NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. AZ-10-1160-BaPaJu
	)	
SHIRLENE FANT RAND and NEIL RAND,	)	Bk. No. 07-06801
Debtors.	)	
SHIRLENE FANT RAND; NEIL RAND,	)	
Appellants,	)	
v.	)	M E M O R A N D U M[1]
PORSCHE FINANCIAL SERVICES, INC.,	)	
Appellee.	)	

Argued and Submitted on October 22, 2010
at Phoenix, Arizona

Filed - December 7, 2010

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

Honorable Randolph J. Haines, Bankruptcy Judge, Presiding

Appearances: Appellant Shirlene Fant Rand argued pro se. John G. Stestak, Jr. of Jennings, Strouss & Salmon, PLC argued for Appellee Porsche Financial Services, Inc.

Before: BAUER,[2] PAPPAS and JURY, Bankruptcy Judges.

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[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

[2] The Honorable Catherine E. Bauer, United States Bankruptcy Judge for the Central District of California, sitting by designation.

This appeal arises from the bankruptcy court's order dismissing Debtors' case for cause pursuant to 11 U.S.C. § 1112(b).[3] We AFFIRM the bankruptcy court's dismissal of the case.

STATEMENT OF FACTS

On December 13, 2007, individual chapter 11 debtors Shirlene Fant Rand and Neil Rand ("Debtors") filed a pro se chapter 11 petition. Debtors' bankruptcy filing was prompted by multiple sets of state court litigation resulting in judgments in favor of creditors. As a result of the litigation, Debtors were subject to wage garnishment and had several judicial liens attached to their home.

Shortly after filing their petition, Debtors sought two orders for relief from the automatic stay to pursue: (1) an appeal against unsecured creditor City of Glendale (the "City") for alleged claims of wrongful eviction, and (2) remanded state court claims against unsecured creditor Porsche Financial Services, Inc. ("PFS") for trespass and civil rights violations.[4]

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[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

[4] The state court litigation against PFS arose from a dispute over a Porsche vehicle acquired by Debtors and financed by PFS. The lawsuit against PFS was for wrongful repossession, trespass, and civil rights violations. PFS filed a counterclaim for a deficiency judgment and attorneys' fees. At the time Debtors' chapter 11 petition was filed, the Arizona Court of Appeals had: (1) affirmed PFS' motion for summary judgment on its counterclaim and attorneys' fees, and (2) reversed and remanded on the trespass and civil rights claims. Pursuant to the bankruptcy court's order for stay relief, the case was tried to a jury and a verdict was rendered in favor of PFS on all counts.

The bankruptcy court granted relief from stay to pursue the above claims for the benefit of the estate. Debtors lost on both matters and increased judgments of attorneys' fees and costs were entered against Debtors.

Debtors have no ongoing business operations and have a negative projected disposable income of $406. Debtors' only assets are their wholly exempt homestead property with a current market value of $100,000, a civil default judgment against Interstate Recovery of Arizona in the amount of $169,000,[5] and "certain litigation claims against third parties." Debtors listed one secured claim held by Bank of the West on their vehicle, a 2005 Hummer, a priority unsecured IRS claim for $97,000, and general unsecured claims totaling $261,902.

Debtors filed an amended disclosure statement and plan of reorganization on December 9, 2009. Debtors' plan of reorganization proposed to "cram down" and pay off the secured claim on their vehicle and provided for no disbursement to unsecured creditors. The disclosure statement was approved by the bankruptcy court on February 23, 2010.

A hearing on plan confirmation came before the bankruptcy court on March 31, 2010. PFS filed an objection to plan confirmation, and the City orally joined PFS' objection.

Debtors subsequently appealed that verdict in order to preserve their claim.

[5] Interstate Recovery of Arizona was the repossession company used by PFS to recover Debtors' Porsche vehicle. Debtors have not collected on the default judgment and did not provide the bankruptcy court with any substantial evidence as to the status of collecting those funds.

At the hearing, the bankruptcy court found that the proposed plan failed to meet all of the criteria for confirmation set forth under § 1129(a). First, Debtors failed to file a ballot report that evidenced acceptance of the Plan by an impaired class, as required by § 1129(a)(10). Second, the bankruptcy court found that Debtors failed to satisfy §1129(a)(7), the best interests of the creditors test, by failing to allocate all of the non-exempt assets, or value thereof, to payment of unsecured claims. Third, the bankruptcy court noted a potential issue with § 1129(a)(9), which requires payment in full of all claims entitled to administrative priority. Last, the court addressed PFS' objection under § 1129(a)(15), requiring that individual debtors pay the value of the projected disposable income to objecting unsecured creditors.

After thoroughly discussing the above issues, the bankruptcy court denied confirmation of the plan based on § 1129(a)(10) and (a)(7). After denying confirmation, the bankruptcy court noted that the case had been filed in 2007 and had "been pending a long time." As a result, the court set a non-evidentiary hearing for April 29, 2010 on "why the case should not be dismissed for failure to confirm a plan within a reasonable time." Hr'g Tr. 24:9-13, March 31, 2010. The court invited the parties to brief the issues surrounding plan confirmation.

Prior to the April 29th hearing, Debtors filed an amended ballot report that evidenced acceptance of the plan by their sole secured creditor, Bank of the West, satisfying

§ 1129(a)(10). Debtors filed a Memorandum in Support of Debtors' Amended Plan and unsecured creditor PFS filed an Opposition to Debtors' Chapter 11 Plan and Request for Dismissal of the Case.

In their memorandum, Debtors argued that their plan met the criteria set forth under §§ 1129(a)(10), and (a)(7). As discussed above, their amended ballot report evidenced acceptance of the plan by an imparied class, curing any deficiency under § 1129(a)(10). Debtors also asserted that their plan satisfied § 1129(a)(7) by paying their unsecured creditors no less then they would receive under their Chapter 7 Liquidation Analysis. However, Debtors did not file an amended plan in order to provide for treatment of their non-exempt assets under the plan (i.e., the default judgment and "certain litigation claims against third parties"). In addition, Debtors did not address the bankruptcy court's concern with § 1129(a)(9), regarding PFS' claim for administrative status on its post-petition attorneys' fees.

At the April 29th hearing, Debtors proved they had correctly calculated their disposable income as required by § 1129(a)(15). However, after argument from the parties, the bankruptcy court found that the plan still failed to meet the best interests test under § 1129(a)(7). In addition, the court noted that the plan did not satisfy § 1129(a)(3), as the plan had not been proposed in good faith "and for that reason would not be confirmable." Hr'g. Tr. 28:6-7, April 29, 2010. The court reasoned:

It is clear to me that the plan has not been proposed in

> good faith. What the Debtors are seeking to do here is on the one hand achieve a result that is no different for unsecured creditors than would have been [in] a chapter 7 liquidation, but that achieves for the Debtors effectively results that could not have been achieved in a chapter 7.

Hr'g. Tr. 26:15-25, 27:1, April 29, 2010.

The bankruptcy court dismissed the case for cause under § 1112(b), finding that there was (1) a failure to confirm a plan within a reasonable time, and (2) a continuing loss to or diminution of the bankruptcy estate and an absence of any reasonable likelihood of rehabilitation. Hr'g Tr. 28:7-15, April 29, 2010.[6] The order dismissing the case was entered on April 30, 2010. Debtors filed a timely notice of appeal on May 6, 2010.

JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (L). We have jurisdiction under 28 U.S.C. § 158.

ISSUE

Whether the bankruptcy court abused its discretion in dismissing Debtors' chapter 11 bankruptcy case for cause under

[6] Debtors adamantly assert that PFS failed to meet its burden to prove "cause" by a preponderance of the evidence. Upon review of the record, it is clear that the bankruptcy court was acting sua sponte pursuant to § 105, as the court independently set the order to show cause at the March 31st hearing. See Tennant v. Rojas (In re Tennant), 318 B.R. 860, 869 (9th Cir. BAP 2004)(finding § 105(a) makes "crystal clear" the court's power to act sua sponte to dismiss a bankruptcy case); see also In re Greene, 127 B.R. 805, 807-08 (Bankr. N.D. Ohio 1991).

§ 1112(b).[7]

STANDARD OF REVIEW

We review the decision to dismiss a case for abuse of discretion. Price v. U.S. Trustee (In re Price), 353 F.3d 1135, 1338 (9th Cir. 2004)(citing Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1223 (9th Cir. 1999)). We follow a two-part test to determine objectively whether the bankruptcy court abused its discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). If we determine that the court erred under either part of the test, we must reverse for an abuse of discretion. Id. First, we "determine de novo whether the [bankruptcy] court identified the correct legal rule to apply to the relief requested." Id. Second, we examine the bankruptcy court's factual findings under the clearly erroneous standard. Id. at 1262. We must affirm the bankruptcy court's factual findings unless those findings are "(1) 'illogical,' (2) 'implausible,' or (3) without 'support in inferences that may be drawn from the facts in the record.'" Id.

DISCUSSION

The Bankruptcy Court Did Not Abuse Its Discretion in Dismissing Debtors' Bankruptcy Case for Cause Under § 1112(b).

The statutory authority for dismissal of a chapter 11

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[7] While Debtors did not appeal the March 31, 2010 order denying confirmation, an order denying confirmation of a chapter 11 plan is interlocutory, and so it merges into the final order dismissing the case. Lievsay v. W. Fin. Sav. Bank (In re Lievsay), 118 F. 3d 661, 662 (9th Cir. 1997)(citing Nicholes v. Johnny Appleseed (In re Nicholes), 184 B.R. 82, 86 (9th Cir. BAP 1995)); see Munoz v. Small Bus. Admin., 644 F.2d 1361, 1364 (9th Cir. 1981).

petition is found in § 1112(b), which provides that ". . . the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, [for] cause." A non-exclusive list of what constitutes "cause" is found in § 1112(b)(4), but the court should "consider other factors as they arise, and use its equitable powers to reach the appropriate result in individual cases." Pioneer Liquidating Corp. v. U.S. Trustee, (In re Consol. Pioneer Mortg. Entities), 248 B.R. 368, 375 (9th Cir. BAP 2000)(finding that "the enumerated causes [in § 1112(b)] are not exhaustive, and 'the court will be able to consider other factors as they arise, and to use its equitable powers to reach an appropriate result in individual cases.'"(citing, in part, H.R. REP. NO. 95-595, at 405-06 (1977), reprinted in 1978 U.S.C.C.A.N. 6362)). The bankruptcy court has broad discretion in determining what constitutes "cause" adequate for dismissal under § 1112(b). Id.; see also Chu v. Syntron Bioresearch, Inc. (In re Chu), 253 B.R. 92, 95 (S.D. Cal. 2000).

Debtors contend that the bankruptcy court abused its discretion in dismissing their case because the court did not apply the proper legal standard and failed to employ proper procedures in arriving at its decision.

As discussed below, the bankruptcy court did not abuse its discretion when it dismissed Debtors' case for cause based on: (1) a continuing loss to or diminution of the bankruptcy estate and an absence of any reasonable likelihood of rehabilitation; and (2) the failure to confirm a plan within a reasonable time.

1. "Cause" Existed for Dismissal Under Section 1112(b)

A. Section 1112(b)(4)(A)

There are two elements to show the existence of cause for dismissal under § 1112(b)(4)(A): (1) a substantial and continuing loss to or diminution of the estate, and (2) the absence of a reasonable likelihood of rehabilitation. Section 1112(b)(4)(A) effectuates the purpose of § 1112(b)(1), which is "to preserve estate assets by preventing the debtor in possession from gambling on the enterprise at the creditors' expense when there is no hope of rehabilitation." Loop Corp. v. U.S. Trustee, 379 F.3d 511, 516 (8th Cir. 2004)(quoting In re Lizeric Realty Corp., 188 B.R. 499, 503 (Bankr. S.D. N.Y. 1995)).

To determine whether there is continuing loss to, or diminution of, the estate, the bankruptcy court must look beyond financial statements and fully evaluate the present condition of a debtor's estate. In re Motel Prop., Inc., 314 B.R. 889, 894 (Bankr. S.D. Ga. 2004)(citing In re Moore Constr., Inc., 206 B.R. 436, 437-38 (Bankr. N.D. Tex. 1997)).

In this case, the bankruptcy court found that Debtors' estate was subject to continuing loss from their commitment to the pursuit of multiple state court claims, which have provided no benefit to the estate. Notwithstanding a pre-petition deficiency judgment in favor of PFS, judicial affirmance of the deficiency judgment by the Arizona Court of Appeals, and a final post-petition state court judgment against Debtors awarding PFS $143,498.99 in attorneys' fees and costs, Debtors have filed yet another appeal. The bankruptcy court found this behavior

represented a misuse of the resources of the estate (and the court) and potentially exposed the estate to substantial post-petition claims by the victims of their misplaced litigation tactics. In addition, the record establishes that there has been a diminution of the estate as Debtors' homestead property has, by Debtors' own estimation, declined in value approximately 50% since the outset of the case.

Debtors' argument that they were "very reasonable in terms of costs" by representing themselves in their state court litigation efforts is not convincing. There are costs associated with litigation beyond legal representation, such as filing fees and court-reporter costs, the burden of which fell on the estate.[8] In addition, through their failed litigation efforts, Debtors have substantially increased the amount owed to certain unsecured creditors.[9] Furthermore, because the

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[8] In their Opening Brief, Debtors insist that no evidence has been presented, by way of monthly operating reports or otherwise, to prove such claims. However, Debtors themselves explained at oral argument that pursuing the appeal would result in additional cost to the estate. Hr'g Tr. at 24:2-14, April 29, 2010. Also, a cursory review of the record revealed at least one approximate payment of $400 for court-reporter costs associated with taking depositions, listed on Debtors' April 2008 Monthly Operating Report.

[9] In their Opening Brief, Debtors assert that no evidence has been presented to prove that any expenses associated with the litigation would consume assets that would otherwise be available to unsecured creditors should they ultimately not prevail on the state court claims. However, this reasoning is misplaced. As the bankruptcy court correctly pointed out, Debtors cannot maintain that because they have no income to pay their unsecured creditors, they have a right to continue to incur more post-petition debt at their creditors' expense.

chapter 11 proceedings have been delayed over two years to allow Debtors to unsuccessfully pursue state court litigation, significant administrative fees and costs have been expended that otherwise could have been utilized to satisfy Debtors' obligations to their creditors.

The issue of rehabilitation for purposes of § 1112(b)(4)(A) "is not the technical one of whether the debtor can confirm a plan, but, rather, whether the debtor's business prospects justify continuance of the reorganization effort." In re Wallace, No. 09-20496-TLM, 2010 Bankr. LEXIS 261, at *13-14 (Bankr. D. Idaho Jan. 26, 2010)(citations omitted).

The record supports the bankruptcy court's finding that there was little likelihood that Debtors could rehabilitate their estate. Debtors presented no cogent outline of a proposed reorganization or restructure. Debtors are not engaged in ongoing business operations and claim a negative disposable income of $406. Debtors' primary assets are their wholly exempt homestead property and "certain litigation claims against third parties." As discussed above, these litigation claims have failed to benefit the estate, but instead have substantially increased the amount owed to unsecured creditors. Debtors also claim a civil default judgment in the amount of $169,000; however, Debtors have failed to present any evidence that they are actively making an effort to recover those funds. Under no circumstances does the plan provide for distribution to Debtors' unsecured creditors, including PFS. Debtors' entire proposed reorganizational plan consists of a monthly payment of $325 to their secured creditor, Bank of the West, in order to pay off a

"crammed down" secured car loan.

The Panel has reviewed the record and none of these findings are clearly erroneous. Under these circumstances, we believe that the bankruptcy court did not abuse its discretion in dismissing Debtors' bankruptcy case for cause pursuant to § 1112(b)(4)(A).

B. Failure to Confirm a Plan Within a Reasonable Time

As stated above, the bankruptcy court has broad discretion in determining what constitutes "cause" adequate for dismissal under § 1112(b). Consol. Pioneer Mortg. Entities, 248 B.R. at 375; see also Chu, 253 B.R. at 95. "Recognizing that repeatedly unsuccessful attempts at confirmation are likely to generate enormous administrative costs, often without increasing the likelihood of success, § 1112(b) recognizes the court's ability to curtail the process through the ultimate conversion or dismissal of the case." 3 Collier Bankruptcy Manual ¶ 1112.04[4][l] (3d ed. rev. 2010). The bankruptcy court has discretion to establish a final deadline for filing a confirmable plan of reorganization to ensure that the process does not outlive the likelihood of its usefulness. Id. As the Seventh Circuit has explained, "bankruptcy courts are given a great deal of discretion to say when enough is enough." In re Woodbrook Assocs., 19 F.3d 312, 322 (7th Cir. 1994). Where reorganization or rehabilitation is unrealistic or futile, a chapter 11 case may be dismissed or converted even at its outset. See In Re Johnston, 149 B.R. 158, 162 (9th Cir. BAP 1992).

In this case, nearly two and a half years passed between

the filing of the bankruptcy and its dismissal. During the long pendency of the case, Debtors were given ample opportunity to propose a confirmable plan. At the conclusion of the March 31st confirmation hearing, the bankruptcy court issued an order and notice of hearing for a determination as to whether the case should be dismissed for failure to confirm a plan within a reasonable time. Due to persistent deficiencies in Debtors' plan, the bankruptcy court concluded at the April 29th hearing that cause existed for dismissal, as the plan still failed to satisfy the confirmation requirements of § 1129(a). For the reasons explained below, the bankruptcy court did not abuse its discretion in finding that cause existed to dismiss Debtors' chapter 11 bankruptcy under § 1112(b) for failure to confirm a plan within a reasonable time.

a. The Bankruptcy Court Properly Denied Plan Confirmation at the March 31st Hearing.

Bankruptcy courts have an affirmative duty to ensure that the plan satisfies all sixteen § 1129(a) requirements for confirmation.[10] Liberty Nat'l Enters. v. Ambanc La Mesa Ltd. P'ship (In re Ambanc La Mesa Ltd. P'ship), 115 F.3d 650, 653 (9th Cir. 1997)(citing In re L & J Anaheim Assocs., 995 F.2d 940, 942 (9th Cir. 1993)). Therefore, if the record does not include sufficient evidence to show that all requirements of § 1129(a) are met, confirmation must be denied.

There is ample evidence in the record to support the bankruptcy court's denial of plan confirmation at the March 31st

[10] Section 1129(a) provides: "The court shall confirm a plan only if all of the following requirements are met."

hearing. First, it is undisputed that Debtors failed to file a ballot report that evidenced acceptance of the plan by an impaired class, as required by § 1129(a)(10). Second, as discussed in more detail below, the Debtors' plan failed to satisfy the best interests of the creditors test because it did not allocate all of their non-exempt assets, or the value thereof, to payment of unsecured claims, as required by § 1129(a)(7).[11]

b. Debtors Failed to Show Cause Why the Case Should Not be Dismissed for Failure to Confirm a Plan Within a Reasonable Time

The record shows the bankruptcy court gave Debtors ample opportunity to take whatever steps were necessary to get their plan in a confirmable posture. Debtors were invited to file briefs on those issues impeding plan confirmation and the issues were thoroughly discussed in two separate hearings before the bankruptcy court. While Debtors filed an amended ballot report to cure the deficiency under § 1129(a)(10) and proved they had accurately calculated their disposable income to satisfy § 1129(a)(15), multiple issues remained and the bankruptcy court was left with serious doubts about the plan's confirmability. As illustrated below, Debtors failed to demonstrate that they had a reasonable likelihood of confirming a plan within a reasonable period of time.

[11] Additionally, the bankruptcy court explicitly recognized potential issues under § 1129(a)(9), payment in full of all claims entitled to administrative priority, and § 1129(a)(15), requirement that individual debtors pay the value of their projected disposable income to objecting unsecured creditors.

(1) Best Interests of the Creditors Test

The best interests of the creditors test requires that each objecting creditor in an impaired class receive at least as much as 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, 591 (9th Cir. BAP 1998). Section 541 instructs the liquidation inquiry, guiding what should be included in the estate. See Forbes v. Forbes (In re Forbes), 215 B.R. 183, 190 (8th Cir. BAP 1997)(discussing the "best interests" test under a chapter 13 plan); see In re Gibson, 415 B.R. 735, 737 (Bankr. D. Ariz. 2009)(noting nearly identical language is found under the "best interests" tests in chapter 11 and chapter 13). Section 541(a)(1) specifically includes as property of the estate, "all legal and equitable interests of the debtor in property." This phrase has been interpreted as sufficiently broad to include causes of action, which are in existence as of the petition date. Forbes, 215 B.R. at 190. Moreover, the "conditional, future, speculative, or equitable nature of an interest does not prevent it from being property of the bankruptcy estate." Affiliated Computer Sys., Inc. v. Sherman (In re Kemp), 52 F.3d 546, 550 (5th Cir. 1995), quoted in Brooks v. Brooks, No. 2:09-cv-01514-MCE, 2010 U.S. Dist. LEXIS 33193, at *9-10 (E.D. Cal. Apr. 5, 2010); see also In re Parker St. Florist & Garden Ctr., 31 B.R. 206, 208 (Bankr. D. Mass. 1983)(finding the debtor can propose a plan taking into account the possible results of litigation).

At the March 31st and April 29th hearings, the bankruptcy

court found that Debtors' proposed plan did not satisfy the best interests test because Debtors had failed to allocate all of their non-exempt assets, or the value thereof, to payment of unsecured claims. Specifically, Debtors' proposed plan failed to allocate any portion of the $169,000 civil default judgment against Interstate Recovery, should it be collected, or any recovery from the claims against PFS, should Debtors recover from their ongoing state litigation.

Despite the fact that the bankruptcy court had apprised Debtors of the specific deficiencies in the plan regarding § 1129(a)(7), Debtors failed to amend the plan to address the bankruptcy court's concerns. Debtors instead relied, as they do in briefs presented to this Panel, on the Liquidation Analysis set forth as Exhibit B in their Disclosure Statement. Debtors assert that because under their Liquidation Analysis unsecured creditors would receive nothing, no distribution to unsecured creditors was required for the plan to satisfy the best interests test of § 1129(a)(7).

While a plan that provides no distribution to unsecured creditors may satisfy the best interests test, as applied in this case, Debtors' argument is flawed. Debtors mistakenly rely on a Liquidation Analysis that fails to include the $169,000 civil default judgment or the potential recovery from claims against PFS, which are "assets," however contingent, that would be distributed in a chapter 7 liquidation. Therefore, the bankruptcy court did not err in finding that Debtors' plan

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failed to satisfy § 1129(a)(7).[12]

(2) Administrative Priority Status of PFS' Claim

Section 1129(a)(9)(A) requires that holders of administrative claims be paid "cash equal to the allowed amount of such claim" on the "effective date of the plan," unless the holder of a particular claim agrees to different treatment. PFS asserts that the post-petition state court judgment against Debtors for attorneys' fees and costs should have administrative priority. If so granted, the plan would have to provide for payment of PFS' claim in order to satisfy § 1129(a)(9).

At the March 31st hearing, the bankruptcy court warned Debtors that determination of the administrative status of PFS' claim would have "a significant bearing" on "the ability ever to confirm a plan." Hr'g Tr. 26:3-7, March 31, 2010. Debtors chose not to comply with the bankruptcy court's explicit request to provide authorities regarding this issue. Notwithstanding Debtors' efforts during oral argument to show that PFS was not entitled to administrative priority status under the plan, the bankruptcy court was not provided enough evidence to make findings on this issue and was therefore unable to determine whether the plan satisfied § 1129(a)(9).

The bankruptcy court did not err in leaving this issue undecided. As counsel for PFS expressed, additional proceedings

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[12] In Debtors' briefs and during oral argument, they also mistakenly look to their disposable income to support their assertion that the proposed plan satisfied the best interests test. As explained by the bankruptcy court, a discussion of disposable income is not relevant to a discussion of the best interests test of § 1129(a)(7).

would likely be required to determine the administrative priority status of PFS' claim, causing further delay in plan confirmation and expending more assets of the estate toward settling disputes rather than satisfying creditors.[13]

(3) Lack of Good Faith in Proposing the Plan

The "good faith" requirement of section 1129(a)(3) 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); see also Sec. Farms v.

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[13] The parties dispute the treatment of PFS' claims for attorneys' fees and costs under the plan. PFS argues that a condition of the bankruptcy court's granting relief from stay was if Debtors lost, they would be required to account for payment in full of PFS' attorneys' fees and costs as an administrative claim under the plan. In response, Debtors argue the order only required treatment of PFS' claims under the plan, and since PFS is a general unsecured creditor it would receive nothing under the plan.

In the alternative, PFS argues that even if the order is unclear, it is entitled to administrative priority on its post-petition attorneys' fees and costs as a matter of law. This is because Debtors voluntarily chose to "return to the fray" and pursue multiple sets of litigation post-petition. PFS claims that this is analogous to the Ninth Circuit's decision in Boeing N. Am., Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018, 1024-27 (9th Cir. 2005). In Ybarra, the Ninth Circuit held that a debtor remains liable for post-petition attorneys' fees awarded to the opposing party when the debtor "voluntarily 'pursued a whole new course of litigation,' commenced litigation, or 'returned to the fray' voluntarily." Id.

Debtors argue that PFS' post-petition fees are not entitled to administrative priority because the claims against PFS arose pre-petition and constituted one contiguous set of litigation, rather than separate claims as in Ybarra.

Gen. Teamsters, Warehousemen & Helpers Union, Local 890 (In re Gen. Teamsters, Warehousemen & Helpers Union, Local 890), 265 F.3d 869, 877 (9th Cir. 2001). The bankruptcy judge is in the best position to assess the good faith of the parties' proposals. Pac. First Bank ex rel. RT Capital Corp. v. Boulders on the River (In re Boulders on the River), 164 B.R. 99, 104 (9th Cir. BAP 1994); see also In re Madison Hotel Assocs., 749 F.2d 410, 425 (7th Cir. 1984). Part of the good faith analysis is that the plan must deal with the creditors in a fundamentally fair manner. In re Marshall, 298 B.R. 670, 676 (Bankr. C.D. Cal. 2003); see, e.g., Jorgensen v. Fed. Land Bank (In re Jorgensen), 66 B.R. 104, 108-09 (9th Cir. BAP 1986). Essentially, the good faith analysis involves a sense that the debtor is trying to maximize the return to the creditors within the confines of the rules. See Gen. Teamsters Warehousemen & Helpers Union, Local 890, 265 F.3d at 877.

At the conclusion of the April 29th hearing, the bankruptcy court found that the plan failed to satisfy § 1129(a)(3), as it had not been proposed in good faith. The bankruptcy court explained:

> The bad faith in this plan is effectively [that] the Debtors are attempting to use chapter 11 to be able to pursue a claim where the state court would say if you lose, you're liable for attorneys' fees and yet the Debtors effectively want to use chapter 11 to be able to pursue that claim without the risk of liability for those attorneys' fees.
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> You may not use a reorganization case to achieve for creditors a result that's no better than [what] they would get in a chapter 7 and yet benefits the debtors more [than they are] able to in a chapter 7. That is bad faith.

Hr'g. Tr. 27:11-18, 28:2-7, April 29, 2010.

In their Opening Brief, Debtors assert that the bankruptcy court erred in finding that the plan was not proposed in good faith. To support this contention, Debtors refer to the fact that they filed a proposed disclosure statement and plan, filed all monthly operating reports, paid all quarterly fees to the United States Trustee, and disclosed all claims in the Disclosure Statement, as well as the intent to pursue litigation of claims involving post-petition transactions. Debtors insist that any actions or omissions in connection with the litigation involving PFS were inadvertent or of no harm to the estate.

Notwithstanding Debtors' reverence for form, the substance of this case indicates that the bankruptcy court's finding of bad faith was not clearly erroneous. The bankruptcy court found that Debtors' purpose in proposing the plan was not to effectuate a reorganization of their estate, but was an improper attempt to use their chapter 11 bankruptcy to pursue their state court litigation against PFS risk-free.

The record establishes that Debtors pursued the state court claims against PFS and the $169,000 civil default judgment on behalf of themselves, rather than for the benefit of the estate. First, Debtors failed to allocate any of the projected amounts to be recovered on the civil default judgment or their claims against PFS to creditors in their proposed plan. Second, Debtors have provided no evidence of their efforts to collect the civil default judgment, other than stating they plan to contact an insurance company to inquire about potential collection. Third, despite previous assertions that claims would provide a "substantial benefit to the estate," at the

March 31st hearing, Debtors asserted their mistaken belief that any personal injury judgment recovered would be exempt from collection by their creditors.

As evidence of their reorganizational purpose, Debtors point out that Bank of the West, the sole secured creditor, will be paid under the plan in accordance with an out-of-court work-out agreement. While this may be true, Debtors have purported to pay their unsecured creditors nothing under the plan under any circumstance. In light of the totality of the circumstances, a plan that purports to accomplish only the payment of a "crammed down" secured car loan does not sufficiently evidence a reorganizational purpose as to overcome the bad faith established in the record.

It is clear that Debtors are not dealing with the creditors in a fundamentally fair manner under the plan. Debtors enjoyed the benefit of chapter 11 protection for nearly two and a half years. While failing to confirm a plan, Debtors were afforded the opportunity to litigate, while forcing their creditors to carry all of the risk. This period was particularly burdensome for PFS, as it incurred substantial attorneys' fees and costs in defense of Debtors' persistent, and unsuccessful, litigation efforts. If PFS' judgment is affirmed on appeal, as the bankruptcy court suspects it will be, PFS along with the other unsecured creditors will have received no benefit from the bankruptcy but will have suffered additional cost and delay in the enforcement of their rights. Therefore, the bankruptcy court did not err in finding Debtors' plan was not proposed in good faith as required under § 1129(a)(3).

2. Section 1112(b)(2) Does Not Prevent Dismissal

Debtors repeatedly assert in their Opening Brief that the bankruptcy court abused its discretion in dismissing the case because it failed to apply the discretionary limit of § 1112(b)(2), which states that the bankruptcy court shall not convert or dismiss a case if: (1) there is a reasonable likelihood that a plan will be confirmed within a reasonable period of time, (2) the cause for dismissal or conversion is something other than a continuing loss or diminution of the estate with a lack of reasonable likelihood of rehabilitation; and (3) there is reasonable justification for a debtor's act or omission and the act or omission will be cured within a reasonable period of time fixed by the court.

However, Debtors incorrectly applied § 1112(b)(2) to their case. Section 1112(b)(2) does not require the bankruptcy court to give Debtors infinite opportunities to correct their acts or omissions before dismissing; rather, the discretionary limit of § 1112(b)(2) only applies if all of the above factors are met. See 7 Collier on Bankruptcy ¶ 1112.05 (16th ed. 2010); see also In re Kent, No. 2:07-bk-03238-SSC, 2008 Bankr. LEXIS 4332, at *15-16 n.5 (Bankr. D. Ariz. Sept. 23, 2008); In re Fisher, 2008 Bankr. LEXIS 1247, at *14 (Bankr. D. Mont. Apr. 15, 2008). The bankruptcy court found cause for dismissal based on (1) an absence of a reasonable likelihood that a plan would be confirmed within a reasonable period of time, and (2) a substantial or continuing loss or diminution of the estate and the absence of a reasonable likelihood of rehabilitation. Accordingly, the bankruptcy court was not limited by

§ 1112(b)(2) and did not abuse its discretion in dismissing the case without allowing Debtors another opportunity to cure their acts or omissions.

3. Dismissal is in the Best Interests of the Creditors and the Estate

Upon determining cause exists and that there are no unusual circumstances to negate dismissal or conversion, the bankruptcy court must engage in a "balancing test" to determine whether appointment of a Chapter 11 Trustee, conversion, or dismissal is "in the best interests of creditors and the estate." § 1112(b)(1); see In re Staff Inv. Co., 146 B.R. 256, 260 (Bankr. E.D. Cal. 1992).[14]

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[14] Courts have looked to multiple factors to determine which action is in the best interest of the creditors and the estate. Collier identifies ten such factors:

> (1) Whether some creditors received preferential payments, and whether equality of distribution would be better served by conversion rather than dismissal.
> (2) Whether there would be a loss of rights granted in the case if it were dismissed rather than converted.
> (3) Whether the debtor would simply file a further case upon dismissal.
> (4) The ability of the trustee in a chapter 7 case to reach assets for the benefit of creditors.
> (5) In assessing the interest of the estate, whether conversion or dismissal of the estate would maximize the estate's value as an economic enterprise.
> (6) Whether any remaining issues would be better resolved outside the bankruptcy forum.
> (7) Whether the estate consists of a "single asset."
> (8) Whether the debtor had engaged in misconduct and whether creditors are in need of a chapter 7 case to protect their interests.
> (9) Whether a plan has been confirmed and whether any property remains in the estate to be administered.
> (10) Whether the appointment of a trustee is desirable to supervise the estate and address possible environmental and safety concerns.

While both PFS and the City advocated for dismissal, Debtors alluded in their Opening Brief that if cause was found under § 1112(b), a chapter 11 trustee should have be appointed rather than dismissal of the case. However, where there are few if any assets to administer, and the estate appears to be administratively insolvent, dismissal would often be the better course. In this case, Debtors' main assets consist of the $169,000 uncollected civil default judgment and Debtors' wholly exempt homestead. As this is essentially a no asset case, and given the fact that continuing in a chapter 11 proceeding would require paying significant administrative fees and costs that would otherwise be utilized to satisfy the Debtors' obligations to their creditors, it did not call for the extraordinary remedy of appointing a chapter 11 trustee. Especially in light of the request for dismissal by PFS and the City, the two largest creditors, and that no oppositions were filed by any other creditors, the bankruptcy court did not err in dismissing the case.

CONCLUSION

For the foregoing reasons, we AFFIRM the bankruptcy court's order dismissing Debtors' chapter 11 case.

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7 Collier on Bankruptcy ¶ 1112.04[7] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed., 2010).