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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	NV-04-1486-MaBmK
	)		
LONG THANH TANG,	)	Bk. No.	03-14524-BAM
	)		
Debtor.	)		
_____	)		
LONG THANH TANG,	)		
	)		
Appellant,	)		
	)		
v.	)	<b><u>MEMORANDUM</u></b> <sup>1</sup>	
	)		
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.<sup>2</sup>

\_\_\_\_\_  
Before: MARLAR, BAUM<sup>3</sup> and KLEIN, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> The Hon. Leslie Tchaikovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation in the District of Nevada.

<sup>3</sup> Hon. Redfield T. Baum, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 **INTRODUCTION**

2  
3 A debtor has appealed the bankruptcy court's order which  
4 reconverted his chapter 13 case to chapter 7 on grounds of bad  
5 faith. The debtor contends that the bankruptcy court failed to  
6 consider the totality of circumstances. We AFFIRM.

7  
8 **FACTS**

9  
10 Debtor Long Thanh Tang ("Tang") is a Vietnamese immigrant,  
11 who, in 2002, was living in Florida and operating a restaurant  
12 known as Tomy's Kitchen with a man named Vincent Chung ("Chung").  
13 Allegedly at Chung's request, Tang signed, as guarantor, many  
14 legal documents such as leases and home loans.

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

23 In his bankruptcy schedules and statements, Tang disclosed  
24 that he was married and had a 15-year-old daughter, that he worked  
25 as a server at a Chinese restaurant, in Las Vegas, earning  
26 \$1,393.33 per month, that he owned no real property and only \$810  
27 worth of personal property, including one automobile, and that he  
28 shared another automobile with his "girlfriend." His was the only

1 scheduled income with which to pay monthly expenses totaling  
2 \$1,378.33.

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

7 Leverage filed a timely complaint to determine its judgment  
8 debt nondischargeable under § 523(a)(2)(A) (fraud or  
9 misrepresentation), § 523(a)(2)(B) (false financial statement),  
10 and § 523(a)(6) (willful and malicious injury). The complaint  
11 alleged that Tang falsely represented that he had received the  
12 equipment, but that he had intentionally and wrongfully abandoned,  
13 concealed, transferred or otherwise disposed of the equipment. It  
14 also alleged that Tang presented a false written financial  
15 statement in connection with the lease in which he stated that his  
16 annual income was \$253,600 and his total assets were approximately  
17 \$858,000.

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

21 Before a discharge was entered in the chapter 7 case, Tang  
22 filed a motion to convert to chapter 13. He alleged that he had  
23 been victimized by Chung and could not afford to pay an attorney  
24

25

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26 <sup>4</sup> In the excerpts of record, the second continuation page to  
27 Tang's chapter 7 Schedule F --the list of unsecured creditors,  
28 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.

1 to bring this defense in the nondischargeability proceeding.<sup>5</sup>  
2 Apparently, therefore, his motivation for conversion was to obtain  
3 the superdischarge under § 1328(a).<sup>6</sup> On December 15, 2003, the  
4 bankruptcy court granted Tang's motion.

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

14 Nonetheless, Tang's chapter 13 plan, filed on March 8, 2004,  
15 proposed to pay \$50 per month for 36 months for a total of \$1,800.  
16 From that total payment, \$1,494 would be paid to his attorney,  
17

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18 <sup>5</sup> We may take judicial notice of the bankruptcy court  
19 docket, although this motion was not included in the excerpts of  
20 record. See also Debtor's Opposition to Motion to Reconvert (May  
21 17, 2004), at 6, ¶ 7 (stating that Tang could not afford a  
22 defense).

23 <sup>6</sup> Section 1328(a) provides, in pertinent part:

24 (a) As soon as practicable after completion by the  
25 debtor of all payments under the plan, unless the court  
26 approves a written waiver of discharge executed by the  
27 debtor after the order for relief under this chapter, the  
28 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--

29 . . . .  
30 (2) of the kind specified in paragraph (5), (8), or  
31 (9) of section 523(a) of this title; . . . .

32 11 U.S.C. § 1328(a)(2).

1 \$180 would be paid to the chapter 13 trustee, and only \$126 would  
2 be paid to unsecured creditors. This was a de minimis .0004%  
3 payout to the unsecured creditors whose claims totaled  
4 \$358,776.45. For example, Leverage would receive only \$30 on its  
5 \$75,000 nondischargeable debt.

6 Leverage immediately filed a motion to reconvert<sup>7</sup> Tang's case  
7 to chapter 7 for lack of eligibility under chapter 13 and bad  
8 faith.

9 Tang opposed the motion. He stated that two of the unsecured  
10 claims, totaling \$196,091, had been satisfied, either by  
11 foreclosure or were paid by someone else. Specifically, a  
12 \$144,000 debt to Chase Manhattan Mortgage had been listed on his  
13 Schedule F but he just learned, in May, 2004, that the lender had  
14 recorded a Release of Mortgage in 2002. Tang alleged that notice  
15 had been sent to his former address in Florida, so he did not  
16 receive it. Another \$52,091 debt to Wachovia Mortgage had also  
17 been satisfied. Therefore, the total amount of unsecured debt was  
18 revised to \$162,685.45 ( $\$358,776.45 - \$196,091 = \$162,685.45$ ).

19 In addition, Tang claimed that, in reviewing his pay stubs as  
20 required in chapter 13, he discovered that his income was actually  
21 \$63.36 more than he had reported in the chapter 7 and was revised  
22 to \$1,456.69 per month ( $\$1,456.69 - \$1,393.33 = \$63.36$ ). Since  
23 his expenditures remained the same at \$1,378.33, his current net  
24 disposable income was \$78.36 ( $\$1,456.69 - \$1,378.33 = \$78.36$ ).

25 \_\_\_\_\_  
26 <sup>7</sup> This motion was proper procedure, in that the bankruptcy  
27 court can "redress dishonest exploitation of the right to convert  
28 [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).

1 On May 24, 2004, Tang filed amended schedules reflecting  
2 these changes, and also filed an amended three-year plan providing  
3 payments of \$78 per month for a total of \$2,808. The unsecured  
4 creditors would now receive a total distribution of \$1,021, which  
5 was a .006% dividend; Leverage would receive about \$450 on its  
6 \$75,000 debt.

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

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

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

21 THE COURT: Can I ask you something? Who benefits  
22 from this plan?  
23 MR. COGAN: The -  
24 THE COURT: What happens other than discharging this  
nondischargeable debt?

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25  
26 <sup>8</sup> See Debtor's Opposition to Motion to Reconvert (May 17,  
2004), p. 4:26-27. There is nothing in the excerpts of record in  
27 regards to whether Tang's girlfriend contributed any income to  
their household.

28 <sup>9</sup> Id. at 6:24.

1 MR. COGAN: The debtor primarily benefits.  
2 THE COURT: But only from getting a discharge of its debts,  
3 including a superdischarge debt.  
4 MR. COGAN: That's correct.  
5 THE COURT: There's no other purpose to the conversion is  
6 there because the unsecureds aren't going to get  
7 any money.  
8 MR. COGAN: That's correct, but this -  
9 THE COURT: Who's getting the money, the trustee and the  
10 attorney?  
11 MR. COGAN: Correct.  
12 THE COURT: I'm going to grant the motion. I don't think  
13 this is a good-faith use of Chapter 13.

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

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

### 18 ISSUE

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

### 24 STANDARD OF REVIEW

25 An order regarding conversion of a case is reviewed for an  
26 abuse of discretion. Croston, 313 B.R. at 450. A bankruptcy  
27  
28

1 court necessarily abuses its discretion if it bases its decision  
2 on an erroneous view of the law or a clearly erroneous factual  
3 finding. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405  
4 (1990).

5 Whether the bankruptcy court applied the correct legal  
6 standard is an issue which we review de novo. Law Offices of  
7 David A. Boone v. Derham-Burk (In re Eliapo), 298 B.R. 392, 397  
8 (9th Cir. BAP 2003). The existence of bad faith is a factual  
9 determination which we review for clear error. Leavitt v. Soto  
10 (In re Leavitt), 171 F.3d 1219, 1222-23 (9th Cir. 1999). "[A]  
11 finding is 'clearly erroneous' when although there is evidence to  
12 support it, the reviewing court on the entire evidence is left  
13 with the definite and firm conviction that a mistake has been  
14 committed." Anderson v. City of Bessemer City, N.C., 470 U.S.  
15 564, 573 (1985) (citation omitted).

## 16 17 DISCUSSION

18  
19 Section 1307(c) provides, in pertinent part:

20 (c) Except as provided in subsection (3) of this  
21 section [debtor farmer], on request of a party in interest  
22 or the United States trustee and after notice and a  
23 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, . . . .

24 11 U.S.C. § 1307(c).

25 The statute enumerates several nonexclusive "causes," which  
26 are inapplicable here. Nonetheless, it is now well established  
27 that "bad faith" may also be a "cause" for dismissal or conversion  
28 under § 1307(c). Leavitt, 171 F.3d at 1224; Eisen v. Curry (In re



1 Eisen), 14 F.3d 469, 470 (9th Cir. 1994).

2 A determination of bad faith requires an analysis of the  
3 "totality of the circumstances." Ho v. Dowell (In re Ho), 274  
4 B.R. 867, 876 (9th Cir. BAP 2002) (quoting Goeb v. Heid (In re  
5 Goeb), 675 F.2d 1386, 1391 (9th Cir. 1982)). A bankruptcy court  
6 generally considers the following factors:

7 (1) whether the debtor misrepresented facts in his or  
8 her petition or plan, unfairly manipulated the Bankruptcy  
9 Code or otherwise filed the Chapter 13 petition or plan in  
10 an inequitable manner;

11 (2) the debtor's history of filings and dismissals;

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

15 (4) whether egregious behavior is present.<sup>10</sup>

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

17 A case filed to obtain the superdischarge of chapter 13 does  
18 not preclude a finding of good faith. See Downey Sav. & Loan  
19 Ass'n v. Metz (In re Metz), 820 F.2d 1495, 1498 (9th Cir. 1987);  
20 Fid. & Cas. Co. of N.Y. v. Warren (In re Warren), 89 B.R. 87, 93  
21 (9th Cir. BAP 1988); Street v. Lawson (In re Street), 55 B.R. 763,  
22 765 (9th Cir. BAP 1985). It is the debtor's burden to prove good  
23 faith; where a debtor seeks a superdischarge, the burden of  
24 proving good faith is "especially heavy." Warren, 89 B.R. at 93;  
25 Leavitt v. Soto (In re Leavitt), 209 B.R. 935, 940 (9th Cir. BAP  
26 1997), aff'd, 171 F.3d 1219 (9th Cir. 1999).

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27 <sup>10</sup> A finding of bad faith does not require fraudulent intent  
28 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.

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

- 10 1) The amount of the proposed payments and the amounts of  
11 the debtor's surplus;
- 12 2) The debtor's employment history, ability to earn, and  
13 likelihood of future increases in income;
- 14 3) The probable or expected duration of the plan;
- 15 4) The accuracy of the plan's statements of the debts,  
16 expenses and percentage of repayment of unsecured debt,  
17 and whether any inaccuracies are an attempt to mislead the  
18 court;
- 19 5) The extent of preferential treatment between classes of  
20 creditors;
- 21 6) The extent to which secured claims are modified;
- 22 7) The type of debt sought to be discharged, and whether  
23 any such debt is nondischargeable in Chapter 7;
- 24 8) The existence of special circumstances such as  
25 inordinate medical expenses;
- 26 9) The frequency with which the debtor has sought relief  
27 under the Bankruptcy Reform Act;
- 28 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.

27 Warren, 89 B.R. at 93 (citing United States v. Estus (In re

1 Estus), 695 F.2d 311, 317 (8th Cir. 1982)).<sup>11</sup>

2 These factors are applied on a case-by-case basis. See id.  
3 See also In re Martin, 233 B.R. 436, 446-48 (Bankr. D. Ariz.  
4 1999).

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

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

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21 <sup>11</sup> In a 1990 opinion, the Eighth Circuit acknowledged that  
22 § 1325(b)'s "ability to pay" criteria, enacted in 1984, subsumed  
23 most of the Estus factors, but nonetheless held that the  
24 "traditional 'totality of circumstances' approach with respect to  
25 Estus factors not addressed by the legislative amendments" have  
26 been preserved. Handeen v. LeMaire (In re LeMaire), 898 F.2d  
27 1346, 1349 (8th Cir. 1990). Such relevant factors include "the  
28 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).



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

5  
6 **Warren Factor No. 2:**  
7 **The debtor's employment history, ability to earn, and likelihood**  
8 **of future increases in income.**

9 The second factor focuses on feasibility to fund a plan. See  
10 Martin, 233 B.R. at 446. A threshold for a feasibility finding,  
11 however, is the existence of a plan to restructure debt. See  
12 Warren, 89 B.R. at 92 ("Chapter 13 was designed with an emphasis  
13 on debt repayment.").

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

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

24 Just eight months before filing bankruptcy, Tang had been the  
25 president of Tomy's Kitchen, and claimed to be earning over  
26 \$200,000 per year. Although Tang conceded that his personal  
27 financial statement was false, the facts reveal a propensity to  
28 tailor the facts to the situation. Clearly, Tang's declared

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

4  
5 **Warren Factor No. 3:**  
6 **The probable or expected duration of the plan.**

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

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

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

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

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

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

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

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

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

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

1 to a finding of bad faith).

2 Therefore, this factor was unfavorable to Tang.

3  
4 **Warren Factor No. 5:**  
5 **The extent of preferential treatment between classes of creditors.**

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

11 Therefore, this factor was favorable to Tang.

12  
13 **Warren Factor No. 6:**  
14 **The extent to which secured claims are modified.**

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

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

21 Tang clearly sought conversion to chapter 13 in order to  
22 discharge the Leverage debt, which had been determined to be  
23 nondischargeable in chapter 7. Seeking such a "superdischarge" is  
24 not per se bad faith. Warren, 89 B.R. at 93.

25 In its examination of all of the circumstances of this case,  
26 the bankruptcy court found that Tang would be getting a  
27 superdischarge as to the nondischargeable Leverage debt and there  
28 was no other purpose for the chapter 13. Tang's counsel conceded



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

3 The Ninth Circuit has held that bad faith exists where the  
4 debtor only intends to defeat state court litigation. Chinichian  
5 v. Campolongo (In re Chinichian), 784 F.2d 1440, 1445-46 (9th Cir.  
6 1986). Accord Leavitt, 171 F.3d at 1224; Eisen, 14 F.3d at 470.  
7 The nondischargeable judgment is final and Tang has not sought to  
8 set it aside. See Martinelli v. Valley Bank of Nev., 96 B.R.  
9 1011, 1013 (9th Cir. BAP 1988) (declining to vacate a postpetition  
10 stipulated judgment of nondischargeability). Tang's sole purpose  
11 in converting to chapter 13 was to avoid payment of the Leverage  
12 judgment, rather than to pay the debt over time. See Warren, 89  
13 B.R. at 92 ("Chapter 13 was designed with an emphasis on debt  
14 repayment"), and at 95 ("The super discharge of Chapter 13 was  
15 provided by Congress as an incentive for the debtor to commit to a  
16 repayment plan under Chapter 13, as an alternative to providing  
17 creditors nothing under Chapter 7.").

18 Therefore, Tang's conversion to chapter 13 in combination  
19 with the minimal payment plan was inequitable conduct and a misuse  
20 of the bankruptcy laws.<sup>12</sup>

---

22 <sup>12</sup> Tang argued that the bankruptcy court should have also  
23 considered, as a factor, his waived defenses in the underlying  
24 nondischargeability proceeding, i.e., that he was the alleged  
25 victim of Chung and was unfamiliar with western business  
26 practices. We disagree that his waived opportunity to present  
27 such defense somehow justified the chapter 13 case to discharge  
28 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.").

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

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

20           Lawrence Tractor Co. v. Gregory (In re Gregory), 705 F.2d  
21 1118 (9th Cir. 1983), was another case of embezzlement by the  
22 debtor and an outstanding state court judgment. The debtor filed  
23 a chapter 13 plan which provided zero payment on the claim. Id.  
24 at 1119. The bankruptcy court confirmed the plan. On appeal, the  
25 Ninth Circuit considered the debtor's good faith and whether he  
26 had "acted equitably" in proposing the plan. Id. It stated: "If  
27 the bankrupt can show good faith, it seems almost pointless to  
28 distinguish between nominal-payment and zero-payment plans." Id.

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

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

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

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

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

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

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

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

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

1 representation of legal counsel.

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

5       Therefore, this factor was unfavorable to Tang.

6

7

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

9

10       Tang filed a chapter 7 petition; prior to discharge he  
11 converted his case to chapter 13. This was not an abusive  
12 "serial" filing. Moreover successive filing of bankruptcy  
13 petitions does not constitute bad faith per se. Metz, 820 F.2d at  
14 1497. Therefore, this factor was favorable to Tang.

15

16

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

18

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

28

Therefore, this factor was unfavorable to Tang.

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

4 Tang's simple chapter 13 plan would place no unusual burdens  
5 upon the chapter 13 trustee, who would be fully compensated.

6 Therefore, this factor was favorable to Tang.  
7

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

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

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

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

6

7

**CONCLUSION**

8

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

21

22

23 KLEIN, Bankruptcy Judge, concurring:

24

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

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

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

9  
10 I

11 I agree with the analysis through page 9, line 17, of the  
12 majority decision. Up to that point, it is an accurate statement  
13 of Ninth Circuit law. It tracks Leavitt and Leavitt's precursor  
14 Ninth Circuit decisions, as well as our leading decision  
15 implementing Leavitt. Ho v. Dowell (In re Ho), 274 B.R. 867, 876-  
16 77 (9th Cir. BAP 2002) (Perris, J.).

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

20 The Ninth Circuit in Leavitt prescribed a four-factor  
21 analysis for applying the "totality of the circumstances" test.  
22 Citing Eisen v. Curry (In re Eisen), 14 F.3d 469, 470 (9th Cir.  
23 1994), and adding one more factor, it ruled:

24 The bankruptcy court should consider the following  
25 factors:

26 (1) whether the debtor "misrepresented facts in his  
27 [petition or] plan, unfairly manipulated the Bankruptcy Code,  
28 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);



1 (3) whether "the debtor only intended to defeat state  
2 court litigation," id. (citing In re Chinichian, 784 F.2d  
1440, 1445-46 (9th Cir. 1986); and

3 (4) whether egregious behavior is present, Tomlin 105  
4 F.3d at 937; In re Bradley, 38 B.R. 425, 432 (Bankr. C.D.  
Cal. 1984).

5 ...

6 We agree with the BAP that the record provides ample  
7 support for the bankruptcy court's findings that Leavitt's  
8 conduct in his Chapter 13 case amounted to bad faith and can  
9 fairly be described as egregious. Application of the four  
10 factors listed above to the facts of this case reinforces  
11 this conclusion.

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

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

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

22 Thus, I disagree when the majority suddenly (at page 9, line  
23 18) jumps the Leavitt tracks, flouts Ho, and takes off on the  
24 tangent of dicta from Fid. & Cas. Co. v. Warren (In re Warren), 89  
25 B.R. 87, 93 (9th Cir. BAP 1988), which dicta I submit no longer  
26 retains vitality and is inconsistent with controlling law.  
27 Instead, the majority should have continued along the Leavitt  
28 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

1 which the bankruptcy court confirmed a minimal-payment plan, over  
2 a "good faith" challenge, without taking evidence or considering  
3 anything other than payments. The BAP reversed the confirmation  
4 and remanded for a new confirmation hearing: (1) holding that the  
5 "good faith requirement of 11 U.S.C. § 1325(a)(3) is separate and  
6 distinct from the best effort requirement of 11 U.S.C.  
7 § 1325(b)(1)(B); (2) requiring that on remand the court should  
8 "make an informed and independent judgment concerning whether  
9 [the] plan was proposed in good faith;" and (3) instructing that  
10 "[w]hen factors of minimal payments and a nondischargeable debt  
11 are present, particular scrutiny by the court is required, and the  
12 debtor has the burden of producing more than simply evidence of  
13 best effort." Id. at 95.

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

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

1 "chapter 20." Johnson v. Home State Bank 501 U.S. 78, 87-88  
2 (1991). Thereafter, it was not necessary to tread so lightly  
3 whenever chapter 7 morphed into chapter 13.

4 Second, in the ensuing seventeen years, the Ninth Circuit has  
5 never cited Warren in a published decision. Nor can this be  
6 chalked off to accident. The published BAP decision in Leavitt  
7 expressly relied on the Warren dictum, yet the Ninth Circuit  
8 substituted a different analysis in its own decision, thereby  
9 impliedly rejecting Warren.<sup>13</sup>

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

---

21  
22 <sup>13</sup> The majority decision is misleading at page 9, lines 22-  
23 24, when it inferentially suggests that the Ninth Circuit has  
approved the Warren analysis:

24 where a debtor seeks a superdischarge, the burden of proving  
25 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).

26 Not only is an "especially heavy" burden not the holding of  
27 Warren, it is apparent from the face of the Ninth Circuit's  
28 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.

1 Circuit elected in Leavitt to decline the BAP's invitation to  
2 endorse Warren.<sup>14</sup>

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

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

---

11  
12 <sup>14</sup> The Eighth Circuit's Zellner modification of Estus in 1987  
13 was:

14 This [new] section's [§ 1325(b)'s] "ability to pay" criteria  
15 subsumes most of the Estus factors and allows the court to  
16 confirm a plan in which the debtor uses all of his disposable  
17 income for three years to make payments to his creditors.  
18 Thus, our inquiry into whether the plan "constitutes an abuse  
19 of the provisions, purpose or spirit of Chapter 13," Estus,  
20 695 F.2d at 316, has a more narrow focus. The bankruptcy  
21 court must look at factors such as whether the debtor has  
22 stated his debts and expenses accurately; whether he has made  
23 any fraudulent misrepresentation to mislead the bankruptcy  
24 court; or whether he has unfairly manipulated the Bankruptcy  
25 Code.

26 Zellner, 827 F.2d at 1227.

27 Although the Eighth Circuit has cited Estus twice since  
28 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20  
21  
22  
23 <sup>15</sup> The manner in which appellee's counsel has pounded on the  
24 table before us about admissions of fraud claimed to inhere in the  
25 stipulated judgment does not inspire confidence that the appellee  
26 would not follow such a cynical course. The debtor's counsel  
27 explained, credibly, at oral argument that he executed the  
28 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.



1 BAUM, Bankruptcy Judge, dissenting:

2

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

9 I agree with the concurrence that the correct legal standard  
10 to be applied here requires, at a minimum, the application of the  
11 four-factor analysis stated in Leavitt v. Soto (In re Leavitt),  
12 171 F.3d 1219 (9<sup>th</sup> Cir. 1999). Hence, this dissent from the  
13 majority's conclusion and the reliance on In re Warren, 89 B.R. 87  
14 (9<sup>th</sup> Cir. B.A.P. 1988). The primary problem here is that the  
15 bankruptcy court did not apply or follow the four factors from  
16 Leavitt. Rather the bankruptcy court focused only on the minimal  
17 amount paid under the proposed chapter 13 plan.

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

26 This opinion is not a general endorsement of nominal-  
27 repayment plans. Nominal repayment is one piece of evidence  
28 that the debtor is unfairly manipulating Chapter 13 and  
therefore acting in bad faith.

However, bankruptcy courts cannot substitute a glance at

1 the amount to be paid under the plan for a review of the  
2 totality of the circumstances. Because the court below did  
3 not inquire adequately into whether the Goeb's acted in good  
4 faith, we must reverse and remand . . . .

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

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

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

1 practical decisions and dissent with a strong sense of regret  
2 because our decision seems to continue this bankruptcy case on a  
3 very impractical course. Regardless, if this debtor is entitled  
4 to try to confirm a plan under chapter 13, as the concurrence  
5 states, it is very difficult, if not impossible, to conclude that  
6 such efforts should not occur in this bankruptcy case. Stated  
7 more simply and bluntly, accepting that this debtor is entitled to  
8 attempt to confirm a chapter 13 plan, that effort should be  
9 undertaken in this case and not in a second chapter 13 case.  
10 Further, affirming may not allow the debtor to confirm a chapter  
11 13 plan in a second bankruptcy case. One suspects that Leverage  
12 Leasing will challenge any such filing on various grounds; for  
13 example, collateral estoppel and res judicata. See In re Palmer,  
14 207 F.3d 566 (9<sup>th</sup> Cir. 2000); Stewart v. U.S. Bancorp, 297 F.3d 953  
15 (9<sup>th</sup> Cir. 2002).

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