IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

IN RE:

RODNEY D. SHEPHERD, ESQ.	:	Misc. No. 22-205-TPA
	:	
UNITED STATES TRUSTEE,	:	Related to Doc. No. 2
Movant	:	
	:	
v.	:	
	:	
RODNEY D. SHEPHERD, ESQ.,	:	
Respondent	:	

MEMORANDUM OPINION AND ORDER

Appearances: Larry Wahlquist, Esq., Counsel for the United States Trustee
Joseph Cotterman, Esq, Counsel for Rodney D. Shepherd, Esq.

This case presents questions surrounding the permissibility of using a "bifurcated" fee arrangement by an attorney for representation of a Chapter 7 debtor in this District. For a long time those questions have remained unanswered and for the most part attorneys did not even attempt that approach. Within the past few years, however, two attorneys have taken the step of offering a bifurcated fee arrangement option to their Chapter 7 clients. When the Court and the United States Trustee ("UST") became aware of this it resulted in the initiation of two proceedings to test what was being done – the current case and the slightly earlier case of *In the Matter of Attorney Paula J. Cialella Concerning Fee Agreements Entered on Various Chapter 7 Proceedings*, Misc. No. 21-0210-TPA ("Cialella").

Cialella was tried first, and the Court has this date issued a Memorandum Opinion and Order in that case with an Attachment "A" setting forth standards that will be applied in evaluating the use of bifurcated attorney fee arrangements in Chapter 7 cases. See, *Cialella* at Doc. No. 37. Those same standards will be applied here, but the Court will not repeat the extensive discussion explaining the law and reasoning behind them. The reader is directed to the *Cialella* Memorandum Opinion and Order for those details.[1]

FACTS

Attorney Rodney D. Shepherd ("Shepherd") has been a member of the Bar of this Court for many years, primarily representing individual debtors in Chapter 7 and Chapter 13 bankruptcy cases.[2] His first bankruptcy case was filed in 1986 and since then he has filed over 2,200 such cases.

On December 1, 2021, the Honorable Gregory L. Taddonio entered an Order in the *Coleman* bankruptcy case (Case No. 21-22372-GLT) in which Shepherd represented the debtor requiring Shepherd to appear at a December 22, 2021 hearing to answer questions about his fee

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[1] The Court has jurisdiction over this matter pursuant to *28 U.S.C. §1334.* A decision as to the allowance of attorney fees for debtors counsel represents a core matter under *28 U.S.C. §157(b)(2)(A)*. *See e.g., In Re Henderson,* 360 B.R. 477, 483 (Bankr. D. S.C. 2006).

[2] The findings of fact by the Court are based on the *Stipulations* of the Parties as set forth in the *Consolidated Pre-Trial Narrative Statement*, Doc. No. 23, the evidence presented at the trial that was held on September 1, 2022, and the Court's judicial notice of filings on the CM/ECF system.

practices.[3] In preparation for that hearing, the UST requested Shepherd to identify all cases in which he utilized bifurcated fee engagement agreements with debtors.[4] Shepherd responded to the UST's request and provided a list of 28 cases in this District where he utilized bifurcated fee engagement agreements ("bifurcated fee agreements"), which cases are noted in a list below.

In 23 of those cases, the Form B2030 that Shepherd originally filed did not reflect the fact that he utilized bifurcated fee agreements or the involvement of a third-party entity, Fresh Start Funding, LLC ("Fresh Start"),[5] in the agreements. Nor did Shepherd file an amended Form B2030 disclosing that he had signed a Post-Filing Agreement with the debtors within 14 days of signing the Post-Filing Agreement in these 23 cases.

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[3] Prior to this time, the Undersigned had *sua sponte* raised similar concerns regarding Atty. Paula Cialella's (Cialella) use of a bifurcated fee agreement procedure in a number of her Chapter 7 filings. On April 22, 2021, the Undersigned directed the UST to comment on whether Cialella's use of the bifurcated fee agreement in question and whether in his opinion it passed "judicial muster." The UST did not approve of Cialella's use of the bifurcated fee process resulting in the filing of Misc. No. 21-210-TPA referenced above. Because Misc. No. 21-210-TPA was already pending, the within matter was assigned to the Undersigned for further consideration.

[4] As explained more fully in the *Cialella* Memorandum Opinion and Order, a bifurcated fee engagement is one where the attorney and the debtor enter into two separate fee agreements, one a "Pre-Filing," or "prepetition" agreement signed before the petition is filed and under which the attorney performs limited services just sufficient enough to get the petition filed, and the other a "Post-Filing" or "postpetition" agreement signed thereafter under which the attorney performs further services to complete the case. This is as opposed to the traditional practice in Chapter 7 of the attorney requiring full payment of the fee for the entire case in advance before the petition is filed.

[5] Details of the agreement between Shepherd and Fresh Start were not introduced into evidence as part of this case, however, the Court was provided with information showing the nature of how it operates. Very basically, an attorney who has an agreement with Fresh Start can submit a proposed bifurcated fee arrangement to Fresh Start, and if Fresh Start approves, it will immediately send a stated percentage of the total fee to the attorney. Fresh Start then manages post-petition payments made by the client. Based on the sample Pre-Filing and Post-Filing Agreements as presented in *Cialella* and the present case it appears that the agreement between Shepherd and Fresh Start is very similar to the agreement between Cialella and Fresh Start.

Shepherd first disclosed the existence of his usage of bifurcated fee agreements in court filings in connection with the *Sachs* bankruptcy (Case No. 21-22654-CMB) filed on December 17, 2021, i.e., the first case he filed following Judge Taddonio's December 1, 2022 Order in *Coleman*. Subsequently, Shepherd filed four more cases that utilized bifurcated fee agreements for a total of 28 cases. Appearing below is the list of the 28 cases and their dates of filing in which Shepherd used the bifurcated fee agreement:

(1)	Kirchner	19-21172-CMB	March 26, 2019
(2)	Andrews	19-21778-JAD	April 30, 2019
(3)	Robinson	19-22647-JAD	June 30, 2019
(4)	Diamond	20-22291-GLT	August 2, 2020
(5)	Jones	20-21667-JAD	May 29, 2020
(6)	Lamond	20-22094-CMB	July 13, 2020
(7)	Jackson	20-22246-GLT	July 30, 2020
(8)	Allen	20-22397-TPA	August 14, 2020
(9)	Williams	20-22400-GLT	August 15, 2020
(10)	Luchon	20-23034-TPA	October 27, 2020
(11)	Archila	20-23103-GLT	October 31, 2020
(12)	Fischbach	20-23428-JAD	December 11, 2020
(13)	Swilley	20-23480-GLT	December 21, 2020
(14)	Heckman	21-20114-JAD	January 21, 2021

(15)	Duncan	21-20394-TPA	February 26, 2021
(16)	Derkach	21-20498-CMB	March 8, 2021
(17)	Buzzard	21-20924-JAD	April 17, 2021
(18)	Trischler	21-20925-GLT	April 17, 2021
(19)	Gee	21-20982-JAD	April 23, 2021
(20)	Vay	21-21491-GLT	June 28, 2021
(21)	Lebovitz	21-22021-CMB	September 16, 2021
(22)	Patton	21-22322-CMB	October 27, 2021
(23)	Coleman	21-22372-GLT	November 2, 2021
(24)	Sachs	21-22654-CMB	December 17, 2021
(25)	Jenkins	22-20077-JAD	January 13, 2022
(26)	McCloe	22-20117-GLT	January 21, 2022
(27)	Paul	22-20156-CMB	January 28, 2022
(28)	Simpson	22-20162-CMB	January 30, 2022

Appended hereto as Attachment "A" is a copy of UST Exhibit LLL which is a chart entitled "Attorney Shepherd Bifurcated Fee Summary." This chart provides accurate, relevant details to the matter at hand for each of the 28 cases identified above in which Shepherd used a bifurcated fee agreement.

Shepherd's standard "up-front" fee for a Chapter 7 bankruptcy case is $1,200 (this does not include the filing fee), which may vary depending on a debtor's particular case and circumstances. Shepherd does not keep time or billing entries for his Chapter 7 cases. Shepherd's

flat rate for clients who choose to bifurcate the representation is $1,700. In four of the 28 cases, however, Attorney Shepherd charged $2,220 to clients who bifurcated the representation because those clients did not pay the filing fee in advance. This additional $500 fee in those four cases was to cover the $338 filing fee and the $162 financing fee for advancing payment of the filing fee.

This may be a good place to take a slight detour to highlight one of the fundamental grounds on which the Cialella opinion and its bifurcation standards was based, that being the importance of consistency and transparency by attorneys when they disclose their fee arrangements with clients to the Court.

As noted in *Cialella*, the duty of disclosure as to attorney fees is motivated by two concerns: (1) debtors can be exploited by overreaching attorneys; and, (2) creditors can be denied their proper share of the bankruptcy estate. A consistent and transparent disclosure by the attorneys helps bankruptcy judges do their job in overseeing lawyers who represent debtors and does not require that they be detectives or clairvoyants to do so. For this reason, full and proper disclosure concerning attorney fees is of the highest importance.

Returning to the relevant facts, in all 28 of the cases identified above the debtor was charged more for Shepherd's legal services when bifurcating the legal representation through use of a Pre-Filing Agreement and a Post-Filing Agreement than if the debtor had paid Shepherd's entire fee prepetition. None of the debtors in the 28 cases entered directly into an agreement with Fresh Start for legal services, nor did any of the debtors enter into any loan or financing agreement directly with Fresh Start. Although the debtors did enter into an agreement to deduct payments from

their financial institutions, such payments were for Shepherd's legal services, the filing fee, and the fee for Fresh Start's involvement.

All references to "Law Firm" in the Pre-Filing Agreements and Post-Filing Agreements are intended to mean Shepherd. It is clear from the record that Fresh Start has never been a part of Shepherd's law firm.

The Pre-Filing Agreement entered into by Shepherd with his clients lists four categories of services:

(1) Pre-Filing Services;
(2) Post-Filing Services;
(3) Supplemental Post-Filing Services; and,
(4) Excluded Services.

The Pre-Filing Agreement stated that Shepherd's services would include, "[r]eviewing and advising for any motions for stay relief." In the Form B2030 for the 23 cases filed prior to December 1, 2021, however, Shepherd declared that his representation did not include, *inter alia*, "relief from stay actions." The Pre-Filing Agreements also state that "the following services are excluded from the work that the Law Firm is agreeing to provide you" and goes on to list one of those Excluded Services as "Pursuing creditors for violations of the automatic stay . . . ."

The Pre-Filing Agreement provides that if the client chooses the "Pay Before You File" option, it will be less expensive for the client, but Shepherd will provide only the Pre-Filing Services and the Post-Filing Services, even though Shepherd "may provide some of the Post-Filing services before the case is filed." The Pre-Filing Agreement further provides that under the "Pay

Before You File" option, any necessary Supplemental Post-Filing Services will be provided at an additional cost of $250 per hour. These "Supplemental Services" include reviewing and advising regarding any trustee turnover demand, 2004 exams, UST audits or lien avoidance; attending any continued Section 341 meetings; preparing and filing claims or objections, amendments, or motions to reinstate the case; and, negotiating and drafting reaffirmation agreements.

The Pre-Filing Agreement further provides that if the client chooses the "File Now Pay Later" option (i.e., a bifurcated fee agreement), Shepherd will provide only the Pre-Filing Services pursuant to the Pre-Filing Agreement. The Pre-Filing Agreement provides that if the client chooses the "File Now Pay Later" option, once the bankruptcy case has been filed the client has the choice to:

(1) represent themselves pro se;
(2) hire another attorney for post-petition representation; or,
(3) enter into a Post-Filing Agreement with Shepherd within ten days after the case is filed.

The Pre-Filing Agreement provides that if the client does not choose to enter into a Post-Filing Agreement, "you will not owe us anything additional" to any amounts paid prepetition. It appears that all 28 debtors involved here chose the option to enter into a Post-Filing Agreement with Shepherd rather than proceed *pro se* or with another attorney.

The Pre-Filing Agreement goes on to indicate that if the client does not choose to enter into a Post-Filing Agreement, "we will ask the bankruptcy court to allow us to withdraw as your lawyer in accordance with the bankruptcy rules, but we will continue to represent you in the

case and perform all necessary services until and unless the bankruptcy court allows us to withdraw." The Pre-Filing Agreement continues to the effect that if the client chooses the "File Now Pay Later"option and enters into a Post-Filing Agreement, Shepherd "will provide you with the Post-Filing Services AND the Supplemental Post-Filing Services . . . ." for the flat fee quoted for a bifurcated case. The Pre-Filing Agreement further provides that "This File Now Pay Later option is more expensive to you, but will include more legal services and allow you to pay some or all of our attorney fee (and, if applicable, your filing fee) in installments over twelve (12) months after we file your case." When asked at trial whether he had ever actually provided any of the "Supplemental Post-Filing Services" to any of the 28 bifurcated fee debtors, Shepherd answered somewhat vaguely that he thought he had done so on a few occasions but he provided no details or documentation.

On December 27, 2021, the UST requested Shepherd to correct Schedule J, Form B2030, and Statement of Financial Affairs #16 (if necessary) to accurately reflect his engagement agreements, and to either (1) file amended documents with the Court, or, (2) provide amended documents to the UST. Shepherd only filed an amended Form B2030 in 7 cases (*Lamond, Duncan, Derkach, Lebovitz, Patton, Coleman* and *Sachs*) and amended Schedule J in 4 cases (*Lamond, Duncan, Derkach* and *Coleman*).

On March 4, 2022, the UST filed a motion with the Court seeking the return of fees to the debtors entitled *Motion to Examine Compensation Paid to Attorney for the Debtors Pursuant to 11 U.S.C. § 329* ("Motion"). On April 7, 2022, Shepherd filed a response to the *Motion*.

Shepherd testified credibly at trial that his failure to make required disclosures concerning the bifurcated fee agreement in the 23 cases was not a deliberate attempt to conceal anything. However, he also testified that he did not conduct any research or make any inquiries about disclosure requirements prior to embarking on the relationship with Fresh Start and providing the bifurcated fee agreement option to his clients.

DISCUSSION

As was indicated above, the Court will not here repeat the legal analysis set forth in the *Cialella* Memorandum Opinion and Order which resulted in the "Chapter 7 Bifurcated Fee Standards for the Western District of Pennsylvania" (hereinafter "Standards") that appear as Attachment "A" to that document since the very same issues are involved in the present case. Instead, the Court will apply the Standards, along with their Principles and Implementing Requirements ("IRs") based on the pertinent facts of this case.

The first Principle in the Standards is that the use of a bifurcated fee agreement should be a last resort, not a first choice. IR #1 under that Principle provides that written materials given to the debtor by the attorney prior to the entry of any written agreement must include a full up-front payment option and the cost of that option. Shepherd does not appear to have complied with IR#1. There was no evidence presented of any pre-agreement written materials that were provided to debtors and while the only two Pre-Filing Agreements introduced into evidence by the

Parties do mention an up-front payment option, they do not state the amount of that option.[6]

IR#2 requires the attorney to include in Form B2030 statements to the effect that information was provided to the debtor indicating that an up-front fee would be the best option, that the attorney is satisfied that under the circumstances the debtor could not make an up-front payment, and that the attorney believes a bifurcated fee agreement to be in the best interest of the debtor. IR#2 was clearly not met here. There was no disclosure at all of the existence of bifurcated fee agreements in the Form B2030s filed in 23 of the cases, and even in the cases where there was a disclosure, it does not appear that Shepherd advised the debtor that an up-front payment would be preferred, that he was satisfied they could not do so, or that he believed a bifurcated fee agreement was in their best interest.[7]

With respect to Principle 1 in general, the Court also notes that Shepherd testified that of the 30 clients he presented with a bifurcated fee option, 28 chose it. It is a bit difficult to reconcile this large percentage with a "last resort" philosophy, especially when one considers that Shepherd filed many, many Chapter 7 cases before he began to offer a bifurcated fee option and presumably all of those debtors paid him in full, up-front. Perhaps the explanation is that he only offered the bifurcated fee option to select clients – those he thought would have difficulty paying an up-front fee, although the record does not support that conclusion.

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[6] The Pre-Filing Agreements in question were for *Kirchner* (UST Exhibit B) and *Lebovitz* (UST Exhibit TT). The Court notes that there are considerable differences between the *Kirchner* Agreements that were signed in March 2019 and the *Lebovitz* Agreements signed in September/October 2021. Unfortunately, no evidence was provided at trial to explain the reasons for the changes and the *Stipulations* of the Parties do not cover that point.

[7] *See* the amended B2030 form filed in *Lebovitz* (UST Exhibit SS).

Principle 2 of the Standards is that the debtor must be given full disclosure in advance regarding the bifurcated fee agreement, including its drawbacks. IR#3 requires that the Pre-Filing Agreement and Post-Filing Agreement both be in writing, and that they both be provided to the debtor for review prior to the filing of the bankruptcy case. Both of these Agreements as used by Shepherd meet the writing requirement, but it is unclear whether they were both provided to the debtors prior to the cases being filed. The Court can assume that the Pre-Filing Agreements were so provided since they were signed by the debtors prepetition, but the evidence does not disclose when Post-Filing Agreements were first given to the debtors for review.

Under IR#4 either the Agreements themselves, or a separate "disclosure statement" to be signed by the debtor, must fully disclose the essential features of the bifurcated fee agreement and must highlight and specify the various expenses that the debtor will incur by choosing a bifurcated fee agreement rather than paying the entire fee up front, as well as the fact that the fee under a post-filing agreement will not be discharged in the bankruptcy. IR#4 does not appear to have been met. There is no indication on the record that the debtors were given any sort of "disclosure statement" by Shepherd, and the Agreements themselves are lacking. Neither the *Kirchner* nor *Lebovitz* Agreements inform the debtor how much more the bifurcated fee agreement will cost them though they do inform the debtors that fees they will owe under the Post-Filing Agreement will not be discharged in the bankruptcy.

Continuing forward with consideration of Principle 2, IR#5 requires the services to be provided under the Pre-Filing and Post-Filing Agreements be clearly set forth and there must be consistency across both Agreements. That requirement has largely been met here, though as noted

above in the *Facts* section of this Opinion there is an inconsistency in the scope of services between the Agreements and the Form B2030 filed by Shepherd regarding motions for relief from stay. IR #5 also requires a certain minimum level of representation by its attorney for a pre-filing agreement to pass muster. Included is assisting the debtor with Section 521 duties, a pre-filing service lacking in both the *Kirchner* and *Lebovitz* agreements. Under IR#6 if a factor or similar entity is involved, the debtor must be informed in writing of all remedies the factor will have if the debtor defaults in payments under the Post-Filing Agreement. That concept is applicable here since Shepherd used Fresh Start in all of the cases. The Post-Filing Agreements do inform the debtors that Fresh Start[8] may pursue collection actions against them if they fail to pay.

Principle 3 of the Standards requires the client's choice whether to continue the representation with a Post-Filing agreement must be freely made and without any financial penalty for not doing so. IR#7 is met here because the Pre-Filing Agreements and Post-Filing Agreements do inform debtors that it is their choice as to how to proceed once a case has been filed.

IR#8 provides that Agreements must clearly inform the debtor that if he or she chooses not to enter into a Post-Filing Agreement the attorney must still continue to represent the debtor in the bankruptcy, at no additional cost to the debtor, unless and until the Court approves the attorney's withdrawal from the case. IR#8 is not met here because although the Agreements do inform the debtor that Shepherd must continue to represent them once the case has been filed until

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[8] As noted earlier in this Opinion, use of Fresh Start to underwrite the Shepherd fees in these cases is qualitatively no different than Fresh Start's role in *Cialella* which clearly involved a factoring situation. *See* n. 5. At the very least, Fresh Start falls under the "similar entity" reference in IR #6.

authorized by the court to withdraw, they do not state that there will be no extra cost to the debtor for such post-petition representation.

IR#9 requires that debtors be given at least 14 days following the case filing to sign a Post-Filing Agreement, or a 14 day period in which it can be rescinded. IR#9 does not appear to be met. The Post-Filing Agreements do not include a rescission period. The *Kirchner* Post-Filing Agreement does not state a time limit by which the debtor must accept it. The *Lebovitz* Post-Filing Agreement does have a stated period for acceptance but it is only 10 days rather than 14. IR#10 which requires the attorney to actually continue representing the debtor until excused by the court is inapplicable here because the evidence indicates all 28 of the debtors involved here elected to enter a Post-Filing Agreement rather than proceed *pro se* or with representation by another attorney.

Next, Principle 4 requires that while the overall cost to the client for a bifurcated fee agreement can be larger than for an up-front payment, it must remain reasonable. Under IR#s 11 and 12, if the reasonableness is questioned, the attorney's normal up-front fee will be compared with the bifurcated fee, and if there is more than a 20% difference that will be presumed to be unreasonable and the attorney will have the burden of overcoming the presumption and showing that the bifurcated fee is reasonable. It is undisputed that Shepherd's normal up-front fee is $1200, and that in most of the bifurcated fee cases he charged $1700. That represents a 41% "mark-up," which is thus presumptively unreasonable. The testimony from Shepherd at trial was to the effect that he estimates a bifurcated fee case requires him on average to devote about 2 hours more time than in an up-front fee case. Shepherd testified that his normal hourly rate is $250 and therefore the additional 2 hours he expends in a bifurcated fee case equals the extra $500 charged in those cases. This testimony was uncontroverted by the UST.

No documentary evidence was provided by Shepherd to back this testimony up. Frankly, the Court is somewhat skeptical that the difference between the two fees, up-front and bifurcated, is actually the product of an analysis of additional work that is required in a bifurcated fee case as opposed to an increase designed to offset the financing charges that Shepherd owes to Fresh Start under their agreement.[9] In any event, since as will be seen the question of whether IR#s 11 and 12 have been met is not critical to the outcome in this case, the Court will assume they have been met and the bifurcated fee is reasonable. For future reference though, attorneys who seek to use a bifurcated fee agreement should be prepared to present better evidence on the reasonableness of the fee question than was done here if the 20% threshold is exceeded.

Principle 5 of the Standards is that the Court must be fully informed about the bifurcated fee agreement on the petition date and the attorney must be prepared to defend such arrangement if challenged by the Court or the UST. IR#13 provides that the Form B2030 filed by the attorney must clearly set forth when a bifurcated fee agreement is being used and must set forth in narrative form the history of the interactions between the attorney and client concerning such arrangement, including the dates on which the Pre-Filing and Post-Filing Agreements were signed by the debtor, and the key terms of the arrangement. This requirement was clearly not met by Shepherd. In 23 of the cases Shepherd made no disclosure of the bifurcated fee agreement whatsoever, and even in the 5 cases where he did make a disclosure, it did not contain all of the

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[9] Furthermore, Shepherd made no attempt to credit the debtors for the time spent in preparation and meeting with the debtors, analyzing their best interests in how to proceed and under what chapter when bankruptcy is chosen and time spend in preparing, reviewing and filing the necessary initial pleadings. *See* p. 16-18, below.

expected information. In addition, even in those Form B2030s that did disclose the bifurcated fee agreement they were not filed until after the petition date, contrary to Principle 5.

IR#14 does not apply here because it deals with debtors who choose not to enter into a Post-Filing Agreement, something that did not happen in any of the cases. IR#15, requiring installment payments that are due under a Post-Filing Agreement to be reflected in the debtor's Schedule J was not met in the majority of the cases, though the later filings did comply.[10]

Next, Principle 6 states that a bifurcated fee agreement that includes a factor or similar entity will be presumed unreasonable, with the burden on the attorney of proving its reasonableness in the event of any challenge. Even though Shepherd argues that Fresh Start's participation in these matters does not rise to the level of a factoring relationship, the involvement of Fresh Start in the referenced cases implicates this Principle, which has three IRs implementing it, none of which have been met. That is because, at the very least, Fresh Start is a "similar entity" to a factor, which is defined as "[s]oneone who buys accounts receivable at a discount." Black's Law Dictionary (11th Ed. 2019). This is essentially what Fresh Start does by obtaining a lien on Shepherd's accounts receivable and the right to manage debtor installment payments on them in exchange for providing a discounted total amount to Shepherd. The fact that Shepherd remains

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[10] In his testimony Shepherd attempted to show that any anticipated payments that would be due under the Post-Filing Agreement did not have to be shown on Schedule J because the directions to Part 2 of the form only requires that expenses "as of your bankruptcy filing date" are to be shown, but Post-Filing Agreement payments do not begin until after the case has been filed. However, Item No. 24 in Schedule J asks whether the debtor expects any increase in expenses within the next year, so clearly the anticipated Post-Filing Agreement payments should have been disclosed in response to that directive.

technically liable should a client not pay is insufficient to escape the overall similarity to a factoring agreement inherent in the relationship between Shepherd and Fresh Start.

IR#16 requires that the existence of the factor or similar entity be disclosed in Form B2030 and that did not happen at all in 23 of the cases and was incomplete in the remaining 5 cases. Under IR#17, Form B2030 must also include a statement by the attorney attesting to a personal discussion with the debtor about the factor or similar entity and the possible conflict of interest thereby presented. Such was not done here. Finally, IR#18 requires an analysis of whether the use of the factor or similar entity could implicate any ethical concerns under the *Pennsylvania Rules of Professional Conduct* which also was not done here.

The Standards close with Principle 7, which states that in no case may the attorney advance filing fees with the expectation of making a recovery from post-petition debtor payments. IR#19 deals with cases where the attorney advances the filing fee for the debtor and provides that if that is done, Form B2030 must indicate that the attorney has no expectation of making any recovery of that filing fee from post-petition payments made by the debtor. This prohibition was violated in 4 of the cases where Shepherd did advance the filing fee and anticipated being repaid via post-petition payments.

IR#20 provides that the work done pursuant to the Pre-Filing Agreement must bear a reasonable relation to the work and services required to be performed under the Bankruptcy Code and Local Rules to reasonably and effectively represent the debtor. The description of "Pre-Filing Services" as set forth in the Agreements appears to meet this minimal standard, but were they actually provided in all of the cases? No testimony on this issue was elicited at trial nor do the

Stipulations provide any light on the subject. The Court also notes that Shepherd's allocation of fees between the Pre-Filing Agreement and the Post-Filing Agreement in the cases involved here is somewhat troubling listing "$0" due under the Pre-Filing Agreement in each of the 28 cases with the full fee due under the Post-Filing Agreement. Strictly as a matter of logic, that would imply that no legal work is being done under the Pre-Filing Agreement, which begs the question of how the attorney can properly be representing the client and meeting his/her responsibilities under the *Bankruptcy Code* and *Rules* to initially file the case, even in a skeletal form, since to do so obviously requires spending time with and advising the client. *See*, e.g., *11 U.S.C. §526(a)(2)* (requiring debt relief agencies to exercise "reasonable care" before making any statement concerning a debtor or advising a debtor to make any statement in a bankruptcy document). The Court suspects that the fee allocation is actually driven by a desire to allocate the entire fee under the non-dischargeable Post-Filing Agreement but since the record is devoid of any evidence in this regard, Shepherd's position will be accepted.

To sum up the above analysis, the bifurcated fee agreement as engaged in by Shepherd is in violation of numerous IRs under the Standards adopted in *Cialella*. For that reason, the Court could find the various Agreements involved in these cases to be void under *11 U.S.C. §§526(c)* and/or *329* and apply a remedy of complete fee disgorgement on that basis. The Court reached that same conclusion in *Cialella*, yet there opted not to take that approach. For very similar reasons, the Court will likewise not declare the Agreements in this case to be void. There is no need to go into those reasons in detail here since they are covered in *Cialella*, but for the sake of convenience the Court will briefly note them.

First, it is not clear that even a void agreement requires a complete fee disgorgement as a remedy. Second, the debtors involved in the 28 cases have all received valuable services from Shepherd and most have already received a discharge with no indication that those who have not won't eventually receive one. Third, fairness dictates that the newly-announced Standards not be applied too stringently to Shepherd who did not have the benefit of knowing them at the relevant time when he was entering into the bifurcated fee agreements. Fourth, as the Court commented at trial, while Shepherd himself could have done more to investigate the use of a bifurcated fee approach before embarking upon that course, the failure of Fresh Start to advise him of the serious legal issues its program has encountered in various courts around the country cannot be condoned or ignored. Finally, the UST himself recognized at trial that a complete disgorgement of fees would be a draconian step under the circumstances presented.

Again, therefore, as in *Cialella*, the Court will proceed not based on a finding of voidness, but rather on Shepherd's failure to make proper disclosure of the bifurcated fee agreement and payments thereunder received by him. Also as in *Cialella*, the Court feels no hesitancy in imposing a remedy of partial disgorgement for the failure to disclose because complete disclosure is a well-known obligation that has long been imposed on debtor attorneys in bankruptcy and not something new that has just recently been adopted.

Shepherd did contend at trial that he did not believe he was required to disclose the payments he received from Fresh Start because they had not been received as of the time the cases were filed. Such position ignores the last sentence of *Fed.R.Bankr.P. 2016(b)*, which states:

> A supplemental statement shall be filed and transmitted to the [UST] within 14 days after any payment or agreement not previously disclosed.

See also the 1987 Advisory Committee Note to this *Rule* which states that the "amended Rule requires the attorney to supplement the §329 Statement if an undisclosed payment is made to the attorney or a new or amended agreement is entered into by the debtor and the attorney." Therefore, even assuming *arguendo* that Shepherd did not have a duty initially to disclose the bifurcated fee arrangement, such duty clearly arose when Post-Filing Agreements were signed and he received payments from Fresh Start but he failed to supplement his Form B2030s.

Reference should also be made to the Memorandum Opinion and Order in *Cialella* for a discussion of the law on disclosure and the approach a court should take in disciplining an attorney who has failed to make a required disclosure. As was discussed therein, the remedy to be imposed should be enough to 'sting" the violator so as to act as a deterrent, without being unduly harsh and punitive.

In *Cialella* the Court found an appropriate amount of the remedy to be determined from the difference between what the attorney had disclosed that the debtors had agreed to pay and what they had actually paid, which resulted in an amount of up to $1,000 in some of the cases at issue there. In sharp contrast, there was an accurate disclosure of the actual amount to be paid by the debtors in 21 of the 23 cases involved in the Shepherd matter where the bifurcated agreement was not disclosed. In two of the cases (*Trischler* and *Patton*) the Form B2030s filed by Shepherd incorrectly stated that "$0" in fees were due post-filing, so those should be treated the same as the

cases involved in *Cialella*, where up to a $1,000 disgorgement was required.[11] However, in the remaining 21 cases what was not disclosed was simply the bifurcated fee agreement itself and the involvement of Fresh Start. In the Court's view, this represents a considerably less egregious and a more technical violation. Additionally, this case is lacking in any of the other aggravating problems that were observed in *Cialella*, such as substantial inconsistencies in the scope of work between pre-filing and post-filing agreements and incorrect payment information given to debtors in some of the agreements. For these reasons, the Court believes a significantly lesser remedy is warranted in the present case.

After giving the matter due consideration, the Court finds that in the 21 cases where the bifurcated fee agreement was not disclosed, a fee disgorgement of $150 to the debtors for each of the cases in which Shepherd failed to disclose the bifurcated fee agreement is appropriate. This is the same amount the Court imposes for technical violations of the Court's Rules and procedures that the Court has been imposing on debtor attorneys who fail to timely file confirmation orders in Chapter 13 cases following the Section 341 meeting of creditors. The Court finds that the misconduct engaged in by Shepherd in failing to disclose the bifurcated fee agreement under the facts in the referenced cases to be at a similar level of seriousness. Given that there are 21 such cases where a full disclosure of the bifurcated fee agreement was not made, disgorgement of $3,150 for that non-disclosure issue – plus a total $2,000 for the false statement as to post-filing fees in the

[11] As in *Cialella*, the Court here will also recognize the $1,000 maximum on the disgorgement amount for failure to disclose so as to avoid a windfall to the debtors who have actually received value.

Trischler and *Patton* cases – strikes the Court as an appropriate balance between being a deterrent without being overly harsh.

This Court also believes an additional remedy should be imposed concerning the four cases in which the debtors "financed" the filing fee (*Lebovitz, Patton, Coleman* and *Sachs)*. As indicated by IR#19, the Court has found that an attorney who advances the filing fee to a debtor cannot do so with the expectation of recovering it through post-petition payments. In violation of that prohibition, Shepherd had the debtors in those four, affected cases build the repayment of the filing fee into their post-filing scheduled payments – and not just the fee itself, but an additional finance charge of $162 – and therefore Shepherd conceivably would be required to pay the filing fee of $338 plus $162 for a total of $500 in each case. The impropriety of this arrangement should have been apparent to Shepherd even before the Cialella Opinion was issued, so the Court has no hesitancy in imposing a penalty for that. As noted, full disgorgement of the $500 in each case could be warranted but the Court will require only a return of the $162 finance charge in this instance, which equals an additional amount of $648, resulting in a total fee/cost disgorgement of $5,798.

AND NOW, this ***26th*** day of ***September, 2022***, for the reasons stated above, it is ***ORDERED, ADJUDGED*** and ***DECREED*** that Attorney Rodney D. Shepherd, Esq. shall disgorge fees and costs previously received by him to make refund payments ***on or before January 15, 2023***, as follows:

(1) $150 to the debtors in each of the following cases by sending them a check to their last known address: *Kirchner*, Case No. 19-21172-CMB; *Andrews*, Case No. 19-21778-JAD; *Robinson*, Case No. 19-22647-JAD; *Diamond*, Case No. 20-22291-GLT; *Jones*, Case No.

20-21667-JAD; *Lamond*, Case No. 20-22094-CMB; *Jackson*, Case No. 20-22246-GLT; *Allen*, Case No. 20-22397-TPA; *Williams*, Case No. 20-22400-GLT; *Luchon*, Case No. 20-23034-TPA; *Archila*, Case No. 20-23103-GLT; *Fischbach*, Case No. 20-23428-JAD; *Swilley*, Case No. 20-23480-GLT; *Heckman,* Case No. 21-20114-JAD; *Duncan*, Case No. 21-20394-TPA; *Derkach*, Case No. 21-20498-CMB; *Buzzard*, Case No. 21-20924-JAD; *Gee*, Case No. 21-20982-JAD; *Vay*, Case No. 21-21491-GLT.

(2) $1000 to the debtor in the following case by sending him a check to his last known address: *Trischler*, Case No. 21-20925-GLT.

(3) $1,162 to the debtor in the following case by sending her a check to her last known address: *Patton*, Case No. 21-22322-CMB.

(4) $312 to the debtors in each of the following cases by sending them a check to their last known address: *Lebovitz*, Case No. 21-22021-CMB; and *Coleman*, Case No. 21-22372-GLT.

(5) $162 to the debtor in the following case by sending him a check to his last known address: *Sachs*, Case No. 21-22654-CMB.

(6) Along with the payment checks as required in Paragraphs 1 through 5, above, Shepherd shall also include a cover letter signed by him and explaining the reason why the payment is being made.

It is ***FURTHER ORDERED*** that, along with the payment checks as required in Paragraphs 1 through 5, above, Shepherd shall also include a cover letter signed by him and explaining the reason why the payment is being made and ***on before January 22, 2023,*** Shepherd shall file a ***Certification of Service*** setting forth detailed information as to his compliance with this Order and indicating whether any of the payment checks were returned as undeliverable or have not been negotiated by the payee.

Thomas P. Agresti, Judge
United States Bankruptcy Court

Case Administrator to serve:
Larry E. Wahlquist, Esq.
Joseph E. Cotterman, Esq.
Rodney D. Shepherd, Esq.