

JUL 29 2011

ORDERED PUBLISHED

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. AZ-10-1253-MkMaD  
)  
KENNETH K. ELLSWORTH and ) Bk. No. 07-00986-CGC  
JESSICA T. ELLSWORTH, )  
)  
Debtors. )

\_\_\_\_\_)  
KENNETH K. ELLSWORTH; )  
JESSICA T. ELLSWORTH, )  
)  
Appellants, )

O P I N I O N

v. )  
)  
LIFESCAPE MEDICAL ASSOCIATES, )  
P.C.; EDWARD J. MANEY, Chapter )  
13 Trustee, )  
)  
Appellees. )

\_\_\_\_\_)  
Argued and Submitted on May 13, 2011  
at Phoenix, Arizona

Filed - July 29, 2011

Appeal From The United States Bankruptcy Court  
For The District Of Arizona

Honorable Charles G. Case, II, Bankruptcy Judge, Presiding

\_\_\_\_\_)  
Appearances: Tracy S. Essig of the Law Office of Tracy S.  
Essig, PLC argued for appellants;  
Joseph E. Cotterman of Gallagher & Kennedy, P.A.  
argued for appellee LifeScape Medical Associates,  
P.C.

\_\_\_\_\_)  
Before: MARKELL, MANN\* and DUNN, Bankruptcy Judges.

\_\_\_\_\_)  
\*Hon. Margaret M. Mann, Bankruptcy Judge for the Southern  
District of California, sitting by designation.

1 MARKELL, Bankruptcy Judge:  
2

3 **INTRODUCTION**

4 Doctor Jessica Ellsworth, M.D., and Kenneth Ellsworth  
5 (jointly, the "Ellsworths") appeal the bankruptcy court's order  
6 granting the motion of Lifescape Medical Associates, P.C.  
7 ("Lifescape") to dismiss the Ellsworths' chapter 13<sup>1</sup> bankruptcy  
8 case with prejudice. The Ellsworths have not established that  
9 the bankruptcy court abused its discretion in dismissing their  
10 case with prejudice, nor have they established that any of the  
11 bankruptcy court's key findings supporting that dismissal were  
12 clearly erroneous. Therefore, we AFFIRM.

13 **FACTS**

14 Lifescape is a provider of concierge medical services.<sup>2</sup> Dr.  
15 Ellsworth began working with Lifescape in 2003. At that time,  
16 she signed a non-compete agreement. Dr. Ellsworth ceased working  
17 with Lifescape in 2004, and shortly thereafter founded her own  
18 medical practice known as Family Practice of Scottsdale (the  
19 "Medical Practice").  
20

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21 <sup>1</sup>Unless specified otherwise, all chapter and section  
22 references are to title 11 of the United States Code, commonly  
23 referred to as the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All  
24 "Rule" references are to the Federal Rules of Bankruptcy  
Procedure, Rules 1001-9037, and all "Civil Rule" references are  
to the Federal Rules of Civil Procedure.

25 <sup>2</sup>"Concierge Medicine" generally refers to a range of premium  
26 medical services that physicians will provide to a limited number  
27 of subscribing patients in exchange for an annual fee. See  
28 Vasilios J. Kalogredis, Should You Consider Concierge Medicine?,  
PHYSICIAN'S NEWS DIGEST, Feb. 2004, [http://www.physiciansnews.com/  
business/204.kalogredis.html](http://www.physiciansnews.com/business/204.kalogredis.html).

1 **1. The Injunction Litigation**

2 In 2005, Lifescape sought and obtained an injunction against  
3 Dr. Ellsworth in Arizona state court (the "Injunction  
4 Litigation"). Dr. Ellsworth appealed the injunction, but failed  
5 to obtain a reversal from the Arizona Court of Appeals or the  
6 Arizona Supreme Court. Lifescape ultimately obtained a judgment  
7 for its attorney's fees and costs incurred in prosecuting the  
8 Injunction Litigation and defending against Dr. Ellsworth's  
9 appeal (the "State Court Judgment").

10 **2. The Ellsworths' Chapter 13 Bankruptcy and Plan**

11 When the Ellsworths filed chapter 13 bankruptcy on March 8,  
12 2007, they listed only five debts. Two were secured; one for  
13 their Mercedes and one for their house (in which they claimed  
14 over \$250,000 in equity). The remaining three debts were listed  
15 as unsecured; two related to student loans in the aggregate  
16 amount of \$194,706, and the remaining debt was Lifescape's,  
17 listed at \$58,000.<sup>3</sup>

18 The Ellsworths filed their initial chapter 13 plan on March  
19 21, 2007, shortly after they filed their bankruptcy. This plan  
20 provided for monthly payments of \$200, plus a \$20,000 balloon  
21 payment payable in month 48. A few weeks later, they filed their  
22 first amended plan.<sup>4</sup> Unlike their first plan, the amended plan

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24 <sup>3</sup>By the time the bankruptcy court denied confirmation of the  
25 Ellsworths' second amended chapter 13 plan in January 2009, the  
26 debt owed to Lifescape had increased to an amount in excess of  
\$133,000.

27 <sup>4</sup>The excerpts of record provided by the parties were limited  
28 to several of the bankruptcy court's orders, and excerpts from  
(continued...)

1 omitted a balloon payment. The effect of this omission was to  
2 reduce the aggregate amount of payments by more than 60%.

3 Lifescape objected to confirmation of the amended plan,  
4 claiming that the Ellsworths had understated their income, had  
5 overstated their expenses, and were not committing all of their  
6 projected disposable income to plan payments as required under  
7 § 1325(b). After several lengthy continuances to afford time for  
8 discovery, briefing, and mediation, a confirmation hearing was  
9 set for July 2008.

10 Less than a week before the scheduled confirmation hearing,  
11 the Ellsworths filed their second amended chapter 13 plan (the  
12 "July 2008 Plan"). The July 2008 Plan provided for sixty monthly  
13 payments, with \$202 payments for months 1 through 16, \$500  
14 payments for months 17 through 59, and a balloon payment of  
15 \$25,000 for month 60.<sup>5</sup>

16 The bankruptcy court held a plan confirmation hearing in  
17 August 2008. In January 2009, it entered an order denying  
18 confirmation of the July 2008 Plan (the "January 2009 Order").  
19

20 <sup>4</sup>(...continued)  
21 several hearing transcripts. We have exercised our discretion to  
22 independently review the bankruptcy court's electronic docket,  
23 and the imaged documents attached thereto. See O'Rourke v.  
24 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957-58  
(9th Cir. 1989); Atwood v. Chase Manhattan Mortg. Co. (In re  
Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

25 <sup>5</sup>It is not clear from the record presented why the \$20,000  
26 balloon payment was omitted from the first amended plan, or why a  
27 larger \$25,000 balloon payment was added to the July 2008 Plan,  
28 or how the Ellsworths expected to fund the balloon payment, or,  
for that matter, any of the plan payments. According to the July  
3, 2008 version of the Ellsworths' Form B22C, they had negative  
monthly disposable income of \$1,147.94.

1 Many reasons supported this denial. Among other things, the  
2 court noted that the Ellsworths' financial records were "a  
3 shambles." The bankruptcy court also noted that the Ellsworths'  
4 disposable income calculation, derived from Form B22C, included  
5 over \$34,000 in nonrecurring legal expenses that had been  
6 incurred in defending against the Injunction Litigation.  
7 Moreover, only about \$10,000 of that amount was incurred within  
8 six months of the Ellsworths' bankruptcy, as required for Form  
9 B22C calculation and disclosure.

10 The court found that it was "clearly inappropriate" for the  
11 Ellsworths to have claimed the entire \$34,000 in legal expenses,  
12 given the statutory definition of current monthly income.<sup>6</sup> The  
13 court also pointed out that the Ellsworths had submitted two  
14 different statements of the Medical Practice's revenue and  
15

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16  
17 <sup>6</sup>As set forth in the Bankruptcy Code, the term "current  
monthly income" in relevant part means:

18 (A) . . . the average monthly income from all sources  
19 that the debtor receives (or in a joint case the debtor  
20 and the debtor's spouse receive) without regard to  
whether such income is taxable income, derived during  
21 the 6-month period ending on--

22 (i) the last day of the calendar month immediately  
preceding the date of the commencement of the case  
23 if the debtor files the schedule of current income  
required by section 521(a)(1)(B)(ii); or

24 (ii) the date on which current income is  
25 determined by the court for purposes of this title  
26 if the debtor does not file the schedule of  
current income required by section  
27 521(a)(1)(B)(ii) . . . .

28 11 U.S.C. § 101(10A)(A) (West 2011).

1 expenses for 2006, and that these two statements contradicted  
2 each other. As the court further recounted, the Ellsworths  
3 initially had indicated that the Medical Practice was conducted  
4 through a separate professional limited liability company;  
5 however, the Ellsworths later filed a brief (after the August  
6 2008 confirmation hearing) in which they changed their story -  
7 indicating that Dr. Ellsworth owned and operated the Medical  
8 Practice as a sole proprietorship until December 31, 2006.

9       Following Drummond v. Wiegand (In re Wiegand), 386 B.R. 238  
10 (9th Cir. BAP 2008), the bankruptcy court ruled that none of the  
11 Ellsworths' \$34,000 in legal expenses from the Injunction  
12 Litigation should have been considered in calculating the  
13 Ellsworths' current monthly income for Form B22C because those  
14 were business expenses of a self-employed debtor. The bankruptcy  
15 court also ruled that, in calculating disposable income under  
16 § 1325(b), none of the \$34,000 in legal expenses should have been  
17 considered because these expenses would not recur.

18       The January 2009 Order required the Ellsworths, within  
19 thirty days, to file a new plan. They didn't. It also required  
20 them to file new versions of their Form B22C. They nominally  
21 complied with this part of the order, filing an amended Form B22C  
22 (the "February 2009 Form B22C") which, consistent with the  
23 January 2009 Order, did not deduct any of the Medical Practice's  
24 business expenses in calculating current monthly income. This  
25 form, consistent with the bankruptcy court's instructions and  
26 Wiegand, supra, deducted \$26,407.00 in estimated average monthly  
27 business expenses from the Ellsworths' current monthly income of  
28 \$23,202.74. This calculation produced a monthly disposable

1 income of negative \$3,204.26.

2 In March 2009, the Ellsworths filed a request for a status  
3 conference on plan confirmation, in which they asserted that an  
4 evidentiary hearing was necessary before a plan could be  
5 confirmed. They also requested that the court set discovery and  
6 briefing deadlines.

7 **3. Lifescape's Motion to Dismiss**

8 Thereafter, in April 2009, Lifescape filed a motion to  
9 dismiss the Ellsworths' case "with prejudice." Lifescape alleged  
10 four grounds as establishing cause for such a dismissal: (1)  
11 unreasonable delay by the debtor that was prejudicial to  
12 creditors; (2) failure to file a plan timely under § 1321; (3)  
13 denial of confirmation of a plan under § 1325 and denial of a  
14 request made for additional time to file another plan or a  
15 modified plan; and (4) bad faith.

16 The Ellsworths responded by denying all of Lifescape's  
17 allegations. While they admitted that Lifescape's judgment was  
18 the immediate cause of their bankruptcy filing, they denied that  
19 they sought to defeat the Injunction Litigation or the resulting  
20 judgment. Further, the Ellsworths repeatedly asserted that it  
21 was unnecessary for them to have complied with the January 2009  
22 Order's requirement to file an amended plan because their  
23 February 2009 Form B22C showed that they had negative disposable  
24 income.

25 The court held a series of status conferences on the motion  
26 to dismiss over the next several months. Lifescape and the  
27 chapter 13 trustee (the "Trustee") took depositions of the  
28 Ellsworths as well as their accountant. The parties each filed

1 pre- and post-hearing briefs in support of their respective  
2 positions and a joint pretrial statement.

3 In spite of all these preparations, the Ellsworths decided  
4 to change the game by a series of filings just before the  
5 continued September 11 evidentiary hearing (the "September 11  
6 Evidentiary Hearing"). Twelve days before the scheduled hearing,  
7 the Ellsworths filed thirteen months' worth of operating reports.  
8 Two days before the hearing, they filed a further amended Form  
9 B22C (the "September 2009 Form B22C"), and one day before the  
10 hearing they filed a new chapter 13 plan (the "September 2009  
11 Plan").

12 These new documents changed significantly the effect of the  
13 Ellsworths' plan by increasing their planned charitable  
14 donations, and by recalculating many of their operating expenses.  
15 These new documents also showed positive disposable income of  
16 \$412, as opposed to the negative disposable income shown on the  
17 February 2009 Form B22C.<sup>7</sup> The September 2009 Plan provided for  
18 sixty monthly payments, with a \$202 monthly payment for months 1  
19 through 16, a \$500 payment for months 17 through 27, no payments  
20 for months 28 through 31, a \$1,350 payment for months 32 through  
21 59, and a final balloon payment of \$26,350 in month sixty.

22 Following the September 11 Evidentiary Hearing, the Trustee  
23 filed a post-hearing brief in which he essentially sided with  
24 Lifescape. The Trustee asserted that three of the four "bad  
25 faith" factors enumerated in Leavitt v. Soto (In re Leavitt), 171

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27  
28 <sup>7</sup>The Ellsworths also filed amended Schedules I and J,  
showing monthly net income of \$467.

1 F.3d 1219, 1224 (9th Cir. 1999) ("Leavitt I")<sup>8</sup> were satisfied by  
2 the circumstances surrounding the Ellsworths' bankruptcy case.  
3 According to the Trustee, the bankruptcy was filed for only one  
4 purpose: to obtain a discharge of Lifescape's judgment arising  
5 from the Injunction Litigation without paying it in full. The  
6 Trustee also pointed to incomplete, inconsistent, and missing  
7 financial information submitted by the Ellsworths. In addition,  
8 the Trustee argued that a number of significant facts about the  
9 Ellsworths' finances became apparent only after their depositions  
10 were taken. These new facts included the revelation that,  
11 immediately prior to filing, Mr. Ellsworth had withdrawn nearly  
12 \$10,000 from one of the Ellsworths' bank accounts in order to  
13 prepay their utilities and to prepay the costs of a future  
14 surgical procedure for Dr. Ellsworth.

#### 15 **4. The Ruling on the Motion to Dismiss**

16 On March 24, 2010, the court issued a written ruling  
17 granting Lifescape's motion to dismiss. In justifying dismissal,  
18 the court in part relied upon (and incorporated by reference) its  
19 January 2009 Order, the main thrust of which "was that the court  
20 did not trust the numbers provided by the [Ellsworths] . . . ."<sup>9</sup>

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21  
22 <sup>8</sup>We refer to the court of appeals' decision as Leavitt I  
23 because, elsewhere in this Opinion, we refer to our decision,  
24 Leavitt v. Soto (In re Leavitt), 209 B.R. 935 (9th Cir. BAP  
1997), aff'd, 171 F.3d at 1219, as "Leavitt II."

25 <sup>9</sup>The court further pointed out that it had reiterated this  
26 concern during the first status conference on the motion to  
27 dismiss, held on April 14, 2009. Indeed, during the April 14  
28 hearing, the court, at length and more than once, voiced grave  
concerns regarding the trustworthiness of the Ellsworths'  
financial reporting. One instance illustrates the court's view:

(continued...)

1 The court also noted that the January 2009 Order had required the  
2 Ellsworths to file a new plan by no later than February 11, 2009,  
3 which they had not done.

4 In connection with its ruling, the court made several key  
5 findings of fact and conclusions of law. Initially, the court  
6 found that the Ellsworths had unreasonably delayed in filing  
7 their September 2009 Form B22C and September 2009 Plan. Both  
8 documents contained significant changes that could have and  
9 should have been made before the eve of the September 11  
10 Evidentiary Hearing. Under the circumstances, the bankruptcy  
11 court found that the Ellsworths' filing of the September 2009  
12 Form B22C and the September 2009 Plan on the eve of the September  
13 11 Evidentiary Hearing prejudiced Lifescape by ensuring that  
14 Lifescape could not properly prepare for the confirmation hearing  
15 on the newly-filed plan.

16 The Ellsworths attempted to justify their late filings by  
17 pointing to the Ninth Circuit's decision in Ransom v. MBNA Am.

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19 <sup>9</sup>(...continued)

20 I don't trust any of these numbers. And I don't think  
21 it's good for your client having me not trust the  
22 numbers.

22 . . .  
23 And so you got to figure out a way to get to the point  
24 where everybody trusts and understands the numbers.  
25 And your client has to understand that in the absence  
26 of that I'm going to grant [the motion to dismiss].

25 . . .  
26 I mean we have to understand where this case is going  
27 and why it's going there. And what these expenses are.  
28 And what she can pay and what she can't pay. And why  
she can't pay it if she can't. Or, like I said, this  
is not an appropriate case for a 13 and I'll grant the  
motion.

1 Bank, N.A. (In re Ransom), 577 F.3d 1026 (9th Cir. 2009), aff'd,  
2 Ransom v. FIA Card Servs., N.A., 131 S.Ct. 716 (2011), issued in  
3 August 2009, and then claiming that this recent decision  
4 necessitated the filing of their September 2009 Form B22C and  
5 September 2009 Plan.

6 The court rejected the Ellsworths' excuse. The court  
7 reminded the Ellsworths that it had told them that the court  
8 intended to follow the prior BAP decision in Ransom, which  
9 required the same changes to the plan and to the Form B22C that  
10 the Ellsworths belatedly attempted to make in their September  
11 2009 Form B22C and their September 2009 Plan. Further, the  
12 changes made were not confined to those required by the Court of  
13 Appeals' ruling in Ransom - the Ellsworths had made material  
14 changes to non-car-related expenses, and significantly increased  
15 their charitable contributions.

16 The court also found that the Ellsworths only had a few  
17 creditors, and Lifescape was the only creditor who would be  
18 adversely affected by the bankruptcy and by the Ellsworths'  
19 proposed plans. From this, and their historic efforts to avoid  
20 the financial consequences of the Injunction Litigation, the  
21 court concluded that the only purpose of the bankruptcy was to  
22 discharge the debt owed to Lifescape without paying it in full.

23 With respect to Lifescape's allegations of bad faith, the  
24 court examined the Ellsworths' claim that they were unable to pay  
25 Lifescape outside of bankruptcy. The bankruptcy court looked  
26 askance at this claim; the Ellsworths had offered no evidence  
27 that they made any attempt before filing bankruptcy to pay the  
28 judgment or to rework their finances so as to be able to satisfy

1 the judgment. In particular, there was no evidence that the  
2 Ellsworths considering refinancing their residence, even though  
3 their bankruptcy schedules indicated it had \$250,000 in equity.  
4 The court also took as evidence of bad faith the Ellsworths'  
5 recalcitrance in only begrudgingly amending key schedules and  
6 documents to increase payments to Lifescape. In the first three  
7 versions of their Form B22C, the Ellsworths reported improper  
8 business expenses for the Medical Practice. These included: (1)  
9 payments for Dr. Ellsworth's salary, (2) attorney's fees for the  
10 Ellsworths' bankruptcy attorney, (3) payments for Dr. Ellsworth's  
11 student loans, and (4) payments for the loan that enabled Dr.  
12 Ellsworth to purchase her Mercedes.

13 The Ellsworths' reporting of these expenses should have been  
14 corrected, at the latest, by the time the Ellsworths filed their  
15 February 2009 Form B22C, but the Ellsworths did not correct these  
16 items until the eve of the September 11 Evidentiary Hearing, when  
17 they filed their September 2009 Form B22C.

18 The court also saw latent and improper gamesmanship in the  
19 manner in which the Ellsworths reported the amount of their  
20 charitable giving. The Ellsworths incorrectly reported a  
21 charitable giving expense of \$650 per month in the first three  
22 versions of their Form B22C, whereas the amount reported in their  
23 September 2009 Form B22C was almost twice that amount, or \$1,199  
24 per month.

## 25 **5. The Ellsworths' Motion for Rehearing**

26 Shortly after the court issued its March 24, 2010 ruling,  
27 Lifescape lodged a proposed form of order. The Ellsworths  
28 objected, and also filed a motion for rehearing under Civil Rule

1 59 (made applicable in bankruptcy cases by Rule 9023). According  
2 to the Ellsworths, they had a reasoned basis for not following  
3 the BAP's holding in Ransom and not immediately making the  
4 necessary corrections in their February 2009 Form B22C. Even  
5 though they have admitted that they were aware of the bankruptcy  
6 court's announced intention to follow the BAP's holding in  
7 Ransom, the Ellsworths asserted that they had found a case at  
8 odds with the BAP's holding in Ransom from the U.S. District  
9 Court for the Eastern District of Washington. This case, Brunner  
10 v. Armstrong (In re Armstrong), 395 B.R. 127 (E.D. Wash. 2008),  
11 purportedly justified their decision not to comply with the  
12 court's January 2009 Order because it rejected the BAP's  
13 reasoning and holding in Ransom. The Ellsworths further argued  
14 that there was no evidence in the record to support the court's  
15 bad faith finding and that the court's ruling, in effect, would  
16 force future debtors to use their exempt equity in their  
17 homestead to pay off their creditors or else face the prospect of  
18 a finding of bad faith. The Ellsworths finally suggested that  
19 the court's focus on their charitable giving interfered with  
20 their First Amendment right to freedom of religion.

21 The court denied the Ellsworths' Civil Rule 59 motion in a  
22 written ruling issued without a hearing. According to the  
23 bankruptcy court, the Ellsworths had not set forth cause for  
24 reconsideration of the court's ruling. As the court stated,

25 [T]he Debtors do not present an error of law or fact.  
26 Each of [the Ellsworths'] actions alone may have been  
27 justifiable, but they were part of an overall pattern  
28 by the Debtors under which forms were filed late and  
numbers changed when the forms were filed. The Court  
has already thought this through and will not do so  
again.

1 The court then held that the totality of the circumstances had  
2 established the Ellsworths' bad faith in filing bankruptcy, and  
3 that bad faith constituted cause for dismissal of the case with  
4 prejudice under Leavitt I:

5 Dismissal with prejudice is justified. Lifescape's  
6 [sic] asked the Court to dismiss with prejudice in  
7 their motion to dismiss. Bad faith is cause for  
8 dismissal with prejudice. In re Leavitt at 393. Here  
9 the Court found bad faith by the [Ellsworths] under the  
10 Leavitt factors and will therefore dismiss with  
11 prejudice.

12 On July 22, 2010, the court entered its order dismissing the case  
13 with prejudice, and the Ellsworths timely appealed.<sup>10</sup>

#### 14 **STANDARD OF REVIEW**

15 We review the bankruptcy court's dismissal of a chapter 13  
16 bankruptcy case for abuse of discretion, regardless of whether  
17 the court dismisses under any of the enumerated paragraphs of  
18 Section 1307(c), or for bad faith. See Leavitt I, 171 F.3d at  
19 1222-23; Ho v. Dowell (In re Ho), 274 B.R. 867, 871 (9th Cir. BAP  
20 2002).

21 To determine whether the bankruptcy court has abused its  
22 discretion, we conduct a two-step inquiry: (1) we review de novo  
23 whether the bankruptcy court "identified the correct legal rule  
24 to apply to the relief requested" and (2) if it did, whether the  
25 bankruptcy court's application of the legal standard was  
26 illogical, implausible or "without support in inferences that may  
27 be drawn from the facts in the record." United States v.  
28 Hinkson, 585 F.3d 1247, 1261-62 & n.21 (9th Cir. 2009) (en banc).

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<sup>10</sup>The bankruptcy court had jurisdiction under 28 U.S.C.  
§§ 1334 and 157(b) (2) (A), and we have jurisdiction under 28  
U.S.C. § 158.

1 "If the bankruptcy court did not identify the correct legal rule,  
2 or its application of the correct legal standard to the facts was  
3 illogical, implausible, or without support in inferences that may  
4 be drawn from the facts in the record, then the bankruptcy court  
5 has abused its discretion." USAA Fed. Sav. Bank v. Thacker (In  
6 re Taylor), 599 F.3d 880, 887-88 (9th Cir. 2010) (citing United  
7 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009) (en  
8 banc)).

9 In particular, when a bankruptcy court makes factual  
10 findings of bad faith to support dismissal of a chapter 13 case,  
11 we review those findings for clear error. See Leavitt I, 171  
12 F.3d at 1222-23; Greatwood v. IRS (In re Greatwood), 194 B.R.  
13 637, 639 (9th Cir. BAP 1996); Rule 8013. Under this standard,  
14 "[w]here there are two permissible views of the evidence, the  
15 fact finder's choice between them cannot be clearly erroneous."  
16 Anderson v. City of Bessemer City, N.C., 470 U.S. 564, 574  
17 (1985). As a consequence, so long as the bankruptcy court  
18 applied the correct legal standard, we must affirm unless the  
19 bankruptcy court's findings of bad faith were clearly erroneous.

## 20 DISCUSSION

21 **A. The bankruptcy court did not err in finding bad faith or in**  
22 **finding that other cause existed to dismiss the Ellsworths'**  
**bankruptcy.**

23 Section 1307(c) enumerates eleven non-exclusive grounds  
24 which may constitute "cause" for dismissal. In relevant part,  
25 § 1307(c) gives the bankruptcy court discretion to dismiss based  
26 on:

27 (1) unreasonable delay by the debtor that is  
28 prejudicial to creditors;

1 . . .

2 (3) failure to file a plan timely under section  
3 1321 of this title;

4 . . .

5 (5) denial of confirmation of a plan under section  
6 1325 of this title and denial of a request made for  
7 additional time for filing another plan or a  
8 modification of a plan . . . .

9 Even though § 1307(c) does not explicitly mention it, the  
10 bad faith filing of a bankruptcy petition also may constitute  
11 "cause" for dismissal. Leavitt I, 171 F.3d at 1224.

12 Furthermore, a bad faith bankruptcy filing may justify dismissal  
13 of the case with prejudice, under § 349. See id. at 1223.

14 In this case, the bankruptcy court determined that cause  
15 existed to dismiss the case under §§ 1307(c)(1), (3) and (5), and  
16 because the Ellsworths filed their bankruptcy petition in bad  
17 faith. The Ellsworths argue that the bankruptcy court erred  
18 because "there was no evidence" to support the bankruptcy court's  
19 findings. In particular, the Ellsworths argue that they had  
20 reasonable explanations for any missteps they made in prosecuting  
21 their bankruptcy case and that "no evidence or testimony was ever  
22 presented refuting" their explanations. Consequently, they  
23 assert, the bankruptcy court could not and should not have found  
24 any cause for dismissal. We disagree.

25 **1. Section 1307(c)(1)**

26 A debtor's unjustified failure to expeditiously accomplish  
27 any task required either to propose or to confirm a chapter 13  
28 plan may constitute cause for dismissal under § 1307(c)(1). See  
Howard v. Lexington Invs., Inc., 284 F.3d 320, 323 (1st Cir.  
2002) (failure to file necessary tax returns); Badalyan v. Holub

1 (In re Badalyan), 236 B.R. 633, 638 (6th Cir. BAP 1999) (failure  
2 to file amended plan and to file legal memoranda supporting  
3 debtor's assertions); see also Vomhof v. United States, 207 B.R.  
4 191, 193 (D. Minn. 1997) ("Failure to supply crucial information  
5 required by a court order is proper grounds for dismissal under  
6 § 1307(c) (1).").

7       Here, the bankruptcy court found that the Ellsworths  
8 unjustifiably delayed their bankruptcy case by not promptly  
9 resolving issues concerning the trustworthiness of their  
10 financial reporting. The record supports this finding. The  
11 court warned the Ellsworths at the April 14, 2009 status  
12 conference (more than two years into their bankruptcy case) that  
13 the court doubted the accuracy and transparency of their  
14 financial information and that their chapter 13 case would be  
15 dismissed unless the Ellsworths expeditiously resolved the  
16 court's doubts. Yet many important issues regarding how the  
17 Ellsworths reported certain expenses and how the Medical Practice  
18 paid these expenses (e.g., payment of bankruptcy legal fees,  
19 payments on Dr. Ellsworth's Mercedes, and payment of student loan  
20 debt) only became apparent after Lifescape and the Trustee took  
21 the depositions of the Ellsworths and their accountant.  
22 Furthermore, the Ellsworths for the first time came up with a  
23 proposed resolution for these payment issues in their September  
24 2009 Plan and in their September 2009 Form B22C, both filed on  
25 the eve of the September 11 Evidentiary Hearing on the motion to  
26 dismiss. This was simply too little, too late.

27       Moreover, the need on the eve of the hearing to correct the  
28 obvious and significant error in the reporting of their

1 charitable giving expense reflected that the Ellsworths did not  
2 take seriously the court's admonitions regarding the need for  
3 their numbers to be accurate. It would have been a relatively  
4 simple matter for either the Ellsworths, or their accountant, or  
5 their attorneys, to proofread for accuracy the then-current  
6 version of their Form B22C, but no one apparently did. Or if  
7 they did, no one bothered to file and serve a corrected Form B22C  
8 until the eve of the September 11 Evidentiary Hearing.

9 The Ellsworths' appeal brief suggests that their missteps  
10 were inadvertent and/or that they resulted from the ineffective  
11 assistance of counsel. But the court found, based on the entire  
12 record, that the delay was unjustified. We cannot say on this  
13 record that this finding was "illogical," "implausible," or  
14 "without support in inferences that may be drawn from the facts  
15 in the record." Hinkson, 585 F.3d at 1262 n.21.

16 The record also supports the bankruptcy court's finding that  
17 Lifescape was prejudiced by the delay. Because the Ellsworths  
18 were either unwilling or unable to identify and/or attempt to  
19 resolve many of the issues concerning their Form B22C until the  
20 eve of the September 11 Evidentiary Hearing, Lifescape was  
21 hindered in its ability to respond to the Ellsworths' financial  
22 reporting and plan proposals. Simply put, Lifescape was forced  
23 to aim at a fuzzy and constantly-moving target for no reason  
24 other than the Ellsworths could not or would not address earlier  
25 the problems with the prior versions of their Form B22C. In  
26 short, the court did not clearly err when it found that the delay  
27 in addressing the accuracy and transparency of their financial  
28 reporting prejudiced Lifescape.

1           **2. Section 1307(c) (3)**

2           Section 1307(c) (3) is simply phrased. Cause for dismissal  
3 exists for "failure to file a plan timely under Section 1321."  
4 Under this provision, a plan is untimely unless it is filed  
5 within the fourteen-day deadline provided for in Rule 3015 or  
6 within such other deadline as the court duly orders. See Keith  
7 M. Lundin & William H. Brown, Chapter 13 Bankruptcy,  
8 [http://www.ch13online.com/Subscriber/Chapter\\_13\\_Bankruptcy\\_4th](http://www.ch13online.com/Subscriber/Chapter_13_Bankruptcy_4th_Lundin_Brown.aspx)  
9 [\\_Lundin\\_Brown.aspx](http://www.ch13online.com/Subscriber/Chapter_13_Bankruptcy_4th_Lundin_Brown.aspx), § 55.1, at ¶ [6] (4th ed., 2004 rev.) (citing  
10 cases). This paragraph is an important restriction on a chapter  
11 13 debtor who, unlike a chapter 11 debtor, is the only entity  
12 that may file a plan. 8 Collier on Bankruptcy ¶ 1321.01 (Alan N.  
13 Resnick & Henry J. Sommer, eds., 16th ed 2011) ("The chapter 13  
14 debtor has the exclusive right to file a plan.").

15           Paragraph (3) of § 1307(c) applies not only to the first  
16 plan filed, but also to any subsequent plan or modification  
17 required by the court. See § 1329(b) (2) ("The plan as modified  
18 becomes the plan . . . ."). Here, the Ellsworths failed to file  
19 timely a plan as required by the bankruptcy court's January 2009  
20 Order. Under that order, the Ellsworths were to file a new plan  
21 within thirty days. But they did not file a new plan until  
22 September 2009, seven months after the court's deadline.

23           The Ellsworths argue that they did not need to comply with  
24 the deadline because they had no disposable income to support the  
25 filing of a new plan and that the need for a new plan only became  
26 apparent after the Ninth Circuit Court of Appeals issued its  
27 decision in Ransom. The bankruptcy court found, and we agree,  
28 that the Ellsworths' excuses for not complying with the deadline

1 in the January 2009 Order were unpersuasive.

2 The Ellsworths flouted the court's specific order at their  
3 peril. They apparently thought their inaction was justified  
4 because they assumed that the court's implicit reasoning (as  
5 opposed to its explicit words) no longer compelled them to file a  
6 new plan. But even if this kind of tortured logic - ignoring  
7 express language based on a supposition that the court would  
8 later see it their way and absolve them of any noncompliance -  
9 had any validity, the Ellsworths had no substantial basis for  
10 their supposition.

11 Part of the Ellsworths' claim is that a new plan was not  
12 necessary because they contended that Ransom would soon no longer  
13 be binding. Not only did this prognostication prove wrong, it  
14 was contrary to what the bankruptcy court actually said; indeed,  
15 they admitted they were aware of the court's stated intent to  
16 follow the BAP's holding in Ransom.

17 The Ellsworths then offer a variant on this argument. They  
18 argue Armstrong, 395 B.R. 127, was at odds with the BAP's holding  
19 in Ransom, and thus Armstrong's contrary holding justified their  
20 inaction. But Armstrong was not binding on the bankruptcy court,  
21 and nothing in Armstrong or elsewhere made it appropriate for the  
22 Ellsworths simply to ignore the court's ordered thirty-day  
23 deadline for filing a new plan. If the Ellsworths believed that  
24 the deadline needed modification, they should have sought  
25 modification or clarification of the order. They never did,  
26 essentially substituting their judgment for the court's. This  
27 was obviously improper. Thus, we cannot say that the finding of  
28 the bankruptcy court concerning the untimeliness of the

1 Ellsworths' plan was clearly erroneous. Dismissal under  
2 § 1307(c) (3) was appropriate.

### 3 **3. Section 1307(c) (5)**

4 The considerations referenced above also likely support the  
5 court's dismissal under § 1307(c) (5) - based on denial of  
6 confirmation of a plan and denial of a request made for  
7 additional time to file a new plan. However, dismissal under  
8 § 1307(c) (5) often requires an express request for additional  
9 time to file a plan, and a denial thereof. See Nelson v. Meyer  
10 (In re Nelson), 343 B.R. 671, 676 & n.9 (9th Cir. BAP 2006).  
11 Here, the Ellsworths never explicitly requested additional time  
12 to file a plan. We might, however, construe their September 2009  
13 Plan as an implicit, belated request for additional time, which  
14 request the bankruptcy court implicitly denied when it declined  
15 to consider the merits of the September 2009 Plan. We need not  
16 decide, however, whether these facts satisfy the requirements of  
17 § 1307(c) (5) in light of our rulings on the other grounds for  
18 dismissal. Dismissal was justified regardless of the propriety  
19 of the bankruptcy court's reasoning on § 1307(c) (5).

### 20 **4. Bad Faith**

21 The bankruptcy court additionally found that the Ellsworths  
22 filed their bankruptcy in bad faith, and that the bad faith  
23 filing served as cause for dismissal. A chapter 13 petition  
24 which is filed in bad faith may be dismissed "for cause" under  
25 § 1307(c). Leavitt I, 171 F.3d at 1224; Eisen v. Curry (In re  
26 Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (per curiam); In re Ho,  
27 274 B.R. at 876-77. "To determine if a petition has been filed  
28 in bad faith courts are guided by the standards used to evaluate

1 whether a plan has been proposed in bad faith." Eisen, 14 F.3d  
2 at 470. In reaching this determination, a bankruptcy court must  
3 review the "totality of the circumstances" to determine if a  
4 petition was filed in bad faith. Id.; Goeb v. Heid (In re Goeb),  
5 675 F.2d 1386, 1390-91 (9th Cir. 1982). See Lundin & Brown,  
6 supra, at § 334.1, at ¶ [6] ("the test for bad-faith dismissal of  
7 a Chapter 13 case under § 1307(c) is similar to the analysis of  
8 good faith required for confirmation under § 1325(a)(3)").

9 In Leavitt I, the Ninth Circuit expanded on Eisen and held  
10 that when considering dismissal of a chapter 13 case due to bad  
11 faith in its filing, a bankruptcy court should consider: (1)  
12 whether the debtor misrepresented facts in his petition or plan,  
13 unfairly manipulated the Code, or otherwise filed his petition or  
14 plan in an inequitable manner; (2) the debtor's history of  
15 filings and dismissals; (3) whether the debtor intended to defeat  
16 state court litigation; and (4) whether egregious behavior is  
17 present. Leavitt I, 171 F.3d at 1224; see also In re Ho, 274  
18 B.R. at 876; Collier, supra, ¶ 1307.04[10].<sup>11</sup>

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21 <sup>11</sup>As stated in Lundin & Brown:

22 The characteristics of a bad-faith Chapter 13 case  
23 include the presence of few creditors, filing on the  
24 eve of a foreclosure sale or on the eve of some other  
25 litigation event in another court, the debtor's failure  
26 to meet deadlines for filing or amending the statement,  
27 schedules or the plan, the debtor's failure to attend  
the meeting of creditors or other hearings, a plan that  
proposes little payment to creditors, a plan that has  
no hope of confirmation and general lying, cheating or  
stealing by the debtor.

28 Lundin & Brown, supra, at 334.1, at ¶ 6.

1           When seeking confirmation of a plan, the debtor, as plan  
2 proponent, has the burden of proof on the issues of whether both  
3 the case and the plan were filed in good faith. §§ 1325(a)(3),  
4 (7). When a creditor seeks dismissal due to bad faith, the  
5 applicable burden of proof is not as clear. We acknowledge that  
6 Leavitt II states that, for purposes of determining whether cause  
7 exists to dismiss a chapter 13 case based on bad faith, the  
8 “[d]ebtor bears the burden of proving that the petition was filed  
9 in good faith.” Leavitt II, 209 B.R. at 940.<sup>12</sup> As applied to  
10 chapter 13 as in force in 1997, when we decided Leavitt II, this  
11 statement was unexceptional. In 1997, there was no statutory  
12 requirement that a chapter 13 case be filed in good faith; the  
13 present requirement, now contained in § 1325(a)(7), was not added  
14 formally until 2005. It is thus true now that the debtor, as  
15 plan proponent, has the burden of proof on the confirmation  
16 issues of whether both the case and the plan were filed in good  
17 faith. §§ 1325(a)(3), (7).

18           If the question were close, we might question the strength  
19 and applicability of Leavitt II’s statement regarding burden of  
20 proof for motions to dismiss given the 2005 statutory addition of  
21

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22           <sup>12</sup>Leavitt II relied solely on In re Powers, 135 B.R. 980,  
23 997 (Bankr. C.D. Cal. 1991). Powers dealt directly with bad  
24 faith in filing, but hedged its statement regarding the debtor’s  
25 burden by placing that burden on the debtor only “once a debtor’s  
26 good faith is in issue,” id., which could be read to shift the  
27 burden to the debtor only after the movant has met its burden of  
28 going forward with the evidence. Other cases cited by Powers  
also indicate that in that court’s view, before the 2005  
amendments, a debtor’s burden was one of persuasion after the  
movant introduced evidence suggestive of a bad faith filing. Id.  
at 997-98.

1 § 1325(a)(7), and given, as other courts have noted, that such a  
2 statement runs contrary to the ordinary notion that a movant  
3 bears the burden of production and persuasion as to the relief  
4 requested. See, e.g., In re Lancaster, 280 B.R. 468, 474 (Bankr.  
5 W.D. Mo. 2002) (“The difference between good faith in filing a  
6 case and good faith in proposing a plan is relatively minor, and  
7 the evidence on both issues may properly be considered  
8 together. . . . Perhaps the only real distinction between the  
9 two is in the burden of proof. Under § 1307(c), the objecting  
10 creditor bears the burden of proof.”); In re Virden, 279 B.R.  
11 401, 407-11 (Bankr. D. Mass. 2002) (“The same standard for  
12 finding good, or bad, faith may properly be used [under  
13 §§ 1307(c) and 1325(a)(3)], the only distinction being who bears  
14 the burden of proof. . . . Under Section 1307(c), the objecting  
15 creditor bears the burden of proof.”). This is especially the  
16 case when, given the more serious consequences of dismissal,  
17 leading treatises recognize that “proof sufficient to deny  
18 confirmation of a plan for lack of good faith will not always  
19 also be sufficient to dismiss the case for cause.” Lundin &  
20 Brown, supra, § 334.1, at ¶ [6]; see also Collier, supra, at ¶  
21 1307.04[10] (“Because dismissal is a harsher remedy than denial  
22 of plan confirmation, the showing of bad faith required for  
23 dismissal should be greater than that necessary for denial of  
24 confirmation.” (citing In re Love, 957 F.2d 1350, 1356 (7th Cir.  
25 1992))).

26 But we need not address now the propriety of Leavitt II's  
27 statement regarding the burden of proof. The Ellsworths did not  
28 raise or brief the issue of the burden of proof either in the

1 bankruptcy court or on appeal and thus we are not obliged to  
2 address it. See Golden v. Chicago Title Ins. Co. (In re Choo),  
3 273 B.R. 608, 613 (9th Cir. BAP 2002); Branam v. Crowder (In re  
4 Branam), 226 B.R. 45, 55 (9th Cir. BAP 1998), aff'd, 205 F.3d  
5 1350 (table) (9th Cir. 1999). But cf. Tyner v. Nicholson (In re  
6 Nicholson), 435 B.R. 622, 634 (9th Cir. BAP 2010) (holding that  
7 panel would review evidentiary standard challenged for the first  
8 time on appeal when the bankruptcy court's application of an  
9 erroneous evidentiary standard might have caused it to reach a  
10 different result).

11 More importantly, however, any error by the bankruptcy court  
12 in concluding that the Ellsworths had the burden of proof on the  
13 bad faith issue was harmless. The record reflects ample evidence  
14 to establish the Ellsworths' bad faith. As a result, the  
15 assignment of the burden of proof on the bad faith issue played  
16 no material role in the bankruptcy court's bad faith finding; the  
17 facts were not anywhere close to equipoise. Consequently, we  
18 will leave for another day the issue of whether Leavitt II's  
19 statement regarding the burden of proof requires review.

20 Regardless of who has the burden of proof, the point remains  
21 that it is well established that a lack of good faith constitutes  
22 "cause" to dismiss a chapter 13 case, and that courts may look at  
23 the same evidence for both confirmation and dismissal purposes.  
24 As the Ninth Circuit has stated, albeit in dicta:

25 [W]e have held that bad faith does provide "cause" to  
26 dismiss Chapter 11 and Chapter 13 bankruptcy petitions.  
27 . . . The Bankruptcy Code specifically mentions good  
28 faith in Chapters 11 and 13 when it permits a court to  
confirm a payment plan only if it is proposed in good  
faith. . . . In [Eisen v. Curry (In re Eisen), 14 F.3d  
469 (9th Cir. 1994),] we linked the good faith

1 requirement implicit in a Chapter 13 bankruptcy with  
2 the good faith requirement for proposing a payment plan  
3 when we stated that “[t]o determine if a petition has  
4 been filed in bad faith courts are guided by the  
5 standards used to evaluate whether a plan has been  
6 proposed in bad faith.” . . . The Bankruptcy Code’s  
7 language and the protracted relationship between  
8 reorganization debtors and their creditors lead us to  
9 conclude that bad faith per se can properly constitute  
10 “cause” for dismissal of a Chapter 11 or Chapter 13  
11 petition . . . .

12 Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1192-93 (9th  
13 Cir. 2000).

14 In dismissing the Ellsworths’ case, the bankruptcy court  
15 employed and appropriately considered all these factors. In  
16 particular, it relied on Leavitt I’s holding that bad faith was a  
17 ground for dismissal under § 1307(c), and looked at the totality  
18 of the circumstances and the four factors enumerated in Leavitt I  
19 in finding the Ellsworths filed and prosecuted their case in bad  
20 faith. Against these standards, it weighed all evidence in a  
21 reasoned, well-written opinion, and concluded that the totality  
22 of the circumstances indicated bad faith.

23 The Ellsworths have not challenged the bankruptcy court’s  
24 reliance on Leavitt I. Rather, they have argued that they had  
25 insufficient notice that their alleged bad faith was an issue.  
26 And even if there were sufficient notice, they contend that there  
27 was no evidence to support the bankruptcy court’s bad faith  
28 findings. Further, the Ellsworths claim that the bankruptcy  
29 court should have held a separate evidentiary hearing to consider  
30 their alleged bad faith.

31 The record belies all the Ellsworths’ contentions.  
32 Initially, we can dispense with the Ellsworths’ claim of lack of  
33 notice. Lifescape’s motion to dismiss explicitly discussed the

1 Ellsworths' bad faith, and thereafter virtually every other  
2 filing discussed the contention. Bad faith also was discussed at  
3 a number of the hearings held, and the joint pretrial statement  
4 referred to it. Thus, the Ellsworths had ample notice of and  
5 opportunity to be heard on the bad faith issue.

6 Similarly, the Ellsworths' argument regarding the  
7 sufficiency of the evidence simply ignores key parts of the  
8 record. Based upon the numerous uncontested facts, and upon the  
9 facts as found by the bankruptcy court and all reasonable  
10 inferences from those facts, a court could properly find bad  
11 faith. In particular, the timing and circumstances of the  
12 Ellsworths' bankruptcy filing were suspicious. The record  
13 established that the Ellsworths filed bankruptcy on the heels of  
14 the Injunction Litigation. In addition, Lifescape's claim, one  
15 of very few scheduled, was the only claim that would have been  
16 affected by any discharge; except for Lifescape, the Ellsworths  
17 were timely paying all of their other creditors and continued to  
18 timely pay all of them postpetition.

19 Were these facts not sufficient, the bad faith finding was  
20 further supported by the Ellsworths' false contention that they  
21 unsuccessfully tried to pay Lifescape's claim prepetition - a  
22 contention unsupported by any evidence and contrary to their own  
23 estimates of the value of their assets. Based on these facts and  
24 others, the bankruptcy court found that the only purpose of the  
25 Ellsworths' bankruptcy was the illegitimate one of attempting to  
26 discharge and pay a fraction of only one contested debt, a debt  
27 their own schedules suggested they could pay in full.

28 The bankruptcy court's bad faith finding was also bolstered

1 by its concerns regarding the Ellsworths' handling and reporting  
2 of their finances, both prepetition and postpetition. Among  
3 other concerns, the Ellsworths withdrew close to \$10,000 from a  
4 bank account on the eve of their bankruptcy filing to prepay  
5 certain expenses, which skewed their reporting of both their  
6 assets and their expenses. The court's concerns were also  
7 justified by the length of the Ellsworths' bankruptcy case  
8 without a confirmed plan, as well as the number and inconsistency  
9 of their amendments to their financial reporting. The  
10 Ellsworths' bankruptcy had been pending for over three years,  
11 during which time they filed four different versions of their  
12 Form B22C. The last version of their Form B22C, the September  
13 2009 Form B22C, for the first time excluded from their reported  
14 business expenses certain payments by the Medical Practice of  
15 personal expenses, including Dr. Ellsworth's student loan  
16 payments, the payment of the Ellsworths' bankruptcy legal fees,  
17 and payments on Dr. Ellsworth's Mercedes, which she purchased  
18 while her Medical Practice was still a sole proprietorship.

19 The September 2009 Form B22C also for the first time  
20 revealed that the Ellsworths had been apparently under-reporting  
21 \$1,200 per month in charitable giving expense by roughly 45%. In  
22 short, as of the eve of the September 11 Evidentiary Hearing, the  
23 Ellsworths were still attempting to reconcile and resolve their  
24 financial reporting, even though the court had expressed, on more  
25 than one occasion over the previous year, grave concerns  
26 regarding the transparency and accuracy of that reporting.  
27 Indeed, the court had explicitly warned them that continued  
28 problems with their reporting would lead to dismissal of their

1 case. The court was well within its power to find these actions  
2 to be part of a scheme to continue their bad faith filing.

3 The Ellsworths' refusal to comply with the court's January  
4 2009 Order was simply more undisputed evidence of the Ellsworths'  
5 continuing bad faith. The January 2009 Order directed the  
6 Ellsworths to file an amended plan consistent with the order  
7 within 30 days, but the Ellsworths did not file the required  
8 amended plan until September 2009, thinking that they knew better  
9 than the court when they needed to file a new plan.

10 In assessing whether a bankruptcy has been filed in bad  
11 faith, the court may infer bad faith from the totality of the  
12 surrounding circumstances. See In re Eisen, 14 F.3d at 470-71.  
13 Further, as we stated at the outset, the trier of fact's choice  
14 between two permissible views of the evidence cannot be clearly  
15 erroneous. Anderson, 470 U.S. at 574.

16 Here, the court duly exercised its role as the trier of fact  
17 and drew inferences from the totality of the circumstances that  
18 the Ellsworths filed their bankruptcy in bad faith. The  
19 circumstances reviewed were those identified in Leavitt I, a  
20 controlling Ninth Circuit precedent that had been on the books  
21 for at least ten years. On this record, we cannot say that the  
22 court's bad faith finding was clearly erroneous. See Hinkson,  
23 585 F.3d at 1262 (stating that findings of fact are not clearly  
24 erroneous unless they are "(1) illogical, (2) implausible, or (3)  
25 without support in inferences that may be drawn from the facts in  
26 the record."). Since the bankruptcy court also used the correct  
27 legal test to decide the dismissal motion, we cannot say the  
28 court abused its discretion either. Accordingly, there are no

1 grounds to reverse the bankruptcy court's determination that  
2 "cause" existed to dismiss the Ellsworths' bankruptcy case.

3  
4 **B. The bankruptcy court did not abuse its discretion when it  
5 dismissed the Ellsworths' bankruptcy case with prejudice.**

6 The bankruptcy court did not just dismiss; it dismissed the  
7 Ellsworths' case "with prejudice." Under appropriate  
8 circumstances, a bankruptcy court may dismiss a bankruptcy case  
9 with prejudice. See § 349(a); Leavitt I, 171 F.3d at 1223  
10 (citing Colonial Auto Center v. Tomlin (In re Tomlin), 105 F.3d  
11 933, 937 (4th Cir. 1997)).

12 As a preliminary matter, we note that dismissal of a  
13 bankruptcy case "with prejudice" does not have a single,  
14 universally-accepted meaning. See Tomlin, 105 F.3d at 938-39.  
15 Sometimes, when a bankruptcy court uses the phrase "dismissed  
16 with prejudice," it merely seeks to invoke § 109(g), which bars  
17 the debtor from filing any bankruptcy case for a period of 180  
18 days. See id.; see also Leavitt II, 209 B.R. at 941 n.10.

19 In Leavitt I and Leavitt II, however, this Panel and the  
20 Ninth Circuit Court of Appeals construed the bankruptcy court's  
21 dismissal with prejudice to mean that the debtor was precluded  
22 from ever again seeking to discharge those debts which would have  
23 been discharged had the plan been confirmed and completed. "A  
24 dismissal with prejudice is a complete adjudication of the issues  
25 presented by the pleadings and a bar to further action between  
26 the parties." Leavitt II, 209 B.R. at 939 (citing Tomlin, 105  
27 F.3d at 936-37). Functionally, then, a dismissal with prejudice  
28 is equivalent to a judgment under § 523(a) that each debt that  
would have been discharged under the debtor's plan is thereafter

1 nondischargeable.

2       The bankruptcy court here was familiar with both Leavitt I  
3 and Leavitt II. The court's use of the phrase "dismissal with  
4 prejudice," taken in this context, reflects that the court used  
5 the phrase in the same manner as Leavitt I and Leavitt II used  
6 it: to preclude the Ellsworths from ever again seeking to  
7 discharge debts which would have been discharged by their plan.  
8 Again, functionally, the effect of that ruling here was to make  
9 Lifescape's debt nondischargeable; the Ellsworths were either  
10 paying or could not discharge any remaining debts.

11       We acknowledge that dismissal with prejudice is a drastic  
12 remedy reserved for "extreme situations." Tomlin, 105 F.3d at  
13 937. As Tomlin explained:

14       [A] bankruptcy court rarely uses its authority to bar  
15 the discharge of debts in a later case. In any court,  
16 a dismissal order that bars subsequent litigation is a  
17 severe sanction warranted only by egregious misconduct.  
18 Given that the Bankruptcy Code's central purpose is  
19 remedial, i.e., to afford insolvent debtors an  
20 opportunity to enjoy a new opportunity in life with a  
21 clear field for future effort, unhampered by the  
22 pressure and discouragement of preexisting debt, such  
23 an order is particularly devastating in a bankruptcy  
24 case. For this reason, a permanent bar to discharge is  
25 at times referred to as the capital punishment of  
26 bankruptcy, for it removes much of the benefit of the  
27 bankruptcy system.

28 Id. (citations and internal quotation marks omitted).

      We acknowledge the harshness, but do not believe the  
bankruptcy court abused its discretion here. Dismissal under  
§ 1307(c) is a two-step process. Once the court has determined  
that cause to dismiss exists, it still must decide what remedial  
action - what form of dismissal - should be taken. See In re  
Nelson, 343 B.R. at 675; In re Ho, 274 B.R. at 877. In both

1 Nelson and Ho, we focused on the court's need to choose between  
2 conversion and dismissal. But, unlike here, dismissal with  
3 prejudice was not at issue in Nelson and Ho. When the court is  
4 considering dismissal with prejudice, the second step of this  
5 two-step process ordinarily should include consideration of  
6 whether some sanction less than dismissal with prejudice would be  
7 sufficient. For instance, aside from dismissing with prejudice,  
8 a court might consider barring the debtor from refileing for 180  
9 days pursuant to § 109(g), or for some other length of time.  
10 Alternately, a court might consider indefinitely barring relief  
11 to the debtor only under certain chapters of Title 11. See  
12 Lundin & Brown, supra, § 339.1.

13 Leavitt I and Leavitt II support this two-step process. In  
14 Leavitt I, the court of appeals noted that the bankruptcy court  
15 held a separate hearing to hear argument and to explicitly  
16 consider alternatives to dismissal with prejudice. Leavitt I,  
17 171 F.3d at 1222. In Leavitt II, we noted that a dismissal with  
18 prejudice can raise due process concerns, because such a  
19 dismissal can function like a § 727 denial of discharge, but  
20 without providing the same procedural protections that are  
21 afforded to a debtor when a creditor commences an adversary  
22 proceeding objecting to the debtor's discharge under § 727.  
23 Leavitt II, 209 B.R. at 941-42. We concluded that the procedures  
24 employed by the Leavitt bankruptcy court satisfied any due  
25 process concerns. Id. Those procedures included advance notice  
26 that dismissal with prejudice was at issue, a separate  
27 evidentiary hearing on the issue of whether the case should be  
28 dismissed with prejudice (at which time alternatives to dismissal

1 with prejudice were considered), and an explicit court  
2 determination that dismissal with prejudice was the proper remedy  
3 under the circumstances. Id. at 937-38.<sup>13</sup>

4 In this case, Lifescape's motion explicitly requested  
5 dismissal with prejudice. Thereafter, several months elapsed  
6 during which the parties appeared at hearings on the motion,  
7 conducted discovery, and filed pre- and post-trial briefs. The  
8 parties also prepared a joint pretrial statement, and  
9 participated in a formal evidentiary hearing. Once Lifescape  
10 raised the issue of dismissal with prejudice and presented a  
11 persuasive prima facie case showing sufficient bad faith to  
12 justify such a remedy, it was incumbent upon the Ellsworths to  
13 attempt to show the bankruptcy court that an alternative to  
14 dismissal with prejudice was appropriate. But the Ellsworths did  
15 not advocate for, or present any evidence in support of, any  
16 alternative. They simply rested on their assertions that  
17 dismissal, in any form, was not appropriate.

18 Consequently, even though the bankruptcy court ordinarily  
19 would be expected to explicitly consider alternatives to  
20 dismissal with prejudice, the Ellsworths' silence thwarted that  
21 task. Simply put, the Ellsworths defaulted on this issue, and we  
22 cannot say under these circumstances that the court abused its  
23 discretion when it dismissed their case "with prejudice." Given

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24  
25 <sup>13</sup>This discussion of Leavitt I and Leavitt II is not meant  
26 to suggest that the second step - determining remedy -  
27 necessarily requires a second hearing separate from the hearing  
28 determining that cause exists for dismissal or conversion. The  
bankruptcy court has the discretion to determine whether  
bifurcation of the issues is appropriate or necessary under the  
circumstances of the particular case.

1 the Ellsworths' bad faith, both independently and taken in  
2 conjunction with the other bases for dismissal, we cannot say  
3 that the bankruptcy court abused its discretion in dismissing  
4 with prejudice.

5 **CONCLUSION**

6 For the reasons set forth above, the dismissal order of the  
7 bankruptcy court is AFFIRMED.

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