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3 UNITED STATES BANKRUPTCY COURT
4 EASTERN DISTRICT OF CALIFORNIA
5 SACRAMENTO DIVISION
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8 In re)
9) Case No. 06-21524-A-11
10 RICHARD SHIELDS,)
11) Docket Control No. UST-1
12 Debtor.)
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13 **MEMORANDUM**

14 The United States Trustee's motion to dismiss the petition
15 will be granted because the individual chapter 11 debtor, Richard
16 Shields, did not obtain a credit counseling briefing before
17 filing his petition as required by 11 U.S.C. § 109(h). In
18 addition, the debtor has not shown that one of the exemptions
19 under sections 109(h)(2), (h)(3) or (h)(4) applies to him. As a
20 result, the debtor is not eligible for bankruptcy relief.

21 The debtor filed the instant petition on May 11, 2006, but
22 did not complete the credit counseling requirements of section
23 109(h)(1) until May 12, 2006.

24 Creditor Stohlman & Rogers, Inc., dba Lakeview Petroleum
25 ("S&R"), opposes dismissal on the ground that dismissal would
26 prejudice the creditors because the estate would lose the right
27 to avoid pre-petition transfers and recover property transferred
28 by the debtor after the petition was filed. S&R requests that

1 the court appoint a trustee due to the debtor's failure to
2 disclose these transfers. In support of its position, S&R cites
3 a recent case, In re Echols, Case No. 06-20226, decided by Judge
4 Christopher Klein of this court.

5 The debtor also opposes dismissal but on the ground that
6 exigent circumstances warranted filing the petition without first
7 receiving a credit counseling briefing. The exigency was created
8 by a looming foreclosure of real property. The petition date was
9 the last day for the debtor to preserve his right to reinstate a
10 loan secured by a commercial real property in Gridley, California
11 ("Gridley Property"), subject to a foreclosure sale scheduled for
12 May 17, 2006. According to the debtor, the Gridley Property has
13 approximately \$1,000,000 of equity that could be used to pay all
14 creditors of the estate in full.

15 An individual is prohibited by section 109(h)(1) from being
16 a debtor under any chapter unless that individual has, during the
17 180 days preceding the filing of the petition, received a
18 "briefing" from an "approved nonprofit budget and credit
19 counseling agency." See In re Fuller, 2005 WL 3454699 (Bankr.
20 W.D. Pa. 2005); In re Rodgers, 2005 WL 3454702 (Bankr. W.D. Pa.
21 2005); In re Stidham, 2005 WL 3454709 (Bankr. W.D. Pa. 2005); In
22 re Childs, 335 B.R. 623 (Bankr. D. Md. 2005); In re Davenport,
23 335 B.R. 218 (Bankr. M.D. Fla. 2005); In re Wallace, 338 B.R. 399
24 (Bankr. E.D. Ark. 2006). The credit counseling requirement does
25 not violate an individual's equal protection rights under the
26 14th Amendment of the U.S. Constitution because corporate debtors
27 are not required to receive such counseling. See Hedquist v.
28 Fokkena (In re Hedquist), 2006 WL 1042429 (B.A.P. 8th Cir. 2006).

1 The debtor in this case did not receive a briefing before he
2 filed his petition.

3 Before the court turns to the question of whether the
4 debtor's failure to comply with section 109(h)(1) requires
5 dismissal, the court will examine whether any of the exceptions
6 of section 109(h)(1) apply.

7 The debtor has not argued, or even attempted to argue, that
8 the exemptions provided by section 109(h)(2) or section 109(h)(4)
9 apply in this case.

10 If the United States Trustee determines that the approved
11 nonprofit budget and credit counseling agencies for the district
12 are not reasonably able to provide adequate services, section
13 109(h)(2)(A) exempts the debtor from the briefing requirement.
14 Such a determination by the United States Trustee is not a case-
15 by-case determination. Rather, it is a determination that is
16 made generally and that must be reviewed not less than annually.
17 See 11 U.S.C. § 109(h)(2)(B).

18 The United States Trustee has not made a determination for
19 this district that credit counseling agencies are not able to
20 provide adequate services. Hence, an exemption under section
21 109(h)(2) is unavailable in this case.

22 If the court determines, after notice and a hearing, that
23 the debtor cannot satisfy the requirements of section 109(h)(1)
24 because of incapacity, disability, or active military duty in a
25 combat zone, it may grant an exemption from the briefing
26 requirement. See 11 U.S.C. § 109(h)(4). "Incapacity" is defined
27 as impairment by reason of mental illness or mental deficiency
28 such that the debtor is incapable of realizing and making

1 rational decisions with respect to his or her financial
2 responsibilities. A "disability" requires that the debtor be so
3 physically disabled as to be unable, after reasonable effort, to
4 participate in an in-person, telephone, or Internet briefing.

5 There is no evidence in this case that the debtor is
6 entitled to an exemption under section 109(h) (4).

7 A debtor may also "submit" a "certification" of exigent
8 circumstances meriting, to the satisfaction of the court, a
9 waiver of the briefing if it also indicates that the debtor
10 requested a pre-filing briefing but was unable to obtain the
11 counseling services within 5 days of the request. See 11 U.S.C.
12 § 109(h) (3) (A). This certification must describe the attempts
13 that were made to obtain a briefing prior to filing the petition.
14 See In re Cleaver, 333 B.R. 430 (Bankr. S.D. Ohio 2005); In re
15 Rodriguez, 336 B.R. 462 (Bankr. D. Idaho 2005).

16 Here, the debtor filed a Certification of Exigent
17 Circumstances ("Certification") on the petition date, stating
18 that an exigency existed because the petition date was the last
19 day for him to preserve his right to reinstate a loan secured by
20 the Gridley Property. The debtor had been negotiating a
21 voluntary 60-day postponement of the foreclosure sale, but those
22 negotiations broke down "in the last three days prior to the
23 filing of the [p]etition."

24 The several courts that have tackled the recently enacted
25 section 109(h) are split over what constitutes exigent
26 circumstances for purposes of section 109(h) (3) (A) (i). On one
27 hand, some courts have required only a showing of "some looming
28 event that renders prepetition credit counseling . . .

1 infeasible.” See In re Childs, 335 B.R. 623, 630 (Bankr. D. Md.
2 2005). On the other hand, some courts have required the debtor
3 to explain why he waited until the petition date to obtain credit
4 counseling. When a debtor is aware of a pending foreclosure, but
5 nonetheless waits until the day before the scheduled sale date to
6 seek credit counseling, the debtor has failed to prove exigent
7 circumstances. See In re Dixon, 338 B.R. 383, 388-89 (B.A.P. 8th
8 Cir. 2006); In re Mingueta, 338 B.R. 833, 838 (Bankr. C.D. Cal.
9 2006).

10 A bankruptcy petition is rarely viewed as a desirable event
11 and it is rarely filed until some financial sword of Damocles has
12 fallen or is about to fall. Filing a bankruptcy petition is
13 usually a matter of last resort. It is typically associated with
14 a foreclosure, repossession, lawsuit, etc. Hence, most, if not
15 every debtor, could show that some impending financial crisis
16 precipitated the filing of a petition.

17 However, in drafting section 109(h)(3)(A)(i), Congress could
18 not have intended that exigent circumstances be satisfied merely
19 by pointing to some impending financial crisis. Otherwise, any
20 debtor could easily establish that there is an exigent
21 circumstance, rendering the requirement superfluous.

22 Therefore, the court concludes that a debtor is not merely
23 required to show some impending event that would not allow him to
24 obtain credit counseling before filing. Such a debtor must also
25 explain why he waited until the last minute to obtain counseling.

26 While the debtor has explained the impending event that he
27 viewed as requiring the filing of a petition no later than May
28 11, he has failed to explain why he waited until the last minute

1 to seek counseling.

2 The foreclosure began months ago. The debtor had ample time
3 to plan for the worst. Also, given that the negotiations for the
4 60-day voluntary postponement of the foreclosure sale fell apart
5 approximately three days before the petition date, the debtor had
6 no excuse for waiting until the last minute to seek credit
7 counseling. And, the debtor knew the last day to reinstate the
8 loan for weeks.

9 However, even if this court followed those courts concluding
10 that, without regard to a debtor's diligence, the mere existence
11 of a financial crisis is an exigent circumstance, the court would
12 still find and conclude that the debtor's circumstances were not
13 exigent.

14 The foreclosure was not set to conclude until May 17. The
15 debtor knew on May 8, when negotiations broke down, that the
16 foreclosing creditor would grant no extensions. The petition was
17 filed on May 11. Whether the debtor requested counseling on May
18 10 or May 11 is somewhat unclear. Nonetheless, the debtor was
19 able to receive the briefing on May 12, within one or two days of
20 his request.

21 Given that the briefing eventually was obtained in one or
22 two days after the debtor's request, and given that the financial
23 crisis came to a head on May 8, it is clear that the debtor could
24 have requested a briefing on May 8, 9, 10, 11, 12, and 15, and
25 possibly May 16 [this sequence of dates excludes the weekend of
26 May 13 and 14], obtained the briefing, and then filed the
27 petition before the May 17 foreclosure.

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1 While the debtor asserts that he would have lost the right
2 to reinstate the loan on May 12, the loss of that right is
3 irrelevant in the context of a chapter 11 case. CAL. CIV. CODE §
4 2924c(e) entitles a borrower/trustor to reinstate a debt secured
5 by real property until 5 business days before the sale set in a
6 notice of sale. Assuming Saturday, May 13 was a business day
7 [see CAL. CIV. CODE §§ 7, 7.1, 9, & 11], arguably May 11 was the
8 last date the debtor could reinstate.

9 However, if the debtor had filed a petition after the
10 reinstatement period expired, say on May 16, and after receiving
11 a briefing, the debtor still would be entitled to "decelerate"
12 the loan in his chapter 11 plan. 11 U.S.C. § 1124(2) permits a
13 chapter 11 plan to reverse a contractual or legal acceleration of
14 a loan. See e.g., Great W. Bank & Trust v. Entz-White Lumber &
15 Supply (In re Entz-White Lumber & Supply), 850 F.2d 1338 (9th
16 Cir. 1988). In other words, the deadline set by section 2924c(e)
17 means nothing in chapter 11.

18 Accordingly, the court finds that the debtor has not
19 demonstrated exigent circumstances for purposes of section
20 109(h) (3) (A) (i).

21 Further, the Certification also fails to satisfy section
22 109(h) (3) (A) (ii). The Certification does not state that the
23 debtor requested counseling, but was unable to obtain a briefing
24 for five days, starting on the day of the request. The
25 Certification does not even disclose when the debtor first
26 requested a credit counseling briefing.

27 Assuming that the request for a credit counseling briefing
28 was made on May 10 or May 11 (the petition date), and assuming

1 the debtor could prove an exigent circumstance, the debtor was
2 not eligible to file a petition for five days following his
3 request.

4 A certificate of exigent circumstances must show, in
5 addition to some looming exigent circumstance, that the debtor
6 diligently attempted to obtain credit counseling but was unable
7 to receive counseling within five days of the request for the
8 counseling. See In re Burrell, 339 B.R. 664 (Bankr. W.D. Mich.
9 2006). The request for counseling must be made at least five
10 days prior to filing the petition. See In re Dansby, 340 B.R.
11 564, 568 (Bankr. D.S.C. 2006); In re Cleaver, 333 B.R. 430, 435
12 (Bankr. S.D. Ohio 2005); In re Talib, 335 B.R. 424, 427 (Bankr.
13 W.D. Mo. 2005); In re Wallert, 332 B.R. 884, 890 (Bankr. D. Minn.
14 2005).

15 The court agrees with those cases holding that the five-day
16 period must elapse before the debtor may file a petition.

17 First, section 109(h) requires a briefing before the
18 petition was filed.

19 It appears that the intent of Congress was to require
20 individuals to consider an alternative to bankruptcy
21 prior to the petition date and to discourage hasty
22 filings. This goal is not accomplished if the
23 individual waits until just before the petition date to
24 seek credit counseling. Dismissal may be a harsh
25 result for debtors who wait until the last minute to
26 deal with this issue of eligibility; however, the
27 statute appear to be designed to encourage debtors to
28 be proactive about their financial situation and deal
squarely with their insolvency at least five days
before they seek relief in this Court. See Wallert,
332 B.R. at 890. Further, allowing a debtor to wait
until just before the petition to ask for credit
counseling may lead to illogical results. For example,
if a debtor waits until as late as the petition date to
request credit counseling and the credit counseling
agency is diligently able to provide counseling within
five days of the request, then the debtor would not be

1 eligible to seek a waiver under § 109(h)(3) and is not
2 eligible for relief under Title 11 pursuant to §
3 109(h)(1) and the case must be dismissed. However, if
4 the credit counseling were not available until six days
5 after the request, then the same debtor may be eligible
6 for a waiver under § 109(h)(3)(A). The Court does not
believe that Congress intended such an arbitrary result
but rather intended that each debtor request credit
counseling at least five days before filing for
bankruptcy to allow for careful consideration of
alternatives.

7 In re Dansby, 340 B.R. at 568.

8 Second, if Congress had intended to permit a debtor to file
9 a petition without waiting five days, section 109(h)(3) would
10 specify that the debtor must complete counseling within 5 days
11 after the filing of the petition. There is nothing in section
12 109(h)(3) susceptible to such an interpretation.

13 Finally, and as noted above, the debtor was able to obtain
14 credit counseling within one or two days of his request.
15 Counseling, then, was available within 5 days.

16 Based on the foregoing, the Certification is not
17 satisfactory to the court for purposes of section
18 109(h)(3)(A)(iii).

19 Now, the court turns to whether the debtor's failure to
20 obtain credit counseling requires dismissal.

21 Although Judge Klein did not issue a written ruling in In re
22 Echols, S&R has provided this court with the transcript from the
23 hearing on the United States Trustee's motion to dismiss. The
24 United States Trustee sought dismissal on the same grounds as
25 here. In denying the motion to dismiss, Judge Klein made several
26 points.

27 Judge Klein first analyzed whether the requirement of credit
28 counseling under section 109(h)(1) is jurisdictional or is

1 "merely an essential element to the filing of the petition." He
2 analogized it to the eligibility requirement of section 109(g),
3 concluding that neither of the requirements are jurisdictional
4 "in the sense of the bankruptcy case being invalid the moment the
5 case was filed."

6 While section 109 specifies the debtors who are eligible for
7 relief under each chapter of the Bankruptcy Code, prior to BAPCPA
8 courts generally did not treat the eligibility requirements of
9 section 109 as jurisdictional. That is, if a party in interest
10 did not raise a debtor's eligibility at some point during the
11 case, they could be precluded from raising the issue. See e.g.,
12 In re Wenberg, 902 F.2d 768 (9th Cir. 1990), *affirming*, 94 B.R.
13 631 (B.A.P. 9th Cir. 1988); Promenade National Bank v. Phillips
14 (In re Phillips), 844 F.2d 230 (5th Cir. 1988).

15 In reaching this conclusion, Judge Klein also relied on a
16 Supreme Court case, Arbaugh v. Y&H Corporation, 126 S. Ct. 1235
17 (2006), where the court dealt with the distinction between
18 elements to a claim for relief and jurisdictional requirements.
19 Judge Klein focused on the absence of references to dismissal for
20 want of jurisdiction in section 109(h) and in the dismissal
21 provision, 11 U.S.C. § 707.

22 In other words, Judge Klein uses Arbaugh to conclude that
23 section 109(h)(1) is an essential element to the filing of the
24 petition and not a jurisdictional requirement. In Arbaugh, the
25 court pointed out that, as opposed to jurisdictional
26 requirements, elements to a claim for relief can be waived and
27 cannot be disputed after trial.

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1 This court agrees with Judge Klein's conclusion that the
2 requirement of credit counseling is not jurisdictional.

3 But, neither the debtor in this case, nor S&R, have
4 established why a conclusion that credit counseling is not
5 jurisdictional should preclude this court from dismissing this
6 case. The debtor filed the instant bankruptcy petition on May
7 11, 2006 and the United States Trustee filed her motion to
8 dismiss on June 2, 2006, only 22 days after the petition date.
9 This was before the meeting of creditors, scheduled for June 15.
10 This is much earlier than the request for dismissal in Arbaugh.
11 There are no facts present in this case that convince the court
12 that the United States Trustee has failed to bring her motion to
13 dismiss in a timely fashion.

14 Judge Klein goes on to note in Echols that dismissal of the
15 case would deny the estate the opportunity to exercise its
16 avoidance powers and recover pre-petition transfers made by the
17 debtor. To the extent that Judge Klein relied only upon this
18 fact to not dismiss the petition in Echols, this court
19 respectively disagrees.

20 The lesson of Arbaugh is that, when the failure to
21 seasonably raise a debtor's eligibility, a nonjurisdictional
22 defect, results in material prejudice to third parties, the
23 United States Trustee or some other party in interest requesting
24 dismissal has waived, or will be estopped to assert, that defect.

25 The fact that the debtor does or fails to do something, like
26 obtain credit counseling, to the prejudice of creditors is not
27 enough to prevent the United States Trustee from raising the
28 debtor's eligibility. The United States Trustee will be estopped

1 only if her conduct causes prejudice to others.

2 If the rule were otherwise, the credit counseling
3 requirement would be a requirement if it burdened only the debtor
4 and not the creditors. Section 109(h) has been added to the
5 Bankruptcy Code because, in the judgment of Congress, creditors
6 as well as debtors are best served if individual debtors consult
7 a credit counselor before filing a bankruptcy petition. The
8 bankruptcy court is not given the option of waiving counseling if
9 it believes the interests of creditors are best served by
10 ignoring the requirement.

11 This court concludes that, even if section 109(h)(1) is not
12 jurisdictional and therefore may be waived, sufficient time has
13 not expired, nor events transpired, such that the United States
14 Trustee should be precluded from challenging the eligibility of
15 the debtor under section 109(h).

16 While this court may agree that section 109(h)(1) is not a
17 jurisdictional requirement, this does not necessarily mean that
18 the court should not dismiss the case for non-compliance with
19 section 109(h)(1). See In re Seaman, 340 B.R. 698, 700, 707
20 (Bankr. E.D.N.Y. 2006). Individuals who did not obtain credit
21 counseling pre-petition and do not qualify for an exemption from
22 the counseling requirement are not eligible to be debtors. See
23 11 U.S.C. § 109(h)(1); In re Seaman, 340 B.R. at 700, 707; In re
24 Mingueta, 338 B.R. 833, 838 (Bankr. C.D. Cal. 2006) (stating that
25 "[a]bsent strict compliance with § 109(h), individual debtors are
26 ineligible for bankruptcy relief."). And, if the court
27 determines that an individual is ineligible to be a debtor, it
28 must dismiss the case. See e.g., In re Seaman, 340 B.R. at 707.

1 When a seasonable motion to dismiss is filed, other than granting
2 the exemptions permitted by subsections 109(h)(2), (h)(3), and
3 (h)(4), the court may neither waive the credit counseling
4 requirement, nor use Fed. R. Civ. P. 60(b) to excuse the failure
5 to obtain counseling. In re Sukmungs, 333 B.R. 875, 879, 880
6 (Bankr. D. Utah 2005) (rejecting the debtors' attempt to excuse
7 their failure to comply with section 109(h)(1) as excusable
8 neglect under Rule 60(b)).

9 The court also rejects S&R's argument that it can appoint a
10 trustee rather than dismiss the case. 11 U.S.C. § 1104(a)(3)
11 gives the court the option of appointing a trustee whenever there
12 are grounds for dismissal under 11 U.S.C. § 1112. However, when
13 a debtor is not eligible for bankruptcy relief, the court cannot
14 and should not permit that debtor to remain in bankruptcy,
15 whether or not appointment of a trustee is warranted.

16 For example, an insurance company is not eligible for
17 bankruptcy relief. See 11 U.S.C. § 109(b)(2). If an insurance
18 company filed a petition, that petition would be dismissed if
19 dismissal was requested by a party in interest. The court could
20 not ignore the insurance company's ineligibility and appoint a
21 trustee rather than dismiss the case.

22 The same is true here. The debtor is not eligible for
23 bankruptcy relief because he did not obtain a credit counseling
24 briefing before he filed the petition. He remains ineligible
25 whether or not the appointment of a trustee is warranted.

26 Consider the issue in the chapter 7 context. A trustee is
27 automatically appointed in a chapter 7 case. See 11 U.S.C. §
28 701. If an individual debtor files a chapter 7 petition without

1 first obtaining the briefing, the petition is not rescued simply
2 because there is a trustee. The debtor is not eligible for
3 chapter 7 relief. The result should be no different in the
4 chapter 11 context.

5 The petition will be dismissed. The debtor did not obtain
6 pre-petition credit counseling before filing this petition and he
7 does not qualify for any of the exemptions permitted by section
8 109(h). Hence, he is ineligible to be a debtor.

9 Counsel for the United States Trustee shall lodge a proposed
10 order dismissing the petition.

11 Dated: July 13, 2006

12 By the Court

13 /s/
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15 Michael S. McManus, Chief Judge
16 United States Bankruptcy Court
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