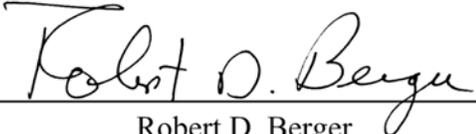


The relief described hereinbelow is **SO ORDERED**.

SIGNED this 15th day of June, 2022.




Robert D. Berger
United States Bankruptcy Judge

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:

AMBER KAY SHANK,

Debtor.

Case No. 21-20605

Chapter 13

ORDER PARTIALLY OVERRULING OBJECTION TO CONFIRMATION

Instant One Media, Inc., sued Amber Shank and her company, EZFauxDecor, LLC (“**EZF**”), for trademark infringement and breach of contract in the Northern District of Georgia in 2019.¹ Five days before trial, on May 28, 2021, Shank filed for

¹ Instant One and EZF both sell decorative peel-and-stick vinyl film for use on kitchen countertops and appliances.

Chapter 13 bankruptcy in the District of Kansas. Shank's bankruptcy petition stayed the Georgia case as to Shank herself, *see* 11 U.S.C. § 362(a), but the case against EZF continued.

On June 4, 2021, a Georgia jury awarded Instant One a judgment of \$1,035,000 against EZF. However, due to an apparent calendaring error, Instant One missed the August 6, 2021 deadline to file a proof of claim in Shank's bankruptcy case.² Because there will therefore be no distributions to Instant One under Shank's amended plan, the plan will pay 100% of allowed unsecured claims.³

Instant One objected to confirmation of Shank's amended plan on October 4, 2021.⁴ At this Court's direction, the parties have briefed the issue of Instant One's standing to do so in light of its failure to timely file a claim.⁵

Instant One's brief focuses on § 1324(a) of the Bankruptcy Code,⁶ which provides that a "party in interest" may object to confirmation. The Code does not

² Fed. R. Bankr. P. 3002(c) provides that a claim is timely if filed no later than 70 days after the order for relief in a Chapter 13 case (i.e., the petition, *see* 11 U.S.C. § 301(b)). Here, because Shank filed her Chapter 13 petition on May 28, 2021, the deadline to file a proof of claim (i.e., the bar date) was 70 days later, on August 6, 2021.

³ *See* ECF 78 at 2, 4. On December 3, 2021, this Court denied Instant One's motion to allow a late-filed claim. *See* ECF 60.

⁴ ECF 50.

⁵ *See* ECF 78; ECF 82; ECF 85. Whenever standing is unclear, courts must consider the issue *sua sponte*. *See Hobby Lobby Stores, Inc. v. Sibelius*, 723 F.3d 1114, 1126 (10th Cir. 2013), *aff'd sub nom. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

⁶ All statutory references in this order are to Title 11, United States Code (the "Bankruptcy Code").

define “party in interest,” but courts generally understand the term to include “all persons whose pecuniary interests are directly affected by the bankruptcy proceedings,” as well as “anyone who has an interest in the property to be administered and distributed under the Chapter 13 plan.” *Davis v. Mather (In re Davis)*, 239 B.R. 573, 579 (B.A.P. 10th Cir. 1999) (citing *Nintendo Co. v. Patten (In re Alpex Comput. Corp.)*, 71 F.3d 353, 356 (10th Cir. 1995)). Here, Instant One has unliquidated and disputed claims against Shank that were stayed by, and are subject to discharge in, Shank’s Chapter 13 case. Under these circumstances, the Court agrees that Instant One is a party in interest under § 1324.

But § 1324 does not end the inquiry, because a party in interest must also have *standing* to object to confirmation. See *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 887 (9th Cir. 2012) (reasoning that a party in interest under § 1109(b) must also meet Article III and prudential standing requirements to object to confirmation of a Chapter 11 plan). And standing to object requires that the party in interest have a direct stake, cognizable under the Bankruptcy Code, in making that particular objection.⁷ See *In re Alpex Comput. Corp.*, 71 F.3d at 356; *id.* (providing examples of different “stakes”

⁷ Thus, while a creditor may be a party in interest under § 1324, “[n]ot all creditors have standing to raise all objections.” Keith M. Lundin, *Lundin on Chapter 13* § 116.1, at ¶ 6; compare *In re Rothwell*, Case No. 04-41153-JMK, 2005 Bankr. LEXIS 132 (Bankr. D. Kan. Feb. 3, 2005) (holding that former spouse who failed to timely file proof of claim had standing to object that Chapter 13 plan would improperly avoid his lien), with *In re MacKenzie*, 314 B.R. 277 (Bankr. D.N.H. 2004) (holding that mortgagee who failed to timely file proof of claim lacked standing to object that Chapter 13 plan understated mortgage arrearage).

various parties-in-interest might hold in reopening a Chapter 11 case under § 350(b)).

Here, Instant One objects to confirmation of Shank's amended Chapter 13 plan on six grounds: (1) that Shank's schedules do not include a breakdown of EZF's receipts, expenses, and net income as required by Schedule J, line 8a, and that "[a]n increase in [Shank's] income will cause a larger dividend available to [Instant One] as an unsecured creditor";⁸ (2) that Shank's plan undervalues the assets of EZF; (3) that Instant One suspects Shank and/or EZF may have additional assets (in the form of other bank accounts); (4) that whereas Shank's plan lists the liquidation value of her non-exempt property as \$5,100, her means test yields a "pool" of \$28,846.20; (5) that Shank's bankruptcy is a "scheme to defraud" Instant One; and (6) that "[Shank] is using this bankruptcy and the automatic stay as a shield to siphon money from [EZF] to frustrate [Instant One's] rights to collect on its Judgment."⁹ While Instant One's objections do not cite any particular provisions of the Bankruptcy Code, they appear to arise under the following subsections of § 1325, which governs confirmation of Chapter 13 plans:

- objections (1) and (4), under § 1325(b)(1)(B);
- objections (2) and (3), under § 1325(a)(4);
- objection (5), under § 1325(a)(7); and
- objection (6), under § 1325(a)(3).

⁸ ECF 50 at 3.

⁹ *See id.* at 3-5.

1. Disposable income

Instant One's objections (1) and (4) are about whether Shank's amended plan devotes all of her projected disposable income to the payment of unsecured claims.

Such arguments are governed by § 1325(b)(1), which provides:

If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

Thus, under § 1325(b)(1), if “the trustee or the holder of an allowed unsecured claim” objects to confirmation, one of two conditions must be satisfied: either (A) the plan pays 100% of the objecting creditor's unsecured claim, or (B) the plan applies all of the debtor's projected disposable income to the payment of unsecured claims.

Here, Instant One's failure to timely file a claim has two consequences: first, that Instant One cannot be the “holder of an allowed unsecured claim” whose objection triggers application of § 1325(b)(1); and second, that Shank's amended plan will pay 100% of all allowed unsecured claims. Therefore, even if Instant One's objection triggered § 1325(b)(1) (which it does not), Shank's plan now satisfies § 1325(b)(1)(A). For these reasons, the Court will overrule objections (1) and (4).

2. Liquidation test

Instant One's objections (2) and (3) are about the value of Shank's nonexempt assets.¹⁰ Such arguments are governed by § 1325(a)(4), i.e., the "liquidation test" or "best interests of creditors test," which requires that:

the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date[.]

However, Instant One's failure to timely file a claim means that it will receive no distributions under Shank's Chapter 13 plan. Instant One thus has no direct stake, cognizable under the Bankruptcy Code, of ensuring that Shank's plan pays unsecured creditors at least as much as they would receive from the liquidation of her non-exempt assets in Chapter 7. It follows that Instant One lacks standing to object under § 1325(a)(4). And even if Instant One did have such standing, Shank's amended plan will pay 100% of allowed unsecured claims. Therefore, Shank's plan satisfies § 1325(a)(4) regardless of what her non-exempt assets are worth (since

¹⁰ Instant One's argument to this effect is mostly about the value of EZF's assets, not Shank's. However, under Kansas law, Shank has no interest in EZF's personal property. See Kan. Stat. Ann. § 17-76,111 ("A limited liability company interest is personal property. A member has no interest in specific limited liability company property."). Moreover, the value of Shank's equity interest in EZF is not the value of EZF's assets, but rather the value of EZF's assets *minus its liabilities*. See, e.g., *Accounting Equation*, <https://www.investopedia.com/terms/a/accounting-equation.asp> (last visited June 1, 2022) ("The accounting equation states that a company's total assets are equal to the sum of its liabilities and its shareholders' equity.").

unsecured creditors would not be paid more than 100% in a Chapter 7 case). For these reasons, the Court will overrule objections (2) and (3).

3. Good faith

In objection (5), Instant One alleges that Shank's bankruptcy is a "scheme to defraud" Instant One; in objection (6), it alleges that Shank's Chapter 13 plan will "fraudulently" "siphon" money from EZF to Instant One's detriment. These objections challenge Shank's good faith in filing her Chapter 13 petition and amended plan. Such arguments are governed by § 1325(a)(7), which requires that "the action of the debtor in filing the petition was in good faith," and § 1325(a)(3), which requires that "the plan has been proposed in good faith." Both are determined on a case-by-case basis under the totality of the circumstances. *See Anderson v. Cranmer (In re Cranmer)*, 697 F.3d 1314, 1318 (10th Cir. 2012); *cf. In re Gier*, 986 F.2d 1326, 1329 (10th Cir. 1993) (adopting totality-of-the-circumstances test for determining whether Chapter 13 petition was filed in bad faith under § 1307(c)).¹¹

¹¹ Factors relevant to whether a Chapter 13 petition was filed in good faith include:

the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

In re Gier, 986 F.2d at 1329 (quoting *In re Love*, 957 F.2d 1350, 1357 (7th Cir. 1992)). Factors relevant to whether a Chapter 13 plan was filed in good faith include "whether the debtor has stated his debts and expenses accurately; whether

As to standing, Instant One argues: “[Instant One] clearly has an interest in objecting to a Chapter 13 plan that will be distributing funds that are being fraudulently transferred from [EZF] to [Shank].”¹² Shank’s reply acknowledges that she will fund her Chapter 13 plan with EZF’s profits, but denies that Instant One has any present interest in those profits by virtue of its judgment against EZF.¹³

The burden of establishing standing is on the objecting party. *See Thomas v. Fed. Nat’l Mortg. Ass’n (In re Thomas)*, 469 B.R. 915, 921 (B.A.P. 10th Cir. 2012); *cf. Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (observing that the party invoking federal jurisdiction has the burden of establishing elements of standing). When evaluating a party’s standing at the pleading stage, a court must accept the party’s material allegations as true and construe the pleading in that party’s favor. *See Initiative & Referendum Institute v. Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc) (citations omitted). Here, Instant One’s objection to confirmation is—while not technically a “pleading” under Fed. R. Civ. P. 7(a)—at the pleading stage. Therefore, the Court must (at this stage) accept Instant One’s material

he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.” *In re Cranmer*, 697 F.3d at 1319 n.5 (quoting *Educ. Assistance Corp. v. Zellner*, 827 F.2d 1222, 1227 (8th Cir. 1987); *see id.* (noting that § 1325(b) “subsumes” most of the factors listed in *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983), such that “the good faith inquiry now ‘has a more narrow focus’” (quoting *Zellner*, 827 F.2d at 1227)).

¹² ECF 82 at 4.

¹³ ECF 85 at 3.

allegations as true, and construe the objection to confirmation in Instant One's favor, to determine whether Instant One has standing to object.

Accordingly: if Shank filed for bankruptcy in an attempt to defraud Instant One, and if Shank's Chapter 13 plan will be funded with fraudulently-transferred property in which Instant One has an interest,¹⁴ does Instant One has standing to object under §§ 1325(a)(3) and (a)(7)? The Court thinks that it does. Instant One's objections (5) and (6) will therefore be set for evidentiary hearing. The hearing will be limited to the issues of Shank's good faith in filing her Chapter 13 petition and amended plan under §§ 1325(a)(3) and (a)(7). The remainder of Instant One's objection to confirmation is hereby overruled.

IT IS SO ORDERED.

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¹⁴ Whether Instant One actually *does* have a property interest in EZF's profits seems to be about the merits of Instant One's objection rather than its standing to object. *Cf. Harzewski v. Guidant Corp.*, 489 F.3d 799, 803-04 (7th Cir. 2007) (Posner, J.) (distinguishing merits from standing); *Initiative & Referendum Inst.*, 450 F.3d at 1092-93 ("For purposes of standing, we must assume the Plaintiffs' claim has legal validity.").