



1 This Memorandum Decision constitutes the Court's findings of fact and conclusions of law,  
2 pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure ("FRBP").

3 I.

4 FACTS

5 Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on April 2,  
6 1997.<sup>1</sup> Debtor testified that he is married and that his wife filed her own Chapter 13 petition at  
7 some unspecified time in the past because of tax debts arising out of Debtor's business affairs, but  
8 Debtor did not commence this Chapter 13 case as a joint one with his wife. Debtor stated that he  
9 filed Chapter 13 because he wanted "a fresh start" and to "adjust" his debts, which included credit  
10 card debt and potential liability for debts arising out of a failed restaurant franchise; it was necessary  
11 for Debtor to sell his house to prevent foreclosure by the Small Business Administration and that  
12 debt still was not paid in full. Debtor is an accountant who used to have a private practice and was  
13 involved in various business ventures, but he has been employed by a non-profit organization since  
14 August 1996 and earns \$4,200 per month. Debtor stated that all disposable income after payment  
15 of necessary living expenses is devoted to the Amended Plan, which provides for payment to the  
16 Trustee of \$750 per month for five years. Debtor's original plan called for a dividend of 5% to  
17 general unsecured creditors, without specifically mentioning Creditor's claim -- the Amended Plan  
18 treats Creditor as the holder of a claim secured by certain real property in Texas ("Real Property")  
19 and provides that Creditor be paid nothing other than from sale or refinance of the Real Property,  
20 which is to occur within twenty-four months after confirmation of the Amended Plan; at that time,  
21 Creditor is to be paid in full with interest of 10% from April 1, 1997.

22 Debtor testified that he provided accounting services to Creditor for some ten years prior to  
23 1990. He stated that Creditor was a "multi-millionaire" with a restaurant business, profitable invest-  
24 ments, and "lots of cash in the bank" (\$6,000,000 to \$8,000,000 in 1990), and that she asked  
25 Debtor to recommend investments with a higher interest rate than was offered by banks. Creditor's  
26 counsel stipulated that, at time of trial, Creditor was 91 years old; Debtor testified that, while he  
27 was serving as Creditor's accountant, she worked fourteen hour days, seven days a week in her

restaurant.

1           Creditor asserts an unsecured, non-priority claim against Debtor of approximately \$681,000,  
2 consisting of \$320,000 principal, approximately \$67,000 in interest, \$100,000 in punitive damages,  
3 and approximately \$194,000 in attorney's fees. The principal sums totalling \$320,000 arise from  
4 two loans made by Creditor to Bellfort Chateau Ltd. Partnership ("Partnership"); Debtor was a  
5 limited partner of Partnership and he was also the Vice President of Chateau Management Corp., a  
6 corporation that was the general partner of Partnership. Such loans are evidenced by two non-  
7 recourse promissory notes from Partnership to Creditor, one for \$300,000 issued in February 1990  
8 and one for \$20,000 issued in July 1991. Debtor testified that Creditor knew and agreed that the  
9 notes were to be secured by a deed of trust on the Real Property, a 154 unit apartment complex in  
10 Houston, Texas owned by Partnership, and that such deed of trust would originally be in third  
11 priority position but would later occupy the first priority position. According to Debtor,  
12 Partnership had an agreement with J. Michael Schaefer ("Schaefer") that Schaefer would  
13 subordinate his \$508,000 second deed of trust to Creditor's new first deed of trust once Creditor's  
14 loan proceeds had been used to pay off the existing \$100,000 first deed of trust and to renovate the  
15 apartment complex on the Real Property. Debtor testified that, after Partnership had borrowed  
16 from Creditor and performed under the agreement with Schaefer, Schaefer reneged and refused to  
17 subordinate; Partnership therefore sued Schaefer in 1995 to enforce subordination of Schaefer's  
18 deed of trust to Creditor's deed of trust, which suit was still pending in Texas State Court at time of  
19 trial in this Court.

20           Debtor stated that, after Partnership borrowed from Creditor, the holder of the original first  
21 deed of trust on the Real Property was paid in full and such deed of trust was taken by Debtor's  
22 sister, Kathleen Roberts ("Roberts"), a Texas attorney who agreed that her professional corporation  
23 would "hold" the first deed of trust pending Schaefer's performance of the subordination agreement.  
24 Partnership then applied the balance of Creditor's loan proceeds and some additional funds to  
25 renovate the apartment complex as agreed with Schaefer. When Schaefer did not perform his  
26 agreement to subordinate and did not make payments on the first deed of trust, Roberts' pro-  
27 fessional corporation foreclosed under the first deed of trust and took title to the Real Property,

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extinguishing Schaefer's second deed of trust and Creditor's third deed of trust in the process.

1 According to Debtor, Roberts did not want her professional corporation to own the Real Property  
2 and therefore conveyed it to K.P.A.M., a corporation wholly owned by Roberts. Shortly before  
3 Roberts' death, she transferred her interest in K.P.A.M. to Debtor; Debtor testified that he held no  
4 interest in K.P.A.M. before such transfer, but that he is now the sole shareholder and only member  
5 of the board of directors.<sup>2</sup>

6 Debtor testified that, due to Schaefer's wrongdoing, Partnership was never able to place a  
7 deed of trust on behalf of Creditor in first priority position on the Real Property and also had to  
8 stop paying the interest under Creditor's promissory notes at some point in 1995 because Schaefer  
9 told the tenants of the apartment complex to pay rents to him and such rents were Partnership's sole  
10 source of income. On October 25, 1995, Creditor filed a complaint in California State Court  
11 against Debtor, Partnership, Chateau Management Corp., and others, entitled "Complaint for  
12 Intentional Misrepresentation, Negligent Misrepresentation, Intentional Infliction of Emotional  
13 Distress, Promise Without Intent to Perform, Breach of Covenant of Good Faith and Fair Dealing,  
14 Negligence, Fraudulent Concealment, Breach of Fiduciary Duty, Rescission, Fraud, Breach of  
15 Contract, Civil Conspiracy and Elder Abuse". Following a court trial, State Court Judge David W.  
16 Leahy issued a memorandum of tentative decision on December 31, 1996 finding Debtor liable  
17 under an alter ego theory for breach of contract, negligent misrepresentation, and intentional  
18 misrepresentation, awarding compensatory damages of \$320,000 and punitive damages of  
19 \$100,000. Debtor requested that a statement of decision be issued and one was submitted by  
20 Creditor but Judge Leahy died on February 10, 1997 without signing it. Debtor then moved to  
21 strike Creditor's proposed statement of decision, which motion was denied by State Court Judge  
22 Peter Stone on March 31, 1997. Creditor then submitted a proposed judgment and statement of  
23 decision to Judge Stone, but they had not been signed when Debtor filed his Chapter 13 petition on  
24 April 2, 1997; Creditor obtained relief from this Court to have the judgment and statement of  
25 decision signed, and they were signed by Judge Stone on August 5, 1997. Debtor appealed from  
26 that judgment, which appeal was pending at time of trial in this Court.

27 On April 1, 1997 -- the day before Debtor filed his Chapter 13 petition -- Debtor signed on

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1 behalf of K.P.A.M. a deed of trust upon the Real Property in favor of Creditor, which was recorded  
2 on April 2, 1997. Creditor refers to this as a "unilateral deed of trust" and contends that Creditor  
3 did not request it, did not know it was being issued, and gave no consideration for it. Debtor  
4 testified that, while he denies having any personal liability to Creditor under the non-recourse  
5 Partnership notes or under an alter ego theory, he nevertheless has always wanted to see Creditor  
6 made whole and he caused K.P.A.M. to issue the deed of trust so that Creditor would receive what  
7 she bargained for and would have received had Schaefer abided by his agreement to subordinate: a  
8 first deed of trust on the Real Property. Debtor said that Creditor had been offered such a deed of  
9 trust in the past but would not accept it.

10 Debtor testified that Partnership purchased the Real Property in 1990 for \$640,000; he  
11 stated his opinion that, once Partnership renovated the apartment complex with the funds borrowed  
12 from Creditor, the Real Property was worth at least \$1,000,000. At the time of Creditor's loan to  
13 Partnership, the Real Property was encumbered by the original \$100,000 first deed of trust and  
14 Schaefer's \$508,000 second deed of trust; accordingly, Creditor's third deed of trust securing notes  
15 totalling \$320,000 was fully supported by equity of at least \$392,000 under Debtor's valuation. In  
16 1995, Partnership had to evict all tenants from the apartment complex because income was not  
17 sufficient to maintain utility services required by Texas law; the value of the Real Property  
18 decreased and, by time of trial in this Court (approximately one year and four months after  
19 commencement of Debtor's Chapter 13 case), K.P.A.M. had received two offers to buy it, one for  
20 \$510,000 and one for \$550,000. Debtor testified that, when he filed his Chapter 13 petition and at  
21 time of trial in this Court, the Real Property was encumbered only by Creditor's first deed of trust,  
22 some liens for water and taxes, and a lis pendens asserting a claim of \$508,000 by Schaefer;<sup>3</sup> he  
23 estimated that a sale for \$550,000 would net (after payment of costs of sale, commissions, and liens  
24 for water and taxes) some \$400,000 to \$450,000, all of which would be available for Creditor's first  
25 deed of trust, since Schaefer's claim is "spurious".

## 26 II.

### 27 ANALYSIS

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A. Eligibility

1           Creditor contends that Debtor is ineligible for Chapter 13 because his debt to Creditor alone  
2 exceeds the maximum amount of unsecured debt permitted by Chapter 13. For cases (such as this  
3 one) filed between October 22, 1994 and April 1, 1998, §109(e) provides that

4                     Only an individual with regular income that  
5                     owes, on the date of the filing of the peti-  
6                     tion, noncontingent, liquidated, unsecured  
7                     debts of less than \$250,000 and noncontingent,  
8                     liquidated secured debts of less than \$750,000,  
9                     or an individual with regular income and such  
10                    individual's spouse, except a stockbroker or  
                      a commodity broker, that owe, on the date of  
                      the filing of the petition, noncontingent,  
                      liquidated, unsecured debts that aggregate  
                      less than \$250,000 and noncontingent, liquid-  
                      ated, secured debts of less than \$750,000 may  
                      be a debtor under Chapter 13 of this title.

11 Debtor does not contest that the principal amount of Creditor's claim is \$320,000 (without addition  
12 of interest, punitive damages, or attorney's fees), so such a claim would exceed the \$250,000 ceiling  
13 for unsecured claims if it were unsecured, and also both noncontingent and liquidated, at the time  
14 Debtor's Chapter 13 petition was filed.

(1) Unsecured Debt

18           Debtor argues that Creditor's claim does not represent an unsecured debt owed by Debtor at  
19 commencement of the Chapter 13 case because Creditor was at that time the beneficiary of a first  
20 deed of trust upon the Real Property.

21           The terms "unsecured debts" and "secured debts" used in §109(e) are not defined by the  
22 Bankruptcy Code but the term "debt" is, at §101(12):

23                     ... "debt" means liability on a claim[.]

24           The term "claim" is also defined, at §101(5):

25                     "claim" means -- (A) right to payment, whether or not such right is  
26                     reduced to judgment, liquidated, unliquidated, fixed, contingent,  
27                     matured, un- matured, disputed, undisputed, legal, equitable, secured  
                      or unsecured; or (B) right to an equit- able remedy for breach of  
                      performance if such breach gives rise to a right to payment, whether

or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured[.]

In re Quintana, 107 B.R. 234, 237 (9th Cir. BAP 1989), aff'd, 915 F.2d 513 (9th Cir. 1990) holds that the terms "debt" and "claim" are "coextensive":

Any difference between the two definitions are merely those differences inherent in describing a term from opposing points of view. "Debt" concerns itself with a debtor's obligation, while "claim" concerns itself with a creditor's rights. [citation omitted] Thus, a debt is coextensive with a claim. To the extent that a creditor has a claim against the debtor, the debtor owes a debt to the creditor.

Thus, when §109(e) speaks of unsecured debts and secured debts owed by a debtor at time of filing, it is likewise referring to unsecured claims and secured claims held by creditors against the debtor at that time. The terms "unsecured claim" and "secured claim" are defined by §506(a):

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with, any hearing on such disposition or use or on a plan affecting such creditor's interest.

Accordingly, a secured claim is one that is "secured by a lien on property in which the estate has an interest ... to the extent of the value of [the] creditor's interest in the estate's interest in such property". In this case, Creditor's claim is secured by a lien on the Real Property, which is not owned by Debtor but by K.P.A.M., a corporation. Debtor owns all of the stock in K.P.A.M. but he does not own K.P.A.M.'s assets, so those assets are not property of Debtor's bankruptcy estate and the estate has no interest in them. Debtor has a right to receive shareholders' distributions from K.P.A.M., and a right to receive K.P.A.M.'s assets if K.P.A.M. is ever liquidated and all of its creditors paid in full, and the rights of a sole shareholder and director to vote and otherwise control

1 K.P.A.M. -- all of those rights are also property of Debtor's bankruptcy estate, but neither Debtor  
2 nor his bankruptcy estate has any direct interest in K.P.A.M.'s assets, including the Real Property.  
3 Creditor's deed of trust on the Real Property does not, therefore, represent "a lien on property in  
4 which the estate [of Debtor] has an interest" and there is no evidence that Creditor holds any  
5 security interest other than that represented by such deed of trust; Creditor is therefore not the  
6 holder of a secured claim against Debtor's estate -- put another way, any debt owed by Debtor to  
7 Creditor when Debtor commenced his Chapter 13 case was not a secured one as to Debtor.

8 (2) Noncontingent

9 Debtor argues that he is not indebted to Creditor because the notes given by Partnership are  
10 non-recourse and he has appealed the State Court judgment finding him liable. Nevertheless,  
11 Creditor asserts an unsecured claim against Debtor and, for purposes of eligibility under §109(e),  
12 such claim represents a debt that existed at the time Debtor filed his Chapter 13 petition. The fact  
13 that Debtor disputes liability is irrelevant, see In re Sylvester, 19 B.R. 671 (9th Cir. BAP 1982)  
14 ("Sylvester"), since §109(e) excludes from the eligibility calculation only debts that are either  
15 contingent or unliquidated, not debts that are merely disputed. A contingent debt has been defined  
16 as "one which the debtor will be called upon to pay only upon the occurrence or happening of an  
17 extrinsic event which will trigger the liability of the debtor to the alleged creditor", see In re  
18 Fostvedt, 823 F.2d 305, 306 (9th Cir. 1987) ("Fostvedt"); "[s]tated another way, where all the facts  
19 giving rise to liability are in existence at the time of the filing of the petition, and no future  
20 occurrence is required in order to establish debtor's liability, the claim is not contingent as to  
21 liability", see In re Dill, 30 B.R. 546, 549, aff'd, 731 F.2d 629 (9th Cir. 1984). Here, by the time  
22 Debtor filed his Chapter 13 petition, the events creating Debtor's liability had already transpired and  
23 the parties were not awaiting the occurrence of an extrinsic event to trigger Debtor's liability. The  
24 facts that Debtor's liability was not reduced to judgment pre-petition and may be subject to reversal  
25 on appeal post-petition do not alter the fact that the liability springs from pre-petition events, and  
26 the debt is therefore not a contingent one within the meaning of §109(e), see In re Loya, 123 B.R.  
27 338 (9th Cir. BAP 1990); In re Nicholes, 184 B.R. 82 (9th Cir. BAP 1995); In re Keenan, 201 B.R.

263 (Bkrcty.

1 S.D.Ca. 1996).<sup>4</sup>

3 (3) Liquidated

4 The term "liquidated" for purposes of §109(e) is defined by Sylvester (at 673), quoting from  
5 In re Bay Point Corp., 1 B.C.D. 1635 (D.N.J. 1975):

6 The concept of liquidation has been variously expressed. The  
7 common thread ... has been  
8 ready determination and precision in computa-  
9 tion of the amount due.... Some cases have  
stated the test as whether the amount due is  
capable of ascertainment by reference to an  
agreement or by simple computation.

10 The Sylvester definition was adopted by the Ninth Circuit in Fostvedt, and expanded upon by In re  
11 Wenberg, 94 B.R. 631, 634-635 (9th Cir. BAP 1988), aff'd, 902 F.2d 768 (9th Cir. 1990)  
12 ("Wenberg"):

13 The definition of "ready determination" turns on the distinction  
14 between a simple hearing to determine the amount of a certain debt,  
15 and an extensive and contested evidentiary hearing in which  
16 substantial evidence may be necessary to establish amounts or  
17 liability. On this issue, the bankruptcy judge has the best occasion to  
determine whether a claim will require an overly extensive hearing or  
whether the claim is subject to a bona fide dispute; therefore not  
subject to "ready determination."<sup>5</sup>

18 The Wenberg definition of "ready determination" was commented upon by Nicholes (at 90):

19 In other words, it is the nature of the dispute, and not the existence of  
20 the dispute, that makes a claim unliquidated. Like tort claims and  
21 other claims requiring juridical awards before liability and amount are  
22 established, some disputed claims cannot be readily determined  
23 because they require additional processing by the court.

24 Loya (at 340) cautions against a simplistic approach of considering all tort claims unliquidated and  
25 all contract claims liquidated, stressing the importance of focusing instead on whether the amount  
26 of a claim (regardless of type) can be readily determined:

27 Therefore, whether a debt is liquidated or  
28 not for purposes of 11 U.S.C. § 109(e) does  
not depend strictly on whether the claim  
sounds in tort or in contract, but whether  
it is capable of ready computation.

1 Creditor contends that her claim is based on contract (the promissory notes) and Debtor argues that  
2 it is based on tort (his alter ego liability for the non-recourse debt of Partnership). As explained by  
3 Nicholes and Loya, the label borne by the claim is not dispositive as to whether it is liquidated for  
4 purposes of §109(e).

5 In this case, the amount of Creditor's claim is not capable of "ready determination" because  
6 Creditor received a partial payment on account of it when the first deed of trust on the Real  
7 Property was issued in Creditor's favor the day before Debtor filed his Chapter 13 petition, and the  
8 amount of that payment cannot be ascertained by a simple hearing. Debtor testified that, when he  
9 filed his Chapter 13 petition, the Real Property was encumbered by some water and tax liens, a lis  
10 pendens representing Schaefer's "spurious" claim of \$508,000, and Creditor's first deed of trust --  
11 he further testified that, approximately a year and a half post-petition, K.P.A.M. received offers to  
12 buy the Real Property for \$510,000 and \$550,000, and he believed that a sale in that range would  
13 yield some \$400,000 to \$450,000 after payment of costs of sale and the liens for water and taxes.  
14 Net proceeds in those amounts would clearly be insufficient to cover the \$508,000 claim  
15 represented by Schaefer's lis pendens, which was recorded prior to recordation of Creditor's first  
16 deed of trust. Schaefer's claim of lien cannot just be ignored simply because Debtor considers it  
17 "spurious" and, unless it is disposed of, Creditor's first deed of trust will represent no value,  
18 whereas the opposite will be true if the Schaefer claim is removed or subordinated. In order to deal  
19 with Schaefer's lis pendens, K.P.A.M. will have to sell the Real Property free and clear of both  
20 Schaefer's lien claim and Creditor's first deed of trust, transfer both to proceeds, and file a complaint  
21 pursuant to FRBP 7001(2) to determine the validity and priority of each; only after that process has  
22 been completed can the value of Creditor's first deed of trust be ascertained. Such an exercise is  
23 plainly not "a simple hearing to determine the amount of a certain debt", so that the debt might be  
24 "readily determined" (and, hence, liquidated) under the test of Wenberg -- rather, it is "an extensive  
25 and contested evidentiary hearing in which substantial evidence may be necessary to establish  
26 amounts", such as Wenberg held would prevent a debt from being "readily determined" (and, hence,  
27 unliquidated).

28 Creditor argues that the Court should not consider the first deed of trust, since it was

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bestowed upon Creditor without her request, knowledge, or consent, and in exchange for no consideration -- Creditor has even offered to reconvey the interest in the Real Property that she unwittingly acquired when the first deed of trust was issued in her favor. Reconveyance now, post-petition, would not affect the test of §109(e) as to how matters stood when Debtor's Chapter 13 petition was filed, and the fact that Creditor did not participate in issuance of the deed of trust and gave no new consideration in exchange is irrelevant to the state of affairs existing at commencement of Debtor's Chapter 13 case. At that time, Creditor was the beneficiary of a deed of trust on the Real Property, which constituted an undetermined amount of credit against, or partial payment of, Creditor's claim. It is true that, as a general rule:

Unless the parties agree otherwise, or the obligee consents to receive some other medium, payment of an obligation may be made only in money, and it follows that a tender must be made in money or in that which by law passes as money for the payment of debts. Money is the natural standard of value, which theoretically is not supposed to fluctuate from year to year; and when the sum in dollars and cents is expressed in a contract, to be paid by one to another, it should not be rejected for a more uncertain standard. Unless the parties so agree, a debtor has no right, except at his own peril, to substitute something in lieu of money as the medium of payment of his debt. No custom can compel a creditor, in the absence of a special agreement, to accept anything but legal tender in payment of the debt. [footnotes omitted]

60 American Jurisprudence (2d ed. 1987, supp. 1998), and see cases cited therein. However, Creditor in this case did originally agree to have her note secured by a deed of trust on the Real Property and the effect of such a deed of trust is to reduce Creditor's claim by whatever amount of value the deed of trust represents. Since that value cannot be ascertained by means of a simple hearing and will instead require an adversary proceeding by K.P.A.M. against Schaefer, the amount of Creditor's claim when Debtor filed his Chapter 13 petition cannot be readily determined and is therefore unliquidated within the meaning of §109(e).

#### B. Bad Faith

Creditor argues that the Amended Plan should not be confirmed because it was not filed in good faith as is required by §1325(a)(3). Creditor cites In re Padilla, 213 B.R. 349 (9th Cir. BAP 1997) ("Padilla"), which relies heavily upon In re Warren, 89 B.R. 87 (9th Cir. BAP 1988)

1 ("Warren") in setting forth a non-exhaustive list of eleven factors to be considered in determining  
2 whether a debtor has met his burden of demonstrating good faith. Warren and Padilla hold that  
3 such burden is particularly heavy when a debt that would be non-dischargeable under Chapter 7 is  
4 sought to be discharged in Chapter 13, and that good faith is to be determined with reference to the  
5 totality of the circumstances. The factors of Warren (at 93) and Padilla (at 352-53) are as follows.

6 (1)

7 The amount of the proposed pay-  
8 ments and the amount of the  
9 debtor's surplus.

10 Debtor testified without contradiction that he is devoting all disposable income to the Amended  
11 Plan at the rate of \$750 per month.

12 (2)

13 The debtor's employment history,  
14 ability to earn, and likelihood of  
15 future increases in income.

16 Debtor testified without contradiction that he earns \$4,200 per month as an accountant for a non-  
17 profit organization, after having once operated a certified public accountancy practice and a failed  
18 restaurant franchise.

19 (3)

20 The probable or expected duration of the plan.

21 Debtor testified without contradiction that the term of the plan is sixty months, which is the  
22 maximum term permitted by §1322(d).

23 (4)

24 The accuracy of the plan's statements of the debts,

1 expenses and percentage of repayment of unsecured  
2 debt, and whether any inaccuracies are an attempt to  
3 mislead the court.

4 Creditor argues that she is erroneously scheduled as a secured creditor, whereas she is actually an  
5 unsecured creditor, and her claim was not provided for in the version of the plan that was originally  
6 filed.

7 As discussed above, this Court has concluded that Creditor is not a secured creditor of this  
8 estate, but Debtor's counsel has argued to the contrary throughout proceedings in this case. There  
9 is no evidence or basis for inference that it was Debtor, rather than his attorney, who caused  
10 Creditor to be scheduled as a secured creditor, and there is no indication that such inaccuracy was  
11 an attempt to mislead the Court. Creditor's claim is scheduled as being secured by the Real  
12 Property, and the Real Property is scheduled with Debtor as the "owner in fee through wholly  
13 owned corporation, K.P.A.M., Incorporated" -- all facts were fully disclosed, however erroneous  
14 the legal conclusions may have been.

15 With respect to the omission of Creditor from the original version of the plan, there is again  
16 no evidence or basis for inference that this was a bad faith attempt by Debtor to harm Creditor or  
17 mislead the Court, as opposed to an error by counsel in preparing a plan that should be consistent  
18 with the schedules.

19 (5)

20 The extent of preferential  
21 treatment between classes of  
22 creditors.

23 Creditor has not alleged any such treatment and there was no testimony on this subject, but the  
24 Court notes no such treatment on the face of the Amended Plan.

25 (6)

26 The extent to which secured claims are modified.

27 Creditor has not addressed this issue and there was no testimony on this subject, but the Court  
28 notes that the Amended Plan provides for only two secured creditors. One is Creditor (although, as

discussed above, she is not a secured creditor of Debtor's estate), whose claim is to be paid in full with 10% interest when the Real Property is sold or refinanced within twenty-four months -- the other holds a claim of \$19,795 and is to be paid the full value of its collateral (an automobile worth \$18,000) with 10% interest.

(7)

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

Creditor argues that her claim would be non-dischargeable in Chapter 7 as one arising out of actual fraud under §523(a)(2)(A).

Creditor concedes that the State Court proceedings cannot be given collateral estoppel effect because no final State Court judgment existed when Debtor's Chapter 13 petition was filed, see In re Turner, 204 B.R. 988 (9th Cir. BAP 1997), but urges that the findings made in Judge Leahy's memorandum of tentative decision are "persuasive". As a practical matter, regardless of how persuasive the State Court's findings might be, they carry no legal weight and can have no effect in the absence of issue preclusion by application of collateral estoppel. The legal analysis and rationale of a non-binding decision from another court might persuade a judge to take the same view of legal issues, but this Court can make no use of factual findings that are not binding through the use of collateral estoppel.

The elements of actual fraud under §523(a)(2)(A) are: (1) a representation made by the debtor; (2) known by the debtor at the time made to be false; (3) made with the intention and purpose of deceiving the creditor; (4) upon which the creditor justifiably relied; (5) which proximately caused damage to the creditor, see In re Kirsh, 973 F.2d 1454 (9th Cir. 1992). To the extent that this issue has been tried in this Court (where the only witness was Debtor himself), Debtor testified without contradiction that Creditor knew from the outset that her loan would be secured only by a third deed of trust until such time as Schaefer subordinated, so Creditor has not established that she justifiably relied upon receiving a first deed of trust simultaneously with making the loan or by a date certain. Nor has Creditor proven, or attempted to prove in this Court, that

Debtor knowingly made false representations to Creditor with the intent of deceiving her. Since  
1 Creditor ultimately did receive a first deed of trust on the Real Property, it is questionable whether  
2 she has in fact suffered any damage caused by any act of Debtor.<sup>6</sup>

3  
4 (8)

5 The existence of special cir-  
6 cumstances such as inordinate  
7 medical expenses.

8 There is no evidence of such circumstances, other than Debtor's uncontroverted testimony that he  
9 had to sell his house due to the failure of his restaurant franchise and still faced debts from that  
10 source.

11 (9)

12 The frequency with which the debtor  
13 has sought relief under the Bankruptcy  
14 Reform Act.

15 There is no evidence that Debtor has ever filed bankruptcy before.

16 (10)

17 The motivation and sincerity of  
18 the debtor in seeking Chapter 13  
19 relief.

20 Creditor attacks Debtor's motive for filing Chapter 13 on two bases.

21 Creditor cites In re Chinichian, 784 F.2d 1440 (9th Cir. 1986) ("Chinichian"), which found  
22 that a Chapter 13 plan was filed in bad faith due in part to the debtors' "strategic timing" in twice  
23 filing a bankruptcy petition on the eve of a State Court trial in an action against the debtors for  
24 specific performance of an agreement to sell their residence. The only debts listed in the second  
25 case were a deed of trust on the residence, a \$40,000 loan from a relative, and the claim of the  
26 plaintiff in the State Court litigation; the debtors proposed to fund their Chapter 13 plan by selling  
27 real property worth \$20,000, and also sought to reject the executory contract that was the subject  
28 of the specific performance action in the State Court. The Ninth Circuit (at 1445) agreed with the

trial court's conclusion that

1           The debtors in this case are not the poor,  
2           the oppressed and the unfortunate seeking  
3           a fresh start. They own a home valued at  
4           \$140,000 which is encumbered for \$40,000  
5           and upon which the payments are current.  
6           They also own four parcels of desert acre-  
7           age free and clear. They are not having  
8           difficulty in meeting their financial obli-  
9           gations. Instead, their purpose in-filing  
10          [sic] this Chapter 13 case is solely to defeat  
11          the pending action for specific performance.

12       The facts of Chinichian are clearly distinguishable from the facts of the case that is before this  
13       Court. Debtor here schedules nineteen unsecured creditors with claims totalling \$147,554.39  
14       (exclusive of Creditor's claim), no real property owned by him, personal property with equity of  
15       either \$29,768.50 or \$9,973.50,<sup>7</sup> and an annual income of \$50,400 -- he testified without  
16       contradiction that the failure of a restaurant franchise exposed him to liability for business debts and  
17       required the sale of his home to satisfy part of that liability. In Chinichian, the trial court and two  
18       appellate courts concluded that the debtors filed bankruptcy in order to avoid having to perform  
19       under their agreement to sell their home, rather than for the legitimate purpose of reorganizing their  
20       financial affairs. The same conclusion is not compelled in this case, where Debtor has unsecured  
21       debt of nearly \$150,000 even without Creditor's claim, a medium income, and assets worth less than  
22       20% of his liabilities (and Debtor may well be incurring further debt in the form of legal expense to  
23       appeal Creditor's judgment). It is possible that Debtor would have been able to avoid filing  
24       bankruptcy if Creditor had not prevailed in the State Court action, but his financial condition was  
25       already poor before that occurred.

26       Creditor also argues that Debtor demonstrated bad faith by causing K.P.A.M. to issue the  
27       deed of trust to Creditor the day before Debtor filed his Chapter 13 petition, in an effort to  
28       transform an unsecured debt into a secured one and create eligibility for Chapter 13. First, as  
29       discussed above, Creditor's claim was not transformed into a secured claim against Debtor's estate.  
30       Moreover, Debtor testified that he had previously offered Creditor the deed of trust and been  
31       turned down, but he caused it to be issued anyway so that Creditor (who had sued him and won  
32       because her notes were not paid), would get paid through sale of the Real Property. The facts

surrounding what Creditor describes as the "unilateral" transaction do not support Creditor's explanation of Debtor's motive any more or less than they support Debtor's explanation of his motive, and Creditor has cited no authority for the proposition that it is bad faith to take legally available measures to meet the eligibility requirements of §109(e). As a general proposition, pre-bankruptcy planning is a common and legally acceptable practice -- for example, in the Ninth Circuit under both the former Bankruptcy Act and the current Bankruptcy Code, non-exempt assets may be converted into exempt assets on the eve of bankruptcy, see Love v. Menick, 341 F.2d 680 (9th Cir. 1965); Wudrick v. Clements, 451 F.2d 988 (9th Cir. 1971); Matter of Jackson, 472 F.2d 589 (9th Cir. 1973); In re Roosevelt, 176 B.R. 200 (9th Cir. BAP 1994); In re Cataldo, 224 B.R. 426 (9th Cir. BAP 1998).

(11)

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

There is no evidence of any unusual burden upon the trustee.

Upon consideration of the foregoing factors and the totality of the circumstances, the Court concludes that Debtor's Amended Plan was filed in good faith.

#### CONCLUSION

For the reasons hereinabove set forth, Creditor's objection to confirmation is overruled. Counsel for Debtor shall submit a form of order so providing, after review by counsel for Creditor as to form.

Dated:

\_\_\_\_\_  
ARTHUR S. WEISSBRODT

MEMORANDUM DECISION  
OVERRULING AMELIA VAHL'S OBJECTION  
TO CONFIRMATION OF FIRST AMENDED PLAN

0 Unless otherwise noted, all statutory references are to Title 11, United States Code ("the  
1 Bankruptcy Code"), as amended on October 22, 1994.

2 0 The Court takes judicial notice of the fact that K.P.A.M. filed a Chapter 11 petition on  
3 January 14, 1998, Case No. 98-50277, currently pending before this Court.

4 0 The Court takes judicial notice from pleadings filed in other matters that Schaefer's lis  
pendens was recorded prior to recordation of Creditor's first deed of trust.

5 0 The Court notes that the precise issue of whether tort claims may be noncontingent as to  
6 liability has not been decided by the Ninth Circuit, which expressly declined to reach it in Dill, 731  
7 F.2d 629, at 631. The Ninth Circuit BAP held in Nicholes that a principal's liability for his  
8 corporation's debt was not contingent merely because such liability had not been judicially fixed pre-  
9 petition, inasmuch as all events giving rise to any liability that might exist had occurred pre-petition.  
Such an analysis burdens a principal with a liability that has not been proven to belong to him (as with  
Debtor here, and Partnership's non-recourse notes), but the Ninth Circuit has not ruled contra to the  
BAP's approach in Nicholes.

10 0 The BAP's use of the phrase "to establish amounts or liability" (emphasis supplied) is  
11 confusing, which confusion has been repeated by the BAP's later use of the same phrase in Loya.  
That language, if taken in the disjunctive and literally, would mean that a claim is unliquidated even if  
12 the amount is subject to computation, if it would require a substantial evidentiary hearing to resolve  
the contested issue of liability. That, in turn is inconsistent with the notion that a claim against a  
13 principal of a corporation is liquidated, even if it would take a substantial evidentiary hearing to  
determine whether the principal is liable for the debts of the corporation (e.g., a trial on the issues of  
14 piercing the corporate veil and/or whether the principal engaged in tortious conduct). If the BAP's  
phrase is taken at face value, then the claim against the principal should logically be treated as  
unliquidated for eligibility purposes, if a substantial evidentiary hearing would be necessary to resolve  
the principal's liability for a corporate debt.

15 On the other hand, the above-quoted phrase may improperly combine the concept of  
contingency (which focuses on liability) with that of liquidation (which focuses on amount). The  
16 rationale of case law in general (including Wenberg and Loya themselves) is at odds with mixing the  
two concepts, and with considering liability (no matter how complex the matter) as an aspect of  
17 liquidation.

18 0 The Court makes no finding herein as to whether Creditor was harmed by not receiving a  
19 third deed of trust on the Real Property when she was promised one. No evidence was presented by  
either party on that issue.

20 0 The schedule of personal property includes what may be a duplicate entry in the form of a  
21 1996 Eagle Vision automobile worth \$19,795 that is listed twice.