UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Ronald H. Sargis
Chief Bankruptcy Judge
Sacramento, California

July 6, 2017, at 10:30 a.m.

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1. **16-23600-E-7** **TODD SHAW**
DNL-7 **Cindy Lee Hill**

MOTION TO COMPROMISE CONTROVERSY / APPROVE SETTLEMENT AGREEMENT WITH GREG HAY
6-15-17 [100]

Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Below is the court's tentative ruling, rendered on the assumption that there will be no opposition to the motion. If there is opposition presented, the court will consider the opposition and whether further hearing is proper pursuant to Local Bankruptcy Rule 9014-1(f)(2)(C).

Local Rule 9014-1(f)(2) Motion—Hearing Required.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, creditors, parties requesting special notice, and Office of the United States Trustee on June 15, 2017. By the court's calculation, 21 days' notice was provided. 21 days' notice is required. FED. R. BANKR. P. 2002(a)(3) (twenty-one-day notice).

The Motion for Approval of Compromise was properly set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(2). Debtor, creditors, the Trustee, the U.S. Trustee, and any other parties in interest were not required to file a written response or opposition to the motion. If any of these potential respondents appear at the hearing and offer opposition to the motion, the court will set a briefing schedule and a final hearing, unless there is no need to develop the record further. If no opposition is offered at the hearing, the court will take up the merits of the motion. At the hearing, ----------.

The Motion for Approval of Compromise is granted.

Alan Fukushima, the Trustee ("Movant"), requests that the court approve a compromise and settle competing claims and defenses with Greg Hay ("Settlor"). The claim and dispute to be resolved by the proposed settlement is the bankruptcy estate's interest in a manufactured home generally identified as

a 2001 Fleetwood 6522L ("Fleetwood") sold by Todd Shaw ("Debtor") to Settlor in 2013. Movant asserts that Debtor sold the Fleetwood to Settlor in 2013 for $24,000.00, payable with $5,000.00 up-front and the balance due over time; however, Settlor has only paid the $5,000.00 down payment and has failed to make any other payments, despite retaining possession of the Fleetwood.

Movant and Settlor have resolved this claim and dispute, subject to approval by the court on the following terms and conditions summarized by the court (the full terms of the Settlement are set forth in the Settlement Agreement filed as Exhibit A in support of the Motion, Dckt. 103):

A. Settlor agrees to pay Movant $19,000.00 within fifteen calendar days of entry of the court's order approving this Motion.

B. Upon entry of the court's order approving this Motion and upon Movant's receipt of the $19,000.00 from Settlor within fifteen calendar days of entry of the court's order approving this Motion, Movant shall forever release and discharge Settlor from all actions, obligations, costs, expenses, attorney fees, damages, losses, claims, debts, liabilities and demands with respect to the Fleetwood.

C. Movant makes no representations or warranties regarding the condition of the Fleetwood, and Settlor agrees to take the Fleetwood in "as is" and "where is" condition.

D. Settlor agrees to take the Fleetwood subject to any and all claims of lien, encumbrance, and interest, including any unpaid fees and taxes.

E. Settlor will be solely responsible for any and all transfer taxes, escrow fees, and associated closing costs.

DISCUSSION

Approval of a compromise is within the discretion of the court. *U.S. v. Alaska Nat'l Bank of the North (In re Walsh Constr.)*, 669 F.2d 1325, 1328 (9th Cir. 1982). When a motion to approve compromise is presented to the court, the court must make its independent determination that the settlement is appropriate. *Protective Comm. for Indep. S'holders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424–25 (1968). In evaluating the acceptability of a compromise, the court evaluates four factors:

1. The probability of success in the litigation;

2. Any difficulties expected in collection;

3. The complexity of the litigation involved and the expense, inconvenience, and delay necessarily attending it; and

4. The paramount interest of the creditors and a proper deference to their reasonable views.

In re A & C Props., 784 F.2d 1377, 1381 (9th Cir. 1986); *see also In re Woodson*, 839 F.2d 610, 620 (9th Cir. 1988).

Probability of Success

Movant argues that although Movant could contend that the bankruptcy estate is the true owner of the Fleetwood and seek to obtain a determination regarding the same, the success of seeking to evict Settlor from the Fleetwood and then placing the Fleetwood on the open market is unknown. Dckt. 100.

Difficulties in Collection

Movant argues that collection from litigation may be made difficult by potential offsets to Settlor on account of Settlor's payment of space rent, property taxes, and approximately $5,000.00 in expenses improving the Fleetwood over the last three years. Dckt. 100.

Expense, Inconvenience, and Delay of Continued Litigation

Movant argues that this Agreement avoids the expense and delay of litigation. Movant argues that although the value of the Fleetwood may have increased since 2013 to approximately $40,000.00 or more, this additional value could be consumed by the costs of litigation and potential offsets to Settlor on account of Settlor's payment of space rent, property taxes, and approximately $5,000.00 in expenses improving the Fleetwood over the last three years. Dckt. 100.

Paramount Interest of Creditors

Movant argues that this Agreement is in the best interest of the bankruptcy estate. Movant argues that this Agreement ensures a recovery to the bankruptcy estate that equals the full amount due to Debtor under the 2013 sales agreement of the Fleetwood without unnecessary risks, costs, or delay. Dckt. 100.

Consideration of Additional Offers

At the hearing, the court announced the proposed settlement and requested that any other parties interested in making an offer to Movant to purchase or prosecute the property, claims, or interests of the estate present such offers in open court. At the hearing ----------.

Upon weighing the factors outlined in *A & C Props* and *Woodson*, the court determines that the compromise is in the best interest of the creditors and the Estate because it ensures a recovery to the Estate equal to the amount originally due to Debtor according to Debtor and Settlor's 2013 sales agreement of the Fleetwood. The Motion is granted.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion to Approve Compromise filed by Alan Fukushima, the Trustee ("Movant"), having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the Motion for Approval of Compromise between Movant and Greg Hay ("Settlor") is granted, and the respective rights and interests of the parties are settled on the terms set forth in the executed Settlement Agreement filed as Exhibit A in support of the Motion (Dckt. 103).

2. **15-25641-E-7** **FRANK DAVIS** **MOTION TO RECONVERT CASE TO**
DAO-2 **Dale Orthner** **CHAPTER 13**
5-21-17 [64]

No Tentative Ruling: Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Chapter 7 Trustee, creditors, and Office of the United States Trustee on May 21, 2017. By the court's calculation, 46 days' notice was provided. 28 days' notice is required.

The Motion to Convert has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006).

The Motion to Convert the Chapter 7 Bankruptcy Case to a Case under Chapter 13 is xxxxxxxxxxxxxxxxxxxxxx.

Frank Davis ("Debtor") seeks to convert this case, initially filed under Chapter 13 and subsequently converted to Chapter 7, back to a case under Chapter 13. The Bankruptcy Code authorizes a one-time, near-absolute right of conversion from Chapter 7 to Chapter 13. 11 U.S.C. § 706(a); *see also Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007). However, the availability of this one-time, near-absolute right of conversion requires that "the case has not been converted under section 1112, 1208, or 1307 of this title." 11 U.S.C. § 706(a).

Debtor asserts that the case should be reconverted to a case under Chapter 13 as Debtor now wishes and finds it feasible to pay off his mortgage due to certain changes in circumstance:

A. Change of counsel ordered by the court on February 28, 2017. Dckt. 54.

B. A newly claimed homestead exemption of $175,000 for a previously unmentioned "physical disability" under C.C.P. § 704.730.

C. Contributions by Debtor's brother and niece in the amounts of $1,000.00 and $300.00, respectively. His brother resides in the home, while his niece does not.

PREVIOUS CONVERSION

Debtor initially filed this case under Chapter 13 on July 15, 2015. Dckt. 1. A Plan was confirmed on November 9, 2015, by the court wherein Debtor agreed to either refinance or sell his house within eighteen months to pay off his mortgage. At the expiration of eighteen months, Debtor did not refinance or sell his house. Dckt. 64.

On February 3, 2017, Chapter 13 Trustee David Cusick moved to dismiss Debtor's case due to default on terms of the Plan. Dckt. 41. On February 22, 2017, the order to dismiss was granted, but the case was converted by the court to one under Chapter 7 to allow the Trustee to administer assets of the bankruptcy estate. Dckt. 45.

DISCUSSION

Here, the Debtor's case has been previously converted pursuant to 11 U.S.C. § 1307(c). That extinguishes Debtor's near-absolute right under 11 U.S.C. § 706(a) to convert a Chapter 7 case "at any time." *Gualtieri v. Goux (In re Goux)*, 65 B.R. 121 (Bankr. E.D.N.Y. 1986); *see* H.R. REP. NO. 595 (1997) ("If the case has already once been converted from chapter 11 or 13 to [C]hapter 7, then the debtor does not have that right [of conversion].")

While there is a sharp divide whether this permits debtors to request reconversion at all, a slight majority of courts have held that debtors may still make such a motion. *Compare In re Johnson*, 116 B.R. 224 (Bankr. D. Idaho 1990) (acknowledging the court's authority to allow reconversion while denying due to failure of debtors to demonstrate facts that would persuade the court to exercise its discretion), *with In re Banks*, 252 B.R. 399, 399 (Bankr. E.D. Mich. 2000) (interpreting 11 U.S.C. § 706(a) as placing a bar on any reconversion). While there is no binding precedent on this matter in this Circuit, previous decisions of this court, as well as of the Bankruptcy Appellate Panel for the Ninth Circuit, show a trend toward adoption of the majority rule: allowing reconversion on a discretionary basis. *In re De La Salle*, No. 10-29678-E-7, 2011 Bankr. LEXIS 5621, at *26 (Bankr. E.D. Cal. Sept. 6, 2011) ("If [debtors] wish to propose a confirmable plan, they may seek to re-convert this case to one under Chapter 13. . ."); *see Gallagher v. Dockery (In re Gallagher)*, No. CC-13-1368-TaKuPa, 2014 Bankr. LEXIS 1037 (B.A.P. 9th Cir. Mar. 17, 2014) (assessing whether a tax refund was rightfully the property of the Chapter 13 or Chapter 7 estate in a case converted to Chapter 7 then subsequently reconverted to Chapter 13).

It remains within the court's discretion, therefore, whether to grant such a reconversion. Generally, a court will grant such a motion absent abuse of bankruptcy law and if the confirmed plan is in accordance with the requirements of 11 U.S.C. § 1325, in particular whether a plan is feasible under 11 U.S.C. § 1325(a)(6). Of great weight in such considerations is any change in circumstance from the initial failed plan that would suggest more likelihood of success now. *In re Johnson*, 116 B.R. at 227. Notice was provided to the Chapter 7 Trustee, Office of the United States Trustee, and other interested parties. No opposition has been filed.

Debtor asserts that due to change in circumstances from the original plan filing, the proposed plan meets the requirements of 11 U.S.C. § 1325(a)(6) and is feasible. Debtor first asserts such change in circumstance relying upon a previously unmentioned physical disability, entitling him to a homestead exemption of $175,000.00, pursuant to California Code of Civil Procedure § 704.730(3). While the court finds it odd that Debtor's prior counsel failed to raise this exemption, that no where else is this disability explicitly referenced, and that Debtor's current counsel failed to supplement this claim with any additional evidence or details, the Trustee's failure to raise an objection coupled with the persuasive evidence of Debtor's continued reliance on Social Security is sufficient to maintain the rebuttable presumption afforded to Debtor's claim. CAL. CIV. P. § 704.730(3)(B).

Debtor's proposed Chapter 13 plan also relies upon the contributions of non-debtor third parties to enable Debtor to make proposed plan payments. Debtor's brother, who resides with him, and Debtor's niece, who does not, have agreed to contribute $1,000.00 and $300.00, respectively, each month to Debtor's plan payments. That contribution accounts for more than half of the monthly plan payments. Dckt. 69, Exhibit B. Both parties have submitted a Declaration attesting to such commitment. Dckts. 67 & 68.

In the Motion, Debtor asserts that reconverting the case to one under Chapter 13 would allow him to "pay off his home mortgage in a Chapter 13 case, but not via any sale or refinance." Motion at 2:4–5. Debtor goes further to allege that with the help of his brother and niece "Debtor is able to propose a feasible plan to pay the mortgage, IRS lien, and CA FTB priority amount, in full over 60 months." *Id.* at 2:6–7.

A copy of what is intended to be the Plan is filed as Exhibit A in support of the Motion. Dckt. 69. That Plan requires:

A. Monthly Plan Payments of.....$1,552.00
B. For a Period of ..... 60 Months

To pay the following claims:

C. David Mercuiro $67,850.26 Secured Claim
with 0% Interest.....$1,130.84 monthly
D. Internal Revenue Service $6,802.32 Secured Claim
with 0% Interest.....$ 122.23 monthly

E. FTB ($1,818.19) Priority Claim with 3% Interest.....$ 30.31 monthly
F. General Unsecured Claims (Est. $5,823.61)..... 0.00% dividend

G.	Debtor's Attorney's Fees ($4,000).....$	66.66 monthly
H.	Chapter 13 Trustee Fees (Est. 7%).....$	108.64 monthly

When spread over sixty months, those payments total $1,458.68.

In reviewing the proofs of claims filed, the court first notes that the Mercuiro proof of claim is for $67,850.26, but it also asserts the right to 12% interest per annum. Proof of Claim No. 2.

The Internal Revenue Service proof of claim is filed in the amount of $6,802.32 and asserts the right to 3% interest per annum. Proof of Claim No. 1.

The FTB claim is filed in the amount of $6,949.52, not the $1,818.19 stated in the Plan. Proof of Claim No. 4. While the other numbers may work, the FTB claim may be a monkey wrench in the intended Plan.

Debtor has a more fundamental problem in reconverting this case (as opposed to having this case dismissed and starting a new Chapter 13 case). Debtor must have a sixty-month plan. However, this case was filed on July 15, 2015—two years ago. Debtor has already spent eighteen months in a Chapter 13 Plan in this case before it was converted to one under Chapter 7. Even if Debtor would not have to count the Chapter 7 period of this case, Debtor would have only forty-two Chapter 13 Plan months left in this case. Debtor has not shown any basis for having greater than sixty months for a Chapter 13 plan because Debtor defaulted on the first plan and now wants to modify the terms. With a new sixty-month Plan, Debtor would then effectively have a seventy-eight-month Chapter 13 Plan, which exceeds the "not for a period longer than 5 years" limitation for Chapter 13 plans found in 11 U.S.C. § 1322(d).

The Bankruptcy Code provides that a confirmed plan in a Chapter 13 case may be modified, but that such modification cannot extend the time beyond five years from when the first payment under the confirmed plan in the case was due. 11 U.S.C. § 1329(c). As stated above, if reconverted and the existing confirmed plan is modified, Debtor's required sixty months under the modified plan exceeds the five-year maximum under § 1329(c) by eighteen months.

Congress expressly provides in the Bankruptcy Code that when requested, the court may either convert or dismiss a Chapter 13 case pursuant to 11 U.S.C. § 1307(c), whatever is in the best interests of the creditors. Here, it appears that Debtor will need the full sixty months of a Chapter 13 Plan to get the secured claim paid in full (if the creditor agrees to 0% interest), and the FTB claim is the lower amount stated by Debtor in the draft Plan.

Thus, dismissal of the case, rather than re-conversion, appears to be in the best interests of not only the creditors, but also Debtor.

That relief has not been requested, at the hearing, counsel for Debtor explained **xxxxxxx**.

~~The court shall issue a minute order substantially in the following form holding that:~~

~~Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.~~

~~The Motion to Convert filed by Frank Davis having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,~~

~~**IT IS ORDERED** that the Motion to Convert is xxxxxxxxxxx.~~

3. **16-25899-E-7** **JUDITH ACERETO**
SLC-3 **Stephen Murphy**

MOTION TO EMPLOY GONZALES & ASSOCIATES, INC. AS ACCOUNTANT AND/OR MOTION FOR COMPENSATION FOR GONZALES & ASSOCIATES, INC., ACCOUNTANT(S)
5-30-17 [72]

Final Ruling: No appearance at the July 6, 2017 hearing is required.

Local Rule 9014-1(f)(1) Motion—No Opposition Filed.

Sufficient Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, creditors, and Office of the United States Trustee on May 30, 2017. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

The Motion to Employ has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). Failure of the respondent and other parties in interest to file written opposition at least fourteen days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(B) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995) (upholding a court ruling based upon a local rule construing a party's failure to file opposition as consent to grant a motion). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the non-responding parties and other parties in interest are entered. Upon review of the record, there are no disputed material factual issues, and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion to Employ is granted.

Sheri Carello, the Chapter 7 Trustee, seeks to employ Gonzales & Associates, Inc., as Accountant, pursuant to Local Bankruptcy Rule 9014-1(f)(1) and Bankruptcy Code Sections 328(a) and 330. The Trustee seeks the employment of Accountant to perform tax-related accounting as well as income tax preparation.

The Trustee argues that Accountant's appointment and retention is necessary to continue to settle and secure funds due to the bankruptcy estate because the Trustee must file a tax return for real property that was sold by prior order of the court. *See* Dckts. 68 & 69. Accountant has agreed to receive a flat fee of $1,350.00 for performing tax accounting and preparing income tax returns.

Gene Gonzalez, a Certified Public Accountant of Gonzales & Associates, Inc., testifies that he is willing and able to perform tax-related accounting and tax form preparation for the Estate. Gene Gonzalez testifies he and the company do not represent or hold any interest adverse to Debtor or to the Estate and that they have no connection with Debtor, creditors, the U.S. Trustee, any party in interest, or their respective attorneys.

Pursuant to § 327(a), a trustee or debtor in possession is authorized, with court approval, to engage the services of professionals, including attorneys, to represent or assist the trustee in carrying out the trustee's duties under Title 11. To be so employed by the trustee or debtor in possession, the professional must not hold or represent an interest adverse to the estate and be a disinterested person.

Section 328(a) authorizes, with court approval, a trustee or debtor in possession to engage the professional on reasonable terms and conditions, including a retainer, hourly fee, fixed or percentage fee, or contingent fee basis. Notwithstanding such approved terms and conditions, the court may allow compensation different from that under the agreement after the conclusion of the representation, if such terms and conditions prove to have been improvident in light of developments not capable of being anticipated at the time of fixing of such terms and conditions.

Taking into account all of the relevant factors in connection with the employment and compensation of Accountant, considering the declaration demonstrating that Accountant does not hold an adverse interest to the Estate and is a disinterested person, the nature and scope of the services to be provided, the court grants the motion to employ Gonzales & Associates, Inc. as Accountant for the Chapter 7 Estate on the terms and conditions set forth in the Motion, which relates that Accountant will perform tax-related accounting and income tax form preparation for a flat fee of $1,350.00. Approval of the flat fee is subject to the provisions of 11 U.S.C. § 328 and review of the fee at the time of final allowance of fees for the professional.

The court shall issue a minute order substantially in the following form holding that:

> Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.
>
> The Motion to Employ filed by the Chapter 7 Trustee having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,
>
> **IT IS ORDERED** that the Motion to Employ is granted, and the Chapter 7 Trustee is authorized to employ Gonzales & Associates, Inc. as Accountant for the Chapter 7 Trustee on the terms and conditions as set forth in the Motion, which

relates that Accountant will perform tax-related accounting and income tax form preparation for a flat fee of $1,350.00.

IT IS FURTHER ORDERED that no compensation is permitted except upon court order following an application pursuant to 11 U.S.C. § 330 and subject to the provisions of 11 U.S.C. § 328.

IT IS FURTHER ORDERED that no hourly rate or other term referred to in the application papers is approved unless unambiguously so stated in this order or in a subsequent order of this court.

IT IS FURTHER ORDERED that except as otherwise ordered by the Court, all funds received by counsel in connection with this matter, regardless of whether they are denominated a retainer or are said to be nonrefundable, are deemed to be an advance payment of fees and to be property of the estate.

IT IS FURTHER ORDERED that funds that are deemed to constitute an advance payment of fees shall be maintained in a trust account maintained in an authorized depository, which account may be either a separate interest-bearing account or a trust account containing commingled funds. Withdrawals are permitted only after approval of an application for compensation and after the court issues an order authorizing disbursement of a specific amount.