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NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No. NC-15-1055-DTaKu
)	
STERLING V. HARWOOD,)	Bk. No. 13-55890
)	
Debtor.)	
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RONALD MENDEZ,)	
)	
Appellant,)	
v.)	MEMORANDUM¹
)	
STERLING V. HARWOOD,)	
)	
Appellee.)	
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Submitted without Oral Argument
on March 17, 2016

Filed - April 8, 2016

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

Honorable Stephen L. Johnson, Bankruptcy Judge, Presiding

Appearances: Appellant Ronald Mendez, pro se, on brief; Lars T. Fuller and Sam Taherian of The Fuller Law Firm, PC on brief for appellee.

Before: DUNN, TAYLOR and KURTZ, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8024-1.

1 Creditor Ronald Mendez appeals from the bankruptcy court's
2 order overruling his objection to confirmation of debtor
3 Sterling Harwood's chapter 13² plan. We AFFIRM.

4 **I. FACTUAL BACKGROUND³**

5 **A. Prepetition events**

6 Mendez is an inmate of the California Department of
7 Corrections and Rehabilitation. In 2007, while Mendez was housed
8 at Folsom State Prison, he met Harwood, an attorney, and
9 requested his assistance in seeking postconviction relief.
10 Mendez gave Harwood the names of "alibi witnesses" whom he wanted
11 Harwood to interview in the hopes of establishing grounds for a
12

13 ² Unless otherwise indicated, all chapter and section
14 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.
15 All "Rule" references are to the Federal Rules of Bankruptcy
16 Procedure. All "Civil Rule" references are to the Federal Rules
of Civil Procedure.

17 ³ Harwood asks us to take judicial notice of the prior
18 criminal conviction of his former client Mendez, whom he labels
19 "an incarcerated violent felon." Harwood argues that, under the
20 Federal Rules of Evidence ("FRE"), evidence of the conviction
"must be admitted," and Mendez' various declarations "must be
21 weighed in light of [Mendez'] conviction." (Emphases in
original.)

22 This argument misapprehends both the FRE and our role as an
23 appellate body. First, FRE 609(a)(1)(A) makes admission of prior
24 conviction evidence subject to the balancing test of FRE 403, and
25 FRE 609(b) further limits its admissibility if the conviction is
more than ten years old. Second, we, as an appellate body, are
not called upon to "weigh" Mendez' declaration evidence, as it is
not our place to substitute our own credibility judgments for
those of the bankruptcy court.

26 For both these reasons, we DENY the request for judicial
27 notice. The facts recited here are for background purposes only,
28 and, to the extent they are drawn from statements made by Mendez
or are disputed, we have so indicated.

1 new trial. Harwood requested \$1,000 for each of the five
2 witnesses, and Mendez, acting through friends and relatives
3 outside of prison, paid \$3,000 as what Harwood called a "flat
4 fee" to investigate the first three witnesses.

5 Apparently, the investigation made little progress, and
6 Harwood eventually indicated he would pursue a different
7 strategy. Harwood requested a total of \$15,000 to prepare, file
8 and argue a motion for a new trial, and Mendez signed a retainer
9 agreement to that effect. The \$15,000 fee was paid in full by
10 Mendez' former spouse, Sandra Huerta-Mendez, in September 2008.
11 Over the following months, Mendez became dissatisfied with his
12 attorney, concerned about the lack of progress and communication.
13 In February 2009, Mendez sent Harwood two letters, complaining
14 that Harwood had not produced "one piece of news" regarding the
15 matter, had not returned an executed copy of their agreement or
16 receipts for payment, and had misled Mendez and his family
17 regarding Harwood's purported association with another attorney,
18 who allegedly had denied any involvement in the matter. Mendez
19 demanded that Harwood either remedy these purported failures or
20 return all the money - a total of \$18,000 - that he had received
21 from Mendez and his family; otherwise, Mendez threatened to
22 submit a complaint to the California Bar Association.

23 In August 2009, Harwood visited Mendez at the prison.
24 According to Mendez, Harwood reported that he had lost the
25 paperwork relating to his representation of Mendez during a
26 recent move, owing to Harwood's mounting financial difficulties.
27 Harwood allegedly told Mendez he could not repay the \$18,000, and
28 he had insufficient resources to continue pursuing the matter.

1 On March 1, 2011, Mendez filed a complaint against Harwood
2 in the Superior Court of California, County of Santa Clara (the
3 "State Court"), alleging breach of contract, "common counts" and
4 fraud. The asserted basis of the fraud claim was "Promise
5 Without Intent to Perform," and Mendez alleged damages in the
6 amount of "\$18[,]000, which is the total amount paid to [Harwood]
7 to perform promises [Harwood] never intended to perform."
8 Specifically, Mendez alleged that Harwood did not intend to
9 perform his promises to investigate and to prepare, file and
10 argue a motion for a new trial.

11 Default was entered against Harwood in the State Court on
12 March 26, 2012. On June 25, 2012, the State Court clerk entered
13 a request for entry of default judgment. Then, on November 30,
14 2012, Harwood filed a motion to set aside the June 25 request for
15 entry of judgment. He stated in an attached declaration that
16 Mendez had sent the State Court complaint and summons to the
17 address of Harwood's father-in-law, who spoke little English and
18 did not understand the need to transmit the documents to Harwood.
19 Although Harwood's declaration appears to indicate that he had
20 been aware of the State Court action for at least five months, he
21 argued his delay in response should be excused due to the lack of
22 personal service, along with his financial and medical problems,
23 which prevented him from responding timely.

24 The State Court disagreed with Harwood, noting that his
25 motion did not address the fact that default already had been
26 entered in March, making Harwood's motion untimely. Regarding
27 Harwood's argument that service had been improper, the State
28 Court found that "an examination of the proof of service [did]

1 not reveal any defect in service.” Finding Harwood “ha[d] not
2 adequately explained the entire period of delay,” the State Court
3 denied the motion and subsequently entered judgment by default in
4 favor of Mendez in the amount of \$26,887.36.⁴

5 **B. Harwood’s bankruptcy case**

6 In response to garnishment based on the State Court
7 judgment, Harwood filed a skeletal chapter 13 petition. His
8 first bankruptcy case was dismissed for failure to file necessary
9 schedules and complete credit counseling. At that point, Harwood
10 retained bankruptcy counsel and filed a second chapter 13
11 petition. On his schedule of unsecured creditors (“Schedule F”),
12 Harwood listed Mendez’ claim with the notation: “Alleged breach
13 of contract[.] Debtor disputes any liability to this individual.
14 A default was taken based on improper service.” Harwood’s
15 initial chapter 13 plan proposed to make no payments to unsecured
16 creditors, but an amended plan proposed to distribute a total of
17 \$16,920 on unsecured claims over a five-year period.

18 In addition to filing a proof of claim,⁵ Mendez objected to
19 confirmation of Harwood’s plan. Initially, the basis for Mendez’
20 objection was his allegation that Harwood had concealed or
21 transferred assets. Mendez eventually abandoned that argument
22 and submitted a brief presenting a series of alternative bases

23
24 ⁴ This figure includes interest and costs, but it is unclear
25 from the record how the total amount was calculated.

26 ⁵ We exercise our discretion to take judicial notice of
27 documents filed in Harwood’s bankruptcy case. See Fear v. United
28 States Trustee (In re Ruiz), 541 B.R. 892, 894 n.3 (9th Cir. BAP
2015); Atwood v. Chase Manhattan Mortg. Co. (In re Atwood),
293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 for his objection ("Objection Brief"): (1) Harwood had filed his
2 petition and proposed his plan in bad faith; (2) the "unclean
3 hands" doctrine prohibited confirmation; (3) the plan was part of
4 a "ploy" to discharge a nondischargeable debt; and (4) the value
5 of the property to be distributed to unsecured creditors under
6 the plan was less than what those creditors would receive in a
7 chapter 7 liquidation; that is, the plan was not in the best
8 interests of creditors.

9 Mendez argued that Harwood had demonstrated bad faith in
10 part by mischaracterizing his claim on Schedule F, both by
11 omitting any mention of the fraud count of the State Court
12 complaint and by describing service of the State Court complaint
13 as "improper" in spite of the State Court's finding to the
14 contrary. According to Mendez, these misstatements, taken
15 together with the fact that Harwood's initial plan proposed to
16 make no payments to unsecured creditors, supported a finding of
17 bad faith, unclean hands and an inappropriate effort to discharge
18 a nondischargeable debt. Mendez further took issue with
19 Harwood's statement that he filed for bankruptcy relief to
20 forestall wage garnishment, which Mendez took as an admission
21 that the filing was intended "to defeat the state court action,"
22 further supporting a finding of bad faith.

23 The bankruptcy court entered an order overruling Mendez'
24 objection to confirmation ("Order"). The court found, contrary
25 to Mendez' arguments, that Harwood had filed his petition and
26 proposed his plan in good faith. Specifically, the court found
27 that the description of Mendez' claim on Harwood's Schedule F was
28 not a misrepresentation, as the State Court judgment did not

1 distinguish between the breach of contract and fraud claims
2 pleaded in the State Court complaint. Although Harwood had filed
3 both of his chapter 13 petitions at least partially in response
4 to Mendez' wage garnishment, the court concluded he was "well
5 within his rights" to do so, as he was not using the bankruptcy
6 process "solely to defeat state court litigation."

7 Concerning Mendez' argument that Harwood had proposed his
8 plan in a bad faith effort to discharge a nondischargeable debt,
9 the bankruptcy court noted that Mendez had not filed a
10 nondischargeability complaint within the time allowed.⁶ Because
11 Harwood's debt to Mendez had not been declared nondischargeable,
12 the court found no basis to conclude the chapter 13 plan was
13 proposed in bad faith. Having found that the plan was not
14 proposed in bad faith, the bankruptcy court applied the same
15 analysis to Mendez' "unclean hands" argument, concluding the
16 unclean hands doctrine was inapplicable, and the "analysis [wa]s
17 subsumed in the examination of [Harwood's] good faith."

18 With respect to the "best interests of creditors" argument,
19 the bankruptcy court concluded that the plan satisfied the
20 applicable test. Based on Harwood's schedules, the bankruptcy
21 court found that general unsecured creditors would have received
22

23 ⁶ Any complaint seeking to determine the dischargeability of
24 a debt must be filed no later than 60 days following the date set
25 for the meeting of creditors. Rule 4007(c). According to the
26 main case docket, Harwood's meeting of creditors was scheduled
27 for December 23, 2013. Therefore, if Mendez wished to seek a
28 determination that the debt owed to him was nondischargeable, he
was required to file an adversary proceeding complaint by
February 21, 2014. The main case docket reveals that no such
complaint was filed.

1 no distributions in a hypothetical chapter 7 case. Thus,
2 Harwood's plan, which proposed to pay \$16,920 to unsecured
3 creditors, was in the best interests of creditors.

4 Based on its analysis, the bankruptcy court overruled
5 Mendez' objection to confirmation of Harwood's plan. This appeal
6 followed. The bankruptcy court's order confirming Harwood's plan
7 was entered on February 27, 2015.

8 **II. JURISDICTION**

9 The bankruptcy court had jurisdiction under 28 U.S.C.
10 §§ 1334 and 157(b) (2) (L). We have jurisdiction under 28 U.S.C.
11 § 158.

12 **III. ISSUE**

13 Whether the bankruptcy court abused its discretion in
14 overruling Mendez' objection to plan confirmation.

15 **IV. STANDARDS OF REVIEW**

16 We review a bankruptcy court's decision to confirm a
17 chapter 13 plan for abuse of discretion. de la Salle v. U.S.
18 Bank, N.A. (In re de la Salle), 461 B.R. 593, 601 (9th Cir. BAP
19 2011). A bankruptcy court abuses its discretion only if it
20 applies an incorrect legal standard or misapplies the correct
21 legal standard, or if its factual findings are illogical,
22 implausible or unsupported by inferences that may be drawn from
23 the evidence in the record. TrafficSchool.com, Inc. v. Edriver
24 Inc., 653 F.3d 820, 832 (9th Cir. 2011); United States v.
25 Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc). We may
26 affirm the decision of the bankruptcy court on any basis
27 supported by the record. See ASARCO, LLC v. Union Pac. R.R. Co.,
28 765 F.3d 999, 1004 (9th Cir. 2014); Shanks v. Dressel, 540 F.3d

1 1082, 1086 (9th Cir. 2008).

2 **V. DISCUSSION**

3 Mendez states a total of seven issues on appeal, but most of
4 them relate to asserted errors in the bankruptcy court's good
5 faith determinations and to the purported nondischargeability of
6 the debt owed to Mendez.

7 **A. Good faith generally**

8 Section 1325, which governs the confirmation of chapter 13
9 plans, imposes two requirements of good faith. The bankruptcy
10 court must consider, first, whether "the plan has been proposed
11 in good faith and not by any means forbidden by law," and second,
12 whether "the action of the debtor in filing the petition was in
13 good faith." Section 1325(a)(3), (7). Thus, the debtor must
14 exercise good faith both in filing the chapter 13 petition and in
15 proposing a plan.

16 In evaluating a debtor's good faith in connection with both
17 the petition and the plan, the bankruptcy court must consider

18 (1) whether the debtor misrepresented facts in his
19 petition or plan, unfairly manipulated the Bankruptcy
20 Code, or otherwise filed his Chapter 13 petition or
21 plan in an inequitable manner . . . ;

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

23 (3) whether the debtor only intended to defeat state
24 court litigation; and

25 (4) whether egregious behavior is present[.]

26 Leavitt v. Soto (In re Leavitt), 171 F.3d 1219, 1224 (9th Cir.
27 1999) (internal quotation marks and citations omitted); see also
28 Drummond v. Welsh (In re Welsh), 711 F.3d 1120, 1132 (9th Cir.
2013). The bankruptcy court correctly identified and applied
each of these factors in its written findings and conclusions.

1 We therefore must affirm the Order unless we determine that the
2 bankruptcy court's factual findings were illogical, implausible
3 or without support from inferences that can be drawn from the
4 record. Hinkson, 585 F.3d at 1262.

5 In his Objection Brief, Mendez made two specific arguments
6 in relation to these factors. With respect to the first factor,
7 Mendez argued that Harwood misrepresented the nature of his debt
8 by describing the basis for the debt as an "[a]lleged breach of
9 contract," without mentioning that Mendez' State Court complaint
10 also included a fraud claim. We see no clear error in the
11 bankruptcy court's finding that Harwood's description of the debt
12 was adequate. As the bankruptcy court noted, the State Court
13 judgment did not distinguish between the causes of action stated
14 in the State Court complaint. Though Harwood could have provided
15 greater detail concerning the specific causes of action giving
16 rise to the State Court judgment, his decision not to do so did
17 not require a finding of bad faith. The same is true with
18 respect to Harwood's notation that the default judgment was
19 "based on improper service." This statement, though arguably
20 inaccurate in light of the State Court's finding that service was
21 proper, does not evince an intention to mislead the bankruptcy
22 court or unfairly manipulate the Code.

23 Concerning the second and third factors, Mendez argued that
24 Harwood had demonstrated bad faith by filing his first chapter 13
25 case for the stated purpose of avoiding wage garnishment, after
26 which he allowed that case to be dismissed and filed a second
27 chapter 13 case. Granted, a debtor's intent "to frustrate
28 collection of a state-court judgment" is properly considered in a

1 good faith analysis. In re Welsh, 711 F.3d at 1132. But this
2 does not mean every chapter 13 petition that is immediately
3 precipitated by the threat of wage garnishment by a judgment
4 creditor is filed in bad faith. The bankruptcy court found that
5 Harwood had acted "well within his rights" by filing his
6 petitions "in response to mounting financial pressure, even if
7 that pressure included wage garnishment from a judgment debt."
8 The record provides support for this finding.

9 **B. Unclean hands**

10 In addition to his arguments concerning bad faith, Mendez
11 argued that the doctrine of "unclean hands" should preclude
12 Harwood from availing himself of bankruptcy relief. The
13 bankruptcy court concluded the doctrine was "subsumed in the
14 examination of a debtor's good faith."

15 The unclean hands doctrine provides that a plaintiff in
16 equity must "have acted fairly and without fraud or deceit as to
17 the controversy in issue." Id. (citing Ellenburg v. Brockway,
18 Inc., 763 F.2d 1091, 1097 (9th Cir. 1985)). This equitable
19 doctrine has been held applicable in bankruptcy proceedings.
20 See, e.g., Northbay Wellness Group, Inc. v. Beyries
21 (In re Beyries), 789 F.3d 956, 959 (9th Cir. 2015) (unclean hands
22 doctrine applicable in dischargeability proceedings). We agree
23 with the bankruptcy court, however, that the doctrine is not
24 applicable in the chapter 13 plan confirmation context.
25 Section 1325(a) provides that "the court shall confirm a plan" if
26 the provisions of §§ 1325(a) and (b) are satisfied. Where those
27 requirements are met, the bankruptcy court's inherent equitable
28 powers do not permit it to impose additional requirements for

1 plan confirmation. See Law v. Siegel, 134 S.Ct. 1188, 1194
2 (2014) (bankruptcy court's inherent powers do not allow it to
3 contravene express Code provisions). Thus, the bankruptcy court
4 did not err in rejecting the unclean hands doctrine as a
5 potential barrier to confirmation separate and distinct from the
6 good faith requirements of § 1325(a)(3) and (7).

7 **C. Nondischargeability**

8 Mendez also argued that the bankruptcy court should deny
9 confirmation of Harwood's plan because the plan was "a ploy to
10 discharge a nondischargeable debt." In his Objection Brief,
11 Mendez argued that the debt owed to him was based on fraud and
12 therefore nondischargeable.⁷ The bankruptcy court was correct in
13 rejecting this argument.

14 To begin with, there is no general principle prohibiting a
15 debtor from including in his schedules and plan a debt that later
16 might be declared nondischargeable. If a creditor wishes to
17 prevent the discharge of a debt owed to him, it is up to the
18 creditor to take the appropriate action. Even if the creditor
19 does obtain a judgment of nondischargeability, which Mendez did
20 not do here, it does not follow that the debtor's petition or

21
22 ⁷ In his opening brief, Mendez raises the new argument that
23 Harwood's debt to him is nondischargeable because of the
24 purported existence of a fiduciary relationship between Harwood
25 and Mendez. This argument was not raised before the bankruptcy
26 court and is not properly before us. See U.S. v. Real Prop.
Located at 17 Coon Creek Rd., Hawkins Bar Cal., Trinity Cty.,
27 787 F.3d 968, 979 (9th Cir. 2015) ("general practice" is not to
28 consider arguments raised for the first time on appeal).

27 We do not consider this argument, except to note that the
28 following discussion applies with equal force regardless of which
theory of nondischargeability Mendez espouses.

1 plan was filed in bad faith.

2 There is some authority for the proposition that a debtor's
3 effort to discharge through chapter 13 a debt that would be
4 nondischargeable under chapter 7 may be relevant to a good faith
5 analysis. See, e.g., United States v. Estus (In re Estus),
6 695 F.2d 311, 316 (8th Cir. 1982) (including among factors for
7 analysis "the type of debt sought to be discharged and whether
8 any such debt is nondischargeable in Chapter 7"). But Estus was
9 decided during an era in which the discharge available in
10 chapter 13 was much broader than the chapter 7 discharge.
11 Subsequent amendments to the Code have narrowed this so-called
12 "super discharge" significantly.⁸ There is no indication in the
13 record, nor has Mendez argued, that the obligation owed to him is
14 of a type dischargeable in chapter 13 but nondischargeable in
15 chapter 7. Rather, Mendez contended that the debt is not
16 dischargeable in either chapter.

17 Moreover, as the bankruptcy court correctly pointed out,
18 Mendez neither obtained a judgment excepting Harwood's debt to
19 him from discharge, nor even filed an adversary proceeding
20 complaint to achieve that result. The exceptions to discharge
21 set forth in § 523(a)(2), (4) and (6) are not self-executing.
22 See Mohsen v. Wu (In re Mohsen), 2010 WL 6259979 at *6 (9th Cir.
23 BAP Dec. 21, 2010). Rather, § 523(c)(1) provides, with
24 exceptions not applicable here, that a creditor must request and
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26 ⁸ See § 1328(a)(2), which excepts from the chapter 13
27 discharge, among other things, "any debt . . . of the kind
28 specified in section 507(a)(8)(C) or in paragraph (1)(B), (1)(C),
(2), (3), (4), (5), or (9) of section 523(a)."

1 obtain a determination of nondischargeability. Rule 4007, in
2 turn, provides that the proper avenue for such a request is an
3 adversary proceeding, which must be commenced within 60 days
4 following the date set for the debtor's meeting of creditors.
5 Mendez did not commence an adversary proceeding within the time
6 permitted.⁹ We therefore conclude that the bankruptcy court did
7 not abuse its discretion in rejecting Mendez' nondischargeability
8 argument.

9 **D. Mendez' lack of opportunity to reply**

10 Finally, we take up Mendez' contention that "it was error
11 for [the bankruptcy c]ourt to confirm [Harwood's] Plan without
12 [Mendez] having seen or been allowed to reply to [Harwood's]
13 response" A review of the bankruptcy court docket shows
14 Mendez initially filed his objection to confirmation on
15 January 9, 2014. A hearing was held on the matter on July 24,
16 2014, and an Order Setting Briefing Schedule ("Scheduling Order")
17 was entered the same day. The Scheduling Order set deadlines for
18 Mendez to file his Objection Brief and for Harwood to file a
19 response, and it provided that Mendez' objection would be deemed
20 submitted on October 9, 2014. The Scheduling Order made no
21 allowance for a reply by Mendez.

22 Mendez did not file his Objection Brief within the time set
23 by the Scheduling Order, but, according to a docket text entry on
24 October 16, 2014, the court "excuse[d] the lateness of the
25 [Objection Brief]" due to Mendez' incarceration. Harwood never
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27 ⁹ We express no opinion as to whether such an action would
28 have been successful.

1 filed a response, although prior to the filing of the Objection
2 Brief, Harwood had submitted a five-paragraph declaration in
3 which he "categorically den[ied]" that he had filed the petition
4 in bad faith. In sum, the reason Mendez did not see Harwood's
5 response to his Objection Brief is that Harwood did not file a
6 response. There was no reason for the bankruptcy court to permit
7 any further briefing or argument, and it did not err in taking
8 the matter under submission in accord with the Scheduling Order.

9 **VI. CONCLUSION**

10 Based upon the foregoing, we conclude that the bankruptcy
11 court did not abuse its discretion in overruling Mendez'
12 objection to confirmation of Harwood's amended chapter 13 plan.
13 We AFFIRM.