WRITTEN DECISION – NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re:	BK. No. 18-07278-LT13
RICHARD ALAN GOETHALS AND ROBIN ELLYN GOETHALS,	MEMORANDUM DECISION
Debtors.	

I.[1]

INTRODUCTION

Debtors Richard Alan and Robin Ellyn Goethals defaulted under their chapter 13[2] plan over a 12-month period. In response to the chapter 13 trustee's motion to dismiss, they proposed a new plan that eliminated the amount in default as a plan obligation and, solely as a result of this retroactive change, reduced distributions to unsecured creditors. The Debtors argue that the Bankruptcy Code's plain language requires confirmation of their modified plan.

The Court disagrees.

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[1] This opinion is intended only to resolve the dispute between these parties and is not intended for publication.

[2] Unless otherwise indicated, all chapter, section, and rule references are to the Bankruptcy Code, 11 U.S.C. §§101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

The statutory language allowing cure or waiver through plan modification does not specifically allow cure or waiver of a plan default by elimination of pre-existing plan obligations. And application of the relevant cannons of statutory construction does not support the Debtors' argument either. In short, the Debtors' proposed modified plan cannot be confirmed as it seeks a result inconsistent with the Code.

II.

FACTS

The Debtors initiated a chapter 13 case on December 7, 2018. This was not their first bankruptcy. In 2012 they filed a chapter 7 case and discharged over $41,000 in scheduled unsecured debt.

Unfortunately, the 2012 bankruptcy did not provide a solid basis for an improved financial life. Their claims docket in the present case eventually evidenced more than $27,000 in secured debt, more than $19,000 in priority tax debt, and over $30,000 in unsecured debt.

At the time the Debtors initiated this case, chapter 13 was their only option. Because of the previous bankruptcy, they did not qualify for a discharge under chapter 7. Further, because of the tax defaults and defaults on their car loans, they needed the ability to cure that a chapter 13 case provides.

In their initial plan, the Debtors proposed two payments of $504.00 and 58 payments of $975.00. This initial plan paid car loan arrearage and priority debt. The Debtors initially estimated that unsecured creditors would receive nothing.

The chapter 13 trustee filed objections to the initial plan. Among other things, he questioned the Debtors' alleged below median income status noting that their tax deduction was too high and that they had additional disposable income which must be applied to the plan.

The Debtors subsequently modified their plan to satisfy the trustee, providing for two payments of $975.00 and 58 payments of $1,200.00. They agreed to an applicable commitment period of 60 months; thus, payments under this plan totaled $71,550.00 and

they estimated a payment to unsecured creditors. The Court confirmed this plan (the "Original Plan") without making a determination on the trustee's objections.

The Debtors made the payments required by the Original Plan for several years. But in 2021, payments ceased. As a result, after 12 months of default, the trustee brought a motion to dismiss the case. The default then totaled $14,400. The Court ordered that the Debtors either file a plan modification or a motion for hardship discharge to avoid dismissal.

In response, the Debtors filed a modified plan (the "New Plan") which is the focus of this decision. They also filed documents explaining that during the period of default they encountered unusual health challenges and expenses related to an unexpected move. They additionally emphasized that life disruptions complicated their ability to make the payments. In particular, the explanation strongly suggests that Ms. Goethal's health challenges left Mr. Goethals with primary responsibility for ensuring that the payments were made; it appears that he was not up to the task.

Typically, in such a situation, a modified plan would attempt to cure the previous plan defaults over the remaining life of the plan. But the Debtors chose another course. Instead of acknowledging the payment defaults, they attempted to alter history. The New Plan changed the amount of payments required by the Original Plan and reduced them to the amount of the payments paid. They then proposed additional payments of $1,400 going forward for the remaining 15 months of their commitment period. The New Plan thus proposed a disguised but substantial reduction in the amount paid to unsecured creditors in their chapter 13 case.

The trustee objected to the New Plan on numerous bases, including that the Debtors could not retroactively modify the Original Plan to change the amount of payments due before the modification date thereby eliminating their plan default.

The Court notes that there are numerous hurdles which the Debtors must overcome in order to stay in this chapter 13 case. First is the question of good faith. The Court requires an evidentiary hearing on this point. Second, if a hardship discharge is requested, the Debtors must meet the stringent standards for such extraordinary relief. There are also

substantial questions about the correct payment amount under the New Plan. The information provided supports a payment in excess of the $1,400.00 payment they now propose. Again, an evidentiary hearing may be required.[3]

In the interest of avoiding resolution of these evidentiary issues at potentially high expense, the Court has focused on the Debtors' treatment of the Original Plan default. To the extent the Debtors cannot simply eliminate the consequences of default as they attempt, the New Plan is unconfirmable. As a result, the Court turns to the Debtors' arguments on this point.

III.

ANALYSIS

Bankruptcy courts "apply the traditional tools of statutory interpretation in construing the Code." *In re Sisk*, 962 F.3d 1133, 1145 (9th Cir. 2020). When interpreting a statute, "[t]he plain meaning of the text controls unless it is ambiguous or leads to an absurd result." *United States v. Pacheco*, 977 F.3d 764, 767 (9th Cir. 2020). Further, the plain and unambiguous meaning only controls if "the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). Whether a statute is ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Id.* at 341. Further, "[w]hen construing a statute, courts should avoid any statutory interpretation that renders any section superfluous." *Tulelake Irrigation Dist. v. United States Fish & Wildlife Serv.*, 40 F.4th 930, 936 (9th Cir. 2022) (internal citations omitted). If a statute is ambiguous, courts may look to legislative history and the purpose of the statute. *United States v. LKAV*, 712 F.3d 436, 440 (9th Cir. 2013).

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[3] In particular, the Debtors in their revised Schedule J reduce income substantially by "taxes." Schedule J specifically requires that these taxes not be those deducted from income and that the nature of the taxes be specified. The Debtors provide no such information. Also, medical expenses are noted as "estimated." But the Debtors provide nothing other than this estimate and no backup to indicate that it is based in fact.

At bottom, Debtors' argument is that § 1322(b)(3) plainly and unambiguously permits the curing or waiving of a plan default through a retroactive plan modification. The Debtors start with the plain language of § 1329, which governs post-confirmation plan modifications. Section 1329(a)(1) permits plan modifications to increase or reduce the payment amount, and § 1329(a)(2) permits such modifications to extend or reduce time for such payments up to five years from the time the first payment under the original confirmed plan was due. Section 1329(b)(1) also provides that § 1322(b), among other statutes, applies to plan modifications. Section 1322(b)(3), in turn, states that a plan may "provide for the curing or waiving of any default." The Debtors also cite § 1322(b)(11), which states that the plan may "include any other appropriate provision not inconsistent with this title," and argue that no provision of the Code prohibits retroactive modifications. Thus, under the Debtors' interpretation of these statutes, they are permitted to modify their plan to retroactively reduce the payments required by a confirmed plan because "any default" in § 1322(b)(3) unambiguously includes a plan default. The Court disagrees.

As one court noted: "The Code is unclear on whether a plan requiring payments may, after the debtor's payment obligation arises, be modified to relieve the debtor of that duty." *In re Alonso*, 570 B.R. 622, 630 (Bankr. D. Idaho 2017). This Court agrees that, in isolation, § 1329(a)(1) and 1322(b)(3) are ambiguous on this point. But when they are examined in context, it becomes clear that the Code does not permit such retroactive modification.

A. The Debtors' interpretation of § 1322(b) and § 1329(a) to permit retroactive plan modification to cure or waive a plan default is inconsistent with other Code sections, limiting their meaning or rendering them superfluous.

The Code delineates specific outcomes in chapter 13 proceedings related to debtors' performance under their bankruptcy plan. Debtors either: (1) complete all plan payments and receive a § 1328(a) discharge; (2) fail to complete all plan payments but move for and meet the requirements of a § 1328(b) hardship discharge; (3) fail to complete all plan payments and face conversion or dismissal under § 1307(c)(6) for material default; or (4) in those cases where a discharge is not available because the chapter 13 occurs less than four

years after discharge in an earlier bankruptcy, complete the payments required to cure an arrearage or reach other appropriate goal and the case closes without discharge. Here, the Debtors attempt to avoid completing all plan payments under their confirmed plan, to avoid the hardship discharge analysis, to evade conversion or dismissal, and to, nonetheless, receive a discharge. Such a result is not plainly allowed by the Code, and such a construction does violence to the statutory scheme.

1. The Debtors have failed to meet the requirements for a § 1328(a) standard discharge and have not attempted to meet the requirements of a § 1328(b) hardship discharge.

The Debtors' reading of the code is inconsistent with the statutory requirements for discharge. The Debtors have failed to make all plan payments as required for a § 1328(a) discharge. The New Plan does not pay what the Original Plan required before modification. The Code explicitly provides that meeting the three enumerated § 1328(b) elements represents the *only* way that debtors can fail to make plan payments and still receive a discharge. Courts may only grant a § 1328(b) hardship discharge after missed payments if: (1) the debtor should not be held accountable under the circumstances for the failure to make payments, (2) the payment to unsecured creditors is at least equivalent to a hypothetical chapter 7 liquidation, and (3) it is impracticable to modify the plan under § 1329. The Debtors' interpretation of the Code as permitting retroactive plan modifications to eliminate plan defaults renders the stringent hardship discharge requirements superfluous.

The Debtors are asking the Court to read into the Code an ability to grant a discharge after missing plan payments but without engaging in the hardship discharge analysis. They rely on § 1329(b)(2) which states "[t]he plan as modified becomes the plan." But this argument flies in the face of § 1328(b), which requires a court to carefully examine the facts before granting a discharge where a debtor did not make all plan payments. As explained by the First Circuit Bankruptcy Appellate Panel:

> Of course, we are mindful that a request for discharge under § 1328(b) merits special vigilance. Creditors do not enjoy the same participation in the Chapter 13

> confirmation process as is afforded creditors in Chapter 11, and, with a § 1328(b) discharge, the debtor is deemed to have reorganized his or her financial affairs without meeting his or her postpetition obligations. A bankruptcy court asked to grant a discharge under Chapter 13, notwithstanding the debtor's failure to comply with its postpetition promises, should treat the request as a matter of some gravity and consider that granting unjustified requests will likely discourage effort by some debtors to meet their plan obligations when financial strain inevitably intrudes into their postconfirmation lives.

Bandilli v. Boyajian (In re Bandilli), 231 B.R. 836, 840 (1st Cir. BAP 1999). Given the high bar a debtor and court face in granting a discharge notwithstanding plan default under the hardship discharge statute, it is illogical for the Code to be interpreted as providing for retroactive plan modifications that eliminate payment obligations. Section 1328(b)(3) leaves no room in the Code for debtors to evaporate plan payment defaults under § 1329 and thereby gain a discharge.

2. The Code provides for dismissal or conversion in the case of material plan default based on the best interests of the creditors.

Rather than providing for retroactive elimination of plan default, the Code provides for conversion or dismissal after material plan default. Section 1307(c)(6) provides that the court has discretion to convert or dismiss a chapter 13 proceeding, whichever is in the best interests of creditors, due to "material default by the debtor with respect to a term of a confirmed plan." The best interests of the debtor are not relevant. *Brown v. Sobczak (In re Sobczak)*, 369 B.R. 512, 519 (9th Cir. BAP 2007) (Section 1307(c) "does not instruct the bankruptcy court to consider the best interests of the debtor in deciding whether to dismiss a chapter 13 case."). It would be inconsistent for the Code to require courts to examine the creditors' best interests when deciding between conversion or dismissal after a material plan default, but to allow courts to ignore the creditors' interests altogether to instead permit debtors to modify their plans to disappear plan defaults. Such a treatment of plan defaults solely serves a debtor's interests.

3. The Debtors' attempt to retroactively reduce plan payments to cure a plan default is inconsistent with the prospective disposable income requirement governing the Original Plan.

Projected disposable income under § 1325(b)(1) is a "forward-looking approach" that "may account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation." *Hamilton v. Lanning*, 560 U.S. 505, 517, 524 (2010). Retroactive alteration of play payment amounts would result in an *actual* disposable income requirement. *In re Poe*, 2022 WL 3639415, at *4–5 (Bankr. N.D. Ohio Aug. 23, 2022). And "an order confirming a Chapter 13 plan is res judicata as to all issues decided or which could have been decided at the hearing on confirmation." *Friendly Fin. Serv.-Eastgate Inc. v. Dorsey (In re Dorsey)*, 505 F.3d 395, 398–99 (5th Cir. 2007) (internal citations omitted); see *In re Talbot*, 124 F.3d 1201, 1209 (10th Cir. 1997) ("Upon becoming final, the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan. Absent timely appeal, the confirmed plan is *res judicata* and its terms are not subject to collateral attack.") (citing 8 *Collier on Bankruptcy* ¶ 1327.02[1] (Lawrence P. King ed., 15th ed., 1996). This includes a determination of the Debtors' projected disposable income that, per the Code, must be applied during the commitment period to pay unsecured creditors.

Debtors agreed to increase monthly plan payments from $975 in their initial plan to $1,200 per month and agreed to the 60-month commitment period for above median income debtors. Whether Debtors were above median and the proper amount of projected disposable income are issues that could have been decided and the determinations necessary implied by confirmation of the Original Plan are thus res judicata.

Yet in the New Plan, Debtors propose that the $37,950 that they paid under the Original Plan suffice. This results in a monthly payment that is entirely unsupported by the disposable income test as it was applied when they obtained confirmation of the Original Plan. Their retroactive modification validates a monthly payment of $843.33; a plan paying only this amount was not confirmed. The res judicata effect of the order confirming the

Original Plan with a much higher payment precludes Debtors from changing the disposable income requirement under § 1325(b)(1) through retroactive modification.

B. Debtors incorrectly interpret the meaning of cure or waiver of default under § 1322(b)(3).

The Code does not provide a definition of cure, waiver, or default. The Debtors argue that "any default" includes a default in plan payments and they may cure or waive a plan default through a plan modification. Having determined that the Debtors' interpretation would lead to absurd results inconsistent with other Code sections, the Court turns to the meaning of cure or waiver of a default.

In context, a § 1322(b)(3) default refers to a default on a pre-petition debt, not a default under a plan. Section 1322 describes the mandatory and optional components of the initial plan. Section 1329's subsequent incorporation of the statute does not expand the original meaning of § 1322; it does not reference post-petition obligations.

Courts have defined a default in the bankruptcy context as follows: "A default is an event in the debtor-creditor relationship which triggers certain consequences." *Di Pierro v. Taddeo (In re Taddeo)*, 685 F.2d 24, 26 (2nd Cir. 1982), cited with approval in *Fla. Partners Corp. v. Southeast Co. (In re Southeast Co.)*, 868 F.2d 335, 338 (9th Cir. 1989). A plan default, on the other hand, involves the debtor-creditor body or trustee relationship.

Even if "any default" could include a plan default, the Debtors' modified plan fails to cure the default. "[T]he concept of 'cure' used throughout the Bankruptcy Code," then, involves the debtor "taking care of the triggering event and returning to pre-default conditions" such that "[t]he consequences are thus nullified." *In re Taddeo*, 685 F.2d at 26–27. Norton's definition of cure is in agreement: "Circuit case law unanimously holds that to cure a default means to rectify the triggering event and restore matters to the status quo ante." WILLIAM L. NORTON, III & HON. RANDOLPH J. HAINES, NORTON BANKR. L. & PRAC. DICT. OF BANKR. TERMS § C355 (3d ed., 2023). So, even if a § 1322(b)(3) contemplated curing a failure to make plan payments, the Debtors here are not attempting to do so (nor did they seem to argue they were). Instead of making missed payments, they seek to

retroactively modify the plan to eliminate default. In short, they seek to avoid the consequences of default by eliminating the triggering event itself. The Code does not permit them to do so—that is not cure of a default but rather evasion of a default.

The Debtors also cannot resort to the argument that they were waiving their plan default. Waiver is not available here. According to Norton:

> Little has been written concerning the term "waiving" of defaults found in Code § 1322(b)(3), as contrasted with the "curing" of defaults. It can be postulated that to cure a default means to remedy a failure to perform a duty, i.e., to restore to a condition of full compliance, whereas the "waiving" of a default would mean a breach of duty or failure to perform is forgiven or ignored. For example, a plan might provide that the debtor's failure to perform maintenance on collateral be forgiven, and if the plan were confirmed, this breach or default by the debtor would be waived.

WILLIAM L. NORTON, III 7 NORTON BANKR. L. & PRAC. § 149:8 (William L. Norton, III. et al. eds., 3d ed., 2023 update). Note Norton refers to a pre-plan breach of duty or failure to perform. In its common use, waiver is "the act of ... intentionally relinquishing or abandoning a known right, claim, or privilege," which in the legal context can be either express or implied. *In re Jordan*, 555 B.R. 636, 653–54 (Bankr. S.D. Ohio 2016), citing *Waiver*, MERRIAM–WEBSTER UNABRIDGED DICTIONARY, http://unabridged.merriam-webster.com/unabridged/waiver, and BLACK'S LAW DICTIONARY (10th ed. 2014) (defining waiver as "[t]he voluntary relinquishment or abandonment—express or implied—of a legal right or advantage"). "In general, '[a] right may be waived only [by] the party that holds that right.'" *In re Jordan*, 555 B.R. at 654 (internal citations omitted). The Code provides debtors the ability to waive certain pre-petition defaults in some contexts. But no provision of the Code permits waiver of postpetition defaults of any kind.

Debtors cannot waive a plan default when the Code provides rights, claims, or privileges to another party. For example, in *In re Jordan*, the holders of debt deemed nondischargeable by the Code held the rights; the debtor could not waive the creditors' right to the nondischargeable debt. *Id.* The Code provides several relevant rights and privileges to

the chapter 13 trustee and creditors. First, § 1325(b)(1) furnishes the trustee and unsecured creditors the ability to prevent the approval of an initial plan that does not apply all of a debtor's projected disposable income, as of the effective date of the plan, to the plan during the applicable commitment period. See 8 *Collier on Bankruptcy* ¶ 1302.03 (Alan N. Resnick et. al. eds., 16th ed., 2022) ("Section 1325(b) explicitly gives the trustee the right to object to the plan under the ability-to-pay test."). Allowing the debtor to unilaterally and retroactively reduce plan payments for the initial plan period would amount to a debtor's retroactive waiver of the § 1325(b) rights of others. The Trustee in this case objected to the plan payment based on disposable income and obtained the payment requirement Debtors attempt to eliminate. Second, § 1307(c)(6) provides the trustee with the ability to seek dismissal or conversion for a material plan default. *Collier*, *supra*, at ¶ 1302.03 ("The chapter 13 trustee has always had a duty to monitor the debtor's payments under a plan and to take appropriate action, such as the filing of a motion to dismiss or convert the case, if there is a material default in payments."). The ability to retroactively cure a plan default undermines that right.

C. Consistent with the above analysis and past decisions, §1329(a)(1) plan payment modifications are prospective.

Under §1327(a), "the order confirming a chapter 13 plan represents a binding determination of the rights and liabilities of the parties as ordained by the plan." *Collier*, *supra*, at ¶ 1327.02. "The general theme of these cases" examining retroactive plan modifications "is that the binding provisions of a confirmed plan operate as a contract, and, absent compelling facts justifying a different approach, the parties must respect those terms until the plan is modified, breached, or concluded." *In re Alonso*, 570 B.R. at 630–31 (collecting cases). As another court wrote, "A confirmed chapter 13 plan is binding, and the Court will not eliminate a payment that came due under the plan before the debtors request relief." *In re Stain*, 2013 WL 5217800, at *3 (Bankr. D. Utah Sept. 16, 2013). Rather than eliminating payments, courts can permit debtors to "modify plans prospectively to include delinquent payments." *Id.*

The facts of this case do not justify the approach the Debtors advance. If they could not make their plan payments, they could have and should have sought prompt modification. But they did not. They waited 12 months until the Trustee moved to dismiss before they addressed the problem. Yet even now, to the extent the default and delay were for reasons beyond their control and cure is impossible, they can and should seek a hardship discharge. But if a hardship discharge is not warranted, dismissal or conversion appear appropriate absent a plan that pays the amounts in default under the Original Plan.

CONCLUSION

Based on the foregoing, the Court denies the Debtors' motion to approve and confirm the New Plan.

DATED: March 30, 2023

LAURA S. TAYLOR, JUDGE
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

RICHARD ALAN GOETHALS AND ROBIN ELLYN GOETHALS, Bankruptcy Case No. 18-07278-LT13

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified employee in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

MEMORANDUM DECISION

was enclosed in a sealed envelope bearing the lawful frank of the Bankruptcy Judges and mailed to each of the parties at their respective address listed below:

Christopher R. Bush, Esq.
8880 Rio San Diego Dr.,
Suite 800
San Diego, CA 92108

Robin Ellyn Goethals
1141 Warmlands Ave.
Vista, CA 92084

Rebecca Pennington
David L. Skelton
Chapter 13 Trustee
402 West Broadway, Suite 1450
San Diego, CA 92101

Richard Alan Goethals
4567 Beverly Glen Dr.
Oceanside, CA 92056

United States Trustee
Office of the U.S. Trustee
880 Front Street, Suite 3230
San Diego, CA 92101

Said envelope(s) containing such document were deposited by me in a regular United States mailbox in the City of San Diego, in said district on March 30, 2023.

Regina A. Fabre, Judicial Assistant