NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-05-1069-MaMcB
EDDIE M. DUQUE,	Bk. No. LA 04-24113-BB
Debtor.	
JULIE MENDOZA,	
Appellant,	
v.	**M E M O R A N D U M**[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, McMANUS[2] and BRANDT, Bankruptcy Judges.

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[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.

INTRODUCTION

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

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

FACTS

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

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

[3] Unless otherwise indicated, all "chapter" and "section" 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.

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

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

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

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

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

[5] Debtor's Amended Schedule F was filed in September 2004 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.

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

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

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

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

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

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

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

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

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

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

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

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

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[6] In a subsequent order denying stay relief for Mendoza's action, (of which we take judicial notice), the bankruptcy court 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).

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

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

ISSUES

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

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

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

the plan.[7]

STANDARDS OF REVIEW

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

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

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

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

[8] Mendoza states that the standard of review for a determination of good faith in this case is de novo. See 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.

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

DISCUSSION

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

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

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

A. Section 109(e) Eligibility

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

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

11 U.S.C. § 109(e).

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

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

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

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

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

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

(1) Mendoza's Civil Tort Claim was Contingent

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

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

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

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

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

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

Since restitution was awarded based on Mendoza's evidence of 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

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

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

(2) Mendoza's Claim was Unliquidated

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

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

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

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

Slack, 187 F.3d at 1074.

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

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

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[9] But see Judge Klein's concurring opinion in Ho, in which he expressed a lingering concern that Scovis "meant everything it said," particularly as it followed the Sixth Circuit Pearson 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.

> necessary to establish amounts or liability. On this issue, the bankruptcy judge has the best occasion to 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."

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

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

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

Id. at 875.

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

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

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

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

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

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

other economic loss.

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

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

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

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

[12] Even if the restitution portion could be considered liquidated, Mendoza knew at the time she filed her proof of claim 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.

Therefore, we conclude that Mendoza's claim was unliquidated at the petition date and, thus, Debtor properly scheduled Mendoza's claim as "unknown." The bankruptcy court did not err in its determination that Debtor was eligible for chapter 13 pursuant to § 109(e).

B. Good Faith

Mendoza also contends that Debtor filed his chapter 13 petition and plan in bad faith. "To determine if a petition has been filed in bad faith courts are guided by the standards used to evaluate whether a plan has been proposed in bad faith." Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994).

A determination of bad faith requires an analysis of the "totality of the circumstances." Ho, 274 B.R. at 876 (quoting Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1391 (9th Cir. 1982)). "The court should examine the debtor's intentions and the legal effect of confirmation in light of the spirit and purposes of chapter 13." Villanueva, 274 B.R. at 841. A bankruptcy court generally considers the following factors:

> (1) whether the debtor misrepresented facts in his or her petition or plan, unfairly manipulated the Bankruptcy Code or otherwise filed the Chapter 13 petition or plan in an inequitable manner[13];
>
> (2) the debtor's history of filings and dismissals;

[13] A finding of bad faith does not require fraudulent intent by the debtor, nor is evidence required of the debtor's ill will directed at creditors, or that debtor was affirmatively attempting to violate the law--malfeasance is not a prerequisite to bad faith. See Ho, 274 B.R. at 876.

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

(4) whether egregious behavior is present.

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

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

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

1) The amount of the proposed payments and the amounts of the debtor's surplus;

2) The debtor's employment history, ability to earn, and likelihood of future increases in income;

3) The probable or expected duration of the plan;

4) The accuracy of the plan's statements of the debts,

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

5) The extent of preferential treatment between classes of creditors;

6) The extent to which secured claims are modified;

7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;

8) The existence of special circumstances such as inordinate medical expenses;

9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;

10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and

11) The burden which the plan's administration would place upon the trustee.

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

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

[14] In a 1990 opinion, the Eighth Circuit acknowledged that § 1325(b)'s "ability to pay" criteria, which was enacted in 1984, subsumed most of the Estus factors, but nonetheless held that the "traditional 'totality of circumstances' approach with respect to 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.

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

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

Leavitt Factors

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

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

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

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

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

This factor was favorable to Debtor.

Leavitt Factor No. 2: History of Filings and Dismissals

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

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

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

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

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

This factor was favorable to Debtor.

Leavitt Factor No. 4: Presence of egregious behavior

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

Warren Factors

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

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

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

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

This factor was favorable to Debtor.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

This factor was favorable to Debtor.

Warren Factor No. 8: Special circumstances

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

Warren Factor No. 9: Frequency of seeking bankruptcy relief

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

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

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

Debtor.

Warren Factor No. 11: Burden upon the trustee

Debtor's simple chapter 13 plan would place no unusual burdens upon the chapter 13 trustee, who would be fully compensated. Therefore, this factor was favorable to Debtor.

In summary, analyzed via either the Leavitt or Warren factors, the bankruptcy court's finding of good faith was not clearly erroneous.

C. Dismissal - § 1307(c)

Section 1307(c) provides, in pertinent part:

> (c) Except as provided in subsection (3) of this section [debtor farmer], on request of a party in interest or the United States trustee and after notice and a hearing, the court may convert a case under this chapter to a case under chapter 7 of this title, or may dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause, ...

11 U.S.C. § 1307(c).

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.

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,

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

CONCLUSION

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

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