

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:

**SERGIO MIGUEL MEZA and
SHARON SAUCEDA MEZA,**

Debtors.

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CASE NO. 01-42612-BJH-13

MEMORANDUM OPINION AND ORDER

On April 6, 2001, Sergio Miguel and Sharon Saucedá Meza (the “Debtors”) filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code. The Court confirmed their Chapter 13 plan on April 2, 2002, and an Amended Order Confirming Modified Chapter 13 Plan, Valuing Collateral and Allowing Debtor’s Attorney’s Fees (the “Confirmation Order”) was entered on April 9, 2002.

The Debtors’ “Final Chapter 13 Plan and Motion for Valuation” (the “Plan”) provides that they will pay “\$350.00 per month for 46 months \$16,100.00.” The Plan estimates that unsecured creditors will be paid zero percent on their claims. The Plan also contains a provision entitled

“Number of Payments” which states

The months allowed for repayment of claims indicated in Section I, Part A [which in this case is 46] shall be determined to be met when the trustee receives a sum of money equal to the amounts he should have received in the number of months provided for by the Plan, or the Plan as modified.

Although no modified Plan was filed, the Confirmation Order provides that the Debtors “shall pay the sum of \$350.00, per month, commencing on May 21, 2001, for 50 months (not to exceed 60), for a total of \$17,500.00.” The Confirmation Order further provides that “the Trustee is authorized to receive, endorse, and apply to any delinquent payments under the Plan, any Income Tax Refund payable to debtor(s) during the pendency of this case.”

On March 23, 2004, the Chapter 13 Trustee (the “Trustee”) filed a Modification of Plan after Confirmation (the “Modification”) together with a request that the Modification be approved and a Notice scheduling a hearing if objections to the Modification were timely filed.¹ The Modification recites that the Debtors’ “current plan base amount” is \$17,500.00, and that the Trustee has received payments to date of \$15,104.00. The Modification seeks to increase the Plan base amount to \$19,045.00, which will result in an approximate 8.4 percent distribution to unsecured creditors. The Trustee alleges that the Modification is sought because

The I.R.S. issued a tax refund in the amount of \$3,029 for the year 2003. The Trustee has retained possession of the tax refund. \$1,545 of the tax refund is disposable income pursuant [sic] to 11 U.S.C. Section 1325(b)(1)(B) therefore the Trustee proposes to apply the lump sum payment of \$1,545 to the plan base and raise the percent to general unsecured creditors. The remaining \$1,484 of the refund will be returned to the debtor.

On May 3, 2004, the Debtors filed their objection to the Modification (the “Objection”). The

¹The Debtors objected to the Modification. In accordance with Chapter 13 practice in this District, the Modification was set for a pre-hearing conference on May 7, 2004, with a hearing before the Court on June 2, 2004. By agreement of the parties, the hearing was passed to July 7, 2004, at which time the Court heard argument and took the Modification and the Debtors’ objection under advisement.

Debtors assert that “they have completed payments under their confirmed Chapter 13 plan; and therefore, the provisions of 11 U.S.C. § 1329 do not allow the trustee to modify that plan.” *Objection*, ¶ 6. They also argue that the income tax refund is not additional disposable income and does not present a change in circumstances such that a modification of the Plan is proper.²

It is undisputed that sometime after the filing of, and before the July 7, 2004 hearing on, the Modification, the Debtors refinanced their exempt homestead and used the proceeds to pay off the balance due under the Plan.³ According to the Debtors, since they completed all payments due under the Plan before the Modification was actually heard, the Trustee’s request for approval of the Modification is barred by 11 U.S.C. § 1329(a).

To dispose of the Modification and the Objection, this Court must decide if a debtor may deprive the Court of the power to approve a proposed modification to a confirmed Chapter 13 plan by paying off the plan before the request to modify is heard. The parties have not cited, and the Court’s own research has not revealed, any case in which this issue has been addressed.

²Because the Court concludes that it cannot authorize a modification of the Plan after the Debtors completed all payments required by the Plan, the Court does not have to reach this issue. However, the Court notes that there is a split in authority as to whether the party seeking modification must show a substantial and unanticipated change in circumstances sufficient to warrant modification. *Compare Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000) and *In re Witkowski*, 16 F.3d 739 (7th Cir. 1994) (holding that neither § 1329 nor the doctrine of res judicata require the movant to show a change in circumstances prior to modification) *with Arnold v. Weast (In re Arnold)*, 869 F.2d 240 (4th Cir. 1989) and *In re Perkins*, 304 B.R. 477 (Bankr. N.D. Ala. 2004) (modification is allowed only if the movant establishes a post-confirmation material change of circumstances). If the Trustee is required to make such a showing, the Court questions whether he would be able to do so here. The Confirmation Order provides that future tax refunds will be retained by the Trustee and applied to delinquencies under the Plan, suggesting that the potential for tax refunds was anticipated and addressed by the parties.

³The Debtors did not seek, or receive, Court authority to incur debt in connection with the refinancing of their homestead. While the Debtors should have obtained Court approval of their refinancing, there is nothing in the record to suggest that they have acted in bad faith, to the extent that their motive is relevant. As one court has noted, “[f]or those extremely rare circumstances under which a debtor’s prepayment is actually an affirmative attempt to defraud creditors by concealing an economic windfall, the Code provides that a discharge entered under such circumstances can be revoked.” *In re Smith*, 237 B.R. 621, 627 n.9 (Bankr. E.D. Tx. 1999) (holding that a chapter 13 debtor may, without providing advance notice to any party, tender all payments due under a confirmed plan on an accelerated basis and thereby create an entitlement to a discharge). *See* 11 U.S.C. § 1328(e).

Legal Analysis

Once a plan is confirmed, it is binding on the debtor and creditors. *See* 11 U.S.C. § 1327(a). Many courts have held that confirmation of a plan is res judicata of all issues that could or should have been litigated at the confirmation hearing. *See, e.g., In re Coffman*, 271 B.R. 492, 495 (Bankr. N.D. Tx. 2002); *In re Goos*, 253 B.R. 416, 419 (Bankr. W.D. Mich. 2000). However, “section 1329(a) of the Bankruptcy Code creates a statutory exception to the binding effect of a confirmed chapter 13 plan because it authorizes certain post-confirmation modifications to such a plan.” *In re Cameron*, 274 B.R. 457, 460 (Bankr. N.D. Tx. 2002).

As relevant here, § 1329(a) provides that “[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim” Moreover, § 1329(b)(2) provides that “[t]he plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.” Finally, Federal Rule of Bankruptcy Procedure 3015(g), which implements § 1329, provides:

A request to modify a plan pursuant to § 1229 or § 1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee, and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by rule 9014.

Thus, when read together, § 1329 and Rule 3015(g) contemplate that the proposed modification does not become the plan until the expiration of a twenty-day notice period after the modification is filed.⁴ As noted by a leading treatise, “the literal language of section 1329(a) would appear to permit a debtor to complete payments during the 20 days that a request to modify must be pending under Federal Rule of Bankruptcy Procedure 3015(g) and thereby deprive the court of the power to modify the plan.” 8 *Collier on Bankruptcy* § 1329.08 (Alan. N. Resnick and Henry J. Sommer, eds., 15th ed. rev. 2004).

The Court agrees that the plain language of § 1329 leads inexorably to that result. While at first blush that may seem to encourage strategic behavior on the part of debtors, the plain language of the statute allows such strategy, and “when the statute’s language is plain, the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms.” *Lamie v. United States Tr.*, 124 S. Ct. 1023, 1030 (2004) (citation omitted). Because the result is not absurd, this Court concludes that a Chapter 13 debtor may deprive the Court of the power to authorize a plan modification by completing his plan payments during the twenty-day notice period of Rule 3015(g).

Apart from the literal language of § 1329(a), there are other bases to support the Court’s conclusion that the Trustee’s motion, while timely filed, is now moot.⁵ First, when Congress wanted

⁴As contrasted with pre-confirmation modifications, which can be filed “at any time before confirmation,” 11 U.S.C. § 1323(a), and, “after the debtor files a modification under this section, the plan as modified becomes the plan.” 11 U.S.C. § 1323(b).

⁵Neither party has addressed a threshold issue – namely, whether completion of payments occurs when the debtor tenders funds to the trustee, or whether it occurs when the trustee thereafter disburses the funds to creditors. A clear majority of cases hold that payments are completed when the debtor tenders funds to the trustee sufficient to make payment in full in accordance with the plan. *See, e.g., Casper v. McCullough (In re Casper)*, 154 B.R. 243, 246 (N.D. Ill. 1993). Most courts hold that the debtors need not make the number of monthly payments specified in a plan, as long as they have paid in the amount that would have been paid had the plan lasted the specified number of months. In this case, the Plan stated that “[t]he months allowed for repayment of claims . . . shall be determined to be met when the trustee receives a sum of money equal to the amounts he should have received in the number of

to make clear that the mere filing of a motion within a specific deadline is sufficient (to either meet the deadline or to trigger some event), and that the motion does not need to be *actually heard* within the original deadline, it knew how to do so.⁶ For example, Federal Rule of Bankruptcy Procedure 4003(b) provided, prior to December 1, 2000, that “[t]he trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion of the meeting of creditors held pursuant to Rule 2003(a) or the filing of any amendment to the list or supplemental schedules unless, within such period, further time is granted by the court.” Under this former version of Rule 4003(b), a body of case law developed which held that the bankruptcy court lacked jurisdiction to grant a timely filed request for an extension if it had failed to actually *hear and rule* on the request within the original time period. However, on December 1, 2000, Rule 4003(b) was amended to provide:

A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

. . .

The Advisory Committee Notes to the 2000 Amendments indicate that the Rule was amended to make clear that a bankruptcy court may grant a request for an extension as long as the request was *filed* within the original time period.

In contrast, § 1329 does not say that a request for a plan modification must be *filed* prior to the completion of plan payments. Rather, it says that a plan may be modified “after confirmation

months provided for by the Plan, or the Plan as modified.” Here, the parties agree that the Debtors have paid all monies required by the Plan as originally confirmed.

⁶ Technically, the Federal Rules of Bankruptcy Procedure are prescribed by the United States Supreme Court. However, they are transmitted to Congress and automatically become effective if Congress fails to act.

. . . but before completion of payments under such plan.” 11 U.S.C. § 1329(a). In other instances throughout the Code or Rules where Congress believed that the filing of a motion was sufficient to preserve the status quo or effect some action, it said so. *See, e.g.*, 11 U.S.C. § 109(g)(2); Fed. R. Bankr. P. 4004(b). It did not say so in § 1329.

Further, while it makes sense in some instances that the filing of a motion should be sufficient, there is a logical distinction that can be made with respect to the deadline imposed in § 1329(a). In those instances in which the filing of a motion is sufficient, the bankruptcy case is in progress. And, in those instances, Congress is understandably concerned that a court’s inability to schedule a hearing or to rule upon a motion within a very short time period may affect the substantive rights of parties in an active and ongoing case. In contrast, however, upon completion of plan payments in a Chapter 13 case, the bankruptcy case is, for all intents and purposes, over. While there is unquestionably some administrative and ministerial work to be performed, the debtor is immediately entitled to a discharge. *See* 11 U.S.C. § 1328(a) (“As soon as practicable after completion by the debtor of all payments under the plan . . . the court shall granted the debtor a discharge”) A discharge “is, without question, the ‘holy grail’ of the Bankruptcy Code. Indeed, it forms the nucleus around which the Code orbits.” *Rupert v. Krautheimer (In re Krautheimer)*, 210 B.R. 37, 46 (Bankr. S.D.N.Y. 1997). Because a debtor is immediately *entitled* to a discharge, there is no point in time between completion of plan payments and the issuance of a discharge during which a modification of the plan is possible. *Casper v. McCullough (In re Casper)*, 154 B.R. 243, 247 (N.D. Ill. 1993). “If a trustee could amend a Chapter 13 plan after the debtor completes his or her payments . . . the mandatory nature of the discharge provision would be eviscerated.” *Id.*

Finally, any unfairness perceived to result from this decision can be remedied by the Trustee.

In this District, the Trustee prepares all documentation that is filed in connection with confirmation of a plan. In short, the plan is a form plan that is used in all Chapter 13 cases pending in this District, as is the order of confirmation. That a Chapter 13 debtor may be entitled to a tax refund during the several year pendency of his case and plan is not surprising. If the Trustee believes that tax refunds should, as a matter of course, be considered disposable income and be required to be added to the plan base during the life of the plan, the Trustee could object to confirmation of any plan that fails to so provide.

Here, if the Plan or the Confirmation Order had required a turnover of a tax refund (or some portion of a tax refund) to the Trustee as disposable income, the Modification could not have been mooted by the Debtors, as the Debtors would have been unable to complete their Plan payments without tendering the tax refund.⁷ *See, e.g., Profit v. Savage (In re Profit)*, 283 B.R. 567 (9th Cir. BAP 2002) (motion to modify filed before debtors had turned over tax refund was timely). Instead, the Confirmation Order in this case provides that the “Trustee is authorized to receive, endorse, *and apply to any delinquent payments* under the Plan, any Income Tax Refund payable to debtor(s) during the pendency of this case.” (emphasis added). The Debtors were not delinquent in their Plan payments when the tax refund was received; and they refinanced their exempt house to pay off the Plan prior to the hearing on the Modification.

Conclusion

By the time the Modification was presented to the Court, the Debtors had completed all payments required by the terms of the Plan. Thus, in accordance with the unambiguous language of § 1329(a), the Modification is disapproved as untimely.

⁷In fact, no modification would have been required because the plan as confirmed would have required the payment of the tax refund (or some portion of the tax refund) into the plan.

SO ORDERED.

END OF ORDER