

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE: )  
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JACINTA CHARZETTA POWE, ) Case No. 20-10054  
 )  
Debtor. )

ORDER OVERRULING OBJECTION TO CONFIRMATION WITH CONDITIONS

The debtor in this case is too broke to file chapter 7 -- or at least she cannot come up with the upfront money for a chapter 7 attorney's fee. She thus filed chapter 13, which under current bankruptcy laws allows her to pay her lawyer over time through her chapter 13 plan. The chapter 13 trustee has filed an objection to confirmation and motion to dismiss (doc. 19), contending that the debtor did not file this case in "good faith" as required by Bankruptcy Code § 1325(a)(7). For the reasons set out below, the court finds that the filing was not in bad faith and denies the motion, although with conditions on the attorney's fee.

Background

Debtor Jacinta Powe is a custodian with the Mobile County Public School System. According to her Schedule I, her gross monthly wages are \$1,361.84 and her total monthly take home pay is \$858.20. She also receives child support of \$370 and SSI income for one child (whom the court presumes is disabled) in the amount of \$689, bringing her total gross monthly income to \$1,917.20. According to her Schedule J, she has two children at home and her monthly expenses are \$1,782, leaving a net monthly income of \$135.20.

According to her Schedules A/B, Ms. Powe does not own any real estate and does not have a vehicle. The value of all of her total personal property at the time of filing was \$1,473, consisting of the following: furniture and appliances, \$700; electronics, \$200; personal clothing, \$200; dog, \$1; two pulmonary machines, \$200; cash, \$20; bank accounts, \$150; retirement account, \$1; and child support arrears, \$1.

Ms. Powe did not participate in the telephonic confirmation hearing held on April 9, 2020 because of circumstances caused by the coronavirus pandemic. Ms. Powe's attorney represented to the court that she filed bankruptcy to stop a wage garnishment. Her attorney filed excerpts from the Alacourt state court docket system (doc. 21) showing that Credit Acceptance Corporation has a 2011 judgment against Ms. Powe for \$8,447.18 plus costs. The state court file reflects numerous garnishments of both Ms. Powe's wages and her account at Progressive Credit Federal Credit Union. Credit Acceptance garnished Ms. Powe's wages in December 2019. Ms. Powe filed this bankruptcy on January 8, 2020.

Ms. Powe's schedules do not list any priority or secured debt, and her proposed plan (doc. 3) does not provide for any. She proposes a plan payment of \$135 a month (all of her net income) for 36 months, which is the applicable period for a below-median income debtor under Bankruptcy Code § 1325(b). The chapter 13 trustee estimates that the plan will pay \$1,809.84, which is about 9%, on unsecured claims. The proposed chapter 13 attorney's fees are \$2,400, which is currently the floor for "no look" attorney's fees in chapter 13's pursuant to local Administrative Order No. 2019-3. At the hearing, Ms. Powe's counsel offered to reduce his fee to \$1,800 so that it would be less than the amount paid to unsecured creditors.

#### Discussion

The trustee argues that Ms. Powe did not file this case in good faith because the case is essentially a "fee-only" or "fee-centric" chapter 13. The underlying problem is that most debtor's counsel want to be paid "upfront" -- that is, before the petition -- for a chapter 7 bankruptcy because a prepetition fee agreement is dischargeable. The attorney's fees in a chapter 13 are not only generally much higher than in a 7 (the standard no-look fee is \$4,000 pursuant to Administrative Order 2019-3), but also the debtor pays those fees through the court-supervised chapter 13 plan without collection efforts on the part of the attorney. The difference in the way fees are paid creates an uneven playing field pushing debtors who do not have funds on hand into the more expensive,

failure-prone chapter 13. This issue is well-known in the bankruptcy world, and a full discussion is beyond the scope of this order.<sup>1</sup>

This court is very concerned with ensuring that low-income debtors have access to the bankruptcy system and file under the appropriate chapter. The undersigned recently co-authored an article on the issue in the ABI Journal.<sup>2</sup> The undersigned also spoke on the issue at the Alabama State Bar Bankruptcy Section's 2016 annual meeting, served as a panelist on access to justice at two Federal Judicial Center bankruptcy judge workshops and as an adviser to a non-profit (Upsolve) which assists with pro se chapter 7's, and currently serves on the advisory board for the Alabama State Bar's bankruptcy pro bono project. The Middle and Southern Districts of Alabama rank numbers 3 and 5, respectively, among all bankruptcy courts in the percentage of chapter 13's even though they contain some of the poorest counties in the United States. Within this district, the counties with the lowest poverty rates (Baldwin and Mobile) also have the lowest percentage of chapter 13's, while the counties with the higher poverty rates (*e.g.*, Dallas) have higher percentage of chapter 13's -- the opposite of what you would expect. Numerous factors contribute to the high percentage of chapter 13's in this district -- including historical bar practices, attorney incentive, and low Alabama exemptions -- but the inability to come up with upfront attorney's fees is, in this court's opinion, a very if not the most significant obstacle to filing chapter 7.

It is possible for a debtor to find a local attorney who will agree to postpetition payment of fees for a chapter 7 bankruptcy. The court reviewed the disclosures of compensation of attorneys for debtors in all the chapter 7 cases (excluding pro se and Legal Services Alabama cases, either direct or

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<sup>1</sup> The American Bankruptcy Institute Commission on Consumer Bankruptcy's final report devotes 16 pages to the issue and suggests several amendments to the Bankruptcy Code, including making prepetition attorney's fees nondischargeable in a chapter 7 and/or delaying the discharge of fees for a specific period of time. *See* American Bankruptcy Institute Commission on Consumer Bankruptcy, 2017-2019 Final Report and Recommendations 89-106 (2019).

<sup>2</sup> Henry Callaway & Jonathan Pitts, *Too Broke For a Fresh Start*, AM. BANKR. INST. J., Feb. 2019, at 24.

contract) filed in this district between January 1 and April 15, 2020. Of the 310 cases reviewed, 9% involved at least some portion of the fee being paid postpetition, with over half of those involving all of the fee being paid postpetition.

Some courts by case law allow chapter 7 debtors and their counsel to enter into separate pre- and postpetition fee agreements which skirt the dischargeability of prepetition agreements. *See, e.g., In re Carr*, 2020 WL 373507 (Bankr. E.D. Ky. 2020); *In re Hazlett*, 2019 WL 1567751 (Bankr. D. Utah 2019); *Walton v. Clark & Washington, P.C.*, 469 B.R. 383 (Bankr. M.D. Fla. 2010). This court has to some extent codified that procedure in Local Bankruptcy Rule 2016-2, which allows the practice with certain safeguards, but does not have a feel for how often the somewhat cumbersome procedure is actually being used.

This case was set for confirmation with a similarly situated one, *In re Coleman*, case no. 20-10118. When the court asked counsel in that case why her firm would not agree to payment of postpetition chapter 7 fees, counsel stated that in essence the debtor bar generally did not want to be in the business of collecting from their own impecunious clients -- a concern that this court has heard anecdotally from other debtors' counsel. Debtors' counsel understandably prefer to have the court and the chapter 13 trustee collect their fees through the chapter 13 plan rather than having to attempt to collect directly from their own clients to get paid for chapter 7 legal work that has already been done.

Many debtors like Ms. Powe would clearly benefit from filing chapter 7 instead of 13. They would pay less and get a discharge quickly with little risk of their case being dismissed. However, a debtor paying attorney's fees through a chapter 13 plan does benefit somewhat from spreading the payments out over a longer period of time. The court doubts that many attorneys would want to extend postpetition payments for more than a few months.

In *In re Brown*, 742 F.3d 1309 (11th Cir. 2014), the Eleventh Circuit confirmed Bankruptcy Judge James Robinson's dismissal of a "fee-only" chapter 13. Neither the bankruptcy court nor the

Eleventh Circuit categorically prohibited attorney-fee-centric or attorney-fee only chapter 13 plans. *See id.* at 1318-19. Instead, the Eleventh Circuit “has set forth a non-exhaustive list of factors relevant to whether a plan was proposed in good faith[.]” commonly referred to as the *Kitchens* factors. *See id.* at 1316-17. These same factors are used for “determining whether a petition was filed in good faith” under Code § 1325(a)(7). *See id.* at 1317. The court determines good faith on a case by case basis using a “totality of the circumstances” approach. *See, e.g., id.* at 1316-17.

Turning to the case at hand, the court has reviewed the *Kitchens* factors and the totality of the circumstances and is simply not convinced that Ms. Powe filed this case in bad faith. Ms. Powe works as a custodian and has monthly take-home wages of \$858.20, plus some child support and SSI income for one child. Her net monthly income is \$135.20. This is her first bankruptcy case and she filed this case to stop garnishment of her wages. The court finds that Ms. Powe could not have been reasonably expected to save up a \$800-\$1,600 upfront attorney’s fee for a chapter 7, particularly while her wages were being garnished. As noted above, there are some local attorneys who accept chapter 7 attorney’s fees either partially or wholly postpetition. In an ideal world with complete transparency, Ms. Powe would be able to shop around and find an attorney who would make arrangements for her to pay chapter 7 fees postpetition. But the court is not willing to go so far as to say it was bad faith on Ms. Powe’s part that she did not do so in this case; such a finding would penalize debtors because their attorneys want to be paid postpetition through a chapter 13 plan rather than directly.

Nonetheless, given the fact that this case is filed as a chapter 13 instead of a 7 primarily for the benefit of Ms. Powe’s counsel, the court finds that the attorney’s fee should be adjusted to make it commensurate with the fees for a chapter 7. A fee-centric chapter 13 with no secured debt like this one is not much more complex than a chapter 7; for example, it is doubtful that creditors will file objections to confirmation in a fee-centric chapter 13 (and none were filed here) because of the lack of secured claims. The risk that a fee-centric chapter 13 could require more time than a chapter 7

should be borne by the attorney who is the primary beneficiary of the chapter choice. Reducing the fee in a fee-centric chapter 13 to the level of a chapter 7 will also reduce the financial incentive for attorneys to put their clients in chapter 13 rather than 7. Admittedly, the debtor is getting the benefit of paying over a somewhat longer period (not the full three year minimum for a chapter 13 plan, since the payment of fees is front-end loaded in this district). However, the debtor is to some extent paying for that privilege because the court will set the fee at the higher end of the chapter 7 fee scale and the debtor is also paying a trustee's commission (currently about 7%).

The court rejects the option of making the debtor pay more to unsecured creditors -- for example, at least the amount of attorney's fees -- than would be otherwise required under the Bankruptcy Code, particularly section 1325(b). To do so would penalize the debtor twice for her attorney's preference by requiring her to pay the higher fee and then doubling that amount.

The court recognizes the costs that allowing this case to proceed will impose on the system. The chapter 13 trustee will have to administer this case while receiving only a minimal fee. However, the trustee's office is funded by a percentage commission imposed on all pending chapter 13 cases on a monthly basis, so that cost is not borne directly by the trustee but is spread among all the pending chapter 13 cases. Of course, the court incurs some additional hassle and expense with a 13 as opposed to a 7, but that is the court's job. Unsecured creditors which file proofs of claim on which little or nothing will be paid are incurring some expense, but the cost is de minimis. This court has many chapter 13 cases which pay secured debt but little or nothing on unsecured claims.

As noted above, the court has reviewed the fees for all chapter 7 cases filed in this district between January 1 and April 15, 2020, excluding pro se and Legal Services cases. Excluding outliers, the chapter 7 fees fall within a range from \$800 to \$1,600. The most common fee is \$1,000 and the average as calculated by the court is \$1,142. Based upon the factors discussed herein, the court sets the attorney's fees in this case at \$1,500. The court finds this amount, which is at the higher end of the chapter 7 attorney's fees, to be reasonable for the services thus rendered and to be

rendered in this case, especially taking into account that the case is filed as a chapter 13 rather than 7 primarily for the attorney's benefit.

Conclusion

For the reasons discussed above, the court overrules the trustee's objection to confirmation based on lack of good faith with the condition that the attorney's fee in this case is limited to \$1,500. The confirmation hearing remains set for May 18, 2020.

Dated: May 1, 2020

  
HENRY A. CALLAWAY  
CHIEF U.S. BANKRUPTCY JUDGE