Dated: September 01, 2009
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
CAROL RENEE WELLS, Case No. 08-20612-L
Debtor. Chapter 13

ORDER DENYING TRUSTEE'S MOTION TO MODIFY PLAN

BEFORE THE COURT is the motion of Sylvia Ford Brown, Chapter 13 Trustee, to Modify Plan to Increase Distribution to Unsecured Creditors to One Hundred (100) Percent ("Motion to Modify"). The Motion to Modify does not state the authority under which relief is sought, but the court will treat it as a motion for post-confirmation modification pursuant to 11 U.S.C.§1329(a)(1). The debtor did not file a written objection to the Motion to Modify, but counsel for the debtor made oral arguments at the hearing on Thursday, August 6, 2009. After hearing arguments of counsel, carefully considering the motion, and reviewing the case file, the court has determined that the motion should be denied. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

FACTUAL BACKGROUND

The Debtor commenced this case by filing a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on January 18, 2008. Doc. No. 1.[1] *See* 11 U.S.C. § 301(a). On January 21, 2008, the debtor filed her proposed Chapter 13 Plan (the "Initial Plan") which provided that plan payments be made by a $200.00 monthly deduction from the debtor's benefits under Assistance to Families with Dependent Children ("AFDC"). The initial plan proposed a term of sixty months. The initial plan further provided for payment of one secured creditor, Parkway Motors, with a claim in the amount of $3,000.00 to be paid through the plan together with interest at 9.25% in equal monthly installments of $100.00. The debtor's obligation under a lease with Clyde Fitzgerald was listed as an unsecured debt to be paid directly by the debtor outside the plan, and there were no other unsecured creditors specifically listed.[2] Doc. No. 5.

On April 22, 2008, the court entered an order confirming the initial plan with certain revisions (the "April 2008 Plan"). The monthly plan payment was set at $192.00 and the plan provided that the percentage to be paid to unsecured creditors would be "determined by the Trustee after the expiration of the 90 day bar date for the filing of claims."[3] The April 2008 Plan referenced Clyde Fitzgerald's debt as "deleted - paid outside" and specifically listed only two other unsecured creditors, Premier Bankcard Charter, with an unsecured claim in the amount of $446.59, and Memphis Light Gas & Water Division with a claim in the amount of $1,179.70.

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[1]References to the court's docket are abbreviated Doc. No. for "document number."

[2]As discussed below, the debtor's plan was subsequently amended to list two additional unsecured creditors.

[3]The court does not find a reference in the record to the trustee having made this determination.

The April 2008 Plan provided that it would "terminate upon payment" of the amounts owed under the plan and the term was estimated to be sixty months. Doc. No. 17 including Attachment. As with the initial plan, the April 2008 Plan provided for payment to Parkway Motors as a secured creditor with its claim valued at $3,000.00 to be paid together with interest at the rate of 9.25% per annum in equal monthly installments of $100.00.

On July 7, 2008, the debtor filed a Motion to Modify Plan, alleging that,

> Debtor's 1996 Eagle Vision has a bad transmission. She [the Debtor] has put a lot of money into the car, and it will not run. Parkway Motors has [a] lien on the vehicle's title. However, Parkway Motors did not file a proof of claim, and the time has passed for filing claims.

Doc. No. 21.

In her motion to modify, the debtor prayed that the court set the percentage to unsecured creditors at 70%; that her plan payment be reduced to $30 per month; that she be allowed to surrender her vehicle to Parkway Motors; and that any claim by Parkway Motors be disallowed as a late claim. An order was entered on August 11, 2008, granting the debtor's motion except that plan payments were set at $69.00 per month rather than the $30.00 amount.[4] Doc. No. 26. Neither the debtor's motion to modify nor the order granting the motion made any reference to the duration of the plan.

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[4]The relief obtained by the debtor is generally not permitted. The Sixth Circuit Court of Appeals has held that a debtor "cannot modify a plan under section 1329(a) [postconfirmation] by: 1) surrendering the collateral to a creditor; 2) having the creditor sell the collateral and apply the proceeds toward the claim; and 3) having any deficiency classified as an unsecured claim. *In re Nolan*, 232 F.3d 528, 535 (6th Cir. 2000), citing *In re Coleman*, 231 B.R. 397, 398 (Bankr. S.D. Ga. 1999). In the present case, however, Parkway Motors did not object to the debtor's motion to modify her plan and did not object to the entry of the order disallowing any claim of Parkway Motors as a late claim. As of the filing of this opinion, Parkway Motors has not filed a claim. *See* Claims Register.

A little over ten months after the entry of the order modifying the plan on the debtor's motion, the trustee filed the present motion requesting that the court further modify the plan to provide for a payment to unsecured creditors of one hundred percent. The trustee's motion recites that she "believes that without a claim from Parkway Motors the distribution to unsecured creditors can now be set at one hundred (100) percent." Doc. No. 28. The debtor objects to this further modification of her plan on the basis that the debtor wants the percentage to unsecured creditors to remain at seventy percent, and she wishes to be granted her discharge in the very near future when that percentage has been paid. The debtor contends that the trustee has not demonstrated any cause to increase the percentage payment to unsecured creditors and that there have been no changes in the debtor's circumstances to warrant the modification.

DISCUSSION

Section 1329(a)(1) of the Bankruptcy Code provides that "[a]t any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to increase or reduce the amount of payments on claims of a particular class provided for by the plan."

The Trustee's sole basis for requesting the increase in payments to unsecured creditors is the surrender of the debtor's vehicle to Parkway Motors and the elimination of Parkway Motor's claim, which might provide the debtor an opportunity to pay more to her two unsecured creditors.

By its own terms, section 1329 expresses no standard for permitting post-confirmation modification. *In re Storey*, 392 B.R. 266, 270 (B.A.P. 6th Cir. 2008). In *Storey*, the Bankruptcy Appellate Panel (the "BAP") explained that "[g]iven this absence and the *res judicata* effect of a confirmed plan, the courts have disagreed over whether a party seeking to modify a confirmed plan

must establish as a threshold requirement a post-confirmation change in circumstances." *Id*. at 270 (citations omitted). *See also In re Perkins*, 111 B.R.671, 673 (Bankr. M.D. Tenn. 1990)("Changed circumstances or unanticipated events after confirmation of the original plan may be evidence relevant to one or more of the listed standards [contained in 1329(b)(1)]. Changed circumstances, unanticipated or otherwise, is not imposed by the Code as a threshold barrier to access to modification under § 1329."). The *Storey* panel noted that the Sixth Circuit Court of Appeals has not addressed the issue. *Storey*, 392 B.R. at 270. In a prior opinion, the BAP held that section 1329 does not contain a requirement for "unanticipated or substantial change" as a prerequisite to plan modification but that the bankruptcy court "may properly consider changed circumstances in the exercise of its discretion." *In re Brown,* 219 B.R. 191, 195 (B.A.P. 6th Cir. 1998). The *Storey* panel concluded, however, that because "§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, ... modification under §1329(a) will be limited to matters that arise post-confirmation." *Storey*, 392 B.R. at 272.

In the *Storey* case, a chapter 13 trustee filed a motion to modify a confirmed plan to correct his pre-confirmation mistake in calculating the plan's duration. At the hearing on the motion to modify, counsel for the trustee reported that the trustee's pre-confirmation recommendation of the plan "had been based on his erroneous projection that the Plan would last 48 months" and in connection with his review of the case after the claims bar date, the trustee "realized that he had mistakenly counted a secured claim twice in his initial calculation of plan length, and that rather than the projected 48 months, the Plan would only last 27 months." *Id*. at 269. The requested modification would have resulted in a greater dividend to unsecured creditors. The bankruptcy court

approved the modification over the debtors' objection and the debtors appealed. *Id*. The BAP reversed. *Id*. at 274.

The BAP first noted that "[m]odification under §1329 is discretionary" (*id*. at 268, citing *In re Brown*, 219 B.R. at 192) and that absent a timely appeal, a confirmation order is "*res judicata* and not subject to collateral attack." *In re Storey*, 392 B.R. at 270, citing *In re Parmenter*, 527 F.3d 606, 609 (6th Cir. 2008) and *In re Adkins*, 425 F.3d 296, 302 (6th Cir. 2005) quoting *In re Cameron*, 274 B.R. 457, 460 (Bankr. N.D. Tex. 2002)("[C]onfirmation of a plan has been described as *res judicata* of all issues that could or should have been litigated at the confirmation hearing."). Section 1327(a) of the Bankruptcy Code provides that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." Thus, the BAP 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 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.").

In reaching this conclusion, first the BAP reviewed its earlier decision, *In re Brown*, 219 B.R.191 (B.A.P. 6th Cir. 1998), in which it reversed the bankruptcy court's decision that a Chapter 13 trustee must establish "unanticipated or substantial" change in the debtor's circumstances as a prerequisite to plan modification under §1329.

In *Brown*, the debtors' Chapter 13 schedules listed a pre-petition personal injury claim. The plan did not reference the personal injury claim nor did it contain a provision for any future proceeds of the lawsuit to be applied to plan payments. The plan was confirmed without objection from the trustee or any other party. Twelve days after confirmation, the debtors filed an application to settle the personal injury claim. The trustee objected on the ground that certain portions of the proceeds should be used to make additional plan payments. The bankruptcy court determined that before it could "address the merits of the [t]rustee's argument that the personal bodily injury proceeds are projected disposable income includible in the plan, the [t]rustee first must show unanticipated and substantial change in the [d]ebtors' circumstances." *Id.* at 193, citing *In re Brown*, 212 B.R. 856, 859 (Bankr. S.D. Ohio 1997). The bankruptcy court held that the trustee could not meet this threshold requirement for post- confirmation modification, and the proposed modification was denied. *Brown*, 219 B.R. at 194. The BAP vacated and remanded the decision to the bankruptcy court, holding that the court "may properly consider changed circumstances in the exercise of its discretion," but that "§ 1329 does not contain a requirement for unanticipated or substantial change as a prerequisite to modification." *Id.* at 195.

Then, the *Storey* panel reviewed the Sixth Circuit Court of Appeal's unpublished decision in *Welch*, 1998 WL 773999 (6th Cir. 1998), which noted 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." *Storey*, 392 B.R. at 272, citing *Welch*, 1998 WL 773999 at 2. The panel concluded that the "practical impact of this conclusion" is that modification under § 1329(a) will be limited to matters that arise post-confirmation. *Id*. at 272-273 (citations omitted). Because the question of the required plan length was "an issue that could have been decided at confirmation had

the Trustee or an unsecured creditor with an allowed claim objected," the BAP vacated the decision of the bankruptcy court and remanded the case for further proceedings. *Storey*, 392 B.R. at 273-374.

This court is persuaded by and adopts the holding in *Storey.* A confirmed Chapter 13 plan may not be modified to address an issue that was or could have been decided at the time of confirmation, or in this case, at the time of a previous modification. In considering a motion to modify a confirmed Chapter 13 plan, the court must determine whether the trustee has raised one or more issues that were not and could not have been decided at confirmation. The trustee has raised no such issue in this case.

Throughout her case, the debtor consistently valued Parkway Motors' claim at $3,000.00 and consistently proposed to pay Parkway Motors $100.00 per month through the plan. The only two claims filed in the case, those of Memphis Light Gas & Water and Premier Bankcard Charter, were allowed by order of May 31, 2008, and have not been amended subsequently. *See* Claims Register. The bar date for filing proofs of claim was May 28, 2009, and July 16, 2008, for governmental claims. Accordingly, the trustee knew in August of 2008 the total amount of claims at issue under the plan and should have raised any objection to the percentage to be paid to unsecured creditors at that time.

CONCLUSION

The court appreciates the trustee's motivation in seeking to further modify the plan, i.e., to allow the two unsecured creditors to be paid in full. In this case, however, the court need not determine whether, as a threshold requirement, a movant must establish an "unanticipated or substantial" change of circumstances in order to modify a confirmed plan because the trustee failed

to present any argument for modifying the plan that could not have been raised and decided at the hearing on the debtor's previous motion to modify. Accordingly, the trustee's motion is **DENIED**.

cc: Debtor
Debtor's Attorney
Chapter 13 Trustee
Counsel for Chapter 13 Trustee
United States Trustee
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