The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: November 07 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re: George E. Kuehnl and Martha Kuehnl, Debtors. Trustees of the Ohio Carpenters Health and Welfare Fund, et al., Plaintiffs, v. George Kuehnl, III, Defendant.	)	Case No.: 04-33968 Chapter 7 Adv. Pro. No. 04-3265 Hon. Mary Ann Whipple

MEMORANDUM OF DECISION

This adversary proceeding is before the court for decision after trial on Plaintiffs' complaint to determine dischargeability of debts allegedly owed to them by George E. Kuehnl, III ("Defendant").

Plaintiffs are the trustees of various employee benefit funds[1] and the Northwest Ohio Carpenters District Council ("the Union"). Plaintiffs allege that the debts should be excepted from discharge under 11 U.S.C. § 523(a)(2)(A) and (a)(4).

The court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 1334(b) and 157 (a) and (b) and under the general order of reference in this district. Proceedings to determine the dischargeability of debts are core proceedings that this court may hear and decide. 28 U.S.C. § 157(b)(1) and (2)(I).

This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, the court finds that a debt owed by Defendant to Plaintiffs in the amount of $7,756.97 is non-dischargeable under 11 U.S.C. § 523(a)(2)(A).

FINDINGS OF FACT

Defendant was the principal officer, director, and shareholder of a corporation known as Kuehnl Contractors, Inc. ("the Corporation"), which he formed in 1996 or 1997. The Corporation was engaged in the commercial construction business, focusing on interior remodeling. On August 18, 1999, the Corporation entered into a collective bargaining agreement ("CBA") with the Union to employ Union labor, agreeing to be bound by the terms of trust agreements establishing the various employee benefit funds ("the Funds"). The CBA required the Corporation to deduct 4% of Union employees' gross wages as Union dues and to make contributions to the Funds. The amount of the contribution to each fund, which was part of the employees' compensation package, was a specified amount per hour of wages paid to or worked by Union members. [Plf. Ex. 1, Art. XIII, ¶¶ 44-46 and Art. XXXI]. The Corporation was required to submit to the Administrator of the Funds regular periodic reports of hours paid. The reports were to be made, and payments of the fringe benefit amounts due and union dues withheld were to be remitted, by the 15th day of each calendar month for all hours paid in the prior calendar month. [*Id.* at ¶¶ 47 and 48(1)]. The CBA

[1] The specific employee benefit funds involved are the Ohio Carpenters Health and Welfare Fund, the Ohio Carpenters Pension Fund, the Northwest Ohio Carpenters Joint Apprenticeship Fund, the Northwest Ohio Carpenters Supplemental Pension Fund, and the Contractors' Administrative Fund.

provides that an employer who has not filed the proper reporting forms and remitted the total amount due (both fringe benefit contributions and Union dues deducted) in a timely manner shall be liable for liquidated damages in accordance with the Trust Agreements as well as for reasonable attorney's fees. [*Id.* at ¶ 48(3)]. In addition, the CBA provides that an employer who is more than thirty days delinquent in the remittance of fringe benefit payments "shall be placed on a weekly payment schedule." [*Id.* at ¶ 48(2)]. Failure to timely remit the weekly payments would result in the Union employees being withdrawn until such time as all delinquencies and assessed liquidated damages have been paid. [*Id.*]. Finally, the CBA provides that the trustees of the Funds may establish payroll audit programs that would be binding upon the parties to the CBA. [*Id.* at ¶ 49]. The provisions of the CBA became effective with respect to the Corporation upon Defendant's signing the Employer Participation Agreement on August 18, 1999. [*Id.* at 26-27].

Joseph Ivan, administrative manager for the Ohio Carpenters Health & Welfare Fund, testified at trial. His office ("the Fund Office") collects employer contributions on behalf of each of the Funds at issue, and his duties include enforcing procedures for collection of such contributions. While the Funds generally rely on self-reporting by the employers of the hours eligible Union members have worked, the Fund Office randomly selects employers for audit to ensure accurate reporting. In addition, if no report is submitted by an employer, that fact appears in the fringe benefit report that the Fund Office sends to the Union business managers on a monthly basis. Ivan testified that the business managers will then notify the Fund Office if they find employees working at a job site of an employer who is delinquent in its contribution payments. The Union business manager, rather than the Fund Office, has the authority to withdraw employees and shut a job down if the employer is delinquent. The Fund Office, however, has the authority to request a payroll audit when the employer fails to file a report. Ivan testified that an audit request is normally not made until after the business manager is given time to check job sites and determine whether the employer is actually delinquent.

Defendant testified at trial that, although the Corporation was experiencing some cash flow problems due to the payment terms of its major client, during 1999 the Corporation began receiving larger remodeling contracts. The evidence indicates that business was improving and that net income was increasing from 1999 to 2000. [*See* Plf. Ex. 2, pp. 55, 170-172]. Defendant testified that he was responsible for handling the Corporation's books, doing payroll calculations and filing the periodic reports required by the CBA. He testified that he failed to file reports for at least some periods in 1999 and 2000 and that he filed no reports for any month in 2001. In 1999, he filed contribution reports and remitted payments for October

and November on January 21, 2000, and for December on February 28, 2000. [Plf. Ex. 3, pp. 1, 6-7]. Although the CBA became effective as to the Corporation on August 18,1999, Defendant apparently filed no reports and remitted no payments for the period between August 18 and September 30, 1999.[2]

The record is silent regarding the reason that no reports or payments were submitted for that period of time.

In 2000, Defendant filed contribution reports and remitted payments for January on February 28, 2000, for February on April 7, 2000, and for March and April on June 9, 2000. [*Id.*, pp. 2-3, 8-9]. As the reports for each month were due by the 15th of the following month, every report filed by Defendant was filed late. Nevertheless, according to Defendant, those reports accurately reflected the hours of the Corporation's employees for the months reported. Ivan, who eventually conducted an audit of the Corporation, testified that he has no reason to believe otherwise. Defendant testified that, due to a lack of funds with which to pay required contributions, he filed no reports for any month after April 2000. In response to a question from the court, Defendant stated he could not recall whether Union dues had been withheld from the Corporation's employees' pay as required by the CBA. There is no other evidence in the record to show whether Union dues were actually withheld from employees' pay and not paid over.

Defendant also testified that during the time period that he owed the Funds for employee benefit contributions and knowing that he owed the Funds, he withdrew money from the Corporation. Specifically, he withdrew $12,800 between October 15 and December 10, 1999, $35,600 in 2000 and $83,094.97 in 2001, for a total amount withdrawn of $131,494.97. [Plf. Ex. 2, pp. 1-5]. He also contributed funds to the Corporation during these time periods. In 2000, he contributed $38,896.00 and in 2001, he contributed $62,218.97, for a total contribution amount of $101,114.97. [*Id.*, pp. 2-5]. Thus, from October 15, 1999, to November 2001, Defendant withdrew from the Corporation a net amount of $30,380. Defendant testified that, as of November 2001, there were no funds remaining in the capital account. Although he testified that the money he withdrew was in repayment of loans he made to the Corporation, the Corporation's general ledger specifies the Capital Stock account as the account against which each of these withdrawals were charged and to which each contribution of funds was credited. [*See id.*]. The Corporation also made

[2] This conclusion is supported by Defendant's testimony that he failed to file reports for some periods in 1999 but that he submitted accurate reports and payments for October through December of 1999. In addition, the Corporation's general ledger for 1999 reveals no payments made to Key Bank, the depository collection agent for all contributions and deductions submitted by employers under the CBA. [*See* Plf. Ex. 2, pp. 31-43, Plf. Ex. 1, Art. XVI, ¶ 58].

payments on Defendant's truck loan, paid for repairs on his truck and reimbursed him for expenses.

Notwithstanding the general collection procedures in place as set forth in the CBA and as testified to by Ivan, and notwithstanding the fact that Defendant had not filed reports for August or September 1999 and filed no reports after June 2000 (which was the April 2000 report), the Fund Office did not request an audit of the Corporation's payroll records until September 8, 2000. Before that date, the only contact by the Fund Office with Defendant was by phone at some undisclosed time. The record is silent as to any action taken by the Union business manager or any communication between the Fund Office and the business manager regarding the Corporation's failure to file contribution reports.

After parting ways with its major customer in October 2001, the Corporation ceased doing business in November 2001 and was eventually dissolved on September 16, 2002. On December 17, 2001, Coyote Builders, Ltd., ("Coyote") was legally formed, with the assistance of attorneys at the law firm Wagoner & Steinberg. [Plf. Ex. 15]. Defendant was a part-owner of Coyote, and began working for Coyote upon cessation of the Corporation's business. Defendant's testimony shows that efforts to set up Coyote began earlier, at least in November, 2001. Most of the Corporation's employees also went to work at Coyote, which was engaged in the same business as the Corporation - interior remodeling. Defendant testified that rather than selling the physical assets of the Corporation, such as drills, ladders, a wheelbarrow, a welder, a laser level and other small tools, he gave them to Coyote. He testified that the value of the equipment transferred to Coyote is approximately $2,000, although he estimated that it would cost approximately $10,000 to $12,000 to buy new. Plaintiff presented no evidence of greater value.[3] The record also shows funds of the Corporation were paid to the attorneys who set up Coyote for Defendant. [Plf. Ex. 2, p. 676].

On July 1, 2002, Plaintiffs filed a complaint against the Corporation in the United States District Court for the Northern District of Ohio. It was not until after the complaint was filed that Defendant, on behalf of the Corporation, finally provided the records needed to perform the payroll audit. Although Defendant was aware of the fact that the Funds had requested an audit on or about September 8, 2000, he did not contact the Funds until November 2002, approximately two months after the Corporation was formally dissolved and long after Defendant had disbursed all assets of the Corporation. At that time,

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[3] Defendant also contributed to Coyote the proceeds of the sale of Oasis Pools, which he previously owned but sold in 2002, and a portion of the proceeds of the sale of Roan Investments, which consisted of property he owned but sold in 2004. However, the court finds these transfers to Coyote have no relevance to the issues before it since Plaintiff has not shown that the Corporation ever had any interest in either Oasis Pools or Roan Investments.

Defendant informed the Funds that the Corporation had been dissolved and had no assets. The audit eventually performed by Ivan showed that the Corporation owed Plaintiffs the total of $237,896.19. [*See* Plf. Ex. 2, pp. 686-708]. Ivan testified that he did not include hours personally worked by Defendant in calculating the amount owed by the Corporation. On April 1, 2003, the district court entered judgment for Plaintiffs and against the Corporation, only, for unpaid fringe benefits, liquidated damages and Union dues owing for 1999-2001 in the amount of $237,896.19, plus additional liquidated damages after February 28, 2003, at the rate of $386.80 per month. [Plf. Ex. 4]. The court also awarded attorney's fees and collection costs in the amount of $1,952.43. [*Id.*].

After the judgment was entered against the Corporation, Plaintiffs sued Defendant on July 7, 2003, in the United States District Court for the Northern District of Ohio, seeking to hold him personally liable for the judgment against the Corporation. [Plf. Ex. 12, p.99]. On May 12, 2004, Defendant, together with his wife, filed a joint petition for relief under Chapter 7 of the Bankruptcy Code, staying Plaintiffs' district court lawsuit against Defendant.

LAW AND ANALYSIS

Plaintiffs seek a ruling both that Defendant is personally liable for the judgment debt owed by the Corporation to Plaintiffs and that such debt is nondischargeable under 11 U.S.C. § 523(a)(2)(A) and (a)(4). A creditor must prove exceptions to dischargeability for individual debts under 11 U.S.C. § 523(a), including the exception for fraud, by a preponderance of the evidence.[4] *Grogan v. Garner,* 498 U.S. 279, 291 (1991). Exceptions to discharge are to be strictly construed against the creditor. *Rembert v. AT&T Universal Card Servs. (In re Rembert),* 141 F.3d 277, 281 (6th Cir. 1998).

I. 11 U.S.C. § 523(a)(2)(A)

Under § 523(a)(2)(A), a debt is excepted from discharge to the extent it was obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." Plaintiffs allege both express and implied misrepresentations made by

[4] Plaintiffs' citation to several cases holding that the burden of proof shifts to the employer once the trustees of an ERISA plan produce evidence raising genuine questions about the accuracy of the employer's records and the number of hours worked by the employees has no application in this case. Those cases were addressing only the burden of proof on the issue of damages owed to the ERISA plan in actions brought under ERISA for unpaid fringe benefit contributions . *See Brick Masons Pension Trust v. Indus. Fence & Supply, Inc*, 839 F.2d 1333, 1338 (9th Cir. 1988); *Michigan Laborers' Health Care Fund. v. Grimaldi Concrete, Inc.,* 30 F.3d 692, 696 (6th Cir. 1994). They do not apply in a proceeding to determine the dischargeability of a debt under 11 U.S.C. § 523.

Defendant and actual fraud committed by Defendant. With respect to allegations that Defendant himself made misrepresentations or engaged in fraud, Plaintiffs need not pierce the corporate veil to hold him liable. Ohio law is clear that a director or officer of a corporation is personally liable for a fraud in which he actively participated. *Yo-Can, Inc. v. Yogurt Exch., Inc.,* 149 Ohio App. 3d 513, 526-27*,* 778 N.E.2d 80, 90-91 (Ohio Ct. App. 2002).

In order to except a debt from discharge on the basis of a false representation, a plaintiff must prove the following elements by a preponderance of the evidence: (1) the debtor obtained money or services through a material misrepresentation (other than a statement respecting the debtor's or an insider's financial condition) 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 loss. *Rembert,* at 280-81.

For purposes of § 523(a)(2)(A), "false representations and false pretenses encompass statements that falsely purport to depict current or past facts." *Peoples Sec. Fin. Co., Inc. v. Todd (In re Todd)*, 34 B.R. 633, 635 (Bankr. W.D. Ky. 1983). "'False pretense' involves implied misrepresentation or conduct intended to create and foster a false impression, as distinguished from a 'false representation' which is an express misrepresentation." *Ozburn v. Moore (In re Moore)*, 277 B.R. 141, 148 (Bankr. M.D. Ga. 2002)(quoting *Sears Roebuck & Co. v. Faulk (In re Faulk)*, 69 B.R. 743, 750 (Bankr. N.D. Ind. 1986)).

In addition, recent cases emphasize that § 523(a)(2)(A) also addresses "actual fraud" as a concept broader than misrepresentation. *See McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000); *Mellon Bank, N.A. v. Vitanovich (In re Vitanovich)*, 259 B.R. 873 (B.A.P. 6th Cir. 2001). "[A]ctual fraud encompasses 'any deceit, artifice, trick, or design involving direct and active operation of the mind, used to circumvent and cheat another." *Id.* at 877 (quoting *McClellan v. Cantrell*, 217 F.3d 890, 893 (7th Cir. 2000)). [5] A debtor's intent to defraud a creditor under § 523(a)(2)(A) is measured by a subjective standard and must be ascertained by the totality of the circumstances of the case at hand. *See Rembert*, 141 F.3d at 281-82.

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[5] The holding of *McClellan* and *Vitanovich* that actual fraud is a statutory basis for non-dischargeability distinct from non-dischargeability based on misrepresentations is not universally embraced by other courts. *See Wymard v. Ali (In re Ali)*, 321 B.R. 685, 690-91 (Bankr. W.D. Pa. 2005). *Vitanovich* involved a check-kiting scheme and *McClellan* involved a fraudulent transfer recipient's unexplained dumping of the proceeds of property transferred to her. This court finds Judge Posner's analysis in *McClellan* especially persuasive, while *Vitanovich* is a case from this circuit's own bankruptcy appellate panel. Plaintiffs argued a broader fraudulent scheme without objection by Defendant as to the propriety of such a claim. The court will therefore also analyze the evidence to determine whether Defendant owes Plaintiffs a debt for money, property or services obtained by actual fraud beyond just alleged misrepresentations.

A. Express and Implied Misrepresentations

Plaintiffs first contend that Defendant knowingly submitted reports that did not report all hours worked by Union employees. The evidence at trial proves otherwise. According to Defendant, although reports for every month were not filed, the reports were accurate for the particular months for which he submitted reports and, thus, no express misrepresentation was made regarding the hours worked by Union employees during those months. Defendant's testimony was corroborated by Ivan, who testified that, after performing an audit, he had no reason to believe that the reports actually submitted by Defendant were not accurate. Thus, Plaintiffs failed to show that Defendant made any affirmative representation that was false.

Nevertheless, Plaintiffs also presented evidence at trial, and Defendant admitted, that no reports were submitted for the months of August and September 1999, or for any month after April 2000 through November 2001, when the Corporation ceased doing business. The last time the Corporation filed a contribution report was in June 2000. Defendant's failure to file the reports is arguably an implied misrepresentation intended to create and foster a false impression (i.e. that no Union employees worked for the Corporation during those periods of time). A deliberate failure to disclose when a duty to disclose exists can constitute a false representation under § 523(a)(2). *AT&T Universal Card Services v. Mercer (In re Mercer)*, 246 F.3d 391, 404 (5th Cir. 2001) (citing Restatement (Second) of Torts, §§ 550, 551). "The duty to disclose arises when one party has information that the other party is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *Steinfels v. Ohio Dept. of Commerce, Div. of Sec.*, 129 Ohio App. 3d 800, 807 (1998) (citing *State v. Warner*, 55 Ohio St. 3d 31, 54 (1990)). The CBA's reporting requirements, as well as its provisions requiring the Corporation to deduct Union dues from employees' pay, created a "similar relation of trust and confidence" giving rise to a duty to speak. Ivan testified that employers were "on their honor" in calculating hours worked and submitting reports. It is undisputed that Defendant knew he should report the hours worked by his employees and consciously decided not to do so. Plaintiffs have, therefore, established the first element of their § 523(a)(2)(A) claim, that is, a material misrepresentation that Defendant knew was false.

The court cannot, however, find from the totality of the circumstances that Defendant stopped filing the reports required by the CBA with the *subjective intent to deceive* Plaintiffs by creating the appearance that no employees were working for the Corporation during the relevant time periods. Rather, Defendant testified that he stopped filing reports because he had cash flow problems due to the payment terms of his main customer and did not file the reports because there were insufficient funds in the Corporation's

accounts [Plf. Ex. 2] to make the fringe benefit contributions required by the CBA. Although Defendant was an occasionally unnecessarily combative witness, the court finds his testimony credible on this point. Every contribution report Defendant did file on behalf of the Corporation was late, which supports that there were cash flow problems. And significantly, those reports filed did not falsely report hours. The Corporation's general ledger also generally corroborates Defendant's testimony in that regard. Some months there was clearly cash in the account at the middle of the month with which payments could have been made, but the balances were routinely quickly dissipated, through payments to suppliers, subcontractors and employee wages. Other months, the account was drawn down to minimal or negative amounts and there were insufficient funds in the account to also pay the fringe benefits. No report was filed after the April, 2000, report, and it was not filed until June. In May, 2000, when the April report would have been due, at the middle of the month the Corporation's general ledger shows only $1,698.34 on hand. The month of July, 2000, is also a crucial time because the last contribution report was filed in June, 2000. At the middle of July, 2000, when the report and contributions were due, the Corporation's general ledger shows the account was overdrawn. [*See* Plf. Ex. 2, p. 91].

Plaintiffs emphasize as a circumstance indicative of an intent to deceive that Defendant made personal withdrawals charged against his capital stock account at times when he knew employee fringes were not being paid. [*See* Plf. Ex. 2, pp. 1-5]. Plaintiffs ignore, however, that Defendant also personally contributed funds back to working capital when funds were needed. The last contribution report was filed in June 2000. In 2000, Defendant's contributions of capital actually exceeded his withdrawals, with both contributions and withdrawals in no particular pattern made after the last report was filed. In 2001, Defendant's withdrawals exceeded his capital contributions by a total of approximately $21,000.00. But there is again no general pattern to the withdrawals throughout the year indicative of an intent to deceive. Even toward the end of business operations from August through October 2001, Defendant continued to make both withdrawals and capital contributions, concluding with a contribution of $5,000 on October 19, 2001.

Even if Plaintiffs have sufficiently shown Defendant's intent to deceive, Plaintiffs must also prove that they relied on Defendant's misrepresentations. The Supreme Court decided in *Field v. Mans*, 516 U.S. 59, 74-75 (1995), that the standard for proof of reliance in § 523(a)(2)(A) cases is justifiable reliance. "Justifiable reliance requires proof that a creditor actually relied upon the defendant's false representations and that such reliance was justified under the circumstances." *Corradini v. Corradini (In re Corradini)*, 276

B.R. 571, 578 (Bankr. W.D. Mich. 2003), *aff'd* 75 Fed. Appx. 444 (6th Cir. 2003); *see id.* at 70. Before analyzing whether a plaintiff acted justifiably, the court must first be sure that the plaintiff proved actual reliance on the defendant's representation. *Corradini,* 296 B.R. at 578.; *Wayne Lumber Co. v. Peternel (In re Peternel)*, 220 B.R. 923, 931 (Bankr. N.D. Ohio 1998). The court finds that Plaintiffs have failed to prove that they actually relied on the absence of reports for August and September of 1999 and for all months after April 2000. To the extent they proved reliance, the court finds that reliance was not justified.

The evidence shows that the Union and the Funds work hand-in-hand in collecting both Union dues and fringe benefit contributions. The Fund Office collects payments from employers that include both dues and contributions based on hours reported as being worked by Union employees. In addition, the Fund Office sends monthly reports to Union business managers that reflect whether or not an employer has submitted a fringe benefit report for the previous month. Ivan testified that the business managers then notify the Fund Office if they find employees working at a job site of an employer who is delinquent and that they have the authority to withdraw employees and shut the job down if the employer is delinquent. According to Ivan, the Fund Office allows the business manager time to check the job site before it requests an audit of the delinquent employer, which it did as to the Corporation in September, 2000 [Plf. Ex. 8].

While it is true that the Union and the Fund Office generally rely on the accuracy of the wages paid and hours worked in the reports that are actually submitted, there is no evidence of the converse that they routinely rely on an employer's failure to file a report as indicating no payment is due or that no hours were worked. The record lacks any evidence that Plaintiffs did anything differently or refrained from acting in some manner based on the absence of contribution reports. Instead, the evidence indicates that Plaintiffs have specific procedures in place to determine whether an employer is actually delinquent. There was no testimony indicating that either the Union or the Funds actually relied on the Corporation's failure to file its reports and, in so doing, believed the Corporation owed no dues and no fringe benefit contributions because it had no Union employees working at any time after June 2000, when the last report was filed.

Moreover, even if actual reliance had been shown, the court finds such reliance was not justified given the routine procedures in place to determine otherwise. The test of justifiable reliance is subjective. *Field*, 516 U.S. at 70. As explained by the Supreme Court, '[j]ustification is a matter of the particular plaintiff, and the circumstances of the particular case, rather than the application of a community standard of conduct to all cases." *Id.* And while the subjective standard of justifiable reliance adopted in *Field* is a lesser burden than the objective standard of reasonable reliance it rejected, this definition is not without

limits; a plaintiff "cannot recover if he blindly relies upon a misrepresentation, the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation." *Id.* (quoting *Restatement (Second) of Torts* § 541 (1976) Comment a)).

It appears that Plaintiffs simply dropped the ball with respect to the Corporation's failure to file reports and waited unreasonably long to take any action to protect their rights. The Corporation's relationship with Plaintiffs as a signatory to the CBA was in its infancy; there was no extended relationship of trust and reliable performance by the Corporation as a Union employer to support reliance on the absence of reports.[6] Moreover, every report that the Corporation did file was very late, further emphasizing its overall reporting and payment unreliability. Notwithstanding the procedures in place, there is no evidence or testimony indicating whether the Corporation's job sites were checked and, if so, the findings communicated to the Fund Office. The only evidence of record indicates that the Fund Office did not request an audit until September 8, 2000, nearly one year after the August and September 1999 reports were due and three months after the May 2000 report was due. It was not until nearly two years later that a lawsuit was filed in district court to force the audit and recover the unpaid funds. The court cannot find from the record that these long delays were due to reliance on the Corporation's omission of fringe benefit reports. Rather, the length of the delay in acting is a fact that emphasizes the lack of subjective justifiability. As such, Plaintiffs cannot prevail on their § 523(a)(2)(A) claim based upon any misrepresentation.

B. Actual Fraud

Plaintiffs also allege that Defendant's diversion of the Corporation's assets to his personal use and/or to Coyote's use constitute actual fraud. As discussed above, "[w]hen 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." *Vitanovich*, 259 B.R. at 877. Specifically, Plaintiffs allege that Defendant engaged in fraud by withdrawing funds from the Corporation's capital account in 1999, 2000, and 2001, and diverting personal property owned by the Corporation to Coyote when the Corporation ceased operation as an ongoing business in order to deprive creditors of assets that would otherwise have been available to satisfy obligations owed by the Corporation. *See K-B Bldg.*

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[6] To the contrary, the CBA itself evidences an inherent and understandable *absence* of trust of employers lacking a track record of timely reporting and payment of fringes. Until an employer has established a 24 month on-time record for reporting, the CBA requires a cash deposit to be posted to assure payment to the Funds. [Plf. Ex. 1, Article XIII, ¶¶ 50-54]. Absent such a bond, "[t]he Union will not furnish men until the deposit required by this article is made." [*Id.*, ¶ 54]. There is no evidence that this provision of the CBA was followed as to the Corporation.

Co. v. Barber (In re Barber), 281 B.R. 617, 624-25 (Bankr. W.D. Pa. 2002). Under the *McClellan* and *Vitanovich* analysis, proof of fraudulent misrepresentation is not required. *Digital Commerce, Ltd. v. Sullivan (In re Sullivan)*, 305 B.R. 809, 824 (Bankr. W.D. Mich. 2004). Subjective fraudulent intent must, however, still be proven. *Vitanovich*, 259 B.R. at 877. Direct evidence of a debtor's fraudulent intent is not necessary and is rarely available. *Official Unsecured Creditors Committee v. Ampco-Pittsburgh Corp. (In re Valley-Vulcan Mold Co.),* 237 B.R. 322, 331 (B.A.P. 6th Cir. 1999). Consequently, courts look to inferences from the circumstances surrounding the transaction and the relationship of the parties involved. *Id.* But "[i]f there is room for an inference of honest intent, the question of non-dischargeability must be resolved in favor of the debtor." *ITT Fin'l Servs. v. Szczepanski (In re Szczepanski),* 139 B.R. 842, 844 (Bankr. N.D.Ohio 1991).

In this case, the evidence shows that the Corporation began experiencing financial difficulties in 2000, as evidenced by Defendant's testimony that he stopped filing the reports required by the Funds for months after April 2000 because funds were not available for contributions to the employee benefit plans. By October 2001, difficulties had arisen with the Corporation's major client and it terminated its business relationship with that client. Defendant was aware that he owed unpaid contributions to the Funds and was preparing to cease business operations of the Corporation when he consciously chose to disburse all of the Corporation's remaining assets either to himself or to his newly formed company, Coyote, for no consideration. He did so notwithstanding Ohio law precluding any distribution of assets to shareholders when the corporation is insolvent or during the winding up of the affairs of the corporation without payment of all known obligations of the corporation. *See* Ohio Rev. Code §§ 1701.33(C) and 1701.95(A)(1)(b). At the time, Defendant was aware that in September 2000, the Funds had requested an audit of the Corporation's employment records. He waited to respond to their request until November 2002, two months after the Corporation was formally dissolved and after all corporate assets had been disbursed. Only then did Defendant contact the Funds to inform them that the Corporation had been dissolved and had no assets. In light of this sequence of events, the court concludes that Defendant diverted corporate assets with the intent to deprive or cheat Plaintiffs of property that would have otherwise been available to satisfy, at least in part, the Corporation's obligations to them. Indeed, Plaintiff made a point in his testimony that all other creditors, including taxes, were paid in winding up. At the end, Plaintiffs were singled out as assets were diverted off to Defendant's new non-Union business venture. Aware of the unpaid contributions owed to Plaintiffs, Defendant nevertheless transferred all of the Corporation's physical assets to Coyote, his new

enterprise, for no consideration. Thus, Plaintiffs have succeeded in proving that Defendant engaged and participated in actual fraud with respect to a debt owed to them by the Corporation.

The more difficult issue is what debt is non-dischargeable as a result of Defendant's actual fraud in diverting assets to his new business. In a non-dischargeable debt action, it is permissible for the bankruptcy court to determine whether a debt exists and, if so, the amount of the debt. *Longo v. McLaren (In re McLaren)*, 3 F.3d 958, 965-66 (6th Cir. 1993). Plaintiffs argue that the total unpaid contributions and liquidated damages owed by the Corporation under the District Court judgment should be excepted from Defendant's Chapter 7 discharge. Alternatively, Plaintiffs point to the total amount of distributions paid to Defendant in 1999, 2000, and 2001, irrespective of amounts contributed back as capital. The court disagrees because the record does not support either amount as constituting a non-dischargeable debt under § 523(a)(2)(A).

Rather, the debt owed to Plaintiffs as a proximate result of Defendant's actual fraud is excepted under § 523(a)(2)(A) from his discharge. The plain terms of § 523(a)(2) only except from discharge any debt "for money, property, services...to the extent obtained by —" actual fraud. *See McCrory v. Spigel (In re Spigel)*, 260 F.3d 27, 33 (1st Cir. 2001). In this case, the amount of that debt is limited by the amount that would have been available to Plaintiffs to satisfy the Corporation's debt but for Defendant's active fraud. The Seventh Circuit's discussion and distinction in *McClellan* about the nature and extent of the debt that is non-dischargeable under § 523(a)(2)(A) where the basis is actual fraud, as distinct from misrepresentation in the incurrence of debt, is equally persuasive and instructive in this case. *McClellan*, 217 F.3d at 895-896 (claimed non-dischargeable debt was the dissipated $160,000 sale proceeds of property fraudulently obtained by transferee/debtor, not original debt amount due from transferor to creditor); *but cf. National City Bank v. Plechaty (In re Plechaty)*, (B.A.P. 6th Cir. 1997)(if a debtor uses false representations to cause a creditor to forbear from collecting a debt, the entire debt becomes non-dischargeable regardless whether the forbearance causes the creditor to collect less than it would have). *McClellan* requires a direct link between the alleged fraud and the creation of the debt. *See also Overhead, Inc. v. Peternel (In re Peternel)*, 1998 Bankr. LEXIS 654 at *16-*20 (Bankr. N.D. Ohio April 7, 1998).

The District Court judgment amount represents the breach of contract debt for unpaid contributions, liquidated damages and Union dues owed by the Corporation from 1999 through 2001, not the value of the money, property or services obtained by Defendant's fraudulent scheme to benefit his new company and himself instead of paying Plaintiffs.

Likewise, the record does not support for purposes of Plaintiffs' § 523(a)(2)(A) claim that the gross amount of capital distributions taken by Defendant from 1999 through 2001 ($131,494.97) or any portion thereof constitute money or property obtained through Defendant's actual fraud in diverting corporate assets to his new business. There is no evidence from which the court can infer that Defendant intended to defraud Plaintiffs by taking capital distributions during 1999 and 2000. Although Defendant never filed employee benefit reports for August or September, 1999, the record is silent as to his reason for not doing so. He did file reports and remit contributions for every month thereafter until April 2000. By contrast, Defendant credibly testified that he stopped filing reports after April 2000 because funds were not available to pay the contributions owed. The court will not speculate as to why reports and contributions were not submitted for August and September, 1999. Furthermore, although the Corporation experienced some cash flow problems due to the payment terms of its major client, during 1999 the Corporation began receiving larger remodeling contracts. The evidence indicates that business was improving and that net income was increasing. And there is no evidence that Defendant was planning to cease operations of the Corporation at that time. The court also considers the fact that during 2000, Defendant contributed $3,296 more to the capital account than he withdrew. That fact precludes a finding that he was intentionally diverting assets to defraud the Corporation's creditors during 2000.

By 2001, the Corporation was, however, experiencing financial difficulties. Although Defendant did make contributions to the account during 2001, his net withdrawals on account of his capital interest in the Corporation totaled $20,876. Defendant testified, however, that he did not decide to shut down the Corporation's business and start a new entity until November 2001, after he had severed his relationship with his largest customer sometime in October 2001. There is nothing in the record to contradict that timing, and the court has no reason to doubt the credibility of Defendant's testimony on that point. Indeed documents in evidence corroborate that time frame as the turning point for the business. From August through October 2001, Defendant made both capital contributions and withdrawals in relatively comparable amounts. [Plf. Ex. 2, pp. 4-5]. His last four withdrawals in 2001 occurred on September 28 ($1,000) and October 10 ($1,000), 11 ($4,000), and 18 ($853.64). Before his September 28 withdrawal Defendant contributed $8,218.97 on September 21 and after his last withdrawal, he contributed $5,000 on October 19. There was no further activity charged against his capital interest in the Corporation after the October 19 contribution. Although overall withdrawals exceeded contributions in 2001, these contributions and the general ledger records through October 2001 negative any inference of actual fraud having occurred by

then. The contributions in particular are inconsistent with a fraudulent intent. And the new business was not legally created until December 17, 2001. [Plf. Ex. 15]. Contrary to Plaintiffs' arguments, the court cannot link either Defendant's gross withdrawals overall or his gross and net withdrawals from the Corporation in 2001 to the fraud proven by the evidence.

Having explained what debts are not supported as excepted under § 523(a)(2)(A) from Defendant's discharge, the question remains what, if any, debt the evidence supports as being excepted from discharge. According to Defendant, the physical assets transferred without consideration to Coyote were valued at approximately $2,000. *See In re Petrella,* 230 B.R. 829, 834 n. 5 (Bankr. N.D. Ohio 1999) (citing *South Cent. Livestock Dealers, Inc. v. Security State Bank,* 614 F.2d 1056, 1061 (5th Cir.1980) and noting that "[a]n owner is competent to give his opinion as to the value of his property, often by stating the conclusion without stating a reason"). There is no other evidence of the liquidation value of those assets, which is what Plaintiffs would have recovered had they not been improperly transferred. The Corporation's general ledger shows clearly only two other distributions to Defendant or for the benefit of his new business after November 1, 2001. He reimbursed himself for expenses in the amount of $3,756.97 on November 5, 2001[Plf. Ex. 2, p. 672]. This reimbursement amount and its timing were unusual; there were no such payments to Defendant for expenses from July through October. [Plf. Ex. 2, pp.603-669]. If the expenses had actually been incurred, preferring creditors is generally not fraud. But when the "creditor" is both the person in control of the checkbook and the engineer of a scheme designed to divert assets from paying legitimate non-insider creditors during the winding up phase of an entity, the payment reflects money or property obtained by actual fraud. Defendant also paid the lawyers that set up Coyote $2,000 from the Corporation's funds on December 12, 2001 [Plf. Ex. 2 at 676, Plf. Ex 15]. The Corporation's general ledger shows that many other payments were made in November and December, 2001, but there is no evidence from which the court can find that any other payments represent money, property or service obtained by or diverted through Defendant's fraud. The court therefore finds that the debt arising from Defendant's actual fraud is the $7,756.97 sum of the personal property liquidation value, the expense payment and the payment to Coyote's lawyers.

In making this determination of damages to be excepted from Defendant's discharge , the court is mindful of the Supreme Court's decision in *Cohen v. De La Cruz*, 523 U.S. 213, 118 S.Ct. 1212, 140 L.Ed.2d 341 (1998). In isolation, some of the broad language of *Cohen* could be interpreted to entitle Plaintiffs to the full amount of $237,896.14, particularly the language evincing the Court's belief that

Congress did not intend the language of the statute to impose any "restitutionary limit" on non-dischargebalility under § 523(a)(2)(A). This court nevertheless believes that, even after *Cohen*, bankruptcy courts in § 523(a)(2)(A) cases must still distinguish between creditor losses occasioned by fraud and creditor losses occasioned by breach of contract. *See Sandak v. Dobrayel (In re Dobrayel)*, 287 B.R. 3, 24-25 (Bankr. S.D.N.Y. 2002)(carefully and thoroughly distinguishes between building contractor fraud and plain breach of contract in determining damages and dischargeability); *Novartis Corp. v. Luppino (In re Luppino)*, 221 B.R. 693, 703-04 (Bankr. S.D.N.Y. 1998)(analysis still required on each debt to determine whether it was proximately caused by § 523(a)(2)(A) acts). *Cohen* requires the court to focus on *all* damages proximately caused to the creditor by the wrongful act,[7] but does not eradicate the requirement of determining that damages arose out of fraudulent conduct in the first instance. *Metro. Real Estate Corp. v. Gard (In re Gard)*, 327 B.R. 372, 377-78 (Bankr. N.D. Ind. 2003)(distinguishes *Cohen* in § 523(a)(2)(A) actual fraud case, awarding only amount of dishonored check and not enhanced damages and attorney's fees); *Nunnery v. Rountree (In re Rountree)*, 330 B.R. 166 (E.D. Va. 2004).

In light of the foregoing, the court finds that Defendant owes Plaintiffs a debt of $7,756.57 that is non-dischargeable under § 523(a)(2)(A).[8]

II. 11 U.S.C. § 523(a)(4)

Plaintiffs also allege that the debt owed to them by Defendant is non-dischargeable under § 523(a)(4), which provides as follows:

> (a) A discharge under section 727 . . . of this title does not discharge an individual from any debt –
> . . . .
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or

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[7] In contrast and by way of illustration, if the court had determined in Plaintiffs' favor their claim of implied misrepresentation arising from the failure to file contribution reports, the unpaid contributions and liquidated damages occurring thereafter would have proximately resulted therefrom. Under *Cohen*, both the unpaid contributions and the liquidated damages, not just the unpaid contributions, would be non-dischargeable. That is not, however, the fraudulent scheme the court has determined that Defendant engineered for his own benefit. *Cf. Digital Commerce,* 305 B.R. at 824 (bankruptcy court also finds actual fraud under *McClellan* and *Vitanovich* even though it finds no fraud arising from misrepresentation).

[8] Although Plaintiffs argue that the corporate form should be disregarded and the corporate veil pierced such that Defendant is made liable for the entire state court judgment debt owed by the Corporation, as indicated in the court's Memorandum of Decision on summary judgment, piercing the corporate veil is not itself an alternative basis for a determination of non-dischargeability. [Doc. # 43, p. 9]. Under Ohio law, the corporate veil may be pierced not only in situations involving fraud, but to avoid inequity, *see Wiencek v. Atcole, Inc*., 109 Ohio App. 3d 240,244-45(Ohio Ct. App. 1996), which, notwithstanding personal liability, would still not amount to circumstances of non-dischargeability under 11 U.S.C. § 523. Personal liability for a corporate debt and non-dischargeability are not necessarily coterminous.

larceny.

11 U.S.C. § 523(a)(4).

A. Fraud or Defalcation While Acting in a Fiduciary Capacity

Plaintiffs contend that Defendant committed a fraud or defalcation while acting in a fiduciary capacity by taking capital distributions without making required contributions to the Funds. Plaintiffs argue that Defendant was a fiduciary under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. ("ERISA"), under Ohio Revised Code §§ 1701.33(C) and 1701.95(A)(1)(a), and as an officer and director of the Corporation in general.

The question of who is a fiduciary for purposes of § 523(a)(4) is one of federal law, although courts look to state law in determining when a trust relationship exists. *Carlisle Cashway, Inc. v. Johnson (In re Johnson)*, 691 F.2d 249, 251 (6th Cir. 1982). The Sixth Circuit has adopted a narrow interpretation of "fiduciary" as used in § 523(a)(4). *R.E. America, Inc. v. Garver (In re Garver)*, 116 F.3d 176, 178 (6th Cir. 1997). In order to trigger the fraud or defalcation provision in that statute, a debtor must hold funds in trust for the benefit of a third party. *Id.* at 179. Furthermore, the types of trusts that will trigger the fraud or defalcation provision of § 523(a)(4) are "limited to only those situations involving an express or technical trust relationship arising from placement of a specific res in the hands of the debtor." *Id.* at 180. Thus, not every fiduciary relationship will establish the trust relationship required under § 523(a)(4). *See, id.* (finding that "[t]he attorney-client relationship, without more, is insufficient to establish the necessary fiduciary relationship for defalcation under § 523(a)(4)"). In order to establish non-dischargeability of the debt at issue, "there must be (1) an express trust status to the property at issue; (2) [Defendant] must have been acting in a fiduciary capacity; (3) Defendant must have breached this relationship by at least 'defalcation' of funds." *Capitol Indemnity Corp. v. Interstate Agency, Inc. (In re Interstate Agency, Inc.)*, 760 F.2d 121, 124 (6th Cir. 1985).

While it may be true that the directors of a corporation owe a fiduciary duty to the shareholders, *see* Ohio Rev. Code § 1701.59(B)[9]; *Thompson v. Central Ohio Cellular, Inc.*, 93 Ohio App. 3d 530, 540 (1994),

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[9] Section 1701.59(B) provides as follows:

> A director shall perform his duties as a director, including his duties as a member of any committee of the directors upon which he may serve, in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation, and with the care that an ordinarily prudent person

it is not so clear that a duty exists between a director and a creditor, *see First Fed. Sav. & Loan Assoc. of Toledo v. Bostic*, No. 88AP-40, 1988 WL 115949 (Ohio App. Oct. 27, 1988) (stating there is no fiduciary duty between a director or officer of a corporation and a creditor/investor). In any event, such a fiduciary relationship is insufficient to establish the trust relationship required under § 523(a)(4). *See Ronk v. Maresh (In re Maresh)*, 277 B.R. 339, 348-50 (Bankr. N.D. Ohio 2001) (finding that a director's fiduciary duty under Ohio Rev. Code § 1701.59(B) is not a trust relationship for purposes of § 523(a)(4)).

Although a technical trust may be created by statute, neither Ohio statute relied upon by Plaintiffs creates such a trust. The Sixth Circuit has addressed the types of statutes that create a technical trust. In *Carlisle Cashway, Inc. v. Johnson (In re Johnson),* 691 F.2d 249 (6th Cir. 1982), the court considered Michigan's Building Contract Fund Act, which provides as follows:

> In the building construction industry, the building contract fund paid by any person to a contractor, or by such person or contractor to a subcontractor, shall be considered by this act to be a trust fund, for the benefit of the person making the payment, contractors, laborers, subcontractors or materialmen, and the contractor or subcontractor shall be considered the trustee of all funds so paid to him for building construction purposes.

Mich. Comp. Laws Ann. § 570.151. The court found that the statute satisfied the trust requirements under § 17(a)(4) of the Bankruptcy Act, the current version of which under the Bankruptcy Code is § 523(a)(4), since (1) a trust relationship is unambiguously imposed on a contractor or subcontractor by the language of the statute, (2) the trust res is clearly defined, (3) the trustee is charged with specific affirmative duties, and (4) the trust exists separate from the act of wrongdoing. *Johnson*, 691 F.2d at 252-53. Similarly, the Sixth Circuit found that the Michigan Insurance Code of 1956, Mich. Comp. Laws § 500.1207(1), clearly establishes an insurance agency relationship as a trust fiduciary relationship by the following language:

> An agent shall be a fiduciary for all moneys received or held by him in his capacity as an agent. Failure by an agent in a timely manner to turn over the monies which he holds in a fiduciary capacity to the persons to whom they are owed is prima facie evidence of violation of the agent's fiduciary responsibility.

Interstate Agency, Inc., 760 F.2d at 124.

In this case, the Ohio statutes relied upon by Plaintiffs do not satisfy the requirements of a technical trust. Section 1701.33(C) provides in relevant part that "[n]o dividend or distribution shall be paid to the

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in a like position would use under similar circumstances.

holders of shares of any class . . . when the corporation is insolvent or there is reasonable ground to believe that by such payment it would be rendered insolvent." Section 1701.95(A)(1)(b) provides that directors of a corporation shall be liable *to the corporation* if they vote for or assent to "[a] distribution of assets to shareholders during the winding up of the affairs of the corporation, on dissolution or otherwise, without the payment of all known obligations of the corporation or without making adequate provision for their payment." Unlike the statutes discussed above, neither Ohio statute relied upon by Plaintiffs expresses an intention to create any trust relationship, not to mention a trust relationship between a director and its creditors. And neither Ohio statute defines a specific res being held in trust. Rather, § 1701.33(C) simply instructs as to when corporate dividends or distributions may be made, and § 1701.95(A)(1)(b) provides for a director's liability *to the corporation* if a distribution is made on dissolution without providing for payment of its obligations to its creditors. As such, the court cannot find that these statutes impose the fiduciary relationship required under § 523(a)(4). *See Peoples Bank & Trust Co. of Hazard v. Penick (In re Penick)*, 199 B.R. 15, 20 (Bankr. E.D. Ky. 1996), *aff'd* 149 F.3d 1184 (Table) (6th Cir. 1998) (finding a Kentucky statute providing that no corporate distributions shall be made if the distribution would make the company insolvent did not create the requisite technical trust and fiduciary relationship for purposes of § 523(a)(4)).

Plaintiffs also contend that Defendant was a fiduciary under the provisions of ERISA.[10] Courts are not in agreement as to whether ERISA satisfies the technical trust requirement under § 523(a)(4). *Compare Eavenson v. Ramey*, 243 B.R. 160 (N.D. Ga. 1999) (finding ERISA satisfies the elements of a technical trust); *with Schrimsher v. Nielsen (In re Nielson)*, 53 B.R. 289 (Bankr. N.D. Ala. 1985) (finding that defendants were not fiduciaries within the meaning of § 523(a)(4), even if they were fiduciaries under ERISA). However, because the court finds that Defendant was not a fiduciary under ERISA, it need not address this issue.

There are three ways that a party may acquire fiduciary status under ERISA: (1) be named as a fiduciary in the instrument establishing the plan, (2) be named as a fiduciary pursuant to a procedure specified in a plan instrument, or (3) fall within the statutory definition of fiduciary. *Board of Trustees of*

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[10] The court will assume for purposes of this discussion that each of the Plaintiffs in this case may rely upon Defendant's fiduciary status under ERISA to the extent that such status exists. The Ohio Carpenters Health and Welfare Fund, the Northwest Ohio Carpenters Joint Apprenticeship Fund, the Ohio Carpenters Pension Fund, and the Northwest Ohio Carpenters Supplemental Pension Fund are employee welfare benefit plans or pension plans as defined by ERISA. *See* 29 U.S.C. § 1002(1) and (2). However, there was no testimony or other evidence explaining the purpose of the Contractors' Administrative Fund and it is not clear to the court that this is an ERISA employee benefit plan. Also it does not appear that the Union can rely on Defendant's alleged fiduciary status under ERISA to except a debt for Union dues from Defendant's discharge.

Teamsters Local 863 Pension Fund v. Foodtown, Inc., 296 F.3d 164, 174 (3d Cir. 2002). Plaintiffs do not allege that Defendant is a named fiduciary. Rather, they contend that he falls with the statutory definition of fiduciary set forth in 29 U.S.C. § 1002(21)(A), which provides in relevant part as follows: "a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management or disposition of its assets. . . ."[11] Plaintiffs rely on the fact that Defendant exercised discretionary control over funds held by the Corporation and over whether or not the Corporation paid contributions owed to the Funds. However, Defendant is an ERISA fiduciary only to the extent that the unpaid contributions owed to the Funds constitute plan assets.

ERISA itself does not provide a definition of what constitutes an "asset" of an ERISA fund.[12] Courts have taken different approaches in determining whether unpaid employer contributions to an ERISA fund constitute plan assets. Some courts look to the language of the plan documents in making such determinations. *See, e.g., ITPE Pension Fund v. Hall*, 334 F.3d 1011, 1013 (3d Cir. 2003); *NYSA-ILA Med. & Clinical Servs. Fund v. Catucci*, 60 F. Supp. 2d 194, 200-01 (S.D.N.Y. 1999); *United States v. Panepinto*, 818 F. Supp. 48, 51 (E.D.N.Y. 1993). In *Hall*, the Third Circuit found that an officer of the employer was not an ERISA fiduciary with respect to unpaid employer contributions where the Fund Agreement was susceptible of two interpretations of what constitutes an asset of the fund. The court explained that "[w]hen contractual language is facially ambiguous and not anchored by the clear, shared intent of the parties, then fiduciary responsibility under ERISA predicated on such language is improper." *Id.* at 1016. Thus, the court found that "[t]he proper rule . . . is that unpaid employer contributions are not assets of a fund unless the agreement between the fund and the employer specifically and clearly declares otherwise." *Id.* at 1013; *see also Catucci*, 60 F. Supp. 2d at 200-01 (finding unpaid employer contributions to be plan assets where the plan document defined "Assets of the Fund" to include "money received from *or owing from* any other person, corporation, or Fund required to make contributions or payments to this Fund" (emphasis added)); *Panepinto*, 818 F. Supp. at 51 (finding unpaid employer contributions to be plan assets where the underlying wage agreement provides that the employer shall have no legal or equitable right, title or interest in or to any sum paid by *or due from* the Employer).

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[11] A party is also a "fiduciary" if "(ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan." 29 U.S.C. § 1002(21)(A).

[12] Although the Department of Labor's regulations define when *employee* contributions paid to or withheld by an employer become plan assets, *see* 29 C.F.R. § 2510.3-102, no such regulation is provided for *employer* contributions.

In *Hunter v. Philpott (In re Philpott)*, 373 F.3d 873 (8th Cir. 2004), the Eight Circuit reversed the district court and bankruptcy court's conclusion that unpaid employer contributions constituted plan assets. The bankruptcy court had reasoned that since the collective bargaining agreements provided that the contributions were part of the employees' total wage package and the obligation to remit payments to the employee benefit plans was not conditional or contingent, once the employees worked the hours giving rise to the obligation to make employer contributions to the plans, the obligation to pay constituted an asset of the plan and the defendant had a fiduciary duty to ensure that the assets of the plan did not inure to the benefit of the employer. *Hunter v. Philpott (In re Philpott)*, 281 B.R. 271, 283-84 (Bankr. W.D. Ark. 2002). However, the Eight Circuit explained that the court is required to "look specifically at the property that is alleged to have been defalcated to determine whether [the debtor] was legally obligated to hold that specific property for the benefit of the Funds." *Philpott*, 373 F.3d at 875. The collective bargaining agreement did not include any provision requiring the employer to hold any particular property for the benefit of the ERISA funds. Thus, the court explained that "[s]imply possessing property to which an ERISA plan asserts a claim does not place one in a fiduciary relationship with the plan." *Id.* at 876; *cf Voyk v. Brotherhood of Locomotive Engineers*, 198 F.3d 599, 606-07 (6th Cir. 1999) (rejecting contention that *employee* contributions are plan assets at the time they are paid to the employer and finding that they do not become plan assets until they are transmitted to the plan administrator, assuming the transmission takes place within a reasonable time).

In *Navarre v. Luna (In re Luna)*, 406 F.3d 1192 (10th Cir. 2005), the court acknowledged that reference to the plan documents could aid in the determination of what constitutes a plan asset, but found that in making such determination, the court must "construe ERISA and give effect to its plain meaning." *Id.* at 1200-01. The court noted that "the Department of Labor has instructed that 'the assets of a plan generally are to be identified on the basis of ordinary notions of property rights under non-ERISA law. In general the assets of a welfare plan would include any property, tangible or intangible, in which the plan has a beneficial ownership interest.'" *Id.* at 1199 (citing Dept. of Labor Advisory Op. No. 93-14A (May 5, 1993)). The court reasoned that because an ERISA plan cannot use, devise, assign, transfer, or otherwise act upon contributions that it has not yet received, it does not have a present interest in unpaid contributions. Nevertheless, although the unpaid contributions themselves are not plan assets, the plan does own the contractual right to collect such contributions. *Id.* Thus, the court concluded that "[t]he plain meaning of the term "asset" includes a chose in action to collect contractually-owed contributions." *Id.* at 1200; *see United States v. LaBarbara*, 129 F.3d 81, 88 (2d Cir. 1997) (finding that once wages were paid to union

members, the defendant had contractual obligations to the ERISA Funds that constituted "assets" of the Funds since "an audit of the Funds would have to include such fixed obligations as assets"); *Hall*, 334 F.3d at 1014 n. 4 (explaining that "an agreement which only makes receivables assets may not provide a predicate for holding a corporate officer personally responsible for nonpayment of contributions since a receivable is a contractual or legal claim for payment of the money due, in contrast to the actual money due"); *see also Chapman v. Klemick*, 3 F.3d 1508, 1510 (11th Cir. 1993). Because the corporate officers of the employer exercised no control over how the trustees of the ERISA fund managed or disposed of the contractual right to collect the unpaid contributions, they were not fiduciaries under ERISA. *Luna*, 406 F.3d at 1204.

Applying the above principles in this case, the court finds that Defendant is not a fiduciary under ERISA. The court first considers the reasoning of those cases that rely on the language of the plan documents and underlying wage agreements to determine whether unpaid employer contributions constitute plan assets. In this case, Plaintiffs have directed the court to, and the court has found, no language in either the CBA or the relevant plan documents in evidence in this case indicating a clear understanding that unpaid employer contributions constitute plan assets. The Ohio Carpenters Health and Welfare Fund defines the trust estate as "including but not limited to the income from any and all investments and any and all other assets, property or money *received by or held by* the Trustees for the uses or purposes of this Trust." [Plf. Ex. 5, p. 6 (emphasis added)]. Similarly the Northwest Ohio Carpenters Supplemental Pension Plan defines trust assets, in relevant part, as "all funds *received* in the form of Employer Contributions . . . and any other property or funds *received and held* by the Trustees under this Agreement." [*Id.* at 143 (emphasis added)]. And the Northwest Ohio Carpenters Supplemental Pension Plan, as amended and restated effective July 1, 2000, provides that the "Trust Fund means the assets of the Plan *held* by the Trustee." [Plf. Ex. 6, p. 10 (emphasis added)]. It does not further define assets. The Ohio Carpenters' Pension Plan defines the trust estate, in relevant part, as "including without limitation all Employer contributions *made* under the Plan and Trust Agreement. . . ."[13] [*Id.* at 49 (emphasis added)]. Finally, no documents relating to the Northwest Ohio Carpenters Joint Apprenticeship Fund and the Contractors' Administrative Fund, other than the CBA, were offered as evidence at trial. Because the underlying documents do not "specifically and clearly" declare

[13] An unsigned version of the Amended and Restated Agreement and Declaration of Trust of the Ohio Carpenters' Pension Fund was also admitted into evidence at trial. This version defines "assets" as including all funds *received or due to be received* by the Trustees in the form of Employer Contributions. . . ." [Plf. Ex. 5, p. 181]. While this language may evidence the requisite intent that unpaid employer contributions are themselves assets of the plan, the court places little or no weight on this document since it not only is unsigned but was not effective until August 19, 2004, well after the relevant time period in this case. *[Id.* at 178, 201 and 206].

unpaid employer contributions to be assets of the Funds, under the reasoning in *Hall* and similar cases, the unpaid employer contributions at issue is this case are not plan assets such that Defendant becomes a fiduciary under ERISA's statutory definition of fiduciary in 29 U.S.C. § 1002(21)(A).

Moreover, the plain meaning of the term "asset" requires the court to reach the same conclusion. The court finds the Tenth Circuit's reasoning in *Luna* persuasive. Because the Funds had no authority or control over the unpaid contributions themselves, that is, they had no control over the Corporation's funds that could be used to satisfy the obligation to remit contributions to the Funds, the Funds' assets consisted only of the contractual right to the contributions and not the unpaid contributions themselves. As in *Luna,* Defendant exercised no control over how the Funds manage or dispose of that asset. Thus, Defendant does not fall within the statutory definition of "fiduciary" set forth in § 1002(21)(A), that is, Defendant did not exercise any "authority or control respecting management or disposition of [plan] assets." 29 U.S.C. § 1002(21)(A).

The cases relied upon by Defendant do not persuade the court otherwise. In *Southern Electrical Health Fund v. Kelley*, 308 F. Supp. 2d 847, 868 n.10 (M.D. Tenn. 2003), the court noted without discussion that a company's contributions to benefit funds constitute plan assets under 29 U.S.C. § 1002(21)(A) as they become due. However, the court cited in support thereof 29 C.F.R. § 2510.3-102, which addresses only the *employee* contributions paid to an employer. *Id.* The remaining two cases relied upon by Defendants for the proposition that an employer's contributions to employee benefit funds constitute plan assets as they become due were also relied upon by the court in *Kelley. Id.* In both of those cases, the courts relied on the clear and unambiguous language of the underlying wage and trust agreements that title to all monies "due and owing" vested in the ERISA fund in finding that unpaid employer contributions were plan assets. *Connors v. Paybra Mining Co.*, 807 F. Supp. 1242, 1246 (S.D. W. Va. 1992); *Galgay v. Gangloff*, 677 F. Supp. 295, 301 (M.D. Pa. 1987). The underlying agreements in this case contain no such language.

Having failed to show that Defendant was a fiduciary with respect to the unpaid employer contributions, Plaintiffs cannot prevail on their claim to except the debt at issue from discharge as a debt for fraud or defalcation while acting in a fiduciary capacity.

B. Embezzlement

Plaintiffs also argue that the debts at issue are non-dischargeable under the embezzlement provision of § 523(a)(4) for which there is no requirement to prove fiduciary capacity. *See Peavey Electronics Corp. v. Sinchak (In re Sinchak)*, 109 B.R. 273, 276 (Bankr. N.D. Ohio 1990) (stating the element of "fiduciary capacity" in § 523(a)(4) refers only to "fraud or defalcations" and need not be present where embezzlement

is the exception relied upon). The Sixth Circuit defines embezzlement for purposes of § 523(a)(4) as "the fraudulent appropriation of property by a person to whom such property has been entrusted or into whose hands it has lawfully come." *Brady v. McAllister (In re Brady)*, 101 F.3d 1165, 1172-73 (6th Cir. 1996). A creditor proves embezzlement by establishing that (1) he entrusted his property to the debtor or debtor lawfully obtained the property, (2) the debtor appropriated the property for a use other than that for which it was intended, and (3) the circumstances indicate fraud. *Id.* at 1173.

In this case, even assuming that the second and third elements can be met, Plaintiffs cannot satisfy the first element necessary to prove embezzlement, that is, that Plaintiffs entrusted their property to Defendant or Defendant lawfully obtained their property. "An embezzlement claim requires a showing that the property, allegedly embezzled by the defendant, was the property of the plaintiff." *Florida Outdoor Equip., Inc. v. Tomlinson (In re Tomlinson)*, 220 B.R. 134, 136 (Bankr. M.D. Fla. 1998); *see also Chapman v. Pomainville (In re Pomainville)*, 254 B.R. 699, 705 (Bankr. S.D. Ohio 2000).

In *Tomlinson*, a secured creditor argued that a debt owed to it by the defendant was non-dischargeable under § 523(a)(4), alleging that the defendant's failure to remit inventory proceeds that were subject to the creditor's security interest constituted embezzlement. The court found that the inventory sale proceeds were not property of the creditor and, as such, the creditor could not support its non-dischargeability claim on the basis that the defendant embezzled the proceeds. *Tomlinson*, 220 B.R. at 136. In *Pomainville*, a fifty-percent shareholder of a corporation co-owned by the debtor sought to except a debt from discharge based on the debtor's embezzlement of property insurance proceeds received by the corporation. Because the insurance proceeds were property of the corporation and were entrusted to the debtor by the corporation rather than the plaintiff, the court found that "any damages and related judgment of non-dischargeability for embezzlement pursuant to § 523(a)(4) run to the corporation and not the shareholder." *Pomainville*, 254 B.R. at 705.

As in *Tomlinson* and *Pomainville*, the assets allegedly embezzled by Defendant in this case did not, as discussed above, belong to the Funds. They consisted of corporate assets that were entrusted to Defendant, not by Plaintiffs but by the Corporation, in his capacity as an officer and director of the Corporation. As such, Defendant's alleged embezzlement of those assets cannot form the basis of Plaintiffs' § 523(a)(4) claim. Defendant is, therefore, entitled to judgment on that claim.

CONCLUSION

For the foregoing reasons, the court finds that Defendant owes Plaintiffs a prepetition debt of $7,756.97, that such debt is non-dischargeable under 11 U.S.C. § 523(a)(2)(A), and that Plaintiff is entitled

to judgment in that amount. Further finding, however, that Plaintiffs have not met their burden of proof on their claims under § 523(a)(4), judgment will be entered in Defendant's favor on those claims. The court will enter a separate judgment in accordance with this Memorandum of Decision.