UNITED STATES BANKRUPTCY COURT

DISTRICT OF IDAHO

IN RE: **DOUGLAS JEROME HARMON and CHRISTINE RENNA HARMON,** **Debtors.**	**Case No. 19-01424-TLM** **Chapter 13**

MEMORANDUM OF DECISION

On June 16, 2020, the chapter 13 trustee, Kathleen A. McCallister ("Trustee"), filed pursuant to Rule 9023 "Trustee's Motion to Reconsider Denial of Trustee's Fees on Preconfirmation Disbursements." Doc. No. 43 at 1 (the "Motion").[1] Trustee also filed a brief in support of the Motion. Doc. No. 45 (the "Brief"). Trustee further set the matter for a hearing on July 14, 2020, and filed a Notice of Hearing. Doc. No. 44.

For the reasons stated herein, the Court finds that the Motion will be denied, and the noticed hearing vacated.

BACKGROUND

Douglas and Christine Harmon (the "Harmons") filed a chapter 13 petition on December 5, 2019. They ultimately filed a voluntary motion to dismiss under § 1307(b) on April 17, 2020. Doc. No. 36. That motion was granted, and the case dismissed on

[1] Unless otherwise indicated, statutory citations are to the Bankruptcy Code, Title 11, U.S. Code, §§ 101–1532, and those to "Rules" are to the Federal Rules of Bankruptcy Procedure.

April 28, 2020. Doc. No. 37. Also on April 28, the Harmons' counsel filed an application for compensation. Doc. No. 38. Trustee's "response" to this application noted that funds on hand were $2,178.03; counsel's requested fees were $1,839.00; and that "Trustee has no objection to the proposed attorney's fees subject to trustee's fees." Doc. No. 40 at 1.

The application had been issued on notice and opportunity for objection, and no objections were filed. Doc. No. 38; Doc. No. 41 (minute entry). A proposed order was then submitted to the Court, endorsed by both the Harmons' counsel and Trustee. Its decretal paragraph stated:

> IT IS HEREBY ORDERED that Counsel's request for attorney's fees is hereby approved in the amount of $1839 with a balance due of $1839. Trustee is authorized to pay said fees from funds on hand on the date of dismissal with the balance of the funds on hand to be refunded to the Debtor(s). Said disbursement shall be subject to Trustees [*sic*] fees.

That proposed order was entered by the Court after striking that final sentence, by lining through the same, and providing an additional note below the Court's signature stating:

> [MODIFICATION MADE BY THE COURT AS THE LANGUAGE AND RESULT ARE INCONSISTENT WITH *In re Evans*, 2020 WL 739258 (Bankr. D. Idaho Feb. 13, 2020), and *In re Leal*, 20-00068-TLM. ORDER OTHERWISE AGREED TO BY THE PARTIES.]

Doc. No. 42 at 1 (the "Order").[2]

[2] *Evans* and *Leal* addressed the same issue regarding Trustee's right to fees in a dismissed case.

Trustee now asks this Court to "reconsider" its entry of the Order, arguing it deprives her of fees in a case dismissed before confirmation, and that *Evans* and *Leal* were wrongly decided.

DISCUSSION AND DISPOSITION

A. Trustee's Entitlement to Fees in Cases Dismissed Pre-Confirmation

In a contested matter previously before Chief Bankruptcy Judge Meier of this Court, chapter 13 debtors objected to Trustee's final report in a case dismissed prior to plan confirmation, and they sought an order requiring Trustee to disgorge all the plan payments, including amounts Trustee's final report indicated were being retained by her for her expenses and compensation. *Evans*, 2020 WL 739258, *1. The matter was presented to the Court at a hearing, and the debtors and Trustee presented argument and authority. *Id.* The Court, in a lengthy and thoughtful decision, sustained the debtors' objection to the final report and required Trustee to return to the debtors all funds including those that had been retained by her for her percentage fees and trustee expenses. *Id.* at *11. Trustee appealed, and the matter is now pending before the District Court for the District of Idaho. *In re Roger A. Evans and Lori A. Steedman*, Case No. 19-40193-JMM, Doc. Nos. 43–44. The trustee's motion for stay pending that appeal was denied. *Id.* at Doc. No. 60.

Subsequently, an unconfirmed and dismissed chapter 13 case came before the undersigned. *In re Joseph Thomas Leal*, Case No. 20-00068-TLM. Much of the dispute in that case concerned Trustee's objections to the amount of fees requested by the debtor's counsel, which, if allowed, would be treated as § 503(b) administrative expenses

and paid to such counsel before remaining funds were paid to debtor's under § 1326(a)(2).[3] *See generally Leal*, Case No. 20-00068-TLM, Doc. Nos. 28 and 31. Following hearing and argument, the issues were taken under advisement. Trustee's objections were later sustained in part in an oral ruling reducing counsel's fees. *See Leal*, Case No. 20-00068-TLM, Doc. No. 34 (minute entry). In that oral ruling, the Court also stated:

> Trustee's Objection also asserts that "any disbursement by the trustee should be subject to Trustee's fees." *See* Doc. No. 28 at 2, ¶ (d). Trustee clarified at hearing that this refers to any payment made under § 503(b) to [debtor's] Counsel, and that such payment should be subject to Trustee's fees. That proposition is unexplained in the Objection and no authority was cited there or at hearing.
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> In the case of *In re Evans*, 2020 WL 739258 (Bankr. D. Idaho Feb. 13, 2020), this Court addressed § 1326(a)(2). It there noted the same requirement expressed earlier in today's decision—that upon dismissal, this section requires the trustee to return the funds on hand to the debtor after deducting any unpaid claim under § 503(b).

Following additional comments and discussion regarding *Evans* and the relevant provisions of Title 11 and Title 28, United States Code, the Court ruled:

> The assertion that Trustee's fees should be assessed on the funds delivered to counsel is not persuasively advanced. The funds on hand should be delivered to Debtor after distributing such amounts to Debtor's counsel as the Court might determine appropriate in light of its disposition of [counsel's] Application and the Objection.

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[3] That section provides:

> (2) A payment made under paragraph (1)(A) shall be retained by the trustee until confirmation or denial of confirmation. . . . If a plan is not confirmed, the trustee shall return any such payments not previously paid and not yet due and owing to creditors pursuant to paragraph (3) to the debtor, after deducting any unpaid claim allowed under section 503(b).

An order was entered on June 2, 2020, consistent with that decision. *Leal*, Case No. 20-00068-TLM, Doc. No. 35. The deadline for appeal of the June 2 order under Bankruptcy Rule 8002 or a motion under Bankruptcy Rule 9023 expired June 16, 2020. Neither an appeal nor a motion was filed in *Leal*.

B. Trustee's Position

Trustee's Motion to Reconsider is brought under Rule 9023.[4] Doc. No. 43 at 1. In it, Trustee prays "that this court reconsider the denial of trustees' fees on disbursement made by the trustee in cases dismissed or converted prior to confirmation and find that the decision of the Court [in] *In re Evans*, 2020 WL 739258 upon which it based its ruling was incorrect."[5] *Id* at 2.

The fifteen-page Brief filed simultaneously with the Motion elaborates that the Court should not only reconsider its ruling in the instant case of the Harmons, but in doing so also address *Evans*. Doc. No. 45 at 1. The Brief states:

> The Court's ruling in *Evans*, 2020 WL 739258 (Bankr. D. Idaho Feb. 13, 2020) which is the basis of this Court's denial of Trustee's fees on disbursements being made in cases dismissed prior to confirmation is incorrect and consequently this Court's decision to not allow Trustee fees on disbursements is in error.

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[4] Rule 9023, which incorporates Fed. R. Civ. Proc. 59, requires such a motion to be brought within fourteen days of the subject order. The Order was entered on June 2, 2020, and the Motion was filed on June 16, 2020, and is timely.

[5] The Motion mentions the appeal pending in *Evans*. It also indicates Trustee's desire to appeal the decision in *Leal*, but that such decision was orally entered and an appeal would require a transcript of the ruling. Trustee also concedes that, in *Leal*, "Trustee failed to adequately brief the issue on which to make a record." *Id*. at 2. After acknowledging these failures in *Leal*, Trustee "requests an opportunity to fully brief and argue her position . . . to attempt to remedy the matter at least before this Court." *Id.* As noted earlier, an appeal in *Leal* would be required by June 16, 2020, and no appeal was filed. Nor was any motion filed in *Leal*. Thus, *Harmon* is the only case properly before the Court despite Trustee's focus on the Court's order in *Leal*.

Id. at 1. The Brief also argues: "[i]n the alternative . . . that the court find that *Evans* held that Trustees **are** entitled to fees in cases where the Trustee makes a disbursement in cases dismissed prior to confirmation." *Id*. at 14 (emphasis added).[6] In numerous pages of argument and case citations, Trustee contends that *Evans* erred in its statutory analysis, "misinterpreted" legislative history, failed to understand the costs of administration, and some of its findings and holdings are "clearly incorrect." *Id*. at 2–13.

C. Reconsideration under Rule 9023

Motions to reconsider do not exist under the Rules. *In re Ricks*, 2015 WL 6125559, *2 (Bankr. D. Idaho Oct. 16, 2015) (citations omitted). When so asserted, they are treated as motions under Fed. R. Civ. P. 59(e) made applicable by Rule 9023. *Id.* Such motions under Civil Rule 59(e) "will not be granted 'absent highly unusual circumstances,' and reconsideration of a judgment or order after its entry by the court 'is an extraordinary remedy which should be used sparingly.'" *Id*. (citing *McDowell v. Calderon*, 197 F.3d 1253, 1254 n.1 (9th Cir. 1999) (citation omitted)). The Court entertains "considerable discretion" in granting or denying such a motion. *Id*. The standards are high: a motion to reconsider "should not be granted, absent highly unusual circumstances, unless the [] court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Id*. (citing *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009) (internal citation omitted)).

[6] *Evans* held no such thing.

In this case, the first factor—newly discovered evidence—is inapplicable because the issue of whether Trustee is entitled to fees is a question of law and there is no evidentiary aspect to the Court's consideration of that issue. Likewise, the third factor—change in the law—is not met as this Court's decisions in *Evans* and *Leal* have not been reversed, nor has any intervening decision to the contrary been issued.

The second factor—clear error—is not met. *Evans* is pending appeal, but has not been stayed. *Leal* has not been appealed. Though the Court is not bound by the decisions of its colleagues, it gives them the significant respect they warrant. "While this Court's decisions are not binding, the Court will not depart from those decisions unless presented with compelling circumstances such as a statutory amendment, a change or development in the case law, or some other factor that undermines the basis for the earlier ruling." *In re Arehart*, 2019 WL 171466, *3 (Bankr. D. Idaho Jan. 10, 2019) (quoting *In re DeBoer*, 1999 WL 33486710, *3 (Bankr. D. Idaho July 20, 1999)). Contrary to the sense of the Motion and Brief, this Court carefully and fully considered the decision in *Evans* when rendering its decision in *Leal*, and believes *Evans* was correctly decided. The Court also fully evaluated *Evans* and *Leal* before entering its Order in this case, which Order, as amended, is in compliance with that authority.[7]

[7] A proposed order is just that—a proposal for the Court's review. The Court may reject a proposed order. *See, e.g., In Hurd*, 2010 WL 3190752, at *1 (Bankr. D. Idaho Aug. 11, 2010); *In re Johnson*, Case No. 04-21637-TLM, Doc. No. 33 (Bankr. D. Idaho. Aug. 9, 2006); *In re Scheiwe*, Case No. 04-06282-TLM, Doc. No. 11 at 1 (Bankr. D. Idaho Aug 3, 2005). The Court also has discretion to modify a proposed order as it deems appropriate. *Prudential Equity Grp., LLC v. Rowland*, 2008 WL 2113388, *1 (D. Ariz. May 16, 2008), *aff'd on other grounds,* 362 F. App'x 591 (9th Cir. 2010).

At bottom, the Motion asks the Court to "rethink matters already decided, to reargue matters already submitted, or to attempt to cure deficiencies . . . that were found to be inadequate," and none of these grounds support "reconsideration" under Civil Rule 59(e). *Ricks*, 2015 WL 6125559, at *2 (citations omitted).

Trustee has failed to carry her burden to show that the extraordinary remedy of reconsideration is warranted. Therefore, the request to "reconsider" the ruling in the instant case, under the authorities above, is found not well taken or adequately supported.

CONCLUSION

Trustee and counsel for the Harmons agreed on, and submitted, a proposed form of order. The Court was not required to accept it as presented. It therefore edited the same based upon its prior ruling in *Leal*, and its agreement with and reliance on the decision in *Evans*. Seeking "reconsideration" of the order in the Harmons' case seemingly as a means to challenge *Evans* while *Evans* is presently on appeal, and *Leal* after the window to appeal *Leal* expired, is a questionable tactic. Based upon the foregoing analysis, the Motion will be denied. A hearing on the matter is unnecessary, and the hearing set for July 14, 2020, will be vacated. The Court will enter an Order accordingly.

DATED: June 23, 2020

TERRY L. MYERS
U.S. BANKRUPTCY JUDGE