

DEC 09 2014

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

ORDERED PUBLISHED

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:	)	BAP Nos.	CC-14-1021-TaDKi
		)		CC-14-1041-TaDKi
7	ZAFAR DAVID KHAN,	)		CC-14-1062-TaDKi
)		
8	Debtor.	)	Bk. No.	2:13-bk-19713-WB
)		
9	_____	)	Adv. No.	2:13-ap-01962-WB
	ZAFAR DAVID KHAN,)		
10)		
	Appellant,)		
11)		
12	v.)		
)		
13	KENNETH BARTON; THOMAS BURKE;)		
	NANCY K. CURRY, Chapter 13)		
14	Trustee,*)		
)		
15	Appellees.)		
	_____)		

16	In re:	)	BAP Nos.	CC-14-1020-TaDKi
		)		CC-14-1060-TaDKi
17	TERRANCE ALEXANDER TOMKOW,	)		CC-14-1061-TaDKi
)		
18	Debtor.	)	Bk. No.	2:13-bk-19712-WB
)		
19	_____	)	Adv. No.	2:13-ap-01989-WB
	TERRANCE ALEXANDER TOMKOW,)		
20)		
	Appellant,)		
21)		
22	v.)		
)		
23	KENNETH BARTON; THOMAS BURKE;)		
	NANCY K. CURRY, Chapter 13)		
24	Trustee,*)		
)		
25	Appellees.)		
	_____)		

O P I N I O N

Argued and Submitted on October 23, 2014
at Malibu, California

* Appellees Thomas Burke and Nancy K. Curry did not file
briefs and did not participate in these appeals.

1 Filed - December 9, 2014

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

4 Honorable Julia W. Brand, Bankruptcy Judge, Presiding

5
6 Appearances: Lewis R. Landau of Horgan, Rosen, Beckham &
7 Coren, LLP for appellants Zafar David Khan and
8 Terrance Alexander Tomkow; Patrick C. McGarrigle
9 of McGarrigle, Kenney & Zampiendo, APC for
10 appellee Kenneth Barton.

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Before: TAYLOR, DUNN, and KIRSCHER, Bankruptcy Judges.

1 TAYLOR, Bankruptcy Judge:

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3 Creditor and appellee Kenneth Barton successfully recovered
4 a state court judgment against debtors and appellants Zafar
5 David Khan and Terrance Alexander Tomkow (jointly,
6 "Appellants")¹ and their corporation, RPost International, Ltd.
7 ("RIL"), based on conversion, fraud, breach of fiduciary duty,
8 and California statutory violations related to his loss of
9 common stock shares in RIL. The state court found the
10 Appellants and RIL jointly and severally liable to Barton for
11 compensatory damages and also awarded him punitive damages
12 against the Appellants.

13 Prior to the final liquidation of damages, the Appellants
14 each filed a chapter 13² petition. Barton filed proofs of claim
15 in each case and also moved to convert both chapter 13 cases to
16 chapter 7. The Appellants each countered with an adversary
17 proceeding; they sought to disallow Barton's claims under
18 § 502(b)(1) based on the allegation that the claims were subject
19 to mandatory subordination under § 510(b). They also filed
20 objections to Barton's claims in their respective bankruptcy
21

22
23 ¹ The Appellants moved for permission to file a single
24 brief and excerpts of record as to all six of the related
25 appeals. A BAP motions panel granted the unopposed request.
26 This treatment continues the same approach employed by the
27 bankruptcy court and the parties before it; that is, a de facto
28 joint administration of these proceedings.

26 The BAP Clerk of Court is directed to enter this
27 disposition in each of these six related appeals.

28 ² Unless otherwise indicated, all chapter and section
references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 cases on the same theory.

2 After a hearing, the bankruptcy court converted the cases
3 to chapter 7 and overruled the claims objections. And, based on
4 the Appellants' representations that the claims objections
5 resolved the adversary proceedings, it also dismissed the
6 adversary proceedings with prejudice. These six related appeals
7 followed.

8 We conclude that mandatory subordination was not required
9 in relation to Barton's claims and, thus, that the bankruptcy
10 court did not err in overruling the claims objections and
11 dismissing the adversary proceedings with prejudice. Nor did it
12 abuse its discretion in converting the cases to chapter 7.
13 Therefore, we AFFIRM.

14 **FACTS**

15 During the "dot-com bubble" of the late 1990s, the
16 Appellants and Barton co-founded start-up companies RPost, Inc.
17 and RIL, which owned or controlled various patents relating to
18 authentication and verification of emails and electronic
19 payments. Barton subsequently suffered a stroke and was
20 sidelined from active involvement in the businesses. Afterward,
21 his relationship with the Appellants deteriorated to the point
22 that he commenced litigation seeking unpaid compensation and
23 reimbursement of expenses.

24 During the course of that litigation, Barton discovered
25 that the Appellants took control of his 6,016,500 common stock
26 shares in RIL, returned them to the company treasury, and
27 thereby divested him of an equity interest in RIL.
28 Consequently, he commenced another action against the Appellants

1 and RIL, among others, for conversion, fraud, breach of
2 fiduciary duty, and violations of the California Business and
3 Professions Code.

4 In August 2012, the state court determined that Barton met
5 his burden of proof on all of the causes of action against the
6 Appellants and RIL. As a result, it initially ordered the
7 reissue of the converted RIL shares to Barton and awarded
8 monetary damages for emotional distress. It also determined
9 that the Appellants acted with malice, oppression, and fraud
10 and, thus, that Barton was entitled to punitive damages. The
11 state court subsequently conducted a second phase of trial to
12 determine the appropriate amount of punitive damages.

13 On April 14, 2013 - the eve of the final hearing on
14 punitive damages - the Appellants each filed a chapter 13
15 petition. In addition to Barton's claims, the Appellants each
16 scheduled their respective secured mortgage debt and credit card
17 debts.³

18 Thereafter, the bankruptcy court approved stipulated stay
19 relief that allowed the state court action to continue to
20 finalization of the judgment.⁴ In a revised statement of
21 decision and ruling on punitive damages issued in June 2013, the
22

23 ³ Both of the Appellants also scheduled a few "notice only"
24 creditors, including the Internal Revenue Service and their
25 state court attorney, on their schedules E and F; there were no
claim amounts provided for these creditors.

26 ⁴ We exercised our discretion to take judicial notice of
27 documents electronically filed in the adversary proceedings and
28 bankruptcy cases as necessary. See Atwood v. Chase Manhattan
Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
2003).

1 state court reversed its decision to order restoration of
2 Barton's converted RIL stock; instead, it awarded the value of
3 the converted stock. It, thus, entered a judgment awarding
4 Barton compensatory damages in the amount of \$2,840,060 (the
5 value of his dispossessed RIL common stock shares), damages for
6 emotional distress, and \$880,021.91 in prejudgment interest.
7 The judgment provided for joint and several liability for these
8 compensatory damages against each of the Appellants and RIL.
9 The state court also awarded punitive damages to Barton; it
10 awarded \$250,000 against Khan and \$150,000 against Tomkow. The
11 Appellants appealed from the judgment to the California court of
12 appeal; to our knowledge, the appeal remains pending.

13 Barton filed proofs of claim in the bankruptcy cases and
14 commenced adversary proceedings against the Appellants, seeking
15 to deem the state court judgment nondischargeable under
16 § 523(a)(2), (a)(4), and (a)(6). Barton subsequently moved to
17 convert both of the Appellants' chapter 13 cases to chapter 7
18 based on, among other things, bad faith filings.

19 Days later, the Appellants commenced adversary proceedings
20 against Barton. The adversary complaints contained a single
21 claim for relief: disallowance of Barton's claims pursuant to
22 § 502(b)(1) based on mandatory subordination under § 510(b).
23 Concurrently, they filed objections to Barton's claims on the
24 adversary proceeding dockets based on the same grounds. The
25 Appellants filed identical claims objections in their chapter 13
26 cases.

27 The bankruptcy court simultaneously heard the motions to
28 convert and claims objections. At an initial hearing, it noted

1 its disinclination to rule on the claims objections given the
2 pending adversary proceedings. The Appellants, however,
3 requested consideration of the claims objections at a continued
4 hearing, asserted that they filed the adversary proceedings only
5 to comply with procedural rules, and acknowledged that a ruling
6 on the claims objections would resolve the adversary
7 proceedings.

8 At the continued hearing, the bankruptcy court orally ruled
9 in favor of Barton on both the motions to convert and the claims
10 objections. Based on the factors set forth in Leavitt v. Soto
11 (In re Leavitt), 171 F.3d 1219 (9th Cir. 1999), it found that
12 the Appellants filed their chapter 13 cases in bad faith and,
13 thus, it determined that cause for conversion to chapter 7
14 existed. The bankruptcy court found that the timing of the
15 Appellants' chapter 13 filings evidenced an intent to defeat the
16 state court action and that Appellants refused to provide
17 sufficiently complete and accurate financial information
18 relating to settlements and transactions involving their
19 companies. As to the claims objections, it determined that
20 Barton's claims were not subject to mandatory subordination
21 under § 510(b).

22 The bankruptcy court entered orders converting the cases
23 and overruling the claims objections, as well as judgments
24 dismissing the adversary proceedings with prejudice. The
25 Appellants timely appealed.

26 JURISDICTION

27 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
28 §§ 1334 and 157(b)(2)(B) and (O). We have jurisdiction under 28

1 U.S.C. § 158.

2 **ISSUES**

- 3 1. Did the bankruptcy court err in determining that Barton's
4 claims were not subject to mandatory subordination and,
5 thus, overruling the Appellants' claims objections?
6 2. Did the bankruptcy court err in dismissing the Appellants'
7 adversary proceedings?
8 3. Did the bankruptcy court abuse its discretion in converting
9 the Appellants' chapter 13 cases to chapter 7?

10 **STANDARDS OF REVIEW**

11 We review de novo the bankruptcy court's dismissals of the
12 adversary proceedings with prejudice. In the context of the
13 claims objections, we review the bankruptcy court's legal
14 conclusions de novo and its factual findings for clear error.
15 See Pierce v. Carson (In re Rader), 488 B.R. 406, 409 (9th Cir.
16 BAP 2013) ("An order overruling a claim objection can raise
17 legal issues (such as the proper construction of statutes and
18 rules) which we review de novo, as well as factual issues (such
19 as whether the facts establish compliance with particular
20 statutes or rules), which we review for clear error." (citation
21 omitted)).

22 Factual findings are clearly erroneous if illogical,
23 implausible, or without support in inferences that may be drawn
24 from the facts in the record. See TrafficSchool.com, Inc. v.
25 Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United
26 States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en
27 banc)). Bad faith is a factual finding reviewed for clear
28 error. Ellsworth v. Lifescape Med. Assocs., P.C. (In re

1 Ellsworth), 455 B.R. 904, 914 (9th Cir. BAP 2011).

2 An order converting a chapter 13 case to chapter 7 is
3 reviewed for an abuse of discretion. Rosson v. Fitzgerald (In
4 re Rosson), 545 F.3d 764, 771 (9th Cir. 2008). A bankruptcy
5 court abuses its discretion if it applies the wrong legal
6 standard, misapplies the correct legal standard, or if its
7 factual findings are clearly erroneous. TrafficSchool.com,
8 Inc., 653 F.3d at 832.

9 We may affirm on any basis in the record. Caviata Attached
10 Homes, LLC v. U.S. Bank, N.A. (In re Caviata Attached Homes,
11 LLC), 481 B.R. 34, 44 (9th Cir. BAP 2012).

12 **DISCUSSION⁵**

13 **A. The bankruptcy court did not err in determining that**
14 **Barton's claims were neither subject to mandatory**
15 **subordination nor appropriately dismissed.**

16 The Appellants argue that the bankruptcy court erred when
17 it failed to disallow Barton's claims based on the alleged
18 necessity for mandatory subordination of the claims under
19

20 ⁵ Barton filed a request for judicial notice as to an order
21 entered by the United States District Court for the Eastern
22 District of Texas in an unrelated action. He seeks to
23 supplement the record on our review of the bankruptcy court's
24 decision to convert the cases with the district court's findings
25 and conclusions as to the Appellants' conduct in that case. The
26 district court's order, however, was entered on January 30, 2014
27 - after the bankruptcy court's entry of all of the orders and
28 judgments on appeal here except for the judgment dismissing
Tomkow's adversary proceeding.

Given that we review the bankruptcy court's decision to
convert the cases for an abuse of discretion, we decline to take
judicial notice of bad faith findings that were not before the
bankruptcy court when it rendered its decision. Therefore, we
deny Barton's request for judicial notice.

1 § 510(b). We disagree. On this record, disallowance would not
2 follow mandatory subordination, even if subordination was
3 appropriate. In any event, on this record, subordination was
4 not required.

5 As the dismissal judgments were predicated on the orders
6 overruling the claims objections, we first review the decisions
7 on the claims objections.

8 **1. The bankruptcy court correctly overruled the claims**
9 **objections.**

10 The Appellants contend that the plain language of § 510(b)
11 requires mandatory subordination of Barton's claims and, as a
12 result, that claims disallowance under § 502(b)(1) necessarily
13 follows. Although the bulk of the Appellants' arguments focus
14 on mandatory subordination, it is clear that subordination is
15 simply a means to an end: the total disallowance of Barton's
16 claims. We conclude that disallowance would never result in
17 these cases.

18 **a. Even if Barton's claims were subject to mandatory**
19 **subordination, statutory claims disallowance**
20 **would not follow.**

21 Generally speaking, subordination relates to the order of
22 distribution among a debtor's creditors, not whether a claim is
23 allowed under the Code. See O'Donnell v. Tristar Esperanza
24 Props., LLC (In re Tristar Esperanza Props., LLC), 488 B.R. 394,
25 404 (9th Cir. BAP 2013) ("The purpose of subordination . . . is
26 to adjust the place in line of certain claims in the bankruptcy
27 distribution scheme."). Although subordination may result in
28 the functional disallowance of a claim, it is not a statutory

1 basis for claims disallowance. See Travelers Cas. & Sur. Co. of
2 Am. v. Pac. Gas & Elec. Co., 549 U.S. 443, 449 (2007) (claims
3 disallowance is limited to grounds set forth in § 502(b)(1)-
4 (9)).

5 Here, the Appellants contend that mandatory subordination
6 effectuates disallowance under § 502(b)(1) "because a holder of
7 common stock has no claim or interest against individual
8 [d]ebtors." We certainly agree that one cannot hold an equity
9 interest in another human being. But, other than quoting
10 § 502(b)(1) in their brief on appeal, the Appellants' argument
11 lacks both logical development and any authoritative support.

12 The Appellants' cursory reference to Carrieri v. Jobs.com
13 Inc., 393 F.3d 508 (5th Cir. 2004), does not aid them. As
14 directly relevant here, the Fifth Circuit affirmed the district
15 court's determination that a shareholders group's asserted
16 claims based on a contract allowing redemption of shares and
17 warrants were "equity securities," as defined by § 101(16)(C).
18 Id. at 518-28. In doing so, it concluded that, "even assuming
19 *arguendo*" that the shareholders held claims, the bankruptcy
20 court properly disallowed the claims for two reasons: (1) the
21 claims were subject to subordination under § 510(a) or (b); and
22 (2) the shareholders' rights under the operative agreement with
23 the debtor were neither ripe nor exercised as of the petition
24 date. Id. at 526-27.

25 Carrieri is distinguishable. There, the debtor was a
26 corporation, not an individual, and the shareholders held only
27 equity securities within the meaning of § 101(16). Here, the
28 Appellants are individuals, and they fail to explain how any

1 claim based on a state court judgment is categorized correctly
2 as an equity security, within the plain meaning of § 101(16), as
3 opposed to being categorized as a claim under § 101(5) (A). More
4 importantly, they fail to recognize that while the Carrieri
5 bankruptcy court disallowed claims following subordination under
6 § 510(b), it did so because there was no then-existing right to
7 payment or recovery as required for a claim under § 101(5) (A).
8 Id. at 524-25. Here, the state court judgment created a present
9 right to payment. And, finally, they fail to acknowledge that
10 the Fifth Circuit noted support for the theory that equity
11 securities are not always mutually exclusive of a claim,
12 although it ultimately determined not to finally decide that
13 issue. Id. at 525. Carrieri, if anything, makes clear that
14 what Barton holds here is a claim or right to payment - not an
15 equity security.

16 On this record, there is no basis for claims disallowance
17 under § 502(b) (1) - even if mandatory subordination is
18 appropriate; and it is not.

19 **b. Barton's claims were not subject to mandatory**
20 **subordination under the Code.**

21 Section 510(b) "mandates the subordination of damages
22 claims arising from the purchase or sale of a security."⁶ Am.
23 Broad. Sys., Inc. v. Nugent (In re Betacom of Phx., Inc.), 240
24 F.3d 823, 827 (9th Cir. 2001) (internal quotation marks

25
26 ⁶ Mandatory subordination also includes claims arising from
27 rescission of a purchase or sale of security and allowed
28 reimbursement or contribution under § 502 on account of such a
claim. Those types of claims, however, are not at issue in this
appeal.

1 omitted). The Ninth Circuit broadly interprets the scope of
2 § 510(b). See In re Tristar Esperanza Props., LLC, 488 B.R. at
3 403.

4 Our analysis here begins with the statutory construction of
5 § 510(b), “the first step of which is to determine whether the
6 language has a plain and unambiguous meaning with regard to the
7 particular dispute.” Hawkins v. Franchise Tax Bd. of Cal., 769
8 F.3d 662, 666 (9th Cir. 2014). This first step requires an
9 evaluation of “not only the specific provision at issue, but
10 also the structure of the statute as a whole, including its
11 object and policy.” Id. (citation and internal quotation marks
12 omitted). If the plain language of the statute is unambiguous,
13 that meaning controls, and the inquiry terminates. Id. If,
14 however, the language is ambiguous, then we proceed to the
15 second step and consult the legislative history. Id.

16 Section 510(b) provides for subordination in relation to
17 “claims or interests that are **senior to or equal** the claim or
18 interest represented by such security.” 11 U.S.C. § 510(b)
19 (emphasis added). It is axiomatic that a claim or interest
20 based on stock may exist only at a corporate level because, as
21 the Appellants concede in connection with their claims
22 disallowance argument, it is impossible to assert an equity
23 interest in a person.

24 More importantly, the subordination that § 510(b) mandates
25 relates to claims that are senior or equal to Barton’s claims.
26 Here, there is no evidence that the Appellants’ individual,
27 general unsecured creditors could seek recovery as creditors at
28 the corporate level. As a result, their individual, general

1 unsecured creditors do not hold claims senior to or equal to any
2 of Barton's claims, past or current, based on an equity position
3 at the corporate level. We find this portion of the statutory
4 language clearly inconsistent with mandatory subordination of
5 Barton's claims, but, at a minimum, ambiguity exists as to
6 whether § 510(b) applies in an individual debtor case.

7 The object and policy of mandatory subordination "serve[]
8 to effectuate one of the general principles of corporate and
9 bankruptcy law: that creditors are entitled to be paid ahead of
10 shareholders in the distribution of **corporate** assets." Racusin
11 v. Am. Wagering, Inc. (In re Am. Wagering, Inc.), 493 F.3d 1067,
12 1071 (9th Cir. 2007) (emphasis added). As these general
13 principles disfavor shifting all of the risk of loss to
14 creditors, § 510(b) works "to prevent disappointed shareholders,
15 sometimes the victims of corporate fraud, from recouping their
16 investment in parity with [the corporation's] unsecured
17 creditors." Id. at 1071-72. The object and policy of mandatory
18 subordination, thus, affirm that § 510(b) relates to corporate
19 debt and the distribution of corporate assets.

20 The legislative history of § 510(b) also supports its
21 inapplicability in an individual debtor's case. In enacting
22 mandatory subordination, Congress intended to address "the
23 historical problem of investors recovering fraud claims pari
24 passu with general creditors in [corporate] bankruptcy cases."
25 In re Tristar Esperanza Props., LLC, 488 B.R. at 402. And, in
26 crafting the statute, Congress relied extensively on a 1973 law
27 review article authored by professors John J. Slain and Homer
28 Kripke. Id. As acknowledged in the legislative history of

1 § 510, the article concluded that the distribution of assets in
2 corporate bankruptcy should be predicated on the allocation of
3 risk between general creditors and security holders. See H.R.
4 Rep. 95-595, at 195 (1977).

5 The Ninth Circuit has since recognized that § 510(b) is,
6 thus, premised on two assumptions: "1) the dissimilar risk and
7 return expectations of shareholders and [corporate] creditors;
8 and 2) the reliance of [corporate] creditors on the equity
9 cushion provided by shareholder investment." In re Betacom of
10 Phx., Inc., 240 F.3d at 830. These assumptions support
11 subordination at the corporate level - not in an individual
12 debtor case where, once again, equity interests do not exist.

13 Neither the language of the statute nor the object and
14 policy of mandatory subordination nor the legislative history of
15 § 510(b) support the view that Congress intended mandatory
16 subordination to apply in an individual debtor case. Instead,
17 all of these sources point to the subordination of a corporate
18 shareholder's equity-based claim in a corporate case context.

19 The Ninth Circuit case law on mandatory subordination is
20 consistent with our interpretation. Our review of the case law
21 reveals no case in which § 510(b) was applied in an individual
22 debtor's case based on an equity position in an affiliate
23 entity. The cases at the appellate level, instead, all involved
24 entity debtors. See, e.g., In re Am. Wagering, Inc., 493 F.3d
25 1067; In re Betacom of Phx., Inc., 240 F.3d 823; Kira v. Holiday
26 Mart, Inc. (In re Holiday Mart, Inc.), 715 F.2d 430 (9th Cir.
27 1983); Falcon Capital Corp. S'holders v. Osborne (In re THC Fin.
28 Corp.), 679 F.2d 784 (9th Cir. 1982) (Bankruptcy Act case);

1 Kelce v. U.S. Fin. Inc. (In re U.S. Fin. Inc.), 648 F.2d 515
2 (9th Cir. 1980) (Bankruptcy Act case); see also Margaret B.
3 McGimsey Trust v. USA Capital Diversified Trust Deed Fund, LLC
4 (In re USA Commercial Mortg. Co.), 377 B.R. 608 (9th Cir. BAP
5 2007); cf. In re Tristar Esperanza Props., LLC, 488 B.R. 394
6 (applying § 510(b) to a limited liability company).

7 We acknowledge that an unpublished decision reached a
8 contrary conclusion. See Liquidating Trust Comm. of the Del
9 Biaggio Liquidating Trust v. Freeman (In re Del Biaggio), 2012
10 WL 5467754 (Bankr. N.D. Cal. Nov. 8, 2012), aff'd, 2013 WL
11 6073367 (N.D. Cal. Nov. 18, 2013). Del Biaggio, however, is not
12 binding on this Panel. Further, as an unpublished decision, the
13 analysis and outline of the facts is not well-developed; in
14 particular, it does not focus squarely on the question of who is
15 being subordinated. And while the factual summary is not
16 complete, the case appears distinguishable; the subordinated
17 creditor did not hold a final judgment that included a punitive
18 damages recovery, and the facts suggest that creditors in the
19 individual case also held claims against the corporate affiliate
20 for recovery of embezzled funds used to acquire shares in the
21 affiliate.

22 At oral argument, the Appellants also referenced two other
23 cases that they contend are supportive of their position on
24 mandatory subordination: Orange Cnty. Nursery, Inc. v. The
25 Minority Voting Trust (In re Orange Cnty. Nursery Inc.),
26 --- B.R. ----, 2014 WL 5472534 (C.D. Cal. Oct. 1, 2014); and In
27 re Lehman Brothers, Inc., 503 B.R. 778 (Bankr. S.D.N.Y. 2014).
28 For the reasons already discussed, however, neither case assists

1 them, as both cases involved a corporate debtor. The
2 Appellants, in fact, conceded that the case law is devoid of any
3 published decision in which § 510(b) subordination occurred in a
4 non-entity debtor case.

5 Here, in determining that Barton's claims were not subject
6 to mandatory subordination, the bankruptcy court recognized the
7 critical distinction between corporate debtor cases and
8 individual debtor cases when mandating subordination. Based on
9 the plain language of the statute, its objective and policy, the
10 § 510(b) legislative history, and case law, we conclude that the
11 bankruptcy court did not err in determining that § 510(b) was
12 not applicable here and in overruling the claims objections.

13 **2. As there was no basis for claims disallowance or**
14 **mandatory subordination, the bankruptcy court**
15 **appropriately dismissed the adversary proceedings.**

16 Given our conclusion on the claims objections, the
17 challenge to the adversary proceeding dismissals necessarily
18 fails, and the bankruptcy court did not err in dismissing them
19 with prejudice.

20 At the first hearing, the bankruptcy court indicated that
21 it would not rule on the claims objections because of the
22 pending adversary proceedings. In response, the Appellants
23 clarified that they filed the claims objections in both the
24 bankruptcy cases and adversary proceedings for procedural and
25 technical reasons; namely, in order to comply with Rules 3007
26 and 7001 of the Federal Rules of Bankruptcy Procedure. The
27 Appellants asserted, emphatically, that resolution of the claims
28 objections and the adversary proceedings did not require a trial

1 and that a ruling on the claims objections resolved the
2 adversary proceedings. Barton agreed. The bankruptcy court
3 then proceeded accordingly.

4 The bankruptcy court's case dismissals were based
5 appropriately and squarely on its determinations on the claims
6 objections. The Appellants could not, as a matter of law,
7 prevail on the adversary complaints. We, thus, conclude that
8 dismissal of the adversary proceedings was appropriate.

9 **B. The bankruptcy court did not abuse its discretion in**
10 **converting the Appellants' chapter 13 cases to chapter 7**
11 **cases.**

12 The Appellants also argue that the bankruptcy court erred
13 when it failed to consider the totality of the circumstances in
14 converting their chapter 13 cases to chapter 7. In particular,
15 they contend that the bankruptcy court improperly considered
16 only two of the four factors set forth in In re Leavitt. We
17 again disagree.

18 On request of a party in interest and after notice and a
19 hearing, the bankruptcy court may convert a chapter 13 case to
20 chapter 7 for cause. 11 U.S.C. § 1307(c). In addition to a
21 non-exclusive statutory list of factors, the filing of a chapter
22 13 case in bad faith may constitute cause for conversion. See
23 In re Leavitt, 171 F.3d at 1224 (citing Eisen v. Curry (In re
24 Eisen), 14 F.3d 469, 470 (9th Cir. 1994) (discussing bad faith
25 in the context of chapter 13 case dismissal)).

26 In determining whether cause exists based on a bad faith
27 filing, the bankruptcy court must assess the totality of the
28 circumstances. In re Eisen, 14 F.3d at 470. This assessment

1 includes consideration of the following four factors:

- 2 1. whether the debtor misrepresented facts in his petition or
3 plan, unfairly manipulated the Bankruptcy Code, or
4 otherwise filed his petition or plan in an inequitable
5 manner;
- 6 2. the debtor's history of filings and dismissals;
- 7 3. whether the debtor only intended to defeat state court
8 litigation; and
- 9 4. the presence of egregious behavior.

10 In re Leavitt, 171 F.3d at 1224.

11 The Leavitt factors are not conjunctive. The bankruptcy
12 court is not required to find that each factor is satisfied or
13 even to weigh each factor equally. See, e.g., Meyer v. Lepe (In
14 re Lepe), 470 B.R. 851, 863 (9th Cir. BAP 2012) (in the context
15 of a good faith determination at plan confirmation, the Panel
16 noted that two of the Leavitt factors were inapplicable to the
17 case on appeal). The Appellants conceded as much at oral
18 argument. The bankruptcy court's critical consideration in
19 determining bad faith is the totality of the circumstances. The
20 Leavitt factors are simply tools that the bankruptcy court
21 employs in considering the totality of the circumstances.

22 Here, the bankruptcy court found that the Appellants filed
23 their chapter 13 cases in bad faith. Stating that it had
24 considered all of the Leavitt factors in reaching its
25 determination, it found that the majority of the factors were
26 satisfied, with the exception of the second factor, which it
27 deemed inapplicable.

28 The bankruptcy court found that the timing of the filings

1 demonstrated the Appellants' intent to impose barriers to the
2 conclusion of the state court action; in particular, that they
3 strategically filed prior to entry of the state court judgment,
4 a judgment that would have precluded the Appellants from seeking
5 chapter 13 relief based on the statutory debt limit. See 11
6 U.S.C. § 109(e).

7 The bankruptcy court also specifically found that the
8 Appellants did not candidly and completely provide financial
9 information. It observed that they refused to provide
10 information on transactions made by owned or controlled
11 companies, including litigation settlements that resulted in
12 payments to the Appellants and RIL, and that they valued their
13 ownership interests in RIL at zero despite the potential
14 positive impact on value from the settlements.

15 Based on its statements at the hearing, it is clear that
16 the bankruptcy court did not apply the wrong legal standard. It
17 expressly identified the Leavitt factors, stated that it
18 considered all four factors, and then made adequate findings.

19 The Appellants specifically challenge the bankruptcy
20 court's application of the third Leavitt factor. Relying first
21 on Ho v. Dowell (In re Ho), 274 B.R. 867 (9th Cir. BAP 2002),
22 they argue that the bankruptcy court was required to find that
23 the sole purpose for their chapter 13 filings was to defeat the
24 state court action, which they assert it did not do. We are not
25 persuaded by this argument.

26 In Ho, this panel recognized that "bad faith exists where
27 the debtor's *only* purpose is to defeat state court litigation."
28 274 B.R. at 877 (emphasis in original). The Panel, however,

1 concluded that the bankruptcy court abused its discretion where
2 it "relied exclusively on the third [Leavitt] factor and did not
3 base its bad faith finding on the totality of the
4 circumstances." Id. at 876-77. The converse is true here; the
5 bankruptcy court identified and applied the relevant Leavitt
6 factors and, as its statements at the hearing reflect, it
7 considered the totality of the circumstances of the Appellants'
8 filings.

9 Although the third Leavitt factor presumes that a debtor
10 has no other legitimate purpose for filing, the bankruptcy court
11 does not consider this factor in a vacuum. Even if a debtor
12 presents more than one purpose for filing, the third Leavitt
13 factor does not fail to support cause if the other purpose also
14 reflects bad faith. And, once again, the third factor is
15 considered in a totality of the circumstances context. The
16 record here does not evidence a legitimate purpose that negated
17 a totality of the circumstances finding of bad faith.

18 The Appellants also argue that the bankruptcy court should
19 have considered their proposed chapter 13 plans in evaluating
20 the purpose of their chapter 13 filings. This argument
21 similarly fails. There is no per se rule mandating that the
22 bankruptcy court evaluate confirmability of a debtor's proposed
23 chapter 13 plan when determining whether § 1307(c) cause exists.
24 In fact, one Leavitt factor requires consideration of whether
25 the debtor misrepresented facts in his petition **or** plan, or
26 otherwise filed his petition **or** plan in an inequitable manner.
27 We reject the suggestion that cause cannot exist where a plan is
28 facially confirmable. And, here, the plans did not propose to

1 pay any amount to Barton; that is, the plans did not suggest a
2 good faith attempt to pay the Appellants' largest creditor.

3 The Appellants also emphasize that they were eligible for
4 chapter 13 at the time of their petitions. But, eligibility is
5 not synonymous with entitlement. Chapter 13 was advantageous to
6 the Appellants; they possessed more control over estate assets
7 and, importantly, could potentially circumvent
8 nondischargeability of Barton's claims under § 523(a)(6). See
9 11 U.S.C. §§ 523(a), 1328(a), (c)(2); Fed. R. Bankr. P. 4007(d);
10 Toste v. Smedberg (In re Toste), 2014 WL 3908139, at *2 (9th
11 Cir. BAP Aug. 12, 2014) (unless a chapter 13 debtor moves for a
12 hardship discharge, § 523(a)(6) is unavailable in chapter 13
13 case). As the state court judgment sounded, in part, in
14 conversion, chapter 13 offered a unique and attractive
15 opportunity to the Appellants. A strategic desire for
16 chapter 13 relief, however, does not support reversal on this
17 record.

18 In sum, the bankruptcy court appropriately considered the
19 third Leavitt factor; there was no abuse of discretion in this
20 regard.

21 Further, the Appellants challenge the bankruptcy court's
22 alleged finding that they concealed information relating to
23 potentially valuable settlements. They contend that the
24 bankruptcy court did not actually find that they concealed
25 anything and, instead, improperly based its decision to convert
26 on "if there were valuable settlements that might enhance stock
27 value, then [Appellants'] may have misrepresented the value of
28 such shares in their schedules by scheduling a zero value."

1 Aplt's Joint Op. Br. at 21 (emphasis in original). The
2 Appellants insist that they did not conceal anything and, to the
3 best of their ability, made appropriate disclosures. This
4 argument also fails.

5 The record reflects that the bankruptcy court's findings
6 related to the nature and quality of the Appellants' conduct in
7 filing their chapter 13 schedules and responding to questions at
8 their § 341(a) meetings of creditors. Transcripts of the
9 Appellants' § 341(a) meetings show that the chapter 13 trustee
10 asked for additional information as to valuation of the
11 Appellants' shares in their various businesses and requested
12 that the Appellants amend their statements of financial affairs
13 accordingly. At a continued meeting of creditors two months
14 later, the Appellants had not done so. Khan, in fact, never
15 amended his schedules.⁷

16 On examination by Barton's counsel at the § 341(a) meeting,
17 Khan refused to respond to questions about third party
18 settlements based on non-disclosure agreements. When asked
19 whether he or Tomkow provided the terms of the settlement to the
20 chapter 13 trustee, Khan evasively responded that he provided
21 many documents and had not committed to memory the documents
22 produced to the trustee. And, Khan also refused to provide
23 testimony as to the approximate amount of sales, transfers of
24 assets, and loans by and between various business entities owned

25
26 ⁷ Khan filed amendments to schedules B and J and the
27 statement of financial affairs on the same day as the second
28 continued § 341(a) meeting. The Clerk's Office, however,
immediately issued a notice of error and instructed him to re-
file the documents. Khan never did so.

1 or controlled by Appellants in the 18 months before the chapter
2 13 filings.

3 The bankruptcy court's concern regarding these statements
4 was reasonable, as was its determination that a chapter 7
5 trustee was necessary to investigate the settlements and to
6 determine whether additional assets existed. It did not find
7 that the Appellants had concealed assets; and it did not need to
8 do so. Instead, as part of its totality of the circumstances
9 analysis, the bankruptcy court appropriately considered the
10 nature and quality of the Appellants' statements and conduct and
11 found them evasive and inappropriate. On this record, its
12 findings were not clearly erroneous.

13 The bankruptcy court did not abuse its discretion in
14 converting the Appellants' cases to chapter 7.

15 **CONCLUSION**

16 Based on the foregoing, we AFFIRM the bankruptcy court.
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