

Dated: May 11, 2020



*Daniel P. Collins*

Daniel P. Collins, Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF ARIZONA**

<b>In re:</b>	)	<b>Chapter 11 Proceedings</b>
<b>LARRY VICTOR ZIMONT and</b>	)	
<b>JESSICA BARRY ZIMONT,</b>	)	<b>Case No.: 2:19-bk-09079-DPC</b>
<b>Debtors.</b>	)	<b>AMENDED UNDER ADVISEMENT</b>
	)	<b>ORDER RE: POST-PETITION</b>
	)	<b>RETIREMENT LOAN PAYMENTS</b>
	)	<b>AND CONTRIBUTIONS TO</b>
	)	<b>RETIREMENT PLAN</b>
	)	<b>[NOT FOR PUBLICATION]</b>

Before this Court is the question of whether Debtors’ post-petition retirement loan repayments and contributions to their retirement account prevent confirmation of Debtors’ chapter 11 plan. Because the Debtors failed to adequately disclose in their Amended Plan and Amended Disclosure Statement their continued retirement plan contributions, the Court denies confirmation of Debtors’ plan. So long as any plan submitted by the Debtors (a) fails to return to the estate their post-petition retirement account loan repayments and post-petition retirement plan contributions or (b) calls for additional payments or contributions during the life of their proposed plan, the Court cannot find Debtors’ plan to be proposed in good faith.

**I. BACKGROUND**

On July 23, 2019, Debtors, Larry Victor Zimont and Jessica Barry Zimont (“Debtors”) filed this chapter 11 case.<sup>1</sup> Ms. Zimont is employed as Director of Transplant at Banner Health. Her monthly take home income is \$8,850.<sup>2</sup> This income is net of a

<sup>1</sup> DE 1. “DE” references a docket entry in the case 2:19-bk-09079-DPC.

<sup>2</sup> *Id.* at Schedule I, pages 45 – 46 of 71.

1 payroll deduction of \$506/month paid towards her retirement plan.<sup>3</sup> Mr. Zimont recently  
2 became employed as a Client Business Partner. He now receives a salary of \$4,230.77  
3 every other week.<sup>4</sup> Debtors' Schedules and Statements disclose \$28,900 in secured  
4 obligations<sup>5</sup> and \$488,900 in non-priority unsecured debt.<sup>6</sup>

5 On December 2, 2019, Debtors filed their Chapter 11 Plan of Reorganization<sup>7</sup>  
6 ("Plan") and Disclosure Statement in Support of Debtors' Chapter 11 Plan of  
7 Reorganization<sup>8</sup> ("Disclosure Statement"). At the Court's hearing on Debtors' Disclosure  
8 Statement, the Court raised concerns about Debtors' Plan.<sup>9</sup> Among other things, the Court  
9 focused on the fact that Debtors were using estate property (post-petition wages) to repay  
10 a pre-petition loan ("Retirement Plan Loan") against Ms. Zimont's 403(b) retirement plan.

11 Debtors then filed their First Amended Plan<sup>10</sup> ("Amended Plan") and First  
12 Amended Disclosure Statement<sup>11</sup> ("Amended Disclosure Statement"). Debtors also filed  
13 the Report of Ballots<sup>12</sup> and Declaration of Debtors in Support of Confirmation<sup>13</sup>  
14 ("Declaration"). Debtors' Declaration states:

15 [Debtors] believe and declare that our Amended Plan was filed in good faith  
16 and not by any means forbidden by law. [Debtors] believe the Amended  
17 Plan is in the best interest of our creditors and the Bankruptcy Estate and  
18 provides for the maximum reasonable recovery to creditors. The affirmative  
19 vote of 100% of the creditors voting confirms the creditors' confidence in  
20 the Amended Plan.<sup>14</sup>

21 Debtors' Amended Plan proposes to pay unsecured creditors between \$140,690  
22 and \$162,690, depending on total administrative expenses and Ms. Zimont's net bonus

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23 <sup>3</sup> *Id.* at Schedule I, page 46 of 71, line 5b.

24 <sup>4</sup> DE 51 at page 6 of 10. Debtors Schedule I was not amended to reflect this income or whether his income is a gross  
or net amount.

25 <sup>5</sup> DE 1 at page 27 of 71.

26 <sup>6</sup> *Id.* at page 41 of 71.

27 <sup>7</sup> DE 35.

28 <sup>8</sup> DE 36.

<sup>9</sup> DE 47.

<sup>10</sup> DE 50.

<sup>11</sup> DE 51.

<sup>12</sup> DE 62.

<sup>13</sup> DE 63.

<sup>14</sup> DE 63 at page 4 of 7.

1 income.<sup>15</sup> Debtors' Amended Plan proposes to pay into the Amended Plan most (but not  
2 all) of their projected disposable income. Exhibit 3 attached to Debtors' Amended  
3 Disclosure Statement reflects that Mr. Zimont's income is accounted for in calculating  
4 Debtors' disposable income.

5 Debtors filed additional documents in response to the Court's questions related to  
6 their retirement assets.<sup>16</sup> Debtors' Retirement Memorandum disclosed that the balance  
7 due on the Retirement Plan Loan as of March 13, 2020 was \$7,700. The Retirement Plan  
8 Loan is being repaid post-petition from Ms. Zimont's gross wages at the rate of  
9 approximately \$420 per month.<sup>17</sup> After conferring with Ms. Zimont's retirement plan  
10 administrator, the Court was advised by Debtors' counsel that the Retirement Plan Loan  
11 was secured by the assets in Ms. Zimont's retirement account and payments could not be  
12 deferred or reduced.<sup>18</sup> If Ms. Zimont defaulted on the Retirement Plan Loan, that plan's  
13 administrator would offset her retirement assets to satisfy the balances owed on the  
14 Retirement Plan Loan.<sup>19</sup> That setoff would, in turn, cause a taxable event to occur in the  
15 amount of the offset plus a 10% early distribution<sup>20</sup> penalty which would be assessed in  
16 the year of such offset. For the sake of discussion, the Court will assume the tax bill to the  
17 Zimonts would total about 34% of the amount offset.<sup>21</sup>

18 At the hearing on confirmation of Debtors' Amended Plan, Debtor's counsel noted  
19 Ms. Zimont had been making voluntary post-petition contributions to her current  
20 employer's retirement plan. Subsequent to that hearing, Debtors filed their Information

21 \_\_\_\_\_  
22 <sup>15</sup> DE 50 at page 10 of 16.

23 <sup>16</sup> Debtors filed Declaration Regarding Childcare Expenses at DE 64 and Memorandum Regarding Debtors' Pre-  
24 Petition 403(b) Retirement Loan ("Retirement Memorandum") at DE 66.

25 <sup>17</sup> DE 66.

26 <sup>18</sup> *Id.*

27 <sup>19</sup> Under § 362(b)(19), there is no bankruptcy stay preventing a retirement plan administrator from withholding an  
28 employee's wages to repay such loan. However, Ms. Zimont no longer works for the employer/sponsor of that  
retirement plan. The Court is unaware of any exception to the bankruptcy automatic stay permitting the retirement  
plan administrator to repay the Retirement Plan Loan by offset without first gaining stay relief in this case.

<sup>20</sup> Ms. Zimont is under the age of 59 ½. 26 U.S.C. § 72(t)(1) provides for a 10% additional tax on early distributions  
from qualified retirement plans.

<sup>21</sup> The 10% penalty plus the Debtors' highest marginal tax rate of 24%. The Court estimated Debtors' combined  
annual income based on the latest MOR filed at DE 72. Debtors listed \$15,224 in combined monthly income and the  
Court multiplied this by 12 to get an annual income of \$182,688. That annual income fell in the 24% tax bracket for  
married individuals filing jointly. See 26 U.S.C. § 1(j)(2).

1 Regarding Post-Petition 401(k) Contributions and 403(b) Loan Payments (“Retirement  
2 Plans Information”), disclosing that a total of \$4,207 had been contributed post-petition  
3 to Ms. Zimont’s current 401(k) (\$525/month)<sup>22</sup> and \$3,403 had been paid post-petition  
4 towards repayment of the Retirement Plan Loan.<sup>23</sup> Without disclosing the matter, the  
5 Debtors’ Plan presumably contemplates that, post-confirmation, the Debtors would  
6 continue making contributions of \$525/month towards Ms. Zimont’s current employer’s  
7 sponsored retirement plan.

8 This Court entered its April 20, 2020, Under Advisement Order<sup>24</sup> to which the  
9 Debtors filed their Statement of Controverting Facts.<sup>25</sup> Debtors also filed their Notice of  
10 Filing Revised Budget related to Debtors’ First Amended Plan and Disclosure  
11 Statement.<sup>26</sup> A hearing was held on May 11, 2020, at which these matters were discussed  
12 at length.

## 13 14 15 **II. JURISDICTION**

16 This Court has jurisdiction over this matter under 28 U.S.C. §§ 157(b)(2)(A), (E),  
17 (M), (L) and (O).

## 18 19 **III. ISSUE**

20 Whether Debtors’ post-petition repayment of their Retirement Plan Loan or  
21 Debtors’ post-petition contributions to their retirement plans prevent confirmation of  
22 Debtors’ Plan.

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25 \_\_\_\_\_  
26 <sup>22</sup> The \$525/month estimate is slightly higher than what Debtors’ disclosed in their Schedules and Statements. The  
27 \$525/month figure was reached based on the information in the Retirement Plans Information, which revealed a total  
28 of \$4,207 in contributions since Debtors’ bankruptcy. The Court divided \$4,207 by 8 (the number of months Debtors’  
have been in bankruptcy) to reach the \$525/month estimate.

<sup>23</sup> DE 71.

<sup>24</sup> DE 73.

<sup>25</sup> DE 76.

<sup>26</sup> DE 79.

1 **IV. LEGAL ANALYSIS**

2 **A. Debtors’ Fiduciary Duty**

3 A debtor-in-possession is a fiduciary for their bankruptcy estate and assumes  
4 virtually all of the rights and responsibilities of a bankruptcy trustee.<sup>27</sup> A debtor-in-  
5 possession owes a duty to creditors of the estate not to waste the estate’s assets.<sup>28</sup> Although  
6 “[o]ne of the most difficult concepts an individual Chapter 11 debtor has to grasp is that  
7 once he files bankruptcy he has a fiduciary duty to his creditors to act in the best interest  
8 of the bankruptcy estate[,]” such duties “imply a special burden on debtors...to ensure that  
9 the resources that flow through the debtor-in-possession’s hands are used to benefit the  
10 unsecured creditors and other parties in interest.”<sup>29</sup>

11  
12 **B. Debtors’ Post-Petition Earnings Are Property of the Estate**

13 Upon commencement of a bankruptcy case, all the debtor’s property passes to the  
14 estate.<sup>30</sup> Section 1115<sup>31</sup> determines what is property of the estate in an individual’s chapter  
15 11 bankruptcy. Section 1115(a)(2) provides, in relevant part:

16  
17 In a case in which the debtor is an individual, property of the estate includes,  
18 in addition to the property specified in section 541 –  
19 ...  
20 (2) earnings from services performed by the debtor after the commencement  
21 of the case but before the case is closed, dismissed or converted to a case  
22 under chapter 7, 12, or 13, which occurs first.<sup>32</sup>

23 Section 1115(a) expanded the definition of property of the estate in individual chapter 11  
24 cases to include property obtained by the debtor after the commencement of the case.<sup>33</sup>  
25 Property of this bankruptcy estate includes Debtors’ post-petition income.

26 <sup>27</sup> 11 U.S.C. § 1107. See also *In re Bame*, 251 B.R. 367, 373 (Bankr. D. Minn. 2000) (citing *Wolf v. Weinstein*, 372  
27 U.S. 633, 649-50 (1963)).

28 <sup>28</sup> *In re Bame*, 251 B.R. at 373 (citing Jeffrey C. Krause, *Whose Lawyer Are You: Fiduciary Obligations of Debtor  
and Debtor-in-Possession and Counsel*, 31 Beverly Hills B.A. J. 37, 39 (1997)).

29 <sup>29</sup> *In re Breland*, 570 B.R. 643, 656 (Bankr. S.D. Ala. 2017).

30 <sup>30</sup> 11 U.S.C. § 541.

31 <sup>31</sup> Unless indicated otherwise, statutory citations refer to the U.S. Bankruptcy Code, 11 U.S.C. §§ 101 – 1532.

32 <sup>32</sup> 11 U.S.C. § 1115(a)(2).

33 <sup>33</sup> *Zachary v. California Bank & Trust*, 811 F.3d 1191, 1197 (9th Cir. 2016) (interpreting BAPCPA amendments).

1 Section 541(b)(7)(A) excludes from property of the estate wages withheld by an  
2 employer for payments as contributions to qualifying retirement plans.<sup>34</sup> The Ninth Circuit  
3 Bankruptcy Appellate Panel (“BAP”) considered whether a chapter 13 debtor’s voluntary  
4 post-petition contributions to a 401(k) retirement plan were excluded when calculating his  
5 or her disposable income.<sup>35</sup> In *In re Parks*, the BAP determined that “by reading  
6 §541(a)(1) and § 541(b)(7)(A) together, the most reasonable interpretation of  
7 §541(b)(7)(A) is that it excludes from property of the estate only those 401(k)  
8 contributions made before the petition date.”<sup>36</sup> The Court went on to hold that despite  
9 §541(b)(7)(A)’s exclusion of wages withheld by employers for qualifying retirement plans  
10 from property of the estate, such contributions to qualifying retirement plans were not  
11 excluded when calculating debtor’s disposable income.<sup>37</sup> This Court acknowledges that  
12 the BAP was analyzing the question in the context of a chapter 13 proceeding but still  
13 finds the analysis and rationale employed by the BAP to be instructive for it tells us that  
14 § 541(b)(7)(A) does not exclude from property of a bankruptcy estate the Debtors’ post-  
15 petition contributions to a qualified retirement plan.

### 16 17 **C. § 1129(a)(3) Good Faith Requirement**

18 Section 1129(a) lists 16 requirements for a plan to be confirmed under chapter 11.<sup>38</sup>  
19 Section 1129(a)(3) precludes confirmation of a plan that is not proposed in good faith.<sup>39</sup>  
20 Case law defines the good faith requirement as requiring there to exist “a reasonable  
21 likelihood that the plan will achieve a result consistent with the objections and purposes  
22  
23

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24 <sup>34</sup> 11 U.S.C. § 541(b)(7).

25 <sup>35</sup> *In re Parks*, 475 B.R. 703, 706 (B.A.P. 9th Cir. 2012).

26 <sup>36</sup> *Id.* at 708.

27 <sup>37</sup> *Id.* At least one court disagrees with the BAP’s conclusion in *Parks* and quite cogently explains why *Parks* is incorrect. See *In re Anh-Thu Thi Vu*, 2015 WL 6684227(Bankr. W.D. Wash. 2015). However, as this Court stated in *In re Sample*, “so long as there is not a contrary published opinion from the District Court of Arizona, this Court will follow the opinions of the Ninth Circuit BAP, whether or not this Court agrees with the reasoning behind the particular BAP decision.” *In re Sample*, 2013 WL 3759795 (Bankr. D. Ariz. 2013).

28 <sup>38</sup> 11 U.S.C. § 1129(a).

<sup>39</sup> 11 U.S.C. § 1129(a)(3).

1 of the Bankruptcy Code.”<sup>40</sup> The primary purposes of chapter 11 are to rehabilitate the  
2 debtor and maximize the value of the estate.<sup>41</sup> The good faith requirement under  
3 §1129(a)(3) is narrower than the requirement that a petition be filed in good faith and  
4 focuses exclusively on the filed plan.<sup>42</sup> The good faith determination is based on the  
5 totality of the circumstances.<sup>43</sup>

#### 6 7 **D. § 1129(a)(15) Disposable Income Requirement**

8 Section 1129(a)(15) requires that the value to be distributed under a plan is not less  
9 than the projected disposable income of the debtor to be received during the 5-year plan  
10 period.<sup>44</sup> Significantly, § 1129(a)(15) only applies where the holder of an allowed  
11 unsecured claim objects to the confirmation of the plan. The statute provides, in relevant  
12 part:

13 (A) The value, as of the effective date of the plan, of the property to be  
14 distributed under the plan on account of such claim is not less than the  
15 amount of such claim; or

16 (B) the value of the property to be distributed under the plan is not less  
17 than the projected disposable income of the debtor (as defined in section  
18 1325(b)(2)) to be received during the 5-year period beginning on the date  
19 that the first payment is due under the plan, or during the period for which  
20 the plan provides payments, whichever is longer.<sup>45</sup>

21 Where § 1129(a)(15) is applicable, “Congress made clear that a chapter 11 plan of  
22 any length may be confirmed as long as the value of the property to be distributed is not  
23 less than the projected disposable income of the debtor to be received over five years (or  
24 the length of the plan, whichever is longer).”<sup>46</sup> Section 1325 (b)(2) defines “disposable

25 <sup>40</sup> *In re Madison Hotel Assocs.*, 749 F.2d 410, 424-25 (7th Cir. 1984). See also *In re Stolrow’s Inc.*, 84 B.R. 167, 172  
26 (B.A.P. 9th Cir. 1988); *In re Jorgensen*, 66 B.R. 104, 108-09 (B.A.P. 9th Cir. 1986); *In re Corey*, 892 F.2d 829, 835  
27 (9th Cir. 1989).

<sup>41</sup> *In re Sunnyslope Hous. Ltd. P’ship*, 859 F.3d 637, 646-47 (9th Cir. 2017) (*en banc*).

<sup>42</sup> 7 *Collier on Bankruptcy* ¶ 1129.02 (16th Ed. 2019). See also *Stolrow’s Inc.*, 84 B.R. at 172 and *Madison Hotel*,  
28 749 F.2d at 425.

<sup>43</sup> *Stolrow’s Inc.*, 84 B.R. at 172.

<sup>44</sup> 11 U.S.C. § 1129(a)(15).

<sup>45</sup> *Id.*

<sup>46</sup> *Baud v. Carroll*, 634 F.3d 327, 340 (6th Cir. 2011). See Randolph J. Haines, *Chapter 11 May Resolve Some  
Chapter 13 Issues*, 8 Norton Bankr. L. Adviser 1 (August 2007).

1 income” as the current monthly income received by the debtors with exceptions that do  
2 apply in this case.<sup>47</sup> Current monthly income is broadly defined under § 101(10A) as “the  
3 average monthly income from all sources that the debtor receives...” In calculating a  
4 chapter 13 debtor’s disposable income, deductions for debtor’s voluntary post-petition  
5 401(k) contributions are not permitted.<sup>48</sup>

6 The Ninth Circuit has considered whether post-petition retirement contributions are  
7 a necessary expense in the context of a § 707(b) motion to dismiss for substantial abuse.<sup>49</sup>  
8 The Ninth Circuit determined that there is not a *per se* prohibition against debtors making  
9 retirement contributions and bankruptcy courts have the discretion to determine whether  
10 such contributions are a necessary expense based on the particular facts of the case.<sup>50</sup> The  
11 Ninth Circuit provided the following factors courts should consider when making this  
12 determination:

13 the debtor's age, income, overall budget, expected date of retirement,  
14 existing retirement savings, and amount of contributions; the likelihood that  
15 stopping contributions will jeopardize the debtor's fresh start by forcing the  
16 debtor to make up lost contributions after emerging from bankruptcy; and  
the needs of the debtor's dependents.<sup>51</sup>

17 The BAP has also applied these factors in a similar context and specifically considered  
18 the debtor’s age and plans to continue working for at least 20 years.<sup>52</sup> The BAP reasoned  
19 that interrupting debtor’s retirement contributions would have a minimal impact where  
20 the debtor does not plan on retiring soon.<sup>53</sup> In *In re Ng*, the BAP also sided with a majority  
21 of courts in determining that “[l]oan repayments are ‘disposable income’ because of their  
22 unique character; the debtor is in essence repaying a loan to himself.”<sup>54</sup>

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25 <sup>47</sup> 11 U.S.C. § 1325(b)(2).

26 <sup>48</sup> *In re Parks*, 475 B.R. at 709.

27 <sup>49</sup> *Hebbring v. U.S. Tr.*, 463 F.3d 902, 905 (9th Cir. 2006).

28 <sup>50</sup> *Id.* at 907.

<sup>51</sup> *Id.*

<sup>52</sup> *In re NG*, 477 B.R. 118, 127 (B.A.P. 9th Cir. 2012)

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 128.



1 **V. APPLICATION OF THE LAW TO THIS CASE**

2 This Court has found no statute or case that squarely answers the question at issue  
3 in the case at bar. In looking to whether a chapter 11 plan is proposed in good faith within  
4 the meaning of § 1129(a)(3), one court eloquently stated, “[g]ood faith is an amorphous  
5 notion, largely defined by factual inquiry.” This Court recognizes that the primary  
6 purposes of a chapter 11 may often appear to conflict with one another. On the one hand,  
7 the purpose of a chapter 11 is the rehabilitation of a debtor and, on the other, to maximize  
8 the value of the estate. This Court will analyze two distinct, yet equally important aspects  
9 of Debtors’ proposed Amended Plan and Disclosure Statement. First, Debtors’ failed to  
10 adequately disclose their post-petition contributions to Ms. Zimont’s 401(k). Second, even  
11 if the Debtors hereafter file an amended disclosure statement which adequately discloses  
12 their post-petition 401(k) contributions, such post-petition contributions impermissibly  
13 divert Debtors’ disposable income for their exclusive benefit and to the detriment of their  
14 unsecured creditors.

15  
16 **A. Debtors’ Failure to Disclose**

17 Debtors’ contributions to Ms. Zimont’s 401(k) plan were not adequately disclosed  
18 in Debtors’ Amended Disclosure Statement or Debtors’ Amended Plan. The Debtors did  
19 disclose Ms. Zimont’s post-petition contributions to her 401(k) plan in Schedule I, Line 5  
20 ( c)<sup>55</sup> and in their Amended Declaration of Employer’s Payments Within 60 Days<sup>56</sup> but  
21 there is no mention in their Amended Plan or Amended Disclosure Statement of their post-  
22 petition retirement plan contributions or their intent to continue such contributions post-  
23 confirmation. When creditors were asked to vote on Debtors’ Amended Plan, they did not  
24 have this important information at hand.<sup>57</sup>

25 \_\_\_\_\_  
26 <sup>55</sup> DE 1.

27 <sup>56</sup> DE 25.

28 <sup>57</sup> According to Debtors’ Ballot Report, 4 of the Debtors’ 30 unsecured creditors voted in favor of the Amended Plan. The amount of their claims totaled \$172,871. No unsecureds voted against the Amended Plan. 2 of these 4 voting creditors are insiders whose votes cannot be counted for confirmation purposes. See §1129 (a)(10). Of the remaining creditors who voted for the Amended Plan, their claims totaled \$34,171, 7% of the total unsecured claims of \$488,900. In summary, 7% of the Debtors’ creditors holding 7% of the unsecured claims voted for the Amended

1 Based on Debtor's failure to disclose this significant item in their Amended  
2 Disclosure Statement or Amended Plan, this Court cannot find that the Debtors' Amended  
3 Plan was proposed in good faith. Debtors' Plan does not satisfy the requirement of  
4 §1129(a)(3) and cannot be confirmed.

5  
6 B. Even if Debtors' Disclosures Were Adequate, the Court Cannot Find  
7 Debtors' Plan Was Proposed in Good Faith

8 Even assuming Debtors' file a new plan and disclosure statement adequately  
9 disclosing post-petition contributions to their 401(k) plan, this Court finds Debtors' failure  
10 to contribute this income and their post-petition repayments towards the Retirement Plan  
11 Loan to their Amended Plan violates § 1129(a)(3). Although this Court acknowledges that  
12 §1129(a)(15) is not necessarily triggered unless a creditor objects to an individual's  
13 chapter 11 plan, the Court finds that Debtors' failure to contribute approximately  
14 \$39,200<sup>58</sup> over the life of the Amended Plan constitutes cause to deny confirmation of  
15 Debtors' Amended Plan under §1129(a)(3).

16 Section 1129(a)(15) requires an individual chapter 11 debtor to distribute value of  
17 property that is not less than debtor's projected disposable income. Such calculation of  
18 Debtors' disposable income would require inclusion of both the amounts Debtors' are  
19 repaying on the Retirement Plan Loan and the voluntary contributions to Debtors' 401(k)  
20 plan. Here, Debtors are distributing far less than their entire disposable income by virtue  
21 of (a) repaying the Retirement Plan Loan at \$420 per month until it is paid in full and (b)  
22 continuing to make contributions to Ms. Zimont's 401(k) plan in the amount of  
23 approximately \$525 per month. The Court finds that Debtors have not discharged their

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25 \_\_\_\_\_  
26 Plan. However, those voting creditors were not adequately apprised of material disclosure omissions concerning  
27 Debtors' post-petition use of bankruptcy estate property to increase Debtors' exempt retirement assets.

28 <sup>58</sup> The Court comes to this figure based on the Retirement Loan Information filings and the following math: The  
balance of the Retirement Plan Loan is \$7,700. Debtors are currently contributing \$525 per month to their 401(k).  
Under the current Amended Plan Debtors will pay off the \$7,700 balance due on their Retirement Plan Loan. Debtors  
will also make 60 monthly contributions of \$525 (\$31,500). ( $\$31,500 + \$7,700 = \$39,200$ ). The Court is mindful of  
the increased tax liability they will bear if the \$7,700 loan is partially paid by the retirement plan administrator and  
if pre-tax contributions to the plan cease.

1 fiduciary duties to their creditors when such a significant portion of their disposable  
2 income is used post-petition to build up Debtors' exempt retirement assets to the detriment  
3 of the unsecured creditors of their estate. Moreover, if the *Hebbring* or *Ng* cases referenced  
4 in Section IV (D) above are pertinent to this chapter 11 case,<sup>59</sup> the Debtors have not in  
5 their Declaration or elsewhere demonstrated to this Court that the Retirement Plan Loan  
6 repayments or their ongoing retirement plan contributions are "necessary expenses."

7 No objection was filed to the Debtors' Plan so the provisions of § 1129 (a)(15) are  
8 not applicable.<sup>60</sup> Moreover, nothing contained in section § 1129(a) requires a debtor to  
9 commit all or any definitive portion of their disposable income to fund their chapter 11  
10 plan. Rather, §1123(a)(8) requires an individual chapter 11 debtor to provide for payment  
11 to unsecured creditors "all or such portion of earnings from personal services performed  
12 by the debtor ...as is necessary for the execution of the plan."<sup>61</sup>The Bankruptcy Code does  
13 not mandate payment into an individual chapter 11 plan all income which was pre-petition  
14 dedicated to retirement plan contributions or loan repayments. Nevertheless, this Court is  
15 persuaded that, viewing in totality §§ 1123(a)(8), 1129 (a)(15) and 1325 (b)(2), Congress  
16 intended that an individual chapter 11 debtor commit to their plan that portion of their  
17 income which was otherwise used to pay their Retirement Plan Loan and to make further  
18 retirement plan contributions, unless such contributions are found by the court to be  
19 "necessary expenses" of the debtor. The Court does not propose to identify how much of  
20 Debtors' disposable income needs to be committed to their plan. Rather, the Court cannot  
21 find Debtors' plan was proposed in good faith where a portion of their income is being  
22 used to increase the size of their exempt retirement assets. This *sua sponte* inquiry by the  
23 Court is not prohibited by the Code or by any case law known to this Court.

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26 \_\_\_\_\_  
27 <sup>59</sup> Recall those cases were concerned with possible dismissal of an individual's chapter 7 case under § 707(b).

28 <sup>60</sup> At least one court has suggested that, in the chapter 13 context, absent an objection by a trustee or creditor, the court may not *sua sponte* raise issues concerning a debtor's disposable income calculations. *Briggs v. Johnson*, 591 B.R. 664 (Bank. W.D. La. 2018). This may pertain to individual chapter 11 cases as well, but that issue need not be decided here. There have been no objections to the Debtors' Amended plan which would invoke a § 1129 (a)(15) analysis.

<sup>61</sup> Courts have compared 1123(a)(8)'s requirement to a similar requirement found in 1322(a)(1).

1 At least one bankruptcy judge has suggested (in the context of a chapter 13) that a  
2 debtor should be permitted to direct a portion of their disposable income to fund a savings  
3 account to help smooth over the inevitable ups and downs experienced over the course of  
4 a debtor's chapter 13 plan.<sup>62</sup> This may well make sense in both chapter 13 plans and in  
5 the case of an individual's chapter 11. However, such a savings plan is far different than  
6 permitting a debtor to use estate property in order to save for their retirement. The former  
7 has the potential of aiding a successful conclusion to their plan thereby benefitting their  
8 creditors. The latter serves only a debtor's interests and does so to the direct detriment of  
9 their creditors.

10 The Court notes that Debtors' unsecured claims totaled \$488,900. Debtors'  
11 Amended Plan proposes a 28% to 33% repayment to unsecured claimants. Additional  
12 distributions of \$39,200 to unsecured creditors would represent an 8% increase in  
13 distributions to unsecured claimants. This fact together with the other above-outlined  
14 circumstances of this case lead this Court to conclude Debtors' have not satisfied the good  
15 faith requirements of § 1129(a)(3).

## 16 **VI. CONCLUSION**

17  
18 Debtors' fiduciary duties in this case include a duty to maximize this bankruptcy  
19 estate for the benefit of unsecured creditors. Debtors' proposed Amended Plan which calls  
20 for diversion of their post-petition income to repay the Retirement Plan Loan and to make  
21 ongoing contributions to Ms. Zimont's 401(k), is not in accord with their fiduciary duties.  
22 Debtors' Amended Plan looks to maximize their personal exempt retirement assets to the  
23 detriment of their creditors. This Court finds that, unless Debtors propose a plan calling  
24 for (a) additional plan payments in the amount of the post-petition Retirement Plan Loan  
25 payments and contributions to their retirement plan and (b) no further retirement Plan  
26 Loan payments or contributions during the life of Debtors' chapter 11 plan, this Court  
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<sup>62</sup> See David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases?*, 26 *Am. Bankr. Inst. L. Rev.* 243 (2018).

1 cannot find the Debtors' plan is proposed in good faith and, therefore, must be denied  
2 confirmation. However, if the debtors submit an order confirming their Amended Plan  
3 which incorporates these required changes, the Court will sign the confirmation order  
4 without requiring renoticing of the Amended Plan or Amended Disclosure Statement.

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**DATED AND SIGNED ABOVE.**