UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re: Marcos Ramirez, Debtor(s).	Case No.: 2:15-bk-27027-NB CHAPTER 13 **MEMORANDUM DECISION DENYING MOTION TO AMEND OR VACATE DISMISSAL ORDER** [No hearing required]

I. BACKGROUND

On November 5, 2015, the debtor commenced this case by filing his chapter 13 petition. His chapter 13 plan proposed to pay only 1% to his unsecured creditors (dkt. 3), later amended to 0.92% and then 2.8% (dkt. 13, p.2; dkt. 32, p. 2), while "stripping off" a junior lien and keeping his valuable home.

These things by themselves are not necessarily impermissible, if the debtor had proposed his plan in good faith and otherwise met the requirements for confirmation (11 U.S.C. § 1325), and had appeared in proper prosecution of his bankruptcy case. But he did not.

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According to the debtor's appraisal (dkt. 20, Ex.E, p. 2 of 36), he purchased the home in 2005 for $1.45 million and it has a pool, three fireplaces, four bedrooms, four bathrooms, and a three-car garage. It is understandable that he would want to retain such a nice home, even though he has not repaid the loans that are secured by it. But the Bankruptcy Code only permits him to do so if, among other things, he has acted in good faith. In assessing good faith this Bankruptcy Court considers the totality of the circumstances, including whether the debtor "misrepresented facts, unfairly manipulated the bankruptcy Code or otherwise proposed the plan in an inequitable manner . . . and whether [his] behavior was egregious." Dkt. 62, p. 5:13–18 (citing *In re Welsh*, 711 F.3d 1120, 1132 (9th Cir. 2013)).

The debtor does not dispute that he was required to devote all of his projected disposable income to repaying his creditors. In the six months before filing his bankruptcy petition he earned gross income averaging **between $18,000 and over $22,000 per month** (the parties disagree about how this is calculated, although the lower figure appears to ignore the income of the debtor's wife – *see, e.g.,* dkt. 52; 51; 50 pp. 1:25 & 2:28; 45 pp. 5-6), and in the preceding year (2014) his Statement Of Financial Affairs ("SOFA" dkt. 1 at PDF p. 24) reveals that he earned an average of **$26,000 per month** ($312,000/yr = $26,000/mo.). Yet his proposed chapter 13 plans are predicated on projected gross income of only **$9,500 or even $8,500 per month**. *See, e.g.,* dkt. 62, p. 9:28 ($9,500/mo.); dkt. 31, PDF p. 13 (same); dkt. 1, at PDF p. 35 ($8,500/mo.).

The burden was on the debtor to show "exceptional" circumstances that would warrant this drastic decrease to approximately one half or even one third of his recent historical income. *Hamilton v. Lanning*, 560 U.S. 550, 130 S.Ct. 2464, 2471 & 2478 (2010). He failed to come anywhere close to meeting that burden.

Hearings were held on March 10, April 7, and June 2, 2016 on whether to confirm the debtor's proposed chapter 13 plan. This Bankruptcy Court concluded, based on extensive arguments and evidence, that the debtor had not proposed his plan

in good faith, and to the contrary he had failed to appear in proper prosecution of this case. This Bankruptcy Court was not quite prepared to find that such failure was "willful," instead giving the debtor the benefit of the doubt as explained below. An order denying confirmation and dismissing this case was entered shortly thereafter (dkt. 58).

On June 13, 2016 the debtor filed his motion to amend and vacate the dismissal order (dkt. 62) ("Reconsideration Motion"). For the reasons set forth herein, and as set forth on the record at the confirmation hearing, the Reconsideration Motion will be denied.

II. STANDARD FOR RECONSIDERATION

Reconsideration is the common term applied to motions to amend orders or judgments under Federal Rule of Bankruptcy Procedure 9023 (largely incorporating Rule 59, Fed. R. Civ. P.) or 9024 (largely incorporating Rule 60, Fed. R. Civ. P.). As the debtor concedes, "reconsideration should not be granted, absent highly unusual circumstances[.]" Reconsideration Motion, p. 2:11–12. The debtor requests reconsideration pursuant to Rules 9023. (To the extent, if any, that the debtor also requests reconsideration pursuant to Rule 9024, that makes no difference to the analysis set forth below.)

"[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the [trial] court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Kona Enter., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). "A reconsideration motion should not give a litigant a 'second bite at the apple.'" *In re Sandoval*, 2005 WL 6960187, at *11 (9th Cir. BAP Aug. 3, 2005) (citations omitted). "A motion brought under Rule 59(e) is not a procedural folly to be filed by a losing party who simply disagrees with the decision; otherwise, the Court would be inundated with motions from dissatisfied litigants." *In re Standard Foundry Prods., Inc.*, 208 B.R. 164, 166 (Bankr. N.D. Ill. 1997).

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In this case the debtor has not presented newly discovered evidence, or otherwise satisfied the above standards. He is merely dissatisfied with this Bankruptcy Court's ruling.

Alternatively, even if this Bankruptcy Court were to review the matter *de novo*, it would reach the same result. The debtor simply did not act in good faith, and instead he failed to appear in proper prosecution of this case.

III. PROCEDURAL DEFICIENCY

The posted procedures of the undersigned Bankruptcy Judge are designed to save the possible expense of responding to meritless motions for reconsideration by providing that the undersigned Bankruptcy Judge, not the party seeking reconsideration, will determine if the motion warrants a hearing. Those posted procedures state:

> **Reconsideration motions.** *Do not* self-calendar or request a specific hearing date. Call chambers to advise that the motion has been filed. The judge reviews these motions to determine the necessity and timing of a hearing. [Judge Bason's Procedures [as then applicable], at p. 2 (emphasis in original), posted at www.cacb.uscourts.gov]

In violation of this procedure, counsel for the debtor self-calendared the Reconsideration Motion. That violation is not a ground on which this Memorandum Decision denies the Reconsideration Motion, but counsel is strongly encouraged not to continue disregarding this Court's procedures and orders, or making frivolous arguments as he has done in this matter (and in other cases). *See In re Abdelahad* (Case No. 2:15-bk-28589-NB), dkt. 99 (order imposing $200 sanctions for repeatedly disregarding court orders and procedures), *appeal pending* (*id.,* dkt. 105, 108, 110).

To remedy counsel's unauthorized self-calendaring of the Reconsideration Motion, this Bankruptcy Court issued an order (dkt. 64) taking the matter off calendar and staying any further briefing. Having reviewed the Reconsideration Motion and the other filed documents and records in this case, this Bankruptcy Court now issues this memorandum decision.

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IV. THE DEBTOR'S ARGUMENTS ARE UNPERSUASIVE

A. The debtor misrepresents the holding of *Hamilton v. Lanning*

In a chapter 13 case like this one, a debtor must devote all of his or her "projected disposable income" for many months toward paying unsecured creditors. *See* 11 U.S.C. § 1325(b)(1)(B). In projecting future disposable income, the mandatory starting point is "current" monthly income, which is statutorily defined to mean the average of all monthly income received for the full six months preceding the filing of the bankruptcy petition. 11 U.S.C. § 101(10A)(A)(i). Once the current monthly income is calculated, certain deductions may be taken, and the result is the debtor's current "disposable" monthly income. As the debtor concedes, the calculation of the "projected" future disposable income is governed by *Lanning*, 560 U.S. 505 (2010).

The debtor, however, disregards the portions of *Lanning* that require him (and this Court) to use the six month prepetition income to project future disposable income except in "exceptional" circumstances, such as where that approach "would produce senseless results[.]" *Lanning*, 560 U.S. 505, at 520. Adopting the Tenth Circuit's reasoning, the U.S. Supreme Court explained:

> [A] court taking the forward-looking approach should begin by calculating disposable income, and in most cases, nothing more is required. It is only in unusual cases that a court *may* go further and take into account other known or virtually certain information about the debtor's future income or expenses. [*Lanning*, 560 U.S. 505, 519 (emphasis added)].

"[E]xceptional cases [are those] where significant changes in a debtor's financial circumstances are known or virtually certain," and only in these exceptional cases does "a bankruptcy court ha[ve] discretion to make an appropriate adjustment." *Lanning*, 560 U.S. 505, at 513 (emphasis added).

The debtor implies that *Lanning* did not really mean that circumstances must be "exceptional" because it only used that word twice. Dkt. 62, p.7:21. If that is the debtor's argument it is frivolous. The holding is still the holding, even if it is only stated once, let alone twice.

The debtor argues in the alternative that "*every* self-employed debtor" can show "exceptional" circumstances simply by reporting decreased income between the petition date and the confirmation date. Dkt. 62, p. 8:24-25 *et seq.* (emphasis in original). According to the debtor, this Bankruptcy Court lacks any discretion to conclude otherwise, and must accept his projected drastic reduction in future income absent "clear and convincing" evidence to the contrary (dkt. 62, p. 9:26), because *Lanning* "plainly" did not apply an "abuse of discretion standard." Dkt. 62, p. 9:10-13.

The debtor simply makes up these presumptions in his favor. He ignores *Lanning*'s own words, quoted above, that only in exceptional circumstances does "a bankruptcy court ha[ve] discretion to make an appropriate adjustment," and its further statement that "the Court declines to infer … that Congress intended to eliminate, *sub silentio*, the discretion that courts previously exercised to account for known or virtually certain changes." *Lanning*, 560 U.S. 505, at 507, 513 (emphasis added). As the Ninth Circuit has stated, *Lanning* "instruct[s] courts to start with the presumption that the mechanically calculated figure is correct" and "to use their discretion" to take into account changes in future income and expenses "but only if future changes in [the debtor's] financial circumstances [are] 'known or virtually certain' …." *In re Scholz*, 699 F.3d 1167, 1172 (9th Cir. 2012) (emphasis added). The debtor's proposed standard would turn *Lanning* on its head, and has no basis in reality.

In sum, the burden was on the debtor to show that his future projected income was "known or virtually certain" to be drastically lower than his historical six month prepetition income. Only then would this Bankruptcy Court even have discretion to depart from the presumption that such mechanically calculated figure is correct. At that point the debtor still would have the burden to show a sufficient basis for whatever income he projected, and more generally to propose a chapter 13 plan in good faith and meet the other requirements for confirmation and prosecuting his case.

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B. The debtor's lack of good faith, and failure to appear in proper prosecution of the case

The debtor argues that this Bankruptcy Court cannot possibly find that he acted without good faith because it cannot "conclude that the debtor has intentionally earned less money post-petition in the absence of clear and convincing independent evidence of slacking off." Reconsideration Motion, p. 9:25-26. This is wrong in several ways.

First, the debtor reverses the burden of proof. The debtor, as plan proponent, bears the burden on issues related to confirmation, and as described above he has to show "exceptional circumstances" – not just a failure to generate income, but a reasonable explanation supported by actual evidence of why that income has decreased and why that situation is "exceptional."

Second, the debtor once again simply fabricates the heightened "clear and convincing" evidence standard. He cites no authority.

Third, the drastic contrast between the debtor's historical income and his projection of $9,500 per month or even $8,500 per month of future income is itself evidence of "slacking off." As noted above, that is a reduction to approximately **one half** or even **one third** of his recent historical income. It is frivolous for the debtor to argue that this is not evidence of slacking off.

The debtor also argues that, in his view, "[s]elling real estate is not like selling, say, bibles, where in general the more time you spend door knocking, the more you sell." Reconsideration Motion, p. 11:4-6. That is nonsense. He offers no independent support for this view, just his own assertion. In the experience of the undersigned Bankruptcy Judge, based on thousands of cases involving the sales of real property – and declarations and live testimony of many real estate agents, appraisers, and similar professionals – the business of selling real estate is very much like other sales businesses: reduced effort typically results in reduced sales and commissions. The debtor's unsupported argument is, again, frivolous.

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The debtor contends that seasonal trends and variations account for the difference in gross income during the lookback period and the postpetition period. *See* Reconsideration Motion, pp. 5:23-7:6. Although it is true that the real estate market has seasonal fluctuations, that obviously cuts both ways: the market fluctuates seasonally both up and down, so if the debtor's earnings in the months immediately following the petition date were reduced then he could expect offsetting increased income in the following months. The debtor cannot simply take the slowest months and extrapolate his projected future income from that artificially reduced starting point, and his attempt to do so is, once again, frivolous.[1]

The debtor asserts that this Court erred in considering his lavish prepetition spending: he claims that this "only begins to make sense if the debtor possessed second sight and knew exactly how much money he would make for the next twelve months." Reconsideration Motion, p. 11:16–18. The debtor (perhaps intentionally) misses the point (which this Bankruptcy Court carefully explained at the hearing on June 2, 2016).

His lavish prepetition expenditures show either (a) that he himself projected that his high average monthly income would continue or, alternatively, (b) that he was acting in bad faith by dissipating assets just before filing his bankruptcy petition. *See, e.g.,* dkt. 52, p.3:23-4:15 (admitting $10,500 spent on a cruise and a trip to Las Vegas, $10,800 expended on a non-exempt motorcycle, and gifts of over $2,000 to his wife and mother); dkt. 50, p. 5:8-17 & Ex.A-D; dkt. 37, pp. 2:12-3:2; dkt. 36, pp. 2:16-3:4. Thus the debtor's lavish prepetition expenditures only reinforce his lack of good faith in projecting, for purposes of repaying his creditors, that he will only earn approximately one half or even one third of his recent historical income. It is entirely appropriate to consider such

[1] The debtor might have argued, if he had sufficient supporting evidence of actual market fluctuations, that he would have temporary cash flow problems for the first few months of this case during the slow season, and on that basis he could have proposed a "step-up" plan that increased monthly payments later on. But he has never suggested anything like that, let alone supported it with actual evidence. In addition, as this Bankruptcy Court pointed out at the confirmation hearings, chapter 13 is only available to individuals with "regular" income (11 U.S.C. § 109(e)), so the extreme fluctuations alleged by the debtor might disqualify him from chapter 13.

prepetition conduct. *See Lanning*, 560 U.S. 505, at 522 ("[A] debtor's prepetition conduct may inform the court's good-faith inquiry.") (citation omitted).[2]

All of this has been explained to the debtor and his counsel before. The debtor's entire Reconsideration Motion is frivolous and a waste of time and (the debtor's/bankruptcy estate's) money.

Despite numerous opportunities to address these issues and propose a chapter 13 plan in good faith, the debtor was intransigent. His counsel argued that by simply showing up at hearings the debtor proved that he had been appearing in proper prosecution of this case. Again, this is frivolous. He had over seven months in which to come into compliance with his obligations under the Bankruptcy Code and propose a plan in good faith, but he refused to do so. That is not appearing in "proper" prosecution of this case, and the only reason that this Bankruptcy Court did not dismiss this case with a 180 day bar against being a debtor in bankruptcy is that, giving the debtor the benefit of the doubt, this Bankruptcy Court was not quite prepared to find that such failure was "willful" (11 U.S.C. § 109(g)(1)). As stated at the hearing on June 2, 2016, perhaps the debtor had only been attempting to present a tough negotiating stance. Perhaps he would be persuaded by the dismissal of this case to proceed in future in a manner more in keeping with good faith, either outside of bankruptcy or in another bankruptcy case. It remains to be seen whether he will do so.

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[2] In fact, the debtor's conduct in this case may be considered by the Bankruptcy Judge presiding over the debtor's latest bankruptcy case (Case No. 2:16-bk-19317-WB). To hold otherwise would let the debtor artificially depress his income for several months by "slacking off," and then start his next case with a presumption of that artificially reduced income (based on the six month lookback period in that case) without any ability of the Bankruptcy Court to take that artificial reduction in income into account.

V. CONCLUSION

For the foregoing reasons, the debtor's Reconsideration Motion will be DENIED by a separate order.

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Date: August 18, 2016

Neil W. Bason
United States Bankruptcy Judge