

1 CERTIFIED FOR PUBLICATION

2  
3 IN THE UNITED STATES DISTRICT COURT

4  
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA

6 JANET AND ROBERT C. WALKER,

No. C-98-20966-JW

7 Appellants,

**ORDER AFFIRMING BANKRUPTCY  
COURT'S ORDER; ORDER DECLARING  
APPELLANTS VEXATIOUS LITIGANTS**

8 v.

9 LINDA EKSTROM STANLEY, UNITED  
10 STATES TRUSTEE,

[Docket No. 2]

11 Appellee.  
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12  
13 I. INTRODUCTION

14 Robert Walker and Janet Walker, ("Debtors") appeal an order of Bankruptcy Judge James R.  
15 Grube, which dismissed their bankruptcy with prejudice. The appeal raises two issues: (1) whether  
16 Judge Grube properly dismissed Debtors' bankruptcy petition with prejudice; and (2) whether Judge  
17 Grube abused his discretion in denying Debtors' request to continue the hearing to dismiss with prejudice  
18 so that they could retain counsel. For reasons set forth in this order, the Court: (1) affirms the  
19 Bankruptcy Court's ruling that Debtors' ninth petition for bankruptcy was filed in bad faith and (2) finds  
20 that Judge Grube did not abuse his discretion in denying Debtors' request to continue the hearing to  
21 dismiss with prejudice so that they could retain counsel.

22 The consideration of this appeal brought to the Court's attention that the Debtors' had filed  
23 numerous petitions, which were never fully prosecuted. On January 25, 1999, the Court ordered the  
24 Debtors to show cause why they should not be declared vexatious litigants. For reasons set forth in this  
25 order, the Court declares Debtors vexatious litigants and places restrictions on their access to Bankruptcy  
26 Courts.

27 II. BACKGROUND

28 This appeal involves ten petitions for bankruptcy filed by Debtors. On March 2, 1998, the

1 Debtors filed their ninth petition for bankruptcy, the bankruptcy at issue in this case. On June 30,  
2 1998, Judge Grube dismissed Debtors' ninth bankruptcy with prejudice which barred the Debtors  
3 from filing further bankruptcy petitions for a period of 180 days and barred Debtors from seeking  
4 discharge of their existing debts for two years. The Walkers appeal Judge Grube's order.

5 Since 1991, Debtors have filed ten bankruptcies, individually or jointly. Nine of the ten  
6 bankruptcies were dismissed for failure to comply with bankruptcy requirements or failure to attend  
7 the scheduled section 341 meeting of creditors. The tenth bankruptcy is pending the outcome of this  
8 appeal.

9 The Debtors stated on the record that they filed at least three bankruptcy cases to avoid  
10 garnishment of Janet Walker's wages. In addition, Bank of America, holder of the deed of trust to  
11 Debtors' house, objected to Debtors' most recent Chapter 13 plan because the Debtors had not made  
12 payments on pre-petition arrears in any of the prior bankruptcy cases. That is, no payments were  
13 made on the Note from April, 1995 to July, 1996 even though a Chapter 13 case was filed on  
14 October 2, 1995 and another Chapter 13 case was filed on May 23, 1996. Furthermore, the City of  
15 Santa Clara believes that at least seven of the bankruptcies since 1994 were filed in response to the  
16 City's efforts to collect utility charges which were 90 days or more overdue.

17 With respect to the ninth petition for bankruptcy, the Debtors failed to appear at the section  
18 341 meeting of creditors. The case was then dismissed for failure to file completed schedules. This  
19 dismissal was not noticed to the standing trustee until May 11, 1998 and the United States Trustee  
20 ("UST") on May 29, 1998. Before receiving notice of the dismissal, the UST filed a motion to  
21 dismiss the Chapter 7 petition with prejudice. On May 28, 1998, the UST filed an ex parte motion to  
22 vacate the order dismissing the Chapter 7 case. Judge Grube granted the UST's motion and the case  
23 was reopened on June 3, 1998. A hearing took place on June 30, 1998 at 2:00 p.m. and Robert  
24 Walker was present. During the hearing, Debtors requested a continuance of the proceeding to allow  
25 them to retain counsel. Judge Grube denied Debtors' request and granted the UST's motion to  
26 dismiss with prejudice which barred the Debtors from filing further cases for a period of 180 days  
27 and barred Debtors from seeking discharge of their existing debts for two years. On June 30, 1998 at  
28 1:59 p.m., one minute before the scheduled hearing on the UST's motion, the Debtors filed their

1 tenth petition for bankruptcy. That bankruptcy is also pending.

2 The order dismissing the Debtors' case with prejudice was entered on July 8, 1998. The  
3 Debtors filed a timely notice of appeal on July 14, 1998. The Debtors argue that Judge Grube erred  
4 in concluding that the Walkers filed their bankruptcy in bad faith and that Judge Grube abused his  
5 discretion when he denied Debtors' request to continue the hearing to afford them an opportunity to  
6 retain counsel.

### 7 III. LEGAL STANDARD

8 Rule 8013 of the Federal Rules of Bankruptcy provides that the district court "may affirm,  
9 modify, or reverse a Bankruptcy Court's judgment, order, or decree or remand with instructions for  
10 further proceedings." A Bankruptcy Court's dismissal of a case is reviewed for an abuse of  
11 discretion. In re Leavitt, 209 B.R. 935, 937 (9th Cir. 1997) (citing In re Marsch, 36 F.3d 825, 828  
12 (9th Cir. 1994)). The factual determinations of the Bankruptcy Court are subject to the clearly  
13 erroneous standard, while its conclusions of law are subject to de novo review. In re Comer, 723  
14 F.2d 737, 739 (9th Cir. 1984).

### 15 IV. DISCUSSION

#### 16 A. Dismissal of Bankruptcy

17 Under 11 U.S.C. section 109 (g)(1), "no individual . . . may be a debtor under this title who  
18 has been a debtor in a case pending under this title at any time in the preceding 180 days if-- (1) the  
19 case was dismissed by the court for willful failure of the debtor[s] to abide by orders of the court, or  
20 to appear before the court in proper prosecution of the case. . . ." 11 U.S.C. § 109 (g)(1). In the case  
21 at bar, Debtors filed their eighth petition for bankruptcy on October 29, 1997. The Debtors failed to  
22 appear at a mandatory 11 U.S.C. section 341 meeting of creditors ("341 meeting of creditors"). The  
23 meeting of creditors was continued, and again the Debtors failed to appear. Upon the trustee's  
24 request, the Bankruptcy Court dismissed the case on February 6, 1998. Debtors filed this petition  
25 for bankruptcy, their ninth such petition, on March 2, 1998 in violation of section 109(g)(1) because  
26 it was filed only 24 days after the previous petition was dismissed, well within 180 days after the  
27 previous case was dismissed for failure to abide by a court order.

28 Because section 109(g)(1) prohibits a debtor relief under the Bankruptcy Code, the debtor

1 must have acted "willfully." Although "willful" is not defined in the bankruptcy code, courts  
2 interpret willful to mean "deliberate or intentional." In re Herrera, 194 B.R. 178, 188 (N.D. Ill 1996).  
3 "[A] mere failure to make a payment under a Chapter 13 plan or failure to appear at the first meeting  
4 or a court hearing, will not, in itself, be sufficient to sustain a finding of willful conduct." Id. at 189  
5 (quoting In re Nelkovski, 46 B.R. 542 (Bankr.N.D.Ill. 1985)). However, a court may

6 construe repeated failure to appear or lack of diligence as willful conduct. Repeated  
7 conduct strengthens the inference that the conduct was deliberate. Additionally, the  
8 court will infer from a pattern of dismissals and re-filing in unchanged circumstances  
9 willful failure to abide by orders of the court and an abuse of the bankruptcy process  
10 which this amendment was designed to prevent. Id. (quoting In re Nelkovski, 46 B.R.  
11 542, 545 (N.D.Ill. 1985)).

12 In the instant case, Debtors have filed nine petitions for bankruptcy without fully prosecuting  
13 any one of the cases. Although there is no express statutory prohibition against filing successive or  
14 serial petitions for bankruptcy, such conduct may be evidence of bad faith. Tsafaroff v. Taylor, 884  
15 F.2d 478 (9th Cir. 1989). In three cases, 91-53761, 94-32134, 97-59161, debtors failed to appear at  
16 section 341 meeting of creditors. In three other cases, 95-56439, 97-50898, 98-51561, Debtors failed  
17 to appear at the first meeting of creditors. In addition, Debtors failed to make payments under  
18 previous Chapter 13 plans, failed to file completed schedules and failed to comply with court orders.  
19 The Walkers' circumstances appear unchanged because their bankruptcy petitions stem from the  
20 same basic facts and circumstances. Moreover, petitions admitted that three of their petitions were  
21 filed to prevent one creditor from garnishing Janet Walker's wages.

22 Because appellants repeatedly failed to perform their duties under the Bankruptcy Code, they  
23 willfully failed to abide by the Bankruptcy Court's orders. Therefore, the Debtors were in violation  
24 of section 109(g)(1), and the Bankruptcy Court properly dismissed the case.

#### 25 B. Dismissal of the Bankruptcy with Prejudice

26 On July 8, 1998, Judge Grube dismissed Debtors' ninth petition for bankruptcy with prejudice  
27 which barred Debtors from filing further bankruptcy petitions for a period of 180 days and barred  
28 Debtors from seeking discharge of their existing debts for two years. The first part of Judge Grube's  
order is moot because 180 days has elapsed. The second part of Judge Grube's order barring Debtors  
from seeking discharge of their existing debts for two years is not moot.

1 A court may, with cause, dismiss a case with prejudice and "bar the discharge in a later case. .  
2 . of debts that were dischargeable in the case dismissed." 11 U.S.C § 349(a); see also In re Leavitt,  
3 209 B.R. 935 (9th Cir. 1997) (stating that section 349 "expressly grants a bankruptcy court the  
4 authority to 'dismiss the case with prejudice thereby preventing the debtor from obtaining a discharge  
5 with regard to the debts existing at the time of the dismissed case, at least for some period of time."  
6 (citing 3 Collier on Bankruptcy § 349.01, at 349-2-3 (15th ed. 1997))). In order to have cause, the  
7 debtors conduct must have been "egregious;" a finding of bad faith constitutes egregious behavior.  
8 Leavitt 209 B.R. at 939. A Bankruptcy Court may dismiss a case with prejudice in order "to punish  
9 abusive or bad faith filing." In re Leavitt, 209 B.R. at 939 (quoting In re Walker, 102 B.R. 612, 614  
10 (Bankr.N.D.Ohio 1989)); see also 11 U.S.C. §§ 109, 349(a). In determining whether bad faith is  
11 present, the court should apply to the "totality of the circumstances test." In re Leavitt, 209 B.R. at  
12 939 (citing In re Eisen, 14 F.3d at 469, 470 (9th Cir. 1994)).

13 In determining whether bad faith exists, the Ninth Circuit requires a judge to "ask whether the  
14 debtor 'misrepresented facts in his [petition or] plan, unfairly manipulated the Bankruptcy Code, or  
15 an otherwise [filed] his . . . [petition or] plan in an inequitable manner." In re Eisen 14 F.3d at 470  
16 (quoting In re Nash, 765 F.2d 1410, 1415 (9th Cir.1985)). "A debtor's history of filings and  
17 dismissals is relevant." In re Eisen 14 F.3d at 470 (quoting In re Chinichian, 784 F.2d 1440, 1445-46  
18 (9th Cir.1986)). In evaluating a debtor's history of filings and dismissals, it is useful to consider five  
19 factors: "(1) the time between the prior case and the present one; (2) whether the second case was  
20 filed to obtain the favorable treatment afforded by the automatic stay; (3) the effort made to comply  
21 with the prior case plan; (4) the fact that Congress intended the debtor to achieve its goals in a single  
22 case; (5) any other facts the court finds relevant." In re Hureta, 137 B.R. 356, 367 (B.R. CD  
23 Cal.1992). Although this is not an exclusive list, it is helpful to determine whether a serial  
24 bankruptcy petition was filed in bad faith.

25 In the present case, the Debtors have filed one bankruptcy after the other. Within six years,  
26 Debtors have filed ten petitions for bankruptcy. More significantly, nine of those petitions were filed  
27 in a period of four years, May 1994 to June 1998. Debtors did not fully prosecute any of their  
28 petitions for bankruptcy. The petition that is the subject of this appeal was filed only twenty-four

1 days after the previous petition was dismissed. Furthermore, within a 19-month period, Debtors filed  
2 four Chapter 13 petitions with no more than five months and as few as 49 days between filings.

3 Debtors also stated on the record before the Bankruptcy Court and this Court that they filed at  
4 least three petitions to obtain favorable treatment afforded by the automatic stay because they wanted  
5 to prevent the same creditor from garnishing Janet Walker's wages. In addition, Bank of America  
6 received no payments and was prevented from collecting on their Note from April 1995 to July 1996  
7 despite Debtors' Chapter 13 bankruptcy petitions. Furthermore, the City of Santa Clara believes that  
8 the Debtors filed at least seven bankruptcies to prevent the City from shutting off their utilities for  
9 failure to pay for the services provided. Whether the City's belief is correct is difficult to determine,  
10 but it is certain that the effect of Debtors' serial filings delayed the City's exercise of their rights and  
11 remedies.

12 Furthermore, Debtors have not made an effort to comply with the previous bankruptcy  
13 petitions. All eight prior bankruptcy petitions were dismissed; three cases were dismissed for failure  
14 to appear at an section 341 meeting of creditors or a hearing regarding a Chapter 13 plan. In three  
15 other cases Debtors failed to appear at the initial meeting of creditors. Debtors also failed to make  
16 payments under one of their Chapter 13 plans which resulted in the dismissal of the bankruptcy.  
17 Debtors also failed to comply with court orders, file appropriate papers and confirm Chapter 13  
18 plans.

19 The Debtors are clearly abusing the system which was designed to allow debtors to achieve  
20 their goal in a single case. The Bankruptcy Court's record indicates that the Debtors' ninth petition  
21 was dismissed with prejudice to prevent the Debtors from further abusing the bankruptcy system.  
22 Since the record supports the conclusion that the Debtors abused the system and filed the bankruptcy  
23 petition in bad faith, the Bankruptcy Court's June 30, 1998 order dismissing the case with prejudice  
24 is affirmed.

### 25 C. Bankruptcy Court's Abuse of Discretion

26 The Walkers argue that the Bankruptcy Court abused its discretion by denying Debtors  
27 request to continue the motion so that they could retain legal counsel. Under Bankruptcy Rule  
28 2002(a)(4), a Bankruptcy Court is required to give the debtors at least 20 days notice by mail.

1 Debtors had more than 20 days notice because on June 1, 1998, Debtors were served with notice of  
2 the June 30, 1998 hearing on the UST's motion to dismiss the Chapter 7 case with prejudice. Despite  
3 receiving adequate notice, Debtors failed to either file a timely opposition to the UST's motion or  
4 retain counsel for the proceeding. Furthermore, despite Debtors' claim that they were unaware of the  
5 hearing, Debtors appeared at the hearing with a witness. The Bankruptcy Court afforded the Debtors  
6 an opportunity to speak at the hearing. Where the Bankruptcy Court gave proper notice of the  
7 hearing but Debtors choose to appear without counsel and where Debtors had an opportunity to  
8 speak at the hearing, the Bankruptcy Court did not abuse its discretion by denying Debtors' request  
9 for a continuance to obtain counsel.

#### 10 D. Vexatious Litigant

##### 11 1. Debtors as Vexatious Litigants

12 A district court has power under the All Writs Act, 28 U.S.C. § 1651(a), to enjoin litigants  
13 who abuse the court system. Tripati v. Beaman, 878 F.2d 351 (10th Cir. 1989); In re Oliver, 682  
14 F.2d 443, 445 (3rd Cir. 1982) (scope of All Writs Act includes district court's issuance of order  
15 restricting filing of meritless cases); In re Hartford Textile Corp., 681 F.2d 895, 897 (2nd Cir. 1982)  
16 (Section 1651(a) empowers courts to give injunctive relief against vexatious litigant). Furthermore,  
17 "[t]here is strong precedent establishing the inherent power of federal courts to regulate the activities  
18 of abusive litigants by imposing carefully tailored restrictions under the appropriate circumstances."  
19 Tripati, 878 F.2d at 352. "[E]ven onerous conditions' may be imposed upon a litigant as long as  
20 they are designed to assist the district court in curbing the particular abusive behavior involved." Id.  
21 (citing Carter v. United States, 733 F.2d 735, 737 (10th Cir. 1984)). However, the conditions cannot  
22 be so burdensome as to deny a litigant meaningful access to the courts. Tripati, 878 F.2d at 352.

23 In the present case, the UST presented substantial documentation establishing that the  
24 Debtors are vexatious litigants. Debtors filed nine petitions in the last four years in addition to a  
25 Chapter 13 petition that was filed in 1991. All of Debtors' petitions for bankruptcy appear to arise  
26 from the same basic facts and circumstances. The cases and there status are as follows:

27 1. Chapter 13 Robert and Janet Walker, 91-53761, filed 6/21/91 dismissed on 11/7/91 for  
28 failure to appear at hearing regarding Chapter 13 plan;

- 1           2. Chapter 7, Robert Walker, 94-32134, filed 5/25/94 dismissed on 10/31/94 for failure to  
2 appear at 341 meeting of creditors;
- 3           3. Chapter 13, Robert and Janet Walker, 94-34228, filed 11/3/94 dismissed on 1/17/95 for  
4 failure to comply with court order;
- 5           4. Chapter 13, Robert and Janet Walker, 95-53020, filed 5/11/95 dismissed on 6/21/95 for  
6 failure to file required papers;
- 7           5. Chapter 13, Robert and Janet Walker, 95-56439, filed 10/2/95 dismissed on 12/11/95  
8 trustee's motion;
- 9           6. Chapter 13, Robert and Janet Walker, 96-53882, filed 5/23/96 dismissed on 12/16/96 no  
10 confirmed plan;
- 11          7. Chapter 13, Janet Walker, 97-50898, filed 2/3/97 dismissed 10/6/97 for failure to  
12 prosecute or make plan payments;
- 13          8. Chapter 7, Robert and Janet Walker, 97-59161, filed 10/29/97 dismissed on 2/6/98 for  
14 failure to appear at 341 meeting of creditors;
- 15          9. Chapter 7, Robert and Janet Walker, 98-51561, filed 3/2/98 dismissed on 7/8/98 with  
16 prejudice (originally dismissed for failure to file completed schedules), pending;
- 17          10. Chapter 7, Robert and Janet Walker, 98-55249, filed 6/30/98, pending.

18 Eight of the ten cases were dismissed because of Debtors' failure to prosecute; the other two are  
19 pending. The case at issue here was originally dismissed because Debtors failed to file completed  
20 schedules. Case number 98-55249, Debtors' tenth bankruptcy, is pending because it was filed one  
21 minute before Judge Grube's hearing to dismiss case number 98-51561 with prejudice.

22           The large number of bankruptcy petitions initiated by the Debtors suggests that the Debtors  
23 are abusing the bankruptcy system without gumption. Furthermore, the number of dismissals for  
24 failure to prosecute also supports the conclusion that the Debtors are abusing the system.  
25 Accordingly, the Court declares Debtors vexatious litigants.

## 26                   2. Debtors Future Access to Bankruptcy Courts

27           The court should consider six factors to determine whether or not to restrict vexatious  
28 litigants future access to the Bankruptcy Court: "(1) the litigant's history of litigation and in particular

1 whether it entailed vexatious, harassing or duplicative lawsuits; (2) the litigant's motive in pursuing  
2 the litigation . . . (3) whether the litigant is represented by counsel; (4) whether the litigant has  
3 caused needless expense to other parties . . . or has posed an unnecessary burden on the courts and  
4 their personnel; and (5) whether other sanctions would be adequate to protect the courts and other  
5 parties." See Safir v. United States Lines, Inc., et. al., 792 F.2d 19, 23 (2nd Cir. 1986). The final and  
6 ultimate factor is "whether a litigant who has a history of vexatious litigation is likely to continue to  
7 abuse the judicial process. . . ." Id.

8 Applying the above factors to this case, it is clear that the Walkers' access to Bankruptcy  
9 Courts should be restricted. First, Debtors' petitions for bankruptcy were duplicative and vexatious  
10 because Debtors repeatedly filed bankruptcy to avoid the same creditors. In addition, the Debtors did  
11 not fully prosecute one of their nine petitions for bankruptcy. Second, the Debtors stated that they  
12 were motivated by the benefits of the automatic stay; Debtors admitted that at least three petitions  
13 were filed to prevent one creditor from garnishing Janet Walker's wages. Third, although the  
14 Debtors are not represented by counsel, Debtors have had counsel in the past. In addition, Robert  
15 Walker is president of a non-profit organization which files bankruptcies at no charge. Although  
16 Debtors are not represented by counsel, they are familiar with the bankruptcy system. Fourth,  
17 Debtors have caused needless expense to creditors because they have taken advantage of the  
18 automatic stay without fully prosecuting one case. In addition, Debtors have burdened the courts  
19 because of their repeated failure to appear at section 341 meeting of creditors or hearings regarding  
20 confirmation of Chapter 13 plans and failure to file schedules. Furthermore, Debtors are likely to  
21 continue to abuse the system if their access to the Bankruptcy Court is not restricted. Evidence of  
22 the Debtors continued abuse is the filing of their tenth petition for bankruptcy one minute prior to the  
23 dismissal with prejudice of this Chapter 7 petition.

24 Accordingly, the Court requires the Debtors to obtain leave of court before filing a petition  
25 for bankruptcy. The court finds this condition provides adequate protection to the courts and  
26 creditors while not preventing Debtors' right to file a legitimate petition for bankruptcy.

#### 27 V. ORDER

28 Based on the foregoing, the Court hereby orders the following:

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1. The Bankruptcy Court's June 30, 1998 order dismissing Debtors ninth petition for bankruptcy with prejudice is affirmed. Debtors, Robert and Janet Walker, are hereby declared to be vexatious litigants. Debtors' access to the Bankruptcy Courts of the United States shall be limited as follows:
  - a. Debtors shall notify the clerk of any Bankruptcy Court with whom they desire to file any petition that they have been declared vexatious litigants and of the terms of this order;
  - b. Before a petition by Debtors may be filed in any Bankruptcy Court, the clerk shall lodge it with the General Duty Bankruptcy Judge on designee, and may be filed only upon being granted leave to be filed.
  - c. Once a petition for bankruptcy has been accepted for filing, Debtors must obtain leave of the Bankruptcy Court before they may voluntarily dismiss the petition.

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d. This Order shall remain in effect for 10 years unless further modified by this Court upon duly noticed motion or Order to Show Cause.

Dated: February 17, 1999

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JAMES WARE  
United States District Judge

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