



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack  
United States Bankruptcy Judge  
Date Signed: December 8, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

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UNITES STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

TAMMY L. BROWNLOW,

CASE NO. 15-10629-NPO

DEBTOR.

CHAPTER 13

**ORDER ON TRUSTEE'S MOTION TO MODIFY CONFIRMED PLAN**

There came on for hearing on November 3, 2016 (the "Hearing"), the Trustee's Motion to Modify Confirmed Plan (the "Motion") (Dkt. 29) and the proposed Order (Dkt. 30) filed by the chapter 13 trustee, Locke D. Barkley (the "Trustee") in the above-referenced chapter 13 bankruptcy case. At the Hearing, W. Jeffrey Collier represented the Trustee, and Michael W. Boyd represented the debtor, Tammy L. Brownlow (the "Debtor"). At the end of the Hearing, the Court asked the Trustee to submit a brief supporting her position that allows the Debtor to retain a portion of non-exempt settlement proceeds. The Trustee filed the Memorandum Brief Supporting Trustee's Motion to Modify Confirmed Plan (Dkt. #29) and Proposed Order (Dkt. #30) (the "Trustee's Brief") (Dkt. 37) on November 8, 2016.

**Jurisdiction**

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. These are core proceedings under 28 U.S.C. § 157(b)(2)(A) and (O). Notice of the Motion was proper under the circumstances.

## Facts

1. On February 19, 2015, the Debtor filed a chapter 13 petition for relief (Dkt. 1), a proposed Chapter 13 Plan (the “Plan”) (Dkt. 5), and schedules of assets and liabilities (Dkt. 1). Schedule I: Your Income (Dkt. 1 at 24-25) and Schedule J: Your Expenses (Dkt. 1 at 26-27) indicate that the Debtor receives \$753.00 per month from Social Security income and \$130.00 per month in SNAP/food stamps and that she has monthly expenses of \$831.00. The Plan provides for monthly payments of \$61.00 for a period of sixty (60) months. (Plan at 1). Under the Plan, unsecured creditors will receive nothing. (*Id.* at 2). The Plan lists only one secured creditor, Credit Plan, which has a claim of \$224.72 secured by a 1994 Pontiac Grand Prix. (*Id.*; Dkt. 1 at 11). The Plan provides for payment of the Debtor’s attorney’s fees in the amount of \$3,200.00. (Plan at 2).

2. On April 20, 2015, the Court entered the Order Confirming the Debtor’s Plan, Awarding a Fee to the Debtor’s Attorney and Related Orders (the “Confirmation Order”) (Dkt. 12). The Confirmation Order provides that “[a]ll property shall remain property of the estate and shall vest in the debtor only upon dismissal, discharge or conversion. ” (Conf. Ord. at 2).

3. On July 28, 2015, the Debtor was involved in an automobile accident. (Dkt. 24). On July 7, 2016, the Debtor filed an application to employ special counsel, *nunc pro tunc*, to pursue a personal injury claim. (Dkt. 14). The Court approved the employment of Patrick S. Wooten (“Wooten”) as special counsel on August 2, 2016. (Dkt. 23). Wooten negotiated a settlement of the Debtor’s personal injury claim for \$8,000.00. (Dkt. 24). After deducting \$971.31 for medical expenses and \$3,151.94 for Wooten’s attorney’s fees and expenses (*Id.*), the

net settlement proceeds are \$3,876.75. (Dkt. 16-2).<sup>1</sup> These deductions are not disputed and have been approved by the Court. (*Id.*; Dkt. 25). Moreover, because the net settlement proceeds were received as the result of a postpetition personal injury, it is undisputed that they are available to fund the Debtor's plan.

4. On August 31, 2016, the Trustee filed the Motion pursuant to 11 U.S.C. § 1329(a)(1),<sup>2</sup> seeking permission to modify the Plan. In the Motion, the Trustee proposed to disburse the net settlement proceeds of \$3,876.75, as follows: (a) \$1,850.00 to the Debtor; (b) \$169.00 to pay Credit Plan the balance of its secured claim; (c) approximately \$53.33 to pay the balance of the attorney's fees owed the Debtor's attorney under the Plan; (d) the Trustee's statutory compensation; and (e) \$1,650.00 to general unsecured creditors with timely filed and allowed claims. (Mot. ¶ 5). At the Hearing, the Trustee testified that the total of allowed unsecured claims is approximately \$3,400.00.<sup>3</sup> Thus, the \$1,650.00 payment he proposed results in a *pro rata* distribution to unsecured creditors of almost fifty percent (50%). In the Motion, the Trustee also asked the Court to reduce the term of the Plan from sixty (60) months to thirty-six (36) months. (Mot. ¶ 6).

5. The Debtor testified that her financial situation has worsened significantly since the automobile accident.<sup>4</sup> She is unable to work because of back pain and relies on family and

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<sup>1</sup> In the Motion, the Trustee alleges that "the net amount remaining for Debtor and the bankruptcy estate is approximately \$3,868.75." (Mot. ¶ 3). This figure appears to be the result of a typographical error. ( $\$3,876.75 = \$8,000.00 - \$971.31$ ).

<sup>2</sup> From this point forward, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless otherwise indicated.

<sup>3</sup> Hr'g Tr. at 10:14:26 to 10:15:00. The Hearing was not transcribed. References are to the timestamp of the audio recording.

<sup>4</sup> Hr'g Tr. at 10:45:10 to 10:13:44:00.

friends to buy food and other basic necessities. She recently received a medical bill of \$721.00, which she does not have the funds to pay. Without a portion of the settlement proceeds, the Debtor will not be able to continue making her monthly Plan payments of \$61.00.

### **Discussion**

There is no dispute that the net settlement proceeds of \$3,876.75 are property of the estate under § 541 and § 1306(a)(1),<sup>5</sup> and, therefore, they are eligible for distribution to the Debtor's creditors under the Plan. The issue before the Court is whether it may exercise its discretion to allow the Debtor to retain \$1,850.00 of these proceeds to pay her continuing medical and living expenses.

Section 1327(a) provides that a confirmed plan is binding on the debtor and each creditor. 11 U.S.C. § 1327(a). Section 1329, however, creates an exception, as it authorizes the modification of a confirmed plan “[a]t any time after confirmation of the plan but before the completion of payments under such plan . . . upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to . . . increase or reduce the amount of payments on claims of a particular class provided for by the plan [or to] extend or reduce the time for such payments.” 11 U.S.C. § 1329(a)(1)-(2); *Meza v. Truman (In re Meza)*, 467 F.3d 874, 877-78 (5th Cir. 2006) (holding that “modification is based on the premise that during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly”) (citation omitted). This exception is limited by § 1329(b)(1), which imposes certain statutory requirements on any proposed modification, including the requirements for confirmation of a plan found in § 1325(a). Among them is the feasibility requirement under § 1325(a)(6). Thus, a

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<sup>5</sup> The Confirmation Order contains a provision that precludes vesting of the property of the estate in the Debtor at confirmation under § 1327(b).

plan may not be modified unless “the debtor will be able to make all payments under the plan and to comply with the plan,” as modified.<sup>6</sup> 11 U.S.C. § 1325(a)(6).

In the Trustee’s Brief, the Trustee asserted that he was unable to find any analogous case but cited *In re Wilson*, 555 B.R. 547 (W.D. La. 2016), in support of the proposition that courts may consider a debtor’s financial needs when determining whether a plan modification satisfies the feasibility requirement. (Tr. Br. at 2). In *Wilson*, the debtor was injured in an automobile accident, and his court-approved counsel negotiated a settlement of his claim in the amount of \$196,845.00, with net proceeds of \$74,067.00. *Wilson*, 555 B.R. at 549-50. The debtor proposed to use the net settlement proceeds to pay the \$2,631.00 balance due under his confirmed chapter 13 plan and retain the remaining \$71,436.00. *Id.* at 550. The chapter 13 trustee, in contrast, proposed to pay the unsecured creditors in full, which would reduce the amount kept by the Debtor from \$71,436.00 to \$62,323.00. *Id.*

In the end, the *Wilson* Court ruled in favor of the chapter 13 trustee, holding that the liquidation analysis of § 1325(a)(4), also known as the best interests of the creditors test, required that unsecured creditors receive at least as much as they would be paid if the debtors case were converted to a chapter 7 case. *Id.* Before reaching its decision, however, the *Wilson* Court noted that the debtor failed to provide any “shred of evidence” that he needed any portion of the settlement proceeds to pay ongoing medical expenses. *Id.*

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<sup>6</sup> There is a debate about whether the disposable income test in § 1325(b) likewise applies to proposed plan modifications. 11 U.S.C. § 1325(b)(2)(A) (defining disposable income as income greater than that needed for the maintenance and support of the debtor). Although § 1329 does not make the disposable income test expressly applicable to plan modifications, § 1325(a) refers to § 1325(b), which has led some courts to hold that the disposable income test applies to plan modifications indirectly. *In re Stretcher*, 466 B.R. 891, 894 (Bankr. W.D. Tex. 2011). The Court finds it unnecessary to resolve this issue because it reaches the same result based on the feasibility requirement, which is specifically cited in § 1329.

[W]hile the court is concerned with insuring that [the debtor] is paying all he can to his creditors during the pendency of his Chapter 13 case, the court is equally concerned with [the debtor's] wellbeing in light of the accident. In other words, the primary concern at this point is . . . whether [the debtor] may need part or all of the settlement proceeds for his continuing medical or living expenses. Accordingly, the court must be satisfied that the proposed modified plan is feasible, meaning that the “debtor will be able to make all payments under the plan and comply with the plan.” 11 U.S.C. § 1325(a)(6). *If it is shown that the debtors needs the settlement proceeds to fund medical bills or basic living expenses, then it is possible the court, in its discretion, will not approve the proposed modification on the grounds that the modification is not feasible.*

*Id.*(emphasis added). The Trustee contended that *Wilson* supports the Court's exercise of discretion to allow the Debtor to retain a portion of the settlement proceeds in light of her demonstrated financial need. (Tr. Br. at 3).

Having considered the matter, the Court finds that modification of the Plan as proposed by the Trustee should be approved. The Trustee's proposed distribution of the net settlement proceeds increases the *pro rata* distribution to unsecured creditors from zero percent (0%) to almost fifty percent (50%). In the absence of an objection by any party in interest, including any unsecured creditor, and in light of the discussion of the feasibility requirement in *Wilson*, the Court finds it appropriate to exercise its discretion to allow the Debtor to retain a portion of the net settlement proceeds to fund her medical and basic living expenses. Because the Court reaches this conclusion, it is unnecessary to address the Trustee's alternative argument that the Court authorize the distribution of almost \$1,000.00 to the Debtor based on a liquidation analysis that takes into account the fee allowed a chapter 7 trustee under § 326(a). (Tr. Br. at 3).

### **Conclusion**

Based on the foregoing, the Court concludes that the modification of the Plan that proposes to pay \$1,850.00 to the Debtor, \$1,650.00 to unsecured creditors, \$169.00 to Credit Plan, \$53.33 to Debtor's counsel, and an amount for the Trustee's statutory compensation should

be approved pursuant to § 1329.<sup>7</sup> The Court also approves the reduction of the term of the Plan from sixty (60) months to thirty-six (36) months

IT IS, THEREFORE, ORDERED that the Motion is hereby granted.

##END OF ORDER##

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<sup>7</sup> As noted previously, the Debtor testified at the Hearing that she recently received a medical bill of \$721.00. Because she did not relate the medical expense to the automobile accident and did not attempt to introduce the bill into evidence at the Hearing, the Court will not require the Trustee to deduct payment of the bill from the net settlement proceeds. Instead, the Court relies on the Debtor to pay her postpetition medical expenses.