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6 UNITED STATES BANKRUPTCY COURT  
7 EASTERN DISTRICT OF CALIFORNIA  
8

9 In re ) Case No. 07-20593-D-13L  
10 CHAREL WINSTON, ) Docket Control No. NLE-1  
11 Debtor. )  
12 ) DATE: May 29, 2007  
TIME: 11:30 a.m.

13 This memorandum decision is not approved for publication and may  
14 not be cited except when relevant under the doctrine of law of the  
case or the rules of claim preclusion or issue preclusion.

15 MEMORANDUM DECISION ON DEBTOR'S  
16 REQUEST FOR WAIVER AND MOTION TO DISMISS

17 I. BACKGROUND

18 On January 30, 2007 Charel Winston (the "debtor") initiated  
19 the above Chapter 13 case. With her petition the debtor filed  
20 Exhibit D - Individual Statement of Compliance with Credit  
21 Counseling Requirement ("Exhibit D"). The debtor checked the box  
22 indicating that she received pre-petition credit counseling, from  
23 an agency approved by the United States Trustee (the "UST"), within  
24 180 days before the filing of the case. Exhibit D requires the  
25 debtor to attach a copy of the certificate of credit counseling.  
26 The debtor failed to attach a certificate of credit counseling, but  
27  
28

1 rather, attached a Certificate of Debtor Education (the "CDE").<sup>1</sup>  
2 The CDE indicates that on January 23, 2007 the debtor completed a  
3 course on personal financial management given through the internet  
4 by A Better Financial Education, Inc.

5 On January 30, 2007, Lawrence J. Loheit (the "Trustee") was  
6 appointed the Chapter 13 Trustee. On March 8, 2007 the Trustee  
7 filed a Motion to Dismiss (the "Motion to Dismiss") the debtor's  
8 case. The Motion to Dismiss is based, in part, on the Trustee's  
9 assertion that the debtor is not eligible for bankruptcy relief  
10 because she failed to obtain pre-petition credit counseling, as  
11 required by section 109(h) of the Bankruptcy Code (the "Code").

12 On March 23, 2007 the debtor filed opposition to the Motion to  
13 Dismiss (the "Opposition"). The Opposition is based, in part, on  
14 the debtor's contention that she is disabled, and as a result of  
15 her disability the pre-petition credit counseling requirement does  
16 not apply to her. The Opposition was not served on the UST, nor  
17 did the debtor affirmatively request that the court determine she  
18 is exempt from pre-petition credit counseling under section  
19 109(h)(4) of the Code.

20 On April 17, 2007, the debtor submitted to chambers a manilla  
21 envelope marked "Enclosed Record is Subject to Application to File  
22 the Records Under Seal." The envelope contained a pleading  
23 entitled "Petitioner's Declaration in Support of Her Opposition to  
24 Trustee's Motion to Dismiss." Attached to this declaration are

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26 <sup>1</sup> Exhibit D also contains a specific box to check if a  
27 debtor asserts they are exempt from the pre-petition credit  
28 counsel requirement because of incapacity, disability, or  
active military duty pursuant to section 109(h)(4) of the  
Bankruptcy Code. The debtor did not check this box.

1 three letters from doctors (two of which are unsigned), a statement  
2 of general instructions and a copy of a declaration filed in a  
3 State Court proceeding (the "Medical Records").<sup>2</sup> The Medical  
4 Records were filed to support the debtor's contention that she is  
5 disabled and exempt from the pre-petition credit counseling  
6 requirement. The court has reviewed the Medical Records.  
7 Notwithstanding the evidentiary defects and for the purpose of this  
8 Memorandum only, the court will consider the Medical Records.<sup>3</sup>

9 On April 27, 2007, the court issued an order setting a hearing  
10 on the debtor's request to have the credit counseling requirement  
11 waived pursuant to section 109(h)(4) of the Code (the "Request for  
12 Waiver"). The order allowed the debtor to supplement the record no  
13 later than May 11, 2007 and provided for opposition to the Request  
14 for Waiver to be filed no later than May 21, 2007. The court held  
15 a hearing on the Request for Waiver on May 29, 2007, and the matter  
16 was taken under submission.

## 17 18 II. ANALYSIS

### 19 A. Jurisdiction

20 This court has jurisdiction over the Request for Waiver  
21 pursuant to 28 U.S.C. sections 1334 and 157(b)(1). The Request for  
22 Waiver is a core proceeding under 28 U.S.C. section 157 (b)(2)(A).

### 23 B. Legal Standard for Waiving the Pre-Petition Credit Counseling

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24  
25 <sup>2</sup> The court has granted the debtor's request to have the  
26 Medical Records filed under seal.

27 <sup>3</sup> The debtor has failed to lay a sufficient evidentiary  
28 foundation for the Medical Records. Two of the letters  
from doctors are not signed, and the Medical Records are  
hearsay statements.

1        Requirement

2        Section 109(h) of the Code provides in part as follows:

3            "(1) Subject to paragraphs (2) and (3), and  
4        notwithstanding any other provisions of this section, an  
5        individual may not be a debtor under this title unless  
6        such individual has, during the 180-day period preceding  
7        the date of filing of the petition by such individual,  
8        received from an approved nonprofit budget and credit  
9        counseling agency described in section 111(a) an  
10       individual or group briefing (including a briefing  
11       conducted by telephone or on the Internet) that outlined  
12       the opportunities for available credit counseling and  
13       assisted such individual in performing a related budget  
14       analysis."

15            . . . . .

16            "(4) The requirements of paragraph (1) shall not  
17        apply with respect to a debtor whom the court determines,  
18        after notice and hearing, is unable to complete those  
19        requirements because of incapacity, disability, or active  
20        military duty in a military combat zone. For the  
21        purposes of this paragraph, incapacity means that the  
22        debtor is impaired by reason of mental illness or mental  
23        deficiency so that he is incapable of realizing and  
24        making rational decisions with respect to his financial  
25        responsibilities; and 'disability' means that the debtor  
26        is so physically impaired as to be unable, after  
27        reasonable effort, to participate in an in person,  
28        telephone, or Internet briefing required under paragraph  
      (1)."

      Federal Rule of Bankruptcy Procedure 1007(b)(3) provides:

      Unless the United States Trustee has determined  
      that the credit counseling requirement of §  
      109(h) does not apply in the district, an  
      individual debtor must file a statement of  
      compliance with the credit counseling  
      requirement, prepared as prescribed by the  
      appropriate Official Form which must include  
      one of the following:

- (A) an attached certificate and debt repayment plan, if any required by § 521(b);
- (B) a statement that the debtor has received the credit counseling briefing required by § 109(h)(1) but does not have the certificate required by § 521(b);
- (C) a certification under § 109(h)(3); or
- (D) a request for a determination by the court under § 109(h)(4).

1 The certificate of creditor counseling and/or other documents  
2 required under paragraphs (A), (C), and (D) of Fed.R.Bankr.P.  
3 1007(b)(3) shall be filed with the petition. *General Order 06-04*  
4 (E.D. Cal., September 28, 2006).

5  
6 B. Discussion

7 Fed.R.Bankr.P § 1007(b)(3)(d) requires a debtor asserting that  
8 they are exempt from the credit counseling requirement, to  
9 affirmatively request that the court make such a determination.  
10 This request is to be made at the time the petition is filed, and  
11 the request is to be made by way of a noticed hearing (11 U.S.C. §  
12 109(h)(4)). The debtor has never requested that the court make  
13 this determination. Rather, the debtor raised the issue for the  
14 first time in her opposition to the Motion to Dismiss. The court  
15 then, on its own, set a hearing on the Request for Waiver.

16 A disability exemption under section 109(h)(4) requires a  
17 three-prong analysis. First, the court must decide whether the  
18 debtor is disabled. Second, the court must determine whether the  
19 debtor has made a reasonable effort, despite the impairment, to  
20 participate in pre-petition credit counseling. Third, the court  
21 must determine whether the debtor is unable, because of the  
22 disability, to meaningfully participate in an in-person, telephone,  
23 or internet pre-petition briefing. In re Tulper, 345 B.R. 322  
24 (Dist. Col. 2006).

25 For the purpose of this Memorandum the court will accept the  
26 debtor's assertion that she is disabled. However, the analysis  
27 does not stop there. The debtor does not argue, nor has the debtor  
28 submitted any evidence to establish, that she made a reasonable

1 effort to participate in pre-petition credit counseling. Further,  
2 the debtor does not argue, nor has the debtor submitted any  
3 evidence to establish, that her disability renders her unable to  
4 participate in an in-person, telephone, or internet briefing.

5 On the contrary, the debtor has represented herself throughout  
6 this case, has filed numerous pleadings which are coherent and  
7 articulate, and has appeared before the court. The debtor has  
8 personally appeared at court hearings on at least three occasions  
9 and personally attended her Meeting of Creditors on March 1, 2007  
10 (Docket Entry No. 19). The record also demonstrates that the  
11 debtor is quite capable of using the internet and telephone. To  
12 underscore the foregoing, the court notes that the debtor has  
13 requested to appear at court hearings telephonically and has  
14 appeared at hearings telephonically on numerous occasions.<sup>4</sup> The  
15 debtor's ability to use the internet is evidenced by her completion  
16 of a course on personal financial management through the internet.  
17 The court notes that the procedure for taking a pre-petition credit  
18 counseling course through the internet is very similar to the  
19 procedure for taking an internet course on personal financial  
20 management. The fact that the debtor completed the course on  
21 personal financial management through the internet makes it clear  
22 that she could have obtained pre-petition credit counseling through  
23 the internet.

24 When the debtor filed her case, she checked the box on Exhibit  
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26 <sup>4</sup> As a result of the debtor's asserted disability, she has  
27 requested that she be excused from having to go through the  
28 normal court procedures for telephone appearances. The  
court granted this request and allows the debtor  
to appear at hearings telephonically without incurring the  
cost of going through Court Conference.

1 D indicting she had completed the course on credit counseling and  
2 then attached the CDE. The debtor never requested that the court  
3 determine she is exempt from the credit counsel requirement, but  
4 raised it for the first time in her opposition to the Motion to  
5 Dismiss. This convincingly suggests that the debtor made a mistake  
6 and took the course on personal financial management as required by  
7 section 1328(g)(1) of the Code instead of the course on credit  
8 counseling required under section 109(h). Such a mistake is not a  
9 basis for permanent waiver of the credit counsel requirement under  
10 section 109(h)(4).

11 It is the debtor's burden to demonstrate that she has made a  
12 reasonable effort, despite her disability, to participate in pre-  
13 petition credit counseling, and that her disability renders her  
14 unable to meaningfully participate in a telephone or internet  
15 briefing. The debtor has submitted no evidence in either regard.  
16 The court finds that the debtor certainly could have obtained  
17 credit counseling over the telephone or internet.

18 Accordingly, the court finds that the debtor is not exempt  
19 from the credit counseling requirement under section 109(h)(4) of  
20 the Code and that she was required to obtain pre-petition credit  
21 counseling. The debtor did not obtain pre-petition credit  
22 counseling; and accordingly, she is not eligible for bankruptcy  
23 relief. Therefore, the Motion to Dismiss will be granted.

24 A separate order will be entered consistent with this  
25 memorandum decision.

26 Dated: \_\_\_\_\_

\_\_\_\_\_/s/  
Robert S. Bardwil  
United States Bankruptcy Judge