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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STEWART JAY WARREN,

No. C 07-03244 CRB

Appellant,

**ORDER**

v.

ANDREA A. WIRUM,

Appellee.

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This appeal from the United States Bankruptcy Court of the Northern District of California presents a tricky and as-yet unsettled question of law within this circuit: whether a bankruptcy court must dismiss a bankruptcy petition at the debtor's own urging for failure to file schedules and other information requested by 11 U.S.C. § 521(a), even if the evidence suggests that the debtor is acting with the goal of evading his financial obligations. In accord with the majority of courts to consider the question, this Court concludes that where, as here, the debtor fails to file the documents required by § 521(a), there is no evidence of a good faith effort on the part of the debtor to file payment advices, and the bankruptcy court does not waive the debtor's obligation to file payment advices within the time limitations set forth in § 521(i), the bankruptcy petition must be dismissed pursuant to the automatic dismissal provision of § 521(i)(1). Accordingly, the bankruptcy court's denial of Warren's request to dismiss is REVERSED and REMANDED for proceedings consistent with this order.

**BACKGROUND**

1  
2 Appellant Stewart Jay Warren’s foray into the realm of bankruptcy began on  
3 September 25, 2006, when the State of California’s Health and Human Services Agency issued an  
4 “Order to Withhold” to the Exchange Bank in Santa Rosa, ordering the bank to freeze Warren’s  
5 account and turn over \$93,330.46 in overdue child support payments. In an apparent attempt to  
6 evade his child support obligations, Warren filed a bankruptcy petition pursuant to Chapter 7 of Title  
7 11 on October 11, 2006.

8 Because Warren’s petition did not include a variety of required schedules and forms, the  
9 bankruptcy court filed an order on October 12 notifying Warren that unless he submitted such  
10 information within fifteen days, his case could be dismissed. Warren failed to file the schedules  
11 within fifteen days and accordingly, the bankruptcy court entered an Order for Hearing re: Sanctions  
12 on October 30, which ordered Warren to appear at a hearing on November 17 to face possible  
13 sanctions.

14 On November 15, two days before the scheduled hearing, the trustee in bankruptcy, Appellee  
15 Andrea Wirum, responded to the order for sanctions, notifying the court “that there may be assets  
16 which may be administered for the benefit of creditors and request[ing] that [the] Court refrain from  
17 immediately dismissing this case so the Trustee may complete her investigation.” ER 6. Wirum  
18 informed the court that she had received a call from a representative of Exchange Bank, who advised  
19 Wirum that the bank intended to turn over \$93,330.46 from Warren’s account to the State of  
20 California to satisfy Warren’s child support debts. In addition, the bank representative informed  
21 Wirum that Warren had withdrawn an additional \$90,000 or so from his account when he learned  
22 that the bank would honor the child support order. Warren failed to appear at the November 17  
23 hearing on sanctions, and the court declined to dismiss his case at that time.

24 Suffering from a change of heart, Warren filed a motion on March 6, 2007 to dismiss his own  
25 case. Warren claimed that because he failed to obtain pre-petition credit counseling or to apply for a  
26 statutory waiver of the counseling requirement, he failed to qualify as a “debtor.” See 11 U.S.C. §  
27 109(h). Because he was not a debtor, Warren argued, a jurisdictional element had not been satisfied  
28 and the bankruptcy court was obligated to dismiss his case.

1 Before briefing on the first motion was yet finalized, Warren filed a second motion –  
2 termed a Request for Entry of Order of Dismissal – contending that his failure to file the  
3 schedules and statements mandated by 11 U.S.C. § 521(a) within 45 days of the filing of his  
4 petition required an “automatic dismissal” of his case under § 521(i).

5 On April 9, 2007, the bankruptcy court denied both of Warren’s motions. Troubled  
6 that Warren “want[ed] out of Chapter 7 based on his own failures and misconduct,” the court  
7 concluded that dismissal under § 109(h) and § 521(i) is not mandated “where the debtor is  
8 seeking to take advantage” of either provision “to the prejudice of his creditors.” ER 56-57  
9 (citing In re Withers, 2007 WL 628078 (Bkrcty. N.D. Cal. 2007)). The court held that  
10 Warren was judicially estopped from seeking dismissal under § 109(h), and that the  
11 automatic dismissal provision of § 521(i) had not been triggered because Warren’s obligation  
12 to file schedules and statements had been waived. Although the debtor’s duty to file  
13 schedules and statements can only be waived through motion of the trustee, see 11 U.S.C. §  
14 521(i)(4), the court construed the trustee’s November 15 request to refrain from dismissal as  
15 a motion to waive Warren’s obligation.

16 Judgment was entered on April 20, 2007. Warren filed this timely appeal on April 23.

### 17 JURISDICTION

18 This Court has jurisdiction to hear bankruptcy appeals from “final judgments, orders, and  
19 decrees” pursuant to 28 U.S.C. 158 § (a)(1). “[T]he general standards for appealability of  
20 bankruptcy orders are broader and more flexible than those that apply to ordinary civil cases.” In re  
21 Benny, 791 F.2d 712, 718 (9th Cir. 1986). That is because “certain proceedings in a bankruptcy  
22 case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome  
23 of the case that final decisions as to them should be appealable as of right.” In re Mason, 709 F.2d  
24 1313, 1317 (9th Cir. 1983).

25 A bankruptcy order is appealable where it resolves and seriously affects substantive rights  
26 and finally determines the discrete issue to which it is addressed. See In re Wiersma, 483 F.3d 933,  
27 939 (9th Cir. 2007). In this case, the bankruptcy court determined that the debtor’s failure to make  
28 certain filings and obtain pre-petition counseling did not mandate dismissal. Because that decision

1 seriously affects the debtor’s substantive rights and finally determined the issue of dismissal, this  
2 Court concludes that the bankruptcy court’s order denying the motions to dismiss is a final decree  
3 and that this court’s jurisdiction has been properly invoked pursuant to 28 U.S.C. § 158(a)(1). See  
4 Rivera v. Miranda, 2007 WL 2993611, \*1 (D.P.R. 2007).

5 **STANDARD OF REVIEW**

6 The district court’s standard of review over a bankruptcy court’s decision is identical to the  
7 standard used by circuit courts reviewing district court decisions. See Ford v. Baroff, 105 F.3d 439,  
8 441 (9th Cir. 1997). Thus, the district court reviews the bankruptcy court’s factual findings for clear  
9 error and its conclusions of law de novo. See Diamant v. Kasparian, 165 F.3d 1243, 1245 (9th Cir.  
10 1999).

11 **DISCUSSION**

12 Warren argues that his bankruptcy petition must be dismissed both because he failed  
13 to obtain pre-petition counseling pursuant to § 109 and because he failed to file the requisite  
14 schedules and forms pursuant to § 521. Warren’s first argument is misguided and easily  
15 dispatched: § 109’s counseling requirement is not jurisdictional, and therefore the bankruptcy  
16 court was wholly within its right to judicially estop Warren from seeking dismissal on that  
17 basis. Warren’s second argument is far more substantial, and has split lower courts across  
18 the country. See Rivera, 2007 WL 2993611 at \*2 (listing cases). Although there are valid  
19 arguments on both sides, this Court agrees with the majority of courts, which have concluded  
20 that there is “no discretion to fashion any reasonable or equitable solution” when debtors  
21 who fail to file the documents required by § 521 seek to take advantage of the bankruptcy  
22 process and dismiss their own petition. Id. at \*3.

23 **A. Credit Counseling**

24 On April 20, 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer  
25 Protection Act of 2005 (BAPCPA), one of the most sweeping reforms of this nation’s  
26 bankruptcy laws in the past twenty-five years. The avowed purpose of BAPCPA was to  
27 reduce the number of bankruptcy filings, which Congress viewed as excessive and used too often “as  
28

1 a first resort, rather than a last resort.” H.R. Rep. 109-31 at 4, reprinted in, 2005 U.S.C.C.A.N. 88,  
2 90 (2005).

3 To reduce the number of bankruptcy filings, Congress imposed a number of new  
4 requirements on debtors, including § 109’s counseling obligation. Section 109(h)(1) provides that a  
5 person may not be a debtor under the Bankruptcy Code “unless such individual has, during the  
6 180-day period preceding the date of filing of the petition by such individual, received from an  
7 approved nonprofit budget and credit counseling agency . . . an individual or group briefing . . . that  
8 outlined the opportunities for available credit counseling and assisted such individual in performing  
9 a related budget analysis.” The law includes an exception for debtors who reside in districts without  
10 qualifying counseling agencies, see id. § 109(h)(2)(A), which is inapplicable in this case.

11 The parties agree that Warren never received the counseling that § 109(h) requires before  
12 filing his bankruptcy petition. The only question is whether Warren, as the petitioner, can be  
13 judicially estopped from seeking dismissal on this ground because he previously maintained that he  
14 was eligible for bankruptcy relief. Warren’s primary argument is that § 109(h)’s counseling  
15 requirement is jurisdictional, and therefore the doctrine of judicial estoppel has no force. See United  
16 States v. Cotton, 535 U.S. 625, 630 (2002) (holding that subject matter jurisdiction can never be  
17 forfeited or waived).

18 After the Supreme Court’s decision in Arbaugh v. Y&H Corp., 546 U.S. 500 (2006), there  
19 can be no doubt that § 109(h) does not set forth a jurisdictional limitation. In Arbaugh, the Supreme  
20 Court set forth a bright-line rule for distinguishing between jurisdictional requirements and elements  
21 of a claim: “If the Legislature clearly states that a threshold limitation on a statute’s scope shall  
22 count as jurisdictional, then courts and litigants will be duly instructed and will not be left to wrestle  
23 with the issue. But when Congress does not rank a statutory limitation on coverage as jurisdictional,  
24 courts should treat the restriction as nonjurisdictional in character.” Id. at 515-16.

25 Because there is no “jurisdictional” language in § 109, Arbaugh’s test for jurisdictional  
26 limitations cannot be satisfied. See In re Meza, 2007 WL 1821416, \*2 (E.D. Cal. 2007); In re  
27 Manalad, 360 B.R. 288, 295 (Bkrtcy. C.D. Cal. 2007); see also In re Mendez, 367 B.R. 109, 118 (9th  
28 Cir. BAP 2007) (holding that “strict compliance with the credit counseling requirements of § 109(h)

1 can be waived by a debtor”). Accordingly, the bankruptcy court correctly determined that it could  
2 prevent Warren from dismissing his case for failure to obtain counseling under the doctrine of  
3 judicial estoppel.<sup>1</sup>

4 B. Payment Advices & Automatic Dismissal

5 In addition to the counseling requirement, BAPCPA imposed a requirement on debtors to file  
6 certain documents to prevent automatic dismissal of their case. In particular, § 521(a)(1) provides  
7 that the debtor shall file a list of creditors and, unless the court orders otherwise:

- 8 (i) a schedule of assets and liabilities;  
9 (ii) a schedule of current income and current expenditures;  
10 (iii) a statement of the debtor’s financial affairs . . . ;  
11 (iv) copies of all payment advices or other evidence of payment received within 60  
12 days before the date of the filing of the petition, by the debtor from any employer of  
13 the debtor;  
14 (v) a statement of the amount of monthly net income, itemized to show how the  
15 amount is calculated; and  
16 (vi) a statement disclosing any reasonably anticipated increase in income or  
17 expenditures over the 12-month period following the date of the filing of the petition.

18 11 U.S.C. § 521(a)(1)(B). The consequence of a debtor’s failure to file is severe. If the debtor fails  
19 to file all of the information required by § 521(a)(1) within 45 days of filing the bankruptcy petition,  
20 “the case shall be automatically dismissed effective on the 46th day after the date of the filing of the  
21 petition.” Id. § 521(i)(1). Section 521(i)’s draconian result can only be avoided in two  
22 circumstances. First, within the 45 days after the filing of the petition, the debtor may request an  
23 additional 45 day extension. See id. § 521(i)(3). Second, the trustee can file a motion within 45  
24 days after the filing of the petition, “and after notice and a hearing, the court may decline to dismiss  
25 the case if the court finds that the debtor attempted in good faith to file all the information required  
26 by subsection (a)(1)(B)(iv) [i.e., copies of all payment advices or other evidence of payment  
27 received within 60 days before the date of the filing of the petition, by the debtor from any employer  
28 of the debtor] and that the best interests of creditors would be served by administration of the case.”  
Id. § 521(i)(4).

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<sup>1</sup> Because Warren does not raise the argument, this Court does not address whether  
judicial estoppel was appropriately applied under the circumstances. See New Hampshire v.  
Maine, 532 U.S. 742, 750-51 (2001) (setting forth “several factors [that] typically inform the  
decision whether to apply the doctrine in a particular case”).

1           There is no dispute that – other than a list of creditors – Warren failed to file the information  
2 required by § 521(a)(1). Accordingly, Warren’s case was automatically dismissed on the 46th day  
3 after he filed the bankruptcy petition, unless one of § 521(i)’s exception applies. Because Warren  
4 never requested an extension, § 521(i)(3) is inapplicable. Therefore, the only question is whether  
5 Warren’s bankruptcy petition is justiciable because the elements of § 521(i)(4) have been satisfied.

6           Under § 521(i)(4), a case is not automatically dismissed – despite the debtor’s failure to file  
7 required documents – if: (1) the trustee filed a motion within the applicable timeframe; (2) the  
8 bankruptcy court finds that the debtor attempted in good faith filed copies of all payment advices;  
9 and (3) the best interests of creditors would be served by administration of the case.

10           The third element is clearly satisfied in this case. There is ample evidence that Warren seeks  
11 to dismiss his own petition to evade his financial obligations. Therefore, the best interests of  
12 Warren’s creditors would be served by not dismissing his case.

13           The bankruptcy court found that the first element was satisfied when the trustee filed a  
14 pleading on November 15, 2006, requesting that the bankruptcy court not dismiss Warren’s case.  
15 The trustee’s request did not specifically reference § 521’s requirements, but the bankruptcy court  
16 concluded that the request could fairly be construed as a motion to waive § 521’s requirements.

17           The function of interpreting pleadings rests primarily on the trial judge. See Lilly v. Grand  
18 Trunk Western R. Co., 317 U.S. 481, 489-90 (1943). Thus, the bankruptcy court’s interpretation of  
19 the trustee’s request is entitled to deference. Moreover, pleadings must be construed as to do  
20 substantial justice. See Fed. R. Civ. P. 8(f). Under the circumstances, substantial justice is  
21 forwarded by the bankruptcy court’s interpretation. Accordingly, this Court finds that it was  
22 reasonable for the bankruptcy court to construe the trustee’s request as a § 521(i)(4) motion.

23           The trustee’s argument fails, however, because there is no evidence in the record that Warren  
24 attempted in good faith to file all payment advices. To the contrary, all the evidence suggests that  
25 Warren has consistently and intentionally shirked his obligations under § 521. Hence, the §  
26 521(i)(4) exception has no application in the present instance. See In re Ackerman, 374 B.R. 65, 67  
27 (Bkrcty. W.D.N.Y. 2007).

28

1 The trustee argues that Warren’s lack of good faith is of no moment because the bankruptcy  
2 court was authorized, and did, waive Warren’s obligation to file payment advices. It is true that §  
3 521(a)(1)(B) states that the debtor must file copies of payment advices or other evidence of payment  
4 “unless the court orders otherwise.” (Emphasis added). This Court agrees that if the bankruptcy  
5 court had waived Warren’s obligation to file payment advices before § 521’s automatic dismissal  
6 provision was triggered on the 46th day after Warren filed his petition, then Warren would not have  
7 been required to file payment advices and therefore his failure to file such information could not  
8 implicate the dismissal provisions of subdivision (i)(1). See Ackerman, 374 B.R. at 67.

9 The critical question, however – and the question that has split courts across the country – is  
10 whether a court may retroactively waive the debtor’s obligation to file payment advices. In denying  
11 Warren’s motion to dismiss, the bankruptcy court relied on In re Withers, 2007 WL 628078 (Bkrcty.  
12 N.D. Cal. 2007), a case that typifies the minority position on the retroactivity issue. In Withers, the  
13 court concluded that because § 521 does not expressly mandate that an order excusing the debtor  
14 from filing payment advices be entered prior to the 45 day period, courts are permitted to  
15 retroactively waive filing obligations. See id. at \*4, \*4 n.4. This Court finds the logic of Withers  
16 unpersuasive. Even if retroactively waiving filing requirements is not expressly prohibited, allowing  
17 bankruptcy courts to retroactively relieve debtors from filing payment advices “would render the  
18 automatic dismissal provision in Section 521(i)(1) meaningless,” Rivera, 2007 WL 2993611 at \*2.  
19 It is a basic rule of statutory construction that one provision should not be interpreted in a way which  
20 is internally contradictory or that renders other provisions of the same statute inconsistent or  
21 meaningless. See DirecTV, Inc. v. Hoa Huynh, 2007 WL 2596115, \*3 (9th Cir. 2007).  
22 Accordingly, this Court agrees with the majority of courts that have considered the issue that any  
23 order excusing the debtor from filing payment advices must be entered before the expiration of §  
24 521(i)(1)’s 45-day deadline.

25 When Congress drafted § 521, its intent to create a rigid, unyielding bar to proceeding as a  
26 debtor in bankruptcy proceedings could not have been more clear. Under the plain terms of § 521(i),  
27 if the debtor fails to file all of the information required by subdivision (a)(1) within 45 days after  
28 filing the petition, the case “shall be” – i.e., must be – automatically dismissed on the 46th day. If

1 “any party in interest,” including the debtor, requests the court to enter an order dismissing the case  
2 – as Warren did – the court “shall enter” an order of dismissal not later than five days after the  
3 request. 11 U.S.C. § 521(i)(2). In this case, Warren filed a request for an order dismissing the case  
4 on April 4, 2007. By the time the bankruptcy court denied Warren’s motions on April 9, there was  
5 no live case, as it had already been automatically dismissed pursuant to § 521(i)(1), even without the  
6 bankruptcy court’s entry of an order. See In re Ott 343 B.R. 264, \*267 (Bkrtcy. D. Colo. 2006)  
7 (“Section 521(i)(1) does not contemplate any independent action by the Court or any other party-the  
8 case is merely dismissed by operation of the statute itself. There is no ambiguity.”). The court  
9 could not, therefore, retroactively resuscitate Warren’s case by waiving his obligation to file  
10 payment advices.

11 The trustee argues that the majority interpretation of § 521 is harsh and results in prejudice  
12 to creditors. But that is the inevitable result of Congress’ decision to draft an automatic dismissal  
13 provision that is “self-executing, inflexible, and unforgiving.” In re Hall, 368 B.R. 595, 598  
14 (Bkrtcy. W.D. Tex.2007). Congress’ express goal in enacting BAPCPA was to reduce the number  
15 of bankruptcy filings, not to provide greater protections for creditors. H.R. Rep. 109-31 at 4,  
16 reprinted in, 2005 U.S.C.C.A.N. 88, 89 (2005). Interpreting § 521 as a rigid bar – whether equitable  
17 as a political or policy matter – forwards Congress’ intent.

18 This Court is sympathetic to the fact that because Congress did not provide an exception for  
19 debtors who seek to manipulate the bankruptcy process by intentionally withholding documents  
20 required under § 521, petitioners like Warren are provided with an undeserved opportunity to “test  
21 the waters” of bankruptcy and thereby minimize their exposure to creditors. Unfortunately, this is a  
22 problem that can only be resolved by Congress, and not the courts. Perhaps the Executive Office for  
23 United States Trustees will convey the legitimate arguments made before this Court to the rightful  
24 body.

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1           Because Warren’s bankruptcy petition must be automatically dismissed under § 521 for  
2 failure to file payment advices and other required information, the bankruptcy court’s order denying  
3 the request for dismissal is REVERSED and REMANDED for proceedings consistent with this  
4 order.

5           **IT IS SO ORDERED.**

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7  
8 Dated: November 14, 2007

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CHARLES R. BREYER  
UNITED STATES DISTRICT JUDGE