

Dated: June 25, 2018



Brenda Moody

Brenda Moody Whinery, Chief Bankruptcy Judge

Amended for Clarification Only

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**UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA**

In re:
JESSICA HAYDEN,

Debtor.

Chapter 7
Case No. 4:15-bk-12619-BMW

**AMENDED RULING AND ORDER
REGARDING PAYMENT OF CHAPTER
13 ATTORNEY’S FEES**

This matter is before the Court pursuant to the *Trustee’s Application for Expenses and Fees, Distribution of Funds for Costs and Adequate Protection Payments in a Converted Pre-Confirmed Case* filed by Dianne Kerns, the Chapter 13 Trustee (the “Trustee’s Application”), *Debtor’s Counsel’s Objection to Trustee’s Application* (the “Objection”) filed by Dean O’Connor (the “Debtor’s Counsel”), and the *Application for Allowance of Compensation and Reimbursement of Expenses of Dean W. O’Connor P.L.L.C.* (the “Fee Application”). The Trustee’s position is supported by the *Trustee’s Brief on Payment of Attorney’s Fees (and Other Administrative Expenses In a Case Converted Prior to Confirmation* (the “Trustee’s Brief”).

The matter has been under advisement and the Court now issues its ruling.

I. Jurisdiction

This Court has jurisdiction in this matter pursuant to 28 U.S.C. §§ 157(a) and 1334(b), and it is a core proceeding under 28 U.S.C. § 157(b).

1 **II. Findings of Fact**

2 The facts in this matter are undisputed. This case was commenced by the Debtor's filing
3 of a voluntary petition seeking relief under Chapter 13 of the Bankruptcy Code on October 1,
4 2015. Debtor filed a Chapter 13 Plan (the "Plan") and made some plan payments to the Trustee
5 as contemplated by 11 U.S.C. § 1326(a)(1).¹

6 The Plan provides that Debtor's Counsel had agreed to a \$4,500 flat fee for representing
7 the Debtor through confirmation of a plan. The Plan also contains a provision for hourly fees,
8 which creates some confusion, but is not relevant to the Court's determination, given the amounts
9 at issue. An amended Plan was subsequently filed, but the fee provisions did not change. The flat
10 fee is presumptively reasonable pursuant to the Local Rules of Bankruptcy Procedure for the
11 District of Arizona, as revised and effective December 1, 2017.

12 On August 1, 2016, Debtor's Counsel filed a Notice of Submitting Proposed Stipulated
13 Order of Confirmation. Although represented by counsel, on August 3, 2016, Debtor filed a
14 Motion to Convert her case to one under Chapter 7. The case was converted. A plan was not
15 confirmed prior to conversion of the Chapter 13 case to Chapter 7.

16 Debtor's Counsel filed his Fee Application, seeking allowance and payment of fees in the
17 amount of \$4,650. The Application was brought pursuant to Code § 330, which fees, if allowed,
18 would be entitled to administrative priority pursuant to Code § 503(b)(2).

19 The Trustee's Application provides that the Trustee collected \$1,125.00 during the
20 Chapter 13 proceedings and made disbursements of \$73.14, leaving a balance of \$1,051.86. The
21 Trustee's Application requests authorization to refund the remaining balance to the Debtor and
22 contains the following provision:

23 In light of *Harris v. Viegelahn*, 575 U.S. ____ (2015), the Trustee
24 **will not** disburse any funds to attorneys (even if a prior order
25 approving fees has been entered) or other non-levying creditors
26 unless said party files an objection to this application and obtains
27 an order from the Bankruptcy Court specifically allowing the
28 disbursement in light of the *Harris* decision.

¹ 11 U.S.C. § 101 et seq. shall hereinafter be referred to as the "Bankruptcy Code" or "Code."

1 The Debtor's Counsel objected to the return of funds to the Debtor on the basis that no
2 objection had been raised with respect to the fees set forth in the Plan, and that the Debtor's
3 signing of the Stipulated Order of Confirmation, prior to filing the Motion to Convert, constituted
4 consent. Debtor's Counsel requested that the Court direct payment of the remaining balance of
5 funds held by the Trustee to him. There was no allegation that the conversion was in bad faith.

6 The Trustee's Brief noted that the Trustee had no objection to the allowance of the fees
7 sought by Debtor's Counsel, nor to the payment of the remaining funds held by the Trustee to
8 Debtor's Counsel. The Trustee takes the position that she can pay allowed administrative
9 expenses, including attorneys' fees, in a case that is converted without a plan having been
10 confirmed, pursuant to Code § 1326(a)(2).

11 12 **III. Issue Presented**

13 Whether post-petition wages held by the Chapter 13 Trustee may be used to pay allowed
14 administrative expenses, including attorney's fees, when the case converts to Chapter 7 before a
15 plan is confirmed.

16 17 **IV. Legal Analysis and Conclusions of Law**

18 The starting point for this analysis is Code section 11 U.S.C. § 1326(a)(2), which provides
19 as follows:

20 A payment made under paragraph (1)(A) shall be retained by the
21 trustee until confirmation or denial of confirmation. If a plan is
22 confirmed, the trustee shall distribute any such payment in
23 accordance with the plan as soon as is practicable. If a plan is not
24 confirmed, the trustee shall return any such payments not
25 previously paid and not yet due and owing to creditors pursuant to
26 paragraph (3) to the debtor, after deducting any unpaid claim
27 allowed under section 503(b).

28 This Code section clearly states what the Trustee is to do with funds in her possession if a plan
is not confirmed, and the case is converted. It does not address the disposition of such funds if
conversion occurs post-confirmation.

1 The latter situation is the one addressed by the U.S. Supreme Court in *Harris v. Viegelahn*,
2 575 U.S. ___, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015). In the *Harris* case the Supreme Court
3 resolved a circuit split as to whether a debtor’s post-petition wages held by a Chapter 13 trustee
4 at the time of conversion to Chapter 7 should be returned to the debtor or paid to creditors under
5 the terms of the confirmed Chapter 13 plan. In the underlying case from the Fifth Circuit, *In re*
6 *Harris*, 757 F.3d 468 (5th Cir. 2014), the Fifth Circuit held that funds held by the Chapter 13
7 trustee at the time of conversion must be distributed to creditors. The Third Circuit had previously
8 held, however, that such funds must be returned to the debtor. *In re Michael*, 699 F.3d 305, 307
9 (3d Cir. 2012). In resolving the circuit split, the Supreme Court reversed the Fifth Circuit’s
10 decision in *In re Harris*.

11 The Supreme Court concluded that the issue before it was resolved by § 348 of the Code,
12 which deals with the conversion of a case from one chapter to another. Specifically,
13 § 348(f)(1)(A) of the Code provides that upon conversion of a Chapter 13 case to another chapter,
14 property of the estate consists of property of the estate, as of the petition date, that remains in the
15 possession of, or under the control of the debtor, as of the date of conversion. The Supreme Court
16 held that absent a finding of bad faith, post-petition, pre-conversion wages held by the Chapter
17 13 Trustee do not fit that definition. *Harris*, 135 S. Ct. at 1837. Further, Code § 348(e) provides
18 that conversion terminates the duties of a trustee serving in a case prior to conversion. The
19 Supreme Court further held that “[a]llowing a terminated Chapter 13 trustee to distribute the very
20 same earnings to the very same creditors is incompatible with that statutory design.” *Harris*, 135
21 S. Ct. at 1837.

22 The Supreme Court also noted that pursuant to § 1326(c) the core service of a trustee is
23 making plan payments and that “[t]he moment a case is converted from Chapter 13 to Chapter 7,
24 however, the Chapter 13 trustee is stripped of authority to provide that ‘service.’” *Id.* at 1838.
25 The Court went on to state that “[w]hen a debtor exercises his statutory right to convert, the case
26 is placed under Chapter 7’s governance, and no Chapter 13 provision holds sway.” *Id.* This
27 statement was made in the context that the trustee lacked authority to make payments pursuant
28 to a plan, since the plan would no longer be binding. The Supreme Court did, however,

1 acknowledge that the Chapter 13 Trustee would have some ongoing responsibilities after
2 conversion. *Id.* at 1839.

3 The issue that was before the Supreme Court is not the issue before this Court, given that
4 in the present case, the conversion to Chapter 7 occurred prior to plan confirmation. That being
5 said, the majority of courts that have considered the issue have concluded that the *Harris* case is
6 controlling and that funds must be returned to the debtor, irrespective of outstanding
7 administrative expenses. *See In re Beauregard*, 533 B.R. 826, 831 (Bankr. D. N.M. 2015)
8 (“While *Harris* was focused on the second sentence of § 1326(a)(2), there is no principled basis
9 upon which to continue to give effect to the third but not the second sentence of § 1326(a)(2)
10 after conversion.”); *In re Sowell*, 535 B.R. 824, 826 (Bankr. D. Minn. 2015) (“While the *Harris*
11 case involved a debtor whose plan had been confirmed, this Court believes that the logic and
12 analysis employed by the Supreme Court applies with equal force to a case, like this one, in
13 which no plan has been confirmed.”); *see also In re Ivey*, 568 B.R. 85 (Bankr. E.D. Ark. 2017);
14 *In re Harris* (No. 15-12618-JDW, 2016 WL 3517757 (Bankr. N.D. Miss. Feb. 1, 2016); *In re*
15 *Spraggins*, No. BR 13-28807-ABA, 2015 WL 5227836 (Bankr. D. N.J. September 3, 2015); and
16 *In re Beckman*, 536 B.R. 446 (Bankr. S.D. Cal. 2015). These cases rely on a broad interpretation
17 of the phrase “no Chapter 13 provision holds sway” and do not apply the context in which it was
18 given. Further, certain of the cases also overlook or ignore the fact that holders of administrative
19 claims are not creditors as defined in § 101(10) of the Code.

20 The court in *In re Brandon*, however, ruled that “[b]ecause a plan has not been confirmed,
21 I conclude that those post-conversion responsibilities continue to include compliance with the
22 third sentence of § 1326(a)(2) regarding the payment of administrative expenses such as the
23 remaining allowed fee of debtor’s counsel prior to returning unpaid funds to a debtor.” 537 B.R.
24 231, 236 (Bankr. D. Md. 2015). The *Brandon* court reached this conclusion based on the Supreme
25 Court’s resolution of the circuit split by adopting the view of the Third Circuit in the *In re Michael*
26 case, cited above.

27 The *Brandon* court specifically cited to the following portion of the Third Circuit’s ruling
28 in the *Michael* case:

1 Conversion also “terminates the services” of the Chapter 13
2 trustee. *Id.* § 348(e). Though [her] services are ended after
3 conversion, the trustee is required to account for the funds that
4 came into [her] possession by filing a final report under Federal
5 Rule of Bankruptcy Procedure 1019(5)(B)(ii). In addition, **if the**
6 **case is converted prior to confirmation of a plan, the trustee**
7 **must return any payments held by [her] to the debtor after**
8 **deducting adequate funds for [her] to pay allowed**
9 **administrative expense claims. See 11 U.S.C. § 1326(a)(2).**

10 *Id.* (quoting *In re Michael*, 699 F.3d at 310) (emphasis added by the *In re Brandon* court). The
11 court in *Brandon* went on to state that it did not follow that, after *Harris*, a Chapter 13 trustee, in
12 a converted case with no confirmed plan, must comply with a portion of the third sentence of
13 § 1326(a)(2) referring to the return of pre-confirmation plan payments to the debtor, but ignore
14 the remainder of the same sentence relating to the payment of allowed administrative expenses.
15 *Id.* at 237.

16 **V. Conclusion**

17 This Court finds the reasoning in *Brandon* persuasive, and therefore concludes that the
18 decision in the *Harris* case does not preclude this Court from approving the payment of allowed
19 administrative expenses, including attorneys’ fees, from funds held by the Chapter 13 trustee in
20 a case converted to Chapter 7 prior to plan confirmation.

21 Wherefore, based upon the foregoing and for good cause shown;

22 **IT IS HEREBY ORDERED** allowing the Debtor’s Counsel’s fees in the sum of
23 \$4,500.00, and approving payment of such fees from the remaining funds held by the Chapter 13
24 Trustee.

25 **SIGNED AND DATED ABOVE.**

26 To be NOTICED by the BNC ("Bankruptcy
27 Noticing Center") to:

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