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NOT FOR PUBLICATION

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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. SC-14-1388-JuKlPa
)
 JASON SCOTT BROWN,) Bk. No. 13-11913
)
 Debtor.)
)
 _____)
)
 JASON SCOTT BROWN,)
)
 Appellant,)
)
 v.) M E M O R A N D U M *
)
 THOMAS H. BILLINGSLEA, JR.,)
 Chapter 13 Trustee,)
)
 Appellee.)
 _____)

Submitted Without Oral Argument
on July 23, 2015**

Filed - October 26, 2015

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

Honorable Margaret M. Mann, Bankruptcy Judge, Presiding

Appearances: Michael G. Doan of Doan Law Firm on brief for
appellant; Todd Headden on brief for appellee.

* 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 8024-1.

** The parties to this appeal filed a motion and stipulation
for submission of the appeal on the briefs. By order entered on
May 13, 2015, the Panel determined that oral argument was not
needed and that this appeal is suitable for submission on the
briefs and record without oral argument pursuant to Rule 8012.

1 Before: JURY, KLEIN,^{***} and PAPPAS, Bankruptcy Judges.

2
3 Debtor Jason Scott Brown (Debtor) appeals from the
4 bankruptcy court's order converting his chapter 13¹ case to one
5 under chapter 7. We AFFIRM.

6 **I. FACTS**

7 On July 20, 2012, Debtor's father died intestate. On
8 June 13, 2013, probate was initiated. Debtor was the personal
9 representative of the probate estate. In this capacity, Debtor
10 filed documents in the state court probate proceedings which
11 stated that his three brothers each assigned and abandoned to
12 him their beneficial interests in the father's estate. Debtor
13 also arranged to sell his father's home which was the only
14 significant asset owned by the probate estate. The sale of the
15 home closed on December 16, 2013, and generated net proceeds of
16 \$65,812.

17 Three days before the closing, on December 13, 2013, Debtor
18 filed a bare bones chapter 13 petition. Thomas H. Billingslea
19 was appointed the chapter 13 trustee (Trustee). Eleven days
20 later, Debtor filed his schedules and chapter 13 plan which
21 proposed \$520 monthly payments over thirty-six months. The plan
22

23 ^{***} Hon. Christopher M. Klein, Chief United States Bankruptcy
24 Judge for the Eastern District of California, sitting by
25 designation.

26 ¹ Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
28 "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" references are to the Federal Rules of
Civil Procedure.

1 paid three secured creditors in full and proposed a 0% dividend
2 for unsecured creditors.

3 In Schedule B, Debtor listed an anticipated inheritance of
4 \$2,500 which he claimed fully exempt in Schedule C. In
5 Schedule F, Debtor listed unsecured claims in the amount of
6 \$33,499. At the time Debtor filed his petition he was
7 unemployed and collecting social security. Debtor indicated
8 that he was renting garage space to run an automotive repair
9 business and expected his income to increase within the next
10 year.

11 At the § 341(a) meeting, Debtor's counsel and Trustee's
12 counsel signed a pre-confirmation modification to the chapter 13
13 plan (PCM). The PCM resolved Trustee's objection to the length
14 of the plan by requiring Debtor to turn over \$3,224 in probate
15 proceeds within forty-five days of receipt because the plan
16 needed to pay a car creditor more funds.

17 On April 11, 2014, the probate estate closed and Debtor
18 distributed to himself \$55,487.97 as the sole beneficiary of his
19 father's estate. Debtor did not amend his schedules at this
20 time to include the increased inheritance or claim any further
21 exemption in the amount received.

22 In late April, Trustee objected to Debtor's plan and moved
23 to dismiss his case. Trustee argued that since Debtor's plan
24 did not make the non-exempt portion of the inheritance proceeds
25 available to pay creditors it failed the best interest of
26 creditors test under § 1325(a)(4). Trustee further asserted
27 that any confirmation order should be contingent upon Debtor's
28 forwarding a check to Trustee's lockbox account in the amount of

1 \$37,569 and a PCM increasing the pro-rata pot for payment to the
2 general unsecured creditors to \$34,563.

3 Attached to Trustee's objection was the petition for final
4 distribution from the probate estate. This document showed that
5 Debtor's brothers each filed assignments of their beneficial
6 interests in the inheritance to Debtor with the probate court on
7 August 7, 2013, and that \$55,487.97 was available for
8 distribution.

9 On May 9, 2014, Debtor's counsel resigned from the Doan Law
10 Firm and a new attorney was assigned to his bankruptcy case.

11 On the same day, Debtor filed a response to Trustee's
12 objection. Debtor asserted that his equitable share of his
13 father's estate was \$12,372 and fully exempt. Thus, according
14 to Debtor, his plan did not need to be modified. In the
15 attached declaration, Debtor stated that he and his three
16 brothers were each entitled to 25% of the inheritance. Debtor
17 requested the bankruptcy court to confirm his plan as proposed
18 or, in the alternative, allow him additional time to negotiate
19 an alternative plan.

20 On May 20, 2014, Trustee filed a status report noting that
21 Debtor was the sole beneficiary of his father's estate because
22 his siblings assigned their interest to him. Despite this
23 assignment, Debtor now asserted a contrary position – that his
24 three brothers "would receive their fair share." In light of
25 this development, Trustee requested the bankruptcy court to
26 refrain from granting any request for voluntary dismissal
27 without a hearing to allow Trustee to consider conversion.

28 The bankruptcy court held an initial hearing on Trustee's

1 objection to Debtor's plan on May 27, 2014. The matter was
2 continued to July 8, 2014, to allow the parties to present
3 additional evidence regarding distribution of the father's
4 estate.

5 Trustee subsequently filed an amended objection to Debtor's
6 plan and sought conversion to chapter 7 instead of dismissal.
7 Trustee maintained that conversion was appropriate because
8 Debtor failed to disclose his inheritance which was an abuse of
9 the bankruptcy system under the holding in Rosson v. Fitzgerald
10 (In re Rosson), 545 F.3d 764, 767 (9th Cir. 2008). Trustee also
11 renewed his request that Debtor turn over the non-exempt portion
12 of the funds and provide a PCM increasing the pro-rata to
13 unsecured creditors to \$34,563 so that the plan complied with
14 the best interest of creditors test. If Debtor refused to
15 comply, Trustee requested the court to convert the case to
16 chapter 7 for a panel trustee to seek turnover of the funds and
17 request any other remedies available to the trustee. Attached
18 to the amended objection were Debtor's brothers' assignments of
19 their beneficial interest in the inheritance to Debtor and a
20 document showing Debtor had received \$55,487.97 from the probate
21 estate on April 1, 2014.

22 On June 17, 2014, Debtor's counsel filed a status report
23 advising the court that Debtor had misunderstood that the
24 inheritance funds were property of his estate and that he could
25 propose a 100% plan once he objected to a certain creditor's
26 claim.

27 Trustee later filed a status report stating that Debtor
28 appeared to acknowledge that the inherited property was part of

1 the bankruptcy estate and that the unsecured creditors should be
2 provided a substantial pro-rata payment. Trustee also stated
3 that Debtor's counsel indicated that he needed additional time
4 to present a confirmable and feasible plan which provided the
5 necessary pro-rata payments.

6 In a June 26, 2014 amended status report, Trustee again
7 expressed his concern that while Debtor was trying to formulate
8 a confirmable plan, the liquid assets of his estate would
9 continue to diminish. Trustee requested Debtor to deposit the
10 remaining funds in his counsel's client trust account, provide a
11 declaration concerning the transfers to his brothers, and
12 provide bank statements and cancelled checks. If Debtor failed
13 to deposit \$37,569 into his counsel's client trust account by
14 the hearing, Trustee requested immediate conversion to
15 chapter 7.

16 At the July 8, 2014 continued hearing on Trustee's
17 objection to confirmation of Debtor's plan, without being sworn
18 in, Debtor explained to the court that his share of the
19 inheritance went into his business and the balance was paid in
20 cash to two brothers and by check to a third brother. The
21 bankruptcy court did not make any findings of bad faith at that
22 hearing, stating that it would require an adversary proceeding
23 or an evidentiary proceeding to decide whether Debtor acted in
24 bad faith. Nonetheless, the court opined that since the only
25 apparent source of assets to pay creditors had been dissipated,
26 Debtor's pursuit of the chapter 13 plan could not be in good
27 faith. The bankruptcy court also found that cause existed for
28 conversion because a chapter 7 trustee would be better suited to

1 investigate Debtor's transfers to his brothers and bring any
2 fraudulent transfer claims.

3 Debtor's counsel represented to the court that he had been
4 unable to provide an accounting since several of the transfers
5 were to Debtor's brothers in cash. Further, when the bankruptcy
6 court indicated that it would convert the case, Debtor's counsel
7 asserted Debtor's right under § 1307(b) to dismiss his case.
8 The bankruptcy court then ordered conversion of the case,
9 finding there was an abuse of the bankruptcy process, relying on
10 In re Rosson. When Debtor's counsel requested an opportunity to
11 distinguish Rosson, the court stated: "You have that
12 opportunity. You may object to the order in the ordinary
13 course."

14 On July 25, 2014, the bankruptcy court entered the order
15 converting Debtor's chapter 13 case to chapter 7 under § 1307(c)
16 for cause. The order provided in part:

17 After inquiry by the Court regarding Debtor's
18 inheritance of \$55,487.97; the Court finds Debtor's
19 actions constituted an abuse of the bankruptcy system
20 and were not filed in good faith.

21 The Court grants the Trustee's motion to convert to
22 chapter 7 under section 1307(c) for cause for the
23 following reasons:

24 1) Debtor's proposed plan (Docket # 11) as modified by
25 Pre-Confirmation Modification form (Docket # 24)
26 provides a 0% dividend to the general unsecured
27 creditors;

28 2) Debtor has provided no evidence indicating that a
modified plan is feasible;

3) Debtor ignored the entered Pre-Confirmation
Modification form (Docket #24) whereby Debtor would
turnover \$3,224 within 45 days of receipt of the
inheritance and thus is in default on his plan
payments;

1 4) Despite knowledge to the contrary, Debtor did not
2 correct inaccurate schedules; and,

3 5) Debtor intentionally spent money of the estate and
4 transferred the funds to relatives. As such, an
5 independent party is needed to evaluate whether the
6 estate should bring fraudulent conveyance actions
7 [against] these parties.

8 6) The Court finds that the "best interest of the
9 creditors" is served by conversion to chapter 7.

10 Debtor filed an amendment to his schedules on August 8,
11 2014, updating the value of the inheritance and claiming his
12 exemption.

13 On August 11, 2014, Debtor filed a notice of appeal from
14 the bankruptcy court's order converting his case.

15 On the same day, Debtor filed a motion for reconsideration,
16 the substance of which was that § 1307(c) required both a
17 finding of cause and that conversion be in the best interest of
18 the creditors and the estate. Debtor maintained that the
19 bankruptcy court's findings at the initial conversion hearing
20 did not expressly state any of the grounds set forth in
21 § 1307(c) for cause. Debtor also argued that since most of the
22 inheritance was transferred pre-conversion, the inheritance was
23 no longer part of the estate under § 348(f)(1)(A).

24 After a hearing on the matter, the bankruptcy court
25 supplemented its previous findings of fact and conclusions of
26 law in a memorandum decision denying Debtor's motion for
27 reconsideration.² The court found that the undisputed facts

28 ² In essence, Debtor's motion was a request for
clarification and reconsideration. Under Civil Rule 52(b),
incorporated by Rule 7052, the bankruptcy court had discretion to
amend its findings - or make additional findings - and amend the
(continued...)

1 demonstrated three separate statutory grounds for conversion
2 under § 1307(c). That section provides in relevant part:

3 (c) Except as provided in subsection (f) of this
4 section, on request of a party in interest or the
5 United States trustee and after notice and a hearing,
6 the court may convert a case under this chapter to a
7 case under chapter 7 of this title, or may dismiss a
8 case under this chapter, whichever is in the best
9 interests of creditors and the estate, for cause,
10 including--

11 (1) unreasonable delay by the debtor that is
12 prejudicial to creditors;

13

14 (4) failure to commence making timely payments under
15 section 1326 of this title;

16

17 (5) denial of confirmation of a plan under
18 section 1325 of this title and denial of a request
19 made for additional time for filing another plan or a
20 modification of a plan;

21 First, the bankruptcy court determined that its findings at
22 the prior conversion hearing supported a determination of cause
23 under § 1307(c) (4); i.e., Debtor's failure to turn over the one
24 time plan payment of \$3,224 within 45 days of receipt of the
25 inheritance as required under the PCM. Instead, the court
26 observed that Debtor spent the money, could not account for it,
27 and blamed his counsel.

28 Next, the bankruptcy court found cause for conversion under
§ 1307(c) (5). The court noted that at the July 8, 2014 hearing,
it denied confirmation of Debtor's plan and denied Debtor's
request to modify the plan to render it a 100% plan. The

²(...continued)
conversion order accordingly.

1 bankruptcy court found the undisputed evidence showed that
2 Debtor could not fund a 100% plan since he transferred the
3 inheritance funds and he otherwise lacked cash flow to fund a
4 100% plan. In that regard, the court pointed out that Debtor's
5 amended schedules filed after conversion reflected that his net
6 monthly income from his business at the time of conversion was
7 \$2,052.17. According to the court, this was insufficient to
8 cover his previous living expenses of \$2,266 set forth in his
9 original Schedule J.

10 Finally, the bankruptcy court found cause existed under
11 § 1307(c)(1) due to Debtor's delay in confirming a plan that had
12 been prejudicial to creditors. The court observed that Debtor's
13 case had been pending for seven months, during which time Debtor
14 received funds belonging to the estate of \$55,487.97, an amount
15 sufficient to pay his creditors in full. Yet, during a three
16 month period, Debtor may have spent all of the money despite
17 Trustee's pending claims to it and has never accounted for it.
18 The court found that the loss of the money was clear prejudice.

19 The bankruptcy court then concluded it did not need to
20 reconsider its finding that conversion was in the best interests
21 of creditors. The court simply noted that conversion would
22 result in the appointment of a chapter 7 trustee who would have
23 standing to assert avoiding powers against Debtor and his
24 brothers. The court also rejected Debtor's argument that
25 conversion would not be in the best interests of creditors since
26 the inheritance was already spent. According to the bankruptcy
27 court, this premise did not apply when Debtor acted in bad
28 faith.

1 The bankruptcy court also considered the test for bad faith
2 set forth in Drummond v. Welsh (In re Welsh), 711 F.3d 1120,
3 1129 n.45 (9th Cir. 2013) (citing Leavitt v. Soto
4 (In re Leavitt), 171 F.3d 1219 (9th Cir. 1999)):

- 5 1. whether the debtor misrepresented facts in his
6 petition or plan, unfairly manipulated the Bankruptcy
7 Code, or otherwise filed his petition or plan in an
8 inequitable manner;
- 9 2. the debtor's history of filings and dismissals;
- 10 3. whether the debtor only intended to defeat state
11 court litigation; and
- 12 4. the presence of egregious behavior.

13 The court found factors 1 and 4 were amply supported by the
14 evidence and that the other two factors were not applicable.

15 As to factor one, the bankruptcy court found that whether
16 Debtor was misguided or not, he intentionally spent the
17 inheritance rather than pay his creditors despite Trustee's
18 demands and Debtor was less than candid in his bankruptcy
19 disclosures in pursuing this aim. The court found the facts
20 similar to those in Rosson in that substantial property of the
21 estate was gone because Debtor ignored Trustee's demands for the
22 inheritance and Debtor failed to provide an accounting.

23 The bankruptcy court also explained that ample evidence of
24 concealments supported its finding that Debtor intentionally
25 abused the bankruptcy system: (1) Debtor made inaccurate
26 statements that his inheritance was only worth \$2,500, when he
27 had arranged the sale of property that generated \$65,812 in
28 proceeds, and he had possession of this money before his
schedules were filed; (2) Debtor proposed a 0% plan when the
funds he now admits he was entitled to receive would have paid

1 his creditors in full; (3) his claim that his brothers were
2 entitled to 75% of the inheritance was inconsistent when the
3 evidence showed Debtor had filed the brothers' waivers with the
4 probate court, and these waivers were the reason Debtor alone,
5 not his brothers, received the probate estate net funds. Debtor
6 never explained why he filed these waivers himself, if he always
7 intended to respect his parents' will; (4) Debtor never provided
8 an accounting of the funds that he had given his brothers and
9 was evasive when the court asked him about these gifts; and
10 (5) although Debtor blamed his counsel for his misguided
11 actions, Debtor alone was responsible for his conduct and acted
12 intentionally, particularly since there was no evidence showing
13 counsel's knowledge that Debtor was holding over \$65,000 in
14 inheritance when Debtor had scheduled the inheritance at \$2,500.
15 In the end, the court denied Debtor's motion for reconsideration
16 by an order entered September 23, 2014.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
19 §§ 1334 and 157(b) (2) (A) and (O).³ We have jurisdiction under
20 28 U.S.C. § 158.⁴

21 _____
22 ³ The bankruptcy court correctly concluded that it had
23 jurisdiction over Debtor's motion for clarification and
24 reconsideration despite the fact Debtor had filed a premature
25 notice of appeal. Under Rule 8002(b), the notice of appeal
became effective with entry of the bankruptcy court's order which
resolved the motion for reconsideration.

26 ⁴ Debtor did not amend his notice of appeal to include the
27 order denying his motion for reconsideration. Nonetheless, we
28 conclude that his notice of appeal incorporates the bankruptcy
court's supplemental findings of fact and conclusions of law

(continued...)

1
2 **V. DISCUSSION**

3 **A. Legal Standards: Conversion for "Cause"**

4 On request of a party in interest and after notice and a
5 hearing, the bankruptcy court may convert a chapter 13 case to
6 chapter 7, or may dismiss a case, whichever is in the best
7 interests of creditors and the estate, for cause. § 1307(c).
8 Section 1307(c) sets forth a non-exclusive list of factors which
9 constitute "cause" for conversion or dismissal including
10 unreasonable delay by the debtor that is prejudicial to creditors
11 (§ 1307(c)(1)); failure to commence making timely payments under
12 § 1326 (§ 1307(c)(4)); and denial of confirmation of a plan under
13 § 1325 and denial of a request made for additional time for
14 filing another plan or a modification of a plan (§ 1307(c)(5)).

15 Section 1307(c) establishes a two-step analysis for dealing
16 with questions of conversion and dismissal. "First, it must be
17 determined that there is 'cause' to act. Second, once a
18 determination of 'cause' has been made, a choice must be made
19 between conversion and dismissal based on the 'best interests of
20 the creditors and the estate.'" Nelson v. Meyer (In re Nelson),
21 343 B.R. 671, 675 (9th Cir. BAP 2006).

22 In addition to the non-exclusive statutory list of factors
23 under § 1307(c), the filing of a chapter 13 case in bad faith may
24 constitute cause for conversion. See In re Leavitt, 171 F.3d at
25 1224 (citing Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th
26 Cir. 1994) (discussing bad faith in the context of chapter 13
27 case dismissal)). In determining whether cause exists based on a
28 bad faith filing, the bankruptcy court must assess the totality
of the circumstances. In re Eisen, 14 F.3d at 470. This

1 assessment includes consideration of the following four factors:

- 2 1. whether the debtor misrepresented facts in his
3 petition or plan, unfairly manipulated the Bankruptcy
4 Code, or otherwise filed his petition or plan in an
5 inequitable manner;
- 6 2. the debtor's history of filings and dismissals;
- 7 3. whether the debtor only intended to defeat state
8 court litigation; and
- 9 4. the presence of egregious behavior.

10 In re Welsh, 711 F.3d at 1129 n.45. "The bankruptcy court is not
11 required to find that each factor is satisfied or even to weigh
12 each factor equally." Khan v. Curry (In re Khan), 523 B.R. 175,
13 185 (9th Cir. BAP 2014) (citing Meyer v. Lepe (In re Lepe),
14 470 B.R. 851, 863 (9th Cir. BAP 2012) (in the context of a good
15 faith determination at plan confirmation, the Panel noted that
16 two of the Leavitt factors were inapplicable to the case on
17 appeal)). Rather, "[t]he . . . factors are simply tools that the
18 bankruptcy court employs in considering the totality of the
19 circumstances." In re Khan, 523 B.R. at 185.

20 So long as the bankruptcy court applied these legal
21 standards to the facts, it was for the bankruptcy court, as the
22 trier of fact, to determine whether there was "cause" for
23 conversion based on either § 1307(c) or bad faith grounds and to
24 determine whether conversion was in the best interest of
25 creditors and the estate.

26 **B. "Cause" For Conversion Under § 1307(c)**

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

28 Under § 1307(c) (1), the bankruptcy court may convert a
chapter 13 case to one under chapter 7 ". . . for cause,
including . . . (1) unreasonable delay by the debtor that is

1 prejudicial to creditors." Debtor argues that this provision
2 does not apply because first, there was no unreasonable delay
3 that was prejudicial to creditors when he was current on plan
4 payments the entire time and second, a PCM could have been
5 entered at the July 8, 2014 hearing allowing a 100% plan and
6 immediate disbursement to creditors.

7 We are not convinced. The bankruptcy court's conclusion
8 that there was unreasonable delay which was prejudicial to
9 creditors was adequately supported by inferences drawn from the
10 facts presented at the underlying hearings. The record shows
11 Debtor's case was pending for seven months during which time he
12 received funds of \$55,487.97. The non-exempt portion of those
13 funds was sufficient to pay his unsecured creditors in full.
14 Yet, despite Trustee's numerous requests for him to turn over the
15 funds, Debtor disbursed the bulk of the money to his brothers and
16 then spent the rest. On these facts, it was not error for the
17 court to conclude that Debtor's creditors suffered prejudice from
18 the loss of the money.

19 Indeed, nowhere does Debtor contend on appeal that the
20 bankruptcy court's findings were clearly erroneous. Instead,
21 Debtor focuses on his "proposed" 100% plan and "timely" payments.
22 Debtor's focus is improper. First, the record shows that Debtor
23 never affirmatively "proposed" or "filed" a plan modification.
24 Rather, Debtor's counsel stated both in a pleading and at oral
25 argument that Debtor anticipated objecting to a certain proof of
26 claim and, if successful, Debtor "believed" that he could propose
27 and complete a plan that paid 100% of all allowed claims.
28 Second, even if Debtor had affirmatively proposed such a plan, it

1 was unconfirmable on its face when Debtor's income was
2 insufficient to support the payments. Finally, the record
3 reflects that Debtor never made the \$3,224 payment to Trustee
4 under the PCM. Therefore, contrary to his belief, he did not
5 make all the payments under his plan in a timely manner.
6 Accordingly, the bankruptcy court did not err in finding "cause"
7 for conversion under § 1307(c)(1).

8 **2. Section 1307(c)(4)**

9 Under § 1307(c)(4), the bankruptcy court may convert a
10 chapter 13 case to one under chapter 7 ". . . . for cause,
11 including . . . (4) failure to commence making timely payments
12 under [§] 1326 of this title." Section 1326, in turn, provides
13 that "[u]nless the court orders otherwise, the debtor shall
14 commence making payments not later than 30 days after the date of
15 the filing of the plan . . . in the amount . . . proposed by the
16 plan to the trustee."

17 Debtor maintains that § 1307(c)(4) cannot be a basis for
18 conversion of his case because he was current and timely on his
19 plan payments. Debtor further asserts that he did not turn over
20 the \$3,224 to Trustee on the advice of counsel. In any event,
21 Debtor contends that his failure to pay the \$3,224 to Trustee
22 does not matter since the PCM has no relation to § 1307(c)(4).
23 These arguments fail.

24 Under § 1323 the debtor may modify the plan at any time
25 prior to confirmation. After the debtor files a modification,
26 "the plan as modified becomes the plan." § 1323(b). Therefore,
27 the PCM required Debtor to make a payment of \$3,224 to Trustee
28 within forty-five days of his receipt of the inheritance. Debtor

1 does not dispute that he failed to make the payment as required
2 by the PCM. The requirement to make plan payments under
3 § 1307(c) (4) applies when a debtor commences making payments but
4 then pays less than the plan requires. See In re Mallory,
5 444 B.R. 553, 558 (S.D. Tex. 2011) (citing In re Jenkins, 2010 WL
6 56003, at *2 (Bankr. S.D. Tex. Jan. 5, 2010) (finding cause for
7 dismissal of a case in which the debtor commenced making the
8 payments required in the proposed plan but paid an amount less
9 than required)). Therefore, the bankruptcy court did not err in
10 finding "cause" for conversion of Debtor's case under
11 § 1307(c) (4).

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

13 Under § 1307(c) (5), the bankruptcy court may convert a
14 chapter 13 case to one under chapter 7 ". . . . for cause,
15 including . . . (5) denial of confirmation of a plan under
16 section 1325 of this title and denial of a request made for
17 additional time for filing another plan or a modification of a
18 plan."

19 Debtor asserts that § 1307(c) (5) requires both a denial of
20 confirmation and a denial of a request made for additional time
21 to file another plan or modification of a plan. Debtor maintains
22 that the bankruptcy court never denied his request for additional
23 time to file a modified plan and thus this section does not
24 apply.

25 Debtor correctly states that under § 1307(c) (5) two elements
26 must exist to constitute "cause" for conversion: (1) denial of
27 confirmation; and (2) denial of a request for time to file a new
28 or a modified plan. In re Nelson, 343 B.R. at 675-76.

1 We are persuaded that the second element of
2 § 1307(c)(5) requires, at a minimum, that the court
3 must afford a debtor an opportunity to propose a new or
4 modified plan following the denial of plan
5 confirmation. Because the court did not offer the
6 debtor such an opportunity, the second element of
7 § 1307(c)(5) was not satisfied. It follows that there
8 was no 'cause' to dismiss or convert the chapter 13
9 case under that authority." Id. at 676.

6 Here, Debtor "proposed" a modified plan following the denial
7 of confirmation of his plan that proposed no payments to the
8 unsecured creditors. This proposal was in a pleading filed in
9 opposition to Trustee's motion for conversion and made orally at
10 the conversion hearing. Although Debtor never affirmatively
11 filed a modified plan, the bankruptcy court found that Debtor
12 provided no evidence that his modified plan was feasible when his
13 income would not support a 100% plan and the inheritance, which
14 was the only source for 100% payment, was gone. While we held in
15 Nelson that the Bankruptcy Code contemplates that chapter 13
16 debtors "be afforded more than one opportunity to confirm a
17 Chapter 13 plan before the case is dismissed or converted
18 following denial of plan confirmation," this does not mean the
19 bankruptcy court must grant infinite second chances to a debtor
20 when a modified plan fails confirmation standards on its face.
21 See Nelson, 343 B.R. at 678. Any further continuance would have
22 been futile. We thus conclude that the bankruptcy court applied
23 the correct legal standards under § 1307(c)(5) and did not err in
24 finding "cause" for conversion.

25 **C. Cause For Conversion: Bad Faith**

26 The bankruptcy court explicitly found that under the four
27 factor test for determining bad faith set forth in Leavitt, two
28 of the four factors were present: (1) whether the debtor

1 misrepresented facts in his petition or plan, unfairly
2 manipulated the Bankruptcy Code, or otherwise filed his petition
3 or plan in an inequitable manner and (2) the presence of
4 egregious behavior.

5 On appeal, Debtor argues that he never misrepresented facts
6 in his petition and plan. He valued his inheritance based on his
7 estimate of its worth. Further, Debtor maintains that he gave
8 notice to Trustee and the court of his intent to distribute the
9 inheritance to his brothers and, once he realized the legal
10 significance of the inheritance waivers in relation to bankruptcy
11 law, he proposed a 100% plan and amended his schedules.

12 Debtor also contends that there was no egregious behavior.
13 He filed his schedules in good faith, never concealed any assets,
14 and disclosed the inheritance in his schedules. Debtor asserts
15 that he "fully cooperated" with Trustee⁵ at all times and any
16 delay in amending his schedules was a direct result of his former
17 attorney resigning from the Doan Firm. In short, according to
18 Debtor, he acted in good faith throughout the entire process.
19 Finally, Debtor argues that there was no testimony under oath and
20 an evidentiary hearing and, thus, the bankruptcy court based its
21 findings on speculation and assumptions.

22 In its bad faith analysis, the bankruptcy court opined that
23 the facts here were very similar to those in Rosson and Marrama
24

25 ⁵ This contention is not supported by the record when Debtor
26 failed to turn over the funds despite numerous requests by
27 Trustee for him to do so. Furthermore, Trustee states in his
28 responsive brief that Debtor was not forthcoming with information
about the probate estate as all the information obtained was the
result of Trustee's research and investigation.

1 v. Citizens Bank of Mass., 549 U.S. 365, 368 (2007). In Rosson,
2 after filing a chapter 13 petition, Rosson assured the court and
3 his creditors that he would soon be receiving several hundred
4 thousand dollars in an arbitration award and that he would use
5 that money to fund his proposed Chapter 13 plan. When the money
6 finally came in, however, Rosson failed to deliver it to the
7 chapter 13 trustee as the bankruptcy court had ordered him to do.
8 Upon discovering that the arbitration proceeds had not been
9 delivered to the trustee, the bankruptcy court found that Rosson
10 was "rebelliously" "horsing around" with estate assets and, on
11 its own motion, converted the chapter 13 case to one under
12 chapter 7. Before the court filed the formal conversion order,
13 Rosson invoked his right to voluntarily dismiss his chapter 13
14 petition under § 1307(b). The bankruptcy court denied the
15 request for dismissal and converted the case and its decision was
16 affirmed on appeal.

17 In Marrama, the debtor filed a chapter 7 case and
18 misrepresented the value of his principal asset, a house in
19 Maine, and also denied that he had transferred the property
20 during the preceding year. Marrama later admitted that he
21 transferred the property to a newly created trust for no
22 consideration seven months prior to his filing to protect the
23 property from his creditors. The chapter 7 trustee stated his
24 intention to recover the Maine property as an estate asset.
25 Thereafter, Marrama sought to convert the proceeding to
26 chapter 13, but the trustee and respondent bank, Marrama's
27 principal creditor, objected, contending that the request to
28 convert was made in bad faith and would constitute an abuse of

1 the bankruptcy process. At the hearing on conversion, Marrama
2 explained that his statements about the Maine property were
3 attributable to "scrivener's error," and that he filed under
4 chapter 7 because he was unemployed and now that he was employed
5 he was eligible to proceed under chapter 13. The bankruptcy
6 judge denied Marrama's request, finding under the totality of the
7 circumstances he had acted in bad faith.

8 On appeal, Debtor attempts to distinguish his case from the
9 bad faith conduct in Rosson and Marrama. Unlike Rosson, Debtor
10 maintains there was no court order for the turnover of the
11 inheritance funds. Moreover, unlike Rosson who failed to provide
12 any explanation of what happened to the missing funds, Debtor
13 maintains that he told the court at the July 8, 2014 hearing
14 exactly how the funds were disbursed. Finally, unlike Marrama,
15 Debtor maintains that he never lied to the court or took efforts
16 to conceal what he had done. Rather, the spending and transfer
17 of the inheritance took place with full disclosure.

18 We are not persuaded by these arguments. As an initial
19 matter, the bankruptcy court properly considered the Leavitt four
20 factors for determining bad faith which are simply tools in the
21 bad faith totality of circumstances analysis. Thus, the
22 bankruptcy court applied the correct legal standards and only its
23 factual findings are at issue. We conclude there was no clear
24 error in the bankruptcy court's finding of bad faith.

25 In re Ellsworth, 455 B.R. at 914 (bad faith is a factual finding
26 reviewed for clear error). The facts Debtor points to as
27 evidence of his good faith as contrasted to those in Rosson and
28 Marrama do not make the bankruptcy court's bad faith findings

1 clearly erroneous.

2 The bankruptcy court made numerous findings regarding
3 Debtor's bad faith. The court found Debtor's failure to provide
4 an accounting of the inheritance funds was bad faith as in
5 Rosson. The court also considered Debtor's explanation for
6 disbursing the funds to his brothers, but found that his
7 explanation did not justify his actions when Trustee had made
8 demands on Debtor to place the funds in Trustee's lockbox account
9 or deposit the funds in his counsel's client trust account. The
10 bankruptcy court's finding of bad faith derives further support
11 from several inconsistencies in Debtor's disclosures. For
12 example, the evidence showed that Debtor already had the proceeds
13 from the sale of his father's house at the time he filed his
14 schedules. Yet Debtor disclosed that he anticipated receiving
15 only \$2500 from the probate estate. There is no explanation in
16 the record from Debtor as to how he came up with the \$2500
17 number. Another example is that Debtor claimed his brothers were
18 entitled to 75% of the inheritance but his brothers had filed
19 waivers of their beneficial interests with the probate court. A
20 fair inference from these inconsistencies is that Debtor wanted
21 to withhold any non-exempt amount of the inheritance from his
22 unsecured creditors.

23 Debtor also argues that the bankruptcy court's
24 interpretation of the facts is incomplete and not persuasive
25 evidence of bad faith because the court took no testimony and did
26 not conduct an evidentiary hearing. We reject these contentions.
27 Debtor neither requested an evidentiary hearing, nor has he
28 identified what material facts are in dispute or what facts were

1 not before the bankruptcy court which would influence its
2 decision. See Romley v. Sun Nat'l Bank(In re The Two "S" Corp.),
3 875 F.2d 240, 242 (9th Cir. 1989) (no purpose served by
4 evidentiary hearing if all facts are before bankruptcy court and
5 not disputed).

6 In short, the record shows that there was sufficient
7 evidence before the bankruptcy court to support a finding of bad
8 faith. In reality, Debtor's main complaint on appeal is that the
9 bankruptcy court misinterpreted the evidence before it. However,
10 when the evidence gives rise to competing interpretations, each
11 plausible, "the factfinder's choice between them cannot be
12 clearly erroneous." Anderson v. City of Bessemer City, N.C.,
13 470 U.S. 564, 574 (1985). In sum, the bankruptcy court relied on
14 substantial evidence in the record when determining Debtor's bad
15 faith, and its factual inferences were permissible.

16 **D. Best Interests of Creditors And The Estate**

17 On appeal, Debtor argues that the conversion was not in the
18 best interests of creditors and the estate because, had the case
19 remained in chapter 13 with a 100% dividend, creditors would have
20 been receiving payments since July 8, 2014. Debtor further
21 asserts that conversion cannot be in the best interests of
22 creditors since the inheritance has been eliminated as an asset
23 of the estate under § 348(f), thereby rendering the chapter 7
24 case a "no asset" case. Last, Debtor maintains that upon
25 dismissal, the creditors would have been free to immediately
26 collect against him and their security. Now, they will never be
27 able to collect due to the new "no asset" estate. In essence,
28 Debtor's argument is that the creditors will fare worse under

1 chapter 7.

2 Once again, these arguments do not demonstrate error. When
3 a case under chapter 13 is converted to a case under another
4 chapter, "property of the estate of the converted case shall
5 consist of all property of the estate as of the date of filing of
6 the petition, that remains in the possession of or is under the
7 control of the debtor on the date of conversion. . . ."

8 § 348(f)(1)(A). Under this section, all non-exempt assets in the
9 chapter 13 case would become property of the chapter 7 estate
10 unless the debtor had authority to dispose of the asset, either
11 by court order or pursuant to the Bankruptcy Code. Here, there
12 was no court order authorizing Debtor to dispose of the property
13 nor was Debtor's conduct authorized under the Bankruptcy Code.
14 Moreover, § 348(f)(1)(A) "was never designed to be a safe harbor
15 for Debtors who fraudulently and surreptitiously dispose of
16 property of the estate while in chapter 13." Wyss v. Fobber
17 (In re Fobber), 256 B.R. 268, 279 (Bankr. E.D. Tenn. 2000).

18 There is also no evidence in the record that showed Debtor's
19 unsecured creditors had any avenue for prompt payment if Debtor's
20 case was dismissed. As a consequence, we fail to see how
21 dismissal was more advantageous than conversion. Because the
22 inheritance was a potentially valuable asset and appointment of a
23 disinterested chapter 7 trustee would facilitate pursuit and
24 possible recovery of that asset to pay creditors, it is axiomatic
25 that conversion of Debtor's case was in the best interests of the
26 creditors and the estate.

27 **E. Absolute Right To Dismiss**

28 To the extent Debtor argues that he has an absolute right to

1 dismiss his case under § 1307(b) he is mistaken. The Ninth
2 Circuit in Rosson held that a chapter 13 debtor's right of
3 voluntary dismissal under § 1307(b) was not absolute, but was
4 qualified by the authority of a bankruptcy court to deny
5 dismissal on grounds of bad faith conduct or "to prevent an abuse
6 of process." 545 F.3d at 774 (citing § 105(a)).

7 **VI. CONCLUSION**

8 Having found no error, we AFFIRM.

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