

AUG 14 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NOT FOR PUBLICATION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**

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In re:)	BAP No. WW-05-1422-PaNK
)	
DEBORAH J. MacGIBBON,)	Bk. No. 05-15099
)	
Debtor.)	
_____)	
MARSELE BURNS,)	
)	
Appellant,)	
)	
v.)	MEMORANDUM¹
)	
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, NIELSEN² and KLEIN, 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 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.

1 **FACTS**

2 Deborah MacGibbon ("Deborah") was divorced from her husband
3 of 20 years, Richard MacGibbon ("Richard"), in 2000, and was
4 awarded sole custody of the parties' four minor children in 2001.
5 Richard, a former Federal Express pilot now on disability, filed
6 for protection under chapter 11 of the Bankruptcy Code³ on April
7 13, 2004. Deborah filed a § 507(a)(7) priority claim for unpaid
8 child support and maintenance in Richard's chapter 11 case.

9 During that case, Richard sold his residence and the net proceeds,
10 approximately \$170,000 at the time of sale, were deposited into a
11 trust account of his bankruptcy lawyer (the "Trust Account").

12 Deborah filed her own chapter 11 petition on April 20, 2005.
13 No creditors' committee was appointed. Deborah alleges that she
14 was forced to file the petition to prevent a sheriff's execution
15 sale of her most valuable asset, her claims against Richard. The
16 executing creditor was Marsele Burns ("Burns"), whom Deborah owed
17 \$54,047.37 under the terms of two judgments entered in October
18 2002 and February 2004. Deborah argues that a sheriff's sale of
19 her rights to collect from Richard would have jeopardized the
20 status and value of her claims in Richard's bankruptcy case
21 because priority is lost if a support claim "is assigned to
22 another entity, voluntarily, by operation of law, or otherwise."
23 § 507(a)(7)(A).

24
25 ³ Unless otherwise indicated, all "Code," "chapter" and
26 "section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
27 1330 prior to its amendment by the Bankruptcy Abuse Prevention and
28 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.").

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

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

21 The Court considered the pending motions at a hearing on July
22 15, 2005. It (1) denied the motion to dismiss or convert, or for
23 appointment of a trustee; (2) directed the Debtor to file a Plan
24 and Disclosure Statement no later than August 1, 2005; (3) granted
25 Richard's motion to set aside the order setting August 31 as the
26 claims bar date and ordered a new bar date for August 1, 2005; (4)
27 set a hearing on the plan and disclosure statement for August 26,
28 2005.

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

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

12 One critical component of both the disclosure statement and
13 plan is Deborah's proposal for funding her reorganization.
14 Deborah promised to take the necessary steps to recover the
15 \$125,000 from Richard's bankruptcy attorney held in the Trust
16 Account. According to the disclosure statement:

17 When the funds are recovered, Richard
18 MacGibbon's remaining obligation for unpaid
19 child support and maintenance as of April 20,
2005, will be reduced to approximately
\$60,253.34, calculated as follows:

20	\$ 204,453.99	Balance due as of 4-20-05
21		(including judgment awarded on
22		4-22-05)
22	\$ (18,294.21)	Less judgments awarded on 5-19-
23		05 but set aside on 7-20-05
	<u>\$ (125,906.44)</u>	Garnished funds
	\$ 60,253.34	

24 Collecting the balance of the debt owed to
25 Richard MacGibbon will be problematic because
26 the maintenance awards are on appeal in King
27 County Superior Court and have not yet been
28 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

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

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

15 Burns filed timely objections to the disclosure statement and
16 plan. The unsecured creditors, other than Burns and a finance
17 company, voted to accept Deborah's plan. On August 26, 2005, the
18 bankruptcy court conducted the hearing on final approval of the
19 disclosure statement and confirmation of the plan. Counsel for
20 Deborah, Richard and Burns were present and were heard. After
21 argument, the court approved the disclosure statement: "I think
22 the disclosure statement provides adequate information. I'll
23 overrule the objections to that." Hr'g Tr. at 6:23-25 (August 26,
24 2005).

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

28 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.

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

5 In comments from the bench, the bankruptcy judge decided that
6 Deborah's plan was feasible, overruled all objections and
7 confirmed the plan. A written Order Approving Disclosure
8 Statement and Confirming Chapter 11 Plan was entered on September
9 12, 2005.

10 On September 23, 2005, Burns filed a Motion to Reconsider the
11 Order Confirming Plan. The bankruptcy court entered an order
12 without oral argument denying Burns' Motion to Reconsider on
13 October 5, 2005. Burns timely filed this appeal on October 7,
14 2005.

15 On October 4, 2005, the bankruptcy court in Richard's chapter
16 13 case ordered Richard's counsel to pay over the funds in the
17 Trust Account, then totaling \$125,906.44, to the Department of
18 Social and Health Services, Division of Child Support of the State
19 of Washington for Deborah's benefit.

20 **JURISDICTION**

21 The bankruptcy court had jurisdiction via 28 U.S.C. § 1334
22 and § 157(b) (1). We have jurisdiction under 28 U.S.C.
23 § 158(a) (1).

24 **ISSUES PRESENTED**

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

28

- 1 2. Whether the bankruptcy court erred in finding that the plan
2 of reorganization was feasible and proposed in good faith.
- 3 3. Whether the bankruptcy court erred in concluding that the
4 plan of reorganization complied with the provisions of the
5 Bankruptcy Code.
- 6 4. Whether the court abused its discretion in denying Burns'
7 motions to appoint a Trustee, convert the Debtor's Chapter 11
8 proceeding to a Chapter 7 proceeding, or to dismiss Debtor's
9 Chapter 11 proceeding.

10
11 **STANDARDS OF REVIEW**

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

20 A determination concerning the adequacy of a disclosure
21 statement under § 1125 is reviewed for abuse of discretion. Mabey
22 v. Sw. Elec. Power Co. (In re Cajun Elec. Power Coop., Inc.), 150
23 F.3d 503, 518 (5th Cir. 1998). We review a bankruptcy court's
24 decision to grant or deny a motion for dismissal of a chapter 11
25 case for abuse of discretion, Loya v. Rapp (In re Loya), 123 B.R.
26 338, 340 (9th Cir. BAP 1991), as is the bankruptcy court's
27 decision whether to appoint a trustee in a chapter 11 case.
28 Lowenschuss v. Selnick (In re Lowenschuss), 171 F.3d 673, 685 (9th

1 Cir. 1999). A bankruptcy court's denial of a motion for
2 reconsideration is reviewed for an abuse of discretion. Arrow
3 Elecs., Inc. v. Justus (In re Kaypro), 218 F.3d 1070, 1073 (9th
4 Cir. 2000); Weiner v. Perry, Settles & Lawson (In re Weiner), 161
5 F. 3d 1216, 1217 (9th Cir. 1998). In reviewing the orders of a
6 bankruptcy court under an abuse of discretion standard, the Panel
7 cannot reverse unless it has a definite and firm conviction that
8 the trial court committed a clear error of judgment in the
9 conclusions it reached upon a weighing of the relevant factors.
10 Solomon v. N. Am. Life & Cas. Ins. Co., 151 F.3d 1132, 1138-39
11 (9th Cir. 1998).

12 **DISCUSSION**

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

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

20 . . . information of a kind, and in sufficient
21 detail, as far as is reasonably practical in
22 light of the nature and history of the debtor
23 and the condition of the debtor's books and
24 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.

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

1 150 F.3d at 508; Menard-Sanford v. A.H. Robins Co. (In re A.H.
2 Robins Co.), 880 F.2d 694, 696 (4th Cir. 1988).

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

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

21 The court considered the disclosure statement,
22 the objections filed by Marsele Burns and
23 Richard MacGibbon to the disclosure statement,
24 and the responses filed by Deborah MacGibbon
25 to the objections. The court conditionally
26 approved the disclosure statement on July 29,
27 2005. The court finds that the disclosure
28 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.

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

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

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

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

12 This is the only rationale Deborah provides in the disclosure
13 statement suggesting in her liquidation analysis that the value of
14 the recovery of claims against Richard would be 10 percent.⁵

15 However, Deborah does disclose in the disclosure statement that
16 her liquidation analysis was not verified by any auditing
17 procedure.⁶

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

22
23 Ms. MacGibbon believes that Marsele Burns and
24 Richard MacGibbon had an arrangement whereby
25 Marsele Burns would assign claims purchased at
26 the Sheriff's sale to Richard MacGibbon in
27 exchange for some consideration, presumably
28 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.

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

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

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

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

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

27

28 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.

1 creditor, a finance company, voted against the plan.

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

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

20

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

23

24 a. Feasibility.

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

1 debtor or any successor to the debtor under the plan, unless such
2 liquidation or reorganization is proposed in the plan.

3 § 1129(a)(11).

4 Again, whether a plan is feasible is a question of fact
5 reviewed for clear error. Pizza of Haw., Inc. v. Shakey's (In re
6 Pizza of Haw., Inc.), 761 F.2d 1374, 1382 (9th Cir. 1985); In re
7 Brotby, 303 B.R. at 184. The plan proponent's burden is to
8 demonstrate a reasonable probability of success, not that the
9 plan's success is inevitable. Acequia, Inc. v. Clinton (In re
10 Acequia, Inc.), 787 F.2d 1352, 1358 (9th Cir. 1986); In re Brotby,
11 303 B.R. at 191-92. A relatively low quantum of proof will
12 satisfy § 1129(a)(11), In re Sagewood Manor Assocs. Ltd. P'ship,
13 223 B.R. 756, 762 (Bankr. D. Nev. 1998), provided that adequate
14 evidence supports the finding of feasibility. In re Pizza of
15 Hawaii, Inc., 761 F.2d at 1382.

16 The touchstone of a feasibility analysis is that the plan is
17 "not likely to be followed by the liquidation, or the need for
18 further financial reorganization, of the debtor . . . unless such
19 liquidation or reorganization is proposed in the plan."

20 § 1129(a)(11). In its comments from the bench, the bankruptcy
21 court found "that this plan is most feasible. It's no different
22 than a plan that comes out of profits." Tr. Hr'g 3:6-8 (August
23 26, 2005). In making its feasibility determination concerning
24 Deborah's plan, the court was charged with answering a fairly
25 simple question: was it more likely than not that Deborah could
26 obtain the funds in the Trust Account held by Richard's counsel
27 needed to fund the distribution to her creditors?

28

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

14 This Panel gives special deference to the trial judge's
15 ability to evaluate the testimony of witnesses at a hearing.
16 Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); Allen v.
17 Iranon, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002). Indeed, the
18 bankruptcy court's decision that the plan was feasible has been
19 borne out by subsequent events - the funds in the Trust Account
20 were ordered paid over to the State for Deborah's use on October
21 4, 2005.⁸ While the feasibility evidence was somewhat meager, we
22 can not say that the bankruptcy court clearly erred in deciding
23 the plan was feasible.

24
25 ⁸ On page 9 of Deborah's Opening Brief, she states that she
26 has received the funds from the Trust Account and they are
27 available for distribution to creditors on resolution of this
28 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.

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

8 A final feasibility argument raised by Burns is that the plan
9 "does not prohibit the Debtor from incurring additional debt or
10 encumbering the available cash assets by retaining professionals
11 at uncontrolled hourly or fee rates, thereby reducing or
12 eliminating any equity." This argument misconstrues the
13 provisions of the plan. Section 9.1 of the plan deals with
14 professional expenses, and allows payments from the recovered
15 funds solely to Deborah's bankruptcy counsel "as approved by the
16 Bankruptcy Court." Presumably, the bankruptcy court, acting in
17 accord with the limitations placed on professional compensation by
18 § 330(a), would not allow "uncontrolled" payments to
19 professionals. No other professional fees are to be paid from the
20 recovered funds. As a result, we believe the bankruptcy court did
21 not err in rejecting this argument.

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

24 b. Good Faith.

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

1 the plan will fairly achieve a result consistent with the
2 objectives and purposes of the Bankruptcy Code. Platinum Capital,
3 Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d
4 1070, 1074-75 (9th Cir. 2002); Stolrow v. Stolrow's, Inc. (In re
5 Stolrow's, Inc.), 84 B.R. 167, 171-72 (9th Cir. BAP 1988).

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

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

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

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

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

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

25
26 ⁹ Even if Deborah's pre-bankruptcy conduct should have been
27 analyzed by the bankruptcy court at confirmation under
28 § 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.

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

3 In our opinion, the bankruptcy court did not clearly err when
4 it found that Deborah's plan satisfies the good faith test of
5 § 1129(a) (3).

6

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

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

14 Section 1129(a) (2) ("[t]he proponent of the plan [must
15 comply] with the applicable provisions of this chapter") primarily
16 addresses adherence to the disclosure and solicitation provisions
17 in §§ 1125 and 1126. 7 COLLIER ON BANKRUPTCY ¶1129.03 (15th ed. rev.
18 2000). We examined, and have rejected, Burns' arguments
19 concerning the adequacy of the disclosure statement. Burns does
20 not argue there was improper solicitation of votes in this case.

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

28

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

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

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

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

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

10

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

15 Richard moved to convert or dismiss the bankruptcy case, a
16 motion to which Burns joined. In the joinder, Burns also asked,
17 in the alternative, that the bankruptcy court appoint a chapter 11
18 trustee. At the July 15, 2005, hearing, the bankruptcy court
19 denied the motions. No appeal was taken from these admittedly
20 interlocutory orders. Leisure Dev., Inc. v. Burke (In re Burke),
21 95 B.R. 716, 717 (9th Cir. BAP 1989). Burns then renewed the
22 motion to convert or dismiss in her objection to confirmation of
23 the plan.

24

25 ¹⁰ At the hearing before the Panel, counsel for Burns argued
26 that she attempted to offer proof on valuation of Richard's
27 claims. We have examined the transcript of the August 26, 2005,
28 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.

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

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

24 Deborah asserts that the bankruptcy court's ruling on the
25 motions to convert, dismiss or appoint trustee were interlocutory,
26 and because Burns did not immediately either appeal, or move for
27 leave to appeal, the court's July 15, 2005, oral ruling denying
28 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

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

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

11 The grounds for Burns' dismissal/conversion/trustee theory
12 can be assembled from the arguments made in various pleadings
13 filed by Burns and Richard during the pendency of the case.

14 Patching those contentions together, Burns asserts that:

- 15 a. Deborah filed the chapter 11 case "solely" to hamper and
16 delay Ms. Burns' ability to collect her judgment.
- 17 b. Deborah is an abusive serial filer, having previously
18 filed two petitions under chapter 13, one of which was
19 converted to 11, and all of which were dismissed.
- 20 c. Deborah received large sums from Richard prepetition,
21 but failed to apply them to the debts for which they
22 were proffered.
- 23 d. Deborah only earns \$309 per week in child support and
24 cannot explain how she will pay her creditors.
- 25 e. Deborah failed to list all known creditors in her
26 schedules.
- 27 f. Deborah failed to provide accurate testimony regarding
28 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.

1 a. Good Faith and Conversion/Dismissal.

2 The Code provides in § 1112(b) that:

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

12 This section details ten nonexclusive reasons which may justify
13 dismissal or conversion. None of these grounds are precisely
14 implicated in this case. However, the Ninth Circuit has ruled
15 that a debtor's lack of good faith in filing a chapter 11 petition
16 can constitute grounds for dismissal of the case under § 1112(b).
17 Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1187 (9th Cir.
18 2000).

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

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

32 1. The debtor has few or no unsecured creditors.

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

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

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

5 5. There is no possibility of reorganization.

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

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

8 Burns repeatedly notes that Deborah filed the chapter 11
9 petition to thwart Burns' sheriff sale of Deborah's claims against
10 Richard. In support of her argument that this evidences bad
11 faith, Burns, through her joinder in Richard's motion, cites four
12 cases. Of these four, only one, Marsch v. Marsch (In re Marsch),
13 36 F.3d 825, 828-29 (9th Cir. 1994), is binding on this Panel.

14 However, Marsch notes that where a debtor has sufficient assets to
15 satisfy a judgment debt, it may be improper for that debtor to use
16 a chapter 11 petition solely to delay collection of that judgment.

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

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

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

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

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

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

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

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

12

13 b. Appointment of the Trustee.

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

16 At any time after the commencement of the case
17 but before confirmation of a plan, on request
18 of a party in interest or the United States
19 Trustee, and after notice and a hearing, the
20 court shall order the appointment of a Trustee

21 (1) for cause, including fraud, dishonesty,
22 incompetence, or gross mismanagement of the
23 affairs of the debtor by current management,
24 either before or after the commencement of the
25 case, or similar cause, but not including the
26 number of holders of securities of the debtor
27 or the amount of assets or liabilities of the
28 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.

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

1 discretion. Although the statute speaks in the imperative, the
2 court explained that, even if cause is shown, under the abuse of
3 discretion standard, the bankruptcy court may decline to appoint a
4 trustee based upon practical considerations. In re Lowenschuss,
5 171 F.3d at 685. Accord, In re Sharon Steel Corp., 871 F.2d 1217,
6 1225 (3d Cir. 1989); Comm. of Dalkon Shield Claimants v. A.H.
7 Robins Co., Inc., 828 F.2d 239 (4th Cir. 1987).

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

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

25

26 ¹¹ Burns has never actually invoked § 1104(a). Richard's
27 original motion to dismiss or convert did not request appointment
28 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.

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

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

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

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

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

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

15 **CONCLUSION**

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

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