UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 2, 2014 at 10:00 a.m.

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1. 13-30804-A-11 ELWYN/JEANNINE DUBEY — MOTION FOR REMOVAL OF ATTORNEY AND FOR SANCTIONS
8-4-14 [170]

Tentative Ruling: The motion will be denied.

The debtors are asking the court to sanction G. Patrick Jennings by removing him from his representation of the IRS in this case, arguing that:

- Mr. Jennings "does not want to interact with" the debtors' accountant, Mr. Stephens;

- Mr. Jennings has "made false accusations" against Mr. Stephens in the district court action;

- Mr. Jennings "has falsely slandered the [debtors'] Accountant Stephens by saying he was not competent or qualified as an expert, nor eligible to give his opinion;"

- Mr. Jennings "has been less than objective in his court filings, accusing the [debtors] of false and unlawful intentions;"

- Mr. Jennings has been partial against the debtors in representing his client the IRS;

- Mr. Jennings has undermined the "integrity and the trustworthiness of the IRS—now under heavy scrutiny of Congress for long running and deep seated partiality;"

- Mr. Jennings' "bias and impartiality has deprived the [debtors] of due process by way of an accounting, thereby preventing the [debtors] from receiving a fair shake in court;"

- Mr. Jennings "has subverted the judicial process, especially from its principle function of ascertaining the truth [and] has demonstrated unethical conduct, bias acts, and actively misled this Court by false statements denying the [debtors] due process and an accurate accounting.

This court also has inherent authority to impose sanctions. Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991). The authority covers a broad range of conduct that goes beyond the violation of an order. Price v. Lehtinen (In re Lehtinen), 564 F.3d 1052, 1058 (9th Cir. 2009). While it may be used to impose civil contempt sanctions, this inherent authority may be applied without resorting to contempt proceedings, but only so long as the sanctions are

intended to coerce compliance or compensate. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192, 1196 (9th Cir. 2003) (noting that the inherent sanction authority, and civil penalties in general, must either be compensatory in nature or designed to coerce compliance); see also Miller v. Cardinale (In re Deville), 280 B.R. 483, 495 (B.A.P. 9th Cir. 2002) (citing and discussing Chambers at 42-51 and Caldwell v. Unified Capital Corp. (In re Rainbow Magazine, Inc.), 77 F.3d 278 (9th Cir. 1996)).

Chambers at 43 holds that the inherent sanction authority includes power to control admission to the court's bar and to discipline attorneys who appear before the court. See also Lehtinen at 1059 (reminding the suspended attorney that attorney disciplinary proceedings are neither civil nor criminal in nature and are not for the purpose of punishing but to maintain the integrity of the courts and the profession).

To exercise its inherent authority to sanction, a court must make explicit finding of bad faith or willful conduct, which is conduct more egregious than mere negligence or recklessness. Lehtinen at 1058.

On the other hand, disqualification of counsel motions are a drastic measure which courts should hesitate to employ unless absolute necessity. Schiessle v. Stephens, 717 F.2d 417, 420 (7th Cir. 1983). Such motions are often tactically motivated. Thus, the movant must satisfy a high standard of proof. Evans v. Artek Sys. Corp., 715 F.2d 788, 791-92, 794 (2nd Cir. 1983). The motions, as a result, are subject to particularly strict judicial scrutiny. Optyl Eyewear Fashion Int'l Corp. v. Style Cos., Ltd., 760 F.2d 1045, 1049 (9th Cir. 1985).

It includes sanctioning the moving party for making a disqualification motion where no evidence is presented justifying the motion. Adriana Int'l Corp. v. Thoeren, 913 F.2d 1406, 1416 (9th Cir. 1990). To be justified, a disqualification motion must establish present concerns of impropriety, and not merely anticipatory and speculative concerns. City of Long Beach v. Standard Oil Co. of California (In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation), 658 F.2d 1355, 1361 (9th Cir. 1981).

The debtors have not demonstrated bad faith or willful conduct that is more egregious than mere negligence or recklessness on the part of Mr. Jennings.

Mr. Jennings' objection to the evidence from the debtors' accountant was an evidentiary objection that was sustained by the court. The debtors are complaining of Mr. Jennings' objection to the evidence from their accountant as if the debtors are somehow do not have to comply with the Federal Rules of Evidence that govern the admissibility of evidence in federal court proceedings.

In its ruling on the debtors' objection to IRS's proof of claim, the court stated that:

"The only declaration in support of the foregoing and the above-cited exhibits is the declaration of L.H. Stephens, CPA.

"The IRS objects to the admissibility of Mr. Stephens' declaration because Mr. Stephens has not been qualified as an expert witness, eligible to render an opinion as to the debtors' tax liabilities.

"The court agrees. Mr. Stephens' declaration does not qualify him as an expert eligible to render an opinion about the debtors' tax liabilities. His

declaration does not state his skill, education, work experience, training or knowledge for expert witness qualification. Fed. R. Evid. 702. Although in the declaration Mr. Stephens' name ends with 'CPA', this is not sufficient for the court to qualify Mr. Stephens as an expert. Docket 108, Ex. C; Fed. R. Evid. 702. As Mr. Stephens has not been qualified as an expert witness, his opinions about the debtors' tax liabilities are inadmissible. Fed. R. Evid. 701(c). Without the opinions of Mr. Stephens, the debtors' other evidence - consisting of exhibits that are illegible or incomprehensible (Exhibit B) and are not helpful in supporting the debtors' own conclusions above - is also inadmissible. As a result, the debtors have not offered sufficient evidence to rebut the presumptive validity of the claim."

Docket 147 at 2.

There is nothing slanderous to challenge a purported expert witness by saying he is not competent or qualified as an expert and he is not eligible to give his opinion, when his declaration does not state his skill, education, work experience, training or knowledge that would qualify him as an expert witness. See Fed. R. Evid. 702.

The motion does not mention other specific instances where Mr. Jennings challenged Mr. Stephens or evidence procured from him. The motion speaks of challenges to Mr. Stephens or evidence from him only in general terms. And, besides the foregoing, the court does not recall of other specific instances where Mr. Stephens or evidence from him was challenged by Mr. Jennings.

The court will not address any of the litigation that transpired in federal district court or any other litigation that has not been before this court. As this court has ruled several times before, this court will not permit the debtors to relitigate any aspect of the litigation in district court.

Further, Mr. Jennings' partiality in this proceeding is warranted, given that he represents a client, the IRS, which has interests that are adverse to the interests of the debtors. Court proceedings are adversarial in nature, meaning that Mr. Jennings' loyalties lie with the IRS and the interests of the IRS - his loyalties do not lie with the debtors. Thus, the fact that he has been less than objective and impartial with the debtors should be of no surprise to the debtors.

More, the court rejects the debtors' contention that Mr. Jennings' partiality in representing the IRS here is somehow inconsistent with the integrity and trustworthiness expected from the IRS. As mentioned above, court proceedings are adversarial in nature and the IRS is entitled to protect its interests like any other party that applies for relief with a federal court. Protecting one's rights and asserting one's claims includes use of the tools prescribed by the Federal Rules of Evidence, Federal Rules of Civil Procedure, Federal Rules of Bankruptcy Procedure, and all applicable substantive law.

The IRS has liquidated its claim against the debtors in federal district court, but the debtors are seeking to minimize that claim by prosecuting this bankruptcy case. Mr. Jennings' attempts to protect the rights and enforce the claims of the IRS, to the fullest extent possible under the law, are not inconsistent with integrity and trustworthiness.

This is especially true in this case, given that the debtors have been engaged in this dispute with the IRS for well-over two decades and the IRS has had to go back to district court to avoid the fraudulent transfers the debtors had

made in an effort to avoid paying IRS's claim against them.

Finally, the instant motion avoids mentioning specific instances where Mr. Jennings disobeyed or violated a court order or violated a statute, warranting sanctions against him. The allegations of Mr. Jennings making false accusations and false statements, to mislead this court, are devoid of specific instances or facts and are devoid of admissible supporting evidence. The instant motion is not supported by any admissible evidence. There is no declaration signed under the penalty of perjury by the debtors to establish the factual assertions in the motion and to authenticate the exhibits that have been attached to the motion. See Fed. R. Evid. 802, 602, 901. The fact that the debtors do not have an attorney does not absolve them from the requirement of submitting admissible evidence in support of their motions. This motion will be denied.

2. 13-30804-A-11 ELWYN/JEANNINE DUBEY — MOTION TO DISMISS OR CONVERT CASE 7-18-14 [162]
GPJ-2

Tentative Ruling: The motion will be granted and the case will be dismissed.

The IRS moves for dismissal or conversion, pursuant to 11 U.S.C. § 1112(b), arguing that the debtors cannot confirm a chapter 11 plan in this case. The California Franchise Tax Board has filed a joinder to the motion, asking for the same relief.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, without limitation, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The court overruled the debtors' objection to the proof of claim of the IRS. Docket 147. That claim totals $2,039,928.13, $1,079.17 of which is unsecured ($524.88 is priority) and $2,038,848.96 is secured by five real properties owned by the debtors. The court also overruled the debtors' objection to the proof of claim of the Franchise Tax Board. Docket 145.

Aside from the claims of the Franchise Tax Board (scheduled at $160,000) and the IRS, the debtors' five real properties listed in Schedule A are unencumbered. Docket 20, Schedules A & D. The aggregate scheduled value of those properties is $812,000. Docket 20, Schedule A. The Franchise Tax Board has relinquished any interest in the debtors' five real properties, however. Docket 145. In addition to the claims of the IRS and the FTB, there is only one other claim scheduled by the debtors, the general unsecured claim of Sutter Roseville Medical Center for $1,132.

The court is perplexed at how the debtors will be able to confirm a plan in this case. Clearly, neither the IRS, nor the FTB will be voting to accept the

debtors' plan.

As the debtors have not stripped down IRS's secured claim, that approximately $2 million secured claim will have to be paid in full. But, even if the debtors were to sell all their real properties, they cannot satisfy the claim in full because the value of the properties is only approximately $812,000, excluding sale costs and exemption claims. See Schedule A. This means that the debtors will have to find another source of income - besides the proceeds from the sale of the properties - to satisfy that claim in full.

Yet, their opposition does not explain or disclose what other source of income with which the debtors will pay the IRS's secured claim in full.

On the other hand, if the debtors were to strip down IRS's secured claim to the value of the properties, IRS's claim would be bifrucated into a secured claim and an unsecured claim, entitling the IRS to vote on both claims.

However, IRS's unsecured claim, which would exceed $1 million, along with the unsecured claim of the FTB, will dominate the general unsecured class of claims, ensuring that class' rejection of the plan.

Under either of the above scenarios, the court sees no ability of the debtors to obtain plan confirmation. The court does not see how the debtors will be able to pay off claims in full or how they will be able to secure acceptance of the plan by at least one impaired class.

The opposition filed by the debtors is unhelpful in establishing how the debtors are planning to obtain plan confirmation. The opposition is focused on merely quoting statements from the motion and complaining that those statements are untrue, fabricated or irrelevant.

For instance, the debtors complain because the IRS "has persistently refused to work with [them]," and has rejected settlement offers from the debtors. Docket 171 at 3. This is irrelevant to this motion and to the debtors' ability to confirm a chapter 11 plan.

The debtors also complain that they "have never concealed nor hidden transfer of their property into trust." Docket 171 at 4. This is also irrelevant as the debtors and the IRS have had the opportunity to litigate this issue in the district court action. Once again, the debtors are missing the point. This court will not serve as the court of appeals for the district court. The issues that have been litigated in the district court actions will not be visited by this court.

Further, the debtors continue to deny that the IRS holds a claim based on a judgment against them, even though this court already overruled their objection to IRS's proof of claim. The debtors are under the impression that they will be able to still somehow challenge IRS's proof of claim in this case. In their opposition, they state "[b]ut no judgment has been rendered because no court has declared any amount owed. In all events, without a real accounting, followed by a hearing respecting that accounting, and a court's conclusion concerning the amount of the [debtors'] tax obligations, there is no judgment to satisfy." Docket 171 at 4.

The court also notes that the debtors' opposition is devoid of admissible evidence. The exhibits attached to the opposition are not authenticated or otherwise supported by a declaration. Also, even if the exhibits were

admissible, they are not helpful for resolution of this motion. None of the exhibits pertain to the debtors' ability to confirm a plan.

Exhibit 1 to the opposition is an Internet article about bankruptcy and tax defense. Exhibit 2 is a letter from the debtors to Mr. Jennings dated August 5, 2013. Exhibit 3 is an internal IRS memorandum about the debtors' 1985 taxes, dated August 21, 1989. Exhibit 4 is the curriculum vitae of the debtors' accountant, Lawrence Stephens, along with his declaration analyzing the debtors' tax liabilities extending back to 1985. This is the same declaration the court rejected as inadmissible in connection with the debtors' objection to IRS's proof of claim. Docket 147 at 2.

In summary, the court is not convinced that the debtors have even a remote possibility of confirming a chapter 11 plan. This is cause for purposes of 11 U.S.C. § 1112(b)(4).

The debtors' personal property listed in Schedule B has been claimed as fully exempt in Schedule C. Docket 20. As the debtors' only assets with value are the five real properties that are over-encumbered by IRS's claim, there would be no assets to be administered for the benefit of the unsecured creditors. Conversion to chapter 7 then would serve no purpose. Dismissal is in the best interest of the estate and the creditors. The motion will be granted and the case will be dismissed.

3. 14-26307-A-13 STEVEN PASCAL — MOTION TO CONVERT CASE 7-1-14 [15]
RLC-2

Tentative Ruling: The motion will be granted.

The assertion that notice of the motion and the hearing on it are not in accord with Local Bankruptcy Rule 9014-1(f)(1) because less than 28 days' notice was given to the debtor and his attorney is rejected. The motion was served on June 22 and 23. This means at least 28 days' notice was given. Therefore, the statement in the notice of the motion that written opposition was necessary was accurate and in compliance with the local rule.

At any rate, assuming inadequate notice as alleged, given the continuance to August 18 and the debtor's opportunity to file additional opposition to the motion, there was no prejudice caused by any initial failure to abide strictly by the notice rules.

The motion asserts that the debtor has asserted control over the bank account of a limited liability company, admitted to interests in trusts and Nevada real estate, and asserted ownership in a large boat. His schedules and statements however do not list any of these assets. And, while his opposition states that an LLC owns the boat and he owns no interest in the LLC, he admits he is the captain of the boat, is responsible for the costs associated with its operation, and he sometimes lives on the boat. These facts suggest to the court that the debtor has not truthfully explained all of his connections to the boat or the LLC.

More, even after the court continued the hearing on this motion to provide the parties with further opportunity to submit briefs, and the debtor filed an amended statement of financial affairs on August 20, 2014, the court still concludes that the debtor has not truthfully and fully explained all of his connections to the boat, the LLCs and the trust.

First, the amended statement of financial affairs, unlike the original statement, lists the Emerald Bay Family Trust as an "irrevocable Nevada spendthrift trust," of which the debtor is both the trustee and beneficiary. Docket 72, items 10 & 14; Docket 1.

Yet, the debtor's Schedule B states that he has no interest in a trust, even though question 20 of Schedule B specifically asks the debtor to disclose "Contingent and noncontingent interests in estate or a decedent, death benefit plan, life insurance policy, or trust." Docket 1.

Second, in his amended statement of financial affairs, the debtor has disclosed three limited liability companies, Emerald Bay Holdings, LLC, Emerald Bay Properties, LLC and Lake Tahoe Cruises, LLC, for each of which the debtor has listed himself as "trustee of manager." Docket 72, item 14. Although the trust(s) of which the debtor is a trustee is not identified by the debtor, the court assumes the debtor's position as a trustee (of the manager for each LLC) is with one of the two trusts listed in item 14 of the amended statement of financial affairs, the Emerald Bay Family Trust or the Sartorio Family Trust. Docket 72, item 14.

But, the court still cannot tell which trust owns which LLC. From item 10 of the amended statement of financial affairs, the debtor seems to be stating that the Emerald Bay Family Trust owns Emerald Bay Holdings, LLC. Docket 72, item 10. Yet, the court cannot tell which trust owns the other two LLCs, Emerald Bay Properties, LLC and Lake Tahoe Cruises, LLC.

Also, the court cannot tell whether the Sartorio Family Trust is a revocable or irrevocable trust.

Third, question 19 of Schedule B asks the debtor to disclose "Equitable or future interests, life estates, and rights or powers exercisable for the benefit of the debtor other than those listed in Schedule A - Real Property." The debtor has answered "none" to this question and Schedule A does not list any assets either.

In item 18 of the amended statement of financial affairs, the debtor states that he has no ownership interest in any of the three LLCs listed in the amended statement of financial affairs, Emerald Bay Holdings, LLC, Emerald Bay Properties, LLC and Lake Tahoe Cruises, LLC. Docket 72, item 18.

This obviously is not true because the debtor has already admitted to being the trustee of the managing member of each of the LLCs. Docket 72, item 14. As the managing member of each of the LLCs is a trust, of which the debtor is a trustee, the debtor holds at the least legal title to the managing members' interest in each of the LLCs.

In addition, the debtor is both the trustee and beneficiary of the Emerald Bay Family Trust. Docket 72, item 10. This means that he holds both the legal and beneficial interests in the LLCs owned by that trust. Docket 72, items 10 & 14. At best, then, the debtor holds "rights or powers exercisable for the benefit of the debtor," as contemplated by question 19 of Schedule B.

Nevertheless, the debtor lists no such rights or powers in question 19 of Schedule B. The foregoing is also inconsistent with the debtor's contention in item 18 of the amended statement of financial affairs that he has no ownership interest in any of the three LLCs. It seems clear from the amended statement of financial affairs that the debtor holds both the legal (as trust trustee)

and equitable (as trust beneficiary) interests in Emerald Bay Family Trust's interest in Emerald Bay Holdings, LLC. Docket 72, item 10.

Fourth, although the debtor claims that he has no ownership interest in any of the three LLCs listed in the amended statement of financial affairs, the debtor's financial affairs seem to contradict this. For instance, on October 15, 2012, the debtor used Lake Tahoe Cruises, LLC's bank account to pay his personal apartment rent. Docket 11 at 67. Also, the certificate of documentation for the debtor's 56 foot boat identifies Lake Tahoe Cruises, LLC as the owner and states that the LLC is comprised of only one member. Docket 11 at 66. According to item 14 of the amended statement of financial affairs, the one member of Lake Tahoe Cruises, LLC is a trust - whether the Emerald Bay Family Trust or the Sartorio Family Trust - of which the debtor is the trustee and possibly also the beneficiary, assuming the Emerald Bay Family Trust is the member. Docket 72, item 14.

From this, the court infers that the debtor has complete ownership and control of the assets and interests of Lake Tahoe Cruises, LLC. Nevertheless, he has not listed in Schedule B any ownership interest in Lake Tahoe Cruises, LLC or the trust that owns Lake Tahoe Cruises, LLC.

Fifth, in a March 7, 2014 article by the Lake Tahoe News, the debtor is quoted as complaining that although he had to remove his 56 foot boat from the Tahoe Keys Marina due to low water levels, in addition to his slip fees for the storage of the boat during the past 21 years, there was "a surcharge for dredging maintenance." The debtor estimated that he must have spent $240,000 on slip fees, maintenance dredging fees, and water quality fees during the past 21 years. Docket 11 at 65. The debtor had to move his boat to San Diego due to the Marina's unwillingness to dredge. Docket 11 at 65.

In other words, the debtor holds a claim against the Tahoe Keys Marina for collected dredging maintenance fees, while the Marina has been unwilling to dredge to enable the debtor's boat and other boats to go out of the channel.

Nonetheless, the debtor has listed no claims against the Tahoe Keys Marina for collected dredging maintenance fees. See Schedule B.

The bottom line for the court is that the debtor has structured his business affairs in order to obscure his interests in his business affairs, he has failed to come forward with a cogent explanation for this structure and the relationships between the trusts and the LLCs, and has failed to explain who, if it is not him, holds the beneficial interests in the trusts and LLCs. This lack of complete disclosure and candor, exacerbated by the debtor's failure to twice attend meetings of creditors, is bad faith. In these circumstances, the best interests of creditors requires conversion to chapter 7 where a trustee will investigate further for the benefit of creditors.

And, while 11 U.S.C. § 1307(b) suggests the debtor has a right to dismiss the chapter 13 case, Rosson v. Fitzgerald (In re Rosson), 545 F.3d 764 (9th Cir. 2008) makes clear that the court has discretion to override a chapter 13 debtor's desire to dismiss the case when there is bad faith or an abuse of the bankruptcy system. See also Marrama v. Citizens Bank of Massachusetts, 127 S.Ct. 1105 (2007).

Therefore, the court concludes there is cause to convert the case to chapter 7. Given the omissions of disclosure and uncertainty as to the debtor's interests in the boat, the LLCs, and the trusts, conversion rather than dismissal is

warranted.

4. 14-26307-A-13 STEVEN PASCAL — MOTION TO CONFIRM PLAN
RPH-2 — 7-2-14 [24]

Tentative Ruling: The motion will be denied.

The debtor twice failed to appear at the meeting of creditors. Appearance is mandatory. See 11 U.S.C. § 343. To attempt to confirm a plan while failing to appear and be questioned by the trustee and any creditors who appear, the debtor is also failing to cooperate with the trustee. See 11 U.S.C. § 521(a)(3). Under these circumstances, attempting to confirm a plan is the epitome of bad faith. See 11 U.S.C. § 1325(a)(3).

It is unnecessary to address the remaining objections.

5. 14-22435-A-7 WILLIAM DUGO — MOTION FOR SERVICE BY PUBLICATION OF DEBTOR
14-2152 GLJ-1 — 7-22-14 [7]
BANK OF STOCKTON V. DUGO

Tentative Ruling: The motion will be denied as unnecessary.

The plaintiff, the Bank of Stockton, is asking the court for permission to serve the defendant, William Dugo, with the summons and complaint by publication.

The motion will be denied. Serving the defendant by publication makes no sense here because Fed. R. Bankr. P. 7004(b)(1) permits service by *first class* mail and the plaintiff obviously has the defendant's mailing address as this motion was served on him by mail. In other words, the plaintiff may serve the defendant with the summons and complaint as he served this motion.

6. 13-34541-A-11 6056 SYCAMORE TERRACE L.L.C. — MOTION TO APPROVE DISCLOSURE STATEMENT
CAH-13 — 7-22-14 [176]

Tentative Ruling: The motion will be granted.

The debtor asks the court to approve its disclosure statement filed on May 28, 2014. Docket 136.

The motion will be granted and the disclosure statement will be approved, as it contains adequate information and the detail necessary that will permit creditors to make an informed decision regarding the plan. See 11 U.S.C. § 1125(a).

7. 13-36164-A-7 DENIS BONFILIO — MOTION FOR SUMMARY JUDGMENT
14-2071 SAC-2 — 7-28-14 [43]
RLED, LLC V. BONFILIO

Tentative Ruling: The motion will be granted in part and denied in part.

The plaintiff, RLED, L.L.C., seeks summary judgment on its 11 U.S.C. § 523(a)(4) embezzlement and larceny claims and on its 11 U.S.C. § 523(a)(6) claim.

For summary judgment to be granted, the movant must show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) incorporated by Fed. R. Bankr. P. 7056. The Supreme Court discussed the standards for summary judgment in a trilogy of cases, Celotex Corporation v. Catrett, 477 U.S. 317, 327 (1986), Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and Matsushita Electrical Industry Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In a motion for summary judgment, the moving party bears the initial burden of persuasion in demonstrating that no issues of material fact exist. See Anderson at 255. A genuine issue of material fact exists when the trier of fact could reasonably find for the non-moving party. Id. at 248. The court may consider pleadings, depositions, answers to interrogatories and any affidavits. Celotex at 323. Where the movant bears the burden of persuasion as to the claim, it must point to evidence in the record that satisfies its claim. Id. at 252. The court must evaluate whether there is a genuine issue of material fact with regard to each element of the plaintiff's claim.

Federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered." In re Younie, 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997) (quoting Migra v. Warren City School Dist. Bd. Of Educ., 465 U.S. 75, 81 (1984)); Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001). Collateral estoppel applies in dischargeability proceedings. Harmon at 1245.

Under California law, collateral estoppel requires that: (1) the issue sought to be precluded from litigation must be identical to that decided in the former proceeding; (2) the issue must have been actually litigated in the former proceeding; (3) the issue must have been necessarily decided in the former proceeding; (4) the decision in the former proceeding must have been final and on the merits; and (5) the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding. Harmon at 1245 (citing Lucido v. Superior Court, 51 Cal. 3d 335 (1990)).

"The arbitration provision of the Restatement (Second) of Judgments specifically incorporates the standards for preclusive administration adjudications. Restatement (Second) of Judgments § 84, incorporating id. § 83. Thus, whether any particular arbitration is eligible for preclusion depends upon whether adjudicatory standards for administrative tribunals were satisfied.

"Under Restatement (Second) of Judgments § 83, an adjudicative determination by an administrative tribunal is preclusive only insofar as the proceeding entailed the essential elements of adjudication, including:

(a) Adequate notice to persons who are to be bound by the adjudication, as stated in § 2;

(b) The right on behalf of a party to present evidence and legal argument in support of the party's contentions and fair opportunity to rebut evidence and argument by opposing parties;

(c) A formulation of issues of law and fact in terms of the application of rules with respect to specified parties concerning a specific transaction, situation, or status, or a specific series thereof;

(d) A rule of finality, specifying a point in the proceeding when presentations are terminated and a final decision is rendered; and

(e) Such other procedural elements as may be necessary to constitute the proceeding a sufficient means of conclusively determining the matter in question, having regard for the magnitude and complexity of the matter in question, the urgency with which the matter must be resolved, and the opportunity of the parties to obtain evidence and formulate legal contentions.

Restatement (Second) of Judgments § 83(2)."

Khaligh v. Hadaegh (In re Khaligh), 338 B.R. 817, 829-30 (B.A.P. 9th Cir. 2006).

The defendant obviously had adequate notice of the arbitration as the plaintiff had filed a federal district court action against the defendant, prior to the arbitration, which action was dismissed in deference to the arbitration.

From the arbitrator's findings and conclusions, it is apparent that both the plaintiff and the defendant had opportunity to submit evidence and argument. The arbitrator often refers to evidence and argument proffered by the parties. The arbitrator even listed the witnesses proffered by the parties.

The claims of the plaintiff and the counterclaims of the defendant were well formulated. The arbitrator recognized that the plaintiff had eight claims and the defendant had three counterclaims.

There was a point of finality when the arbitrator closed the record and adjudicated the claims on the merits in writing. The court also notes that the arbitrator's award was confirmed by the Orange County Superior Court. That court also entered a separate judgment consistent with the arbitrator's award. The judgment was approved as to form by counsel for the defendant.

Given the foregoing, this court concludes that all adjudicatory standards for the arbitration tribunal were satisfied. Issue preclusion is applicable in part, as discussed below.

Turning to the merits of the 11 U.S.C. § 523(a)(4) claims, 11 U.S.C. § 523(a)(4) provides that an individual is not discharged "from any debt for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny." Embezzlement and larceny do not require the existence of a fiduciary relationship. Transamerica Commercial Fin. Corp. v. Littleton (In re Littleton), 942 F.2d 551, 555 (9th Cir. 1991); see also First Delaware Life Ins. Co. v. Wada (In re Wada), 210 B.R. 572, 576 (B.A.P. 9th Cir. 1997). In the motion, the plaintiff argues that the defendant's actions amount to embezzlement or larceny under section 523(a)(4).

Embezzlement requires a showing of: (1) property rightfully in the possession of a non-owner; (2) the non-owner's appropriation of the property to a use other than which the property was entrusted; and (3) circumstances indicating fraud. Littleton at 555. Fraud in the context of a claim for embezzlement against a debtor is fraud in fact, involving moral turpitude or intentional wrong, rather than implied or constructive fraud. Gilner v. Licalsi, Nos. C-07-0960 MMC & 05-31522 DM7, 2008 WL 552470, at *2 n.3 (N.D. Cal. Feb. 27, 2008). Whether the intent to deprive is permanent or temporary is immaterial. The court may infer adequate intent to deprive even from alleged intent to deprive temporary. Murray v. Woodmand (In re Woodman), 451 B.R. 31, 43 (Bankr. D. Id. 2011) (citing Applegate v. Shuler (In re Shuler), 21 B.R. 643, 644 (Bankr. D. Id. 1982)).

Summary judgment will be denied as to embezzlement and larceny because the issues involved with embezzlement and larceny are not identical to the issues litigated in the arbitration.

The plaintiff and the defendant entered into a distribution agreement, providing that the defendant may distribute the plaintiff's energy drink, Roaring Lion. The record is unclear as to whom the defendant was distributing the drink.

Beginning in August of 2007, it came to the plaintiff's attention that the defendant was distributing products that were not produced by the plaintiff. The defendant used the Roaring Lion energy drink trademark on energy drinks that were produced by him and not the plaintiff. Docket 50 at 17.

As to embezzlement, the only property the defendant wrongfully used was the plaintiff's trademark of the Roaring Lion energy drink.

On the other hand, the only property that was rightfully in the defendant's possession that belonged to the plaintiff was the plaintiff's product, the energy drink. And, the defendant did in fact distribute the plaintiff's drink, meaning that the drink was appropriated to the use for which it was entrusted to the defendant.

By possessing the energy drink, however, the defendant did not rightfully possess the plaintiff's trademark. The defendant simply copied the plaintiff's trademark on a label created by the defendant. He then did not misappropriate property rightfully in his possession.

As to larceny, it is defined as a "'felonious taking of another's personal property with intent to convert it or deprive the owner of the same.'" In re Brown, 331 B.R. 243, 249 (Bankr. W.D. Va. 2005) (citing Johnson v. Davis (In re Davis), 262 B.R. 663, 672 (Bankr. E.D. Va. 2001)). Larceny requires an intent to steal. In re Lynch, 315 B.R. 173, 179-80 (Bankr. D. Col. 2004) (discussing the requisite intent for larceny).

Larceny is not present under the facts described in the arbitration award either. The defendant did not "take" the plaintiff's trademark label. The defendant did not have physical possession of the plaintiff's label at any time.

More, as the trademark is intangible personal property, the court is perplexed as to how the defendant could have had physical possession of the trademark. As mentioned above, the defendant simply copied the plaintiff's trademark on his own label.

Thus, summary judgment will be denied as to the embezzlement and larceny claims. The motion is not seeking summary judgment as to any other claims under § 523(a)(4).

Turning to the 11 U.S.C. § 523(a)(6) claim, summary judgment will be granted only with respect to the malicious injury element of the claim. The intent issue pertaining to the willful injury element of the claim was not actually litigated in the arbitration.

11 U.S.C. § 523(a)(6) provides that an individual is not discharged "from any debt for willful and malicious injury by the debtor to another entity or to the property of another entity."

To prevail on its 11 U.S.C. § 523(a)(6) claim, the plaintiff must show that the injury was both willful and malicious. Kawaauhau v. Geiger, 523 U.S. 57, 61 (1998); Baldwin v. Kilpatrick (In re Baldwin), 249 F.3d 912, 917 (9th Cir. 2001).

The injury element of 11 U.S.C. § 523(a)(6) necessarily involves harm to the plaintiff's person or property. Quarre v. Saylor (In re Saylor), 108 F.3d 219, 221 (9th Cir. 1997) (citing Snoke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th Cir. 1992)).

The term willful means a deliberate or intentional injury. Kawaauhau, 523 U.S. at 61. This requires proof not only that the actor intended to act, but that the injury was also intended by the actor. Id.

Determining the intent aspect of a willful injury is a subjective standard, focusing on the debtor's state of mind. Carrillo v. Su (In re Su), 290 F.3d 1140, 1144-46 (9th Cir. 2002); Hughes v. Arnold, 393 B.R. 712, 718 (E.D. Cal. 2008); Ormsby v. First American Title Co. of Nevada (In re Ormsby), 386 B.R. 243, 250 (E.D. Cal. 2008). The debtor must have had the subjective intent to harm or the subjective belief / knowledge that harm is substantially certain to result from his conduct. Su at 1144. "We hold that § 523(a)(6)'s willful injury requirement is met only when the debtor has a subjective motive to inflict injury or when the debtor believes that injury is substantially certain to result from his own conduct." Su at 1142.

A willful injury though is not necessarily malicious for purposes of 11 U.S.C. § 523(a)(6).

A malicious injury involves (1) a wrongful act, (2) done intentionally, (3) which necessarily causes injury, and (4) is done without just cause or excuse. Carrillo v. Su (In re Su), 290 F.3d 1140, 1146-47 (9th Cir. 2002) (citing In re Jercich, 238 F.3d 1202, 1209 (9th Cir. 2001)); see also Jett v. Sicroff (In re Sicroff), 401 F.3d 1101, 1106 (9th Cir. 2005).

The arbitrator's findings are clear that the defendant intended the act of labeling 317 boxes of his own energy drinks with the plaintiff's trademark and selling them as the plaintiff's energy drinks. Writing of the defendant, the arbitrator noted that "it is incredulous that he made 317 'mistakes'." Docket 50 at 19.

On the other hand, the court does not have any findings or conclusions from the arbitrator as to the defendant's subjective intent to harm or subjective belief or knowledge that harm is substantially certain to result from his conduct. The defendant's subjective intent to harm or knowledge that harm is substantially certain was not actually litigated or necessarily decided by the arbitrator. The arbitrator states merely that the mislabeling was intentional and not mistaken. While the court may be able to infer such intent or knowledge, the request for summary judgment is based solely on issue preclusion.

More important, courts are hesitant to grant summary judgment on claims involving intent, motive or state of mind because such issues are provable only by circumstantial evidence. See, e.g., Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962); see also Maffei v. N. Ins. Co. of New York, 12 F.3d 892, 898 (9th Cir. 1993); Morgan Creek Prods., Inc. v. Franchise Pictures LLC (In re Franchise Pictures LLC), 389 B.R. 131, 144-45 (Bankr. C.D. Cal. 2008).

The court will deny summary judgment based on issue preclusion as to the willfulness requirement of § 523(a)(6). The plaintiff has not sought summary judgment on other basis.

Next, the court concludes that issue preclusion applies with respect to the malicious injury element of § 523(a)(6). First, as mentioned above, the wrongful act by the defendant was his affixing of the plaintiff's trademark on the labels of energy drinks produced by the defendant and selling those drinks to the public as the plaintiff's products.

This was done intentionally because, as stated by the arbitrator, "it is incredulous that [the defendant] made 317 'mistakes'." Docket 50 at 19. This led to the defendant selling 80,000 servings of his energy drink with the plaintiff's label to consumers. Id.

This wrongful act necessarily caused harm to the plaintiff's energy drink brand-name. The findings of the arbitrator were that the defendant's energy drink product - sold with the plaintiff's label - was markedly inferior in quality from the plaintiff's energy drink product. Docket 50 at 19. The harm to the plaintiff's brand-name occurred when the defendant sold his inferior in quality product to the public as the plaintiff's products, causing consumers to receive a product with the plaintiff's trademark that is different and lower in quality from the product sold by the plaintiff, and thus undermining consumer confidence in the quality of the plaintiff's energy drink product.

Additionally, the defendant has not provided a just cause or excuse for his actions. In his response to the plaintiff's statement of undisputed facts, the defendant merely states that the foregoing facts are disputed, without providing any references to the record that explain why the facts are disputed.

Furthermore, the court will deny summary judgment with respect to the damages issue. The arbitrator awarded $265,488 in damages to the plaintiff, calculating them as follows:

- $28,530 in actual damages for the plaintiff based on its breach of contract claim against the defendant,

- $240,000 in damages for the plaintiff based on the defendant's violations of the Lanham Act,

- $242 in damages for the defendant due to confiscated product by the plaintiff, and

- $2,800 in damages for the defendant for his costs in having to litigate the damages claims in the federal district court action brought by the plaintiff prior to the start of the arbitration, which was required by the parties' distribution agreement.

Docket 50 at 21-22.

As the court is not granting summary judgment with respect to the entirety of any of the plaintiff's claims, the damages issue is not ripe for adjudication.

In any event, the court cannot apply issue preclusion to the damages issue because the damages awarded by the arbitrator and confirmed by the state court judgment are based on a dischargeable breach of contract claim and are also calculated pursuant to a statute - the Lanham Act - that does not apply to any

of the § 523(a) claims here.

Finally, the court rejects the defendant's following contentions:

- the defendant was not a party to the distribution agreement;

- "there is never any finding whatever [sic] that defendant . . . was properly a party to the arbitration as an individual;"

- in confirming the arbitration award, the state court "never having explicitly addressed the fundamental question of whether the arbitrator had contractual authority to make the award which was rendered as to either [the defendant] or Dan Good Distributing Company, Inc.;"

- the arbitration award does not refer specifically to the defendant but rather refers to "respondent" "for the most part;"

- the state court judgment in evidence has not been properly authenticated.

The impact of whether or not the defendant was a party to the distribution agreement and a proper party to the arbitration, and the impact of whether the arbitrator had contractual authority to make the award, should have been litigated by the defendant prior to the entry of the state court judgment. That judgment, attached as Exhibit A to the Notice of Entry of Judgment (Ex. F in the motion record) specifically states that "[the plaintiff] shall recover the sum of $265,488.00, jointly and severally, from DENIS BONFILIO and DAN GOOD DISTRIBUTING COMPANY." Docket 51 at 20. This court will not revisit the merits of the judgment entered by the state court. The defendant should have litigated these issues, if he did not already, before that judgment was entered. The court will not permit collateral attacks against the state court judgment.

As to the defendant's subject matter jurisdiction challenge to the arbitration award, arbitrations are conducted by agreement of the parties and subject matter jurisdiction is not implicated. Subject matter is an issue only when claims are brought before a court of competent jurisdiction.

A review of the record reveals that the defendant participated in the arbitration and litigated the issue of whether he should be held personally liable and should be bound by the arbitration provision in the distribution agreement. Docket 50 at 38. The defendant also argued that only his corporation should be responsible for any liability. Docket 50 at 33-34, 37-39.

The arbitrator rejected the argument that the defendant was not personally liable to the plaintiff, reasoning as follows:

"1. The contract in this case is not with California Wine Cocktail Co, Inc., it is with Dan Good Distributing Co., Inc.
2. There is no 'Dan Good Distributing Co., Inc.' Therefore, Respondent is entitled to no exemption from personal liability due to the existence of a corporation because there is no corporation.
3. Even if there were a corporation called "Dan Good Distributing Co., Inc.," its existence would not shield Dennis Bonfilio from his own tortuous conduct. See, for example PMC, Inc. vs. Kadisha(2000} 78 Cal App 4th 1368. The evidence in this case abundantly established that the Lanham Act violations were perpetrated by Bonfilio personally. In his August 28, 2008 ruling in U.S.

District Court Case No. Civ. S-08-851 LKK/DAD, Federat Districl Court Judge Lawrence Karlton found, as to all defendants, one of whom was Denis Bonfilio individually, an extensive record of trade mark infringement, noting that 'the infringement that took place was not an isolated incident; it occurred over a period of several months and affected hundreds of boxes (and thousands of servings) of energy drink...it appears that defendants' conduct in manufacturing their own energy drink was in clear violation of the distribution agreement.'
4. Denis Bonfilio was one of the named defendants whose contract was enjoined by ths U.S. District Court."

Docket 50 at 42-43.

Additionally, even though the defendant opposed the request for confirmation of the arbitration award by the state court, the only point of opposition was as to the entry of a judgment against California Wine Cocktail Co, Inc. Docket 50 at 28-30.

Hence, the defendant had the opportunity to litigate and did litigate his personal liability, yet he lost that litigation and the court has found no evidence that he appealed the state court's judgment.

As to the state court's subject matter jurisdiction over the claims, that court is a court of general jurisdiction and obviously it determined that the arbitration was binding on the defendant. See Cal. Civ. Proc. Code §§ 1286.2 & 1286.6 (permitting the vacation and correction of an arbitration award, including, without limitation, when "arbitrators exceed[] their powers"). The court did not locate evidence in the record that the defendant appealed the state court's determination that the arbitration was binding on him as an individual.

More, the state court judgment has been properly authenticated. The declaration of Michael Sutton states that "Exhibit F is a true and correct certified copy of the March 25,2011 notice of entry of judgment which attaches the judgment against Bonfilio and DGDC in the amount of $265,488. This judgment has not been appealed and is final." Docket 47 ¶ 9. Fed. R. Evid. 901(b)(2) (permitting authentication by the "[t]estimony of a [w]itness with [k]nowledge" that "an item is what it is claimed to be."

The court also disagrees with the defendant that the arbitration award does not necessarily refer to him. The arbitration award says:

"The evidence that Bonfilio sold another energy dririk, in violation of Paragraph I of the Distribution Agreement, and that he counterfeited the Roaring Lion trademark and passed off inferior, cheaper goods as Roaring Lion goods, is overwhelming."

"Among other things, I note:

1. The findings of the U.S. District Court judge,
2. Mr. Bonfilio's admission in Federal Court that he mistakenly labeled as much as 317 boxes of energy drink as Roaring Lion between April 2007 and March 2008,
3. The overwhelming evidence that the mislabeling was intentional, not 'mistaken'. First, it is incredulous that he made 317 'mislakes'. Second, Mr. Bonfilio had an extensive history of passing off counterfeited energy drinks such as 'Crazy Monkey' and 'Jack's Blaster'. Third, he destroyed his business records. Finally, he purchased only 120 BIBs from [the plaintiff], but sold at

least 437 which were branded as Roaring Lion during the relevant time frame."

Docket 50 at 19 (emphasis added).

The foregoing narrative from the award clearly refers to acts by the defendant and not some fictitious entity.

The motion will be granted in part and denied in part.

8. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION TO APPROVE COMPROMISE
13-2069 LP-11
CARDILLO V. FABIE ET AL — 7-19-14 [71]

Tentative Ruling: The motion will be granted.

The defendants, who are also the debtors in possession in the underlying chapter 11 case, request approval of a settlement agreement with the plaintiff, Mike Cardillo, resolving the instant adversary proceeding, which contains fraudulent conveyance, nondischargeability, civil conspiracy, and elder abuse claims.

The factual background for the subject settlement agreement are as follows. Inocencia and Joseph Arindaeng purchased a real property in Danville, California in 1997. In 2003, the Arindaengs sold the property to the debtors for $430,000 but the Arindaengs continued to occupy the property, using it to operate a senior care facility, with the understanding that the Arindaengs would be paying the mortgage on the property and would be paying rent to the debtors. Because the Arindaengs failed to pay rent, the debtor transferred the property back to the Arindaengs in 2006. As part of that transfer, the debtors and the Arindaengs agreed that the Arindaengs would refinance the property and pay off an amount owed to the debtors. The Arindaengs never refinanced the property and in 2010 the debtors asked the Arindaengs to sell the property. The Arindaengs opposed a sale of the property. As the property was in danger of foreclosure, the debtors filed the underlying chapter 11 case on October 11, 2011. Pursuant to the debtors' demand, the Arindaengs transferred the property back to the debtor in December 2011.

Unknown to the debtors, the Arindaengs had been sued by the plaintiff, resulting in a $78,000 judgment against the Arindaengs, entered on or about October 17, 2011. When the plaintiff sought to execute on the judgment against the property but discovered that it had been transferred to the debtors, the plaintiff brought the instant adversary proceeding. After participating in a mediation, the parties reached a settlement agreement.

Under the terms of the compromise, the defendants will pay $18,377 to the plaintiff and will retain the real property, to operate their own senior care home. This adversary proceeding will be dismissed. Each side will bear its own costs of litigation. Also, the plaintiff will not be reporting his fraudulent conveyance claim to the senior care licensing authority.

On a motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Fed. R. Bankr. P. 9019. Approval of a compromise must be based upon considerations of fairness and equity. In re A & C Properties, 784 F.2d 1377, 1381 (9th Cir. 1986). The court must consider and balance four factors: 1) the probability of success in the litigation; 2) the difficulties, if any, to be encountered in the matter of collection; 3) the complexity of the litigation involved, and the expense, inconvenience, and

delay necessarily attending it; and 4) the paramount interest of the creditors with a proper deference to their reasonable views. In re Woodson, 839 F.2d 610, 620 (9th Cir. 1988).

The court concludes that the Woodson factors balance in favor of approving the compromise. That is, given the inherent costs, risks, delay and inconvenience of further litigation, and that the settlement will permit the debtors to use the real property to operate a senior care home without hindrance from the plaintiff, the settlement is equitable and fair.

Therefore, the court concludes the compromise to be in the best interests of the creditors and the estate. The court may give weight to the opinions of the trustee, the parties, and their attorneys. In re Blair, 538 F.2d 849, 851 (9th Cir. 1976). Furthermore, the law favors compromise and not litigation for its own sake. Id. Accordingly, the motion will be granted.

9. 11-44274-A-11 GEOFFREY/MARIVIE FABIE — MOTION FOR SUMMARY JUDGMENT
13-2069 LP-9 — 1-30-14 [17]
CARDILLO V. FABIE ET AL

Tentative Ruling: The motion will be dismissed as moot.

This motion will be dismissed as moot given that the parties have reached a settlement agreement.

10. 14-25893-A-11 ZOYA KOSOVSKA — ORDER TO SHOW CAUSE
8-6-14 [41]

Final Ruling: The order to show cause will be discharged and the petition will remain pending.

The debtor was given permission to pay the petition filing fee in installments pursuant to Fed. R. Bankr. P. 1006(b). The installment fee in the amount of $429 due on August 1, 2014 was not paid. However, the debtor paid the installment fee on August 8, 2014. No prejudice has resulted from the delay.

11. 14-25893-A-11 ZOYA KOSOVSKA — MOTION TO CONVERT OR DISMISS CASE O.S.T.
UST-1 — 8-21-14 [45]

Tentative Ruling: The motion will be granted and the case will be dismissed.

The U.S. Trustee moves for dismissal, arguing, among other things, that:

- this is the sixth bankruptcy case filed in this district by the debtor or her husband, Ivan Kosovskiy, since February 2, 2011;

- four of the five prior cases were dismissed;

- the debtor is unemployed and has disclosed only $866 of monthly income, from Social Security, with only $286 in monthly disposable income left, and no expenses are disclosed for mortgage or rent payments;

- the debtor's secured debt is listed as $0.00 or unknown;

- the debtor is not represented by counsel even though she was unsuccessful at

representing herself in any of her two prior chapter 13 cases;

- there is no reasonable likelihood of rehabilitation;

- the debtor has not filed a plan and disclosure statement in compliance with the court's July 7, 2014 order, which provides that "[t]he debtor in possession shall file a proposed plan of reorganization and a disclosure statement not later than August 15, 2014." Docket 33.

11 U.S.C. § 1112(b)(1) provides that "on request of a party in interest, and after notice and a hearing, the court shall convert a case under this chapter to a case under chapter 7 or dismiss a case under this chapter, whichever is in the best interests of creditors and the estate, for cause unless the court determines that the appointment under section 1104(a) of a trustee or an examiner is in the best interests of creditors and the estate."

For purposes of this subsection, "'cause' includes- (A) substantial or continuing loss to or diminution of the estate and the absence of a reasonable likelihood of rehabilitation." 11 U.S.C. § 1112(b)(4)(A). The above instances of cause are not exhaustive. For instance, unreasonable delay that is prejudicial to creditors is also cause for purposes of 11 U.S.C. § 1112(b)(1). In re Colon Martinez, 472 B.R. 137, 144 (B.A.P. 1st Cir. 2012).

The debtors have not filed a plan and disclosure statement yet. And, the court agrees with the motion that there is no reasonable likelihood of plan confirmation in this case. As stated by the motion, the debtor is unemployed and has disclosed only $866 of monthly income, all from Social Security, with $580 in monthly expenses and only $286 in monthly disposable income. And, the debtor has listed no expenses for mortgage or rent payments, from which the court infers that she does not have the funds to even maintain mortgage or rent payments during the performance of a confirmed chapter 11 plan.

In addition, the debtor and her husband filed five prior cases, including:

- Case No. 13-32562-A-13, filed by the debtor on September 27, 2013 and dismissed on January 3, 2014;

- Case No. 12-40454-A-7, filed by Ivan Kosovskiy on November 26, 2012 and discharged on March 5, 2013;

- Case No. 12-38060-A-13, filed by the debtor on October 10, 2012 and dismissed on November 14, 2012;

- Case No. 12-31189-C-7, filed by Ivan Kosovskiy on June 13, 2012 and dismissed on August 16, 2012; and

- Case No. 11-22693-B-13, filed by Ivan Kosovskiy on February 2, 2011 and dismissed on February 14, 2011.

The history of dismissed bankruptcy cases filed by the debtor and her husband and the debtor's nonexistent disposable income, after taking into account the debtor's failure to list any expenses for rent or mortgage payments, are cause for purposes of 11 U.S.C. § 1112(b)(1).

As the debtor's general unsecured debt appears to be minimal - only $6,000 in student loans listed in Schedule F, and the court cannot identify any nonexempt assets that could be administered for the benefit of creditors, dismissal is in

the best interests of the creditors and the estate. The motion will be granted.