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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	EC-11-1349-PaDMk
)		
ANGEL LEPE,)	Bk. No.	10-60264
)		
Debtor.)		
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)		
MICHAEL H. MEYER, Chapter 13)		
Trustee,)		
)		
Appellant,)		
)	CORRECTED OPINION*	
v.)		
)		
ANGEL LEPE,)		
)		
Appellee.)		
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Argued and Submitted on March 22, 2012
at Sacramento, California

Filed - May 9, 2012

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

Hon. Whitney Rimel, Bankruptcy Judge, Presiding

Appearances: Deanna K. Hazelton argued for appellant Michael H. Meyer; Thomas O. Gillis argued for appellee Angel Lepe.

Before: PAPPAS, DUNN and MARKELL, Bankruptcy Judges.

* Two minor revisions have been made to this Opinion, originally issued on May 9, 2012, as reflected in the Clerk's Notice Re Clerical Corrections filed contemporaneously herewith.

1 PAPPAS, Bankruptcy Judge:

2

3 Chapter 13¹ trustee Michael H. Meyer ("Trustee") appeals the
4 order of the bankruptcy court confirming the amended plan of
5 debtor Angel Lepe ("Lepe"). We AFFIRM.

6

FACTS

7

The material facts are undisputed.

8

9 Lepe filed a petition for relief under chapter 13 on
10 September 2, 2010. In his accompanying schedules, Lepe listed
11 assets valued at \$363,900, liabilities of \$581,380 (including \$549
12 of unsecured debts), monthly income of \$2,631, and expenses of
13 \$2,481. In Lepe's original chapter 13 plan, he proposed to pay
14 directly the payments on the first mortgage on his house, to
15 "strip" the second mortgage on his house and to treat that
16 creditor's claim as unsecured, and to pay \$150 per month for 36
17 months to Trustee. The payments to Trustee would provide an
18 estimated 17.25 percent dividend to Lepe's unsecured creditors,
19 including the soon-to-be-unsecured second mortgage creditor's
20 claim.

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¹ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The Federal Rules of Civil Procedure are referred to as "Civil Rules."

1 since Lepe's total unsecured debt at the time he filed his
2 petition was only \$549, and because he had monthly income
3 sufficient to pay all of his monthly expenses and his debts, the
4 only reason Lepe had filed the bankruptcy case was to use chapter
5 13 to strip the second mortgage on his house. In Trustee's
6 opinion, Lepe's strategy amounted to an abuse of the bankruptcy
7 laws. Trustee later submitted a brief identifying several errors
8 in Lepe's schedules, and expanding on his argument concerning
9 Lepe's alleged lack of good faith.

10 Lepe filed a First Amended Plan on February 24, 2011. It
11 increased the monthly plan payments to Trustee from \$150.00 to
12 \$275.00, which in turn increased the proposed payback on unsecured
13 claims.² Lepe also amended his schedules to include certain
14 assets not disclosed in the original filings.

15
16 ² Trustee accepted without question Lepe's estimate that
17 dividends to unsecured creditors would amount to 17.25 percent
18 under the original plan, and 17.5 percent under the First Amended
19 Plan. The bankruptcy court relied upon the latter estimate in its
20 finding that the payments to unsecured creditors under the First
21 Amended Plan would be "not insignificant." Moreover, neither
22 party has questioned these estimates in this appeal.

23 Under Lepe's original plan, the plan payments were \$150 per
24 month for 36 months, for a total of \$5,400. The unsecured claims
25 were approximately \$29,540, including the unsecured portion of the
26 second mortgage after the lien strip. Allowing for some trustee
27 fees and administrative expenses, this yields approximately a
28 17.25 percent dividend for creditors from the payments over the
term of the plan.

23 However, we are unable to confirm that Lepe's First Amended
24 Plan would provide a 17.5 percent dividend to unsecured creditors.
25 That plan called for payments of \$150 for five months (\$750), then
26 \$275 for 31 months (\$8,525), for a total of \$9,275. Even allowing
27 for increased administrative fees, the increased payments proposed
28 in the First Amended Plan should result in something closer to a
30 percent return to unsecured creditors, not 17.5 percent.

26 If there is error in these calculations (either ours or that
27 of the parties), it is harmless. Trustee has not challenged the
28 calculations under the First Amended Plan, and because the
bankruptcy court determined that a 17.5 percent dividend was "not
insignificant," any higher dividend to unsecured creditors would
also presumably be "not insignificant."

1 Trustee submitted a detailed opposition to Lepe's amended
2 plan on March 24, 2011. In addition to repeating earlier
3 arguments on good faith, Trustee discussed the separate chapter 13
4 case filed by Lepe's girlfriend, Elsa Antonio, and how the cases
5 were related.³ Lepe filed a response to Trustee's submissions on
6 April 29, 2011; Trustee filed a reply brief on May 5, 2011.

7 At a June 2, 2011 confirmation hearing concerning both
8 Antonio's plan and Lepe's amended plan, the bankruptcy court
9 announced its findings of fact, conclusions of law, and decision
10 regarding confirmation. In material part, the court found and
11 concluded that:

12 - Any inaccuracies in Lepe's schedules were occasioned by his
13 lawyer's inadvertence, and did not evidence any lack of good faith
14 by Lepe.

15 - The amount of payments being made under Lepe's amended plan
16 to unsecured creditors was "not insignificant."

17 - The bankruptcy court was not persuaded that "the fact that
18 [Lepe and Antonio] don't have very much unsecured debt makes
19 [them] ineligible to be a debtor in chapter 13."

20 - "[I]t is a proper reorganization purpose to deal with
21 secured claims as well as to deal with unsecured claims" in
22 chapter 13 cases.

23 - The second mortgage creditor, whose lien was being stripped
24 in Lepe's plan, had not opposed confirmation.

26 ³ Trustee did not include in the record on appeal any of the
27 documents or pleadings from the Antonio bankruptcy case. As a
28 result, although Trustee and the bankruptcy court frequently refer
to the Antonio case, the Panel must rely on the "second-hand"
information about the financial relationship between Lepe and
Antonio as related in argument by the parties.

1 - While deeming the decision "a very close call," the
2 bankruptcy court concluded both plans should be confirmed.⁴

3 The bankruptcy court entered the order confirming Lepe's
4 amended plan on July 1, 2011. Trustee filed this timely appeal.

5 JURISDICTION

6 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
7 and 157(b)(2)(L). The Panel has jurisdiction under 28 U.S.C.
8 § 158.

9 ISSUES

10 Whether the bankruptcy court erred in finding that Lepe's
11 First Amended Plan was filed in good faith.

12 Whether the bankruptcy court erred in confirming Lepe's First
13 Amended Plan.

14 STANDARDS OF REVIEW

15 The bankruptcy court's determination regarding a debtor's
16 good faith in proposing a chapter 13 plan for confirmation is a
17 factual finding reviewed under the clearly erroneous standard.
18 Figter Ltd. v. Teachers Ins. & Annuity Ass'n (In re Figter Ltd.),
19 118 F.3d 635, 638 (9th Cir. 1997); Ho v. Dowell (In re Ho), 274
20 B.R. 867, 870 (9th Cir. BAP 2002).

21 Whether a chapter 13 plan should be confirmed involves mixed
22 questions of fact and law, where factual determinations are
23 reviewed under the clearly erroneous standard, and determinations
24 of law are reviewed de novo. Andrews v. Loheit (In re Andrews),

25
26 ⁴ In addition, the bankruptcy court reduced the attorney's
27 fees allowed to the lawyer representing both Lepe and Antonio from
28 \$5,000 to \$3,500 in the Antonio case, and from \$3,500 to \$3,000 in
Lepe's case. Since Antonio paid these fees in cash before the
bankruptcy cases were filed, the court ordered that the difference
be returned to Antonio.

1 155 B.R. 769, 770 (9th Cir BAP 1993).

2 **DISCUSSION**

3 I.

4 In order to confirm a plan, the debtor must show, and the
5 bankruptcy court must find, that the debtor's "plan has been
6 proposed in good faith and not by any means forbidden by law."
7 § 1325(a) (3). In his brief, Trustee concedes that the "debtor was
8 not 'bad' in any way." Even so, Trustee argues that, given these
9 facts, the bankruptcy court's order confirming Lepe's amended plan
10 must be reversed because Lepe "fails to pass the 'good faith
11 standard [not] because the debtor is 'bad,' but because what the
12 debtor is proposing, stripping a second mortgage while being
13 otherwise solvent, is not within the spirit or purpose of Chapter
14 13." It is the Trustee's view that, as a matter of law, any
15 debtor who is "otherwise able to pay [his or her] debts," and
16 whose "sole purpose" for filing for relief under chapter 13 is to
17 strip a totally unsecured lien on the debtor's home, while paying
18 unsecured creditors (including the mortgage creditor holding the
19 stripped lien) only a percentage of that debt over the term of the
20 plan, lacks good faith.⁵

21
22 ⁵ Another confirmation standard, § 1325(a) (7), requires the
23 debtor to show that "the action of the debtor in filing the
24 petition was in good faith." This subsection was added to the
25 Bankruptcy Code by BAPCPA in 2005. Although Trustee argued in the
26 bankruptcy court that Lepe could not satisfy this requirement, he
27 has not raised Lepe's compliance with § 1325(a) (7) as an issue on
28 appeal. See Tr. Op. Br. at 1 ("The single issue on appeal is
whether the Bankruptcy Court erred in finding that the Debtor's
Chapter 13 plan was [proposed] in good faith pursuant to 11 U.S.C.
§ 1325(a) (3).") Though the Panel has held that "[t]he difference
(continued...)

1 Based upon the long-standing precedents of this circuit, we
2 reject Trustee's construction of the Code. We also disagree with
3 Trustee's characterization of the facts in this case.

4 The decisional law in the Ninth Circuit guiding a bankruptcy
5 court's examination of a chapter 13 debtor's good faith under the
6 Code is well-known. Goeb v. Heid (In re Goeb), 675 F.2d 1386 (9th
7 Cir. 1982), was one of the first decisions to construe the
8 § 1325(a)(3) good faith requirement, and its holding has
9 continuing vitality.

10 Goeb noted that neither the former Bankruptcy Act, nor the
11 then-new Bankruptcy Code, defined good faith, and that there was
12 no controlling case law assigning meaning to the term. In light
13 of the equitable nature of bankruptcy court proceedings, when
14 weighing a debtor's good faith in a chapter 13 case, Goeb held
15 that a bankruptcy court should ask whether the debtor had acted
16 equitably in proposing the plan. Id. at 1390. More precisely,
17 according to the court, a bankruptcy court should inquire "whether
18 the debtor has misrepresented facts in his plan, unfairly
19 manipulated the Bankruptcy Code, or otherwise proposed his Chapter
20 13 plan in an inequitable manner." Id. To make its decision
21 about a debtor's good faith (or lack of it), Goeb emphasized that

22 _____
23 ⁵(...continued)
24 plan is relatively minor, and the evidence on both issues may
25 properly be considered together[,]” Ellsworth v. Lifescape Med.
26 Assocs., P.C. (In re Ellsworth), 455 B.R. 904, 918 (9th Cir. BAP
27 2011), we deem Trustee's objection to confirmation based on
28 § 1325(a)(7) waived because “we consider only those issues argued
specifically and distinctly in a party's opening brief.” Leigh v.
Salazar, ___ F.3d ___, 2012 WL 1255043 at * 4 (9th Cir. 2012)
(quoting Greenwood v. Fed. Aviation Admin., 28 F.3d 971, 977 (9th
Cir.1994)).

1 a bankruptcy court must engage in a "case-by-case" analysis of the
2 "particular features of each Chapter 13 Plan," and should consider
3 "all militating factors." Id. To do justice to the purposes of
4 the Code, the court stated:

5 We emphasize that the scope of the good-faith inquiry
6 should be quite broad. The statement most quoted on the
7 meaning of "good faith" is: ["]Good faith itself is not
8 defined but generally the inquiry is directed to whether
9 or not there has been an abuse of the provisions,
10 purpose, or spirit of Chapter XIII in the proposal or
11 plan.["] 10 W. Collier, Bankruptcy ¶ 29.06[6] (14th ed.
12 1980). However, even this generalization does not
adequately reflect the range of relevant considerations.
. . . . Too much weight should not be given to Collier's
observation. . . . [B]ankruptcy courts cannot
substitute a glance at [one factor such as the amount to
be paid under the plan] for a review of the totality of
the circumstances.

13 In re Goeb, 675 F.2d at 1390 n.9; see also Chinichian v.
14 Campolongo (In re Chinichian), 784 F.2d 1440, 1444 (9th Cir. 1986)
15 (stating that the good faith inquiry "should examine the
16 intentions of the debtor and the legal effect of the confirmation
17 of a Chapter 13 plan in light of the spirit and purposes of
18 Chapter 13").

19 Goeb is particularly instructive in resolving the issue in
20 this appeal because, in that case, the court reversed the decision
21 of a bankruptcy court refusing to confirm the debtors' plan solely
22 because it would pay primarily secured and priority debt, and not
23 "substantially repay their unsecured creditors." 675 F.3d at 1391
24 ("Although these two considerations are relevant, they are not
25 determinative. Unless the [bankruptcy] court can muster other
26 evidence of bad faith on remand, it must confirm the Goeb's'
27 plan."). After ruling that a plan provision providing a nominal
28 repayment to unsecured creditors was "one piece of evidence that

1 the debtor is unfairly manipulating Chapter 13 and therefore
2 acting in bad faith," the Ninth Circuit then cautioned:

3 However, bankruptcy courts cannot substitute a glance at
4 the amount to be paid for a review of the totality of
5 the circumstances. Because the court below did not
6 inquire adequately into whether the Goebes acted in good
7 faith, we must reverse and remand.

8 In re Goeb, 675 F.2d at 1391.

9 In short, Goeb established that, in this circuit, a good
10 faith determination in connection with chapter 13 plan
11 confirmation cannot be based on any single factor or feature of a
12 proposed plan, to the exclusion of review of all other relevant
13 information. Importantly, it is of no moment that a single factor
14 may be indicative of bad faith, or that a specific plan feature is
15 not consistent with the "spirit of chapter 13" or may indicate
16 manipulation of the Bankruptcy Code. Factors indicating good and
17 bad faith may not be considered in isolation, but must always be
18 weighed against the totality of the circumstances in each case.

19 Later decisions by the BAP and Ninth Circuit have
20 consistently reaffirmed this principle. For example, in Downey
21 Sav. & Loan Ass'n v. Metz (In re Metz), 67 B.R. 462 (9th Cir. BAP
22 1986), aff'd In re Metz, 820 F.2d 1495 (9th Cir. 1987), a so-
23 called "chapter 20 case,"⁶ the creditor argued that the debtor
24 should not be allowed to use a chapter 13 plan to discharge
25 mortgage arrearages that could not be discharged in his earlier
26 chapter 7 case. The Ninth Circuit held that the fact that a

27 ⁶ In the vernacular of bankruptcy, a "chapter 20" case
28 usually refers to a chapter 13 case that follows on the heels of a
29 chapter 7 case filed by the same debtor, in which unsecured debt
30 has been discharged. The debtor then utilizes a chapter 13 plan
31 to deal with secured (or possibly nondischargeable) debts. Nelson
32 v. Meyer (In re Nelson), 341 B.R. 671, 677 n.10 (9th Cir. BAP
33 2007).

1 chapter 13 case was filed after the debtor had sought and received
2 a chapter 7 discharge was not per se a basis for finding that the
3 debtor had engaged in bad faith. Indeed, after analyzing the
4 totality of the circumstances in Metz, the court held that the
5 debtor's plan could be confirmed. Id. at 1499.

6 To implement the totality of circumstances approach, the BAP
7 has identified a variety of factors to assist a bankruptcy court
8 in determining whether a chapter 13 debtor has proposed a plan in
9 good faith on a case-by-case basis. A bankruptcy court might
10 consider:

- 11 1) The amount of the proposed payments and the amount of
12 any surplus of debtor's income after paying expenses;
- 13 2) The debtor's employment history, ability to earn, and
14 likelihood of future increases in income;
- 15 3) The probable or expected duration of the plan;
- 16 4) The accuracy of the plan's statements of the debts,
17 expenses and percentage of repayment of unsecured debt,
18 and whether any inaccuracies are an attempt to mislead
19 the court;
- 20 5) The extent of any preferential treatment between
21 classes of creditors;
- 22 6) The extent to which secured claims are modified;
- 23 7) The type of debt sought to be discharged, and whether
24 any such debt is nondischargeable in chapter 7;
- 25 8) The existence of special circumstances such as
26 inordinate medical expenses;
- 27 9) The frequency with which the debtor has sought
28 bankruptcy relief;
- 10) The motivation and sincerity of the debtor in
seeking Chapter 13 relief; and
- 11) The burden which the plan's administration would
place upon the trustee.

28 Fid. & Cas. Co. of N.Y v. Warren (In re Warren), 89 B.R. 87, 93

1 (9th Cir. BAP 1987) (citing In re Brock, 47 B.R. 167, 169 (Bankr.
2 S.D. Cal. 1985), which in turn quoted United States v. Estus (In
3 re Estus), 695 F.2d 311, 317 (8th Cir. 1982)).⁷

4 The Ninth Circuit has likewise amplified the criteria to be
5 employed by parties and bankruptcy courts in applying the
6 "totality of circumstances" chapter 13 good faith analysis:

7 [In determining whether the debtor has acted in good
8 faith, a] bankruptcy court should consider the following
factors:

9 (1) whether the debtor "misrepresented facts in his
10 [petition or] plan, unfairly manipulated the Bankruptcy
11 Code, or otherwise [filed] his Chapter 13 [petition or]
plan in an inequitable manner," id. [citing In re Goeb,
675 F.2d at 1391];

12 (2) "the debtor's history of filings and dismissals,"
13 [citing In re Nash, 765 F.2d 1410, 1415 (9th Cir. 1985)];

14 (3) whether "the debtor only intended to defeat state
15 court litigation," [citing In re Chinichian, 784 F.2d at
1445-46]; and

16 (4) whether egregious behavior is present, (citing
17 Colonial Auto Ctr. v. Tomlin (In re Tomlin), 105 F.3d
937; In re Bradley, 38 B.R. 425, 432 (Bankr. C.D. Cal.
1984)).

18 Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir.
19 1999). But while a Warren/Estus and Leavitt "factors approach"
20 may be helpful to bankruptcy courts faced with good faith issues,
21 it must be remembered that these lists are guidelines to be
22 understood as "the beginning and not the end of the analysis." In
23 re Nelson, 343 B.R. at 677 n.10.⁸

24 _____
25 ⁷ Within the Ninth Circuit, these eleven points are often
26 referred to as the Warren factors. Outside the Ninth Circuit,
they are usually referred to as the Estus factors. Here we will
refer to them generally as the Warren/Estus factors.

27 ⁸ Whether a bankruptcy court employs the eleven point
28 Warren/Estus factors (some of which are arguably dated) or the
(continued...)

1 In summary, then, in the Ninth Circuit, in determining
2 whether a debtor has proposed a plan in good faith under
3 § 1325(a)(3), a bankruptcy court must examine the totality of the
4 circumstances. Stated another way, in evaluating good faith, a
5 bankruptcy court must never view one factor in isolation, even if
6 that one factor is indicative of bad faith. In re Goeb, 675 F.2d
7 at 1391.

8 II.

9 In this appeal, Trustee argues that the bankruptcy court
10 erred in finding that Lepe proposed his plan in good faith,
11 because any debtor who is otherwise able to pay debts, and whose
12 sole purpose for filing for relief under chapter 13 is to strip a
13 totally unsecured lien on the debtor's home, while paying
14 unsecured creditors (including the mortgage creditor holding the
15 stripped lien) only a percentage of that debt over the term of the
16 plan, lacks good faith.

17 The courts find good faith in only those cases where the
18 debtor is "insolvent" meaning that he "needs" bankruptcy
19 and where there is an actual "reorganization" of the
20 debtor's debts. The Debtor here simply does not need to
reorganize anything and appears to be seeking a short
cut on his second mortgage.

21 Trustee contends that because Lepe proposes to use a chapter
22 13 plan to strip a second mortgage on his home although Lepe is,
23 using Trustee's vernacular, "solvent," requires the bankruptcy
24 court to find that Lepe lacks good faith. In making this

25 _____
26 ⁸(...continued)

27 four-point Leavitt guidelines, some combination, or even its own
28 matrix, it is important, as per In re Goeb, that the court not
base its findings regarding the debtor's good faith (or lack of
it) on a single factor, but rather, that it consider the totality
of the circumstances.

1 argument, Trustee invites the bankruptcy court and this Panel to
2 isolate our attention on only one of the four Leavitt criteria:
3 whether the debtor has “unfairly manipulated the Bankruptcy
4 Code” In re Leavitt, 171 F.3d at 1224. That approach is
5 improper; it is patently at odds with the Ninth Circuit case law
6 discussed above.

7 Trustee cites no “lien strip” cases to support his argument.
8 Instead, Trustee relies upon decisions examining chapter 13 plans
9 in which the debtor proposes to pay only the debtor’s attorney
10 fees and not other creditors, or plans filed in chapter 20 cases.
11 Of course, Lepe’s plan is not one designed to benefit only his
12 attorney. And because Lepe has not previously sought chapter 7
13 relief, this is also not a chapter 20 case. Trustee nonetheless
14 insists that “both of these lines of cases are instructive in
15 determining good faith in the instant case. What is important to
16 both lines of cases is that there is a reorganization in process
17 and that lien avoidance is given extra scrutiny.” We disagree
18 that the cases cited by Trustee support denial of confirmation in
19 this case.

20 Trustee refers to four attorney fee cases: In re Molina, 420
21 B.R. 825 (Bankr. D.N.M. 2009); In re Sanchez, 2009 WL 2913224
22 (Bankr. D.N.M. 2009); In re Montry, 393 B.R. 695 (Bankr. W.D.
23 Miss. 2008); In re Paley, 390 B.R. 53 (Bankr. N.D.N.Y. 2008).

24 In In re Molina, the debtor secured a chapter 7 discharge
25 about five years before commencing the chapter 13 case. Her
26 chapter 13 plan proposed to pay only trustee fees and her
27 attorney’s fees. While cited by Trustee for support, the
28 bankruptcy court actually confirmed Molina’s plan after a detailed

1 application of the eleven Warren/Estus factors to the facts,
2 thereby conducting a classic totality of the circumstances
3 analysis. In re Molina, 420 B.R. at 830.

4 In re Sanchez involved facts similar to those in Molina,
5 i.e., a plan proposing payment only for the debtor's attorney's
6 fees. In re Sanchez, 2009 WL 2913224 at *1. Unlike the Molina
7 court, though, the Sanchez court denied confirmation, in part
8 finding that filing a plan that would pay only attorney fees was
9 an abuse of the bankruptcy process. However, like Molina, the
10 Sanchez court reached that conclusion after explicitly analyzing
11 the plan and applying the eleven Warren/Estus factors. Id. at *
12 2. The court in In re Paley took a similar approach, and reached
13 a similar result to Molina. In re Paley, 390 B.R. at 59-60.

14 In re Montry would appear to be the only decision that
15 seemingly supports the notion that "attorney fee only" plans are
16 per se bad faith filings justifying denial of confirmation.
17 Unlike the other three attorney fee cases cited by Trustee, the
18 bankruptcy court in Montry, purportedly relying on Paley, declined
19 to perform a detailed analysis of the debtor's good faith,
20 observing that "[a] point-by-point application of [the Warren-
21 Estus] factors is unnecessary here because, as the court in Paley
22 concisely stated, [a] plan whose duration is tied only to payment
23 of attorney's fees simply is an abuse of the provisions, purpose,
24 and spirit of the Bankruptcy Code." In re Montry, 393 B.R. at
25 696. In our view, Montry misstates the holding in Paley, because
26 the Paley bankruptcy court reached its conclusion denying
27 confirmation only after what it described as a "case-by-case
28 analysis of the totality of the circumstances" and applying the

1 eleven-point Warren/Estus factors. In re Paley, 390 B.R. at 59.

2 Of course, none of these four decisions addresses whether a
3 debtor's efforts to use a chapter 13 plan to effect a lien
4 avoidance is a factor indicating bad faith. In Paley, the plan
5 provided that the debtor would "continue to pay her sole secured
6 creditor directly in connection with a car loan." In re Paley,
7 390 B.R. at 56. And in Molina, Sanchez and Montry, no secured
8 debts or liens were treated in the plans at all. Instead, in
9 three of the four decisions, the bankruptcy court reached its
10 conclusion only after conducting a detailed examination of good
11 faith, applying a Warren/Estus multi-factor analysis.

12 In addition, while decided after the parties submitted their
13 briefs, the Panel now has the benefit of a detailed examination of
14 the good faith implications of "attorney fee plans" in Berliner v.
15 Pappalardo (In re Puffer), 674 F.3d 78 (1st Cir. 2010). In
16 Puffer, the court of appeals rejected an argument that such cases
17 present an example of per se bad faith. Indeed, the First Circuit
18 went further and observed that it would constitute reversible
19 error for a bankruptcy court to apply a per se rule, rather than
20 to engage in a totality of the circumstances analysis in
21 determining good faith in chapter 13 confirmations:

22 We believe that the totality of the circumstances
23 approach to adjudicating good faith should apply equally
24 to inquiries under section 1325. . . . The totality of
25 the circumstances test cannot be reduced to a mechanical
26 checklist, and we do not endeavor here to canvass the
27 field and catalogue the factors that must be weighed
28 when determining whether a debtor has submitted a
Chapter 13 plan in good faith. . . . But we, like other
courts, are reluctant to read per se limitations into
section 1325's good faith calculus. See Johnson v.
Vanguard Holding Corp. (In re Johnson), 708 F.2d 865,
868 (2d Cir. 1983) (per curiam) (collecting cases).
After all, Congress has legislated nine requirements

1 that must be met before a Chapter 13 plan can be
2 confirmed, see 11 U.S.C. § 1325(a)(1)-(9), and we do not
think that it is our province to insist upon a tenth.

3 In all events, good faith is a concept, not a
4 construct. Importantly, it is a concept that derives
5 from equity. . . . This matters because equitable
6 concepts are peculiarly insusceptible to per se rules.
7 See Johnson v. Spencer Press of Me., Inc., 364 F.3d 368,
383 (1st Cir. 2004); see also Rosario-Torres v.
Hernandez-Colon, 889 F.2d 314, 321 (1st Cir.1989) (en
banc) (stating that "the hallmark of equity is the
ability to assess all relevant facts and circumstances
and tailor appropriate relief on a case by case basis").

8 In re Puffer, 674 F.3d at 82.

9 The Puffer majority did note that it was not blessing
10 attorney-fee cases, and that such cases are subject to special
11 scrutiny.⁹ Nevertheless, the court concluded that a bankruptcy
12 court's application of a per se bad faith rule, and the failure to
13 examine the totality of the circumstances in determining good
14 faith, was improper. In re Puffer, 674 at 83.

15 Trustee also offers four decisions arising from chapter 20
16 scenarios. In re Tran, 431 B.R. 230 (Bankr. N.D. Cal. 2010),
17 aff'd 814 F. Supp. 2d 946 (N.D. Cal. 2011); In re Okosisi, 451
18 B.R. 90 (Bankr. D. Nev. 2011); In re Fair, 450 B.R. 853 (E.D.
19 Wisc. 2011); In re Hill, 440 B.R. 176 (Bankr. S.D. Cal. 2010).
20 According to Trustee, these cases are instructive because, in
21 each, the bankruptcy courts required the debtor to demonstrate a

22
23 ⁹ Although the Puffer majority held that it was legal error
24 to isolate one factor in performing a good faith analysis, it
25 instructed that, in attorney fee cases, the proponent of good
26 faith needed to establish "special circumstances" limited to
27 "relatively rare" instances in order to support good faith of such
28 filings. Id. at 83. The concurrence in Puffer would not require
the application of any special rule in such cases, and instead,
would simply rely upon the discretion of the bankruptcy court to
determine good faith based on relevant facts. Id. Of course, we
express no opinion on whether, under the Ninth Circuit case law,
the debtor's motives in proposing a plan that pays only attorneys
fees warrant any "special scrutiny" by the bankruptcy court.

1 need for filing a chapter 13 case separate and distinct from the
2 debtor's desire to employ lien avoidance. However, each of these
3 decisions can be distinguished on the facts.

4 In Okosisi and Hill, the bankruptcy courts ruled that the
5 debtors filed their chapter 13 petitions and proposed their plans
6 in good faith. The debtors in each case were insolvent when they
7 filed, and each had significant debts to reorganize. Both courts
8 reached their good faith conclusion after applying a totality of
9 the circumstances analysis.

10 The district court in Fair actually came to no conclusion
11 regarding the debtor's good faith. It did, however, pose an
12 observation before remanding that case to the bankruptcy court to
13 engage in further fact-finding regarding good faith:

14 Filing a chapter 13 case "solely for the purpose of the
15 lien avoidance" suggests manipulation of the bankruptcy
16 code and is evidence of bad faith. Hill at 184 (citing
17 Tran [411 B.R.] at 238). The Court expresses no opinion
18 on this issue, which should be explored by the
19 bankruptcy court on remand. In re Sidebottom, 430 F.3d
20 893, 899 (7th Cir. 2005) (listing factors for good faith
21 inquiry).¹⁰

22 In re Fair, 450 B.R. at 858. In other words, after noting that
23 filing a chapter 13 petition to secure a lien avoidance had in
24 other cases been viewed as "evidence of bad faith," the Fair court
25 remanded its case to the bankruptcy court to consider that fact as
26 only one relevant factor in the good faith inquiry.

27 Trustee places greatest emphasis on In re Tran. In Tran,
28 the debtor filed a chapter 13 petition after she had received a

¹⁰ The Seventh Circuit in Sidebottom listed seven factors in the good faith analysis, none of which are inconsistent with those identified in Leavitt and Warren/Estus.

1 discharge in a chapter 7 case. The bankruptcy court determined
2 that Tran's sole purpose in filing the second bankruptcy case was
3 to avoid a second mortgage on her residence, that the debtor had
4 only a small arrearage on her first deed of trust to cure, and
5 owed no unsecured debt. The bankruptcy court ruled that the
6 debtor lacked good faith. However, that the debtor filed merely
7 to avoid the lien was not the only factor considered in the
8 bankruptcy court's good faith determination. Both the bankruptcy
9 court, and the district court on appeal, noted that an additional
10 factor influencing the good faith analysis was that the debtor was
11 solvent on a balance sheet basis.

12 Hoping to find support in Tran, Trustee argues that Lepe was
13 "solvent" in this case. But the "insolvency" discussed in Tran
14 refers to a situation where "the sum of [the debtor's] debts is
15 greater than all of such entity's property, at a fair
16 valuation[.]" § 101(32)(A). In accounting parlance, a solvent
17 debtor's assets would exceed liabilities. This balance sheet
18 insolvency must be distinguished, though, from cash flow
19 insolvency, where a debtor is unable to pay its debts when they
20 come due. Oney v. Weinberg (In re Weinberg), 410 B.R. 19, 26 (9th
21 Cir. BAP 2009).

22 Whether the debtor suffers from balance sheet insolvency may
23 well be important to a bankruptcy court in evaluating the debtor's
24 good faith in a chapter 20 scenario because it may indicate that
25 the debtor has assets available with which to pay debts without
26 resort to the bankruptcy process. However, based upon the
27 schedules and other evidence given to the bankruptcy court here,
28 it is clear that Lepe was not balance sheet solvent. Quite the

1 contrary appears to be true. While Lepe's cash-flow would
2 arguably allow him to pay his mortgage payments with some small
3 amount remaining each month to apply toward unsecured debts,
4 Lepe's financial circumstances were, indisputably, dire. As noted
5 above, indisputably, Lepe was balance sheet insolvent, in that the
6 amount of his debts greatly exceeded the value of his assets.

7 Moreover, neither balance sheet insolvency, nor inability to
8 pay debts, is a prerequisite for filing a voluntary petition under
9 the Bankruptcy Code. Stolrow v. Stolrow's, Inc. (In re Stolrow's,
10 Inc.), 84 B.R. 167, 171 (9th Cir. BAP 1988); see also Taylor v.
11 Winneconr (In re Taylor), 450 B.R. 577, 579 n.3 (Bankr. W.D. Pa.
12 2011) ("Of course, there is no requirement that an individual be
13 insolvent to be a debtor in bankruptcy. See generally 11 U.S.C.
14 § 109, 'Who may be a debtor,' wherein there is no requirement of
15 insolvency regarding individuals."); In re Local Union 722 Int'l
16 Bhd. of Teamsters, 414 B.R. 443, 450 (Bankr. N.D. Ill. 2009). The
17 eligibility requirements for chapter 13 relief, in particular,
18 make no reference to a debtor's insolvency or ability to pay his
19 debts. § 109(e) (prescribing that, subject to stated debt
20 limitations, a chapter 13 debtor be "an individual with regular
21 income").

22 The Ninth Circuit has held that the debtor's insolvency,
23 while relevant, is not a requirement for finding that a debtor has
24 proposed a plan in good faith in a chapter 11 case. Platinum
25 Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P., 314
26 F.3d 1070, 1074-75 (9th Cir. 2002). In interpreting § 1129(a)(3),
27 the chapter 11 good faith rule, the court rejected any per se
28 approach to determining good faith, observed that "insolvency is

1 not a prerequisite to a finding of good faith," and noted that
2 "[t]he fact that a debtor proposes a plan in which it avails
3 itself of an applicable Code provision does not constitute
4 evidence of bad faith." Id. at 1074-75 (quoting In re PPI Enters.,
5 Inc., 228 B.R. 339, 344-45 (Bankr. D. Del. 1998)).

6 III.

7 The Ninth Circuit has also held that a debtor's chapter 13
8 plan may strip the lien of a creditor holding a claim secured by
9 the debtor's house where there is no value to support that lien:

10 To put it more simply, a claim such as a mortgage is not
11 a "secured claim" to the extent that it exceeds the
12 value of the property that secures it. Under the
13 Bankruptcy Code, "secured claim" is thus a term of art;
14 not every claim that is secured by a lien on property
15 will be considered a "secured claim." Here, it is plain
16 that PSB Lending's claim for the repayment of its loan
17 is an unsecured claim, because its deed of trust is
18 junior to the first deed of trust, and the value of the
19 loan secured by the first deed of trust is greater than
20 the value of the house.

21 Zimmer v. PSB Lending Corp. (In re Zimmer), 313 F.3d 1220, 1223
22 (9th Cir. 2002). Given Zimmer, in proposing to strip the second
23 mortgage, Lepe's amended plan therefore proposes to do only that
24 which the Bankruptcy Code allows. As a result, the plan's lien-
25 strip provision, standing alone, cannot support a finding that
26 Lepe lacked good faith. Drummond v. Welsh (In re Welsh), 465 B.R.
27 843, 854 (9th Cir. BAP 2012) ("[A] debtor's lack of good faith
28 cannot be found based solely on the fact that the debtor is doing
what the Code allows.").

Here, had Lepe filed a chapter 7 case, because the
creditor's second mortgage was valueless, it is likely that
neither the mortgage creditor, nor any other unsecured creditors,
would have been paid at all. By contrast, under Lepe's proposed

1 amended plan, both the second mortgage creditor and other
2 unsecured creditors will receive a substantial partial
3 distribution on their claims. As compared to Lepe's option to
4 seek chapter 7 relief, and as the bankruptcy court found, his
5 proposed plan benefitted unsecured creditors significantly.

6 The bankruptcy court did not clearly err in determining that
7 Lepe filed his chapter 13 petition and proposed his plan in good
8 faith. The court properly recognized at the beginning of the
9 confirmation hearing that "the debtor has the burden of proof to
10 show that the debtor is proceeding in good faith." See United
11 States v. Arnold & Baker Farms (In re Arnold & Baker Farms), 177
12 B.R. 648, 654 (9th Cir. BAP 1994) (burden of proof for
13 confirmation issues is preponderance of the evidence).

14 Turning to the evidence, the bankruptcy court noted the
15 numerous errors in the debtor's petition and pleadings, but it
16 found that these errors were attributable to the inadvertence of
17 Lepe's counsel. In making this finding, the court thus addressed
18 both the first and second Leavitt criteria. The third Leavitt
19 factor, whether the debtor was utilizing the plan to defeat state
20 court litigation, is inapplicable in this case since no state
21 court litigation was pending here. And there was no need for the
22 bankruptcy court to address the fourth factor (i.e., whether
23 egregious behavior is present) because Trustee has conceded that
24 he was "not arguing . . . that the Debtor was 'bad' in any way."

25 Trustee's sole basis for arguing that the bankruptcy court's
26 good faith finding was clearly erroneous is his contention that
27 Lepe is manipulating the Bankruptcy Code by proposing a plan to
28 strip an unsecured lien on his house while he was, in Trustee's

1 imprecise terms, solvent. However, when this argument was briefed
2 by Trustee and presented to the bankruptcy court, the court
3 declined to endorse it. Instead, after considering the totality
4 of his circumstances, the bankruptcy court found that Lepe had
5 filed his plan in good faith. In particular, the bankruptcy court
6 found that the amount paid to unsecured creditors over the term of
7 Lepe's plan was "not insignificant," a finding Trustee has not
8 challenged, and which appears to us to be clearly correct. The
9 bankruptcy court also observed that the secured creditors,
10 including the creditor holding the lien to be stripped, had not
11 opposed confirmation. After considering all relevant
12 circumstances, the bankruptcy court concluded that Lepe had
13 established that his petition and plan were filed and proposed in
14 good faith: "I'm persuaded that [Lepe's plan is] confirmable."

15 The bankruptcy court's finding concerning Lepe's good faith
16 resolved a disputed question of fact. While the bankruptcy court
17 acknowledged that confirmation in this case was "a very close
18 call," and while another judge might have arrived at a contrary
19 conclusion, "[w]here there are two permissible views of the
20 evidence, the factfinder's choice between them cannot be clearly
21 erroneous." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384,
22 400-401 (1990). Simply put, the bankruptcy court's finding that
23 Lepe proposed his amended plan in good faith was not clearly
24 erroneous.

25 **CONCLUSION**

26 The bankruptcy court did not clearly err in finding that Lepe
27 acted in good faith in proposing his amended plan. The bankruptcy
28 court's decision to confirm that plan was not an abuse of

1 discretion. We AFFIRM.

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