The below described is SIGNED.

Dated: November 19, 2004

WILLIAM T. THURMAN
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re **Gregory A. Smith and Allison D. Smith,** **Debtors.**	**Bankruptcy Number 03-36469** **Chapter 13**

MEMORANDUM DECISION GRANTING TRUSTEE'S MOTION TO DISMISS CASE WITH PREJUDICE PURSUANT TO 11 U.S.C. § 349(a)

A hearing on the United States Trustee's Application for Default Judgment regarding his Motion to Dismiss Case with Prejudice Pursuant to 11 U.S.C. § 349(a) ("U.S. Trustee's Motion") was conducted on September 9, 2004 before the Honorable William T. Thurman in room 376, United States Courthouse, 350 South Main Street, Salt Lake City, Utah. Present at the hearing were Peter Kuhn, counsel for the U.S. Trustee, and Phillip Dew, counsel for Gregory A. Smith and Allison D. Smith ("Debtors"). Neither of the Debtors appeared. Representations were made and arguments were had thereupon. Based upon the same, the pleadings, and other court papers on file and good cause appearing, the Court makes this Memorandum Decision, which will constitute its findings of fact and conclusions of law as required by Rule 52 of the

Federal Rules of Civil Procedure.[1]

JURISDICTION

The Court has jurisdiction over the parties and subject matter of this contested matter under 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (I), and the Court has authority to enter a final order. Venue is proper in the Central Division of the District of Utah under 28 U.S.C. § 1409.

FACTS

Debtors have filed eight bankruptcy petitions over the past nine years. Debtors filed Chapter 7 petitions in 1995 and 2001; in each case they received a discharge. Debtors filed Chapter 13 petitions in 1996, 1997, 1998, 2000, 2002, and 2003.[2] The Court dismissed the Debtors' Chapter 13 petitions in 1996, 1997, 1998, 2000, and 2002 for failure to make plan payments. As of March 26, 2004, the filing date of the U.S. Trustee's Motion, Debtors were five months delinquent on their Plan payments. No pre-confirmation payments have been made to the Chapter 13 Trustee except the initial Plan payment made at the first meeting of creditors. The IRS objected to the Debtors' Chapter 13 plan because it has a secured claim of $2,119 and priority claim of $2,679.28.[3]

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[1] Incorporated into the Bankruptcy Code via Bankruptcy Rule 7052.

[2] On September 26, 2003 Debtors filed the current case, number 03-36469.

[3] The IRS also objected to the Debtors' Plan confirmation in their 1997, 1998, and 2002 cases for listing an incorrect amount owing to the IRS and for failing to file their income tax returns.

LEGAL STANDARD

Section 349(a) of the Bankruptcy Code states that:

> *Unless the court, for cause, orders otherwise*, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.[4]

Accordingly, the Court must find cause to bar the discharge of currently scheduled debts in any future case filed by the Debtors.

DISCUSSION

On March 25, 2004, the U.S. Trustee moved to dismiss the Debtors' current case with prejudice and bar the discharge of scheduled debts in this case to any case filed in the future. The U.S. Trustee argues that the Debtors' serial filings, coupled with dismissals in each Chapter 13 case for failure to make Plan payments, are evidence that the Debtors filed the current petition in bad faith.

The History of § 349(a)

The evolution of the Bankruptcy Code indicates that § 349(a) was Congress' attempt in 1938 to limit dismissals that would bar future discharge of scheduled debts to situations where the debtor exhibited egregious conduct. Prior to 1938, courts barred discharge of debts from dismissed bankruptcies regardless of whether the court dismissed with prejudice. The 1898

[4] 11 U.S.C. § 349(a) (2004) (emphasis added).

Bankruptcy Act provided:

> Any person may, after the expiration of one month and within twelve months subsequent to being adjudged a bankrupt, file an application for a discharge in the court of bankruptcy in which the proceedings are pending; if it shall be made to appear to the judge that the bankrupt was unavoidably prevented from filing it within such time, it may be filed within but not after the expiration of the next six months.[5]

As such, many debtors were barred from discharge unless they had the wherewithal to apply for such discharge within the limited time period imposed by the statute of limitations. In 1938, however, Congress passed the Chandler Act, which amended the 1898 Bankruptcy Act. The Chandler Act provided that "[t]he adjudication of any person, except a corporation, shall operate as an application for a discharge."[6] The Chandler Act eliminated any statute of limitations that would bar discharge of provable debts from a dismissed action.

Nevertheless, courts continued to deny discharge of provable debts from a previously dismissed bankruptcy. For example, while the court in Colwell v. Epstein recognized that the Chandler Act "destroyed [the statute of limitations] argument stressed in the cases prior to the amendment,"[7] it also reasoned that the doctrine of res judicata barred discharge because "[the] House Report on the 1938 Amendment contains no mention of the case law which has grown up under the Bankruptcy Act, and in no way revealed any intention on the part of Congress to overrule those decisions by legislation on its part."[8]

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[5] Section 14 of the Bankruptcy Statute of 1898.

[6] 1938 Bankruptcy Act § 14.

[7] 142 F.2d 138, 139 (1st Cir. 1944).

[8] Id.

Throughout the 1940s and 1950s, courts applied the doctrine of res judicata to bar discharge of debts from dismissed actions. In addition to the res judicata rationale, courts reasoned that discharge of dismissed debts was unfair to creditors. Then, in 1978, Congress added § 349(a) to the Bankruptcy Code. Section 349(a) specifically provides that a dismissal without prejudice does not bar discharge of debts in a subsequent action. Presumably, Congress enacted this provision to repeal the judge-made doctrine of res judicata barring discharge of debts from every dismissed action. One court has surmised that the statute "establishes a general rule that the dismissal of any bankruptcy case is usually without prejudice to the Debtor's right to file a subsequent petition and to receive a discharge. It does, however, give the court discretion to deny the Debtor the benefit of this general rule, if there is a reason to do so."[9]

The Tenth Circuit Court of Appeals ("Tenth Circuit") employs a "plain meaning" statutory interpretation standard to construe the meaning and purpose of § 349(a). "The task of interpreting § 349(a) 'begins where all such inquiries must begin: with the language of the statute itself . . . . In this case, it is also where the inquiry ends, 'for where, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.'"[10] The Tenth Circuit found that § 349(a) "consists of two clauses, separated by a semicolon and addressing two distinct concerns: (1) the discharge in a later case of the particular debts dischargeable in the case dismissed and (2) the much different matter of the filing of any subsequent bankruptcy petition."[11]

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[9] In re Smith, 133 B.R. 467, 469 (Bankr. N.D. Ind. 1991).

[10] In re Frieouf v. U.S., 938 F.2d 1099, 1102-1103.

[11] Frieouf, 938 F.2d at 1103.

Application of § 349(a) to the Present Case:

Section 349(a) allows courts to consider the res judicata effect of "[a] dismissal with prejudice [as] a complete adjudication of the issues presented by the pleadings and a bar to further action between the parties."[12] The party seeking dismissal with prejudice bears the burden of proving that the circumstances merit a dismissal with prejudice.[13] Under § 349(a), a court must find "cause" to dismiss a bankruptcy case with prejudice and bar future discharge of the petition's scheduled debts.[14] While "'[c]ause' under §349 has not been defined by the Code, [a] review of the case law indicates that 'egregious' conduct must be present, [and] a finding of bad faith [that prejudices creditors] constitutes such egregiousness."[15] The Tenth Circuit has rejected a per se bad faith standard, holding instead that bad faith is to be judged by the totality of the circumstances on a case by case basis.[16] In Flygare, the court found that the proper inquiry is whether the plan constitutes an abuse of the provisions, purpose, or spirit of Chapter 13.[17] The stated legislative purpose of Chapter 13 was to achieve broad, extensive, and unqualified

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[12] Leavitt v. Soto, 209 B.R. 935, 939 (B.A.P. 9th Cir. 1997).

[13] In Matter of Hall, 258 B.R. 908, 911 (Bankr. N.D. Indiana 2001) (citations omitted).

[14] 11 U.S.C. 349(a).

[15] Frieouf, 938 F.2d at 1104 (citation omitted) ("a prejudicial dismissal under section 349(a) must be premised on bad faith conduct that is prejudicial to a creditor . . . section 349(a) gives bankruptcy courts discretion to determine whether there is 'cause' to dismiss a case with prejudice . . . section 349(a) only denies a debtor future discharge of debts dischargeable in that particular case").

[16] Flygare v. Boulden, 709 F.2d 1344, 1347-78 (10th Cir. 1983); In re Gier, 986 F.2d 1326 (10th Cir. 1993).

[17] Flygare, 709 F.2d at 1347.

discharge of debts for a working debtor.[18] In addition, the Flygare Court set forth eleven factors to be considered, among other relevant circumstances, in determining whether the Chapter 13 plan was filed in good faith. These factors include:

(1) the amount of the proposed payments and the amount of the debtor's surplus;

(2) the debtor's employment history, ability to earn and likelihood of future increases in income;

(3) the probable or expected duration of the plan;

(4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;

(5) the extent of preferential treatment between classes of creditors;

(6) the extent to which secured claims are modified;

(7) the type of debt sought to be discharged and whether any such debt is non-dischargeable in Chapter 7;

(8) the existence of special circumstances such as inordinate medical expenses;

(9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

(10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and

(11) the burden which the plan's administration would place upon the Trustee.[19]

Six of these eleven enumerated factors appear to have bearing on the totality of circumstances surrounding this case. The Court believes the good faith tests of Flygare should be applicable under § 349(a). The Court will address each one.

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[18] In re Rasmussen, 888 F.2d at 705 (10th Cir. 1989).

[19] Flygare, 709 F.2d at 1347-48, cited with approval in In re Young, 237 F.3d 1168, 1174-75 (10th Cir. 2001).

A. The Amount of the Proposed Payments and the Amount of the Debtor's Surplus

and

B. The Accuracy of the Plan's Statements of Debts, Expenses, and Percentage Repayment of Unsecured Debt and Whether Any Inaccuracies Are an Attempt to Mislead the Court

The Court has reviewed the Statements and Schedules filed in the Debtors' eight bankruptcy proceedings, and has found significant inconsistencies. The following is a non-exhaustive list of such discrepancies:

1. In their 2002 case, Debtors stated they owned a 1991 Pontiac 6000 with fair market value equal to $790. In their 2003 case, Debtors stated they owned a 1991 Pontiac 6000 (presumably the same car) with fair market value equal to $3,900.
2. In their 2002 case, Debtors' auto insurance was listed at $77 per month. In their 2003 case the auto insurance was listed at $178 per month.
3. From 1997 to 2001, Debtors did not list any monthly expenditures for Charitable Contributions in their Schedule J. In their 2002 case, however, Debtors claimed to give $288 in monthly Charitable Contributions. In their current 2003 case, however, Debtors reverted back to not listing any expenditures for Charitable Contributions.
4. From 1997 to 2000, Debtors did not list any monthly expenditures for Recreation. For 2001 and each subsequent case, Debtors listed $50 or $100 each month for Recreation.
5. In their 2002 case, Debtors' Transportation costs were listed as $150 per month. In their 2003 case, Debtors' Transportation costs doubled to $300 per month.
6. The Schedule I's filed in 2000 and 2001 by the Debtors showing their income are identical, with one exception. The Payroll Taxes and Social Security deductions listed

for 2000 totaled $475, while the same line item totaled $600 in 2001.

In addition, the Debtors appear to be confused about their income, depending on which year they state it. The following chart details the amount of income the Debtors stated in their Statements, which varied by year.

Year in Question	Income As Stated in 2000	Income As Stated in 2001	Income As Stated in 2002	Income As Stated in 2003
1999	$18,000.00	$25,000.00		
2000		$26,000.00	$23,000.00	
2001			$15,470.00	$28,000.00

It appears that the Debtors are manipulating the numbers in their budgets to decrease plan payments and increase undetected disposable income. Schedules should be true reflections of Debtors income and expenditures in order for their Plan to be proposed in good faith.[20] Consequently, the Court finds that the inaccuracy of the Debtors' Statements and Schedules and the manipulated Amount of the Proposed Plan Payments are evidence that the Debtors' Plan has not been proposed in good faith.

C. The Debtors' Employment History, Ability to Earn, and Likelihood of Future Increases in Income

Because each of the Debtors' prior Chapter 13 cases have been dismissed for failure to make Plan payments, the Court believes this factor is vital to a showing of good faith. If the Debtors do not have a steady source of income they cannot make their Plan payments, despite

[20] See In re Sorrell, No. 02-28611, slip op. At 14 (D. Utah Nov. 1, 2002).

their honest desires. As set forth below, the Debtors' employment history[21] is unstable, and shows that neither of the Debtors have kept a job for longer than one year since 1998.

	Gregory Smith	Alison Smith
1997	Stocker–8 months	Nursing Assistant--2 months
1998	Stocker/Press Helper–2 years 3 months	Homemaker
2000	Load Builder--3 months	Assistant Manager--3 months
2001	Load Builder--3 months	Assistant Manager--3 months
2002	Ascettling–11 months	Customer Service--7 months
2003	Dairy--1 year/ Lube Tech--just started	Self-employed Daycare--just started

While the Court understands that the economy is still recuperating and that lay-offs are not necessarily the fault of the employee, the Debtors still have a duty under the Bankruptcy Code to maintain employment to enable themselves to make regular monthly payments. The Court finds no evidence that the Debtors have any more job security in their current case than in their previous filings. Accordingly, this factor weighs against the Debtors under the totality of the circumstances.

D . The Type of Debt Sought to Be Discharged and Whether Any Such Debt Is Non-dischargeable in Chapter 7

The following is a synopsis of the Debtors' Scheduled Debts. The Court notes that the Debtors incurred $8,254 in unsecured debt in the year between their Chapter 7 discharge in 2001 and the filing of their next Chapter 13 petition in 2002.

[21] As stated in their Schedule I filed in each individual case.

	Secured	Priority	Unsecured
1997	$15,558.00	$1,200.00	$13,950.00
1998	$0.00	$2,585.00	$15,760.00
2000	$0.00	$2,585.00	$16,856.00
2001 (*Chapter 7)	$4,200.00	$2,585.00	$21,930.00
2002	$3,200.00	$3,034.00	$8,254.00
2003	$9,099.00	$5,567.00	$11,089.00

The escalating amounts of unsecured debt is troubling to the Court because these Debtors continued to accrue debt while failing to make their Plan payments for years. While it is not the Court's place to dictate every aspect of the Debtors' lifestyle, the Court finds that the Debtors have the responsibility to maintain reasonable spending habits when requesting the extraordinary relief granted under the Bankruptcy Code. Accordingly, this factor too cuts against the Debtor's burden of showing that the plan was proposed in good faith.

E . The Frequency with Which the Debtor Has Sought Relief under the Bankruptcy Reform Act

As stated previously, Debtors have filed eight bankruptcy petitions over the past nine years. Debtors filed petitions in 1995, 1996, 1997, 1998, 2000, 2001, 2002, and 2003. While serial filings are not per se bad faith in the Tenth Circuit, the Court finds that this factor still weighs against the Debtors under the totality of the circumstances.

F . The Motivation and Sincerity of the Debtor in Seeking Chapter 13 Relief

Debtors' first petition was filed in 1995 under Chapter 7. Debtors then spent the next six years in and out of Chapter 13 bankruptcies, ultimately having each one dismissed for failing to make Plan payments. Once the six year statute of limitation had expired, Debtors filed another Chapter 7 petition in 2001. One year after receiving their discharge, Debtors were back in court,

filing their fifth Chapter 13 case. Four months after having that case dismissed for failing to make Plan payments, the Debtors filed this current Chapter 13 petition. And now, once again, the case has been dismissed for failure to make Plan payments. The Court determines that the Debtor's primary motivation in filing this Chapter 13 case was to impose the automatic stay to prevent having to pay creditors ,without a corresponding good faith intention of proposing and consummating a Chapter 13 Plan, while calculatedly waiting for the six years to run until they could file their next Chapter 7 petition.

CONCLUSION

Based upon the foregoing, the Court concludes that the Debtors' Plan was filed in bad faith. Accordingly, the United States Trustee's Motion to Dismiss with Prejudice Pursuant to 11 U.S.C. § 349(a) should be granted. Debtors' debts scheduled in the current bankruptcy petition should be barred from future discharge. A separate order will follow.

END OF DOCUMENT

Service of the foregoing **MEMORANDUM DECISION GRANTING TRUSTEE'S MOTION TO DISMISS CASE WITH PREJUDICE PURSUANT TO 11 U.S.C. § 349(a)** will be effected through the Bankruptcy Noticing Center to each party listed below.

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