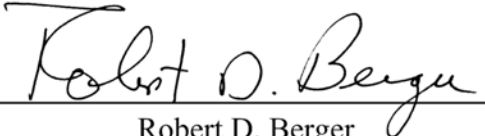




The relief described hereinbelow is SO ORDERED.

SIGNED this 7th day of November, 2019.


Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

**Jack M. Lana, Jr.
Jeri L. Lana,**

**Case No. 12-21357
Chapter 13**

Debtors.

Order Denying Trustee's Motion to Dismiss

Debtors Jack and Jeri Lana filed their Chapter 13 bankruptcy petition in May 2012, about seven and a half years ago. Debtors completed their plan payments and received a discharge on October 4, 2017.¹ More than a year later, on November 9, 2018, the United States Trustee filed a motion to reopen Debtors' case,² and this Court signed an Order reopening the case without hearing.³ In that motion, the United States Trustee alleged that Debtor Jeri Lana underwent

¹ Doc. 58.

² Doc. 63.

³ Doc. 64.

surgery on September 9, 2011, and is now entitled to receive a \$7500 (gross) settlement stemming from that surgery.

The Chapter 13 Trustee for this division was reappointed to Debtors' case,⁴ and another six months passed before the Court heard anything more. On May 13, 2019, the Chapter 13 Trustee filed a motion to dismiss the case.⁵ The motion stated, in full: "A request pursuant to LBR 4002.2 for information relating to the personal injury settlement was made on April 22, 2019. To date, a response to the Trustee's request has not been received." In response, Debtors amended their Schedule B to disclose their interest in a class-action transvaginal mesh case for \$7500 (gross value before attorney fees and applicable medical liens).⁶ Debtors also filed a response to the motion to dismiss stating that (1) they did not yet know what the net settlement amount would be, and (2) Debtors' confirmed plan had long been completed and the case discharged, and the Court "lacked jurisdiction" to amend Debtors' plan under 11 U.S.C. § 1329(a).⁷ The Court heard the parties' positions on the motion at a hearing on June 18, 2019, and took the matter under advisement.

⁴ Doc. 65.

⁵ Doc. 67.

⁶ Doc. 71.

⁷ Doc. 72. Lack of jurisdiction is probably not the right way to view the issue, although Debtors' counsel may be correct that modification of Debtors' plan is probably not possible at this point. Section 1329(a) expressly provides that a plan may be modified "before completion of payments." The Tenth Circuit has not addressed the timing of plan modification, but the Fifth Circuit has expressly stated that "if a debtor pays his plan balance and the trustee then seeks to modify the plan under § 1329 to account for newly-acquired funds, modification is not permitted." *Meza v. Truman (In re Meza)*, 467 F.3d 874, 878 (5th Cir. 2006). Other circuits have not squarely addressed the issue, but the Seventh Circuit seems to agree. *Germeraad v. Powers*, 826 F.3d 962, 969 (7th Cir. 2016) (concluding that a motion to modify is timely filed as long as the motion is filed after plan confirmation but before plan payments are completed). *See also In re Ezzell*, 438 B.R. 108, 116 (Bankr. S.D. Tex. 2010) ("If 'completion of payments' in § 1329 means both completion of payments by the debtor to the trustee and by the trustee to creditors under the plan, the trustee would have the right to seek to amend the plan to increase the amount the debtor's unsecured creditors with allowed claims would receive *after the debtor had received*

First and foremost, the Court can only rule on what is in front of it at the moment. The Trustee has filed a motion to dismiss this case, which does not seem to advance his case at all. What would the Court be dismissing? The reopened case against both Debtors? In addition, the only basis stated for dismissal is Debtors failure to comply with Local Bankruptcy Rule 4002.2. Local Rule 4002.2 governs a trustee's request for information from a debtor, and states that, "[u]nless the court orders otherwise, a debtor must comply with any written request for information made by a trustee or the United States trustee within 14 days." If Debtors have failed to comply with a written request for information from the Trustee, then the Trustee should file a motion to compel, seeking the needed information. At that point, the court could rule on any objection to the motion to compel, and the remedy—if the Trustee's motion is well founded—would be contempt, not dismissal.

To sum, the Trustee has a long road to travel. At this point, what we *don't* know is more than what we do know. What will Debtor Jeri Lana's net settlement amount be? When did Debtor discover the injury stemming from her transvaginal mesh surgery?⁸ When did she

a discharge. Thus, in theory, the debtor could be compelled to pay discharged debts under a modified plan. Congress could never have intended such an absurd result."); *but see Waldron v. Brown (In re Waldron)*, 536 F.3d 1239, 1245 (11th Cir. 2008) (concluding that personal injury claims were property of the estate and debtor had a continuing duty to disclose, and stating that this "postconfirmation duty of disclosure for Chapter 13 debtors" is necessary to give a trustee "a meaningful right to request, under section 1329, a modification of the debtor's plan to pay his creditors").

⁸ Another hurdle the Trustee would have to overcome is showing that the net settlement is property of the estate. *See, e.g., In re Purcell*, 573 B.R. 859, 867 (Bankr. D. Kan. 2017) (concluding that a transvaginal mesh settlement was not property of the estate under the "discovery rule"); *In re Carroll*, 586 B.R. 775, 790 (E.D. Cal. 2018) (concluding the debtor's personal injury claim existed prior to commencement of case and was property of Chapter 7 estate); *In re Vasquez*, 581 B.R. 59, 78 (Bankr. D. Vt. 2018) (concluding the personal injury claim accrued at time of discovery of injury, but was not "sufficiently rooted" in pre-bankruptcy past to be asset of Chapter 7 estate); *Davis v. Nasuti (In re Davis)*, No. 10-24836-JRS, 2018 WL 2223076, at *3 (Bankr. N.D. Ga. May 15, 2018) (concluding that elements of cause of action occurred prepetition and the personal injury accrued to the debtor when the injury was inflicted

become involved in the class action lawsuit? How is Debtor Jack Lana impacted? What is the Trustee after here? Turnover? Revocation of Debtors' discharge for failure to disclose the class action cause of action?⁹ All of those questions need addressed, and none are brought to fruition by the Trustee's motion to dismiss.

The Trustee's motion to dismiss¹⁰ is denied. If the Trustee decides to proceed and seek additional information from Debtors, he should file a motion to compel within fourteen days. If no additional information is needed, he should file his request for substantive relief within fourteen days. If neither such motion is filed by the Trustee within that time frame, the Clerk is directed to close Debtors' case.

IT IS SO ORDERED.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE

in Georgia, not when it was discovered, making personal injury settlement property of the estate).

⁹ Revocation would not be a simple matter either. Revocation of a Chapter 13 discharge is governed by 11 U.S.C. § 1328(e). Under that section, a court "may" revoke a discharge if debtor obtained the discharge "through fraud" and the Trustee did not know of the fraud until after the discharge was granted. But, the revocation request must be made "before one year after a discharge."

¹⁰ Doc. 67.