

AUG 17 2006

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. ID-05-1467-HKMa
7)
8 PAUL PENLAND; LESLIE PENLAND,) Bk. No. 05-00172
9)
10 Debtors.)
11)
12)
13 PAUL PENLAND; LESLIE PENLAND,)
14)
15 Appellants,)
16)
17 v.) **MEMORANDUM**¹
18)
19 BERNIE R. RAKOZY, Chapter 13)
20 Trustee,)
21)
22 Appellee.)
23)
24)

Argued and Submitted on June 22, 2006
at Portland, Oregon

Filed - August 17, 2006

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

Honorable Jim D. Pappas, Bankruptcy Judge, Presiding.

Before: Hollowell,² Klein and Marlar, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

² Hon. Eileen W. Hollowell, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 **INTRODUCTION**

2 Appellants Paul and Leslie Penland (the "Penlands" or
3 "Debtors") appeal a final order of the bankruptcy court denying
4 confirmation of their second amended chapter 13 plan ("Second
5 Amended Plan") for failure to prove that it was proposed in good
6 faith as required under § 1325(a)(3), and dismissing their case
7 under § 1307(c)(1) and (5).³ We REVERSE the order dismissing the
8 case, AFFIRM the order denying confirmation of the Second Amended
9 Plan and REMAND the case for further proceedings consistent with
10 this decision.

11 **FACTS AND PROCEDURAL HISTORY**

12 The Penlands are professionals who filed for bankruptcy
13 protection because they had accumulated substantial unsecured
14 debt, primarily to credit card companies. Mr. Penland, an
15 experienced lawyer who specializes in representing insurance
16 companies in workers compensation cases, is the managing partner
17 of his three-lawyer firm. Mrs. Penland works for a bank. Their
18 combined yearly income in the two years preceding their
19 bankruptcy exceeded \$130,000.

20 Mrs. Penland's elderly parents moved into the Penlands'
21 house in 2003 after her mother experienced difficulties with
22 Parkinson's disease, but they do not pay rent or otherwise
23 contribute to household expenses. In 2004, the Penlands borrowed
24

25 ³ Absent contrary indication, all chapter, section, and
26 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330 and to the Federal Rules of Bankruptcy Procedure, Rules
28 1001-9036, in effect prior to the effective date of the
Bankruptcy Abuse Prevention and Consumer Protection Act of
2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23 (Apr. 20, 2005).

1 \$52,000 from her parents and secured those loans with a second
2 deed of trust on their 3,600 square foot, five-bedroom residence.
3 Most of the loan proceeds were used to make repairs to the house,
4 but some of the money was used to make payments to the first
5 mortgage holder, to outstanding credit card debt, and to make
6 contributions to the Penlands' exempt retirement accounts.

7 The Penlands have their own health problems. Mr. Penland
8 has suffered bouts of optical neuritis which have left him unable
9 to see for up to a month. He also suffers from depression and
10 anxiety. Mrs. Penland has high blood pressure.

11 The Penlands' primary assets consist of their home which
12 they value at \$300,000, two cars (one is 8 years old and one is
13 over 20 years old), and approximately \$500,000 in various
14 retirement accounts. There is approximately \$50,000 of equity in
15 their house. That equity and the retirement accounts are the
16 Penlands' major exempt assets.

17 The Penlands originally filed for relief under chapter 7.
18 Their schedules listed \$810,565.83 in assets, and \$475,469.05 in
19 liabilities of which \$221,824.05 was unsecured. The court,
20 acting on its own motion, issued an order for the Penlands to
21 appear and show cause why their case should not be dismissed
22 pursuant to § 707(b). The court also ordered the Penlands to
23 submit to a Rule 2004 examination by the U.S. Trustee. Three
24 days before that examination, the Penlands moved to convert their
25 case to chapter 13. The case was converted on June 7, 2005.

26 The Penlands' first chapter 13 plan ("Plan") was for a 36-
27 month term with payments of \$300 per month. Two non-evidentiary
28 confirmation hearings were continued so that the Chapter 13

1 Trustee could conduct further investigations regarding the
2 Penlands' assets, income, expenses and pre-bankruptcy
3 transactions. The Chapter 13 Trustee filed three different
4 recommendations concerning the Plan, each of which opposed
5 confirmation.

6 At a September 28, 2005 hearing, the Penlands' counsel
7 informed the court that the Chapter 13 Trustee's concerns had all
8 been resolved and that a confirmation order would be forthcoming.
9 The court, however, refused to accept a stipulated confirmation
10 order and, instead, set an evidentiary hearing to determine if
11 the Penlands had disposable income that should be contributed to
12 the Plan under § 1325(b); whether the Plan met the best interests
13 of creditors test under § 1325(a)(4); and whether the Plan had
14 been filed in good faith as required by § 1325(a)(3). There was
15 no indication from the court that dismissal of the case would
16 result if the Plan was not confirmed after the hearing.

17 Two days before the evidentiary hearing, the Penlands filed
18 a first amended plan ("First Amended Plan") and an amended
19 Schedule J which reduced their monthly expenses by the amount of
20 the monthly payments to Mrs. Penland's parents, who agreed to
21 forebear on their secured loans until after the Penlands
22 completed their plan payments. The First Amended Plan extended
23 the term and increased the payment amounts by requiring three
24 payments of \$300 and 52 payments of \$925.

25 At the evidentiary hearing, both the Penlands testified and
26 were questioned by the Chapter 13 Trustee and the court. The
27 court asked Mr. Penland why he expected to earn \$20,000 less in
28 2005 than he had in the previous two years which, in the court's

1 view, was far less than an attorney of Mr. Penland's experience
2 would be expected to earn in Boise. In response to the court's
3 questions, Mr. Penland acknowledged that if the Penlands' income
4 increased over the term of the First Amended Plan, that such
5 increases would be devoted to plan payments. The court's
6 examination also indicated concerns about the \$5,400 amount of
7 the Penlands' monthly expenses, especially the large amount
8 devoted to house payments. When the Penlands were asked why
9 Mrs. Penland's parents were not contributing to household
10 expenses and whether they had the financial ability to make such
11 contributions or live on their own, they responded that they did
12 not know anything about Mrs. Penland's parents' finances and
13 believed it would be wrong to charge rent to family.

14 In explaining his decision to support confirmation, the
15 Chapter 13 Trustee stated that he had extensively reviewed the
16 facts and the Penlands' records. He found that the loan
17 transaction with Mrs. Penland's parents had been fully disclosed
18 and all proceeds accounted for. The Chapter 13 Trustee stated
19 that, while he was troubled by the fact that Mrs. Penland's
20 parents did not pay rent or contribute to household expenses, he
21 did not feel that was a sufficient reason to oppose confirmation
22 for lack of good faith.

23 At the conclusion of the hearing, the court indicated that,
24 while the Penlands' initial filing of chapter 7 did not
25 necessarily demonstrate a lack of good faith, it was not clear
26 that they were making their best efforts at dealing with their
27 debt. The court then informed the Penlands that they would be
28 allowed only one more opportunity to amend their plan. If such

1 an amended plan (or the First Amended Plan) was not confirmed,
2 their case would be dismissed without any further hearings.

3 On October 12, 2005, the Penlands filed a second amended
4 plan ("Second Amended Plan") and an amended Schedule J, which
5 decreased their monthly expenses by \$100 by reducing the amounts
6 spent on home maintenance, food and recreation. The Second
7 Amended Plan proposed three payments of \$300 and 57 months of
8 payments of \$1,025 with a total payout of almost \$60,000, which
9 was approximately a 50% return to unsecured creditors.

10 On November 8, 2005, the bankruptcy court issued a
11 memorandum decision ("Memorandum Decision") denying confirmation
12 of the Second Amended Plan, finding that it was not proposed in
13 good faith, and dismissing the Penlands' case. The court
14 reviewed five factors in explaining how it had arrived at the
15 determination that the Second Amended Plan did not meet the good
16 faith requirements of § 1325(a)(3). First, the court found that
17 the Penlands attempted to manipulate the Bankruptcy Code by:
18 (a) seeking to discharge all of their unsecured debt by filing
19 for chapter 7, in probable violation of § 707(b) and, (b) failing
20 to propose a chapter 13 plan that made any meaningful
21 distributions to unsecured creditors until the Chapter 13 Trustee
22 and the court itself intervened ("Factor 1"). Second, the court
23 found that the Penlands' living arrangements were inequitable to
24 their creditors because they were supporting Mrs. Penland's
25 parents even though her parents could not be considered the
26 Penlands' dependents for purposes of the chapter 13 disposable
27 income analysis, and thus, the creditors were effectively
28 subsidizing the parents' lifestyle. ("Factor 2"). Third, the

1 court found that the Penlands' monthly expenses were excessive,
2 especially the amounts spent for housing, food and life insurance
3 ("Factor 3"). Fourth, the court found that the Penlands had
4 understated their earning capacity and attempted to "lock in" the
5 amount of their plan payments when Mr. Penland's earnings were
6 below market level ("Factor 4").⁴ Fifth, the court found that the
7 failure of the Penlands to submit any evidence that they had
8 considered accessing their exempt retirement accounts to pay
9 their debt demonstrated a lack of good faith ("Factor 5"). The
10 court concluded that because the Penlands were unwilling to
11 engage in any kind of "meaningful belt tightening," the Second
12 Amended Plan did not satisfy the good faith requirements of
13 § 1325(a)(3).

14 The court then dismissed the case pursuant to § 1307(c)(1)
15 and (5) because of the Penlands' "lack of diligence in performing
16 their statutory responsibilities." An order was entered denying
17 confirmation and dismissing the case on November 8, 2005.

18 The Penlands timely filed a notice of appeal. On March 15,
19 2006, the Chapter 13 Trustee filed a notice stating he would not
20 file an opposition to the appeal because he did not object to
21 confirmation of the Penlands' First or Second Amended Plans.
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25 ⁴ The court also expressed concern that a zero value was
26 placed on Mr. Penland's interest in his law firm in the
27 Penlands' schedules. Apparently, no business valuation was
28 provided to the court to support the accuracy of that
contention. The court's skepticism as to that proposed value
was therefore justified.

1 **ISSUES**

2 1. Did the bankruptcy court abuse its discretion when it
3 dismissed the case, sua sponte, without affording the Penlands an
4 opportunity to further amend their Second Amended Plan or
5 otherwise address the court's concerns after it denied
6 confirmation for the first time?

7 2. Did the bankruptcy court abuse its discretion by
8 applying an incorrect legal standard in its determination that
9 the Penlands' Second Amended Plan had not been filed in good
10 faith, or did it clearly err in determining that it was not filed
11 in good faith?

12 **STANDARD OF REVIEW**

13 The decision to dismiss a bankruptcy case is reviewed for
14 abuse of discretion. Ho v. Dowell (In re Ho), 274 B.R. 867, 871
15 (9th Cir. BAP 2002). Generally, the determination regarding
16 whether a chapter 13 plan has been proposed in good faith is a
17 factual finding reviewed for clear error. Smyrnos v. Padilla (In
18 re Padilla), 213 B.R. 349, 352 (9th Cir. BAP 1997). Discretion
19 is abused when the court applies an incorrect legal standard,
20 rests a decision on a clearly erroneous view of the facts, or
21 reaches a result with respect to which the reviewing court has
22 the definite and firm conviction that there has been a clear
23 error in judgment. Reynoso v. Neary (In re Reynoso), 315
24 B.R. 544, 550 (9th Cir. BAP 2004).

1 denial of confirmation of a plan and denial of a request made for
2 additional time for filing another plan, must exist to constitute
3 "cause" to dismiss a chapter 13 case. See Nelson v. Meyer (In re
4 Nelson), 343 B.R. 671 (9th Cir. BAP 2006). This Panel concluded
5 in Nelson that "[t]he Bankruptcy Code contemplates in
6 § 1307(c) (5) that chapter 13 debtors be afforded more than one
7 opportunity to confirm a chapter 13 plan before the case is
8 dismissed...following denial of plan confirmation." Id. at 678.

9 Here, at the end of the only evidentiary confirmation
10 hearing, the court gave the Penlands an opportunity to submit a
11 second amended plan, and they did so three days later. But the
12 Penlands were not given any opportunity to address the court's
13 concerns after it ruled on the Second Amended Plan and denied
14 confirmation for the first time. The Debtors had only one
15 confirmation hearing and that was not on the Second Amended Plan.
16 This case is similar to Nelson where we found that the bankruptcy
17 court "preempted the debtor's chance to try again and dismissed
18 the case after the first denial of plan confirmation." Id. at
19 676.

20 Because the Penlands were not afforded an opportunity to
21 respond to the court's only ruling on confirmation, they were not
22 afforded the opportunity to make further amendments or otherwise
23 address the court's concerns. Accordingly, the Penlands' case
24 should not have been dismissed under § 1307(c) (5).

25 B. Denial of Confirmation for Lack of Good Faith Under
26 § 1325(a) (3)

27 Because we have reversed the dismissal of the Penlands'
28 chapter 13 case and remanded it for further proceedings to give

1 the Penlands an opportunity to address the concerns raised by the
2 court in its Memorandum Decision, we address the requirements of
3 § 1325(a) (3).⁵

4 C. Legal Standard for Establishing Good Faith

5 The test for assessing lack of good faith, in the chapter 13
6 context, is the "totality of the circumstances." Goeb v. Heid
7 (In re Goeb), 675 F.2d 1386, 1391 (9th Cir. 1982). In Leavitt,
8 the Ninth Circuit Court of Appeals set out a four-factor analysis
9 for bankruptcy courts to consider in deciding whether chapter 13
10 debtors have exhibited a lack of good faith. 171 F.3d at 1224.

11 Those factors are:

12 1. whether the debtor misrepresented facts in his
13 petition or plan, unfairly manipulated the Bankruptcy Code, or
14 otherwise filed his chapter 13 petition or plan in an inequitable
15 manner; (citing Goeb, 675 F.2d at 1391);

16 2. the debtor's history of filings and dismissals;

17 3. whether the debtor only intended to defeat state
18 court litigation; and

19 4. whether egregious behavior is present.

20 In considering the question of good faith, the court must
21 consider all the factors that relate to the equities in a
22 particular case. Street v. Lawson (In re Street), 55 B.R. 763,
23 764 (9th Cir. BAP 1985); Goeb, 675 F.2d at 1390 (a "court must

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26 ⁵ On remand, the Penlands may seek permission to file a
27 third amended plan or request a further hearing on the Second
28 Amended Plan. In either event, they bear the burden of
demonstrating that their Plan has been filed in good faith.

1 make its good faith determination in the light of all militating factors”).

2 In its Memorandum Decision, the bankruptcy court cited Goeb
3 and In re Warren, 89 B.R. 87 (9th Cir. BAP 1988) as the legal
4 standards for the court to use in evaluating good faith. Warren
5 includes an eleven item “laundry list” of factors for courts to
6 consider on a case-by-case basis, as part of the good faith
7 analysis.⁶ 89 B.R. at 93. The Appellants rely almost exclusively
8 on the Warren factors in support of their appeal.

9 The narrow holding of Warren was that the § 1325(a)(3) “good
10 faith” requirement is independent of the best efforts requirement
11 of § 1325(b) and remains good law. But the Warren guidelines for
12 evaluating good faith have never been expressly adopted by the
13 Ninth Circuit, and must be considered in light of subsequent
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16 ⁶ The list of factors used by the Warren court are:

- 17 1) The amount of the proposed payments and the amounts of the
- 18 debtor's surplus;
- 19 2) The debtor's employment history, ability to earn, and
- 20 likelihood of future increases in income;
- 21 3) The probable or expected duration of the plan;
- 22 4) The accuracy of the plan's statements of the debts,
- 23 expenses and percentage of repayment of unsecured debt, and
- 24 whether any inaccuracies are an attempt to mislead the court;
- 25 5) The extent of preferential treatment between classes of
- 26 creditors;
- 27 6) The extent to which secured claims are modified;
- 28 7) The type of debt sought to be discharged, and whether any
- such debt is nondischargeable in Chapter 7;
- 8) The existence of special circumstances such as inordinate
- medical expenses;
- 9) The frequency with which the debtor has sought relief under
- the Bankruptcy Reform Act;
- 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.

1 amendments to the Bankruptcy Code and later decided case law.

2 Nelson, 343 B.R. at 677 n.10.

3 The Warren factors were borrowed from an Eighth Circuit
4 decision, United States v. Estus (In re Estus), 695 F.2d 311, 317
5 (8th Cir. 1982). However, in Educ. Assistance Corp. v. Zellner,
6 827 F.2d 1222, 1227 (8th Cir. 1987), the Eighth Circuit Court of
7 Appeals recognized that the 1984 amendments to § 1325(b) subsumed
8 most of the Estus factors, to permit confirmation of chapter 13
9 plans in which the debtor uses all disposable income for three
10 years to make payments to his creditors regardless of the amount
11 of the payments or the return to creditors. The Eighth Circuit
12 court noted:

13 [O]ur inquiry into whether the plan constitutes an
14 abuse of the provisions, purpose or spirit of
15 Chapter 13, has a more narrow focus. The bankruptcy
16 court must look at factors such as whether the debtor
17 has stated his debts and expenses accurately; whether
18 he has made any fraudulent misrepresentation to mislead
19 the bankruptcy court; or whether he has unfairly
20 manipulated the Bankruptcy Code.

21 Zellner, 827 F.2d at 1227. (citations omitted).

22 Because so many of the Warren factors have been subsumed
23 into § 1325(b), the factors identified in Leavitt should control
24 a § 1325(a) (3) good faith analysis.

25 D. Applying Leavitt to the Penlands' case

26 The only Leavitt factors applicable to the Penlands' case
27 are whether they engaged in bad faith manipulation of the
28 Bankruptcy Code or proposed their chapter 13 Plan in an
inequitable manner. As noted earlier, in finding that the Second
Amended Plan was not filed in good faith, the Memorandum Decision
identified five factors which the court found demonstrated either

1 a bad faith manipulation of the Bankruptcy Code or inequitable
2 treatment of creditors.

3 In Factors 2 and 3, the court considered a number of matters
4 related to the Penlands' income and expenses which generally
5 would be reviewed as part of a disposable income analysis under
6 § 1325(b). On appeal, the Penlands, citing to Andrews v. Loheit
7 (In re Andrews), 155 B.R. 769 (9th Cir. BAP 1993), argue that the
8 court could not, sua sponte, address disposable income issues.

9 The holding of the BAP in Andrews was that a chapter 13
10 trustee was not limited to § 1325(b)(1) in objecting to a plan,
11 but also had standing to object under § 1325(a)(5). Id. At 772.
12 The BAP opinion does state that the ability-to-pay test may not
13 be raised by a court sua sponte. Id. at 771. However, that
14 statement was not essential to the holding. The BAP's decision
15 in Andrews was affirmed by the Ninth Circuit Court of Appeals
16 without any reference to a court's rights to review a debtor's
17 ability to pay in the absence of objections from the Chapter 13
18 Trustee or unsecured creditors. Andrews v. Loheit (In re
19 Andrews), 49 F.3d 1404 (9th Cir. 1995). Arguably, therefore, the
20 BAP's statement regarding a bankruptcy court's ability to, sua
21 sponte, consider a debtor's ability to pay, is dicta.

22 Since Andrews was decided, we have found that a bankruptcy
23 court's § 1325(a)(3) good faith determination "necessarily
24 requires an assessment of a debtor's overall financial condition
25 including, without limitation, the debtor's current disposable
26 income". Sunahara v. Burchard (In re Sunahara), 326 B.R. 768,
27 781-82 (9th Cir. BAP 2005). The court, therefore, could properly
28 engage in its own independent analysis of the Penlands' income

1 and expenses, relying on its specific experience in deciding if
2 the Second Amended Plan had been proposed in good faith.

3 Because the court's multi-factored determination that the
4 Second Amended Plan did not meet the good faith requirement of
5 § 1325(a) (3) does not leave us with a definite and firm
6 conviction that a clear error was committed, we sustain the
7 denial of confirmation of the Second Amended Plan. However,
8 while we affirm the denial of confirmation, some of the court's
9 findings regarding the Penlands' lack of good faith merit
10 discussion because, by themselves, they would be insufficient to
11 support a finding of a lack of good faith.

12 The court found that the Penlands had attempted to
13 manipulate the Bankruptcy Code by initially filing for chapter 7,
14 in apparent violation of § 707(b).⁷ However, initially filing for
15 chapter 7 relief and then converting to a chapter 13 is not a bad
16 faith manipulation of the Bankruptcy Code. Arguably, the
17 Penlands' attempts to secure a discharge under chapter 7 may have
18 been grounds for a finding of substantial abuse and dismissal,
19 but dismissal is not mandatory. See Zolg v. Kelly (In re Kelly),
20 841 F.2d 908, 914 (9th Cir. 1988). Furthermore, the fact that a
21 debtor's case could have been dismissed under § 707(b) should not
22 result in a per se finding of a lack of good faith under
23 § 1325(a) (3). If that were the case, debtors would be faced with
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26 ⁷ In fact, the court applied, at least in part, the
27 totality of the circumstances analysis it would have used in a
28 § 707(b) proceeding. However, to the extent that the good
faith analysis in § 707(b) proceeding requires a court to
consider a "hypothetical" chapter 13 case, it is irrelevant to
the good faith analysis in an actual chapter 13 case.

1 an impossible paradox of being refused bankruptcy relief except
2 under chapter 13 (11 or 12) and then being refused confirmation
3 because their case was initially commenced as a chapter 7. Such
4 a result is inconsistent with congressional policy which prefers
5 chapter 13 over chapter 7 as evidenced by the enactment of
6 § 707(b), and by the amendments to the Bankruptcy Code made by
7 the Bankruptcy Abuse Prevention and Consumer Protection Act
8 ("BAPCPA") of 2005. Specifically, under BAPCPA, a debtor is
9 permitted to request conversion to chapter 13 if there is a
10 determination of substantial abuse. See § 707(b)(1).

11 The court found that the failure of the Penlands to consider
12 borrowing from their tax exempt retirement accounts put their
13 good faith in question. A court may properly consider the
14 existence and use or non-use of exempt assets as part of the good
15 faith analysis of § 1325(a)(3). Solomon v. Cosby (In re
16 Solomon), 67 F.3d 1128, 1133 (4th Cir. 1995). However, outside
17 of bankruptcy, creditors cannot reach exempt assets and,
18 generally, the results should not be different in bankruptcy. As
19 the U.S. Supreme Court noted in Patterson v. Shumate, 504 U.S.
20 753, 764 (1992), the mere "happenstance of bankruptcy" should not
21 result in a windfall to creditors. Here, there was no evidence
22 that the Penlands engaged in aggressive pre-bankruptcy asset
23 protection planning, that they hid assets or failed to cooperate
24 with the Chapter 13 Trustee. An exemption the legislature has
25 provided should not be denied or impaired simply because a judge
26 finds it to be out of proportion. In re Crater, 286 B.R. 756,
27 772 (Bankr. D. Ariz. 2002) (citing Norwest Bank Nebraska (In re
28

1 Tveten), 848 F.2d 871, 879 (8th Cir. 1988)). To do so is to
2 “invade the province of the legislative branch.” Id.

3 The record also does not support the court’s determination
4 that the Penlands had engaged in bad faith manipulation of the
5 Code by “locking in” their plan payments at a time when
6 Mr. Penland’s income was artificially low. Mr. Penland testified
7 that he understood that if his income increased, plan payments
8 would increase. Furthermore, debtors cannot lock in their plan
9 payments because § 1329(a)(1) permits a trustee or an unsecured
10 creditor to request a plan modification to increase the amount of
11 plan payments.

12 **CONCLUSION**

13 On remand, it may be that the bankruptcy court will again
14 find that the Penlands have not satisfied the good faith
15 requirements of § 1325(a)(3) and that their case should again be
16 dismissed. However, the Penlands must be given an opportunity to
17 address the concerns set forth in the Memorandum Decision. The
18 fact that the Penlands first filed a chapter 7 petition and that
19 Mr. Penland’s income may later increase cannot be considered as
20 negative factors in the good faith analysis. Given that the
21 legislative branch has specifically provided for the protection
22 of exempt assets, any determination that the failure to use
23 exempt assets to fund a plan constitutes bad faith should be
24 supported by a finding that the Penlands affirmatively engaged in
25 bad faith conduct, such as aggressive and fraudulent pre-
26 bankruptcy planning.

27 For these reasons we AFFIRM in part, REVERSE in part, and
28 REMAND for further proceedings.

1 KLEIN, Bankruptcy Judge, CONCURRING:

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3 With one exception, I join the decision reversing the order
4 dismissing the case in light of Nelson v. Meyer (In re Nelson),
5 343 B.R. 671 (9th Cir. BAP 2006), which was decided after the
6 entry of the order we now reverse on that account, affirming the
7 denial of confirmation, and remanding for further proceedings.

8 I have reservations about part of the penultimate paragraph
9 of part D. In my view, the implications of use or non-use of
10 exempt assets is a fact-intensive inquiry that presents a
11 question of degree that ultimately rests on the discretion of the
12 trial judge in evaluating the totality of the circumstances.