**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Elizabeth E. Brown

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| In re:<br><br>ROBERT WILLIAM BAKER,<br><br>Debtor. | Bankruptcy Case No. 17-14041 EEB<br><br>Chapter 13 |

## ORDER ON REQUESTED PLAN MODIFICATIONS

THIS MATTER is before the Court on two competing motions to modify the Debtor's chapter 13 plan, one filed by the Debtor and one by the chapter 13 trustee (the "Trustee"). Post-confirmation, the Debtor sold his residence and realized net sales proceeds in excess of Colorado's homestead exemption. The Debtor's request to modify seeks to eliminate any further payments to the mortgage holder, whose debt the Debtor repaid from the sales proceeds. The Trustee's request would require the Debtor to segregate the homestead proceeds and agree to restrict their use to only the purchase of a new home, as well as the immediate turnover of the non-exempt portion and the eventual turnover of the exempt proceeds in the event the Debtor does not purchase a new home within two years of the sale date.

To rule on the competing motions, the Court must decide whether the sale proceeds, or any portion of them, constitute post-confirmation property that vested in the Debtor (unfettered by any bankruptcy restrictions) or whether they remain property of the estate (subject to restricted use). While this might appear to be a narrow question, answering it requires the Court to interpret several foundational chapter 13 statutes. Some might argue that these statutes are vague and even contradictory. One thing is certain, court interpretations of them are widely divergent.

## I. BACKGROUND

Before engaging in this legal discourse, there are two aspects of this matter that require some background, one involves the value of the Debtor's home and the other applicable state law. When the Debtor filed his chapter 13 case on May 3, 2017, he owned a home he valued at $230,000, encumbered by a first deed of trust in the amount of $196,131. He claimed an exemption for the $34,131 of equity under Colorado's $75,000 homestead exemption statute.[1] But when he sold his home post-confirmation, he realized $86,000 in net sales proceeds, only $75,000 of which is

[1] Colorado's homestead exemption statute is Colo. Rev. Stat. § 38-41-201. The Debtor has acknowledged that he incorrectly cited Colo. Rev. Stat. § 38-41-204 as the source of his homestead exemption. This statute governs the homestead exemption rights of surviving spouses or children of deceased homeowners. However, no party objected to the Debtor's homestead exemption within the time prescribed by Fed. R. Bankr. P. 4004(b) and as such the Debtor's claim of a $75,000 homestead exemption is not subject to challenge. *Taylor v. Freeland & Kronz*, 503 U.S. 638, 643-44 (1992).

exempt. The Trustee has not disputed or requested an evidentiary hearing on whether the Debtor improperly scheduled the petition date value of his home or whether the increase reflects post-confirmation changes, such as reduction of the mortgage balance or changes in the residential marketplace. In the absence of any challenge to the Debtor's original valuation, the Court assumes the increase in value reflects a post-confirmation change.

Second, according to Colorado law, proceeds up to the amount of the applicable homestead exemption remain exempt:

> for a period of two years after such sale if the person entitled to such exemption keeps the exempted proceeds separate and apart from other moneys so that the same may be always identified. If the person receiving such proceeds uses said proceeds in the acquisition of other property for a home, there shall be carried over to the new property the same homestead exemption to which the owner was entitled on the property sold.

Colo. Rev. Stat. § 38-41-207. In this case, the Debtor's two-year reinvestment period will expire on May 17, 2021.

## II. DISCUSSION

The Trustee's argument is straight forward. The Debtor can only exempt $75,000. Therefore, the additional $11,000 should be immediately contributed toward the repayment of creditors. The remaining $75,000 only retains its exempt character if the Debtor uses it to buy a new home within two years. Consequently, he should not be able to spend it on anything else. If he loses his exemption, then all the funds must go toward repaying creditors.

This argument requires the Court to interpret three pivotal statutes: 11 U.S.C. §§ 1306, 1327, and 1329.[2] Section 1306 delineates what is property of the estate in a chapter 13 case. In addition to the property specified in § 541, the chapter 13 estate includes all property the debtor "acquires after the commencement of the case but before the case is closed, dismissed, or converted. . . ." 11 U.S.C. § 1306(a)(1). Section 1327 describes the legal effect of plan confirmation. In subsection (b), it provides that, unless the plan states otherwise, "confirmation . . . vests all of the property of the estate in the debtor." *Id*. § 1327(b). These two statutes appear to be contradictory. Is property acquired post-confirmation property of the estate under § 1306(a)(1) that must be contributed toward plan obligations? Or is it property of the debtor following confirmation as provided by § 1327(b) and, therefore, it is no longer subject to the claims of his creditors, except as provided in the plan?

[2] Unless otherwise specified, all further references to "§" or "section" are to the Bankruptcy Code, Title 11, United States Code.

Finally, § 1329 sets forth the requirements for any post-confirmation modification of a plan. It allows for increases and decreases in plan payments but does not specify what constitutes cause for a change in payments. Is it limited to changes in income? Or does a sale of an asset provide grounds for an increase? It also specifies that any modification must satisfy certain confirmation standards, such as the best-interest-of-creditors test (the "BIC"). *Id*. § 1329(b) (incorporating § 1325(a)(4)). This test requires a showing that the creditors will receive under the modified plan at least as much as they would from a chapter 7 liquidation. *Id*. § 1325(a)(4). But § 1329(b) does not specify the measuring date on which the BIC test must be applied in a modification context. Should the court measure the hypothetical chapter 7 distribution on the date of the proposed modification or does it remain the date of the plan's effective date as specified in § 1325(a)(4)? The value of the debtor's assets, and even the existence of the assets themselves, may differ significantly on these two dates.

Congress may have left these statutes intentionally vague to allow courts greater flexibility in interpretation but, as a result, courts are sharply divided on how they have filled these gaps. When applicable bankruptcy statutes are subject to varying interpretations, this Court always begins by stepping back and looking at the Bankruptcy Code as a whole. It has provided two different methods by which individual debtors may restructure their finances and obtain a fresh start, one in chapter 7 and the other in chapter 13.[3] In chapter 7, the debtor parts with his non-exempt property but keeps his future income and, in exchange, he receives a discharge of his debts. In chapter 13, the debtor retains his property, but to achieve a discharge he agrees to contribute all his disposable income over the life of the plan, which payments must amount to at least as much as his creditors would receive in a chapter 7 liquidation. Thus, the two bargains struck are fundamentally different. David Gray Carlson, *Modified Plans of Reorganization and the Basic Chapter 13 Bargain*, 83 Am. Bankr. L.J. 585 (2009) ("Carlson"). Either the debtor trades his property or his income for his discharge, but not both. Any interpretation of these chapter 13 statutes must not attempt to blur this fundamental premise. It must recognize that, in chapter 13, the debtor's plan payments substitute for his property, leaving the debtor with the freedom "to treat his . . . property as his . . . own without court intervention at every turn." *Yoon v. Krick* (*In re Krick)*, 373 B.R. 593, 607 (Bankr. N.D. Ind. 2007).

Another bedrock principle of chapter 13 is that a debtor must make his best efforts to repay creditors with his future income. However, often debtors' circumstances change over the three-to-five-year terms of their plans, whether for better or worse. The Bankruptcy Code anticipates this. In § 1329(a), the Code provides for modification of a confirmed plan to request four types of changes: (1) an increase or decrease in payments (§ 1329(a)(1)); (2) an extension or reduction in the time for payments (§ 1329(a)(2)), provided that any extension does not cause the plan to exceed five years in length (§ 1329(c)) or seven years in length if the debtor has experienced

[3] Individuals may also file a chapter 11 petition, but few do so because of the greater cost and complexity of such a proceeding. Those who do usually do so because they are not eligible for chapter 13. *See* 11 U.S.C. § 109(e). In chapter 11, as in chapter 13, individual debtors are required to contribute their disposable income over the life of their plans. *Id*. §§ 1115(a)(2), 1129(a)(15).

material financial hardship due to the COVID-19 pandemic (§ 1329(d)); (3) an alteration in a creditor's distribution rights under the plan to account for non-plan payments the creditor has received (§ 1329(a)(3)); and (4) a decrease in payments necessary to allow the debtor to acquire health insurance (§ 1329(a)(4)).

This statute not only limits the types of permissible modifications, but also standing to request a modification. Requests for post-confirmation modification can be made only by the debtor, the chapter 13 trustee, or the holder of an allowed unsecured claim. *Id*. § 1329(a). And they must make their requests before the completion of payments under the confirmed plan. *Id.*

Before approval, the court must determine whether, with the proposed modification, the plan will continue to satisfy many of the original confirmation requirements. In § 1329(b), the Code lists several sections of chapter 13 that "apply to any modification." They are: §§ 1322(a), 1322(b), 1323(c) and "the requirements of section 1325(a)." *Id*. § 1329(b)(1). By failing to place restrictions on the use of the sale proceeds, the Trustee asserts that the Debtor's proposed modification does not meet two of the requirements of § 1325(a): (1) the BIC test of § 1325(a)(4) and (2) the good faith requirement of § 1325(a)(3).

### A. What is the Measuring Date for the BIC Test under § 1329?

In the confirmation context, § 1325(a)(4) clearly specifies that the BIC test is to be applied "as of the effective date of the plan." However, § 1329(b) does not state its measuring date. Given its silence in this regard, many courts assume that they should reapply it as of the modification date. Keith M. Lundin, *Lundin on Chapter 13*, § 126.2, at ¶ 11 (September 27, 2020 update) ("Lundin"). The leading case for this view is *In re Barbosa,* 236 B.R. 540 (Bankr. D. Mass. 1999), *aff'd sub nom. Barbosa v. Solomon*, 243 B.R. 562 (D. Mass 2000), *aff'd,* 235 F.3d 31 (1st Cir. 2000). In that case, the debtors owned an investment property they valued at $63,000 at the time of confirmation of their original plan. A few months later, they sold the property for $137,500 and the chapter 13 trustee moved to modify the debtors' plan to increase the distribution to unsecured creditors. The bankruptcy court determined that the BIC test should be applied as of the date of modification, reflecting the higher asset value. *Barbosa*, 236 B.R. at 552.[4]

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[4] For other cases following this view, see *In re Guentert,* 206 B.R. 958, 963 (Bankr. W.D. Mo. 1997) (observing that there is no specific Code provision so providing, but reasoning that the court must account for any property that has become property of the estate post-confirmation before any plan modification can be confirmed); *In re Roberts*, 514 B.R. 358, 365 (Bankr. E.D.N.Y. 2014) (concluding that the majority view maintains the purpose of the BIC test at modification, ensuring that creditors receive at least as much as they would under a chapter 7 liquidation); *In re Auernheimer*, 437 B.R. 405, 409 (Bankr. D. Kan. 2010) (applying the majority rule in a case that benefitted debtors because their property declined in value after confirmation of the original plan); and *In re Davenport*, 2011 WL 6098068, at *3-4 (Bankr. D. Kan. Dec. 7, 2011) (discounting practical problems inherent in majority view and anticipating that requests to modify would not occur absent significant unexpected changes in the value of estate property). As the Trustee notes in his brief, this Court has previously adopted the majority view in an unpublished decision, *In re Pettway-Wilson*, Case No. 13-13668 EEB (December 8, 2015), ECF No. 139. The court in *In re*

The legislative history of § 1329(b) can be read to support this view:

> In applying the standards of proposed 11 U.S.C. § 1325(a)(4) to the confirmation of a modified plan, 'the plan' as used in the section will be the plan as modified under this section, by virtue of the incorporation by reference into this section of proposed 11 U.S.C. § 1323(b). Thus, the application of the liquidation value test must be redetermined at the time of the confirmation of the modified plan.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 431 (1977), *as reprinted in* U.S.C.C.A.N. 5787, 6387. When a statute is susceptible to varying interpretations, legislative history is a relevant factor to consider. *Nat'l Credit Union Administration Board v. Nomura Home Equity Loan, Inc.,* 764 F.3d 1199, 1225-26 (10th Cir. 2014); 2A Norman Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 48:1 (7th ed., October 2019 update) ("Sutherland") (citing *Train v. Colo. Public Interest Research Group, Inc,* 426 U.S. 1, 10 (1976)).

However, does this statement really answer the question? One possible interpretation is that the BIC test must be measured by valuing the assets as of the modification date, but it is also possible to interpret it as saying the test must be reapplied, but not necessarily with a change in the measuring date. If the debtor proposes a modification to decrease plan payments due to a decrease in his income, he still must pay his creditors at least as much as they would have received in chapter 7 on the effective date. If his confirmed plan required him to pay at least $25,000 to meet this test because he had $25,000 of non-exempt equity in his home on the effective date, he cannot later modify his confirmed plan to pay less than $25,000 to creditors. In this instance, the BIC test is reapplied to the proposed modification but with the same measuring date – to make sure creditors will still receive at least as much as they would have if the case had originally been filed as a chapter 7 proceeding.

Even if the legislative history is interpreted to mean a court should revalue the assets as of the modification date, legislative history is not the only factor to consider in interpreting this statute. When the overall context of a statutory scheme and the actual language of the statute suggest a different interpretation, the court need not be bound by legislative history. In fact, courts may disregard legislative history and rules of statutory construction and "expand a statute's literal meaning to accomplish beneficial results, or to serve an act's purpose, or to avoid thwarting a legislative intent apparent from an entire act . . . ." 2A Sutherland, *supra*, § 47:25 (footnotes omitted).

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*Villegas*, 573 B.R. 844 (Bankr. W.D. Wash. 2017) adopted a slight variation on the majority rule. It determined that the value of assets in existence on the petition date are fixed "once and for all" at the time of confirmation. *Id*. at 850. However, courts should value new assets coming into the estate after confirmation at the date of any modification for the purposes of § 1325(a)(4) and add the nonexempt value of such assets to the previously calculated BIC number. *Id*.

Before considering the overarching statutory framework of chapter 13, the language of § 1329(b) itself sheds some light on this interpretive question. First, § 1329(b) is a bit of an anomaly. Instead of stating in § 1329(b) itself the tests that apply to modifications, it merely incorporates other statutes by reference. The BIC test in § 1325(a)(4), which it incorporates, states that the test is to be applied "as of the effective date of the plan." Thus, in the absence of any other date specified in § 1329(b), it is logical to assume that the court should apply the same testing date. After all, § 1329(b) incorporated the totality of § 1325(a)(4), without making any changes to it.

The other statutes referenced in § 1329(b), and those omitted from it, provide further insight. While § 1329(b) incorporates § 1322(a) and (b), which list the required contents of a plan, it does not incorporate § 1322(c) – (f). Subsection (d), for example, specifies the permitted maximum length of the plan, which differs depending on whether the debtor is an above-median-income or below-median-income debtor. Section 1329 specifies its own term limit, *i.e.* that the plan, as modified, may not exceed five years in length. 11 U.S.C. § 1329(c). Thus, § 1329(b) did not need to incorporate § 1322(d). However, when § 1329 intended to incorporate a prior confirmation standard without making any changes, it did so merely by reference to it. From this standpoint, one can assume that Congress did not intend in § 1329(b) to change the BIC test measuring date from its original requirement in § 1325(a)(4), which specified the "effective date."

So, what is the effective date? Unfortunately, the Bankruptcy Code does not define its use of this phrase. Consequently, there are no less than three schools of thought as to what it means. One holds that it is the confirmation date. *See, e.g., In re Gibson*, 415 B.R. 735, 738 (Bankr. D. Ariz. 2009). Another relies on § 1326(a)(1), which requires the debtor to begin making plan payments no later than thirty days from the filing of the plan. This "implies that the plan is effective against the debtor even before it is confirmed . . . ." Carlson, *supra*, at 601. "Judge Lundin, however, reports that most courts assume that the date of the bankruptcy petition is the date as of which the test must be performed." *Id.* (*citing* 3 Keith M. Lundin, *Chapter 13 Bankruptcy* § 160.1 (3d ed. 2000)); *see also In re Green,* 169 B.R. 480, 482 (Bankr. S.D. Ga. 1994). Whether it is the petition date, the first payment date, or the confirmation date, in most cases this date will be close in time to the petition date.

Some courts have adopted the view that the measuring date remains the confirmed plan's effective date when considering a modification request.[5] The leading case is *Forbes v. Forbes (In re Forbes),* 215 B.R. 183, 189 (8th Cir. BAP 1997). In *Forbes*, the court determined that settlement proceeds from a cause of action that accrued post-petition would not be included in property of the estate under the BIC test and their existence was irrelevant to the court's approval of plan modification. The *Forbes* panel noted the impracticalities of applying the test at the date of plan

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[5] For cases adopting this view, see *Hollytex Carpet Mills v. Tedford,* 691 F.2d 392, 393 (8th Cir. 1982); *In re Statmore,* 22 B.R. 37, 38 (Bankr. D. Neb. 1982). *See also In re Easley*, 240 B.R. 563, 566 (Bankr. W.D. Mo. 1999) (making determination in context of hardship discharge).

modification. It might lead to the "absurd result that a Chapter 13 debtor could be required by consecutive motions from unsecured claim holders to continuously modify the confirmed plan if the debtor owns an asset that appreciates after confirmation of each modified plan." *Forbes*, 215 B.R. at 190. Ultimately, the *Forbes* court relied on the concept that the Code contemplates only one "'plan' as a unitary constant and solitary construct." *Forbes*, 215 B.R. at 188. The court reasoned that

> there is but a single plan in effect at any given time during the pendency of a bankruptcy case [and] there is ordinarily but a single plan confirmation made during the entire course of a bankruptcy case. The Bankruptcy Code does not provide for the 'confirmation' of a modified plan; rather, the plan as modified becomes the plan if it is not disapproved.

*Id.*

Expanding on this reasoning, the court in *In re Gibson* relied on the language in § 1329(b)(2) that says, "the plan as modified becomes the plan." The court then concluded that:

> [t]he Code thus contemplates only one plan that is effective although its terms may be modified. It would be an anomaly for that one plan, as modified, to have two effective dates. . . . [O]nce the plan became binding on creditors, that event defined the plan's effective date. Modification of the terms of the plan makes no change to its effectiveness in binding creditors and cannot change the date on which it became effective.

*In re Gibson*, 415 B.R. 735, 739 (Bankr. D. Ariz. 2009). "There should be only one date as of which the determination is made as to what creditors would have received upon liquidation, so the 'effective date of the plan' must remain that of the original plan." *Id*.

This interpretation maintains the fundamental bargain of chapter 13 where a debtor trades his future income, not his property, to obtain a discharge. Any interpretation that would require a debtor to trade both his income and his property should be eschewed. The Collier treatise sums up the flaws inherent in the *Barbosa* view. It argues that the court should not recalculate the BIC test based on property values at the time of modification because:

> [t]he best-interests test turns on what would have happened had the debtor filed a chapter 7 case instead of a chapter 13 case. If a chapter 7 case had been filed, only property of the estate under section 541 would have been available to creditors and not the additional property that became property of the estate under section 1306(a). Therefore, property acquired after the petition, other than the limited types that become property of the estate under section 541, is not relevant to application of section 1325(a)(4) to a proposed plan modification. To hold otherwise, a court would have to find the best-interests test to be a constantly fluctuating standard, subject not only to property coming into the estate

> and leaving the estate but also to changes in the value of estate property. Indeed, if a case is converted from chapter 13 to chapter 7, property of the estate ordinarily is based on the property the debtor had on the date of the petition, and not the date of conversion. [§ 348(f)(1)] The policy behind this provision, that a debtor should not be discouraged from filing a chapter 13 case by the possibility that property acquired during the case could be lost to creditors who would have no right to it had the debtor initially filed a chapter 7 case, is equally applicable. For similar reasons, the acquisition or liquidation of assets should not be grounds for modification, at least if those assets do not produce additional ongoing income for the debtor.

8 *Collier on Bankruptcy* ¶ 1329.05[3] (Richard Levin & Henry J. Sommer eds.,16th ed. 2019).

Demanding an increase in plan payments because of a post-confirmation sale of property or its appreciation in value would threaten the very fabric of the chapter 13 bargain.

> Suppose a debtor owns a house. The §1325(a)(4) test is conducted at the time of the confirmation hearing and the court finds that, given the appraised value of the house, all creditors would receive more from the plan than they would have received in a chapter 7 liquidation. Two years later, however, the house has increased in value. If an unsecured creditor moves to modify, and if the § 1325(a)(4) test is redone, the payments, previously high enough to justify confirmation, no longer suffice. To make the plan work as modified, the debtor would have to liquidate principal, not income. This would be a violation of the basic chapter 13 bargain.

Carlson, *supra*, at 599-600.

### B. Are the Homestead Proceeds Property of the Chapter 13 Estate Under § 1306(a)?

The Trustee's second argument for taking the sales proceeds into account when determining an increase or decrease in plan payments is based on his reading of § 1306(a). Section 1306(a)(1) provides that property of the estate includes "all property of the kind specified in [§ 541] that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 . . . ." In his view, this language is broad enough to include the increase in value that has occurred since confirmation. Many courts agree with him and this Court acknowledges that, if this statute is read in isolation, it would. But § 1327(b) provides that, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." And § 1327(c) says that, "[e]xcept as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan."

These latter two sections suggest that the chapter 13 estate terminates at confirmation. At that point property of the estate becomes property of the debtor, no longer subject to bankruptcy court oversight.

The apparent contradiction between § 1306(a) and § 1327 have led courts to adopt no less than five different approaches to reconciliation:

> Estate-termination approach – At confirmation the estate ceases to exist and all property of the estate, whether acquired before or after confirmation, becomes property of the debtor.
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> Estate-transformation approach – At confirmation, all property of the estate becomes property of the debtor except property essential to the debtor's performance of the plan; the Chapter 13 estate continues to exist, but it contains only property necessary to performance of the plan, whether acquired before or after confirmation.
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> Estate-replenishment approach – At confirmation, all property of the estate becomes property of the debtor; the Chapter 13 estate continues to exist and "refills" with property defined in § 1306 that is acquired by the debtor after confirmation, without regard to whether that property is necessary to performance of the plan.
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> Estate-preservation approach – The vesting of property in the debtor under § 1327(b) does not remove any property from the chapter 13 estate, whether acquired before or after confirmation; property remains in the estate until the case is closed, dismissed or converted. The debtor's rights and responsibilities with respect to property of the estate may change somewhat at confirmation, but the existence and composition of the estate are not disturbed by § 1327(b).
>
> Conditional-vesting approach – At confirmation, vesting gives the debtor an immediate and fixed right to use estate property, but that right is not final until the debtor completes the plan and obtains a discharge.

Lundin, *supra*, at § 120.3, ¶ [9] (citations omitted).

Under the "estate termination" view, all property that vested in the debtor at confirmation and any post-confirmation income or property he acquires is no longer property of the estate. There is no chapter 13 estate once the court confirms a chapter 13 plan. *See, e.g.*, *Calif. Franchise Tax Bd. v. Jones (In re Jones)*, 420 B.R. 506, 514 (9th Cir. BAP 2009). The vested property is no longer subject to administration by the bankruptcy court. Under this view, neither the Debtor's home nor the proceeds of the home sale are estate property and the Debtor is free to do with the proceeds whatever he wants.

The “estate transformation” view also would not obligate the Debtor to contribute the homestead proceeds to his plan. Under this view, the post-confirmation chapter 13 estate includes only post-petition income and property necessary to consummate the plan. *See, e.g.*, *Telfair v. First Union Mortg. Corp.,* 216 F.3d 1333, 1340 (11th Cir. 2000) (concluding that the plan returns so much of that property to the debtor’s control as is not necessary to the fulfillment of the plan); *Black v. U.S. Postal Serv. (In re Heath)*, 115 F.3d 521, 524 (7th Cir. 1997) (stating that post-confirmation income that is not necessary to fulfillment of plan is not estate property). The Debtor’s confirmed plan does not require him to use the homestead proceeds to pay creditors, so it is not property of his estate under this view.

The “estate preservation” and “conditional vesting” views both deem all property, whether acquired pre- or post-confirmation, to be estate property. Thus, the Debtor would have to account for the non-exempt proceeds in a BIC calculation if the Court performs the BIC test as of the date of modification. *See, e.g.*, *In re Brensing*, 337 B.R. 376, 383 (Bankr. D. Kan. 2006); *In re Fisher*, 198 B.R. 721, 732-34 (Bankr. N.D. Ill. 1996), *rev’d*, 203 B.R. 958 (N.D. Ill. 1997); *W. Va. State Tax Dep’t v. Mullins (In re Mullins)*, 2009 WL 3160361, at *3-4 (S.D. W. Va. Sep. 30, 2009) (describing but disagreeing with lower court’s conditional vesting analysis).

The “estate replenishment” view, sometimes called the “modified estate transformation” approach, is the most difficult to apply in the present context. Under this view, all pre-confirmation property, including his former home, vested in the Debtor on confirmation of his plan, but if one views the homestead proceeds as “new” property, they would become estate property under § 1306(a). Conversely, if one interprets the vesting provision of § 1327(b) as permanently removing the home from the jurisdiction of the Court, or if one views the homestead proceeds as a “substitute” for the home rather than an entirely new property interest, then the proceeds would not become estate property under § 1306(a). *See, e.g., Waldron v. Brown (In re Waldron),* 536 F.3d 1239, 1242-43 (11th Cir. 2008) (determining that “entirely new” property interests acquired post-confirmation are estate property under § 1306(a), whether “necessary” to the completion of the plan or not); *City of Chicago v Fisher (In re Fisher)*, 203 B.R. 958 (N.D. Ill. 1997); *In re Gonzales*, 587 B.R. 363, 370 (Bankr. D. N.M. 2018) (adopting estate replenishment view but explaining that pre-confirmation wages are no longer estate property after confirmation). Some courts do not make the distinction between the sale of pre-bankruptcy property and the acquisition of additional property post-confirmation*.* *See*, *e.g.*, *Garcia v. Bassel*, 507 B.R. 907 (N.D. Tex. 2014).

### 1. **No Binding Precedent**

There is no binding precedent in the Tenth Circuit on this question. There is, however, language in *United States v. Richman (In re Talbot)*, 124 F.3d 1201 (10th Cir. 1997) consistent with either the “estate termination” or “estate preservation” approach. In *Talbot*, the debtors proposed a plan that bifurcated the I.R.S.’ claim into a secured claim with a lien against their home to the extent of $18,000 and an unsecured claim in the amount of $19,000. The I.R.S. did not object to this treatment and the court confirmed the plan. However, when the debtors sold their home post-confirmation, the

I.R.S. refused to release its lien at closing unless it was paid $37,000 on its combined claim. The debtors capitulated to this demand. Then they moved to modify their plan to eliminate any remaining payment of secured debts against the home and any further payment to the I.R.S. The chapter 13 trustee requested an order requiring the I.R.S. to disgorge the sales proceeds. The bankruptcy court, and the district court on appeal, ordered disgorgement. Before the Tenth Circuit, the trustee argued that the disgorgement order was proper because the bankruptcy court retained jurisdiction over the sale proceeds as property of the estate under § 1306(a). The Tenth Circuit rejected this notion, applying § 1327. Under § 1327(b), the house vested in the debtors at confirmation. Therefore, it was no longer property of the estate under § 1306(a). Under § 1327(c), the Debtor's title to the home was free and clear of any claim or interest provided for by the plan, except as expressly provided otherwise. This plan only retained an $18,000 lien of the I.R.S. Finally, under § 1327(a), the I.R.S. was bound by the confirmed plan. Its action in extracting full payment at the closing violated the plan. Therefore, on remand, the bankruptcy court could order disgorgement, but only of the excess payment amount.

This reasoning and its ruling are consistent with the estate termination approach. However, the Tenth Circuit was careful to note that it did not have to decide whether the "vesting provisions in § 1327(b) operate to grant absolute 'ownership' of estate property to the debtor upon confirmation of a Chapter 13 plan," because the trustee had conceded this point. *Talbot*, 124 F.3d at 1207 n.5. So, this case provides no precedent on this issue, but we are left with several indications of the court's leanings. It clearly acknowledged that "vesting" under § 1327 is an important consequence of plan confirmation. It relied on *Black v. U.S. Postal Serv. (In re Heath)*, 115 F.3d 521, 524 (7th Cir. 1997), which held that a bankruptcy court lacks jurisdiction to control disposition of a chapter 13 debtor's property that is no longer property of the estate. *Talbot*, 124 F.3d at 1206-07. However, in a parenthetical, the Tenth Circuit described the *Heath* case as "holding that post-confirmation income *that is not necessary to the fulfillment of the plan* of reorganization does not become part of bankruptcy estate." *Id.* at 1208 n.9 (emphasis added). This language echoes the estate transformation approach, in which all property vests in the debtor on confirmation, except property essential to the fulfillment of the plan. Thus, it is not possible from this case alone to decipher what position the Tenth Circuit would take on this thorny issue.

Nor is there is a Tenth Circuit Bankruptcy Appellate Panel ("BAP") decision on this issue. Twice, the BAP has recognized the issue and the split in authority. *See Rael v. Wells Fargo Bank, N.A. (In re Rael*), 527 B.R. 799, 2015 WL 847432 (10th Cir. BAP Feb. 27, 2015) (unpublished opinion); *Vannordstrand v. Hamilton (In re Vannordstrand*), 356 B.R. 788, 2007 WL 283076 (10th Cir. BAP Jan. 31, 2007) (unpublished opinion). Yet it has not yet reached this issue.

In a recent decision, *In re Gonzales*, 587 B.R. 363 (Bankr. D.N.M. 2018), the New Mexico bankruptcy court adopted the estate transformation view, in part based on language in *Harris v. Viegelahn*, 510 U.S. 510, 135 S. Ct. 1829 (2015). In *Harris v. Viegelahn*, the Supreme Court said that "the Chapter 13 estate . . . includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing." *Id.* at 1835. However, the Supreme Court addressed only whether, after conversion of a chapter 13 case to chapter 7, a chapter 13 trustee could distribute to creditors funds derived from the debtor's post-petition wages remaining in the trustee's possession on the conversion date. The Court was not required to, and did not consider, the effect of § 1327(b) on property of the estate on the date of confirmation. The Supreme Court's general statements regarding property of the estate under § 1306(a) were only made to highlight the differences between chapter 7 and chapter 13 cases. Moreover, the debtor's plan in *Harris v. Viegelahn* specifically provided that "[u]pon confirmation of the plan, all property of the estate shall not vest in the Debto[r], but shall remain as property *of the estate*." *Id.* at 1839 (emphasis in original). Therefore, *Harris v. Viegelahn* does not directly speak to the issue at hand.

### 2. **Estate Termination View is the Better Interpretation**

This Court has previously addressed the interplay between § 1327 and § 1306(a) in *In re Dagen*, 386 B.R. 777, 782 (Bankr. D. Colo. 2008), a case alleging a stay violation under a prior version of § 362(b). There, the issue was whether a child support creditor had violated the automatic stay when she collected her pre- and post-petition debts from the debtor's post-confirmation income. The Court had to determine whether post-confirmation income was property of the estate because § 362(b)(2)(B) only allows a child support creditor to collect its debt from "property that is not property of the estate." 11 U.S.C. § 362(b)(2)(B). The Court adopted the "estate termination" approach because it is the only construction that "gives effect to the literal terms of § 1327(b), which expressly states that confirmation vests all property in the debtor." *Id.* at 782. Accordingly, the Court held that the debtor's post-confirmation disability income, even though necessary to fund the plan, was no longer property of the estate under § 1306(a). *Id.* at 785.

Another division of this court, faced with facts similar to the present case, held that proceeds from a post-confirmation sale of the homestead were no longer property of the estate under § 1306(a)(1). *Sender v. Golden (In re Golden)*, 528 B.R. 803 (Bankr. D. Colo. 2015). In *Golden*, the chapter 13 debtor sold his home after confirmation, transferred the proceeds from the sale to his ex-wife, and then converted his case to chapter 7. His chapter 7 trustee sued the ex-wife under § 549 to recover the sale proceeds transferred without court authorization. Because § 549 applies only to an unauthorized transfer of "estate property," the court had to address whether the proceeds were in fact property of the estate. 11 U.S.C. § 549(a).

Reasoning that the most common meaning of "vest" refers to a transfer of ownership, the *Golden* court determined that § 1327(b) meant that, upon confirmation, "ownership of the property left the estate and vested in the Debtor." *In re Golden*, 528 B.R. at 806. The court discussed the various theories regarding the extent of the post-confirmation chapter 13 estate and concluded that only the "estate preservation" approach would consider the proceeds to be estate property. Under any other approach, because the home sale proceeds were not necessary to consummate the plan, they would not become estate property under § 1306(a)(1). The court further noted that, in *Talbot*, the Tenth Circuit did not adopt the estate preservation view and neither had prior bankruptcy court decisions from Colorado. *Id.* at 807-08 (citing *In re Segura*, 2009 WL 416847 at *6 (Bankr. D. Colo. Jan. 9, 2009) (adopting "estate termination" approach) and *Providian Nat'l Bank v. Vitt* (*In re Vitt),* 250 B.R. 711, 718-19 (Bankr. D. Colo. 2000) (adopting "estate transformation" approach)). Viewing its decision as consistent with the reasoning in *Talbot,* the court said "the home was no longer property of the Chapter 13 estate upon confirmation of the Debtor's plan. The Debtor, therefore, enjoyed full ownership and control over the property after the date of confirmation." *Golden,* 528 B.R. at 808.

This Court believes the estate termination approach is the only interpretation that respects the plain meaning of the language of § 1327(b). As the *Golden* court noted, in § 1306(b), the Code already provides that a chapter 13 debtor has the right to possess all property of the estate from and after the date of filing. Therefore, unless the concept of "vesting" in § 1327(b) refers to a transfer of ownership, § 1327(b) is rendered meaningless. *Golden*, 528 B.R. at 806-07 (citing *In re Clouse*, 446 B.R. 690, 699 (Bankr. E.D.Pa. 2010)); *see also Yoon v. Krick (In re Krick)*, 373 B.R. at 601 (to give meaning to § 1327(b), the words "estate" and "debtor" must define separate concepts and, therefore, "vesting" must mean a change in ownership from the estate to the debtor).

While the estate termination approach gives meaning to § 1327(b)'s vesting provision, it is admittedly at odds with the general language of § 1306(a). In the face of this apparent conflict, resort to traditional canons of statutory construction are called for. First, "where one statute deals with a subject in general terms and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible. But if two statutes conflict, the general statute must yield to the specific statute involving the same subject." 2B Sutherland, *supra*, § 51:5; *see also In re Petruccelli*, 113 B.R. 5, 15 (Bankr. S.D. Cal. 1990). Section 1306(a) is a more general statute defining what property comes into the chapter 13 estate. Section 1327(b) is the more specific statute describing its status following confirmation.

The estate termination view gives meaning to both statutes. Consider a debtor's home and his wages. On the filing of his chapter 13 petition, both become property of his estate under § 1306(a), protected by the automatic stay from creditor attempts to collect prepetition debts. On confirmation, his home and his wages become property of the debtor once again, but despite this change in status, they continue to be protected by the automatic stay, (with only very narrow exceptions set out in § 362(b) such as the domestic support creditor), until the case is closed, dismissed, or the debtor receives or is denied his discharge, whichever comes first. 11 U.S.C. §§ 362(a)(5)-(7), (c)(2). The plan provides creditors with substitute rights in regard to their prepetition debts. *Id*. § 1327(a).

Section 1306(a) still plays an important role in many respects, including bringing those assets under the umbrella of the automatic stay and in determining what assets must be considered in the BIC test analysis at confirmation. Section 1327(b), on the other hand, terminates the estate's rights to that property. The debtor is then free to spend his wages and deal with his assets however he wishes, so long as he fulfills his plan obligations. Post-confirmation, he does not need to run into the bankruptcy court for approval to trade his car in for a new one or to obtain a home-equity line of credit to repair his plumbing. The plan is the only contract between the debtor and his prepetition creditors. They have no further rights in the debtor's property except those specifically preserved in the plan. § 1327(c). Therefore, the bankruptcy court has no further authority over this property, except to rule on a motion for stay relief or a dismissal motion if the debtor defaults on his plan obligations. And, of course, it continues to have jurisdiction over post-confirmation modification motions until the plan has been completed.

A modification request may alter the contract between the debtor and his prepetition creditors by requiring an increase in plan payments, but not because § 1306(a) causes his post-petition wages to remain property of the estate. It is because Congress has expressly provided for the adjustment of the contract to reflect changes in the debtor's financial circumstances. It does so not by changing title to the property once again but only by increasing his payment obligation. In that sense, modification grants his unsecured creditors an *impersonam,* not an *in rem* remedy.

This interpretation is also consistent with another well-known canon of statutory construction, which advises that identical words used in different parts of the same or a similar statute should be interpreted to have the same meaning absent some contrary indication. 2A Sutherland, *supra*, § 46.6. Thus, the term "vest" in § 1327(b) should be construed similarly to how it is used in other Code provisions. Section § 1141(b) mirrors § 1327(b) insofar as it "vests" property of the estate in the debtor on confirmation. Courts construing § 1141(b) have interpreted it to mean that the property is no longer property of the estate. *Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n*, 997 F.2d 581, 587 (9th Cir. 1993); *Still v. Rossville Bank (In re Chattanooga Wholesale Antiques)*, 930 F.2d 458, 462 (6th Cir. 1991); *Penthouse Media Group v. Guccione (In re General Media, Inc.)*, 335 B.R. 66, 74 (Bankr. S.D.N.Y. 2005).

Section § 349(b)(3) uses the term "revest" to describe the change in title that occurs with dismissal of a bankruptcy case. Dismissal "revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case. . . ." 11 U.S.C. § 349(b)(3). In most instances, this means the property will revert to its status as property of the debtor but, if for example, the trustee avoided a preferential transfer or fraudulent conveyance during the case, dismissal will return title to the transferee. *Sender v. Golden (In re Golden)*, 528 B.R. 803, 807 (Bankr. D. Colo. 2015); *In re Van Stelle*, 354 B.R. 157, 167-68 (Bankr. W.D. Mich. 2006); *In re Beaird*, 578 B.R. 643, 646-49 (Bankr. D. Kan. 2017); *In re Sadler*, 935 F.2d 918 (7th Cir. 1991). In both §§ 1141(b) and 349(b)(3), "vesting" connotes a transfer of title and the termination of an estate. *In re Petruccelli*, 113 B.R. 5, 16-17 (Bankr. S.D. Cal. 1990).

The Court rejects the estate preservation view and the conditional vesting view because they give no effect to the term "vest," essentially reading § 1327(b) out of the Code. They also strip this term of its commonly accepted meaning, which signifies a transfer of ownership. *See Vest*, *Black's Law Dictionary* (11th ed. 2019) (defining "vest" as “[t]o confer ownership (of property) on a person,” “[t]o invest (a person) with the full title to property,” or “[t]o give (a person) an immediate, fixed right of present or future enjoyment.” ).

The estate transformation view reads nonexistent language into the statute by distinguishing between property necessary to consummation of the plan from that which is not. Decisions in which the courts employ this approach often seem result driven, with the courts endeavoring to protect the debtor’s post-confirmation assets from the collection efforts of post-petition creditors. *See, e.g., In re Ziegler*, 136 B.R. 497, 502 (Bankr. N.D. Ill. 1992) (ruling that debtor’s post-petition earnings were property of the estate and protected by the automatic stay from post-petition creditors to the extent the earnings were necessary to fund plan payments); *see also McGlockling v. Chrysler Fin. Co. (In re McGlockling),* 296 B.R. 884, 887 (Bankr. S.D. Ga. 2003) (determining that debtor’s car was property of the estate because he needed reliable transportation to complete plan and compelling lender to permit debtor to take car overseas). However, nothing in chapter 13, or the Code as a whole, promises protection against the collection of *post*-petition debts.

Finally, the Court disagrees with the estate replenishment view because it reads § 1306(a) too broadly and gives insufficient weight to § 1327(b). The Court has considered but respectfully disagrees with the decisions of the Fifth Circuit and the lower courts in Texas that have viewed proceeds from the post-confirmation sale of exempt property as “new” property interests that enter a chapter 13 estate through § 1306(a). *See*, *e.g., Hawk v. Engelhart (In re Hawk)*, 871 F.3d 287 (5th Cir. 2017); *Garcia v. Bassel*, 507 B.R. 907 (N.D. Tex. 2014). The Trustee relies heavily on these decisions, but the Court finds them unpersuasive.

In *Black v. Leavitt (In re Black)*, 609 B.R. 518 (9th Cir. BAP 2019), the court analyzed the interplay between §§ 1306(a) and 1327(b) in the context of property appreciating in value post-confirmation. Its interpretation gave full effect to the chapter 13 bargain a debtor makes when trading his future income for his assets. In *Black*, the debtor owned a rental property that he valued at $44,000. In his plan, he provided that he would sell the rental property at some point during the plan and contribute $45,000 from the sale to his creditors. Near the end of his three-year plan, the debtor sold the property for $107,000. The chapter 13 trustee moved to modify to require the debtor to contribute all the sales proceeds to his creditors. The bankruptcy court approved the trustee’s modification request, but the appellate court reversed. Recognizing a split of authority, the court rejected *Barbosa’s* estate preservation approach and reaffirmed its prior adoption of the estate termination view. *Black*, 609 B.R. at 529 (*citing Cal. Franchise Tax Bd. v. Jones (In re Jones)*, 420 B.R. 506, 515 (9th Cir. BAP 2009)). It held that when the bankruptcy court confirmed the debtor’s plan, the property vested in him. It was no longer property of the estate, so the appreciation in the property’s value did not belong to the estate.

### C. Good Faith

The Trustee also objects to the Debtor's proposed modification on the basis of "bad faith." The only evidence of bad faith that he asserts is the Debtor's failure to commit the proceeds from the sale of his home to repay creditors.[6] The fact that the Debtor seeks to remain in chapter 13 but refuses to modify his plan in accordance with his present ability to pay, says the Trustee, contravenes the purpose and intent of chapter 13. "[T]he spectacle of [a debtor] profiting while in bankruptcy is disconcerting and may be indicative of a bad faith manipulation of the Code." *In re Barbosa,* 236 B.R. 540, 552 (Bankr. D. Mass. 1999), *aff'd sub nom. Barbosa v. Solomon*, 243 B.R. 562 (D. Mass 2000), *aff'd,* 235 F.3d 31 (1st Cir. 2000).

Section 1325(a)(3) requires that a plan be "proposed in good faith" and § 1329(b) applies this same test to post-confirmation modifications. The Tenth Circuit has directed bankruptcy courts to make the good faith determination on a case-by-case basis, considering the totality of the circumstances. *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983). One of the factors to consider in evaluating good faith is "whether [the debtor] has unfairly manipulated the Bankruptcy Code." *Robinson v. Tenantry (In re Robinson),* 987 F.2d 665, 668 n. 7 (10th Cir. 1993).

In this case, the Debtor clearly intends to keep all the sales proceeds while paying his unsecured creditors almost nothing. Is this an unfair manipulation of the Bankruptcy Code to the detriment of his creditors? Or is the Debtor merely taking advantage of what the Bankruptcy Code permits? If, as this Court has determined, the Code itself does not compel the Debtor to use these proceeds to pay creditors, can the Court nevertheless find he has acted in bad faith solely because he refuses to do so? In a different context, the Tenth Circuit has answered this question in the negative, saying that it is "not bad faith for [a debtor] to adhere to the provisions of the Bankruptcy Code and, in doing so, obtain a benefit provided by it." *Anderson v. Cranmer* (*In re Cranmer)*, 697 F.3d 1314, 1319 (10th Cir. 2012).

The *Cranmer* case is instructive. The debtor was an above-median-income debtor who, in addition to his other sources of income, received $1,940 each month in social security income. Over the life of his plan, this would amount to an additional $87,000 in income. The chapter 13 trustee opposed confirmation because he did not include his social security income in his calculation of "projected disposable income." The trustee argued that his refusal to commit any of these funds to the payment of creditors meant he had not proposed his plan in good faith.

While the definition of "current monthly income," which is used to calculate a debtor's disposable income, expressly excludes social security income, the trustee argued social security income should nevertheless be considered part of the debtor's projected disposable income under the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. 505 (2010). In that case, the Supreme Court held that known and

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[6] The Court offered the parties an opportunity to present evidence on the good faith objection but they agreed to submit the matter to the Court on this basis only.

virtually certain changes to the debtor's income should be taken into account when calculating projected disposable income. *Lanning,* 560 U.S. at 524. It was virtually certain the *Cranmer* debtor would receive $87,000 in additional income during his plan. Nevertheless, the Tenth Circuit rejected this argument because the Bankruptcy Code authorized the debtor's exclusion of social security income and, therefore, the exclusion was not "one of the unusual cases contemplated by *Lanning*." *Cranmer*, 697 F.3d at 1318. Accordingly, when a debtor calculates his plan payments "exactly as the Bankruptcy Code and Social Security Act allow him to," the exclusion of social security income from his plan payments "cannot constitute a lack of good faith." *Cranmer,* 697 F.3d at 1319; *see also Beaulieu v. Ragos (In re Ragos)*, 700 F.3d 220, 227 (5th Cir. 2012) ("Having already concluded that Debtors' plan fully complied with the Bankruptcy Code, it is apparent that [d]ebtors are not in bad faith merely for doing what the Code permits them to do.").

In *In re Boisjoli*, 591 B.R. 468 (Bankr. D. Colo. 2018), the debtors proposed a sixty-month plan to pay one hundred percent of their debts, but the trustee objected because they had the financial ability to repay their creditors much sooner. The court rejected the trustee's argument that stringing out payments over a five-year period amounted to bad faith. It concluded the debtors' plan met all the Code's requirements and the debtors had done everything the Bankruptcy Code required of them.

The same reasoning applies here. Courts may disagree on whether the BIC test should be recalculated as of the date of modification and whether the estate terminates at confirmation. However, this Court has determined both issues in the Debtor's favor and ruled that he is permitted to retain the sale proceeds. As a result, it cannot find that in doing so he is acting in bad faith or unfairly manipulating the Code.

## III. CONCLUSION

For the reasons set forth above, the Court hereby:

1. OVERRULES the Trustee's objection to the Debtor's proposed modification;

2. DENIES the Trustee's proposed modification; and

3. APPROVES the Debtor's modification of his plan, dated May 7, 2019, finding that it satisfies the requirements of § 1329.

DATED this 29th day of September, 2020.

BY THE COURT:

Elizabeth E. Brown

Elizabeth E. Brown, Bankruptcy Judge