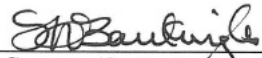




SO ORDERED.

SIGNED this 28th day of June, 2023

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.**


Suzanne H. Bauknicht
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

ROBERT CLIFFORD NEWBY, III

Debtor

Case No. 3:23-bk-30918-SHB
Chapter 13

MEMORANDUM AND ORDER

The Court held a hearing on June 28, 2023, pursuant to the Order entered June 6, 2023 (“June 6 Order”) [Doc. 17], directing Debtor to appear and show cause why this case should not be dismissed and, as authorized by 11 U.S.C. § 349(a), incorporating 11 U.S.C. § 109(g), why the Court should not impose a 730-day bar against the filing of a bankruptcy case by Debtor under any chapter of Title 11 for his repeated and willful failure to abide by orders of the bankruptcy court or otherwise comply with the provisions of the Bankruptcy Code in this and prior cases, including his failure to comply with 11 U.S.C. §§ 109(h), 521(a)(1), and 1321; Rules 1007(b) and 3015(b) of the Federal Rules of Bankruptcy Procedure; E.D. Tenn. LBR 9036-1(b)(1); and the Notice of Additional Documents to Be Filed dated May 23, 2023, by filing the Certificate of Credit Counseling; Statement Regarding Payment Advices; Schedules A/B through J; Declaration About

Schedules; Statement of Financial Affairs; Summary of Assets and Liabilities and Certain Statistical Information; Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period; Chapter 13 Plan; and Debtor Electronic Noticing Election (DeBN) in this case. Also before the Court was the Trustee's Motion to Dismiss filed by Debra L. Miller, Chapter 13 Trustee, on May 24, 2023 [Doc. 10], which was noticed for hearing on June 14, 2023, and continued to June 28, 2023. Debtor did not file a response to June 6 Order or the Chapter 13 Trustee's Motion to Dismiss, nor did he appear at the hearing on June 28, 2023, or file any of the delinquent documents.

I. FINDINGS OF FACT

The record reflects the following undisputed facts. Debtor has filed multiple bankruptcy cases since 2012, which are summarized as follows:

(A) Case No. 3:12-bk-32504-rs, which was filed with the assistance of counsel on June 18, 2012, and dismissed September 14, 2012, at Debtor's request;

(B) Case No. 1:12-bk-15493-NWW, which was filed with the assistance of counsel on October 23, 2012, and dismissed on July 6, 2017, for failure to make plan payments;

(C) in Case No. 1:19-bk-14044-SDR, which was filed *pro se* on September 26, 2019, Debtor failed to file the Certification of Credit Counseling; Statement Regarding Payment Advices; Chapter 13 Plan; and Debtor Electronic Noticing Election (DeBN) as required by 11 U.S.C. §§ 521(a)(1) and 1321; Rules 1007(b) and 3015(b) of the Federal Rules of Bankruptcy Procedure; and E.D. Tenn. LBR 9036-1(b)(1) and, as reflected on the Trustee's Objection to Confirmation filed on November 8, 2019, failed to make plan payments, did not appear at the meeting of creditors, did not file the Certification of Credit

Counseling or Chapter 13 plan, and did not provide the Chapter 13 Trustee with proof of income or tax returns, resulting in dismissal on December 11, 2019;

(D) in Case No. 1:20-bk-10250-SDR, which was filed on January 21, 2020, Debtor failed to file the Certification of Credit Counseling; Statement Regarding Payment Advices; Chapter 13 Plan; and Debtor Electronic Noticing Election (DeBN) as required by 11 U.S.C. §§ 521(a)(1) and 1321; Rules 1007(b) and 3015(b) of the Federal Rules of Bankruptcy Procedure; and E.D. Tenn. LBR 9036-1(b)(1) and, as reflected in the Motion to Dismiss With Prejudice filed by the Chapter 13 Trustee on March 11, 2020, failed to make plan payments, did not appear at the meeting of creditors, did not file the delinquent statements and schedules or plan, and did not file the Certification of Credit Counseling, resulting in dismissal on April 2, 2020, with a 180-day bar;

(E) in Case No. 1:20-bk-12799-SDR, which was filed on October 26, 2020, Debtor failed to file the Certification of Credit Counseling; Statement Regarding Payment Advices; Schedules A/B through J; Declaration About Schedules; Summary of Assets and Liabilities and Certain Statistical Information; Statement of Financial Affairs; Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period; Chapter 13 Plan; and Debtor Electronic Noticing Election (DeBN) as required by 11 U.S.C. §§ 521(a)(1) and 1321; Rules 1007(b) and 3015(b) of the Federal Rules of Bankruptcy Procedure; and E.D. Tenn. LBR 9036-1(b)(1) and, as reflected in the Motion to Dismiss With Prejudice filed by the Chapter 13 Trustee on December 14, 2020, failed to appear at the hearing held on December 10, 2020 on the Court's Order, failed to make plan payments, did not appear at the meeting of creditors, did not file the delinquent statements schedules

or plan, and did not file the Certification of Credit Counseling, resulting in dismissal on January 14, 2021, with a 365-day bar;¹ and

(F) in this case, filed May 19, 2023, Debtor failed to (i) obtain the pre-petition credit counseling briefing required by 11 U.S.C. § 109(h); (ii) file the Statement Regarding Payment Advices; Schedules A/B through J; Declaration About Schedules; Statement of Financial Affairs; Summary of Assets and Liabilities and Certain Statistical Information; Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period; Chapter 13 Plan; and Debtor Electronic Noticing Election (DeBN) as required by 11 U.S.C. §§ 109(h), 521(b)(1), and 1321; Rules 1007(b) and 3015(b) of the Federal Rules of Bankruptcy Procedure; and E.D. Tenn. LBR 9036-1(b)(1); and (iii) appear at the hearing held June 28, 2023, on the June 6 Order and the Chapter 13 Trustee's Motion to Dismiss, notwithstanding the directive for dismissal with prejudice and a 730-day bar. Additionally, Debtor has not complied with the directives of an Order entered May 23, 2023, by paying the \$313.00 filing fee required at the commencement of this case.

II. CONCLUSIONS OF LAW

Because “[g]ood faith and candor are necessary prerequisites to obtaining a fresh start,” it is implicit that Chapter 7 cases must be filed in good faith. *See In re Eddy*, 288 B.R. 500, 504 (Bankr. E.D. Tenn. 2002) (quoting *Industrial Ins. Servs. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991)). Courts routinely examine the following factors to determine whether a Chapter 7 case should be dismissed for lack of good faith:

1. The debtor reduced his creditors to a single creditor in the months prior to filing the petition.

¹ Additionally, Case No. 1:22-bk-11301-NWW was filed on June 21, 2022, in Debtor's name as a Chapter 13 case; however, the case was converted to Chapter 7 on August 4, 2022, on motion by the Chapter 13 Trustee and subsequently dismissed and declared “null and void” on December 1, 2022, on Debtor's motion because, as proffered by the Chapter 7 Trustee and the attorney for the United States Trustee, Debtor had not filed the case.

2. The debtor failed to make lifestyle adjustments or continued living an expansive or lavish lifestyle.
3. The debtor filed the case in response to a judgment[,] pending litigation, or collection action; there is an intent to avoid a large single debt.
4. The debtor made no effort to repay his debts.
5. The unfairness of the use of Chapter 7.
6. The debtor has sufficient resources to pay his debts.
7. The debtor is paying debts to insiders.
8. The schedules inflate expenses to disguise financial well-being.
9. The debtor transferred assets.
10. The debtor is over-utilizing the protection of the [Bankruptcy] Code to the unconscionable detriment of creditors.
11. The debtor employed a deliberate and persistent pattern of evading a single major creditor.
12. The debtor failed to make candid and full disclosure.
13. The debts are modest in relation to assets and income.
14. There are multiple bankruptcy filings or other procedural “gymnastics.”

Id. at 504-05 (quoting *In re Spagnolia*, 199 B.R. 362, 365 (Bankr. W.D. Ky. 1995)).

Although courts must find that imposition of a sanction “be commensurate with the egregiousness of the conduct,” the purpose of adding § 109(g) was to address abuse of the system including “the filing of meritless petitions in rapid succession to improperly obtain the benefit of the Bankruptcy Code’s automatic stay provisions as a means of avoiding foreclosure under a mortgage or other security interest.” *In re Cline*, 474 B.R. 789 (Table), No. 11-8075, 2012 WL 1957935, at *7 (B.A.P. 6th Cir. June 1, 2012) (citations omitted). “While multiple filings are not, in and of themselves, improper or indicative of bad faith, a history of multiple filings and

dismissals may be construed as bad faith.” *Cusano v. Klein (In re Cusano)*, 431 B.R. 726, 735 (B.A.P. 6th Cir. 2010) (citing *In re Glenn*, 288 B.R. 516, 520 (Bankr. E.D. Tenn. 2002)). Further, if there is sufficient cause, courts have the authority under §§ 105(a) and 349(a) to sanction abusive debtors with a prohibition against filing for more than the 180 days set forth in § 109(g)(1). *Id.* at 737; see also *In re Henderson*, No. 12-50376, 2012 WL 4498887, at *1–2 (Bankr. S.D. Ohio May 4, 2012) (stating that while “only egregious behavior that demonstrates bad faith and prejudices creditors will warrant a permanent bar from refiling,” a debtor who had filed four prior Chapter 13 cases that had been dismissed and had received discharges in two Chapter 7 cases was a serial filer whose bankruptcy cases “had the effect of staying creditor’s [sic] attempts to collect what they [were] owed repeatedly for almost two decades,” resulting in her being permanently enjoined from filing another case or receiving a discharge of the debts scheduled in that case).

Debtor has a history of multiple filings and dismissals based on his failure to comply with the requirements of the Bankruptcy Code and orders of this court. The two most recent of Debtor’s prior cases were dismissed with a 180-day and a 365-day bar, respectively, and in each of his pro se cases, Debtor has failed to obtain (or file certification that he obtained) the required pre-petition credit counseling briefing, failed to file the documents required by § 521(a)(1), failed to attend meetings of creditors or pay the filing fee, and failed to appear in compliance with show-cause orders and the notices of hearing for motions to dismiss. Again, in this case, Debtor did not appear at the hearing held June 28, 2023, or otherwise respond to the June 6 Order, notwithstanding that it expressly referenced imposition of a 730-day bar on refiling. A totality of the circumstances evidences that Debtor did not file this case in good faith.

For the foregoing reasons, constituting the Court's findings of fact and conclusions of law as required by Rule 52 of the Federal Rules of Civil Procedure, applicable to contested matters by virtue of Rule 9014 of the Federal Rules of Bankruptcy Procedure, the Court directs the following:

1. Because Debtor did not file the Certificate of Credit Counseling; Statement Regarding Payment Advices; Schedules A/B through J; Declaration About Schedules; Statement of Financial Affairs; Summary of Assets and Liabilities and Certain Statistical Information; Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period; Chapter 13 Plan; and Debtor Electronic Noticing Election (DeBN) as required by 11 U.S.C. §§ 109(h), 521(b)(1), and 1321; Rules 1007(b) and 3015(b) of the Federal Rules of Bankruptcy Procedure; E.D. Tenn. LBR 9036-1(b)(1); and the Notice of Additional Documents to Be Filed dated May 23, 2023, this Chapter 13 bankruptcy case is DISMISSED.

2. Because he has repeatedly and willfully failed to abide by orders of the Court as outlined herein and has failed to appear before the Court as directed, Debtor Robert Clifford Newby, III is BARRED from filing another bankruptcy petition under any chapter of Title 11 of the United States Code for a period of 730 days from the date of entry of this Order. *See* 11 U.S.C. § 109(g)(1).

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