NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. NV-04-1486-MaBmK
LONG THANH TANG,	Bk. No. 03-14524-BAM
Debtor.	
LONG THANH TANG,	
Appellant,	
v.	**M E M O R A N D U M**[1]
LEVERAGE LEASING CO.,	
Appellee.	

Argued and Submitted on March 24, 2005
at Las Vegas, Nevada

Filed - May 25, 2005

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

Honorable Leslie Tchaikovsky, Bankruptcy Judge, Presiding.[2]

Before: MARLAR, BAUM[3] and KLEIN, Bankruptcy Judges.

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

[2] The Hon. Leslie Tchaikovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation in the District of Nevada.

[3] Hon. Redfield T. Baum, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

INTRODUCTION

A debtor has appealed the bankruptcy court's order which reconverted his chapter 13 case to chapter 7 on grounds of bad faith. The debtor contends that the bankruptcy court failed to consider the totality of circumstances. We AFFIRM.

FACTS

Debtor Long Thanh Tang ("Tang") is a Vietnamese immigrant, who, in 2002, was living in Florida and operating a restaurant known as Tomy's Kitchen with a man named Vincent Chung ("Chung"). Allegedly at Chung's request, Tang signed, as guarantor, many legal documents such as leases and home loans.

One such document was the guaranty of an equipment lease between Tomy's Kitchen and Leverage Leasing Co. ("Leverage"). In August, 2002, Tang executed the guaranty as "president" of Trenmaster Corp., dba Tomy's Kitchen. When default occurred and the equipment could not be located, Leverage obtained a state court judgment against Tang. Leverage's attempt to execute on the judgment was halted when Tang filed a chapter 7 petition, in April, 2003, in the Nevada bankruptcy court.

In his bankruptcy schedules and statements, Tang disclosed that he was married and had a 15-year-old daughter, that he worked as a server at a Chinese restaurant, in Las Vegas, earning $1,393.33 per month, that he owned no real property and only $810 worth of personal property, including one automobile, and that he shared another automobile with his "girlfriend." His was the only

scheduled income with which to pay monthly expenses totaling $1,378.33.

There were no secured or priority creditors listed. Tang's unsecured debts totaled $358,775.45,[4] most of which were denominated as "identity theft." Leverage's claim, in the amount of $75,580.45, was the only one marked as disputed, however.

Leverage filed a timely complaint to determine its judgment debt nondischargeable under § 523(a)(2)(A) (fraud or misrepresentation), § 523(a)(2)(B) (false financial statement), and § 523(a)(6) (willful and malicious injury). The complaint alleged that Tang falsely represented that he had received the equipment, but that he had intentionally and wrongfully abandoned, concealed, transferred or otherwise disposed of the equipment. It also alleged that Tang presented a false written financial statement in connection with the lease in which he stated that his annual income was $253,600 and his total assets were approximately $858,000.

On October 1, 2003, Tang admitted to the alleged facts and stipulated to the entry of a nondischargeable judgment as to Leverage's claim.

Before a discharge was entered in the chapter 7 case, Tang filed a motion to convert to chapter 13. He alleged that he had been victimized by Chung and could not afford to pay an attorney

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[4] In the excerpts of record, the second continuation page to Tang's chapter 7 Schedule F --the list of unsecured creditors, which lists a $52,091.00 debt to Wachovia Bank, is missing, which would bring the total unsecured debt to $358,775.45. However, this page is attached to the chapter 13 Schedule F.

to bring this defense in the nondischargeability proceeding.[5] Apparently, therefore, his motivation for conversion was to obtain the superdischarge under § 1328(a).[6] On December 15, 2003, the bankruptcy court granted Tang's motion.

Tang filed an amended Schedule F. Although the total unsecured debt was the same--$358,776.45--he marked seven out of ten unsecured claims as "disputed." The amount of unsecured debt exceeded the eligibility requirements for a chapter 13. See 11 U.S.C. § 109(e) (noncontingent, liquidated, unsecured debts of less than $307,675). In addition, according to those unrevised figures, Tang had only $15 in net disposable income with which to pay administrative expenses and his creditors ($1,393.33 income minus $1,378.33 expenses = $15).

Nonetheless, Tang's chapter 13 plan, filed on March 8, 2004, proposed to pay $50 per month for 36 months for a total of $1,800. From that total payment, $1,494 would be paid to his attorney,

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[5] We may take judicial notice of the bankruptcy court docket, although this motion was not included in the excerpts of record. See also Debtor's Opposition to Motion to Reconvert (May 17, 2004), at 6, ¶ 7 (stating that Tang could not afford a defense).

[6] Section 1328(a) provides, in pertinent part:

> (a) As soon as practicable after completion by the debtor of all payments under the plan, unless the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter, the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title, except any debt--
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> . . . .
>
> (2) of the kind specified in paragraph (5), (8), or (9) of section 523(a) of this title; . . . .

11 U.S.C. § 1328(a)(2).

$180 would be paid to the chapter 13 trustee, and only $126 would be paid to unsecured creditors. This was a de minimis .0004% payout to the unsecured creditors whose claims totaled $358,776.45. For example, Leverage would receive only $30 on its $75,000 nondischargeable debt.

Leverage immediately filed a motion to reconvert[7] Tang's case to chapter 7 for lack of eligibility under chapter 13 and bad faith.

Tang opposed the motion. He stated that two of the unsecured claims, totaling $196,091, had been satisfied, either by foreclosure or were paid by someone else. Specifically, a $144,000 debt to Chase Manhattan Mortgage had been listed on his Schedule F but he just learned, in May, 2004, that the lender had recorded a Release of Mortgage in 2002. Tang alleged that notice had been sent to his former address in Florida, so he did not receive it. Another $52,091 debt to Wachovia Mortgage had also been satisfied. Therefore, the total amount of unsecured debt was revised to $162,685.45 ($358,776.45 - $196,091 = $162,685.45).

In addition, Tang claimed that, in reviewing his pay stubs as required in chapter 13, he discovered that his income was actually $63.36 more than he had reported in the chapter 7 and was revised to $1,456.69 per month ($1,456.69 - $1,393.33 = $63.36). Since his expenditures remained the same at $1,378.33, his current net disposable income was $78.36 ($1,456.69 - $1,378.33 = $78.36).

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[7] This motion was proper procedure, in that the bankruptcy court can "redress dishonest exploitation of the right to convert [in § 706(a)] through its statutory powers to convert the case back to chapter 7 . . . ." Croston v. Davis (In re Croston), 313 B.R. 447, 449 (9th Cir. BAP 2004).

On May 24, 2004, Tang filed amended schedules reflecting these changes, and also filed an amended three-year plan providing payments of $78 per month for a total of $2,808. The unsecured creditors would now receive a total distribution of $1,021, which was a .006% dividend; Leverage would receive about $450 on its $75,000 debt.

Tang argued, in his opposition, that his plan was feasible and utilized all of his disposable income. He added that his utility expenses of electricity, water and telephone were paid by his "live-in girlfriend."[8] Indeed, he did not claim any expense for those items.

Tang also argued that he had filed the chapter 13 petition and plan in good faith, and that he had no choice but to convert to chapter 13 because he could not afford a $2,000 retainer for his legal defense in the nondischargeability action. Therefore, Tang asserted that he was "being punished for being poor."[9]

At the May 25, 2004 hearing, the bankruptcy court heard arguments and questioned Tang's disclosures and plan provisions. The following exchange occurred between the court and Tang's attorney:

THE COURT: Can I ask you something? Who benefits from this plan?

MR. COGAN: The —

THE COURT: What happens other than discharging this nondischargeable debt?

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[8] See Debtor's Opposition to Motion to Reconvert (May 17, 2004), p. 4:26-27. There is nothing in the excerpts of record in regards to whether Tang's girlfriend contributed any income to their household.

[9] Id. at 6:24.

MR. COGAN: The debtor primarily benefits.

THE COURT: But only from getting a discharge of its debts, including a superdischarge debt.

MR. COGAN: That's correct.

THE COURT: There's no other purpose to the conversion is there because the unsecureds aren't going to get any money.

MR. COGAN: That's correct, but this —

THE COURT: Who's getting the money, the trustee and the attorney?

MR. COGAN: Correct.

THE COURT: I'm going to grant the motion. I don't think this is a good-faith use of Chapter 13.

Tr. of Proceedings (May 25, 2004), p. 16:5-22.

The bankruptcy court's order granting Leverage's motion for reconversion was entered on September 20, 2004, and Tang filed a timely notice of appeal.

ISSUE

The issue on appeal is whether the bankruptcy court abused its discretion in reconverting Tang's case because it either: (1) applied an incorrect legal standard in its determination of bad faith; or (2) clearly erred in determining that Tang filed the chapter 13 case in bad faith.

STANDARD OF REVIEW

An order regarding conversion of a case is reviewed for an abuse of discretion. Croston, 313 B.R. at 450. A bankruptcy

court necessarily abuses its discretion if it bases its decision on an erroneous view of the law or a clearly erroneous factual finding. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990).

Whether the bankruptcy court applied the correct legal standard is an issue which we review de novo. Law Offices of David A. Boone v. Derham-Burk (In re Eliapo), 298 B.R. 392, 397 (9th Cir. BAP 2003). The existence of bad faith is a factual determination which we review for clear error. 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).

DISCUSSION

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. Nonetheless, it is now well established that "bad faith" may also be a "cause" for dismissal or conversion under § 1307(c). Leavitt, 171 F.3d at 1224; 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 v. Dowell (In re Ho), 274 B.R. 867, 876 (9th Cir. BAP 2002) (quoting Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1391 (9th Cir. 1982)). 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;
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> (2) the debtor's history of filings and dismissals;
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> (3) whether the debtor's only purpose in filing for chapter 13 protection is to defeat state court litigation; and
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> (4) whether egregious behavior is present.[10]

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).

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[10] 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.

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, and 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;
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> 2) The debtor's employment history, ability to earn, and likelihood of future increases in income;
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> 3) The probable or expected duration of the plan;
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> 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;
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> 5) The extent of preferential treatment between classes of creditors;
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> 6) The extent to which secured claims are modified;
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> 7) The type of debt sought to be discharged, and whether any such debt is nondischargeable in Chapter 7;
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> 8) The existence of special circumstances such as inordinate medical expenses;
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> 9) The frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
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> 10) The motivation and sincerity of the debtor in seeking Chapter 13 relief; and
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> 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)).[11]

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 an evidentiary hearing on the objection and good-faith issue; it had before it the entire record of the case, which supported the totality of circumstances approach. The May 25, 2004 hearing transcript provides a record of the bankruptcy court's inquiry. See Leavitt, 171 F.3d at 1223 (complete understanding of issues may be had from record without the aid of separate written findings).

Even though the bankruptcy court did not specifically refer to the Warren factors in its ruling, we may review the record and the court's ruling in accordance therewith. See Leavitt, 171 F.3d at 1223 (we may affirm on any ground fairly supported by the record); Davis v. Courington (In re Davis), 177 B.R. 907, 912 (9th Cir. BAP 1995) ("Even if bankruptcy court did not rely upon given basis for decision, Bankruptcy Appellate Panel can affirm upon any basis presented by record.").

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[11] In a 1990 opinion, the Eighth Circuit acknowledged that § 1325(b)'s "ability to pay" criteria, 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. See also Banks v. Vandiver (In re Banks), 248 B.R. 799, 803 (8th Cir. BAP 2000) (citing totality of circumstances approach of LeMaire and Estus for a good-faith determination), aff'd, 267 F.3d 875 (8th Cir. 2001); Nielsen v. DLC Inv., Inc. (In re Nielsen), 211 B.R. 19, 22 (8th Cir. BAP 1997) (same).

Warren Factor No. 1:
The amount of the proposed payments and the amounts of the debtor's surplus.

Tang contends that the bankruptcy court ignored the totality of circumstances and focused only on the nominal amount of his proposed payment to the unsecured creditors. Tang apparently committed all of his disposable income to the plan and there would be no surplus.

The issue of nominal payment as indicia of bad faith in chapter 13 was addressed in Goeb. There, the bankruptcy court denied the plan because it provided for only a 1% payment to unsecured creditors, and the debtors appealed to the Ninth Circuit. The Ninth Circuit declined to impose a "substantial payment requirement." Goeb, 675 F.2d at 1389. Instead, it held that a debtor's insubstantial payment should be just one factor to be considered in an "all militating factors" analysis. Id. at 1391.

In Goeb, the debtors were not seeking a superdischarge and their "primary purpose for electing Chapter 13 was to restructure the payment of delinquent taxes in order to avoid trouble with the IRS." Id. at 1389. In addition, they proposed to pay secured and priority creditors in full. Therefore, the facts differed from our case.

Tang's plan proposed a de minimis dividend (.006%) to all unsecured creditors including Leverage and there were no priority or secured creditors. Tang conceded that no one would benefit from the plan except for his attorney, the chapter 13 trustee, and Tang himself by receiving the superdischarge.

If viewed in a vacuum, this factor would favor Tang. However, when viewed in the totality of circumstances, particularly in combination with Factor No. 7 (see discussion below), this factor is unfavorable to Tang.

Warren Factor No. 2:
The 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. A threshold for a feasibility finding, however, is the existence of a plan to restructure debt. See Warren, 89 B.R. at 92 ("Chapter 13 was designed with an emphasis on debt repayment.").

Here, the bankruptcy court found that Tang had no secured or priority creditors, only unsecured creditors who would receive only a nominal dividend. Therefore, Tang's plan did not meaningfully restructure debt through a repayment schedule.

Tang's ability to make the $78 monthly payments was not questioned, as his income reflected that amount. Tang's immigrant status and current employment as a waiter were not indicative of any short-term potential for an increase in his annual income. When these facts are viewed in the totality of circumstances, however, a different picture arises.

Just eight months before filing bankruptcy, Tang had been the president of Tomy's Kitchen, and claimed to be earning over $200,000 per year. Although Tang conceded that his personal financial statement was false, the facts reveal a propensity to tailor the facts to the situation. Clearly, Tang's declared

income and employment in bankruptcy is below his potential but, conveniently, would give no benefit to his creditors. Therefore this factor was unfavorable to Tang.

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

Tang's plan called for payments over 36 months. Such a three-year plan is the minimum plan period allowed under the Code. See 11 U.S.C. § 1322(d). Tang could have requested court approval for up to five years, or 60 months, but he did not do so.

Other than Tang's attorney, his only creditors were unsecured creditors who would receive de minimis pro-rata distributions from the $78 per month payments. A longer plan, although not required, would have demonstrated Tang's willingness to pay something, over and above the administrative expenses, on the nondischargeable Leverage debt. Therefore, this factor was unfavorable to Tang.

Warren Factor No. 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.

Tang's schedules were suspect. He amended his schedules only after Leverage filed valid objections. For example, Tang's chapter 7 petition and bankruptcy schedules listed unsecured debt in excess of the chapter 13 debt limits. Nonetheless, he moved to convert his case to chapter 13 based on those same figures. Forced to amend his schedules, Tang suddenly discovered that two major debts had been satisfied, and their subtraction then brought his debt limits within the Code requirements.

The bankruptcy court questioned Tang's attorney concerning the discrepancies in the amount of unsecured debt in Tang's schedules. Counsel explained that Tang had made an honest mistake by including two debts which were no longer owed.

Tang at first listed his income as $1,393.33 per month. Following Leverage's objection based on bad faith, Tang conveniently discovered that he actually earned $1,456.69 per month. He did not report any income for his nonfiling spouse. While conceding that his live-in girlfriend paid the household utilities, he did not indicate her income for purposes of determining the projected disposable income, which omission was an apparent inconsistency.

In the chapter 7, Tang only disputed the claim of Leverage; whereas, in the amended schedules he disputed six other unsecured claims that were previously undisputed.

These more mundane inaccuracies nonetheless potentially affected the amount of payments on the valid unsecured claims, and required that Leverage, which stood to lose the most, monitor and affirmatively object to the content of Tang's schedules and plan proposals.

Furthermore, the record reveals that Tang consented to judgment in the chapter 7 nondischargeability proceeding and admitted to the allegations that he had misrepresented personal financial information, such as the amount of his income and assets, in order to obtain the Leverage equipment lease.

While fraud was not found concerning Tang's bankruptcy schedules and statements, their accuracy was at best questionable. See Ho, 274 B.R. at 876 (fraudulent intent is not a prerequisite

to a finding of bad faith).

Therefore, this factor was unfavorable to Tang.

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

Tang's plan proposed to pay administrative claims first, as required by § 1322(a)(2). There were no other priority or secured claims. The unsecured claims would then share pro-rata and receive less than 1% of their claims. The plan complied with the Code and did not discriminate among classes of creditors.

Therefore, this factor was favorable to Tang.

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

There were no secured claims. Therefore, this factor was neutral.

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

Tang clearly sought conversion to chapter 13 in order to discharge the Leverage debt, which had been determined to be nondischargeable in 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 court found that Tang would be getting a superdischarge as to the nondischargeable Leverage debt and there was no other purpose for the chapter 13. Tang's counsel conceded

that no one else would benefit from a chapter 13 plan other than counsel, the chapter 13 trustee and Tang.

The Ninth Circuit has held that bad faith exists where the debtor only intends to defeat state court litigation. Chinichian v. Campolongo (In re Chinichian), 784 F.2d 1440, 1445-46 (9th Cir. 1986). Accord Leavitt, 171 F.3d at 1224; Eisen, 14 F.3d at 470. The nondischargeable judgment is final and Tang has not sought to set it aside. See Martinelli v. Valley Bank of Nev., 96 B.R. 1011, 1013 (9th Cir. BAP 1988) (declining to vacate a postpetition stipulated judgment of nondischargeability). Tang's sole purpose in converting to chapter 13 was to avoid payment of the Leverage judgment, rather than to pay the debt over time. 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.").

Therefore, Tang's conversion to chapter 13 in combination with the minimal payment plan was inequitable conduct and a misuse of the bankruptcy laws.[12]

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[12] Tang argued that the bankruptcy court should have also considered, as a factor, his waived defenses in the underlying nondischargeability proceeding, i.e., that he was the alleged victim of Chung and was unfamiliar with western business practices. We disagree that his waived opportunity to present such defense somehow justified the chapter 13 case to discharge Leverage's judgment. In addition, Tang may be judicially estopped from proposing a chapter 13 plan that does not pay a judgment to which he consented. See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 780 (9th Cir. 2001) ("Judicial estoppel is an equitable doctrine that precludes a party from gaining an advantage by asserting one position, and then later seeking an advantage by taking a clearly inconsistent position.").

Tang cites case law for the proposition that the nominal payment and superdischarge were insufficient indicia of bad faith. In Bank of Am. Nat'l Trust & Sav. Ass'n v. Slade (In re Slade), 15 B.R. 910 (9th Cir. BAP 1981), the bank held a judgment against the debtor with a balance of approximately $26,000, resulting from debtor's embezzlement, which would have been nondischargeable in a chapter 7. Id. at 911. Instead of filing under chapter 7, the debtor filed a chapter 13 petition and could only afford to pay all creditors $135 per month for two years; the unsecured creditors, including the judgment creditor, were to receive a total amount of $250. Id. The case went to the panel on appeal after the bankruptcy court confirmed the chapter 13 plan. The panel looked at all of the circumstances and found that the debtor was making his "best effort" to repay, which was a "significant indication of good faith on his part." Id. at 912. Thus, the panel affirmed the plan confirmation.

Subsequently, in Warren, we held that the best effort criteria was an insufficient test, by itself, for good faith. Warren, 89 B.R. at 94.

Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d 1118 (9th Cir. 1983), was another case of embezzlement by the debtor and an outstanding state court judgment. The debtor filed a chapter 13 plan which provided zero payment on the claim. Id. at 1119. The bankruptcy court confirmed the plan. On appeal, the Ninth Circuit considered the debtor's good faith and whether he had "acted equitably" in proposing the plan. Id. It stated: "If the bankrupt can show good faith, it seems almost pointless to distinguish between nominal-payment and zero-payment plans." Id.

at 1121. However, the appellate court did not decide the good faith issue since the creditor had not raised that issue in the confirmation proceedings.

The facts in our case are more egregious than those in Slade or Gregory. Other "chapter 20" cases are also distinguishable from our facts because they were more beneficial to creditors. In Street, the debtor sought a superdischarge, but proposed to pay all unsecured creditors a 28% dividend in the chapter 13. The bankruptcy court denied the plan, as a matter of law, because of the intent to discharge a nondischargeable debt. On appeal, the panel reversed on the legal issue and remanded for further information, so the final outcome was unknown.

In Metz, after the debtor received a chapter 7 discharge, he filed two consecutive chapter 13 petitions in order to cure his delinquent mortgage payments and avoid foreclosure. The plan provided for payment of these arrearages as well as payment of delinquent property taxes. No provision was made for payment to the unsecured creditors whose debts had been discharged. The bankruptcy court confirmed the plan and the Ninth Circuit affirmed the finding that the plan was proposed in good faith because the debtor's changed circumstances enabled him to cure the mortgage arrearages and save his house.

Tang conceded that the chapter 13 case was an attempt to vindicate his failure to defend against the § 523 action. Assuming, arguendo, that his allegations that he was a victim of Chung and was unfamiliar with Western business practices are true, he waived that defense by consenting to judgment, and the nondischargeable judgment is final. Tang cannot collaterally

attack the judgment, yet that is apparently what he seeks to do, albeit indirectly, in the chapter 13 case. The bankruptcy court correctly rejected Tang's argument that his lost opportunity to present his defense somehow justified the strategy to immediately convert to chapter 13 in order to discharge Leverage's judgment.

Based on the foregoing analysis, therefore, this factor was unfavorable to Tang.

Warren Factor No. 8:
The existence of special circumstances such as inordinate medical expenses.

Tang, a Vietnamese immigrant, argued that his financial woes and any misconduct on his part were precipitated by his limited English language skills, his unfamiliarity with Western business practices, his blind trust in Chung, and his lack of money.

Thus, Tang paints over, with a very broad brush, any personal responsibility for his unfortunate circumstances. Again, the facts discredit this argument. In 2002 Tang was president of a corporation doing business as Tomy's Kitchen. He signed numerous legal documents involving real and personal property. He admitted to both falsifying a financial statement in order to obtain commercial equipment from Leverage and then disposing of the equipment in some manner. When Leverage obtained a judgment against him and attempted to execute on it, Tang had the wherewithal to file for bankruptcy protection, utilizing legal counsel. After he consented to judgment to except the Leverage debt from the chapter 7 discharge, Tang converted his case to chapter 13 in order to discharge that same debt, again with the

representation of legal counsel.

These actions are not indicative of an unsophisticated immigrant, but, rather, they reflect a pattern of deception, delay tactics, and bad faith.

Therefore, this factor was unfavorable to Tang.

Warren Factor No. 9:
The frequency with which the debtor has sought relief under the Bankruptcy Reform Act.

Tang filed a chapter 7 petition; prior to discharge he converted his case to chapter 13. This was not an abusive "serial" filing. Moreover successive filing of bankruptcy petitions does not constitute bad faith per se. Metz, 820 F.2d at 1497. Therefore, this factor was favorable to Tang.

Warren Factor No. 10:
The motivation and sincerity of the debtor in seeking Chapter 13 relief.

The bankruptcy court found that Tang's sole motivation for proposing a chapter 13 plan was to discharge the nondischargeable Leverage judgment debt. Because there were no priority or secured creditors, seven of the ten unsecured creditors' claims were "disputed," and effectively no distribution would be made on those claims, we conclude that the bankruptcy court's finding was correct. Tang's intent was to defeat indirectly Leverage's state court judgment, and such a motivation is an indicator of bad faith. See Eisen, 14 F.3d at 471.

Therefore, this factor was unfavorable to Tang.

Warren Factor No. 11:
The burden which the plan's administration would place upon the trustee.

Tang'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 Tang.

In summary, seven Warren factors are unfavorable to Tang, only three are favorable, and one is neutral. Thus, this analysis supports the bankruptcy court's ruling. Specifically, while the Factor No. 1 minimal payment to the unsecured creditors was not per se bad faith, when viewed with all of the circumstances of the case, it was an indicia of unfair manipulation of chapter 13. See Warren, 89 B.R. at 94.

It is clear that the bankruptcy court analyzed the totality of circumstances. The court questioned Tang's attorney concerning the amount of unsecured debt in Tang's schedules. It considered Tang's proposed plan and noted that there were no secured or priority creditors, only unsecured creditors who would receive less than 1% of their claims. Examining the circumstances in greater detail, the bankruptcy court found that Tang would be receiving a superdischarge as to the single nondischargeable debt owed to Leverage, and that there was no other purpose for the chapter 13. Counsel conceded this when admitting no one would benefit from a chapter 13 plan other than Tang's counsel, the chapter 13 trustee and Tang. Thus, the bankruptcy court considered counsel's arguments, whether Tang misstated facts, his eligibility for chapter 13, the proposed plan provisions, his

motivation for converting to chapter 13, and its effect (or lack thereof) on his creditors.

We therefore conclude that the bankruptcy court applied the correct legal standard and that the finding of bad faith was not clearly erroneous.

CONCLUSION

The bankruptcy court applied the correct legal standard for determining bad faith by viewing the totality of circumstances. The court's factual finding that Tang filed the chapter 13 petition in bad faith was not clearly erroneous and was supported by the entire record. Tang's primary motive for filing the chapter 13 petition was to discharge the Leverage nondischargeable debt by paying the debt over time; yet Leverage and other unsecured creditors would receive less than a 1% dividend. Effectively, there was no other purpose for the chapter 13 plan than to avoid payment of the Leverage judgment to which he had previously stipulated. Therefore the bankruptcy court's order reconverting the case to chapter 7 is AFFIRMED.

KLEIN, Bankruptcy Judge, concurring:

With reservations, I concur in the result affirming the conversion order and write separately to emphasize two points regarding this review of an order re-converting a case from chapter 13 to chapter 7, whence it was initially converted.

First, to the extent the majority's line of analysis strays from the Ninth Circuit's analysis in Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir. 1999), it is not correct.

Second, although we could reverse for an abuse of discretion based on the bankruptcy court's application of an incorrect standard (by, among other things, ignoring Leavitt), there is no point in inviting further appeal because the practical solution is to clear the way for the debtor to file a new chapter 13 case.

I

I agree with the analysis through page 9, line 17, of the majority decision. Up to that point, it is an accurate statement of Ninth Circuit law. It tracks Leavitt and Leavitt's precursor Ninth Circuit decisions, as well as our leading decision implementing Leavitt. Ho v. Dowell (In re Ho), 274 B.R. 867, 876-77 (9th Cir. BAP 2002) (Perris, J.).

The controlling test for assessing lack of good faith in the chapter 13 context is the "totality of the circumstances." Goeb v. Heid (In re Goeb), 675 F.2d 1386, 1391 (9th Cir. 1982).

The Ninth Circuit in Leavitt prescribed a four-factor analysis for applying the "totality of the circumstances" test. Citing Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir. 1994), and adding one more factor, it ruled:

> The bankruptcy court should consider the following factors:
>
> (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," id. (citing In re Goeb, 675 F.2d 1386, 1391 (9th Cir. 1982);
>
> (2) "the debtor's history of filings and dismissals," id. (citing In re Nash, 765 F.2d 1410, 1415 (9th Cir. 1985);

> (3) whether "the debtor only intended to defeat state court litigation," id. (citing In re Chinichian, 784 F.2d 1440, 1445-46 (9th Cir. 1986); and
>
> (4) whether egregious behavior is present, Tomlin 105 F.3d at 937; In re Bradley, 38 B.R. 425, 432 (Bankr. C.D. Cal. 1984.
>
> ...
>
> We agree with the BAP that the record provides ample support for the bankruptcy court's findings that Leavitt's conduct in his Chapter 13 case amounted to bad faith and can fairly be described as egregious. Application of the four factors listed above to the facts of this case reinforces this conclusion.

Leavitt, 171 F.3d at 1224 (brackets in original, emphasis supplied).

The BAP has held that the Leavitt test is now the controlling method for assessing bad faith under the Goeb totality of the circumstances test. Ho, 274 B.R. at 876-77. The Ho decision reflects a square holding, rather than dicta, because it formed the basis for a reversal and is binding on us.

Although the majority cites Ho, it declines, without explanation, to follow Ho. I submit that Judge Perris' decision for the BAP in Ho is binding.

Thus, I disagree when the majority suddenly (at page 9, line 18) jumps the Leavitt tracks, flouts Ho, and takes off on the tangent of dicta from Fid. & Cas. Co. v. Warren (In re Warren), 89 B.R. 87, 93 (9th Cir. BAP 1988), which dicta I submit no longer retains vitality and is inconsistent with controlling law. Instead, the majority should have continued along the Leavitt tracks and applied the Leavitt four-factor analysis that is controlling law in the Ninth Circuit generally and, under Ho, of the BAP specifically.

Warren was a case in which a debtor responded to a nondischargeability action by converting to chapter 13 and in

which the bankruptcy court confirmed a minimal-payment plan, over a "good faith" challenge, without taking evidence or considering anything other than payments. The BAP reversed the confirmation and remanded for a new confirmation hearing: (1) holding that the "good faith requirement of 11 U.S.C. § 1325(a)(3) is separate and distinct from the best effort requirement of 11 U.S.C. § 1325(b)(1)(B); (2) requiring that on remand the court should "make an informed and independent judgment concerning whether [the] plan was proposed in good faith;" and (3) instructing that "[w]hen factors of minimal payments and a nondischargeable debt are present, particular scrutiny by the court is required, and the debtor has the burden of producing more than simply evidence of best effort." Id. at 95.

The trouble with Warren comes not so much from its holding (which presented the procedural question of how to conduct the confirmation hearing) as from its dicta, that went on to achieve a life of their own. One dictum was an eleven-item laundry list of "guidelines" supposedly pertinent to considering good faith. The other dictum was a statement (inconsistent with the actual holding in Warren) noting that a bankruptcy court in another circuit had characterized the burden of establishing good faith as "especially heavy" when a "superdischarge" is sought.

There are good reasons to question the vitality of the Warren dicta. First, Warren was decided in 1988 in a context of delicacy reflecting uncertainties attendant to a raging controversy over whether chapter 13 relief was available to one who had recently obtained chapter 7 relief, which controversy was resolved by a unanimous Supreme Court in 1991 in favor of permitting so-called

"chapter 20." Johnson v. Home State Bank 501 U.S. 78, 87-88 (1991). Thereafter, it was not necessary to tread so lightly whenever chapter 7 morphed into chapter 13.

Second, in the ensuing seventeen years, the Ninth Circuit has never cited Warren in a published decision. Nor can this be chalked off to accident. The published BAP decision in Leavitt expressly relied on the Warren dictum, yet the Ninth Circuit substituted a different analysis in its own decision, thereby impliedly rejecting Warren.[13]

Third, the Warren eleven-item laundry list was borrowed from a 1982 Eighth Circuit decision that it had significantly modified in 1987, the year before Warren was decided. United States v. Estus (In re Estus), 695 F.2d 311, 317 (8th Cir. 1982) (11-item laundry list). In 1987, the Eighth Circuit abandoned much of Estus in recognition that many of the items on its laundry list had been superseded by subsequent amendments to the Bankruptcy Code. Educ. Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). Indeed, the Eighth Circuit's Zellner test for assessing "totality of the circumstances," looks much like the Ninth Circuit's Leavitt test, which may help explain why the Ninth

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[13] The majority decision is misleading at page 9, lines 22-24, when it inferentially suggests that the Ninth Circuit has approved the Warren analysis:

> 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).

Not only is an "especially heavy" burden not the holding of Warren, it is apparent from the face of the Ninth Circuit's Leavitt decision, which did not mention the Warren analysis set out in the BAP Leavitt decision, that it was declining an invitation to adopt Warren as law of the circuit.

Circuit elected in Leavitt to decline the BAP's invitation to endorse Warren.[14]

Fourth, the Warren eleven-item laundry list has little analytical value and, like most decisions that set out laundry-lists of putative factors, it is susceptible of luring one into treating the laundry list as a scorecard or algorithm, instead of promoting genuine analysis.

Indeed, the scorecard approach is precisely my difficulty with pages 10-22 of the proposed memorandum decision. Although the bankruptcy court followed neither Leavitt nor Warren, we

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[14] The Eighth Circuit's Zellner modification of Estus in 1987 was:

> This [new] section's [§ 1325(b)'s] "ability to pay" criteria subsumes most of the Estus factors and allows the court to confirm a plan in which the debtor uses all of his disposable income for three years to make payments to his creditors. Thus, our inquiry into whether the plan "constitutes an abuse of the provisions, purpose or spirit of Chapter 13," Estus, 695 F.2d at 316, has a more narrow focus. The bankruptcy court must look at factors such as whether the debtor has stated his debts and expenses accurately; whether he has made any fraudulent misrepresentation to mislead the bankruptcy court; or whether he has unfairly manipulated the Bankruptcy Code.

Zellner, 827 F.2d at 1227.

Although the Eighth Circuit has cited Estus twice since Zellner, it has each time done so to assert that the "totality of the circumstances" is still the controlling concept and through the filter of the recognition in Zellner that the enactment of § 1325(b) subsumed a number of the Estus factors. Noreen v. Slattengren, 974 F.2d 75, 76-77 (8th Cir. 1992) (affirming use of three factors to assess "totality of circumstances"); Handeen v. LeMaire (In re LeMaire), 898 F.2d 1346, 1349 (8th Cir. 1990) (en banc) ("Although Zellner modified the good faith determination in response to the new section 1325(b), it is recognized that Zellner preserved the traditional "totality of circumstances" approach with respect to Estus factors not addressed by the legislative amendments. See In re Smith, 848 F.2d 813, 820 n. 8 (7th Cir. 1988)"). The key point is that the Eighth Circuit no longer uses all eleven factors set out in Estus.

undertake on our own to apply Warren. The eleven factors are toted up. The score is 7-3-1 in favor of bad faith, hence it is concluded that conversion should be sustained.

The difficulty with this scorekeeping is that it does not entail genuine analysis. As Professors White and Summer have noted, "[w]e number these cases with some trepidation, for we realize that those who can analyze, do, and those who cannot, number." JAMES J. WHITE & ROBERT J. SUMMERS, UNIFORM COMMERCIAL CODE § 1-3 at p. 7 (4th ed. 1995). The reality is that a clear-cut case of bad faith could be based on a single factor, while all other factors went the other way. In other words, assuming Warren retains vitality and constitutes an exclusive list (it does not), even though the score is 1-10 against conversion or dismissal, a court's decision to convert or dismiss could be sustained.

Fifth, if anything, the bias of Congressional policy reflected in the Bankruptcy Code, as evidenced, for example, by the enactment of § 707(b) in 1984, and by continuing "bankruptcy reform" proposals, is to prefer chapter 13 over chapter 7 in a fashion that is inconsistent with an "exceptionally heavy" burden to be in chapter 13. That bias was already manifesting itself as of the 1984 amendments. Ironically, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, which generally becomes effective on October 17, 2005 (the "2005 Bankruptcy Reform Act"), appears to require an "exceptionally heavy" burden to get into chapter 7, instead of chapter 13.

In sum, if we are going to superimpose an analysis on the bankruptcy court's ruling, we should use the Ninth Circuit's controlling Leavitt analysis. See Ho, 274 B.R. at 876-77.

II

The bankruptcy court did not apply the Leavitt analysis. Instead, it reasoned from two propositions that the case should be converted back to chapter 7. First, it noted an ambiguity about whether a separate chapter 13 case was required. Second, it noted that only the debtor and the debtor's counsel would benefit from the chapter 13 case because it did not appear that funds would be sufficient to permit payments for unsecured creditors. Thus, it ruled that the case should be reconverted.

The omission to apply a controlling test ordinarily warrants reversal, because it is an abuse of discretion to apply an incorrect legal standard or rule of law. Allen v. Shalala, 48 F.3d 456, 457 (9th Cir. 1995); Ho, 274 B.R. at 871; Yadidi v. Herzlich (In re Yadidi), 274 B.R. 843, 847 (9th Cir. BAP 2002).

There is, indeed, an even more profound problem regarding the pertinent rule of law. The court conflated confirmation analysis with conversion/dismissal analysis. It appeared to use the perceived low level of payment to creditors as a basis for concluding that the § 1325(a) good faith plan confirmation standard was not met and as a basis to convert the case. It did not, however, consider the question of confirmation and did not take evidence on the question of plan confirmation.

In chapter 13 practice, if the court is not persuaded during the plan confirmation process that the plan was proposed in good faith, the debtor ordinarily would be afforded at least one opportunity to modify the plan. Here, the problem that triggered the court's action was perceived low payments, which might have been remedied, for example, by a modification to provide for

regular post-confirmation reports of income and a plan provision for periodically increasing plan payments to reflect increases in income. Thus, one of the statutory bases for converting or dismissing a chapter 13 case is "denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or modification of a plan." 11 U.S.C. § 1307(c)(5).

This brings up yet another incorrect legal standard that was applied. A finding of "bad faith" is, at most, "cause" to act under § 1307(c) either to dismiss or to convert: "[a] court is obligated to choose between the two options based on the best interests of the creditors and the estate." Ho, 274 B.R. at 877 (Perris, J.). This is, thus, another reason for finding an abuse of discretion in applying an incorrect legal standard.

Notwithstanding good reasons to find that the bankruptcy court abused its discretion by applying incorrect legal standards and rules of law, considerations of sound judicial administration make affirmance the prudent course. There appears to be no legal impediment to the prompt filing of another chapter 13 case in which the debtor could propose and attempt to confirm a plan. The existence of a § 523(a)(2) nondischargeable debt is not, standing alone, enough to defeat § 1325(a) good faith. It does not appear that creditors would be harmed by the loss of the original date of the order for relief, there being nothing in the record to suggest that there are avoiding actions to recover prepetition transfers that might thereby be lost.

Indeed, if we were to reverse, that would almost certainly precipitate an appeal to the Ninth Circuit for tactical reasons

because a relevant change to the law will soon become effective. The 2005 Bankruptcy Reform Act, which generally becomes effective on October 17, 2005, contains a provision making § 523(a)(2) debts nondischargeable in chapter 13 cases. Thus, the appellee has an affirmative incentive to prolong this appeal.[15]

Under the current statute, the debtor is entitled to propose and attempt to have a plan confirmed that, if fully performed, would discharge appellee's debt. I intimate no view about whether the debtor will actually be able to surmount those hurdles. He is, however, entitled to the opportunity to try. The plain, speedy, and efficient way for that to happen is to terminate this appeal in favor of appellee, even though reversal could be justified.

In other words, although I perceive error that is more than trivial, the peculiar circumstances in which another chapter 13 case is both permissible and practicable persuade me that it is harmless error that does not affect the substantial rights of the parties. 28 U.S.C. § 2111; Fed. R. Civ. P. 61, incorporated by Fed. R. Bankr. P. 9005.

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[15] The manner in which appellee's counsel has pounded on the table before us about admissions of fraud claimed to inhere in the stipulated judgment does not inspire confidence that the appellee would not follow such a cynical course. The debtor's counsel explained, credibly, at oral argument that he executed the stipulation as a "courtesy" on the premise it made no difference because a conversion to chapter 13 was planned. However improvident such a "courtesy" may have been in light of the use that appellee's counsel made of it, there is nothing nefarious about the strategy of converting to chapter 13 for the purpose of dealing with nondischargeable debt.

BAUM, Bankruptcy Judge, dissenting:

I dissent. For the reasons set forth below and in the concurrence, I conclude that the bankruptcy court applied either an incorrect or insufficient legal standard and that the finding of bad faith was clearly erroneous. The bankruptcy court's decision should be reversed and the case remanded for further proceedings.

I agree with the concurrence that the correct legal standard to be applied here requires, at a minimum, the application of the four-factor analysis stated in Leavitt v. Soto (In re Leavitt), 171 F.3d 1219 (9th Cir. 1999). Hence, this dissent from the majority's conclusion and the reliance on In re Warren, 89 B.R. 87 (9th Cir. B.A.P. 1988). The primary problem here is that the bankruptcy court did not apply or follow the four factors from Leavitt. Rather the bankruptcy court focused only on the minimal amount paid under the proposed chapter 13 plan.

In re Goeb, 675 F.2d 1386 (9th Cir. 1982) established the totality of the circumstances test for determining the good faith requirement to confirm a chapter 13 plan. There the bankruptcy court had denied confirmation because the plan did not substantially repay the debts which according to that bankruptcy court made the plan proposed in bad faith. That decision was reversed and remanded on appeal. The court's conclusion seems particularly appropriate to our case:

> This opinion is not a general endorsement of nominal-repayment plans. Nominal repayment is one piece of evidence that the debtor is unfairly manipulating Chapter 13 and therefore acting in bad faith.
>
> However, bankruptcy courts cannot substitute a glance at

> the amount to be paid under the plan for a review of the totality of the circumstances. Because the court below did not inquire adequately into whether the Goebs acted in good faith, we must reverse and remand . . . .

Goeb, 675 F.2d at 1391. Here the bankruptcy court did precisely what Goeb directed not be done, glancing at the amount proposed to be paid without considering the totality of the circumstances. For this reason alone, the decision should be reversed, as the concurrence seems to acknowledge.

Although the record is insufficient to make a decision, from the record before this court, this judge is left with a sense that the four-factor test may not warrant a finding of bad faith. There is no history of prior bankruptcy filings and dismissals. There is no pending state court litigation. From the limited record before us, it is not clear that the debtor engaged in either egregious behavior or somehow acted in an inequitable manner. Certainly there appear to have been errors in the debtor's original schedules. But it is unclear if those errors constituted intentional misrepresentations or were simply efforts to obtain a discharge in chapter 7 of all potential liabilities. Significantly the bankruptcy court did not appear to rely on this point in rendering its decision and, in any event, the record is insufficient for this court to tell. Finally, the record before us indicates the debtor has no ability to make any meaningful payment(s) to Leverage Leasing in or out of bankruptcy.

The concurrence concludes on practical grounds that the bankruptcy court's decision should be affirmed because this debtor can and should file another chapter 13 case thereby attempting to confirm his chapter 13 plan. As a general rule, I strongly favor

practical decisions and dissent with a strong sense of regret because our decision seems to continue this bankruptcy case on a very impractical course. Regardless, if this debtor is entitled to try to confirm a plan under chapter 13, as the concurrence states, it is very difficult, if not impossible, to conclude that such efforts should not occur in this bankruptcy case. Stated more simply and bluntly, accepting that this debtor is entitled to attempt to confirm a chapter 13 plan, that effort should be undertaken in this case and not in a second chapter 13 case. Further, affirming may not allow the debtor to confirm a chapter 13 plan in a second bankruptcy case. One suspects that Leverage Leasing will challenge any such filing on various grounds; for example, collateral estoppel and res judicata. See In re Palmer, 207 F.3d 566 (9th Cir. 2000); Stewart v. U.S. Bancorp, 297 F.3d 953 (9th Cir. 2002).