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SOUTHERN DISTRICT OF CALIFORNIA
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

DAVID N. HARTER,

Debtor.

Case No. 97-01634-B13

MEMORANDUM DECISION

I.

INTRODUCTION

The chapter 13 trustee ("Trustee") moves to dismiss the case for cause because the Debtor failed to complete the plan within the five-year plan period. The Debtor's opposition memorandum argued that he had overpaid the plan. However, prior to the hearing on the motion, he paid the Trustee the outstanding balance of \$130.00. The Debtor argues the case should not be dismissed because the plan is complete.

Rancho Rios Homeowners Association ("RR HOA") joins the Trustee's motion. It contends the case must be dismissed because the Court lacks authority to allow a cure beyond the maximum five-year plan period provided in § 1322(d). Additionally, RR HOA argues the modified plan required the Debtor to contribute his inheritance from the *Estate of Eldean N. Harter* when he receives it. It contends the Trustee must receive this payment

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1 before the plan is complete.¹

2 After considering all of the evidence and arguments of counsel, the Court holds the
3 Debtor can complete the plan within a reasonable time period beyond the maximum
4 five-year plan period provided in § 1322(d). Additionally, it holds the modified plan merely
5 required the Debtor to contribute his inheritance if he received it within the five-year plan
6 period, or such additional time it took the Debtor to complete the minimum plan payments
7 provided under the plan. As part of the modification order, the Court directed the Debtor
8 to seek an interim distribution from the probate estate, and ordered him not to interfere with
9 or delay the distribution of the assets from the probate estate. If the Debtor complied with
10 this provision in good faith but was unsuccessful in obtaining a distribution, then the plan
11 is complete.

12 II.

13 FACTS

14 The Debtor filed his chapter 13 case on February 4, 1997. After months of protracted
15 litigation, the Debtor's second amended plan was confirmed over the objection of RR HOA.
16 The second amended plan provides:

17 There shall be paid to the Chapter 13 Trustee \$260.00 each
18 month by debtor(s) Debtor(s) ... agree to pay sufficient funds
19 to the Trustee on or before five years from the commencement
20 of this case to fully complete this Plan.

21 10. Unsecured Claims Trustee shall pay dividends prorata
22 [sic] on claims allowed unsecured herein to 25% of the amount
23 allowed in full satisfaction thereof.²

24 It is undisputed that the Debtor had until March 21, 2002 to complete his plan ("Plan
25 Completion Date").

26 ¹ RR HOA raised the above arguments for the first time at the hearing on the motion to
27 dismiss.

28 ² Order Confirming Plan entered August 4, 1997 (this Memorandum Decision refers to the
25% dividend as the "minimum plan payment").

1 In February 2000, RR HOA moved to modify the plan on the ground that the Debtor
2 had become entitled to a postpetition inheritance which would enable the Debtor to pay
3 100% of his unsecured claims. After more protracted litigation, the Court issued an order
4 modifying the plan which stated:

5 1. The motion to modify the chapter 13 plan is granted in part,
6 as follows:

7 a. Immediately upon the debtor's receipt of distributions
8 from the probate proceedings ... (the "Estate Distributions"), the
9 debtor shall turn over such Estate Distributions to his chapter 13
10 trustee for distribution to the debtor's unsecured creditors. The
11 debtor's chapter 13 plan shall be amended to provide for
12 increased distribution to the debtor's unsecured creditors in an
13 amount equal to the Estate Distributions

14 b. The debtor shall seek an interim distribution of assets
15 from the Estate of Eldean N. Harter and shall not interfere with
16 or delay the distributions of assets from the Estate of Eldean N.
17 Harter.

18 2. Except to the extent granted above, the motion to modify the
19 debtor's chapter 13 plan is denied.³

20 RR HOA then moved for findings of fact concerning the estate's priority ahead of
21 the Debtor in receiving the Estate Distributions, and for an order authorizing and directing
22 the Trustee to file a "Notice of Right to Proceeds" in the probate proceeding. In support of
23 its motion, RR HOA argued the order was necessary because there was a substantial risk the
24 Debtor would fail to turn over the Estate Distributions and would continue to thwart the
25 Trustee's efforts to apply the Estate Distributions to the payment of claims.⁴ The Court
26 denied RR HOA's motion, and issued a *sua sponte* order clarifying the Modified Plan Order
27 to direct the Debtor to turn over the proceeds from the probate estate within three business
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25 ³ Order Granting in Part and Denying in Part RR HOA's Motion for Modification of Chapter
26 13 Plan entered June 15, 2000 ("Modified Plan Order").

27 ⁴ Motion of RR HOA for (1) A Finding of Fact Regarding the Chapter 13 Estate's Priority
28 of Entitlement to Probate Estate Assets and (2) An Order Authorizing and Directing the Filing of a
Notice of Right to Proceeds In the Eldean N. Harter Probate Proceeding, filed May 18, 2001.

1 days of his receipt.⁵

2 The Debtor did not receive a distribution from the probate estate. He claims he did
3 not delay the distribution of assets from the probate estate. Further, the Debtor claims he
4 attempted to obtain an interim distribution, but the state court refused to listen to him
5 because his applications did not comply with their local procedural rules, and because he had
6 been declared a vexatious litigant.⁶ The Court makes no findings concerning the Debtor's
7 claims.

8 On February 13, 2002, the Trustee filed this motion to dismiss the case for failure to
9 complete the plan within the five-year plan period. The Trustee indicates the Debtor still
10 owed \$130.00 to complete the minimum plan payments on the Plan Completion Date. On
11 April 10, 2002, the Debtor made the final minimum plan payment.

12 **III.**

13 **ISSUES**

14 1. Can the Debtor complete his plan beyond the maximum five-year period provided
15 in § 1322(d)?

16 2. Did the Debtor complete all of the payments under the plan?

17 **IV.**

18 **DISCUSSION**

19 1. **Can the Debtor Complete His Plan After the Five-Year Period Provided**
20 **in § 1322(d)**

21 At issue is the Court's ability to allow the Debtor to pay off his plan after the
22 maximum five-year plan period provided in § 1322(d). Section 1322(d) provides:

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24 ⁵ Order Granting Motion (1) Denying Creditor's Request to File Notice in Probate
25 Proceeding; (2) Modifying Order Entered on June 15, 2000; and (3) Denying Debtor's Application
for a Restraining Order, entered August 3, 2001 ("Clarification Order").

26 ⁶ Request for Additional Judicial Instruction Regarding Judge Adler's Order Directing
27 Debtor to Seek "Interim Distribution" of San Francisco Probate filed February 13, 2002 ("Request
28 for Additional Instructions"). The Minute Order from the March 12, 2002 hearing indicates the
Request for Additional Instructions was taken off calendar as moot.

1 **§ 1322. Contents of plan**

2 (d) The plan may not provide for payments over a period that is
3 longer than three years, unless the court, for cause, approves a
4 longer period, *but the court may not approve a period that is*
5 *longer than five years.*

6 (Emphasis added.) RR HOA argues the five-year maximum plan period is a “drop dead”
7 date, and the Court simply has no authority to allow the Debtor to cure the plan after this
8 date no matter how small the amount. [Transcript from April 16, 2002 hearing Re: Trustee’s
9 Motion to Dismiss at p.20:9-12 (“Transcript”).] According to RR HOA, the case of *In re*
10 *Goude*, 201 B.R. 275 (Bank. D. Or. 1996), says § 1322(d) contains a “drop dead” date.

11 The Court has reviewed *In re Goude* and is not persuaded that this is what it says.
12 *Goude* involved a trustee’s motion to dismiss the case for failure to pay a secured priority
13 tax claim in full during the five-year plan period. *Goude*, 201 B.R. at 276. The holding in
14 *Goude* is no longer good law in this circuit in light of the Ninth Circuit’s ruling in *In re*
15 *Pardee*, 193 F.3d 1083, 1086 (9th Cir. 1999). Even if it were good law, *Goude* did not
16 address the issue of whether the debtors could complete their payments after the maximum
17 plan period of five years. *Goude* did not reach this issue since *the debtors indicated they*
18 *were unable to make up the short fall* in their plan payments. *Id.* at 276.

19 Similarly, RR HOA’s additional case authorities do not support its position that the
20 case must be dismissed after five years. RR HOA directed the Court’s attention to *In re*
21 *Rivera*, 177 B.R. 332 (Bank. C.D. Cal. 1995), but this case allowed the debtors to complete
22 the plan payments after the plan period had elapsed. *Id.* As the plan period was only three
23 years, it was unnecessary to address whether the debtors could complete their plan after the
24 maximum plan period of five years.

25 In contrast, the case of *In re Black*, 78 B.R. 840 (Bank. S.D. Ohio 1987), addressed
26 this precise issue. In *Black*, the court confirmed an amended plan providing for completion
27 of the payments in the 59th month. Thereafter, the trustee moved to dismiss the case
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1 pursuant to § 1322(c)⁷ because the plan, then in its 62nd month, had exceeded the 60-month
2 bar contained in § 1322(c). The court denied the motion because § 1322(c) does not
3 provide for dismissal of the case. It reasoned:

4 In construing the language of the statute, the Court concludes
5 that, while § 1322(c) [renumbered § 1322(d)] instructs the
6 Court on the maximum length ... under a Chapter 13 plan,
7 § 1322(c) contains no provision for dismissal of a Chapter 13
8 plan whose payments extend past a five-year period, but which
9 otherwise complied with the duration limitations at the time of
confirmation. Thus, while Congress' intention to prohibit
lengthy plans is evidenced in its legislative history, case
precedent and the Code, § 1322(c) cannot serve as statutory
support for the dismissal of a properly-confirmed plan whose
payments have continued beyond five years.

10 *Id.* at 842. The court held the procedure for requesting dismissal of a chapter 13 case is set
11 forth in § 1307(c). *Id.* This section permits the court, on request of the debtor, a creditor,
12 or the trustee, to dismiss or convert a chapter 13 case for “cause,” and it enumerates ten
13 specific instances of cause.

14 In deciding whether to dismiss pursuant to § 1307(c), the court found no “cause”
15 existed to dismiss the case because movants failed to assert or establish sufficient cause
16 under § 1307(c). *Id.* at 843. Additionally, the court reasoned dismissal is inequitable given
17 the fact that the plan provided a 100% dividend to general unsecured claims, and the plan
18 was substantially complete. *Id.*; accord 8 L. King, *Collier On Bankruptcy*, ¶ 1322.17[1] at
19 1322-55 (15th ed. Rev. 2001)(section 1322(d) focuses on the payments *provided for* by the
20 plan, and if the debtor is substantially complying with the plan, the court should allow the
21 plan to be completed within a reasonable period of time)(emphasis in original).

22 The Court adopts the reasoning of *Black* and holds § 1322(d) does *not* contain a
23 “drop dead” provision that mandates dismissal of the case after five years. Since no other
24 ground for dismissal was enumerated, and since the Debtor tendered the amount to complete
25 the minimum plan payments within a reasonable period of time after the Plan Completion
26 Date, the Court will deem the plan cured.

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28 ⁷ This section was renumbered § 1322(d) by the Bankruptcy Reform Act of 1994.

1 **2. Did the Debtor Complete All of the Payments Under the Plan?**

2 Additionally, RR HOA argues the Debtor did not complete all of the payments
3 required under the plan, and he is not entitled to a discharge, because the modified plan
4 requires the Debtor to contribute his inheritance when he receives it. It contends the
5 bankruptcy case must remain open until the Debtor's entire inheritance is paid to the estate,
6 or until creditors are paid 100% of their claims.

7 RR HOA's argument is inconsistent with its contention that the court must dismiss
8 the case after five years. It has directed the Court's attention to *In re Profit*, 269 B.R. 51
9 (Bank. D. Nev. 2001), wherein it claims the court allowed a case to stay open beyond five
10 years to accept a tax return into the estate. According to RR HOA, *Profit* instructs that the
11 payments received *from the debtor* must be complete within five years. Thereafter, the estate
12 can remain open to accept assets from a third party source. [Transcript at p.16:7-25]

13 The Court reads *Profit* differently. *Profit* involved the issue of whether the trustee's
14 motion to modify a chapter 13 plan was timely. *Profit*, 269 B.R. at 55. The debtors argued
15 the motion was untimely because it was filed after they completed all of the \$26,000 in
16 payments provided under their plan. *Id.* at 54-55. The court rejected this argument,
17 reasoning that in addition to the \$26,000 in payments, the plan included a provision
18 requiring the debtors to pay over any tax refunds that they received during the life of the
19 plan. *Id.* at 56. The court found the provision for turnover of tax refunds was a plan
20 payment. *Id.* Because the debtors had applied their 1998 tax refund to their 1999 tax
21 liability instead of paying the refund to the trustee, the court held the debtors had failed to
22 make all of their plan payments and the plan was not yet complete. *Id.*

23 Accordingly, *Profit* stands for the simple proposition that debtors must make all of
24 their plan payments to complete their plan. It cannot stand for the proposition that the case
25 can remain open after the five-year period has elapsed, as the debtors paid the trustee an
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1 amount equal to their 1998 tax refund prior to the end of five years. *Id.* at 54-55.⁸

2 Rather, the Court will look to the plain language of the plan to determine the Debtor's
3 obligations. The plan requires the Debtor to pay \$260.00 per month and to pay sufficient
4 funds *on or before five years* from commencement of the case to fully complete the plan.
5 Further, the plan provides that unsecured creditors will receive a dividend of 25% of their
6 allowed unsecured claims in full satisfaction of their claims. Thereafter, the Debtor was
7 directed to turn over his Estate Distributions immediately upon his receipt, and the plan was
8 amended to increase the distribution to unsecured creditors in an amount equal to the Estate
9 Distributions that the Debtor receives. [Modified Plan Order at ¶ 1.a.] While this
10 modification could be construed to require the Debtor to turn over his Estate Distributions
11 regardless of when he receives them, the Court rejects this interpretation for several reasons.

12 First, the Modified Plan Order does not expressly state that the Debtor must turn over
13 his Estate Distributions regardless of when he receives them. Given the silence, the Court
14 concludes that the first paragraph of the plan governs the issue of the plan's length. This
15 paragraph expressly provides that the plan period is five years.

16 Second, RR HOA's proposed interpretation is inconsistent with paragraph 1.b. of the
17 Modified Plan Order. Because of the five-year plan period, the Court directed the Debtor
18 to seek an interim distribution from the probate estate and prohibited the Debtor from
19 interfering with or delaying the distribution of assets from the probate estate. There was an
20 expectation that the Debtor would receive his Estate Distribution during the plan period.

21 Finally, RR HOA's proposed interpretation conflicts with § 1322(d) which expressly
22 prohibits a court from confirming a plan that provides for payments over a period longer
23 than five years. If RR HOA's proposed interpretation is accepted, then the Court confirmed
24 a plan that provided the plan would continue indefinitely until the Debtor received his
25 inheritance or unsecured creditors were paid 100% of their allowed claims. This is not what

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27 ⁸ The decision indicates: the debtors filed their petition on May 9, 1996; the Trustee filed
28 his motion to modify the plan on December 13, 2000; and the debtors paid their 1998 tax return to
the trustee on January 19, 2001.

1 the plan provides, and this is certainly not what the Court intended.

2 For all of the forgoing reasons, the Court rejects RR HOA's argument that the plan
3 requires the Debtor pay over his inheritance regardless of when he receives it. The plan
4 required the Debtor to contribute the Estate Distributions that he received within the five-
5 year plan period, or the additional time that it took the Debtor to complete the minimum plan
6 payments, and the Debtor was directed to help facilitate the likelihood that he would actually
7 receive his Estate Distributions before the plan was completed. If the Debtor has complied
8 with the Court's directive in good faith and was unsuccessful in obtaining a distribution,
9 then the plan is complete.

10 V.

11 CONCLUSION

12 The motion to dismiss the case is denied. The Debtor made the final minimum plan
13 payment within a reasonable period of time after the Plan Completion Date. Accordingly,
14 the Debtor will be deemed to have completed the plan and will be entitled to his discharge
15 pursuant to § 1328(a) if the Debtor complied with paragraph 1.b. of the Modified Plan Order
16 in good faith. The Debtor is directed to file an order consistent with the terms of this
17 Memorandum Decision within ten (10) days of its date.

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20 Dated: 23 May 02


LOUISE DeCARL ADLER, Judge