

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
Honorable Howard R. Tallman**

**In re:** )  
 )  
**ALAN EUGENE ABILA and** ) **Case No. 10-18358 HRT**  
**ELIZABETH CHRISTINA DUPONT,** )  
 ) **Chapter 13**  
**Debtors.** )  
 )  
\_\_\_\_\_ )

**ORDER**

This case comes before the Court on *Trustee’s Statement Regarding Debtor’s Eligibility for Discharge* (docket #111) (“Trustee’s Statement”).

**I. PROCEDURAL POSTURE**

1. On November 23, 2015, each of the Debtors filed *Chapter 13 Debtor’s Certification to Obtain Discharge Pursuant to 11 U.S.C. § 1328* (docket #107) (“Debtor’s Certification”).
2. On December 14, 2015, the Chapter 13 Trustee (the “Trustee”), as required by FED. R. BANKR. P. 3002.1, filed his *Notice of Final Cure Payment* (docket #109) (“Trustee’s Notice”). He served copies on mortgage creditor Select Portfolio Servicing, Inc., the creditor’s counsel, the Debtors, Debtors’ counsel, and the U.S. Trustee.
3. On January 7, 2016, creditor, through counsel, filed *Creditor’s Statement in Response to Trustee’s Notice of Final Cure Payment Pursuant to Fed R.B.P. 3002.1 (f)* (filed as a supplement to Claim No.8-1) (“Creditor’s Response”). According to Creditor’s Response, it had received disbursements from the Trustee that fully satisfied the pre-petition mortgage arrearage it had reported on its proof of claim but, as of December 1, 2015, the Debtors had failed to make 11 post-petition direct mortgage payments.
4. On March 1, 2016, Trustee filed Trustee’s Statement. Trustee’s Statement informs the Court that the Debtors completed all of the payments they were obligated to make to the Trustee under their confirmed chapter 13 plan (docket #52) (the “Plan”) but that Creditor’s Response indicates that “the debtors are not current with their post-petition mortgage payments.” Trustee’s Statement is in the nature of an informational filing only. This is a disfavored form of pleading in that it seeks no relief from the Court and does nothing to move a case toward final resolution.

ORDER  
Case No. 10-18358 HRT

5. On March 21, 2016, the Court entered its *Order Setting Response Deadline and Notice of Hearing* (docket #112) (the “Hearing Notice”). The Court’s Hearing Notice invited interested parties to “file a response or position statement regarding whether the Debtors are substantially current on their post-petition payments to SPS/PNC Bank, N.A., and whether the Debtors are entitled to a discharge.” It set a deadline of April 11, 2016, for the filing of such responses but no interested party responded.

## II. DISCUSSION

The Court will vacate the hearing set in this matter. No party has denied the factual information set forth in Creditor’s Response. With no factual dispute to resolve, a hearing is unnecessary and the Court must determine the legal effect of the facts it has before it.

FED. R. BANKR. P. 3002.1 became effective on December 1, 2011. The rule was put into effect “to aid in the implementation of § 1322(b)(5), which permits a chapter 13 debtor to cure a default and maintain payments of a home mortgage over the course of the debtor’s plan.” NORTON BANKRUPTCY LAW AND PRACTICE 3D, BANKRUPTCY RULES, FED. R. BANKR. P. 3002.1, Advisory Committee Note (2011). At the end of a case, the rule sets up a process where the chapter 13 trustee notifies the mortgage creditor that plan payments have been completed and the creditor is required to respond and report whether it agrees or disagrees that the pre-petition arrearage has been cured and whether it agrees or disagrees that regular post-petition payments have been maintained. FED. R. BANKR. P. 3002.1(f) & (g). If the debtor or trustee disagrees with information contained in the creditor’s response under Rule 3002.1(g), either one may request a court determination whether the debtor has cured the pre-petition default and whether post-petition payments have been maintained. FED. R. BANKR. P. 3002.1(h). The rule is silent as to the consequence either of a failure to cure the pre-petition default or, the circumstance that is much more common, the failure to maintain post-petition payments.

A word on procedure. No party has filed a motion with the Court seeking relief. That places cases like this one in a troublesome posture. The Debtors have not sought a determination under Rule 3002.1(h) and have not otherwise controverted or denied the truth of the Creditor’s Response that they are in default on post-petition payments. The Court construes the Debtors’ silence as an admission. As a consequence, the Court cannot grant the Debtors a discharge.

Section 1328(a) of the Bankruptcy Code provides, in relevant part, that:

as soon as practicable after completion by the debtor of all payments under the plan . . . the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title . . . .

11 U.S.C. § 1328(a).

ORDER  
Case No. 10-18358 HRT

In the case of *In re Gonzales*, 532 B.R. 828 (Bankr. D. Colo. 2015), this Court considered in some detail whether a debtor who failed to make post-petition mortgage payments, as provided for under a confirmed chapter 13 plan, was eligible for discharge under § 1328(a). It concluded there, as it concludes here, that such debtor is not eligible for discharge. *See Id.* at 831-34.

But the Court's determination that it cannot grant the Debtors a discharge leaves the case in an unacceptable state of limbo. The Court cannot simply close the case. Section 350(a) of the Code provides that [a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." 11 U.S.C. § 350(a). The case, in its current posture, has not been fully administered because the Debtors have not completed payments under their plan. *See, e.g., In re Evans*, 543 B.R. 213, 235 n.19 (Bankr. E.D. Va. 2016) ("[W]here all of the required payments under the plan were not made, the condition of case closure established by 11 U.S.C. § 350, that this case has been 'fully administered,' is unmet."); *In re Avery*, 272 B.R. 718, 734 (Bankr. E.D. Cal. 2002) (Where a creditor's claim was not paid by the trustee, as provided for under the plan, court vacated the debtors' discharge and vacated final decree discharging the trustee.). Therefore, any final report and account that a trustee should file in a case of this nature, which alleges that the case has been completed, must be rejected by the Court because such cases cannot be characterized as having been completed. Such cases will remain open with the trustee in place until the case is finally resolved.

Final resolution of these cases requires a motion seeking dispositive relief. In the usual case, the alternatives are limited: a) discharge, b) dismissal or c) conversion.<sup>1</sup> In a proper case, a debtor might seek entry of a hardship discharge. A debtor may elect a chapter 7 conversion, 11 U.S.C. § 1307(a), or, under § 1307(b) a debtor may request dismissal if none of the limitations in that section apply. Finally, the trustee or other interested party may seek conversion or dismissal of a case under 11 U.S.C. § 1307(c). Where it appears that a debtor is in material default of his obligations under a confirmed chapter 13 plan, it seems to the Court that a trustee's motion under § 1307(c) would likely be the most common course of action to bring a chapter 13 case to a final resolution under circumstances such as those presented here. *See, e.g. In re Heinzle*, 511 B.R. 69, 81-83 (W.D. Tex. 2014) (Court found that failure to make direct mortgage payments as provided under confirmed chapter 13 plan was grounds for dismissal under § 1307(c).).

---

<sup>1</sup> Bankruptcy courts are authorized to close a case without entry of a discharge where a debtor has performed all obligations under a plan but the court lacks proof the debtor has completed a course of personal financial management. *See* 11 U.S.C. § 1328(g)(1); FED. R. BANKR. P. 5009(b). Also, where a debtor has satisfied all plan obligations but is not eligible for discharge because the case was filed too soon after a prior case that resulted in entry of a discharge, *see* 11 U.S.C. § 1328(f), then a court can find the case has been fully administered and close it.

ORDER  
Case No. 10-18358 HRT

III. CONCLUSION

In accordance with the above discussion, the Court will entertain a motion from any interested party seeking dispositive relief and, in the absence of a motion from another interested party, the Chapter 13 Trustee shall file such a motion. Therefore, it is

**ORDERED** that the hearing set in this matter for May 18, 2016, is hereby VACATED. It is further

**ORDERED** that any party in interest may file an appropriate motion in this case seeking dispositive relief no later than **May 4, 2016**. It is further

**ORDERED** that, if no such motion is filed by another party in interest, the Chapter 13 Trustee shall file an appropriate motion seeking dispositive relief no later than **May 11, 2016**.

Dated this 20th day of April, 2016.

**BY THE COURT:**

  
Howard R. Tallman, Judge  
United States Bankruptcy Court