SO ORDERED.

SIGNED this 3rd day of November, 2023.

BENJAMIN A. KAHN
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Johnny Ray Adams,	)	Case No. 21-80425
	)	
Debtor.	)	Chapter 13

ORDER GRANTING MOTION TO MODIFY PLAN TO REQUIRE TURNOVER OF FUNDS AND TO INCREASE LIQUIDATION REQUIREMENT

This matter is before the Court on the Motion to Modify Plan to Require Turnover of Funds and to Increase the Liquidation Requirement (the "Motion"), ECF No. 149, filed by the chapter 13 trustee (the "Trustee"). For the reasons set forth herein, the Court will grant the Trustee's motion.

I. BACKGROUND

Debtor filed a petition under chapter 7 on November 17, 2021. ECF No. 1. On May 6, 2022, Debtor filed Amended Schedules A/B, listing the resale value of his residential real property located at 300 Plaza Dr, Garner, NC 27529 (the "Garner Property") at $260,000.00, and claiming $35,000.00 in value of his interest in

the Garner Property exempt.[1] ECF No. 60. On May 12, 2022, the Court granted Debtor's motion to convert his case to chapter 13. ECF No. 64. The Court confirmed Debtor's chapter 13 plan (the "Plan") on December 14, 2022. ECF No. 121. The Plan included a liquidation requirement of $79,705.55 under 11 U.S.C. § 1325(a)(4),[2] ECF No. 98, at 2, and provided that property of the estate would remain property of the estate, notwithstanding 11 U.S.C. § 1327(b).[3] Id. at 5. On June 15, 2023, Debtor moved to

[1] Debtor states in his response to the Trustee's Motion that the Garner Property was valued at this amount as of the filing date. ECF No. 151, at 1. But Debtor did not file Schedule A/B concurrently with the petition. Debtor's original Schedule A/B, filed on December 16, 2021, listed the value of the Garner Property as "unknown." ECF No. 16. Debtor filed his request to convert his case from chapter 7 to chapter 13 after the chapter 7 trustee filed an application to employ a real estate broker to market the property on April 6, 2022, ECF No. 43, which the Court approved on April 11, 2022. ECF No. 46. Debtor's counsel filed a notice of appearance in the case on April 12, 2022, and a motion to convert to a case under chapter 13 on the same day. ECF Nos. 49 and 50, respectively. On May 5, 2022, Debtor filed an amended Schedule A/B which stated that the resale value of the Garner Property was $260,000.00 and, assuming a six percent cost of sale, that the current value was $244,400.00. ECF No. 60, at 1. The parties do not dispute that $260,000.00 is the appropriate valuation; however, Debtor argues that this valuation relates back to the petition date, November 17, 2021, and represents the value of the Garner Property as of the petition date. Debtor offered no evidence of this valuation; nevertheless, this valuation was used for purposes of determining the liquidation value at confirmation of the original plan.

[2] The parties do not dispute that Debtor's interest in the Garner Property on the petition date represented $63,744.36 of the liquidation value reflected in the original plan. The Trustee's Motion asserts that, as of the date of the Motion, a balance of $60,022.38 remained due to unsecured creditors to meet the Plan's liquidation requirement attributable to Debtor's interest in the Garner Property.

[3] North Carolina property exemptions fall into one of two categories: (1) those exemptions that "allow debtors to exempt items in full, regardless of value;" and (2) those exemptions that allow debtors "to exempt an interest in value up to a specified monetary amount in the particular item." In re Gregory, 487 B.R. 444, 450-51 (Bankr. E.D.N.C. 2013). Under N.C. Gen. Stat. 1C-1601(a)(1), Debtor exempted $35,000.00 in value of his interest in the Garner Property. Debtor's interest in the Garner Property remained property of the estate under the terms of the Plan, notwithstanding Debtor's exemption of a portion of its value.

sell the Garner Property for $289,000.00, ECF No. 142, and the Court approved the sale on June 30, 2023. ECF No. 144. The sale price represents an 11.2 percent increase from Debtor's valuation on the schedules of $260,000.00, which was used about six months earlier at plan confirmation as the value of the property for purposes of determining whether the Plan complied with the best interests of the creditors test under § 1325(a)(4). At the hearing on the sale motion, the Trustee requested that the net proceeds of the sale be turned over to the Trustee for payment to creditors to the extent that the proceeds exceeded Debtor's exemption. ECF No. 143, at 00:49-01:14. Because Debtor's interest in the Garner Property represented a substantial portion of the liquidation value and the Plan did not contemplate the sale of property, the Court permitted the sale but required that all net proceeds above the $35,000.00 exemption amount be held in a Sasser Law Firm Trust Account, subject to the Trustee filing a motion to modify the plan within thirty days of receiving the settlement statement from the sale closing. ECF No. 144, at 1.

The Trustee timely filed the motion to modify the plan on August 8, 2023, recommending that the Plan be modified pursuant to 11 U.S.C. § 1329: (1) to require the turnover of a minimum of $60,022.38 of the net proceeds to the Trustee for distribution to unsecured creditors; (2) to increase the liquidation requirement to $109,403.00 to include the increased post-petition liquidation

value realized from the sale of the Garner Property; and (3) to require the turnover of an additional $31,319.57 of the nonexempt net proceeds to the Trustee for distribution to unsecured creditors. ECF No. 149. Debtor contends that modification should be denied because the Plan is res judicata and modification is not permitted under § 1329(b)(1). ECF No. 151. Debtor further contends that he should have "the exclusive right to use and possess estate property in chapter 13 regardless of whether the property is 'subject to depletion,'" including all proceeds of the sale, and be allowed to continue to pay the liquidation value provided under the originally confirmed plan over the life of the plan. ECF No. 151, at 1-2. The Court held a hearing on the Motion on September 18, 2023. Jennifer Harris, attorney for the Trustee, and Travis Sasser, counsel for Debtor, appeared at the hearing. At the conclusion of the hearing, the Court took the matter under advisement.

II. DISCUSSION

The doctrine of res judicata prevents modification of a confirmed plan pursuant to § 1329(a) unless the debtor experiences a "substantial and unanticipated post-confirmation change in his financial condition." In re Murphy, 474 F.3d 143, 149 (4th Cir. 2007). The party seeking modification bears the burden of demonstrating that the post-confirmation change in the debtor's ability to pay was both substantial and unanticipated. See id.;

In re Arnold, 869 F.2d 240, 242 (4th Cir. 1989) (citing In re Fitak, 92 B.R. 243, 250 (Bankr. S.D. Ohio 1988) (holding that, where the plan contemplated sale of the debtor's property 57 months into a plan and the property was sold as and when contemplated by the plan, a 20 percent appreciation in value during the first 57 months of the plan was reasonably foreseeable and did not justify overcoming res judicata)). Once res judicata is overcome, the plan can be modified if the purpose of the proposed modification is one that is identified in § 1329(a), and if the proposed modification complies with § 1329(b)(1). Murphy, 474 F.3d at 150.

A. Substantial Change

1. Ability to Pay

The Plan did not contemplate selling the Garner Property. Instead, the Plan contemplated that Debtor would retain the property in the estate and pay the equity that otherwise would have been available to creditors over the life of the Plan. Instead, Debtor moved to approve a sale of the property only five months after confirmation. See In re Stinson, 302 B.R. 828, 830-31 (Bankr. D. Md. 2003) (holding that an unanticipated sale of property, when the original plan contemplated retention of the property, constituted a substantial and unanticipated change permitting modification, and observing that "Debtors have initiated a *de facto* modification of the plan by voluntarily selling the Property and seeking to pay off their Plan obligation

with the proceeds . . . [and] seek[ing] to bind the Trustee to the valuation of the Property at the time of confirmation, and thus obtain the benefit of the Property's appreciation"). As a result, funds realized from the unanticipated sale of the Garner Property substantially changed Debtor's ability to pay post-confirmation. "A substantial change in circumstances can be increased income . . . or receipt of a large sum of money." In re Solis, 172 B.R. 530, 532 (Bankr. S.D.N.Y. 1994) (citing Arnold, 869 F.2d at 240 and Fitak, 92 B.R. at 250; and holding that a post-confirmation sale of the debtor's business that provided the debtor substantial proceeds warranted modification of the plan). In Murphy, the Fourth Circuit held that the "money received" by the debtor from a post-confirmation sale of property was "[u]nquestionably" substantial." 474 F.3d at 152. There, the debtor, who owned $34,000 of nonexempt equity in real property, sold the real property post-confirmation for $80,000 more than its valuation on his schedules.[4] Id. at 147. The Fourth Circuit held that the debtor's financial condition had improved substantially and affirmed the bankruptcy court's order requiring turnover of

[4] The debtor owned a condominium that he valued on his schedules at $155,000, subject to a lien of $121,000. In re Murphy, 474 F.3d 143, 147 (4th Cir. 2007). It was sold post-confirmation for $235,000. Id.

$30,000[5] of sale proceeds to the trustee for distribution to unsecured creditors. Id. at 152.

Although the 11.2 percent appreciation in the value of Debtor's petition-date interest in[6] the Garner Property is proportionately smaller than the 51.6 percent appreciation in Murphy, the amount of additional funds available for creditors in this case is almost identical to the amount that was required to pay creditors in full in Murphy. Further, while the proportionate appreciation of the Garner Property alone may not have resulted in a substantial and unanticipated change in this case—especially over a longer post-confirmation period—the sale resulted in a "substantial amount of readily available cash without any debt," and therefore created a substantial change in Debtor's financial condition. Id. Other courts similarly recognize that unanticipated receipt of a substantial amount of readily available cash can constitute a substantial change for purposes of § 1329. In Fitak, for example, the Bankruptcy Court for the Southern District of Ohio found that a debtor's post-confirmation withdrawal of $16,000 from her scheduled retirement account

[5] The trustee in Murphy only sought turnover of $30,000, rather than the full nonexempt equity, because that amount would be sufficient to pay all unsecured creditors in full. 474 F.3d at 147.

[6] Section 541(a) lists those interests in property that become property of the estate. There is a difference between an interest in property and the property itself. See In re Gifford, 634 B.R. 909, 917 (Bankr. M.D.N.C. 2021) (rejecting trustee's argument that conflated debtor's interest in the property with the property itself).

constituted a substantial change in the debtor's financial condition. See 92 B.R. at 251.[7] "When a debtor's financial fortunes improve, the creditors should share some of the wealth." Arnold, 869 F.2d at 243. As in Arnold and Solis, the sale of the Garner Property constituted a substantial change in Debtor's ability to pay post-confirmation.

2. Protection of Creditors' Entitlement to Receive Liquidation Value Under the Plan

The conversion of estate property into cash constituted a substantial change from the perspective of the creditors. The sale of the property itself materially altered the creditors' protections embodied within the Plan. Debtor's interest in the Garner Property remained property of the estate after plan confirmation, and Debtor's nonexempt equity in the property constituted a substantial portion of the liquidation value required to be paid to creditors under the Plan. In these

[7] The court in Fitak determined that the appreciation in the debtor's real property was insufficiently significant to overcome res judicata where the property was sold as contemplated under the original plan and the appreciation in value was insufficient to be deemed unexpected 56 months after confirmation. The court nevertheless held that the debtor's receipt of cash from her retirement funds constituted a substantial and unanticipated change warranting modification. 92 B.R. at 250-51. The conversion of retirement funds to cash did not change the debtor's balance sheet, but the court nevertheless held that the receipt of readily available funds warranted modification. Id. As a result, the court confirmed a modified plan that included payment to allowed unsecured claims of the value of the withdrawn retirement funds but not to include payment of the appreciation value of the property. This court respectfully disagrees with the court in Fitak to the extent that it held that these issues could be parsed once res judicata is overcome. Instead, once the court determines that modification is appropriate and res judicata has been overcome, the court must ensure that the modified plan meets the requirements for confirmation under 11 U.S.C. § 1325(a), including 1325(a)(4). See 11 U.S.C. § 1329(b); see also Section III, infra.

circumstances, the estate's interest in the real property provided protection to creditors in the event of a reconversion to chapter 7. But if an unanticipated sale of estate property is permitted and the case is later reconverted, the value promised to creditors is at risk if Debtor is granted "the exclusive right to use" the sale proceeds as he requests in his response to the Trustee's Motion. See ECF No. 151 at 1-2. Even if Debtor does not expend any of the proceeds, proceeds from a sale of the property may not constitute property of the chapter 7 estate if the case is reconverted to chapter 7. See 11 U.S.C. § 348(f)(1)(A) (property of the estate in a case converted from chapter 13 to chapter 7 consists of property of the estate as of the filing of the petition that remains in the possession of the debtor on the date of conversion); see also In re Marsh, 647 B.R. 725, 736-37 (Bankr. W.D. Mo. 2023) (recognizing that proceeds of property of the estate is a different category of property than the property itself, or there would be no need for § 541(a)(6)); In re Barrera, 22 F.4th 1217, 1223 (10th Cir. 2022) (holding in a post-confirmation conversion from chapter 13 to chapter 7 that proceeds from the post-petition, pre-conversion sale of property are not identical to the underlying property the debtor possessed on the chapter 13 petition date and, absent bad faith, do not constitute property of the chapter 7 estate under § 348(f)).

For this reason, when nonexempt proceeds from an unanticipated post-confirmation sale of property are not committed to funding the plan, "conversion or dismissal after the sale could leave creditors with less than they were entitled to in the Chapter 13 case." Keith M. Lundin, Lundin on Chapter 13, § 127.6, at ¶ 3 (2023). As attorney for the Trustee argues, there would be nothing to stop a debtor after a post-confirmation sale of estate property from spending the proceeds and allowing the case to be dismissed or converted. ECF No. 155, at 20:29-21:55; see also Lundin, § 120.3, at ¶ 45 ("[A] subsequent conversion produces a Chapter 7 estate that does not include the equity dissipated by the debtor."). Therefore, under the circumstances of this case, the sale itself was a substantial and material change in the creditors' protection as contemplated in the Plan.

B. Unanticipated Change

The change also was unanticipated as required for modification under § 1329. The Fourth Circuit has adopted the test applied in Fitak to determine whether a change in a debtor's financial condition was unanticipated. Arnold, 869 F.2d at 243. The Fitak test asks whether a debtor's "altered financial circumstances could have been *reasonably anticipated* at the time of confirmation by the parties seeking modification." 92 B.R. at 250 (emphasis in original). Debtor's Plan contains a liquidation requirement of $79,705.55. ECF No. 121. The vast majority of

this liquidation value is attributable to nonexempt equity of $63,744.36 in the Garner Property. ECF No. 149, at 1. The Plan gave no indication that Debtor intended to sell the Garner Property. "[W]here a Chapter 13 plan provides for unsecured creditors to be paid from income earned from a business and the confirmed plan gives no indication of a debtor's intention to sell the business, a post-confirmation sale could be an unanticipated change warranting plan modification." In re Suratt, No. 95-6183-HO, 1996 WL 914095, at *2 (D. Or. Jan. 10, 1996); see also Arnold, 869 F.2d at 243 (if income increase was anticipated, debtor's expectations should have been disclosed to the bankruptcy court before the plan was confirmed). Similarly, where the liquidation value of a plan relies on property that will remain property of the estate, the liquidation of that property during the case can be an unanticipated change. See Lundin, § 127.6, at ¶ 1 ("Modification under § 1329 may be required if the debtor sells property after confirmation.").

The court in Surratt rejected the debtor's argument that the plan must specifically provide for payment to creditors of any proceeds in the event of a sale of the property:

> The logical extension of the debtor's argument here is that there must be a provision in all Chapter 13 plans requiring post-confirmation sale proceeds from property originally part of the estate to be paid to creditors, in order to preclude the debtor from receiving those funds. There is no such requirement in the Bankruptcy Code, nor has any court imposed

> such a requirement. 11 U.S.C. § 1329(a) is intended, in part, to provide the protection the debtor claims is missing.

1996 WL 914095, at *3. Thus, at the time of confirmation, the Trustee could not have reasonably anticipated the substantial change in Debtor's ability to pay resulting from the sale of the Garner Property.

Because the change in Debtor's post-confirmation ability to pay following the sale of the Garner Property was both substantial and unanticipated, res judicata is overcome, and the Court must consider whether the purpose of the modification is consistent with § 1329(a) and whether the modification satisfies § 1329(b)(1).

C. Purpose of Modification

The purpose of the proposed modification is consistent with § 1329(a). Debtor argues that the proposed modification "exceeds the bounds of 11 U.S.C. § 1329(a)(1) which only allows for payments to be increased to a class of claims," and that Trustee's proposed modification would transform a plan that provides for payments "to be cash flowed out of ongoing disposable income . . . into a liquidating plan." ECF No. 151, at 2. However, this argument is inconsistent with the text of the Bankruptcy Code and relevant caselaw.

Section 1329(a)(1) provides that the trustee may request modification of the plan after confirmation to "increase or reduce the amount of payments on claims of a particular class provided

for by the plan." Section 1329(a)(2) provides that the plan can be modified to "extend or reduce the time for such payments." Debtor's Plan provides for payment over time. The Trustee seeks modification to (1) require immediate turnover of the unpaid balance of the liquidation value attributable to the Garner Property established by the confirmed Plan, (2) increase the liquidation requirement to include the increased post-petition liquidation value realized from the sale of the Garner Property, and (3) require the immediate turnover of the additional nonexempt net proceeds. ECF No. 149. These modifications have the effect of increasing the amount of the distribution to unsecured creditors and to reduce the time for the payment by Debtor. A chapter 13 plan may be modified consistent with § 1329(a) to require turnover of funds that would create a "windfall" to the debtor. See Murphy, 474 F.3d at 152; infra Section III (and cases cited therein). Thus, the purpose of the modification is permitted under § 1329(a).

III. COMPLIANCE WITH § 1329(b)(1).

Section 1329(b)(1) sets out the confirmation requirements applicable to modification of plans. Of the four sections made applicable by § 1329(b)(1), Debtor asserts that the proposed modification should be denied pursuant to § 1325(a)(1), § 1325(a)(3), and § 1325(a)(4). ECF No. 151, at 1-2.

A. Section 1325(a)(1)

Section 1325(a)(1) provides that a court shall confirm a plan if the plan "complies with the provisions of this chapter and with the other applicable provisions of this title." Debtor contends that the proposed plan modification violates §§ 542, 1303, 1306(b), and 1327(a). ECF No. 151, at 1. None of these provisions are explicitly made applicable to modification of confirmed plans under § 1329(b)(1). Debtor asserts that they apply under the general reference in § 1325(a)(1), which § 1329(b)(1) incorporates.

Debtor does not cite authority suggesting that a debtor can use proceeds from a post-confirmation sale of estate property at the exclusion of the trustee and without court approval, and neither § 1303, nor § 363(b) permit a debtor to do so. Section 1303 provides that "[s]ubject to any limitations on a trustee under this chapter, the debtor shall have, exclusive of the trustee, the rights and powers of a trustee under sections 363(b), 363(d), 363(e), 363(f), and 363(l)." But § 363(b), as incorporated by § 1303, provides that the debtor may use, sell, or lease property of the estate "other than in the ordinary course of business" only "after notice and a hearing." As observed by Collier, although the debtor has the right to use or sell property of the estate exclusive of the trustee,

> [i]t is of equal importance, however, that the chapter 13 debtor not be allowed to dispose of property of the estate other than in the ordinary course of business during the pendency of the plan, absent consent or at least the acquiescence of the chapter 13 trustee and creditors.

8 Collier on Bankruptcy ¶ 1303.02 (16th 2023). Implicit in this observation that the creditors and trustee are entitled to be heard on the disposition of the estate's interest in property is that the estate's interest must be sufficiently protected. Here, there cannot be any dispute that Debtor's interest in the Garner Property remained property of the estate. Debtor's nonexempt equity in that interest represents a significant portion of the liquidation requirement in the Plan, and the additional nonexempt net proceeds represent a significant portion of the proposed increased liquidation requirement.

Because Debtor's interest in the Garner Property remained property of the estate post-confirmation, the interest of the estate in the property must be protected in the event that the case is reconverted to chapter 7. See supra Section II.A.2. Therefore, Debtor cannot use the proceeds from the sale of the Garner Property without court approval, and turnover of the proceeds to the Trustee does not violate § 1325(a)(1) or otherwise frustrate the "purposes and spirit of the Bankruptcy Code." ECF No. 151, at 1. On the contrary, turnover protects the expectations

of the creditors in this case both before conversion and under the terms of the confirmed plan.

B. Section 1325(a)(3)

The proposed modification satisfies § 1325(a)(3). Section 1325(a)(3) provides that a court shall confirm a plan if "the plan has been proposed in good faith and not by any means forbidden by law." The Fourth Circuit has held that this good faith test is satisfied when modification would prevent a debtor from receiving a "substantial windfall." Murphy, 474 F.3d at 153; see also Arnold, 869 F.2d at 242 ("Certainly Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors."). Other courts have similarly found good faith when the proposed modification reflects a "'significant increase in income and a commensurately increased payout to unsecured creditors.'" In re Wetzel, 381 B.R. 247, 254 (Bankr. E.D. Wis. 2008) (quoting In re Brown, 332 B.R. 562, 566 (Bankr. N.D. Ill. 2005)). The Murphy Court found that the trustee's modification was made in good faith to prevent the debtor, who realized an $80,000 appreciation in property value by selling his house less than a year after plan confirmation, from receiving a substantial windfall. 474 F.3d at 153. As in Murphy, the Trustee here recognized that Debtor's liquidation of the substantial appreciation in property value significantly altered Debtor's ability to pay. Furthermore, in

this case, permitting Debtor to expend all the proceeds to which the creditors are entitled transfers the entire risk of nonpayment to the creditors, substantially frustrates the creditors' legitimate expectations when this case was commenced and subsequently converted to avoid the chapter 7 trustee's liquidation of the property, and would be inequitable. See supra note 1. Therefore, the Trustee's proposal to increase the liquidation requirement to include the post-petition liquidation value realized from the sale of the Garner Property and to require turnover of the nonexempt proceeds was made in good faith to prevent Debtor from receiving a substantial and unanticipated windfall not contemplated in the original plan and impermissibly shifting the risk of nonpayment entirely to creditors.

C. Section 1325(a)(4)

Section 1325(a)(4) provides that a court shall confirm a plan if "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date." This test, generally known as the "best interests of the creditors" or "liquidation value" test, is applied using the values as of the effective date of the plan as modified. See, e.g., In re Barbosa, 236 B.R. 540, 552-53 (Bankr. D. Mass. 1999); In re Walker, 153 B.R. 565, 568-69 (Bankr.

D. Or. 1993); In re Morgan, 299 B.R. 118 (Bankr. D. Md. 2003); In re Nott, 269 B.R. 250, 255 (Bankr. M.D. Fla. 2000); In re Auernheimer, 437 B.R. 405, 409 (Bankr. D. Kan. 2010); In re Taylor, 631 B.R. 346, 354 (Bankr. D. Kan. 2021) (analyzing cases and finding that the liquidation test is applied as of the date of confirmation of the modified plan, but that property acquired post-petition is not included in the best interests calculation); see also Lundin, § 126.2, at ¶ 11 ("[A] majority of reported decisions fix the effective date for best-interests-of-creditors test purposes at modification as the effective date of the plan as modified.").

Reading the phrase "effective date of the plan" to constitute the petition date ignores the plain language of the statute. Although Judge Lundin argues for a petition date valuation to "avoid vagaries of the court's scheduling of confirmation," among other potential problems associated with a roving valuation determination, he concedes that "Congress demonstrated its ability to identify the date of the petition or entry of the order for relief as the magic date for other consequences." Lundin, § 90.1, at ¶ 5.[8] Using the date of confirmation of the original plan for

[8] Not only does Congress know how to say either "the petition date" or "the order for relief" when it means to refer to that date, but the "effective date of the plan" also does not describe the petition date under any other section of the Code. See Hall v. U.S., 566 U.S. 506, 519, 132 S.Ct. 1882, 1891 (2012) ("'[I]dentical words and phrases within the same statute should normally be given the same meaning.'") (quoting Powerex Corp. v. Reliant En. Servs., Inc., 551 U.S. 224, 232, 127 S.Ct. 2411, 2417 (2007)).

purposes of determining liquidation value at modification similarly is at odds with the logic of § 1329(a), "which permits modification after confirmation to reflect changes after the effective date of the original plan." Id. § 126.2, at ¶ 8. Regardless, using an earlier date—whether petition date or prior confirmation date—is irreconcilable with the holding in Murphy, which required the debtor to pay the appreciated value of the debtor's petition-date property interest to the creditors.

Thus, the effective date of the plan for purposes of this test is the date of the plan as modified. This conclusion, however, does not necessarily determine which property interests are considered for purposes of determining the liquidation value on the effective date of the modified plan, or, specifically to this case, which portion of the sale proceeds from the Garner Property should be included in that calculation. This Court agrees with the court in Taylor that the property interests to be included in the valuation as of the effective date of the modified plan include only those interests under § 541, and excludes those interests that have come into the estate post-petition under § 1306. 631 B.R. at 353. Courts have struggled to delineate this concept. In determining that the proceeds from the settlement of a post-petition personal injury claim should not be included in the calculation, the court in Taylor cites Judge Lundin and Collier

for the proposition that post-petition property is excluded from this calculation. Id. at 354.

Finding an ambiguity in the operative statutes, the court in In re Barrera looked to legislative history. 620 B.R. 645, 652-53 (Bankr. D. Colo. 2020) (citing H.R. Rep. No. 103-835, at 57 (1994), as reprinted in 1994 U.S.C.A.N. 3340, 3366, for the proposition that a debtor should not be penalized for paying down equity during the chapter 13 case because to do so would "create a serious disincentive to chapter 13 filings"), aff'd 22 F.4th 1217 (10th Cir. 2022). The court recognized that "one could . . . attempt to distinguish between increased equity that arises from the debtor's repayment of secured debt from an increase that results from a change in market conditions," but declined to make that distinction, finding no language in § 348(f)(1)(A) or elsewhere in the Bankruptcy Code to support such a distinction. Id.

This Court respectfully disagrees that any additional statutory language is necessary. The distinction is in the property interests at issue. Appreciation is attributable to the property interest Debtor held on the petition date, while paydown of equity is attributable to Debtor's interest in his post-petition income that would not have been property of the estate in a hypothetical chapter 7. See Goins, 539 B.R. at 511, 515 (holding that the trustee was entitled to value attributable to the

appreciation of the real estate because it "was *always* property of the estate under Section 541(a)," but nevertheless allowing the debtor to retain proceeds reflecting the reduction of debt from post-petition income). This distinction is fully consistent with the policy that a debtor should be no worse off by choosing chapter 13 than he would have been by filing a chapter 7. Had the debtor in this case remained in chapter 7, he would have been entitled to the value of his exemption in the Garner Property upon its sale, and he would have been entitled to retain his post-petition income. 11 U.S.C. § 541(a)(6).[9] The creditors, in turn, had the expectation to receive the value of the Garner Property, less Debtor's exemption, but did not have an expectation that they would be entitled to further reduction of any liens by payments made by Debtor toward the debt. Both these expectations are fulfilled by allocating proceeds between these interests in the Garner Property. Further, this distinction is required in this circuit under Murphy, which held that the creditors were entitled to the appreciated value of the estate property once it is sold during the chapter 13 case.

For these reasons, the proposed modification satisfies § 1325(a)(4). Because the effective date of the plan is the date of

[9] This distinction also would apply to the hypothetical posed by the court in Barrera in which there is an increase in value attributable to improvements to a property made by a debtor using post-petition income. 620 B.R. at 653-54.

modification, the liquidation value requirement includes the nonexempt net value realized from the post-confirmation sale of the Garner Property, less any principal reduction attributable to Debtor's post-petition property. Accordingly, the best interests of the creditors test requires Debtor to turn over all nonexempt net proceeds from the sale of the Garner Property to the Trustee for distribution to the unsecured creditors, less any amount of proceeds attributable to principal reduction resulting from Debtor's post-petition payments and any portion of the liquidation value previously paid to creditors in this case (the result being the "Estate Proceeds"). Neither Debtor, nor the Trustee adduced any evidence of the amount of this principal reduction, if any. The Trustee's motion indicates that $60,022.28 of the original $63,744.36 attributable to the liquidation value of the Garner Property remains unpaid, and she requests an additional $31,319.57 in proceeds be turned over for distribution to unsecured creditors pursuant to the increased liquidation requirement of $109,403.00 under the proposed modificiation. Accordingly, the Trustee has requested turnover of a total of $91,341.85. The parties do not dispute that the remaining net proceeds held by counsel for Debtor (after payment of Debtor's exemption at closing) is $95,063.93. Therefore, it appears that Trustee has not sought turnover of $3,722.08 of the remaining net proceeds held by Debtor's counsel and that this amount may fully account for previous payments toward

liquidation value and reduction in principal. Nevertheless, the record is unclear. Therefore, the Court will permit the parties fourteen (14) days to submit a stipulation of the appropriate amounts of remaining unpaid liquidation value and any principal reduction that occurred prior to the sale as a result of payments made by Debtor after the date of the filing of the chapter 7 petition.

IV. CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED as follows:

1. The Trustee's Motion to Modify Plan to Require Turnover of Funds and to Increase the Liquidation Requirement is granted as provided herein;

2. The plan as modified consistent with the Trustee's Motion to increase the liquidation value of the plan to $109,403.00 is approved;

3. Contemporaneous with filing the stipulation in paragraph 4 below, Counsel for Debtor shall turn over all Estate Proceeds to the Trustee for distribution consistent with the terms of the plan as modified. If the parties do not file a stipulation as contemplated by paragraph 4, Counsel for Debtor shall turnover the undisputed portion of the Estate Proceeds based on calculations as directed herein within fourteen (14) days of the date of this order, and retain any disputed portion of the Estate Proceeds pending further order of the Court. Nothing herein shall be

construed as permitting counsel to retain any portion of Estate Proceeds on any basis other than a calculation of principal reduction or previous payment of liquidation value, including without limitation an appeal or contemplated appeal of this order, absent a stay of this order.

4. The parties shall have fourteen (14) days from the entry of this order to file a stipulation of the amount of Estate Proceeds. If a stipulation is timely filed, the amount in the stipulation will be deemed incorporated herein without further order, and this order shall be deemed a final order as of the date of the filing of the stipulation. If the parties do not file a timely stipulation as contemplated in this order, the Court will conduct a hearing on November 20, 2023, at 2:00 p.m. in the United States Bankruptcy Court, Courtroom 1, 101 S. Edgeworth St., Greensboro, North Carolina 27408 to determine the amount of Estate Proceeds consistent with this order.

[END OF DOCUMENT]

Parties to be Served
21-80425

Page 1 of 1

Anita Jo Kinlaw Troxler
Chapter 13 Trustee — via electronic notice

John Paul Hughes Cournoyer
U.S Bankruptcy Administrator — via electronic notice

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