

UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF WISCONSIN

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In re:  
Angela M. Dean,  
Debtor.

Chapter 13  
Case No. 19-30112-kmp

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**ORDER GRANTING MOTION TO SHORTEN OBJECTION PERIOD AND DENYING  
MOTION REQUESTING EXTENSION OF TIME TO FILE PREPETITION TAX  
RETURNS UNDER 11 U.S.C. § 1308(b)(2)**

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This matter is before the Court on the Debtor’s Motion to Extend the Time to File her Pre-Petition Tax Returns under 11 U.S.C. § 1308(b)(2) and the Debtor’s Motion to Shorten Time for objections to her Motion. The Debtor did not file her 2016, 2017, or 2018 tax returns (the “Past-Due Returns”) before the date of her first meeting of creditors. The Trustee agreed to hold open the meeting of creditors until January 9, 2020 to permit the Debtor to file her Past-Due Returns. The Debtor did not file her tax returns by the January 9, 2020 extended deadline and the Trustee subsequently closed the § 341 meeting on January 10, 2020. On January 28, 2020, the Debtor filed a motion seeking an extension of time from the Court under § 1308(b)(2) to permit her to file her Past-Due Returns. In her motion, the Debtor requests an order from the Court allowing her to have until February 8, 2020<sup>1</sup> to file her tax returns, a thirty-day extension of the deadline offered by the Trustee. Because the longest extension the Court is authorized to grant under § 1308(b)(2) is February 10, 2020, the Court finds that there is cause pursuant to Bankruptcy Rule 9006(c)(1) to shorten the notice and objection period for the Debtor’s Motion.

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<sup>1</sup> The Debtor’s Motion to Shorten Objection Period states that she is “requesting relief which may require an Order be entered no later than February 8, 2020,” a Saturday. Section 1308(b)(2)(A) does not state a method for calculating time, and accordingly, Bankruptcy Rule 9006(a)(1)(C) provides the method. That rule provides that the period “continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” Thirty days from the close of the § 341 meeting on January 10, 2020 is Sunday, February 9, 2020. The next day that is not a Saturday, Sunday, or legal holiday is Monday, February 10, 2020. Therefore, if the Court finds in favor of the Debtor, the Debtor would have until February 10, 2020 to file her Past-Due Returns.

However, for the reasons stated below, the Court denies the Debtor's motion to extend time to file her Past-Due Returns because the motion is untimely. If the Debtor wanted the Court to extend the filing period established by the Trustee, the Debtor was required under § 1308(b)(2) to file her motion in time to permit the Court to enter the order granting an extension before the expiration of the Trustee's deadline and the close of the § 341 meeting.

### **DISCUSSION**

The requirement that debtors file pre-petition tax returns was added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and appears or is incorporated in numerous sections of the Bankruptcy Code. *See* 11 U.S.C. §§ 1307(e), 1308, and 1325(a)(9). Congress enacted sections 1307(e), 1308, and 1325(a)(9) with two goals in mind:

The scattered legislative history of BAPCPA seems to indicate that, from the beginning of BAPCPA's long journey to enactment, Congress intended to require debtors to file their tax returns as a condition of confirmation . . . The legislative history sheds a bit of light on why Congress thought it important to demand that debtors file returns. First, it appears that Congress wanted to help state revenue agencies figure out whether they had claims against the debtor. . . . It also appears that Congress wanted to punish those debtors who were delinquent in filing tax returns, by withholding confirmation until they did so.

*In re French*, 354 B.R. 258, 260-61 (Bankr. E.D. Wis. 2006).

Section 1308(a) requires debtors to file all tax returns with the appropriate taxing authorities "for all taxable periods ending during the 4-year period ending on the date of the filing of the petition." Debtors are required under § 1308(a) to file four years of their pre-petition tax returns "[n]ot later than the day before the date on which the meeting of the creditors is first scheduled to be held." 11 U.S.C. § 1308(a). It is undisputed in this case that the Debtor did not file her 2016, 2017, or 2018 tax returns before the date of her first meeting of creditors on December 5, 2019.

All is not lost, however, for debtors who fail to file four years of their pre-petition tax returns before their § 341 meeting. Section 1308(b)(1) gives the trustee discretion to “hold open” the § 341 meeting “for a reasonable period of time” to allow debtors to file their missing pre-petition tax returns:

Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns . . . .

Nothing in § 1308(b)(1) requires the trustee to hold open the meeting. Instead, § 1308(b)(1) grants the trustee discretion to hold open the § 341 meeting by stating that the trustee “may” hold it open.

If the trustee decides to hold open the § 341 meeting, § 1308(b)(1) limits the amount of time that the trustee can hold open the meeting so that debtors can file their missing tax returns. The amount of time that the trustee is permitted to offer under § 1308(b)(1) is dependent on whether the debtor’s tax returns are past due or not past due as of the date of the filing of the petition. For any tax return that is past due as of the date of the filing of the petition, § 1308(b)(1)(A) limits the amount of time that the trustee can hold open the § 341 meeting to permit the debtor to file the missing pre-petition tax returns to a maximum of 120 days after the § 341 meeting.<sup>2</sup> For any tax return that is not past due as of the date of the filing of the petition, § 1308(b)(1)(B) limits the amount of time that the trustee can hold open the § 341 meeting to permit the debtor to file the tax returns to the later of 120 days after the § 341 meeting or until

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<sup>2</sup> Section 1308(b)(1)(A) states in full: “Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond - (A) for any return that is past due as of the date of the filing of the petition, the date that is 120 days after the date of that meeting.”

the deadline for the filing of the return under applicable nonbankruptcy law (such as the April 15th deadline imposed by the Internal Revenue Code or the October 15th automatic extension for which a taxpayer may have applied).<sup>3</sup>

In this case, the Trustee held the Debtor's first § 341 meeting on December 5, 2019. The Debtor's 2016, 2017, and 2018 tax returns were past due at the time of her meeting of creditors. Accordingly, the Trustee exercised the discretion granted to him under § 1308(b)(1)(A) to hold open the § 341 meeting for a "reasonable period of time" not to exceed 120 days to permit the Debtor to file her Past-Due Returns. As noted by the Debtor in her motion, "the Trustee held the meeting of creditors open to January 9, 2020 upon the statement of the Debtor that the returns would be filed within 30 days in accordance with 11 U.S.C. § 1308(b)." The Trustee confirmed on the docket that he would "hold open" the Debtor's § 341 meeting pursuant to 11 U.S.C. § 1308(b)(1) for 35 days until January 9, 2020 to permit the Debtor to file her Past-Due Returns. (Docket No. 25.) The Trustee then made an additional docket entry on January 10, 2020, stating "Meeting of Creditors Held and Concluded." (Docket No. 46.)

Under certain circumstances, if the trustee has extended the tax return filing deadline, the Court may intervene and extend the deadline further. Section 1308(b)(2) provides:

After notice and a hearing, and order entered before the tolling of any applicable filing period determined under paragraph (1), if the debtor demonstrates by a preponderance of the evidence that the failure to file a return as required under paragraph (1) is attributable to circumstances beyond the control of the debtor, the court may extend the filing period established by the trustee under paragraph (1) for-

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<sup>3</sup> Section 1308(b)(1)(B) states in full: "Subject to paragraph (2), if the tax returns required by subsection (a) have not been filed by the date on which the meeting of creditors is first scheduled to be held under section 341(a), the trustee may hold open that meeting for a reasonable period of time to allow the debtor an additional period of time to file any unfiled returns, but such additional period of time shall not extend beyond - (B) for any return that is not past due as of the date of the filing of the petition, the later of- (i) the date that is 120 days after the date of that meeting; or (ii) the date on which the return is due under the last automatic extension of time for filing that return to which the debtor is entitled, and for which request is timely made, in accordance with applicable nonbankruptcy law."

- (A) a period of not more than 30 days for returns described in paragraph (1)(A); and
- (B) a period not to extend after the applicable extended due date for a return described in paragraph (1)(B).

In other words, the Court is permitted to extend the filing period for past-due returns established by the trustee for a period of not more than thirty days so long as three requirements are met: (1) the extension is granted after notice and a hearing; (2) the order extending the filing deadline for the past-due tax returns is entered before the tolling of any applicable filing period; and (3) the debtor shows by a preponderance of the evidence that the failure to file the returns is attributable to circumstances beyond the control of the debtor.

This case turns upon the Court's interpretation of the phrase "order entered before the tolling of any applicable filing period determined under paragraph (1)." The Court is permitted to extend the filing period established by the trustee for a period of not more than thirty days if the order is "entered before the tolling of any applicable filing period determined under paragraph (1)." If the Court reads that phrase to mean that the order extending the Debtor's filing period for her Past-Due Returns must be entered before the expiration of the additional period of time offered by the Trustee and the close of the § 341 meeting (i.e. January 10, 2020), then the Debtor's January 28, 2020 motion to extend time is too late. If, as advocated by the Debtor, the Court reads the phrase to mean that the order extending the Debtor's filing period for her Past-Due Returns must be entered before the expiration of the maximum 120-day period stated in § 1308, regardless of the filing deadline the Trustee extended to the Debtor, then the Debtor's January 28, 2020 motion to extend time is timely. The Debtor would have until 120 days after the first § 341 meeting to file the motion and receive an order (i.e. April 3, 2020).

The Debtor argues in her Brief that the Court should interpret the phrase “order entered before the tolling of any applicable filing period determined under paragraph (1)” in § 1308(b)(2) to mean that the Debtor has up to 120 days after the first § 341 meeting to bring a motion to extend the deadline to file her missing pre-petition tax returns under § 1308, even though the extension the Trustee afforded her was much shorter. In other words, it is the Debtor’s position that if a return is past due, the “applicable filing period determined under paragraph (1)” is always 120 days regardless of the amount of time that the trustee gave the debtor to file the return.

The Debtor’s reading of § 1308(b)(2) seems to ignore the “cardinal rule that statutory language must be read in context since a phrase gathers meaning from the words around it.” *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 596 (2004) (internal quotation omitted). The reading of the statute advocated by the Debtor requires the Court to overlook the discretion granted to the trustee in paragraph 1 to set the deadline by which a debtor must file her past-due tax returns. Reading the statute in context, the trustee is given discretion to hold open the meeting of creditors for a “reasonable period of time” to allow the debtor to file any unfiled past-due returns, but such additional period of time cannot extend beyond 120 days after the first scheduled § 341 meeting. 11 U.S.C. § 1308(b)(1)(A). The “reasonable period of time” offered by the trustee could be thirty days, sixty days, ninety days, or any other time period, up to the maximum of 120 days. The statute does not dictate the length of the extension that the trustee may offer to debtors for the filing of their past-due returns. It only imposes a maximum number of days that the trustee can offer. The trustee is also given discretion to hold open the meeting of creditors for a “reasonable period of time” to allow the debtor to file any unfiled tax returns that are not past due as of the date of the filing of the petition, to the later of 120 days after the § 341

meeting or until the deadline for the filing of the return under applicable nonbankruptcy law, including the last automatic extension. 11 U.S.C. § 1308(b)(1)(B). In setting the deadline for the Court to enter an order granting an extension, the statute refers to “any applicable filing period determined under paragraph (1).” It is hard to see how the inclusion of the phrase “any applicable filing period” means only 120 days when the trustee is granted the discretion to set the length of the filing period. Because of the statute’s grant of discretion to the trustee, and because the extension offered by the trustee under either § 1308(b)(1)(A) or § 1308(b)(1)(B) could vary significantly in length, this phrase most naturally, and within the context of the entire statute, means any extension the trustee has afforded the debtor in a particular case.

The Debtor’s reading of § 1308(b)(2) also leads to an absurd result and “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.” *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) (citations omitted). If the Debtor’s interpretation of § 1308(b)(2) is correct, a motion requesting that the Court extend the Trustee’s deadline would be timely even if filed well after the expiration of the thirty-day extension the statute authorizes the Court to grant. In this case, for example, if the Debtor’s reading of § 1308(b)(2) is followed, the Debtor could file a request with the Court for more time to file her past-due tax returns at any time so long as the Court entered an order before April 3, 2020, but the Court would only be authorized to grant an extension of time for the Debtor to file her past-due tax returns through February 10, 2020.

The only way to read § 1308(b)(2) in context and avoid an absurd result is to read it to mean that if the Debtor wanted the Court to extend the filing period for her past-due tax returns as established by the Trustee, the Debtor was required to file her motion before the expiration of the Trustee’s deadline and before the Trustee concluded the § 341 meeting, and the Court was

required to enter the order granting her motion before the expiration of the Trustee's deadline and before the Trustee concluded the § 341 meeting. The Court believes that any other interpretation of the statute does not read the words of the statute in context and ignores the discretion granted to the trustee in § 1308(b)(1) to set the deadline by which tax returns must be filed by the debtor.

Applying the Court's interpretation of § 1308(b)(2) to this case, the Trustee closed the § 341 meeting on January 10, 2020, and the Debtor did not bring a Motion to Extend Time to file her past-due 2016, 2017, and 2018 pre-petition tax returns until January 28, 2020. The relevant deadline by which the Court was required to enter an order extending the Debtor's deadline to file her Past-Due Returns under § 1308(b)(2) was January 10, 2020. The Court is unable to offer the Debtor an extension of time to file her missing Past-Due Returns because the Court did not enter an order extending the Debtor's deadline to file those returns by January 10, 2020.

The Debtor's unfiled Past-Due Returns present an additional problem related to confirmation. The Bankruptcy Code provides that the Court shall confirm a Chapter 13 plan if, among other things, "the debtor has filed all applicable Federal, State, and local tax returns as required by section 1308." 11 U.S.C. § 1325(a)(9). Case law in this district holds that this provision incorporates § 1308's timing requirement:

§ 1325(a)(9) requires, as a condition of plan confirmation, that the debtor file all applicable tax returns by the deadline specified in § 1308(a) or within any period of additional time provided by the trustee under § 1308(b)(1), subject to the court's limited ability to extend that period under § 1308(b)(2). If the debtor does not comply with the deadline for filing the previous years' tax returns as provided under § 1308 and the time for such compliance has passed, the debtor cannot file returns "as required by section 1308". The debtor cannot then satisfy § 1325(a)(9), and the court cannot confirm the plan.



*In re Long*, 603 B.R. 812, 819 (Bankr. E.D. Wis. 2019); *see also In re Souter*, No. 19-21582-GMH, 2019 WL 5887174, at \*3 (Bankr. E.D. Wis. Sept. 17, 2019) (declining to revisit the arguments made in *Long* that § 1325(a)(9) does not require compliance with § 1308's timing provisions). The Court is persuaded by Judge Halfenger's reasoning in *Long* and considers failure to file returns within § 1308's timing requirements to be an incurable defect under § 1325(a)(9). If the Debtor can never satisfy the requirements of § 1325, the Court cannot confirm a plan, and if the Court cannot confirm a plan, conversion or dismissal for cause is warranted under § 1307(c).

IT IS THEREFORE ORDERED: the Debtor's Motion to Shorten Objection Period is granted.

IT IS FURTHER ORDERED: the Debtor's Motion Requesting Extension of Time to File Prepetition Tax Returns is denied.

IT IS FURTHER ORDERED: unless the Debtor moves to convert the case on or before **February 24, 2020**, the Court will dismiss the case for cause under § 1307(c) because the Court cannot confirm a plan in this case due to the Debtor's failure to file her 2016, 2017, and 2018 tax returns as required by 11 U.S.C. § 1308.

Dated: February 10, 2020

  
Katherine Maloney Perhach  
United States Bankruptcy Judge