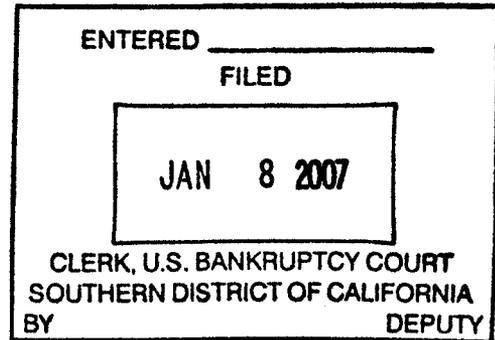


1 **WRITTEN DECISION - FOR PUBLICATION**



9 UNITED STATES BANKRUPTCY COURT  
10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re ) Case No. 06-01392-B13  
 12 )  
 12 GWENDA ANN GORDON, ) ORDER ON CHAPTER 13 TRUSTEE'S  
 13 ) OBJECTION TO CONFIRMATION OF  
 13 ) PLAN  
 14 Debtor. )  
 14 \_\_\_\_\_ )

15 This matter came on regularly for hearing on the Chapter 13  
16 Trustee's objection to confirmation of debtor's proposed plan.

17 The Court has subject matter jurisdiction over the  
18 proceeding pursuant to 28 U.S.C. § 1334 and General Order  
19 No. 312-D of the United States District Court for the Southern  
20 District of California. This is a core proceeding under  
21 28 U.S.C. § 157(b)(2)(L).

22 Background

23 In order to fully engage in grappling with the Chapter 13  
24 Trustee's objection, one must begin at the beginning, which for  
25 our purposes is 1997. On December 16, 1997 debtor filed a  
26 Chapter 13 petition (97-18541) under the name Gwenda Haywood.

1 Trustee Billingslea objected to confirmation and, after hearing  
2 on May 13, 1998, the case was ordered dismissed.

3 A few days later on May 20, 1998, debtor refiled under  
4 Chapter 13. Trustee Billingslea objected to confirmation,  
5 asserting debtor was unable to make timely payments. Debtor  
6 contended she made some payments and, after a continued hearing  
7 during which she brought payments current, the plan was confirmed  
8 on December 2, 1998. Debtor immediately fell behind on payments,  
9 and on February 16, 1999 the trustee moved to dismiss. Debtor  
10 opposed the motion, contending her wages had been garnished in  
11 the interim two different times, and that she had new employment.  
12 The motion was twice continued to track payments, and then the  
13 debtor proposed to modify her plan to cut her payments by more  
14 than 50%. The trustee objected, contending the debtor had made  
15 only half the payments that had come due. After debtor agreed to  
16 grant a dividend of 20% to unsecured creditors, the modified plan  
17 was confirmed in September, 1999.

18 About a year later, the trustee brought another motion to  
19 dismiss for failure to make payments, at the reduced rate.  
20 Debtor acknowledged the arrears, saying she had quit work because  
21 of a death in the family, and had associated travel and funeral  
22 expenses. She proposed to bring the payments current by a lump  
23 sum payment to the trustee. After a continuance, the motion to  
24 dismiss was taken off calendar in December 2000.

25 In March, 2001 debtor again proposed to reduce her plan  
26 payment, followed by a step-up six months later. That motion was

1 granted without opposition on May 1, 2001. Then, on October 11,  
2 the trustee filed another motion to dismiss for failure to make  
3 payments. Debtor opposed the motion, asserting her state  
4 disability payments had been improperly terminated, and that she  
5 had brought the plan payments current right after the motion was  
6 filed. The hearing was continued to track payments, and  
7 subsequently taken off calendar in February, 2002.

8 Then, in May, 2002, still another motion to dismiss was  
9 filed by the trustee for failure to make payments. Debtor  
10 requested a hearing, saying she was evaluating her options and  
11 whether to convert the case to Chapter 7. At the hearing on  
12 July 23, 2002 the case was ordered dismissed, and the trustee  
13 agreed to hold the order for five days to allow the debtor the  
14 opportunity to convert. She did not, and the order dismissing  
15 was entered August 5, 2002.

16 In September 2002, just a month after having her 1998 case  
17 dismissed for failure to make payments, she purchased a 2001  
18 Mercedes Benz C240 sedan (according to Schedule D of her third  
19 petition, filed October 30, 2003). Sometime prior to October,  
20 2003 her last name changed to Gordon, and she had two daughters,  
21 ages 2 and 1. In her third petition, she listed she was  
22 separated and, as in 1998, she had just started a new job. The  
23 plan she proposed in her third case called for payments of \$1,175  
24 with 0% to unsecureds, whose claims exceeded \$72,000 (not  
25 including \$26,000 in priority tax debt, combined, to IRS and the  
26 FTB).

1 Trustee Skelton objected to debtor's 2003 proposed plan on  
2 multiple grounds. However, the trustee withdrew his objection  
3 when debtor agreed to increase her monthly payment to \$1,200.  
4 The plan was confirmed in January, 2004. Then, in August, 2004  
5 the trustee filed a motion to dismiss for failure to make  
6 payments. Debtor opposed, saying she was laid off from work, and  
7 had incurred expenses in traveling to the funeral of a family  
8 member. She indicated she had a new job with the Housing  
9 Commission and wanted to go forward. Debtor agreed to increase  
10 her plan payment to \$1,540, and the motion to dismiss was  
11 subsequently withdrawn in December, 2004.

12 Just weeks later, the trustee filed another motion to  
13 dismiss for failure to make payments. At least one of the  
14 payments she tendered had been returned NSF. Again, she opposed  
15 the motion, saying she had replaced the NSF check and had made  
16 the regular January payment. She also indicated she had surgery  
17 and was expecting disability payments to commence. The motion  
18 was taken off calendar in March, 2005. Then, in June, the  
19 trustee filed still another motion to dismiss for nonpayment.  
20 Debtor opposed, saying she was temporarily out of work and her  
21 disability payments were stopped, but had resumed. The hearing  
22 was continued to track payments, and subsequently taken off  
23 calendar in November.

24 In January, 2006 the trustee filed another motion to dismiss  
25 for nonpayment. Debtor opposed, saying she was trying to raise  
26 funds to pay down or pay off her plan, while admitting she had

1 not been making the requisite payments. The hearing was  
2 continued, and on May 9, 2006, the case was ordered dismissed.

3 Current Case

4 All of the foregoing (and not mentioning debtor's 1992 case)  
5 leads up to the present case, which was filed June 8, 2006, just  
6 three weeks after entry of the order of dismissal of the 2003  
7 case. The 2006 case reveals the unsecured priority tax debt had  
8 grown to \$43,500 and general unsecured debt had grown to over  
9 \$77,000. Debtor proposed to pay \$1,283 per month, with 0% to  
10 general unsecured creditors.

11 Trustee Skelton objected to confirmation, asserting that  
12 debtor had only made half the required payments in the 2003 case;  
13 that there was no change in circumstances from the 2003 case;  
14 that while debtor had the same job she did not pay 2005 income  
15 taxes to the IRS and FTB (totalling \$8760); and that the Form  
16 B22C required a significant distribution to unsecured creditors  
17 based on debtor's average income for the six months immediately  
18 prepetition. The initial hearing on the motion was continued to  
19 file amended tax returns and to track payments. At the continued  
20 hearing debtor was given a date by which she had to be current or  
21 the case would be dismissed. A further declaration on changed  
22 circumstances was also required.

23 It appears from the submission by debtor's counsel on  
24 November 16, 2006 that debtor was not current as of that date,  
25 set by another judge of this court. The declaration regarding  
26 changed circumstances was an unsworn and undated statement

1 regarding debtor's health and election to work part time. Her  
2 counsel's submission also recognized the need to provide a pay  
3 stub from debtor's new employer. The court continued the  
4 confirmation hearing yet again, and directed that a declaration  
5 regarding adequate protection payments and one concerning a  
6 revised B22C Form be filed by December 20. In fact, the docket  
7 shows the B22C, and amended Schedules I and J were filed on  
8 November 21, the day before the hearing. Nothing further was  
9 filed on behalf of the debtor until December 29, when counsel  
10 submitted a terse proposal to reduce the proposed plan payment  
11 amount to \$1,100, without any proposed modification noticed to  
12 any creditors. Counsel also asserted that debtor had made  
13 statutorily required adequate protection payments to the car  
14 creditor, and wrote: "Please see attached." However, there is no  
15 attachment in the court file. Lastly, counsel recognized debtor  
16 was in arrears to the trustee by \$582 and would make "great  
17 efforts to bring these funds to the Trustee at time of hearing."  
18 The trustee indicated he had not seen any of counsel's documents  
19 because there had been no mail service on December 31, January 1  
20 or January 2. While the trustee did not press the matter, it  
21 appears to the Court that debtor's counsel's submission on  
22 December 29 was untimely, given Judge Hargrove's directive that  
23 that declaration be filed by December 20. The Court does not  
24 know whether debtor had brought her payments to the trustee  
25 current, nor does the Court know whether debtor provided the  
26 trustee with evidence that she was current on adequate protection

1 payments to the car creditor, since the evidence was not attached  
2 to counsel's declaration.

3 Discussion

4 Debtor's case raises a number of issues, a few of which  
5 the Court addressed in another recent case. As noted, the  
6 trustee objects to confirmation because debtor's current monthly  
7 income (CMI) and disposable income as calculated under 11 U.S.C.  
8 § 1325(b)(2) and § 101 (10A), using Form B22C, would require  
9 debtor to provide a significant return to unsecured creditors.  
10 However, her plan does not so provide. This Court has stated its  
11 view that the B22C calculation is important, but not controlling  
12 on plan confirmation because § 1325(b)(1)(B) requires commitment  
13 of "projected disposable income" on a going-forward basis, not  
14 historical CMI or "disposable income" without regard to  
15 intervening changes in employment or other circumstances.

16 In the instant case, according to her statement, debtor has  
17 voluntarily reduced her work effort for health and child care  
18 reasons, so she has amended her Schedules I and J, as well as her  
19 Form B22C. In this Court's view, amendment of I and J may be  
20 appropriate, but amendment of B22C is not. The latter is a  
21 historical calculation, and it is what it is. The effort in this  
22 case to amend the B22C raises another important issue, however.  
23 Under the B22C filed at the outset of this case, debtor is an  
24 above-median income debtor, and her "applicable commitment  
25 period" is five years under § 1325(b)(4). Debtor's efforts to  
26 amend her B22C to reflect her expected future income, if allowed,

1 would put her below median income, and reduce the applicable  
2 commitment period to three years (since she proposes a 0% plan).

3       The Court is persuaded that amendment of the Form B22C to  
4 reflect anticipated future income is not permitted under § 101  
5 (10A) or § 1325. As § 1325(b)(4) makes clear, the "applicable  
6 commitment period" is determined by using "current monthly  
7 income" which, in turn, is defined in § 101(10A) as a historical  
8 average for the six months immediately prepetition. That does  
9 not change looking forward, and efforts to rewrite it are  
10 unavailing. In other words, the historical CMI, determined under  
11 § 101(10A), will determine the "applicable commitment period"  
12 under § 1325(b)(4) without consideration of "projected disposable  
13 income" under § 1325(b).

14       Which brings us back to the confirmability of debtor's  
15 proposed plan. To the extent debtor proposes a three year  
16 commitment period, the Court concludes the plan cannot be  
17 confirmed because by statute the "applicable commitment period"  
18 in her case is five years based on the B22C form filed at the  
19 outset of the case. And there are other problems, as well. As  
20 noted, debtor's plan calls for payments of \$1,283 per month, but  
21 the amendments to Schedules I and J make clear she cannot make  
22 payments in that amount. Her counsel's submission on December 29  
23 argued that \$1,100 should be the payment amount, providing \$718  
24 to IRS and \$326 to the car creditor each month. Counsel  
25 acknowledged there was also a debt to the Franchise Tax Board,  
26 but said debtor's ex-husband would pay that debt. No evidence of

1 any commitment by the ex-husband has been provided, nor has any  
2 amended plan been filed.

3 Conclusion

4 For all the foregoing reasons, the Court concludes debtor's  
5 plan, as presently proposed is not confirmable, and that debtor  
6 has been afforded multiple opportunities over the intervening  
7 almost seven months to make all necessary amendments. The Court  
8 has heard debtor's plea as a single mother with two small  
9 children, and understands debtor's need for a vehicle. But  
10 according to her Schedule F, debtor has held creditors at bay for  
11 debts incurred as long ago as 1991 through employment of the  
12 Chapter 13 process. Debtor now has elected to reduce her work  
13 hours, without offering any corroboration by medical  
14 professionals, or even her own assertions under oath.

15 Accordingly, confirmation of debtor's proposed plan is  
16 denied, and the case is ordered dismissed on the trustee's  
17 motion, without further leave to amend.

18 IT IS SO ORDERED.

19 DATED: JAN - 8 2007

20  
21   
22 PETER W. BOWIE, Chief Judge  
United States Bankruptcy Court  
23  
24  
25  
26