

1 than 60 days after the first date set for the meeting of creditors under § 341(a).” Fed. R.
2 Bankr. P. Rule 7004(c). The meeting of creditors was scheduled for August 19, 2010
3 creating an October 18, 2010 filing deadline.

4 The Plaintiffs respond that they did not receive notice of the bankruptcy until
5 October 27, 2010 and therefore are not subject to the deadline under Rule 7004(c).
6 Instead, the Plaintiffs claim that they can file the complaint at any time because the
7 complaint is really one brought under §523(a)(3)(B) and Rule 4007(b).

8 **II. Timeline**

9 The Debtors filed their petition on July 14, 2010 on which their last name was
10 misspelled “Diepholtz” instead of “Diepholz.” On July 15, 2010, the Court sent a notice
11 of meeting of creditors in which October 18, 2010 is clearly set as the bar date to file
12 objections to discharge.¹ On August 12, 2010, the Debtors filed: 1) an amended petition
13 to correct the spelling of Debtors’ last name, but the caption remained unchanged until
14 June 15, 2011;² 2) amended schedules which lists Walter C. Zahlman³ and Mayes Telles,
15 PLLC⁴ on Schedule F; and 3) an amended mailing list which includes Walter C.
16 Zahlman⁵ and Mayes Telles, PLLC.⁶

17 On August 12, 2010, James Ehinger, the Diepholz’s state court attorney, emailed
18 Blake Mayes, the Zahlmann’s state court attorney, advising “I have been told that Mr.
19 and Mrs. Diepholz have filed bankruptcy, but I have not seen any paperwork to confirm
20 that filing.” On August 22, 2010 Mr. Mayes emailed Ehinger asking him to keep him
21 appraised of the Bankruptcy . According to Mayes’ declaration, beginning on August 22,
22

23 ¹ The notice provides:

Deadlines:

Papers must be *received* by the bankruptcy clerk's office by the following deadlines:

**Deadline to File a Complaint Objecting to Discharge of the Debtor or to Determine
Dischargeability of Certain Debts: 10/18/10**

(bolds and italics in the original).

26 ² In a follow up with the Clerk’s Office, the Court learned that an “Amendment to Petition” – the title of the
27 pleading – is not the type of filing that the Clerk’s Office would automatically review. Thus, no changes
28 were made to the pleading title until June 15, 2011.

³ With the address of: c/o Twin Enterprises Consulting, 4236 E. Whitney Lane, Phoenix, AZ 85032.

⁴ With the address of: 331 North First Avenue, Ste 107, Phoenix, AZ 85003.

⁵ With the address of: c/o Twin Enterprises Consulting, 4236 E. Whitney Lane, Phoenix, AZ 85032.

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1 2010, he conducted multiple PACER searches to determine if the Debtors had indeed
2 filed, but could not find the filing because of the misspelling of their last name. On
3 August 22, 2010, Mayes ask Ehinger to keep him apprised regarding the bankruptcy to
4 which Ehinger responds “will do.” On August 25, 2010 Mayes asks Ehinger for an the
5 identity of the Debtors’ bankruptcy counsel.

6 On October 11, 2010, Mayes informs Ehinger that PACER still does not show
7 that the Debtors have filed for bankruptcy. Ehinger replies that according to Don
8 Lawrence, the Debtors’ bankruptcy attorney, the bankruptcy has been filed, “but I must
9 admit I’ve never actually seen the paperwork on it.” October 18, 2010, the bar date for
10 filing objections to discharge, comes and goes with no objection filed. On October 25,
11 2010, Ehinger emails Mayes inquiring about the status of the bankruptcy to which Mayes
12 responds that Lawrence assures him that bankruptcy was filed and that “I just don’t know
13 how to run a PACER search, since I got the same results that you did.” On October 27,
14 2010, Lawrence emails Mayes advising him of the bankruptcy case number. Lawrence
15 also states:

16 [t]he reason you haven’t been able to find it on PACER is that their name
17 was inadvertently misspelled initially. That has been corrected with the
18 Court, however, it’s still showing in the ECF register with the incorrect
19 spelling. According to my records, Mr. Zahlmann and your firm were sent
20 notices, however, there are times when notice doesn’t actually get through
21 to creditors.

22 A notice of the bankruptcy first appears on the state court docket on November 9, 2010.
23 On November 15, 2010 this Court entered a discharge.

24 On December 10, 2010 LaShawn Jenkins, Mr. Zahlmann’s bankruptcy attorney,
25 filed an objection to a proposed trustee sale; Jenkins filed his notice of appearance the
26 next day. On January 6, 2010, Lawrence filed a certificate of service listing Mayes Tells,
27 PLLC and Walter C. Zahlmann as recipients, but no address is listed for any creditor on
28 the certificate of service. The Plaintiffs filed the adversary proceeding on February 7,
2011.

1 **III. Analysis**

2 The short statute of limitations for Section 523(c) challenges to the discharge of a
3 debt depends upon the creditor receiving notice. Did the Plaintiffs have notice of the case
4 within the time to file a timely complaint? Under the reasoning of *Ellet v. Stanislaus*, 506
5 F.3d 774 (9th Cir. 2007), the Court concludes no and therefore denies the motion to
6 dismiss.

7 In *Ellett*, the Chapter 13 Debtor sent notice of his bankruptcy to the California
8 Franchise Tax Board (“FTB”) which the FTB received. However, Mr. Ellett erroneously
9 misstated the last four numbers of his social security number when he filed.
10 Consequently, when the FTB cross checked his name and social security number in its
11 data base against his name and mis-numbered last four digits, the data base did not show
12 him as owing taxes. Thus, the FTB did not file a proof of claim and did not receive a
13 distribution under the Chapter 13 plan.

14 The threshold question, as described by the Circuit, was whether the FTB
15 received adequate notice of the bankruptcy “when the § 341(a) notice it received reported
16 an incorrect [social security number] but contained his correct name and address.” *Ellett*
17 at 777. After a review of the case law, including *Price*⁷ and *Dewalt*,⁸ the Circuit
18 determined that under Fed. R. Bankr. P. Rule 1005, proper notice of was not provided
19 and that Mr. Ellett was negligent in listing an improper social security number. *Ellett* at
20 781.

21 Rule 1005⁹ requires a debtor to provide, among other things, its name and the last
22 four digits of the social security number. Much like Ellet’s mis-numbering of his social

23 ⁷ 871 F.2d 97 (9th Cir. 1989).

24 ⁸ 961 F.2d 848 (9th Cir. 1992).

24 ⁹ Rule 1005 reads:

25 The caption of a petition commencing a case under the Code shall contain the name of
26 the court, the title of the case, and the docket number. The title of the case shall include
27 the following information about the debtor: name, employer identification number, last
28 four digits of the social-security number or individual debtor's taxpayer-identification
number, any other federal taxpayer-identification number, and all other names used
within eight years before filing the petition. If the petition is not filed by the debtor, it
shall include all names used by the debtor which are known to the petitioners.

1 security number, the Debtors' erroneous misspelling of their name ran afoul of Rule
2 1005. The Plaintiffs' attempts to verify the Debtors bankruptcy filing through PACER is
3 akin to the FTB cross-checking the social security number against those who owe taxes.
4 This difficulty in verification is shown by the Debtors' own attorney who couldn't find
5 the case.

6 The Debtors were in the best position to list their correct name on their petition.
7 *Ellett*. at 781. "Requiring a creditor to ferret out a debtor's correct identity when incorrect
8 identifying information is provided would be overly burdensome and inappropriate ...
9 Thus, it is not unreasonable to place the burden on the debtors to ensure that their
10 creditors received proper notice of their bankruptcy filing." *Id.* The Court is aware that
11 the Debtors took what it believed were the proper steps to correct the misspelling.
12 However, the Debtors' own negligence caused the misspelling initially and should not be
13 held against the Plaintiffs.

14 Because the Plaintiffs did not receive proper notice, the relief requested in the
15 complaint falls under §523(a)(3)(B) and Rule 4007(b). Under Rule 4007(b), "A
16 complaint other than under § 523(c) may be filed at any time." Therefore, the motion to
17 dismiss is denied. Counsel for Plaintiffs is to upload a form of order.

18
19 **So ordered.**

20 Dated: July 18, 2011

21
22 
23 Charles G. Case
24 UNITED STATES BANKRUPTCY JUDGE

25 **COPY** of the foregoing mailed by the BNC and/or
sent by auto-generated mail to:

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