



IT IS ORDERED as set forth below:

Date: September 29, 2008

C. Ray Mullins

**C. Ray Mullins
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

TERRY ALAN TENNYSON,

Debtor.

CASE NO. 07-78937-CRM

CHAPTER 13

ORDER

BEFORE THE COURT is an objection to the Debtor's chapter 13 Plan (the "Plan") filed by Nancy J. Whaley, Chapter 13 Trustee (the "Trustee"). The Court heard argument and resolved all but one of the Trustee's objections. The parties filed post-hearing briefs on the remaining issue.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(a) & (b). This is a core proceeding under 28 U.S.C. § 157(b)(2)(L).

The issue before the Court is whether Terry Alan Tennyson (the “Debtor”), an above-median income debtor with negative monthly disposable income, as reported on line 58 of Form 22C, may confirm a thirty-six month plan. For the reasons set forth below, the Court overrules the Trustee’s objection to confirmation and confirms the Debtor’s plan.

Factual Background

The Debtor’s voluntary chapter 13 petition for relief was filed on November 10, 2007. The Debtor later amended his plan on November 12, 2007. The amendment changed the duration of the Plan from sixty to thirty-six months. The Plan provides for payments of \$420.00 per month. The Debtor has one secured debt totaling \$9,036.51. Line 58 of Form 22C calculates Debtor’s monthly disposable income at negative \$349.50. The Plan provides no dividend to general unsecured creditors. The Debtor’s combined monthly plan payments would total over \$15,000.00.

The Debtor is single with no dependents, and has been steadily employed for over three years. The Debtor’s currently monthly income, as defined by section 101(10A) of the Bankruptcy Code, is \$3,229.37. His annual income exceeds Georgia’s median income level by about \$800.00. Therefore, Debtor is classified as an above-median income debtor. 11 U.S.C. § 101(39A). Debtor’s Form 22C has two boxes selected at the top of the first page: “The applicable commitment period is 5 years” and “Disposable income is determined under § 1325(b)(3).”

The Trustee's remaining objection relates solely to the Plan's thirty-six month term. The Trustee asserts that the Plan must extend sixty months to comply with the applicable commitment period set forth in section 1325(b)(4). The Trustee contends that her position aligns with the majority of courts subscribing to the temporal interpretation of the term "applicable commitment period."¹ The Trustee notes that requiring the Debtor to provide a sixty-month plan would result in a 50% dividend to general unsecured creditors, instead of the 0% dividend provided by the Debtor's thirty-six month Plan.

The Trustee does not assert any remaining objections to Debtor's expenses. The Trustee does not challenge the propriety of Debtor's Form 22C or Debtor's reported negative monthly disposable income. The Trustee's objection is not based on the Debtor's ability to pay more into the plan per month. Instead, the Trustee's objection is solely based on a strict application of section 1325(b)(4)'s sixty month applicable commitment period for above-median income debtors.

Discussion

The interplay between three statutory subsections is at issue in this matter. The Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") included amendments to sections 1322(d) and 1325(b)(4), and each provide distinct requirements based on a debtor's status as an above or below-median income debtor. Section 1322 is titled, "Contents of plan,"

¹ Although the post-hearing briefs from both parties include arguments that interpret applicable commitment period as a temporal or multiplier concept, the dispositive issue before the Court is the effect of the applicable commitment period in § 1325(b)(1)(B) when the debtor has negative projected disposable income. The Court's analysis will be limited to such legal question.

and section 1322(d)(1) states that an above-median income debtor's plan "may not provide for payments over a period that is longer than 5 years." 11 U.S. C. § 1322(d)(1). Section 1325 is titled, "Confirmation of plan," and § 1325(b)(4) provides "[f]or purposes of this subsection, the 'applicable commitment period' . . . shall be not less than 5 years" 11 U.S.C. § 1325(b)(4)(A)(ii) (for above-median income debtors).

The Debtor's status as an above-median income debtor is unquestioned. The Debtor, however, relies on statutory subsections 1325(b)(1)(B) and 1322(d) in support of the Plan's thirty-six month term. The Debtor argues that section 1325(b)(1)(B) only requires compliance with the applicable commitment periods prescribed in section 1325(b)(4) when a debtor has projected disposable income to fund a plan. Therefore, the Debtor asserts that because he has negative disposable income he has no obligation to fulfill the above-median applicable commitment period. The Plan conforms to the plain language of section 1322(d)(1) because thirty-six months is not "a period that is longer than 5 years." The Debtor argues that this statutory subsection controls a plan's prescribed duration.

The Trustee asserts that the directive in section 1325(b)(4) and the "not less than 5 year" language mandates a sixty month plan. The Debtor selected the box at the top of Form 22C that the applicable commitment period is 5 years. The Court agrees that the Debtor's applicable commitment period is 5 years according to section 1325(b)(4). However, the Court also finds that the prescribed applicable commitment period is irrelevant when a debtor has no projected disposable income.

In addition to sections 1325(d) and 1325(b)(4), the third statute implicated herein is section 1325(b)(1)(B). An objection to confirmation of a plan triggers section 1325(b)(1), which provides:

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

(A) the value of the property to be distributed under the plan on account of such claims is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the 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.

11 U.S.C. § 1325(b)(1). Here, there is no dispute that the Plan will not provide payment for all unsecured claims. As such, the Court must determine the proper application of section 1325(b)(1)(B).

BAPCPA narrowed the objective of section 1325(b)(1)(B). Pre-BAPCPA, a debtor's disposable income was calculated by subtracting the expenses on Schedule J from income reported on Schedule I. The debtor's disposable income was committed to a Chapter 13 plan to cover administrative, secured, priority, and general unsecured claims. Under BAPCPA, a debtor's disposable income or projected disposable income is committed exclusively to unsecured creditors. Section 1325(b)(1)(B) now directs that unsecured creditors receive "all of the debtor's projected disposable income . . . in the applicable commitment period."

Three terms within section 1325(b)(1)(B) are critical to its application: projected disposable income, applicable commitment period, and unsecured creditors.² Here, the parties agree that the Debtor has no projected disposable income. As such, section 1325(b)(1)(B)'s use of the applicable commitment period becomes irrelevant. Without any projected disposable income there is nothing for unsecured creditors to receive, and “[t]he applicable commitment period does not even come into play.” *In re Frederickson*, 375 B.R. 829, 831 (B.A.P. 8th Cir. 2007).

Section 1325(b)(4) does not stand alone and provide for a strict five year minimum plan duration for all above-median income debtors. Instead, section 1325(b)(4)'s qualifying language, “[f]or purposes of this subsection,” provides respective applicable commitment periods for debtors within the context of section 1325(b)(1)(B). *In re Kagenveama*, 527 F.3d 990, 998 (9th Cir. 2008) (explaining that the applicable commitment period in § 1324(b)(4) is not a “freestanding plan length requirement”). As such, section 1325(b)(4) provides a period in which a debtor must pay projected disposable income to the trustee for the benefit of unsecured creditors. 11 U.S.C. § 1325(b)(1)(B); *In re Kagenveama*, 527 F.3d at 999; *In re Frederickson*, 375 B.R. at 835; *In re Green*, 378 B.R. 30, 33-34 (Bankr. N.D.N.Y. 2007). However, if there is no projected disposable income then there is no requirement for an above-median income

² “There are two [] other variables from [§ 1325(b)(1)(B)] that must be examined to address that issue: ‘projected disposable income’ and ‘unsecured creditors.’ If neither of those variables exist, then the § 1325(b)(1)(B) formula loses its meaning.” *In re Green*, 378 B.R. 30, 34 (Bankr. N.D.N.Y. 2007).

debtor to adhere to the applicable commitment period requirements provided for in § 1325(b)(4). *In re Frederickson*, 375 B.R. at 835; *In re Green*, 378 B.R. at 35. “Any money other than projected disposable income that the debtor proposes to pay does not have to be paid out over the applicable commitment period.” *In re Kagenveama*, 527 F.3d at 998 (citing *In re Alexander*, 344 B.R. 742, 751 (Bankr. E.D.N.C. 2006)).

The court in *In re Green* provides an excellent explanation of the relationship between section 1325(b)(4)’s applicable commitment period and section 1322(d)(1)’s plan period:

It appears that many courts may be confusing the ACP under § 1325(b)(1)(B) with the term of the plan as provided by § 1325(d). They are not necessarily synonymous. All plans have a § 1325(d) term, and in some cases this term will be the same as the § 1325(b)(1)(B) ACP. However, it must be remembered that the ACP is not the actual term of the plan, but only a subset of the term.

In re Green, 378 B.R. at 35; *see also In re Kagenveama*, 527 F.3d at 998. The term of the Plan conforms to the requirement in section 1322(d) because the Plan does “not exceed 5 years.” The Plan has no other durational requirement without the presence of any projected disposable income. “[T]here is no reason to extend plans artificially if there is no requirement that debtors pay a dividend to unsecured creditors over time.” *In re Alexander*, 344 B.R. at 751.

The Trustee argues that this Court’s prior rulings interpreting projected disposable income should prevent the Court from adopting a strict application of Form 22C’s disposable income calculation to section 1325(b)(1)(B). The Trustee correctly notes that

this Court has previously held that projected disposable income in section 1325(b)(1)(B) carries a distinct meaning from disposable income in section 1325(b)(2). *In re Grady*, 343 B.R. 747, 750 (Bankr. N.D. Ga. 2006); *In re Foster*, No. 06-68298, slip. op., 2007 Bankr. LEXIS 2192 at *8-9 (Bankr. N.D. Ga. May 8, 2007). “The significance of the word projected is that it requires the Court to consider both future and historical finances of a debtor in determining compliance with section 1325(b)(1)(B).” *In re Grady*, 343 B.R. at 751 (citations omitted). However, this Court’s decision to look beyond Form 22C to accurately determine the debtor’s “projected disposable income” in both *In re Grady* and *In re Foster* was based on the debtor’s change in circumstances between the six month look back period reported on Form 22C and the debtor’s actual financial ability to repay creditors at the time of the petition. *In re Grady*, 343 B.R. at 751; *In re Foster*, 2007 Bankr. LEXIS 2191 at *9. This Court’s prior holdings interpreting projected disposable income in section 1325(b)(1)(B) beyond Form 22C was limited to circumstances where the debtor’s financial ability to repay debts has significantly changed. In *In re Grady*, the Court’s holding lowered debtors’ monthly plan payments, and in *In re Foster*, the Court’s holding increased debtor’s monthly plan payments.

In the matter at hand, neither party presents any change in circumstances regarding the Debtor’s financial position. In fact, the Trustee even includes this distinction in her brief.³ A strict interpretation of section 1325(b)(4)’s applicable commitment period without reading the term in context of section 1325(b)(1)(B) is a misapplication of this

³ “In this case there is no change in circumstances.” Trustee’s Brief, Page 12.

Court's prior holdings regarding projected disposable income, in addition to a misinterpretation of the role of the applicable commitment period within section 1325(b)(1)(B). Section 1325(b)(1)(B) requires that its terms be read in context. Just as this Court considers a change in the debtor's circumstances significant in determining projected disposable income for purposes of section 1325(b)(1)(B), the Court also considers the existence of projected disposable income significant in determining the role of the applicable commitment period in section 1325(b)(1)(B). Because the Trustee limits her objection to the Plan's thirty-six month duration, the Court has no reason to consider any figures beyond those reported on Form 22C to determine the Debtor's projected disposable income. The parties agree that the Debtor's monthly disposable income is negative \$349.30. Therefore, the Court finds that under these circumstances the Debtor's projected disposable income is also negative. Because the Debtor has no projected disposable income, the applicable commitment period in sections 1325(b)(1)(B) and (b)(4) does not require the Plan to extend sixty months.⁴

In *Grady*, this Court emphasized that BAPCPA modified, not abrogated, the Bankruptcy Code. *In re Grady*, 343 B.R. at 751. The Court then noted that the plan modification provisions of section 1329 remained substantively unchanged by BAPCPA.

⁴ The Court aligns itself with numerous court that have held that a debtor has no applicable commitment period when the debtor has no projected disposable income. *In re Kagenveama*, 527 F.3d 990 (9 Cir. 2008); *In re Frederickson*, 375 B.R. 829 (B.A.P. 8 Cir. 2007); *In re Ellis*, 388 B.R. 456 (Bankr. D. Mass. 2008); *In re Rush*, 387 B.R. 26 (Bankr. W.D. Mo. 2007); *In re Green*, 378 B.R. 30 (Bankr. N.D.N.Y. 2007); *In re Lawson*, 361 B.R. 215 (Bankr. D. Utah 2007); *In re Alexander*, 344 B.R. 742 (Bankr. E.D.N.C. 2006).

Id. Similarly, nothing in this Order shall prejudice either party from seeking modification during the Plan period. *See In re Kagenveama*, 527 F.3d at 999. Accordingly,

IT IS ORDERED that the Trustee's Objection be and is hereby **OVERRULED**, and the Debtor's Plan is **CONFIRMED**.

The Clerk of Court is directed to serve a copy of this Order on the Debtor, Debtor's counsel, the Chapter 13 Trustee, and all other parties in interest.

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