IT IS ORDERED as set forth below:

Date: July 19, 2011

Paul W. Bonapfel
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	CASE NUMBER: 09-81662-PWB
	:	
SCOTT BRIAN LOPEZ,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER SUSTAINING CHAPTER 13 TRUSTEE'S OBJECTION TO MODIFICATION OF CONFIRMED PLAN

The Chapter 13 Trustee objects to the Debtor's modification of his confirmed plan to reduce chapter 13 plan payments to $0 per month and the payment to unsecured creditors to 0%. The Debtor contends that such a modification is necessary and permissible due to his post-confirmation change in circumstances. For the reasons set forth herein, the Trustee's objection to the modification is sustained and the modification is disallowed.[1]

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[1]This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) over which this Court has jurisdiction pursuant to 28 U.S.C. § 1334.

Factual Background

Because the Debtor's proposed modification is premised on a change of circumstances, the Court must examine the history of the case. The Debtor's original chapter 13 plan filed in August 2009 (Doc. 4), proposed a monthly plan payment of $0.00 per month and a dividend of 0% to unsecured creditors over an applicable commitment period of thirty-six months.[2] Attorney's fees of $1,250.00 were paid in full prior to the filing of the case. The Debtor's plan also provided that the Debtor would maintain an automobile lease payment of approximately $340 per month directly to the creditor; no lease arrears were expected. The Debtor anticipated only unsecured, non-priority claims, including an alleged property settlement debt owed to his former spouse that appears to be nondischargeable in a chapter 7 case pursuant to 11 U.S.C. § 523(a)(15).[3] The Debtor's original budget shows monthly net income of negative $17.89. (Doc. 1, Schedule J).

Two of the Chapter 13 Trustee's objections to confirmation of the plan are important here. One objection was that the chapter 13 plan failed to provide for the contribution to the plan of the monthly lease expense upon its expiration in February 2011, possibly indicating a lack of good faith in proposing the plan, 11 U.S.C. § 1325(a)(3). The second was that the proposed plan imposed an administrative burden on the Trustee because it served no apparent bankruptcy purpose and proposed no monthly plan payments or distributions. (Doc. 11).

[2]The Court uses the term "plan payment" to refer to the funds to be paid by the Debtor to the Chapter 13 Trustee each month for disbursement to creditors pursuant to the terms of the plan.

[3]The obligation to his former spouse appears to arise from liability he may owe her upon surrender of real property in Michigan and default on two mortgages on the property.

In response to the Trustee's objections, the Debtor amended the plan.[4] He added a provision requiring the Debtor to pay his 2009, 2010, and 2011 tax refunds (if any existed, presumably) to the Trustee for disbursement to creditors pursuant to the plan. (Doc. 15). He also amended the plan to include a "step" increase in plan payments from $0 to $340.09 beginning in February 2011 (based on expiration of the automobile lease) and proposed to pay the greater of $5,509.44 or two percent (2%) to general unsecured creditors, whichever is greater. (Doc. 27). This ability to begin payments at that time was premised on expiration of the automobile lease.

Apparently satisfied with these changes, the Trustee recommended confirmation of the amended plan. Because the parties resolved the Trustee's objections, the Court heard no argument on any preconfirmation factual or legal issues and entered an order confirming the amended plan on December 2, 2009.

Thirteen months later, and one month before the "step" increase was to go into effect, the Debtor filed a modification of the confirmed plan reducing the plan payment to $0 (removing the step increase) and reducing the dividend to unsecured creditors to $0 or 0%. The modification states, "The Debtor proposed this amendment because his auto lease ends in February 2011. He has to obtain a new lease in order to have transportation. Debtor expects the expense of the new lease to be comparable to the old lease. Debtor's income and other expenses are comparable to what they were at the time of plan confirmation." (Doc. 40, ¶ 2).

An amended budget filed five days later shows a reduction of the lease expense to $200 per month, reduced expenses for food, laundry, automobile insurance, and a gym membership, and

[4]The Debtor filed three amended plans prior to confirmation (Docs. 15, 21, 27). Only the first amended plan (Doc. 15) and the third amended plan (Doc. 27) are relevant here.

an unexplained increase of $356 per month in child support. The budget shows monthly net income of negative $13.79.

The Trustee objected to the modification on the basis that it had not been proposed in good faith, *i.e.*, that this was a return to the original plan to which she had objected in the first place.

At a hearing on March 16, 2011, the Debtor's attorney explained that the modification was necessary due to a change in the Debtor's circumstances. Thus, she explained that the modification to reduce payments to nothing was due to the Debtor's continuing need for an automobile and its attendant expense. At the hearing, the Court approved the Debtor's oral request to enter into a lease agreement on an expedited basis (Doc. 43) and directed the parties to file briefs on the issues raised by the proposed modification.

After the hearing, the Debtor filed another amended budget eliminating the lease expense in its entirety, reducing other expenses, and adding the health insurance expense deducted from wages of $260 per month. (Doc. 47). This budget shows monthly net income of negative $53.79.

Schedule J provides explanations for two of the items in the budget change. First, Schedule J states, "Mr. Lopez' child support agreement stipulates that he must pay health insurance for his two children. He is not currently doing this because they are covered by their stepfather's plan. This is not expected to continue, and Mr. Lopez will begin paying." Second, the Schedule states, "Mr. Lopez anticipates having to make a catch up payment of $2,848 for child support for April-November 2010. This amount is not yet finalized in Wayne County Circuit Court." (Doc. 47-1).

With respect to the elimination of the automobile lease expense, the Debtor's brief

states, "Though he successfully obtained an Order from the Court . . . to sign a new lease (Docket 43), Mr. Lopez was unable to obtain lease financing because he is in an active bankruptcy. He bought a 2001 Volvo S40 from a Craigslist seller for $3400." (Doc. 49, at 7, n.4). The source of funds for this lump sum purchase is not disclosed.

Based on these facts the Court must determine whether the Court should approve modification of the Debtor's chapter 13 plan that will result in the payment of no funds to creditors.

11 U.S.C. § 1329: Modification of a confirmed chapter 13 plan

Section 1329(a)(1) provides that after confirmation of the plan but before completion of plan payments, the debtor, trustee or an unsecured creditor may seek modification of the plan to, *inter alia*, "increase or reduce the amount of payments on claims of a particular class provided for by the plan."[5] A postconfirmation modification of a plan is subject to the preconfirmation plan parameters set forth in § 1322(a), § 1322(b), and § 1323(c), as well as the plan confirmation requirements of § 1325(a). 11 U.S.C. § 1329(b). Thus, whether the Debtor's modification is proposed in "good faith" as required by § 1325(a)(3) is an appropriate inquiry made applicable by § 1329(b).

Further, a bankruptcy court has discretion to determine whether to approve a post-confirmation modification of a plan. *See* § 1329(a) ("the plan *may* be modified"). This discretion

[5]Section 1329(a)(4) makes special provision for changes due to the purchase of health insurance coverage. Though the Debtor did not raise this issue at the hearing, his amended budget contains the explanation, "Mr. Lopez' child support agreement stipulates that he must pay health insurance for his two children. He is not currently doing this because they are covered by their step-father's plan. This is not expected to continue, and Mr. Lopez will begin paying." Section 1329(a)(4) contains specific requirements that the Debtor document such health care expenses. The Debtor has not done so and the amendment does not refer to them as actual expenses, but anticipated expenses. In any event, based on the Court's ruling as set forth herein, the nature of the budgetary expenses is not determinative.

is necessary and inherent in the determination when a court must weigh competing considerations.

On the one hand, the Debtor, based on an alleged change of circumstances, seeks to do exactly what § 1329(a)(1) permits, namely reduce the payments to creditors notwithstanding the bargain he has struck with creditors as commemorated in the confirmed plan. On the other hand, the Trustee contends that a modification to pay creditors nothing and obtain a chapter 13 discharge, including the discharge of a property settlement debt that would not otherwise be dischargeable in chapter 7 or via a chapter 13 hardship discharge, is not made in good faith when it modifies the fairly negotiated deal made to resolve the Trustee's original objections to confirmation. The Court will examine each argument in turn.

Whether the Debtor has experienced a change in circumstances

Courts are split on whether a change in circumstances is necessary in order for a debtor to modify a confirmed chapter 13 plan. Some courts have recognized that a substantial and unanticipated change in circumstances in a debtor's financial condition is a prerequisite to modification of a confirmed plan. *See*, *In re Murphy*, 474 F.3d 143, 149-150 (4th Cir. 2007); *In re Mellors*, 372 B.R. 763 (Bankr. W.D. Pa. 2007); *In re Euler*, 251 B.R. 740 (Bankr. M.D. Fla. 2000). Such a requirement is premised on the principle that a confirmed plan is a final order binding the debtor and creditors and entitled to claim preclusive effect, 11 U.S.C. § 1327(a), and that to permit modification without demonstrating an unanticipated change undermines the fundamental precept of finality and may permit the relitigation of issues that could or should have been litigated prior to confirmation. *Murphy*, 474 F.3d at 149.

Other courts conclude that no change in circumstance is necessary for post-confirmation modification of a plan. These courts conclude that because § 1329 explicitly permits modification

of a confirmed plan, it operates as a statutory exception to the principle of claim preclusion. *E.g., In re Meza,* 467 F.3d 874 (5th Cir. 2006)*; In re Witkowski*, 16 F.3d 739 (7th Cir. 1994).

In *In re Hoggle*, 12 F.3d 1008, 1011 (11th Cir. 1994), the Eleventh Circuit considered the scope and purpose of § 1329 in conjunction with § 1322. In concluding that § 1322(b) and § 1329 permit a debtor to modify a chapter 13 plan to cure a postpetition mortgage default, it looked to the legislative history of § 1329, observing, "Congress designed § 1329 to permit modification of a plan due to changed circumstances of the debtor unforeseen at the time of confirmation." *Hoggle*, 12 F.3d at 1011.

Although *Hoggle* does not hold that a change in circumstances is necessary to support modification, the Eleventh Circuit's view of the purpose of § 1329 supports the conclusion that consideration of whether the Debtor has experienced a change in circumstances since confirmation of the plan is an appropriate inquiry and is one factor that a court should consider in determining whether to approve a proposed modification.

The Debtor contends that the modification of his confirmed plan to reduce payments to $0 and the payment to creditors to 0% is necessary because his circumstances have changed due to an increase in his expenses. Upon closer examination, however, it is unclear whether the Debtor has demonstrated an actual change in circumstances.

Although the Debtor's amended budgets show a reallocation of expenses (some have increased, some decreased), the Debtor's net monthly income from day one of this case has been consistently negative. At no time, by the Debtor's own admission in the schedules, has he had funds to pay to creditors in a chapter 13 case (aside from the direct payments for the automobile lease).

Further, the Debtor appears to concede that the proposal in his preconfirmation amendments to step up the payments in February 2011 was never realistic. In his brief, the Debtor explains, "The Chapter 13 Trustee knew then, as now, that the plan payment was entirely dependent on the ending of a car lease. The Trustee did not raise a feasibility objection. One wonders how the Chapter 13 trustee envisioned that Mr. Lopez would get to work to make the money to fund the plan if he had no car." (Doc. 49, at 7).

The Debtor's observation and shifting of blame to the Chapter 13 Trustee is somewhat disingenuous. It begs the question that, if the Debtor knew there would be a continuing need for a car expense in the future, why did he agree to the step increase in plan payments based upon elimination of the lease expense?

Section 1329 is not a vehicle for revisiting issues that could have or should have been decided at the time of the confirmation hearing. To the extent that a party amends a plan to satisfy an objection with the thought that it can be undone later, he misunderstands the concept of plan confirmation and its preclusive effect. *See In re Storey*, 392 B.R. 266 (6th Cir. B.A.P. 2008); *In re Butler*, 174 B.R. 44, 47 (Bankr. M.D.N.C. 1994) (absent principles of finality, "there is no readily available brake on the filing of motions under § 1329 by creditors and debtors simply hoping to produce a more favorable plan based on the same facts presented at the original confirmation hearing").

Whether the Debtor has experienced a change in circumstances can be viewed in two ways. The Debtor's circumstances have changed in the sense that his monthly expenses have changed. Conversely, the Debtor's circumstances remain unchanged since the beginning of the case in that he has had and continues to have negative monthly income. The Debtor has never had

income to pay to creditors in his case, and, in fact, it is unclear how he is making ends meet based on the regular monthly expenses he reports. Coupled with his acknowledgment that the step increase in payments was not likely to occur because he would have a continuing vehicle payment, the Debtor's circumstances have not changed at all. The Debtor does not have and arguably never had the ability to fund his confirmed chapter 13 plan. Nothing has changed since confirmation of the plan.

Whether the modification is proposed in good faith

The Chapter 13 Trustee contends that the Debtor's modification should be disallowed because it has not been proposed in "good faith" as required by § 1325(a)(3) and made applicable by § 1329(b). The "good faith" test requires the Court to examine the totality of the circumstances, including, but not limited to, the factors set forth in *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983).[6] Ultimately, the good faith inquiry requires a court to determine whether a plan (or modification in this case) "constitutes an abuse of the provisions, purpose, or spirit of Chapter 13." *In re Lundahl*, 307 B.R. 233, 243 (Bankr. D. Utah 2003).

There is no dispute that the Debtor's income appears stable, he is hard-working, his living expenses are reasonable, and his debts are fairly typical of a chapter 13 debtor. The problem is that the debtor has *no net income at all* to pay creditors, yet seeks the shelter of a chapter 13

[6]The *Kitchens* factors include: the amount of the debtor's income from all sources; the debtor's living expenses; the amount of attorney's fees; the length of the chapter 13 plan; the debtor's motivations in seeking chapter 13 relief; the debtor's degree of effort; the debtor's ability to earn and the likelihood of change to wages; special circumstances such as medical expenses; the frequency with which the debtor has sought bankruptcy relief; the circumstances under which the debtor has contracted his debts and the manner of dealings with creditors; the burden the plan's administration places on the trustee; the types of debts to be discharged and whether such debts would be dischargeable in chapter 7; and the accuracy of the schedules. *Kitchens*, 702 F.2d at 888-889.

discharge. In such a case, the logical conclusion is that other provisions of the Bankruptcy Code are available. A debtor who cannot make plan payments may convert the case to chapter 7 or seek a hardship discharge under § 1328(b).

But a chapter 7 discharge or a hardship discharge will not discharge the property settlement debt. Thus, the Debtor's proposed modification would accomplish what he could not do in chapter 7 or via a hardship discharge.[7]

Herein lies the crux of the "good faith" or fairness issue: whether a plan that pays absolutely nothing to creditors subverts the purpose of chapter 13. Chapter 13 contemplates that an individual with regular income devote a portion of that income over a period of three to five years on a monthly basis to pay various debts, such as mortgages, car notes, taxes, or child support. Unsecured creditors may receive anything from 0% to 100% of their claims depending on the circumstances of the case.

A nondischargeable claim under § 523(a)(15) can be discharged under the § 1328(a) discharge even though the holder gets only a *de minimis* amount, depending on the circumstances. Thus, an attempt to discharge a debt that is otherwise not dischargeable in chapter 7 is not *per se* bad faith. *See In re Young*, 237 B.R. 791 (10th Cir. B.A.P. 1999). Indeed, the Debtor's case demonstrates this. The proposed nominal payment on the property settlement claim that was included in the class of unsecured creditors receiving 2% satisfied the Trustee's objections and the plan was confirmed.

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[7]Section 523(a)(15) debts (debts arising from a divorce decree or settlement agreement owed to a spouse, former spouse, or child, but that are not domestic support obligations as provided for by § 523(a)(5)) are unique. They are excepted from discharge in chapter 7, but are dischargeable in chapter 13. However, they are excepted from the chapter 13 hardship discharge. *See* § 1328(b); § 1328(c)(2).

The issue here, however, is not whether a plan that pays nothing to a creditor holding a § 523(a)(15) claim is proposed in good faith. Rather, it is whether a plan that pays nothing to *all creditors* is proposed in good faith.[8]

The purpose and goal of Chapter 13 is "to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period." *In re Smith*, 848 F.2d 813, 816-17 (7th Cir. 1988) (quoting H.R.Rep. No. 95-595, 95th Cong., 1st Sess. 118 (1977)); *see In re Hoggle,* 12 F.3d 1008, 1010 (11th Cir. 1994) ("Chapter 13's overall policy is to facilitate adjustments of the debts of individuals with regular income through flexible repayment plans funded primarily from future income" (citations omitted)); *In re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir.1988) ("The bankruptcy court must ultimately determine whether the debtor's plan, given his or her individual circumstances, satisfies the purposes undergirding Chapter 13: a sincerely-intended repayment of pre-petition debt consistent with the debtor's available resources.").

Chapter 13 relief, therefore, is premised on the fact that a debtor will actually make payments to creditors, whether those payments are large or small.

Indeed, the requirement of payments to creditors is found in the language of the statute

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[8]In *In re Buck*, 443 B.R. 463 (Bankr. N.D. Ga. 2010) (Diehl, J.) the court held that the above-median debtors could not modify a confirmed chapter 13 plan to reduce the applicable commitment period from sixty months to thirty-six months based on a change in circumstances, but suggested that where no funds are available for monthly payments, the debtors could propose a modification with monthly payments of zero dollars for the balance of the applicable commitment period. The instant case is different for two reasons. First, the *Buck* case involved the applicability of the projected disposable income test to a post-confirmation modification, not issues of good faith. Second, the debtors in *Buck* already had made payments of $340 per month required by their plan for forty months at the time they sought the reduction of the applicable commitment period to thirty-six months.

itself. Only an "individual with regular income" may be a debtor under chapter 13. The Bankruptcy Code defines an "individual with regular income" as an "individual whose income is sufficiently stable and regular to enable such individual to *make payments under a plan* under chapter 13." 11 U.S.C. § 101(30) (emphasis added). Section 1326 provides for the timing and manner of payments to be made by the debtor and specifically provides, "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the trustee shall make *payments to creditors under the plan*." 11 U.S.C. § 1326(c) (emphasis added). Indeed, chapter 13 contemplates a mechanism for the debtor to obtain a discharge when he "has not completed *payments under the plan*." 11 U.S.C. § 1328(b) (emphasis added).

Based upon the statutory language and the purpose of chapter 13, the Court concludes that a plan that provides for no payments to any creditors does not satisfy the good faith requirement of § 1325(a)(3), made applicable to the modification process by § 1329(b).

If the Debtor is unable to comply with the terms of his confirmed plan, he is not without alternatives; he may convert to chapter 7, seek a hardship discharge under § 1328(b), or let the case be dismissed. While these alternatives are not as advantageous as a chapter 13 "superdischarge," they are the alternatives the Bankruptcy Code contemplates in the event a chapter 13 debtor is unable to complete payments under or otherwise modify a confirmed chapter 13 plan.

For the reasons set forth above, the Court disallows the proposed modification of the Debtor's confirmed plan based upon the totality of circumstances in the case. Accordingly, it is

ORDERED that the Trustee's objection to the Debtor's post-confirmation modification is sustained. The modification is disallowed.

End of Order

(This Order has not been prepared, and is not intended, for publication)

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