

1 **WRITTEN DECISION - NOT FOR PUBLICATION**

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8 **UNITED STATES BANKRUPTCY COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10
11 **In re**
12 **MARICELA and MICHAEL**
13 **GAMBOA,**
14 **Debtors.**

Case No. 10-14560-A13

**MEMORANDUM DECISION
RE: CHAPTER 13 TRUSTEE'S
MOTION TO INCREASE
PERCENTAGE PAID TO
UNSECURED CREDITORS**

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18 Before the Court is the Chapter 13 Trustee's ("Trustee") motion to increase
19 the percentage paid by the debtors, Maricela and Michael Gamboa ("Debtors"), to
20 unsecured creditors from 8% in the Debtors' initial plan to 50.96%. The Trustee
21 seeks this increase in percentage to distribute the Debtors' tax refunds in
22 accordance with the terms of their pre-confirmation modification dated
23 December 8, 2010 ("PCM"). The Debtors recognize that they must turn over their
24 tax refunds totaling \$11,235, and that the dividend to general unsecured creditors
25 should be increased. However, they object to increasing the dividend to 50.96%
26 because the Trustee has failed to deduct from the tax refunds his additional
27 administrative fee to distribute these refunds. Upon further review of the
28 Trustee's calculations and the terms of the PCM, the Court grants the motion but

1 the increased percentage must be adjusted downward to account for the Trustee's
2 administrative fee to distribute the tax refunds.

3 FACTS

4 The Debtors filed their Chapter 13 petition on August 16, 2010, and
5 confirmed their plan of reorganization on December 21, 2010. The confirmed
6 plan includes the terms in their initial plan dated August 16, 2010, and the
7 additional terms contained in their PCM dated December 8, 2010 (collectively
8 "Plan"). The Plan requires the Debtors to pay \$326.00 monthly to the Trustee for
9 payment of the administrative claims provided for in Paragraph 3 of the Plan,
10 including the Trustee's administrative fee. Additionally, the Plan pays general
11 unsecured creditors a dividend of 8% or a *pro rata* of \$24,060, whichever is
12 greater, calculated as follows: the \$15,000 dividend proposed in Paragraph 13 of
13 the initial plan, plus an additional \$9,060 agreed to in the PCM, for a total
14 dividend to general unsecured creditors of \$24,060. The PCM also added
15 Paragraph 20 which provides:

16 For the duration of the plan, debtor(s) ... shall annually:
17 (i) provide copies of tax returns to trustee; (ii) turnover
18 tax refunds as [and] for additional payments and trustee
may increase the dividend to unsecured creditors to
distribute those funds.

19 Except for the amendments made in the PCM, the initial plan remained in full
20 force and effect. [ECF No. 36].

21 The Debtors appear to have made all of their monthly Plan payments and,
22 except for distribution of their tax refunds totaling \$11,235, they have completed
23 the Plan. The Trustee filed this motion to increase the percentage paid to general
24 unsecured creditors to distribute the tax refunds, and the Debtors have objected.

25 ANALYSIS

26 At issue is the proper interpretation of the provision in the PCM that permits
27 the Trustee to increase the dividend to general unsecured creditors. The Trustee
28 contends that the PCM requires all of the tax refunds to be distributed to general

1 unsecured creditors with no deduction for his administrative fee payable in
2 Paragraph 3 of the Plan. Thus, he calculates the payment to general unsecured
3 creditors to be \$35,295 ($\$24,060 + \$11,235 = \$35,295$), which divided by total
4 general unsecured claims of \$69,259.59, yield a 50.96% *pro rata* dividend. The
5 Trustee argues his administrative fee is built into the payments that are to be paid
6 under the Plan, so there is no basis to deduct his administrative fee from the
7 additional tax refunds simply because the PCM allows the *pro rata* to general
8 unsecured creditors to be increased. [Hr'g Tr. 7:2-13 (April 24, 2013)] The
9 Trustee did not cite any statute or case authorities in support of his argument, and
10 it is contrary to the terms of the Plan and common sense.

11 The Trustee's argument ignores that the Debtors have already contributed
12 all of their monthly disposable income for the duration of the Plan. The Debtors
13 also agreed to pay over their tax refunds for the duration of the Plan as "additional
14 payments," presumably because they recognized the tax refunds represent
15 additional disposable income. However, the tax refunds were not built into the
16 monthly Plan payments as the Trustee contends. The Debtors did not receive the
17 tax refunds on a monthly basis, and the amounts were unknown. Therefore, the
18 PCM treats the tax refunds as "additional payments" to be contributed to the Plan
19 if received, and it provides that the Trustee may increase the dividend to general
20 unsecured creditors to distribute these additional payments. Pursuant to
21 Paragraph 3 of the Plan, the Trustee must deduct from his disbursements his
22 administrative fee since this provision remained in full force and effect.

23 The Trustee's interpretation would require the Debtors to contribute another
24 "additional payment" on top of contributing all of their disposable income and
25 their tax refunds for the duration of the Plan, which is now otherwise complete,
26 merely to pay his administrative fees for distributing these tax refunds. The
27 Debtors have already contributed all that they were required to contribute. The
28 PCM does not require them to contribute more.

1 CONCLUSION

2 The Court grants the motion to increase the percentage paid to general
3 unsecured creditors, but the percentage must be adjusted downward to account for
4 the Trustee's administrative fee to distribute the tax refunds. The tax refunds were
5 not built into the Plan payments as the Trustee claims. The Debtors did not
6 receive the tax refunds on a monthly basis, and the amounts were unknown.
7 Consequently, the PCM obligates the Debtors to contribute the tax refunds as
8 "additional payments" if they receive them, and it permits the dividend to be
9 increased by an unspecified amount to distribute these additional payments.

10 The PCM does not obligate the Debtor to contribute another "additional
11 payment" to pay the Trustee his administrative fee to distribute the "additional
12 payments." The Trustee's interpretation is unsupportable and the Court would not
13 have approved such a provision in this first instance. The Trustee shall submit an
14 order consistent with this memorandum decision within ten days of its entry.

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17 Dated: June 3, 2013



18 Louise De Carl Adler, Judge
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