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

In Re:

ANTHONY STALLWORTH, Case No. 16-04277

Debtor.

DONNA BOLTON and CARLTON BRADLEY BOLTON, JR., Case No. 17-00651

Debtors.

ORDER SUSTAINING OBJECTIONS TO CONFIRMATION

These two cases involve the same scenario. An above-median income Chapter 13 debtor proposes in his plan to pay 100% of unsecured claims over the five year applicable commitment period but using less than all of his projected disposable income. Because the debtor is paying less than all of his net disposable income, the Chapter 13 trustee objects to the plan without a provision that he cannot later modify the plan to pay less than 100% of unsecured claims. For the reasons set out below, the Court sustains the trustee's objections to the plans without a modified version of such a provision.

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 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.

The Court agrees with the debtors that these two prongs are disjunctive, that is, only one has to be met and not both. See In re Bailey, 2013 WL 6145819 (Bankr. E.D. Ky. 2013). A Chapter 13 debtor can thus choose to pay either 100% on unsecured claims or all of his projected disposable income for the applicable commitment period (three years for below-median debtors, five years for above-median debtors).

The first issue is whether the requirements of Code § 1325(b)(1) apply to plan modifications under Bankruptcy Code § 1329 as well as the initial confirmation. Bankruptcy Code § 1329 does not specifically refer to § 1325(b)(1). However, the Eleventh Circuit, other bankruptcy courts in Alabama, and this Court have either held or assumed that § 1325(b)(1) applies to plan modifications as well as confirmations:

> Clearly, section 1329 makes the provisions of section 1325(a) applicable to modified plans. 11 U.S.C. § 1329(b)(1). Section 1325(a) begins with the phrase "[e]xcept as provided in subsection (b) …." The exception for subsection (b) found in subsection (a) has the effect of capturing both subsections, making the disposable income requirement of § 1325(b) applicable to modified plans. Further, section 1325(a)(1) makes all other provisions of chapter 13 applicable to plan confirmation. The disposable income requirements are a provision of chapter 13. Therefore, this court finds that the disposable income provisions of § 1325(b)(1) are applicable to plan modifications.

In re Baxter, 374 B.R. 292, 296 (Bankr. M.D. Ala. 2007) ("This holding is all the more practicable when routinely and as a matter of course, debtors modify plans to reduce payments to creditors based on a diminution of disposable income.") See also In re Tennyson, 611 F. 3d 873, 879 (11th Cir. 2010) (if debtor's negative disposable income increases to a positive number, unsecured creditors can move to modify plan under § 1329); In re Waldron, 536 F. 3d 1239, 1243-46 (11th Cir. 2008) (creditors or debtor can move to modify plan postconfirmation under § 1329 based upon postconfirmation

changes in debtor's ability to pay). "Under the ability-to-pay standard, creditors share both the gains and losses of the debtor." Id. at 1246. See also In re Buck, 443 B.R. 463, 468-70 (Bankr. N.D. Ga. 2010).

The debtors in these two cases have chosen the 100% option under § 1325(b)(1)(A). They propose to lower their monthly plan payments by spreading payment of the unsecured claims in full over five years, thus making the plan payments lower than their net disposable income. Mr. Stallworth has a disposable income of $1,077.68 according to his Schedule J, but his proposed plan payment is $875. The Boltons propose a plan payment of $401 a month, although Schedule J lists their disposable income as $666.08. The debtors have a right to do this, and this Court has previously held that debtors choosing this option are not required to pay postpetition interest on the unsecured claims in that situation. In re Miller, Case No. 16-02777-HAC-13 (Bankr. S.D. Ala. 2/14/17).

However, the trustee's objection is that the debtors want to retain the option to switch from § 1325(b)(1)(A) to (B), the net disposable income option. In other words, if they start having trouble partway through the bankruptcy, debtors want the option to amend their plan to reduce the percentage paid on unsecured claims and start paying only their net disposable income from that point forward. The practical effect of allowing such a modification is to put the risk of a future income drop on the unsecured creditors. So the question is: can a Chapter 13 debtor switch between the two alternative prongs of § 1325(b)(1)(A) and (B) on a "going-forward" basis? Although the parties have not presented any case law on this exact issue, the undersigned find that under the language of the statute the answer is no, the requirements of either § 1325(b)(1)(A) or (B) must be completely satisfied -- one or the other. The Code does not

allow a debtor to satisfy § 1325(b)(1)(A) for part of the plan term and then § 1325(b)(1)(B) for the rest of the plan term without fully satisfying either prong.

The Chapter 13 trustee has requested the following language in the debtors' plans, based upon the holdings of In re McCarthy, 554 B.R. 388 (Bankr. W.D. Tex. 2016); In re Crawford, 2016 WL 4089241 (Bankr. W.D. Tex. 2016); and In re Molina v. Langehennig, 2015 WL 8494012 (W.D. Tex. 2015):

> The Plan as currently proposed pays 100% dividend to unsecured claims. In exchange for retaining a portion of their disposable income, the Debtor(s) shall not seek modification of the Plan unless said modification also pays 100% dividend to unsecured claims. Additionally, should this Plan ever fail to pay 100% dividend to unsecured claims, the Debtor(s) will modify the plan to continue paying a 100% dividend. If the Plan fails to pay all allowed claims in full the Debtor(s) will not receive a standard discharge in this case.

However, the trustee's proposed language does not provide for the possibility that a debtor could modify his plan to switch from compliance with § 1325(b)(1)(A) to (B) by "catching up" or "buying back" the amount he would have paid into the plan if it had been initially confirmed under § 1325(b)(1)(B). The undersigned will thus confirm the debtors' plans (assuming they meet other requirements) if they include language along the following lines:

> The plan as currently proposed pays a 100% dividend on unsecured claims. Any future modification will provide either for a 100% dividend on unsecured claims or payment of all of debtor(s)' projected disposable income for a period of five years beginning on the date the first plan payment is due.

The undersigned are not wedded to this verbiage if the parties want to suggest changes. As discussed at the hearing, below-median income debtors rarely are in a position to pay less than disposable income into a 100% plan, so this provision assumes that the debtors are above median income and that the applicable commitment period is thus five years under § 1325(b)(4)(A)(ii). If an above-median income debtor seeks to modify a plan to reduce the distribution on unsecured

claims to less than 100% and to pay disposable income under § 1325(b)(1)(B), the applicable commitment period must remain five years under § 1325(b)(4)(B) because unsecured claims are not being paid in full.

The Court is not deciding at this point whether a "buy-back" of projected disposable income from the first payment date would be determined in hindsight based on actual disposable income or the information available at the time of confirmation. A hardship discharge under Code § 1328(b) is always available, so the trustee's proposed language about a standard discharge does not seem necessary. The undersigned asked at the hearing whether it was appropriate to include this type of restrictive language in the plan instead of waiting for a motion to modify under § 1329; however, both debtors' counsel and the trustee's counsel requested that the issue be handled on the front end through plan language rather waiting for debtors to file a motion to modify.

Because the debtors have not yet agreed to such a provision, for the time being the trustee's objections to confirmation in both cases are sustained.

Dated: July 12, 2017

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE

JERRY C. OLDSHUE, JR.
U.S. BANKRUPTCY JUDGE