UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

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In re:

MARJORIE ANN VIAN,

Debtor.

ORDER DENYING DEBTOR'S APPLICATION FOR EXTENSION, AND DISMISSING CHAPTER 7 CASE

BKY 07-50369

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At Duluth, Minnesota, this 1st day of June, 2007.

This Chapter 7 case is before the Court in chambers on an "Application to Extend Time to File Credit Counseling Certificate," filed in electronic format on May 30, 2007, by Michael C. Bender, the Debtor's counsel, with the Debtor's petition, statements, and schedules. The Debtor seeks an extension of the deadline otherwise set by 11 U.S.C. § 109(h), for the filing of a certificate attesting to her having received certain services from an approved credit counseling agency, i.e., a "briefing" regarding credit counseling available to her and a "related budget analysis." The receipt of such services is a prerequisite for the Debtor's eligibility to receive bankruptcy relief in any form. If the Debtor does not receive the services timely under the statute, "she may not be a debtor" under the Bankruptcy Code. *See*, e.g., *In re Dixon*, 338 B.R. 383, 389 (B.A.P. 8th Cir. 2006); *In re Wallert*, 332 B.R. 884, 891 (Bankr. D. Minn. 2005); *In re La Porta*, 332 B.R. 879, 882-883 (Bankr. D. Minn. 2005).[1]

Both as to form and content, this "Application" is fatally deficient. The reasons are as follows:

[1]The Debtor does not request a complete dispensation from going through credit counseling. That is available only in circumstances so limited that they will apply to very, very few individual debtors. *See* 11 U.S.C. § 109(h)(4); *In re Rendler*, _____ B.R. _____, _____, 2007 WL 1276947 *1 (Bankr. D. Minn. May 1, 2007).

1. The application is signed only by the Debtor's counsel.[2] However, 11 U.S.C. § 109(h)(3)(A) requires a "certification" executed by the Debtor herself, i.e., a document attesting to the relevant facts, holographically signed by her and made under oath or penalty of perjury. *In re Wallert*, 332 B.R. at 887, n.3; *In re LaPorta*, 332 B.R. at 881-882. She did not provide this.

2. To merit a dispensation from the "first-level" requirement of having the credit counseling *before the bankruptcy filing*, *In re LaPorta*, 332 B.R. at 883, a debtor must "describe[ ] exigent circumstances that merit a waiver" of this requirement. 11 U.S.C. § 109(h)(3)(A). The circumstances must include a compelling reason why the debtor had to file for bankruptcy when he or she did, so quickly that the debtor could not have waited to go through counseling in the ordinary course, when and as it was available from an approved provider. *In re Rendler*, _____ B.R. at _____, n.3, 2007 WL 1276947 *3, n.3. The existence of an exigency must be judged by an objective standard, or the requirement would have no meaning. In the abstract, at least, the need to interpose the automatic stay in bankruptcy against a pressing creditor that was in the process of foreclosure, repossession, garnishment, or other legal remedy entailing the debtor's loss of property or income might qualify as exigent. *In re Wallert*, 332 B.R. at 887. *But see In re Dixon*, 338 B.R. at 388-389 (affirming bankruptcy court's finding adverse to debtor on exigent-circumstances requirement, where debtor had at least 20 days' notice of sheriff's foreclosure sale, did not contact attorney regarding bankruptcy until day before sale, and could not obtain credit counseling before he filed on morning of day of sale). However, there is no statutorily cognizable exigency whatsoever in having "two of [a debtor's] creditors contacting her almost every day, one of them three times [on the] morning [of the bankruptcy filing] before noon," no matter how much that debtor "wants to get the protection of the Bankruptcy Court." This is all that the Debtor's counsel recites, in a single sentence--a persistency of simple dunning activity by a very small number of creditors.[3] There is no way to categorize this as "exigent," let alone to do so with a straight face. Waiting several days until she could have gone through credit counseling would have placed the Debtor in no jeopardy whatsoever.[4]

3. The dreadfully skeletal verbiage of counsel's submission does not satisfy the

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[2]Counsel's signature is in the typographical format permitted for documents executed by attorneys who are filing users of the Court's CM/ECF system. *See* Loc. R. Bankr. P. (D. Minn.) 9011-4(b).

[3]The Debtor worded it in another way in her Exhibit D: "I do need to get this case filed because two of my creditors are contacting me almost every day, one of them three times this morning before noon, and I want to get started." That last statement truly begs the question that Congress required to be answered, on the issue of exigent circumstances.

[4]Counsel acknowledges in the same paragraph of the "Application" that the counseling would have been available to his client "after June 1," a mere three days after the day on which he tried to rush his client into bankruptcy.

specifics of § 109(h)(3)(A)(ii), in that it does ***not***:

a. identify the date on which the Debtor requested credit counseling services from an approved agency;

b. identify the precise date on which that provider could have given the counseling to the Debtor; and therefore

c. permit a finding as to whether the services were unavailable to the Debtor "during the 5-day period beginning on the date on which the [D]ebtor made the request."

A debtor seeking an extension under § 109(h)(3)(A) must fit into this window in time in order to obtain that relief. *In re Wallert*, 332 B.R. at 888-890. This debtor has made no record at all on this point.

4. Because the Debtor has not met either of the substantive requirements of §§ 109(h)(3)(A)(i) - (ii), her request for an extension cannot possibly be "satisfactory to the court," § 109(h)(3)(A)(iii).

The Debtor did not receive credit counseling before she filed her bankruptcy petition. She has not established the basis for an "exemption" from that requirement, i.e., a grant of leave to go through the counseling post-petition. As a result, she is not eligible to proceed as a debtor in this case. *In re Wallert*, 332 B.R. at 891. And, because she is not, it is appropriate to dismiss this case now. *In re Dixon*, 338 B.R. at 389; *In re Hedquist*, 342 B.R. 295, 300-301 (B.A.P. 8th Cir. 2006).[5]

IT IS THEREFORE DETERMINED AND ORDERED:

1. The Debtor's application for an order excusing her from the requirement that she receive credit counseling under 11 U.S.C. § 109(h) is denied.

2. The Debtor not having received such counseling, she is ineligible to receive relief under Chapter 7 through this case.

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[5]The truly grotesque thing about all this emerged after the rough draft of this decision was prepared but before it is being entered. The Debtor's attorney e-filed a certificate of credit counseling, attesting to his client having received the service on *June 1*. But, because his client gave no good reason why she had to rocket into bankruptcy before that, the fact of her having received it then does not close the fatal gap in her case for eligibility for bankruptcy relief. Because this was not done before she filed, and because she has made no case for permission to have done it after, it does not "count." The local case law that makes this conclusion inevitable has been on the books for months. Counsel should have known better.

3. Therefore, this case is dismissed, effective the date of this order.

BY THE COURT:

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GREGORY F. KISHEL
CHIEF UNITED STATES BANKRUPTCY JUDGE