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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NOT FOR PUBLICATION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 Nos. | NV-15-1349-KiLDo |
| 6 | GLOYD GREEN and GAIL HOLLAND, |) | | NV-15-1360-KiLDo |
| | |) | | (Related appeals) |
| 7 | Debtors. |) | Bk. No. | 14-15981-abl |
| 8 | _____ |) | | |
| 9 | GLOYD GREEN; GAIL HOLLAND, |) | | |
| | Appellants, |) | | |
| 10 | v. |) | MEMORANDUM¹ | |
| 11 | HOWARD FAMILY TRUST DATED |) | | |
| 12 | AUGUST 21, 1998, |) | | |
| 13 | Appellee. |) | | |
| 14 | _____ |) | | |

Argued and Submitted on October 21, 2016,
at Las Vegas, Nevada

Filed - November 9, 2016

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

Honorable August B. Landis, Bankruptcy Judge, Presiding

Appearances: Christopher Burke argued for appellants; Jerimy L.
Kirschner argued for appellee.

Before: KIRSCHER, LAFFERTY and DORE,² Bankruptcy Judges.

¹ This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have, it has no precedential value. See 9th Cir. BAP Rule 8024-1.

² Hon. Timothy W. Dore, Bankruptcy Judge for the Western
District of Washington, sitting by designation.

1 Debtors Gloyd Green ("Green") and his wife Gail Holland
2 appeal an order converting their chapter 11³ case to chapter 7 for
3 bad faith under § 1112(b). Debtors also appeal an order
4 estimating and temporarily allowing for voting purposes the claim
5 of creditor Howard Family Trust dated August 21, 1998 ("Trust").
6 We AFFIRM the conversion order. Consequently, we DISMISS the
7 appeal of the claim estimation order as MOOT.

8 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

9 A. Prepetition events

10 The Trust was created in 1998 by Oscar Brannon Howard, Jr.
11 and his wife, who had both passed away by late 2005. They were
12 survived by their only son and beneficiary, Oscar Brannon
13 Howard, III. Green, a family friend, was named successor trustee.
14 He became trustee of the Trust on November 5, 2005, upon the
15 passing of Howard, Jr. Green was also a beneficiary under the
16 Trust.

17 1. The probate action

18 Suspecting possible misappropriation of Trust assets, in
19 September 2008, Truman Holt, Mrs. Howard's brother and also a
20 Trust beneficiary, brought a probate action against trustee Green,
21 seeking to compel Green to account for and report information
22 about Trust assets ("Probate Action" 08P063929).

23 In October 2008, Green was ordered to provide an inventory
24 and accounting of income and expenses from November 5, 2005
25 through October 2008, and copies of tax returns for the same

27 ³ Unless specified otherwise, all chapter, code and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 period. Green was also ordered to pay Holt's attorney's fees and
2 costs or to show cause why he should not ("2008 Order").

3 In response, Green produced a two-page handwritten document
4 purporting to list the assets, income and expenses of the Trust
5 for the required time period ("2008 List"). The 2008 List did not
6 provide all information required under the 2008 Order, lacked any
7 substantive detail or supporting documentation or other
8 corroborative information, omitted Trust assets and provided no
9 information about which Trust assets Green claimed to have
10 administered.

11 In March 2009, Holt moved to have Green removed as trustee
12 for cause, citing Green's continuing failure to account for Trust
13 assets. At the hearing, the probate court removed Green and
14 appointed Holt as trustee. Green failed to respond to the removal
15 petition or appear at the hearing.

16 In an order filed in April 2009, the probate court found that
17 Green, while acting as Trustee, failed to: (1) provide an
18 adequate inventory and accounting of Trust assets and their
19 values; (2) provide details for distributions purportedly made to
20 Trust beneficiaries or details of any income received by the
21 Trust; (3) pay Holt's attorney's fees and costs as ordered; and
22 (4) provide any Trust tax returns. Green was ordered to turn over
23 to newly appointed trustee Holt: (1) complete copies of the Trust
24 agreement and all amendments thereto;⁴ (2) copies of all Trust

25
26 ⁴ Prior to his removal as trustee, Green had produced an
27 undated, but signed and notarized, two-page document entitled
28 Amendment of Trust ("Amendment"). Green claimed Howard, Jr. made
the Amendment just prior to his death. The Amendment purports to
(continued...)

1 records during the term of his administration, including tax
2 returns, check registers, canceled checks and information
3 regarding Trust investments; and (3) copies of all deeds,
4 mortgages, deeds of trust, promissory notes and the like related
5 to Trust activities.

6 In response to the April 2009 order, Green sent a list of
7 Trust assets and liabilities as of November 5, 2005, by email to
8 Holt's attorney, Harriet Roland, in June 2009 ("2009 List"). The
9 2009 List differed materially from the 2008 List, stating that the
10 Trust held \$612,000 in assets, almost a two-fold increase from
11 Green's previous accounting.⁵

12 In November 2009, Holt, individually and on behalf of the
13 Trust, moved to enforce the Trust's forfeiture clause and compel
14 Green to forfeit any right to property or benefits received from
15 the Trust based on his malfeasance. Green did not oppose the
16 motion. After a hearing and finding that notice was proper, the
17 probate court entered an order directing that Green forfeit his
18 beneficial interest in the Trust or any rights to use or keep
19 Trust property ("Forfeiture Order"). The Forfeiture Order

20 _____
21 ⁴(...continued)
22 modify the distribution of the Trust's residuary estate. The
23 names of Trust beneficiaries had been redacted from the document.
24 Holt alleged that Trust beneficiaries were previously unaware of
25 the Amendment's existence and claimed that Green never mentioned
26 it before the Probate Action. The purported Amendment apparently
27 caused further litigation between Trust beneficiaries, who
28 ultimately settled their dispute and decided that Holt and the
Howards' son would investigate any malfeasance by Green.

26 ⁵ Holt and the Trust contended that a later investigation
27 revealed the 2009 List still under-reported Trust assets and
28 income by at least \$1 million. The bankruptcy court found,
however, that the record did not substantiate a loss of Trust
assets of that magnitude.

1 contains findings establishing that Green had violated the terms
2 of the Trust and had failed to carry out properly his duties as
3 trustee. Green was also ordered "to return any and all prior or
4 current property of [the Trust] previously taken by [Green] from
5 the Trust" to Holt. Green did not appeal the Forfeiture Order.

6 In March 2012, Holt, on behalf of the Trust, filed a notice
7 of taking Green's deposition for May 3, 2012. Green was also
8 summoned by the probate court to appear at a hearing on May 11,
9 2012, and show cause why he should not be held in contempt for
10 failure to comply with the October 2008 and April 2009 orders.
11 Green failed to appear for the deposition or appear at the May 11
12 hearing.

13 On September 6, 2012, the probate court issued a second
14 citation for Green to appear at a hearing on September 21, 2012.
15 Green failed to appear for the September 21 hearing.

16 **2. The civil action**

17 In August 2012, Holt/Trust filed a complaint against Debtors
18 and their revocable trust alleging ten causes of action, including
19 conversion, embezzlement, breach of fiduciary duty, civil theft
20 and fraud, both actual and constructive ("Civil Action,"
21 A-12-667650-C). The complaint further alleged that Holland
22 "knowingly accepted the benefits of, and participated in, Green's
23 unlawful conversion of Trust assets."

24 Debtors never answered the complaint. Holt/Trust then sought
25 default entries against Debtors; the state court entered defaults
26 against Debtors and their revocable trust on January 31, 2013.

27 The state court held a prove-up hearing to establish damages
28 about 18 months later on May 22 and August 28, 2014. Green

1 appeared pro se at both sessions of the prove-up hearing, but
2 because the May 22 session started earlier than scheduled, Green
3 missed most of it. Prior to his arrival, a forensic investigator
4 for the Trust, Jayne Klein, was admitted as an expert witness and
5 testified about her findings regarding the alleged
6 misappropriation of Trust assets by Debtors.

7 At the later prove-up session on August 28, Green cross-
8 examined Klein, presented documentary evidence and testified under
9 oath. In summary, Klein testified that she had analyzed hundreds
10 of transactions and transfers between multiple accounts held in
11 the names of Debtors and the Trust. Her analysis also extended to
12 several home purchase and sale transactions involving the Debtors,
13 as well as transactions involving several individual deeds of
14 trust. Klein concluded that at least \$638,427.07 "was either
15 stolen or taken or lost by the [Debtors]." Klein opined that more
16 Trust assets could have existed, but Green's refusal to assist in
17 her investigation made finding any additional assets problematic.

18 During the August 28 session of the prove-up hearing, the
19 state court commended Holt/Trust's tracing of Trust assets,
20 stating that "[t]hey did the best job of tracing in a fraudulent
21 case that I have seen in almost 40 years of doing this[.]" The
22 court further noted:

23 Mr. Green, I have gone through this amended application
24 and looked at the various transactions that they have
25 done, that they have examined, to show me you're a thief.
26 You have stolen substantial amounts of money from this
trust over a period of years. The total amount that they
have compiled, and I believe it to be accurate, is
\$638,427.07[.]

27 In conclusion, the court stated that a money judgment would be
28 entered for \$638,427.07, with a like amount for punitive damages,

1 and equitable relief in the form of a constructive trust and
2 equitable liens on Debtors' property. Green asked the court about
3 filing an appeal; the court told him to seek counsel.

4 Holt/Trust counsel submitted on August 28, 2014, a Proposed
5 Judgment consistent with the relief announced by the state court
6 at the conclusion of the hearing. It provided for a constructive
7 trust over Debtors' home; an equitable lien on Debtors' rental
8 property and vacant land they owned; an equitable lien on Debtors'
9 personal property; actual damages of \$638,427.07; punitive damages
10 of \$638,427.07; and costs. The Proposed Judgment, however, was
11 not entered because of Debtors' bankruptcy filing six days later.⁶

12 **B. Postpetition events**

13 Debtors filed a skeletal chapter 11 case on September 3,
14 2014. They had not previously filed for bankruptcy. They had
15 also historically paid their debts as they became due, including
16 paying off credit card balances every month. The initial
17 schedules filed two weeks later showed that Debtors owned free and
18 clear all three of their real properties valued at \$455,000. They
19 also had nearly \$1 million in their retirement accounts. They had
20 no secured creditors or unsecured priority creditors.

21 Absent Holt/Trust's scheduled "unsecured" claim of
22 \$1.3 million, Debtors had only four other unsecured creditors:
23 three credit card companies collectively owed \$5,100; and

24
25 ⁶ The Proposed Judgment was subsequently signed by the state
26 court on September 10, 2014, after Debtors' bankruptcy petition
27 had been filed, but it was never docketed. Nonetheless, the
28 Proposed Judgment was the subject of a separate motion by Debtors
for contempt sanctions against Holt/Trust for violation of the
automatic stay. In the bankruptcy court's order granting the
contempt motion, it determined that the judgment was void.
Holt/Trust appealed the contempt order to the district court.

1 Ms. Holland's mother, who loaned Debtors \$7,500 to cover a portion
2 of Debtors' bankruptcy related fees of \$32,000. Debtors listed
3 the Holt/Trust debt from the Civil Action as "contingent,
4 unliquidated and disputed."

5 **1. The motion to dismiss**

6 In November 2014, Holt/Trust filed an Omnibus Motion: (1) To
7 Dismiss for Bad Faith; (2) To Remove Debtors as Trustee; and
8 (3) For Relief from Stay ("Motion to Dismiss").⁷ For dismissal
9 under § 1112(b), Holt/Trust argued that Debtors' chapter 11 case
10 had been filed in bad faith solely as a litigation tactic to
11 defeat or delay the Civil Action judgment. In short, Holt/Trust
12 contended that Debtors' bankruptcy filing was merely a substitute
13 for posting an appeal bond. Holt/Trust contended that the timing
14 of Debtors' case – filed just days after an announced adverse
15 judgment for \$1.3 million and a constructive trust against their
16 real property (purchased with allegedly stolen Trust money) – was
17 a glaring example of a bad faith filing intended to prevent a
18 written order being entered and to circumvent the appeals process.

19 Holt/Trust contended that Debtors had provided direct
20 evidence of their bad faith by admitting at their § 341(a)
21 meetings that the sole reason for filing the bankruptcy case was
22 to impede entry of the Civil Action judgment. Debtors also
23 admitted they were aware of their right to appeal, but chose to
24 file for bankruptcy instead. Finally, Holt/Trust argued that

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26 ⁷ Because the bankruptcy court decided to convert the case
27 to chapter 7, no relief to appoint a chapter 11 trustee or
28 examiner was necessary. No party disputes that ruling.
Holt/Trust also withdrew the request for relief from stay before
the evidentiary hearing on the Motion to Dismiss. Therefore, we
focus only on the court's decision to convert.

1 Debtors were solvent. At the time of filing, Debtors' liabilities
2 were \$12,600; their assets were \$1,435,849.04.

3 Debtors opposed the Motion to Dismiss, maintaining that their
4 case was not filed in bad faith. First, they asserted that they
5 arguably were not solvent, considering the large Holt/Trust debt.
6 Second, the bankruptcy case was filed 18 months after the defaults
7 had been entered. Third, litigation in the Civil Action was
8 essentially over except for some accounting. Finally, since their
9 case had been filed only three months ago, they had not been given
10 a reasonable opportunity to file a plan of reorganization.
11 Alternatively, Debtors argued that "unusual circumstances" existed
12 to not dismiss their case, which included the fact they were
13 defaulted in the Civil Action.

14 **a. Initial hearing on the Motion to Dismiss**

15 Both parties appeared with counsel at the initial hearing on
16 the Motion to Dismiss on December 10, 2014. Holt/Trust requested
17 a continuance for an opportunity to remedy notice deficiencies.
18 Because of the seriousness of the issue, the bankruptcy court
19 decided that an evidentiary hearing was appropriate. In its
20 scheduling order entered December 15, 2014, the court ordered the
21 parties to submit briefs to "elaborate on and address the evidence
22 elicited during the trial in connection with the parties' state
23 court litigation and the issues identified in the Motion and
24 Debtors' response to it." An evidentiary hearing was set for
25 March 2, 2015.

26 Debtors' pre-hearing brief in opposition to the Motion to
27 Dismiss was essentially a copy and paste of their prior brief and
28 did not address the issues noted by the bankruptcy court in the

1 scheduling order. Holt/Trust's brief, however, did provide more
2 details about the Civil Action. Holt/Trust noted that when Green
3 received notice of the pleading to remove him as trustee, he
4 withdrew \$125,000 in cash and securities from Trust accounts and
5 provided the Amendment with the redacted beneficiary designation,
6 which caused havoc between the beneficiaries. The distribution
7 pattern to beneficiaries during Green's tenure matched neither the
8 original Trust nor the Amendment. Holt/Trust also emphasized that
9 the prove-up hearing was originally scheduled for November 7,
10 2013. However, on Green's request, the state court reset the
11 hearing for November 26, 2013; then to December 11, 2013; then to
12 January 23, 2014; then to March 13, 2014; then to May 8, 2014;
13 then to May 22, 2014. At the end of the May 22 session, the court
14 continued the prove-up hearing for Green to review a copy of the
15 transcript and to file any written objections and/or obtain
16 counsel; Green did neither by the deadline of June 11, 2014.
17 Green then asked for another continuance for extra time to
18 respond. The state court again continued the prove-up hearing to
19 August 28, 2014.

20 **b. The evidentiary hearing on the Motion to Dismiss**

21 Roland, Klein and Debtors testified at the evidentiary
22 hearing on March 2, 2015. Klein stated that she had been employed
23 at the law firm representing Holt/Trust for the past 15 years.
24 Klein explained that a forensic investigator is someone who looks
25 into, particularly at her firm, probate trust malfeasance. She
26 admitted that she had no college level degree in forensic
27 accounting, accounting or any other subject. She testified that,
28 besides work done for her firm, she had done forensic

1 investigation of this type for several other parties for a fee.
2 Klein admitted that Green did not appear at the May 22 session of
3 the prove-up hearing in the Civil Action until after she had been
4 admitted as an expert, so he was not there to object.

5 Green's testimony as to the state court proceedings was vague
6 and sometimes contradictory; he recalled little. As for the
7 petition seeking his removal as trustee and subsequent order,
8 Green claimed that he understood nothing about Holt/Trust's
9 allegations of malfeasance and that he had no knowledge of the
10 state court finding that the accounting he submitted in 2008 was
11 inaccurate. Green could not recall being served with the orders
12 to appear and to provide an accounting of Trust assets or to
13 appear for deposition. Green did not recall that he had been
14 removed as trustee of the Trust for malfeasance, claiming that the
15 April 2009 order never stated a reason for his removal. Green was
16 also unsure as to whether he even received notice of the hearing
17 seeking his removal as trustee. However, Green admitted that when
18 he removed thousands of dollars out of Trust accounts as repayment
19 for approximately \$163,311 in loans he made to the Trust years
20 prior, it could have been in response to the removal notice.
21 Green also testified that although he deposited check payments for
22 Trust assets into his personal bank accounts, he did not believe
23 that he commingled his personal assets with those of the Trust.
24 Green testified that once he provided the 2009 List to Roland in
25 June 2009, he was under the impression that everything was settled
26 and his involvement was over.

27 Green also stated that he did not recall getting notice of
28 the Forfeiture Order in 2012, which contradicted his § 341(a)

1 meeting testimony, but he later testified that he did not dispute
2 receiving it. He testified that he knew nothing about the default
3 entries in the Civil Action in January 2013. Green also said he
4 did not recall the state court's oral ruling at the August 28,
5 2014 session of the prove-up hearing, just six months prior, that
6 he was a thief and had stolen hundreds of thousands of dollars
7 from the Trust.

8 Holland testified that her understanding when filing their
9 bankruptcy case was that Green would be able to produce documents
10 showing that no Trust funds were misappropriated, that all of
11 their assets would not be dissolved, and that if they did owe
12 anything to Holt/Trust it could be paid in an orderly fashion.
13 Holland testified that she knew "very little" about Green's
14 activities while he was acting as trustee for the Trust. Holland
15 stated that she had no involvement with the Trust or had any
16 control over Trust assets. She also knew nothing about the
17 Probate Action when it was pending.

18 After closing arguments from the parties, the bankruptcy
19 court took the matter under submission, noting that it would issue
20 a written decision promptly. The written decision was not issued
21 for several months.

22 **2. Debtors' disclosure statement and plan**

23 Meanwhile, the exclusivity period for Debtors to file their
24 chapter 11 plan and disclosure statement was set to expire on
25 January 1, 2015, with a plan confirmation deadline of March 3,
26 2015. On December 30, 2014, Debtors moved to extend the
27 exclusivity period. The bankruptcy granted the extension, giving
28 Debtors until April 1, 2015, to file their plan and disclosure

1 statement and until June 1, 2015, to get their plan confirmed.

2 Debtors filed their disclosure statement and plan on April 1,
3 2015.

4 Before any decision was entered, Debtors again moved for an
5 extension of another 180 days to get their plan confirmed.

6 Although discussed more fully below, Debtors contended another
7 extension was warranted due to: (1) Holt/Trust's objection to
8 Debtors' claimed exemptions set for hearing on July 2, 2015; and
9 (2) two pending adversary proceedings between Holt/Trust and
10 Debtors that had been consolidated and not resolved, as well as
11 two appeals, one of which was the contempt order. In addition,
12 Holt/Trust had sought to withdraw the reference, which had not yet
13 been decided.

14 On June 10, 2015, the bankruptcy court entered an order
15 giving Debtors until November 28, 2015, to get their plan
16 confirmed.

17 Meanwhile, on June 2, 2015, the bankruptcy court disapproved
18 Debtors' disclosure statement on the basis that it failed to
19 provide adequate information under § 1125(a). Debtors never filed
20 an amended disclosure statement or another plan.

21 **3. Holt/Trust's motion to estimate and temporarily allow**
22 **claim for voting purposes**

23 Holt/Trust filed an amended proof of claim on December 31,
24 2014 ("Claim"). The Claim was based on a "compensatory and
25 punitive judgment" of \$1,276,854.14, alleged to be secured in part
26 pursuant to a constructive trust and equitable lien on Debtors'
27 (stolen) real estate and other property in the amount of
28 \$638,427.07; the remaining \$638,427.07 was unsecured.

1 Some additional background here is warranted for context.
2 Shortly after Debtors filed their bankruptcy case, they removed
3 the Civil Action to the bankruptcy court ("Removal Action," Adv.
4 No. 14-01177). Thereafter, Holt/Trust moved for remand and asked
5 the bankruptcy court to abstain from hearing the matter. The
6 bankruptcy court denied remand. Holt/Trust appealed the remand
7 denial to the district court. Holt/Trust also moved for
8 withdrawal of the reference in the Removal Action.

9 The same day Debtors filed the Removal Action, Holt/Trust
10 filed a dischargeability action against Debtors, seeking to except
11 the debt from discharge under § 523(a)(2), (4) and (6) (the "523
12 Action," Adv. No. 14-01178). In their answer, Debtors asserted a
13 counterclaim objecting to Holt/Trust's Claim and sought a
14 determination of the validity, extent and priority of any lien
15 held by Holt/Trust.

16 On Debtors' motion, the Removal Action and the 523 Action
17 were consolidated on February 18, 2015. Thus, matters pending in
18 both the Removal Action and the 523 Action are subject to the
19 withdrawal of the reference, which is still undecided.

20 On August 5, 2015, Holt/Trust moved to estimate and
21 temporarily allow the Claim for voting purposes ("Claim Estimation
22 Motion"). At that point, Debtors' disclosure statement had been
23 disapproved and not amended.

24 Debtors opposed the Claim Estimation Motion for three
25 reasons. First, Debtors questioned the bankruptcy court's
26 jurisdiction to estimate the Claim because allowance of the Claim
27 was subject to the 523 Action, which had now been consolidated
28 with the Removal Action, which was subject to Holt/Trust's

1 withdrawal of the reference. Second, even if the bankruptcy court
2 had jurisdiction, Debtors contended the Claim Estimation Motion
3 was premature as there was no plan pending. Finally, Debtors
4 contended the court had discretion to deny the Claim Estimation
5 Motion because the Claim was subject to dispute and the delay in
6 its resolution was the fault of Holt/Trust.

7 In reply, Holt/Trust contended the bankruptcy court had
8 jurisdiction to estimate the Claim even though the removed
9 523 Action contained the counterclaim seeking to disallow it.
10 Plan confirmation was still within the bankruptcy court's
11 jurisdiction, which was a separate question from claim allowance.
12 Further, argued Holt/Trust, the Claim Estimation Motion was not
13 premature. Debtors had cited no case law that requires a plan to
14 be pending before a request to vote a disputed claim is sought.
15 Finally, while Holt/Trust conceded they had caused some delay in
16 resolving the Claim issue, nothing about it was improper. In
17 fact, Debtors consolidating the two adversaries ensured that
18 appeal of any one substantive issue within them would delay all
19 issues, including resolution of Debtors' Claim objection.

20 After a hearing on September 9, 2015, the bankruptcy court
21 issued its oral ruling on the Claim Estimation Motion on
22 September 18, 2015. Concluding that it had jurisdiction to
23 estimate and temporarily allow the Claim for voting purposes, the
24 court granted the motion on the basis that the Claim was both
25 contingent and unliquidated, and waiting until the Claim was
26 liquidated would cause undue delay in the administration of the
27 case. The court estimated the unsecured Claim at \$638,427.07
28 ("Estimated Claim").

1 The bankruptcy court entered an order allowing the Estimated
2 Claim for voting purposes only under § 502(c)(1) and Rule 3018(a)
3 on September 23, 2015 ("Claim Estimation Order"). Debtors timely
4 appealed the Claim Estimation Order.

5 **4. The bankruptcy court's decision on the Motion to Dismiss**

6 The bankruptcy court entered its 43-page Memorandum Decision
7 on the Motion to Dismiss on September 30, 2015, one week after the
8 Claim Estimation Order had been entered. The court found that
9 Debtors' bankruptcy case had been filed in bad faith, thereby
10 providing "cause" under § 1112(b)(1). Debtors had failed to
11 establish that any "unusual circumstances" existed under
12 § 1112(b)(2) to not dismiss or convert the case. However, the
13 court declined to dismiss the case, finding that conversion to
14 chapter 7 was in the best interest of creditors and the estate.

15 The bankruptcy court entered an order converting Debtors'
16 case to chapter 7 on October 1, 2015 ("Conversion Order").
17 Debtors timely appealed the Conversion Order.

18 **II. JURISDICTION**

19 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
20 and 157(b)(2)(A). Subject to our discussion below, we have
21 jurisdiction under 28 U.S.C. § 158.

22 **III. ISSUES**

- 23 1. Did the bankruptcy court abuse its discretion when it
24 converted Debtors' chapter 11 bankruptcy case to chapter 7?
25 2. Did the bankruptcy court abuse its discretion by estimating
26 and temporarily allowing the Claim for voting purposes?

27 **IV. STANDARDS OF REVIEW**

28 The bankruptcy court's interpretation of the Code is reviewed

1 de novo. Barrientos v. Wells Fargo Bank, N.A., 633 F.3d 1186,
2 1188 (9th Cir. 2011). We review our own jurisdiction, including
3 questions of mootness, de novo. Ellis v. Yu (In re Ellis),
4 523 B.R. 673, 677 (9th Cir. BAP 2014) (citing Silver Sage
5 Partners, Ltd. v. City of Desert Hot Springs (In re City of Desert
6 Hot Springs), 339 F.3d 782, 787 (9th Cir. 2003)).

7 We review the bankruptcy court's order converting Debtors'
8 chapter 11 case to chapter 7 for an abuse of discretion. Pioneer
9 Liquidating Corp. v. U.S. Trustee (In re Consol. Pioneer Mortg.
10 Entities), 264 F.3d 803, 806 (9th Cir. 2001). We review the
11 bankruptcy court's finding of "bad faith" for clear error. Marsch
12 v. Marsch (In re Marsch), 36 F.3d 825, 828 (9th Cir. 1994).

13 We also review for an abuse of discretion the bankruptcy
14 court's decision to allow temporarily the Estimated Claim for
15 voting purposes. See Beal Bank USA v. Windmill Durango Office,
16 LLC (In re Windmill Durango Office, LLC), 481 B.R. 51, 63 (9th
17 Cir. BAP 2012) (Rule 3018(a) decisions are reviewed for abuse of
18 discretion). However, we review de novo whether the bankruptcy
19 court had subject matter jurisdiction to enter the Claim
20 Estimation Order. See McCowan v. Fraley (In re McCowan), 296 B.R.
21 1, 2 (9th Cir. BAP 2003) ("Whether a court has subject matter
22 jurisdiction is a question of law that we review de novo.").

23 A bankruptcy court abuses its discretion if it applied the
24 wrong legal standard or its factual findings were illogical,
25 implausible or without support in the record. TrafficSchool.com
26 v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011).

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V. DISCUSSION

A. The bankruptcy court did not abuse its discretion when it converted Debtors' chapter 11 case to chapter 7.

1. Dismissal or conversion under § 1112(b)

Section 1112(b)(1) provides, in relevant part, that "the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause" If cause is established, the decision whether to convert or dismiss the case falls within the sound discretion of the court. Sullivan v. Harnisch (In re Sullivan), 522 B.R. 604, 612 (9th Cir. BAP 2014). And, if the bankruptcy court determines that cause exists to convert or dismiss, it must also: (1) decide whether dismissal, conversion, or the appointment of a trustee or examiner is in the best interests of creditors and the estate; and (2) identify whether there are unusual circumstances that establish that dismissal or conversion is not in the best interests of creditors and the estate. Id. (citing § 1112(b)(1), (b)(2)).

The movant seeking relief under § 1112(b) bears the initial burden of proving by a preponderance of the evidence that "cause" exists. Id. at 614.

2. Bad faith as cause to convert or dismiss

The bankruptcy court found that "cause" existed to convert on the basis that Debtors' petition was filed in bad faith. Although § 1112(b) does not explicitly require that cases be filed in "good faith," a lack of good faith in filing a chapter 11 case establishes cause for dismissal. Marshall v. Marshall

1 (In re Marshall), 721 F.3d 1032, 1047 (9th Cir. 2013);
2 In re Marsch, 36 F.3d at 828; In re Sullivan, 522 B.R. at 614. In
3 determining whether the petition was filed in good faith, "the
4 debtor's subjective intent is not determinative." In re Marsch,
5 36 F.3d at 828. Rather, the good faith inquiry focuses on the
6 manifest purpose of the filing and whether the debtor is seeking
7 to achieve thereby "objectives outside the legitimate scope of the
8 bankruptcy laws." Id.; In re Sullivan, 522 B.R. at 614.

9 Simply put, in determining whether the chapter 11 petition
10 was filed in good faith, the bankruptcy court must ascertain
11 "whether [the] debtor is attempting to unreasonably deter and
12 harass creditors or attempting to effect a speedy, efficient
13 reorganization on a feasible basis." In re Marsch, 36 F.3d at 828
14 (citing Idaho Dep't of Lands v. Arnold (In re Arnold), 806 F.2d
15 937, 939 (9th Cir. 1986)); Grego v. U.S. Tr. (In re Grego), 2015
16 WL 3451559, at *5 (9th Cir. BAP May 29, 2015).

17 When bad faith is relied upon and established as cause for
18 relief under § 1112(b), "[d]ebtor bears the burden of proving that
19 the petition was filed in good faith." In re Marshall, 721 F.3d
20 at 1048 (quoting Leavitt v. Soto (In re Leavitt), 209 B.R. 935,
21 940 (9th Cir. BAP 1997)), aff'd, 171 F.3d 1219 (9th Cir. 1999).

22 In making the good faith determination, the bankruptcy court
23 typically must consider "an amalgam of factors," instead of
24 relying on a single dispositive fact. In re Marsch, 36 F.3d at
25 828. Such determinations are to be made "on a case by case basis,
26 and there is no talismanic list of factors that must be present in
27 each case in order to find bad faith; the weight given to any
28 particular factor depends on all of the circumstances of the

1 individual case." In re Grego, 2015 WL 3451559, at *6 (citing
2 Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna
3 Assocs. Ltd. P'ship), 30 F.3d 734, 738 (6th Cir. 1994); de la
4 Salle v. U.S. Bank, N.A. (In re de la Salle), 461 B.R. 593, 605
5 (9th Cir. BAP 2011) (holding that, in chapter 13 cases, bankruptcy
6 courts must consider the "totality of the circumstances" before
7 making a bad faith determination)).

8 **3. Analysis**

9 After carefully reviewing an amalgam of factors, the
10 bankruptcy court determined that Debtors were and are attempting
11 to unreasonably deter and harass Holt/Trust by filing their
12 chapter 11 petition. In addition, the court found that Debtors
13 were not attempting to effect a speedy, efficient reorganization
14 on a feasible basis, but were instead attempting to achieve delay
15 and other objectives outside the legitimate scope of the Code.
16 Thus, Debtors' bankruptcy petition was not filed in good faith and
17 established "cause." Debtors do not challenge the bankruptcy
18 court's finding of bad faith directly, but rather raise procedural
19 arguments and challenge the court's finding that unusual
20 circumstances were not present under § 1112(b)(2). We now turn to
21 these arguments.

22 Debtors contend that because the bankruptcy court held the
23 evidentiary hearing four months after the Motion to Dismiss was
24 filed and did not decide the matter until seven months later, it
25 erred as a matter of law. Under § 1112(b)(3), the bankruptcy
26 court is required to hear a motion under § 1112(b) within 30 days
27 after the filing of the motion and decide the motion not later
28 than 15 days after the initial hearing, "unless the movant

1 expressly consents to a continuance for a specific period of time
2 or compelling circumstances prevent the court from meeting the
3 time limits established by this paragraph."

4 Debtors never before objected to the timing of the
5 evidentiary hearing or of the bankruptcy court's decision.
6 Generally we will not consider an issue raised for the first time
7 on appeal; the failure to raise an issue before the bankruptcy
8 court may constitute a waiver. See Price v. Lehtinen
9 (In re Lehtinen), 332 B.R. 404, 411 (9th Cir. BAP 2005). We may
10 consider such an issue later on appeal. See Mano-Y & M, Ltd. v.
11 Field (In re Mortg. Store, Inc.), 773 F.3d 990, 998 (9th Cir.
12 2014). Given the pure legal issue here and the developed record,
13 we exercise our discretion to consider Debtors' argument and
14 conclude to the contrary. See Id. (we have discretion to consider
15 arguments raised for the first time on appeal if the issue
16 presented is purely a legal one and either does not depend on the
17 factual record developed below or the pertinent record has been
18 fully developed). As prescribed by the statute, which is clearly
19 designed for the party seeking dismissal or conversion, movant
20 Holt/Trust expressly consented to the evidentiary hearing set four
21 months out. See Smith v. Colo. Dep't of Rev. (In re Hook), 2008
22 WL 3906794, at *5 (10th Cir. BAP Aug. 26, 2008) (statutory right
23 under § 1112(b)(3) to have hearing conducted within 30 days
24 "plainly belongs to the moving party" rather than to the debtor).
25 Secondly, while the seven month wait for a decision was arguably
26 lengthy, particularly when considering the court's statement at
27 the evidentiary hearing that it would render a decision promptly,
28 Debtors fail to acknowledge the second part of § 1112(b)(3), which

1 permits the court to decide the motion beyond the 15-day time
2 limit if "compelling circumstances" so require. Clearly, the
3 15-day decision rule in § 1112(b)(3) is flexible; the court is
4 allowed to extend that time limit if necessary.

5 We further observe that § 1112(b)(3) is not self-executing
6 and does not provide for a specific consequence for either party
7 should a motion to dismiss or convert not be heard within 30 days
8 or decided within 15 days thereafter. See In re Pinnacle Labs.,
9 Inc., 2008 WL 5157981, at *4 n.1 (Bankr. D.N.M. June 19, 2008)
10 (noting the difference between § 1112(b)(3) and § 362(e)(1) & (2),
11 which allow relief or modification from stay if hearings are not
12 conducted or decisions rendered within certain periods of time).
13 Therefore, the bankruptcy court did not commit reversible error by
14 conducting an evidentiary hearing four months after the Motion to
15 Dismiss had been filed or by not adhering to the 15-day decision
16 rule after that hearing's conclusion.

17 Debtors next contend the bankruptcy court erred by
18 considering in its decision to convert events that occurred months
19 after the evidentiary hearing, when it should have based its
20 decision only on facts from the Motion to Dismiss and the related
21 evidentiary hearing in March 2015. In particular, Debtors assign
22 error to the court's consideration of evidence regarding alleged
23 commingled Trust funds used to purchase their residence that was
24 presented at a hearing on Holt/Trust's objection to Debtors'
25 claimed exemptions in July 2015. In making a credibility
26 determination about Debtors, the bankruptcy court indicated that
27 the testimony regarding whether alleged commingled Trust funds
28 were used to purchase their residence was in fact presented at the

1 evidentiary hearing on the Motion to Dismiss. Review of that
2 transcript reflects that no such testimony was offered there. So,
3 with respect to that factual statement, the court did err.

4 However, careful review of the transcript from the
5 evidentiary hearing on the Motion to Dismiss also shows that
6 Green's testimony was not particularly creditworthy and was
7 impeached on a variety of issues. In addition, Green admitted to
8 depositing Trust funds into Debtors' personal accounts, but then
9 claimed he did not commingle any Trust funds with Debtors'. More
10 importantly, the fact of the alleged commingled Trust funds
11 evidence at the hearing on Debtors' exemptions was only one part
12 of one factor the court relied upon as indicia of bad faith for
13 the Motion to Dismiss (i.e., whether egregious behavior by debtor
14 is present). Thus, even if the court erred in considering that
15 evidence and in making any factual finding respecting it, it does
16 not negate the court's other factual findings supporting its bad
17 faith ruling which Debtors do not contest.

18 Next, Debtors argue that the bankruptcy court should not have
19 converted the case at the time it did, because of the pending
20 Claim objection, pending appeals, and an undecided withdrawal of
21 the reference filed by Holt/Trust. This argument appears to go to
22 Debtors' argument that "unusual circumstances" existed to not
23 convert their case, and the bankruptcy court erred by not
24 concluding otherwise. As noted above, once the bankruptcy court
25 determines that cause exists to convert or dismiss, it must also:
26 (1) decide whether dismissal, conversion, or the appointment of a
27 trustee or examiner is in the best interests of creditors and the
28

1 estate;⁸ and (2) identify whether there are unusual circumstances
2 that establish that dismissal or conversion is not in the best
3 interests of creditors and the estate. In re Sullivan, 522 B.R.
4 at 612; § 1112(b)(1), (b)(2). The word "unusual" is not defined
5 in the Code, but contemplates facts that are not common to
6 chapter 11 cases, generally. 7 COLLIER ON BANKRUPTCY ¶ 1112.05[2]
7 (Alan N. Resnick & Henry J. Sommers, eds., 16th ed.).

8 If the bankruptcy court does specifically find and identify
9 such "unusual circumstances," the debtor must also prove (1) there
10 is a reasonable likelihood of plan confirmation within a
11 reasonable time, (2) that the "cause" shown for conversion or
12 dismissal was reasonably justified, and (3) that the cause for
13 conversion or dismissal can be "cured" within a reasonable time.
14 Warren v. Young (In re Warren), 2015 WL 3407244, at *4 (9th Cir.
15 BAP May 14, 2015) (citing § 1112(b)(2)(A) & (B)).

16 Debtors concede it was their burden to demonstrate unusual
17 circumstances existed so that dismissal or conversion was not in
18 the best interests of creditors and the estate. See id. at *4
19 ("Once the movant has established cause, the burden shifts to the
20 respondent to demonstrate by evidence the unusual circumstances
21 that establish that dismissal or conversion is not in the best

22 ⁸ Debtors do not dispute the bankruptcy court's decision to
23 convert as opposed to dismiss. We see no error in that ruling.
24 The court independently analyzed the issue and determined that
25 conversion was in the best interest of creditors and the estate,
26 particularly because conversion ensured that all estate assets
27 could be properly collected, secured and distributed promptly in
28 an equitable manner. See In re Sullivan, 522 B.R. at 613
(bankruptcy court has an independent duty under § 1112 to consider
whether dismissal or conversion would be in the best interest of
all creditors and the estate, regardless of what form of relief
the moving party has requested); In re Sann, 2015 WL 1943911 at
*10-11 (Bankr. D. Mont. Apr. 29, 2015) (same).

1 interests of creditors and the estate.") (quoting 7 COLLIER ON
2 BANKRUPTCY at ¶ 1112.05[2]). The only "unusual circumstances"
3 Debtors raised before the bankruptcy court was the fact of the
4 default entry. The bankruptcy court disagreed this constituted
5 anything unusual in a chapter 11 case. We agree; this hardly
6 seems unusual, as many debtors prior to filing for bankruptcy have
7 had defaults entered against them in another court.

8 However, Debtors now argue that the proposed plan and
9 disclosure statement, pending Claim objection, pending appeals,
10 and the undecided withdrawal of the reference constitute unusual
11 circumstances. Leaving aside momentarily the proposed plan,
12 Debtors do not explain how any of these issues establish that
13 chapter 11, as opposed to conversion or dismissal, is in the best
14 interest of creditors or the estate. Also, nothing is unusual
15 about pending dischargeability actions or claim objections in an
16 individual chapter 11 case. As for the proposed plan, a
17 compelling ground for denying a motion to dismiss grounded on bad
18 faith is a debtor showing that a plan of reorganization qualifies
19 and is ready for confirmation. In re Marshall, 721 F.3d at 1049.
20 Although Debtors had filed a proposed plan, their disclosure
21 statement was rejected and they never filed an amended version
22 curing the defect(s). Thus, this does not help them either.

23 Along this same vein, and assuming unusual circumstances
24 exist, Debtors argue that the bankruptcy court erred in converting
25 their case to chapter 7 on October 1, 2015, after giving them
26 until November 30, 2015, to confirm a plan, and in finding that a
27 plan could not be confirmed in a reasonable time. Debtors argue
28 that with the Claim Estimation Order being entered just one week

1 earlier estimating the Claim at \$638,427.07, they were not given
2 time to file a new plan and disclosure statement based on that
3 decision. The bankruptcy court noted that while Debtors had filed
4 a plan, no disclosure statement had been approved and the plan was
5 never set for a confirmation hearing. Even if Debtors were
6 correct that they should have been given more time, they failed to
7 address the court's other concern that Debtors identified only one
8 class of creditors – general unsecured. As such, the court found
9 that no separate impaired class of creditors existed that could
10 vote in support of the plan, and the likelihood that Holt/Trust
11 would vote in favor of it was remote. Any new plan would appear
12 to have the same challenges.

13 More importantly, even if Debtors could confirm a plan within
14 a reasonable time, they have not shown how the "cause" established
15 to convert their case – bad faith – was either reasonably
16 justified or is curable. See § 1112(b)(2)(B). As the bankruptcy
17 court found, filing a petition in bad faith could never be
18 reasonably justified or curable, no matter what plan Debtors could
19 now propose. For this same reason, we reject Debtors' argument
20 that because they had the assets to fund a 100% plan if needed,
21 the bankruptcy court erred in holding that they could not propose
22 a confirmable plan.

23 Debtors' last contention seems to go more to their appeal of
24 the Claim Estimation Order, arguing that the bankruptcy court
25 erroneously based its decision to convert, in part, on its
26 estimation of the Claim. Debtors' argument here is unclear.
27 Although the bankruptcy court had entered the Claim Estimation
28 Order one week before the Conversion Order, the court said nothing

1 in its Memorandum Decision about the Estimated Claim or that it
2 was a basis for converting. In any event, Debtors' argument is
3 without merit as the bankruptcy court temporarily estimated the
4 Claim solely and exclusively for purposes of voting to accept or
5 reject any proposed plan under § 502(c)(1) and Rule 3018(a); such
6 estimation did not serve as a basis for converting the case under
7 § 1112 or applicable case law. Moreover, the resolution of the
8 appeal of the Claim Estimation Order will not change the
9 bankruptcy court's ruling that Debtors filed their petition in bad
10 faith, which was not substantially justified and cannot be cured.⁹

11 Accordingly, because the bankruptcy court's finding of bad
12 faith is supported by the record and not clearly erroneous, and it
13 properly applied the governing law, we AFFIRM the Conversion
14 Order.

15 **B. Because we are affirming the Conversion Order, the appeal of**
16 **the Claim Estimation Order is DISMISSED as MOOT.**

17 Debtors also appeal the Claim Estimation Order. After
18 determining it had jurisdiction over the matter, the bankruptcy
19 court proceeded to estimate and temporarily allow Holt/Trust's
20 unsecured Claim for voting purposes only in the amount of

21 _____
22 ⁹ Debtors make a great deal of Klein's testimony, arguing
23 that she lacked the credentials necessary to be admitted as an
24 expert witness. First, Klein was admitted as an expert witness at
25 the state court prove-up hearing, not at the evidentiary hearing
26 on the Motion to Dismiss, which the bankruptcy court merely
27 acknowledged in its recitation of the facts. Second, Debtors had
28 months between the two sessions of the prove-up hearing to object
to Klein's testimony or to hire counsel but did not do so.
Finally, while Klein may not have a degree in forensic accounting,
she has been doing probate trust malfeasance investigation for at
least 15 years, and the state court judge commented favorably on
her abilities, noting that her work was the best he had seen in
his 40 years on the bench.

1 \$638,427.07. Notably, the court's ruling here was very narrow.
2 It explicitly stated at the hearing and in the order that the
3 temporary estimate and allowance of the Claim was solely and
4 exclusively for purposes of voting to accept or reject a
5 chapter 11 plan of reorganization; the court was not determining
6 the allowance or disallowance of the Claim, the allowable amount
7 or the extent of any lien securing the Claim if allowed, nor the
8 nondischargeability of the Claim under § 523(a). In other words,
9 the Claim Estimation Order would have no preclusive effect in any
10 other matter or before any other court.

11 In light of the bankruptcy court's narrow ruling and our
12 decision affirming the Conversion Order, we must dismiss the
13 appeal of the Claim Estimation Order. See United States v.
14 Pattullo (In re Pattullo), 271 F.3d 898, 900 (9th Cir. 2001) (we
15 cannot exercise jurisdiction over a moot appeal). No chapter 11
16 case exists and no plan will be presented requiring voting from
17 creditors. Therefore, even if we were to reverse the Claim
18 Estimation Order, we can provide no effective relief to Debtors.
19 See Castaic Partners II, LLC v. Daca-Castaic, LLC (In re Castaic
20 Partners II, LLC), 823 F.3d 966, 968-69 (9th Cir. 2016) (test for
21 mootness is whether an appellate court can still grant effective
22 relief to the prevailing party if it decides the merits in his or
23 her favor).

24 VI. CONCLUSION

25 For the foregoing reasons, we AFFIRM the Conversion Order.
26 Because we are affirming the Conversion Order, the appeal of the
27 Claim Estimation Order is therefore DISMISSED as MOOT.

28