

DEC 06 2016

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. WW-15-1377-JuTaKu
)
 7 SHAUN MICHEIL MARTIN and) Bk. No. 13-42847-DBL
 PATRICIA MAUREEN MCCARTHY,)
 8)
 Debtors.)
 9)
 FEARGHAL MCCARTHY,)
 10)
 Appellant,)
 11)
 v.) **M E M O R A N D U M**
 12)
 SHAUN MICHEIL MARTIN; PATRICIA)
 13 MAUREEN MCCARTHY; MICHAEL G.)
 MALAIER, Chapter 13 Trustee,)
 14)
 Appellees.)
 15)

Argued and Submitted on November 17, 2016
at Pasadena, California

Filed - December 6, 2016

Appeal from the United States Bankruptcy Court for the
Western District of Washington

Honorable Brian D. Lynch, Chief Bankruptcy Judge, Presiding

Appearances: Appellant Fearghal McCarthy argued pro se.

Before: JURY, TAYLOR, and KURTZ, Bankruptcy Judges.

* 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.

1 Appellant Fearghal McCarthy (Mr. McCarthy) appeals from the
2 bankruptcy court's order dismissing the chapter 13¹ case of
3 debtors, Shaun Micheil Martin (Mr. Martin) and Patricia McCarthy
4 (Ms. McCarthy) (collectively, Debtors),² without prejudice. On
5 appeal, Mr. McCarthy assigns error to the bankruptcy court's
6 decision to dismiss Debtors' case without prejudice, contending
7 that the underlying facts supported dismissal with prejudice.
8 For the reasons stated below, we discern no error and AFFIRM.

9 **I. FACTS**

10 **A. Prepetition Events**

11 In 2005, the McCarthys were involved in a contentious and
12 acrimonious divorce proceeding. In October 2006, while the
13 divorce was pending, Ms. McCarthy filed a chapter 7 bankruptcy
14 petition and obtained a discharge. The rancor evident in the
15 divorce persisted in the bankruptcy case. In January 2010, a
16 final divorce decree was entered. The state court appointed
17 Mr. McCarthy as custodian of the couple's two sons and ordered
18 Ms. McCarthy to pay child support and provide health insurance
19 for the children. During the divorce proceedings, Mr. McCarthy
20 moved for contempt numerous times resulting in over \$30,000 in
21 sanctions against Ms. McCarthy.

22 In April 2013, Mr. McCarthy applied for a judgment based on
23 a promissory note for \$225,000 that Ms. McCarthy had signed as

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

² Neither Debtors nor the chapter 13 trustee have appeared
in this appeal.

1 part of the dissolution proceeding. While Mr. McCarthy's motion
2 for judgment was pending, Debtors purchased a new 2013 Dodge
3 Caravan minivan for \$20,794 which they financed at 21% interest.
4 Mr. McCarthy obtained entry of \$224,000 judgment on April 24,
5 2013. He then threatened to garnish Ms. McCarthy's wages.

6 **B. Bankruptcy Events**

7 On April 28, 2013, Debtors filed their chapter 13 petition
8 to prevent any garnishments based on the judgment. Debtors'
9 Schedule F showed approximately \$350,000 in unsecured debt,
10 including Mr. McCarthy's \$224,000 judgment.³ Ms. McCarthy was
11 also delinquent on her support payments. Debtors' chapter 13
12 plan stated that they would make monthly payments of \$2,000 for
13 thirty-six months and that they elected not to contribute their
14 tax refunds. Secured debt payments were \$300 monthly, payable
15 on the Dodge minivan and a 2008 Kia Spectra (Kia).

16 **1. Debtors First Amended Plan**

17 Debtors filed a first amended plan dated May 31, 2013.
18 This plan raised the monthly payment to \$2,104 with the
19 commitment period still at thirty-six months. Debtors also
20 proposed to use their tax refunds to fund the plan, with the
21 exception of the first \$1,400 of each refund. The plan also
22 showed monthly domestic support payments to Mr. McCarthy of
23 \$1,000 and raised the monthly payments on their secured car debt

24
25 ³ Mr. McCarthy asserts that the debts listed in Schedule F
26 are overstated by \$91,583, consisting of a mortgage debt that was
27 discharged in Ms. McCarthy's chapter 7 case. He further contends
28 the scheduled debts are understated because the \$30,000 in
sanctions Mr. McCarthy obtained in the divorce proceedings was
not listed.

1 to \$800.

2 Mr. McCarthy objected to the confirmation of Debtors'
3 amended plan, contending that Debtors' Form B22C failed to
4 accurately report their household size (three versus five) and
5 their average monthly income. He also alleged that Debtors'
6 plan was proposed in bad faith because they purchased the new
7 minivan prior to filing their bankruptcy case and accelerated
8 payments in the plan on that debt. Mr. McCarthy further argued
9 that Debtors' living expenses included excessive or unwarranted
10 amounts and complained that the plan failed to commit Debtors'
11 federal and state income tax refunds in their entirety.⁴

12 **2. Confirmation of Debtors' Second Amended Plan**

13 About a week before the hearing on Mr. McCarthy's objection
14 to Debtors' first amended plan, Debtors filed their second
15 amended plan dated July 30, 2013, causing the evidentiary
16 hearing on confirmation to be rescheduled. Debtors also amended
17 their Schedules I and J. Amended Schedule I showed that
18 Mr. Martin was unemployed and listed his income as between
19 \$1,800-\$2,200 a month whereas the previous Schedule I showed
20 Mr. Martin's income as \$1,004 per month. The amended Form B22C
21 reduced Debtors' household size to three, noted that Debtors
22 were above median income with negative disposable income, and
23 showed the applicable commitment period as five years.

24 The second amended plan indicated monthly payments of
25 \$2,104 for four months and \$2500 thereafter for a term of sixty
26

27 ⁴ Mr. McCarthy, an accountant by trade, continued to raise
28 issues related to Debtors' tax returns throughout this case.

1 months. Debtors' treatment of their tax refunds stayed the
2 same, but they lowered the payment on the minivan to the
3 contractual rate of \$519. The plan showed that Debtors would
4 pay at least \$95,081.23 to allowed nonpriority unsecured claims
5 for a return of 27% on allowed claims.

6 Mr. McCarthy objected to Debtors' second amended plan,
7 alleging that the plan was not proposed in good faith due to
8 Debtors' purchase of the minivan prior to their filing.
9 Although some expenses had been adjusted in their amended
10 Schedule J, Mr. McCarthy continued to object to certain expenses
11 as excessive or unwarranted. He further asserted that Debtors
12 offered no reason or authority for their retention of the first
13 \$1,400 of any tax refund. He also pointed out that, although
14 Debtors acknowledged a prepetition support payment default of
15 over \$11,000, they failed to make a provision for payment of
16 that debt in the plan. Finally, Mr. McCarthy complained that
17 Debtors' Schedule I and J were misleading.

18 The chapter 13 trustee submitted a brief in support of
19 confirmation.

20 On November 6, 2013, the bankruptcy court held an
21 evidentiary hearing on confirmation. Mr. Martin, Ms. McCarthy,
22 and Mr. McCarthy testified and numerous exhibits were offered
23 into evidence. The bankruptcy court took the matter under
24 advisement.

25 On November 21, 2013, the bankruptcy court issued an order
26 setting forth its findings of fact and conclusions of law. The
27 court overruled Mr. McCarthy's objections and confirmed Debtors'

1 second amended plan.⁵ The court found that Debtors had filed
2 their petition in good faith after applying the factors set
3 forth in Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224
4 (9th Cir. 1999). The court also found the plan was proposed in
5 good faith and committed substantially more than their projected
6 disposable income for the sixty month commitment period of the
7 plan.

8 In addressing Mr. McCarthy's bad faith argument based on
9 the purchase of the minivan, the court concluded that Debtors'
10 purchase did not indicate a lack of good faith when they
11 successfully modified the interest rate from over 20% down to 6%
12 and demonstrated that their family needed a reliable car.

13 The bankruptcy court also found that the discrepancies in
14 the schedules and Form B22C were mistakes primarily due to the
15 sloppiness of Debtors' attorney and Debtors. The court opined
16 that neither understood the basic strategy of chapter 13
17 practice applicable to Debtors' situation. The court observed
18 that had Debtors' attorney and Debtors properly analyzed the
19 case, Debtors would have rushed to claim they were above median
20 debtors for two reasons.

21 First, once they corrected the household size to three it
22 was obvious that their monthly projected disposable income was
23 \$1080 in the negative. According to the court, for purposes of
24

25 ⁵ Mr. McCarthy also filed a motion to dismiss Debtors' case
26 with prejudice and an order shortening time to have the motion
27 heard the same day as the evidentiary hearing on confirmation.
28 The bankruptcy court denied the order shortening time without
prejudice to Mr. McCarthy's refileing of the motion and scheduling
a hearing in due course.

1 the disposable income test, Debtors would have no obligation to
2 pay any money to nonpriority unsecured creditors such as the
3 claim filed by Mr. McCarthy for the \$224,000 judgment and the
4 vast majority of the over \$30,000 in monetary sanctions arising
5 out of the dissolution.

6 Second, the court noted that at the time Debtors filed
7 their case, there was no applicable commitment period for
8 debtors with negative income under the holding in Maney v.
9 Kagenveama (In re Kagenveama), 541 F.3d 868 (9th Cir. 2008).

10 Accordingly, the bankruptcy court concluded: "Instead of running
11 away from status as above median debtors, they should have been
12 embracing it, as they could have been arguing for an even
13 shorter plan."

14 In the end, the bankruptcy court decided that the facts
15 showed Debtors were not manipulating the schedules or their
16 income to their advantage but, rather, that they and their
17 attorney did not handle the case competently from the outset.

18 The court also found that given the size of the proposed
19 plan payment, the budget submitted in the most recent schedules,
20 and the substantial disbursement to unsecured creditors,
21 Debtors' proposal to keep the first \$1,400 of any tax refund was
22 reasonable and prudent.

23 **3. Postconfirmation Modification: Third Amended Plan**

24 Debtors filed a third amended plan dated April 3, 2014, and
25 requested modification of their confirmed plan based on
26 increased income and expenses. The third amended plan showed
27 plan payments in the amount of \$23,224.68 through March 2014 and
28 \$2900 per month commencing May 1, 2014. The third amended plan

1 also indicated that Debtors would pay \$109,000 to unsecured
2 creditors for a return of 30% of their allowed claims.

3 On April 29, 2014, Mr. McCarthy filed an objection to
4 Debtors' third amended plan. There, he stated that he received
5 information that Mr. Martin had returned to regular, union
6 assignment work shortly following the November 6, 2013 hearing
7 on confirmation and that he had been regularly employed
8 thereafter. Mr. McCarthy informed the court that he told the
9 chapter 13 trustee about this development but that the trustee
10 did not seek payroll information from Mr. Martin. According to
11 Mr. McCarthy, Mr. Martin's income was a moving target.

12 Mr. McCarthy also argued that Debtors' increased income and
13 reasonable expenses showed an after-tax income of \$1,790 per
14 month; yet, Debtors proposed only a \$400 per month increase in
15 the plan payment. Mr. McCarthy further asserted that there was
16 no justification or explanation as to why the difference of
17 \$1,390 was not included in the plan. Finally, Mr. McCarthy
18 objected to numerous increased expenses relating to cell phones,
19 food, clothing and personal care.

20 The court scheduled an evidentiary hearing for September 3,
21 2014. Mr. McCarthy moved for a continuance and to compel
22 discovery related to Debtors' income and expenses. On
23 September 2, 2014, Debtors filed a notice withdrawing the motion
24 to modify their confirmed plan. Eight days later, the
25 bankruptcy court ordered a 2004 examination of Mr. Martin's
26 employer, Western Partitions, and Ms. McCarthy's employer,
27 DM2 Software. In response, Debtors filed fifth amended
28 Schedules I and J stating higher income for Mr. Martin.

1 **4. Postconfirmation Modification: Fourth Amended Plan**

2 Debtors filed a fourth amended plan dated September 27,
3 2014, and again moved to modify their plan due to increased
4 income and expenses. This plan showed payments in the amount of
5 \$40,209.28 through September 2014, \$633 per month for six months
6 commencing October 2014, and \$2300 per month thereafter. The
7 plan indicated that Debtors would pay \$73,402 to nonpriority
8 unsecured claims for a return of 27.3% on their allowed claims.

9 Debtors also moved for permission to incur debt for the
10 purchase of a second new car. They declared that the Kia was
11 not driveable and disclosed that they sold the car to a repair
12 shop for \$2,000. The sale price, according to Debtors, was the
13 amount Ms. McCarthy was offered for the Kia as a trade-in.

14 Mr. McCarthy again objected to Debtors' fourth amended
15 plan. He complained that Debtors' amended Schedule J increased
16 most of their expenses without showing any change in
17 circumstances to support the increases. Mr. McCarthy also
18 objected to Mr. Martin's child support obligation which was
19 listed as an expense in an amended Schedule J for the first
20 time. Finally, Mr. McCarthy argued that Debtors did not need a
21 another new vehicle.

22 The chapter 13 trustee supported Debtors' requested
23 modification. The trustee noted that Debtors voluntarily
24 increased their monthly plan payment (from \$2,307.00 to
25 \$2,676.92) in May 2014, following their disclosure of increased
26 income. The trustee also supported Debtors' request to purchase
27 a new car. Finally, the trustee informed the court that
28 Debtors' request to temporarily allocate \$1,667.00 per month for

1 appellate attorney fees was necessitated by Mr. McCarthy's
2 conduct because the underlying appeal was being prosecuted by
3 him and not by Debtors.

4 On November 4, 2014, the bankruptcy court held a hearing on
5 the matter. The bankruptcy court allowed a reduction in the
6 plan payments, granted Debtors' request to employ an appellate
7 attorney for the pending state court appeal, and allowed
8 Mr. Martin to make his child support payment. The bankruptcy
9 court made no rulings with respect to other issues raised by
10 Mr. McCarthy relating to Debtors' expenses. Those issues were
11 reserved for a later evidentiary hearing.

12 On November 20, 2014, the bankruptcy court entered an order
13 modifying Debtors' chapter 13 plan. The court ordered that on
14 the effective date of the plan, October 1, 2014, their monthly
15 payment obligation was reduced to \$1124 per month to reflect
16 Debtors' ongoing legal fee expenses. The court further ordered
17 that Debtors could submit a request for a vehicle purchase
18 which, upon trustee approval, could result in further reduction
19 of Debtors' plan payment obligation. Finally, the court ordered
20 that Mr. Martin's ongoing child support obligation was approved
21 as an allowable expense.⁶

22 Debtors subsequently obtained a court order authorizing
23 them to purchase a new vehicle.

24 **5. Mr. McCarthy's Motion to Dismiss**

25 On December 31, 2014, Mr. McCarthy filed an updated motion
26

27 ⁶ According to Mr. Martin, the state court ordered him to
28 pay \$1,328 a month in child support effective October 1, 2014.

1 to dismiss Debtors' case with prejudice, alleging bad faith. He
2 argued that (1) Debtors misrepresented facts in their petition
3 and supporting schedules; (2) Debtors commenced the case to
4 defeat state court litigation, i.e., enforcement of the \$224,000
5 judgment; (3) Debtors exhibited bad faith in the continuing
6 manipulation of their income and living expenses schedules,
7 seeking to minimize their apparent, disposable income
8 commitment; (4) Debtors disposed of personal property, the Kia,
9 without court authority and without a timely accounting of such
10 disposal to the court; (5) Debtors concealed Mr. Martin's income
11 from the court and the trustee; (6) Debtors routinely inflated
12 and misstated their Schedule J living expenses; (7) Debtors
13 evaded discovery of their income and expenses; (8) Debtors
14 appeared to have filed a materially false Form 1040 income tax
15 return for 2013; and (8) Ms. McCarthy improperly used her
16 company credit card for personal expenses which increased her
17 debt. Based on these allegations, Mr. McCarthy argued that
18 Debtors' conduct was "egregious", warranting dismissal of their
19 case with prejudice under the factors set forth in Leavitt.

20 The chapter 13 trustee supported dismissal if the
21 allegations were proved at an evidentiary hearing.

22 In opposition, Debtors maintained that most of the issues
23 raised by Mr. McCarthy were previously adjudicated. They
24 further explained that Mr. Martin was unemployed at the time of
25 confirmation and receiving unemployment benefits. They
26 explained that his income increased postconfirmation because
27 Mr. Martin was assigned to a project in Beaverton, Oregon. At
28 the beginning of December 2013 he was laid off for one week and

1 then dispatched for work in Pullman, Washington and then to
2 Moscow, Idaho. Debtors maintained that they provided evidence
3 of Mr. Martin's income to the trustee on February 24, 2014.

4 Debtors also explained their "alleged" fraudulent tax
5 returns contained errors and had been corrected by a CPA. They
6 further argued that Ms. McCarthy's use of her company's credit
7 card was authorized as her employer allowed her to use the card
8 for non-business expenses during her travel and those amounts
9 were reimbursed to her employer.

10 As explained below, Mr. McCarthy's motion to dismiss was
11 scheduled for an evidentiary hearing at the same time as
12 Debtors' request to further modify their confirmed plan and to
13 resolve outstanding issues related to their fourth amended plan.

14 **6. Postconfirmation Modification: Fifth Amended Plan**

15 Debtors filed a fifth amended plan dated March 23, 2015,
16 based on increased income and expenses. They also filed amended
17 Schedules I and J. In the fifth amended plan, they proposed
18 payments of \$1124 for six months, then \$1,044 for two months,
19 and then had payments resume at at \$2711 per month. This plan
20 showed that Debtors would pay at least \$85,665 to nonpriority
21 unsecured claims which was approximately 32.43% of their allowed
22 claims.

23 On April 28, 2015, Mr. McCarthy objected to the fifth
24 amended plan on several grounds including, among others, that
25 Debtors were not acting in good faith in either the filing of
26 their case or the proposal of their modified plan. He further
27 complained that Debtors had understated Mr. Martin's income and
28 Ms. McCarthy's earnings by omitting bonus payments made to her

1 which averaged \$500 per month from December 2013 through January
2 2015. Finally, he pointed out that Debtors' 2013 and 2014 tax
3 returns showed that Debtors improperly took deductions. As a
4 result, Mr. McCarthy asserted that Debtors owed over \$23,000 in
5 taxes for those years. Mr. McCarthy also alleged that Debtors
6 intentionally under-withheld taxes and spent the extra income
7 which, in turn, created a large postpetition obligation that
8 diverted disposable income from their creditors.

9 **7. The Evidentiary Hearing**

10 An evidentiary hearing on Mr. McCarthy's motion to dismiss
11 and Debtors' motion to modify their plan commenced on May 6,
12 2015, and continued on September 1-2, 2015. At the May hearing,
13 Ms. McCarthy testified concerning various issues including her
14 use of her employer's company credit card for personal expenses
15 and discrepancies on her tax returns.⁷

16 Mr. Ford, the owner of the repair shop that purchased the
17 Kia, also testified. He testified that the car was not safe to
18 drive, that he quoted a price of \$1,500 minimum to make the car
19 safe, and that he purchased the car for \$2,000 and sold it for
20 \$4,700 once it was in salable condition. To make it salable,
21 Mr. Ford replaced the brakes and put two new tires on the car.

22 Mr. Burkard, a fifty percent owner of DM2 Software, Inc.,
23 testified that there was no prohibition to Ms. McCarthy using
24 the company credit card for personal expenses at the time she
25 incurred those expenses. Since then, the company changed its
26

27 ⁷ The transcripts contain only excerpts of the witness's
28 testimony.

1 policy and now prohibits employees from charging non-business
2 expenses on the credit card. He also testified as to the amount
3 of Ms. McCarthy's bonuses and indicated that they were likely to
4 continue.

5 Finally, Mr. Erickson, the CPA who prepared Debtors' tax
6 returns, testified as to how he identified errors on Debtors'
7 2013 tax return and prepared their 2014 tax return.

8 Mr. Erickson testified that Debtors appeared to owe several
9 thousand dollars over the amount they had withheld for 2014
10 taxes. He also testified that he had made errors himself on the
11 returns which were based on Debtors' representations.

12 On September 1, 2015, Mr. Martin testified about his
13 employment in 2013. He did not recall whether he worked for
14 Western Partitions, his employer, for the bulk of that year.

15 On September 2, 2015, Mr. Martin testified that he no
16 longer had the \$2,000 from the sale of the Kia. He was also
17 questioned about \$3,250 that Debtors spent on rental cars from
18 Hertz after they sold the Kia for \$2,000. Although Mr. Martin
19 said he could not recall the brands of the cars that were
20 rented, he later recalled that at one point it was a Dodge
21 minivan and at another point a GMC pick-up truck. He also could
22 not recall how long the cars had been rented for. Mr. Martin
23 further testified that Debtors had not saved any money for a
24 down payment on a new car.

25 Mr. Martin conceded that it was error to claim one of the
26 McCarthy's sons as an exemption on their tax return and further
27 testified that it was error to claim a \$5,000 deduction for a
28 contribution to an IRA account since he had no such account in

1 2013.

2 Mr. Martin further testified that Debtors continued to send
3 their daughter to a private school for \$600 a month because the
4 school offered a higher quality education than the public
5 school.

6 Finally, Mr. Martin testified that he was delinquent in his
7 support payments but was not certain as to how many months.

8 Mr. McCarthy also testified that Mr. Martin was four months
9 delinquent in his support payments. He further opined that
10 Debtors budgeted \$2,000 more than necessary for the payment of
11 attorney's fees to Ms. McCarthy's state court lawyer.

12 Closing arguments were held on September 14, 2015.
13 Debtors' counsel argued that dismissal was not necessary and
14 that there were other remedies available to the court besides
15 dismissal with prejudice. Counsel noted that a six month bar to
16 re-filing would force Debtors to forego over \$60,000 and
17 29 months of progress towards discharge. Counsel also noted
18 that Mr. McCarthy would be able to execute on his judgment over
19 the course of the next six months and observed that he would
20 collect a greater portion of the payments in a subsequent
21 chapter 13 because Debtors' child support obligation to him
22 would run its course over the next few years. Finally, counsel
23 argued that the court should not dismiss Debtors' case but
24 requested that any dismissal be without prejudice.

25 Counsel for the chapter 13 trustee represented that the
26 trustee supported dismissal of the case based on his view that
27 Debtors had not really approached the bankruptcy with an eye
28 towards reorganization of their personal finances. The trustee

1 also thought that Debtors were not truthful as to their income
2 despite repeated opportunities to disclose to the trustee
3 exactly what they expected in the future. According to the
4 trustee, evidence of any additional income had to be obtained
5 through repeated discovery requests. Finally, the trustee
6 opined that the case was a two-party dispute with no end in
7 sight. He qualified his support of dismissal, however, by
8 observing that Debtors may have presented a sufficient argument
9 against dismissal with prejudice or suggested that a lesser
10 sanction would be appropriate.

11 The court took the matter under advisement.

12 **8. The Bankruptcy Court's Order**

13 On October 21, 2015, the bankruptcy court issued its
14 findings of fact and conclusions of law in an order dismissing
15 Debtors' case without prejudice and denying Debtors' motion to
16 modify their plan.

17 **1. Findings of Fact**

18 Income: The court found that Debtors had understated or
19 failed to effectively disclose their income. Based on the
20 evidence, the court noted that Ms. McCarthy did not report her
21 bonus income of \$8,943 to the chapter 13 trustee or in Debtors'
22 amended schedules and that Debtors had understated Mr. Martin's
23 income by over \$20,000 for the postconfirmation period of
24 November 2013 to September 2014.

25 Sale of the Kia: Although there was some question whether
26 Ms. McCarthy sold the Kia prior to obtaining court approval, the
27 court did not find that important. The court noted that Debtors
28 received approval from the trustee in January 2015 for the

1 purchase of a new vehicle and that since March 2015, their
2 schedules showed a \$350 a month deduction for a new car payment.
3 However, Debtors testified at the evidentiary hearing that they
4 took the \$2,000 from the sale, deposited it into their bank
5 account and spent it in the ordinary course. Mr. Martin
6 testified that they have been unable to buy another vehicle
7 since they no longer had funds for a down payment.

8 Tax Returns: The bankruptcy court found that the evidence
9 showed that Debtors owed over \$23,000 in taxes for the 2013 and
10 2014 tax years because they had claimed numerous improper
11 deductions. Although Ms. McCarthy had testified that she found
12 the tax software confusing when she prepared Debtors' original
13 tax returns, the court did not find her testimony credible when
14 her job was associated with computer software in the petroleum
15 industry. The court opined that had Debtors filed the 2013
16 return with the properly claimed deductions, they would likely
17 have been able to modify their plan to reflect the need to pay
18 the resulting tax liability, with little adverse consequence.
19 The court observed that Debtors' "irresponsible claims of
20 deductions . . . simply played into the hands of Mr. McCarthy.
21 They certainly should have expected that Mr. McCarthy would have
22 scrutinized their return."

23 Company Credit Card: The court found Ms. McCarthy's use of
24 her company credit card to pay for her father's airline ticket
25 on two occasions so that he could accompany her in her travel
26 was de minimis and not prohibited by the company at the time the
27 expenses were incurred.

28 Expenses. The court also noted that the costs associated

1 with Debtors' daughter's private schooling was \$600 per month
2 which was above the National standard of \$156. The court
3 observed that Debtors had claimed the expense only since March
4 2014 and that they maintained that their daughter needed to
5 attend the private school as a public school would hold her back
6 educationally.

7 Next, the court addressed Mr. Martin's child support
8 obligation, noting that prior to confirmation, Debtors never
9 listed any child support owed by him. The court also noted that
10 no documentation regarding Mr. Martin's support obligation was
11 put into evidence, but he testified that the obligation was
12 imposed in October 2014 and that Debtors made the payment from
13 their bank account but are frequently delinquent on the payment.

14 Spending Habits. Last, the court noted that there had been
15 extensive examination and testimony about Debtors' expenses and
16 spending habits. There was evidence showing vacations, five
17 phone lines, and that Debtors ate out a substantial amount of
18 the time with almost daily purchase of fast food. The court
19 found that the bank statements put into evidence by Mr. McCarthy
20 showed Debtors were constantly overdrawn on their accounts. In
21 light of this evidence, the bankruptcy court found that there
22 was no indication that Debtors attempted to rein in their
23 spending and reorganize in good faith.

24 In the end, the bankruptcy court found that Debtors were
25 not forthcoming about disclosing either their income or their
26 actual expenses. The court concluded that it was clear they
27 could not obtain financial stability even with the increased
28 income and improper claims of tax deductions. However, the

1 court also found that Mr. McCarthy was equally to blame "for
2 this debacle." The court noted that he closed his accounting
3 practice and unsuccessfully argued in state court and on appeal
4 that Ms. McCarthy was obligated to pay higher child support for
5 him to stay at home with their sons, who are both teenagers.
6 See McCarthy v. McCarthy, 2015 WL 5139089 (Wash. Ct. App.
7 Sept. 1, 2015). The court further observed that Mr. McCarthy
8 spent much of his time scrutinizing Debtors' income and spending
9 habits and preparing exhaustive spreadsheets showing the
10 Debtors' income and expenses.

11 The bankruptcy court reiterated that Debtors ended up
12 confirming a plan which proposed payments to unsecured
13 creditors, primarily Mr. McCarthy, which exceeded what they
14 would have had to pay if they had properly calculated their
15 projected disposable income as above median debtors from the
16 outset. The court observed that Debtors had been making
17 substantial payments to the chapter 13 trustee under their plan
18 which resulted in substantial distributions to Mr. McCarthy over
19 and above the ongoing child support obligation.

20 **2. Legal Conclusions**

21 In its legal conclusions, the bankruptcy court first noted
22 that although it had found in the November 2013 confirmation
23 hearing that Debtors had proposed their plan in good faith, the
24 court could review that finding postconfirmation if new
25 information had come to light. See In re Luxford, 368 B.R. 63,
26 70-71 (Bankr. D. Mont. 2007) (considering trustee's post
27 confirmation motion to dismiss for lack of good faith after
28 discovering that debtors had confirmed a plan based on fraud,

1 where debtors had purposely omitted assets and transactions from
2 their schedules and statements such that the Chapter 13 plan did
3 not actually meet the best interests of creditors test of
4 § 1325(a)(4)).

5 Accordingly, the court considered again the four factors of
6 the Leavitt test to determine whether, under the totality of the
7 circumstances, Debtors were acting in good faith. These factors
8 are: (1) whether the debtor misrepresented facts in his
9 petition or plan, unfairly manipulated the Code, or otherwise
10 filed his petition or plan in an inequitable manner; (2) the
11 debtor's history of filings and dismissals; (3) whether the
12 debtor intended to defeat state court litigation; and
13 (4) whether egregious behavior is present. In re Luxford,
14 368 B.R. at 70. In considering these factors, the court noted
15 dismissal turned on the first and the fourth factors because it
16 had previously found the second and third factors were not met
17 in its findings on confirmation of Debtors' second amended plan.
18 The bankruptcy court found that nothing presented at the May and
19 September 2015 hearings changed those findings.

20 First Leavitt Factor: As to misrepresentation of facts,
21 unfair manipulation of the Bankruptcy Code and/or the filing of
22 a plan in an inequitable manner, the court found that the most
23 glaring example was the understatement of both Mr. Martin's and
24 Ms. McCarthy's income to the tune of almost \$30,000. Ms.
25 McCarthy's bonuses were not disclosed, and Mr. Martin was listed
26 as unemployed when he was in fact employed. The court observed
27 that early in 2013 Mr. Martin's income may have been sporadic
28 due to the economy, but his situation had improved. The court

1 noted that even when his employment was disclosed, the earnings
2 were understated.

3 According to the bankruptcy court, Debtors similarly
4 misrepresented many of their expenses. The court observed that
5 Debtors' bank account statements which showed how Debtors spent
6 their money, little resembled their Schedule J. The court found
7 that, rather than using funds on hand to make a down payment and
8 buy a new vehicle as the Court approved, they used the \$2,000
9 from the sale of the Kia for day to day expenses and then wasted
10 another \$3,250 renting brand new cars from Hertz. "Their \$350
11 per month budget item for the purchase of a new car remains,
12 nine months after the purchase was approved, a fiction." The
13 court also noted that Debtors never demonstrated that Mr. Martin
14 had an actual monthly support obligation of \$1328 nor did they
15 identify with any accuracy how or when that obligation was paid.
16 Finally, the court observed that Debtors had not budgeted for
17 the hundreds of dollars a month they incurred in overdraft fees
18 from their bank as a result of the irresponsible spending
19 habits.⁸ In the end, the bankruptcy court concluded that
20 Debtors' schedules did not accurately reflect their actual
21 spending. Thus, this factor weighed in favor of dismissal.

22 Fourth Leavitt Factor: Next, the court considered whether
23 egregious behavior was present. The court acknowledged that
24 Debtors had not properly disclosed their income and expenses,
25 had been irresponsible in some of their spending habits, and had

26
27 ⁸ In closing argument, Mr. McCarthy's attorney argued that
28 for the period of January 1 through April 31, 2015, Debtors'
average monthly overdraft was \$419 a month.

1 filed initial tax returns which plainly and simply misstated
2 their deductions. However, weighing against these facts was
3 that Debtors were not living a luxurious lifestyle, and the
4 court also noted they had been making substantial plan payments
5 - likely more than they would have had to pay if they had
6 properly filled out the Form B22C from the outset. The court
7 further observed that Debtors were subjected to constant and
8 unremitting scrutiny from Mr. McCarthy in their case and his
9 continued efforts in the state court to contest matters arising
10 from the dissolution of the McCarthys' marriage. These efforts,
11 although unsuccessful, required Ms. McCarthy to incur additional
12 attorney's fees. On balance, the court concluded that Debtors'
13 behavior was not egregious.

14 Based upon the totality of the circumstances, the
15 misstatement of income and expenses and, as mentioned by the
16 chapter 13 trustee, a failure to demonstrate the kind of
17 responsible spending that is required in a Chapter 13 case, the
18 court found "cause" to dismiss Debtors' case under § 1307(c).
19 The court concluded however that Debtors' conduct did not rise
20 to the level warranting dismissal with prejudice.

21 Mr. McCarthy filed a timely notice of appeal from this
22 order.

23 **II. JURISDICTION**

24 The bankruptcy court had jurisdiction over this proceeding
25 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction
26 under 28 U.S.C. § 158.

27 **III. ISSUE**

28 Whether the bankruptcy court abused its discretion by not

1 dismissing Debtors' chapter 13 bankruptcy case with prejudice.

2 **IV. STANDARDS OF REVIEW**

3 We review the bankruptcy court's case dismissal for an
4 abuse of discretion. In re Leavitt, 171 F.3d at 1222-23.

5 To determine whether the bankruptcy court has abused its
6 discretion, we conduct a two-step inquiry: (1) we review de novo
7 whether the bankruptcy court "identified the correct legal rule
8 to apply to the relief requested" and (2) if it did, whether the
9 bankruptcy court's application of the legal standard was
10 illogical, implausible or "without support in inferences that
11 may be drawn from the facts in the record." United States v.
12 Hinkson, 585 F.3d 1247, 1261-62 & n. 21 (9th Cir. 2009)
13 (en banc). "If the bankruptcy court did not identify the
14 correct legal rule, or its application of the correct legal
15 standard to the facts was illogical, implausible, or without
16 support in inferences that may be drawn from the facts in the
17 record, then the bankruptcy court has abused its discretion."
18 USAA Fed. Sav. Bank v. Thacker (In re Taylor), 599 F.3d 880,
19 887-88 (9th Cir. 2010) (citing Hinkson, 585 F.3d at 1261-62).

20 When a bankruptcy court makes factual findings of bad faith
21 to support dismissal of a chapter 13 case, we review those
22 findings for clear error. In re Leavitt, 171 F.3d at 1222-23.
23 Whether or not a debtor's conduct rose to the level of
24 egregiousness is a question of fact. A court's factual
25 determination is clearly erroneous if it is illogical,
26 implausible, or without support in the record. Hinkson,
27 585 F.3d at 1261-62 & n.21. Under this standard, "[w]here there
28 are two permissible views of the evidence, the fact finder's

1 choice between them cannot be clearly erroneous.” Anderson v.
2 City of Bessemer City, N.C., 470 U.S. 564, 574 (1985).

3 V. DISCUSSION

4 A. Legal Standards: Dismissal and Dismissal With Prejudice

5 Section 1307(c) sets forth nonexclusive grounds which may
6 constitute cause for dismissal of a chapter 13 case. Although
7 not specifically listed, bad faith is a “cause” for dismissal
8 under § 1307(c). Eisen v. Curry (In re Eisen), 14 F.3d 469, 470
9 (9th Cir. 1994). In this Circuit, bankruptcy courts make good
10 faith determinations on a case-by-case basis, after considering
11 the totality of the circumstances. In re Leavitt, 171 F.3d at
12 1124. In addition, a “court must make its good-faith
13 determination in the light of **all** militating factors.” Ho v.
14 Dowell (In re Ho), 274 B.R. 867, 876 (9th Cir. BAP 2002) (citing
15 Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1390 (9th Cir. 1982)).

16 Section 349(a) expressly grants the bankruptcy court
17 authority to dismiss a case with prejudice. In re Leavitt,
18 171 F.3d at 1123. A dismissal with prejudice is a severe and
19 drastic sanction that is limited to extreme situations:
20 “Generally, only if a debtor engages in egregious behavior that
21 demonstrates bad faith and prejudices creditors—for example,
22 concealing information from the court, violating injunctions, or
23 filing unauthorized petitions—will a bankruptcy court forever
24 bar the debtor from seeking to discharge then existing debts.”
25 In re Chabot, 411 B.R. 685, 705 (Bankr. D. Mont. 2009) (citing
26 Colonial Auto Ctr. v. Tomlin (In re Tomlin), 105 F.3d 933, 937
27 (4th Cir. 1997)); see also Ellsworth v. Lifescape Med. Assocs.,
28 P.C. (In re Ellsworth), 455 B.R. 904, 922 (9th Cir. BAP 2011)

1 (acknowledging that dismissal with prejudice is a drastic remedy
2 reserved for "extreme situations."). Dismissal with prejudice
3 imposes a bar on further bankruptcy proceedings between the
4 parties and is a complete adjudication of the issues.

5 In re Leavitt, 171 F.3d at 1123. "Functionally, then, a
6 dismissal with prejudice is equivalent to a judgment under §
7 523(a) that each debt that would have been discharged under the
8 debtor's plan is thereafter nondischargeable." In re Ellsworth,
9 455 B.R. at 922.

10 In deciding whether to dismiss a case with prejudice,
11 Leavitt directs the bankruptcy court to consider the same four
12 factors for dismissal based on "cause" and make a finding of bad
13 faith based on egregious conduct. 171 F.3d at 1224. "The court
14 is not obligated to count the four Leavitt factors as though
15 they present some sort of a box-score but rather is to consider
16 them all and weigh them in judging the 'totality of the
17 circumstances.'" In re Lehr, 479 B.R. 90, 98 (Bankr. N.D. Cal.
18 2012).

19 **B. Analysis**

20 Here, in considering dismissal of Debtors' case in
21 conjunction with confirmation of Debtors' modified plan, the
22 bankruptcy court correctly examined the totality of the
23 circumstances and considered the four factors enunciated in
24 Leavitt to determine Debtors' good faith. See In re Luxford,
25 368 B.R. at 70-71; see also § 1329(b)(1) (incorporating good
26 faith standard under § 1325(a)(3) for modification of a
27 confirmed plan). On appeal, Mr. McCarthy has not challenged the
28 legal standards that the bankruptcy court applied: instead, he

1 argues that the court's factual findings on the Leavitt factors
2 were erroneous or an abuse of discretion. He also contends that
3 reversal is warranted because neither Debtors nor the court
4 provided any analysis for an alternative sanction which would
5 have afforded him a sufficient remedy. These errors, according
6 to Mr. McCarthy, demonstrate that the court abused its
7 discretion in dismissing this case without prejudice.

8 We are not persuaded. "The bankruptcy court is not
9 required to find that each [Leavitt] factor is satisfied or even
10 to weigh each factor equally." Khan v. Curry (In re Khan),
11 523 B.R. 175, 185 (9th Cir. BAP 2014). Rather, "[t]he factors
12 are simply tools that the bankruptcy court employs in
13 considering the totality of the circumstances." Id. By
14 applying the Leavitt factors in a totality of circumstances
15 analysis, the bankruptcy court, as the trier of fact, determines
16 whether there is "cause" for dismissal for bad faith and whether
17 such dismissal should be with prejudice based on the debtor's
18 egregious conduct. Here, the bankruptcy court applied the
19 correct legal standards and only its factual findings are at
20 issue. The court explicitly found that under the four factor
21 test for determining bad faith set forth in Leavitt, only one of
22 the four factors was present; i.e., factor one.

23 The First Leavitt Factor: this factor questions whether
24 Debtors misrepresented facts in the petition or plan, unfairly
25 manipulated the Code, or otherwise filed their petition or plan
26 in an inequitable manner. The bankruptcy court found numerous
27 misrepresentations regarding Debtors' income and expenses and
28 found that this factor weighed in favor of dismissal. Nowhere

1 does Mr. McCarthy argue with any specificity why the court's
2 findings related to this factor were erroneous. Based on our
3 review of the record, we conclude that the bankruptcy court's
4 findings under this factor were plausible and supported by
5 inferences drawn from the facts in the record and thus not
6 erroneous.

7 The Second Leavitt Factor: This factor looks at the
8 history of filings and dismissals of prior bankruptcy cases. "A
9 debtor's history of filings and dismissals is relevant" to the
10 bad faith analysis. Nash v. Kester (In re Nash), 765 F.2d 1410,
11 1415 (9th Cir. 1985). Here, the bankruptcy court afforded
12 Ms. McCarthy's prior bankruptcy filing little weight in its bad
13 faith analysis because Ms. McCarthy had filed her chapter 7 case
14 and received her discharge while the dissolution case was
15 pending. The bankruptcy court found her filing was
16 understandable given that Mr. McCarthy had received over \$30,000
17 in sanctions against Ms. McCarthy during the dissolution
18 proceedings and the on-going animosity between the parties.

19 Mr. McCarthy does not challenge these findings on appeal.
20 Rather, he contends that the court erred by not considering
21 Debtors' numerous filings in the case itself; i.e., they filed
22 three Form B22c's all of which were false, seven sets of
23 Schedule I and J's all of which falsely stated income and
24 expenses, and six plans, only one of which was confirmed due to
25 the court's reliance on Debtors' false testimony and Form B22c.
26 In other words, all Debtors' filings and amendments were false.
27 These facts, however, do not make the bankruptcy court's
28 findings on the second Leavitt factor clearly erroneous.

1 When evaluating the second Leavitt factor, a bankruptcy
2 court is concerned with prior bankruptcy case filings and
3 dismissals and not with filings within the case itself.
4 Actually, Mr. McCarthy's arguments about Debtors' "merry-go-
5 round" of amended filings in the case is intertwined with the
6 court's analysis under the first Leavitt factor; i.e., Debtors'
7 misrepresentation of facts related to their income and expenses.
8 Moreover, Mr. McCarthy ignores the bankruptcy court's factual
9 findings regarding Debtors' initial schedules and Form B22c.
10 The court initially found that the "mistakes" were largely due
11 to the "sloppiness of Debtors' attorney, abetted by Debtors,
12 neither of whom understood the basic strategy of chapter 13
13 practice applicable to their situation." In short, the
14 bankruptcy court's findings on this factor were logical and
15 supported by inferences drawn from the facts in the record and,
16 thus, were not clearly erroneous.

17 The Third Leavitt Factor: This factor examines whether
18 Debtors intended to defeat state court litigation. The
19 bankruptcy court found that Debtors had not filed their petition
20 to defeat state court litigation. Mr. McCarthy contends this
21 was error. He points out that the facts in this case are
22 similar to the facts in Leavitt. There, the debtor filed a
23 chapter 13 petition approximately two weeks after a judgment on
24 a jury verdict was entered against him and then he proposed zero
25 payment to unsecured creditors in his first plan and 3% in his
26 second plan. According to Mr. McCarthy, Debtors filed their
27 petition just four days after Mr. McCarthy obtained his judgment
28 and Debtors' original plan proposed paying unsecured creditors

1 2% and their amended plan proposed paying unsecured creditors
2 3%. He also asserts that this case is essentially a single
3 creditor case since he represents 89% of all non-priority
4 unsecured claims.

5 Again, these arguments do not make the bankruptcy court's
6 findings under this factor clearly erroneous. Mr. McCarthy
7 ignores the bankruptcy court's findings of fact under this
8 factor and does not tell us why those findings are clearly
9 erroneous. As the bankruptcy court noted, the portion of the
10 McCarthy dissolution proceedings related to the \$224,000
11 judgment was concluded when Debtors filed their case. Since
12 Mr. McCarthy had threatened garnishment, the bankruptcy court
13 found it was not surprising that Debtors filed for bankruptcy
14 protection. The court also found that Mr. McCarthy's debt was
15 not the only debt sought to be addressed by Debtors' case.
16 Although he was the largest unsecured creditor, Debtors had
17 issues with the large secured claim arising from their
18 prepetition purchase of the minivan. Taken together, these
19 facts do not show that Debtors' only purpose in filing was to
20 defeat the state court litigation. See In re Eisen, 14 F.3d at
21 470 (bad faith exists where the debtor's only purpose is to
22 defeat state court litigation).

23 Finally, the facts in Leavitt are distinguishable. Unlike
24 Mr. Leavitt, Debtors confirmed a plan which paid 27% to
25 unsecured creditors. In sum, the bankruptcy court's findings on
26 this factor were logical and supported by inferences drawn from
27 facts in the record and thus were not clearly erroneous.

28 The Fourth Leavitt Factor: This factor looks at whether

1 egregious behavior is present. This factor is relevant to
2 Mr. McCarthy's request to dismiss this case with prejudice
3 because under Leavitt the bankruptcy court must make a finding
4 of bad faith based on egregious conduct. The bankruptcy court
5 properly noted that egregious behavior demonstrates bad faith
6 and prejudices creditors, such as concealing information from
7 the court, violating injunctions, filing unauthorized petitions,
8 hiding or undervaluing assets, making post-petition payments to
9 pre-petition creditors, violating non-bankruptcy laws or
10 otherwise demonstrating fraudulent conduct, without excuse. See
11 In re Chabot, 411 B.R. at 704-705 (citing Leavitt, 171 F. 3d at
12 1223-24) and In re Cortez, 349 B.R. 608, 613-614 (Bankr. N.D.
13 Cal. 2006).

14 The bankruptcy court acknowledged that Debtors had not
15 properly disclosed their income and expenses, had been
16 irresponsible in some of their spending habits, and had filed
17 initial tax returns which plainly and simply misstated their
18 deductions. However, in its totality of circumstances analysis,
19 the bankruptcy court also considered all mitigation factors.
20 See In re Ho, 274 B.R. at 876. Those factors included: Debtors
21 were not living a luxurious lifestyle; Debtors had been making
22 substantial plan payments - likely more than they would have had
23 to pay if they had properly filled out Form B22C from the
24 outset; and Debtors were subjected to constant and unremitting
25 scrutiny from Mr. McCarthy in their case and his ongoing efforts
26 in the state court to continue fights arising from the
27 dissolution of the McCarthys' marriage. On this last point, the
28 court observed that, although Mr. McCarthy was unsuccessful in

1 state court, his actions required Ms. McCarthy to incur
2 additional attorney's fees. Accordingly, on balance, the court
3 concluded that Debtors' behavior was not egregious.

4 With respect to this factor, Mr. McCarthy argues on appeal
5 that Debtors' conduct throughout this case cumulatively amounts
6 to nothing less than egregiousness. He further maintains that
7 the bankruptcy court's findings concerning his conduct should be
8 stricken because the allocation of blame was without any factual
9 basis. We disagree with both contentions.

10 Mr. McCarthy's arguments fail to appreciate the reality
11 that "bad faith" is a term which is used to describe a broad
12 range of improper conduct, only some of which is sufficient to
13 support the extreme sanction of dismissal with prejudice. In
14 Leavitt, the Ninth Circuit held that dismissal with prejudice
15 must be coupled with a finding of bad faith based on egregious
16 conduct. 171 F.3d at 1224. In other words, dismissal with
17 prejudice under § 349(a) is not meant to be a remedy for every
18 instance of debtor misconduct.

19 On the evidence before it, the bankruptcy court was not
20 persuaded that Debtors' case was associated with sufficient bad
21 faith to justify dismissal with prejudice. The bankruptcy court
22 applied the correct legal standards and, as noted above, its
23 factual findings were plausible and supported by inferences
24 drawn from the facts in the record. We cannot reverse the
25 bankruptcy court's findings of fact simply because we might have
26 decided the case differently. "Where there are two permissible
27 views of the evidence, the fact finder's choice between them
28 cannot be clearly erroneous." Anderson, 470 U.S. at 574.

1 Moreover, as already noted, the bankruptcy court was directed to
2 consider all militating factors and therefore could properly
3 consider Mr. McCarthy's conduct throughout this case.

4 Finally, Mr. McCarthy argues that the bankruptcy court
5 abused its discretion by failing to consider alternative
6 remedies to dismissal with prejudice as instructed by Ellsworth.
7 Mr. McCarthy is mistaken. First, in its findings and
8 conclusions, the bankruptcy court expressly recognized that
9 dismissal under § 1307(c) is a two-step process: first the
10 court must determine whether there is cause for dismissal; then
11 there should be some consideration of whether a sanction less
12 than dismissal with prejudice is sufficient. In re Ellsworth,
13 455 B.R. at 922. "For example, the Court could simply dismiss a
14 case, or dismiss it with a 180 day (or some other length of
15 time) bar to re-filing." Id. Therefore, the court approached
16 the question of dismissal with prejudice by recognizing the
17 two-step process and was well aware that lesser sanctions could
18 be imposed.

19 Second, the debtors in Ellsworth did not advocate for, or
20 present any evidence in support of, any alternative besides
21 dismissal with prejudice. In contrast, Debtors here argued that
22 dismissal was not necessary, but they also pointed out that
23 there were other remedies available to the court besides
24 dismissal with prejudice. In closing argument, counsel for
25 Debtors argued that a six month bar to re-filing would force
26 them to forego over \$60,000 and twenty-nine months of progress
27 towards discharge. Counsel also noted that Mr. McCarthy would
28 be able to execute on his judgment over the course of the next

1 six months but that he would collect a greater portion of the
2 payments in a subsequent chapter 13 because Debtors' child
3 support obligation to him would run its course over the next few
4 years. Finally, counsel argued that the court should not
5 dismiss Debtors' case but, if it did dismiss, that it should
6 dismiss without prejudice. Therefore, alternatives to dismissal
7 with prejudice were placed squarely before the bankruptcy court.

8 Although Mr. McCarthy requested dismissal with prejudice,
9 the court did not find sufficient bad faith to justify this
10 extreme result. Therefore, it was unnecessary for the court to
11 further explore, much less analyze, whether alternative remedies
12 were appropriate. Mr. McCarthy mistakenly complains that the
13 dismissal left him with no remedies at all when he has the full
14 array of state law rights at his disposal. Moreover, from the
15 bankruptcy court's comments, it is evident that Debtors paid
16 more to Mr. McCarthy than the amount required by the bankruptcy
17 code under their short-lived confirmed plan.

18 In sum, Mr. McCarthy offers no arguments on appeal that
19 demonstrate that the bankruptcy court's dismissal of this case
20 without prejudice was an abuse of discretion.

21 **VI. CONCLUSION**

22 For the reasons stated above, we AFFIRM.
23
24
25
26
27
28