The relief described hereinbelow is SO ORDERED.

SIGNED this 11th day of August, 2021.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

MARIAH KEYANA NICKSION,

Debtor.

Case No. 17-21284
Chapter 13

ORDER DENYING MOTION FOR ENTRY OF DISCHARGE

Section 1328(a) of the Bankruptcy Code[1] provides that a Chapter 13 debtor is entitled to a discharge of debts "after completion by the debtor of all payments under the [debtor's Chapter 13] plan." The issue presented in this case is whether a

[1] All statutory references in this order are to Title 11, United States Code (the "Bankruptcy Code").

debtor with unpaid but "abated" plan payments can receive a discharge under § 1328(a). The Court holds that she cannot.

Debtor Mariah Keyana Nicksion filed for bankruptcy under Chapter 13 on July 7, 2017. According to the Schedule J and the Form 122C-1 attached to her petition, Nicksion is a below-median-income debtor with a monthly net income of $309.17. Her confirmed plan (1) requires her to make monthly payments of $300 to the Chapter 13 trustee for "not less than 3 years, but in any event, not more than 5 years,"[2] (2) allocates $200 of each monthly payment to secured creditor Santander Consumer USA to pay for a 2011 Nissan Altima; and (3) provides that she will pay all priority claims in full. At the time of plan confirmation, the Chapter 13 trustee calculated that in order to pay all priority claims (here, attorney fees and tax debts), Nicksion's plan would need to run for 43 months.[3]

Nicksion missed a number of plan payments between 2017 and 2020, causing the trustee to file several motions under § 1307(c) to dismiss her case for default.[4] To avoid dismissal of her bankruptcy case, Nicksion filed three motions to "abate/suspend" the missed payments.[5] She also filed a motion to surrender the

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[2] ECF 2. The confirmation order requires Nicksion to make monthly $300 payments to the trustee "as required by the Plan as Confirmed." ECF 36.

[3] Although § 1322(d)(2) of the Bankruptcy Code generally limits the length of a below-median-income debtor's plan to 3 years, it allows the bankruptcy court to approve a plan length of up to 5 years for "cause."

[4] ECF 38; ECF 52; ECF 61; ECF 78; ECF 85. Section 1307(c)(6) permits a bankruptcy court to dismiss a Chapter 13 case for "material default by the debtor with respect to a term of a confirmed plan."

[5] ECF 57; ECF 64; ECF 91. The first motion to abate stated that Nicksion had been temporarily unable to work due to "health reasons." The second motion stated that

Altima, alleging that it "constantly needs repair, and the cost of same has become burdensome."[6]

The Court granted Nicksion's motions to abate on April 1, 2019; December 4, 2019; and March 3, 2021. Those orders, which were drafted by Nicksion's counsel and approved by the trustee, provide that "the Plan shall be modified to abate/suspend all payments due and not yet paid."[7] The Court also granted Nicksion's motion to surrender on December 4, 2019, with an order (again drafted by Nicksion's counsel and approved by the trustee) providing that "[Santander] is hereby eliminated from any payments under the plan."[8]

Nicksion now moves for discharge under § 1328(a), asserting that she "has made all payments required under the Chapter 13 Plan."[9] The trustee objects, pointing out that "[w]hile this case has run 44 calendar months from the Petition date, 36 plan payments have not been made[;] . . . only $9,288.00 (the equivalent of 31.46 plan payments) has been paid to date."[10] Nicksion responds that "Debtor has completed all payments by surpassing [her] 36-month applicable commitment period and by paying . . . priority claims in full."[11] Nicksion does not dispute the

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she had fallen behind on payments while on maternity leave. The third motion stated that she had fallen behind on payments "due to COVID-19."

[6] ECF 66.

[7] ECF 59; ECF 70; ECF 95.

[8] ECF 71.

[9] ECF 93 ¶ 1.

[10] ECF 97.

[11] ECF 98 ¶ 2.

trustee's assertion that she has paid only $9,288 into her plan, but argues that she has "paid in [her] disposable income for over 36 months," reasoning that "[s]ome months, there was no disposable income."[12]

Nicksion's plan requires her to make monthly payments of $300 for a term of three to five years and to pay all priority claims in full. She argues that she has completed the plan because she has paid in her actual disposable income for more than three years and satisfied all priority claims, but her argument is inconsistent with her plan language. The plan does not provide for monthly payments of actual disposable income—it provides for monthly payments of $300. Nor does the plan require monthly payments for three years *or* until priority creditors are paid in full; rather, it requires monthly payments for three years *and thereafter* until priority claims are paid.

Nicksion cites *Fridley v. Forsythe (In re Fridley)*, 380 B.R. 538 (B.A.P. 9th Cir. 2007), and this Court's decision in *In re Beckerle*, 367 B.R. 718 (Bankr. D. Kan. 2007), for the apparent proposition that she need not pay any particular amount into her plan so long as three years have elapsed. In *Fridley*, the debtors' Chapter 13 plan provided "for payments of $125 per month and . . . that the debtors would pay their projected disposable income of $0 for no less than the applicable commitment period of thirty-six months." *Fridley*, 380 B.R. at 540. The debtors, whose actual gross income in the first year was 45% more than they had projected, made a lump-sum payment to the trustee in the fourteenth month of their plan that

[12] ECF 107 at 2.

"brought the total paid to slightly more than the $4,500 required by the 36-month plan," then moved for discharge. *Id.* The Ninth Circuit B.A.P. held that the debtors were not eligible for discharge under § 1328(a) because 36 months had not yet elapsed, reasoning that "the statutory concept of 'completion' of payments includes the completion of the requisite period of time." *Id.* at 546. *Fridley*, then, stands for the proposition that the passage of time is *necessary* to "complete" a 36-month plan. It does not mean that the passage of time is *sufficient*.

Beckerle involved an above-median-income debtor whose monthly disposable income as calculated on Form B22C was -$1,498.52. *Beckerle*, 367 B.R. at 718-19. The debtor, whose Schedules I and J showed a monthly net income of $123.86, proposed a plan in which he would pay $120 per month for 38 months. *Id.* at 719. This Court denied confirmation of the proposed plan for failure to comply with § 1325(b)(1) and (4), reasoning:

> A negative number on Form B22C indicates a plan is not feasible. However, if the debtor can propose a feasible plan payment, then the debtor has shown there is, in fact, disposable income, and the plan must last for five years if his income is above median. Debtors cannot have it both ways. If they want to rely exclusively on Form B22C with a negative disposable income number, then they cannot propose a feasible plan. On the other hand, a feasible plan payment commits debtors to a certain plan length, for the above-median income debtor, of no less than five years.

Id. at 721 (citations omitted). *Beckerle* thus stands for the proposition that Nicksion's plan, which requires monthly payments of $300 for at least three years, satisfied § 1325(b) at confirmation. It does not mean that Nicksion has "completed"

her plan payments once three years have elapsed regardless of how many payments she has actually made.[13] An obligation to make monthly payments for at least three years "is not satisfied by the mere passage of time." *See* Keith M. Lundin, *Lundin on Chapter 13* § 91.5, at ¶ 5.[14]

Nicksion's plan requires monthly payments of $300 for at least three years.[15] The plan therefore requires Nicksion to make at least thirty-six $300 payments, for a minimum total of $10,800. The parties agree that all priority claims have been paid in full and that $150 may be subtracted from the total amount Nicksion must

[13] In the other case Nicksion cites, *In re Chancellor*, the debtors' confirmed Chapter 13 plan provided for monthly payments of $580 for 60 months. *See In re Chancellor*, 78 B.R. 529, 529 (Bankr. N.D. Ill. 1987). The plan also specifically provided that secured creditors would receive 100% of their claims, and that unsecured creditors would receive 10%. *Id.* After a secured creditor foreclosed on the debtors' property, an unsecured creditor moved to modify the plan under § 1329(a) to increase its recovery. *Id.* at 530. Although the debtors had made only 14 of their 60 plan payments, the two unsecured creditors in the case had already received 10% of their claims; the court reasoned that payments were "complete" for purposes of § 1329(a) because the debtors had "completed their obligation to each class of creditors as provided for in their plan." *Id.* Accordingly, the court held that the unsecured creditor's motion to modify was untimely under § 1329(a). *Id.* at 531. *Chancellor* is distinguishable because the present case because (1) *Chancellor* is about plan modification under § 1329 rather than discharge under § 1328(a), and (2) unlike the plan at issue in *Chancellor*, Nicksion's plan does not specify that unsecured creditors will receive any particular percentage of their claims. Regardless, this Court respectfully declines to follow it.

[14] Judge Lundin's treatise is available at https://lundinonchapter13.com.

[15] A plan providing for fewer than three years' worth of payments and less than full payment of allowed unsecured claims would have run afoul of § 1325(b) if the trustee or an unsecured creditor objected to confirmation.

pay.[16] Therefore, Nicksion must—without more—have paid a minimum of $10,650 to the trustee before she has "completed" her Chapter 13 plan payments.

There is more to this case, though, because Nicksion has successfully "abated" several payments. But what does abatement do? Does it remove payments from a Chapter 13 plan, as argued by Nicksion, or merely postpone the payments, as argued by the trustee? Neither the Bankruptcy Code, nor the Federal Rules of Bankruptcy Procedure, nor the Local Rules of the United States Bankruptcy Court for the District of Kansas provide an answer—the term "abatement" does not appear in any of them.[17]

Abatement is a term of art in bankruptcy. It evolved under local practice as a way for debtors to address delinquencies in plan payments.[18] Before Nicksion raised the issue here,[19] it was the common understanding of the Chapter 13 trustee and this Court that abatement does not remove missed plan payments, but only postpones them—i.e., allows them to be cured at a later date.

Nicksion's motions to "abate/suspend" her missed payments and the proposed orders drafted by her counsel are both consistent with that understanding. They do

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[16] Nicksion's third motion to abate also requested that "her Plan payment be lowered to $150 for January 2021." ECF 91. The trustee agrees that the order granting that motion reduced by $150 the total amount Nicksion must pay into her plan. *See* ECF 106 ¶ 10.

[17] *See Zeigler v. Lomas & Nettleton Co. (In re Zeigler)*, Bankr. No. 91-12620S, Adv. No. 91-1014S, 1992 WL 50006 (Bankr. E.D. Pa. Mar. 2, 1992); *see generally* D. Kan. LBR.

[18] *See In re Tonioli*, 359 B.R. 814, 816 n.1 (Bankr. D. Utah 2007) (citing *Zeigler*).

[19] Nicksion's counsel has raised the same issue in *In re Annett*, Case No. 17-22434.

not state that Nicksion will pay less than $10,800 into her plan, or make fewer than 36 payments, or (with one exception that subtracted $150 from one payment)[20] pay less than $300 each time, or contain any unambiguous language regarding Nicksion's obligations under her plan. In the absence of such language, this Court (which is in the best position to interpret its own orders)[21] concludes that Nicksion's obligations under her plan remained intact following abatement of the missed payments. Nicksion must therefore cure the missed payments (to the extent not already paid) to be eligible for a discharge under § 1328(a).

The Court notes that while abatement allows a debtor to cure missed plan payments, it is not—at least as practiced in this Court—a formal modification of the plan pursuant to § 1329. Rather, abatement is the provision of a grace period in which a debtor may cure missed payments. Technically, when this Court grants a debtor's motion to abate missed payments, it is declining to dismiss the debtor's case for material default under § 1307(c)(6)[22] so long as the debtor cures the missed payments within a reasonable time.[23] The debtor's obligations under the plan, however, remain intact.

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[20] *See* note 16 *supra*.

[21] *See, e.g.*, *Casarotto v. Mo. Dep't of Revenue (In re Casarotto)*, 407 B.R. 369, 376 (Bankr. W.D. Mo. 2009).

[22] Here, as is usually the case, the debtor's motions to abate missed payments followed the trustee's motions to dismiss her case for default under § 1307(c)(6).

[23] Prior to the Tenth Circuit's recent decision in *Kinney v. HSBC Bank*, it was the view of this Court that a debtor could cure missed payments outside the maximum five-year commitment period. *Cf.* Hon. W. Homer Drake, Jr., et al., *Chapter 13 Practice & Procedure* § 4:9 (2021) (observing that according to some courts, "allowing the debtor additional time to cure defaults does not violate [the five-year

Nicksion's obligation to make monthly payments of $300 for at least three years also remained intact following her surrender of the Altima. The order granting the motion to surrender provides that "[Santander] is hereby eliminated from any payments under the plan," meaning that Santander will receive no further payment from the Chapter 13 trustee on its secured claim. However, in the absence of any unambiguous language regarding *Nicksion's* obligations under the plan, those obligations have not changed. Thus, like abatement, surrender of the Altima did not modify Nicksion's obligation to make at least thirty-six $300 payments. While Nicksion argues that this decision "punishes the Debtor in this case for a financially sound choice (surrendering cars they no longer needed or could afford),"[24] the Court disagrees. Eliminating Santander from the plan allows Nicksion to complete her plan with 36 payments rather than the 43 payments originally estimated by the trustee. And the Court is not ruling that a debtor can never lower her Chapter 13 plan payment by surrendering an unaffordable car—only that if a debtor wishes to lower her plan payment, she must request to do so in clear and specific terms.

Nicksion will be entitled to a discharge under § 1328(a) after completion of all payments under her plan. To complete her plan payments, she must have paid a

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limitation on plan payments] because the payments are not 'provided for' by the plan") (citing *Germeraad v. Powers*, 826 F.3d 962, 968 (7th Cir. 2016)). However, in *Kinney*, the Tenth Circuit held that a debtor must make all payments within the five-year period to receive a discharge under § 1328(a). *See Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, No. 20-1122, 2021 WL 3123644, at *8 (10th Cir. July 23, 2021).

[24] ECF 102 at 7.

minimum of $10,650 to the Chapter 13 trustee. She has paid only $9,288, and must cure $1,362 in missed payments before she can receive a discharge under § 1328(a). The motion for discharge is therefore denied.

IT IS SO ORDERED.

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