

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re:]	Case No. 98-51326-ASW
]	
H. KEITH HENSON,]	Chapter 7
]	
Debtor]	

MEMORANDUM DECISION
DENYING MOTION TO DISMISS
CHAPTER 7 CASE

Before the Court is a motion to dismiss this bankruptcy case, filed by creditor Religious Technology Center ("Creditor"). The case was commenced by H. Keith Henson ("Debtor"), who filed a Chapter 13¹ petition on February 28, 1998; the case was converted to Chapter 7 on February 7, 2003.

Creditor is represented by Elaine M. Seid, Esq. of McPharlin, Sprinkles & Thomas LLP; Samuel D. Rosen, Esq.; and Helena K. Kobrin, Esq. of Moxon & Kobrin. Debtor is represented by Stanley A. Zlotoff, Esq. ("Zlotoff"). Carolyn Wu, the Chapter 7 Trustee in the case, ("Trustee") is represented by Judith S. Suelzle, Esq.

¹ Unless otherwise noted, all statutory references are to the Bankruptcy Code, Title 11 United States Codes, as it provided with respect to cases commenced on February 23, 1998.

1 William T. Neary, United States Trustee, and Edwina E. Dowell,
2 Assistant United States Trustee, (collectively, "U. S. Trustee")
3 are represented by Nanette Dumas, Esq.

4 The matter has been briefed and argued, and submitted for
5 decision. This Memorandum Decision constitutes the Court's
6 findings of fact and conclusions of law, pursuant to Rule 7052 of
7 the Federal Rules of Bankruptcy Procedure ("FRBP").

8
9 I.

10 FACTS

11 The facts are not in dispute.

12 Debtor appeared at the creditors' meeting held pursuant to
13 §341 in the Chapter 13 case in 1998. During the Chapter 13 case,
14 Creditor conducted very extensive and protracted discovery
15 concerning Debtor's assets, in connection with Creditor's objection
16 to confirmation of Debtor's proposed Chapter 13 plan and a motion
17 to dismiss the Chapter 13 case.

18 At some point in 2001, during the Chapter 13 case, Debtor
19 left California to live in Canada, shortly prior to being sentenced
20 on unrelated criminal charges in Riverside County. Debtor stated
21 in declarations filed in the Chapter 13 case that he had filed a
22 petition for Canadian refugee status and could not leave that
23 country while it was pending.

24 Creditor's motion to dismiss the Chapter 13 case was tried in
25 2002; Debtor did not appear at trial. This Court ruled that Debtor
26 would not be permitted to remain in Chapter 13 and that, pursuant
27 to §1307(c), the interests of the bankruptcy estate and its
28

1 creditors would be better served by conversion than by dismissal.
2 An order converting the case to Chapter 7 was filed on February 7,
3 2003.

4 The Trustee was appointed in the Chapter 7 case and the Clerk
5 of the Bankruptcy Court issued a "Notice of Chapter 7 Bankruptcy
6 Case, Meeting of Creditors, & Deadlines" ("Notice") on March 3,
7 2003. The Notice states that a "Meeting of Creditors" will be held
8 on April 1, 2003, that Debtor "must be present at the meeting to be
9 questioned under oath by the trustee and by creditors", and that
10 Debtor must "provide government-issued photo identification and
11 proof of social security number to the trustee at the meeting of
12 creditors".

13 Debtor did not appear at the April 1 meeting. Zlotoff did
14 appear, and asked for a continuance so that he could make
15 arrangements for Debtor to appear by telephone; the Trustee
16 continued the meeting to April 29, 2003. At the continued meeting,
17 Debtor did not appear and the Trustee announced that Debtor's
18 request to appear by telephone had been denied by the U. S.
19 Trustee. The Trustee also stated that the meeting was concluded,
20 but she then wrote to counsel for Debtor and Creditor on May 7,
21 2003 and said that she was changing the minutes to reflect that the
22 meeting "has been taken off calender rather than concluded".

23 Creditor moved to dismiss the Chapter 7 case based on
24 Debtor's failure to appear at the meeting. When that motion first
25 came on for hearing June 5, 2003, counsel appeared for the Trustee
26 and stated that her client did not oppose dismissal because Chapter
27 7 administrative expenses were likely to exceed any possible asset
28

1 recovery, which would preclude distribution to creditors. The
2 Trustee's attorney also said:

3 ... not being able to examine the debtor at
4 a 341 particularly in the absence of a 1019
5 report of any sort would make administration
6 of the estate more difficult, but I'm not sure
7 that examination of the debtor given the history
8 of this case is necessarily going to get us any
9 closer to the truth of anything than we have
10 under -- through other documents executed under
11 penalty of perjury.

12 ...

13 The trustee's position is that it really isn't all
14 that important to have the meeting of creditors
15 that that's probably not going to make any differ-
16 ence, that the real reason for dismissing is that
17 there really isn't anything thing here for creditors.²

18 Counsel appeared for the U. S. Trustee and stated that her client
19 took no position regarding dismissal. Since then, the Trustee has
20 moved to sell the principal asset of Debtor's estate, the residence
21 Debtor shared with his wife, Arel Lucas, which is scheduled for
22 hearing on October 23, 2003 and opposed by Creditor.

23 II.

24 ANALYSIS

25 Creditor's motion to dismiss the Chapter 7 case is based on
26 Debtor's failure to appear at the initial or continued post-
27 conversion creditors' meeting. Creditor cites §341, which provides
28 (in pertinent part) as follows:

(a) Within a reasonable time after the
order for relief in a case under this
title, the United States trustee shall

² In response, counsel for Debtor correctly pointed out
that most Chapter 7 cases are "no asset" cases in which creditors
receive no distribution.

1 convene and preside at a meeting of creditors.

2 ...

3 (d) Prior to the conclusion of the meeting
4 of creditors or equity security holders,
the trustee shall orally examine the debtor
5 to ensure that the debtor in a case under
chapter 7 of this title is aware of --
6 (1) the potential consequences of seeking
a discharge in bankruptcy, including the
7 effects on credit history; (2) the debtor's
ability to file a petition under a dif-
8 ferent chapter of this title; (3) the
effect of receiving a discharge of debts
9 under this title; and (4) the effect of
reaffirming a debt, including the debtor's
10 knowledge of the provisions of section 524(d)
of this title.

11 Creditor also cites §343, which provides in full as follows:

12 The debtor shall appear and submit to exam-
13 ination under oath at the meeting of creditors
under section 341(a) of this title. Creditors,
14 any indenture trustee, any trustee or examiner
in the case, or the United States trustee may ex-
15 amine the debtor. The United States trustee may
administer the oath required under this section.

16 Debtor argues that his appearance was not required after the
17 case was converted from Chapter 13 to Chapter 7, citing In re
18 Smith, 235 F.3d 472 (9th Cir. 2000) ("Smith") for the proposition
19 that conversion from one chapter to another does not "reset" the
20 date of the original order for relief under the Bankruptcy Code
21 and, while conversion "triggers the Clerk's office to renotice a
22 new date" for a creditors' meeting, that meeting is "technically"
23 not a meeting pursuant to §341, so a debtor has no duty to appear.
24 Debtor also points out that the Notice issued post-conversion in
25 this case does not describe the creditors' meeting as a "§341
26 meeting", and is not an order directing Debtor to appear. Holding
27 aside for a moment Debtor's arguments regarding the substance of
28

1 the Notice, this Court disagrees with Debtor's interpretation of
2 Smith. In that case, a creditors' meeting under §341 was commenced
3 in a Chapter 11 case but never expressly concluded; rather, the
4 trustee adjourned it indefinitely. Objections to exemption claims
5 were filed many months after the indefinite adjournment, even
6 though FRBP 4003 requires them to be filed within thirty days after
7 conclusion of the §341 meeting. Then, when the case later
8 converted to Chapter 7, another creditors' meeting was held and the
9 objections were renewed. The Ninth Circuit held that FRBP 2003
10 does not permit a §341 meeting to be adjourned indefinitely as the
11 trustee purported to do, and failure to announce a continued date
12 within thirty days after the adjournment meant that the meeting was
13 concluded on the date of adjournment; since objections to exemption
14 had to be made within thirty days after conclusion, it followed
15 that the objections made months after the adjournment (which was
16 deemed a conclusion) were untimely. With respect to conversion,
17 Smith states (at 477):

18 ... we turn to consider the conversion issue:
19 whether the conversion of Smith's bankruptcy
20 from a Chapter 11 reorganization to a Chapter
21 7 liquidation began a new thirty-day period
22 for objections under Rule 4003(b). Rule
23 4003(b) allows as timely filed only those
24 objections made "within 30 days after the
25 conclusion of the meeting of creditors held
26 pursuant to Rule 2003(a)." See In re
27 Halbert, 146 B.R. 185, 189 (Bankr.W.D.Tex.
28 1992). Accordingly, for the Creditors'
objections to be timely, conversion of the
bankruptcy process from Chapter 11 to Chapter
7 would have to restart the time period in
which objections may be filed. [¶] Section
341 of the Bankruptcy Code requires the
trustee to convene a meeting of creditors
"[w]ithin a reasonable time after the order
for relief in a case under this title."
Certainly, the conversion of a case initially

1 brought under Chapter 11 to a case under
2 Chapter 7 constitutes an order for relief
3 under the chapter to which the case is
4 converted. However, conversion does not
5 reset the date of the order for relief. 11
6 U.S.C. § 348(a). "The purpose of section 348
7 is to preserve actions already taken in the
8 case before conversion.... To effect this
9 purpose, section 348(a) establishes the
10 general rule that, in a converted case, the
11 dates of the filing, the commencement of the
12 case and the order for relief remain
13 unchanged by the conversion." In re Bell,
14 225 F.3d 203, 213 (2nd Cir.2000) (citations
15 omitted). Except for certain specifically
16 enumerated filing deadlines, see 11 U.S.C. §
17 348(b) and (c), § 348 "does not effect a
18 change in the date of ... the order for
19 relief." 11 U.S.C. § 348(a). [¶]
20 Furthermore, Rule 1019(2), which "implements"
21 § 348's provisions on conversion from Chapter
22 11 to Chapter 7, In re Bell, 225 F.3d at 209,
23 specifies new time periods for a number of
24 events, see Fed. R. Bankr.P. 1019(2)
25 (resetting Rule 3002, 4004, and 4007
26 deadlines), but none for objections to
27 exemptions pursuant to Rule 4003(b). See In
28 re Bell, 225 F.3d at 209. Reading Rule
1019(2) in conjunction with § 348 compels the
conclusion that § 348 generally requires the
order for relief to remain unaltered by
conversion from Chapter 11 to Chapter 7. To
the extent that Rule 1019(2) resets any
deadlines, it does so only for those
exceptions expressly enumerated in section
[sic] §§ 348(b) and (c). Neither § 341 nor
§ 702(b) (providing for the election of the
Chapter 7 trustee "[a]t the meeting of
creditors held under section 341") is among
these enumerated exceptions. See In re Bell,
225 F.3d at 214.

22 Debtor interprets that discussion to mean that there need be no
23 post-conversion meeting under §341, such that the requirement of
24 §343 for a debtor's attendance at a meeting held under §341 does
25 not apply post-conversion. However, the reference to the date of
26 the order for relief not being "reset" by conversion is dicta with
27 respect to the issues of whether a new §341 meeting is required
28

1 post-conversion, and whether a debtor is required to appear at it.

2 In Smith, the Ninth Circuit addressed the following issues:

3 ... first, whether the indefinite "con-
4 tinuance" of a Bankruptcy Code §341(a)
5 'meeting of creditors' tolls the period
6 for filing objections to property claimed
7 as exempt under §522(l); and second, whether
8 conversion of the case from Chapter 11 to
9 Chapter 7 triggers a new period within which
10 to file objections to property already excluded
11 as exempt during the Chapter 11 proceeding.

12 Smith at 473. On those issues, Smith holds that no new opportunity
13 to object did arise, for the reasons explained -- Smith does not
14 hold that no new creditors' meeting need be held post-conversion,
15 and that was not an issue in the case. Moreover, the fact that
16 §348 does not "reset" the date of the order for relief does not
17 mean that FRBP 2003 and §341 do not apply to a case that is
18 converted to Chapter 7 from Chapter 13. The Rule provides that
19 "the United State trustee shall call a meeting of creditors to be
20 held no fewer than 20 and no more than 40 days after the order for
21 relief" -- the Code section provides that "[w]ithin a reasonable
22 time after the order for relief in a case under this title, the
23 United States trustee shall convene and preside at a meeting of
24 creditors" -- since §348(a) provides that a conversion order
25 constitutes an order for relief under the new chapter, §341 calls
26 for a meeting of creditors to be held within a reasonable time
27 post-conversion. In other words, there are two orders for relief
28 in a converted case -- the first occurs when the original petition
is filed (i.e., an order for relief under the chapter specified in
the petition) -- the second occurs when the conversion order is
made (i.e. an order for relief under the new chapter) -- see, e.g.,

1 F&M Marquette National Bank vs. Richards, 780 F.2d 24 (8th Cir.
2 1985). Accordingly, the Bankruptcy Code does require a §341
3 meeting to be held after a case is converted from one chapter to
4 another.

5 We turn next to Debtor's arguments with respect to the form
6 of the Notice. The fact that the Notice issued by the Clerk's
7 office is not an order directing Debtor to appear and does not cite
8 §341 in announcing the creditors' meeting does not mean that the
9 meeting is not being held pursuant to §341 and that Debtor is not
10 required to attend it as provided by §343 -- the law is created by
11 the Bankruptcy Code, not by the Clerk's office and its notices.³

12 Creditor argues that the §343 requirement for appearance at
13 the creditors' meeting held pursuant to §341 is mandatory and not
14 subject to waiver, citing cases from other jurisdictions. However,
15 those cases are not binding on this Court. The more enlightened
16 view is that of In re Bergeron, 235 B.R. 641 (Bankr. N.D. Ca. 1999)
17 ("Bergeron"), recognizing that bankruptcy courts have discretion in
18 the matter. That case notes that, under Supreme Court and Ninth
19 Circuit case law, the plain language of §343 must govern unless it
20 would lead to results that do not comport with the intent of the
21 drafters, or are absurd or impractical. The Bankruptcy Court in

22
23 ³ In any event, this Court's decision to allow the Debtor
24 another opportunity to appear renders moot Debtor's arguments with
25 respect to the adequacy of the Notice. The Court notes in this
26 regard that, if the U. S. Trustee waited until, or close to, the
27 date of the April 29, 2003 continued meeting to announce that it
28 had denied Debtor's request to appear by telephone, then Debtor
would not have known prior to then whether the U. S. Trustee would
allow him to appear telephonically. This is another reason it
would be fairer to allow the Debtor another opportunity to appear
at a §341 meeting.

1 Bergeron found that, when all parts of the Bankruptcy Code
2 concerning consumer debtors are read together, it would be absurd
3 to construe the mandatory language of §343 to mean that the Court
4 lacks any discretion to excuse appearance, because §109 concerning
5 eligibility and §727 concerning denial of discharge include no
6 requirement of appearance at the §341 meeting, which suggests that
7 Congress did not intend to "strip the bankruptcy court of all
8 discretion to excuse an individual debtor's appearance at a §341
9 meeting, at least where such appearance would be impossible or
10 utterly pointless". In that case, neither the trustee nor
11 creditors desired to examine the debtor, and his wife testified
12 that her husband was too ill to appear either personally or by
13 telephone. It was undisputed that the 89 year old debtor suffered
14 from blindness, senile dementia, renal failure, and prostatism
15 requiring a catheter -- a doctor's opinion stated that the debtor
16 was unable to attend and, even if accommodations were made to
17 permit attendance, he could not testify competently. The Court
18 reasoned that:

19 It would be ironic, indeed, for Congress to
20 permit [the debtor] to seek chapter 7 relief
21 and require that he be issued a discharge,
22 but then to negate his ability to obtain that
23 relief because he is physically and mentally
24 unable to appear and be questioned under oath
 at the §341 meeting. It would be a particularly
 bitter irony in this case, since no one has
 expressed the slightest interest in interrogating
 him. I cannot imagine that Congress intended
 such an "absurd and impracticable" result.

25 In this case, the Court is not prepared to waive Debtor's
26 appearance at the Meeting of Creditors. However, both the
27 Bankruptcy Code and the FRBP are silent as to the manner in which
28

1 such appearances must be made, i.e., whether in person or by some
2 alternative means such as telephone or video transmission. With
3 respect to the latter alternative, modern technology offers a
4 method of appearance that is fully equivalent to a personal
5 appearance, in which demeanor can be observed as well as if the
6 witness were present in the room. Indeed, while the U. S. Trustee
7 notes that office's "general policy" to require personal
8 appearance, it acknowledges that, in "rare" instances and "under
9 extraordinary circumstances", that policy can be "relaxed" to
10 accommodate those with "legitimate" circumstances precluding
11 personal appearance, such as by permitting telephone appearance in
12 cases of disability or hospitalization. Moreover, various kinds of
13 non-personal appearances are provided for in other contexts, such
14 as discovery and at trial, see, respectively, Rule 30(b)(2) of the
15 Federal Rules of Civil Procedure ("FRCP") (incorporated by FRBP
16 7030) and FRCP 43(a) (incorporated by FRBP 9017) -- indeed, many
17 judges regularly conduct hearings or entire calendars by appearing
18 telephonically or by video transmission. It makes no sense to say
19 that, if someone is too sick to attend a creditors' meeting in
20 another city or across town, but well enough to appear by
21 telephone, he or she should be denied an opportunity to appear by
22 some reasonable means (such as telephone or video), particularly if
23 no one will be prejudiced by such method of appearance. Nor is it
24 appropriate for courts to deny debtors who absolutely cannot appear
25 in person the right to appear by such alternative means on
26 moralistic grounds -- this is highlighted by those cases which deny
27 prisoners the right to appear by other means. First, people end up

1 in prison for very short or longer periods of time and for all
2 sorts of reasons with widely varying degrees of moral turpitude.
3 It is not logical to deprive a prisoner (perhaps with minor
4 children) of the opportunity to save a house with substantial
5 equity from immediate foreclosure or to deny that person a
6 discharge merely because he is in prison at the moment he needs
7 protection. Second, and more importantly, if Congress had wanted
8 to prevent prisoners from filing bankruptcy, it could have done so
9 -- since it did not, courts should not deny them access to
10 bankruptcy protection solely because they are unable to appear
11 personally at a §341 meeting; incarceration is not among the
12 grounds provided by §727 for denial or revocation of discharge.⁴

13 Some persons might argue that the case at bench is less
14 sympathetic than even a prisoner case because Debtor has presumably
15 made a choice to flee the United States to avoid prosecution. But,
16 if Congress had wanted to preclude such persons from filing
17 bankruptcy, it could have done that on moral, or other policy
18 and/or practical grounds. Where, as here, there may be no real
19 reason why a telephone or video meeting should not suffice, under
20 the particular facts of this case, the courts should not elevate
21 the requirement that a debtor appear at a second §341 meeting in a
22 converted bankruptcy case into a moral issue. The issue is whether
23 it is important to the particular case that the debtor appear

24
25 ⁴ There is an extensive body of statutory and case law
26 regarding denial of discharge and revocation of discharge. That
27 body of law is applicable to Debtor's case. If Creditor or the
28 U. S. Trustee had believed that Debtor was not entitled to a
discharge, they could have filed a complaint under §727 to deny him
a discharge. They did not (Creditor filed a §523 complaint) even
after the case converted, which was long after he went to Canada.

1 physically rather than by telephone or video.

2 Further, and of equal importance, the Bankruptcy Code was
3 enacted to help creditors as well as debtors, such as by providing
4 for orderly and fair distribution of assets and avoiding a stampede
5 to the courthouse. It may well be in the creditors' interest as
6 well as in a debtor's interest for a given debtor to be in a
7 Chapter 13 or 7 or 11 case, even though he or she may happen to be
8 ill or in prison or a fugitive.⁵ By taking a moralistic attitude
9 toward a debtor's inability to appear (or if it is impractical and
10 other alternative means are available), courts will end up
11 punishing creditors as well as, or even more than debtors in many
12 cases. For example, in a case where assets are available but the
13 debtor does not appear at a mandatory creditors' meeting, dismissal
14 frequently is completely inappropriate. Denial of discharge for
15 failure to abide by court orders (if appropriate under the
16 particular circumstances) would remain a possibility and would
17 directly address the debtor's wrongdoing (if any) without harming
18 creditors by depriving them of assets.

19 This Court is not prepared to insert a moralistic standard
20 where Congress did not do so. As the Bankruptcy Court in Bergeron
21 noted, neither eligibility to be a bankruptcy debtor nor
22 entitlement to discharge is governed by §343 requiring attendance
23 at §341 meetings -- rather, they are governed by, respectively,
24 §109 and §727, which include no such requirement. Courts should
25 consider the manner of appearances at §341 meetings in the same way

26
27 ⁵ Indeed, Debtors often move to dismiss their bankruptcy
28 cases and are met with objections to dismissal by creditors,
trustees, and/or the U. S. Trustee.

1 they would the manner of any other appearance, assessing the
2 available options and what is actually required under the
3 circumstances. In this case, Debtor lives in Canada -- it may be a
4 appropriate to permit him to appear by telephone or video
5 transmission rather than spending time and money to travel to San
6 Jose, and that result is not necessarily altered by the particular
7 circumstances under which he is located in Canada.

8 As a practical matter, little or no purpose may be served by
9 conducting a post-conversion §341 meeting in this case. Creditor
10 argues that, although extensive discovery occurred in the Chapter
11 13 case, none has been conducted since Debtor moved to Canada in
12 2001, so there is no information about current assets and
13 liabilities. However, Debtor correctly points out that the Chapter
14 7 estate consists of the assets that existed on the original
15 petition date in 1998, and post-conversion income and expenses are
16 irrelevant in Chapter 7. The Trustee considers that it "really
17 isn't all that important to have the meeting of creditors" and it
18 is "probably not going to make any difference". Three creditors
19 (Dezotell, Hoden, and Wagoner) who have filed a complaint to except
20 their claim from discharge under §523 recently filed a pleading in
21 connection with the pending sale of Debtor's real property stating
22 that they would prefer examining Debtor at a §341 meeting to using
23 the Adversary Proceeding discovery rules under the FRBP, which may
24 or may not be a legitimate position. No one else, including the
25 U. S. Trustee, has expressed any interest in examining Debtor.
26 Nevertheless, the plain language of §343 does make appearance
27 mandatory, and cases such as Bergeron have permitted waiver only in
28

1 extreme situations that do not apply here. Accordingly, the Court
2 will require Debtor to appear at a §341 meeting, but the
3 circumstances of the case may warrant permitting him to appear in
4 some manner other than personally. Counsel for Debtor; the U. S.
5 Trustee; the Trustee; Dezotell, Hoden, and Wagoner; and Creditor
6 should meet and confer concerning the manner of appearance and who
7 is to bear any associated expense -- if they cannot agree, the
8 disputed issues should be set for hearing.⁶ In connection with any
9 such hearing, all parties should address all possibilities,
10 including practical issues (e.g., regarding video transmission,
11 relevant issues would include technical aspects and cost) --
12 further, if the parties cannot agree, Creditor should provide a
13 declaration of how much discovery it has already conducted in the
14 case, including the number of hours devoted to depositions of
15 Debtor and each witness (specifying the name and number of hours
16 for each), and the number of interrogatories, requests for document
17 production propounded to Debtor (and others), etc.

18 19 CONCLUSION

20 For the reasons set forth above, Creditor's motion to dismiss
21 the Chapter 7 case is denied, without prejudice. Counsel for
22 Debtor shall submit a form of order so providing, following review
23 as to form by counsel for the U. S. Trustee, the Trustee, and

24
25 ⁶ If any party takes the position that Debtor should only
26 be permitted to appear in person, that party should also fully
27 address the other possibilities -- telephone, video transmission,
28 or other method, even if such methods are unacceptable to that
party. Debtor should also specifically research and address the
possibility of appearing by video transmission as well as any other
method.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Creditor.

Dated:

ARTHUR S. WEISSBRODT
UNITED STATES BANKRUPTCY JUDGE