

**FILED**

DEC 14 2004

UNITED STATES  
BANKRUPTCY COURT  
FOR THE DISTRICT OF ARIZONA

UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re )  
 ) Chapter 13  
 )  
ROBERT RANSOM HORTON, ) No. 03-15574-PHX-GBN  
 )  
Debtor. ) FINDINGS OF FACT,  
 ) CONCLUSIONS OF LAW  
 ) AND FINAL ORDER

The motion of Paul F. Glenn and related creditors ("Glenn") to convert Robert R. Horton's ("debtor") case to a Chapter 7 liquidation was tried to the court as a bench trial on August 23-24 and September 8, 2004. Post trial briefing was completed and an interim order was entered on December 2, 2004 announcing the court's decision.

The court has considered the August 20, 2004 joint corrected pretrial statement, sworn witness testimony and the facts and circumstances of this case. The following findings and conclusions are now entered:

**FINDINGS OF FACT**

1. Robert R. Horton is one of several defendants in litigation brought by Glenn that is pending in Maricopa County Superior Court as case CV 99-08295. Plaintiffs allege fraud, securities fraud and other matters. Trial dates had been

1 previously established and continued. Trial was to begin on  
2 September 30, 2003. Joint corrected pretrial statement ("JPS") at  
3 I. The litigation commenced on May 13, 1999. Admitted exhibit  
4 ("ex.") FFFF at attachment A, p.1.

5           2. Plaintiff Glenn's state court litigation arose from  
6 debtor's promotion of the Genesis Coals project, an unsuccessful  
7 attempt to economically remove sulfur from coal through operation  
8 of a \$40 million Pennsylvania plant. The project failed due to  
9 declining coal prices. One hundred participants, including the  
10 federal government, lost their multi-million dollar investment.  
11 Cross examination trial testimony ("test") of Robert R. Horton on  
12 August 24, 2004.

13           3. Debtor filed his individual Chapter 13 petition on  
14 September 2, 2003. His wife did not file bankruptcy. Mr. Horton's  
15 testimony is that he could not pay his attorneys to represent him  
16 at the September 30 trial. Debtor had paid \$700,000 in attorney  
17 fees to date in the litigation. His counsel requested an  
18 additional \$300,000 to \$400,000 payment to represent him at a  
19 trial expected to last between six and eight weeks. Debtor  
20 testified he first considered filing bankruptcy when state court  
21 mediation in May of 2003 failed. However, his accountant recalls  
22 a July 30, 2002 meeting in which asset protection was discussed  
23 in connection with pending litigation. Debtor retained bankruptcy  
24 counsel in June or July of 2003. Bankruptcy counsel attempted to  
25 settle, offering Glenn \$250,000 for a global settlement and  
26 release of all defendants in August of 2003. Plaintiff rejected  
27  
28

1 the offer as inadequate. Plaintiff's counsel requested that if a  
2 bankruptcy case was to be filed, that it be filed as soon as  
3 possible, so trial preparation expenses could be avoided. Test.  
4 id., test. of James O. Ehinger, test. of Jeffrey Corallo, ex. 52  
5 at last three pages. Debtor objected to the Glenn bankruptcy  
6 claim on August 18, 2004. Ex. FFFF, administrative docket item  
7 ("dkt.") 107.

8 4. Debtor is employed as chairman, founder, principal  
9 shareholder and currently the only board member of Alchemex  
10 Corporation, a small company that is attempting to develop a low-  
11 cost method of producing commercial amounts of hydrogen from high  
12 sulphur coal. He is the firm's only full time employee and last  
13 received a salary draw of \$7,865.03 in September of 2002. Since  
14 then, he has deferred his salary. His income currently consists  
15 of draws from Medici Associates LLC, a Delaware limited liability  
16 company that holds approximately 11 million shares of Alchemix  
17 stock. Over the years, he has received hundreds of thousands of  
18 dollars from this entity. Medici funds were even used to pay  
19 debtor's \$85,000 gambling debt in July of 2002. Prior to its  
20 incorporation in 1998, Medici was a "d/b/a" controlled by debtor.  
21 Mr. Horton owns 92.2 % of Medici, following an August 7, 2003  
22 restructuring in which three relatives were each given 2.6%  
23 interests. In exchange, debtor's wife Cheryl Horton, daughter  
24 Sarah Horton-Imaz and son-in-law Ignacio Imaz each contributed  
25 300,000 shares of Alchemix stock. As the controlling majority  
26 interest holder, debtor can take any action he wishes with  
27

1 Medici, including its termination. In May of 2002, debtor used  
2 Medici's Alchemix holdings to gift his future wife with a million  
3 shares of stock. He also used Medici to gift Alchemix stock to  
4 his daughter and son-in-law. Horton direct test. of August 23,  
5 2004, ex. 38, ex. 63 at p.2 and attachment A, ex. 26, ex. 17 at  
6 p. 9 entry for September 30, 2002.

7 5. Debtor considers the promise of Alchemix to be his  
8 principal personal asset. The company currently is experiencing  
9 hard times. It has run out of money, has not generated operating  
10 income in its seven to eight year existence, its liabilities  
11 exceed its assets, its hydrogen technology is not commercially  
12 proven and it would cost hundreds of millions to build a plant to  
13 implement its technology. Its privately held stock is a high-risk  
14 investment, similar to a lottery ticket. Potential investors tend  
15 to be risk takers and are told by debtor that they'll either lose  
16 their investment or make a large profit. Horton cross examination  
17 test. of August 24 and September 8, 2004, test. of John F. Olive.

18 6. Notwithstanding the company's current status, the  
19 Alchemix stock did have value, as debtor should have known. On  
20 June 14, 2002, Western Oil Sands, Inc. agreed to purchase 1.5  
21 million shares of Alchemix for a price of \$2 per share. The  
22 agreement included an option allowing Western Oil to purchase an  
23 additional 2.5 million shares at the same \$2 price until July 31,  
24 2002. Western Oil did not exercise the option. Ex. 1.

25 Around this time, John F. Olive, a former Alchemix  
26 board member, had raised three million dollars he was prepared to  
27

1 lend Alchemix for six months, secured by the company's  
2 intellectual property. Although the Alchemix board had already  
3 approved this loan, debtor convinced the board at the last moment  
4 that the Western Oil equity investment was superior to Olive's  
5 proposed secured loan. As a consolation for arranging the  
6 attempted financing, Olive's group was permitted to purchase  
7 three million Alchemix shares personally owned by debtor at \$1  
8 per share. Mr. Olive or his group wired \$2,910,000 to Medici on  
9 June 25 and 26, 2002. He currently holds 1.5 million shares and  
10 keeps aware of Alchemix developments. Even given the company's  
11 current depressed state and mindful of the risks, Olive would pay  
12 between \$100,000 and \$200,000 for an additional ten to eleven  
13 million shares. Mr. Olive, like debtor, believes in the potential  
14 of the company. He has never been told by debtor or anyone else  
15 that the stock is worthless. The fact finder finds this testimony  
16 credible. Olive test., Ex. 2.

17 Debtor is confident he'll be paid his deferred  
18 Alchemix salary in the future. He expects the company to start  
19 receiving \$750,000 annually from a licensing agreement signed  
20 with a Canadian company known as Alchemix Energy, which has  
21 separate management. He verified Medici received payments of \$2.4  
22 Million and an another \$510,000 in June of 2002 for Alchemix  
23 stock purchases by Olive's group. Additional \$1 per share stock  
24 purchases are reflected in Medici records. On October 6, 2003, a  
25 month after debtor filed bankruptcy, Medici borrowed money and  
26 granted a \$1 per share Alchemix acquisition option to Canadian  
27

1 investor Meyer Herzberg. Debtor gave approximately one million  
2 shares of Alchemix stock to his wife in May of 2002 as a wedding  
3 gift. As previously noted, he has also given stock to his  
4 daughter and son-in-law, using Alchemix shares held by Medici.  
5 Within the last 90 days before bankruptcy, 112,500 shares were  
6 sold at \$2 per share, along with an option for additional \$2 per  
7 share purchases. Finally, as previously noted, shortly before  
8 bankruptcy, debtor transferred 2.6% interests in Medici to  
9 relatives as an estate planning tool, requiring them to  
10 contribute 300,000 shares of Alchemix stock in exchange. Ex. 67,  
11 Finding of fact 4 *supra*, Horton test. of August 23, 2004. The  
12 Court finds the Alchemix stock had value at the time of filing  
13 bankruptcy and debtor had personal knowledge of this value.

14           7. Notwithstanding his personal knowledge of the above  
15 transactions, debtor scheduled his 114,000 personally held shares  
16 of Alchemix stock<sup>1</sup>, as having no current value. Schedule B, item  
17 12. The court finds debtor to be a sophisticated financial  
18 professional, represented by knowledgeable, experienced  
19 bankruptcy counsel. He previously filed a bankruptcy case in  
20 Denver, Colorado in 1977. Mr. Horton explains he scheduled his  
21 holdings as lacking current value because the stock was  
22 restricted, had no public market and the company owed more money  
23

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24           <sup>1</sup>Debtor proposes not to make available to his creditors the  
25 10.6 million shares of Alchemix stock he controls through Medici.  
26 Test. of September 8, 2004.

1 than it had. Accordingly he ignored his knowledge of the prior  
2 sales at \$1 to \$2 per share and the expected \$750,000 annual  
3 revenue expected for the company from the licensing agreement he  
4 personally negotiated with Alchemix Energy. Test. of August 23  
5 and 24, 2004, finding 6 *Id.* The court does not find this  
6 testimony credible.

7 8. On September 9, 2003, debtor scheduled his  
8 controlling interest in Medici Associates LLC as having no  
9 current value. Schedule B, item 13. This was done regardless of  
10 its holdings of 10.6 million shares of Alchemix stock, its  
11 funding of hundreds of thousands of dollars of income to debtor  
12 over the years and its use the month before as an estate  
13 planning device for debtor and his immediate family. Findings of  
14 fact 4, 6 *id.* Additionally, Medici held a security interest in  
15 Alchemix's intellectual property, securing a June 26, 2002 loan  
16 of \$900,000. The lien was in place when debtor filed bankruptcy  
17 and was exercisable since Alchemix had defaulted a year and a  
18 half earlier.<sup>2</sup> The loan was increased on June 30, 2004 to  
19 \$990,000. Debtor's test. of August 23, 2004.

20 On August 31, 2003 Medici had \$ 54,680.68 in its  
21 checking account and \$42,869.64 in savings. Ex. 67 at checking

22  
23 <sup>2</sup>Debtor subsequently caused Medici to release this security  
24 interest to facilitate the Alchemix Energy Canadian licensing  
25 transaction. Since debtor contends Medici is an independent  
26 entity, not subject to this bankruptcy or liable for his personal  
27 debts, he did not seek court approval to release the lien. Test.  
28 of August 23 and September 8, 2004.

1 register and money market entries for August 31, 2003.  
2 Additionally Medici had \$17,717.22 in an investment account as of  
3 September 26, 2003. Ex. 71 at statement period August 30 to  
4 September 26, 2003. It paid debtor \$30,000 on September 22, 2003  
5 for travel expenses, including \$25, 687.71 due on his American  
6 Express credit card. Ex. 67 at September 22, 2003 entry, Ex. 25  
7 at p.1. Medici was used to pay debtor's wife \$20,000 post  
8 petition on November 25, 2003. Ex.65 at November 1-28, 2003 check  
9 copies and p. 6718, test. of Cheryl A. Horton. Medici was also  
10 used pre petition to pay Ms. Horton \$300,000 in cash as part of  
11 an oral prenuptial agreement on October 3, 2002. Glenn's state  
12 court fraud action was pending against debtor at the time. Test.  
13 of August 23 and 23, 2004, Cheryl A. Horton test.

14 Medici's only liability is \$250,000 owed to Meyer  
15 Herzberg, a resident of Australia. Debtor uses this liability to  
16 argue Medici is valueless. However, debtor chose for Medici to  
17 formally acquire this debt from Alchemix a month after the  
18 bankruptcy filing. September 8, 2004 test. Herzberg was also  
19 given a \$1 per share option for Alchemix stock through Medici on  
20 October 6, 2003, approximately a month after the bankruptcy was  
21 filed. Test. of August 23, 2004. Debtor's scheduling of no  
22 current value for an entity he controlled since at least 1998,  
23 used as a repository for millions of shares of Alchemix stock,  
24 used to funnel hundreds of thousands of dollars to himself and  
25

1 his wife and used to gift more than a million shares of Alchemix  
2 stock to his family is not credible to this fact finder.

3           9. In a September 9, 2003 bankruptcy filing, debtor  
4 listed his occupation as an executive with Alchemix Corporation,  
5 receiving a gross income of \$16,667 monthly and net monthly  
6 income of \$9,267. For purposes of his 36-month Chapter 13 plan,  
7 he projects his monthly income will continue to be \$9,267. In  
8 reality this figure is only an expectation. His salary is  
9 accruing and unpaid. Debtor was last paid by Alchemix in  
10 September of 2002. Instead his income is from unreported draws  
11 from Medici, an entity he lists as having no current value.  
12 Schedule I, Current Income of Individual Debtor, Schedule J at  
13 Chapter 13 debtor projected income, test. of August 24, finding  
14 of fact 4.

15           On the same date, debtor scheduled his average monthly  
16 rent or mortgage payment as \$3,800. He additionally listed  
17 monthly housing expenses of \$266 for electricity and heating, \$88  
18 for water and sewer and \$400 for home maintenance. Total monthly  
19 expenses are listed as \$ 7,669. The budget includes \$1,500  
20 monthly for recreation. Based on his purported income and  
21 expenses, debtor projects disposable income of \$1,598 and  
22 proposes a monthly chapter 13 payment to his creditors of \$1,500,  
23 the same amount as his monthly recreational expense. Test. of  
24 August 24, Schedule J, Current Expenditures of Individual  
25 Debtor.





1 v. *Anderson (In re Jan Weilert RV, Inc.)*, 315 F.3d 1192, 1196 (9<sup>th</sup>  
2 Cir.) amended by 326 F.3d 1028 (9<sup>th</sup> Cir. 2003).

3 4. A debtor's bad faith in filing a chapter 13  
4 petition is "cause" under 11 U.S.C. § 1307 (c) to either dismiss  
5 the case or convert it to Chapter 7. *Ho v. Dowell (In re Ho)*, 274  
6 B.R. 867, 877 (Bankr. 9<sup>th</sup> Cir. 2002). In determining whether a  
7 Chapter 13 case has been filed in bad faith, a bankruptcy court  
8 must consider the totality of the circumstances, in light of all  
9 militating factors. Factors to be considered include (1) Whether  
10 debtor misrepresented facts in his petition, unfairly manipulated  
11 the Bankruptcy Code or otherwise filed the petition or plan in an  
12 inequitable manner; (2) Debtor's history of filing bankruptcy  
13 cases; (3) Whether debtor's only purpose in filing for Chapter 13  
14 protection is to defeat state court litigation and (4) whether  
15 egregious behavior is present. 274 B.R. at 876 (citing cases).

16 5. A finding of bad faith does not require fraudulent  
17 intent by debtor. Neither malice nor actual fraud is required to  
18 find a lack of good faith. The bankruptcy judge is not required  
19 to have evidence of debtor ill will directed at creditors.  
20 Neither must it be shown that debtor was affirmatively attempting  
21 to violate the law. Malfeasance is not a prerequisite to bad  
22 faith. *Leavitt v. Soto (In re Leavitt)*, 171 F.3d 1219, 1224-25  
23 (9<sup>th</sup> Cir. 1999). Debtor bears the burden of proving that the  
24 petition was filed in good faith. *Leavitt v. Soto (In re*

1 Leavitt), 209 B.R. 935, 940 (Bankr. 9<sup>th</sup> Cir.1997), *aff'd* 171 F.3d  
2 1219 (9<sup>th</sup> Cir. 1999).

3 6. Chapter 13 eligibility should normally be  
4 determined by the debtor's originally filed schedules, checking  
5 only to see if they have been filed in good faith. *Scovis v.*  
6 *Henrichsen (In re Scovis)*, 249 F. 3d 975, 982 (9<sup>th</sup> Cir. 2001). A  
7 debtor who signs schedules under penalty of perjury containing  
8 asset valuations and budget figures bases on "guesses" may not be  
9 given another opportunity to file amended schedules. *In re*  
10 *Henson*, 289 B.R. 741, 750 (Bankr. N.D.Cal. 2003).

11 7. The Court will not condone nor overlook the filing  
12 of false, inaccurate and misleading schedules. The importance of  
13 a debtor's actual income and expenses in Chapter 13 cases cannot  
14 be overstated. Probably the most important papers that are filed  
15 by a debtor in a chapter 13 case are schedules I and J, listing  
16 current income and expenses. It is imperative that schedules I  
17 and J are reasonably accurate. The court, trustee and creditors  
18 evaluate debtor's ability to propose and effectuate a confirmable  
19 plan based on the truthfulness and accuracy of the disclosures in  
20 these documents. Under 11 U.S.C. §521(1) (1986), debtor is  
21 required to file schedules of assets and liabilities. The law  
22 requires such schedules to be as reasonably complete and accurate  
23 as possible. That did not occur in this case. *In re McNichols*,  
24 254 B.R. 422, 432 (Bankr. N.D.Ill. 2000) (Dismissing case for  
25 lack of good faith). Also see *In re McNichols*, 255 B.R.857, 876-

1 77 (Bankr. N.D.Ill. 2000) (Reiterating importance of accurate  
2 schedules in denying debtor's motion for reconsideration).

3 8. Here the court, trustee and creditors cannot  
4 evaluate debtor's ability to confirm and consummate a feasible  
5 plan, given a fantasy salary that hasn't been paid for a year  
6 before the bankruptcy. Schedules that do not even correctly  
7 identify the entity providing debtor's income are worthless.  
8 Equally fanciful is the listing of monthly expenses debtor does  
9 not pay regularly, and hadn't paid for months prior to his  
10 testimony. The actual amounts debtor previously paid in household  
11 expenses for a home he neither owns nor rents, could not be  
12 stated by either debtor or his spouse. Finding of fact 9.

13 9. Debtor's principal asset is Alchemix, a closely-  
14 held entity, he controls, whose stock he schedules as currently  
15 valueless. He knows or should know better. Findings of fact 6, 7.  
16 This is not simply a dispute over opinions regarding asset  
17 valuation. Cf. *Cox v. Cox (In re Cox)*, 247 B.R. 556, 564-65 and  
18 n.11 (Bankr. D.Mass.2000) (Without more, a difference in a  
19 valuation determination is insufficient to demonstrate debtor's  
20 bad faith). Instead, this is a bad faith valuation by probably  
21 the most knowledgeable person of this closely held, privately  
22 traded stock's value.

23 Clearly Alchemix is an unproven, development company  
24 that must overcome serious financial and technological hurdles  
25 before its product will be commercially viable. Debtor testified  
26

1 he informed his investors of the enterprise's risk. Nonetheless  
2 they agreed to invest between one and two dollars per share for  
3 the opportunity. Additionally, he used the stock as gifts for  
4 family members and for estate planning. The stock's "promise" is  
5 his principal asset. Whatever the current value of Alchemix might  
6 be, debtor presented no credible evidence that it has zero value  
7 or that this valuation was made in good faith. See creditor's  
8 closing memorandum filed October 8, 2004 at pgs. 11-13, dkt. 126;  
9 Findings 4-8, *id.*

10           10. There is a final aspect of debtor's pre petition  
11 conduct that needs to be considered in connection with the good  
12 faith analysis. Debtor sought protection from the financial  
13 burdens of defending the state court securities fraud action,  
14 asserting that litigation would require the payment of additional  
15 hundreds of thousands of dollars he didn't have. Findings of fact  
16 1-3. He obtained this protection by voluntarily choosing to file  
17 Chapter 13. Standing alone, seeking relief from litigative costs  
18 can be a proper basis for bankruptcy and not necessarily  
19 indicative of bad faith. However in this context, Chapter 13 can  
20 also be abused, depending on the circumstances. *In re James*, 260  
21 B.R. 498, 510-11 (Bankr. D.Idaho 2001). Here, after staying the  
22 state court action through the bankruptcy, debtor objected to  
23 creditors' claim, asserting all "...the detailed defenses and  
24 pleadings set forth in the State Court proceeding, out of which  
25 the Glenn Creditors' claims arise, being case no. CV 1999-08295."

1 Ex. FFFF. Accordingly the same litigation is to begin anew, this  
2 time in bankruptcy court under the claims objection process.

3           Instead of using bankruptcy to end the financial drain  
4 of litigation, debtor intends to continue the fight, only in  
5 bankruptcy court instead of the state court system. This case can  
6 be seen not as a sincere request for financial relief, but as a  
7 litigation tactic to transfer to a possibly friendlier or more  
8 convenient forum and venue. This hardly amounts to good faith. *In*  
9 *re James*, *id.* at 511. The court concludes debtor's purpose in  
10 filing for Chapter 13 protection was to defeat state court  
11 litigation.

12           11. After considering the totality of the  
13 circumstances and in light of all militating factors, the court  
14 concludes that debtor misrepresented facts in his petition,  
15 unfairly manipulated the Bankruptcy Code, filed his petition in  
16 an inequitable manner, with a principal purpose of defeating  
17 state court litigation and failed to carry his burden of proving  
18 his petition was filed in good faith.

19           12. The Glenn creditors assert an amended bankruptcy  
20 claim of \$12,468,625.95, which debtor disputes. Creditors' plan  
21 confirmation objection of January 23, 2004 at p. 2, dkt. 51; Ex.  
22 FFFF. Creditors' amended proof of claim, based on allegations of  
23 securities and common law fraud, breach of fiduciary duty,  
24 negligence, conversion and breach of contract is supported by  
25 detailed computations of extensions of credit principal amounts,

1 pre petition interest accruals, pre petition attorneys' fees and  
2 costs arising from the state court litigation, state court  
3 taxable costs (consisting of expert witness fees and deposition  
4 expenses) and crediting the debt for recoveries from co-  
5 defendants and dividends from another bankruptcy estate. Second  
6 amended claim of July 23, 2004 at exhibits A-revised G.<sup>3</sup>

7           Only an individual with regular income that owes, on  
8 the date of filing bankruptcy, non-contingent, liquidated,  
9 unsecured debts of less than \$290,525 and non-contingent  
10 liquidated secured debts of less than \$871,550 may be a debtor  
11 under Chapter 13. 11 U.S.C. §109(e)(2000). Section 109(e)  
12 excludes unliquidated or contingent debts from the eligibility  
13 computation, but does not exclude debts that are merely disputed.  
14 *Nicholes v. Johnny Appleseed of Washington (In re Nicholes)*, 184  
15 B.R. 82, 88 (Bankr. 9<sup>th</sup> Cir. 1995) (Claim asserting debtor's  
16 personal liability for corporate debt is neither contingent nor  
17 unliquidated). A debt is contingent if it is one that debtor will  
18 be called upon to pay only upon the happening of an extrinsic  
19 event which triggers liability. *Fostvedt v. Dow (In re Fostvedt)*,  
20 823 F. 2d 305, 306-7 (9<sup>th</sup> Cir. 1987) (Fact that amount debtor must  
21 pay under promissory notes is dependent on whether creditor

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22  
23           <sup>3</sup>Creditor also asserts a claim for an unspecified amount for  
24 alleged misappropriated intellectual property. Amended claim at  
25 revised exhibit B. Since the specific amounts creditor can  
26 quantify exceed Chapter 13 debt limits, this unspecified claim  
27 component need not be liquidated for eligibility purposes. See  
28 discussion *infra*.

1 actually demands payment and on amount his co-obligors pay does  
2 not make debt unliquidated and contingent), *Nicholes* at 88, *Loya*  
3 *v. Rapp (In re Loya)*, 123 B.R. 338, 340 (Bankr. 9<sup>th</sup> Cir.  
4 1991) (Disputed professional malpractice claims are not  
5 contingent). A tort claim ordinarily is not contingent as to  
6 liability. The events that give rise to the tort usually have  
7 occurred. Liability is not dependent on some future event that  
8 may not happen. *Id.* The fact that a claim has not been reduced to  
9 judgment does not make it contingent. *Nicholes, Loya, id.*,

10 A debt is liquidated if its amount, at the time of  
11 bankruptcy filing, is ascertainable with certainty. Even if  
12 debtor disputes liability, if the amount is calculable with  
13 certainty, it is liquidated for purposes of § 109(e). *Scovis v.*  
14 *Henrichsen (In re Scovis)*, 249 F.3d 975, 983-84 (9<sup>th</sup> Cir.  
15 2001) (Junior lien that is not yet avoided is nonetheless  
16 considered unsecured in eligibility computation when lien is  
17 clearly undersecured).

18 Here, there are no extrinsic events yet to occur to  
19 trigger asserted liability on the disputed Glenn claim. The  
20 events that give rise to the alleged fraud have all occurred.  
21 *Loya, id.* Accordingly it is not contingent. Given the detailed  
22 proof of claim and attachments, it is subject to "...ready  
23 determination and precision in computation of the amount due."  
24 *Fostvedt* at 306. Therefore it is liquidated and is to be included  
25 in the eligibility computation. The asserted claim's amount

1 dwarfs Chapter 13 debt limits. This is not a claim asserted in an  
2 arbitrary amount or fashion. Rather it is a claim pending in  
3 litigation since 1999, ready for trial, but for debtor's last  
4 minute bankruptcy, carefully documented in a detailed proof of  
5 claim. The court concludes that debtor is ineligible for Chapter  
6 13 relief.

7 13. A debtor has an absolute right to dismiss a  
8 Chapter 13 case. 11 U.S.C. § 1307(b) (1986). The better reasoned  
9 view is that a court must dismiss a Chapter 13 case, upon  
10 debtor's request, if that request is made prior to the effective  
11 time of an order converting the case to Chapter 7. This view  
12 comports with the plain language of § 1307(b) and the voluntary  
13 nature of that chapter. *Beatty v. Traub (In re Beatty)*, 162 B.R.  
14 853, 857 (Bankr. 9<sup>th</sup> Cir. 1994). See also, *Croston v. Davis (In*  
15 *re Croston)*, 313 B.R. 447, 451 (Bankr. 9<sup>th</sup> Cir. 2004).

16 **ORDER**

17 The court finds for creditor and against debtor<sup>4</sup>. The  
18 Glenn motion to convert will be granted and debtor's Chapter 13  
19

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20  
21 <sup>4</sup>Creditor, an energetic litigator, raises additional issues  
22 of tax fraud, false loan application, corporate alter ego,  
23 improper valuation of debtor's interest in Phasexx Corporation,  
24 non disclosure of pending Phasexx litigation, unscheduled gifts  
25 and misrepresentation of the true sales price of a Carefree,  
26 Arizona residence. Debtor thinks creditor has it in for him.  
27 Debtor's opening brief at pgs. 22-23, closing brief at pgs. 1-2  
28 and n. 2. Dkts. 125, 128. Perhaps creditor does, but his proof  
regarding these additional issues fail, in the opinion of this  
fact finder.

1 case will be converted to Chapter 7, unless within ten days of  
2 the date of this order, debtor moves to dismiss his case.

3 DATED this 14<sup>th</sup> day of December, 2004.

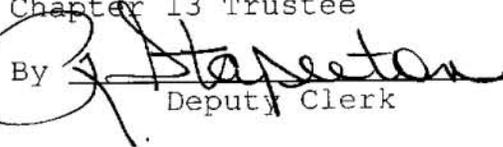
4  
5   
6 George B. Nielsen, Jr.  
7 United States Bankruptcy Judge

8 Copies E-mailed/mailed this  
9 14<sup>th</sup> day of December, 2004, to:

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27 By   
28 Deputy Clerk