SO ORDERED.
SIGNED this 4th day of February, 2019

Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

NORA RECTOR HOLT
fka NORA ALICE HOLT
fka NORA R. HOLT

Debtor

Case No. 3:16-bk-32396-SHB
Chapter 13

MEMORANDUM AND ORDER ON
MOTION TO MODIFY CONFIRMED CHAPTER 13 PLAN

This contested matter is before the Court on the Motion to Modify Confirmed Chapter 13 Plan ("Motion to Modify") filed by Debtor on August 8, 2018 [Doc. 43], and the Objection to Modified Plan by Chapter 13 Trustee ("Objection to Modification") filed by Gwendolyn M. Kerney, Chapter 13 Trustee ("Trustee") on August 15, 2018 [Doc. 45]. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

I. PROCEDURAL POSTURE AND FACTS

Debtor filed the Voluntary Petition commencing this Chapter 13 bankruptcy case on August 11, 2016. Her originally proposed plan provided for monthly payments of $810.00 for

sixty months, payment into the plan of all tax refunds over $500.00, and a dividend to unsecured creditors of 71 to 100%. [Doc. 2.] The Trustee objected to confirmation of the originally proposed plan under 11 U.S.C. § 1325(a)(4) and (6).[1] [Doc. 20.] After two status hearings, the Court scheduled an evidentiary confirmation hearing for January 11, 2017; however, the Trustee withdrew her objection [Doc. 31] after she and Debtor's counsel reached an agreement that resolved the feasibility and best-interest objections. Under the agreement, Debtor agreed to change her monthly payment from $810.00 to $996.00; to file an amended budget in support of the new payment amount; and, most notably, to increase the dividend to be paid to unsecured creditors to 100%. [*See* Doc. 32 at p. 2.] The Trustee and Debtor memorialized their agreement on the Modification of Plan Dated 12/28/16, which was attached to and incorporated in the Order Confirming Chapter 13 Plan ("Confirmation Order") entered on January 19, 2017. [Doc. 32.]

In June 2018, Debtor filed an Application for Hardship Discharge, arguing that her circumstances had significantly changed because she lost her job after her employer's building had been damaged in a fire, her unemployment benefits had expired, and she was facing serious health issues and scheduled for surgery in August 2018. [Doc. 37 at ¶ 1.] In support of the request for hardship discharge, Debtor acknowledged that she had paid only $21,927.58 to unsecured creditors, which was a 41% dividend rather than the 100% provided for in the Confirmation Order; however, Debtor asserted that her payments to unsecured creditors met the best-interest requirement. [*Id*. at ¶¶ 2-3.] The Trustee objected to Debtor's request for a hardship discharge, arguing that because Debtor had not paid 100% to unsecured creditors, the best-

[1] Section 1325(a)(4) contains the so-called best-interest-of-creditors test, under which a plan may be confirmed only if it provides that unsecured creditors will receive as much through the plan as they would receive if the debtor liquidated under Chapter 7. Under subsection (a)(6), the debtor must show that the proposed plan is feasible – i.e., that he is be able to make all payments under and comply with the plan.

interest test was not satisfied and it would not be appropriate to grant a hardship discharge under 11 U.S.C. § 1328(b). [*See* Doc. 41.]

At the hearing on Debtor's hardship-discharge application on July 25, 2018, Debtor's counsel began by acknowledging that Debtor could not meet the best-interest test for hardship discharge, even though the original schedules and calculations appeared to meet the best-interest requirement. Debtor's counsel then orally withdrew the request for hardship discharge and later filed the Motion to Modify, which sought to reduce Debtor's monthly plan payments from $996.00 to $100.00 because Debtor was no longer able to work and her only income is Social Security benefits. [Doc. 43.] The requested reduction in monthly payments would reduce the dividend payable to unsecured creditors from 100% to a range of 21 to 70%. [*Id.*] Through her Objection to Modification, the Trustee argues that, as with the request for a hardship discharge, Debtor's Modified Plan does not meet the best-interest test. [Doc. 45.]

At the preliminary hearing held September 19, 2018, the Trustee argued that her original best-interest objection had been resolved by increasing the unsecured creditors' dividend to 100% so that when Debtor agreed to the modification as a condition of confirmation, the issue became res judicata. Debtor disagreed, arguing that the best-interest inquiry was not decided or resolved definitively at the confirmation stage and that her agreement to modify at that time did not bind her to a 100% dividend now that her circumstances and income have so significantly changed. Because the threshold res judicata issue is solely a matter of law, the parties advised the Court that the issue could be decided without an evidentiary hearing. Debtor filed a brief on October 12, 2018 [Doc. 52], and the Trustee filed a brief on October 26, 2018 [Doc. 53].

The question to be resolved is whether the resolution of the Trustee's best-interest objection raised at confirmation, as incorporated in the Confirmation Order, is now res judicata

such that the Court must deny the Motion to Modify. If the answer to this question is no, then the parties would be allowed to litigate the value of Debtor's properties for the Court to decide whether her proposed modified plan meets the best-interest test. For the following reasons, the Court finds that the Confirmation Order is res judicata on the question so that Debtor's proposal to modify her plan to reduce the dividend to 21 to 70% does not satisfy the requirements of 11 U.S.C. § 1329(a) and the Motion to Modify must be denied.

II. ANALYSIS

The provisions of a confirmed Chapter 13 plan are binding on all parties thereto and res judicata as to all issues that were or could have been raised at the time of confirmation. *See* 11 U.S.C. § 1327(a); *Ruskin v. DaimlerChrysler Svcs. N. Am., LLC (In re Adkins)*, 425 F.3d 296, 302 (6th Cir. 2005) ("Indeed, confirmation of a plan has been described as 'res judicata of all issues that could or should have been litigated at the confirmation hearing.'" (quoting *In re Cameron*, 274 B.R. 457, 460 (Bankr. N.D. Tex. 2002))); *Storey v. Pees (In re Storey)*, 392 B.R. 266, 270 (B.A.P. 6th Cir. 2008) ("[A]bsent a timely appeal, a confirmation order is *res judicata* and not subject to collateral attack."). Although § 1327 "typically is employed as a shield by a debtor to bar a creditor from taking action against the debtor in contravention of the terms of a confirmed plan, a debtor is equally bound by the confirmation order." *Pees v. CitiMortgage, Inc. (In re Crum)*, 479 B.R. 734, 741 (Bankr. S.D. Ohio 2012) (citation omitted).

The Bankruptcy Code allows debtors to modify confirmed plans under limited circumstances, including, as relevant here, a reduction in income necessitating a reduction in plan payments and payments on claims to a particular class of creditors within the plan, as long as the modified plan also satisfies the requirements of 11 U.S.C. §§ 1322, 1323, and 1325. *See* 11 U.S.C. § 1329. Courts in the Sixth Circuit, however, will not approve plan modifications that

do not fall squarely within the express language of § 1329(a). *See In re Adkins*, 425 F.3d at 299-305 (discussing and reaffirming the court's decision in *Chrysler Fin. Corp. v. Nolan (In re Nolan)*, 232 F.3d 528 (6th Cir. 2000), notwithstanding some courts' disagreement with *Nolan*, and holding that the express language of § 1329(a) does not allow debtors to reclassify or alter treatment of a previously allowed claims). Additionally, the Sixth Circuit Bankruptcy Appellate Panel has expressly stated that "§ 1327 precludes modification of a confirmed plan under § 1329 to address issues that were or could have been decided at the time the plan was originally confirmed." *In re Storey*, 392 B.R. at 272. Thus, "modification under § 1329(a) [is] limited to matters that arise post-confirmation." *Id.*

Debtor argues that she should be allowed to revisit whether her proposed modified plan meets the best-interest test so that she can reduce the dividend to unsecured creditors. She notes that "[t]here were no evidentiary hearings . . . and no factual findings by the bankruptcy court." [Doc. 52 at ¶ 3.] Relying solely on *In re Guillen*, 570 B.R. 439 (Bankr. N.D. Ga. 2017), Debtor argues that "§ 1329(a) allows the bankruptcy court to completely revisit the confirmation requirements" when a debtor moves to modify a plan post-confirmation. [Doc. 52, at p. 5-6.]

The *Guillen* court relied primarily on the Seventh Circuit decision in *In re Witkowski*, 16 F.3d 739 (7th Cir. 1994), for the proposition that "Congress created an exception to the finality of an order confirming a Chapter 13 plan through Section 1329 of the Bankruptcy Code." *In re Guillen*, 570 B.R. at 444. The *Guillen* court also cited to the First Circuit's decision in *Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000). *Id.* The Sixth Circuit BAP acknowledged the approach of these two courts, as well as the Fifth Circuit (also cited by the *Guillen* court, *id.* (citing *In re Meza*, 467 F.3d 874 (5th Cir. 2006)). *In re Storey*, 392 B.R. at 272-73. As noted by the *Storey* court, however,

> "[P]arties requesting modifications of Chapter 13 plans must advance a legitimate reason for doing so, and they must strictly conform to the three limited circumstances set forth in § 1329." *Barbosa*, 235 F.3d at 41 (quoting *In re Barbosa*, 236 B.R. 540, 548 (Bankr. D. Mass. 1999)). Moreover, "motions to modify cannot be used to circumvent the appeals process for those creditors who have failed to object [to] confirmation of a Chapter 13 plan or whose objections to confirmation have been overruled." *Id.*

Id. at 271.

The *Storey* court then noted that "the Sixth Circuit Court of Appeals has addressed modifications under § 1329 on three separate occasions and in each instance has reiterated the necessity of only permitting modifications that strictly fall within the parameters of § 1329, due in part to the binding effect of confirmation under § 1327." *Id.* (citing *Ford Motor Credit Co. v. Bankr. Estate of Clayton Parmenter & Lydia Parmenter (In re Parmenter)*, 527 F.3d 606, 609-10 (6th Cir. 2008); *In re Adkins*, 425 F.3d at 305; *In re Nolan*, 232 F.3d at 533). Ultimately, relying on prior Sixth Circuit precedent (including the unpublished decision in *Cline v. Welch (In re Welch)*, No. 97-5080, 1998 WL 773999 (6th Cir. Oct. 11, 1998)), the *Storey* panel expressly concluded "that § 1327 precludes modification of a confirmed plan under § 1329 to address issues that were or could have been decided at the time the plan was originally confirmed." *In re Storey*, 392 B.R. at 272 (citing *In re Welch*, 1998 WL 773999, at *2 n.1 ("Under 1327, . . . an issue is precluded if it could have been decided at confirmation, whether or not it was actually decided."); 8 Collier on Bankruptcy ¶ 1329.03 (15th ed. rev. 2008) ("A trustee . . . may not raise as grounds for modification under [§ 1329] facts that were known and could have been raised in the original confirmation proceedings, because the order of confirmation must be considered res judicata as to that set of circumstances.")).

Thus, the question raised here – whether issues or objections that could have been or should have been raised at confirmation are res judicata as to any proposed modification – has

been answered repeatedly by courts within the Sixth Circuit with a resounding "yes."[2] That is, neither a debtor, creditor, nor the trustee may raise any issue at the modification stage that could have been or should have been raised and/or litigated at the confirmation stage because modification under § 1329 applies only to issues that have arisen between the time of confirmation and the request for modification.[3]

Turning to the situation at hand, the Trustee unquestionably raised the best-interest issue in her initial objection to confirmation of Debtor's plan in 2016. Debtor was aware of the Trustee's feasibility and best-interest objections, and to resolve the issues fourteen days before the scheduled evidentiary hearing, Debtor agreed (as evidenced by her counsel's signature on the Trustee's modification form that was incorporated into the Confirmation Order) to increase her plan payments (to satisfy the feasibility objection) and to pay unsecured creditors a 100% dividend (to satisfy the best-interest objection, as evidenced by the notation "(best interest)" on the modification form). [Doc. 32 at p. 2.] The result was that on entry of the Confirmation Order on January 19, 2017, all of the potential issues or objections to the plan – including not only feasibility and best interest, but also valuation, good faith, disposable income, and unfair discrimination, to name a few – were resolved and binding on all parties to the Confirmation Order.

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[2] A split of authority exists concerning whether a debtor must prove a change in financial or personal circumstances for a court to approve plan modification. *See In re Storey*, 392 B.R. at 270. That issue, however, is not present here because Debtor unquestionably has had a change in circumstances – both financially and personally – that would satisfy any such requirement.

[3] The Court also questions the wisdom of allowing an issue that was resolved by agreement in order to avoid a trial – i.e., settled issues – to be the subject of a § 1329 modification. If such were permitted, no party in interest would be willing to resolve any objection to confirmation short of an evidentiary hearing followed by a formal ruling by the Court.

Accordingly, because the Confirmation Order bound all parties with respect to the best-interest issue, which was actually raised[4] and resolved on confirmation, it is irrelevant that the Court did not expressly decide the Trustee's initial best-interest objection to Debtor's plan. As would also be germane with respect to valuation or avoidance, good faith or disposable income, "[the] failure to litigate [the best-interest objection] . . . cannot be remedied by [a] post-confirmation second bite at the apple." *Charlick v. Cmty. Choice Credit Union (In re Charlick)*, 444 B.R. 762, 765 (Bankr. E.D. Mich. 2011); *see also In re Welch*, 1998 WL 773999, at *3 (holding that "Section 1327(a) has been consistently interpreted as barring the relitigation of any issue which was decided or which *could have been decided* at confirmation," and thus, the creditor could not challenge whether a plan was confirmed in good faith or met the disposable-income test through a later appeal).

Because the Trustee raised a best-interest objection that Debtor could have litigated at confirmation, the Confirmation Order definitively decided the issue, and in this bankruptcy case, in order to satisfy § 1325(a)(4), Debtor must pay a 100% dividend to unsecured creditors. Because the Modified Plan, which proposes only 21 to 70%, does not satisfy the requirements of § 1325(a)(4), it cannot be approved under § 1329. The Court, accordingly, directs the following:

1. The Objection to Modification filed by the Trustee on August 15, 2018 [Doc. 45], is SUSTAINED.

2. The Motion to Modify filed by Debtor on August 8, 2018 [Doc. 43], is DENIED.

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[4] The Court need not reach the question of whether a failure of the Chapter 13 Trustee to raise the best-interest issue would preclude a modification under § 1329. For example, if a debtor, based on an incorrect valuation or calculation, proposes a plan with a 100% dividend to avoid a potential best-interest objection, this decision would not necessarily preclude the debtor's modification of the plan to correct the error. Such would be a horse of a different color with different analyses required.