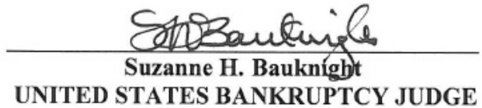
SO ORDERED.
SIGNED this 22nd day of October, 2019

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



Suzanne H. Bauknight
UNITED STATES BANKRUPTCY JUDGE

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

In re

SHAWN DAVID SPIVEY
LEONA LYNN SPIVEY
aka LEONA LYNN STENZLER

Debtors

Case No. 3:19-bk-32908-SHB
Chapter 13

MEMORANDUM AND ORDER

On October 16, 2019, the Court held a hearing on (1) the Order entered September 11, 2019 ("September 11 Order") [Doc. 7], directing Debtors, acting *pro se*, to appear and describe exigent circumstances allowing the Court to determine whether such circumstances merit a waiver of the credit counseling briefing requirement of 11 U.S.C. § 109(h) or whether Debtors' bankruptcy case must be dismissed due to their ineligibility to be debtors under Title 11; (2) the Motion by Chapter 13 Trustee to Dismiss Case with Prejudice ("Motion to Dismiss") filed by Gwendolyn M, Kerney, Chapter 13 Trustee ("Trustee") on September 13, 2019 [Doc. 11], asking the Court to dismiss this case with a one-year bar against Debtors re-filing a case; and (3) the Motion to Continue Hearings ("Motion to Continue") filed by Debtors on October 15, 2019, asking

the Court to continue the October 16, 2019 hearing on the September 11 Order and the Motion to Dismiss to November 6, 2019, asserting that "[o]ne of the debtors is not available to attend the hearing on 10/16/2019[;] [o]ne of the filers has a medical appointment that cannot be rescheduled." [Doc. 48.][1] Other than seeking to continue the hearing from October 2, 2019, to October 16, 2019 [Doc. 42] and to further continue the October 16, 2019 hearing to November 6, 2019 [Doc. 48], Debtors did not respond to either the Motion to Dismiss or the September 11 Order. At the October 16, 2019 hearing, neither debtor appeared (even though Debtors specifically asked the Court to continue the matters to October 16 only eight days earlier), and the Trustee provided the Court with a satisfactory explanation why she seeks to bar Debtors' refiling for one year, which explanation is supported by the record.

I. FINDINGS OF FACT

The record reflects the following undisputed facts. Debtors have filed three Chapter 13 bankruptcy cases since August 2018. The histories of the cases are summarized as follows:

A. Case No. 3:18-bk-32602-SHB was filed, with benefit of counsel, on August 27, 2018, and dismissed on December 13, 2018, on the Trustee's objection to confirmation as to feasibility after Debtors failed to bring plan payments current before the December 12 hearing as directed by the Court on November 7, 2018. Debtors' proposed plan included a $1,625.00 maintenance payment on their mortgage to PennyMac Loan Services and included a mortgage arrearage of $13,000.00, to be cured through monthly payments of $217.00. PennyMac Loan Services filed a proof of claim in the amount of $270,265.80, including a pre-petition arrearage of $12,033.43, with the last pre-petition payment having posted to the account on January 4, 2018;

B. Case No. 3:19-bk-30251-SHB was filed, with benefit of counsel, on January 30,

[1] The Motion to Continue is unsigned and does not include a certificate of service reflecting that a copy was provided to the Trustee, notwithstanding that the Court, in granting Debtors' first non-conforming motion to continue the October 2, 2019 hearing (which also was filed in person on the day before the hearing), expressly directed that "any future filings in this or any case by debtors shall comply with the local rules of this Court, available on the Court's intranet webpage." [Doc. 44.]

2019, and dismissed on July 3, 2019, on the Trustee's objection to confirmation after Debtors failed to bring plan payments current before the July 3 hearing as directed by the Court on June 5, 2019. Debtors' proposed amended plan included a $1,625.00 maintenance payment on their mortgage to PennyMac Loan Services and included a mortgage arrearage of $15,500.00, to be cured through monthly payments of $260.00. PennyMac Loan Services filed a proof of claim in the amount of $278,136.79, including a pre-petition arrearage of $22,351.47, with the last pre-petition payment having posted to the account on February 1, 2018;

C. Debtors, acting *pro se*, filed this bankruptcy case on September 9, 2019. They filed the outdated Exhibit D – Individual Debtor's Statement of Compliance With Credit Counseling Requirement form [Doc. 3], through which they certified under penalty of perjury that they each asked for pre-petition credit counseling services from an approved agency, as required by 11 U.S.C. § 109(h)(1), but were unable to obtain the required services during the seven days after they made the request and that exigent circumstances merit a temporary waiver of the pre-petition credit counseling briefing requirement for thirty days. In support of their statements, Debtors attached an unsworn letter stating that "[t]he credit counseling from our previously filed chapter 13 is no longer valid as it is over 180 days old. While compiling the documents to submit to the court, we discovered the error and will correct it within the 30 day period that is allowed by law, with your permission." [Doc. 3-1 at 5.] On September 23, 2019, Debtors filed an Amended Voluntary Petition [Doc. 21] and a Motion for Additional Time to File Chapter 13 Schedules, Other Documents and Information Required Under 11 U.S.C. § 521(a)(1) ("Motion to Extend Time")[2] [Doc. 24], which was granted by the Order entered September 25, 2019 [Doc. 25], allowing Debtors through September 30, 2019, to file 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 (Form 122C-1); Chapter 13 Plan; and Debtor Electronic Noticing Election (DeBN). As noted, the Court also entered an Order on October 2, 2019, granting Debtors' unsigned and unserved Motion to Continue Hearings

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[2] Debtors did not sign or serve the Motion to Extend Time, and they requested an additional seven days "so that the Debtor may assist counsel in submitting the necessary forms and information" – notwithstanding the Debtors' have not been represented by counsel in this case. [Doc. 24 ¶ 4.]

filed on October 1, 2019 [Doc. 42], in which Debtors expressly asked that the hearings on the September 11 Order and the Motion to Dismiss be rescheduled to October 16, 2019, "[d]ue to unforeseen family obligations." [Doc. 44.]

II. CONCLUSIONS OF LAW

Under § 1325(a)(3) and (7), debtors are required to file and proceed in their cases in good faith, and likewise, to propose their plans in good faith, with an almost identical standard as cases concerning good faith and dismissal under § 1307(c). *In re Hall*, 346 B.R. 420, 426 (Bankr. W.D. Ky. 2006). Whether a debtor has filed in bad faith requires examination of the totality of the circumstances and is based on past and present circumstances. *Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Surety Co. (In re Laguna Assocs. Ltd. P'ship)*, 30 F.3d 734, 738 (6th Cir. 1994); *In re Glenn*, 288 B.R. 516, 519-20 (Bankr. E.D. Tenn. 2002).

In making the good faith determination, courts generally focus on the following factors:

> (1) the debtor's income; (2) the debtor's living expenses[;] (3) the debtor's attorney fees; (4) the expected duration of the Chapter 13 plan; (5) the sincerity with which the debtor has petitioned for relief under Chapter 13; (6) the debtor's potential for future earning; (7) any special circumstances the debtor may be subject to, such as unusually high medical expenses; (8) the frequency with which the debtor has sought relief before in bankruptcy; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by debtor as indicative of the debtor's sincerity to repay the debt; (11) the burden which administration would place on the trustee; and (12) the statutorily-mandated policy that bankruptcy provisions be construed liberally in favor of the debtor.

Soc'y Nat'l Bank v. Barrett (In re Barrett), 964 F.2d 588, 592 (6th Cir. 1992). Other relevant factors include "the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt[,] and whether any inaccuracies are an attempt to mislead the court[.]" *Hardin v. Caldwell (In re Caldwell)*, 851 F.2d 852, 859 (6th Cir. 1988) (citation omitted). Courts also look to the following:

> the nature of the debt, including the question of whether the debt would be nondischargeable in a Chapter 7 proceeding; the timing of the petition; how the

> debt arose; the debtor's motive in filing the petition; how the debtor's actions affected creditors; the debtor's treatment of creditors both before and after the petition was filed; and whether the debtor has been forthcoming with the bankruptcy court and the creditors.

Alt v. United States (In re Alt), 305 F.3d 413, 419 (6th Cir. 2002) (citation omitted). Weighing these factors — "which 'may circumstantially reflect the debtor's motivation, and ultimately his "good faith,"' in seeking relief under chapter 13" — assists courts in determining whether "the debtor's purpose in filing for chapter 13 relief is consistent with the underlying purpose and spirit of chapter 13 – i.e., financial 'rehabilitation through repayment of debt' – [and if] the filing is likely in good faith." *Condon v. Brady (In re Condon)*, 358 B.R. 317, 326 (B.A.P. 6th Cir. 2007) (internal citations omitted).

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. at 520). 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).

As previously stated, this is Debtors' third Chapter 13 bankruptcy case filed within the last fourteen months. Between the first and second cases, filed on August 27, 2018, and January 30, 2019, respectively, the arrearage owed on their mortgage obligation to PennyMac Loan Services increased by more than $10,000.00.[3] More significantly, Debtors, who were represented by counsel in the first two cases but filed this case *pro se*, did not obtain the required pre-petition credit counseling briefing. Instead, they certified under penalty of perjury that they asked for pre-petition credit counseling services from an approved agency, as required by 11 U.S.C. § 109(h)(1), but were unable to obtain the required services during the seven days after they made the request and that exigent circumstances merit a temporary waiver of the pre-petition credit counseling briefing requirement for thirty days, stating that "[t]he credit counseling from our previously filed chapter 13 is no longer valid as it is over 180 days old. While compiling the documents to submit to the court, we discovered the error and will correct it within the 30 day period that is allowed by law, with your permission." [Doc. 3 at 5.]

Notwithstanding their requests to continue the show-cause hearings in this case, Debtors did not file a response to or otherwise defend the Trustee's Motion to Dismiss, even though it expressly requests imposition of a one-year bar on refiling, and the most recent request for a continuance filed on October 15, 2019, from the October 16, 2019 date that Debtors originally requested in their motion filed on October 1, 2019, appears to be an abuse of the bankruptcy

[3] As of the October 16, 2019 hearing date, PennyMac Loan Services had not filed a proof of claim in this case.

process. Debtors also failed to comply with the Court's direction to comply with the local rules by signing and serving motions and ignored memoranda dated September 24 and October 3, 2019, from the clerk's office directing the filing of a notice of amendment and certificate of service as required by the Federal Rules of Bankruptcy Procedure and the Local Rules.

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 the request on the eve of the Court's show-cause hearing to continue that hearing from a date that Debtors expressly requested only two weeks prior appears to be an abuse of the bankruptcy process, the Motion to Continue Hearings [Doc. 48] is DENIED.

2. Because Debtors did not obtain the required credit counseling briefing within the 180 days preceding the September 9, 2019 petition date, as required by 11 U.S.C. § 109(h)(1), they are not eligible to be debtors under title 11.

3. Because Debtors are not eligible to be debtors under Title 11, the Motion by Chapter 13 Trustee to Dismiss Case with Prejudice [Doc. 11] is GRANTED.

4. This Chapter 13 bankruptcy case is DISMISSED.

5. Because he has repeatedly and willfully failed to abide by orders of the Court or to appear before the Court as directed,[4] Shawn David Spivey is BARRED from filing another bankruptcy petition under any chapter of Title 11 of the United States Code for a period of one year from the date of entry of this Order. *See* 11 U.S.C. § 109(g)(1).

6. Because she has repeatedly and willfully failed to abide by orders of the Court or to appear before the Court as directed, Leona Lynn Spivey is BARRED from filing another

[4] The Court interprets the statements in the October 15, 2019 Motion to Continue to mean that one of the debtors could have appeared at the hearing on October 16.

bankruptcy petition under any chapter of Title 11 of the United States Code for a period of one year from the date of entry of this Order. *See* 11 U.S.C. § 109(g)(1).

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