The document below is hereby signed.

Signed: May 10, 2019

S. Martin Teel, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLUMBIA

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| In re | ) | |
| | ) | |
| ELEANOR JOYCE DRABO, | ) | Case No. 15-00653 |
| | ) | (Chapter 13) |
| Debtor. | ) | Not for publication in |
| | ) | West's Bankruptcy Reporter. |

MEMORANDUM DECISION AND ORDER
GRANTING MOTION FOR ENTRY OF A DISCHARGE

The debtor has filed *Debtor's Motion for Entry of § 1328(a) Chapter 13 Discharge and Notice of Deadline and Opportunity to Object* (Dkt. No. 60) wherein the debtor asserts that she meets all of the qualifications for a discharge under 11 U.S.C. § 1328(a) and requests that a chapter 13 discharge be entered. A creditor, Ameritas Life Insurance Corp. ("Ameritas"), filed an *Objection to Motion for Discharge* (Dkt. No. 63) alleging that the debtor has not completed all payments under the plan as required by § 1328(a) because the debtor did not make cure payments under 11 U.S.C. § 1322(b)(5) on her prepetition arrears. For the following reasons, I find that the debtor has completed payments under the plan and is entitled to a discharge.

I

The debtor initiated this case under chapter 13 of the Bankruptcy Code by the filing of a voluntary petition on December 16, 2015. The debtor filed a third amended chapter 13 plan (Dkt. No. 31) (the "Plan") on February 10, 2016, that was confirmed on February 12, 2016. Key provisions of the Plan provide:

> The debtor hereby authorizes and directs the employer/income source to comply with all Trustee's Directions by deducting and forwarding plan payments directly out of debtor's income source. The debtor shall commence proposed plan payments as required by 11 U.S.C. § 1326(a)(1), **by money order,** and continuing **each month** until automatic payroll deductions begin.
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> **EACH HOLDER OF AN ALLOWED SECURED CLAIM SHALL RETAIN ITS LIEN AS REQUIRED BY 11 U.S.C. §1325(a)(5)(B)(i), AND FROM THE PAYMENTS RECEIVED, THE TRUSTEE SHALL MAKE DISBURSEMENTS AS FOLLOWS:**
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> B. 11 U.S.C. §1322(b)(5) CLAIMS (FINAL PAYMENT UNDER THE PLAN BEING TREATED AS DUE 60 MONTHS FROM PETITION DATE): THE DEBTOR SHALL MAINTAIN POST-PETITION PAYMENTS DIRECTLY WHILE CASE IS PENDING AND THE TRUSTEE WILL CURE ALL PREPETITION ARREARS, COSTS, AND FEES OF THE FOLLOWING CLAIMS:
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> - - WITH FULL 100% PAYMENT:
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> - - WITH FULL 100% PAYMENT PLUS 6% POST-CONFIRMATION INTEREST PER ANNUM:
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> ***
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> C. DIRECT PAYMENTS: THE DEBTOR SHALL PAY DIRECTLY THE FOLLOWING CLAIMS TO THE EXTENT THEY ARE **§1322(b)(2) CLAIMS** (SECURED ONLY BY SECURITY INTEREST IN DEBTOR'S PRINCIPAL RESIDENCE) OR **§1322(b)(5) CLAIMS** (FINAL PAYMENT UNDER THE PLAN BEING TREATED AS DUE 60 MONTHS FROM

> PETITION DATE) OR **ALLOWED SECURED CLAIMS** (SUBJECT TO THE PROVISIONS OF HANGING SENTENCE OF §1325(a)(5), IF APPLICABLE):
>
> Ameritas Life Insurance

The chapter 13 trustee filed a *Notice of Completion of Chapter 13 plan* (Dkt. No. 52) on March 11, 2019. The debtor subsequently filed her *Debtor's Motion for Entry of § 1328(a) Chapter 13 Discharge and Notice of Deadline and Opportunity to Object* on March 26, 2019.

Ameritas filed its *Objection to Motion for Discharge* on April 15, 2019. Ameritas contends that the debtor was required to make all postpetition monthly mortgage payments and to cure prepetition arrears by making payments directly to Ameritas, but the debtor failed to cure the debtor's prepetition arrears. Ameritas further alleges that the debt is secured by the debtor's principal residence and accordingly cannot be modified pursuant to 11 U.S.C. § 1322(b)(2), and objects to any discharge of Ameritas's lien.

II

The issue is whether payments to cure prepetition arrears were "payments under the plan" that the debtor was required to complete in order to be entitled to a discharge under § 1328(a). Section 1328(a) provides in relevant part:

> Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, and in the case of a debtor who is required by a judicial or administrative order, or by statute, to pay a domestic

> support obligation, after such debtor certifies that all amounts payable under such order or such statute that are due on or before the date of the certification (including amounts due before the petition was filed, but only to the extent provided for by the plan) have been paid, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt—
>
> (1) provided for under section 1322(b)(5) . . . .

I acknowledged, but did not decide, this issue in *In re Starkey*, No. 15-00659, 2016 WL 3034738 (May 18, 2016). In *Starkey*, I was asked to decide whether a plan could be confirmed over a creditor's objection because the plan did not address the creditor's claim for arrears. I held that the claim was not "provided for" by the plan and would be unaffected by any discharge, provided that the creditor's claim would be paid directly without specifying payments to be made during the pendency of the case: it was a § 1322(b)(5) claim but the debtor had not elected to treat the claim under § 1322(b)(5) by providing for a cure of arrears and maintenance of monthly payments. I then held that alternatively, should the claim be considered as "provided for" by the plan, the plan could be confirmed because the creditor's claim, as a § 1322(b)(5) claim, was exempted from discharge under § 1328(a)(1), and the creditor's claim would be unaffected. I recognized, however, that this alternative interpretation of the plan presented an

issue regarding the debtor's obtaining a discharge. I wrote:

> The debtor is only entitled to a discharge "after completion by the debtor of all payments under the plan...." 11 U.S.C. § 1328(a). If a claim for which payments are to be maintained directly by a debtor is a claim "provided for" by the plan, and such payments are "payments under the plan" within the meaning of § 1328(a), that debtor would literally have not completed all payments under the plan and would be ineligible for a discharge. *See In re Evans*, 543 B.R. 213, 225–26 (Bankr. E.D. Va. 2016). However, if the claim is viewed as being provided for under § 1322(b)(5), § 1328(a)(1) would except the claim from discharge. It would not matter to that creditor whether the debtor receives a discharge, and the lack of payments to that creditor would not be a concern of other creditors. Denying a discharge in that circumstance would seem silly.

*Starkey*, 2016 WL 3034738, at * 2.

A.

There has been a split of authority on whether direct payments are "payments under the plan" under § 1328(a). The majority view is that such payments are "payments under the plan." *See Simon v. Finley ("In re Finley")*, No. 18-4011, 2018 WL 4172599 (Bankr. S.D. Ill. Aug. 28, 2018); *In re Evans*, 543 B.R. 213 (Bankr. E.D. Va. 2016); *In re Heinzle*, 511 B.R. 731 (Bankr. W.D. Tex. 2014). The reasoning under the majority view is that the plain language of the statute requires "all payments under the plan," and the phrase "contemplates completion of all amounts set forth to be paid under the relevant Chapter 13 plan." *Evans*, 543 B.R. at 221. These courts also hold that the debtor is made a disbursing agent under the plan, and as a disbursing agent, the debtor is making payments under the plan. *Heinzle*,

511 B.R. at 75.

A minority of courts have held that direct payments are not "payments under a plan." *See In re Rivera*, No. 2:13-bk-20842-MCW, 2019 WL 1430273 (Bankr. D. Ariz. Mar. 20, 2019); *In re Gibson*, 582 B.R. 15 (Bankr. C.D. Ill. 2018). The leading case in this line of cases, *Gibson*, explains that the statutory language is ambiguous and can be read to include, or not include, direct payments. 582 B.R. at 18. The court then acknowledged that it is the general policy in bankruptcy cases to interpret the Bankruptcy Code in favor of the debtor. Here, the interpretation that direct payments are not "payments under the plan" favors debtors by allowing them to obtain their discharge, even if they should default on direct payments.

Additionally, § 1328(a) uses the phrase "under the plan" to describe payments that must be completed in order to receive a discharge, and uses a similar, but different, phrase — "provided for by the plan" — to describe the scope of the discharge. The Supreme Court has given the phrase "provided for by the plan" an expansive interpretation "to mean that a plan 'makes a provision' for, 'deals with,' or even 'refers to' a claim." *Rake v. Wade*, 508 U.S. 464, 474 (1993). The court in *Gibson* held that Congress intended the phrase "under the plan" to have "a narrower effect." 582 B.R. at 19. The court further held "[t]he most logical line of demarcation is between payments made by the trustee from funds

received from the debtor versus payments made by the debtor direct to a creditor." *Id.*

The court in *Gibson* pointed out that the debtor is under no obligation under the Bankruptcy Code to confirm that all direct payments are being made to creditors. The only exception is specified in § 1328(a), requiring the debtor to certify that payments of domestic support obligations are being made. This is strong evidence that direct payments are not "under the plan." If direct payments were "under the plan," there would be no reason for Congress to specifically require the debtor to certify that payments of domestic support obligations are being made: such certification would be required already under that interpretation of § 1328(a) to show that all direct payments "under the plan" were completed.

Another point made by the court in *Gibson* that has little practical relevance to this case, but is helpful when considering the issue, is that no court had ever denied a debtor a discharge due to failure to complete direct payments prior to the adoption of Fed. R. Bankr. P. 3002.1.[1] 582 B.R. at 18. Prior to the adoption of Rule 3002.1, the trustee would not know whether the

[1] This argument is inapplicable in this case because the trustee is not seeking a denial of a discharge upon discovering that the debtor has defaulted on direct payments from a Rule 3002.1 disclosure. Nevertheless, the point is well made that prior to the adoption of the rule, the question of whether the debtor had completed direct payments was never an issue as to whether the debtor was entitled to a discharge.

debtor was making direct payments to know whether to object to a discharge based on the debtor's default in making direct payments. The court in *Gibson* noted that the purpose of Rule 3002.1 was "ensuring the fresh start to a Chapter 13 debtor who completes a plan," and not an "impetus for dismissal without discharge." 582 B.R. at 19. I agree with *Gibson* that it is odd that a rule created to benefit the debtor would become an obstacle to the debtor obtaining a discharge.

I find the minority view to be more persuasive and more consistent with the intent of the Bankruptcy Code. Accordingly, I hold that the debtor's direct payments are not "payments under the plan," and the debtor has completed all "payments under the plan," and is entitled to a discharge.

B.

The Plan in this case further evidences that the direct payments by the debtor to Ameritas are not intended to be considered "payments under the plan." The opening line of the Plan specifically states that "[t]he debtor hereby authorizes and directs the employer/income source to comply with all Trustee's Directions by deducting and forwarding plan payments directly out of debtor's income source." It is clear that the Plan contemplates that all plan payments would be made to the Trustee, and would only include payments made to the trustee. Moreover, the next sentence of the Plan required the debtor "to commence

proposed plan payments as required by 11 U.S.C. § 1326(a)(1), by **money order**, and continuing **each month** until automatic payroll deductions begin." The only relevant part of § 1326(a)(1) was § 1326(a)(1)(A), which directs that the debtor commence making payments "proposed by the plan to the trustee." It is thus abundantly clear that the Plan viewed any payments proposed by the Plan as being those being made to the trustee.

Additionally, this case is similar to *Starkey*. Like the debtor in *Starkey*, the debtor opted not to provide for Ameritas's claim to receive the treatment authorized by § 1322(b)(5) of the trustee's curing prepetition arrears and the debtor's maintaining postpetition monthly payments, a treatment the Plan accorded any claims listed under Part B of the Plan. The Plan made no provision requiring the debtor to cure and maintain with respect to Ameritas's claim. Instead, the debtor elected to make all payments directly to Ameritas outside of the Plan under Part C, which made no specification that the debtor was to cure prepetition arrears during the life of the Plan, and left it to the debtor when to pay the claim. Part C does not say that the debtor was providing for any listed claims under § 1322(b)(5), only that to extent that such claims were § 1322(b)(5) claims, the debtor would make such payments directly, with no provision in the Plan requiring that they be paid during the life of the Plan. The debtor was throwing herself to the mercies of

nonbankruptcy law if she failed to address her payment obligations to Ameritas, under nonbankruptcy law, in a manner satisfactory to Ameritas.

As a claim for which the Plan failed to specify any payments the debtor was required to make during the life of the Plan, payments of Ameritas's claim were not payments being made under the Plan. The Plan provided for Ameritas's claim only in the sense of leaving the claim unimpaired by retaining intact the debtor's nonbankruptcy law obligation to pay the claim (by providing for no alteration of Ameritas's claim and by specifying that the debtor "SHALL PAY [the claim] DIRECTLY").[2] Any default in making payments to Ameritas was not a default in completing payments "under the plan." This follows because the Plan failed to specify any payments to be made to Ameritas during the life of the Plan, and left it to Ameritas to invoke nonbankruptcy law as controlling what payments were required and as controlling consequences Ameritas wished to pursue if there was a failure to make such payments. The payments were not payments the Plan specified would be made under the Plan.

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[2] Despite the expansive view in *Rake v. Wade* of the term "provided for by the plan," the Plan's provision for direct payments of Ameritas's claim did not provide for payment of the claim during the life of the Plan and the debt cannot be deemed a debt provided for by the plan for purposes of 11 U.S.C. § 1328(a): implicitly the Plan left Ameritas's claim unimpaired (except for the effect of the automatic stay of 11 U.S.C. § 362(a)) with the claim to be dealt with outside of the bankruptcy case.

Moreover, the terms of Ameritas's claim anticipates that the final payment on the secured claim would be made April 1, 2035. That is more than 5 years after the confirmation date of the Plan. To treat direct payments on the claim until April 1, 2035, "under the plan" would be in violation of the limitation under § 1322(d)(2) that a plan not extend longer than a period of 5 years. *Gibson*, 582 at 20.

I agree with *Gibson* that the proper remedy for a debtor's failure to make direct payments is not a denial of a discharge, but for the creditor to seek a lift of the automatic stay to pursue nonbankruptcy remedies. *Gibson*, 482 B.R. at 21. Ameritas failed to take this action during the course of the Plan. However, upon the entry of a discharge and the closing of this case, the automatic stay will be lifted, and Ameritas's § 1322(b)(5) claim will be exempted from a discharge, meaning Ameritas will be able to pursue its nonbankruptcy remedies to collect the prepetition arrears from the debtor.

III

Ameritas's objection states that "objection is taken to the extent that Debtor's motion seeks to discharge the lien obligation itself." I readily reject that objection.

A.

The debtor's motion only seeks the entry of a discharge, which results in a discharge injunction under 11 U.S.C.

§ 524(a)(2) against collecting a debt "as a personal liability of the debtor" and not against enforcement of a lien against property, for "a bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor in personam—while leaving intact another—namely, an action against the debtor in rem." *Johnson v. Home State Bank*, 501 U.S. 78, 84 (1991). As already discussed, the debtor is entitled to a discharge. The motion does not seek a determination that Ameritas's lien is no longer effective.

B.

In any event, the lien has been unaffected by the debtor's bankruptcy case for reasons discussed below (which also reinforce the court's conclusion that the debtor is entitled to a discharge). Under 11 U.S.C. § 1327(c), the estate property revesting in the debtor under § 1327(b) is "free and clear of any claim or interest of any creditor provided for by the plan," but the debtor's Plan does not provide for Ameritas's lien in a way that alters it, and does not attempt to alter Ameritas's lien rights.

First, the court's confirmation order provided that "notwithstanding 11 USC § 1327(b), confirmation of the plan shall not vest the property of the estate in the debtor(s) until the plan has been completed . . . ." If the provision for the debtor to pay Ameritas's claim directly were viewed as providing for the

payment of Ameritas's claim (as to which the final payment is not due for many years), then obviously the Plan has not been completed, and property of the estate would not revest in the debtor, an absurd result. The better view of the provision for direct payment of Ameritas's claim is that the Plan did not provide for the claim at all other than to leave it unimpaired: it did not attempt to alter Ameritas's rights in any fashion, and simply left the claim to be dealt with by the debtor directly. The Plan specifically provided that "**EACH HOLDER OF AN ALLOWED SECURED CLAIM SHALL RETAIN ITS LIEN**" and Ameritas's claim, for which a proof of claim was timely filed, was an allowed claim and was a secured claim within the meaning of 11 U.S.C. § 506(a)(1) as a claim that is secured by a lien against the debtor's real property. Section 1327(c) makes clear that property does not vest in the debtor free and clear of a lien if "otherwise provided in the plan." The intention of the Plan was to leave Ameritas's rights unimpaired, with the result that Ameritas's rights should be treated as unaffected by § 1327(c).

Second, even if Ameritas had not filed a proof of claim, with the result that Ameritas had no allowed secured claim, its lien was unaffected by the Plan. Under the definition of "lien" in 11 U.S.C. § 101(37) as meaning a "charge against or interest in property to secure payment of a debt or performance of an obligation," a lien is distinct from the underlying claim that it

secures. If Ameritas had not filed a proof of claim, the provision regarding allowed secured claims would not apply, but there would have been no mention of Ameritas's lien in the Plan. The provision for direct payment of Ameritas's claim was not a provision addressing the lien securing the claim. The lien would not have been an interest of Ameritas "provided for by the plan" as the Plan failed to mention the lien. *See Deutchman v. Internal Revenue Service (In re Deutchman)*, 192 F.3d 457, 461 (4th Cir. 1999) (part II(C)); *Cen-Pen Corp. v. Hanson*, 58 F.3d 89, 93-94 (4th Cir. 1995) (part II(B)). As an interest in the debtor's property not provided for by the Plan, the lien would remain unaffected by the Plan and by § 1327(c). *See In re Pence*, 905 F.2d 1107, 1110 (7th Cir. 1990) ("unless the bankruptcy proceeding avoided it, [a creditor's] lien . . . should remain intact.").

Ameritas's claim and its lien rights were left unimpaired by the Plan, and the lien therefore falls under the general principle that liens left unimpaired by a plan pass through the case unaffected. Like the claim itself, which was not to be paid "under the plan" and which will thus be unaffected by the debtor's discharge, the lien securing the claim will remain intact and unaffected by the bankruptcy case.

C.

Therefore, this objection addressing the effect of the case

on the lien must be overruled as not providing a basis for denying the debtor a discharge.

IV

For all these reasons, it is

ORDERED that Ameritas's Objection to Motion for Discharge (Dkt. No. 63) is OVERRULED. It is further

ORDERED that the Debtor's Motion for Entry of § 1328(a) Chapter 13 Discharge (Dkt. No. 60) is GRANTED and the clerk of the court is hereby directed to enter a chapter 13 discharge pursuant to 11 U.S.C. § 1328(a), with notice to all creditors.

[Signed and dated above.]

Copies to: Recipients of e-notifications of filings.