

MAR 28 2007

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No. EC-06-1267-DMoPa
7	ELIZABETH RODRIGUEZ MENDEZ,)	Bk. No. 05-62634
8	Debtor.)	
9	_____)	
10	ELIZABETH RODRIGUEZ MENDEZ,)	
11	Appellant,)	
12	v.)	O P I N I O N
13	JAMES E. SALVEN, CHAPTER 7)	
14	TRUSTEE,)	
15	Appellee.)	
	_____)	

Argued and Submitted on February 21, 2007
at Sacramento, California

Filed - March 28, 2007

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Hon. Whitney Rimel, Bankruptcy Judge, Presiding

Before: DUNN, MONTALI, and PAPPAS, Bankruptcy Judges.

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1 DUNN, Bankruptcy Judge:
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3 One of the principal areas of concern among members of the
4 bench, the bar and the public under the recently enacted
5 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005
6 ("BAPCPA") is the requirement that individuals contemplating
7 bankruptcy obtain credit counseling before they file their
8 bankruptcy petitions. More specific is the question of whether
9 failure to do so leaves the court without jurisdiction over the
10 case, or if such failure is a matter of individual eligibility,
11 subject to traditional principles of waiver and estoppel. Our
12 disposition here represents the first reported appellate decision
13 to answer the question. On appeal of an order denying a debtor's
14 motion to dismiss ("Motion to Dismiss") her own case, we conclude
15 that pre-bankruptcy credit counseling is not a jurisdictional
16 prerequisite, and we AFFIRM.

17
18 **I. FACTS**

19 The debtor, Elizabeth Rodriguez Mendez ("Debtor"), commenced
20 her chapter 7¹ case with a "bare" or skeleton petition filing on
21 October 17, 2005. On October 26, 2005, the Debtor filed her
22 schedules and a motion to proceed in forma pauperis. That motion
23

24 ¹ Unless otherwise indicated, all chapter, section and rule
25 references are to the Bankruptcy Code, §§ 101-1532, and to the
26 Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
27 enacted and promulgated as of October 17, 2005, the effective
28 date of most of the provisions of BAPCPA (Pub. L. 109-8, 119
Stat. 23). The Debtor's chapter 7 petition was filed on the
BAPCPA effective date.

1 was granted on October 27, 2005.

2 The Debtor asserts that she was induced to file her chapter
3 7 case by a fellow church member, John DeRosa ("DeRosa").
4 According to the Debtor, DeRosa told other church members that he
5 was an attorney and advised the Debtor that filing a bankruptcy
6 petition "would solve her debt problems." Debtor further asserts
7 that DeRosa prepared her bankruptcy petition, forged her
8 signature to the petition, and filed it. DeRosa is not listed as
9 an attorney in the records of the State Bar of California.

10 On December 1, 2005, an order to show cause was issued and
11 served on the Debtor by the bankruptcy court, indicating that no
12 certificate of credit counseling had been filed in the Debtor's
13 case. A hearing on the order to show cause was scheduled for
14 January 4, 2006 ("Show Cause Hearing").

15 The first of three § 341(a) meetings was held in the
16 Debtor's case on December 5, 2005. The Debtor attended,
17 accompanied by DeRosa, who identified himself as her attorney.
18 Because the trustee ("Trustee") had not received documents
19 required to complete his examination of the Debtor, the § 341(a)
20 meeting was continued to January 26, 2006.

21 At the Show Cause Hearing on January 4, 2006, the Debtor
22 appeared, without DeRosa, with a credit counseling certificate
23 that she had obtained the day before from an approved credit
24 counseling agency. At the Show Cause Hearing, the bankruptcy
25 court advised the Debtor that if she filed her credit counseling
26 certificate by the following day, January 5, 2006, "your case
27 will go forward. Otherwise it will be dismissed." The Debtor
28 filed her credit counseling certificate with the bankruptcy court

1 the day of the Show Cause Hearing.

2 At the continued § 341(a) meeting on January 26, 2006
3 ("Second 341(a)"), the Debtor appeared, again accompanied by
4 DeRosa. At the Second 341(a), the Debtor testified that she had
5 reviewed and signed her bankruptcy petition and schedules and
6 that the information included therein was true and correct to the
7 best of her knowledge. At the Second 341(a), the Trustee asked
8 the Debtor a number of questions about her home and her
9 schedules. The Trustee uncovered some issues with respect to
10 title to the Debtor's home and the exemption the Debtor claimed
11 in her home.²

12 After their discussion, the Trustee recommended to the
13 Debtor that she needed to "talk to a lawyer that's well-versed in
14 bankruptcy." The Debtor expressed some frustration with the
15 Trustee's concerns and asked, "Why am I not entitled to do
16 bankruptcy like everyone else?" In light of the issues raised
17 concerning the Debtor's home, the Trustee further continued the
18 § 341(a) meeting to February 23, 2006.

19 On February 7, 2006, the Trustee filed an objection to the
20 exemption claimed by the Debtor in her home ("Exemption
21 Objection"). The hearing on the Exemption Objection was
22 scheduled for March 8, 2006.

23 On February 23, 2006, the final session of the Debtor's
24 § 341(a) meeting ("Third 341(a)") took place. The Debtor
25 attended without DeRosa and without counsel. At the Third
26 341(a), the Trustee discussed with the Debtor the value of her

27
28 ² Apparently, the Debtor had transferred an interest in her
home to her disabled daughter in 2003 for no consideration, and
Debtor claimed a \$440,000 exemption in the home, when as a
disabled person herself, her maximum exemption under California
law would be \$150,000.

1 home, the mortgage against it and his continuing concerns about
2 the propriety of the Debtor's exemption claim for the home. The
3 Trustee forcefully reiterated his advice to the Debtor to contact
4 a lawyer. During the Third 341(a), the following exchange took
5 place between the Debtor and the Trustee:

6 Debtor: "...So that's why I tried to do this, a 7,
7 because that's all I could do. But you're saying that
8 there would be an issue of me still continuing on on
9 [sic] to get the 7?"

10 Trustee: "No. There's no issue about you getting a
11 discharge. I'm not--"

12 Debtor: "Oh."

13 Trustee: "There's no issue on that. The issue is you
14 keeping the house."

15 Debtor: "Oh, they won't let me keep the house?"

16 Trustee: "No, I'm not saying that either. What I'm
17 saying is that you need to talk to a lawyer."

18 On March 7, 2006, the day before the scheduled hearing on
19 the Exemption Objection, the Debtor filed a letter with the
20 bankruptcy court asserting for the first time that her bankruptcy
21 papers had been forged and requesting dismissal of her bankruptcy
22 case. The Debtor did not appear at the hearing on the Exemption
23 Objection, and the bankruptcy court sustained the Trustee's
24 objection, limiting the Debtor's homestead exemption claim to
25 \$150,000. The Debtor did not appeal the bankruptcy court's order
26 sustaining the Exemption Objection. Because the Debtor's
27 informal motion to dismiss her case was not properly noticed and
28 scheduled, the bankruptcy court denied it, "without prejudice to
a properly noticed hearing on a motion to dismiss."

On May 5, 2006, the Debtor filed the Motion to Dismiss
through counsel. The hearing on the Motion to Dismiss was held

1 on May 17, 2006, at which time the bankruptcy court heard
2 testimony from the Debtor and the Trustee, and took the matter
3 under advisement. The bankruptcy court issued its Findings and
4 Conclusions and entered an order denying the Motion to Dismiss on
5 July 17, 2006. Debtor filed a timely notice of appeal on July
6 27, 2006.

7 8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
10 §§ 1334 and 157(b) (1) and (b) (2) (A) and (O). We have
11 jurisdiction pursuant to 28 U.S.C. § 158.

12 13 **III. ISSUES**

14 (1) Whether the bankruptcy court erred as a matter of law
15 in denying Debtor's Motion to Dismiss, because the Debtor did not
16 obtain pre-bankruptcy credit counseling as required by § 109(h).

17 (2) Whether the bankruptcy court erred in denying the
18 Debtor's Motion to Dismiss, when the Debtor presented evidence
19 that signatures on her bankruptcy papers, including the petition,
20 were forged, she had not intended to file bankruptcy, and she did
21 not wish to remain in bankruptcy.

22 23 **IV. STANDARDS OF REVIEW**

24 We review issues of statutory construction and conclusions
25 of law, including interpretation of provisions of the Bankruptcy
26 Code, de novo. Einstein/Noah Bagel Corp. v. Smith (In re BCE W.,
27 L.P.), 319 F.3d 1166, 1170 (9th Cir. 2003).

28 We review the bankruptcy court's factual findings for clear

1 error. Rule 8013. A factual finding is clearly erroneous if the
2 appellate court, after reviewing the record, has a firm and
3 definite conviction that a mistake has been committed. Anderson
4 v. Bessemer City, 470 U.S. 564, 573 (1985).

5 We review the bankruptcy court's decision whether or not to
6 dismiss a chapter 7 case for "cause" for abuse of discretion.
7 Sherman v. SEC (In re Sherman), 441 F.3d 794, 813 (9th Cir.
8 2006). "A bankruptcy court necessarily abuses its discretion if
9 it bases its ruling on an erroneous view of the law. The panel
10 also finds an abuse of discretion if it has a definite and firm
11 conviction the court below committed a clear error of judgment in
12 the conclusion it reached." Lopez v. Specialty Rest. Corp. (In
13 re Lopez), 283 B.R. 22, 26 (9th Cir. BAP 2002) (quoting Palm v.
14 Klapperman (In re Cady), 266 B.R. 172, 178 (9th Cir. BAP 2001)).

15 16 **V. DISCUSSION**

17 A. The Bankruptcy Court Did Not Err in Declining to Dismiss the
18 Debtor's Chapter 7 Case for Failure to Comply Timely With the
Credit Counseling Requirements of § 109(h).

19 The record in this case reflects that the Debtor is a person
20 with debt problems who took advice to seek a solution to her
21 financial difficulties through a chapter 7 bankruptcy. Once in
22 bankruptcy, when she found that a consequence of her filing might
23 be the sale of her home, she wanted out.

24 The new wrinkle to this commonly encountered scenario is the
25 Debtor's attempt to use the BAPCPA credit counseling requirement
26 offensively, as a ticket to get out of bankruptcy.

27 The new § 109(h) requires, as a condition to eligibility for
28 bankruptcy relief, that within 180 days prior to an individual

1 debtor's bankruptcy filing, the debtor receive (1) a briefing as
2 to available opportunities for credit counseling, and (2)
3 assistance in performing a budget analysis from a nonprofit
4 credit counseling agency, approved ordinarily by the United
5 States Trustee (collectively, "credit counseling").³ The purpose
6 of these provisions is to require debtors at least to explore the
7 utility of credit counseling as an option before throwing in the
8 towel and seeking a discharge of their debts in bankruptcy.⁴

9 If a debtor faces "exigent circumstances," under
10 § 109(h) (3), the debtor can obtain a postpetition extension of
11 the period to receive credit counseling of up to thirty days,
12 based upon a certification "satisfactory to the court," that the
13 debtor requested, but could not obtain, the required credit
14 counseling services "during the 5-day period beginning on the
15 date on which the debtor made that request." See e.g., In re
16 Romero, 349 B.R. 616 (Bankr. N.D. Cal. 2006); In re Henderson 339
17 B.R. 34 (Bankr. E.D.N.Y. 2006); In re Childs, 335 B.R. 623
18 (Bankr. D. Md. 2005). For "cause" shown, the debtor can obtain
19 up to an additional fifteen days postpetition to receive the
20 required credit counseling. See, e.g., In re Vollmer, 2007 WL
21 541747 (Bankr. E.D. Va. February 16, 2007); In re Miller, 336
22

23 ³ Section 109(h) (4) sets forth exceptions to the credit
24 counseling requirement for debtors who are unable to complete
25 credit counseling "because of incapacity, disability, or active
26 military duty in a military combat zone." None of these
exceptions apply in this case.

27 ⁴ "Experience with the credit counseling requirement has
28 been disappointing. A National Association of Consumer
Bankruptcy Attorneys study found that only 3.3% of all consumers
seen by the credit counseling firms as the required first stop
under the new bankruptcy law were able to utilize the debt
management plans contemplated by the new law." In re Parker, 351
B.R. 790, 799 n. 8 (Bankr. N.D. Ga. 2006).

1 B.R. 232 (Bankr. W.D. Pa. 2006); In re Williams, 2005 WL 3752226
2 (Bankr. E.D. Ark. December 1, 2005).

3 In this case, the Debtor did not receive the required credit
4 counseling prior to her chapter 7 petition being filed. There
5 further is no evidence in the record that the Debtor requested a
6 postpetition extension to receive credit counseling. In fact,
7 the box to request a waiver or extension of time to satisfy the
8 credit counseling requirement on the Debtor's bankruptcy petition
9 is not checked. On December 1, 2005, the bankruptcy court issued
10 its order to show cause why the case should not be dismissed for
11 failure to satisfy the credit counseling requirement.

12 The Debtor did not receive the required credit counseling
13 until one day before the Show Cause Hearing, seventy-nine days
14 after her chapter 7 petition was filed, and she filed the credit
15 counseling certificate with the court the day of the Show Cause
16 Hearing.

17 Debtor asserts that the language of § 109(h) sets forth
18 mandatory standards for eligibility for bankruptcy relief, with
19 which the Debtor clearly did not comply. The Debtor did not
20 obtain credit counseling during the 180-day period in advance of
21 her bankruptcy filing, and she did not comply with the statutory
22 requirements to obtain a postpetition extension of time to
23 complete credit counseling. Based upon these uncontested facts,
24 the Debtor contends that the bankruptcy court erred as a matter
25 of law in denying the Debtor's Motion to Dismiss.

26 Debtor cites a number of authorities for the proposition
27 that the credit counseling requirements of § 109(h) are mandatory
28 and strictly construed, particularly commending to our attention

1 the decisions in In re Fields, 337 B.R. 173 (Bankr. E.D. Tenn.
2 2005), and In re Childs, 335 B.R. 623 (Bankr. D. Md. 2005).
3 Fields and Childs are fairly typical of decisions strictly
4 construing the requirements of § 109(h), with the usual result
5 being dismissal of the debtor's bankruptcy case. See, e.g.,
6 Dixon v. LaBarge (In re Dixon), 338 B.R. 383 (8th Cir. BAP 2006)
7 (Debtor had ample notice of the pending foreclosure sale.
8 Accordingly, any problem of "exigent circumstances" was of the
9 debtor's own making, and it was not an abuse of discretion by the
10 bankruptcy court to dismiss the case.); In re Rodriguez, 336 B.R.
11 462 (Bankr. D. Id. 2005) (In order to obtain an extension
12 postpetition to receive the required credit counseling, the
13 debtor's certificate must state that the debtor requested credit
14 counseling and that credit counseling was not available for five
15 days.); In re LaPorta, 332 B.R. 879 (Bankr. D. Minn. 2005) (The
16 pro se debtor's certification was not satisfactory to the court,
17 at least in part, because it was not signed.).

18 None of the authorities cited by the Debtor addresses the
19 situation before us where the Debtor, rather than another
20 interested party, is seeking dismissal based upon her own failure
21 to comply strictly with the credit counseling requirements of
22 § 109(h). However, there is at least one published decision that
23 deals directly with this issue, albeit in a different factual
24 setting.

25 In In re Parker, 351 B.R. 790 (Bankr. N.D. Ga. 2006), the
26 debtor, represented by counsel, filed a chapter 7 petition on
27 February 6, 2006, stating that "I/we have received approved
28 budget and credit counseling during the 180-day period preceding

1 the filing of this petition." Id. at 793. However, the debtor
2 did not file a credit counseling certificate with his chapter 7
3 petition. In his assets schedules, the debtor included a home
4 valued at \$1,500,000, a "Fantasy Houseboat" valued at \$180,000,
5 five cars, including a 2003 Mercedes valued at \$75,000 and a 2004
6 Mercedes valued at \$81,960, and other personal property valued at
7 \$48,000. Id. at 793-94. Apparently, the credit counseling
8 company through which the debtor received credit counseling
9 prepetition was not included among the credit counseling agencies
10 approved by the United States Trustee. Id. at 794.

11 On February 10, 2006, the clerk of the bankruptcy court sent
12 a deficiency notice to the debtor with respect to the unfiled
13 credit counseling certificate. Id. On February 21, 2006, the
14 debtor filed a Motion to Extend Time for Credit Counseling
15 ("Extension Motion"), indicating that although the debtor had
16 received counseling prepetition, such counseling was not received
17 from an approved credit counseling agency, and requesting
18 additional time to file his credit counseling certificate. Id.
19 at 795. Under the bankruptcy court's local rules, it was the
20 debtor's obligation to schedule the Extension Motion for hearing.
21 However, the debtor did not schedule a hearing on the Extension
22 Motion, and the bankruptcy court took no action. Id. The
23 § 341(a) meeting was rescheduled twice from March 13, 2006,
24 ultimately to April 24, 2006, when it was held and concluded. At
25 the final § 341(a) meeting, the debtor presented a credit
26 counseling certificate from an approved credit counseling agency
27 to the trustee. Id.

28 The Parker trustee sought to employ a broker to sell the

1 debtor's "Fantasy Houseboat" on May 30, 2006, and further filed a
2 Motion to Approve Compromise and Settlement Between Trustee and
3 Ironstone Bank, the lienholder on the "Fantasy Houseboat," one
4 week later. The debtor did not oppose either action. Id.

5 New counsel appeared for the debtor on June 15, 2006, and
6 filed a motion to dismiss the case pursuant to § 109(h). The
7 following day, the debtor's new counsel also filed a withdrawal
8 of the debtor's Extension Motion. The trustee opposed the motion
9 to dismiss, and the bankruptcy court scheduled the matter for
10 hearing. Id. On July 3, 2006, the trustee filed a motion to
11 approve a sale of the "Fantasy Houseboat." No objections were
12 filed to the proposed sale. Id.

13 The bankruptcy court's decision sets forth a thorough
14 analysis. It first concludes that the eligibility requirements
15 with respect to credit counseling in § 109(h) are not
16 jurisdictional.

17 The better view is that because the bankruptcy court
18 retains the authority to determine the debtor's
19 eligibility, the court must have jurisdiction over a
20 case commenced by an ineligible debtor. Determining
21 eligibility is certainly a matter which "arises in a
22 case under Title 11." 28 U.S.C. § 1334(a). Collier on
23 Bankruptcy states unequivocally with respect to Section
24 109 that "it is clear that it is not jurisdictional."
25 2 Alan N. Resnick and Henry J. Somer, Collier on
26 Bankruptcy ¶ 109.01[2] at 109-6.2. This is consistent
27 with what other courts have held in construing other
28 issues under Section 109 prior to the enactment of
Section 109(h).

24 Parker, 351 B.R. at 796 (citations omitted). See Duplessis v.
25 Valenti (In re Valenti), 310 B.R. 138, 147-48 (9th Cir. BAP
26 2004); FDIC v. Wenberg (In re Wenberg), 94 B.R. 631, 637 (9th
27 Cir. BAP 1988) ("§ 109 eligibility is not jurisdictional"), aff'd
28 902 F.2d 768 (9th Cir. 1990).

1 The bankruptcy court then considered whether, given that the
2 question of eligibility was not jurisdictional, the credit
3 counseling requirements of § 109(h) could be waived. In the
4 bankruptcy court's view, the question virtually answered itself:
5 "[I]f a court has jurisdiction over a case in which a debtor is
6 ineligible and thus orders entered in the case are valid and
7 binding, the non-jurisdictional requirement must be waivable."
8 Id. at 797.

9 This approach is consistent with the analyses of other
10 courts that have considered § 109 eligibility issues in
11 bankruptcy. See, e.g., Hamilton Creek Metro. Dist. v.
12 Bondholders Colo. Bondshares (In re Hamilton Creek Metro. Dist.),
13 143 F.3d 1381, 1385 n.2 (10th Cir. 1998) (In a chapter 9 case,
14 "none of the § 109(c) criteria is jurisdictional in nature.");
15 Rudd v. Laughlin, 866 F.2d 1040 (8th Cir. 1989) (The lack of
16 debtors' eligibility for relief in chapter 13 under § 109(e) did
17 not deprive the bankruptcy court of jurisdiction to convert the
18 case to chapter 7 on the trustee's motion.); Promenade Nat'l Bank
19 v. Phillips (In re Phillips), 844 F.2d 230, 236 n. 2 (5th Cir.
20 1988) ("If eligibility [under § 109(g)(2)] raised an issue of
21 subject matter jurisdiction, the parties could not expressly
22 waive, or be held to have waived, their objections on the
23 issue."); Valenti, 310 B.R. at 147-48 (§ 109(e) does not create a
24 jurisdictional "trump" to get around the 180-day limit in
25 § 1330(a) on filing motions to revoke a chapter 13 plan
26 confirmation order based on allegations that it was procured by
27 fraud.).

28 It also is consistent with rulings regarding eligibility

1 defenses to involuntary bankruptcy filings. See, e.g., Marlar v.
2 Williams (In re Williams), 432 F.3d 813, 814-15 (8th Cir. 2005)
3 (In involuntary cases, "we hold that an alleged debtor must
4 timely assert his or her status in one of the exempted categories
5 as an affirmative defense. If the alleged debtor fails to timely
6 raise the issue, it is waived."); McCloy v. Silverthorne (In re
7 McCloy), 296 F.3d 370, 375 (5th Cir. 2002) ("[W]e hold that an
8 individual's status as a farmer does not go to the jurisdiction
9 of the bankruptcy court over an involuntary bankruptcy petition
10 but instead is an affirmative defense that may be waived").

11 It further is analogous to the result reached in Kontrick v.
12 Ryan, 540 U.S. 443 (2004), where the Supreme Court held that the
13 time limits for filing a complaint objecting to the debtor's
14 discharge under Rules 4004 and 9006 are not jurisdictional and
15 can be waived.

16 Reviewing the facts in Parker, the bankruptcy court noted
17 that the only party raising eligibility as an issue was the
18 debtor himself. The United States Trustee, the trustee in the
19 case, and the only creditor to appear at the hearing on the
20 debtor's motion to dismiss all opposed the motion. 351 B.R. at
21 797. The bankruptcy court recognized that, "[a] waiver may be
22 found when there is an 'intentional and voluntary relinquishment
23 of a known right.'" Id. (citations omitted).

24 The bankruptcy court then reviewed the facts from the record
25 that supported a waiver by the debtor of strict compliance with
26 the credit counseling requirements of § 109(h):

27 The fact which most clearly supports a waiver is that
28 Debtor filed his [Extension Motion] on February 21,
2006, just fifteen days after the filing of his

1 bankruptcy petition. Debtor affirmatively sought
2 approval from the court for obtaining post-petition
3 services to comply with the credit briefing
4 requirement. If Debtor, fully aware of the requirement
5 for a briefing under Section 109(h) and his apparent
6 failure to comply with the requirement, had desired to
7 avail himself of this defect to dismiss his case, he
8 certainly had the opportunity to do so. Additional
9 support for a waiver is found in the numerous instances
10 in which Debtor continued to actively participate in
11 his Chapter 7 case after he became aware of the Section
12 109(h) issue: negotiation and consent to Orders
13 Granting Relief From Stay, attendance at the Section
14 341 meeting of creditors at which he presented the
15 Trustee with a copy of a certificate from an approved
16 Credit Counseling Agency and agreement to court orders
17 granting parties an extension of time to object to his
18 discharge. There is no indication that Debtor ever
19 raised the issue of his eligibility in any of these
20 matters. It is only when the Trustee was proceeding
21 with the sale of the Fantasy Houseboat, which Debtor
22 intended to retain and reaffirm, that Debtor hired new
23 counsel and did an about-face as to the eligibility
24 issue.

25 351 B.R. at 797. Based on the record, the bankruptcy court
26 determined that the debtor had waived any § 109(h) eligibility
27 issues as a basis for dismissing his case.⁵

28 ⁵ The bankruptcy court further based its denial of the
debtor's § 109(h) motion to dismiss on judicial estoppel.
Application of judicial estoppel prevents a party from taking
unfair advantage by asserting inconsistent positions either in
the same or different legal proceedings. "The doctrine of
judicial estoppel, sometimes referred to as the doctrine of
preclusion of inconsistent positions, is invoked to prevent a
party from changing its position over the course of judicial
proceedings when such positional changes have an adverse impact
on the judicial process." Religious Tech. Ctr., Church of
Scientology Int'l, Inc. v. Scott, 869 F.2d 1306, 1311 (9th Cir.
1989) (Hall, J., dissenting).

The Parker court opened its opinion, stating that, "[t]his
case involves the attempt by a Chapter 7 debtor to use the
eligibility and automatic dismissal provisions of BAPCPA to abuse
the bankruptcy system." Parker, 351 B.R. at 792. As noted by
the Parker court,

In taking the initial position that he had complied with the
requirement of Section 109(h) and seeking an extension of
(continued...)

1 Consistent with the Parker analysis, the bankruptcy court in
2 this case determined that compliance with the requirements of
3 § 109(h) was a matter of eligibility rather than jurisdiction,
4 and consequently, was waivable. We agree with the Parker court's
5 analysis, and the determination of the bankruptcy court in this
6 case, that strict compliance with the credit counseling
7 requirements of § 109(h) can be waived by a debtor.

8 The Trustee opposed the Motion to Dismiss, and counsel
9 confirmed at the hearing that the United States Trustee did not
10 intend to file a motion to dismiss the Debtor's chapter 7 case
11 based on any failure to comply with the requirements of § 109(h).

12 The Debtor neither filed a credit counseling certificate
13 with her bankruptcy petition nor checked the box in the petition
14 to request a waiver or extension of time to comply with the
15 credit counseling requirements of § 109(h). However, when faced
16 with the prospect of her chapter 7 case being dismissed,
17 following notice of the bankruptcy court's order to show cause,
18

19
20 ⁵(...continued)

21 time to file evidence of his compliance, Debtor obtained the
22 benefits of the automatic stay to halt no less than eleven
23 separate lawsuits pending against him and to forestall
24 repossession and foreclosure actions against his real and
25 personal property. The Debtor's action also caused the
26 Chapter 7 Trustee to take action to engage professionals,
27 expend administrative time to investigate causes of action
28 and to take actions to liquidate property of the estate for
the benefit of unsecured creditors in the case. The Court
entered a number of Orders with the consent of the Debtor
based upon Debtor's implicit representation that he was
eligible for bankruptcy relief. Allowing the Debtor to
change his position would make a mockery of the bankruptcy
process--the precise situation that the application of
judicial estoppel guards against.

Id. at 798-99. Based upon our determination that Debtor waived
the § 109(h) eligibility requirement, we need not reach whether
she also should be barred by the doctrine of judicial estoppel.

1 the Debtor received the required credit counseling from an
2 approved credit counseling agency. The Debtor appeared
3 personally at the Show Cause Hearing with her credit counseling
4 certificate in hand. After she was told by the bankruptcy court
5 that if she filed her credit counseling certificate with the
6 court no later than the following day, her case would continue,
7 and otherwise, it would be dismissed, she filed her credit
8 counseling certificate with the bankruptcy court on the day of
9 the Show Cause Hearing. That factual record provides ample
10 evidence that the Debtor intentionally waived strict compliance
11 with the requirements of § 109(h) and supports the bankruptcy
12 court's ruling. Accordingly, we find that the bankruptcy court
13 did not err as a matter of law in denying the Motion to Dismiss
14 on § 109(h) grounds.

15
16 B. The Bankruptcy Court Did Not Err in Denying the Motion to
17 Dismiss Based on the Debtor's Contentions that Her Bankruptcy
18 Papers Were Forged, She Did Not Intend to File a Bankruptcy Case,
19 and She Does Not Want to Be in Bankruptcy.

20 At the hearing on the Motion to Dismiss, the bankruptcy
21 court framed the issues as:

22 THE COURT: I think the issues are whether [the Debtor]
23 really intended to file a petition in the first place,
24 whether, as you're suggesting, she intended to file the
25 petition and only decided not to go forward when she
26 discovered that there was a question about her being
27 able to retain assets.

28 In advance of the hearing on the Motion to Dismiss, counsel
for the Debtor submitted the report of a forensic document
examiner purporting to show that various signatures on the
Debtor's bankruptcy papers were not hers. The report was not

1 conclusive as to whether certain other signatures on the Debtor's
2 bankruptcy papers were hers or not.

3 In addition, at the hearing, the Debtor stated, in testimony
4 that the bankruptcy court characterized as "evasive," that she
5 did not intend to file bankruptcy, that the signatures on her
6 bankruptcy papers were forged, that she thought her credit
7 counseling certificate was "a paper for filing fees," that she
8 never took a credit counseling course, that she "didn't file for
9 bankruptcy," and that she did not receive the notice of
10 commencement of her bankruptcy case.

11 In contrast, the record reflects that the Debtor appeared at
12 all three sessions of her § 341(a) meeting. At the Second
13 341(a), the Debtor testified that she had reviewed and signed her
14 bankruptcy petition and schedules and that the information
15 included therein was true and correct to the best of her
16 knowledge. She also questioned during the course of her
17 discussions with the Trustee, "Why am I not entitled to do
18 bankruptcy like everyone else?" At the Third 341(a), the Debtor
19 stated, "...So that's why I tried to do this, a 7, because that's
20 all I could do."

21 In response to the bankruptcy court's order to show cause,
22 the Debtor received credit counseling from an approved credit
23 counseling agency and brought her credit counseling certificate
24 to the Show Cause Hearing. When the bankruptcy court informed
25 her at the Show Cause Hearing that her bankruptcy case would go
26 forward if she filed her credit counseling certificate but
27 otherwise would be dismissed, the Debtor filed her credit
28 counseling certificate with the bankruptcy court on the day of

1 the Show Cause Hearing.

2 The bankruptcy court considered the Motion to Dismiss as
3 primarily turning on the question of the Debtor's intent. Based
4 on the foregoing canvas of the record, the bankruptcy court's
5 determination that the Debtor was not misled in filing her
6 chapter 7 petition is not clearly erroneous.

7 At each successive meeting of creditors, [the Debtor's]
8 testimony shows that she understood she had filed a
9 bankruptcy case and that she had no inclination to
dismiss the case. She only decided to dismiss the case
when the trustee objected to her homestead exemption.

10 While strategically avoiding the implications of other
11 evidence of the Debtor's intent in the record, the Debtor, in her
12 brief, argues that there is no evidence that the Debtor gave
13 written consent to authorize the filing of a bankruptcy petition
14 in her behalf, and accordingly, the Debtor's bankruptcy case must
15 be dismissed. Debtor cites In re Curtis, 262 B.R. 619 (Bankr. D.
16 Vt. 2001), as authority.

17 In the Curtis case, a chapter 7 bankruptcy petition was
18 filed in behalf of the debtor by his daughter, as the holder of a
19 general power of attorney in his behalf. The debtor did not
20 attend the § 341(a) meeting, which was attended by his daughter,
21 again in his behalf. The debtor filed a motion to dismiss that
22 was granted by the bankruptcy court in a narrow holding, because
23 the "general language of the subject Power of Attorney, although
24 requiring a liberal construction, does not authorize the filing
25 of a bankruptcy case." Id. at 623.

26 The Curtis case is distinguishable because this case does
27 not revolve around the limited issue of interpretation of the
28 authority granted by a power of attorney. Rather, as correctly

1 perceived by the bankruptcy court, the real question in this case
2 is whether the Debtor intended to file for protection under
3 chapter 7 of the Bankruptcy Code in light of evidence in the
4 record that at least some of the signatures on her bankruptcy
5 papers were forged. Based upon our review of the record, the
6 bankruptcy court's denial of the Motion to Dismiss based upon the
7 evidence before it was not clearly erroneous.

8 The bankruptcy court pointed out that under § 707(a), a
9 bankruptcy court may dismiss a chapter 7 case for cause shown,
10 but the Debtor does not have an absolute right to have her
11 chapter 7 case dismissed.

12 Section 707(a) vests the court with the authority to
13 decide whether a case should be dismissed. But that
14 authority is severely circumscribed by the two
15 mandatory conditions of section 707(a): Dismissal may
16 occur only after notice and a hearing; and [d]ismissal
17 may be "only for cause" (emphasis supplied).

18 6 Collier on Bankruptcy ¶ 707.01, p. 707-11 (15th ed. rev. 2006).
19 See also Sherman, 441 F.3d at 813.

20 The bankruptcy court balanced the interests of the Debtor
21 and creditors in this case. The bankruptcy court considered the
22 Trustee's argument that creditors would be prejudiced by a
23 dismissal in light of the fact that the Debtor's home could be
24 sold, with creditors potentially being paid in full, and the
25 Debtor receiving the full amount of her \$150,000 homestead
26 exemption. Based on the record, the bankruptcy court determined
27 that the Debtor had not met her burden to establish cause to
28 dismiss, and we find no abuse of discretion in the bankruptcy

1 court's decision.⁶

2 **VI. CONCLUSION**

3 We AFFIRM.

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⁶ Although we are affirming the bankruptcy court's decision
22 on the Motion to Dismiss, we want to emphasize that this is not a
23 zero sum game: Denial of dismissal does not automatically equate
with the Debtor losing her home.

24 As the Trustee commendably pointed out to the Debtor at the
25 Second 341(a) and again, at the Third 341(a), there may be
26 options to resolve the Debtor's financial problems, allowing for
27 payment of creditors' claims, with the Debtor retaining her home,
in chapter 13. While the Debtor's eligibility to convert her
28 case to chapter 13 is not before us, nothing in the record
suggests she might be disqualified by bad faith from doing so.
See Marrama v. Citizens Bank of Mass., __ U.S. __, 127 S.Ct. 1105
(2007). The Debtor will be able to explore those options, if she
chooses, in further proceedings before the bankruptcy court.