UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re **MATTHEW BANKS ASHWORTH,** Debtor.	Case No. 8:11-bk-10946-RK Chapter 13 **MEMORANDUM DECISION ON MOTIONS OF CREDITOR KATHRYN EHRGOTT: (1) FOR FINDING OF BAD FAITH DUE TO DEBTOR'S NON-DISCLOSURE OF INCOME AND ABUSE OF BANKRUPTCY PROCESS; (2) FOR DISMISSAL WITH PREJUDICE, DISGORGEMENT, RE-FILING BAR AND SANCTIONS; AND (3) FOR ATTORNEYS' FEES AND COSTS FOR ENFORCEMENT OF SUPPORT AND BAD FAITH**

The above-captioned bankruptcy case came on for an evidentiary hearing before the undersigned United States Bankruptcy Judge on June 28, 2013 on the following motions of Creditor Kathryn Ehrgott ("Creditor"): (1) Motion for Dismissal with Prejudice, Disgorgement, Re-Filing Bar and Sanctions (Docket No. 166) ("Motion to Dismiss"); (2) Motion for Finding of Bad Faith Due to Debtor's Non-Disclosure of Income and Abuse of Bankruptcy Process (Docket No. 174) ("Bad Faith Motion"); and (3) Motion for Attorneys' fees and Costs against Debtor for Enforcement of Support and Bad Faith (Docket No. 145)("Attorneys' Fees Motion"). The object of these motions is that this Chapter 13

bankruptcy case filed by Debtor Matthew Banks Ashworth ("Debtor") should be dismissed with prejudice and with a bar on refilling a new bankruptcy case on grounds that this case was filed in bad faith pursuant to 11 U.S.C. § 1307(c) with an award of attorneys' fees and costs for Creditor. Appearances were made as noted on the record.

Having considered the evidence received at the evidentiary hearing and the written and oral arguments of the parties on the matters before the court, including the post-trial briefing submitted by the parties on the issue of the applicable burden of proof filed in November 2013, this court determines that Creditor's motions should be denied. The court discusses below the various factors in determining that the Debtor's Chapter 13 case was not filed in bad faith.

ANALYSIS

I. CREDITOR'S BAD FAITH MOTIONS SHOULD BE DENIED FOR FAILURE TO MEET HER BURDEN OF PROVING BAD FAITH UNDER THE TOTALITY OF THE CIRCUMSTANCES

Previously in this case, the court had conducted an evidentiary hearing on a contested matter between these parties on Debtor's objection to the claim of Creditor, and the court discussed the factual background of this case in its memorandum decision on the objection to the claim. *Memorandum Decision re Debtor's Objection to Claim No. 2 of Kathryn Ehrgott ("Memorandum Decision")(Docket No. 125),* filed on October 1, 2012. The parties had been married for almost six years from 1999 to 2005 with the final judgment of dissolution of marriage being entered in 2006. *Id.* The parties have two children. *Id.* Debtor had objected to the claim of Creditor as a priority, unsecured claim, which was based on a judgment of $306,000 "as alimony" entered by a Tennessee family law court pursuant to a settlement between the parties to resolve their family law case and a civil tort lawsuit brought by Creditor against Debtor. *Id.* Based on existing circuit case precedent, this court held that the claim of Creditor was for a domestic support obligation within the meaning of 11 U.S.C. § 101(14A) and thus was entitled to priority claim status under 11 U.S.C. § 507(a)(1)(A). *Id.*

According to Creditor, "[t]he central issue in Debtor's bankruptcy (and appeal) has been his desire to avoid paying $1,000 per month in spousal support to [Creditor], his ex-wife and the custodian of his two children, who [sic] he scheduled as constituting 77.75% of his non-priority creditors." *Bad Faith Motion* at 1. (In a footnote, Creditor admitted that Debtor actually pays her $1,500 per month in alimony, but, for the sake of argument, she reduced the amount to $1,000 because he can claim a deduction on his tax return for this payment, effectively reducing his net loss from alimony by $500. *Id.* at 1 n. 1.).[1] Creditor argues that "Debtor, age 36, could have used his $268,000.05 gross income (2011) as Regional Sales Manager of Business Banking at U.S. Bank to pay this relatively insignificant amount," but "[i]nstead, Debtor used his superior earning power to punish and frustrate his supporter [sic] creditor (a homemaker and former part-time social worker earning less than $30,000 a year) who demanded that he pay the spousal support as he agreed to in the divorce." *Id.* at 1. (In another footnote, Creditor stated that "[a]lthough [she] was working on the date of Debtor's petition, she resumed her role as a homemaker, as Debtor intended during their marriage, following post-petition garnishment for past and current alimony." *Id.* at 1 n. 2. Although Creditor acknowledges that she stopped her gainful employment, she did not mention that she remarried and that her current spouse is gainfully employed and is supporting her and her family now. *See Memorandum Decision* at 8-9.). Creditor contends that in light of this factual background, "Debtor's petition, plan, amendments thereto and conduct herein have lacked good faith under the totality of the circumstances test from *Leavitt v. Soto (In re Leavitt),* 171 F.3d 1219, 1224 (9th Cir. 1999) . . . ." *Bad Faith Motion* at 1.

The matters now before the court are the two "bad faith" motions filed by Creditor. First, Creditor filed her motion for finding of bad faith, which, if granted, would result in

[1] Creditor acknowledges that Debtor is current on his alimony payments to her, but argues that she had to undertake garnishment of his wages to collect prepetition alimony payment arrearages, and argues that Debtor's counsel warned her counsel not to garnish his wages upon threat of a motion for sanctions for violation of the automatic stay. *Bad Faith Motion* at 5, *citing Declaration of Scott Talkov (Docket No. 146),* at 2-3.

"allowing this Court to provide various remedies to prevent injustice in this and further bankruptcy actions." *Bad Faith Motion* at 2. The Bad Faith Motion is ancilliary to Creditor's motion for attorneys' fees, request for dismissal and motion for dismissal (Docket Nos. 145, 165 and 167), which she argues require a finding of bad faith, but it seems to the court that it is not necessary to bring a separate motion for a finding of bad faith to assert that the grounds for these other motions include bad faith. *Id.* at 5. According to Creditor, the Bad Faith Motion is not tied to a particular claim or defense, but apparently, it was intended to be multipurpose. Bad Faith Motion at 2 ("These facts, explained below [in the moving papers] give rise to a finding of bad faith, allowing this Court to provide various remedies to prevent injustice in this and future bankruptcy actions"). In essence, Creditor by the Bad Faith Motion is seeking declaratory relief that Debtor filed this case in bad faith, specifically with respect to pending motions as well as with respect to matters not yet pending before the court. With respect to the pending motions, the Bad Faith Motion is superfluous, and with respect to matters not yet pending, there is no actual case or controversy, which makes the Bad Faith Motion premature. See 28 U.S.C. § 2201 (subject matter jurisdiction over declaratory relief matters applies to actual controversies). Accordingly, the Bad Faith Motion as a separate matter should be denied for lack of subject matter jurisdiction, or for failure to state a claim upon which relief should be granted, as superfluous or premature. However, the court will consider the factual and legal assertions in the Bad Faith Motion as part of the arguments in support of the Motion to Dismiss and the Attorneys' Fees Motion since it appears that the evidence and arguments in the Bad Faith Motion provide the factual and legal predicate for Creditor's arguments in favor of her motions for dismissal with prejudice and with a bar on refiling and for attorneys' fees and costs. Bad faith is raised as grounds for Creditor's Motion to Dismiss, and thus, will be considered in connection with Creditor's dismissal motion.

In this case, Creditor argues that the case should be dismissed with prejudice on grounds of bad faith. Section 1307(c) of the Bankruptcy Code, 11 U.S.C., expressly

provides that ". . . on request of a party in interest . . ., the court . . . may dismiss a case under [Chapter 13], whichever is in the best interests of creditors and the estate, for cause . . ." Cause for dismissal has been held to include the filing of a Chapter 13 bankruptcy case in bad faith. *Soto v. Leavitt (In re Leavitt),* 171 F.3d 1219, 1224 (9th Cir. 1999)(citations omitted); *Ellsworth v. Lifescape Medical Associates, P.C. (In re Ellsworth),* 455 B.R. 904, 917-918 (9th Cir. BAP 2011)(citations omitted).

As the Ninth Circuit noted in *Leavitt*, Section 349(a) of the Bankruptcy Code, 11 U.S.C., authorizes the dismissal of bankruptcy cases with or without prejudice. 171 F.3d at 1223 (citations omitted). However, "[g]enerally, dismissals are ordered without prejudice to carry out the remedial purpose of the Bankruptcy Code and to restore property rights, insofar as is practicable, to the same positions as when the case was first filed, but without affecting the disposition of debts." *Id.* (citations omitted). As explained by the Ninth Circuit in *Leavitt,* "[a] dismissal with prejudice bars further bankruptcy proceedings between the parties and is a complete adjudication of the issues." *Id.* (citation omitted). Dismissal with prejudice would mean that Debtor would not be able to obtain relief in a bankruptcy case as to Creditor and her claim. *See Debtor's Opposition to Bad Faith Motion (Docket No. 182),* filed on March 26, 2013, at 10-11 and n. 7 (referring to dismissal with prejudice as "the most Draconian of all sanctions"), *citing Soto v. Leavitt (In re Leavitt),* 209 B.R. 935, 939 n. 6 (9th Cir. BAP 1997)("Dismissal with prejudice has been called the 'capital punishment of bankruptcy.'").

As the Ninth Circuit further observed in *Leavitt,* Section 349(a) of the Bankruptcy Code, 11 U.S.C., authorizes the bankruptcy court to dismiss a Chapter 13 bankruptcy case with prejudice for "cause." *Id.* "Cause" for dismissal under Section 349 is not specifically defined by the Bankruptcy Code, but as the Ninth Circuit has held that bad faith constitutes "cause" for dismissing a Chapter 13 bankruptcy case under Section 1307(c) of the Bankruptcy Code, 11 U.S.C. *In re Leavitt,* 171 F.3d at 1224 (citations omitted). Therefore, "it follows that a finding of bad faith based on egregious behavior can justify dismissal with prejudice" and bad faith is "cause" for a dismissal with prejudice

pursuant to Section 349(a) of the Bankruptcy Code, 11 U.S.C. *In re Leavitt,* 171 F.3d at 1223-1224.

According to the Ninth Circuit, the court should consider the totality of circumstances in determining whether a Chapter 13 bankruptcy case should be dismissed with prejudice for bad faith. *In re Leavitt,* 171 F.3d at 1224 (citation omitted). In *Leavitt,* the Ninth Circuit set out four factors that the bankruptcy court should consider in determining whether the totality of circumstances of a debtor's Chapter 13 case indicates bad faith as a cause to warrant dismissal with prejudice:

1. Whether the Debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner;
2. The Debtor's history of filings and dismissals;
3. Whether the Debtor only intended to defeat state court litigation;
4. Whether egregious behavior is present.

Id.; *accord, Drummond v. Welsh (In re Welsh),* 711 F.3d 1120, 1129, 1132 and n. 45 (9th Cir. 2013); *see also, In re Ellsworth,* 455 B.R. at 917-918. The Ninth Circuit in *Leavitt* also stated that a finding of bad faith does not require fraudulent intent by the debtor. *Id., citing inter alia, In re Powers,* 135 B.R. 980, 994 (Bankr. C.D. Cal. 1991).

On October 24, 2013, the court issued an order granting leave for the parties to submit further briefing regarding which party has the burden of proof on the issue of bad faith for a motion to dismiss a Chapter 13 bankruptcy case pursuant to 11 U.S.C. § 1307(c). On November 5, 2013, Creditor filed a Supplemental Brief stating that "[d]ebtor bears the burden of proving that the petition was filed in good faith," but that the Ninth Circuit BAP had not resolved the issue of placement of burden. *Creditor's Supplemental Brief (Docket No. 219)* at 1-2. On November 11, 2013, Debtor filed a supplemental brief arguing that while the Ninth Circuit has not yet decided the issue of burden of burden of proof for a motion to dismiss a Chapter 13 case on the grounds of bad faith, the majority of courts that have considered the issue have found that the burden should fall on the party seeking such conversion or dismissal. *Debtor's Supplemental Brief (Docket No. 220)* at 1-3. Having reviewed the parties' supplemental briefing, the court concludes, as

discussed below, that the burden of proving bad faith sufficient to dismiss a case pursuant to 11 U.S.C. § 1307 lies with the movant.

When seeking confirmation of a plan, the debtor, as the Chapter 13 plan proponent, has the burden of proof on the issues of whether both the bankruptcy case and the Chapter 13 plan were filed in good faith. 11 U.S.C. § 1325(a)(3) and (7). In a case where a creditor seeks dismissal due to bad faith, the allocation of the burden of proof is less clear. In its decision in *Leavitt* reviewing whether the bankruptcy court correctly dismissed the debtor's Chapter 13 case for bad faith, the Ninth Circuit Bankruptcy Appellate Panel ("BAP") observed without discussion that the "[d]ebtor bears the burden of proving that the petition was filed in good faith." *In re Leavitt,* 209 B.R. at 940, *citing In re Powers*, 135 B.R. 980, 997 (Bankr. C.D. Cal. 1991); *accord, In re Craigshead,* 377 B.R. 648, 655 (Bankr. N.D. Cal. 2007), *cited in, Bad Faith Motion* at 7. Subsequently, the BAP in *Ellsworth* called this observation by a prior BAP panel in *Leavitt* into question because "such a statement runs contrary to the ordinary notion that a movant bears the burden of production and persuasion as to the relief requested," but it did not decide the allocation of the burden of proof for a motion to dismiss a Chapter 13 case on grounds of bad faith. *In re Ellsworth,* 455 B.R. at 918-919 (citations omitted).

More recently, a bankruptcy court in *In re Cluff* determined that when a party seeks dismissal due to bad faith, the moving party should bear the burden of proof. *In re Cluff,* 2012 WL 1552391 (Bankr. D.Idaho 2012). The *Cluff* court noted that "the majority of courts to have considered the burden of proving bad faith under § 1307(c) have found that, while a debtor bears the burden of proving good faith under § 1325(a), 'the burden of showing that a case was filed in bad faith so as to require conversion or dismissal under § 1307(c) falls on the party seeking such conversion or dismissal.'" *Id., citing, In re Love,* 957 F.2d 1350, 1355 (7th Cir. 1992)("Section 1307(c) provides that a petition may be dismissed 'for cause.' Dismissal for cause cannot mean that a debtor must show an absence of cause; it can only mean that the party moving for dismissal must demonstrate cause."); *In re Werts,* 410 B.R. 677, 690 and n. 44 (Bankr. D. Kan. 2009), *citing, Condon*

v. Brady (In re Condon), 358 B.R. 317, 326 (6th Cir. BAP 2007); *Sullivan v. Solimini (In re Sullivan),* 326 B.R. 204, 211 (1st Cir. BAP 2005); *In re Haque,* 334 B.R. 486, 489 (Bankr. D. Mass. 2005); *In re Smith,* 418 B.R. 160, 165 (Bankr. D.S.C. 2009); and *In re Lancaster,* 280 B.R. 468, 474 (Bankr. W.D. Mo. 2002). For purposes of this case, this court agrees with *Cluff* and concludes that the burden of proving cause sufficient to dismiss a case lies with the movant because as noted in *Ellsworth,* this would better comport with the "ordinary notion that the movant bears the burden of production and persuasion as to the relief requested" and as stated by the Seventh Circuit in *Love,* "[d]ismissal for cause cannot mean that a debtor must show an absence of cause; it can only mean that the party moving for dismissal must demonstrate cause. *In re Ellsworth,* 455 B.R. at 918-919; *In re Love,* 957 F.2d at 1355. As discussed herein, this court concludes that Creditor bears the burden of proof to establish cause for dismissal of the case under 11 U.S.C. § 1307(c).

A. Creditor failed to show that Debtor misrepresented facts in his petition or plan, unfairly manipulated the bankruptcy code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner.

As stated in *Leavitt*, the first prong of the totality of the circumstances test for whether a Chapter 13 case should be dismissed under 11 U.S.C. § 1307(c) for bad faith is "whether the debtor misrepresented the facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner." *In re Leavitt,* 171 F.3d at 1224. In *Leavitt,* the Ninth Circuit concluded that this first factor of the totality of the circumstances test was satisfied because the debtor had: (1) failed to fully disclose his assets and financial dealings; (2) omitted assets and undervalued others in his initial schedules; (3) inflated his expenses; (4) inequitably offered nothing to the largest unsecured creditor in debtor's initial plan; (5) failed to obey a court order directing debtor to include at least a thirty percent payment to his unsecured creditors; and (6) failed to disclose the receipt of $36,000 and the purchase of a new home during the pendency of the bankruptcy case. *Id.* at 1225.

In the case at bar, Creditor argues that the first prong of the *Leavitt* totality of the circumstances test is met because Debtor has engaged in bad faith amendments of his bankruptcy schedules. *Bad Faith Motion* at 7. In support of her argument, Creditor quotes the opinion in *In re Dowling,* 415 B.R. 740, 749 (Bankr. N.D. Cal. 2009), stating: "The typical case of bad faith amendment involves the debtor's attempt to hide an asset by omitting it from the schedules, then amending the schedules if the asset is later discovered." *Id. Dowling* is not precisely on point because that case was a Chapter 7 liquidation bankruptcy case, not a Chapter 13 payment plan case like this one, and the case did not involve an omitted asset, but a late claim of a homestead exemption that the court in *Dowling* held was not in bad faith, so the quoted text relied upon by Creditor is only dicta. 415 B.R. at 749. Based on this dicta, Creditor argues that "[i]n the Chapter 13 context, this would equate to non-disclosure of income received, following by an amendment by the Debtor when the income is discovered." *Bad Faith Motion* at 7. Nevertheless, as one bankruptcy law treatise has observed, "[c]ourts have found bad faith where the debtor was not honest in disclosing assets, liabilities, income and/or expenses in the plan." 2 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶ 13:685 at 13-76 – 13-77 (2013), *citing, In re Huerta,* 137 B.R. 356, 376 (Bankr. C.D. Cal. 1992)(inaccuracies in debtors' budget, plan statements and other information demonstrating debtors' willingness to "play loose" with the facts) and *In re DeReus,* 53 B.R. 362, 365-366 (Bankr. S.D. Cal. 1985)(debtors' failure to account for over $44,000 in cash received and discrepancies in schedules constituted lack of good faith).

Thus, Creditor contends that this first factor of *Leavitt* is met on grounds that Debtor misrepresented his income and expenses on his Chapter 13 bankruptcy petition, and his original Chapter 13 plan and amendments, and unfairly manipulated the Bankruptcy Code to avoid paying support to Creditor. *Id.* Creditor makes three arguments as to how Debtor acted in violation of this first factor of the totality of circumstances test, which are each discussed below.

Creditor Fails to Show that Debtor Misrepresented Facts in His Petition or Plan by Concealing His Bonus.

Creditor contends that Debtor's Bankruptcy Petition and Chapter 13 Plan filed on January 21, 2011 were in bad faith because Debtor failed to list any bonus income on these documents, even though he received a bonus of $21,500 in 2010. *Bad Faith Motion* at 4, 7, 8. According to Creditor, Debtor only listed his base salary of $11,250 as his monthly gross wages without any reference to any bonus income. *Id.* Creditor further contends that only "five weeks later" after filing his bankruptcy petition on January 21, 2011, Debtor was paid an annual bonus of $116,899. *Id.* at 4, 8.

In response, Debtor stated in his declaration that he did not learn that he would be receiving a bonus in 2011 until the first week of February 2011, which was after he filed his bankruptcy petition on January 21, 2011. *Declaration of Matthew Ashworth (Docket No. 183)("Ashworth Declaration"),* filed on March 26, 2013, at ¶ 8. Debtor did not actually receive the bonus until February 28, 2011. *Id. at* ¶ 9; *Declaration of Current/Post-Petition Income (Docket No. 72)*, filed on January 9, 2012, at 1.

As to whether Debtor should have listed bonus income on his bankruptcy petition and Chapter 13 plan, filed on January 21, 2011, the court determines that the petition and Chapter 13 plan were not filed in bad faith for not listing bonus income on those documents. The court finds Debtor's testimony that, while he received a bonus of $21,500 in 2010, he was not aware that he had another bonus coming in 2011, to be credible. *Ashworth Declaration* at ¶ 8. Because Debtor's initial bankruptcy schedules for his bankruptcy petition were prepared prior to his knowledge or receipt of the bonus income for 2011, the court finds that Debtor did not disclose his bonus income on his Petition and initial Plan for the reason that he did not know he was receiving a bonus for 2011 until a week after the Petition and initial Plan were filed and did not *actually* receive the bonus for over a month after they were filed. There was no fraudulent failure of Debtor to disclose his 2010 bonus income on his bankruptcy petition and initial Chapter 13 plan because that amount had been received in the prior year and he did not know

that he would be receiving bonus income for 2011, the year the bankruptcy petition was filed.

Creditor also argues that bad faith is shown because Debtor failed to disclose his 2011 bonus income on documents he filed in the case other than on his bankruptcy petition and his Chapter 13 plan, i.e., on his Declaration of Post-Petition Income, which was filed four months after his bankruptcy petition and plan was filed on January 21, 2011. *Bad Faith Motion* at 4, 8; *Creditor's Supplemental Brief (Docket No. 219)* at 2-3. On June 11, 2011, Debtor filed an amended Chapter 13 plan and an Amended Schedule I listing his monthly gross wages as $11,250.44 without any reference to the bonus he received in February 2011. *Bad Faith Motion* at 4, *citing Amended Chapter 13 Plan* and *Amended Schedule I (Docket No. 29),* filed on June 30, 2011. According to Creditor, she took Debtor's deposition on October 27, 2011, during which he "revealed for the first time that he received a $110,000 post-petition bonus." *Id.* at 4. Based on this information, Creditor filed objections to Debtor's First Amended Plan on the basis that Debtor had not pledged all disposable income, including bonuses, to the plan. *Id., citing Objections to Plan (Docket Nos. 47 and 55).*

On January 9, 2012, Debtor filed a Declaration of Current/Post-Petition Income and Expenses indicating that he had received a discretionary bonus in February 2011 of $110,229. *Ashworth Declaration* at ¶¶ 19-20; *Declaration of Current/Post-Petition Income (Docket No. 72)* at 1. On the same date, Debtor filed a Second Amended Plan. *Ashworth Declaration* ¶ 19; *Second Amended Chapter 13 Plan (Docket No. 73).* In an attachment to the Second and Third Amended Plans, Debtor proposed that he would provide copies of his tax returns to the Trustee on an annual basis within 10 days of filing and proof of his income to the Trustee on a semi-annual basis. *Ashworth Declaration at* ¶ 21; *Second Amended Chapter 13 Plan* at 8; *Third Amended Chapter 13 Plan (Docket No. 156)* at 8. On January 16, 2013, Debtor again filed a Declaration of Current/Post-Petition Income and Expenses. *Ashworth Declaration* at ¶ 26; *Declaration of Current/Post-Petition Income (Docket No. 155)*. On the income portion of this

declaration, Debtor listed his current salary as $12,083.34 per month (this was $332.88 higher than the January 2012 Declaration of Current/Post-Petition Income monthly salary, reflecting a raise he received in the interim). *Ashworth Declaration at* ¶ 26; *Declaration of Current/Post-Petition Income (Docket No. 72)* at 1; *Declaration of Current/Post-Petition Income (Docket No. 155)* at 2. Debtor's income declaration also included a *projected* bonus of $80,000, adding $6,667 per month to his income and indicated that "Projected bonus is anticipated to be 20% below [Debtor's] 2011 bonus of $100,000 and all additional net bonus will be paid into the Plan." *Ashworth Declaration* at ¶ 26; *Declaration of Current/Post-Petition Income (Docket No. 155)* at 2. The court also notes that Debtor's bonus income has since been incorporated into his Third Amended Chapter 13 Plan. *Ashworth Declaration* at ¶¶ 28-29; *Amended Chapter 13 Plan (Docket No. 156).* The Third Amended Chapter 13 Plan provides funds representing the amount of the February 2011 bonus and those of future bonuses are committed to payment of creditors under the plan. *Ashworth Declaration* at ¶¶ 27-29; *Amended Chapter 13 Plan (Docket No. 156).*

Specifically, in response to Creditor's arguments that Debtor failed to disclose his 2011 bonus income on documents other than the petition and original plan, Debtor contends that his postpetition filings were accurate and truthful regarding his bonus income because there is no certainty for him to receive bonuses or raises of a known amount and that such irregular income may give rise to cause for plan modifications. *Debtor's Opposition to Bad Faith Motion* at 9-10, *citing, In re Powers,* 202 B.R. 618, 620 (9th Cir. BAP 1996) and *In re McGovern,* 278 B.R. 888, 895-896 (Bankr. S.D. Fla. 2002), *vacated on other grounds,* 297 B.R. 650 (S.D. Fla. 2003). Debtor argues in his opposition to the Bad Faith Motion, here quoted at length:

> Rather, an alleged concealment of income is argued to have occurred on June 24, 2011 when ASHWORTH filed his Amended Chapter 13 Plan, by which time EHRGOTT had commenced post-petition garnishment of his wages to collect accrued arrearages on the disputed claim, which actually reduced his net disposable income. Based thereon, ASHWORTH proposed a payment of $246.19 per month for

35 months, increasing to $820.87 for the duration of the Plan, based on additional income being available when his car was paid off, and also proposing that the monthly payment would increase further by another $600 per month if EHRGOTT's post-petition garnishment of his income ceased upon a determination that the claim was not one of support.

Also, at that time, ASHWORTH re-executed Schedule I, in which he stated that his "monthly gross wages, salary, and commissions" currently were $11,250.44. That statement was true; that is what he earned in that month. At Line 17 of Schedule I, when asked to describe any increase or decrease in income reasonably anticipated to occur within the year following the filing of the schedule, ASHWORTH answered "none." While arguing that the term "monthly gross wages, salary, and commissions" required that ASHWORTH provide not his monthly salary, but an average of income that included the bonus, Creditors have cited no authority as to how bonus income is to be treated in Schedule I.

Admittedly, little law exists to address how a debtor is to deal with bonus income in the context of Chapter 13. In In re McGovern, 278 B.R. 888, 895-896 (Bkrtcy..S.D.Fla. 2002), vacated on other grounds at In re McGovern, 297 B.R. 650 (S.D.Fla. 2003), the court addressed what income must be included in the calculation of a debtor's disposable income, where the debtor had not included any bonus income, stating:
"On Schedule I, the Debtor lists his total monthly net income as $4,393.44. However, the income listed on Schedule I does not include bonuses which the Debtor received or which he may receive post-petition, and does not provide for any possible future raises. The issue of whether bonuses must be included in the Debtor's income is dependent on whether the Debtor has already received the bonus.

"The Debtor is not contractually entitled to receive any bonuses or raises from his employer. The mere fact that it is possible that he may receive bonuses or raises in the future does not require the chapter 13 plan to reflect that contingency. "As a practical matter, unless there are changes which can clearly be foreseen, the court [for a three-year plan] must simply multiply the debtor's current monthly income by 36." 8 Collier on Bankruptcy ¶ 1325.08[4][a](15th ed. rev.2001)(emphasis added). **Therefore, absent evidence that the Debtor is certain to receive bonuses or raises of a known amount, such bonuses or raises are too speculative to include in income.** Nonetheless, pursuant to section 1329(a) the plan may be modified to deal with any extraordinary or substantial unforeseen changes. See In re Powers, 202 B.R. 618, 620 (9th Cir. BAP 1996). A holder of an allowed unsecured claim may request such a modification of the plan. See 11 U.S.C. § 1329(a)." (Emphasis added.)
Here, when the case was filed ASHWORTH had not yet received the bonus paid to him approximately six weeks after the case was filed, nor have Creditors, provided any evidence

> to suggest that he was aware he would be receiving it. Like McGovern, ASHWORTH has no contractual right to an annual bonus, and any plan predicated upon the assumption that he would receive a bonus each and every year for the duration of the plan would likely be met by an objection based upon feasibility raise, if by no one else, the Chapter 13 trustee.
>
> However, as noted by the court in In re McGovern, supra, and has held [sic] by the Ninth Circuit BAP in the cited decision of In re Powers, 202 B.R. 618, 620 (9th Cir. BAP 1996), Chapter 13 Plan provisions providing for disclosure of bonuses may give rise to good cause for creditors to seek plan modification based thereon. Such provisions were included in each of ASHWORTH's proposed Chapter 13 Plans.

Debtor's Opposition to Bad Faith Motion at 9-10 (emphasis in original); *see also, id.* at 17-19; *Ashworth Declaration* at 1-15.

In his trial declaration, Debtor discussed his knowledge and disclosure of his bonus income for 2011:

> I provided Mr. Heston's [i.e., Debtor's counsel's] office with current pay stubs and information about my salary at US Bank, where I worked through December 31, 2010. From the time I retained him through the time I filed this Chapter 13 bankruptcy on January 21, 2011, I had no idea about the substantial bonus I would earn in February 2011. In fact, had I known about that bonus at the time, it likely could have changed my mind regarding the appropriateness of filing for Chapter 13. I didn't find out what amount my bonus would be until approximately the first week of February 2011.

Ashworth Declaration at ¶ 8. Debtor described in his trial declaration when he found out about the bonus:

> Upon actually receiving the bonus at the end of February 2011, I shared the information with Mr. Heston's office to learn if it would have any impact on my case. Since my Chapter 13 plan included an attachment of additional provisions that required that I provide copies of my tax returns to the trustee on an annual basis, and information concerning my current earnings on a semiannual basis following approval of the Plan, I realized the information concerning my bonus would automatically be provided to the Trustee. I also learned that just as I might need to seek a reduction in my monthly Plan payment if my earnings dropped or expenses increased, the Trustee could also seek an increase in my Plan payment if my income rose above what it had been when I filed the case.

Ashworth Declaration at ¶ 9. Debtor also stated in his declaration that "[t]here has been some confusion as to where in the schedules to include my bonus income, as it truly isn't 'monthly income and it is so variable in its nature since my bonus is completely subjectively given by my employer." *Id.* at ¶ 11.

In her reply to Debtor's opposition, Creditor argues that case law exists, which requires a bankruptcy debtor to include future bonuses into projected disposable income. *Creditor's Reply to Debtor's Opposition to Bad Faith Motion (Docket No. 188),* filed on April 2, 2013, at 5-7, *citing inter alia, In re Arsenault,* 370 B.R. 845, 851 (Bankr. M.D. Fla. 2007); *In re Meade,* 420 B.R. 291, 306 (Bankr. W.D. Va. 2009); *In re Katz,* 451 B.R. 512, 514 (Bankr. C.D. Cal. 2011); and *Thomson v. Glenn (In re Glenn),* 335 B.R. 703, 706 (Bankr. W.D. Mo. 2005). Of particular relevance is *In re Glenn,* which criticized a Chapter 13 debtor for failing to disclose his prepetition bonus by only reporting his base salary as gross monthly income. *In re Glenn,* 335 B.R. at 706. Debtor argues that the *Glenn* court at page 706 of its opinion was "particularly distributed [sic]" (i.e., disturbed?) that:

> There [were] no other indications of income on Schedule I other than the Debtor's base salary. The Debtor did not include the $19,230.08 in bonuses received [pre-petition] as prorated gross monthly income, despite the instructions on the official form to do so, nor did he avail himself of the opportunity at the bottom of Schedule I, as the form instructs, "describe any increase of more than 10% in any of the above categories anticipated to occur within the year following the filing of this document."

Creditor's Reply to Debtor's Opposition at 7, *citing In re Glenn,* 335 B.R. at 706. As Creditor further argues that the *Glenn* court "found that debtor's 'failure to disclose over one-quarter of his income is clearly material' and inferred that the omission was intentional where debtor had received bonuses in the past and because Debtor was a 'general manager' who 'routinely reviewed operating reports' showing that the company was performing well such that a bonus would potentially be paid." *Id.* In *Glenn,* the employer paid the debtor quarterly and semi-annual bonuses, which constituted a regular

portion of his actual annual income (roughly 20 to 28%). 335 B.R. at 306. Accordingly, Creditor points out that the *Glenn* court found that:

> [T]hese facts dispel any notion that the Debtor could not reasonably anticipate receiving postpetition a bonus attributable to his prepetition employment in 2004. He may not have known the exact amount of the bonus, but the certainty to which he expected receiving one (or more) rose to a level such that it was necessary for him to disclose that expectation. And the failure to make such a disclosure constitutes an intentional, material omission from his schedules.

Id. Thus, it appears that the regularity of the bonuses demonstrated to the court in *Glenn* that the debtor had an expectation of regular bonus income to warrant inclusion into "current monthly income" reportable on Schedule I. *Id.* at 707. The *Glenn* court took notice that reporting only base salary without bonuses underreported debtor's actual income as reported on the statement of financial affairs and therefore concluded that debtor should be denied a Chapter 7 discharge for intentional omission of material fact on his bankruptcy schedules under 11 U.S.C. § 727(a)(4). *Id.* at 706-708.

In this court's view, whether Debtor acted in bad faith in disclosing his bonus income on Schedule I is not so clear-cut. Schedule I requires disclosure of "current monthly income" at the time the bankruptcy case is filed, and "current monthly income" is a statutorily defined term under 11 U.S.C. § 101(10A), which generally means the average during the six month reporting period ending with the last day of the calendar month immediately before the petition date if a Schedule I is filed. 11 U.S.C. §§ 101(10A)(A)(i) and 521(a)(1)(B)(ii); *see also, In re Katz,* 451 B.R. 512, 515-517 and n. 9 (Bankr. C.D. Cal. 2011). "Current monthly income" is defined under 11 U.S.C. § 101(10A)(A) where the debtor files Schedule I as "the average monthly income from all sources that the debtor receives . . . without regard to whether such income is taxable income, derived during the 6-month period ending on---(i) the last day of the calendar month immediate preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii). *See also, In re Katz,* 451 B.R. at 516; *In re Meade,* 420 B.R. at 304.

In *Meade*, the court held that income from an annual bonus paid to the debtor within the six-month reporting period of 11 U.S.C. § 101(10A)(A) should be included into "current monthly income" on Schedule I, but annualized and prorated over a 12-month period based on the consideration of the fact that it is an annual bonus. 420 B.R. at 305-306. The court in *Meade* disagreed with the United States Trustee and another court which took the position that an annual bonus received within the six-month reporting period of 11 U.S.C. § 101(10A)(A) should be taken fully into account and averaged by dividing by six. *Id.* at 305-306 and n. 14 (disagreeing with *In re Cruz,* 2008 WL 3346583 (Bankr. E.D. Wis. 2008). The *Meade* court reached its decision based on the view that debtor's current monthly income, including bonuses, should be annualized, but this is not exactly what is stated in the Bankruptcy Code pursuant to the statutory language of 11 U.S.C. § 101(10A) and that the statutory language is susceptible of different interpretations. *Id.* The court in *Meade* reached its interpretation based on its view that the use of the words "receives" and "derived" in 11 U.S.C. § 101(10A)(A) meant that "Congress intended for there to be some connection between the compensation received and the period of time in which the applicable services for such compensation was rendered." *Id.* at 305, *citing inter alia,* Lundin, *Chapter 13 Bankruptcy,* § 468.1 at 468-17 (3d ed. 2000 and Supp. 2007-1). In reaching its result in *Meade,* the court acknowledged:

> There are admittedly some logical difficulties here with projecting in advance a bonus which relates to services actually rendered during the preceding year. In that sense the Court is arguably allocating backwards a bonus received in February 2009 to Mr. Meade's income during four (January thru April, 2008). While the Court acknowledges the conceptual difficulties, it concludes that they are inherent with the larger problem faced by Congress as well as bankruptcy courts, namely, using past experience to predict what a debtor will be able to pay in the future from income not yet received or even guaranteed to come.

Id. at 306. (The court in *Meade* recognized that it was not deciding the situation of an annual bonus received by the debtor before the six-month reporting period, which it said was a harder case and is the situation now before this court, but would apply the same

principles to reach a similar result. *Id.* at 306.). If this court applied the *Meade* rule, then Debtor should have included six months of the annualized 2010 bonus income as "current monthly income" on Schedule I (i.e., the bonus was attributed to 2010 and the six-month reporting period under 11 U.S.C. § 101(10A)(A) was July to December 2010).

Debtor took the position that "current monthly income" referred to the current month in which the current income schedule, Schedule I, was filed, but this also does not seem to be correct pursuant to 11 U.S.C. § 101(10A). Literally speaking, Debtor's bonuses for 2010 and 2011 were not paid within the six-month reporting period before the petition date for "current monthly income" provided under 11 U.S.C. § 101(10A)(i.e., the 2010 bonus was paid before the six-month reporting period, and the 2011 bonus was paid afterwards). This would have been consistent with the position argued by the United States Trustee in *Meade* and adopted by the court in *In re Cruz,* 2008 WL 3346583 (Bankr. E.D. Wis. 2008), but rejected by the court in *Meade,* 420 B.R. at 305-306 and n. 14. It seems to this court, however, that the spirit of the reporting requirement for current monthly income on Schedule I, though perhaps not the letter of the statute in 11 U.S.C. § 101(10A), would be to consider it on an annualized basis as the court determined in *Meade*, but the case law seems to be split in that regard, considering the different results in *Meade* and *Cruz.* Moreover, where Schedule I at the bottom of the page calls for a statement of further income anticipated within the year following the petition date, Debtor stated that he did not anticipate a bonus. Again, this seems to the court to be within the letter of the request on the form, but perhaps not so much within the spirit based on the view of the court in *Glenn,* but acceptable in the view of the bankruptcy court in *McGovern.* There does not appear to be any controlling precedent on how to treat annual bonus income received within the year immediately preceding the petition date under 11 U.S.C. § 101(10A)(A), as no party has cited any, nor has the court found any in its research. *See In re Katz,* 451 B.R. at 513-517 (finding no controlling authority on the

issue of interpreting the word "derived" in 11 U.S.C. §101(10A)). [2] The existence of case law consistent with Debtor's treatment of his bonus income and the lack of clear, controlling case law to the contrary indicate that Debtor did not act in bad faith.

It may be problematic that when Debtor filed his amended Schedule I in June 2011, which is to reflect his current monthly income for purposes of 11 U.S.C. § 101(10A) in the six-month reporting period before the petition date, he did not list his 2011 bonus then actually received in February 2011, but then again, the form asks for what was anticipated in the year following the petition date. *See Creditor's Trial Exhibit 16, Excerpt of Transcript of Deposition of Matthew Banks Ashworth* at 17 ("Q: Can you find where on [Amended] Schedule I it includes the bonus income that you had already received? A I don't see a location for it to have been included.") and at 20 ("Q: Is there a reason why you didn't choose to list [the bonus] on line 17 in your June 30th, 2001 schedule line? A I don't know.") Literally speaking, as stated previously, Debtor had not anticipated receipt of such bonus income, and his testimony to this effect is credible, though in terms of the spirit of disclosure pursuant to 11 U.S.C. §§ 101(10A)(A)(i) and 521(a)(1)(B)(ii) it would have been preferable that Debtor had disclosed the bonus on the amended Schedule I, but it is arguable and inconclusive that this shows bad faith by itself since Schedule I relates to what was paid pre-petition and what Debtor actually anticipated as of the petition date.

Creditor argues that "[e]xtensive case law suggests that Debtor's non-disclosure of his $117,000 post-petition bonus in his June 30, 2011 Amended Schedule I constitutes bad faith." *Creditor's Reply to Debtor's Opposition* at 5, *citing inter alia, United States*

[2] *Katz* involved the situation of a debtor receiving an annual bonus during the six-month reporting period of 11 U.S.C. § 101(10A)(A), who did not include such income into "current monthly income" on Schedule I on grounds that the income was derived from services performed before the six-month reporting period. 451 B.R. at 515-517. The court in *Katz* determined that the word "derived" was not a limitation on the inclusion of the bonus income because all income received during the six-month period under the statute was to be included, and the debtor's failure to include this income as "current monthly income" in his bankruptcy schedules raised the presumption of abuse, leading to the dismissal of the debtor's Chapter 7 case. *Id.* *Katz* is not applicable here because this case involves the issue of treatment of bonus income received outside of the six-month reporting period of 11 U.S.C.

Trustee v. Cortez (In re Cortez), 457 F.3d 448, 458 (5th Cir. 2006). Specifically, Creditor argues:

> In assessing whether substantial abuse had occurred under Section 707(b), the Fifth Circuit found that courts can consider the fact that a "debtor [ ] retain[ed] post-petition improvements in earnings, without committing the increase in income" to their plan because "debtors [are] obligated to amend their schedules to disclose any post-petition income under Chapter 13." *United States Tr. V. Cortez* (In re Cortez), 457 F.3d 448, 458 (5th Cir. Tex. 2006). This is because, "[i]n a Chapter 13 proceeding, debtors are obligated to amend their schedules to include subsequent income, even if that income is not known or realized at the time of filing." *Id.* at 457.

Creditor's Reply to Debtor's Opposition at 5. Thus, Creditor argues that the omission of the 2011 bonus from the amended Schedule I was in bad faith. *Id.* at 5-7.

In *Cortez,* the Fifth Circuit held that a Chapter 13 bankruptcy case may be dismissed for "substantial abuse" under Section 707(b) of the Bankruptcy Code, 11 U.S.C., based on a debtor's ability to repay her or his debts as reflected in post-petition improvements in earnings. In so holding, the Fifth Circuit commented on the situation of a debtor whose future earnings are not known as of the petition date:

> When, as here, the debtors' future earnings are not known at the time of filing, we should look to the requirements imposed on debtors under Chapter 13. In a Chapter 13 proceeding, debtors are obligated to amend their schedules to include subsequent income, even if that income is not known or realized at the time of filing. Section 521(3) requires the debtor to cooperate with the trustee, and § 1302(b) imposes duties on the trustee, including the duty to investigate the debtor's financial affairs under § 704(4). Based upon the trustee's investigation of the debtor's financial affairs, the trustee makes a decision to support or oppose confirmation of the Chapter 13 plan. If the trustee objects to the plan confirmation, the court may not approve the plan unless it "provides that *all* of the debtor's projected disposable income to be received [during the plan] will be applied to make payments under the plan." 11 U.S.C. § 1325(b)(1)(B) (emphasis added). Even if the plan, as initially proposed, is confirmed, § 1329 allows the trustee to seek a subsequent modification of the plan based on an increase in the debtor's income, so that more money is paid to the creditors. *See id.* § 1329(a)(1); *see also Arnold v. Weast (In re Arnold),* 869 F.2d 240, 241 (4th Cir.1989) ("[I]t is well-settled that a substantial change in the debtor's financial condition after confirmation may warrant a change in the level of payments."). Put another

> way, permitting a debtor to retain post-petition improvements in earnings, without committing the increase in income that is not reasonably necessary for support of the debtor or the debtor's dependents, would be grounds for rejection or later modification of a Chapter 13 plan. As a practical matter, then, the debtors would be obligated to amend their schedules to disclose any post-petition income under Chapter 13. Therefore, it would seem to us, drawing on Chapter 13 and the schedules themselves, as we are required to do in a substantial abuse determination under § 707(b), that post-petition improvements in earnings can be taken into account and should be taken into account up until the point at which the discharge is entered.

In re Cortez, 457 F.3d at 457-458 (footnotes omitted). The court agrees with the general observations of the Fifth Circuit in *Cortez* that a Chapter 13 plan may not be confirmed unless all of the debtor's projected disposable income received during the plan duration is applied to make plan payments, and that a plan as originally proposed may be modified based on increases in the debtor's income. *Id., citing,* 11 U.S.C. § 1325(b)(1)(B) and 1329. With all due respect to the Fifth Circuit, this court is not so sure that it agrees with the Fifth Circuit's observations in *Cortez* that a debtor is obligated to amend his or her income schedules to include post-petition income. The income schedule is intended to reflect "current monthly income," which as provided in 11 U.S.C. §§ 101(10A)(A)(i) and 521(a)(1)(B)(ii) reflects the average monthly income for the six-month reporting period ending with the last day of the calendar month ending before the filing date of the bankruptcy petition, and would not include post-petition income. The Fifth Circuit in *Cortez* in determining that a Chapter 13 debtor had an obligation to amend his or her schedules to reflect post-petition income did not cite any statutory or other legal authority for this proposition other than 11 U.S.C. §§ 521(3) and 1302(b), which only provide for general duties of a debtor to cooperate with the Chapter 13 trustee and of the Chapter 13 trustee to investigate the financial affairs of the debtor. Nothing in these cited statutes says anything specific about an obligation of a Chapter 13 debtor to file amended schedules to report post-petition income. Thus, it appears to this court that the Fifth Circuit's reading into these statutes an obligation of amending the schedules to reflect

post-petition income is problematic because this is inconsistent with other provisions of the Bankruptcy Code, namely, 11 U.S.C. §§ 101(10A)(A)(i) and 521(a)(1)(B)(ii), that Schedule I is to reflect "current monthly income, which covers the six-month period before the petition date, and thus, the court does not find that there is such an obligation to amend Schedule I to reflect post-petition income as found by the Fifth Circuit in *Cortez.*

This is not to say that the court is not to consider a Chapter 13 debtor's post-petition income with respect to plan confirmation, which it should. *See, e.g., Hamilton v. Lanning,* 560 U.S. 505, 524 (2010)(when a bankruptcy court calculates a Chapter 13 debtor's projected disposable income for plan confirmation purposes, the court may account for changes in the debtor's income that are known or virtually certain at time of confirmation); 11 U.S.C. § 1325(b)(1)(B). A debtor should file an amended plan in the event of an increase in income, pre-confirmation, or a motion to modify the plan may be filed if a plan has already been confirmed and there is a post-petition increase in income. There does not appear to be a specific Bankruptcy Code provision or a bankruptcy rule mandating how and when such amended or modified plans should be filed, but in this court's view, before plan confirmation, which is the situation here, the amended plan and income information should be filed before the confirmation hearing consistent with the requirement that the plan be proposed in good faith under 11 U.S.C. § 1325(a)(3).[3]

Here, when the Chapter 13 case initiated on January 21, 2011, the plan confirmation hearing was initially set for April 14, 2011. Debtor received his bonus for 2011 on February 28, 2011. After Creditor filed her objection to plan confirmation on February 17, 2011 on grounds that the plan failed to provide for her priority claim, at the initial plan confirmation hearing on April 14, 2011, the court continued the confirmation

[3] This court has a local form to report post-petition income to reflect changes in income called "Declaration of Current/Post-Petition Income," which is designated as Form F 3015-1.20. This form, however, is not the national bankruptcy form, Schedule I, which is contemplated under 11 U.S.C. § 521(a)(1)(B)(ii) and is designated as Form B6I (Official Form 6I). *Compare Creditor's Trial Exhibit 12, Amended Schedule I and J (Jun. 2011), with Creditor's Trial Exhibit 13, Declaration of Current/Post-Petition Income (erroneously described on Creditor's Exhibit Register as "Amended Schedules I and J (Jan. 2012)).*

hearing to July 14, 2011 to allow discovery and pretrial preparation because plan confirmation was a contested matter. Debtor filed an objection to the priority claim of Creditor on May 26, 2011. Debtor filed his first amended Chapter 13 plan and Amended Schedule I on June 30, 2011, which did not disclose any bonus income. Creditor filed an objection to confirmation of the amended plan on grounds that the plan did not provide for her priority claim on July 11, 2011. At the continued plan confirmation hearing on July 11, 2011, the court set a pretrial schedule for the contested matter of Debtor's objection to Creditor's priority claim and continued the plan confirmation hearing to January 12, 2012. Creditor filed a further objection to the first amended plan on December 8, 2011, arguing that Debtor did not commit all disposable income to the plan, including his bonus income. On January 9, 2012, Debtor filed his third amended Chapter 13 plan and a declaration of post-petition income, disclosing his bonus income for 2011. The court has continued the plan confirmation hearing then set for January 12, 2012 from time to time pending the outcome of the contested matters of Debtor's objection to Creditor's claim now on appeal to the Ninth Circuit and the instant motions now before the court, which are also contested matters. No final plan confirmation hearing has been conducted. Under these circumstances, the court is not inclined to find bad faith on the part of Debtor for not filing an amended plan and a post-petition income statement disclosing his bonus income until January 9, 2012 because Chapter 13 plan confirmation was not ready for final adjudication until the parties had litigated their disputes regarding the priority status of Creditor's claim. Debtor's testimony that he had not expected a bonus for 2011 when he filed his bankruptcy petition on January 21, 2011 is credible, and there is no indication of a long and regular history of bonus income since as Schedule I indicates that he had only been with his employer, US Bank, for "2 yrs., 3 mos." as of the petition date and the 2010 bonus paid outside the six month reporting period for Schedule I was apparently his first bonus with that employer. *See Creditor's Trial Exhibit 11, Petition for Chapter 13 Bankruptcy of Debtor, Schedule I.* Although Creditor's objections to Debtor's plans may have prodded Debtor in part to file a disclosure of his bonus income in the case and to

amend his plan to include bonus income, Debtor did so voluntarily and before the case was ready for final plan confirmation and a failure to disclose the change in post-position income from the 2011 bonus would have been considered as a material omission. Moreover, there was no violation of an alleged obligation to amend the schedules to list post-petition income that would constitute bad faith on Debtor's part for the reasons stated above.

Without offering any evidence to support her claim, Creditor contends that Debtor continues to underreport his bonus income. *Bad Faith Motion* at 8. In his declaration, Debtor stated that he has shared all of his pay stubs and information about his income. *Ashworth Declaration* at ¶ 11. As discussed above, Debtor has voluntarily filed Declarations of Current/Post-Petition Income to reflect post-petition changes to his income. Additionally, while no Chapter 13 Plan has yet been confirmed, Debtor's proposed Chapter 13 Plans contain a provision requiring that Debtor automatically disclose his income on both an annual and semiannual basis. *Ashworth Declaration at* ¶¶ 11 and 29; *see also, Amended Plan (Docket No. 30)* at 8; *Second Amended Plan (Docket No. 73)* at 8; and *Third Amended Plan (Docket No. 156)* at 8. In other words, over the course of the five years that Debtor anticipated making payments into the Chapter 13 plan, Debtor also proposed providing to the Chapter 13 Trustee semi-annual proof of his income and copies of all of his tax returns filed during the Chapter 13 Plan term. *See Amended Plan (Docket No. 30)* at 8; *Second Amended Plan (Docket No. 73)* at 8; and *Third Amended Plan (Docket No. 156)* at 8. Furthermore, in his Second Amended Chapter 13 Plan, Debtor's proposed payments are based upon the averaging of his salary and the bonus he received with modifications to be made in the plan payments in the event of recurring bonus income. *See Attachment to Second Amended Plan (Docket No. 73.)* at 8. In the Third Amended Plan, Debtor has proposed a Chapter 13 Plan based upon the inclusion of an anticipated $80,000 of annual bonus income, even though bonuses paid to Debtor are entirely at the discretion of his employer, based on employer performance, and a matter of no certainty. *See Attachment to Third*

Amended Plan (Docket No. 156) at 8; *Ashworth Declaration* at ¶¶ 11, 26, 27, 29 and 51. Because Debtor has voluntarily filed Declarations of Current/Post-Petition Income to correct post-petition changes to his income and included provisions in his proposed plans that require him to provide to the Chapter 13 Trustee semi-annual proof of his income and annual tax returns, this court finds that Debtor has in good faith fully disclosed his income in this bankruptcy case.

Creditor contends that Debtor conferred with his counsel before "defrauding" the court, suggesting some collusion between Debtor and his counsel. *Bad Faith Motion* at 8-9. Creditor cites to deposition transcript testimony in which her counsel attempted to examine Debtor regarding his communications with his attorney regarding Debtor's bonus income. *Id., citing, Deposition Transcript, Exhibit 1 to Request for Judicial Notice.* Debtor's counsel objected to the examination on the basis of attorney-client privilege and advised Debtor of his right to assert the privilege by not answering. *Id.* Because Debtor refused to provide an answer regarding the confidential communication with his counsel, Creditor now argues that Debtor's answer would have shown knowing concealment of Debtor's bonus. *Id.* The court is not persuaded by Creditor's argument that Debtor and his counsel have engaged in collusion to conceal income from the court and the creditors. This court does not conclude here that merely because Debtor invoked the attorney-client privilege that he was therefore knowingly concealing his bonus income.

Creditor also argues that because the Indiana Court of Appeals had affirmed a judgment of an Indiana state trial court, which had found "that [Debtor]'s failure to disclose . . . bonus payments constituted fraud on the court" and a "knowing concealment in violation of [state law]," this court should find that "Debtor's failure to disclose his bonus income . . . is part of his pattern and practice of attempting to defraud courts and his support creditor," and "This constitutes bad faith." *Bad Faith Motion* at 9; *see also, Creditor's Trial Exhibits 9 and 10, Order Modifying Child Support [re: Debtor's Undisclosed Bonuses]* and *Indiana Court of Appeals Opinion [re: Debtor's Undisclosed Bonuses].* Creditor further argues that this ruling of the Indiana Court of Appeals shows

fraudulent activity by the Debtor under 11 U.S.C. § 1307(c). *Id.* However, it seems to this court that the rulings of the Indiana courts have limited evidentiary value because it is not directly relevant to the first factor under *Leavitt* of whether debtor had misrepresented facts in his bankruptcy petition and plan, unfairly manipulated the Bankruptcy Code or otherwise filed his petition and plan in an inequitable manner. *See In re Leavitt,* 171 F.3d at 1221 n. 4 (explaining "[debtor's] conduct before the petition was filed was not taken into account by the bankruptcy court in its determination of bad faith").[4] However, the court considers such evidence with respect to the third and fourth *Leavitt* factors whether Debtor only intended to defeat state court litigation and has engaged in egregious conduct.

Creditor contends that by not pledging his 2011 bonus income into his Chapter 13 plan, Debtor tried to hide approximately $63,000 in bonus money that should have been pledged to the plan, that is, Debtor spent his 2011 bonus income on his alleged "lavish" lifestyle. *Bad Faith Motion* at 10-13. Of the amount of over $115,000 that Creditor claims should be attributable to the plan through the 2011 bonus (of which there was only approximately $63,000 available after taxes), Creditor acknowledges that some of this money went to pay child support of $20,301.17, which left $42,698.83 in net disposable income for 2011. *Id.* at 10. Creditor argues that Debtor's failure to commit this net disposable income to the Chapter 13 plan is "simply bad faith." *Id.* at 11.

[4] The Indiana trial court made a specific finding that Debtor violated a mandatory Indiana trial court discovery rule in failing to amend his financial declaration of 2010 after receiving his bonus or irregular income in 2010 because the financial declaration constituted mandatory discovery under Indiana trial court rules requiring supplementation if a response when the information was correct was made is no longer true and the circumstances are such that a failure to amend is in substance a knowing concealment. *Creditor's Trial Exhibit 9, Order Modifying Child Support [re: Debtor's Undisclosed Bonuses],* filed on April 24, 2012, at 4-5, citing Indiana Trial Rule 26(E)(2) and (3) and Marion County Family Law Rule 504. (As Debtor has pointed out, there is no allegation by Creditor that the financial declaration was untruthful when Debtor originally filed it with the state court. *Debtor's Opposition to Bad Faith Motion* at 7-8 and n. 6.) Creditor in her moving and reply papers did not cite to any specific statute or rule showing that Debtor had a duty to amend his schedules to report his 2010 or 2011 bonus income, and as discussed above, there does not appear to be any such statute or rule applicable to Debtor's bankruptcy schedules. *See Bad Faith Motion* at 7-10; *Reply to Debtor's Opposition to Bad Faith Motion* at 3-11.

In her Bad Faith Motion movant focuses her attention on approximately $7,000 in allegedly luxurious purchases made over a four-month period between January and April 2011, which are argued to be evidence of additional income not pledged to the plan in bad faith. *Bad Faith Motion* at 11-12, *citing In re Trimarchi,* 421 B.R. 914, 923 (Bankr. N.D. Ill. 2010)(quoting the opinion as observing that "[e]xpenses may amount to an obvious indulgence in luxuries when a debtor is enjoying luxuries that are not enjoyed by an average American family."). These purchases range from a pair of jeans, to dinner at a steakhouse, to furniture and a computer. As Creditor acknowledges, none of the goods purchased were more expensive than a new Apple laptop computer, which was approximately $1,200. *Id.* Creditor characterizes these expenditures as frivolous and unnecessary and thus, indicative of bad faith. *Id.* In his trial declaration, Debtor explained the reasons for some of the expenditures alleged by Creditor as lavish and wasteful. *Ashworth Declaration* at ¶37. Debtor stated that (1) the clothing purchased at the AG Jeans store is allowed and accounted for in Debtor's plan under his clothing allowance; (2) the dinner at Opal Restaurant was a party for his domestic partner's 50th birthday, which had been planned in the Fall of 2010, before Debtor had filed for bankruptcy, and Debtor was contractually obligated to go through with it; (3) Debtor states that the furniture items were purchased in preparation for his children's visits with him pursuant to his parental visitation rights; and (4) the laptop computer was purchased because Debtor's prior laptop was no longer in working condition and he needed a computer for work as well as personal use. *Ashworth Declaration* at ¶ 37. Based on Debtor's explanation, which the court finds credible, the court finds that these expenditures were not lavish or unreasonable, which were paid for with the Debtor's discretionary income or otherwise allowable as reasonable living expenses under Debtor's proposed Chapter 13 Plan.

Creditor also argues that aside from these expenditures, Debtor was unable to answer questions during his deposition as to how was the net disposable income from the 2011 bonus was otherwise spent. *Bad Faith Motion* at 11. According to Creditor,

Debtor testified at his deposition that "I don't know," later clarifying that "it was spent," but that he "couldn't tell . . . specifically what was purchased." *Id., citing Deposition of Matthew Ashworth* at 16, 20. However, Creditor acknowledged that Debtor had later explained in his deposition that between June 30, 2011 and January 9, 2012, he had to help his domestic partner pay some of the rent of their apartment because his partner was not able to earn income to contribute to the rent. *Bad Faith Motion* at 15, *citing Ashworth Deposition* at 91-92. Creditor argues that this explanation by Debtor to explain the disposition of the net disposable income from the 2011 bonus is simply an "attempt to hide $62,400 ($1,300 per month over 48 months)" as "part of his bad faith attempt to show that his $110,299 bonus actually caused him to have less disposable income because of his supposedly skyrocketing expenses." *Id.* at 15. In other words, Creditor argues that it is bad faith for Debtor to support the other member of his household, i.e., his domestic partner, regardless of the economic circumstances of the partner. Based on this record, it appears to the court that the disposition of the net disposable income from the 2011 bonus other than the specific alleged luxury items went to help support Debtor's domestic partner through rent contributions during the time his partner's earning capacity declined. Thus, it appears that Debtor has satisfactorily explained where much of the bonus money went, and as discussed below, the question is whether Debtor may treat such expenditure as a reasonable living expense for his Chapter 13 plan budget.

Moreover, Debtor stated in his declaration that he "held onto some of the bonus money and spent some of the money on furniture for my home to prepare for the upcoming visit of my children (to furnish their bedroom with beds, linens, etc), family law attorney fees to my attorney to deal with [Creditor's] objections to having the kids come to spend part of the summer with me, and I placed some in various savings accounts (IRA retirement, for the kids college educations, and just some in my bank savings account). *Ashworth Declaration* at ¶ 10; *see also, id.* at ¶¶ 35-36 (setting forth Debtor's recollection of the specific uses of the bonus money). Thus, it appears that Debtor has otherwise

satisfactorily explained where the remainder of the bonus money went, and as discussed below, Debtor has committed these assets to the plan.

Creditor fails to show that Debtor continues to refuse to pledge his other disposable income.

Creditor contends that Debtor refuses to pledge other disposable income to the plan. *Bad Faith Motion* at 13-16. Specifically, Creditor argues that Debtor failed to pledge non-taxable income for 2011 and 2012 to the plan. *Id.* at 13-14. The court finds that Debtor has not unreasonably failed to pledge his non-taxable income at issue here because such non-taxable income is not actually available to Debtor. This non-taxable income results from the current legal requirement that Debtor's employer must treat as gross taxable income the money the employer pays on Debtor's partner's behalf for his benefits (medical, dental, and other insurance) – the employer paid portion of his same sex partner's benefits. See IRS Private Letter Ruling 9850011 (December 11, 1998); *Ashworth Declaration* at ¶ 38. Therefore, the court does not find as argued by Creditor that Debtor refused to pledge non-taxable income to the plan.

Creditor also argues that Debtor refused to commit over $26,000 in tax refunds for 2011 to the plan. *Bad Faith Motion* at 14. Debtor testified at trial that he did not receive and keep his 2011 tax refund. *Ashworth Declaration* at ¶ 39. Rather, the "refund", which is really a tax overpayment, was applied to the following year's income tax liability as estimated taxes. *Id.* As such, the court finds that Debtor did not receive a tax refund for 2011, but rather had his tax overpayment for that year applied to estimated tax liability for the following year, and was thus not a refusal to commit such funds to the Chapter 13 Plan.

Creditor argues that because Debtor's rent doubled from $1,300 (one-half previously paid by his domestic partner) as shown on his bankruptcy petition to $2,600 as listed in the Second Amended Chapter 13 Plan, Debtor improperly sought to deduct $62,400 from his Chapter 13 Plan in third party rent expenses. *Bad Faith Motion* at 14-15. Debtor contends that his partner's ability to pay one-half of their rent has changed

during the pendency of the bankruptcy case. *Ashworth Declaration* at ¶ 40. According to Debtor, his partner was not able to pay one-half of the rent primarily because his income from working as a fitness instructor has declined substantially. *Id.* Furthermore, Debtor argues that all of his payments of the rent have been well documented in the bank statements provided to Creditor and her attorneys. *Id.* Because Debtor's partner's income has declined, affecting his ability to contribute to the rent, and Debtor has accounted for all of his rent payments, the court finds that Creditor has failed to show that Debtor has improperly sought to deduct $62,400 from the Chapter 13 Plan in third party rent expenses to demonstrate bad faith. While the court would expect that Debtor's domestic partner should contribute to the household expenses based on his income earning ability, it is not bad faith for Debtor to help defray their joint living expenses due to bad economic times impacting his partner's ability to earn income.

Creditor further argues that the Debtor refused to commit improperly deducted 401(k) plan contributions. *Bad Faith Motion* at 15-16. Specifically, Creditor argues that Debtor has failed to propose repayment of his previous $13,860.48 in 401(k) plan deductions in his Third Amended Plan. *Id* at 16. As explained by Debtor in his trial declaration, Debtor cannot now withdraw his past 401(k) contributions without incurring substantial taxes and penalties. *Ashworth Declaration* at ¶ 41. Furthermore, at the time Debtor made the contributions, the courts in this circuit had not specifically ruled that Chapter 13 debtors were barred from contributing to retirement plans. *Id.; see also, In re Parks,* 475 B.R. 703, 708-709 (9th Cir. BAP 2012)(holding that debtors may not deduct postpetition 401(k) payments from disposable income); *In re McCullers*, 451 B.R. 498 (N.D. Cal. 2011); 2 March, Ahart and Shapiro, *California Practice Guide: Bankruptcy,* ¶¶ 13:934.3 – 934.4 at 13-138.8 – 13-138.9 (citing and discussing divided case law whether postpetition 401(k) contributions are deductible or not). Once the BAP's decision in *Parks* was issued, Debtor modified his proposed Chapter 13 Plan to stop deductions of his contributions to the 401(k) plan from his income committed to the Chapter 13 Plan. *Ashworth Declaration* at ¶ 41. Based on these circumstances, the court finds that

Creditor has not shown that Debtor improperly deducted 401(k) contributions based on the case law at the time.

Creditor also cites a document that the Indiana family law court in 2010 had taken judicial notice of, which was a balance sheet indicating that Debtor had a right to a long term work incentive income vesting in 2012. *Bad Faith Motion* at 16; *Request for Judicial Notice, Docket No. 189, Exhibit A* at 7. However, Creditor has not otherwise offered any evidence to show whether this incentive income actually exists, that is, showing that vesting entitles Debtor to take out money now or later, or what type of pension income the incentive is. There is no evidence to demonstrate what the single line referring to this purported income on the balance sheet actually is. As such, the court finds that Creditor has not shown that Debtor is otherwise concealing such income in this case to demonstrate bad faith.

As noted previously in the Attachment to Debtor's Third Amended Plan, Debtor proposes *liquidating* his children's existing 529 college savings accounts he had contributed to from his first post-petition bonus, as well as his Individual Retirement Account ("IRA") account, and paying the resulting proceeds into his Chapter 13 Plan to pay creditors. *Ashworth Declaration* at ¶ 29; *see also, Attachment to Third Amended Chapter 13 Plan (Docket No. 156)* at 8. This attachment also has a provision that states that if the pending appeal of proceedings in Indiana concerning retroactive child support imposed on Debtor based on bonus income resulted in a post-petition support claim, it would be paid in full as a priority claim through the Chapter 13 Plan. *Ashworth Declaration at* ¶ 29; *see also, Attachment to Third Amended Chapter 13 Plan (Docket No. 156)* at 9. Because the evidence indicates that Debtor proposes liquidating his tax-deferred savings and retirement accounts and paying the resulting proceeds into the Chapter 13 Plan, and for the additional reasons discussed above, the court finds that Creditor has failed to show that Debtor continues to refuse to pledge his other disposable income to demonstrate bad faith.

Based on the foregoing, the court finds that Creditor has not shown that under the totality of the circumstances of this case, Debtor acted in bad faith by misrepresenting the facts on his Chapter 13 Petition or Plans or other documents filed in this case with respect to his income. Based on the foregoing, the court finds that Debtor has voluntarily supplemented his Chapter 13 Petition and Plans to correctly reflect the post-petition changes to his income and to provide assurances that there would be disclosure of any future changes in his income.

Creditor fails to show how Debtor's claimed special circumstance deductions give rise to the presumption of abuse.

Creditor contends that Debtor's special circumstance deductions claimed on his Chapter 13 Plan give rise to abuse of the bankruptcy process. *Bad Faith Motion* at 17-18. Creditor claims that the attorneys' fees and travel expenses exceed the "special circumstances" cap which is set under 11 U.S.C § 707. Specifically, Creditor claims that Debtor's deduction for legal expenses is presumed "abuse." *Bad Faith Motion* at 17. Debtor argues that the substantial attorneys' fees he has incurred and claimed on his Chapter 13 Plan are a result of his having to counter Creditor's attempts to keep their children from visiting Debtor for summer vacation, Creditor's efforts to increase child support, and Debtor's efforts to obtain custody of the children after Debtor learned that Creditor's teenage stepson had allegedly repeatedly sexually assaulted and abused Debtor's children. *Ashworth Declaration* at ¶¶ 45-46. The court finds that Debtor's explanation is credible as to how and why he has incurred substantial legal fees in light of the continued litigation between Creditor and Debtor over child support, custody and visitation, that the circumstances are unfortunate but special, justifying the incurrence of such fees to protect his legal rights as a parent and claiming such fees as special circumstance expenses in this case as reasonable and that therefore, Creditor has not shown that the deductions for these legal expenses to be an abuse of the bankruptcy process to warrant a finding of bad faith. Debtor contends that in light of the traumatic abuse his children have allegedly suffered, his continued visitation with them is

particularly important, necessitating the disputed travel expenses. *Ashworth Declaration* at ¶ 47. This court finds that Debtor's testimony explaining the special circumstances for the travel expense deductions to be credible and that such travel expenses were needed for dependent child visitation and do not show an abuse of the bankruptcy process.

B. The history of bankruptcy case filings and dismissals does not support dismissal for bad faith in this bankruptcy case.

The second factor in the "totality of the circumstances" test in *Leavitt* requires review of the debtor's history of bankruptcy case filings and dismissals. *In re Leavitt,* 171 F.3d at 1225. In *Leavitt*, the Ninth Circuit reviewed the history of bankruptcy case filings and dismissals of the debtor, Leavitt, and noted that he had filed his second bankruptcy case in six years and went on to file three more Chapter 13 bankruptcy petitions. *Id*. Leavitt's second petition was dismissed with prejudice and with the imposition of a 180-day bar to refiling a new bankruptcy case and monetary sanctions against the debtor in the amount of $5,500. *Id.* Less than a month later, Leavitt filed his third bankruptcy petition under a different social security number. *Id.* The third petition was dismissed by the Clerk of Court. *Id.* Leavitt then filed a fourth bankruptcy petition using a third social security number. *Id.* The bankruptcy court dismissed the fourth petition with prejudice as a bad faith filing. *Id.* The Ninth Circuit held that "Leavitt's conduct clearly shows his willingness to use inappropriate filings to seek a discharge". *Id.*

With respect to this factor, Creditor argues that the Debtor is being dishonest with respect to his request for voluntary dismissal of this case. *Bad Faith Motion* at 19. She contends that Debtor plans to refile for bankruptcy protection, though she offers no evidence to support this claim. In his declaration, Debtor directly addressed Creditor's assertion where he stated:

> The only situation in which I may refile the bankruptcy case if the appeal that is currently pending before the Ninth Circuit BAP regarding the nature and treatment of the obligation that is owed to [Creditor] is successful. . . The primary reason that I am unable to propose a confirmable Plan is because of the sudden arising of a nearly $41,000 retroactive post-petition child support arrearage based on my bonus income that the Indiana family court imposed, and the appeals court affirmed.

> I cannot come up with a way to pay the priority claims that must be paid in order to confirm my Plan and therefore my plan is simply unconformable.

Ashworth Declaration at ¶ 48. There is no evidence that Debtor has filed or dismissed a bankruptcy case previously. Debtor's filing history is not egregious like the debtor in *Leavitt,* who had filed multiple bankruptcy cases that were dismissed for bad faith and then refiled new cases using false social security numbers. Because Debtor has not filed for bankruptcy protection before, this court finds that Creditor has not shown that Debtor has a history of repeated bankruptcy case filings and dismissals that support dismissal of this single bankruptcy case for bad faith based on the second *Leavitt* factor.

C. Creditor has not shown that Debtor only intended to defeat state court litigation.

Next, the court considers the third *Leavitt* factor, that is, whether the debtor intended to invoke the automatic stay for improper purposes, such as for the sole objective of defeating state court litigation. *In re Leavitt,* 171 F.3d at 1225. In *Leavitt,* the Ninth Circuit held this factor was satisfied where the debtor, Leavitt, filed his bankruptcy petition two weeks after a state court judgment was entered against him and filed three additional bankruptcy petitions in repeated efforts to avoid that judgment. *Id.*

In this case, Creditor contends that the Debtor is using the bankruptcy process as a method to defeat his alimony and child support obligations to her. *Bad Faith Motion* at 20.[5] In response, Debtor stated that he was having problems paying all of his debts due to his court-ordered obligations to pay alimony and child support to Creditor, and upon consultation with counsel, determined he might be able to obtain relief in a Chapter 13

[5] Creditor stated in her declaration in support of the Bad Faith Motion that when she told Debtor of her decision to divorce him in 2005, he said to her that "you just go ahead and try to divorce me. You won't get any alimony. I'll never pay you a cent." *Ehrgott Declaration* at 2. As Creditor further stated, Debtor then told her, "I will leave you bankrupt, destitute and in the street." *Id.* Debtor in his declaration denied making such statements, commenting that he and Creditor "had a difficult divorce that is not in question and there were many things that were said in the context of that divorce." *Ashworth Declaration* at 1. None of the things that Debtor allegedly said came to pass because Creditor was paid alimony, which is current based on this record, and there is no evidence in the record showing that she has been left "bankrupt, destitute and in the street."

bankruptcy case by obtaining a discharge of some of the debt owed to Creditor on grounds that it was a disguised tort settlement debt rather than spousal support. *Ashworth Declaration* at 2-3.

In its memorandum decision overruling Debtor's objection to Creditor's claim as a domestic support obligation entitled to unsecured priority status, this court stated:

> While the court follows the binding precedent of the Ninth Circuit in *Sternberg* as it must, the court is of the view that there is a good faith and reasonable argument to apply a different rule in this case based on the circumstances of this case. In the court's view, the facts of this case present circumstances that appear to be different than the one presented in *Sternberg*.

Memorandum Decision at 27. The issue of the proper characterization of Creditor's claim as priority or not is now on appeal. As noted in the court's memorandum decision on Debtor's objection to Creditor's claim, the question of whether or not the claim of the Creditor is a domestic support obligation is a federal question arising under Sections 101(14A) and 507(a)(1) of the Bankruptcy Code, 11 U.S.C., and the court's consideration of Debtor's legal arguments in support of his objection to Creditor's claim indicates that Debtor's bankruptcy case raising the question of Creditor's claim as being entitled to priority status were not frivolous and raised serious and legitimate questions of law that are still being litigated. *See Memorandum Decision* at 12-35.

This court also notes that as of November and December 2010 when Debtor filed his bankruptcy petition, he was unable to meet all of his obligations to pay all of his debt obligations as shown by his bankruptcy schedules showing that as of the petition date, he had only $62,623 in assets, but $367,776 in liabilities. Debtor listed in his schedules about $50,000 in credit card debt, about $18,000 in debt for attorneys' fees and the remaining debt owed to Creditor. *Ashworth Declaration* at ¶ 49; *see also Debtor's Bankruptcy Petition, Schedule F*. The court finds that Creditor has not established the third *Leavitt* factor that Debtor had only intended to defeat state court litigation because Debtor had legitimate reasons to file his Chapter 13 bankruptcy case since he had considerable debts at the time he filed for bankruptcy, he was insolvent based on his

debts owed to other creditors, he had a legitimate reason to file a Chapter 13 bankruptcy case to pay debts from his regular income over the life of a Chapter 13 plan of 60 months and he had non-frivolous arguments under federal bankruptcy law to object in this case to Creditor's claim as a priority support claim.

D. There has been no showing that egregious behavior is present.

The fourth *Leavitt* factor is whether Debtor's behavior is egregious. *In re Leavitt,* 171 F.3d at 1225-1226. The term "egregious" is not specifically defined in the Bankruptcy Code, but is generally understood to include behavior that is "extremely or remarkably bad" or "flagrant" as defined in Garner, *Black's Law Dictionary* at 593 (9th ed. 2009). "Flagrant" acts include those that are "so obviously inconsistent with what is right or proper as to appear to be a flouting of law or morality." *Merriam-Webster Online: Dictionary and Thesaurus* at www.merriam-webster.com/dictionary/flagrant (accessed on March 25, 2014).

Creditor listed the following examples in support of her argument that Debtor has acted egregiously in this bankruptcy case: (1) Debtor's litigation with Creditor "due to his desire to avoid paying child support"; and (2) Debtor's non-disclosure of his bonus income. *Bad Faith Motion* at 22-23. First, Creditor asks this court to consider the highly contested state court litigation between her and Debtor predating this bankruptcy case by six years as evidence of Debtor's egregious behavior in this case. Creditor argues that Debtor sought bankruptcy protection merely because he wanted to avoid paying alimony and child support to her. As discussed above, Debtor's bankruptcy case raising the issue of how to characterize Creditor's claim was not in bad faith because it raised legitimate and nonfrivolous questions of federal bankruptcy law that are still being litigated. *See Ashworth Declaration, supra.* Moreover, as discussed above, Debtor was insolvent at the time the bankruptcy case was filed and had a legitimate need of bankruptcy protection at the time he filed this case. While insolvency is not a prerequisite to a finding of Debtor's good faith, this court finds that Debtor had a legitimate need to file for bankruptcy and that his bankruptcy filing is not egregious behavior on his part.

As to Creditor's second argument that Debtor has engaged in egregious behavior, this court has already found that Debtor was not aware that he had a bonus coming for 2011 and was not paid such a bonus until after the filing of his bankruptcy petition and initial Chapter 13 Plan were filed. *See Ashworth Declaration* at 1-15. Debtor's bonus income is committed to Debtor's Third Amended Chapter 13 Plan. *Id.* at ¶ 27-29; *Third Amended Chapter 13 Plan (Docket No. 156)* at 8. The Third Amended Chapter 13 Plan provides funds representing the amounts of his 2011 bonus and those of future bonuses are committed to the Chapter 13 Plan and includes regular income and tax return reporting requirements. *Id.* Based on these circumstances, the court further finds that Creditor has not shown that Debtor has engaged in egregious behavior on grounds that he failed to disclose his bonus income in this case.

Based on the foregoing, the court concludes that Creditor has not demonstrated that Debtor filed this case in bad faith sufficient to grant the Bad Faith Motion and denies that motion. As to Creditor's Motion to Dismiss, the motion stated, "In the event this Court concludes that Debtor has committed bad faith or an abuse of process, it should exercise its authority to make numerous remedial measures . . . includ[ing] dismissal with prejudice as to all existing debts, disgorgement of estate funds, a re-filing bar, and sanctions." *Motion to Dismiss* at 7. In support of the Motion to Dismiss, Creditor cites language in the Supreme Court's decision in *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 373 (2007), stating: "Under § 1307(c), a bankruptcy court may dismiss a Chapter 13 proceeding or convert it to Chapter 7 "for cause," which courts have "routinely" interpreted to include bad-faith conduct. Because the court finds that Creditor has not demonstrated that Debtor filed this case in bad faith, the court will deny the Motion to Dismiss and the Bad Faith Motion.

However, the court makes no ruling at this time regarding whether or not Debtor will be able to obtain confirmation of a Chapter 13 plan. Debtor has indicated in his pleadings filed in this case that if he is not able to obtain an appellate ruling to reduce Creditor's priority claim on grounds that it is not really support, but a disguised tort

settlement obligation, it is likely that his plan is not feasible. *See Ashworth Declaration* at 14-15. The court has previously determined that based on existing circuit precedent, Creditor's claim is fully entitled to priority status, which determination was affirmed on appeal by the Bankruptcy Appellate Panel. At this time, debtor's appeal of the court's determination that Creditor's claim is entitled to priority status is pending before the Ninth Circuit, and it remains to be seen what would be the outcome of that appeal.

II. CREDITOR'S MOTION FOR ATTORNEYS' FEES SHOULD BE DENIED WITHOUT PREJUDICE AT THIS TIME BECAUSE SHE HAS FAILED TO SHOW BAD FAITH UNDER THE TOTALITY OF THE CIRCUMSTANCES AND HAS NOT SHOWN THAT AN AWARD SHOULD BE MADE UNDER THE CIRCUMSTANCES UNDER TENNESSEE LAW.

In her motion for attorneys' fees, Creditor argues that Debtor should pay her attorneys' fees to enforce her obligation for support against Debtor under Tennessee law and for opposing Debtor's bankruptcy case filed in bad faith. *Attorneys' Fees Motion* at 1-11. Creditor argues that the court may award her attorneys' fees against Debtor for "act[ing] in bad faith, vexatiously, wantonly, and for oppressive reasons." *Id.* at 6-7 and n. 18, *citing inter alia,* 11 U.S.C. § 105(a); Fed. R. Bankr. P. 9011; and *Chambers v. NASCO, Inc.,* 501 U.S. 32, 45-46 (1991). That is, according to Creditor, the court in finding that Debtor has acted in bad faith in filing his Chapter 13 petition and plan should also impose sanctions for this conduct pursuant to its inherent authority and under Rule 9011. *Id.* Because, as is discussed above, the court finds that Creditor has not shown that Debtor has acted in bad faith, the court declines to impose sanctions against Debtor and award attorneys' fees to Creditor under its inherent authority or under Rule 9011 and therefore, the motion for attorneys' fees on these grounds should be denied.

Alternatively, Creditor argues that the court should award her attorneys' fees incurred in enforcing her rights to spousal support under Section 36-5-103(c) of the Tennessee Code, which provides that:

> The plaintiff spouse may recover from the defendant spouse and the spouse or other person to whom the custody of the child, or children, is awarded may recover from the other spouse **reasonable attorney fees incurred in enforcing any decree for alimony and/or child support**, or in regard to any

> suit or action concerning the adjudication of the custody or the change of custody of any child, or children, of the parties, both upon the original divorce or at any subsequent hearing, which fees may be fixed and allowed by the court, before whom such action or proceeding is pending, in the discretion of the court.

Tennessee Code, § 36-5-103(c)(emphasis added); *see also, Attorneys' Fees Motion* at 4.

Debtor opposes any award of attorneys' fees against him in favor of Creditor under this provision on grounds that the statute requires a showing that the award would protect the interests of the affected children, such an award would impermissibly intrude into the field of domestic relations so that the court should abstain in favor of the state court having primary jurisdiction over domestic relations matters and the requested award is excessive and disproportionate to the issues addressed. *Debtor's Opposition to Attorneys' Fees Motion* at 6-10.

The court does not agree with Debtor's first argument that Creditor should show that such an award would protect the interests of the affected children because while many of the reported Tennessee cases involving Section 36-5-103(c) deal with child custody proceedings, the plain language of Section 36-5-103(c) authorizes a spouse to recover reasonable attorneys' fees from the other spouse to enforce any decree for alimony without the need to show that such award relates to the children or any child custody dispute. *Id.* at 6-8; Tennessee Code, § 36-5-103(c). The wording of the statute that fees may be awarded to enforce any decree for alimony, or child support, or in regards to child custody modification is in the disinjunctive, and is not dependent on a relationship to child custody modification as argued by Debtor, which indicates that the requesting spouse is authorized to seek attorneys' fees under the statute solely to enforce a decree for alimony. *Id.*

The court also does not agree with Debtor's second argument that the court should abstain in favor of the state court because the court's adjudication would impermissibly intrude into domestic relations which is primarily a state law matter. *See Debtor's Opposition to Attorneys' Fees Motion* at 8-10, *citing inter alia, Colbert v. Colbert*

(In re Colbert), 185 B.R. 247 (Bankr. M.D. Tenn. 1995). Citing *Travelers Casualty & Surety Co. of America v. Pacific Gas & Electric Co.,* 549 U.S. 443 (2007), Creditor argues that the court may rely upon state law to award attorneys' fees with respect to the proceedings in this bankruptcy case arising from Creditor's actions to enforce her support claim. *Attorneys' Fees Motion* at 4-6, *citing inter alia, Busch v. Hancock (In re Busch),* 369 B.R. 614 (10th Cir. BAP 2007).

In *Travelers,* the Supreme Court observed that "[u]nder the American Rule, 'the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser.'" 549 U.S. at 448 (citations omitted). However, as the Supreme Court then noted that "[t]his default rule can, of course, be overcome by statute [and] . . . by an 'enforceable contract' allocating attorney's fees." *Id.* (citations omitted). The Supreme Court applied these principles to hold that the Bankruptcy Code does not otherwise disallow contract-based claims for attorneys' fees based solely on the fact that the fees were incurred in litigating issues of bankruptcy law, which was the rule in the Ninth Circuit. *Id.* at 448-449, *abrogating In re Fobian,* 951 F.2d 1149 (9th Cir. 1991). In so holding, the Supreme Court had also observed that the "basic federal rule in bankruptcy" is that "state law governs the substance of claims," that "[p]roperty interests are created and defined by state law," and that "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Id.* at 450-451, *citing inter alia, Butner v. United States,* 440 U.S. 48, 55, 57 (1979)(other citations and internal quotation marks omitted). Thus, the Supreme Court in *Travelers* held that a creditor was entitled to claim attorneys' fees based on a contract with the debtor authorizing such fees, which fees had been incurred in litigating bankruptcy law issues. *Id.* at 445-456 (citations omitted).

Following *Travelers,* the Tenth Circuit Bankruptcy Appellate Panel (BAP) in *In re Busch* held that the bankruptcy court properly awarded attorneys' fees to a creditor, who was the former spouse of the debtor, incurred in connection with debtor's bankruptcy

cases based on a Utah state statute authorizing an award of such fees for enforcement of obligations under a divorce decree. *In re Busch,* 369 B.R. at 623-627 (citations omitted). The Tenth Circuit BAP in *Busch* expressly declined to follow pre-*Travelers* case law, such as *In re Colbert, supra,* that had refused to award attorneys' fees to creditors prevailing in dischargeability actions under 11 U.S.C. § 523 for lack of a specific provision in the Bankruptcy Code authorizing such fees because such case law is inconsistent with the analysis in *Travelers* that the courts should apply nonbankruptcy statutory law which authorizes a fee shifting exception to the American Rule. 369 B.R. at 625-627 (citations omitted). The court agrees with Creditor that the Tenth Circuit BAP's analysis based on *Travelers* is correct and that the court should not follow pre-*Travelers* case law, such as *In re Colbert* to hold that Creditor may not seek attorneys' fees under an express fee shifting statute, Tennessee Code, § 36-5-103(c), for enforcing her support claims in this court. Also, as argued by Creditor, the "domestic relations exception" to federal court jurisdiction is not a bar to the court's determination of her motion for an award of attorneys' fees under Tennessee Code, § 36-5-103(c), because the Ninth Circuit has held that the exception is limited to cases under diversity jurisdiction pursuant to 28 U.S.C. § 1332, which is not the case here since the court has jurisdiction over this matter under the bankruptcy jurisdiction statute of 28 U.S.C. § 1334. *Atwood v. Fort Peck Tribal Court Assiniboine,* 513 F.3d 945, 946-947 (9th Cir. 2008), *citing inter alia, Ankenbrandt v. Richards,* 504 U.S. 689 (1992); *contra, In re Busch,* 369 B.R. at 627-631 (Berger, J., concurring and dissenting). Moreover, as further argued by Creditor, in this case, it may be more appropriate for this court rather than a state family law court to determine such application because the express terms of Section 36-5-103(c) apply as Creditor had to litigate in this court the enforcement of her claim for alimony or spousal support on Debtor's objection to the priority status of her claim. Tennessee Code, § 36-5-103(c), *cited in Reply to Debtor's Opposition to Attorneys' Fees Motion* at 7.

As Section 36-5-103(c) provides, the determination of an award of attorneys' fees to the requesting spouse is committed to the sound discretion of the trial court. *Deas v.*

Deas, 774 S.W.2d 167, 170 (Tenn. 1989)("As provided in [Section 36-5-103(c)], the entire matter is subject to the discretion of the trial judge. If the trial judge deems that fees are inappropriate or that awarding them would be inequitable or unnecessary, the court may decree accordingly."); *Richardson v. Richardson,* 969 S.W.2d 931, 936 (Tenn. Ct. App. 1997)(award of attorneys' fees under Tenn. Code, § 36-5-103(c) "is in the sound discretion of the trial court")(citation omitted); *Shofner v. Shofner,* 181 S.W.3d 703, 719 (Tenn. Ct. App. 2005), *citing, Holt v. Holt,* 995 S.W.2d 68, 78 (Tenn. 1999) and *Archer v. Archer,* 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). The Tennessee Court of Appeals in *Shofner v. Shofner* stated: "In determining whether an award for attorneys' fees is warranted, we should consider, among other factors, the ability of the requesting party to pay his or her own attorney's fees, the requesting party's success on appeal, and whether the requesting party has been acting in good faith." 181 S.W.3d at 719 (citation omitted); *see also, Archer v. Archer,* 907 S.W.2d at 418 (exercising discretion not to award attorneys' fees under Section 36-5-103(c) in proceeding to enforce alimony and child support obligations, "[g]iven the issues and results of [the] litigation as well as the financial position of the parties"); *Disher v. Disher,* 2003 WL 23100334 at *6 (Tenn. Ct. App. 2003), *citing Folk v. Folk,* 357 S.W.2d 828, 829 (Tenn. 1962)(in considering whether to award attorneys' fees, the court should also consider "any other equitable factor that need be considered").

Creditor argues that "Tennessee courts require no showing that the prevailing support creditor is financially unable to pay his or her attorneys' fees." *Attorneys' Fees Motion* at 4 and n. 4, *citing, Gaddy v. Gaddy,* 861 S.W.2d 236 (Tenn. Ct. App. 1992). This is apparently the reason why Creditor submitted little, if any, evidence regarding her ability to pay the fees of her attorneys and her financial condition; the only evidence offered by Creditor regarding her finances is Exhibit 7, an unsigned child support obligation worksheet for the State of Indiana from 2010, which does not contain much meaningful information regarding her ability or lack of ability to pay her own attorneys' fees or her financial condition. No information is provided regarding Creditor's current

assets and liabilities and income and expenses, including tax returns. Debtor argues that "[a]s the Court has effectively no information whatsoever bearing on the financial circumstances of Movants,[6] or any one of them, or the source of the payment thus far of the attorney's fees and costs they have incurred to date of the motion, weighing all of the necessary factors will require an evidentiary hearing, prior to which Debtor should be accorded the opportunity to conduct discovery into Movants' finances." *Debtor's Opposition to Attorneys' Fees Motion* at 7. In her reply to Debtor's opposition, Creditor argues that her ability to pay should not be the controlling consideration in whether to award her fees and that "[t]o the extent Ehrgott's (less than prosperous) finances play any role, it should be minimal." *Reply to Debtor's Opposition to Attorneys' Fees Motion* at 5-6, *citing inter alia, Sherrod v. Wix,* 849 S.W.2d 780, 785 (Tenn. Ct. App. 1992).[7] As Creditor also argues, this is appropriate "where the cost of vindicating th[e obligee's] right produces an inequitable reduction in the actual amount the [obligee] receives." *Id., citing Richardson v. Richardson,* 969 S.W.2d at 936. However, Creditor in her reply to Debtor's opposition does not offer any other evidence regarding her lack of ability to pay her attorneys' fees or her financial condition, though she refers to matters outside the record of these motions (i.e., trial exhibits for the contested matter of Debtor's objection to her claim filed in this case). *Id.* at 4-5 (arguing "Debtor has nothing but theories that are contradicted by the facts he already has" and "This Court can rule notwithstanding the

[6] According to the Attorneys' Fees Motion, "Movants" not only include Creditor, but also her family law attorneys, Lockridge Law Firm and Andrew Lewis. *Attorneys' Fees Motion* at 1, 13. This is apparent from the representation by Debtor's counsel, Reid & Hellyer, that it is representing "Creditors Kathryn Ehrgott, Lockridge Law Firm & Andrew Lewis, Esq." *Id.*

[7] Creditor's assertion in the Attorneys' Fees Motion that "Tennessee courts require no showing that the prevailing support creditor is financially unable to pay his or her attorneys' fees" is somewhat of an overstatement because the court's analysis of Tennessee case law as discussed herein shows that the financial positions of the parties is normally a factor in whether discretion should be exercised to award fees. *See, e.g., Shofner v. Shofner,* 181 S.W.3d at 719 and *Archer v. Archer,* 907 S.W.2d at 419; *see also, Attorneys' Fees Motion* at 4 and n. 4, *citing, Gaddy v. Gaddy,* 861 S.W.2d 236 (Tenn. Ct. App. 1992). If anything, *Gaddy* stands for the proposition that a trial court in exercising its discretion to award fees may determine that a showing of financial need is not a prerequisite for a fee award under the circumstances and that the ability or inability to pay fees should not be the controlling factor. *Gaddy v. Gaddy,* 861 S.W.2d at 241; *Sherrod v. Wix,* 849 S.W.2d at 785.

information Debtor claims he needs more time to obtain (without explanation for his failure to do so since the Motion was filed on January 4, 2013).").

In order for the court to exercise its sound discretion whether or not to award Creditor reasonable attorneys' fees in enforcing her support order in these bankruptcy proceedings pursuant to Tennessee Code, § 36-5-103(c), the court will need to consider whether an award of fees is appropriate or not and whether awarding them would be inequitable or unnecessary as the Tennessee Supreme Court stated in *Deas v. Deas*, and, among other factors: (1) the ability of Creditor as the requesting party to pay her own attorneys' fees; (2) her success in the litigation; (3) whether she has been acting in good faith as the Tennessee Court of Appeal stated in *Shofner v. Shofner;* (4) the issues and the results of the litigation as well as the financial position of the parties as the Tennessee Court of Appeal stated in *Archer v. Archer*; and (5) any other equitable factor the court should consider as the Tennessee Court of Appeal stated in *Disher v. Disher*. *See also, Richardson v. Richardson,* 969 S.W.2d at 936 ("There is no exhaustive list of the factors a trial court should take into account in exercising its discretion on the question of attorney fees."). The court does not grant Creditor's motion for attorneys' fees at this time because she has not provided sufficient evidence regarding her ability or inability to pay her own attorneys' fees or her financial position, and is apparently unwilling to do so, and thus, the court denies her motion for attorneys' fees without prejudice and with leave for her to amend her motion to provide sufficient evidence regarding her ability or inability to pay her own attorneys' fees and her financial position. If Creditor files a renewed motion for attorneys' fees and Debtor opposes such a motion (i.e., on reasonableness grounds since Tennessee Code, § 36-5-103(c) only authorizes an award of reasonable attorneys' fees), the court will deem such motion as a contested matter pursuant to Fed. R. Bankr. P. 9014 and will set a schedule of pretrial and trial proceedings, including discovery.

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This memorandum decision constitutes the court's findings of fact and conclusions of law concerning Creditor's Bad Faith, Dismissal and Attorneys' Fees Motions. A separate order setting forth the court's rulings on the motions is being filed concurrently herewith.

IT IS SO ORDERED.

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Date: March 25, 2014

Robert Kwan
United States Bankruptcy Judge