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:

Vikki Lindemuth,

Debtor.

Case No. 17-20763
Chapter 11

Order Denying Debtor's Motion for Entry of Chapter 11 Discharge

Debtor Vikki Lindemuth asks this Court to enter a discharge in her individual Chapter 11 case.[1] Nothing about the overarching "Lindemuth bankruptcies" has been typical, however, and both the U.S. Trustee and Debtor's estranged husband object to the entry of discharge. The Court concludes that Debtor is not entitled to a discharge under the provision upon which she relied in her motion (11 U.S.C. § 1141(d)(5)(A)[2]). And if she wishes to seek discharge under an alternate section (§ 1141(d)(5)(B)), procedural and substantive hurdles must first be overcome. As a result, Debtor's motion is denied.

[1] Doc. 76.
[2] Future statutory references are to Title 11, the Bankruptcy Code, unless otherwise stated.

I. Factual Background and Procedural History

Consideration of the issue at hand would be incomplete without at least a broad stroke understanding of the procedural history of this case. Joint Debtors Kent and Vikki Lindemuth filed a Chapter 11 voluntary petition in November 2012. Multiple of Debtor Kent Lindemuth's business entities also filed Chapter 11 petitions at that time. The cases were jointly administered under lead case number 12-23055. A plan was confirmed,[3] and the Court eventually closed those cases in January 2016. In March 2017, however, the U.S. Trustee moved to reopen the individual case of Kent and Vikki Lindemuth, arguing that previously undiscovered assets of Kent Lindemuth had been discovered. Shortly after the reopening of the case, Debtor Vikki Lindemuth asked that the individual Debtors' joint Chapter 11 case be severed. Debtor Vikki Lindemuth reported that she and Kent Lindemuth were then engaged in a contentious divorce proceeding and that it would be in all parties' best interest for the joint individual case to be split. Debtor Vikki Lindemuth's Chapter 11 case was then split from her husband's and Debtor Vikki Lindemuth is now proceeding under her own Chapter 11 case number. Nearly two and a half years have passed since the joint individual case was deconsolidated, with substantial activity in Kent Lindemuth's case but almost no activity in Debtor Vikki Lindemuth's case.

Debtor has now filed a motion for entry of Chapter 11 discharge in her individual case.[4] The motion was served on Debtor's individual creditors, but it is not clear whether it was served on the plan administrator in the jointly administered case or all creditors impacted by that joint plan. In her motion, Debtor states that all payments under the applicable plan have been completed and that she is entitled to a discharge. In a footnote, Debtor acknowledges the reality

[3] Case No. 12-23055-11, Doc. 443 and Doc. 652.
[4] Doc. 76.

is that funds have been deposited into a trust account to pay the remaining balance due on allowed unsecured claims, but that payments have not actually been completed. Debtor also made the appropriate certifications for discharge under § 1141(d)(5)(C) concerning domestic support obligations, homestead exemptions and debt under § 522(q), and nondischargeable or reaffirmed debts.

Both the U.S. Trustee[5] and Debtor Kent Lindemuth[6] objected to Debtor's motion. The U.S. Trustee argues that, in fact, all payments under the plan have not been made, to both secured creditors and unsecured creditors, and that Debtor's motion is premature. Debtor Kent Lindemuth agrees with the U.S. Trustee that plan payments are not "complete" and also claims to not know whether Debtor's certifications under § 1141(d)(5)(C) were accurate.

In response, Debtor filed a reply brief that shifted gears. While not abandoning her argument that she is entitled to a "full payment" discharge under § 1141(d)(5)(A), Debtor also now argues that she should be granted a "payment noncompleted" discharge under § 1141(d)(5)(B). At oral argument on the motion, Debtor's counsel indicated Debtor is suffering from terminal cancer, and an in-camera letter submitted by Debtor's physician confirmed the same.

II. Analysis

Discharge in a Chapter 11 case generally "follows the chapter 13 model, under which the debtor receives a discharge only upon completion of all payments under the plan."[7] Specifically, § 1141(d)(5)(A) states that in individual Chapter 11 cases, unless otherwise ordered by the Court

[5] Doc. 82.
[6] Doc. 81.
[7] 8 *Collier on Bankruptcy* ¶ 1141.05 (Richard Levin & Henry J. Sommer eds., 16th ed.).

for cause,[8] confirmation of a plan does not discharge the debtor's debts "until the court grants a discharge on completion of all payments under the plan."[9]

The Court agrees with the objecting parties that a so-called "full payment discharge" under § 1141(d)(5)(A) does not apply. Under this section, "all payments under the plan" must be made. In this case, the controlling plan is the plan confirmed in Case No. 12-23055—it is undisputed that the so-called "Joint Plan" confirmed in that case governs the individual, and now severed, cases of Debtors Kent and Vikki Lindemuth. It is also undisputed that "all payments" have not been made under that plan. Counsel for Vikki Lindemuth argues that because those plan payments are to come from sources other than Vikki Lindemuth, she should be considered to have made all her payments. Counsel asks "whose payments" must be made, and under what plan for a discharge under § 1141(d)(5)(A) to be granted? But the statute clearly answers those questions: all payments under the controlling plan must be made before an individual discharge may be granted, the statute making no consideration for source. Vikki Lindemuth cites no case law in support of her argument, and this Court is unable to locate any. To the contrary, courts generally recognize that *all* payments under a Chapter 11 plan, at least as to unsecured debt,[10]

---

[8] Debtor has not argued that "cause" exists for making her discharge effective upon confirmation of her plan.

[9] *See also Santander Consumer, USA, Inc. v. Houlik (In re Houlik)*, 481 B.R. 661, 664 (10th Cir. BAP 2012) ("Pursuant to 11 U.S.C. § 1141(d)(5), individual Chapter 11 debtors are not discharged from their debts upon plan confirmation, unless after notice and hearing, the bankruptcy court orders otherwise for cause. Instead, discharge ordinarily occurs when individual Chapter 11 debtors complete all payments under their plan.").

[10] For a discussion on the treatment of secured debt in individual Chapter 11 cases with respect to discharge, see *In re Brown*, No. 07-00148, 2008 WL 4817505, at *1 (Bankr. D.C. Oct. 29, 2008). Regular payments on secured debts may continue for years, and § 1141(d)(5)(A) was probably not written with those types of payments in mind. *See also In re Johnson*, 402 B.R. 851, 855 (Bankr. N.D. Ind. 2009) (noting that a bright line rule that prohibited closing individual Chapter 11 cases prior to discharge would be impractical where the debtor has long-term debt obligations).

must be completed before an individual Chapter 11 discharge may be granted under § 1141(d)(5)(A).[11]

That said, the Code is not completely inflexible. Alternatively, in her reply brief, Debtor also seeks discharge under § 1141(d)(5)(B). Section 1141(d)(5)(B) states:

> (B) at any time after the confirmation of the plan, and after notice and a hearing, the court may grant a discharge to the debtor who has not completed payments under the plan if—
>
> > (i) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 on such date;
> >
> > (ii) modification of the plan under section 1127 is not practicable; and
> >
> > (iii) subparagraph (C) permits the court to grant a discharge[.]

Again, this section is "generally in line with the chapter 13 model."[12] Under this section, a bankruptcy court can grant an individual Chapter 11 debtor a discharge, even if plan payments have not been completed, if: "(a) the value (as of the plan's effective date) actually distributed to creditors under the plan is at least what creditors would have received in a chapter 7 liquidation

---

[11] *See, e.g.*, *A&H Ins. v. Huff (In re Huff)*, BAP No. NV-13-1263-JuKiTa, 2014 WL 904537, at *4 n.6 (9th Cir. BAP 2014) ("Under § 1141(d)(5)(A), in an individual's case, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan."); *Torrington Livestock Cattle Co. v. Berg (In re Berg)*, 423 B.R. 671, 676 (10th Cir. BAP 2010) (recognizing that under § 1141(d)(5), a court "generally may not enter an order discharging debts until the debtor has completed all payments required under a confirmed Chapter 11 plan"); *Shotkoski v. Fokkena (In re Shotkoski)*, 420 B.R. 479, 482 (8th Cir. BAP 2009) (noting that an individual debtor's discharge is not entered until "completion of all payments under the plan"); *In re Necaise*, 443 B.R. 483, 487 (Bankr. S.D. Miss. 2010) (recognizing that 2005 amendments to the Bankruptcy Code modified Chapter 11 to make Chapter 11 discharges similar to Chapter 13, and that courts recognize that "an individual chapter 11 debtor must complete payments under his plan . . . before he can obtain his discharge").

[12] 8 *Collier on Bankruptcy* ¶ 1141.05 (Richard Levin & Henry J. Sommer eds., 16th ed.).

as of the effective date and (b) modification of the plan under section 1127 is not practicable."[13] Contrary to the Chapter 13 model, however, *there is no hardship requirement like that found in § 1328(b)(1)*.[14] To the contrary of Chapter 13 plans, "there is no express statutory standard for the individual chapter 11 noncompletion discharge other than the court's discretion."[15]

There are courts that have considered the grant of a "payment noncompleted discharge" under § 1141(d)(5)(B), but there are no published cases squarely on all fours with the facts present herein. For example, in *In re Belcher*,[16] the bankruptcy court denied the Chapter 11 debtors request for 'early" discharge, and, focusing on the "modification" issue, concluded that the debtors' plan could be modified under § 1127(e) because future circumstances may make modification "not merely justifiable, but completely necessary."[17] Contrary to the facts here, however, in the *Belcher* case, the debtors were obligated under their plan to make monthly payments for five years, from their future income.[18] In that situation, like in the standard Chapter 13 case, any number of reasons could make modification practicable: changed income, injury or illness, etc.[19] Here, Debtor's plan does not require her to make individual payments from her future earnings. In that aspect, this case is more like a "corporate Chapter 11" than an "individual Chapter 11."

Another example is *In re Necaise*,[20] in which the bankruptcy court discussed multiple cases interpreting § 1141(d)(5) and found that the debtor had not make the appropriate showing

---

[13] *Id.*
[14] Section 1328(b)(1) requires that a Chapter 13 debtor show "failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable."
[15] 8 *Collier on Bankruptcy* ¶ 1141.05 (Richard Levin & Henry J. Sommer eds., 16th ed.).
[16] 410 B.R. 206 (Bankr. W.D. Va. 2009).
[17] *Id.* at 217.
[18] *Id.* at 208.
[19] *Id.* at 217.
[20] 443 B.R. 483 (Bankr. S.D. Miss. 2010).

on either the liquidation prong or the modification prong. Regarding liquidation, the debtor had not appropriately compared the value of the distributions in his Chapter 11 plan to the value that would have been liquidated in a Chapter 7 case.[21] In addition, the *Necaise* court also concluded that the debtor's plan was modifiable, as additional proceeds from the sale of real property were forthcoming.[22] But again, the debtor in *Necaise* is unlike Debtor herein: in *Necaise*, the debtor admitted that modification of his plan may be necessary to clarify the amount of administrative expenses paid from proceeds of the sale of certain properties.[23]

Other courts have also struggled with exactly when it *would* be appropriate to apply § 1141(d)(5)(B). For example, the bankruptcy court in *In re Lovey*[24] discussed the omission of the hardship portion of § 1328(b)(1) from § 1141(d)(5)(B), and stated:

> The Court finds this omission curious, because potentially, individual chapter 11 debtors, upon finding themselves in more difficult circumstances than anticipated, could simply move for early discharge as soon as they have paid sufficient amounts to unsecured creditors to meet the best interest of creditors test, but ignore the number of months that have either elapsed or remain under the chapter 11 plan. . . . On the other hand, reading the requirements too strictly could gut the rule.[25]

In the end, the court in *Lovey* did not need to struggle with the "legal and philosophical issues" it raised, because under the facts therein the debtors failed to demonstrate that modification of their plan was not practicable, as the court found that the debtors could pay some lesser amount monthly to creditors under their plan.[26]

Despite that the Court cannot locate case law with similar facts, the case law is helpful in providing some basics. First, procedurally it does not seem the parties are in the right posture in

---

[21] *Id.* at 492.
[22] *Id.* at 492-93.
[23] *Id.* at 492 n.13.
[24] 599 B.R. 97 (Bankr. D. Idaho 2019).
[25] *Id.* at 104.
[26] *Id.* at 105-06.

Debtor's case. For example, no express motion for a discharge under § 1141(d)(5)(B) has been filed,[27] let alone noticed to interested parties who are impacted by the same plan that governs' Debtor's case. Regarding the "notice and hearing" required by § 1141(d)(5)(B), as one bankruptcy court has stated, essential to that requirement "is that creditors be given actual notice that a discharge prior to all plan payments is being requested."[28] In this case, all creditors and interested parties of the plan governing Debtor Vikki Lindemuth would need notified of any motion by her under § 1141(d)(5)(B).

In addition, the case law is clear that it is Debtor's burden to show that the elements for early discharge under § 1141(d)(5)(B) have been met.[29] Specific findings of fact are necessary to explain how Debtor has satisfied the criterion for a discharge under § 1141(d)(5)(B).[30] If Debtor does properly motion and notice for early discharge, the Court would then set the motion for an evidentiary hearing, at which point Debtor would be required to show that the factors of § 1141(d)(5)(B) are met.[31]

The bottom line is that Debtor has not, at this point, overcome the problems the Court sees with proceeding under § 1141(d)(5)(B). Debtor may fit the scenario that is envisioned by an

---

[27] *In re Sheridan*, 391 B.R. 287, 290 n.3 (Bankr. E.D.N.C. 2008) ("A discharge under § 1141(d)(5)(B) requires a motion to be filed by or [on] behalf of the debtor.").
[28] *Id.* at 290.
[29] *See In re Necaise*, 443 B.R. 483, 492 (Bankr. S.D. Miss. 2010) (requiring the debtor to make the necessary showings under § 1141(d)(5)(B)); *In re Lovey*, 599 B.R. at 105 ("It is the Debtors' burden to prove that all required conditions are met to qualify for an early discharge.").
[30] *Am. First Fed., Inc. v. Theodore*, 584 B.R. 627, 636 (D. Vt. 2018) (faulting the bankruptcy court for not making findings of fact or explaining how the debtor met the requirements of § 1141(d)(5)(B)). There is apparently a dispute concerning the § 1141(d)(5)(C) certifications as well, which must also be addressed by the parties at any discharge hearing.
[31] As the Court previously recognized at oral argument on this matter, Debtor is suffering from terminal cancer. The Court hopes any objecting parties could reach an agreement about permitting Debtor to testify via affidavit, for example, by stipulating that the affidavit would be served upon objecting parties prior to the evidentiary hearing so that they could pursue whatever rebuttal they deemed necessary.

"early" discharge under § 1141(d)(5)(B). Debtor personally owes no future payment to any creditors. Debtor has not committed to payment of a certain number or amount of future earnings to the Chapter 11 plan. While the Court has not heard testimony about the liquidation value of Debtor's plan compared to a Chapter 7 liquidation, it is the Court's understanding that all creditors have or will be paid in full by the master, joint plan. The Court cannot envision a modification of the plan that would be beneficial to any of the parties at this point in this lengthy undertaking. The Court notes that counsel should keep in mind the purpose of § 1141(d)(5). Section § 1141(d)(5) was adopted from the Chapter 13 practice. As the bankruptcy court noted in *In re Brown*:[32]

> Section 1141(d)(5)(A) provides that "unless after notice and a hearing the court orders otherwise for cause, confirmation of the plan does not discharge any debt provided for in the plan until the court grants a discharge on completion of all payments under the plan." Here, if the debtor's plan is confirmed, unsecured claims would be paid shortly after the Effective Date. But the plan provides for monthly mortgage payments to continue on the debtor's various mortgage debts. Those payments might last for many years, and for the reasons explored below, I do not believe that the statutory provision was written with those types of payments to mortgagees in mind.
>
> Section 1141(d)(5)(B) makes clear that the concern in delaying a discharge until plan payments are completed is that unsecured creditors might be adversely affected if their claims were discharged and replaced with a reduced claim under the plan that was not being paid in accordance with the terms of the plan, and they did not receive that which they would have received in a liquidation on the effective date of the plan. Presumably Congress intended that in those circumstances, the case should be dismissed or closed without the unsecured claims being discharged. No automatic stay would be in place upon dismissal or closing of the case, and without a discharge being in place, creditors would no longer be barred by any statutory injunction from pursuing collection of their claims.
>
> Significantly, section 1141(d)(5) roughly mirrors chapter 13 provisions delaying discharge until completion of payments to the chapter 13 trustee. The chapter 13 provisions, however, are never construed as delaying discharge until completion of payments that the debtor was to continue to make directly to mortgagees (payments "outside" of the plan), the significant difference being that in the case of a chapter

[32] No. 07-00148, 2008 WL 4817505 (Bankr. D.C. Oct. 29, 2008).

> 11 plan, all payments are under the plan. But, as in the case of regular monthly mortgage payments being paid outside the plan in a chapter 13 case, Congress likely did not intend for § 1141(d)(5) to delay entry of a chapter 11 debtor's discharge pending the debtor's completion of all remaining regular monthly mortgage payments that the debtor obligates herself to pay under a confirmed chapter 11 plan. This suggests that cause exists for ordering that the debtor may obtain a discharge notwithstanding not having completed all future regular monthly mortgage payments.[33]

Likewise, in this case the secured plan payments may proceed yet for years in the future. But counsel has reported that funds have been deposited into trust accounts for the payment of all the unsecured claims in this case. It appears there is little benefit for denying Debtor a fresh start, approximately seven years after her bankruptcy journey began and while she may now be terminally ill.[34] On the other hand, a proper record is not before the Court at this time to enable the Court to make the necessary findings.

III. Conclusion

Debtor's motion for discharge[35] under § 1141(d)(5)(A) is denied.

If Debtor wishes to pursue a discharge under § 1141(d)(5)(B), she must file a proper motion requesting that relief, and provide notice of the same to all creditors and interested parties of the joint plan. The Court will then schedule an evidentiary hearing on the same, at which point

---

[33] *Id.* at *1 (internal citations and footnote omitted).

[34] Debtor understandably seeks to extinguish her personal liability on her prepetition debts, *In re Mirchou*, 588 B.R. 555, 568 (Bankr. D. Nev. 2018) ("For an individual Chapter 11 debtor, however, a discharge of his or her personal liability for the debts specified in the confirmed plan does not occur until the bankruptcy court grants a discharge on completion of all payments under the plan."), although her commitments under the plan would remain, *Santander Consumer, USA, Inc. v. Houlik (In re Houlik)*, 481 B.R. 661, 672–73 (10th Cir. BAP 2012) ("Pursuant to § 1141(a), after confirmation of a plan, the debtors and creditors are bound by the provisions thereof. Implementation of the plan is governed by § 1142, which requires the debtor to carry out the plan and to comply with any orders of the court. Further, § 1142 authorizes the bankruptcy court to 'direct the debtor and any other necessary party . . . to perform any . . . act . . . that is necessary for the consummation of the plan.'").

[35] Doc. 76.

Debtor must provide testimony that (1) the value (as of the plan's effective date) actually distributed to creditors under the plan is at least what creditors would have received in a chapter 7 liquidation as of the effective date, (b) modification of the plan under section 1127 is not practicable, (c) the Court should exercise its discretion and grant Debtor an "early" discharge and (d) the certifications of § 1141(d)(5)(C) are satisfied.

IT IS SO ORDERED.

###

ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE