UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re:	
RAYMOND and JUDI A. PARKER,	No. 02-04195-W13
Debtor(s).	MEMORANDUM DECISION RE: DISMISSAL/CONFIRMATION

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on February 24-25, 2003 for confirmation of the Chapter 13 Plan and upon McNellis's Motion to Dismiss. The court reviewed the files and records herein, heard argument of the parties, heard testimony of witnesses, and was fully advised in the premises. The court now enters its Memorandum Decision. This memo opinion contains the court's findings of fact and conclusions of law.

A. FACTS

In May, 1995, Mr. Parker created Advanced Orthotics, Inc. (hereinafter "Advanced"), a Washington corporation. It sold orthotics and incontinent products to persons receiving Medicare and Medicaid. It had a provider number from the State of Washington to bill Medicaid or Medicare. It was operated by Mr. Parker who contacted nursing homes, adult care centers, and medical facilities to sell the products to the

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individual patients in the facilities. In early 1998, Mrs. Parker, together with Brandi Bosserman, Mr. Parker's daughter, owned and operated Advantage Orthotics, Inc. (hereinafter "Advantage"), an Idaho corporation. It is not clear if Ms. Bosserman ever had any active involvement in the corporation, but any involvement had ended by April, 2001. Advantage sold orthotics and incontinence supplies and, like Advanced, was operated out of the Parkers' home. Mr. Parker was in charge of sales and Mrs. Parker handled all the non-sales aspects of the business. Advantage also had an office in Moscow, Idaho. It also had a provider number in Washington and Idaho. Advantage was commenced as the State of Washington had placed Advanced on "paper review." Due to problems with the electronic billings submitted by Advanced, the state required billing be done on a paper basis which resulted in a delay of payments from the 14 to 21 days typical of electronic billing to 30-45 days of submitting the billing in paper format. Advanced could not therefore pay its bills when they became due so a new entity, Advantage Orthotics, Inc., was started as it was able to electronically submit billings.

The State of Washington administratively dissolved the Advanced corporate entity effective January 24, 2000. About the first of April of 2000, the Parkers and Mr. McNellis formed Parker-McNellis, Inc., with each owning a one-half interest. That corporate entity was to purchase orthotics and medical supplies at volume prices and then resell the same to Advantage and a business owned solely by Mr. McNellis. A dispute arose between the owners, and in December, 2000, Mr. and Mrs. Parker, both of whom worked in the business, were required to leave and the

business was closed. The claim of Mr. McNellis against the Parkers arose out of that failed business relationship.

The Parkers continued to conduct the sale of orthotics and incontinent supplies from their home as Advantage. Beginning in January of 2001, Mr. O'Connor became a salesman in the business. On February 8, 2001, the FBI seized, as part of a national investigation into a supplier of orthopetic shoes, all the business records and computer equipment of Advantage. Within one or 2 business days, Advantage was again operating as it had before the seizure had occurred.

A few months after the FBI seizure of records and equipment, Advantage ceased business as it could not meet its financial obligations. According to the testimony of Mrs. Parker, it "could not survive" and never operated after April, 2001. Simultaneously, however, Mr. Parker restarted Advanced. A new provider number was obtained from the State of Washington, a new business license, etc. He testified that he thought he had reinstituted that corporate entity, although, according to the records of the State of Washington, it remained dissolved. It filed a corporate tax return for 2001. After this "restart" of Advanced, it was also referred to as AOI. For the sake of clarity, in this opinion, this period of the business operation will be referred to as AOI.[1] Mr. Parker and Mr. O'Connor continued to sell

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[1]The use of the names Advanced Orthotics, Advantage Orthotics and AOI is confusing. During testimony, witnesses would periodically become confused about which entity was being discussed. All the witnesses, as well as counsel, would repeatedly glance at a demonstrative exhibit upon which the various names had been written. This was done in an effort to accurately identify which entity was being discussed. The debtors offered no explanation why they chose to do business under names which were so similar.

orthotics and incontinence supplies as they had for Advantage, and Mrs. Parker continued to devote her time to the non-sales aspects of AOI. AOI, after January 24, 2001, was merely a sole proprietorship.

During March and April of 2001, Mrs. Parker assisted Mrs. Ridgely in forming a new Washington corporate entity, Parkridge Medical Supply, Inc. (hereinafter "Parkridge"). Mrs. Parker assisted in the application process for a provider number from the state, a business license, and other necessary licenses and prerequisites to doing business. Mrs. Parker took Mrs. Ridgely to Mr. Johnson, the accountant for the Parkers personally, for Advanced, for Advantage and for AOI. Mr. Johnson became the accountant for Parkridge. Mr. O'Connor was told one day in September of 2001 to report for work the next day to a new location in the Industrial Park area of Spokane. He did so and was then told that he would be working for a new business entity and was given new business cards and new forms but continued to perform the same job functions and sell the same products to the same customers. Parkridge, Advanced, Advantage and AOI are virtually indistinguishable in terms of how the businesses operated and the products which were sold, although in the early years, Advanced did emphasize some type of products over others.

Documentation for the business license and other necessary prerequisites for Parkridge were completed in April, but Mr. Parker testified there was some months of delay before the state issued the necessary license. Consequently, the business did not commence until September. However, business premises at the Industrial Park had tentatively been identified in March and it was contemplated by the

parties that Parkridge would start business that spring rather than in the fall. This testimony is consistent in the fact that the Parkers personally filed a Chapter 7 proceeding on April 12, 2001 (Case No. 01-03091) and Advantage filed a Chapter 7 (Case No. 01-04964) on June 15, 2001. Both of the Parkers continued the business of selling orthotics and incontinence supplies as AOI until September, 2001. Since October, 2001, Mr. Parker has been the general manager of Parkridge, and Mrs. Parker, although uncompensated, has worked in the business nearly full time. Their services to Parkridge are the same services they provided for Advantage, Advanced, and AOI.

In their personal Chapter 7 proceeding, the Parkers listed themselves as employees of Advantage located in Moscow, Idaho. They stated that the corporate entity was primarily liable for the business debts listed in the schedules. The schedules make no mention of Parkridge.

In the Advantage Chapter 7 proceeding, Mr. Boyden was appointed the Trustee. It listed liabilities of $31,935 and assets of $9,916, which was an account receivable due from AOI for equipment and inventory purchased from Advantage. Mrs. Parker signed the bankruptcy schedules and statement of affairs and attended the § 341 meeting as the President of Advantage. Mr. Boyden wrote to Mr. Parker and AOI reminding him of the obligation and informing him that the obligation was payable to Mr. Boyden as the Trustee of the Advantage bankruptcy estate. When no payment was made, the defense offered was that the equipment had been seized by the FBI. This defense was raised despite the fact the seizure occurred in February 2001, months before the purported April, 2001, sale

from Advantage to AOI. In September 2002, Mr. Boyden conducted a 2004 exam of Mrs. Parker, and she also told him the equipment had been seized by the FBI. She also told him she was unemployed and stayed at home and did gardening. Based on that testimony, he filed a no asset report in the Advantage Chapter 7 proceeding. He has now obtained a list of equipment seized from the FBI, but it is impossible to determine from a comparison of that list and the April, 2001 sale document whether the equipment is the same. Mr. Boyden has now applied to reopen the Advantage Chapter 7 proceeding. He believes, based upon the evidence presented on this motion, that Advantage may have continued to conduct business for approximately 3 months after the Chapter 7 filing.

In debtors' personal Chapter 7 proceeding, Mr. McNellis, who had brought suit in state court against the Parkers, commenced an adversary alleging that the obligation to him was not dischargeable under 11 U.S.C. § 523(a)(4). The Chapter 7 discharge as to other obligations was entered on July 18, 2001.[2] On May, 21, 2002, the Parkers commenced this Chapter 13 proceeding. Mr. McNellis requests that the Chapter 13 proceeding be dismissed with prejudice under 11 U.S.C. § 1325(a)(3) as it was commenced in bad faith. He also alleges that the Parkers have concealed assets as they have an ownership interest in Parkridge and in real estate in Mexico, and have undervalued a 1972 Corvette.

PROPERTY IN MEXICO

It is undisputed that the Parkers own a three week time share in

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[2]This motion does not resolve the adversary complaint. The question of the dischargeability of the obligation to Mr. McNellis in the Chapter 7 proceeding is still at issue in the adversary proceeding. Nor does the resolution of this motion effect the discharge entered in the prior Chapter 7 proceeding.

Puerto Vallarta and a week time share in Mazatlan. However, part of Mr. McNellis's claim represents the sum of $10,560 he advanced to Mr. McMillan on behalf of the Parkers. Mr. McMillan is a friend of the debtors and lives most of the year in Mexico. Mr. McNellis was told by Mr. Parker that Mr. McMillan intended to purchase a parcel of real estate which would be divided into three separate ownership interests: one each for Mr. McNellis, the Parkers and Mr. McMillan. Mr. McNellis wire transferred to Mr. McMillan the amount necessary to purchase the one-third ownership interest to be held by Mr. McNellis and the one-third ownership interest to be held by the debtors. This much is undisputed. The dispute is whether the real estate was ever acquired, and whether debtors failed to reveal their ownership interest on their schedules. Mr. McNellis testified that he has been unable to locate Mr. McMillan.

Mr. O'Connor was employed by Advantage beginning in January of 2001 and then by the Parkers doing business as AOI, and ultimately by Parkridge until late September or early October of 2001. He worked with both debtors. They told him that they had purchased land in Mexico with Mr. McNellis and another individual. Mr. Parker stated he intended to build on the property.

Ms. Evans, the sister of Mrs. Ridgely, vacationed in Mexico with both the debtors and the Ridgelys. She testified that while in Mexico Mrs. Parker once vaguely pointed in a particular direction and stated that she intended to purchase property there. Later at a dinner party in Spokane at which Mr. McMillan was present, Mrs. Parker had a plat map of some property which she identified as real estate owned with the

McMillans. Ms. Evans was clearly confused as to the date of these events but was very clear as to the substance of the conversations and that they occurred.

Both Mr. and Mrs. Parker denied owning any property in Mexico. They said there had been a plat map of some property provided by Mr. McMillan, but the property had not been acquired. They also testified that Mr. McNellis did not loan them the money to acquire the property, rather he insisted he wire transfer the money so that the Parkers could acquire a one-third interest in the real estate. Mrs. Parker initially testified there was no obligation to repay Mr. McNellis the funds. She was then referred to a letter she wrote to a third party acknowledging funds owed to McNellis "for the Mexico property." Then her testimony was that the debtors did have a duty to repay.

The general tenor of the testimony of both debtors on this issue was that they could not afford to purchase the property and Mr. McNellis forced them to allow him to wire transfer the money on their behalf, and he should look to Mr. McMillan as they never acquired any interest in any real estate in Mexico. Mr. McNellis's testimony that this was a loan he made to the Parkers is much more credible. They have an obligation to repay the $10,560.00. There is, however, no persuasive evidence that the debtors have any ownership interest in real estate in Mexico other than the time shares referenced above.

THE 1972 CORVETTE

On April 19, 1999, Mrs. Parker completed a loan application with Spokane Teachers Credit Union for what she identified as a loan for the

debtors' business. She pledged her 1972 Corvette which the application form values at $12,000. In the Chapter 7 proceeding filed April 12, 2001, the Corvette is listed with a fair market value of $7,200 and a lien of $7,277. Payments were still being made at $376 month. In the Chapter 13 proceeding commenced May 21, 2002, the 1972 Corvette was listed with the same fair market value, but the lien had been reduced to $4,700. Since filing the Chapter 13, the debtors have continued making the monthly payments due Spokane Teachers Credit Union. Mrs. Parker opined that the fair market value of the Corvette is actually about $2,500 based upon her conversations with persons in the used car industry. She indicated that since 1991, the vehicle has not been safe to drive and has not been driven. Indeed, she stated that the motor has not been started since 1991.

She also testified that the reason for commencing the Chapter 13 was that the debtors had fallen behind on their house payments, were about to default on a work out plan with the IRS for past due taxes, and needed to deal with a $75,000 obligation they had forgotten to list in the Chapter 7. They purchased a new vehicle a few days before filing the Chapter 13 as their older model vehicle had become unreliable. Under those circumstances, it is inexplicable why the debtors had continued after the Chapter 7 and have continued during this Chapter 13 proceeding to make monthly payments of $376 on a vehicle which cannot be driven and has a value of $2,500. When asked that question, Mrs. Parker's response was that she would not sell the vehicle "at any price."

The Chapter 13 Trustee representative indicated that if he had

known that the vehicle had not been driven in 12 years, he would have objected to its retention. Understandably, he never asked the debtors if they actually drove the vehicles listed in their schedules.

There is no evidence that the debtors intentionally understated the fair market value of the vehicle on their schedules. This history of events indicates, however, that in the Chapter 13 proceeding, the debtors are not making their best efforts to repay creditors.

OWNERSHIP OF PARKRIDGE MEDICAL SUPPLY, INC.

Creditor McNeillis contends that the debtors are the owners of the corporate entity, Parkridge, and that their failure to reveal that ownership interest in the Chapter 7 and Chapter 13 schedules is a failure to list assets. The debtors and Mrs. Ridgely vehemently deny that the debtors share any ownership interest in the entity. Mrs. Ridgely consistently maintains that the corporate entity is owned by her husband and herself. Mrs. Ridgely is listed as the incorporator, signed the application for a provider number with the state as principal or owner, and has consistently signed documents as President of the corporation. None of the corporate records reveal or imply an ownership interest in the corporation by the debtors.

Mr. McNellis argues that should the debtors be allowed to remain in a Chapter 13 proceeding, they must, as the true owners of Parkridge, include its value in their Liquidation Analysis. The forensic accountant, Mr. Dorell, was qualified as an expert and asked to provide an opinion as to the value of Parkridge and the other entities. His opinion was based upon the accounting records, checking account records, tax returns and other information regarding the manner in which the

businesses were conducted. Mr. Dorell opined that Parkridge had a value of $215,000 as of December 3, 2002. The value of Advantage, as of the date of the bankruptcy filing on April 15, 2001, was $126,000. The value of the Advanced, whether that business was a sole proprietorship or in the corporate form, was $162,000 as of September 30, 2001 when it terminated.[3] The debtors take issue with these opinions and repeatedly argue that the businesses have no significant value as there is no contract to supply products to the customers. Customers, i.e., the nursing homes, assisted living facilities, and other medical facilities can be readily identified by reference to the local phone book or internet. Any person or entity selling the same product is free to contact the customers of Parkridge or AOI and persuade the customers to change their supplier. Even Mr. O'Connor, when he left the employ of Parkridge, started his own business as a seller of orthotic and incontinence products. There is no covenant not to compete between Parkridge and Mr. Parker. He could legally leave his employment with

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[3]During the hearing, Mr. Parker visited the local office of the Department of Licensing and reinstated the dissolved corporate entity Advanced Orthotics, Inc. pursuant to R.C.W. 23B.14.220. Apparently this was an attempt to avoid any personal liability for any obligations incurred by AOI from the date of the Parkers' discharge in the Chapter 7 proceeding to the date AOI stopped doing business in late September, 2001. The state statute provided that the reinstatement of the corporate entity relates back to the date of the dissolution, i.e., January, 2001. There is no case law which applies that reinstatement to a situation such as this where the business conducted by the dissolved corporate entity had totally terminated months before the reinstatement and its assets have been disbursed. Even assuming state law would retroactively reinstate the corporate entity under such circumstances, the debtors have in the interim received a bankruptcy discharge from much of the personal liability. Furthermore, this is yet another attempt by the Parkers to hide behind a corporate shell for liability purposes while simultaneously treating the corporate entity as their alter ego for financial benefit.

Parkridge and begin his own business or work for another and sell the same products to the same customers. This does not change the conclusion that an existing business relationship with a customer base for a particular product has some value. Even Mr. Parker admitted that it is easier to sell to an existing customer than to develop a new customer. The existing customer relationship was one of the factors relied upon by Mr. Dorell in reaching his conclusions.

Mr. Dorell's opinion was based upon the financial and other evidence regarding each business's operation and was developed in accordance with commonly accepted principles and standards used in valuing businesses. The court finds that the values of the various enterprises are as set forth in his testimony.

Since the issue of the debtors' actual interest in Parkridge is interwoven factually with the question of the debtors' good faith, it will be further discussed below.

BAD FAITH

Creditor McNellis asks this case to be dismissed with prejudice as the debtors commenced the Chapter 13 and filed the Chapter 13 Plan in bad faith. The evidence indicates a history of unacceptable practices totally out of compliance with any generally accepted commercial standards and motivated solely by the debtors' own self interest. That history has continued throughout this proceeding with the debtors not only failing to make best efforts to pay creditors but, in fact, engaging in self dealing at the expense of various individuals, including Mrs. Ridgely.

Mr. Parker, when asked at deposition if his wife was employed,

indicated that she was not and she stayed at home and "planted flowers." In her 2004 exam taken by Mr. Boyden in the Advantage bankruptcy proceeding, Mrs. Parker indicated that she was not employed and stayed at home and gardened. On the contrary, Mrs. Parker works full time without compensation for Parkridge. She is there when the office opens for the day and she leaves when it closes. She works just as many hours as Mr. Parker. She does most of the financial dealings for the business, is the only person who regularly deals with the accountant, writes the checks and does the filing. She ships products, answers the phone, and generally does all of the non-selling aspects of the business. She does for Parkridge all the services she had done for Advantage, Advanced and AOI.

At a later deposition, after admitting that indeed she did spend time at Parkridge, Mrs. Parker indicated that she swept floors and did filing a couple of hours a week. At the hearing, she stated "I help with everything." Even that final admission seems to understate her actual functions.

At trial, her explanation for being unemployed was that she has health problems. It would seem if her health problems prevent her from working for compensation, they would also prevent her from working without compensation. Her other explanation is that Parkridge cannot afford to pay her and that she is afraid to stay home. Two years ago she had two threatening phone calls from an unknown person and a year ago she received two more.

Mrs. Parker not only completes the check forms, she often signs Mrs. Ridgely's name to the checks as Mrs. Parker is not a signatory on

the checking account. Although Mrs. Ridgely initially stated that this was done only with her prior approval, it became apparent in testimony that it is done when Mrs. Ridgely is at the office, when she is not at the office, when she pre-approves the check, and when she does not. Mrs. Parker also reconciles the invoices from suppliers, thus determining to whom checks should be written and for how much. Some of the checks signed by Mrs. Parker were payable to AOI, although Mrs. Ridgely also signed checks payable to AOI. The checks signed by Mrs. Ridgely were marked "product" and when asked why, she explained that was for "convenience." Mrs. Parker was adamant, however, that Parkridge was purchasing products from AOI. From October, 2001, to the end of that year, Parkridge wrote checks of $3,634 to AOI.

Parkridge has paid $4,500 of personal attorney fees owed by Mrs. Parker which were totally unrelated to any business activity. This occurred from April 28, 2002 to May 28, 2002, immediately before and after the Chapter 13 filing. Parkridge, also in July of 2002, paid about $3,300 of Mr. Parker's dental bills incurred in Mexico. While in Mexico, Mr. Parker used the Parkridge debit card 11 times. The explanation offered by the debtors was that Mr. Parker needed dental work and it was cheaper to have the work performed in Mexico. This, of course, is no basis for the payment by the corporation. The testimony was unclear if Mrs. Ridgely knew of this prior to its occurrence. She testified, however, that this would be a loan from Parkridge to the Parkers. They are to pay it back when they can. There is no writing evidencing the loan.

Between February and May, 2002, the four months before the

Advantage Chapter 7 filing, it wrote checks of approximately $9,000 to Advanced/AOI. In fact, the total checks written during that period for the personal benefit of the debtors was approximately $16,800. They included payments for auto insurance, mortgage on the home personal credit cards, and purchases at local clothing stores. Mrs. Parker had indicated to Mr. Boyden, the Trustee of the Advantage bankruptcy estate, that Advantage had stopped selling product after the FBI seizure in February of 2001. This is contrary to Mr. O'Connor's testimony. No explanation was given as to the source of the $16,800 as well as whatever funds may have been used to pay Advantage creditors in the months prior to the bankruptcy filing.

While Mr. O'Connor was employed by Advantage and then later while employed by AOI, he received pay checks with FICA and FUTA withheld. In February, 2001, Mrs. Parker indicated to the accountant that Mr. O'Connor was an independent contractor, yet later checks from Advantage and AOI periodically withheld FICA and FUTA. Mr. O'Connor was provided a 1099 for the 2001 tax year by both Advantage and AOI. Mr. and Mrs. Parker stated they could not remember if the money withheld from Mr. O'Connor had been paid to the IRS. No employment tax returns or records of deposits were in the accountant's files.

Mrs. Parker testified at deposition and signed a declaration in relation to a motion to compel discovery earlier in this proceeding that she had a practice for many years of shredding bank statements and checks. She stated she could not produce the same in response to the discovery request as they did not exist. They were then produced by Mr. Johnson, the accountant, pursuant to a subpoena. At hearing,

Mrs. Parker attempted to rehabilitate her prior inconsistent testimony by stating that she meant she shredded the materials after they were returned to her by the accountant. This was simply not credible.

Mr. Parker receives monthly wages of $5,000 plus reimbursement of travel expenses from Parkridge. From the termination of the AOI business in early September of 2001 until Parkridge was fully operational in late September or early October 2001, he testified that he continued to sell the same product to the same customers. Those customers became Parkridge's customers. Mr. Parker testified in deposition that he had not received any wages from Parkridge until February of 2002. Examination of the checking account of Parkridge produced by the accountant revealed between October of 2001 and the end of that year checks to Mr. Parker of $10,309. Several were noted as "draw" and at least one had FICA and FUTA withheld. He was also paid a salary in January of 2002. During this four month period, Mr. Parker was the sole support of the Parker household. When confronted with the checks, he explained that he had not realized he had received wages as his wife handles the family finances. This testimony was not credible.

The information to prepare all Parkridge, Advantage, Advanced and AOI, as well as the Parkers personal federal tax returns, is provided to the accountant by Mrs. Parker. The 2001 Parkridge return does not show any wages to anyone other than a minimal amount to a part-time employee who was also employed by AOI. Nor does the 2001 personal return of the Parkers reflect the wages paid Mr. Parker by Parkridge.

The original schedules filed in the Chapter 13 proceeding reveal no loans from the Parkers to Parkridge and no loans from Parkridge to the

Parkers. At the hearing, the payments made by Parkridge for the personal expenses of the Parkers (the attorney fees and dental work) were characterized as loans. Shortly before the hearing, the schedules were amended to list Parkridge as a creditor for those amounts.

Nearly all of the relatively small amount of initial capital to begin Parkridge was traced to AOI. The bankruptcy schedules were amended shortly before the hearing to reflect that this was a loan from the Parkers to Parkridge. Also, the Schedules "I" and "J" were amended. The amended Schedule "I" now reflects a deduction from Mr. Parker's wages of $650 a month for medical insurance for Mrs. Parker. At prior depositions, this had not been revealed. The explanation was that the insurance had only recently been acquired. The most telling evidence was the testimony of Mrs. Ridgely. It was obvious that she had no idea when the benefits were put in place or indeed what medical or other employment benefits even existed. In fact, she did not know if Mr. Parker was to be reimbursed his travel or other expenses until she asked her husband that question during the hearing. She then indicated expenses were to be reimbursed, but had no knowledge of the basis to determine reimbursement. Mr. Parker initially stated that he completed his expense reports and submitted them to Mrs. Ridgely and then later stated that it is his wife who reviews and approves the reimbursement of expenses. Since he has received reimbursement for items such as oil changes and car insurance, it is not surprising Mrs. Parker is the one approving the expenses.

The most striking aspect of Mrs. Ridgely's testimony was her lack of knowledge about the business affairs of Parkridge. She earns $3,000

a month and works, according to the Parkers, from about 10:30 in the morning to about 2:30 for three or four days a week. Mrs. Ridgely testified she works about four hours beginning at 10:30 and leaves as soon as the shipping labels are prepared for the UPS pickup which occurs at 2:30.

Ms. Thomas, a process server, testified that she was at the business premises on November 8, 2002, November 13, 2002, and February 19, 2003 to serve process. Mrs. Ridgely was not there. Mrs. Parker identified herself as a secretary and process was served on her. Mr. Schlesinger, a private investigator, went to the business premises on 12 different days in November and December of 2002 and January and February of 2003, usually more than once a day. He was to survey the parking area for Mrs. Ridgely's vehicle. On several occasions, he visited the premises before 10:30 when she would ordinarily begin work, but generally his visits occurred at various times of day and various days of the week. He saw her car in the area twice.

The inception of Parkridge dates to a conversation sometime in February of 2002 when Mrs. Ridgely asked the Parkers if they could employ her. The two families are "best friends." Mr. Parker testified that at that time that he no longer wanted to own his own business so he suggested to the Ridgelys that they start an orthotics business and employ him, and he "would teach them everything I know." Mrs. Ridgely had never worked in a business setting. She had modeled for her mother's modeling business on a part-time basis for cash. She has no experience or even knowledge of financial affairs and, in fact, had not

even had a checking account until recently. She has no knowledge of business financing, payroll, personnel matters, bookkeeping, renting or acquisition of space or equipment, ordering of supplies, or any of the myrid aspects of a business endeavor. Nor had she any experience dealing with the state Medicaid or Medicare programs. She was unaware that Mr. Parker had received wages from Parkridge in 2001 until just before the hearing. In fact, she had not seen the profit and loss statements or trial balances for Parkridge until receiving them from the accountant for her deposition.

From her testimony at the hearing and her inconsistent statements in her depositions, it was obvious she had no idea of some of the conduct of the Parkers. In her inexperience, she does not realize the potential tax problems inherent in their conduct of the affairs of Parkridge nor the impropriety of their payment of personal expenses. Although Mr. Parker testified that Mrs. Ridgely is quite capable of running the office and, in fact, ran it while the Parkers were on vacation in July, it is apparent that she is not capable of running the business.

The evidence reveals numerous indicia of ownership of Parkridge by the Parkers. They provided nearly all the capital necessary for its inception. Mrs. Parker played a vital role in obtaining business licenses, a state provider number, and other prerequisites to the commencement of the business. The employees of AOI were Mr. O'Connor, Mr. Parker, Mrs. Parker, and a part-time person. They all began as employees of Parkridge which had only the additional employee, Mrs. Ridgely. The initial customers of Parkridge were the customers of

AOI. When Parkridge needed additional capital, the Parkers contacted their son-in-law who loaned the business money without any documentation. Mrs. Ridgely had only met the son-in-law once, could not remember his last name, and never discussed the loan with him. The Parkers treated the corporate entity as their alter ego for financial purposes. There are undocumented loans to and from the corporation and the Parkers. The corporation periodically pays their personal expenses. Parkridge could not have obtained credit from its major supplier without use of Mr. Parker's prior credit with that company. Mr. Parker signed on the credit application together with Mrs. Ridgely. The supplier billed Parkridge for several months in the name of AOI and under the AOI account number. This is not the conduct of an employee of a business but conduct typical of an owner.

From her demeanor, however, it is apparent that Mrs. Ridgely firmly believes that she owns this corporate entity and that it is her business. She is not a party to this motion. In order to deprive her of her ownership interest or determine if it exists, it is necessary to provide her with due process. Although she attended, testified, and fully participated in the proceeding, this proceeding is not the proper forum in which to reach the ultimate conclusion of whether she has a property interest in the corporate entity of Parkridge and the extent of any interest.

The Trustee objected to confirmation of the debtor's Chapter 13 Plan as the Trustee could not determine the debtors' disposable income. The Trustee's position is that the debtors have greater disposable income than reflected on their Schedule "J" as they take funds from the

corporation on an "as needed" basis.

As this court cannot deprive Mrs. Ridgely of any property interest in Parkridge in the context of this motion, it is impossible to determine if the debtors' plan would pay creditor the equivalent of what creditors would receive in a liquidation under 11 U.S.C. § 1325(a)(4). Nor can it be determined whether the debtors are devoting all their projected disposable income to the plan as required by 11 U.S.C. § 1325(b)(1)(B). Their income is impossible to project based on the history of simply using the corporation as their financial alter ego.

B. LEGAL STANDARDS

The creditor in this case seeks to dismiss the proceeding with prejudice as the proceeding was commenced and the plan filed in bad faith. The moving creditor seeks not only dismissal, but a determination that all pre-petition obligations are not subject to discharge in any future bankruptcy.

A Chapter 13 petition may be dismissed or converted under 11 U.S.C. § 1307(c) for cause. Section 1307 of the Code provides a non-exhaustive list of circumstances which constitute cause. Bad faith may also constitute cause to dismiss. *In re Leavitt*, 171 F.3rd 1219 (9th Cir. 1999); Eisen *v. Curry (In re Eisen)*, 14 F.3d 469 (9th Cir. 1994). When determining whether a Chapter 13 petition has been filed in bad faith, a court must examine the totality of circumstances surrounding a petition or conversion. The Ninth Circuit recognized in *In re Leavitt* the following factors to be considered in applying the test: 1) whether the debtor has misrepresented facts in either the petition or Chapter 13 Plan, 2) whether in filing the petition the debtor has unfairly

manipulated the Bankruptcy Code, 3) whether the debtor has filed the petition in any otherwise inequitable manner, 4) whether the debtor has a history of bankruptcy filings and dismissals and lastly, 5) whether the debtor's only intent in filing the petition was to defeat state court litigation. See also *Goeb v. Heid (In re Goeb)*, 675 F.2d 1386 (9th Cir. 1982). Authority exists for the consideration of other factors in determining whether the debtor has acted in bad faith such as those used by the District Court for the Eastern District of Washington in *Spokane Railway v. Gonzales (In re Gonzales)*, 172 B.R. 320 (E.D. Wash. 1994). See also *In re Warren*, 89 B.R. 87 (B.A.P. 9th Cir. 1988).

Bad faith, in addition to being grounds for denial of confirmation, may be "cause" for a dismissal of a Chapter 13 case with prejudice under 11 U.S.C. § 349(a) and § 1307(c). *In re Gress*, 257 B.R. 563, 567 (Bankr. D. Mont. 2000); *In re Leavitt*, supra, at 1244; *In re Eisen*, supra, at 470. If the conduct constituting bad faith is egregious or of sufficient magnitude, the dismissal may contain a provision that the obligations which existed at the time the proceeding was commenced are not subject to discharge in any later bankruptcy proceeding. *Leavitt*, supra; *In re Covino*, 245 B.R. 162 (Bankr. D. Idaho 2000). See also *In re Gress*, supra.

The Fourth Circuit describes a dismissal order that bars subsequent litigation as a "severe" and "drastic" sanction which is limited to "extreme situations". The court stated in *In re Tomlin*, 105 F.3d 933, 937 (4th Cir. 1997):

> Generally, only if a debtor engages in egregious behavior that demonstrates bad faith and prejudices creditors--for example, concealing information from the court, violating injunctions, or filing

unauthorized petitions--will a bankruptcy court forever bar the debtor from seeking to discharge then existing debts.

D. CONCLUSION

The debtors have misrepresented facts before and during the course of this proceeding. They misrepresented facts to the Chapter 7 Trustee in their prior proceeding. Their pre-petition and post-petition conduct indicates not just a disregard of corporate formalities but an egregious manipulation of their financial affairs, whether in the corporate form or not, to the detriment of their creditors. After application of the *Leavitt* factors to the evidence in this case, the court concludes that the Parkers filed their Petition and Plan in bad faith. The totality of the circumstances shown by the record warrants dismissal of this case with prejudice and a specific determination that no pre-petition obligation, i.e., any obligation not discharged in the previous Chapter 7 proceeding, is subject to discharge in any future bankruptcy proceeding.

DATED this 27th day of March, 2003.

PATRICIA C. WILLIAMS, Bankruptcy Judge