UNITED STATES BANKRUPTCY COURT
Eastern District of California

Honorable Michael S. McManus
Bankruptcy Judge
Sacramento, California

September 15, 2014 at 10:00 a.m.

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1. 13-27002-A-13 RICHARD ROBERTS — MOTION TO
13-2338 TAA-3 — DISMISS
ACEITUNO V. ROBERTS — 8-7-14 [31]

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

The plaintiff, Thomas Aceituno, the trustee in the underlying chapter 7 case, seeks dismissal of the adversary proceeding. The complaint pleads two claims for revocation of discharge pursuant to 11 U.S.C. § 727(a)(4)(A) and (a)(2).

Fed. R. Civ. P. 41(a)(2), as made applicable here via Fed. R. Bankr. P. 7041, provides that "Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice."

Fed. R. Bankr. P. 7041, via which Fed. R. Civ. P. 41 applies here, provides that:

"Rule 41 F.R.Civ.P. applies in adversary proceedings, except that a complaint objecting to the debtor's discharge shall not be dismissed at the plaintiff's instance without notice to the trustee, the United States trustee, and such other persons as the court may direct, and only on order of the court containing terms and conditions which the court deems proper."

The defendant has not answered the complaint and this motion has been served on the U.S. Trustee. Docket 33.

As the case has been converted to chapter 13 and no discharge will be entered except to the extent provided under the terms of a confirmed and completed plan, and because the plaintiff no longer desires to prosecute the action, the court will dismiss it pursuant to Rule 41(a)(2). The motion will be granted.

2. 13-35308-A-7 DOROTHY PARENT — MOTION TO
14-2166 BJ-1 — DISMISS AND TO STAY PROSECUTION
SWENDEMAN ET AL V. SCHARFF, — 7-15-14 [10]
BRADY & VINDING ET AL

Tentative Ruling: The motion will be granted.

The defendants, Scharff, Brady & Vinding, a partnership, Brady & Vinding, a partnership, Michael E. Vinding, as partner and individually, and Michael V.

Brady, as partner and individually, seek dismissal of the subject complaint filed by the plaintiffs, Robert E. Swendeman, an individual (dba T'N'T Real Estate), Kevin C. Bulter, and DOODA, LP.

The complaint objects to the defendants' proof of claim, POC 6-1, which is in the amount of $365,876.35, secured by a 50% interest in a real property in Red Bluff, California. When this chapter 7 case was filed on December 2, 2013, that 50% interest was held by the debtor, Dorothy Parent. Consequently, it is now property of her chapter 7 bankruptcy estate. The aggregate value of the real property has been estimated to be approximately $6 million, making the estate's interest worth approximately $3 million. See Docket 24, Ex. 9 at 2 (admission by the plaintiffs' own counsel that "[l]iquidation of this asset [(*i.e.*, the subject property)] by sale will result in an immediate fund to satisfy all creditors' claims").

This is actually the second complaint filed by the plaintiff. An earlier complaint, Adv. Pro. 14-2034, was dismissed on May 8, 2014.

Plaintiff Robert E. Swendeman, a judgment creditor of debtor Dorothy Parent, holds the junior encumbrance on the subject property, an abstract of a $225,333.47 judgment, recorded only eight days after the recordation of the senior encumbrance, a deed of trust securing a $350,000 note held by Brady & Vinding, a partnership of which Michael Brady and Michael Vinding are members.

The first complaint was dismissed because it was filed in violation of the automatic stay and it was an attempt to avoid the senior encumbrance held by the defendants under a variety of theories. Whether these theories are premised on state law or the bankruptcy code, only the trustee has standing to pursue these claims. See 11 U.S.C. §§ 544, 547, 548, and 551.

The second complaint seeks to sidestep these problems by objecting to the proof of claim of the defendants for the same reasons plaintiff previously attempted to avoid the senior encumbrance. The court incorporates by reference its ruling on the motion to dismiss the first complaint. Adv. Pro. 14-2166, Docket 47.

This complaint objects to the defendants' proof of claim by arguing

- the proof of claim (POC) should be disallowed because of a legal malpractice claim offset;

- there is no consideration for the debt represented by the POC;

- the POC cannot be secured because the defendants have not valued the collateral property;

- the POC represents debt for legal services rendered to the debtor pre-petition and the reasonable value of those services does not exceed $25,000;

- the debt represented by the POC is not owed, except to the extent of an unsecured claim for $25,000;

- by the debtor incurring the debt represented in the POC (by her executing a note and a corresponding deed of trust that secures the note), the defendants received a preference from the debtor;

- not all creditors identified on the POC are signatories to the note and deed

of trust;

- the POC includes unmatured interest; and

- the POC is untimely.

Although the complaint is characterized as an objection to a proof of claim, it is a claim by one creditor asserting that the interest of the defendants in the 50% interest in the property now owned by the estate is avoidable. Only the trustee may do this

Even if the complaint truly is an objection to a proof of claim, the trustee alone may interpose objections to it unless the trustee refuses to act and the bankruptcy court permits a creditor to act on behalf of the estate. See In re Thompson, 965 F.2d 1136 (1st Cir. 1992).

The court rejects the plaintiffs' contention that they have been given permission by the trustee to prosecute the objection to the proof of claim. The trustee has disputed ever giving the plaintiffs permission to prosecute the instant complaint. Docket 12 ¶¶ 4, 6. In any event, the permission was not given in writing and it has not been approved by the court.

Absent court approval, only the bankruptcy estate has the authority to prosecute causes of action for the benefit of the estate and the creditors. In re O'Reilly, Case No. C 13-3177 PJH, WL 460767, at * 8 (N.D. Cal. Feb. 3, 2014); J & J Sports Prods., Inc. v. Benitez, Case No. 1:12-CV-00735-LJO-SMS, WL 5347547, at * 4 (E.D. Cal. Sept. 23, 2013); Montgomery v. Wal-Mart Stores, Inc., Case No. 12CV3057 JLS (DHB), WL 5278649, at * 7 (S.D. Cal. Sept. 18, 2013); JMS Labs Ltd. (U.S.A.), LLC v. Silver Eagle Labs, Inc. (In re Lockwood), 414 B.R. 593, 602-03 (Bankr. N.D. Cal. 2008); State of California v. PG & E Corp. (In re Pac. Gas & Electric Co.), 281 B.R. 1, 13-15 (Bankr. N.D. Cal. 2002) (citations omitted). This includes all types of causes of action that would benefit the estate and the creditors.

In other words, regardless of whether the trustee has given his permission for the prosecution of the subject complaint, the court still must authorize anyone other than the trustee to prosecute the complaint.

Finally, even if it were clear that the trustee would not act to object to the claim of the defendants, at this point the record suggests that the sale of the subject property will produce sufficient money to pay all claims in full whether or not they are secured by the subject property. Hence, no purpose would be served by determining whether the plaintiff's interest is senior to that of the defendants' interest or is secured at all.

Further, the plaintiffs have ignored 11 U.S.C. § 362(a)(3), which prohibits "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

To the extent the complaint asserts claims for relief that the interest of the defendant's in the subject property are avoidable, those claims are property of the estate and must be asserted by the trustee.

To the extent the plaintiffs are attempting to prosecute the complaint, they are exercising control over property of the estate. Actions taken in violation of the automatic stay are void. Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants), Inc., 754 F.2d 811, 816 (9th Cir. 1985); O'Donnell v.

Vencor Inc., 466 F.3d 1104, 1110 (9th Cir. 2006).

A creditor who has violated the automatic stay is required to reverse its actions. For instance, the stay requires the creditor to direct a levying officer to return or reverse post-petition collections, such as bank account or wage levy. In re Johnson, 262 B.R. 831, 847-48 (Bankr. D. Idaho 2001). The stay obligates the creditor to maintain or restore the status quo that existed as of the petition date. Id. (quoting Franchise Tax Board v. Roberts (In re Roberts), 175 B.R. 339, 343 (B.A.P. 9th Cir. 1994)).

Even if the trustee had consented to the lifting of the automatic stay to allow the plaintiffs to prosecute the complaint, such consent must have been given in writing and must have been approved by the court. Fed. R. Bankr. P. 4001(d)(1)(A)(iii) requires that agreements for the lifting of the stay be approved by the court, "A motion for approval of any of the following shall be accompanied by a copy of the agreement . . . (iii) an agreement to modify or terminate the stay provided for in §362."

Neither the plaintiffs, nor the trustee have applied with the court to approve an agreement for the lifting of the stay to allow the plaintiffs to prosecute the subject complaint.

Accordingly, the plaintiffs have no standing to prosecute the subject complaint and in doing so are violating the automatic stay of 11 U.S.C. § 362(a)(3).

Finally, whether or not the proof of claim was untimely filed is not relevant because the debt is secured by a property which, when sold, will satisfy all secured claims in full. And, even if the debt represented by the proof of claim was unsecured, it will be paid in full because this is a surplus estate and tardy proofs of claim will be paid in the order specified by 11 U.S.C. § 726(a)(3).

The motion will be granted and the adversary proceeding will be dismissed.

3. 14-24810-A-7 BLANE/JENETTE PARROTT — STATUS CONFERENCE
14-2155 — 7-10-14 [10]
BRUNE V. PARROTT ET AL

Tentative Ruling: None.

4. 14-24810-A-7 BLANE/JENETTE PARROTT — MOTION TO
14-2155 DBJ-1 — DISMISS
BRUNE V. PARROTT ET AL — 8-6-14 [12]

Tentative Ruling: The motion will be granted.

The defendants, Blane and Jenette Parrott, the debtors in the underlying chapter 7 case, seek dismissal of the amended complaint filed on July 10, 2014. Docket 10.

Under the federal pleading rules, a complaint needs to give fair notice of the pleader's claim(s) so that the respondent parties can respond, undertake discovery, and prepare for trial. See Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Swierkiewicz.v. Sorema N.A., 534 U.S. 506, 513-14 (2002). Rule 8(a)(2), as incorporated by Fed. R. Bankr. P. 7008, calls for this notice to be contained in a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 9(b), as applied here via Fed. R. Bankr. P. 7009, requires parties alleging fraud to plead with particularity the circumstances constituting fraud. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Fed. R. Civ. P. 9(b). The main purpose of the rule is for the plaintiff to provide the defendant with notice about fraud claim(s). Hayduk v. Lanna, 775 F.2d 441, 444 (1st Cir. 1985).

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by

factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

This dispute arises from the plaintiff's work as a contractor on real property owned by the defendants. The parties became involved in a dispute that led to the plaintiff not being paid in full for his services and the defendants making claims against the plaintiff's contractor bond. Overall, the complaint is vague, ambiguous, and confusing about the sequence of events, the extent of involvement by the defendants, including, without limitation, whether both defendants were involved or only Mr. Parrott was involved, and the causal connections between the defendants' alleged misconduct and the unidentified damages sustained by the plaintiff.

First, the court will not admit any "matters outside the pleadings," in resolving this motion. Hence, the court's adjudication of the motion is limited to the four corners of the July 10, 2014 amended complaint.

Second, the amended complaint does not contain fair notice of the plaintiff's claims permitting the defendants to respond. While the complaint mentions "U.S.C. § 523(a)(2)(4)(6), and U.S.C. § 548," it does not ask for a declaration as to nondischargeability of any debt. It simply asks for the bankruptcy case to "be dismissed including prosecution of the Debtors pursuant to U.S.C. § 523(a)(2)(4)(6), and U.S.C. § 548," as if the plaintiff is expecting someone other than himself to prosecute the referenced claims. Docket 10 at 6. As such, the court cannot tell how or why any of those claims are supported by the facts pleaded in the complaint.

Third, the complaint does not identify a specific debt owed by the defendants to the plaintiff. At best, the complaint is ambiguous about any debt owed by the defendants to the plaintiff. On one hand, the complaint says that the plaintiff has not received compensation and final payment for work or materials and that he has received "only $93,300.00 of the $241,000.00 from the construction lender." Docket 10 at 4, 5.

On the other hand, the complaint says that on April 21, 2009 the plaintiff "signed a lien release upon final payment." Docket 10 at 2-3.

The court also notes that the plaintiff has not filed a proof of claim against the defendants' bankruptcy estate. The proof of claim deadline expired on September 5, 2014.

Fourth, beyond the inconsistent claim of non-receipt of payment, the complaint identifies no misconduct by the defendants that is actionable under 11 U.S.C. § 523(a)(2), (a)(4) or (a)(6).

For instance, 11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff justifiably relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")).

The complaint contains no representations by either of the defendants, inducing the plaintiff to sustain damages.

The complaint also does not identify any willful and malicious injuries sustained by the plaintiff due to misconduct by the defendants. The crux of the complaint seems to be the following statement: "I am writing this complaint to you because I have been put in a difficult position because of, I believe, corruption at our local town hall in collusion with a fellow making false statements to our county's tax assessor, as included, on Nov 2007." Docket 10 at 2.

Additionally, it is unclear from the complaint what aspect of 11 U.S.C. § 523(a)(4) is being invoked, fraud, defalcation, embezzlement or larceny. Also, assuming the plaintiff is invoking the fraud aspect of the 11 U.S.C. § 523(a)(4) claim, the complaint contains no facts that rise to the level of an actionable fiduciary relationship between the plaintiff and the defendant.

Importantly, Rule 9(b) requires that fraud be pleaded with particularity.

Further, the complaint is not seeking the recovery of any damages against the defendants. As mentioned above, it is asking for the underlying bankruptcy case to be dismissed and for the "prosecution of the Debtors pursuant to U.S.C. § 523(a)(2)(4)(6), and U.S.C. § 548." Docket 10 at 6.

But, the defendants received their bankruptcy discharge on August 8, 2014 already and it is the plaintiff that must prosecute the claims pleaded in the complaint. Neither the court, nor the bankruptcy trustee prosecutes the claims pleaded by the plaintiff.

Furthermore, in the opposition to the motion, the plaintiff has raised new allegations against the defendants, including failure to disclose assets and liabilities in the bankruptcy case and damages sustained by the plaintiff due to the actions of the defendants. Those allegations are not in the complaint and the court will not permit the plaintiff to supplement the complaint by the allegations in his opposition to this motion.

Nevertheless, even considering the allegations in the opposition, the plaintiff cannot state a claim upon which relief can be granted. In the opposition, the plaintiff claims that the defendants engaged in the following pre-petition misconduct: making "false claims to bond companies in order to acquire Plaintiffs' insurance bond of $12,500.00;" the defendants "have provided false information and declarations to insurance company, [b]anks, including and not limited to the California State Licensing Board;" the defendants "used the

Plaintiffs [*sic*] California State Contractors license to acquire their loan because Debtors started work prior to obtaining permits in November 2007;" the defendants "solicited perjured testimony from personal friends . . . in order to profit from the Plaintiff by way of fraud including deceiving the creditors listed in their Bankruptcy." Docket 20 at 3. The plaintiff then contends that the defendants have caused him "irreparable harm." Docket 20 at 3. The harm is unspecified.

However, neither the complaint, nor the opposition to the motion connects the misconduct to the harm. The court cannot tell what harm was sustained by the plaintiff and what caused that harm.

Finally, the plaintiff has alleged no facts stating a claim under 11 U.S.C. § 548. 11 U.S.C. § 548 permits the avoidance of transfers made by the debtor-defendants pre-petition. The complaint and opposition to the motion make no mention of any such transfers made by the defendants.

More important, even if there were facts stating a claim for relief under 11 U.S.C. § 548 claim, such a cause of action would belong to the defendants' chapter 7 trustee. The plaintiff, as a creditor, has no standing to prosecute avoidance claims.

Absent court approval, only the bankruptcy estate has the authority to prosecute claims for the benefit of the estate and the creditors, such as the avoidance of a transfer. In re O'Reilly, Case No. C 13-3177 PJH, WL 460767, at * 8 (N.D. Cal. Feb. 3, 2014); J & J Sports Prods., Inc. v. Benitez, Case No. 1:12-CV-00735-LJO-SMS, WL 5347547, at * 4 (E.D. Cal. Sept. 23, 2013); Montgomery v. Wal-Mart Stores, Inc., Case No. 12CV3057 JLS (DHB), WL 5278649, at * 7 (S.D. Cal. Sept. 18, 2013); JMS Labs Ltd. (U.S.A.), LLC v. Silver Eagle Labs, Inc. (In re Lockwood), 414 B.R. 593, 602-03 (Bankr. N.D. Cal. 2008); State of California v. PG & E Corp. (In re Pac. Gas & Electric Co.), 281 B.R. 1, 13-15 (Bankr. N.D. Cal. 2002) (citations omitted).

11 U.S.C. § 541(a) provides that "[t]he commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held," including "all legal or equitable interests of the debtor in property as of the commencement of the case" and "[a]ny interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title." 11 U.S.C. § 541(a)(1) & (3).

11 U.S.C. § 704 charges only the bankruptcy trustee to "collect and reduce to money the property of the estate" and to "examine proofs of claims and object to the allowance of any claim that is improper." 11 U.S.C. § 704(a)(1) & (5).

"[I]n order for a creditor . . . to obtain standing to object to another creditor's claims in such a case, the objecting party must first request the trustee to object to the claim, the trustee must refuse to object to the claim, and the Bankruptcy Court may then authorize the creditor . . . to proceed." In re Bakke, 243 B.R. 753, 756 (Bankr. D. Ariz. 1999).

The court is not persuaded - even from the opposition - that the plaintiff can state a claim upon which relief can be granted.

Accordingly, the motion will be granted and the plaintiff's amended complaint will be dismissed. As there are no facts in the record of a causal link between the alleged misconduct and the alleged harm, the court will not grant

the plaintiff leave to amend the complaint.

5. 10-36150-A-11 KARIN FRANK — MOTION FOR SANCTIONS AND TO ENFORCE CONFIRMED PLAN
KMF-27 — 11-12-13 [412]

Tentative Ruling: None. Pursuant to this court July 29, 2014 order, the September 15, 2014 hearing will be treated as a status conference. Docket 463.

6. 14-22266-A-7 CHRISTOPHER/ELIZABETH BEHNAM — MOTION TO DISMISS AND FOR A MORE DEFINITE STATEMENT
14-2167 BLC-1 — 7-15-14 [8]
JOHAL V. BEHNAM ET AL

Tentative Ruling: The motion will be granted.

The defendants, Christopher and Elizabeth Benham, the debtors in the underlying chapter 7 case, seek dismissal of the instant complaint filed on June 14, 2014 by the plaintiff, Teji Johal. Docket 1.

Under the federal pleading rules, a complaint needs to give fair notice of the pleader's claim(s) so that the respondent parties can respond, undertake discovery, and prepare for trial. See Conley v. Gibson, 355 U.S. 41, 47-48 (1957); Swierkiewicz.v. Sorema N.A., 534 U.S. 506, 513-14 (2002). Rule 8(a)(2), as incorporated by Fed. R. Bankr. P. 7008, calls for this notice to be contained in a short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 9(b), as applied here via Fed. R. Bankr. P. 7009, requires parties alleging fraud to plead with particularity the circumstances constituting fraud. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Fed. R. Civ. P. 9(b). The main purpose of the rule is for the plaintiff to provide the defendant with notice about fraud claim(s). Hayduk v. Lanna, 775 F.2d 441, 444 (1st Cir. 1985).

Rule 12(b)(6) permits dismissal when a complaint fails to state a claim upon which relief can be granted. Dismissal is appropriate where there is either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. Saldate v. Wilshire Credit Corp., 686 F. Supp. 2d 1051, 1057 (E.D. Cal. 2010) (citing Balisteri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990)(as amended)).

"In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most favorable to the plaintiff; (2) accept all well pleaded factual allegations as true; and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief." See Stoner v. Santa Clara County Office of Educ., 502 F.3d 1116, 1120-21 (9th Cir. 2007); see also Schwarzer, Tashmina & Wagstaffe, California Practice Guide: Federal Civil Procedure Before Trial, § 9.187, p. 9-46, 9-47 (The Rutter Group 2002).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' . . . A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. . . . The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer

possibility that a defendant has acted unlawfully. . . . Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of "entitlement to relief."'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (Citations omitted).

"In sum, for a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief." Moss v. U.S. Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) (quoting Iqbal at 678).

More recently, the Supreme Court has applied a "two-pronged approach" to address a motion to dismiss:

"First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. . . . Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. . . . But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'-'that the pleader is entitled to relief.'

"In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Ashcroft v. Iqbal, 556 U.S. 662, 678-79 (2009) (Citations omitted).

"A pleading that states a claim for relief must contain . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Fed. R. Civ. P. 8(a)(2).

Further, "[i]f, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56." Fed. R. Civ. P. 12(d); S&S Logging Co. v. Barker, 366 F.2d 617, 622 (9th Cir. 1966). If either party introduces evidence outside of the challenged pleading, a court *may* bring the conversion provision (Rule 12(d) - converting motion to dismiss into motion for summary judgment) into operation. Cunningham v. Rothery (In re Rothery), 143 F.3d 546, 548-549 (9th Cir. 1998).

The facts giving rise to this dispute arise from the plaintiff extending two loans to the defendants and their airline business. The plaintiff and Mr. Benham were United Airlines pilots when Mr. Benham owned and operated a charter airline and air taxi service from Fort Lauderdale, Florida. The names of the defendants' businesses were, "Friendship Airways, Inc., Friendship Airways Leasing, Inc., and a dba known as Yellow Air Taxi." Docket 1 ¶ 3.

On March 27, 2007, Mr. Benham executed a $40,000 unsecured promissory note in favor of the plaintiff. Mr. Benham executed the note on behalf of his company

Friendship Airways Leasing, Inc. Docket 1, Ex. A. The complaint says that Mr. Benham induced the plaintiff to loan him the $40,000 in connection with a promise made by Mr. Benham that the loan will be repaid "by the imminent re-financing of one of the airplanes in the Friendship Airways fleet." Docket 1 ¶ 7. Even though the $40,000 promissory note was executed solely by Mr. Benham on behalf of Friendship Airways Leasing, Inc., the plaintiff claims that "multiple borrowers" were implied by the language of the note. Docket 1 ¶ 8.

The complaint is unclear when the defendants defaulted on the $40,000 note. Although the complaint states that the last payment on the note was on February 17, 2011, that does not appear to be true because the plaintiff instituted an action to collect on the note in February 2008 and the settlement of that action was reduced to writing and executed by the parties on or about August 25, 2010. Docket 1 ¶¶ 9, 15.

In February 2008, the plaintiff filed an action in Florida state court against the defendants' businesses to collect on the $40,000 note. Docket 1 ¶ 15. On or about August 17, 2010, the defendants gave the plaintiff a tour of the operations of their businesses. In the context of that tour, the defendants represented to the plaintiff that they had large amount of cargo awaiting shipment by their planes, that their businesses needed additional capital to meet growing passenger and air cargo demand, and needed additional capital to refurbish one of the airplanes to meet private air charter demand. Docket 1 ¶ 11.

As a result of the foregoing representations, on or about August 25, 2010, the plaintiff and the defendants settled the pending collection action as pertaining to the $40,000 note and the plaintiff loaned additional $30,000 to the defendants. Docket 1 ¶¶ 12, 15. The settlement of the collection action was executed by both defendants individually and Mr. Benham on behalf of Friendship Leasing Airways, Inc. Docket 1, Ex. C. The settlement consisted of requiring the defendants to resume making monthly payments of $632 on the $40,000 note immediately. The settlement also included a requirement for a balloon payment of $10,663.82 no later than January 1, 2016. Docket 1, Ex. C.

The $30,000 note was executed by both defendants individually and Mr. Benham on behalf of Friendship Leasing Airways, Inc. The first payment under the $30,000 note - in the amount of $3,600 - was due on December 1, 2010. Docket 1, Ex. B.

The defendants defaulted on the settlement of the action pertaining to the $40,000 note and defaulted on the $30,000 note. Docket 1 ¶¶ 13, 18. The only payment the defendants ever made on the $30,000 note was in January 2011, in the amount of $1,000. Docket 1 ¶ 13. The defendants never made a payment on account of the settlement agreement. Docket 1 ¶ 18.

The complaint alleges that the defendants started admitting their financial difficulties for the first time six months after the August 25, 2010 $30,000 note and settlement of the collection action pertaining to the $40,000 note. Docket 1 ¶ 21. The admissions consisted of: a March 15, 2011 e-mail stating that the "IRS have frozen my United paycheck and are taking my paycheck;" an April 7, 2011 e-mail stating that "Nothing positive as yet. Phone has been disconnected due to payment issue. Trying to get it restored tomorrow. Don't think that [t]his company is what Tony might be interested in;" a July 5, 2011 e-mail from Mr. Benham stating that "I am shutting the business down. [T]he website has been suspended. [M]y phone has been disconnected due to lack of payment. IRS lawyer has quite [sic] due to lack of payment. [L]ife insurance has been canceled due to lack of payment. [I]nternet has been canceled due to

lack of payment." Docket 1 ¶¶ 21-23.

The IRS seized the majority of Mr. Benham's retirement funds. Docket 1 ¶ 24.

The plaintiff alleges that the defendants "concealed the existence of their significant unpaid tax liabilities, []the impending lien and garnishment collection activity," and numerous pending lawsuits against Friendship Airways Leasing, Inc. and Mr. Benham, "when they stipulated to settle the 2008 Lawsuit and borrowed additional money from plaintiff in August 2010." Docket 1, ¶¶ 24-26. At the time the plaintiff agreed to settle the collection action and loan the additional $30,000, nine lawsuits were pending against Friendship Airways Leasing, Inc. and 11 lawsuits were pending against Mr. Benham individually. Docket 1 ¶¶ 25-26.

Friendship Airways Leasing, Inc. and Friendship Airways, Inc. were in two respective involuntary bankruptcy cases, filed in the Southern District of Florida in 2011. Both cases were dismissed. Docket 1 ¶¶ 29-30. Mrs. Benham filed her own voluntary chapter 13 case in August 2013 in Florida, where she purportedly failed to disclose assets and debts. Docket 1 ¶¶ 31-32. She dismissed that case in September 2013. Docket 1 ¶ 32.

The complaint also includes allegations of misconduct by the defendants committed in connection with the filing of the underlying bankruptcy case, including understatement of Mr. Benham's monthly income and ongoing retirement contributions by United Airlines and failure to disclose assets from the Friendship Airways businesses, such as a "fleet of Cessna 402 airplanes." Docket 1 ¶¶ 39-41.

Initially, the court notes in passing that the complaint contains some serious errors and inconsistencies, including, without limitation, that: the $30,000 note was entered into on August 25, 2011, although the attached note reflects a date of August 25, 2010 (Docket 1 ¶ 12, Ex. B); the complaint referring to a 2011 note and a 2010 note, when there is only a 2010 note (Docket 1 ¶¶ 12-14); the defendants defaulting on the $40,000 note after their entering into the settlement over the collection action (Docket 1 ¶¶ 9, 15).

First, the court will not admit any "matters outside the pleadings" in resolving this motion. The court's adjudication of the motion then is limited to the four corners of the complaint.

Second, none of the defendants' alleged misconduct that is not causally related to the plaintiff's damages identified in the complaint is relevant to the asserted 11 U.S.C. § 523(a)(2)(A), (a)(4) and (a)(6) claims. This includes conduct by Mrs. Benham associated with her filing of a prior 2013 bankruptcy case in Florida and the purported understatement of Mr. Benham's income and retirement contributions in the underlying case.

The court fails to see how those allegations, assuming them to be true, have any bearing on the outcome of the asserted claims, given that the complaint identifies no causal link between them and the damages sustained by the plaintiff. The allegations pertain to conduct that took place no earlier than 2013, whereas the plaintiff extended the loans to and settled debt with the defendants in 2007 and 2010.

More, the basic theory of the complaint is that the plaintiff was fraudulently induced to lend money to the defendants and their businesses. The misconduct at issue then should have happened in 2007 and 2010, and not in 2013 when Mrs.

Benham filed her chapter 13 case or 2014 when the underlying case was filed.

Third, the allegations pertaining to improper venue in the filing of the underlying bankruptcy case also have no bearing on the asserted causes of action. The court fails to see how the defendants' purported manipulation of the venue provisions in filing in this district has any bearing on the nondischargeability of the debt owed to the plaintiff.

Again, the theory of the complaint is that the plaintiff was fraudulently induced to lend money to the defendants and their businesses.

Fourth, the plaintiff's contention that the defendants have not disclosed the assets of their businesses makes no sense. The court is perplexed at how the defendants can claim direct ownership interest in the assets of their corporations, which themselves are separate legal entities, entitled to own assets and incur debt separately and aside from the defendants individually.

Fifth, the court will dismiss the 11 U.S.C. § 523(a)(6) claims because, as mentioned above, the basic theory of the complaint is that the plaintiff was fraudulently induced to lend money to the defendants and their businesses, before or at the time the plaintiff lent the funds.

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; 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).

There are no facts in the complaint supporting a misconduct by the defendants, after they received the loaned funds from the plaintiff, which misconduct resulted in harm sustained by the plaintiff.

As to the $30,000 note, it was signed on August 25, 2010. Docket 1 ¶ 12 (erroneously identifying the date of the note as August 25, 2011); see also Docket 1, Ex. B. The complaint contains no misconduct attributed to the defendants, after August 25, 2010, that is identified as the cause for the plaintiff's harm under the $30,000 note.

For instance, the complaint does not allege that the defendants had the funds to make the payments under the $30,000 note, made the payments for some period of time, but then they did something - such as misappropriating the funds they were to use to make the payments under the $30,000 note - causing them to cease payments under that note.

As to the $40,000 note, it was signed in March 2007 and the only misconduct pertaining to that note after that date was the defendants inducing the plaintiff to settle the pending collection action. According to the complaint, the defendants executed the settlement on August 25, 2010. Docket 1 ¶ 15. As the defendants had already incurred the $40,000 debt, their nonpayment of the installments under the settlement agreement could not have caused the plaintiff's damages pursuant to the $40,000 note.

The only damages that could have resulted from the defendants' agreement to settle the pending collection action and then not perform under that settlement, was the plaintiff relinquishing the prosecution of the collection action and the enforcement of a judgment entered pursuant to the action.

However, foregoing the prosecution of a collection action does not necessarily result in the same damages as not recovering the debt sought to be collected in the action. The only damages a creditor would be entitled to for being fraudulently induced not to continue the prosecution of a collection action is what he would have recovered had he continued to prosecute the action until judgment and executed on that judgment.

This requires allegations about the likelihood of success of the collection action and the likelihood of collection on any judgment that would have resulted from the action.

The complaint contains no such allegations. It makes no assertions about the likelihood of success of the collection action and the likelihood of collection on any judgment that would have resulted from the action.

Sixth, the court will dismiss the 11 U.S.C. § 523(a)(2)(A) claims. 11 U.S.C. § 523(a)(2)(A) requires a showing that: (1) the defendant made representations; (2) the defendant knew them to be false, when he made them; (3) he made the representations with the intent and purpose to deceive the plaintiff; (4) the plaintiff *justifiably* relied on the representations; and (5) as a result, the plaintiff sustained damage. Younie v. Gonya (In re Younie), 211 B.R. 367, 373 (B.A.P. 9th Cir. 1997); see also Providian Bancorp. (In re Bixel), 215 B.R. 772, 776-77 (Bankr. S.D. Cal. 1997) (citing Field v. Mans, 516 U.S. 59, 59-60 (1995) (holding that "§ 523(a)(2)(A) requires justifiable, but not reasonable, reliance")). False promises of one's intention to perform a contract are potentially actionable under section 523(a)(2)(A).

With respect to the $40,000 note, the complaint contains no representations by the defendants prior to or at the time Mr. Benham executed that note, in March 2007. The fact that Mr. Benham was a pilot earning a lot of money, along with the plaintiff, and Mr. Benham owned a business, does not rise to the level of misrepresentations within the meaning of 11 U.S.C. § 523(a)(2)(A).

The complaint contains no allegations that the defendants had financial difficulties and made related misrepresentations to the plaintiff, at the time or prior to when Mr. Benham executed the $40,000 note.

The court also notes that Mrs. Benham never executed the $40,000 note. Thus, all claims against her based on that note will be dismissed solely for that reason.

With respect to the settlement agreement of the pending collection action as to the $40,000 note and the execution of the $30,000 note - both of which were executed by both defendants - the 11 U.S.C. § 523(a)(2)(A) claims will be dismissed because the allegations in the complaint do not rise to the level of known misrepresentations.

The representations asserted by the complaint as inducing the plaintiff to enter into the August 25, 2010 settlement and $30,000 note, include: the defendants giving the plaintiff a tour of the operations of their businesses on August 17, 2010 and representing to the plaintiff during the tour that they had large amount of cargo awaiting shipment by their planes, that their businesses needed additional capital to meet growing passenger and air cargo demand, and needed additional capital to refurbish one of the airplanes to meet private air charter demand. Docket 1 ¶ 11.

Yet, the complaint does not state anywhere that the above representations were false or that the defendants knew that these representations were false when they made them.

The plaintiff also complains that the defendants "concealed the existence of their significant unpaid tax liabilities, []the impending lien and garnishment collection activity," and numerous pending lawsuits against Friendship Airways Leasing, Inc. and Mr. Benham. Docket 1, ¶¶ 24-26.

The allegations of concealment by the defendants are legal conclusions, which the court cannot accept as true because they are unsupported by factual assertions. Concealment can come as the result of the defendants not reporting their financial condition when they have the obligation to report it. Concealment can also result from the defendants not disclosing financial information even though they were expressly asked to disclose it, in connection with their promissory notes or the settlement agreement they executed in favor of the plaintiff.

But, the complaint contains no allegations of the defendants having the legal obligation to report their financial condition to the plaintiff and contains no allegations of the plaintiff ever expressly asking them about their tax liabilities, liens, garnishments or other collection activity by other creditors.

The complaint lacks sufficient allegations of known misrepresentations within the meaning of 11 U.S.C. § 523(a)(2)(A).

Seventh, for the above reasons, the court will dismiss the "fraud . . . while

acting in a fiduciary capacity" aspect of the 11 U.S.C. § 523(a)(4) claim.

Eight, the court will dismiss the "defalcation while acting in a fiduciary capacity" aspect of the 11 U.S.C. § 523(a)(4) claim as well. The complaint states no facts rising to the level of an actionable fiduciary relationship between the plaintiff and the defendants, within the meaning of 11 U.S.C. § 523(a)(4).

Whether a person is a fiduciary under 11 U.S.C. § 523(a)(4) is a question of federal law. Ragsdale v. Haller (In re Haller), 780 F.2d 794, 795 (9th Cir. 1986).

While the definition of a "fiduciary" is governed by federal law, courts have relied in part on state law to ascertain whether the requisite trust relationship exists. Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1125 (9th Cir. 2003).

The fiduciary relationship required by section 523(a)(4) must arise before the alleged wrongdoing. Blyler v. Hemmeter (In re Hemmeter), 242 F.3d 1186, 1190 (9th Cir. 2001). Put differently, the alleged nondischargeable debt "must arise from breach of trust obligations imposed by law, separate and distinct from any breach of contract." See In re Baird, 114 B.R. 198, 202 (B.A.P. 9th Cir. 1990).

Bankruptcy courts limit the definition of a fiduciary for 11 U.S.C. § 523(a)(4) purposes to situations where the fiduciary debtor holds an express or technical trust on behalf of beneficiary/creditor. The phrase "while acting in a fiduciary capacity" has long been interpreted to require an express trust (arising by agreement) or technical trust (arising by statute or by law). Chapman v. Forsyth, 43 U.S. 202, 208 (1844). 11 U.S.C. § 523(a)(4) does not apply to trusts imposed after the fact, such as constructive, resulting or implied trusts, or other trusts arising ex maleficio (as a result of wrongdoing). Haller at 796. General fiduciary duties, such as those owed by an agent to his or her principal, do not satisfy 11 U.S.C. § 523(a)(4). Cal-Micro, Inc. v. Cantrell (In re Cantrell), 329 F.3d 1119, 1126, 1127 (9th Cir. 2003) (rejecting the notion that corporate principals are fiduciaries to the corporation within the meaning of 11 U.S.C. § 523(a)(4)).

The complaint offers no facts that would support an express or technical trust relationship between the plaintiff and the defendants.

The complaint states only that the defendants "while employed as corporate officers and/or directors of the various Friendship Airways entities, owed a fiduciary duty to all interested parties of Friendship Airways." Docket 1 ¶ 48. Such allegations are at best identifying fiduciary duties owed by the defendants to the plaintiff by virtue of the fact that the plaintiff is a creditor of their corporate businesses.

However, such a fiduciary relationship is only implied and general in nature, and does not involve the express or technical trust relationship required by 11 U.S.C. § 523(a)(4). Although the defendants, as corporate officers, owed fiduciary duties in their capacities as agents of the corporations, they were not trustees of a statutory trust with respect to the corporate or their individual assets. See Cantrell at 1125-27; Saccheri v. St. Lawrence Valley Dairy (In re Saccheri), Case No. 12-1269-JuKiD, WL 5359512, at *11 (B.A.P. 9th Cir. Nov. 1, 2012) (quoting Cantrell at 1126 and affirming that "although officers and directors [under California law] are imbued with the fiduciary

duties of an agent and certain duties of a trustee, they are not trustees with respect to corporate assets"); Honkanen v. Hopper (In re Honkanen), 446 B.R. 373, 381 (B.A.P. 9th Cir. 2011) (affirming Cantrell at 1126 and quoting Bainbridge v. Stoner, 16 Cal. 2d 423 (1940) that under California law "a director of a corporation acts in a fiduciary capacity, and the law does not allow him to secure any personal advantage as against the corporation or its stockholders[,] [h]owever, strictly speaking, the relationship is not one of trust, but of agency").

Ninth, the larceny and embezzlement claims will be dismissed. 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)).

Larceny is 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).

None of the allegations in the complaint rise to an actionable claim for embezzlement or larceny because there are no allegations of the defendants ever having possession of property owned by the plaintiff and there are no allegations of the defendants ever feloniously, with intent to steal, taking the plaintiff's personal property. The complaint has alleged only fraud, *i.e.*, the defendants inducing the plaintiff to loan them the funds. In other words, when the plaintiff loaned the funds to the defendants, the funds became property of the defendants subject to their contractual obligation to repay the funds. And, the defendants did not take possession of the funds loaned by the plaintiff feloniously. They took possession of the funds lawfully, after entering into a promissory note agreement with the plaintiff.

Lastly, the opposition does not include new factual allegations, in addition to the allegations already in the complaint, tending to indicate that the plaintiff may be able to amend the complaint to state a claim upon which relief can be granted under 11 U.S.C. § 523(a)(2)(A), (a)(4) and/or (a)(6). The opposition is wholly unhelpful as it merely refers the court to the complaint, without even making the effort to connect the factual assertions to the

elements of each pleaded cause of action. Docket 16. Accordingly, the motion will be granted and all claims will be dismissed without leave to amend.

7. 14-22266-A-7 CHRISTOPHER/ELIZABETH BEHNAM — STATUS CONFERENCE 6-14-14 [1]
14-2167 JOHAL V. BEHNAM ET AL

Tentative Ruling: None.

8. 14-27083-A-12 DBH-2 RCK CONSERVATION CO-OP, LLC — MOTION TO CONFIRM PLAN 8-1-14 [35]

Tentative Ruling: The motion will be denied.

The debtor is asking the court to confirm its chapter 12 plan filed on August 1, 2014. Docket 39.

The chapter 12 trustee opposes the motion, challenging the debtor's eligibility for chapter 12 relief and challenging the plan's feasibility as it does not cash-flow and does not pay all claims secured by the property.

As the debtor is ineligible for chapter 12 relief, the plan cannot be confirmed.

Further, the plan does not resolve the conflicting and competing claims purportedly secured by the property, one by Charles Hawley and Teresa Jones and the other by Paige Sharrer. As a result, the trustee will not know who to pay the mortgage on the two properties to, Charles Hawley and Teresa Jones or Paige Sharrer. The debtor should resolve this through the plan. The court will not confirm a plan that perpetuates the uncertainty of the debtor's correct mortgage creditor.

Next, the plan does not cash-flow. It provides for payments of $4,100 a month for the first 30 months of the plan term, whereas the trustee's monthly plan payment calculations indicate a necessary monthly plan payment of at least $4,763. Docket 39 at 7. Although the debtor is proposing to increase the monthly plan payments to $5,383, this is not what this plan provides.

Finally, the plan contains many references to provisions from chapter 13 of title 11. See, e.g., Docket 39 at 2-3. The court will not permit the debtor to utilize a chapter 13 form plan as basis for a chapter 12 plan without editing all provisions applicable only in a chapter 13 case.

9. 14-27083-A-12 RPG-101 RCK CONSERVATION CO-OP, LLC — MOTION FOR RELIEF FROM AUTOMATIC STAY 7-23-14 [24]
CHARLES B. HAWLEY, TERESA JONES VS.

Tentative Ruling: The motion will be granted.

The hearing on this motion was continued from August 18, 2014 in order for the court to consider further briefing from the parties. The parties have filed their additional briefs. An amended ruling follows below.

The movant, Teresa Jones and Charles Hawley, move for relief from stay as to two real properties, one in Clipper Mills, California (Butte County) and the other in Challenge, California (Yuba County). The movant asks for relief from

stay under 11 U.S.C. § 362(d)(1) for cause, arguing that: (1) the debtor has not made payments on account of the claim secured by the properties since August 2012, (2) the debtor filed this case on July 8, 2014, the eve of foreclosure of the property, scheduled for July 11, 2014, (3) the debtor lost a motion for a temporary restraining order, heard in state court on July 7, 2014, and (4) the debtor is not qualified for chapter 12 relief.

While the movant checked the box on the information sheet for "bad faith" as one of the grounds for the motion, the motion is devoid of any discussion or mention of bad faith. Consequently, the court will not consider bad faith as basis for granting the motion.

Further, the court does not have admissible or probative evidence of value for the properties. The only evidence of value for the properties in support of the motion is in the declaration of Charles Hawley, where he says that: "I have not had an appraisal conducted for the Real Property. Accordingly, I do not have an opinion as to market value. However, I believe that the Debtor's opinion of value in the amount of $450,000 is completely unsupported and that the actual market value would be no greater than $300,000." Docket 26 at 4.

However, Mr. Hawley has not been qualified as an expert to render an opinion of value as to the properties. His declaration states nothing of his skills to appraise real property. He does not even state that he has inspected the properties. See Fed. R. Evid. 701(c) & 702. Accordingly, his statements about the value of the property are inadmissible.

But, even if the court were to consider his statements as admissible evidence, with a value of $300,000 and encumbrances totaling approximately $272,543, there is still $27,456 of equity in the property, meaning that relief under 11 U.S.C. § 362(d)(2) is unavailable.

The movant's deed is the only deed against the property and secures a claim of approximately $267,743. The properties are also encumbered by outstanding property taxes in the amount of $4,800.

The court also notes that there is no evidence in the record establishing that the properties are depreciating in value. Under United Sav. Ass'n. Of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988), a secured creditor's interest in its collateral is considered to be inadequately protected only if that collateral is depreciating or diminishing in value. The creditor, however, is not entitled to be protected from an erosion of its equity cushion due to the accrual of interest on the secured obligation. In other words, a secured creditor is not entitled to demand, as a measure of adequate protection, that "the ratio of collateral to debt" be perpetuated. See Orix Credit Alliance, Inc. v. Delta Resources, Inc. (In re Delta Resources, Inc., 54 F.3d 722, 730 (11th Cir. 1995).

As this case was just filed on July 8, 2014 and there is at least approximately $27,543 of equity in the properties - assuming the court considers Mr. Hawley's valuation, the court is unwilling to grant relief from stay this early in the case on the sole basis that the debtor is not making contractual payments to the movant.

Nevertheless, the motion also raises the debtor's eligibility for chapter 12 relief as cause for relief from stay.

11 U.S.C. § 109(f) provides that only a family farmer or family fisherman with

regular income may be a debtor under chapter 12.

11 U.S.C. § 101(18) defines a family farmer as:

"(A) individual or individual and spouse engaged in a farming operation whose aggregate debts do not exceed $4,031,575 and not less than 50 percent of whose aggregate noncontingent, liquidated debts (excluding a debt for the principal residence of such individual or such individual and spouse unless such debt arises out of a farming operation), on the date the case is filed, arise out of a farming operation owned or operated by such individual or such individual and spouse, and such individual or such individual and spouse receive from such farming operation more than 50 percent of such individual's or such individual and spouse's gross income for—

(i) the taxable year preceding; or

(ii) each of the 2d and 3d taxable years preceding; the taxable year in which the case concerning such individual or such individual and spouse was filed; or

(B) corporation or partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family, and such family or such relatives conduct the farming operation, and

(i) more than 80 percent of the value of its assets consists of assets related to the farming operation;

(ii) its aggregate debts do not exceed $4,031,575 and not less than 50 percent of its aggregate noncontingent, liquidated debts (excluding a debt for one dwelling which is owned by such corporation or partnership and which a shareholder or partner maintains as a principal residence, unless such debt arises out of a farming operation), on the date the case is filed, arise out of the farming operation owned or operated by such corporation or such partnership; and

(iii) if such corporation issues stock, such stock is not publicly traded."

Although limited liability companies are not specifically mentioned by 11 U.S.C. § 101(18), they are are quite similar to corporations in their control and ownership structures, for purposes of applying 11 U.S.C. § 101(18). Also, the court has found no cases precluding limited liability companies from being chapter 12 debtors.

"The term 'farming operation' includes farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 U.S.C. § 101(21). This is not an exclusive list. Rinehart v. Sharp (In re Sharp), 361 B.R. 559, 564 (B.A.P. 10th Cir. 2007).

While the movant filed this motion and the movant has the burden to establish cause, the movant cannot be expected to prove a negative, *i.e.*, disproving that the debtor is a family farmer within the meaning of 11 U.S.C. § 101(18).

As the debtors bear the burden of persuasion on all elements necessary for plan confirmation, they also bear the burden of persuasion on establishing eligibility for chapter 12 relief. First Nat'l Bank of Durango v. Woods (In re Woods), 743 F.3d 689, 705 (10th Cir. 2014) (citing Ames v. Sundance State Bank

(In re Ames), 973 F.2d 849, 851 (10th Cir. 1992)); In re Sohrakoff, 85 B.R. 848, 850 (Bankr. E.D. Cal. 1988); In re Bircher, 241 B.R. 11, 14 (Bankr. S.D. Iowa 1999); Integra Bank, N.A. v. Ross (In re Ross), 270 B.R. 710, 714 (Bankr. S.D. Ill 2001).

The debtor has not met its burden of persuasion that it is eligible for chapter 12 relief. Specifically, the debtor has not established that it engaged in a "farming operation" within the meaning of 11 U.S.C. § 101(18)(B), as of the petition date, July 8, 2014.

11 U.S.C. § 101(18)(B) requires the debtor to be conducting a "farming operation," which includes, without limitation, "farming, tillage of the soil, dairy farming, ranching, production or raising of crops, poultry, or livestock, and production of poultry or livestock products in an unmanufactured state." 11 U.S.C. § 101(21).

David Major is a more than 50% membership interest holder in the debtor. His July 2, 2014 declaration submitted by the debtor with the state court, in connection with the debtor's pre-petition request for a temporary restraining order, states that "[The debtor] had the ability to make its [mortgage] payments through the combination of capital contributions of its members as well as rental income and concert event income. The majority of the expenses have been paid from members' capital contributions." Docket 29 at 2.

That declaration does not list a single business activity of the debtor that could be classified as a farming operation. The debtor's business activities, just six days prior to the filing of this case, are anything but a farming operation. On July 2, 2014, Mr. Major says:

"I have been working over the course of this year to obtain additional members of [the debtor] as well as attempting to make the property self-sustaining financially. In January of 2014 I was able to obtain two new members in the [debtor], and additional members have joined since then. We have turned the property from 80 tons of junk, including 57 junk cars, into a music venue with camp grounds. We have held concerts at the property and have one concert per month booked this year through October. With our new membership as well as the revenue the property is now raising, we are now able to make the monthly payments."

Docket 29 at 4.

After the debtor did not prevail on its request for a temporary restraining order, it filed the instant chapter 12 case on July 8, 2014.

At the meeting of creditors, on August 13, 2014, Mr. Major appeared on behalf of the debtor, testifying that the debtor's two real properties (also referred to as "property" in this ruling) "are currently primarily used for rentals for camping and outdoor festivals/concerts." Docket 47 at 3.

In further briefing this motion, the debtor has sought to reconcile the lack of farming operation activities in its prior statements about the business activities conducted at the property. The debtor contends that it has been engaging in a farming operation. Purportedly, Mr. Major did not mention it in his declaration submitted with the state court because he did not draft that declaration - his attorney drafted it, as if Mr. Major never reviewed the declaration he signed and submitted with the state court. Also, Mr. Major purportedly always understood that everyone knew of the farming operation the

debtor was conducting on the property.

Allegedly, the debtor's farming operation activities have consisted of selling firewood, raising and selling vegetables, selling eggs, and selling farm equipment. To support this, the debtor has submitted its 2012 and 2013 tax returns, pointing out that the debtor generated income from farming operation activities during those years.

The court is unconvinced that the debtor's farming activities rise to the level of a farming operation for purposes of 11 U.S.C. § 101(18)(B). For instance, the debtor's 2013 tax return indicates that the farming activity conducted by the debtor was the sale of firewood. However, the debtor's profit and loss statement indicates that the debtor sold only $3,500 of firewood in 2013. The total gross farm income reported for that year was $9,845. The remaining $6,345 came from "federal and state gasoline or fuel tax credit." Docket 51, Ex. B. Mr. Major ignores this and cites to the entire $9,845 income coming from "the farming operation." Docket 51 at 3.

Similarly, the debtor's 2014 financial reports indicate that the debtor has sold only $6,250 in firewood thus far this year; $1,300 in the January report, $2,300 in the February report, $500 in the March report, and $2,150 in the April report. Docket 51, Ex. D.

More, Schedule B does not list any farming equipment or implements. Docket 15, Schedule B, item 33. It lists only $550 in tools, including various hand tools valued at $200, a weed eater valued at $50, and a chain saw valued at $300.

The farming or other equipment seen in the photographs attached to Mr. Major's declaration (Docket 51) does not match the property disclosed by the debtor in Schedule B. For instance, Exhibit E to Mr. Major's declaration contains a photograph where a tractor can be seen. Docket 51, Ex. E. There are no tractors listed as assets in Schedule B. Docket 15, Schedule B, items 29, 33, 35.

The court is not convinced that the debtor's firewood activities are sufficiently substantial to rise to the level of a farming operation within the meaning of 11 U.S.C. § 101(18)(B).

Next, Schedule B also lists chickens with a value of $300, planted vegetable crop with a value of "unknown" and timber with a value of "unknown".

The raising and sale of vegetables is quite a minor activity by the debtor. The debtor has never described the extent of its raising and sale of vegetables. For instance, there is no information in the record about what crop the debtor plants, harvests and sells, or how much land has been utilized for the planting of vegetables. The activity is not even listed in the debtor's 2012 and 2013 tax returns. The only farming activity listed in the tax returns is "firewood".

Mr. Major has also admitted that the debtor has sold no vegetables yet this year "because they are not yet ripe." Docket 51 at 4, Ex. D. This makes little sense because the debtor should have been selling its summer vegetable crop by now. We are already well into September 2014. The planting of vegetables starts as early as March, with sales anticipated as early as May or June.

The foregoing applies also to the debtor's sale of eggs. The debtor has not

described the extent of that activity, it is not listed in the debtor's 2012 and 2013 tax returns, and it is not listed in the debtor's monthly financial reports for 2014 (Docket 51, Ex. D). With $300 in chickens - of which the court has no information how many are able to lay eggs - the court is not convinced that the debtor's egg selling activity constitutes a farming operation within the meaning of 11 U.S.C. § 101(18)(B).

Further, the debtor's reference to a logging activity is inconsistent with the debtor's other evidence in the record and is unsupported by the record. Docket 51 ¶ 6. For instance, in his latest declaration, Mr. Major says that "timber and logging is the focal operation" of the debtor. Docket 51 ¶ 6.

However, the debtor has done no logging of timber. Neither the debtor's tax returns, nor monthly financial reports for 2014 reflect logging activity by the debtor. Docket 51, Exs. B, C, D. Schedules B and G list no contracts with anyone about the logging of timber on the debtor's property. Schedule G lists only two agreements for the lease of two parcels, a five-acre parcel and a 10-acre parcel. Schedule B lists no timber logging equipment owned by the debtor.

And, in the declaration of Wayne Helm, submitted by the debtor, Mr. Helm says that in 2012 he advised the debtor to wait "at least a couple of years" before starting to harvest and/or log the timber. Docket 50 at 1-2.

From the above, it is clear that the debtor was not engaged in any harvesting or logging activities on the petition date. Clearing the tan oak and brush around the timber and selling it as firewood does not amount to harvesting or logging. The fact that the debtor may be anticipating harvesting or logging timber at some point in the future is not helpful or relevant to establishing eligibility for chapter 12 relief because eligibility is determined as of the petition date.

Although Schedule B lists timber as crop on the property, the fact that the value assigned to the timber is "unknown" by the debtor is consistent with the debtor never having harvested or logged that timber. Docket 15, Schedule B, item 32. If the debtor had done harvesting or logging of the timber prior to the petition date, the debtor would have been at the least familiar with the value of the timber available as of the petition date.

Lastly, the court has seen no evidence of the debtor being involved in the business of selling farm equipment on regular bases. While the debtor may have sold farmg equipment at individual points of time in the past, the court has no probative evidence that the debtor is involved in a regular and ongoing activity of selling farming equipment and generating revenue from such activity.

In conclusion, upon examining the totality of the circumstances pertaining to the debtor's business activities, the debtor's farming activities are de minimis at best and do not rise to the level of a "farming operation" within the meaning of 11 U.S.C. § 101(18)(B). The debtor is conducting other activities on the property that are far removed from a farming operation, including renting the property for concert venues, for camping, and to unspecified vendors. See Docket 51, Ex. D. The debtor also has not shown that its business activities are susceptible to the inherent risks of farming, such as drought and other difficult to predict or control circumstances. It appears to the court that the debtor is clearing trees in aid of these nonfarming operations and selling those trees for firewood. This activity is incidental to nonfarming operations.

Therefore, the debtor is ineligible for chapter 12 relief and this is cause for the granting of relief from stay.

The motion will be granted pursuant to 11 U.S.C. § 362(d)(1) to permit the movant to conduct a nonjudicial foreclosure sale and to obtain possession of the subject property following sale. No other relief is awarded.

To the extent applicable, the court determines that this bankruptcy proceeding has been finalized for purposes of Cal. Civil Code § 2923.5 and the enforcement of the note and deed of trust described in the motion against the subject real property. Further, upon entry of the order granting relief from the automatic stay, the movant and its successors, assigns, principals, and agents shall comply with Cal. Civil Code § 2923.52 et seq., the California Foreclosure Prevention Act, to the extent it is otherwise applicable.

As the court does not have admissible evidence of value for the two properties from the movant, the court awards no fees and costs in connection with the movant's secured claim as a result of the filing and prosecution of this motion. 11 U.S.C. § 506(b).

The 14-day stay of Fed. R. Bankr. P. 4001(a)(3) will be waived.

10. 14-22884-A-11 RAYMOND/ROSA KING — MOTION TO CONFIRM PLAN AND APPROVE DISCLOSURE STATEMENT 6-24-14 [40]
CAH-3

Tentative Ruling: The motion will be conditionally granted.

The debtors are seeking an approval of their disclosure statement filed on June 24, 2014. Docket 41. The debtors are not a small business debtor within the meaning of 11 U.S.C. § 101(51D).

Nationstar Mortgage, the first mortgage holder on the debtors' rental real property, objects to confirmation of the debtors' proposed plan, arguing that the debtors have not stated whether they will be paying the property taxes and insurance on the real property securing Nationstar's claim, the plan violates the absolute priority rule, and the debtors have not met their burden of persuasion on establishing the value of the collateral property. Docket 52.

The disclosure statement states that the debtors will be paying the property taxes and insurance on the collateral property. Docket 41 at 31.

The motion will be conditionally granted and the disclosure statement will be approved, subject to the debtors making the following changes: the debtors shall amend the disclosure statement to include the newly proposed treatment of Nationstar Mortgage's class 3 claim, *i.e.*, continuing to pay Nationstar pursuant to the existing mortgage agreement. See Docket 72.

The new treatment of Nationstar's claim resolves the need for a valuation of the collateral property and resolves the absolute priority rule issue, at least with respect to Nationstar.

11. 14-22790-A-13 AMANDA SHRINER — MOTION FOR ENTRY OF DEFAULT JUDGMENT
14-2177 SNM-2 — 8-1-14 [12]
GALLOWAY V. SHRINER

Tentative Ruling: The motion will be denied.

The plaintiff, Eileen Galloway, as trustee of the Cabral Survivor's Trust, seeks the entry of a default judgment against the defendant, Amanda Shriner, who is the debtor in the underlying - now dismissed - chapter 13 case, pursuant to the plaintiff's claims under 11 U.S.C. § 523(a)(2)(A) and (a)(2)(B).

The defendant opposes the motion, pointing out that the underlying chapter 13 case was dismissed on July 29, 2014.

To establish standing, a plaintiff must meet both constitutional and prudential requirements. Under the case or controversy requirements of Article III of the United States Constitution, a plaintiff (1) must have suffered some actual or threatened injury due to alleged illegal conduct, known as the "injury in fact element;" (2) the injury must be fairly traceable to the challenged action, known as the "causation element;" and (3) there must be a substantial likelihood that the relief requested will redress or prevent plaintiff's injury, known as the "redressability element." U.S.C.A. Const. Art. 3, § 1 et seq.; Allen v. Wright, 468 U.S. 737, 751 (1984).

The plaintiff cannot satisfy the injury in fact element of the case or controversy requirements of Article III of the United States Constitution because the underlying chapter 13 case has been dismissed and the court will not be entering a discharge of the defendant's debts, including the debt owed to the plaintiff. The fact that the defendant may file another bankruptcy case some time in the future is purely speculative at this time. And, the court is not prepared to adjudicate this adversary proceeding in an advisory fashion.

"'[I]t is quite clear that "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions."' Flast v. Cohen, 392 U.S. at 96 . . . (citing c. Wright, Federal Courts 34 (1963)). The doctrine of justiciability is a blend of constitutional and policy or prudential considerations. Id. at 97. . . ."

Krasnoff v. Marshack (In re General Carriers Corp.), 258 B.R. 181, 190 (B.A.P. 9th Cir. 2001).

Accordingly, this motion will be denied and the adversary proceeding will be dismissed as moot.

12. 14-25893-A-11 ZOYA KOSOVSKA — MOTION FOR RELIEF FROM AUTOMATIC STAY
DJD-1 — 8-23-14 [50]
SETERUS, INC. VS.

Tentative Ruling: The motion will be dismissed as moot.

The movant, Sterus, Inc., seeks relief from stay as to a real property in Rocklin, California.

The motion will be dismissed as moot because the court will be dismissing this case, as reflected by the ruling on the United States Trustee's motion, DCN UST-1, also being heard on this calendar. See 11 U.S.C. § 362(c)(2)(B). This motion is not seeking nunc pro tunc or § 362(d)(4) relief.

13. 14-25893-A-11 ZOYA KOSOVSKA
UST-1

MOTION TO
CONVERT OR DISMISS CASE
8-21-14 [45]

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

The hearing on this motion was continued from September 2, 2014. The debtor was given the opportunity to file a written opposition to the motion and she did file such opposition on September 2, 2014. An amended ruling from September 2 follow below.

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 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).

The debtor's contention that the prior cases are irrelevant is rejected. The court does not believe the debtor's contention that "she has been separated from her husband for the last several years." Only as of October 10, 2012, less than two years ago, when the debtor filed Case No. 12-38060-A-13, the debtor listed her husband on Schedule I in that case as receiving and contributing to the household $2,000 in monthly Social Security income. Docket 60 at 2; Case No. 12-38060-A-13, Docket 17 at 17.

In other words, even if the debtor is separated from her husband now, she was not separated from him when he filed Case No. 11-22693-B-13 on February 2, 2011 and Case No. 12-31189-C-7 on June 13, 2012. Although the debtor's husband did not file a Schedule I in Case No. 11-22693-B-13, the earlier-filed of the cases, the court has confirmed that the debtor was listed on Schedule I of Case No. 12-31189-C-7 as part of her husband's household. Case No. 12-31189-C-7, Docket 35.

The court also does not have admissible evidence from the debtor that she has been separated from her husband. The debtor's opposition to the motion is unsupported by a declaration or affidavit establishing its factual assertions. Docket 60.

More, the debtor's two prior bankruptcy cases, which were both reorganization bankruptcies, were dismissed because of the debtor's failure to prosecute those cases. Case No. 13-32562-A-13 was dismissed because the debtor failed to: provide the trustee with the most recent tax return, amend the Statement of Financial Affairs, and obtain plan confirmation of an amended plan. Case No. 13-32562-A-13, Docket 55.

Case No. 12-38060-A-13 was dismissed because the debtor failed to: provide the trustee with schedules and statements, file and serve a chapter 13 plan, and file and serve a motion to confirm that plan. Case No. 12-38060-A-13, Dockets 16 & 23.

The debtor's filing of and failure to prosecute the two prior chapter 13 cases, along with her husband's filing of and failure to prosecute two other bankruptcies while the debtor was still not separated from her husband, is cause for conversion or dismissal under 11 U.S.C. § 1112(b)(1).

Further, the court agrees 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.

The debtor's contention that she will be able to fund a chapter 11 plan are rejected because she plans to "restart a family run daycare business again." Docket 60 at 3.

Chapter 11 is not for the debtor to reorganize by starting a business. This is especially true when the business was one the debtor operated unsuccessfully and closed down prior to the petition filing. According to the Schedule I filed by the debtor in Case No. 12-38060-A-13, the debtor closed the daycare business sometime before that case was filed. Case No. 12-38060-A-13, Docket 17 at 17. The Schedule I in that case indicates that the debtor "was a daycare provider." Id.

The debtor then closed her daycare business prior to filing her first chapter 13 case, Case No. 12-38060-A-13, on October 10, 2012. Aside from the $866 in Social Security income the debtor disclosed in Case No. 13-32562-A-13 and the instant case, the debtor has disclosed no other income in any of her three bankruptcy cases. See also Case No. 13-32562-A-13, Docket 12 at 11.

From this, the court infers that the debtor did not intend to reorganize when she filed her two prior chapter 13 cases. Given the multiple reorganization bankruptcies file by the debtor, the court also infers that she did not have the intention to restart her daycare business to fund the plans in the prior chapter 13 cases.

This court then cannot conclude that the debtor has the intention to restart her daycare business to fund a chapter 11 plan in this case. She has had two prior reorganization bankruptcies and has done nothing to restart the business to fund the plans in those prior cases.

In addition, even if the debtor does have the intention to restart her daycare business, the court has no admissible evidence about the likelihood of success of that business, given that the debtor had to close down the business. The court has no evidence about why the debtor closed the daycare business. The fact that the business was closed down years ago, that the debtor did not restart the business to reorganize in the prior bankruptcies, and the lack of any probative evidence of the likelihood of success of the daycare business, leads the court to conclude that there is no reasonable likelihood of plan confirmation in this case.

The foregoing presents multiple causes for conversion or dismissal under 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.