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<p>FILED</p> <p>AUG 16 2016</p>
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UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA

In re:)	Case No. 11-27847-B-13
)	
TIMOTHY MANSOURI and LYDIA)	DC Nos. JHH-6
MANSOURI,)	JPJ-2
)	
)	
Debtor(s).)	

ORDER GRANTING MOTION FOR HARDSHIP DISCHARGE AND DENYING MOTION TO DISMISS

Introduction

There are two motions before the court. The first, filed by chapter 13 debtors Timothy Mansouri and Lydia Mansouri, is a motion for hardship discharge pursuant to 11 U.S.C. § 1328(b). The second, filed by the chapter 13 trustee, is a motion to dismiss pursuant to §§ 1325(b)(4) and 1307(c)(1) based on the debtors' failure to conclude a plan within 60 months and failure to timely reconcile payment of estimated and actual unsecured claims, respectively. Both motions were heard on August 2, 2016. The hearing on both motions was continued to August 16, 2016, for purposes of the court's decision.

This order constitutes the court's findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52(a) made applicable by Federal Rules of Bankruptcy Procedure 7052 and 9014. For the reasons explained below, the debtors' motion for a hardship discharge will be granted and the trustee's motion to dismiss will be denied as moot.

1 **Background**

2 The debtors filed a chapter 13 petition on March 30, 2011.
3 The debtors filed a chapter 13 plan with their petition. The
4 debtors' initial plan estimated unsecured claims at \$124,824.37
5 and proposed to pay 0% to unsecured creditors.

6 On May 3, 2011, FIA Card Services filed a \$26,725.23
7 unsecured proof of claim. The FIA claim was not included in the
8 Schedules. The debtors omitted the FIA claim from the Schedules
9 because they believed the claim was settled in 2009 when it was
10 held by Bank of America. Thus, the debtors believed the FIA
11 claim was no longer enforceable against them in March of 2011.

12 The debtors filed a first amended plan and motion to confirm
13 it on June 3, 2011. The first amended plan estimated unsecured
14 claims at \$76,175.97. It also obligated the debtors to pay 100%
15 of unsecured claims. However, when the first amended plan was
16 filed in June of 2011, according to the claims register,
17 unsecured claims totaled approximately \$113,364.10 and not
18 \$76,175.97. The former amount included the \$26,725.23 FIA claim
19 filed earlier in May of 2011.

20 The first amended plan was ordered confirmed on July 21,
21 2011. The confirmation order was entered on August 12, 2011.
22 There were no objections to confirmation of the debtors' first
23 amended plan.

24 Almost a year later, on April 18, 2012, the trustee filed a
25 notice of claims filed. According to that notice, there were
26 \$108,542.97 in unsecured claims. That amount included the
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1 \$26,725.23 FIA claim.

2 Debtors, through their attorney, timely objected to the FIA
3 claim on June 16, 2012. However, because the debtors were unable
4 to produce sufficient evidence to prove that the FIA claim was no
5 longer enforceable, in an order filed on August 3, 2012, the
6 court overruled the debtors' objection without prejudice.

7 For the next 3½ years, the debtors paid their disposable
8 monthly income into the first amended plan. They also made the
9 plan payments the first amended plan required them to make. On
10 the other hand, during that same 3½ year period, the debtors'
11 attorney did nothing to reconcile the difference between actual
12 and estimated unsecured claims. With the objection to the FIA
13 claim overruled, and aware of the amount unsecured claims stated
14 in the trustee's earlier notice, the debtors' attorney knew or
15 should have known that the debtors' plan payments premised on the
16 payment of estimated unsecured claims in the first amended plan
17 were insufficient to pay 100% of actual unsecured claims.

18 It was not until March 24, 2016, that the debtors' attorney
19 finally filed a motion to reduce the amount and percentage paid
20 to unsecured creditors. In other words, in March of 2016 the
21 debtors' attorney filed the motion which should have been filed
22 immediately after the objection to the FIA claim was overruled in
23 August of 2012. However, because the debtors made their last
24 plan payment on March 22, 2016, under § 1329(a), the motion to
25 modify was untimely and was denied with prejudice.

26 As it now stands, the debtors have completed plan payments
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1 for a 60-month plan term under the first amended plan. However,
2 those payments did not pay 100% of unsecured claims as the first
3 amended plan required. Whereas actual unsecured claims total
4 \$108,542.97, the debtors report that the trustee has distributed
5 only the estimated unsecured claim total of \$76,175.97. That
6 means the debtors are \$32,367 - or approximately 30% - short in
7 the payment of unsecured claim. Put another way, the debtors
8 have paid only about 70% of unsecured claim whereas the first
9 amended plan obligated them to pay 100% of those claims.

10 **Discussion**

11 Section 1328(b) of the Bankruptcy Code provides for the
12 so-called "hardship" discharge. It permits the court to grant
13 a discharge to a debtor who has not completed payments if certain
14 requirements are met. The section states as follows:

15 Subject to subsection (d), at any time after the
16 confirmation of the plan and after notice and a
17 hearing, the court may grant a discharge to a debtor
18 that has not completed payments under the plan only if-

19 (1) the debtor's failure to complete such payments
20 is due to circumstances for which the debtor should not
21 justly be held accountable;

22 (2) the value, as of the effective date of the
23 plan, of property actually distributed under the plan
24 on account of each allowed unsecured claim is not less
25 than the amount that would have been paid on such claim
26 if the estate of the debtor had been liquidated under
27 chapter 7 of this title on such date; and

28 (3) modification of the plan under section 1329 of
this title is not practicable.

11 U.S.C. § 1328(b).

The debtor bears the burden of proof on all elements of
§ 1328(b). In re Harrison, 1999 WL 33114273 *1 (Bankr. E.D. Va.

1 1999). The grant or denial of a request for a hardship discharge
2 is within the discretion of the bankruptcy court. Bandilli v.
3 Boyajian (In re Bandilli), 231 B.R. 836, 838 (1st Cir. BAP 1999).

4 Upon review of the evidence presented, the court is
5 satisfied that a hardship discharge is appropriate under the
6 facts and circumstances of this case. The court also concludes
7 there is no reasonable cause to believe that § 522(q)(1) may be
8 applicable to the debtors and also there also is no reasonable
9 cause to believe there is a pending proceeding that would render
10 the debtor subject to § 522(q)(1)(A) or (B). Therefore, the
11 court will exercise its discretion and order that the debtors
12 receive a hardship discharge.

13 Section 1328(b)(1) is satisfied. The debtors made all of
14 the plan payments they were required to make under the first
15 amended plan. The debtors were unable to increase plan payments
16 during the plan term to account for the difference between
17 estimated and actual unsecured claims and pay 100% of the latter
18 because any additional income they could have earned would have
19 been offset by additional childcare expenses incurred to earn the
20 additional income. The debtors' attorney, on the other hand, has
21 offered no explanation for his great disservice to the debtors
22 during that same 3½-year period. Knowing after August of 2012
23 that actual unsecured claims exceeded the unsecured claims
24 estimated in the first amended plan, the docket reflects
25 absolutely no effort by the debtors' attorney between August of
26 2012 and March of 2016 to reconcile the difference or reduce the
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1 amount and percentage paid to unsecured creditors.¹ When the
2 debtors' attorney finally attempted to modify the plan to reduce
3 the amount and percentage paid to unsecured creditors, he was 2
4 days late. See 11 U.S.C. § 1329(a). Inasmuch as the debtors'
5 failure to complete plan payments under the first amended plan by
6 paying 100% of unsecured claims is attributable to the
7 carelessness and neglect of their attorney, those are
8 circumstances for which the debtors should not justly be held
9 accountable.

10 Section 1328(b)(2) is also satisfied. Whereas the first
11 amended plan requires the debtors to pay 100% of unsecured
12 claims, the debtors have paid approximately 70% to unsecured
13 creditors. That percentage is greater than the 0% unsecured
14 creditors would have received in the debtors' chapter 7 case.
15 Therefore, the value distributed under the first amended plan is
16 significantly greater than the chapter 7 liquidation value.

17 Section 1328(b)(3) is likewise satisfied. The debtors made
18 their last plan payment on March 22, 2016, which means after that
19 date further plan modifications are not possible. See 11 U.S.C.
20 § 1329(a). Although a motion to modify the first amended plan to
21 reduce the amount and percentage paid to unsecured creditors was
22 filed on March 24, 2016, it was denied with prejudice because it
23 was 2 days late. See 11 U.S.C. § 1329(a).

24 _____
25 ¹Doing nothing to address the problem during this 3½-year
26 period means the motion to modify and the hardship discharge
27 motion are not unanticipated. See LBR 2016-1(c)(3). Moreover,
it is not reasonable to award compensation for post-confirmation
work under these circumstances. See 11 U.S.C. § 330(a)(1)(A).

1 Therefore, based on the foregoing;

2 IT IS ORDERED that the debtors' motion is GRANTED as
3 follows:

4 (1) The debtors shall be granted a discharge under 11
5 U.S.C. § 1328(b).

6 (2) The debtors shall be discharged from all unsecured
7 debts provided for by the first amended plan or disallowed under
8 11 U.S.C. § 502, except any debt provided for under 11 U.S.C.
9 § 1322(b)(5), or of a kind specified in 11 U.S.C. § 523(a).

10 (3) Within seven days of entry of this order, the debtors'
11 attorney shall (a) serve both this order and a notice on all
12 creditors and parties in interest in the manner provided in
13 Federal Rule of Bankruptcy Procedure 2002 and (b) file a
14 certificate of service that service has been effected.

15 (4) As stated in Federal Rule of Bankruptcy Procedure
16 4007(d), subject to any further appropriate extensions, creditors
17 and parties in interest shall have thirty (30) days from the date
18 of service of this order and the above-referenced notice to file
19 a complaint to determine the dischargeability of any debt under
20 11 U.S.C. § 523(a)(6).

21 IT IS FURTHER ORDERED that the trustee's motion to dismiss
22 is DENIED as moot.

23 IT IS FURTHER ORDERED that the continued hearing on August
24 16, 2016, at 1:00 p.m. is VACATED.

25 Dated: August 15, 2016.

26 
27 UNITED STATES BANKRUPTCY JUDGE

**INSTRUCTIONS TO CLERK OF COURT
SERVICE LIST**

The Clerk of Court is instructed to send the attached document, via the BNC, to the following parties:

Judson H. Henry
5150 Sunrise Boulevard, Suite H-6
Fair Oaks CA 95628

Jan P. Johnson
PO Box 1708
Sacramento CA 95812