THE FOLLOWING ORDER
IS APPROVED AND ENTERED
AS THE ORDER OF THIS COURT:

DATED: June 7, 2018

Beth E. Hanan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

In re:

Shakinah Hicks,	Case No. 17-28000-beh
Debtor.	Chapter 13

DECISION AND ORDER OVERRULING TRUSTEE'S OBJECTION TO CONFIRMATION

The Trustee objected to confirmation of the debtor's proposed modified plan on the ground that it improperly shortened the plan commitment period. The issue presented is whether a debtor, who was below median income at the time her chapter 13 petition was filed, may, post-confirmation, reduce the plan duration without reducing the percentage originally proposed to pay unsecured creditors. The Trustee and counsel for the debtor presented their arguments at two hearings.

BACKGROUND

Shakinah Hicks filed her chapter 13 petition on August 5, 2017. Her plan, confirmed on December 14, 2017, provided that she was to pay $575 in monthly plan payments, primarily for a 2016 Nissan Altima. The plan term was 60 months, although the plan included shortening language. (CM-ECF, Doc. No. 2.) The debtor's plan also proposed 1% repayment on claims of unsecured creditors. On February 21, 2018, the Trustee filed a motion to dismiss for nonpayment. The debtor objected to dismissing her case, asserting that she had missed work and lost income due to injuries from a motor vehicle accident. (CM-ECF, Doc. No. 15.)

The Trustee and the debtor resolved the motion to dismiss by stipulating that the debtor would make $100 monthly plan payments—"or such other amount as specified under the terms of any subsequent Chapter 13 plan confirmed by this Court"— going forward. (CM-ECF, Doc. Nos. 22, 24.)[1] Shortly thereafter the debtor filed a proposed modified plan providing for surrender of her Altima and a cessation of plan payments on that vehicle, providing total plan payments of $1,925 through April, 2018, and $100 monthly plan payments beginning in April, for a duration of up to 51 months. The plan shortening language confirmed in the original plan was retained. It reads:

> General unsecured non-priority claims shall be paid not less than 1% of their respective total claims and paid pro rata, with no interest. Anytime the Plan reaches 36 months, the plan shall complete once unsecured creditors receive the percentage numerically indicated above. If the Plan duration actually becomes 36 months or less, then the unsecured claims shall be paid all remaining available funds through month 36 up to 100%.

The debtor filed an amended budget in support of the modified plan, adding a $232 monthly vehicle payment on Schedule J and some additional childcare expenses. (CM-ECF, Doc. No. 14.)

The Trustee objected to the proposed plan modification as a "retroactive forgiveness" of the missed plan payments. (CM-ECF, Doc. No. 28.) He asserted that due to the shortening language in the confirmed plan, the modified plan would terminate prior to the debtor paying three years' worth of plan payments. To make up for that, the Trustee sought an increase in the dividend to nonpriority unsecured creditors to $2,500 (equaling approximately 24% of the unsecured creditors' claims), which reflects an addition of approximately four months of missed plan payments, at the original $575 payment amount.

ARGUMENTS

The Trustee argues that the projected disposable income requirement of 11 U.S.C. section 1325(b)(1)(B) applies to the debtor's proposed modification, and requires an increase in her proposed dividend to unsecured creditors. The

[1] The stipulation provided for $100 monthly plan payments, rather than the $575 monthly payment in the debtor's confirmed plan, because shortly after the trustee moved to dismiss, the debtor filed a motion to modify her plan, which reduced payments to $100 per month. (CM-ECF, Doc. No. 16.) The trustee objected to confirmation of that plan on the same ground raised in the pending objection, and the debtor subsequently withdrew that plan and filed the current proposed modification.

Trustee does not argue that the debtor's modified plan was proposed in bad faith. Section 1325(b)(1) provides:

> 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 –
>
> . . .
>
> > (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)(B).

In response, the debtor asserts that an initial commitment to pay all disposable income does not always mean that a debtor actually will make 36 months of payments at the amount in the original confirmation order. While agreeing that section 1325 requires a plan duration of 36 months, Ms. Hicks recognizes that circumstances can intervene to prevent a debtor from making a plan payment in a particular month. As the proponent of the plan modification, Ms. Hicks bears the burden of proof. *In re Wetzel*, 381 B.R. 247, 254 (Bankr. E.D. Wis. 2008).

The Trustee urges that the cure for a month or more of missed plan payments, at least in this circumstance, is an extension of plan duration. The Trustee argues that plan shortening language should not be employed to excuse or waive missed payments.

ANALYSIS

Acknowledging that a debtor's circumstances change over time, the Code permits modification of a plan as follows, in relevant part:

> (a) At any time after confirmation of the plan but before completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to –
>
> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
>
> (2) extend or reduce the time for such payments;
>
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take

> account of any payment of such claim other than under the plan; or . . . .

11 U.S.C. § 1329(a).

Here, the debtor does not invoke section 1329(a)(1) to reduce her payments to unsecured creditors – her modified plan proposes the same one percent of claims payment as does her original, confirmed plan. In one sense her modification changes the original plan's terms for duration of payments, going from 60 months to 51 months. *See* section 1329(a)(2). But in another sense, by retaining the alternative shortening language, there may not be a duration change. Ms. Hicks' request to modify may also be viewed as invoking section 1329(a)(3), altering the distribution to a creditor to take account of any payment other than under the plan (here, ceasing plan payment to Nissan Motor Corp. following surrender of the vehicle) and substituting a direct vehicle payment on Schedule J. *See In re Arguin*, 345 B.R. 876, 880 (Bankr. N.D. Ill. 2016), citing Lundin, *Chapter 13 Bankruptcy* § 264.1 at 254-4 – 264-5 n.22, discussing plan modification for surrender of collateral. Her amended budget shows a net monthly income of approximately $97.00 (CM-ECF, Doc. No. 14), and her modified plan proposes $100 as a monthly plan payment (CM-ECF, Doc. No. 16).

The Trustee argues that the projected disposable income requirement of section 1325(b)(1)(B), as calculated for Ms. Hicks' original plan, still applies, and to make up for the payments she missed early in her plan term when she was unable to work, the court should require an increase in the dividend to unsecured creditors to approximately $2,500, or 24% of the unsecured claims. To do otherwise, the Trustee argues, could mean, in other cases, that some debtors could propose modifications where they pay nothing.

The Trustee's argument is reflective of "a split of authority as to whether the disposable income test of section 1325(b) applies to a modification under section 1329." *In re Barnes*, 506 B.R. 777, 780 (Bankr. E.D. Wis. 2014). Neither the Trustee nor the debtor cite any cases addressing the interplay between sections 1325(b)(1) and 1329(a). But, as will be seen, courts in this district repeatedly have concluded that the disposable income test does not apply to modifications under section 1329.

Some courts have declined to allow a modification that reduces the applicable commitment period—the temporal requirement of the disposable income test—by considering the language of section 1325(a), as expressly incorporated into section 1329. Section 1325(a) states "except as provided in

subsection (b), the court shall confirm a plan." 11 U.S.C. § 1325(a). As *Barnes* discussed, those courts determined that the quoted language

> implicitly incorporates the disposable income test of section 1325(b)(1)(B) into the modification provisions of section 1329. *See, e.g., In re Heideker*, 455 B.R. 263, (Bankr. M.D. Fla. 2011) (holding requirement that debtors must either pay their unsecured creditors in full or propose plans that extend for entire term of their applicable commitment periods, were equally applicable to modified plans); [and] *In re Heyward*, 386 B.R. 919 (Bankr. S.D. Ga. 2008) (finding "applicable commitment period" is temporal concept, not a multiplier, so that below-median income debtor did not have ability, by obtaining reverse mortgage on his home to pay off plan early less than 36 months into plan unless payment that he made with funds obtained from reverse mortgage transaction was sufficient to pay unsecured creditors in full).

506 B.R. at 780-81.

Barnes was not convinced by the reasoning of cases holding that the projected disposable income test applies to a proposed modification and that the commitment period cannot be reduced: "[T]hese courts bolster their interpretation of statutory language with policy reasons as well, even when modification could reduce, or even eliminate, plan payments over the remaining term to an amount the debtor can pay." *Id.* at 781.

Barnes concluded a plain language analysis was most appropriate, noting that Congress included certain statutory references in section 1329, but left out section 1325(b). 506 B.R. at 782. Likewise, other courts have determined that while the disposable income test of section 1325(b) does not apply to modified plans under section 1329, the good faith test remains applicable. *Barnes*, 506 B.R. at 782, citing cases. Before *Barnes,* another court in this district, *In re Kearney*, 439 B.R. 694 (Bankr. E.D. Wis. 2010), employed the same plain language analysis to hold that a proposed plan modification did not have to meet the projected disposable income requirement. In *Kearney*, the debtor proposed to modify her confirmed plan by reducing payments to unsecured creditors, and the Trustee contended that she should have to pay in her tax refunds. Importantly, *Kearney* acknowledged that the debtor's income and expenses remained relevant to a determination of whether the modification was proposed in good faith. 439 B.R. at 696, endorsing *In re Sunahara*, 326 B.R. 768, 781-82 (9th Cir. BAP 2005).

The plain language approach to section 1329(a) and disposable income has been followed in this district since at least 2007. *See, e.g., In re Robenhorst*, No. 10-25094 , 2011 WL 1434696 (Bankr. E.D. Wis. April 14,

2011), citing *In re Young*, 370 B.R. 799, 802 (Bankr. E.D. Wis. 2007) ("[t]he plain meaning of the statute supports the conclusion that modification is not subject to the disposable income test"). The district court affirmed Judge Kelley in *King v. Robenhorst*, No. 11-C-573, 2011 WL 5877081, at *2, (E.D. Wis. Nov. 23, 2011) (explaining that a disposable income analysis can be part of the good faith analysis). In affirming, the district court highlighted a cautionary note from the Seventh Circuit:

> The varying threshold standards adopted in the bankruptcy court decisions further underscore the need to apply the statutory language when it is clear and unambiguous. "[T]he various approaches to postconfirmation modification of chapter 13 bankruptcy plans are obscured in rhetoric, resulting in contradictory judicial approaches to postconfirmation modification of chapter 13 plans."

Robenhorst, 2011 WL 5877081, at *3, citing *In re Witkowski*, 16 F.3d 739 (7th Cir. 1994) (construing section 1329). This court will maintain that clear approach.

CONCLUSION

The Trustee's objection to the debtor's proposed modification, framed as a "retroactive forgiveness" or waiver of several missed plan payments, is a new characterization of a familiar occurrence, an occurrence addressed under Code authorization and subject to court review. Section 1329 permits plan modification under certain circumstances, and at least under precedent in this district, does not mandate that the debtor continue to pay her projected disposable income.

Without a challenge to the proposed modification being in bad faith, the court hereby OVERRULES the Trustee's objection.

It is so ordered.

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