SO ORDERED.

SIGNED this 17th day of November, 2014.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	**Case No. 13-41131**
Terry Lee Ungerer	**Chapter 7**
Delores Jean Ungerer,	
Debtors.	

Order Denying
Debtors' Motion to Refund Postpetition Mortgage Payments

Debtors Terry and Delores Ungerer filed a chapter 13 bankruptcy petition and about eight months later converted their case to one under chapter 7 of the Bankruptcy Code. Post-conversion, Debtors requested refund of a significant portion of the plan payments they made to the chapter 13 trustee (the "Trustee"), because those payments were intended for a mortgage creditor that never filed a proof of claim, and because they no longer wished to retain the related real property. The Trustee resisted, arguing that the funds should instead be disbursed to creditors pursuant to the confirmed chapter 13 plan.

This debate—the subject of a current Circuit Court split, but one that the Tenth Circuit has not yet weighed in on—has reasonable arguments on both sides. After considering these arguments,

this Court holds that Debtors do not have a right to refund of the payments reserved for payment of the mortgage note, as their confirmed chapter 13 plan controls disbursements and requires the chapter 13 Trustee pay those funds to creditors. Debtors' motion for return of the money held by the Trustee at conversion is denied.

I. Procedural and Factual Background

The parties have stipulated to the following facts or they are part of the record in this case. Debtors filed a chapter 13 bankruptcy petition in August 2013. Their chapter 13 plan proposed payments of $1025 per month for at least 36 months, and indicated the following would be paid: filing fees, attorney fees for their bankruptcy attorney, home mortgage arrearage to Ocwen Loan Servicing, and ongoing mortgage payments and "conduit administrative expenses" associated with the home mortgage pursuant to this Court's Standing Order 11-3 (the "conduit mortgage rule"). Paragraph 14 of the District's form plan also states that "[g]eneral unsecured claims will be paid after all other unsecured claims, including administrative and priority claims, from Debtor's projected disposable income in an amount not less than the amount those creditors would receive if the estate of Debtor were liquidated under Chapter 7 on the date of confirmation. . . ."[1]

The chapter 13 plan was confirmed on November 20, 2013, after Debtors agreed to raise their monthly plan payment to $1093 to assure the plan's feasibility. Debtors' mortgage creditor never filed a proof of claim.[2]

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[1] Doc. 2 (Plan).

[2] This failure of a mortgagee to file a claim— an increasingly common situation—presents difficult problems for debtors and trustees, alike. Counsel entered an appearance for the mortgage creditor in September 2013 (Doc. 17), so lack of notice is clearly not the cause.

About eight months after they filed their chapter 13 petition, Debtors filed a notice to convert their case to chapter 7, and the case was converted a few days later. Debtors have since received their chapter 7 discharge, and the chapter 7 trustee has claimed no interest in these funds.

On the date of conversion (and to date), the chapter 13 Trustee held $8007.56 in plan payments in his account. While the chapter 13 case was pending, each time the chapter 13 Trustee made a disbursement, he retained a portion of the plan payments he had received, in anticipation of receiving a proof of claim from the mortgage creditor. As of the date of conversion, and pursuant to the plan terms and this District's conduit mortgage rule, the Trustee had reserved $7184 for the ongoing mortgage payments and $166.75 for the mortgage administrative claim. The remainder of the funds would typically have been disbursed as follows: $624.59 to the chapter 13 Trustee for his statutory fees (pursuant to 28 U.S.C. § 586(e)(2)), and $32.22 to Debtors' attorney. Based on the timely filed claims, if the Court orders the chapter 13 Trustee to stop holding the funds for the mortgage claim and to disburse these funds to the remaining creditors Debtors' plan provides to pay, in full or in part, the funds would be disbursed as follows: $624.59 to the Trustee, $2587.24 to Debtors' attorney, and $4795.73 to allowed unsecured claims.

After converting their case, Debtors filed the motion to require the Trustee return the money being held for the mortgage creditor to them, as opposed to having the Trustee disburse the funds in the normal course of a confirmed plan.[3] The chapter 13 Trustee objected, arguing that Debtors do not have a right to control the funds after they pay them to the trustee, and that the funds received prior to conversion should be disbursed by the chapter 13 Trustee pursuant to the confirmed chapter

[3] Doc. 59 (seeking order requiring Trustee "to disburse the proceeds . . . directly to the Debtors.").

13 plan. The parties have now fully briefed this matter on the above stipulated facts. This matter constitutes a core proceeding over which the Court has the jurisdiction and authority to enter a final order.[4]

II. Analysis

Debtors' motion to disburse, and the Trustee's opposition thereto, are the subject of divided rulings from two Circuit Courts of Appeal: the Third Circuit and Fifth Circuit have reached different conclusions on whether undistributed payments held by a chapter 13 trustee after the conversion of a case from a chapter 13 to a chapter 7 should be returned to the debtor or distributed to creditors. There are no pertinent rulings on this matter from the Tenth Circuit or Tenth Circuit BAP, and no Judge in this District has yet decided the issue.[5]

A. Third Circuit: *In re Michael*[6]

The Third Circuit was the first Circuit Court to hear this issue, and it held that if the chapter 13 trustee is holding funds acquired from the debtor postpetition at the time of conversion from a chapter 13 to a chapter 7, the chapter 13 trustee must return those funds to the debtor.[7] In *In re*

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[4] *See* 28 U.S.C. § 157(b)(2)(A) (stating that "matters concerning the administration of the estate" are core proceedings); § 157(b)(1) (granting authority to bankruptcy judges to hear core proceedings).

[5] There is an older bankruptcy case from this District that concluded that funds held by a chapter 13 trustee at the time of conversion to chapter 7 were not property of the chapter 7 estate but should instead be distributed to creditors pursuant to the chapter 13 plan, *In re Simmons*, 286 B.R. 426, 427, 430–31 (Bankr. D. Kan. 2002) (Flanagan, J.). But apparently no party in that case argued that the funds should be returned to the debtors. Rather, it was an argument about which trustee was entitled to administer the funds. The *Simmons* case also addresses no arguments that aren't thoroughly addressed by the Third and Fifth Circuit cases, so the Court finds it more instructive to focus on the Circuit Court opinions.

[6] 699 F.3d 305 (3d Cir. 2012).

[7] *Id.* at 307.

Michael, the debtor filed a chapter 13 bankruptcy, and his plan was later confirmed.[8] The plan required the debtor to pay $277 per month to the chapter 13 trustee for 53 months, with funds to be distributed to secured and priority creditors, and any remaining funds to be distributed to unsecured creditors pro rata.[9] GMAC held the mortgage on the debtor's home, and the plan provided that its prepetition delinquency would be paid by the trustee inside the plan, with debtor continuing to make postpetition mortgage payments directly to GMAC outside the plan.[10]

Soon after plan confirmation, however, GMAC filed a motion for relief from stay because the debtor had failed to make ongoing mortgage payments outside the plan. The court granted GMAC's motion to allow it to foreclose on the home.[11] But because the debtor did not amend his plan or modify the wage order that required his employer make the $277 plan payments, the employer continued to send the plan payments to the chapter 13 trustee.[12] The chapter 13 trustee attempted to pay funds to GMAC, but GMAC refused to accept them to avoid possible estoppel or waiver defenses regarding its foreclosure action. As a result, the funds continued to accumulate.[13]

Approximately three years later, the debtor moved to convert his case to chapter 7.[14] Shortly after the conversion of his case, the debtor filed a motion seeking return of the accumulated

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.*

funds—then totaling $9181.62—from the chapter 13 trustee.[15] The chapter 13 trustee objected, arguing that the funds should be distributed pro rata to unsecured creditors as provided by the confirmed chapter 13 plan.[16]

The Third Circuit began its analysis with 11 U.S.C. § 348(f)(1)(A),[17] which states that "property of the estate in the converted case shall consist of property of the estate, as of the date of filing the petition, that remains in the possession of or is under the control of the debtor on the date of conversion." In the case of a bad faith conversion, "the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion."[18] The *In re Michael* court noted that

> "Prior to the addition of § 348(f), courts considering the disposition of funds held by a Chapter 13 trustee at the time of conversion reached three different results: the funds were (i) property of the new Chapter 7 estate, (ii) property of the debtor, or (iii) property of creditors under a confirmed Chapter 13 plan. . . . Section 348(f) removed the first result, but did not resolve explicitly whether the Chapter 13 trustee should give the funds to the debtor or distribute them to creditors under the confirmed Chapter 13 plan."[19]

The Third Circuit ultimately concluded that the funds should be returned to the debtor.

First, the Third Circuit noted that § 1327(b) vests all property of the chapter 13 estate in the debtor upon plan confirmation. Section 1327(b) states: "Except 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

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[15] *Id.*

[16] *Id.*

[17] All future statutory references are to title 11 of the United States Code (the "Bankruptcy Code") unless otherwise specified.

[18] § 348(f)(2).

[19] *In re Michael*, 699 F.3d at 308–09.

the debtor." According to the Third Circuit, this implies that property held by the Chapter 13 trustee after plan confirmation is "under the control of the debtor as of the date of a later conversion" for purposes of § 348(f)(1).[20] According to the Third Circuit, there is no provision in the Bankruptcy Code that classifies any property, including post-petition wages, as belonging to creditors, and the debtor loses no vested interest until the trustee affirmatively transfers the funds to creditors.[21] Because the debtor retains this vested interest, the Third Circuit reasoned, the funds should revert to the debtor.[22]

Second, the Third Circuit concluded that returning the funds to the debtor better aligns with § 348(e). Section 348(e) states that after the conversion of the case, the services of the chapter 13 trustee are terminated, and this "seemingly renders [the chapter 13 trustee] powerless to make payments to creditors under a Chapter 13 plan."[23] The Third Circuit reasoned that the chapter 13 trustee has limited post-conversion duties, and returning undistributed funds better aligns with those duties as "their return should be considered part of the Chapter 13 trustee's short list of remaining duties."[24]

Third, the Third Circuit concluded that returning the funds to the debtor furthers the legislative intent of encouraging debtors to attempt chapter 13 cases. The Third Circuit noted that the legislative history of § 348(f) shows that Congress revised § 348(f) to its current state based on

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[20] *Id.* at 310.

[21] *Id.* at 312–13.

[22] *Id.*

[23] *Id.* at 310.

[24] *Id.* at 314.

the reasoning of *In re Bobroff* [25]—a case holding that a postpetition tort cause of action did not become part of the chapter 7 estate after conversion of the chapter 13 case to chapter 7—to encourage debtors to attempt to pay their creditors something under chapter 13 before resorting to a chapter 7 liquidation.[26] The Third Circuit concluded that Congress was concerned that losing postpetition earnings to the chapter 7 estate would dissuade debtors from attempting chapter 13.[27] Additionally, to account for "game the system" behavior, Congress enacted § 348(f)(2), giving the court discretion if the debtor has converted in bad faith.[28]

Fourth, the Third Circuit concluded that distributing the funds to creditors, rather than returning them to the debtor, would weaken the disincentive of § 348(f)(2)'s bad faith provisions. The Third Circuit reasoned that by allowing property that would normally be excluded from the chapter 7 estate to be included and thereby distributed to creditors, § 348(f)(2) provides a punishment for converting in bad faith.[29] It concluded the disincentive provided by § 348(f)(2) would be weakened if funds that would be returned to the debtor are instead distributed to creditors anyway.[30]

Finally, the Third Circuit concluded that returning the funds to the debtor is not unjust to creditors. The Third Circuit specifically rejected the argument that returning undistributed plan

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[25] 766 F.2d 797 (3d Cir. 1985).

[26] *Id.* at 803.

[27] *In re Michael*, 699 F.3d at 314–15.

[28] *Id.* at 315.

[29] *Id.*

[30] *Id.*

payments would be "unjust," and cited case law noting that creditors will most likely receive as much, if not more, than they would have if the debtor originally filed under chapter 7 based on the fact that under chapter 13, creditors have had the benefit of a debtors's wage contributions, and these funds are not available under chapter 7.[31]

B. Fifth Circuit: *Viegelahn v. Harris (In re Harris)*[32]

The Fifth Circuit in *In re Harris* has just recently addressed this issue.[33] In *In re Harris*, the debtor also initially filed for chapter 13 relief, and his confirmed plan required monthly payments of $530 for 60 months.[34] Of that monthly payment, $352 was to repay Chase for the debtor's home mortgage arrearage.[35] The debtor was also required to directly pay Chase $960/month for his ongoing mortgage payment.[36] About six months after the debtor's plan was confirmed, Chase moved to lift the automatic stay with respect to the debtor's home, stating that the debtor had failed to make payments to Chase as the plan required.[37] The debtor moved out of the home and "it was presumably foreclosed upon."[38]

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[31] *Id.* at 312 (citing *In re Boggs*, 137 B.R. 408, 410 (Bankr. W.D. Wash. 1992)).

[32] 757 F.3d 468 (5th Cir. 2014).

[33] The *In re Harris* case has been appealed to the United States Supreme Court (petition for certiorari filed October 6, 2014), although as of the date of this order, no decision has been issued on that certiorari petition.

[34] *Id.* at 471.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

Despite this, the debtor continued to make $530 monthly payments to the chapter 13 trustee for approximately the next year, at which point the debtor converted to chapter 7.[39] When the case was converted, the chapter 13 trustee distributed all the funds she held, including the money intended for Chase, as follows: $397.68 to another secured creditor, $3583.78 to unsecured creditors, and $267.79 to herself as a statutory commission.[40] The debtor moved to compel her to return these funds.[41]

The Fifth Circuit rejected much of the *In re Michael* analysis and reversed the bankruptcy and district courts, concluding that fairness required the funds instead be distributed to creditors.[42] The Fifth Circuit addressed § 348, and quickly held it bore little weight in its analysis. It found little merit to the argument that § 348(e) terminates the chapter 13 trustee's services and thus the trustee has no power to disburse funds.[43] It reasoned that if that premise were to follow, then the chapter 13 trustee would also have no authority to return the funds to the debtor.[44] The chapter 13 trustee also has the duty to issue a final report and account, and turn over necessary records and property to the chapter 7 trustee, the Fifth Circuit reasoned, and therefore the language of § 348(e) should not be taken "too literally."[45]

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[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 480–81 (noting that strong considerations of fairness support holding).

[43] *Id.* at 474.

[44] *Id.*

[45] *Id.*

Second, the Fifth Circuit concluded that the Third Circuit had erred in applying § 1327(b). Although the Fifth Circuit agreed that § 1327(b) typically vests all property in the debtor upon confirmation of the plan,[46] it found that the Third Circuit erred by ignoring the clear exception to that rule: "except as otherwise provided in the plan or the order confirming the plan."[47] If the plan required the debtor to make payments to be distributed to creditors, it follows that the debtor does not retain any possession of, or control over, these payments after they are paid to the trustee.[48]

Third, the Fifth Circuit concluded that distributing funds to creditors does not weaken the disincentive created by § 348(f)(2), noting that the Third Circuit failed to take into account that if the conversion is found to be in bad faith, *all* of a debtor's postpetition property would go into the chapter 7 estate, and in most cases, this would be more than just the attached wages held by the chapter 13 trustee.[49] "Accordingly, distributing the remaining payments held by the trustee at the time of the conversion [to creditors] neither renders § 348(f)(2) superfluous nor removes the disincentive for bad faith in most cases."[50]

Fourth, the Fifth Circuit determined that the legislative intent to encourage debtors to attempt chapter 13 is not harmed by distributing funds to creditors rather than returning them to debtors. The Fifth Circuit acknowledged that Congress enacted § 348(f) to further the policy of encouraging

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[46] *Id.* at 477.

[47] *Id.*

[48] *Id.* at 478 (confirmation divests the debtor of any interest).

[49] *Id.*

[50] *Id.*

debtors to attempt chapter 13.[51] The Fifth Circuit, however, held that the knowledge that payments made under a chapter 13 plan will not be returned would not meaningfully deter a debtor from attempting chapter 13.[52] The Fifth Circuit's reasoning was based on the facts that (1) the debtor can voluntarily end chapter 13 payments at any time by converting to chapter 7, and (2) it is the debtor who proposes the chapter 13 plan in the first place with the explicit provision that the funds will be used to pay creditors.[53]

Finally, the Fifth Circuit reasoned that distributing funds to creditors was supported by strong considerations of fairness, because if the funds were to revert to the debtor, the debtor would receive a "windfall."[54] The Fifth Circuit also supported its fairness analysis with the idea that the attached wages in the chapter 13 plan are "quid pro quo that the debtor has given up" for the benefit of the automatic stay.[55] The conversion does not undo the benefits the debtor receives from the automatic stay nor does it undo the distinct disadvantages creditors suffer from that stay, which prevents them from attempting to collect money or foreclose on, or repossess, property. Therefore, the Fifth Circuit reasoned it would be unfair to return the funds to the debtor.[56]

C. This Court's Analysis

Both the Third Circuit and Fifth Circuit concede that there is no clear answer as to whether

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[51] *Id.* at 479.

[52] *Id.*

[53] *Id.* at 479–80.

[54] *Id.*

[55] *Id.* at 480.

[56] *Id.*

funds should be returned to the debtor or distributed to creditors after conversion of a case from chapter 13 to chapter 7,[57] and this Court agrees. Unfortunately, despite the rule of statutory construction that courts should begin by looking to the plain language of the Bankruptcy Code,[58] there *is* no direct answer in the Bankruptcy Code. For example, the Third Circuit concluded that the return of the funds to the debtor better aligns with § 348(e) and the chapter 13 trustee's limited post-conversion duties,[59] but the Fifth Circuit countered that if the chapter 13 trustee had no post-conversion power then he or she would be powerless to return the funds to the debtor.[60] On the other hand, the Third Circuit's argument is not that the chapter 13 trustee is completely powerless, simply noting the limited duties the chapter 13 trustee has post-conversion.[61] But the Fifth Circuit counters that the chapter 13 trustee's many statutory duties post-conversion are not "limited."[62]

This example shows how the Code does not anticipate, let alone answer, the question at hand. The argument that returning funds to the debtor better aligns with the chapter 13 trustee's

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[57] *Id.* at 473 (noting that "no statute explicitly states what should happen to these funds"); *In re Michael*, 699 F.3d at 308 ("We have a pure question of law—what does the Bankruptcy Code require a Chapter 13 trustee to do with undistributed funds received pursuant to a confirmed Chapter 13 plan when that Chapter 13 case is converted to Chapter 7? Not only does the Code provide no clear answer to this question, in reading it one finds an internal tension, as separate provisions seemingly lead to divergent results.").

[58] *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240–41 (1989) (instructing courts with Bankruptcy Code questions to begin "with the language of the statute itself").

[59] *In re Michael*, 699 F.3d at 314.

[60] *In re Harris*, 757 F.3d at 474.

[61] *In re Michael*, 699 F.3d at 310–12.

[62] *In re Harris*, 757 F.3d at 474.

limited duties[63] is persuasive. The chapter 13 trustee's duties post-conversion are typically in the nature of wrapping up the chapter 13 estate, and it is reasonable that simply returning the funds to the debtor better aligns with the Code's wrapping up function of the chapter 13 trustee—as opposed to distributing the funds among creditors. Distribution to creditors is admittedly a more active role than the other more passive post-conversion duties of returning funds.

On the other hand, however, the argument that disbursing funds to a creditor is no more active than disbursing funds back to the debtor[64] is also persuasive. If the chapter 13 Trustee has no power to write a check to a creditor to distribute funds already held by him—in a distribution scheme governed by the order of priorities set out in § 507—how does the chapter 13 Trustee have the power to write a check to Debtors?

A similar quandary results when assessing the parties' arguments on how confirmation and the vesting of property impacts the right to the funds. As stated above, the Third Circuit noted that § 1327(b) vests all property of the chapter 13 estate in the debtor upon plan confirmation, and that this implies that property held by a Chapter 13 trustee after plan confirmation is "'under the control of the debtor [on] the date of conversion.'"[65] The Third Circuit reasoned that because there is no provision in the Bankruptcy Code that classifies any property as belonging to creditors, and the debtor retains a vested interest in the funds, the debtor does not lose his or her vested interest until the trustee affirmatively transfers the funds to creditors.[66] The Fifth Circuit, however, concluded that

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[63] *Id.*

[64] *In re Harris*, 757 F.3d at 474.

[65] *In re Michael*, 699 F.3d at 310 (quoting § 348(f)(1)).

[66] *Id.* at 312–13.

the Third Circuit erred in its application of § 1327(b). The Fifth Circuit agreed that § 1327(b) vests all property in the debtor upon confirmation of the plan, but concluded that the Third Circuit erred by ignoring the clear exception to that rule: "except as otherwise provided in the plan or the order confirming the plan."[67]

And regardless, here, Debtors' plan (and the confirmation order for that plan), provides that property of the estate vests with Debtors only upon receipt of a discharge under their Chapter 13 plan or dismissal.[68] So even if § 1327(b) somehow directed who has control over this property— by defining when property of the estate is vested in the debtor—Debtors specifically provided the property would not vest in them at confirmation, a choice they could have exercised when drafting the plan. Accordingly § 1327(b) does not seem to help here.

Because the Bankruptcy Code provides no clear answer, it is reasonable to try to determine legislative intent.[69] By specifically adopting the reasoning from *In re Bobroff* that a postpetition tort cause of action did not become part of the chapter 7 estate after conversion of the chapter 13 case to chapter 7, to encourage debtors to attempt chapter 13 before chapter 7,[70] it does seem clear that Congress intended, in enacting § 348(f), to encourage debtors to attempt chapter 13 before

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[67] *In re Harris*, 757 F.3d at 477. Although this discussion in both the Third and Fifth Circuit cases is really only about the Code's vesting of property of the estate, and neither case explicitly addresses the factual circumstances of the plans in those cases or how they addressed vesting, the Fifth Circuit does note in a footnote that the debtor's plan in that case had conflicting terms about the timing of the vesting of property in the debtor. *Id.* at 478 n.8. The factual timing of the plan's vesting of property in *Michael* is not addressed.

[68] Doc. 2 at ¶ 16.b (plan); Doc. 36 at ¶ 13 (order confirming plan).

[69] *See Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("If the statute's plain language is ambiguous . . ., we look to the legislative history and the underlying public policy of the statute [to determine Congressional intent].").

[70] 766 F.2d 797, 803 (3d Cir. 1985).

proceeding under chapter 7.[71] But again, the legislative history of § 348(f) does not necessarily help here. The Third Circuit persuasively argues that if a debtor was to lose postpetition earnings to the chapter 7 estate, it would dissuade the debtor from attempting a chapter 13 plan before resorting to a straight liquidation in chapter 7, and it should therefore follow that losing those earnings to creditors through the chapter 13 trustee after converting would have the same effect on the debtor as losing those earnings to the chapter 7 estate.[72] Under this reasoning, returning the funds to the debtor seems to be in accordance with the legislative intent of § 348(f). But the Fifth Circuit's equity and fairness arguments are equally well-founded. It is troubling that a debtor could receive the benefits of the automatic stay by making required payments to the chapter 13 trustee under the confirmed plan (while creditors are disadvantaged by the automatic stay), but when the debtor converts to chapter 7 the creditors are still disadvantaged in the same way without a corresponding "hurt" to the debtor.[73]

Debtors in this case argue that the facts here are different: the specific funds at issue—paid in pursuant to this District's conduit mortgage rule—are designated for a specific purpose, and thus these funds are different than "normal" plan payments. Debtors contend that a conduit creditor receives special benefits under the conduit mortgage rule, and that the conduit creditor's failure to file a proof of claim to enjoy those special benefits does not create an alternate right for other creditors to receive them—a result Debtors contend would be unfair.

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[71] *See In re Michael*, 699 F.3d at 314 ("The legislative history of § 348(f) supports that Congress's intended outcome is that payments held by the Chapter 13 trustee revert to the debtor on conversion. Congress stated that it was . . . "adopting the reasoning" of our decision in *Bobroff*.").

[72] *Id.* at 314–15.

[73] *In re Harris*, 757 F.3d at 480–81.

To the contrary, however, nothing in the Bankruptcy Code, or this Court's conduit mortgage rule, changes the presumption that Debtors' monthly payment is made pursuant to their plan, and that Debtors' plan, as supplemented by the conduit mortgage rule, controls. The conduit mortgage rule does not somehow transform the monthly plan payment so that it is not a "normal" plan payment. Rather, the purpose of the conduit mortgage rule is to define what needs to be included in the plan payment. The mortgage creditor is just one of the parties impacted by the plan, and Debtor's confirmed plan dictates how each creditor is to be treated.

This Court finds that, although there is no clear answer, the strongest arguments favor the chapter 13 Trustee disbursing the accumulated funds to creditors, pursuant to the confirmed plan. As the Fifth Circuit noted, the wages that the chapter 13 Trustee is holding have already been "attached" under Debtors' plan and were "paid to the trustee for distribution to the creditors."[74] Debtors made these payments to the chapter 13 Trustee under their confirmed plan, with the intent that they then be distributed. The fact that the mortgage creditor did not file a proof of claim does not change the fact that Debtors made these payments to fulfill their obligations under the plan in exchange for the benefit of the protections derived from that plan. This Court agrees with the Fifth Circuit that Debtors enjoyed the benefits of the chapter 13 proceeding, and as such, the only fair result is that those payments be distributed to creditors for that privilege.

Also, this Court agrees with the Fifth Circuit that distributing funds to creditors in the situation at hand would not generally deter debtors from attempting chapter 13 cases. As the Fifth Circuit stated, "it is unlikely a debtor would be meaningfully deterred by the knowledge that payments made under a confirmed Chapter 13 plan will not be returned to him if he chooses to

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[74] *In re Harris*, 757 F.3d at 480.

convert to Chapter 7."[75] The reasoning of the Fifth Circuit is sound:

> It is the debtor who proposes the payment plan in the first place, with the explicit provision that the funds are to be used to pay creditors. Because the funds are out of the hands of the debtor after payment and under the control of the trustee, it is essentially fortuitous whether any undistributed funds are still in the hands of the trustee at the time of conversion. And if the undistributed funds revert to the debtor, instead of being distributed to the creditors in accordance with the plan's terms, the debtor would receive a windfall.[76]

As a result, this Court sees no conflict with the legislative history of § 348(f) by requiring distribution to creditors, rather than return of the funds to Debtors. As the Fifth Circuit notes, if a debtor is concerned about a chapter 13 trustee distributing funds on hand to creditors at conversion, the debtor could time his or her conversion and payments to "prevent any additional wages from going into the hands of creditors."[77]

Finally, debtors can generally prevent the situation presented here by modifying their plan to surrender a home and reduce their plan payment by the amount of their house payment. The plan in this case had only been in effect a few months when these Debtors converted, but in both the *Michael* and *Harris* cases, the debtors continued to voluntarily pay in amounts for a creditor who had been granted stay relief. As the chapter 13 Trustee notes here, the money a debtor pays to the Trustee is not a personal savings account that the debtor can have returned if he changes his mind. Once a debtor makes a plan payment under a confirmed plan, he no longer has the right to direct the

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[75] *Id.* at 479.

[76] *Id.* (internal footnote, quotations, and alterations omitted).

[77] *Id.* at 480. Debtors here could have modified their plan to surrender their interest in the subject real property to the mortgage creditor, and modified the wage order to their employer to stop the higher plan payment. Admittedly, this would have resulted in their having more excess income (if they were able to continue to live in the home until foreclosure and ultimate sale), which excess income might have been the basis for the Trustee seeking the return of the higher payment for the benefit of other creditors.

Trustee how to disburse the payment (so long as the Trustee is disbursing the payment as the plan requires). Because the mortgage creditor here elected not to receive payment under the plan by failing to file a claim, the money on hand then trickled down to the remaining creditors who had timely filed a claim, and the chapter 13 Trustee is required to disburse the money in accordance with the confirmed plan.

III. Conclusion

Because the Court concludes the balance of factors weighs in favor of distributing the remaining plan payments held by the Trustee to creditors, rather than returning them to Debtors, the motion to refund postpetition mortgage payments[78] is denied. The chapter 13 Trustee is authorized to disburse these funds to the remaining creditors in Debtors' case, pursuant to Debtors' confirmed plan.

It is so ordered.

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[78] Doc. 59.