

DEC 07 2010

SUSAN M SPRAY, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. AZ-10-1160-BaPaJu
)
 SHIRLENE FANT RAND and) Bk. No. 07-06801
 NEIL RAND,)
 Debtors.)
)
 SHIRLENE FANT RAND;)
 NEIL RAND,)
 Appellants,)
)
 v.) M E M O R A N D U M¹
)
 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.

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.

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

5
6 **STATEMENT OF FACTS**

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

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

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

23 ⁴ The state court litigation against PFS arose from a
24 dispute over a Porsche vehicle acquired by Debtors and financed
25 by PFS. The lawsuit against PFS was for wrongful repossession,
26 trespass, and civil rights violations. PFS filed a counterclaim
27 for a deficiency judgment and attorneys' fees. At the time
28 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.

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

5 Debtors have no ongoing business operations and have a
6 negative projected disposable income of \$406. Debtors' only
7 assets are their wholly exempt homestead property with a current
8 market value of \$100,000, a civil default judgment against
9 Interstate Recovery of Arizona in the amount of \$169,000,⁵ and
10 "certain litigation claims against third parties." Debtors
11 listed one secured claim held by Bank of the West on their
12 vehicle, a 2005 Hummer, a priority unsecured IRS claim for
13 \$97,000, and general unsecured claims totaling \$261,902.

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

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

23 _____
24 Debtors subsequently appealed that verdict in order to preserve
25 their claim.

26 ⁵ Interstate Recovery of Arizona was the repossession
27 company used by PFS to recover Debtors' Porsche vehicle. Debtors
28 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.

1 At the hearing, the bankruptcy court found that the
2 proposed plan failed to meet all of the criteria for
3 confirmation set forth under § 1129(a). First, Debtors failed
4 to file a ballot report that evidenced acceptance of the Plan by
5 an impaired class, as required by § 1129(a)(10). Second, the
6 bankruptcy court found that Debtors failed to satisfy
7 §1129(a)(7), the best interests of the creditors test, by
8 failing to allocate all of the non-exempt assets, or value
9 thereof, to payment of unsecured claims. Third, the bankruptcy
10 court noted a potential issue with § 1129(a)(9), which requires
11 payment in full of all claims entitled to administrative
12 priority. Last, the court addressed PFS' objection under
13 § 1129(a)(15), requiring that individual debtors pay the value
14 of the projected disposable income to objecting unsecured
15 creditors.

16 After thoroughly discussing the above issues, the
17 bankruptcy court denied confirmation of the plan based on
18 § 1129(a)(10) and (a)(7). After denying confirmation, the
19 bankruptcy court noted that the case had been filed in 2007 and
20 had "been pending a long time." As a result, the court set a
21 non-evidentiary hearing for April 29, 2010 on "why the case
22 should not be dismissed for failure to confirm a plan within a
23 reasonable time." Hr'g Tr. 24:9-13, March 31, 2010. The court
24 invited the parties to brief the issues surrounding plan
25 confirmation.

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

1 § 1129(a)(10). Debtors filed a Memorandum in Support of
2 Debtors' Amended Plan and unsecured creditor PFS filed an
3 Opposition to Debtors' Chapter 11 Plan and Request for Dismissal
4 of the Case.

5 In their memorandum, Debtors argued that their plan met the
6 criteria set forth under §§ 1129(a)(10), and (a)(7). As
7 discussed above, their amended ballot report evidenced
8 acceptance of the plan by an impaired class, curing any
9 deficiency under § 1129(a)(10). Debtors also asserted that
10 their plan satisfied § 1129(a)(7) by paying their unsecured
11 creditors no less than they would receive under their Chapter 7
12 Liquidation Analysis. However, Debtors did not file an amended
13 plan in order to provide for treatment of their non-exempt
14 assets under the plan (i.e., the default judgment and "certain
15 litigation claims against third parties"). In addition, Debtors
16 did not address the bankruptcy court's concern with
17 § 1129(a)(9), regarding PFS' claim for administrative status on
18 its post-petition attorneys' fees.

19 At the April 29th hearing, Debtors proved they had
20 correctly calculated their disposable income as required by
21 § 1129(a)(15). However, after argument from the parties, the
22 bankruptcy court found that the plan still failed to meet the
23 best interests test under § 1129(a)(7). In addition, the court
24 noted that the plan did not satisfy § 1129(a)(3), as the plan
25 had not been proposed in good faith "and for that reason would
26 not be confirmable." Hr'g. Tr. 28:6-7, April 29, 2010. The
27 court reasoned:

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

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

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

6 The bankruptcy court dismissed the case for cause under
7 § 1112(b), finding that there was (1) a failure to confirm a
8 plan within a reasonable time, and (2) a continuing loss to or
9 diminution of the bankruptcy estate and an absence of any
10 reasonable likelihood of rehabilitation. Hr'g Tr. 28:7-15,
11 April 29, 2010.⁶ The order dismissing the case was entered on
12 April 30, 2010. Debtors filed a timely notice of appeal on
13 May 6, 2010.

14 JURISDICTION

15 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
16 §§ 1334 and 157(b)(2)(A) and (L). We have jurisdiction under
17 28 U.S.C. § 158.

18 ISSUE

19 Whether the bankruptcy court abused its discretion in
20 dismissing Debtors' chapter 11 bankruptcy case for cause under
21
22

23 ⁶ Debtors adamantly assert that PFS failed to meet its
24 burden to prove "cause" by a preponderance of the evidence. Upon
25 review of the record, it is clear that the bankruptcy court was
26 acting sua sponte pursuant to § 105, as the court independently
27 set the order to show cause at the March 31st hearing. See
28 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).

1 § 1112(b).⁷

2 **STANDARD OF REVIEW**

3 We review the decision to dismiss a case for abuse of
4 discretion. Price v. U.S. Trustee (In re Price), 353 F.3d 1135,
5 1338 (9th Cir. 2004)(citing Leavitt v. Soto (In re Leavitt),
6 171 F.3d 1219, 1223 (9th Cir. 1999)). We follow a two-part test
7 to determine objectively whether the bankruptcy court abused its
8 discretion. United States v. Hinkson, 585 F.3d 1247, 1261-62
9 (9th Cir. 2009). If we determine that the court erred under
10 either part of the test, we must reverse for an abuse of
11 discretion. Id. First, we “determine de novo whether the
12 [bankruptcy] court identified the correct legal rule to apply to
13 the relief requested.” Id. Second, we examine the bankruptcy
14 court’s factual findings under the clearly erroneous standard.
15 Id. at 1262. We must affirm the bankruptcy court’s factual
16 findings unless those findings are “(1) ‘illogical,’
17 (2) ‘implausible,’ or (3) without ‘support in inferences that
18 may be drawn from the facts in the record.’” Id.

19 **DISCUSSION**

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

22 The statutory authority for dismissal of a chapter 11
23

24 ⁷ While Debtors did not appeal the March 31, 2010 order
25 denying confirmation, an order denying confirmation of a chapter
26 11 plan is interlocutory, and so it merges into the final order
27 dismissing the case. Lievsay v. W. Fin. Sav. Bank (In re
28 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).

1 petition is found in § 1112(b), which provides that “. . . the
2 court shall convert a case under this chapter to a case under
3 chapter 7 or dismiss a case under this chapter, whichever is in
4 the best interests of creditors and the estate, [for] cause.” A
5 non-exclusive list of what constitutes “cause” is found in
6 § 1112(b)(4), but the court should “consider other factors as
7 they arise, and use its equitable powers to reach the
8 appropriate result in individual cases.” Pioneer Liquidating
9 Corp. v. U.S. Trustee, (In re Consol. Pioneer Mortg. Entities),
10 248 B.R. 368, 375 (9th Cir. BAP 2000)(finding that “the
11 enumerated causes [in § 1112(b)] are not exhaustive, and ‘the
12 court will be able to consider other factors as they arise, and
13 to use its equitable powers to reach an appropriate result in
14 individual cases.’”(citing, in part, H.R. REP. NO. 95-595, at
15 405-06 (1977), reprinted in 1978 U.S.C.C.A.N. 6362)). The
16 bankruptcy court has broad discretion in determining what
17 constitutes “cause” adequate for dismissal under § 1112(b).
18 Id.; see also Chu v. Syntron Bioresearch, Inc. (In re Chu),
19 253 B.R. 92, 95 (S.D. Cal. 2000).

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

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

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

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

3 There are two elements to show the existence of cause for
4 dismissal under § 1112(b)(4)(A): (1) a substantial and
5 continuing loss to or diminution of the estate, and (2) the
6 absence of a reasonable likelihood of rehabilitation. Section
7 1112(b)(4)(A) effectuates the purpose of § 1112(b)(1), which is
8 "to preserve estate assets by preventing the debtor in
9 possession from gambling on the enterprise at the creditors'
10 expense when there is no hope of rehabilitation." Loop Corp. v.
11 U.S. Trustee, 379 F.3d 511, 516 (8th Cir. 2004)(quoting In re
12 Lizeric Realty Corp., 188 B.R. 499, 503 (Bankr. S.D. N.Y.
13 1995)).

14 To determine whether there is continuing loss to, or
15 diminution of, the estate, the bankruptcy court must look beyond
16 financial statements and fully evaluate the present condition of
17 a debtor's estate. In re Motel Prop., Inc., 314 B.R. 889, 894
18 (Bankr. S.D. Ga. 2004)(citing In re Moore Constr., Inc.,
19 206 B.R. 436, 437-38 (Bankr. N.D. Tex. 1997)).

20 In this case, the bankruptcy court found that Debtors'
21 estate was subject to continuing loss from their commitment to
22 the pursuit of multiple state court claims, which have provided
23 no benefit to the estate. Notwithstanding a pre-petition
24 deficiency judgment in favor of PFS, judicial affirmance of the
25 deficiency judgment by the Arizona Court of Appeals, and a final
26 post-petition state court judgment against Debtors awarding PFS
27 \$143,498.99 in attorneys' fees and costs, Debtors have filed yet
28 another appeal. The bankruptcy court found this behavior

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

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

17
18 ⁸ In their Opening Brief, Debtors insist that no evidence
19 has been presented, by way of monthly operating reports or
20 otherwise, to prove such claims. However, Debtors themselves
21 explained at oral argument that pursuing the appeal would result
22 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
23 approximate payment of \$400 for court-reporter costs associated
24 with taking depositions, listed on Debtors' April 2008 Monthly
25 Operating Report.

26 ⁹ In their Opening Brief, Debtors assert that no evidence
27 has been presented to prove that any expenses associated with the
28 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.

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

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

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

1 "crammed down" secured car loan.

2 The Panel has reviewed the record and none of these
3 findings are clearly erroneous. Under these circumstances, we
4 believe that the bankruptcy court did not abuse its discretion
5 in dismissing Debtors' bankruptcy case for cause pursuant to
6 § 1112(b)(4)(A).

7 **B. Failure to Confirm a Plan Within a Reasonable Time**

8 As stated above, the bankruptcy court has broad discretion
9 in determining what constitutes "cause" adequate for dismissal
10 under § 1112(b). Consol. Pioneer Mortg. Entities, 248 B.R. at
11 375; see also Chu, 253 B.R. at 95. "Recognizing that repeatedly
12 unsuccessful attempts at confirmation are likely to generate
13 enormous administrative costs, often without increasing the
14 likelihood of success, § 1112(b) recognizes the court's ability
15 to curtail the process through the ultimate conversion or
16 dismissal of the case." 3 Collier Bankruptcy Manual
17 ¶ 1112.04[4][1] (3d ed. rev. 2010). The bankruptcy court has
18 discretion to establish a final deadline for filing a
19 confirmable plan of reorganization to ensure that the process
20 does not outlive the likelihood of its usefulness. Id. As the
21 Seventh Circuit has explained, "bankruptcy courts are given a
22 great deal of discretion to say when enough is enough."
23 In re Woodbrook Assocs., 19 F.3d 312, 322 (7th Cir. 1994).
24 Where reorganization or rehabilitation is unrealistic or futile,
25 a chapter 11 case may be dismissed or converted even at its
26 outset. See In Re Johnston, 149 B.R. 158, 162 (9th Cir. BAP
27 1992).

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

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

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

17 Bankruptcy courts have an affirmative duty to ensure that
18 the plan satisfies all sixteen § 1129(a) requirements for
19 confirmation.¹⁰ Liberty Nat'l Enters. v. Ambanc La Mesa Ltd.
20 P'ship (In re Ambanc La Mesa Ltd. P'ship), 115 F.3d 650, 653
21 (9th Cir. 1997)(citing In re L & J Anaheim Assocs., 995 F.2d
22 940, 942 (9th Cir. 1993)). Therefore, if the record does not
23 include sufficient evidence to show that all requirements of
24 § 1129(a) are met, confirmation must be denied.

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

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

1 hearing. First, it is undisputed that Debtors failed to file a
2 ballot report that evidenced acceptance of the plan by an
3 impaired class, as required by § 1129(a)(10). Second, as
4 discussed in more detail below, the Debtors' plan failed to
5 satisfy the best interests of the creditors test because it did
6 not allocate all of their non-exempt assets, or the value
7 thereof, to payment of unsecured claims, as required by
8 § 1129(a)(7).¹¹

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

12 The record shows the bankruptcy court gave Debtors ample
13 opportunity to take whatever steps were necessary to get their
14 plan in a confirmable posture. Debtors were invited to file
15 briefs on those issues impeding plan confirmation and the issues
16 were thoroughly discussed in two separate hearings before the
17 bankruptcy court. While Debtors filed an amended ballot report
18 to cure the deficiency under § 1129(a)(10) and proved they had
19 accurately calculated their disposable income to satisfy
20 § 1129(a)(15), multiple issues remained and the bankruptcy court
21 was left with serious doubts about the plan's confirmability.
22 As illustrated below, Debtors failed to demonstrate that they
23 had a reasonable likelihood of confirming a plan within a
24 reasonable period of time.

25
26 ¹¹ Additionally, the bankruptcy court explicitly recognized
27 potential issues under § 1129(a)(9), payment in full of all
28 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 (1) Best Interests of the Creditors Test

2 The best interests of the creditors test requires that each
3 objecting creditor in an impaired class receive at least as much
4 as it would receive in a hypothetical chapter 7 liquidation.
5 § 1129(a)(7)(A)(i)-(ii); M & I Thunderbird Bank v. Birmingham
6 (In re Consol. Water Utils., Inc.), 217 B.R. 588, 591 (9th Cir.
7 BAP 1998). Section 541 instructs the liquidation inquiry,
8 guiding what should be included in the estate. See Forbes v.
9 Forbes (In re Forbes), 215 B.R. 183, 190 (8th Cir. BAP
10 1997)(discussing the "best interests" test under a chapter 13
11 plan); see In re Gibson, 415 B.R. 735, 737 (Bankr. D. Ariz.
12 2009)(noting nearly identical language is found under the "best
13 interests" tests in chapter 11 and chapter 13). Section
14 541(a)(1) specifically includes as property of the estate, "all
15 legal and equitable interests of the debtor in property." This
16 phrase has been interpreted as sufficiently broad to include
17 causes of action, which are in existence as of the petition
18 date. Forbes, 215 B.R. at 190. Moreover, the "conditional,
19 future, speculative, or equitable nature of an interest does not
20 prevent it from being property of the bankruptcy estate."
21 Affiliated Computer Sys., Inc. v. Sherman (In re Kemp), 52 F.3d
22 546, 550 (5th Cir. 1995), quoted in Brooks v. Brooks,
23 No. 2:09-cv-01514-MCE, 2010 U.S. Dist. LEXIS 33193, at *9-10
24 (E.D. Cal. Apr. 5, 2010); see also In re Parker St. Florist &
25 Garden Ctr., 31 B.R. 206, 208 (Bankr. D. Mass. 1983)(finding the
26 debtor can propose a plan taking into account the possible
27 results of litigation).

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

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

9 Despite the fact that the bankruptcy court had apprised
10 Debtors of the specific deficiencies in the plan regarding
11 § 1129(a)(7), Debtors failed to amend the plan to address the
12 bankruptcy court's concerns. Debtors instead relied, as they do
13 in briefs presented to this Panel, on the Liquidation Analysis
14 set forth as Exhibit B in their Disclosure Statement. Debtors
15 assert that because under their Liquidation Analysis unsecured
16 creditors would receive nothing, no distribution to unsecured
17 creditors was required for the plan to satisfy the best
18 interests test of § 1129(a)(7).

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

27 //

28 //

1 failed to satisfy § 1129(a)(7).¹²

2 (2) Administrative Priority Status of PFS' Claim

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

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

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

24
25 ¹² In Debtors' briefs and during oral argument, they also
26 mistakenly look to their disposable income to support their
27 assertion that the proposed plan satisfied the best interests
28 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).

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

5 (3) Lack of Good Faith in Proposing the Plan

6 The "good faith" requirement of section 1129(a)(3) is
7 determined on a case-by-case basis taking into account the
8 totality of the circumstances of the case, with a view to
9 whether the plan will fairly achieve a result consistent with
10 the objectives and purposes of the Bankruptcy Code. Platinum
11 Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.),
12 314 F.3d 1070, 1074-75 (9th Cir. 2002); see also Sec. Farms v.

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

23 In the alternative, PFS argues that even if the order is
24 unclear, it is entitled to administrative priority on its
25 post-petition attorneys' fees and costs as a matter of law. This
26 is because Debtors voluntarily chose to "return to the fray" and
27 pursue multiple sets of litigation post-petition. PFS claims
28 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.

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

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

21 The bad faith in this plan is effectively [that] the
22 Debtors are attempting to use chapter 11 to be able to
23 pursue a claim where the state court would say if you
24 lose, you're liable for attorneys' fees and yet the
25 Debtors effectively want to use chapter 11 to be able
26 to pursue that claim without the risk of liability for
27 those attorneys' fees.

28 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.

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

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

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

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

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

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

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

2 Debtors repeatedly assert in their Opening Brief that the
3 bankruptcy court abused its discretion in dismissing the case
4 because it failed to apply the discretionary limit of
5 § 1112(b)(2), which states that the bankruptcy court shall not
6 convert or dismiss a case if: (1) there is a reasonable
7 likelihood that a plan will be confirmed within a reasonable
8 period of time, (2) the cause for dismissal or conversion is
9 something other than a continuing loss or diminution of the
10 estate with a lack of reasonable likelihood of rehabilitation;
11 and (3) there is reasonable justification for a debtor's act or
12 omission and the act or omission will be cured within a
13 reasonable period of time fixed by the court.

14 However, Debtors incorrectly applied § 1112(b)(2) to their
15 case. Section 1112(b)(2) does not require the bankruptcy court
16 to give Debtors infinite opportunities to correct their acts or
17 omissions before dismissing; rather, the discretionary limit of
18 § 1112(b)(2) only applies if all of the above factors are met.
19 See 7 Collier on Bankruptcy ¶ 1112.05 (16th ed. 2010); see also
20 In re Kent, No. 2:07-bk-03238-SSC, 2008 Bankr. LEXIS 4332, at
21 *15-16 n.5 (Bankr. D. Ariz. Sept. 23, 2008); In re Fisher, 2008
22 Bankr. LEXIS 1247, at *14 (Bankr. D. Mont. Apr. 15, 2008). The
23 bankruptcy court found cause for dismissal based on (1) an
24 absence of a reasonable likelihood that a plan would be
25 confirmed within a reasonable period of time, and (2) a
26 substantial or continuing loss or diminution of the estate and
27 the absence of a reasonable likelihood of rehabilitation.
28 Accordingly, the bankruptcy court was not limited by

1 § 1112(b)(2) and did not abuse its discretion in dismissing the
2 case without allowing Debtors another opportunity to cure their
3 acts or omissions.

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

6 Upon determining cause exists and that there are no unusual
7 circumstances to negate dismissal or conversion, the bankruptcy
8 court must engage in a "balancing test" to determine whether
9 appointment of a Chapter 11 Trustee, conversion, or dismissal is
10 "in the best interests of creditors and the estate."

11 § 1112(b)(1); see In re Staff Inv. Co., 146 B.R. 256, 260
12 (Bankr. E.D. Cal. 1992).¹⁴

13
14 ¹⁴ Courts have looked to multiple factors to determine which
15 action is in the best interest of the creditors and the estate.
16 Collier identifies ten such factors:

17 (1) Whether some creditors received preferential payments,
18 and whether equality of distribution would be better served
19 by conversion rather than dismissal.

20 (2) Whether there would be a loss of rights granted in the
21 case if it were dismissed rather than converted.

22 (3) Whether the debtor would simply file a further case
23 upon dismissal.

24 (4) The ability of the trustee in a chapter 7 case to reach
25 assets for the benefit of creditors.

26 (5) In assessing the interest of the estate, whether
27 conversion or dismissal of the estate would maximize the
28 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.

1 While both PFS and the City advocated for dismissal,
2 Debtors alluded in their Opening Brief that if cause was found
3 under § 1112(b), a chapter 11 trustee should have be appointed
4 rather than dismissal of the case. However, where there are few
5 if any assets to administer, and the estate appears to be
6 administratively insolvent, dismissal would often be the better
7 course. In this case, Debtors' main assets consist of the
8 \$169,000 uncollected civil default judgment and Debtors' wholly
9 exempt homestead. As this is essentially a no asset case, and
10 given the fact that continuing in a chapter 11 proceeding would
11 require paying significant administrative fees and costs that
12 would otherwise be utilized to satisfy the Debtors' obligations
13 to their creditors, it did not call for the extraordinary remedy
14 of appointing a chapter 11 trustee. Especially in light of the
15 request for dismissal by PFS and the City, the two largest
16 creditors, and that no oppositions were filed by any other
17 creditors, the bankruptcy court did not err in dismissing the
18 case.

19 **CONCLUSION**

20 For the foregoing reasons, we AFFIRM the bankruptcy court's
21 order dismissing Debtors' chapter 11 case.
22
23
24
25
26

27
28 ⁷ Collier on Bankruptcy ¶ 1112.04[7] (Alan N. Resnick & Henry
J. Sommer, eds., 16th ed., 2010).