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District of New Mexico**

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
DANIEL PETMECKY and
JEAN ANN PETMECKY,
Debtors.

No. 13-97-12421 SA

**MEMORANDUM OPINION ON DEBTORS'
MODIFICATION OF CHAPTER 13 PLAN**

This matter came before the Court for hearing on the Debtors' Modification of Chapter 13 Plan and the objection thereto filed by the Trustee. The Debtors appeared through their attorney Bonnie Gandarilla. The Chapter 13 Trustee appeared through her attorney Annette DeBois. This is a core proceeding. 28 U.S.C. § 157(b)(2)(L). The parties agree that there are no factual disputes and submitted the issue to the Court on oral argument and statements of points and authorities.

Facts

Debtors filed their chapter 13 case on April 25, 1997. Their plan was confirmed by order entered September 18, 1997. The plan called for sixty monthly payments of \$650.00. Debtors have made 48 of the payments. The plan estimated a dividend¹ to unsecured creditors of 1%. In fact, fewer

¹ The Court finds that the Debtors' plan is a "pot plan" rather than a "percentage plan" despite language describing that creditors will get 1%. See e.g., In re Martin, 232 B.R. 29, 33-34 (Bankr. D. Ma. 1999) (quoting In re Witkowski, 16 F.3d 739, 741 (7th Cir. 1994).) "[A] 'percentage plan' is a plan which provides a set percentage of his claim each

unsecured claims were filed than originally anticipated, and creditors would receive approximately 76% of their claims if the plan were fully performed. The Debtors modification proposes to shorten the plan to 48 months, which would result in an estimated dividend to unsecured creditors of 29%. There is no question that the chapter 7 test would be met under the modification.

In support of the proposed modification, debtors claim that Mr. Petmecky wishes to expand his business but feels he cannot do so while in chapter 13. Debtors dispute, however, that any reason is even required for modification; debtors claim that § 1329(b)(1) specifically sets out the only requirements for modification. Debtors also point out that § 1329 allows for modifications of the amount and timing of payments to creditors, and argue that it cannot be bad faith to take advantage of explicit code provisions.

Trustee argues first that res judicata and contract theories should prevent this modification. The Trustee frames the issue in this case as who should receive the windfall

creditor will receive but leaves the exact amount the debtor will pay in flux until all claims are approved. A 'pot plan' refers to a plan which provides that the debtor will pay a fixed amount or 'pot' of money into the bankruptcy estate but the percentage creditors will receive ultimately depends on the total amount of claims that are approved." Witkowski, 16 F.3d at 741.

benefit when not all creditors file claims. Finally, Trustee suggests that the modification is not in good faith.

Discussion

Bankruptcy Code section 1329 governs modifications to confirmed chapter 13 plans. That section 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; or
(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.

(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.

11 U.S.C. § 1329.

Trustee's first argument is that the plan is res judicata, and that the confirmed plan is a binding contract. Some courts follow this theory, e.g., Arnold v. Weast (In re Arnold), 869 F.2d 240, 243 (4th Cir. 1989) ("The doctrine of res judicata bars an increase in the amount of monthly payments only where there have been no unanticipated, substantial changes in the debtor's financial situation.") (citations

omitted). Other courts do not, e.g., Barbosa v. Soloman, 235 F.3d 31, 39 (1st Cir. 2000) ("Many other courts have ruled that section 1329(a) allows the parties an absolute right to request a modification (although a modification will not necessarily be granted.)") (citing cases.) See also In re Witkowski, 16 F.3d 739, 745 (7th Cir. 1994) ("[W]e disagree with Arnold.")² The Court finds the plain language of 1329(a) has no change in circumstances requirement, and adopts the later line of reasoning. Therefore, the Court finds that the Debtors in this case may pursue a modification of their confirmed chapter 13 plan without demonstrating a substantial change in circumstances.

To confirm a modified plan, the modification must meet all of the requirements in § 1329 including the conditions set out in sections 1322, 1323, and 1325. Witkowski, 16 F.3d at

² Trustee cites In re Harvey, 213 F.3d 318, 321 (7th Cir. 2000) for the proposition that a confirmed plan acts as a contract or consent decree that binds both the debtor and all the creditors. The Harvey court based this statement on the "general justification for res judicata principles--after the affected parties have an opportunity to present their arguments and claims, it is cumbersome and inefficient to allow those same parties to revisit or recharacterize the identical problems in a subsequent proceeding." Id. Harvey, which is not a Section 1329 case, never cites Witkowski, which remains good law in the Seventh Circuit. The argument in Harvey centered only on what the provisions of the plan were, and whether GMAC should be bound by the provisions of a plan to which it had not objected. Id., at 321-23.

747. The only requirement relevant to this case is that the modified plan must be proposed in good faith. 11 U.S.C. § 1325(a)(3). See Barbosa, 235 F.3d at 38. The record in this case shows that the Debtors have made payments for 48 months. Under 11 U.S.C. § 1325(b)(1)(B) the Debtors were only required to pay their disposable income to the Trustee for 36 months. The Trustee argues that 12 month reduction in plan length is per se bad faith, i.e., the glass is half empty. From another perspective, however, Debtors have already paid for 12 months longer than required, i.e., the glass is half full. Furthermore, Debtors stated two legitimate business reasons for their request: first, fewer claims were filed³, and second, the Debtors wish to expand their business.

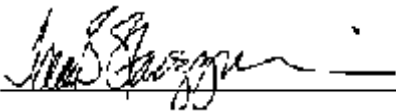
Further, what would happen in a hypothetical case in which the plan were confirmed after the claims had been filed and adjudicated? In that instance, as occurs with a percentage plan, the debtor could craft a plan that paid only those claims, or portions of those claims, as minimally required by the Code, in particular the best interests of creditors test, §1325(a)(4), and the disposable income test, §1325(b)(1)(A). Presumably that is what the Debtors would

³ And, under the plan creditors expected a 1% dividend but have already received a 27% dividend.

have done in this case were that information available to them at the time. They seek to accomplish that same result by modification as permitted by §1329; the result should not be different merely because at the beginning of the case the Debtors lacked the information that they now have with the claims-filing process completed. See Witkowski, 16 F.3d at 740 ("Once the allowable claims are established, the actual amount the debtor must pay may differ from the amount of estimated claims.... This may require an adjustment in the payment schedule, depending on the type of plan." [Citations omitted.]).

The Court does not find the reduction in time in this case to be bad faith. The Court finds the proposal to modify was filed in good faith.

For the reasons set forth above, the Modification to Chapter 13 Plan is approved. Counsel for Debtors should prepare an order in conformity with this Opinion within ten days.



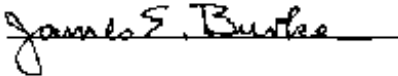
Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on October 11, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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A handwritten signature in black ink, reading "James S. Bustee", is written over a horizontal line.