



The relief described hereinbelow is SO ORDERED.

Signed July 25, 2007.

A handwritten signature in cursive script that reads "Robert D. Berger".

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ROBERT D. BERGER  
United States Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF KANSAS

In re:

LOUIS M. NOVELLO,  
Debtor.

Case No. 06-21029  
Chapter 13

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MEMORANDUM AND ORDER DENYING  
UNITED STATES' MOTION TO DISMISS AND  
GRANTING DEBTOR'S MOTION TO REOPEN THE § 341(a) MEETING

The United States' Motion to Dismiss pursuant to §§ 1307(e) and 1308<sup>1</sup> is before the Court. The Internal Revenue Service (IRS) seeks dismissal for Debtor's failure to file prepetition tax returns. Debtor responds that all prepetition tax returns have now been filed and moves the Court either to ratify the filing of the untimely tax returns or, in the alternative, reopen the § 341 meeting of creditors.<sup>2</sup> The Court denies the IRS's Motion to Dismiss and grants Debtor's motion, in part, and orders the Chapter 13 Trustee to reopen the § 341 meeting.

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<sup>1</sup> Doc. No. 18.

<sup>2</sup> Doc. No. 36.

### ***Factual Matters***

Debtor filed a Chapter 13 petition on July 17, 2006. At the time, Debtor had not filed any tax returns for any taxable period ending in the prior four years. Specifically, Debtor had not filed a federal income tax return for 2001, 2002, 2003, 2004, and 2005. Debtor alleges he had little or no income in those years. The § 341 meeting of creditors was scheduled for August 16, 2006, and continued to September 6, 2006, at which time it concluded. By the conclusion of the § 341 meeting, Debtor had filed all tax returns except for 2002. Debtor expected to submit an affidavit averring he was not required to file a return for 2002. On September 21, 2006, the IRS filed its Motion to Dismiss. By October 10, 2006, Debtor had filed a 2002 tax return. The 2002 return showed the Debtor received \$0 taxable income. After the Court considered the IRS's standing,<sup>3</sup> the Debtor responded to the Motion to Dismiss with his own motion for ratification of the filing of the returns or, in the alternative, for the Court to reopen the meeting of creditors.

### ***Discussion***

The IRS's motion is based on two new provisions found in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). Section 1308 requires debtors to complete all tax returns for the four years preceding the petition date. Returns are due the day before the debtor's § 341 meeting<sup>4</sup> unless the trustee holds open the § 341 meeting to allow the debtor more time to comply.<sup>5</sup> Failure to comply can result in dismissal or conversion pursuant to 11 U.S.C. § 1307(e). Section 1307(e) is not discretionary stating.

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<sup>3</sup> At the October 17, 2006, hearing on the Motion to Dismiss, the Court questioned the IRS's standing to seek dismissal. On November 20, 2006, the Court found the IRS was a party in interest and had standing to prosecute the motion. (Doc. No. 32).

<sup>4</sup> 11 U.S.C. § 1308(a).

<sup>5</sup> 11 U.S.C. § 1308(b).

Upon the failure of the debtor to file a tax return under section 1308, on request of a party in interest or the United States trustee and after notice and a hearing, the court *shall* dismiss a case or convert a case under this chapter to a case under chapter 7 of this title, whichever is in the best interest of the creditors and the estate. (Emphasis added.)

Accordingly, under the plain language of the statute, if a debtor fails to file a tax return as required by the terms of § 1308 and a party in interest files the proper motion and notice of hearing, the court must dismiss or convert the case.<sup>6</sup>

By §1308's terms, debtors are allowed an opportunity to extend the deadline to file their returns. All debtors have to do is ask for the extensions provided in § 1308(b). First, a debtor may have the § 341 meeting held open for up to an additional 120 days for any return which is past due as of the petition date. For returns which are not past due on the petition date, a debtor may have 120 days or the due date under any extension obtained by the debtor under non-bankruptcy law, whichever is later.<sup>7</sup> If, after 120 days, the debtor still needs more time, he may petition the court for another 30 days with a showing that failure to file has been due to circumstances beyond the debtor's control.<sup>8</sup> Because all these time extensions are included in §1307(e)'s reference to §1308, cause for dismissal or conversion does not arise until the time extensions are exhausted. If a debtor cannot file his returns after almost five months of additional time, prosecution of a § 1307(e) motion makes sense.

Given the premise that § 1307(e) logically should not come into play until after the debtor has been given a § 1308 extension and still fails to file returns, the issue is what happens to a

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<sup>6</sup> *In re McCluney*, Case No. 06-21175 (Bankr. D. Kan. June 22, 2007) (J. Somers).

<sup>7</sup> 11 U.S.C. § 1308(b)(1).

<sup>8</sup> 11 U.S.C. § 1308(b)(2).

compliant debtor who suffers the misfortune of failing to request additional time or, as in this case, adequate time under § 1308(b)(1). *McCluney* recently addressed the same issue and, like this Court, struggled with the government’s decision to pursue a motion to dismiss even after all returns were filed within 120 days of the § 341 meeting. Filing a § 1307(e) motion is discretionary on the part of the trustee and a party in interest. The movant may withdraw the motion once it obtains the relief it seeks, which should be to acquire the debtor’s tax returns to determine whether there is a tax claim against the estate. However, if the movant does not withdraw its motion, as *McCluney* adeptly analyzes, the court does not have the discretion to deny the motion, but must undertake the next step and determine whether dismissal or conversion would be in the best interest of the creditors.<sup>9</sup> However, the IRS makes no effort to explain how either dismissal or conversion would be in the best interest of creditors. In fact, the IRS concedes the Debtor may immediately file a new Chapter 13 petition after dismissal. Thus, the IRS fails to explain what it seeks to accomplish through the relief it seeks. Instead, the IRS charges the Debtor is to be punished with the lost time, lost filing fee, and the albeit brief interruption of stay protection. The record does not present any facts, such as a significant improvement in the Debtor’s financial situation, to demonstrate the creditors’ best interests would be served by dismissal. Likewise, the benefit to creditors after conversion to Chapter 7 is not discussed. The desire to punish the Debtor rather than benefit the creditors appears to be driving this motion. Such a goal is not part of the plain language of § 1307(e), which specifically directs the Court to accord relief which “is in the best interest of the creditors and the estate.”<sup>10</sup> Although *McCluney* and the IRS discuss a Congressional intent to punish debtors for

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<sup>9</sup> *Id.*

<sup>10</sup> 11 U.S.C. § 1307(e).

late filing, as *French* points out, the intent could also be characterized as creating “a strong incentive for debtors who had delinquent tax returns to get them filed.”<sup>11</sup> Once the returns are filed almost immediately after the motion to dismiss, as was done in this case, § 1307(e)’s purpose has been fulfilled.

Facing similar but not identical facts, *McCluney* found it could not grant an extension under § 1308. Further, even though it was not requested, *McCluney* considered, but refused to grant, equitable relief under § 105 based on the facts of that case. However, the facts and procedure in *McCluney* are distinguishable from this case. First, *McCluney* notes the debtor did not request relief pursuant to 11 U.S.C. § 105. In this case, Debtor does and further makes an alternative request for the Court to reopen the § 341 meeting of creditors. A § 105 order to reopen the meeting of creditors is within the power of this Court.<sup>12</sup> Although § 1308(b)(1) gives the Trustee the power to hold open the meeting of creditors, this Court retains ultimate jurisdiction over every proceeding under Title 11. As *Vance* analyzes, if the Chapter 13 trustee refuses a debtor’s request for more time, does the debtor not have recourse to the court? He must. The Trustee’s discretion whether to hold open the § 341 meeting must be subject to review for abuse of discretion as is any other administrative action. Although the result may be to provide the Debtor additional time in this particular case, the Court is not impermissibly extending a statutory deadline not already available to the Debtor. The December 18 motion to reopen was made within 120 days of the original § 341 meeting. The Court would deny a motion to reopen made after 120 days. Additionally, the facts of this case raise an issue of

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<sup>11</sup> See *In re French*, 354 B.R. 258, 264 (Bankr. E.D. Wis. 2006).

<sup>12</sup> *In re Vance*, 176 B.R. 772, 773 (Bankr. W.D. Va. 1995) (Court has jurisdiction over § 341 meetings, “including their scheduling, continuances, and so forth, if necessary.”).

balancing the equities and carrying out the provisions of BAPCPA. The Chapter 13 Trustee in this case did hold open the § 341 meeting an additional 20 days. Neither party argues the Debtor would not have received the full 120-day extension had he asked for it. Before the § 341 meeting concluded, the Debtor had filed all but the 2002 return, and he filed the 2002 return by October 10, again, within the available 120-day extension. Balancing all the factors in this case: the Debtor's immediate compliance; the harm to the Debtor and Estate if the case is dismissed or converted; the lack of harm to the IRS; and no identified benefit to the other creditors, the Court holds § 105 relief is proper under these specific and limited circumstances and orders the § 341 meeting of creditors reopened through and including October 11, 2006.

***Conclusion***

For the foregoing reasons, the United States's Motion to Dismiss is DENIED. Debtor's Motion to Ratify Filing of Income Tax Returns for Purposes of § 1325(a)(9), or in the Alternative, to Re-open the § 341(a) Meeting is GRANTED.

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ROBERT D. BERGER  
U.S. BANKRUPTCY JUDGE  
DISTRICT OF KANSAS