IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONDA J. WINNECOUR *Chapter 13 Trustee,* **Appellant,** **v.** **BRYAN K. REFOSCO** *and* **BETH REFOSCO,** **Appellees.**	)	**Bankruptcy Appeal** **2:13-cv-01219**

MEMORANDUM OPINION AND ORDER OF COURT

Pending before the Court is an appeal from a Memorandum Opinion and Order issued by United States Bankruptcy Judge Jeffrey A. Deller on July 9, 2013 in which he granted a Motion for Early Payoff of Chapter 13 Plan filed by the debtors, Bryan K. Refosco and Beth Refosco (the "Debtors"). Chapter 13 Trustee Ronda J. Winnecour (the "Trustee" or "Appellant") now appeals. Debtors have not filed anything with this Court or otherwise participated in this appeal.[1] Nevertheless, this matter is ripe for disposition.

I. Background

Debtors commenced the underlying action on November 28, 2011 by filing a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code. Debtors filed an amended Chapter 13 plan on September 4, 2012, which was modified on October 18, 2012 and confirmed on October 30, 2012 (the "Confirmed Plan"). The Confirmed Plan provides for a

1. The Trustee is not, however, entitled to a summary reversal of the Order from which it appealed. *See In re Donahue*, 406 B.R. 407, 411 (M.D. Fla. 2009); *In re Rauso*, 212 B.R. 242, 243 (E.D. Pa. 1997). Instead, on September 26, 2013, Debtors were ordered to show cause on or before October 4, 2013 why this matter should not be decided on Appellant's brief alone.

term of sixty (60) months with monthly payments of $4,976.[2]

On November 21, 2012, Debtors filed a "Motion for Early Payoff of Chapter 13 Plan" in which they assert that their parents "'have agreed to give [them] the amount necessary to pay the remaining plan base and pay off their bankruptcy case' so that [they] can 'exit their bankruptcy case earlier.'" *In re Refosco*, BR 11-27174-JAD, 2013 WL 3489923, at *1 (Bankr. W.D. Pa. July 9, 2013). Moreover, Debtors sought to amend the term of the Confirmed Plan from sixty (60) months to twelve (12) months. By their proposed amendment, Debtors sought to pay the pre-petition mortgage arrears claims, their third mortgage in full, the priority claims of the Pennsylvania Department of Revenue and the United States Internal Revenue Service, attorneys' fees, and an unsecured pool of approximately $14,312.88—roughly ten-percent (10%) of the unsecured claims filed totaling $142,970.49. Debtors' counsel approximated that the amount necessary to pay off these particular items totaled $56,865.60.

The Trustee filed a response in opposition on December 6, 2012, arguing that the Debtors' proposed early payoff constitutes a "modification" under the Bankruptcy Code. *See* 11 U.S.C. § 1329. As such, the Trustee contended that Debtors are bound by the applicable commitment period of three (3) years per Form 22C and 11 U.S.C. § 1325(b)(4)(A) and that they were only in month eleven of their Confirmed Plan. The Trustee further maintained that even if Debtors could pay off their Confirmed Plan in less than three (3) years, the proposal still must be denied because it failed to satisfy the liquidation alternative test as required by 11 U.S.C. § 1325(a)(4) and the good faith requirement set forth in 11 U.S.C. § 1325(a)(3).

A hearing on the motion was held on January 9, 2013 before the Bankruptcy Court.

2. As set forth more fully in Appellant's brief, Debtors' Official Form 22C (colloquially referred to as the "means test") disclosed self-employment income which totaled a monthly sum less than the median income for a household of four in Pennsylvania. The practical result of the means test is that the applicable commitment period for the duration of plan payments became three (3) years; however, Debtors chose to propose a sixty (60) month plan.

Debtors and the Trustee thereafter filed post-argument briefs. To summarize, "the parties primarily focused their arguments on the applicability of 11 U.S.C. §§ 1325 and 1329, and whether they must be interpreted together as requiring a debtor to make plan payment for a minimum term of thirty-six months, or whether a debtor is entitled to modify the plan to complete such payments in fewer than thirty-six months without having to pay 100% of allowed unsecured claims." *In re Refosco*, 2013 WL 3489923, at *2.

By Memorandum Opinion and Order dated July 9, 2013, the Bankruptcy Court granted the motion for early payoff. *Id.* at **3-4. The Bankruptcy Court also overruled several objections that the Trustee made pursuant to 11 U.S.C. §§ 1325 and 1329 on the basis that they were moot. *Id.* at *4

The Trustee timely filed its notice of appeal on July 22, 2013, which was docketed with this Court on August 23, 2013. For the reasons that follow, the Court will reverse the decision of the Bankruptcy Court and remand this action for further proceedings.

II. Standard of Review

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158. Bankruptcy Rule 8013 provides that the district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013. On appeal from an order of the Bankruptcy Court, the district court must apply the clearly erroneous test to factual findings and de novo review to questions of law. *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998); Fed. R. Bankr. P. 8013.

III. Discussion

The Trustee raises several issues on appeal, but it urges the Court to narrowly rule that Debtors do seek to modify their plan. As the Trustee asserts, its proposed ruling would end the

inquiry and require no further findings as to the meaning of the applicable commitment period because Debtors would become bound by the terms of their existing Confirmed Plan. The Court agrees that a Motion for Early Payoff constitutes a plan modification under the plain language of the statute.

Section 1329(a) of the United States Bankruptcy Code provides, in relevant part, as follows:

> (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; . . . .

11 U.S.C. § 1329. Notably, § 1329(b) states that "§§ 1322(a), 1322(b) and 1323(c) of [the Bankruptcy Code] and the requirements of § 1325(a) of this title apply to any modification under [§ 1329(a)]." 11 U.S.C. § 1329(b)(1).[3]

Section 1325(a) specifies that, "[e]xcept as provided in subsection (b), the court shall confirm a plan if" various prerequisites are met, such as the good faith and liquidation alternative requirements. *See* 11 U.S.C. §§ 1325(a)(3)-(4). Section 1325(b), on the other hand, provides as

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3. Several courts have disagreed as to whether the a plan modification under § 1329 must comply with § 1325, which requires a commitment period of five years, three years, or less if all unsecured claims are paid in full over a shorter period. *See generally In re Williams*, 09-42400 (NLW), 2014 WL 274307, at **5-7 (Bankr. D.N.J. Jan. 24, 2014) (disagreeing with *In re Davis*, 439 B.R. 863 (Bankr. N.D. Ill. 2010) and *In re Tibbs*, 478 B.R. 458 (Bankr. S.D. Fla. 2012)). The dispute focuses on principles of statutory construction. *See id.* ("Because of the omission of § 1325(b) from § 1329(b)(1), courts disagree over whether § 1329 incorporates the applicable commitment period defined in § 1325(b)"). Some courts have applied the maxim *expressio unius est exclusio alterius* in holding that modification of a plan under § 1329 does not require compliance with § 1325(b). *See, e.g., In re Davis*, 439 B.R. at 867. Others have disagreed with that interpretation, holding that the list of applicable provisions in § 1325(b)(1) is not exclusive. *See, e.g.*, *In re Williams*, 2014 WL 274307, at *6 (citing *In re King*, 439 B.R. 129 (Bankr. S.D. Ill.2010)).

follows:

> (1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan --
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
>
> (B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

For purposes of this statute, the "applicable commitment period" --

> (A) subject to subparagraph (B), shall be
>
> (i) 3 years; or
>
> (ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—[the median family income of the applicable state]—and;
>
> (B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

11 U.S.C. §§ 1325(b)(4)(A)-(B). *See also Pliler v. Stearns*, -- F.3d --, 13-1445, 2014 WL 1259569 (4th Cir. Mar. 28, 2014) ("We, like all the other circuits to have addressed this issue, hold that an 'applicable commitment period' is a temporal requirement.") (citing *In re Flores*, 735 F.3d 855, 856 (9th Cir. 2013) (en banc); *Baud v. Carroll*, 634 F.3d 327, 338 (6th Cir. 2011); *Whaley v. Tennyson*, 611 F.3d 873, 880 (11th Cir.2010); *Coop v. Frederickson*, 545 F.3d 652, 660 (8th Cir. 2008)).

The Bankruptcy Court did not address the interplay between § 1329 and § 1325 because it concluded that Debtors did not seek a modification of their Confirmed Plan, which it viewed as a threshold issue. *See In re Refosco*, 2013 WL 3489923 , at *3 ("Whether the Court needs to

address the interplay between these statutes turns on whether [the] Motion of the Debtor[s] actually seeks to 'modify' the Debtors' confirmed Plan."). In reaching that decision, the Bankruptcy Court found persuasive *In re Miller*, 325 B.R. 539, 541 (Bankr. W.D. Pa. 2005).

In *Miller*, the court was confronted with the issue of "whether Debtor's proposal to refinance her residence to achieve an early payoff of the Plan from the proceeds of the loan constitutes a plan modification under § 1329." *Id.* The *Miller* Court declined to treat a voluntary early payoff as a modification where the debtor "[sought] no change in the payment amount and actually increase[d] the economic worth by paying the contractual obligations due under a confirmed plan earlier than promised." *Id.* at 542. To the *Miller* Court, "'treat[ing] the debtor's voluntary early payoff of the plan as a "modification" would represent a triumph of formalism over substance and common sense.'" *Id*. (quoting *In re Murphy*, 327 B.R. 760, 770 (Bankr. E.D. Va. 2005)).

The *Miller* Court was not, however, writing on a blank slate. Adopting the rationale set forth in *Murphy*, the court recognized that "'early payoff of a plan would have the literal effect of reducing the period over which payments are made'"—*i.e.*, a modification under § 1329(a)(1)-(3)—but it opined that "'such early payoff of the plan has absolutely no prejudicial effect on any party.'" *In re Miller*, 325 B.R. at 542 (quoting *In re Murphy*, 327 B.R. 760 , 770 (Bankr. E.D. Va. 2005)).[4]

Applying those standards, the Bankruptcy Court disagreed with the Trustee's position that a Motion for Early Payoff constitutes a request for a post-confirmation reduction of the term length. The Bankruptcy Court instead found that "[a]lthough the time period for payment for

4. This rational emanates, in part, from the *Murphy* Court's reliance on *Massachusetts Hous. Fin. Agency v. Evora*, which synthesized several bankruptcy decisions and prescribed the following "rule": "'Courts examine the substance of the plan and the nature of the debtor's obligation to the debtor's creditors, not to the number of payments proposed.'" *In re Murphy*, 327 B.R. at 770 (quoting 255 B.R. 336, 342 (D. Mass. 2000)).

unsecured creditors will be altered if the Motion is granted (*i.e.*, it will be expedited), the amount to be paid to such unsecured creditors will not be adversely altered." *In re Refosco*, 2013 WL 3489923, at *3. As the Bankruptcy Court stated:

> [B]ecause unsecured creditors would be paid their 10% distribution within a shorter time period than that under the Confirmed Plan, unsecured creditors are actually benefited by the Motion after considering the time value of money. *See In re Miller*, 325 B.R. at 542 ("Indeed, because there is a time value to money, an early payoff actually increases the economic worth, or present value, of the distribution to the unsecured creditors.") (citing *In re Murphy*, 327 B.R. at 770)). Thus, the Motion seeks no material adverse change in the payment amounts and actually increases the benefit to creditors.

Id. Accordingly, the Debtors' motion was granted.

Other bankruptcy courts have rejected the rule adopted by *Miller* as contrary to the plain language of the statute. *See In re Turek*, 346 B.R. 350, 355 (Bankr. M.D. Pa. 2006). For example, in *Turek*, the court recognized that *Murphy* is a practical decision, but that "it adds a threshold requirement to the application of § 1329 that is not present in the plain, unambiguous language of the statute." 346 B.R. at 356. As the court highlighted, "§ 1329 explicitly states that a plan may be modified to reduce the *time* for payments under the plan and, in a separate provision, states that a plan may be modified to reduce *payments* under the plan." *Id.* (emphasis in original). Thus, as the *Turek* Court concluded, "[i]f the time for making payments under a plan is a modification of the plan only if the amount of the payments are reduced, paragraph (a)(2) of the section would be superfluous." *Id.*

Here, Debtors seek to make a lump sum payment for an immediate payoff of their Chapter 13 Confirmed Plan. This request would indeed reduce the time for payments on claims held by their creditors from the applicable five-year commitment period to which they previously agreed in their Confirmed Plan to just twelve months. The Bankruptcy Court recognized this fact, but it injected an additional "prejudicial effect" prerequisite not found in the statute. *See In*

re Refosco, 2013 WL 3489923, at *3 ("Although the time period for payment for unsecured creditors will be altered if the Motion is granted (*i.e.*, it will be expedited), the amount to be paid to such unsecured creditors will not be adversely altered."). Therefore, based on a plain reading of § 1329, Debtors' motion constitutes a request to modify their Confirmed Plan.

Nevertheless, even if this Court were to impose a "prejudicial effect" requirement for modification, the immediate payoff would still meet that threshold. The Bankruptcy Code requires a one-hundred-percent (100%) distribution to unsecured creditors before a Court may confirm a plan length less than three or five years. Debtors instead propose only a ten-percent (10%) distribution per their Confirmed Plan. Moreover, an immediate payoff would deprive creditors of payment as to ninety-percent (90%) of their claims without any recourse if Debtors' circumstances change for the better during the otherwise applicable commitment period. Thus, to shorten the plan duration to just twelve months, would rob the Trustee and creditors of their ability to propose plan modification in the event of a windfall.

IV. Conclusion

For the reasons hereinabove stated, the Court will reverse the order of the Bankruptcy Court and remand this cause for further proceedings. An appropriate Order follows.

McVerry, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

RONDA J. WINNECOUR *Chapter 13 Standing Trustee,* **Appellant,** **v.** **BRYAN K. REFOSCO** *and* **BETH REFOSCO,** **Appellees.**	)	**Bankruptcy Appeal** **2:13-cv-01219**

ORDER OF COURT

AND NOW, this 9th day of April, 2014, in accordance with the foregoing Memorandum Opinion, it is hereby **ORDERED, ADJUDGED and DECREED** that the Order of the Bankruptcy Court dated July 8, 2013 is **REVERSED** and the cause is **REMANDED** to the Bankruptcy Court for further proceedings.

BY THE COURT:

s/Terrence F. McVerry
United States District Judge

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