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528 B.R. 501 (Bkrtcy.S.D.Ga. 2015)

IN RE: MARK C. BARNES, Debtor

No. 14-11079, Chapter 13

United States Bankruptcy Court, S.D. Georgia, Augusta Division

March 17, 2015

For Mark C. Barnes, aka Mark Clifford Barnes, Debtor: Zane P. Leiden, Leiden & Leiden, Augusta, GA.

For Huon Le, Trustee: Huon Le, Augusta, GA.

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ORDER

SUSAN D. BARRETT, CHIEF UNITED STATES BANKRUPTCY JUDGE.

Before the Court is an Objection to Confirmation filed by the Chapter 13 Trustee (" Trustee") arguing that the chapter 13 plan submitted by Mark C. Barnes (" Debtor") does not satisfy 11 U.S.C. § 1325(b)(1) because it fails to propose to pay interest on Debtor's allowed general unsecured claims and Debtor is not committing all of his disposable income into the plan. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) and the Court has jurisdiction under 28 U.S.C. § 1334. For the following reasons, the Trustee's objection to confirmation is sustained.

FINDINGS OF FACT

Debtor filed his chapter 13 bankruptcy petition on June 18, 2014. Debtor's chapter 13 plan proposes to pay $1,125.00 for 60 months and " a 100% dividend or a pro-rata share of $7,500.00, whichever is greater." Dckt. No. 4. According to Debtor's means test calculation, Debtor is an above median debtor with the applicable commitment period of 5 years and a monthly disposable income of $930.77. Dckt. No. 2. However, according to Debtor's schedule J, his current monthly net income is $2,102.87, well above his proposed monthly plan payment. Dckt. No. 1. Schedule I also includes a pro rated tax refund in the amount of $935.33 per month.

This matter involves two issues. The first issue is whether Debtor is proposing to contribute all of his projected disposable income into the plan. The second issue is whether Debtor must pay interest to his unsecured creditors when his plan proposes to pay a 100% dividend to his unsecured creditors over five years, but he fails to contribute all of his projected disposable income into the plan.

CONCLUSIONS OF LAW

Section 1325(b)(1) provides:

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(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 claim 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). The section is in the disjunctive requiring a debtor to comply with either § 1325(b)(1)(A) or § 1325(b)(1)(B) to overcome an objection by the Trustee or an unsecured creditor. *Hamilton v. Lanning*, 560 U.S. 505, 508-09, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010)(" If an unsecured creditor or the bankruptcy trustee objects to confirmation, § 1325(b)(1) requires the debtor either to pay unsecured creditors in full or to pay all 'projected disposable income' to be received by the debtor over the duration of the plan.")(emphasis added); *In re Sampson-Pack*, 2014 WL 1320371, at *2 (Bankr. D. Md. March 31, 2014)(same); *In re Bailey*, 2013 WL 6145819, at *1 (Bankr. E.D. Ky. Nov. 21, 2013) (same) (quoting *In re Jones*, 374 B.R. 469, 469 (Bankr. D.N.H. 2007)); *In re Winn*, 469 B.R. 628, 630 (Bankr. W.D.N.C. 2012) (" Only one of the prongs [of § 1325(b)(1)] need be met, not both.").

The Trustee contends Debtor's plan does not satisfy 11 U.S.C. § 1325(b)(1)(A) because the language " as of the effective date of the plan-the value of the property to be distributed" requires a present value determination which requires Debtor to pay interest on allowed unsecured claims. See *In re Hight-Goodspeed*, 486 B.R. 462, 464 (Bankr. N.D. Ind. 2013). The Trustee also argues Debtor's plan fails to satisfy subsection (B) because the Debtor is not proposing to pay all of his projected disposable income into

his plan for the applicable commitment period.[1]

Conversely, Debtor contends he has satisfied both prongs of § 1325 (b)(1) . First, he claims he has satisfied § 1325 (b)(1) (B) because his projected tax refund should not be included in the Trustee's calculation of his projected disposable income. With the tax refund properly excluded, Debtor argues he is devoting all of his disposable income to the plan and therefore his proposal satisfies § 1325 (b)(1)(B). Second, Debtor argues § 1325 (b)(1) (A) does not require him to pay interest therefore his plan is confirmable under § 1325(b)(1)(A).

11 U.S.C. § 1325(b)(1)(B).

The Bankruptcy Code defines the term " disposable income" to mean:

current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended-

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

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(ii) for charitable contributions (that meet the definition of " charitable contribution" under section 548(d)(3)) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2). Current monthly income:

(A) means the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income . . . and . . .

(B) includes any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents (and in a joint case the debtor's spouse if not otherwise a dependent), but excludes benefits received under the Social Security Act, payments to victims of war crimes or crimes against humanity on account of their status as victims of such crimes, and payments to victims of international terrorism (as defined in section 2331 of title 18) or domestic terrorism (as defined in section 2331 of title 18) on account of their status as victims of such terrorism.

11 U.S.C. § 101(10A)(emphasis added). The Bankruptcy Code expressly excludes specific items from the definition of current monthly income, and tax refunds are not among the excluded items. In addition, tax refunds are a product of a debtor's wages and are generally property of the bankruptcy estate included in a debtor's projected disposable income. See *In re Cook,* 2013 WL 5574978 (Bankr. N.D. Ala. Oct. 10, 2013)(full tax refund is disposable income that must be turned over to the trustee) ; *In re Murchek,* 479 B.R. 521 (Bankr. N.D. Iowa 2012)(future tax refunds are disposable income) ; *In re Myles,* 2006 WL 6591834 (Bankr. N.D.Ga. March 9, 2006)(same); *In re Abner,* 234 B.R. 825 (Bankr. M.D. Ala. 1999)(same).

This refund money would unquestionably be included in Debtor's projected disposable income if Debtor did not voluntarily elect to overwithhold. See generally, *In re Hale,* 2007 WL 2990760, at *2 (Bankr. N.D. Ohio Oct. 10, 2007) (" income tax withholding is not the same as actual tax liability, and can be manipulated by taxpayers to produce excess withholding and a refund"); *In re Rhein,* 73 B.R. 285, 288 (Bankr. E.D. Mich. 1987) (sustaining an objection to confirmation where debtor had not committed her tax refund into the plan but rather had created a " virtual savings account through the vehicle of overwithholding of income from her wages"); see also *In re Lawson,* 361 B.R. 215, 223, n. 24 (Bankr. D. Utah 2007) (" The Internal Revenue Service would not allow taxpayers to effectively retain a savings account through overwithholding while accepting less than full payment on tax liabilities owed, nor will this Court permit debtors to manipulate their tax withholdings to understate their income."). Given the nature of Debtor's tax refund, I find the refund is included within Debtor's projected disposable income and therefore Debtor's plan fails to satisfy § 1325(b)(1)(B). See *Hamilton v. Lanning,* 560 U.S. at 524 (" the court may account for changes in the debtor1s income or expenses that are known or virtually certain at the time of confirmation.").

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11 U.S.C. § 1325(b)(1)(A).

Next, Debtor argues § 1325(b)(1)(A) does not require interest to be paid in 100% dividend cases where debtors propose to devote less than all of their projected disposable income into the plan. By paying less than all of his projected disposable income into the plan each month, Debtor proposes to extend the length of his chapter 13 plan

to the fullest term allowed by the Bankruptcy Code, 5 years.

There is a split of authority among bankruptcy courts and treatises as to whether interest is required in these circumstances. Compare *In re Hight-Goodspeed,* 486 B.R. at 465 (requiring the payment of interest); *In re McKenzie,* 516 B.R. 661 (Bankr. M.D. Ga. 2014)(interest required); *In re Sampson-Pack,* 2014 WL 1320371, at *3-4 (Bankr. D. Md. March 31, 2014) (interest required); *In re Rhein,* 73 B.R. 285, 287 (Bankr. E.D. Mich. 1987)(interest required); 7 Norton Bankr. L. & Prac. § 151:19 (3d ed. 2015)(interest required); Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, § 168.1, at ¶ 6, (4th ed.), Sec. Rev. June 7, 2004, www.Ch13online.com (interest required); with *In re Richall,* 470 B.R. 245, 249 (Bankr. D.N.H. 2012)(interest is not required); *In re Stewart-Harrel,* 443 B.R. 219, 222-24 (Bankr. N.D.Ga. 2011)(interest is not required); *In re Ross,* 375 B.R. 437, 444 (Bankr. N.D. 111. 2007)(same); *In re Eaton,* 130 B.R. 74, 77-78 (Bankr. S.D. Iowa 1991)(same); 8 Alan N. Resnick and Henry J. Sommer Collier on Bankruptcy, ¶ 1325.11[3], 1325-56 (16th ed. 2013)(same).

The split turns on the interpretation of the words " the effective date of the plan" when placed before the word " value", instead of after it. In other sections of the Code, the phrase " as of the effective date of the plan" appears after the word " value" [2] and has consistently been interpreted to require interest to be paid. See *Till v. SCS Credit Corp.,* 541 U.S. 465, 474, 124 S.Ct. 1951, 158 L.Ed.2d 787 (2004)(discussing § 1325(a)(5)(B)(ii)); *Assocs. Commercial Corp. v. Rash,* 520 U.S. 953, 957, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997) (discussing § 1325(a)(5)(B)(ii)); *Rake v. Wade,* 508 U.S. 464, 469-70, 113 S.Ct. 2187, 124 L.Ed.2d 424 (1993) (discussing § 1325(a)(5)(B)(ii)); United Sav. Ass'n of Texas, 484 U.S. 365, 377, 108 S.Ct. 626, 98 L.Ed.2d 740 (discussing § 1129(b)(2)(A)(i)(II)). As stated in Till, " the Bankruptcy Code includes numerous provisions that, like the cramdown provision, require a court to 'discoun[t] . . . [a] stream of deferred payments back to the[ir] present dollar value,' to ensure that a creditor receives at least the value of its claim." *Till,* 541 U.S. at 474 (quoting *Rake v. Wade,* 508 U.S. 464, 472, n. 8, 113 S.Ct. 2187, 124 L.Ed.2d 424).

The word placement is slightly different in § 1325 (b)(1)(A) where the phrase " as of the effective date" appears before the words " the value," rather than after. The court in Stewart-Harrel examined this word order and concluded the phrase " as of the effective date of the plan" must apply to both § 1325(b)(1)(A) and § 1325(b)(1)(B). *Id.* " Reading the phrase 'as of the effective date of the plan' to require the present value of distributions on the claims may make sense with respect to subsection (A) but would make no sense with respect to subsection (B)." *In re Stewart-Harrel,* 443 B.R. at 222. The Stewart-Harrel court concluded the only interpretation of " as of the effective date of plan" which would make sense in both § 1325(b)(1)(A) and § 1325(b)(1)(B) is for it to mean the date that the court is to make the applicable determinations for subsections (A) and (B). *Id.* at 223.

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The Stewart-Harrel court also noted the Trustee's position creates an anomaly in the Bankruptcy Code because it would require the payment of interest on claims of general unsecured creditors under § 1325(b)(1)(A), but not on priority claims under § 1322(a)(2).[3] *Id.* at 223-24. " [Section] 1322(a)(2) allows for deferred payment of priority claims but clearly no interest payment is required there. If the payment of interest were required under 11 U.S.C. § 1325(b)(1), it would have the effect of unsecured creditors receiving more under a Chapter 13 plan than a priority creditor." *Id.* at 224. The court also noted 11 U.S.C. § 502 expressly disallows claims for unmatured interest and that 11 U.S.C. § 726 specifically requires the payment of interest. *Id.* The Stewart-Harrel court also concluded that the payment of interest is already subsumed by the best interest of creditors test set forth in 11 U.S.C. § 1325(a)(4) and that is where the issue belongs, not as an additional element of confirmation under § 1325(b)(1). *Id.*

Conversely, the court in In re McKenzie disagreed with Stewart-Harrel and found the two phrases, " the value, as of the effective date of the plan, of property to be distributed . . ." and " as of the effective date of the plan--the value of property to be distributed . . ." to mean the same thing and both require a present value calculation. *In re McKenzie,* 516 B.R. at 664; *In re Hight-Goodspeed,* 486 B.R. at 465 (" In this court's opinion, the meaning of those words is not changed by relocating the phrase " as of the effective date of the plan."). The court explained, " [C]learly, the date of confirmation is the date at which the court must determine whether the requirements of subsection (A) or subsection (B) have been met . . . [and] is the date the court must determine generally whether the requirements of confirmation have been met." *Id.* citing *Hamilton v. Lanning,* 560 U.S. 505, 518, 130 S.Ct. 2464, 177 L.Ed.2d 23 (interpreting the " effective date of the plan" as the date the plan is confirmed); see also *United States v. Silva,* 443 F.3d 795, 797-98 (11th Cir. 2006)(" If the statute's meaning is plain and unambiguous, there is no need for further inquiry . . . [a court] should not interpret a statute in a manner inconsistent with the plain language of the statute, unless doing so would lead to an absurd result.").

In addressing the Stewart-Harrel court's concern that requiring interest would produce anomalies such as requiring interest where the best interest of the creditor's test of § 1325(a)(4) would not and allowing interest to be paid to general unsecured creditors while priority claimants receive no interest, the McKenzie court acknowledged these

anomalies, but explained, there is " nothing untoward in such a result, as interest represents the time value of money and the risk of default. As to the difference between priority and non-priority unsecured claims, the court attributes the disparate effect on successive amendments to the Bankruptcy Code which have created certain distortions." *Id*. (quoting *In re Braswell*, 2013 WL 3270752, at *3-4 (Bankr. D. Or. June 27, 2013)).

After considering the arguments, I agree with the conclusion reached by the courts holding that interest must be paid in these circumstances. The two phrases " value, as of the effective date of the plan" and " as of the effective date of the plan, the value" do not have different meanings in regards to this issue. " It seems that § 1325(b)(1)(A) is phrased somewhat differently because Congress apparently wanted the concept of the effective date of the plan to apply to both the valuation of the distribution under (A) and to the disposable income alternative of (B) and by putting the phrase into (b)(1) it was able to

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say that once rather than twice." *In re Hight-Goodspeed*, 486 B.R. at 465. I find reading the language " effective date of the plan" language as the date of confirmation to be relevant to both subsection (A) and (B). As the Supreme Court stated in *Hamilton v. Lannincr*. " § 1325(b)(1) directs courts to determine projected disposable income 'as of the effective date of the plan,' which is the date on which plan is confirmed or becomes binding." *Hamilton v. Lanning*, 560 U.S. 505, 518, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010). In subsection (A), " as of the effective date of the plan" is the date the Court must determine the value of the property to be distributed. Under subsection (B), " as of the effective date of the plan," is the date the Court must determine if the debtor is devoting all of his disposable income into the plan.

While the Trustee's interpretation may allow an unsecured creditor to receive interest while a priority claimant does not; and may require interest payments where the best interest of creditors of § 1325(a)(4) would not, these purported anomalies are not sufficient to overcome the plain language of the statute. First, the best interest of the creditors test of § 1325(a)(4) is a separate, independent confirmation requirement from § 1325(b)(1). *See In re Hale*, 65 B.R. 893, 895 (Bankr. S.D. Ga. 1986) (" Section 1325(b)(1) is an exception to Section 1325(a) (1-6) which sets forth the criteria which, if found to exist, require the court to confirm a plan. That is, a plan which meets the tests for mandatory confirmation, including " good faith" still cannot be confirmed, if after objection, the disposable earnings test is not met."). As set forth in Till, interest represents the time value of money, inflation, and the risk of default. *Till*, 541 U.S. at 466. When a debtor chooses to pay less than all of his disposable income into his plan, his repayment plan gets extended as well, so requiring interest in such circumstances is not an absurd result. Till, 541 U.S. at 474; *In re Hight-Goodspeed*, 486 B.R. at 465. (" Since interest represents the time value of money and compensation for the risk of default, . . . the court sees nothing untoward with such a result."). Requiring interest is the price a debtor pays for choosing to devote less than all of his projected disposable income into the plan. *In re Hight-Goodspeed*, 486 B.R. at 465 (" [I]f a debtor would prefer to have a more flexible or less rigorous budget it may choose to devote less than all of its disposable income to the plan; but the price for doing so, and thereby paying unsecured creditors over a longer period of time, is that they must be paid in full with interest.").

Second, the purported anomaly that a priority claimant may receive less in a chapter 13 than a general unsecured creditor may be due, as stated in Hight-Goodsped, to successive amendments to the Bankruptcy Code that created the distortion. " Much like barnacles on the bottom of a boat, that disparity seems to be the consequence of the accretions that have grown up on the Bankruptcy Code since 1978, spoiling the clean lines and carefully crafted features it originally had. The resulting distortion suggests that Congress was so focused on solving one problem--the degree of effort that could reasonably be expected of a debtor--that it neglected to smoothly integrate the new provisions of the statute with those that were already there." *In re Hight-Goodspeed*, 486 B.R. at 465; see also *Olden v. LaFarge Corp.*, 383 F.3d 495, 506 (6th Cir. 2004) (the court " will not ignore the plain, unambiguous language of a statute where it achieves its intended purpose without any absurd result but simply has additional unintended consequences."). In addition, there also is no real evidence this is an unintended consequence.

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Customarily, priority claims are paid in full before general unsecured claims are paid. The requirement to pay interest to general unsecured claims arguably is designed to account for the time value of money for this extended delay and potentially greater risk of non-payment. See 11 U.S.C. § § 507, 1322(a) (2), and 1326(b). In the chapter 13 context this is an unusual situation where a debtor has the ability to pay a 100% dividend in less than 5 years, but opts to pay over the full statutorily allowed period. It is not an absurd result for Congress to require interest payments to general unsecured creditors in such event.

The Court also disagrees with Debtor's assertion that the Trustee's interpretation is irreconcilable with 11 U.S.C. § 1322(b)(10) which allows interest to be paid on nondischargeable unsecured claims and 11 U.S.C. § 502 which expressly disallows claims to be asserted for unmatured interest. Section 1322(b)(10) is a discretionary

provision where a plan " may" include a provision to pay interest on non-dischargeable unsecured debts if debtor agrees to pay all claims in full and has the disposable income to pay such interest. In such circumstances, 11 U.S.C. § 1322(b)(10) is still relevant because when such a debtor is seeking confirmation under § 1325(b)(1)(B), and commits all of his disposable income into the plan, then the debtor may opt to pay post-petition interest on § 1322(b)(10) claims, without paying interest on all other unsecured claims. See generally, *In re Brown*, 500 B.R. 255 (Bankr. S.D. Ga. 2013). Furthermore, the general language of 11 U.S.C. § 502, disallowing claims for unmatured interest and other statutory provisions expressly allowing/disallowing interest, cannot overcome the plain language of § 1325(b)(1)(A), where Congress inserted statutory language requiring interest to be paid. See *Till v. SCS Credit Corp.*, 541 U.S. at 469.

Lastly, Debtor argues § 1325(b)(4) requires Debtor to be in bankruptcy for the duration of the applicable commitment period of 5 years and therefore, he is not required to pay interest. I disagree. The applicable commitment period of 5 years is determined based upon a Debtor's means test calculation of disposable income and only 11 U.S.C. § 1325(b)(1)(B) requires a calculation of projected disposable income to be received in the applicable commitment period. There is no reference to disposable income or applicable commitment period in § 1325(b)(1)(A). See *In re McKenzie*, 516 B.R. at 664 n. 1 (" that section [1325(b)(4)(B)] only applies if the debtor is paying all of his projected disposable income to unsecured creditors pursuant to section 1325(b)(1)(B). It does not apply where the debtor is relying on section 1325(b)(1)(A).").

For the foregoing reasons, the Trustee's Objection to Confirmation is SUSTAINED and confirmation is ORDERED DENIED. Debtor shall file an Amended Plan consistent with this order within twenty-one (21) days of entry of this order or the case will be dismissed without further notice or hearing.

Notes:

[1]At the hearing, the Trustee conceded that Debtor's proposed plan complied with all the other provisions of 11 U.S.C. § 1325, including the best interests requirement of § 1325(a)(4) as well as the good faith requirement of § 1325(a)(3) and therefore those provisions need not be addressed in this opinion.

[2]In the following provisions, " value, as of the effective date of the plan" has been interpreted to require the payment of interest: 11 U.S.C. § 1129(a)(7), § 1225(a)(4), § 1325(a)(4) (best interest of creditors test) ; § 1129(b)(2)(A)(i)(II), (B)(i), (C)(i), § 1225(a)(5)(B)(ii), § 1325(a)(5)(B)(ii) (cram down); § 1129(a)(9)(C)(i) (payment of priority claims); § 1141(d)(5)(B)(i), § 1173(a)(2), and § 1328(b)(2).

[3]In chapter 13 cases, unsecured creditors typically receive a pro rata distribution on their respective claims after priority claims are paid in full. 11 U.S.C. § 507 and § 1322(a)(2).

In the Matter of: WILLIE F. MCKENZIE, Debtor

No. 14-51374-JPS

United States Bankruptcy Court, Middle District of Georgia, Macon Division

September 8, 2014

APPEARANCE:

For Debtor: John K. James

For Trustee: Tony Coy

AMENDED MEMORANDUM OPINION[*]

James P. Smith United States Bankruptcy Judge

This case presents the issue of whether a debtor must pay interest on unsecured claims in order to comply with 11 U.S.C. § 1325(b)(1)(A) where the debtor is not paying all of his "projected disposable income" to unsecured creditors as required by section 1325(b)(1)(B).

According to the facts stipulated by Debtor and the Chapter 13 trustee in open court on August 28, 2014, Debtor is an above median income debtor for purposes of section 1325, with no dependents. Accordingly, Debtor's "projected disposable income" is $1, 113.21, as determined in accordance with sections 1325(b)(2) and (3), and the applicable commitment period is five years pursuant to section 1325(b)(4)(A)(ii)(I). Debtor's plan, as amended, provides for payment of only $378.53 per month to the unsecured creditors. This amount will pay the total face amount of the unsecured claims over the applicable commitment period. However, if Debtor paid the unsecured creditors all of his projected disposable income, unsecured creditors would be paid in full in approximately one year.

The Chapter 13 trustee objects to confirmation of Debtor's plan, contending that Debtor must pay interest to unsecured creditors in order to comply with section 1325(b)(1)(A) since Debtor is not paying all of his projected disposable income pursuant to section 1325(b)(1)(B).

DISCUSSION

11 U.S.C. § 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-

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

(B) the plan provides that all of 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.

In the case of *In re Ellis*, 2012 WL 5865906, at *2 (Bankr. M.D. Ga. Nov. 16, 2012), this court held that, "a plan satisfies section 1325(b) if unsecured claims will be paid in full even if the claims could be paid in a shorter period of time if all monthly disposable income was contributed to the plan payments." However, in that case, the issue of whether interest must be paid to unsecured creditors was not raised. The case at bar, however, squarely presents the issue.

Neither the Eleventh Circuit, nor any other circuit court, has addressed this issue. As explained by the court in *In re Hight-Goodspeed*, 486 B.R. 462 (Bankr. N.D. Ind. 2012):

Although § 1325(b) has been part of the Bankruptcy Code for almost 30 years, and thousands of decisions address disposable income and the required plan term, there has been surprisingly little litigation over the value of the distribution to unsecured creditors. Only a handful of decisions address the requirements of § 1325(b)(1)(A) and they are divided. Some, such as *In re Parke*, 369 B.R. 205, 208 (Bankr. M.D. Pa. 2007); *In re Rhein*, 73 B.R. 285 (Bankr. E.D. Mich. 1987); and *In re Luna*, 2012 WL 4679170, *2 (Bankr.W.D.Tex. 2012), support the trustee. *See also*, *In re Derschan*, 1988 WL 1014957 (Bankr. D.N.D. 1988) (discussing the issue under chapter 12). A somewhat greater number agree with the debtor. *See*, *In re Richall*, 470 B.R. 245, 249 (Bankr. D.N.H. 2012); *In re Stewart-Harrel*, 443 B.R. 219, 222-24 (Bankr. N.D.Ga. 2011); *In re Ross*, 375 B.R. 437, 444 (Bankr. N.D.Ill. 2007); *Matter of Eaton*, 130 B.R. 74, 77-78 (Bankr. S.D. Iowa 1991). *See also*, *In re Coay*, 2012 WL 2319100, *4 (Bankr. C.D. Ill. 2012). The commentators are also divided, with Collier supporting the debtor, 8 *Collier on Bankruptcy*, ¶ 1325.11[3] (16th ed.), while Norton and Lundin agree with the trustee. 7 *Norton Bankr. L. & Prac.* (3d ed.), § 151:19; Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th edition, § 168.1, at ¶ 6, Sec. Rev. June 7, 2004, *www.Ch13online.com.*

Id. at 463.

In the case of *In re Braswell*, 2013 WL 3270752, at *3-4 (Bankr. D. Or. June 27, 2013), the court discussed this split of authority, noting that in the case of *Hight-Goodspeed*:

The court interpreted the phrase "as of the effective date of the plan-, " which is found in § 1325(b)(1) and applies to both subsections (A) and (B), as requiring a present value calculation when subsection (A) is chosen. The court acknowledged that the Code, when requiring a present value calculation, normally uses the wording: "the value, as of the effective date of the plan, of the property to be distributed ... is not less than ..., " while subjection (A) is read as: "as of the effective date of the plan-(A) the value of property to be distributed under the plan on account of such claim is not less than the amount of such claim." In the court's view, the meaning of the words is not changed in the two uses and " § 1325(b)(1)(A) is phrased somewhat differently because Congress apparently wanted the concept of the effective date of the plan to apply to both the valuation of the distribution under (A) and to the disposable income alternative of (B)." *Id*. at 464-65.

The court in *In re Stewart-Harrel*, 443 B.R. 219 (Bankr. N.D. Georgia 2011) looked at the same set of facts and concluded that there is no interest requirement in § 1325(b)(1)(A). Rather, it found that the better interpretation of the phrase "as of the effective date of the plan" in § 1325(b)(1) "refers to the date as of which the court is to make the determination of either (A) (payment in full) or (B) (payment of all projected disposable income)." *Id*. at 222. It noted that interpreting the phrase "as of the effective date of the plan" to require the present value of distributions on claims may make sense with respect to subsection (A), but would be meaningless with respect to subsection (B). *Id*. at 222-23. It further noted that finding a present value requirement in subsection (A) would create certain anomalies such that interest would be required on claims of general unsecured creditors under § 1325(b)(1)(A), but not on priority claims under § 1322(a)(2) and that the trustee's interpretation would require the payment of interest where the best interest of creditors test did not. *Id*. at 223 to 24. The *Hight-Goodspeed* court acknowledges these anomalies, but as to the second concern, the payment of interest where the best interest of creditors test does not, counters that it sees nothing untoward in such a result, as interest represents the time value of money and the risk of default. As to the difference between priority and non-priority unsecured claims, the court attributes the disparate effect on successive amendments to the Bankruptcy Code which have created certain distortions. *Hight-Goodspeed* at 465.

The better interpretation is the one found in *Hight-Goodspeed*. The court found that in cases where the trustee or an unsecured creditor objects, § 1325(b)(1) allows the debtor to choose subsection (B) and devote all of his projected disposable income to the plan or, if the debtor wishes to devote less of his income to the plan, he may chose subsection (A). The price for doing so, however, is that unsecured claims must be paid in full with interest.

The two statements "the value, as of the effective date of the plan, of property to be distributed..." and "as of the effective date of the plan-the value of property to be distributed..." have the same meaning and require a present value calculation. In order to apply to both subsections (A) and (B) and make sense, the second wording was used in § 1325(b)(1). The Supreme Court in *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010) interpreted the phrase "as of the effective date of the plan" with respect to subsection (B) as the date to measure projected disposable income. *Id*. at 2474. In other words, the effective date of the plan, being the date of confirmation, is the date at which the value and amount of projected future income should be calculated. Unlike the court in *Stewart-Harrel*, I do not find that the *Hamilton v. Lanning* holding is at odds with an interpretation of § 1325(b)(1)(A) requiring the payment of interest. Clearly, the date of confirmation is the date at which the court must determine whether the requirements of subsection (A) or subsection (B) have been met, as stated in *Stewart-Harrel*. The date of confirmation is the date the court must determine generally whether the requirements of confirmation have been met. With respect to subsection (A), "the value of property to be distributed under the plan" must be measured as of the date of confirmation, and must be "not less than the amount of such claim." This interpretation would require the payment of interest, because a future income stream must be discounted to present value, and is consistent with the interpretation advanced in *Hamilton v. Lanning* that projected disposable income be measured as of the date of confirmation.

(footnotes omitted).

CONCLUSION

For the reasons stated therein, this Court agrees with the interpretations found in *Hight-Goodspeed* and *Braswell*. Accordingly, this Court holds that where the debtor is not paying all of his projected disposable income to unsecured creditors as required by section 1325(b)(1)(B), the debtor must pay interest on unsecured claims in order to comply with section 1325(b)(1)(A)[1]. Accordingly, the Court sustains the objection to confirmation by the trustee and denies confirmation of Debtor's Chapter 13 plan. An order consistent with this opinion will be issued.

Notes:

[*] This Amended Memorandum Opinion is published solely to add an attorney of record and to correct

typographical errors contained in the original Memorandum Opinion that do not change the substantive decision.

[1] Debtor's argument that section 1325(b)(4)(B) supports the interpretation that no interest is required is misplaced. That section provides that the applicable commitment period may be reduced "if the plan provides for payment in full of all allowed unsecured claims over a shorter period." However, that section only applies if the debtor is paying all of his projected disposable income to unsecured creditors pursuant to section 1325(b)(1)(B). It does not apply where the debtor is relying on section 1325(b)(1)(A).

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516 B.R. 661 (Bkrtcy.M.D.Ga. 2014)

In the Matter of WILLIE F. MCKENZIE, Debtor

Chapter 13, Case No. 14-51374-JPS

United States Bankruptcy Court, M.D. Georgia, Macon Division

September 3, 2014

As Amended September 8, 2014.

For Debtor: John K. James Warner Robins, GA.

For Trustee: Tony Coy, Camille Hope, Chapter 13 Trustee, Macon, GA.

BEFORE James P. Smith, United States Bankruptcy Judge.

OPINION

AMENDED MEMORANDUM OPINION[*]

James P. Smith, United States Bankruptcy Judge

This case presents the issue of whether a debtor must pay interest on unsecured

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claims in order to comply with 11 U.S.C. § 1325(b)(1)(A) where the debtor is not paying all of his " projected disposable income" to unsecured creditors as required by section 1325(b)(1)(B).

According to the facts stipulated by Debtor and the Chapter 13 trustee in open court on August 28, 2014, Debtor is an above median income debtor for purposes of section 1325, with no dependents. Accordingly, Debtor's " projected disposable income" is $1,113.21, as determined in accordance with sections 1325(b)(2) and (3), and the applicable commitment period is five years pursuant to section 1325(b)(4)(A)(ii)(I). Debtor's plan, as amended, provides for payment of only $378.53 per month to the unsecured creditors. This amount will pay the total face amount of the unsecured claims over the applicable commitment period. However, if Debtor paid the unsecured creditors all of his projected disposable income, unsecured creditors would be paid in full in approximately one year.

The Chapter 13 trustee objects to confirmation of Debtor's plan, contending that Debtor must pay interest to unsecured creditors in order to comply with section 1325(b)(1)(A) since Debtor is not paying all of his projected disposable income pursuant to section 1325(b)(1)(B).

DISCUSSION

11 U.S.C. § 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-

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

(B) the plan provides that all of 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.

In the case of *In re Ellis*, 2012 WL 5865906, at *2 (Bankr. M.D. Ga. Nov. 16, 2012), this court held that, " a plan satisfies section 1325(b) if unsecured claims will be paid in full even if the claims could be paid in a shorter period of time if all monthly disposable income was contributed to the plan payments." However, in that case, the issue of whether interest must be paid to unsecured creditors was not raised. The case at bar, however, squarely presents the issue.

Neither the Eleventh Circuit, nor any other circuit court, has addressed this issue. As explained by the court in *In re Hight-Goodspeed*, 486 B.R. 462 (Bankr. N.D. Ind. 2012):

Although § 1325(b) has been part of the Bankruptcy Code for almost 30 years, and thousands of decisions address disposable income and the required plan term, there has been surprisingly little litigation over the value of the distribution to unsecured creditors. Only a handful of decisions address the requirements of § 1325(b)(1)(A) and they are divided. Some, such as *In re Parke*, 369 B.R. 205, 208 (Bankr. M.D. Pa. 2007); *In re Rhein*, 73 B.R. 285 (Bankr. E.D. Mich. 1987); and *In re Luna*, 2012 WL 4679170, *2 (Bankr. W.D. Tex. 2012), support the trustee. See also, *In re Derschan*, 1988 WL 1014957 (Bankr. D.N.D. 1988) (discussing the issue under chapter 12). A somewhat greater number agree with the debtor. See, *In re Richall*, 470 B.R. 245, 249 (Bankr. D.N.H. 2012); *In re Stewart-Harrel*, 443 B.R. 219, 222-24 (Bankr. N.D.Ga. 2011); *In re Ross*, 375 B.R. 437, 444 (Bankr. N.D.Ill.

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(Bankr. S.D. Iowa 1991). See also, *In re Coay*, 2012 WL 2319100, *4 (Bankr. C.D. Ill. 2012). The commentators are also divided, with Collier supporting the debtor, 8 Collier on Bankruptcy, ¶ 1325.11[3] (16th ed.), while Norton and Lundin agree with the trustee. 7 Norton Bankr. L. & Prac. (3d ed.), § 151:19; Keith M. Lundin & William H. Brown, Chapter 13 Bankruptcy, 4th edition, § 168.1, at ¶ 6, Sec. Rev. June 7, 2004, www.Ch13online.com.

Id. at 463.

In the case of *In re Braswell*, 2013 WL 3270752, at *3-4 (Bankr. D. Or. June 27, 2013), the court discussed this split of authority, noting that in the case of Hight-Goodspeed:

The court interpreted the phrase " as of the effective date of the plan--," which is found in § 1325(b)(1) and applies to both subsections (A) and (B), as requiring a present value calculation when subsection (A) is chosen. The court acknowledged that the Code, when requiring a present value calculation, normally uses the wording: " the value, as of the effective date of the plan, of the property to be distributed ... is not less than ...," while subjection (A) is read as: " as of the effective date of the plan--(A) the value of property to be distributed under the plan on account of such claim is not less than the amount of such claim." In the court's view, the meaning of the words is not changed in the two uses and " § 1325(b)(1)(A) is phrased somewhat differently because Congress apparently wanted the concept of the effective date of the plan to apply to both the valuation of the distribution under (A) and to the disposable income alternative of (B)." *Id*. at 464-65.

The court in *In re Stewart-Harrel*, 443 B.R. 219 (Bankr. N.D. Georgia 2011) looked at the same set of facts and concluded that there is no interest requirement in § 1325(b)(1)(A). Rather, it found that the better interpretation of the phrase " as of the effective date of the plan" in § 1325(b)(1) " refers to the date as of which the court is to make the determination of either (A) (payment in full) or (B) (payment of all projected disposable income)." *Id*. at 222. It noted that interpreting the phrase " as of the effective date of the plan" to require the present value of distributions on claims may make sense with respect to subsection (A), but would be meaningless with respect to subsection (B). *Id*. at 222-23. It further noted that finding a present value requirement in subsection (A) would create certain anomalies such that interest would be required on claims of general unsecured creditors under § 1325(b)(1)(A), but not on priority claims under § 1322(a)(2) and that the trustee's interpretation would require the payment of interest where the best interest of creditors test did not. *Id*. at 223 to 24. The Hight-Goodspeed court acknowledges these anomalies, but as to the second concern, the payment of interest where the best interest of creditors test does not, counters that it sees nothing untoward in such a result, as interest represents the time value of money and the risk of default. As to the difference between priority and non-priority unsecured claims, the court attributes the disparate effect on successive amendments to the Bankruptcy Code which have created certain distortions. Hight-Goodspeed at 465.

The better interpretation is the one found in Hight-Goodspeed. The court found that in cases where the trustee or an unsecured creditor objects, § 1325(b)(1) allows the debtor to choose subsection (B) and devote all of his projected disposable income to the plan or, if the debtor wishes to devote less of his

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income to the plan, he may chose subsection (A). The price for doing so, however, is that unsecured claims must be paid in full with interest.

The two statements " the value, as of the effective date of the plan, of property to be distributed..." and " as of the effective date of the plan--the value of property to be distributed..." have the same meaning and require a present value calculation. In order to apply to both subsections (A) and (B) and make sense, the second wording was used in § 1325(b)(1). *The Supreme Court in Hamilton v. Lanning*, 560 U.S. 505, 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010) interpreted the phrase " as of the effective date of the plan" with respect to subsection (B) as the date to measure projected disposable income. *Id*. at 2474. In other words, the effective date of the plan, being the date of confirmation, is the date at which the value and amount of projected future income should be calculated. Unlike the court in Stewart-Harrel, I do not find that the Hamilton v. Lanning holding is at odds with an interpretation of § 1325(b)(1)(A) requiring the payment of interest. Clearly, the date of confirmation is the date at which the court must determine whether the requirements of subsection (A) or subsection (B) have been met, as stated in Stewart-Harrel. The date of confirmation is the date the court must determine generally whether the requirements of confirmation have been met. With respect to subsection (A), " the value of property to be distributed under the plan" must be measured as of the date of confirmation, and must be " not less than the amount of such claim." This interpretation would require the payment of interest, because a future income stream must be discounted to present value, and is consistent with the interpretation advanced in Hamilton v. Lanning that projected disposable income be measured as of the date of confirmation.

(footnotes omitted).

CONCLUSION

For the reasons stated therein, this Court agrees with the interpretations found in Hight-Goodspeed and Braswell. Accordingly, this Court holds that where the debtor is not paying all of his projected disposable income to unsecured creditors as required by section 1325(b)(1)(B), the debtor must pay interest on unsecured claims in order to comply with section 1325(b)(1)(A)[1]. Accordingly, the Court sustains the objection to confirmation by the trustee and denies confirmation of Debtor's Chapter 13 plan. An order consistent with this opinion will be issued.

ORDER

In accordance with the memorandum opinion published this date, it is

ORDERED AND ADJUDGED that the Chapter 13 trustee's Objection To Confirmation (Docket No. 18) is hereby sustained, and it is further

ORDERED AND ADJUDGED that confirmation of Debtor's Chapter 13 plan (Docket No. 5) is denied.

SO ORDERED.

Notes:

[*]This Amended Memorandum Opinion is published solely to add an attorney of record and to correct typographical errors contained in the original Memorandum Opinion that do not change the substantive decision.

[1] Debtor's argument that section 1325(b)(4)(B) supports the interpretation that no interest is required is misplaced. That section provides that the applicable commitment period may be reduced " if the plan provides for payment in full of all allowed unsecured claims over a shorter period." However, that section only applies if the debtor is paying all of his projected disposable income to unsecured creditors pursuant to section 1325(b)(1)(B). It does not apply where the debtor is relying on section 1325(b)(1)(A).

In the Matter of: WILLIE F. MCKENZIE, Chapter 13, Debtor.

No. 14-51374-JPS.

United States Bankruptcy Court, M.D. Georgia, Macon Division.

September 3, 2014.

John K. James, Warner Robins, GA, For Debtor.

Camille Hope, Chapter 13 Trustee, Macon, GA, For Trustee.

MEMORANDUM OPINION

JAMES P. SMITH, Bankruptcy Judge.

This case presents the issue of whether a debtor must pay interest on unsecured claims in order to comply with 11 U.S.C. § 1325(b)(1)(A) where the debtor is not paying all of his "projected disposable income" to unsecured creditors as required by section 1325(b)(1)(B).

According to the facts stipulated by Debtor and the Chapter 13 trustee in open court on August 28, 2014, Debtor is an above median income debtor for purposes of section 1325, with no dependants. Accordingly, Debtor's "projected disposable income" is $1, 113.21, as determined in accordance with sections 1325(b)(2) and (3), and the applicable commitment period is five years pursuant to section 1325(b)(4)(A)(ii)(I). Debtor's plan, as amended, provides for payment of only $378.53 per month to the unsecured creditors. This amount will pay the total face amount of the unsecured claims over the applicable commitment period. However, if Debtor paid the unsecured creditors all of his projected disposable income, unsecured creditors would be paid in full in approximately one year.

The Chapter 13 trustee objects to confirmation of Debtor's plan, contending that Debtor must pay interest to unsecured creditors in order to comply with section 1325(b)(1)(A) since Debtor is not paying all of his projected disposable income pursuant to section 1325(b)(1)(B).

DISCUSSION

11 U.S.C. § 1325(b)(1) provides:

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

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In the case of In re Ellis, 2012 WL 5865906, at *2 (Bankr. M.D. Ga. Nov. 16, 2012), this court held that, "a plan satisfies section 1325(b) if unsecured claims will be paid in full even if the claims could be paid in a shorter period of time if all monthly disposable income was contributed to the plan payments." However, in that case, the issue of whether interest must be paid to unsecured creditors was not raised. The case at bar, however, squarely presents the issue.

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The court in *In re Stewart-Harrel* , 443 B.R. 219 (Bankr. N.D. Georgia 2011) looked at the same set of facts and concluded that there is no interest requirement in § 1325(b)(1)(A). Rather, it found that the better interpretation of the phrase "as of the effective date of the plan" in § 1325(b)(1) "refers to the date as of which the court is to make the determination of either (A) (payment in full) or (B) (payment of all projected disposable income)." *Id.* at 222. It noted that interpreting the phrase "as of the effective date of the plan" to require the present value of distributions on claims may make sense with respect to subsection (A), but would be meaningless with respect to subsection (B). *Id.* at 222-23. It further noted that finding a present value requirement in subsection (A) would create certain anomalies such that interest would be required on claims of general unsecured creditors under § 1325(b)(1)(A), but not on priority claims under § 1322(a)(2) and that the trustee's interpretation would require the payment of interest where the best interest of creditors test did not. *Id.* at 223 to 24. The Hight-Goodspeed court acknowledges these anomalies, but as to the second concern, the payment of interest where the best interest of creditors test does not, counters that it sees nothing untoward in such a result, as interest represents the time value of money and the risk of default. As to the difference between priority and non-priority unsecured claims, the court attributes the disparate effect on successive amendments to the Bankruptcy Code which have created certain distortions. Hight-Goodspeed at 465.

The better interpretation is the one found in Hight-Goodspeed. The court found that in cases where the trustee or an unsecured creditor objects, § 1325(b)(1) allows the debtor to choose subsection (B) and devote all of his projected disposable income to the plan or, if the debtor wishes to devote less of his income to the plan, he may chose subsection (A). The price for doing so, however, is that unsecured claims must be paid in full with interest.

The two statements "the value, as of the effective date of the plan, of property to be distributed..." and "as of the effective date of the plan-the value of property to be distributed..." have the same meaning and require a present value calculation. In order to apply to both subsections (A) and (B) and make sense, the second wording was used in § 1325(b)(1). The Supreme Court in *Hamilton v. Lanning* , 130 S.Ct. 2464 (2010) interpreted the phrase "as of the effective date of the plan" with respect to subsection (B) as the date to measure projected disposable income. *Id.* at 2474. In other words, the effective date of the plan, being the date of confirmation, is the date at which the value and amount of projected future income should be calculated. Unlike the court in Stewart-Harrel, I do not find that the *Hamilton v. Lanning* holding is at odds with an interpretation of § 1325(b)(1)(A) requiring the payment of interest. Clearly, the date of confirmation is the date at which the court must determine whether the requirements of subsection (A) or subsection (B) have been met, as stated in Stewart-Harrel. The date of confirmation is the date the court must determine generally whether the requirements of confirmation have been met. With respect to subsection (A), "the value of property to be distributed under the plan" must be measured as of the date of confirmation, and must be "not less than the amount of such claim." This interpretation would require the payment of interest, because a future income stream must be discounted to present value, and is consistent with the interpretation advanced in *Hamilton v. Lanning* that projected disposable income be measured as of the date of confirmation.

(footnotes omitted).

CONCLUSION

For the reasons stated therein, this Court agrees with the interpretations found in Hight-Goodspeed and Braswell. Accordingly, this Court holds that where the debtor is not paying all of his projected disposable income to unsecured creditors as required by section 1325(b)(1)(B), the debtor must pay interest on unsecured claims in order to comply with section 1325(b)(1)(A)[1]. Accordingly, the Court sustains the objection to confirmation by the trustee and denies confirmation of Debtor's Chapter 13 plan. An order consistent with this opinion will be issued.

Notes:

[1] Debtor's argument that section 1325(b)(4)(B) supports the interpretation that no interest is required is misplaced.

That section provides that the applicable commitment period may be reduced "if the plan provides for payment in full of all allowed unsecured claims over a shorter period." However, that section only applies if the debtor is paying all of his projected disposable income to unsecured creditors pursuant to section 1325(b)(1)(B). It does not apply where the debtor is relying on section 1325(b)(1)(A).

In re: Renee L. Sampson-Pack, Chapter 13, Debtor.

No. 12-30589-NVA

United States Bankruptcy Court, D. Maryland (Baltimore Division)

March 31, 2014

MEMORANDUM ORDER SUSTAINING CHAPTER 13 TRUSTEE'S OBJECTION [doc. 23] TO CONFIRMATION OF CHAPTER 13 PLAN

NANCY V. ALQUIST, Bankruptcy Judge.

Renee L. Sampson-Pack, the debtor herein (the "Debtor"), proposed an amended Chapter 13 Plan (the "Plan") [doc. 20] calling for monthly payments, from the Debtor's income, in the amount of $900 over a period of 60 months.[1] Based on the claims filed, the Plan will pay all claims in full. The Debtor, however, could afford to pay more to the plan each month by operating on a tighter budget and could pay the claims off earlier, but she has elected not to do so. Despite the Debtor's elective stretch out of the plan payment period, the Plan does not propose to pay any interest on the claims.

The Chapter 13 Trustee, Ellen W. Cosby (the "Trustee"), objects to the Plan. She argues that even though the Plan pays all claims in full, it is not confirmable because it does not comply with both prongs of the confirmation requirement set forth in §1325(b)(1) of the Bankruptcy Code.[2] The Trustee argues that in order for the Plan to be confirmed, the Debtor would need to make the commitment period shorter such that she would dedicate all of her available disposable income to the Plan (and still pay 100% of the claims), or compensate the creditors by paying them interest.

For the reasons stated herein, this Court agrees with the Trustee and finds that §1325(b)(1) requires the Debtor to pay interest on unsecured claims if the Debtor fails to commit all disposable income to the payment of unsecured creditors, but nonetheless pays unsecured creditors in full. This Court sustains the Trustee's Objection and denies the confirmation of the plan with leave to amend.

Applicable Law

A Chapter 13 Plan may not be confirmed over the objection of an unsecured creditor or the trustee unless the Plan complies with the provisions of §1325(b) of the Bankruptcy Code. *Petro v. Mishler*, 276 F.3d 375 (7th Cir. 2002); *In re Brumm* , 344 B.R. 795 (Bankr. N.D.W.Va. 2006). Section 1325(b) of the Bankruptcy Code 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 claim 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.

This section governs the amount of income that must be dedicated to a Chapter 13 plan and was designed to deal with plans that yield little or nothing for unsecured creditors. *In re Hight-Goodspeed* , 486 B.R. 462, 463 (Bankr. N.D. Ind. 2012). The purpose of this section is to insure that when proposing a plan, a debtor dedicates the necessary amount of effort and seriousness in repaying unsecured creditors. *Id.*

Discussion

On its face, §1325(b)(1) requires a Debtor to comply with either subsection (A) (requiring a debtor to pay "the amount of the claim") or, in the alternative, subsection (B) (requiring that "all of the debtor's projected disposable income" be dedicated to a plan) before the court can confirm the plan. "As written, §1325(b)(1) requires compliance with either subsection (A) or (B), but not both." *In re Bailey* , 13-60782, 2013 WL 6145819 (Bankr. E.D. Ky. 2013) (quoting *In re Jones*, 374 B.R. 469, 469 (Bankr.D.N.H.2007)); *In re Winn* , 469 B.R. 628, 630 (Bankr. W.D. N.C. 2012) ("Only one of the prongs [of §1325 (b)] need be met, not both.").

It is undisputed that the Debtor has failed to dedicate all of her disposable income as required by §1325(b)(1)(B). The Debtor is currently paying $900 per month for a period of 60 months, but her disposable income exceeds the amount she has dedicated to the Plan by approximately $500 to $1000 a month.[3] Because the Debtor has not dedicated all of her disposable monthly income to the Plan, it cannot be confirmed under §1325(b)(1)(B).

Thus, the Plan must be confirmed, if at all, under §1325(b)(1)(A). Section 1325(b)(1)(A) states that a plan may not be confirmed unless the value of property

distributed on account of a claim is "not less than the amount of such claim." *Id* . The Debtor argues that this section entitles creditors to the face amount of their claims and no more, and accordingly, she proposes to pay her creditors 100% of the face amount of their claims. The Debtor takes the position that §1325(b)(1)(A) does not require her to pay interest when her claims will be paid at 100% of face value, notwithstanding that she is not dedicating all of her disposable income to the Plan.

The Trustee argues that because the Debtor in this case has voluntarily decided to slow down the plan process by extending the Plan commitment period (which would be many months shorter while still providing for a 100% payout if the Debtor dedicated all of her disposable income), she must compensate her creditors for the time value of their claims and must do this by paying them interest. By paying any lesser amount, the Trustee argues, the claims would not be paid in full - the plan would not, "as of its effective date" distribute "property" the "value" of which in not less than the amount of the creditors' claims, as mandated by §1325(b)(1)(A).

According to the Trustee, when Congress intends that claims may be paid in full without interest, it has made this intent clear. *SeeIn re Krump* , 89 B.R. 821, 824 (Bankr. D.S.D. 1988) (finding that §1222(a)(2) of the Code does not require the payment of interest); *In re Fowler* , 394 F.3d 1208 (9th Cir. 2005) (finding that §1322(a)(2) does not require the payment of interest). By way of illustration, §§1222(a)(2) and 1322(a)(2) mandate that a "plan shall - provide for the full payment, in deferred cash payments of all claims entitled to priority under section 507...." Unlike §1325(b)(1)(A), neither of these sections (which are uniformly interpreted as not requiring interest) require a debtor to pay the "value" of the claim "as of the effective date" in order to provide full, *albeit* deferred, payment. Absent such a phrase requiring the payment of "present value, " courts have concluded that Congress did not intend that deferred payments must include interest. *In re Hageman* , 108 B.R. 1016, 1019 (Bankr. N.D. Iowa 1989); *See alsoIn re Kingsley* , 86 B.R. 17 (Bankr. D. Conn. 1988) ("[I]t has been consistently held that when Congress intended to provide a claimholder with interest to compensate for the present value of a claim, it expressly provided for that treatment by the use of specific words, such as, *value, as of the effective date of the plan equal to the allowed amount of such claim.'").* Thus, because this language is included in §1325(b)(1), Congress did not excuse a debtor who utilizes this section to confirm her plan from paying interest in order to compensate a creditor fully for the value of its claim.

The Trustee relies on *Hight-Goodspeed, supra.* In that case, the court held that §1325(b)(1)(A) requires interest payments when a debtor does not devote all disposable income to the 100% Chapter 13 Plan. *Id.* In reaching this conclusion, the court determined that the phrase "as of the effective date of the Plan, " found in §1325(b)(1), applies to both subsections (A) and (B). *Id* . at 464-65.

For the "value of the property to be distributed under the plan on account of such claim... [to be] not less than the amount of such claim" as of the effective date of the plan, the plan must provide compensation for the value of money paid over time. *Id* . at 465 ("If a debtor would prefer to have a more flexible or less rigorous budget it may choose to devote less than all of its disposable income to the Plan; but the price for doing so, is that [unsecured claims] must be paid in full with interest."). An appropriate compensation for the value of time is interest on a claim. *Id.*

As noted in *Hight-Goodspeed,* various provisions of the Bankruptcy Code contain the phrase "as of the effective date of the Plan."[4] These provisions are interpreted uniformly to require the payment of interest to compensate creditors for a debtor's delayed payment. *Id.* at 464.[5] However, it is appropriate to look at the placement of the phrase "as of the effective date of the plan" and the phrase "the value" in various sections of the Bankruptcy Code. In other sections of the Code, the phrase "as of the effective date of the plan" appears *after* the words "the value." Conversely, in §1325(b)(1)(A), the phrase "as of the effective date" appears *before* the words "the value."

Notwithstanding that these phrases appear in a different order in §1325(b)(1)(A) than they do in other Code sections, the court in *Hight-Goodspeed* interpreted the phrases as they appear in §1325(b)(1)(A) to have the same meaning and effect as they do in other sections of the Code. *Id.* The court concluded that the placement of the phrase in §1325(b) reflects the desire of Congress to make the phrase "as of the effective date of the Plan" apply to both subsections (A) and (B). "[T]he meaning of those words is not changed by relocating the phrase as of the effective date of the Plan.'" *Id* . at 464-65. The *Hight-Goodspeed* court concluded that, "[t]he two statements the value, as of the effective date of the Plan, of the property to be distributed...' and as of the effective date of the Plan-the value of the property to be distributed...' have the same meaning." *Id.* at 465.

The Debtor, in turn, relies upon *In re Stewart-Harrel* , 443 B.R. 219 (Bankr. N.D.Ga. 2011), in which the court construed the §1325(b) language differently. The court held that the better interpretation of the phrase "as of the effective date of the plan" in §1325(b)(1) is that it refers to the date on which the court makes the determination whether the debtor will proceed under subsection (A) or (B). *Id.* at 222. In that court's view, reading the phrase "as of the effective date of the plan" to require the payment of interest may make sense with respect to subsection (A), but

would have no meaning if applied to subsection (B). *Id.* at 222-23. The court also reasoned that holding that subsection (A) requires the payment of interest would create a contradiction within the Bankruptcy Code: interest would have to be paid on claims of general unsecured creditors under §1325(b)(1)(A), but not on priority claims under §1322(a)(2). *Id.* at 223-24.[6] The court in *Hight-Goodspeed* acknowledged that while this contradiction may exist, the difference in treatment of priority and non-priority unsecured claims should be attributed to the multiple amendments to the Bankruptcy Code which have caused certain discrepancies. *In re Hight-Goodspeed, supra* at 465.

This Court believes that the Trustee has the more compelling position. It is not illogical, in this Court's view, to conclude that Congress intended the phrase "as of the effective date of the plan" to modify both prongs of §1325(b)(1). As applied to subsection (B), the phrase "as of the effective date of the plan, " would mean the date on which the value and the amount of projected future income should be calculated. *See In re Braswell* , 2013 WL 3270752 (Bankr. D. Or. June 27, 2013) ("In order to apply to both subsections (A) and (B) and make sense, the second wording was used in §1325(b)(1).").

This Court recognizes that other jurisdictions disagree with an interpretation of §1325(b)(1)(A) that requires interest payments, even where a debtor fails to dedicate all of her monthly disposable income to a plan. *See, e.g.,In re Ross* , 375 B.R. 437, 444 *opinion amended on reconsideration* , 377 B.R. 599 (Bankr. N.D.Ill. 2007) ("Indeed, §1325(b)(1)(A) does not specify that the value to be paid must be the value, as of the effective date of the Plan.' Hence, §1325(b)(1)(A) does not require the payment of present value through interest for unsecured claims.") (internal citations omitted). *See also,In re Richall* , 470 B.R. 245, 249 (Bankr. D.N.H. 2012) (dismissing trustee's concerns regarding the time value of money and stating, "[t]he Debtors' Plan provides for payment of all unsecured claims in full during a five year term through payments of approximately one-half of their disposable income. Thus, the Debtors' Plan complies with §1325(b)(1)(A).").

This Court agrees with the court in *Hight-Goodspeed* , that denying interest to unsecured creditors who must wait to be paid on their claims longer than a debtor's disposable income would otherwise allow is to "overlook the language in [§1325](b)(1) that precedes sub-paragraph (A)...." *See Id* . at 465. The use of the phrase "as of the effective date" in conjunction with language calling for the payment of the value of a claim is interpreted throughout the Bankruptcy Code as providing for interest. *Krump, supra* , at 824. The result should be no different here. Statutory interpretation is a holistic endeavor, and identical words used in different parts of the same statute are intended to have the same meaning. *In re Parke* , 369 B.R. 205, 208 (Bankr. M.D. Pa. 2007).

A debtor must pay the full value of the claim "as of the effective date of the plan" because "a dollar received today is worth more than a dollar to be received in the future." *Parke,* 369 B.R. at 208, (*quotingIn re Szostek* , 886 F.2d 1404, 1406 at n. 1 (3d Cir.1989)). The price a debtor pays for not committing all of her disposable income to her plan is interest. *Hight-Goodspeed, supra* , at 465. This insures, consistent with the language of §1325(b)(1), that creditors either are receiving all of a debtor's disposable income *or* that that they are compensated for the debtor's elective delay.[7]

Conclusion

This Court concludes that debtors who do not devote all of their disposable income to a Chapter 13 plan, but pay all claims in full, must pay a rate of interest in exchange for their election to make payments over a longer period of time. For the foregoing reasons, it is, by the United States Bankruptcy Court for the District of Maryland

ORDERED that the Trustee's objection [doc. 23] to confirmation of the Debtor's amended Chapter 13 Plan [doc. 20] is hereby sustained; and it is further

ORDERED that the Debtor is granted leave to amend the Plan; and it is further

ORDERED that an amended Plan must be filed within fourteen days of the date of the entry of this Order or this case will be dismissed.

SO ORDERED.

Notes:

[1] The Plan also provides that the Debtor will pay into the Plan one half of the amount of the refund she receives on account of her jointly-filed state and federal tax returns for tax years 2013-2016.

[2] Title 11 of the United States Code.

[3] Although the parties originally disputed the amount of the Debtor's disposable monthly income, they have stipulated that not all of the Debtor's disposable income is being dedicated to the Plan. *See generally* [doc. 41].

[4] 11 U.S.C. §§1129(a)(7), 1225(a)(4), 1325(a)(4) (best interest of creditors test); §§1129(b)(2)(A)(i)(I, II), (B)(i), (C)(i), 1225(a)(5)(B)(ii), 1325(a)(5)(B)(ii) (cram down); §1129(a)(9)(C)(i) (payment of priority claims).

[5] *SeeTill v. SCS Credit Corp.*, 541 U.S. 465, 469, 472-73, 124 S.Ct. 1951, 1955-56, 1958, 158 L.Ed.2d 787 (2004) (discussing §1325(a)(5)(B)(ii)); *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 957, 117 S.Ct. 1879, 1882-83, 138 L.Ed.2d 148 (1997) (discussing §1325(a)(5)(B)(ii)); *Rake v. Wade*, 508 U.S. 464, 469-70, 113 S.Ct. 2187, 2191, 124 L.Ed.2d 424 (1993) (discussing §1325(a)(5)(B)(ii)); *United Savings Association of Texas*, 484 U.S. at 377, 108 S.Ct. at 633 (discussing §1129(b)(2)(A)(i)(II)). *See also,In re Airadigm Communications, Inc.*, 547 F.3d 763, 768-69 (7th Cir.2008) (§1129(b)(2)(A)(i)(II)); *Koopmans v. Farm Credit Services of Mid-America, ACA*, 102 F.3d 874 (7th Cir.1996) (§ 1225(a)(5)(B)(ii)); *In re Hardy*, 755 F.2d 75 (6th Cir.1985) (§1324(a)(4)); *Matter of Burgess Wholesale Mfg.*, 721 F.2d 1146, 1147 (7th Cir.1983) (§1129(a)(9)(C)). *In re Hight-Goodspeed* , at 464 (Bankr. N.D. Ind. 2012).

[6] A debtor is never compelled to pay interest on unsecured claims in order to confirm a Chapter 13 Plan under §1325 (b). To avoid paying interest, a debtor need only devote all of his or her disposable income to the Plan. *SeeIn re Hight-Goodspeed* , 486 B.R. 462, 465 (Bankr. N.D. Ind. 2012).

[7] The Fourth Circuit recently analyzed the meaning of the term "applicable commitment period, " as used in §1325(b)(1)(B). *Pliler v. Stearns*, No. 13-1445 (4th Cir. Mar. 29, 2014). In *Pliler* , the Fourth Circuit held that above-median income debtors (who did not propose to pay claims in full) must maintain a 60-month plan, even though they had, on paper, negative monthly disposable income. The court stated that its decision was in harmony with the "core purpose" underpinning the 2005 Bankruptcy Code revisions, that "debtors devote their full disposable income to repaying creditors." *Id.* at 9 (quoting *Ransom v. FIA Card Servs., N.A.*, 131 S.Ct. 716, 729 (2011)). This Court believes the instant decision similarly is in harmony with the core purpose of the amendments. Requiring a debtor to pay interest for delayed plan payments is an acceptable economic substitute for devoting all monthly disposable income to the plan.

IN RE CHRISTOPHER MICHAEL BRASWELL, Debtor.

No. 13-60564-fra13

United States Bankruptcy Court, D. Oregon.

June 27, 2013

MEMORANDUM OPINION

FRANK R. ALLEY, III, Bankruptcy Judge.

Trustee has objected to confirmation of Debtor's amended chapter 13 plan of reorganization (Amended Plan) on a number of grounds, most notably on grounds of lack of good faith and the failure to provide interest to unsecured claimants in Debtor's 100% plan. A confirmation hearing was held on June 11, 2013, and the matter was taken under advisement. For the reasons that follow, confirmation of Debtor's Amended Plan will be denied.

FACTS

The Debtor is married and lists four children on Schedule J. Both Debtor and his spouse have salaried jobs and the Debtor also shows net monthly income from his construction business. Debtor filed his chapter 13 bankruptcy case on February 27, 2013. Because the combined income of the Debtor and his spouse exceeds the applicable median income for their family size, he was required to prepare and file with his Form 22C the Statement of Current Monthly and Disposable Income (the "Means Test"), which revealed a monthly disposable income amount of $1, 531 and an applicable commitment period of five years. Schedules I and J, also filed with the bankruptcy petition, calculated net monthly income of $1, 651. The original plan of reorganization filed with the bankruptcy petition provided a monthly plan payment of $725 to be used for payment of Debtor's attorney fees and the trustee fees, and to pay unsecured claimants 100% of their claims over a period of 53 months. An Amended Plan was thereafter filed which provides for the same 100% payout over 53 months, but at $500 per month.

Trustee objected to the Debtor's Amended Plan on a number of technical grounds as well as the legal questions posed under 11 U.S.C. §§ 1325(a)(3) and 1325(b)(1) by Debtor's failure to devote 100% of his projected disposable income to the plan.

DISCUSSION

A. Good Faith - 11 U.S.C. 1325(a)(3):

The Trustee objected to the fact that Debtor proposes to devote only 30% of his monthly disposable income to his chapter 13 plan payment ($500/$1, 651) while retaining the remainder. Moreover, the $1, 651 monthly disposable income figure is, according to the Trustee, projected to increase to $2, 200 when a vehicle payment attributable to Debtor's spouse is paid off. Trustee argues that this evidences a lack of good faith[1] because it unfairly elevates the Debtor's self-interest over the rights of his creditors, and because it unfairly shifts the risk of loss to creditors in the event the Debtor suffers post-petition financial problems or simply decides he no longer wishes to continue with the chapter 13 case.

The Debtor counters that if a debtor has complied with the requirements set forth in § 1325(b)(1)(A)[2] by providing that all unsecured creditors will be paid in full, the Court may not find a lack of good faith solely for the debtor's failure to propose greater monthly payments to unsecured creditors.

In the Ninth Circuit, the Court of Appeals has provided the standard by which a lack of good faith should be measured:

(1) Whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Code, or otherwise filed his petition or plan in an inequitable manner;

(2) The debtor's history of filings and dismissals;

(3) Whether the debtor intended to defeat state court litigation; and

(4) Whether egregious behavior is present.

Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 122-23 (9th Cir. 1999). Trustee argues that the actions of the Debtor are an unfair manipulation of the Bankruptcy Code. The court in *In re Stewart-Harrel*, 443 B.R. 219, 224 (Bankr. N.D. Georgia 2011) stated that it would decide the matter of good faith in these circumstances on a case-by-case basis which would include a series of factors, such as the extent of the difference in payment and the reasons for the difference in payment. Courts in this Circuit, however, are bound by the holding of *Drummond v. Welsh (In re Welsh)*, 711 F.3d 1120 (9th Cir. 2013), which appears to rule out a finding of lack of good faith in these circumstances.

In *Welsh*, the Chapter 13 trustee objected to confirmation of the debtors' plan on grounds that it was not proposed in good faith and that debtors were not committing 100% of their disposable income to plan payments. The issue was

whether Social Security income, which is specifically excluded from current monthly income in calculating disposable income, and the deduction of expenses that are expressly allowed by the Code as part of the "Means Test" could be used as a basis for a finding that the plan was not proposed in good faith. The Court, in holding that those factors could not be the basis for a finding of lack of good faith, stated that "[j]ust as we cannot add to what Congress has enacted under the guise of interpreting good faith, ' so too we cannot ignore the explicit repayment requirements that Congress has chosen to enact." *Id.* at 1131. "Having already concluded that Debtor's plan fully complied with the Bankruptcy Code, it is apparent that Debtors are not in bad faith merely for doing what the Code permits them to do." *Id.* at 1132 (citing quote from *Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220, 227 (5th Cir. 2012)).

Applying the holding of *Welsh* to the facts of the present case: so long as the repayment requirements of § 1325(b)(1) are met, the court cannot find a lack of good faith solely on the basis that Debtor is paying less per month than the amount of his projected monthly disposable income. The next issue we must confront is whether the requirements of § 1325(b)(1)(A) are met with a 100% payment of unsecured claims over the term of a chapter 13 plan (i.e. no accommodation for the time-value of money), when less than all of Debtor's projected disposable income is devoted to the plan. The Trustee argues that an appropriate rate of interest must be applied in these circumstances, while the Debtor argues that there is no such requirement.

B. Interest Requirement under § 1325(b)(1)(A):

The court in *In re Hight-Goodspeed* [3] was confronted with the trustee's objection to a debtor's proposed chapter 13 plan under which considerably less than debtor's projected disposable income would be devoted to plan payments, but which paid unsecured creditors in full, without interest. It noted that the opinions that addressed the requirements of § 1325(b)(1)(A) were relatively few and were divided. Further, while Colliers sided with the Debtor's view, 8 *Collier on Bankruptcy*, ¶ 1325.11[3] (16th ed.), Norton and Lundin agree with the trustee. 7 *Norton Bankr. L. & Prac* (3d ed.), § 151:19; Keith M. Lundin & William H. Brown, *Chapter 13 Bankruptcy*, 4th edition, § 168.1, at ¶ 6. *Hight-Goodspeed* at 463. The court interpreted the phrase "as of the effective date of the plan-, " which is found in § 1325(b)(1) and applies to both subsections (A) and (B), as requiring a present value calculation when subsection (A) is chosen. The court acknowledged that the Code, when requiring a present value calculation, normally uses the wording: "the value, as of the effective date of the plan, of the property to be distributed... is not less than..., " while subjection (A) is read as: "as of the effective date of the plan - (A) the value of property to be distributed under the plan on account of such claim is not less than the amount of such claim." In the court's view, the meaning of the words is not changed in the two uses and "§ 1325(b)(1)(A) is phrased somewhat differently because Congress apparently wanted the concept of the effective date of the plan to apply to both the valuation of the distribution under (A) and to the disposable income alternative of (B)." *Id.* at 464-65.

The court in *In re Stewart-Harrel*, 443 B.R. 219 (Bankr. N.D. Georgia 2011) looked at the same set of facts and concluded that there is no interest requirement in § 1325(b)(1)(A). Rather, it found that the better interpretation of the phrase "as of the effective date of the plan" in § 1325(b)(1) "refers to the date as of which the court is to make the determination of either (A) (payment in full) or (B) (payment of all projected disposable income)." *Id.* at 222. It noted that interpreting the phrase "as of the effective date of the plan" to require the present value of distributions on claims may make sense with respect to subsection (A), but would be meaningless with respect to subsection (B). *Id.* at 222-23. It further noted that finding a present value requirement in subsection (A) would create certain anomalies such that interest would be required on claims of general unsecured creditors under § 1325(b)(1)(A), but not on priority claims under § 1322(a)(2) and that the trustee's interpretation would require the payment of interest where the best interest of creditors test did not. *Id.* at 223 to 24. The *Hight-Goodspeed* court acknowledges these anomalies, but as to the second concern, the payment of interest where the best interest of creditors test does not, counters that it sees nothing untoward in such a result, as interest represents the time value of money and the risk of default. As to the difference between priority and non-priority unsecured claims, the court attributes the disparate effect on successive amendments to the Bankruptcy Code which have created certain distortions. *Hight-Goodspeed* at 465.

The better interpretation is the one found in *Hight-Goodspeed*. The court found that in cases where the trustee or an unsecured creditor objects, § 1325(b)(1) allows the debtor to choose subsection (B) and devote all of his projected disposable income to the plan or, if the debtor wishes to devote less of his income to the plan, he may chose subsection (A). The price for doing so, however, is that unsecured claims must be paid in full with interest.

The two statements "the value, as of the effective date of the plan, of property to be distributed..." and "as of the effective date of the plan - the value of property to be distributed..." have the same meaning and require a present value calculation. In order to apply to both subsections (A) and (B) and make sense, the second wording was used in § 1325(b)(1). The Supreme Court in *Hamilton v. Lanning*, 130 S.Ct. 2464 (2010) interpreted the phrase "as of the effective date of the plan" with respect to subsection (B) as the date to measure projected disposable income. *Id.* at 2474. In other words, the effective date of the plan, being

the date of confirmation[4], is the date at which the value and amount of projected future income should be calculated. Unlike the court in *Stewart-Harrel*, I do not find that the *Hamilton v. Lanning* holding is at odds with an interpretation of § 1325(b)(1)(A) requiring the payment of interest.[5] Clearly, the date of confirmation is the date at which the court must determine whether the requirements of subsection (A) or subsection (B) have been met, as stated in *Stewart-Harrel*. The date of confirmation is the date the court must determine generally whether the requirements of confirmation have been met. With respect to subsection (A), "the value of property to be distributed under the plan" must be measured as of the date of confirmation, and must be "not less than the amount of such claim." This interpretation would require the payment of interest, because a future income stream must be discounted to present value, and is consistent with the interpretation advanced in *Hamilton v. Lanning* that projected disposable income be measured as of the date of confirmation.

C. Proper Rate of Interest to be Used Under § 1325(b)(1)(A):

In *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004), the Supreme Court applied a "formula approach" to determine the appropriate rate of interest to be paid to an secured creditor subject to a "cramdown" in Chapter 13. I believe the same approach applies here. Unsecured creditors are expected to bear a greater risk of failure in the proposed plan because they are to be paid over a greater time period. The Court described the formula approach:

> Taking its cue from ordinary lending practices, the approach begins by looking to the national prime rate, reported daily in the press, which reflects the financial market's estimate of the amount a commercial bank should charge a creditworthy commercial borrower to compensate for the opportunity costs of the loan, the risk of inflation, and the relatively slight risk of default. Because bankrupt debtors typically pose a greater risk of nonpayment than solvent commercial borrowers, the approach then requires a bankruptcy court to adjust the prime rate accordingly. The appropriate size of that risk adjustment depends, of course, on such factors as the circumstances of the estate, the nature of the security, and the duration and feasibility of the reorganization plan. The court must therefore hold a hearing at which the debtor and any creditors may present evidence about the appropriate risk adjustment. Some of this evidence will be included in the debtor's bankruptcy filings, however, so the debtor and creditors may not incur significant additional expense.

Id. at 478-79. The court noted that "if the court could somehow be certain a debtor would complete his plan, the prime rate would be adequate to compensate any secured creditors forced to accept cramdown loans." *Id.* at 479, n.18. The court goes on to note that starting at the low prime rate and adjusting upwards "places the evidentiary burden squarely on the creditors" - or, in this case, the trustee. *Id.* at 479.

Rather than put the parties to the additional expense of a hearing on interest (which would surely cost more than what is at stake here), the Court will determine, from the record and filings available to it, what the appropriate rate is in this case. The prime rate published by the Wall Street Journal on June 26, 2013, is 3.25% per annum.[6] The creditors' risk is enhanced by several factors:

1. They must wait 53 months before being paid in full, as opposed to being paid in less than 18 months if all of the Debtor's monthly disposable income is used for plan payments.

2. The debtor's schedules indicate that, while he and his wife have substantial salaries, they have little in the way of unencumbered or non-exempt assets, and virtually no liquidity. This increases the risk to creditors in the event of an unanticipated expense or loss of income.

3. Neither the plan, nor anything else in the record, indicates what the debtor will do with the disposable income not paid each month, amounting to over $1, 100 a month. If these funds are not saved, or employed in some other manner protecting the creditors' interests, their risk is enhanced.

On the Debtor's side, the creditor's claims will not be discharged if they are not paid in full. This provides some incentive to the debtor (although less as the claims are paid down) and gives the creditors the right to enforce any unpaid claims after the case is closed.

Taking these factors into account the court finds that the "appropriate risk adjustment" is 2.5% per annum, and that the interest rate to be applied is therefore 5.75% per annum.

D. Plan Length:

The Trustee argues that the court should use pre-BAPCPA[7] practice and limit the Debtor to a 36-month plan in these circumstances, even though current law provides for an "applicable commitment period" for "above median" debtors of "not less than five years." § 1325(b)(4)(A)(ii). This is so, according to the Trustee, so that an "above median" debtor is not treated more favorably than a "below median" debtor, who is limited to a 36-month plan. However, disparate treatment of "above median" and "below median" debtors under the Code has been recognized by the courts. *See e.g.Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 858 (9th Cir. 2008) ("above median" debtor with negative projected disposable income as reported on Form 22C has no applicable commitment

period); *Drummond v. Welsh (In re Welsh),* 711 F.3d 1120 (9th Cir. 2013)(deductions for "luxury items" allowed to "above median" debtors in calculating disposable income pursuant to Form 22C cannot be basis of good faith objection). Accordingly, the Debtor in this case has an "applicable commitment period" of "not less than five years, " unless the plan provides for "payment in full of all allowed unsecured claims over a shorter period." § 1325(b)(4)(B).

E. Remaining Objections to Confirmation:

1. Paragraph 2(f)(2) of Plan: The court agrees that the plan should be amended to read that the holders of allowed, nonpriority unsecured claims will receive "a minimum" of 100% of their claims.

2. Tax Refunds: Trustee objects to ¶ 12 of the Plan which allows the Debtor to retain tax refunds attributable to the non-filing spouse's tax payments and applicable credits. He feels the provision is too vague and will invite future litigation and that all tax refunds attributable to a "married filing jointly" tax return should be paid into the plan. Debtor objects and argues that the tax refunds attributable to the withholdings and credits of the non-filing spouse are the property of the non-filing spouse and are not property of the estate. Mindful of the Trustee's misgivings, the court, however, agrees with Debtor that the non-filing spouse's attributable tax refunds should not be required to be paid into the plan. However, the plan must be amended to provide more specific language acceptable to the Trustee in calculating the non-debtor spouse's share of any tax refunds.

3. Surrender of Real Property: The court agrees with Trustee that ¶ 13 of the Plan should be amended to strike the phrase "in full satisfaction of their claims." Upon surrender of the property, the creditor's right to any unsecured deficiency judgment should be determined pursuant to Oregon law.

CONCLUSION

For the foregoing reasons, the Debtor's chapter 13 plan cannot be confirmed as currently proposed. If the Debtor wishes to pay less than his projected disposable income into the plan, then he must pay all unsecured claims in full, with interest calculated at 5.75% per annum, unless other terms acceptable to the Trustee are made. An order will therefore be entered by the Court denying confirmation and providing Debtor 21 days to file an amended chapter 13 plan consistent with this memorandum opinion.

Notes:

[1] Section 1325(a)(3) provides that the court shall confirm a plan if - "(3) the plan has been proposed in good faith and not by any means forbidden by law;"

[2] Section 1325(b)(1):

If the trustee or the holder of an allowed unsecured claim objects to 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 property to be distributed under the plan on account of such claim 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.

[3] 486 B.R. 462 (Bankr. N.D. Indiana 2012).

[4] *Hamilton v. Lanning* at 2474.

[5] *See Stewart-Harrel* at 223.

[6] See http://www.bankrate.com/rates/interest-rates/wall-street-prime-rate.aspx (Accessed by the court on June 26, 2013.) According to the site, the Wall Street Journal surveys 30 large banks and publishes a "consensus" prime rate. "It's the most widely quoted measure of the prime rate, which is the rate banks will lend money to their most-favored customers." *Id.* It appears that 3.25% has been the WSJ prime for over a year.

[7] Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.
