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OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re: SALVADOR SANDOVAL and LUZ E. SANDOVAL, Debtors. _____ GARY R. FARRAR, Ch. 7 Trustee, Appellant, v. SALVADOR SANDOVAL; LUZ E. SANDOVAL, Appellees. _____	BAP No. EC-04-1549-MaSP Bk. No. 02-92884-7 **M E M O R A N D U M**[1]

Argued and Submitted on May 20, 2005
at Sacramento, California

Filed - August 3, 2005

Appeal from the United States Bankruptcy Court
for the Eastern District of California

Honorable Thomas C. Holman,[2] Bankruptcy Judge, Presiding.

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Before: MARLAR, SMITH and PERRIS, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

[2] Two judges presided in this case. As a visiting judge, the Hon. David E. Russell presided over and entered the abandonment order. Judge Holman then presided over and entered the order denying the motion for reconsideration.

INTRODUCTION

In this case, chapter 13[3] debtors converted to chapter 7 and then obtained an order to compel the chapter 7 trustee ("Trustee") to abandon their residential real property ("Residence"), in which approximately $155,000 in nonexempt equity had accrued during the chapter 13 case. Trustee has appealed the order, contending that the postpetition appreciation belonged to the chapter 7 estate because the debtors converted their case in bad faith, see § 348(f)(2), and he challenges the bankruptcy court's finding that bad faith was not present. We conclude that the bankruptcy court applied the correct test for determining bad faith under § 348(f)(2), which is the totality of circumstances test, and AFFIRM its finding and order.

Trustee has also appealed the bankruptcy court's denial of his motion for reconsideration in which he raised a legal argument for the first time. We conclude that Trustee waived the legal argument and, thus, his motion was properly denied. Therefore, we also AFFIRM the order denying Trustee's motion for reconsideration.

FACTS

Salvador ("Sal") and Luz Sandoval ("Luz") (together

[3] Unless otherwise indicated, "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and "rule" references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, which make applicable certain Federal Rules of Civil Procedure ("FRCP").

"Debtors") filed a chapter 13 petition on August 5, 2002. At that time, Sal was a self-employed truck driver, and Luz was collecting unemployment. Together, they earned $10,010.42 in net income per month, and their expenses were $8,493, leaving a monthly surplus of about $1,500.

The couple owned a big-rig truck, a flatbed trailer, and a 1998 Toyota 4-Runner, all of which were effectively fully encumbered by liens. The Toyota 4-Runner was reportedly used in Sal's business, and Debtors claimed to have another 1990 vehicle for personal use.

Debtors' Residence had an estimated value of $329,000, and was encumbered by a mortgage lien in the amount of $260,000. They claimed the $69,000 difference as exempt equity under the California Homestead statute.[4]

Debtors filed a five-year plan in which they proposed to pay $1,500 per month for 12 months, and then $2,235 per month for 48 months. Primarily, the plan would manage about $97,000 in the secured debt owed to the lienholders on the truck, flatbed trailer and Toyota 4-Runner. It also would pay an unsecured priority tax claim in the amount of about $1,400. However, general unsecured claims, which totaled approximately $60,000, would be paid nothing.

Then, in one month's time, Debtors' circumstances changed significantly. Sal was no longer self-employed and was hired by

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[4] Exempt property is defined by the state law in effect on the date the bankruptcy petition is filed. See 11 U.S.C. § 522(b)(2)(A). The relevant exemption statute provided up to a $75,000 homestead exemption. See Cal. Civ. Proc. Code § 704.730(a)(2).

another trucking company, and Luz was working as a part-time waitress at Mimi's Café.[5] In January 2003, they filed amended schedules which reflected a significant decrease in combined net income and expenses, respectively, to $3,692.41 per month (from $10,010.42) and $3,263 (from $8,493). This reflected a monthly surplus of only $429 (from $1,500).

Debtors filed their second-amended 60-month plan ("Plan"), which proposed to suspend delinquent payments through December 2002, and beginning in January 2003, make reduced payments of $200 for one month, and then $429 for 53 months. Debtors proposed to reduce their secured debt by surrendering the truck and flatbed trailer. General unsecured claims would still be paid nothing.

In addition, the Plan provided that property of the estate would not revest in Debtors until completion of the plan. Prior to Plan confirmation, Debtors did not amend their schedules and/or Plan to reflect that their monthly mortgage payment, based on an adjustable interest rate loan, had declined by $316, thus increasing their disposable income.

The Plan was confirmed in April 2003.[6] Over approximately 14 months, Debtors paid $9,848 into the Plan. One year after Plan confirmation, Debtors filed a motion to convert their case to chapter 7, under § 1307(a), and their motion was granted on March 30, 2004.

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[5] Luz testified that she worked approximately 20 hours per week in order to be home with her 14-year-old child.

[6] Without explanation, the confirmation order changed the proposed monthly plan payments to $295 for two months (increased from $200 for one month), then to $325 per month for the remaining months (decreased from $429). It is unclear from the record whether this was the actual payment or was a typographical error.

Debtors filed amended schedules in April 2004, showing another decrease in combined net income to $3,349.51 (down from $3,692.41). Expenses remained the same: $3,263. The change was reflected in Luz's net income, which reportedly decreased from $1,279.62 to $936.73 per month. Luz's net income also showed a "payroll deduction" of $433 for "tips." Accordingly, Debtors' surplus income reportedly decreased to $86 per month.

In their Statement of Intention for chapter 7, Debtors proposed to surrender the Toyota 4-Runner, and to retain their Residence and continue mortgage payments.

On May 10, 2004, Debtors filed a motion to compel Trustee to abandon the Residence, maintaining that, as of the date of the chapter 13 petition, there was no nonexempt equity in it. They further argued that the purpose of § 348 was to allow them to retain any accrued equity in the Residence as after-acquired property. Finally they argued that there was no bad faith on their part.

Trustee opposed abandonment of the Residence, which he estimated had appreciated in value since the chapter 13 petition date and was now worth $490,000. Therefore, he maintained that the nonexempt equity was $155,000 ($490,000 - $335,000 ($260,000 secured claims + $75,000 exemption) = $155,000). Significantly, Trustee disregarded the possible legal argument regarding the applicability of § 348(f)(1) to postpetition appreciation and simply maintained that the only relevant issue was whether Debtors had converted their case in bad faith, in which event the bankruptcy court could value the Residence as of the conversion date, pursuant to § 348(f)(2).

Following an initial hearing, the court continued the matter in order to provide the parties with an opportunity to conduct discovery and file supplemental briefs on the bad-faith issue.

After their depositions were taken, Debtors filed an amended expense schedule, in July 2004, reflecting their reduced mortgage payment, as well as increased food and transportation costs. The total expenses were $3,078.59 (down from $3,692.41). The adjustment meant they had $271 in surplus income, or about $700 if the $433 tip income was added in.

Trustee filed a supplemental response, including the declaration of his accountant, as well as documentary evidence of Debtor's income tax returns and pay stubs. Particularly, he alleged that Debtors had both under-reported their income and overestimated their expenses, and should have been able to make Plan payments of over $700 per month.

Debtors conceded that they had made mistakes in their schedules and that their disposable income was more than reported, but denied any intent to deceive or that their surplus income was as much as Trustee stated. Furthermore, they maintained that Trustee's allegations, even if true, did not rise to the level of bad faith, which they argued requires "nefarious planning" or "unfair manipulation of the bankruptcy system to the substantial detriment or disadvantage of creditors." In re Bejarano, 302 B.R. 559, 563 (Bankr. N.D. Ohio 2003) (citation omitted). They explained that the general unsecured creditors would not have received anything, even if they had stayed in chapter 13, in part, because there was an unexpected tax debt which would have required monthly plan payments of over $500. In addition, they maintained

that Trustee had the burden of proving bad faith.

On August 24, 2004, after listening to arguments and examining the documentary evidence, the bankruptcy court found that Debtors' mistakes on their schedules did not rise to the level of bad faith, particularly in light of their fluctuating financial circumstances and the fact that they had made payments under their chapter 13 plan for a period of time. It ruled:

> All right. Well, I cannot conclude that the debtors acted in bad faith. I mean anybody that spends two years in a plan and tries to make payments, you're going to have to show some real bad conduct. And I don't think that, you know, mistakes on determining the amounts of income, the changes in circumstances that these debtors went through result in a finding of bad faith.

Tr. of Proceedings (August 24, 2004), pp. 21:23-25 to 22:1-5.

The order granting Debtors' motion to compel Trustee to abandon the Residence was entered on August 30, 2004.

Trustee filed a timely motion for reconsideration, which was opposed by Debtors.[7] For the first time, in his reply pleading on the reconsideration motion, Trustee raised the legal issue that any nonexempt postpetition equity belonged to the estate in accordance with § 541(a)(6), which provides in relevant part that property of the estate includes "any proceeds, product, offspring, rents, or profits of or from property of the estate . . . ." 11 U.S.C. § 541(a)(6). In other words, Trustee proposed that § 348(f)(1) did not apply because the postpetition appreciation was not after-acquired property.

Following a hearing, the bankruptcy court denied the motion.

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[7] Debtors also objected to the declaration of Trustee in which he presented a broker's opinion and comparable sales data as to the current value of the Residence.

Trustee timely appealed both orders.

ISSUES

1) Whether the bankruptcy court applied the correct legal standard under § 348(f)(2), and whether its finding that Debtors did not convert their bankruptcy case in bad faith was clearly erroneous.

2) Whether the bankruptcy court abused its discretion in denying Trustee's motion for reconsideration of its order abandoning the Residence.[8]

STANDARDS OF REVIEW

The bankruptcy court's factual findings are reviewed for clear error, and its conclusions of law, such as whether it applied the correct legal standard, are reviewed de novo. Price v. U.S.T. (In re Price), 353 F.3d 1135, 1138 (9th Cir. 2004); Law Offices of David A. Boone v. Derham-Burk (In re Eliapo), 298 B.R. 392, 397 (9th Cir. BAP 2003) (legal standard). The existence of

[8] Trustee urges us to resolve the legal issue concerning the applicability of § 348(f) to the postpetition appreciation, which he did not present until filing his reply in the proceeding on reconsideration. The issue was not considered by the bankruptcy court. While we have discretion to consider a legal issue raised for the first time on appeal if it is a pure question of law and does not affect or rely upon the factual record developed by the parties, or where the pertinent record has been fully developed, Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R. 339, 345 (9th Cir. BAP 1994), we decline to exercise that discretion in this case.

bad faith is a factual determination. Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 122-23 (9th Cir. 1999).

The bankruptcy court's decision on abandonment is reviewed for an abuse of discretion. Vu v. Kendall (In re Vu), 245 B.R. 644, 647 (9th Cir. BAP 2000). We also review the bankruptcy court's decision to grant or deny a motion for reconsideration, under Fed. R. Bankr. P. 9023/Fed. R. Civ. P. 59(e), for an abuse of discretion. Far Out Prods., Inc. v. Oskar, 247 F.3d 986, 992 (9th Cir. 2001). "Under the abuse of discretion standard, we will not reverse unless we are 'definitely and firmly convinced that the bankruptcy court committed a clear error of judgment.'" Eliapo, 298 B.R. at 397-98.

DISCUSSION

Section 554(b) provides that "[o]n request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(b).

Debtors moved to compel Trustee to abandon the Residence based on the lack of nonexempt equity on the filing date of their chapter 13 petition. This appeal presents a common situation where chapter 13 debtors realize nonexempt equity in their prepetition property during the course of the bankruptcy case, whether due to market appreciation or to ongoing reduction of the amount of liens through payments made during the normal period of their plan, or both. When they exercise their right to convert to

chapter 7, pursuant to § 1307(a), the bankruptcy trustee will attempt to liquidate the property and claim the postpetition appreciation for the estate and its creditors, while the debtors will argue that it is theirs by operation of law, specifically, § 348(f).

Section 348 governs the effects of conversion from one chapter to another, and its effect on property rights. In most instances, conversion constitutes an order for relief under the chapter to which the case is converted, but does not effect a change in the date of the filing of the petition, the commencement of the case, or the original order for relief. See § 348(a). Section 348(f) further provides:

> **§ 348. Effect of conversion**
>
> . . . .
>
> **(f)(1)** Except as provided in paragraph (2), when a case under chapter 13 of this title is converted to a case under another chapter under this title—
>
> **(A)** property of the estate in the converted case shall consist of property of the estate, as of the date of filing of the petition, that remains in the possession of or is under the control of the debtor on the date of conversion; and
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> **(B)** valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claims reduced to the extent that they have been paid in accordance with the chapter 13 plan.
>
> **(2)** If the debtor converts a case under chapter 13 of this title to a case under another chapter under this title in bad faith, the property in the converted case shall consist of the property of the estate as of the date of conversion.

11 U.S.C. § 348(f).[9]

It was undisputed that, in the absence of bad faith, the valuation of the Residence in the chapter 13 case would control pursuant to § 348(f)(1)(B) and there would be no nonexempt equity in the residence.[10] Therefore, the only issue properly before the bankruptcy court was whether bad faith was present.

A. § 348(f)(2) Bad Faith

Section 348(f) makes an exception for a debtor who "converts . . . under this title in bad faith." 11 U.S.C. § 348(f)(2). The statute does not explain what would constitute a bad-faith conversion.

The legislative history gives some insight into Congressional intent by adopting the position of Bobroff v. Continental Bank (In re Bobroff), 766 F.2d 797 (3d Cir. 1985). In Bobroff, the court held that a tort cause of action, which arose during the chapter 13 phase of the bankruptcy case, and thus became property of the

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[9] We do not need to address the amendments to § 348(f)(1)(B) under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which do not take effect until October 17, 2005.

[10] Debtors' uncontested homestead exemption based on the declared property value was a "valuation" for purposes of § 348(f)(1)(B). See 3 Collier on Bankruptcy ¶ 348.07[3] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2005) (reading § 348(f)(1)(B) to control exemption valuation would be consistent with § 348(f)(1)(A) and serves judicial efficiency). Such valuation may be applicable to determine existing equity at the time of the chapter 13 filing. For instance, in a conversion from a chapter 11 to chapter 7 an exemption claim cannot be challenged anew in the converted chapter 7 case. See Smith v. Kennedy (In re Smith), 235 F.3d 472, 473 (9th Cir. 2000) (conversion from chapter 11 to chapter 7 does not give rise to a new 30-day period in which to object to exemption claims).

chapter 13 estate under § 1306(a), would not be part of the chapter 7 estate upon conversion. Id. 804. The Third Circuit looked at the legislative history of § 348(f) and Congress' goal of encouraging the use of debt repayment plans. See H.R. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977) reprinted in 1978 U.S.C.C.A.N., p. 5904. It held:

> This result is consonant with the Bankruptcy Code's goal of encouraging the use of debt repayment plans rather than liquidation. . . . If debtors must take the risk that property acquired during the course of an attempt at repayment will have to be liquidated for the benefit of creditors if chapter 13 proves unavailing, the incentive to give chapter 13--which must be voluntary--a try will be greatly diminished. Conversely, when chapter 13 does prove unavailing "no reason or policy suggests itself why the creditors should not be put back in precisely the same position as they would have been had the debtor never sought to repay his debts. . . ."

Bobroff, 766 F.2d at 803-04 (citation omitted) (quoting Hannan v. Kirschenbaum (In re Hannan), 24 B.R. 691, 692 (Bankr. E.D.N.Y. 1982)).

"By adopting Bobroff in its enactment of § 348(f)(1)(A), Congress intended to avoid penalizing debtors for their chapter 13 efforts by placing them in the same economic position they would have occupied if they had filed chapter 7 originally." Wyss v. Fobber (In re Fobber), 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000) (citing In re Pearson, 214 B.R. 156, 164 (Bankr. N.D. Ohio 1997)). "In other words, § 348(f)(1)(A) was designed to mitigate the effect of § 1306(a) in cases converted from chapter 13 by excluding from property of the estate in the converted case property brought into the estate under § 1306(a)." Fobber, 256 B.R. at 278.

Accordingly, under § 348(f)(2), "[c]ourts clearly should not

find bad faith if the debtor is [merely] unable to complete a plan due to a change in circumstances or financial hardship. Moreover, simply taking advantage of the statute's provisions excluding property acquired during the chapter 13 case from the chapter 7 estate after conversion is not bad faith." See 3 Collier on Bankruptcy ¶ 348.07[2], p. 348-23 to 348-24 (Alan N. Resnick & Henry J. Sommer, eds. 15th ed. rev. 2005) (alteration added), citing In re Wiczek-Spaulding, 223 B.R. 538, 540 (Bankr. D. Minn. 1998).

Nonetheless, a bad-faith conversion may be found under § 348(f)(2) if debtors file a chapter 13 petition with the intention of converting thereafter to chapter 7 simply to shelter a prepetition asset, or one they expect to acquire and that would have been liquidated if they had filed the chapter 7 in the first instance. See Collier, supra, at 348-23.

Trustee's argument is twofold. First, he contends that the bankruptcy court erroneously placed the burden of proving Debtors' bad faith on him. Secondly, he maintains that the bankruptcy court required a heightened proof of "real bad conduct" instead of applying the "totality of circumstances" test. As a result, he argues that the court found that Debtors' plan payments were evidence of their good faith, but it ignored inaccuracies in their schedules and their alleged undisclosed ability to fund a chapter 13 plan.

1. Burden of Proof

Trustee's attempt to defeat the provisions of § 348(f)(1)(B)

on the grounds of bad faith is comparable to an interested party's motion to dismiss or convert for "cause" under § 1307(c). We have held that, in a § 1307(c) proceeding, once bad faith is at issue, it is the debtor's burden to prove that the chapter 13 petition was filed in good faith. See Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 940 (9th Cir. BAP 1997), aff'd, 171 F.3d 1219 (9th Cir. 1999).

Furthermore, here, the bad-faith issue arose in the context of an abandonment proceeding that was initiated by Debtors after they voluntarily converted to chapter 7. Debtors were required to prove their good faith in order to establish their entitlement to the Residence and its equity.

Finally, Congress did not expressly provide a presumption of good faith in § 348(f)(2), such as it provided a presumption in the debtor's favor in a § 707(b) "substantial abuse" proceeding.

Therefore, we hold that once Trustee put bad faith at issue, under § 348(f)(2), Debtors had the burden of proving that they converted their chapter 13 case to chapter 7 in good faith.

2. Totality of Circumstances Test

Most courts interpret bad faith in § 348(f)(2) consistently with existing interpretations of "good faith" utilized in the Bankruptcy Code. See, e.g., Warren v. Peterson, 298 B.R. 322, 327 (N.D. Ill. 2003). In their appellate briefs, Trustee argued and Debtors conceded that the "totality of the circumstances" test applies to § 348(f)(2), and we find no reason to deviate from this

well-established test for bad faith.[11] See Ho v. Dowell (In re Ho), 274 B.R. 867, 876 (9th Cir. BAP 2002) (citing Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1391 (9th Cir. 1982)). Under the totality of the circumstances test, a bankruptcy court generally considers the following factors:

> (1) whether the debtor misrepresented facts in his or her petition or plan, unfairly manipulated the Bankruptcy Code or otherwise filed the Chapter 13 petition or plan in an inequitable manner;
>
> (2) the debtor's history of filings and dismissals;
>
> (3) whether the debtor's only purpose in filing for chapter 13 protection is to defeat state court litigation; and
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> (4) whether egregious behavior is present.

Ho, 274 B.R. at 876 (citing Leavitt, 171 F.3d at 1224).

Factors (2) and (3) are not implicated here. Factor (4)--

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[11] In bankruptcy court, Debtors proposed that the test for bad faith under § 348(f)(2) was a heightened test: debtor's "nefarious planning" or "manipulation of the bankruptcy system to the substantial detriment or disadvantage of creditors." Bejarano, 302 B.R. at 563. The cited case relied on Sixth Circuit precedent that "bad faith" required "a state of mind affirmatively operating with furtive design or ill will." United States v. True, 250 F.3d 410, 423 (6th Cir. 2001). This is not the law in the Ninth Circuit. Although egregious circumstances may indicate bad faith, evidence of fraudulent intent, ill will directed at creditors, or an attempt to violate the law, i.e., malfeasance, are not prerequisites to a finding of bad faith. See Leavitt, 171 F.3d at 1224-25; Ho, 274 B.R. at 876.

In any event, this issue was deemed abandoned by Debtors who failed to argue it in their appellate brief. See Meehan v. County of Los Angeles, 856 F.2d 102, 105 n.1 (9th Cir. 1988) (issue not briefed by a party is deemed waived); Jodoin v. Samayoa (In re Jodoin), 209 B.R. 132, 143 (9th Cir. BAP 1997) (same). Instead, Debtors conceded that "[t]here is no evidence in the record to indicate that [the bankruptcy judge] did not use the totality of the circumstances test . . . ." Appellees' Brief (March 16, 2005), p. 12:22-23.

egregious behavior[12]—is comparable to the heightened "real bad conduct" factor employed by the bankruptcy court. The bankruptcy court did not find such conduct, nor did Trustee allege that Debtors' behavior was egregious, but instead argued that he was inappropriately required to prove such a heightened standard of proof. Therefore, factor (4) is also inapplicable. Consequently, our review focuses on factor (1).

Most courts would agree that

> [a]ny inquiry into a debtor's good faith or bad faith will necessarily be very fact driven. A court must apply broad standards and general definitions of bad faith to the specific facts of the case to determine if there is fraud, deception, dishonesty, lack of disclosure of financial acts or an abuse of the provisions, purpose or spirit of the Bankruptcy Code. In other words, a court will have to determine if there has been an unfair manipulation of the bankruptcy system to the substantial detriment or disadvantage of creditors.

In re Siegfried, 219 B.R. 581, 585 (Bankr. D. Colo. 1998).

See also Goeb v. Heid (In re Goeb), 675 F.2d 1386 (9th Cir. 1982), which held:

> Given the nature of bankruptcy courts and the absence of congressional intent to specially define "good faith," we believe that the proper inquiry is whether the [debtors] acted equitably in proposing their Chapter 13 plan. A bankruptcy court must inquire whether the debtor has misrepresented facts in his plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed his Chapter 13 plan in an inequitable manner. Though it may consider the substantiality of the proposed repayment, the court must make its good-faith determination in the light of all militating factors.

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[12] "Egregious" conduct has been described as unexcused and unjustified dishonesty that pervades the proceedings and is designed to avoid payment of a judgment. See Leavitt, 171 F.3d at 1225-26. Or, it may be "behavior that demonstrates bad faith and prejudices creditors--for example, concealing information from the court, violating injunctions, or filing unauthorized petitions . . . ." Colonial Auto Center v. Tomlin (In re Tomlin), 105 F.3d 933, 937 (4th Cir. 1997).

Id. at 1390 (alteration added).

3. Application of Test by the Bankruptcy Court

The bankruptcy court's ruling expressly stated that it considered all of the circumstances, including Debtors' performance under the Plan, their "mistakes on determining the amounts of income" and "the changes in circumstances."

In order to review its decision, we examine the evidence in accordance with the first Leavitt factor.[13] We can affirm on any ground fairly supported by the record. See Leavitt, 171 F.3d at 1223.

As a threshold matter, under § 1307(a), Debtors had the absolute right to convert at any time, subject to the dismissal for cause and substantial abuse provisions of § 707(a) and (b), under which provisions the ability to fund a chapter 13 plan is relevant.[14] See Price v. U.S.T. (In re Price), 353 F.3d 1135, 1138 (9th Cir. 2004). It is not bad faith simply to take advantage of one's statutory rights. See Wiczek-Spaulding, 223 B.R. at 540.

Bad faith is not merely a disposable income test; some manipulation or abuse of the Bankruptcy Code for unfair or inequitable purposes must be found in Debtors' conduct in the chapter 13 case or in the conversion. Trustee maintained that

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[13] Leavitt factor 1 is whether debtors misrepresented facts in their petition or plan, unfairly manipulated the bankruptcy code or otherwise filed the chapter 13 petition or plan in an inequitable manner. Leavitt, 171 F.3d at 1224.

[14] Moreover, no interested party challenged Debtors' conversion to chapter 7 under § 707(b).

Debtors amended their income and expense schedules, both in the chapter 13 case and at conversion, based on how the presentation of the information suited their purposes, i.e., (1) to disguise their actual disposable income and (2) to avoid performing under the confirmed Plan even though they had ample disposable income.

To counter Trustee's allegations, Debtors denied any intent to misrepresent their income and expenses and admitted that they made inadvertent errors in their schedules. They also presented various reasons for conversion, based on their fundamental perception that they were struggling to fund a Plan they could no longer afford after they had lost their business and most of their assets.

Trustee's allegations centered on the following conduct.

a. Undisclosed Reduction in Mortgage Payments

Trustee contends that the Plan was confirmed upon Debtors' representation that they had $429 in net disposable income when, actually, they had $316 more because they failed to report their decreased adjustable mortgage payment.

The confirmed Plan was res judicata as to any and all plan confirmation issues, such as whether all of Debtors' disposable income was utilized in the Plan. See § 1325(b)(1)(B); § 1327(a). Debtors' ability to pay under the Plan was not the issue, but rather the issue was whether Debtors were intentionally under-reporting their income to avoid continuing in chapter 13.

Luz is the family's bookkeeper and was responsible for making the mortgage payments. Theirs was an adjustable mortgage, which

from 2002 to 2004 had decreased each year. In February 2003, the mortgage payment decreased by about $300, but Debtors did not notify the chapter 13 trustee or amend their schedules. They allowed the Plan to be confirmed under the higher payment figure and the $429 monthly Plan payment. Then, in February 2004, the mortgage payment decreased again, allegedly increasing their surplus income to over $700.

When asked, at her July 14, 2004 deposition, why she did not tell the chapter 13 trustee or amend the schedules to reflect the lower mortgage payment, Luz had no explanation and stated that she did not remember if she talked to Trustee about it. She further stated that she did not remember whether she had even read the incorrect April 2004 amended schedules before signing them. She acknowledged that the April 2004 schedules should be changed. Debtors finally amended their expense schedule to reflect the correct mortgage payment in July 2004, after they had converted to chapter 7.

In August 2004, Debtors filed the declaration of their attorney, who stated that his computer program did not query for an adjustable mortgage, nor had he asked about it, and the program printed out the old amount on the April 2004 amended schedules, which Debtors then overlooked. Luz's declaration was also filed in which she stated that she "did not notice that the line for the mortgage payment had not been upgraded." Decl. of Luz Sandoval (August 10, 2004), p. 2 ¶ 7.

Although Luz made the monthly mortgage payments and should have known that the schedules needed to be amended, her overall deposition testimony revealed that she was confused and

overwhelmed by the bankruptcy proceedings and schedules and simply overlooked the mistake. The schedules were timely amended when the error was discovered. Therefore, the evidence supports a finding of good faith.

b. Unsubstantiated Reasons for Conversion

Trustee also contends that Debtors' reasons for conversion were based on erroneous reporting in their bankruptcy schedules and were unsubstantiated by the evidence.

First, Luz averred that Debtors converted in the belief that her income would be significantly reduced. In fact, such a reduction did not occur, and Luz's income was under-reported on Debtors' post-conversion amended schedules, filed in April 2004. Her reported $936.73 net monthly income reflected a deduction for "tips," but instead should have been augmented by the tip income. In addition, Trustee analyzed Luz's pay statements and concluded that her net monthly income, averaged over the six months ending in June 2004, was $1,356.29 and not the reported $936.73--giving her approximately $400 more in surplus income each month.

In her testimony, Luz explained that "my income did go down but not as far as I believed it would." Decl. of Luz Sandoval (August 10, 2004), ¶ 2, at 1-2. She testified that the alleged decrease in her income had resulted from her fluctuating work schedule, decreased tips due to the opening of nearby, competing restaurants, and high gasoline prices which kept customers away. At the same time, Luz did not explain why she had deducted the entire $433 in tips from her gross income, since she testified

that only 4% of the tip money (plus taxes deducted later) was withheld from the tips, and that she received the cash at the end of each shift.

On the whole, Luz's testimony reveals that she believed her income as a part-time waitress fluctuated depending on the number of hours she worked, the number of customers on any given day, and general economic influences. This explanation for believing that her income had decreased or would decrease in the future was reasonable, considering the nature of her employment. Luz's erroneous deduction for tips was an error made in plain view on the schedules. She had made the same mistake on the January 2003 schedule, where she obviously deducted $520 in tips from her gross pay. However, there was no request by the chapter 13 trustee for a clarification nor was an objection lodged at plan confirmation, four months later, to Debtors' reported net disposable income and proposed Plan payment. Although Luz's recordkeeping left something to be desired, the evidence supports a finding that these were innocent mistakes and not bad faith.

Second, Debtors alleged, in their motion to compel Trustee to abandon and at Sal's deposition, that they converted their bankruptcy case due to a decline in Sal's trucking business income. However, the evidence showed that Sal's income remained stable from 2003 to 2004.

Nonetheless, the evidence also supports the fact that Debtors' lives were greatly changed between 2002 and 2003. Sal stopped operating his own trucking business and went to work for another employer. They lost a big-rig truck and trailer, and then, finally, their Toyota 4-Runner, leaving a 1990 vehicle as

their only vehicle. Although Luz was working as a part-time waitress, she still had parental responsibilities to their 14-year-old child, and chose not to work full time. The evidence and testimony supports a finding that Debtors perceived Sal's income as decreasing, even if, on paper and in hindsight, it did not. Therefore, the bankruptcy court did not clearly err in treating this misperception as not indicating dishonesty or bad faith.

Third, Sal testified that they decided to surrender the Toyota 4-Runner, for which the pre-bankruptcy payments were $678 per month, and convert to chapter 7, in order to afford health insurance, since he is diabetic. Trustee maintained that there was no evidence that Debtors either had health insurance or were seeking to obtain it at any time relevant to these proceedings. While true, Trustee's evidence was not dispositive, because Debtors could still attempt to obtain health insurance at any time.

Fourth, Luz averred that they converted because they could not afford a higher Plan payment to cover a supplemental property tax claim, which would require their Plan payments to go up to around $520 per month. In fact, Trustee's evidence revealed that Debtors' surplus income exceeded $520 at that time, given the reduced mortgage payment and under-reported income.

Again, the mistakes in calculating the amount of their disposable income did not, standing alone, rise to the level of bad faith. On the entire evidence, Debtors demonstrated a distinct lack of attention to detail and confusion in regards to the schedules, and consequently, their testimony was inconsistent. Certain inaccuracies in the schedules conflicted with Debtors'

statements under oath that they had read the schedules and found them to be accurate. When confronted with the errors, Debtors denied having read them or having paid close attention to them. At the same time, there was evidence that they conceded certain errors and affirmed the need for amended schedules. For example, at the chapter 7 § 341 meeting, a questionnaire asked if the schedules were complete and accurate, to which Debtors answered "no." When asked, on the form, if they needed to make changes, they answered "yes."

Therefore, we conclude that the bankruptcy court's finding that Debtors' mistakes in calculations and reported income and expenses were inadvertent and did not rise to the level of bad faith was not a clearly erroneous finding because there is evidence to support that view.

As for their other stated reasons for conversion, Debtors' belief that Sal's failed truck driving business and Luz's waitress job simply could not support payment on a luxury vehicle and the Plan is generally supported by the evidence and their expressed motivation to surrender the Toyota 4-Runner and convert to chapter 7. The evidence did not expose a scheme by Debtors to abuse chapter 13 in order to protect an asset from the creditors. As it turned out, although the Residence did appreciate, Debtors merely sought the statute's protection for their increased equity, and there was nothing sinister about their doing so. See Wiczek-Spaulding, 223 B.R. at 540; In re Jean, 306 B.R. 708, 716 (Bankr. S.D. Fla. 2004) (simply taking advantage of the statutory exclusion for property acquired during the chapter 13 case was not necessarily acting in bad faith).

In summary, Debtors' attempt at making their Plan work for over one year, in the midst of fluctuating financial circumstances, was a testament to their good faith in the chapter 13 case. Although the bankruptcy court gave great weight to this factor, its ruling and the entire record reflects that the bankruptcy court examined all of the underlying facts and circumstances. We conclude that the bankruptcy court applied the correct totality of circumstances test. Our review of the entire record supports the bankruptcy court's finding that Debtors were not attempting to manipulate the Bankruptcy Code to the detriment of their creditors and, thus, that they converted in good faith.

Therefore, since (pursuant to § 348(f)(1)(A) and (B)) there was no equity in the Residence at the commencement of the chapter 13 case, the bankruptcy court did not abuse its discretion in granting Debtors' motion to compel Trustee to abandon the Residence.

B. Motion for Reconsideration

Rule 9023 makes FRCP 59 applicable in bankruptcy cases. "Granting a motion for new trial under FRCP 59(a)(2) is appropriate if the moving party demonstrates (1) a manifest error of fact; (2) a manifest error of law; or (3) newly discovered evidence." Janas v. Marco Crane & Rigging Co. (In re JWJ Contracting Co.), 287 B.R. 501, 514 (9th Cir. BAP 2002), aff'd, 371 F.3d 1079 (9th Cir. 2004).

On appeal, Trustee simply challenges the bankruptcy court's rejection of his untimely legal argument that the postpetition

appreciation was property of the estate under § 541(a)(6) and that § 348(f)(1) was inapplicable. Trustee did not raise this issue until his reply to Debtors' response to his motion for reconsideration. Moreover, he had already rejected, as being irrelevant, Debtors' legal argument concerning whether § 348(f)(1) was applicable in the underlying proceedings. In fact, Trustee conceded in his pleadings that § 348(f)(1)(A) and (B) governed, unless Debtors had converted their bankruptcy case in bad faith. Therefore, Trustee waived the legal issue. See Marx v. Loral Corp., 87 F.3d 1049, 1056 (9th Cir. 1996) (arguing against the applicability of a particular claim constitutes a waiver of such claim). Focusing on the bad-faith issue, Debtors agreed to depositions, and the parties submitted argument and evidence in regards to the bad-faith issue only.

At a hearing on the motion for reconsideration, the bankruptcy court denied the motion and expressly ruled that Trustee could not raise a new legal issue which reasonably could have been raised in the abandonment proceeding.

A reconsideration motion should not give a litigant a "second bite at the apple." In re Christie, 222 B.R. 64, 67 (Bankr. D.N.J. 1998). See also Sac & Fox Nation of Mo. v. LaFaver, 993 F. Supp. 1374, 1375-76 (D. Kan. 1998) ("[P]arty's failure to present its strongest case in the first instance does not entitle it to a second chance in the form of a motion for reconsideration."); In re Hillis Motors, Inc., 120 B.R. 556, 557 (Bankr. D. Haw. 1990) (Rule 59 does not "give a disappointed litigant another chance") (citation omitted). Accordingly, "a motion for reconsideration is an improper vehicle to introduce evidence previously available or

to tender new legal theories." Bally Export Corp. v. Balicar. Ltd., 804 F.2d 398, 404 (7th Cir. 1986).

Trustee's attempt to raise the waived legal issue was properly denied by the bankruptcy court in the context of a motion for reconsideration, and we affirm its order denying the motion.

CONCLUSION

The bankruptcy court found that Debtors did not convert their chapter 13 case to chapter 7 in bad faith after it expressly examined all of the circumstances. Our review of the totality of the circumstances supports the court's finding, which was not clearly erroneous. Based on a good-faith conversion and the lack of equity for the estate in the Residence as of the commencement of the chapter 13 case, the bankruptcy court did not abuse its discretion in granting Debtors' motion to compel Trustee to abandon the Residence. Finally, the bankruptcy court did not abuse its discretion in denying Trustee's motion for reconsideration. Therefore, both orders are **AFFIRMED**.