at modification.

The court finds persuasive the reasoning of *In re Villegas*, 573 B.R. 844 (Bankr. W.D. Wash. 2017). That court first found, as the parties here agree, that the value of the nonexempt portion of the personal injury settlement should be added to the liquidation calculation in determining whether the modified plan satisfies § 1329. *See id.* at 849-50. But the court rejected the position that the liquidation test of § 1325(a)(4) and the disposable income test of § 1325(b) are cumulative. Instead, the liquidation "test is a 'floor,' i.e. the minimum amount that creditors must receive in a Ch. 13, whereas the [disposable income] test functions as a ceiling." *See id.* at 850. In other words, the amount paid to unsecured creditors must meet both the liquidation test and the projected disposable income test, but the same payments from income used to satisfy the projected disposable income test can also satisfy the liquidation test. *See id.* So when a trustee seeks to modify a confirmed chapter 13 plan to increase the distribution to unsecured creditors because an asset was liquidated postconfirmation, debtors are entitled to a credit against the amount owed under the liquidation test for payments that they have made or will make to unsecured creditors under the plan pursuant to the disposable income test. *See id.* at 850-51. "In fact, that is the essence of Ch. 13, paying the value of assets which might otherwise be liquidated by a trustee in a Ch. 7, from the debtor's income over the life of the plan." *Id.* at 851.

The court concludes, consistent with *In re Villegas*, that here the nonexempt $16,396.20 of the personal injury settlement must be included in the liquidation test calculation but that the debtors are entitled to a credit in applying the liquidation test for payments made or to be made

to unsecured creditors under the plan. Put another way, the projected disposable income test and the liquidation test are separate, not stacked. But note that the credit is only for plan payments to unsecured creditors – not the total plan payments – since the liquidation test looks at what unsecured creditors are being paid.

The court thus resets the hearing on the motion to modify, amended motion to modify, and objections (docs. 66, 74, 76, 83) to the court's telephonic docket on December 15, 2021 at 8:30 a.m. to allow the parties to recalculate the numbers under the analysis set forth above. If the parties reach a resolution before the hearing, they may submit a proposed order to the court, copying the court's law clerk.

Dated: December 2, 2021

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE