IT IS SO ORDERED.

Dated: 11:39 AM June 11 2010

MARILYN SHEA-STONUM
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE:	)	CASE NO. 09-52964
	)	
Terry R. Pelton and Susan M. Pelton,	)	CHAPTER 7
	)	
DEBTORS.	)	
	)	
Michael Malek, *et al.*,	)	ADVERSARY NO. 10-5002
	)	
PLAINTIFFS,	)	JUDGE MARILYN SHEA-STONUM
	)	
vs.	)	
	)	**ORDER DENYING**
Terry R. Pelton,	)	**DEFENDANT'S MOTION TO**
	)	**DISMISS, IN PART, AND**
DEFENDANT.	)	**GRANTING MOTION TO DISMISS, IN PART**

This matter is before the Court on the Motion of Terry R. Pelton ("Debtor" or "Defendant") to Dismiss the Complaint of Michael and Cheryl Malek ("Plaintiffs") and the Plaintiffs' Response. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I), (J) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

Background

On July 3, 2009, the Debtor and Susan M. Pelton filed a voluntary petition for relief under chapter 7 of the Bankruptcy Code. The last day to file a complaint to determine dischargeability of certain debts was set as October 30, 2009. On October 30, 2009, in the main case, the Plaintiffs filed a complaint to determine dischargeability of a debt and to deny the Debtor a discharge (docket #25) (the "Complaint"). The Complaint was signed by Rodd Sanders, as counsel for the Plaintiffs. The Court sent the Plaintiffs a Notice of Filing Deficiency instructing the Plaintiffs to open an adversary proceeding and re-file the complaint (docket #27). On January 4, 2010, Plaintiffs did open an adversary proceeding and re-file the Complaint (docket # 32).

The Plaintiffs make the following allegations in their Complaint:

The Plaintiffs were the owners of real property in Marblehead, Ohio and they entered into a contract with Brentwood Lakes LLC to construct a residence for the Plaintiffs on that real estate in Marblehead (the "Project"). The Defendant was an officer, shareholder and/or controlling owner or controlling member of Brentwood Lakes, LLC, Pelton Design and Construction Co., and Pelton Design, and other unidentified construction related companies (collectively, the "Pelton Entities"). The Defendant was actively involved in the day-to-day operations and activities of the Pelton Entities.

In addition, the Plaintiffs allege that at the time that they executed the agreement with Brentwood Lakes LLC, the Plaintiffs provided Brentwood and/or Defendant with a down payment in the amount of $20,000.00 for the Project that Defendant falsely represented would be applied toward the cost of obtaining labor and materials for the Project. During the course

of the Project, the Defendant and the Pelton Entities approached the Plaintiffs and requested progress payments from them that were to be disbursed from the Plaintiffs' construction loan (the "Pay Requests").

On or about August 26, 2008; September 19, 2008; September 30, 2008; October 20, 2008; and November 14, 2008; Defendant, the Pelton Entities and/or another person acting under Defendant's direction and/or control, and with his knowledge and approval, submitted Pay Requests and obtained disbursements from the Plaintiffs, through their construction lender, that totaled $117,026.16.

As part of each Pay Request, Defendant, the Pelton Entities, and/or another person acting under Defendant's direction and/or control, and with his knowledge and approval, submitted a Requisition for Payment and a sworn Affidavit of Original Contractor. In each Affidavit of Original Contractor, Defendant, his agents and/or representatives, falsely represented and falsely stated under oath that the Pelton Entities had "paid in full for all work and materials, machinery or fuel furnished * * * and all subcontractors, materialmen and laborers in connection with the making of any improvements to the Premises."

On at least one occasion, the Defendant and/or one of his agents, employees and/or representatives, while acting with his approval, knowledge and encouragement, forged Michael Malek's signature on a Requisition for Payment that Defendant subsequently submitted to the Plaintiffs' lender. As a result, an unauthorized disbursement from the Plaintiffs' lender in the sum of $11,812.60 was made based upon the forged authorization on the Requisition for Payment. Exhibit F to the Complaint is allegedly a copy of that forged Requisition for Payment.

In addition, the Plaintiffs also allege that the Defendant represented and assured the Plaintiffs that all monies that they paid to Defendant and/or the Pelton Entities on the Project were applied and/or would be applied solely to labor and materials that would be and/or were provided on the Project; that no such monies or funds would be and/or were diverted outside the Project; that any monies that the Plaintiffs paid in advance for uncompleted work would be and/or were set aside and segregated into an account that would be solely used for the purposes of the Project; and that Defendant and/or the Pelton Entities would obtain lien waivers from all subcontractors and material suppliers and that Defendant and the Pelton Entities had obtained lien waivers from all subcontractors and material suppliers on the Project.

The statements of Defendant in the Affidavits of Original Contractor were material and were made with the intent to induce the Plaintiffs to provide their approval and consent to the disbursements requested in the Pay Requests. In reasonable reliance upon the representations of Defendant, the Plaintiffs authorized the disbursements requested in the Pay Requests and/or made payments directly to Defendant and/or the Pelton Entities.

After the foregoing disbursements were made to Defendants and/or the Pelton Entities, Plaintiffs discovered that payment had not been made to the subcontractors and/or material suppliers on the project as represented by Defendant and that his statements, assurances and representations were false. Exhibit G to the Complaint is a copy of a worksheet from Defendant and/or the Pelton Entities identifying the unpaid subcontractors and material suppliers on the Project. Thereafter, numerous subcontractors and material suppliers filed liens against the premises.

The Motion to Dismiss

The Debtor requests the Court dismiss the adversary due to Plaintiffs' failure to commence an adversary proceeding in a timely fashion, or, in the alternative, dismiss the Complaint due to Plaintiffs' failure to state a claim upon which relief can be granted and to plead with sufficient particularity.

Timeliness

Debtor argues that Plaintiffs failed to timely "commence" an adversary proceeding, and, therefore, Plaintiffs' Complaint should be dismissed as untimely. Fed. R. Bankr. P. 7003-Commencement of Adversary Proceeding, which incorporates Fed. R. Civ. P. 3, provides, "[a] civil action is commenced by filing a complaint with the court." In addition, Fed. R. Bankr. P. 4007 provides, in pertinent part, that "a complaint to determine the dischargeability of a debt under § 523(c) shall be filed no later than 60 days after the first date set for the meeting of creditors under § 341(a)." A complaint is filed with the court when it is delivered to the clerk of the appropriate court. *New Boston Dev. Co. v. Toler (In re Toler)*, 999 F.2d 140, 142 (6th Cir. 1993) (finding a nondischargeability complaint to be timely filed, despite procedural defect of failing to file summons simultaneously). "Mistakes or errors can be corrected after the document is filed." *In re Toler*, 999 F.2d at 142.

On October 30, 2009, the Plaintiffs filed their Complaint, and an adversary proceeding cover sheet, with the Court electronically in the Debtor's bankruptcy case. *See* docket #25. Therefore, the Plaintiffs' filing was timely. Their mistake was a technical one: electronically filing the Complaint as a pleading in the Debtor's main bankruptcy case, rather than electronically opening an adversary proceeding and filing the Complaint in the adversary

proceeding. Notwithstanding their failure to "open an adversary proceeding," the Plaintiffs complied with Fed. R. Bankr. P. 4007 by filing the Complaint with the Court, and they did so in a timely fashion.

Furthermore, rules governing form of pleading should be liberally construed, and motions to dismiss complaints based on pleading errors are to be disfavored. *In re Little*, 220 B.R. 13 (Bankr. D. N.J. 1998). In the *Little* case, an objection to discharge, rather than a complaint, was filed prior to the deadline set by the bankruptcy rules. The debtor argued that the objection was not a complaint and thus, no complaint was filed before the expiration of the deadline. The *Little* court found that a judgment creditors' objection, filed before the expiration of the deadline to file a complaint objecting to discharge, was sufficient to constitute a complaint. *Id.* at 19. Therefore, the court held that although defective in form, the objection was timely filed and could be amended, and such amendments were deemed to relate back to the date of the initial filing. *Id*. at 19-20.

In this case, the Plaintiffs' timely filed their Complaint, albeit in the main case. On the date it was filed, October 30, 2009, the Complaint was served electronically on Debtor's counsel. The Plaintiffs remedied the procedural defect - failing to open an adversary proceeding- by opening an adversary proceeding on January 4, 2010 and re-filing the Complaint. The Complaint was timely filed and the correction of the procedural defect relates back to the date the Complaint was filed in the main case.

Failure to State a Claim

The Plaintiffs' Complaint seeks a determination of the dischargeability of the "Debtor's obligation and/or debt to Plaintiffs" pursuant to 11 U.S.C. § 523(a)(2), (4) and (6).

See Complaint, Counts I, II and III. In addition, Plaintiffs seek the denial of the Debtor's discharge pursuant to 11 U.S.C. § 727(a)(2), (4) and (5) in Count IV of the Complaint. The Defendant, without reference to any particular count of the Complaint, argues that the Complaint in its entirety should be dismissed because, it

> rests on the assumption that Terry Pelton is personally liable for the actions and/or inactions of Brentwood Properties, LLC and/or that Terry Pelton himself received disbursements from Plaintiffs' construction loan. However, the exhibits attached to Plaintiffs' complaint are in stark contrast to these assertions. Upon review of the exhibits it is clear that all funds were made to Brentwood Properties, LLC and all of the affidavits submitted with the requests were not signed by Terry Pelton.
>
> Furthermore, Brentwood Properties, LLC is not a party to this action. Plaintiffs specifically states that their contract for construction was with this entity. Plaintiffs cannot rely on an unsupported legal conclusion that Terry Pelton is personally liable for the claims Plaintiffs may have against Brentwood Properties, LLC. Especially considering that Plaintiff did not include the entity in this lawsuit.
>
> ...
>
> Plaintiff's complaint and accompanying exhibits have nothing but conclusory statements indicating that Terry Pelton is liable to Plaintiff. There is no reference in Plaintiff's Complaint to any specific time, place, or misrepresentation made to Plaintiffs by Terry Pelton. Plaintiffs merely presume fraud against Terry Pelton on alleged action and/ or inaction of other persons or entities who are not party to this action.

Debtor argues that Plaintiffs' Complaint fails to state a claim for relief against Terry Pelton and should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), as incorporated by Fed. R. Bankr. P. 7012. To withstand 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 factual 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.

Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d. 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). This standard does not require "detailed factual allegations," but does require more than "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Hensley Mfg. v. ProPride, Inc.*, 579 F.3d 603, 609 (6th Cir. 2009) (quoting *Twombly*, 550 U.S. at 555). When considering whether to grant a motion to dismiss for failure to state a claim, a court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazelle v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (citing *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976)). Although the Court must accept all well-pleaded factual allegations in the complaint as true, the Court is not required to "accept as true a legal conclusion couched as a factual allegation." *Hensley Mfg.*, 579 F.3d at 609 (quoting *Twombly*, 550 U.S. at 555). The Defendant, as movant, has the burden of showing that no claim has been stated. *See Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006).

In addition, Debtor argues in his motion to dismiss that the Complaint fails to plead fraud with the particularity required by Fed. R. Civ. P. 9(b) as incorporated by Fed. R. Bankr. P. 7009. Fed. R. Civ. P. 9(b) provides, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." To satisfy Rule 9(b), "a plaintiff must at a minimum allege the time, place and contents of the misrepresentation(s) upon which he relied." *Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984). Rule 9(b) does not require the pleading of detailed evidentiary matter." *In re*

Lionel Corporation, 41 B.R. 804, 805 (Bankr. D. N.Y. 1984). It remains for "[t]he party seeking an exception from discharge in bankruptcy under § 523(a)(2) [who] has the burden of proof on the issue by clear and convincing evidence," *Knoxville Teachers Credit Union v. Parkey*, 3 Bankr.L.Rep. (CCH) ¶ 71,126 at 88,972 (6th Cir.1986); *Martin v. Bank of Germantown (In re Martin)*, 761 F.2d 1163, 1165 (6th Cir.1985), to prove the case at trial, not at the pleading stage. *In re Schwartzman*, 63 B.R. 348, 356 (Bankr. S.D. Ohio 1986).

> "[T]he who, what, when, and where aspects of the fraud need not be related with exact details in the complaint as a journalist would hope to relate them to general public." *Zamora v. Jacobs (In re Jacobs)*, 403 B.R. 565, 573 (Bankr.N.D.Ill.2009). That is, it is only necessary to set forth a basic outline of fraud in order to alert the defendant of the purported fraud he is defending against. *Barr*, 207 B.R. at 173 (*citing Vicom Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 777 (7th Cir.1994)). "Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally." Fed.R.Civ.P. 9(b). Moreover, a plaintiff is not required to plead facts as to which they lack access prior to discovery. *Barr*, 207 B.R. at 172-73 (citing *Katz v. Household Inter., Inc.*, 91 F.3d 1036, 1040 (7th Cir.1996)).

In re Carmell, 424 B.R. 401, 412 (Bankr. N.D. Ill. 2010).

Count I

Section 523(a) provides, in pertinent part, that a discharge does not discharge a debtor from a debt

> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by-- (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

In the Sixth Circuit, creditors seeking to except a debt from discharge under § 523(a)(2)(A) must prove that:

[1] the debtor obtained money through a material misrepresentation that,

> at the time, the debtor knew was false or made with gross recklessness as to is truth;
> [2] the debtor intended to deceive the creditor;
> [3] the creditor justifiably relied on the false representation; and
> [4] its reliance was the proximate cause of the loss.

Field v Mans, 516 U.S. 59, 116 S.Ct. 437, 439 (1995); *Longo v. McClaren (In re McLaren*), 3 F.3d 958, 961 (6th Cir. 1993); *Rembert v. AT&T Universal Card Servs., Inc. (In re Rembert)*, 141 F.3d 277, 280-81 (6th Cir. 1998). The Complaint sets forth sufficient allegations to withstand the motion to dismiss with respect to Count I. The Complaint contains sufficiently detailed allegations concerning the Pay Requests and the [mis]use of funds received from the Plaintiffs' construction lender to provide notice of a plausible claim under § 523(a)(2).

Count II

Section 523(a)(4) provides, in pertinent part, that a discharge does not discharge a debtor from a debt, "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;"

In this Circuit,

> A debt is non-dischargeable as the result of defalcation when a preponderance of the evidence establishes: (1) a pre-existing fiduciary relationship, (2) a breach of that relationship, and (3) resulting loss. *Bd. of Trustees v. Bucci (In re Bucci)*, 493 F.3d 635, 642 (6th Cir.2007). In *Davis*, the Supreme Court instructed that the term "fiduciary capacity" is narrower here than it is in some other contexts: section 523(a)(4) covers only "express" or "technical trusts" and not trusts arising out of "the very act of wrongdoing." 293 U.S. at 333, 55 S.Ct. 151. These "constructive trusts," which arise ex maleficio (at the time the wrong is done), do not satisfy the "fiduciary capacity" requirement because the debtor was not "a trustee before the wrong." *Id.*
>
> Establishing an "express" trust is straightforward. The creditor must demonstrate: "(1) an intent to create a trust; (2) a trustee; (3) a trust res; and

> (4) a definite beneficiary." *In re Blaszak*, 397 F.3d at 391-92. But Shamrock does not allege an express trust and instead claims the existence of a "technical trust" flowing from duties imposed on Patel by the Michigan Builders Trust Fund Act. *See* Mich. Comp. Laws § 570.151. In *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, this Court held that the MBTFA satisfied the necessary "requirement that the trust exist separate from the act of wrongdoing" as a matter of federal law, and thus MBTFA "contractors" are fiduciaries to their subcontractors under § 523(a)(4). 691 F.2d 249, 251-52 (6th Cir.1982). *But see In re Marchiando*, 13 F.3d 1111 (7th Cir.1994) (holding that Illinois lottery law did not create sufficient "fiduciary relationship" despite professing to create a trust).

Patel v Shamrock Flooring Services, Inc. (In re Patel), 565 F.3d 963 (6th Cir. 2009). The Complaint does not allege the existence of a fiduciary relationship. Therefore, the second count is insufficient as a matter of law with respect to fraud or defalcation while acting in a fiduciary capacity.

"Embezzlement," however, for the purposes of § 523(a)(4), is the fraudulent appropriation of property of another by a person to whom such property has been entrusted or into whose hands it has lawfully come. Thus, to have a debt held nondischargeable as a debt for embezzlement under § 523(a)(4), it must be shown that there was an appropriation with fraudulent intent of property of another by a person who lawfully acquired the property or was entrusted with the property. Embezzlement differs from larceny in that in cases of embezzlement the original taking of the property was lawful or with the consent of owner, while, with larceny, there is the requirement that a felonious intent exist at the time of the taking. *E.g., In re Bustamante*, 239 B.R. 770 (Bankr. N.D. Ohio 1999).

The allegations of the Plaintiffs are that the Defendant forged the signature of one of the Plaintiffs, or directed the signing of a false affidavit that subcontractors had been paid and obtained construction disbursements from Plaintiffs as a result. Ultimately, numerous

subcontractors and material suppliers were not paid, despite disbursement of money from the Plaintiffs' construction lender for payment of those subcontractors and suppliers and representations by Defendant that the money would be used for the purpose of making those payments. Count II of the Complaint with respect to Embezzlement under § 523(a)(4) is sufficient to withstand the Defendant's motion to dismiss.

Count III

Section 523(a)(6) provides, in pertinent part, that a discharge does not discharge a debtor from a debt, "for willful and malicious injury by the debtor to another entity or to the property of another entity." In order for a debt to be found nondischargeable under § 523(a)(6), a Plaintiffs must prove three elements: (1) that the Debtor intended to cause and caused an injury; (2) that the Debtor's actions were willful; and (3) that the Debtor's actions were malicious. 11 U.S.C. § 523(a)(6). As the plain language of the statute suggests, the alleged injury must be both willful and malicious for the debt to be nondischargeable. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 (6th Cir.1999). With regard to the "willful" requirement, the Supreme Court has held that a debt is nondischargeable under § 523(a)(6) only if it results from an act "done with the actual intent to cause injury." *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998). The requisite intent to harm "exists when the defendant 'desires to cause consequences of his act, or ... believes that the consequences of his action are substantially certain to result from it.' " *Spring Works, Inc. v. Sarff (In re Sarff)*, 242 B.R. 620 (6th Cir. B.A.P. 2000) (quoting *In re Markowitz*, 190 F.3d at 464) (emphasis added).

In this context, "malicious means in conscious disregard of one's duties or without just

cause or excuse; it does not require ill-will or specific intent." *In re Trantham*, 304 B.R. at 308 (quoting *Wheeler v. Laudani*, 783 F.2d 610, 615 (6th Cir.1986)) (internal quotation marks omitted). For purposes of § 523(a)(6), "willful" means actual intent to cause injury, not merely the commission of an intentional act that leads to injury. *Kawaauhau v. Geiger*, 523 U.S. 57, 61, 118 S.Ct. 974, 140 L.Ed.2d 90 (1998). To satisfy the elements under § 523(a)(6), creditors must plead and prove that the debtor actually intended to harm them and not merely that the debtor acted intentionally and they were thus harmed. *Id.* at 61-62, 118 S.Ct. 974. In other words, the Debtor must have intended the harmful consequences of their acts. *Id.* Whether he did or did not is a question of fact which does not have to be answered on a motion to dismiss. To withstand a motion to dismiss a general allegation that the actions described in the complaint were done with the requisite malice and intent is sufficient. Fed. R. Civ. P. 9.

Count IV

Section 727 provides, in pertinent part,

> (a) The court shall grant the debtor a discharge, unless--
> ...
> (2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed--
> (A) property of the debtor, within one year before the date of the filing of the petition; or
> (B) property of the estate, after the date of the filing of the petition;
> ...
> (4) the debtor knowingly and fraudulently, in or in connection with the case--
> (A) made a false oath or account;

> (B) presented or used a false claim;
> (C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or
> (D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;
> (5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities.

11 U.S.C. § 727.

The Complaint does not allege any additional facts in support of Count IV nor does it identify which alleged facts support the denial of the debtor's discharge pursuant to § 727. However, the Plaintiffs have alleged facts, which if true, show that the Defendant accepted funds from the Plaintiffs' lender, but did not use them in the manner they should been used. Instead, Defendant failed to pay the subcontractors and material suppliers. If Defendant transferred that money with the intent of defrauding its creditors, a claim under § 727(a)(2) might be stated. Similarly, if the Debtor cannot account for the disposition of the funds, a claim might be stated under § 727(a)(5). Unfortunately, the complaint as currently drafted is more of a "shotgun" pleading, ie - "one that contains several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions." *See In re American Remanufacturers, Inc.*, 2007 WL 2376723, (Bankr. D. Del. Aug. 16, 2007). The result of such a complaint is that "in ruling on the sufficiency of a claim, the trial court must sift out the irrelevancies, a task that can be quite onerous." *Id.* As written count IV of the

Complaint does not appear to state a claim under § 727. However, in keeping with the policy of Rule 15 as incorporated by Federal Rule of Bankruptcy Procedure that amendment of pleadings to cure deficiencies should be allowed where justice so requires, the Court will treat the motion to dismiss as it relates to § 727 as a motion for a more definite statement. *See Huntington Nat'l Bank v. Schwartzman (In re Schwartzman*), 63 B.R. 348, 358 (Bankr. S.D. Ohio 1986). Nothing in the record suggests the Plaintiffs have made these allegations in bad faith and no undue prejudice will befall the Defendant if such an amendment is allowed. Therefore, the Court grants the Plaintiffs twenty-one (21) days from the date of this order to amend the complaint to state with particularity the specific facts satisfying the requirements of § 727.

Conclusion

As Debtor points out, in the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012, the court must view the allegations in the light most favorable to the nonmoving party. The court should only grant the motion to dismiss if those allegations, when construed in plaintiff's favor, do not entitle plaintiff to relief. In this case, Plaintiffs have made allegations which state a plausible claim for relief under § 523(a)(2), (a)(4) and (a)(6). Therefore, the motion to dismiss is denied with respect to Counts I, II, and III.

However, with respect to Count IV, the Plaintiff's have twenty-one (21) days from the date hereof to file an amended complaint stating with specificity the facts satisfying the requirements of § 727. Accordingly, the Court grants the Defendant's motion to dismiss with respect to Count IV unless the Plaintiffs file an amended complaint within twenty-one (21)

days.

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cc: (via electronic mail) Michelle DiBartolo

Rodd Sanders

(via U.S. mail) Terry R. Pelton