NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-05-1422-PaNK
DEBORAH J. MacGIBBON,	Bk. No. 05-15099
Debtor.	
MARSELE BURNS,	
Appellant,	
v.	**MEMORANDUM**[1]
DEBORAH J. MacGIBBON, et al.,	
Appellees.	

Argued and Submitted on June 23, 2006
at Seattle, Washington

Filed - August 14, 2006

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

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

Before: PAPPAS, NIELSEN[2] and KLEIN, Bankruptcy Judges.

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

[2] Hon. George B. Nielsen, Jr., United States Bankruptcy Judge for the District of Arizona, sitting by designation.

FACTS

Deborah MacGibbon ("Deborah") was divorced from her husband of 20 years, Richard MacGibbon ("Richard"), in 2000, and was awarded sole custody of the parties' four minor children in 2001. Richard, a former Federal Express pilot now on disability, filed for protection under chapter 11 of the Bankruptcy Code[3] on April 13, 2004. Deborah filed a § 507(a)(7) priority claim for unpaid child support and maintenance in Richard's chapter 11 case. During that case, Richard sold his residence and the net proceeds, approximately $170,000 at the time of sale, were deposited into a trust account of his bankruptcy lawyer (the "Trust Account").

Deborah filed her own chapter 11 petition on April 20, 2005. No creditors' committee was appointed. Deborah alleges that she was forced to file the petition to prevent a sheriff's execution sale of her most valuable asset, her claims against Richard. The executing creditor was Marsele Burns ("Burns"), whom Deborah owed $54,047.37 under the terms of two judgments entered in October 2002 and February 2004. Deborah argues that a sheriff's sale of her rights to collect from Richard would have jeopardized the status and value of her claims in Richard's bankruptcy case because priority is lost if a support claim "is assigned to another entity, voluntarily, by operation of law, or otherwise." § 507(a)(7)(A).

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[3] Unless otherwise indicated, all "Code," "chapter" and "section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure (also "Fed. R. Bankr. P."), which make applicable certain Federal Rules of Civil Procedure (also "Fed. R. Civ. P.").

Richard's chapter 11 case was dismissed on June 24, 2005. Deborah alleges that approximately $145,000 remained in the Trust Account on that date. Immediately after the dismissal, the State of Washington served an order to withhold and deliver on Richard's bankruptcy counsel, seeking to recover $125,906.44 from the Trust Account for Deborah's past due child support and maintenance. Richard responded by filing a chapter 13 petition on July 5, 2005. His chapter 13 schedules indicate that, as of the chapter 13 filing date, the Trust Account held only approximately $125,000.

On June 21, 2005, Richard, who claims to be a creditor in Deborah's bankruptcy case, filed a motion to convert Deborah's chapter 11 case to Chapter 7 or to dismiss it. Deborah amended her schedules on July 1, 2005, to list six additional creditors who had filed claims but were not listed on the original schedules. On July 7, 2005, Deborah filed a Motion for Order Fixing Last Date to File Proof of Claim. On July 8, 2005, the court entered an order setting a bar date for filing proofs of claim for August 31, 2005. Burns filed a Joinder in Richard's Motion to Dismiss or Convert and added an alternative Motion to Appoint an Independent Trustee.

The Court considered the pending motions at a hearing on July 15, 2005. It (1) denied the motion to dismiss or convert, or for appointment of a trustee; (2) directed the Debtor to file a Plan and Disclosure Statement no later than August 1, 2005; (3) granted Richard's motion to set aside the order setting August 31 as the claims bar date and ordered a new bar date for August 1, 2005; (4) set a hearing on the plan and disclosure statement for August 26, 2005.

At the time Deborah filed her proposed disclosure statement and plan on July 28, she held multiple, substantial claims against Richard for unpaid support and maintenance payments arising from the divorce, but none of her claims had been reduced to judgment. Deborah's debts were nearly $500,000, of which almost $400,000 was owed to various law firms hired to help her collect from Richard.

On July 29, 2005, the bankruptcy court granted Deborah's Motion for Conditional Approval of the Disclosure Statement, to Set Deadlines, and to Approve Notice to Creditors and Ballot. It ordered that the disclosure statement be conditionally approved and that a confirmation hearing be held on August 26, 2005.

One critical component of both the disclosure statement and plan is Deborah's proposal for funding her reorganization. Deborah promised to take the necessary steps to recover the $125,000 from Richard's bankruptcy attorney held in the Trust Account. According to the disclosure statement:

> When the funds are recovered, Richard MacGibbon's remaining obligation for unpaid child support and maintenance as of April 20, 2005, will be reduced to approximately $60,253.34, calculated as follows:
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> | | |
> |---|---|
> | $ 204,453.99 | Balance due as of 4-20-05 (including judgment awarded on 4-22-05) |
> | $ (18,294.21) | Less judgments awarded on 5-19-05 but set aside on 7-20-05 |
> | $(125,906.44) | Garnished funds |
> | $ 60, 253.34 | |
>
> Collecting the balance of the debt owed to Richard MacGibbon will be problematic because the maintenance awards are on appeal in King County Superior Court and have not yet been reduced to judgment. In addition, Richard MacGibbon's chapter 13 case could substantially slow the process. Ms. MacGibbon also will incur substantial, additional legal fees with her dissolution counsel in pursuing the remaining claim. Because of the uncertainty in timing and result and the

> expense associated with recovering the additional $60,253.34, that sum is not included in the Plan. Rather than delay these Chapter 11 proceedings any further, and to provide for certainty to both creditors and Ms. MacGibbon, Ms. MacGibbon believes that a plan providing payment to creditors from the funds in the trust account of Richard MacGibbon's lawyer makes the most practical sense.

In other words, it was Deborah's proposal that payments under her plan to unsecured creditors be funded solely from amounts hopefully to be recovered from the Trust Account; no further recoveries from Richard, if any, would be used to pay claims.

Burns filed timely objections to the disclosure statement and plan. The unsecured creditors, other than Burns and a finance company, voted to accept Deborah's plan. On August 26, 2005, the bankruptcy court conducted the hearing on final approval of the disclosure statement and confirmation of the plan. Counsel for Deborah, Richard and Burns were present and were heard. After argument, the court approved the disclosure statement: "I think the disclosure statement provides adequate information. I'll overrule the objections to that." Hr'g Tr. at 6:23-25 (August 26, 2005).

After approving the disclosure statement and disposing of certain claim classification issues,[4] the court addressed confirmation of the plan. Deborah testified as to each of the

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[4] The court disallowed proofs of claim filed by Richard's current wife, and removed all of Richard's claims from Class 2 of the plan, rendering class 2 "empty." Class 1, the general, unsecured creditor class, was the only voting class, and Richard's Class 1 claims were disallowed for voting purposes. The rulings concerning Richard's various claims are not at issue in this appeal, but are the subject of a different appeal pending before the Panel. Richard did not appeal the orders concerning adequacy of the disclosure statement or confirmation.

elements of § 1129 required for plan confirmation. She was cross-examined by counsel for Burns and Richard. Neither Burns nor Richard testified, nor did their counsel call any witnesses to support their opposition to confirmation.

In comments from the bench, the bankruptcy judge decided that Deborah's plan was feasible, overruled all objections and confirmed the plan. A written Order Approving Disclosure Statement and Confirming Chapter 11 Plan was entered on September 12, 2005.

On September 23, 2005, Burns filed a Motion to Reconsider the Order Confirming Plan. The bankruptcy court entered an order without oral argument denying Burns' Motion to Reconsider on October 5, 2005. Burns timely filed this appeal on October 7, 2005.

On October 4, 2005, the bankruptcy court in Richard's chapter 13 case ordered Richard's counsel to pay over the funds in the Trust Account, then totaling $125,906.44, to the Department of Social and Health Services, Division of Child Support of the State of Washington for Deborah's benefit.

JURISDICTION

The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(b)(1). We have jurisdiction under 28 U.S.C. § 158(a)(1).

ISSUES PRESENTED

1. Whether the bankruptcy court abused its discretion in concluding that the disclosure statement contained adequate information.

2. Whether the bankruptcy court erred in finding that the plan of reorganization was feasible and proposed in good faith.

3. Whether the bankruptcy court erred in concluding that the plan of reorganization complied with the provisions of the Bankruptcy Code.

4. Whether the court abused its discretion in denying Burns' motions to appoint a Trustee, convert the Debtor's Chapter 11 proceeding to a Chapter 7 proceeding, or to dismiss Debtor's Chapter 11 proceeding.

STANDARDS OF REVIEW

Factual findings regarding whether a plan meets the requirements for confirmation under § 1129 are reviewed for clear error. Computer Task Group, Inc. v. Brotby (In re Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003). Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been committed. Id. The ultimate decision to confirm a plan of reorganization is reviewed for an abuse of discretion. Id.

A determination concerning the adequacy of a disclosure statement under § 1125 is reviewed for abuse of discretion. Mabey v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.), 150 F.3d 503, 518 (5th Cir. 1998). We review a bankruptcy court's decision to grant or deny a motion for dismissal of a chapter 11 case for abuse of discretion, Loya v. Rapp (In re Loya), 123 B.R. 338, 340 (9th Cir. BAP 1991), as is the bankruptcy court's decision whether to appoint a trustee in a chapter 11 case. Lowenschuss v. Selnick (In re Lowenschuss), 171 F.3d 673, 685 (9th

Cir. 1999). A bankruptcy court's denial of a motion for reconsideration is reviewed for an abuse of discretion. Arrow Elecs., Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th Cir. 2000); Weiner v. Perry, Settles & Lawson (In re Weiner), 161 F. 3d 1216, 1217 (9th Cir. 1998). In reviewing the orders of a bankruptcy court under an abuse of discretion standard, the Panel cannot reverse unless it has a definite and firm conviction that the trial court committed a clear error of judgment in the conclusions it reached upon a weighing of the relevant factors. Solomon v. N. Am. Life & Cas. Ins. Co., 151 F.3d 1132, 1138-39 (9th Cir. 1998).

DISCUSSION

1. The bankruptcy court did not abuse its discretion in determining that the disclosure statement contained adequate information.

Section 1125(b) requires a plan proponent to transmit a disclosure statement containing adequate information to creditors when soliciting acceptance of a plan. Section 1125(a)(1) defines "adequate information" as

> . . . information of a kind, and in sufficient detail, as far as is reasonably practical in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan.

The determination of what constitutes adequate information is subjective and made on a case-by-case basis; it is a decision committed to the discretion of the bankruptcy court. In re Brotby, 303 B.R. at 193. Accord, In re Cajun Elec. Power Coop,

150 F.3d at 508; Menard-Sanford v. A.H. Robins Co. (In re A.H. Robins Co.), 880 F.2d 694, 696 (4th Cir. 1988).

Disclosure statements are not designed for the public at large. They are intended for a discrete audience: those creditors whose votes on a plan are being solicited. Thus, the adequacy of the information is measured against that necessary to a hypothetical "investor typical of holders of claims or interests of the relevant class" as defined in § 1125(a)(1). The degree of disclosure necessary in a chapter 11 case must be determined with reference to the particular needs and sophistication of each class of creditors. Where there is a small, sophisticated group of creditors, the need for close judicial scrutiny of the disclosure statement is minimized. In re Cdeco Maritime Constr., Inc., 101 B.R. 499 (Bankr. N.D. Ohio 1989)(holding that adequacy of disclosure statement should be considered in light of a "relatively small and generally sophisticated creditor body.")

In its Order Approving Disclosure Statement and Confirming Plan of Reorganization, the court made the required finding that the disclosure statement contained adequate information. The Order recites:

> The court considered the disclosure statement, the objections filed by Marsele Burns and Richard MacGibbon to the disclosure statement, and the responses filed by Deborah MacGibbon to the objections. The court conditionally approved the disclosure statement on July 29, 2005. The court finds that the disclosure statement transmitted to creditors and other parties in interest on August 2, 2005, contains adequate information as defined in 11 U.S.C. § 1125(a)(1) regarding the plan of reorganization and that the notice of hearing provided to creditors and other parties was appropriate and reasonable under the circumstances.

We have reviewed the disclosure statement, the transcript of the confirmation hearing and the pleadings referenced by the court in its Order. The disclosure statement includes information concerning the background of Deborah's bankruptcy case, pending and in-progress litigation affecting the bankruptcy estate, and contains a list of Deborah's assets and liabilities, a summary of the plan of reorganization, the proposed treatment of claims under the plan, and a liquidation analysis. Our review reveals that there is ample evidence in the record to support the court's conclusion that the disclosure statement provided adequate information to the unsecured creditors that would allow them to make any informed judgment about Deborah's proposed plan.

Contrary to Burns' contention in her Opening Brief that the disclosure statement "does not clearly set out Ms. MacGibbon's debts or the funds or assets available to pay those debts," Appendix C to the disclosure statement lists all unsecured claims. Deborah's assets are listed on pages 6-7 of the disclosure statement, including a detailed list of all amounts owed to Deborah by Richard.

Neither Burns nor Richard could seriously question the accuracy of the lists of assets and liabilities. The focus of Burns' challenge is, instead, the valuation placed in the disclosure statement on Deborah's claims for recovery of maintenance and support from Richard. Deborah argues that it was difficult to place a liquidation value on maintenance claims, cost awards and attorneys' fees against a recalcitrant ex-husband with a history of litigiousness. According to the disclosure statement,

> a "garden variety" judgment creditor, or a company that specialized in purchasing such claims, most likely would pay no more than 10 cents on the dollar for the liquidated and unliquidated claims, none of which had been reduced to judgment by April 20, 2005. In other words, a more accurate estimate of the liquidation value of the claims is $18,314.81, based on the face value of the nonexempt claims against Richard MacGibbon as of September 6, 2005.

This is the only rationale Deborah provides in the disclosure statement suggesting in her liquidation analysis that the value of the recovery of claims against Richard would be 10 percent.[5] However, Deborah does disclose in the disclosure statement that her liquidation analysis was not verified by any auditing procedure.[6]

Burns' also objects to various statements in the disclosure statement suggesting that Burns and Richard were somehow acting in collusion (referred to in the hearings as "in cahoots"). The disclosure statement provides:

> Ms. MacGibbon believes that Marsele Burns and Richard MacGibbon had an arrangement whereby Marsele Burns would assign claims purchased at the Sheriff's sale to Richard MacGibbon in exchange for some consideration, presumably full payment of her judgment or some lesser sum. Ms. MacGibbon has no proof that such an arrangement existed, but common sense dictates that it did.

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[5] In her testimony at the plan confirmation hearing on August 26, Deborah amplified on her choice of a 10 percent valuation. She testified she "Googled" various online sources for selling claims against others and determined that the most she could get for an unsecured, non-real estate claim that had not been reduced to judgment was 10 percent of face value. Hr'g Tr. 39:4-12 (August 26, 2005).

[6] Deborah had no special expertise in valuing the claims against her former spouse for liquidation purposes. The record shows she was a nurse before becoming a full-time mother and housekeeper.

In addition to being personally upset by these statements, Burns argues that including such charges in a disclosure statement may have influenced the creditors voting on the plan by suggesting that this collusion would deflate the value of Deborah's claims against Richard.

If this were a complex chapter 11 case involving a broad array of creditors with different levels of financial sophistication, Burns' argument, that Deborah's unprofessional method of estimating the liquidation value of her assets was misleading and failed to provide creditors with adequate information, might be persuasive. So, too, under those circumstances, Deborah's speculation about Burns' and Richard's relationship and motivations might conceivably mislead the creditors.

But this is not such a case. Instead, as discussed above, the unsecured creditor pool here consists predominantly of Burns and Deborah's former counsel. Most of the creditors were presumably well-equipped to evaluate Deborah's prospects for successfully collecting her claims against Richard, as well as understanding the difficulties in collection of those claims. Of the 13 unsecured creditors other than Burns casting ballots, five came from law firms; one from a public utility; three from finance companies; two from real estate developers and appraisers; and two from smaller businesses.[7] These creditors voted overwhelmingly in favor of the plan: 86 percent of ballots cast, and 85 percent of dollar amount of claims voted. Besides Burns, only one other

[7] Four additional creditors were eligible to cast ballots in Class 1 but did not vote: two government agencies (IRS and U.S. Trustee), one real estate developer and one finance company.

creditor, a finance company, voted against the plan.

In our opinion, while Deborah's approach to valuation of her assets was not sophisticated, it was not misleading. And while Deborah's allegations of collusion between Burns and Richard were unsupported, they amounted to harmless, albeit unnecessary, speculation. Viewed in context, we believe the disclosure statement presented a sufficiently accurate picture of Deborah's assets, liabilities and financial affairs, and included the essential kinds of information for creditors to evaluate her proposed plan. Although the liquidation analysis was somewhat speculative, and Deborah's suggestions that Burns and Richards were "in cahoots" were accusatory, the creditor pool was sufficiently familiar with Deborah's predicament, and her prospects for collecting from her ex-husband, to make it unlikely that the creditors were seriously misled by such deficiencies.

The bankruptcy court did not abuse its discretion in ruling that the disclosure statement contained adequate information to enable unsecured creditors to make an informed judgment about the plan as required by § 1125(b).

2. The court did not clearly err in finding that Deborah's plan was feasible and proposed in good faith.

a. Feasibility.

An essential element for plan confirmation, embodied in the so-called "feasibility" test, requires that the proponent show that confirmation of a plan is not likely to be followed by liquidation, or need for further financial reorganization of the

debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan. § 1129(a)(11).

Again, whether a plan is feasible is a question of fact reviewed for clear error. Pizza of Haw., Inc. v. Shakey's (In re Pizza of Haw., Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985); In re Brotby, 303 B.R. at 184. The plan proponent's burden is to demonstrate a reasonable probability of success, not that the plan's success is inevitable. Acequia, Inc. v. Clinton (In re Acequia, Inc.), 787 F.2d 1352, 1358 (9th Cir. 1986); In re Brotby, 303 B.R. at 191-92. A relatively low quantum of proof will satisfy § 1129(a)(11), In re Sagewood Manor Assocs. Ltd. P'ship, 223 B.R. 756, 762 (Bankr. D. Nev. 1998), provided that adequate evidence supports the finding of feasibility. In re Pizza of Hawaii, Inc., 761 F.2d at 1382.

The touchstone of a feasibility analysis is that the plan is "not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor . . . unless such liquidation or reorganization is proposed in the plan." § 1129(a)(11). In its comments from the bench, the bankruptcy court found "that this plan is most feasible. It's no different than a plan that comes out of profits." Tr. Hr'g 3:6-8 (August 26, 2005). In making its feasibility determination concerning Deborah's plan, the court was charged with answering a fairly simple question: was it more likely than not that Deborah could obtain the funds in the Trust Account held by Richard's counsel needed to fund the distribution to her creditors?

Deborah's direct examination testimony was limited to a single affirmative response where her lawyer asked her whether the plan was feasible and not likely to be followed by a liquidation or the need for further financial reorganization. But Deborah was cross-examined extensively about the feasibility of this plan by Richard's attorney. While Deborah's testimony was not particularly insightful or comprehensive concerning her ability to snare the $125,000 tied up in Richard's chapter 13 case, neither Richard nor Burns offered any contradictory testimony, nor did either call any witnesses concerning this question. The court based its decision on feasibility (as well as other § 1129(a) factors) on Deborah's testimony and the arguments and representations of counsel.

This Panel gives special deference to the trial judge's ability to evaluate the testimony of witnesses at a hearing. Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); Allen v. Iranon, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002). Indeed, the bankruptcy court's decision that the plan was feasible has been borne out by subsequent events – the funds in the Trust Account were ordered paid over to the State for Deborah's use on October 4, 2005.[8] While the feasibility evidence was somewhat meager, we can not say that the bankruptcy court clearly erred in deciding the plan was feasible.

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[8] On page 9 of Deborah's Opening Brief, she states that she has received the funds from the Trust Account and they are available for distribution to creditors on resolution of this appeal. The Panel is unable to verify this statement, either from the docket entries in Deborah's or Richard's bankruptcy case, or by resort to other papers submitted in this appeal. However, Burns' Reply Brief does not contradict Deborah's statement that she has the funds. Nor did Burns dispute this statement in oral argument before the Panel.

In view of the release of the Trust Account for distribution to creditors, the Panel need not consider Burns' other feasibility argument that the plan "does not provide a realistic time frame in which any claim, including availability of garnished cash assets, must be liquidated. . ." As it turns out, the funds are now available, and the plan's failure to set a deadline for obtaining these funds is of no further moment.

A final feasibility argument raised by Burns is that the plan "does not prohibit the Debtor from incurring additional debt or encumbering the available cash assets by retaining professionals at uncontrolled hourly or fee rates, thereby reducing or eliminating any equity." This argument misconstrues the provisions of the plan. Section 9.1 of the plan deals with professional expenses, and allows payments from the recovered funds solely to Deborah's bankruptcy counsel "as approved by the Bankruptcy Court." Presumably, the bankruptcy court, acting in accord with the limitations placed on professional compensation by § 330(a), would not allow "uncontrolled" payments to professionals. No other professional fees are to be paid from the recovered funds. As a result, we believe the bankruptcy court did not err in rejecting this argument.

The Panel concludes that the court did not commit clear error in finding that the plan was feasible.

b. Good Faith.

To be confirmed, a chapter 11 plan must be proposed in good faith. § 1129 (a)(3). Whether this requirement is satisfied is determined on a case-by-case basis taking into account the totality of the circumstances of the case, with a view to whether

the plan will fairly achieve a result consistent with the objectives and purposes of the Bankruptcy Code. Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1074-75 (9th Cir. 2002); Stolrow v. Stolrow's, Inc. (In re Stolrow's, Inc.), 84 B.R. 167, 171-72 (9th Cir. BAP 1988).

Here the bankruptcy court found that the plan complied with the § 1129(a) factors, including the § 1129(a)(3) "good faith" test, based on the admittedly terse testimony of Deborah and arguments of counsel. But, again, both Burns and Richard had the opportunity to cross-examine Deborah about her income, receipts, expenditures, and other financial affairs (including her prior bankruptcy reorganizations attempts). Neither Burns nor Richard took the stand, or provided other witnesses or proof on the good faith question.

Burns' objections regarding good faith fall into two general categories: (1) complaints about Deborah's prepetition conduct; and (2) objections about features of the proposed plan. Regarding prepetition conduct issues, such as Deborah's multiple bankruptcy filings, failure to include creditors in the initial schedules, payments to children and family members, allegedly excessive expenditures and the like, while these topics are fair game in analyzing Deborah's good faith in filing for chapter 11 relief, they do not assist in determining whether her plan is proposed in good faith, the focus of § 1129(a)(3). The good faith standards required to file a petition are different from those for proposing the plan. Pacific First Bank ex rel. R.T. Capital Corp. v. Boulders on the River, Inc. (In re Boulders on the River, Inc.), 164 B.R. 99, 103 (9th Cir. BAP 1994); In re Stolrow's, 84

B.R. at 171; accord, In re Madison Hotel Assocs., 749 F.2d 410, 424-25 (7th Cir. 1984).[9]

Regarding the plan, Burns argues that the plan "clearly was not proposed in good faith, given the amount of assets that have been distributed and will, in the future, be distributed to the exclusion of existing creditors." In this contention, Burns refers to the $60,253.44 over and above the $125,000 owed by Richard to Deborah which may be collected, but will not be a part of the creditor "pot" for distribution purposes.

Of course, in making this argument, Burns presumes this sum will indeed be recovered from Richard. Deborah's statements in the disclosure statement regarding the uncertainty in timing and expense associated with collecting additional funds could be considered in deciding whether the additional collections were properly excluded from amounts used to pay the creditors.

And, again, the reasons for excluding these funds from the creditor payment pool were fully explained to the creditors in this case who, collectively, voted in large numbers to accept the plan. While, as Deborah acknowledges, her pot plan is not a perfect solution to her financial problems, it is one that the bankruptcy court and creditors could decide made practical sense. Considering the totality of the circumstances, Deborah's plan can be seen to achieve a result consistent with the objectives and purposes of the Bankruptcy Code. The plan facilitated a

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[9] Even if Deborah's pre-bankruptcy conduct should have been analyzed by the bankruptcy court at confirmation under § 1129(a)(3), there is no indication in the record that the bankruptcy court did not do so. In fact, the bankruptcy court had already considered many of these factors in its decision refusing to dismiss or convert the case, or to appoint a trustee, discussed infra.

successful rehabilitation of the debtor, while at the same time, expeditiously maximizing the return to her creditors.

In our opinion, the bankruptcy court did not clearly err when it found that Deborah's plan satisfies the good faith test of § 1129(a)(3).

3. The bankruptcy court did not err in concluding that the plan of reorganization otherwise complied with the Bankruptcy Code.

Section 1129(a)(1) requires that a confirmable chapter 11 plan comply with the applicable provisions of title 11. In her arguments under this issue, Burns attacks confirmation of the plan by alleging it violates § 1129(a)(2),(3),(7) and (11).

Section 1129(a)(2) ("[t]he proponent of the plan [must comply] with the applicable provisions of this chapter") primarily addresses adherence to the disclosure and solicitation provisions in §§ 1125 and 1126. 7 COLLIER ON BANKRUPTCY ¶1129.03 (15th ed. rev. 2000). We examined, and have rejected, Burns' arguments concerning the adequacy of the disclosure statement. Burns does not argue there was improper solicitation of votes in this case.

We have also discussed above why we hold that it was not clear error when the bankruptcy court found that Deborah's plan was proposed in good faith under § 1129(a)(3), and was feasible for purposes of § 1129(a)(11). Burns' objection based on the plan's failure to satisfy the "best interests of the creditor" under § 1129(a)(7) was partly examined in our consideration of the disclosure statement, but we will examine it further here.

In this case, the best interests of creditors test requires that either all the claimants in the unsecured creditors class accept Deborah's proposed chapter 11 plan, or that each creditor in the class receive at least as much it would receive in a hypothetical chapter 7 liquidation. § 1129(a)(7)(A)(i)-(ii); M & I Thunderbird Bank v. Birmingham (In re Consol. Water Utils., Inc.), 217 B.R. 588, 594 (9th Cir. BAP 1998). Burns argues that the plan does not satisfy this test because "there is sufficient information to suggest that the creditors would receive more assets in liquidation than under the plan."

Burns' argument is merely a variation of the same argument examined above concerning adequacy of the disclosure statement. Burns' premise is that the $60,253.44 in additional funds potentially collectible from Richard and not included in the plan should be accounted for and made available to satisfy debt under the plan. This argument presumes these funds can be collected in this amount. But as discussed above, Deborah articulated several reasons why these funds were not incorporated into the plan. Deborah's claims for these sums had not been reduced to judgment. Richard had demonstrated his intent to vigorously contest the claims in court, and to otherwise oppose Deborah's collection efforts, adding to the delay and expense of any projected collection. And Richard was involved in a chapter 13 bankruptcy, and may not be able to pay the full amount due from his current income.

Those unsecured creditors voting, for the most part, presumably accepted Deborah's explanation of the difficulties in collecting from Richard by accepting the plan. Deborah addressed

the best interest of creditors test on the witness stand, but was not significantly cross-examined on this issue by either Richard or Burns. Nor did Burns or Richard present any independent proof or testimony concerning the liquidation value of the additional claims against Richard.[10]

Based on the evidence, the court did not err in deciding that the plan satisfied § 1129(a)(7), or in deciding that the plan complied with otherwise applicable provisions of title 11 as required by § 1112(a)(1).

4. The bankruptcy court did not abuse its discretion in denying Burns' motions to convert the Debtor's chapter 11 case to a chapter 7 case, dismiss Debtor's chapter 11 case, or to appoint a trustee.

Richard moved to convert or dismiss the bankruptcy case, a motion to which Burns joined. In the joinder, Burns also asked, in the alternative, that the bankruptcy court appoint a chapter 11 trustee. At the July 15, 2005, hearing, the bankruptcy court denied the motions. No appeal was taken from these admittedly interlocutory orders. Leisure Dev., Inc. v. Burke (In re Burke), 95 B.R. 716, 717 (9th Cir. BAP 1989). Burns then renewed the motion to convert or dismiss in her objection to confirmation of the plan.

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[10] At the hearing before the Panel, counsel for Burns argued that she attempted to offer proof on valuation of Richard's claims. We have examined the transcript of the August 26, 2005, hearing and find no indication that Burns attempted to offer such proof. In fact, at the conclusion of the hearing on August 26, 2005, the court asked, "What other evidence do I need to look at today?" Burns' counsel replied, "The only thing I would do is to point out to the court some of the discussion at the 341 that has to do with the feasibility of this claim." Tr. Hr'g 67:19-23 (August 26, 2005). Burns' counsel then continued to elaborate on Burns' feasibility objection but made no reference to valuation.

Burns has cited the bankruptcy court's denial of these motions as an issue in this appeal. However, the Panel is handicapped in its review because the parties give only cursory attention to this issue in their briefs. Burns' Opening Brief devotes only one paragraph to this issue:

> It is clear from the facts of this proceeding that the Debtor filed the Petition under Chapter 11 solely to hamper and delay Ms. Burns' ability to collect her judgment. Her failure to properly identify her creditors and her actions in paying family members and insiders with large amounts of money recovered from her husband, rather than taking care of her legal obligations, demonstrates that the petition was not filed in good faith and should have been dismissed. At the very least, given the amount of debt and the character of Ms. MacGibbons' most significant assets, the Bankruptcy Court should have converted the proceeding to a liquidation to avoid consumption of the net estate by legal fees that are being claimed by attorneys involved in the collection process.

Deborah asserts that the bankruptcy court's ruling on the motions to convert, dismiss or appoint trustee were interlocutory, and because Burns did not immediately either appeal, or move for leave to appeal, the court's July 15, 2005, oral ruling denying those motions, any right to review of the bankruptcy court's decision was lost.

Deborah is correct that the bankruptcy court's decisions regarding these motions were interlocutory. However, once the bankruptcy court entered its order confirming the plan of reorganization, the bankruptcy court's ruling on the motions to dismiss, convert or appoint trustee become final and appealable:

> Although orders denying motions to dismiss are generally interlocutory, such an order is final and appealable where a reorganization

> plan has already been confirmed, since the order effectively ends all litigation on the merits of dismissal.

Vicenty v. San Miguel Sandoval (In re San Miguel Sandoval), 327 B.R. 493, 505 (1st Cir. BAP 2005). Although Sandoval did not address a motion to appoint a trustee in its analysis, for the same reasons discussed in Sandoval, litigation on the merits of such a motion is necessarily concluded upon confirmation of a plan of reorganization. We must therefore consider Burns' argument that the court abused its discretion in denying the motions for conversion, dismissal or appointment of a trustee.

The grounds for Burns' dismissal/conversion/trustee theory can be assembled from the arguments made in various pleadings filed by Burns and Richard during the pendency of the case. Patching those contentions together, Burns asserts that:

a. Deborah filed the chapter 11 case "solely" to hamper and delay Ms. Burns' ability to collect her judgment.

b. Deborah is an abusive serial filer, having previously filed two petitions under chapter 13, one of which was converted to 11, and all of which were dismissed.

c. Deborah received large sums from Richard prepetition, but failed to apply them to the debts for which they were proffered.

d. Deborah only earns $309 per week in child support and cannot explain how she will pay her creditors.

e. Deborah failed to list all known creditors in her schedules.

f. Deborah failed to provide accurate testimony regarding payment of insurance premiums, her driver's status, use of vehicles, accurate information regarding her expenses for clothing and household goods, legal expenses to Sarah Weaver, accurate information regarding monthly statements, failure to disclose disbursement details and prepaid rent, and miscellaneous discrepancies.

a. Good Faith and Conversion/Dismissal.

The Code provides in § 1112(b) that:

> Except as provided in subsection (c) of this section, on request of a party in interest or the United States Trustee or bankruptcy administrator, and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title or may dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause . . . .

This section details ten nonexclusive reasons which may justify dismissal or conversion. None of these grounds are precisely implicated in this case. However, the Ninth Circuit has ruled that a debtor's lack of good faith in filing a chapter 11 petition can constitute grounds for dismissal of the case under § 1112(b). Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1187 (9th Cir. 2000).

The Panel has on several occasions discussed the requirements for determining whether a debtor has filed a chapter 11 petition in good or bad faith. In Del Rio Dev. v First Liberty Fin., Inc. (In re Del Rio Dev.), 35 B.R. 127, 129 (9th Cir. BAP 1983), we held that a good faith analysis requires an examination of all facts and circumstances of a particular case. We reaffirmed this approach in In re Stolrow's, 84 B.R. at 172, where we held that resolution of a bad faith argument in a chapter 11 case requires an exercise of the discretion of the court after consideration of the "totality of the circumstances."

In this context, lists of bad faith "factors" are of limited utility. Even so, one oft-cited register of indicia directs the bankruptcy court to consider whether, among other issues:

1. The debtor has few or no unsecured creditors.

2. There has been a previous bankruptcy petition by the debtor or a related entity.

3. The prepetition conduct of the debtor has been improper.

4. The petition was filed on the eve of foreclosure.

5. There is no possibility of reorganization.

6. The debtor filed solely to create the automatic stay.

In re Gonic Realty Trust, 909 F.2d 624 (1st Cir. 1990).

Burns repeatedly notes that Deborah filed the chapter 11 petition to thwart Burns' sheriff sale of Deborah's claims against Richard. In support of her argument that this evidences bad faith, Burns, through her joinder in Richard's motion, cites four cases. Of these four, only one, Marsch v. Marsch (In re Marsch), 36 F.3d 825, 828-29 (9th Cir. 1994), is binding on this Panel. However, Marsch notes that where a debtor has sufficient assets to satisfy a judgment debt, it may be improper for that debtor to use a chapter 11 petition solely to delay collection of that judgment.

It can be argued here that Deborah's bankruptcy filing was not solely motivated by her desire to delay collection of Burns' judgment. She was attempting to preserve her only significant asset for distribution to all her creditors, not just Burns. It is also doubtful that, even if all her claims against Richard could be collected, the recovery would have been adequate to pay all her debts, as opposed to solely Burns' judgment. Therefore, we do not think the decision in Marsch required the bankruptcy court to find that Deborah acted in bad faith.

The other cases cited by Burns all stand for the proposition that a debtor may be guilty of bad faith in filing a petition for the sole purpose of delaying creditors where that debtor is either

unable to, or has no legitimate interest in, reorganizing its financial affairs. But here, as subsequent events have shown, Deborah not only intended to reorganize, but was eventually successful in proposing and confirming a plan of reorganization acceptable to the significant majority of her creditors. The case law relied upon by Burns is inapposite.

Burns, using Richard's motion, argues that Deborah is an abusive serial filer. For support, the motion cites In re Spectee Group, Inc., 185 B.R. 146, 156 (Bankr. S.D.N.Y. 1995), which held that repeated bankruptcy case filings are a badge of bad faith.

In testimony before the bankruptcy court, Deborah admitted to filing two and possibly three earlier bankruptcy petitions. She testified that these cases were dismissed because she was not receiving the regular maintenance and support payments from Richard she needed to fund her proposed plans. In addition to the deference that this Panel gives the credibility findings of a trial judge, we note that at the time of Deborah's earlier bankruptcies, Burns and the other creditors were apparently not seeking to enforce their claims against Deborah. It is therefore difficult to conclude that Deborah filed the prior bankruptcy cases solely to obtain protection under the automatic stay.

Burns' other arguments alleging that Deborah engaged in improper activities before filing her petition are also not persuasive. Deborah either testified on direct examination at the confirmation hearing, or was cross-examined by counsel for Burns or Richard, as to each contention. Deborah was the only witness at the hearing on confirmation where the renewed motion for dismissal or conversion was heard. Although Burns provided

several declarations in which she alleged Deborah was guilty of improper activities, she did not take the stand or call witnesses in support of her arguments. Because the bankruptcy court had an opportunity to review Burns' allegations of improper prepetition activities, and considered Deborah's testimony on direct and cross, we defer to the findings of the bankruptcy court that Deborah was not guilty of bad faith in filing for chapter 11 relief.

For all the above reasons, the Panel concludes that the bankruptcy court did not abuse its discretion in declining to grant the motions to convert or dismiss the chapter 11 case.

b. Appointment of the Trustee.

The statutory authority for appointment of a chapter 11 trustee is § 1104(a), which provides:

> At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States Trustee, and after notice and a hearing, the court shall order the appointment of a Trustee –
> (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
> (2) if such appointment is in the interest of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.

As the Ninth Circuit discussed in In re Lowenschuss, 171 F.3d at 685, the decision to appoint a trustee is reviewed for abuse of

discretion. Although the statute speaks in the imperative, the court explained that, even if cause is shown, under the abuse of discretion standard, the bankruptcy court may decline to appoint a trustee based upon practical considerations. In re Lowenschuss, 171 F.3d at 685. Accord, In re Sharon Steel Corp., 871 F.2d 1217, 1225 (3d Cir. 1989); Comm. of Dalkon Shield Claimants v. A.H. Robins Co., Inc., 828 F.2d 239 (4th Cir. 1987).

While not altogether clear, we presume from Burns' arguments that she relies upon § 1104(a)(1), and that "cause" existed for the appointment of a trustee because of the incompetence or gross mismanagement of the debtor.[11] There are numerous examples in the record that arguably show Deborah was a poor manager of her financial affairs. She admitted that she did not keep a checkbook, that she failed to list creditors on her initial bankruptcy schedules (although this oversight was corrected), failed to file a certain income tax return (explaining that Richard had not provided necessary information to her and that, in any event, no taxes were due), and numerous other failings.

If this were a business reorganization, the Panel, and presumably the trial judge, should be greatly concerned with Deborah's management deficiencies because such could presage a financial collapse of a continuing business. In this comparatively small consumer case, however, where a "pot" plan is before the court, the continuity of a business entity is not at

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[11] Burns has never actually invoked § 1104(a). Richard's original motion to dismiss or convert did not request appointment of a trustee. Burns joined in Richard's motion, adding a request for appointment of a trustee, but not specifying any statutory or case law authority for that motion.

issue. Despite Deborah's administrative shortcomings, she was able to confirm a plan of reorganization, and apparently has now obtained the funds necessary to implement her plan. Deborah's creditors supported her plan in convincing fashion. In short, it would seem Deborah's alleged lack of financial management skills have not seriously impaired the progress of this chapter 11 case or confirmation of a plan. As result, in the exercise of its discretion, the bankruptcy court was not compelled to appoint a trustee.

Burns might argue that appointment of a trustee was necessary to recover potential preferences and transfers made by Deborah to her family and friends. Deborah acknowledges that funds were transferred to her parents, children and close friends during the year preceding the filing of her petition. She states in her disclosure statement that, while these transfers may be avoidable by a chapter 11 debtor-in-possession, for various reasons she will not seek to recover them under her plan. The total of these potentially avoidable transfers amounts to about $62,000.

On the other hand, there are serious practical impediments to the appointment of a trustee in small chapter 11 cases such as this. To do so would impose a financial and administrative burden on the bankruptcy estate. In addition to the compensation required for a trustee, administrative expense in the form of counsel fees and costs will necessarily result from avoidance litigation.

There are also intangible costs to such an approach. Delay to "educate" a trustee and to pursue the preferences will necessarily extend the time before creditors could be paid. And

finally, even if a trustee were appointed to prosecute the avoidance actions, it is uncertain whether that litigation would be successful. For example, it is questionable whether the largest potential preference to Deborah's parents for $35,000 could be collected. Simply put, it was not certain, or perhaps even likely, that appointment of a trustee under these circumstances would have resulted in sufficient benefit to the creditors to justify the appointment.

The voting creditors endorsed Deborah's plan despite her disclosure that she did not intend to pursue recovery of a significant number and amount of possible preferences. Their views about their best interests deserved consideration by the bankruptcy court. We conclude that the bankruptcy court did not abuse its discretion in declining to appoint a chapter 11 trustee.

CONCLUSION

We AFFIRM the decisions of the bankruptcy court in all respects.