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8 UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
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10 In re:)	District Court Case No.
11 Lavarro Taylor & Teresa Delphine Taylor)	EDCV11-01879GK
12 Debtor(s)/Appellant(s))	Bankruptcy Case No.
13 v.)	6:11-25512-WJ
14 Rod Danielson)	APPELLANTS' BRIEF REGARDING
15 Appellee)	APPEAL FROM BANKRUPTCY
16)	COURT

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19 **Statement of Jurisdiction**
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21 This appeal arises from an order of the United States Bankruptcy Court for the
22 Central District of California dismissing the Debtors' chapter 13 case. The Bankruptcy
23 Court had jurisdiction to enter the final order pursuant to 28 U.S.C. §§ 157(a), 157(b)(1)
24 and 1334. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158.
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1 **Statement of Issue Presented**

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3 Did the court err in denying the effect of the Taylors' Notice of Conversion from
4 chapter 13 to chapter 7 and subsequently dismissing the Taylors' chapter 13 case?
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6 **Standard of Review**

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8 A district court reviews a bankruptcy court's conclusions of law *de novo* and its
9 findings of fact for clear error. *In re Int'l Fibercom, Inc.*, 503 F.3d 933, 940 (9th Cir.
10 2007). As the facts are not in dispute, and the bankruptcy court made no findings of
11 fact, this case is subject to *de novo* review.
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13 **Statement of the Case and Statement of Facts**

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15 Lavarro and Teresa Taylor filed a voluntary petition for bankruptcy protection
16 under Chapter 13 on May 11, 2011. *See* Docket #1. In their chapter 13 plan, the Debtor
17 proposed to cure the arrearage owed on their home mortgage. *See* Docket #3; Debtor's
18 Chapter 13 Plan at 5. To bring their mortgage current the Taylors were required to pay
19 the current mortgage payment of \$1582.77 as it came due, plus an additional \$310
20 towards the arrears, for a total of \$1892.77. The Taylors also care for their 23-year old
21 son who is physically and mentally disabled. *See* Docket #1, Schedule I. However, due
22 to health and financial circumstances the Taylors were unable to make their mortgage
23 payments and therefore opted to convert their chapter 13 case to a chapter 7 case. By
24 converting to chapter 7, the bankruptcy court would retain jurisdiction over the Taylors
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1 and their estate, the chapter 7 trustee would be allowed to liquidate any of their non-
2 exempt assets and the bank would be allowed to foreclose on their home.
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4 On October 4, 2011, the Taylors filed a Notice of Conversion. *See* Docket # 21.
5 Despite the Notice of Conversion, the Taylors by their counsel appeared at a continued
6 chapter 13 confirmation hearing and hearing on the court's order to show cause why the
7 case should not be dismissed¹ both of which were scheduled for October 5, 2011. *See*
8 Docket #22. Counsel advised the bankruptcy court that a Notice of Conversion had been
9 filed the previous day. Transcript, Oct 5 Hearing at 1. Despite acknowledging that the
10 Notice of Conversion had been filed, the bankruptcy court *sua sponte* denied any effect
11 of this filing and stated that the case had not, in fact, been converted. *Id.* The court
12 further denied confirmation of the Taylors' chapter 13 plan and dismissed their chapter
13 13 case. *See* Docket #22; Transcript, Oct. 5 Hearing at 1. Appellant, the chapter 13
14 trustee, never challenged the Taylors' right to convert their case to chapter 7 or raised any
15 objection to the conversion. *See generally* Transcript, Oct. 5 Hearing.
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21 **A. Conversion from chapter 13 to chapter 7 is effective upon the filing of a Notice of**
22 **Conversion.**
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26 ¹ The order to show cause why the case should not be dismissed was the notice required by section
27 1307(c) when a party in interest other than the debtor seeks to have a case converted or dismissed.
28 While the section 1307(c) states that only "parties in interest" or the United States Trustee may seek
conversion or dismissal of the case, the Ninth Circuit Court of Appeals has noted that the bankruptcy
court may also convert (or dismiss) a chapter 13 case on its own motion. *See In re Rosson*, 545 F.3d
764, 771 n.8 (9th Cir. 2008).

1 Section 1307, which governs conversion or dismissal of chapter 13 cases, provides
2 in relevant part:

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5 (a) The debtor may convert a case under this chapter to a case under chapter 7 of
6 this title at any time. Any waiver of the right to convert under this subsection is
7 unenforceable.

8
9 The Federal Rules of Bankruptcy Procedure 1017(f)(3) further states that:

10
11 A chapter 12 or a chapter 13 case shall be converted without court order when the
12 debtor files a notice of conversion under §§ 1208(a) or 1307(a). The filing date of
13 the notice becomes the date of the conversion order for the purposes of applying §
14 348(c) and Rule 1019. The clerk shall promptly transmit the noticed to the United
15 State trustee. Rule 1017(f)(3) is unambiguous. When the notice of conversion is
16 filed under section 1307(a), the case is converted.² The effect is immediate and no
17 order of the court is required. 9 Collier on Bankruptcy, ¶ 1017.06 (Alan N.
18 Resnick & Henry J. Sommer, eds. 16th ed. 2011)(“If at any point the debtor
19 decides not to proceed under chapter 13, the debtor may convert the case. Since
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26 ² By contrast, section 1307(c), which relates to conversion at the request of a party other than the debtor, permits an order to
27 convert a case only after notice and a hearing. Similarly, Federal Rule of Bankruptcy Procedure 1017(f)(2) requires notice and hearing
28 before dismissing a case upon debtor’s request. *See also* Fed. R. Bankr. P. 1017(f)(2), 9014.

1 this conversion right is not subject to any limitations, there is no reason for notice
2 and hearing prior to conversion.”).

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4 In this case, the bankruptcy erred by failing to give effect to the Taylors’ Notice of
5 Conversion. There is no dispute that the Taylors filed their Notice of Conversion on
6 October 4, 2011. *See* Docket #22. The bankruptcy court acknowledged that the notice
7 had been filed. *See* Transcript, Oct. 5 Hearing at 1 (acknowledging a notice of
8 conversion had been filed the previous day). However, contrary to the express language
9 of the Rule 1017(f)(3), the bankruptcy court concluded that the Taylors’ chapter 13 case
10 had not been converted.
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14 MR. JENKINS: I’m sorry, your Honor, if I may interrupt, this case was actually
15 converted to Chapter 7 yesterday.

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17 THE COURT: No, it wasn’t. Confirmation denied. Cased dismissed. 109(g)
18 applies.

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20 There is simply no basis in the Federal Rules of Bankruptcy Procedure or the
21 Bankruptcy Code—and the bankruptcy court provided none—to deny the effect of the
22 Taylors’ Notice of Conversion. For this reason alone, the order of the bankruptcy court
23 dismissing the Taylors’ chapter 13 case should be reversed and the Taylors should be
24 permitted to proceed in chapter 7.
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1 **B. Debtor has an absolute right to convert a case from chapter 13 to chapter 7.**

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3 A debtor may convert a case under chapter 13 to a case under chapter 7 at any
4 time, and without limitation. 11 U.S.C. § 1307(a); 9 Collier on Bankruptcy, ¶ 1017.06
5 (Alan N. Resnick & Henry J. Sommer, eds. 16th ed. 2011)(the right to convert from
6 chapter 13 to chapter 7 is not subject to any limitations). The statutory language of
7 section 1307(a) is plain and clear. It is well established that when the "statute's language
8 is plain, the sole function of the court, at least where the disposition required by the text
9 is not absurd, is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v.*
10 *Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted). A result
11 will be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the
12 intentions of its drafters. *See In re Spradlin*, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999)
13 (citing *Public Citizen v. Dept of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377
14 (1989)). The statute, in this case, sets forth no limitation on the Debtor's ability to
15 convert his chapter 13 case to chapter 7.
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21 The Ninth Circuit Bankruptcy Appellate Panel has twice addressed this precise
22 issue and had twice concluded that a chapter 13 debtor's right to convert his case to
23 chapter 7 is absolute. *Nady v. DeFrantz*, 454 B.R. 108 (B.A.P. 9th Cir. 2011); *In re*
24 *Croston*, 313 B.R. 447 (B.A.P. 9th Cir. 2004); *see also In re Torres*, 2000 WL 1515170
25 (Bankr D. Idaho 2000)(chapter 13 debtor has the absolute right to convert his or her case
26 at any time); *In re Boggs*, 137 B.R. 408, 410 (Bankr. W.D. Wash. 1992)(noting that while
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1 § 1307(b) conditions dismissal and requires court action, § 1307(a) gives debtors the
2 absolute right to convert to chapter 7 at any time). Most recently, in *Nady*, a creditor had
3 filed a motion to dismiss the debtor’s chapter 13 case, alleging that the debtor had
4 engaged in bad faith conduct. 454 B.R. at 110. The debtor filed a notice of conversion
5 prior to the hearing on the motion to dismiss. *Id.* at 111. The creditor argued that the
6 debtor’s ability to convert his case was not absolute where the debtor had engaged in bad
7 faith conduct. *Id.* at 113. In rejecting the creditor’s arguments, the BAP held that both
8 the statutory language and underlying bankruptcy policy supported the debtor’s absolute
9 right to convert. *Id.* at 114. Importantly, the BAP noted that unlike dismissal under
10 section 1307(b), which removes debtor’s assets from the jurisdiction of the court,
11 conversion under 1307(a) does not immunize chapter 13 debtors from bad faith conduct
12 upon conversion. *Id.* Instead, upon conversion “the court retains jurisdiction over the
13 debtor and the debtor’s estate, and the court has continuing power to address any
14 improprieties that may result from the change in the nature of the proceedings.” *Id.*

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21 Because the bankruptcy court retains jurisdiction over the debtor and debtor’s
22 estate upon conversion, the BAP found inapplicable the policy considerations behind the
23 Supreme Court’s decision in *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365 (2007)
24 and Ninth Circuit’s decision in *Rosson v. Fitzgerald*, 545 F.3d 764 (9th Cir. 2008). In
25 *Marrama*, the Supreme Court examined the debtor’s right to convert from chapter 7 to
26 chapter 13 under section 706(a). The *Marrama* Court concluded that debtors’ right to
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1 convert could be limited based on the debtors' fraudulent conduct and the courts'
2 inherent authority to prevent abuse of process under section 105(a). In *Marrama*, the
3 debtor had made misleading or inaccurate statements about his principal asset, a house in
4 Maine. For example, the debtor significantly misstated the value of the property and did
5 not properly disclose the circumstances surrounding the transfer of the property to a trust.
6 The *Marrama* decision allows bankruptcy courts to differentiate between "the vast
7 majority" "of honest but unfortunate debtors who do possess an absolute right to convert
8 their cases from chapter 7 to chapter 13" and the "atypical litigant who has demonstrated
9 that he is not entitled to the relief available to the typical debtor." *Id.* at 1111.
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14 Similarly, the *Rosson* court held that a chapter 13 debtor's right to voluntary
15 dismissal under section 1307(b) was not absolute, but rather was qualified by the
16 authority of the bankruptcy court to deny dismissal on the grounds of bad faith conduct.
17 545 F.3d at 774. In *Rosson*, the debtor was directed to deposit with the chapter 13
18 trustee \$185,000 received from an arbitration proceeding. After delaying the deposit for
19 several months, the debtor ultimately gave the chapter 13 trustee only \$104,000. The
20 debtor did not explain to the bankruptcy court what happened to the missing funds. *Id.* at
21 774. Relying on the *Marrama* decision, the *Rosson* court concluded that the debtor did
22 not have an absolute right to dismiss his chapter 13 case, and upheld the court's
23 conversion of the case to chapter 7. *Id.* at 774-75.
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1 Driving these decisions is the concern that unscrupulous debtors may be able to
2 evade the consequences for their bad faith conduct by dismissing their cases or
3 converting from chapter 7 to chapter 13. As the BAP in *Nady* rightly concluded, this
4 concern does not come into play when the debtor is converting from chapter 13 to chapter
5 7 under section 1307(a). 454 B.R. at 114. Because the court retains jurisdiction over the
6 debtor and debtor's estate when a case is converted from chapter 13 to chapter 7, issues
7 of bad faith can be more appropriately addressed in the chapter 7 case.
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12 **C. Even if this court finds that the debtor's right was not absolute, there was no**
13 **evidence supporting a conclusion of bad faith, and none exists.**
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15 The Debtors in this case, the Taylors, are typical debtors who filed chapter 13 to
16 save their home from foreclosure, but ultimately found their financial circumstances
17 would not allow them to successfully cure the arrearages on the mortgage and make
18 current mortgage payments on the loan as they came due. Realizing the he could not
19 save their home, the Taylors opted to convert to chapter 7, thus effectively surrendering
20 the home to the bank and allowing the chapter 7 trustee to administer any non-exempt
21 assets. The Taylors engaged in no fraudulent or bad faith conduct, and the bankruptcy
22 court found none. The Appellant, the chapter 13 trustee, never objected to the conversion
23 of the Taylors' case and never identified any conduct that would constitute bad faith or
24 fraudulent conduct. The worse that could be said about the Taylors, like so many others,
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1 is that in the face of financial hardship, they were unable to keep up with the mortgage
2 payments on their home.
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4 Even if this court were to find that the Taylors' right to convert was not absolute,
5 the bankruptcy court's order must still be reversed because the bankruptcy court did not
6 find that the Taylors engaged in bad faith or fraudulent conduct or that the Taylors are not
7 honest, but unfortunate debtors. *See Marrama*, 549 U.S. 375 n.11 ("debtor's conduct
8 must, in fact, be atypical."). In this case, the bankruptcy court made no findings of fact
9 that would support dismissal based on bad faith, the trustee presented no facts to support
10 a finding of bad faith, the record does not support a finding of bad faith, and no facts exist
11 to support a finding of bad faith. In this case, there is no evidence on which the
12 bankruptcy court could rationally have found bad faith and denied debtor his right to
13 convert to chapter 7. To the contrary, the Taylors are typical of debtors throughout the
14 country who try to save their homes through a chapter 13, but ultimately fail. *See, e.g.*,
15 John Eggum, et al., *Saving Homes in Bankruptcy: Housing Affordability and Loan*
16 *Modification*, 2008 Utah L. Rev. 1123 (2008)(noting the heavy financial burden of
17 debtors trying to save their homes in bankruptcy and finding that 70% of chapter 13
18 bankruptcy homeowners have housing costs that are unaffordable or severely
19 unaffordable.). The inability to make mortgage payments is insufficient to support a
20 finding of bad faith and it is certainly not fraudulent. Debtors such as the Taylors should
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1 be lauded, not punished, for attempting a repayment plan under chapter 13, before
2 eventually falling back to chapter 7.
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4 **Conclusion**

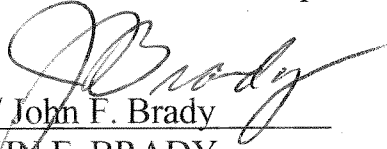
5 The Taylors have an absolute right to convert their case from chapter 13 to chapter
6 7. The conversion of the case was effective on October 4, 2011, when they filed his
7 Notice of Conversion. The bankruptcy court erred in failing to give effect to this Notice
8 of Conversion. Therefore the order of the bankruptcy court dismissing the debtor's
9 chapter 13 must be reversed and the debtor's case should be permitted to proceed under
10 chapter 7 in accordance with the Notice of Conversion.
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14 Even if this court concludes that the Taylors' right to convert to chapter 13 was not
15 absolute, the bankruptcy court's order dismissing the case must still be reversed because
16 the bankruptcy court did not find that the Taylors acted in bad faith or engaged in
17 fraudulent conduct. The fact that the Taylors tried, but failed, to save their home through
18 a chapter 13 bankruptcy does not equate to bad faith or fraudulent conduct of an atypical
19 debtor that would warrant denying their right to convert their case to chapter 7.
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22
23 Dated: February 7, 2012

Respectfully Submitted,

24 John F. Brady & Associates,
25 A Professional Law Corporation

26
27 By:  /s/ John F. Brady

28 JOHN F. BRADY

Attorney for Debtor(s)

In re: Lavarro Taylor Teresa Delphine Taylor Debtor(s).	6:11-bk-25512 CHAPTER: 13 BK CASE NUMBER: 6:11-bk-25512 District Court Case Number: EDCV11-01879GK
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A true and correct copy of the foregoing document described as **Appellant's Brief Regarding Appeal from Bankruptcy Court** will be served or was served **(a)** on the judge in chambers in the form and manner required by Local Rule 11-3 and 11-3.5 on or before February 8, ; and **(b)** in the manner indicated below:

Hon. George H. King Courtroom No. 650, Los Angeles - Roybal

I. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING ("NEF") - Pursuant to controlling General Order(s) and Local Bankruptcy Rule(s) ("LBR"), the foregoing document will be served by the court via NEF and hyperlink to the document. On _____, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following person(s) are on the Electronic Mail Notice List to receive NEF transmission at the email address(es) indicated below:

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On **February 7, 2012**, I served the following person(s) and/or entity(ies) at the last known address(es) in this appeals proceeding as provided in FRCivP 5 by placing a true and correct copy thereof in a sealed envelope in the United States Mail, first class, postage prepaid, and/or with an overnight mail service addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.


Honorable Wayne Johnson, US Bankruptcy Court, 3420 Twelfth Street, Ste 345, Riverside, CA 92501
Rod Danielson, Chapter 13 Trustee, 4361 Latham Street, Ste 270, Riverside, CA 92501
Lavarro Taylor and Teresa Delphine Taylor, 7515 Bonnie, San Bernardino, CA 92410

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III. SERVED BY PERSONAL DELIVERY, FACSIMILE TRANSMISSION OR EMAIL (indicate method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on _____, I served the following person(s) and/or entity(ies) by personal delivery, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on the judge will be completed no later than 24 hours after the document is filed.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

<u>February 7, 2012</u> Date	<u>Anika Renaud-Kim</u> Type Name	 <u>Is/ Anika Renaud-Kim</u> Signature
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