NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	)	BAP No. WW-05-1425-NKPa
	)	
JUSTIN EUGENE EVANS and JEANNE JESELLE EVANS,	)	Bk. No. 05-15492
	)	
Debtors.	)	
	)	
JUSTIN J. SHRENGER and HOWARD HUI ZHENG,	)	
	)	
Appellants.	)	
	)	
v.	)	**MEMORANDUM**[1]
	)	
JUSTIN EUGENE EVANS and JEANNE JESELLE EVANS,	)	
	)	
Appellees.	)	

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

Filed - July 31, 2006

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

Honorable Thomas T. Glover, Bankruptcy Judge, Presiding.

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

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

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

Appellants appeal the bankruptcy court's decision confirming debtors' Chapter 13 plan. We AFFIRM.

FACTS

On April 27, 2005, debtors Justin Eugene and Jeanne Jeselle Evans ("appellees") filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code.[3] Previously, appellants Justin J. Shrenger and Howard Hui Zheng ("appellants") and Deep Magic LLC initiated a civil action in Los Angeles Superior Court against Justin Evans and others. In February of 2005, the Superior Court entered an order striking Mr. Evans' answer and dismissing his cross-complaint with prejudice as a discovery sanction. No appeal of this order was filed. The bankruptcy filing prevented any attempt to obtain a judgment against Mr. Evans, based on the order.

On June 2 of 2005, appellees filed a motion to convert their bankruptcy to Chapter 13. Appellant Shrenger filed an opposition, focused on two arguments: debtors were ineligible for relief under Chapter 13 because their unsecured debts exceeded the maximum allowed by section 109(e) when the claims of appellant and other creditors were properly valued. Appellant also objected that debtors had insufficient income to fund a plan.

The initial hearing on the contested conversion motion was conducted on June 22, 2005, before Bankruptcy Judge Overstreet. She cautioned appellant that, based upon his

[3]Unless otherwise indicated, all references to "chapter" or "section" are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

submissions, she could not determine how the damage claim had been calculated. A hearing was set for July 15, 2005, to determine whether debtors had sufficient income to support their Chapter 13 plan. Another hearing was set for July 22 on the section 109(e) eligibility issue. Regarding these hearings, Judge Overstreet ordered:

1) For the income hearing, debtors must provide a declaration demonstrating they had net income.

2) For the eligibility hearing, if debtors demonstrated sufficient income, then appellant would have to establish the amount of his claim. Judge Overstreet required a "declaration from him that itemizes–what I'm looking for is ascertainable means. He can tell me how he came up with that number. Because if he can't, then I don't believe it is easily ascertainable ....You will need to go back and look at that complaint to make sure .... [E]ssentially I would be looking for the same kind of presentation that he would have to make with regard to his motion for default. He has got to be able to break the numbers down."

Bankruptcy Judge Glover presided over the July 15 income hearing. Following argument, he overruled appellants' conversion objections based on lack of regular income and bad faith.

At the second hearing, conducted on July 22, Judge Glover ruled the claim was not subject to ready determination. An order denying the objection and converting the case to Chapter 13 was entered on August 9, 2005. Appellants filed a notice of appeal on August 17, 2005.

While the appeal was pending before the United States District Court for the Western District of Washington, debtors continued their plan confirmation efforts. Appellants objected, arguing the plan was not feasible as it understated federal tax withholding obligations. Appellants also argued that debtors' plan evidenced bad faith.

At the October 12, 2005, confirmation hearing the plan was confirmed. A confirmation order was entered on October 17, 2005. Appellants timely appealed to this Panel.

Appellees filed a Motion before us to limit issues on appeal to those not under consideration by the district court. Appellants filed an Opposition. On April 19 of 2006, our Motions Panel ruled the motion would be under advisement until this panel ruled. Appellees recently moved for an order allowing consideration of an addendum to their brief. By order filed June 5, 2006, we took that motion under advisement as well.

In a March 27, 2006, disposition of the appeal before it, the district court affirmed that debtors were eligible to proceed under Chapter 13, noting the right to convert was absolute, so long as conversion prerequisites are met. "Order on Bankruptcy Appeal" ("Order") at 2.

The district court noted the appeal focused primarily on the bankruptcy court's resolution of three issues: (1) whether the debtors' unsecured, liquidated debt was less than $307,675 upon filing; (2) whether debtors had "regular income" and (3) whether debtors sought to convert their case in bad faith. Id. at 2.

As to the first issue, the district court analyzed if appellants' proof of claim was prima facie evidence of a liquidated claim, and whether its amount could be readily ascertained through a default hearing held in the California state court case. Id. at 5-7.

The court cited our decision in Ho v. Dowell (In re Ho), 274 B.R. 867, 871 n. 5 (9th Cir. BAP 2002) and affirmed, finding that the proof of claim did not establish the debt as liquidated. Order at 5.

As to whether the claim was readily ascertainable, the district court also affirmed, noting:

> ... the debt does not appear to be capable of ready determination through a simple hearing, given Mr. Shrenger's failure to explain how his claims for damages were calculated. Mr. Schrenger claims that he is owed $106,000 in 'cash payments...converted or misappropriated' by Mr. Evans, as well as $100,000 in damages for defamation and tortious interference. Mr. Shrenger did not explain how he arrived at these figures, despite Judge Overstreet's explicit direction that Mr. Shrenger needed to provide more information regarding these claims. Judge Overstreet informed Appellants' counsel that 'essentially I would be looking for the same kind of presentation that [Mr. Shrenger] would have to make with regard to his motion for default. He has got to be able to break the numbers down'.... As a result, the Bankruptcy Court provided Appellants with the opportunity to demonstrate how Mr. Shrenger calculated the amount of damages claimed and to explain what type of proof Mr. Shrenger would present to quantify his claims. Appellants did not avail themselves of this opportunity. Under these circumstances, the Bankruptcy Court did not err in concluding that Mr. Shrenger's claims against Mr. Evans were not liquidated.

Id. at 6-7.

The district court also affirmed the bankruptcy court's determination that debtors did not engage in bad faith by converting their case. After citing our Circuit's familiar Leavitt factors,[4] the district court noted appellants' contention that two factors were present: (1) misrepresentation of facts because amended schedules differed from the original schedules and (2) bankruptcy was solely filed to defeat state court litigation. Appellants also argued that debtors engaged in egregious behavior. However, the court found the egregious behavior argument was not raised below in the bankruptcy court. Id. at 9.

The district court cited Judge Glover's comments at the hearing. When appellants suggested the amendments were made in bad faith, noting in particular that debtor had " ... simply said that, whoops, our expenses are less than what we originally represented to the Court in our original schedules," Judge Glover asked, "What's wrong with that?" He then stated:

> The good faith standard that's been set by the circuit is to be very cautiously applied, because some of those requirements standing alone don't make any sense. For instance, almost all bankruptcy cases are filed - or a big portion of them - because somebody's

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[4] 1) Whether the debtor misrepresented facts in his petition or plan, unfairly manipulated the Bankruptcy Code, or otherwise filed his Chapter 13 petition or plan in an inequitable manner.
2) The debtor's history of filings and dismissals.
3) Whether the debtor only intended to defeat state court litigation.
4) Whether egregious behavior is present.
Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999).

> suing the debtor. And that doesn't make sense to me. What else is the debtor going to do except propose what they can? And why would a debtor ever want to say, okay, let's let the litigation in state court go forward and take all of those risks. It doesn't make any sense to me.

Id. at 9-10.

The court rejected appellants' argument that these comments indicated the bankruptcy court refused to apply Leavitt. Judge Glover was found not in error in dismissing arguments that amending the schedules demonstrated bad faith. The district court noted that amendment of schedules is liberally allowed without leave of court. Second, the bankruptcy court did not commit reversible error in determining that filing bankruptcy to defeat state court litigation, standing alone, does not support a bad faith finding. Id. at 9-11. See, In re Ho, supra at 876-77 (holding that a bankruptcy court abused its discretion when it based a bad faith determination exclusively on this factor). Cf. Dressler v. Seeley Co. (In re Silberkraus), 336 F.3d 864, 871 (9th Cir. 2003)(Chapter 11 bad faith demonstrated by filing shortly before trial setting, combined with factors of near impossibility of reorganization and that bankruptcy could not provide more value to debtor than proceeding with state court litigation).

ISSUES

1. Should this Panel exercise its discretion and decline to rule on eligibility and good faith issues under the doctrine of law of the case, as these or similar issues were previously ruled upon by the district court.

2. Did the bankruptcy court err in determining that the plan was feasible.

STANDARDS OF REVIEW

We review Chapter 13 plan confirmation issues requiring only statutory interpretation de novo. Moen v. Hull (In re Hull), 251 B.R. 726, 730 (9th Cir. BAP 2000). Ordinarily, feasibility is a question of fact. Therefore, the bankruptcy court's determination should not be disturbed, unless clearly erroneous. Federal Nat. Mortg. Ass'n v. Ferreira (In re Ferreira), 223 B.R. 258, 262 (D.R.I. 1998).

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334(a), 157(b)(1) and (2)(L). Our jurisdiction is based on 28 U.S.C. § 158(c)(1).

DISCUSSION

1. Law of the case

Under the doctrine of law of the case, a court is generally precluded from reconsidering an issue already decided by the same or a higher court in the identical case. Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone, Inc., 275 F.3d 762, 766 (9th Cir. 2001). The doctrine is not a limitation of power, but a guide to discretion. A court has discretion to depart from the law of the case where the evidence before it is substantially different. However, failure to apply the doctrine, absent one of the requisite exceptions, constitutes an abuse of discretion. For the doctrine to apply, the issue must have been decided explicitly or by necessary implication

in the earlier disposition. Rebel Oil Co., Inc. v. Atlantic Richfield Co., 146 F.3d 1088, 1093 (9th Cir. 1998), cert. denied, 119 S.Ct 541 (1998).

Applying the doctrine as between appellate tribunals, our Circuit instructs:

> The law of the case doctrine provides that a panel of this court has discretion to depart from the law of the case established by the same panel, or another, where: '(1) the decision is clearly erroneous and its enforcement would work a manifest injustice, (2) intervening controlling authority makes reconsideration appropriate, or (3) substantially different evidence was adduced at a subsequent trial.'

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency, 216 F.3d 764, 787 (9th Cir. 2000), aff'd, 122 S.Ct. 1465 (2002)(citations, footnote and internal quotes omitted).

The doctrine is not an absolute bar to revisiting legal issues. It merely expresses the practice of courts generally to refuse to reopen what has been decided. American Express Travel Related Serv. Co. v. Fraschilla (In re Fraschilla), 235 B.R. 449, 454 (9th Cir. BAP 1999), (citations omitted), aff'd, 242 F.3d 381 (9th Cir 2000) (Table).

The doctrine is flexible. While it is axiomatic that an appellate panel would not be bound by the trial court's law of the case, Soper v. Crystal Palace Gambling Hall, Inc. (In re Crystal Palace Gambling Hall, Inc.), 36 B.R. 947, 952 (9th Cir. BAP 1984), appeal dismissed, 785 F.2d 315 (9th Cir. 1986), the issue is whether this Panel should defer to the ruling of the district court in an earlier appeal in the same case.

The district court affirmed the bankruptcy court's ruling that appellants' claim was not liquidated for purposes of § 109(e). A debt is liquidated for such purposes:

> [I]f the amount of the creditor's claim at the time of the filing the petition is ascertainable with certainty, a dispute regarding liability will not necessarily render a debt unliquidated.... Even if a debtor disputes the existence of liability, if the amount of the debt is calculable with certainty, then it is liquidated for the purposes of § 109(e).... [A] debt is liquidated if the amount is readily ascertainable, notwithstanding the fact that the question of liability has not been finally decided.

Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 983-84 (9th Cir. 2001) (emphasis original). See also, Guastella v. Hampton (In re Guastella), 341 B.R. 908, 916 (9th Cir. BAP 2006).

The district court found the bankruptcy court did not err in determining the debt was not readily ascertainable. Order at 6-7. The issue was fully briefed in that court. Nothing in appellants' brief suggests this Panel would decide the issue differently. Appellants argue the only step necessary for entry of a judgment in the California state litigation is the "default prove up in State Court." Appellants' Opening Brief at 20-21. They urge that only a simple hearing, not an extensive and contested evidentiary hearing, is necessary to determine the exact amount owed. This identical argument was rejected by the district court, which noted appellants failed to provide the declaration required by Judge Overstreet to calculate damages. Id. at 6-7.

Appellants argue the bankruptcy court erred by ignoring the evidentiary effect of their subsequently filed claims. They also argue that bankruptcy courts frequently refer to proofs of claim in determining section 109(e) eligibility. Opening Brief at 21-24.

These issues were before the district court, which rejected them and invoked In re Ho, 274 B.R. at 871, n. 5. Order at 5. Ho noted:

> DHE argues that Debtor is ineligible to be a chapter 13 debtor based on its claim alone, because it has filed a $1,387,651.39 proof of claim, Debtor has not objected to its claim and, under § 502(a), a claim is deemed allowed absent an objection. We reject DHE's argument for two reasons. First, the bankruptcy court did not rely in this theory when it concluded that DHE's claim was liquidated in the amount of $50,000. Second, the amount of a chapter 13 debtor's debt is determined as of the date of the filing of the petition. In re Slack, 187 F.3d 1070, 1073 (9th Cir.1999). A court cannot look to postpetition events to determine the amount of a debt.

Id. (Emphasis added.)

Guastella recognized that normally there is no need to look beyond the schedules:

> The phrase 'checking only to see if the schedules were made in good faith' does not mandate that the court make findings of 'bad faith.' Neither does it require that a debtor intentionally misrepresent her debts to create the appearance of eligibility before there can be an absence of good faith.
>
> Bankruptcy courts have consistently recognized that, as a matter of public

policy, the issue of chapter 13 eligibility should be determined quickly. The Pearson court addressed the policy considerations by comparing chapter 13 eligibility with the issue of subject matter jurisdiction in federal diversity cases.

> This threshold eligibility determination for Chapter 13 is in many respects like the threshold subject matter jurisdiction determination in diversity cases where the $10,000 minimum amount in controversy is challenged. Clearly in both situations Congress intended to limit the class of persons who might avail themselves of access to the federal forum. Just as clearly, it is necessary that the procedures for determining initial jurisdiction cannot be allowed to dominate the proceedings themselves nor to delay them unduly. As important as this may be in the ordinary diversity litigation in a district court, it is even more important with respect to Chapter 13 proceedings for time is of the essence. The resources of the debtor are almost by definition limited and the means of determining eligibility must be efficient and inexpensive. To allow an extensive inquiry in each case would do much toward defeating the very object of the statute.
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> In re Pearson, 773 F.2d at 757 (emphasis added).

> Pearson's 'diversity' analogy adds another dimension to our decision because diversity jurisdiction, like chapter 13 eligibility, is determined by the 'amount in controversy.' Discussing the test for diversity jurisdiction, the U.S. Supreme Court in St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1938) recognized that the 'amount in controversy' cannot always be ascertained. It defined a diversity test very similar to the Scovis test used in chapter 13 cases stating, 'the amount claimed in good faith by the plaintiff controls unless it appears to a legal certainty that the claim is for less than the jurisdictional amount or the

> amount claimed is merely colorable.' In re Pearson, 773 F.2d at 757 (citing St. Paul Mercury, 303 U.S. at 288-90....

Guastella, 341 B.R. at 920. (emphasis original).

In the present case, as noted by the district court, appellant was given an opportunity by the bankruptcy court to establish their claim was liquidated by presenting evidence. The bankruptcy court was willing to look past the schedules, as appellant had asserted not only that debtors were ineligible for chapter 13 relief, but also that the conversion was in bad faith. See Guastella 341 B.R. at 918. However, appellant failed to produce the required evidence to liquidate the claim.

Here, by the time of the confirmation hearing, the bankruptcy court had resolved eligibility. Yet, appellants' plan objection again argued that the proof of claim filed by appellant and two other unsecured creditors established claim amounts. They again urge that no extensive hearing was necessary to establish the exact amount of liability. These were essentially the same issues raised during the conversion litigation, resolved by the bankruptcy court and affirmed by the district court. Perceiving no reason to depart from law of the case principles, we are constrained to accept the district court's ruling that appellants' claim is not liquidated for purposes of determining debtor eligibility under Chapter 13.

2. Good faith

In addition to eligibility, the district court also affirmed the bankruptcy court on whether debtors converted their case in bad faith. Order at 9-11. We conclude

application of the law of the case doctrine is appropriate here as well, although appellees' motion to limit the issues on appeal did not ask us to invoke preclusionary doctrines.[5]

The good faith requirement of section 1325(a)(3) is a mandatory confirmation requirement. Chinichian v. Campolongo, (In re Chinichian) 784 F.2d 1440, 1444 (9th Cir.1986). Debtors have the burden of proving that each confirmation element is met. Id. at 1443-44; See also, Guastella, at 919.

A bankruptcy court must inquire whether debtors have misrepresented facts in their plan, unfairly manipulated the Bankruptcy Code, or otherwise proposed the plan in an inequitable manner. Although it may consider the substantiality of the proposed repayment, the court makes its good-faith determination in the light of all militating factors. Platinum Capital, Inc. v. Sylmar Plaza, L.P. (In re Sylmar Plaza, L.P.), 314 F.3d 1070, 1075 (9th Cir. 2002) (Chapter 11); In re Goeb, 675 F.2d 1386, 1390 (9th Cir.1982).

In its affirmance, the district court specifically referenced the Leavitt factors in determining whether the bankruptcy court erred in concluding the conversion was in good faith. The court rejected appellants' argument that the bankruptcy court refused to apply Leavitt. Judge Glover was found not to have erred in dismissing arguments that amending schedules demonstrates bad faith. The district court noted that amendment of schedules is liberally allowed without leave of court. Further, the bankruptcy court was found not in

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[5]Instead, appellees argued the issue of plan good faith was not appealed to district court. Motion at 7-8.

error in determining that filing bankruptcy to defeat state court litigation, standing alone, does not support a bad faith finding. Order at 9-11.

In the instant appeal, appellants argue that under the "totality of the circumstances" test, the plan was proposed in bad faith. They urge this is a minimum payment plan. Appellants calculate repayment to unsecured creditors of 0.2%, whereas debtors allegedly estimated a 5% return. Second, debtors allegedly misrepresented facts in their schedules by amending schedules to assert certain debts were unliquidated, when previously listed in specific claim amounts. Third, debtors amended their schedules to establish a small surplus to fund minimum repayments. Fourth, debtors engaged in egregious behavior before and after filing. The state court found Mr. Evans " ... willfully disobeyed court orders ... withheld material documents, refused to provide substantive responses to material discovery, and ... used the discovery process as an excuse to delay the resolution" of the action. Finally, the timing of the petition and conversion to chapter 13 reflect debtors filed to thwart entry of judgment in the California civil action and acquire a chapter 13 discharge for otherwise nondischargeable debt. Appellants' Opening Brief at 24-30.

The confirmation hearing transcript adds little to the existing record on debtors' good faith. Appellants' counsel noted that the [plan objection] " ... that was filed relists some issues that we've already argued, so I'm not going to argue them today. I just needed to renote them in the motion.

But what I want to talk about today is the feasibility of the plan." Because the bankruptcy court did not readdress the good faith issue during the confirmation hearing or make written findings, the record for "good faith" review primarily consists of the earlier conversion hearings.[6] See Leavitt, 171 F.3d at 1223 (a complete understanding of issues may be had from the record without the aid of separate written findings). This is the record that was before the district court in the conversion appeal, which specifically included issues of good faith. It is essentially the same record this Panel must review in determining whether the plan was proposed in good faith. We may affirm on any basis fairly supported by that record. Jorgenson v. State Line Hotel, Inc. (In re State Line Hotel, Inc.), 323 B.R. 703, 708 (9th Cir. BAP 2005); Williams v. Swenson (In re Williams), 280 B.R. 857, 863 n. 7 (9th Cir. BAP 2002).

A determination regarding the good faith of instituting a Chapter 13 case and the good faith in proposing a particular Chapter 13 plan involve similar factual inquiries under the totality of the circumstances. Matter of Love, 957 F.2d 1350, 1356-57 (7th Cir. 1992). Eligibility and good faith were

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[6]We would prefer a more extensive confirmation hearing record to review. However, the bankruptcy court had before it the evidence the parties chose to present. Apparently counsel appeared without witnesses or exhibits and relied upon filed declarations, prior briefing and oral argument. Transcript of October 12, 2005 at 3-6. Appellants did not object to the evidence and do not claim the bankruptcy court refused to permit further evidence. They do not argue there are disputed factual issues, but instead that the bankruptcy court failed to correctly apply existing law. Reply at 1-2.

tested at the outset of the case when debtors moved to convert. These matters were resolved by the bankruptcy court and on appeal by the time the confirmation process began. Much of appellants' confirmation objection reprised this earlier litigation and in effect, sought reconsideration of the bankruptcy court's earlier rulings. Appellants continue their reprise in the appeal before us, creating a troubling procedural posture involving two appellate tribunals. The law of the case doctrine is in place to end endless litigation. This panel finds no reason not to apply the doctrine here.[7]

3. Plan feasibility

A bankruptcy court is to confirm a plan if, among other things, debtor will be able to make all payments under the plan and to comply with the plan. Section 1325(a)(6). This is the feasibility requirement. In re Gavia, 24 B.R. 573, 574 (9th Cir. BAP 1982).

In evaluating whether a plan is feasible, some courts stress the desirability of providing a cushion enabling debtor to meet unexpected expenses. That is not an absolute requirement. The test is whether the expectations of income reflected in the Plan are sufficiently realistic that debtors should be given an opportunity to carry out their plan. Ferreira, 223 B.R. at 262-63.

Here, appellants assert the plan is unfeasible because debtors understated necessary federal tax withholdings. Based

[7]Had we not applied the preclusive doctrine, we can nevertheless find no clear error in the bankruptcy court's factual finding of good faith. Guastella at 915, citing Smyrnos v. Padilla (In re Padilla), 213 B.R. 349, 352 (9th Cir. BAP 1997).

on Ms Evans' salary record and expert declarations, appellants assert:

> ... it was apparent at the confirmation hearing that Debtors had understated the actual withholdings from Ms. Evans' paycheck in Amended Schedule I, and therefore overstated their true monthly take-home income, by $216.55 per month. Simple arithmetic clearly demonstrated that Debtors cannot possibly make their Plan payments ($482.82), meet their current tax and insurance withholdings ($561.80), and pay their living expenses ($2,486.00) from their gross income ($3,333.33) per month.

Opening Brief at 14-15.

Appellants complain that although the bankruptcy court had this information at the confirmation hearing, the court ignored lack of feasibility in favor of a "proof in the pudding" test:

> THE COURT: With regard to these matters the objecting creditor has as creative argument as I have ever seen--and it comes from elsewhere, I know--but it seems to me, you know, the proof of the plan like this is really in the pudding, and the debtor, you know, is going to get a chance to make these payments because he's already making the payments.
>
> I would have to say, Ms. Latta, that your client needs to be aware that specific attention has been given with respect to the issue of --involving the taxes. And so the debtor, for instance, won't be in a position in the future to come back to the Court and say, Your Honor, we want to modify the Plan because of a change in circumstances....
>
> Years ago I got overruled by the Eighth Circuit, I think it was, on projecting certain kinds of income in the future. But the projections need to be made as to the time of the confirmation. Okay, sometimes that works

> for expenses too. In this particular instance, the debtor is going to have to perform under this plan.
>
> Now the issues of this plan concerning, you know, the matters on appeal, which relate to whether or not we have a liquidated claim, that is really a separate issue. But I'm going to find this plan is fine and confirm it subject to those restrictions and issues you are entertaining.

The bankruptcy court also had the October 7, 2005 declaration of debtor Jeanne J. Evans and debtors' reply of the same date explaining their decision regarding tax withholding. Based on this record, it appears the bankruptcy court weighed the competing declarations and concluded the plan was feasible. This finding is not clearly erroneous. If the trial court's account of the evidence is plausible in light of the record viewed in its entirety, the appellate court may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. McClure v. Thompson, 323 F.3d 1233, 1240-41 (9th Cir. 2003); Phoenix Eng'g & Supply Inc. v. Universal Elec. Co., Inc., 104 F.3d 1137, 1141 (9th Cir. 1997).

The bankruptcy court's analysis is plausible and will not be disturbed.

CONCLUSION

Mindful that application of the law of the case doctrine is not necessarily mandatory in this instance, this Panel nevertheless elects to apply it to the district court determinations on issues of eligibility and good faith. Finally, we affirm the bankruptcy court's ruling that the plan

is feasible, finding no clear error. Given this disposition, we deny as moot the pending motions.