THIS ORDER IS SIGNED AND ENTERED.

Dated: January 29, 2020

Hon. Brett H. Ludwig
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WISCONSIN

In re

James B. Chipman and
Tiffany J. Chipman, Bankruptcy No. 1-18-10489-bhl

Debtors. Chapter 13

DECISION AND ORDER APPROVING SETTLEMENT AGREEMENT,
BUT REDUCING UNREASONABLE ATTORNEYS' FEES

INTRODUCTION

On October 15, 2019, counsel for debtors James and Tiffany Chipman filed a "Joint Notice of Motion and Joint Motion to Approve Settlement Agreement," requesting court approval of an agreed-upon resolution of disputes between the debtors and Hayward Community Credit Union (HCCU) and Bates Legal Group, LLC (BLG) over an alleged violation of the automatic stay. Under the settlement, the credit union and its counsel will make a $15,000 payment to resolve both an adversary proceeding pending in this court and a Fair Debt Collection Practices Act lawsuit filed in the District Court. In the motion, counsel also asks the court to approve his proposed retention of $14,000 of the $15,000 settlement proceeds for attorneys' fees and costs. At an October 17, 2019 pre-trial conference, the court directed counsel to file a fee application to justify his attorneys' fees request. He complied on October 28, 2019. Based on the record, including counsel's submissions, the court approves the settlement, but rejects counsel's proposed attorneys' fees as unreasonable.

BACKGROUND

On February 20, 2018, debtors James and Tiffany Chipman filed a chapter 13 petition and plan. The court confirmed their plan on May 22, 2018. Fourteen months later, on July 29, 2019, the debtors filed an adversary proceeding (Bank. W.D. Wis. No. 1-19-00052) against their mortgage lender, HCCU, and its counsel, BLG, alleging the defendants violated the automatic stay by pursuing a state court foreclosure action against the debtors while their chapter 13 case remained pending. The debtors simultaneously filed a complaint in the district court (W.D. Wis. No. 3:19-cv-00614) against BLG, alleging the same set of facts and seeking damages for a violation of the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §1692 et seq.

Not long thereafter, the parties agreed to resolve both the adversary proceeding and district court lawsuit. Under the settlement, HCCU will forgive the debtors' accrued late fees and outstanding interest, waive any other payment default, and re-amortize their note over a period of 118 months. In addition, HCCU and BLG will make a cash payment of $15,000. In exchange, the debtors agree to stipulate to the dismissal of both pieces of litigation.

In a "joint motion," debtors' counsel asked the court to approve the settlement. He also asked the court to approve the payment of his fees and costs out of the settlement proceeds. More specifically, he asks the court to bless his retention of $14,000 of the $15,000 settlement (93.33%), leaving just $1,000 for the debtors and their bankruptcy estate. At the October 17, 2019 pre-trial conference, counsel explained the settlement terms and stated that even though his "fees and costs were over the $15,000 … I really wanted the client to get [$1,000], primarily because I think it's just good marketing for me."

On October 28, 2019, at the court's request, counsel filed a Motion for Attorney Fees and Costs to justify his fee request. In this second motion, counsel states that he is applying for an award of fees and costs totaling $15,000, while claiming that his actual fees and costs are $18,232.35. He indicates in a footnote that he seeks only $14,000 for fees and costs, because he is willing to "give" $1,000 to the debtors "as he likes when clients receive some cash." ECF No. 88, n. 1.

ANALYSIS

1. The Settlement Terms Are Reasonable.

The court has no issue approving the settlement agreement. The adversary complaint alleges facts suggesting a blatant stay violation and the proposed resolution provides consideration to both sides. The debtors will receive both monetary and non-monetary relief. The bank is waiving fees and interest and re-amortizing the debtors' note.[1] Defendants are also paying $15,000 in compensation, not an insubstantial amount, given the short time the matter was litigated. The bank and its lawyers get the dismissal of two pieces of litigation and an end to the related financial exposure. The settlement seems sensible for both sides.

2. Counsel's Requested Attorneys' Fees Are NOT Approved.

Counsel's request for fees is another matter. Section 329(b) of the Bankruptcy Code authorizes the bankruptcy court to determine the "reasonable value" of an attorney's services. If an attorney's fee "exceeds the reasonable value" of counsel's services, the court can cancel any fee agreement or order the return of that part of the fee found "excessive." *Id*. The attorney whose fee has been called into question, not the party questioning it, bears the burden of showing the fee's reasonableness. *In re Geraci*, 138 F.3d 314, 318 (7th Cir. 1998). Counsel has not met his burden of showing that his requested fee is reasonable. To the contrary, his request is a barefaced and unreasonable attempt at double-billing.

Counsel arrives at his unreasonable fee by pushing the bounds of two different billing methodologies and then *adding the results together*. Counsel first calculates fees of $10,753 based on an hourly-rate methodology, using a ledger that includes questionable time entries and a $400/hour billing rate, a 33% increase from the hourly rate he charged the debtors for the underlying bankruptcy case.[2] But counsel does not end there. Remarkably, he asks for another

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[1] These benefits have not been quantified despite the court's specific request to counsel for information regarding the value of the non-monetary consideration at the October 17 hearing. Curiously, counsel's description of legal services rendered on August 25, 2019 includes the following: "Reviewed Ch. 13 materials to determine if offer is any good. Reviewed current plan and POC – there are no arrearages. I doubt the offer of waiving the fees is worthwhile since HCCU didn't file a rule 3002.1 notice[.]" ECF No. 88, Exh. B.

[2] Based on a review of other fee petitions filed with this court, the $300/hour rate is within (albeit at the high end of) the range of hourly fees charged by debtors' counsel in this district. The $400/hour rate is not within range, particularly given the straightforward nature of the underlying dispute. Counsel's self-serving claim that "[b]y any standards, he is an accomplished member of the Wisconsin bar" is hard to square with his application, which

$6,750, based on an additional 45% contingent-fee arrangement. He finally arrives at a total figure of $18,232.35 by adding costs of $729.35. Without a hint of irony or shame, counsel then states that he is willing to reduce his requested fees and costs to $14,000 and to "give" his clients the remaining $1,000 from the settlement payment, so they can get "some cash." ECF No. 88, n. 1. This request for a double recovery goes well beyond reasonably compensating counsel for his efforts.

In determining "reasonable value" for an attorney's services, the court must be "guided by section 330." *Geraci*, 138 F.3d at 318. In a chapter 13 case, "the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor." 11 U.S.C. §330(a)(4)(B). Under 11 U.S.C. §330(a)(3), reasonable compensation depends on "the nature, the extent, and the value" of the services.

A reasonable attorneys' fee under section 330 can be calculated on an hourly-rate or contingent-fee basis. Collier on Bankruptcy ¶330.03[4] (16th 2019). Both are accepted methods of compensating an attorney for his or her work and each has its advantages and disadvantages. An hourly-rate arrangement "places the risk of unexpectedly complex litigation, or even inefficient lawyering, on the client," while the client receives "the entire reward of a favorable judgment without reduction for a contingency share." Jerry M. Custis, Litigation Management Handbook §4:13 (Dec. 2019 update). A contingent-fee arrangement enables "persons who could not otherwise afford counsel to assert their rights" and allows clients "to share the risk of losing with a lawyer, who is usually better able to assess the risk." Restatement (Third) of the Law Governing Lawyers §35 (2000).

Counsel's attempt to collect both types of fees from the same clients in the same case borders on the obnoxious. Here, the parties have settled two (duplicative) pieces of litigation for a lump sum of $15,000 and other consideration of unquantified value. The settlement amount presumably encompasses the defendants' exposure for both actual damages and attorneys' fees.

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includes three sloppy errors on the opening page. Nor is the court persuaded by counsel's citations to other courts' apparent approval of $400/hour fees in other cases or the conclusory pages of a fee survey. Moreover, hourly-rate issues aside, counsel's time charges include time spent preparing and filing both the adversary proceeding in this court and a duplicative lawsuit in the district court. Counsel also billed $1,200 as "[e]stimated to finish case which includes [but] is not limited to signing the agreement, motion for approval plus mailings, dismissal." He later charged an additional $120 for having the debtors sign the documents and $71 for mailing the settlement notice.

Counsel is not entitled to double dip by taking fees out of the settlement proceeds based on his inflated hourly rate and then taking an additional 45% as a contingency fee.

To be clear, in the right circumstances, an attorney and client might agree to a "hybrid" approach that combines elements of both an hourly-rate and contingency-fee arrangements. But logically, a hybrid arrangement should involve a lower-than-typical hourly rate coupled with a lower-than-typical contingent-fee percentage. In that situation, the client gets the benefit of paying a smaller hourly rate up front in exchange for sharing a smaller amount of the final award. The lawyer benefits by getting paid at least something up front, but sacrifices a higher recovery under a more typical contingent-fee contract. *See, e.g., Boston & Maine Corp. v. Sheehan, Phinney, Bass & Green, P.A.*, 778 F.2d 890, 897 (1st Cir. 1985) (hybrid fee combined both hourly rate and percentage award; in return for lowered risk, attorney accepted much lower contingency fee of 15%); *Marquis Aurbach Coffing, P.C. v. Dofrman*, No. 2:15-CV-701 JCM, 2016 WL 3395462 (D. Nev. June 13, 2016) (hybrid fee agreement specified that client agreed to pay reduced hourly rate for legal services provided in exchange for a reduced contingency fee of 20% of any amount recovered); *In re Adam Aircraft Indus., Inc.*, No. 08-11751 MER, 2013 WL 414213 (Bankr. D. Colo. Feb. 1, 2013) (firm agreed to take 15% contingency and charge 75% of its normal hourly rate).

Counsel undertook his representation of the debtors in the underlying disputes based on a second fee agreement that he and the debtors signed specifically for the stay violation litigation. That second fee agreement states that counsel will not charge the debtors for his time; instead, the debtors agree that counsel may seek attorneys' fees from defendants at hourly rates ranging from $350 to $550 per hour for attorney time. The agreement also provides for a contingency fee. Counsel's agreement provides that he will be "**entitled to an additional 45% of any actual damages paid to client either by verdict, judgment or settlement. These fees are in addition to any payment or award of attorneys' fees. Attorneys are entitled to recover fees for their actual time spend working on the case BEFORE any actual damages will be paid.**" ECF No. 88, Exh. F (emphasis in original). While not the model of clarity, the agreement appears to contemplate that counsel will be entitled to recover court-awarded fees, as allowed under the FDCPA, plus a 45% contingency on any damages award. To the extent the bold language could

be read as the debtors' agreement to allow counsel to double charge for fees, the court rejects that reading as unreasonable and refuses to enforce it under section 329.

Having rejected counsel's request for fees encompassing *both* an hourly rate and contingency fee, the court must determine a reasonable fee based on counsel's submissions. Because counsel's second fee agreement is drafted as a contingent-fee arrangement, the court is inclined to determine counsel's reasonable fees using a contingent-fee methodology. Counsel was undoubtedly successful in achieving a settlement from the defendants for their alleged violation of the automatic stay. But this good result does not warrant an unreasonable fee award.

Based on the record, the court will reduce the contingency percentage from 45% to 33%. The complaint alleges a direct violation of the automatic stay in a state court foreclosure filing. If the facts alleged in the adversary complaint are true, there was minimal risk to counsel. Nor did the case require investment in extensive investigative work or expert witnesses, of the type that would increase the financial risk to counsel sufficient to increase the contingency rate. In these circumstances, a 45% contingency fee, which sits at the very high end of contingency fees offered in this district, is not reasonable. A reduction of the contingency percentage to 33% is reasonable. *See In re Ferguson*, No. 17-41615-JJR13, 2019 WL 1270451 (Bankr. N.D. Ala. Mar. 15, 2019) (reducing 45% contingent fee as excessive for a simple stay violation); *In re Jones*, 356 B.R. 39 (Bankr. D. Idaho 2005) (disallowing counsel's 75% contingency fee in full and reducing hourly rate by 25% in multi-case litigation related to alleged automatic stay violations); *In re Buckner*, 350 B.R. 874 (Bankr. D. Idaho 2005) (rejecting 50% contingent fee for pursuit of alleged violation of automatic stay). This results in attorneys' fees due of $5,000, which reasonably compensates counsel for his efforts.

3. The Court Approves Counsel's Application for $729.35 in Costs.

The court approves costs of $729.35, consistent with counsel's application. While the court has questions as to whether it made sense for counsel to file duplicative litigation in both this court and in the District Court, there is no dispute that the costs requested were actually incurred. Accordingly, with some reservation, payment of the requested costs is approved.

For the reasons stated above, IT IS ORDERED:

1. The Settlement Agreement and Release is approved.

2. Of the settlement proceeds, Lein Law Offices is awarded reasonable compensation for actual, necessary services rendered in the amount of $5,000 plus actual, necessary expenses in the amount of $729.35 for a total of $5,729.35. The remainder of the settlement proceeds, $9,270.65, must be remitted to the debtors and any non-exempt portion to their bankruptcy estate.

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