

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: JENICE R. WALTON,

No. 18-10735-j7

Debtor.

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on the Application for Allowance and Payment of Compensation and Reimbursement of Expenses and Costs (“Fee Application”) filed by Diane Webb, Attorney at Law, P.C. (“Attorney”) *See* Docket No. 51. Debtor voluntarily converted her Chapter 13 case to Chapter 7 a few days after her Attorney filed the Fee Application. The Court did not confirm Debtor’s Chapter 13 plan prior to conversion. The Chapter 13 Trustee objected to the Fee Application based on 11 U.S.C. § 348(e),¹ which terminates the trustee’s services upon conversion, and based on the Chapter 13 Trustee’s obligation under § 1326(a)(2) to return undisbursed plan payments to the Debtor if a plan is not confirmed. *See* Trustee’s Objection to First Application for Compensation by Counsel for Debtor and Trustee’s Amended Objection to First Application for Compensation by Counsel for Debtor – Docket Nos. 60 and 61. Because the Debtor executed a valid assignment to her attorney of the funds held by the Chapter 13 Trustee, the Court will enter an order directing the Chapter 13 Trustee to pay the allowed fees, expenses, and costs to Debtor’s counsel to the extent of available funds on hand.²

FACTS AND PROCEDURAL HISTORY

Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on March 27, 2018. *See* Docket No. 1. On the same date, Debtor filed a Chapter 13 Plan. *See* Docket No. 7. Pre-petition, Debtor paid her Attorney a retainer of \$1,450.00, \$310.00 of which was used to pay the filing fee. *See* Disclosure of Compensation of Attorney for Debtor – Docket No. 9. Debtor

¹ All future statutory references in this Memorandum Opinion are to Title 11 of the United States Code.

² No objection was made to the amount of compensation sought.

filed an amended Chapter 13 Plan on May 25, 2018. *See* Docket No. 37. On August 22, 2018, Debtor's counsel filed the Fee Application seeking approval of compensation as an allowed administrative expense of the estate in the total amount of \$8,412.88, less payments totaling \$1,450.00, leaving an unpaid balance of \$6,962.88. *See* Docket No. 51. The Fee Application further requests the Court to authorize the Chapter 13 Trustee to pay the unpaid balance of the allowed fees from estate funds "after confirmation, conversion or dismissal." *Id.* Attached to the Fee Application is a notarized Assignment of Funds Held by Chapter 13 Trustee ("Assignment") signed by the Debtor postpetition on July 13, 2018. *Id.* By the Assignment, Debtor assigned her interest in undistributed funds held by the Chapter 13 Trustee to her Attorney to pay allowed unpaid attorneys' fees in the event of dismissal or conversion of her Chapter 13 case. *Id.* The Assignment includes the following provisions:

If any allowed fees charged by Debtor's Counsel remain unpaid at the time this case is dismissed, converted, or otherwise concluded, I assign such fees to Debtor's Counsel to the extent the Trustee has such funds on hand as of the date of dismissal, conversion, or conclusion of the case, and the Trustee shall pay such funds to the Debtor's Counsel rather than the Debtor until such fees have been paid (and also to pay herself any trustee fees in connection therewith, if a plan has been confirmed). Debtor acknowledges that there is cause to modify the provisions of 11 U.S.C. § 349(b)(3) to such an extent.

If any portion of Debtor's Counsel fees have not yet been approved by the Court, the Trustee shall hold sufficient funds on hand as of the date of dismissal, conversion, or other conclusion of this case until Debtor's Counsel has submitted a final fee application and the Court has ruled on the same. Debtor's Counsel shall file a final fee application within seven (7) days after dismissal, conversion, or conclusion of this case. Debtor agrees to shorten the deadline to object to any such fee application to 10 days, to which three days shall be added pursuant to Fed.R.Bankr.P. 9006(f). When the fee application has been ruled on, the Trustee shall comply with the provisions of paragraph 1 of this assignment. If a fee application is not timely filed, the Trustee may return all funds to the Debtor. Any fees of Debtor's Counsel not approved by the Court as herein set forth in paragraphs 1 and 2 of this Assignment shall be disbursed to the Debtor.

I have been advised by my bankruptcy attorney, P. Diane Webb, that I have the right to discuss this Assignment with another attorney of my choosing before I sign this Assignment.

I have been advised by my bankruptcy attorney, P. Diane Webb, that any attorney fees earned by her prior to the conversion of my bankruptcy case from Chapter 13 to Chapter 7 are dischargeable.

I am signing this Assignment freely and voluntarily without any undue influence or coercion of any kind.

Assignment, ¶¶ 1, 2, 3, 4, and 6.

On the same date that Attorney filed the Fee Application, Attorney sent a 21-day notice of the deadline to object to the Fee Application. *See* Docket No. 54.

Debtor converted her case from Chapter 13 to Chapter 7 on August 29, 2018. *See* Notice of Conversion of Case to Chapter 7 Under Section 1307(A) – Docket No. 57. On September 10, 2018, the Chapter 13 Trustee objected to the Fee Application in the converted Chapter 7 case. *See* Docket Nos. 60 and 61. No other objections to the Fee Application were timely filed. The Chapter 13 Trustee did not object to the amount of the fees, only to the request that the Chapter 13 Trustee pay the amount of the allowed compensation to Debtor's Attorney pursuant to the Assignment instead of returning the funds to Debtor.

On September 17, 2018, Debtor filed a Supplement to Assignment of Funds Held by Chapter 13 Trustee ("Supplement"). *See* Docket No. 62. Debtor signed the Supplement before a notary public on September 11, 2018. *Id.* The Supplement states, "I understand that the fees incurred during my chapter 13 are dischargeable and I am not obligated to allow the fees held by the chapter 13 Trustee to be paid to Attorney, Diane Webb, if I convert to a chapter 7." *Id.* The Court held a preliminary hearing on the Fee Application on October 23, 2018 and took the matter under advisement.

DISCUSSION

At issue is whether, following conversion of the Debtor's case from Chapter 13 to Chapter 7, the Chapter 13 Trustee must pay to Debtor's Attorney pursuant to Debtor's pre-conversion Assignment, the Attorney's unpaid allowed compensation for services performed in the Chapter 13 case from funds the Chapter 13 Trustee held on the conversion date instead of returning the funds to Debtor. This issue implicates § 348 regarding the effect of conversion and § 1326(a)(2), which governs distribution of plan payments.

The Effect of Conversion

Conversion of a bankruptcy case from one chapter to another is governed by § 348. When a case converts from Chapter 13 to Chapter 7, the funds held by the Chapter 13 Trustee on the date of conversion, which consist of retained plan payments made by the Debtor from postpetition earnings, are not property of the Chapter 7 estate³ unless the Debtor converted the case in bad faith.⁴ There is no contention that the Debtor converted this case in bad faith.

In addition, conversion of the Chapter 13 case to Chapter 7 terminates the service of the Chapter 13 Trustee. *See* 11 U.S.C. § 348(e) (conversion from Chapter 13 to Chapter 7

³ *See* 11 U.S.C. § 348(f)(1)(A) (“[P]roperty of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion.”). *See also Harris v. Viegelahn*, 135 S. Ct. 1829, 1837, 191 L. Ed. 2d (2015) (“A debtor’s postpetition wages, including undisbursed funds in the hands of a trustee, ordinarily do not become property of the Chapter 7 estate created by conversion.”); *In re Stamm*, 222 F.3d 216, 217 (5th Cir. 2000) (determining that postpetition wages in the hands of the Chapter 13 Trustee as of the date of conversion are not property of the Chapter 7 estate); *In re DeSimone*, No. 12-18258 (DHS), 2013 WL 6328751, at *2 (Bankr. D.N.J. Dec. 5, 2013) (observing that “usually, the source of the debtor’s payments to the Chapter 13 trustee is the debtor’s post-petition earnings and such earnings are not property of the [Chapter 7] estate by virtue of section 541(a)(6)” such that upon conversion from Chapter 13 to Chapter 7, undistributed plan payments do not become property of the Chapter 7 estate). *See also In re Michael*, 699 F.3d 305, 313 (3d Cir. 2012) (“[P]roperty acquired post-petition that is in the Chapter 13 estate at the time of conversion is not property of the new Chapter 7 estate.”)

⁴ *See* 11 U.S.C. § 348(f)(2) (“If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property of the estate in the converted case shall consist of the property of the estate as of the date of conversion.”). *See also Viegelahn*, 135 S. Ct. at 1837-38 (pointing out the bad faith exception in § 348(f)(2) and explaining that § 348(f)(2) “penalizes bad-faith debtors by making their postpetition wages available for liquidation and distribution to creditors.”).

“terminates the service of any trustee . . . that is serving in the case before such conversion.”). Consequently, once the case is converted to Chapter 7, the Chapter 13 Trustee no longer serves as trustee in the case. *See Viegelahn*, 135 S. Ct. at 1836 (“Conversion . . . immediately ‘terminates the service’ of the Chapter 13 trustee, replacing her with a Chapter 7 trustee.”) (citing § 348(e)).

An attorney’s claim for unpaid compensation earned while a case was pending under Chapter 13 is dischargeable in the converted Chapter 7 case. Under § 348, pre-conversion attorney’s fee claims of Chapter 13 debtor’s counsel are treated as prepetition dischargeable claims in the converted Chapter 7 case. Subsection (d) provides:

A claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section . . . 1307 of this title, other than a claim specified in section 503(b)⁵ of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

11 U.S.C. § 348(d).⁶ The exception contained in § 348(d) for § 503(b) claims means that claims specified in § 503(b), including pre-conversion attorney’s fee claims, continue to have a priority status in the converted Chapter 7 case but are treated as prepetition claims for most other purposes, including discharge. 3 *Collier on Bankruptcy* ¶ 348.05[1] (Richard Levin & Henry J. Sommer, eds, 16th ed.).

Debtor’s Attorney’s allowed compensation for services performed while the case was pending under Chapter 13 will have a priority administrative expense status in the converted

⁵ Section 503(b) governs administrative expense claims. 11 U.S.C. § 503(b). Attorney’s fees allowed pursuant to § 330 are administrative expense claims under § 503(b). *See* 11 U.S.C. § 503(b)(2) (“After notice and a hearing, there shall be allowed administrative expenses . . . including . . . compensation and reimbursement awarded under section 330(a) of this title.”). Section 330(a)(4)(B) authorizes the Court to allow reasonable compensation to counsel for an individual Chapter 13 debtor “for representing the interests of the debtor in connection with the bankruptcy case.” 11 U.S.C. § 330(a)(4)(B). Here, however, Attorney’s Fee Application was not approved prior to conversion of the case. Consequently, Attorney did not have an allowed administrative expense claim on the date of conversion.

⁶ Conversion of a case from Chapter 13 to Chapter 7 generally does not change the date of the order for relief. 11 U.S.C. §§ 348(a)–(c).

Chapter 7 case, but such claim is subordinated to Chapter 7 administrative expenses. *See* 11 U.S.C. §§ 348(d), 503(b) and 726(b). *See also In re Hoggarth*, 546 B.R. 875, 879 (Bankr. D. Colo. 2016) (explaining that “the administrative claims arising from a reorganization case, such as a chapter 13 proceeding, will be subordinated to the chapter 7 administrative claims.”). Section 726(b) provides that “in a case that has been converted to this chapter under section . . . 1307 of this title, a claim allowed under section 503(b) of this title incurred under this chapter after such conversion has priority over a claim allowed under section 503(b) of this title incurred under any other chapter of this title” 11 U.S.C. § 726(a). *See also In re Gutierrez*, 309 B.R. 488, 494, n.6 (Bankr. W.D. Tex. 2004) (“Fees incurred during the Chapter 13 phase of the case would be allowed in the converted chapter 7 phase as an administrative expense claim under section 503(b)(2) and awarded under section 330(a).”).

Distribution of Plan Payments Upon Conversion

Subsection (a)(2) of § 1326 governs the distribution of plan payments a debtor makes to the Chapter 13 trustee.⁷ It provides:

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

11 U.S.C. § 1326(a)(2).

In considering the effect of § 1326(a)(2) after conversion, the United States Supreme Court determined that upon case conversion a Chapter 13 trustee must return retained plan

⁷ A Chapter 13 debtor must begin making plan payments within thirty days after the petition date unless the Court orders otherwise. *See* 11 U.S.C. § 1326(a)(1) (“Unless the court orders otherwise, the debtor shall commence making payments not later than 30 days after the filing of the plan or the order for relief, whichever is earlier”); 11 U.S.C. § 101(42) (defining “petition” as the “petition filed under section 301 . . . commencing a case under this title.”); 11 U.S.C. § 301(b) (“The commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter.”).

payments made from postpetition wages to the debtor instead of distributing the funds to creditors under a confirmed Chapter 13 plan. *Viegelahn*, 135 S. Ct. at 1838 (holding that the Chapter 13 trustee, upon conversion, must “return undistributed postpetition wages to the debtor” rather than disbursing funds to creditors under the plan). The Supreme Court reasoned that because § 348(e) provides that conversion “terminates the service of any trustee . . . serving in the case before such conversion,” the Chapter 13 trustee is stripped of any authority to make distributions to creditors under § 1326(a)(2), a “core service provided by a Chapter 13 Trustee.” *Id.* Post-conversion payments to creditors is not an authorized Chapter 13 trustee service. *Id.*

The Supreme Court reasoned further, applying § 103(i), that once “a debtor exercises his statutory right to convert, the case is placed under Chapter 7’s governance, and *no Chapter 13 provision holds sway.*” *Viegelahn*, 135 S. Ct. at 1838 (emphasis added). According to *Viegelahn*, that includes the second sentence of § 1326(a)(2) that otherwise would govern the Chapter 13 trustee’s duty to distribute plan payments to creditors if a plan is confirmed since § 103(i) provides that “Chapter 13 of this title applies only in a case under such chapter.” 11 U.S.C. § 103(i).

If a plan is not confirmed (*i.e.*, the case is either converted or dismissed),⁸ the third sentence of § 1326(a)(2) directs the Chapter 13 trustee to “deduct[] any unpaid claim allowed

⁸ See *Hoggarth*, 546 B.R. at 879 (explaining that “§ 1326(a)(2) is only triggered with the denial of confirmation” and that upon denial of confirmation “[e]ither the case will be dismissed or it will be converted.”). In *Hoggarth*, the bankruptcy court distinguished dismissal from conversion for purposes of applying § 1326(a)(2) after *Viegelahn*. *Hoggarth*, 546 B.R. at 879.

Dismissal is governed by § 349 and authorizes the Court to alter the effects of dismissal, including the revesting of property of estate assets in the debtor, “for cause.” 11 U.S.C. § 349(b) (“Unless the court, for cause, orders otherwise . . .”). It is the practice of this Court to modify the provisions of § 349(b)(3) for cause so that debtor’s counsel may be paid allowed fees from the funds the Chapter 13 trustee has on hand as of dismissal. See NM LF 1017-2. *Cf. In re Lewis*, 346 B.R. 89, 105 (Bankr. E.D. Pa. 2006) (concluding that “§ 349(b)(3) is the controlling provision in determining the disposition of all estate property upon dismissal of a bankruptcy case” such that “if a request for the allowance of an administrative expense is pending at the time of dismissal of a chapter 13 case, the asserted entitlement ordinarily will constitute ‘cause’ for the entry of an order modifying the presumptive revesting of estate property under § 349(b)(3).”)

under section 503(b)” before returning the undisbursed plan payments to the debtor. 11 U.S.C. § 1326(a)(2). However, after *Viegelahn* conversion renders this Chapter 13 requirement inapplicable because “no Chapter 13 provision holds sway.” *Viegelahn*, 135 S. Ct. at 1838. Thus, a Chapter 13 trustee cannot use funds on hand to pay allowed attorney’s fees upon conversion as an administrative claim under §§ 503(b)(2) and 507(a)(2). See *In re Beauregard*, 533 B.R. 826, 831 (Bankr. D.N.M. 2015) (*Viegelahn*’s “ruling is broad enough to encompass unpaid Chapter 13 administrative expenses such as debtor’s unpaid attorneys’ fees.”). Even though *Viegelahn* “focused on the second sentence of § 1326(a)(2), there is no principled basis upon which to continue to give effect to the third but not the second sentence of § 1326 after conversion.” *Id.* See also *Hoggarth*, 546 B.R. at 878 (concluding that *Viegelahn* “is broad enough to encompass the situation where a case is converted prior to confirmation and the debtor’s attorney seeks payment of her chapter 13 fees [from funds held by the Chapter 13 trustee].”); *In re Beckman*, 536 B.R. 446, 449 (Bankr. S.D. Cal. 2015) (“Section 1326(a)(2) cannot be read in conjunction with *Harris* [*Viegelahn*] to allow him to pay administrative claims from the accumulated funds because *Harris* [*Viegelahn*] clearly states that the Chapter 13 provisions ‘hold no sway’ in the converted Chapter 7 case.”).

The Effectiveness of the Assignment

In a Chapter 13 case in which a plan is confirmed, debtor’s counsel ordinarily obtains an order approving pre-confirmation attorneys’ fees and is paid those fees from plan payments disbursed by the Chapter 13 trustee. On the other hand, if the case is converted from Chapter 13 to Chapter 7 before plan confirmation, counsel’s fees for postpetition Chapter 13 services generally will not have been allowed by the Court. In addition, those fees will be subordinated to Chapter 7 administrative claims and ordinarily will be discharged in the converted Chapter 7

case. In many Chapter 7 cases converted from Chapter 13 there are no funds in the estate available to pay any Chapter 13 administrative claims. That puts Chapter 13 debtor's counsel at risk of never being paid for work performed while the case was pending under Chapter 13. It seems unfair for debtor's counsel to risk non-payment for Chapter 13 services when the Chapter 13 Trustee has funds on hand upon conversion that would have been used to pay counsel's approved fees if the case had continued in Chapter 13.

To mitigate that result, Debtor's Attorney obtained an Assignment of the Debtor's interest in the plan payments held by the Chapter 13 Trustee upon conversion. The issue before the Court is whether the Assignment is an acceptable method to obtain payment of approved Chapter 13 attorneys' fees from undisbursed plan payments that would otherwise be returned to the Debtor upon conversion.

“An assignment is an act or expression of intention by which one person causes a transfer of a right or interest in property” to another. *Benton v. Albuquerque Nat'l Bank*, 1985-NMCA-039, ¶13, 103 N.M. 5, 10, 701 P.2d 1025, 1030 (citation omitted).⁹ The Debtor's interest in undisbursed plan payments held by the Chapter 13 trustee upon conversion of the case is an assignable future property interest. *Cf. In re Luna*, 406 F.3d 1192, 1199 (10th Cir. 2005) (explaining that a “chose in action . . . is a future interest, and, like all property interests, it is transferrable.”). The Court holds that a debtor may assign his or her interest in undisbursed plan payments to pay counsel's Chapter 13 attorneys' fees *provided*: 1) the Court approves the fees under the reasonable and necessary standards of § 330; and 2) the debtor's decision to grant the assignment is “knowing” and “voluntary.”

⁹ See also *Quality Chiropractic, PC v. Farmers Ins. of Arizona*, 2002-NMCA-080, ¶6, 132 N.M. 518, 51 P.3d 1172 (“An assignment is a transfer of property or some other right from one person (the assignor) to another (the assignee) . . .”) (quoting 6 Am Jur.2d Assignments, § 1 (1999) (additional internal quotation marks and remaining citations omitted)).

Requiring court approval of the requested fees for Chapter 13 services as reasonable and necessary in accordance with the requirements of § 330 enforces the Bankruptcy Code requirement that Chapter 13 debtor's professional fees are subject to Court review and approval even after dismissal or conversion, if counsel is attempting to collect from the debtor's own assets. *See In re Jankowski*, 382 B.R. 533, 541 (Bankr. M.D. Fla. 2007) (“[A] Bankruptcy Court is obliged to review all aspects of a professional’s claim for compensation, even after the dismissal of a case.”) (citations omitted); *In re Quaker Distributors, Inc.*, 189 B.R. 63, 68 (Bankr. E.D. Pa. 1995) (“[T]here is no reason to conclude that dismissal of a case could or should eliminate bankruptcy court review of a debtor’s transactions with its professionals.”). *See also In re Garris*, 496 B.R. 343, 353 -55 (Bankr. S.D.N.Y. 2013 (declining to enforce an assignment, in part, because the Chapter 13 fees had not been allowed by the Court); *In re Harris*, 258 B.R. 8, 14 (Bankr. D. Idaho 2000) (“If Counsel desires to be paid [upon dismissal] from the money held by Trustee, he should apply for allowance of his fees in the manner prescribed by the Code.”).

Requiring that the debtor's decision to grant the assignment is “knowing” and “voluntary” enforces the Bankruptcy Code requirement that Chapter 13 debtor's professional fees are subject to Court oversight and ameliorates concerns of overreaching by debtor's counsel. The grant of an assignment alters the effect of the Chapter 7 discharge injunction imposed by § 524 because it creates a non-dischargeable lien securing payment of counsel's fees.¹⁰ Just as a

¹⁰ An assignment intended as security for payment of a debt is a collateral assignment that creates a lien. *See In re Vanniewaal*, No. 97-81559, 1999 WL 33582224, at *2 (Bankr. C.D. Ill. Aug. 20, 1999) (even an assignment that appears on its face to be an absolute transfer is a collateral assignment if intended as security). The discharge injunction imposed by § 524(a) does not prevent a creditor from taking *in rem* action to enforce a lien against the debtor's property. *Fonseca v. Gov't Employees Ass'n*, 542 B.R. 628, 634 (B.A.P. 1st Cir. 2015). It only “prohibits efforts to collect a debt ‘as a *personal liability* of the debtor.’” *In re Paul*, 534 F.3d 1303, 1309 n. 6 (10th Cir.2008) (quoting 11 U.S.C. § 524(a)(2) (emphasis in *Paul*)).

decision to waive the discharge under § 727(a)(10) must be made knowingly and voluntarily,¹¹ so must a debtor's assignment of plan payments held by the Chapter 13 trustee upon conversion to Chapter 7 to secure payment of counsel's Chapter 13 attorney's fees be made knowingly and voluntarily.

For a debtor's decision to grant an assignment to be "knowing," counsel should inform the debtor in writing that, with limited exceptions, debtor could keep the funds held by the Chapter 13 trustee upon conversion and would never be required to pay Chapter 13 counsel's unpaid attorney's fees absent the assignment.

Generally, for the decision to be "voluntary" the assignment should be obtained prior to commencement of the Chapter 13 case when the debtor is in a better position to seek other counsel to represent him or her in the Chapter 13 case if the debtor does not want to sign the assignment. The debtor should be advised of the right to consult independent counsel regarding whether to sign the assignment. A debtor may also sign the assignment after the case is converted to Chapter 7; or, if the debtor makes an assignment during the Chapter 13 case, the debtor ordinarily must ratify the assignment post-conversion after being informed by counsel that counsel will continue to represent the debtor in the converted Chapter 7 case even if the debtor does not execute the assignment.¹²

At least one court has concluded the Court may not enforce an assignment after a case is dismissed to enable an attorney to secure payment of fees incurred in the Chapter 13 case from

¹¹ *Cf. In re Akbarian*, 505 B.R. 326, 328 (Bankr. D. Utah 2014) (a waiver of discharge under § 727(a)(10) must be made "knowingly, voluntarily, and with awareness of what consequences come from waiving a discharge in bankruptcy.).

¹² An assignment made while the Chapter 13 case is pending may not meet the voluntary requirement because of the potential for undue pressure on the debtor to sign the assignment as a condition to counsel continuing to represent the debtor.

undisbursed plan payments held by the Chapter 13 trustees. *See Garris*, 496 B.R. at 353. In *Garris*, the Court reasoned, in part:

There is no provision in the Bankruptcy Code that allows the Court to direct the trustee to pay this money to anyone other than the Debtors. There is no Bankruptcy Code provision that allows the Court to enforce an agreement, like the assignment between Debtor and counsel in this case, which directs the trustee to pay funds to Debtor's counsel.

496 B.R. at 353. This Court disagrees.

Applicable state law remains enforceable in bankruptcy cases unless limited by bankruptcy law. *Cf. Travelers Cas. and Sur. Co. of America v. Pacific Gas & Elec. Co.*, 549 U.S. 443, 454, 127 S. Ct. 1199, 1206, 167 L. Ed. 2d 178 (2007) (acknowledging the general presumption “that claims enforceable under applicable state law will be allowed in bankruptcy unless they are expressly disallowed.”). Nothing in the Bankruptcy Code limits the enforceability of a knowing, voluntary assignment of the debtor's own funds held by the Chapter 13 trustee upon conversion to Chapter 7 to pay allowed attorney's fees incurred while the case was pending under Chapter 13. As discussed above, the Assignment creates a lien against the debtor's own funds that are not property of the Chapter 7 estate, and an *in rem* action to enforce the lien is not subject to the Chapter 7 discharge injunction. The Assignment does not affect creditors' rights or distributions in the converted Chapter 7 case. Further, an attorney's use of an assignment in this manner does not run afoul of *Viegelahn*.¹³ Honoring a debtor's instructions regarding disposition of the funds to be returned to the debtor upon conversion does not constitute a “Chapter 13-

¹³ Interestingly, in *Viegelahn*, the Chapter 13 trustee disbursed the funds on hand upon conversion to pay counsel's attorney's fees pursuant to an assignment. *See Viegelahn v. Harris*, 757 F.3d 468, 471 (5th Cir. 2014), *rev'd sub nom. Harris v. Viegelahn*, 135 S. Ct. 1829, 191 L. Ed. 2d 783 (2015) (“Attached to Harris' notice of conversion was an assignment of funds assigning \$1,200 of the remaining funds to Harris' counsel in payment for legal fees.”). On appeal, the debtor did not challenge payment of counsel's attorney's fees pursuant to the assignment from funds on hand as of the conversion date.

authorized ‘service’” any more than returning all undisbursed plan payments to the debtor upon conversion. *Viegelahn*, 135 S. Ct. at 1838.

In addition, in the case before the Court, the Debtor ratified the Assignment after conversion of the case. The Bankruptcy Code does not prevent a debtor from voluntarily paying an otherwise dischargeable debt. *See* 11 U.S.C. § 524(f) (“Nothing contained in subsection (c) or (d) of this subsection [which govern the effect of discharging debts] prevents a debtor from voluntarily repaying any debt”); *In re Cook*, Adv. No. 11-1074-S, 2011 WL 1675299, at *4 (Bankr. D.N.M. Apr. 28, 2011) (acknowledging that a debtor “is perfectly free to repay any claims of creditors . . . that he wishes to pay.”) (citing 11 U.S.C. § 524(f)); 4 *Collier on Bankruptcy* ¶ 524.06 (Richard Levin & Henry J. Sommer, eds., 16th ed.) (stating that none of the discharge injunction provisions of § 524 “prevents a voluntary repayment of a discharged debt.”).

The Court finds further support for its decision in *In re Zamora*, 274 B.R. 268 (Bankr. W.D. Tex 2002). In *Zamora*, the bankruptcy court considered whether debtors could pay their attorney for future services in her converted Chapter 7 case from plan payments held by the Chapter 13 trustee upon conversion. The bankruptcy court acknowledged that the Chapter 13 trustee ordinarily must return the undisbursed plan payments to the debtor upon conversion, but ultimately concluded that the debtors could “assign all or a portion of the monies on hand with the chapter 13 trustee to their attorney for the purpose of paying for post-conversion services.” *Zamora*, 274 B.R. at 277. The *Zamora* court reasoned that the Bankruptcy Code is “silent regarding a debtor’s right to assign to another what is otherwise owed to the debtor by the chapter 13 trustee once the case has been converted.” *Id.* at 275. Provided the assignment is otherwise valid, the bankruptcy court determined that the debtors may rely on an assignment to

use funds on hand with the Chapter 13 trustee to pay for post-conversion attorneys' fees. *Id.* (“With the Code’s silence, the presumption is that the normal rules regarding the enforceability of valid assignments apply.”).¹⁴

The Court will allow the Attorney’s fees under § 330(a). Debtor’s Assignment meets the knowing and voluntary requirements. The Debtor ratified the Assignment after conversion of the case to Chapter 7, was advised that she had the right to discuss the Assignment with another attorney of her choosing before signing it and acknowledged that the unpaid fees would be dischargeable in the converted Chapter 7 case. The Assignment states that the Debtor has executed it “freely and voluntarily and without any undue influence or coercion.” Further, the Assignment contemplates that the requested fees require the Court’s approval, and Debtor’s counsel filed the Fee Application seeking Court approval and allowance of the requested compensation. Debtor’s informed agreement to assign her interest in the funds held by the Chapter 13 Trustee to pay allowed Chapter 13 attorney’s fees following conversion to Chapter 7 is, therefore, effective.

Having determined that the Assignment is effective, and after reviewing the requested fees under the standards of § 330, the Court concludes that the requested fees and expenses in the Fee Application were reasonable and necessary and should be approved.

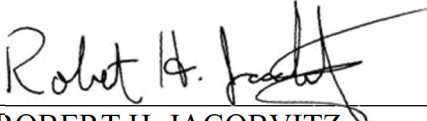
WHEREFORE, IT IS ORDERED that the Fee Application is GRANTED. Total fees in the amount of \$8,412.88 are approved.

ORDERED FURTHER, that the Chapter 13 trustee pay the unpaid balance of allowed attorneys’ fees in the amount of \$6,962.88 to Debtor’s counsel from funds on hand as of the date

¹⁴ The *Zamora* court expressly did not decide whether a debtor may assign undisbursed plan payments held by the Chapter 13 trustee to pay for the attorney’s Chapter 13 fees. *Zamora*, 274 B.R. at 277–78 (“The court leaves to another day questions about assigning monies to pay the lawyer’s fees incurred in the chapter 13 case, when a case is dismissed or converted.”).

of conversion to the extent of available funds on hand, and, if there are funds in excess of the allowed fees, return the excess funds to the Debtor.

ORDERED FINALLY, that Debtor's counsel is granted an allowed administrative expense in the Chapter 7 case in the amount of any unpaid balance of allowed attorneys' fees after payment by the Chapter 13 trustee.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: January 28, 2019

COPY TO:

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Tiffany M. Cornejo
Chapter 13 Trustee
625 Silver Avenue SW, Suite 350
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