Dated: February 22 2022

John P. Gustafson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 21-30046
	)	
David L. Meddings and	)	Chapter 7
Michelle L. Meddings,	)	
	)	Adv. Pro. No. 21-03021
Debtors.	)	
	)	Judge John P. Gustafson
James Harrison,	)	
Plaintiff,	)	
v.	)	
	)	
David L. Meddings and	)	
Michelle L. Meddings,	)	
	)	
Defendants.		

MEMORANDUM OF DECISION AND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS ADVERSARY PROCEEDING

This adversary proceeding is before the court on Defendants David L. Meddings and Michelle L. Meddings' ("Defendants" or "Debtors") "Motion to Dismiss" ("Motion"). [Doc. #12]. Plaintiff James Harrison ("Plaintiff") filed a "Memorandum Contra to Motion Dismiss" ("Response"). [Doc. #15]. Defendants filed a "Memorandum in Support of Motion to Dismiss"

("Reply"). [Doc. #22].

For the reasons below, Defendants' Motion is granted in part and denied in part.

JURISDICTION AND VENUE

The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) as a civil proceeding arising in or related to a case under Title 11. The Chapter 7 case and all proceedings in it arising under Title 11, including this adversary proceeding, have been referred to this court for decision. 28 U.S.C. §157(a); General Order 2012-7 of the United States District Court for the Northern District of Ohio. This is a core matter under 28 U.S.C. §157(b)(2)(I) and (J). Venue is proper under 28 U.S.C. §1409(a).

BACKGROUND

According to Plaintiff's Complaint,[1] Defendants are husband and wife. [Doc. #1, ¶8]. In 2014, Plaintiff sold the assets of his business to Defendants and MMH, LLC, an entity owned by Defendants, through a seller-financed transaction. [*Id.*, ¶¶9-13, 16-17, 32]. This transaction appears to have included three instruments: a promissory note, a security agreement, and a sublease. [*Id.*, ¶¶10, 12, 16]. Defendants entered into this transaction for the purpose of opening a restaurant. [*Id.*, ¶32].

On October 6, 2014, Defendants and MMH, LLC executed a promissory note ("Note") with J & R BBQ, LLC as the payee. [*Id.*, ¶10]. On October 6, 2014, MMH, LLC executed a security agreement ("Security Agreement") with J & R BBQ, LLC. [*Id.*, ¶12]. On October 6, 2014, MMH, LLC and Defendants entered into a sublease with J & R, BBQ, LLC ("Sublease"). [*Id.*, ¶16]. Plaintiff is the successor-in-interest to J & R BBQ, LLC and entitled to enforce the Note, Security Agreement, and Sublease. [*Id.*, ¶¶11, 13, 17]. Defendants were not signatories to the Security Agreement, but were signatories to the Note and Sublease.

In the Security Agreement, MMH, LLC granted J & R BBQ, LLC a security interest in all

1/ This background constitutes a summary of the factual allegations drawn from Plaintiff's Complaint, construed in the light most favorable to Plaintiff, accepting all well-pleaded factual allegations as true, and drawing all reasonable inferences in the Plaintiff's favor. *Waskul v. Washtenaw Cnty. Cmty. Mental Health*, 979 F.3d 426, 440 (6th Cir. 2020). The court here makes no findings of fact, as resolving any factual disputes would be inappropriate at this stage in the litigation. Additionally, this court may consider "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice," such as the contents of its case docket and Debtors' schedules. *Ohio Pub. Emps. Ret. Sys. v. Fed. Home Loan Mortg. Corp.*, 830 F.3d 376, 383 (6th Cir. 2016)(quoting *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322, 127 S.Ct. 2499, 168 L.Ed.2d 179 (2007)); Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *Job v. Calder* (*In re Calder*), 907 F.2d 953, 955 n.2 (10th Cir. 1990); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (6th Cir. 1979)(stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it).

"business, inventory, equipment, and seating, including but not limited to, those items set forth on Exhibit 'A' attached hereto and incorporated herein" ("Collateral"). [Doc. #1-2, p. 1]. Exhibit A attached to the Security Agreement is an equipment inventory list, namely, the equipment of a restaurant. [*Id.*, pp. 9-11]. MMH, LLC granted J & R BBQ, LLC this security interest in the Collateral to secure payment under the Note. [*Id.*, p. 1]. In this Security Agreement, MMH, LLC also made certain warranties and representations, including that the Collateral will be at MMH, LLC's principal place of business. [*Id.*, pp. 1-2]. MMH, LLC further agreed, among other things, not to sell, lease, encumber, or dispose of the Collateral; to protect the Collateral; to promptly notify J & R BBQ, LLC of any change of MMH, LLC's place of business or place where records of the Collateral are kept; and any change of MMH, LLC's name. [*Id.*, pp. 2, 4-6]. Through Defendants, MMH, LLC defaulted on these obligations.[2] [Doc. #1, ¶¶14-15]. This included Defendants causing MMH, LLC to default by dispossessing itself of all the Collateral and Defendants retaining the proceeds of the sale. [*Id.*, ¶14].

The Complaint alleges that Defendants entered into the transaction with the intent to defraud Plaintiff, having no intention to repay, misrepresenting their experience, history, and aptitude, and with the intention, based on two previously filed Chapter 7 bankruptcies, that the obligations "could or would be discharged" by filing bankruptcy. [*Id.*, ¶24]. Plaintiff would not have entered into any transaction but for Defendants' material and willful representations and misrepresentations. [*Id.*, ¶25]. The Complaint also alleges the following:

> When Defendants made the representation that they would repay the sums under the [Note, Security Agreement, and/or Sublease], they knew that the representation was false as they had no intent to ever repay the indebtedness so they could reap the benefit of receiving the funds to open the restaurant with Plaintiff's money and then ultimately convey their interest or otherwise avoid liability on the [Note, Security Agreement, and/or Sublease]. In the alternative, Defendants made the repayment representations recklessly, as a positive assertion, and without knowledge of its truth.
>
> Defendants represented that they would repay the sums under the [Note, Security Agreement, and/or Sublease], plus interest, with the intent that Plaintiff act on the same and provide the funding for the [Note, Security Agreement, and/or Sublease].
>
> Plaintiff relied upon Defendants' representations. Absent the promises by

2/ Plaintiff's Complaint also alleges that Defendants caused MMH, LLC to default under Section "3(B)(11)" of the Security Agreement. [Doc. #1, ¶15]. This court does not see a Section "3(B)(11)" in the Security Agreement. [Doc. #1-2].

> the Defendants, Plaintiff would not have funded the purchase of the assets and sublease.
>
> As a direct and proximate result of Defendants' knowingly false representations, Plaintiff has incurred monetary injuries in excess of $140,000.00, plus interest, and attorneys' fees and expenses in excess of $30,000.00.

[*Id.*, ¶¶32-35].

The Complaint further alleges "Debtors willfully and maliciously caused injury and damage" to Plaintiff's Collateral and the real property under the Sublease. [*Id.*, ¶26].

On September 10, 2018, apparently after filing a complaint in state court against Defendants, and MMH, LLC and Brewview Properties, LLC (entities owned by Defendants) the Marion County, Court of Common Pleas ("State Court") granted Plaintiff a judgment against Brewview Properties, LLC and MMH, LLC in the amount of $140,544.76 ("Judgment"), but not against Defendants personally. [*Id.*, ¶¶18-19]. Defendants stated they own or have a legal or equitable interest in Brewview Properties, LLC and MMH, LLC in Official Form 106A/B, Schedule A/B: Property, Part 4, of their petition. [*Id.*, ¶18].

Before and after entry of the Judgment, the Complaint states that Defendants "engaged in a concerted and intentional campaign to avoid the debt they incurred in connection with the" obligations under the Note, Security Agreement, Sublease, and Judgment. [*Id.*, ¶20]. This included the following:

> Debtors transferred assets to themselves as insiders, concealed assets and information to which Plaintiff was entitled, stripped their entities of all assets with the purpose of defrauding a creditor, and engaged in bad-faith tactics in the course of the [State Court] litigation for purposes of delaying the cause.
>
> Debtors transferred assets from one business they owned, MMH, LLC to another they owned, Brewview [Properties], LLC, in an effort to avoid the [obligations under the Note, Security Agreement, and/or Sublease], including the security interest.
>
> Debtors failed to produce financial information notwithstanding their obligations to do so, in an intentional and willful effort to avoid the [obligations under the Note, Security Agreement, and/or Sublease].

[*Id.*, ¶¶21-23].

In July 2020, while litigation in State Court between Plaintiff and Defendants was pending, Defendants refinanced their residence. [*Id.*, ¶¶21, 28]. The Complaint alleges:

> Debtors have, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under Title 11 of the United States Code,

> transferred, removed, destroyed, mutilated, or concealed, or have permitted to be transferred, removed, destroyed, mutilated, or concealed property of the Debtors, within one year before the date of the filing of the petition.

[*Id.*, ¶27]. In connection with this allegation, the Complaint alleges Defendants refinanced about $205,781.00 in debt and liquidated over $119,000.00 in home equity to cash or cash equivalents.[3] [*Id.*, ¶28].

On January 13, 2021, Defendants filed a voluntary petition for relief under Chapter 7 of the Bankruptcy Code, eight days before certain matters were scheduled to go to a jury trial in State Court. [*Id.*, ¶6]. In Official Form 106A/B, Schedule A/B: Property, Part 4, Defendants listed a lawsuit against a third party, Marion Historical LLC, valued at $120,000.00. [Case No. 21-30046, Doc. #1, p. 15]. This lawsuit appears to have been for Marion Historical LLC's failure to meet certain contractual terms causing Defendants lost profits and investments. [*Id.*] The Complaint alleges Defendants reported less than $4,000.00 (presumably, this amount does not include the lawsuit against Marion Historical LLC) in liquid assets on the date of the petition in Form 106A/B, Schedule A/B: Property, Part 4. [Doc. #1, ¶29]. The Complaint alleges the following:

> Debtors have failed to otherwise account for all of their assets, have, with actual intent to hinder, delay, or default [sic] Plaintiff, transferred property and/or transferred property without a reasonable equivalent value in exchange and/or the Debtors knew or should have known that doing so would render them insolvent and unable to pay their debts as they became due.
>
> Despite the above, the Debtors' sworn Schedules and Statement of Financial Affairs filed with this Court fail to reflect Debtors' liquidated home equity, purchased assets under the [Note, Security Agreement, and/or Sublease], and other assets. Further, such Statement of Financial Affairs does not reflect any transfer or conveyance of their ownership interest the same [sic] to Debtors or to any other person, nor do they reflect the value of such ownership interest transferred or the value paid for the same. Additionally, Defendants' sworn Schedules and Statement of Financial Affairs filed do not show Debtors' income from their businesses.

[*Id.*, ¶¶30-31].

Plaintiff commenced this Adversary Proceeding by filing the Complaint requesting an

3/ The Complaint alleges that Defendants liquidated "over $119,000 in home equity to, on information and belief, cash or cash equivalents." Pleading based on "information and belief" in the Sixth Circuit is subject of some judicial debate. *Johnstone Supply of Detroit v. Rooks* (*In re Rooks*), 2017 WL 4404272, at *2 n.3, 2017 Bankr. LEXIS 3283, at *5 n.3 (Bankr. N.D. Ohio Sept. 28, 2017). "Two published circuit court decisions appear to be, at least, hostile to the concept of using 'information and belief' pleading to meet the *Iqbal/Twombly* standards to avoid dismissal." *Id.* "There are subsequent District Court decisions that have not dismissed complaints, even though some elements were pled based, at least in part, upon 'information and belief.'" *Id.*

order of nondischargeability under 11 U.S.C. §§523(a)(2)(A) and (a)(6), or denial of Defendants' discharge under 11 U.S.C. §727(a). [*Id.*]

On July 7, 2021, Defendants answered the Complaint and asserted separate affirmative defenses. [Doc. #8]. Defendants admit to the first four allegations, and deny the balance of the allegations in paragraphs five through thirty-five. [*Id.*, p. 1].

On September 16, 2021, Defendants filed their Motion. [Doc. #12]. Defendants' Motion asserts that this Adversary Proceeding should be dismissed. [*Id.*, p. 1]. The Motion asserts that the Complaint should be dismissed under Fed. R. Civ. P. 12(b)(6), but does not directly address the Complaint's allegations and claims for relief. Instead, Defendants' Motion argues that Plaintiff's Complaint fails to state claims upon which relief can be granted because Plaintiff is barred under two principles of preclusion, the *Rooker-Feldman* doctrine and res judicata. [*Id.*, pp. 2-5]. Defendants' Motion also asserts that Plaintiff lacks standing, and Plaintiff's act of filing the Complaint initiating this Adversary Proceeding is "against decent principles of equity" under 11 U.S.C. §105(a) and should be dismissed. [*Id.*, pp. 5-6].

On September 30, 2021, Plaintiff filed his Response arguing this court has exclusive jurisdiction to determine Plaintiff's claims and res judicata is inapplicable because the state court did not enter a final judgment. [Doc. #15, pp. 4-5]. Plaintiff's Response also argues that the obligations owed to him give him standing as a creditor under §§523(a)(2)(A) and (a)(6), and that the Defendants' act of refinancing their residence shortly before filing bankruptcy gives him standing to object to discharge under §727(a). [*Id.*, pp. 6-8]. Lastly, Plaintiff argues that equity does not demand dismissal because a bankruptcy court's equitable powers must be exercised within the confines of the Bankruptcy Code. [*Id.*, pp. 8-9].

On October 29, 2021, Defendants filed their Reply. [Doc. #22]. Defendants' Reply corrects certain factual assertions Plaintiff made in his Response.

LAW AND ANALYSIS

I. Legal Standards.

A. *Rooker-Feldman* and Res Judicata.

A motion brought by a defendant to dismiss an adversary proceeding is governed by Federal Rule of Civil Procedure 12(b), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b). Under Rule 12(b)(1), a defendant may move to dismiss for lack of subject-matter jurisdiction.

On June 10, 2021, Defendants filed an Answer to the Complaint. [Doc. #8].

On September 16, 2021, Defendants filed the Motion challenging this court's subject-matter jurisdiction. [Doc. #12]. A Rule 12(b) motion must be made before any responsive pleading is filed. Thus, Defendants' Motion under Rule 12(b)(1) was filed too late.

However, a party does not waive a defense based on subject-matter jurisdiction by failing to raise it by motion before filing a responsive pleading. Fed. R. Civ. P. 12(h)(1). The procedural basis for an examination of this court's subject-matter jurisdiction is its authority under Rule 12(h)(3), which authorizes the court to dismiss an action "at any time" for lack of subject-matter jurisdiction. *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 506, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006).

Challenges to subject-matter jurisdiction "come in two varieties: a facial attack or a factual attack." *Carrier Corp. v. Outokumpu Oyj*, 673 F.3d 430, 440 (6th Cir. 2012)(quoting *Gentek Bldg. Prods., Inc. v. Sherwin-Williams Co.*, 491 F.3d 320, 330 (6th Cir. 2007)). A "facial attack" on subject-matter jurisdiction "questions merely the sufficiency of the pleading," *Gentek Bldg. Prods., Inc.*, 491 F.3d at 330 (citing *Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990)), in which case all allegations in a complaint must be considered as true. *Id.*; *Abbott v. Michigan*, 474 F.3d 324, 328 (6th Cir. 2007)(citation omitted). A "factual attack," on the other hand, places the "factual basis for jurisdiction" at issue, "in which case the trial court must weigh the evidence and the plaintiff bears the burden of proving that jurisdiction exists." *Abbott*, 474 F.3d at 328 (citation omitted).

In this case, by asserting that this court lacks subject-matter jurisdiction under the *Rooker-Feldman* doctrine and res judicata,[4] Defendants' Motion is a "facial attack" on Plaintiff's jurisdictional claim.[5] *See, Reguli v. Guffee*, 371 F. App'x 590, 595 (6th Cir. 2010). Accordingly, a court is bound to consider the challenge to subject-matter jurisdiction as a preliminary matter,

4/ In *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984), the United States Supreme Court expressed its preference for usage of the terms "issue preclusion" and "claim preclusion" to refer to the preclusive effect of a judgment in foreclosing future litigation, rather than the more common terms of "collateral estoppel" and "res judicata."

5/ To the extent that Defendants present a "factual attack" on subject-matter jurisdiction, Defendants have not presented any competing facts, such as affidavits or other additional matter, raising a factual controversy that at least one of the Complaint's allegations is demonstrably untrue that would call into question this court's jurisdiction. *See, e.g., Mata v. Eclipse Aerospace, Inc.* (*In re AE Liquidation, Inc.*), 435 B.R. 894, 903 (Bankr. D. Del. 2010)(a "factual attack" on jurisdiction may include an event that occurred after the filing of the complaint that renders the case moot); *Ogilvie v. Nationstar Mortg. LLC* (*In re Ogilvie*), 533 B.R. 460, 465 (Bankr. M.D. Pa. 2015)("In a factual attack, the face of the pleadings satisfy the jurisdictional requirements. However, at least one of the allegations is demonstrably untrue, negating the court's jurisdiction.").

"since the Rule 12(b)(6) challenge becomes moot if this court lacks subject matter jurisdiction." *Moir v. Greater Cleveland Reg'l Transit Auth.*, 895 F.2d 266, 269 (6th Cir. 1990).

There are two preclusion doctrines relevant to Defendants' Motion. First, the "*Rooker-Feldman* doctrine provides that inferior federal courts lack jurisdiction to review the final judgments of state courts." *WLP Cap., Inc. v. Tolliver* (*In re Tolliver*), 2021 WL 6061853, at *9, 2021 Bankr. LEXIS 3463, at *24 (B.A.P. 6th Cir. Dec. 20, 2021)(quoting *Hutcherson v. Lauderdale Cnty., Tenn.*, 326 F.3d 747, 755 (6th Cir. 2003)). Second, principles of preclusion. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that should have been advanced in an earlier suit; and issue preclusion addresses when and how to apply a state court's factual findings from a prior judgment. *See, id.*; *Long v. Piercy* (*In re Piercy*), 21 F.4th 909, ___ (6th Cir. 2021). Although distinct, these doctrines work together to give full faith and credit to state-court judgments. *Tolliver*, 2021 WL 6061853, at *9, 2021 Bankr. LEXIS 3463, at *24.

Since the *Rooker-Feldman* doctrine strips federal courts of jurisdiction, it should be considered first. *Id.* Under the *Rooker-Feldman* doctrine, lower federal courts lack subject-matter jurisdiction to hear cases that require them to review or set aside a state court judgment. *Id.* 2021 WL 6061853, at *10, 2021 Bankr. LEXIS 3463, at **25-26 (citation omitted). The *Rooker-Feldman* doctrine, however, occupies narrow ground – it "does not prevent [federal courts] from deciding an independent claim," *id.* (quoting *Sill v. Sweeney* (*In re Sweeney*), 276 B.R. 186, 195 (B.A.P. 6th Cir. 2002)), and "provides no protection in areas where Congress has explicitly endowed federal courts with jurisdiction." *Id.* (quoting *Hamilton v. Herr* (*In re Hamilton*), 540 F.3d 367, 372 (6th Cir. 2008)). "Bankruptcy courts have exclusive jurisdiction to determine whether a debt is dischargeable under §523(a)(2), (4) and (6) of the Bankruptcy Code." *Id.* (quoting *Schafer v. Rapp* (*In re Rapp*), 375 B.R. 421, 430 (Bankr. S.D. Ohio 2007)).

Defendants' Motion asserts that the *Rooker-Feldman* doctrine compels dismissal because Plaintiff is advancing the same claims and arguments made in the State Court. However, whether a debt is dischargeable under §523(a)(2) or (6) is an independent claim, and bankruptcy courts have been given exclusive jurisdiction to determine this independent claim. Accordingly, the *Rooker-Feldman* doctrine does not warrant dismissal.

Defendants' claim preclusion argument suffers from the same defect by asserting Plaintiff's Complaint in this adversary proceeding is advancing the same claims made in the State

Court. Where there has been a final judgment on the merits, claim preclusion "prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding." *In re Piercy*, 21 F.4th 909 (6th Cir. 2021)(quoting *Brown v. Felsen*, 442 U.S. 127, 131, 99 S.Ct. 2205, 60 L.Ed.2d 767 (1979)). Issue preclusion, on the other hand, is a narrower doctrine, which "precludes relitigation of issues of fact or law actually litigated and decided in a prior action between the same parties and necessary to the judgment, even if decided as part of a different claim or cause of action." *Id.* (quoting *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 461 (6th Cir. 1999)). "The difference in these two doctrines is critical as applied to dischargeability proceedings in bankruptcy." *Id.*

"Whether a debt is nondischargeable under 11 U.S.C. §523(a) is a matter separate from the merits of the debt itself." *Id.* Bankruptcy courts have exclusive jurisdiction to determine whether the debt is dischargeable under §523(a)(2), (4), and (6). *Tolliver*, 2021 WL 6061853, at *10, 2021 Bankr. LEXIS 3463, at *26. Claim preclusion applies to the existence of a debt. Thus a "bankruptcy court may not review and redetermine the merits [(e.g., the existence and the amount)] of the debt," *id.*, but claim preclusion cannot apply to the "question of whether that debt is dischargeable in bankruptcy because dischargeability is a legal conclusion within the exclusive jurisdiction of the bankruptcy courts." *In re Piercy*, 21 F.4th 909. Since dischargeability is not a claim that could have been litigated in a state court, the affirmative defense of claim preclusion is unavailable. *Id.*

Lastly, Defendants argue that issue preclusion divests this court of subject-matter jurisdiction. This argument is misplaced. Issue preclusion is not a jurisdictional matter. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 293, 125 S.Ct. 1517, 161 L.Ed.2d 454 (2005)("Preclusion, of course, is not a jurisdictional matter."); *Commodities Exp. Co. v. City of Detroit*, 2010 WL 2633042, at *9 n.4, 2010 U.S. Dist. LEXIS 64097, at *28 n.4 (E.D. Mich. June 29, 2010)("Issue preclusion, unlike the *Rooker-Feldman* doctrine, is not a jurisdictional issue." (citing *Exxon Mobil Corp.*, 544 U.S. at 293)), *aff'd sub nom. Commodities Exp. Co. v. Detroit Int'l Bridge Co.*, 695 F.3d 518 (6th Cir. 2012).

However, as mentioned above, issue preclusion does apply to a determination of dischargeability. *In re Piercy*, 21 F.4th 909. "So, when the debt at issue is based on a state-court judgment, the bankruptcy court's ultimate dischargeability determination may be governed by

factual issues decided by the state court, provided that the requirements" for issue preclusion are met. *Id.* (citing *Spilman v. Harley*, 656 F.2d 224, 227-28 (6th Cir. 1981)). This court "must review the record of the state-court proceeding to determine if any factual issues relevant to dischargeability have been actually and necessarily determined by the state court. If not so determined, the bankruptcy court must independently make the necessary factual findings." *Id.* The court cannot do that here because Defendants' Motion did not attach "the record of the state-court proceeding to determine if any factual issues" have been actually and necessarily determined by the State Court.[6] Moreover, it appears that there was no final judgment as to the Defendant-Debtors. They filed this bankruptcy case before the trial on the Plaintiff's State Court complaint.

In sum, movant has not shown that this court lacks jurisdiction. The *Rooker-Feldman* doctrine and principles of preclusion do not warrant dismissal.

B. Rule 12(b)(6).

A motion brought by a defendant to dismiss an adversary proceeding is governed by Federal Rule of Civil Procedure 12(b), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7012(b). Defendants' Motion is brought under Rule 12(b)(6), for failure to state a claim upon which relief can be granted.

On June 10, 2021, Defendants filed an Answer to the Complaint. [Doc. #8].

On September 16, 2021, Defendants filed the Motion under Rule 12(b)(6). [Doc. #12]. A Rule 12(b) motion must be made before any responsive pleading is filed. Thus, Defendants' Motion under Rule 12(b)(6) was filed too late.

In the alternative, failure to state a claim upon which relief can be granted may also be raised by moving for judgment on the pleadings under Rule 12(c) or at trial. Fed. R. Civ. P. 12(h)(2). Since the only difference between Rule 12(c) and Rule 12(b)(6) is the timing of the motion to dismiss, the "manner of review under Rule 12(c) is the same as a review under Rule 12(b)(6)." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761 (6th Cir. 2006). *Accord Bates v. Green Farms Condo. Assoc.*, 958 F.3d 470, 480 (6th Cir. 2020). Accordingly, the court will treat Defendants' Motion as one for judgment on the pleadings brought under Rule 12(c). *See, Sun Fed.*

6/ Assuming that Defendants may invoke defensive issue preclusion, and that Plaintiff is bound by the findings made (or not made), *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 329, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979)(noting defensive issue preclusion occurs when a defendant seeks to prevent a plaintiff from litigating an issue that the plaintiff previously litigated and lost against another defendant), issue preclusion does not deprive this court of jurisdiction. *See e.g., In re Piercy*, 21 F.4th 909. The parties, however, should not assume that this means that this court may not determine at a later stage in this litigation that Plaintiff is indeed bound by findings made in State Court.

Credit Union v. Montague (*In re Montague*), 2021 WL 2816326, at *1, 2021 Bankr. LEXIS 1787, at *3 (Bankr. N.D. Ohio July 6, 2021)(Whipple, J.).

"For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Moderwell v. Cuyahoga Cnty.*, 997 F.3d 653, 659 (6th Cir. 2021)(citation omitted). "But we 'need not accept as true legal conclusions or unwarranted factual inferences.'" *Id.* (citation omitted). "A Rule 12(c) motion 'is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.'" *Id.* (citation omitted).

Plaintiff's Response attached exhibits for consideration by the court. The Sixth Circuit recently addressed the consideration of evidence outside the pleadings on a plaintiff's opposition to a Rule 12(c) motion:

> [I]t is black-letter law that, with a few irrelevant exceptions, a court evaluating a motion for judgment on the pleadings (or a motion to dismiss) must focus only on the allegations in the pleadings. *See Ross v. PennyMac Loan Servs. LLC*, 761 F. App'x 491, 494 (6th Cir. 2019); *Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 698 (6th Cir. 2018); *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 405 (6th Cir. 2012); 5B Charles A. Wright et al., *Federal Practice and Procedure* § 1357, at 375-76 (3d ed. 2004); 5C Charles A. Wright et al., *Federal Practice and Procedure* § 1368, at 238, 242 (3d ed. 2004). This rule applies just as much when the plaintiff attaches evidence to its opposition as when (as is more common) the defendant attaches evidence to its motion. *Cf.* 5C Wright, *supra*, § 1366, at 150, 155-56. "The court may not . . . take into account additional facts asserted in a memorandum opposing the motion to dismiss, because such memoranda do not constitute pleadings under Rule 7(a)." 2 James Wm. Moore et al., *Moore's Federal Practice* § 12.34[2], LEXIS (database updated 2020).

Bates, 958 F.3d at 483. *See also, Max Arnold & Sons, LLC v. W.L. Hailey & Co.*, 452 F.3d 494, 503 (6th Cir. 2006)(holding that the mere presentation of evidence outside the pleadings, without the court's rejection of such evidence, is enough to trigger conversion of a Rule 12(c) motion to summary judgment). Therefore, this court expressly rejects and declines to consider Plaintiff's exhibits attached to his Response.

II. Plaintiff's Claims.

A. Sections 523(a)(2)(A) and 523(a)(6).

The Complaint asserts causes of actions under §523(a)(2)(A) and §523(a)(6) by incorporating the Complaint's introductory facts set forth in paragraphs six through thirty-five by

reference and then alleging the statutory language for both of these exceptions to discharge.

A presumption exists that all debts owed by the debtor are dischargeable unless the party contending otherwise proves non-dischargeability. 11 U.S.C. §727(b). "A central purpose of the Bankruptcy Code is to give 'honest but unfortunate debtor[s]' a 'fresh start.'" *Pazdzierz v. First Am. Title Ins. Co.* (*In re Pazdzierz*), 718 F.3d 582, 586 (6th Cir. 2013)(citation omitted); *see also, Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 367, 127 S.Ct. 1105, 1107, 166 L. Ed. 2d 956 (2007)("The principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor. Both Chapter 7 and Chapter 13 of the Code permit an insolvent individual to discharge certain unpaid debts toward that end." (internal quotation marks omitted)(internal citation omitted)). Therefore, "exceptions to discharge in §523(a) must be narrowly construed." *Bd. of Trs. v. Bucci* (*In re Bucci*), 493 F.3d 635, 642 (6th Cir. 2007)(citing *Meyers v. IRS* (*In re Meyers)*, 196 F.3d 622, 624 (6th Cir. 1999)). "In any §523(a) analysis, the creditor bears the burden of proving by a preponderance of the evidence that a debt is excepted from discharge." *Conti v. Arrowood Indem. Co.* (*In re Conti*), 982 F.3d 445, 448 (6th Cir. 2020), *cert. denied sub nom. Conti v. Arrowood Indem. Co.*, 141 S.Ct. 2862, 210 L.Ed.2d 965 (2021)(alterations omitted)(internal quotation marks omitted)(citation omitted).

1. Section 523(a)(2)(A).

Section 523(a)(2)(A) excepts from discharge any debt for money, property, services, or an extension, renewal, or refinancing of credit to the extent obtained by false pretenses, a false representation, or actual fraud. *See, Tolliver*, 2021 WL 6061853, at *12, 2021 Bankr. LEXIS 3463, at *39 (quoting *Kraus Anderson Cap., Inc. v. Bradley* (*In re Bradley*), 507 B.R. 192, 205 (B.A.P. 6th Cir. 2014)). Section 523(a)(2)(A) "is not limited to excepting from discharge debts arising out of false representations. The concepts of debts arising from 'false pretenses' and from schemes involving 'actual fraud' are broader grounds for exception of debts from discharge." *Sun Fed. Credit Union v. Montague* (*In re Montague*), 2021 WL 2816326, at *4, 2021 Bankr. LEXIS 1787, at **10-11 (Bankr. N.D. Ohio July 6, 2021)(Whipple, J.).

Money, property, services, or credit obtained by fraud need not fall directly into a debtor's hands, so long as a debtor realizes some kind of benefit from the asset obtained. *Brady v. McAllister* (*In re Brady*), 101 F.3d 1165, 1172 (6th Cir. 1996). A debtor's fraudulent conduct, of course, must cause a loss to the victim of the fraud. *See e.g., Rembert v. AT&T Universal Card Serv.* (*In re Rembert*), 141 F.3d 277, 280-81 (6th Cir. 1997); *Leonard v. RDLG, LLC* (*In re Leonard*), 644 F.

App'x 612, 619 (6th Cir. 2016).

i. False Representation.

To except a debt from discharge under §523(a)(2)(A) for false representations, a plaintiff must prove the following elements of the claim:

> (1) the debtor obtained money [or an extension, renewal, or refinancing of existing credit] through a material misrepresentation that, at the time, the debtor knew was false or made with gross recklessness as to its 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.

In re Rembert, 141 F.3d at 280-81. A false representation is defined as "an expressed misrepresentation." *Sheen Falls Strategies, LLC v. Keane* (*In re Keane*), 560 B.R. 475, 486 (Bankr. N.D. Ohio 2016). "When one has a duty to speak, both concealment and silence can constitute fraudulent misrepresentation; an overt act is not required." *Busch, Inc. v. Grilliot* (*In re Grilliot*), 293 B.R. 725, 729 (Bankr. N.D. Ohio 2002)(citation omitted).

The first element requires a plaintiff to show that the debtor knew the material misrepresentation was false or made with gross recklessness as to its truth. *See, In re Keane*, 560 B.R. at 486. For instance, a debtor's knowledge of an inability to comply with the terms of a loan agreement may permit such a finding for nondischargeability. *See, FIA Card Services, N.A. v. Mueller* (*In re Mueller*), 2012 WL 32570, at *5, 2012 Bankr. LEXIS 100, at **13-14 (Bankr. E.D. Tenn. Jan. 6, 2012).

The second element requires an intent "to deceive." "A finding of fraudulent intent may be made on the basis of circumstantial evidence or from the debtor's 'course of conduct,' given that direct, express proof of intent is rarely available." *Launder v. Doll* (*In re Doll*), 585 B.R. 446, 455 (Bankr. N.D. Ohio 2018)(citation omitted). The "proper inquiry to determine a debtor's fraudulent intent is whether the debtor subjectively intended to repay the debt." *In re Rembert*, 141 F.3d at 281. Courts have held that partial performance may weigh against a finding that a debtor never intended to perform a promise or obligation:

> An often employed indicia, especially with respect to fraudulent actions under §523(a)(2)(A), centers on a debtor's subsequent conduct. *Williamson v. Busconi*, 87 F.3d 602, 603 (1st Cir. 1996). Of particular evidentiary weight in this regard, especially in situations such as this involving a debtor/contractor, is whether the debtor undertook any of the steps necessary to perform as promised. *Mack v. Mills*

> (*In re Mills*), 345 B.R. 598, 605 (Bankr. N.D. Ohio 2006). In this way, a type of an inverse relationship can be found. On the one side, a debtor acting with an intent to defraud will usually not undertake any significant measures toward the performance of their obligation. *Accord Anastas v. American Savings Bank* (*In re Anastas*), 94 F.3d 1280, 1285 (9th Cir. 1996). Conversely, the opposite is also logically true—when a debtor undertakes significant steps to perform as promised, inferences of fraud are muted. Thus, as a general rule, this Court has observed that the greater the extent of a debtor's performance, the less likely it will be that they possessed an intent to defraud. *Id.*

Siebanoller v. Rahrig (*In re Rahrig*), 373 B.R. 829, 834 (Bankr. N.D. Ohio 2007); *accord Arciniega v. Clark* (*In re Arciniega*), 2016 WL 455428, at *7, 2016 Bankr. LEXIS, at *21 (B.A.P. 9th Cir. Feb. 3, 2016)("A complete failure to take steps towards carrying out a promise can support an inference that the promisor never intended to perform.").

Additionally, under the "intent to deceive" element, it is important to distinguish a debtor's intent not to follow through on a promise from an inability to do so. *See, Ewing v. Bissonnette* (*In re Bissonnette*), 398 B.R. 189, 194 (Bankr. N.D. Ohio 2008). For this reason, "the mere breach of a promise to pay does not establish the existence of an intent to defraud. Otherwise, any breach of contract would be a nondischargeable debt." *Bartson v. Marroquin* (*In re Marroquin*), 441 B.R. 586, 593 (Bankr. N.D. Ohio 2010). For example, in *Bissonnette*, evidence that the debtor repeatedly came up with excuses for not repaying the plaintiffs and used the loan-proceeds for personal uses, rather than business uses as originally intended, was sufficient to show that the debtor's false representations were intentional. *Bissonnette*, 398 B.R. at 194. But in *Rembert*, the court held that the debtor lacked an intent not to repay where the debtor honestly, but unreasonably, believed she would win enough money gambling to pay off her debts while making some payments towards those debts. *Rembert*, 141 F.3d at 282-83.

The third element requires "justifiable, but not reasonable, reliance on a debtor's misrepresentations." *Field v. Mans*, 516 U.S. 59, 74-75, 116 S.Ct. 437, 133 L.Ed.2d 351 (1995)(citation omitted). This reliance is a subjective standard that accounts for many factors, such as "special knowledge, experience, and competence[.]" *In re Tolliver*, 2021 WL 6061853, at *17, 2021 Bankr. LEXIS 3463, at *40 (citation omitted). Therefore, in "considering justifiable reliance, the court may consider the sophistication of the creditor and the parties' past relationship." *Id.* (citation omitted).

The last element requires that the creditor's justifiable reliance must be the proximate cause

of its loss.[7] Proximate cause "may be established by showing the conduct was a substantial factor in the loss, or the loss may be reasonably expected to follow." *In re Keane*, 560 B.R. at 489.

a. Analysis.

In order to plead a plausible false representation claim, Plaintiff must plead facts supporting the material elements set forth above. The Complaint alleges Defendants knowingly misrepresented their intent to pay Plaintiff, and knowingly misrepresented their experience, history, and aptitude to run a small business in order to receive funds and then transfer assets to open a new restaurant with the intent of never repaying Plaintiff. [Doc. #1, ¶¶21, 24, 32]. These allegations satisfy the first and second elements of a false representation claim.

The Complaint states due to Plaintiff's reliance on these false representations, Plaintiff lost some $170,000.00. [*Id.*, ¶¶34-35]. These allegations satisfy the third and fourth elements of a false representation claim. The Complaint therefore states a plausible claim adequate to withstand the scrutiny under a traditional motion to dismiss.[8] *See, Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Because the Complaint pleads factual allegations that state a plausible cause of action for false representations under §523(a)(2)(A), the Motion as for this cause of action is denied.

ii. False Pretenses.

False pretenses involve an implied misrepresentation or conduct intended to create and foster a false impression. *In re Tolliver*, 2021 WL 6061853, at *17, 2021 Bankr. LEXIS 3463, at *39. False pretenses include:

> Any intentional fraud or deceit practiced by whatever method in whatever manner, which may be implied from conduct or may consist of concealment or non-disclosure where there is a duty to speak, and may consist of any acts, work, symbol, or token calculated and intended to deceive. It is a series of events, activities or communications which, when considered collectively, create a false and misleading set of circumstances, or a false and misleading understanding of a transaction, by which a creditor is wrongfully [induced] by a debtor to transfer

7/ The Supreme Court in *Cohen v. de la Cruz*, addressed two distinct concepts. 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). Whether "§523(a)(2)(A) is limited to the value obtained through fraud (the answer is no) and whether a portion of an allegedly nondischargeable debt 'arose from' amounts obtained by fraud[.] Thus, one thing that the Supreme Court did not do in *Cohen* is eliminate the requirement of causation." *Ott v. Somogye* (*In re Somogye*), 2020 WL 1519315, at *18, 2020 Bankr. LEXIS 824, at *53 (Bankr. N.D. Ohio Mar. 30, 2020)(Whipple, J.).

8/ Defendants' Motion does not assert Fed. R. Civ. P. 9(b) as a basis for dismissal. Rule 9(b) requires a plaintiff to allege fraud with particularity - "the who, what, where, when, and how." "There is non-binding authority that a defendant's failure to raise a Rule 9(b) argument with or before an answer operates as a waiver of that argument." *Sun Fed. Credit Union v. Montague* (*In re Montague*), 2021 WL 2816326, at *2, 2021 Bankr. LEXIS 1787, at *4 (Bankr. N.D. Ohio July 6, 2021)(Whipple, J.).

> property or extend credit to the debtor. Silence or concealment as to a material fact can constitute false pretenses.

Fuller v. Givens (*In re Givens*), 634 B.R. 755, 761-62 (Bankr. E.D. Tenn. 2021)(alterations omitted)(internal quotation marks omitted). *Accord Launder v. Doll* (*In re Doll*), 585 B.R. 446, 455 (Bankr. N.D. Ohio 2018).

a. Analysis.

To state a claim for false pretenses, the Complaint must allege: "(1) the defendant made an omission or implied misrepresentation; (2) promoted knowingly and willingly by the defendant; (3) creating a contrived and misleading understanding of the transaction on the part of the plaintiff; (4) which wrongfully induced the plaintiff to advance money, property, or credit to the defendant." *R & R Express, Inc. v. Cawthon* (*In re Cawthon*), 594 B.R. 913, 920 (Bankr. N.D. Ga. 2018)(alterations omitted).

The Complaint alleges that Defendants knowingly concealed and failed to disclose assets and information to defraud Plaintiff; with the ultimate goal being to strip their entities of all assets and conveying those assets to a new entity in order to start a new restaurant. [Doc. #1, ¶¶14, 20-26, 32]. These allegations that Defendants knowingly and willingly made omissions or implied misrepresentations to create a misleading understanding of the transaction satisfy the first three elements.

Because of Plaintiff's reliance on Defendants' omissions and implied misrepresentations, Plaintiff was wrongfully induced to advance some $170,000.00. [*Id.*, ¶¶34-35]. These allegations satisfy the fourth element because Defendants' conduct is stated to have wrongfully induced Plaintiff to enter into the transaction. Considering the chain of events collectively, these facts plausibly allege a cause of action for "false pretenses" under §523(a)(2)(A).

Because the Complaint pleads factual allegations that state a plausible cause of action for "false pretenses" under §523(a)(2)(A), the Motion as for this cause of action is denied.

iii. Actual Fraud.

"Actual fraud" includes "fraudulent conduct" such as a fraudulent transfer scheme. *See*, *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356, 359, 136 S.Ct. 1581, 194 L.Ed.2d 655 (2016). As clarified by the Supreme Court:

> "Actual fraud" has two parts: actual and fraud. The word "actual" has a simple meaning in the context of common-law fraud: it denotes any fraud that "involve[es] moral turpitude or intentional wrong." "Actual" fraud stands in contrast to

> "implied" fraud or fraud "in law," which describe acts of deception that "may exist without the imputation of bad faith or immorality." Thus, anything that counts as "fraud" and is done with wrongful intent is "actual fraud."

Id. at 360 (internal citations omitted). Under this standard, §523(a)(2)(A) encompasses "a fraudulent conveyance of property made to evade payment to creditors." *Id.* at 357. "In such cases, the fraudulent conduct is not in dishonestly inducing a creditor to extend a debt. It is in the acts of concealment and hindrance." *Id.* at 361-62. This is true even when it does not involve a false representation and even where it is carried out after the transaction that created the debt. *Id.* at 364-65; *In re Doll*, 585 B.R. at 462 ("Alternatively, a showing of 'actual fraud', through reference to a debtor's fraudulent transfer or fraudulent conduct, may also be sufficient."); *Schafer v. Rapp* (*In re Rapp*), 375 B.R. 421, 435 (Bankr. S.D. Ohio 2007). Thus, "actual fraud" is a separate category of debtor misconduct not limited to representations. *Husky*, 578 U.S. at 365.

For purposes of §523(a)(2)(A), "actual fraud" is defined broadly – "any deceit, artifice, trick or design involving a direct and active operation of the mind, used to circumvent and cheat another." *Sun Fed. Credit Union v. Montague* (*In re Montague*), 2021 WL 2816326, at *4, 2021 Bankr. LEXIS 1787, at *11 (Bankr. N.D. Ohio July 6, 2021)(Whipple, J.)(citation omitted); *see also,* 4 Collier on Bankruptcy ¶523.08[1][e] (16th ed. 2021). Actual fraud requires the intent to deceive. *Sullivan v. Glenn* (*In re Glenn*), 502 B.R. 516, 532 (Bankr. N.D. Ill. 2013). "When a debtor intentionally engages in a scheme to deprive or cheat another of property or a legal right, that debtor has engaged in actual fraud and is not entitled to the fresh start provided by the Bankruptcy Code." *Mellon Bank, N.A. v. Vitanovich* (*In re Vitanovich*), 259 B.R. 873, 877 (B.A.P. 6th Cir. 2001).

A creditor may prevail on a theory of "actual fraud" in either of two ways that depend on the specific debt he seeks to be excepted from discharge. First, a creditor may prevail in excepting from discharge a debt created by a credit transaction. Second, a creditor may prevail in excepting a debt in cases where a fraudulent conveyance of property is made to evade payment of the debt – it is not the credit transaction that creates the debt, but rather a debtor's active participation in the purportedly fraudulent conduct that creates the debt. *E.g.*, *Husky*, 578 U.S. at 361-62; *McClellan v. Cantrell*, 217 F.3d 890, 895 (7th Cir. 2000)("The debt that McClellan is seeking to collect from her (and prevent her from discharging) arises by operation of law *from her fraud*."). That is to say, a new debt may arise in a creditor's favor if a debtor participated in the transfer that prevented or hindered a creditor's ability to collect. *E.g.*, *McClellan*, 217 F.3d at 895 ("That debt arose not when

her brother borrowed money from McClellan but when she prevented McClellan from collecting from the brother the money the brother owed him.").

a. Analysis.

To state a claim for "actual fraud," the Complaint must allege Defendants intentionally engaged in a scheme intended to deprive Plaintiff of property or a legal right. *Meade v. Pinkerman* (*In re Alwood*), 531 B.R. 182, 188 (Bankr. N.D. Ohio 2015). The Complaint alleges that Defendants "engaged in a concerted and intentional campaign" at the time they entered into the seller-financed transaction to reap the benefit of receiving funds to open a restaurant with the ultimate goal of transferring the assets, starting a new business, and not repaying Plaintiff. [Doc. #1, ¶¶14, 21-26, 32]. Taking these facts as true, the court could draw the reasonable inference that Defendants engaged in "actual fraud" for the funds and rights received in the Note, Security Agreement, and Sublease. Thus, these facts plausibly allege a cause of action for "actual fraud" under §523(a)(2)(A).

Moreover, the Complaint alleges that Defendants "engaged in a concerted and intentional campaign" of stripping their entities of assets, transferring property from one entity to another, and concealing information from Plaintiff with the intent to hinder or delay and avoid the obligations under the Note, Security Agreement, Sublease, and Judgment. [Doc. #1, ¶¶20-23]. The Complaint further alleges that Defendants engaged in this series of misrepresentations, concealment of information, and transfers of property to deprive Plaintiff of property or a legal right. [*Id.*, ¶¶14, 21, 32]. These allegations set forth a plausible claim for "actual fraud" under §523(a)(2)(A) for the resulting debt, presumably the debt liquidated in the Judgment. Because the Complaint pleads factual allegations that state a plausible cause of action for "actual fraud" under §523(a)(2)(A), the Motion to dismiss this cause of action is denied.

2. Section 523(a)(6).

Section 523(a)(6) provides that a debt for "willful and malicious injury by the debtor to another entity or to the property of another entity" is excepted from discharge. *In re Tolliver*, 2021 WL 6061853, at *12, 2021 Bankr. LEXIS 3463, at **30-31 (B.A.P. 6th Cir. Dec. 20, 2021). The statutory language of §523(a)(6) excepts debts from discharge that result from intentional torts. *Id.* The word "willful" modifies the word "injury," indicating that a specific intent to "injure" is required. *Id.* A "malicious injury" is defined as conduct done "without just cause or excuse, or for which there is no reasonable justification." *Id.* A plaintiff must prove that the injury was both

"willful" and "malicious." *Id.* In many cases, facts satisfying the "willful" requirement will likewise satisfy the "malicious" requirement. *Id.*

The Supreme Court in *Geiger* emphasized "a debtor might act intentionally but simply not know that the act will cause injury" in cases involving "negligence" or a "knowing breach of contract," which would be insufficient for purposes of dischargeability. *Id.* (citation omitted). Therefore, to succeed in a §523(a)(6) action, a plaintiff must show that the debtor knew the injury would result from his actions. *See, id.*

i. Analysis.

To state a claim under §523(a)(6), the Complaint must allege willfulness and malice. Accepting the Complaint's factual allegations as true, the allegations can fairly be read to plead a plausible cause of action under §523(a)(6). First, the Complaint alleges Defendants, through MMH, LLC, transferred the Collateral without notice or written consent. [Doc. #1, ¶¶14-15]. Second, the Complaint alleges circumstances from which willfulness and malice can be inferred. The Defendants, through MMH, LLC, entered into the Security Agreement that prohibited sale or encumbrance of the Collateral without written consent. [*Id.*, ¶14]. This suggests that Defendants knew of the security interest in the Collateral and were aware of the obligation to obtain permission prior to "dispossessing itself" of the Collateral. [*Id.*] Defendants knew, or were substantially certain, that transferring the Collateral would cause an injury. [*Id.*, ¶26]. Moreover, to avoid the obligations under the Note, Security Agreement, and Sublease, Defendants transferred and concealed assets and failed to produce financial information to Plaintiff. [*Id.*, ¶¶20-23]. Here, malice could be implied because Defendants allegedly caused MMH, LLC to deviate from its contractual duty to produce financial information to Plaintiff. [*Id.*, ¶23].

Because the Complaint pleads factual allegations that state a plausible cause of action under §523(a)(6), the Motion to dismiss this cause of action is denied.

B. Section 727(a).

The causes of action under 11 U.S.C. §§727(a)(2)-(5), and (7) allege that Defendants made false oaths by failing to provide a complete financial snapshot in their bankruptcy schedules and statement of affairs, including, but not limited to, the intentional omission of the liquidated home equity and other assets.

A bankruptcy discharge is a privilege and not a right and should be granted only to the honest but unfortunate debtor. *Grogan v. Garner*, 498 U.S. 279, 286-87, 111 S.Ct. 654, 113

L.Ed.2d 755 (1991). "[T]he bankruptcy court must balance the policy in favor of liberally applying the Bankruptcy Code to grant discharge to the honest debtor against the policy of denying relief to debtors who intentionally engage in dishonest practices and violate the Bankruptcy Code provision." *Yoppolo v. Walter* (*In re Walter*), 265 B.R. 753, 758 (Bankr. N.D. Ohio 2001)(citation omitted). The Sixth Circuit has also held, in a decision involving an appeal under §727(a), that the "Bankruptcy Code should be construed liberally in favor of the debtor." *Keeney v. Smith* (*In re Keeney*), 227 F.3d 679, 683 (6th Cir. 2000).

The plaintiff bears the burden of proof in a trial seeking to deny a debtor his discharge. Fed. R. Bankr. P. 4005. The burden of proof is by a preponderance of the evidence. *Keeney*, 227 F.3d at 683; *Barclays/Amer. Bus. Credit, Inc. v. Adams* (*In re Adams*), 31 F.3d 389, 394 (6th Cir. 1994).

1. Sections 727(a)(2)(A) and (a)(2)(B).

Sections 727(a)(2)(A) and (B) provide that:

> (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[.]

11 U.S.C. §727(a)(2)(A)-(B).

Plaintiff has alleged that he is a creditor and has standing under 11 U.S.C. §727(c)(1).[9] [Doc. #1, ¶5]. Once standing is established, this section of the Bankruptcy Code requires a plaintiff to prove the following two elements: "1) a disposition of property, such as concealment, and 2) a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act disposing of the property." *Keeney*, 227 F.3d at 683 (internal quotation marks omitted)(citation omitted); *Eifler v. Wilson & Muir Bank & Tr. Co.*, 588 F. App'x 473, 479 (6th Cir. 2014); *In re Adams*, 31 F.3d 389, 394 (6th Cir. 1994)(concluding that property of corporation controlled by debtor can be considered to be property of debtor for purposes of §727(a)(2)).

9/ Defendants' Answer, [Doc. #8], denies the allegation in Plaintiff's Complaint, [Doc. #1, ¶5], that Plaintiff is a creditor. Defendants' Motion did not attach evidence or make any argument explaining why Plaintiff is not a creditor.

Under §727(a)(2)(A), the "property disposed of, or concealed, must be property of the debtor and the disposition or concealment must have occurred within one year before the date the petition was filed." *McDermott v. Kerr* (*In re Kerr*), 2017 WL 3880875, at *9, 2017 Bankr. LEXIS 2447, at *25 (Bankr. N.D. Ohio Aug. 30, 2017). Under §727(a)(2)(B), "the property disposed of must be property of the bankruptcy estate and the disposition must therefore have occurred after the filing of the petition." *Id.*

This court has previously addressed these subsections,

> The Sixth Circuit ruled in *Keeney v. Smith* (*In re Keeney*), 227 F.3d 679, 684 (6th Cir. 2000) that under the continuous concealment doctrine, a transfer made and recorded more than one year prior to filing may serve as evidence of the requisite act of concealment where the debtor retains a secret benefit of ownership in the transferred property within the year prior to filing. The key issue in "continuing concealment" is whether a defendant possessed the requisite intent to "hinder, delay or defraud" a creditor during the year prior to filing. *Id.*

McDermott v. Kerr (*In re Kerr*), 556 B.R. 343, 348 (Bankr. N.D. Ohio 2016).

In *Swegan*, the Sixth Circuit Bankruptcy Appellate Panel clarified that the *Keeney* decision did not require a transfer of property. *In re Kerr*, 2017 WL 3880875, at *9, 2017 Bankr. LEXIS 2447, at *25. "Instead, the language in the decision 'was simply recognition that concealment allegations typically arise in the context of a debtor who transferred title to property in order to hinder, delay, or defraud a creditor while retaining some benefit of ownership.'" *Id.* (quoting *Buckeye Ret. Co., LLC v. Swegan* (*In re Swegan*), 383 B.R. 646, 653 (B.A.P. 6th Cir. 2008)).

Thus, the *Swegan* court held:

> In cases where there has not been a transfer of property, courts have defined concealment as including the withholding of knowledge or information required by law to be made known. *See, e.g., Peterson v. Scott* (*In re Scott*), 172 F.3d 959, 967 (7th Cir. 1999) (defining concealment as "'preventing discovery, fraudulently transferring or withholding knowledge or information required by law to be made known'" (quoting *United States v. Turner*, 725 F.2d 1154, 1157 (8th Cir.1984))). To restrict the meaning of concealment in §727(a)(2)(A) to a debtor's retention of some interest in property after divestiture of legal ownership would effectively write the word out of the statute, since the word "transfer" is already included in the statute. To give effect to each word in the statute, as we must, we conclude that concealment as used in §727(a)(2)(A) includes the withholding of knowledge of an asset by the failure or refusal to divulge information required by law to be made known. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 36, 112 S.Ct. 1011, 1015, 117 L.Ed.2d 181 (1992) ("[S]tatute must, if possible, be construed in such [fashion] that every word has some operative effect.").

Kerr, 2017 WL 3880875, at *10, 2017 Bankr. LEXIS 2447, at **25-26 (quoting *Swegan*, 383 B.R. at 654-55).

As mentioned briefly above, the *Keeney* court discussed "the continuing concealment doctrine, a doctrine under which 'a transfer made and recorded more than one year prior to filing may serve as evidence of the requisite act of concealment where the debtor retains a secret benefit of ownership in the transferred property within the year prior to filing.'" *Kerr*, 2017 WL 3880875, at *10, 2017 Bankr. LEXIS 2447, at *27 (quoting *Keeney*, 227 F.3d at 684). "Continuing concealment" will be "found to exist during the year before bankruptcy even if the initial act of concealment took place before this one year period as long as the debtor allowed the property to remain concealed into the critical year." *Id.* (quoting *Rosen v. Bezner*, 996 F.2d 1527, 1531 (3d Cir. 1993)).

For denial of discharge under §727(a)(2)(B), "the Plaintiff has to prove: 1) that the debtor transferred, removed, destroyed, mutilated or concealed property of his bankruptcy estate after the petition filing date; and 2) the conduct occurred with actual intent to hinder, delay or defraud a creditor or officer of the estate." *Kerr*, 2017 WL 3880875, at *12, 2017 Bankr. LEXIS 2447, at **30-31. The "debtor must fraudulently conceal property of the estate after the date of the filing of the petition." *Id.* Fraudulent intent "can be found where the defendant demonstrates reckless disregard or indifference for the truth." *Id.* (internal quotation marks omitted)(citation omitted). Courts may "'deduce fraudulent intent from all the facts and circumstances of a case', and there is no requirement that a creditor actually be harmed by the debtor's actions." *Id.* (quoting *Keeny*, 22 F.3d at 685-86).

"As with §727(a)(2)(A), the plaintiff may establish the debtor's intent under §727(a)(2)(B) through evidence of his conduct." *Id.*

i. Analysis.

To state a claim under §727(a)(2)(A), the Complaint must allege: "1) a disposition of property, such as concealment, and 2) 'a subjective intent on the debtor's part to hinder, delay or defraud a creditor through the act disposing of the property.'" *Keeney*, 227 F.3d at 683 (citation omitted).

The Complaint's factual allegations, taken as true, state a plausible claim that Defendants "concealed" property within one year before the date the petition was filed. The Complaint alleges that Defendants were active participants and "engaged in a concerted and intentional campaign"

of stripping their entities of assets, transferring property from one entity to another, or concealing information from Plaintiff within one year prior to filing the petition with the intent to hinder or delay, and to avoid the obligations under the Note, Security Agreement, Sublease, and Judgment. [Doc. #1, ¶¶20-23, 27]. Importantly, these allegations constitute circumstantial evidence of Defendants' subjective intent to hinder, delay or defraud Plaintiff's rights as a creditor. And this subjective intent is specifically alleged in the Complaint. [*Id.*, ¶¶21, 27, 30]. These factual allegations, taken as true, establish a plausible claim under §727(a)(2)(A).

Plaintiff further alleges that Defendants refinanced their home and used the proceeds to make transfers without receiving reasonably equivalent value in return, rendering them insolvent. [*Id.*, ¶¶27-30]. The Complaint also alleges that Defendants failed to disclose this refinancing in their bankruptcy petition. [*Id.*, ¶31]. A debtor's act of refinancing a mortgage, reducing the equity, using the proceeds to pay other debts, and failing to disclose this information on their bankruptcy petition has been held to warrant denial of discharge. *Williams v. Courtney* (*In re Courtney*), 351 B.R. 491 (Bankr. E.D. Tenn. 2006); *Stevenson v. Cutler* (*In re Cutler*), 291 B.R. 718 (Bankr. E.D. Mich. 2003).

In *Courtney*, the court found, *inter alia*, that the act of refinancing a mortgage thereby significantly reducing the equity available for the benefit of the bankruptcy estate evidenced an intent to hinder some creditors. 351 B.R. at 503. The court then concluded that the debtor's actions considered collectively, and even "construing §727(a)(2)(A) strictly" in favor of the debtor, warranted denying the debtor his discharge. *Id.* at 504.

In *Cutler*, the court found, *inter alia*, that refinancing the home left debtor with no equity and virtually no assets and that the various transfers made after refinancing the home were all indicia of badges of fraud warranting an inference of an intent to defraud. 291 B.R. at 723. The court then concluded that debtor's actions met the elements of §727(a)(2)(A) and denied the debtor his discharge. *Id.*

Here, the factual allegations of the Complaint allege that Defendants failed to account for the refinancing of their mortgage within a year before the filing of the petition and liquidated over $119,000.00 in equity[10] to cash or cash equivalents and then made transfers without receiving a reasonably equivalent value in return rendering them insolvent in order to hinder, delay, or defraud

10/ At this stage of the proceeding, the court need not consider any defense based on the argument that this alleged equity would have been subject to exemption under Ohio law.

Plaintiff's rights as a creditor. [Doc. #1, ¶¶27-32]. These factual allegations, taken as true, also establish a plausible claim under §727(a)(2)(A).

To state a claim under §727(a)(2)(B), the Complaint must allege: "1) that the debtor transferred, removed, destroyed, mutilated or concealed property of his bankruptcy estate after the petition filing date; and 2) the conduct occurred with actual intent to hinder, delay or defraud a creditor or officer of the estate." *Kerr*, 2017 WL 3880875, at *12, 2017 Bankr. LEXIS 2447, at **30-31.

The Complaint alleges that Defendants' sworn Schedules and Statement of Financial Affairs fail to reflect the liquidated home equity, assets, and business income. [Doc. #1, ¶¶27-32]. The Complaint further alleges that Defendants failed to disclose the transfers and the refinancing of their residence. [*Id.*, ¶¶20-22, 27-32]. These allegations satisfy the first element by concealing the transfers after the petition filing date. Importantly, these same allegations constitute circumstantial evidence of Defendants' subjective intent to hinder, delay, or defraud Plaintiff's rights as a creditor satisfying the second element. And this subjective intent is specifically alleged in the Complaint. [*Id.*, ¶¶27, 31]. These factual allegations, taken as true, establish a plausible claim under §727(a)(2)(B).

Because the Complaint pleads factual allegations that state a plausible cause of action under §§727(a)(2)(A)-(B), the Motion to dismiss this cause of action is denied.

2. Section 727(a)(3).

Section 727(a)(3) permits the court to deny the debtor a discharge if the plaintiff proves that the debtor has "concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information . . . from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case." 11 U.S.C. §727(a)(3). This provision protects the interest of "creditors . . . [as the debtor] is required to take such steps as ordinary fair dealing and common caution dictate to enable the creditors to learn what he did with his estate." *Vara v. Bristol* (*In re Bristol*), 2021 WL 4272823, at *2, 2021 Bankr. LEXIS 2587, at *6 (Bankr. N.D. Ohio Sept. 20, 2021)(Whipple, J.)(citation omitted).

In order to prevail on a §727(a)(3) action, the plaintiff must prove: "(1) that the debtor failed to keep or preserve recorded information; and (2) debtor's financial condition and business transactions might be ascertained from such missing recorded information." *Id.* (citing *Turoczy*

Bonding Co. v. Strbac (*In re Strbac*), 235 B.R. 880, 882-83 (B.A.P. 6th Cir. 1999); *Strzesynski v. Devaul* (*In re Devaul*), 318 B.R. 824, 829, 832-34 (Bankr. N.D. Ohio 2004)). "Courts applying §727(a)(3) have uniformly held that it contemplates a burden-shifting framework." *Smalley v. Smalley* (*In re Smalley*), 2021 WL 5177483, at *8, 2021 Bankr. LEXIS 3035, at *20 (Bankr. W.D. Ky. Nov. 3, 2021)(citing *In re Devaul*, 318 B.R. at 829; *In re Strbac*, 235 B.R. at 882-83). The party objecting to discharge must prove not only that the debtor has failed to keep records, but also that the missing records are of the kind required under the statute, thereby imposing a materiality requirement on that party. *Id.* If this prima facie case is established the burden of proof shifts to the defendant to justify the lack of records under all of the circumstances of the case. *In re Bristol*, 2021 WL 4272823, at *3, 2021 Bankr. LEXIS 2587, at *6. At this stage of the proceeding, only Plaintiff's allegations as to its initial burden under §727(a)(3) are relevant.

This section "requires the debtor to provide creditors 'with enough information to ascertain the debtor's financial condition and track his financial dealings with substantial completeness and accuracy for a reasonable period past to present.'" *In re Strbac*, 235 B.R. at 882 (citation omitted). "Examples of inadequate disclosures include the failure to produce checking account statements, tax returns, household bills and/or credit card records, loan documentation, pay records, and real estate closing statements." *Williams v. Courtney* (*In re Courtney*), 351 B.R. 491, 505 (Bankr. E.D. Tenn. 2006). *See also*, *Strbac*, 235 B.R. at 884 (tax returns, paycheck stubs, and records of debtor's subcontractor work); *DeWine v. Scott* (*In re Scott*), 566 B.R. 471, 480 (Bankr. N.D. Ohio 2017)(records evidencing business transactions); *U.S. Tr. v. Kandel* (*In re Kandel*), 2015 WL 1207014, at *7, 2015 Bankr. LEXIS 790, at *27 (Bankr. N.D. Ohio March 13, 2015)(collecting cases holding business records from a closely related business fall within the statute); *Burton Food Servs., Inc. v. Aseireh* (*In re Aseireh*), 526 B.R. 246, 252 (Bankr. N.D. Ohio 2015)(records related to management fees). Ultimately, the "linchpin of a §727(a)(3) claim" must set forth facts stating what records a debtor should have but did not have. *In re Bristol*, 2021 WL 4272823, at *3, 2021 Bankr. LEXIS 2587, at *9. If a court has to speculate on what a debtor should have had that a debtor did not turn over, then the claim fails to set forth a plausible claim. *Id.*

The adequacy of debtor's records must be determined on a case-by-case basis. *Strbac*, 235 B.R. at 882. "Considerations to make this determination include debtor's occupation, financial structure, education, experience, sophistication and any other circumstances that should be considered in the interest of justice." *Reinhart FoodService, LLC v. Riley* (*In re Riley*), 2021 WL

4227701, at *20, 2021 Bankr. LEXIS 2577, at *60 (Bankr. S.D. Ohio Aug. 11, 2021)(citation omitted). In other words, the responsibility to keep records is a "sliding scale, with one end consisting of large businesses that must maintain in-depth records, and the other end consisting of unsophisticated consumer debtors requiring far less documentation." *In re Kandel*, 2015 WL 1207014, at *6, 2015 Bankr. LEXIS 790, at **24-25 (internal quotation marks omitted). "Where a debtor falls on the sliding scale is very important to the amount and sophistication of records a court will require a debtor to produce." *Id.*

Thus, the plaintiff must first offer evidence of "the general nature of debtor's business or personal financial position (e.g. consumer, business relationships and interests, general nature of business interests and sources of income) and the types of transactions about which recorded information is sought." *In re Devaul*, 318 B.R. at 833. "Second, the plaintiff must present evidence identifying . . . what recorded information it alleges has been concealed, destroyed, mutilated, falsified, or not kept or preserved by a debtor." *Id.* Third, the plaintiff must show how the missing recorded information "might" enable a particular debtor's actual financial condition or business transactions to be ascertained under the circumstances of the case – this "is the ultimate connection between the first two elements of proof." *Id.*

Fraudulent intent is not an element of §727(a)(3).

i. Analysis.

To state a claim under §727(a)(3), the Complaint must allege: (1) that the debtor failed to keep or preserve recorded information; and (2) debtor's financial condition and business transactions might be ascertained from such missing recorded information. *In re Devaul*, 318 B.R. at 833. Accepting the factual allegations as true, the Complaint appears to state a plausible claim. Plaintiff alleges that Defendants purchased assets and made transfers after liquidating over "$119,000 in home equity to cash in July 2020" but reporting "less than $4,000 in liquid assets at the date of the Petition." [Doc. #1, ¶¶28-31]. Plaintiff then generally alleges that the assets or transfers were not "accounted for." [*Id.*, ¶30].

The allegation that Defendants failed to "account for," assets purchased or transfers made, satisfies the first element for a §727(a)(3) claim. This allegation identifies the general nature of Defendants' financial position, consumer debtors refinancing their home, and also states what recorded information it alleges was concealed, destroyed, mutilated, falsified, or not kept or preserved: purchased assets and transfers.

The allegation that Defendants liquidated over "$119,000 in home equity" but reported less than "$4,000 in liquid assets at the date of the Petition" satisfies the second element for a §727(a)(3) claim. This allegation ties back into the recorded information Plaintiff alleges was concealed, destroyed, mutilated, falsified, or not kept or preserved. This missing information (assets Defendants purchased and the transfers Defendants made) "might" enable the Defendants' actual financial condition (liquidating $119,000.00 in home equity but reporting less than $4,000.00 in liquid assets on the date of the petition) to be ascertained under the circumstances of the case.

Because the Complaint identifies missing recorded information that "might" enable Defendants' actual financial condition to be ascertained, Defendants' Motion as for this claim is denied.[11]

3. Section 727(a)(4)(A).

A prerequisite to the privilege of obtaining a discharge in bankruptcy is complete financial disclosure. *Keeney v. Smith* (*In re Keeney*), 227 F.3d 679, 685 (6th Cir. 2000). Section 727(a)(4)(A) permits the court to deny a debtor their discharge for knowingly making a material, false oath or account, with fraudulent intent. *See*, 11 U.S.C. §727(a)(4)(A). The intent required under this section must be actual, as distinguished from constructive, intent. *Risk v. Hunter* (*In re Hunter*), 535 B.R. 203, 222 (Bankr. N.D. Ohio 2015)(quoting *Gold v. Guttman* (*In re Guttman*), 237 B.R. 643, 647 (Bankr. E.D. Mich. 1999)).

Under §727(a)(4)(A), discharge will be denied if "1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case." *In re Hunter*, 535 B.R. at 221 (quoting *In re Keeney*, 227 F.3d 679, 685 (6th Cir. 2000)); *Eifler v. Wilson & Muir Bank & Tr. Co.*, 588 F. App'x 473, 477 (6th Cir. 2014); *McDermott v. Perez* (*In re Perez*), 2019 WL 7341580, at *8, 2019 Bankr. LEXIS 3942, at **22-23 (B.A.P. 6th Cir. Dec. 30, 2019).

The Sixth Circuit has "previously considered fraudulent intent and materiality under [§727(a)(4)(A)] as follows:"

11/ Defendants filed a "Motion to Quash Subpoena Duces Tecum." [Doc. #28]. Plaintiff filed a "Memorandum Contra to Defendants' Motion to Quash Subpoena" asserting that Defendants' Motion to Quash was moot because the subpoena was responded to, subpoenaed documents were submitted, and the documents were being reviewed. [Doc. #32]. This court does not make any conclusions as to how this affects any of the Plaintiff's claims in his Complaint.

> [I]ntent to defraud "involves a material representation that you know to be false, or, what amounts to the same thing, an omission that you know will create an erroneous impression." *In re Chavin*, 150 F.3d 726, 728 (7th Cir.1998). A reckless disregard as to whether a representation is true will also satisfy the intent requirement. *See id.* "[C]ourts may deduce fraudulent intent from all the facts and circumstances of a case." *Williamson* [*v. Fireman's Fund Ins. Co.*, 828 F.2d 249, 252 (4th Cir.1987)] (citation omitted). However, a debtor is entitled to discharge if false information is the result of mistake or inadvertence. *See* [*Gullickson v. Brown* (*In re Brown*), 108 F.3d 1290, 1294 (10th Cir.1997)]. The subject of a false oath is material if it " 'bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property.' " *Beaubouef*, 966 F.2d at 178 (citation omitted).

Gandy v. Schuchardt (*In re Gandy*), 645 F. App'x 348, 352 (6th Cir. 2016)(quoting *In re Keeny*, 227 F.3d at 685-86).

Because "[d]ebtors rarely admit to making a statement with fraudulent intent, . . . courts must use circumstantial evidence and the debtor's conduct to infer the requisite state of mind." *McDermott v. Van Auken* (*In re Van Auken*), 2020 WL 762622, at *5, 2020 Bankr. LEXIS 400, at *15 (Bankr. N.D. Ohio Feb. 14, 2020)(citation omitted). While false statements that are the result of ignorance or mere carelessness are not sufficient for purposes of establishing fraudulent intent, "[j]ust one wrongful act may be sufficient to show actual intent . . . . However, a continuing pattern of wrongful behavior is a stronger indication of actual intent." *Gold v. Guttman* (*In re Guttman*), 237 B.R. 643, 647 (Bankr. E.D. Mich. 1999)(quoting *Hunter v. Sowers* (*In re Sowers*), 229 B.R. 151, 157 (Bankr. N.D. Ohio 1998)). In other words, a "series or pattern of errors or omissions may have a cumulative effect giving rise to an inference of an intent to deceive." *In re Van Auken*, 2020 WL 762622, at *5, 2020 Bankr. LEXIS 400, at *15 (citation omitted). Additionally, innocent mistakes which evidence a pattern of reckless and cavalier disregard for the truth can give rise to a finding of fraudulent intent as required under §727(a)(4)(A). *Id.*

A false oath is material if it "bears a relationship to the bankrupt's business transactions or estate, or concerns the discovery of assets, business dealings, or the existence and disposition of his property." *In re Van Auken*, 2020 WL 762622, at *6, 2020 Bankr. LEXIS 400, at *16 (citations omitted). "Given that broad ambit, the threshold for materiality is relatively low." *Id.*

"The fundamental purpose of §727(a)(4)(A) is to ensure that the trustee and creditors have accurate information without having to do costly investigations." *Id.* ("Neither the trustee nor the creditors should be required to engage in a laborious tug-of-war to drag the simple truth into the glare of daylight." (citation omitted)). "A bankruptcy trustee has neither the time nor the resources

to conduct an in-depth review of each and every debtor, necessitating accurate initial disclosures as a key feature of the U.S. bankruptcy system." *Id.*

"Statements in bankruptcy schedules and at 341 meetings are given under penalty of perjury." *Id.* "Statements made during Rule 2004 examination are also made under oath." *Id.* "Thus, any false statement made by the debtor in the debtor's schedules, at a creditors' meeting held pursuant to §341, or during a 2004 examination or deposition relating to the debtor's assets and financial circumstances, could potentially lead to denial of a debtor's discharge under §727(a)(4)(A)." *Id.*; *U.S. Tr. v. Elass* (*In re Elsass*), 597 B.R. 860, 870 (Bankr. S.D. Ohio 2019)("The goal is to penalize the failure to disclose significant assets, or discourage actions that makes it more difficult for trustees to administer assets for the benefit of creditors.").

i. Analysis.

To state a claim under §727(a)(4)(A), the Complaint must allege that "1) the debtor made a statement under oath; 2) the statement was false; 3) the debtor knew the statement was false; 4) the debtor made the statement with fraudulent intent; and 5) the statement related materially to the bankruptcy case." *Keeney*, 227 F.3d at 685. The Complaint does so.

First, the Complaint sets forth factual allegations that Defendants made various false statements and omissions under oath in their Schedules and Statement of Financial Affairs. [Doc. #1, ¶¶28-31]. These factual allegations in the Complaint are sufficiently specific and not "legal conclusions." *See e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). The Complaint's factual allegations meet the first *Keeney* element.

Second, the Complaint's factual allegations allow the court to draw the reasonable inference that the statements were false. The Complaint alleges that Defendants liquidated "over $119,000 in home equity" about six months before filing for bankruptcy but failed to reflect this in their bankruptcy petition. [Doc. #1, ¶¶28-29]. The Complaint's factual allegations meet the second *Keeney* element.

Third, the Complaint's factual allegations allow the court to draw the reasonable inference that Defendants knew the statements were false. The Complaint alleges numerous false statements in Defendants' sworn Schedules and Statement of Financial Affairs, including the failure to reflect the liquidated home equity shortly before filing bankruptcy. [*Id.*, ¶31]. These same allegations also allow the court to draw the reasonable inference that the false statements were made with fraudulent intent in order to defraud Plaintiff. Alternatively, the cumulative effect of Defendants'

numerous false statements that were made under oath plausibly evidence "a pattern of reckless and cavalier disregard for the truth." *In re Gandy*, 645 F. App'x 348, 354 (6th Cir. 2016)(quoting *Stevenson v. Taylor* (*In re Taylor*), 461 B.R. 420, 423 (E.D. Mich. 2011)). Thus, the Complaint's factual allegations meet the third and fourth *Keeney* elements.

Lastly, the Complaint's allegations meet the fifth *Keeney* element. The Complaint alleges Defendants' failure to disclose the liquidated home equity, purchased assets, transfers made with proceeds from the refinancing, and income from their business. These false statements (or omissions) concerned the disposition, existence, and discovery of assets, business dealings, and property all of which were material because they relate to Defendants' assets. The Complaint's factual allegations meet the fifth *Keeney* element.

Defendants' Reply attributed the false statements pertaining to the refinancing to reliance on different sources of value. At this stage, this argument is a defense that raises questions of fact for trial. Since the Complaint contains factual allegations that, if taken as true, support a plausible claim under §727(a)(4)(A), the Motion with respect to this claim for relief is denied.

4. Section 727(a)(4)(C).

Section 727(a)(4)(C) permits the court to deny a debtor their discharge who knowingly and fraudulently, "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." 11 U.S.C. §727(a)(4)(C). The purpose of §727(a)(4)(C) is to punish the efforts of a debtor "to subvert the bankruptcy process itself, as differentiated from the seeking of an advantage with respect to a particular claim." *Schachter v. Verbeek* (*In re Verbeek*), 2018 WL 4907840, at *5, 2018 Bankr. LEXIS 3154, at *12 (Bankr. N.D. Ohio Oct. 9, 2018)(Whipple, J.)(citation omitted). "Most of the cases addressing §727(a)(4)(C) cite Collier on Bankruptcy which concludes that the section is meant to address any attempted or actual extortion or bribery in connection with a bankruptcy case." *SE Prop. Holdings, LLC v. Stewart* (*In re Stewart*), 577 B.R. 581, 585 (Bankr. W.D. Okla. 2017)(collecting cases). *See also, In re Chipwich, Inc.*, 64 B.R. 670, 678 (Bankr. S.D.N.Y. 1986)(Section 727(a)(4)(C) tracks the language of the criminal code relating to bankruptcy crimes of bribery or extortion)(citing 18 U.S.C. §152)).[12] A complaint must set forth specific allegations or explain how a debtor engaged in extortion or bribery in connection with a bankruptcy case.

12/ The legislative history indicates that this provision was intended to deny a discharge to a debtor who commits a bankruptcy crime although the standard of proof is preponderance of the evidence rather than proof beyond a reasonable doubt. *Persica v. Gioele* (*In re Gioele*), 452 B.R. 581, 590 (Bankr. M.D. La. 2011).

Lennox v. Udelhoven (*In re Udelhoven*), 624 B.R. 629, 656 (Bankr. N.D. Ill. 2021)(citing *In re Verbeek*, 2018 WL 4907840, at *5, 2018 Bankr. LEXIS 3154, at *12)(other citation omitted).

i. Analysis.

The allegations in Plaintiff's Complaint address transfers or concealment of property and the distribution of proceeds after refinancing Defendants' home. The Complaint does not allege efforts to "subvert the bankruptcy process in the underlying bankruptcy case." *In re Verbeek*, 2018 WL 4907840, at *5, 2018 Bankr. LEXIS 3154, at *12. The Complaint fails to allege facts to state a claim that Defendants engaged in extortion or bribery in connection with a bankruptcy case. Since the Complaint does not contain factual allegations that, if taken as true, would support a plausible claim under §727(a)(4)(C), the Motion to dismiss with respect to this claim will be granted.

5. Section 727(a)(4)(D).

Section 727(a)(4)(D) permits the court to deny the debtor a discharge if the plaintiff proves that the debtor knowingly and fraudulently: 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; and in or in connection with the debtor's own case. 11 U.S.C. §727(a)(4)(D); *Risk v. Hunter* (*In re Hunter*), 535 B.R. 203, 222 (Bankr. N.D. Ohio 2015).

The party objecting to discharge under §727(a)(4)(D) must prove "1) the debtor withheld documents relating to the debtor's property or financial affairs; 2) in connection with a case; 3) from an officer of the estate entitled to possession; 4) and such withholding was [done] knowingly and fraudulently." *Barbacci v. Stimer* (*In re Stimer*), 2020 WL 1518536, at *8, 2020 Bankr. LEXIS 823, at *23 (Bankr. N.D. Ohio Mar. 30, 2020)(citing *Fidelity & Guar. Life Ins. Co. v. Settembre* (*In re Settembre*), 425 B.R. 423, 433 (Bankr. W.D. Ky. 2010)). A plaintiff must present evidence that the defendant "knowingly and fraudulently withheld documents," proving that a defendant "lackadaisically responded to the production orders" and "failed to keep or preserve financial records" is insufficient under this subsection. *In re Settembre*, 425 B.R. at 433.

"Courts have interpreted this provision as imposing an affirmative duty on the [d]ebtor to cooperate with the trustee 'by providing all requested documents to the trustee for [her] review, and failure to do so constitutes grounds for denial of discharge.'" *Labbadia v. Martin* (*In re Martin*), 2019 WL 3543778, at *9, 2019 Bankr. LEXIS 2415, at *24 (Bankr. D. Conn. Aug. 2,

2019)(quoting *Pereira v. Gardner* (*In re Gardner*), 384 B.R. 654, 668 (Bankr. S.D.N.Y. 2008)).

Thus, the case law focuses on the debtor's cooperation with an officer of the estate, usually the trustee, and the production of recorded information requested by an officer of the estate. *See e.g.*, *Apartments at Cambridge Co., L.L.C. v. Lewiston* (*In re Lewiston*), 537 B.R. 808, 844 (Bankr. E.D. Mich. 2015)("The record is devoid of any evidence, or even an inference, that the Debtor acted knowingly and fraudulently in his interactions with the Trustee."); *U.S. Tr. v. Varner* (*In re Varner*), 2014 WL 4988236, at *2 n.2, 2014 Bankr. LEXIS 4293, at *5 n.2 (Bankr. N.D. Ohio Oct. 7, 2014)("The Original Complaint also included a count under §727(a)(4)(D) for Debtor's failure to turn over financial documents. However, between the Original Complaint and the Amended Complaint, Debtor provided the missing documents and Trustee subsequently dropped the count."); *Barbacci v. Ungar* (*In re Ungar*), 2011 WL 2711374, at *9, 2011 Bankr. LEXIS 2677, at *24 (Bankr. N.D. Ohio July 12, 2011)("Trustee does not identify what documents were requested and not provided or when the request was made."); *Fugate v. Wood* (*In re Wood*), 2008 WL 4551850, at **1-2, 2008 Bankr. LEXIS 4607, at **4-5 (Bankr. E.D. Tenn. Sept. 19, 2008)(debtor had been served with subpoena *duces tecum* and the trustee made "repeated requests" to produce records); *In re Mitan*, 2007 WL 1424225, at *3, 2007 U.S. Dist. LEXIS 34612, at *4 (E.D. Mich. May 10, 2007)("[Section 521(a)(3)] imposes a duty upon Mitan to cooperate with the Trustee to enable the Trustee to perform his duties. Rather than cooperate, Mitan refused to turn over documents."), *aff'd*, 334 F. App'x 752 (6th Cir. 2009); *Williams v. Courtney* (*In re Courtney*), 351 B.R. 491, 509 (Bankr. E.D. Tenn. 2006)("At trial, the Debtor testified that he has produced all documentation requested by the Chapter 7 Trustee."); *Olson v. Slocombe* (*In re Slocombe*), 344 B.R. 529, 536 (Bankr. W.D. Mich. 2006)("The Trustee continuously and consistently requested the same information from Slocombe several different times throughout this bankruptcy case."); *Sweeney v. Lombardi* (*In re Lombardi*), 263 B.R. 848, 856 (Bankr. S.D. Ohio 2001)("Without evidence that the debtor failed to hand over any particular records to the trustee, the Court cannot sustain the Sweeneys' objection to discharge under §727(a)(4)(D)."); *Gold v. Guttman* (*In re Guttman*), 237 B.R. 643, 650 (Bankr. E.D. Mich. 1999)("The trustee confirmed this request [March 16, 1998]. The trustee again requested this information on [March 30, 1998]. And again, on September 29, 1998 and October 21, 1998. . . . It was Guttman's duty to produce the requested documents. . . . Guttman did not fulfill this duty."); *In re McDonald*, 25 B.R. 186, 189 (Bankr. N.D. Ohio 1982)("The Debtor was sent by mail a request from the Trustee to furnish certain

material.").

A claim under §727(a)(4)(D) fails where a creditor asserts the objection and there is no evidence that a debtor withheld any documents or information from an "officer of the estate." *Davis v. Baker* (*In re Baker*), 2021 WL 2020287, at *10, 2021 Bankr. LEXIS 1366, at *25 (Bankr. D. Kan. May 20, 2021). Moreover, a creditor is not an officer of the estate for purposes of §727(a)(4)(D). *Id.* n.49 (citing *Blackwell Oil Co., Inc. v. Potts* (*In re Potts*), 501 B.R. 711,723 (Bankr. D. Colo. 2013)).

i. Analysis.

To state a claim under §727(a)(4)(D), the Complaint must allege: "1) the debtor withheld documents relating to the debtor's property or financial affairs; 2) in connection with a case; 3) from an officer of the estate entitled to possession; 4) and such withholding was [done] knowingly and fraudulently." *In re Stimer*, 2020 WL 1518536, at *8, 2020 Bankr. LEXIS 823, at *23 (citing *In re Settembre*, 425 B.R. 423, 433); *In re Slocombe*, 344 B.R. at 534.

The Complaint fails to allege facts to state a claim that Defendants knowingly failed to submit information to an "officer of the estate." Unlike an action under §727(a)(2), which applies to a debtor's act to defraud a "creditor" *or* "an officer of the estate," an action under §727(a)(4)(D) applies when the debtor knowingly and fraudulently, in or in connection with the case, withholds documents or information "from an officer of the estate." The word "creditor" is absent from §727(a)(4)(D). Where Congress includes language in one section of a statute but omits it in another, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion. *Byers v. United States Internal Revenue Serv.*, 963 F.3d 548, 553-54 (6th Cir. 2020). Plaintiff, as a "creditor," is not an "officer of the estate." *Cadles of Grass Meadows II, LLC v. St. Clair* (*In re St. Clair*), 2014 WL 279850, at *9, 2014 U.S. Dist. LEXIS 8615, at *30 (E.D.N.Y. Jan. 21, 2014). The Complaint also fails to allege any facts that an officer of the estate requested any information from Defendants. Since the Complaint does not contain factual allegations that, if taken as true, would support a plausible claim under §727(a)(4)(D), the Motion to dismiss with respect to this claim will be granted.

6. Section 727(a)(5).

Section 727(a)(5) precludes a discharge if the debtor fails to satisfactorily explain any loss or deficiency of assets to meet the debtor's liabilities. *See,* 11 U.S.C. §727(a)(5). Section 727(a)(5) is broad enough to include any unexplained disappearance or shortage of assets. 4 Collier on

Bankruptcy ¶727.08 (16th ed. 2021). The purpose of §727(a)(5) derives from two competing concerns: "(1) the trustee and creditors' right to question the debtor about their financial affairs; and (2) the knowledge that debtors will not always be completely forthcoming with information about their financial activities." *Kovacs v. McVay* (*In re McVay*), 363 B.R. 824, 830-31 (Bankr. N.D. Ohio 2006). Section 727(a)(5) addresses these competing concerns by conditioning a discharge on a "debtor satisfactorily explaining any prepetition diminution or loss of asset." *Id.* at 831. "While the goals of §727(a)(3) and §727(a)(5) are similar, §727(a)(5) imposes strict liability if a debtor cannot explain a material loss of assets." *Randolph v. Whitaker* (*In re Whitaker*), 2020 WL 1182667, at *5, 2020 Bankr. LEXIS 633, at *13 (Bankr. E.D. Ky. Mar. 10, 2020)(citing *Baker v. Reed* (*In re Reed*), 310 B.R. 363, 368 (Bankr. N.D. Ohio 2004)). Additionally, how the loss or deficiency occurred is irrelevant, this statutory subsection is only concerned with the adequacy of the debtor's explanation. *Id.*

Section 727(a)(5) contemplates a burden shifting analysis. *In re Reed*, 310 B.R. at 369. A plaintiff must demonstrate that "(1) at a time not too remote from the bankruptcy, the Defendant owned identifiable assets; (2) on the day that he commenced his bankruptcy case, the Defendant no longer owned the particular assets in question; and (3) his schedules and/or pleadings in the bankruptcy case do not offer an adequate explanation for the disposition of the assets in question." *McDermott v. Kerr* (*In re Kerr*), 556 B.R. 343, 351 (Bankr. N.D. Ohio 2016)(citation omitted). Section 727(a)(5) contains no explicit time limitation. *Reed*, 310 B.R. at 369. The "exact time a court should look back depends on the case; there is no hard and fast rule." *In re Kerr*, 556 B.R. at 351. If the plaintiff meets this burden, the burden then shifts to the debtor to provide a satisfactory explanation for the loss. *Id.*

Determining what constitutes a satisfactory explanation is left to the discretion of the trial court. *Krieger Craftsmen, Inc. v. Ostosh* (*In re Ostosh*), 589 B.R. 319, 346 (Bankr. W.D. Mich. 2018). The "satisfactory explanation" must be reasonable under the circumstances. *Reed*, 310 B.R. at 370. In deciding whether a debtor's explanation is satisfactory, "the issue is whether the explanation satisfactorily describes what happened to assets; not whether what happened to assets was proper." *Ostosh*, 589 B.R. at 346 (quoting *Clippard v. Jarrett* (*In re Jarrett*), 417 B.R. 896, 905-06 (Bankr. W.D. Tenn. 2009)). Irresponsible spending, such as money spent on illegal activities, is not a failure to explain, as long as the debtor's explanation is sufficient to satisfy the "court that the creditors have no cause to wonder where the assets went." *Id.* (quoting *Strzesynski*

v. Devaul (*In re Devaul*), 318 B.R. 824, 839 (Bankr. N.D. Ohio 2004)). But the debtor must offer more than a "vague, indefinite, and uncorroborated hodgepodge of financial transactions." *Id.* (quoting *Schechter v. Hansen* (*In re Hansen*), 325 B.R. 746, 763 (Bankr. N.D. Ill. 2005)). "An important component in ascertaining the reasonableness of any explanation is its capacity for verification; that is, is the explanation sufficient to enable either the trustee or a creditor to properly investigate the circumstances surrounding the loss or deficiency." *Reed*, 310 B.R. at 370. In some cases, the crux of a "satisfactory explanation" is whether the information sufficiently enables "the trustee to track down a potential preferential transfer" and claw back the asset. *Id.*

Thus, a debtor's explanation does not necessarily need to be comprehensive, but it must meet two criteria highlighted above in order to be found "satisfactory." *In re Kerr*, 556 B.R. at 350. "First, it usually needs to be supported by documentation." *Id.* "Second, the documentation must sufficiently 'eliminate the need for the Court to speculate as to what happened to all the assets.'" *Id.* (quoting *In re Stamat*, 395 B.R. 59, 77 (Bankr. N.D. Ill. 2008), *aff'd*, 635 F.3d 974 (7th Cir. 2011)).

Fraudulent intent is not an element of §727(a)(5). *Id.*

i. Analysis.

The Complaint must allege "(1) the debtor had a cognizable ownership interest in a specific fund(s) or identifiable piece of property; and (2) that such an interest existed at a time not too far removed from when the petition was filed." *Reed*, 310 B.R. at 369. The Complaint alleges that Defendants liquidated "over $119,000 in home equity to cash" and "reported less than $4,000" in liquid assets in Form 106A/B, Schedule A/B, Part 4. [Doc. #1, ¶29]. Thus, the Complaint alleges Defendants had an interest in an identifiable piece of property, the equity in their home, satisfying the first element.

The Complaint further alleges that Defendants "liquidated over $119,000 in home equity" in July 2020. [*Id.*, ¶¶6, 28]. The Complaint alleges that this interest existed at a time not too far removed from when the petition was filed, approximately six months, satisfying the second element.

Not only does the Complaint allege that Defendants dissipated funds and assets that could be used to pay creditors before filing for bankruptcy, but it also alleges Defendants have failed to explain the disposition of this asset in their Schedules and/or Statement of Financial Affairs. [*Id.*, ¶31]. Thus, the Complaint also alleges that Defendants' schedules did not offer an adequate

explanation for the disposition of the asset in question.

Because the Complaint identifies Defendants' interest in property that existed a time not too far removed from when the petition was filed, Defendants' Motion to dismiss this claim is denied.

7. Section 727(a)(7).

Section 727(a)(7) provides for the denial of a discharge where the debtor has committed any of the acts specified in paragraphs (2), (3), (4), (5), or (6) of §727, on or within one year before the date of the filing of the petition, or during the case, or in connection with another case, "concerning an insider." There are four elements to §727(a)(7): "(1) the act must be committed by the debtor; (2) the act must be within those described in § 727(a)(2) through (a)(6); (3) the time frame is limited to one year pre-petition, or during the case; and (4) the act must have been committed in connection with another case concerning an insider." *Apartments at Cambridge Co., L.L.C. v. Lewiston* (*In re Lewiston*), 537 B.R. 808, 846 (Bankr. E.D. Mich. 2015). "Insider" status is determined by applying the definition in 11 U.S.C. §101(31).

Section 727(a)(7) extends the basis for denial of discharge to the debtor's misconduct in a substantially contemporaneous related bankruptcy case. 4 Collier on Bankruptcy ¶727.10 (16th ed. 2021). For example, in *In re Adams*, an individual debtor was denied his discharge because the debtor transferred property of a corporation he controlled, without authorization, while the corporation was in bankruptcy. *Barclays/Am. Bus. Credit, Inc. v. Adams* (*In re Adams*), 31 F.3d 389, 394 (6th Cir. 1994).

i. Analysis.

To state a claim the Complaint must allege the following: "(1) the act must be committed by the debtor; (2) the act must be within those described in § 727(a)(2) through (a)(6); (3) the time frame is limited to one year pre-petition, or during the case; and (4) the act must have been committed in connection with another case concerning an insider." *In re Lewiston*, 537 B.R. at 846.

In order deny a discharge under §727(a)(7), the acts under paragraphs (2), (3), (4), (5) or (6) "must be in connection with *another* case concerning an insider." *Id.* The Complaint fails to allege facts to state a claim that Defendants were insiders in a substantially contemporaneous bankruptcy case, or that another person or entity who would be an "insider" filed a bankruptcy case. Therefore, the Complaint has not alleged that Defendants committed a violation under

paragraphs (2), (3), (4), (5) or (6) in connection with another bankruptcy case in which they are an "insider," or involved an "insider." Since the Complaint does not contain factual allegations that, if taken as true, would support a plausible claim under §727(a)(7), the Motion to dismiss with respect to this claim will be granted.

III. Defendants' Equitable Argument.

Defendants assert that Plaintiff's Complaint is yet another act of punishing the Defendants by continuing to litigate the matters between the parties. Defendants' Motion further asserts that the adversary proceeding is against decent principles of equity and should thus be dismissed because bankruptcy courts sit in equity. [Doc. #12, p. 5]. Defendants' Motion also asserts that the statutory exceptions to discharge are narrowly construed in order to implement the fundamental policy of affording relief to the honest but unfortunate debtor.

Defendants' equitable argument is not sufficient to support dismissal of any of the causes of action under Rule 12(c), which considers only the legal adequacy of the Complaint. Defendants' argument appears to assert that this court can alternatively dismiss the case under 11 U.S.C. §105(a) because Plaintiff is engaging in litigation to punish Defendants.

The Supreme Court has been abundantly clear that bankruptcy courts may not employ §105(a) as a general license to do equity as they perceive it. *Law v. Siegel*, 571 U.S. 415, 420-21, 134 S.Ct. 1188, 1194-95, 188 L.Ed.2d 146 (2014); *Wasserman v. Immormino* (*In re Granger Garage, Inc.*), 921 F.2d 74, 77 (6th Cir. 1990)("Those equitable powers may only be exercised within the confines of the Bankruptcy Code."). Accordingly, bankruptcy courts cannot use their equitable powers, created by §105(a), where the relief requested conflicts with, or contravenes, the Bankruptcy Code or the Federal Rules of Bankruptcy Procedure. *Law*, 571 U.S. at 421. This is "simply an application of the axiom that a statute's general permission to take actions of a certain type must yield to a specific prohibition found elsewhere." *Id.* Rule 12(c), made applicable by Bankruptcy Rule 7012, allows a party to move for judgment on the pleadings for failure to state a claim upon which relief can be granted; conversely, if a complaint states a claim upon which relief could be granted, the motion for judgment on the pleadings cannot be granted under Rule 12(c). Thus, Defendants' request must be denied.

CONCLUSION

For the reasons explained above, the Motion to Dismiss this adversary proceeding is granted in part and denied in part, as follows:

1) Denied as to §523(a)(2)(A), §523(a)(6), §727(a)(2), §727(a)(3), §727(a)(4)(A), and §727(a)(5); and
2) Granted as to §727(a)(4)(C), §727(a)(4)(D), and §727(a)(7); and
3) Defendants' request to dismiss the adversary proceeding under §105(a) is denied.