

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

ASSIGNED JUDGE	Timothy A. Barnes	CASE NO.	17bk27961
DATE	03/28/2018	ADVERSARY NO.	
CASE TITLE	In re Kimberly Yvonne Williams-Hayes		
TITLE OF ORDER	Order Denying in Part and Continuing for Further Hearing Attorney's Application for Chapter 13 Compensation Under the Court-Approved Retention Agreement [Dkt. No. 14]		

DOCKET ENTRY TEXT

Attorney's Application for Chapter 13 Compensation Under the Court-Approved Retention Agreement [Dkt. No. 14] is DENIED in part and is continued for further hearing.

[For further details see text below.]

STATEMENT

The matter arises out numerous applications for compensation in chapter 13 cases brought by Geraci Law L.L.C. ("Geraci") and other chapter 13 counsel, including The Semrad Law Firm, LLC ("Semrad"). In the above-captioned chapter 13 case, the application is the Attorney's Application for Chapter 13 Compensation Under the Court-Approved Retention Agreement [Dkt. No. 14] (the "Williams-Hayes Application"). A separate Memorandum Decision (the "Semrad Memorandum") issued concurrently by this court in the case *In re Talecia Gilliam*, Case No. 17bk19368 forms the basis of the court's holding herein, except as expressly stated otherwise. The court's jurisdiction and authority to hear this matter are as set forth in the Semrad Memorandum.

The matter before the court arises out of a request for compensation in a chapter 13 case. Here, the chapter 13 trustee (the "Chapter 13 Trustee") objects to counsel's application for compensation. That practice is set forth in detail in the Semrad Memorandum, but in short, involves modifying the local form chapter 13 plan (the "Model Plan")¹ or the recently imposed national plan² to change priority of payments to debtor's counsel.

In the case at bar, the debtor, Kimberly Yvonne Williams-Hayes (the "Debtor"), presented a chapter 13 plan dated September 19, 2017 [Dkt. No. 7] (the "Plan") wherein the following language was added: "Debtor attorney disbursements will be paid at an E3 disbursement level." Plan, at ¶ G(1). It

¹ The Model Plan was made effective through this court's General Order No. 08-04.

² As the parties are aware, for cases filed on and after December 1, 2017, Official Form 113 (the "National Plan") has replaced the Model Plan in this jurisdiction.

also seeks to pay the Debtor's car creditor \$65.00 a month³ until November 2018, when payments to Geraci are complete, and thereafter payments to the car creditor increase to \$419.00 per month. Plan, at ¶¶ E(3.1), G(5). Both modifications have the net effect of elevating the payment of Geraci and altering the priority of payments to creditors.

CHAPTER 13 TRUSTEE'S OBJECTION

In its objection, the Chapter 13 Trustee raises two issues. First, the Chapter 13 Trustee challenges Geraci's right to compensation given the self-dealing that has allegedly occurred. Second, the Chapter 13 Trustee argues that Geraci did not adequately disclose its agreements with the debtor regarding the plan modification.

On January 11, 2018, after the parties concluded initial briefing on the matter, the court conducted a combined hearing (the "Hearing") on the Chapter 13 Trustee's objection to compensation in both Semrad and Geraci's cases. Because counsel expressed some surprise at the court's focus on the disclosure aspects of the Chapter 13 Trustee's objection, the parties were afforded the opportunity to further brief that issue. The last of those filings was submitted on January 31, 2018 and the matter is now fully briefed and under advisement. This Order concludes the matter under advisement with respect to the Williams-Hayes Application, except as expressly continued herein.

CHAPTER 13 PROFESSIONAL COMPENSATION

In the Semrad Memorandum, the court discusses in detail the applicable standards and statutes for professional compensation in a chapter 13 case. That discussion is incorporated herein by reference.

BENEFIT TO THE ESTATE

The Chapter 13 Trustee argues that Geraci's efforts relating to the plan modifications are of no benefit to the estate. Section 330 of the title 11 of the United States Code, the Bankruptcy Code, states, in pertinent part, that "the court shall not allow expenses for services that were not reasonably likely to benefit the debtor's estate." 11 U.S.C. § 330(a)(4)(A); *see also Fed. Trade Comm'n v. Trudeau*, 845 F.3d 272, 274-75 (7th Cir. 2016) (*citing to* 11 U.S.C. §§ 327 & 330; *Baker Botts L.L.P. v. ASARCO LLC*, — U.S. —, 135 S. Ct. 2158 (2015)).

As noted in the Semrad Memorandum, there is no question that the revisions are asserted for the benefit of the attorneys alone, not the debtors in whose plans they are contained. Had this been a case under another chapter, Geraci would be in danger of disqualification. *See, e.g., Kravit, Gass & Weber, S.C. v. Michel (In re Crivello)*, 134 F.3d 831, 835 (7th Cir. 1998) (a professional is not disinterested if it possesses an "interest or relationship that would even faintly color the independence and impartial attitude required by the Code" (*quoting In re BH & P Inc.*, 949 F.2d 1300, 1308 (3d Cir. 1991)); *In re Pillowtex, Inc.*, 304 F.3d 246, 249 (3d Cir. 2002) (attorney's status as a creditor beyond that approved by the court, even if nebulous, made such counsel not disinterested). There is little doubt that counsel's attempt to change the *status quo* regarding its compensation colors its independence and impartiality.

³ The Plan originally contained a typo calling for the full claim of the car creditor, \$6,450.00, to be the monthly payment. Later filed plans [Dkt. Nos. 18 and 20] corrected that mistake.

As described in the Semrad Memorandum, the inquiry in chapter 13 matters is instead regarding benefit to the debtor's estate under section 330. The Chapter 13 Trustee argues that the revisions are of no benefit, and thus the work relating to those revisions is not compensable. The Chapter 13 Trustee further argues that the revisions are harmful to debtors, by causing in some instances a slower rate of payment for secured creditors. This, the Chapter 13 Trustee argues, leaves debtors in a much more vulnerable position in the event of dismissal with very little benefit to the bankruptcy estate.

Geraci argues that its actions do not harm debtors, but in fact help them. First, Geraci argues that by receiving a higher level of payment through priority modification and step plan payments, Geraci ensures availability of legal representation for risky cases such as this—cases where in an earlier case the debtors had failed to make their plan payments—that might not otherwise have access to counsel. Second, Geraci argues that the step payments actually accelerate full payment of a secured creditor, rather than slow payment down. Neither one of these arguments is persuasive.

As to the first, the benefit to the system argument propounded by Geraci has been rejected by the Supreme Court relatively recently. *ASARCO*, 135 S. Ct. at 2165-66. In *ASARCO*, the Supreme Court stated that “relying on such prognostications to interpret statutes” was problematic because such predictions are so vague. *Id.* at 2168. In light of that, the Supreme Court narrowly interpreted what is actual and necessary to exclude self-serving actions of counsel.

Geraci's second argument glosses over the possible harm to debtors whose cases are dismissed before the accelerated payments take effect. While it might be true that a secured creditor would be paid off sooner once the step the accelerated payments took effect, but until that time, the debtor's exposure increases. By Geraci's own example, a debtor with a step language plan would have only paid out about half the amount to a secured creditor than a debtor's plan without step language. If a debtor's case was dismissed prior to the step in payments to a secured creditor, a debtor would have little reduction in the secured debt but would have less time in which to pay it as the loan term remains the same. This harms the debtor. A dismissal during that time would leave a debtor much worse off in a plan with step language than a plan without it. As stated in the Semrad Memorandum, the court views that the step language was implemented with the best interests of the debtor's attorney, not the debtor themselves. The court is not persuaded that the step language in this context does anything other than incidentally benefit the debtor while ultimately serving the interests of the debtor's attorney.

In light of the foregoing and for the reasons more fully stated in the Semrad Memorandum, the court concludes that both the plan provisions themselves and any effort spent on the plan provisions by Geraci provide very little to no benefit to the estates in question. While that does not definitively determine whether the requested fees are unreasonable, it calls into question such requests. The court will take up the remedies after having considered the allegation regarding Geraci's failure to disclose.

INADEQUATE DISCLOSURE

The disclosure requirements of counsel in this District are discussed in detail in the Semrad Memorandum, including the obligation under Rule 2016-1 of the United States Bankruptcy Court of the Northern District of Illinois (the “Local Rules”) that all agreements between a debtor and its counsel regarding compensation be in writing, signed by both parties and filed with the court under Federal Rule of Bankruptcy Procedure 2016 (the “2016 Statement”). Geraci argues that because there was no

agreement to modify priority between Geraci and the Debtor, there was nothing to file. As more fully discussed in the Semrad Memorandum, this argument is not persuasive.

Specifically, Geraci cannot avoid this obligation by way of its “Attorney-Client Agreement,” which provides disclosures to debtors of how Geraci will be paid under bankruptcy plans generally.⁴ Nothing contained therein specifically addresses the revisions Geraci has subsequently sought in these cases. Even if it did, Geraci did not file the agreement as required.

Finally, Geraci represents that a plan with such modification itself acts as a sufficient disclosure and is the only agreement that governs the manner in which Geraci’s fees are to be paid. For the reasons stated in the Semrad Memorandum, including that the Plan is not signed by both parties and is not filed as part of counsel’s 2016 Statement, Geraci’s reliance on the chapter 13 plan in this regard is misplaced.

By failing to file the required disclosures, Geraci has failed to fully apprise the court of the changes it has made to the balance struck in this jurisdiction between debtors and their counsel. As a result, the court considers the potential remedies.

REMEDIES

As discussed more fully in the Semrad Memorandum, it is within the court’s discretion, and fundamental to the bankruptcy process, for the court to determine if and to what extent compensation is due to counsel as it affects the bankruptcy estate.

Geraci has disqualified itself from seeking the Flat Fee as defined in Local Rule 5082-2(A)(5) because it has not complied with Second Amended General Order 11-2 dated September 21, 2011 (the “General Order”) and Local Rule 2016-1. Geraci must reapply in an itemized form where it may not seek more than it is contractually entitled to under its Court-Approved Retention Agreement (the “CARA”) with the Debtor. Only upon such reapplication can the court make a determination of reasonableness.

For the reasons described in the Semrad Memorandum, the court further concludes that the violation of the disclosure rules also merits an independent sanction. In that regard, however, the court notes that the circumstances surrounding Geraci’s violation differ from those of Semrad. Notably, Geraci has a single case wherein the priority was modified. When that case was challenged, Geraci stopped the practice before the undersigned until the court could rule on the propriety of this matter. Semrad, on the other hand, initially filed more than 50 cases with the higher priority of its payments, but even thereafter, continued to file case after case following the same approach. By taking the more cautious approach, Geraci limited the issue to a single case and showed a greater respect for the process.

While this more cautious approach does not excuse Geraci’s actions in the case at bar, it militates in favor of a lesser sanction. Considering the amounts in question and the nature of Geraci’s transgression, the court concludes that a \$250.00 reduction in the Williams-Hayes Application is

⁴ The Attorney-Client Agreement is a form that Geraci employs and acts as an acknowledgement by a debtor that Geraci has complied with the obligations under the CARA (defined *supra*). Both Geraci and the debtor sign the form. Even if this form of glove box disclaimer satisfied the Local Rule requirement of an agreement in writing (it does not), it is undisputed that this document was not filed with the court under Local Rule 2016-1 and the General Order (defined *supra*).

“necessary to indicate the severity of the transgression and to deter similar conduct in the future.” *In re Chapman*, 323 B.R. 470, 479 (Bankr. W.D. Wis. 2005). Thus, when and if Geraci reapplies in an itemized form, the total it may seek will be limited to its contractual limitations set forth in the CARA in this case, less \$250.00.

A determination of reasonableness in the remaining cases must wait for Geraci’s reapplication. However, with respect to the reapplication required above, the court affords Geraci a choice of convenience in the manner authorized under *In re Geraci*, 138 F.3d 314, 318 (7th Cir. 1998): Geraci may either reapply in itemized form (seeking only the amount it is contractually entitled to minus the \$250.00, as described above) and await the court’s later determination of what, within that reduced amount, is reasonable, or it may accept a further \$1,000.00 reduction in the Williams-Hayes Application and not reapply in itemized form. Such a reduction, the court presumes, will bring the Williams-Hayes Application in line with the presumed reasonableness contemplated by *Geraci* and the Flat Fee in light of the self-dealing that has occurred.

What remains is how to close the gap in disclosure Geraci has created in this case and in like matters going forward.

In any matter before the undersigned where Geraci seeks compensation from the court and where Geraci seeks or has sought to alter the Model Plan’s or National Plan’s treatment of its compensation for its benefit so that Geraci may be paid more expeditiously (including the Williams-Hayes Application herein), Geraci must as a predicate to the allowance of that application enter into a clear and concise written agreement with the debtor regarding the change in compensation Geraci seeks to include for its own benefit in the debtor’s plan, including its risks and lack of benefit to the debtor (the “Priority Agreement”). The Priority Agreement must be approved by the court, physically signed by both the debtor and an attorney for Geraci and filed with the court either as part of its initial 2016 Statement or, if the case is presently pending as of the date hereof (including the Williams-Hayes Application herein), as a supplement to the 2016 Statement. Any unapproved alteration in the Priority Agreement once approved by the court will render Geraci’s fees unreasonable and unnecessary and result in denial of compensation in its entirety in the subject case.

As Geraci now has clear notice of where it erred, should it make no change, the court will deny Geraci’s applications in their entirety in these type of matters.

On future matters, as to reasonableness requiring the Priority Agreement, once it has complied with the Priority Agreement requirement and its disclosure requirements to the court, Geraci may seek either the Flat Fee or itemized compensation in the manner set forth in the Local Rules. In either case, the court will, on a case-by-case basis and in accordance with the standards set forth herein, determine the reasonableness of Geraci’s compensation and any resulting reduction in light of the facts of the case where the self-dealing has occurred.

CONCLUSION

It is therefore the court's conclusion that the Williams-Hayes Application should be, and hereby is, DENIED in part and set for further hearing, as follows:

- (1) Geraci's compensation shall be reduced by \$250.00.
- (2) Further, Geraci may either:
 - a. Stand on the Williams-Hayes Application as reduced by the \$250.00 detailed above, but accept a further \$1,000.00 reduction in the Williams-Hayes Application so as to bring the Williams-Hayes Application within the range of reasonableness presumed by the court in light of Geraci's self-dealing; or
 - b. Reapply in itemized form, seeking no more than the amount it is contractually entitled to under the CARA in the absence of itemization, less the \$250.00 reduction set forth in (1) above.
- (3) The Williams-Hayes Application is continued to April 12, 2018 at 11:00 a.m. Geraci shall appear at that date and time state its election under paragraph (2) above.
- (4) At the April 12, 2018 hearing, Geraci shall present a draft Priority Agreement for the court's consideration. The draft Priority Agreement shall be delivered to the court via its "draft order to follow" email three business days in advance of the hearing, with a copy also delivered to the Chapter 13 Trustee at that time.
- (5) Once the Priority Agreement is approved by the court, physically signed by the debtor and Geraci and filed with the court in accordance with Federal Rule of Bankruptcy Procedure 2016, the court will make a final determination of the compensation allowed hereunder.

SO ORDERED:

TIMOTHY A. BARNES
United States Bankruptcy Judge