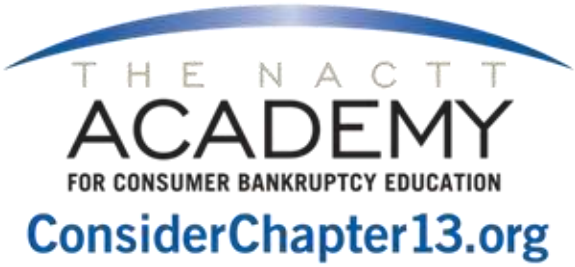
NACTT 57th Annual Seminar

San Francisco, CA

Educational Materials



Saturday - 8:45-9:45

No Cure After 60 Months: Judicial Splits on Debtor's Ability to Cure After Plan Term Expires

Moderator: **Douglas B. Kiel,** Chapter 13 Standing Trustee for the District of Colorado (Greenwood Village)

Honorable Craig A. Gargotta, Chief United States Bankruptcy Judge, Western District of Texas (San Antonio)

Honorable Brian D. Lynch, United States Bankruptcy Judge, Western District of Washington (Tacoma)

MATERIALS INDEX

No Cure After 60 Months
Judicial Splits on Debtor's Ability to Cure After Plan Term Expires

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8. Lessons Learned?
    a. Be careful what you ask for. Perhaps a direct appeal to the circuit is not the way to go.
    b. BAP has judges that understand what we do.
    c. Whatever the issue, predicting what an appeals court will do is risky. Maybe not appealing is the best decision.

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 15-3341 & 16-3482

IN RE: PAUL E. KLAAS; BETH ANN KLAAS,
Debtors

ELIZABETH SHOVLIN,
Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(Nos. 2-15-cv-00802 & 2-16-cv-00467)
Honorable Arthur J. Schwab, District Judge

Argued: October 26, 2016

Before: FISHER,* VANASKIE, and KRAUSE, *Circuit Judges*

(Filed: June 1, 2017)

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* Honorable D. Michael Fisher, United States Circuit Judge for the Third Circuit, assumed senior status on February 1, 2017.

Phillip S. Simon, Esq. (Argued)
Suite 401
603 Washington Road
Pittsburgh, PA 15228
Attorney for Appellees Paul E. Klaas and Beth Ann Klaas

Aurelius P. Robleto, Esq. (Argued)
Robleto Law
Suite 1306
401 Liberty Avenue
Pittsburgh, PA 15218
Attorneys for Appellant Elizabeth Shovlin

Owen W. Katz, Esq. (Argued)
Jana S. Pail, Esq.
Ronda J. Winnecour, Esq.
Office of Chapter 13 Trustee
600 Grant Street
3250 USX Tower
Pittsburgh, PA 15219
Attorneys for Appellee Ronda J. Winnecour

OPINION OF THE COURT

KRAUSE, *Circuit Judge.*

The Bankruptcy Code sets certain limits on the amount of time that debtors may be required to remain in Chapter 13 proceedings and make payments on their debts. This case presents two questions of first impression among the Courts of Appeals: whether bankruptcy courts have discretion to grant a brief grace period and discharge debtors who cure an arrearage in their payment plan shortly after the expiration of the plan term, and if so, what factors are relevant for the bankruptcy court to consider when exercising that discretion. Because we conclude the Bankruptcy Code does permit a bankruptcy court to grant such a grace period and the Bankruptcy Court did not abuse its discretion in granting one here, we will affirm the rulings of the District Court, which in turn affirmed the relevant order and judgment of the Bankruptcy Court.

I. Background

This consolidated appeal presents two decisions for review from the District Court: one affirming the Bankruptcy Court in its denial of Appellant-Creditor's Motion to Dismiss a Chapter 13 bankruptcy proceeding, and the other affirming the Bankruptcy Court's grant of Appellee-Debtors' Motion for Summary Judgment in a related adversary proceeding. Before addressing the facts relevant to those orders, a brief review of the relevant Bankruptcy Code provisions is necessary to understand the rights and obligations at issue in this case.

A. Statutory Background

Chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 1301–1330, offers the possibility of relief to individual debtors who have some capacity to make payments on their

debts. 11 U.S.C. § 109(e). After filing a voluntary petition for relief, a Chapter 13 debtor must propose a "plan" that provides for the payment of future earnings to cover claims on the debtor's estate. 11 U.S.C. §§ 1321, 1322(a)-(c). The Code includes requirements for the contents of such a plan, including that the plan must provide for the payment of all priority claims and may not "discriminate unfairly" between classes of unsecured creditors. 11 U.S.C. § 1322. Relevant to this case, the Code requires that if the debtor's income is higher than the median income for the state in which the debtor resides, "the plan may not provide for payments over a period that is longer than 5 years." 11 U.S.C. § 1322(d)(1). The proposed plan is subject to court approval, but the Code directs the bankruptcy court to confirm a proposed plan if it complies with the Code's requirements, including that it is proposed in good faith and that it is anticipated "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(1), (a)(3), (a)(6).

The bankruptcy court may appoint a neutral trustee to collect the money paid under the plan and to distribute it to creditors throughout the plan period. 11 U.S.C. § 1302. The total amount to be paid to the trustee in order to complete the goals of the plan, including charges for escrow account fees and the trustee's services, is often referred to as the "plan base." Although "[t]he term 'base' is not found in the Bankruptcy Code," it is "commonly understood to mean the sum of money that a debtor will pay through his Chapter 13 plan." *In re Jenkins*, 428 B.R. 845, 849 (B.A.P. 8th Cir. 2010).

Once confirmed, modifications to the plan are governed by 11 U.S.C. § 1329. That section provides, in

relevant part: "[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, to ... extend or reduce the time for such payments." 11 U.S.C. §§ 1329(a)(2). However, it also incorporates § 1322(d)(1)'s five-year term limit by specifying that "the court may not approve" a plan modification that would extend the term to require payments more than five years after the first payment was due under the original plan. 11 U.S.C. § 1329(c). Once a debtor meets his obligations by completing "all payments under the plan," he becomes entitled to "a discharge of all debts provided for by the plan," 11 U.S.C. § 1328, often referred to as a "completion discharge."

Of course, not all debtors are able to meet their plan obligations. In that circumstance, the bankruptcy court may dismiss a case or convert it to a Chapter 7 bankruptcy "for cause," including upon "material default by the debtor with respect to a term of a confirmed plan." 11 U.S.C. § 1307(c)(6). Alternatively, the court may grant a "hardship discharge" of some of the debts if (1) the debtor cannot make all payments due to "circumstances for which [he] should not justly be held accountable," (2) a certain amount of property has already been distributed under the plan, and (3) modification under § 1329 "is not practicable." 11 U.S.C. § 1328(b).

B. Factual Background

In 2009, Appellee-Debtors Paul and Beth Ann Klaas filed a voluntary Chapter 13 petition in the Western District of Pennsylvania, proposing a plan that required payments of $2,485 each month for sixty months, i.e., five years, and that

was confirmed by the Bankruptcy Court. About a year after confirmation, in response to an increase in mortgage payments, the plan was amended to increase the payments to $3,017 a month for the remainder of the sixty-month period. This new monthly payment reflected an anticipated plan base of $174,059.24 that Debtors were then required to pay to complete the plan's goals. Debtors made consistent monthly payments and, after sixty months, they had paid a total of $174,104, slightly exceeding their projected plan base.

Nevertheless, sixty-one months after the start of the plan, Appellee-Trustee Ronda Winnecour filed a Motion to Dismiss the case under 11 U.S.C. § 1307(c), alleging that her final calculation showed that Debtors still owed $1,123 to complete their plan base.[1] She noted in her motion that "[s]hould the debtors remit funds sufficient to complete the plan, the Trustee [would] not object to withdrawing her motion to dismiss." Appellant App. Vol. II, 7. Debtors cured the arrears within 16 days of the motion alerting them to the deficit, and the Trustee consequently withdrew the motion.

By that point, however, the Trustee's motion had been joined by Appellant-Creditor Elizabeth Shovlin, who was the successor in interest to a holder of several unsecured claims against Debtors, and Creditor pressed forward, arguing that

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[1] The record is unclear about the source of this shortfall. The Bankruptcy Court found that it was largely due to an increase in the Trustee's fee during the term of the plan, and not to any missed payments during the plan term. *In re Klaas ("Klaas III")*, 548 B.R. 414, 424 (Bankr. W.D. Pa. 2016).

the late payment was invalid because the plan and the Code required all payments to be completed within sixty months.[2] While the Bankruptcy Court agreed that the failure to completely fund the plan base within sixty months was a material default constituting cause for dismissal under 11 U.S.C. § 1307(c), it also found that the default was not the result of an unreasonable delay by Debtors, that Debtors promptly corrected the deficiency, and that the delay did not significantly alter the timing of plan distributions to creditors. The court, therefore, denied the Motion to Dismiss, concluding that "[b]y the time of the hearing on the trustee's motion, the default was no longer material," and that Debtors had "fully funded their plan obligations." *In re Klaas ("Klaas I")*, 533 B.R. 482, 488 (Bankr. W.D. Pa. 2015). Creditor appealed the order denying the motion, and the District Court affirmed. *Shovlin v. Klaas ("Klaas II")*, 539 B.R. 465, 466 (W.D. Pa. 2015).

Creditor also initiated an adversary proceeding by filing a complaint objecting to the discharge of the Klaases' debts. Nearly a year after its decision on the Motion to Dismiss, the Bankruptcy Court, relying on that ruling and the law of the case doctrine, again rejected Creditor's arguments that the failure to complete all payments within the plan term mandated dismissal and granted summary judgment in favor of Debtors. *In re Klaas ("Klaas III")*, 548 B.R. 414, 425 (Bankr. W.D. Pa. 2016). The Bankruptcy Court issued a

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[2] Creditor also argued that Debtors should be denied a discharge on the basis that they failed to timely complete a required financial management course, *In re Klaas ("Klaas I")*, 533 B.R. 482, 485–86 (Bankr. W.D. Pa. 2015), but she does not raise this issue on appeal.

completion discharge, Bankr. Case 09-29574 Dkt. No. 211,[3] and the District Court again affirmed on appeal, *Shovlin v. Klaas ("Klaas IV")*, 555 B.R. 500, 502 (W.D. Pa. 2016). Creditor then filed a notice of appeal of the adversary case, which was consolidated with the first appeal before our Court.

II. Jurisdiction

Although no party in this case contests our jurisdiction, "[w]e have an independent obligation to ascertain our own jurisdiction" before we may reach the merits of the case. *In re Cont'l Airlines, Inc.*, 932 F.2d 282, 285 (3d Cir. 1991). And although the two appeals have been consolidated before us, "[n]either consolidation with a jurisdictionally proper case nor an agreement by the parties can cure a case's jurisdictional infirmities." *Brown v. Francis*, 75 F.3d 860, 866 (3d Cir. 1996). For these reasons, we must verify that we can exercise jurisdiction over each of the consolidated cases independently.

District courts have "jurisdiction to hear appeals ... from final judgments, orders, and decrees ... of bankruptcy judges," 28 U.S.C. § 158(a), and, in turn we have jurisdiction to hear appeals from "all final decisions, judgments, orders, and decrees entered" by a district court. 28 U.S.C. § 158(d). On appeal, then, "[t]he finality issue must be resolved with respect to the decisions of both the bankruptcy judge and the district court." *In re White Beauty View, Inc.*, 841 F.2d 524, 526 (3d Cir. 1988).

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[3] The court provided, however, that the discharge is subject to any claims held by Creditor after the outcome of this appeal. Bankr. Case 09-29574 Dkt. No. 216.

Typically, in civil litigation, a decision is only final if it leads to a court's complete disassociation from a case. *Bullard v. Blue Hills Bank*, 135 S. Ct. 1686, 1691 (2015). The challenge in this case is that, while the Bankruptcy Court's grant of summary judgment in the adversary case clearly did conclude the court's involvement in the bankruptcy proceeding, its order denying Creditor's Motion to Dismiss did not. Creditor's appeal from the denial of the Motion to Dismiss therefore requires additional analysis to determine if that order, and the District Court's affirmance of that order, should nonetheless be deemed final and, hence, subject to our review.

We start with the premise that "[c]onsiderations unique to bankruptcy appeals have led us to construe the factor of finality somewhat more broadly in this context than under 28 U.S.C. § 1291." *In re White Beauty View, Inc.*, 841 F.2d at 526. Because bankruptcy proceedings are often "protracted and involve numerous parties with different claims," we take a pragmatic approach and examine the practical effect of the court's ruling. *Id.* Simply put, when it comes to analyzing the finality of an order, "[t]he rules are different in

bankruptcy."[4] *Bullard*, 135 S. Ct. at 1692. Our Court considers four factors in this analysis: "(1) the impact on the assets of the bankruptcy estate; (2) the need for further fact-finding on remand; (3) the preclusive effect of a decision on the merits; and (4) the interests of judicial economy." *In re Armstrong World Indus., Inc.*, 432 F.3d 507, 511 (3d Cir. 2005).

Here, as to the first factor, we find it relevant that in the course of denying Creditor's Motion to Dismiss, the Bankruptcy Court explicitly reached the legal conclusion that "the Debtors have completed their plan obligations." *Klaas I*, 533 B.R. at 489. The practical effect of that conclusion was to certify the case as eligible for a completion discharge, and the Bankruptcy Code directs courts to grant a discharge "as soon as practicable" following this determination. 11 U.S.C. § 1328(a). This functionally ended the bankruptcy case and thus affected Creditor's claim on the estate.

As to the second and third factors, the parties agreed there were no disputed factual issues (and, hence, no need for further fact-finding) relevant to the availability and propriety

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[4] In *In re Christian*, for example, we exercised jurisdiction over a district court order affirming a bankruptcy court's denial of a motion to dismiss a Chapter 7 case because without timely appellate review, the entire bankruptcy proceeding would have had to be completed before it could be determined whether the case was properly brought in the first place, and such a resolution would not be "desirable or practical." 804 F.2d 46, 48 (3d Cir. 1986). *See also In re Taylor*, 913 F.2d 102, 104 (3d Cir. 1990); *In re Brown*, 916 F.2d 120, 124 (3d Cir. 1990).

of a grace period for debtors here to cure their arrearage. As a result, the parties' rights and obligations on those issues were settled by the court's decision on the Motion to Dismiss, and both the Bankruptcy Court and District Court gave that decision preclusive effect by applying the law of the case doctrine when adjudicating the adversary claim and concluding that discharge was a foregone conclusion. *See Klaas III*, 548 B.R. at 421; *Klaas IV*, 555 B.R. at 507.

Admittedly, the fourth factor—judicial economy—may have been better served had Creditor waited to appeal until after final judgment was rendered in both the bankruptcy and the adversary proceeding. That would have relieved the District Court of the burden of adjudicating these appeals separately. But now that both appeals are before our Court, this factor too counsels in favor of adjudicating both claims.

In sum, all four of the relevant factors indicate the Bankruptcy Court's order denying the Motion to Dismiss, and consequently the District Court's order affirming that denial, should be deemed final orders. We therefore may exercise jurisdiction over both appeals.

III. Standard of Review

In reviewing bankruptcy court decisions on appeal, we "stand in the shoes" of the district court and apply the same standard of review. *In re Global Indus. Techs., Inc.*, 645 F.3d 201, 209 (3d Cir. 2011) (en banc). Accordingly, "we review the bankruptcy court's legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof." *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998).

Here, the order granting Debtors summary judgment is subject to plenary review. *Rosen v. Bezner*, 996 F.2d 1527, 1530 (3d Cir. 1993). The other order under review, denying Creditor's Motion to Dismiss, is reviewed for an abuse of discretion, but the bankruptcy court necessarily abuses its discretion when its decision "rests upon ... an errant conclusion of law." *In re SGL Carbon Corp.*, 200 F.3d 154, 159 (3d Cir. 1999) (citation omitted). In this case, Creditor argues that the Bankruptcy Court's exercise of discretion to allow a curative payment rather than dismiss the case was premised on an errant legal conclusion—specifically, the conclusion that "the Debtors were entitled to a discharge under section 1328(a) when they did not complete all of their payments within the 60-month term of their Plan," Creditor Reply to Trustee Br., 2, and we exercise plenary review over any conclusions of law that form the basis for an exercise of discretion, *In re SGL Carbon Corp.*, 200 F.3d at 159; *see also In re Mintze*, 434 F.3d 222, 228 (3d Cir. 2006) (holding that before we can determine whether a bankruptcy court abused its discretion, we must determine as a matter of law whether the court "had any discretion to exercise").

In short, despite the different procedural posture of the two orders under review, both turn upon the same narrow and dispositive legal question: whether Debtors may be granted a completion discharge under § 1328(a), despite having completed their plan base funding only after the end of the sixty-month term. The District Court correctly reviewed that question *de novo* when it was presented on each appeal, *see Klaas II*, 539 B.R. at 469; *Klaas IV*, 555 B.R. at 506–07, and we will do the same.

IV. Analysis

Creditor argues that because, in her view, the Bankruptcy Code compels courts to dismiss a bankruptcy proceeding whenever a shortfall remains at the conclusion of the five-year term, the Bankruptcy Court here abused its discretion in denying her Motion to Dismiss and erred in granting summary judgment.

It appears this is a recurring problem in bankruptcy cases, for "many situations ... may arise in which completion of the monthly plan payments will not result in the payment of the dividends required by the Bankruptcy Code and promised in the plan," such as when "fees are higher than projected, administrative expenses are incurred, ... or larger than expected secured claims are filed" after plan confirmation. *In re Estrada*, 322 B.R. 149, 153 (Bankr. E.D. Cal. 2005). While the modification procedure may be used to adjust for some of these changes during the course of the plan, "there will be the occasional case where the plan's insolvency is not apparent until very late in the case," and "despite the trustee's and the debtor's best efforts to avoid the problem, the plan payments may not fund" all dividends and expenses necessary to complete the plan base. *Id.*; *see also In re Escobedo*, 169 B.R. 178 (Bankr. N.D. Ill. 1993). The Code does not expressly provide for this scenario, nor does it appear that the United States Trustee Offices have developed a consistent practice to address it. Oral Argument at 26:56 (No. 15-3341), *available at* http://www.ca3.uscourts.gov/oral-

argument-recordings.[5] In the absence of an *ex ante* solution, however, we hold that bankruptcy courts retain discretion under the Bankruptcy Code to grant a reasonable grace period for debtors to cure an arrearage, and we also hold that the Bankruptcy Court here did not abuse its discretion in doing so in this case. We explain the basis for each holding below.

A. Discretion under the Bankruptcy Code

We interpret provisions of the Bankruptcy Code using established canons of statutory construction. *In re Armstrong World Indus.*, 432 F.3d at 512. We begin with the plain language of the statute, and if its meaning is plain, we "make no further inquiry unless the literal application of the statute will end in a result that conflicts with Congress's intentions." *Id.* (citations omitted). We also read statutory provisions in context and avoid an interpretation that is incompatible with the rest of the law. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988).

Creditor argues that the plain language of the statute bars any payment after the plan term. Specifically, as Creditor points out, § 1322 instructs that a court "may not" approve a proposed plan if it schedules payments over a period of more than five years. 11 U.S.C. § 1322(d).

[5] We note that the practice of the Trustee in this case, of filing and then withdrawing motions to dismiss after the end of the plan term, appears problematic—tending to produce unnecessary litigation as it did here. Indeed, even the Trustee acknowledged a better approach would be to conduct an audit and provide notice to the parties by filing a motion for a status conference prior to the end of the plan term. *Id.* at 37:05.

Likewise, under § 1329, a court "may not" approve a proposed plan modification that would schedule payments to be due more than five years after the first payment under the original plan was due. 11 U.S.C. § 1329(c). And in addition, the court must find the plan is proposed "in good faith" and it is anticipated at the time of confirmation or modification that "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a); § 1329(b)(1) (incorporating the requirements of § 1325(a)).

In focusing on these sections of the Code, however, Creditor misapprehends the relevant question, which is not whether bankruptcy courts may confirm a plan or plan modification that proposes a plan term greater than five years. Plainly, it may not. The relevant question here, however, is whether a bankruptcy court may deny a motion to dismiss and/or grant a completion discharge when there remains at the end of that plan term a shortfall that the debtor is willing and able to cure. And the answer to that question is that it may—an answer found in two entirely different sections of the Code, namely, § 1307, which governs the Bankruptcy Court's power to grant a dismissal, and § 1328, which governs its power to issue a completion discharge.

Section 1307, for example, not only has no express restriction on term length, but also provides that upon a material default, the court "may"—not must—dismiss a case

for cause. 11 U.S.C. § 1307(c).[6] That permissive language, *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947), stands in contrast to the "may not" language of §§ 1322 and 1329, which by definition is prohibitive. 11 U.S.C. § 102(4) (defining "may not" as "prohibitive, and not permissive"). Indeed, although no other Court of Appeals has squarely addressed this issue to date, a number of bankruptcy courts have, and the majority have drawn this same distinction between criteria for plan confirmation and criteria for dismissal.[7] *See, e.g.*, *In re Brown*, 296 B.R. 20, 22 (Bankr. N.D. Cal. 2003) ("[W]hile the court may not confirm a plan which is to run for more than 60 months, nothing in the Code mandates dismissal of a case with a confirmed plan which ends up needing some extra time to complete."); *In re Harter*, 279 B.R. 284, 288 (Bankr. S.D. Cal. 2002) ("[Section] 1322(d) does *not* contain a 'drop dead' provision that mandates dismissal of the case after five years."); *see also* 8 Collier on Bankruptcy (16th Ed.), ¶ 1322.18[2] (footnote

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[6] As the Bankruptcy Court here assumed Debtors' failure to fund the plan base before the end of the plan period constituted a "material default by the debtor with respect to a term of a confirmed plan," 11 U.S.C. § 1307(c)(6), *Klaas I*, 533 B.R. at 487–88, and Debtors do not challenge this ruling on appeal, we will assume, without deciding, that the $1,123 arrearage at issue constituted a plan default.

[7] The only Court of Appeals to have considered the issue is the Seventh Circuit, which recently assumed, without deciding, that a bankruptcy court had discretion to allow a debtor to cure a default resulting from a failure to make all payments within the five-year plan period. *Germeraad v. Powers*, 826 F.3d 962, 968 (7th Cir. 2016).

omitted) ("[S]ection 1322(d) ... focuses on the payments *provided for* by the plan. If payments are late, but the debtor is substantially complying with the plan, the court should allow the plan to be completed within a reasonable time after the stated term.").

Likewise, § 1328 directs bankruptcy courts to issue a completion discharge if the debtor has completed "all payments under the plan," 11 U.S.C. § 1328(a), without an express requirement that such payments were made within five years. While Creditor would read such a requirement into the phrase "under the plan," that reading would be in conflict with the way that phrase is used elsewhere in the Code. Section 1325(a)(6), for example, requires the Bankruptcy Court at confirmation to verify that the debtor is able "to make all payments under the plan" and also "to comply with the plan." 11 U.S.C. § 1325(a)(6). Distinguishing between these two requirements would be unnecessary, and the first would be rendered superfluous, if, as Creditor asserts, making "all payments under the plan" requires perfect compliance with each plan term, including

the term length.[8] *See In re Fesq*, 153 F.3d 113, 115 (3d Cir. 1998) ("[A]s a general rule of statutory construction '[w]e strive to avoid a result that would render statutory language superfluous, meaningless, or irrelevant.'").

In addition, we have previously interpreted the nearly identical phrase "under a plan confirmed" as used in 11 U.S.C. § 1146(c) to simply mean "made pursuant to the authority conferred by such a plan," *In re Hechinger Inv. Co. of Del., Inc.*, 335 F.3d 243, 254 (3d Cir. 2003), and we assume "identical words used in different parts of the same act are intended to have the same meaning," *Sorenson v.*

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[8] Creditor seeks to engraft principles of contract law onto our statutory interpretation, insisting that payment within sixty months is a necessary condition precedent to discharge and that a failure to fully fund the plan within sixty months is therefore an irreparable breach of the plan. True, the Klaases' plan contains a clause that prohibits the *Trustee* from extending the plan term beyond sixty months. But even if this could be read to prohibit the Trustee from accepting the late payment made in this case, we have never held that a Chapter 13 plan creates a contract between a debtor and his creditors governed by common law principles, nor have we held that all of the debtor's rights under the Bankruptcy Code are extinguished upon breach of any particular plan term. Creditor relies on our holding in *In re Shenango Group, Inc.*, in which we applied contract principles in the bankruptcy context, but we did so there to resolve a dispute about the correct construction of a Chapter 11 reorganization plan, not to interpret the rights of the parties under the Bankruptcy Code itself. 501 F.3d 338, 344 (3d Cir. 2007). This analogy is therefore unavailing.

Sec'y of Treasury of U.S., 475 U.S. 851, 860 (1986). Consistent with this canon, if the District Court allows a grace period so that the final payment exceeds five years, the payment due is still "pursuant to the authority conferred by [the] plan," *In re Hechinger*, 335 F.3d at 254, so that if the debtor makes that payment, he will have completed all payments "under the plan" and the bankruptcy court "shall grant the debtor a discharge. 11 U.S.C. § 1328(a).[9]

While the text is unambiguous and we need not refer to legislative history, the history of the act here reinforces our conclusion and sheds light on the statute's purpose. *See Sec. & Exch. Comm'n v. C. M. Joiner Leasing Corp.*, 320 U.S. 344, 350–51 (1943). The Bankruptcy Reform Act of 1978 amended the former Bankruptcy Act, which the Reform Act described as "overly stringent and formalized," in order to make wage earner plans more flexible and to encourage the use of debt repayment plans rather than liquidation. H.R. Rep. No. 95-595, at 117 (1977). The House Judiciary Committee Report for the Reform Act also lamented that wage payment plans had become "a way of life for certain debtors" and that extensions on plans for seven to ten years had "become the closest thing there is to indentured servitude;

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[9] For the avoidance of all doubt, we are not holding that a debtor has an absolute right under the Bankruptcy Code to cure an arrearage after the five-year limit has passed and thus obtain a completion discharge. Rather, we interpret the statute to grant bankruptcy courts discretion to deny dismissal and allow a grace period, so that if such payment is made within that grace period, the debtor will then have completed "all payments under the plan" and only then would be statutorily entitled to a discharge. 11 U.S.C. § 1328(a).

it lasts for an indentifiable [sic] period, and does not provide the relief and fresh start for the debtor that is the essence of modern bankruptcy law." *Id.* In response to Congress's evident concern about debtors being forced to remain in repayment plans indefinitely, the Act capped the plan term at five years, an amendment the District Court here aptly described as intended to provide "a shield" for debtors rather than "a sword" for creditors. *Klaas IV*, 555 B.R. at 513. Interpreting §§ 1307 and 1328 to mandate dismissal and preclude a completion discharge thus would be contrary not only to the language of the Bankruptcy Code but also to the purpose of the five-year cap.

In view of the statutory language and purpose, we find Creditor's remaining two objections unpersuasive. First, Creditor points out that 11 U.S.C. § 1329(c) prohibits courts from approving a plan modification that would provide for payments beyond five years. Creditor contends that the bankruptcy court may not grant forgiveness where it could not otherwise grant permission, and that allowing debtors to make a plan payment after five years would constitute an informal modification of the plan beyond the five years permitted by § 1329(c). Debtors in this situation, however, are not seeking to modify their commitments and create a new plan, but instead to complete the payments owed under their confirmed plan. We therefore agree with the Seventh Circuit's observation, albeit dictum, that allowing such curative payments would not modify the plan because the payments at issue "would not be payments 'provide[d] for' by [a] modified plan; rather, they would be payments made to cure a default ... *i.e.*, payments made because the debtors did not make the payments 'provide[d] for' by the plan in the first place." *Germeraad v. Powers*, 826 F.3d 962, 968 (7th Cir.

2016). Moreover, as the Bankruptcy Court noted, given that debtors who default early in the case can cure the default without requesting formal modification, denying that opportunity to debtors after a lengthy track record of good faith payments would "impose a standard of perfection at the conclusion of the plan term that does not exist at any other point in the case." *Klaas I*, 533 B.R. at 487.

Second, Creditor asserts that a hardship discharge, pursuant to 11 U.S.C. § 1328(b), is the exclusive remedy for a debtor who fails to make all payments within the five-year plan period, foreclosing a completion discharge by way of a late curative payment. Section 1328(b) gives a bankruptcy court discretion to grant a hardship discharge when a debtor fails to complete all payments under the plan "due to circumstances for which the debtor should not justly be held accountable." 11 U.S.C. § 1328(b). That section, however, provides a stop-gap for debtors who tried in good faith to complete all payments and find themselves at the end of the plan term unable to do so. That bankruptcy courts may grant a partial discharge in that situation has no bearing on whether they may decline to dismiss the bankruptcy proceeding and may grant a completion discharge for debtors who *are* able and willing at the end of their plan term to complete their plan funding.

Creditor's argument would also produce absurd results. Where, as here, debtors substantially complied with the Plan and acted in good faith to make a prompt payment as soon as they were notified of an arrearage, it would hardly make sense to deny them the benefit of Chapter 13 bankruptcy by dismissing the entire proceeding. Nor would it make sense to require such debtors to seek a hardship discharge, i.e., to withhold the remainder of the plan funding

that they have at their disposal and deprive creditors of those distributions simply because the payment is late. On the contrary, that would contravene the Code's goal of "provid[ing] for the efficient and equitable distribution of an insolvent debtor's remaining assets to its creditors," *Westmoreland Human Opportunities, Inc. v. Walsh*, 246 F.3d 233, 251 (3d Cir. 2001), and we decline to interpret § 1328 in such a manner, *see United States v. Am. Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940) (instructing courts to construe the language of statutes to avoid results that are "absurd" or "at variance with the policy of the legislation as a whole").

B. The Bankruptcy Court's Exercise of Discretion

Having concluded that bankruptcy courts have discretion to allow a grace period for a late curative payment and thus to deny dismissal and issue a completion discharge, we turn to the question whether the Bankruptcy Court here exercised that discretion properly. Before we can make that determination, however, we must first identify what factors should inform the exercise of that discretion.

While none of our sister Circuits have yet examined this threshold question, the bankruptcy courts that have addressed this question consistently rely on *In re Brown*, which identified four factors as relevant: "[(1)] How much longer is it going to take to complete the plan?[; (2)] Has the debtor been diligently making plan payments?[; (3)] How much time has elapsed since confirmation before dismissal is sought?[; and (4)] If the plan cannot be completed on time

due to a large prepetition claim, was the debtor culpable in failing to properly schedule the claim?" 296 B.R. at 22.[10]

We agree that *In re Brown* offers a helpful starting point, but it does not account for certain additional factors we deem relevant, such as the materiality of the default or whether allowing a cure would prejudice any creditors—two considerations that the Code expressly identifies as relevant to a motion to dismiss. *See* 11 U.S.C. § 1307(c). In addition, we draw helpful guidance from our case law concerning the circumstances in which a district court, in the exercise of its discretion, may set aside a default judgment. In that context, we also have instructed district courts to consider any prejudice the plaintiff will suffer if the default is lifted, as well as the defaulting defendant's ability to present a meritorious defense, the excusability or culpability of the

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[10] *See, e.g.*, *In re Henry*, 368 B.R. 696, 701–02 (N.D. Ill. 2007) (affirming a bankruptcy court's application of the *In re Brown* factors and its exercise of discretion to allow a cure); *In re Hill*, 374 B.R. 745, 749–50 (Bankr. S.D. Cal. 2007) (allowing a cure based on the debtors' history of consistent payments and lack of culpability); *cf. In re Black*, 78 B.R. 840, 843 (Bankr. S.D. Ohio 1987) (noting that a cure was appropriate because creditors would receive a sufficient dividend). Bankruptcy treatises likewise cite *In re Brown*, *see, e.g.*, Hon. W. Homer Drake, Jr., et al., *Chapter 13 Practice & Procedure*, § 4:9 Maximum Duration of Plan (2d ed. 2016); Francis C. Amendola, et al., 8A C.J.S. Bankruptcy § 152 What Constitutes Cause (2017), or advise that a cure should be permitted if the debtor is "substantially complying with the plan," 8 Collier on Bankruptcy (16th Ed.), ¶ 1322.18[2].

defendant's conduct, and the effectiveness of applying alternative sanctions. *See Emcasco Ins. Co. v. Sambrick*, 834 F.2d 71, 73 (3d Cir. 1987).

Building on *In re Brown*, and taking into account considerations relevant to § 1307(c) and the analogous default judgment context, we conclude the non-exhaustive list of factors a bankruptcy court should consider in deciding whether to allow a grace period include: (1) whether the debtor substantially complied with the plan, including the debtor's diligence in making prior payments; (2) the feasibility of completing the plan if permitted, including the length of time needed and amount of arrearage due; (3) whether allowing a cure would prejudice any creditors; (4) whether the debtor's conduct is excusable or culpable, taking into account the cause of the shortfall and the timeliness of notice to the debtor; and (5) the availability and relative equities of other remedies, including conversion and hardship discharge.

Applying these factors, we have no trouble concluding that the Bankruptcy Court here properly exercised its discretion. First, the Bankruptcy Court found that Debtors had diligently and timely made each of the sixty monthly payments called for in their plan, had promptly augmented their payments when the mortgage payment increased mid-term, and had not violated any other plan terms. *Klaas I*, 533 B.R. at 484–85, 488–89; *Klaas III*, 548 B.R. at 417.

Second, the Bankruptcy Court found that a cure was feasible: the arrearage was small relative to the plan base; Debtors were financially able and willing to cure; and Debtors did so promptly once notified, making payment even

before the hearing on the motion. *Klaas I*, 533 B.R. at 488–89.

Third, crucial to the Bankruptcy Court's conclusion and ours today, that court found the tardiness of the curative payment did not adversely affect any creditor. *Klaas III*, 548 B.R. at 425. On the contrary, it completed the plan base and enhanced the funds available for distribution. Even Creditor does not contend that her rights under the plan were prejudiced.

Fourth, the Bankruptcy Court found that the shortfall was not the result of an unreasonable or culpable delay by Debtors, and the only cause for the arrearage identified in the record or by the parties at argument was the Trustee's own fee increase that the Trustee did not call to Debtors' attention until after the end of the plan term. *Id.* at 424. Creditor has not suggested that Debtors had knowledge of the arrearage before that point, and the record indicates that the reason they did not was the approach taken by the Trustee of filing a Motion to Dismiss in the sixty-first month and withdrawing it instead of, e.g., conducting an audit and giving notice to Debtors before the plan term had ended. Had Debtors received such notice, their prior conduct in diligently making all payments, including the interim increase, indicates they likely would have completed the plan base before sixty months if given the opportunity.

Finally, conversion and hardship discharge would be nonsensical in this situation, and modification was no longer permitted. Considering the consequences to Creditor of allowing a cure and the consequences to Debtors of disallowing it in these circumstances, the equities weigh in

favor of Debtors, and the Bankruptcy Court reasonably concluded that allowing a cure would further the goals of the Bankruptcy Code and the plan.

Under these circumstances, the Bankruptcy Court was well within its discretion to decline to dismiss and to grant summary judgment and a discharge to Debtors.

V. Conclusion

For the foregoing reasons, we will affirm the order and judgment of the District Court, and by extension the Bankruptcy Court.

FILED
United States Court of Appeals
Tenth Circuit

July 23, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: MARGARET L. KINNEY,

Debtor.

MARGARET L. KINNEY,

Appellant,

v.

HSBC BANK USA, N.A.,

Appellee.

DOUGLAS B. KIEL, Chapter 13 Trustee,

Amicus Curiae.

No. 20-1122

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF COLORADO (Bankr. Ct. No. 1:13-27912-EEB)

Stephen E. Berken, Berken Cloyes, Denver, Colorado, for the Appellant.

Jamie G. Siler, Murr Siler & Accomazzo, Denver, Colorado, for the Appellee.

Matthew W. Hoelscher, Greenwood Village, Colorado, for Chapter 13 Trustee, Douglas B. Kiel, Amicus Curiae

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Before **BACHARACH**, **EBEL**, and **EID**, Circuit Judges.

BACHARACH, Circuit Judge.

The bankruptcy code provides a five-year limit on payment plans under Chapter 13. 11 U.S.C. § 1322(d). Once a debtor completes payments under the plan, the bankruptcy court must grant a discharge. 11 U.S.C. § 1328(a).

This appeal arises because Ms. Margaret L. Kinney failed to make some of the required mortgage payments within her plan's five-year period. Shortly after the five-year period ended, however, she made the back payments and requested a discharge. The bankruptcy court denied the request and dismissed the case.

The issue on appeal is whether the bankruptcy court could grant a discharge, and the answer turns on how we characterize Ms. Kinney's late payments. She characterizes them as a cure for her earlier default; HSBC Bank characterizes them as an impermissible effort to modify the plan. We agree with the bank and affirm.

1. Chapter 13 plans are limited to five years.

Chapter 13 of the bankruptcy code allows qualifying debtors to cover claims through "plans" that pledge future earnings. 11 U.S.C. §§ 1321,

1322(a)–(c). Upon confirmation, the plans bind the debtors and creditors. 11 U.S.C. § 1327.

But the code also allows modification of the plan. Through modification, a bankruptcy court can

- "extend or reduce the time for . . . payments" (11 U.S.C. § 1329(a)(2)) and
- permit the debtor to cure a default on a mortgage payment (*In re Hoggle*, 12 F.3d 1008, 1011 (11th Cir. 1994)).

But modifications cannot provide for payments more than five years after the deadline for the first payment. 11 U.S.C. § 1329(c).

A Chapter 13 bankruptcy case ends in discharge, conversion to Chapter 7, or dismissal. *See* Part 5(B)(1), below. Dismissals and conversions are governed by 11 U.S.C. § 1307; discharges are governed by 11 U.S.C. § 1328.

2. After suffering a car accident, Ms. Kinney missed two mortgage payments to the bank in the final months of her Chapter 13 plan.

Ms. Kinney filed bankruptcy under Chapter 13. Her plan, ultimately confirmed, required monthly mortgage payments to the bank.[1]

Ms. Kinney was current with her mortgage payments when she filed bankruptcy, and she made her first post-petition payment in November

[1] The parties agree that Ms. Kinney's mortgage payments during the plan were payments "under the plan."

2013.[2] Under the plan, she needed to keep making timely mortgage payments through November 2018.

But misfortune struck: In March 2018, Ms. Kinney suffered a car accident. The accident triggered substantial expenses, and Ms. Kinney missed two mortgage payments in the final months of the five-year plan. (After the plan ended, Ms. Kinney missed two more mortgage payments.)

3. Because Ms. Kinney had not completed her payments within five years, the bankruptcy court concluded that it lacked discretion to grant a discharge.

The missed mortgage payments constituted a material default; so after the five-year plan had ended, the bank moved to dismiss the bankruptcy case. Ms. Kinney objected and tendered the back payments; but the bankruptcy court granted the motion to dismiss, reasoning that a

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[2] Ms. Kinney notes that courts are divided on whether the five-year period begins with the first post-petition payment or after confirmation of the plan. Appellant's Opening Br. at 4 n.1. But she does not argue that the five-year period begins after confirmation of the plan or contest the bank's assertion that the five-year period began on the due-date of the first payment. So Ms. Kinney has waived any argument that the term started after confirmation of the plan. *See United States v. Harman*, 297 F.3d 1116, 1131 (10th Cir. 2002) (en banc) ("Arguments raised in a perfunctory manner, such as in a footnote, are waived."). Given this waiver, we assume without deciding that the five-year period began with the due-date of the first post-petition payment.

discharge was no longer possible. Ms. Kinney unsuccessfully moved for reconsideration and now appeals.

4. We conduct de novo review of the bankruptcy court's interpretation of the code provision.

The bankruptcy code states that the court "may" dismiss a Chapter 13 case. 11 U.S.C. § 1307(c). Given the word "may," we would ordinarily review the dismissal for an abuse of discretion. *See Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.,* 170 F.3d 985, 995–96 (10th Cir. 1999) (applying the abuse-of-discretion standard based on the statutory term "may").

But the issue here is a legal one, and a bankruptcy court abuses its discretion by making a legal error. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990). To determine whether the bankruptcy court legally erred in construing the code provisions, we conduct de novo review. *In re Scrivner*, 535 F.3d 1258, 1262 (10th Cir. 2008).

5. Though the bankruptcy code is ambiguous, its language suggests that discharge is allowable only if the debtor had no ongoing material default when the plan ended.

Conducting de novo review, we consider whether the bankruptcy code permits the court to treat Ms. Kinney's late payments as a "cure" rather than an impermissible "modification" of the plan. On this question, the code itself is ambiguous; but its language suggests that the late payments do not constitute a cure of the default. The statutory language thus

supports the bank's position that the court couldn't grant Ms. Kinney a discharge.

A. We consider the code's language.

We start with the language of the code, giving undefined terms their "ordinary meaning." *Ransom v. FIA Card Servs., N.A.*, 562 U.S. 61, 69 (2011); *Hamilton v. Lanning*, 560 U.S. 505, 513 (2010) (quoting *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995)). To avoid interpretations incompatible with the rest of the code, we read the provisions in the context of each other. *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.,* 484 U.S. 365, 371 (1988).

The code is ambiguous if it can be "understood by reasonably well-informed persons in two or more different senses." *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002) (internal quotation marks omitted). Ambiguity depends on "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.) Inc.*, 965 F.3d 792, 804 (10th Cir. 2020) (quoting *Ceco Concrete Const., LLC v. Centennial State Carpenters Pension Tr.*, 821 F.3d 1250, 1258 (10th Cir. 2016)). If the code is ambiguous, we can consider congressional intent. *In re Geneva Steel Co.*, 281 F.3d at 1178.

B. The code's language is ambiguous.

A discharge is necessary upon the debtor's "completion . . . of all payments under the plan." 11 U.S.C. § 1328(a). But the code doesn't define this phrase, so we must decide whether payments could contribute to a "completion . . . of all payments under the plan" when the payments come after expiration of the plan's five-year term.

On this question, other courts differ based on how they interpret the statutory phrase "completion . . . of all payments under the plan."[3] These differences are understandable in light of the ambiguity inherent in the combination of §§ 1307(c), 1322, 1325, 1328(a), and 1329.

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[3] In *In re Klaas*, the Third Circuit held that such payments after five years are "under the plan." 858 F.3d 820, 827–33 (3d Cir. 2017). Before that opinion, bankruptcy courts had divided on the issue.

Many bankruptcy courts had concluded that untimely payments are allowable under the plan. *In re Hill*, 374 B.R. 745, 749–50 (Bankr. S.D. Cal. 2007); *In re Henry*, 343 B.R. 190, 192–93 (Bankr. N.D. Ill. 2006); *In re Aubain*, 296 B.R. 624, 634 (Bankr. E.D.N.Y. 2003); *In re Brown*, 296 B.R. 20, 22 (Bankr. N.D. Cal. 2003); *In re Harter*, 279 B.R. 284, 287–88 (Bankr. S.D. Cal. 2002); *In re Black*, 78 B.R. 840, 842–43 (Bankr. S.D. Ohio 1987).

But many other bankruptcy courts had disagreed, concluding that untimely payments are not "under the plan." *In re Hanley*, 575 B.R. 207, 217–19 (Bankr. E.D.N.Y. 2017); *In re Ramsey*, 507 B.R. 736, 739 (Bankr. D. Kan. 2014); *In re Grant*, 428 B.R. 504, 507–08 (Bankr. N.D. Ill. 2010); *In re Goude*, 201 B.R. 275, 277 (Bankr. D. Or. 1996); *In re Jackson*, 189 B.R. 213, 214 (Bankr. M.D. Ala. 1995); *In re Woodall,* 81 B.R. 17, 18 (Bankr. E.D. Ark. 1987).

(1) Sections 1307(c) and 1328(a) don't definitively resolve the extent of discretion over dismissal and discharge, but suggest that discharge is unavailable when the plan ends with an ongoing material default.

The code gives the bankruptcy courts three options:

1. grant a discharge (11 U.S.C. § 1328(a))

2. dismiss the case (11 U.S.C. § 1307(c)(6))

3. convert the case to a Chapter 7 bankruptcy (11 U.S.C. § 1307(c)(6))

The options differ in the extent of discretion that they provide.

Section 1307(c)(6) says that a bankruptcy court "may" order dismissal or conversion if debtors have materially defaulted. 11 U.S.C. § 1307(c)(6). "May" usually implies some discretion. *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193, 198–99 (2000); *see* Part 4, above.

But under § 1328(a), a district court "shall" grant discharges to debtors who have completed payments under the plans. 11 U.S.C. § 1328(a).[4] The term "shall" means that discharges are mandatory if

[4] Ms. Kinney points out that "nothing in the Code mandates dismissal of a case with a confirmed plan which ends up needing some extra time to complete." Appellant's Opening Br. at 16 (quoting *In re Klaas*, 858 F.3d 820, 829 (3d Cir. 2017)). But this omission in the bankruptcy code does not necessarily imply discretion to grant a discharge when the plan ends with a material default. To the contrary, the existence of discretion may stem from flexibility built elsewhere into the bankruptcy code. Such flexibility exists, for example, when a debtor seeks a partial discharge based on a hardship after committing a material default. 11 U.S.C. § 1328(b).

debtors complete the payments under their plans. *Forest Guardians v. Babbitt*, 174 F.3d 1178, 1187 (10th Cir. 1999); *see* 11 U.S.C. § 1328(a). So § 1328(a) supports a discharge only if the late payments were considered "under the plan."

Ms. Kinney argues that discharge was permissible because the court could regard her payments as "under the plan." She did make the payments, but were they completed "under the plan" if they came after its expiration?

To answer we start with the term "under." The term "under" is a "chameleon," bearing ambiguity in light of its multiple meanings. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018) ("chameleon"); *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 40–41 (2008) (recognizing that "under" bears multiple meanings and "both sides present credible interpretations").[5] To ascertain the better interpretation of this ambiguous term, we must focus on the context. *See Pereira*, 138 S. Ct. at 2117 (stating that the Court must draw the meaning of "under" from its context). The context here suggests that the payments are "under the plan" only if they are subject to or under the authority of the plan.

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[5] Though the Supreme Court regarded the competing interpretations of the statutory term "under" as "credible," the Court ultimately declined to decide whether the term was ambiguous facially or within the statutory context. *Piccadilly Cafeterias*, 554 U.S. at 41, 47. Irrespective of the term's ambiguity, the Court interpreted the term "under" based not only on the statutory text but also on legislative intent. *Id.* at 47–52. We've likewise considered legislative intent, though the concurrence does not. *See* Part 6, below.

"Under" connects two nouns: "payments" and "plan." 11 U.S.C. § 1128(a). Though "under" bears multiple meanings, a payment "under" a bankruptcy plan is "more natural[ly]" read as something "subject to . . . or under the authority of" the plan. *Piccadilly Cafeterias*, 554 U.S. at 39–41.

An earlier version of the code used a similar term in a different provision, referring to a transfer "under a plan confirmed." 11 U.S.C. § 1146(c) (2000). To apply this provision, the Supreme Court considered whether a transfer could be "under" a confirmed plan if the transfer had preceded confirmation of the plan. *Piccadilly Cafeterias*, 554 U.S. at 35. The Court answered "no," reasoning that

- the "more natural" reading of "under" suggests that the transfer must be "subject to" or "under the authority of" the plan (*id.* at 39) and

- the transfer could not be subject to or under the authority of the plan if the plan had not yet been confirmed (*id.* at 41).

The Supreme Court cited a Third Circuit opinion, *In re Hechinger Investment Co. of Delaware, Inc.*, 335 F.3d 243 (3d Cir. 2003). *E.g.*, *id.* at 38, 40. *Hechinger* had drawn the same conclusion:

> After considering all of these definitions [of the term "under"], we believe that the most natural reading of the phrase "under a plan confirmed" in 11 U.S.C. § 1146(c) is "authorized" by such a plan. [*See Random House Dictionary of the English Language* 1543 (unabridged ed. 1967)]. When an action is said to be taken "under" a provision at law or a document having legal effect, what is generally meant is that the action is "authorized" by the provision of law or legal document. Thus, if a claim is asserted "under" 42 U.S.C. § 1983, Section 1983 provides the authority for the claim. If a motion is made "under" Fed. R. Civ. P.

> 12(b)(6), that rule provides the authority for the motion. If benefits are paid "under" a pension or welfare plan, the payments are authorized by the plan.
>
> On this reading, if an instrument of transfer is made or delivered "under" a plan, the plan must provide the authority for the transaction.

335 F.3d at 252; *see also In re NVR, LP*, 189 F.3d 442, 457–58 (4th Cir. 1999) (concluding that the plain meaning of "under" forecloses characterization of preconfirmation transfers as "under a plan confirmed" for purposes of 11 U.S.C. § 1146(c)).

Likewise, the more natural reading here is that the payments could fall "under" a plan only if the plan remained in existence. The Supreme Court concluded that a transfer likely hadn't fallen "under" a plan if it hadn't been confirmed yet. *See* pp. 10–11, above. There is no reason for a different result when a plan has expired.

Ms. Kinney insists that even though the plan had ended, she could informally cure her default by making the late payments. But if those payments came after the plan had ended, they wouldn't have been "subject to" or "authorized by" the plan. So the statutory term "under" suggests that the payments would permit a discharge only if they had been made during the existence of the plan.

(2) Section 1307(c) does not control.

Ms. Kinney argues that § 1307(c) controls because it is specific to dismissals. But § 1307(c) is no more specific than § 1328(a); these sections

simply authorize the three possible outcomes (dismissal, conversion to a Chapter 7 bankruptcy, or discharge). *See* Part 5(B)(1), above.

Ms. Kinney also argues that § 1307(c)'s permissive language creates discretion to order dismissal. The bank disagrees, arguing that the court lacks discretion under § 1328(a) because the five-year plan ended with an ongoing material default.

According to Ms. Kinney, the bank's interpretation erases § 1307's use of the word "may." We disagree, for the code still gives discretion to the court in various situations involving material defaults. For example, the court has discretion to avoid dismissal of a Chapter 13 case by

- permitting modification of the plan before it has ended and
- granting a hardship discharge.

See, e.g., *In re Hoggle*, 12 F.3d 1008, 1011 (11th Cir. 1994) (allowing a debtor to cure a default on mortgage payments through modification of the plan); 11 U.S.C. § 1328(b)–(c) (permitting a court to grant a discharge based on partial hardship despite the failure to complete the plan payments). So even if the bankruptcy court lacked discretion to regard Ms. Kinney's late payments as "under the plan," the bank's interpretation would still give effect to § 1307(c)'s permissive "may."

* * *

The bankruptcy code suggests that material defaults cannot be cured after the plan has ended. But § 1307(c) does not say whether payments can

be "under the plan" when they're made after the plan has ended. So we must consider whether other sections clarify the meaning of the phrase "under the plan."

(3) The other statutory provisions are ambiguous on whether payments after the five-year period are "under the plan."

The parties point to four other sections (§§ 1322, 1325, 1328, and 1329) in debating whether "payments under the plan" include payments following expiration of the plan. These sections are not conclusive, but the better interpretation is that the late payments are not "under the plan" if it has already expired.

a. Sections 1322 and 1329 suggest that payments after the plan's expiration are not "under the plan."

The bank argues that under §§ 1322 and 1329, a debtor doesn't complete payments "under the plan" if the payments come after the plan has expired. As Ms. Kinney argues, these sections don't remove the ambiguity. But they do suggest that the late payments are not "under the plan."

Under § 1322, a Chapter 13 debtor cannot commit to a plan lasting more than five years. 11 U.S.C. § 1322(d). And § 1329 permits some types of plan modifications, including those extending or shortening "the time for . . . payments [under the plan]." 11 U.S.C. § 1329(a)(2). But modified plans are also subject to the five-year time limit. 11 U.S.C. § 1329(c).

Together, §§ 1322 and 1329(a)(2) suggest that a late payment is simply an effort to modify the plan by extending the time for payment.

Suppose that after the accident, Ms. Kinney had moved for an extension of time, asking the bankruptcy court to allow her to make the back payments soon after the five-year period had ended. As Ms. Kinney conceded in oral argument, the court would have needed to deny the motion. Oral Argument at 2:36–2:50.

Ms. Kinney nonetheless urges consideration of her late payments as an informal cure rather than an improper modification. But this approach would nullify the code's restrictions on modifications. *See In re Scrivner*, 535 F.3d 1258, 1263 (10th Cir. 2008) ("[T]o allow the bankruptcy court, through principles of equity, to grant any more or less than what the clear language of [the code] mandates would be tantamount to judicial legislation and is something that should be left to Congress, not the courts.") (quoting *In re Alderete*, 412 F.2d 1200, 1207 (10th Cir. 2005)). How could a bankruptcy court forgive a late payment as an informal cure if the court couldn't approve the payment through a properly filed motion? So §§ 1322 and 1329(a)(2) suggest that a debtor completes payments "under the plan" only when the payments come during the plan's five-year period.

b. Sections 1325 and 1328 do not require us to characterize payments after the five-year period as payments under the plan.

Section 1325. Ms. Kinney relies partly on § 1325(a)(6), which requires confirmation of a plan if "the debtor will be able to make all payments under the plan and to comply with the plan." 11 U.S.C. § 1325(a)(6). The Third Circuit interpreted this language to imply that a debtor can make payments under the plan without complying with the plan's terms. *In re Klaas*, 858 F.3d 820, 829–30 (3d Cir. 2017).

But this language doesn't show that post-plan payments are "under the plan." For instance, a debtor may make a late payment while the plan remains in effect. The late payment would not "comply with" the plan, but could still be "under the plan." So the Third Circuit's distinction sheds no light on whether payments after the five-year period are payments "under the plan."

Section 1328. Ms. Kinney also argues that because § 1328(a) does not require timeliness for "payments under the plan," debtors need not complete the plan payments within five years. We disagree.

As Ms. Kinney points out, § 1307 elsewhere requires "timely" actions. 11 U.S.C. § 1307(c)(3)–(4). In those places, however, the code otherwise gives no guidance on timing. For example, § 1307(c)(3) allows dismissal for "failure to file a plan *timely* under section 1321 of this title." 11 U.S.C. § 1307(c)(3) (emphasis added). Because § 1321 does not itself

specify a time requirement, the term "timely" is needed to prevent overeager creditors from moving to dismiss when the debtor still has time to file a plan.

But the term is unnecessary in § 1328(a); here the phrase "under the plan" is naturally read to require that a plan remain in effect when the payments are made. *See Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 45 (2008). And it's not clear whether "timely" here would mean that the payments came

- within the five-year period or
- by the due-date for each monthly payment.

Either interpretation is reasonable.

* * *

The parties present competing arguments from the statutory language, but none is conclusive. In the end, there's no code provision that expressly allows or prohibits a discharge when the debtor has not completed the plan payments by the end of the five-year period. So the text is ambiguous.

Because the text is ambiguous, we "seek guidance from Congress's intent, a task aided by reviewing the legislative history." *In re Geneva Steel Co.*, 281 F.3d 1173, 1178 (10th Cir. 2002). Along with the legislative history, we consider which interpretation best fits the statutory language. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001).

In our view, the statutory language suggests that Ms. Kinney's late payments are not "under the plan" because they came after the plan had already ended. This suggestion is supported by the legislative history of Chapter 13.

6. Congress intended to limit payments under Chapter 13 plans to five years.

The legislative history is also ambiguous, but likewise supports the bank's interpretation of the code.

"The principal purpose of the Bankruptcy Code is to grant a 'fresh start' to the 'honest but unfortunate debtor.'" *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367 (2007) (quoting *Grogan v. Garner*, 498 U.S. 279, 286–87 (1991)). Concern for this purpose led the 1977 House Judiciary Committee to criticize the frequency of court-supervised repayment plans lasting seven to ten years:

> [I]nadequate supervision of debtors attempting to perform under wage earner plans have made them a way of life for certain debtors. Extensions on plans, new cases, and newly incurred debts put some debtors under court supervised repayment plans for seven to ten years. This has become the closest thing there is to indentured servitude; it lasts for an identifiable period, and does not provide the relief and fresh start for the debtor that is the essence of modern bankruptcy law.

House Judiciary Committee Report for the Reform Act, H.R. Rep. No. 95–595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6078 (footnotes omitted).

On the other hand, the 1977 House Judiciary Committee regarded Chapter 13's predecessor as "overly stringent and formalized." *Id.* The Committee observed that Chapter 13 had "simplifie[d], expand[ed], and ma[de] more flexible wage earner plans." *Id.* at 117–18.

The bank argues that allowing debtors to informally cure their plans would lead to a "slippery slope" that extends the duration of plans, the evil that Congress tried to prevent. This concern is not entirely hypothetical. In *In re Henry*, 368 B.R. 696 (N.D. Ill. 2007), the district court applied a flexible test to allow a debtor to take an "extra 30 months" beyond the 5-year plan. *Id.* at 701–02.

Despite the potential for lengthy plans, recognition of informal cures could permit fresh starts by injecting flexibility into administration of the plan.[6] Given the benefit of flexibility, the Third Circuit views the five-year limit on plans as a "shield" for debtors rather than as a "sword" for creditors. *In re Klaas*, 858 F.3d 820, 830 (3d Cir. 2017). This approach

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[6] As an amicus, Ms. Kinney's Trustee contends that attorney fees would skyrocket if every late payment requires modification. Here, though, we are addressing only the inability to cure a default after the five-year period has ended. At that point, the parties agree that the court cannot modify the plan to permit future payments. In any event, we must interpret the bankruptcy code as Congress drafted it even if this interpretation would increase legal expenses.

makes sense because dismissal or conversion to a Chapter 7 bankruptcy could hurt both the debtor and creditor.[7]

But the 1977 House Judiciary Committee Report reflects Congress's concern as to "inadequate supervision" and indefinite extensions of payment plans. House Judiciary Committee Report for the Reform Act, H.R. Rep. No. 95–595, at 117 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6077. The Committee apparently reasoned that

- what is best for an individual debtor might not be what is best for debtors as a whole and
- strict deadlines are best for debtors as a whole.

Second, the bankruptcy court points out that without informal extensions, most Chapter 13 debtors would lack meaningful breathing room. Appellant's App'x at 175. After 2005, Chapter 13 plans for above-

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[7] The alternatives to discharge may be harsh for debtors, like Ms. Kinney, suffering unanticipated setbacks late in a five-year payment period. To soften the blow, Congress has added a temporary provision allowing discharges for debtors defaulting on mortgage payments. 11 U.S.C. § 1329(i) (2021).

But the permanent alternatives—hardship discharge, dismissal, and conversion—are tough. The hardship discharge is not always available and even when it is, the relief is limited to unsecured debts. 11 U.S.C. § 1328(b), (c). And after a dismissal, the debtor does not get a fresh start and might need to re-enter bankruptcy or continue in debt. 11 U.S.C. § 349. Conversion also has downsides. For some Chapter 13 debtors, conversion to Chapter 7 may not be available. *See* 11 U.S.C. § 707(b). And even if conversion to Chapter 7 were available, it could jeopardize debtors' ability to remain in their homes. *See* 11 U.S.C. § 726.

median debtors must last exactly five years (unless the debtors are fully paying all unsecured claims). *See* 11 U.S.C. § 1325(b)(4).[8]

Strict enforcement of the five-year period would inevitably limit the court's flexibility when debtors experience unexpected calamities in the final stages of their plans. But Congress presumably recognized the problem when requiring plans to last five years and prohibiting plan extensions. Indeed, Congress labelled the section "Chapter 13 plans to have 5-year duration in certain cases." Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109–8, Title III, § 318, Apr. 20, 2005, 119 Stat. 23.

Recent legislation suggests congressional recognition that the bankruptcy code prohibited informal cures after expiration of the five-year period. In December 2020, Congress inserted a new subsection "i" in 11 U.S.C. § 1328. The new subsection allows discharges for debtors, like Ms. Kinney, who have "not completed payments to . . . a creditor holding a security interest in the principal residence of the debtor" if

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[8] Some exceptions may exist. *See In re Lanning*, 545 F.3d 1269, 1274 n.4 (10th Cir. 2008) ("The ruling on the relevant duration of the commitment period is not at issue in this appeal."); *see also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109–8 (titling the relevant section of the bill "Chapter 13 plans to have 5-year duration in certain cases"); *In re Sisk,* 962 F.3d 1133, 1146 (9th Cir. 2020) (concluding that 11 U.S.C. § 1325(b)(4) requires the plan to last a minimum of five years "only if the plan triggered an objection" by a trustee or creditor).

> (2)(A) the plan provides for the curing of a default and maintenance of payments on a residential mortgage under § 1322(b)(5); and
>
> (B) the debtor has entered into a forbearance agreement or loan modification with the holder or servicer . . . .

11 U.S.C. § 1328(i)(2); Consolidated Appropriations Act, 2021, Pub. L. 116-260, Div. FF, Title X, § 1001(b)(1)–(2), Dec. 27, 2020, 134 Stat. 3217. This provision, which was effective upon enactment, expires in December 2021. *Id.*

This enactment suggests that (1) Congress realizes that unexpected calamities prevent many Chapter 13 debtors, like Ms. Kinney, from timely paying their mortgages and (2) Congress tried to soften the blow without disturbing the code's other limitations.

* * *

So in our view, Congress intended to strictly limit the time for payments under Chapter 13 plans.

7. Conclusion

We affirm the dismissal of Ms. Kinney's Chapter 13 case. Although the Code's language and legislative history are ambiguous, both suggest that Congress intended to limit Chapter 13 plan payments to five years.

If Ms. Kinney wanted to avoid a material default, she needed a plan modification. But the court couldn't permit Ms. Kinney to cure her default once the plan's five-year period ended.

Given Ms. Kinney's material default, the plan's expiration left the bankruptcy court without authority to grant a discharge. We thus affirm dismissal of the Chapter 13 bankruptcy case.

20-1122, *Kinney v. HSBC Bank*

EID, J., concurring in the judgment.

Although I agree with the majority's conclusion that payments made after the five-year payment period cannot cure a default and permit discharge, I write separately because I would not find the statutory scheme to be ambiguous on this point. *Contra* Maj. Op. at 6, 16.

Under the statutory scheme, a plan can only last five years. 11 U.S.C. § 1322(d)(1) ("the plan may not provide for payments over a period that is longer than 5 years"). As the majority points out, a discharge can occur only when the debtor "complet[es] . . . all payments under the plan." Maj. Op. at 8 (citing 11 U.S.C. § 1328(a)). While the majority suggests that the term "under" is automatically ambiguous, *id.* at 9, the statutory language and context in this case show that the plain meaning of "under" is "subject to." *See Pereira v. Sessions*, 138 S. Ct. 2105, 2113, 2117 (2018) (explaining that while the word "under" is a "chameleon," the "plain language and context" in the case before it showed that "Congress ha[d] supplied a clear and unambiguous answer to the interpretive case at hand"). As the majority concludes, properly in my view, a payment cannot be made subject to a plan if the plan no longer exists—that is, if the five-year period has passed. Maj. Op. at 11, 16. Given that Kinney did not "complet[e] . . . all payments under the plan," as required by § 1328(a), within five years, as required by § 1322, the bankruptcy court was without jurisdiction to grant a discharge and properly dismissed the case. There is no ambiguity here. *See* A. Scalia &

B. Garner, Reading Law 167 (2012) ("The text must be construed as a whole"); *Pereira*, 138 S. Ct. at 2116 (rejecting "strain[ed]" efforts "to inject ambiguity into the statute").[1]

The majority concludes that the language is ambiguous because "[i]n the end, there's no code provision that expressly allows or prohibits a discharge when the debtor has not completed the plan payments by the end of the five-year period." Maj. Op at 16. The majority then proceeds to consider the legislative history of the statute, concluding that it too is ambiguous. *Id*. at 17.

It was not necessary for Congress to have added an express provision regarding payments made after the five-year period because the language already provides for such a result: a plan expires after five years, and payments cannot be "under" a plan that has come to an end. Because the majority's definition of ambiguity places an untenable burden on Congress to expressly spell out a result even where the result is plain under application of existing statutory provisions, I respectfully concur only in the judgment it reaches.

[1] In addition to *Pereira*, the majority cites to *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc*., 554 U.S. 33, 39–41 (2008). That decision provides no support for its finding of ambiguity, however, as it assumed for the sake of argument that the language in that case was ambiguous. *Id.* at 41.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Thomas B. McNamara

In re: MICHAEL BRYAN ALBERT, Debtor.	Bankruptcy Case No. 16-15128 TBM Chapter 13

MEMORANDUM OPINION AND ORDER GRANTING MOTION TO MODIFY

I. Introduction.

Chapter 13 of the Bankruptcy Code[1] "affords individuals receiving regular income an opportunity to obtain some relief from their debts while retaining their property." *Bullard v. Blue Hills Bank*, 575 U.S. 496, 498 (2015). The *quid pro quo* is a Chapter 13 plan. A debtor must propose and obtain Court approval of a plan under which such debtor pays creditors out of future income. 11 U.S.C. §§ 1321-1325; *Bullard*, 575 U.S. at 498; *Hamilton v. Lanning*, 560 U.S. 505, 508 (2010). For an above-median-income debtor, "the plan may not provide for payments over a period that is longer than 5 years." 11 U.S.C. § 1322(d)(1). The time limitation was designed to avoid imposing a form of long-term involuntary servitude upon Chapter 13 debtors. If a debtor timely completes "all payments under the plan," such debtor is entitled to a discharge of most debts. 11 U.S.C. § 1328. Discharge is the *raison d'etre* of bankruptcy and provides a debtor with "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of pre-existing debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Chapter 13 is a very tough bargain — the vast majority of Chapter 13 cases fail because debtors either are unable to obtain confirmation of their plans or fail to complete all the required payments.[2]

In this bankruptcy proceeding, Debtor Michael Bryan Albert (the "Debtor") did almost everything right. He proposed a Chapter 13 Plan in which he committed to pay $541 each month for five years to the Chapter 13 Trustee for the benefit of his creditors. In 2016, the Court confirmed the Debtor's Chapter 13 Plan. Then, to his credit, even though he was struggling financially, the Debtor made all the required payments for four years and eleven months. But, he paid the last installment ($436) approximately 23 days late (according to the most common way to make such calculation).

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[1] All references to the "Bankruptcy Code" are to the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* Unless otherwise indicated, all references to "Section" are to sections of the Bankruptcy Code.

[2] *See* Sara S. Greene, Parina Patel and Katherine Porter, *Cracking the Code: An Empirical Analysis of Consumer Bankruptcy Outcomes*, 101 MINN. LAW. REV. 1031, 1032 (2017).

Thereafter, the Debtor requested that the Court grant him a Chapter 13 discharge. No one objected. However, the Court determined *sua sponte* that the Debtor's discharge request raised numerous difficult legal issues concerning the five-year Chapter 13 plan limit. For example, there is no binding appellate precedent establishing when the five-year period actually starts. Although most courts use the date listed in the Chapter 13 plan for starting payments, some courts have ruled that the Chapter 13 plan confirmation date (usually much later) governs the calculation. And the difference could be dispositive in this case. Further, a recent appellate decision, *Kinney v. HSBC Bank USA, N.A. (In re Kinney)*, 5 F.4th 1136 (10th Cir. 2021), suggests that the Court might not have authority to grant the Debtor a discharge of his debts since the Debtor exceeded the five-year payment term. There are other legal complications too. To ensure due process, the Court requested that the Debtor and interested parties submit legal analysis. Subsequently, the Debtor, the Chapter 13 Trustee, and a group of bankruptcy lawyers (acting as *amicus curiae*) presented arguments in favor of discharge.

However, apparently in the alternative, the Debtor also asked that the Court approve modification of his Chapter 13 plan to extend the term from 60 months to 62 months. The Debtor relied on a fairly new amendment to the Bankruptcy Code designed to protect bankruptcy debtors adversely impacted by the COVID-19 pandemic: Section 1329(d). That Section provides that if a debtor "is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic," such debtor may extend the Chapter 13 plan term from five years to no more than seven years. The Debtor set forth various circumstances arising from the COVID-19 pandemic which caused him to have difficulty completing Chapter 13 plan payments within the five-year term. His factual allegations of financial hardship were uncontested.

The Court elects, in its judicial discretion, to address the Debtor's modification request first and the discharge request second. For the reasons set forth below, the Court grants the Debtor's request for modification of his Chapter 13 plan to extend the payment period by two months under Section 1329(d). Since the Debtor already completed all required payments under the proposed modified Chapter 13 plan within that extended time frame, the Court also will grant the Debtor a discharge per Section 1328(a). Given the foregoing resolution, the Court need not address any other legal complications such as start date controversy and the application of *Kinney*, 5 F.4th 1136. That binding appellate precedent does not foreclose modification (and extension of the payment period) under 11 U.S.C. § 1329(d).

II. <u>Jurisdiction and Venue</u>.

This Court has jurisdiction to enter final judgment on the issues presented in this bankruptcy case pursuant to 28 U.S.C. § 1334. The Chapter 13 plan modification and discharge issues are core proceedings under 28 U.S.C. §§ 157(b)(2)(A) (matters concerning administration of the estate), 157(b)(2)(L) (confirmation of plans),

157(b)(2)(J) (objections to discharges), and 157(b)(2)(O) (other proceedings affecting the liquidation of the assets of the estate). Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. No party has contested the Court's jurisdiction or venue.

III. Procedural and Factual Background.

No party opposed the procedural and factual allegations asserted by the Debtor. And, not surprisingly, because there are no factual disputes, no party requested an evidentiary hearing on the modification and discharge issues. Accordingly, the Court relies for its factual findings on the uncontested facts advanced by the Debtor, supplemented with the record procedural background from the Court's docket. The Court makes the following findings under Fed. R. Civ. P. 52, Fed. R. Bankr. P. 7052 and Fed. R. Bankr. P. 9014(c).

The Debtor filed for relief under Chapter 13 of the Bankruptcy Code on May 23, 2016.[3] At the same time, the Debtor submitted a "Chapter 13 Plan Including Valuation of Collateral and Classification of Claims" (the "Original Chapter 13 Plan").[4] Douglas B. Kiel, the Standing Chapter 13 Trustee (the "Chapter 13 Trustee") objected to the Original Chapter 13 Plan.[5] In order to resolve the objection, on July 20, 2016, the Debtor filed an "[Amended] Chapter 13 Plan Including Valuation of Collateral and Classification of Claims" (the "Amended Chapter 13 Plan").[6] In section III of the Amended Chapter 13 Plan, the Debtor provided:

> The Debtor submits to the supervision and control of the Trustee all or such portion of the debtor's future earnings as is necessary for the execution of the plan, including: . . . [f]uture earnings of $541 per month which shall be paid to the trustee for a period of approximately 60 months, beginning 6/18/2016.

No party objected to the Amended Chapter 13 Plan. Accordingly, the Court entered an Order confirming the Debtor's Amended Chapter 13 Plan on August 1, 2016.[7]

About five years later, on August 3, 2021, the Debtor filed his "Chapter 13 Debtor's Certification to Obtain Discharge" (the "Certification to Obtain Discharge") wherein the Debtor requested a discharge and stated that he had "completed all payments and obligations required by my chapter 13 plan."[8] A week later, the Chapter 13 Trustee submitted his "Trustee's Statement Regarding Debtor(s)

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[3] Docket No. 1. Unless otherwise indicated, the Court will refer to particular documents contained in the CM/ECF docket for this bankruptcy case using the convention: "Docket No. ___."
[4] Docket No. 2.
[5] Docket No. 18.
[6] Docket No. 19.
[7] Docket No. 25.
[8] Docket No. 41.

Eligibility for Discharge" (the "Trustee's Statement").[9] In the Trustee's Statement, the Chapter 13 Trustee advised:

> The trustee is unaware of how this Court will calculate the timeliness of debtor payments to the trustee. However, if the plan term end date is calculated in accordance with the Humes/Kinney decisions, the final payment of $436 would appear to be twenty-three days late. The final plan payment is less than one payment. This is not a "material default" either in time or in amount; therefore, the discharge should enter. The trustee does not oppose discharge.

No party contested the entry of a discharge.

However, the Trustee's Statement (which suggested that the Debtor's final payment "would appear to be twenty-three days late") raised the legal issue of whether the Court was authorized to grant a discharge under binding appellate precedent: *Kinney*, 5 F.4th 1136. Therefore, the Court entered an "Order for Briefing" directing the Debtor, the Chapter 13 Trustee, and any other party in interest to file legal briefs:

> . . . setting forth additional facts and legal argument, complete with citation to statutory, rules, and case law authority, on the following and on any other matters they believe are relevant to the Court's consideration of whether the Court may enter the Debtor's discharge pursuant to 11 U.S.C. § 1328(a):
>
> (1) When and how was the Debtor's final payment made and received?
>
> (2) Did the Debtor's Plan commence on the date that the first payment under the Plan was due to be made (June 18, 2016, as set forth in the Plan), on the date that the Plan was confirmed (August 1, 2016), or some other date, and was payment completed before or after expiration of the term of the Plan?
>
> (3) Does the *Kinney* decision allow the Court to enter the Debtor's discharge if the final payments due under the Plan were not made until after expiration of the 60-month term of the Plan? If so, under what circumstances?

[9] Docket No. 42.

> (4) If the Court determines that, under the reasoning of *Kinney* and/or *Humes*, the Debtor is not eligible to receive a discharge under 11 U.S.C. § 1328(a), should the Court convert the case to another chapter of the Bankruptcy Code, dismiss the case pursuant to 11 U.S.C. § 1307, or grant a discharge pursuant to a different subsection of 11 U.S.C. § 1328 (such as 11 U.S.C. § 1328(b) or (i))? If so, which procedures would the parties propose to employ to move the case toward conversion, dismissal, or entry of discharge?
>
> (5) Does the Court need to conduct an evidentiary hearing on any factual issues? If so, on what issues? If not, what are the specific agreed on stipulated facts that the Court should utilize for its decision.[10]

Subsequently, the Chapter 13 Trustee and the Debtor submitted legal briefs.[11] The Chapter 13 Trustee stated that the Debtor's last payment ($436) was initiated on July 10, 2021, through the Chapter 13 Trustee's "ePay System" and posted on July 12, 2021. The Debtor seems to concur.

Both the Chapter 13 Trustee and the Debtor contended that the facts were not in dispute and the Court could rule on the basis of the uncontested facts and procedural background. Subsequently, a group of 16 Colorado consumer bankruptcy practitioners (Tara Gaschler Salinas, James Anderson, Berenice Arroyo, Stephen Berken, Bonnie Bell Bond, Debby Bowinski, Karen Cody-Hopkins, Jessica Deal, Steven Holland, Cynthia Kennedy, Thomas Mathiowetz, William Morris, Peter Mullison, Charles Parnell, David Serafin, and Andrew Trexler) (together, the "Bankruptcy Practitioners Group") filed a "Motion for Leave of Court to File *Amicus Curiae* Brief" along with an "*Amicus Curiae* Brief by Interested Bankruptcy Practitioners."[12] The Court granted authorization for the Bankruptcy Practitioners Group to participate as *amicus curiae.*[13] The Court appreciates the high-quality advocacy of the legal briefing submitted by the Debtor, the Chapter 13 Trustee, and the Bankruptcy Practitioners Group.

Meanwhile, on September 9, 2021, the Debtor submitted a "Motion to Modify Confirmed Chapter 13 Plan" (the "Motion to Modify") along with a proposed "Modified Chapter 13 Plan Including Valuation of Collateral and Classification of Claims" (the "Modified Chapter 13 Plan").[14] In the Motion to Modify, the Debtor implicitly recognizes that he made the last payment 23 days late and thus did not "complete all payments under the plan [Amended Chapter 13 Plan]" as that phrase has been interpreted in *Kinney*, 5 F.4th 1136. In the Motion to Modify, the Debtor averred the following facts:

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[10] Docket No. 47.
[11] Docket Nos. 49 and 51.
[12] Docket Nos 57 and 58.
[13] Docket No. 60.
[14] Docket Nos. 54 and 53.

- To date, Debtor has paid a total of $32,460, into his plan of a total plan base due of $32,460, in the confirmed chapter 13 plan.

- Debtor faced a reduction in wages and an increase in expenses during the COVID-19 pandemic.

- From the beginning of the pandemic through September of 2020, Debtor was required to be the sole caretaker of an uncle who was fighting lung cancer. Given the uncle's ailment, he was highly susceptible to COVID-19 and needed to minimize the number of people to whom he was exposed. Debtor incurred the costs of an 80 mile round trip, taken 5 days a week, to transfer his uncle to chemotherapy, radiation treatments, and doctor's appointment, etc…, during this time period.

- In March of 2020, Debtor's spouse contracted COVID-19 and was out of work for a period of three to four weeks, causing a loss of wages.

- In July of 2020, Debtor's position with Walgreens was outsourced to an overseas company, TCS. This caused Debtor's health insurance to increase from approximately $380/month to over $1,100/month.

- With the change in employer came a change in working conditions. Debtor was required to work from home and had to purchase hardware and software to facilitate working from home.

- As a result of the stress . . . Debtor developed high blood pressure and Type 2 diabetes in the fall of 2020. These condition[s], along with Debtor's history of asthma and pneumonia, made Debtor particularly susceptible to COVID-19, causing him to take extra measures to reduce his contact with the outside world such as home delivery of groceries and other essentials.

- The conditions and expenses reflected . . . above were not contemplated by his confirmed plan and are the direct result of the COVID-19 pandemic and steps

> he reasonably took to protect his health and the health of family members.[15]

The substantive and economic terms of the Modified Chapter 13 Plan are identical to the confirmed Amended Chapter 13 Plan, except that the Debtor proposed to extend the payment term from 60 months to 62 months. The Debtor already has paid to the Chapter 13 Trustee the entire amount required ($32,460) in the Modified Chapter 13 Plan. The Debtor sent the Motion to Modify and Modified Chapter 13 Plan out on notice to the Chapter 13 Trustee, all creditors, and parties in interest.[16] No party contested any of the factual allegations or the relief requested. Accordingly, the Court accepts each of the facts asserted by the Debtor in the Motion to Modify.

IV. Legal Analysis.

A. Chapter 13 Debtors Generally Must Complete Their Plan Payments Within Five Years.

Congress set a hard five-year limit on plan payments in Chapter 13 bankruptcy cases. Numerous statutory provisions confirm the restriction:

- Section 1322(d)(1) applies to above-median-income debtors[17] and states: "the plan may not provide for payments over a period that is longer than 5 years."

- Section 1322(d)(2) applies to below-median-income debtors[18] and states: "the plan may not provide for payments over a period that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years."

- Section 1325(b)(4)(A) defines the "applicable commitment period" as "(i) 3 years; or (ii) not less than 5 years [for above-median-income debtors.]"

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[15] Docket No. 54.

[16] Docket No. 55.

[17] In bankruptcy vernacular, an "above-median-income debtor" refers to a debtor whose income exceeds the "median family income" as "calculated and reported by the Bureau of the Census in the then most recent year" for a household "of the applicable State for a family of the same number" as the debtor's household. 11 U.S.C. §§ 101(39(A)) and 1325(b)(3). Above-median-income debtors must pass higher bankruptcy hurdles than below-median-income debtors.

[18] As the name suggests, the term "below-median-income debtor" refers to a debtor whose income is less than the "median family income" as "calculated and reported by the Bureau of the Census in the then most recent year" for a household "of the applicable State for a family of the same number" as the debtor's household. 11 U.S.C. §§ 101(39(A)) and 1325(b)(3).

- Sections 1329(a) and (c) permit modification of confirmed Chapter 13 plans to "extend or reduce the time for such payments"; however "the court may not approve a period that expires after five years after [the time that the first payment under the original confirmed plan was due]."

In this bankruptcy case, the Debtor is an above-median-income debtor. As stated succinctly in *In re Humes*, 579 B.R. 557, 559 (Bankr. D. Colo. 2018), the above-median-income debtor "must make payments for no more than five years and no less than five years or, put more simply, for exactly five years [unless the debtor pays all creditors in full prior to the expiration of five years]." If a Chapter 13 debtor makes "all payments under the [confirmed] plan" within the five-year term, then "the court shall grant the debtor a discharge of all debts provided for by the plan [with certain specific exceptions]." 11 U.S.C. §1328(a).

Notwithstanding the clear five-year limit for payments under a confirmed Chapter 13 plan, there is some debate concerning when the five-year period actually begins. The two main approaches are evident in the case law. *See Christensen v. Black (In re Black)*, 292 B.R. 693, 701 (10th Cir BAP 2003) (describing "two main conflicting conclusions about when 'the first payment under the original confirmed plan' becomes due"). A few courts have determined that the five-year period starts when a Chapter 13 plan is confirmed. *See West v. Costen*, 826 F.2d 1376, 1378 (4th Cir. 1987). On the other hand, "[a] strong majority of courts and bankruptcy treatises hold that the 60 month period runs from the date the first payment is due under Section 1326(a)(1)" (*i.e.,* "not later than 30 days after" [the petition date]) rather than from the confirmation date. *In re Lundy*, 2016 WL 6108524, at *12-13 (Bankr. N.D. Ohio Oct. 19, 2016). Such date is typically specified in the Chapter 13 plan. Cases in that ilk include: *In re Schuster*, 2015 WL 9282447, at *4 (Bankr. D.C. Dec. 18, 2015); *In re Ramsey*, 507 B.R. 736, 739 n.11 (Bankr. D. Kan. 2014); *In re Musselman*, 341 B.R. 652, 657 (Bankr. N.D. Ind. 2005); *Profit v. Savage (In re Profit)*, 283 B.R. 567, 575-76 (9th Cir. BAP 2002); *Baxter v. Evans (In re Evans)*, 183 B.R. 331, 333 (Bankr. S.D. Ga. 1995). There is no binding appellate precedent in the Tenth Circuit on such topic. *Kinney*, 5 F.4th at 1139, n.2 ("we assume without deciding that the five-year period began with the due-date of the first post-petition payment"). However, there is solid Colorado precedent right on point: Judge Brown's thorough and erudite *Humes* decision decided that the five-year period runs from the date specified in the Chapter 13 plan for the first plan payment — not the confirmation date which typically occurs much later. *Humes*, 579 B.R. at 560-61.

Leaving aside the start-date issue, the question then arises: Is the Court authorized to enter a Section 1328(a) discharge if a Chapter 13 debtor does not complete all plan payments within the five-year limit? Again, the answer is not so simple. Some courts have permitted a "grace period" for Chapter 13 debtors to catch up and complete all plan payments after the expiration of the five-year limit,

thereby earning a Section 1328(a) discharge. *In re Klaas*, 858 F.3d 820 (3d Cir. 2017). Behind the scenes, that appears to have been the practice in Colorado for years, provided that no party objected and the "cure payment" was received by the Chapter 13 Trustee within some "reasonable" amount of time after the expiration of the five-year term. Frequently, the Court was not even advised that payments had been made after the expiration of the five-year period. However, a few years ago, in *Humes*, Judge Brown criticized that practice and determined that the Court "does not have the discretion to allow a debtor to make plan payments beyond five years." 579 B.R. at 567. Accordingly, the *Humes* court denied the entry of discharge for a debtor who tried to complete Chapter 13 plan payments about seven months after the end of the five-year limit. *Id*. at 567.

The *Humes* approach was effectively validated (albeit not by name) in a recent Tenth Circuit decision: *Kinney*, 5 F.4th 1136. The message of *Kinney* is unequivocal: Chapter 13 debtors must complete all payments under their Chapter 13 plans within the five-year limit. To emphasize the point again, practitioners and Chapter 13 debtors now are on notice that Chapter 13 debtors must complete all payments under their Chapter 13 plans *within the five-year limit* in order to secure a Section 1328(a) discharge.[19]

In *Kinney*, the debtor "failed to make the last three mortgage payments [required under her Chapter 13 plan] during the [five year] plan period." *Kinney,* 2019 WL 7938815, at *1 (Bankr. D. Colo. Feb. 27, 2019), *aff'd*, 5 F.4th 1136. Instead, the debtor made the payments about two and a half months after the end of the five-year Chapter 13 plan term and then requested a Section 1328(a) discharge anyway. *Id*. The Bankruptcy Court characterized the debtor's actions as a "material default" under her Chapter 13 plan and dismissed the bankruptcy case without entry of a discharge. *Id*. at *4. On appeal, the Tenth Circuit framed the question as: "whether the bankruptcy court could grant a discharge [under such circumstances]." Kinney, 5 F.4th at 1139. The appellate panel unanimously determined that

> . . . the [bankruptcy] court couldn't permit Ms. Kinney to cure her default once the plan's five-year period ended.

5 F.4th at 1147.

Other passages in *Kinney* are similar, but in some, the Tenth Circuit injected the word "material" into the language it used to refer to default under a confirmed plan. For example, the *Kinney* appellate panel held:

- "Though the bankruptcy code is ambiguous, its language suggests that discharge is allowable only

[19] As set forth below, there may be an exception if a debtor is able to extend the five-year plan term under 11 U.S.C. § 1329(d).

if the debtor had no ongoing material default when the plan ended." (*Id*. at 1140.)

- "Sections 1307(c) and 1328(a) don't definitively resolve the extent of discretion over dismissal and discharge, but suggest that discharge is unavailable when the plan ends with an ongoing material default." (*Id*. at 1141.)

- "The bankruptcy code suggests that material defaults cannot be cured after the plan has ended." (*Id*. at 1142.)

- "Given Ms. Kinney's material default, the plan's expiration *left the bankruptcy court without authority to grant a discharge.* We thus affirm dismissal of the Chapter 13 bankruptcy case." (*Id*. at 1147 (emphasis added).)

One appellate judge went even further and determined that the Bankruptcy Court lacked jurisdiction to grant a discharge. *Id*. at 1147-48 (Eid, J. concurring) ("Given that Kinney did not 'complet[e] . . . all payments under the plan,' as required by § 1328(a), within five years, as required by § 1322, the bankruptcy court was *without jurisdiction to grant a discharge* and properly dismissed the case. There is no ambiguity here." (emphasis added)).

The Tenth Circuit's *Kinney* holding would appear facially to bar the entry of discharge in this case. After all, the Debtor made his final required Chapter 13 plan payment after the expiration of the five-year period (at least as calculated using the Amended Chapter 13 Plan first payment date as the start date for the five-year period in accordance with the approach endorsed in *Humes*, 579 B.R. 567). But at least two very challenging legal issues may remain: (1) a timing issue; and (2) a materiality issue. Regarding timing, the Debtor now contends that the five-year period should start after confirmation of the Amended Chapter 13 Plan (August 1, 2016) instead of the date for first payment identified in the Amended Chapter 13 Plan (June 18, 2016). Since the Debtor initiated the final payment on July 10, 2021 (which payment cleared on July 12, 2021), the timing may make a dispositive difference. Regarding materiality, the Debtor, the Chapter 13 Trustee, and the Bankruptcy Practitioners Group all contend that the *Kinney* holding is limited to material defaults. They claim that since the Debtor's alleged default (a final payment about 23 days late at most) is not material, the Debtor should still be able to obtain a discharge under Section 1328(a).

The foregoing legal issues (which were briefed in a very professional manner by the Debtor, the Chapter 13 Trustee, and the Bankruptcy Practitioners Group) are quite difficult. As noted previously, there is no binding appellate precedent on the timing

issue. The only Court of Appeals decision endorses using the confirmation date for the start date of the five-year period while the majority of Bankruptcy Courts have rejected that approach and instead utilize Section 1326(a)(1) as the basis for the start date. Regarding discharge in the context of a single late payment, Judge Brown noted that "this Court does not want to deny debtors a discharge when they simply make the final payment two days late" and "there may be cases . . . where debtors are unable to complete plan payments due to circumstances beyond their control and subsequently cure a small arrearage in one payment, very shortly after the end of a plan." *In re Kinney*, 2019 WL 7938816, at *4 and 6 (Bankr. D. Colo. Nov. 22, 2019), aff'd 5 F.4th 1136. All that points out the equitable tension. And then, there is the deep mystery why the Tenth Circuit repeatedly referred to the term "material default" throughout the *Kinney* decision (especially since materiality does not feature in the text of Section 1328(a) which governs discharge). The Court struggles with such issues in the context on this case because the Debtor was just 23 days late at most in making the last payment after five long years. And, creditors were not affected.

Now that the Court has identified these difficult legal issues and re-emphasized to practitioners and debtors the importance of completing all Chapter 13 plan payments within five years, fortunately, it turns out that the Court is not required to finally resolve such matters. In addition to asking for discharge on the current record, the Debtor also filed the Motion to Modify and Modified Plan. As explained below, the Court's decision on the Motion to Modify and Modified Plan is functionally dispositive.

B. <u>The Debtor Has Satisfied the Requirements to Modify the Amended Chapter 13 Plan under Section 1329(d) and Extend the Payment Term by Two Additional Months</u>.

Congress recognized that financial circumstances may change during the five-year payment term required for above-median-income debtors in Chapter 13 bankruptcies. So, it built some limited flexibility into the Bankruptcy Code. Section 1329 allows debtors, creditors and the Chapter 13 Trustees to request modification and provides:

> (a) At 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, to —
>
> > (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
> >
> > (2) extend or reduce the time for such payments;
> >
> > (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or

> (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage) . . .
>
> (b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.
>
> (2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.
>
> (c) A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but *the court may not approve a period that expires after five years after such time*.

(Emphasis added.) Regarding the payment term applicable for modifications of Chapter 13 plans under Sections 1329(a)-(c), the Tenth Circuit confirmed the statutory time limit plainly: ". . . modifications cannot provide for payments more than five years after the deadline for the first payment." *Kinney*, 5 F.4th at 1139.

However, since the underlying default in *Kinney* (which occurred in 2018), the world — and the Bankruptcy Code — have changed. Two words: "COVID-19 pandemic." The COVID-19 pandemic is the most significant public health disaster to hit the United States (and the globe) in the last century. According to recent data from the Centers for Disease Control and Prevention, 45,316,210 people have been infected with the COVID-19 virus in the United States of which 733,834 have died.[20] And, the COVID-19 pandemic has had significant economic impacts. Attempting to ameliorate some of the initial adverse financial impacts of the COVID-19 pandemic and ensure future financial stability, on March 27, 2020, Congress enacted the "Coronavirus Aid, Relief, and Economic Security Act" (the "CARES Act"). Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). At the time, the CARES Act was characterized as the largest economic relief bill ever enacted in the United States.

As part of the CARES Act, Congress added a new subpart (d) to Section 1329 allowing for the term of Chapter 13 plans to be extended past the five-year limit to a new seven-year maximum. The new provision was originally set to expire after one year (*i.e.,* March 27, 2021), but was subsequently amended and extended through March 27, 2022 pursuant to the "COVID-19 Bankruptcy Relief Extension

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[20] United States Centers for Disease Control and Prevention COVID Data Tracker available on www.covid.cdc.gov (last visited October 25, 2021).

Act of 2021" (the "COVID Extension Act"). Pub. L. 117-5, 135 Stat. 249 (Mar. 27, 2021). The new Section 1329(d) (as enacted under the CARES Act and amended by the COVID Extension Act) is currently in effect and now provides:

> (d)(1) Subject to paragraph (3), for a plan confirmed prior to the date of enactment of the COVID-19 Bankruptcy Relief Extension Act of 2021 [March 27, 2021], the plan may be modified upon request of the debtor if —
>
> > (A) the debtor is experiencing or has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic; and
> >
> > (B) the modification is approved after notice and a hearing.
>
> (2) A plan modified under paragraph (1) may not provide for payments over a period that expires more than 7 years after the time that the first payment under the original confirmed plan was due.
>
> (3) Sections 1322(a), 1322(b), 1323(c), and the requirements of section 1325(a) shall apply to any modification under paragraph (1).

Section 1329(d) does not separately specify the type of Chapter 13 plan modifications which are permissible. Accordingly, the Court looks to Section 1329(a) and determines that the same type of modifications may be pursued under Section 1329(d). In other words, a debtor may seek to: (1) increase or reduce the amount of payments on claims of a particular class; (2) extend or reduce the time for such payments; (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan; or (4) reduce amounts to be paid under the plan by the actual amount expended by the debtor to purchase health insurance for the debtor (and for any dependent of the debtor if such dependent does not otherwise have health insurance coverage).

In this bankruptcy proceeding, the Debtor tacitly (and in the alternative) concedes through the Motion to Modify that he did not "complete all payments under the plan [the Amended Chapter 13 Plan]" as that phrase has been construed in *Kinney*, 5 F.4th 1136. So, he asked to modify. The Debtor seeks only to extend the time for payments by two months — nothing else. So, that is a permissible type of modification under Section 1329(a) and (d). Beyond that, the Court discerns only the following additional requirements which must be established by the Debtor under Section 1329(d). *First*, the Debtor must establish that he confirmed his Amended Chapter 13 Plan before March 27, 2021. *Second,* the Debtor must prove that he "is experiencing or has

experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic." *Third,* the Debtor must show that the requirements of Sections 1322(a), 1322(b), 1323(c), and 1325(a) are met. *Fourth,* the Debtor must not propose an extension longer than seven years. And, *fifth,* procedurally, the Debtor must provide notice and opportunity for a hearing to all creditors and parties in interest. Notably, there is no statutory requirement that a motion to modify must be filed prior to the end of the original five-year plan term. *See*, *e.g.*, *In re Harbin*, 626 B.R. 888 (Bankr. E.D. Mich. Mar. 22, 2021) (approving modification for payments made after expiration of five-year plan payment period). And, it is not necessary for a debtor to prove that a modification is needed solely or exclusively because of COVID-19 hardships nor that such debtor was current in Chapter 13 plan payments prior to the onset of the COVID-19 pandemic. *See*, *e.g.*, *In re Gilbert*, 622 B.R. 859, 864 (Bankr. E.D. La. 2020) ("nothing in the text of the CARES Act forecloses the relief available under § 1329(d) to those Debtors simply because they were behind in plan payments prior to March 27, 2020"); *In re Fowler,* 2020 WL 6701359 (Bankr. M.D. Ala. Nov. 13, 2020) (modification under Section 329(d) not limited to debtors who were current on Chapter 13 plan payments on March 27, 2020).

In this case, the Debtor has met his burden to prove all the requirements for modification under Section 1329(d) so as to extend the payment term by two additional months past the typical five-year limit.

First, the Debtor's Amended Chapter 13 Plan was confirmed on August 1, 2016, which is several years before March 27, 2021. So, the Debtor falls within the timing parameters under Section 1329(d).

Second, by virtue of the uncontested facts presented by the Debtor, the Debtor has shown that he "has experienced a material financial hardship due, directly or indirectly, to the coronavirus disease 2019 (COVID-19) pandemic." Most significantly, like many Americans, the Debtor suffered the double-whammy of a reduction in income and an increase in expenses. The reduction in income occurred because the Debtor lost his job and his wife contracted COVID-19 and was out of work for about a month. His expenses increased because: the Debtor became the sole caretaker for his COVID-19 susceptible uncle (which required the Debtor to incur substantial transportation expenses); the Debtor's health insurance costs increased by about $720 per month because of his employment termination; and the Debtor suffered health setbacks (high blood pressure and diabetes) as a result of stress which made him much more susceptible to COVID-19, thus causing him to take extra measures to isolate. Those extra measures were costly.

Third, the requirements of Sections 1322(a), 1322(b), 1323(c), and 1325(a) are satisfied. The Debtor is only proposing to extend the payment term for his confirmed Amended Chapter 13 Plan by a mere two months. He is not attempting to reduce payments to any of his creditors and has demonstrated that he can make the final two payments (by already doing so). The same reasons that the Court used to confirm the

Amended Chapter 13 Plan under Sections 1322(a), 1322(b), 1323(c), and 1325(a) are equally applicable to the Modified Plan. And, the satisfaction of such elements is uncontested.

Fourth, in the Motion to Modify and Modified Plan, the Debtor proposes to extend the Chapter 13 plan payment term by only two months. That period is well less than the Section 1329(d) seven-year maximum.

Fifth, procedurally, the Debtor sent the Motion to Modify and Modified Plan out on notice to all creditors and parties in interest. No one objected. Accordingly, while all creditors and parties in interest were afforded the opportunity for a hearing, no hearing was actually necessary.

Thus, the Court finds that modification of the Debtor's Amended Chapter 13 Plan is reasonable and warranted. The Court grants the Motion to Modify and approves the Modified Plan. As fair warning to bankruptcy practitioners, the Court observes that motions to modify under Section 1329(d) must be accompanied by factual allegations (or better still, an affidavit) providing sufficient details to enable the Court to determine whether or not a particular debtor actually suffered "material financial hardship" due to the COVID-19 pandemic. Furthermore, prudence dictates that any request for modification should be submitted promptly after the circumstances justifying modification arise.

C. The Court Grants the Debtor a Discharge Under Section 1328(a) Since the Debtor Already Paid the Full Amount Required through the Extended Payment Period in the Modified Plan.

Since the Court approved the Modified Plan, the Modified Plan has become the operative Chapter 13 plan for purposes of discharge. Under the Modified Plan, the Debtor was obligated to pay the Chapter 13 Trustee a total of $32,460 on or before August 18, 2021 (*i.e.*, within two months after expiration of the five-year period set forth in the Amended Chapter 13 Plan). Based upon the uncontested facts, the Debtor has satisfied such obligation. The Debtor also already submitted the Certification to Obtain Discharge verifying that he "completed all payments and obligations required by my Chapter 13 plan," has "no domestic support obligations," and has "not been convicted of a felony." Under Section 1328(a), "as soon as practicable after completion by the debtor of all payments under the plan . . ., the court shall grant the debtor a discharge" of most types of debts. Accordingly, the Court grants the Debtor a Section 1328(a) discharge and will enter a separate standard Section 1328(a) Order of Discharge.

V. Conclusion.

For the reasons set forth above, the Court:

GRANTS the Motion to Modify;

APPROVES the Modified Plan; and

GRANTS the Debtor a Section 1328(a) discharge since the Debtor has completed all payments required under the Modified Plan.

DATED this 27th day of October, 2021.

BY THE COURT:

Thomas B. McNamara
United States Bankruptcy

Speaker Biographies

Douglas B. Kiel, Esq., received his undergraduate degree in Business Administration from Trinity University in 1982 and his Juris Doctor from the University of Houston Law School in 1991. For most of his twenties, he practiced as a CPA focusing on taxation. Prior to becoming a Colorado Chapter 13 trustee on October 1, 2011, he was a practicing lawyer in the state of Texas with an emphasis on creditors' rights and bankruptcy.

The Honorable Craig A. Gargotta was appointed to the bench on October 1, 2007. He was then appointed Chief Bankruptcy Judge for the Western District of Texas on November 2, 2021. Judge Gargotta has a B.A. and M.A. from Texas A&M University and his J.D. from St. Mary's School of Law in San Antonio, Texas. After law school he clerked for the Honorable Ronald B. King, United States Bankruptcy Judge for the Western District of Texas. He then served as an Asst. U.S. Attorney for 17 years prior to taking the bench. Judge Gargotta is a member of the NCBJ, Federal Bar Association, and Larry E. Kelly Inn of Court. He serves as an Associate Editor for the *American Bankruptcy Law Journal* and is an adjunct professor at St. Mary's Law School. Judge Gargotta has spoken at numerous bar conferences on a local and national level. Judge Gargotta and his wife Susan has been married for over 36 years and have two sons.

The Honorable Brian Lynch was sworn in as a United States Bankruptcy Judge for the Western District of Washington, Tacoma Division, on June 1, 2010. He served as Chief Bankruptcy Judge of the District from October 1, 2014 to September 30, 2019., and served as Chair of the Conference of 9 th Circuit Chief Bankruptcy Judges in 2017. Prior to his appointment, he served as the Standing Chapter 13 Trustee for the Portland Division of the District of Oregon, and as the Standing Chapter 12 Trustee for the District of Oregon. And in 2018, he was the recipient of the National Association of Chapter 13 Trustees Hon. Ralph Kelley Award.