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FEB 27 2002

TERRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (3)

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Michele Walker,

Debtor.

C/A No. 01-11884-W

JUDGMENT

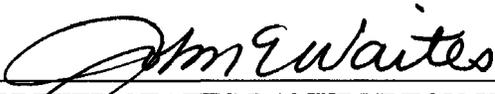
Chapter 13

ENTERED

FEB 27 2002

V. L. D.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Court orders Harvey W. Burgess ("Burgess") to disgorge the remaining \$1,199.00 in fees Michele Walker ("Debtor") paid him for representing her in her bankruptcy cases and to complete the following acts within twenty days from the date of this Order: (1) review those Chapter 13 cases in which he served as debtor's attorney and filed in the calendar year 2001 and determine whether he made the proper disclosures of his compensation in those cases, (2) based on the review of these cases, compile a report of his findings and submit it to the Court and to the Trustee, and (3) upon discovery of any errors, file supplemental Disclosures of Compensation to correct any inaccuracies.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
February 27, 2002.

02-22
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CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

FEB 27 2002

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE, UST jgmt Indw

VANNA L. DANIEL

Deputy Clerk

via mail

FILED

at.....O'clock &.....min.....M

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United States Bankruptcy Court
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FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Michele Walker,

Debtor.

C/A No. 01-11884-W

ORDER

Chapter 13

ENTERED

FEB 27 2002

V. L. D.

THIS MATTER comes before the Court upon an Order to Appear and a continued hearing to determine attorney's fees. The Order to Appear was entered in response to Michele Walker's ("Debtor") pro se motion to reconsider the dismissal of this case. The Court held a hearing on the matter on February 5, 2002, and Debtor, her attorney Harvey W. Burgess ("Burgess"), and the Chapter 13 Trustee, William Keenan Stephenson, Jr., attended. At this hearing, Debtor asserted that Burgess failed to inform her of hearing dates and that she repeatedly attempted to obtain assistance from Burgess but that he had little contact with her other than to tell her to prepare to move from her residence. In essence, Debtor blamed her two bankruptcy cases' failures on Burgess. In response, Burgess averred that he and his office staff met with Debtor on a number of occasions, that he considered several legal strategies in order to obtain the best result for Debtor, and that he earned the fees paid to him. During the hearing, Debtor testified that she paid Burgess over \$2,500.00 in attorney's fees for his services. This amount exceeds what Burgess certifies he received in his Disclosures of Compensation provided to the Court pursuant to 11 U.S.C. §329¹ and Federal Rule 2016 of Bankruptcy Procedure. After weighing the testimony of Debtor and Burgess, the Court vacated the dismissal of Debtor's case

¹ Further references to the Bankruptcy Code shall be by section number only.

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and continued the hearing until February 20, 2002 to consider the issue of Burgess' fees.² At the continued hearing, the Court considered the evidence submitted and the parties' arguments regarding the amount and the disclosure of compensation Burgess received for representing Debtor in her two bankruptcy cases. After considering the evidence and the arguments, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule 52 of Civil Procedure, applicable in bankruptcy proceedings by Federal Rule 7052 of Bankruptcy Procedure.³

FINDINGS OF FACT

1. Debtor filed her first bankruptcy petition on June 29, 2001, and Burgess represented her in that case.
2. Neither Debtor nor Burgess attended the rescheduled §341 meeting of creditors, and consequently, on August 31, 2001, the Court entered an Order of Dismissal pursuant to Local Rule 2003-1.
3. As compensation for his services in Debtor's first bankruptcy case, Burgess certifies in the Disclosure of Compensation filed on July 18, 2001 that he charged \$1,100.00, \$550.00 of which he received prior to filing the Disclosure and \$550.00 of which the balance was due. The information provided on the Disclosure, however, contradicts Debtor's Statement of Financial Affairs, also filed on July 18, 2001, which indicates Burgess received only \$450.00 within one

² At the February 5, 2002 hearing, Burgess agreed that he should no longer represent Debtor, and he returned \$750.00 of the fees Debtor paid him in order for Debtor to hire new counsel.

³ The Court notes that, to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and, to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

year prior to the filing and that was received on June 17, 2001.

4. Debtor filed her second bankruptcy case on November 6, 2001, and, again, Burgess was her attorney.

5. Upon dismissal of the first case and before the filing of a second case, Debtor's furniture and certain household goods were repossessed.

6. The Court dismissed the second case on January 9, 2002 for failure to comply with the requirements of Chapter 13. Specifically, Burgess failed to submit a confirmable plan and failed, along with Debtor, to attend the confirmation hearing, and the Trustee recommended the dismissal of the case.

7. As compensation for his services, Burgess certifies in the Disclosure of Compensation filed on November 6, 2001 for Debtor's second bankruptcy case that he charged \$1,050.00, \$315.00 of which he received prior to filing the Disclosure and \$735.00 of which the balance was due. The Statement of Financial Affairs filed on November 6, 2001 indicates that Debtor paid Burgess \$315.00 on June 17, 2001. This statement is inconsistent with the statement made in the first case.

8. On January 24, 2002, Debtor, pro se, filed a request with the Bankruptcy Court seeking a reconsideration of the dismissal of her second case. In the request, Debtor complains, among other things, that Burgess did not inform her of the status of her cases and that he failed to return her phone calls and essentially places the blame on him for the dismissal of both cases.

9. In her request, Debtor alleges that she paid Burgess approximately \$2,700.00 for his legal representation in both cases. She alleges that Burgess did nothing on her behalf to earn this fee.

10. At the hearing, Debtor presented a series of receipts as evidence of payments she made to

Burgess. The following list illustrates these receipts:

<u>DATE</u>	<u>AMOUNT</u>
June 20, 2001	\$ 185.00
July 19, 2001	\$ 100.00
September 24, 2001	\$ 400.00
November 26, 2001	\$ 450.00
December 12, 2001	\$ 185.00
Undated	\$ 100.00
Undated	\$ 460.00
Undated	\$ 439.00
TOTAL:	\$2,319.00

11. After reviewing his records, Burgess did not dispute that Debtor actually paid him a total of \$1,949.00 in fees and \$370.00 for the Court's filing fees.⁴

CONCLUSIONS OF LAW

I. Disclosure of Attorney's Fees

While hearing the allegations of attorney misconduct by Burgess, it became clear to the Court that there is an issue whether Burgess adequately disclosed the fees he received from Debtor. Indeed, Debtor, at one point, argued she paid Burgess \$2,700.00; however, the Disclosures of Compensation filed by Burgess indicate that he received only a total of \$865.00 for representing Debtor in the two bankruptcy cases (\$550.00 in the first case and \$315.00 in the second case). Further, the Disclosures indicate a balance owed of \$550.00 in the first case and \$735.00 in the second case. The Chapter 13 Plans filed in both cases indicate that no attorney's fees are to be paid through the Trustee's distributions; therefore, it is implied that the balances would be paid directly by Debtor in the future.

⁴ The Court concludes that the June 20, 2001 payment of \$185.00 and the December 12, 2001 payment of \$185.00 represent Chapter 13 filing fees.

Pursuant to §329(a), any attorney representing a debtor in a bankruptcy case must file with the Court a statement of compensation paid or agreed to be paid, if the payment or agreement was made after one year before the filing of the petition, for services rendered in the bankruptcy case.⁵ Federal Rule 2016(b) of Bankruptcy Procedure implements this code section and requires the filing of the disclosure statement within fifteen days after the order for relief. To fulfill §329(a) and Rule 2016(b), the disclosure statement must (1) disclose all compensation paid or promised, (2) list services rendered or to be rendered in contemplation of or in connection with the case, (3) indicate if the payment or the agreement to pay was made within a year before the filing of the petition, (4) disclose the source of the payment, and (5) disclose any agreement or understanding concerning the sharing of compensation with an entity outside of the firm receiving compensation. See 3 Lawrence P. King, ed., Collier on Bankruptcy ¶329.02[1] (15th ed. rev. 2001). Moreover, the obligation to disclose fees received is a continuous one, as Rule 2016(b) provides, “A supplemental statement shall be filed and transmitted to the United States trustee within 15 days after any payment or agreement not previously disclosed.”

It is difficult to conclude the timing and the amounts of payments Debtor made to Burgess because some receipts are undated and the Disclosures do not appear to coincide with the amount of payments shown on the receipts. In Debtor’s first case, it is clear that either the Disclosure or the Statement of Affairs, both prepared by Burgess, is incorrect.

In Debtor’s second case, Burgess certifies he had received \$315.00 from Debtor within a year prior to the filing of the Disclosure (November 6, 2001). This amount appears incorrect for

⁵ There is no evidence that any fees were paid to Burgess other than for services to be rendered in the subject bankruptcy cases.

two reasons. In the first case, Burgess certifies that he received \$550.00 from Debtor; therefore, the \$315.00 amount must be in error as it does not take into account the amount Burgess previously certified as receiving. Also, dated receipts indicate Burgess received at least an additional \$500.00 (\$100.00 on July 19, 2001 and \$400.00 on September 24, 2001) before he filed the second case. When the Disclosure was filed, Burgess had received at least \$865.00 from Debtor and perhaps as much as \$2,364.00 (\$315.00 from the second case's Disclosure, the additional \$500.00 in payments received before the second case, \$550.00 from the first case's Disclosure, and the three undated payments totaling \$999.00).⁶

Burgess also received a payment of \$450.00 from Debtor on November 26, 2001. Burgess should have disclosed this additional payment from Debtor within fifteen days of receiving it; however, Burgess failed to do so. This failure contravenes Rule 2016(b)'s continuing obligation to disclose payments.

In addition, there are three undated receipts totaling \$999.00 that Burgess failed to report.

These facts lead the Court to conclude that Burgess failed to comply with §329(a). As noted previously, the duty to disclose compensation is a continuing one; however, Burgess failed to disclose the payments he received before the filing of Debtor's second case as well as a payment received while the second case was pending. See In re TJN, Inc., 194 B.R. 400, 402 (Bankr. D. S.C. 1996) (emphasizing the language of Rule 2016(b) that supplemental disclosure statements must be filed upon the receipt of any payment); In re Century Plaza Associates, 154 B.R. 349, 352 (Bankr. S.D. Fla. 1992) (finding that counsel did not meet the requirements of

⁶ Despite being given time to review his records, Burgess did not offer any specific proof of payments or payment dates. He merely agreed that he received more than he disclosed.

§329 and Rule 2016(b) where he failed to disclose additional compensation received).

Moreover, Burgess failed to make an accurate disclosure when Debtor's second case began. Although he had received at least \$865.00, he disclosed receipt of only \$315.00. The consequence of this inadequate disclosure is that the Court can order the denial and disgorgement of compensation. See In re Hathaway P'ship, 116 B.R. 208, 220 (Bankr. C.D. Cal. 1990); see also TJN, 194 B.R. at 403-04 ("Many courts have denied all compensation because of counsel's failure to comply with [Rule 2016(b) and §329]."); In re Levin, 1998 WL 732878 at 3 (Bankr. E.D. Pa.) (noting that the ability to deny compensation and to order the disgorgement of funds is part of the bankruptcy court's inherent authority to regulate professional compensation and protect bankruptcy estates and ordering a partial disgorgement of funds where the attorney provided an inaccurate disclosure). An attorney's duty to make an accurate disclosure of fees is as significant as debtors' duty to disclose their assets and liabilities. Such disclosures are important in that they enable the Court, Trustee, U.S. Trustee and other parties to review the reasonableness of fees and debtors' transactions with their attorneys. At worst, the Disclosures and certifications provided by Burgess are intentionally false; at best, they are inaccurate and treated by Burgess as if they have little importance. In this case, the Court believes Burgess' failure to disclose is flagrant and therefore concludes that the disgorgement of all of the fees Debtor paid him is merited. In considering this matter, the Court notes that it has previously stressed the importance of complying with §329(a) and Rule 2016(b): "This Court believes the policy requiring timely disclosure of such matters under §329 and Rule 2016(b) is central to the integrity of the bankruptcy process and are not to be taken lightly nor easily dismissed . . ." TJN, 194 B.R. at 403. In addition, in TJN, the Court announced, "[T]his Order may serve to place the

bankruptcy bar on further notice that strict compliance with the disclosure requirements of the Bankruptcy Code and the Rules is expected. . .” Id. at 404. Accordingly, the Court orders Burgess to return the remaining amount of the fee, \$1,199.00, to Debtor.⁷

II. Reasonableness of Burgess’ Fees

During the hearing, Burgess indicated that he believed he earned the total fees charged, \$1,100.00 in the first bankruptcy case and \$1,050.00 in the second case, by the actions he took on Debtor’s behalf. In response, the Chapter 13 Trustee argued that Burgess should receive no fee in either bankruptcy case because of Burgess’ poor quality of work and the poor results his efforts produced for Debtor. The Trustee based his argument upon several deficiencies in each of Debtor’s bankruptcy cases. In Debtor’s first case, the Trustee cited, among other things, Burgess’ failure to file a certificate of service, his claiming exemptions that Debtor was not entitled to, and the inconsistent representation of the amount of fees he received between the Disclosure of Compensation and Debtor’s Statement of Financial Affairs as examples of Burgess’ poor representation. In Debtor’s second case, the Trustee noted the poor quality of Debtor’s Schedules and that part of the Schedules are missing. Finally, the Trustee pointed to the end result both cases produced: essentially, both were summarily dismissed in large part due to Burgess’ failure to attend hearings and to present proper Schedules and Statements and a confirmable Plan. Based on these facts, the Trustee argues that the \$1,949.00 Burgess charged was unreasonable and should be disallowed.

The Court agrees with the Trustee’s argument and, as an alternative holding, holds that

⁷ The receipts indicate the total amount of fees Debtor paid Burgess is \$1,949.00. The Court reaches the \$1,199.00 figure by subtracting the \$750.00 Burgess voluntarily returned to Debtor after the earlier hearing from the total of the fees, \$1,949.00.

the amount of fees Burgess charged is unreasonable. It is apparent that Burgess failed to attend at least one §341 meeting and the confirmation hearing, failed to properly complete Schedules, Statement of Affairs and a confirmable Plan, and failed to adequately advise and communicate with Debtor. Although Burgess indicated he spent a significant amount of time exploring various theories in order to protect Debtor from losing her residence, Debtor testified that Burgess did not advise her of such efforts but instead advised her to prepare to vacate her residence. Further, as a result of the dismissal of the first case and the absence of the automatic stay, Debtor's furniture and certain household goods were repossessed. Pursuant to §329(b), the Court finds that fees paid to Burgess exceeds the reasonable value of the services provided and therefore orders Burgess to return the remaining \$1,199.00 to Debtor. See In re Vann, 128 B.R. 285, 293 (Bankr. D. Colo. 1991), aff'd 986 F.2d 1431 (10th Cir. 1993) (ordering that a law firm was entitled to no fees in part because the debtor received absolutely no benefit from the services of his attorney).

CONCLUSION

From the facts and legal conclusions discussed above, it is therefore

ORDERED that Burgess shall disgorge and return to Debtor the remaining \$1,199.00 in fees Debtor paid to him for representing her during her two bankruptcy cases.

IT IS FURTHER ORDERED that Burgess, within twenty days of the date of this Order, shall (1) review those Chapter 13 cases in which he served as debtor's attorney and filed in the calendar year 2001 and determine whether he made the proper disclosures of his compensation in those cases, (2) based on the review of these cases, compile a report of his findings and submit it to the Court and to the Trustee, and (3) upon discovery of any errors, file supplemental

Disclosures of Compensation to correct any inaccuracies.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
February 27, 2002.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

FEB 27 2002

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE *gmt indw, UST via mail*

VANNA L. DANIEL

Deputy Clerk