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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

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In re:	)	BAP No.	NC-17-1256-BTaF
	)		
DAVID MRDUTT and CHRISTINA	)	Bk. No.	11-61029-HLB
MRDUTT,	)		
	)		
Debtors.	)		
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	)		
DEVIN DERHAM-BURK, Chapter	)		
13 Trustee,	)		
	)		
Appellant,	)		
	)		
v.	)		
	)		
DAVID MRDUTT; CHRISTINA	)		
MRDUTT,	)		
	)		
Appellees.	)		
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**O P I N I O N**

Argued and Submitted on May 25, 2018,  
at San Francisco, California

Filed - May 6, 2019

Appeal from the United States Bankruptcy Court  
for the Northern District of California

Honorable Hannah L. Blumenstiel, Bankruptcy Judge, Presiding

Appearances: \_\_\_\_\_  
Jane Z. Bohrer argued for appellant Devin Derham-  
Burk, Chapter 13 Trustee.  
\_\_\_\_\_

Before: BRAND, TAYLOR and FARIS, Bankruptcy Judges.

1 BRAND, Bankruptcy Judge:

2  
3 Chapter 13<sup>1</sup> trustee, Devin Derham-Burk ("Trustee"), appeals  
4 an order granting the debtors' motion to modify their chapter 13  
5 plan. The debtors proposed to modify their confirmed plan to  
6 surrender their residence to the lender. Trustee opposed the  
7 motion as untimely, because it was filed seven months after the  
8 debtors had completed their plan payments to Trustee. The  
9 bankruptcy court held that, because the debtors had not cured  
10 their prepetition mortgage arrears as provided for in the plan,  
11 the payments under the plan were not complete; therefore, the  
12 motion to modify was timely under § 1329(a). The court allowed  
13 the plan modification under § 1329(c) to surrender the residence,  
14 even though the 60-month time period set forth in § 1329(c) had  
15 already expired.

16 We agree with the bankruptcy court that the debtors' plan  
17 payments were not complete for purposes of § 1329(a). We  
18 conclude, however, that the debtors could not modify their plan to  
19 surrender their residence, because the surrender was a payment  
20 made outside the 60-month time limit. Accordingly, we REVERSE.

21 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

22 David and Christina Mrdutt filed their chapter 13 bankruptcy  
23 case on November 30, 2011. Their residence, valued at \$235,000,  
24 was encumbered by two deeds of trust in favor of Wells Fargo.  
25 Wells Fargo filed two related secured proofs of claim: one for  
26 \$406,299.67 for the first lien (the primary mortgage), which

27  
28 <sup>1</sup> Unless specified otherwise, all chapter and section  
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
all "Rule" references are to the Federal Rules of Bankruptcy  
Procedure.

1 included nearly \$65,000 in prepetition arrears; and one for  
2 \$42,427.01 for the second lien (a HELOC). The Mrdutts later  
3 obtained an order avoiding the wholly unsecured second lien, which  
4 was contingent upon their completion of a chapter 13 plan and  
5 receiving discharges.

6 Prior to plan confirmation, the Mrdutts filed a declaration  
7 required by local guidelines stating that their request to Wells  
8 Fargo to modify the primary mortgage loan was still pending.

9 Months later, with the loan modification still pending, the  
10 bankruptcy court confirmed the Mrdutts' second amended chapter 13  
11 plan on December 11, 2012 ("Plan"). The 60-month Plan provided \$0  
12 for allowed general unsecured claims. The Plan also provided that  
13 all prepetition mortgage arrears would be cured if Wells Fargo  
14 approved the loan modification; if Wells Fargo disapproved it, the  
15 Mrdutts would file a modified plan to pay the arrears. The  
16 Mrdutts also agreed to make all postpetition mortgage payments  
17 directly to Wells Fargo.<sup>2</sup>

18 Following confirmation, the Mrdutts continued to make regular  
19 payments to Trustee and the case proceeded uneventfully until  
20 after they made their final Plan payment to her in October 2016,  
21 which she distributed in November. In December 2016, Mr. Mrdutt  
22 wrote a letter to the bankruptcy judge asking her to stop Wells  
23 Fargo from foreclosing on the residence. Sadly, Mrs. Mrdutt had  
24 passed away from cancer. Mr. Mrdutt explained that Wells Fargo  
25 was refusing to deal with him for a loan modification because the

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27 <sup>2</sup> The Mrdutts' "cure and maintain" plan for a long-term  
28 mortgage debt is authorized by § 1322(b)(5), which allows a  
debtor's plan to provide for the curing of any prepetition default  
within a reasonable time and maintaining postpetition mortgage  
payments while the case is pending. See Cohen v. Lopez (In re  
Lopez), 372 B.R. 40 (9th Cir. BAP 2007), aff'd, 550 F.3d 1202 (9th  
Cir. 2008).

1 loan was in Mrs. Mrdutt's name only.

2 In January 2017, Wells Fargo moved for relief from stay to  
3 foreclose its first lien on the residence. The Mrdutts had failed  
4 to make postpetition mortgage payments totaling \$123,819. The  
5 outstanding debt for the primary mortgage was now \$536,861. The  
6 residence was still valued at \$235,000. The bankruptcy court  
7 granted stay relief but ordered that its effectiveness was stayed  
8 until entry of the Mrdutts' discharges.

9 In June 2017, Trustee filed notices of plan completion and  
10 requested that the case be closed without discharge. Trustee  
11 asserted that the Mrdutts were not entitled to a discharge because  
12 they had failed to deal with their prepetition mortgage arrears.

13 In response, the Mrdutts<sup>3</sup> moved to modify their Plan ("Motion  
14 to Modify"). Because they ultimately did not receive the loan  
15 modification, they wished to modify the Plan to surrender the  
16 residence. Trustee argued that the Motion to Modify was untimely,  
17 because plan payments had been completed months prior.

18 After a hearing, the bankruptcy court granted the Motion to  
19 Modify, finding that it was timely under § 1329(a) and that the  
20 Mrdutts could surrender the residence even though the 60-month  
21 time period under § 1329(c) had expired. Trustee timely appealed.

## 22 **II. JURISDICTION**

23 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
24 and 157(b)(2)(L). We have jurisdiction under 28 U.S.C. § 158.

## 25 **III. ISSUES**

26 1. Did the bankruptcy court err in determining that, because the  
27 Mrdutts had not completed all payments under the Plan due to their

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<sup>3</sup> Mr. Mrdutt continued to prosecute the case on behalf of himself and his late wife. As a result, we refer to the Mrdutts in the plural.

1 failure to satisfy the prepetition mortgage arrears, the Motion to  
2 Modify was timely under § 1329(a)?

3 2. Did the bankruptcy court err in determining that the Plan, as  
4 modified, complied with the time limits set forth in § 1329(c)?

#### 5 IV. STANDARDS OF REVIEW

6 Modification under § 1329 is discretionary and is reviewed  
7 for an abuse of discretion. Powers v. Savage (In re Powers), 202  
8 B.R. 618, 623 (9th Cir. BAP 1996). A bankruptcy court abuses its  
9 discretion if it applies the wrong legal standard or its factual  
10 findings are illogical, implausible or without support in the  
11 record. TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820,  
12 832 (9th Cir. 2011).

13 While the bankruptcy court's decision whether to allow  
14 modification is reviewed for abuse of discretion, whether the  
15 bankruptcy court was correct in its interpretation of the  
16 applicable statutes is reviewed de novo. Mattson v. Howe (In re  
17 Mattson), 468 B.R. 361, 367 (9th Cir. BAP 2012) (citing Towers v.  
18 United States (In re Pac.-Atl. Trading Co.), 64 F.3d 1292, 1297  
19 (9th Cir. 1995)).

#### 20 V. DISCUSSION

21 **A. The bankruptcy court did not err in determining that Plan**  
22 **payments were not complete for purposes of § 1329(a) and that**  
**the Motion to Modify was timely.**

23 A plan is a contract between the debtor and the debtor's  
24 creditors. Max Recovery, Inc. v. Than (In re Than), 215 B.R. 430,  
25 435 (9th Cir. BAP 1997). The order confirming a chapter 13 plan,  
26 upon becoming final, represents a binding determination of the  
27 rights and liabilities of the parties as specified by the plan.  
28 8 COLLIER ON BANKRUPTCY ¶ 1327.02 (Richard Levin & Henry J. Sommer

1 eds. 16th ed. 2019).

2 Under the Plan, the Mrdutts agreed to cure their prepetition  
3 mortgage arrears either through a loan modification or a modified  
4 plan. They also agreed to make all postpetition mortgage payments  
5 directly to Wells Fargo. When the loan modification failed, the  
6 Mrdutts sought to modify the Plan to surrender the residence to  
7 Wells Fargo sixty-seven months after the first Plan payment was  
8 due and after they had made all sixty Plan payments to Trustee.<sup>4</sup>  
9 The Mrdutts acknowledged that the Code did not necessarily support  
10 their position. Nevertheless, they were seeking a way to get a  
11 discharge.

12 Section 1329 provides that the bankruptcy court may modify a  
13 confirmed plan "[a]t any time after confirmation of the plan, but  
14 before the **completion of payments under such plan[.]**" § 1329(a)  
15 (emphasis added). See Danielson v. Flores (In re Flores), 735  
16 F.3d 855, 859 (9th Cir. 2013) (en banc) (plan modification must  
17 occur before the completion of payments under the plan); In re  
18 Profit, 283 B.R. at 573 (same). The bankruptcy court reasoned  
19 that plan modification was still possible under § 1329(a), because  
20 the Mrdutts had not completed their plan payments due to the  
21 outstanding obligation of the prepetition mortgage arrears.

22 The question before us is whether the Plan was "complete" for  
23 purposes of § 1329(a) even though the Mrdutts failed to cure their  
24 prepetition mortgage arrears. Trustee maintains that only  
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27 <sup>4</sup> The 60-month maximum term for chapter 13 plans begins to  
28 run from the date when plan payments are statutorily required to  
commence, no more than 30 days after the plan is filed. Profit v.  
Savage (In re Profit), 283 B.R. 567, 575 (9th Cir. BAP 2002). The  
Mrdutts filed their initial plan in December 2011.

1 payments to the chapter 13 trustee are "payments under such plan"  
2 and that plan payments are "complete" once the debtor has made all  
3 plan payments to the trustee. We must determine what constitutes  
4 "payments under such plan" within the meaning of § 1329(a). Is it  
5 limited to those payments made to the trustee or does it include a  
6 debtor's direct payments to creditors?

7 While no controlling authority defines payments for purposes  
8 of plan modification under § 1329(a), courts have held in the  
9 discharge context of § 1328(a)<sup>5</sup> that a debtor's direct payments to  
10 a creditor for a debt treated by the plan are payments under the  
11 plan. Precisely, when the chapter 13 plan provides for the curing  
12 of prepetition mortgage arrears and a debtor's direct postpetition  
13 maintenance payments in accordance with § 1322(b)(5), such direct  
14 payments are "payments under the plan." And if the debtor does  
15 not complete "all payments under the plan," the debtor is not  
16 entitled to a discharge.

17 In re Coughlin, 568 B.R. 461, 474 (Bankr. E.D.N.Y. 2017), is  
18 an excellent example of the overwhelming majority of courts which  
19 have interpreted the term "payments" in § 1328(a) to include  
20 direct payments by the debtor to a creditor. See also Kessler v.  
21 Wilson (In re Kessler), 655 F. App'x. 242, 244 (5th Cir. July 8,  
22 2016) (when a plan provides for the curing of mortgage arrears as  
23 well as direct maintenance payments, both payments fall "under the  
24 plan" for purposes of § 1328(a) because both payments concern the

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26 <sup>5</sup> Section 1328(a) provides, in relevant part, that "as soon  
27 as practicable after completion by the debtor of **all payments**  
28 **under the plan . . .** the court shall grant the debtor a discharge  
of all **debts provided for by the plan** or disallowed under section  
502 . . . ." (Emphasis added).

1 same claim; debtors' discharge properly denied for not making  
2 direct maintenance payments to creditor despite making all plan  
3 payments to trustee) (citing Foster v. Heitkamp (In re Foster),  
4 670 F.2d 478 (5th Cir. 1982) (when the plan provides for curing of  
5 mortgage arrears, a debtor's direct mortgage payments to creditor  
6 are payments under the plan)); Evans v. Stackhouse, 564 B.R. 513,  
7 518-20 (E.D. Va. 2017) (debtor's direct maintenance payments  
8 provided for in the plan were payments under the plan for purposes  
9 of § 1328(a)); In re Dowey, 580 B.R. 168, 172-73 (Bankr. D.S.C.  
10 2017) (rejecting debtor's argument that payments under the plan in  
11 § 1328(a) means only those payments made to the chapter 13  
12 trustee); In re Hoyt-Kieckhaben, 546 B.R. 868, 874 (Bankr. D.  
13 Colo. 2016) (both cure and maintenance payments are equal and  
14 necessary parts of a plan's treatment of a secured claim under  
15 § 1322(b)(5) and thus any payment made to effectuate the plan's  
16 treatment of the claim is a payment under the plan for purposes of  
17 discharge); In re Heinzle, 511 B.R. 69, 78-79 (Bankr. W.D. Tex.  
18 2014) (debtors entitled to discharge only when they make all  
19 payments under the plan, which includes cure and maintenance  
20 payments under § 1322(b)(5)).

21 The court in Coughlin relied, in part, on Rake v. Wade, 508  
22 U.S. 464 (1993), and the Supreme Court's interpretation of the  
23 phrase "provided for by the plan" in § 1325(a)(5).<sup>6</sup> In Rake, each  
24 debtor's chapter 13 plan proposed to pay all postpetition mortgage  
25 payments directly to the creditor and to cure the prepetition  
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28 <sup>6</sup> Notably, the debtor in Coughlin had already received a  
discharge despite failing to remain current on postpetition  
mortgage payments. The court was not aware of the default until  
after the discharge order had been entered. Ultimately, the court  
declined to vacate the discharge order despite the default,  
because the discharge had not been obtained by the debtor's fraud.  
568 B.R. at 474-76.



1 mortgage arrearages, without interest, over the term of the plan.  
2 The issue was whether the oversecured mortgage creditor was  
3 entitled to postpetition interest on the arrearages, when the  
4 contract did not so provide. Because the plans "provided for" the  
5 creditor's claim by establishing repayment terms for the  
6 arrearages as permitted by § 1322(b)(5), the Court ruled that the  
7 creditor was entitled to interest on them. Id. at 473.

8 To reach its holding, the Court reviewed § 1328(a), which  
9 also contains the phrase "provided for by the plan," and noted:

10 As used in § 1328(a), that phrase is commonly understood  
11 to mean that a plan 'makes a provision' for, 'deals with,'  
12 or even 'refers to' a claim. [Citation omitted]. In  
13 addition, § 1328(a) unmistakably contemplates that a plan  
14 'provides for' a claim when the plan cures a default and  
15 allows for the maintenance of regular payments on that  
16 claim, as authorized by § 1322(b)(5). Section 1328(a)  
17 states that 'all debts provided for by the plan' are  
dischargeable, and then lists three exceptions. One type  
of claim that is 'provided for by the plan' yet excepted  
from discharge under § 1328(a) is a claim 'provided for  
under section 1322(b)(5) of this title.' § 1328(a)(1).  
If claims that are subject to § 1322(b)(5) were not  
'provided for by the plan,' there would be no reason to  
make an exception for them in § 1328(a)(1).

18 Id. at 474-75. While the question of whether a debtor has  
19 completed "all payments under the plan" was not at issue in Rake,  
20 construing this language in § 1328(a) narrowly to include only  
21 those payments made to the chapter 13 trustee proves difficult  
22 given the Supreme Court's broad construction of "provided for by  
23 the plan," in that same section, to include claims that are merely  
24 referred to in the plan. See In re Gonzales, 532 B.R. 828, 832  
25 (Bankr. D. Colo. 2015).<sup>7</sup>

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27 <sup>7</sup> But see Dukes v. Suncoast Credit Union (In re Dukes), 909  
28 F.3d 1306 (11th Cir. 2018). In Dukes, the debtor was current on  
her mortgage payments at the time she filed her chapter 13 case  
but became delinquent at some point after confirmation. The  
mortgage lender foreclosed on its second lien and sought a

(continued...)

1           Only two courts have held that a debtor's direct payments on  
2 a nonmodifiable, nondischargeable residential mortgage loan under  
3 § 1322(b)(5) are not "payments under the plan" for purposes of  
4 § 1328(a). The first was In re Gibson, 582 B.R. 15, 24 (Bankr.  
5 C.D. Ill. 2018). In reviewing the language of § 1328(a), the  
6 Gibson court reasoned that the "ambiguous" phrase "all payments  
7 under the plan," which is used to define when completion of  
8 payments occurs (thus triggering entitlement to a full compliance  
9 discharge), and the phrase "provided for by the plan," which is  
10 used to describe the scope of the discharge, should have different  
11 meanings. The court concluded that the phrase "'under the plan'  
12 was intended to have a narrower effect, allowing for the  
13 possibility that not all creditors holding debts **provided for by**  
14 **the plan** are receiving payments **under the plan**" – i.e., direct

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16           <sup>7</sup>(...continued)  
17 personal judgment against the debtor post-discharge on its first  
18 lien. The mortgage lender reopened the debtor's case, seeking a  
determination that the first mortgage debt had not been  
discharged.

19           Relying on a narrow reading of Rake, the Eleventh Circuit  
20 held that the plan did not "provide for" the mortgage payments for  
21 purposes of § 1328(a), because the plan merely stated that  
22 postpetition payments would be made "outside the plan"; the plan  
23 did not set forth any repayment terms for any portion of the  
24 lender's mortgage. Id. at 1313-15. The Eleventh Circuit  
alternatively held that the first mortgage debt was not discharged  
based on § 1322(b)(2), which prohibits modification of the rights  
of holders of claims secured by the debtor's principal residence.  
Id. at 1316-18.

25           We note that the situation presented in Dukes was different  
26 from that in this case. There, the debtor was prepetition current  
27 on her mortgage payments. The Dukes court did not address the  
28 issue presented here, whether cure and maintain payments under  
§ 1322(b)(5) are payments under the plan. Nevertheless, we also  
disagree with Dukes's narrow interpretation of Rake and whether  
postpetition mortgage payments are payments under the plan for the  
reasons set forth in this decision.

1 payments by the debtor to a creditor. Id. at 19 (emphasis in  
2 original). It followed, therefore, that completion of "all  
3 payments under the plan" meant only those payments made to the  
4 trustee. Id. The court disagreed with the "absolutist" view that  
5 § 1328(a) should be construed in a way that would make every  
6 uncured default on a direct payment grounds for dismissing a case  
7 without discharge. Id. at 23.

8 The Gibson court believed that Rule 3002.1<sup>8</sup> was to blame for  
9 the recent trend favoring dismissal without discharge in cases  
10 where the debtor made the required payments to the trustee but  
11 failed to make all of the direct mortgage payments to the  
12 creditor. Id. at 18-19. The court observed that, prior to the  
13 rule's adoption in 2011, the trustee generally was not privy to a  
14 debtor's direct payment status, and thus "countless" debtors pre-  
15 2011 had received a discharge despite arrears on direct payments.  
16 Id. at 18.

17 The other case holding that a debtor's direct payments are  
18 not "payments under the plan" for purposes of § 1328(a) is the  
19 recent case of In re Rivera, No. 2:13-20842, 2019 WL 1430273, at  
20 \*4-6 (Bankr. D. Ariz. Mar. 28, 2019). As with Gibson, the debtors  
21 in Rivera had paid their prepetition mortgage arrears over the  
22 course of the plan but failed to make all of their direct  
23 postpetition mortgage payments to the creditor. The court relied  
24 heavily on Gibson to hold that "payments under the plan" means  
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26 <sup>8</sup> Rule 3002.1 requires lienholders on the debtor's principal  
27 residence to disclose, in response to the trustee's notice of  
28 final cure payment, whether the debtor is current on postpetition  
mortgage payments.

1 only those payments made to the trustee. It also viewed the  
2 direct payments by the debtors as payments "outside the plan,"  
3 even though the plan provided for both the curing of the  
4 prepetition mortgage arrears and the debtors' direct postpetition  
5 mortgage payments to the creditor. Id. at \*9. Interestingly, the  
6 Rivera court opined that the debtors could still seek to modify  
7 the plan under § 1329(a) to pay the postpetition arrears, but then  
8 conversely noted that a plan cannot be modified after completion  
9 of the payments under the plan, which, under the court's  
10 reasoning, occurred when the debtors made their last payment to  
11 the trustee. Id. at \*10.

12 Arguably, the facts in both Gibson and Rivera weighed heavily  
13 on those courts' decisions to deny the motions to dismiss without  
14 discharge. In Gibson, the debtors' failure to make direct  
15 payments on their second mortgage was due to an innocent  
16 misunderstanding of their plan's requirements; they thought the  
17 trustee was going to make those payments. Further, the mortgage  
18 creditor failed to take any action until after the debtors had  
19 made their last plan payment to the trustee even though the  
20 creditor never received any direct maintenance payments. 582 B.R.  
21 at 22-23. In Rivera, the debtors did not default on their  
22 postpetition mortgage payments until **after** the 41-month plan was  
23 complete. 2019 WL 1430273, at \*9-10. Thus, denying the debtors a  
24 discharge under those facts seemed particularly harsh.

25 While Gibson and Rivera are thoughtful and well-intended  
26 decisions, we respectfully disagree. And we perceive some flaws  
27 with interpreting the phrase "payments under the plan" to include  
28 only those payments made to the trustee. One is the different

1 outcomes that would result in conduit versus non-conduit  
2 jurisdictions. See In re Coughlin, 568 B.R. at 474. In a conduit  
3 district, where all payments to creditors are made by the chapter  
4 13 trustee, postpetition mortgage payments would unquestionably be  
5 payments under the plan. But in a non-conduit or direct-pay  
6 district, postpetition mortgage payments made directly by the  
7 debtor would not be considered payments under the plan. The  
8 trustee in a conduit district would quickly observe the debtor's  
9 failure to pay the mortgage and could seek dismissal, if the  
10 debtor did not seek to modify the plan. In a non-conduit  
11 district, the debtor would know he stopped paying the mortgage,  
12 but, absent a motion for relief from stay from the mortgage  
13 creditor, the trustee, the court and other creditors would not  
14 know of the default, at least not until the trustee files her  
15 notice of final cure payment and the mortgage creditor responds  
16 with its statement in accordance with Rule 3002.1(g). As the  
17 Coughlin court correctly observed, whether postpetition mortgage  
18 payments are paid directly by the debtor or paid by the chapter 13  
19 trustee should not be dispositive of granting a discharge under  
20 § 1328(a). 568 B.R. at 474. A direct-pay debtor should not  
21 receive a discharge that a conduit debtor would not. Such a  
22 result "is inconsistent both with the words and intent of chapter  
23 13." Id.

24 In addition, the promise to maintain postpetition payments to  
25 a mortgage creditor is a mandatory element of the treatment of  
26 claims subject to § 1322(b)(5), and it is not severable. In re  
27 Dowey, 580 B.R. at 174. Failing to perform this promise is a  
28 material default of the plan, subjecting the case to dismissal

1 under § 1307(c)(6).<sup>9</sup> In re Young, No. 12-11509, 2017 WL 4174363,  
2 at \*2 (Bankr. M.D. La. Sept. 9, 2017); In re Dowey, 580 B.R. at  
3 174 (citing In re Formanek, 534 B.R. 29, 35 (Bankr. D. Colo.  
4 2015)); In re Heinzle, 511 B.R. at 82-83. We have difficulty  
5 reconciling that a debtor can receive a discharge after failing to  
6 make maintenance payments under § 1322(b)(5), when that same  
7 failure is grounds for case dismissal. See In re Dowey, 580 B.R.  
8 at 174.

9 While we understand the concern in Gibson and Rivera about  
10 misuse of Rule 3002.1, simply because debtors prior to 2011 were  
11 flying under the radar and receiving discharges despite not making  
12 all maintenance payments as required under § 1322(b)(5), does not  
13 mean that such practice was correct or give it any legitimacy.  
14 Perhaps as an unintended consequence, Rule 3002.1 has merely  
15 exposed the problem at a point in the case where modification to  
16 cure the postpetition arrears is no longer an option.

17 Lastly, to interpret "payments under the plan" to include  
18 only those payments made to the trustee raises an additional  
19 concern in cases where debtors have chosen to retain their home  
20 and the confirmed plan does not provide a 100% dividend to  
21 unsecured claims. The computation of disposable income to pay  
22 creditors under § 1325(b) takes into account the promised direct  
23 payments for housing, including § 1322(b)(5) maintenance payments.  
24 Debtors who fail to make these payments, which often amount to

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26 <sup>9</sup> Section 1307(c)(6) provides, in relevant part:

27 [O]n request of a party in interest or the United States  
28 trustee and after notice and a hearing, the court may  
. . . dismiss a case under this chapter . . . for cause,  
including . . . material default by the debtor with  
respect to a term of a confirmed plan[.]

1 tens of thousands of dollars, benefit from years of living without  
2 mortgage payments at the expense of creditors. Had the debtor  
3 sold or surrendered the home, the distribution to unsecured  
4 creditors may have been the full amount owed as opposed to pennies  
5 on the dollar or nothing. See In re Dowey, 580 B.R. at 174; In re  
6 Formanek, 534 B.R. at 34; Stephen J. Maier, Living Mortgage and  
7 Interest Free?: The Unwarranted Discharge For Debtors Who Fail To  
8 Make Direct Post-Petition Mortgage Payments, 82 ALB. L. REV. 643,  
9 649 (2018). See also In re Coughlin, 568 B.R. at 473 ("Chapter 13  
10 debtors who do not pay their post-petition mortgage payments are  
11 essentially claiming a deduction to which they are not  
12 entitled."). The concern is very real in this case. The Mrduttts  
13 failed to pay \$123,819 in postpetition mortgage payments, yet they  
14 paid nothing to unsecured creditors. This raises the question of  
15 good faith for purposes of plan confirmation and plan modification  
16 under § 1325(a)(3).

17 Accordingly, we join the overwhelming majority of courts  
18 holding that a chapter 13 debtor's direct payments to creditors,  
19 if provided for in the plan, are "payments under the plan" for  
20 purposes of a discharge under § 1328(a) and hold that this same  
21 rule should apply in the context of post-confirmation plan  
22 modifications under § 1329(a). Although the language in § 1328(a)  
23 is slightly different from that in § 1329(a) – § 1328(a) uses the  
24 phrase "payments under **the** plan" while § 1329(a) uses the phrase  
25 "payments under **such** plan" – we see no reason to interpret these  
26 phrases differently. The word "such" simply describes the plan  
27 which has been confirmed. See In re Goude, 201 B.R. 275, 277  
28 (Bankr. D. Or. 1996) ("There is no reason to attach a different

1 meaning to the completion of payments required in § 1328(a) from  
2 the same requirement in § 1329(a).").

3 Trustee argues that our cases Profit, Fridley and Escarcega  
4 support her position that the "completion of payments" under a  
5 plan for purposes of § 1329(a) means only those payments a debtor  
6 makes to the chapter 13 trustee. We disagree.

7 Profit actually supports our decision here. In Profit, the  
8 confirmed 60-month plan required the debtors to remit a tax refund  
9 to the trustee. 283 B.R. at 570. At some point prior to the  
10 plan's 54th month, the debtors gave the trustee a lump-sum payment  
11 which completed the projected plan payments. However, the debtors  
12 did not turn over the tax refund. Id. at 570-71. In the 54th  
13 month of the plan, the trustee moved to modify the plan to, among  
14 other things, compel the debtors to turn over the tax refund. Id.  
15 at 571. The debtors argued that the motion was untimely because  
16 the plan payments had been completed, and that the outstanding tax  
17 refund was not a plan payment.

18 The Panel held that, because the plan required the debtors to  
19 remit the tax refund to the trustee, the tax refund was a "plan  
20 payment" for purposes of § 1329(a). Id. at 573-74. The Panel  
21 further held that the motion to modify was timely under § 1329(a),  
22 because the plan payments had not been completed at the time the  
23 motion was filed due to the debtors' failure to remit the tax  
24 refund. In so holding, the Panel noted that, "[i]t is generally  
25 held that the payments alluded to [in § 1329(a)] are the payments  
26 required to be made by the debtor under the plan terms." Id. at  
27 573. Contrary to Trustee's argument, Profit did not hold that  
28 only those payments a debtor makes to the chapter 13 trustee are



1 "payments under such plan" for plan modification purposes under  
2 § 1329(a).

3 Trustee never cited Fridley v. Forsythe (In re Fridley), 380  
4 B.R. 538 (9th Cir. BAP 2007), to the bankruptcy court, and In re  
5 Escarcega, 573 B.R. 219 (9th Cir. BAP 2017), was issued after she  
6 filed this appeal. Trustee argues that these cases reinforce  
7 Profit's holding that the "completion of payments" for purposes of  
8 § 1329(a) properly relates to the payments that a debtor must pay  
9 to the trustee under the terms of his or her plan. Again,  
10 Profit's holding is not as narrow as Trustee suggests. Further,  
11 Fridley and Escarcega simply recognized the temporal requirements  
12 of chapter 13 plans and that payments under a plan must continue  
13 for the duration provided for in the initial plan, absent  
14 modification, before they can be considered "complete" for  
15 purposes of discharge and modification. See In re Escarcega, 573  
16 B.R. at 240; In re Fridley, 380 B.R. at 543-44. These cases did  
17 not hold that "completion of payments" for purposes of § 1329(a)  
18 means only those payments a debtor makes to the chapter 13  
19 trustee.

20 Even if Trustee were correct that the payments were complete  
21 when the Mrdutts made their final payment to her, we would still  
22 disagree with Trustee's conclusion. In effect, the Plan required  
23 the Mrdutts to make monthly payments in a fixed amount **plus** an  
24 additional amount necessary to cure their prepetition arrears,  
25 unless they obtained a loan modification that eliminated the  
26 arrears. These additional monthly payments were required payments  
27 even though the Mrdutts did not take the required steps to  
28 quantify them.

1 Trustee's arguments are also undermined by her action of  
2 filing the notices of plan completion. In those notices, Trustee  
3 asserted that the Mrdutts were not entitled to a discharge because  
4 they had failed to deal with their prepetition mortgage arrears.  
5 In other words, the notices suggest that Plan payments were not  
6 complete for purposes of a discharge under § 1328(a) because of  
7 the uncured arrears. If that is true, then why should they be  
8 considered complete for purposes of plan modification under  
9 § 1329(a)? It makes little sense to say that a debtor's plan  
10 payments are complete for determining whether the debtor has  
11 timely moved to modify the plan, but to say they are not complete  
12 for the purpose of denying the debtor a discharge.

13 The Plan provided for the curing of the Mrdutts' prepetition  
14 mortgage arrears by either a loan modification or a modified plan  
15 and for direct postpetition mortgage payments to Wells Fargo. We  
16 conclude that all of these payments were "payments under such  
17 plan" for purposes of § 1329(a). Because the Mrdutts failed to  
18 satisfy the obligation of their prepetition arrears, and also  
19 failed to make their direct postpetition mortgage payments, their  
20 Plan payments were not "complete" under § 1329(a). Accordingly,  
21 we agree with the bankruptcy court that the Motion to Modify was  
22 timely.

23 **B. The bankruptcy court erred in determining that the Plan, as**  
24 **modified, complied with § 1329(c).<sup>10</sup>**

25 Although the bankruptcy court did not expressly rule that  
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27 <sup>10</sup> Section 1329(c) mandates that a modification "may not  
28 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."

1 modification was permissible under § 1329(c), it implicitly ruled  
2 that it was by granting the Motion to Modify. Trustee argues that  
3 the court had no statutory authority to approve a modified plan  
4 that provided for payments several months beyond the 60-month time  
5 limit. We agree.

6 No fewer than three Code provisions, §§ 1322(d), 1325(b)(4),  
7 and 1329(c), prohibit a plan exceeding five years in length.  
8 Section 1329(c) specifically prohibits the court from approving a  
9 plan modification that would "provide for payments" beyond five  
10 years. Here, the 60-month period for the Plan expired in October  
11 2016; the Motion to Modify was filed in June 2017, the 67th month  
12 after which the Mrdutts' first Plan payment came due.

13 Although we held in Profit that the trustee's motion to  
14 modify was timely under § 1329(a) due to incomplete plan payments,  
15 we also held that the trustee's modification request failed  
16 because it required payments in excess of the 60-month time  
17 limitation in § 1329(c) and its counterpart, § 1322(d). 283 B.R.  
18 at 573-74. See also In re Heinzle, 511 B.R. at 79 (modification  
19 may not occur after completion of the 60-month term for plan  
20 payments); In re Goude, 201 B.R. at 276-77 (dismissing case  
21 because plan could not be modified since the 60-month period had  
22 expired and plan could not be extended to include payment of  
23 priority tax claims).

24 The Mrdutts sought to modify the Plan to surrender the  
25 residence in satisfaction of the Wells Fargo debt. They argue  
26 that surrender is not a "payment" and therefore does not violate  
27 the 60-month rule in § 1329(c). We conclude that surrender **is** a  
28 form of payment for purposes of § 1329(c). Numerous courts have

1 so held. See Bank One, N.A. v. Leuellen, 322 B.R. 648, 652-54  
2 (S.D. Ind. 2005); In re Fayson, 573 B.R. 531, 535 (Bankr. D. Del.  
3 July 13, 2017) ("Surrender of collateral is a form of payment under  
4 the Code."); In re Dennett, 548 B.R. 733, 737 (Bankr. N.D. Tex.  
5 2016) (holding that surrender is a payment of debt but allowing  
6 plan modification to surrender because debtors were only 40 months  
7 into their 60-month plan); In re Jones, 538 B.R. 844, 849 (Bankr.  
8 W.D. Okla. 2015) (holding that § 1322(b)(8), which applies to plan  
9 modifications under § 1329(a), "plainly and unequivocally  
10 contemplates that surrender of collateral is a form of payment");  
11 In re Tucker, 500 B.R. 457, 462 (Bankr. N.D. Miss. 2013); In re  
12 Davis, 404 B.R. 183, 194-95 (Bankr. S.D. Tex. 2009). Thus,  
13 allowing the surrender after the 60-month term had expired was  
14 contrary to § 1329(c).

15 Besides a time limitation problem, it is not clear that  
16 modification of the Plan was even appropriate. A modified plan is  
17 essentially a new plan and must be consistent with the statutory  
18 requirements for confirmation. In re Profit, 283 B.R. at 574;  
19 McDonald v. Louquet (In re Louquet), 125 B.R. 267, 268 (9th Cir.  
20 BAP 1991). This includes compliance with §§ 1322(a), 1322(b),  
21 1323(c), and 1325(a). See § 1329(b)(1). At minimum, good faith  
22 was in question when unsecured creditors received nothing under  
23 the Plan while the Mrdutts retained over \$100,000 by failing to  
24 make their required postpetition mortgage payments. See  
25 § 1325(a)(3).

26 This is not a case where the debtors sought a reasonable  
27 extension of time beyond the 60 months to catch up on some missed  
28 plan payments or fees. See In re Profit, 283 B.R. at 576 n.11

1 (noting the difference between plan modification and the cure of  
2 plan payments within a reasonable time after the plan has expired  
3 in order to prevent case dismissal). The Mrdutts asked the  
4 bankruptcy court to modify a confirmed plan to surrender an asset  
5 of the estate and extinguish a secured claim seven months after  
6 the 60-month period had already expired. The court had no  
7 authority to modify a plan that allowed for payment beyond the 60-  
8 month time limit. Accordingly, it abused its discretion in  
9 granting the Motion to Modify.

#### 10 **VI. CONCLUSION**

11 We do not ignore the sad facts of this case and the  
12 bankruptcy court's understandable desire to do equity. But the  
13 Mrdutts should have been more proactive in their bankruptcy case  
14 and sought relief from the court when it was apparent that the  
15 loan modification with Wells Fargo was futile. The same goes for  
16 Wells Fargo, which sat idly by and did not seek relief from stay  
17 until after the Mrdutts had made all of their Plan payments to  
18 Trustee and the postpetition mortgage arrears were so  
19 astronomical. However, for the reasons stated above, we REVERSE.

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