

DEC 30 2005

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-05-1069-MaMcB
)		
EDDIE M. DUQUE,)	Bk. No.	LA 04-24113-BB
)		
Debtor.)		
_____)		
JULIE MENDOZA,)		
)		
Appellant,)		
)		
v.)	<u>MEMORANDUM</u> ¹	
)		
NANCY CURRY, Chapter 13)		
Trustee; EDDIE M. DUQUE,)		
)		
Appellees.)		
_____)		

Argued and Submitted on September 28, 2005

Filed - December 30, 2005

Appeal from the United States Bankruptcy Court
for the Central District of California

Honorable Sheri Bluebond, Bankruptcy Judge, Presiding.

Before: MARLAR, McMANUS² and BRANDT, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited by the courts of this circuit except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Michael S. McManus, Chief Bankruptcy Judge for the Eastern District of California, sitting by designation.

1 **INTRODUCTION**

2
3 The chapter 13³ debtor's estranged wife, Julie Mendoza
4 ("Mendoza"), has appealed the bankruptcy court's order confirming
5 the debtor's plan and denying her combined objection to plan
6 confirmation and request for case dismissal on grounds of
7 ineligibility for exceeding the debt limit of § 109(e) and for bad
8 faith. Mendoza contends that the debtor manufactured eligibility
9 in order to obtain a "superdischarge" of a tort obligation to her,
10 while proposing little to no dividend to unsecured creditors in
11 his chapter 13 plan.

12 We conclude that Mendoza's civil tort claim was subject to a
13 bona fide dispute as to both the debtor's liability and the
14 amount, which rendered the debt contingent and unliquidated. We
15 further find no clear error in the bankruptcy court's good-faith
16 finding. Therefore, we AFFIRM the plan confirmation order and the
17 court's implicit denial of dismissal.

18
19 **FACTS**

20
21 Eddie Mitchell Duque ("Debtor") filed a chapter 13 petition
22 on June 25, 2004.

23 Prepetition, Debtor had been arrested and charged with one
24 felony count of corporal spousal abuse following an argument with
25 Mendoza, on July 7, 2002, in which Mendoza alleged that Debtor

26
27 ³ Unless otherwise indicated, all "chapter" and "section"
28 references are to the Bankruptcy Code prior to its amendment by
the Bankruptcy Abuse Prevention and Consumer Protection Act of
2005 ("BAPCPA"), 11 U.S.C. §§ 101-1330.

1 physically attacked her and threw her to the ground causing
2 extensive knee and thumb injuries. At his arraignment, Debtor
3 entered a plea of not guilty. Prior to the criminal trial, Debtor
4 entered a plea of nolo contendere ("no contest") to a reduced
5 misdemeanor charge.⁴

6 Mendoza filed the civil tort complaint on May 20, 2003
7 alleging assault and battery. During prepetition discovery and
8 mediation, Mendoza provided voluminous documentation of her
9 injuries, medical treatment and out-of-pocket costs. She attached
10 statements including medical bills, lost wage calculations, child
11 care expense, and miscellaneous costs to support her demand for
12 approximately \$250,000 in special damages, \$250,000 in general
13 damages and \$500,000 in punitive damages. In addition, Mendoza
14 offered to settle for \$500,000.

15 Debtor filed a chapter 13 petition just 19 days before the
16 trial in the civil action. In his bankruptcy Schedule F, Debtor
17 listed the lawsuit claim as disputed, contingent, unliquidated and
18 of "unknown" amount. In addition, Debtor listed \$184,106 total
19 unsecured debt,⁵ as well as priority tax and child support debt.
20 He also listed a secured mortgage debt of \$175,474 and a secured
21 car loan in the amount of \$26,747.

22 At the time of Debtor's filing, an individual debtor was
23 eligible for relief under chapter 13 if he had "noncontingent,

24 ⁴ Mendoza's pleadings are misleading in that they suggest
25 Debtor pleaded to a "felony" charge. Debtor's plea had the effect
26 of reducing the felony count to a misdemeanor count.

27 ⁵ Debtor's Amended Schedule F was filed in September 2004
28 and listed a total of \$188,722.27 in general unsecured debt. This
\$4,000-\$5,000 difference is insignificant to the issues in this
appeal.

1 liquidated, unsecured debts of less than \$307,675 and
2 noncontingent, liquidated, secured debts of less than \$922,975."
3 See § 109(e) (effective April 1, 2004). Debtor was eligible for
4 chapter 13 relief on the face of his petition and schedules, which
5 reflected \$184,106 in total noncontingent liquidated unsecured
6 debt, and secured debt also within the limit.

7 Debtor's chapter 13 plan proposed to pay priority and
8 administrative claims with monthly payments of \$296 for 60 months,
9 for a total of about \$17,700. His schedules showed that his child
10 support debt alone was \$16,000. The secured car loan debt would
11 be paid outside the plan. Presumably, the payment of the mortgage
12 lien plus any possible distribution to unsecured claims would be
13 determined upon the sale of the family home, in which Mendoza and
14 the couple's child still resided. Debtor's interest in the home,
15 which he estimated to be worth \$500,000, was the only significant
16 asset of the bankruptcy estate.

17 In a single motion, Mendoza objected to plan confirmation and
18 requested dismissal of the chapter 13 petition based on
19 ineligibility and bad faith. She contended that Debtor listed her
20 claim as contingent and unliquidated, and its amount as unknown,
21 in an attempt to bring himself within the debt limits of chapter
22 13 and obtain a "superdischarge" of his tort liability. See
23 § 1328(a)(2) (debts resulting from willful and malicious injury
24 (§ 523(a)(6)) are dischargeable in a chapter 13). She asserted
25 that the claim for assault and battery was noncontingent because
26 Debtor's liability was established on the date of the battery.
27 Moreover, she argued that her claim for special damages was
28 liquidated because it was readily determinable from her

1 spreadsheet and supporting itemizations of economic damages, which
2 amounted to \$214,435 at the time of the bankruptcy petition.

3 Debtor disagreed, declaring that he did not cause Mendoza's
4 injuries, but that they resulted from her own actions and behavior
5 during the couple's argument. Debtor also disputed the extent of
6 Mendoza's reported injuries and economic damages.

7 The parties agreed to continue the plan confirmation hearing
8 in order to allow Mendoza to file a proof of claim. Mendoza then
9 filed a proof of claim for \$912,459 based on her personal
10 injuries. She attached a summary of her damages which indicated
11 that her total "liquidated economic damages caused by assault
12 . . . by Debtor" were \$411,234, along with \$500,000 in punitive
13 damages and \$1,225 in prepetition child support, to make up the
14 total claim.

15 Debtor objected that the claim was overstated and
16 unsupported. The restitution award, which had been issued on
17 October 26, 2004 in the misdemeanor proceedings, was in the amount
18 of \$25,626. Debtor argued that Mendoza's claim should either be
19 denied in full or limited to the restitution amount.

20 Mendoza filed a supplement to her plan objection which
21 included copies of her brief and evidence that was presented at
22 the mediation in the state court lawsuit, as well as a copy of her
23 responses to interrogatories propounded by Debtor. Her attorney
24 declared that Debtor had received copies of all these medical
25 bills, records, reports and discovery materials prior to filing
26 his bankruptcy petition, and therefore he should have been aware
27 that Mendoza's out-of-pocket losses were approximately \$257,000.
28 Included in these expenses, however, were significant expenses

1 payable to her relatives, such as "Chauffeur Services" in the
2 amount of \$23,240, payable to her father, and "24-hour In Home
3 Care" services in the amount of \$87,450, payable to her mother.
4 (Plaintiff's Response to Defendant's Form Interrogatories (March
5 12, 2004), p. 12.)

6 On January 20, 2005, the bankruptcy court heard the claim
7 objection, and the continued dismissal and plan confirmation.
8 In regards to the claim objection, the bankruptcy court held that
9 it lacked jurisdiction to liquidate Mendoza's personal injury
10 claim, and rejected Debtor's argument that the claim should be
11 determined to be the amount of the restitution award. It entered
12 an order consistent with these rulings on January 28, 2005, which
13 was not appealed.⁶

14 In regards to dismissal, the bankruptcy court found that
15 Mendoza's claim was unliquidated at the time of the bankruptcy
16 petition and, therefore, that Debtor was eligible for chapter 13
17 relief.

18 The bankruptcy court then analyzed the total circumstances
19 for good faith, on the premise that filing to obtain the
20 "superdischarge," standing alone, was insufficient to prove bad
21 faith. It noted that Debtor had been cooperative and generally
22 fulfilled his duties in the chapter 13 in an effort to pay all of
23 his creditors. It found that the only significant estate asset
24 was the marital home, which, if sold for its estimated value of

25
26 ⁶ In a subsequent order denying stay relief for Mendoza's
27 action, (of which we take judicial notice), the bankruptcy court
28 treated Mendoza's claim "for all purposes in this chapter 13 case"
as an allowed unsecured claim in the full amount of \$912,459. See
Order Denying Movant's Motion for Relief from the Automatic Stay
(March 16, 2005).

1 \$500,000, would provide a stream of payments to Mendoza and the
2 other unsecured claimants. Such a plan would pay a "significant
3 percentage" of the unsecured claims, the court found. It stated:
4 "So it seems to me that this Debtor is giving at least as much as
5 in [chapter] 7 -- would be in [chapter] 7 and then some and that
6 the Debtor is fulfilling its [sic] obligations in Chapter 13. And
7 then on the balance, I don't see any reason to find the Debtor
8 isn't acting in good faith." Transcript of Proceedings (January
9 20, 2005), p. 12:17-21. Finding that Debtor had proposed his plan
10 in good faith, the court confirmed the plan, and implicitly denied
11 Mendoza's motion to dismiss.

12 The order confirming the chapter 13 plan was entered on
13 February 3, 2005, and Mendoza filed a timely notice of appeal.

14

15 **ISSUES**

16

17 1. Whether the bankruptcy court erred in determining that
18 Mendoza's claim for prepetition economic damages was
19 unliquidated for purposes of determining Debtor's
20 chapter 13 eligibility pursuant to § 109(e).

21

22 2. Whether the bankruptcy court's finding that Debtor had
23 filed the petition and proposed the plan in good faith
24 was clearly erroneous.

25

26 3. Whether the bankruptcy court abused its discretion in
27 denying dismissal of the chapter 13 case and confirming

28

1 the plan.⁷

2
3 **STANDARDS OF REVIEW**
4

5 The bankruptcy court's findings of fact are reviewed for
6 clear error and its conclusions of law are reviewed de novo.
7 Scovis v. Henrichsen (In re Scovis), 249 F.3d 975, 980 (9th Cir.
8 2001). Questions whether a debt is contingent or liquidated
9 involve interpretation of the Bankruptcy Code and are reviewed de
10 novo. See Ho v. Dowell (In re Ho), 274 B.R. 867, 870 (9th Cir.
11 BAP 2002); Slack v. Wilshire Ins. Co. (In re Slack), 187 F.3d
12 1070, 1073 (9th Cir. 1999).

13 The existence of bad faith is a factual determination which
14 we review for clear error.⁸ Ho, 274 B.R. at 870; Leavitt v. Soto
15 (In re Leavitt), 171 F.3d 1219, 1222-23 (9th Cir. 1999). "[A]
16 finding is 'clearly erroneous' when although there is evidence to
17 support it, the reviewing court on the entire evidence is left
18 with the definite and firm conviction that a mistake has been
19 committed." Anderson v. City of Bessemer City, N.C., 470 U.S.
20 564, 573 (1985) (citation omitted).

21 The bankruptcy court's decision on a motion to dismiss a

22
23 ⁷ The confirmed plan called for the sale of the family home
24 and use of the proceeds of Debtor's interest (he waived any
25 homestead exemption) to fund the plan. We note that no party
26 briefed the impact of confirmation (if any) on Mendoza's rights
27 under § 363(f) or (h), and we are not addressing that possible
28 issue here.

26 ⁸ Mendoza states that the standard of review for a
27 determination of good faith in this case is de novo. See
28 Villanueva v. Dowell (In re Villanueva), 274 B.R. 836, 840 (9th
Cir. BAP 2002) (applying a de novo standard to mixed question of
law and fact). We disagree, because the historical facts in our
case are disputed; therefore, the determination of good faith was
a factual finding subject to review for clear error. Id.

1 chapter 13 case for "cause" pursuant to § 1307(c) is reviewed for
2 an abuse of discretion. Leavitt, 171 F.3d at 1222. Moreover, an
3 order confirming a chapter 13 plan is reviewed for an abuse of
4 discretion. See Computer Task Group, Inc. v. Brotby (In re
5 Brotby), 303 B.R. 177, 184 (9th Cir. BAP 2003). A bankruptcy
6 court necessarily abuses its discretion if it bases its decision
7 on an erroneous view of the law or on clearly erroneous factual
8 findings. Warrick v. Birdsell (In re Warrick), 278 B.R. 182, 184
9 (9th Cir. BAP 2002).

11 DISCUSSION

13 Mendoza objected to plan confirmation on two grounds: (1)
14 Debtor's alleged ineligibility for chapter 13; and (2) bad faith.

15 Debtor has the burden of proof on all essential elements for
16 confirmation, including that "the plan complies with the
17 provisions for this chapter and with the other applicable
18 provisions of this title" and whether "the plan has been proposed
19 in good faith and not by any means forbidden by law." 11 U.S.C.
20 § 1325(a)(1) and (a)(3). Ho, 274 B.R. at 883 (concurring op.)

21 Mendoza also moved for dismissal of the case on the grounds
22 of lack of eligibility for chapter 13 and for initially filing the
23 petition in bad faith.

25 A. Section 109(e) Eligibility

26
27 Eligibility for chapter 13 is established under § 109(e),
28 which provides:

1 Only an individual with regular income that owes, on
2 the date of the filing of the petition, noncontingent,
3 liquidated, unsecured debts of less than \$307,675 and
4 noncontingent, liquidated, secured debts of less than
5 \$922,975 . . . may be a debtor under chapter 13 of this
6 title.

7 11 U.S.C. § 109(e).

8 Only contingent or unliquidated debts are excluded from the
9 § 109(e) eligibility computation. Disputed debts are not excluded
10 solely on that basis. See Sylvester v. Dow Jones & Co., Inc. (In
11 re Sylvester), 19 B.R. 671, 673 (9th Cir. BAP 1982) (disputed
12 contract claim was liquidated). One basis for excluding a
13 disputed debt may be where the nature of the dispute renders the
14 debt unascertainable and, therefore, unliquidated. See Ho, 274
15 B.R. at 875.

16 Debtor's original Schedule F indicated a total of \$184,106 in
17 noncontingent, liquidated, unsecured debts other than Mendoza's
18 claim. Debtor designated the debt to Mendoza as a disputed,
19 contingent and unliquidated debt of "unknown" amount. Mendoza
20 contends that her claim was noncontingent and liquidated for at
21 least the amount of her economic damages as of the petition date--
22 \$214,435. Therefore, she argues that Debtor's unsecured debts
23 exceeded the eligibility limits: $\$184,106 + \$214,435 = \$389,541$.

24 Moreover, she argues that Debtor's designation of the claim
25 as "unknown" was a bad-faith attempt to keep his debts within the
26 chapter 13 limits, so that any civil tort judgment would be
27 dischargeable. See § 1328(a)(2).

28 The rule in the Ninth Circuit is that chapter 13 eligibility
under § 109(e) "should normally be determined by the debtor's
originally filed schedules, checking only to see if the schedules

1 were made in good faith.” Scovis, 249 F.3d at 982 (citing
2 Comprehensive Accounting Corp. v. Pearson (Matter of Pearson), 773
3 F.2d 751, 757 (6th Cir. 1985)). If a bad-faith objection has been
4 brought by a party in interest, “‘a bankruptcy court should look
5 past the schedules to other evidence submitted,’” so long as the
6 debt computation for eligibility is determined as of the petition
7 date. Scovis, 249 F.3d at 981 (quoting Quintana v. IRS (In re
8 Quintana), 107 B.R. 234, 239 n.6 (9th Cir. BAP 1989) (citation
9 omitted), aff’d, 915 F.2d 513 (9th Cir. 1990)).

10 Moreover, a determination of “cause” for dismissal of the
11 case, under § 1307(c), premised on both ineligibility and bad
12 faith requires a “totality of the circumstances” analysis. Ho,
13 274 B.R. at 879 (concurring op.).

14 15 **(1) Mendoza’s Civil Tort Claim was Contingent**

16
17 The bankruptcy court did not specifically address whether
18 Mendoza’s claim was contingent, and we review this issue de novo.

19 “A contingent claim is ‘one which the debtor will be called
20 upon to pay only upon the occurrence or happening of an extrinsic
21 event which will trigger the liability of the debtor to the
22 alleged creditor.’” Boeing N. Am., Inc. v. Ybarra (In re Ybarra),
23 424 F.3d 1018, 1023 (9th Cir. 2005) (citation omitted). Mendoza
24 contends that the claim was noncontingent because Debtor’s
25 liability was established prepetition by his alleged assault and
26 battery as well as his no-contest plea. We agree that Debtor’s
27 liability for the criminal count was established prepetition, but
28 disagree that his liability was established for the civil tort.

1 In California, the no-contest or nolo contendere plea cannot
2 be used as an admission to prove Debtor's liability in a civil
3 trial. See 20A Cal. Jur. 3d Criminal Law: Pretrial Proceedings
4 § 778 (Thompson/West 2005). The California Penal Code describes
5 this kind of plea as follows:

6 3. Nolo contendere, subject to the approval of the court.
7 The court shall ascertain whether the defendant completely
8 understands that a plea of nolo contendere shall be
9 considered the same as a plea of guilty and that, upon a
10 plea of nolo contendere, the court shall find the
11 defendant guilty. The legal effect of such a plea, to a
12 crime punishable as a felony, shall be the same as that of
13 a plea of guilty for all purposes. In cases other than
14 those punishable as felonies, the plea and any admissions
15 required by the court during any inquiry it makes as to
16 the voluntariness of, and factual basis for, the plea may
17 not be used against the defendant as an admission in any
18 civil suit based upon or growing out of the act upon which
19 the criminal prosecution is based.

20 Cal. Penal Code § 1016 (Thompson/West, WESTLAW through 2005
21 legislation) (emphasis added).

22 Debtor disputed the allegations of the civil complaint. His
23 no-contest criminal plea did not establish his liability for the
24 civil damages. The restitution award was, therefore, a separate
25 nondischargeable debt which Debtor owed to Mendoza. See
26 § 1328(a) (3).

27 Since restitution was awarded based on Mendoza's evidence of
28 economic damages, any civil damages awarded to her in the future
would likely be subject to affirmative defenses, such as setoff
for any restitution already paid since double recovery is not
favored in California. See Anheuser-Busch, Inc. v. Starley, 28
Cal. 2d 347, 350, 170 P.2d 448, 451 (1946).

Moreover, the restitution was awarded postpetition, on
October 26, 2004, and therefore could not be considered in the

1 calculation of the amount of debt for purposes of § 109(e)
2 eligibility. See Ho, 274 B.R. at 873; Scovis, 249 F.3d at 987
3 (amount of general unsecured debt at time of filing of petition
4 determines chapter 13 eligibility); Slack, 187 F.3d at 1072
5 (refusing to consider civil judgment amount entered postpetition).
6 Compare In re Gordon, 127 B.R. 574, 577 (Bankr. E.D. Pa. 1991)
7 (prepetition restitution order was a noncontingent claim).

8 We conclude that Debtor's liability for the net civil tort
9 recovery was not determined at the petition date, and therefore
10 Mendoza's claim was contingent.

11 12 **(2) Mendoza's Claim was Unliquidated**

13
14 A bankruptcy court must determine the liquidated amount of
15 any disputed claim prior to making the § 109(e) computation.
16 Sylvester, 19 B.R. at 673. A debt that is "readily ascertainable"
17 is liquidated. Ho, 274 B.R. at 873.

18 Scovis muddied the waters when it restated the § 109(e) rule,
19 for it did not explain how good-faith eligibility would be
20 determined without looking at evidence which could possibly change
21 the liquidated or unliquidated status of the debt per the original
22 schedules, such as evidence of the debtor's liability for the
23 debt. However, Scovis did not expressly abrogate precedent
24 involving the analysis of postpetition factors relating to
25 liability and good faith. Rather, its holding focused on a timing
26 issue--as of what date should the amount of unsecured debt be
27 calculated. See Scovis, 249 F.3d at 987; Ho, 274 B.R. at 875
28 n.9.

1 Thus, in Ho, we distinguished Scovis where a lingering bona
2 fide dispute as to the debtor's liability rendered a debt
3 unliquidated, even though the debt amount was readily
4 ascertainable at the petition date.⁹ See Ho, 274 B.R. at 875 &
5 n.9. In Ho, the nature of the dispute was such that an extensive
6 evidentiary hearing would have been necessary to resolve the
7 liability issue. We had previously held that where an extensive
8 evidentiary hearing would be required to determine liability, such
9 debt was not readily ascertainable and was therefore unliquidated.
10 Id. at 874-75 (citing Nicholes v. Johnny Appleseed of Wash. (In re
11 Nicholes), 184 B.R. 82, 90-91 (9th Cir. BAP 1995)). In Slack, the
12 Ninth Circuit agreed with this approach when it stated:

13 Whether the debt is subject to "ready determination" will
14 depend on whether the amount is easily calculable or
15 whether an extensive hearing will be needed to determine
16 the amount of the debt, or the liability of the debtor.

16 Slack, 187 F.3d at 1074.

17 Here, both parties agreed that the definition of "readily
18 ascertainable" is that set forth in the Ninth Circuit precedent of
19 Slack and Wenberg v. FDIC (In re Wenberg), 902 F.2d 768 (9th Cir.
20 1990). In Wenberg, the Ninth Circuit affirmed and adopted the
21 BAP's definition:

22 The definition of "ready determination" turns on the
23 distinction between a simple hearing to determine the
24 amount of a certain debt, and an extensive and contested
evidentiary hearing in which substantial evidence may be

25 ⁹ But see Judge Klein's concurring opinion in Ho, in which
26 he expressed a lingering concern that Scovis "meant everything it
27 said," particularly as it followed the Sixth Circuit Pearson
28 decision in using a technical analogy between § 109(e) and the
amount-in-controversy requirement for diversity jurisdiction. See
Ho, 274 B.R. at 880; Scovis, 249 F.3d at 982. Nevertheless, Ho
was not appealed and is good law.

1 necessary to establish amounts or liability. On this
2 issue, the bankruptcy judge has the best occasion to
3 determine whether a claim will require an overly extensive
hearing or whether the claim is subject to a bona fide
dispute; therefore not subject to "ready determination."

4 FDIC v. Wenberg (In re Wenberg), 94 B.R. 631, 634-35 (9th Cir. BAP
5 1988) (emphasis added), cited with approval in Ho, 274 B.R. at 875
6 and Slack, 187 F.3d at 1074.

7 Mendoza contends that her claim for special damages was
8 readily ascertainable from the spreadsheet, itemizations, medical
9 bills, invoices, and other documentation which she provided to
10 both Debtor and the court. She maintains that Debtor failed to
11 provide rebuttal evidence. However, Debtor maintains that there
12 is a bona fide dispute as to his liability in the civil tort
13 action, and extensive hearings will be required to resolve the
14 issues of liability and damages. In addition, he argues that only
15 the state court has the jurisdiction to adjudicate the action.

16 In Ho, the debtor had listed a breach of contract civil
17 lawsuit as an unliquidated and disputed debt of unknown amount,
18 for she was not a named defendant. Ho, 274 B.R. at 872-73. The
19 plaintiffs then asserted that the contract damages were readily
20 ascertainable and that debtor's possible liability was irrelevant
21 under Ninth Circuit law, which holds that a disputed debt can
22 still be liquidated. The bankruptcy court agreed with the
23 plaintiffs that the debt was liquidated, but the BAP reversed.
24 The BAP concluded that Ninth Circuit law had not removed any and
25 all issues of liability from the determination of whether a debt
26 is liquidated or unliquidated. Id. at 874. It held that where
27 liability was "remote" and extensive hearings would be necessary
28 to resolve the issue, the dispute rendered the debt unliquidated.

1 Id. at 875.

2 There is a line of cases addressing the concern that a debtor
3 may abuse the bankruptcy system by listing a fixed debt as
4 “disputed” simply as a stalling device or as a device to
5 manipulate his or her eligibility for relief under chapter 13.
6 Most of these cases involve a debt fixed pursuant to judgment,
7 statute or specific contract terms. See, e.g., Scovis, 249 F.3d at
8 984 (judgment lien); Sylvester, 19 B.R. at 673 (contract debt);
9 Fostvedt v. Dow (In re Fostvedt), 823 F.2d 305, 306 (9th Cir.
10 1987) (promissory notes); In re Monroe, 282 B.R. 219, 223 (Bankr.
11 D. Ariz. 2002) (prepetition judgment); In re Madison, 168 B.R.
12 986, 989 (D. Haw. 1994) (taxes and deficiencies determined by
13 IRS); United States v. Verdunn, 89 F.3d 799, 802 (11th Cir. 1996)
14 (tax liabilities and penalties); In re Knight, 55 F.3d 231, 235
15 (7th Cir. 1995) (statutory penalty owed by judge for failure to
16 report traffic violations); Barcal v. Laughlin (In re Barcal), 213
17 B.R. 1008, 1014 (8th Cir. BAP 1997) (assessed taxes).

18 However, the majority of cases involving a bona fide dispute
19 as to liability and requiring extensive hearings to resolve such
20 dispute fall within the Ho analysis, which looks at the potential
21 for creditor-inspired abuse. For example, creditors might assert
22 inflated or invalid claims that exceed the § 109(e) limits, which
23 then would be a “disincentive for debtors to provide accurate,
24 complete and candid schedules” Ho, 274 B.R. at 875; In re
25 Baird, 228 B.R. 324, 330 (Bankr. M.D. Fla. 1999) (creditors may
26 file duplicate or triplicate claims or allege treble damages). In
27 such factual situations, we said that “if [Ninth Circuit
28 precedent] were interpreted to preclude consideration of the

1 remoteness of liability, we would have created a dilemma that
2 inevitably will lead to schedules that are shaded to omit debts at
3 the margin of liability." Ho, 274 B.R. at 875.

4 Claims that are not capable of ready and precise
5 determination without an extensive evidentiary hearing, because of
6 a bona fide dispute, frequently involve pending tort or personal
7 injury litigation. See, e.g., In re Allen, 241 B.R. 710, 717
8 (Bankr. D. Mont. 1999) (debtor disputed ex-wife's assault claim
9 and amount of requested damages), rev'd and remanded in part on
10 other grounds, 23 Fed. Appx. 859 (9th Cir. 2002); Baird, 228 B.R.
11 at 329-30 (dispute as to corporate or personal liability for
12 treble damages); In re King, 9 B.R. 376, 379 (Bankr. D. Or. 1981)
13 (fraud action).

14 Here, Mendoza filed a proof of claim for \$912,459, of which
15 she argued that economic, or special damages, in the amount of
16 \$411,234 was liquidated (\$214,435 at the time the petition was
17 filed). Debtor denied Mendoza's allegations of assault and
18 battery and also disputed the amount of damages. We agree with
19 Debtor that there are several reasons why Mendoza's claim was not
20 liquidated.

21 First, special damages are "those naturally, but not
22 necessarily, resulting from the injury inflicted on the plaintiff,
23 and which are not implied by law." 23 Cal. Jur. 3d Damages § 182
24 (Thompson/West 2005); Crowe v. Sacks, 44 Cal. 2d 590, 597, 283
25 P.2d 689, 693 (1955) (jury's verdict for special damages was not
26 restricted to the amount demanded). Thus, special damages are
27 subject to proof of liability and amount at trial, notwithstanding
28 Mendoza's voluminous evidence of medical bills, lost wages and

1 other economic loss.

2 Second, a resolution of the liability and damages issues
3 would require extensive hearings and evidence from both parties.
4 The fact that Debtor did not provide rebuttal evidence in
5 bankruptcy court was irrelevant, as that action must be tried in
6 state court, and Mendoza did not request an evidentiary hearing in
7 bankruptcy court.¹⁰

8 Third, in weighing the parties' credibility, the bankruptcy
9 court could properly question Mendoza's claim for chauffeur
10 services in the amount of \$23,240 for her father, and home care
11 expenses of \$87,450 for her mother.¹¹ It could also look to the
12 amount of restitution awarded to Mendoza for her economic loss in
13 the criminal proceeding. The difference between that amount,
14 \$25,626, and \$214,435 is significant, lending credibility to
15 Debtor's "dispute" of the claim.¹²

16

17

18 ¹⁰ Mendoza did not request an evidentiary hearing on either
19 the eligibility or bad faith issue. The Bankruptcy Rule 9014(d)
20 requirement--that disputed factual issues arising in contested
21 matters must be heard with witness testimony in the same manner as
22 in an adversary proceeding--was not implicated for two reasons.
23 First, the bankruptcy court did not have jurisdiction to
24 adjudicate the personal injury action or to determine damages.
25 See 28 U.S.C. § 157(b)(5). Secondly, the rule allows the parties
26 to agree to resolution of the contested matter on affidavit
27 testimony. Here, Mendoza filed documentary and affidavit
28 testimony and did not request any further evidentiary hearing.
See Fed. R. Bankr. P. 9014(d).

24 ¹¹ At oral argument, Mendoza's counsel could not answer the
25 panel's question as to whether such sums had, indeed, been paid.

26 ¹² Even if the restitution portion could be considered
27 liquidated, Mendoza knew at the time she filed her proof of claim
28 that the state court had awarded her only \$25,626. It would be
inequitable to conclude that any more than that amount was
liquidated. That amount would not put Debtor over the eligibility
limits.

1 (3) whether the debtor's only purpose in filing for
2 chapter 13 protection is to defeat state court
litigation; and

3 (4) whether egregious behavior is present.

4 Ho, 274 B.R. at 876 (citing Leavitt, 171 F.3d at 1224).

5 A case filed to obtain the "superdischarge" of chapter 13
6 does not preclude a finding of good faith. See Downey Sav. & Loan
7 Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1498 (9th Cir. 1987);
8 Fid. & Cas. Co. of N.Y. v. Warren (In re Warren), 89 B.R. 87, 93
9 (9th Cir. BAP 1988); Street v. Lawson (In re Street), 55 B.R. 763,
10 765 (9th Cir. BAP 1985). It is the debtor's burden to prove good
11 faith; where a debtor seeks a "superdischarge," the burden of
12 proving good faith is "especially heavy." Warren, 89 B.R. at 93;
13 Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 940 (9th Cir. BAP
14 1997), aff'd, 171 F.3d 1219 (9th Cir. 1999).

15 In Warren, the debtor filed a chapter 13 petition and a
16 minimal repayment plan in order to discharge a debt that was
17 potentially nondischargeable in a chapter 7. The bankruptcy court
18 confirmed the plan without a hearing, but the panel reversed and
19 remanded for an evidentiary hearing on the issue of good faith.
20 We set forth a nonexclusive list of factors which the court may
21 use as a guidepost in its determination of whether such a case,
22 similar to the one at bar, has been filed in bad faith. Those
23 factors are:

- 24 1) The amount of the proposed payments and the amounts
25 of the debtor's surplus;
- 26 2) The debtor's employment history, ability to earn, and
likelihood of future increases in income;
- 27 3) The probable or expected duration of the plan;
- 28 4) The accuracy of the plan's statements of the debts,

1 expenses and percentage of repayment of unsecured
2 debt, and whether any inaccuracies are an attempt to
mislead the court;

- 3 5) The extent of preferential treatment between classes
4 of creditors;
- 5 6) The extent to which secured claims are modified;
- 6 7) The type of debt sought to be discharged, and whether
any such debt is nondischargeable in Chapter 7;
- 7 8) The existence of special circumstances such as
8 inordinate medical expenses;
- 9 9) The frequency with which the debtor has sought relief
under the Bankruptcy Reform Act;
- 10 10) The motivation and sincerity of the debtor in seeking
Chapter 13 relief; and
- 11 11) The burden which the plan's administration would
12 place upon the trustee.

13 Warren, 89 B.R. at 93 (citing United States v. Estus (In re
14 Estus), 695 F.2d 311, 317 (8th Cir. 1982)).¹⁴ These factors are
15 applied on a case-by-case basis. See id.; see also In re Martin,
16 233 B.R. 436, 446-48 (Bankr. D. Ariz. 1999).

17 The bankruptcy court conducted a hearing on the plan
18 objection and good-faith issue. The January 20, 2005 hearing
19 transcript provides a record of the bankruptcy court's inquiry
20 into all of the facts and circumstances of Debtor's chapter 13
21 filing and plan, which supported the totality of circumstances
22 approach. See Leavitt, 171 F.3d at 1223 (complete understanding

23
24 ¹⁴ In a 1990 opinion, the Eighth Circuit acknowledged that
25 § 1325(b)'s "ability to pay" criteria, which was enacted in 1984,
26 subsumed most of the Estus factors, but nonetheless held that the
27 "traditional 'totality of circumstances' approach with respect to
28 Estus factors not addressed by the legislative amendments" have
been preserved. Handeen v. LeMaire (In re LeMaire), 898 F.2d
1346, 1349 (8th Cir. 1990). Such relevant factors include "the
type of debt sought to be discharged and whether the debt is
nondischargeable in a chapter 7, and the debtor's motivation and
sincerity in seeking Chapter 13 relief" Id.

1 of issues may be had from record without the aid of separate
2 written findings.) Even though the bankruptcy court did not
3 specifically refer to either the Leavitt or Warren factors in its
4 ruling, we may affirm on any ground fairly supported by the
5 record. Leavitt, 171 F.3d at 1223; Davis v. Courington (In re
6 Davis), 177 B.R. 907, 912 (9th Cir. BAP 1995).

7 We next examine the record evidence in light of the Leavitt
8 and Warren factors, keeping in mind what we have noted in other
9 contexts, that "such lists [of factors] are capable of being
10 misconstrued as inviting arithmetic reasoning, [and therefore] we
11 emphasize that these items are merely a framework for analysis and
12 not a scorecard. In any given case, one factor may so outweigh
13 the others as to be dispositive." Fjeldsted v. Lien (In re
14 Fjeldsted), 293 B.R. 12, 25 (9th Cir. BAP 2003).

15 16 Leavitt Factors

17 18 Leavitt Factor No. 1: Whether Debtor misrepresented facts, 19 unfairly manipulated the Code or otherwise filed the chapter 13 20 petition or plan in an inequitable manner

21 Debtor accurately scheduled Mendoza as a creditor, and
22 accurately described her lawsuit as a disputed, contingent and
23 unliquidated debt of unknown amount. Therefore, he was eligible
24 for chapter 13 without any misrepresentation of the facts.

25 His maximum-term, 60-month plan proposed to pay priority
26 child support, taxes, and \$188,000 in unsecured debt, according to
27 his amended schedules. He proposed to sell his only significant
28 asset, his interest in the family home, and to forfeit his

1 homestead exemption in order to satisfy the secured lien and to
2 distribute the net proceeds to the unsecured creditors. Under the
3 plan, Mendoza would receive her pro rata share of everything she
4 was due on any allowed claim.

5 While the nature of Debtor's criminal offense was serious, he
6 had cooperated with the chapter 13 trustee, the court, and
7 authorities. The evidence did not support Mendoza's allegations
8 that Debtor was lying or unfairly manipulating the Code by listing
9 her claim as "unknown."

10 This factor was favorable to Debtor.

11
12 **Leavitt Factor No. 2: History of Filings and Dismissals**

13
14 No prior bankruptcies or dismissals were noted in the
15 excerpts of record. Therefore, this factor was favorable to
16 Debtor.

17
18 **Leavitt Factor No. 3: Whether Debtor's only purpose in filing**
19 **for chapter 13 protection is to defeat state court litigation**

20 It is clear that Debtor filed a chapter 13 petition to avoid
21 litigating Mendoza's civil action. A bona fide dispute existed,
22 however, as to his liability and the amount of damages.
23 Therefore, his attempt to save litigation costs was a valid reason
24 for seeking bankruptcy protection.

25 Moreover, Mendoza was one of many unsecured creditors whose
26 debts would be treated in the chapter 13 plan. Even if these
27 creditors would receive little or nothing through the plan, Debtor
28 was making his best efforts and devoting all of his disposable

1 income to the plan. A nominal payment of unsecured debt does not
2 necessarily mean that a plan has been proposed in bad faith.
3 Villanueva, 274 B.R. at 841.

4 This factor was favorable to Debtor.

5

6 **Leavitt Factor No. 4: Presence of egregious behavior**

7

8 There was no egregious behavior relevant to the chapter 13
9 case that was evident in the record. Therefore, this factor was
10 favorable to Debtor.

11

12 **Warren Factors**

13

14 **Warren Factor No. 1: Amount of the proposed**
15 **payments and any surplus**

16 Debtor apparently committed all of his disposable income to
17 the plan and there would be no surplus.

18 Although the unsecured creditors might receive either a
19 nominal or zero dividend, his plan to pay them from the proceeds
20 of the sale of his only major asset, the family home, was fair to
21 all concerned. Mendoza would receive all that she was entitled
22 to, based upon any allowed claim that she held against the estate.

23 The plan was also needed so that Debtor could pay his
24 priority creditors. He was not simply attempting to wipe out his
25 unsecured debt.

26 This factor was favorable to Debtor.

27 //

28 //

1 **Warren Factor No. 2: Debtor's employment history, ability**
2 **to earn, and likelihood of future increases in income**

3 The second factor focuses on feasibility to fund a plan. See
4 Martin, 233 B.R. at 446. The bankruptcy court found that Debtor
5 had been "cooperative and generally fulfilling the requirements
6 and requests" made of him by the chapter 13 trustee. Tr. of
7 Proceedings (January 20, 2005), p.11:18-20. There were no
8 concerns raised in this area. Therefore, this factor was
9 favorable to Debtor.

10
11 **Warren Factor No. 3: Probable or expected duration of the plan**

12
13 Debtor proposed the longest term available for his plan--60
14 months. See 11 U.S.C. § 1322(d). This reflects Debtor's best
15 effort. Therefore, this factor was favorable to Debtor.

16
17 **Warren Factor No. 4: Accuracy of the plan's statements of the**
18 **debts, expenses and percentage of repayment of unsecured debt, and**
19 **whether any inaccuracies are an attempt to mislead the court**

20 Mendoza's contention that Debtor misrepresented the amount of
21 his unsecured debt has not been upheld on review. Debtor met his
22 burden to prove that he did not intentionally file inaccurate
23 schedules or attempt to mislead the court by stating that the
24 amount of Mendoza's claim was "unknown." Therefore, this factor
25 was favorable to Debtor.

26 //

27 //

28 //

1 **Warren Factor No. 5: Extent of preferential treatment**
2 **between classes of creditors**

3 Debtor's plan fulfilled the requirements to pay
4 administrative claims and priority debt first, as required by
5 § 1322(a)(2). There were no secured claims to be paid under the
6 plan other than the mortgage lien which presumably would be paid
7 from the sale proceeds. The unsecured creditors, other than
8 Mendoza, did not object to sharing pro rata in any net proceeds
9 received from the sale of the home. Therefore, this factor was
10 favorable to Debtor.

11
12 **Warren Factor No. 6: Extent to which secured claims are modified**

13
14 There were no modified secured claims; this factor was
15 neutral.

16
17 **Warren Factor No. 7: Type of debt sought to be discharged, and**
18 **whether any such debt is nondischargeable in Chapter 7**

19 Debtor clearly sought conversion to chapter 13 in order to
20 avoid litigation of Mendoza's civil action and/or discharge any
21 tort liability. Such debt would have been nondischargeable in a
22 chapter 7. Seeking such a "superdischarge" is not per se bad
23 faith. Warren, 89 B.R. at 93.

24 In its examination of all of the circumstances of this case,
25 the bankruptcy found that Mendoza was complying with the
26 Bankruptcy Code in regards to Mendoza's claim, that she would
27 receive at least as much as she would have in a chapter 7 case,
28 and that there were other purposes for the chapter 13 case.

1 Where Debtor did not file the chapter 13 petition solely to avoid
2 payment of Mendoza's claim, he did not abuse the Code provisions.
3 See Warren, 89 B.R. at 92 ("Chapter 13 was designed with an
4 emphasis on debt repayment"), and at 95 ("The super discharge of
5 Chapter 13 was provided by Congress as an incentive for the debtor
6 to commit to a repayment plan under Chapter 13, as an alternative
7 to providing creditors nothing under Chapter 7.").

8 This factor was favorable to Debtor.

9
10 **Warren Factor No. 8: Special circumstances**

11
12 No special circumstances have been shown; this factor was
13 neutral.

14
15 **Warren Factor No. 9: Frequency of seeking bankruptcy relief**

16
17 There is no evidence of prior bankruptcy cases filed by
18 Debtor. Therefore, this factor was favorable to Debtor.

19
20 **Warren Factor No. 10: Debtor's motivation and sincerity**

21
22 The bankruptcy court found that Debtor's motivation for
23 proposing a chapter 13 plan was to discharge the nondischargeable
24 Mendoza judgment debt. That alone is not bad faith. His
25 cooperation with the chapter 13 trustee and his proposed 60-month
26 plan support the bankruptcy court's finding that, "on balance,"
27 Debtor exhibited good faith and his petition was not an attempt to
28 mislead or conceal. Therefore, this factor was favorable to

1 Debtor.

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Warren Factor No. 11: Burden upon the trustee

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Section 1307(c) provides, in pertinent part:

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11 U.S.C. § 1307(c).

21

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24

The statute enumerates several nonexclusive "causes," which are inapplicable here. While ineligibility may be a "cause" for dismissal, we have affirmed the bankruptcy court's decision that Debtor was eligible for chapter 13 relief.

25

26

27

28

It is well-established law that "bad faith" may also be a "cause" for dismissal or conversion under § 1307(c). Leavitt, 171 F.3d at 1224; Eisen, 14 F.3d at 470. As the bankruptcy court did not err in finding neither ineligibility nor lack of good faith,

1 it follows that it did not err in declining to convert or dismiss
2 the chapter 13 case.

3
4 **CONCLUSION**

5
6 Mendoza's claim for civil tort damages was contingent and
7 unliquidated. Therefore, Debtor did not misrepresent the facts or
8 attempt to manufacture eligibility when he stated the amount of
9 Mendoza's tort claim as "unknown."

10 On the totality of circumstances, and considering both the
11 Leavitt and Warren factors, the bankruptcy court's finding of
12 Debtor's good faith, both in filing the petition and in proposing
13 the chapter 13 plan, is supported by the record and evidence.
14 Since there was no basis for dismissal, the bankruptcy court did
15 not abuse its discretion in confirming the plan. Its confirmation
16 order is therefore **AFFIRMED**.