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UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

William F. Brooks
d/b/a Vermont Country Furniture Chapter 13
Debtor. Case # 99-11125 cab

ORDER DENYING ATTORNEY'S MOTION TO WITHDRAW

On October 25, 2000, the debtor's attorney, Michael R. Kainen, Esq. (hereafter referred to "counsel"), filed a *Motion to Withdraw* seeking leave to withdraw from his position as debtor's legal counsel herein. Counsel's prayer for this relief is:

> "This plan has been confirmed. Wherefore, counsel's role in the case is over, it is prayed that counsel be permitted to withdraw from the above case."

For the reasons stated below, the motion is denied.

The debtor filed for relief under chapter 13 on August 13, 1999 and the plan was confirmed on July 26, 2000. According to the Bankruptcy Rule 2016 statement filed with the debtor's petition, counsel agreed to accept, and the debtor paid counsel, $1,100 as his fee for this case, prior to the case being filed. Counsel indicated on the record at the hearing held on November 16, 2000 that he has incurred approximately $1,200 of additional fees since the case was filed, in excess of the $1,100 that he was paid pre-petition, and that he has no expectation that the debtor will be able to pay these additional fees. Counsel further indicated that if the debtor is unable to consummate the terms of the plan, creditors will file motions for lift stay relief and/or conversion to chapter 7 and that the chapter 13 trustee will file a motion to dismiss or convert the case. Counsel anticipates that responding to these motions on behalf of the debtor could easily result in another $1,200 of attorneys fees, and again, the debtor will not be able to compensate him for his time and efforts. Essentially, counsel is trying to cut

his losses.

I am very sensitive to both the need for counsel to be paid for the services they render and the difficulty debtors often have paying their attorneys. These must be carefully balanced in order to avoid discouraging attorneys from representing chapter 13 debtors while providing assurance of continuous, high quality representation of debtors who wish to file chapter 13. However, I do not believe that releasing attorneys from their obligations to chapter 13 debtors during the pendency of the case is the appropriate response to a debtor's inability to pay post-petition attorney's fees.

Chapter 13 cases, by definition, are likely to last three to five years. [11 USC §1322(d)]. When an attorney undertakes to represent a chapter 13 debtor I believe he or she is making a commitment to represent that client for the duration of the case. It is essential to the viability of the debtor's plan and the success of the case that the debtor have competent counsel available for consultation, response to motions and possible modifications of the plan until the case is closed. If one agrees to undertake to represent a chapter 13 debtor, this is the commitment one is making to the client. Without this, the debtor is left to navigate the unfamiliar waters of a chapter 13 case without a compass. This is particularly inequitable since the debtor is, during the pendency of the case, required to live within a specified budget and devote all disposable income to the plan. Thus, a debtor who is fulfilling his obligations under chapter 13 typically would not have access to the funds necessary to retain new counsel.

In the case of In re Meyers, 120 B.R. 751 (Bankr. S.D.N.Y. 1990), a chapter 7 debtor's counsel requested leave to withdraw during the pendency of the case because his client was unable to pay the fees demanded by counsel. Although the services required in a chapter 13 case are rather different from those in a chapter 7 case, the rationale of the Meyers movant was remarkably similar to that presented here. Counsel had accepted a retainer in the amount of $1,500, and claimed that "the debtor will be unable to pay not only the fees already accrued but any additional fees if [counsel] is not allowed to withdraw." Id. The Meyers court denied the motion to withdraw and noted:

> An attorney who undertakes to represent a client assumes obligations towards his client which are not excused merely because the client is unable to pay fees demanded by the attorney. [citations omitted]. A motion for withdrawal made by an attorney who has not received full

> payment may be denied where this will not impose an unreasonable financial burden. [citation omitted].

Id. at 752. As in Meyers, there is no evidence here that the debtor is deliberately violating the fee arrangement. In fact, the debtor has paid all fees approved by the Court to date. There is not sufficient evidence in the record to determine whether the post- petition developments and attendant legal fees complained of by counsel should have been anticipated; nor did counsel proffer any explanation as to why he has not sought approval of the fees for post-petition services to be paid through the plan.

It is well recognized that "once counsel appears in a bankruptcy case for a debtor, withdrawal is not generally allowed unless replacement counsel is available, even if the reasons for withdrawal appear justified under the rules." In re Glenn, 1992 WL 174696 (Bankr. E.D.Pa. 1992); *see also* In re Meyers, *supra* (withdrawal denied where fees beyond retainer higher than anticipated); In re Cumberland Investment Corp., 116 B.R. 353 (Bankr. R.R.I. 1990)(lack of client confidence not sufficient grounds); In re Edsall, 89 B.R. 772 (Bankr. N.D.Ind. 1988)(legal fees not being paid does not warrant withdrawal); In re Burruss, 57 B.R. 415 (Bankr. D.D.C. 1984)(client's rejection of counsel's advice on conversion issue not grounds for withdrawal). Moreover, allowing counsel to withdraw before completion of the plan would clearly interfere with the prompt and economical administration of this case and often result in a total failure of the debtor's reorganization.

Moreover, there are many safeguards built into chapter 13 that protect debtors' attorneys against the risk of non-payment. In fact, I believe chapter 13 debtors' attorneys are more likely to be paid their full fee than Chapter 7 debtors' attorneys, if post-petition legal services are required. The key to getting paid is careful computation of the fee and inclusion of the fee in the plan if the debtor does not have the funds available. It is the responsibility of chapter 13 counsel to carefully assess the debtor's situation and determine the appropriate fee needed to compensate the attorney for all services that will be required during the pendency of the case, prior to filing the chapter 13 case. If the debtor cannot pay the full fee prior to the case being filed, whatever portion has not been paid pre-petition may be paid through the plan, and counsel can even seek to have the attorney's fees paid immediately, i.e., prior to distributions to creditors. Moreover, if, during the pendency of the case, additional services are required or unanticipated legal issues arise, counsel can apply for additional fees and, upon approval of the additional fees, seek leave to have those fees also paid through the plan. This is critical because, as noted

above, the debtor would be prohibited from paying these fees "outside the plan" by the terms of the confirmation order and general principles of chapter 13. If the plan provides for payment of the fees directly from the trustee to the attorney, the chances of the attorney being fully compensated are only contingent upon the debtor making the plan payments.

This is not to say that there are never instances where an attorney is not fully compensated for the fair value of services rendered to a chapter 13 debtor. Unfortunately, this will occur from time to time in any type of case. However, I find that, on balance, the need for chapter 13 debtors to be assured of continuous representation by their legal counsel throughout the chapter 13 case outweighs the attorney's right to withdraw during the case for non-payment of fees, particularly in light of the many safeguards in place to ensure that the attorney who diligently computes the fee, keeps careful records, seeks additional fees when necessary and has the attorney's fees paid through the plan, will generally be paid in full in a timely fashion.

For the reasons stated above, and based upon the record of the hearing, counsel's motion is DENIED.

SO ORDERED.

/S/ Colleen A. Brown
Hon. Colleen A. Brown
U.S. Bankruptcy Judge

December 23, 2000
Rutland, Vermont