

\*\*\*NOT INTENDED FOR OFFICIAL PUBLICATION\*\*\*

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO  
Bankruptcy Judge Elizabeth E. Brown

In re:	)	
	)	
NICOLE GESSNER-ELFMAN,	)	Bankruptcy Case No. 06-11109 EEB
	)	Chapter 7
Debtor.	)	
	)	
	)	
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In re:	)	
	)	
ANNA BOYICE,	)	Bankruptcy Case No. 06-11145 EEB
	)	Chapter 7
Debtor.	)	
	)	
	)	
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In re:	)	
	)	
CHRISTINA SZARKA,	)	Bankruptcy Case No. 06-11146 EEB
	)	Chapter 7
Debtor.	)	
	)	

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**ORDER DISMISSING CASES**

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THESE MATTERS come before the Court on the Report of Debtor’s Failure to Provide Tax Return Pursuant to 11 U.S.C. § 521(e)(2) and Notice of Pending Dismissal of Case Pursuant to T.L.B.R. 1017-1 (“Report”), filed in each case by M. Stephen Peters, Chapter 7 trustee (the “Trustee”), and the Debtors’ Objections. The Court, having reviewed the filings and heard arguments of the parties at a non-evidentiary hearing, and being otherwise advised in the premises, hereby FINDS and CONCLUDES:

Nicole Gessner-Elfman filed her Chapter 7 petition on March 21, 2006. Anna Boyice and Christina Szarka filed their Chapter 7 petitions on March 22, 2006. Each Debtor was sent a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (“Notice”). Each Notice included the name and address of the Trustee, and the date of the first meeting of creditors, which in each case was April 21, 2006. The Notice also included the following provision:

**Deadline to Provide Documents and Notice of Possible Dismissal:**

*For cases filed on or after October 17, 2005*

Pursuant to 11 U.S.C. §521(e)(2), Interim Bankruptcy Rule 4002 and T.L.B.R. 1017-1, no later than *seven* business days prior to the original date set for the first meeting of creditors, the debtor shall provide to the case trustee a copy of the Federal income tax return required under applicable law, or a transcript of such return, for the most recent tax year ending immediately before the commencement of the case and for which a Federal income tax return is filed, and provide the same tax information to creditors that requested a copy at least *fifteen* days prior to the meeting of creditors. The failure to comply will result in dismissal of the debtor's case unless the debtor demonstrates that the failure to so comply is due to circumstances beyond the control of the debtor. T.L.B.R. 1017-1.

Notice at 1 (emphasis in original).

In each case, the Debtor did not provide the Trustee with a copy of her most recent federal tax return within the time specified in the Notice, pursuant to 11 U.S.C. § 521(e)(2). At the first meeting of creditors, the Trustee advised each Debtor of the requirement, and in each case, the Debtor promptly provided a copy of her tax return to the Trustee. Ms. Gessner-Elfman and Ms. Szarka provided copies on the same day as the meeting of creditors, and Ms. Boyice provided a copy on the next business day, April 24, 2006.

On April 24, 2006, the Trustee filed a Report in each case, giving notice that the case was subject to dismissal under Section 521(e)(2). Each Debtor timely filed an opposition to the Trustee's Report. The Court held a non-evidentiary hearing in each case. The Trustee, Ms. Gessner-Elfman, and Ms. Boyice appeared at the hearing, either in person or by telephone, but Ms. Szarka did not. At the hearing, the Trustee explained that he was uncertain whether he had any discretion in determining whether to file a motion to dismiss under Section 521(e)(2), citing *In re Duffus*, 339 B.R. 746 (Bankr. D. Or. 2006) (holding that a trustee has prosecutorial discretion to waive untimely delivery of a copy of a debtor's tax return by declining to file a motion to dismiss). The Trustee further stated that in each case, if he had such discretion, he would still have filed a motion to dismiss, noting that (1) the requirement to provide a copy of the tax return seven days prior to the meeting of creditors was clearly stated in the Notice, and compliance with the requirement was not difficult; and (2) each case was a no-asset case with no special circumstance, such as a pending discharge objection, that might warrant keeping the case open. Ms. Gessner-Elfman and Ms. Boyice candidly acknowledged their receipt of the Notice but asked that their failure to comply with the Notice and with Section 521(e)(2) be excused, as they ultimately provided a copy of their tax returns to the Trustee, and the estate suffered no prejudice from the seven-day or eight-day delay.

The language of Section 521(e)(2) is plain, and it is this Court's duty to apply it as written. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989). The Section requires that a debtor provide a copy of her tax return seven days prior to the first meeting of creditors. The Section further provides that if the debtor does not meet that requirement, "the court shall dismiss the case unless the debtor demonstrates that the failure to provide a copy of such tax return . . . is due to circumstances beyond the control of the debtor." 11 U.S.C. § 521(e)(2)(B). By the plain language of the statute, the Court may excuse the Debtors' failure to comply with

Section 521(e)(2) only if the Debtors demonstrate circumstances beyond their control.

In these cases, the Debtors have not met their burden. Ms. Gessner-Elfman and Ms. Boyice presented no evidence or argument that their failure to comply with Section 521(e)(2) was due to any reason other than their ignorance of the law's requirements, which they candidly acknowledged was an insufficient justification. *See Marsh v. Soares*, 223 F.3d 1217, 1220 (10th Cir. 2000) (ignorance of the law does not constitute circumstances beyond one's control, in the habeas corpus context). Ms. Szarka did not appear at the hearing to present any argument or evidence. In her Objection to the Trustee's Report, she claimed that she had been given two different addresses for the Trustee, and her inability to determine which address was correct constituted a circumstance beyond her control. Notably, however, Ms. Szarka did not represent that she had attempted to send a copy of her tax return to the Trustee at either address. Nor did she represent that she attempted to ascertain the correct address of the Trustee before the seven-day deadline passed. As a result, the Court finds that none of these debtors has met the burden of showing circumstances beyond her control.

The Court appreciates the Debtors' candor and is sympathetic to their plight. They are attempting to comply with a new, and sometimes confusing, law that imposes many technical requirements. In some instances, the Court has the ability to waive the Debtor's failure to comply with the requirements. But, in this case, the Court has no such ability. Unless a debtor can show that circumstances beyond her control prevented her from complying with the law, the Court must dismiss the case. The Court is aware of cases finding circumstances beyond a debtor's control when the debtor timely provided her counsel with a copy of her tax return, and counsel failed to timely provide the copy to the trustee. *See, e.g., In re Merrill*, 340 B.R. 671 (Bankr. D.N.H. 2006); *In re Grasso*, 341 B.R. 821 (Bankr. D.N.H. 2006). But, those cases do not apply to these Debtors, who are each proceeding *pro se*. The Court has no option but to dismiss each case.

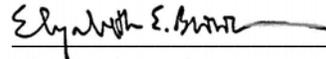
The Trustee asks this Court to determine whether he has prosecutorial discretion, or the ability to waive a debtor's untimely compliance with Section 521(e)(2). *Compare In re Duffus*, 339 B.R. at 748 (trustee has discretion), *with In re Norton*, \_\_ B.R. \_\_, 2006 WL 2349172 (Bankr. E.D. Tenn. 2006) (trustee has no discretion). In these cases, the Trustee has stated that if he had discretion, he would nevertheless seek dismissal. These cases therefore do not present an appropriate opportunity for this Court to consider the issue of the Trustee's discretion. *See In re Department of Energy Stripper Well Litigation*, 206 F.3d 1345, 1351 (10th Cir. 2000) (“[C]ourts decide cases in the context of a particular dispute and not in a legal vacuum.”).

The Debtors are not prohibited from filing a new case following the dismissal of these cases. They must be aware, however, that if they choose to re-file, they may need to seek an extension of the automatic stay under 11 U.S.C. § 362(c). In advance of the adoption of new local rules to conform with the recent changes in the Bankruptcy Code, the Court has established procedural guidelines for requesting an extension, set forth on the Court's website at [www.cob.uscourts.gov](http://www.cob.uscourts.gov). Appearing on its home page is a hyperlink called “Public Announcements,” which will take the searcher to a further link entitled, “Guidelines for Requests Under 11 U.S.C. § 362(c), (h) and (j).” In addition, the Court cautions the Debtors that, if they have taken their credit counseling course more than 180 days before the date of their new case, they will have to attend another counseling class *before* re-filing. The Court strongly recommends that each of the Debtors hire counsel to represent them in order to avoid these and other technical pitfalls under the new law.

Accordingly, it is HEREBY ORDERED that the cases are DISMISSED. The Clerk of the Court shall give notice to all creditors and other parties in interest.

Dated this 22nd day of September, 2006.

BY THE COURT:



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Elizabeth E. Brown  
United States Bankruptcy Judge