

APR 22 2011

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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

5	In re:	)	BAP No.	OR-10-1217-JuMkH
6	BERENICE CAROL GLOVER,	)	Bk. No.	10-33473-RLD
7	Debtor.	)		
8	_____	)		
9	BERENICE CAROL GLOVER,	)		
10	Appellant.	)		
11	_____	)		

M E M O R A N D U M \*

Submitted Without Oral Argument on March 16, 2011  
at Pasadena, California

Filed - April 22, 2011

Appeal from the United States Bankruptcy Court  
for the District of Oregon

Honorable Randall L. Dunn, Bankruptcy Judge, Presiding

Appearances: Berenice Carol Glover pro se on brief

Before: JURY, MARKELL and HOLLOWELL Bankruptcy Judges.

Debtor Berenice Carol Glover appeals the bankruptcy court's  
order dismissing her chapter 13<sup>1</sup> bankruptcy case with a five

\* This disposition is not appropriate for publication.  
Although it may be cited for whatever persuasive value it may  
have (see Fed. R. App. P. 32.1), it has no precedential value.  
See 9th Cir. BAP Rule 8013-1.

<sup>1</sup> Unless otherwise indicated, all chapter, section and  
rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-  
1532, and to the Federal Rules of Bankruptcy Procedure, Rules  
1001-9037.

1 year bar to refiling. We AFFIRM.

2 **I. FACTS**

3 Debtor has filed eight bankruptcy cases in the District of  
4 Oregon. Her first chapter 13 case (Bankruptcy Case No. 88-  
5 33517), jointly filed with her husband in 1988, was converted to  
6 chapter 7 and was the only case in which debtor received a  
7 discharge. From 1999 to 2009, Debtor filed six chapter 13  
8 cases, none of which resulted in a confirmed plan and all of  
9 which had either been voluntarily dismissed or dismissed by the  
10 court for various reasons.<sup>2</sup> Her most recent chapter 13 case  
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12 <sup>2</sup> These cases are as follows:

13 **Case No. 99-36297-13** - Debtor filed her second case on  
14 August 18, 1999, which was dismissed on October 26, 2000, on  
debtor's motion.

15 **Case No. 01-35166-13** - Debtor filed her third case on  
16 May 25, 2001. The case was dismissed on June 28, 2001, because  
17 the plan was not complete (the certificate of service was not  
18 signed and there was no matrix). Debtor moved to set aside the  
dismissal and reopen the case. The bankruptcy court granted her  
19 motion by order entered on September 6, 2001. The trustee moved  
to dismiss the case pre-confirmation due to missed plan payments.  
20 The bankruptcy court granted the trustee's motion by order  
entered on December 3, 2001.

21 **Case No. 02-35185-13** - Debtor filed her fourth case on  
May 15, 2002. The case was dismissed on July 18, 2002, on  
22 debtor's motion. At that time, the bankruptcy court issued a two  
year bar against refiling.

23 **Case No. 08-33163-13** - Debtor filed her fifth case on  
June 27, 2008. That case was dismissed on August 18, 2008, based  
24 on debtor's failure to file documents and pay the filing fee.

25 **Case No. 08-35558-13** - Debtor filed her sixth case on  
October 17, 2008. The case was dismissed on December 5, 2008, on  
debtor's motion.

26 **Case No. 09-30250-13** - Debtor filed her seventh case on  
27 January 16, 2009, despite the fact she was not eligible to file  
chapter 13 under § 109(g)(2) because of the voluntary dismissal  
28 of her previous case after a motion for relief from stay had been  
filed. Thereafter, debtor voluntarily dismissed the case.

1 filed on April 22, 2010, is the subject of this appeal.

2 On April 27, 2010, the bankruptcy court issued an Order To  
3 Show Cause ("OSC") as to why debtor's case should not be  
4 dismissed with a bar to refiling or with prejudice. At the  
5 June 2, 2010 hearing, the bankruptcy court dismissed debtor's  
6 case with a five year bar to refiling based on the totality of  
7 circumstances test set forth in Leavitt v. Soto (In re Leavitt),  
8 171 F.3d 1219, 1224 (9th Cir. 1999). The order was entered on  
9 June 7, 2010.

10 Debtor timely filed this appeal. The Panel issued an order  
11 waiving the requirement under Rule 8009(b) that debtor file and  
12 serve an appendix to the brief containing excerpts of the record  
13 because the transcript of the OSC hearing was on the bankruptcy  
14 court's docket. We take judicial notice of the copy of the  
15 transcript as it appears in the publicly available official  
16 record of the bankruptcy case at Docket Entry 33. See Atwood v.  
17 Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9  
18 (9th Cir. BAP 2003).

## 19 II. JURISDICTION

20 The bankruptcy court had jurisdiction over this proceeding  
21 under 28 U.S.C. §§ 1334 and 157(b)(1) and (2). We have  
22 jurisdiction under 28 U.S.C. § 158.

## 23 III. ISSUE

24 Whether the bankruptcy court abused its discretion by  
25 dismissing debtor's chapter 13 bankruptcy case with a five year  
26 bar to refiling.

## 27 IV. STANDARD OF REVIEW

28 We review the bankruptcy court's decision to dismiss a

1 bankruptcy case with prejudice for abuse of discretion.  
2 Leavitt, 171 F.3d at 1224. We follow a two-part test to  
3 determine objectively whether the bankruptcy court abused its  
4 discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62  
5 (9th Cir. 2009) (en banc). First, we "determine de novo whether  
6 the bankruptcy court identified the correct legal rule to apply  
7 to the relief requested." Id. Second, we examine the  
8 bankruptcy court's factual findings under the clearly erroneous  
9 standard. Id. at 1262 n.20. We affirm the court's factual  
10 findings unless those findings are "(1) 'illogical,'  
11 (2) 'implausible,' or (3) without 'support in inferences that  
12 may be drawn from the facts in the record.'" Id. (internal  
13 quotation marks omitted). If the bankruptcy court did not  
14 identify the correct legal rule, or its application of the  
15 correct legal standard to the facts was illogical, implausible,  
16 or without support in the record, then the bankruptcy court  
17 abused its discretion. Id.

## 18 V. DISCUSSION

19 Debtor argues on appeal that § 1307(c)<sup>3</sup> is the only  
20 provision in the Bankruptcy Code applicable to the dismissal of  
21 her case and points out that none of the factors listed in that  
22 section apply. Debtor further argues that § 1307(c) authorizes  
23 only a party in interest or the United States trustee to request  
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25 <sup>3</sup> Section 1307(c) provides that "on request of a party in  
26 interest or the United States trustee . . . the court may . . .  
27 dismiss a case under this chapter, . . . , for cause . . . ."  
28 The subsection then lists eleven nonexclusive factors that may  
constitute "cause" for dismissal. The bankruptcy court did not  
rely on these factors to determine whether there was "cause."

1 dismissal of her case, implying that the bankruptcy court did  
2 not have the authority to issue its OSC regarding dismissal of  
3 her case. Debtor's reliance on § 1307(c) is misplaced.

4 Here, the bankruptcy court's order dismissed debtor's case  
5 as an abuse, with prejudice. The inclusion of the phrase "with  
6 prejudice" in the order necessarily implicated §§ 105(a) and  
7 349(a) as appropriate sources for the court's authority.

8 Section 105(a) states:

9 The court may issue any order, process, or judgment  
10 that is necessary or appropriate to carry out the  
11 provisions of this title. No provision of this title  
12 providing for the raising of an issue by a party in  
13 interest shall be construed to preclude the court  
14 from, sua sponte, taking any action or making any  
15 determination necessary or appropriate to enforce or  
16 implement court orders or rules, or to prevent an  
17 abuse of process.

14 The plain language of § 105(a) authorizes the bankruptcy court  
15 to sua sponte raise the issue of dismissal of debtor's case to  
16 prevent an abuse of process.

17 Section 349(a) which governs the dismissal of a bankruptcy  
18 case with prejudice states:

19 Unless the court, for cause, orders otherwise, the  
20 dismissal of a case under this title does not bar the  
21 discharge, in a later case under this title, of debts  
22 that were dischargeable in the case dismissed; nor  
23 does the dismissal of a case under this title  
24 prejudice the debtor with regard to the filing of a  
25 subsequent petition under this title, except as  
26 provided in section 109(g) of this title.

24 "The phrase '[u]nless the court, for cause, orders otherwise' in  
25 Section 349 authorizes the bankruptcy court to dismiss the case  
26 with prejudice." Leavitt, 171 F.3d at 1223. Dismissal of a  
27 case with prejudice involves the application of the "totality of  
28 the circumstances" test which requires consideration of the

1 following: (1) whether the debtor misrepresented facts in the  
2 petition or plan, unfairly manipulated the Code or otherwise  
3 filed the chapter 13 petition or plan in an inequitable manner;  
4 (2) the debtor's history of filings and dismissals; (3) whether  
5 the debtor only intended to defeat state court litigation; and  
6 (4) whether egregious behavior is present. Id. at 1224.

7 Relying on Leavitt, the bankruptcy court made the following  
8 factual findings: First, the court found that by filing eight  
9 bankruptcy cases over a number of years, debtor had unfairly  
10 manipulated the Bankruptcy Code to prevent creditor activity.  
11 The court further found that debtor filed the current chapter 13  
12 case in an inequitable manner knowing that the plan she filed  
13 was patently not confirmable on its face.<sup>4</sup> Second, the court  
14 found that debtor's filings represented a "pattern of abuse"  
15 because she filed the chapter 13 cases without ever completing  
16 her obligations or receiving a discharge. Next, the court  
17 determined that debtor filed many of her chapter 13 cases to  
18 "impose a series of stays to prevent strategically creditor  
19 foreclosures on property." The court observed that foreclosure  
20 of debtor's residence was completed in the seventh case, in part  
21 because the case was filed so soon after the prior two cases  
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25 <sup>4</sup> In this regard, debtor's plan showed that she owed  
26 Yamhill County \$39,624.86 in back taxes. Debtor proposed to pay  
27 \$124 a month under her plan, which the court calculated would  
28 amount to a total payment of \$7,440 over 60 months. Further, the  
taxes bore interest at 16% and the chapter 13 trustee would also  
have to be paid a commission. Based on these numbers, the court  
found that the plan was "woefully not feasible."

1 that no stay had gone into effect.<sup>5</sup>

2 Finally, the bankruptcy court found egregious behavior was  
3 present. In that regard, the bankruptcy court stated that  
4 debtor had been using chapter 13 as her "tool of choice to use  
5 as a shield against creditor action without . . . fulfilling her  
6 obligations as a debtor in chapter 13." For all these reasons,  
7 the court dismissed debtor's case with a five year bar to  
8 refiling.

9 Contrary to debtor's suggestion otherwise, the court's  
10 findings were explicit and concise. As a result, there is  
11 little doubt about the court's reasons for dismissal. Notably,  
12 debtor did not assign error to any of the court's factual  
13 findings on appeal. Rather, she simply states in conclusory  
14 fashion that the court's order was not supported under Leavitt.  
15 Debtor is mistaken.

16 The bankruptcy court identified and applied the correct  
17 legal test under Leavitt when considering whether to dismiss  
18 debtor's case with prejudice. Further, the record supports the  
19 bankruptcy court's factual findings with respect to each element  
20 under the totality of circumstances test in Leavitt. Debtor  
21 provided no evidence, or even an explanation, as to why her  
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23 <sup>5</sup> In her seventh case, Bankruptcy Case No. 09-30250-13,  
24 the bankruptcy court entered an order for the creditor whose note  
25 was secured by debtor's residence. The order stated that if no  
26 objection was filed within fourteen days of the order, the  
27 automatic stay would be determined to have terminated or to never  
28 have gone into effect. Debtor did not file an objection to the  
court's order nor did she move to reimpose the automatic stay.  
We take judicial notice of the underlying docket in Bankruptcy  
Case No. 09-30250-13. Atwood, 293 B.R. at 233 n.9.

1 numerous filings did not amount to an abuse of the system. She  
2 had several opportunities to avail herself of meaningful  
3 bankruptcy relief, but in none of her chapter 13 cases did  
4 debtor attempt to complete her case. Instead, debtor attributed  
5 all of her failed chapter 13 cases to everyone else and accepted  
6 no responsibility whatsoever for the dismissal or other failure  
7 of any of these cases.

8 Finally, the record indicates that debtor filed four of her  
9 cases between 2008 and 2010. Given this pattern, we cannot  
10 conclude that a five year bar to refiling was unreasonable or  
11 amounted to an abuse of the court's discretion. In short, under  
12 the totality of the circumstances test espoused in Leavitt, we  
13 perceive no error.

#### 14 VI. CONCLUSION

15 For the reasons stated above, we AFFIRM.  
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