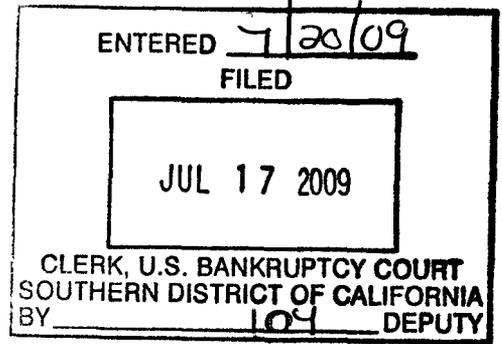


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WRITTEN DECISION - NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA

In re: } BK. No. 08-07421-LA13  
Wayne Cornell Cross and Laura Ann }  
Cross, } MEMORANDUM DECISION  
Debtors. }

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Wayne Cornell Cross and Laura Ann Cross seek an order confirming a proposed Chapter 13 Plan that strips the lien of Creditor Countrywide Home Loans, cures arrearage owed to the senior lender over 51.27 months, and pays 0% to unsecured creditors. The Chapter 13 Trustee opposes confirmation and argues that a 60 month plan is appropriate.

**FACTS**

On August 04, 2008 (the "Petition Date"), Wayne Cornell Cross and Laura Ann Cross ("Debtors") filed Chapter 13 case number 08-07421. The Debtors' Schedules:

- a. Valued their residence at \$481,000.00;

1           b.       Scheduled the claim of Countrywide Home Loans ("CWL") secured by the  
2 first trust deed at \$539,990.00; and

3           c.       Scheduled the claim of CWL secured by the second trust deed at \$98,452.00  
4 (the "CWL Junior Claim").

5  
6           The Debtors also filed a Chapter 13 Plan and an Amended Chapter 13 Plan (the  
7 "Plan"). The Plan provides for an initial payment of \$500.00 and monthly payments of  
8 \$1,650.00 over the remaining 51.27 month plan period. The Plan yields a 0% dividend to  
9 unsecured creditors. The Plan also proposes to strip the second trust deed securing the CWL  
10 Junior Claim under 11 U.S.C. § 1322(b)(2).

11  
12           The Debtors' initial B22 Statement of Current Monthly Income and Calculation of  
13 Commitment Period and Disposable Income ("B22") identified Debtors as above median  
14 income debtors and listed monthly disposable income of \$760.27. On December 9, 2008,  
15 however, Debtors submitted an amended B22 (the "Amended B22") that showed negative  
16 disposable income. The Amended B22 deletes \$1,000.00 per month in rental income.  
17 Debtors' counsel advised the Court that the original inclusion of this income was in error  
18 and that Debtors did not receive any such income during the six months prior to the Petition  
19 Date. The Debtors included \$1,100 of rental income on Schedule I as anticipated income.  
20 Apparently, the Debtors did not begin receiving rent until December of 2008.<sup>1</sup>

21  
22           Both forms of the B22 include at line 47(c) a deduction of \$842.74 on account of the  
23 payment on the CWL Junior Claim. Consistent with their intention to strip the lien securing  
24 the CWL Junior Claim and to treat the CWL Junior Claim as wholly unsecured, Debtors do

25  
26 <sup>1</sup> Debtors' counsel provided a detailed discussion of relevant facts including facts relating to pre-  
27 petition and post-petition rental income in Debtors' Reply to Trustee's Objection to Debtor's (sic)  
28 Chapter 13 Plan, Dkt. No. 42 (the "Reply"). The factual recitation in the Reply is not supported by  
a declaration. Notwithstanding, the Court accepts and relies upon the statements of counsel as  
establishing relevant facts given the Court's belief that the Chapter 13 Trustee does not dispute the  
accuracy of these assertions.

1 not include this payment in their Schedule J. Thus, Debtors' Schedule J lists monthly net  
2 income of \$1,368.49.

3  
4 The Chapter 13 Trustee (the "Trustee") objects to confirmation of the Plan. The  
5 Trustee proposes a plan with monthly payments of \$1,650.00 and an applicable commitment  
6 period of 60 months. The Trustee's proposed plan yields a 12% - 14% dividend to  
7 unsecured creditors.

8  
9 The Debtors assert that because of their negative projected disposable income, a  
10 36-month applicable commitment period in this case is appropriate. Debtors' counsel also  
11 asserts that Debtors have actually lost income since the Petition Date due to a loss of  
12 overtime opportunities.

13  
14 Debtors' counsel advises that Mr. Cross, a San Diego firefighter, is a victim of budget  
15 tightening which limits his opportunities for overtime (and happily there have been no  
16 wildfires since the Petition Date). Further, he also argues that certain expenses have  
17 increased since the Petition Date. Thus, Debtors' counsel emphasizes that the Debtors have  
18 struggled financially to meet their obligations under the Plan and to save their home.

19  
20 In an order dated April 15, 2009 the Court granted the Debtors' Motion for Valuation  
21 of Debtors' Residence and Avoidance of Second Trust Deed. The Court valued the  
22 residence at \$481,000.00, found the CWL Junior Claim to be wholly unsecured, and found  
23 the trust deed securing the CWL Junior Claim avoidable under Debtors' Plan.

## 24 25 **DISCUSSION**

26  
27 The Trustee originally objected to the Plan on several theories, but now limits his  
28 argument to an assertion that Debtors should be required to make payments over a 60 month

1 period. While there is some disagreement as to the percentage that unsecured creditors  
2 would receive under such a plan, it is clear that the percentage payable would increase from  
3 0% - the percentage payable under the 51.27 month period of the Plan. In order to resolve  
4 this dispute, the Court must analyze three issues. First, does the Amended B22 correctly  
5 evidence that Debtors are above median income debtors with negative projected disposable  
6 income? Then, if so, is a 60 month applicable commitment period required either by the  
7 Ninth Circuit's *Kagenveama* decision or pursuant to the good faith requirements of  
8 11 U.S.C. § 1325(a)(3)? After appropriate consideration, the Court concludes that the  
9 Debtors are correctly described by the Amended B22 and that neither the *Kagenveama*  
10 decision nor considerations of good faith require a 60 month commitment period in this  
11 case. As a result, the Court determines that the Plan is confirmable.

12  
13 **A. The Amended B22 Correctly Indicates That Debtors Are Above Median Income**  
14 **Debtors With No Disposable Income.**

15  
16 The Trustee argues that the Amended B22 improperly includes payment on the CWL  
17 Junior Claim as a monthly payment reducing income. If this item was not included in debt,  
18 Debtors would have positive disposable income under the Amended B22, and Debtors  
19 would be required to commit income for 60 months under the Plan.

20  
21 The Trustee bases his argument on the Debtors' intention to strip the lien on account  
22 of the CWL Junior Claim and relies on *In re McGillis*, 370 B.R. 720 (Bankr. W.D. Mich.  
23 2007). The Debtors, in contrast, argue that the payment on the CWL Junior Claim is  
24 appropriately included in the Amended B22 and cite in support *In re Maya*, 374 B.R. 750  
25 (Bankr. S.D. Cal. 2007). The Court finds the analysis in the *Maya* decision to be the more  
26 compelling. While *Maya*, as well as *McGillis*, focus on eligibility for a chapter 7 case, there  
27 is no reason to reach a different conclusion in a case where the means test is utilized to  
28 determine the appropriate applicable commitment period in a chapter 13 case. As the Court

1 noted in *Maya*: ". . . the statutory scheme of the 'means test' is intended to be a mechanical  
2 formulaic calculation . . . [and] it has to be as of a point in time, which almost always is the  
3 petition date." *Maya*, 374 B.R. at 753. In *Maya*, the trustee argued that a payment should  
4 not be included because the debtors stated their intention to "surrender" the residence at  
5 issue. This situation is exactly analogous to one where the debtor proposes to cease making  
6 payments not because the home will be surrendered, but because the loan will be stripped.

7  
8 In this case, the mechanical formulaic approach created by Congress requires that the  
9 Court ignore the Debtors' intention and focus, instead, on the Debtors' actual obligations as  
10 of the Petition Date and during the 6 months prior to the Petition Date. Congress chose this  
11 time period and this methodology. If it results in an artificiality that disfavors creditors in  
12 this circumstance, it is for Congress, and not this Court, to determine that this is  
13 inappropriate. The Court notes that the Ninth Circuit position in *Kagenveama*, as discussed  
14 below, seems supportive of this formulaic approach which is consistent with the plain  
15 language of the statute.<sup>2</sup>

16  
17 **B. Under The Ninth Circuit *Kagenveama* Decision A 60 Month Commitment**  
18 **Period Is Not Required.**

19  
20 In order to confirm a chapter 13 plan, a debtor must ordinarily provide for plan  
21 payments of either 36 months or 60 months in accordance with 11 U.S.C. §1325(b)(4)(A).<sup>3</sup>

22 \_\_\_\_\_  
23 <sup>2</sup> The Trustee also raises another issue, relating to priority claims, but the quantum of that  
24 payment would not be enough to result in a positive disposable income even if decided in  
the Trustee's favor. As a result, the Amended B22 correctly shows that the Debtors are  
above median income debtors with only negative disposable income.

25 <sup>3</sup> 11 U.S.C. §1325(b)(4): For purposes of this subsection, the 'applicable commitment period' –  
26 (A)subject to paragraph (B), shall be –  
27 (i) 3 years; or  
(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse  
28 combined, when multiplied by 12, is not less than –  
(I) in the case of a debtor in a household of 1 person, the median family income  
of the applicable State for 1 earner;

1 In this case, the Debtors claim that a 36-month applicable commitment period is  
2 appropriate, whereas the Trustee claims that a 60 month period applies.

3  
4 In *Maney v. Kagenveama (In re Kagenveama)*, 541 F.3d 868 (9th Cir. 2008), the  
5 Ninth Circuit held that an above-median income chapter 13 debtor with a "negative  
6 projected disposable income" is not subject to any "applicable commitment period" in which  
7 to pay unsecured creditors, notwithstanding the requirements of 11 U.S.C. §1325(b)(4)(A).  
8 The Ninth Circuit, employing a plain-word analysis of 11 U.S.C. §1325(b)(2), determined  
9 that "projected disposable income" simply means "disposable income" projected over the  
10 applicable commitment period. *Kagenveama*, 541 F.3d at 871-872. As such, a court may  
11 not depart from the section 1325(b)(2) "disposable income" calculation and consider other  
12 evidence to derive "projected disposable income." Therefore, a chapter 13 debtor with a  
13 "negative disposable income" also has a "negative projected disposable income."

14  
15 As explained by the Ninth Circuit in *Kagenveama*, only above-median income  
16 chapter 13 debtors with "projected disposable income" are subject to a 5-year commitment  
17 period. As such, debtors with "negative projected disposable income" have no "projected  
18 disposable income" for the purposes of the plan confirmation requirements of 11 U.S.C.  
19 § 1325(b).

20  
21 Although such debtors are not subject to the "applicable commitment period", they  
22 must still submit a good-faith voluntary payment plan for their unsecured creditors.  
23 11 U.S.C. § 1325(a)(3). And in the case of *Kagenveama*, this good-faith requirement was  
24 met by an approved payment plan in which the debtor proposed to pay her unsecured

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26  
27 (II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest  
28 median family income of the applicable State for a family of the same  
number or fewer individuals.

1 creditors in monthly installments that were slightly lower than those proposed by the trustee,  
2 over a 3-year commitment period.

3  
4 In this case, the Amended B22 demonstrates that Debtors, who are above-median  
5 income chapter 13 debtors, have a "negative disposable income." Therefore, they also have  
6 a "negative projected disposable income." Although the Debtors correctly note that this  
7 finding means that they are not subject to a 5-year "applicable commitment period", they  
8 wisely have proposed payments that go beyond a 3-year period.

9  
10 **C. The Good Faith Requirement Of Section 1325(a)(3) Does Not Bar Confirmation.**

11  
12 Even if a 60 month commitment period is not required, the Court must independently  
13 determine whether the Plan has been proposed in good faith. In this case, the Court  
14 determines that the good faith requirement is met.

15  
16 With respect to the commitment period's length, the United States Bankruptcy  
17 Appellate Panel for the Ninth Circuit in *Washington Student Loan Guaranty Ass'n v. Porter*  
18 (*In re Porter*), 102 B.R. 773 (B.A.P. 9<sup>th</sup> Cir. 1989) and again in *Villanueva v. Dowell (In re*  
19 *Villanueva)*, 274 B.R. 836 (B.A.P. 9<sup>th</sup> Cir. 2002) held that a 36-month commitment period,  
20 standing alone, did not constitute bad faith even though a chapter 13 debtor had initially  
21 proposed a longer term. As such, case law supports the conclusion that a 36-month  
22 commitment period may be long enough to constitute good faith, notwithstanding other  
23 factors.

24  
25 Further, while the Court can speculate that Congress may have intended that all  
26 above-median income debtors commit to 60 months, the tool Congress chose to police its  
27 above-median income debtor filing requirements was the means test. Thus, where the Code  
28 does not expressly require a 60 month commitment given that a debtor has negative

1 projected disposable income, the Court cannot and should not use good faith as a cudgel to  
2 beat the debtor into submission to a 60 month plan in all above-median income debtor cases.  
3 The Court must consider the unique facts of each case. Thus, while there may be cases  
4 where 60 months is required,<sup>4</sup> 60 months is not required here.

5  
6 First, the Debtors propose a plan that is only 8.73 months short of 60 months.  
7 Debtors will make payments over a 51 month period. To the extent fortune shines on them  
8 during this almost five year plan, the Trustee will be able to seek a modification under  
9 11 U.S.C. § 1328 in order to increase payments to achieve a payment to unsecured creditors.  
10 Further, the proposed plan payments exceed the disposable income as set forth in their  
11 Schedule J. The Court is also aware that their fortunes have not been favorable since the  
12 Petition Date. It appears to be undisputed that their income has fallen and that their  
13 expenses have risen. Thus, it is clear that the Debtors have proposed a plan that, at least  
14 currently, provides for payments that are difficult for them to meet. In particular, there is no  
15 evidence that Debtors have improperly inflated expenses in their Schedule J. Debtors'  
16 Schedule J does not include any payment on account of the CWL Junior Claim.

17  
18 Finally, the Court notes that the extension of the applicable commitment period could  
19 have little impact on the fortunes of unsecured creditors. In proposing a plan, the Debtors  
20 could consistent with their budget propose slightly lower monthly payments in the amount  
21 set forth in Schedule J (\$1,368.49) or in a lower amount if appropriate given increases in  
22 appropriate expenses and decreases in income. Sixty months of payments at \$1,368.49  
23 equals \$82,109. The Plan pays slightly more.

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28 <sup>4</sup> It is difficult for the Court to envision any situation where an above-median income debtor could  
in "good faith" propose a plan of less than 36 months.

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**CONCLUSION**

Consistent with this Memorandum Decision, the Debtors' proposed Plan may be confirmed. Counsel for the Debtors is to submit a confirmation order within ten (10) days. If counsel wishes to request additional fees beyond the presumptive fee in this atypical case, counsel must submit a fee application complying with the U.S. Trustee Guidelines within thirty (30) days and must set this matter for hearing in Department 3.

DATED: July 17, 2009

  
LAURA S. TAYLOR, JUDGE  
United States Bankruptcy Court