IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re: ALICE M. SINK aka ALICE M. PHILLIPS, Debtor;	Bankruptcy Number 02-40042 JAB [Chapter 13]
In re HIPOLITO D. VALENZUELA, Debtor;	Bankruptcy Number 02-32504 JAB [Chapter 13]
In re: CLAY PETERSEN, Debtor.	Bankruptcy Number 02-38843 JAB [Chapter 7]

MEMORANDUM DECISION and ORDERS

These matters come before the Court on motions to dismiss with prejudice, pursuant to 11 U.S.C. § 109(g)(1),[1] filed in each of the above cases by creditors holding claims secured by the debtors' real property. Each debtor has filed multiple bankruptcy cases in close proximity to trustee's sales scheduled on their real property; each has either failed to attend the meeting of creditors scheduled in the pending cases under §341, failed to file required papers or failed to

[1] All statutory references are to Title 11 of the United States Code unless otherwise indicated.

make chapter 13 plan payments; and each has failed to appear before the Court to defend against dismissal, either with or without prejudice, of their respective cases. Despite the lack of objection to the motions to dismiss with prejudice, the Court took the matters under advisement in order to carefully consider whether the creditors had made a sufficient showing in each case to warrant barring the debtors from bankruptcy relief for the next 180 days.

FACTS

The facts of each case are undisputed. They are established by affidavits filed by the creditors and the uncontroverted statements of the attorney for the respective Chapter 13 Trustees. The Court also takes judicial notice of the pleadings contained in the Court's files in these and related cases.[1] From these sources, the undisputed facts of the cases are as follows.

Alice M. Sink

This is the third bankruptcy case since January 2001 filed by Alice M. Sink ("Sink"), all three filed under chapter 13. The first petition, dated January 4, 2001, occurred when Sink was delinquent $7,426.42 on her mortgage payments to Wells Fargo Home Mortgage, Inc. ("Wells Fargo"), and after a Notice of Default had been recorded. Sink filed all required documents and a plan, appeared at the first meeting of creditors, and made her initial plan payment. The case was dismissed September 6, 2001, after a contested confirmation hearing, and Wells Fargo rescheduled a trustee's sale to be held December 5, 2001.

Sink filed her second case the day before the scheduled trustee's sale, on December 4, 2001. Mortgage arrears had increased to $12,626.56. Sink again filed all required documents and a plan, appeared at the first meeting of creditors, and made her initial plan payment. Wells

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[1] Judicial notice was taken pursuant to FED. R. EVID. 201(d).

Fargo filed a motion for relief from the automatic stay based upon Sink's failure to make post-petition mortgage payments. This was resolved by an agreed order entered by stipulation of the parties on April 24, 2002. Sink's case was dismissed on October 10, 2002, after a contested confirmation hearing. Wells Fargo scheduled another trustee's sale for November 27, 2002.

Sink filed the present case six days before the scheduled trustee's sale, on November 22, 2002. Once again, Sink filed all required papers along with her bankruptcy petition. In this last case, Sink failed to appear at the properly noticed meeting of creditors and failed to tender her initial plan payment. The Chapter 13 Trustee filed a recommendation for dismissal noting the failure to appear or make payment and served it upon Sink and her attorney. Sink did not timely file a written objection under Local Rules 2003-1(a) and 2083-1(b).

Wells Fargo, however, filed an objection to the Trustee's recommendation for dismissal over three weeks before the time to object had run, and filed the motion to dismiss with prejudice currently before the Court. Sink did not respond to this motion either, nor did she appear at the hearing on the motion to dismiss with prejudice.

Since Wells Fargo recorded the Notice of Default, Sink has made twelve of thirty-two mortgage payments that have come due, and the arrearage has increased from $7,426.42 to $18,580.11 over that timespan. The same attorney represented Sink in each of the three cases.[3]

Hipolito D. Valenzuela

This is the also the third bankruptcy case filed by Hipolito D. Valenzuela ("Valenzuela"), all three filed under chapter 13. The first petition, dated June 4, 2001, occurred when Valenzuela was delinquent $12,926.03 on his mortgage payments to Fairbanks Capital Corp. ("Fairbanks"),

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[3] Sink's attorney was allowed to withdraw prior to the §109(g) dismissal hearing.

and a Notice of Default had been recorded. Valenzuela filed all required documents and a plan, appeared at the first meeting of creditors, and made his initial plan payment. Fairbanks obtained an order lifting the automatic stay for Valenzuela's failure to make post petition mortgage payments. The case was dismissed January 17, 2002, after a contested confirmation hearing, and Fairbanks rescheduled a trustee's sale to be held February 26, 2002.

Valenzuela filed his second case on February 4, 2002. Mortgage arrears had increased to $22,017.10. Valenzuela again filed all required documents and a plan, appeared at the first meeting of creditors, and made his initial plan payment. Fairbanks obtained a second order lifting the stay for Valenzuela's failure to make post petition mortgage payments. Valenzuela's case was dismissed on June 26, 2002 for failure to file tax returns. Fairbanks scheduled another trustee's sale for August 1, 2002.

Valenzuela filed the present case the day before the scheduled sale, on July 30, 2002. Fairbanks obtained an order lifting the automatic stay that was entered January 21, 2002. Once again, Valenzuela filed all required documents and a plan, attended his scheduled § 341 meeting, and made his initial plan payment.

The Chapter 13 Trustee filed and served a motion to dismiss because Valenzuela made only two chapter 13 plan payments. Valenzuela did not respond to the Chapter 13 Trustee's motion to dismiss. Fairbanks, however, objected to the Trustee's motion on the last date to file objections, and filed the motion to dismiss with prejudice currently before the Court. Valenzuela did not appear at the hearing on the motions or file any pleading in defense.

Since Fairbanks recorded the Notice of Default, Valenzuela has made three of twenty-eight mortgage payments that have come due, and the arrearage has increased from $12,926.03

to $29,973.14 over that timespan. The same attorney represented Valenzuela in each of the three cases.

Clay Petersen

This is Clay Petersen's ("Petersen") second bankruptcy filing in the past 4 months and presents a somewhat different fact pattern. Petersen filed his first bankruptcy case *pro se*, under chapter 13, on July 9, 2002. At that time, Petersen had not paid Wells Fargo Mortgage Corp. ("Wells Fargo") since February, 2002. Wells Fargo recorded a Notice of Default on May 15, 2002, and scheduled a trustee's sale for September 12, 2002. Petersen filed a mailing matrix along with his petition, but filed no other papers. Petersen was served with the notice of the meeting of creditors but did not attend. The Chapter 13 Trustee filed a Recommendation for Dismissal noting Petersen's failure to file the required papers, failure to appear or to make the first plan payment and served it upon Petersen. Petersen failed to respond and the case was dismissed on September 18, 2002 without a hearing. Wells Fargo rescheduled a trustee's sale of the subject property for November 12, 2002.

The present case was filed under Chapter 7 on November 4, 2002. Once again, Petersen filed the within case without the assistance of an attorney. Once again Petersen filed neither the statement of financial affairs nor the schedules, and the mailing matrix was returned to Petersen because it was not scannable. In December, Wells Fargo filed a motion for relief from the § 362 automatic stay to which Petersen failed to respond. Relief was granted without a hearing December 31, 2002. The order allowed Wells Fargo to proceed with foreclosure and recovery of possession of the subject real property. A copy of the Court's order was served upon Petersen. Wells Fargo rescheduled a trustee's sale to be held February 25, 2003. Since the Notice of

Default was recorded, Petersen has made none of the twelve payments that have come due.

Because Petersen failed to appear at the meeting of creditors or to file the required papers, the Trustee served a Section 341 Meeting Detailed Report for Chapter 7 on Petersen noting his failure to file and to attend, and recommended dismissal, but Petersen failed to respond. Wells Fargo objected to dismissal of the case on the last date to file objections, pursuant to Local Rule 2003-1(a). At the properly scheduled and noticed hearing on the objection to dismissal, Wells Fargo appeared but Petersen did not. The Court dismissed the case[4] but retained jurisdiction for the purpose of ruling on Wells Fargo's motion to dismiss with prejudice. At the subsequent hearing on the § 109(g) motion, Petersen also failed to appear or to file any response objecting to the motion.

Creditors' Argument

These uncontroverted facts provide the basis for the argument of Wells Fargo and Fairbanks ("Creditors") that these three cases should not only be dismissed, but that the dismissal should be with prejudice to bar refiling for 180 days. The Creditors argue that the failure to make interim payments or attend the § 341 meeting constitute a willful failure to abide by an order of the court, that the debtors' actions constitute unreasonable delay that is prejudicial to creditors, evidences bad faith, and that the chapter 13 debtors have no hope, based upon past experience, of getting a case confirmed or maintaining plan payments.

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[4] Wells Fargo requested that dismissal of Petersen's case be deferred until after it had completed its scheduled foreclosure sale, but this relief was denied. Had this relief been granted, Petersen's discharge would have issued in the interim, even though none of the required documents has been filed and Petersen had never attended a meeting of creditors. Instead, the Court overruled the objection and dismissed the case but retained jurisdiction to consider Wells Fargo's motion to dismiss under § 109(g).

DISCUSSION

I. JURISDICTION AND BURDEN OF PROOF

The Court has jurisdiction over these contested matters pursuant to 28 U.S.C. §§ 1334 and 157(a). Venue in this division is proper. These are core proceedings as contemplated by 28 U.S.C. § 157(b)(2)(A).

Dismissal with prejudice is a severe sanction that should be infrequently invoked by the courts.[5] The burden is on the movant to show that the sanction is appropriate.[6] Once the movant has set forth a sufficient *prima facie case*, the burden shifts to the debtor to show that § 109(g)(1) does not apply.[7] Ultimately, the burden of persuasion lies with the Creditors to demonstrate, by a preponderance of the evidence, either that the debtors willfully failed to abide by orders of the court, or that the debtors willfully failed to appear before the court in proper prosecution of their cases.

II. DISMISSAL OF AN INDIVIDUAL DEBTOR'S BANKRUPTCY CASE

No party has objected to dismissal of these three cases or challenged that the failure of the debtors to attend the meeting of creditors, pay plan payments, or file statements and schedules, constitutes cause for dismissal. The Creditors' assertion that the debtors' actions constitute unreasonable delay that is prejudicial to creditors is well taken.

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[5] *Hall v. Vance*, 887 F.2d 1041, 1045 (10th Cir. 1989).

[6] *Montgomery v. Ryan (In re Montgomery)*, 37 F.3d 413, 416 (8th Cir. 1994) (Judge Arnold, concurring); *In re Pike*, 258 B.R. 876, 882 (Bankr. S.D.Ohio, 2001); *In re Estrella*, 257 B.R. 114, 117-118 (Bankr. D.P.R. 2000).

[7] *Estrella*, 257 B.R. at 117; *In re Basile*, 142 B.R. 930 (Bankr. D. Idaho 1992); *McIver v. Phillips (In re McIver)*, 78 B.R. 439 (D.S.C. 1987).

Bad faith is also argued as a basis for dismissal of the cases.[8] Certainly the ever escalating mortgage arrearages and the timing of the filings designed in each case to prevent the trustee's sales argues in favor of a conclusion of bad faith. In the Sink and Valenzuela cases, the apparent lack of changed circumstances such that they could successfully prosecute a Chapter 13 case adds to the argument that the cases were filed in bad faith. In Petersen's case, the total failure, twice, to file required papers or appear at the meeting of creditors is even stronger evidence of bad faith. When the Trustee filed the motion to dismiss, the burden shifted to the debtor to appear and explain his conduct. The debtor failed to do so.

The Sink and Valenzuela cases are therefore dismissed for cause under § 1307(c)(1) and (4), and an order memorializing the dismissal of Petersen's case for cause under § 707(a)(1), shall issue. The remaining issue is whether these three cases should be dismissed with prejudice to the debtors refiling, under § 109(g).

III. DISMISSAL WITH PREJUDICE

The effect of dismissal is governed by § 349(a). Unless otherwise ordered, the dismissal of a case is without prejudice and does not bar a subsequent discharge of debts that were dischargeable in the dismissed case. However, in order for an individual debtor to obtain a subsequent discharge once a case is dismissed, a debtor must file a subsequent case. Subsequent filing is governed by § 349(a) and §109(g). Section 349(a) provides that the dismissal of a bankruptcy case does not prevent the debtor from filing a subsequent petition under Title 11 except as provided in § 109(g). In the Tenth Circuit, it is only through § 109(g) that a debtor can be precluded from refiling, and then only under the conditions and time frames set forth in

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[8] *In re Durnji*, 287 B.R. 710, 713 (Bankr. S.D.Ohio 2003) (Courts have held that a lack of good faith is "cause" for the dismissal of a case).

§ 109(g).[9]

Section 109(g)(1)

Section 109(g)(1) provides

> Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if
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> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case.

A debtor's access to relief under the Bankruptcy Code is limited only to the extent that Congress has expressly chosen to limit it in the statute.[10] Therefore, a motion to dismiss that seeks to enjoin a debtor from refiling for 180 days must do more than recite that a series of prior bankruptcy filings occurred, for we know that even a series of bankruptcy filings, without more, is not prohibited by the Bankruptcy Code.[11]

Failure to Abide by an Order of the Court or Appear Before the Court in Proper Prosecution of the Case

The Creditors must first prove one of two things: that the debtors failed to abide by an order of the court or failed to appear before the court in proper prosecution of the case. The first clause relates to the debtor's failure to abide by a specific order that may be issued in the case.

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[9] *Frieouf v. United States (In re Frieouf)*, 938 F.2d 1099, 1103 (10th Cir. 1991) (§ 349(a) limited by § 109(g)); *but see Casse v. Key Bank Nat'l Assoc. (In re Casse)*, 198 F.3d 327 (2d Cir. 1999) (discussing the split in the Circuits on this issue and disagreeing with *Frieouf*, characterized as the minority position, on all points); *Colonial Auto Center v. Tomlin (In re Tomlin)*, 105 F.3d 933, 938 (4th Cir. 1997) (§ 349 was never intended to limit the bankruptcy Court's ability to impose a permanent bar to discharge).

[10] *Fed. Communications Comm'n v. NextWave Personal Communications, Inc.*, 123 S.Ct. 832, 839 (2003) (courts must look to the specific language of the Bankruptcy Code rather than what the parties believe it ought to say).

[11] *Johnson v. Home State Bank*, 501 U.S. 78, 87-88 (1991).

Without a violated order, application of the statute becomes problematic. In *In re Fulton*,[12] cited by the Creditors, the Court concluded that the notice of the § 341 meeting sent by the Clerk of Court that required the debtors to attend was equivalent to an order of the Court (citing Local Rule 13(d)). Local Rule 13(d) provided that the Clerk of Court could imprint the *Court's* facsimile signature upon certain documents and was similar to current Local Rule 5003-1(d).[13] At the time *Fulton* was issued, Standing Order 19 provided the procedure, now found in Local Rules 2003-1(a) and 2083-1(a) and (b), for dismissal of a case where the debtor failed to file documents, appear at a §341 meeting or make Chapter 13 plan payments. Therefore, it appears that two court orders that are no longer used may have been implicated in the *Fulton* decision. *Fulton* is not alone in determining that failure to attend a meeting of creditors or commence making payments prompts application of § 109(g).[14] However, whether a statutory requirement such as filing papers under §§ 521 or 1321, appearing under § 343, or paying under § 1326(a)(1), or whether Local Rules promulgated under Fed. R. Bankr. P. 9029

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[12] 52 B.R. 627 (Bankr.D.Utah 1985).

[13] *Fulton* is unclear whether the notice sent to creditors by the Clerk of the Court issued over the Clerk's signature, or the imprinted facsimile signature of the Court. Prior to 1985, the Order for Meeting of Creditors and Fixing Times for Filing Objections to Discharge was issued over the name of the judge assigned to the case, and failure to appear resulted in contempt of court or dismissal of the case. The procedure for dismissal for violation of the court order was embodied in Standing Order # 19. That standing order is now found, in substance, in Local Rules 2003-(1)(a) and 2083-1(a) and (b). Official Form 9 now issues over the signature of the Clerk of Court rather than the Court.

[14] *See, Montgomery*, 37 F.3d at 414 (concluding that failure to attend a creditors meeting was a failure to obey an order of the court); *Walker v. Stanley*, 231 B.R. 343 (D. N.D.Cal. 1999) (finding that a debtors repeated failure to perform the duties under the Bankruptcy Code, including filing schedules and appearing at the meeting of creditors, constitured failure to abide by court orders); *In re Nix*, 217 B.R. 237, 238 (Bankr. W.D.Tenn. 1998) (failure to commence making payments, where standing order required such, qualified as failure to abide by an order of the court); *In re Catron*, 199 B.R. 11, 14-15 (Bankr. E.D. Va. 1996) (discussing cases requiring debtor to attend a § 341 meetings); *In re Yensen*, 187 B.R. 676, 677-78 (Bankr. D. Idaho 1995) (failure to attend a meeting of creditors constitutes the failure to abide by a court order); *In re Pappalardo*, 109 B.R. 622, 626 (Bankr.S.D.N.Y. 1990) (order contained in notice of meeting of creditors formed basis of failure to comply with order of court for purposes of § 109(g)(1)); *In re Dodge*, 86 B.R. 535, 537-38 (Bankr. S.D. Ohio 1988) (attendance at the hearing is necessary if the debtor is to complete all the steps of a bankruptcy case, and hence it seems logical to consider non- attendance as a failure to abide by an order of the court).

constitute a court order as used in § 109(g)(1),[15] need not be resolved here for the reasons set forth below.

The second clause of § 109(g)(1) relates to a much broader category of conduct covering the debtors' failure to appear before the court in proper prosecution of a case. An "appearance" is a term of art "by which one against whom suit has been commenced submits himself to the court's jurisdiction."[16] As the term is used in the Federal Rules of Civil Procedure, an appearance is more than physical presence at a hearing before a judicial officer, and includes, among other things, being represented at non-court hearings related to a case or filing papers in the case.[17] *Fulton* concluded that "the debtors' appearance and submission to examination under oath at the meeting of creditors under Section 341(a) constitutes an "appear[ance] before the court" as used in Section 109(f)(1) [now § 109(g)]."[18] Some courts,[19] however, have concluded

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[15] *Woods Constr. Co., Inc. v. Atlas Chem. Indust. Inc.*, 337 F.2d 888, 890 (10th Cir. 1964) local rules have the force and effect of law); *Grubb v. Pittsburgh Nat'l Bankr (In re Grubb)*, 169 B.R. 341, (Bankr. W.D.Pa. 1994) (when a district court acts under Fed. R. Bankr. P. 9029 to promulgate local bankruptcy rules, such rules carry the weight of a court order); *but see In re Hollis*, 150 B.R. 145 (D. Md. 1993) (stating that failure to follow a local rule does not constitute a violation of a court order).

[16] BLACK'S LAW DICTIONARY (7th Ed. 1999).

[17] *Gomes v. Williams*, 420 F.3d 1364, 1367 (10th Cir. 1970) (discussing whether an attorney's appearance representing a client at a deposition constituted an appearance in a case for purposes of Fed. R. Civ. P. 55(b)(2)). *See also Civic Center Square, Inc. v. Ford (In re Roxford Foods, Inc.)*, 12 F.3d 875, 881 (9th Cir. 1993) (concluding that a Chapter 11 Trustee had made an informal appeared in an adversary proceeding for purposes of Fed. R. Civ. P. 55(b)(2) as a result of contacts between creditor and trustee in underlying bankruptcy case); *United States v. McCoy*, 954 F.2d 1000, 1003 (5th Cir. 1992) (stating that the concept of "appearance" is not limited to those instances in which the party has made a physical appearance in court or has filed a document in the record, but can include instances where a party indicated in some way an intent to pursue a defense, for purposes of Fed. R. Civ. P. 55(b)(2)); *North Central Ill. Laborers' Dist. Counc'l. v. S.J. Groves*, 842 F.2d 164, 169-70 (7th Cir. 1988) (for Fed. R. Civ. P. 55(b)(2) purposes, "has appeared" has not been read to require the filing of responsive papers or actual in-court efforts, and may include settlement conferences or even informal phone calls).

[18] *Fulton*, 52 B.R. at 632.

[19] *In re Arena*, 81 B.R. 851, 855 (Bankr. E.D.Pa.1988) (because a meeting a creditors must be conducted out of the presence of the court, it cannot be characterized as an appearance before the court, even if attendance is necessary to properly prosecute one's bankruptcy case).

that because § 341(c) precludes the court from presiding at a meeting of creditors, a debtor's appearance at a meeting of creditors is not an "appearance before the court." In light of the broad meaning of "appearance," this interpretation construes the statute too narrowly. If any ambiguity exists as to whether Congress meant to limit "appearance" by the term "before the court," reference need only be made to Senator Hatch's comments that the amendment that is now § 109(g) was intended to render the debtor ineligible for bankruptcy relief "for failure to appear at a meeting of creditors or for failure to follow orders."[20] Failure to appear at a meeting of creditors, therefore, must fall under the second clause of § 109(g)(1) rather than the first. "Proper prosecution of a case" is not a defined phrase either, but could include, among other things, compliance with the various statutory duties the Bankruptcy Code requires the debtor to perform including but not limited to §§ 341, 521, 1304, 1321, 1322, 1326, compliance with the Federal Rules of Civil and Bankruptcy Procedure, and compliance with the Local Rules.

The second clause of § 109(g)(1) covers a broad array of responsibilities that are initiated by filing a petition, and that eventually result in the debtor obtaining the relief sought. Included in these responsibilities is that the debtor must properly prosecute the case. When a debtor fails to respond to a motion to dismiss a case because, presumably, the debtor has no cause to excuse the conduct prompting the motion, the debtor fails to properly prosecute the case. Therefore, a debtor's failure to defend a pleading that seeks the most fundamental challenge to the very existence of the case also constitutes a failure to appear before the court in proper prosecution of

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[20] 130 Cong. Rec. S8894, (daily ed. June 29, 1994), 1978 U.S.Code Cong. & Admin. News, pp. 597-98.

the case.[21]

B. Willful Conduct

Once the Creditors have identified the order the debtor has failed to abide by or how the debtor has failed to appear before the court in proper prosecution of the case, the Creditors must prove that the conduct was willful. The term "willful" applies to both clauses in subsection (1). This is shown by the parallel construction of the statute. The two clauses "to abide by orders of the court" and "to appear before the court before the court in proper prosecution of the case" are both modified by the preceding phrase "willful failure of the debtor." It has been suggested that the element of willfulness may not apply to an appearance before the court.[22] To read the first clause as modified by "willful failure of the debtor" and the second as modified only by "failure of the debtor" unreasonably strains both grammar and logic. Other courts reviewing this section have reached similar conclusions.[23]

The Tenth Circuit has not construed the term willful in the context of § 109(g), and the term is not defined in the Bankruptcy Code. "[W]hen the statutory term is undefined, that term must be given its ordinary and popularly understood meaning."[24] In its ordinary standard meaning, "willful" may be defined as "done on purpose or wittingly; purposed, deliberate,

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[21] *Arena*, 81 B.R. at 855 (concluding that though failure to defend a motion to dismiss a case is not equivalent to a voluntary motion to dismiss, a willful failure to attend the dismissal hearing could constitute a failure to properly prosecute the case).

[22] *See id.* at 855.

[23] *See, e.g., Id.* at 855; *In re Allen*, 79 B.R. 757, 758 (Bankr. W.D. Tenn. 1987); *In re Lewis*, 67 B.R. 274, 276 (Bankr. E.D.Tenn. 1986); *Fulton*, 52 B.R. at 632 (examining same statutory language under subsection (f) prior to redesignation as subsection (g) by Congress in 1986).

[24] SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47:27 (6th Ed. 2000) (citations omitted).

intentional; not accidental or casual."[25]

In this jurisdiction there may be some confusion as to the meaning of the term willful because of conflicting judicial interpretations of the word as it is used in other sections of the Bankruptcy Code, specifically in § 523(a)(6) and § 362(h). Section 523(a)(6) excepts from discharge "any debt for willful and malicious injury by the debtor to another entity or the property of the entity." The Supreme Court has narrowly interpreted the term willful in this context to limit the discharge exception to only those debts resulting from acts of the debtor akin to intentional torts.[26] The Court determined that "willful" modified the word "injury," such that nondischargeability is predicated upon deliberate or intentional injury, rather than a volitional act that results in an injury.[27] Injuries caused by negligent or reckless actions are outside the scope of § 523(a)(6).[28] In other words, an intentional act is not enough. The debtor must specifically intend to injure either a creditor or the creditor's property.[29]

Section 362(h) provides for the recovery of actual and sometimes punitive damages where "[a]n individual [is] injured by any willful violation of a stay provided by [§ 362]." In *Jardine's Prof. Collision Repair v. Gamble*,[30] the Court concluded "willful" modifies "violation

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25 OXFORD ENGLISH DICTIONARY (2nd Ed. 1989).

26 *See Kawaauhau v. Geiger*, 523 U.S. 57, 61 (1998).

27 *Id.*

28 *Id.* at 64.

29 *Mitsubishi Motors Credit of America, Inc. v. Longley, (In re Longley)*, 235 B.R. 651, 655 (10th Cir. BAP 1999).

30 232 B.R. 799 (D. Utah 1999).

of a stay" in § 362(h) in the same manner that "willful" modifies "injury" in § 523(a)(6).[31] The Court held that a violation of § 362(h) requires a deliberate or intentional *violation* of the stay.[32]

The Bankruptcy Appellate Panel for the Tenth Circuit specifically considered the application of the *Geiger* standard of willfulness, but rejected that narrow reading as inapplicable in the context of § 362(h).[33] The BAP instead adopted the broader view expounded in *INSLAW, Inc. v. United States (In re INSLAW)*:[34]

> A "willful violation" does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant's actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was "willful" or whether compensation must be awarded.[35]

The Court regarded as significant the fact that a party who willfully violates the stay has an opportunity to seek permission from the court prior to action, while determinations of willful and malicious injury under § 523(a)(6) are only made after the debtor has acted, with no opportunity to obtain a protective ruling from the court.[36]

This Court declines to adopt the analysis in *Gamble*. Section 523(a)(6) refers to "willful and malicious injury," and is essentially an overlay of tort liability theory onto a bankruptcy

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31 *Id.* at 803.

32 *Id.*

33 *See Diviney v. NationsBank of Texas*, 225 B.R. 762, 774 (10th Cir. BAP 1998).

34 83 B.R. 89 (Bankr.D.D.C. 1988) *vacated on jurisdictional grounds*, 932 F.2d 1467 (D.C. Cir. 1991).

35 *Diviney*, 225 B.R. at 774 (quoting *INSLAW*, 83 B.R. at 165).

36 *Id.*

nondischargeability action.[37] Stay violations do not involve tort issues. It is therefore reasonable to assume that the two sections use different standards for measuring what constitutes prohibited conduct. The different verbal formulas utilized in the two sections supports this conclusion ("willful and malicious injury" in § 523(a)(6) versus "willful violation" in § 362(h)). The determination that must be made on a § 109(g)(1) motion parallels that made under § 362(h). Both § 109(g) and § 362(h) relate to post-petition conduct. All parties in interest are already governed by the Bankruptcy Code and subject to the court's authority. The debtor may seek prior permission from the court to file required papers after the statutory deadline, to continue a regularly scheduled § 341 meeting, to abate Chapter 13 plan payments, or for other relief. It is in light of the immediacy of access to the imprimatur of court that the debtor's actions must be evaluated. Therefore, conduct is willful within the meaning of § 109(g)(1) when the debtor had notice of the responsibility to act, and that the debtor intentionally engaged in conduct that resulted in a failure to fulfill that responsibility.[38] This necessarily rules out accidental failures, or failures resulting from circumstances beyond the debtor's control.

IV. SECTION 109(g)(1) AS APPLIED TO SINK AND VALENZUELA

In both Sink and Valenzuela's cases, the first two bankruptcy cases were dismissed at confirmation, but the debtors actively prosecuted both cases through the confirmation hearing. Without further evidence, their actions in these two cases would not support a finding of willful failure to abide by a court order or willful failure to appear before the court in proper prosecution

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[37] *See Geiger*, 523 U.S. at 61.

[38] *Pike*, 258 B.R. at 883 (willful means deliberate or intentional); *Estrella*, 257 B.R. at 117 (willful failure requires a finding that the person, with notice of the responsibility to act, intentionally disregarded it or demonstrated plain indifference); *Walker* 231 B.R. at 347-48 (willful as used in § 109(g)(1) means deliberate or intentional); *In re Walker*, 171 B.R. 197, 203 (Bankr.E.D.Pa 1994) (debtors conduct is willful within the meaning of § 109(g)(1) if it is intentional, knowing and voluntary, as opposed to conduct that is accidental or beyond a persons control).

of a bankruptcy case. It is only their actions in the present case that serve as the basis for a § 109(g)(1) dismissal.

Sink and Valenzuela filed the required Chapter 13 documents. Sink failed to appear at first meeting of creditors and make the initial plan payment. This constitutes a failure to appear before the court in proper prosecution of the case. Valenzuela failed to make plan payments subsequent to the first meeting of creditors. This also constitutes a failure to appear before the court in proper prosecution of the case. Both debtors failed to defend against the dismissal proceedings that resulted. The Court finds that Sink and Valenzuela's failure to respond to the Trustee's motion to dismiss also constitutes a failure to appear before the court in proper prosecution of the cases.[39]

Further, neither debtor has offered any justification for that failure nor has explained the circumstances of the conduct that resulted in the motions to dismiss. The uncontroverted evidence indicates that both debtors have a history of repeated filings on the eve of foreclosure[40] and ever escalating mortgage arrearages.[41] Both debtors, because of the repeated filings, can be deemed to have a certain level of familiarity with bankruptcy proceedings and knowledge of the consequences of their failure to fulfill their responsibilities under the Bankruptcy Code. Both

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[39] Creditors filed their objections in the Valenzuela and Petersen cases on the last day to object to dismissal, and in the Sink case several weeks before the deadline. In the Valenzuela and Petersen cases, the Creditors could properly cite the failure to defend against the Trustee's Motion to Dismiss or under Local Rules 2003-1(a), as additional grounds for dismissal.

[40] *Walker*, 231 B.R. at 348 (repeated conduct strengthens the inference that the conduct was deliberate); *Pike*, 258 B.R. at 883 (a serial filer who repeatedly fails to perform the duties imposed by the Code fails to appear in proper prosecution of the case).

[41] *In re Herrera*, 194 B.R. 178, 188 (Bankr. N.D. Ill. 1996) (when a case has been filed only for the purpose of inhibiting or forestalling a foreclosure action on the debtor's assets without the intention of financial rehabilitation, the case should be dismissed as having been filed in bad faith).

debtors were served with the Trustee's pleadings seeking dismissal and were represented by counsel at the time. Therefore, the Court determines that both debtors knew of the consequences of their failure to defend and concludes that their failure to do so was intentional. Further evidentiary support that the debtors conduct was willful is found in Sink and Valenzuelas' failure to defend against the Creditors' motions to dismiss with prejudice. Accordingly, both Sink and Valenzuelas' cases will be dismissed with prejudice to refiling a voluntary bankruptcy petition under Title 11 for 180 days.

V. SECTION 109(g)(1) AS APPLIED TO CLAY PETERSEN

Creditor has moved for dismissal of Petersen's case "with prejudice pursuant to 11 U.S.C. Section 109(g)(1) and 1307(c) (sic) for the debtors'(sic) willful failure to abide by orders of the Court and delay that is prejudicial to Creditors...."[42] Section 1307(c) does not apply to Petersen, as his case was filed under Chapter 7 of the Bankruptcy Code. The Court will construe the motion as being brought under §§ 109(g)(1) and 707(a)(1).

Petersen has filed two bankruptcy petitions, the first under Chapter 13 and the present one under Chapter 7. He has not had the benefit of counsel in either case. However, he has done nothing to fulfill his responsibilities under the Bankruptcy Code. Because his prior case was dismissed for identical conduct, the Court concludes that he knew of his responsibility to act, and intentionally engaged in conduct that resulted in a failure to fulfill that responsibility. Though served with the Trustee's papers indicating that his case would be dismissed for failure to file his statement of affairs and schedules and his failure to attend the meeting of creditors, Petersen failed to defend. This conduct constitutes failure to appear before the court in proper prosecution

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[42] This sentence is identical to the one in Creditor's motion filed in the Sink case.

of the case. Further, based upon Petersen's repeated filings that frustrated the Creditors' foreclosure attempts, his failure to comply with even the most basic duties under the Bankruptcy Code, and his failure to explain in any manner his conduct, the Court concludes that his actions were knowledgeable and intentional, and therefore willful. Petersen's case will be dismissed with prejudice to refiling a voluntary bankruptcy petition under Title 11 for 180 days.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the case of Alice M Sink, 02-40042, be and hereby is **Dismissed** and that such dismissal is with prejudice to refiling a voluntary bankruptcy petition under Title 11 for 180 days, and it is further

ORDERED, that the case of Hipolito D. Valenzuela, 02-32504, be and hereby is **Dismissed** and that such dismissal is with prejudice to refiling a voluntary bankruptcy petition under Title 11 for 180 days, and it is further

ORDERED, that the case of Clay Petersen, be and hereby is **Dismissed** with prejudice to refiling a voluntary bankruptcy petition under Title 11 for 180 days.

DATED this 28th day of February, 2003.

JUDITH A. BOULDEN
United States Bankruptcy Judge

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CERTIFICATE OF MAILING

I hereby certify that I served the foregoing **MEMORANDUM DECISION and ORDERS** upon the following at the address set forth below, postage prepaid, by depositing the same in the United States Mail on the 28th day of February, 2003.

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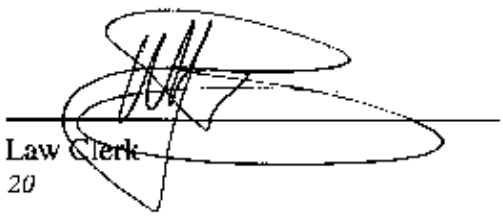

Law Clerk