United States Bankruptcy Court
Northern District of Illinois
Eastern Division

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Bankruptcy Caption: In re Julio C. Zambrano and Dora P. Zambrano

Bankruptcy No. 22 B 04462

Adversary Caption:

Adversary No.

Date of Issuance: November 3, 2022

Judge: Donald R. Cassling

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 13
	)	
JULIO C. ZAMBRANO and	)	Bankruptcy No. 22 B 04462
DORA P. ZAMBRANO,	)	
	)	Judge Donald R. Cassling
Debtors.	)	

AMENDED ORDER SUSTAINING THE U.S. TRUSTEE'S OBJECTION TO XIAOMING WU'S APPLICATION FOR ATTORNEY FEES AND GRANTING RELATED RELIEF [Dkt. No. 17][1]

Xiaoming Wu is a partner in the firm of Borges & Wu, LLC. He frequently represents consumer debtors in Chapter 13 cases pursuant to his retention under the Court-Approved Retention Agreement (hereinafter the "CARA"). The U.S. Trustee alleges that Mr. Wu made untrue or misleading statements on his certified CARA fee application in this case, presenting it as in compliance with the Local Rules and Section 526(a)(2) of the Bankruptcy Code, when in fact it was not. Mr. Wu argues that he was wholly truthful in his fee application's certifications and that he did nothing to mislead the Court. For the reasons set forth below, the Court agrees with the U.S. Trustee.

BACKGROUND

An explanation of what the CARA is, how it came into being, and the role it plays in awarding Chapter 13 fees in this District will aid in explaining why the Court concludes that Mr. Wu's statements were untruthful and misleading. The Seventh Circuit has given the Bankruptcy Court considerable discretion to adopt local standards governing the allowance of attorney fees to debtors' attorneys in consumer cases. *In re Kindhart*, 160 F.3d 1176, 1178 (7th Cir. 1998); *In re Geraci*, 138 F.3d 314, 320-21 (7th Cir. 1998).

The Bankruptcy Court for this District has made two avenues available to Chapter 13 debtors' counsel to apply for and recover their fees:

The first route is the standard procedure available to all debtors' counsel, regardless of the bankruptcy chapter involved. Under this route, debtors' counsel must prepare and submit a detailed fee application listing each task performed by counsel on a tenth-of-an-hour basis, grouped according to task, and otherwise demonstrating that each task performed was necessary, non-

[1] The revisions made herein resolve the motions to amend filed by the U.S. Trustee and Mr. Wu, each of which are unopposed by the other party and granted in full. [Adv. Dkt. Nos. 44, 50.] In those motions, the U.S. Trustee asked the Court to have the Standing Chapter 13 Trustee process the refunds of Mr. Wu's disgorged fees, and Mr. Wu asked for some minor factual clarifications and for the Court to reduce the amount of sanctions in light of the current financial hardships his firm is facing.

duplicative, and reasonable in time expended and results achieved. Applications submitted through this avenue are reviewed in detail by the Court and, if necessary, adjusted downward to ensure that the fees awarded are in fact reasonable. In larger and more complex Chapter 13 cases, this avenue is sometimes followed (and is required in all cases under other chapters of the Code), even though this fee application process is expensive and time-consuming.

Chapter 13 cases differ from cases filed under other chapters in that they are vastly more numerous and are often uncomplicated, generating fees per case that are significantly less than those incurred in cases filed under other Chapters. In simple Chapter 13 cases, the time and effort devoted to preparing and reviewing fee petitions on a line-by-line basis can be costly and inefficient, diverting counsel's and the Court's time and attention from more pressing matters and cases that are not routine.

To address this inefficiency, the Bankruptcy Court in this District created an alternative fee application procedure in which debtors' counsel may avoid the time and effort of preparing a detailed fee application and instead file a two-page application (the "CARA fee application") seeking the award of a flat fee[2] set by the Local Rules (the "CARA flat fee"). But the benefit of being able to seek fees without filing detailed fee applications is offset by several safeguards that are designed to ensure that the fees awarded are in fact reasonable:

First, the CARA flat fee set by the Local Rules is deemed only *presumptively* reasonable. As is the case with all presumptions, this one is subject to rebuttal by the U.S. Trustee or an objecting creditor.

Second, to ensure uniformity of procedure and results, debtors' counsel seeking the CARA flat fee *must* use only the Court-approved form (the CARA) and *must not* amend or supplement that form with any language or side agreements that enable counsel to receive:

(a) any kind of compensation, reimbursement, or other payment; or
(b) any form of, *or security for*, compensation, reimbursement, or other payment *that varies from the [CARA]*.

Local Rule 5082-2(C)(3) (emphasis added). Under this Local Rule, counsel ignoring these limitations are not entitled to receive the CARA flat fee or, indeed, any compensation at all for services performed.

Third, to ensure compliance with these limitations, Local Rule 5082-2(B)(1) requires debtors' attorneys to use and sign the approved two-page application form when applying for the CARA flat fee. That form requires the applying attorney to certify that he and the debtor have not entered into the type of agreements prohibited by Local Rule 5082-2(C)(3). Counsel must also acknowledge through certification both that the CARA cannot be modified and that the CARA's terms supersede any conflicting provisions of earlier agreements between counsel and the debtor.

[2] The flat fee is currently $4,500 in this District. *See* Local Rule 5082-2(C)(1); Second Am. Gen. Order 13-01. Debtors' counsel may receive up to an additional $1,500 if the attorney and the debtor complete the Mortgage Modification Mediation Program. *See* Second Am. Gen. Order 13-01.

Mr. Wu made all of these certifications when he submitted his fee application in this case. Notwithstanding those certifications, he also caused the Debtors to execute a separate agreement providing an additional form of security for payment of the CARA flat fee not present in the CARA itself — a contingent assignment of Debtors' future wages to Mr. Wu's law firm.

The U.S. Trustee argues that when Mr. Wu certified that he had not entered into any prohibited agreements with the Debtors, that certification was both false and misleading because he had caused the Debtors to execute a wage assignment as a condition of his employment by the Debtors as their bankruptcy attorney.

Mr. Wu responds that his certifications were truthful because the wage assignment agreement he used contains a clause making the assignment ineffective during the pendency of the bankruptcy case. In Mr. Wu's view, the wage assignment only becomes effective if and when Debtors' case is dismissed, a circumstance which Mr. Wu argues would deprive this Court of jurisdiction to attack the wage assignment.

Mr. Wu also argues that his certifications were not misleading because (a) he attached the wage assignment to his fee application packet, so that no one should have been misled by his certification that the Debtors and he had not executed a side agreement that varied from the CARA and (b) he had been using these wage assignments in multiple cases since "late 2018" and no judge, debtor, or creditor had ever complained about them. (Resp. Br. at p. 6, Dkt. No. 36.)

For the reasons that follow, the Court agrees with the U.S. Trustee and rejects both of Mr. Wu's arguments.

DISCUSSION

The BAPCPA amendments to the Bankruptcy Code made Section 526, which governs "debt relief agencies," applicable to attorneys representing consumer debtors. *In re Spurlock*, 642 B.R. 269, 278 (Bankr. S.D. Ohio 2022). The U.S. Trustee is responsible for enforcing the restrictions and obligations arising under that statute. *Layng v. Maksymonko (In re Gelb)*, Bankr. No. 20-81538, Adv. No. 21-96006, 2022 WL 982199, at *3 (Bankr. N.D. Ill. Mar. 31, 2022). Here, the U.S. Trustee seeks to enforce the Section 526(a)(2) prohibition against statements made by debtors' counsel to the Bankruptcy Court that are "untrue or misleading." 11 U.S.C. § 526(a)(2). For the reasons which follow, the Court concludes that the fee application Mr. Wu filed in this case is both of these things.

I

Mr. Wu certified on his fee application that he and the Debtors had not entered into any agreement for his representation of the Debtors in this case that would give him "any form of, *or security for*, compensation, reimbursement, or other payment that *varies from* the [CARA.]" (Dkt. No. 17 at p. 10 (emphasis added).) Significantly, Mr. Wu acknowledged in his brief that neither the CARA nor the corresponding form fee order would allow him to collect any portion of the CARA flat fee that remained unpaid if the Debtors were to fail to complete their plan. (Resp. Br.

at p. 3; Tr. at 7:22-8:8.)[3] Of equal significance, he also conceded during oral argument that recovery of his fees under the CARA would be limited to assets in the Debtors' estate during the pendency of the bankruptcy case. (Tr. at 10:25-11:4.) But Mr. Wu argues that the CARA only governs his right to compensation *during the pendency of the Chapter 13 bankruptcy case*, and has no bearing on what he does to collect any unpaid CARA fees after the case has been dismissed. (Resp. Br. at pp. 3, 5; Tr. at 23:3-22.)

Mr. Wu argues that the wage assignment agreement does not violate the Local Rules because that agreement is a prepetition agreement which is ineffective during the pendency of the bankruptcy case and only springs to life if and when the case is dismissed. (Resp. Br. at pp. 3-5; Tr. at 7:22-8:8, 10:25-11:18.) From this starting position, he argues that the wage assignment agreement is no different from any other prepetition security agreement securing a prepetition debt. In all of those other instances, Mr. Wu argues, a creditor may resume collection activities on its prepetition debt if the Chapter 13 case is dismissed before completion of a plan and issuance of a discharge. Why should he not be entitled to the same protection afforded all other prepetition creditors?

The answer to this question is obvious and straightforward: The wage assignment agreement does not create a debt of any kind, prepetition or otherwise. What it does accomplish is to create a *security agreement* securing payment of a post-petition debt — the CARA flat fee. The CARA fee award is undeniably a post-petition award. While it compensates debtors' counsel for Chapter 13 work performed both in preparation for an imminent Chapter 13 filing and in work performed for the debtor after the filing, the award itself is never made prepetition; it is made weeks or months after the bankruptcy case has been filed.

In addition, the only security granted under a CARA fee award by the Bankruptcy Code or by the accompanying Local Rules and forms is the Code's treatment of debtors' counsel's fees as an administrative expense to be paid ahead of unsecured creditors out of the assets contained within the debtor's bankruptcy estate. 11 U.S.C. § 507(a)(2). No other form of security is provided.

Finally, the Local Rules expressly prohibit counsel seeking a CARA flat fee from entering into any security agreement with the debtor that varies from the CARA rules and forms. Under these circumstances, it is difficult to comprehend any reasonable interpretation of Local Rule 5082-2(C)(3) that does not result in a finding that Mr. Wu's wage assignment is a security agreement that varies from the CARA and is therefore prohibited by that Rule.

There is one additional factor that makes Mr. Wu's wage assignment objectionable. As Judge Doyle recognized in her opinion in *In re St. John*, Bankr. No. 22 B 02548, 2022 WL 4827351 (Bankr. N.D. Ill. Sept. 30, 2022), the way in which Mr. Wu engineered the wage assignment agreement is an attempt to avoid not only the Local Rules of this Court, but also the necessary prerequisites to a collection action for a domesticated judgment under applicable Illinois law:

[3] Citations to "Tr. at __" are to the transcript of the hearing conducted and oral argument made by the U.S. Trustee and Mr. Wu on September 15, 2022.

> Notably, the wage assignment deprives the debtor of the right to defend against any collection action that Wu could potentially file in a non-bankruptcy court after the bankruptcy case is dismissed. Wu tried to eliminate the need to file a lawsuit against the debtor and thereby eliminate any chance for the debtor to raise potential defenses (such as that Wu did not perform under the contract). The assignment allows Wu to go straight to collection from the debtor's wages without the procedural safeguards afforded to a defendant in a lawsuit before and after judgment. *In re Rosol*, 114 B.R. 560, 565 (Bankr. N.D. Ill. 1989) ("wage assignments . . . do not require any judgment and can be filed without any judicial review of the creditor's claim."); *see* 740 ILCS § 170/2 (requiring creditor to provide only minimal notice to a debtor prior to making demand of employer under wage assignment).

Id. at *1.

In short, the Court finds it self-evident that Mr. Wu's certifications were not truthful and that he knew or should have known them to be untrue. The Court, therefore, finds that Mr. Wu's certifications on his fee application are "untrue" for purposes of Section 526(a)(2) and that he knew or should have known that they were untrue when made.

II

Having concluded that Mr. Wu's certified statements of fact supporting his fee application were untrue would by itself be a sufficient basis for sustaining the U.S. Trustee's objection. However, Section 526(a)(2) is written in the disjunctive, and the other element of that statute prohibits an attorney from making statements that mislead even if they are true. *See* 11 U.S.C. §§ 102(5), 526(a)(2).

Mr. Wu relies on that alternative standard to make a curious argument: That his fee application could not have misled anyone because, irrespective of what he certified on the required form, "the wage assignments. . . have been out in the open for the whole world to see[.]" (Resp. Br. at p. 6.) First, this statement is itself untruthful. In the majority of the cases listed in Appendix A, he executed a wage assignment agreement with the debtor, but did not file it with his fee application.[4] Those cases are marked with an asterisk on Appendix A. Second, even if Mr. Wu's statement had been truthful, attaching a wage assignment agreement to a fee application while simultaneously certifying that no such agreement has been executed is obviously misleading. And, for the reasons which follow, it is sufficiently misleading to constitute a serious threat to the integrity of the bankruptcy system if left uncorrected.

Each bankruptcy judge in this district typically presides over several thousand Chapter 13 cases at any one time; this Court currently has about 4,200 Chapter 13 cases on its docket alone.

[4] Mr. Wu stated in open court that the instances in which the wage assignments were not attached to the applications were inadvertent and resulted from a software error. He states that, in each of those cases, he appended a copy of the wage assignment to the application, believing that the assignment would also be filed. However, due to an alleged software error, Mr. Wu stated that the wage assignment did not get uploaded along with the application. The Court has no reason to disbelieve his explanation.

A caseload of that magnitude makes accurate, clear, and complete disclosures critical. *In re Andreas*, 373 B.R. 864, 872 (Bankr. N.D. Ill. 2007) (describing employment-related disclosures as being "central to the integrity of the bankruptcy process"). The Seventh Circuit succinctly explained why attorneys cannot hide the ball from the Court in this way: "Bankruptcy courts have neither the resources nor the time to investigate the veracity of the information submitted in [employment-related] statements and affidavits and to root out the existence of undisclosed [information]." *Kravit, Gass & Weber, S.C. v. Michel (In re Crivello)*, 134 F.3d 831, 839 (7th Cir. 1998).

If accepted as the appropriate standard, Mr. Wu's proposal would reverse the *Crivello* standard, putting the onus on the Court to gather and verify the information that debtors' counsel are obligated to provide. This would effectively box the Court into a choice between the lesser of two evils: Parsing every word of every filing and supporting addenda across its thousands of dockets or accepting that there is bound to be some level of prevarication in the many certified statements it receives.

The first choice is not a reasonable solution. *In re Jackson*, 401 B.R. 333, 339 (Bankr. N.D. Ill. 2009) ("Coy or incomplete disclosures that force the court to ferret out pertinent information" are simply insufficient) (internal quotations omitted); *see also United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Jeralds ex rel. Jeralds v. Astrue*, 754 F.Supp.2d 984, 985 n.1 (N.D. Ill. 2010) ("Nor are they archaeologists searching for treasure.").

Nor is the second. Our system of justice is dependent upon counsel fulfilling his ethical duty of candor to the Court. In a contest between counsel's duty of zealous advocacy and his ethical duty of candor, an attorney's "ethical duty of candor before the bankruptcy court . . . trumps (or at least defines the boundaries of) the duty of zealous advocacy." *In re Varan*, No. 11 B 44072, 2014 WL 2881162, at *11 (Bankr. N.D. Ill. June 24, 2014). Those boundaries recede even further when the attorney, as in the case of a fee application, is pursuing his own interests rather than his client's.

For these reasons, the Court finds that Mr. Wu's certifications on his fee application are also "misleading" for purposes of Section 526(a)(2), and that his crabbed interpretation of his obligation of candor has no reasonable basis in law or fact.

III

Finally, the Court addresses the impact of the Seventh Circuit's decision in *In re Sweports, Ltd.*, 777 F.3d 364 (7th Cir. 2015), upon the issues raised by the U.S. Trustee's objection. For purposes of this decision, *Sweports* makes two important points:

First, its holding that the Bankruptcy Court retains jurisdiction over fee-related issues after the entry of a dismissal order, *id*. at 367-68, effectively rebuts Mr. Wu's argument that the Court lacks jurisdiction to punish him for his misrepresentations in any cases that have already been dismissed. (Resp. Br. at p. 3.)

Second, the Seventh Circuit held that bankruptcy fee orders generally create a judgment debt that the attorney can enforce in state court. *Sweports*, 777 F.3d at 366-67. But the issue in this case is not whether counsel may enforce a bankruptcy fee award in state court.[5] Rather, it is whether Debtors' counsel may both (1) ignore the Local Rule's prohibition against executing security agreements with the Debtors that vary and expand the terms of the CARA and (2) lie about that fact to the Court. Nothing in *Sweports* can be read as approval of such misconduct.

IV

Having determined that Mr. Wu has violated Section 526(a)(2), the Court must levy appropriate sanctions. To start with, the Court rejects Mr. Wu's subsidiary argument that he should not be penalized for his false certifications because he has been submitting them since 2018, and no one had challenged his practices—at least before Judge Doyle's recent unearthing of that misconduct. (Resp. Br. at p. 6.) But that argument is founded on yet another misstatement:[6]

Over a year ago, Judge Baer entered the following order denying one of Mr. Wu's CARA fee applications and alerting Mr. Wu that the wage assignment he had received in that case violated the same local rule upon which this Court's conclusions rest:

> The "Wage Assignment" attached to the fee application is a violation of Local Rule 5082-2C(3). Counsel is instructed to refile the fee application with proof that this agreement between the parties has been rescinded. If such proof is not provided, all compensation will be denied in accordance with the local rules.

Dkt. No. 18, Bankr. No. 21 B 07794.

Notwithstanding Judge Baer's warnings, Mr. Wu's violations continued unabated. He has required his Chapter 13 clients to execute wage assignments since 2018, (Resp. Br. at p. 6), though he only began partially disclosing them to this Court in 2021 as noted in Appendix A.

In short, Mr. Wu has breached not only his obligations as an officer of the court but also his duties as a fiduciary for his clients by obtaining from them security arrangements which he is

[5] There is an argument to be made that *Sweports* does not mandate that CARA fee awards are enforceable in state court. The fee award in *Sweports* was an award in which counsel detailed its hours and tasks in the application and asked the bankruptcy court to undertake a line-by-line review in order to issue a reasonable fee award based on the tasks actually performed. It was not a CARA flat-fee award. The CARA fee alternative provided by the Local Rules is in fact a voluntary alteration of the scope of counsel's right to receive compensation for his services in bankruptcy cases in exchange for other valuable benefits received. Nothing in *Sweports* suggests that counsel may not voluntarily alter his rights in this manner. Nor is this unfair to debtors' counsel, because counsel can always file a detailed fee application and submit it to the bankruptcy court for its review and possible downward adjustment. But if counsel decides to forego the risks and costs of filing a detailed fee application and instead pursue the simpler and more certain route of seeking fees under a CARA, they must also assume all of the burdens of that choice. CARA-adopting Chapter 13 attorneys have therefore arguably bargained away their otherwise applicable *Sweports* rights in favor of those afforded by the CARA process.

[6] Even if Mr. Wu's claim had been true, it would remain unpersuasive. *See In re Valladares*, 415 B.R. 617, 623 (Bankr. S.D. Fla. 2009) ("If every attorney waited until he or she is caught to file a statement of disclosure, the entire concept of mandatory disclosure would become a farce.") (quotation omitted).

not entitled to receive and then certifying to the Court that he had done no such thing. Congress adopted the debt-relief-agency rules set forth in Sections 526 through 528 of the Bankruptcy Code precisely to prevent behavior of this sort. *See Milavetz, Gallop & Milavetz, P.A. v. United States*, 559 U.S. 229, 231-32 (2010); *In re Cook*, 610 B.R. 852, 865 (Bankr. N.D. Ill. 2019) ("The prohibition against making untrue or misleading statements in bankruptcy cases is expressly designed to protect unsophisticated individuals in financial distress who rely on debt relief agencies for proper guidance.").

For a court to allow an attorney to engage in such misconduct without consequence will only invite more of the same from other lawyers. Mere denial of Mr. Wu's fee petition in this case, while appropriate, is insufficient. As a result, as an additional sanction, the Court will require disgorgement of half the fees sought in all cases which Mr. Wu currently has pending before this Court, and will also require Mr. Wu to show proof of attendance for at least one semester of an ethics course at an accredited law school in the Chicago area.

CONCLUSION

For all the foregoing reasons, the Court hereby:

1. Sustains the U.S. Trustee's objection to Mr. Wu's fee application and disallows all fees sought but allows his request for costs totaling $25.00;

2. Finds that Mr. Wu has engaged in a clear and consistent pattern or practice of violating Section 526(a)(2);

3. Requires disgorgement of half of any fees awarded Mr. Wu in any other Chapter 13 case currently pending before this Court in which he accepted a wage assignment pursuant to Section 526(c)(5)(B);

4. Orders Mr. Wu to turn over those disgorged fees by delivering funds in the amount of $16,652.95[7] to the Standing Chapter 13 Trustee no later than 5:00 p.m. on November 16, 2022;

5. Directs Mr. Wu to submit contemporaneous proof of this disgorgement to the U.S. Trustee;

6. Directs the Standing Chapter 13 Trustee to disburse those funds in the relevant amount to the debtors from whom those funds were taken; and

7. Directs Mr. Wu to complete an ethics course at an ABA accredited law school in the Chicago area no later than the summer semester of 2023, and to upload proof of his attendance at and completion of such course with a passing grade no later

[7] This sum includes all of the fees Mr. Wu received in the pending cases listed in Appendix A that exceeded one half of the amount originally awarded, along with the $2,500 pre-petition retainer Mr. Wu received in this case.

than October 31, 2023. Continuing legal education courses shall not satisfy this directive.

ENTERED:

DATE: **November 3, 2022**

Donald R. Cassling

Donald R. Cassling
United States Bankruptcy Judge

APPENDIX A

Case No.	Date Filed	Plan Confirmed?	Debtor Discharged?	Disposition?	Fees Awarded
20 B 03639*	02/09/20	N	N	DFPP	NFO
20 B 03917*	02/12/20	N	N	DFPP	$4,500
20 B 04274*	02/15/20	N	N	DFPP	$283.80 – est.
20 B 04853*	02/21/20	Y	P	P	$4,500
20 B 05716*	02/29/20	Y	N	DFPP	$4,500
20 B 06742*	03/10/20	Y	P	P	$4,500
20 B 07504*	03/16/20	Y	N	P	$4,500
20 B 11937*	06/03/20	Y	P	P	$4,500
21 B 04218	03/31/21	Y	P	P	$4,500
21 B 10494	09/10/21	Y	P	P	$4,500
21 B 13452	11/24/21	Y	N	D	$4,500
21 B 14026	12/10/21	Y	P	P	$4,500
21 B 14158*	12/14/21	N	N	DFPP	$4,500
22 B 03503	03/25/22	Y	P	P	$4,500
22 B 03891*	04/04/22	Y	P	C	$4,500

* = Mr. Wu did not disclose this wage assignment by attaching it to his fee application.
DFFP = Dismissed for failure to make plan payments.
NFO = Debtor's counsel was allowed no fees because the Chapter 13 Trustee held no funds at dismissal.
$__ -- est. = Debtor's counsel provisionally granted this amount subject to a final determination of the funds held by the Chapter 13 Trustee.
P = Pending.
C = Converted to Chapter 7.